

**OBLIGATIONS OF NON-STATE PARTIES TO THE ROME STATUTE TO  
COOPERATE WITH THE INTERNATIONAL CRIMINAL COURT: A LOOK  
AT LIBYA AND THE SUDAN**

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**A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE  
REQUIREMENTS FOR THE AWARD OF THE DEGREE OF BACHELOR OF  
LAWS (LL.B) OF STRATHMORE UNIVERSITY**

**STRATHMORE LAW SCHOOL**

**APRIL 2016**

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## DEDICATION

To God for His grace and my Mum for her inspiration, sacrifice and prayers which have followed me all my life.

## ACKNOWLEDGMENTS

I am greatly indebted to my supervisor Ms. Jerusha Asin for her encouragement, insight and guidance, and Mr John Osogo Ambani for his support, comments and guidance throughout this dissertation.

I am also most appreciative of the assistance from Ms Anne-Charlotte Recker in obtaining the research material and I offer my sincere gratitude to my family and the Strathmore Law School family, as well, for their inspiration and support during this study.

## DECLARATION

I declare that this dissertation is my original work and has not been submitted for the award of a degree or any other award in any other university.

Signature: 


Date: 20<sup>th</sup> April, 2016.

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

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## ABSTRACT

For the longest period in the history and development of International Law, the main subjects of it were states, in and of themselves. However, with the coming into force of the Rome Statute of the International Criminal Court (ICC) in July of 2002, a great and substantive shift was experienced in this area of law. The Rome Statute made individuals the primary subjects of ICL; they could be held jointly and personally liable for crimes such as: crimes against humanity, genocide, war crimes and the last envisioned crime is the crime of aggression.<sup>1</sup>

In the Statute and thus far, the ICC has no police enforcement agency of its own; it therefore relies on states and other players in the international law arena to be the enforcers of its decisions and orders.<sup>2</sup> This is however not the case as not all states act in good faith when it comes to ICL and honoring of the orders of the ICC, since not all states are parties, and even if they are, not all of them necessary cooperate with the ICC, as was exhibited by South Africa when it failed to arrest Omar Al-Bashir, an indictee of the ICC, whose arrest warrant remains unsealed, yet South Africa is a party to the Rome Statute.<sup>3</sup>

This paper therefore focuses on the concept of state cooperation with the ICC, especially cooperation of both state parties and non-state parties to the Rome Statute when it comes to situations in which the indicted persons are nationals of a non-state party. This paper shall limit itself to only two jurisdictions in which this state of affairs is currently existent: the Sudan and Libya, and shall assess their progress (or lack of it) in cooperation with the Court thus far.

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<sup>1</sup> Article 5(1) of the Rome Statute of the International Criminal Court.

<sup>2</sup> Akande D, 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC' [2012] 10 (2) *Journal of International Criminal Justice* <https://jicj.oxfordjournals.org/> accessed 3/21/2016.

<sup>3</sup> South Africa signed the Rome Statute on 17 July, 1998 accessed from [https://www.icc-cpi.int/en\\_menus/asp/states%20parties/african%20states/Pages/south%20africa.aspx](https://www.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/south%20africa.aspx) on 3/23/2016.

## LIST OF ABBREVIATIONS

ICC – International Criminal Court.

ICL – International Criminal Law.

ICJ – International Criminal Justice.

ICTY – International Criminal Tribunal for the Former Yugoslavia.

OTP – Office of The Prosecutor of the International Criminal Court.

SCSL – Special Court for Sierra Leone.

STL – Special Tribunal for Lebanon.

ICTR – International Criminal Tribunal for Rwanda.

UN – United Nations.

UNGA – United Nations General Assembly.

UNSC – United Nations Security Council.

UNSCR – United Nations Security Council Resolution.

UNSMIL – United Nations Support Mission in Libya.

VCLT – The Vienna Convention on the Law of Treaties.

## LIST OF CASES

*Prosecutor v Tihomir Blaskic* IT-95-14-T, Trial Chamber Judgment.

*Prosecutor v Slobodan Milosevic* IT-98-29/1-A, Appeal Judgment.

*Prosecutor v Aleksovski* IT-95-14/1-A, Appeals Chamber Judgement.

*Prosecutor v Todorovic* IT-95-9/1-S, Sentencing Judgment.

*Prosecutor v Momir Nikolic* IT-02-60/1-S, Sentencing Judgment.

## 1. CHAPTER ONE

### Background

The (ICC) was birthed by the Rome Statute of the ICC of 1998 (“**the Statute**”). It however began its operations on 1<sup>st</sup> July, 2002, when the Rome Statute entered into force<sup>4</sup>. The Statute at Articles 13(b) and 16 empowers the (UNSC) to refer matters to the ICC under the UN Charter<sup>5</sup>, which enables the UNSC to move to protect against breaches of the prevalent global peace and security. This is pursuant to the relationship existent between the UN and the ICC, as contemplated under Article 2<sup>6</sup> of the Statute. The matters referred to the ICC by the UNSC need not come from only states that are party to the Statute but such referrals may be from any state, which in the opinion of the UNSC, is a threat to global peace and security. Such has been the case with the situation in the Sudan, and the situation in Libya.

It is alleged that crimes under the jurisdiction of the ICC<sup>7</sup> were committed in Darfur, the Sudan and in Libya.<sup>8</sup> Seeing as this was happening, the UNSC moved under their power per the Statute and per Chapter VII of the UN Charter to refer the matters to the ICC<sup>9</sup>. These referrals were made despite the fact that both countries are not state parties to the Statute, and hence raise the pertinent question as to whether they are now bound by the Statute after being referred to the ICC for crimes falling within the jurisdiction of the Statute. The main problem with this, as has been rightly pointed out, is that the UNSC Resolutions are greatly lacking and deeply insufficient in covering most of the issues that are of concern in matters (ICL)<sup>10</sup>, pertinent here is the issue of cooperation. Of relevance to this inquiry however, is Part IX of the Statute on the obligation to cooperate. Article 86 of the Statute provides that;

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<sup>4</sup> The text of the Rome Statute of the International Criminal Court.

<sup>5</sup> Chapter VII of the United Nations Charter speaks on ‘*Action with respect to threats to the peace, breaches of the peace, and acts of aggression*’ accessed from <https://treaties.un.org/doc/publication/ctc/uncharter.pdf> on 3/21/2016.

<sup>6</sup> Article 2 provides that the court shall be brought into a relationship with the UN on terms agreed upon by the Assembly of State Parties and that such process shall be concluded by the President of the Court. This agreement has since been negotiated and is existent under the title ‘*Negotiated Relationship Agreement between the International Criminal Court and the United Nations*’. As accessed from [https://www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1\\_English.pdf](https://www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1_English.pdf) on 3/21/2016.

<sup>7</sup> Enlisted at Article 5(1) of the Statute.

<sup>8</sup> Resolution 1593 (2005) for Darfur and Resolution 1970 (2011) for Libya.

<sup>9</sup> Resolution 1593 (2005) for Darfur and Resolution 1970 (2011) for Libya.

<sup>10</sup> Akande D, ‘*The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC*’ [2012] 10 (2) JICJ <https://jicj.oxfordjournals.org/> accessed 3/21/2016.

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

There are two main contentions and two-pronged limitations at this article, being;

- i. the use of the phrase ‘State parties’ seeing as both Libya and Sudan are not state parties to the Rome Statute, and;
- ii. the purport of the UNSC Resolution<sup>11</sup> that all member states to the Rome Statute shall cooperate, as well as the situation countries (Libya and the Sudan). This is so because the crimes in question are those contemplated under the Rome Statute.

So far, Libya still insists on the need to prosecute the cases involving its nationals, thereby raising the issue of complementarity and initial admissibility of the cases by the ICC<sup>12</sup>, while the Sudan and other state parties have failed to arrest and hand over Omar Hassan Al-Bashir to the court, chiefly because he is the sitting Sudanese President<sup>13</sup>. This is happening against the backdrop of the UNSC Resolutions obligating the states to cooperate and the provisions of the Statute on member states to ‘*cooperate fully with the court*’.

#### Statement of the problem

Since the UNSC has exercised one of its powers pursuant to its relationship with the ICC, and referred two situations to it from countries that are not member states to the Statute of the ICC (Libya and the Sudan), what obligations, as regards cooperation, do the two countries bear in so far as the Resolutions referring the situations are concerned? And to what extent are they bound by the Statute in terms of fully cooperating with the court?

#### Research objectives

- a. To establish whether the UNSC Resolutions can confer obligations to non-state parties to the extent that they become bound by certain provisions of the Rome Statute.

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<sup>11</sup> Paragraph 2 of Resolution 1593 (2005) for Darfur and paragraph 5 of Resolution 1970 (2011) for Libya.

<sup>12</sup> Accessed from [https://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx) on 3/21/2016.

<sup>13</sup> Accessed from <http://www.theguardian.com/global-development-professionals-network/2015/jun/24/south-africas-failure-arrest-al-bashir-not-in-keeping-mandelas-ideals> on 3/21/2016.

- b. To make recommendations on the best ways for the ICC to ensure cooperation from non-member states to the Statute, when situations from such states are before the ICC.

### Research questions

- a. Can the UNSC make non-state parties to the Statute be bound by provisions of the Rome Statute on account of them having matters before the ICC?
- b. Can a state be held liable for failing to cooperate with the ICC on account of not being party to the treaty creating the ICC, and therefore not bound by such a treaty?

### Justification and scope of the study

There are persons indicted by the ICC from states that are not parties to the Rome Statute. Some of these persons have willingly handed themselves over to the ICC<sup>14</sup>, while others have failed to appear before the Court<sup>15</sup>. Member states to the Rome Statute have an obligation to cooperate with the ICC and help it with its activities. Non-member states whose matters are before the ICC bear this obligation, as well, as conferred by the relevant UNSC Resolution referring the situation to the ICC Prosecutor. These states being members of the international community and the UN have obligations under the UN Charter,<sup>16</sup> under which the UNSC operates and similarly, on account of the rules of customary international law, have a duty to punish certain crimes, such as those under the jurisdiction of the ICC, if and when they occur in their respective jurisdictions.<sup>17</sup> When both member states and non-member states fail to cooperate with the ICC, what recourse does the discipline of ICL and, International Law in general, have so that such crimes are aptly punished and the individuals involved brought to justice? This research focuses on the best ways of addressing this problem, if at all it is a due legal problem and proposing ways of remedying it, once and for all.

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<sup>14</sup> Abu Garda, Banda and Jerbo appeared voluntarily before the ICC, being nationals of the Sudan, as accessed from [https://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx) on 3/21/2016.

<sup>15</sup> Al-Bashir of the Sudan has an international arrest warrant of arrest against him but no state has executed it so far, while Saif Gaddafi of Libya has been held by the incumbent Libyan regime, arguing that it has the capacity to prosecute.

<sup>16</sup> Article 25 of the UN Charter requires that member states of the UN agree to carry out decisions of the UNSC.

<sup>17</sup> The crimes under Article 5 of the Rome Statute have since acquired the status of customary international law, and hence their punishment shall be carried out regardless of the state's subscription to the Rome Statute of the ICC.

## Hypothesis

Non-member states to the Statute have an equal obligation as the member states to cooperate fully with the court to the extent that the situation in the state has been referred to the court by the UNSC pursuant to the UN Charter's Article 25, on member states' cooperation with the decisions of the UNSC.

## Theoretical framework

International law is majorly thought to be a 'house of cards' for international politics<sup>18</sup>; Cassese brings this out quite clearly by explaining that the definition of Crimes Against Humanity in the London Agreement<sup>19</sup> fell short in that it only covered crimes which affected the interests of state and had little to nothing to do with the crimes that had actually been perpetrated by the accused individuals. There are antecedent principles to human principles and these are well captured in the theory of Natural Law<sup>20</sup>. Customary international law as prescribed by Article 38(1) of the Statute of the International Court of Justice<sup>21</sup> envisions the use of laws that are of natural occurrence to humans, through the use of the phrase 'principles of law recognized by civilized nations'.<sup>22</sup>

This article shall therefore employ the theory of Natural Justice and that of an international Rule of Law<sup>23</sup>. Koskenniemi<sup>24</sup> further argues that an adoption of a system of the international Rule of Law, is a rejection of politics in the legal system and an adoption of the binding principles antecedent to the human existence. This however does not mean

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<sup>18</sup> Cassese A, Gaeta P, Baig L, Fan M, Gosnell C and Whiting A, *Cassese's International Criminal Law* (Third edn, OUP, Hampshire, Great Britain) 86.

<sup>19</sup> This established the Nuremberg Tribunal and embodied its charter of creation.

<sup>20</sup> Murray J, *Natural Law and Legal Positivism in the Nuremberg Trials* Senior Thesis for the Honours Programme (Liberty University, Spring 2014) 4 accessed from <http://digitalcommons.liberty.edu/cgi/viewcontent.cgi?article=1456&context=honors> on 3/21/2016.

<sup>21</sup> The Article lists the following rules and principles to constitute customary international law:  
a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. Accessed from <http://www.icj-cij.org/documents/?p1=4&p2=2> on 3/21/2016.

<sup>22</sup> Kammerhofer J and Hoogh A, *All Things to All People? The International Court of Justice and its Commentators* [2008] 18 (5) *European Journal of International Law* <http://www.ejil.org/pdfs/18/5/247.pdf> accessed 4/14/2016.

<sup>23</sup> Koskenniemi M, *The Politics of International Law* [1990] 1 (4) *European Journal of International Law*, pg 1-2 <http://ejil.org/pdfs/1/1/1144.pdf> accessed 3/21/2016.

<sup>24</sup> Koskenniemi M, *The Politics of International Law*, pg 1-2.

that politics is completely negated from the system of international law, and in this case, ICL<sup>25</sup>.

The idea of Natural Justice then comes in to bring to the fore the thought that some offences are so abhorrent to human nature that their punishment grows to become 'meta-national'<sup>26</sup>. These crimes are well captured in the Statute at Article 5(1) and this paper will go to use this theory to demonstrate that states, whether party or not to the Statute have a duty to cooperate with the ICC to ensure that such crimes are punished and that they do not participate in harboring persons accused of committing such offences before they are heard and certified either guilty or innocent of their commission.<sup>27</sup>

These two ideas: Rule of Law and Natural Justice shall inform the thematic concern of this paper and seek to examine the extent to which various states follow them in cooperation with the court and in helping to punish and bring to book the perpetrators of international crimes, in so far as the Libyan and Sudanese indictees are concerned.

ICL aims at punishing the commission of certain crimes and the theories of such punishment are closely linked to the theory of Natural Law and Natural Justice, as explained above. Hence, it is important that this idea of ICL is properly justified and its objectives are well known. These justifications are broadly divided into two approaches:<sup>28</sup>

- a. Forward-looking (teleological) approach; and
- b. Focusing on the crime itself (deontological) approach.

Most national and international jurisdictions employ a hybrid of both approaches in their system of delivery of justice. These justifications, therefore include, but are not limited to:

- a. **Retribution** – This theory is best explained in the *Nikolic*<sup>29</sup> case thusly;

*'In light of the purposes of the Tribunal and international humanitarian law generally, retribution is better understood as the expression of condemnation and outrage of the international community at such grave violations of, and*

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<sup>25</sup> Koskeniemi M, *The Politics of International Law*, pg 2.

<sup>26</sup> Cassese A, Gaeta P, Baig L, Fan M, Gosnell C and Whiting A, *Cassese's International Criminal Law*, pg 87.

<sup>27</sup> Based on Article 25 of the UN Charter as an obligation to member states of the UN to cooperate with the decisions of the UNSC.

<sup>28</sup> Cryer R, Friman H, Robinson D, Wilmschurst E, *An Introduction to International Criminal Law and Procedure* 29 quoting Cohen S, 'An Introduction to the Theory, Justifications and Modern Manifestations of Criminal Punishment', (1981-2) 27 *McGill Law Journal* 73.

<sup>29</sup> *Prosecutor v Momir Nikolic*, ICTY T. Ch. I, 2 December 2003, paras. 86-7.

*disregard for, fundamental human rights at a time that people may be at their most vulnerable, namely during armed conflict. It is also recognition of the harm and suffering caused to the victims. Furthermore, within the context of international criminal justice, retribution is understood as a clear statement by the international community that crimes will be punished and impunity will not prevail.'*

This theory focuses on the necessity of punishing those who have violated social norms, irrespective of any future benefits of that Prosecution. It exists on the basis that the offenders have done wrong and deserve to be punished.<sup>30</sup> This view is of the persuasion that persons should be seen as ends in and of themselves and not as a means to another end. *Aleksovski*<sup>31</sup> explains that the idea of retribution is not understood as a toll for revenge but as a means of expressing the outrage of the international community over the crimes that have been committed; and hence make plain condemnation of the acts of commission or omission. Of import is the idea that retribution itself, tends to punish the crime itself in an exact and appropriate manner. This is as opposed to other methods may tend to impose harsher punishments so as to 'teach lessons' among other reasons, that are over and above the crime committed.<sup>32</sup>

**b. Deterrence** – This theory was held and advocated for by political theorists like Jeremy Bentham, who focused on the future benefits of punishing a crime.<sup>33</sup> It is seen that persons will make a cost-benefit analysis before committing a crime and if the price is too high, then the person will refrain from committing the crime. It is however argued that this is not the ordinary decision-making process towards the commission of a crime as it is not the ordinary sense of thought for a human being.<sup>34</sup> On the idea of deterrence, the *Nikolic*<sup>35</sup> case explains that deterrence should not be given undue prominence in the assessment of a sentence for a convicted person. This is because the Tribunal aims at bringing about the culture for the respect of the Rule of Law as opposed to simply the fear of the consequences of breaking the law.

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<sup>30</sup> Cryer R, Friman H, Robinson D, Wilmshurst E. *An Introduction to International Criminal Law and Procedure* 30.

<sup>31</sup> *Prosecutor v Aleksovski*, ICTY A. Ch. 24 March 2000, para 185.

<sup>32</sup> *Prosecutor v Todorovic* T. Ch. I, 31 July 2001, para 29.

<sup>33</sup> Cryer R, Friman H, Robinson D, Wilmshurst E, *An Introduction to International Criminal Law and Procedure* 32.

<sup>34</sup> Cryer R, Friman H, Robinson D, Wilmshurst E, *An Introduction to International Criminal Law and Procedure* 32.

<sup>35</sup> *Prosecutor v Momir Nikolic*.

In the preamble of the Statute at Article 5,<sup>36</sup> the ICC is determined to put an end to impunity of the perpetrators and in that sense contribute to the prevention of such crimes in the future. This exhibits aspects of deterrence in the Rome Statute and hence exists as one of the theories that inform sentencing of a convicted person/s.

- c. **Incapacitation** – This is yet another utilitarian ideology on punishment. It refers to the idea that a person be locked away for committing the Article 5 crimes so that they are taken away from society and are hence unable to continue committing those crimes. In this manner, they are therefore incapacitated for the moment that they are locked up.<sup>37</sup> This theory does not focus on what has been done but what might be done in the future.
- d. **Rehabilitation** – It argues that the point of criminal sanctions is reformation of the offender. The ICTY in *Erdemovic*<sup>38</sup> saw that the young accused person, who had been involved in the Srebrenica massacre under duress was corrigible and reformable and hence went ahead to employ this theory in sentencing him to a short five-year jail term so he could come out while still young and build a better life for himself, having learnt of his wrong-doing and hopefully changed his ways.
- e. **Denunciation/education** – This idea is designed to engage offenders, and attempt to make them understand what was wrong with what they have done, whilst reaffirming the norm in the community and also educating society about the unacceptable nature of the conduct committed.<sup>39</sup> It reaffirms the Rule of Law as it interrogates the crime itself, the ideas of the perpetrator and extrapolates this, in negative light, so as to show society what exactly is wrong with the conduct in question and ways of correcting such through the punishment imposed. The ICTY, once more sought to assert this in the *Kordic and Cerkez*<sup>40</sup> case by asserting that the punishment being imposed was to convey the message that the rules of IHL have to be obeyed at all times, and through the punishment, this idea would be internalized into the morals of the populace.

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<sup>36</sup> Preamble of the Rome Statute of the ICC.

<sup>37</sup> Cryer R, Friman H, Robinson D, Wilmschurst E, *An Introduction to International Criminal Law and Procedure* 32.

<sup>38</sup> *Prosecutor v Erdemovic*, ICTY T. Ch. 5 March 1998, para 16.

<sup>39</sup> Cryer R, Friman H, Robinson D, Wilmschurst E. *An Introduction to International Criminal Law and Procedure* 32 quoting Wilson, *Central Issues*, 62-3; Gunter K, 'The Criminal Law of "Guilt" as a Subject of the Politics of Remembrance in Democracies' in Christodoulidis E and Veitch S (eds.), *Lethal's Law: Justice, Law and Ethics in Reconciliation* (Oxford, 2001) 3.

<sup>40</sup> *Prosecutor v Kordic and Cerkez*, ICTY A. Ch. 17 December 2004, paras. 1080-1.

Conclusively, the rights of the victims of the crimes have not only to be asserted, but also upheld via punishment of the perpetrators of the abhorrent crimes listed under Article 5 of the Rome Statute of the ICC. Similarly, the ICC is existent to uphold the rights of all peoples of the world to live in a peaceful and secure world where they are free to exercise their rights without undue interference from any quarters. The various trigger mechanisms available are to help achieve this end and also make sure that such crimes are no longer committed, both at that instance and in the future.

### Literature Review

This paper shall majorly rely on the following texts as the information base for the two underlying theories discussed (Rule of Law and Natural Justice), as well as the formation of the main ideas and recommendations of the paper:

Cassese<sup>41</sup> opines that for international criminal courts, state cooperation is crucial to the effectiveness of the judicial process. Only other bodies or entities; that are national authorities or international organizations, can enforce their decisions, orders and requests. He further argues that without the cooperation of these authorities, the international criminal courts cannot operate. This point of view will help in cementing the idea posited in this paper that states have a duty to comply with the International Criminal Court to ensure that indictees are brought to answer to the crimes against in a manner that is right, fair and just. Furthermore, this text provides a clear account of the main substantive and procedural aspects of ICL. It is a classical text as it contains the infinite knowledge of the late Judge Antonio Cassese, who was President of the Special Tribunal for Lebanon, the ICTY and was Professor of International Law at Florence University. The UN Secretary-General Ban Ki-Moon referred to him as ‘a giant of international law’<sup>42</sup>.

International Law is argued to be of a Natural Law persuasion<sup>43</sup>. Currie argues that the Natural Law Theory, as applied to International Law, seemed to ensure that conceptions of justice, or morality, remained at the core of international obligations. This argument posited is essential to establishing that the crimes under the jurisdiction of the ICC are so abhorrent to the nature of the person that action to punish them must be uniformly

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<sup>41</sup> Cassese A, Gaeta P, Baig L, Fan M, Gosnell C and Whiting A, *Cassese's International Criminal Law*, pg 298.

<sup>42</sup> Tribute paid to the late judge accessed from [http://www.un.org/apps/news/story.asp?NewsID=40163#.VvAxD\\_I97IU](http://www.un.org/apps/news/story.asp?NewsID=40163#.VvAxD_I97IU) on 3/21/2016.

<sup>43</sup> Currie J, Forcese C, Harrington J, Oosterveld V, *International Law: Doctrine, Practice and Theory* (2 edn, Irwin Law, Toronto) pg 14.

assumed by all states and persons to the very best of their abilities for the sake of preserving the morality and dignity of the person. The idea contains introductory information on the nature, history and theory of international law from an international relations, as well as, legal perspective. It contains extensive analysis and of primary sources like: treaties, UN documents and cases that guide the student in understanding the rules, their strengths and weaknesses, and their place in the international legal system.

In *Prosecutor v Tihomir Blaskic*<sup>44</sup>, the Appeals Chamber of the ICTY remarked that cooperation in criminal matters between states is essentially based on a 'horizontal' relationship, while that between the Tribunal and states is of a 'vertical' nature. Cassese<sup>45</sup> further developed this idea into two separate models of cooperation, which shall be explored and used in this paper. This idea will also be used to keenly explore the various provisions of the Rome Statute.

These texts shall form the opinions and positions that shall be assumed in this paper, in the chapters to come.

### Design and methodology

This study approaches the subject matter through literature review on the Rome Statute and ICL, in general. It describes and conducts qualitative analysis in the course of dealing with the subject matter. It further uses primary and secondary sources in the review. The Rome Statute, the UN Charter, various other international statutes and policies constitute the primary sources which are significant for laying down the legal position in relation to the subject matter. Books, journal articles, conference papers and online journals comprise the secondary sources. The secondary sources document the studies on the Statute and the idea of state cooperation by various scholars.

The study does not involve field activities for example, collection of data. This is due to the time constraints as the research is required for submission as part of the requirements for the award of the degree of bachelor of laws.

### Limitations

This study is limited by the following factors:

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<sup>44</sup> Cassese A, Gaeta P, Jones JRW, *The Rome Statute of the International Criminal Court: A Commentary* (2edn, OUP, Oxford) pg 1590.

<sup>45</sup> Cassese A, Gaeta P, Jones JRW, *The Rome Statute of the International Criminal Court: A Commentary* pg 1590.

- a. Time constraint - this study is part of the course work for the requirements for the award of the degree of Bachelor of Laws. The study, therefore, has to be conducted and submitted within the prescribed period.
- b. Research design and methodology - the method chosen does not incorporate collection of data on the subject matter. This implies that the study is limited to the aspects of ICL that can only be deciphered through qualitative analysis.

### Chapter Breakdown

- a. Chapter One – Introduction; This chapter provides an introduction to the study, the statement of the problem, the literature review, the objectives and questions, the hypothesis, the conceptual framework and the design methodology of the study.
- b. Chapter Two – The ICC, its objectives and the indictment on Article 5 of the Statute crimes for non-state party persons: the substance and form of it. This chapter seeks to elaborate the genesis of the problem stated in the introductory chapter.
- c. Chapter Three – This chapter will look at the experience of the ICC so far in terms of state cooperation on non-state parties. The situations examined are Darfur, the Sudan and Libya.
- d. Chapter Four – Conclusion and Recommendation. This chapter makes the conclusions of the study and comes up with recommendations on measures to ensure and cement state cooperation with the ICC when indictees from non-state parties are in question, and the role that the UNSC plays in this respect. It draws from the findings of Chapter Two, Three and Four.

### Research Timeline

Chapter Two – 25<sup>th</sup> March 2016.

Chapter Three – 27<sup>th</sup> March 2016.

Chapter Four – 30<sup>th</sup> March 2016.

## 2. CHAPTER TWO

### THE INTERNATIONAL CRIMINAL COURT: THE INDICTMENTS ON ARTICLE 5 CRIMES FOR NON-STATE PARTY NATIONALS AND ITS OBJECTIVES

*The Statute for the creation of the Court was adopted at an international conference in Rome on July 17, 1998. After intense negotiations, 120 countries voted to adopt the treaty. One hundred thirty-nine states have signed the treaty as of mid-2004. Sixty-six countries – six more than the threshold needed to establish the court - ratified the treaty on April 11, 2002. This meant that the ICC's temporal jurisdiction commenced on July 1, 2002. In February 2003, the Court's Assembly of States Parties - the ICC's governing body - elected the Court's first eighteen judges.<sup>46</sup>*

The ICC is a permanent court with an independent international legal personality.<sup>47</sup> Obura<sup>48</sup> provides an apt breakdown of the structure thusly, per the Statute<sup>49</sup>: the ICC is divided into four organs; the Presidency, Judicial Divisions, Office of the Prosecutor, Registry and Other Offices. The ICC's jurisdiction over crimes is further elaborated and limited to the four crimes listed<sup>50</sup>:

- a. Genocide;
- b. crimes against humanity;
- c. war crimes; and
- d. crimes of aggression.

The ICC has exercised its jurisdiction over all these crimes, except over crimes of aggression, which is still pending definition.<sup>51</sup> Obura<sup>52</sup> further explains that the ICC will gain jurisdiction over the crime of aggression only when it is defined through an amendment to the Statute<sup>53</sup>.

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<sup>46</sup> Human Rights Watch, *The International Criminal Court: How Non-governmental Organizations Can Contribute To the Prosecution of War Criminals* [2004] HRW 1, 2.

<sup>47</sup> Article 4, *Rome Statute*.

<sup>48</sup> Obura K, *The Security Council and the International Criminal Court: When Can the Security Council Defer a Case?* [2015] *Strathmore Law Journal* 118, 122.

<sup>49</sup> Article 34, *Rome Statute*.

<sup>50</sup> Article 5(1), *Rome Statute*.

<sup>51</sup> As defined by Annex 1 to Kampala 2010 on Article 8 on the crime of aggression accessed from [https://www.icc-epi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.6-ENG.pdf](https://www.icc-epi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf) on 4/14/2016.

<sup>52</sup> Obura K, *The Security Council and the International Criminal Court: When Can the Security Council Defer a Case?*, 122 (footnote 30).

<sup>53</sup> Articles 121 and 123, *Rome Statute*.

The jurisdiction of the ICC is triggered through three main ways:

- a. A referral to the Prosecutor by a party to the Rome Statute;<sup>54</sup>
- b. A referral by the UNSC as under Chapter VII of the UN Charter;<sup>55</sup>
- c. The Office of the Prosecutor acting *proprio motu* (on its own motion).<sup>56</sup>

It is paramount at this point to note that it is for the Prosecutor, not for political bodies, if the matter is a UNSC referral or State Party referral, to determine which specific cases and suspects warrant investigation.<sup>57</sup>

#### Referral to the Prosecutor by a State Party to the Rome Statute;

States which are party to the Rome Statute<sup>58</sup> may refer situations to the ICC through the Prosecutor. Not all states are party to this Statute, and the question then begs as to whether they can have their matters before the court through this mechanism. The answer to this question is no. Such states can only seek a referral by the UNSC for their matters to be heard before the ICC, if such matters fulfill the condition of being a threat to international peace and security. Only then the UNSC can legally move under Chapter VII of the UN Charter.<sup>59</sup> Otherwise, the state may pass some essential information to the Prosecutor in the hope that the Prosecutor will move *proprio motu*. Thus far, only four state parties have made referrals to the ICC.<sup>60</sup>

#### Referral by the UNSC

The trigger mechanism of the UNSC<sup>61</sup> as provided for by Chapter VII of the UN Charter is one of essence and question in this paper. Even though there was great opposition to this role of the UNSC referring matters to the court due to the need to maintain the independence of the ICC, it was seen through the *ad hoc* Tribunals<sup>62</sup> that the UNSC had a key role to play in

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<sup>54</sup> Article 12, *Rome Statute*.

<sup>55</sup> Article 13, *Rome Statute*.

<sup>56</sup> Article 15, *Rome Statute*.

<sup>57</sup> Cryer R, Friman H, Robinson D, Wilmschurst E, *An Introduction to International Criminal Law and Procedure* (3<sup>rd</sup> edn, Cambridge University Press, Cambridge) 163.

<sup>58</sup> At the time of the writing of this paper, only 124 countries were state parties to the Rome Statute. As accessed from [https://www.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) on 29/3/2016.

<sup>59</sup> Cryer R, Friman H, Robinson D, Wilmschurst E, *An Introduction to International Criminal Law and Procedure* 163.

<sup>60</sup> These are Uganda, the Democratic Republic of Congo, the Central African Republic and Mali.

<sup>61</sup> Article 13(b), *Rome Statute*.

<sup>62</sup> The Nuremberg Tribunal, the ICTY, the ICTR, the STL and the STSL.

international criminal justice to ensure the restoration and maintenance of international peace and security whenever threatened.<sup>63</sup>

Additionally, it is open to the UNSC to impose obligations on states to cooperate with the ICC.<sup>64</sup> Of keen note in this, is the fact that a UNSC resolution can impose obligations only on states but cannot purport to alter the powers or the jurisdiction of the ICC.<sup>65</sup> The UNSC can refer or defer<sup>66</sup> matters to the ICC even when the states in concern are not parties to the Rome Statute of the ICC. The Vienna Convention on the Law of Treaties<sup>67</sup> asserts that every state possesses the capacity to conclude treaties<sup>68</sup>. Sudan is recognized as a state<sup>69</sup> but did not at all, in its capacity to conclude treaties, conclude to join the Rome Statute of the ICC. This factor and the idea of the VCLT is overridden by Chapter VII of the UN Charter, enabling the UNSC to refer matters to the ICC so as to keep and protect international peace and security.

### *The Prosecutor moving Proprio Motu*

The idea of the Prosecutor being able to begin investigations on his/her own initiative was a major point of controversy during the trigger mechanisms negotiations at the Rome Conference.<sup>70</sup> The main opposition raised to this was that the Prosecutor could initiate politically motivated prosecutions since they did not have the ordinary oversight that a national prosecutor has, on the other hand, the counter was raised that the ICC should not be entirely dependent on external forces (State Parties and the UNSC) to do its work.<sup>71</sup> This dispute was mitigated by the requirement that the Prosecutors' prosecutions be authorized by a Judicial Organ of the ICC, the Pre-Trial Chamber. This subjection of the process to an independent organ of the ICC ensures that the Prosecutors' powers are restricted while still

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<sup>63</sup> Cryer R, Friman H, Robinson D, Wilmschurst E, *An Introduction to International Criminal Law and Procedure* 164.

<sup>64</sup> Resolution 1593(2005) on the situation in Darfur at Para. 2 and Resolution 1970(2011) on the situation in Libya at Para. 5.

<sup>65</sup> Cryer R, Friman H, Robinson D, Wilmschurst E, *An Introduction to International Criminal Law and Procedure* 164.

<sup>66</sup> Article 16, *Rome Statute*.

<sup>67</sup> This treaty on international law of treaties was signed in 1969. It governs the treaties entered into between states only, as prescribed in its Article 1.

<sup>68</sup> Article 6, *Vienna Convention on the Law of Treaties*.

<sup>69</sup> The Sudan gained independence from the UK and Egypt on 1<sup>st</sup> January 1956.

<sup>70</sup> Cryer R, Friman H, Robinson D, Wilmschurst E, *An Introduction to International Criminal Law and Procedure* 164.

<sup>71</sup> Banner A.M, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 *American Journal of International Law* 510, as quoted by Cryer R, Friman H, Robinson D, Wilmschurst E, *An Introduction to International Criminal Law and Procedure* 165.

maintaining the independence of their office.<sup>72</sup> So far the *proprio motu* trigger mechanism has only been applied twice; Kenya and Cote D' Ivore.

Of concern in this paper is the trigger mechanism of the UNSC and its employment to the situations in Libya and the Sudan. The UNSC derives its authority as a 'trigger body', primarily from Chapter VII of the UN Charter. Under this provision, the UNSC is tasked with the responsibility of keeping international peace and security and is also enabled to make recommendations on the best way to achieve this.<sup>73</sup> The UN Charter<sup>74</sup> goes further to claim its superiority over any other international instrument in so far as the duties of the member states are concerned, under the Charter. Article 103 asserts that in the event of a conflict of obligations, the obligations of member states under the Charter shall take preference over any other obligations. This is an interesting consistency with Article 25 of the Charter which states that the members of the UN shall carry out the decisions of the UNSC under and in accordance with the Charter.

The trigger mechanism of the UNSC is backed by Chapter VII of the UN Charter. A resolution of the UNSC to refer a matter to the ICC is therefore not only founded upon Chapter VII, but also Articles 25 and 103 to the following extent. That the UNSC has a binding authority over all member states of the UN. It hence proceeds to bind all states to cooperate with the ICC<sup>75</sup> through the respective UNSC Resolutions on the Sudan and Libya. Furthermore, the states have an obligation to adhere to all the decisions of the UNSC in so far as the UN Charter is concerned, and in this case, Chapter VII applies as the relevant provision of the Charter under which the UNSC binds all member states to cooperate with it so as to help maintain international peace and security, which is under threat via the atrocities taking place in the situation countries.

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<sup>72</sup> Banner A.M, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 *American Journal of International Law* 510, as quoted by Cryer R, Friman H, Robinson D, Wilmshurst E, *An Introduction to International Criminal Law and Procedure* 165.

<sup>73</sup> Article 39 of Chapter VII of the UN Charter.

<sup>74</sup> Article 103 speaks in the event that there is a conflict of obligations due to the existence of other international instruments that clash with obligations of member states due to the UN Charter.

<sup>75</sup> Paragraph 2, UNSCR 1593(2005) and Paragraph 5, UNSCR 1970(2011).

### 3. CHAPTER THREE

#### NON-STATE PARTY COOPERATION SO FAR WITH THE ICC: THE CASE OF DARFUR AND LIBYA

Following UNSC Resolutions<sup>76</sup>, matters in Darfur, Sudan and Libya were referred to the ICC Chief Prosecutor for investigation and possible prosecution. Resolution 1593(2005) referred the matter in Darfur, while Resolution 1970(2011) referred the matter in Libya. Each of the two cases is peculiar in so far as cooperation is concerned, and hence each shall be looked at separately. This chapter is divided into three parts; the Sudan, Libya and the Politics of Cooperation. The third part will look at the law and politics of cooperation in the two situations.

##### Darfur, The Sudan

Resolution 1593(2005) was adopted by the UNSC at its 5158<sup>th</sup> meeting on 31 March 2005<sup>77</sup>. This Resolution provided at paragraph 2 that:

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

At this paragraph, the Resolution requires that the Sudan, being the subject of the situation at hand, although not a party to the Rome Statute to cooperate fully with the ICC in investigating and prosecuting the matter. Further, it requires all other parties to the conflict in Darfur to cooperate with the court in the matter, regardless of whether they are parties to the Rome Statute or not.

Thus far in pursuance of fulfillment of the Resolution, five persons are still at large even after the Pre-Trial Chamber of the ICC having issued arrest warrants (Hassan Omar Al-Bashir,

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<sup>76</sup> Pursuant to Chapter VII of the UN Charter, as previously discussed, as well as, the Agreement between the UN and the ICC on their Cooperation.

Akande D, 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC ' [2012] 10 (2) *Journal of International Criminal Justice* <https://jicj.oxfordjournals.org/> accessed 3/21/2016.

<sup>77</sup> UNSC Resolution 1593(2005).

Abdel Hussein, Ahmad Harun, Ali Kushayb and Abdallah Banda).<sup>78</sup> The aim of this first part is to examine the extent to which the Sudan, as a sovereign state is bound to cooperate with the UNSC Resolution, it being a non-party state to the Rome Statute.

In the Darfur situation, only two of the persons indicted have appeared before the court, while the rest are still at large.<sup>79</sup> One of the persons still at large is the Head of State of the Sudan itself; Hassan Omar Al-Bashir, who is charged with committing war crimes, crimes against humanity and genocide.<sup>80</sup> Furthermore, Mr. Al-Bashir has two warrants of arrest against him having been unsealed in 2009 and 2010. The issue of Al-Bashir's status as President of a situation country and an indicted person raises the issue of political interplay with international law. Politics, Shraga<sup>81</sup> explains, is a decision-making process informed by calculations of self-interest, while justice,<sup>82</sup> in this case, is the institutional tool used to bring perpetrators of international criminal justice to book. This dimension of local politics can be used and abused as in Cambodia<sup>83</sup> and Uganda,<sup>84</sup> respectively. The rest of the indictees still at large are reported to occupy senior government positions and hold great political influence within the Sudan.<sup>85</sup>

A further look into the Darfur situation reveals yet another political dimension, the involvement of the UNSC in international criminal justice, to the extent that the organ is empowered to refer matters to the ICC. The UNSC is composed of various member states of the UN, it having five permanent members and ten non-permanent members who are elected

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<sup>78</sup> Twentieth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), para. 1. As accessed from <https://www.icc-cpi.int/iccdocs/otp/20th-UNSC-Darfur-report-ENG.PDF> on 30/3/2016.

<sup>79</sup> Abdalla Banda and Abu Garda have appeared before the ICC to face their charges. [https://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/Pages/situation%20icc-0205.aspx](https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/Pages/situation%20icc-0205.aspx) accessed on 4/8/2015.

<sup>80</sup> [https://www.iccpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/Pages/situation%20icc-0205.aspx](https://www.iccpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/Pages/situation%20icc-0205.aspx) accessed on 4/8/2015.

<sup>81</sup> Shraga D. *Politics and Justice: The Role of the Security Council*, in Cassese A, *The Oxford Companion to International Criminal Justice* (OUP, Oxford) 168.

<sup>82</sup> Shraga D. *Politics and Justice: The Role of the Security Council*, in Cassese A, *The Oxford Companion to International Criminal Justice* (OUP, Oxford) 168.

<sup>83</sup> In Cambodia, the co-Prime Ministers united, though still in their opposition, to have the international criminal justice system deal with the Khmer Rouge. Shraga D. *Politics and Justice: The Role of the Security Council*, in Cassese A. *The Oxford Companion to International Criminal Justice* (OUP, Oxford) 169.

<sup>84</sup> In Uganda, on the other hand, it is generally believed that the President's referral of the matter of the Lord's Resistance Army (LRA) to the ICC, was simply to coerce them to negotiate with the government. Shraga D, *Politics and Justice: The Role of the Security Council*, in Cassese A, *The Oxford Companion to International Criminal Justice* (OUP, Oxford) 169.

<sup>85</sup> Twenty-Second Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1593 (2005) at para. 2 accessed from [https://www.icc-cpi.int/iccdocs/otp/OTP-rep-15-12-15\\_Eng.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-rep-15-12-15_Eng.pdf) on 4/8/2015.

by the UNGA and serve a two-year term.<sup>86</sup> Shraga<sup>87</sup> further captures the politics of the UNSC rather well in explaining that the political considerations of the UNSC underpin decisions to establish international criminal tribunals, throughout history, as well as what situations to be referred or deferred to these courts and tribunals. To this end, it is important to acknowledge the role of politics in the UNSC since it serves a decisive role in international criminal justice.

According to the Prosecutor's Report to the UNSC<sup>88</sup> the crimes enlisted by the Rome Statute<sup>89</sup> are still being committed in the Sudan, among other violations of International Humanitarian Law; this is in addition to the crimes allegedly committed by the indictees, who are still at large. On 29<sup>th</sup> June 2015, the UNSC further adopted Resolution 2228 (2015) which observed;

*"[e]xpressing deep concern at the serious deterioration in the security situation in Darfur overall so far in 2015, and the profound negative impact of this on civilians, in particular women and children, in particular through a marked escalation of hostilities between Government forces and rebel armed groups, as well as an escalation of inter-communal conflicts over land, access to resources, migration issues and tribal rivalries, including with the involvement of paramilitary units and tribal militias, and a rise in criminality and banditry targeting the local population; further expressing deep concern that the deteriorating security Twenty-second report pursuant to paragraph 8 of UN Security Council Resolution (UNSCR) 1593 | 15 December 2015 Page 2 / 11 situation, as characterized by attacks by rebel groups and Government forces, aerial bombardment, by the Government of Sudan, inter-tribal fighting, banditry and criminality, continues to threaten civilians; and reiterating its demand that all parties to the conflict in Darfur immediately end violence, including attacks on civilians, peacekeepers and humanitarian personnel."*<sup>90</sup>

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<sup>86</sup> <http://www.un.org/en/sc/members/> accessed on 4/8/2016.

<sup>87</sup> Shraga D, *Politics and Justice: The Role of the Security Council*, in Cassese A, *The Oxford Companion to International Criminal Justice* (OUP, Oxford) 170.

<sup>88</sup> Twenty-Second Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1593 (2005) at para. 3 accessed from [https://www.icc-cpi.int/iccdocs/otp/OTP-rep-15-12-15\\_Eng.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-rep-15-12-15_Eng.pdf) on 4/8/2015.

<sup>89</sup> Article 5(1) of the Rome Statute.

<sup>90</sup> Twenty-Second Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1593 (2005) at para. 3 accessed from [https://www.icc-cpi.int/iccdocs/otp/OTP-rep-15-12-15\\_Eng.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-rep-15-12-15_Eng.pdf) on 4/8/2015.

The Darfur situation is made even more complex by the fact that Mr. Bashir has been travelling around the world to countries that are party to the Statute and others that are not party to the Statute, yet he has still not been arrested.<sup>91</sup> The OTP registered their concern over this trend, while acknowledging the fact that most of the countries that Bashir has visited are non-party states.<sup>92</sup> The OTP went on in the report<sup>93</sup> to register their disappointment with the UNSC in asserting that the UNSC has been of little to no assistance to ensure that the Government of the Sudan cooperates with the ICC as required under UNSC Resolution 1593 (2005)<sup>94</sup>. The OTP urged the UNSC to use its powers under the UN Charter<sup>95</sup> to ensure compliance of the Court's orders by the Government of the Sudan, as well as enforce cooperation with the OTP on its various requests to the Sudan. Thus far, very little progress has been made with regards to the situation in Darfur and as a result, various witnesses having been 'pulling out' of the case, putting the Prosecutor's chances of success at a minimum.<sup>96</sup>

The foregoing captures the political interplay among the parties, being: the ICC, the UNSC and the Government of the Sudan. The crux of the Prosecutor's Report is mainly the assertion that the crimes enlisted by the Rome Statute Article 5 are still being committed in the Sudan, the indictees are still at large and the UNSC has not done much to ensure that the ICC's orders are enforced and that the various measures available to it haven't been fully exhausted to ensure that the Court and the OTP proceed smoothly with the situation in Darfur.

## Libya

The situation in Libya was referred to the ICC by the UNSC under Resolution 1970 (2011)<sup>97</sup>. Just like the Sudan case, Libya is also not a party to the Rome Statute and hence the similar

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<sup>91</sup> Al-Bashir has travelled to Kenya, Uganda and Nigeria, which are state parties to the Rome Statute but has not been arrested.

<sup>92</sup> Twenty-Second Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1593 (2005) at para. 7 accessed from [https://www.icc-cpi.int/iccdocs/otp/OTP-rep-15-12-15\\_Eng.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-rep-15-12-15_Eng.pdf) on 4/8/2015.

<sup>93</sup> Twenty-Second Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1593 (2005) at paras. 18-20 accessed from [https://www.icc-cpi.int/iccdocs/otp/OTP-rep-15-12-15\\_Eng.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-rep-15-12-15_Eng.pdf) on 4/8/2015.

<sup>94</sup> Paragraph 2.

<sup>95</sup> Wholly and under Chapter VII of the UN Charter.

<sup>96</sup> Twenty-Second Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1593 (2005) at para. 9 accessed from [https://www.icc-cpi.int/iccdocs/otp/OTP-rep-15-12-15\\_Eng.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-rep-15-12-15_Eng.pdf) on 4/8/2015.

<sup>97</sup> Accessed from <https://www.icc-cpi.int/NR/rdonlyres/081A9013-B03D-4859-9D61-5D0B0F2F5EFA/0/1970Eng.pdf> on 4/8/2016.

question of cooperation arises. The Libya situation before the ICC had three indictees: Saif Al-Islam Gaddafi, Muammar Gaddafi and Abdullah Al-Senussi. Muammar Gaddafi has since died, the Pre-Trial Chamber of the ICC declared the case against Al-Senussi inadmissible and Saif is still being held by the Libyan government.<sup>98</sup> Resolution 1970 at paragraph 5 still demands cooperation from the Libyan authorities, while still recognizing that Libya is a non-state party to the Rome Statute but is still obliged to cooperate per the Resolution;

*Decides that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor;*

According to the OTP Report to the UNSC<sup>99</sup>, Saif Gaddafi has been tried in *absentia* and a death sentence has been passed on him. The Court has requested through the Libyan authorities that Saif be handed over to them and the Prosecutor went ahead to ask the Court to issue an ordering barring the Libyan government from executing Saif. The Libyan authorities have intimated to the ICC and the UNSC that Saif is not in their custody and he is still being held in Zintan. The Prosecutor has since requested the UNSC to redouble efforts so as to make sure that Saif is handed over to the ICC without delay.

On the other hand, Al-Senussi is still being tried by the Libyan courts. The Prosecutor intimated to the UNSC that her office is still keenly following and re-examining the Senussi situation to see if there are new facts that arise to warrant a review<sup>100</sup> of Pre-Trial Chamber I's decision of 2013 and relook at the case.<sup>101</sup> The Report concludes by offering its support to the Government of Libya and to the UNSMIL in its limited capacity so as to ensure that Saif is handed over to the Court and the trial against Senussi is conducted fairly and justly.

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<sup>98</sup> Accessed from [https://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/icc0111/Pages/situation%20index.aspx](https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/Pages/situation%20index.aspx) on 4/8/2016.

<sup>99</sup> Tenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011) accessed from <https://www.icc-cpi.int/iccdocs/otp/otp-rep-uns-05-11-2016-Eng.pdf> on 4/8/2016.

<sup>100</sup> Article 19(10) of the Rome Statute allows the Prosecutor to submit a request for a review of the decision of the Court in case the matter had been declared inadmissible before.

<sup>101</sup> Tenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011) para. 7 accessed from <https://www.icc-cpi.int/iccdocs/otp/otp-rep-uns-05-11-2016-Eng.pdf> on 4/8/2016.

Similarly, the Prosecutor requested all states and agencies including the UNSC, to help the UNSMIL and the Libyan government in their efforts to rebuild their country.<sup>102</sup>

### The Legal Interplay of Conflicting Obligations

The obligation to cooperate with the ICC is paramount to its effectiveness and long term survival as has been observed by Shraga.<sup>103</sup> The ICC's main undoing is that it does not have an enforcement mechanism of its own, say like a police force.<sup>104</sup> Furthermore, even if it were to have such, the issue of its functionality within the sovereign jurisdiction of a state would still be a problem. Therefore, the ICC is left in a precarious position in which it has to rely on other foreign agencies, institutions and even states so as to enforce its decisions. This hence throws the ICC to the very murky waters of politics; as had been defined by Shraga.<sup>105</sup> The ICC is now left at the mercy of political institutions including, as had been previously discussed, the UNSC. The drive of self-interest, though cheaply, can be said to be the underpinning factor of international criminal law and justice.<sup>106</sup>

The UNSC is composed of various members of the UN, who are state parties. Under Chapter VII of the UN Charter, the UNSC is tasked with the protection of international peace and security and it is this provision that informs the power of the UNSC to refer matters to the Prosecutor of the ICC so that the OTP can investigate the matters and possibly prosecute the perpetrators if indeed crimes within the jurisdiction of the ICC have been committed.<sup>107</sup> In the Agreement between the ICC and the UNSC<sup>108</sup>, the ICC is allowed to seek assistance from the UNSC to procure cooperation from both state and non-state parties to the Rome Statute. This relationship, as Obura<sup>109</sup> observes, is borne out of the realization that the net result of the

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<sup>102</sup> Tenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011) para. 51 accessed from <https://www.icc-epi.int/iccdocs/otp/otp-rep-uns-05-11-2016-Eng.pdf> on 4/8/2016.

<sup>103</sup> Shraga D, *Politics and Justice: The Role of the Security Council*, in Cassese A, *The Oxford Companion to International Criminal Justice* (OUP, Oxford) 173.

<sup>104</sup> Akande D, 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC' [2012] 10 (1) *Journal of International Criminal Justice* <https://jicj.oxfordjournals.org/> accessed 3/21/2016.

<sup>105</sup> Shraga posits that politics is a process of decision-making that is driven by self-interest. Shraga D, *Politics and Justice: The Role of the Security Council*, in Cassese A, *The Oxford Companion to International Criminal Justice* (OUP, Oxford) 168.

<sup>106</sup> Shraga D, *Politics and Justice: The Role of the Security Council*, in Cassese A, *The Oxford Companion to International Criminal Justice* (OUP, Oxford) 168.

<sup>107</sup> Shraga D, *Politics and Justice: The Role of the Security Council*, in Cassese A, *The Oxford Companion to International Criminal Justice* (OUP, Oxford) 169-170.

<sup>108</sup> *Negotiated relationship agreement between the International Criminal Court and the United Nations* 4 October 2004 ASP/UN.

<sup>109</sup> Obura K, 'The Security Council and the International Criminal Court: When Can the Security Council Defer a Case?' 123.

two institutions is complementary; achievement of international peace and security. Obura<sup>110</sup> further observes that the inclusion of the UNSC in the Rome Statute was not without contestation. This contest was between those who valued peace over justice and those who valued justice over peace; in the end, the compromise reached was to have referrals<sup>111</sup> and deferrals.<sup>112</sup> Referrals would work to ensure peace through justice, while deferrals would work to allow a delay in justice as peace is sought.

The provision of a referral was first exercised by the UNSC in the Sudan case. The gravity of the crimes committed: killings, rape, torture and forceful displacement, conducted by the government-supported Janjaweed militia was such that it attracted the attention of both houses of the U.S Congress, which certified the crimes to constitute genocide.<sup>113</sup> The US advocated for action to be taken to save innocent citizens from the crimes that were being committed in Darfur. The action that the US advocated for was not necessarily military and the only other possible alternative was intervention of international criminal justice; the ICC would then be the most natural and easiest way to achieve this.<sup>114</sup> At the UNSC, a majority of members favored a referral to the ICC, and through this, the UNSC Resolution 1593 (2005) was adopted, referring the situation in Darfur to the OTP.

The referral of the situation in Libya occurred as a result of the events during the Arab Spring.<sup>115</sup> The Prosecutor<sup>116</sup> observes that investigations conducted in Libya during the events of the Arab Spring reveal that crimes that constitute crimes against humanity, war crimes and acts of genocide were committed in Libya and such crimes were happening in a widespread and systematic manner. The Prosecutor explained that evidence collected shows government forces shooting peaceful protesters and persons being forcibly transferred. The

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<sup>110</sup> Obura K, *'The Security Council and the International Criminal Court: When Can the Security Council Defer a Case?'* 124.

<sup>111</sup> Article 13(b) of the Rome Statute.

<sup>112</sup> Article 16 of the Rome Statute.

<sup>113</sup> Shraga D, *Politics and Justice: The Role of the Security Council*, in Cassese A, *The Oxford Companion to International Criminal Justice* (OUP, Oxford) 171.

<sup>114</sup> Shraga D, *Politics and Justice: The Role of the Security Council*, in Cassese A, *The Oxford Companion to International Criminal Justice* (OUP, Oxford) 171.

<sup>115</sup> Arab Spring refers to the democratic uprisings that arose independently and spread across the Arab world in 2011. The movement originated in Tunisia in December 2010 and quickly took hold in Egypt, Libya, Syria, Yemen, Bahrain, Saudi Arabia, and Jordan.

<sup>116</sup> Statement to the United Nations Security Council on the situation in the Libyan Arab Jamahiriya, pursuant to UNSCR 1970 (2011) accessed from [https://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/statement%20to%20the%20united%20nations%20security%20council%20on%20the%20situation%20in%20the%20libyan%20.aspx](https://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/statement%20to%20the%20united%20nations%20security%20council%20on%20the%20situation%20in%20the%20libyan%20.aspx) on 4/9/2016.

UNSC then moved in a bid to bring to book the perpetrators of these crimes and adopted Resolution 1970 (2011) that referred the situation in Libya to the ICC.

To ignore the fact that political considerations shape the nature of international criminal justice is to deny the political realities within which it operates.<sup>117</sup> Taking this into account, it would be important to acknowledge that the birth of international criminal justice itself, is politics and hence, politics cannot be divorced from this branch of law. The fear that the UNSC, by being closely linked to the ICC may tamper with the justice process and may terminate matters before the court or greatly interfere with the independence of both the OTP and the Court itself has come to be seen as a more apparent fear than a real one.<sup>118</sup>

With the benefit of hindsight from the *ad hoc* Tribunals the play of politics in international law has greatly yielded a fair level of state cooperation with the Tribunals. The ICTY, for example, remains a *locus classicus* on 'playing politics' to yield state cooperation as a result. This cooperation was actually achieved with very little to no assistance from the UNSC; it is posited<sup>119</sup> that the UNSC lacked the requisite political will to enforce compliance, pursuant to Chapter VII of the Charter of the UN<sup>120</sup>. Surprisingly, it is members of the UNSC, who individually acted to ensure compliance with the Tribunals. For example, the surrender of Milosevic<sup>121</sup> to the ICTY was as a condition for US-EU funding in form of aid to Belgrade. After his transfer to The Hague for trial, a donor conference was held and such funding was approved. In yet another case, the surrender of Charles Taylor was effected through a series of complex negotiations involving Nigeria, Liberia, the African Union (AU) and the Economic Community of West African States (ECOWAS).<sup>122</sup> Members of the UNSC moved unilaterally and took up the duty of preservation of international peace and security and employed methods which would offer incentives to cooperate as opposed to sanctions for non-cooperation. This was done despite the fact that the UNSC had collectively, as a body, 'abdicated' its role to ensure cooperation via its duty as prescribed in Chapter VII of the UN Charter.

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<sup>117</sup> Shraga D, *Politics and Justice: The Role of the Security Council*, in Cassese A, *The Oxford Companion to International Criminal Justice* (OUP, Oxford) 174.

<sup>118</sup> Shraga D, *Politics and Justice: The Role of the Security Council*, in Cassese A, *The Oxford Companion to International Criminal Justice* (OUP, Oxford) 174.

<sup>119</sup> In several occasions when the Presidents of ICTY and ICTR requested UNSC intervention, the UNSC chose not to act.

<sup>120</sup> Shraga D, *Politics and Justice: The Role of the Security Council*, in Cassese A, *The Oxford Companion to International Criminal Justice* (OUP, Oxford) 173.

<sup>121</sup> *Prosecutor v Slobodan Milosevic* IT-02-54-R77.4.

<sup>122</sup> Shraga D, *Politics and Justice: The Role of the Security Council*, in Cassese A, *The Oxford Companion to International Criminal Justice* (OUP, Oxford) 174.

Of particular interest in this inquest is the input of the African Union (AU). Firstly, it is paramount to point out the key players in this state of affairs: the non-member state, the UNSC and the ICC. The UNSC serves to refer the non-member states to the ICC, and prescribes various modes of cooperation since the non-member states cannot be bound by the Rome Statute.<sup>123</sup> The UNSC therefore prescribes the relationship, and serves as the 'conduit of cooperation' between the non-member state and the ICC, since the state bears no obligation whatsoever under the Rome Statute. The AU at the time of passing of the Sudan Resolution<sup>124</sup> had three members in the UNSC<sup>125</sup>; only Algeria, of the three African countries abstained from the vote on grounds that they would only move in such decisions under the auspices of the AU. At the passing of the Resolution on Libya,<sup>126</sup> three African states had seats at the UNSC and this time around, none abstained.

On the situation in Sudan, the AU passed a resolution<sup>127</sup> that ordered the Government of the Sudan to submit a report on the situation in Darfur and to comply with the orders of the UNSC, as well as the UN Charter obligations. This resolution was in no conflict whatsoever with the UNSCR 1593(2005) that referred the human rights situation in Darfur to the ICC. The AU onslaught that came much later on the ICC, was only inspired by the Kenyan cases at the ICC, and the situation in the Sudan and Libya had very little to no part in it.<sup>128</sup>

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<sup>123</sup> Article 6, *Vienna Convention on the Law of Treaties*.

<sup>124</sup> UNSCR 1593(2005).

<sup>125</sup> Algeria, Benin and Tanzania were that circuits non-permanent members from the AU.

<sup>126</sup> Gabon, Nigeria and South Africa were that circuits non-permanent members from the AU.

<sup>127</sup> Resolution ACHPR/Res.93, 04 adopted by the 38<sup>th</sup> Ordinary Session on 5<sup>th</sup> December 2005.

<sup>128</sup>

## 4. CHAPTER FOUR

### CONCLUSIONS AND RECOMMENDATIONS

#### Conclusion

It therefore emerges at this point that the issue of state cooperation with the ICC is no longer a question of whether the state is a party to the Rome Statute or not. What really matters is that there is sufficient evidence that certain crimes have been committed, and that there are suspects (who are still presumed innocent until otherwise proved) that have to appear before the Court so as to answer to the allegations leveled against them. The crimes listed at Article 5 of the Rome Statute are crimes that are naturally abhorrent to the very order of the human being and the human person that whenever they are committed, each state that claims to be civilized owes a duty to not only the human race, but also the international community of nations, in general. It is now apparent that the Rome Statute provisions on cooperation with the ICC do not bind non-state parties due to the law on treaties (VCLT). What appears to bind them is the provision in the UNSC Resolutions that refer the matters to the ICC on cooperation of the situation countries themselves, as well as other nations to cooperate with the court so as to help it deliver justice. This provision in the UNSC Resolutions is backed by the enforcement power that the UNSC possesses courtesy of Chapter VII of the UN Charter.

This study had the following as its objectives;

1. To establish whether the UNSC Resolutions can confer obligations to non-state parties to the extent that they become bound by certain provisions of the Rome Statute.
2. To make recommendations on the best ways for the ICC to ensure cooperation from non-member states to the Statute, when situations from such states are before the ICC.

It has addressed these objectives thusly;

1. It has been established that the UNSC Resolutions cannot confer obligations on non-state parties to the extent that such parties become bound by certain provisions of the Rome Statute, such as those on cooperation. This is so since the VCLT is essential in all treaties and their application only to those states that are parties to it; save for those rules that have attained the status of customary international law and bind all states and persons, regardless of their acceptance of the treaty.

2. This chapter shall now proceed to provide a solution that has been tried and tested to ensure cooperation from non-state parties to the Rome Statute:

### Recommendation

Every state on earth is in need of the other state so as to engage in trade among other levels of interaction. This provides the perfect channel for enforcement of cooperation obligations. That the UNSC may be crippled by its politics and hence fail to pursue states to cooperate owing to their power and authority as donated under Chapter VII of the UN Charter. This obligation at Chapter VII to 'preserve and protect international peace and security' may be employed by the UNSC to take certain steps to ensure that the state in question complies with the demands of the ICC or the requests of the OTP.

If the UNSC fails, as it has numerous times before, then individual states that share the concerns of the ICC and share in civilization and general care for the human race, may take it upon themselves to offer certain essential incentives to the state in question so as to lure them into cooperating with the ICC. This method is a win-win for all parties: the ICC achieves justice, the non-state party gains incentives and the state offering the incentives gets general satisfaction on restoring justice, as well as, gaining some economic or other advantage through offering the incentive.

The one main downside to this mode of procuring cooperation is that it can only effectively be employed by powerful, rich and advanced countries since they have the means and are 'above' the rest. This makes this mode prone to abuse and makes it whimsical as well since it is dependent on the moods and wishes of the powerful nation in question. So far, this has proved to be the best and most effective way to secure cooperation from a non-state party to the relevant treaty and still maintain state relations, while providing a win-win situation for all the parties involved. It is a mode that provides incentive to cooperate as opposed to a sanction for non-cooperation; a positive model that has been proven to work.

The hypothesis to this paper was:

*Non-member states to the Statute have an equal obligation as the member states to cooperate fully with the court.*

This hypothesis has been proved as it has been established that all states have an equal obligation to cooperate with the ICC, either by virtue of being party to the Rome Statute

or through being bound by the UNSC Resolution as passed to refer a situation to the ICC. Similarly, a mode of ensuring cooperation has also been prescribed.

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