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**FACULTY OF LAW**

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**A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF A BACHELOR OF  
LAWS HONOURS DEGREE.**

**RESEARCH TOPIC:  
JUDICIAL INDEPENDENCE OF THE INTERNATIONAL CRIMINAL COURT: A  
CASE STUDY OF THE RELATIONSHIP BETWEEN THE INTERNATIONAL  
CRIMINAL COURT AND THE UNITED NATIONS SECURITY COUNCIL**

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**APPROVAL FORM**

The undersigned certify that they have read and recommend to the Midlands State University for acceptance, a dissertation entitled **JUDICIAL INDEPENDENCE OF THE INTERNATIONAL CRIMINAL COURT: A CASE STUDY OF THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND THE UNITED NATIONS SECURITY COUNCIL** submitted in partial fulfilment of the requirements for the Bachelor of Laws Honours Degree.

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## DECLARATION

I **MANDLA NDLOVU**, do hereby declare that this dissertation is a result of my own investigation and research, save to the extent indicated in the acknowledgment, references and comments included in the body of the research, and that to the best of my knowledge, it has not been submitted either wholly or in part thereof for any other degree at any other University.

.....  
**STUDENT'S SIGNATURE**

...../...../.....  
**DATE**

## DEDICATIONS

This work is dedicated to my wife **Miriam Mungai Ndlovu** for her unfailing love and being my pillar of strength throughout this long journey.

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## **ABSTRACT**

The research sought to establish the extent of the judicial independence of the ICC with particular reference to its relationship with the United Nations Security Council (UNSC). The research provides a critical analysis on the development of the international criminal justice system and the role played by the UNSC before the establishment of the ICC. This research traced the history of the ICC, starting by looking at other institutions that were established before the ICC. The research also looks at mechanisms that are found in the Rome Statute that enhance judicial independence of the ICC. Further, this dissertation investigates some of the challenges that are bedevilling the ICC as a result of the involvement of the UNSC in ICC processes. This is in light of the fact that, the referrals, deferrals and enforcement processes in the ICC, where the UNSC is involved has resulted in controversy and negatively affected the integrity and impartiality of the ICC. The research also proffered some recommendations, on how the UNSC and ICC can co-exist and complement each other whilst performing their different mandates of maintaining peace and security and justice delivery, respectively.

## CHAPTER ONE

### 1.1 INTRODUCTION

The International Criminal Court (ICC) is a young institution that became operational on the 1<sup>st</sup> of July 2002.<sup>1</sup> Its mandate is to investigate, prosecute, try and punish individuals who commit heinous international crimes; namely genocide, war crimes and crimes against humanity.<sup>2</sup> The ICC is the first permanent international criminal court. The previous and current international criminal tribunals were and are ad hoc, created by the international community to investigate and prosecute international crimes in specific areas.<sup>3</sup> The Rome Statute<sup>4</sup> is the ICC's founding document, the instrument was drafted and created with the full active participation of United Nations General Assembly.<sup>5</sup> The Rome Statute provides several mechanisms that are meant to ensure that no undue political influence can exercise over the ICC and its Prosecutor.<sup>6</sup> These are designed to ensure that the ICC is independent and free from interference.

In terms of Article 13,<sup>7</sup> United Nations Security Council (UNSC) has power to refer a situation to the ICC prosecutor for investigation. The Rome Statute also allows the UNSC to suspend investigations<sup>8</sup> that have been commenced by the ICC for a maximum period of 12 months. The UNSC is comprised of 15 members that are also part of the United Nations; 5 members occupy permanent seats and exercise veto power. Three of the UNSC members that have veto power are not part of the ICC, since they did not assent to or ratify the Rome Statute. The rest of the members occupy their seats on rotational basis. Historically, the UNSC has been an important player in the international criminal justice system. The UNSC played a crucial role in International Criminal Tribunal for the former Yugoslavia (ICTY) and the International

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<sup>1</sup> The Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (hereinafter Rome Statute).

<sup>2</sup> Article 5, of the Rome Statute.

<sup>3</sup> B Rosen, '*From the outside in Shaping the International Criminal Court*', Unpublished Dissertation, Pardee Rand Graduate School (2007) 11.

<sup>4</sup> The Rome Statute.

<sup>5</sup> Rosen (n3 above) 9.

<sup>6</sup> KA Snitzer, '*Peace through Justice? Evaluating the International Criminal court*' Unpublished International Studies Honors Project P9, Macalester College (2012) 9.

<sup>7</sup> Articles 13, of the Rome Statute.

<sup>8</sup> Article 16, of the Rome Statute.

Criminal Tribunal for Rwanda (ICTR)<sup>9</sup> and other international criminal tribunals that were set up before the formation of ICC.

By their nature, the crimes that go before the ICC are committed on a large scale and are often state sponsored. This makes the ICC to operate in a volatile political environment making the independence of the ICC from political environment very important. This justifies why there are several mechanisms in the Rome Statute that are meant to enhance judicial independence in the ICC. However, the involvement of the UNSC in the referral and deferral of cases has caused a lot of controversy and brings some questions on whether the ICC is really able to exercise judicial independence.

## **1.2 BACKGROUND TO THE STUDY**

The first, model tribunal was established at Nuremburg by the four major powers (France, the Soviet Union, the United Kingdom, and the United States) to prosecute Nazi crimes.<sup>10</sup> This was followed by the creation of Tokyo tribunal. The purpose of the two tribunals was to prosecute the individuals that were responsible for the excesses of the Second World War as aptly put by Justice R H Jackson;

*'The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that power has ever paid to reason.'*<sup>11</sup>

The two tribunals were very important in the sense that they made individuals the subjects under international law. For the first time perpetrators of horrific crimes were charged in their individual capacity, regardless of the fact that they committed the offences in the course of their duties as state officials. In 1993 the International

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<sup>9</sup> T Intelmann *The International Criminal Court and the United Nations Security Council: Perceptions and Politics* (Ambassador; President of the Assembly of State Parties, International Criminal Court).

<sup>10</sup> WA Schabas *An Introduction to the International Criminal Court* (2001) 5.

<sup>11</sup> RH Jackson, Chief Counsel for the United States at Nuremburg, *Opening Statement before the International Military Tribunal* (Nov. 21, 1945), <http://www.roberthjackson.org/Man/theman2-7-8-1/>.

Criminal Tribunal for Yugoslavia (ICTY) was set up through UNSC Resolution.<sup>12</sup> This was followed by the formation of the International Criminal Tribunal for Rwanda (ICTR) in 1994.<sup>13</sup> The ad hoc tribunals dealt with cases in retrospective, this often resulted in them being accused of being biased against the accused.<sup>14</sup>

The idea of a permanent international court that would try individuals for large scale human rights violations was first mooted after the Second World War.<sup>15</sup> However, it took more than half a century for the idea to become reality. The ICC became operational on the 1<sup>st</sup> July 2002. The ICC is a creation of the Rome Statute,<sup>16</sup> it derives its powers from the above mentioned document. The Rome Statute has several provisions that are meant to ensure that the proceedings before the ICC are fair, and the Prosecutor and the judges enjoy independence. Just like the tribunals that came before it, the ICC focuses on the individual not the state. According to the Rome Statute, ICC only tries adult individuals for crimes committed after it became operational.<sup>17</sup> This is in contrast with the tribunals that dealt with offences committed in retrospect.

Cases are brought before the ICC through referral by state parties, the UNSC can refer a matter to ICC regardless whether the country is a state party or not and the Prosecutor may initiate investigation *proprio motu* on a situation prevailing on state parties. The Rome Statute also allows the UNSC to halt any investigation that the prosecutor may be conducting for a period of 12 months.<sup>18</sup>

The involvement of the UNSC in the referral and deferral of cases to ICC has drawn a lot of criticism and controversy since UNSC is known for giving political expediency too much weight as opposed to ensuring that justice is done.<sup>19</sup> The UNSC has been

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<sup>12</sup> S/RES/827 (1993).

<sup>13</sup> S/RES/ 955 (1994).

<sup>14</sup> Prosecutor Vs Slobodan Milosevic case number IT-02-54T.

<sup>15</sup> R Sifris 'Weighing Judicial Independence against Judicial Accountability: Do the Scales of the International Criminal Court Balance' (2008) *Chicago-Kent Journal of International and Comparative Law* 89.

<sup>16</sup> The Rome Statute.

<sup>17</sup> Article 11 & 32, of the Rome Statute.

<sup>18</sup> Article 16, of the Rome Statute.

<sup>19</sup> L Moss 'The United Nations Security Council and The International Criminal Court: Towards a more principled relationship' in Friedrich-Ebert-Stiftung (ED) *Global Policy and Development* (2012).

accused of making referrals in a selective manner which puts the judicial independence of the ICC in issue.

### **1.3 PROBLEM STATEMENT**

There seems to be a problem that emanates from the fact that the ICC and UNSC have different mandates and are constituted differently, and the convergence between justice on one hand and peace and security on the other poses complications and challenges. The primary objective of the ICC is to help put an end to impunity for the perpetrators of the most serious crimes of concern to the International Community as a whole, and thus to contribute to the prevention of such crimes.<sup>20</sup> On the other hand, the main responsibility of the UNSC is the maintenance of peace and security at global level. The UNSC is a political body, its members chosen not for their wisdom, virtue, or independence, but because they (particularly its five permanent members) have political, economic and military strength to keep peace.<sup>21</sup> In addition to the above, three of the permanent members of the UNSC who are also the most powerful ones are not members of the ICC statute.<sup>22</sup>

In as much as the ICC is recognised as an independent body by the United Nations<sup>23</sup> the UNSC has power to refer situations for investigation by ICC. The UNSC also has power to defer ICC investigations. There is a strong suspicion that the referral mechanism provided for in the Rome Statute is being abused and there is also likelihood of misuse of the deferral system by the UNSC. The author will analyse the relationship that exists between the ICC and the UNSC with a view of determining whether the ICC enjoys judicial independence.

### **1.4 RESEARCH AIMS AND OBJECTIVES**

1. To discuss the different but related purposes of the International Criminal Court and the United Nations Security Council.

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<sup>20</sup> International Criminal Court *Understanding International Court*, Public Information and Documentation Section 4.

<sup>21</sup> International Criminal Court (n 19 above) 5.

<sup>22</sup> These three are United States of America, Russia and China.

<sup>23</sup> Article 2 (1) of the Relationship Agreement between the United Nations and the International Criminal Court.

2. To critically analyse the relationship that exists between the International Criminal Court and United Nations Security Council.
3. To illustrate structural safeguards in place meant to enhance the independence of the International Criminal Court.
4. To critically assess the implementation of the referral and deferral system as effective mechanisms in response to impunity.
5. To provide recommendations on how the International Criminal Court and UNSC may work together to provide a more impartial international justice system.

## 1.5 LITERATURE REVIEW

According to Booth<sup>24</sup> the role of the International Criminal Court is to end impunity, to ensure that injustice is not left in peace; to ensure that the scales balance, since letting major war criminals live undisturbed to write their 'memoirs' in peace 'would mock the dead and make cynics of the living.'<sup>25</sup>

Only an independent court can provide justice, hence the need for a judicial independent ICC. Gerwitz<sup>26</sup> defines the core of judicial independence as "the capacity to decide cases in a lawful and impartial manner free from improper control and influence." According to John Ferejohn,<sup>27</sup> 'independence' has at least two meanings. Firstly, a person, such as a judge, is independent if he or she is able to act without fear of interference by another. Secondly, a person or an institution is independent if it is able to do its job without relying on some other institution or group. The Rome Statute has internal mechanisms that insulate the ICC judges from interference by another party. However, the involvement and reliance of the ICC on UNSC has made some to question the ability of the court to dispense justice independently.

The provisions of the Rome Statute<sup>28</sup> permit the UNSC to refer cases to ICC and to defer cases that are being investigated by the ICC. The UNSC members argue that

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<sup>24</sup> T Booth 'Prospects and Issues for the International Criminal Court' 177.

<sup>25</sup> Booth (n 24 above) 178.

<sup>26</sup> P Gewirtz, 'Independence and Accountability of Courts' (2002 ) Vol. 24 Global Law Review 7. <http://islandia.law.yale.edu/chinalaw/pdf/independence%20eng.pdf> (accessed on 13 April 2017)

<sup>27</sup> J Ferejohn 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence' (1999), Vol. 72 *Southern California Law Review* 355.

<sup>28</sup> See Articles 13 and 16 of the Rome Statute, respectively.

under the United Nations Charter they have a *primary responsibility for the maintenance of international peace and security*.<sup>29</sup> Bolton<sup>30</sup> asserts that it is the responsibility of the United States and other UNSC members to maintain international peace and security therefore the UNSC should play a significant role in the work of the ICC. Soon after the Rome conference, the United States expressed the concern that a broad, unrestrained ICC would become a rule-making body whose breadth would distract it and thereby limit its ability to investigate and punish the most serious international crimes.<sup>31</sup> According to Rubin<sup>32</sup> there was a risk that the ICC would turn into an international human rights ombudsman and that would stop it from conducting its core business. Bolton<sup>33</sup> further argues that true political accountability is almost totally absent from the ICC, which lacks both any semblance of democratic accountability or effective governmental oversight and control. While the United States has frequently asserted that the ICC Prosecutor is largely unconstrained and unaccountable,<sup>34</sup> Ferencz argues that “*no other Prosecutor in human history has been subjected to as many controls as exist in the ICC Statute.*”<sup>35</sup>

In order for any court to function properly, independence and freedom from political pressures are critical. The UN Basic Principles on the Independence of the Judiciary<sup>36</sup> which was endorsed by the United Nations General Assembly recognizes that. International human rights instruments such as the International Covenant on Civil and Political Rights<sup>37</sup> and the European Convention on Human Rights<sup>38</sup> stipulates that true justice can only thrive where there is judicial independence.

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<sup>29</sup> Article 24 of United Nations Charter.

<sup>30</sup> JR Bolton *The Risks and Weaknesses of the International Criminal Court from America's Perspective* (2001) Vol. 64 Virginia Law Review 177.

<sup>31</sup> MR Mumford, 'Building on a Foundation of Sand: A Commentary on the International Criminal Court Treaty Conference' (1999) Vol 8 *International Law & Practise* 199.

<sup>32</sup> JP. Rubin, U.S. Dept. of State Daily Press Briefing (July 20, 1998), at <http://secretary.state.gov/www/briefings/9807/980720db.html> (last visited April 17, 2017).

<sup>33</sup> JR Bolton (n 29 above) 177.

<sup>34</sup> DF Orentlicher 'Judging Global Justice: Assessing the International Criminal Court' (2003) Vol. 21 *Wisconsin International Law Journal* 510.

<sup>35</sup> BB Ferencz 'Misguided Fears about the International Criminal Court'(2003) Vol. 15 *PACE International Law Review* 232.

<sup>36</sup> Basic Principles on the Independence of the Judiciary U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985).

<sup>37</sup> The Document was approved by United Nations in 1985.

<sup>38</sup> All European states are members of the Convention and it came into force on 3 September 1953.

## **1.6 RESEARCH METHODOLOGY**

The research of this dissertation will adopt a desktop study as the main research methodology. Desktop study refers to secondary data which can be collected without field survey. This will include searching the library and the internet. Other primary and secondary sources will be used including internet sources, newspaper articles, journal articles, international instruments and textbooks. The research will also employ a descriptive methodology in describing the importance of an independent international criminal justice delivery system. Some Chapters of this dissertation will interrogate the challenges faced by the International Criminal Court (ICC) as a result of the involvement of the United Nations Security Council (UNSC) in ICC process. The dissertation will also adopt a comparative analysis wherein the various bodies that were involved in the international criminal justice delivery system would be compared with the ICC, though not in detail but in passing. Case studies will also be used to analyse how the UNSC has used the power that it derives from the Rome Statute.

## **1.7 CHAPTER SYNOPSIS**

### **Chapter 1**

Introduction and background to the ICC mandate and the role of UNSC under the Rome Statute, statement of the problem, research objectives, literature review, research methodology as well as synopsis of chapters.

### **Chapter 2**

The chapter will give a historical narrative of the development of international criminal justice system, with particular reference to the involvement of the UNSC.

### **Chapter 3**

The chapter will deal with a critical analysis of the different mechanisms that are found in the Rome Statute that enhance the judicial independence of the ICC in the light of the ICC.

### **Chapter 4**



The chapter will analyse the challenges that the ICC is facing as a result of the involvement of the UNSC in the justice delivery system.

## **Chapter 5**

This chapter is a conclusive one and ties the major arguments made and provides some recommendations as to how to enhance the judicial independence of the ICC.

## CHAPTER TWO

### THE ROLE OF POLITICS AND UNSC IN THE DEVELOPMENT OF INTERNATIONAL CRIMINAL JUSTICE SYSTEM

#### 2:1 Introduction

Serious atrocities committed in the 20<sup>th</sup> century made the world to realize that there was a need to ensure that individuals that are responsible for holocaust and other heinous crimes of such grave magnitude must be held liable. There was a realization that in order to deliver justice to victims, perpetrators of severe international crimes like genocide, crimes against humanity and war crimes must be prosecuted. There was a need for law at international level that would ensure that liable individuals are prosecuted in a fair manner and punished for their conduct regardless of their positions. This approach of making individuals the subjects under international criminal law came about after realizing that it is individual persons, acting in groups or in furtherance of a common goal that commit atrocities.

International criminal law is divorced from the conventional public international law approach that only had states as subject under international law. International criminal law moved to criminalise some acts that were prohibited under international law, but because there were no precedents or penal provisions for punishing responsible individuals the offences were being committed with impunity.<sup>39</sup>

However, there is a paradox; the international criminal law has been able to score notable success because of the support of powerful nations, United Nations and its organs like the United Nations Security Council (UNSC). On the other hand, for international criminal justice to be credible and legitimate, it requires a separation from politics. It stands that justice is most legitimate if pursued independently from the power-politics of institutions like the UNSC.<sup>40</sup>

This chapter will give a narrative of the development of international criminal accountability with particular emphasis on various post 1945 tribunals to the present ICC legal framework. The chapter will investigate how international criminal justice institutions functioned under the UNSC system. The main models of institutions

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<sup>39</sup> R Misazgnones, International Criminal Law Manual (2010)24  
<https://www.ibanet.org/document/default.aspx?ddocumentuid=AB401Eco-3FF8-4440>.

<sup>40</sup> M Kersten, 'The UNSC and the ICC: Between a Rock and a hard place' Justice in conflict (2010).

established under the UNSC are critically examined in terms of their independence in discharging international criminal justice.

## **2:2 Historic context**

The first notable attempt to stop commission of international crimes through the employment of international justice system was made after the end of the First World War (WW1).<sup>41</sup> The atrocities, destruction of property and massive violations of human rights that occurred during the war, caused the world to realize that impunity must not be allowed. Due to political considerations the Allied powers failed to come up with a competent tribunal to try King Wilhelm II of Germany and those that had played a significant role in the commission of heinous crimes during the war.<sup>42</sup> Politics and diplomacy took centre stage to the detriment of international criminal justice.

However, there are important lessons that came from post WW1's attempt to subject the violators of international law to criminal justice. The possibility of subjecting state leaders and high ranking state officials to international justice became apparent. The international community started to think twice about state immunity which was proving to be a great obstacle to the prosecution of high ranking state actors. At the relevant time the doctrine of state immunity was regarded as being inviolable.<sup>43</sup>

## **2:3 The Nuremberg tribunals**

It took another catastrophic international war (the World War II), that was unprecedented in its brutality and costs in terms of both human lives and resources, for the international leaders to speak with one voice on the need to prosecute and punish individuals responsible for international crimes that were perpetrated during the war. To prosecute the leaders of the holocaust, the International Military Tribunal

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<sup>41</sup> The treaty of Versailles stated that an international tribunal was set up to try Wilhelm II of Germany.

<sup>42</sup> B Dube 'Trials of high ranking officials of states: Whether immunity is an exception to international criminal

Accountability in the 21<sup>st</sup> Century' (2014) Vol 5, No. 5.2 *International Journal of Politics and Good governance* 9.

<sup>43</sup> Dube (n 42 above) 9.

in Nuremberg was established in 1946<sup>44</sup> after the Allies' signing of the London Agreement in August 1945.<sup>45</sup>

The United States of America, the United Kingdom, the Soviet Union and France each supplied two judges (a primary and an alternate) and a prosecution team for the trial.<sup>46</sup> The Nuremberg trials sought to prosecute only those with the greatest responsibility, all perpetrators convicted at the tribunal held high positions within the Germany state hierarchy or were high ranking military leaders.<sup>47</sup> The tribunal seemed to represent a triumph of law over power, but it also represented justice as imposed by the victorious Allied powers and who did not prosecute the Allied for their own crimes.<sup>48</sup> According to the London Charter, the tribunal had the power to prosecute only those who were '*acting in the interest of European Axis countries*'.<sup>49</sup> This clearly showed selective justice taking into consideration that Germany officials were prosecuted for the 1939 invasion of Poland, but Soviet Union was not prosecuted for the same invasion which occurred on the same year with Germany invasion.<sup>50</sup> Dube<sup>51</sup> asserts that the trials were a mere formality and a way of just deciding on suitable sentence on the defendants as opposed to real legal prosecutions.

There is no doubt the Nuremberg tribunal established new rules of international conduct and laid boundaries for future human rights violations.

## **2:4 The Tokyo tribunals**

After the surrender of Japan in August 1945, the Japanese government was placed under the control of General Douglas MacArthur, the Supreme Commander of the Allied Powers in the Far East.<sup>52</sup> In 1946 General MacArthur created the International Criminal Tribunal for the Far East through a Special Proclamation of the Supreme

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<sup>44</sup> United to End Genocide, 'The Holocaust', (2005) Washington DC, USA.

<sup>45</sup> J Cerone 'U. S Attitude towards International Criminal Courts and Tribunals' (2008) Working Paper series paper 1 *New England School of Law*.

<sup>46</sup> United to End Genocide, 'The Holocaust', (2005) Washington DC, USA.

<sup>47</sup> A Novack, *The International Criminal Court*, (2015) 11.

<sup>48</sup> Novack (n 48 above) 8.

<sup>49</sup> Article 6 of the London Charter, 1945.

<sup>50</sup> J Laughland 'A *history of political trials*' *The Journal of Social, Political and Economic Studies* (2008) 24.

<sup>51</sup> B Dube '*The relationship between the United Nations Security Council and the International Criminal Court: Querying the International Criminal Court's independence from international politics*' Unpublished LLM thesis, The Open University of Tanzania, (2015) 29.

<sup>52</sup> Novack (n 47 above) 11.

Commander of Japan.<sup>53</sup> The tribunal was set up with an intention to assign criminal liability to individuals and reject allegation of collective responsibility for the Japanese people. Eleven judges were appointed from Allied powers and MacArthur made sure that the chief prosecutor was an American. The crimes tried by the tribunal and procedure closely resembled those of the Nuremberg.<sup>54</sup>

## **2:5 International Criminal Tribunal for the former Yugoslavia**

The International Criminal Tribunal for the former Yugoslavia (ICTY) was established in 1993 through a UNSC Resolution<sup>55</sup> in reaction to ethnic cleansing in the former Yugoslavia that had claimed the lives of over 100 000 and displaced over 3,5 million people in the region.<sup>56</sup> The ICTY had primacy over national courts and could try genocide, war crimes and crimes against humanity.

In terms of the Article 13 (2) of the statute<sup>57</sup> judges of the ICTY were elected by United Nations General Assembly from a list submitted by the UNSC. The Prosecutor was appointed by the UNSC. The President of the ICTY was obliged to make annual reports to the UNSC. Members of the UNSC like the United States of America (US) were able to influence the ICTY by nominating judges that were sympathetic to their political positions. The US was able to '*silently*' influence the operations of the ICTY by staffing of the tribunal with a number of its citizens several of whom have been former government officials.<sup>58</sup> The US has always had a US nominated judge on the ICTY and in addition US nationals have always occupied the largest number of senior positions in the office of the prosecutor and the registry.<sup>59</sup> The US also contributed the greatest share of political and financial muscle towards the ICTY.<sup>60</sup> In other words the ICTY personnel knew that the tribunal could not survive without the US.

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<sup>53</sup> Novack (n 47 above) 11.

<sup>54</sup> The tribunal had jurisdiction over war crimes, crimes against humanity and crimes against peace.

<sup>55</sup> S/RES/827 (1993).

<sup>56</sup> Novack (n 47 above) 12.

<sup>57</sup> 13 (2) of Statute of the International Criminal Tribunal for the Former Yugoslavia.

<sup>58</sup> Cerone (n 45 above) 16.

<sup>59</sup> Cerone (n 45 above) 16.

<sup>60</sup> By 2006 the US had contributed an amount in excess of \$500 million, far more than other countries and UN organs, see statement of John Bellinger, May 11 2006.

## **2:6 International Criminal Tribunal for Rwanda**

The International Tribunal for Rwanda (ICTR) was established through another UNSC Resolution in 1994.<sup>61</sup> This was after an estimated 500 000 to one million Tutsis and Moderate Hutus were brutally murdered by Hutus in a carefully planned ethnic cleansing operation in Rwanda.<sup>62</sup> The ICTR was based in Arusha, Tanzania and it shared appeals chamber with ICTY in the Hague.<sup>63</sup> The ICTR's statute<sup>64</sup> and terms of reference were similar to the ICTY's statute, although it recognized the localized nature of the conflict. The ICTR's decisions extensively helped to develop international jurisprudence on the crimes of genocide and crimes against humanity, producing considerable writing on the element of the offences, the intention element and status of the victims.

Just like in the ICTY, the judges of the ICTR were selected by the United Nations General assembly from a list submitted by the UNSC.<sup>65</sup> The Prosecutor was appointed by the UNSC.<sup>66</sup> The President of the ICTR was obliged to present annual report to the UNSC.<sup>67</sup> Members of the UNSC contributed significantly to the funding of the ICTR.<sup>68</sup> It can be said that both the ICTR and the ICTY tribunals were subservient to the UNSC since they did not enjoy absolute independence from the UNSC.<sup>69</sup>

## **2:7 The hybrid tribunals**

The ICTY and ICTR were followed by the hybrid tribunals<sup>70</sup>; these courts combined local and international elements. For example each trial was conducted before a court constituted by foreign and local judges, the courts employed local and foreign prosecutors and staff. The Special Courts personal jurisdiction was limited only to

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<sup>61</sup> S/RES/955(1994).

<sup>62</sup> Novack (n 47 above) 12.

<sup>63</sup> ICTR was closed in 2014, after 83 defendants were tried and 12 were acquitted, the ICTR costs the international community \$1.7 billion. However, 1.9 million accused were tried in traditional Gacaca courts in Rwanda at village level. The outstanding cases were handed over to the Rwanda national courts.

<sup>64</sup> Statute of the International Criminal Tribunal for Rwanda.

<sup>65</sup> Article 12(1) of the Statute of the International Criminal Tribunal for Rwanda.

<sup>66</sup> Article 15(4) of the Statute of the International Criminal Tribunal for Rwanda.

<sup>67</sup> Article 32 of the Statute of the International Criminal Tribunal for Rwanda.

<sup>68</sup> Cerone (n 45 above) 16.

<sup>69</sup> Dube (n 51 above) 34.

<sup>70</sup> The list of Hybrid courts include; Special Court for Sierra Leone, State Court of Bosnia and Herzegovina, the Extra Ordinary Chambers in the Courts of Cambodia and East Timor, Special Tribunal for Lebanon, the Extra Ordinary African Chamber in the Court of Senegal, Iraqi High Tribunal.

those who have the greatest responsibility for commission of international crimes.<sup>71</sup> The hybrid tribunals were established as a result of 'tribunal fatigue' of the UNSC, shortcomings of the ICTY and ICTR, logical and financial strains on the UN, and the general political demands of the situations.<sup>72</sup>

The Special Court for Sierra Leone (SCSL), which was established by an agreement between the United Nations and the Government of Sierra Leone,<sup>73</sup> was the first of these experiments. Just like in the international tribunals the UNSC played a leading role in the formation and funding of the operations of the SCSL. The judges of this court were three for every trial, one appointed by the government of Sierra Leone and two appointed by UN Secretary General from a list submitted by the UNSC.<sup>74</sup> The UNSC made sure that SCSL statute excluded peacekeepers from the personal jurisdiction of the court.<sup>75</sup> The hybrid tribunals were not different from the ad hoc tribunals in terms of their relationship with the UNSC.<sup>76</sup>

## 2:8 The International Criminal Court

A lesson that was learnt from the military tribunals of the 1940s, the ad hoc tribunals and the hybrid courts was that a permanent international court was the best mechanism of dealing with international crimes. Various countries representing the international community adopted the Rome Statute<sup>77</sup> in 1998, an international treaty. The Rome Statute created the International Criminal Court (ICC) which became operational on the 1<sup>st</sup> of July 2002. The optimism that followed the creation of the ICC is aptly summed up in Annan's words; '*the court would deter future war criminals and bring nearer the day when no ruler, no state, no junta and no army anywhere will be able to abuse human rights with impunity*'.<sup>78</sup>

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<sup>71</sup> For example the Statute of the Special Court of Sierra Leone gave the court competence to prosecute persons who bore the greatest responsibility for serious violations of international humanitarian law committed in Sierra Leone, since 30 November 1996.

<sup>72</sup> E Skinnider 'Experiences and Lessons from Hybrid Tribunals: Sierra Leone, East Timor and Cambodia'. International Centre for Criminal Law Reform and Criminal Justice Policy, February 3 -4, 2002.

<sup>73</sup> Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone <http://www.sc-sl.org/scsl-agreement.html> (accessed 16 July 2017).

<sup>74</sup> Article 12 (1) (a) of the Statute of the Special Court of Sierra Leone.

<sup>75</sup> Article 1, Statute of the Special Court for Sierra Leone

<sup>76</sup> Dube (n 51 above) 36.

<sup>77</sup> The Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (hereinafter referred to as Rome Statute).

<sup>78</sup> M Simons, '*Without Fanfare or Cases, International Court Sets Up*' (2002) New York Times.

The Rome Statute was created with active participation of the United Nations General Assembly.<sup>79</sup> Currently 124 states are parties to the statute, accepting the jurisdiction of the ICC as the court of last resort to investigate crimes against humanity, war crimes and genocide. The Rome Statute established an unprecedented international criminal court. While temporary international tribunals such as Nuremberg and Tokyo Tribunals, the ICTY and ICTR paved the way, the ICC differed from its predecessors because it was not established to deal with a particular case of violations of international law, but instead has a more universal goal.<sup>80</sup>

## **2:9 Jurisdiction of the ICC**

The Rome Statute lays out the jurisdiction of the ICC. The ICC has jurisdiction over crimes committed after it became operational.<sup>81</sup> Unlike the International Military Tribunals and the ad hoc tribunals the ICC does not exercise its jurisdiction retrospectively. Personal jurisdiction of the ICC extends to persons who either are nationals of state parties or who are alleged to have committed crimes on the territory of state parties.<sup>82</sup> However, the UNSC acting under Chapter VII of the UN Charter can refer a situation to the ICC thereby extending the jurisdiction of the court to a territory of a state that is not party to the Rome Statute.<sup>83</sup> It is important to note that in order for the UNSC to refer a situation to ICC all five permanent members of the UNSC must reach a consensus.<sup>84</sup> This is regardless of the fact that the most powerful three permanent members of the UNSC, namely, Russia, China and the US are not members of the ICC Statute. The above mentioned nations did not ratify the Rome Statute since they felt that the instrument does not adequately protect their national interests.

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<sup>79</sup> B Rosen, '*From the outside in shaping the International Criminal Court*', Unpublished Dissertation, Pardee Rand Graduate School (2007) 11.

<sup>80</sup> K A Snitzer, '*Peace Through Justice?: Evaluating the international Criminal Court*' (2012) Unpublished Dissertation, International Studies Honors, Macalester College, 20.

<sup>81</sup> Article 11, of the Rome Statute.

<sup>82</sup> Article 12, of the Rome Statute.

<sup>83</sup> Article 13 (b), of the Rome Statute.

<sup>84</sup> The UNSC has five permanent members namely, United Kingdom, France, Russia, China and United States of America.



## **2:10 Conclusion**

This chapter gave a narration of how the international criminal justice system has developed from being a law that could not be enforced, into a substantive law which has specific crimes and defences. Throughout this chapter, it was shown how the UNSC permanent members, acting individually or under United Nations participated in all bodies that were mandated to dispense justice at international level. Most importantly it was shown how the members of the UNSC use their privileged position to protect their interest to the detriment of justice, by influencing the judicial bodies. In a bid to show how the Rome Statute came up with provisions to protect the ICC from interference as a way of enhancing its judicial independence a critical analysis of the different protective mechanisms found in the instrument would be done in the next chapter.

## CHAPTER THREE

### ROME STATUTE MECHANISMS THAT ENHANCE JUDICIAL INDEPENDENCE OF THE ICC

#### 3:1 Introduction

In Chapter Two, a historical summary of the development of international criminal justice system up to the modern era was given. The discussion highlighted the involvement of the five permanent members of the UNSC and the UNSC in almost all the initiatives to end commission of international crimes with impunity. The political interference and shortcomings of International Military Tribunals (IMTs), the ad hoc international tribunals, as well as the hybrid courts were exposed. The above issues motivated the international community to search for an alternative international justice institution that would not be subject to UNSC influence or national politics. The international community wanted to create a new model international criminal court that would be stronger, more independent and human rights conscious. With this in mind, this chapter is going to discuss the different mechanisms that are found in the Rome Statute that are meant to enhance the independence of the ICC.

#### 3:2 The importance of an independent ICC

Ferejohn<sup>85</sup> argues that '*independence*' has at least two meanings. First, a person, such as a judge, is independent if he or she is able to act without fear or interference by another. Secondly, a person or an institution is independent if it is able to do its job without relying on some other institution or group.<sup>86</sup> It follows that independence of a court is not merely concerned with being free from interference; it also encompasses the ability to carry out its mandate without depending on another person or institution that is not part of the court.

For any court, independence and freedom from political pressure are critical. Only if the judges are independent will the court be able to carry out its function of controlling the other branches of government and administering justice properly. And

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<sup>85</sup> J Ferejohn 'Independent Judges, Dependant Judiciary: Explaining Judicial Independence' (1999) Vol. 72 *Southern California Law Review*, 353.

<sup>86</sup> Ferejohn (n 85 above) 353.

only when the judiciary is independent will it be respected by society.<sup>87</sup> For the ICC, independence is more important than in domestic courts. The types of crimes the ICC has jurisdiction over are very serious crimes, committed on a large scale and are often state sponsored. The suspects that appear before the ICC include former Presidents, cabinet ministers, military leaders and heads of state.

The international community wanted to come up with an institution that would be beyond the control of the superpowers in the UNSC, which so far had dominated the operations of all other institutions that were created before the ICC.<sup>88</sup> It was perceived that an independent ICC would deliver justice and ensure the triumph of rule of law over political power and end impunity. The creators of the ICC wanted to come up with an institution that was structured in a way that was meant to safeguard its independence, impartiality and legitimacy. In that regard, the Rome Statute's processes and procedures are designed to facilitate a just, fair, independent and impartial criminal accountability mechanism which is positioned to deliver criminal justice.<sup>89</sup>

### **3:3 Independence of ICC's Judges**

The judges' appointment and how they operate were a key area in Rome Statute negotiations. Participants hoped that the structure of the institution would have a bearing on its effectiveness and independence. The establishment of the ICC was designed with the intention to improve on how the judges of international institutions were perceived.<sup>90</sup> This is demonstrated in the Rome Statute by its preoccupation with insulating the judges from unwarranted influence and interference.

#### **3:3:1 Appointments of Judges and their conditions of service**

The judges of the ICC are elected by the Assembly of States Parties, where each state has one vote.<sup>91</sup> Candidates must be nationals of state parties and they must be *'persons of high moral character, impartiality and integrity who possess the qualifications required in their respective states for appointment to the highest*

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<sup>87</sup> S Song *'The Independence of the ICC and Safeguards Against Political Influence: Speech Outline'* (2007) A Speech by Sang-Hyun Song (ICC Judge) prepared for the symposium on ICC.

<sup>88</sup> B Dube *'The relationship between the United Nations Security Council and the International Criminal Court: Querying the International Criminal Court's independence from international politics'* Unpublished LLM thesis, The Open University of Tanzania, (2015) 41.

<sup>89</sup> Dube (n 88 above) 46.

<sup>90</sup> Dube (n 88 above) 46.

<sup>91</sup> Article 36 (6), of the Rome Statute.

*judicial offices*.<sup>92</sup> Successful candidates require two-thirds majority of the Assembly of States Parties.<sup>93</sup> Judges are elected for a non renewable term of office of 9 years.<sup>94</sup> There is, in principle, no possibility of re-election, which is meant to strengthen the independence of the judiciary.<sup>95</sup> The salaries of judges are determined by the Assembly of State Parties, may not be reduced during the term of office of a judge.<sup>96</sup> Judges serving on fulltime basis may not seek outside employment.<sup>97</sup>

It can be argued that judges are not representatives of their own countries, but derive their mandate from the international community since they are directly elected into office by the Assembly of States Parties. The requirement that a judge's salary cannot be reduced during the term of office is meant to ensure that financial pressure is not used to influence judges. More significantly, the appointment of judges has no link with any UNSC or UN process and this is designed to preserve the independence and integrity of ICC.<sup>98</sup>

### **3:3:2 Removal of Judges from Office**

The Rome Statute makes it difficult to remove an ICC judge from office. A judge may only be removed from office for commission of serious misconduct or a serious breach of the judges' duties or the judge is unable to perform his duties, due to incapacity or otherwise.<sup>99</sup> In addition, removing an ICC judge requires the consensus of the other judges and the Assembly of States Parties.<sup>100</sup> The relevant provision stipulates that a supermajority of two-thirds of the judges and two-thirds of the state parties must vote in favour of removal.<sup>101</sup>

The Rome Statute provides necessary institutional safeguards for the independence of the judges and fully complies with the UN Basic Principles on the Independence of Judiciary.<sup>102</sup> This constitute a significant improvement from the International Military

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<sup>92</sup> Article 36 (3) (a), of the Rome Statute.

<sup>93</sup> Article 36, of the Rome Statute.

<sup>94</sup> Article 36 (9) (a) of the Rome Statute.

<sup>95</sup> Song (n 87 above).

<sup>96</sup> Article 49, of the Rome Statute.

<sup>97</sup> Article 40 (2), of the Rome Statute.

<sup>98</sup> Dube (n 89 above) 46.

<sup>99</sup> Article §6 (1), of the Rome Statute.

<sup>100</sup> Article 46 (2) (a), of the Rome Statute.

<sup>101</sup> Article 46 (2) (a), of the Rome Statute.

<sup>102</sup> Basic Principles on the Independence of the Judiciary U. N. Doc. A/CONF.121/22/Rev.1 at 59 (1985).

Tribunals, ad hoc tribunals and hybrid courts where the appointments were heavily influenced by the UNSC and its members which impacted on the independence and integrity of those institutions.

### **3:4 The ICC's Independent Prosecutor**

Article 15<sup>103</sup> provides for an independent prosecutor. During the Rome Statute negotiations the United States of America (US) expressed concern over the independence of the Prosecutor; ostensibly on the basis that a *proprio motu* prosecutor might be potentially motivated.<sup>104</sup> However, the US's advocacy for the UNSC to have a strong influence over the ICC Prosecutor was not driven by the fear that the Prosecutor may conduct malicious prosecutions. The US, just like the other superpowers, was worried about its inability to control the ICC Prosecutor. The prosecutorial structure introduced by the Rome Statute is completely different from the previous International Military Tribunals and courts that were prone to abuse by the superpowers and the UNSC.

The Rome Statute was crafted with full knowledge that the office of the Prosecutor is one of the most important functions of an independent and impartial court. The Prosecutor must be positioned in such a way that his or her office does not operate subject to the control of anyone, in deciding who to prosecute, when to prosecute an individual and what charges to prefer against that person.<sup>105</sup> Independent prosecutor safeguards judicial processes against the risk of double standards and in order to achieve this, the prosecutor must be assertive and be able to only act according to law. The Rome Statute sought to give the Prosecutor that impartiality and independence.

#### **3:4:1 Election of the ICC Prosecutor and Deputy**

Election of the ICC Prosecutor is done through a secret ballot. The successful candidate must attain absolute majority of the members of the Assembly of States Parties.<sup>106</sup> The Deputy Prosecutor is elected the same way from a list of candidates provided by the Prosecutor.<sup>107</sup> The process of the election of the prosecutor is designed in such a way that the prosecutor derives his mandate from the

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<sup>103</sup> The Rome Statute.

<sup>104</sup> R Sifris *Weighing Judicial Independence against Judicial Accountability: Do the Scales of the International Criminal Court Balance* Chi-Kent J. Int'l & Comp. L. p89.

<sup>105</sup> Dube (n 88 above) 46.

<sup>106</sup> Article 42 (4), of the Rome Statute.

<sup>107</sup> Article 42 (4), of the Rome Statute.

international community. This approach is very different from that which used to prevail under the International Military Tribunals, the international courts and the hybrid courts where the Prosecutor was appointed or nominated by the superpowers or UNSC.<sup>108</sup> The Rome Statute stipulates that the Prosecutor and his deputy must be persons of high moral character, be highly competent and have extensive practical experience in the prosecution or trial of criminal cases.<sup>109</sup>

### **3:4:2 Removal of ICC Prosecutor from Office**

The Rome Statute provides three grounds for the removal of the prosecutor. The Prosecutor or his deputy may be removed from office for commission of gross misconduct or a serious breach of his duties or inability to exercise the functions of his office.<sup>110</sup> This provision is meant to protect the prosecutor from being dismissed for making decisions which may be unpopular to some individuals or states.

### **3:4:3 Role of the Prosecutor in Referrals**

In order for the ICC to be seized with jurisdiction there must be legally accepted ways and means of bringing the matter to the attention of the ICC. The Rome Statute provides three means of bringing a matter to the jurisdiction of the ICC;<sup>111</sup> this trigger mechanism of the ICC is exercised by state parties,<sup>112</sup> the UNSC<sup>113</sup> and the Prosecutor acting *proprio motu*.<sup>114</sup> It is important that this mechanism must have checks and balances to ensure that it is not used to settle political battles.

### **Article 13 (a)**

Under Article 13 (a),<sup>115</sup> state parties to the ICC statute may trigger the jurisdiction of the ICC by referring a situation to the Prosecutor for investigation. The state concerned directs the ICC's attention to situations involving heinous criminal acts, with a view of making the Prosecutor to investigate the situation for purposes of determining whether one or more persons should be charged by the ICC.<sup>116</sup> The Prosecutor conducts his own investigations before making a decision whether the

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<sup>108</sup> The Prosecutor in the Nuremberg Tribunals was appointed by the Allies, in the Tokyo Tribunals the USA appointed the prosecutor, in the ICTY and ICTR the UNSC appointed the Prosecutor and in the SCSL the UN Secretary General appointed the Prosecutor from a list submitted by the UNSC.

<sup>109</sup> Article 42 (3), of the Rome Statute.

<sup>110</sup> Article 46 (1) (a), of the Rome Statute.

<sup>111</sup> Article 13, of the Rome Statute.

<sup>112</sup> Article 13 (a), of the Rome Statute.

<sup>113</sup> Article 13 (b), of the Rome Statute.

<sup>114</sup> Article 13 (c), of the Rome Statute.

<sup>115</sup> Article 13 (a), of the Rome Statute.

<sup>116</sup> Article 14 (1), of the Rome statute.

situation warrants full investigation.<sup>117</sup> Countries like Uganda and Democratic Republic of Congo have used this trigger mechanism and some accused were successfully prosecuted as a result.<sup>118</sup>

### **Article 13 (b)**

According to Article 13 (b),<sup>119</sup> the UNSC may trigger ICC's jurisdiction, if the alleged crimes are committed in the territory of non-state parties. This is a way of acknowledging that there would be impunity for many perpetrators of grave crimes the ICC is meant to punish and prevent if the ICC's jurisdiction were entirely limited to nationals of state parties, or where the alleged crimes were committed in the territories of state parties.<sup>120</sup> The power of referral granted to the UNSC allows for jurisdiction over major atrocities committed in territories where it would otherwise be unavailable. However, the selective referral of cases by the UNSC has given the ICC many challenges.

### **Article 13 (c)**

The trigger mechanism provided for under Article 13 (c) is very important<sup>121</sup> as it allows the Prosecutor to *proprio motu* initiate proceedings. For example, if for political reasons, state parties or UNSC fail to refer a situation to the ICC, even though that situation clearly would need the attention of the ICC. The Prosecutor is empowered to open an investigation into a situation on his own without a referral if he is convinced that there are reasonable grounds for investigations to be conducted. The Prosecutor can act independently without any political interference or influence.

When the drafters of the Rome Statute introduced these trigger mechanisms they were fully aware that the system could be prone to abuse and as a result the system has inherent checks and balances. For example, the UNSC is a political body, its members are not chosen for their wisdom, virtue, or independence, but because they, particularly its five permanent members, have the political, economic and

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<sup>117</sup> Article 53 of the Rome Statute.

<sup>118</sup> Reference is made to the two ICC reported cases, both from DRC, Prosecutor Vs Thomas Lubanga Dyilo ICC-01/04-01/06 and Prosecutor Vs Jean-Pierre Bemba Gomba ICC-01/05-01/08.

<sup>119</sup> Article 13 (b), of the Rome Statute.

<sup>120</sup> L Moss 'The United Nations Security Council and The International Criminal Court: Towards a more principled relationship' in Friedrich-Ebert-Stiftung (ED) *Global Policy and Development* (2012).

<sup>121</sup> Article 13 (c), of the Rome Statute.

military strength to keep peace.<sup>122</sup> This is what gives rise to concerns over allowing the UNSC to have a major role in the referral of cases to ICC. The involvement of the UNSC in the referral system allows the ICC to have jurisdiction over countries that are not members of the ICC statute. The power of referral granted to the UNSC allows for jurisdiction over major atrocities where it would otherwise be unavailable; therefore, this is a necessary evil.

The Rome statute allows state parties and the UNSC to refer a situation to the ICC. Thus, at first sight, it might seem that this alone would amount to substantial political influence on the ICC because states and the UNSC might have political rather than judicial reasons for the referral to the ICC.<sup>123</sup> When a referral has been made, the ICC Prosecutor is duty bound to scrutinize the situation to make a determination on whether an investigation should proceed.<sup>124</sup> The Prosecutor has an obligation to probe whether or not there is a reasonable basis to proceed with the investigation. The Statute allows the Prosecutor not to initiate investigations if he determines that there is no reasonable basis to proceed or an investigation would not serve the interest of justice.<sup>125</sup>

According to the Rome Statute,<sup>126</sup> States Parties and the UNSC can only refer situations to the Prosecutor, which is a conflict defined by temporal geographical and personal parameters, not a specific case against a specific suspect.<sup>127</sup> This is meant to ensure that a referral is not used as weapon to target a specific person. It is the duty of the Prosecutor, not the referring party, to decide who the suspects are and who should be charged.

#### **3:4:4 Role of the Pre-Trial Chamber in Referrals**

When the Prosecutor is acting in terms of Article 13 (c)<sup>128</sup> of the Rome Statute, he/she is also subject to checks from the court. If the Prosecutor concludes that there is a reasonable basis to proceed with investigations, on a case that was not referred to him by the UNSC or state parties, he shall submit to the Pre-Trial Chamber a request for authorization of investigation, together with any supporting

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<sup>122</sup> Moss (n 120 above).

<sup>123</sup> Song (n 87 above).

<sup>124</sup> Article 15 (2), of the Rome Statute.

<sup>125</sup> Article 53 (2), of the Rome Statute.

<sup>126</sup> Article 14, of the Rome statute.

<sup>127</sup> Song (n 88 above).

<sup>128</sup> Article 13 (c), of the Rome Statute.



material at his disposal.<sup>129</sup> Thus, three judges will closely scrutinize the Prosecutor's decision in order to avoid any unsound decision being taken.<sup>130</sup> It is important that the Prosecutor is subjected to scrutiny by a judicial body which uses legal basis for its decisions. This is an important mechanism meant to check and balance the Prosecutor's exercise of power.

### **3:5 ICC FUNDING**

Politicians normally try to influence judicial bodies by allocating insufficient funds to the judiciary if they are not happy with the decisions of the court. The reasoning is simple, if there is no money available for investigations and trials, the court would not conduct any investigations and trials. Under-financing is another issue that pose potential threat to the international criminal justice system, this problem has been experienced, for example, by the SCSL, which depended entirely on voluntary contributions by states and at times, the financing of that court has been at risk.<sup>131</sup> The International Military Tribunals, the international criminal tribunals and the hybrid courts relied heavily on the UNSC for funding, particularly the US.<sup>132</sup> This resulted in those judicial bodies being perceived as being biased and dependent on the UNSC, such that they were not expected to make decisions detrimental to the UNSC. The Rome Statute sought to avoid falling into the same pitfalls by making the ICC to be financially independent and transparent.

All state parties to the statute pay contributions to the ICC, which are used to finance the ICC's budget.<sup>133</sup> The amount to be paid by each state is assessed on the basis of the system used by the UN.<sup>134</sup> Thus, a well known system is used for financing the ICC, which avoids political influence. Each year the ICC's budget is presented to the Assembly of States Parties for deliberations before it is adopted.<sup>135</sup> The ICC may also receive funds from the UN for use in relation to expenses incurred in pursuance of referrals made by the UNSC in terms of Article 13 (b) of the statute.<sup>136</sup> Such funds

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<sup>129</sup> Article 15 (3), of the Rome Statute.

<sup>130</sup> Song (n 87 above).

<sup>131</sup> Song (n 87 above).

<sup>132</sup> J Cerone, U. S Attitude towards International Criminal Courts and Tribunals: Working Paper series paper 1 (2008) New England School of Law.

<sup>133</sup> Article 115 (a), of the Rome Statute.

<sup>134</sup> Article 117, of the Rome Statute.

<sup>135</sup> Song (n 87 above).

<sup>136</sup> Article 13 (b), of the Rome Statute.

are not paid by individual states but are paid by the UN after the General Assembly has approved the payment.

The ICC also receives voluntary contributions from governments, international organisations, individuals, corporations and other entities.<sup>137</sup> In order to avoid those contributions from being used to influence the ICC States Parties adopted a resolution in 2002 requesting those that make voluntary contributions to declare that such contributions are not intended to affect the independence of the ICC.<sup>138</sup> The registrar of the ICC is mandated to report all voluntary contributions to the Assembly of States Parties, regardless whether they were accepted or not.<sup>139</sup>

All these measures and mechanisms are meant to ensure that the ICC is financially transparent, which goes a long way in curtailing any suspicion of undue political influence.

### **3: 6 Conclusion**

This chapter gave a critical analysis of the key mechanisms that are found in the Rome Statute that are meant to protect the ICC's independence. It has been demonstrated how the parties to the treaty successfully came up with measures that ensure the independence of the judiciary and prosecutor. The checks and balances that ensure that judges and the Prosecutor do not abuse their immense power were discussed. The chapter also displayed how the statute avoided reliance on the benevolence of the powerful UNSC members for funding, considering that the superpowers may be having a hidden agenda. It has also been shown how the UNSC plays an important role of referral of non-party states to the ICC. In the next chapter a critical analysis would be done on the challenges faced by the ICC as a result of the involvement of UNSC in ICC's activities.

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<sup>137</sup> Article 116, of the Rome Statute.

<sup>138</sup> Song (n 87 above).

<sup>139</sup> Song (n 87 above).

## CHAPTER FOUR

### CHALLENGES FACED BY THE ICC DUE TO THE INVOLVEMENT OF THE UNSC IN ICC PROCESSES

#### 4:1 Introduction

In chapter three, a critical analysis of the different mechanisms that are found in the Rome Statute that are meant to enhance the judicial independence of the ICC was done. It was also observed that the political UNSC enjoys unfettered power to refer non-party states to the ICC and can defer investigation and prosecution of a situation that is before the ICC. This raises a question; can the ICC maintain its independence when the UNSC is so involved in its referral, deferral and enforcement of ICC processes? In light of the above, this chapter investigates some of the challenges that have been caused by the involvement of the UNSC in ICC processes affecting the independence of the ICC its impartiality and integrity, perceived from the point of view of stakeholders and neutral parties.

#### 4:2 Composition of UNSC and its mandate

The United Nations Security Council is an institution established and functioning under the UN Charter, with primary responsibility to maintain international peace and security.<sup>140</sup> The UNSC has fifteen members, ten members occupy their seats on rotational basis, whilst the remaining five are permanent members, these include the US, China, Russia, United Kingdom (UK) and France. Only the five permanent members can exercise the veto power. Out of the five permanent members of the UNSC, only United Kingdom and France are state parties to the Rome Statute.<sup>141</sup>

The Security Council is the UN's primary and most powerful organ for carrying out UN's central mission of keeping peace in the world.<sup>142</sup> It was with this primary purpose in mind that the great powers of 1945 were given permanent seats on the council as they were best positioned to perform their task, due to their economic and military mighty.<sup>143</sup> Whenever the UNSC determines that there is threat to security or peace and the requisite nine votes are obtained, without any veto from the five

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<sup>140</sup> Article 24, Chapter VII of the UN Charter of 1945.

<sup>141</sup> Russia and the US signed the Rome Statute but did not ratify it, whilst China did not sign it.

<sup>142</sup> L Moss 'The United Nations Security Council and The International Criminal Court: Towards a more principled relationship' in Friedrich-Ebert-Stiftung (ED) *Global Policy and Development* (2012).

<sup>143</sup> Article 23, the UN Charter of 1945.

permanent members, several broad clauses grant it extra ordinary powers, with no appeal or recourse to any authority or body.

There is a sharp contrast between the UNSC and the ICC. The ICC was meant to be an impartial and independent judicial body, with jurisdiction to investigate, prosecute and punish those that commit international crimes. Because the ICC is a treaty based court, its normal jurisdiction is limited to the states that signed and ratified the Rome Statute. Excluding the UNSC completely from ICC processes was going to mean that those that commit heinous international crimes without being members of the ICC will continue to do so with impunity, hence the involvement of the UNSC in referral, deferral and enforcement mechanism.<sup>144</sup> It opens up the space for the ICC to intervene where it otherwise could not.

The situation given above illustrate a paradox; on one hand, a closer relationship between the power-politics of the UNSC and the ICC diminishes the quality and legitimacy of international justice delivery system; on the other hand, without cooperation between the UNSC and the ICC, or in other words without pursuing justice through power politics, some of the worst international crimes would never be tried.

#### **4:3 Attitude of the UNSC towards the formation of ICC**

The UNSC played no role in the creation of the ICC, although its members were active participants in the negotiations at the Final Diplomatic Conference in Rome in 1998.<sup>145</sup> However, the presence of the UNSC members was very important since the council had established its power to direct international criminal prosecutions as a tool for promoting international peace and security under chapter VII<sup>146</sup> and was also responsible for the creation of ICTY and ICTR.

During the Rome negotiations to establish the ICC in 1998 the most fervent states and civil society advocates in favour of creating the court sought to ensure that the ICC would be independent from the power-politics of the UNSC.<sup>147</sup> On the other

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<sup>144</sup> T Intelmann, 'The International Criminal Court and the United Nations Security Council: Perceptions and politics'

<sup>145</sup> L Moss 'The United Nations Security Council and The International Criminal Court: Towards a more principled relationship' in FE Stiftung (n 142 above).

<sup>146</sup> Article 41, of the United Nations Charter.

<sup>147</sup> M Kersten, 'The UN Security Council and the ICC: Between a Rock and a Hard Place' Justice in Conflict.

hand most members of the UNSC feared an independent Prosecutor hence they wanted a setup that guaranteed their involvement in ICC business. The US announced that its opposition came from the potential that the US's '*unique international policing responsibilities will expose it to politically motivated prosecutions before an unaccountable court.*'<sup>148</sup> The US also felt particularly susceptible if the ICC was to have an independent Prosecutor because of the volume of the state's military action as it provided greater opportunity for ICC to find cases against it.<sup>149</sup> Some powerful states like the US, Russia and China believed that European nations that were advocating for an independent ICC wanted to use international criminal justice system to restrain the power of military superior states.<sup>150</sup>

The UNSC members, particularly the US, feared that the Rome Statute's potential breadth would open the ICC to both '*frivolous and potentially motivated complaints.*'<sup>151</sup> As a result the US often argued that states should only be bound by the laws to which they consent.<sup>152</sup> The UNSC opposition was mainly caused by the fact that the powerful nations were used to making key decisions in all international criminal justice delivery bodies that were established before the ICC. Therefore, they were not prepared to allow an arrangement that had the potential to reduce their power.

Although the US was the most vocal opponent to the creation of a more independent and impartial ICC the other key members of the UNSC, namely Russia and China were of the same opinion. A compromise was reached which gave the ICC's prosecutor three avenues of initiating an investigation; by state referral, the Prosecutor acting *proprio motu* and the UNSC referral.<sup>153</sup> Despite the compromise only the United Kingdom and France signed and ratified the Rome Statute. The US and Russia only signed the Rome Statute but did not ratify it, China did not sign nor ratify it. It became clear from the onset that the UNSC did not fully support the ICC,

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<sup>148</sup> J Goldsmith , 'The Self-Defeating International Criminal Court' (2003) Vol 70 University of Chicago Law Review 89.

<sup>149</sup> B Rosen, '*From the outside in shaping the International Criminal Court*', Unpublished Dissertation, Pardee Rand Graduate School (2007) 113.

<sup>150</sup> J Goldsmith (n 148 above) 89.

<sup>151</sup> JP Rubin, US Dept of State Daily Press Briefing (July 20, 1998), <http://secretary.state.gov/www/briefings/9807/980720db.html> (accessed) 7 August 2017.

<sup>152</sup> Rosen (n 149 above) 113.

<sup>153</sup> Article 13, the Rome Statute.

but the two bodies were expected to work together in ending impunity through investigating, prosecuting and punishing those that commit international crimes. It can be argued that the marriage of convenience started to have challenges before the ink was even dry.

#### **4:4 Challenges associated with Referral of cases**

Under Article 13 (b) of the Rome Statute, a situation may be referred to the prosecutor by the UNSC acting in terms of Chapter VII of the United Nations Charter. The UNSC's power to refer potential prosecution to the ICC in situations outside the ICC's treaty based territorial and national jurisdiction was meant to deter the perpetration of genocide, war crimes and crimes against humanity everywhere in the world. There would be impunity for many perpetrators of grave crimes the ICC is meant to punish and prevent if the ICC's jurisdiction were limited to the nationals of state parties, or where the alleged crimes were committed on territories of state parties.

##### **4:4:1 Case study of Sudan**

On 31 March 2005, acting under Chapter VII, the UNSC adopted Resolution 1593 referring the situation in Darfur to the ICC, with eleven votes in favour and four abstentions.<sup>154</sup> The referral was triggered by local, regional and international condemnation of the atrocities that were being perpetrated in the Darfur region. The UNSC referral came after UN Commission of Enquiry on Darfur appointed by the UN Secretary General produced a report which recommended more detailed investigations in the region in order to assign criminal responsibility in Sudan.<sup>155</sup> The UNSC resolution was largely heralded as a major advance for the ICC, allowing investigation and prosecution of crimes committed in a major humanitarian crises that would otherwise be outside the ICC's jurisdiction, as Sudan was not a state party to the Rome Statute.<sup>156</sup>

However, the Sudan referral exposed the double standards of the UNSC. The resolution<sup>157</sup> in its paragraph 6 went on to shield from the jurisdiction of the ICC, nationals of non-party states participating in UN or AU operations in Sudan. The

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<sup>154</sup> Resolution 1593.

<sup>155</sup> UN Report of the International Commission of Enquiry on Darfur, to the UN Secretary General, pursuant to UNSC Resolution 1564 of 18 September 2004, 25 January 2005.

<sup>156</sup> L Moss 'The United Nations Security Council and The International Criminal Court: Towards a more principled relationship' in FE Stiftung (n 142 above).

<sup>157</sup> Resolution 1593.

resolution cites Article 16 of the Rome Statute, and also purports to be giving total immunity as opposed to the one year deferral that is provided under the Rome Statute.<sup>158</sup> The fact that the resolution granted immunity to nationals of certain countries, from the ICC seriously eroded the credibility, independence and legitimacy of the ICC, violating principles of equality before the law. It is a paradox that the UNSC resolution provided immunity to non-party states, whilst at the same time it referred Sudan to ICC for investigation and prosecution when it is also a non-member of the Rome Statute. Furthermore, the image of the UNSC has been dented by the fact that the five permanent members, three of which have decided not to be subjected to the jurisdiction of the ICC compel other non-members to subject to the ICC; this is illogical and morally wrong.<sup>159</sup>

The Sudanese government views the resolution 1593 as undermining the sovereignty of their country and illegal interference with the Sudanese internal politics, which works only to undermine peace efforts in Darfur.<sup>160</sup> The government has become very uncooperative and hostile as a result of the UNSC resolution, ICC indictees President al-Bashir and Ahmed Hanoun still serve as President of Sudan and governor of the Sudan Southern Kordafan, respectively. Atrocities are still being committed in the Darfur region, largely due to the involvement of the arrogant UNSC that has caused the other countries not to cooperate with the ICC.<sup>161</sup>

The African Union has not been cooperative on the issue of warrant of arrest against President Al Bashir. As a result countries such as Malawi, Chad, Djibouti, the Democratic Republic of the Congo, Kenya and most recently South Africa refused to arrest and surrender Al Bashir when he visited those countries.<sup>162</sup> According to the ICC Al Bashir has crossed international borders on 131 occasions since March 2009,

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<sup>158</sup> Article 16, the Rome Statute.

<sup>159</sup> B Dube '*The relationship between the United Nations Security Council and the International Criminal Court: Querying the International Criminal Court's independence from international politics*' Unpublished LLM thesis, The Open University of Tanzania, (2015) 46.

<sup>160</sup> L Moss '*The United Nations Security Council and The International Criminal Court: Towards a more principled relationship*' in FE Stiftung (n 142 above).

<sup>161</sup> L Moss '*The United Nations Security Council and The International Criminal Court: Towards a more principled relationship*' in FE Stiftung (n 142 above).

<sup>162</sup> In the case of South Africa the Court ordered his arrest and surrender to ICC after an application had been made by Democratic Alliance Party, however, the executive allowed al Bashir to clandestinely, leave the country before the warrant of arrest has been executed.

on 4 occasions to state parties and on 117 occasions to non-state parties.<sup>163</sup> African countries under the umbrella body of African Union now view the ICC as a tool of western powers which is targeting African leaders. For instance, the former chairperson of the AU Commission, Jean Ping, expressed Africa's disappointment with the ICC in noting that rather than pursuing justice around the world, including in cases such as Syria, Palestine, Colombia, Sri Lanka and Iraq the ICC seems to be targeting only Africans.<sup>164</sup>

A number of situations (outside Africa) that might have been referred by the UNSC to the ICC have not been, often because the state concerned has veto wielding allies amongst the permanent five UNSC members. The situation in Syria is a good example that illustrates how the UNSC uses double standards when referring cases to ICC. Since March 2011, thousands of largely peaceful protesters have been killed by Syrian security forces.<sup>165</sup> A special session of the UN Human Rights Council (HRC) in April 2011 condemned the use of lethal violence against peaceful protesters by the Syrian authorities.<sup>166</sup> The High Commissioner encouraged the UNSC as early as August 2011 to refer the situation in Syria to the ICC, but the UNSC only condemned the human rights violations.<sup>167</sup> Despite the overwhelming factual and procedural pre-conditions for referral, this remains politically impossible as a result of the veto powers.

It is unfortunate that the situation on the ground suggests that the ICC has not been able to dispense justice in an impartial and independent manner due to the involvement of UNSC. As a result of this, the legitimacy of the international Criminal justice is viewed with skepticism by some on the African continent.

#### **4: 4: 2 Case study of Libya**

The UNSC exercised its referral powers for the second time, on 26<sup>th</sup> February 2011; resolution 1970 was adopted by unanimous vote of all 15 members, referring the

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<sup>163</sup> Statement of ICC Prosecutor, Fatau Bensouda, before the United Nations Security Council on the situation in Darfur, pursuant to UNSCR 1593 (2005).

<sup>164</sup> Seeking Justice or Shielding Suspects? An analysis of the Malabo Protocol on the African Court

<sup>165</sup> L Moss 'The United Nations Security Council and The International Criminal Court: Towards a more principled relationship' in FE Stiftung (n 142 above).

<sup>166</sup> A/HRC/19/69 'Report of the Independent International Commission of inquiry on the Syrian Arab Republic'.

<sup>167</sup> Security SC/10352.



situation in Libya since 15 February to the ICC.<sup>168</sup> The resolution was triggered by harsh military crackdown on peaceful opposition protesters in Libya at the instance of the Gadhafi regime and probably also motivated by the resentment and suspicion that UNSC members viewed the Libyan leader. On the 27<sup>th</sup> June 2011, the ICC issued three warrants of arrests against the Libyan leader Muammar Gadhafi, his son Saif Al-Islam and Abdullah Al-Senussi a key intelligence operative in Libya at the time, for crimes against humanity.

The resolution was in response to the killing of civilians, since Libya is not a state party to the Rome Statute. The Statute provides that the ICC may exercise jurisdiction over statute crimes if a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the UNSC acting under Chapter VII of the UN.<sup>169</sup>

Although there was proof that international crimes were committed in Libya before the UNSC referred the matter to the ICC, it acted too quickly in adopting the resolution. The ICC is supposed to play a complementary role; therefore, it might have been better to allow a full process of inquiry to establish the facts justifying referral, and also to ask Libya to investigate crimes under the Rome Statute's principle of complementarity.<sup>170</sup> This gives an impression that the UNSC was motivated by a regime change agenda as opposed to the need to defend the Libyans from the onslaught of Gadhafi's government. The Sudanese referral was taken as a last resort, after all other measures had been exhausted, yet the referral in Libyan situation was made before other procedures and remedies that were available to the UNSC were considered.

The position of those that question the independence of the ICC is also supported by the events that took place after the fall of the Gadhafi regime in August 2011. The priority of the US, the UK and France shifted from ensuring that the ICC suspects are brought to justice to those of establishing strong ties with the new authorities.<sup>171</sup> The US made a public statement after the apprehension of Saif Al-Islam that it would not

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<sup>168</sup> L Moss 'The United Nations Security Council and The International Criminal Court: Towards a more principled relationship' in FE Stiftung (n 142 above).

<sup>169</sup> Article 13 (b) of the Rome Statute.

<sup>170</sup> This is contained in the Preamble of the Rome Statute.

<sup>171</sup> L Moss 'The United Nations Security Council and The International Criminal Court: Towards a more principled relationship' in FEStiftung (n 142 above).

press for his surrender to the ICC and the UK said they will want to see the suspect brought before a body that follows international standards without specifically referring to the ICC.<sup>172</sup> As a result Saif Al- Islam is still in Libya, with no indications that he will ever be tried before the ICC. The approach displayed by the three permanent members of the UNSC defies logic, considering that when the situation in Libya was referred to the ICC the idea was to have those responsible for international crimes tried before the ICC. Those that felt that the UNSC had an ultra motive when it referred the situation to the ICC in terms of Article 13 (b) have been vindicated.

#### **4: 4: 3 Observations made from Sudanese and Libyan referrals**

The situations discussed above show how the ICC has been discredited as a result of UNSC referrals. No undertaking has been adopted by the UNSC that it will refer to the ICC for investigation every peace and security threat or to bring to account each and every individual who commits international crime. The lack of referral guidelines and policies on what the UNSC takes into account when referring a particular situation helps to alienate the ICC instead of empowering it. The discretion to refer or not to refer is made on the basis of political consideration. The lack of clearly defined guidelines and procedures becomes clear when one looks at the Sudanese and Libyan situations; in Sudan, referral was done as a last resort whilst in Libya preliminary processes were not exhausted when the situation was referred to the ICC. There is a real possibility that the referrals may end up bringing the good name of ICC into disrepute and may even cause some members to leave the Rome Statute.<sup>173</sup>

The ICC Prosecutor has unfettered mandate to decide whether an investigation under Article 15 is required or not; based on legal considerations. However, UNSC referrals contaminates the international justice delivery process, since only enemies of powerful UNSC members are referred and but those that enjoy the protection of UNSC members are allowed to commit international crimes with impunity. This

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<sup>172</sup> L Moss 'The United Nations Security Council and The International Criminal Court: Towards a more principled relationship' in FE Stiftung (n 142 above).

<sup>173</sup> The AU has vowed not to cooperate with the ICC on Al Bashir warrant of arrest, Gambia, South Africa and Burundi gave a notice to pull out of the ICC in 2016, although the first two later on withdrew their notices.

means some situations would never be referred to the Prosecutor, whilst others that are relatively minor by comparison are hastily referred.

The UNSC referrals give fugitives and suspects that are being investigated or prosecuted by the ICC an opportunity to allege political victimisation and selective application of the law by the ICC. The AU has vowed not to cooperate with the ICC on the basis that it is targeting African leaders, the same sentiments were echoed by Al Bashir who is refusing to recognize the jurisdiction of the ICC because of UNSC one-sided referrals.

UNSC referrals are based on grounds broader than those of criminal accountability. For example the cases that were looked at clearly reveal that the gravity of the situation is not an important consideration when referring a situation to ICC. The Syrian government has killed more civilians than those killed by the Gadhafi regime but Syria has never been referred to the ICC, because it is protected by Russia.<sup>174</sup> It is now an unwritten rule that allies of powerful UNSC members are untouchable and only foes of the UNSC are referred to ICC. Therefore when the ICC investigates and prosecutes UNSC referrals the impartiality of the ICC, its reputation and its independence is brought into disrepute.

It can be argued that the UNSC referrals has taken the ICC back to the position of the IMTs and international criminal tribunals, yet one of the main reasons for its establishment was to give birth to a court that would function outside the UNSC politics.

#### **4:5 Challenges caused by UNSC deferral of cases**

The Rome Statute<sup>175</sup> provides that no investigation or prosecution of any matter by ICC may be commenced or proceeded for a period of twelve months if the UNSC through a resolution adopted under Chapter VII of the UN Charter, has requested the ICC to that effect. The authors of the Statute placed this provision in an attempt to reconcile any potential conflict between the interests of peace and the interests of

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<sup>174</sup> Russia rejected three proposed resolutions that would have enacted positive consequences for Syria, because it possesses its last foreign military base outside the former USSR in Syria, relies on Syrian purchases of Russian military exports and is openly and actively militarily supporting the Syrian government.

<sup>175</sup> Article 16 of the Rome Statute.

justice. In other words if the interests of peace requires investigation or prosecution to be suspended the UNSC can activate the deferral provision.

#### **4:5:1 Initial Abuse of Deferral Provision by the UNSC**

The UNSC initial use of the deferral provision damaged the credibility and legitimacy of the ICC. Soon after the establishment of ICC the US threatened to veto the extension of UN peace keeping mission in Bosnia unless the UNSC granted permanent blanket immunity to all UN peacekeepers in that country.<sup>176</sup> In July 2002 UNSC passed a compromise resolution.<sup>177</sup> The resolution provided immunity to all peacekeepers from non-state parties. The resolution was renewed again in 2003.<sup>178</sup> The resolutions did not comply with the spirit and the letter of the Rome Statute<sup>179</sup> because there were no investigations or prosecution that had been commenced by the ICC in Bosnia. What became clear is the fact that the UNSC wanted to insulate its members from the jurisdiction of the ICC for any offences that may be committed by their troops. This was the first incident in which the UNSC exercised its powers under the Rome Statute, and it clearly showed that the UNSC regarded itself as being above the ICC.

#### **4:5:2 UNSC Deferrals: A Case Study of Sudan**

After the Sudanese situation was referred to the ICC by the UNSC acting in terms of the Statute,<sup>180</sup> civil unrest in Darfur and military crackdown continued. This prompted the African Union<sup>181</sup> and the Organisation of the Islamic Conference to request the UNSC to invoke Article 16 of the Rome Statute and suspend investigations and prosecutions, the Arab League also supported this approach. The African Union felt that the temporary reprieve provided by the referral would allow the parties, including the President of Sudan who was on ICC issued warrant of arrest, to fully participate in African Union peace initiatives that were meant to provide a lasting peace in the region. It can be argued that the situation in Sudan satisfied the requirements of both Chapter VII of the UN Charter and Article 16 of the Rome Statute due to the insecurity, instability and turmoil created in neighboring countries like Chad, CAR,

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<sup>176</sup> L Moss 'The United Nations Security Council and The International Criminal Court: Towards a more principled relationship' in FE Stiftung (n 142 above).

<sup>177</sup> UNSC Resolution 1422.

<sup>178</sup> UNSC Resolution 1487.

<sup>179</sup> Article 16 of the Rome Statute.

<sup>180</sup> Article 13 (b) of the Rome Statute.

<sup>181</sup> African Union, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court, 3 July 2009, Assembly/AU/Dec.245(XII)Rev. 1, operating paragraph 8.

Sudan and South Sudan by the proliferation of arms and refugees. The situation in Darfur sharply contrasted with the position of UN peacekeepers in Bosnia at the time the UNSC passed the UNSC Resolution 1422<sup>182</sup> that provided blanket immunity to peacekeepers in that country. In Bosnia when the UNSC passed the resolution in favour of deferral the peacekeepers were not involved in any active combat, on the other hand the hostilities were still ongoing in Sudan and thousands of civilians were being killed annually. The UNSC refused to suspend investigations and prosecution in Darfur region of Sudan.

Many political players including the African Union could not understand the UNSC's refusal to defer the legal procedures in Sudan. As a result there was increased tension between African Union and the ICC, the Africa Union termed the prosecution of Al Bashir a colonial project which was targeting African leaders and the ICC was accused of being part of western machinations.<sup>183</sup> The African Unions criticism of ICC is justified; since under the Rome Statute the UNSC enjoys too much power which it wields at will, without following any clearly defined guidelines. It is also unfortunate that the 15 members of the UNSC could refuse to follow the advice of more than 50 members of the African Union, taking into consideration that African Union has been seized with the situation in Sudan for a long time.<sup>184</sup> In addition the request for deferral was also supported by the Arab League (AL), Non-Aligned Movement (NAM) and Organisation of Islamic Countries (OIC) whose combined membership exceeds half of the Rome Statute state parties. The deferral provisions subordinate the ICC to the UNSC and give an independent observer the impression that ICC processes are inferior to those of the UNSC.

The deferral provisions are too wide and open ended such that the UNSC decides where and when to defer proceedings, regardless of what is the situation on the ground. The possibility of deferral provisions being used to settle political scores and protection of allies of members of the UNSC is real.

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<sup>182</sup> UNSC Resolution 1422.

<sup>183</sup> AU "Report of the Chairperson of the Commission on the Activities of the AU High Level Implementation Panel on Sudan." 2<sup>nd</sup> July 2010.

<sup>184</sup> The African Union deployed peacekeeping force (AMIS) in Sudan in 2004 until it was replaced UNAMID in December 2007. The AU has also played a leading role in all peace initiatives in Sudan.

#### **4: 5: 3 UNSC Deferrals: A case study of Kenya**

In 2007 there was a Presidential election that was bitterly contested; the dispute degenerated into anarchy and violence after the swearing in of Mwai Kibaki as the President in December of the same year. Violence escalated and as a result 1,113 people were killed, 3,561 were seriously injured and numerous cases of destruction of property occurred in the Post Election Violence (PEV).<sup>185</sup> In 2010 the ICC Prosecutor conducted investigations on the situation in Kenya which resulted in ICC prosecutions.

The first initiatives to have the situation deferred happened in 2011 without success. Kenya's reasons for deferral were that the country was establishing credible judicial mechanisms to try the suspects in the country; therefore it needed time to come up with appropriate judicial institutions. Kenya's deferral had the backing of African Union but was rejected without a formal meeting of the UNSC, since the majority of veto wielding permanent members of the UNSC had expressed their oppositions.<sup>186</sup>

The second Kenyan attempt was made after Uhuru Kenyatta and William Samoei arap Ruto, key suspects in the ICC prosecutions, were voted into the offices of the President and Deputy-President, respectively. Kenya's request was to the effect that there was a prevailing and continuing terrorist threat existing in the region and Kenya also needed a chance to conclude consultations with the ICC and ASP to the Rome Statute, to consider how best to respond to the threat to international peace and security in the context of the Kenyan situation.<sup>187</sup> Kenya asserted that in light of the above, having its President and his Deputy being tried before the ICC constituted a threat to peace and security in Kenya and the region.

The request for deferral was rejected by the UNSC, with seven members voting in favour and eight abstaining. The US, France and UK abstained from voting. The reasons given by the three permanent members of the UNSC for abstaining were not convincing; the US said the ICC and ASP offered the best platform for redress.

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<sup>185</sup> D Mwangi *Deferral and Enforcement Powers of the United Nations Security Council under the Rome Statute: A case study of Kenya*. (2016) International Journal of Education and Research Vol. 4 No. 7, 17.

<sup>186</sup> A Tiemessen *The International Criminal Court and the politics of prosecutions* (2014) International Journal of Human rights, DOI:10.1080/1364 2987.2014.901310.

<sup>187</sup> Mwangi (n 185 above) 17.

France's reasons were that the UNSC was still in consultations with African states.<sup>188</sup> According to Article 16 of the Rome statute, only the UNSC can defer a situation that it referred to the ICC prosecutor. In this regard, the hands of the ICC are tied once a situation has been referred to it, any suggestion that the remedy could have come from elsewhere is incorrect.

UK's reasons were that the sponsors of the deferral had failed to establish the Chapter VII threshold beyond which the ICC's proceedings against the Kenyan leaders would pose a threat to international peace and security.<sup>189</sup> UK did not explain what it considered to be the threshold which a country requesting deferral must reach. There was no attempt on the part of UK or the rest of the UNSC members to explain what constitute a threat to international peace and security. The Bosnian referrals resolutions 1422 of 2002 and 1487 of 2003 did not attempt to explain the meaning of the phrase. However, many people particularly in the African continent felt the Kenyan case was more compelling than the Bosnian one. It can still be argued that the trial of a President and deputy of an African country bedeviled by a terrorist crises in a volatile region constitute a threat to international peace and security as submitted by Kenya and African Union.

#### **4: 5: 4 Observations made from Sudanese and Kenyan cases**

Although the ICC was supposed to prosecute cases on the basis of culpability of individual concerned at international level, deferral provisions<sup>190</sup> make that position unattainable. There are no definite guidelines which distinguish a deferral that is lawful from the one that is unlawful. The UNSC's hands are unfettered when it is exercising its discretion.

The deferral provisions of ICC proceedings are controversial and its effects do not further the goals and mandate of the ICC or strengthen the rule of law at international level. Under Article 16 the UNSC is allowed to directly interfere with judicial processes being conducted by the ICC even at trial stage. This makes the ICC to be vulnerable and has serious repercussions on the independence of the ICC

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<sup>188</sup> Department of Public Information News and Media Division *Security Council SC/11176* (2013) New York.

<sup>189</sup> Security Council *Identical letters dated 21 October 2013 from the Permanent Representative of Kenya to the United Nations addressed by the Secretary-General and the President of the Security Council S/2013/624*.

<sup>190</sup> Article 16 of the Rome Statute.

as an impartial body. This means the ICC only investigates and prosecutes cases at the benevolence of the UNSC; the ICC proceedings can be stopped at any stage by the UNSC. The ICC is at the mercy of the UNSC, this means it does not enjoy the much needed judicial independence.

The Darfur and Kenya situations have made it clear that not every serious threat to international peace and security is adequate reason to cause the UNSC to defer a case. This emphasises the fact that the UNSC enjoys unfettered discretion when it comes to deferrals, since there is no obligation on the part of UNSC to treat like cases alike.

The Rome Statute has no provisions that enable it to question the UNSC on how a particular situation was deferred; neither can the ICC appeal against a patently defective deferral decision. As a result it can be said that deferral provisions have an effect of not only inconveniencing all parties that are involved in the ICC proceedings, but it has the potential of defeating the very reason why the ICC was set up as it can result in the commission of international crimes with impunity. Under the current Rome Statute provisions the UNSC may continuously defer a case year after year for an indefinite period.

The deferral procedure has upgraded the UNSC's position to that of ICC's gatekeeper. The deferral provisions allow the UNSC to decide who should be investigated, prosecuted and tried by the ICC. The deferral procedure is a sad acknowledgment and legitimisation of some political interference in judicial proceedings and therefore seriously undermines the independence and integrity of the ICC.

It can be argued that through the operation of the deferral provisions the UNSC can manipulate, influence and interfere with the ICC's work as it makes the ICC subordinate to it. Any judicial body that is subordinate of another body that does not exercise legal functions cannot be truly independent. It is unfortunate that the ICC is in a similar predicament.

#### **4: 6 The Role of UNSC in the Enforcement of ICC processes**

The involvement of UNSC in the enforcement of ICC processes is another area that has brought a lot of controversy. Since the ICC does not have its police force it



mainly depends on state parties and UNSC for the enforcement of its decisions. The Rome Statute authorises the ICC to inform the UNSC on issues of non-cooperation by non-parties where the matter was referred by the UNSC.<sup>191</sup> In terms of the UN Charter the UNSC can ensure compliance by imposing sanctions or military attack where appropriate. However, the position on the ground indicates that the UNSC only assist the ICC in matters where it has peculiar interests, the UNSC and its members will fold their hands and watch the ICC struggling to deal with other matters before it.

For example the UNSC referred the situation in Sudan to the ICC,<sup>192</sup> in that resolution the UNSC directed Sudan to cooperate with the ICC, but Sudan has not been cooperative, instead it has been defiant. The failure to cooperate has been reported to the UNSC in annual reports that are made to the UNSC by the Prosecutor.<sup>193</sup> However, in June 2011, China a permanent member of the UNSC hosted Al Bashir, fully aware that he is on warrant of arrest issued after the UNSC has referred the Sudan situation to ICC.<sup>194</sup> There is no doubt that China was sending a message to Sudan that China valued their friendship more than its obligation to arrest Al Bashir.

The Pre-trial Chamber has now issued 13 decisions finding non-compliance and / or requesting for appropriate action to be taken against Sudan and state parties for failure to arrest Al Bashir and other fugitives in Sudan.<sup>195</sup> Although, the UNSC has not formally deferred the situation in Sudan, failure to cooperate or deliberately frustrating the enforcement of the decisions of the ICC results in *de facto* deferral. The ICC can only prosecute a suspect that is before the ICC, failure by the UNSC members to cooperate with the ICC ensures that some suspects will never be tried.

Libya is the only situation where the UNSC made sure that the ICC's decision was enforced when it declared a no flight zone over the country.<sup>196</sup> It can be argued that

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<sup>191</sup> Article 87 (5) & 87 (7) of the Rome Statute.

<sup>192</sup> Resolution 1593.

<sup>193</sup> Statement of ICC Prosecutor, Fatau Bensouda, before the United Nations Security Council on the situation in Darfur, pursuant to UNSCR 1593 (2005).

<sup>194</sup> L Moss 'The United Nations Security Council and The International Criminal Court: Towards a more principled relationship' in FE Stiftung (n 142 above) 8.

<sup>195</sup> Statement of ICC Prosecutor, Fatau Bensouda, before the United Nations Security Council on the situation in Darfur, pursuant to UNSCR 1593 (2005).

<sup>196</sup> UNSC Resolution 1973.

the enforcement of ICC processes in Libya was motivated by the regime change agenda. After the fall of the Gadhafi regime, the interests of the US, the UK and France shifted from one of ensuring that the key suspects like Sarf al-Islam Gadhafi are brought before the ICC to that of developing political and economic ties with the new regime.<sup>197</sup> The US declared that it will not push for Sarf al- Islam Gadhafi to be brought before the ICC, whilst France and the UK said they will want the suspect to be tried in line with international standards.<sup>198</sup> The three permanent members of the UNSC did not mention the need to enforce the ICC warrant of arrest by having the suspect brought before the ICC.

The approach employed by the UNSC of enforcing ICC decisions when it suits their selfish ends and withdrawing their support where it has no interest has resulted in the other countries and regional blocks adopting the same approach when it comes to enforcing ICC processes. The AU made a decision to the effect that its members must not cooperate with the ICC on the issue of the Sudanese President warrant of arrest.<sup>199</sup> ICC's reliance on the UNSC that uses double standards has brought disrepute to ICC and clearly shows that ICC processes are not being enforced uniformly. The selective enforcement of ICC's decisions has defeated the argument that ICC is an independent judicial body that is capable of acting with impartiality.

#### **4: 7 Conclusion**

The discussion above has made a critical analysis of the challenges that the ICC is facing as a result of the involvement of the UNSC in the justice delivery system, with particular reference to the referral, deferring and enforcement by the UNSC. Case studies of Sudan, Libya and Kenya were used to show how the ICC has struggled to fulfill its mandate as a result of the interference and lack of cooperation of the UNSC members. It was also illustrated how the ICC has suffered from bad perception due to the Rome Statute's combining of justice and politics, leading to it being viewed

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<sup>197</sup> L Moss 'The United Nations Security Council and The International Criminal Court: Towards a more principled relationship' in FE Stiftung (n 142 above).

<sup>198</sup> L Moss 'The United Nations Security Council and The International Criminal Court: Towards a more principled relationship' in FE Stiftung (n 142 above).

<sup>199</sup> African Union, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court, 3 July 2009, Assembly/AU/Dec.245(XII)Rev. 1, operating paragraph 8.

with suspicion and lack of trust; which has diminished the impartiality and independence of the ICC.

## **CHAPTER FIVE**

### **CONCLUSION**

#### **5:1 Introduction**

This chapter is the last one on the judicial independence of the international criminal court; a case study of the relationship between the ICC and the UNSC, assessing how independent is the ICC from the power politics of the UNSC. The first part briefly summarises the findings made in this research and the arguments proffered for investigating the judicial independence of the ICC. The second part focuses at the recommendations being suggested to strengthen the judicial independence of the ICC under the Statute. The last part is a conclusive one that ties the main arguments discussed in this paper.

#### **5:2 Summary of findings**

The key objective of the research was to investigate the judicial independence of the ICC, to critically analysis of the relationship that exists between the ICC and the UNSC, to probe the structural safeguards that enhance the independence of the ICC and to investigate the role of the UNSC and its effectiveness in the fight to end impunity. It was also an opportunity to illustrate how the ICC's reputation has suffered from bad perception due to the Rome Statute's combining of peace, security and justice leading to the ICC being viewed with suspicion and lack of trust; which has exposed the ICC to criticism on the basis that it lacks impartiality and independence.

The first chapter of the research gave a lay out of the frame work for a critical analysis of the judicial independence of the ICC, with particular reference to the relationship between the ICC and UNSC. Chapter two gave a historic narrative of the development of international criminal justice from the end of WWII to the current era, with particular focus on the involvement of the UNSC and UNSC member states in the administration of international criminal justice.

Chapter three made a critical analysis of the different mechanisms that are found in the Rome Statute which are meant to strengthen the judicial independence of the ICC. It was shown how the checks and balances that are found in the Rome Statute ensure that the judges and the office of the prosecutor do not abuse their powerful

positions in furtherance of their own goals. It was also demonstrated how the Rome Statute steered away the ICC from relying on funding from UNSC members but on the other hand gave the UNSC important referral, deferral and enforcement roles.

Chapter four looked at some of the obstacles to the success of the international criminal justice system as a result of the involvement of the UNSC in ICC functions. This was done with the aid of case studies of Sudan, Libya and Kenya situations, which reveal selective application of referral and deferral provisions and inconsistent enforcement of the decisions of the ICC. This research revealed that the UNSC has not adopted any undertaking to refer to ICC every individual who commits international crime. There are no clear guidelines and procedures that are followed when the UNSC is considering referring a situation to the ICC. Deferrals are also handled in the same unsatisfactory manner.

The research also exposed double standards that are used by the UNSC when enforcing ICC processes and decisions. Members of the UNSC only actively participate in the enforcement of ICC decisions when they have vested interest in the matter in issue.

It was observed that although the ICC's Prosecutor can initiate investigations *proprio motu*, the court has no power or control on situations involving non-party states, regardless of the gravity of the matter. Furthermore, the UNSC is empowered by the Statute to defer any matter that is being investigated or prosecuted by the ICC. A trial may be halted by UNSC without an explanation. Since the court has no enforcement powers, the UNSC and state parties decide who should be brought before the court, the court has no control in this process at all. The chapter revealed how the ICC is now handicapped by the combining of justice and politics, thereby making a plea for urgent reforms.

In brief, the paper argued that although the Rome Statute's involvement of the UNSC in ICC processes could have been necessitated by the need to harness the political muscle of the UNSC, this has damaged the reputation and independence of the ICC as a judicial body. The ICC's independence has been compromised, together with its ability to end impunity; provide impartial, uniform and effective justice to all international crime victims.

Looking at the above mentioned issues cumulatively, it is strongly submitted that these challenges justify the research topic. It can be argued that the judicial independence of the ICC exist only on paper, therefore, there is an urgent need to reform the Rome Statute in order to re-affirm the judicial independence of the ICC.

### **5:3 Specific Recommendations**

There's no doubt that despite its shortcoming the ICC offers the best model for addressing international crimes. It is important that the following corrective measures be taken to restrict the role of UNSC in ICC processes and to strengthen the independence of the ICC.

#### **5:3:1 UNSC referrals**

It is suggested that the Rome Statute should completely remove the UNSC referrals.<sup>200</sup> This is because the UNSC referrals have created more controversy than any other aspect of the Rome Statute, the referral of Libyan and Sudanese whilst leaving out more deserving cases like the situation in Syria has made AU to turn its back on the ICC.<sup>201</sup> The UNSC's role of referring non-member states would be taken over by United Nations General Assembly (UNGA). It is recommended that when a member of the UN is of the view that a situation exist which requires referral in a country that is not a party to Rome Statute, the member should be able to move a motion for referral. If the motion gets support of at least two thirds majority of UNGA, the situation would be referred to the ICC Prosecutor for investigation. The advantage of using the UNGA is that all countries have equal votes, unlike in the UNSC where the decision of the majority is susceptible to veto power.

The second available alternative is to revisit Article 13 (b) of the Rome Statute and introduce standing guidelines that would govern the exercise of UNSC referrals. The guidelines must have criteria that are as objective and consistent as possible. This will alleviate the arbitral use of referral power by the UNSC. The Sudanese and Libyan cases revealed that under the current Rome Statute framework there is no clearly defined guidelines which governs the referral of cases by the UNSC. There is no assurance that like cases would be decided in a similar manner.

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<sup>200</sup> Article 13 (b) of the Rome Statute.

<sup>201</sup> AU Heads of States, Decision of the 12<sup>th</sup> of October 2013.

Another option is to amend Article 13 (b) and introduce a committee of experts that is supposed to advise the UNSC. These experts should be selected by the UNSC on the basis of their experience in international criminal justice, humanitarian law and human rights. This committee of experts must consult all stakeholders, including parties involved, victims, regional bodies like AU and NGOs active in the region before making their recommendations. The UNSC should only act on the recommendations of the group of experts and the recommendations of this group should be binding. The Rome Statute should bar the use of UNSC veto power in all ICC referrals.

It is also recommended that Article 13 (b) of the Rome Statute be amended so that a clause is inserted that mandates the UNSC to first demand investigations and prevention by national government under the Rome Statute's tenet of complementary.<sup>202</sup> Referral to ICC should only be resorted to in circumstances where the national authorities have failed to launch adequate investigation and prosecution.

### **5:3:2 UNSC deferrals**

Article 16 of the Rome Statute must be amended to include guidelines to be followed when deferrals are being implemented. The guidelines will work as a standard against which all deferrals would be measured against. The ICC Pre-Trial Chamber must be empowered to review all deferrals made by the UNSC to see if they meet the set standards, this will avoid speculative deferrals like the Bosnian deferral resolutions that were meant to protect the US and their allies from prosecution.<sup>203</sup> Upon the expiry of the deferral period if the UNSC is of the opinion that a renewal is required the ICC must review the situation and decide whether that is justified. The Pre-Trial Chamber that is seized with the deferral reviews must give well reasoned and detailed legal judgments that would provide jurisprudence and precedents in this opaque field.

It is recommended that in the event that the UNSC fails to make a deferral after being formally asked to do so; any party who is affected by the decision of UNSC or lack of it may appeal to the Rome Statute Assembly of State Parties (ASP). The ASP must be able to override the decision of the UNSC if the motion is voted for on

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<sup>202</sup> Article 1 & Preamble of the Rome Statute.

<sup>203</sup> UNSC Resolution 1422 and its subsequent renewal, UNSC Resolution 1487.

two third majority. This will avoid a repeat of the Sudanese and Kenyan situations where many members of the Rome Statute felt that deferrals were justified but the UNSC in its wisdom refused to defer both situations.

Article 16 must be amended and a clause introduced which makes it a requirement that only cases that have not reached prosecution stage may be deferred. This will ensure that once a trial has started the case would have to reach its logical conclusion, this will remove the possibility of the deferrals being used to frustrates and interfere with active ICC trials.

### **5:3:3 UNSC enforcement**

The Rome Statute must be amended so that a new provision is included which provide for ICC police force. The ICC police force should be under the control of the registrar or ICC administration. There should be another clause in the Rome Statute where all state parties sign and make an undertaking that they will allow the ICC police force freedom to operate within their borders and may arrest any fugitive who happens to be within their borders, provided there is a valid ICC warrant of arrest which authorises the arrest. Having ICC standing police force will ensure that the ICC has reliable, independent and credible enforcement mechanism at its disposal at the same time limit the ICC's dependence on Rome Statute member states and the politically motivated UNSC.

It is also recommended that the Rome Statute should be amended in order to completely remove the UNSC from being involved in the enforcement of ICC processes and decisions. The role of the US, UK and France in the Libyan situation and the China's hosting of Al Bashir in 2011, when he was already on warrant of arrest, shows that the UNSC is not committed to serving the ICC or safeguarding the credibility and reputation of the ICC.

However, if the complete removal of the UNSC from the Rome Statute is not possible due to its position in international politics and military strength, it is suggested that its role in the enforcement of ICC must be restricted. This can be done by amending the Rome Statute so that the UNSC only participate in ICC enforcement duties when it is specifically invited by the ICC to assist in a given situation within clearly defined parameters. The Rome Statute should give the ICC authority to request the UNSC to participate in the ICC enforcement activities and



the ICC should also retain the power to stop the UNSC once the problem had been addressed or at any time upon giving the UNSC adequate notice. This will ensure that the ICC benefits from the political and military muscle of the UNSC without being subordinated to the UNSC. For any court to function properly its independence is important at the same time its judgments and decisions must not become *brutum fulmen*.

#### **5:4 Conclusion**

There is no doubt that international criminal justice delivery system has made some great strides in the past 70 years as a result of the active participation and involvement of the UNSC. However, the involvement of the UNSC in ICC processes is proving to be the proverbial poisoned chalice. The UNSC's obsession with politics is threatening to undo all the remarkable work that is being done by the ICC. The UNSC's use of double standards in referral, deferral and enforcement of ICC decisions have made a mockery of all the checks and balances that are in the Rome Statute that were meant to ensure that the ICC dispenses justice in an impartial and independent manner. The UNSC has given itself the role of the ICC's gatekeeper; it decides who should be tried by the ICC and who cannot. Unfortunately, UNSC's decision are not based on any logic or legal principle, but are influenced by politics. The ICC's reputation has suffered as a result, as evidenced by lack of cooperation with the ICC exhibited by many countries, particularly in Africa, accusing it of being biased.

As it has been demonstrated in this research paper, international criminal justice is still a relatively new phenomenon; it is still experiencing teething problems. Each challenge brings a lesson. Therefore, in order to strengthen the independence of the ICC there is a need to amend the Rome Statute so that its relationship with the UNSC is redefined. The amendments must enhance the independence of the ICC by making the UNSC answerable and accountable to the ICC for any action or decision done in exercise of power that it derive from the Rome Statute. The ICC and ASP should be empowered to override irrational decisions that are made by the UNSC.

As long as the ICC's processes are susceptible to UNSC control and interference the ICC will never enjoy genuine judicial independence and the ICC would always be handicapped in its fight to end impunity.

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## **ACRONYMS**

AL	Arab League
AU	African Union
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IMT	International Military Tribunal
NAM	Non Aligned Movement
SCSL	Special Court for Sierra Leone
UK	United Kingdom
UN	United Nations Organisation
UN Charter	United Nations Organisation Charter
UNSC	United Nations Security Council
US	United States of America
WWII	World War 2