

**A critical examination of the relationship between the
International Criminal Court and the United Nations
Security Council, in the light of referrals and deferrals**



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DECLARATION

This research dissertation is presented for the approval of the Senate in partial fulfillment of the requirements for the degree in Masters in Criminal Justice in approved courses and minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of a Masters in Law dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that the dissertation conforms to those regulations.

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30.09.2014

ABSTRACT

The Rome Statute of the International Criminal Court (Rome Statute) provides for a close relationship between the International Criminal Court (Court) and the United Nations Security Council (Security Council). This relationship is demonstrated through Security Council exercise of referrals and deferrals. This dissertation discusses first, the Security Council referrals of the situations in Darfur, Sudan and Libya. Second, the Security Council passing of resolutions 1422(2002) and 1487(2003), which deferred the Court from commencing any investigations or prosecuting of any crimes that could have arisen as a result of the United Nations peacekeeping operations.

This dissertation argues that the Security Council has exercised referrals and deferrals contrary to the Rome Statute, the Charter of the United Nations (the Charter), and the Negotiated Relationship Agreement between the Court and the Security Council (Relationship Agreement) as envisaged by the drafters of the Rome Statute.

It concludes by stating that, the relationship between the Court and the Security Council is at a crossroad because the latter has failed to exercise referrals and deferrals in the manner provided for in the Rome Statute and as envisioned during the drafting of the Rome Statute, thereby equating the Court to the proverbial bark of a toothless dog.

CHAPTER ONE

OVERVIEW OF THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND THE SECURITY COUNCIL

1.0 Introduction

The authors of the Rome Statute envisioned a close relationship between the Court and the Security Council. This relationship is realised through the Negotiated Relationship Agreement between the International Criminal Court and the United Nations (Relationship Agreement). The Relationship Agreement not only sets out the terms on which the Court and Security Council should relate but also lays obligations on both entities to respect each other's mandates and to cooperate in order to achieve mutual obligations.¹ These mutual obligations are prosecuting serious international crimes which concern the international community and maintaining international peace and security.

The Court was established by the Rome Statute to determine individual criminal responsibility and punish perpetrators of egregious human rights violations. Article 1 of the Rome Statute states: 'A court is hereby established .It shall be a permanent institution and shall have power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute' Pursuant to article 5 of the Rome Statute, 'the Court has jurisdiction over genocide, crimes against humanity, war crimes and aggression.'²

On the other hand, the Security Council plays the role of maintaining international peace and security under Chapter VII of the Charter. Article 24 (1) of the Charter reads that:

In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.³

¹ Article 3 of the Relationship Agreement reads: 'The United Nations and the Court agree that, with a view to facilitating the effective discharge of their respective responsibilities, they shall cooperate closely ... and consult each other on matters of mutual interest pursuant to the provisions of the present Agreement and in conformity with the respective provisions of the Charter and the Statute.'

² Presently, the Court can only exercise jurisdiction over the crime of aggression after the Rome Statute is amended and the amendment is ratified by at least a third of the state parties.

³ United Nations 'Charter of the United Nations' available at <http://www.un.org/en/documents/charter/chapter5.shtml#article24>, accessed on 21 July 2014.

It is important to note that, while the Court has the role of prosecuting serious international crimes which shock the international community, the Security Council maintains international peace and security pursuant to Chapter VII powers of the Charter. Consequently, their primary roles overlap because the crimes that fall within the jurisdiction of the Court have the ability to threaten international peace and security.⁴ It is worth noting that, the prosecution of perpetrators who commit genocide, crimes against humanity, war crimes or acts of aggression deters potential criminals from committing serious international crimes which may destabilise international peace and security.⁵ In this regard, the Security Council and the Court require mutual collaboration for effective discharge of their roles.

The Rome Statute acknowledges the role that the Security Council plays in maintaining international peace and security through empowering it to exercise referrals and deferrals .

This chapter commences the discussion on the relationship between the Court and the Security Council in the context of referrals and deferrals. It does this by examining the provisions of the International Law Commission's Draft Statute of the International Criminal Court (Draft Statute of the Court), the Ad Hoc Committee of the Court and the reports of the Preparatory Committee on the Establishment of an International Criminal Court (Preparatory Committee). It evaluates the delegates' views on the relationship of the Court and Security Council at the Rome Conference as well as the provisions of the Rome Statute that regulate the said relationship.

This chapter lays a basis for discussions in chapters Three and Four which focuses on how the Security Council exercised referrals and deferrals and evaluates whether this exercise complied with how the drafters of the Rome Statute envisaged them and the provisions of the Rome Statute itself.

⁴ Paragraph 3 of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations.

⁵ L Condorelli and S Villalpando 'Relationship of the Court with the United Nations' in Antonio Cassese et al (eds) *The Rome Statute of the International Criminal Court : A Commentary* (2002) page 220.

To understand how the relationship between the Court and the Security Council is structured, it is necessary to evaluate the drafting history of the relationship between the Court and the Security Council.

1.1 The road to the establishment of the Court

The United Nations General Assembly (General Assembly) established the International Law Commission whose aim was to research on the viability of establishing an international organ to prosecute genocide.⁶ The International Law Commission negotiated the Draft Statute of the Court, which laid the basis for future discussions on the proposed Court. Additionally, the International Law Commission proposed the establishment of an International Criminal Court and of an Ad Hoc Committee on the Establishment of an International Criminal Court (Ad Hoc Committee) whose mandate was to review the substantive decisions of the Draft Statute of the Court.⁷ Following the report of the Ad Hoc Committee, the General Assembly established the Preparatory Committee to consolidate the drafts. Finally, the General Assembly held a United Nations' Conference of Plenipotentiaries on the Establishment of the International Criminal Court (Rome Conference), which was characterised by extensive discussions on the drafts of the establishment of the Court by states, and lead to the adoption of the Rome Statute.⁸

(a) International Law Commission, Ad Hoc Committee and Preparatory Committee

The International Law Commission envisaged a close relationship between the Court and the Security Council. Article 2 of the Draft Statute of the Court states that: '[t]he President with the approval of the state parties to this Statute ("State parties") may conclude an agreement establishing an appropriate relationship between the Court and the United Nations.'⁹

⁶ M Bassiouni 'The journey to a permanent International Criminal Court' in M Bassiouni (ed) *International Criminal Court: Compilation of United Nations Documents and Draft Statute before the Diplomatic Conference* (1998) page xvii.

⁷ Coalition for the International Criminal Court 'History of the ICC' available at <http://www.iccnw.org/?mod=icchistory> accessed on 20 July 2014 para 2.

⁸ M Bassiouni 'The journey to a permanent International Criminal Court' in M Bassiouni (ed) *International Criminal Court: Compilation of United Nations Documents and Draft Court Statute before the Diplomatic Conference* (1998) page xvii.

⁹ United Nations '1994 Draft Statute for an International Criminal Court' 2005 available at http://legal.un.org/InternationalLawCommission/texts/instruments/english/draft%20articles/7_4_1994.pdf, accessed on 20 July 2014 page 15.

The Preparatory Committee negotiated for a close relationship between the Court and the Security Council. Article 2 of the Preparatory Committee reiterated the provisions of the International Law Commission's Draft Statute of the Court, which sought a close relationship between the Court and the United Nations which was to be enforced through an agreement.¹⁰

Similarly, the Ad Hoc Committee considered the relationship as 'an essential condition of the universality and moral authority of the new institution and, as well as of its financial and administrative viability.'¹¹

Consequently, the Ad Hoc Committee viewed the relationship as the source of credibility and legitimacy for the Court and also as a way of facilitating the work of the Court. Thus, the Relationship Agreement was viewed as a way of promoting cooperation between the two institutions.

(b) The Rome Conference

The relationship between the Court and the Security Council was a contentious topic during the negotiation of the Rome Statute. At the initial stages of the negotiation, many delegates viewed the relationship between the Court and the Security Council as a threat and an impediment against the achievement of either the Court or the Security Council objectives.

A vast majority of delegates at the Rome Conference heavily debated upon the Security Council's proposed power of referrals and deferrals. The debate ranged between two opposing factions; one side opposed the relationship between the two on the basis that the Court was an independent judicial body which had to be insulated from political interference with regard to its functions. Conversely, the supporters of the Security Council argued that the jurisdiction of the Court would interfere with the primary role of the Security Council under the Charter of the United Nations.¹²

As the negotiations proceeded, the majority of the delegates supported a relationship between the Court and the Security Council but subject to conditions.

¹⁰ 'The Court shall be brought into relationship with the United Nations by an agreement to be approved by the State Parties to this Statute and concluded by the President on behalf of the Court.'

¹¹ M Bassiouni *The Legislative History of the International Criminal Court: an Article by Article Evolution of the Statute from 1994- 1998* (2005) page 17.

¹² H Olasolo *The Triggering Procedure of the International Criminal Court* (2005) page 17.

Canada, the United Kingdom of Great Britain, Northern Ireland, Lesotho, Belgium, Brazil and Denmark opted for a close relationship between the Court and the Security Council only if the latter respected the Court as an independent legal institution. A Canadian representative stated: ‘The Court would need to have a constructive relationship with the United Nations, while preserving its independence and impartiality. The Security Council could play a useful role in referring matters to the Court.’¹³

Additionally, China supported the need for a close relationship between the Court and the Security Council, as long as the provisions of the Rome Statute were not contrary with the provisions of the Charter.¹⁴ On the other hand, Australia supported a relationship between the two entities only if the Court acknowledged the Security Council’s primary role in maintaining peace and security. The Australian representative stated: ‘There must also be a workable relationship between the Court and the Security Council, recognizing the Council’s primacy in matters relating to international peace and security.’¹⁵ During the Rome Conference, the Rome Statute was adopted after ratification by 160 states.¹⁶ It emphasised the importance for close interactions between the Court and the Security Council.

(c) The relationship between the Rome Statute of the Court and the Security Council

Paragraph 8 of the preamble of the Rome Statute states as follows: ‘Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes’

¹³ United Nations ‘Diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court Rome .Summary records of the plenary meetings of the Committee of the Whole. A/CONF.183/13’ available at http://legal.un.org/Court/rome/proceedings/E/Rome%20Proceedings_v1_e.pdf, accessed on 10 July 2014, page 54.

¹⁴ United Nations ‘Diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court A/CONF.183/13’, page 100.

¹⁵ United Nations ‘Diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court. Summary records of the plenary meetings of the Committee of the Whole. A/CONF.183/13’ available at http://legal.un.org/Court/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf ,accessed on 12 July 2014, page 43.

¹⁶ International Criminal Court ‘What is the Rome Statute?’ available at http://www.Court-cpi.int/en_menus/Court/about%20the%20court/frequently%20asked%20questions/Pages/3.aspx, accessed on 10 July 2014, paragraph 1.

In addition, article 2 of the Rome Statute provides that: ‘The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of State Parties to this Statute and therefore concluded by the President of the Court on its behalf.’

The need for a close relationship between the Court and the Security Council was important for a number of reasons. First, in punishing perpetrators who commit serious international crimes of genocide, war crimes and crimes against humanity, the Court contributes towards maintaining international peace and security.¹⁷ Secondly, in referring a situation to the Court, the Security Council extends the jurisdiction of the Court over non-state parties to the Rome Statute.¹⁸ Thirdly, the Court relies on the Security Council for enforcement of its decisions.¹⁹ The Security Council promotes the credibility and legitimacy of the Court when it enforces its decisions under article 86 of the Rome Statute. This dissertation will discuss at length the referrals and deferrals under articles 13(b) and 16 of the Rome Statute of the Court in Chapters Three and Four.

The Rome Statute, therefore, lays out the foundation of the relationship between the Court and the Security Council through; paragraph 8 of the preamble and article 2 of the Rome Statute. Additionally, articles 13(b) and 16 of the Rome Statute further acknowledge the relationship between the two institutions while laying out the conditions and the nature of the relationship between the Court and the Security Council.

After the adoption of the Rome Statute, the President of the Assembly of Parties of the Court and the Secretary General of the Security Council signed the Relationship Agreement which laid out the purposes and obligations between the two entities.²⁰

¹⁷ L Condorelli and S Villalpando ‘Relationship of the Court with the United Nations’ in Antonio Cassese et al *The Rome Statute of the International Criminal Court; A Commentary* page 222.

¹⁸ Pursuant to article 12 of the Rome Statute, the Court can only exercise its jurisdiction over state parties or over non state parties when they declare to accept Court’s jurisdiction.

¹⁹ L Caflisch *Promoting justice human rights and conflict resolution through International Law* (2007) page 87.

²⁰ Coalition for the International Criminal Court ‘A universal court with global support ,cooperation agreements and enforcement ,cooperation with the United Nations’ available at <http://www.Courtnow.org/?mod=agreementsun> ,accessed on 14 July 2014 para 3.

(d) The Negotiated Relationship Agreement between the International Criminal Court and the United Nations

Presently, the Relationship Agreement provides for a close relationship between the Court and the United Nations. The purpose of the Relationship Agreement is to bring the two entities into a relationship pursuant to the Rome Statute and the Charter.²¹

The Relationship Agreement obliges the Court and the Security Council to cooperate closely to ensure the attainment of their objectives. The effect of the Relationship Agreement is that it ties the Security Council to the Court therefore, both independent organisations have the obligation to cooperate with each other to ensure the effective discharge of their functions pursuant to the provisions of the Relationship Agreement, the Charter and the Rome Statute.²²

1.2 Objectives of the study

The objectives of this study are to examine the interaction between the Court and the Security Council which is demonstrated through referrals and deferrals, then to evaluate whether the Security Council has exercised this relationship in accordance with the provisions of the Rome Statute as envisaged during the drafting of the Rome Statute.

1.3 Research questions

This study seeks to answer:

- (a) Whether the Security Council exercised referrals and deferrals in accordance with the provisions of the Rome Statute, the Charter and as envisaged by the drafters of the Rome Statute.
- (b) How the Security Council's exercise of the power of referrals and deferrals has affected the relationship between the latter and the Court.

1.4 Research Methodology

This research is conducted from primary and secondary resources. The primary sources will include the Rome Statute, the Charter, the Relationship Agreement, the International Law Commission's Draft Statute of the Court and the reports of the

²¹ Article 1 of the Relationship Agreement which reads that: 'The present Agreement, which is entered into by the United Nations and the International Criminal Court ... defines the terms on which the United Nations and the Court shall be brought into relationship.'

²² The Relationship Agreement Op cit (no) 1.

Preparatory Committee on the Establishment of an International Criminal Court. It also includes cases which arose from the situations in Darfur and Libya, while the secondary sources entail textbooks on international criminal law and the Security Council, journals will be drawn from the Court and United Nations websites.

1.5 Chapter outline

Chapter One introduces the relationship between the Court and the Security Council by examining how the crafters of the Rome Statute envisaged that relationship, and how legislation provides for the relationship at present.

Chapter Two provides an overview of how the Security Council's exercise of referrals and deferrals was envisaged during the making of the Rome Statute.

Chapter Three examines the Security Council power of referrals under article 13(b) of the Rome Statute. It examines how the Security Council exercised its power of referral in the situations in Darfur and Libya. It deals with the issues that arose from these referrals, such as the failure of states to cooperate with the Court for effective prosecution of President Omar Al-Bashir and Saif Al-Islam Gaddafi for crimes against humanity. Moreover, it looks at the failure of the Security Council in both situations to back up the referrals. Finally, the chapter examines the enforcement mechanisms available to the Court and whether the Security Council has enforced the Court's decisions.

Chapter Four, evaluates the deferral of investigations by the Security Council to the Court under article 16 of the Rome Statute. Generally, this chapter focuses on Security Council deferral resolutions 1422(2002) and 1487 (2003) which grants immunity to United Nations peacekeepers from non-state parties, thus excluding them from the jurisdiction of the Court. First, it begins by examining the Security Council deferral powers and the conditions to be fulfilled before the exercise of a deferral. It examines whether the Security Council resolutions on deferral were consistent with the provisions of the Rome Statute.

Chapter Five concludes by stating that the Security Council has exercised referrals and deferrals contrary to the provisions of the Relationship Agreement, the Charter, the Rome Statute and as envisaged by the crafters of the Rome Statute. Consequently, it argues that the relationship between the Court and the Security

Council is at a crossroad and proceeds to recommend for the two international organisations to improve their relationship.

CHAPTER TWO

REFERRALS AND DEFERRALS AS ENVISAGED BY THE INTERNATIONAL LAW COMMISSION AND THE PREPARATORY COMMITTEE

2.0 Introduction

As mentioned in Chapter One, the drafters of the Rome Statute envisioned a close relationship between the Court and the Security Council. This interaction was essential to facilitate mutual achievement of each of the independent organisations' objectives.

This chapter focuses on the provisions of the International Law Commission's Draft Statute of the Court and the reports of the Preparatory Committee on referrals and deferrals. It seeks to provide a background to how the drafters of the Rome Statute envisioned the Security Council's exercise of referrals and deferrals. It also evaluates the views of the delegates at the Rome Conference on the proposed powers of the Security Council to refer situations and defer prosecutions and investigations.

The chapter commences by laying out the provisions of referrals and deferrals as provided for by the International Law Commission and the Preparatory Committee. It argues that the crafters of the Rome Statute envisaged for the Security Council to refer situations within the jurisdiction of the Court to the latter and halt investigations and prosecutions as a way of maintaining international peace and security. However, the exercise of referrals and deferrals was subject to conditions laid out in the Draft Statute of the Court and the reports of Preparatory Committee. For instance, when exercising referrals, the Security Council has to adopt a resolution pursuant to the provisions of the Charter. Further, it has to refer a 'situation' as opposed to a 'matter'.

On the other hand, the Security Council can only exercise deferrals sparingly when the pursuit of justice interferes with the attainment of peace. Just like referrals, deferrals must be adopted through a formal Security Council resolution. For a deferral to be valid, there must be a threat to peace, a breach of peace or an act of aggression at the time of its adoption. Lastly, the Security Council can halt the Court's investigations or proceedings for only a year, but this is renewable,

depending on whether the prior conditions on which the deferral was first adopted still exist.

2.1 Referrals as envisaged by the International Law Commission and the Preparatory Committee

(a) The International Law Commission

Initially, a vast majority of states at the Rome Conference for the establishment of the Court were against the Security Council referral of situations for prosecution to the Court, unsurprisingly, many states objected strongly against the Security Council's power to defer Court's investigations and prosecutions. The delegates perceived referrals as an interference of the work of an independent judicial body.²³

However, the Draft Statute of the Court recognised the importance of a relationship between the Court and the Security Council. It recognised the essence of referring 'matters' to the Court article 23(1) of the Draft Statute of the Court read that: 'Notwithstanding article 21, the Court has jurisdiction in accordance with this Statute with respect to crimes referred to in article 20 as a consequence of the referral of a matter to the Court by the Security Council acting under chapter VII of the Charter of the United Nations.'

The Draft Statute of the Court therefore envisioned a close interaction between the two entities which was demonstrated through the referral of 'matters' by the Security Council to the Court. However, the Court had to seek permission from the Security Council before it exercised jurisdiction on matters or situations within its jurisdiction over which the Security Council was acting upon.²⁴ The only cure to the foreseen power imbalance between the Court and the Security Council was to acknowledge the role played the Security Council in maintaining peace and security and thus allow the latter to exercise referrals in a way that would not affect the independence of the Court.²⁵

²³ N White and R Cryer 'The Court and the Security Council; an uncomfortable relationship' in Jose Doria et al (eds) *The Legal Regime of the International Criminal Court. Essays in Honour of Igor Blishchenko* page 464.

²⁴ S Kim 'Maintaining the independence of the International Criminal Court: The legal and procedural implications of article 16 deferral request' (2011) 29 *Agenda Internacional* 175- 212.

²⁵ K Ambos 'Establishing an International Criminal Court and an International Criminal Code. Observations from an International Law Viewpoint' (1996) 7 *EIJIL* 519-544.

As the negotiations proceeded, delegates supported the Security Council referral of ‘situations’ as opposed to ‘matters’ to the Court in order to obviate the need to create more ad hoc tribunals for prosecution of egregious human rights violations. Sweden stated as follows: ‘The Security Council, under Chapter VII of the Charter of the United Nations, should indeed be able to refer to the Court situations in which crimes under the Court's jurisdiction appeared to have been committed but not punished. That would obviate the need to create new ad hoc tribunals.’²⁶

It is evident from this discussion that the International Law Commission envisaged a close interaction between the two international organisations through the referral of matters and the deferral of the Court’s judicial proceedings. The discussion on whether the Security Council was to refer ‘situations’ as opposed to ‘matters’ will be discussed in the subsequent subsection.

(b) The Preparatory Committee’s discussion on the referral of ‘matters’ or ‘situations’ by Security Council to the Court

The Preparatory Committee was not certain on whether the Security Council should refer matters or situations to the Court. Pursuant to article 10(1) of the Preparatory Committee:

[N]otwithstanding article 6, [7] [and [9], the court has jurisdiction in accordance with this statute with respect to crimes [referred to][specified] in articles [as a consequence of the referral of][on the basis of a [formal]decision to refer a [matter] [situation] in which one or more crimes appear to have been committed to [the Prosecutor of] the Court by the Security Council[acting under Chapter VII of the Charter of the United Nations] in accordance with the terms of such referral.]²⁷

The debate on whether the Security Council should refer ‘situations’ or ‘matters’ to the Court arose at this stage, as mentioned earlier, the draft statute of the Court allowed the Security Council to refer ‘matters’. Many delegates opposed for the Security Council to refer ‘matters’ to the Court as the term was considered to be

²⁶ United Nations ‘Diplomatic conference of Plenipotentiaries on the establishment of an International Criminal Court. Report of the Preparatory Committee on the establishment of an International Criminal Court A/CONF.183/SR’ available at http://legal.un.org/Court/rome/proceedings/E/Rome%20Proceedings_v3_e.pdf, accessed on 12 July 2014 page 100.

²⁷ United Nations ‘Diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court. Report of the Preparatory Committee on the establishment of an International Criminal Court A/CONF.183/2’ available at http://legal.un.org/Court/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf, accessed on 12 July 2014 page 26.

limited in scope and would subsequently affect the independence of the Court to prosecute, thus the term ‘situation’ was preferred as it was general in nature and would not interfere with the independence of the Court.²⁸

The Draft Statute of the Court, proposed for the Security Council to refer ‘matters’ and defer investigations and prosecutions from the Court. Slovenia,²⁹ Malawi,³⁰ Norway,³¹ Denmark,³² Italy,³³ Lesotho,³⁴ Bosnia and Herzegovina³⁵ and other delegates preferred for the Security Council to refer ‘situations’ to the Court as opposed to ‘matters’. It was agreed that the Security Council could only refer situations to the Court in order to respect the office of the Prosecutor of the Court and hence promote the independence of the Court.³⁶

However, other states opposed the exercise of referral by the Security Council to the Court. India expressed the lack of support for the Security Council referrals. The Indian representative argued that referring situations to the Court was unnecessary because the Court could exercise jurisdiction through the initiation by the Prosecutor and by state party referrals. India stated as follows; ‘[T]he Security Council had set up ad hoc tribunals because no appropriate judicial mechanism had existed to try such crimes at the time, but with the establishment of the Court, States parties would have the right to refer cases to it. The Council did not need to refer cases ...’³⁷

From the reports of the Preparatory Committee, it is evident that the spirit of the Rome Statute was to create a close interaction between the Security Council and the Court through the referral of situations which would maintain international peace and security as it preserved the independence of the Court.

²⁸ S Williams W Schabas ‘Article 13 exercise of jurisdiction’ in William A Schabas (ed) *A Commentary to the Rome Statute of an International Criminal Court* page 108.

²⁹ United Nations ‘Diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court. Summary records of the plenary meetings and of the meetings of the Committee of the Whole A/CONF.183/C.1/SR.10’ available at accessed on page 202.

³⁰ United Nations op cit (no27) at 206.

³¹ United Nations op cit (no27) at 208.

³² United Nations op cit (no27) at 212.

³³ United Nations op cit (no27) at 215.

³⁴ United Nations ‘Diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court .Summary records of the plenary meetings and of the meetings of the Committee of the Whole A/CONF.183/C.1/SR.11’ available at http://legal.un.org/Court/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf , accessed on 12 July 2014 page 307.

³⁵ United Nations op cit (no 27) at 316.

³⁶ Doria op cit (no23) at 457.

³⁷ Doria op cit (no23) at 464.

2.2 Deferrals as envisaged by the International Law Commission and the Preparatory Committee

(a) Deferrals under the International Law Commission

The Draft Statute of the Court formed a basis for future negotiations of the Security Council power of deferrals in the Ad Hoc Committee and the Preparatory Committee. Article 23 (3) of the Draft Statute of the Court provided as follows: ‘No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.’³⁸

Although the Draft Statute of the Court acknowledged the role of the Security Council under Chapter VII of the Charter, it also proposed a vertical relationship between the Court and the Security Council. Evidently, article 23(3) of the Draft Statute for the Court imposed certain obligations on the Court before the latter exercised jurisdiction which was that, the Court had to ascertain whether the Security Council was dealing with a situation which threatened international peace and security and then refrain from exercising jurisdiction in such a given situation.

Delegates opposed this provision because it meant that the Court had to seek the Security Council’s permission before it exercised jurisdiction upon a situation which the Security Council was dealing with. The Court’s request was subject to a veto by any of the permanent members of the Security Council.³⁹

Seeking permission from the Security Council before exercising jurisdiction on a situation would obstruct the Court from conducting judicial proceedings because, as already mentioned, the request was subject to a veto and the process of requesting would considerably delay the Court in fulfilling its objectives. Further, it would have made the Court to be dependent on the Security Council, this would affect the independence of the Court.

³⁸ United Nations ‘Draft Statute for an International Criminal Court’ available at http://legal.un.org/InternationalLawCommission/texts/instruments/english/draft%20articles/7_4_1994.pdf , accessed on 22 July 2014.

³⁹ United Nations ‘Diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court .Summary records of the plenary meetings and of the meetings of the Committee of the Whole’ available at http://legal.un.org/Court/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf , accessed on page 212.

(b) Deferrals under the Preparatory Committee

During the negotiation of the Security Council's power of deferrals, majority of the delegates were of the view that deferring the Court's investigations and prosecutions was unnecessary because it amounted to a political interference in the work of an independent legal institution.

Many states including, Nigeria, Malawi, Philippines amongst others, argued that allowing the Security Council to defer the Court's investigations or prosecutions would interfere with the independent functioning of the Court.⁴⁰ Other states opposed the Security Council's exercise of deferrals as there was fear of the permanent members vetoing situations that either arose from their countries or involved their nationals.⁴¹

India objected strongly to the involvement of the Security Council in the judicial proceedings of the Court, therefore it did not support referrals and deferrals of the Security Council to the Court. The Indian representative stated as follows:

'The power to block proceedings was even harder to accept. On the one hand, it was argued that the Court was to try crimes of the gravest magnitude, yet on the other, it was argued that the maintenance of international peace and security might require that those who committed such crimes should be permitted to escape justice, if the Council so decided.'⁴²

Singapore made a proposal which found middle ground between states who were against the Security Council's exercise of deferrals and those who strongly believed that the Security Council should be allowed to halt the investigations or prosecutions of the Court. The Singapore compromise made it harder for the Security Council to misuse the power of deferrals.⁴³ The proposal allowed the Security Council to halt investigations or prosecutions of the Court only after passing a formal resolution which was subject to a veto by any of the permanent members. The Singapore compromise read as follows:

⁴⁰ Lawyers Committee for Human Rights 'Establishing an International Criminal Court major unresolved issues on the draft statute' available at <http://www.iccnw.org/documents/2PrepCmtEstablishICCLCHR.pdf> , accessed on 12 July 2014 page 1.

⁴¹ P Kirsch, JT Holmes, M Johnson 'International tribunals and courts' in David Malone (ed) *The UN Security Council from the Cold War to the 21 century* (2004) page 290.

⁴² United Nations op cit (no39) page 183.

⁴³ R Cryer *Prosecuting International Crimes. Selectivity and the International Criminal Law regime* (2005) page 226.

'No investigation or prosecution may be commenced or proceeded with under this Statute where the Security Council has, acting under Chapter VII of the Charter of the United Nations, given a direction to that effect.'⁴⁴

On the other hand, Canada agreed with the Singaporean proposal and added a time limitation before the exercise of deferrals. Canada proposed that:

'No investigation or prosecution may be commenced or proceeded with under this statute for a period of twelve months where the Security Council has been acting under Chapter VII of the Charter of the United Nations, notified the Court to that effect. Notification that the Security Council is continuing to act may be renewed at twelve months intervals.'⁴⁵

A deferral was envisaged to be exercised in limited occasions when the attainment of justice would interfere with the maintenance of peace and security.⁴⁶ The Canadian proposal enabled the Court to proceed with legal proceedings after a year, if the Security Council did not request a renewal.

The time limit avoided the probable seizing of the situations by the Security Council over an undefined period of time which would have had the effect of delaying the Court from exercising its judicial activities.

A huge majority of states in the Rome Conference supported the Canadian and Singaporean proposals as the formal request by the Security Council to the Court acknowledged the independence of both of the entities. Further the limitation of time enabled the Court to proceed with its judicial activities after the lapse of twelve months in the absence of a formal request of an extension by the Security Council.

The Canadian proposal was widely supported by the delegates who agreed that it was necessary for the Security Council to temporarily suspend legal proceedings if they affected the maintenance of international peace and security.⁴⁷

Conclusion

⁴⁴United Nations 'Non paper /WG.3/No 16' 8 August 1997 available at <http://www.iccnw.org/documents/SingaporeSecurityCouncil.pdf>, accessed on 20 July 2014.

⁴⁵ United Nations 'Diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court. Summary records of the plenary meetings and the meetings of the Committee of the Whole A/CONF.183/ C.1/L 20' available at http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf, accessed on 12 July 2014 page 120.

⁴⁶ R Pitty 'Political constraints upon the International Criminal Court' in Ustina Dolgopol et al (eds) *The Challenge of Conflict: International Law responds* (2006) page 347.

⁴⁷ United Nations 'Diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court. Summary records of the plenary meetings A/CONF/183/SR.6.' available at http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf, accessed on 14 July 2014 page 200.

At the initial stages of the negotiations of the Rome Statute delegates were opposed to the involvement of the Security Council in the work of the Court. They perceived the involvement of the Security Council as an interference of a political organ in the work of an independent judicial body. However, as the negotiations of the Rome Statute proceeded, delegates agreed for the Security Council to refer situations and defer investigations and prosecutions subject to certain conditions.

Both referrals and deferrals were to be adopted under Chapter VII of the Charter through a formal Security Council resolution. The Security Council could only refer situations as opposed to matters to the Prosecutor of the Court. Finally, with regard to deferrals, the Security Council could only defer an investigation or prosecution for twelve months which was subject to a renewal through a Security Council resolution.

From the above discussion, it is evident that the founders of the Rome Statute were apprehensive about the interference of the Security Council in the work of the Court. However, mechanisms were put in place to ensure that the Security Council did not misuse the powers of referrals and deferrals. The subsequent chapters discuss whether the Security Council has complied with the said mechanism in the exercise of referrals and deferrals.

CHAPTER THREE

THE SECURITY COUNCIL EXERCISE OF REFERRALS IN DARFUR AND LIBYA

3.1 Introduction

The previous chapters have set out at length how the crafters of the Rome Statute envisaged a close interaction between the Court and the Security Council as a way of ensuring successful prosecution of serious crimes within the Court's jurisdiction and maintaining international peace and security.

This chapter focuses on the Security Council referral of the situations in Libya and Darfur to the Court and the issues arising from them. It discusses firstly, the failure of state parties and non-state parties to fulfil their arrest and surrender obligations arising from the Rome Statute and the Charter respectively; secondly, the failure of the Security Council to cooperate with the Court after the latter sent the Security Council a finding pursuant to article 87(7) of the Rome Statute. The finding informed the Security Council of two things, first the non-cooperation of state parties and secondly, that non-state parties had to comply with obligations emanating from the Security Council resolutions and the provisions of the Rome Statute.

It argues that for successful referrals, the Court requires cooperation from state parties, non-state parties and the Security Council. The failure of these entities to cooperate has made both the Darfur and Libyan referrals unsuccessful up to date. This chapter is divided into five parts. The first part briefly highlights how the Security Council can exercise jurisdiction, it then discusses the history of the conflicts in Darfur and Libya; the chapter proceeds to examine the state's obligations arising from the Security Council referrals. It studies the need for states to cooperate with the Court and the enforcement mechanisms available to the Court after the Security Council refers situations to the latter. Also, it examines whether the Security Council's has enforced the said mechanisms after referring the situations to the Court. Finally, the chapter concludes by stating that the inaction of the Security Council to respond to the states non-cooperation, strains the relationship between the two international organisations contrary to what the authors of the Rome Statute envisaged, the provisions of the Rome Statute and the Relationship Agreement.

Consequently, in the nine years after the Security Council referral of the situation in Darfur, President Omar Al-Bashir (Al-Bashir) has not been surrendered to the Court. Similarly, in the Libyan case, Saif Al-Islam Gaddafi (Al-Islam) has not been surrendered to the Court, in the five years after the Security Council referred the situation in Libya to the Court.

3.2 The Security Council exercise of referrals

The Prosecutor of the Court can exercise jurisdiction only in the following instances: first, through a state party referral, second, when the Security Council refers a situation to the Court acting under article 13(b) of the Rome Statute and third, when he or she acts in their own accord to initiate investigations.

Pursuant to article 13(b)⁴⁸ of the Rome Statute, the Security Council has the power to refer situations in which one or more crimes within the jurisdiction of the Court has been committed.

When the Security Council refers a situation to the Court, it has to comply with the conditions arising from the Rome Statute. First, the Security Council can only refer 'situations' in which one or more crimes have been committed according to the Rome Statute of the Court. As previously mentioned in Chapter Two of this thesis, the crafters of the Rome Statute preferred the term 'situation' to 'matter,' because the former would uphold the independence of the Court. Second, the Security Council must act under Chapter VII of the Charter when referring situations to the Court. Subsequently, the referral of a situation to the Court should be exercised after the Security Council has established the existence of a breach of peace or threat to peace.

The effects of Security Council referrals are that, firstly, it enhances international criminal justice through extending the jurisdiction of the Court over non-state parties. Therefore, the jurisdiction of the Court extends over all states irrespective of whether they are parties to the Rome Statute or not.⁴⁹ Secondly, the Security

⁴⁸ Accordingly, article 13(b) of provides: '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: (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; or'

⁴⁹ C Heyder 'The UN Security Council's referral of the crimes in Darfur to the International Criminal Court in light of U.S position to the Court: Implications for the International Criminal Court's functions and status '(2006) J.INT'L LAW 650.

Council's referrals to the Court increases the legitimacy of the Court as it obviates with the need to create ad hoc tribunals to investigate and prosecute the situations in Darfur and Libya.⁵⁰ Thirdly, Security Council's referrals can be viewed as a tool for maintaining international peace and security⁵¹ thus, the Darfur and Libya referrals can be viewed as measures of restoring international peace and security without the use of force as stipulated under articles 39 to 41 of the Charter.⁵²

So far and at the time of writing this thesis, the Security Council has referred only two situations to the Court, that is, the situations in Darfur⁵³ and Libya.⁵⁴

With regard to the situation in Darfur, Sudan the Prosecutor applied for a warrant of arrest against Al-Bashir. The Pre-Trial Chamber issued a warrant of arrest against him for crimes against humanity and war crimes.⁵⁵ The Pre Trial-Chamber issued a second warrant of arrest against Al-Bashir for committing genocide.⁵⁶ Presently, the war in Darfur between the Sudanese government and the rebel forces still persist.⁵⁷ Subsequently, nine years after the Security Council referral of the situation in Darfur to the Court, and five years after the Court issued a warrant of arrest against Al-Bashir, the suspect has not been prosecuted to the Court.

⁵⁰ S Garsky 'Strong, independent, and effective: The European Union's promotions of the International Criminal Court' in Astrid Boening et al (eds) *Global Power Europe Volume 2 Policies, Actions and Influence of the EU's External Relations* (2013) page 12.

⁵¹ L Condorelli and S Villapando 'Referral and deferral by the Security Council' in Antonio Cassese et al (eds) *The Rome Statute of the International Criminal Court: A commentary* (2002) page 630.

⁵² Article 39 of the Charter states 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, to maintain or restore international peace and security.' The Security Council referrals to the Court can be viewed as a non-use of force measure taken to maintain international peace and security.

⁵³ United Nations Security Council 'Resolution 1593(2005)' available at <http://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf>, accessed on 21 August 2014 paragraph 1.

⁵⁴ United Nations Security Council 'Resolution 1970(2011)' available at <http://www.icc-cpi.int/NR/rdonlyres/081A9013-B03D-4859-9D61-5D0B0F2F5EFA/0/1970Eng.pdf>, accessed on 21 August 2014 paragraph 1.

⁵⁵ International Criminal Court 'Pre Trial Chamber I Situation in Darfur Sudan, in the case of *The Prosecutor v Omar Hassan Ahmad Al Bashir* (Omar Al Bashir)' available at <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>, accessed on 21 August 2014 page 7.

⁵⁶ Ibid.

⁵⁷ Human Rights Watch 'Sudan: renewed attacks on civilians in Darfur. Activists detained, protester killed' available at <http://www.hrw.org/news/2014/03/21/sudan-renewed-attacks-civilians-darfur>, accessed on 25 August 2014.

In the Libyan situation, the Pre-Trial Chamber I issued warrants of arrest against Al-Islam, Muammar Gaddafi⁵⁸ and Abdullah Al-Senussi.⁵⁹ Al-Islam was charged with murder and persecution as crime against humanity⁶⁰ while Abdullah Al-Senussi was charged with murder and crimes against humanity. The Pre-Trial Chamber I decided that complementarity rendered the Court's proceedings against Abdullah Al-Senussi inadmissible because Libya was conducting proceedings against him for the same charges.⁶¹ On 21 May 2014, the Appeals Chamber ruled that the case against Al-Islam was admissible before the Court and reiterated Libya's obligations to surrender him.⁶² Therefore, Libya is yet to surrender Al-Islam to the Court.

3.3 Background to the conflicts

3.3.1 Darfur

The conflict in Darfur arose between the Sudanese government and rebel groups. The conflict resulted in many deaths, displacement of people and wanton destruction of property.⁶³ The United Nations Human Rights Experts called for the Security Council to take effective measures to end egregious human rights violations in Darfur region which were characterised by sexual violence, deaths, displacement of people and torture.⁶⁴

The Security Council requested the Secretary General to establish an International Commission of Inquiry to investigate the human rights violations and to determine if genocide had occurred. The Commission identified the perpetrators and proposed for the Security Council to refer the situation in Darfur to the

⁵⁸ Following his demise the Court terminated charges against him on 22 November 2011.

⁵⁹ International Criminal Court 'Warrant of arrest for Abdullah Al Senussi' <http://www.icc-cpi.int/iccdocs/doc/doc1099332.pdf>, accessed on 21 July 2014 page 3.

⁶⁰ International Criminal Court 'Pre Trial Chamber I Situation in Libyan Jamahiriya Warrant of arrest for Saif Al-Islam Gaddafi NO ICC-01/11 available at <http://www.icccpi.int/iccdocs/doc/doc1099329.pdf>, accessed on 21 July 2014 page 3.

⁶¹ International Criminal Court 'Pre Trial Chamber I Situation in Libyan Jamahiriya Warrant of arrest for Abdullah Al Senussi NO ICC-01/11' available at <http://www.icccpi.int/iccdocs/doc/doc1099332.pdf>, accessed on 21 July 2014 page 7.

⁶² International Criminal Court 'ICC Appeals Chamber confirms the admissibility before the ICC of the case against Saif -Al-Islam Gaddafi' available at http://www.icccpi.int/en_menus/icc/press%20and%20media/press%20releases/pages/pr1005.aspx accessed on 1 September 2014 para 1.

⁶³ American Non-Governmental Organizations Coalition for the International Criminal Court 'Darfur, Sudan investigation' available at <http://www.amicc.org/icc/darfur>, accessed on 25 April 2014 para 3.

⁶⁴ United Nations Press Release AFR/1126 HR/4822 'United Nations Human Rights experts call for urgent, effective action on Darfur Sudan' available at <http://www.un.org/News/Press/docs/2005/afr1126.doc.htm>, accessed on 25 August 2014 para 4.

Prosecutor of the Court.⁶⁵ Subsequently, the Security Council referred the situation to the Court.⁶⁶

3.3.2 Libya

On 18 February 2011, the Libyans protested against the Muammar Gaddafi's dictatorship.⁶⁷ Gaddafi responded by using excessive force against the Libyan people which resulted in many deaths, gross human rights violations and displacement of many people.⁶⁸

The Security Council, invoking its Chapter VII powers under the Charter, passed sanctions on Gaddafi and his family and referred the situation to the Court.⁶⁹ The Security Council imposed an arms embargo on Libya, a travel ban, freezing of the assets of Gaddafi, his family members and some military officers.

3.4 State obligations

3.4.1 Non-state party cooperation

International law does not impose any obligations to third states who have not ratified a treaty. Customary international law recognises that states can be bound to the terms of a treaty only if they expressly consent to it as provided in the Vienna Convention on the Law of Treaties.⁷⁰

Theoretically, as non-state parties to the Rome Statute, Sudan and Libya have no obligations arising from the Rome Statute.

Conversely, there are two ways in which non-state parties are obliged to cooperate with the Court: firstly, when the non-state party enters into an ad hoc arrangement with the Court under articles 12(3)⁷¹ and 87(5) (a) and (b) of the Rome

⁶⁵United Nations 'Report of the international commission of inquiry on Darfur to the United Nations Security General' available at http://www.un.org/news/dh/sudan/com_inq_darfur.pdf, accessed on 21 August 2014 page 149.

⁶⁶United Nations Security Council op cit (no53).

⁶⁷CNN wire staff 'A timeline of the conflict in Libya August 24 2011' available at <http://edition.cnn.com/2011/WORLD/africa/08/18/libya.timeline/> accessed on 30 July 2014 para 4.

⁶⁸The American Non-Governmental Organization Coalition for the International Criminal Court 'The UN Security Council referral of the situation in Libya to the International Criminal Court' available at http://www.amicc.org/docs/Libya_Referral.pdf, accessed on 30 July 2014 para 3.

⁶⁹United Nations Security Council 'In swift decisive action, Security Council Imposes tough measures on Libyan regime' adopting resolution 1970 in the wake of crackdown protestors available at <http://www.un.org/News/Press/docs/2011/sc10187.doc.htm>, accessed on 30 July 2014 para 9.

⁷⁰Article 34 of the Vienna Convention on the Law of Treaties, 'A treaty does not create obligations for a third state without its consent.'

⁷¹'If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court

Statute.⁷² Secondly, non-state parties have an obligation to cooperate with the Court emanating from the Security Council resolutions as members of the United Nations. In referring the situations in Darfur and Libya, the referrals obliged both non-state parties to cooperate with the Court because they are members of the United Nations.

Paragraph 2 of the Security Council 1593(2005) resolution that referred the situation in Darfur reads:

‘Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;’⁷³

Similarly, the Security Council resolution in the situation in Libya reiterated the same provisions⁷⁴, thereby making it compulsory for the two countries to comply with the Security Council directions.

Cooperation obliges states to act in good faith with a view to fulfilling international obligations.⁷⁵ Both Sudan and Libya have obligations to cooperate with the Court and these obligations stem from their membership to the United Nations. State cooperation, especially from Sudan, is essential in maintaining international peace and security.⁷⁶

As high contracting parties to the Geneva Conventions, Sudan and Libya are obliged to act in accordance with the provisions of the Charter in cases of egregious

with respect to the crime in question .The accepting State shall cooperate with the Court without delay or exception in accordance with Part 9.’

⁷² ‘5 (a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

(b) Where a State not party to Statute, which has entered into an ad hoc arrangement or any other arrangement with the Court fails, to cooperate with requests pursuant to any such arrangement or agreement, the Court may also inform the Assembly of Parties or where the Security Council referred the matter to the Court, the Security Council.’

⁷³ United Nations Security Council op cit (no 53) para 2.

⁷⁴ United Nations Security Council op cit (no 54) para 2.

⁷⁵ A Ciampi ‘The obligation to cooperate’ in Antonio Cassese et al (eds) *The Rome Statute of the International Criminal Court; A commentary* page 1616.

⁷⁶ Article 25 of the Charter of the United Nations states that; ‘The members of the United Nations agree to accept and carry out decisions of the Security Council in accordance with the present Charter.’ see also D Kiel ‘Article 25’ in B Sirma H Mosier et al (eds) *The Charter of the United Nations ;A Commentary* (1995) page 406.

human rights violations.⁷⁷ The crimes within the jurisdiction of the Court are similar to those that state parties to the Geneva Conventions agreed to respect.⁷⁸

Therefore, the Security Council decision requiring non-state parties to cooperate with the Court blurs the distinction between state and non-state party obligations because all states are obligated to cooperate with the Court.⁷⁹

3.4.2 International cooperation with the Court

In identifying issues related to the prosecution by international criminal tribunals. Antonio Cassese likens the International Criminal Court of Yugoslavia to ‘a giant without arms and legs — it needs artificial limbs to walk and work.’⁸⁰ Similarly, the Court requires cooperation from the Security Council, state parties, non-state parties and international organisations in order to effectively fulfil its functions, otherwise the Court’s decisions are likened to the proverbial harmless toothless watchdog. The Court requires the Security Council to enforce its decisions when states fail to cooperate with it with respect to referrals.

Lack of cooperation from state and non-state parties hinders the Court from prosecuting serious crimes. The failure of the Security Council to enforce its decisions makes it more difficult for the Court to try accused persons or even avail them before the Court because it requires and relies on the cooperation of the state parties and other entities in locating indicted persons, arresting, detaining and surrendering of the accused persons to the Court for trial.

State parties to the Court are required to provide full cooperation at all times when so requested by the Court during investigations and prosecutions unless the information so requested may affect the states national security.⁸¹

⁷⁷ Article 89 of Protocol I Additional to the Geneva Conventions relating to the protection of victims of international armed conflicts states that; ‘In situations of serious violations of the Conventions or of this Protocol the High Contracting Parties undertake to act, jointly or individually, in cooperation with the United Nations and in conformity with the United Nations Charter.’

⁷⁸ G Nesi ‘The obligation to cooperate with the International Criminal Court and state parties not party to the Statute’ in Mauro Politi et al (eds) *The Rome Statute of the International Criminal Court; A Challenge to Impunity* (2001) page 28.

⁷⁹ L Condorelli and A Ciampi ‘Comments on the Security Council referral of the situation in Darfur to the ICC’ 3 *Journal of International Criminal Justice* (2005) page 594.

⁸⁰ A Cassese ‘On the current trend towards criminal prosecution and punishment of breaches of international humanitarian law’ 9 *EJIL* (1998).

⁸¹ P Machochoko ‘Judicial Cooperation and judicial assistance’ in Roy S Lee *The International Criminal Court, the Making of the Rome Statute, Issues, Negotiations, Results* (1999) page 32.

The obligation of state parties to cooperate with the Court stems from article 86 of the Rome Statute which states, ‘State Parties shall ... cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.’

3.4.2.1 The travelling tyrant

After the issuance of the arrest warrant on Al-Bashir, the Registrar of the Court made cooperation requests and submitted them to all state parties to arrest and surrender him if he visited their territories.⁸² Nonetheless, Al-Bashir travelled to territories of state parties of the Rome Statute; he visited Chad,⁸³ Malawi,⁸⁴ Djibouti,⁸⁵ Nigeria,⁸⁶ Qatar,⁸⁷ Egypt,⁸⁸ China,⁸⁹ Ethiopia⁹⁰ and Kenya.⁹¹ None of the countries complied with the provisions of the Security Council resolution 1593(2003) or with the cooperation requests to execute outstanding arrest warrants of Al-Bashir.

As mentioned earlier, in 3.4 of this chapter, both state parties and non-state parties to the Court have an obligation to cooperate with it. These obligations arise from the Rome Statute with regard to state parties and from the Charter with regard to non-state parties. The Pre-Trial Chamber II stated as follows in that regard:

...[O]nly States Parties to the Statute are under an obligation to cooperate with the Court. ... [N]on-States Parties may decide to cooperate with the Court on an ad hoc basis... . This

⁸² International Criminal Court ‘Report of the registry on the decision on the prosecution’s urgent notification of travel in the case of *The Prosecutor v. Omar Al-Bashir* ICC-02/05-01/09’ available at <http://www.icc-cpi.int/iccdocs/doc/doc1803812.pdf>, accessed on 27 July 2014 para 1.

⁸³ Xan Rice ‘Chad refuses to arrest Omar Al-Bashir over genocide charges’ *The Guardian* 22 July 2010 available at <http://www.theguardian.com/world/2010/jul/22/chad-refuses-arrest-omar-al-bashir>, accessed on 21 July 2014 para 3.

⁸⁴ Human Rights Watch ‘Malawi; arrest Sudanese President or bar his entry’ 13 October 2011 available at <http://www.hrw.org/news/2011/10/13/malawi-arrest-sudanese-president-al-bashir-or-bar-his-entry>, accessed on 21 August 2014 para 4.

⁸⁵ Voice of America ‘Sudan’s Bashir attends Djibouti’s president inauguration’ available at <http://www.theguardian.com/world/2010/jul/22/chad-refuses-arrest-omar-al-bashir>, accessed on 21 November 2013 para 2.

⁸⁶ Marlise Simons ‘Sudan’s President one step ahead of a suit and a warrant’ *The New York Times* available at <http://www.nytimes.com/2013/07/17/world/africa/sudans-president-one-step-ahead-of-a-suit-and-a-warrant.html>, 17 July 2013 accessed on 27 July 2014.

⁸⁷ Bashir Watch ‘Omar Al-Bashir travels to Qatar’ available at <http://bashirwatch.org/omar-al-bashir-travels-qatar/>, accessed on 21 July 2014 para 1.

⁸⁸ CNN wire staff ‘Sudan’s wanted President visits Egypt’ available at <http://edition.cnn.com/2012/09/16/world/africa/egypt-sudan/>, accessed on 21 July 2014 para 4.

⁸⁹ Malcolm Moore ‘Sudan’s al-Bashir given red carpet treatment by China’ *The Telegraph* available at <http://www.telegraph.co.uk/news/worldnews/asia/china/8605319/Sudans-al-Bashir-given-red-carpet-treatment-by-China.html>, accessed on 22 July 2014 para 4.

⁹⁰ Ethiopian Review Sudan’s ‘President Al Bashir taunts ICC while visiting Ethiopia’ available at <http://www.ethiopianreview.com/index/13636>, accessed on 21 July 2014 para 2.

⁹¹ BBC News Africa ‘Court worry at Omar Al Bashir’s Kenya trip’ 28 August 2010 available at <http://www.bbc.co.uk/news/world-africa-11117662>, accessed on 21 August 2014 para 2.

principle may be altered by the SC which may, by means of a resolution adopted under Chapter VII of the UN Charter, creates an obligation to cooperate with the Court on those UN Member States which are not parties to the Statute. ... [T]he obligation to cooperate stems directly from the UN Charter.⁹²

Chad, Malawi, Djibouti, Ethiopia, Kenya and Nigeria are state parties to the Rome Statute of the Court. They have obligation under article 86⁹³ of the Rome Statute to cooperate with the Court. It has been argued that article 25 of the Charter does away with all the immunities that arise from customary international law and subsequently, all states are mandated to cooperate with the Court pursuant to the Rome Statute.⁹⁴

Likewise, as members of the United Nations, Sudan, Libya, China, Qatar, Ethiopia and Egypt have obligations arising from the Charter, therefore they should have cooperated with the Court pursuant to the provisions of Security Council resolution but did not. Subsequently, the Court sent cooperation requests to Chad,⁹⁵ Malawi,⁹⁶ Nigeria,⁹⁷ the Democratic Republic of Congo,⁹⁸ Djibouti and Kenya before Al-Bashir visited these countries. These states failed to cooperate with the Court; the latter made decisions with regard to Sudan⁹⁹ and Libya's¹⁰⁰ failure to

⁹² International Criminal Court 'Public decision regarding Omar Al-Bashir's potential travel to the federal republic of Ethiopia and the kingdom of Saudi Arabia No. ICC-02/05-01/09' available at <http://www.icc-cpi.int/iccdocs/doc/doc1662849.pdf>, accessed on 21 July 2014 para 2.

⁹³ 'State Parties shall, in accordance with the provisions of this Statute, cooperate fully in its investigation and prosecution of crimes within the jurisdiction of the Court.'

⁹⁴ D Akande 'The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities' (2009)7 JICJ 333-352.

⁹⁵ International Criminal Court 'Pre Trial Chamber I situation in Darfur, Sudan in the case of *The Prosecutor V. Omar Hassan Ahmad Al Bashir* decision pursuant to article 87(7) of the Rome Statute on the refusal of the republic of Chad to comply with the cooperation requests issued by the court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir' available at <http://www.icc-cpi.int/iccdocs/doc/doc1384955.pdf>, accessed on 21 July 2014 para 17.

⁹⁶ International Criminal Court Pre Trial Chamber I 'Situation in Darfur, Sudan in the case of *The Prosecutor V. Omar Hassan Ahmad Al Bashir* decision pursuant to article 87(7) of the Rome Statute on the failure by the republic of Malawi to comply with the cooperation requests issued by the court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir' available at <http://www.icc-cpi.int/iccdocs/doc/doc1287184.pdf>, accessed on 21 July 2014 para 17.

⁹⁷ International Criminal Court Pre Trial Chamber I 'Situation in Darfur, Sudan in the case of *The Prosecutor V. Omar Hassan Ahmad Al Bashir* decision pursuant to article 87(7) of the Rome Statute on the failure by the republic of Malawi to comply with the cooperation requests issued by the court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir' <http://www.icc-cpi.int/iccdocs/doc/doc1619414.pdf>, accessed on 21 July 2014 para 16.

⁹⁸ International Criminal Court Pre Trial Chamber I 'Situation in Darfur, Sudan in the case of *The Prosecutor V. Omar Hassan Ahmad Al Bashir* decision pursuant to article 87(7) of the Rome Statute on the failure by the republic of Congo to comply with the cooperation requests issued by the court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir' available at <http://www.icc-cpi.int/iccdocs/doc/doc1759849.pdf>, accessed on 21 July 2014 para 12.

⁹⁹ International Criminal Court 'Situation in Darfur, Sudan in the case of the *Prosecutor V. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")* decision informing the United Nations Security Council about the lack of cooperation by the Republic

cooperate and sent the same to the Security Council. The Court required Libya to surrender Al-Islam for investigation and prosecution of crimes against humanity.¹⁰¹

The Security Council referrals of the situations in both Sudan and Libya to the Court demonstrate the Court's heavy reliance on state and non-state parties for cooperation failure of which it cannot exercise jurisdiction over the most serious international crimes. This non-cooperation undermines the Court's work and makes it nearly impossible to achieve justice for victims and the public at large in the affected countries. Furthermore, it causes the budget of the Court to shoot up as in the cases where the witnesses and or victims in these cases are in protection, they still need maintenance, financial and otherwise from the Court as they await the surrender or arrest of the accused persons to the Court. Consequently, the Court has not prosecuted either Al-Bashir or Al-Islam for the alleged crimes against humanity.

3.5 Enforcement of the Court's decisions

The Court has two ways of its enforcing decisions when states fail to cooperate with it in arresting and surrendering indicted persons to the Court for prosecution. First, the Court makes a finding on the failure of a state to cooperate and sends the finding either to the Assembly of Parties or to the Security Council. However, the enforcement mechanisms available to the Assembly of Parties are unclear. Article 112(2) enables the Assembly of Parties to deal with all forms of non-cooperation which include: condemning the wrongful act, demanding compliance or referring the matter to the Security Council.¹⁰² When states fail to cooperate in cases of referrals, the Court must make a finding of non-cooperation and send it to the Security Council as stated in article 87(7) of the Rome Statute.¹⁰³

of the Sudan ICC-02/05-01/07' available at <http://www.icc-cpi.int/iccdocs/doc/doc868180.pdf> accessed on 28 July 2014 page 6.

¹⁰⁰ International Criminal Court 'Decision Situation In Libya In The Case Of *The Prosecutor V. Saif Al-Islam Gaddafi And Abdullah Al-Senusi* Public Decision on matters related to Libya's duties to cooperate with the Court ICC-01/1-01/1' <http://www.icc-cpi.int/iccdocs/doc/doc1794255.pdf> , accessed on 28 July 2014 page 5.

¹⁰¹ International Criminal Court 'Decision Situation In Libya In The Case Of *The Prosecutor V. Saif Al-Islam Gaddafi And Abdullah Al-Senusi* Public Decision on matters related to Libya's duties to cooperate with the Court ICC-01/1-01/1' <http://www.icc-cpi.int/iccdocs/doc/doc1794255.pdf> , accessed on 28 July 2014 page 2.

¹⁰² Karin N Calvo-Goller *The Trial Proceedings of the International Criminal Court. ICTY and ICTR precedents* (2006) page 216.

¹⁰³ Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this statute, thereby preventing the Court from exercising its functions and powers under

Conversely, the Court does not have the enforcement powers against non-state parties to the Rome Statute. When the Security Council refers a situation involving a non-state party to the Court, the latter has an obligation to fully cooperate with the Court. However, when the non-state party fails to cooperate with the Court, the Security Council should apply its enforcement powers under Chapter VII of the Charter to enforce compliance.¹⁰⁴

Since the Court does not have an enforcement mechanism, it relies solely on cooperation of states for effective investigation and prosecution of serious international crimes within its jurisdiction. The failure by states to cooperate with the Court frustrates its work as it is unable to proceed with its judicial proceedings, thereby delaying justice to affected people.¹⁰⁵

After the Security Council refers a situation to the Court, the former has an obligation to enforce compliance with state and non-state parties' obligations in the event of non-cooperation.¹⁰⁶ The Security Council can invoke its powers pursuant to Chapter VII of the Charter to compel states to cooperate with the Charter as a way of restoring peace and security.

3.5.1 What can the Security Council do to back up its referrals?

The Security Council has a range of measures it can implement to do away with insecurity, it can employ hard or soft measures to achieve its mandate of maintaining peace and security. The soft tools encompass the use of mediation measures while hard tools means invoking Chapter VII powers under the Charter, referring situations to the Court or passing resolutions to start ad hoc tribunals and the use of force.¹⁰⁷ For instance, in the situation in Darfur, the United Nations Secretary General Special

this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of Parties or, where the Security Council referred the matter to the Court, to the Security Council.

¹⁰⁴ R Aloisi 'A tale of two institutions: The United Nations Security Council and the International Criminal Court' in Dawn L Rothe (et al) eds *The Realities of International Criminal Justice* (2013) page 151.

¹⁰⁵ Machteld Boot *Genocide, Crimes against Humanity and War Crimes Nullum Crimen Sine Lege and the subject matter jurisdiction of the International Criminal Court* (2002) page 45.

¹⁰⁶ Aloisi op cit (no104) at 151.

¹⁰⁷ N Vercken *Protection of Civilians in 2010, Facts, Figures and the UN Security Council's response* Oxfam (2011) page 27.

Envoy for Darfur adopted peace settlement mechanisms which aimed to trigger peace negotiations and improve the humanitarian situation in Darfur.¹⁰⁸

As aforementioned, under Chapter VII of the Charter, the Security Council has the function of determining breaches of peace, threats to peace and acts of aggression and decide or take measures under articles 41 or 42 of the Charter in the maintenance of peace and security.¹⁰⁹ When the Security Council refers a situation to the Court, the latter has an obligation to ensure that states cooperate with the Court. Subsequently, when states fail to cooperate with the Court, Security Council can invoke its Chapter VII powers to ensure compliance. These powers are found under articles 41 and 42 of the Charter. Article 41 notes 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. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

The Security Council has a range of options to exercise as enforcement mechanism when it encounters non-cooperation from states: it can apply article 42¹¹⁰ measures which involve force before it employs non-force measures under article 41, if it foresees that article 41 measures may be inadequate.¹¹¹

The Security Council employed sanctions under article 41 of the Charter with regard to both the referrals in Sudan and Libya. The Security Council ordered the government of Sudan to disarm Janjaweed militias and prosecute them for the human rights violations committed. It proceeded to threaten the use of article 41 of the Charter measures in case of non-compliance.¹¹² The Sudanese government did not comply with Security Council demands. Subsequently, pursuant to Security Council

¹⁰⁸United Nations ‘The United Nations and Darfur’ available at http://www.un.org/news/dh/infocus/sudan/fact_sheet.pdf , accessed on 14 July 2014 para 10.

¹⁰⁹ Article 39 of the Charter.

¹¹⁰ ‘Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.’

¹¹¹D Sarooshi ‘*The United Nations and the Development of Collective Security: The delegation by the UN Security Council of its Chapter Powers*’ (2000) page 102.

¹¹² United Nations Security Council ‘S/RES/1556 Resolution 1556 (2004)’ (2004) available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/446/02/PDF/N0444602.pdf?OpenElement> , accessed on 28 July 2014 para 6.

resolution 1556 (2004), the Sudan Sanctions Committee of the Security Council adopted sanctions against the Janjaweed leaders¹¹³. These included: travel bans, asset freeze and an arms embargo.¹¹⁴ In the referral of the situation in Libya, the Security Council adopted a travel ban, arms embargo on Libya and freezing of assets on Muammar Gaddafi, his family members and some military officers.¹¹⁵

It is important to note that, the Security Council adopted these sanctions on Sudan and Libya before it referred the situations to the Court. It has not adopted any enforcement mechanism after the referral of the situations in both Darfur and Libya.

3.6 The inaction of the Security Council

The Security Council has not adopted any enforcement mechanisms after the referral of the situations in Darfur and Libya to state parties and non-state parties to facilitate cooperation with the Court. The situation in Darfur has been very challenging to the Court as Al-Bashir has made a mockery of the latter and the Security Council by travelling to territories of state and non-state parties including to China, which is a permanent member of the Security Council.

The Security Council, the very body that referred the Sudan situation to the ICC has not stood firmly behind the arrest warrant against Bashir, it could have increased the cost of doing business with Bashir by imposing sanctions on fugitive Sudanese officials and governments that flout the arrest warrant. The Security Council may deserve credit for making the referral, but it appears uninterested in giving the court the kind of support it needs.¹¹⁶

The Prosecutor of the Court, in her report to the Security Council, urged the latter and state parties to take action with regard to the arrest of Al-Bashir, stating as follows:

‘The time has come for this Council and States parties to seriously devise strategies for arresting those alleged to be responsible for these crimes. It was a serious indictment on both the Council and those parties that President Omar Hassan al-Bashir and others had been

¹¹³ These were, Gafar Mohammed, Jibril Abdulkarim, Adam Yacub and Musa Hilal.

¹¹⁴ United Nations Security Council ‘S/RES/1591 Resolution 1591 (2005)’ available at <http://www.treasury.gov/resource-center/sanctions/Documents/1591.pdf>, accessed on 28 July 2014 para 6.

¹¹⁵ United Nations Security Council ‘In swift decisive action, Security Council Imposes tough measures on Libyan regime’ adopting resolution 1970 in the wake of crackdown protestors available at <http://www.un.org/News/Press/docs/2011/sc10187.doc.htm>, accessed on 30 July 2014 para 3.

¹¹⁶ R Smith C Mallory ‘The European system of human systems’ in G Zyberi (ed) *An Institutional Approach to the Responsibility to Protect. International Courts and Tribunals* Cambridge University Press (2013) page 427.

able to travel without fear of arrest. The Council's silence, even when notified of failures by States to comply with their obligations, only added insult to Darfur's victims.'¹¹⁷

The Prosecutor commended the Libyan government and non-state parties on the cooperation it had previously demonstrated but emphasised the need for the government of Libya to fulfil its obligations of surrendering Al-Islam to the Court.¹¹⁸

Evidently, the Security Council has failed to provide support to the Court through investigations and prosecutions after the referral of the situations of in Darfur and Libya. Consequently, Al Bashir has travelled extensively. The failure by the Security Council in providing enforcement mechanisms on its referrals to the Court has been an impediment to the achievement of international criminal justice and has lowered the credibility of the Court.¹¹⁹

Even though the Prosecutor has sent periodic reports to the Security Council, the latter has not supported the investigations and prosecutions or addressed the difficulties faced by the Court after non-cooperation from state and non-state parties. This does not promote the relationship between the Court and the Security Council contrary to intention of the drafters of the Rome Statute, the Rome Statute and the Relationship Agreement. It also frustrates the work of the Court.

Due to the failure of the Security Council to compel states to cooperate with the Court, its referrals weakened the enforcement mechanism of the Court and propelled the unsuccessful referrals as it lowered the credibility and lead to the unsuccessful referrals.¹²⁰

The failure of the Security Council to support the Court contravenes the relationship between the two international organisations as envisaged by the International Law Commission, Ad Hoc Committee and the Preparatory Committee. It also fails to fulfil the obligations of the Security Council under the Relationship

¹¹⁷ United Nations Security Council 'International Criminal Court prosecutor tells Security Council violence in Darfur will not end without robust determination to apprehend perpetrators' SC/11209 available at <http://www.un.org/News/Press/docs/2013/sc11209.doc.htm> , accessed on 28 July 2014 para 2.

¹¹⁸ International Criminal Court 'Seventh Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1970 (2011)' available at <http://www.icc-cpi.int/iccdocs/otp/UNSC-Report-Libya-May-2014-ENG.PDF> , accessed on 28 July 2014 para 10.

¹¹⁹ Aloisi op cit (no104) at 151.

¹²⁰ Heyder op cit (no49) at 650.

Agreement which requires the Court and the Security Council to have a close relationship for mutual attainment of their objectives.

Conclusion

The referral of the situation in Darfur and Libya was an opportunity to prosecute those suspected of having the highest individual criminal responsibility, to seek redress and justice for the victims in the affected areas and to promote the advancement of international criminal justice. The failure of the Security Council to provide enforcement measures under Chapter VII of the Charter has lowered the credibility of both the Court and the Security Council as the perpetrators of the egregious human rights are still at large and the situation in Darfur continues to be a threat to international peace and security.

On the other hand, Libya has not yet surrendered Al-Islam to the Court at the time of writing this dissertation, therefore the Court cannot exercise jurisdiction him for the alleged crimes.

For successful referral of situations to the Court, the Security Council requires cooperation from states, but when states fail to collaborate with the Court, the Security Council has an obligation to compel states to cooperate with the Court. In doing, so the Security Council will kill two birds with one stone, as it will fulfil the obligations set out in the Relationship Agreement and the provisions of the Rome Statute and maintain international peace and security. Therefore, the Court can prosecute Al-Bashir and Al-Islam only if state parties comply with their obligations arising from the Rome Statute and the Charter.

As seen in the situations in Darfur and Libya, the Court relies heavily on states and the Security Council to enforce its decisions, failure to which renders the Court unable to exercise its jurisdiction. The Court should devise enforcement mechanisms to support its decisions. This should include the suspension of recalcitrant states who have signed the Rome Statute as a way of urging all states to cooperate with the Court.¹²¹

¹²¹ G Barnes 'The International Criminal Court's ineffective enforcement mechanism: the indictment of president Omar Al Bashir 39 (2011) Fordham International Law Journal 34 page 1618.

CHAPTER FOUR

THE SECURITY COUNCIL RESOLUTIONS 1422(2002) AND 1487(2003)

4.1 Introduction

As mentioned in Chapter Three of this thesis, the relationship between the Court and the Security Council is demonstrated through the exercise of referrals and deferrals. While the Security Council referral of situations to the Court can be viewed as the maintenance of peace through the achievement of justice, deferral could be perceived as postponing the wheels of justice to attain peace and security.¹²²

Chapters One and Two of this thesis commenced the discussion on deferrals by showing how the majority of delegates were opposed to the Security Council's proposed exercise of deferrals due to the fear of politicised prosecutions. However, Singapore and Canada proposed for the Security Council to exercise deferrals pursuant to Chapter VII of the Charter and to defer only for a limited period of time.

This chapter argues that in passing deferral resolutions 1422(2002) and 1487(2003) the Security Council acted contrary to the provisions of the Rome Statute and the Charter. These deferral resolutions defy the Rome Statute provisions which lay out the conditions to be fulfilled before exercising deferrals and the irrelevance of official capacity. In addition, these resolutions did not comply with Chapter VII powers of the Charter.

This chapter is divided into four parts. The first part briefly discusses the Security Council's powers of deferrals. The second part examines the Security Council's deferral resolutions 1422(2002) and 1487(2003). Thereafter, it evaluates the validity of the aforementioned resolutions. Then, it highlights the effect of the deferral resolutions and the possible remedies against the Security Council deferral resolutions. The chapter concludes by stating that the Security Council deferral resolutions put the relationship between the Court and the Security Council at a crossroad contrary to the intention of the founders of the Rome Statute.

¹²² K Obura 'The Security Council's power to defer ICC's cases under article 16 of the Rome Statute' (2011) 4 *JAIL* 574.

4.2 The Security Council's power of deferral

The Rome Statute has not defined what a deferral means; generally, it means '[t]he act of delaying or postponing something.'¹²³ With regard to the Rome Statute, deferral refers to the act of the Security Council delaying or postponing investigations or prosecutions of the Court for a period of 12 months.¹²⁴

In allowing the Security Council to defer investigations or prosecutions of the Court, the latter recognises the role that the Security Council plays in the maintenance of peace and security under the Charter.

Thus article 16 of the Rome Statute lays out the conditions to be adhered to before the Security Council defers Court's judicial proceedings.

4.2.1 Conditions to be fulfilled by the Security Council before the exercise of deferrals.

The Security Council has to comply with certain prerequisites set forth in article 16 of the Rome Statute and in Chapter VII of the Charter of United Nations before it exercises a deferral. First, the power to defer investigations and prosecutions has to comply with the provisions set out in Chapter VII of the Charter which lays out the action that the Security Council should take in response to threats to peace, breach of the peace and acts of aggression. Article 39 of the Charter notes: '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 of the Charter, to maintain or restore international peace and security.' Therefore, before the Security Council exercises deferrals it has to establish the existence of a threat to peace, breach of the peace or an act of aggression.

Second, article 16 of the Rome Statute provides that the deferral can only last for 12 months.¹²⁵ This means that the suspension should not be for an indefinite period but be temporary. However, this period may be extended for 12 more months subject

¹²³ Merriam-Webster Dictionary available at <http://www.merriam-webster.com/dictionary/deferral> accessed on 30 August 2014.

¹²⁴ '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.'

¹²⁵ Ibid.

to the fulfilment of prior conditions which are there must exist a threat to peace, breach of the peace or an act of aggression and the deferral resolution must be adopted pursuant to Chapter VII of the Charter.

Third, the deferral request can only be adopted through a Security Council resolution. The voting process is achieved when a deferral resolution gains a majority vote by nine members of the Security Council without the exercise of a veto by any of the five permanent members.¹²⁶

Lastly, the Security Council can only defer the Court's judicial proceedings once the Prosecutor has initiated an investigation or prosecution. The first paragraph of article 16 of the Rome Statute states: '[n]o investigation or prosecution may be commenced or proceeded with under this Statute.' This means that the Security Council can postpone the Court's judicial proceedings only when the Prosecutor is conducting an investigation or prosecutions.

The Security Council must conform to the provisions of the Rome Statute as the constitutive document which establishes the Court. These conditions will be discussed further in this chapter when evaluating whether the Security Council resolutions 1422(2002) and 1487(2003) complied with these conditions.

4.3 The Security Council resolutions 1422(2002), 1487(2003) and 1497(2004)

At the time of writing this thesis, the Security Council had passed two deferral resolutions and attempted to renew the said deferral resolutions for the third time. On 14 July 2002 the Security Council adopted resolution 1422 (2002) to avoid the veto of its peacekeeping missions in Bosnia and Herzegovina.¹²⁷ Paragraph 1 of the resolution reads:

Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or

¹²⁶ Article 25(2) of the Charter provides that; 'Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.'

¹²⁷ UN News Centre UN Mission in Bosnia and Herzegovina extended for 3 days; US vetoes longer term available at <http://www.un.org/apps/news/story.asp?NewsID=4077&Cr=Bosnia&Cr1=#.Upodo9JVOrw> , accessed on 3 August 2014 para 1.

proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.¹²⁸

Many states did not support the Security Council deferral request 1422(2002). Canada, South Africa, Brazil and New Zealand, opposed the deferral resolution arguing that the resolution granted immunity to peacekeepers contrary to the provisions of the Rome Statute.¹²⁹ Similarly, Australia, Switzerland, Fiji, Liechtenstein, Syria, Burundi, Malawi and the United Arab Emirates argued that the resolution lowered the credibility of the Court even before it started exercising its judicial proceedings.¹³⁰

The Secretary General to the Security Council wrote a letter to Colin Powell, the then Secretary General of State for the United States of America, stating that the adoption of the Security Council resolution would provide a 'blanket resolution' to peacekeepers from non-state parties to the Court, contrary to the intention of the drafters of the Rome Statute of the Court.¹³¹ This meant that the resolution would completely shield the peace keepers from the jurisdiction of the Court, should they commit human rights violations, of the Court contrary to the provisions of the Rome Statute.

Although, many states and non-governmental organisations opposed resolution 1422(2002), this resolution was renewed through resolution 1487(2003).¹³² Resolution 1487(2003) sought to defer United Nations peacekeeping missions from the prosecution of the Court. Unsurprisingly, this renewal was met with vehement opposition from states and human rights organisations.

¹²⁸ United Nations 'Security Council Resolution 1422(2002)' available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/477/61/PDF/N0247761.pdf?OpenElement> , accessed on 8 August 2014 para 1.

¹²⁹ American Non-Governmental Organizations Coalition for the International Criminal Court 'Ambassadors of New Zealand ,South Africa, Brazil and Canada to the UN Security Council's unanimous decisions concerning Bosnia-Herzegovina/International Criminal Court (July 13 2002)' available at http://www.amicc.org/docs/Joint_letter_to_SC_July_12.pdf accessed on 3 August 2014 para 3.

¹³⁰ American Non-Governmental Organizations Coalition for the International Criminal Court 'Excerpts from statements at the special plenary of the PrepCom on the ICC on 3 July 2002' available at http://www.amicc.org/docs/Special_Plenary.pdf accessed on 3 August 2014 pages 1 and 2.

¹³¹ American Non-Governmental Organizations Coalition for the International Criminal Court 'The secretary general letter to the US secretary of state available at http://www.amicc.org/docs/SG_to_SS.pdf accessed on 3 August 2014 para 2.

¹³² United Nations Security Council 'Resolution 1487(2003)' available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/394/51/PDF/N0339451.pdf?OpenElement>, accessed on 8 August 2014 para 2.

The Human Rights Watch opposed the renewal of resolution 1422(2002) arguing that the resolution was adopted in the absence of any investigations or prosecutions which may have been a threat to international peace and security. Additionally, it argued that the resolution attempted to provide future immunity for the United Nations peacekeeping missions contrary to the provisions of the Rome Statute.¹³³

The Coalition Implementation for the International Criminal Court expressed the view that the resolution was passed contrary to the purposes and principles of the Charter thus the Security Council it contravened the provisions of the Charter.¹³⁴

The United States of America attempted to renew resolution 1487(2003) through resolution 1497(2004), but it dropped the demand amidst allegations of its peacekeeping forces torturing detained prisoners in Iraq.¹³⁵

The question which springs to mind is, whether these Security Council resolutions were adopted in accordance with the provisions of the Rome Statute and the Charter. In passing deferral resolutions 1422(2002), 1487(2003) the Security Council contravened the article 34 and Chapter VII powers of the Charter it also acted contrary to articles 16 and 27 of the Rome Statute.

Pursuant to Chapter VII powers under the Charter, the Security Council must ensure that there is a threat to peace, breach of peace or an act of aggression before deferring Court's investigations or prosecutions. The Security Council resolutions 1422(2002) and 1487(2003) did not fit within the criteria laid out in article 39 of the Charter as discussed below. This is discussed at length in the subsequent subsection.

4.3.1 Validity of resolutions under the Charter

Operative paragraph two of both Security Council resolutions 1422(2002) and 1487(2003) provide for an automatic renewal of the deferral resolution: '[E]xpresses

¹³³ Human Rights Watch 'The International Criminal Court and the Security Council; Resolution 1422. Legal and policy analysis' available at <http://www.hrw.org/legacy/campaigns/icc/docs/1422legal.htm> accessed on 3 August 2014 para 11.

¹³⁴ Coalition for the International Criminal Court 'A universal court with global support .UN and the ICC. Security Council resolutions 1422/1487 (2008)' available at <http://www.iccnw.org/?mod=res1422> accessed on 17 August 2014 para 5.

¹³⁵ Human Rights Watch 'U.S tries to get off the hook on war crimes ahead of U.N. resolution on Iraq U.S. tries to exclude its troops from prosecution' available at <http://www.hrw.org/news/2004/05/20/us-tries-get-hook-war-crimes> , accessed on 8 August 2014 para 9.

the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary.’¹³⁶

This renewal raises the question of whether the Security Council can defer future investigations and situations without the existence of an imminent threat to peace. The Security Council cannot be able to defer future investigations or situations because it requires the existence of a threat to peace or a breach to peace before it halts Court’s judicial proceedings.

The Charter requires the Security Council to conduct investigations pursuant to article 34 of the Charter before determining whether a threat to peace exists.¹³⁷ The automatic renewal of the deferral defies the provisions of the Charter because no investigation was conducted to determine whether a threat to peace existed. Further, the provisions of article 16 of the Rome Statute require a deferral to be determined on a case by case basis. Subsequently, the determination of a future possible threat to peace amends the provisions of article 16 of the Rome Statute contrary to the provisions of the Charter and the Rome Statute.¹³⁸ The determination of whether a threat to peace exists and the decision to invoke a Chapter VII measure, can only be made when concrete terms which have the potential of destabilising peace and security are present.¹³⁹ The Charter does not define what a ‘threat to peace’ or a ‘breach of peace’ means; however, the Security Council resolution has the discretion to define and adopt measures to restore international peace and stability.¹⁴⁰

The threat to peace can be defined in an either negative or positive light. The negative definition perceives a threat to peace as ‘an absence in international armed conflict between states;’ this school also recognises that an internal conflict can destabilise international peace and security.¹⁴¹ Conversely, the positive definition

¹³⁶ United Nations Security Council op cit (no128) para 2.

¹³⁷ Article 34 of the Charter reads; ‘The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.’

¹³⁸ M Zeidy ‘The United States dropped the atomic bomb of article 16 of the ICC Statute: Security Council power of deferrals and resolution 1422’ 35 Vanderbilt Journal of Transnational Law page 1529.

¹³⁹ L Condorelli S Villalpando ‘Referral and Deferral by the Security Council’ in Antonio Cassese et al (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) page 647.

¹⁴⁰ N Jurdi *The International Criminal Court and National Courts a Contentious Relationship* (2011) page 119.

¹⁴¹ E Wet *The Chapter VII Powers of the United Nations Security Council* (2004) page 139.

encompasses the need to have good comity in the economic, social, political and environmental facets as a way of preserving peace among states.¹⁴² The negative definition holds more water, as it encompasses both internal and international conflicts which has the possibility of destabilising international peace and security. Nonetheless, the practice of the Security Council has shown that the definition of ‘threat to peace’ is not cast in stone thus, it is dynamic as it captures the situation considering the circumstances at play.¹⁴³

While the ‘breach of peace’ refers to the existence of armed conflict between states, it is unclear whether a civil war should be included as part of the definition.¹⁴⁴ Nonetheless, it is important to note that civil war in a state which is non-international in nature has the potential of destabilising international peace and security.

The Security Council passed deferral resolutions 1422(2002) and 1487(2003) in the absence of a threat to peace or a breach to the peace, these resolutions do not make any reference to an internal or international conflict, neither do they refer to poor relations between states which may threaten peace and security. However, the only threat evident in these resolutions is the need to maintain United Nations peacekeeping operations.¹⁴⁵ The maintenance of peacekeeping operations does not amount to a threat to peace or a breach of peace. In this regard, in passing these resolutions the Security Council acted contrary to the provisions of Chapter VII of the Charter as it passed resolutions in the absence of a threat to peace or a breach to the peace.

4.3.2 The validity of the Security Council’s resolutions under the Rome Statute

As mentioned earlier, article 16 of the Rome Statute sets out the conditions which the Security Council resolutions must adhere to before deferring Court’s investigations or prosecutions. In a nutshell, a valid deferral should be adopted through a Security Council resolution, pursuant to Chapter VII powers of the Charter and it lasts for only 12 months, although this may be renewed if a threat to peace, breach of the peace or acts of aggression exist. In passing Security Council

¹⁴² Ibid.

¹⁴³ Obura op cit no (122) at 34.

¹⁴⁴ Wet op cit no (141) at 134.

¹⁴⁵ United Nations Security Council op cit (no128) para 2.

resolutions 1422(2002) and 1487(2003), the Security Council defied the conditions set out in the Rome Statute.

Operative paragraph 2 of the resolution expresses the intention to renew the deferral resolution as many times as it may be necessary.¹⁴⁶ This paragraph has the effect of automatically renewing the resolution without conforming to article 16 of the Rome Statute which reads that: ‘... [T]he request may be renewed by the Council under the same conditions’¹⁴⁷ This means that the resolution should be renewed through a subsequent resolution, after determining that the existence of a threat to peace, breach to the peace or an act of aggression still exists. This means that the deferral resolution can only be adopted through an affirmative vote by nine members of the Security Council in the absence a veto. As a result, operative paragraph 2 defied the provisions in the Rome Statute because the renewal was done in the absence of a threat to peace, breach of the peace and an act of aggression, also the intention to renew was not adopted through a resolution.

The renewal of a deferral resolution should be done on a case-by-case basis after the lapse of 12 months, accordingly, an automatic renewal defies the provisions of article 16 of the Rome Statute which provides for the procedure to renew a Security Council resolutions. This has been equated to providing ‘blanket immunity’ over peacekeepers for an indefinite duration. This automatic renewal attempts to amend the provisions of the Rome Statute contrary to international law.¹⁴⁸

As mentioned in Chapter Two of this dissertation, the authors of the Rome Statute envisaged for deferrals to be used sparingly for the purpose of temporarily halting judicial proceedings whenever they interfere with international peace and security. The Security Council resolutions passed these resolutions as a future preventive measure to halt future Court judicial proceedings against peacekeepers from non-state parties without any threat to peace, breach of the peace or an act of aggression. Therefore, the Security Council deferrals were contrary to the intention of the drafters of the Rome Statute.

¹⁴⁶ United Nations Security Council op cit (no128) para 2.

¹⁴⁷ Article 16 of the Rome Statute.

¹⁴⁸ Obura op cit (no124) at 35.

The first paragraph of article 16 of the Rome Statute states: '[n]o investigation or prosecution may be commenced or proceeded with under this Statute' The question that springs to mind is when does a prosecution or investigation occur? The Prosecutor has the power to initiate an investigation in his or her own accord pursuant to article 15 (1) and (2) of the Rome Statute.¹⁴⁹ The term 'initiate' does not mean that the Prosecutor should 'start' with an investigation but it means that the Prosecutor has the discretion to begin with necessary preliminary steps of evaluating necessary material that form the basis of an actual investigation.¹⁵⁰ Accordingly, the Prosecutor commences with the said investigation only after an authorisation from the Pre-Trial Chamber. Article 15(4) of the Rome Statute reads;

If the Pre-Trial Chamber, upon examination of the request and the supporting material considers that there is a reasonable basis to proceed with the investigation, and the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation

Therefore, the Prosecutor can only proceed with full investigation after the Pre-Trial Chamber authorises him or her to do so. Consequently, the Security Council should only defer an investigation or prosecution after the Pre-Trial Chamber decides that the Prosecutor should proceed with the actual investigation in a given matter. Deferring an investigation which has not been authorised by the Pre-Trial Chamber amounts to interference in the independence of the office of the Prosecutor. In passing deferral resolutions in the absence of an investigation or a prosecution, the Security Council resolutions 1422(2002) and 1487(2003) failed to comply with the provisions of article 15 of the Rome Statute.

Similarly, it has been observed that suspects can only be identified at the prosecution stage. Therefore, in passing deferral resolutions before the investigation and the prosecution stage the Security Council contravened with the provisions of the Rome Statute.¹⁵¹

¹⁴⁹ Article 15 (1) provides that; 'The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.'

(2) 'The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non- governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court'

¹⁵⁰ M Bergsmo J Pejic 'Article 15' Prosecutor in Otto Treiffterer (ed) *Commentary on the Rome Statute of the International Criminal Court. Observers Notes, Article by Article* (1999) page 364.

¹⁵¹ S Kim 'Maintaining the independence of the International Criminal Court: The legal and procedural implications of an article 16 deferral request (2011) 29 *Agenda Internacional* 175-212.

Exempting peacekeepers from the jurisdiction of the Court provides immunity over them contrary to the object and purpose of the Court of fighting impunity.¹⁵² I dare to state that the Security Council resolutions 1422(2002) and 1487(2003) is contributing to the same impunity the Court aims to fight! This contravenes article 27 (1) of the Rome Statute which states that: ‘This Statute shall apply equally to all persons without distinction based on official capacity’ This subsection means that the Court has the jurisdiction to determine individual criminal responsibility over perpetrators of genocide, crimes against humanity or war crimes. In providing blanket immunity over United Nations peacekeeping forces the Security Council resolutions 1422(2002) and 1487(2003) acted in contravention of the provisions of article 21 of the Rome Statute which can be seen as an attempt by the Security Council to alter the provisions of the Rome Statute. In doing this, the Security Council acted in an *ultra vires* manner contrary to the provisions of the Rome Statute.¹⁵³

4.4 Effect of these resolutions

In passing the deferral resolutions, the Security Council resolutions attempted to amend the provisions of the Rome Statute which is in itself an interference with the work of the Court and contrary to international law.

The Rome Statute can be amended only by state parties pursuant to articles 121 and 122 of the Rome Statute.¹⁵⁴ The proposed amendments which are subject to considerations by the Assembly of Parties.¹⁵⁵ Article 39 of the Vienna Convention of the Law of Treaties provides that a treaty can generally be amended through an agreement by the state parties to the treaty.

The Security Council resolutions 1422(2002) and 1487(2003) attempt to alter article 16 of the Rome Statute contrary to the provisions of the Rome Statute and what the authors of the Rome Statute envisaged how the Security Council would

¹⁵² Human Rights Watch ‘The International Criminal Court and the Security Council; Resolution 1422.Legal and policy analysis’ available at <http://www.hrw.org/legacy/campaigns/icc/docs/1422legal.htm> accessed on 3 August 2014 para 11.

¹⁵³ Human Rights Watch ‘The International Criminal Court and the Security Council; Resolution 1422.Legal and policy analysis’ available at <http://www.hrw.org/legacy/campaigns/icc/docs/1422legal.htm> accessed on 3 August 2014 para 11.

¹⁵⁴ Article 121 of the Rome Statute.

¹⁵⁵ Article 121(2) of the Rome Statute.

defer the judicial proceedings of the Court.¹⁵⁶ The Court and the Security Council are two independent international organisations established through separate distinct treaties, thus in principle and under international law neither institution can ratify the other institutions treaty neither can they alter the provisions of each other's founding documents.¹⁵⁷ However, as seen in these two resolutions, the Security Council is acting beyond its powers and seems to give the message that it is above international law with no entity having any power to stop such interference.

4.5 Possible remedies against the Security Council resolutions 1422(2002) and 1487(2003) *ultra vires* deferral resolutions.

Article 1 of the Rome Statute reads: '...The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.' This is interpreted to mean that the Court should only carry out its tasks and functions as stipulated in the Rome Statute.¹⁵⁸ In addition, article 21 of the Rome Statute notes:

1. The Court shall apply:
 - (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
 - (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
 - (c) Failing that, general principles derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights....

This article displays the supremacy of the Rome Statute as it governs the running of the Court; it also recognises other sources of law that may be used to fill existing gaps in the Rome Statute, Elements of Crimes or the Rules of Procedure and Evidence.¹⁵⁹ Subsequently, in the light of the above provisions, the Court should establish whether the Security Council resolutions 1422(2002) and 1487(2003)

¹⁵⁶ Zeidy op cit (no138) at 1531

¹⁵⁷ Cryer op cit (no43) at 456.

¹⁵⁸ O Treffterer 'Article 1, The Court' in Otto Treiffterer (ed) *Commentary on the Rome Statute of the International Criminal Court. Observers Notes, Article by Article* (1999) page 61.

¹⁵⁹ M de Guzman 'Article 21 Applicable Law' in Otto Treiffterer (ed) *Commentary on the Rome Statute of the International Criminal Court. Observers Notes, Article by Article* (1999) page 435.

deferrals requests complied with the hierarchy of the applicable laws and make a determination on the same.¹⁶⁰ So far, it has not done this.

The authors of the Rome Statute envisaged that deferrals to be used sparingly, when the pursuit of justice would interfere with the attainment of peace. But the exercise and conduct of the Security Council through resolutions 1422(2002) and 1487(2003) does not reflect what the drafters envisaged. I am of the opinion that the Court should in future ignore deferral requests from the Security Council resolutions on this basis.

The Security Council resolutions has a wide discretion to take suitable action in maintaining international peace and security pursuant to article 39 of the Charter. Being an international organisation it is subject to constitutional limitations set out in its constitutive body and it has to act within the confines of the Charter as it is not above the law.¹⁶¹

As a subject of international law, the United Nations is bound to conform to the rules of international law. Generally, member states to the United Nations have obligations arising from the Security Council resolutions to comply with its decisions. Article 25 states: 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.'

Nonetheless, these obligations are binding on member states only if the Security Council resolutions adopted the resolutions in good faith in accordance with the purposes and principles of the Charter.¹⁶² Evidently, the Security Council resolutions 1422(2002) and 1487(2003) deferrals were not adopted in good faith as they did not conform to the provisions of the Rome Statute neither did they uphold or respect human rights. Further, the Security Council is further not a state, so the requests of the Security Council resolutions should in principle not be obligatory.

¹⁶⁰ Amnesty International 'International Criminal court The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice' available at <http://www.amnesty.org/en/library/asset/IOR40/006/2003/en/af118f82-d6f8-11dd-b0cc-1f0860013475/ior400062003en.html>, accessed on 9 August 2014 para 15.

¹⁶¹ The Prosecutor v Dusko Tadic a/k/a 'DULE' 'Decision on the defence motion for the Interlocutory appeal on jurisdiction' available at <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>, accessed on 27 August 2014 para 28

¹⁶² E Wet, A Nollkaemper, P Dijktra *Review of the Security Council by Member States* (2003) page 8.

The Court has the power to review Security Council resolutions passes a deferral which does not conform to the provisions of the Rome Statute and the principles of international law.¹⁶³ When acting pursuant to Chapter VII powers under the Charter, the Security Council has an obligation to respect universal human rights instruments like the International Covenant on Civil and Political Rights, the United Nations Declaration on Human Rights, the Universal Bill of Rights, the International Covenant on Economic Social and Political Rights and international humanitarian law. The deferral resolutions did not respect human rights law because it grants impunity to violators of human rights and it does not recognise the rights of victims in the affected areas. Therefore, member states and the Court in particular should question the validity of the said resolutions and if need be refuse to comply with deferral requests that are contrary to the aforementioned international law

Conclusion

In passing resolution 1422(2002) and renewing it through 1487(2002) the Security Council did not conform to the provisions of article 16 of the Rome Statute which lays out the conditions to be exercised before a deferral is passed. The deferral requests were passed in theoretical terms in the absence of a threat to peace, breach of peace or an act of aggression. Moreover, these deferral requests had an automatic renewal providing for a renewal after the lapse of 12 months on condition that conditions under article 39 of the Charter are present. Lastly, in providing for an automatic renewal; the Security Council resolutions 1422(2002) and 1487(2003) attempted to alter the provisions of the Rome Statute. Therefore, the Security Council acted in an ultra vires manner.

In granting blanket immunity to peace keepers who are non-state parties to the Rome Statute, the Security Council defies the general principle of equality which encourages different laws to be used among peacekeepers, depending on whether they have ratified the Rome Statute or not.

When assessing the need to defer investigations or prosecutions the Security Council should respect its primary objectives and those of the Court to ensure that the legitimacy and credibility of both of the offices are upheld. The Security Council

¹⁶³ Jurdi op cit (no140).

resolutions 1422(2002) and 1487(2003) put the relationship between the Court and the Security Council resolutions at a crossroad.

CHAPTER FIVE

CONCLUDING REMARKS AND RECOMMENDATIONS

5.1 Introduction

This thesis has shown that the crafters of the Rome Statute envisaged a close interaction between the Court and the Security Council, demonstrated through the latter's exercise of referrals and deferrals of situations to the Court. However, the Security Council's exercise of referrals and deferrals has been inconsistent with the Relationship Agreement, the Charter, the provisions of the Rome Statute and the intention of the drafters. As a result, this has negatively affected the relationship between the Court and Security Council.

This chapter is divided into two parts; the first section makes a conclusion of the issues that arose in the Security Council's exercise of referrals and deferrals while the second part, recommends on how the Security Council may defer and refer in a way that sustains the relationship between the Security Council and the Court.

5.2 Conclusion

Cooperation and enforcement are two aspects that are required for a successful referral. The Security Council's referrals of the situations in Darfur and Libya to the Court has shown that the latter lacks a proper enforcement mechanism. Although the Security Council has an enforcement role to play when it refers situations to the Court, the former has not performed this role pursuant to article 87(7) of the Rome Statute. This is evident when the Security Council failed to impose sanctions on recalcitrant states which failed to cooperate with the Court in arresting Al-Bashir and the Security Council's inaction to respond to the lack of Libya's failure to cooperate with the Court in surrendering Al-Islam to the Court. At the time of writing this dissertation, the Court has been unable to exercise jurisdiction over Al-Bashir nine years after the Security Council referral. Similarly, the Court has been unable to prosecute Al-Islam three years after the Security Council referral of the situation in Libya to the Court. This has lowered the credibility and legitimacy of the Court.

In passing deferral resolutions 1422(2002) and 1487 (2003), the Security Council did not conform to the intention of the authors of the Rome Statute. This is evident when the Security Council passed deferral resolutions in the absence of a threat to peace, breach of the peace or an act of aggression. Moreover, the Security Council did not act in accordance with the conditions laid out in both the Charter and the Rome Statute before exercising of these deferrals.

Through the exercise of referrals and deferrals, the Security Council has failed to promote a close relationship with the Court contrary to the intention of the authors of the Rome Statute, the Relationship Agreement, the Charter and the Rome Statute itself.

In passing the deferral resolutions, the Security Council weakened the relationship between the Court and the Security Council contrary to what was envisaged by the crafters of the Rome Statute and the Relationship Agreement. Consequently, both of the independent international organisations fail to fulfil their mutual objective which lowers the credibility of both the Court and the Security Council.

5.3 The way forward

There is a need to strengthen the relationship between the Court and the Security Council to ensure that both entities fulfil their mutual objectives of prosecuting serious international crimes and maintaining international peace and security pursuant to the provisions of the Rome Statute and the Charter respectively.

When referring situations, the Security Council should stress in the referral resolutions the importance of all states to cooperate with the Court. This will impose obligations on all states to collaborate with the Court for successful referrals. Also, the Security Council should be ready to help the Court to enforce cooperation requests by imposing sanctions on states that fail to fulfil these obligations.

The Court and the Security Council have to cooperate effectively in order to fulfil their roles of fighting the culture of impunity and maintaining peace and security. Nonetheless, the failure of the Security Council to cooperate with the Court in enforcing decisions after a referral or failing to conform to the conditions of deferral lowers the credibility and legitimacy of the Court.

The Security Council should employ soft and hard measures pursuant to 40 or 41 of the Charter to compel recalcitrant states to cooperate with the Court as a way of maintaining peace and security as it simultaneously enforces the Court's decisions.

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**A critical examination of the relationship between the
International Criminal Court and the United Nations
Security Council, in the light of referrals and deferrals**



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DECLARATION

This research dissertation is presented for the approval of the Senate in partial fulfillment of the requirements for the degree in Masters in Criminal Justice in approved courses and minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of a Masters in Law dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that the dissertation conforms to those regulations.

I hereby declare that I have acknowledged all sources of information that I have used for my thesis as required by the rules. To the best of my knowledge, I have not made any copies of others' work or present others' ideas without the proper citation.

Jullie Ingrid Lugulu

30.09.2014

ABSTRACT

The Rome Statute of the International Criminal Court (Rome Statute) provides for a close relationship between the International Criminal Court (Court) and the United Nations Security Council (Security Council). This relationship is demonstrated through Security Council exercise of referrals and deferrals. This dissertation discusses first, the Security Council referrals of the situations in Darfur, Sudan and Libya. Second, the Security Council passing of resolutions 1422(2002) and 1487(2003), which deferred the Court from commencing any investigations or prosecuting of any crimes that could have arisen as a result of the United Nations peacekeeping operations.

This dissertation argues that the Security Council has exercised referrals and deferrals contrary to the Rome Statute, the Charter of the United Nations (the Charter), and the Negotiated Relationship Agreement between the Court and the Security Council (Relationship Agreement) as envisaged by the drafters of the Rome Statute.

It concludes by stating that, the relationship between the Court and the Security Council is at a crossroad because the latter has failed to exercise referrals and deferrals in the manner provided for in the Rome Statute and as envisioned during the drafting of the Rome Statute, thereby equating the Court to the proverbial bark of a toothless dog.

CHAPTER ONE

OVERVIEW OF THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND THE SECURITY COUNCIL

1.0 Introduction

The authors of the Rome Statute envisioned a close relationship between the Court and the Security Council. This relationship is realised through the Negotiated Relationship Agreement between the International Criminal Court and the United Nations (Relationship Agreement). The Relationship Agreement not only sets out the terms on which the Court and Security Council should relate but also lays obligations on both entities to respect each other's mandates and to cooperate in order to achieve mutual obligations.¹ These mutual obligations are prosecuting serious international crimes which concern the international community and maintaining international peace and security.

The Court was established by the Rome Statute to determine individual criminal responsibility and punish perpetrators of egregious human rights violations. Article 1 of the Rome Statute states: 'A court is hereby established .It shall be a permanent institution and shall have power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute' Pursuant to article 5 of the Rome Statute, 'the Court has jurisdiction over genocide, crimes against humanity, war crimes and aggression.'²

On the other hand, the Security Council plays the role of maintaining international peace and security under Chapter VII of the Charter. Article 24 (1) of the Charter reads that:

In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.³

¹ Article 3 of the Relationship Agreement reads: 'The United Nations and the Court agree that, with a view to facilitating the effective discharge of their respective responsibilities, they shall cooperate closely ... and consult each other on matters of mutual interest pursuant to the provisions of the present Agreement and in conformity with the respective provisions of the Charter and the Statute.'

² Presently, the Court can only exercise jurisdiction over the crime of aggression after the Rome Statute is amended and the amendment is ratified by at least a third of the state parties.

³ United Nations 'Charter of the United Nations' available at <http://www.un.org/en/documents/charter/chapter5.shtml#article24>, accessed on 21 July 2014.

It is important to note that, while the Court has the role of prosecuting serious international crimes which shock the international community, the Security Council maintains international peace and security pursuant to Chapter VII powers of the Charter. Consequently, their primary roles overlap because the crimes that fall within the jurisdiction of the Court have the ability to threaten international peace and security.⁴ It is worth noting that, the prosecution of perpetrators who commit genocide, crimes against humanity, war crimes or acts of aggression deters potential criminals from committing serious international crimes which may destabilise international peace and security.⁵ In this regard, the Security Council and the Court require mutual collaboration for effective discharge of their roles.

The Rome Statute acknowledges the role that the Security Council plays in maintaining international peace and security through empowering it to exercise referrals and deferrals .

This chapter commences the discussion on the relationship between the Court and the Security Council in the context of referrals and deferrals. It does this by examining the provisions of the International Law Commission's Draft Statute of the International Criminal Court (Draft Statute of the Court), the Ad Hoc Committee of the Court and the reports of the Preparatory Committee on the Establishment of an International Criminal Court (Preparatory Committee). It evaluates the delegates' views on the relationship of the Court and Security Council at the Rome Conference as well as the provisions of the Rome Statute that regulate the said relationship.

This chapter lays a basis for discussions in chapters Three and Four which focuses on how the Security Council exercised referrals and deferrals and evaluates whether this exercise complied with how the drafters of the Rome Statute envisaged them and the provisions of the Rome Statute itself.

⁴ Paragraph 3 of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations.

⁵ L Condorelli and S Villalpando 'Relationship of the Court with the United Nations' in Antonio Cassese et al (eds) *The Rome Statute of the International Criminal Court : A Commentary* (2002) page 220.

To understand how the relationship between the Court and the Security Council is structured, it is necessary to evaluate the drafting history of the relationship between the Court and the Security Council.

1.1 The road to the establishment of the Court

The United Nations General Assembly (General Assembly) established the International Law Commission whose aim was to research on the viability of establishing an international organ to prosecute genocide.⁶ The International Law Commission negotiated the Draft Statute of the Court, which laid the basis for future discussions on the proposed Court. Additionally, the International Law Commission proposed the establishment of an International Criminal Court and of an Ad Hoc Committee on the Establishment of an International Criminal Court (Ad Hoc Committee) whose mandate was to review the substantive decisions of the Draft Statute of the Court.⁷ Following the report of the Ad Hoc Committee, the General Assembly established the Preparatory Committee to consolidate the drafts. Finally, the General Assembly held a United Nations' Conference of Plenipotentiaries on the Establishment of the International Criminal Court (Rome Conference), which was characterised by extensive discussions on the drafts of the establishment of the Court by states, and lead to the adoption of the Rome Statute.⁸

(a) International Law Commission, Ad Hoc Committee and Preparatory Committee

The International Law Commission envisaged a close relationship between the Court and the Security Council. Article 2 of the Draft Statute of the Court states that: '[t]he President with the approval of the state parties to this Statute ("State parties") may conclude an agreement establishing an appropriate relationship between the Court and the United Nations.'⁹

⁶ M Bassiouni 'The journey to a permanent International Criminal Court' in M Bassiouni (ed) *International Criminal Court: Compilation of United Nations Documents and Draft Statute before the Diplomatic Conference* (1998) page xvii.

⁷ Coalition for the International Criminal Court 'History of the ICC' available at <http://www.iccnw.org/?mod=icchistory> accessed on 20 July 2014 para 2.

⁸ M Bassiouni 'The journey to a permanent International Criminal Court' in M Bassiouni (ed) *International Criminal Court: Compilation of United Nations Documents and Draft Court Statute before the Diplomatic Conference* (1998) page xvii.

⁹ United Nations '1994 Draft Statute for an International Criminal Court' 2005 available at http://legal.un.org/InternationalLawCommission/texts/instruments/english/draft%20articles/7_4_1994.pdf, accessed on 20 July 2014 page 15.

The Preparatory Committee negotiated for a close relationship between the Court and the Security Council. Article 2 of the Preparatory Committee reiterated the provisions of the International Law Commission's Draft Statute of the Court, which sought a close relationship between the Court and the United Nations which was to be enforced through an agreement.¹⁰

Similarly, the Ad Hoc Committee considered the relationship as 'an essential condition of the universality and moral authority of the new institution and, as well as of its financial and administrative viability.'¹¹

Consequently, the Ad Hoc Committee viewed the relationship as the source of credibility and legitimacy for the Court and also as a way of facilitating the work of the Court. Thus, the Relationship Agreement was viewed as a way of promoting cooperation between the two institutions.

(b) The Rome Conference

The relationship between the Court and the Security Council was a contentious topic during the negotiation of the Rome Statute. At the initial stages of the negotiation, many delegates viewed the relationship between the Court and the Security Council as a threat and an impediment against the achievement of either the Court or the Security Council objectives.

A vast majority of delegates at the Rome Conference heavily debated upon the Security Council's proposed power of referrals and deferrals. The debate ranged between two opposing factions; one side opposed the relationship between the two on the basis that the Court was an independent judicial body which had to be insulated from political interference with regard to its functions. Conversely, the supporters of the Security Council argued that the jurisdiction of the Court would interfere with the primary role of the Security Council under the Charter of the United Nations.¹²

As the negotiations proceeded, the majority of the delegates supported a relationship between the Court and the Security Council but subject to conditions.

¹⁰ 'The Court shall be brought into relationship with the United Nations by an agreement to be approved by the State Parties to this Statute and concluded by the President on behalf of the Court.'

¹¹ M Bassiouni *The Legislative History of the International Criminal Court: an Article by Article Evolution of the Statute from 1994- 1998* (2005) page 17.

¹² H Olasolo *The Triggering Procedure of the International Criminal Court* (2005) page 17.

Canada, the United Kingdom of Great Britain, Northern Ireland, Lesotho, Belgium, Brazil and Denmark opted for a close relationship between the Court and the Security Council only if the latter respected the Court as an independent legal institution. A Canadian representative stated: ‘The Court would need to have a constructive relationship with the United Nations, while preserving its independence and impartiality. The Security Council could play a useful role in referring matters to the Court.’¹³

Additionally, China supported the need for a close relationship between the Court and the Security Council, as long as the provisions of the Rome Statute were not contrary with the provisions of the Charter.¹⁴ On the other hand, Australia supported a relationship between the two entities only if the Court acknowledged the Security Council’s primary role in maintaining peace and security. The Australian representative stated: ‘There must also be a workable relationship between the Court and the Security Council, recognizing the Council’s primacy in matters relating to international peace and security.’¹⁵ During the Rome Conference, the Rome Statute was adopted after ratification by 160 states.¹⁶ It emphasised the importance for close interactions between the Court and the Security Council.

(c) The relationship between the Rome Statute of the Court and the Security Council

Paragraph 8 of the preamble of the Rome Statute states as follows: ‘Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes’

¹³ United Nations ‘Diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court Rome .Summary records of the plenary meetings of the Committee of the Whole. A/CONF.183/13’ available at http://legal.un.org/Court/rome/proceedings/E/Rome%20Proceedings_v1_e.pdf, accessed on 10 July 2014, page 54.

¹⁴ United Nations ‘Diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court A/CONF.183/13’, page 100.

¹⁵ United Nations ‘Diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court. Summary records of the plenary meetings of the Committee of the Whole. A/CONF.183/13’ available at http://legal.un.org/Court/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf ,accessed on 12 July 2014, page 43.

¹⁶ International Criminal Court ‘What is the Rome Statute?’ available at http://www.Court-cpi.int/en_menus/Court/about%20the%20court/frequently%20asked%20questions/Pages/3.aspx, accessed on 10 July 2014, paragraph 1.

In addition, article 2 of the Rome Statute provides that: ‘The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of State Parties to this Statute and therefore concluded by the President of the Court on its behalf.’

The need for a close relationship between the Court and the Security Council was important for a number of reasons. First, in punishing perpetrators who commit serious international crimes of genocide, war crimes and crimes against humanity, the Court contributes towards maintaining international peace and security.¹⁷ Secondly, in referring a situation to the Court, the Security Council extends the jurisdiction of the Court over non-state parties to the Rome Statute.¹⁸ Thirdly, the Court relies on the Security Council for enforcement of its decisions.¹⁹ The Security Council promotes the credibility and legitimacy of the Court when it enforces its decisions under article 86 of the Rome Statute. This dissertation will discuss at length the referrals and deferrals under articles 13(b) and 16 of the Rome Statute of the Court in Chapters Three and Four.

The Rome Statute, therefore, lays out the foundation of the relationship between the Court and the Security Council through; paragraph 8 of the preamble and article 2 of the Rome Statute. Additionally, articles 13(b) and 16 of the Rome Statute further acknowledge the relationship between the two institutions while laying out the conditions and the nature of the relationship between the Court and the Security Council.

After the adoption of the Rome Statute, the President of the Assembly of Parties of the Court and the Secretary General of the Security Council signed the Relationship Agreement which laid out the purposes and obligations between the two entities.²⁰

¹⁷ L Condorelli and S Villalpando ‘Relationship of the Court with the United Nations’ in Antonio Cassese et al *The Rome Statute of the International Criminal Court; A Commentary* page 222.

¹⁸ Pursuant to article 12 of the Rome Statute, the Court can only exercise its jurisdiction over state parties or over non state parties when they declare to accept Court’s jurisdiction.

¹⁹ L Caflisch *Promoting justice human rights and conflict resolution through International Law* (2007) page 87.

²⁰ Coalition for the International Criminal Court ‘A universal court with global support ,cooperation agreements and enforcement ,cooperation with the United Nations’ available at <http://www.Courtnow.org/?mod=agreementsun> ,accessed on 14 July 2014 para 3.

(d) The Negotiated Relationship Agreement between the International Criminal Court and the United Nations

Presently, the Relationship Agreement provides for a close relationship between the Court and the United Nations. The purpose of the Relationship Agreement is to bring the two entities into a relationship pursuant to the Rome Statute and the Charter.²¹

The Relationship Agreement obliges the Court and the Security Council to cooperate closely to ensure the attainment of their objectives. The effect of the Relationship Agreement is that it ties the Security Council to the Court therefore, both independent organisations have the obligation to cooperate with each other to ensure the effective discharge of their functions pursuant to the provisions of the Relationship Agreement, the Charter and the Rome Statute.²²

1.2 Objectives of the study

The objectives of this study are to examine the interaction between the Court and the Security Council which is demonstrated through referrals and deferrals, then to evaluate whether the Security Council has exercised this relationship in accordance with the provisions of the Rome Statute as envisaged during the drafting of the Rome Statute.

1.3 Research questions

This study seeks to answer:

- (a) Whether the Security Council exercised referrals and deferrals in accordance with the provisions of the Rome Statute, the Charter and as envisaged by the drafters of the Rome Statute.
- (b) How the Security Council's exercise of the power of referrals and deferrals has affected the relationship between the latter and the Court.

1.4 Research Methodology

This research is conducted from primary and secondary resources. The primary sources will include the Rome Statute, the Charter, the Relationship Agreement, the International Law Commission's Draft Statute of the Court and the reports of the

²¹ Article 1 of the Relationship Agreement which reads that: 'The present Agreement, which is entered into by the United Nations and the International Criminal Court ... defines the terms on which the United Nations and the Court shall be brought into relationship.'

²² The Relationship Agreement Op cit (no) 1.

Preparatory Committee on the Establishment of an International Criminal Court. It also includes cases which arose from the situations in Darfur and Libya, while the secondary sources entail textbooks on international criminal law and the Security Council, journals will be drawn from the Court and United Nations websites.

1.5 Chapter outline

Chapter One introduces the relationship between the Court and the Security Council by examining how the crafters of the Rome Statute envisaged that relationship, and how legislation provides for the relationship at present.

Chapter Two provides an overview of how the Security Council's exercise of referrals and deferrals was envisaged during the making of the Rome Statute.

Chapter Three examines the Security Council power of referrals under article 13(b) of the Rome Statute. It examines how the Security Council exercised its power of referral in the situations in Darfur and Libya. It deals with the issues that arose from these referrals, such as the failure of states to cooperate with the Court for effective prosecution of President Omar Al-Bashir and Saif Al-Islam Gaddafi for crimes against humanity. Moreover, it looks at the failure of the Security Council in both situations to back up the referrals. Finally, the chapter examines the enforcement mechanisms available to the Court and whether the Security Council has enforced the Court's decisions.

Chapter Four, evaluates the deferral of investigations by the Security Council to the Court under article 16 of the Rome Statute. Generally, this chapter focuses on Security Council deferral resolutions 1422(2002) and 1487 (2003) which grants immunity to United Nations peacekeepers from non-state parties, thus excluding them from the jurisdiction of the Court. First, it begins by examining the Security Council deferral powers and the conditions to be fulfilled before the exercise of a deferral. It examines whether the Security Council resolutions on deferral were consistent with the provisions of the Rome Statute.

Chapter Five concludes by stating that the Security Council has exercised referrals and deferrals contrary to the provisions of the Relationship Agreement, the Charter, the Rome Statute and as envisaged by the crafters of the Rome Statute. Consequently, it argues that the relationship between the Court and the Security

Council is at a crossroad and proceeds to recommend for the two international organisations to improve their relationship.

CHAPTER TWO

REFERRALS AND DEFERRALS AS ENVISAGED BY THE INTERNATIONAL LAW COMMISSION AND THE PREPARATORY COMMITTEE

2.0 Introduction

As mentioned in Chapter One, the drafters of the Rome Statute envisioned a close relationship between the Court and the Security Council. This interaction was essential to facilitate mutual achievement of each of the independent organisations' objectives.

This chapter focuses on the provisions of the International Law Commission's Draft Statute of the Court and the reports of the Preparatory Committee on referrals and deferrals. It seeks to provide a background to how the drafters of the Rome Statute envisioned the Security Council's exercise of referrals and deferrals. It also evaluates the views of the delegates at the Rome Conference on the proposed powers of the Security Council to refer situations and defer prosecutions and investigations.

The chapter commences by laying out the provisions of referrals and deferrals as provided for by the International Law Commission and the Preparatory Committee. It argues that the crafters of the Rome Statute envisaged for the Security Council to refer situations within the jurisdiction of the Court to the latter and halt investigations and prosecutions as a way of maintaining international peace and security. However, the exercise of referrals and deferrals was subject to conditions laid out in the Draft Statute of the Court and the reports of Preparatory Committee. For instance, when exercising referrals, the Security Council has to adopt a resolution pursuant to the provisions of the Charter. Further, it has to refer a 'situation' as opposed to a 'matter'.

On the other hand, the Security Council can only exercise deferrals sparingly when the pursuit of justice interferes with the attainment of peace. Just like referrals, deferrals must be adopted through a formal Security Council resolution. For a deferral to be valid, there must be a threat to peace, a breach of peace or an act of aggression at the time of its adoption. Lastly, the Security Council can halt the Court's investigations or proceedings for only a year, but this is renewable,

depending on whether the prior conditions on which the deferral was first adopted still exist.

2.1 Referrals as envisaged by the International Law Commission and the Preparatory Committee

(a) The International Law Commission

Initially, a vast majority of states at the Rome Conference for the establishment of the Court were against the Security Council referral of situations for prosecution to the Court, unsurprisingly, many states objected strongly against the Security Council's power to defer Court's investigations and prosecutions. The delegates perceived referrals as an interference of the work of an independent judicial body.²³

However, the Draft Statute of the Court recognised the importance of a relationship between the Court and the Security Council. It recognised the essence of referring 'matters' to the Court article 23(1) of the Draft Statute of the Court read that: 'Notwithstanding article 21, the Court has jurisdiction in accordance with this Statute with respect to crimes referred to in article 20 as a consequence of the referral of a matter to the Court by the Security Council acting under chapter VII of the Charter of the United Nations.'

The Draft Statute of the Court therefore envisioned a close interaction between the two entities which was demonstrated through the referral of 'matters' by the Security Council to the Court. However, the Court had to seek permission from the Security Council before it exercised jurisdiction on matters or situations within its jurisdiction over which the Security Council was acting upon.²⁴ The only cure to the foreseen power imbalance between the Court and the Security Council was to acknowledge the role played the Security Council in maintaining peace and security and thus allow the latter to exercise referrals in a way that would not affect the independence of the Court.²⁵

²³ N White and R Cryer 'The Court and the Security Council; an uncomfortable relationship' in Jose Doria et al (eds) *The Legal Regime of the International Criminal Court. Essays in Honour of Igor Blishchenko* page 464.

²⁴ S Kim 'Maintaining the independence of the International Criminal Court: The legal and procedural implications of article 16 deferral request' (2011) 29 *Agenda Internacional* 175- 212.

²⁵ K Ambos 'Establishing an International Criminal Court and an International Criminal Code. Observations from an International Law Viewpoint' (1996) 7 *EIJIL* 519-544.

As the negotiations proceeded, delegates supported the Security Council referral of ‘situations’ as opposed to ‘matters’ to the Court in order to obviate the need to create more ad hoc tribunals for prosecution of egregious human rights violations. Sweden stated as follows: ‘The Security Council, under Chapter VII of the Charter of the United Nations, should indeed be able to refer to the Court situations in which crimes under the Court's jurisdiction appeared to have been committed but not punished. That would obviate the need to create new ad hoc tribunals.’²⁶

It is evident from this discussion that the International Law Commission envisaged a close interaction between the two international organisations through the referral of matters and the deferral of the Court’s judicial proceedings. The discussion on whether the Security Council was to refer ‘situations’ as opposed to ‘matters’ will be discussed in the subsequent subsection.

(b) The Preparatory Committee’s discussion on the referral of ‘matters’ or ‘situations’ by Security Council to the Court

The Preparatory Committee was not certain on whether the Security Council should refer matters or situations to the Court. Pursuant to article 10(1) of the Preparatory Committee:

[N]otwithstanding article 6, [7] [and [9], the court has jurisdiction in accordance with this statute with respect to crimes [referred to][specified] in articles [as a consequence of the referral of][on the basis of a [formal]decision to refer a [matter] [situation] in which one or more crimes appear to have been committed to [the Prosecutor of] the Court by the Security Council[acting under Chapter VII of the Charter of the United Nations] in accordance with the terms of such referral.]²⁷

The debate on whether the Security Council should refer ‘situations’ or ‘matters’ to the Court arose at this stage, as mentioned earlier, the draft statute of the Court allowed the Security Council to refer ‘matters’. Many delegates opposed for the Security Council to refer ‘matters’ to the Court as the term was considered to be

²⁶ United Nations ‘Diplomatic conference of Plenipotentiaries on the establishment of an International Criminal Court. Report of the Preparatory Committee on the establishment of an International Criminal Court A/CONF.183/SR’ available at http://legal.un.org/Court/rome/proceedings/E/Rome%20Proceedings_v3_e.pdf, accessed on 12 July 2014 page 100.

²⁷ United Nations ‘Diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court. Report of the Preparatory Committee on the establishment of an International Criminal Court A/CONF.183/2’ available at http://legal.un.org/Court/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf, accessed on 12 July 2014 page 26.

limited in scope and would subsequently affect the independence of the Court to prosecute, thus the term ‘situation’ was preferred as it was general in nature and would not interfere with the independence of the Court.²⁸

The Draft Statute of the Court, proposed for the Security Council to refer ‘matters’ and defer investigations and prosecutions from the Court. Slovenia,²⁹ Malawi,³⁰ Norway,³¹ Denmark,³² Italy,³³ Lesotho,³⁴ Bosnia and Herzegovina³⁵ and other delegates preferred for the Security Council to refer ‘situations’ to the Court as opposed to ‘matters’. It was agreed that the Security Council could only refer situations to the Court in order to respect the office of the Prosecutor of the Court and hence promote the independence of the Court.³⁶

However, other states opposed the exercise of referral by the Security Council to the Court. India expressed the lack of support for the Security Council referrals. The Indian representative argued that referring situations to the Court was unnecessary because the Court could exercise jurisdiction through the initiation by the Prosecutor and by state party referrals. India stated as follows; ‘[T]he Security Council had set up ad hoc tribunals because no appropriate judicial mechanism had existed to try such crimes at the time, but with the establishment of the Court, States parties would have the right to refer cases to it. The Council did not need to refer cases ...’³⁷

From the reports of the Preparatory Committee, it is evident that the spirit of the Rome Statute was to create a close interaction between the Security Council and the Court through the referral of situations which would maintain international peace and security as it preserved the independence of the Court.

²⁸ S Williams W Schabas ‘Article 13 exercise of jurisdiction’ in William A Schabas (ed) *A Commentary to the Rome Statute of an International Criminal Court* page 108.

²⁹ United Nations ‘Diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court. Summary records of the plenary meetings and of the meetings of the Committee of the Whole A/CONF.183/C.1/SR.10’ available at accessed on page 202.

³⁰ United Nations op cit (no27) at 206.

³¹ United Nations op cit (no27) at 208.

³² United Nations op cit (no27) at 212.

³³ United Nations op cit (no27) at 215.

³⁴ United Nations ‘Diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court .Summary records of the plenary meetings and of the meetings of the Committee of the Whole A/CONF.183/C.1/SR.11’ available at http://legal.un.org/Court/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf , accessed on 12 July 2014 page 307.

³⁵ United Nations op cit (no 27) at 316.

³⁶ Doria op cit (no23) at 457.

³⁷ Doria op cit (no23) at 464.

2.2 Deferrals as envisaged by the International Law Commission and the Preparatory Committee

(a) Deferrals under the International Law Commission

The Draft Statute of the Court formed a basis for future negotiations of the Security Council power of deferrals in the Ad Hoc Committee and the Preparatory Committee. Article 23 (3) of the Draft Statute of the Court provided as follows: ‘No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.’³⁸

Although the Draft Statute of the Court acknowledged the role of the Security Council under Chapter VII of the Charter, it also proposed a vertical relationship between the Court and the Security Council. Evidently, article 23(3) of the Draft Statute for the Court imposed certain obligations on the Court before the latter exercised jurisdiction which was that, the Court had to ascertain whether the Security Council was dealing with a situation which threatened international peace and security and then refrain from exercising jurisdiction in such a given situation.

Delegates opposed this provision because it meant that the Court had to seek the Security Council’s permission before it exercised jurisdiction upon a situation which the Security Council was dealing with. The Court’s request was subject to a veto by any of the permanent members of the Security Council.³⁹

Seeking permission from the Security Council before exercising jurisdiction on a situation would obstruct the Court from conducting judicial proceedings because, as already mentioned, the request was subject to a veto and the process of requesting would considerably delay the Court in fulfilling its objectives. Further, it would have made the Court to be dependent on the Security Council, this would affect the independence of the Court.

³⁸ United Nations ‘Draft Statute for an International Criminal Court’ available at http://legal.un.org/InternationalLawCommission/texts/instruments/english/draft%20articles/7_4_1994.pdf , accessed on 22 July 2014.

³⁹ United Nations ‘Diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court .Summary records of the plenary meetings and of the meetings of the Committee of the Whole’ available at http://legal.un.org/Court/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf , accessed on page 212.

(b) Deferrals under the Preparatory Committee

During the negotiation of the Security Council's power of deferrals, majority of the delegates were of the view that deferring the Court's investigations and prosecutions was unnecessary because it amounted to a political interference in the work of an independent legal institution.

Many states including, Nigeria, Malawi, Philippines amongst others, argued that allowing the Security Council to defer the Court's investigations or prosecutions would interfere with the independent functioning of the Court.⁴⁰ Other states opposed the Security Council's exercise of deferrals as there was fear of the permanent members vetoing situations that either arose from their countries or involved their nationals.⁴¹

India objected strongly to the involvement of the Security Council in the judicial proceedings of the Court, therefore it did not support referrals and deferrals of the Security Council to the Court. The Indian representative stated as follows:

'The power to block proceedings was even harder to accept. On the one hand, it was argued that the Court was to try crimes of the gravest magnitude, yet on the other, it was argued that the maintenance of international peace and security might require that those who committed such crimes should be permitted to escape justice, if the Council so decided.'⁴²

Singapore made a proposal which found middle ground between states who were against the Security Council's exercise of deferrals and those who strongly believed that the Security Council should be allowed to halt the investigations or prosecutions of the Court. The Singapore compromise made it harder for the Security Council to misuse the power of deferrals.⁴³ The proposal allowed the Security Council to halt investigations or prosecutions of the Court only after passing a formal resolution which was subject to a veto by any of the permanent members. The Singapore compromise read as follows:

⁴⁰ Lawyers Committee for Human Rights 'Establishing an International Criminal Court major unresolved issues on the draft statute' available at <http://www.iccnw.org/documents/2PrepCmtEstablishICCLCHR.pdf> , accessed on 12 July 2014 page 1.

⁴¹ P Kirsch, JT Holmes, M Johnson 'International tribunals and courts' in David Malone (ed) *The UN Security Council from the Cold War to the 21 century* (2004) page 290.

⁴² United Nations op cit (no39) page 183.

⁴³ R Cryer *Prosecuting International Crimes. Selectivity and the International Criminal Law regime* (2005) page 226.

'No investigation or prosecution may be commenced or proceeded with under this Statute where the Security Council has, acting under Chapter VII of the Charter of the United Nations, given a direction to that effect.'⁴⁴

On the other hand, Canada agreed with the Singaporean proposal and added a time limitation before the exercise of deferrals. Canada proposed that:

'No investigation or prosecution may be commenced or proceeded with under this statute for a period of twelve months where the Security Council has been acting under Chapter VII of the Charter of the United Nations, notified the Court to that effect. Notification that the Security Council is continuing to act may be renewed at twelve months intervals.'⁴⁵

A deferral was envisaged to be exercised in limited occasions when the attainment of justice would interfere with the maintenance of peace and security.⁴⁶ The Canadian proposal enabled the Court to proceed with legal proceedings after a year, if the Security Council did not request a renewal.

The time limit avoided the probable seizing of the situations by the Security Council over an undefined period of time which would have had the effect of delaying the Court from exercising its judicial activities.

A huge majority of states in the Rome Conference supported the Canadian and Singaporean proposals as the formal request by the Security Council to the Court acknowledged the independence of both of the entities. Further the limitation of time enabled the Court to proceed with its judicial activities after the lapse of twelve months in the absence of a formal request of an extension by the Security Council.

The Canadian proposal was widely supported by the delegates who agreed that it was necessary for the Security Council to temporarily suspend legal proceedings if they affected the maintenance of international peace and security.⁴⁷

Conclusion

⁴⁴United Nations 'Non paper /WG.3/No 16' 8 August 1997 available at <http://www.iccnw.org/documents/SingaporeSecurityCouncil.pdf>, accessed on 20 July 2014.

⁴⁵ United Nations 'Diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court. Summary records of the plenary meetings and the meetings of the Committee of the Whole A/CONF.183/ C.1/L 20' available at http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf, accessed on 12 July 2014 page 120.

⁴⁶ R Pitty 'Political constraints upon the International Criminal Court' in Ustina Dolgopol et al (eds) *The Challenge of Conflict: International Law responds* (2006) page 347.

⁴⁷ United Nations 'Diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court. Summary records of the plenary meetings A/CONF/183/SR.6.' available at http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf, accessed on 14 July 2014 page 200.

At the initial stages of the negotiations of the Rome Statute delegates were opposed to the involvement of the Security Council in the work of the Court. They perceived the involvement of the Security Council as an interference of a political organ in the work of an independent judicial body. However, as the negotiations of the Rome Statute proceeded, delegates agreed for the Security Council to refer situations and defer investigations and prosecutions subject to certain conditions.

Both referrals and deferrals were to be adopted under Chapter VII of the Charter through a formal Security Council resolution. The Security Council could only refer situations as opposed to matters to the Prosecutor of the Court. Finally, with regard to deferrals, the Security Council could only defer an investigation or prosecution for twelve months which was subject to a renewal through a Security Council resolution.

From the above discussion, it is evident that the founders of the Rome Statute were apprehensive about the interference of the Security Council in the work of the Court. However, mechanisms were put in place to ensure that the Security Council did not misuse the powers of referrals and deferrals. The subsequent chapters discuss whether the Security Council has complied with the said mechanism in the exercise of referrals and deferrals.

CHAPTER THREE

THE SECURITY COUNCIL EXERCISE OF REFERRALS IN DARFUR AND LIBYA

3.1 Introduction

The previous chapters have set out at length how the crafters of the Rome Statute envisaged a close interaction between the Court and the Security Council as a way of ensuring successful prosecution of serious crimes within the Court's jurisdiction and maintaining international peace and security.

This chapter focuses on the Security Council referral of the situations in Libya and Darfur to the Court and the issues arising from them. It discusses firstly, the failure of state parties and non-state parties to fulfil their arrest and surrender obligations arising from the Rome Statute and the Charter respectively; secondly, the failure of the Security Council to cooperate with the Court after the latter sent the Security Council a finding pursuant to article 87(7) of the Rome Statute. The finding informed the Security Council of two things, first the non-cooperation of state parties and secondly, that non-state parties had to comply with obligations emanating from the Security Council resolutions and the provisions of the Rome Statute.

It argues that for successful referrals, the Court requires cooperation from state parties, non-state parties and the Security Council. The failure of these entities to cooperate has made both the Darfur and Libyan referrals unsuccessful up to date. This chapter is divided into five parts. The first part briefly highlights how the Security Council can exercise jurisdiction, it then discusses the history of the conflicts in Darfur and Libya; the chapter proceeds to examine the state's obligations arising from the Security Council referrals. It studies the need for states to cooperate with the Court and the enforcement mechanisms available to the Court after the Security Council refers situations to the latter. Also, it examines whether the Security Council's has enforced the said mechanisms after referring the situations to the Court. Finally, the chapter concludes by stating that the inaction of the Security Council to respond to the states non-cooperation, strains the relationship between the two international organisations contrary to what the authors of the Rome Statute envisaged, the provisions of the Rome Statute and the Relationship Agreement.

Consequently, in the nine years after the Security Council referral of the situation in Darfur, President Omar Al-Bashir (Al-Bashir) has not been surrendered to the Court. Similarly, in the Libyan case, Saif Al-Islam Gaddafi (Al-Islam) has not been surrendered to the Court, in the five years after the Security Council referred the situation in Libya to the Court.

3.2 The Security Council exercise of referrals

The Prosecutor of the Court can exercise jurisdiction only in the following instances: first, through a state party referral, second, when the Security Council refers a situation to the Court acting under article 13(b) of the Rome Statute and third, when he or she acts in their own accord to initiate investigations.

Pursuant to article 13(b)⁴⁸ of the Rome Statute, the Security Council has the power to refer situations in which one or more crimes within the jurisdiction of the Court has been committed.

When the Security Council refers a situation to the Court, it has to comply with the conditions arising from the Rome Statute. First, the Security Council can only refer 'situations' in which one or more crimes have been committed according to the Rome Statute of the Court. As previously mentioned in Chapter Two of this thesis, the crafters of the Rome Statute preferred the term 'situation' to 'matter,' because the former would uphold the independence of the Court. Second, the Security Council must act under Chapter VII of the Charter when referring situations to the Court. Subsequently, the referral of a situation to the Court should be exercised after the Security Council has established the existence of a breach of peace or threat to peace.

The effects of Security Council referrals are that, firstly, it enhances international criminal justice through extending the jurisdiction of the Court over non-state parties. Therefore, the jurisdiction of the Court extends over all states irrespective of whether they are parties to the Rome Statute or not.⁴⁹ Secondly, the Security

⁴⁸ Accordingly, article 13(b) of provides: '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: (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; or'

⁴⁹ C Heyder 'The UN Security Council's referral of the crimes in Darfur to the International Criminal Court in light of U.S position to the Court: Implications for the International Criminal Court's functions and status '(2006) J.INT'L LAW 650.

Council's referrals to the Court increases the legitimacy of the Court as it obviates with the need to create ad hoc tribunals to investigate and prosecute the situations in Darfur and Libya.⁵⁰ Thirdly, Security Council's referrals can be viewed as a tool for maintaining international peace and security⁵¹ thus, the Darfur and Libya referrals can be viewed as measures of restoring international peace and security without the use of force as stipulated under articles 39 to 41 of the Charter.⁵²

So far and at the time of writing this thesis, the Security Council has referred only two situations to the Court, that is, the situations in Darfur⁵³ and Libya.⁵⁴

With regard to the situation in Darfur, Sudan the Prosecutor applied for a warrant of arrest against Al-Bashir. The Pre-Trial Chamber issued a warrant of arrest against him for crimes against humanity and war crimes.⁵⁵ The Pre Trial-Chamber issued a second warrant of arrest against Al-Bashir for committing genocide.⁵⁶ Presently, the war in Darfur between the Sudanese government and the rebel forces still persist.⁵⁷ Subsequently, nine years after the Security Council referral of the situation in Darfur to the Court, and five years after the Court issued a warrant of arrest against Al-Bashir, the suspect has not been prosecuted to the Court.

⁵⁰ S Garsky 'Strong, independent, and effective: The European Union's promotions of the International Criminal Court' in Astrid Boening et al (eds) *Global Power Europe Volume 2 Policies, Actions and Influence of the EU's External Relations* (2013) page 12.

⁵¹ L Condorelli and S Villapando 'Referral and deferral by the Security Council' in Antonio Cassese et al (eds) *The Rome Statute of the International Criminal Court: A commentary* (2002) page 630.

⁵² Article 39 of the Charter states 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, to maintain or restore international peace and security.' The Security Council referrals to the Court can be viewed as a non-use of force measure taken to maintain international peace and security.

⁵³ United Nations Security Council 'Resolution 1593(2005)' available at <http://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf>, accessed on 21 August 2014 paragraph 1.

⁵⁴ United Nations Security Council 'Resolution 1970(2011)' available at <http://www.icc-cpi.int/NR/rdonlyres/081A9013-B03D-4859-9D61-5D0B0F2F5EFA/0/1970Eng.pdf>, accessed on 21 August 2014 paragraph 1.

⁵⁵ International Criminal Court 'Pre Trial Chamber I Situation in Darfur Sudan, in the case of *The Prosecutor v Omar Hassan Ahmad Al Bashir* (Omar Al Bashir)' available at <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>, accessed on 21 August 2014 page 7.

⁵⁶ Ibid.

⁵⁷ Human Rights Watch 'Sudan: renewed attacks on civilians in Darfur. Activists detained, protester killed' available at <http://www.hrw.org/news/2014/03/21/sudan-renewed-attacks-civilians-darfur>, accessed on 25 August 2014.

In the Libyan situation, the Pre-Trial Chamber I issued warrants of arrest against Al-Islam, Muammar Gaddafi⁵⁸ and Abdullah Al-Senussi.⁵⁹ Al-Islam was charged with murder and persecution as crime against humanity⁶⁰ while Abdullah Al-Senussi was charged with murder and crimes against humanity. The Pre-Trial Chamber I decided that complementarity rendered the Court's proceedings against Abdullah Al-Senussi inadmissible because Libya was conducting proceedings against him for the same charges.⁶¹ On 21 May 2014, the Appeals Chamber ruled that the case against Al-Islam was admissible before the Court and reiterated Libya's obligations to surrender him.⁶² Therefore, Libya is yet to surrender Al-Islam to the Court.

3.3 Background to the conflicts

3.3.1 Darfur

The conflict in Darfur arose between the Sudanese government and rebel groups. The conflict resulted in many deaths, displacement of people and wanton destruction of property.⁶³ The United Nations Human Rights Experts called for the Security Council to take effective measures to end egregious human rights violations in Darfur region which were characterised by sexual violence, deaths, displacement of people and torture.⁶⁴

The Security Council requested the Secretary General to establish an International Commission of Inquiry to investigate the human rights violations and to determine if genocide had occurred. The Commission identified the perpetrators and proposed for the Security Council to refer the situation in Darfur to the

⁵⁸ Following his demise the Court terminated charges against him on 22 November 2011.

⁵⁹ International Criminal Court 'Warrant of arrest for Abdullah Al Senussi' <http://www.icc-cpi.int/iccdocs/doc/doc1099332.pdf>, accessed on 21 July 2014 page 3.

⁶⁰ International Criminal Court 'Pre Trial Chamber I Situation in Libyan Jamahiriya Warrant of arrest for Saif Al-Islam Gaddafi NO ICC-01/11 available at <http://www.icccpi.int/iccdocs/doc/doc1099329.pdf>, accessed on 21 July 2014 page 3.

⁶¹ International Criminal Court 'Pre Trial Chamber I Situation in Libyan Jamahiriya Warrant of arrest for Abdullah Al Senussi NO ICC-01/11' available at <http://www.icccpi.int/iccdocs/doc/doc1099332.pdf>, accessed on 21 July 2014 page 7.

⁶² International Criminal Court 'ICC Appeals Chamber confirms the admissibility before the ICC of the case against Saif -Al-Islam Gaddafi' available at http://www.icccpi.int/en_menus/icc/press%20and%20media/press%20releases/pages/pr1005.aspx accessed on 1 September 2014 para 1.

⁶³ American Non-Governmental Organizations Coalition for the International Criminal Court 'Darfur, Sudan investigation' available at <http://www.amicc.org/icc/darfur>, accessed on 25 April 2014 para 3.

⁶⁴ United Nations Press Release AFR/1126 HR/4822 'United Nations Human Rights experts call for urgent, effective action on Darfur Sudan' available at <http://www.un.org/News/Press/docs/2005/afr1126.doc.htm>, accessed on 25 August 2014 para 4.

Prosecutor of the Court.⁶⁵ Subsequently, the Security Council referred the situation to the Court.⁶⁶

3.3.2 Libya

On 18 February 2011, the Libyans protested against the Muammar Gaddafi's dictatorship.⁶⁷ Gaddafi responded by using excessive force against the Libyan people which resulted in many deaths, gross human rights violations and displacement of many people.⁶⁸

The Security Council, invoking its Chapter VII powers under the Charter, passed sanctions on Gaddafi and his family and referred the situation to the Court.⁶⁹ The Security Council imposed an arms embargo on Libya, a travel ban, freezing of the assets of Gaddafi, his family members and some military officers.

3.4 State obligations

3.4.1 Non-state party cooperation

International law does not impose any obligations to third states who have not ratified a treaty. Customary international law recognises that states can be bound to the terms of a treaty only if they expressly consent to it as provided in the Vienna Convention on the Law of Treaties.⁷⁰

Theoretically, as non-state parties to the Rome Statute, Sudan and Libya have no obligations arising from the Rome Statute.

Conversely, there are two ways in which non-state parties are obliged to cooperate with the Court: firstly, when the non-state party enters into an ad hoc arrangement with the Court under articles 12(3)⁷¹ and 87(5) (a) and (b) of the Rome

⁶⁵United Nations 'Report of the international commission of inquiry on Darfur to the United Nations Security General' available at http://www.un.org/news/dh/sudan/com_inq_darfur.pdf, accessed on 21 August 2014 page 149.

⁶⁶United Nations Security Council op cit (no53).

⁶⁷CNN wire staff 'A timeline of the conflict in Libya August 24 2011' available at <http://edition.cnn.com/2011/WORLD/africa/08/18/libya.timeline/> accessed on 30 July 2014 para 4.

⁶⁸The American Non-Governmental Organization Coalition for the International Criminal Court 'The UN Security Council referral of the situation in Libya to the International Criminal Court' available at http://www.amicc.org/docs/Libya_Referral.pdf, accessed on 30 July 2014 para 3.

⁶⁹United Nations Security Council 'In swift decisive action, Security Council Imposes tough measures on Libyan regime' adopting resolution 1970 in the wake of crackdown protestors available at <http://www.un.org/News/Press/docs/2011/sc10187.doc.htm>, accessed on 30 July 2014 para 9.

⁷⁰Article 34 of the Vienna Convention on the Law of Treaties, 'A treaty does not create obligations for a third state without its consent.'

⁷¹'If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court

Statute.⁷² Secondly, non-state parties have an obligation to cooperate with the Court emanating from the Security Council resolutions as members of the United Nations. In referring the situations in Darfur and Libya, the referrals obliged both non-state parties to cooperate with the Court because they are members of the United Nations.

Paragraph 2 of the Security Council 1593(2005) resolution that referred the situation in Darfur reads:

‘Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;’⁷³

Similarly, the Security Council resolution in the situation in Libya reiterated the same provisions⁷⁴, thereby making it compulsory for the two countries to comply with the Security Council directions.

Cooperation obliges states to act in good faith with a view to fulfilling international obligations.⁷⁵ Both Sudan and Libya have obligations to cooperate with the Court and these obligations stem from their membership to the United Nations. State cooperation, especially from Sudan, is essential in maintaining international peace and security.⁷⁶

As high contracting parties to the Geneva Conventions, Sudan and Libya are obliged to act in accordance with the provisions of the Charter in cases of egregious

with respect to the crime in question .The accepting State shall cooperate with the Court without delay or exception in accordance with Part 9.’

⁷² ‘5 (a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

(b) Where a State not party to Statute, which has entered into an ad hoc arrangement or any other arrangement with the Court fails, to cooperate with requests pursuant to any such arrangement or agreement, the Court may also inform the Assembly of Parties or where the Security Council referred the matter to the Court, the Security Council.’

⁷³ United Nations Security Council op cit (no 53) para 2.

⁷⁴ United Nations Security Council op cit (no 54) para 2.

⁷⁵ A Ciampi ‘The obligation to cooperate’ in Antonio Cassese et al (eds) *The Rome Statute of the International Criminal Court; A commentary* page 1616.

⁷⁶ Article 25 of the Charter of the United Nations states that; ‘The members of the United Nations agree to accept and carry out decisions of the Security Council in accordance with the present Charter.’ see also D Kiel ‘Article 25’ in B Sirma H Mosier et al (eds) *The Charter of the United Nations ;A Commentary* (1995) page 406.

human rights violations.⁷⁷ The crimes within the jurisdiction of the Court are similar to those that state parties to the Geneva Conventions agreed to respect.⁷⁸

Therefore, the Security Council decision requiring non-state parties to cooperate with the Court blurs the distinction between state and non-state party obligations because all states are obligated to cooperate with the Court.⁷⁹

3.4.2 International cooperation with the Court

In identifying issues related to the prosecution by international criminal tribunals. Antonio Cassese likens the International Criminal Court of Yugoslavia to ‘a giant without arms and legs — it needs artificial limbs to walk and work.’⁸⁰ Similarly, the Court requires cooperation from the Security Council, state parties, non-state parties and international organisations in order to effectively fulfil its functions, otherwise the Court’s decisions are likened to the proverbial harmless toothless watchdog. The Court requires the Security Council to enforce its decisions when states fail to cooperate with it with respect to referrals.

Lack of cooperation from state and non-state parties hinders the Court from prosecuting serious crimes. The failure of the Security Council to enforce its decisions makes it more difficult for the Court to try accused persons or even avail them before the Court because it requires and relies on the cooperation of the state parties and other entities in locating indicted persons, arresting, detaining and surrendering of the accused persons to the Court for trial.

State parties to the Court are required to provide full cooperation at all times when so requested by the Court during investigations and prosecutions unless the information so requested may affect the states national security.⁸¹

⁷⁷ Article 89 of Protocol I Additional to the Geneva Conventions relating to the protection of victims of international armed conflicts states that; ‘In situations of serious violations of the Conventions or of this Protocol the High Contracting Parties undertake to act, jointly or individually, in cooperation with the United Nations and in conformity with the United Nations Charter.’

⁷⁸ G Nesi ‘The obligation to cooperate with the International Criminal Court and state parties not party to the Statute’ in Mauro Politi et al (eds) *The Rome Statute of the International Criminal Court; A Challenge to Impunity* (2001) page 28.

⁷⁹ L Condorelli and A Ciampi ‘Comments on the Security Council referral of the situation in Darfur to the ICC’ 3 *Journal of International Criminal Justice* (2005) page 594.

⁸⁰ A Cassese ‘On the current trend towards criminal prosecution and punishment of breaches of international humanitarian law’ 9 *EJIL* (1998).

⁸¹ P Machochoko ‘Judicial Cooperation and judicial assistance’ in Roy S Lee *The International Criminal Court, the Making of the Rome Statute, Issues, Negotiations, Results* (1999) page 32.

The obligation of state parties to cooperate with the Court stems from article 86 of the Rome Statute which states, ‘State Parties shall ... cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.’

3.4.2.1 The travelling tyrant

After the issuance of the arrest warrant on Al-Bashir, the Registrar of the Court made cooperation requests and submitted them to all state parties to arrest and surrender him if he visited their territories.⁸² Nonetheless, Al-Bashir travelled to territories of state parties of the Rome Statute; he visited Chad,⁸³ Malawi,⁸⁴ Djibouti,⁸⁵ Nigeria,⁸⁶ Qatar,⁸⁷ Egypt,⁸⁸ China,⁸⁹ Ethiopia⁹⁰ and Kenya.⁹¹ None of the countries complied with the provisions of the Security Council resolution 1593(2003) or with the cooperation requests to execute outstanding arrest warrants of Al-Bashir.

As mentioned earlier, in 3.4 of this chapter, both state parties and non-state parties to the Court have an obligation to cooperate with it. These obligations arise from the Rome Statute with regard to state parties and from the Charter with regard to non-state parties. The Pre-Trial Chamber II stated as follows in that regard:

...[O]nly States Parties to the Statute are under an obligation to cooperate with the Court. ... [N]on-States Parties may decide to cooperate with the Court on an ad hoc basis... . This

⁸² International Criminal Court ‘Report of the registry on the decision on the prosecution's urgent notification of travel in the case of *The Prosecutor v. Omar Al-Bashir* ICC-02/05-01/09’ available at <http://www.icc-cpi.int/iccdocs/doc/doc1803812.pdf>, accessed on 27 July 2014 para 1.

⁸³ Xan Rice ‘Chad refuses to arrest Omar Al-Bashir over genocide charges’ *The Guardian* 22 July 2010 available at <http://www.theguardian.com/world/2010/jul/22/chad-refuses-arrest-omar-al-bashir>, accessed on 21 July 2014 para 3.

⁸⁴ Human Rights Watch ‘Malawi; arrest Sudanese President or bar his entry’ 13 October 2011 available at <http://www.hrw.org/news/2011/10/13/malawi-arrest-sudanese-president-al-bashir-or-bar-his-entry>, accessed on 21 August 2014 para 4.

⁸⁵ Voice of America ‘Sudan’s Bashir attends Djibouti’s president inauguration’ available at <http://www.theguardian.com/world/2010/jul/22/chad-refuses-arrest-omar-al-bashir>, accessed on 21 November 2013 para 2.

⁸⁶ Marlise Simons ‘Sudan’s President one step ahead of a suit and a warrant’ *The New York Times* available at <http://www.nytimes.com/2013/07/17/world/africa/sudans-president-one-step-ahead-of-a-suit-and-a-warrant.html>, 17 July 2013 accessed on 27 July 2014.

⁸⁷ Bashir Watch ‘Omar Al-Bashir travels to Qatar’ available at <http://bashirwatch.org/omar-al-bashir-travels-qatar/>, accessed on 21 July 2014 para 1.

⁸⁸ CNN wire staff ‘Sudan’s wanted President visits Egypt’ available at <http://edition.cnn.com/2012/09/16/world/africa/egypt-sudan/>, accessed on 21 July 2014 para 4.

⁸⁹ Malcolm Moore ‘Sudan’s al-Bashir given red carpet treatment by China’ *The Telegraph* available at <http://www.telegraph.co.uk/news/worldnews/asia/china/8605319/Sudans-al-Bashir-given-red-carpet-treatment-by-China.html>, accessed on 22 July 2014 para 4.

⁹⁰ Ethiopian Review Sudan’s ‘President Al Bashir taunts ICC while visiting Ethiopia’ available at <http://www.ethiopianreview.com/index/13636>, accessed on 21 July 2014 para 2.

⁹¹ BBC News Africa ‘Court worry at Omar Al Bashir’s Kenya trip’ 28 August 2010 available at <http://www.bbc.co.uk/news/world-africa-11117662>, accessed on 21 August 2014 para 2.

principle may be altered by the SC which may, by means of a resolution adopted under Chapter VII of the UN Charter, creates an obligation to cooperate with the Court on those UN Member States which are not parties to the Statute. ... [T]he obligation to cooperate stems directly from the UN Charter.⁹²

Chad, Malawi, Djibouti, Ethiopia, Kenya and Nigeria are state parties to the Rome Statute of the Court. They have obligation under article 86⁹³ of the Rome Statute to cooperate with the Court. It has been argued that article 25 of the Charter does away with all the immunities that arise from customary international law and subsequently, all states are mandated to cooperate with the Court pursuant to the Rome Statute.⁹⁴

Likewise, as members of the United Nations, Sudan, Libya, China, Qatar, Ethiopia and Egypt have obligations arising from the Charter, therefore they should have cooperated with the Court pursuant to the provisions of Security Council resolution but did not. Subsequently, the Court sent cooperation requests to Chad,⁹⁵ Malawi,⁹⁶ Nigeria,⁹⁷ the Democratic Republic of Congo,⁹⁸ Djibouti and Kenya before Al-Bashir visited these countries. These states failed to cooperate with the Court; the latter made decisions with regard to Sudan⁹⁹ and Libya's¹⁰⁰ failure to

⁹² International Criminal Court 'Public decision regarding Omar Al-Bashir's potential travel to the federal republic of Ethiopia and the kingdom of Saudi Arabia No. ICC-02/05-01/09' available at <http://www.icc-cpi.int/iccdocs/doc/doc1662849.pdf>, accessed on 21 July 2014 para 2.

⁹³ 'State Parties shall, in accordance with the provisions of this Statute, cooperate fully in its investigation and prosecution of crimes within the jurisdiction of the Court.'

⁹⁴ D Akande 'The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities' (2009)7 JICJ 333-352.

⁹⁵ International Criminal Court 'Pre Trial Chamber I situation in Darfur, Sudan in the case of *The Prosecutor V. Omar Hassan Ahmad Al Bashir* decision pursuant to article 87(7) of the Rome Statute on the refusal of the republic of Chad to comply with the cooperation requests issued by the court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir' available at <http://www.icc-cpi.int/iccdocs/doc/doc1384955.pdf>, accessed on 21 July 2014 para 17.

⁹⁶ International Criminal Court Pre Trial Chamber I 'Situation in Darfur, Sudan in the case of *The Prosecutor V. Omar Hassan Ahmad Al Bashir* decision pursuant to article 87(7) of the Rome Statute on the failure by the republic of Malawi to comply with the cooperation requests issued by the court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir' available at <http://www.icc-cpi.int/iccdocs/doc/doc1287184.pdf>, accessed on 21 July 2014 para 17.

⁹⁷ International Criminal Court Pre Trial Chamber I 'Situation in Darfur, Sudan in the case of *The Prosecutor V. Omar Hassan Ahmad Al Bashir* decision pursuant to article 87(7) of the Rome Statute on the failure by the republic of Malawi to comply with the cooperation requests issued by the court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir' <http://www.icc-cpi.int/iccdocs/doc/doc1619414.pdf>, accessed on 21 July 2014 para 16.

⁹⁸ International Criminal Court Pre Trial Chamber I 'Situation in Darfur, Sudan in the case of *The Prosecutor V. Omar Hassan Ahmad Al Bashir* decision pursuant to article 87(7) of the Rome Statute on the failure by the republic of Congo to comply with the cooperation requests issued by the court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir' available at <http://www.icc-cpi.int/iccdocs/doc/doc1759849.pdf>, accessed on 21 July 2014 para 12.

⁹⁹ International Criminal Court 'Situation in Darfur, Sudan in the case of the *Prosecutor V. Ahmad Muhammad Harun* ("Ahmad Harun") and *Ali Muhammad Ali Abd-Al-Rahman* ("Ali Kushayb") decision informing the United Nations Security Council about the lack of cooperation by the Republic

cooperate and sent the same to the Security Council. The Court required Libya to surrender Al-Islam for investigation and prosecution of crimes against humanity.¹⁰¹

The Security Council referrals of the situations in both Sudan and Libya to the Court demonstrate the Court's heavy reliance on state and non-state parties for cooperation failure of which it cannot exercise jurisdiction over the most serious international crimes. This non-cooperation undermines the Court's work and makes it nearly impossible to achieve justice for victims and the public at large in the affected countries. Furthermore, it causes the budget of the Court to shoot up as in the cases where the witnesses and or victims in these cases are in protection, they still need maintenance, financial and otherwise from the Court as they await the surrender or arrest of the accused persons to the Court. Consequently, the Court has not prosecuted either Al-Bashir or Al-Islam for the alleged crimes against humanity.

3.5 Enforcement of the Court's decisions

The Court has two ways of its enforcing decisions when states fail to cooperate with it in arresting and surrendering indicted persons to the Court for prosecution. First, the Court makes a finding on the failure of a state to cooperate and sends the finding either to the Assembly of Parties or to the Security Council. However, the enforcement mechanisms available to the Assembly of Parties are unclear. Article 112(2) enables the Assembly of Parties to deal with all forms of non-cooperation which include: condemning the wrongful act, demanding compliance or referring the matter to the Security Council.¹⁰² When states fail to cooperate in cases of referrals, the Court must make a finding of non-cooperation and send it to the Security Council as stated in article 87(7) of the Rome Statute.¹⁰³

of the Sudan ICC-02/05-01/07' available at <http://www.icc-cpi.int/iccdocs/doc/doc868180.pdf> accessed on 28 July 2014 page 6.

¹⁰⁰ International Criminal Court 'Decision Situation In Libya In The Case Of *The Prosecutor V. Saif Al-Islam Gaddafi And Abdullah Al-Senusi* Public Decision on matters related to Libya's duties to cooperate with the Court ICC-01/1-01/1' <http://www.icc-cpi.int/iccdocs/doc/doc1794255.pdf> , accessed on 28 July 2014 page 5.

¹⁰¹ International Criminal Court 'Decision Situation In Libya In The Case Of *The Prosecutor V. Saif Al-Islam Gaddafi And Abdullah Al-Senusi* Public Decision on matters related to Libya's duties to cooperate with the Court ICC-01/1-01/1' <http://www.icc-cpi.int/iccdocs/doc/doc1794255.pdf> , accessed on 28 July 2014 page 2.

¹⁰² Karin N Calvo-Goller *The Trial Proceedings of the International Criminal Court. ICTY and ICTR precedents* (2006) page 216.

¹⁰³ Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this statute, thereby preventing the Court from exercising its functions and powers under

Conversely, the Court does not have the enforcement powers against non-state parties to the Rome Statute. When the Security Council refers a situation involving a non-state party to the Court, the latter has an obligation to fully cooperate with the Court. However, when the non-state party fails to cooperate with the Court, the Security Council should apply its enforcement powers under Chapter VII of the Charter to enforce compliance.¹⁰⁴

Since the Court does not have an enforcement mechanism, it relies solely on cooperation of states for effective investigation and prosecution of serious international crimes within its jurisdiction. The failure by states to cooperate with the Court frustrates its work as it is unable to proceed with its judicial proceedings, thereby delaying justice to affected people.¹⁰⁵

After the Security Council refers a situation to the Court, the former has an obligation to enforce compliance with state and non-state parties' obligations in the event of non-cooperation.¹⁰⁶ The Security Council can invoke its powers pursuant to Chapter VII of the Charter to compel states to cooperate with the Charter as a way of restoring peace and security.

3.5.1 What can the Security Council do to back up its referrals?

The Security Council has a range of measures it can implement to do away with insecurity, it can employ hard or soft measures to achieve its mandate of maintaining peace and security. The soft tools encompass the use of mediation measures while hard tools means invoking Chapter VII powers under the Charter, referring situations to the Court or passing resolutions to start ad hoc tribunals and the use of force.¹⁰⁷ For instance, in the situation in Darfur, the United Nations Secretary General Special

this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of Parties or, where the Security Council referred the matter to the Court, to the Security Council.

¹⁰⁴ R Aloisi 'A tale of two institutions: The United Nations Security Council and the International Criminal Court' in Dawn L Rothe (et al) eds *The Realities of International Criminal Justice* (2013) page 151.

¹⁰⁵ Machteld Boot *Genocide, Crimes against Humanity and War Crimes Nullum Crimen Sine Lege and the subject matter jurisdiction of the International Criminal Court* (2002) page 45.

¹⁰⁶ Aloisi op cit (no104) at 151.

¹⁰⁷ N Vercken *Protection of Civilians in 2010, Facts, Figures and the UN Security Council's response* Oxfam (2011) page 27.

Envoy for Darfur adopted peace settlement mechanisms which aimed to trigger peace negotiations and improve the humanitarian situation in Darfur.¹⁰⁸

As aforementioned, under Chapter VII of the Charter, the Security Council has the function of determining breaches of peace, threats to peace and acts of aggression and decide or take measures under articles 41 or 42 of the Charter in the maintenance of peace and security.¹⁰⁹ When the Security Council refers a situation to the Court, the latter has an obligation to ensure that states cooperate with the Court. Subsequently, when states fail to cooperate with the Court, Security Council can invoke its Chapter VII powers to ensure compliance. These powers are found under articles 41 and 42 of the Charter. Article 41 notes 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. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

The Security Council has a range of options to exercise as enforcement mechanism when it encounters non-cooperation from states: it can apply article 42¹¹⁰ measures which involve force before it employs non-force measures under article 41, if it foresees that article 41 measures may be inadequate.¹¹¹

The Security Council employed sanctions under article 41 of the Charter with regard to both the referrals in Sudan and Libya. The Security Council ordered the government of Sudan to disarm Janjaweed militias and prosecute them for the human rights violations committed. It proceeded to threaten the use of article 41 of the Charter measures in case of non-compliance.¹¹² The Sudanese government did not comply with Security Council demands. Subsequently, pursuant to Security Council

¹⁰⁸United Nations ‘The United Nations and Darfur’ available at http://www.un.org/news/dh/infocus/sudan/fact_sheet.pdf , accessed on 14 July 2014 para 10.

¹⁰⁹ Article 39 of the Charter.

¹¹⁰ ‘Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.’

¹¹¹D Sarooshi ‘*The United Nations and the Development of Collective Security: The delegation by the UN Security Council of its Chapter Powers*’ (2000) page 102.

¹¹² United Nations Security Council ‘S/RES/1556 Resolution 1556 (2004)’ (2004) available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/446/02/PDF/N0444602.pdf?OpenElement> , accessed on 28 July 2014 para 6.

resolution 1556 (2004), the Sudan Sanctions Committee of the Security Council adopted sanctions against the Janjaweed leaders¹¹³. These included: travel bans, asset freeze and an arms embargo.¹¹⁴ In the referral of the situation in Libya, the Security Council adopted a travel ban, arms embargo on Libya and freezing of assets on Muammar Gaddafi, his family members and some military officers.¹¹⁵

It is important to note that, the Security Council adopted these sanctions on Sudan and Libya before it referred the situations to the Court. It has not adopted any enforcement mechanism after the referral of the situations in both Darfur and Libya.

3.6 The inaction of the Security Council

The Security Council has not adopted any enforcement mechanisms after the referral of the situations in Darfur and Libya to state parties and non-state parties to facilitate cooperation with the Court. The situation in Darfur has been very challenging to the Court as Al-Bashir has made a mockery of the latter and the Security Council by travelling to territories of state and non-state parties including to China, which is a permanent member of the Security Council.

The Security Council, the very body that referred the Sudan situation to the ICC has not stood firmly behind the arrest warrant against Bashir, it could have increased the cost of doing business with Bashir by imposing sanctions on fugitive Sudanese officials and governments that flout the arrest warrant. The Security Council may deserve credit for making the referral, but it appears uninterested in giving the court the kind of support it needs.¹¹⁶

The Prosecutor of the Court, in her report to the Security Council, urged the latter and state parties to take action with regard to the arrest of Al-Bashir, stating as follows:

‘The time has come for this Council and States parties to seriously devise strategies for arresting those alleged to be responsible for these crimes. It was a serious indictment on both the Council and those parties that President Omar Hassan al-Bashir and others had been

¹¹³ These were, Gafar Mohammed, Jibril Abdulkarim, Adam Yacub and Musa Hilal.

¹¹⁴ United Nations Security Council ‘S/RES/1591 Resolution 1591 (2005)’ available at <http://www.treasury.gov/resource-center/sanctions/Documents/1591.pdf>, accessed on 28 July 2014 para 6.

¹¹⁵ United Nations Security Council ‘In swift decisive action, Security Council Imposes tough measures on Libyan regime’ adopting resolution 1970 in the wake of crackdown protestors available at <http://www.un.org/News/Press/docs/2011/sc10187.doc.htm>, accessed on 30 July 2014 para 3.

¹¹⁶ R Smith C Mallory ‘The European system of human systems’ in G Zyberi (ed) *An Institutional Approach to the Responsibility to Protect. International Courts and Tribunals* Cambridge University Press (2013) page 427.

able to travel without fear of arrest. The Council's silence, even when notified of failures by States to comply with their obligations, only added insult to Darfur's victims.'¹¹⁷

The Prosecutor commended the Libyan government and non-state parties on the cooperation it had previously demonstrated but emphasised the need for the government of Libya to fulfil its obligations of surrendering Al-Islam to the Court.¹¹⁸

Evidently, the Security Council has failed to provide support to the Court through investigations and prosecutions after the referral of the situations of in Darfur and Libya. Consequently, Al Bashir has travelled extensively. The failure by the Security Council in providing enforcement mechanisms on its referrals to the Court has been an impediment to the achievement of international criminal justice and has lowered the credibility of the Court.¹¹⁹

Even though the Prosecutor has sent periodic reports to the Security Council, the latter has not supported the investigations and prosecutions or addressed the difficulties faced by the Court after non-cooperation from state and non-state parties. This does not promote the relationship between the Court and the Security Council contrary to intention of the drafters of the Rome Statute, the Rome Statute and the Relationship Agreement. It also frustrates the work of the Court.

Due to the failure of the Security Council to compel states to cooperate with the Court, its referrals weakened the enforcement mechanism of the Court and propelled the unsuccessful referrals as it lowered the credibility and lead to the unsuccessful referrals.¹²⁰

The failure of the Security Council to support the Court contravenes the relationship between the two international organisations as envisaged by the International Law Commission, Ad Hoc Committee and the Preparatory Committee. It also fails to fulfil the obligations of the Security Council under the Relationship

¹¹⁷ United Nations Security Council 'International Criminal Court prosecutor tells Security Council violence in Darfur will not end without robust determination to apprehend perpetrators' SC/11209 available at <http://www.un.org/News/Press/docs/2013/sc11209.doc.htm> , accessed on 28 July 2014 para 2.

¹¹⁸ International Criminal Court 'Seventh Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1970 (2011)' available at <http://www.icc-cpi.int/iccdocs/otp/UNSC-Report-Libya-May-2014-ENG.PDF> , accessed on 28 July 2014 para 10.

¹¹⁹ Aloisi op cit (no104) at 151.

¹²⁰ Heyder op cit (no49) at 650.

Agreement which requires the Court and the Security Council to have a close relationship for mutual attainment of their objectives.

Conclusion

The referral of the situation in Darfur and Libya was an opportunity to prosecute those suspected of having the highest individual criminal responsibility, to seek redress and justice for the victims in the affected areas and to promote the advancement of international criminal justice. The failure of the Security Council to provide enforcement measures under Chapter VII of the Charter has lowered the credibility of both the Court and the Security Council as the perpetrators of the egregious human rights are still at large and the situation in Darfur continues to be a threat to international peace and security.

On the other hand, Libya has not yet surrendered Al-Islam to the Court at the time of writing this dissertation, therefore the Court cannot exercise jurisdiction him for the alleged crimes.

For successful referral of situations to the Court, the Security Council requires cooperation from states, but when states fail to collaborate with the Court, the Security Council has an obligation to compel states to cooperate with the Court. In doing, so the Security Council will kill two birds with one stone, as it will fulfil the obligations set out in the Relationship Agreement and the provisions of the Rome Statute and maintain international peace and security. Therefore, the Court can prosecute Al-Bashir and Al-Islam only if state parties comply with their obligations arising from the Rome Statute and the Charter.

As seen in the situations in Darfur and Libya, the Court relies heavily on states and the Security Council to enforce its decisions, failure to which renders the Court unable to exercise its jurisdiction. The Court should devise enforcement mechanisms to support its decisions. This should include the suspension of recalcitrant states who have signed the Rome Statute as a way of urging all states to cooperate with the Court.¹²¹

¹²¹ G Barnes 'The International Criminal Court's ineffective enforcement mechanism: the indictment of president Omar Al Bashir 39 (2011) Fordham International Law Journal 34 page 1618.

CHAPTER FOUR

THE SECURITY COUNCIL RESOLUTIONS 1422(2002) AND 1487(2003)

4.1 Introduction

As mentioned in Chapter Three of this thesis, the relationship between the Court and the Security Council is demonstrated through the exercise of referrals and deferrals. While the Security Council referral of situations to the Court can be viewed as the maintenance of peace through the achievement of justice, deferral could be perceived as postponing the wheels of justice to attain peace and security.¹²²

Chapters One and Two of this thesis commenced the discussion on deferrals by showing how the majority of delegates were opposed to the Security Council's proposed exercise of deferrals due to the fear of politicised prosecutions. However, Singapore and Canada proposed for the Security Council to exercise deferrals pursuant to Chapter VII of the Charter and to defer only for a limited period of time.

This chapter argues that in passing deferral resolutions 1422(2002) and 1487(2003) the Security Council acted contrary to the provisions of the Rome Statute and the Charter. These deferral resolutions defy the Rome Statute provisions which lay out the conditions to be fulfilled before exercising deferrals and the irrelevance of official capacity. In addition, these resolutions did not comply with Chapter VII powers of the Charter.

This chapter is divided into four parts. The first part briefly discusses the Security Council's powers of deferrals. The second part examines the Security Council's deferral resolutions 1422(2002) and 1487(2003). Thereafter, it evaluates the validity of the aforementioned resolutions. Then, it highlights the effect of the deferral resolutions and the possible remedies against the Security Council deferral resolutions. The chapter concludes by stating that the Security Council deferral resolutions put the relationship between the Court and the Security Council at a crossroad contrary to the intention of the founders of the Rome Statute.

¹²² K Obura 'The Security Council's power to defer ICC's cases under article 16 of the Rome Statute' (2011) 4 *JAIL* 574.

4.2 The Security Council's power of deferral

The Rome Statute has not defined what a deferral means; generally, it means '[t]he act of delaying or postponing something.'¹²³ With regard to the Rome Statute, deferral refers to the act of the Security Council delaying or postponing investigations or prosecutions of the Court for a period of 12 months.¹²⁴

In allowing the Security Council to defer investigations or prosecutions of the Court, the latter recognises the role that the Security Council plays in the maintenance of peace and security under the Charter.

Thus article 16 of the Rome Statute lays out the conditions to be adhered to before the Security Council defers Court's judicial proceedings.

4.2.1 Conditions to be fulfilled by the Security Council before the exercise of deferrals.

The Security Council has to comply with certain prerequisites set forth in article 16 of the Rome Statute and in Chapter VII of the Charter of United Nations before it exercises a deferral. First, the power to defer investigations and prosecutions has to comply with the provisions set out in Chapter VII of the Charter which lays out the action that the Security Council should take in response to threats to peace, breach of the peace and acts of aggression. Article 39 of the Charter notes: '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 of the Charter, to maintain or restore international peace and security.' Therefore, before the Security Council exercises deferrals it has to establish the existence of a threat to peace, breach of the peace or an act of aggression.

Second, article 16 of the Rome Statute provides that the deferral can only last for 12 months.¹²⁵ This means that the suspension should not be for an indefinite period but be temporary. However, this period may be extended for 12 more months subject

¹²³ Merriam-Webster Dictionary available at <http://www.merriam-webster.com/dictionary/deferral> accessed on 30 August 2014.

¹²⁴ '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.'

¹²⁵ Ibid.

to the fulfilment of prior conditions which are there must exist a threat to peace, breach of the peace or an act of aggression and the deferral resolution must be adopted pursuant to Chapter VII of the Charter.

Third, the deferral request can only be adopted through a Security Council resolution. The voting process is achieved when a deferral resolution gains a majority vote by nine members of the Security Council without the exercise of a veto by any of the five permanent members.¹²⁶

Lastly, the Security Council can only defer the Court's judicial proceedings once the Prosecutor has initiated an investigation or prosecution. The first paragraph of article 16 of the Rome Statute states: '[n]o investigation or prosecution may be commenced or proceeded with under this Statute.' This means that the Security Council can postpone the Court's judicial proceedings only when the Prosecutor is conducting an investigation or prosecutions.

The Security Council must conform to the provisions of the Rome Statute as the constitutive document which establishes the Court. These conditions will be discussed further in this chapter when evaluating whether the Security Council resolutions 1422(2002) and 1487(2003) complied with these conditions.

4.3 The Security Council resolutions 1422(2002), 1487(2003) and 1497(2004)

At the time of writing this thesis, the Security Council had passed two deferral resolutions and attempted to renew the said deferral resolutions for the third time. On 14 July 2002 the Security Council adopted resolution 1422 (2002) to avoid the veto of its peacekeeping missions in Bosnia and Herzegovina.¹²⁷ Paragraph 1 of the resolution reads:

Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or

¹²⁶ Article 25(2) of the Charter provides that; 'Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.'

¹²⁷ UN News Centre UN Mission in Bosnia and Herzegovina extended for 3 days; US vetoes longer term available at <http://www.un.org/apps/news/story.asp?NewsID=4077&Cr=Bosnia&Cr1=#.Upodo9JVOrw> , accessed on 3 August 2014 para 1.

proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.¹²⁸

Many states did not support the Security Council deferral request 1422(2002). Canada, South Africa, Brazil and New Zealand, opposed the deferral resolution arguing that the resolution granted immunity to peacekeepers contrary to the provisions of the Rome Statute.¹²⁹ Similarly, Australia, Switzerland, Fiji, Liechtenstein, Syria, Burundi, Malawi and the United Arab Emirates argued that the resolution lowered the credibility of the Court even before it started exercising its judicial proceedings.¹³⁰

The Secretary General to the Security Council wrote a letter to Colin Powell, the then Secretary General of State for the United States of America, stating that the adoption of the Security Council resolution would provide a 'blanket resolution' to peacekeepers from non-state parties to the Court, contrary to the intention of the drafters of the Rome Statute of the Court.¹³¹ This meant that the resolution would completely shield the peace keepers from the jurisdiction of the Court, should they commit human rights violations, of the Court contrary to the provisions of the Rome Statute.

Although, many states and non-governmental organisations opposed resolution 1422(2002), this resolution was renewed through resolution 1487(2003).¹³² Resolution 1487(2003) sought to defer United Nations peacekeeping missions from the prosecution of the Court. Unsurprisingly, this renewal was met with vehement opposition from states and human rights organisations.

¹²⁸ United Nations 'Security Council Resolution 1422(2002)' available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/477/61/PDF/N0247761.pdf?OpenElement> , accessed on 8 August 2014 para 1.

¹²⁹ American Non-Governmental Organizations Coalition for the International Criminal Court 'Ambassadors of New Zealand ,South Africa, Brazil and Canada to the UN Security Council's unanimous decisions concerning Bosnia-Herzegovina/International Criminal Court (July 13 2002)' available at http://www.amicc.org/docs/Joint_letter_to_SC_July_12.pdf accessed on 3 August 2014 para 3.

¹³⁰ American Non-Governmental Organizations Coalition for the International Criminal Court 'Excerpts from statements at the special plenary of the PrepCom on the ICC on 3 July 2002' available at http://www.amicc.org/docs/Special_Plenary.pdf accessed on 3 August 2014 pages 1 and 2.

¹³¹ American Non-Governmental Organizations Coalition for the International Criminal Court 'The secretary general letter to the US secretary of state available at http://www.amicc.org/docs/SG_to_SS.pdf accessed on 3 August 2014 para 2.

¹³² United Nations Security Council 'Resolution 1487(2003)' available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/394/51/PDF/N0339451.pdf?OpenElement>, accessed on 8 August 2014 para 2.

The Human Rights Watch opposed the renewal of resolution 1422(2002) arguing that the resolution was adopted in the absence of any investigations or prosecutions which may have been a threat to international peace and security. Additionally, it argued that the resolution attempted to provide future immunity for the United Nations peacekeeping missions contrary to the provisions of the Rome Statute.¹³³

The Coalition Implementation for the International Criminal Court expressed the view that the resolution was passed contrary to the purposes and principles of the Charter thus the Security Council it contravened the provisions of the Charter.¹³⁴

The United States of America attempted to renew resolution 1487(2003) through resolution 1497(2004), but it dropped the demand amidst allegations of its peacekeeping forces torturing detained prisoners in Iraq.¹³⁵

The question which springs to mind is, whether these Security Council resolutions were adopted in accordance with the provisions of the Rome Statute and the Charter. In passing deferral resolutions 1422(2002), 1487(2003) the Security Council contravened the article 34 and Chapter VII powers of the Charter it also acted contrary to articles 16 and 27 of the Rome Statute.

Pursuant to Chapter VII powers under the Charter, the Security Council must ensure that there is a threat to peace, breach of peace or an act of aggression before deferring Court's investigations or prosecutions. The Security Council resolutions 1422(2002) and 1487(2003) did not fit within the criteria laid out in article 39 of the Charter as discussed below. This is discussed at length in the subsequent subsection.

4.3.1 Validity of resolutions under the Charter

Operative paragraph two of both Security Council resolutions 1422(2002) and 1487(2003) provide for an automatic renewal of the deferral resolution: '[E]xpresses

¹³³ Human Rights Watch 'The International Criminal Court and the Security Council; Resolution 1422. Legal and policy analysis' available at <http://www.hrw.org/legacy/campaigns/icc/docs/1422legal.htm> accessed on 3 August 2014 para 11.

¹³⁴ Coalition for the International Criminal Court 'A universal court with global support .UN and the ICC. Security Council resolutions 1422/1487 (2008)' available at <http://www.iccnw.org/?mod=res1422> accessed on 17 August 2014 para 5.

¹³⁵ Human Rights Watch 'U.S tries to get off the hook on war crimes ahead of U.N. resolution on Iraq U.S. tries to exclude its troops from prosecution' available at <http://www.hrw.org/news/2004/05/20/us-tries-get-hook-war-crimes> , accessed on 8 August 2014 para 9.

the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary.’¹³⁶

This renewal raises the question of whether the Security Council can defer future investigations and situations without the existence of an imminent threat to peace. The Security Council cannot be able to defer future investigations or situations because it requires the existence of a threat to peace or a breach to peace before it halts Court’s judicial proceedings.

The Charter requires the Security Council to conduct investigations pursuant to article 34 of the Charter before determining whether a threat to peace exists.¹³⁷ The automatic renewal of the deferral defies the provisions of the Charter because no investigation was conducted to determine whether a threat to peace existed. Further, the provisions of article 16 of the Rome Statute require a deferral to be determined on a case by case basis. Subsequently, the determination of a future possible threat to peace amends the provisions of article 16 of the Rome Statute contrary to the provisions of the Charter and the Rome Statute.¹³⁸ The determination of whether a threat to peace exists and the decision to invoke a Chapter VII measure, can only be made when concrete terms which have the potential of destabilising peace and security are present.¹³⁹ The Charter does not define what a ‘threat to peace’ or a ‘breach of peace’ means; however, the Security Council resolution has the discretion to define and adopt measures to restore international peace and stability.¹⁴⁰

The threat to peace can be defined in an either negative or positive light. The negative definition perceives a threat to peace as ‘an absence in international armed conflict between states;’ this school also recognises that an internal conflict can destabilise international peace and security.¹⁴¹ Conversely, the positive definition

¹³⁶ United Nations Security Council op cit (no128) para 2.

¹³⁷ Article 34 of the Charter reads; ‘The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.’

¹³⁸ M Zeidy ‘The United States dropped the atomic bomb of article 16 of the ICC Statute: Security Council power of deferrals and resolution 1422’ 35 Vanderbilt Journal of Transnational Law page 1529.

¹³⁹ L Condorelli S Villalpando ‘Referral and Deferral by the Security Council’ in Antonio Cassese et al (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) page 647.

¹⁴⁰ N Jurdi *The International Criminal Court and National Courts a Contentious Relationship* (2011) page 119.

¹⁴¹ E Wet *The Chapter VII Powers of the United Nations Security Council* (2004) page 139.

encompasses the need to have good comity in the economic, social, political and environmental facets as a way of preserving peace among states.¹⁴² The negative definition holds more water, as it encompasses both internal and international conflicts which has the possibility of destabilising international peace and security. Nonetheless, the practice of the Security Council has shown that the definition of ‘threat to peace’ is not cast in stone thus, it is dynamic as it captures the situation considering the circumstances at play.¹⁴³

While the ‘breach of peace’ refers to the existence of armed conflict between states, it is unclear whether a civil war should be included as part of the definition.¹⁴⁴ Nonetheless, it is important to note that civil war in a state which is non-international in nature has the potential of destabilising international peace and security.

The Security Council passed deferral resolutions 1422(2002) and 1487(2003) in the absence of a threat to peace or a breach to the peace, these resolutions do not make any reference to an internal or international conflict, neither do they refer to poor relations between states which may threaten peace and security. However, the only threat evident in these resolutions is the need to maintain United Nations peacekeeping operations.¹⁴⁵ The maintenance of peacekeeping operations does not amount to a threat to peace or a breach of peace. In this regard, in passing these resolutions the Security Council acted contrary to the provisions of Chapter VII of the Charter as it passed resolutions in the absence of a threat to peace or a breach to the peace.

4.3.2 The validity of the Security Council’s resolutions under the Rome Statute

As mentioned earlier, article 16 of the Rome Statute sets out the conditions which the Security Council resolutions must adhere to before deferring Court’s investigations or prosecutions. In a nutshell, a valid deferral should be adopted through a Security Council resolution, pursuant to Chapter VII powers of the Charter and it lasts for only 12 months, although this may be renewed if a threat to peace, breach of the peace or acts of aggression exist. In passing Security Council

¹⁴² Ibid.

¹⁴³ Obura op cit no (122) at 34.

¹⁴⁴ Wet op cit no (141) at 134.

¹⁴⁵ United Nations Security Council op cit (no128) para 2.

resolutions 1422(2002) and 1487(2003), the Security Council defied the conditions set out in the Rome Statute.

Operative paragraph 2 of the resolution expresses the intention to renew the deferral resolution as many times as it may be necessary.¹⁴⁶ This paragraph has the effect of automatically renewing the resolution without conforming to article 16 of the Rome Statute which reads that: ‘... [T]he request may be renewed by the Council under the same conditions’¹⁴⁷ This means that the resolution should be renewed through a subsequent resolution, after determining that the existence of a threat to peace, breach to the peace or an act of aggression still exists. This means that the deferral resolution can only be adopted through an affirmative vote by nine members of the Security Council in the absence a veto. As a result, operative paragraph 2 defied the provisions in the Rome Statute because the renewal was done in the absence of a threat to peace, breach of the peace and an act of aggression, also the intention to renew was not adopted through a resolution.

The renewal of a deferral resolution should be done on a case-by-case basis after the lapse of 12 months, accordingly, an automatic renewal defies the provisions of article 16 of the Rome Statute which provides for the procedure to renew a Security Council resolutions. This has been equated to providing ‘blanket immunity’ over peacekeepers for an indefinite duration. This automatic renewal attempts to amend the provisions of the Rome Statute contrary to international law.¹⁴⁸

As mentioned in Chapter Two of this dissertation, the authors of the Rome Statute envisaged for deferrals to be used sparingly for the purpose of temporarily halting judicial proceedings whenever they interfere with international peace and security. The Security Council resolutions passed these resolutions as a future preventive measure to halt future Court judicial proceedings against peacekeepers from non-state parties without any threat to peace, breach of the peace or an act of aggression. Therefore, the Security Council deferrals were contrary to the intention of the drafters of the Rome Statute.

¹⁴⁶ United Nations Security Council op cit (no128) para 2.

¹⁴⁷ Article 16 of the Rome Statute.

¹⁴⁸ Obura op cit (no124) at 35.

The first paragraph of article 16 of the Rome Statute states: '[n]o investigation or prosecution may be commenced or proceeded with under this Statute' The question that springs to mind is when does a prosecution or investigation occur? The Prosecutor has the power to initiate an investigation in his or her own accord pursuant to article 15 (1) and (2) of the Rome Statute.¹⁴⁹ The term 'initiate' does not mean that the Prosecutor should 'start' with an investigation but it means that the Prosecutor has the discretion to begin with necessary preliminary steps of evaluating necessary material that form the basis of an actual investigation.¹⁵⁰ Accordingly, the Prosecutor commences with the said investigation only after an authorisation from the Pre-Trial Chamber. Article 15(4) of the Rome Statute reads;

If the Pre-Trial Chamber, upon examination of the request and the supporting material considers that there is a reasonable basis to proceed with the investigation, and the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation

Therefore, the Prosecutor can only proceed with full investigation after the Pre-Trial Chamber authorises him or her to do so. Consequently, the Security Council should only defer an investigation or prosecution after the Pre-Trial Chamber decides that the Prosecutor should proceed with the actual investigation in a given matter. Deferring an investigation which has not been authorised by the Pre-Trial Chamber amounts to interference in the independence of the office of the Prosecutor. In passing deferral resolutions in the absence of an investigation or a prosecution, the Security Council resolutions 1422(2002) and 1487(2003) failed to comply with the provisions of article 15 of the Rome Statute.

Similarly, it has been observed that suspects can only be identified at the prosecution stage. Therefore, in passing deferral resolutions before the investigation and the prosecution stage the Security Council contravened with the provisions of the Rome Statute.¹⁵¹

¹⁴⁹ Article 15 (1) provides that; 'The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.'

(2) 'The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non- governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court'

¹⁵⁰ M Bergsmo J Pejic 'Article 15' Prosecutor in Otto Treiffterer (ed) *Commentary on the Rome Statute of the International Criminal Court. Observers Notes, Article by Article* (1999) page 364.

¹⁵¹ S Kim 'Maintaining the independence of the International Criminal Court: The legal and procedural implications of an article 16 deferral request (2011) 29 *Agenda Internacional* 175-212.

Exempting peacekeepers from the jurisdiction of the Court provides immunity over them contrary to the object and purpose of the Court of fighting impunity.¹⁵² I dare to state that the Security Council resolutions 1422(2002) and 1487(2003) is contributing to the same impunity the Court aims to fight! This contravenes article 27 (1) of the Rome Statute which states that: ‘This Statute shall apply equally to all persons without distinction based on official capacity’ This subsection means that the Court has the jurisdiction to determine individual criminal responsibility over perpetrators of genocide, crimes against humanity or war crimes. In providing blanket immunity over United Nations peacekeeping forces the Security Council resolutions 1422(2002) and 1487(2003) acted in contravention of the provisions of article 21 of the Rome Statute which can be seen as an attempt by the Security Council to alter the provisions of the Rome Statute. In doing this, the Security Council acted in an *ultra vires* manner contrary to the provisions of the Rome Statute.¹⁵³

4.4 Effect of these resolutions

In passing the deferral resolutions, the Security Council resolutions attempted to amend the provisions of the Rome Statute which is in itself an interference with the work of the Court and contrary to international law.

The Rome Statute can be amended only by state parties pursuant to articles 121 and 122 of the Rome Statute.¹⁵⁴ The proposed amendments which are subject to considerations by the Assembly of Parties.¹⁵⁵ Article 39 of the Vienna Convention of the Law of Treaties provides that a treaty can generally be amended through an agreement by the state parties to the treaty.

The Security Council resolutions 1422(2002) and 1487(2003) attempt to alter article 16 of the Rome Statute contrary to the provisions of the Rome Statute and what the authors of the Rome Statute envisaged how the Security Council would

¹⁵² Human Rights Watch ‘The International Criminal Court and the Security Council; Resolution 1422.Legal and policy analysis’ available at <http://www.hrw.org/legacy/campaigns/icc/docs/1422legal.htm> accessed on 3 August 2014 para 11.

¹⁵³ Human Rights Watch ‘The International Criminal Court and the Security Council; Resolution 1422.Legal and policy analysis’ available at <http://www.hrw.org/legacy/campaigns/icc/docs/1422legal.htm> accessed on 3 August 2014 para 11.

¹⁵⁴ Article 121 of the Rome Statute.

¹⁵⁵ Article 121(2) of the Rome Statute.

defer the judicial proceedings of the Court.¹⁵⁶ The Court and the Security Council are two independent international organisations established through separate distinct treaties, thus in principle and under international law neither institution can ratify the other institutions treaty neither can they alter the provisions of each other's founding documents.¹⁵⁷ However, as seen in these two resolutions, the Security Council is acting beyond its powers and seems to give the message that it is above international law with no entity having any power to stop such interference.

4.5 Possible remedies against the Security Council resolutions 1422(2002) and 1487(2003) *ultra vires* deferral resolutions.

Article 1 of the Rome Statute reads: '...The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.' This is interpreted to mean that the Court should only carry out its tasks and functions as stipulated in the Rome Statute.¹⁵⁸ In addition, article 21 of the Rome Statute notes:

1. The Court shall apply:
 - (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
 - (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
 - (c) Failing that, general principles derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights....

This article displays the supremacy of the Rome Statute as it governs the running of the Court; it also recognises other sources of law that may be used to fill existing gaps in the Rome Statute, Elements of Crimes or the Rules of Procedure and Evidence.¹⁵⁹ Subsequently, in the light of the above provisions, the Court should establish whether the Security Council resolutions 1422(2002) and 1487(2003)

¹⁵⁶ Zeidy op cit (no138) at 1531

¹⁵⁷ Cryer op cit (no43) at 456.

¹⁵⁸ O Treffterer 'Article 1, The Court' in Otto Treiffterer (ed) *Commentary on the Rome Statute of the International Criminal Court. Observers Notes, Article by Article* (1999) page 61.

¹⁵⁹ M de Guzman 'Article 21 Applicable Law' in Otto Treiffterer (ed) *Commentary on the Rome Statute of the International Criminal Court. Observers Notes, Article by Article* (1999) page 435.

deferrals requests complied with the hierarchy of the applicable laws and make a determination on the same.¹⁶⁰ So far, it has not done this.

The authors of the Rome Statute envisaged that deferrals to be used sparingly, when the pursuit of justice would interfere with the attainment of peace. But the exercise and conduct of the Security Council through resolutions 1422(2002) and 1487(2003) does not reflect what the drafters envisaged. I am of the opinion that the Court should in future ignore deferral requests from the Security Council resolutions on this basis.

The Security Council resolutions has a wide discretion to take suitable action in maintaining international peace and security pursuant to article 39 of the Charter. Being an international organisation it is subject to constitutional limitations set out in its constitutive body and it has to act within the confines of the Charter as it is not above the law.¹⁶¹

As a subject of international law, the United Nations is bound to conform to the rules of international law. Generally, member states to the United Nations have obligations arising from the Security Council resolutions to comply with its decisions. Article 25 states: 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.'

Nonetheless, these obligations are binding on member states only if the Security Council resolutions adopted the resolutions in good faith in accordance with the purposes and principles of the Charter.¹⁶² Evidently, the Security Council resolutions 1422(2002) and 1487(2003) deferrals were not adopted in good faith as they did not conform to the provisions of the Rome Statute neither did they uphold or respect human rights. Further, the Security Council is further not a state, so the requests of the Security Council resolutions should in principle not be obligatory.

¹⁶⁰ Amnesty International 'International Criminal court The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice' available at <http://www.amnesty.org/en/library/asset/IOR40/006/2003/en/af118f82-d6f8-11dd-b0cc-1f0860013475/ior400062003en.html>, accessed on 9 August 2014 para 15.

¹⁶¹ The Prosecutor v Dusko Tadic a/k/a 'DULE' 'Decision on the defence motion for the Interlocutory appeal on jurisdiction' available at <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>, accessed on 27 August 2014 para 28

¹⁶² E Wet, A Nollkaemper, P Dijktra *Review of the Security Council by Member States* (2003) page 8.

The Court has the power to review Security Council resolutions passes a deferral which does not conform to the provisions of the Rome Statute and the principles of international law.¹⁶³ When acting pursuant to Chapter VII powers under the Charter, the Security Council has an obligation to respect universal human rights instruments like the International Covenant on Civil and Political Rights, the United Nations Declaration on Human Rights, the Universal Bill of Rights, the International Covenant on Economic Social and Political Rights and international humanitarian law. The deferral resolutions did not respect human rights law because it grants impunity to violators of human rights and it does not recognise the rights of victims in the affected areas. Therefore, member states and the Court in particular should question the validity of the said resolutions and if need be refuse to comply with deferral requests that are contrary to the aforementioned international law

Conclusion

In passing resolution 1422(2002) and renewing it through 1487(2002) the Security Council did not conform to the provisions of article 16 of the Rome Statute which lays out the conditions to be exercised before a deferral is passed. The deferral requests were passed in theoretical terms in the absence of a threat to peace, breach of peace or an act of aggression. Moreover, these deferral requests had an automatic renewal providing for a renewal after the lapse of 12 months on condition that conditions under article 39 of the Charter are present. Lastly, in providing for an automatic renewal; the Security Council resolutions 1422(2002) and 1487(2003) attempted to alter the provisions of the Rome Statute. Therefore, the Security Council acted in an ultra vires manner.

In granting blanket immunity to peace keepers who are non-state parties to the Rome Statute, the Security Council defies the general principle of equality which encourages different laws to be used among peacekeepers, depending on whether they have ratified the Rome Statute or not.

When assessing the need to defer investigations or prosecutions the Security Council should respect its primary objectives and those of the Court to ensure that the legitimacy and credibility of both of the offices are upheld. The Security Council

¹⁶³ Jurdi op cit (no140).

resolutions 1422(2002) and 1487(2003) put the relationship between the Court and the Security Council resolutions at a crossroad.

CHAPTER FIVE

CONCLUDING REMARKS AND RECOMMENDATIONS

5.1 Introduction

This thesis has shown that the crafters of the Rome Statute envisaged a close interaction between the Court and the Security Council, demonstrated through the latter's exercise of referrals and deferrals of situations to the Court. However, the Security Council's exercise of referrals and deferrals has been inconsistent with the Relationship Agreement, the Charter, the provisions of the Rome Statute and the intention of the drafters. As a result, this has negatively affected the relationship between the Court and Security Council.

This chapter is divided into two parts; the first section makes a conclusion of the issues that arose in the Security Council's exercise of referrals and deferrals while the second part, recommends on how the Security Council may defer and refer in a way that sustains the relationship between the Security Council and the Court.

5.2 Conclusion

Cooperation and enforcement are two aspects that are required for a successful referral. The Security Council's referrals of the situations in Darfur and Libya to the Court has shown that the latter lacks a proper enforcement mechanism. Although the Security Council has an enforcement role to play when it refers situations to the Court, the former has not performed this role pursuant to article 87(7) of the Rome Statute. This is evident when the Security Council failed to impose sanctions on recalcitrant states which failed to cooperate with the Court in arresting Al-Bashir and the Security Council's inaction to respond to the lack of Libya's failure to cooperate with the Court in surrendering Al-Islam to the Court. At the time of writing this dissertation, the Court has been unable to exercise jurisdiction over Al-Bashir nine years after the Security Council referral. Similarly, the Court has been unable to prosecute Al-Islam three years after the Security Council referral of the situation in Libya to the Court. This has lowered the credibility and legitimacy of the Court.

In passing deferral resolutions 1422(2002) and 1487 (2003), the Security Council did not conform to the intention of the authors of the Rome Statute. This is evident when the Security Council passed deferral resolutions in the absence of a threat to peace, breach of the peace or an act of aggression. Moreover, the Security Council did not act in accordance with the conditions laid out in both the Charter and the Rome Statute before exercising of these deferrals.

Through the exercise of referrals and deferrals, the Security Council has failed to promote a close relationship with the Court contrary to the intention of the authors of the Rome Statute, the Relationship Agreement, the Charter and the Rome Statute itself.

In passing the deferral resolutions, the Security Council weakened the relationship between the Court and the Security Council contrary to what was envisaged by the crafters of the Rome Statute and the Relationship Agreement. Consequently, both of the independent international organisations fail to fulfil their mutual objective which lowers the credibility of both the Court and the Security Council.

5.3 The way forward

There is a need to strengthen the relationship between the Court and the Security Council to ensure that both entities fulfil their mutual objectives of prosecuting serious international crimes and maintaining international peace and security pursuant to the provisions of the Rome Statute and the Charter respectively.

When referring situations, the Security Council should stress in the referral resolutions the importance of all states to cooperate with the Court. This will impose obligations on all states to collaborate with the Court for successful referrals. Also, the Security Council should be ready to help the Court to enforce cooperation requests by imposing sanctions on states that fail to fulfil these obligations.

The Court and the Security Council have to cooperate effectively in order to fulfil their roles of fighting the culture of impunity and maintaining peace and security. Nonetheless, the failure of the Security Council to cooperate with the Court in enforcing decisions after a referral or failing to conform to the conditions of deferral lowers the credibility and legitimacy of the Court.

The Security Council should employ soft and hard measures pursuant to 40 or 41 of the Charter to compel recalcitrant states to cooperate with the Court as a way of maintaining peace and security as it simultaneously enforces the Court's decisions.

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**A critical examination of the relationship between the
International Criminal Court and the United Nations
Security Council, in the light of referrals and deferrals**



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DECLARATION

This research dissertation is presented for the approval of the Senate in partial fulfillment of the requirements for the degree in Masters in Criminal Justice in approved courses and minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of a Masters in Law dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that the dissertation conforms to those regulations.

I hereby declare that I have acknowledged all sources of information that I have used for my thesis as required by the rules. To the best of my knowledge, I have not made any copies of others' work or present others' ideas without the proper citation.

Jullie Ingrid Lugulu

30.09.2014

ABSTRACT

The Rome Statute of the International Criminal Court (Rome Statute) provides for a close relationship between the International Criminal Court (Court) and the United Nations Security Council (Security Council). This relationship is demonstrated through Security Council exercise of referrals and deferrals. This dissertation discusses first, the Security Council referrals of the situations in Darfur, Sudan and Libya. Second, the Security Council passing of resolutions 1422(2002) and 1487(2003), which deferred the Court from commencing any investigations or prosecuting of any crimes that could have arisen as a result of the United Nations peacekeeping operations.

This dissertation argues that the Security Council has exercised referrals and deferrals contrary to the Rome Statute, the Charter of the United Nations (the Charter), and the Negotiated Relationship Agreement between the Court and the Security Council (Relationship Agreement) as envisaged by the drafters of the Rome Statute.

It concludes by stating that, the relationship between the Court and the Security Council is at a crossroad because the latter has failed to exercise referrals and deferrals in the manner provided for in the Rome Statute and as envisioned during the drafting of the Rome Statute, thereby equating the Court to the proverbial bark of a toothless dog.

CHAPTER ONE

OVERVIEW OF THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND THE SECURITY COUNCIL

1.0 Introduction

The authors of the Rome Statute envisioned a close relationship between the Court and the Security Council. This relationship is realised through the Negotiated Relationship Agreement between the International Criminal Court and the United Nations (Relationship Agreement). The Relationship Agreement not only sets out the terms on which the Court and Security Council should relate but also lays obligations on both entities to respect each other's mandates and to cooperate in order to achieve mutual obligations.¹ These mutual obligations are prosecuting serious international crimes which concern the international community and maintaining international peace and security.

The Court was established by the Rome Statute to determine individual criminal responsibility and punish perpetrators of egregious human rights violations. Article 1 of the Rome Statute states: 'A court is hereby established .It shall be a permanent institution and shall have power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute' Pursuant to article 5 of the Rome Statute, 'the Court has jurisdiction over genocide, crimes against humanity, war crimes and aggression.'²

On the other hand, the Security Council plays the role of maintaining international peace and security under Chapter VII of the Charter. Article 24 (1) of the Charter reads that:

In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.³

¹ Article 3 of the Relationship Agreement reads: 'The United Nations and the Court agree that, with a view to facilitating the effective discharge of their respective responsibilities, they shall cooperate closely ... and consult each other on matters of mutual interest pursuant to the provisions of the present Agreement and in conformity with the respective provisions of the Charter and the Statute.'

² Presently, the Court can only exercise jurisdiction over the crime of aggression after the Rome Statute is amended and the amendment is ratified by at least a third of the state parties.

³ United Nations 'Charter of the United Nations' available at <http://www.un.org/en/documents/charter/chapter5.shtml#article24>, accessed on 21 July 2014.

It is important to note that, while the Court has the role of prosecuting serious international crimes which shock the international community, the Security Council maintains international peace and security pursuant to Chapter VII powers of the Charter. Consequently, their primary roles overlap because the crimes that fall within the jurisdiction of the Court have the ability to threaten international peace and security.⁴ It is worth noting that, the prosecution of perpetrators who commit genocide, crimes against humanity, war crimes or acts of aggression deters potential criminals from committing serious international crimes which may destabilise international peace and security.⁵ In this regard, the Security Council and the Court require mutual collaboration for effective discharge of their roles.

The Rome Statute acknowledges the role that the Security Council plays in maintaining international peace and security through empowering it to exercise referrals and deferrals .

This chapter commences the discussion on the relationship between the Court and the Security Council in the context of referrals and deferrals. It does this by examining the provisions of the International Law Commission's Draft Statute of the International Criminal Court (Draft Statute of the Court), the Ad Hoc Committee of the Court and the reports of the Preparatory Committee on the Establishment of an International Criminal Court (Preparatory Committee). It evaluates the delegates' views on the relationship of the Court and Security Council at the Rome Conference as well as the provisions of the Rome Statute that regulate the said relationship.

This chapter lays a basis for discussions in chapters Three and Four which focuses on how the Security Council exercised referrals and deferrals and evaluates whether this exercise complied with how the drafters of the Rome Statute envisaged them and the provisions of the Rome Statute itself.

⁴ Paragraph 3 of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations.

⁵ L Condorelli and S Villalpando 'Relationship of the Court with the United Nations' in Antonio Cassese et al (eds) *The Rome Statute of the International Criminal Court : A Commentary* (2002) page 220.

To understand how the relationship between the Court and the Security Council is structured, it is necessary to evaluate the drafting history of the relationship between the Court and the Security Council.

1.1 The road to the establishment of the Court

The United Nations General Assembly (General Assembly) established the International Law Commission whose aim was to research on the viability of establishing an international organ to prosecute genocide.⁶ The International Law Commission negotiated the Draft Statute of the Court, which laid the basis for future discussions on the proposed Court. Additionally, the International Law Commission proposed the establishment of an International Criminal Court and of an Ad Hoc Committee on the Establishment of an International Criminal Court (Ad Hoc Committee) whose mandate was to review the substantive decisions of the Draft Statute of the Court.⁷ Following the report of the Ad Hoc Committee, the General Assembly established the Preparatory Committee to consolidate the drafts. Finally, the General Assembly held a United Nations' Conference of Plenipotentiaries on the Establishment of the International Criminal Court (Rome Conference), which was characterised by extensive discussions on the drafts of the establishment of the Court by states, and lead to the adoption of the Rome Statute.⁸

(a) International Law Commission, Ad Hoc Committee and Preparatory Committee

The International Law Commission envisaged a close relationship between the Court and the Security Council. Article 2 of the Draft Statute of the Court states that: '[t]he President with the approval of the state parties to this Statute ("State parties") may conclude an agreement establishing an appropriate relationship between the Court and the United Nations.'⁹

⁶ M Bassiouni 'The journey to a permanent International Criminal Court' in M Bassiouni (ed) *International Criminal Court: Compilation of United Nations Documents and Draft Statute before the Diplomatic Conference* (1998) page xvii.

⁷ Coalition for the International Criminal Court 'History of the ICC' available at <http://www.iccnw.org/?mod=icchistory> accessed on 20 July 2014 para 2.

⁸ M Bassiouni 'The journey to a permanent International Criminal Court' in M Bassiouni (ed) *International Criminal Court: Compilation of United Nations Documents and Draft Court Statute before the Diplomatic Conference* (1998) page xvii.

⁹ United Nations '1994 Draft Statute for an International Criminal Court' 2005 available at http://legal.un.org/InternationalLawCommission/texts/instruments/english/draft%20articles/7_4_1994.pdf, accessed on 20 July 2014 page 15.

The Preparatory Committee negotiated for a close relationship between the Court and the Security Council. Article 2 of the Preparatory Committee reiterated the provisions of the International Law Commission's Draft Statute of the Court, which sought a close relationship between the Court and the United Nations which was to be enforced through an agreement.¹⁰

Similarly, the Ad Hoc Committee considered the relationship as 'an essential condition of the universality and moral authority of the new institution and, as well as of its financial and administrative viability.'¹¹

Consequently, the Ad Hoc Committee viewed the relationship as the source of credibility and legitimacy for the Court and also as a way of facilitating the work of the Court. Thus, the Relationship Agreement was viewed as a way of promoting cooperation between the two institutions.

(b) The Rome Conference

The relationship between the Court and the Security Council was a contentious topic during the negotiation of the Rome Statute. At the initial stages of the negotiation, many delegates viewed the relationship between the Court and the Security Council as a threat and an impediment against the achievement of either the Court or the Security Council objectives.

A vast majority of delegates at the Rome Conference heavily debated upon the Security Council's proposed power of referrals and deferrals. The debate ranged between two opposing factions; one side opposed the relationship between the two on the basis that the Court was an independent judicial body which had to be insulated from political interference with regard to its functions. Conversely, the supporters of the Security Council argued that the jurisdiction of the Court would interfere with the primary role of the Security Council under the Charter of the United Nations.¹²

As the negotiations proceeded, the majority of the delegates supported a relationship between the Court and the Security Council but subject to conditions.

¹⁰ 'The Court shall be brought into relationship with the United Nations by an agreement to be approved by the State Parties to this Statute and concluded by the President on behalf of the Court.'

¹¹ M Bassiouni *The Legislative History of the International Criminal Court: an Article by Article Evolution of the Statute from 1994- 1998* (2005) page 17.

¹² H Olasolo *The Triggering Procedure of the International Criminal Court* (2005) page 17.

Canada, the United Kingdom of Great Britain, Northern Ireland, Lesotho, Belgium, Brazil and Denmark opted for a close relationship between the Court and the Security Council only if the latter respected the Court as an independent legal institution. A Canadian representative stated: ‘The Court would need to have a constructive relationship with the United Nations, while preserving its independence and impartiality. The Security Council could play a useful role in referring matters to the Court.’¹³

Additionally, China supported the need for a close relationship between the Court and the Security Council, as long as the provisions of the Rome Statute were not contrary with the provisions of the Charter.¹⁴ On the other hand, Australia supported a relationship between the two entities only if the Court acknowledged the Security Council’s primary role in maintaining peace and security. The Australian representative stated: ‘There must also be a workable relationship between the Court and the Security Council, recognizing the Council’s primacy in matters relating to international peace and security.’¹⁵ During the Rome Conference, the Rome Statute was adopted after ratification by 160 states.¹⁶ It emphasised the importance for close interactions between the Court and the Security Council.

(c) The relationship between the Rome Statute of the Court and the Security Council

Paragraph 8 of the preamble of the Rome Statute states as follows: ‘Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes’

¹³ United Nations ‘Diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court Rome .Summary records of the plenary meetings of the Committee of the Whole. A/CONF.183/13’ available at http://legal.un.org/Court/rome/proceedings/E/Rome%20Proceedings_v1_e.pdf, accessed on 10 July 2014, page 54.

¹⁴ United Nations ‘Diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court A/CONF.183/13’, page 100.

¹⁵ United Nations ‘Diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court. Summary records of the plenary meetings of the Committee of the Whole. A/CONF.183/13’ available at http://legal.un.org/Court/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf ,accessed on 12 July 2014, page 43.

¹⁶ International Criminal Court ‘What is the Rome Statute?’ available at http://www.Court-cpi.int/en_menus/Court/about%20the%20court/frequently%20asked%20questions/Pages/3.aspx, accessed on 10 July 2014, paragraph 1.

In addition, article 2 of the Rome Statute provides that: ‘The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of State Parties to this Statute and therefore concluded by the President of the Court on its behalf.’

The need for a close relationship between the Court and the Security Council was important for a number of reasons. First, in punishing perpetrators who commit serious international crimes of genocide, war crimes and crimes against humanity, the Court contributes towards maintaining international peace and security.¹⁷ Secondly, in referring a situation to the Court, the Security Council extends the jurisdiction of the Court over non-state parties to the Rome Statute.¹⁸ Thirdly, the Court relies on the Security Council for enforcement of its decisions.¹⁹ The Security Council promotes the credibility and legitimacy of the Court when it enforces its decisions under article 86 of the Rome Statute. This dissertation will discuss at length the referrals and deferrals under articles 13(b) and 16 of the Rome Statute of the Court in Chapters Three and Four.

The Rome Statute, therefore, lays out the foundation of the relationship between the Court and the Security Council through; paragraph 8 of the preamble and article 2 of the Rome Statute. Additionally, articles 13(b) and 16 of the Rome Statute further acknowledge the relationship between the two institutions while laying out the conditions and the nature of the relationship between the Court and the Security Council.

After the adoption of the Rome Statute, the President of the Assembly of Parties of the Court and the Secretary General of the Security Council signed the Relationship Agreement which laid out the purposes and obligations between the two entities.²⁰

¹⁷ L Condorelli and S Villalpando ‘Relationship of the Court with the United Nations’ in Antonio Cassese et al *The Rome Statute of the International Criminal Court; A Commentary* page 222.

¹⁸ Pursuant to article 12 of the Rome Statute, the Court can only exercise its jurisdiction over state parties or over non state parties when they declare to accept Court’s jurisdiction.

¹⁹ L Caflisch *Promoting justice human rights and conflict resolution through International Law* (2007) page 87.

²⁰ Coalition for the International Criminal Court ‘A universal court with global support ,cooperation agreements and enforcement ,cooperation with the United Nations’ available at <http://www.Courtnow.org/?mod=agreementsun> ,accessed on 14 July 2014 para 3.

(d) The Negotiated Relationship Agreement between the International Criminal Court and the United Nations

Presently, the Relationship Agreement provides for a close relationship between the Court and the United Nations. The purpose of the Relationship Agreement is to bring the two entities into a relationship pursuant to the Rome Statute and the Charter.²¹

The Relationship Agreement obliges the Court and the Security Council to cooperate closely to ensure the attainment of their objectives. The effect of the Relationship Agreement is that it ties the Security Council to the Court therefore, both independent organisations have the obligation to cooperate with each other to ensure the effective discharge of their functions pursuant to the provisions of the Relationship Agreement, the Charter and the Rome Statute.²²

1.2 Objectives of the study

The objectives of this study are to examine the interaction between the Court and the Security Council which is demonstrated through referrals and deferrals, then to evaluate whether the Security Council has exercised this relationship in accordance with the provisions of the Rome Statute as envisaged during the drafting of the Rome Statute.

1.3 Research questions

This study seeks to answer:

- (a) Whether the Security Council exercised referrals and deferrals in accordance with the provisions of the Rome Statute, the Charter and as envisaged by the drafters of the Rome Statute.
- (b) How the Security Council's exercise of the power of referrals and deferrals has affected the relationship between the latter and the Court.

1.4 Research Methodology

This research is conducted from primary and secondary resources. The primary sources will include the Rome Statute, the Charter, the Relationship Agreement, the International Law Commission's Draft Statute of the Court and the reports of the

²¹ Article 1 of the Relationship Agreement which reads that: 'The present Agreement, which is entered into by the United Nations and the International Criminal Court ... defines the terms on which the United Nations and the Court shall be brought into relationship.'

²² The Relationship Agreement Op cit (no) 1.

Preparatory Committee on the Establishment of an International Criminal Court. It also includes cases which arose from the situations in Darfur and Libya, while the secondary sources entail textbooks on international criminal law and the Security Council, journals will be drawn from the Court and United Nations websites.

1.5 Chapter outline

Chapter One introduces the relationship between the Court and the Security Council by examining how the crafters of the Rome Statute envisaged that relationship, and how legislation provides for the relationship at present.

Chapter Two provides an overview of how the Security Council's exercise of referrals and deferrals was envisaged during the making of the Rome Statute.

Chapter Three examines the Security Council power of referrals under article 13(b) of the Rome Statute. It examines how the Security Council exercised its power of referral in the situations in Darfur and Libya. It deals with the issues that arose from these referrals, such as the failure of states to cooperate with the Court for effective prosecution of President Omar Al-Bashir and Saif Al-Islam Gaddafi for crimes against humanity. Moreover, it looks at the failure of the Security Council in both situations to back up the referrals. Finally, the chapter examines the enforcement mechanisms available to the Court and whether the Security Council has enforced the Court's decisions.

Chapter Four, evaluates the deferral of investigations by the Security Council to the Court under article 16 of the Rome Statute. Generally, this chapter focuses on Security Council deferral resolutions 1422(2002) and 1487 (2003) which grants immunity to United Nations peacekeepers from non-state parties, thus excluding them from the jurisdiction of the Court. First, it begins by examining the Security Council deferral powers and the conditions to be fulfilled before the exercise of a deferral. It examines whether the Security Council resolutions on deferral were consistent with the provisions of the Rome Statute.

Chapter Five concludes by stating that the Security Council has exercised referrals and deferrals contrary to the provisions of the Relationship Agreement, the Charter, the Rome Statute and as envisaged by the crafters of the Rome Statute. Consequently, it argues that the relationship between the Court and the Security

Council is at a crossroad and proceeds to recommend for the two international organisations to improve their relationship.

CHAPTER TWO

REFERRALS AND DEFERRALS AS ENVISAGED BY THE INTERNATIONAL LAW COMMISSION AND THE PREPARATORY COMMITTEE

2.0 Introduction

As mentioned in Chapter One, the drafters of the Rome Statute envisioned a close relationship between the Court and the Security Council. This interaction was essential to facilitate mutual achievement of each of the independent organisations' objectives.

This chapter focuses on the provisions of the International Law Commission's Draft Statute of the Court and the reports of the Preparatory Committee on referrals and deferrals. It seeks to provide a background to how the drafters of the Rome Statute envisioned the Security Council's exercise of referrals and deferrals. It also evaluates the views of the delegates at the Rome Conference on the proposed powers of the Security Council to refer situations and defer prosecutions and investigations.

The chapter commences by laying out the provisions of referrals and deferrals as provided for by the International Law Commission and the Preparatory Committee. It argues that the crafters of the Rome Statute envisaged for the Security Council to refer situations within the jurisdiction of the Court to the latter and halt investigations and prosecutions as a way of maintaining international peace and security. However, the exercise of referrals and deferrals was subject to conditions laid out in the Draft Statute of the Court and the reports of Preparatory Committee. For instance, when exercising referrals, the Security Council has to adopt a resolution pursuant to the provisions of the Charter. Further, it has to refer a 'situation' as opposed to a 'matter'.

On the other hand, the Security Council can only exercise deferrals sparingly when the pursuit of justice interferes with the attainment of peace. Just like referrals, deferrals must be adopted through a formal Security Council resolution. For a deferral to be valid, there must be a threat to peace, a breach of peace or an act of aggression at the time of its adoption. Lastly, the Security Council can halt the Court's investigations or proceedings for only a year, but this is renewable,

depending on whether the prior conditions on which the deferral was first adopted still exist.

2.1 Referrals as envisaged by the International Law Commission and the Preparatory Committee

(a) The International Law Commission

Initially, a vast majority of states at the Rome Conference for the establishment of the Court were against the Security Council referral of situations for prosecution to the Court, unsurprisingly, many states objected strongly against the Security Council's power to defer Court's investigations and prosecutions. The delegates perceived referrals as an interference of the work of an independent judicial body.²³

However, the Draft Statute of the Court recognised the importance of a relationship between the Court and the Security Council. It recognised the essence of referring 'matters' to the Court article 23(1) of the Draft Statute of the Court read that: 'Notwithstanding article 21, the Court has jurisdiction in accordance with this Statute with respect to crimes referred to in article 20 as a consequence of the referral of a matter to the Court by the Security Council acting under chapter VII of the Charter of the United Nations.'

The Draft Statute of the Court therefore envisioned a close interaction between the two entities which was demonstrated through the referral of 'matters' by the Security Council to the Court. However, the Court had to seek permission from the Security Council before it exercised jurisdiction on matters or situations within its jurisdiction over which the Security Council was acting upon.²⁴ The only cure to the foreseen power imbalance between the Court and the Security Council was to acknowledge the role played the Security Council in maintaining peace and security and thus allow the latter to exercise referrals in a way that would not affect the independence of the Court.²⁵

²³ N White and R Cryer 'The Court and the Security Council; an uncomfortable relationship' in Jose Doria et al (eds) *The Legal Regime of the International Criminal Court. Essays in Honour of Igor Blishchenko* page 464.

²⁴ S Kim 'Maintaining the independence of the International Criminal Court: The legal and procedural implications of article 16 deferral request' (2011) 29 *Agenda Internacional* 175- 212.

²⁵ K Ambos 'Establishing an International Criminal Court and an International Criminal Code. Observations from an International Law Viewpoint' (1996) 7 *EIJIL* 519-544.

As the negotiations proceeded, delegates supported the Security Council referral of ‘situations’ as opposed to ‘matters’ to the Court in order to obviate the need to create more ad hoc tribunals for prosecution of egregious human rights violations. Sweden stated as follows: ‘The Security Council, under Chapter VII of the Charter of the United Nations, should indeed be able to refer to the Court situations in which crimes under the Court's jurisdiction appeared to have been committed but not punished. That would obviate the need to create new ad hoc tribunals.’²⁶

It is evident from this discussion that the International Law Commission envisaged a close interaction between the two international organisations through the referral of matters and the deferral of the Court’s judicial proceedings. The discussion on whether the Security Council was to refer ‘situations’ as opposed to ‘matters’ will be discussed in the subsequent subsection.

(b) The Preparatory Committee’s discussion on the referral of ‘matters’ or ‘situations’ by Security Council to the Court

The Preparatory Committee was not certain on whether the Security Council should refer matters or situations to the Court. Pursuant to article 10(1) of the Preparatory Committee:

[N]otwithstanding article 6, [7] [and [9], the court has jurisdiction in accordance with this statute with respect to crimes [referred to][specified] in articles [as a consequence of the referral of][on the basis of a [formal]decision to refer a [matter] [situation] in which one or more crimes appear to have been committed to [the Prosecutor of] the Court by the Security Council[acting under Chapter VII of the Charter of the United Nations] in accordance with the terms of such referral.]²⁷

The debate on whether the Security Council should refer ‘situations’ or ‘matters’ to the Court arose at this stage, as mentioned earlier, the draft statute of the Court allowed the Security Council to refer ‘matters’. Many delegates opposed for the Security Council to refer ‘matters’ to the Court as the term was considered to be

²⁶ United Nations ‘Diplomatic conference of Plenipotentiaries on the establishment of an International Criminal Court. Report of the Preparatory Committee on the establishment of an International Criminal Court A/CONF.183/SR’ available at http://legal.un.org/Court/rome/proceedings/E/Rome%20Proceedings_v3_e.pdf, accessed on 12 July 2014 page 100.

²⁷ United Nations ‘Diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court. Report of the Preparatory Committee on the establishment of an International Criminal Court A/CONF.183/2’ available at http://legal.un.org/Court/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf, accessed on 12 July 2014 page 26.

limited in scope and would subsequently affect the independence of the Court to prosecute, thus the term ‘situation’ was preferred as it was general in nature and would not interfere with the independence of the Court.²⁸

The Draft Statute of the Court, proposed for the Security Council to refer ‘matters’ and defer investigations and prosecutions from the Court. Slovenia,²⁹ Malawi,³⁰ Norway,³¹ Denmark,³² Italy,³³ Lesotho,³⁴ Bosnia and Herzegovina³⁵ and other delegates preferred for the Security Council to refer ‘situations’ to the Court as opposed to ‘matters’. It was agreed that the Security Council could only refer situations to the Court in order to respect the office of the Prosecutor of the Court and hence promote the independence of the Court.³⁶

However, other states opposed the exercise of referral by the Security Council to the Court. India expressed the lack of support for the Security Council referrals. The Indian representative argued that referring situations to the Court was unnecessary because the Court could exercise jurisdiction through the initiation by the Prosecutor and by state party referrals. India stated as follows; ‘[T]he Security Council had set up ad hoc tribunals because no appropriate judicial mechanism had existed to try such crimes at the time, but with the establishment of the Court, States parties would have the right to refer cases to it. The Council did not need to refer cases ...’³⁷

From the reports of the Preparatory Committee, it is evident that the spirit of the Rome Statute was to create a close interaction between the Security Council and the Court through the referral of situations which would maintain international peace and security as it preserved the independence of the Court.

²⁸ S Williams W Schabas ‘Article 13 exercise of jurisdiction’ in William A Schabas (ed) *A Commentary to the Rome Statute of an International Criminal Court* page 108.

²⁹ United Nations ‘Diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court. Summary records of the plenary meetings and of the meetings of the Committee of the Whole A/CONF.183/C.1/SR.10’ available at accessed on page 202.

³⁰ United Nations op cit (no27) at 206.

³¹ United Nations op cit (no27) at 208.

³² United Nations op cit (no27) at 212.

³³ United Nations op cit (no27) at 215.

³⁴ United Nations ‘Diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court .Summary records of the plenary meetings and of the meetings of the Committee of the Whole A/CONF.183/C.1/SR.11’ available at http://legal.un.org/Court/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf , accessed on 12 July 2014 page 307.

³⁵ United Nations op cit (no 27) at 316.

³⁶ Doria op cit (no23) at 457.

³⁷ Doria op cit (no23) at 464.

2.2 Deferrals as envisaged by the International Law Commission and the Preparatory Committee

(a) Deferrals under the International Law Commission

The Draft Statute of the Court formed a basis for future negotiations of the Security Council power of deferrals in the Ad Hoc Committee and the Preparatory Committee. Article 23 (3) of the Draft Statute of the Court provided as follows: ‘No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.’³⁸

Although the Draft Statute of the Court acknowledged the role of the Security Council under Chapter VII of the Charter, it also proposed a vertical relationship between the Court and the Security Council. Evidently, article 23(3) of the Draft Statute for the Court imposed certain obligations on the Court before the latter exercised jurisdiction which was that, the Court had to ascertain whether the Security Council was dealing with a situation which threatened international peace and security and then refrain from exercising jurisdiction in such a given situation.

Delegates opposed this provision because it meant that the Court had to seek the Security Council’s permission before it exercised jurisdiction upon a situation which the Security Council was dealing with. The Court’s request was subject to a veto by any of the permanent members of the Security Council.³⁹

Seeking permission from the Security Council before exercising jurisdiction on a situation would obstruct the Court from conducting judicial proceedings because, as already mentioned, the request was subject to a veto and the process of requesting would considerably delay the Court in fulfilling its objectives. Further, it would have made the Court to be dependent on the Security Council, this would affect the independence of the Court.

³⁸ United Nations ‘Draft Statute for an International Criminal Court’ available at http://legal.un.org/InternationalLawCommission/texts/instruments/english/draft%20articles/7_4_1994.pdf , accessed on 22 July 2014.

³⁹ United Nations ‘Diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court .Summary records of the plenary meetings and of the meetings of the Committee of the Whole’ available at http://legal.un.org/Court/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf , accessed on page 212.

(b) Deferrals under the Preparatory Committee

During the negotiation of the Security Council's power of deferrals, majority of the delegates were of the view that deferring the Court's investigations and prosecutions was unnecessary because it amounted to a political interference in the work of an independent legal institution.

Many states including, Nigeria, Malawi, Philippines amongst others, argued that allowing the Security Council to defer the Court's investigations or prosecutions would interfere with the independent functioning of the Court.⁴⁰ Other states opposed the Security Council's exercise of deferrals as there was fear of the permanent members vetoing situations that either arose from their countries or involved their nationals.⁴¹

India objected strongly to the involvement of the Security Council in the judicial proceedings of the Court, therefore it did not support referrals and deferrals of the Security Council to the Court. The Indian representative stated as follows:

'The power to block proceedings was even harder to accept. On the one hand, it was argued that the Court was to try crimes of the gravest magnitude, yet on the other, it was argued that the maintenance of international peace and security might require that those who committed such crimes should be permitted to escape justice, if the Council so decided.'⁴²

Singapore made a proposal which found middle ground between states who were against the Security Council's exercise of deferrals and those who strongly believed that the Security Council should be allowed to halt the investigations or prosecutions of the Court. The Singapore compromise made it harder for the Security Council to misuse the power of deferrals.⁴³ The proposal allowed the Security Council to halt investigations or prosecutions of the Court only after passing a formal resolution which was subject to a veto by any of the permanent members. The Singapore compromise read as follows:

⁴⁰ Lawyers Committee for Human Rights 'Establishing an International Criminal Court major unresolved issues on the draft statute' available at <http://www.iccnw.org/documents/2PrepCmtEstablishICCLCHR.pdf> , accessed on 12 July 2014 page 1.

⁴¹ P Kirsch, JT Holmes, M Johnson 'International tribunals and courts' in David Malone (ed) *The UN Security Council from the Cold War to the 21 century* (2004) page 290.

⁴² United Nations op cit (no39) page 183.

⁴³ R Cryer *Prosecuting International Crimes. Selectivity and the International Criminal Law regime* (2005) page 226.

'No investigation or prosecution may be commenced or proceeded with under this Statute where the Security Council has, acting under Chapter VII of the Charter of the United Nations, given a direction to that effect.'⁴⁴

On the other hand, Canada agreed with the Singaporean proposal and added a time limitation before the exercise of deferrals. Canada proposed that:

'No investigation or prosecution may be commenced or proceeded with under this statute for a period of twelve months where the Security Council has been acting under Chapter VII of the Charter of the United Nations, notified the Court to that effect. Notification that the Security Council is continuing to act may be renewed at twelve months intervals.'⁴⁵

A deferral was envisaged to be exercised in limited occasions when the attainment of justice would interfere with the maintenance of peace and security.⁴⁶ The Canadian proposal enabled the Court to proceed with legal proceedings after a year, if the Security Council did not request a renewal.

The time limit avoided the probable seizing of the situations by the Security Council over an undefined period of time which would have had the effect of delaying the Court from exercising its judicial activities.

A huge majority of states in the Rome Conference supported the Canadian and Singaporean proposals as the formal request by the Security Council to the Court acknowledged the independence of both of the entities. Further the limitation of time enabled the Court to proceed with its judicial activities after the lapse of twelve months in the absence of a formal request of an extension by the Security Council.

The Canadian proposal was widely supported by the delegates who agreed that it was necessary for the Security Council to temporarily suspend legal proceedings if they affected the maintenance of international peace and security.⁴⁷

Conclusion

⁴⁴United Nations 'Non paper /WG.3/No 16' 8 August 1997 available at <http://www.iccnw.org/documents/SingaporeSecurityCouncil.pdf>, accessed on 20 July 2014.

⁴⁵ United Nations 'Diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court. Summary records of the plenary meetings and the meetings of the Committee of the Whole A/CONF.183/ C.1/L 20' available at http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf, accessed on 12 July 2014 page 120.

⁴⁶ R Pitty 'Political constraints upon the International Criminal Court' in Ustina Dolgopol et al (eds) *The Challenge of Conflict: International Law responds* (2006) page 347.

⁴⁷ United Nations 'Diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court. Summary records of the plenary meetings A/CONF/183/SR.6.' available at http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf, accessed on 14 July 2014 page 200.

At the initial stages of the negotiations of the Rome Statute delegates were opposed to the involvement of the Security Council in the work of the Court. They perceived the involvement of the Security Council as an interference of a political organ in the work of an independent judicial body. However, as the negotiations of the Rome Statute proceeded, delegates agreed for the Security Council to refer situations and defer investigations and prosecutions subject to certain conditions.

Both referrals and deferrals were to be adopted under Chapter VII of the Charter through a formal Security Council resolution. The Security Council could only refer situations as opposed to matters to the Prosecutor of the Court. Finally, with regard to deferrals, the Security Council could only defer an investigation or prosecution for twelve months which was subject to a renewal through a Security Council resolution.

From the above discussion, it is evident that the founders of the Rome Statute were apprehensive about the interference of the Security Council in the work of the Court. However, mechanisms were put in place to ensure that the Security Council did not misuse the powers of referrals and deferrals. The subsequent chapters discuss whether the Security Council has complied with the said mechanism in the exercise of referrals and deferrals.

CHAPTER THREE

THE SECURITY COUNCIL EXERCISE OF REFERRALS IN DARFUR AND LIBYA

3.1 Introduction

The previous chapters have set out at length how the crafters of the Rome Statute envisaged a close interaction between the Court and the Security Council as a way of ensuring successful prosecution of serious crimes within the Court's jurisdiction and maintaining international peace and security.

This chapter focuses on the Security Council referral of the situations in Libya and Darfur to the Court and the issues arising from them. It discusses firstly, the failure of state parties and non-state parties to fulfil their arrest and surrender obligations arising from the Rome Statute and the Charter respectively; secondly, the failure of the Security Council to cooperate with the Court after the latter sent the Security Council a finding pursuant to article 87(7) of the Rome Statute. The finding informed the Security Council of two things, first the non-cooperation of state parties and secondly, that non-state parties had to comply with obligations emanating from the Security Council resolutions and the provisions of the Rome Statute.

It argues that for successful referrals, the Court requires cooperation from state parties, non-state parties and the Security Council. The failure of these entities to cooperate has made both the Darfur and Libyan referrals unsuccessful up to date. This chapter is divided into five parts. The first part briefly highlights how the Security Council can exercise jurisdiction, it then discusses the history of the conflicts in Darfur and Libya; the chapter proceeds to examine the state's obligations arising from the Security Council referrals. It studies the need for states to cooperate with the Court and the enforcement mechanisms available to the Court after the Security Council refers situations to the latter. Also, it examines whether the Security Council's has enforced the said mechanisms after referring the situations to the Court. Finally, the chapter concludes by stating that the inaction of the Security Council to respond to the states non-cooperation, strains the relationship between the two international organisations contrary to what the authors of the Rome Statute envisaged, the provisions of the Rome Statute and the Relationship Agreement.

Consequently, in the nine years after the Security Council referral of the situation in Darfur, President Omar Al-Bashir (Al-Bashir) has not been surrendered to the Court. Similarly, in the Libyan case, Saif Al-Islam Gaddafi (Al-Islam) has not been surrendered to the Court, in the five years after the Security Council referred the situation in Libya to the Court.

3.2 The Security Council exercise of referrals

The Prosecutor of the Court can exercise jurisdiction only in the following instances: first, through a state party referral, second, when the Security Council refers a situation to the Court acting under article 13(b) of the Rome Statute and third, when he or she acts in their own accord to initiate investigations.

Pursuant to article 13(b)⁴⁸ of the Rome Statute, the Security Council has the power to refer situations in which one or more crimes within the jurisdiction of the Court has been committed.

When the Security Council refers a situation to the Court, it has to comply with the conditions arising from the Rome Statute. First, the Security Council can only refer 'situations' in which one or more crimes have been committed according to the Rome Statute of the Court. As previously mentioned in Chapter Two of this thesis, the crafters of the Rome Statute preferred the term 'situation' to 'matter,' because the former would uphold the independence of the Court. Second, the Security Council must act under Chapter VII of the Charter when referring situations to the Court. Subsequently, the referral of a situation to the Court should be exercised after the Security Council has established the existence of a breach of peace or threat to peace.

The effects of Security Council referrals are that, firstly, it enhances international criminal justice through extending the jurisdiction of the Court over non-state parties. Therefore, the jurisdiction of the Court extends over all states irrespective of whether they are parties to the Rome Statute or not.⁴⁹ Secondly, the Security

⁴⁸ Accordingly, article 13(b) of provides: '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: (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; or'

⁴⁹ C Heyder 'The UN Security Council's referral of the crimes in Darfur to the International Criminal Court in light of U.S position to the Court: Implications for the International Criminal Court's functions and status '(2006) J.INT'L LAW 650.

Council's referrals to the Court increases the legitimacy of the Court as it obviates with the need to create ad hoc tribunals to investigate and prosecute the situations in Darfur and Libya.⁵⁰ Thirdly, Security Council's referrals can be viewed as a tool for maintaining international peace and security⁵¹ thus, the Darfur and Libya referrals can be viewed as measures of restoring international peace and security without the use of force as stipulated under articles 39 to 41 of the Charter.⁵²

So far and at the time of writing this thesis, the Security Council has referred only two situations to the Court, that is, the situations in Darfur⁵³ and Libya.⁵⁴

With regard to the situation in Darfur, Sudan the Prosecutor applied for a warrant of arrest against Al-Bashir. The Pre-Trial Chamber issued a warrant of arrest against him for crimes against humanity and war crimes.⁵⁵ The Pre Trial-Chamber issued a second warrant of arrest against Al-Bashir for committing genocide.⁵⁶ Presently, the war in Darfur between the Sudanese government and the rebel forces still persist.⁵⁷ Subsequently, nine years after the Security Council referral of the situation in Darfur to the Court, and five years after the Court issued a warrant of arrest against Al-Bashir, the suspect has not been prosecuted to the Court.

⁵⁰ S Garsky 'Strong, independent, and effective: The European Union's promotions of the International Criminal Court' in Astrid Boening et al (eds) *Global Power Europe Volume 2 Policies, Actions and Influence of the EU's External Relations* (2013) page 12.

⁵¹ L Condorelli and S Villapando 'Referral and deferral by the Security Council' in Antonio Cassese et al (eds) *The Rome Statute of the International Criminal Court: A commentary* (2002) page 630.

⁵² Article 39 of the Charter states 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, to maintain or restore international peace and security.' The Security Council referrals to the Court can be viewed as a non-use of force measure taken to maintain international peace and security.

⁵³ United Nations Security Council 'Resolution 1593(2005)' available at <http://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf> , accessed on 21 August 2014 paragraph 1.

⁵⁴ United Nations Security Council 'Resolution 1970(2011)' available at <http://www.icc-cpi.int/NR/rdonlyres/081A9013-B03D-4859-9D61-5D0B0F2F5EFA/0/1970Eng.pdf> , accessed on 21 August 2014 paragraph 1.

⁵⁵ International Criminal Court 'Pre Trial Chamber I Situation in Darfur Sudan, in the case of *The Prosecutor v Omar Hassan Ahmad Al Bashir* (Omar Al Bashir)' available at <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>, accessed on 21 August 2014 page 7.

⁵⁶ Ibid.

⁵⁷ Human Rights Watch 'Sudan: renewed attacks on civilians in Darfur. Activists detained, protester killed' available at <http://www.hrw.org/news/2014/03/21/sudan-renewed-attacks-civilians-darfur> , accessed on 25 August 2014.

In the Libyan situation, the Pre-Trial Chamber I issued warrants of arrest against Al-Islam, Muammar Gaddafi⁵⁸ and Abdullah Al-Senussi.⁵⁹ Al-Islam was charged with murder and persecution as crime against humanity⁶⁰ while Abdullah Al-Senussi was charged with murder and crimes against humanity. The Pre-Trial Chamber I decided that complementarity rendered the Court's proceedings against Abdullah Al-Senussi inadmissible because Libya was conducting proceedings against him for the same charges.⁶¹ On 21 May 2014, the Appeals Chamber ruled that the case against Al-Islam was admissible before the Court and reiterated Libya's obligations to surrender him.⁶² Therefore, Libya is yet to surrender Al-Islam to the Court.

3.3 Background to the conflicts

3.3.1 Darfur

The conflict in Darfur arose between the Sudanese government and rebel groups. The conflict resulted in many deaths, displacement of people and wanton destruction of property.⁶³ The United Nations Human Rights Experts called for the Security Council to take effective measures to end egregious human rights violations in Darfur region which were characterised by sexual violence, deaths, displacement of people and torture.⁶⁴

The Security Council requested the Secretary General to establish an International Commission of Inquiry to investigate the human rights violations and to determine if genocide had occurred. The Commission identified the perpetrators and proposed for the Security Council to refer the situation in Darfur to the

⁵⁸ Following his demise the Court terminated charges against him on 22 November 2011.

⁵⁹ International Criminal Court 'Warrant of arrest for Abdullah Al Senussi' <http://www.icc-cpi.int/iccdocs/doc/doc1099332.pdf>, accessed on 21 July 2014 page 3.

⁶⁰ International Criminal Court 'Pre Trial Chamber I Situation in Libyan Jamahiriya Warrant of arrest for Saif Al-Islam Gaddafi NO ICC-01/11 available at <http://www.icccpi.int/iccdocs/doc/doc1099329.pdf>, accessed on 21 July 2014 page 3.

⁶¹ International Criminal Court 'Pre Trial Chamber I Situation in Libyan Jamahiriya Warrant of arrest for Abdullah Al Senussi NO ICC-01/11' available at <http://www.icccpi.int/iccdocs/doc/doc1099332.pdf>, accessed on 21 July 2014 page 7.

⁶² International Criminal Court 'ICC Appeals Chamber confirms the admissibility before the ICC of the case against Saif -Al-Islam Gaddafi' available at http://www.icccpi.int/en_menus/icc/press%20and%20media/press%20releases/pages/pr1005.aspx accessed on 1 September 2014 para 1.

⁶³ American Non-Governmental Organizations Coalition for the International Criminal Court 'Darfur, Sudan investigation' available at <http://www.amicc.org/icc/darfur>, accessed on 25 April 2014 para 3.

⁶⁴ United Nations Press Release AFR/1126 HR/4822 'United Nations Human Rights experts call for urgent, effective action on Darfur Sudan' available at <http://www.un.org/News/Press/docs/2005/afr1126.doc.htm>, accessed on 25 August 2014 para 4.

Prosecutor of the Court.⁶⁵ Subsequently, the Security Council referred the situation to the Court.⁶⁶

3.3.2 Libya

On 18 February 2011, the Libyans protested against the Muammar Gaddafi's dictatorship.⁶⁷ Gaddafi responded by using excessive force against the Libyan people which resulted in many deaths, gross human rights violations and displacement of many people.⁶⁸

The Security Council, invoking its Chapter VII powers under the Charter, passed sanctions on Gaddafi and his family and referred the situation to the Court.⁶⁹ The Security Council imposed an arms embargo on Libya, a travel ban, freezing of the assets of Gaddafi, his family members and some military officers.

3.4 State obligations

3.4.1 Non-state party cooperation

International law does not impose any obligations to third states who have not ratified a treaty. Customary international law recognises that states can be bound to the terms of a treaty only if they expressly consent to it as provided in the Vienna Convention on the Law of Treaties.⁷⁰

Theoretically, as non-state parties to the Rome Statute, Sudan and Libya have no obligations arising from the Rome Statute.

Conversely, there are two ways in which non-state parties are obliged to cooperate with the Court: firstly, when the non-state party enters into an ad hoc arrangement with the Court under articles 12(3)⁷¹ and 87(5) (a) and (b) of the Rome

⁶⁵United Nations 'Report of the international commission of inquiry on Darfur to the United Nations Security General' available at http://www.un.org/news/dh/sudan/com_inq_darfur.pdf, accessed on 21 August 2014 page 149.

⁶⁶United Nations Security Council op cit (no53).

⁶⁷CNN wire staff 'A timeline of the conflict in Libya August 24 2011' available at <http://edition.cnn.com/2011/WORLD/africa/08/18/libya.timeline/> accessed on 30 July 2014 para 4.

⁶⁸The American Non-Governmental Organization Coalition for the International Criminal Court 'The UN Security Council referral of the situation in Libya to the International Criminal Court' available at http://www.amicc.org/docs/Libya_Referral.pdf, accessed on 30 July 2014 para 3.

⁶⁹United Nations Security Council 'In swift decisive action, Security Council Imposes tough measures on Libyan regime' adopting resolution 1970 in the wake of crackdown protestors available at <http://www.un.org/News/Press/docs/2011/sc10187.doc.htm>, accessed on 30 July 2014 para 9.

⁷⁰Article 34 of the Vienna Convention on the Law of Treaties, 'A treaty does not create obligations for a third state without its consent.'

⁷¹'If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court

Statute.⁷² Secondly, non-state parties have an obligation to cooperate with the Court emanating from the Security Council resolutions as members of the United Nations. In referring the situations in Darfur and Libya, the referrals obliged both non-state parties to cooperate with the Court because they are members of the United Nations.

Paragraph 2 of the Security Council 1593(2005) resolution that referred the situation in Darfur reads:

‘Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;’⁷³

Similarly, the Security Council resolution in the situation in Libya reiterated the same provisions⁷⁴, thereby making it compulsory for the two countries to comply with the Security Council directions.

Cooperation obliges states to act in good faith with a view to fulfilling international obligations.⁷⁵ Both Sudan and Libya have obligations to cooperate with the Court and these obligations stem from their membership to the United Nations. State cooperation, especially from Sudan, is essential in maintaining international peace and security.⁷⁶

As high contracting parties to the Geneva Conventions, Sudan and Libya are obliged to act in accordance with the provisions of the Charter in cases of egregious

with respect to the crime in question .The accepting State shall cooperate with the Court without delay or exception in accordance with Part 9.’

⁷² ‘5 (a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

(b) Where a State not party to Statute, which has entered into an ad hoc arrangement or any other arrangement with the Court fails, to cooperate with requests pursuant to any such arrangement or agreement, the Court may also inform the Assembly of Parties or where the Security Council referred the matter to the Court, the Security Council.’

⁷³ United Nations Security Council op cit (no 53) para 2.

⁷⁴ United Nations Security Council op cit (no 54) para 2.

⁷⁵ A Ciampi ‘The obligation to cooperate’ in Antonio Cassese et al (eds) *The Rome Statute of the International Criminal Court; A commentary* page 1616.

⁷⁶ Article 25 of the Charter of the United Nations states that; ‘The members of the United Nations agree to accept and carry out decisions of the Security Council in accordance with the present Charter.’ see also D Kiel ‘Article 25’ in B Sirma H Mosier et al (eds) *The Charter of the United Nations ;A Commentary* (1995) page 406.

human rights violations.⁷⁷ The crimes within the jurisdiction of the Court are similar to those that state parties to the Geneva Conventions agreed to respect.⁷⁸

Therefore, the Security Council decision requiring non-state parties to cooperate with the Court blurs the distinction between state and non-state party obligations because all states are obligated to cooperate with the Court.⁷⁹

3.4.2 International cooperation with the Court

In identifying issues related to the prosecution by international criminal tribunals. Antonio Cassese likens the International Criminal Court of Yugoslavia to ‘a giant without arms and legs — it needs artificial limbs to walk and work.’⁸⁰ Similarly, the Court requires cooperation from the Security Council, state parties, non-state parties and international organisations in order to effectively fulfil its functions, otherwise the Court’s decisions are likened to the proverbial harmless toothless watchdog. The Court requires the Security Council to enforce its decisions when states fail to cooperate with it with respect to referrals.

Lack of cooperation from state and non-state parties hinders the Court from prosecuting serious crimes. The failure of the Security Council to enforce its decisions makes it more difficult for the Court to try accused persons or even avail them before the Court because it requires and relies on the cooperation of the state parties and other entities in locating indicted persons, arresting, detaining and surrendering of the accused persons to the Court for trial.

State parties to the Court are required to provide full cooperation at all times when so requested by the Court during investigations and prosecutions unless the information so requested may affect the states national security.⁸¹

⁷⁷ Article 89 of Protocol I Additional to the Geneva Conventions relating to the protection of victims of international armed conflicts states that; ‘In situations of serious violations of the Conventions or of this Protocol the High Contracting Parties undertake to act, jointly or individually, in cooperation with the United Nations and in conformity with the United Nations Charter.’

⁷⁸ G Nesi ‘The obligation to cooperate with the International Criminal Court and state parties not party to the Statute’ in Mauro Politi et al (eds) *The Rome Statute of the International Criminal Court; A Challenge to Impunity* (2001) page 28.

⁷⁹ L Condorelli and A Ciampi ‘Comments on the Security Council referral of the situation in Darfur to the ICC’ 3 *Journal of International Criminal Justice* (2005) page 594.

⁸⁰ A Cassese ‘On the current trend towards criminal prosecution and punishment of breaches of international humanitarian law’ 9 *EJIL* (1998).

⁸¹ P Machochoko ‘Judicial Cooperation and judicial assistance’ in Roy S Lee *The International Criminal Court, the Making of the Rome Statute, Issues, Negotiations, Results* (1999) page 32.

The obligation of state parties to cooperate with the Court stems from article 86 of the Rome Statute which states, ‘State Parties shall ... cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.’

3.4.2.1 The travelling tyrant

After the issuance of the arrest warrant on Al-Bashir, the Registrar of the Court made cooperation requests and submitted them to all state parties to arrest and surrender him if he visited their territories.⁸² Nonetheless, Al-Bashir travelled to territories of state parties of the Rome Statute; he visited Chad,⁸³ Malawi,⁸⁴ Djibouti,⁸⁵ Nigeria,⁸⁶ Qatar,⁸⁷ Egypt,⁸⁸ China,⁸⁹ Ethiopia⁹⁰ and Kenya.⁹¹ None of the countries complied with the provisions of the Security Council resolution 1593(2003) or with the cooperation requests to execute outstanding arrest warrants of Al-Bashir.

As mentioned earlier, in 3.4 of this chapter, both state parties and non-state parties to the Court have an obligation to cooperate with it. These obligations arise from the Rome Statute with regard to state parties and from the Charter with regard to non-state parties. The Pre-Trial Chamber II stated as follows in that regard:

...[O]nly States Parties to the Statute are under an obligation to cooperate with the Court. ... [N]on-States Parties may decide to cooperate with the Court on an ad hoc basis... . This

⁸² International Criminal Court ‘Report of the registry on the decision on the prosecution’s urgent notification of travel in the case of *The Prosecutor v. Omar Al-Bashir* ICC-02/05-01/09’ available at <http://www.icc-cpi.int/iccdocs/doc/doc1803812.pdf>, accessed on 27 July 2014 para 1.

⁸³ Xan Rice ‘Chad refuses to arrest Omar Al-Bashir over genocide charges’ *The Guardian* 22 July 2010 available at <http://www.theguardian.com/world/2010/jul/22/chad-refuses-arrest-omar-al-bashir>, accessed on 21 July 2014 para 3.

⁸⁴ Human Rights Watch ‘Malawi; arrest Sudanese President or bar his entry’ 13 October 2011 available at <http://www.hrw.org/news/2011/10/13/malawi-arrest-sudanese-president-al-bashir-or-bar-his-entry>, accessed on 21 August 2014 para 4.

⁸⁵ Voice of America ‘Sudan’s Bashir attends Djibouti’s president inauguration’ available at <http://www.theguardian.com/world/2010/jul/22/chad-refuses-arrest-omar-al-bashir>, accessed on 21 November 2013 para 2.

⁸⁶ Marlise Simons ‘Sudan’s President one step ahead of a suit and a warrant’ *The New York Times* available at <http://www.nytimes.com/2013/07/17/world/africa/sudans-president-one-step-ahead-of-a-suit-and-a-warrant.html>, 17 July 2013 accessed on 27 July 2014.

⁸⁷ Bashir Watch ‘Omar Al-Bashir travels to Qatar’ available at <http://bashirwatch.org/omar-al-bashir-travels-qatar/>, accessed on 21 July 2014 para 1.

⁸⁸ CNN wire staff ‘Sudan’s wanted President visits Egypt’ available at <http://edition.cnn.com/2012/09/16/world/africa/egypt-sudan/>, accessed on 21 July 2014 para 4.

⁸⁹ Malcolm Moore ‘Sudan’s al-Bashir given red carpet treatment by China’ *The Telegraph* available at <http://www.telegraph.co.uk/news/worldnews/asia/china/8605319/Sudans-al-Bashir-given-red-carpet-treatment-by-China.html>, accessed on 22 July 2014 para 4.

⁹⁰ Ethiopian Review Sudan’s ‘President Al Bashir taunts ICC while visiting Ethiopia’ available at <http://www.ethiopianreview.com/index/13636>, accessed on 21 July 2014 para 2.

⁹¹ BBC News Africa ‘Court worry at Omar Al Bashir’s Kenya trip’ 28 August 2010 available at <http://www.bbc.co.uk/news/world-africa-11117662>, accessed on 21 August 2014 para 2.

principle may be altered by the SC which may, by means of a resolution adopted under Chapter VII of the UN Charter, creates an obligation to cooperate with the Court on those UN Member States which are not parties to the Statute. ... [T]he obligation to cooperate stems directly from the UN Charter.⁹²

Chad, Malawi, Djibouti, Ethiopia, Kenya and Nigeria are state parties to the Rome Statute of the Court. They have obligation under article 86⁹³ of the Rome Statute to cooperate with the Court. It has been argued that article 25 of the Charter does away with all the immunities that arise from customary international law and subsequently, all states are mandated to cooperate with the Court pursuant to the Rome Statute.⁹⁴

Likewise, as members of the United Nations, Sudan, Libya, China, Qatar, Ethiopia and Egypt have obligations arising from the Charter, therefore they should have cooperated with the Court pursuant to the provisions of Security Council resolution but did not. Subsequently, the Court sent cooperation requests to Chad,⁹⁵ Malawi,⁹⁶ Nigeria,⁹⁷ the Democratic Republic of Congo,⁹⁸ Djibouti and Kenya before Al-Bashir visited these countries. These states failed to cooperate with the Court; the latter made decisions with regard to Sudan⁹⁹ and Libya's¹⁰⁰ failure to

⁹² International Criminal Court 'Public decision regarding Omar Al-Bashir's potential travel to the federal republic of Ethiopia and the kingdom of Saudi Arabia No. ICC-02/05-01/09' available at <http://www.icc-cpi.int/iccdocs/doc/doc1662849.pdf>, accessed on 21 July 2014 para 2.

⁹³ 'State Parties shall, in accordance with the provisions of this Statute, cooperate fully in its investigation and prosecution of crimes within the jurisdiction of the Court.'

⁹⁴ D Akande 'The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities' (2009)7 JICJ 333-352.

⁹⁵ International Criminal Court 'Pre Trial Chamber I situation in Darfur, Sudan in the case of *The Prosecutor V. Omar Hassan Ahmad Al Bashir* decision pursuant to article 87(7) of the Rome Statute on the refusal of the republic of Chad to comply with the cooperation requests issued by the court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir' available at <http://www.icc-cpi.int/iccdocs/doc/doc1384955.pdf>, accessed on 21 July 2014 para 17.

⁹⁶ International Criminal Court Pre Trial Chamber I 'Situation in Darfur, Sudan in the case of *The Prosecutor V. Omar Hassan Ahmad Al Bashir* decision pursuant to article 87(7) of the Rome Statute on the failure by the republic of Malawi to comply with the cooperation requests issued by the court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir' available at <http://www.icc-cpi.int/iccdocs/doc/doc1287184.pdf>, accessed on 21 July 2014 para 17.

⁹⁷ International Criminal Court Pre Trial Chamber I 'Situation in Darfur, Sudan in the case of *The Prosecutor V. Omar Hassan Ahmad Al Bashir* decision pursuant to article 87(7) of the Rome Statute on the failure by the republic of Malawi to comply with the cooperation requests issued by the court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir' <http://www.icc-cpi.int/iccdocs/doc/doc1619414.pdf>, accessed on 21 July 2014 para 16.

⁹⁸ International Criminal Court Pre Trial Chamber I 'Situation in Darfur, Sudan in the case of *The Prosecutor V. Omar Hassan Ahmad Al Bashir* decision pursuant to article 87(7) of the Rome Statute on the failure by the republic of Congo to comply with the cooperation requests issued by the court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir' available at <http://www.icc-cpi.int/iccdocs/doc/doc1759849.pdf>, accessed on 21 July 2014 para 12.

⁹⁹ International Criminal Court 'Situation in Darfur, Sudan in the case of the *Prosecutor V. Ahmad Muhammad Harun* ("Ahmad Harun") and *Ali Muhammad Ali Abd-Al-Rahman* ("Ali Kushayb") decision informing the United Nations Security Council about the lack of cooperation by the Republic

cooperate and sent the same to the Security Council. The Court required Libya to surrender Al-Islam for investigation and prosecution of crimes against humanity.¹⁰¹

The Security Council referrals of the situations in both Sudan and Libya to the Court demonstrate the Court's heavy reliance on state and non-state parties for cooperation failure of which it cannot exercise jurisdiction over the most serious international crimes. This non-cooperation undermines the Court's work and makes it nearly impossible to achieve justice for victims and the public at large in the affected countries. Furthermore, it causes the budget of the Court to shoot up as in the cases where the witnesses and or victims in these cases are in protection, they still need maintenance, financial and otherwise from the Court as they await the surrender or arrest of the accused persons to the Court. Consequently, the Court has not prosecuted either Al-Bashir or Al-Islam for the alleged crimes against humanity.

3.5 Enforcement of the Court's decisions

The Court has two ways of its enforcing decisions when states fail to cooperate with it in arresting and surrendering indicted persons to the Court for prosecution. First, the Court makes a finding on the failure of a state to cooperate and sends the finding either to the Assembly of Parties or to the Security Council. However, the enforcement mechanisms available to the Assembly of Parties are unclear. Article 112(2) enables the Assembly of Parties to deal with all forms of non-cooperation which include: condemning the wrongful act, demanding compliance or referring the matter to the Security Council.¹⁰² When states fail to cooperate in cases of referrals, the Court must make a finding of non-cooperation and send it to the Security Council as stated in article 87(7) of the Rome Statute.¹⁰³

of the Sudan ICC-02/05-01/07' available at <http://www.icc-cpi.int/iccdocs/doc/doc868180.pdf> accessed on 28 July 2014 page 6.

¹⁰⁰ International Criminal Court 'Decision Situation In Libya In The Case Of *The Prosecutor V. Saif Al-Islam Gaddafi And Abdullah Al-Senusi* Public Decision on matters related to Libya's duties to cooperate with the Court ICC-01/1-01/1' <http://www.icc-cpi.int/iccdocs/doc/doc1794255.pdf> , accessed on 28 July 2014 page 5.

¹⁰¹ International Criminal Court 'Decision Situation In Libya In The Case Of *The Prosecutor V. Saif Al-Islam Gaddafi And Abdullah Al-Senusi* Public Decision on matters related to Libya's duties to cooperate with the Court ICC-01/1-01/1' <http://www.icc-cpi.int/iccdocs/doc/doc1794255.pdf> , accessed on 28 July 2014 page 2.

¹⁰² Karin N Calvo-Goller *The Trial Proceedings of the International Criminal Court. ICTY and ICTR precedents* (2006) page 216.

¹⁰³ Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this statute, thereby preventing the Court from exercising its functions and powers under

Conversely, the Court does not have the enforcement powers against non-state parties to the Rome Statute. When the Security Council refers a situation involving a non-state party to the Court, the latter has an obligation to fully cooperate with the Court. However, when the non-state party fails to cooperate with the Court, the Security Council should apply its enforcement powers under Chapter VII of the Charter to enforce compliance.¹⁰⁴

Since the Court does not have an enforcement mechanism, it relies solely on cooperation of states for effective investigation and prosecution of serious international crimes within its jurisdiction. The failure by states to cooperate with the Court frustrates its work as it is unable to proceed with its judicial proceedings, thereby delaying justice to affected people.¹⁰⁵

After the Security Council refers a situation to the Court, the former has an obligation to enforce compliance with state and non-state parties' obligations in the event of non-cooperation.¹⁰⁶ The Security Council can invoke its powers pursuant to Chapter VII of the Charter to compel states to cooperate with the Charter as a way of restoring peace and security.

3.5.1 What can the Security Council do to back up its referrals?

The Security Council has a range of measures it can implement to do away with insecurity, it can employ hard or soft measures to achieve its mandate of maintaining peace and security. The soft tools encompass the use of mediation measures while hard tools means invoking Chapter VII powers under the Charter, referring situations to the Court or passing resolutions to start ad hoc tribunals and the use of force.¹⁰⁷ For instance, in the situation in Darfur, the United Nations Secretary General Special

this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of Parties or, where the Security Council referred the matter to the Court, to the Security Council.

¹⁰⁴ R Aloisi 'A tale of two institutions: The United Nations Security Council and the International Criminal Court' in Dawn L Rothe (et al) eds *The Realities of International Criminal Justice* (2013) page 151.

¹⁰⁵ Machteld Boot *Genocide, Crimes against Humanity and War Crimes Nullum Crimen Sine Lege and the subject matter jurisdiction of the International Criminal Court* (2002) page 45.

¹⁰⁶ Aloisi op cit (no104) at 151.

¹⁰⁷ N Vercken *Protection of Civilians in 2010, Facts, Figures and the UN Security Council's response* Oxfam (2011) page 27.

Envoy for Darfur adopted peace settlement mechanisms which aimed to trigger peace negotiations and improve the humanitarian situation in Darfur.¹⁰⁸

As aforementioned, under Chapter VII of the Charter, the Security Council has the function of determining breaches of peace, threats to peace and acts of aggression and decide or take measures under articles 41 or 42 of the Charter in the maintenance of peace and security.¹⁰⁹ When the Security Council refers a situation to the Court, the latter has an obligation to ensure that states cooperate with the Court. Subsequently, when states fail to cooperate with the Court, Security Council can invoke its Chapter VII powers to ensure compliance. These powers are found under articles 41 and 42 of the Charter. Article 41 notes 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. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

The Security Council has a range of options to exercise as enforcement mechanism when it encounters non-cooperation from states: it can apply article 42¹¹⁰ measures which involve force before it employs non-force measures under article 41, if it foresees that article 41 measures may be inadequate.¹¹¹

The Security Council employed sanctions under article 41 of the Charter with regard to both the referrals in Sudan and Libya. The Security Council ordered the government of Sudan to disarm Janjaweed militias and prosecute them for the human rights violations committed. It proceeded to threaten the use of article 41 of the Charter measures in case of non-compliance.¹¹² The Sudanese government did not comply with Security Council demands. Subsequently, pursuant to Security Council

¹⁰⁸United Nations ‘The United Nations and Darfur’ available at http://www.un.org/news/dh/infocus/sudan/fact_sheet.pdf , accessed on 14 July 2014 para 10.

¹⁰⁹ Article 39 of the Charter.

¹¹⁰ ‘Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.’

¹¹¹D Sarooshi ‘*The United Nations and the Development of Collective Security: The delegation by the UN Security Council of its Chapter Powers*’ (2000) page 102.

¹¹² United Nations Security Council ‘S/RES/1556 Resolution 1556 (2004)’ (2004) available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/446/02/PDF/N0444602.pdf?OpenElement> , accessed on 28 July 2014 para 6.

resolution 1556 (2004), the Sudan Sanctions Committee of the Security Council adopted sanctions against the Janjaweed leaders¹¹³. These included: travel bans, asset freeze and an arms embargo.¹¹⁴ In the referral of the situation in Libya, the Security Council adopted a travel ban, arms embargo on Libya and freezing of assets on Muammar Gaddafi, his family members and some military officers.¹¹⁵

It is important to note that, the Security Council adopted these sanctions on Sudan and Libya before it referred the situations to the Court. It has not adopted any enforcement mechanism after the referral of the situations in both Darfur and Libya.

3.6 The inaction of the Security Council

The Security Council has not adopted any enforcement mechanisms after the referral of the situations in Darfur and Libya to state parties and non-state parties to facilitate cooperation with the Court. The situation in Darfur has been very challenging to the Court as Al-Bashir has made a mockery of the latter and the Security Council by travelling to territories of state and non-state parties including to China, which is a permanent member of the Security Council.

The Security Council, the very body that referred the Sudan situation to the ICC has not stood firmly behind the arrest warrant against Bashir, it could have increased the cost of doing business with Bashir by imposing sanctions on fugitive Sudanese officials and governments that flout the arrest warrant. The Security Council may deserve credit for making the referral, but it appears uninterested in giving the court the kind of support it needs.¹¹⁶

The Prosecutor of the Court, in her report to the Security Council, urged the latter and state parties to take action with regard to the arrest of Al-Bashir, stating as follows:

‘The time has come for this Council and States parties to seriously devise strategies for arresting those alleged to be responsible for these crimes. It was a serious indictment on both the Council and those parties that President Omar Hassan al-Bashir and others had been

¹¹³ These were, Gafar Mohammed, Jibril Abdulkarim, Adam Yacub and Musa Hilal.

¹¹⁴ United Nations Security Council ‘S/RES/1591 Resolution 1591 (2005)’ available at <http://www.treasury.gov/resource-center/sanctions/Documents/1591.pdf>, accessed on 28 July 2014 para 6.

¹¹⁵ United Nations Security Council ‘In swift decisive action, Security Council Imposes tough measures on Libyan regime’ adopting resolution 1970 in the wake of crackdown protestors available at <http://www.un.org/News/Press/docs/2011/sc10187.doc.htm>, accessed on 30 July 2014 para 3.

¹¹⁶ R Smith C Mallory ‘The European system of human systems’ in G Zyberi (ed) *An Institutional Approach to the Responsibility to Protect. International Courts and Tribunals* Cambridge University Press (2013) page 427.

able to travel without fear of arrest. The Council's silence, even when notified of failures by States to comply with their obligations, only added insult to Darfur's victims.'¹¹⁷

The Prosecutor commended the Libyan government and non-state parties on the cooperation it had previously demonstrated but emphasised the need for the government of Libya to fulfil its obligations of surrendering Al-Islam to the Court.¹¹⁸

Evidently, the Security Council has failed to provide support to the Court through investigations and prosecutions after the referral of the situations of in Darfur and Libya. Consequently, Al Bashir has travelled extensively. The failure by the Security Council in providing enforcement mechanisms on its referrals to the Court has been an impediment to the achievement of international criminal justice and has lowered the credibility of the Court.¹¹⁹

Even though the Prosecutor has sent periodic reports to the Security Council, the latter has not supported the investigations and prosecutions or addressed the difficulties faced by the Court after non-cooperation from state and non-state parties. This does not promote the relationship between the Court and the Security Council contrary to intention of the drafters of the Rome Statute, the Rome Statute and the Relationship Agreement. It also frustrates the work of the Court.

Due to the failure of the Security Council to compel states to cooperate with the Court, its referrals weakened the enforcement mechanism of the Court and propelled the unsuccessful referrals as it lowered the credibility and lead to the unsuccessful referrals.¹²⁰

The failure of the Security Council to support the Court contravenes the relationship between the two international organisations as envisaged by the International Law Commission, Ad Hoc Committee and the Preparatory Committee. It also fails to fulfil the obligations of the Security Council under the Relationship

¹¹⁷ United Nations Security Council 'International Criminal Court prosecutor tells Security Council violence in Darfur will not end without robust determination to apprehend perpetrators' SC/11209 available at <http://www.un.org/News/Press/docs/2013/sc11209.doc.htm> , accessed on 28 July 2014 para 2.

¹¹⁸ International Criminal Court 'Seventh Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1970 (2011)' available at <http://www.icc-cpi.int/iccdocs/otp/UNSC-Report-Libya-May-2014-ENG.PDF> , accessed on 28 July 2014 para 10.

¹¹⁹ Aloisi op cit (no104) at 151.

¹²⁰ Heyder op cit (no49) at 650.

Agreement which requires the Court and the Security Council to have a close relationship for mutual attainment of their objectives.

Conclusion

The referral of the situation in Darfur and Libya was an opportunity to prosecute those suspected of having the highest individual criminal responsibility, to seek redress and justice for the victims in the affected areas and to promote the advancement of international criminal justice. The failure of the Security Council to provide enforcement measures under Chapter VII of the Charter has lowered the credibility of both the Court and the Security Council as the perpetrators of the egregious human rights are still at large and the situation in Darfur continues to be a threat to international peace and security.

On the other hand, Libya has not yet surrendered Al-Islam to the Court at the time of writing this dissertation, therefore the Court cannot exercise jurisdiction him for the alleged crimes.

For successful referral of situations to the Court, the Security Council requires cooperation from states, but when states fail to collaborate with the Court, the Security Council has an obligation to compel states to cooperate with the Court. In doing, so the Security Council will kill two birds with one stone, as it will fulfil the obligations set out in the Relationship Agreement and the provisions of the Rome Statute and maintain international peace and security. Therefore, the Court can prosecute Al-Bashir and Al-Islam only if state parties comply with their obligations arising from the Rome Statute and the Charter.

As seen in the situations in Darfur and Libya, the Court relies heavily on states and the Security Council to enforce its decisions, failure to which renders the Court unable to exercise its jurisdiction. The Court should devise enforcement mechanisms to support its decisions. This should include the suspension of recalcitrant states who have signed the Rome Statute as a way of urging all states to cooperate with the Court.¹²¹

¹²¹ G Barnes 'The International Criminal Court's ineffective enforcement mechanism: the indictment of president Omar Al Bashir 39 (2011) Fordham International Law Journal 34 page 1618.

CHAPTER FOUR

THE SECURITY COUNCIL RESOLUTIONS 1422(2002) AND 1487(2003)

4.1 Introduction

As mentioned in Chapter Three of this thesis, the relationship between the Court and the Security Council is demonstrated through the exercise of referrals and deferrals. While the Security Council referral of situations to the Court can be viewed as the maintenance of peace through the achievement of justice, deferral could be perceived as postponing the wheels of justice to attain peace and security.¹²²

Chapters One and Two of this thesis commenced the discussion on deferrals by showing how the majority of delegates were opposed to the Security Council's proposed exercise of deferrals due to the fear of politicised prosecutions. However, Singapore and Canada proposed for the Security Council to exercise deferrals pursuant to Chapter VII of the Charter and to defer only for a limited period of time.

This chapter argues that in passing deferral resolutions 1422(2002) and 1487(2003) the Security Council acted contrary to the provisions of the Rome Statute and the Charter. These deferral resolutions defy the Rome Statute provisions which lay out the conditions to be fulfilled before exercising deferrals and the irrelevance of official capacity. In addition, these resolutions did not comply with Chapter VII powers of the Charter.

This chapter is divided into four parts. The first part briefly discusses the Security Council's powers of deferrals. The second part examines the Security Council's deferral resolutions 1422(2002) and 1487(2003). Thereafter, it evaluates the validity of the aforementioned resolutions. Then, it highlights the effect of the deferral resolutions and the possible remedies against the Security Council deferral resolutions. The chapter concludes by stating that the Security Council deferral resolutions put the relationship between the Court and the Security Council at a crossroad contrary to the intention of the founders of the Rome Statute.

¹²² K Obura 'The Security Council's power to defer ICC's cases under article 16 of the Rome Statute' (2011) 4 *JAIL* 574.

4.2 The Security Council's power of deferral

The Rome Statute has not defined what a deferral means; generally, it means '[t]he act of delaying or postponing something.'¹²³ With regard to the Rome Statute, deferral refers to the act of the Security Council delaying or postponing investigations or prosecutions of the Court for a period of 12 months.¹²⁴

In allowing the Security Council to defer investigations or prosecutions of the Court, the latter recognises the role that the Security Council plays in the maintenance of peace and security under the Charter.

Thus article 16 of the Rome Statute lays out the conditions to be adhered to before the Security Council defers Court's judicial proceedings.

4.2.1 Conditions to be fulfilled by the Security Council before the exercise of deferrals.

The Security Council has to comply with certain prerequisites set forth in article 16 of the Rome Statute and in Chapter VII of the Charter of United Nations before it exercises a deferral. First, the power to defer investigations and prosecutions has to comply with the provisions set out in Chapter VII of the Charter which lays out the action that the Security Council should take in response to threats to peace, breach of the peace and acts of aggression. Article 39 of the Charter notes: '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 of the Charter, to maintain or restore international peace and security.' Therefore, before the Security Council exercises deferrals it has to establish the existence of a threat to peace, breach of the peace or an act of aggression.

Second, article 16 of the Rome Statute provides that the deferral can only last for 12 months.¹²⁵ This means that the suspension should not be for an indefinite period but be temporary. However, this period may be extended for 12 more months subject

¹²³ Merriam-Webster Dictionary available at <http://www.merriam-webster.com/dictionary/deferral> accessed on 30 August 2014.

¹²⁴ '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.'

¹²⁵ Ibid.

to the fulfilment of prior conditions which are there must exist a threat to peace, breach of the peace or an act of aggression and the deferral resolution must be adopted pursuant to Chapter VII of the Charter.

Third, the deferral request can only be adopted through a Security Council resolution. The voting process is achieved when a deferral resolution gains a majority vote by nine members of the Security Council without the exercise of a veto by any of the five permanent members.¹²⁶

Lastly, the Security Council can only defer the Court's judicial proceedings once the Prosecutor has initiated an investigation or prosecution. The first paragraph of article 16 of the Rome Statute states: '[n]o investigation or prosecution may be commenced or proceeded with under this Statute.' This means that the Security Council can postpone the Court's judicial proceedings only when the Prosecutor is conducting an investigation or prosecutions.

The Security Council must conform to the provisions of the Rome Statute as the constitutive document which establishes the Court. These conditions will be discussed further in this chapter when evaluating whether the Security Council resolutions 1422(2002) and 1487(2003) complied with these conditions.

4.3 The Security Council resolutions 1422(2002), 1487(2003) and 1497(2004)

At the time of writing this thesis, the Security Council had passed two deferral resolutions and attempted to renew the said deferral resolutions for the third time. On 14 July 2002 the Security Council adopted resolution 1422 (2002) to avoid the veto of its peacekeeping missions in Bosnia and Herzegovina.¹²⁷ Paragraph 1 of the resolution reads:

Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or

¹²⁶ Article 25(2) of the Charter provides that; 'Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.'

¹²⁷ UN News Centre UN Mission in Bosnia and Herzegovina extended for 3 days; US vetoes longer term available at <http://www.un.org/apps/news/story.asp?NewsID=4077&Cr=Bosnia&Cr1=#.Upodo9JVOrw> , accessed on 3 August 2014 para 1.

proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.¹²⁸

Many states did not support the Security Council deferral request 1422(2002). Canada, South Africa, Brazil and New Zealand, opposed the deferral resolution arguing that the resolution granted immunity to peacekeepers contrary to the provisions of the Rome Statute.¹²⁹ Similarly, Australia, Switzerland, Fiji, Liechtenstein, Syria, Burundi, Malawi and the United Arab Emirates argued that the resolution lowered the credibility of the Court even before it started exercising its judicial proceedings.¹³⁰

The Secretary General to the Security Council wrote a letter to Colin Powell, the then Secretary General of State for the United States of America, stating that the adoption of the Security Council resolution would provide a 'blanket resolution' to peacekeepers from non-state parties to the Court, contrary to the intention of the drafters of the Rome Statute of the Court.¹³¹ This meant that the resolution would completely shield the peace keepers from the jurisdiction of the Court, should they commit human rights violations, of the Court contrary to the provisions of the Rome Statute.

Although, many states and non-governmental organisations opposed resolution 1422(2002), this resolution was renewed through resolution 1487(2003).¹³² Resolution 1487(2003) sought to defer United Nations peacekeeping missions from the prosecution of the Court. Unsurprisingly, this renewal was met with vehement opposition from states and human rights organisations.

¹²⁸ United Nations 'Security Council Resolution 1422(2002)' available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/477/61/PDF/N0247761.pdf?OpenElement> , accessed on 8 August 2014 para 1.

¹²⁹ American Non-Governmental Organizations Coalition for the International Criminal Court 'Ambassadors of New Zealand ,South Africa, Brazil and Canada to the UN Security Council's unanimous decisions concerning Bosnia-Herzegovina/International Criminal Court (July 13 2002)' available at http://www.amicc.org/docs/Joint_letter_to_SC_July_12.pdf accessed on 3 August 2014 para 3.

¹³⁰ American Non-Governmental Organizations Coalition for the International Criminal Court 'Excerpts from statements at the special plenary of the PrepCom on the ICC on 3 July 2002' available at http://www.amicc.org/docs/Special_Plenary.pdf accessed on 3 August 2014 pages 1 and 2.

¹³¹ American Non-Governmental Organizations Coalition for the International Criminal Court 'The secretary general letter to the US secretary of state available at http://www.amicc.org/docs/SG_to_SS.pdf accessed on 3 August 2014 para 2.

¹³² United Nations Security Council 'Resolution 1487(2003)' available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/394/51/PDF/N0339451.pdf?OpenElement>, accessed on 8 August 2014 para 2.

The Human Rights Watch opposed the renewal of resolution 1422(2002) arguing that the resolution was adopted in the absence of any investigations or prosecutions which may have been a threat to international peace and security. Additionally, it argued that the resolution attempted to provide future immunity for the United Nations peacekeeping missions contrary to the provisions of the Rome Statute.¹³³

The Coalition Implementation for the International Criminal Court expressed the view that the resolution was passed contrary to the purposes and principles of the Charter thus the Security Council it contravened the provisions of the Charter.¹³⁴

The United States of America attempted to renew resolution 1487(2003) through resolution 1497(2004), but it dropped the demand amidst allegations of its peacekeeping forces torturing detained prisoners in Iraq.¹³⁵

The question which springs to mind is, whether these Security Council resolutions were adopted in accordance with the provisions of the Rome Statute and the Charter. In passing deferral resolutions 1422(2002), 1487(2003) the Security Council contravened the article 34 and Chapter VII powers of the Charter it also acted contrary to articles 16 and 27 of the Rome Statute.

Pursuant to Chapter VII powers under the Charter, the Security Council must ensure that there is a threat to peace, breach of peace or an act of aggression before deferring Court's investigations or prosecutions. The Security Council resolutions 1422(2002) and 1487(2003) did not fit within the criteria laid out in article 39 of the Charter as discussed below. This is discussed at length in the subsequent subsection.

4.3.1 Validity of resolutions under the Charter

Operative paragraph two of both Security Council resolutions 1422(2002) and 1487(2003) provide for an automatic renewal of the deferral resolution: '[E]xpresses

¹³³ Human Rights Watch 'The International Criminal Court and the Security Council; Resolution 1422. Legal and policy analysis' available at <http://www.hrw.org/legacy/campaigns/icc/docs/1422legal.htm> accessed on 3 August 2014 para 11.

¹³⁴ Coalition for the International Criminal Court 'A universal court with global support .UN and the ICC. Security Council resolutions 1422/1487 (2008)' available at <http://www.iccnw.org/?mod=res1422> accessed on 17 August 2014 para 5.

¹³⁵ Human Rights Watch 'U.S tries to get off the hook on war crimes ahead of U.N. resolution on Iraq U.S. tries to exclude its troops from prosecution' available at <http://www.hrw.org/news/2004/05/20/us-tries-get-hook-war-crimes> , accessed on 8 August 2014 para 9.

the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary.’¹³⁶

This renewal raises the question of whether the Security Council can defer future investigations and situations without the existence of an imminent threat to peace. The Security Council cannot be able to defer future investigations or situations because it requires the existence of a threat to peace or a breach to peace before it halts Court’s judicial proceedings.

The Charter requires the Security Council to conduct investigations pursuant to article 34 of the Charter before determining whether a threat to peace exists.¹³⁷ The automatic renewal of the deferral defies the provisions of the Charter because no investigation was conducted to determine whether a threat to peace existed. Further, the provisions of article 16 of the Rome Statute require a deferral to be determined on a case by case basis. Subsequently, the determination of a future possible threat to peace amends the provisions of article 16 of the Rome Statute contrary to the provisions of the Charter and the Rome Statute.¹³⁸ The determination of whether a threat to peace exists and the decision to invoke a Chapter VII measure, can only be made when concrete terms which have the potential of destabilising peace and security are present.¹³⁹ The Charter does not define what a ‘threat to peace’ or a ‘breach of peace’ means; however, the Security Council resolution has the discretion to define and adopt measures to restore international peace and stability.¹⁴⁰

The threat to peace can be defined in an either negative or positive light. The negative definition perceives a threat to peace as ‘an absence in international armed conflict between states;’ this school also recognises that an internal conflict can destabilise international peace and security.¹⁴¹ Conversely, the positive definition

¹³⁶ United Nations Security Council op cit (no128) para 2.

¹³⁷ Article 34 of the Charter reads; ‘The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.’

¹³⁸ M Zeidy ‘The United States dropped the atomic bomb of article 16 of the ICC Statute: Security Council power of deferrals and resolution 1422’ 35 Vanderbilt Journal of Transnational Law page 1529.

¹³⁹ L Condorelli S Villalpando ‘Referral and Deferral by the Security Council’ in Antonio Cassese et al (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) page 647.

¹⁴⁰ N Jurdi *The International Criminal Court and National Courts a Contentious Relationship* (2011) page 119.

¹⁴¹ E Wet *The Chapter VII Powers of the United Nations Security Council* (2004) page 139.

encompasses the need to have good comity in the economic, social, political and environmental facets as a way of preserving peace among states.¹⁴² The negative definition holds more water, as it encompasses both internal and international conflicts which has the possibility of destabilising international peace and security. Nonetheless, the practice of the Security Council has shown that the definition of ‘threat to peace’ is not cast in stone thus, it is dynamic as it captures the situation considering the circumstances at play.¹⁴³

While the ‘breach of peace’ refers to the existence of armed conflict between states, it is unclear whether a civil war should be included as part of the definition.¹⁴⁴ Nonetheless, it is important to note that civil war in a state which is non-international in nature has the potential of destabilising international peace and security.

The Security Council passed deferral resolutions 1422(2002) and 1487(2003) in the absence of a threat to peace or a breach to the peace, these resolutions do not make any reference to an internal or international conflict, neither do they refer to poor relations between states which may threaten peace and security. However, the only threat evident in these resolutions is the need to maintain United Nations peacekeeping operations.¹⁴⁵ The maintenance of peacekeeping operations does not amount to a threat to peace or a breach of peace. In this regard, in passing these resolutions the Security Council acted contrary to the provisions of Chapter VII of the Charter as it passed resolutions in the absence of a threat to peace or a breach to the peace.

4.3.2 The validity of the Security Council’s resolutions under the Rome Statute

As mentioned earlier, article 16 of the Rome Statute sets out the conditions which the Security Council resolutions must adhere to before deferring Court’s investigations or prosecutions. In a nutshell, a valid deferral should be adopted through a Security Council resolution, pursuant to Chapter VII powers of the Charter and it lasts for only 12 months, although this may be renewed if a threat to peace, breach of the peace or acts of aggression exist. In passing Security Council

¹⁴² Ibid.

¹⁴³ Obura op cit no (122) at 34.

¹⁴⁴ Wet op cit no (141) at 134.

¹⁴⁵ United Nations Security Council op cit (no128) para 2.

resolutions 1422(2002) and 1487(2003), the Security Council defied the conditions set out in the Rome Statute.

Operative paragraph 2 of the resolution expresses the intention to renew the deferral resolution as many times as it may be necessary.¹⁴⁶ This paragraph has the effect of automatically renewing the resolution without conforming to article 16 of the Rome Statute which reads that: ‘... [T]he request may be renewed by the Council under the same conditions’¹⁴⁷ This means that the resolution should be renewed through a subsequent resolution, after determining that the existence of a threat to peace, breach to the peace or an act of aggression still exists. This means that the deferral resolution can only be adopted through an affirmative vote by nine members of the Security Council in the absence a veto. As a result, operative paragraph 2 defied the provisions in the Rome Statute because the renewal was done in the absence of a threat to peace, breach of the peace and an act of aggression, also the intention to renew was not adopted through a resolution.

The renewal of a deferral resolution should be done on a case-by-case basis after the lapse of 12 months, accordingly, an automatic renewal defies the provisions of article 16 of the Rome Statute which provides for the procedure to renew a Security Council resolutions. This has been equated to providing ‘blanket immunity’ over peacekeepers for an indefinite duration. This automatic renewal attempts to amend the provisions of the Rome Statute contrary to international law.¹⁴⁸

As mentioned in Chapter Two of this dissertation, the authors of the Rome Statute envisaged for deferrals to be used sparingly for the purpose of temporarily halting judicial proceedings whenever they interfere with international peace and security. The Security Council resolutions passed these resolutions as a future preventive measure to halt future Court judicial proceedings against peacekeepers from non-state parties without any threat to peace, breach of the peace or an act of aggression. Therefore, the Security Council deferrals were contrary to the intention of the drafters of the Rome Statute.

¹⁴⁶ United Nations Security Council op cit (no128) para 2.

¹⁴⁷ Article 16 of the Rome Statute.

¹⁴⁸ Obura op cit (no124) at 35.

The first paragraph of article 16 of the Rome Statute states: '[n]o investigation or prosecution may be commenced or proceeded with under this Statute' The question that springs to mind is when does a prosecution or investigation occur? The Prosecutor has the power to initiate an investigation in his or her own accord pursuant to article 15 (1) and (2) of the Rome Statute.¹⁴⁹ The term 'initiate' does not mean that the Prosecutor should 'start' with an investigation but it means that the Prosecutor has the discretion to begin with necessary preliminary steps of evaluating necessary material that form the basis of an actual investigation.¹⁵⁰ Accordingly, the Prosecutor commences with the said investigation only after an authorisation from the Pre-Trial Chamber. Article 15(4) of the Rome Statute reads;

If the Pre-Trial Chamber, upon examination of the request and the supporting material considers that there is a reasonable basis to proceed with the investigation, and the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation

Therefore, the Prosecutor can only proceed with full investigation after the Pre-Trial Chamber authorises him or her to do so. Consequently, the Security Council should only defer an investigation or prosecution after the Pre-Trial Chamber decides that the Prosecutor should proceed with the actual investigation in a given matter. Deferring an investigation which has not been authorised by the Pre-Trial Chamber amounts to interference in the independence of the office of the Prosecutor. In passing deferral resolutions in the absence of an investigation or a prosecution, the Security Council resolutions 1422(2002) and 1487(2003) failed to comply with the provisions of article 15 of the Rome Statute.

Similarly, it has been observed that suspects can only be identified at the prosecution stage. Therefore, in passing deferral resolutions before the investigation and the prosecution stage the Security Council contravened with the provisions of the Rome Statute.¹⁵¹

¹⁴⁹ Article 15 (1) provides that; 'The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.'

(2) 'The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non- governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court'

¹⁵⁰ M Bergsmo J Pejic 'Article 15' Prosecutor in Otto Treiffterer (ed) *Commentary on the Rome Statute of the International Criminal Court. Observers Notes, Article by Article* (1999) page 364.

¹⁵¹ S Kim 'Maintaining the independence of the International Criminal Court: The legal and procedural implications of an article 16 deferral request (2011) 29 *Agenda Internacional* 175-212.

Exempting peacekeepers from the jurisdiction of the Court provides immunity over them contrary to the object and purpose of the Court of fighting impunity.¹⁵² I dare to state that the Security Council resolutions 1422(2002) and 1487(2003) is contributing to the same impunity the Court aims to fight! This contravenes article 27 (1) of the Rome Statute which states that: ‘This Statute shall apply equally to all persons without distinction based on official capacity’ This subsection means that the Court has the jurisdiction to determine individual criminal responsibility over perpetrators of genocide, crimes against humanity or war crimes. In providing blanket immunity over United Nations peacekeeping forces the Security Council resolutions 1422(2002) and 1487(2003) acted in contravention of the provisions of article 21 of the Rome Statute which can be seen as an attempt by the Security Council to alter the provisions of the Rome Statute. In doing this, the Security Council acted in an *ultra vires* manner contrary to the provisions of the Rome Statute.¹⁵³

4.4 Effect of these resolutions

In passing the deferral resolutions, the Security Council resolutions attempted to amend the provisions of the Rome Statute which is in itself an interference with the work of the Court and contrary to international law.

The Rome Statute can be amended only by state parties pursuant to articles 121 and 122 of the Rome Statute.¹⁵⁴ The proposed amendments which are subject to considerations by the Assembly of Parties.¹⁵⁵ Article 39 of the Vienna Convention of the Law of Treaties provides that a treaty can generally be amended through an agreement by the state parties to the treaty.

The Security Council resolutions 1422(2002) and 1487(2003) attempt to alter article 16 of the Rome Statute contrary to the provisions of the Rome Statute and what the authors of the Rome Statute envisaged how the Security Council would

¹⁵² Human Rights Watch ‘The International Criminal Court and the Security Council; Resolution 1422.Legal and policy analysis’ available at <http://www.hrw.org/legacy/campaigns/icc/docs/1422legal.htm> accessed on 3 August 2014 para 11.

¹⁵³ Human Rights Watch ‘The International Criminal Court and the Security Council; Resolution 1422.Legal and policy analysis’ available at <http://www.hrw.org/legacy/campaigns/icc/docs/1422legal.htm> accessed on 3 August 2014 para 11.

¹⁵⁴ Article 121 of the Rome Statute.

¹⁵⁵ Article 121(2) of the Rome Statute.

defer the judicial proceedings of the Court.¹⁵⁶ The Court and the Security Council are two independent international organisations established through separate distinct treaties, thus in principle and under international law neither institution can ratify the other institutions treaty neither can they alter the provisions of each other's founding documents.¹⁵⁷ However, as seen in these two resolutions, the Security Council is acting beyond its powers and seems to give the message that it is above international law with no entity having any power to stop such interference.

4.5 Possible remedies against the Security Council resolutions 1422(2002) and 1487(2003) *ultra vires* deferral resolutions.

Article 1 of the Rome Statute reads: '...The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.' This is interpreted to mean that the Court should only carry out its tasks and functions as stipulated in the Rome Statute.¹⁵⁸ In addition, article 21 of the Rome Statute notes:

1. The Court shall apply:
 - (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
 - (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
 - (c) Failing that, general principles derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights....

This article displays the supremacy of the Rome Statute as it governs the running of the Court; it also recognises other sources of law that may be used to fill existing gaps in the Rome Statute, Elements of Crimes or the Rules of Procedure and Evidence.¹⁵⁹ Subsequently, in the light of the above provisions, the Court should establish whether the Security Council resolutions 1422(2002) and 1487(2003)

¹⁵⁶ Zeidy op cit (no138) at 1531

¹⁵⁷ Cryer op cit (no43) at 456.

¹⁵⁸ O Treffterer 'Article 1, The Court' in Otto Treiffterer (ed) *Commentary on the Rome Statute of the International Criminal Court. Observers Notes, Article by Article* (1999) page 61.

¹⁵⁹ M de Guzman 'Article 21 Applicable Law' in Otto Treiffterer (ed) *Commentary on the Rome Statute of the International Criminal Court. Observers Notes, Article by Article* (1999) page 435.

deferrals requests complied with the hierarchy of the applicable laws and make a determination on the same.¹⁶⁰ So far, it has not done this.

The authors of the Rome Statute envisaged that deferrals to be used sparingly, when the pursuit of justice would interfere with the attainment of peace. But the exercise and conduct of the Security Council through resolutions 1422(2002) and 1487(2003) does not reflect what the drafters envisaged. I am of the opinion that the Court should in future ignore deferral requests from the Security Council resolutions on this basis.

The Security Council resolutions has a wide discretion to take suitable action in maintaining international peace and security pursuant to article 39 of the Charter. Being an international organisation it is subject to constitutional limitations set out in its constitutive body and it has to act within the confines of the Charter as it is not above the law.¹⁶¹

As a subject of international law, the United Nations is bound to conform to the rules of international law. Generally, member states to the United Nations have obligations arising from the Security Council resolutions to comply with its decisions. Article 25 states: 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.'

Nonetheless, these obligations are binding on member states only if the Security Council resolutions adopted the resolutions in good faith in accordance with the purposes and principles of the Charter.¹⁶² Evidently, the Security Council resolutions 1422(2002) and 1487(2003) deferrals were not adopted in good faith as they did not conform to the provisions of the Rome Statute neither did they uphold or respect human rights. Further, the Security Council is further not a state, so the requests of the Security Council resolutions should in principle not be obligatory.

¹⁶⁰ Amnesty International 'International Criminal court The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice' available at <http://www.amnesty.org/en/library/asset/IOR40/006/2003/en/af118f82-d6f8-11dd-b0cc-1f0860013475/ior400062003en.html>, accessed on 9 August 2014 para 15.

¹⁶¹ The Prosecutor v Dusko Tadic a/k/a 'DULE' 'Decision on the defence motion for the Interlocutory appeal on jurisdiction' available at <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>, accessed on 27 August 2014 para 28

¹⁶² E Wet, A Nollkaemper, P Dijktra *Review of the Security Council by Member States* (2003) page 8.

The Court has the power to review Security Council resolutions passes a deferral which does not conform to the provisions of the Rome Statute and the principles of international law.¹⁶³ When acting pursuant to Chapter VII powers under the Charter, the Security Council has an obligation to respect universal human rights instruments like the International Covenant on Civil and Political Rights, the United Nations Declaration on Human Rights, the Universal Bill of Rights, the International Covenant on Economic Social and Political Rights and international humanitarian law. The deferral resolutions did not respect human rights law because it grants impunity to violators of human rights and it does not recognise the rights of victims in the affected areas. Therefore, member states and the Court in particular should question the validity of the said resolutions and if need be refuse to comply with deferral requests that are contrary to the aforementioned international law

Conclusion

In passing resolution 1422(2002) and renewing it through 1487(2002) the Security Council did not conform to the provisions of article 16 of the Rome Statute which lays out the conditions to be exercised before a deferral is passed. The deferral requests were passed in theoretical terms in the absence of a threat to peace, breach of peace or an act of aggression. Moreover, these deferral requests had an automatic renewal providing for a renewal after the lapse of 12 months on condition that conditions under article 39 of the Charter are present. Lastly, in providing for an automatic renewal; the Security Council resolutions 1422(2002) and 1487(2003) attempted to alter the provisions of the Rome Statute. Therefore, the Security Council acted in an ultra vires manner.

In granting blanket immunity to peace keepers who are non-state parties to the Rome Statute, the Security Council defies the general principle of equality which encourages different laws to be used among peacekeepers, depending on whether they have ratified the Rome Statute or not.

When assessing the need to defer investigations or prosecutions the Security Council should respect its primary objectives and those of the Court to ensure that the legitimacy and credibility of both of the offices are upheld. The Security Council

¹⁶³ Jurdi op cit (no140).

resolutions 1422(2002) and 1487(2003) put the relationship between the Court and the Security Council resolutions at a crossroad.

CHAPTER FIVE

CONCLUDING REMARKS AND RECOMMENDATIONS

5.1 Introduction

This thesis has shown that the crafters of the Rome Statute envisaged a close interaction between the Court and the Security Council, demonstrated through the latter's exercise of referrals and deferrals of situations to the Court. However, the Security Council's exercise of referrals and deferrals has been inconsistent with the Relationship Agreement, the Charter, the provisions of the Rome Statute and the intention of the drafters. As a result, this has negatively affected the relationship between the Court and Security Council.

This chapter is divided into two parts; the first section makes a conclusion of the issues that arose in the Security Council's exercise of referrals and deferrals while the second part, recommends on how the Security Council may defer and refer in a way that sustains the relationship between the Security Council and the Court.

5.2 Conclusion

Cooperation and enforcement are two aspects that are required for a successful referral. The Security Council's referrals of the situations in Darfur and Libya to the Court has shown that the latter lacks a proper enforcement mechanism. Although the Security Council has an enforcement role to play when it refers situations to the Court, the former has not performed this role pursuant to article 87(7) of the Rome Statute. This is evident when the Security Council failed to impose sanctions on recalcitrant states which failed to cooperate with the Court in arresting Al-Bashir and the Security Council's inaction to respond to the lack of Libya's failure to cooperate with the Court in surrendering Al-Islam to the Court. At the time of writing this dissertation, the Court has been unable to exercise jurisdiction over Al-Bashir nine years after the Security Council referral. Similarly, the Court has been unable to prosecute Al-Islam three years after the Security Council referral of the situation in Libya to the Court. This has lowered the credibility and legitimacy of the Court.

In passing deferral resolutions 1422(2002) and 1487 (2003), the Security Council did not conform to the intention of the authors of the Rome Statute. This is evident when the Security Council passed deferral resolutions in the absence of a threat to peace, breach of the peace or an act of aggression. Moreover, the Security Council did not act in accordance with the conditions laid out in both the Charter and the Rome Statute before exercising of these deferrals.

Through the exercise of referrals and deferrals, the Security Council has failed to promote a close relationship with the Court contrary to the intention of the authors of the Rome Statute, the Relationship Agreement, the Charter and the Rome Statute itself.

In passing the deferral resolutions, the Security Council weakened the relationship between the Court and the Security Council contrary to what was envisaged by the crafters of the Rome Statute and the Relationship Agreement. Consequently, both of the independent international organisations fail to fulfil their mutual objective which lowers the credibility of both the Court and the Security Council.

5.3 The way forward

There is a need to strengthen the relationship between the Court and the Security Council to ensure that both entities fulfil their mutual objectives of prosecuting serious international crimes and maintaining international peace and security pursuant to the provisions of the Rome Statute and the Charter respectively.

When referring situations, the Security Council should stress in the referral resolutions the importance of all states to cooperate with the Court. This will impose obligations on all states to collaborate with the Court for successful referrals. Also, the Security Council should be ready to help the Court to enforce cooperation requests by imposing sanctions on states that fail to fulfil these obligations.

The Court and the Security Council have to cooperate effectively in order to fulfil their roles of fighting the culture of impunity and maintaining peace and security. Nonetheless, the failure of the Security Council to cooperate with the Court in enforcing decisions after a referral or failing to conform to the conditions of deferral lowers the credibility and legitimacy of the Court.

The Security Council should employ soft and hard measures pursuant to 40 or 41 of the Charter to compel recalcitrant states to cooperate with the Court as a way of maintaining peace and security as it simultaneously enforces the Court's decisions.

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