



**Strathmore University**  

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**Law School**

**ROLE OF THE SECURITY COUNCIL IN  
INTERNATIONAL CRIMINAL JUSTICE:  
ANALYSING THE WIDE DISCRETIONARY POWERS  
OF THE SECURITY COUNCIL UNDER ARTICLE 39  
OF THE UNITED NATIONS CHARTER**

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By

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## **DECLARATION**

I, SALMA KHAMALA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date: .....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: .....

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## ABSTRACT

*“The problem isn’t the abuse of power; it’s the power to abuse”*. – Mike Cloud.

Article 39 of the United Nations Charter clearly states in its wording that “...the Security Council 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.” However, even with the inference of Articles 41 and 42, it is not clear the extent to which the Security Council is bound. Being a body of such abounding political nature, should it have judicial authority to divest in subsidiary institutions selectively? This hereby is the crux of this paper.

The aim of this dissertation is to critically investigate and criticize the role the Security Council has in international justice (while still acting on its rightful mandate to maintain international peace and security) and the selective nature of its intervention. Much dissatisfaction and criticism has been dished out within the international community regarding the role and powers of the Security Council with regard to its abuse of powers; but this discussion shall confine itself to scrutinizing its actions of establishing *ad hoc* international criminal tribunals in the name of Chapter VII of the United Nations Charter.

Indeed, *power must never be trusted without a check*.

## **LIST OF ABBREVIATIONS**

ACHR	American Convention on Human Rights
ACtHPR	African Court of Human and Peoples' Rights
ACtJHR	African Court of Justice and Human Rights
AU	African Union
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICL	International Law Commission
IMT	International Military Tribunal
NATO	North Atlantic Treaty Organization
P-5	Permanent Five States of the Security Council (United States, United Kingdom, China, Russia and France)
RPE	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTAET	United Nations Transitional Authority in East Timor

## LIST OF CASES

### A. International Criminal Justice

*Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, International Court of Justice (ICJ), 26 February 2007.

*Case Concerning the Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. United Kingdom)*, Provisional Measures, 94 ILR 478 (Dissenting Opinion of Judge Weeramantry).

*Conditions of Admission of A State To Membership In The United Nations (Article 4 Of Charter)*, Advisory Opinion, ICJ Reports 1948 (Dissenting opinion JJ. Basdevant, Winiarski, McNair and Read).

*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971.

*Nuclear Tests Case (New Zealand v. France)*, ICJ Reports 1974 (Dissenting Opinion of Judge Berwick).

### B. Ad hoc tribunals

*Prosecutor v. Dusko Tadic aka "Dule"*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), International Criminal Tribunal for the Former Yugoslavia (ICTY), 2 October 1995.

*Prosecutor v. Furundzija*, (Judgment), International Criminal Tribunal for Rwanda (ICTR), 1998.

*Prosecutor v. Joseph Kanyabashi*, (Decision on the Defence Motion on Jurisdiction), International Criminal Tribunal for Rwanda (ICTR), 1997.

*Prosecutor v. Kvočka*, (Judgment), International Criminal Tribunal for the Former Yugoslavia (ICTY), 2001.

C. National jurisdictions

*State Attorney's Office v. Jorgic*, Higher State Court of Dusseldorf, 1997.

*Zand v. Austria*, Commissions Report (7360/76), Decisions and Reports 15, 1978.

*Kadic v. Karadzic*, 518 U.S. 1005 (1996).

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# **I. CHAPTER ONE : Painting the Picture**

## **1.1 BACKGROUND**

### **1.1.1. The Role of International Criminal Justice**

States contemplate international criminal law in what they consider ‘their internal affairs’ as a direct violation of the concept of state sovereignty.<sup>1</sup> On the other hand, the more vulnerable and defeated parties of war or armed conflict have been the sympathetic players towards international tribunals; and believe that international criminal justice is not just a theoretical concept but is a living and breathing animal that needs to be nurtured, fed and given continuous support for it to be beneficial to States.<sup>2</sup>

In the words of Robert H. Jackson on the International Military Tribunal (IMT):<sup>3</sup>

*“This Tribunal, while it is novel and experimental, is not the product of abstract speculations nor is it created to vindicate legalistic theories. This inquest represents the practical effort of four of the mightiest of nations, with the support of 17 more, to utilize international law to meet the greatest menace of our times – aggressive war.”*

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<sup>1</sup> Wind M, ‘Challenging Sovereignty? The USA and the Establishment of the International Criminal Court’ *Ethics and Global Politics* 2 (2009), 83-108.

<sup>2</sup> For instance, in the Kenyan situation, the non-supporters of the ruling ‘Jubilee Party’ regime vehemently supported the International Criminal Court in its quest for justice and visualized it to be a source of hope for the victims by bringing forth retributive justice. In the Former Yugoslavia, still within the debate at the UNGA’s 67<sup>th</sup> assembly, the Croatian representative opined that the ICTY ‘deserved support’ and it has ‘always supported its work’.

<sup>3</sup> Robert H. Jackson was United States Solicitor General, United States Attorney General and an Associate Justice of the United States Supreme Court. He was also the American Prosecutor at the Nuremberg Trials that were held in Germany between November 20<sup>th</sup> 1945 and October 1<sup>st</sup> 1946.

What is clear however, is that with the emergence of the Second World War, the law has also evolved in step.<sup>4</sup> The notion of war calls for regulation in some way no matter the law, tradition or custom.<sup>5</sup>

Whether the IMT was successful or not in its mandate is another question to answer altogether. However, what is really clear is that it made a heavy and impressionable step towards the development of international criminal law, therefore international criminal justice so as to ‘meet the greatest menace of our times – aggressive war’.<sup>6</sup> It is from this reference mark at Nuremberg that the fight to justify the legitimacy of the *ad hoc* tribunal is based and has been ongoing for decades and also from which we see the metamorphosis of international criminal justice from *ad hoc* tribunals to hybrid tribunals and finally to the permanent International Criminal Court (ICC). To be followed closely however, are the players behind the curtains that orchestrated the entire stage of international criminal justice – from the Allies, to them forming the United Nations (UN) and obtaining permanent seats with veto power in the Security Council (UNSC).

### **1.1.2. Establishment of the United Nations Security Council (UNSC or the Council)**

The UNSC is the UN’s principle crisis management body authorized to beseech the 193 Member States of the UN Charter to maintain international peace and security.<sup>7</sup>

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<sup>4</sup> Conventions were concluded post-World War II, to lessen the harshness of war and to protect civilian human rights; including the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287; Universal Declaration of Human Rights, 10 December 1948 217 A (III).

<sup>5</sup> ‘The Influence of the Nuremberg Trial on International Criminal Law’, <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> on 22 May 2016.

<sup>6</sup> Robert Jackson, Opening Statement to the International Military Tribunal at Nuremberg, Trial of the Major War Criminals before the International Military Tribunal 2 (1947), 98.

<sup>7</sup> ‘The UN Security Council’, <http://www.cfr.org/international-organizations-and-alliances/un-security-council-unsc/p31649> on 18 May 2016.

To begin with, it is imperative to understand the context in which the UNSC, under the UN, was formed. First, the UN came into fruition at a time when the world was just emerging from the settling dust of the Second World War. The UN replaced the League of Nations that was established right after the First World War.<sup>8</sup> The major reason for the coming together of States for this purpose was to prevent yet another war of such magnitude from reoccurring, among other equally important reasons.<sup>9</sup> It is also worthwhile to note that the Council's composition is largely based on historical events in that it reflects the victors of the Second World War and is exclusive in nature.<sup>10</sup> This fact has consciously and steadily made its way into majority of the decisions made by the Council<sup>11</sup> and must always be kept at the back of the mind whenever any discussion regarding the Council emerges; more so in the face of international criminal justice.

The UNSC was established as one of the principle organs of the UN<sup>12</sup> whose main functions are clearly laid out in the UN Charter.<sup>13</sup> As one of the organs of this international organization, the Council has a wide and far-reaching scope of

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<sup>8</sup> 'What We Do: The UN Security Council', <http://www.unfoundation.org/what-we-do/issues/united-nations/the-un-security-council.html?referrer=https://www.google.com/> on 18 May 2016.

<sup>9</sup> 'The United Nations is born', <http://www.history.com/this-day-in-history/the-united-nations-is-born> on 12 April 2016.

<sup>10</sup> 'What We Do: The UN Security Council', <http://www.unfoundation.org/what-we-do/issues/united-nations/the-un-security-council.html?referrer=https://www.google.com/> on 18 May 2016.

<sup>11</sup> Blum Y, 'Proposals for UN Security Council Reform' *American Journal of International Law* 99 (2005), 632 – 649.

<sup>12</sup> Chapter V, *Charter of the United Nations*, 26 June 1945, 1 UNTS XVI.

<sup>13</sup> Chapter VII, *Charter of the UN*.

powers<sup>14</sup> and functions in its mandate to maintain world peace and security.<sup>15</sup> This paper will focus on the role that the Council has played in the maintenance of peace and security; the formation of international criminal tribunals to bring about justice and accountability and how the Council has remained relevant in the field of modern international justice.

### **1.1.3. Role of the Security Council**

The functions of the UNSC *inter alia* include the determination of any threat to peace, breach of peace and any recommendations to this regard.<sup>16</sup> Within these powers conferred upon the UNSC, the member States of the Charter agree that they shall also confer primary responsibility on the Council of maintaining world peace and that the Council in achieving this, is doing so on their behalf.<sup>17</sup> Fast forward from the 1940s to the 1990s, we also see the UNSC having a more active role where not only do they make determinations on the threat or breach of peace, but also make referrals to the ICC under the Rome Statute for the judicial process to find accountable those responsible for genocide, war crimes and crimes against humanity.

These functions laid out under Article 39 of the Charter are going to be the subject of this dissertation. The author questions whether in the exercise of the specific powers of the measures that it undertakes or the recommendations that it makes, the Council decides to abuse this power and only exercises it when the international temperatures are suitable. There is the position that due to the wide and unfettered

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<sup>14</sup> The wide freedom is left to the Council to choose to intervene at whatever moment it finds to be appropriate, how to do so as long as it is acting in accordance with the purposes and principles of the United Nations. *See* Statement of the Rapporteur of Committee 3, Doc. 134, 11 U.N.C.I.O. (1945), 785.

<sup>15</sup> Wood M, *The United Nations Security Council and International Law: The Security Council's Powers and Limits*, Second Lecture as delivered on 8<sup>th</sup> November 2006, University of Cambridge, para. 1.

<sup>16</sup> Article 39, *Charter of the UN*.

<sup>17</sup> Article 24, *Charter of the UN*.

discretion of the powers of the Council under Article 39, there is a high risk of the Council acting *ultra vires*.<sup>18</sup> Without a doubt, this leads one to wonder whether there are checks and balances on the actions of the Council to any interested legal scholar and what the margins within which it can exercise its duties, are.

## 1.2. STATEMENT OF THE PROBLEM

Article 39 gives the Council power to make suitable recommendations and adopt certain measures in a situation where there is a threat to peace or a breach to peace. In this regard, the Council enjoys a wide margin of discretionary powers.

In the Appeal Chamber of the Yugoslav Tribunal (ICTY), the Chamber stated in reference to an ICJ decision that:<sup>19</sup>

*“Article 39 leaves the choice and means and evaluation to the UNSC, and in this regard; and it could not have been otherwise, as such a choice involves political evaluations of highly complex and dynamic situations.”*

For this reason, it has been the contention of various States that the UNSC is overstretching its powers in exercising this discretion selectively especially in its establishing of *ad hoc* international tribunals.<sup>20</sup>

However, we also see in our bird’s view, that the UNSC has the power under the Rome Statute where it can make referrals to the ICC for prosecutions – a decision that is not subject to further approval by the Pre-Trial Chamber but one that has an

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<sup>18</sup> Ratner S, The Security Council and International Law in Malone D, *The United Nations and the Security Council: From the Cold War to the 21<sup>st</sup> Century* (2004), 603.

<sup>19</sup> *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, International Court of Justice (ICJ), 26 February 2007).

<sup>20</sup> Reinisch A, ‘FORUM: Should Judges Second-Guess the UN Security Council?’ *International Organizations Law Review* 6 (2009), 263-266.

express route to the bench of the Trial Chamber.<sup>21</sup> It is provisions like these that allow much wiggle room to the UNSC to abuse the exercise of its powers.

### 1.3. JUSTIFICATION OF THE STUDY

Criminal law draws its force from the fact that it represents what the citizens' consensus is on what is expected of human behavior and equally important, that the institution mandated with the task of judging such behavior to be, views as legitimate.<sup>22</sup>

Firstly, the UNSC is a public international institution and prone to abusing its powers as shall be illustrated in this paper; therefore not serving the purpose it was intended to. This reason is also reinforced by the provision of Article 24 of the Charter as has been discussed above. A fundamental question therefore would be, to what extent is the UNSC subject to controls?<sup>23</sup>

The UNSC is subject to legal limits, but never to any clear procedures that the legality of its actions can be tested.<sup>24</sup> For this reason, it can be seen as a grave flaw to leave the UNSC a wide playing field without such boundaries whatsoever. The second reason being that the Charter in this same spirit gives two major ways in which the UNSC may restore peace and security. The first being by pacific means in conformity with the principles of justice and international law while the other is through effective collective enforcement measures for the prevention and removal of threats to the peace.<sup>25</sup> These effective collective measures are found in Articles

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<sup>21</sup> Cakmak C, 'The International Criminal Court in World Politics' *International Journal on World Peace* 23 (2006).

<sup>22</sup> *Prosecutor v. Dusko Tadic aka "Dule"*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), International Criminal Tribunal for the Former Yugoslavia (ICTY), 2 October 1995, para. 6.

<sup>23</sup> Wood M, *The United Nations Security Council and International Law: The Security Council's Powers and Limits*, Second Lecture as delivered on 8<sup>th</sup> November 2006, University of Cambridge, para. 52.

<sup>24</sup> Article 24 (1), *Charter of the UN*.

<sup>25</sup> Article 1, *Charter of the UN*.

41 and 42. They include non – military measures<sup>26</sup> and military measures.<sup>27</sup> Having prescribed that, it is then the author’s question to analyze whether we can extrapolate creation of international tribunals as one of the measures the Council can take up in fulfilling its mandate.

#### 1.4. OBJECTIVES

##### 1.4.1. General objective

The general and wider objective of this study is to analyze the wide discretionary powers of the UNSC and how they have been subject to abuse with the aim of suggesting procedural reform.

##### 1.4.2. Specific objectives

More specifically, the objectives of this dissertation are:

1. To show that the UNSC should not have the power to further establish *ad hoc* international tribunals as it does not have unfettered discretion in its decision-making process.
2. To show that there is need to establish procedural measures in the actions of the UNSC to avoid such uncertainty and ambiguity while exercising its wide discretionary powers.

#### 1.5. RESEARCH QUESTIONS

1. Is the discretion that the UNSC has in taking measures and making recommendations on the threat or breach to peace, an unfettered discretion or is the Council bound to some limits?
2. At the end of the study, if the author finds that the UNSC is rightfully entitled to any judicial or quasi-judicial functions, should it then be bound by procedural rules?

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<sup>26</sup> Article 41, *Charter of the UN*.

<sup>27</sup> Article 42, *Charter of the UN*.

## 1.6. LITERATURE REVIEW

The establishment of the *ad hoc* tribunals has been critiqued by the legal scholar Drumbl.<sup>28</sup> He questions the necessity of putting in place such a mechanism to address the tragedies that happened in the former Yugoslavia since national courts were also involved with addressing civil and criminal matters in the Republic of Yugoslavia at the time.<sup>29</sup>

In addition, there existed extraterritorial criminal prosecutions took place in countries like Germany (which was based on the principle of universal jurisdiction).<sup>30</sup> The United States took part in the adjudging of civil cases that arose from the conflict as well.<sup>31</sup> The UN also facilitated establishment of hybrid tribunals that were operating in Kosovo.<sup>32</sup> The International Court of Justice (ICJ) was also not left behind as it had been tasked with a number of civil suits *inter alia* declaratory reliefs and making reparative claims on the question of state responsibility with regards to the States that were involved in the war in the former Yugoslavia.<sup>33</sup>

With all these institutions seeking to address the atrocities that were committed in the former Yugoslavia, Drumbl is of the opinion that too many cooks run the risk of causing “inconsistencies that could arguably weaken the certainty and

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<sup>28</sup> Drumbl M, ‘Looking Up, Down and Across: The ICTY’s Place in the International Legal Order’ *New England Review* 4 (2003).

<sup>29</sup> In that case, the ICTY needed to reevaluate its position and its role in the collection of institutions dealing with the conflict in the Former Yugoslavia. *See* Drumbl M, ‘Looking Up, Down and Across: The ICTY’s Place in the International Legal Order’, 1038, 1039.

<sup>30</sup> *State Attorney’s Office v. Jorgic*, Higher State Court of Dusseldorf, 1997. (Jorgic was convicted on 30 counts of murder and 11 counts of genocide and was sentenced to life in prison).

<sup>31</sup> *Kadic v. Karadzic*, 518 U.S. 1005 (1996).

<sup>32</sup> Drumbl M, ‘Looking Up, Down and Across: The ICTY’s Place in the International Legal Order’, 1038.

<sup>33</sup> Drumbl M, ‘Looking Up, Down and Across: The ICTY’s Place in the International Legal Order’, 1038. *Also see*, *Bosnia genocide case*, Judgment.

predictability of international criminal law.”<sup>34</sup> For this reason, there has to be a harmonization of the procedures that are to be used in international criminal law.

On the other hand, Watson<sup>35</sup> that the establishment of the ICTY and its sister court – the ICTR – was a successful venture<sup>36</sup> in the history of international criminal justice as they paved way for the ICC.<sup>37</sup>

Furthermore, the tribunals, in his opinion, have contributed to international criminal law where they determined their own jurisdiction (*la competence de la competence*), and their validity on establishment by the UNSC.<sup>38</sup> The Appeals Chamber in this case stated in the interlocutory appeal on the jurisdiction of the Tribunal that the UNSC was well within its powers in Chapter VII of the Charter to establish the Tribunal.

In concurrence with the Appeal Chamber in the *Tadic* case, it would be prudent enough to distinguish – that the discretionary powers of the UNSC are not to be

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<sup>34</sup> Drumbl M, ‘Looking Up, Down and Across: The ICTY’s Place in the International Legal Order’, 1039. See also, Spelliscy S, ‘The Proliferation of International Tribunals: A Chink in the Armor’ *Columbian Journal of Transnational Law* 143 (2001). (Discussing the “proliferation problem” arising from the “explosion” in the number of international dispute resolution mechanisms and suggesting this may undermine the certainty and credibility of international law).

<sup>35</sup> Watson G, ‘The Changing Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia’ *New England Review* 4 (2003), 871 – 885.

<sup>36</sup> *Prosecutor v. Kvočka*, (Judgment), International Criminal Tribunal for the Former Yugoslavia (ICTY), 2001, paras. 546-561. (Holding that rape can constitute torture); *Prosecutor v. Furundzija*, (Judgment), International Criminal Tribunal for Rwanda (ICTR), 1998. (The Rwanda Tribunal has made particularly important contributions to the development of the law on sexual violence).

<sup>37</sup> Rome Statute of the International Criminal Court, 17 July 1998. The Rome Statute entered into force on July 1, 2002. Watson G, ‘The Changing Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia’, 871 – 872.

<sup>38</sup> *Prosecutor v. Dusko Tadic aka "Dule"*, paras. 28-48. See also, *Prosecutor v. Joseph Kanyabashi*, (Decision on the Defence Motion on Jurisdiction), International Criminal Tribunal for Rwanda (ICTR), 1997.

exercised absolutely and that ‘neither the text nor the spirit of the UN Charter’ conceives of the UNSC as *legibus solutus* (unbound by law).<sup>39</sup>

## 1.7. THEORETICAL FRAMEWORK

### Social contract theory and realism

One of the first laws of man is that each is motivated to pursue peace only when others are willing to do the same.<sup>40</sup> The social contract theory is based on seeking to afford individuals a state of civilization rather than a state of nature – which according to the Hobbesian theory, life of man in the state of nature is solitary, nasty, brutish and short.<sup>41</sup>

This theory has been used to justify the existence of a political power because it seeks to reconcile the freedom of the individual actors with that of the sovereign.<sup>42</sup> Jean-Jacques Rousseau postulates that States are always in a state of paranoia and self-interests largely due to their inequality – a quality that does nothing but trigger their need for constant self-preservation.<sup>43</sup>

According to Kant, States also relinquish their rights in exchange for a guarantee that they shall not be attacked by their fellow State actors.<sup>44</sup> Kant sees States to be moral persons also living in a similar condition of nature<sup>45</sup> that mimics the same

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<sup>39</sup> *Prosecutor v. Dusko Tadic aka "Dule"*, para. 28.

<sup>40</sup> ‘Modern Social Contract Theory: Thomas Hobbes’, para. 8 found at <http://www.iep.utm.edu/soc-cont/> on 20 March 2016.

<sup>41</sup> Gauthier D, *The Logic of Leviathan: The Moral and Political Theory of Thomas Hobbes*, Clarendon Press, 1969, 17.

<sup>42</sup> Niedleman J, *The Social Contract Theory in the Global Context*, 9<sup>th</sup> October 2012 found at <http://www.e-ir.info/2012/10/09/the-social-contract-theory-in-a-global-context/> on 20 March 2016.

<sup>43</sup> Blanchet G, ‘Jean-Jacques Rousseau’s Contribution to International Relations Theory’ *Glendon Journal of International Studies* (2002), 18.

<sup>44</sup> Kant I, *Perpetual Peace: A Philosophical Sketch*, 1795.

<sup>45</sup> Kant I, *Grounding for the Metaphysics of Morals: On a Supposed Right to Lie because of Philanthropic Concerns*, 151.

theory that Hobbes propagated on the social contract theory<sup>46</sup> where States are constantly focusing on their power and self-interests. This theory propagates that States come together to form such an organization (the UNSC) to guarantee world security, not because of a ‘harmony of interests’ but because of rational fear and selfish desires.<sup>47</sup>

As has been explained before, Article 24 of the Charter postulates that the States confer the primary responsibility of maintaining world peace and order on the UNSC to do the same on their behalf. This is very much in line with the theories as has been described above. From the composition of the UNSC, the concept of realism is very much clear in granting the permanent five member States with veto power – a classic show of power considerations.<sup>48</sup> By relying on this theory, the author is creating awareness to the reader that States act the way they do out of their innermost egotistical desires and not for the benefit of others. This serves as a compass in discussing the context within which the UNSC was formed, the theory behind its composition and hopefully the rationale within which it makes the decisions that it does.

#### 1.8. HYPOTHESIS

That the UNSC should have checks and balances and effective procedures in determining the legality of its actions in taking measures based on the threat or breach of peace.

#### 1.9. RESEARCH DESIGN AND METHODS

This research is going to be conducted in a descriptive manner through the analysis of the relevant treaties and conventions such as the Charter of the UN. It will also be centered on gathering information based on the current status quo and long-

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<sup>46</sup> Kant I, *Grounding for the Metaphysics of Morals: On a Supposed Right to Lie because of Philanthropic Concerns*, 3ed, Hackett Classics, 1999.

<sup>47</sup> Mearsheimer J, ‘The False Promises of International Institutions’ *International Security* 20 (1995), 82 – 93.

<sup>48</sup> Article 23 and 27, *Charter of the UN*.

standing facts in the international community within the time frames of the birth of the UN to the present.

The research methods that will be employed will be derivation of mainly secondary data to carry out a qualitative research study. This data will be inclusive of international laws, treaties, conventions, international case law and literature works from renowned authors in the field of international law and will be conducted via a desktop research.

In addition, should there be any relevant primary data that will arise from my legal practice attachment at the ICTY during this time, it shall be included into this research study.

#### 1.10. SCOPE AND LIMITATIONS OF THE STUDY

This research study will face a limitation as to time since it is to be carried out between the months of March 2016 and February 2017 where it shall be submitted in partial fulfillment for the Bachelor of Laws degree.

#### 1.11. CHAPTER BREAKDOWN

##### **Chapter One: Painting the Picture**

Chapter One sets the background for the discussion on the analysis of the abuse of the wide discretionary powers by the UNSC as it exercises its powers within the ambit of international criminal justice. This forces the author to firstly, define what the role of international criminal justice is, its relevance and how the UNSC found itself taking a role in it. The author then outlines the problem statement for which a solution is sought, its justification and the objectives of this dissertation based on the social contract and realism theories.

##### **Chapter Two: Blast from the Past**

Chapter Two embellishes the discussion by giving a conceptual framework. The author traces the development of international criminal justice from the 20<sup>th</sup> Century with the UNSC quickly taking its position at its side. The UNSC takes on an 'exclusive club' nature and has only five of its members, whose roots follow

back to victors of the Second World War, securing veto power. At this point, as onlookers we see the spirited efforts to justify the place of the UNSC in the establishment of the *ad hoc* tribunals – setting precedence in international criminal justice.

### **Chapter Three: Sweetening the Deal**

Chapter Three is a shift of lens from the international *ad hoc* tribunals established by the UNSC to an approach where States are getting involved in the process of instituting judicial institutions that shall be responsible for prosecuting their own nationals. This was the birth of hybrid tribunals. It is in this chapter that we see more power being given to the States on this front that finally, they find themselves seated at a negotiation table, discussing the adoption of a permanent international criminal court – without the input *per se* of the UNSC.

### **Chapter Four: The Rising Greenhorn**

Chapter Four changes the gear in a slightly different direction where States – African States – desire to push the agenda of ‘State-established’ judicial institutions – further left by means of treaty. Here, we see the rubbing of shoulders of African States with the UNSC and the ICC and their threats to resort to establishing criminal court of their own, namely, the African Court of Justice and Human Rights. This paper further looks into the role the UNSC would have in this proposed court, if any and whether the UNSC in this case, could be said to slowly lose grip of its role in international criminal justice outside the scope of the ICC.

### **Chapter Five: The End Looking into the Future**

Chapter Five is the final chapter that seeks to propose solutions that allow one to look into the future with an optimistic spirit. The author suggests reforms in procedure within the UNSC and proposes that this should be propagated by the UNSC itself. This way the UNSC will be more accountable to its decisions; an act that would hopefully curb the selective nature of decision – making that has become one of its undesirable characteristics.

## II.CHAPTER TWO : Blast from the Past

### 2.1. DEVELOPMENT OF INTERNATIONAL CRIMINAL JUSTICE AS RELATED TO THE SECURITY COUNCIL

#### 2.1.1. Brief history and mandate of the Security Council

The year is 1945 and the dust after the Second World War is now just settling down. The League of Nations that was established after the First World War failed miserably in preventing yet another war and is now replaced by the UN.<sup>49</sup> The UN was established by the Great Powers<sup>50</sup> for the primary purpose of promoting peace and harmony among States and to prevent future skirmishes.<sup>51</sup> It officially came into being on October 24, 1945 when the Charter was ratified, shortly after the end of the Second World War. According to the principles of its Charter, this was to be achieved by encouraging living in tolerance and in a neighborly manner among States in order to maintain international peace and security.<sup>52</sup>

The UN is perceived to be an international peacekeeping organization<sup>53</sup> to safeguard democracy, freedom and peace in the aftermath of the war and “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.”<sup>54</sup> However, the intention of the Allied nations to form such a collective security organization on the foundation of power politics<sup>55</sup>

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<sup>49</sup> ‘WWII Aftermath & the Creation of the United Nations’, <http://study.com/academy/lesson/wwii-aftermath-the-creation-of-the-united-nations.html> on 6 June 2016.

<sup>50</sup> The Allies of the Second World War including the United States, Britain and the Soviet Union.

<sup>51</sup> Cassese A, *International Law*, 2ed, Oxford University Press, New York, 2005, 317 – 318.

<sup>52</sup> The Preamble, *Charter of the UN*.

<sup>53</sup> ‘WWII Aftermath & the Creation of the United Nations’, <http://study.com/academy/lesson/wwii-aftermath-the-creation-of-the-united-nations.html> on 6 June 2016.

<sup>54</sup> The Preamble, *Charter of the UN*.

<sup>55</sup> Shaw M, *International Law*, 4ed, Cambridge University Press, Cambridge, 1998, 826.

has been criticized for championing for “negative peace” rather than “positive peace”.<sup>56</sup>

In achieving this common objective of collective security, the UNSC was established under the Charter<sup>57</sup> with the major function of maintaining international peace and security.<sup>58</sup> This is achieved through peaceful methods of dispute resolution<sup>59</sup> and through imposition of conflict and non-conflict means such as employing forces of land, air or water<sup>60</sup> – whichever may be necessary – to restore international peace and; severance of diplomatic relations,<sup>61</sup> respectively.

The way that the Council operates today is largely influenced by history, context within which it was formed and its functions. From the beginning, the UNSC was envisaged as a political institution – one that would dominate over other ‘weaker’ nations<sup>62</sup> and would seek to achieve their (Great Powers) political goals while wisely following the law that was laid down.<sup>63</sup> This was to be achieved by the tool

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<sup>56</sup> The UN has only busied itself with focusing on the absence of another war instead of encouraging mechanisms that would promote good neighborliness that would dissuade any political tensions. This is in tandem with the social contract and realism theories that this paper seeks to rely on. *See, Cassese, International Law, 325.*

<sup>57</sup> Chapter III, *Charter of the UN.*

<sup>58</sup> Article 24, *Charter of the UN.*

<sup>59</sup> Article 33, *Charter of the UN.*

<sup>60</sup> Article 42, *Charter of the UN.*

<sup>61</sup> Article 41, *Charter of the UN.*

<sup>62</sup> Winston Churchill expressed that: ‘The eagle should permit the small birds to sing and care not wherefore they [The Great Powers] sang’. *The Conferences at Malta and Yalta, 1945, 589 – 591.*

<sup>63</sup> Cassese, *International Law, 320.*

that is the veto power;<sup>64</sup> the crux of the matter of this paper on the ways and means in which the Council uses its powers since it has not lived to its expectations.<sup>65</sup>

First of all, the powers of the Council can be said to originally root from Article 24 of the UN Charter which states that:

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

It can rightly be deduced therefore that, the Council in its activities of maintenance of peace, should ideally derive its official powers from the member States of the Charter as has been postulated even if this has not been so.<sup>66</sup> For this reason, the Council is not only legally bound by the powers defined in the Charter but is also expected to act in good faith<sup>67</sup> on behalf of these member States. A public entity that repeatedly fails to act in good faith undermines its own legitimacy.<sup>68</sup>

### **2.1.2. Nuremberg Trial (1945-1946)**

Following the atrocities that were executed by the Germans, the IMT was designed to ensure that the upper echelons of the Nazi leaders were tried by their adversaries

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<sup>64</sup> Cassese notes that this veto concept was one that had the power to ‘cripple’ the work of the UNSC where the interests of the P-5 were not protected. *See Cassese, International Law*, 324. Shaw notes that the Soviet Union only agreed to join the UN on inclusion of such power so as to have leverage against USA – more reason why the functioning of the UNSC is politically-based. *See Shaw M, International Law*, 826.

<sup>65</sup> Shaw M, *International Law*, 827 – 828.

<sup>66</sup> Cassese describes the partiality of the UNSC in disputes between States and the lack of political will in invoking Chapter VII of the UN Charter in some situations. (A relevant would be the genocide in Rwanda). *See Cassese, International Law*, 327.

<sup>67</sup> Article 26, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.

<sup>68</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971.

and neutral States (including the Allied Powers)<sup>69</sup> rather than by domestic courts of the States to which they belonged.<sup>70</sup> This was for the purposes of justice and for the record of such trials and the Nazi actions to embed as a lesson, in history for generations to come.

To note, the famous Nuremberg Trial was set up as a result of a declaration among the Allied States to “condemn the Germans – a judgment that will meet history”.<sup>71</sup> What is more interesting however is the composition of the bench<sup>72</sup> that chose to act as the Supreme Judge of the horrendous German criminals. They included nationals from the United States, Great Britain, the Soviet Union and France<sup>73</sup> – a fascinating mix that not only reflected the “victors” of the war but also foreshadowed the composition of the UNSC as we know it today.

### 2.1.3. Cold War (1989)

The Council saw tough days during the Cold War in a situation where the world was divided into two major blocs of Eastern and Western influence. The UN and fittingly the UNSC, became what was known as a bulldog with no teeth.<sup>74</sup> The Council was not able to attain its main objective which was to maintain collective

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<sup>69</sup> Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis and Establishing the Charter of the International Military Tribunal (IMT), Annex, (1951) 82 UNTS 279.

<sup>70</sup> Schabas W, *An Introduction to the International Criminal Court*, 4ed, Cambridge University Press, New York, 2011, 5-6.

<sup>71</sup> ‘International Military Tribunal at Nuremberg’, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007069> on 7 June 2016.

<sup>72</sup> Cassese posits that *in casu*, this court was not an international court – the appointment of the prosecutor and judges from the Allied Nations who only acted on the prerogative of these States, only functioned to characterize the court as a ‘judicial body acting as an organ of the appointing State’. See, Cassese, *International law*, 454.

<sup>73</sup> Schabas, *An Introduction to the International Criminal Court*, 7.

<sup>74</sup> The Council abstained from taking effective action by exercising its veto power during the Cold War. See, Akande D *et al*, ‘Old Questions and New Challenges for the U.N. Security System: The Role of the Security Council in the Light of the Charter’s Reform’ *Journal of International Law and Policy* 4 (2007), 2:4.

international peace and security.<sup>75</sup> The major reason being that the division in the world not only reflected division in ideologies of the two major super powers – the United States and the Soviet Union – but also often resulted in situations of standoffs within the Council at the crucial times of making important and life-saving decisions.<sup>76</sup>

However, with the end of the Cold War, there were many significant shifts in the international atmosphere. The animosity that plagued the Eastern and Western bloc in Europe was slowly melting away and with that arose a spirit of mutual cooperation and friendly international relations.<sup>77</sup> This coupled with the rise of the concept of respect for human rights,<sup>78</sup> was a significant step in the growth of international criminal justice as several institutions were developed to serve this purpose.<sup>79</sup> Nevertheless, it cannot be erased from the scrolls of history that the Council acted only to the benefits of the permanent members that compose it – yet another indicator that clearly shows that politics and self-interests are major influencers in the decisions it makes.

#### **2.1.4. ICTY (1993) and ICTR (1994) (The *Ad hoc* tribunals)**

The repeated bloodbaths that took place in the early nineties were not happening in oblivion in the international community; the horrors were aplenty. Mass killings,

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<sup>75</sup> In fact, due to the failure of the UNSC to take up its mandate at this time, the Secretary-General took it upon himself to propagate peace. This time also saw the rise of other military function groups such as regional institutions, NATO and the Warsaw Pact. *See*, Shaw M, *International Law*, 828.

<sup>76</sup> For instance, the situation in Vietnam was left to run its course at the expense of loss of hundreds of thousands of lives due to the inaction of the Security Council. This just goes to show how the Council has continuously been used as a tool of power and personal interests to the States that hold the veto power.

<sup>77</sup> Cassese, *International Law*, 44 – 45.

<sup>78</sup> With the breaking off of the Soviet Union, the States that arose from began to appreciate principles and rules in international law which led to a situation of *ad idem* between States that allowed them to fulfil their obligations as it was earlier intended. *See*, Cassese, *International Law*, 454 – 455.

<sup>79</sup> At this point international criminal law was developing normatively by allowing human right values to permeate the sphere of international law. *See*, Cassese, *International Law*, 44 – 45.

genocide, massive organizations of detention centers, rape, forcible transfer and ethnic cleansing were considered to be sufficient enough under Chapter VII of the Charter to constitute a breach to international peace and security. Thousands were killed and hundreds of thousands displaced. The UN no longer stood handcuffed after the Cold War and the rise in the concept of international human rights.

However, the UN saw no need to urgently take action where it was dutifully meant to intervene in the case of the Rwandan genocide.<sup>80</sup> Only after 800,000 lives had been lost was the UNSC stirred to action and chose to set up an *ad hoc* international tribunal<sup>81</sup> - as a soap to cleanse their conscience - to prosecute persons responsible for serious violations of international humanitarian law committed by the genocidaires.<sup>82</sup>

The *ad hoc* tribunals have been argued to be part of post-conflict situations for punitive measures and rehabilitation of communities and nations in the sense of: deterring the commission of further crimes,<sup>83</sup> serving the affected communities and victims' justice and the need to establish the truth for purposes of healing<sup>84</sup> and reintegration into societies.<sup>85</sup> Moreover, they have also been perceived to be that red flashing light to perpetrators and individuals of high ranks that they are not

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<sup>80</sup> Cassese, *International Law*, 44.

<sup>81</sup> The International Criminal Tribunal for Rwanda (ICTR) was established to bring to book those who were responsible for violations of international humanitarian law during the 1994 genocide in Rwanda. The UNSC determined the jurisdiction of the Tribunal in the Resolution just as for the ICTY.

<sup>82</sup> Article 1, UN Security Council, *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006)*, 1994.

<sup>83</sup> Morris M, 'The Trials of Concurrent Jurisdiction: The Case of Rwanda' *Duke Journal of Comparative and International Law* 7 (1997), 349-374.

<sup>84</sup> 'Ad Hoc Tribunals', <https://www.icrc.org/eng/war-and-law/international-criminal-jurisdiction/ad-hoc-tribunals/overview-ad-hoc-tribunals.htm> on 22 November 2016.

<sup>85</sup> Drumbl M, 'Punishment Post genocide: From Guilt to Shame to Civis in Rwanda' *New York University Law Review* 75 (2000), 1221-1300.

exempt from the long arm of the law and will be found culpable for any international humanitarian law violations.<sup>86</sup>

Despite all these perceptions, the intentions of the UNSC could easily be misconstrued to be disingenuous since they lacked any ongoing interests in Rwanda and saw no need to intervene in the carnage.<sup>87</sup> The UNSC (read the permanent 5 member States) stood by and watched as the horrors of mass cleansing of the Tutsis took place in a small State in Eastern Africa, even refusing to characterize the conflict as a genocide.<sup>88</sup> Later on, it was acknowledged by the UN the fact that indeed they lacked the political will<sup>89</sup> to intervene and reduce the loss of lives.<sup>90</sup> The same applied in the Former Yugoslavia where the UNSC was divided and often than not, took the role of a mere observer leaving NATO the sole responsibility to

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<sup>86</sup> Article 1, UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia (as updated in September 2009)*, 1993.

<sup>87</sup> Especially the USA which is one of the P-5 States of the UNSC. *See*, Cassese, *International Law*, 44.

<sup>88</sup> Destexhe A, *Rwanda and Genocide in the Twentieth Century*, Pluto Press, London, 1995, 49-50.

<sup>89</sup> NATO Secretary-General on the invasion in Kosovo where he stated that there are situations where the international community is forced to intervene without the express resolution of the UNSC [...] and it may be the right thing to do. *See*, 'NATO Could Intervene without UNSC Decision',

[http://www.b92.net/eng/news/world-article.php?yyyy=2011&mm=10&dd=29&nav\\_id=77085](http://www.b92.net/eng/news/world-article.php?yyyy=2011&mm=10&dd=29&nav_id=77085), on 1 February 2017. *Also see*, 'UN Failed Rwanda',

<https://www.globalpolicy.org/component/content/article/201/39240.html> on 28

December 2016. After the previously failed Somalia mission where the United States had sent peacekeepers of which 18 were killed, the United States was not keen on dispatching peacekeepers to Rwanda and often mischaracterized the genocide as a civil war between the Hutus and the Tutsis.

The same happened with Belgium after 10 peacekeepers were killed in Rwanda and they withdrew their peacekeepers – leaving Rwanda to burn at the watch of the international community. *See also*

<http://news.bbc.co.uk/2/hi/africa/714025.stm> on 28 December 2016.

<sup>90</sup> 'UN Admits Rwanda Genocide Failure', <http://news.bbc.co.uk/2/hi/africa/714025.stm> on 28 December 2016.

respond.<sup>91</sup> These are classic scenarios which strikes right at the core of the issue of the composition of the UNSC.

## 2.2. QUASI – JUDICIAL FUNCTIONS OF THE SECURITY COUNCIL

The Council has the mandate to maintain and promote international peace and security under the Charter. However, the Charter does not draw the line that circumvents the powers of the Council. This creates an ambiguous field in the ambit of its duties – on one hand, it may abuse these wide discretionary powers by going above and beyond what it is required to do and on the other, it may choose not to act in situations that it considers to be “too difficult” politically.<sup>92</sup> Furthermore, the decisions that are made by the Council are not amenable for review.<sup>93</sup>

It has already been argued that the Council needs this unfettered discretion so as to fulfil its mandate under the Charter.<sup>94</sup> In fact, during its drafting by the forefathers of the UN, there were several debates about defining the words “maintenance and promotion of international peace and security.”<sup>95</sup> At this point in time in San Francisco, it was argued that this action was very much intentional so as to provide the Council with the wide discretionary powers to implement and enforce any

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<sup>91</sup> ‘UN Watching Yugoslavia from Sidelines’, <https://www.globalpolicy.org/component/content/article/190/38871.html> on 28 December 2016.

<sup>92</sup> For instance, as has been discussed earlier, in the Rwandan genocide, the United Nations was criticized heavily for choosing to stand by and watch as thousands of the Tutsi population were massacred; their excuse being that they did not have enough vested interests in Rwanda so as to be convinced to step in. Similarly, the Council is being criticized for not taking action in the ongoing Syria crisis.

<sup>93</sup> *Prosecutor v. Dusko Tadic aka "Dule"*, para. 7.

<sup>94</sup> Schachter O, ‘The Quasi-Judicial Role of the Security Council and the General Assembly’ *American Journal of International Law* 58 (1964), 960. Found at [www.jstor.org/stable/2196038](http://www.jstor.org/stable/2196038) on 3 October 2016.

<sup>95</sup> Rusell R, *A History of the United Nations* (1958), 637.

measures it may deem fit.<sup>96</sup> The Council has consequently taken measures ranging from settling disputes concerning States' borders to establishing of international tribunals in furtherance of this purpose.

Regardless, this does not mean that the Council is *legibus solitus*<sup>97</sup> as it is always to be guided by principles of justice and of international law<sup>98</sup> based on two factors: one, that the Council has been born by the Charter therefore it shall abide by the rules, guidelines and spirit within the Charter; and secondly that the Member States of the Charter have vested their powers in the Council to act on its behalf.<sup>99</sup>

The issue of the Council establishing the *ad hoc* tribunals of the Former Yugoslavia and Rwanda has been a controversial topic where a political organ is judged for practicing judicial and legislative functions and by doing so, acting *ultra vires* of Chapter VII of the Charter. In earlier discussions by the members of the Council regarding the situation in the former Yugoslavia, China opined that establishing such a tribunal under Chapter VII by the Council ran the risk of abusing the powers conferred upon the Council.<sup>100</sup>

China was not opposed to the idea of instituting a tribunal – in fact it suggested that instead of the Council taking upon such a duty, a tribunal of such a nature should only be established under the traditional international law procedure – by way of a treaty.<sup>101</sup> The arguments against this were that forming a treaty-based international

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<sup>96</sup> *Case Concerning the Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v United Kingdom)*, Provisional Measures, 94 ILR 478 (Dissenting Opinion of Judge Weeramantry), 549.

<sup>97</sup> *Prosecutor v. Tadic aka "Dule"*, para. 28.

<sup>98</sup> Bowett D.W, *The Law of International Institutions*, 4ed, Stevens & Sons, London, 1982, 33.

<sup>99</sup> Franck T, 'The "Powers of Appreciation": Who is the Ultimate Guardian of the Council's Legality?' *American Journal of International Law* (1992), 523. See also Article 24, *Charter of the UN*.

<sup>100</sup> Li Zhaoxing, Representative of China, to the United Nations, U.N. SCOR, 48th Sess., 3217th mtg. at 33, U.N. Doc. S/PV.3217 (1993).

<sup>101</sup> Li Zhaoxing, Representative of China, to the United Nations. Similarly, this issue was brought forward by the International Progress Organization on behalf of the indictees of the ICTY, including

court would take a great deal of time due to the back and forth negotiations by States. This reasoning, in the opinion of the author, is flawed because the *ad hoc* tribunals did not take a part in stopping the conflict and was not intended by the UNSC to do so – but to assuage their infractions as discussed earlier. In addition, international crimes do not apply a statute of limitations for the specific reason that international crimes committed can be prosecuted freely without time as a limiting factor.

In fact, the Council could easily within its powers adopt a resolution that would create obligations upon States to do so in the interest of international peace and security as it has done before in Lebanon in the 1980s, Iran and Iraq in 1987 and Haiti and Somalia in 1993. It may also pass along the responsibility to the General Assembly to allow participation by other member States of the United Nations.<sup>102</sup> This discussion could be considered as foresight on those sentiments echoed by these discontented States and certainly, pointed to a possible alternative as has been seen by the establishment of the ICC.

The Council as a political organ does not follow any judicial proceedings and may choose not to apply international law in its decisions<sup>103</sup> – the Council makes its

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the former president of the Former Yugoslavia, Slobodan Milosevic. The organization asserted that such an establishment was based purely on political reasons as NATO forces were not estopped for their equally destructive military actions that were serious violations of international humanitarian law. In addition, it highlighted that this was setting a ‘dangerous precedent’ and that the Council, a purely political organ was disregarding one of the major tenets of the rule of law; separation of powers. See <http://i-p-o.org/yu-tribunal-memo1999.htm> on 25 November 2016.

<sup>102</sup> Permanent Representative of the Netherlands, to The United Nations addressed to the Secretary-General, U.N. SCOR, 48th Sess., at 2, U.N. Doc. S/25716 (1993). For example, the Netherlands said that the multilateral treaty was "the most solid legal basis for the establishment of a tribunal." Also Ronaldo Mota Sardenberg, Permanent Representative of Brazil, to the United Nations, U.N. SCOR, 48th Sess., 3217th mtg. at 36, U.N. Doc. S/PV.3217 (1993).

<sup>103</sup> In fact, it may do so selectively as the author has been trying to prove by giving instances throughout this paper. See, Gowlland-Debbas V, ‘The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case’ *American Journal of International Law* 88 (1994), 654. Found at [www.jstor.org/stable/2204134](http://www.jstor.org/stable/2204134) on 4 October 2016.

decisions as it sees fit; in a political manner by examining political facets of a situation while equally its members make their considerations based on politics.<sup>104</sup> Therefore, the confusion comes in when the Council establishes a tribunal that is considered a ‘subsidiary’ of itself with judicial functions. Does this then conclude that the Council as the parent, has judicial functions in itself?

### 2.3. TADIC’S DEFENSE ARGUMENT

Dusko Tadic (Tadic)<sup>105</sup> was not only the first individual that was brought before the ICTY but was also effectively the first person to be brought before international criminal justice after the Nuremberg trials.<sup>106</sup> He was charged with crimes against humanity and war crimes – crimes that he was eventually found guilty of.<sup>107</sup>

Pursuant to the Rules of Procedure and Evidence (RPE) adopted by Judges of the tribunal,<sup>108</sup> the Accused launched a preliminary defense motion on the jurisdiction of the tribunal before the Trial Chamber.<sup>109</sup> Tadic argued that the Tribunal was illegally established as it was not created by law but by resolution – a violation of his rights under the International Covenant on Civil and Political Rights (ICCPR).<sup>110</sup> The motion was dismissed by the Trial Chamber and swiftly landed

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<sup>104</sup> *Conditions of Admission of A State To Membership In The United Nations (Article 4 Of Charter)*, Advisory Opinion, ICJ Reports 1948 (Dissenting opinion JJ. Basdevant, Winiarski, McNair and Read), 85.

<sup>105</sup> He was a local political leader of the Serb Democratic Party in Kozarac, Bosnia and Herzegovina. He was behind the attack of Prijedor and Kozarac towns where several non-Serbs were assaulted, tortured and murdered.

<sup>106</sup> ‘Tadic, Dusko’, <http://www.haguejusticeportal.net/index.php?id=6077> on 21 November 2016.

<sup>107</sup> ‘The Prosecutor v. Duško Tadić a/k/a “Dule”’, <http://www.internationalcrimesdatabase.org/Case/85/Tadi%C4%87/> on 21 November 2016.

<sup>108</sup> Rule 73, *Rules of Procedure and Evidence of the ICTY*, 11 February 1994. This rule provides for the Accused to raise preliminary issues including those related to jurisdiction or lack thereof of the Tribunal.

<sup>109</sup> *Prosecutor v. Dusko Tadic a/k/a “Dule”*, paras. 1-2.

<sup>110</sup> Article 14, *International Covenant on Civil and Political Rights (ICCPR)*, 16 December 1966, 999 UNTS 171.

before the Appeals Chamber. The Prosecution agreed that the Appeals Chamber is mandated to examine the issue before proceeding further with the trial.<sup>111</sup> The tribunal, based on the power of *la competence de la competence*, examined and determined its own jurisdiction as well as the legality of the establishment of the tribunal. The tribunal ruled in the positive.

However, it is the author's contention that indeed, the Defense had grounds to merit such an appeal. It is in the author's opinion that firstly, the Tribunal was not established by law therefore it cannot be said to have such jurisdiction. Secondly, it is not disputed that this matter was already adjudged and in fact, the Tribunal has existed for about two decades at the time of writing this paper. The author merely seeks to critically analyze the said decision which is in tandem with Judge Li's separate opinion.<sup>112</sup> The Tribunal did not have the capacity to decide on such a matter<sup>113</sup> as its jurisdiction was only limited to the "serious violations of international humanitarian law that occurred in the territory of the Former Yugoslavia since 1991."<sup>114</sup> For this reason, it was not within its purview to decide on the legality of the Tribunal. Such an assertion raises the questions of "what next in that case then?" The author does not seek to discuss the same as the work of the

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<sup>111</sup> The Prosecutor submitted that it was in the interest of justice and of the Accused to have the matter adjudged in the Appeals Chamber. *See* Transcript of the Hearing of the Interlocutory Appeal on Jurisdiction, 8 September, 1995, 4. This was to avoid the terrible inconvenience of having to go through a trial only to realize later that the trial was not to take place. The Prosecutor also opined that the Security Council foresaw that the Statute of the Tribunal was filled with *lacunae* and therefore would have to be supplemented – hence giving Judges the authority to make such rules in their wisdom. *See* Rule 72, *Rules of Procedure and Evidence of the ICTY*.

<sup>112</sup> *Prosecutor v. Dusko Tadic a/k/a "Dule"*, paras. 2-3.

<sup>113</sup> The decision of the Security Council to establish such a Tribunal was one that was made in the context of international security and is not justiciable before judicial courts. Such measures taken by the Security Council can only be made by the organization and not by Judges who do not have expertise in international politics and/or affairs. *See Prosecutor v. Dusko Tadic a/k/a "Dule"*, Separate Opinion of Judge Li on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

<sup>114</sup> Article 1, *Statute of the International Criminal Tribunal for the Former Yugoslavia*.

Tribunal cannot be undone even if it is the author's opinion that it was created on a foul foundation but seeks to suggest procedural reform to avoid such situations in the future.

#### 2.4. WEAKNESSES OF THE *AD HOC* TRIBUNALS

There was the question of primacy that was also fought against fervently mostly based on fear of breaking the international rule of sovereignty. Nevertheless, it is worthwhile to note that the tribunals made considerable contributions to the sphere of international criminal justice and was the seed that planted the now permanent ICC. All that is being criticized is the procedure of formation.

##### Courts to be established by law

*"... In the determination of any criminal charged against him [...] everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."*<sup>115</sup>

These words are adopted verbatim from the ICCPR. This right has also been mirrored in the European Convention on Human Rights (ECHR) which guarantees a "speedy trial by an independent and impartial tribunal established by law".<sup>116</sup> The American Convention on Human Rights (ACHR) provides for a court that has been "previously" created by law.<sup>117</sup>

These provisions perceive that such a formation is one that will guarantee impartiality, independence and effectively justice and fairness. In the case of *Zand v. Austria*,<sup>118</sup> this was pointed out and it was made clear that judicial independence

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<sup>115</sup> Article 14, *International Covenant on Civil and Political Rights*.

<sup>116</sup> Article 6, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols 11 and 14*, 4 November 1950.

<sup>117</sup> Article 8, *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969.

<sup>118</sup> *Zand v. Austria*, Commissions Report (7360/76), Decisions and Reports 15, 1978, 80. In this case, the Applicant questioned the authority of the Labor Court that was deciding his matter regarding payment of compensation as was declared by his employer. His argument was that the

means that the courts should act without being moved by the Executive; it is only expected to work within the law that is constituted by the Legislature.

This legal principle does not stop there. It also requires that the appointment of judges be made in a manner that is fair and that does not meddle with judicial independence and impartiality. This includes not being appointed by administrative (and political) decisions or organs.<sup>119</sup> For international criminal tribunals, the same is to be applied in the appointment of Prosecutors.

The Council has the fiat to appoint Prosecutors for both *ad hoc* tribunals. In fact, before 2003 both tribunals shared an Office of the Prosecutor appointed by the Council.<sup>120</sup> However, this in itself may be problematic in the following sense: the Council has the powers to influence the work of the Office of the Prosecutor therefore, swaying the independence of Prosecutor.

The criminal tribunals were established for the major purpose of bringing war criminals to book for their serious violations of international humanitarian law. In certain instances, this was not the case. The former Prosecutor of the ICTR, Carla Del Ponte, exposed some of the cover-up<sup>121</sup> that was being propagated in the Office of the Prosecutor of the ICTR by the United States in favor of Paul Kagame and his

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above court was established by a decree of the Minister and as such he thought it unconstitutional based on the fact that it was not an ‘independent and impartial tribunal established by law’. He also added the fact that by the courts being able to be removed by administrative decisions interferes with its independence.

<sup>119</sup> *Zand v. Austria*, 80.

<sup>120</sup> ‘Justice Richard Goldstone’, [http://www.un.org/News/dh/iraq/richard\\_goldstone.htm](http://www.un.org/News/dh/iraq/richard_goldstone.htm) on 25 November 2016. Justice Goldstone was the first Chief Prosecutor of the ICTY and ICTR appointed by the Council in July 1994. Following him were Louise Arbor and Carla Del Ponte that served as Prosecutors of both tribunals before they were split up to individual offices. *See also* <http://www.icty.org/en/about/office-of-the-prosecutor/former-prosecutors> on 25 November 2016.

<sup>121</sup> Ponte C. D and Sudetic C, ‘*Confrontations with Humanity’s Worst Criminals and the Culture of Impunity: A Memoir*’, The Other Press, New York, 2008.

allies.<sup>122</sup> She found that Kagame was responsible for the assassination of the Rwandan and Burundian president at the time, an event that triggered the genocide that followed.<sup>123</sup>

On pursuing her duties as the Chief Prosecutor, she was dismissed from her position and another Council-favored Prosecutor put in place in her stead.<sup>124</sup> This just goes to show how the Office of the Prosecutor is being puppeteered by the Council and is not as independent as it should be,<sup>125</sup> more so by the fact that its actions are driven by political interests and ambitions. This affects the legitimacy of the tribunal and has an effect towards the perception that the world at large adopts regarding international criminal tribunals and international criminal justice in general.

In conclusion, the UNSC not only establishes the tribunals to favor their self-regarding interests but also continues to retain its fingers in the work of the tribunals to ensure that their securities are always protected. This clear show of abuse of the UNSC exercising its powers leads to the author to dub such a situation as a “new form of victor’s justice”.

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<sup>122</sup> Kagame was found to be responsible for his men killing about 10,000 civilians in a month, prosecutions that were avoided like a plague under instructions from the United States and effectively the United Nations. *See* <http://www.rwandadocumentsproject.net/gsd/collect/arrest/index/assoc/HASH30d2.dir/pt9formerChiefUNRWandaProsecutorDelPonteObamaWarCrimesNominee.pdf> on 25 November 2016.

<sup>123</sup> ‘Former Chief UN Rwanda Prosecutor, Carla Del Ponte: “Obama War-Crimes Nominee – Complicit in War Crimes Cover-Up?”. Does Obama Know...or Care?’ by Prof. Peter Erlinder <http://www.rwandadocumentsproject.net/gsd/collect/arrest/index/assoc/HASH30d2.dir/pt9formerChiefUNRWandaProsecutorDelPonteObamaWarCrimesNominee.pdf> on 25 November 2016.

<sup>124</sup> When she refused to cave under the pressure to stop pursuing the matter, she was quickly replaced by a Prosecutor that was favored by the United Nations, Hassan Jallow who would be under their fist-rule. *See* <http://www.rwandadocumentsproject.net/gsd/collect/arrest/index/assoc/HASH30d2.dir/pt9formerChiefUNRWandaProsecutorDelPonteObamaWarCrimesNominee.pdf>.

<sup>125</sup> Article 42, *Rome Statute*.

## 2.5. RATIONALE BEHIND THE TREATY-MAKING PROCESS

Much has been said about the political agenda that was the chariot that carried the Council into making such decision as to pass resolutions that would establish these *ad hoc* tribunals. This issue has been a factor that has contributed to the perception of the local communities of Rwanda and the Former Yugoslavia that has diminished their appreciation of the establishment of the said tribunals. What *prima facie* looks like the saving grace for these warring States in the nineties, suddenly is met with heavy criticism and attacks to its legitimacy.

It is the author's assertion that the process of establishing these tribunals should have been one that was involving of other States. This could have been achieved by way of allowing the General Assembly to seize of the matter or have States ratify a treaty on this. It has been said that one of the major functions of treaties is that it is symbolic of the position of the community of States regarding a particular international law matter. This as a result creates a genuine and believable effect<sup>126</sup> – a quality that would have been integral in the existence and establishment of these tribunals in 1993 and 1994.

This came to pass in 1998 with the adoption of the Rome Statute but continuous exercise of 'executive' measures by the UNSC under the Statute<sup>127</sup> has brought friction between States, the UNSC and the ICC as shall be discussed in the following chapter.

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<sup>126</sup> Indeed, this is known as the expressive function of treaties where a significant following of States is indicative of what States accept or refuse to accept as acceptable conduct to a community of States. This perception can indeed be felt even by those States that do not ratify the treaty in question. See Hathaway O, 'Do Human Rights Treaties Make a Difference?' *The Yale Law Journal* 111 (2002), 2021.

<sup>127</sup> Article 13 (b), *Rome Statute*.

### III.CHAPTER THREE : Sweetening the Deal

#### 3.1. A SHIFT OF LENS FROM INTERNATIONALLY-ESTABLISHED *AD HOC* CRIMINAL TRIBUNALS TO HYBRID TRIBUNALS

The power of the UNSC is seen to transition in this chapter from establishing tribunals to a compromise with governments of States. The focus on sanctioning criminals has been traditionally recognized in two major ambits; before national courts under domestic law and before purely international criminal courts such as the ICTY and the ICTR (and more recently, the ICC). Enter the third generation of international criminal justice: the establishment of hybrid tribunals which essentially blends the board creating internationalized domestic courts,<sup>128</sup> a new species of courts in international criminal justice. These courts are also known as hybrid courts – comprised of independent judges who work within predetermined rules of procedure as is the fashion of international tribunals while ending up being part of the particular State’s national judicial system.<sup>129</sup>

The *ad hoc* tribunals and hybrid tribunals share similarities in the sense that they are both temporally and geographically limited in jurisdiction. However, there are existing stark differences in the context within which they were designed, the circumstances around them and the method of establishment. Nevertheless, these two types of courts can be seen to have been painted against the backdrop of the Nuremberg trials – the father of international trials.<sup>130</sup>

##### 3.1.1. Special Court for Sierra Leone

Following the civil war that transpired for almost a decade in Sierra Leone (1991 to 2002), the government of Sierra Leone put forward a request to the UN<sup>131</sup> to

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<sup>128</sup> Linton S, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, Kluwer Academic Publishers, the Netherlands, 2001, 185-246.

<sup>129</sup> ‘Hybrid Courts’, <http://www.pict-pecti.org/courts/hybrid.html> on 13 December 2016.

<sup>130</sup> Mundis D, ‘Completing the Mandates of the Ad Hoc International Criminal Tribunals: Lessons from the Nuremberg Process?’ *Fordham International Law Journal* 28 (2004).

<sup>131</sup> In turn, the UNSC made a request to the UN Secretary-General to partake in negotiations with the local government so as to establish a hybrid court. *See Agreement between the United Nations*

assist in the setting up of a special court that would have the mandate to find perpetrators individually criminally responsible for violations of international humanitarian law against civilians and members of the UN peacekeeping missions.<sup>132</sup> The UN welcomed the issue<sup>133</sup> and began negotiations with the government that resulted in the first internationalized court with certain unique features as the first international tribunal. This Special Court was half situated in the place of conflict – being Freetown in Sierra Leone – therefore allowing it to have effective ripple effects on the ground<sup>134</sup> while also being located in The Hague. It has now since completed its mandate (in 2013) and transitioned into a Residual Mechanism that is tasked with carrying forward its legacy.<sup>135</sup>

### **3.1.2. Extraordinary Chambers in the Courts of Cambodia**

In 1997, amidst the war under the Khmer Rouge regime, the government of Cambodia again approached the UN in the similar Sierra Leonean fashion, asking for assistance in establishing trials that would be able to prosecute members of this atrocious regime and find them criminally responsible for the heinous crimes committed against the Cambodian people. Meanwhile, the Cambodian National Assembly passed law that created the Extraordinary Chambers in the Courts of Cambodia (ECCC) in 2006 that had limited temporal jurisdiction for crimes

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*and Sierra Leone reproduced in the Report of the Secretary-General on the Establishment of the Special Court for Sierra Leone*, 4 October 2000, UN Doc S/2000/915.

<sup>132</sup> ‘The Special Court for Sierra Leone; Its History and Jurisprudence’, <http://rscsl.org/> on 13 December 2016.

<sup>133</sup> In line with the *Declaration of the High-Level Meeting on the Rule of Law* by Member States of the United Nations where States refused to tolerate genocide, crimes against humanity and war crimes as gross violations of international human rights and humanitarian law.

<sup>134</sup> ‘The Special Court for Sierra Leone; Its History and Jurisprudence’, <http://rscsl.org/> on 13 December 2016.

<sup>135</sup> ‘The Special Court for Sierra Leone; Its History and Jurisprudence’, <http://rscsl.org/> on 13 December 2016.

committed between 1975 and 1979.<sup>136</sup> Negotiations with the UN finally bore fruits come June 2003 where the UN gave detailed instructions on how the international community could participate in the said legal process.<sup>137</sup>

These Chambers again show similar traits to the SCSL in that it also showed features of the national legal system. For instance, the Chambers were set up within the existing domestic court structure in the trial court and the Supreme Court<sup>138</sup> and is indeed applying its national laws such as their 1956 Penal Code and their Constitution<sup>139</sup> as well as international criminal law provisions. In addition, the Cambodian government was categorical in declaring that they wanted a court with international criminal jurisdiction but only if it was to be located in Cambodia and staffed with Cambodian people.<sup>140</sup> It was described as a Cambodian court in every sense of the word and sought to be independent as such. International participation was allowed as an auxiliary in so far as it would conform to international standards.

### **3.1.3. Special Tribunal for Lebanon**

The trigger mechanism of this Tribunal was the infamous political assassination of the former Prime Minister of Lebanon, Rafik Harir, in February 2005. The government was called upon to act on this terror attack and to bring to book those

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<sup>136</sup> Article 1, *Law on The Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea* (Amendment), 27 October 2004.

<sup>137</sup> 'Introduction to the ECCC', <https://www.eccc.gov.kh/en/about-eccc/introduction> on 13 December 2016.

<sup>138</sup> Article 2 new, *Law on The Establishment of the Extraordinary Chambers in the Courts of Cambodia*.

<sup>139</sup> Article 3 new, *Law on The Establishment of the Extraordinary Chambers in the Courts of Cambodia*.

<sup>140</sup> There are five professional judges of which three are Cambodian, one of them being president while the other two are foreign judges in the Trial Chamber while in the Supreme Court Chamber there are seven professional judges of which four are Cambodian, one of them being president while the other two are foreign judges. See Article 9 new, *Law on The Establishment of the Extraordinary Chambers in the Courts of Cambodia*. See also, 'Introduction to the ECCC', <https://www.eccc.gov.kh/en/about-eccc/introduction> on 13 December 2016.

who were involved; perpetrators, organizers and sponsors that facilitated the terrorist act.

An independent fact-finding mission, ordered by the UN Secretary-General at the time, Ban Ki-Moon was presented to the UNSC<sup>141</sup> and from this resulted the need to conduct internationally independent investigations. This was due to the fact that the Lebanese investigation process “suffers from serious flaws and neither has the capacity nor the commitment to reach a satisfactory and credible conclusion”.<sup>142</sup> The Lebanese government could no longer sit on its hands and therefore requested the UN to create a tribunal with an “international character”<sup>143</sup> to seize of the nationally terrifying matter. Following negotiations between the two parties, an agreement was reached and the Tribunal was born by way of a Resolution.<sup>144</sup>

Uniquely, this Tribunal is the first of its kind to prosecute accused persons solely based on its national law and criminal code. Within its mandate, it also the only tribunal that is responsible for the prosecution of crimes related to terrorism, offences against life and personal integrity, illicit associations and failure to report crimes and offences.<sup>145</sup>

It is located in The Hague where it was thought best for the purposes of justice and security. However, there exists a local office in Beirut, led by Beirut staff, that

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<sup>141</sup> Report of the Fact-Finding Mission to Lebanon Inquiring into the Causes, Circumstances and Consequences of the Assassination of former Prime Minister Rafik Harir, 24 March 2005.

<sup>142</sup> Report of the Fact-Finding Mission to Lebanon Inquiring into the Causes, Circumstances and Consequences of the Assassination of former Prime Minister Rafik Harir.

<sup>143</sup> ‘Creation of the STL’, <https://www.stl-tsl.org/en/about-the-stl/636-creation-of-the-stl> on 13 December 2016.

<sup>144</sup> UNSC S/RES/1757 (2007) Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon. However, it should be noted that the UN Secretary-General played a similar role of negotiations with the government of Lebanon as with other local governments to establish such a court which the UNSC was a mere rubber-stamp in its establishment and implementation; following the nature of the crime in question.

<sup>145</sup> ‘Unique Features’, <https://www.stl-tsl.org/en/about-the-stl/unique-features> on 13 December 2016.

offers support to the Tribunal such as conducting of investigations and other diplomatic related issues in Lebanon.<sup>146</sup> The composition of the chambers is also a mix of both Lebanese judges and international judges.<sup>147</sup>

#### **3.1.4. Special Panels for Serious Crimes in East Timor**

The Special Panels were established in the District of Dili in East Timor in 2000<sup>148</sup> after the hostilities that were witnessed in East Timor following a referendum in September 1999 that favored its independence from Indonesian occupation. An Investigative Commission of Inquiry set up by the UN suggested an *ad hoc* tribunal similar to the ICTY and the ICTR but this was vehemently rejected in favor of hybrid courts that would be established within the domestic legal system.<sup>149</sup> The UN Transitional Authority in East Timor (UNTAET)<sup>150</sup> established the Panels with the temporal jurisdiction of between January and October 1999.<sup>151</sup> The Panels also saw the application of domestic law in the criminal procedure as well as international treaties and conventions<sup>152</sup> in the prosecution of genocide, war crimes, crimes against humanity, murder, torture and sexual offences.<sup>153</sup> In addition, the

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<sup>146</sup> ‘Why is the Tribunal Based in The Netherlands and not in Lebanon?’, <https://www.stl-tsl.org/en/ask-the-tribunal/477-why-is-the-tribunal-based-in-the-netherlands-and-not-in-lebanon> on 13 December 2016.

<sup>147</sup> Article 8, *Statute of the Special Tribunal for Lebanon*, 2007. Also known as UNSC S/RES/1757 (2007) Statute of the Special Tribunal for Lebanon.

<sup>148</sup> UNTAET/REG/2000/15 (2000) On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences.

<sup>149</sup> ‘Special Panels for Serious Crimes in East Timor’, [http://www.ibanet.org/Committees/WCC\\_EastTimor.aspx](http://www.ibanet.org/Committees/WCC_EastTimor.aspx) 13 December 2016.

<sup>150</sup> UNTAET was the official administrative system (although transitional) that was established by the UNSC to have overall responsibility for East Timor. See UNSC S/RES/1272 (1999) on the situation in East Timor. It was endowed with all legislative, executive and judicial powers that an ordinary system of government would have.

<sup>151</sup> Section 2 (2.3), UNTAET/REG/2000/15 (2000).

<sup>152</sup> Section 3 (3.1), UNTAET/REG/2000/15 (2000).

<sup>153</sup> Section 1 (1.3), UNTAET/REG/2000/15 (2000).

composition of judges was to reflect foreign judges being supplemented by East Timorese judges.<sup>154</sup>

This trend of hybrid tribunals was seen raising its head in the early 21<sup>st</sup> century and even more interesting is the role of the UN in their establishment. Imperative to note is that the UNSC decidedly determined the particular areas in question undergoing armed conflict but did not go ahead to directly institute international courts and hire judges and prosecutors, as demonstrated below – moving away from previous conduct that the author finds *ultra vires*.

## 3.2. MODERN INTERNATIONAL JUSTICE: THE INTERNATIONAL CRIMINAL COURT

### 3.2.1. Establishment of the ICC as a “World Court”

So far, all the efforts in international criminal justice from Nuremberg to the 21<sup>st</sup> Century have unwittingly been in preparation for an international criminal court that the UN undoubtedly saw the need to establish to enforce international criminal law.<sup>155</sup>

The ICC was perceived as the “World Court” at the time of its inception in the sense that it was designed to serve universal justice.<sup>156</sup> This visualization was a keystone in international criminal justice that international values shall be upheld. In the same way, a permanent court was seen as a remedy for the shortcomings of the *ad hoc* tribunals;<sup>157</sup> where *ad hoc* tribunals were thought to take too long to set up, to

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<sup>154</sup> Section 22, UNTAET/REG/2000/15 (2000).

<sup>155</sup> Schabas, *An Introduction to the International Criminal Court*, 16.

<sup>156</sup> At the 52<sup>nd</sup> Session of the General Assembly during the adoption of the Rome Statute in 1998, the then Secretary-General, Kofi Annan mentioned that “In the prospect of an international criminal court lies the promise of universal justice [...] in our struggle to ensure that no ruler, State, junta or army may abuse human rights with impunity.” See <http://legal.un.org/icc/general/overview.htm> on 13 December 2016.

<sup>157</sup> For instance, in the Situation in Darfur, the Commission of Inquiry headed by Antonio Cassese noted that setting up an *ad hoc* tribunal would take too long and too much resources therefore the best recourse would be the ICC. See, Schabas, *An Introduction to the International Criminal Court*, 50.

instigate investigations, to collect evidence and so on due to availability of resources, the ICC fills this gap by providing a more stable solution.<sup>158</sup>

The intention was to establish an independent court that would be free from the clutches of politics, representative and effective.<sup>159</sup> This was and continues to be a battle of wills among States within the UNSC on the strong desire to have some control within the ICC.<sup>160</sup>

### **3.2.2. The Council's Role under the Rome Statute**

The ICC may exercise its jurisdiction if a situation in which crimes appear to be committed are referred to the Prosecutor by the UNSC under its mandate of Chapter VII of the UN Charter.<sup>161</sup> In fact, upon such referral, the Prosecutor is authorized to go ahead and investigate without further approval by the Trial Chamber<sup>162</sup> as is the case under her powers of *proprio motu*.

In this case, the UNSC is seen flexing its muscles where it can refer cases where the date of entry into force is non-applicable and the case will remain admissible before the ICC,<sup>163</sup> all factors considered including the exception under Article 12 (3). This is a departure from the general rule of temporal jurisdiction under the

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<sup>158</sup> International tribunals were not enough to tackle the mass atrocities and the gross human rights violations that are happening in today's world due to their limited competence. *See* Sunga L, 'The Emerging System of International Criminal Law: Developments in Codification and Implementation' *Kluwer Law International* (1997), 331. *Also* Jalloh C, 'Regionalizing International Criminal Law' *International Criminal Law Review* 9 (2009), 460.

<sup>159</sup> Cassese, *International Law*, 457.

<sup>160</sup> The US insisted to gain control in the working of the Court but this was rejected by the rest of the member States that recognized the need of such a court to be politically free. *See*, Bill Richardson, US Ambassador to the UN, 'US Declares at Conference that UNSC Must Play Important Role in Proposed International Criminal Court, UN Press Release L/ROM/11, 17 June 1998. *Also see*, Schabas, *An Introduction to the International Criminal Court*, 25.

<sup>161</sup> Article 13 (b), *Rome Statute*.

<sup>162</sup> Cakmak C, 'The International Criminal Court in World Politics' *International Journal on World Peace* 23 (2006).

<sup>163</sup> UNSC S/RES/1593 (2005) on the situation in Darfur.

Statute.<sup>164</sup> In addition, in the case of referrals of non-State Party individuals that have immunity, the Statute disregards this immunity where it ordinarily would not.<sup>165</sup> The fact that the referrals of the UNSC do not need any further approval is a basic presumption of the admissibility of a case in the ICC.<sup>166</sup>

The Rome Statute also provides for the stalling of any investigations for up to 12 months by means of a UNSC Resolution.<sup>167</sup> This deferral may be renewed endlessly.<sup>168</sup> These two ways have been the ingenious path through which the UNSC found itself wiggling its presence into the functioning of the Court. In any case, it is mirthful how this power ended up being included in the Rome Statute intentionally by States to limit the ‘political power’ of the Prosecutor<sup>169</sup> yet they cannot see the log that is in their eye in this regard of checking political control.

The genesis of this power is traced back to the discussions among States during the drafting of the Rome Statute. Among the first proposals of the Statute by the International Law Commission (ILC) envisaged a permanent criminal court that would be subsidiary to the UNSC<sup>170</sup> - only changes being that it be a graduation from the *ad hoc* nature to one of permanence. This, the United States was in concurrence with in Rome and supported the role the UNSC would have in determining actions under Chapter VII followed by referrals to the ICC.<sup>171</sup> This ended up not being the case and the US was known to be defiant to support the

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<sup>164</sup> Article 11 (1) and Article 24 (1), *Rome Statute*.

<sup>165</sup> Article 98 (1), *Rome Statute*. See also, Akande D, ‘International Law Immunities and the International Criminal Court’ *American Journal of International Law* 98 (2004), 407.

<sup>166</sup> Schabas, *An Introduction to the International Criminal Court*, 354.

<sup>167</sup> Article 16, *Rome Statute*.

<sup>168</sup> Cardona Y, ‘A Critical Analysis of the Rome Statute of the International Criminal Court’ Unpublished LL.M Thesis, University of Malta, May 2013, 46.

<sup>169</sup> Cardona Y, ‘A Critical Analysis of the Rome Statute of the International Criminal Court’, 46.

<sup>170</sup> Schabas, *An Introduction to the International Criminal Court*, 26.

<sup>171</sup> The only other mode of jurisdiction over cases that the ICC had other than UNSC referrals were State referrals. These two ways were the only ways agreed upon for the Prosecutor to have the power to act, at the first instanced. See, David Scheffer, ‘The United States and the International Criminal Court’ *American Journal of International Law* 12 (1999), 13.

Court at its inception.<sup>172</sup> With the current number of referrals of African States by the UNSC, the US has begun warming itself up to the ICC but still chooses not to ratify the Statute based on its own individual State interests.<sup>173</sup>

The same has been argued by African States through the African Union (AU). Upon the issuance of the arrest warrant for the Sudanese president, Omar Al-Bashir,<sup>174</sup> the AU asked the UNSC to invoke Article 16 to defer the situation for 12 months due to peace considerations.<sup>175</sup> These requests fell on deaf ears even after the AU reiterated the same<sup>176</sup> resulting in African States agreeing that they shall not cooperate with the ICC on the matter accordingly.<sup>177</sup>

The AU then decided to host a Review Conference with the aim of investigating *inter alia* the powers of the UNSC to refer and defer cases.<sup>178</sup> The result of this conference was a resolution to the effect of calling for an amendment of Article 16 to allow States with jurisdiction over matters before the ICC to request for a deferral to the UNSC and where the UNSC fails to act on such a request, then the UNGA

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<sup>172</sup> The change of attitude and increased good political will by the United States has been explained to be motivated by the recent activity within the ICC – where States that are of interest to the United States are being held accountable for ongoing crimes and the United States has suddenly become a defender of the Statute. *See, Schabas, An Introduction to the International Criminal Court*, 25 – 34.

<sup>173</sup> The main concern of the United States within the ICC being the potential consequences that would arise to its military forces should the Court exercise its jurisdiction. This explained the cold nature that the US approached the ICC with during George Bush’s administration. *See, Schabas, An Introduction to the International Criminal Court*, 25 – 34.

<sup>174</sup> Warrant of Arrest for Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09-1, 4 March 2009.

<sup>175</sup> Ciampi A, ‘The Proceedings against President Al-Bashir and the Prospects of their Suspension under Article 16 ICC Statute’ *Journal of International Criminal Justice* 6 (2008), 885.

<sup>176</sup> Assembly/AU/13 (XIII) AU Assembly Decision on the Meeting of African State Parties to the Rome Statute of the International Criminal Court (ICC), para.9.

<sup>177</sup> AU Assembly Decision the Rome Statute of the International Criminal Court (ICC), para.10.

<sup>178</sup> EX.CL/568 (XVI), Report on the Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC), Executive Council, 25–29 January 2010, Addis Ababa, para. 1.

should be allowed to exercise such power.<sup>179</sup> This is a strong indicator of the sentiments of African States towards the wide margin of discretionary powers the UNSC is applying in the ICC and African States continue to encourage each other to “speak in one voice” in pushing for such reformation of the Rome Statute<sup>180</sup> As if this was not enough, African States are seen to move towards their own solution of empowering African justice systems to include international criminal justice.<sup>181</sup>

### 3.3. THE NATURE OF TODAY’S INTERNATIONAL CRIMINAL JUSTICE

Where at the onset “the four great nations that were flushed with victory and stung with injury”<sup>182</sup> were the self-imposed carriers of justice resulting to the famous coinage “victors’ justice”, today international criminal justice takes a different shape. The *ad hoc* tribunals are no longer in the forefront of our painting and have been surpassed by time and events with the coming of the ICC.

The game, the rules and dynamics are different. Whereas in the past international courts had limited mandate, the ICC does not have a statute of limitations.<sup>183</sup> In addition, the Court is a court of last resort which allows States the first opportunity to address criminal violations in their domestic jurisdictions, whereas the *ad hoc* tribunals had primacy over the national criminal systems.<sup>184</sup>

The UNSC continues to determine threats to peace or breaches of peace under Chapter VII of the UN Charter usually in the form of a “situation” of armed conflict. Where previously the UNSC was taking upon itself the duty to find individuals

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<sup>179</sup> Weldehaimanot S, ‘Arresting Al-Bashir: The African Union’s Opposition and the Legalities’ *African Journal of International and Comparative Law* 19 (2011), 216 – 217.

<sup>180</sup> Weldehaimanot S, ‘Arresting Al-Bashir: The African Union’s Opposition and the Legalities’, 218.

<sup>181</sup> AU Assembly Decision the Rome Statute of the International Criminal Court (ICC), *supra* note 38.

<sup>182</sup> Opening Statement to the International Military Tribunal at Nuremberg, *Trial of the Major War Criminals before the International Military Tribunal* 2 (1947), 98.

<sup>183</sup> Article 29, *Rome Statute*.

<sup>184</sup> Article 17, *Rome Statute*. Also see, Cassese, *International Law*, 457.

criminally liable for international crimes through the *ad hoc* tribunals, now it only has the role of referral to the ICC.

From the beginning of this paper, the author has been advocating for a treaty-based international criminal court where States are actively involved in its formation, vis-à-vis an *ad hoc* tribunal established by the UNSC and more often than not, motivated by political egocentric ideals. Despite the efforts to rid of such political influence, the little involvement of the UNSC in the treaty-based ICC<sup>185</sup> has been met with some disgruntled States (African States in particular) on the selective nature of the invocation of Article 13 (b) of the Statute. The international community begins to feel the winds of change when African States resort to finding their own solution and unexpectedly, propose their own criminal court without the input of the UNSC as shall be discussed in detail in the next chapter.

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<sup>185</sup> Schabas notes that had the UNSC been accommodated more in the ICC (as had been suggested prior by the ILC), there would have been less enthusiasm from other States to ratify the treaty. *See*, Schabas, *An Introduction to the International Criminal Court*, 27. *Also see*, Schabas W, 'United States Hostility to the International Criminal Court: It's All About the Security Council' *European Journal of International Law* 15 (2004).

## IV.CHAPTER FOUR : The Rising Greenhorn

### 4.1. PROPOSED CRIMINAL DIVISION FOR THE AFRICAN COURT

Africa, the ICC and the UNSC, have relished an interesting relationship in the past few years. Zooming into the cases the ICC has involved itself with so far, the only cases it has entertained are cases from Africa;<sup>186</sup> in fact paradoxically it could as well be renamed as the “African Court” as African States seem to be its most ‘clients’. Having in mind the forces at work in African States and effectively their heads of governments of untold dictatorial character, this was not a factor that would easily go unnoticed. Predictably, there have been unsettled sentiments and open discontent about the ICC being biased against African States and not pursuing other ongoing criminal cases in other parts of the world.<sup>187</sup>

The AU has been vocal on the situation in Darfur especially when it opined that by issuing the arrest warrant against Al-Bashir – a sitting Head of State – the ICC was undermining its (the AU) efforts to maintain peace and stability in the region.<sup>188</sup> Following that decision, the AU took action and passed resolutions upon

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<sup>186</sup> ‘Situations under Investigation’, <https://www.icc-cpi.int/pages/situations.aspx> on 28 December 2016. There are 8 African cases at the ICC at the moment of writing this paper; four that have been paradoxically been referred to the Court by the same African member States (Uganda, CAR, DRC and Mali), two that have been referred by the UNSC (Sudan and Libya) and two that the Prosecutor has instituted *proprio motu* (Kenya and Cote d’Ivoire).

<sup>187</sup> Robert Mugabe, the head of State of Zimbabwe and the chairperson of the African Union was quoted, with regards to Al-Bashir’s arrest, saying: “This is not the headquarters of the ICC; we don’t want it in this region at all.” See <http://america.aljazeera.com/articles/2015/6/16/mugabe-says-icc-unwelcome-in-africa.html> on 28 December 2016. Also during his inauguration for his fifth term, Yoweri Museveni, Ugandan president publicly branded the ICC as a ‘bunch of useless people’ and that he no longer supports them – a statement that led United States and the European Union delegates to walk out in protest due to the fact that they felt it was an insult to justice and victims of violations against humanity. See <https://www.theguardian.com/world/2016/may/12/walkout-at-ugandan-presidents-inauguration-over-icc-remarks> on 28 December 2016.

<sup>188</sup> Weldehaimanot S, ‘Arresting Al-Bashir: The African Union’s Opposition and the Legalities’.

resolutions<sup>189</sup> urging member States not to cooperate with the ICC and this point was clearly seen to come across when several States refused to kiss the ring by hosting the Sudanese president in defiance to the warrant.<sup>190</sup> In one of its most infamous summits that was held in Libya in 2009,<sup>191</sup> the AU concluded that it shall not cooperate with the ICC in arresting Al-Bashir pursuant to the Rome Statute rejecting immunities for heads of States. This frustration was further sparked by the instigation of charges against Kenya's Uhuru Kenyatta and William Ruto that continued to fuel the notions that the ICC is unjust and propagates inequality by disproportionately instituting cases in the African continent in the name of international criminal law.

To further color the background against which this discussion is to be carried, one has to understand the judicial system of the African region and where exactly it is the African criminal court division will be expected to fit in. Originally, in the recent past, there only existed the African Court on Human and Peoples' Rights (ACtHPR) that was established by a Protocol in 2004<sup>192</sup> and was tasked with the mandate of interpreting and applying the African Charter on Human and Peoples' Rights (The African Charter).<sup>193</sup> It also has jurisdiction over other international human rights treaties ratified by the State Parties.<sup>194</sup> However, another court which the AU intended to be its principle judicial organ with the jurisdiction over interpretation of AU treaties<sup>195</sup> was to join the club a little later as the African Court of Justice and Human Rights. This did not come to pass as the two major African

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<sup>189</sup> Weldehaimanot S, 'Arresting Al-Bashir: The African Union's Opposition and the Legalities', 216 – 217.

<sup>190</sup> Baldo S, 'The Politics of an Arrest Warrant' (23 July 2008), found at <http://blogs.ssrc.org/darfur/2008/07/23/the-politics-of-an-arrest-warrant/> on 28 October 2016.

<sup>191</sup> Assembly/AU/13 (2009) AU Assembly Decision on the Meeting of African State Parties to the Statute of the Rome Statute of the International Criminal Court (ICC) in Sirte, Libya.

<sup>192</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, 25 January 2004.

<sup>193</sup> Article 3 (1), *Protocol to the African Charter*.

<sup>194</sup> Article 7, *Protocol to the African Charter*.

<sup>195</sup> 'African Court of Justice', <http://www.africanlii.org/catalog/53> on 28 December 2016.

judicial institutions were merged<sup>196</sup> to form the African Court of Justice and Human Rights (ACtJHR) also known as the “Merged Court”.<sup>197</sup> This Court has become the principle judicial organ of the AU and is mandated with the task of adjudicating both human rights issues as well as general affairs regarding interpretation and application of AU treaties and institutions.<sup>198</sup>

African heads of States have not failed to act on their general anti-ICC attitudes. They (through the AU)<sup>199</sup> were the brainchildren to the novel idea that a criminal division be established within the ACtJHR with the jurisdiction to try war crimes, crimes against humanity and genocide *inter alia* corruption, unconstitutional change of government and other related crimes.<sup>200</sup>

In 2010, the AU approached the AU Commission to look into the possibility of setting this up and after several reviews, consultations and amendments, the AU finally recommended a final Draft Protocol to the AU Assembly for adoption. That was the process that led to the birth of a Draft Protocol expanding the mandate of the ACtJHR to include criminal jurisdiction<sup>201</sup> and mostly what has been termed as

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<sup>196</sup> The decision behind this was majorly the fact that the AU found that it did not have sufficient resources to sustain both institutions in a plethora of others within the AU. The AU Commission was instructed to come up with a way of integrating these courts and came up with a Protocol that still maintained the separate jurisdictions of both courts operating within the same chambers. *See* Protocol on the Statute of the African Court of Justice and Human Rights, 2009.

<sup>197</sup> Protocol of the Merged Court, July 2008.

<sup>198</sup> Articles 16 and 17, *Protocol on the Statute of the African Court of Justice and Human Rights*.

<sup>199</sup> Assembly AU/3 (2009) Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction.

<sup>200</sup> Article 28A, *Draft Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, May 2012.

<sup>201</sup> Draft Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, May 2012. *See also*, ‘A Case of Negative Regional Complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes’, <http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/> on 29 December 2016.

the “African solutions for the African problems”<sup>202</sup> – more reason for African States to feel that a non-African court should not be responsible to try African individuals than the issue of selectivity in the cases being brought before the ICC.<sup>203</sup>

#### 4.2. COEXISTENCE BETWEEN THE CRIMINAL COURT IN AFRICA AND THE ICC

It is undisputed that the motivation behind the establishment of the criminal court can be construed in various ways. It may be that indeed, African States aspire to make genuine contributions to international criminal justice by strengthening such sense in the African continent to fight impunity and to protect potential victims from gross human rights violations. In addition, it could be that by showing their frustrations over the UNSC and the ICC intervention in Darfur for instance, the ICC seemed like an interference in the AU’s work to maintain peace and stability in the region and for this reason; not even the stereotypical African character of warmth and hospitality can keep the ICC in the AU’s good graces.

It may also be that this entire process is a scheme, a Trojan horse of sorts, which African States are using to escape the clutches of an international system that they have witnessed to have the judicial power to hold high-ranking individuals personally responsible for any human rights violations committed during armed conflict; and that this follows as a mere knee-jerk reaction to save their skins and escape to a creation of their own that will guarantee their immunity from criminal prosecutions. Nevertheless, regardless of the reason behind the hands that puppeteer such political decisions amongst African heads of States, it is still questionable whether such a move is a viable one. Whether politics and some sense

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<sup>202</sup> Similarly, the AU organ, Peace and Security Council (PSC), was established as a result of African States believing that the UNSC was not sufficiently addressing security concerns in the continent. For this reason, they opted for their own “autonomous security institution” as yet another “African solution to African problems”. *See also*, Jones B, *Evolving Models of Peacekeeping: Policy Implications and Responses*, United Nations Peacekeeping External Study (2003), 19.

<sup>203</sup> Especially where the AU gives as one of its main reason to be that the exercise of universal jurisdiction by the ICC is an abuse of the principle and that this was a blatant violation of State sovereignty.

of inflated ego will be enough drive to keep the prospective criminal court with such ambitious jurisdictional reach running, keeping in mind other factors that come into play; such as financial resources, structural and institutional needs, implementation concerns and even politics within the African States' body in itself.

Given the general overview of what shape the African criminal court is expected to take, it is evident from different discussions already held that there may be some friction in its coexistence with the "World Court" regarding jurisdictional matters especially over war crimes, genocide and crimes against humanity; while still respecting the principle of complementarity that both courts vow to respect. This is due to the fact that both courts have been designed to occupy and overlap in the same space where as many as 34 member States of the AU also function as member States to the Rome Statute and this commotion will most likely bring uncertainty as to which judicial institution between the two shall seize the matters – a question of primacy. If anything, suspiciously, the Draft Protocol does not explicitly mention the relationship this court will have with the ICC – a move that critics<sup>204</sup> opine to mean that it is hoped that the AU member States will have preference towards the African criminal court vis-à-vis the ICC or that this is indication enough of poor and short-sighted treaty-making.

The question that may arise is whether there shall yet be another level to the principle of complementarity in the sense of the international court being the court of last resort<sup>205</sup> or whether African States will have the option of shopping for the right forum in the prosecution of these three major crimes. It is important to flag

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<sup>204</sup> Plessis M, 'Implications of the AU Decision to Give the African Court Jurisdiction over International Crimes' *Institute for Security Studies* 235 (2012), 10. Also available at <https://issafrica.s3.amazonaws.com/site/uploads/Paper235-AfricaCourt.pdf> on 29 December 2016.

<sup>205</sup> However, it should be noted that the African criminal court does not rely on the ICC to exist per se. It is a court that has been established on its own, by its own constitutive documents with its own separate and specific objectives. The correct position is that international courts have a horizontal rather than a vertical relationship. See also Abass A, 'The Proposed International Criminal Jurisdiction for the African Court: Some Problematic Aspects' *Netherlands International Law Review* 60 (2013), 47.

these potential problematic issues although they are matters to be discussed in another forum altogether. What is clear however, is that, the AU as a body has ultimate freedom to create institutions that it deems fit for as long as it does not violate the UN Charter.<sup>206</sup>

#### 4.3. THE ROLE OF THE SECURITY COUNCIL (IF ANY) IN THE PROPOSED CRIMINAL COURT IN AFRICA

The Draft Protocol of the African criminal court has not been adopted by AU member States as of yet due to the main fact that the entire process feels rushed and insufficient time was allowed for genuine consultations regarding legal and practical aspects of such a complex set-up.<sup>207</sup> This has been telling for the most part that the motivation behind instituting the said court seems to be the outward hostility towards ICC as a non-African court and the UNSC. The UNSC has been criticized for taking part in referral of cases in Africa to the ICC yet three of its permanent members (USA, China and Russia) have not ratified the Rome Statute<sup>208</sup> - a move that continues to strengthen the position of African States regarding evident biasness against them as opposed to other areas of conflict where the said States are said to have self-serving interests.

Under the Rome Statute,<sup>209</sup> there are three major triggers to bring a case before the ICC: firstly, through State referral, secondly through referral by the UNSC and finally, *proprio motu* which is by own motion of the Prosecutor. Conveniently, the Protocol of the African Court does not reflect any participation by the UNSC

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<sup>206</sup> Musila G, 'African Union and the Evolution of International Criminal Justice in Africa: Challenges, Controversies and Opportunities' *Trust Africa Publication on International Criminal Justice in Africa* (2013), 35. Also available at <http://ssrn.com/abstract=2391140>.

<sup>207</sup> 'A Case of Negative Regional Complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes', <http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/> on 29 December 2016.

<sup>208</sup> For instance, the United States has used its position as a permanent member to insist on the arrest of Al-Bashir yet it is not party to the Rome Statute.

<sup>209</sup> Article 13, *Rome Statute*.

despite the fact that it has the overall mandate to ensure global peace and security. This is an apparent sign that the African Court wants to edge itself away from “Caucasian influence” and run their house by their own rules. Under its Draft Protocol,<sup>210</sup> cases can only be submitted by State referrals, organs of the AU as authorized by the Assembly and by motion of the Prosecutor.

This being a power play between African States and the two international institutions that have a pertinent role in international criminal justice, a struggle can be foreseen in the horizon where the UNSC acts under Chapter VII of the UN Charter and the Rome Statute when it decides to refer a matter to the ICC. Despite the AU trying to forcibly lock out the UNSC in its regional matters, African States that are party to the UN Charter are bound by the resolutions of the Council<sup>211</sup> and must adhere to any referral to the ICC required of them in the interest of international peace and security. In such a scenario, the African member States of the UN Charter will be forced to realize the hierarchy of obligations where the UN Charter obligations will prevail.<sup>212</sup>

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<sup>210</sup> Article 29, *Protocol to the African Charter* as amended in Article 15, *Draft Protocol to the African Charter*.

<sup>211</sup> Article 25, *Charter of the UN*.

<sup>212</sup> Article 103, *Charter of the UN*. This provision gives that where there exists a conflict between obligations between other international instruments and obligations under the UN Charter, those of the Charter shall prevail.

## V.CHAPTER FIVE : The End Looking Ahead

### 5.1. RECOMMENDATIONS

#### 5.1.1. Substantive reform

There are two lenses of process from which alternative solutions to the problem of wide and unfettered discretion of the UNSC can be found; the first being the substantive lens which may be impractical in the political realm but still remains academic, and features in various discussions<sup>213</sup> such as in this paper.

One of the major recurring issues during any discussion regarding the UNSC is the question of the composition of the UNSC and the use of the veto power. The permanent member States with veto power are still a major reflection of the victors of the Second World War<sup>214</sup> and the most powerful States in the world at the moment. However, there are other factors that come into play that cannot be overlooked based on their contextual consequences. The issue of the change in the balance of power in States globally is one such factor.<sup>215</sup> The P-5 were more powerful back in 1945 at the establishment of the UN compared to other countries as we have seen in the historical context and more or less continue to maintain this

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<sup>213</sup> See e.g. SzeWCzyk B, 'Variable Multipolarity and UN Security Council Reform' *Harvard International Law Journal* 450 (2012).

<sup>214</sup> *Report of the UNGA Secretary-General's High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility*, 2004, UN Doc A/59/565. Koffi Anan, the Secretary-General called for reform of the UNSC based on the fact that the composition of the UNSC was one that mirrored the interests of the victors of the Second World War and not global interests. *Also see*, Statement delivered to the Congress on Public International Law at the UN by UNGA Secretary-General Boutros Boutros-Ghali, UN Press Release SG/SM/5583 & L/2710 (1995) where Boutros mentioned that what seemed like foundations for the international society in the past have now become outdated and obsolete in today's world.

<sup>215</sup> In the words of Boutros Boutros-Ghali, "...as a result of sudden acceleration in the pace of change, a certain number of principles which, in the past, were the foundation for international society have become outdated or obsolete. *See*, Statement delivered to the Congress on Public International Law at the UN by UNGA Secretary-General Boutros Boutros-Ghali, UN Press Release SG/SM/5583 & L/2710 (1995).

scale as is.<sup>216</sup> However, Spain<sup>217</sup> asserts that this is not going to be a surety in the future<sup>218</sup> and for this reason the UNSC should be reformed to accommodate these changes or even to acknowledge that for global interest purposes. The playing field should be more level than it is at the moment.

One does not need much encouragement to recognize the continuous underlying motives in any of their conduct in the international community; why many a times the UNSC has been criticized on so many occasions: the fact that the genocide in Rwanda was not characterized as such to be given the gravity it deserved, the Vietnamese war where one of the P-5 was an involved party in the war and the UNSC failed to act and even more recently today in the situation in Syria where the UNSC is mum regarding the violations of humanitarian law that is currently ongoing.<sup>219</sup>

All their actions (and inactions) are driven by individual State interests unfortunately and for this to be done away with then the reform of the composition of the UNSC is long overdue. There have also been calls to reform the UN Charter<sup>220</sup> as a means of implementing the said reforms due to the secrecy and lack of transparency that is being claimed to plague the UNSC.<sup>221</sup> Should there be a

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<sup>216</sup> Spain A, 'The UN Security Council's Duty to Decide', 329 – 330.

<sup>217</sup> Spain A, 'The UN Security Council's Duty to Decide'.

<sup>218</sup> National Intelligence Council, *Global Trends 2030: Alternative Worlds* 16 (2012). The report shows that come 2030, the United States' power will be overtaken by the aggregate power of developing States. Similarly, there are signs of the decline in Western Europe economically and the rise of Asia. China is also predicted to have a higher GDP than the United States which will then increase its share of the global economy.

<sup>219</sup> The British Foreign Secretary expresses frustration that their [UK] efforts to encourage the UNSC to act have been vetoed by Russia and China. *See*, 'France Recognizes Syrian Opposition Coalition', <http://www.aljazeera.com/news/middleeast/2012/11/20121113174633204988.html> on 1 February 2017.

<sup>220</sup> Akande D *et al*, 'Old Questions and New Challenges for the U.N. Security System: The Role of the Security Council in the Light of the Charter's Reform'.

<sup>221</sup> There have been claims of consultations happening within the UNSC being done in clandestine ways such as outside the Council Chamber and without keeping of records of such meetings. *See*,

disintegration of the P-5 system, then the situation will be alleviated but this continues to remain a politically impossible solution and only an academic one.<sup>222</sup> It is also worthwhile to note that the last significant substantive reform that was made in the UNSC was in 1963 when the number of the members of the UNSC was increased from 11 to 15 members<sup>223</sup> and the further substantive reforms being proposed have been a long time coming.

### 5.1.2. Procedural reform

As has been mentioned before, substantive reform is difficult to concretize in the real world with the forces of State power and international politics.<sup>224</sup> In addition, even with the introduction of any substantive reform, the decision-making process needs to be changed for the better if the UNSC is to remain relevant and effective in maintaining international peace and security, if only not for the sake of procedural propriety and principles of justice.<sup>225</sup> For this reason, another lens which is that of process embraces procedural reform by introducing checks and balances to outline the margins within which the UNSC is to act. This solution has been

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Aust A, 'The Procedure and Practice of the Security Council Today' in Dupuy R. J (ed), *Development of the Role of the Security Council*, Hague Academy of International Law Publications, 1993, 349 – 364. *Also see*, Michael R, 'The Constitutional Crisis in the United Nations' *Faculty Scholarship Series Yale Law School* (1993), 85 – 86.

<sup>222</sup> The academic proposals that propose the doing away with the veto power abound but unfortunately they have been considered to be politically unrealistic and moot since the P-5 have not shown any interest to divulge the power away from themselves. Similarly, making amendments to the UN Charter require a minimum of two-thirds majority from the member States to pull through – a task that is difficult to achieve. *See* Articles 108 and 109, *Charter of the UN*.

<sup>223</sup> Spain A, 'The UN Security Council's Duty to Decide' *Harvard National Security Journal* 4 (2013), 322.

<sup>224</sup> Dinstein Y, 'Sovereignty, the Security Council and the Use of Force' in Bothe M *et al* (eds), *Redefining Sovereignty: The Use of Force After the Cold War*, Martinus Nijhoff, The Hague, 2005.

<sup>225</sup> Spain A, 'The UN Security Council's Duty to Decide', 324.

suggested as borrowing of wisdom from the legal world to the heavily politicized and quasi-judicial UNSC.<sup>226</sup>

The reason for taking up a procedural approach because there is an absence of procedural rules for the UNSC decision-making process at the time of writing.<sup>227</sup> The UNSC does not have clear rules that bind it like any other judicial or quasi-judicial institution that is tasked with the mandate of making high-level decisions.<sup>228</sup> It is the author's contention that had there been express rules and regulations then the ambiguity that so plagues the author leading to the writing of this essay would have been averted – as it would have been clear how the *ad hoc* tribunals came to be.

The justifications for this suggested solution are that: first, the fact that it is easier to implement procedural reforms rather than substantive ones in the UNSC since only a majority of nine votes is required and second; the veto power does not apply to procedural issues.<sup>229</sup> Finally the fact that procedure is easily amendable is also a pull-factor in itself.

The procedural rules that the author seeks to stand guided by are those proposed by Spain in her article.<sup>230</sup> Spain introduces a three tenet system of process that should be part of the UNSC reform: the duty to decide where the UNSC chooses in which instances it shall act and in which it shall not eliminating concerns resulting from its inaction; the duty to disclose where in the instance that it chooses not to act, then

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<sup>226</sup> At the time of writing, the UNSC does not have existing rules in procedure that establish that it has the rule to decide. The author argues that it should and that the UNSC is forced to act in all cases for the benefit of all whom depend on it for their security. *See*, Spain A, 'The UN Security Council's Duty to Decide'.

<sup>227</sup> Article 24 (1), *Charter of the UN*.

<sup>228</sup> For instance, institutions such as courts that are mandated to make decisions do not have any discretion to decide or not to decide a case that is brought before it where it has jurisdiction to do so. *See*, *Nuclear Tests Case (New Zealand v. France)*, ICJ Reports 1974 (Dissenting Opinion of Judge Berwick), 454 – 455.

<sup>229</sup> Article 27 (2), *Charter of the UN*.

<sup>230</sup> Spain A, 'The UN Security Council's Duty to Decide'.

the UNSC will be mandated to disclose the reasons publicly as to why and finally the duty to consult where the UNSC will be required to negotiate and conduct dialogues with the affected communities regarding their proposed action in order to “understand the will of the people”.

## 5.2. DISCUSSION AND CONCLUSION

The journey of this paper finally comes to a conclusion at this juncture. The author has traced the development of this dissertation from a problem statement that the author started out, seeking to find a solution to. The problem being that Article 39 of the UN Charter is too wide and unfortunately allows for not only unfettered discretion but also selective decision-making on the part of the UNSC while making its determination on the threats and breach to international peace. Additionally, the lack of checks and balances regarding the actions and duties of the UNSC has also stood out clearly as an issue that needs a resolve. Why are these problems? Mainly because of the fact that criminal law and procedure is based on the consensus of a people and cannot be imposed by a sovereign – in this case, loosely, the UNSC. Second, the UNSC may be a club for the exclusives but is all the same a public institution by all definitions therefore it is bound to certain controls and legal limits.

These problems were based on the theories that as an international community, States expect that pursuant to Article 24, the UNSC will always act on their behalf and in good faith because they allow it to do so. Following this logic therefore, the UNSC is confined to the language of the UN Charter found in Articles 41 and 42 where the only methods available for the reaction of the UNSC are non-conflict measures and use of force, consecutively.

It cannot be argued that the establishment of the *ad hoc* tribunals has varied consequences; different strokes for different folks. Whereas it has been argued that they were successful<sup>231</sup> in the sense that they made tremendous strides in settling legal precedence that eventually led to the establishment of the ICC, it has also been

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<sup>231</sup> Watson G, ‘The Changing Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia’.

argued that at that point in time these courts were superfluous and were not entirely necessary. If anything, they seemed to be more of an atonement for the guilt that the UNSC was plagued by, following their inaction as they watched numerous civilians lose their lives in armed conflict in the 1990s. At the time there were other institutions and systems in place that had seized of the issues and were more or less achieving justice in their own ways – for instance, the *Gacaca* courts in Rwanda.<sup>232</sup>

The objective of this paper was to show that indeed, the UNSC may have been in the right legal position to create judicial institutions however, this should not be a blatant case of cherry-picking situations that are for the benefit of self-seeking States. For this reason, it was also the objective of this paper to bring in another issue of introduction of procedural rules that would be effective in providing guidance in the decisions by the UNSC.<sup>233</sup> By the Rome Statute including the provision that allows the UNSC to make referrals in the famous Article 13 (b), one could view this as part of the solution although this has also been a matter of contention due to its being used as yet another tool of selective decision-making through referrals to the ICC.

African States rose up in arms protesting that for this reason, the UNSC was meddling in their internal regional affairs and went as far as showing intention to sidestep the ICC by beginning the process of creating their own regional criminal court whose constitutive document locks out any participation by the UNSC. Nevertheless, this does not seem like it will hold water for long as the duties of UN member States under the UN Charter to cooperate with the UNSC ultimately override the duties of the same member States that are State Parties to the AU. Further discussions regarding the interplay between the ICC and the African

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<sup>232</sup> Drumbl M, 'Looking Up, Down and Across: The ICTY's Place in the International Legal Order'.

<sup>233</sup> The UNSC unlike judicial courts does not have procedural rules which guide it in obligating it to make decisions, how to make decisions and when to take up measures; for instance in the case of Rwanda. As a result they do not make decisions in politically difficult situations such as the Vietnamese war, Syria and Iraq at the moment, leaving those relying on the UNSC to suffer at the hands of such ambiguity. *See* Spain A, 'The UN Security Council's Duty to Decide'.

criminal court are thought-provoking and scintillating but are better off being discussed in another forum.

For these reasons, this paper winds down to the plausible recommendations that could be the driving force towards the UNSC being more effective in its role of maintaining international peace and security. For this to ring true, a procedural approach must be applied rather than a substantive approach; creating proper guidelines that guide the work of the UNSC.

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