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**Topic** : **Keeping Peace through Judicial Means:**

**A Critical Examination of the  
International Criminal Court as an  
Instrument for Maintaining Peace under  
the Auspices of the United Nations  
Security Council.**



**UNIVERSITY of the**

**Supervisor** : **Prof. Dr. Gerhard Werle.**

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of the degree of Master of Laws: Transnational Criminal Justice and  
Crime Prevention.**

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## **Declaration**

I declare that '**Keeping Peace through Judicial Means: A Critical Examination of the International Criminal Court as an Instrument for Maintaining Peace under the Auspices of the United Nations Security Council**' is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Bruno Paul Matumbi 2009

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All praise be to the almighty Jah!



## **Dedication**

To my parents,

Ruth and Paul Matumbi.

I love you so much.



## **List of Abbreviations**

GA	General Assembly
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
UNSC	United Nations Security Council
UN	United Nations
IMT	International Military Tribunal for the Prosecution of Major War Criminals



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## **CHAPTER ONE:**

### **1.0. Introduction to the Research Problem**

#### **1.1. Background to the study:**

Under chapter VII of the Charter of the United Nations (UN Charter), the United Nations Security Council (UNSC) has the mandate to take measures aimed at keeping and maintaining international peace. To manifest this mandate the UNSC can employ violent or peaceful measures. Employment of a judicial institution is one of the available peaceful measures and the International Criminal Court (ICC) is a recent example. For this purpose, the ICC was brought into a relationship with the UN system and the UNSC has the power to refer situations that threaten the fabric of international peace to the ICC Prosecutor for investigation and possible prosecution<sup>1</sup>. The UNSC has a further power to defer the commencement or progress of cases and investigations at the ICC<sup>2</sup>. These mandates however, are swords that cut both ways. Under the Referral regime, the ICC benefits from the UN Security Council through enforcement mechanisms<sup>3</sup> and acquires jurisdiction over situations it would not normally handle<sup>4</sup>. The Deferral regime on the other hand allows the UNSC to halt investigations or prosecutions for the sake of peace or other local remedies. In the same breath, the community of states in Rome wanted to

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<sup>1</sup> Rome Statute, art 13 (b).

<sup>2</sup> Rome Statute, art 16.

<sup>3</sup> UNSC Resolutions bind UN Members to take action and enforce them hence a UNSC referral will carry with it the same authority. See UN Charter article 25.

<sup>4</sup> Rome Statute, Art 12. The ICC has jurisdiction over states parties to the Rome Statute and over non-states parties who make a declaration to that effect. UNSC referral extends the jurisdiction to non-member states to the Rome Statute.

create a legitimate, ‘just and fair’<sup>5</sup>, ‘effective’<sup>6</sup> and ‘impartial’<sup>7</sup> court that is ‘independent’<sup>8</sup> and ‘free from political interference’<sup>9</sup>. These values lie in peril at the behest of the UNSC/ICC relationship. The referral is a request-cum-command to the court to prosecute. The Deferral regime effects a stranglehold on the commencement or progress of investigations and prosecutions at the ICC. This paper intends to critically examine the pros and cons of the UNSC using the ICC as an instrument for keeping and maintaining international peace. The nature of the relationship between the ICC and the UN Security Council in the light of the latter’s power to impact on the work of the court is therefore central in this discourse.

Suggestions for introducing an ‘application/motion system’ to the current referral/deferral regimes will be made. The view taken is that the application/motion system will allow the ICC some more discretion. It will also facilitate the proper assessment of the sequencing of justice and peace by the ICC. A further suggestion for the entrenchment of a *Reserve Jurisdiction* rule will be made as this will rid the court of the appearance of politicisation.

## 1.2. Research Question

The main issue the study aims to analyse and examine is **whether the use of the ICC by the UNSC as an instrument for keeping peace under Chapter VII of the UN Charter is proper and satisfactory**. This problem is broken down to the following sub-headings, namely;

<sup>5</sup> J.Prlc (Bosnia and Herzegovina), <<http://www.un.org/icc/pressrel/Irom15.htm>>.

<sup>6</sup> W. Sadi (Jordan), J.Prlc (Bosnia and Herzegovina), D. Opertii Badan (Uruguay), M. Al Badri (Yemen), F. Jensen (Denmark), C. Argius (Malta), M. Cleopas (Cyprus), V. Kirabokyamaria (Uganda), <<http://www.un.org/icc/pressrel/Irom15.htm>>

<sup>7</sup> J. Doneval (Haiti), D. Opertii Badan (Uruguay), <<http://www.un.org/icc/pressrel/Irom15.htm>>

<sup>8</sup> A. De Abreu (Angola), T. Sinunguruza (Burundi), P. Nze (Congo), V. Kirabokyamaria (Uganda), M. Al Badri (Yemen), W. Sadi (Jordan), C. Larrea (Ecuador), Y. Al Admi (Iraq), <<http://www.un.org/icc/pressrel/Irom15.htm>>.

<sup>9</sup> C. Larrea (Ecuador), C. Argius (Malta), <<http://www.un.org/icc/pressrel/Irom15.htm>>.

- Does the court risk losing legitimacy and independence by relating with the UN Security Council as its instrument for keeping peace, bearing in mind that the Security Council is a political body?
- Does the current nature of the relationship unnecessarily draw the ICC into intervening in situations where a judicial solution is not appropriate and thereby confusing the peace-justice sequence?
- How prone to abuse is the current regime in the light of the fact that the UN Security Council may rarely, if ever, use the ICC option for keeping peace against any of its members?
- Does the current referral/deferral regime deny the court enough room to exercise discretion as a judicial body that it is?
- Would introducing an ‘application/motion’ system into the current ‘referral/deferral regime’ improve the UNSC/ICC relationship?
- And finally, would the entrenchment of a *Reserve Jurisdiction* rule help improve the image of the court as an impartial judicial body?

### **1.3. Significance of the study**

This study is principally noteworthy as it seeks to chart, appraise and critique a big challenge to ICC – its availability to the UN Security Council, a body political in nature. The implication of the study will be its suggestion to address the problem in an all-inclusive way. The study will consider current developments relevant to the field as illustrated by the Sudan/Darfur situation and the Israeli/Palestine Gaza conflict. The study also aims to question the effect of politics on the ICC which is a

judicial body. The study will further look at the ICC as body well intended to be available for all in the international arena and yet this is endangered by potential abuse by the UN Security Council and probable misapprehension by states not fully represented in the UN Security Council. As the theme under reflection is of exacting bearing to the current African situation in Sudan/Darfur, genocide and crimes against humanity being alleged, the study is not merely of scholastic significance.

#### **1.4. Literature Review**

The relationship between the UN Security Council and the International Criminal Court has been viewed from different perspectives. Views are separated between those supporting the role of the Council in the light of its responsibilities under the UN Charter and those who fear for the politicisation of the judicial regime<sup>10</sup> and contend that the relationship ‘runs afoul of the very idea of having an independent judiciary deciding criminal liability’<sup>11</sup>. Others have viewed it as a manifestation of neo-colonialist tendencies by the western powers<sup>12</sup> and have pointed that in practice prosecutions could never be undertaken against the permanent member of the Council or their allies because of the power of the veto<sup>13</sup>. Therefore the relationship

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<sup>10</sup> Lionel Yee ‘The International Criminal Court and the Security Council: Articles 13 (b) and 16’ 144, 143-152 in Lee, R. S. (ed) *The International Criminal Court-The Making of the Rome Statute-Issues, Negotiations, Results* The Hague: Kluwer Law International. See also Werle, *Principles of International Criminal Law*, 22, marginal note 65.

<sup>11</sup> George P. Fletcher and Jens David Ohlin ‘The ICC-Two Courts in One?’ *Journal of International Criminal Justice* 4 (2006) 428-433, 433. See also Werle, *Principles of International Criminal Law*, 21, marginal note 61.

<sup>12</sup> ‘Delegates to an African Union summit in Libya agreed a resolution to halt co-operation with the ICC over its indictment of the Sudanese president, Omar Hassan al-Bashir for crimes committed in Darfur. The AU leaders stated that the ICC represented a form of neo-colonial intervention in Africa’s affairs that would ultimately jeopardise peace and stability on the continent’. See Phil Clark ‘Can Africa Trust International Justice?’ Accessed on 16 October at 2009 at <<http://www.guardian.co.uk/commentisfree/2009/jul/16/charles-taylor-hague-icc>>.

<sup>13</sup> Lionel Yee ‘The International Criminal Court and the Security Council: Articles 13 (b) and 16’ 144, 143-152 in Lee, R. S. (ed) *The International Criminal Court-The Making of the Rome Statute-Issues, Negotiations, Results*, The Hague: Kluwer Law International.

is not for, but poised against, the African state. The UN Security Council has recently given life to the relationship in the form of the Darfur referral to the ICC Prosecutor. The resulting warrant of arrest against the serving president of Sudan, Al Bashir caused uproars from all sides of the perspective dice. China described it as 'an inappropriate decision taken at an inappropriate time'<sup>14</sup>. AU members vehemently opposed it<sup>15</sup>. There appears, therefore, to be confusion as to whose purpose the court serves when acting under the auspices of the UN Security Council, a body composed mostly of the western super powers and their allies. Further to this there is misunderstanding about the significance of the relationship especially when one is oblivious of the powers the court enjoys under the wings of the UN Security Council.

An illustration is the court's assumption of jurisdiction in cases where it would not have and this affords justice to individuals whose states have denied them the same. Therefore the exact nature, significance and purpose of the relationship between the ICC and Council requires some clarification so as to find a possible middle ground.

## WESTERN CAPE

### **1.5. Methodology**

The research shall mainly be library based with documented facts on the subject being explored.

### **1.6. Limitations of the study**

The scope of the paper will be limited in terms of volume. This means that the paper will only highlight the main areas of concern in the UNSC/ICC relationship.

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<sup>14</sup> Annalisa Ciampi 'The Proceedings Against President Al Bashir And The Prospects Of Their Suspension Under Article 16 ICC Statute' 6 J Int'l. Crim. Just 885.

<sup>15</sup> In their address at the GA 63rd session, which opened in New York on 19 September 2008, a number of Heads of State and Ministers stressed the need for the Security Council to defer Al Bashir's prosecution. See <<http://www.un.org/ga/63/generaldebate>> (visited 20 April 2009).

## **1.7. Overview of the chapters**

The first part of the paper will be introductory. It will present an overview of problem, define key concepts and delimit the scope of research project. It will finally lay an outline of thesis.

Chapter two will discuss the affinity for control the world's top powerful nations have portrayed from the days of the Versailles Treaty to the present UNSC. An overview of the development of the international criminal law from Nuremberg through the *ad hoc* tribunals to the International Criminal Court (ICC), the current trends, outline of some of the current fundamental issues, the current debates on the Rome Statute, will aid the discussion.



Chapter three will raise the problem of using the ICC as an instrument for keeping peace under the auspices of the UNSC. A critique and appraisal of the UNSC/ICC relationship and considerations the need to redefine or temper it will be made. It will further highlight a few reflections from international customary law and jurisprudence.

Chapter four will discuss the concept of an ideal court through a synthesis of the objectives under the Rome Statute and the UN Charter. An analysis of some of the suggested alternatives towards the development of an application/motion system or the improvement of the current referral regime to immunise it from appearance of bias or politicisation and the other problematic aspects raised will follow. It will finally underscore the need for an International sense of justice, legitimacy and impartiality at the ICC.

Chapter five will summarise the concerns and recommendations made in the research paper and draw conclusions there from.



## CHAPTER TWO

### 2.0. The Genealogy of Power and the Affinity for Control

#### 2.1.0. Introduction:

Since the inception of the idea of nation states, there have inevitably been powerful and weaker states. The powerful ones have tried all their best to keep the status quo. To achieve this end, amassing military strength and attaining rapid economic development are some of the options available. Of interest in this chapter is the grip on the international justice system as a tool for maintaining international supremacy.

The international Criminal Court (ICC) as a major new institution of the 20<sup>th</sup> Century could not escape the affinity powerful states have for the control of the international justice system and its mechanisms. This is however not unusual. History of the role of powerful states in the law of nations will reveal a constant thread of control over international justice mechanisms. International criminal law is a particular illustration.

This chapter will follow the thread from the Treaty of Versailles to the current Rome Statute. It is envisaged that such discourse will aid a clear understanding of the behaviour of the UNSC towards the ICC and the ramifications of the same on the international criminal law system.

#### 2.1.1. UNSC and International Criminal Law:

The progeny of the UNSC can be traced back to the pre-League of Nations era. Three of the current five permanent members have always been an *ad hoc* club supporting one another and emerging victors in both the first and the second world

wars<sup>16</sup>. At the end of the First World War (WWI) this *ad hoc* club<sup>17</sup> signed a peace treaty with Germany at Versailles. The treaty of Versailles provided for the punishment of top figures answerable for war crimes committed throughout the war. Article 227 of the treaty created a special tribunal of five judges to be appointed by the very same victors and charged with trying the vanquished German Emperor, Wilhelm II<sup>18</sup>. This was an early attempt by the powers to use international criminal law as their tool for submission.

During the same period, it was realised that peaceful coexistence among the nations was more guaranteed by a concrete covenant, duly entered into and binding upon the nations of the world. This was an initiative of two of the aforementioned powers, namely USA and UK. In September, 1916, Robert Cecil, a member of the British government, wrote a memorandum where he argued that civilisation could survive only if it could develop an international system that would ensure peace<sup>19</sup>. When negotiations for peace started in October, 1918, Woodrow Wilson, President of the USA insisted that his fourteen Points serve as a basis for the creation of an organisation securing international peace<sup>20</sup>. This included the formation of the League of Nations. Its Covenant, adopted at the Paris Peace Conference in April,

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<sup>16</sup> USA, UK and France.

<sup>17</sup> Then included Italy and Japan. See. Cassese, *International Criminal Law* (2<sup>nd</sup> Ed), 317.

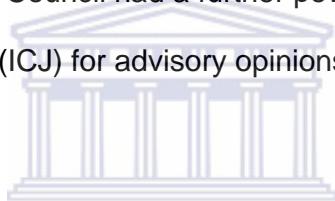
<sup>18</sup> See Peace Treaty of Versailles accessed on 24 October 2009 at <<http://net.lib.byu.edu/~rdh7/wwi/versa/versa6.html>>. The tribunal never tried the Emperor as he sought asylum in the Netherlands and extradition was refused. The composition of the tribunal further received heavy criticism from eminent publicists rendering it unworkable. Cf Cassese, *International Criminal Law* (2<sup>nd</sup> Ed), 317.

<sup>19</sup> History of the League of Nations Accessed on 7th Oct 2009 at <<http://www.spartacus.schoolnet.co.uk/FWWleague.htm>>.

<sup>20</sup> Philip J Strollo 'League of Nations Time Line' Accessed on 7th October 2009 at <<http://worldatwar.net/timeline/other/league18-46.html>>.

1919, provided for the creation of the Council of the League of Nations<sup>21</sup>. It was arguably the most powerful arm of the League as it included two of the powers discussed above namely UK and France<sup>22</sup>.

On the legal plane, the powers fashioned for themselves a tight grip on the international justice and peace system. They endowed themselves with the right to create the International court of Justice<sup>23</sup>. It is contended that this was a measure to ensure that the international justice system remains at the disposal of the powerful. This is a clear illustration of the hunger for control of the justice system the mighty nations have possessed. The Council had a further power to refer matters to the International Court of Justice (ICJ) for advisory opinions<sup>24</sup>.



### **2.1.2. The Decline of the League of Nations:**

The effectiveness of the League of Nations was severely challenged when the Second World War (WWII) broke out. It was then realised that the League of Nations

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<sup>21</sup> Covenant of the League of Nations, art. 4.

'The Council shall consist of Representatives of the Principal Allied and Associated Powers, together with Representatives of four other Members of the League. These four Members of the League shall be selected by the Assembly from time to time in its discretion'.

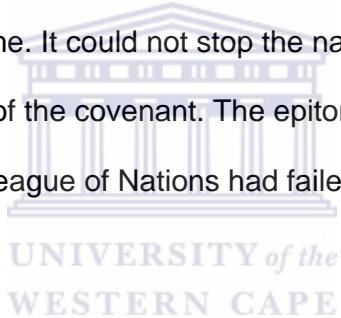
<sup>22</sup> The Council had four permanent members (the two others were Italy and Japan). Failure by the US Congress to ratify the Covenant kept USA out of the League of Nations. It however played a vital role in world politics. See Philip J Strollo 'League of Nations Time Line' Accessed at <<http://worldatwar.net/timeline/other/league18-46.html>> on 7th October 2009.

<sup>23</sup> Covenant of the League of Nations, art. 14;

'The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it.'

<sup>24</sup> Covenant of the League of Nations, art. 14. This is arguably an ancestor to the UNSC referral under the Rome Statute art.13 (b).

was not living up to its dream of securing international peace<sup>25</sup>. The United States of America never became a member to the League of Nations despite the whole concept being a brainchild of Woodrow Wilson, an American president<sup>26</sup>. The Soviet Union was a member for a short period of six years<sup>27</sup>. On October 21, 1933, Germany withdrew from the League of Nations<sup>28</sup>. In 1935 the Nazi Government decided to take the first open steps to free itself from its obligations under the Treaty of Versailles<sup>29</sup>. Hitler's ensuing 'order for rearmament, contrary Germany's obligations under the Covenant of the League of Nations<sup>30</sup>, the introduction of obligatory armed service, the occupation of the Rhineland, the seizure of Austria, and the action against Czechoslovakia<sup>31</sup>' are clear illustrations of how ineffective the League of Nations had become. It could not stop the nations of the world from offending the core principles of the covenant. The epitome of the disintegration was the break-out of WWII. The League of Nations had failed to secure international peace.



The chapter of the League of Nations was therefore closed. In 1946, its responsibilities were handed over to the United Nations<sup>32</sup> which had officially come

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<sup>25</sup> The Covenant of the League of Nations, Preamble at <http://net.lib.byu.edu/~rdh7/wwi/versa/versa1.html>.

<sup>26</sup> Philip J Strollo 'League of Nations Time Line' Accessed at <<http://worldatwar.net/timeline/other/league18-46.html>> on 7th October 2009.

<sup>27</sup> Philip J Strollo 'League of Nations Time Line' Accessed at <<http://worldatwar.net/timeline/other/league18-46.html>> on 7th October 2009.

<sup>28</sup> Philip J Strollo 'League of Nations Time Line' Accessed at on 7th October 2009 <<http://worldatwar.net/timeline/other/league18-46.html>>.

<sup>29</sup> Nuremberg Judgment, 27.

<sup>30</sup> Art. 8 'The Members of the League recognise that the maintenance of peace requires the reduction of national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligations....' See also art. 10.

<sup>31</sup> Nuremberg Judgment, 33.

<sup>32</sup> History of the League of Nations Accessed on 7th Oct 2009.at <<http://www.spartacus.schoolnet.co.uk/FWWleague.htm>>

into existence on 24 October 1945, when the Charter had been ratified by China, France, the Soviet Union, the United Kingdom, the United States and a majority of other signatories.

After the WWII, the nations of the world were once again shocked by the horrors of the war and the aftermath. They quickly and once again seized the opportunity to organise an *ad hoc* club of like-minded nations selected from the victors of the war. They assumed control over the international justice system and this time international criminal law. Intensive talks were held in London on 8 August 1945 and France, the Soviet Union, the United States and Great Britain signed the charter creating the International Military Tribunal for the prosecution and punishment of major war criminals (Nuremberg Tribunal)<sup>33</sup>. These super powers were capable of creating such a treaty never made before because they enjoyed international domination in the political and military arena. This was immediately after immersing victors in WWII. They wanted to cement their grip on international dominance and criminal law was the best option.

### **2.1.3. The Nuremberg Lesson:**

It is widely accepted that it was at the altar of Nuremberg where international criminal law was first and truly applied. Implicit in this assertion is that it was the powerful victors of WWII who created international criminal law. They then imposed it on the vanquished. The Nuremberg judgment, backed by the Charter for the International Military Tribunal (IMT), founded the individual on the international stage, outlawed

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<sup>33</sup> Rob Cawstone, 'Nuremberg and the Legacy of the Law'. Accessed on 21 April 2009 at <<http://www.globalpolicy.org/intljustice/universal/2005/1121legacy.htm>>

the defences of official position and superior orders for international crimes<sup>34</sup>. It thereby narrowed the scope of state sovereignty, and actually convicted living human beings for crimes committed in the name of the state<sup>35</sup>, just to mention a few among the many achievements to its credit.

Despite its myriad achievements, the Nuremberg left a legacy of traits never to be emulated. The collegiality of the court was manifestly biased as only the victors stood in judgement of the vanquished<sup>36</sup>. The IMT Charter was made by the same people who were to use it and they had the crimes in mind while making it<sup>37</sup>. This led to the making of a criminal statute specially tailored to convict the suspects. Further to this, the IMT Charter was a mere annex to a treaty made and entered into by only a few interested nations<sup>38</sup>. It therefore did not enjoy international legitimacy although later on 19 other likeminded nations acceded to it<sup>39</sup>. The Nuremberg court was further to be dismissed immediately after the end of the trial making it a makeshift court and not allowing of any appellate processes<sup>40</sup>.

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<sup>34</sup> IMT Charter art.6, 7 and 8.

<sup>35</sup> Goering, a senior Nazi Official was convicted for crimes he committed in the name of teh Nazi Government. See Nuremberg Judgment.

<sup>36</sup> Yitiha Smbeye, *Imunity and International Criminal Law*, 10.

<sup>37</sup> On August 8, 1945, the Charter for the IMT was signed in London. Robert Jackson's signature "For the Government of the United States of America" led all the rest. He was also going to be the chief prosecutor for the Nuremberg Trial. See *Tribute To Nuremberg Prosecutor Jackson* Available at <[http://www.roberthjackson.org/Man/Speeches\\_About\\_Nuremberg\\_Ferencz/](http://www.roberthjackson.org/Man/Speeches_About_Nuremberg_Ferencz/)> See also the parties to the Charter of the International Military Tribunal pmlb., Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

<sup>38</sup> IMT Charter art. 1.

<sup>39</sup> The accession was an expression of support for the concepts and norms set out in the charter. See *Tribute To Nuremberg Prosecutor Jackson* Available at <[http://www.roberthjackson.org/Man/Speeches\\_About\\_Nuremberg\\_Ferencz/](http://www.roberthjackson.org/Man/Speeches_About_Nuremberg_Ferencz/)>

<sup>40</sup> IMT Charter Art. 26. 'The judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review'.

At the earliest opportune time<sup>41</sup>, the principles created by the powerful nations and laid out in the IMT Charter were affirmed by a UN Resolution<sup>42</sup> and thereby giving them force as core principles of a developing discipline of international criminal law<sup>43</sup>. In this way, the bond between the powerful states and international criminal law was cemented and made unbreakable.

#### **2.1.4. Rwanda and Yugoslavia: United Nations' Nightmares.**

The evils that the Nuremberg Trial was intended to deter were yet to be witnessed once again in the Yugoslavian and Rwandan fields<sup>44</sup>. Massive bloodshed occurred while the world watched in dead silence conclusive of the then regrettable impotence of the international law machinery to move swiftly when needed. The United Nations made commendable attempts to clean its image by flipping back the pages of history to the Nuremberg chapter. The UNSC took a leaf out of this book and soon resolutions were passed creating the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)<sup>45</sup>.

These two *ad hoc* tribunals took upon the disposable nature of the Nuremberg: they

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<sup>41</sup> On 11 December 1946, the very first General Assembly affirmed the principles of law recognized by the IMT Charter and Judgment – thus endowing them with universally binding legal force. See See *Tribute To Nuremberg Prosecutor Jackson* Available at <[http://www.roberthjackson.org/Man/Speeches\\_About\\_Nuremberg\\_Ferencz/](http://www.roberthjackson.org/Man/Speeches_About_Nuremberg_Ferencz/)>

<sup>42</sup> Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, G.A. Res. 95 (I), U.N. GAOR, 1st Sess., pt. 2, at 1144, U.N. Doc. A/236 (1946).

<sup>43</sup> See Report of the International Law Commission to the General Assembly 'Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries 1950, Year Book of International Law Accessed on 19 October 2009 at <[untreaty.un.org/ilc/texts/instruments/english/.../7\\_1\\_1950.pdf](http://untreaty.un.org/ilc/texts/instruments/english/.../7_1_1950.pdf) ->

<sup>44</sup> Serious violations of international humanitarian law were committed in the territory of the former Yugoslavia since 1991 and more was to be witnessed in the territory of Rwanda and the neighbouring states where genocide was one of the atrocities committed in 1994.

<sup>45</sup> Security Council Resolution 827 (1993) (ICTY) and Security Council Resolution 955 (1994) (ICTR)

were to pack and go at specified times<sup>46</sup> and were specially made for their respective situations<sup>47</sup>.

#### **2.2.0. The Nature of the Ad Hocary System:**

Under the *ad hocary* system, a UN Resolution is passed creating a tribunal specially tailored for a particular situation involving commission of international crimes. The tribunal is specially constituted and only mandated to last a specified period and within a delimited area of jurisdiction. For the purposes of this paper, the relevant feature is the fact that the tribunal is created by a UNSC resolution. The system of the *ad hoc* tribunals is therefore, another illustration of the super power nations' aim to reinforce their grip on the international justice system. A quick reflection of the makeshift nature of the *ad hoc* tribunals soon revealed that the world would no longer wait upon the occurrence of atrocities as an impetus to form a judicial institution to handle the legal side of things. This distaste for the temporary nature of the *ad hoc* tribunal system re-planted the seeds of a permanent international criminal court.

Secondly, the fact that the *ad hoc* tribunals were made by the UNSC came out as a minus. The UNSC has its own biases being a political body that it is<sup>48</sup>. These biases are not well tamed in the instrumentality of the *ad hoc* tribunal system. It is contended that the UNSC would rarely, if ever, create an *ad hoc* tribunal to handle a

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<sup>46</sup>ICTR Statute, Art 7 'The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994'

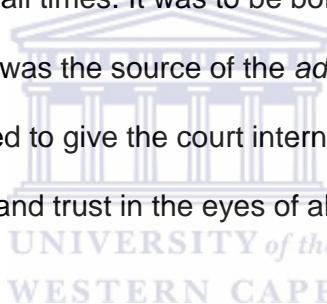
<sup>47</sup> ICTY was to focus on atrocities committed in the territory of the Former Yugoslavia since 1991 and the ICTR was to look at those in and around Rwanda.

<sup>48</sup> Triffterer, (ed) 'Commentary on the Rome Statute of the International Criminal Court (1999) (2<sup>nd</sup> Ed), article 16, marginal note 1.

situation involving any of its powerful members and their allies<sup>49</sup>. A permanent international criminal court had to be formed and created without the defects illustrated by its progeny in the Nuremberg and the other two *ad hoc* tribunals.

### **2.3.0. The Idea of a Permanent International Criminal Court:**

The failure of the UN to act promptly regarding the Rwandan and Yugoslavian situations provided the impetus for the speedy creation of an international criminal court. The idea had however been around, shelved and gathering dust<sup>50</sup>. The permanent court of international criminal law was to be a body free of the biases of the UNSC and ready to go at all times. It was to be born out of multilateral treaty and not a UNSC resolution which was the source of the *ad hoc* tribunals. The idea of a multilateral treaty was intended to give the court international legitimacy. It was to be a court commanding respect and trust in the eyes of all international players.



The super powers of the UNSC realised that this was another opportunity to hold the international justice system in their bosom. They quickly insisted that the intended court be put in a relationship with the United Nations system<sup>51</sup> and particularly the

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<sup>49</sup> They would quickly resort to the power of the veto and frustrate the whole process. A good illustration is USA and its all-time ally, Israel. The Goldstone Report by a U.N.-mandated fact-finding mission which found that both Israel and the militant Palestinian group Hamas likely committed war crimes and possibly crimes against humanity in their brief conflict. See 'HUMAN RIGHTS IN PALESTINE AND OTHER OCCUPIED ARAB TERRITORIES'

Report of the United Nations Fact Finding Mission on the Gaza Conflict' Accessed on 19 October 2009 at

<[http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC\\_Report.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf)> The prospects of the report's recommendations being followed up are in dire straits as 'the United States has joined Israel in characterizing the U.N. report as one-sided and it is making clear its opposition to the prospect of war crimes prosecutions on the Gaza conflict in the International Criminal Court or elsewhere'. See 'US Hits UN Gaza Report for Excess Focus on Israel' By David Gollust. Accessed on 19 October 2009 at <http://www.voanews.com/english/2009-09-19-voa2.cfm>

<sup>50</sup> The concept of an international criminal court is evident as far back as 1899 at the First Peace Conference in The Hague. See Yitiha Simbeye *Immunity and International Criminal Law*, 9.

<sup>51</sup> Rome Statute, art.2.

UNSC<sup>52</sup>. This demand was made under the backing of Chapter VII of the UN Charter<sup>53</sup>.

### **2.3.1. The Controversy Begins:**

At the Rome conference there was controversy over the nature of the relationship between the UNSC and the ICC. One front was of the view that the UNSC should keep hands off as the same would ensure the existence of an impartial judicial body<sup>54</sup>. This front was afraid that the interference of the UNSC would be detrimental to the workings of the ICC. The concern would be understood in the light of the nature of the representation in the UNSC<sup>55</sup>, in particular, the five permanent members equipped with the veto. The fear was that there would be political justice. Members of the UNSC and their allies would be assured of protection from the sting of the ICC at the behest of the UNSC<sup>56</sup>. Further objections were raised in regard to the respect for the concept of state sovereignty. It was felt that the use by the UNSC of the ICC would compel states to surrender a good portion of their sovereign powers<sup>57</sup>, a thing which states are most uncomfortable with. States were more

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<sup>52</sup> Rome Statute, arts. 13 and 16.

<sup>53</sup> As will be discussed later, Chapter VII of the UN Charter mandates the UNSC to keep international peace. It was thought that the ICC should be available to it for this purpose.

<sup>54</sup> A group of 60 like-minded states demanded an independent and efficient court. See 'Commentary on the Rome Statute of the International Criminal Court (1999) (2<sup>nd</sup> Ed), Introduction, marginal note 12.

<sup>55</sup> The UNSC has five permanent members (China, USA, UK, France and Russian Federation) and 10 rotational members.

<sup>56</sup> Decisions on substantive matters require nine votes, including the concurring votes of all five permanent members. This is the rule of "great Power unanimity", often referred to as the "veto" power. Hence the permanent members would veto any resolution affecting its interests or those of an ally. See 'Security Council Membership' <http://www.un.org/sc/members.asp>

<sup>57</sup> UNSC Referral has binding authority over the state concerned regardless of its affiliation to the Rome Statute. This is seen as a violation of the state's sovereignty as it cannot decide to try the suspects itself.

comfortable with a court that was respectful of the concept of sovereignty as evidenced in the newly created concept of complementarity<sup>58</sup>.

The other front was of the view that the UNSC as endowed with the power to maintain peace under the UN Charter chapter VII would do the job better with the use of the ICC. They felt that the relationship would get rid of *ad hoc*ary, a thing some regarded as a pure manifestation of victor's justice. The *ad hoc* tribunal regime was expensive and was riddled with its own biases and the ICC was to be an institution to remedy such biases and shortfalls. It was also felt that the UNSC would give the court more ground in the light of its lack of universal jurisdiction<sup>59</sup>. It was therefore reasoned that the UNSC would afford the court a form of global jurisdiction, or at least jurisdiction on all members of the UN<sup>60</sup>.

### **2.3.2. A Compromise is reached:**

In the end it was agreed that the relationship of the UNSC and the ICC would be tempered by the deferral regime where in certain special circumstances, the UNSC requests the court to *adjourn* for renewable periods of twelve months. This served as the compromise between those who wanted the UNSC to completely stay away from the ICC and those who dreamed of the UNSC as a filter for ICC cases<sup>61</sup>.

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<sup>58</sup> Rome Statute Preamble para. 10 and art. 1.

<sup>59</sup> Triffterer, (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) (2<sup>nd</sup> Ed) art.12, marginal notes 6 and 7. A Germany delegation to the Rome Statute suggested awarding the ICC with Universal Jurisdiction but the suggestion was rejected on political grounds. See also Werle, *Principles of International Criminal Law* 59, marginal note. 170.

<sup>60</sup> Decisions taken by the UNSC have binding authority on all 192 UN Member states. See UN Charter art.25.

<sup>61</sup> For a full list and detailed analysis of the compromises, see Triffterer *Commentary on the Rome Statute of the International Criminal Court* (1999) (2<sup>nd</sup> Ed), Introduction, marginal note 13.

With the compromises reached, the conference adopted the Rome Statute with an overwhelming majority of 120 votes<sup>62</sup>. Many delegates to the conference declared that the passing of the Statute was a momentous step in the history of mankind appropriately taken on the eve of the millennium<sup>63</sup>. The Court was now set up, with two strings attached to it and the UNSC holding the other ends.

#### **2.4.0. The Nature of the ICC/UNSC Relationship: The Referral and Deferral Regimes**

The Rome Statute provides that the ICC is an independent international criminal court<sup>64</sup>. It is independent in the sense that it is a standalone court. However, the UNSC holds two strings attached to it. These are the referral and deferral regimes. What follows is an overview of the same.

#### **2.4.1. The Referral Regime:**

In the exercise of its jurisdiction, the court finds itself attached to the UNSC. The Rome Statute creates a UNSC Referral Regime (the Referral Regime) in the following fashion;

The court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this statute if:

...

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<sup>62</sup> 7 Votes against and 21 abstentions. See Hans Corell "EVALUATING THE ICC REGIME: THE LIKELY IMPACT ON STATES AND INTERNATIONAL LAW" Accessed at on 29 October 2009 <[http://untreaty.un.org/OLA/media/info\\_from\\_lc/romestatute\\_dec00.pdf](http://untreaty.un.org/OLA/media/info_from_lc/romestatute_dec00.pdf)>

<sup>63</sup> Lee, SR, 'The Rome Conference and its contributions to International law' in Roy S Lee, (ed) *The International Criminal Court, the Making of the Rome Statute, Issues, Negotiations and Results*, 26.

<sup>64</sup> Rome Statute, preamble para 9.

(b) A situation in which one or more of such crimes appears to have been committed is referred to the prosecutor by the Security Council acting under chapter VII of the Charter of the United Nations<sup>65</sup>.

This regime allows the UNSC to place situations before the court for investigation and possible prosecution.

#### **2.4.2. The Deferral Regime:**

The power of deferral is the second UNSC tentacle at the ICC. The Rome Statute creates this regime thus:

No investigation or prosecution may be commenced or proceeded with under this statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the court to that effect<sup>66</sup>.

UNIVERSITY of the

This regime awards the UNSC with the power to stop the ICC machinery from moving. It catches state referred matters<sup>67</sup>, *proprio motu* initiatives<sup>68</sup>, and even UNSC referred situations.

The provision further provides that the request may be renewed by the Council under the same conditions<sup>69</sup>. The number of renewals was left open and hence is indefinite.

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<sup>65</sup> Rome Statute, art 13 (b).

<sup>66</sup> Rome Statute, art 16.

<sup>67</sup> Rome Statute, art 13 (a), Art 14.

<sup>68</sup> Rome Statute art 13 (c), Art 15.

<sup>69</sup> Rome Statute art 13 (c), Art 15.

### **2.4.3. UNSC's Mandate under Chapter VII of the UN Charter: Keeping and Maintaining International Peace:**

Chapter VII of the United Nations Charter provides for actions with respect to threats to the peace, breaches of the peace and acts of aggression. It particularly provides that;

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42<sup>70</sup>, to maintain or restore international peace and security<sup>71</sup>.

The Charter adds that;

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures<sup>72</sup>.

This mandate is wide enough to allow the use of the ICC as one of the measures for keeping and maintaining international peace. Decisions taken under this mandate have binding authority over UN member states.

### **2.5.0. Conclusion**

The ICC is now in place as a permanent international institution. Despite the advantages the ICC has over its progeny in the *ad hocary* system, it has taken upon some of the traits which it was supposed to leave for it to be a better institution. The

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<sup>70</sup> Art 42 refers to the use of armed force where the other measures have failed.

<sup>71</sup> UN Charter, art 39.

<sup>72</sup> UN Charter, article 41.

main criticism is its strong link with the UNSC. This is an illustration of the super power nations' love for power. The next chapter proposes a critical analysis of the ICC/UNSC relationship in the light of the latter using the former as an instrument for keeping peace.



## CHAPTER THREE

### 3.0. The Problem of keeping Peace through Judicial Means

#### 3.1. Introduction:

The Rome Statute was adopted as a determination by the community of states to create an independent international criminal court. The independence of the court would entail non-interference from any other body in its work. In the same breath, the community of states also decided to put the court in a relationship with the United Nations' System<sup>73</sup>. This makes the ICC available to the UNSC as a means of achieving chapter VII objectives of the UN Charter. This chapter will discuss the attendant problems of using a court as a peace-keeping mechanism.



#### 3.2.0. Duplication of Roles and the Collision of Means

International criminal law has been succinctly put as the criminal law of nations with the function of protecting the highest legal values of this community<sup>74</sup>. It guards peace, security and the well-being of the world as the fundamental values of the international community<sup>75</sup> and recognised by the UN Charter<sup>76</sup>. The mandate of the ICC is clear: the provision of justice by means of an international criminal process in relation to the crimes within the court's jurisdiction<sup>77</sup>. Criminal laws have deterrent and retributive advantages, amongst many. The deterrence as the first function of

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<sup>73</sup> Rome Statute, preamble, para. 9.

<sup>74</sup> Triffterer *Commentary on the Rome Statute of the International Criminal Court* (1999) (2<sup>nd</sup> Ed), preamble, marginal note 9.

<sup>75</sup> Werle, *Principles of International Criminal Law*, 27, marginal note 77.

<sup>76</sup> 'Peace and security' appear more than 31 times in the UN Charter. See Triffterer (ed) 'Commentary on the Rome Statute of the International Criminal Court' (1999) (2<sup>nd</sup> Ed), preamble, marginal note 10.

<sup>77</sup> Dan Sarooshi 'The Peace and Justice Pradox' in Dominic McGoldrick et al *The Permanent International Criminal Court-Legal and Policy Issues*, 95-115, 96.

criminal law is the more effective way of protecting the legal values<sup>78</sup>. The hunger for justice amongst a population may jeopardise peaceful coexistence among people.

Norman Dorsen<sup>79</sup> has commented that an efficient Court would dissuade gross human rights violators by confronting them with the risk of chastisement<sup>80</sup>. Deterring these potential offenders from embarking on their atrocious adventures is an act of keeping peace bearing in mind that these atrocities almost always involve breaches of international peace. For example, it is during wars that the crimes that fall under the jurisdiction of the ICC most often occur<sup>81</sup>. Maintaining and restoring international peace and security, therefore, directly requires the employment of international judicial intervention against crimes of international concern<sup>82</sup>. Therefore the ICC achieves the peace and security objective through the instrumentality of international criminal law.



On the other hand, the objectives of the UNSC are to take measures to keep or restore international peace and security. This objective is general and wide. It allows the UNSC to use peaceful as well as violent means<sup>83</sup>. Creation of a judicial organ has been taken as a measure under this wide mandate. In the Prosecutor v Dusko Tadic<sup>84</sup> the defence questioned the legality of the UNSC's action of creating the ICTY and contended that it had acted *ultra vires*. The trial Chamber reasoned that the UNSC is not restricted in its use of non-military measures under article 41 of the

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<sup>78</sup> Triffterer *Commentary on the Rome Statute of the International Criminal Court* (1999) (2<sup>nd</sup> Ed), preamble, marginal note 15.

<sup>79</sup> Then Chairman, Lawyers Committee for Human Rights.

<sup>80</sup> <<http://www.un.org/icc/pressrel/1rom15.htm>>

<sup>81</sup> Cf. Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) (2<sup>nd</sup> Ed), preamble, marginal note 18.

<sup>82</sup> Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) (2<sup>nd</sup> Ed), preamble, marginal note 18.

<sup>83</sup> UN Charter, art. 42.

<sup>84</sup> (IT-94-I), Decision on the defence motion on jurisdiction (Trial Chamber), (1995).

Charter. It contended that the measures could include setting up a judicial organ whose aim is to prosecute and punish individuals responsible for gross violations of human rights which are clearly threats to international peace and security<sup>85</sup>.

Recently, the ICC, as a peaceful means, has been read into the mandate and has been employed as one of the options available<sup>86</sup>. Further, through the deferral, the UNSC can stop the ICC processes and thereby achieving peace by properly facilitating the peace/justice sequence.

The above analysis reveals a dual duplication of roles. Firstly, both the UNSC and the ICC are trying to keep peace using international criminal law; the UNSC through the referral/deferral regimes and the ICC through state party referral and *proprio motu* powers of the Prosecutor. This is undesirable bearing in mind that it is only the ICC that is specially mandated to handle the judicial side of international peace keeping efforts. The UNSC should therefore only handle the non-judicial side of the effort.

Secondly, under article 13 (b) of the Rome Statute, the UNSC may also trigger the jurisdiction of the ICC with respect to a state that has already ratified or acceded to the Rome Statute<sup>87</sup>. The ICC has a Prosecutor mandated to watch out for and handle matters falling within the jurisdiction of the court<sup>88</sup>. Member states who have duly ratified or acceded to the Rome statute fall within his scope. Therefore, the

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<sup>85</sup> Prosecutor v Dusko Tadic, (IT-94-I), Decision on the defence motion on jurisdiction (Trial Chamber),(1995), para. 26 and 27.

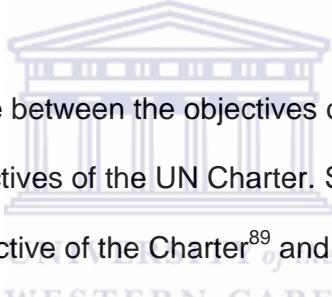
<sup>86</sup> UNSC Resolution 1593, referring the Darfur situation to the ICC.

<sup>87</sup> See Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) (2<sup>nd</sup> Ed), article 13 , marginal note 16.

<sup>88</sup> Rome Statute , article 15: The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.

UNSC action will provide jurisdiction where jurisdiction already exists. This does not make sense as the Rome statute, being a treaty, has already bound its states parties by the obligations under it. Further, the action makes the *proprio motu* powers of the Prosecutor redundant.

The collision of means is manifest when the UNSC trying to keep international peace through non-legal means enters a deferral at the ICC. This may be at a time when the ICC tries to keep the same peace through prosecutions and investigations. The objective is common but the *modus operandi* are on a collision course. The UNSC has the power to frustrate the peace keeping action of the ICC and *vice versa*.



However, there is a difference between the objectives of the UNSC under the UN Charter and the general objectives of the UN Charter. Securing international peace and security is a general objective of the Charter<sup>89</sup> and also ‘lies at the heart of international criminal law’<sup>90</sup>. Taking measures to ensure the same is an objective of the UNSC under Chapter VII of the UN Charter<sup>91</sup>. The UN Charter, as an aspiration of all member states to the UN, can secure international peace through the UNSC

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<sup>89</sup> See UN Charter, The Purposes of the United Nations. Art 1 (1): ‘To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace’.

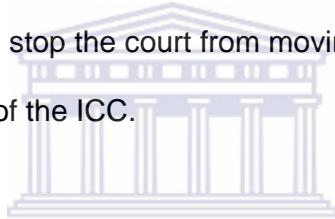
<sup>90</sup> Werle, *Principles of International Criminal Law*, 27, marginal note 78.

<sup>91</sup> See UN Charter, art. 39: ‘The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security’. See also art 24 conferring the UNSC with primary responsibility for the maintenance of international peace and security.

mandates<sup>92</sup> and/or through the ICC mandates under the Rome Statute. Both instrumentalities must bow to one general objective: international peace and security. To clear the duplication and collision as discussed above, it may firstly have to be asked ‘who is serving who?’ and ‘who ought to serve who?’

### **3.2.1. Who is Serving Who?**

A closer look at the current state of the UNSC/ICC relationship reveals that it is the latter which is serving the former. The UNSC in its quest to secure international peace will bring a situation before the ICC. Here, the referral forces the ICC to focus on the needs of the UNSC. When the court moves on its own, the UNSC under the deferral can also come in and stop the court from moving. This shows that interests of the UNSC tramp on those of the ICC.



### **3.2.2. Who ought to be Serving Who?**

The ICC has its own objective of affording justice given to it under the Rome Statute. Bearing in mind that international laws, UN treaties in particular, are made consistent with each other, at least in theory, it may be observed that the Rome Statute was made with the objectives of the UN Charter in mind<sup>93</sup>. The community of states took away some of the powers of the UNSC (the mandate to create judicial organs) under the Charter and crystallised them in the Rome Statute. From the act of creating the ICC under the Rome statute, it may be reasonable to infer that the community of states implicitly delegated the judicial function of the UNSC to the ICC.

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<sup>92</sup>UN Charter, art. 41: The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions...’

<sup>93</sup> Cf. Werle, *Principles of International Criminal Law*, 27, marginal note 78.

The Rome statute is intended to further the very interests of the UN Charter and it is a specialised document. It tackles the issue of international criminal justice. The Rome statute ‘affirms that the most serious crimes of concern to the international community as a whole must not go unpunished’<sup>94</sup>. It further recognises that such grave crimes bully the protected values under the Rome statute, namely; peace, security and well-being of the world<sup>95</sup>. These are the same interests of the UN Charter under chapter VII. Therefore it is the UNSC that ought to be serving the ICC by awarding it jurisdiction as will be discussed later.

### **3.3.0. The Attendant Problems:**

Having reviewed the current status quo of the UNSC/ICC relationship, it is now proposed to discuss the problems that ensue therefrom.



### **3.3.1. Propagating Impunity**

The deferral, which may halt prosecutions to give way for non-legal ways of achieving lasting peace, may perpetuate impunity. A deferral can only be entered by UNSC under Chapter VII mandates. These mandates deal with the issues of international peace and security, breach of which most often entails commission of crimes under the jurisdiction of the court. Armed with the deferral, the UNSC can stop the ICC from exercising its jurisdiction over these crimes<sup>96</sup>. Prosecutions are the international threshold for dealing with international crimes and the elimination of

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<sup>94</sup> Rome Statute, Preamble Para 4.

<sup>95</sup> Rome Statute Preamble Para 3.

<sup>96</sup> Cf. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (1999) (2<sup>nd</sup> Ed), article 16, marginal note 10.

impunity<sup>97</sup>. Justice delayed is justice denied. The UNSC may defer a case for indefinite times thereby permanently choking the formal justice system. This level of impunity for international crimes ‘from formal processes of justice mocks our notions of a coherent, civilised and competent 21<sup>st</sup> Century world system based on universal values’<sup>98</sup>. The State parties to the Rome Statute are determined to put an end to impunity for the perpetrators of the serious crimes and thus prosecutions contribute to the prevention of those crimes<sup>99</sup>. As discussed above, an effective prosecution is a strong statement to would-be offenders and acts as a deterrent. The deferral, however, allows the stalling of (criminal) justice for the sake of the interests of the UNSC under chapter VII of the Charter. This may lead to the perpetration of impunity, a thing the creation of the court was intended to rid the world of.



### **3.3.2. The Peace/Justice Dichotomy: Sequence over Preference**

The concept of preference in the peace/justice discourse is defeatist of its own end. The values of peace and justice cannot be separated from one another<sup>100</sup>. They are so interlinked that placing them as mutually exclusive options may lead to the failure of both. For instance, preference may lead to misapplication of justice and this may lead to escalation of the very injustices the action seeks to curb. A handy illustration is the UNSC referral of the Darfur situation. Immediately after an arrest warrant for the serving president of Sudan, Omar al-Bashir, was sought, there were cries that the court (justice) was misapplied. AU Chairman, Jean Ping saw the action as

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<sup>97</sup> Rome Statute, preamble paras. 4, 5 and 6.

<sup>98</sup> Max Du Plessis and Jolyon Ford (eds) *No Justice No Peace- Unable or Unwilling? Case Studies on Domestic Implementation of the ICC Statute in Selected African Countries*, 1.

<sup>99</sup> Rome Statute, Preamble para 5.

<sup>100</sup> See Werle, *Principles of International Criminal Law*, 27 marginal note 78.

“pouring fuel on the fire” at a moment when the AU was attempting “to extinguish the fire.”<sup>101</sup> He further commented that peace and justice should not collide and that the need for justice should not override the need for peace.<sup>102</sup> Prof. Xavier Philippe<sup>103</sup> has argued that on the ground, the Sudanese government severely limited the operations of international NGO’s. These were the bodies harbouring victims and providing them with basic necessities. It was therefore the victim, the very intended beneficiary of the justice process, who suffered<sup>104</sup>. The action further backfired when the rebels refused to negotiate for peace contending that they could not negotiate with a president who is going to prison<sup>105</sup>. Peace efforts were therefore frustrated by the means. The UNSC had preferred justice over peace instead of sequencing peace before justice. Therefore, using the ICC as a means of keeping peace can frustrate its very end of achieving peace.

Sequencing is therefore a better replacement as it allows the provision of lasting justice and peace. Under this concept, one objective is not discarded for another because ‘the fight against impunity is inseparable from the search for peace....’,<sup>106</sup> One objective merely facilitates the achievement of the other. In this regard for instance, employing the ICC option by the UNSC may be delayed so that peace may

<sup>101</sup> See Tongkeh Joseph Fowale ‘Al Bashir, Darfur and ICC Arrest Warrant Sudanese President Omar Hassan Bashir defies ICC Warrant’ Accessed on 19 October 2009 at <[http://international-politics.suite101.com/article.cfm/al\\_bashir\\_darfur\\_and\\_icc\\_arrest\\_warrant](http://international-politics.suite101.com/article.cfm/al_bashir_darfur_and_icc_arrest_warrant)>

<sup>102</sup> World Reaction: Bashir Warrant’ Accessed on 19 October 2009 at <<http://news.bbc.co.uk/2/hi/africa/7923797.stm>>

<sup>103</sup> Xavier Philippe is ICRC Legal Advisor for Eastern Europe in Moscow and Professor of Public Law at the Universities of Aix-Marseille III and Western Cape.

<sup>104</sup> Prof. Xavier Philippe, ‘International law: The Omaral-Bashir indictment by the International Criminal Court and new forms of piracy in the Indian Ocean’. Seminar presented on Tuesday, 26<sup>th</sup> May 2009 at the University of the Western Cape, Law faculty Boardroom.

<sup>105</sup> See Comment by Abdoulaye Wade, Senegal President - World Reaction: Bashir Warrant’ Accessed on 19 October 2009 at <<http://news.bbc.co.uk/2/hi/africa/7923797.stm>>

<sup>106</sup> Eric Chevallier, French Foreign Ministry Spokesman reacting to the Sudan referral. See *World Reaction: Bashir Warrant*, Accessed on 19 October 2009 at <<http://news.bbc.co.uk/2/hi/africa/7923797.stm>>.

thrive on the ground. Peace facilitates the collection of evidence, identification of witnesses and the resurrection of the most often fallen local justice system which is needed to aid and cooperate with the ICC.

### **3.3.3. Undermining court's legitimacy**

The UNSC is a political body and its link with the ICC brings into question the judicial nature of the court. When perceived as political, the ICC stops being a court and becomes a tool available to the few powerful states properly represented in the UNSC. These states will rarely use the ICC against any of their colleagues and allies. A good illustration is USA and its all-time ally, Israel. The Goldstone Report produced by a U.N.-mandated fact-finding mission has found that both Israel and the militant Palestinian group Hamas likely committed war crimes and possibly crimes against humanity in their short conflict. It proposes that these situations be brought to the ICC for prosecution<sup>107</sup>. The prospects of the report's recommendations being followed up are in dire straits as 'the United States has joined Israel in characterizing the U.N. report as one-sided and it is making clear its opposition to the prospect of war crimes prosecutions on the Gaza conflict in the International Criminal Court or elsewhere'<sup>108</sup>. Israel therefore has immunity by alliance, a privilege Sudan clearly does not enjoy. This portrays the court as targeting the weaker states<sup>109</sup> and hence a

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<sup>107</sup> See 'HUMAN RIGHTS IN PALESTINE AND OTHER OCCUPIED ARAB TERRITORIES Report of the United Nations Fact Finding Mission on the Gaza Conflict' Accessed on 19 October 2009 at <[http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC\\_Report.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf)>.

<sup>108</sup> See David Gollust *US Hits UN Gaza Report for Excess Focus on Israel*. Accessed on 19 October 2009 at <<http://www.voanews.com/english/2009-09-19-voa2.cfm>>

<sup>109</sup> Abdoulaye Wade, Senegal President, in reaction to the ICC arrest warrant stated that: 'The problem is that today many Africans have the impression that this tribunal is only there to judge Africans and this wasn't my intention when I signed for it. Wherever in the world the people committing genocide are, we should judge them, but not only judge the Africans'. *World Reaction: Bashir Warrant*' Accessed on 19 October 2009 at <<http://news.bbc.co.uk/2/hi/africa/7923797.stm>>

political tool in the hands of the mighty. The legitimacy of the court as a judicial organ lies in jeopardy.

### **3.3.4. Denying the ICC Independence**

Criminal law can only function at the national and international level where it can be demonstrated that its rules are and will be applied by an independent jurisdiction<sup>110</sup>. Any court that can be stopped at any time and without it having any say whatsoever cannot be said to be independent. The deferral puts the ICC in this position. Its processes under the Rome Statute are prevented from functioning by mere political pronouncements taken in UNSC<sup>111</sup>. By the wording of article 16 of the Rome Statute, the request is made by way of resolution. The UNSC will convene and pass a motion to halt any investigation or prosecution. It is not a matter that the court will do otherwise about. It's a command from the UNSC upon a supposed independent judicial body. The UNSC can further suffocate the Court for as long as it wants by indefinite renewals of the deferral. The deferral is also not limited to cases or investigations brought by the UNSC itself alone. It also catches those under *proprio motu* and state party referral. It is therefore a full submission hold on the ICC. Therefore the independence of the court is in doubt.

As a judicial body, the court is supposed to be making its own decisions about who to investigate or prosecute. It should further be allowed to halt cases only for

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<sup>110</sup> Triffterer *Commentary on the Rome Statute of the International Criminal Court* (1999) (2<sup>nd</sup> Ed), part I, marginal note 38.

<sup>111</sup> Cf. Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) (2<sup>nd</sup> Ed), article 16, marginal note 2.

legitimate and legally acceptable reasons. The use of the deferral denies the court these essential attributes any judicial body must possess.

### **3.3.5. Fettering the Court's discretion**

The ICC is mandated to carry out Investigations and prosecutions. These processes may have been started by the court itself and yet the UNSC may just come to halt them. This situation puts the court on watch for the interests of the UNSC. Where it may seem that the UNSC may not like the prosecution and therefore enter the deferral, the court may hesitate to move. This fetters the court's discretion as it has to make its decisions with the political interests of the UNSC in mind. The Court is supposed to apply judicial discretion alone. Political discretion is for the UNSC and should not be imported into the ICC.

### **3.3.6. Justice as a Relative Concept**

Justice is a relative term and has many facets. It may be, *inter alia*, retributive/corrective, distributive/restorative, or social. This present discourse will be limited to the just-mentioned three. Criminal law is founded on retributive/corrective justice. It seeks to restore the *status quo ante* the crime between the victim and offender. It produces a remedy (punishment) which runs directly in favour of the victim or their survivors and thus buying them off from any contemplation of revenge<sup>112</sup>. In this way peaceful coexistence in a society may be achieved. However, it is submitted that the theory presupposes humanity's natural aggressiveness as the cause of conflict and eventual criminal activity. Conflict is not always the result of aggressive quasi-animal instincts in humankind which deserve punishment at all costs. Conflict, and in most African conflict zones, is a result of an imbalance in

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<sup>112</sup> Gray C.B. (ed) *The Philosophy of Law-An Encyclopaedia*, (1999), 164.  
[33]

human relations. Therefore, there is need for a remedy that takes care of the root cause of the conflict as trials cannot fully connect with these nuances. The UNSC referral may impose a prosecution hence misapply justice in a situation where it is not the appropriate remedy.

#### **3.4.0. The Relevance of the UNSC/ICC Relationship:**

The UNSC/ICC relationship is not undesirable through and through. With the model of distributive/restorative justice and Africa as a case study, the following paragraphs illustrate the relevance of the UNSC/ICC relationship.

Distributive/restorative justice<sup>113</sup>, as components of social justice<sup>114</sup> recognise that conflict results from competition. Once equilibrium is attained between two or more competing claims, conflict ceases. Maintaining this equilibrium necessarily leads to peaceful coexistence among the peoples. A quick survey of Africa's post-conflict societies reveals a stark affinity for a distributive/restorative justice-based solution.

The Rwandan situation illustrates the point. Romeo Dallaire<sup>115</sup> has contended that there was a power imbalance between the *Hutus* and the *Tutsi*. Resources were not shared equitably between these competing tribes. He further contends that the *Hutus* killed the *Tutsis* because they (the hutus) felt that, *inter alia*, the *Tutsi* were going to take or had taken *Hutu* land and property<sup>116</sup>. The ensuing Genocide was, therefore, a manifestation of an imbalance in human relations and not humanity's alleged natural aggressiveness demanding criminal punishment. Utilitarianism, a component

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<sup>113</sup> It concerns the obligations of the community to the individual, and requires fair disbursement of common advantages and sharing of common burdens.

<sup>114</sup> Concerns the obligations of individual to community and its end is the common good, See Nolan R J and Nolan-Haley, MJ 'Black's Law Dictionary'-With Pronunciations, 6<sup>th</sup> Ed. P 864.

<sup>115</sup> Force Commander of UNAMIR, the United Nations Assistance Mission for Rwanda, 1994.

<sup>116</sup> Dallaire, R. 'Shake Hands with the Devil' a documentary on the Rwandan Genocide screened at 15<sup>th</sup> Rwandan Genocide Commemoration held at CPUT, Cape town on 11<sup>th</sup> April 2009, available at Rwandan Embassy in RSA.

of distributive/restorative justice emphasises the maximisation of the overall good of the community<sup>117</sup> and in these post-conflict societies, it is the best philosophy to embrace. Further to this, it is submitted that the African sense of justice is more akin to this distributive/social justice.

African philosophy has been succinctly put as '*Umuntu ngubuntu ngabantu*' ('I am because we are'). This communitarian approach lends voice to the argument that retributive justice may be alien to Africa. Firstly, African legal systems encapsulate that laws are instruments of conciliation, compromise, consensus and reconciliation<sup>118</sup>. This precept presupposes that conflict and crimes are a result of a failure in human relations. The situation must therefore call for a restoration of the community bonds. The ICC may be impotent to achieve peace here.

Secondly, law in an African situation transcends the sphere of the individual and addresses group personality. The law is accepted since it is embodied in extensively accepted usages and practices in forms of covenants and customs<sup>119</sup>. Implicit in this principle is the desire for *oneness*. Where one is allowed to avenge, this *oneness* falls and a cycle of violence may ensue per the words of Mahatma Gandhi that 'an eye for an eye will make the whole world blind'. It is this *oneness* that breeds peace through reconciliation hence the contention that peace first, (alien) justice later.

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<sup>117</sup> Gray, C. B. *The Philosophy of the Law- An Encyclopaedia*, 221.

<sup>118</sup> Kamunde, N. 'A JURISPRUDENTIAL ANALYSIS OF LAW, MORALITY, AND GENOCIDE: LAW IN A POST GENOCIDE SOCIETY', 14.

<sup>119</sup> Kamunde, N A 'JURISPRUDENTIAL ANALYSIS OF LAW, MORALITY, AND GENOCIDE: LAW IN A POST GENOCIDE SOCIETY', 14.

Therefore, where the ICC has applied itself<sup>120</sup> to a situation like this, UNSC may enter a deferral and hence allow the conception of justice as a wider concept and involving other non-legal practices. It allows the time for the application of local remedies to situations. A handy instance would be a halt of the Joseph Kony prosecution to allow the application of the local *mato oput*<sup>121</sup> practice. This is the African sense of justice where the offender atones, agrees to pay compensation, and finally, as a sign of reconciliation, shares a bitter root with the victim<sup>122</sup>. This would be an application of social and conciliatory justice more akin to an African setting and facilitated by the deferral procedure of the UNSC.

### 3.5.0. Conclusion:

Through the Referral and Deferral regimes, the ICC can be used as an instrument for keeping international peace despite the attendant problems. However, disadvantages appear to outweigh the advantages. In a situation like this, there is need for reform to make sure that the good side of the regimes are not overshadowed by the bad. It is for this reason that the next chapter will focus on the need for reform to allow the ICC/UNSC relationship metamorphose into a commensalism<sup>123</sup> or in the least, a mutualism<sup>124</sup>.

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<sup>120</sup> Through state party referral or *proprio motu* action by the Prosecutor.

<sup>121</sup> A traditional cleansing ceremony which many Acholi people of Uganda believe can bring true healing in a way that a formal justice system cannot. Offenders are embraced into the community after going through the ceremony. See Barney Afako 'Reconciliation and justice: 'Mato oput' and the Amnesty Act' available at <<http://www.c-r.org/our-work/accord/northern-uganda/reconciliation-justice.php>> accessed on 7<sup>th</sup> May 2009.

<sup>122</sup> An Independent Report by Tim Allen WAR AND JUSTICE IN NORTHERN UGANDA: AN ASSESSMENT OF THE INTERNATIONAL CRIMINAL COURT'S INTERVENTION February 2005, P67 Accessed at <<http://www.crisisstates.com/download/others/AllenICCReport.pdf>> on 7<sup>th</sup> May 2009

<sup>123</sup> A relationship where one party benefits more than the other and the other is not harmed at all. See Symbiotic relationship- examples Accessed at



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<<http://www.cals.ncsu.edu/course/ent591k/symbiosis.html>> on 11 Oct 2009. In this case the ICC may be the benefactor.

<sup>124</sup>A relationship where both parties benefit equally and there is no harm to either of them. See Symbiotic relationships- examples Accessed at <<http://www.cals.ncsu.edu/course/ent591k/symbiosis.html>> on 11 Oct 2009.

## CHAPTER FOUR

### 4.0. Towards the Creation of an Ideal Court

#### 4.1.0. Introduction:

As seen in the last chapter, the relationship between the ICC and the UNSC attracts both criticism and appraisal. However, the criticism seems to outweigh the appraisal.

This chapter intends to suggest the way for reform of the relationship. It will firstly suggest a modification of the referral regime through the entrenchment of a *reserve jurisdiction* rule. This will be followed by proposals to tame the deferral regime by unpacking article 16 of the Rome statute. Finally, an introduction of ‘application/motion’ system will be suggested.



#### 4.2.0. Modifying the Referral Regime:

##### 4.2.1. The Reserve Jurisdiction Rule.

The ICC is a specialised body charged with affording justice on the international plane. The member states created it as a resolve ‘to guarantee lasting respect for and enforcement of international justice’<sup>125</sup>. Despite national systems having primacy over the prosecution of international crimes under the rule of complementarity<sup>126</sup>, the ICC can be looked upon as a watchdog. Where states are unwilling or unable<sup>127</sup> to carry out a prosecution, the ICC takes up the case. It can therefore be reasonably argued that the ICC is an oversight body for international justice. However, the ICC can only be an oversight body to the states parties to the Rome Statute and other

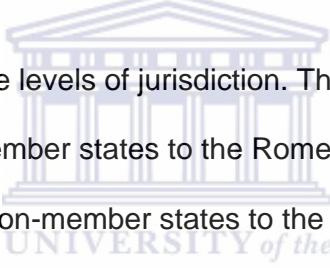
<sup>125</sup> Rome Statute, Preamble, para. 11.

<sup>126</sup> Rome Statute, Preamble, para. 10.

<sup>127</sup> Rome Statute, art. 17(a).

states who submit to the court's jurisdiction<sup>128</sup>. It has limited territorial<sup>129</sup> and national jurisdiction<sup>130</sup>. It only touches crimes committed on the territory of and/ or involving nationals of member states to the Rome statute and those states who submit to it. This bias towards territoriality and personality principles 'creates sensitive gaps in the court's jurisdiction'<sup>131</sup>.

UNSC resolutions have binding authority over all member states to the UN Charter<sup>132</sup>. One such resolution may be to submit a state to the jurisdiction of the ICC in the quest to keep and maintain international peace. With the aid of such UNSC resolution under chapter VII of the Charter, the ICC's limited jurisdiction can be extended to non-member states to the Rome statute.



In summary, the ICC has three levels of jurisdiction. The first one is treaty-based jurisdiction and catches all member states to the Rome statute. The second is state-submitted jurisdiction where non-member states to the Rome statute voluntarily submit to the jurisdiction of the court. The third and relevant to the discussion is UNSC enforced jurisdiction. This is the reserve jurisdiction. To make sense of the ICC's status as the watchdog for international criminal justice and to end the duplication of roles and collision of means as discussed earlier, the possession of this reserve jurisdiction and the UNSC's involvement in the same needs to be improved. The following suggestions are considered.

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<sup>128</sup> Rome Statute, art. 12.

<sup>129</sup> Rome Statute, art. 12, para. 2 (a).

<sup>130</sup> Rome Statute, art. 12, para. 2 (b).

<sup>131</sup> Werle, *Principles of International Criminal Law*, 21, marginal note 64.

<sup>132</sup> UN Charter, art. 25.

#### **4.2.1.1. Entrenching Priority in Article 13:**

Article 13 of the Rome Statute firstly provides for state referral. UNSC referrals come second. Lastly, the *proprio motu* action by the prosecutor is provided. It is proposed that the article should be in order of priority. Under the rule of complementarity, states have primacy over prosecution of international crimes. Where they cannot carry out the prosecution, they have the option of making a state referral. Therefore paragraph (a) is in order.

The second limb in order of priority should be the Prosecutor acting *proprio motu*<sup>133</sup>. This is where the Prosecutor receives information about commission of crimes under the jurisdiction of the court and he or she initiates an investigation<sup>134</sup>. The rational for this paragraph is that at times Governments may keep mum about gross violations of human rights thereby facilitating impunity. The Prosecutor is allowed to break this wall of silence and initiate a justice course. Therefore paragraph 13 (c) should become paragraph 13 (b).

The final limb in order of priority should be the UNSC referral. It should be noted that the above two limbs involve member states or submissive states. In other words, they deal with the court's limited territorial and national jurisdiction. Paragraph 13 (c) should therefore extend this jurisdictional reach and deal with the situation where the relevant states are not states parties to the Rome Statute. This should be the paragraph conferring the ICC with the reserve jurisdiction.

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<sup>133</sup> Rome Statute, art. 13 (c). See also art. 15.

<sup>134</sup> Rome Statute, art. 15.

#### **4.2.2. Significance of the Reserve Jurisdiction Rule**

Entrenching priority in article 13 will facilitate the application of the *Reserve Jurisdiction rule*. If this approach is adopted, several deficiencies in the UNSC/ICC relationship will be remedied as follows;

##### **4.2.2.1. The Clearing the Appearance of Politicisation:**

The reserve jurisdiction rule allows the UNSC to make a referral to the ICC only in cases where the court is devoid of jurisdiction. This will rid the UNSC action of any appearance of politicisation. The action will have a clear motive of merely awarding the ICC with jurisdiction to cases beyond those envisaged in article 12 of the Rome Statute. However, this must not murk the soaring threat of selectivity in the international community's approach to international crimes<sup>135</sup>. The UNSC may still only award the ICC the jurisdiction as a political tool against those unfavorable to the UNSC members. Despite this ever attendant danger, the Reserve jurisdiction rule will afford the ICC meaningful level of legitimacy and independence.

##### **4.2.2.2. Ending the Duplication of Roles:**

The ICC prosecutor has the task to watch for and investigate and further prosecute crimes under the Rome Statute. Crimes under the Rome Statute most often involve situations where international peace is breached and states parties to the Rome Statute recognise that 'grave crimes threaten the peace, security and well-being of

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<sup>135</sup> Phillippe, X, 'The Principles of Universal Jurisdiction and Complementarity: How do these Principles Intermesh?' 398. <<http://journals.cambridge.org>>

the world<sup>136</sup>. In the same breath, the UNSC is mandated to take measures to secure international peace and security. The UNSC can also employ judicial measures to achieve this objective. This creates two bodies responsible for one role: keeping international peace through the justice method. The role is divided into two through application of the *reserve jurisdiction* rule. The ICC prosecutor looks at the cases under the Rome Statute jurisdiction and the UNSC looks at those beyond the prosecutor's reach for lack of jurisdiction.

The above contention has several advantages. It truly manifests the UNSC role as international peace keeper as it comes to the aid of the ICC where the court has no competence. Secondly the move is justified by the award of jurisdiction to the court. It smacks of foul play where the UNSC moves in a situation where the ICC would move on its own. Thirdly, it affords the court a quasi-global jurisdiction. The UNSC award of jurisdiction will bind all UN member states<sup>137</sup> and thereby extend the reach of the ICC tentacles to those who are either mere signatories or third states<sup>138</sup>.

#### **4.2.3. A Call for Amendment to Article 13:**

As discussed above, article 13 should be drafted in order of priority. Further to this, the paragraph (c) dealing with the UNSC referral should have an extra clause entrenching the *reserve jurisdiction* rule. It is therefore suggested that article 13 of the Rome Statute be amended as follows;

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<sup>136</sup> Rome Statute, preamble para. 3.

<sup>137</sup> UN Charter, art. 25: The members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present charter.

<sup>138</sup> As of 15 October, 2009, the UN Charter has 192 member states. See <<http://www.un.org/News/Press/docs/2006/org1469.doc.htm>> while the Rome Statute has 110 parties (139 signatories). See <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-10&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en)>

The court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State party in accordance with article 14;
- (b) The Prosecutor has initiated and investigation in respect of such a crime in accordance with article 15;
- (c) A situation in which one or more of such crimes appears to have been committed is referred to the prosecutor by the Security Council acting under chapter VII of the Charter of the United Nations. **Such referral shall only be made where the Court has no jurisdiction under article 12 of the Statute.** [the extra clause in bold]

This amendment will guarantee that whenever the UNSC moves under Chapter VII of the Charter of the UN, its intentions are not politically motivated and are only serving the interests of justice by awarding the ICC with extended jurisdiction.

#### **4.3.0. Taming the Deferral Regime:**

Background to the creation of the deferral regime reveals that political considerations were given more weight than legal considerations<sup>139</sup>. Relevant to this discussion is that the regime provides an ‘unprecedented opportunity for the Council to influence

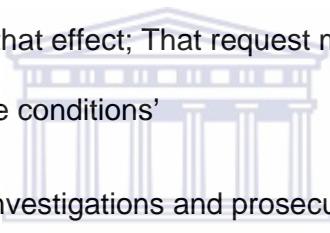
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<sup>139</sup> See Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court*, (1999) (2<sup>nd</sup> Ed), article 16, marginal notes 1 and 2.

the work of a judicial body'<sup>140</sup>. The UNSC, an external body, stops the court processes unilaterally. Following are a few suggestions on how the regime may be tamed so as to inspire international legitimacy.

#### **4.3.1. Unpacking Article 16:**

Article 16 of the Rome statute refers to the commencement and progress of investigations and prosecutions. It provides as follows:

  
'No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the court to that effect; That request may be renewed by the Council under the same conditions'

The article allows the halt of investigations and prosecutions. This is regardless of the fact that investigations and prosecutions are not one and the same exercise. It is also oblivious to the involvement of the Court as a stakeholder in the prosecution stage. It is suggested, therefore, that the article be unpacked into three separate sub-paragraphs. One should deal with the deferral of the commencement or progress of investigations. The second should deal with the deferral of the commencement of prosecutions. A third paragraph should deal with the deferral of the progress of prosecutions.

The rationale for the unpacking of the article is as follows. The office of the Prosecutor has a dual functionality. It exercises investigative functions on the one hand and prosecutorial functions on the other. The investigative function is a non-

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<sup>140</sup> Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court*, (1999) (2<sup>nd</sup> Ed), article 16, marginal note 7.

judicial function whereas the prosecutorial is a judicial function. Secondly, the investigative function is a pre-prosecutorial function. Investigations are the realm of the prosecutor<sup>141</sup> and do not involve the court proper<sup>142</sup>. Prosecutions, however, which are also the realm of the office of the prosecutor, involve the court proper. It is for these reasons that the halting of the two functions be differentiated in the article. The presupposition for this contention is that the judicial machinery of the court starts moving only after the prosecutor has approached the court proper, either for an application for warrant of arrest or the lodging of charges.

From the above, therefore, it is suggested that the first paragraph maintains the UNSC's competence to defer the commencement or progress of investigations as follows;

1. 'No investigation may be commenced or proceeded with under this Statute for a period of 12 months after the security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the court to that effect; That request may be renewed by the Council under the same conditions'

The second suggested paragraph should maintain the UNSC's power to defer the commencement of a prosecution. It may appear in the following fashion;

2. 'No prosecution may be commenced under this Statute for a period of 12 months after the security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the court to that

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<sup>141</sup> Rome Statute, art 42, para 1.

<sup>142</sup> The Judicial chambers namely the Appeals Division, The Trial Division and the Pre-Trial Division. See Rome Statute, Art 34.

effect; That request may be renewed by the Council under the same conditions'

#### **4.3.2. Application/ Motion for Deferral:**

Judicial processes can only be stopped internally and by another legitimate judicial process. External interferences threaten judicial independence. For instance, once a prosecutor has initiated a trial, the process only stops by withdrawal of charges by the prosecution or the acquittal and conviction of the suspects by the court.

Temporary 'stops' are provided by adjournments/continuances. These 'stop' mechanisms illustrate the respect for the independence and legitimacy of a judicial body. They ensure that only legally relevant reasons account for the stopping of the court machinery. Of relevance to the present discussion is the adjournment/continuance<sup>143</sup> mechanism which may be likened to the deferral. An adjournment is a matter for the court to decide in the light of an adequate account of the background against which the application is made. The court expects to be provided with an explanation of the reasons grounding an application for the adjournment or postponement of any trial<sup>144</sup>. Judicial bodies, by virtue of their authority to attend to and decide cases, have innate discretionary power to allow or reject adjournments. A court will grant an adjournment when the application discloses enough grounds that a miscarriage of justice will be done by the continued

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<sup>143</sup> The postponement of an action pending in a court to a later date of the same or another session of the court, granted by a court in response to a motion or application made by a party to a lawsuit. See West's Encyclopedia of American Law. Available on 21 October 2009 at <<http://www.answers.com/topic/continuance>>

<sup>144</sup> Cf. Practice note No.1 of 2004 Adjournment and postponement of trials in the high court of Justiciary issued by Scottish Court. Accessed on 21 October 2009 at <[http://www.scotcourts.gov.uk/justiciary/practicenotes/pn01\\_2004.pdf](http://www.scotcourts.gov.uk/justiciary/practicenotes/pn01_2004.pdf)>

hearing of the case<sup>145</sup>. It will examine all the facts and circumstances of a case — in particular, the applicant's good faith, the rationale and necessity for the adjournment, the likely gain that could result from the adjournment and the possibility of prejudice to the rights of other stakeholders<sup>146</sup>. In short, the interests of justice form a valid consideration in these applications.

It is suggested that the above practice be applied to the deferral regime. At the Rome Conference, Denmark insisted that on top of just having an International criminal court, states should ensure that the ICC acts in the same way in which national justice systems are expected to act<sup>147</sup>. The application/motion system is aimed at respecting the independence and impartiality of the judicial body. It is also mindful of the existence of multiple stakeholders in the justice system, a consideration more relevant at the international level. The rights of the victims of international crimes are brought to the fore in international criminal law<sup>148</sup>.

To emulate the national example, the third paragraph of article 16 should introduce the concept of '*application*' or '*motion for Deferral*'. This will allow the court to conduct deferral proceedings as an instance of a *stop* mechanism. The paragraph would be drafted as follows;

3. 'The UNSC shall have the power, in a resolution adopted under Chapter VII of the Charter of the United Nations, to request the Court to defer a continuing prosecution for a period of 12 months. That request shall be

<sup>145</sup> See West's Encyclopedia of American Law. Available on 21 October 2009 at <<http://www.answers.com/topic/continuance>>

<sup>146</sup> West's Encyclopedia of American Law. Available on 21 October 2009 at <<http://www.answers.com/topic/continuance.>>

<sup>147</sup> [www.un.org/icc/pressrel/1rom15.htm](http://www.un.org/icc/pressrel/1rom15.htm).

<sup>148</sup> Victim involvement and the protection of their rights forms a huge part of the court's considerations in its work. The Rome Statute is replete with references to victims as seen in, *inter alia*, arts. 15(3), 19 (3), 43 (6), 53 (1)(c), 53 (2)(c), 54 (1)(b), 68.

made by way of application filed with [or motion made before] the court by the Prosecutor and may be renewed by the Council under the same conditions'.

This article would allow the UNSC to apply to court for deferral. It will also allow the court the discretion to accept or deny the same. The court will have the discretion and independence that any judicial body needs for its own legitimacy.

#### **4.4.0. Conclusion:**

The current relation between the ICC and the UNSC is useful but it is not satisfactory. It is the former in that it affords the court jurisdiction in cases outside the scope of the article 12. It is the latter in that it perpetrates impunity. It also violates the principles of complementarity<sup>149</sup> and *pacta tertiis nec nocent nec prosunt*<sup>150</sup>. In the context of the above, judicial independence and legitimacy are compromised. It has therefore been suggested that the UNSC referral should be reserved for cases where the ICC has no jurisdiction. As for the deferral, the UNSC should keep its competence to stop the commencement and progress of investigations. It should also keep the competence to halt the commencement of prosecutions. However, once prosecution has started the UNSC should only be able to stop the same upon application laid before the court and the grant of the same by the court. This will

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<sup>149</sup> Complementarity principles guarantees that national jurisdictions have primacy over trial of international crimes yet the UNSC referral will force the national jurisdiction to submit to the ICC jurisdiction as primary forum.

<sup>150</sup> A treaty does not create either obligations or rights for a third state without its consent. See Vienna Conventions on the Law of Treaties, art. 34. The UNSC referral will force non-member states to bow to the obligations under the Rome Statute, a treaty they may not be party to. However, it has been contended that these obligations stem from the UNSC resolution and not the Rome Statute. See Yitiha Simbeye *Immunity and International Criminal Law*, 19.

ensure judicial independence as the court itself will be making the decision to stop the prosecution.

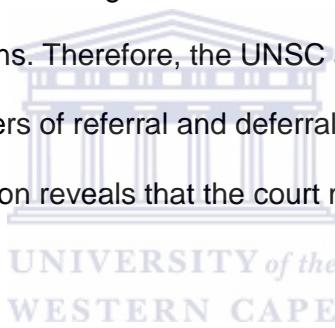


## CHAPTER FIVE

### 5.0. Conclusion and Recommendations:

#### 5.1.0. Overview:

Under chapter VII of the UN Charter, the UNSC can pass a resolution referring a situation to the ICC for possible investigation and prosecution. Under the same powers the UNSC can also request the court to defer proceedings. The rational is that keeping and maintaining international peace is a multifaceted function. It may be promoted by prosecutions and investigations. The function may also be frustrated by investigations and prosecutions. Therefore, the UNSC as a body charged with that function must have both powers of referral and deferral. However, a close examination of the dual function reveals that the court may be reduced to a political puppet of the UNSC.



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The paper has, hence, critically looked at the relationship between the ICC and the UNSC in the light of the latter to use the former as an instrument for achieving its mandate under chapter VII of the UN Charter. This has been done through close scrutiny of the referral and deferral regimes created under the Rome Statute as they are the mechanisms which allow the UNSC to use the ICC in its quest to keep and maintain international peace. Central to the study has been the contention that the relation between the two bodies is useful but unsatisfactory. Besides critically analysing the relationship, the paper has also suggested possible ways of improving the relationship so that the court can retain its judicial independence, impartiality and

legitimacy. Below are the conclusions drawn from the study to be followed by the summary of the recommendations.

#### **5.2.0. Conclusions:**

##### **5.2.1. The Referral Regime:**

The Rome Statute allows the UNSC to bring situations to the attention of the ICC Prosecutor for possible investigation and prosecution. The referral regime is couched in terms that disguise the grip of the UNSC on a court that requires independence and legitimacy. As one arm of the relationship, the referral regime casts amounts of doubt on the status of the court as an independent international criminal court capable of making its own decisions and choices.

The UNSC mandated by chapter VII of the UN Charter wields immense powers to the extent that its referral of a situation to the ICC is a criminal charge in disguise.

The court does not have much to do but find a few suspects to try as failure of the same will reverberate back to the UNSC and show its decision for referral as tainted with bad faith. In simple terms, the referral is a command in disguise. It therefore robs the court of the vital element of independence and discretion. Lack of these elements renders the court redundant in a world where everyone is watchful of the works of the court, not to mention the suspicion surrounding the same.

The referral regime however has an advantage because it affords the court criminal jurisdiction outside the scope of article 12 of the Rome Statute. This is vital to the work of the court as discussed above.

### **5.2.3. The Deferral Regime:**

The second arm of the UNSC/ICC relationship is the deferral regime. Under this arm, the UNSC has powers to halt proceedings at the Court. Investigations and prosecutions can be stopped before and after they are commenced. This is therefore the arm that wields immense power and in the end the most devastating to the independence and legitimacy of the court as a judicial body.

There are several problems with this regime. Firstly, all the UNSC does is pass a resolution and the court on its own motion stops the proceedings. It has neither choice nor say on the reason forwarded by the UNSC. This is an erosion of the court's independence and discretion. Secondly the request is a command in disguise. The UNSC just decides and the court obeys. This is an erosion of the court's legitimacy as a truly judicial body and portrays the court as a political tool in the hands of the representatively imbalanced UNSC. Thirdly, the regime may perpetrate impunity in an era where there is no such option for the crimes falling under the jurisdiction of the ICC. The UNSC may halt prosecutions which are now believed to be the international threshold for dealing with serious atrocities as envisaged in the Rome Statute. This is counterproductive in the light of the strides made in the quest to rid the world of atrocities that offend all humanity.

Despite the above minuses, the deferral regime may achieve some good ends. It may promote the application of local remedies to the atrocities. These may be essential for lasting peace. A good example may be the call for deferral for the Joseph Kony prosecution and the introduction of the *mato oput*<sup>151</sup> practice of the

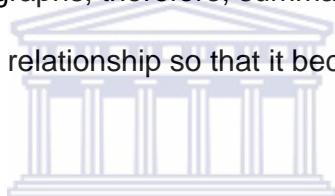
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<sup>151</sup> *Mato Oput* literally means "drinking the bitter root of an *oput* tree". Oketta says it symbolizes the end to a bitter relationship between two clan communities or families of offenders and the offended. See *Acholi want more prominent role for Mato Oput*. Accessed on 19 October 2009 at

local Ugandan people. Some have argued that this is the only way to peace that lasts in Uganda<sup>152</sup>.

### **5.3.0. Recommendations:**

In the light of the above discussed conclusions, it is arguable that the relationship between the ICC and the UNSC allows a threatening level of interference into the court's work, all under the guise of keeping and maintaining international peace. Judicial independence is compromised and international legitimacy of the court is in dire straits. The relationship further leaves the court vulnerable to politicisation by the UNSC. These are the compelling reasons for the relationship to be tamed or improved. The following paragraphs, therefore, summarise several ways of taming and improving the UNSC/ICC relationship so that it becomes more useful and satisfactory.



### **5.3.1. The Referral Regime:** UNIVERSITY of the WESTERN CAPE

The UNSC is probably the most powerful political body in the world. It wields immense influence in the realm of international politics to an extent that it may be said to be the core of the United Nations. It therefore follows that the court benefits a lot by relating with such a body. When the UNSC makes a referral, however, it should not make it in situations where the prosecutor or state parties acting on their

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<<http://www.ugpulse.com/articles/daily/Heritage.asp?about=Acholi+want+more+prominent+role+for+Mato+Oput&ID=1025>>

<sup>152</sup>, Barney Afako (2002) states that:

"The unacceptably high costs of civil war have caused Ugandans to re-assess approaches to resolving conflict. Among the Acholi of northern Uganda, the bitter experience of unending conflict has generated a remarkable commitment to reconciliation and a peaceful settlement of the conflict rather than calling for retribution against the perpetrators of serious abuses... This call for amnesty was underpinned by their faith in the capacity of the community and cultural institutions to manage effective reconciliation even against the background of serious offences". See Joseph Yav Katshung 'Mato Oput versus the International Criminal Court (ICC) In Uganda'. Available at Pan African Voices for Freedom and Justice –Pambazuka News, <<http://www.pambazuka.org/en/category/comment/37403>>

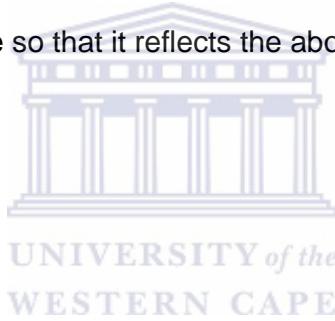
own would move. The Referral power of the UNSC should therefore be a *reserve jurisdiction* mechanism and used for the purposes of awarding the court with jurisdiction only. The referral therefore should be a grant of jurisdiction and not a placement of a situation in the court machinery as the current set up allows.

To facilitate the above suggestion, article 13 of the Rome Statute needs to be amended so that it can arrange the trigger mechanisms in order of priority. This should not be priority of importance but priority of use. This will be in line with the principle of complementarity. It is the state party to the statute that has primacy over trying the Rome Statute crimes. The state is seconded by the ICC Prosecutor who acts where the state is either unwilling or unable. The Prosecutor also acts on his own initiative. The third should be the UNSC referral. It should only be unleashed where the State has not or cannot act and the prosecutor cannot act due to lack of jurisdiction. This is advantageous to the ICC's International image as the reasons for the UNSC referring the situation will be only to award the court with jurisdiction and nothing else.

### **5.3.2. The Deferral Regime:**

The ICC, as the judicial institution that it is, demands independence. This may be manifest in the non-interference of its processes by any other external body, the UNSC inclusive. The deferral regime which allows the UNSC to halt investigations and prosecutions runs counter to this ideal. The UNSC should therefore only be allowed to stop investigations and for a definite period. This is contrary to the current situation where the UNSC can defer the investigations and prosecutions for indefinite periods of 12 months a piece. The above should also apply to prosecutions before they are commenced. Once prosecutions are commenced the UNSC should be

incapable of halting the same by a mere passing of a resolution. If national court practice is anything to go by, the executive branch of the government, which may be likened to the UNSC, cannot just decide in cabinet to halt on-going prosecutions. The normal practice is to apply to the court for an adjournment or continuance. This practice is entrenched in the deep respect for the judicial nature of the courts. It also manifests the independence of the judiciary as it is able to decide on the adjournment or continuance. The same practice should be applied at the ICC. The UNSC should request the ICC Prosecutor to file an application/motion for deferral. The court should be allowed to decide whether to grant it or not. In this way judicial independence will be encouraged. Therefore this paper calls for the amendment of article 16 of the Rome Statute so that it reflects the above suggestions.



## **6.0. EPILOGUE**

The UNSC/ICC relationship is an opportunity for both success and failure of the ICC.

As a new body on the international plane, the ICC needs to amass legitimacy and independence if it is to gain respect and cooperation. It ought to be an independent international body achieving its objectives as outlined under the Rome Statute. It is not for the ICC to help the UNSC foster its political objectives. Rather it is the UNSC that should foster the objectives of the ICC by awarding it jurisdiction and letting it be independent. The ICC's involvement with the UNSC should, therefore, not be allowed to derail the good intentions of the framers of the Rome Statute.

**Word Count: 11, 827.**



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