THE CONFLICTUAL TRIANGULAR RELATIONSHIP BETWEEN THE UNITED NATIONS SECURITY COUNCIL, THE INTERNATIONAL CRIMINAL COURT AND THE AFRICAN UNION THROUGH THE LENS OF COOPERATION: THE IMPLICATIONS FOR INTERNATIONAL CRIMINAL JUSTICE

by

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DECLARATION

I declare that this doctoral thesis entitled “The Conflictual Triangular Relationship between the United Nations Security Council, the International Criminal Court and the African Union through the Lens of Cooperation: The Implications for International Criminal Justice”, which I hereby submit for the degree of Doctor of Laws (LLD) at the University of Pretoria, is my own original work and has not previously been submitted by me for examination or the award of a degree at this or any other university. All the sources used or quoted have been duly acknowledged and referenced.

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Madila Asiel Ngoai

Signature

Dated in Pretoria on this …… Day of May 2024

ABSTRACT

Cooperation, which is the main theme of the study, is at the centre of the regime of the International Criminal Court (ICC). Without cooperation, which is a key principle of international law, the ICC would essentially be a “giant without arms and legs”. Though not specifically defined, it is understood to be an obligation of means, not of results. Through the ages, states have cooperated for various reasons, although primarily to advance their national interests. The importance of cooperation in international law has even led to some authors suggesting that apart from the law of coexistence, there is a new structure of international law – the law of international cooperation.

Ideally, the relationship between the ICC, the UN Security Council and the African Union should be grounded in the law of international cooperation. However, the relationship between these entities has deteriorated and become strained and is characterised by a lack of cooperation. While much of the spotlight is on the African Union’s non-cooperation stance with the Court, all three entities are, to an extent, responsible for the standoff.

The standoff between the three entities started when the UNSC’s referral resolution placed only the situation states, Sudan and parties to the conflict under mandatory obligation to cooperate with the Court. This action by the UNSC could be seen as an attempt to circumvent the cooperation framework of the Rome Statute. After the referrals, the entity similarly did not assist the Court in gaining cooperation from recalcitrant states. Equally so, when deferral request was submitted, it was not formally considered despite meeting the required provisions. Furthermore, the UNSC attempted to invoke the deferral article for unintended purposes, thereby making the entity an active participant in the triangular conflictual relationship.

In trying to secure cases and cooperation from states, the prosecutor was seen as operating too close to the politicians, which many warned could damage the image of the Court. In cases where the Court was called upon to give an authoritative interpretation of the cooperation framework, it gave conflicting decisions with the result that the cooperation model of the Rome Statute was transformed from an inter-state to a supra-state model of cooperation. As it stands, and notwithstanding the exceptions provided for in the Statute, states parties are under a mandatory obligation to cooperate with the Court in all circumstances. The decisions have given credence to the accusation that in its quest for cooperation, the Court does not

necessarily apply the law as provided for in the Statute but rather acts as an instrument to achieve political outcomes.

Despite not being party to the Rome Statute, the AU has decided that all African States Parties must not cooperate with the Court. This decision is unprecedented, as the Statute was not adopted under its auspices and the African State Parties do not have any cooperation obligations to the AU. This decision stems from AU's dissatisfaction with the UNSC. Unless the three entities find some common ground, it seems the triangular conflictual relationship with cooperation at the centre of the conflict, will persist for the foreseeable future.

KEY TERMS

Cooperation, non-cooperation, conflictual relationship, international law, common good, referral, deferral, African Union, International Criminal Court, United Nations Security Council, prosecutor, arrest warrant

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ABBREVIATIONS

AMIB	African Mission in Burundi
ASP	Assembly of State Parties
AU	African Union
AU PSC	African Union Peace and Security Council
DRC	Democratic Republic of Congo
EU	European Union
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ITLOS	Tribunal for the Law of the Sea
ICL	International Criminal Court
IFOR	Implementation Stabilisation Force
ILC	International Law Commission
LRA	Lord Resistance Army
MTFE	Military Tribunal for the Far East
NMT	Nuremburg Military Tribunal
NATO	North Atlantic Treaty Organisation
ONUB	United Nations Operation in Burundi
OTP	Office of the Prosecutor
PTC	Pre-Trial Chamber
RPF	Rwanda Patriotic Front
SFOR	Stabilisation Force
SHAPE	Supreme Headquarters Allied Powers Europe
UK	United Kingdom
UN	United Nations
UNAMID	United Nations –African Union Hybrid Mission in Darfur
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
UNTAES	United Nations Transitional Administration for Eastern Slovenia
US	United States of America

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CHAPTER ONE

INTRODUCTION

1 BACKGROUND

Cooperation, which is the main theme of this study, is at the centre of the regime of the International Criminal Court.[1] Without cooperation, the ICC could rightfully be described as a "giant without arms and legs".[2] The relationship between the International Criminal Court, the United Nations Security Council and the African Union with cooperation at the centre has been in the spotlight, dominating the international criminal justice discourse. The relationship between these three entities ought to be anchored in cooperation, but instead appears to be characterised by a lack thereof.

2 RESEARCH AIMS

To better understand the conflictual relationship between the African Union (the AU), the United Nations Security Council (UNSC), and the International Criminal Court (the ICC or the Court), the study traces the origins and content of the concept of international cooperation under public international law. Having laid the foundation, the study will proceed and narrow the concept of international cooperation by looking into international cooperation in criminal matters. The analysis will help determine the extent to which the cooperation framework of the Rome Statute follows the established principles of international cooperation in criminal matters. The analysis sets the theoretical foundation behind the conflictual triangular relationship between the three entities.

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1 Part IX of the Rome Statute.

2 Antonio Cassese, Paula Gaeta & John Jones (eds) "*The Rome Statute of the International Criminal Court: A Commentary*" (Vol II) (Oxford University Press, 2002) at 1589. Mia Swart & Karin Krisch "An Analysis of Standoff between the African Union and the International Criminal Court" (2014) *African Journal of International Law* at 267. See also Charles Jalloh "Africa and the International Criminal Court: Collision Course or Cooperation" (2012) *North Carolina Central Law Review* at 215.

3 BACKGROUND AND RATIONALE FOR THE PROPOSED STUDY

3.1 Background

On the 17th of July 1998, the Rome Statute of the International Criminal Court (the Rome Statute or the Statute) was adopted by a vote of 120 states.[3] The Statute entered into force on the 1st of July 2002 after ratification by the required threshold of sixty states. With these ratifications, the ICC officially came into being.[4] The Court has jurisdiction to try the identified crimes viz: genocide, crimes against humanity, war crimes and crime of aggression,[5] while its jurisdiction is complementary to that of the national courts.[6] This refers to the fact that the ICC can only exercise jurisdiction when national courts are either unwilling or unable to do so.

Another feature that distinguishes the ICC from national courts, is that the ICC does not have an enforcement mechanism to arrest and bring alleged perpetrators of defined crimes before the Court.[7] As the first permanent international criminal court and like a "giant without arms and legs", it relies mainly on cooperation by States to discharge its primary mandate.[8] For that reason, the Rome Statute puts together a detailed cooperation framework in Part Nine, which is premised on a general obligation entrusted to States Parties to cooperate with the Court.[9]

Article 87 goes further, effecting the aforementioned general obligation by detailing how cooperation requests should be transmitted by the Court, and how States Parties should respond to such a request.[10] To further emphasise the importance of cooperation, the Assembly of States Parties (ASP) routinely adopts resolutions urging States Parties and international and regional organisations to cooperate with the Court.[11] These resolutions reaffirm the importance of timely, effective and comprehensive cooperation.[12] In addition to

3 Seven voted against and 17 abstained from voting. The seven countries that voted against the treaty are China, Iraq, Israel, Libya, Qatar, the United States, and Yemen. http://iccnow.org/?mod=icchistory. (accessed 12 March 2020).
4 History of the ICC. https://www.icc-cpi.int/about. (accessed 04 April 2020).
5 Art 5 of the Rome Statute.
6 Art 1 of the Rome Statute.
7 Swart & Krisch (n 2 above) at 267.
8 Art 86 of the Rome Statute. Hans-Peter Kaul "The ICC and International Criminal Cooperation - Key Aspects and Fundamental Necessities" (2008) *ICC Legal Tools* at 85.
9 Art 86 of the Rome Statute.
10 Art 87 of the Rome Statute.
11 Resolution ICC-ASP/5/Res.3 adopted at the 7th plenary meeting on 1 Dec 2006 at 4. See also ICC-ASP/16/Res.2 Resolution on cooperation of 14 Dec 2017. See further ICC-ASP/17/Res.3 Resolution on cooperation of 11 Dec 2018.
12 ICC Assembly Declaration RC/Decl. 2 Declaration on Cooperation. Adopted at the 9th Plenary Meeting of the Assembly State Parties to the Rome Statute of 8 June 2010. Resolution ICC-ASP/10/Res.5. Adopted at the 9th plenary meeting on 21 Dec 2011 at 30. Resolution ICC - ASP/12/Res.3. Adopted at the 9th plenary meeting, on 27 Nov 2013.

these resolutions and to ensure further cooperation, the ASP adopted procedures relating to non-cooperation.[13]

The ultimate tool for cooperation is capped by the crucial responsibility given to States Parties to arrest and surrender to the Court those indicted for Rome Statute crimes.[14] In this regard, the Statute is unambiguous concerning how the arrest and surrender of accused persons (cooperation) should be executed.[15] By putting together this elaborate cooperation regime, the drafters seem aware of the fact that without cooperation, the ICC will truly be rendered ineffective.

Two entities, namely the UNSC and the AU, continue to play a significant role within the Rome Statute cooperation framework, notwithstanding their differing relationships with the Court. Firstly, the relationship between the ICC and the UNSC is specifically provided for in the Statute, most notably in Articles 13(b) and 16. Article 13(b) of the Statute entrusts the UNSC with powers to refer to the Court a situation where one or more crimes appear to have been committed within the Court's jurisdiction.[16] Article 16, on the other hand, confers on the UNSC the negative powers to defer investigation or prosecution by the ICC in terms of Chapter VII of the UN Charter.[17] Equally so, Article 87(7) of the Statute allows the ICC to refer a State to the UNSC where that State fails to cooperate with the Court pursuant to UNSC referral. Article 17 of the UN-AU Relationship Agreement also makes provision for cooperation in the event of UNSC referral/deferral.

Unlike the UNSC, the AU does not enjoy any specific mandate under the Rome Statute, nor do the two organisations have any legally binding agreement.[18] The relationship is mainly due to AU Member States being the largest bloc of Parties to the Rome Statute[19] and the fact that it is within those Member States that most of the investigative situations occur.[20] Moreover, Article 54(3)(c) and (d) of the Statute allows the OTP to seek cooperation from any

13 ICC Assembly Procedures relating to Non-Cooperation (ICC-ASP/10/Res.5, annex). Also see Report of the Bureau on potential Assembly procedures relating to non-cooperation of 30 Nov 2011(ICC-ASP/10/37).
14 Art 89 of the Rome Statute.
15 Art 90, 91 and 92 of the Rome Statute. See also Kaul (n 8 above) at 89-90.
16 Art 13(b) of the Rome Statute.
17 Art 16 of the Rome Statute.
18 ICC Prosecutor Seventh Annual Report to UNSC pursuant resolution 1593 at para. 45.
19 33 African States are Parties to the Rome Statute. https://asp.icc-cpi.int/enmenus/asp/states%20parties/african%20states/Pages/african%20states.aspx. (accessed 30 April 2020)
20 The majority of the situations under investigation are from the African continent and all the 27 cases before the Court are all from Africa.

intergovernmental organisation and to enter into cooperation agreements with such organisations.[21]

On the other hand, the relationship between the AU and UNSC is regulated by Chapter VIII of the UN Charter. In a nutshell, Chapter VIII lays the framework for cooperation between regional organisations and the UN in matters related to international peace and security. Likewise, the Constitutive Act of the African Union (the AU Act) encourages international cooperation and takes due account of Chapter VIII of the UN Charter.[22] The African Union Peace and Security Council (AU PSC) equally affirms the importance of cooperation among international players, as encapsulated in the UN Charter and the primacy bestowed upon the UNSC to maintain international peace and security.[23] The relationship between AU and the UN is further formalised by the AU-UN Framework for Enhanced Partnership in Peace and Security (AU-UN Framework), wherein the two entities agree to cooperate in matters concerning peace and security.[24]

3.2 Rationale for the Study

The peculiarities of the triangular relationship between the AU, ICC and the UNSC came to the fore with UNSC resolution 1593 referring the situation in Darfur to the ICC.[25] With this referral, the situation in Darfur came under the jurisdiction of the Court with the result that Article 87(7) of the Statute and Article 17 of the UN-ICC Agreement became operative.[26] Both Articles call for cooperation between the ICC and the UNSC where a matter emanates from a UNSC referral.[27] In addition, the referral also brought into play certain elements of cooperation between different international players. Firstly, in relation to the Sudan, resolution 1593 provides that:[28]

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21 Art 55(3)(c) and (d) of Rome Statute.
22 Art 3(e) of the AU Constitutive Act.
23 Para 5 of the Preamble to the Protocol Relating to the Establishment of the Peace and Security Council of the African Union.
24 The UN-AU Framework of 19 April 2017.
25 UNSC 1593 (2005) and 1970 (2011).
26 Art 13(b) of the Rome Statute.
27 Art 87(7) of the Rome Statute holds amongst others that where a state party fails to comply with a request to cooperate preventing the Court from exercising jurisdiction, the Court may make a finding and refer the matter to the UNSC if the matter was before the Court as a result of referral by the UNSC. Art 17(3) of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations (UN-ICC Agreement) provides that "[w]here a matter has been referred to the Court by the Security Council and the Court makes a finding…of a failure by a State to cooperate with the Court, the Court shall inform the Security Council […] The Security Council, […] shall inform the Court […] of action, if any, taken by it."
28 UNSCR 1593 (2005) at para 2.

> [S]udan 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 […]

In addition to the aforementioned cooperation obligations, the implications for Sudan as a Member of the UN are its agreement and acceptance to carry out the decisions of the UNSC.[29] Furthermore, as a Member State of the AU, Sudan might be impacted by any cooperation decisions taken by the Organisation regarding a UNSC referral.

Secondly, in relation to non-States Parties and other international organisations, the resolution provides that:[30]

> [W]hile recognising that States not party to the Rome Statute have no obligation under the Statute, [the resolution] urges all States and concerned regional and other international organisations to cooperate fully.

From the resolution, it could be strongly argued that non-Parties to the Rome Statute and other international organisations, such as the AU, are not obligated to cooperate with the Court. Notwithstanding this discretion, the resolution further invites the AU to discuss practical arrangements that will facilitate the work of the Prosecutor, which is essentially a call for cooperation.[31]

Following the abovementioned referral, the Prosecutor commenced with investigations and upon conclusion, filed an application with the Pre-Trial Chamber 1 (PTC 1) for the issuance of a warrant of arrest for Sudanese President, Omar Hassan Ahmad Al Bashir (Al Bashir).[32] The warrant of arrest for Al Bashir was eventually issued on March 4th, 2009, following the decision of the PTC 1.[33]

In line with the resolution, the AU was expected to heed the UNSC's call by discussing practical arrangements to facilitate the work of the Prosecutor. However, the AU Assembly expressed deep concern at the application of an arrest warrant by the Prosecutor against Al Bashir. The AU strongly argued that the ICC process would undermine AU's peace efforts which were underway in Sudan.[34] The Assembly further reiterated the call by the AU PSC that

29 Art 25 of the UN Charter.
30 UNSCR 1593 (2005) at para 2.
31 Ibid at para 3.
32 Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09) of 4 March 2009.
33 Ibid.
34 AU Assembly Decision (Assembly/AU/Dec.221(XII) of 03 Feb 2009.

the UNSC should exercise its powers under Article 16 of the Rome Statute and defer the ICC process.[35]

This deferral request came before the UNSC meeting on the extension of the mandate of the United Nations – African Union Hybrid Operation in Darfur (UNAMID).[36] During this meeting, the UNSC was divided on the matter, with China, Russia, Libya, South Africa, Burkina Faso and Indonesia supporting the deferral request, while France, the United Kingdom, Belgium and Croatia (amongst others) did not support the request.[37] Those refusing the deferral request argued that there is no prospect of peace in Sudan without justice.[38] At the end of the meeting, a compromise was reached as the preamble to resolution 1828 provides that:[39]

> Taking note of the African Union (AU) communiqué of the 142nd Peace and Security Council (PSC) Meeting dated 21 July (S/2008/481, annex), having in mind concerns raised by members of the Council regarding potential developments subsequent to the application by the Prosecutor of the International Criminal Court of 14 July 2008, and *taking note* of their intention to consider these matters further […]

After adopting the resolution, the delegate of Burkina Faso implored the UNSC to make good on its undertaking to consider the deferral request and that it should further act with speed.[40] However, the pronouncement was the last time the UNSC engaged with the AU's deferral request, contrary to its undertaking.[41] With this posture by the UNSC, and left with no option, the AU called on its Members not to cooperate with the Court in executing the arrest warrant of Al Bashir.[42] This non-cooperation posture in respect of the proceedings against Al Bashir was repeated in subsequent Assembly resolutions.[43] With these non-cooperation decisions

35 Ibid. See also Communiqué of Peace and Security Council 151 Meeting of 22 Sep 2008. http://www.peaceau.org/uploads/pscsudancommeng.pdf. (accessed: 12 Feb 2020). The request for deferral was reiterated in the 145th Meeting of the AU PSC.

36 UNSC 5947th Meeting of 31 July 2008 (S/PV/1942) at 3-10.

37 Ibid.

38 Ibid.

39 Ibid at para 11. See also UNSCR 1828 of 2008. See also UNSC 6020th Meeting of 3 Dec 2008 (S/PV/6020) at 15-17.

40 The delegate of Burkina Faso posited that it was absolutely crucial that the Council take up the preambular paragraph 9 (to consider the matter further) of the resolution as soon as possible. The AU Members were consistence during all UNSC meetings that the UNSC should consider deferral request. See for example UNSC 6028th Meeting of 3 Dec 2008 (statement by Libyan delegate). See further UNSC Meeting 6230th of 3 Dec 2009 (statement by delegate of Burkina Faso).

41 UNSCR 1881 is silent on the deferral request by the AU.

42 AU Assembly Decision (Assembly/AU/Dec.245(XIII) Rev.1) of 1-3 July 2009.

43 Para 4 and 5 of the AU Assembly Decision, Decision on the progress report of the Commission on the implementation of the decision Assembly/AU/Dec/.270 (XIV) on the second ministerial meeting on the Rome Statute of the International Court: Doc. Assembly/AU/10 (XV) in Decision, Declaration, Resolution of the 15th ordinary session of the AU Assembly: Assembly/AU/Dec.296 (XV) (Kampala 27 July 2010 para 4 and 5. Assembly/AU/Dec.366(XVII). On the question of Libya,

by the AU, the conflictual triangular relationship between the ICC, the AU and the UNSC was completed.

The reaction of the Prosecutor in these matters appears to be that when making a decision on whether to prosecute or not, the OTP is guided only by the interests of justice and not by any other criteria that will fall outside the Rome Statute framework.[44] For example, while briefing the UNSC, the then Prosecutor was unflinching in his statement that "I follow evidence. I'm criminal prosecutor, I'm not a political analyst."[45]

Closely related to the complex conflictual relationship between the three entities are their specific objectives and purposes, which may influence their posture towards cooperation. The AU's primary objective is to maintain peace and security on the continent.[46] Similarly, the UNSC's objective is maintaining international peace and security,[47] while the ICC's primary objective is that of justice.[48] These differing objectives create a certain tension between peace and justice.[49] For example, the argument advanced by the AU for not cooperating with the ICC on the Al Bashir matter is that the ICC processes will derail or jeopardize peace processes or other political interventions undertaken by the AU.[50] The OTP, on the other hand, remains consistent in its argument that it is solely guided by the interests of justice and not by other considerations, in particular politics (read "peace").[51] From these differing positions, it could be argued that as long as the tension between peace and justice (real or perceived) is not resolved, cooperation between the ICC and the AU is bound to suffer.

From the legal framework and situations discussed above, a study of the relationship between the three entities becomes necessary. When they refuse to cooperate, international justice is the one that generally suffers.[52] In addition, the study is important to try and break what can

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the Assembly decided that Member States shall not cooperate - UNSC to activate the provisions of art 16.

44 OTP "Policy Paper on the Interests of Justice" Sept 2007.

45 Moreno Ocampo: I follow the Evidence, not Politics (2012) *International Peace Institutehttps://www.ipinst.org/2012/01/moreno-ocampo-i-follow-evidence-not-politics* (accessed 23 Jan 2023). See also UNSC meeting 6230 of 4 Dec 2009.

46 Art 3 of the AU Constitutive Act.

47 Art 24(1) of the UN Charter.

48 Preamble to the Rome Statute.

49 Konstantinos Magliveras & Gino Naldi "The ICC addresses Non-Cooperation by State Parties: The Malawi Decision" *African Journal of Legal Studies* (2013) at 154.

50 AU Assembly Decision (Assembly/AU/Dec.366(XVII) of 1 July 2011.

51 OTP "Policy Paper on the Interests of Justice" September 2007. See also Lee Seymor "The ICC and Africa, Rhetoric, Hypocrisy Management, and Legitimacy" (2016) *Cambridge University Press* at 113.

52 Dire Tladi "When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic" (2014) *African Journal of Legal Studies* (2014) at 387.

only be referred to as a "stand-off", so that States and international organisations can fully cooperate in the investigation, arrest and surrender of those indicted or summoned by the Court. From an African perspective, the study has become critical as one African States Party has already heeded the call by the AU and has formally withdrawn from the Rome Statute.[53]

4 LITERATURE REVIEW

The literature review below analyses the evolution of various aspects of international law and international criminal law relevant to cooperation between different international actors. This analysis includes (among others) a review of the literature on Africa's role in those international criminal tribunals, how cooperation was achieved by the ad hoc tribunals and how some of the cooperation frameworks in those international tribunals were carried over into the Rome Statute. The concretisation of the Statute by way of an analysis of the relationship between the AU, the ICC and the UNSC, through the lens of cooperation, will also be considered. The literature review draws on existing literature, decisions and opinions of the courts (in particular the international courts and/or tribunals), treaties, and the resolutions adopted by international organisations.

4.1 Cooperation under Ad Hoc International Criminal Tribunals

Although this study is mainly concerned with investigating the relationship between the ICC, the UNSC and the AU through the prism of cooperation, a brief analysis of the cooperation framework in the establishment and functioning of ad hoc tribunals is important. Such an analysis will put the cooperation framework as provided for in the Rome Statute into its proper context. Intrinsic within this context, is the fact that the ICC is not a spontaneous event but rather a manifestation of an evolution which started after World War I.[54] Furthermore, a review of the ad hoc tribunals adds context to the study, since they were established by the UNSC, which is one of the entities this study focuses on. Moreover, the successes of these ad hoc tribunals were also dependent on cooperation by States and other international organisations.

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53 Burundi became the first African state to formally withdraw from the ICC. Human Rights Watch *Burundi: ICC withdrawal a major loss to victims* https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims (accessed 07 March 2020).

54 Ramesh Thakur "From Sovereign Impunity to International Accountability: The Search for Justice in the World of States" (2004) *United Nation University Press* at 21. See also Chris Peter "*Fighting Impunity: African State and the International Criminal Court*" in Ankumah (ed) "*The International Criminal Court and Africa: One Decade On"* (Intersentia, 2016) at 2. After World War I institutions were established to address serious violation of human rights, which include the Leipzig War Crimes Trial of 1921, which tried several German military commanders.

The idea of an international criminal tribunal can be traced as far back as after World War I with the signing of the Treaty of Versailles.[55] However, the idea was only revolutionised during World War II with the establishment of the Nuremburg Military Tribunal (NMT) and the Military Tribunal for the Far East (MTFE).[56] The NMT and the MTFE laid the foundation for the ICTY and ICTR.[57] These latter Tribunals were established pursuant to the UNSC resolutions acting under Chapter VII of the UN Charter.[58] In invoking Chapter VII when passing the resolutions, they were made binding on all UN Members.[59] This was succinctly described by Bellelli when he postulated that:[60]

> The relationship between the UN *ad hoc* Tribunals and the Security Council results in the Tribunals' legitimacy resting on the *erga omnes* binding Security Council's resolutions adopted under Chapter VII of the UN Charter. As subsidiary bodies of the Security Council, the Tribunals enjoy the strong mandatory nature of the obligation to cooperate […] the arrest and surrender orders of the *ad hoc* Tribunals […] under Chapter VII – cannot be disregarded without exposing states to the systematic consequences of breaching an obligation established under the UN Charter.

55 Art 227 of the Treaty of Versailles provided amongst other things that a special tribunal will be constituted to try the German Emperor for supreme offence against international morality and the sanctity of treaties. The judges were going to be appointed by the United States of America, Great Britain, France, Italy and Japan.

56 William Schabas "The UN International Criminal Tribunals, The former Yugoslavia, Rwanda and Sierra Leone" (2006) *Cambridge University Press* at 9-11. For example, the Versailles Treaty provided for the establishment of an international tribunal to judge the German emperor Wilhelm II for a supreme offence against international morality and the sanctity of treaties. It also recognised the right of the Allies to set up military tribunals to try German soldiers accused of war crimes. See also Peter (n 54 above) at 2. See also Richard Overy "*The Nuremburg Trials: International Law in the Making*" in Sanda (ed) "*From Nuremburg to the Hague, the Future of International Criminal Justice"* (Cambridge University Press, 2003) at 2. See further Guenael Mettraux "Trial at Nuremburg" in William Schabas and Nadia Bernaz (eds) "*Routledge Handbook of International Criminal Law*" (Routledge, 2013) at 5-13.

57 Cherif Bassiouni "The Statute of the International Criminal Court: A Documentary History" (1998) at 32-33. See also Graham Blewitt "Ad Hoc Tribunals Half a Century after Nuremberg" (1995) *Military Law Review* (1995) at 103.

58 UNSCR 955 (1994) of 8 Nov 1994 establishing the ICTR and UNSCR 827 (1993) of 25 May 1993 establishing the ICTY. Chapter VII deals with action with respect to the Peace, Breaches of Peace and Acts of Aggression.

59 Art 25 of the UN Charter. See also A/49/342. S/1994/1007 of 29 Aug 1994. First Report of the International Tribunal for the Prosecution of Person Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991at 27.http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_1994_en.pdf. (accessed 12 March 2020).

60 Roberto Bellelli "*Obligation to Cooperate and Duty to Implement*" in Bellelli (ed) "*International Criminal Justice, Law and Practice from the Rome Statute to its Review*" (Ashgate, 2010) at 223.

The Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute) and UNSC resolution 827, which establishes the ICTY, are aligned in respect of States' cooperation with the Tribunals. Resolution 827 of the ICTY provides that:[61]

> [A]ll States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution, […] shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance […]

Article 29 of ICTY Statutes equally provides that States shall cooperate with the Tribunal in the investigations and prosecutions of persons accused of committing serious violations of the law.[62] To further elucidate the aforementioned obligation, the Article further directs that States shall comply with, amongst others, the arrest or detention of persons and the surrender or the transfer of persons to the Tribunal.[63]

According to the ICTY Second Annual Report, the aforesaid mandatory obligations to cooperate were observed by some States. By 1995, for example, several States had adopted legislative or regulatory provisions required to give effect to the Tribunal's Statute, especially in relation to the transfer of suspects and accused persons to the seat of the Tribunal. [64] After receiving a request from the ICTY, Germany became the first State to transfer a suspect, Dusko Tadic, to the seat of the Tribunal.[65] Likewise, collective States' actions in threatening to withhold financial aid to Yugoslavia led to suspects being handed over to the Tribunal.[66] The Third ICTY Annual Report also captures the role States played in the functioning of the Tribunal by providing that State cooperation was instrumental in the arrests of Delic and Landzo.[67]

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61 UNSCR 827 (1993) of 25 May 1993 at para 4.

62 The crimes which fell under the jurisdictions of the Tribunal were crimes to commit conspiracy, crimes against the peace, war crimes and a new category of crime called "crimes against humanity".

63 Robert Cryer "*Prosecuting international Crimes Selectivity and the International Criminal Law Regime"* (Cambridge, 2005) at 39.

64 Second Annual Report of the ICTY (A/50/365 S/1995/728 of 14 Aug 1995) at 31 para 132. Amongst states which have enacted implementing legislation in 1995 were Finland, Italy, the Netherlands, Norway, Spain and Sweden. States which did not cooperate indicated that national laws did not cater for cooperation with the Tribunal.

65 Ibid at 8.

66 Gabriel McDonald "Problems, Obstacle and Achievements of the ICTY" (2004) *Journal of International Criminal Justice* at 566. The collective actions by States were in the form of threat to withhold funding for Yugoslavia.

67 Third Annual Report of the ICTY (A/51/292 S/1996/665 of 16 Aug 1996) at para 167. State cooperation was further supported by the signing of General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Accord). Article IX of the Dayton Accord provides that "all Parties to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law."

The converse was also true in the initial stages of the Tribunal when some States blatantly refused to cooperate. Contrary to the Tribunal's rules, Republika Srpska, for example, failed to execute any of the arrest warrants addressed to it.[68] Equally so, the Federal Republic of Yugoslavia (Serbia and Montenegro) had a dismal record of cooperation with the Tribunal.[69] This initial non-cooperation of States was succinctly captured by the Judges of the Tribunal in a 1995 press release when they posited that they have "completed everything they were called upon to do in order for the Tribunal to fulfil its mission" even though by then they did not deliver a single judgment.[70] Other States (for example the Netherlands) were not so blatant in their non-cooperation with the Tribunal; they cited the absence of implementing national legislation for their non-cooperation.[71] Nonetheless, as the work of the Tribunal progressed, cooperation by States improved, for example, Serbia arrested and transferred Ratko Mladic to the seat of the Tribunal. So did Croatia, Bosnia and Herzegovina in allowing the Tribunals access to documents and witnesses.[72]

Surprisingly, the UNSC did not adequately assist the Tribunal, even though it was established under this entity's Chapter VII resolution.[73] To illustrate this lacklustre approach, Mundis posits that the first President of ICTY transmitted five cases of non-cooperation by States to the UNSC, with only one case eliciting a response from the entity.[74] Contrasted with the UNSC, other international actors played a significant role in the successes of the Tribunal.[75] For example, the United Nations Transitional Administration for Eastern Slavonia (UNTAES) and NATO-led forces arrested and surrendered some of the suspects to the Tribunal.[76]

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68 Third ICTY Annual Report (A/51/292 S/1996/665 of 16 Aug 1996) para 168 at 41.

69 Ibid at para 169.

70 Press release of 1 Feb 1995. The Judges of the Tribunal for the former Yugoslavia express their concern regarding the substance of their program of judicial work for 1995. http://www.icty.org/en/press/judges-tribunal-former-yugoslavia-express-their-concern-regarding-substance-their-programme (accessed 07/05/2019).

71 ICTY Second Annual Report at para 134.

72 ICTY Eighteenth Annual Report at para 60-70. See also ICTY nineteenth annual report at para 74-81.

73 McDonald (n 66 above) at 559.

74 Daryl Mundis "*Reporting Non-Compliance*" in May *et al* (eds) "*Essays on the ICTY Procedure and Evidence, in Honour of Gabrielle Kirk McDonald*" (Martinus Nijhoff Publishers, 2001) at 425-7. See also McDonald (n 66 above) at 559. Cases were that of Ivica Rajic, Radovan Karadzic, Ratko Mladic, General Mladic and Colonel Sljivancanin and Dragan Nikolic.

75 For example, the Dayton Accord (annexure A-1) provided for the establishment of multinational military Implementation Force (IFOR) which acted as a kind of enforcement mechanism for the Tribunal as it assisted in the arrest and surrender of certain suspects. See also ICTY Fourth Annual Report at para 76.

76 ICTY Fourth Annual Report Para 133 at 34.

Similarly, the cooperation legislative framework of the ICTR follows that of the ICTY.[77] In this regard, UNSC resolution 955 provides that:

> [A]ll States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal […] including the obligation of States to comply with requests for assistance […]

Equally so, Article 28 of the ICTR Statute provides that States shall cooperate with the Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. The Statute further provides that States shall comply without undue delay with any request for assistance or an order issued by the Tribunal.[78]

In line with the said resolution and the ICTR Statute, States played a crucial role in assisting the Tribunal to discharge its primary mandate.[79] For example, Kenya arrested and delivered twelve accused individuals, including the ex-Rwandan Prime Minister Jean Kambanda, to the UN detention facilities in Arusha, Tanzania.[80] Mali similarly signed an agreement on the enforcement of sentence of the Tribunal, in the process making it the first country to provide prison facilities for the Tribunal.[81]

Schabas argues that the only country that did not give its full cooperation to the ICTR was the situation country, Rwanda. For example, Rwanda threatened to withdraw cooperation from the Tribunal in the case of Barayagwiza claiming jurisdictional primacy over the ICTR.[82] Rwanda's threat to suspend cooperation led to the Tribunal reviewing its earlier decision to stay off prosecution of Barayagwiza.[83] Gibson similarly argues that this conflictual relationship was further apparent when both the ICTR and Rwanda claimed jurisdictional primacy over

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77 See Article 29 of ICTY Statute and UNSC resolution 827 para 4.

78 The request for assistance may include but not limited to the identification and location of persons; the taking of testimony and the production of evidence; the service of documents; the arrest or detention of persons and the surrender or the transfer of the accused to the Tribunal.

79 ICTR Second Annual Report (A/52/582/- S/1997/868 of 13 November 1997) para 62 at 16.

80 ICTR Third Annual Report at 7. See also the ICTR Second Annual (A/52/582/- S/1997/868 of 13 November 1997) Report para 62 at 16. See further ICTR Fourth Annual Report at 24-25.

81 United Nations: Cooperation and Assistance of States Key to Success of ICTR. Press Release 9 March 1999 http://unictr.irmct.org/en/news/cooperation-and-assistance-states-key-success-ictr (accessed 23 Mar 2020). See also Fourth Annual Report at 26 para 121.

82 William Schabas "*Barayagwiza v Prosecutor*" (2000) *American Journal of International Law* at 566. In this case cooperation was used as a bargaining tool. The ICTR released Barayagwiza on procedural grounds. Rwanda reacted with rage towards the Tribunal and subsequently issued a statement that it was suspending cooperation with the ICTR. Rwanda went on and issued an international warrant of arrest, and requested Tanzania to extradite Barayagwiza, in the event he was released into Tanzania.

83 ICTR Fifth Annual Report at 7 para 47.

Colonel Bagosora by filing competing extradition requests over the same suspect.[84] Furthermore, Rwandan authorities put stringent travel conditions on witnesses that ultimately prevented them from travelling and testifying in Arusha, thereby stalling the work of the Tribunal.[85]

As contrasted with the ICTY, almost all international organisations cooperated with the ICTR.[86] For example in the initial stages of the Tribunal, the President of the ICTR, Judge Kama, met with the President of the UNSC, the Secretaries-General of both the OAU and the UN, and all of them pledging their support and cooperation with the Tribunal.[87] The UNSC followed through on their undertaking by further passing resolutions 978 and 1165. Resolution 978 urged States to arrest and detain those within their territory suspected of committing ICTR crimes.[88] Resolution 1165 on the other hand established a third Trial Chamber in response to the difficulties encountered by the trial judges in discharging their mandate.[89] To further demonstrate UN support for the ICTR, Schabas argues that the UN provided the necessary funding and logistics for the Tribunals. [90] For example, since the establishment of the ICTR, the United Nations General Assembly (UNGA) consistently passed annual budgets for the Tribunal with no interference from any international entity.[91]

4.2 Cooperation in relation to Rome Statute

4.2.1 The Relation between the UNSC and the ICC

The relationship between the UNSC and the ICC is mainly regulated by Articles 13(b) and 16, and to a lesser extent, Articles 2, 87(5)(b) and 87(7) of the Rome Statute.[92] Article 13(b)

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84 Kate Gibson "Reliance Upon and Complications with State Cooperation" (1994) *International Residual for Criminal Tribunals* at 2-5.

85 Leslie Haskell & Lars Waldorf "The Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences" (2011) *Hastings International & Comparative Law Review* at 57.

86 ICTR Second Annual Report at 13.

87 Ibid.

88 S/RES/978 (1995) of 27 Feb 1995.

89 S/RES/1165 (1998) of 30 April 1998.

90 William Schabas "*The UN International Criminal Tribunals, The former Yugoslavia, Rwanda and Sierra Leone*" (Cambridge, 2010) at 6. For example, the budget of 2004, the UN *ad hoc* Tribunals consumed more than $250m per annum that was nearly 15 percent of the total UN general budget. ICTR starting from 31 Oct 1995 through to 31 Dec 2003 its budget stood at $48m at 6. http://undocs.org/en/ST/ADM/SER.B/477 (accessed 12 Feb 2017).

91 See for example Assembly Decision (A/RES/50/213) of 22 Feb 1996, A/RES/50/213 C of 15 July 1996, A/RES/50/213 B of 17 April 1996.

92 Art 17 of the Relationship Agreement between the United Nations and the Court makes specific provision for cooperation in the event of UNSC referral. Art 87(5)(a), amongst others, provide that

empowers the UNSC, acting under Chapter VII of the UN Charter, to refer a situation to the ICC where a Rome Statute crime appears to have been committed.[93] Article 16 on the other hand, empowers the UNSC to stop the ICC from commencing or proceeding with an investigation when the UNSC has in a resolution adopted under Chapter VII requested the Court to that effect. According to Jalloh *et al,* the rationale behind these Articles was to try and regulate the mandates of two international entities, one being a political entity (UNSC) and the other a judicial entity (ICC).[94]

Arbour argues that the primary benefit of Council referrals is that they expand the reach of accountability to cases where the ICC would not normally have jurisdiction, including instances where the suspects are not nationals of a party to the Rome Statute, or where the alleged crimes occurred outside the territory of a ratifying party.[95] This observation by Arbour is shared by Aloisi, who posits that the UNSC referral powers could empower international justice, by *de facto* extending ICC jurisdiction to non-parties.[96]

Regarding Article 16, Triffterer argues that the supposed rationale for the article was to, *inter alia,* recognise the primacy of the UNSC in maintaining international peace.[97] He postulates that delegates at the Rome Conference seemingly took the view that without regularising the relationship between the two entities, the ICC might encroach on the mandate of the UNSC as provided for in Chapter VII of the UN Charter.[98] However, Triffterer appears unconvinced by this argument, arguing that the UNSC has previously established international jurisdiction with the justification that it will help maintain international peace.[99]

Notwithstanding the delegates' noble intentions, Arbour maintains that these Articles were some of the most contentious during the negotiations of the Rome Statute, as many believed they provided an unwelcome opportunity for political interference in the functioning of a judicial

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the ICC can refer a State to the Security Council where that state fails to cooperate with the Court pursuant to Security Council referral.

93 Chapter VII of the UN Charter deals with actions with respect threat to peace, breaches of peace and acts of aggressions.

94 Charles Jalloh *et al* "Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court" (2011) *African Journal of Legal Studies* at 10-11.

95 Arbour (n 100 below) at 196.

96 Aloisi (n 105 above) at 149. See also Corrina Heyder "The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court's Functions and Status" (2006) *Journal of International Law* at 652-3.

97 Otto Triffterer "*Commentary on the Rome Statute of the International Criminal Court: Observers' notes, article by article"* (ed) (*München: Beck,* 2008) at 596.

98 Ibid.

99 Ibid.

body.[100] Jalloh *et al* agree with Arbour's views and further submit that many at the Rome Conference warned that any political interference in the functioning of the Court will negatively affect its credibility and moral authority, thus rendering its work ineffective.[101] Despite these initial disagreements and warnings, a balance was ultimately achieved in the form of Articles 13(b) and 16 of the Rome Statute.[102]

Article 13(b) was invoked by the UNSC in passing resolutions 1593 and 1970, referring the situations in both Sudan and Libya to the ICC.[103] These resolutions, amongst others, provide that Sudan and Libya shall cooperate fully with the Court, while States not parties to the Rome Statute and other concerned regional or international organisations are encouraged to cooperate.[104]

The language of resolutions 1593 and 1970 concerning cooperation was heavily criticised by various authors.[105] It appears from the resolutions that only situation States are under a legal obligation to cooperate with the Court, while other international actors are not legally bound. Happold contends that this differential obligation for Parties and non-Parties to the Rome Statute is problematic.[106] Although the resolution obliged the two situation States and the other parties to the conflict to cooperate with the Court, States that were not party to the Rome Statute were not under the same obligation.[107]

Aloisi, while analysing the Sudan and Libya referral, comes to the same conclusion, namely, that the two referrals bear some considerable problems associated with the wording of the requested cooperation, which considerably limits the subjects that can fall under the attention of the ICC and restricts the type of activities the ICC investigators can embark upon while discharging their duties.[108] Aloisi further posits that while the resolutions oblige the two non-State Parties (Sudan and Libya) to cooperate with the ICC, the resolutions clearly recognise that other non-State Parties have no obligations under the Statute—they are merely invited to

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100 Louise Arbour "The Relationship Between the ICC and the UN Security Council" (2014) *Global Governance* at 196.
101 Jalloh *et al* (n 94 above) at 16.
102 Ibid.
103 UNSC Resolution 1593 of 2005 and UNSC Resolution 1970 of 2011.
104 Para 2 of resolution 1593 and para 5 of resolution 1970.
105 Rosa Aloisi "A Tale of Two Institutions: The United Nations Security Council and the International Criminal Court" (2013) *International Criminal Law Review* I47-168. Max du Plessis "Exploring Efforts to Resolve the Tension between the AU and the Bashir Saga" *African legal Aid* (Intersentia, 2016). Mathew Happold "Darfur, the Security Council, and the International Criminal Court" (2006) *International Law and Comparative Law Quarterly* at 230.
106 Happold (n 105 above) at 230.
107 Ibid.
108 Aloisi (n 105 above) at 50.

cooperate.[109] Du Plessis seems to agree with these arguments when he surmises that if the Al Bashir saga teaches us anything, it is that in the context of the UNSC referrals to the ICC, resolutions taken in pursuance of such referrals take on a higher order of legal significance. As such, cooperation obligations must be properly crafted to avoid the current legal wrangling.[110]

Tladi, on the other hand, questions the probity of calling for a UNSC referral in situations like Syria, if the experience in Sudan and Libya is anything to go by.[111] He argues that the referrals did very little for victims of atrocities, and more harm to the reputation of the ICC. For the latter assertion, he advances three arguments. Firstly, the referrals created a cooperation gap by obligating only situation States to cooperate with the Court.[112] Secondly, and directly relevant to the UNSC and ICC, the referrals purported to deprive the Court of the necessary funding, contrary to the ICC-UN agreement. Thirdly, the referrals attempted to insulate the nationals of troop-contributing countries from the jurisdiction of both the ICC and the national courts, thus assailing the principle of equality before the law.[113]

At this juncture, one can ask why the UNSC chose the language it used in the Sudan and Libya resolutions, which appears to limit the scope of cooperation to only the situations countries. Tladi argues that this limitation was not an oversight by the UNSC, but was done purposefully to shield some permanent members who are not parties to the Statute from obligation to cooperate with the Court.[114] He further asserts that the ambiguity in the language of the resolutions creates a legally plausible avenue where State Parties can argue that the exception in Article 98 is applicable.[115] Akande, on the other hand, appears to hold a different view on the language of the resolution. He posits that although the UNSC has extensive powers to compel all States to cooperate with the Court in its resolutions, it does not always have to use mandatory language, because to do so will deprive the entity of the necessary flexibility in taking action under Chapter VII of the UN Charter.[116] He further postulates that there may be a good reason for the UNSC not requiring non-parties to cooperate with the Court, namely, that such a proposal may make a referral resolution difficult to adopt.[117]

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109 Ibid at 163-4.
110 du Plessis (n 105 above) at 256-8.
111 Dire Tladi "When Elephants Collide it is the Grass that Suffers: Cooperation and the UNSC in the Context of the AU/ICC Dynamic" *African Journal of Legal Studies* (2014) 394.
112 Ibid.
113 Ibid.
114 Tladi (n 111 above) at 394.
115 Ibid.
116 Dapo Akande "The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC" (2012) *Journal of International Criminal Justice* at 346.
117 Ibid at 356.

The choice of language used in passing these resolutions laid the foundation for a potentially conflictual relationship. The authors' observations highlight the role the UNSC plays in the triangular conflictual relationship, hence the importance of the study. To further compound matters, the UNSC has, contrary to the Prosecutor's referral and request for assistance in non-cooperation decisions, taken no actions against non-cooperating States.[118]

4.2.2 Relationship between AU and the ICC

Unlike the UNSC, the relationship between the AU and the ICC is not formalised in any international agreement and the statutes of both entities do not refer to each other.[119] Additionally, the primary mandates of the two entities differ diametrically, the AU being a political entity, whilst the ICC is a judicial entity. Notwithstanding these differences, there are overlaps between them. One of the principles of the AU is the condemnation and rejection of impunity, whilst the preamble to the Rome Statute provides that parties are determined to put an end to impunity.[120] With this overlap, it was almost inevitable that the two entities would cross each other's paths, i.e. the AU in its rejection and condemnation of impunity might seek the intervention of the ICC in prosecuting African perpetrators of international crimes. In striving to end impunity on the continent, the ICC might require the cooperation and assistance of the AU in apprehending and surrendering African perpetrators of international crimes.[121]

The aforementioned overlap and relationship are elucidated by the thirty-sixth AU Assembly decision, wherein the Assembly condemned the perpetration of crimes against humanity, war crimes and genocide on the continent, and undertook to cooperate with relevant institutions to prosecute such perpetrators. Against this backdrop, the AU encouraged its Member States to ratify the Rome Statute.[122] In accordance with the said AU Assembly decision, sixty percent of African States signed the Statute.[123] To further concretise the AU Assembly decision,

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118 Statement of 8 June 2017 by Prosecutor Bensouda before the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005) https://www.icc-cpi.int/Pages/item.aspx?name=170608-otp-stat-UNSC (accessed 26 March 2019).

119 See Prosecutor Seventh Annual Report at para 45.

120 Art 4(o) of the Constitutive Act of the African Union and the Preamble to the Rome Statute.

121 For example, article 87(b) provides that "when appropriate, without prejudice […] requests may also be transmitted through […] any appropriate regional organisation.

122 Thirty-Sixth Ordinary Session of the Assembly of Heads of State and Government at para (l) on Stability. See also Rowland Cole "Africa's Relationship with the International Criminal Court: More Political than Legal" (2013) *Melbourne Journal International Law* at 672-3.

123 *Ibid* at 15. See also Phakiso Mochochoko "*Africa and the International Criminal Court*" in " in Evelyn Ankumah (ed) "*The International Criminal Court and Africa, One Decade On"* (Intersentia, 2016) at 249. See further Makau Mutua "Africa and the ICC, Hypocrisy, Impunity, and Perversion" in Clarke *et al* (eds) *Africa and the ICC, Perceptions of Justice* (2016) at 52. See further Shamiso Mbizvo "*The ICC in Africa, the Fight against Impunity*" in Clarke *et al* (eds) *Africa and the ICC, Perceptions of Justice* (2016) at 40-42.

Uganda, the Central African Republic (hereinafter CAR) and the Democratic Republic of Congo (hereinafter DRC) rejected impunity and referred situations in their respective countries to the ICC, making these African cases the first cases to be heard by the Court.[124]

The aforementioned support and cordial relationship between the AU and the ICC were fully acknowledged by the then prosecutor-elect, Fatou Bensouda, when she postulated that "African institutions and African people are largely responsible for building the system of international justice designed by the Rome Statute". She surmised the African support by asserting that:[125]

> [A]frican states have consistently helped us at each step of our activities: in the opening the investigations, in conducting the investigations, in pursuing and arresting individuals sought by the Court, in protecting our witnesses, etc. These are not just words. African States receive more than 50 per cent of our requests for cooperation. 85 per cent are met with a positive response.

The symbiosis between the AU and the ICC is only one side of the complex relationship. According to Peter, the coarse side can be traced back to the issuance of a second warrant of arrest for three counts of genocide against Al Bashir.[126] This warrant took some African leaders aback, as it became clear that an African head of state could face prosecution, something which was previously unimaginable. If the AU cooperated with the ICC and allowed President Al Bashir to go to trial, they would have opened the flood gates and this would have been difficult to stop for the foreseeable future.[127]

Seymour shares the sentiment that the AU appears to be opposed to the prosecution of a sitting African head of state, arguing that the AU did not protest when the situation in Sudan was first referred to the ICC, nor when the ICC issued its first arrest warrant for government minister Ahmed Harun and rebel leader Ali Kushayb. The AU only objected when the investigation led to the Sudanese President.[128] The dichotomous approach to cooperation is

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124 Uganda referred the situation in that country to the Prosecutor of the ICC. Information available at athttps://www.icc-cpi.int/Uganda. (accessed 26 March 2020).

125 Fatou Bensouda "Lessons from Africa Paper by the then Prosecutor elect, at an International Conference: 10 years review of the ICC. Justice for All?" (2012) *The International Criminal Court* https://www.icc-cpi.int/NR/rdonlyres/9100BD4B-0FEF-4209-998D-11C453F187DB/0/IntroductoryremarksSydneyconferenceAustralia_Africalessons.pdf. (accessed 28 Dec 2021).

126 Chris Peter "*Fighting Impunity: African States and the International Criminal Court*" in Evelyn Ankumah (ed) "*The International Criminal* and *Africa: One Decade On"* (Cambridge, 2016) at 17-18.

127 Ibid.

128 Lee Seymour "*The ICC and Africa, Rhetoric, Hypocrisy Management, and Legitimacy*" in Clarke *et al* (eds) "*Africa and the ICC, Perceptions of Justice*" (Cambridge, 2016) at 113.

further demonstrated by the actions of President Museveni, who has called for the mass withdrawal of African States Parties from the Rome Statute, while on the other hand cooperating with the ICC in the arrest and surrender of Dominic Ongwen of the Lord Resistance Army (LRA).[129] The dichotomy further reinforces the importance of the study. Furthermore, the AU's call for Member States not to cooperate with the Court put African States Parties in a difficult position of having to choose between the AU and ICC treaty obligations.

UNSC resolution 1593 foresaw the importance of cooperation between the ICC and the AU. Among others, the resolution invited the Court and the AU to discuss practical arrangements to facilitate the work of the Prosecutor and the Court.[130] The importance of cooperation was equally acknowledged by the OTP in a subsequent press release regarding the referral of the situation. Prosecutor Moreno-Ocampo postulated that:[131]

> The investigation will require sustained cooperation from national and international authorities. It will form part of a collective effort, complementing African Union and other initiatives to end the violence in Darfur and to promote justice.

True to the spirit of the resolution, the initial relationship between the ICC and the affected international actors was characterised by cooperation. For example, in the Third Prosecutor Report, the Prosecutor alluded to the fact that he visited Sudan with the assistance of the Sudanese government.[132] Furthermore, during this visit, the Sudanese government allowed the Prosecutor unfettered access to government institutions and officials.[133] Equally so, the AU illustrated cooperative spirit by urging: [134]

> [t]he Government of the Sudan and the rebel movements, to cooperate with the Office of the Prosecutor of the International Criminal Court (ICC) as called for by UN Security Council Resolution 1593 (2005) of 31 March 2005 and to take all necessary steps to combat impunity to ensure lasting peace and reconciliation in Darfur, and requests the Commission to cooperate with the ICC.

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129 See also Amelia Bleeker & Manuel Ventura "*Universal Jurisdiction, African Perceptions of the International Criminal Court and the New AU Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*" in Evelyn Ankumah (ed) "*The International Criminal Court and Africa, One Decade On"* (Intersentia, 2016) at 443-444.

130 UNSCR 1593 (2005) at para 1 and 3.

131 Press release of 6 June 2005.

132 Third Prosecutor Annual Report at 8-9.

133 Ibid.

134 Peace and Security Council communiqué of 10 March 2006 at para 4(ix) http://www.peaceau.org/uploads/communiqueeng-46th.pdf. (accessed 26 May 2019).

In addition, and according to the Prosecutor Report, Ambassador Konare confirmed in writing to the Prosecutor that the AU is committed to full cooperation with the ICC in the Sudan situation.[135]

The application for a warrant of arrest by the Prosecutor for Al Bashir, and the issuance thereof strained the aforementioned cordial relationship.[136] During this ICC process, the approach by the Prosecutor was that when making decisions on whether to prosecute or not, the OTP is mainly guided by the interests of justice.[137] For example, during a keynote address to the Council on Foreign Relations, the Prosecutor regurgitated the aforementioned position by stating that the "interests of justice" should not be confused with the "interests of peace" and that when making a decision, the OTP will apply the law without political consideration and the others (read AU) have to adjust to the law.[138] With this approach by the Prosecutor, the battle lines between the AU and the ICC were drawn. The ICC expected full cooperation, while the AU thought cooperation in the arrest would threaten peace and security in Darfur. It seems the initial statements by the UNSC that "invited the Court and the AU to discuss practical arrangements", the statement by the Prosecutor that "investigation will require sustained cooperation from AU" and the AU chairperson's commitment that the AU supports the ICC in the Sudanese situation, were forgotten by both the AU and the Prosecutor.

One of the concerns raised by the AU in their non-cooperation decisions was the conduct of the first Prosecutor. For example, in an interview conducted in 2009, the Prosecutor insinuated that Bashir was a criminal, notwithstanding that at the time, Al Bashir was never found guilty by a Court.[139] Furthermore, the statement uttered during the same interview that "I am putting a legal limit to the politicians" while defending the independence of the Court was not well

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135 Third Prosecutor Annual Report at 8-9.

136 Assembly/AU/Dec.221(XII) Page 1 of 3 Feb 2009 (Addis Ababa).

137 Art 53(1) (c) and (2) (c) of the Rome Statute. See also The Policy Paper on the Interest of Justice of September 2007 at 2. The issue of the interests of justice, as it appears in Art 53 of the Rome Statute, represents one of the most complex aspects of the Treaty. It is the point where many of the philosophical and operational challenges in the pursuit of international criminal justice coincide (albeit implicitly), but there is no clear guidance on what the content of the idea is. The phrase "in the interests of justice" appears in several places in the ICC Statute and Rules of Procedure and Evidence3 but it is never defined. For example, Art 53(1) holds among others that if the Prosecutor is satisfied that there is a reasonable basis to believe that the case is within the jurisdiction of the Court and is or would be admissible under Art 17 of the Statute, he must determine whether, taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

138 Address by Luis Moreno-Ocampo Prosecutor of the International Criminal Court to Washington DC on the 4th Feb 2010 http://www.cfr.org/content/publications/attachments/MorenoOcampo.CFR.2.4.2010.pdf. (accessed 29 March 2021) at 6.

139 Partick Smith "Bashir is destined to face justice" *Africa Report* (2009) https://sudanjem.com/2009/10/beshir-is-destined-to-face-justice/ (accessed 22 Jan 2022).

received by many commentators. Nouwen posits that "putting a legal limit to politicians" is inherently political, especially where other groups are branded international terrorists.[140]

True to the call by the AU that Member States should not cooperate with the ICC in the arrest and surrender of Al Bashir, several African States Parties hosted Al Bashir without executing the ICC arrest warrant.[141] Responding to the non-cooperation, the ASP adopted the Procedures Relating to Non-Cooperation (the Procedures), wherein the Procedures identified two possible scenarios of non-cooperation. The first scenario is more formal and relates to where a judicial determination has already been made and referred to the ASP, as in the Malawi decision. The second scenario is more informal and uses regional focal points to raise issues of cooperation with the requested state and relevant stakeholders.[142] The Procedures were adopted solely to ensure cooperation and or prevent future non-cooperation. However, as manifested in the case of Bashir, the procedures were ineffectual, as he seemingly enjoyed free travel in and outside the African continent, within both State Parties and non-State Parties to the Rome Statute.[143] This conclusion can further be supported by the report of the Prosecutor wherein the Prosecutor shares her frustration with the States' lack of cooperation.[144]

Another criticism levelled against the ICC is that in its eagerness to enforce cooperation, the Court fails to adequately address the legal question raised, especially about cooperation as provided for in Article 98 of the Rome Statute. In this regard, Magliveras posits that the Court, in non-cooperation cases such as Malawi and Chad, failed to adequately address the question of immunity of Heads of State under customary law.[145] Tladi shares the same observation when he concludes that the Court failed to interact with the complex legal issues emanating from Article 98(1), and instead chose the easier conclusion as provided for in Article 27. Tladi further argues that the decisions in the Malawi and Chad cases will prop the view that the

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140 Sarah Nouwen & Wouter Werner "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan" *The European Journal of International Law* (2011) at 962.

141 The following African Parties to the Rome Statute did not cooperate with the Court: Uganda, Kenya, Malawi, Nigeria, South Africa, Chad, Djibouti (amongst others).

142 Assembly procedures relating to non-cooperation (ICC-ASP/10/Res.5, annex) at para. 15(a) and 19.

143 See the map depicting Al Bashir travel. http://bashirwatch.org/. (accessed 30 March 2020). See also Human Rights Law, Cooperation and the International Criminal Court Report (Expert Workshop 18-19 Sep 2014) at 10-11. https://www.nottingham.ac.uk/hrlc/documents/specialevents/cooperation-and-the-icc-final-report-2015.pdf. (accessed 29 March 2020).

144 Twenty-Eighth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1593(2005) at para 3. According to this Report the only countries which raised concern with regard to non-cooperation were mostly European (France, Netherlands, Peru, United Kingdom).

145 Konstantinos Magliveras & Gino Naldi "The ICC Addresses Non-Cooperation by States Parties: The Malawi Decision" *African Journal of Legal Studies* (2013) at 146.

Court is just a political tool to be used against those that do not have power, resulting in further non-cooperation.[146] From the previously mentioned analysis, the Court should shoulder some of the blame for its non-cooperation standoff with the AU.

4.2.3 The Relationship between the AU and the UNSC in relation to the ICC

Chapter VIII of the UN Charter regulates the relationship between the AU and the UNSC in general. Chapter VIII authorises UN Member States to enter into regional arrangements to further the primary mandate of the UNSC of maintenance of international peace.[147] Furthermore, the UN Charter mandates the UNSC to utilise regional organisations in the peaceful settlement of regional disputes and where appropriate, utilise them to enforce international peace and security.[148]

In the context of the ICC, the relationship came to the fore as a result of the UNSC referral of the situation in Sudan. UNSCR 1593 invited the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor to fight impunity.[149]

Following the referral, the Prosecutor commenced with investigations and upon conclusion, the OTP applied for the issuance of a warrant of arrest for Al Bashir.[150] With this application by the OTP, the AU requested the UNSC to invoke its powers under Article 16 and defer the OTP process in the Al Bashir matter. The AU Assembly decision of February 2009 urges the UNSC, in accordance with the provisions of Article 16 of the Rome Statute to defer the process initiated by the ICC.[151] When the UNSC did not accede to the request, the Sirte AU Assembly decided that Member States should not cooperate with the Court.[152]

Jalloh *et al* argue that the AU's request for deferral of the ICC processes in the Sudan situation was legitimate, and that it was incumbent upon the UNSC to seriously consider the AU's

146 Dire Tladi "The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98" (2013) *Journal of International Criminal Justice* at 221.
147 Art 52 of the UN Charter.
148 Art 52(3) & 53(1) of the UN Charter.
149 Para 3 of UNSCR 1593.
150 ICC-OTP- Doc 20080714-PR341 of 14 July 2008.
151 Article 16 provides that no investigation or prosecution may be commenced or proceeded with under the Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect. Assembly/AU/Dec.221(XII) of 3 February 2009 at para 3.
152 Assembly/AU/Dec.245(XIII) of 3 July 2009. Para 10 of the Assembly decision provides "in view of the fact that the request by the African Union has never been acted upon, the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir".

request as the matter fell within the mandate of the UNSC (Article 16).[153] According to the authors during the debate on the AU deferral request, the UNSC was divided, with China and Russia being the strongest supporters of the AU's request.[154] China argued that the request was reasonable and that there was no prospect of peace in Sudan without Sudanese cooperation.[155] On the opposing side, the United States argued that the approval of the request for deferral would send a wrong message to Al Bashir and undermine efforts to bring him to justice.[156] The ultimate position of the UNSC on the AU's request was merely to "note" the concern raised by the members and the matter was postponed until it fell out of the UNSC agenda.[157] With this action (or inaction) by the UNSC, the AU adopted a non-cooperation posture towards the ICC.

Arbour surmises that the UNSC has thus far acted exactly as would be expected of the quintessential political body. Despite the calls from the AU to invoke its powers under Article 16 to defer the prosecution of Al Bashir, the UNSC declined the request.[158] Tladi likewise compares the approach of the UNSC in both the Kenyan and Sudanese situations and comes to the same conclusion, namely, that it was easy for the UNSC to dispose of the Kenya situation as the UNSC was unanimous that the matter was not properly before the UNSC.[159] The Sudanese situation, however, was more challenging as it fell precisely within the mandate of the UNSC.[160] In the final analysis, Tladi argues the dynamics and politics of the UNSC appear to have won the day and the deferral request was not formally considered.[161]

The authors' observation regarding the politicisation of deferral powers is clearly illustrated by UNSC resolution 1422, which was adopted immediately after the Rome Statute came into being. Resolution 1422 prospectively requested the ICC, apparently in accordance with Article 16, not to commence or proceed with any possible future investigation or prosecution for

153 Jalloh *et al* "Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court" *4 African Journal of Legal Studies* (2011) at 5-50. Press Release, Decision on the meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), African Union, Addis Ababa, July 14, 2009.

154 Jalloh *et al* (n 153 above) at 23. See also UNSC 5947th Meeting (S/PV. 5947) of 31 July 2008 at 3-6.

155 UNSC 5947th Meeting (S/PV. 5947) of 31 July 2008 at 5-6.

156 UNSC 5947th Meeting (S/PV. 5947) of 31 July 2008 at 8.

157 UNSCR 1828 of 2008 at 2.

158 Louise Arbour "The Relationship Between the ICC and the UN Security Council" *Global Governance* (2014), 195-201.

159 Tladi (n 111 above) at 397.

160 UNSCR 1828 (2008) on the extension of the mandate of UNAMID provides among others that the situation in Sudan continues to constitute a threat to international peace and security.

161 Tladi (n 159 above) at 397.

offences which might be committed by peacekeepers of contributing non-parties.[162] According to Jalloh *et al,* the resolution seeks to modify the Rome Statute by invoking Article 16 contrary to its intended purpose. The authors further posit that the language was included in the resolution to protect the interests of the United States.[163] It appears from the resolution that Article 16 deferral powers are, as warned by some delegates at the Rome Conference, at the disposal of the powerful for political reasons contrary to the drafters' original intentions.[164]

The above actions by the UNSC shows the entity as an active participant in the triangular conflictual relationship. To a large extent, it can be blamed for the tension between the AU and the ICC. The actions of the UNSC might result in the ICC being seen as just another tool at the disposal of the powerful against the weak or perceived enemies (read Africa) of the permanent five.[165] For example, the AU has already accused the ICC of not being an international Court but rather a Court meant only for Africans.[166] This criticism of the ICC by the AU for the decisions of the UNSC highlights the complex triangular conflictual relationship between the three entities. Firstly, the request for deferral was directed at the UNSC and the inaction was from the same entity. The most logical thing for the AU to do was to direct its frustration (non-cooperation) at the entity that failed to act on its request. However, the non-cooperation resolution was directed at the ICC, the entity that had nothing to do with the deferral request. In the Sudan deferral request, the ICC therefore became the casualty of the fight between the AU and the UNSC.

4.2.4 The Tension between Peace and Justice

> These charges against people - like Omar al-Bashir in Sudan or Uhuru Kenyatta in Kenya - they arise out of situations of conflict […] our first response as Africans is that here are Africans who are dying, so we need [to intervene] to end this conflict […] our first task is to stop the killing of these Africans. But the challenge that arises is when someone says that the issue of justice trumps the issue of peace.[167]

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162 UNSCR 1422 at para 1.
163 Jalloh *et al* (n153 above) at 17-19.
164 Ibid at 21.
165 Fatou Bensouda "International Criminal Court and Africa, the State of Play" chapter 4.
166 Statement of Uganda on behalf of AU in ASP, General Debate, 20-26 Nov 2013. https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-AU-Uganda-ENG.pdf. (accessed 14 Dec 18).
167 Thabo Mbeki "Justice cannot trump peace" Talk with Al Jazeera on 23 Nov 2013 https://www.aljazeera.com/programmes/talktojazeera/2013/11/thabo-mbeki-justice-cannot-trump-peace-2013112210658783286.html. (accessed 01 April 2019).

One of the contentious issues about the non-cooperation between the AU, the UNSC and the ICC in the Al Bashir matter, is the tension between peace and justice. This tension could most probably be attributed to the conflicting mandates of the three entities. The AU and the UNSC are both political entities, whilst the ICC is a judicial entity. For the AU, one of the objectives is to promote peace, security and stability on the continent — as manifested in the AU's Sudan peace initiatives.[168] Similarly the primary mandate of the UNSC concerning the ICC is the maintenance of international peace,[169] i.e. Articles 13(b) and 16 of the Rome Statute empowers the UNSC to refer or defer situations when acting under Chapter VII of the UN Charter.[170] This means that once the UNSC has determined, as per Article 39, that a situation constitutes a threat to peace, it may look to Article 41 of the UN Charter when deciding whether to refer or defer the situation to or from the ICC. In this case, the ICC is at the disposal of the UNSC to attain its primary mandate of maintenance of international peace and security.[171] The primary mandate of the ICC, on the other hand, is to prosecute, in line with the Statute, persons responsible for the most serious crimes of international concern.[172]

The tension is clearly illustrated by the AU Assembly decision of 3 July 2009, wherein it held that:[173]

> [T]he unfortunate consequences that the indictment has had on the delicate peace processes underway in Sudan and the fact that it continues to undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur.

From the above, the AU's priority in the Sudan situation clearly is the attainment of peace, and the arrest warrant is seen as interference with the potential to derail the peace process. A further inference is that from the AU's point of view, justice and peace are seen as mutually exclusive. However, in a subsequent explanatory press release following the decision, the AU made it clear that its decision "bears testimony to the glaring reality that the situation in Darfur is too serious and complex an issue to be resolved without recourse to a harmonised approach

168 Art 3(f) of the AU Constitutive Act. Other objectives include to achieve greater unity and solidarity, defend the sovereignty, accelerate the political and socio-economic integration, promote and defend African common positions. Amongst the peace, security and stability initiative taken by the AU was the establishment of African Union Mission in the Sudan (AMIS) peacekeeping force.

169 Art 24(1) of the UN Charter.

170 Chapter VII of the UN Charter deals with "action with respect to threats to the peace, breaches of the peace, and acts of aggressions.

171 Art 41 of the UN Charter gives the UNSC discretion on which measures not involving use of armed forces to apply. In this case these measures are referral or deferral to the ICC.

172 Art 1 of the Rome Statute.

173 Ext/Assembly/AU/Dec.1 of Oct.2013. See also Assembly/AU/Dec.221(XII) of 3 Feb 2009 at para 2.

to justice and peace, neither of which should be pursued at the expense of the other".[174] The press release seemingly suggests that the AU sees peace and justice as mutually reinforcing, i.e. no emphasis should be made on one at the expense of the other. In other words, the tension appears to be more of a sequencing or harmonisation.[175]

The aforementioned tension is also observed by Apiko and Aggad, who surmise that in the context of the AU/ICC relation, this tension between peace and justice is to be expected — in their endeavour to fight impunity the two entities may well follow different paths. The AU will tend to opt for political solutions focusing on peace and reconciliation, whereas the ICC will focus on prosecuting alleged perpetrators of international crimes.[176] Goldstone argues that the tension between peace and justice could be traced back to the birth of *ad hoc* international criminal tribunals as they were established under Chapter VII of the UN Charter by a political body to achieve a political mandate.[177] However, while conceding that prosecuting political leaders might initially derail peace processes, Goldstone concludes that the converse is also true, namely, that the threat of prosecutions and the issue of indictments against senior political players have aided rather than retarded peace processes.[178] Seen in this way, peace and justice are not mutually exclusive but rather complimentary.

Jalloh *et al* make similar observations, positing that the drafters of the Statute must have been fully appraised about the tension between peace and justice. According to the authors, Article 16 was intended to ameliorate this tension. The authors further argue that there is an acceptance in Article 16 that there may be circumstances wherein the demands for peace might require the temporary suspension of an investigation or prosecution by the ICC.[179] Nouwen and Werner agree with this assertion, namely, that the drafters of the Rome Statute

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174 Mbeki's statement at *n* 156 *supra* and Press Release, Decision on the meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), African Union, Addis Ababa, July 14, 2009.

175 The same Assembly decision at para 2 reiterates the AU's unflinching commitment to combating impunity and promoting democracy. See also Assembly/AU/Dec.245(XIII) Rev.1. provides at para 5 that: "the threat that the indictment of H.E Uhuru Muigai Kenyatta …may pose to the on-going efforts in the promotion of peace, national healing and reconciliation, as well as the rule of law and stability."

176 Philomena Apiko & Faten Aggad "Discussion Papers: The International Criminal Court, Africa and the African Union" (2016) *European Centre for Development Policy Management* at 3.

177 Richard Goldstone "Peace versus Justice" (2005) *Nevada Law Journal* at 421.

178 Ibid.

179 Charles Jalloh *et al* "Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court" (2011) *African Journal of Legal Studies* at 11.

should have foreseen that politics and justice might at some point collide.[180] However, they caution that the Court should not be seen as a way of pursuing political goals.[181]

In line with the above authors' observations and as per its primary political mandate, the UNSC was expected to manage the tension between peace and justice in appropriate situations by invoking its powers under Article 16 of the Rome Statute, thereby deferring justice in favour of peace. However, contrary to the intended purpose of Article 16 and the AU's request for deferral (peace process) in the Sudanese situation, the UNSC insisted that there is no prospect of peace in Sudan without justice.[182] Based on the UNSC's posture regarding the Sudanese situation, it could be argued that Article 16 of the Rome Statute is inoperative. To further support this argument, the AU has already suggested modification to Article 16 to empower the UNGA Assembly to act should the UNSC fail to decide on a deferral request.[183]

The ICC has been consistent in its pronouncement that it is a judicial body, applying the law without taking political considerations into account.[184] For example, the then President of the ICC (while reassuring States about the effectiveness of the Court) said that "after three years of existence, the Court hasn't done anything political".[185] The first Prosecutor went even further in trying to assert the Court's independence when he contended that "I apply the law without political considerations. But the other actors have to adjust to the law".[186] The second Prosecutor shares those sentiments, namely, that the Court is a judicial institution guided by the Rome Statute. She proceeds to say, "we are not influenced by any factors relating to geographical or political balance".[187]

From the analysis above, the tension or interface between peace and justice is guaranteed to affect cooperation, particularly when there is no middle ground. Furthermore, the tension (real or perceived) is hard to resolve when considering the different primary mandates of the three entities. Notwithstanding these tensions, the entities need each other - the AU in its fight

180 Sarah Nouwen & Wouter Werner "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan" (2011) *The European Journal of International Law* at 942.
181 Ibid.
182 UNSRC Meeting 5947th of 31 July 2008.
183 Ibid.
184 Fatou Bensouda "*Lessons from Africa, International Conference*: *10 years review of the ICC. Justice for All*?" (15 Feb 2012).
185 Steve Herman 'Japan's Expected to Support International Criminal Court', Voice of America, 6 Dec. 2006 www.amazines.com/article_detail.cfm/183987?articleid=183987. (accessed 2 April 2019).
186 'Keynote address Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Council on Foreign Relations', Washington DC, 4 Feb 2010. http://www.cfr.org/content/publications /attachments/MorenoOcampo.CFR.2.4.2010.pdf. (accessed 03 April 2020).
187 Fatou Bensouda "*International Criminal Justice and Africa the State at Play* Chapter 4.

against impunity,[188] the UNSC in the maintenance of international peace,[189] and the ICC in its investigations, arrests and surrenders.[190]

5 RESEARCH QUESTIONS

Based on the legal framework discussed above, the study will try and answer the following main questions; Firstly, what legal rules govern the relationship between the ICC, the AU and the UNSC in the context of the work of the ICC? Related to this question, is to what extent these legal rules call for and facilitate cooperation? Secondly, to what extent do the mandates of the three entities enhance or hamper cooperation?

6 SIGNIFICANCE OF THE STUDY

Although much has been written about the tension between the ICC and the AU, the literature tends to focus on the conflictual relationship between the ICC and the AU in general, rather than focusing on the role cooperation plays in this conflictual relationship.[191] Where cooperation is mentioned, it is never the focus of the studies and is treated like an ancillary to the tension. Furthermore, in the literature on the conflictual relationship, not enough attention is paid to the role played by the UNSC in potentially exacerbating or alleviating the tension. In most of the studies, the focus is on the AU's non-cooperation posture with the ICC, and none have, as a central element, an analysis of cooperation as a legal concept. Those focussing on cooperation tend to hone in on the cooperation of States under the Rome Statute rather than a broader framework of cooperation between these three entities that are so central to the success of the Rome Statute and international criminal law in general.

188 Art 4(o) of the AU Constitutive Act.
189 Chapter VII of the UN Charter.
190 Art 89 of the Rome Statute.
191 See Ovo Imoedembhe "Unpacking the Tension between the African Union and the International Criminal Court. The Way Forward" *African Journal of International and Comparative Law* (2015) at 82. See also Dire Tladi "The African Union and the International Criminal Court: The Battle for the Soul of International Law" (2009) *South African Yearbook of International Law* at 57-69. See also Alebachew Birhanu "The Relationship between the International Criminal Court and Africa: From Cooperation to Confrontation" (2012) *Bahir Dar University Journal of Law* at 120. See also Konstantinos Magliveras "The International Criminal Court's involvement with Africa: Evaluation of a Fractious Relationship" *Nordic Journal of International Law* (2013) at 440. Birhanu A "The Relationship between the International Criminal Court and Africa: From Cooperation to Confrontation" *Bahir Dar University Journal of Law* (2012) 110-143). Swart & Krisch (n 2 above) at 38-56. Apiko & Aggad (n 176 above).

7 OUTLINE OF THE STUDY

The study outline is as follows. This chapter is Chapter One. It is the introduction and set out the aims and rationale of the study. All the basic component of the study is set out in this chapter including the literature review, research questions and significance of the study. Chapter Two will assess cooperation under general international law. The purpose of this assessment is to determine whether there are any aspects of the duty to cooperate under international law that might apply to the ICC. Furthermore, cooperation, as manifested during the ad hoc international tribunals, is analysed to determine if there are any lessons to be learned by the ICC in its cooperation requests with States Parties. The main indicators of cooperation identified in this chapter will be used to assess the triangular relationship between the ICC, the AU and the UNSC.

Chapter Three analyses the legislative framework of the Rome Statute. The analysis will include the application of the Statute cooperative framework by the Court and general concerns of non-cooperation.

Chapter Four discusses cooperation between the UNSC and the ICC with specific reference to the referral resolutions and the actions taken by the UNSC after cases of non-cooperation by States were reported. Intrinsic within the analysis of referral resolution is the language used by the UNSC when adopting the referral resolutions. The analysis is to determine whether the text of the resolution enhances or hampers cooperation.

Chapter Five considers cooperation between AU and ICC. The analysis looks into early cases of cooperation, decisions on non-cooperation, and arguments advanced for cooperation and non-cooperation. Chapter Six analyses the relationship between the AU and the UNSC in the context of the ICC justice project. This analysis includes the deferral request by the AU and the UNSC's response. Chapter Seven is the conclusion.

CHAPTER TWO

COOPERATION UNDER GENERAL INTERNATIONAL LAW

1 INTRODUCTION

International cooperation plays an important role in public international law.[1] Due to this importance, one author even suggests that apart from the law of coexistence, a new structure of law may exist, that being the law of international cooperation.[2] Initially, when the concept of international cooperation was mentioned it was understood to be one of the most cardinal principles of intergovernmental relations.[3] In the context of the UN, international cooperation became one of the rallying points, culminating in its acceptance as one of the purpose to be pursued by the Organisation.[4]

To make sense of the duty to cooperate under international law, the chapter will firstly look into the concept's theoretical foundation. The analysis includes its nature and content, the approach adopted by the UN in the concretisation of the concept, cooperation in addressing the commons, and cooperation as solidarity. In the latter cases, cooperation under the law of the sea and during disasters is briefly analysed in order to put the principle of cooperation in its proper practical context.

The chapter further analyse international cooperation in respect to prosecuting international crimes. The analysis entails the study of modalities of international cooperation in criminal matters. This includes extradition, surrenders or transfers and mutual assistance. Related to the analysis is whether States and other international actors are legally obliged to cooperate in the

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1 Ademar Pozzatti "The International Law between Ethical Duty and Political Action: The Foundations of an International Cooperation Duty on the Immanuel Kant's Political Philosophy" (2016) *Brazilian Journal of International Law* at 405. See also Lawrence Gostin & Robert Archer, "The Duty of States to Assist Other States in Need: Ethics, Human Rights, and International Law" (2007) *Journal of Law, Medicine & Ethics* at 527.

2 Wolfgang Friedmann "*The Changing Structure of International Law*" (Stevens and Sons, 1964) at 60.

3 Gaetano Arangio-Ruiz "*The United Nations Declaration on Friendly Relations and the System of the Sources of International Law with an Appendix on the Concept of International and the Theory of International Organisations*" (Sijthoff & Noordhoff, 1979) at 102.

4 Bederman *et a*l "International Law: A Handbook for Judges" (2003) *American Society of International Law* at 61. Art 1(3) and 13(1) of the UN Charter.

investigation and prosecution of international crimes.[5] The chapter also looks into the impediments that prevent the full application of the mentioned modalities and the reasons advanced for such impediments. In order to concretise some of the modalities an analysis of international cooperation during the ICTY and the ICTR (ad hoc tribunals) is undertaken to determine the extent to which their cooperation regimes contributed to the principle of international cooperation in criminal matters.

The reasons for this approach are that the cooperation framework of the Rome Statute is conceptually founded on the abovementioned modalities and the principles encapsulated in the ad hoc tribunals.[6] Lastly, the chapter ends with concluding remarks.

2 THE DUTY TO COOPERATE UNDER INTERNATIONAL LAW: A THEORETICAL APPRAISAL

2.1 Law of Coexistence

According to Abi-Saab, international law as it is known today can be traced back to the Peace of Westphalia which ended Europe's protracted religious wars.[7] The problem faced by those involved in the peace negotiations was how to manage the irreconcilable ideological and or religious differences, which had led to the wars.[8] Abi-Saab further posits that the delegates agreed that the possible solutions should go beyond their differences and lead to some form of evenness that would enable peaceful coexistence. It is within this context that the law of coexistence was born.[9] The nature of obligations arising out of this law are mainly those of not doing anything

5 Ibid. See also Cherif Bassiouni "*The Modalities of Cooperation in Penal Matters*" in Cherif Bassiouni (ed) "*International Criminal Law: Multilateral and Bilateral Enforcement Mechanisms*" (Brill/Nijhoff, 2008) at 1-9.

6 Cherif Bassiouni "*Introduction to International Criminal Law*" (Brill, 2012) at 556 & 560.

7 Georges Abi-Saab "Whither the International Community?" (1998) *European Journal of International Law* at 251. See also Steven Patton "The Peace of Westphalia and its Effects on International Relations, Diplomacy and Foreign Policy" (2019) *The Histories* at 93. https://digitalcommons.lasalle.edu/the_histories/vol10/iss1/5?utm_source=digitalcommons.lasalle.edu%2Fthe_histories%2Fvol10%2Fiss1%2F5&utm_medium=PDF&utm_campaign=PDFCoverPage (accessed 03 Jan 2023).

8 See for example art 1 of Treaty of Westphalia of 24 Oct 1648. See also Abi-Saab (n 7 above) at 251. See also Ram Anand "*International Law and the Developing Countries: Confrontation or Cooperation*" (Dordrecht: Martinus Nijhoff Publ, 1987) at 73-74.

9 Abi-Saab (n 7 above) at 251.

because the aim was to keep subjects or (emerging) States peacefully apart, in other words, the result is the negative peace or the absence of war.[10]

Agreeing with Abi-Saab, Patton postulates that to ensure enduring peaceful coexistence between the provinces (and or new States) and other European States, the concept of State sovereignty was born.[11] Before the Treaty, provinces did not have any autonomous powers; they were under the rule of the Holy Roman Emperor, who controlled all actions of provincial princes.[12] According to Zreik, what the Peace of Westphalia gave rise to, is that with the granting of territorial independence, the provinces could enter into treaties, declare war and most significantly – nothing could be done without their explicit consent.[13] The concept of sovereignty, as first established in Westphalia, is equally captured by the Permanent Court of Arbitration in the *Island of Palmas Case* when it held that:[14]

> Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.

The effect of the Treaty of Westphalia is that a new system of international law was established based on the concept of coexistence, sovereignty and consent of States.[15] Perrez, commenting on the Westphalia type of law, posits that the law of coexistence continues to endure with certain aspects of it like sovereign equality being sacred.[16] Gross, in agreeing with Perrez, asserts that the law first conceived at Westphalia is able to maintain and reproduce itself in the same original way.[17] With this endurance, contemporary conflicts amongst States, such as experiments in

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10 Ibid.
11 Patton (n 7 above) at 95.
12 Ibid.
13 Mohamad Zreik "The Westphalian Peace and its Impact on Modern European State" (2021) *Quantum Journal of Social Sciences and Humanities* at 9-10. See also art LXXIII of Treaty of Westphalia 24 Oct 1648.
14 *Island of Palmas Case (Netherlands, USA)* Tri Reports (1928) at 838.
15 Art LXXIII of Treaty of Westphalia 24 Oct 1648. Patton (n 7 above) at 95. On State sovereignty see Bardo Fassbender "*Sovereignty and Constitutionalism in International law*" in Neil Walker (ed) "*Sovereignty in Transition*" (Hart Publishing, 2003) at 117. Michael Fowler & Julie Bunck "*Law, Power, and the Sovereign State*: *The Evolution and Application of the Concept of Sovereignty*" (Penn State Press, 1996) at 4. See also Jackson Maogoto "*State Sovereignty and International Criminal Law: Versailles to Rome*" (Brill/Nijhoff, 2003) at 8.
16 Franz Perrez "*Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*" (Kluwer Law International, 2000) at 114.
17 Leo Gross "The Peace of Westphalia, 1648-1948" (1948) *American Journal of International Law* at 40-41. See Pierre-Marie Dupuy "The Place and Role of Unilateralism in Contemporary International Law" (2000) *European Journal of Law International Law* also at 23.

certain areas of the high seas, and the immunity of foreign governments from national jurisdiction, are not governed by political systems and ideologies, but are rather adjusted between national interests and sovereign rights.[18]

It is against this backdrop that Abi-Saab defines the law of coexistence as: [19]

> [a]n approach to legal regulation which endeavours to establish a minimum of order between antagonistic entities that challenge any authority superior to themselves and which perceive their relations as a "zero sum game" where one's gain is immediately perceived as another' s loss. It is a law which has to manage the disintegration of a community, where the only common interest it can assume is in the rules of the game […]

Held and McGrew argue that the abovementioned traditional law of coexistence as amplified in the concept of State sovereignty, if strictly applied and or misapplied in its so-called classical negative form, has its own problems due to, amongst others, the proliferation of sovereignties, competing national interests, and globalisation. According to the authors, all these developments call for more positive interactions, which is contrary to the law of coexistence.[20] In this regard, Pedrozo postulates that the problems are demonstrable by the protracted negotiations of the UN Law of the Sea Convention, which started in 1958 and was only concluded (at least comprehensively) in 1994, owing mainly to competing national interests.[21] To counter the inward-looking state-centric law of coexistence and promote more interaction between States, Friedmann argues that an alternative approach or new structure, or system of international law has developed.[22]

2.2 New Structure of International Law

In his 1964 study, Friedmann suggests that one of the levels in which the structure of modern international law is moving apart from the abovementioned law of coexistence is the law of "international law of cooperation." According to Friedmann this new structure of law is not

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18 Friedmann (n 2 above) at 61- 60. See also Martti Koskenniemi "International Law and Hegemony: A Reconfiguration" (2004) *Cambridge Review of International Affairs* at 5-6.

19 Abi-Saab (n 7 above) at 251.

20 David Held & Anthony McGrew "*The Great Globalisation Debate: An Introduction*" (Polity Press, 2000) at 1-8. Dire Tladi "Populism's Attack on Multilateralism and International Law: Much Ado About Nothing" (2015) *Chinese Journal of International Law* at 15.

21 Raul Pedrozo "Reflecting on UNCLOS Forty Years Later: What Worked, What Failed" (2022) *International Law Studies* at 875.

22 Friedmann (n 2 above) at 60.

concerned with abstention but with regulating experiments in positive international collaborations.[23] For collaborations to happen, Friedmann argues that there should be identifiable common values, interests or fears that bring the actors together, without these commonalities the need for collaboration similarly falls away. In other words, "commonness" becomes the basis for such cooperation.[24] He further posits that "commonness" is easy to agree on, on a regional level because people from the same region will most probably share the same values, interests and fears. The "regional international law of cooperation" may ultimately be transposed to influence the development or structure of international law on a global level resulting in a fully-fledged international law of cooperation.[25]

Abi-Saab, in agreeing with Friedmann, posits that the law of cooperation begins with the idea of common actions or tasks, which cannot be effectively undertaken individually. According to Abi-Saab, another important issue in respect of the law of cooperation is that in order to thrive or develop, it needs effective institutions because common tasks or actions, by definition, need common enterprises with a clear division of labour amongst the participants.[26] Furthermore, institutions established for a common purpose are better placed to conceive, define, allocate, coordinate and monitor actions and or tasks, and achieve them.[27] Abi-Saab concludes that a distinct factor in the law of cooperation is the form in which the notion of equality of States takes place. In other words, "equality" does not necessarily mean doing the same thing (formal equality), but it means equality of participation while at the same time differentiating tasks and obligations - tasks and obligations have to be adapted and allocated according to participants' means and needs.[28]

The aforementioned authors' proposition is succinctly captured in the Declaration by President Bedjaoui in the *Nuclear Weapons Advisory Opinion* when the Judge held that:[29]

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23 Wolfgang Friedmann "Some Impacts of Social Organisation on International Law" (1956) *American Journal of International Law* at 507.

24 Friedmann (n 2 above) at 64. George Schwarzenberger "*The Frontiers of International Law*" (Stevens and Sons, 1962) at 29-36 characterise this modern trend in international law as the law of reciprocity and the law of coordination.

25 Ibid.

26 Ibid.

27 Ibid. See also Abi-Saab (n 7 above) 252.

28 Ibid.

29 *Legality of the Use of Nuclear Weapons (Advisory Opinion)* ICJ Reports (1996) at 270-271 para 12-13 &13 (per President Bedjaoui). See also Dino Kritsiotis "Imagining the International Community" *European Journal of International Law* (2002) at 969-970.

> Despite the still modest breakthrough of "supra-nationalism", the progress made in terms of the institutionalisation, not to say integration and "globalisation", of international society is undeniable. Witness the proliferation of international organisations, the gradual substitution of an international law of cooperation for the traditional international law of coexistence, the emergence of the concept of "international community" and its sometimes-successful attempts at subjectivisation. A token of all these developments is the place which international law now accords to concepts such as obligations *erga omnes*, rules of *jus cogens*, or the common heritage of mankind. The resolutely positivist, voluntarist approach of international law still current at the beginning of the century […] has been replaced by an objective conception of international law, a law more readily seeking to reflect a collective juridical conscience and respond to the social necessities of States organised as a community […]

Tladi appears less convinced by these arguments, that apart from the law of coexistence there is a new structure in which international law is moving, based on the common good.[30] In order to advance his argument, Tladi points out that the concept of the "common good" is not a new phenomenon, it existed even in classical, sovereignty-centred, consent-based international law. States cooperated to adopt rules with normative content based on the pursuit of their common good.[31] However, the normative content of such cooperation did not derive from any pre-determined objectives of the legal system (common good), it was always based on the consent of States derived from their bargaining powers and in line with their national interests.[32] Instead of proclaiming that there is a new system of international law, Tladi suggests that:[33]

> [i]t would probably be more accurate to say that the system remains based on sovereignty, flirts with solidarity, and seeks to pursue the common good if the common good can be made consistent with the national interests of those with greater bargaining power. More importantly, whatever progressive international agreements are arrived at are based on the consent of States and arrived at through bargain in which States are motivated by national interest.

Along the same line Weil asserts that classical international law had always enabled States to coexist in an equal and orderly manner, to have peaceful relationships amongst themselves and that it catered for the common interests that surfaced during their coexistence.[34] In other words, the foundation of international law from the onset was always to reduce anarchy through the

30 Tladi (n 20 above) at 21.
31 Ibid.
32 Ibid.
33 Ibid.
34 Prosper Weil "Towards Relative Normativity in International Law" (1983) *American Journal of International Law* at 418.

elaboration of norms of conduct that enabled orderly relations among sovereign and equal States. Weil surmises his argument by insisting that:[35]

> Despite the profound transformations that international society has undergone, especially since the end of the Second World War, the functions of international law have remained what they have always been since the outset, and there could be no greater error than to contrast "modern" or "present day" international law with "classic" international law in this respect. For, more than ever, international society remains at bottom a society of juxtaposition, founded on the "sovereign equality of States […]

De Chazournez and Rudall agree with the above authors that cooperation amongst States can be traced much further to the era of industrial revolution and globalisation.[36] The industrial revolution meant that States became linked to each other and were interdependent. The interdependence, according to the authors, manifests itself in cooperation to ensure the freedom of navigation in the rivers Rhine and Danube with the result that the number of European rivers became internationalised. Moreover, as a way of strengthening cooperation, basin organisations were established to monitor and enforce cooperation obligations. However, all of the above international activities were undertaken with the explicit consent of all participating States.[37]

The above authors' arguments appear to be valid because if international law of cooperation has as its sole basis the "common good," and the same "common good" had always been part, albeit incidental, of classical international law, then the argument that there is "new system or structure" of international law called international law of cooperation falls away. The "new system or structure" can at best be classified as the progressive or contemporary application of classical international law. The aforementioned arguments by the various authors still resonate with the judgment in the *Lotus Case* wherein the Court held that: [38]

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations

35 Ibid at 419.
36 Laurence Boisson de Chazournes and Jason Rudall "*Co-Operation*" in Jorge Vinuales (ed) "*The UN Friendly Relations Declaration at 50 - An Assessment of the Fundamental Principles of International Law*" (Cambridge University Press, 2020) at 106.
37 ibid.
38 *The Case of the S.S. "LOTUS"* PCIJ (1927) at 18.

> between these coexisting independent communities or with a view to the achievement of common aims.

From the above argument, it is clear that the common good was always part of classical international law. The Declaration by President Bedjaoui in the *Nuclear Weapon Case* and despite the clear intention to depart from the international law of coexistence as established in the *Lotus Case* appears to be more of an aspiration or *de lege ferenda*.[39] A further argument can also be made that the consternation by the President in the *Lotus Case* seems to be that of strict application of the law of coexistence due to the "spirit of the time." This means the same law can still be applied in a "flexible" way to take into account the "current spirit". In other words, being "strict" or "flexible" does not necessarily change the structure of the law, it is a matter of interpretation.[40] As Weil says:[41]

> [s]tates are at once the creators and the addressees of the norms of international law and that there can be no question today, any more than yesterday, of some "international democracy" in which a majority or representative proportion of states is considered to speak in the name of all and thus be entitled to impose its will on other states. Absent voluntarism, international law would no longer be performing its functions.

As per Gross, the law first conceived at Westphalia appears to maintain and reproduce itself in the same original way.[42]

2.3 Cooperation as a form of Solidarity

Koroma, in capturing the development of the international law of cooperation, uses the term "solidarity" in pursuance of common goals and or interests. The reason for this approach is that, as distinguished from the concept of cooperation, solidarity creates both positive and negative obligations.[43] As an act of solidarity, States may choose to refrain from carrying out certain actions

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39 Weil (n 34 above) at 420.

40 Art 51 Vienna Convention on the Law of Treaties of 1969.

41 Weil (n 20 above) at 420. See John Dugard "The Future of International Law: A Human Rights Perspective – With Some Comments on the Leiden School of International Law" (2007) *Leiden Journal of International Law* at 730. Kritsiotis (n 29 above) at 969-970.

42 Leo Gross "The Peace of Westphalia, 1648-1948" (1948) *American Journal of International Law* at 40-41. See Pierre-Marie Dupuy "The Place and Role of Unilateralism in Contemporary International Law" (2000) *European Journal of Law International Law* also at 23. See also Patton (n 7 above) at 96-98.

43 Abdul Koroma "*Solidarity: Evidence of Emerging International Legal Principle*" in Hestermeyer, Holger, and Rudiger Wolfrum (eds) "*Coexistence, Cooperation and Solidarity*" (Brill Nijhoff, 2012) at 103.

for the sake of the common good.[44] Used in this way (even though Koroma concedes that the term is not widely used), solidarity finds resonance, albeit implicitly, in various international legal instruments dealing with international cooperation. He argues that, for example, Article 1(3) of the UN Charter, which provides that the purpose of the UN is "to achieve international cooperation in solving international problems […]", is a call for solidarity. As with cooperation, Koroma's solidary is concerned with the advancement of the common good.[45]

Wolfrum is much clearer in linking the term solidarity with the concept of cooperation. First, he posits that the purpose of solidarity is to, amongst others; remedy the shortcomings that arise from the limited jurisdictional powers of States.[46] This is so because individual State actions cannot provide satisfactory solutions for larger community interests. Such larger interests, therefore, require collective actions (solidarity) by other States.[47] In other words, the more community interests are being defined, and the more community-orientated regimes are established, the more likely that States will advance or protect the common good.[48] In this sense, solidarity means that an individual State has an obligation, while pursuing its own interests, to take the interests of other States and the common interest of the international community into account. For this to happen, the interests are to be equalised. In other words, acts of solidarity in the form of institutionalised cooperation are required, either through bilateral or multilateral agreements to achieve a common goal. In essence, solidarity is the intensification of cooperation for a specific purpose.[49]

Taking it further, Wolfrum posits that the concept of solidarity manifests itself in the international law of cooperation for the purpose of development. In this case, development means increasing the welfare of the world community.[50] As the name suggests, the proponents of the law of cooperation for development are mainly from developing countries.[51] The reason why developing countries were and or are advocating for solidarity is that international law should no longer be

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44 Ibid.
45 Friedmann (n 2 above) at 64.
46 Rudiger Wolfrum "*International Law of Cooperation*" in in Rudolf Bernandt (ed) "*Encyclopedia of Public International Law*" (Amsterdam, Elsevier, 1995) at 11.
47 Ibid.
48 Pemmaraju Sreenivasa Rao "*The Concept of "International Community" in International Law and the Developing Countries*" in Hestermeyer, Holger, and Rudiger Wolfrum (eds) "*Coexistence, Cooperation and Solidarity*" (Brill Nijhoff, 2012 2012).
49 Wolfrum (n 46 above) at 1242.
50 Ibid.
51 Ibid.

viewed as a regime dedicated to ensuring formal equality (coexistence or the status quo) but should instead be seen as a socio-economic instrument to achieve substantive equality amongst States.[52] In this sense, the international law of cooperation for development (as a form of solidarity) will transform international law from a set of rules to preserve the present unequal and unjust state of international relations into a regime geared to fulfil or promote international social justice. With such a common goal (development), global society will truly become an international community with no need to classify countries as developed or developing, as equality in substance would be achieved.[53] As with the law of cooperation, solidarity: [54]

> [r]equires as a prerequisite, the establishment and agreement on a common goal to be achieved – a community interest. Such community interest is the source of legitimacy for the obligations to cooperate […]

Based on the foregoing, Wolfrum concludes that the principle of solidarity, as with cooperation, has some primary aspects – including the achievement of common objectives, or a common but differentiated responsibility that includes the need for concerted actions by all States to contribute to the global welfare based on mutual responsibility.[55]

Rao seems to agree with Wolfrum regarding the international law of cooperation for development as a form of solidarity. Rao also avers that the law of international cooperation manifests itself and can be assessed from the perspective of developing and least-developed countries.[56] Based on their histories, these countries share common characteristics, i.e. they regained their independence after years of colonialism, are economically and politically weak, and are vulnerable to dependency upon and domination by external forces.[57] By virtue of their weakened positions, developing countries mainly require solidarity from developed countries to secure their common interests with differentiated responsibilities based on the rule of law, justice and equity.[58]

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52 Ibid.
53 Ibid.
54 Ibid.
55 Ibid.
56 Rao (n 48 above) at 327.
57 Ibid.
58 Ibid at 328. See also Wolfrum (n 46 above) at 11 & 1243 and Elisa Morgera "Bilateralism at the Service of Community Interests? Non-judicial Enforcement of Global Public Goods in the Context of Global Environmental Law" (2012) *European Journal of International Law* at 746.

The Human Rights Council succinctly captures the interface between the principle of solidarity and cooperation for advancing the common good by providing:[59]

> [t]hat international solidarity is not limited to international assistance and cooperation […] it is a broader concept and principle that includes sustainability in international relations, especially international economic relations, the peaceful coexistence of all members of the international community, equal partnerships and the equitable sharing of benefits and burdens.

3 APPLICATION OF THE PRINCIPLE OF COOPERATION/SOLIDARY UNDER THE LAW OF THE SEA AND DURING DISASTERS

3.1 Background

In order to concretise the principles of cooperation and solidarity a brief analysis of the law of the sea and cooperation during disaster is undertaken. The reason for this analysis is that for the law of the sea, the legal framework governing the sea (UNCLOS) does not necessarily satisfy the interests of any State but represents the achievement of the international community.[60] On the other hand the magnitude and duration of many emergencies may be beyond the response capacity of many affected countries, international cooperation and or solidarity thus become indispensable to address emergency situations and to strengthen the response capacity of affected countries.[61]

3.2 Cooperation under Law of the Sea

Concerning the law of the sea, the preamble to UNCLOS follows the international law of cooperation (either for development or as a form of solidarity) by affirming to settle in the spirit of cooperation, all issues relating to the law of the sea.[62] It further stipulates that the achievements

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59 Human Rights Council Resolution on 30 June 2016 at para 2.

60 Tommy Koh "A Constitution for the Oceans" (1982) (remarks by the President of the Third United Nations Conference on the Law of the Sea) at xxxiv. https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf (accessed 15 Jan 2023).

61 UNGA resolution 46/182 (1991) para 5. See also Art 7 of draft article on the protection of persons in the event of disasters (ILC Sixty-eight Report) at 36. See further Art 1(1) of Nuclear Emergency Convention cooperative duty is further operationalised by the Convention on Early Notification of a Nuclear Accident. See also art 8 of International Convention for the Prevention of Pollution from Ships (MARPOL).

62 Preamble to UNCLOS. See also Suzan Buck "*Global Commons: An Introduction*" (Island Press, 1998) at 76.

of the goals as set out in the Convention will contribute to the realisation of a just and equitable international economic order that takes into account the interests and needs of humankind as a whole. To achieve these goals, the special interests and needs of developing countries must be considered.[63] The abovementioned preambular paragraphs find application in amongst others, Articles 117, 123 and 194(1) of UNCLOS. The common theme running through these Articles is that States are obliged to cooperate and or take collective action to achieve these common goals.[64]

The above international law of cooperation is further made explicit in Part XI of UNCLOS titled the "Area," also referred to as the "International Seabed Area".[65] Here, the "Area" is beyond the limits of any national jurisdiction, meaning it must be managed to the benefit of all mankind.[66] By declaring the Area common heritage, it means all States are to cooperate to regulate all activities in the Area.[67] To achieve the cooperation obligations States are further required to create appropriate institutional machinery or other cooperative arrangements to implement the governance of the Common Area.[68] In addition and in accordance with Friedmann's law of international cooperation, Articles 167 and 287 of UNCLOS provide for the establishment of the Seabed Authority and an International Tribunal for the Law of the Sea (ITLOS) to settle any disputes emanating from the Area and the interpretation of the Convention.[69]

3.3 The Application of the Principle of Solidarity during Disaster

According to the ILC Report on the Protection of Persons in the Event of Disaster, one of the areas in which the principle of cooperation, or solidarity, manifests itself is in relation to disasters.[70] Even though cooperation relating to disasters is applicable throughout all phases of disasters, it becomes even more apposite in disaster risk reduction as measures adopted before the actual

63 Ibid.
64 See amongst others art 100, 109, 117, 118 & 197 of UNCLOS.
65 Section 1 art 133-135 of UNCLOS.
66 John Noyes "The Common Heritage of Mankind: Past, Present, and Future" (2011) *Denver Journal of International Law & Policy* at 451.
67 UNGA Resolution 2749 (XXV) of (1970): Declaration of Principle Governing the Sea-Bed and Ocean Floor, and the Subsoil thereof, beyond the Limits of National Jurisdiction at 24.
68 Art 118 & 197 of UNCLOS.
69 Art 118 & 197, 287 & 287(1)(a) of UNCLOS & Art 23 of Annex VI: Statute of the International Tribunal for the Law of the Sea. Art 156 and 157 of UNCLOS. See also Chazournes and Rudall (n 36 above) at 127-128.
70 Report of the International Law Commission Sixty-eighth session (2 May-10 June and 4 July-12 Aug 2016) at 18.

disaster can mitigate its effects.[71] For example, the Sendai Framework for Risk Reduction provides that "the reduction of disaster risk is a common concern for all States" and that disaster risk-reduction policies and measures can be further enhanced through sustainable international cooperation.[72]

On the other hand, the principle of solidarity in respect of disasters becomes clearer in their aftermath.[73] According to Teles *et al* the reason for this assertion is that due to their devastation, the affected State/s might have no option but to accept assistance from States it would ordinarily not have.[74] Equally so, States that will not generally offer assistance may, as an act of solidarity, assist such affected States.[75] By the same token, neighbouring States that ordinarily don not allow certain activities on their territories might relax some of their laws to allow the smooth transit of humanitarian assistance to the affected State. They may also come together to mitigate the aftermath of the disaster.[76] Albala-Bertrant shares these observations when he posits that disasters have, over time, proven to be catalysts in bringing people together. For example, the violent floods in the river valley compelled the inhabitants of Tigris-Euphrates, the Nile, the Indus and the Huang Hi to come together and work towards common flood-control measures.[77] Moreover, to reduce the risk of disasters and facilitate timely and coordinated relief, States may enter into international treaties in line with Friedmann's law of international cooperation.[78]

In summarising cooperation during disasters, Teles *et al* posit that even though international disaster law is fragmented as it does not have a unitary, universally binding legal framework, the law remains a manifestation of the principle of solidarity and cooperative conduct.[79]

4 UN APPROACH TO THE PRINCIPLE OF COOPERATION

71 Report of the International Law Commission (n 70 above) at 18.
72 Sendai Framework for Disaster Risk Reduction: Guiding Principles at 13 para (19)(a).
73 Report of the International Law Commission Sixty-eighth session (2 May-10 June and 4 July-12 Aug 2016) at 18.
74 Teles *et al* (n 76 above) at 221.
75 Ibid.
76 Patrícia Teles *et al* "International Cooperation and the Protection of Persons Affected by Sea-Level Rise: Drawing the Contours of the Duties of Non-affected States" (2022) *Yearbook of International Disaster Law Online* at 222-223.
77 Jose Albala-Bertrand "*The Political Economy of Large Natural Disasters: With Special Reference to Developing Countries*" (New York: Oxford University Press, 1993) at 1-2.
78 Teles *et al* (n 76 above) at 221.
79 Ibid.

The aforementioned authors' ideas of international law of cooperation or solidarity equally finds application in various UN instruments, which are replete with calls for cooperation. At the apex of these international instruments is the UN Charter itself.[80] To lay the foundation for the rest of the Charter provisions, Article 1(3) of the UN Charter provides that the purpose of the UN is:[81]

> To achieve international cooperation in solving international problems of economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all […]

Expanding on the aforementioned, UNGA adopted the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States (UN Friendly Relations).[82] Regarding international cooperation, the UN Friendly Relations gives content by providing, amongst others, that as a principle of international law, States must cooperate under the Charter.[83] Like with the UN Charter, cooperation in terms of UN Friendly Relations is envisaged in a variety of fields that include amongst others, peace and security, economic, social fields and development.[84]

Notwithstanding the importance of cooperation, the UN does not endeavour to define the concept but proceeds from a pre-conceived definition.[85] Wolfrum in trying to make sense of the concept and after analysing various UN legal instruments concludes that cooperation has no inherent value, in other words, the significance of cooperation has to be understood from the goals it intends to achieve. Seen in this way, cooperation will therefore mean:[86]

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80 Art 103 of the UN Charter.

81 Art 11(1), 13(1) (a) & (b) and 55 of the UN Charter. See also art 55 of the UN Charter. See further Laurence Boisson de Chazournes and Jason Rudall "*Co-Operation*" in Jorge Vinuales (ed) "*The UN Friendly Relations Declaration at 50 - An Assessment of the Fundamental Principles of International Law*" (Cambridge University Press, 2020) at 108-111.

82 The Declaration on Principles of International Law concerning Friendly Relations and Cooperation amongst States (UNGA 2625 of 24 October 1970).

83 Para d of the UN Friendly Relations.

84 UN Friendly Relations (n 82 above).

85 Wolfrum (n 46 above) at 1242.

86 See also Jost Delbruck "*The International Obligation to Cooperate – An Empty Shell or a Hard Law Principle of International Law? A Critical look at a much Debated Paradigm of Modern International Law*" in Holger Hestermeyer *et al* (eds) "*Co-existence, Cooperation and Solidarity: Liber Amicorum Rudiger Wolfrum*" (Martinus Nijhoff Publishers, 2012) at 5.

> [t]he voluntary coordinated actions of two or more States which takes place under legal regimes and serves a specific objective. To this extent it marks an effort of States to accomplish an object by joint actions […]

Abi-Saab, in taking the Article 1 purpose argument further and using the maintenance of peace and security as an example, argues that the structure of the Charter tends to move more towards international law of cooperation.[87] The reason is the context in which the Charter was adopted, i.e. that of war. Against this background, Abi-Saab asserts that the main purpose or aspiration of the Charter becomes that of cooperation to maintain international peace and security. To achieve this purpose, the Charter holds the peace and security objective as the common good in which all Members and the Organisation have an interest. Once the common good is established, the Organisation and Members resolved to cooperate and protect it through systems provided for in Chapters VI, VII and VIII of the Charter.[88] Used in this way Abi-Saab concludes that the Charter's legal system tends to support Friedmann's law of international cooperation in that the common good of peace and security becomes the rationale behind the call for international cooperation.[89]

In trying to make sense of Article 1 and the UN Friendly Relations' duty to cooperate, Wolfrum posits that during the negotiations on the Declaration, there were two schools of thoughts around the concept of cooperation; the developing countries represented one school, while the developed countries represented the other.[90] The former argued that the duty to cooperate existed under general international law; while the latter questioned such an existence. In rejecting such an existence, the developed countries argued that Article 1(3) of the UN Charter does not in any way evidence a general obligation under international law, implying that the Article is declaratory and represents a statement of competence of the UN. Such general obligations are, per that reasoning, only provided for in Article 2 of the Charter, titled the "Principles."[91] Furthering the argument, Wolfrum states that if the assertion by the developing countries was to be accepted, it would have supported Friedmann's theory of the international law of cooperation, in that the common good for development would have been the reason for cooperation. However, in the final analysis, Wolfrum admits that at the conclusion of the UN Friendly Relations negotiations, there

87 Ibid.
88 Ibid.
89 Ibid.
90 Wofrum (n 46 above) at 1244-1245. See also art 2 of the UN Charter.
91 Ibid.

was consensus by States that such a general obligation to cooperate exists only as a matter of contractual or treaty obligation.[92]

5 COOPERATION UNDER INTERNATIONAL CRIMINAL LAW

5.1 Background

There is an acceptance within the international community that the most serious crimes of international concern should not go unpunished.[93] In order to bring those who commit such crimes to book, States have expressed their desire to cooperate among themselves and with other competent international authorities.[94] According to Dive, the reason for this commitment is that core international crimes are, with few exceptions, committed on the territory of more than one State or are all the affected persons or perpetrators, nationals of one State or found on the territory of one State.[95] Due to these complexities and the seriousness of the crimes, international cooperation becomes indispensable for the successful prosecution of perpetrators.[96]

5.2 Models of Cooperation under International Criminal Law

According to Bassiouni, International Criminal Law (ICL) is enforced through direct and indirect systems.[97] The former is where an international tribunal or court has the means and resources to directly investigate, prosecute, adjudicate and enforce their judgements without resorting to

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92 Wolfrum (n 46 above) at 1244-1246. See also Gaetano Arangio-Ruiz "*The United Nations Declaration on Friendly Relations and the System of the Sources of International Law (with Appendix on the Concept of International and Theory of International Organisation*" (Sijthoff & Noordhoff, 1979) at 117-118. See further Pierre-Marie Dupuy "International Law: Torn between Coexistence, Cooperation and Globalization. General Conclusions" (1998) *European Journal of International Law* at 280-281.

93 General Assembly resolution 3074 (XXVIII) of 3 December 1973 (Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity).

94 International Law Commission 2014: The obligation to extradite or prosecute (*aut dedere aut judicare*) at para 1.

95 Gerard Dive, keynote address, A Legal Gap? Getting the evidence where it can be found: Investigating and prosecuting international crimes 22 Nov 2011.

96 Miguel Costa "*Extradition Law: Reviewing Grounds for Refusal from the Classic Paradigm to Mutual Recognition and Beyond*' (Brilll, 2019) at 9. See also Dire Tladi "Complementarity and Cooperation in International Criminal Justice: Assessing Initiatives to Fill the Impunity Gap" (2014) *Institute for Security Studies* at 4.

97 Cherif Bassiouni "*The Modalities of Cooperation in Penal Matters*" in Cherif Bassiouni (ed) "*International Criminal Law: Multilateral and Bilateral Enforcement Mechanisms*" (Brill/Nijhoff, 2008) at 3.

States for assistance.[98] The most comprehensive example of a direct system of enforcement was with the Nuremberg International Military Tribunal and the International Military Tribunal for the Far East (IMTFE). These Tribunals' systems are classified as comprehensive, because the Allies exercised de facto control over both Germany and Japan, enacting laws that permitted them to prosecute nationals of both zones of occupation.[99] These laws, combined with the political will of the occupying States, and sufficient resources and control of the territory made prosecution at the Military Tribunals effective.[100] In respect of the ad hoc tribunals, Bassiouni argues that the system is still direct but not as comprehensive as those of the Military Tribunals because these institutions did not have full and effective capabilities of direct enforcement. Instead, they partly relied on cooperation by States to apprehend and surrender indicted persons to the Tribunals.[101]

With the indirect enforcement system, Boister posits that the system refers to the enforcement of ICL through a national system. This system is founded on two aspects, the first being the assumption that States will incorporate obligations arising out of the ICL in their national laws.[102] In other words, the domesticated ICL becomes applicable law through the medium and requirements of a national legal system. According to Bassiouni, the second aspect derives from the first and that is for States to use their internal legal process not only to enforce their treaty obligations but also to cooperate internationally.[103]

Notwithstanding these different enforcement systems, Bassiouni asserts that the modalities of cooperation remain the same for all the systems with the main difference being the sources of the legal obligations. For direct enforcement systems the legal basis are treaties, customary international law and *jus cogens*, whereas with indirect systems, the legal sources of cooperation derive from treaties and national systems.[104] Moreover, the modalities apply to all forms of cooperation whether it be provided for in bilateral, multilateral, or between States and international or mixed judicial institutions.[105] Bassiouni concludes that another common feature is that all

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98 Ibid.

99 See also Art III of Control Council Law No 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity. See also Preamble to the International Military Tribunal for the Far East 19 Jan 1946 of 10 Dec 1945. Bassiouni (n 5 above) at 3.

100 Bassiouni (n 6 above) at 536.

101 Ibid.

102 Neil Boister "Transnational Criminal Law"? (2003) *European Journal of International Law* at 962. Bassiouni (n 6 above) at 536.

103 Ibid at 487.

104 Bassiouni (n 5 above) at 4.

105 Ibid at 3-4. See for example the art 15 of the AU Convention on the Preventing and Combating of Corruption of 11 July 2003. See further U.S.-EU Extradition Agreement of 25 June 2003 wherein the

cooperation modalities operate mainly through the intermediate of a national legal system, meaning there should be procedures under national laws to operationalise the modalities.[106]

Sluiter on the other hand, proposes that the modalities of cooperation can also be classified into two categories, one being an inter-state model of cooperation, sometimes referred to as the "horizontal relationship", and the other a "supra-state" or "vertical relationship".[107] Cassese, in agreement with Sluiter, asserts that in the inter-state model of cooperation, the relationship between States is "horizontal" in nature with the result that it is voluntary and based on the sovereign equality of States, such that one State has no jurisdiction over another. Flowing from this sovereign equality, one State may not compel another to act.[108] According to Sluiter, the inter-state model is very much geared towards ordinary criminal conduct and only casually takes into account the unique features of international crimes.[109] The reason for this is that international crimes, in most cases, are committed or sanctioned at the highest level – making it difficult for States to request cooperation in prosecuting high-ranking officials.[110] Added to this is the fact that the requested State has the right to refuse assistance to the requesting State on grounds such as the principles of sovereign equality, reciprocity and the existence or absence of mutual interests.[111] Moreover, in the inter-state model, cooperation arrangements do not cater for on-site investigations by the requesting State, nor for the requesting State to enter into direct contact with the individuals concerned. All investigations or contacts are, therefore, carried out by the requested State in line with domestic laws.[112] On account of the mentioned considerations, it can be safely concluded that cooperation in criminal matters is freely entered into by States, with no

provision was in art 3 that after the conclusion of the Agreement the US will use the agreement as a basis for bilateral agreement.

106 Ibid. See also art 15(5) of the AU Convention on the Preventing and Combating of Corruption which provides that [S]tate Party undertakes to extradite any person charged […] in conformity with their domestic laws… See further art 16 of the European Convention on Extradition of 13 Dec 1973. Equally so article 146 of the Geneva Convention Relative to the Protection of Civilian Person in Time of War of 12 Aug 1949 provides that Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered the commission of grave breaches, and shall bring such persons before their courts.

107 Goran Sluiter "*Cooperation of States with International Tribunals*" in Antonio Cassese, Dapo Akande & Acquaviva Guido "*The Oxford Companion to International Criminal Justice*" (Oxford, 2009) at 188.

108 Antonio Cassese "The Statute of the International Criminal Court: Some Preliminary Reflections" (1999) *European Journal of International Law* at 164-165.

109 Sluiter (n 107 above) at 191.

110 Ibid. See also Sluiter Goran Sluiter "*International Criminal Adjudication and the Collection of Evidence*" (Intersentia, 2002) at 83.

111 Ibid.

112 Bert Swart "*General Problems*" in Antonio Cassese, Paulo Gaeta & John Jones (eds) "*The Rome Statute of the International Criminal Court: A Commentary*" (2002) at 1591.

general international law rule imposing a duty on them to cooperate on matters beyond their treaty obligations.[113]

Compared to inter-state model cooperation, the supra-state or vertical model of cooperation rests on the primacy of the requesting international court tribunal over States or national courts.[114] A decisive factor in this model is that in any disputes concerning the judicial functions of the international tribunal or the court, for example, the nature of cooperation, the dispute is settled authoritatively by the decision of the tribunal or the court. Furthermore, the tribunal or the court can issue binding orders to States and set in motion enforcement measures in case of non-compliance.[115]

5.3 Modalities of Cooperation

5.3.1 Extradition

According to Zimmer, extradition is the oldest and most effective form of inter-state cooperation in criminal matters. This form of cooperation enables the State whose substantive laws have been breached to affect criminal justice in line with national laws.[116] The reason for extradition is that the requesting State is generally where the crime was committed or where the harm was mostly felt, following that it is the best place to gather evidence necessary for prosecution.[117]

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113 Swart (n 112 above) at 87. See also Alexis Demirdjian "Armless Giants: Cooperation, State Responsibility and Suggestions for the ICC Review Conference" (2010) *International Criminal Law Review* at 186.

114 Antonio Cassese "The Statute of the International Criminal Court: Some Preliminary Reflections" (1999) *European Journal of International Law* at 164-165. See also Sluiter (n 107 above) 189.

115 Sluiter (n 107 above) at 191. See also Clause Kress and Kimberly Prost "*Part 9 International Cooperation and Judicial Assistance*" in Otto Triffterer and Kai Ambos "*The Rome Statute of the International Criminal Court: A Commentary*" (Hart Publishing, 2016) at 2009. See further Annalisa Ciampi "*Legal Rules, Policy Choices and Political Realities in the Functioning of the Cooperation Regime of International Court*" in Olympia Bekou & Daley Birkett (eds) "*Cooperation and the international criminal court: Perspectives from theory and practice"* (Brill, 2016) at 11.

116 Brenden Zimmer "*Extradition and Rendition: Background and Issues*" (Nova Science Publishers, Incorporated, 2011) at 2. Bassiouni (n 5 above) at 269.

117 Ibid. See also Costa (n 96 above) at 9. See further Neil Boister "The Trend to Universal Extradition over Subsidiary Universal Jurisdiction in the Suppression of Transnational Crime (2003) *Acta Juridica* at 311 & 313. For example, Art VI of the Genocide Convention provides that persons charged with genocide shall be tried by a competent tribunal of the State in the territory of which the act was committed.

Against this backdrop, Gilbert defines extradition as a formal process where States assist each other in criminal matters.[118] In brief, extradition serves to close the (impunity) gap in the effectiveness of the criminal justice system in that it incentivises both the requesting and requested States to cooperate, with the expectation that in future, they can find themselves being either the requesting or the requested party.[119] If applied in the broad sense, extradition can be defined to include the surrender or transfer (as an immediate result of extradition) of persons not only from the forum to the requesting State but also to a competent international judicial institution.[120] The obligation to extradite becomes even stronger for core international crimes because there is a strong argument already made that core international crimes are not only a concern to the affected State/s but also a concern to the whole of the international community.[121]

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118 Geoff Gilbert "*Responding to International Crime*" (Brill/Nijoff, 2006) at 24. See also Costa (n 117 above) at 4 & 78. Cherif Bassiouni "*International Extradition: United States Law and Practice*" (Oxford University Press, 2014) at 36-37. See also Cherif Bassiouni & Edward Wise "*Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*" (Martinus Nijhoff Publishers, 1995) at 26.

119 Andrea Caligiuri "Governing International Cooperation in Criminal Matters: The Role of the *aut Dedere aut Judicare* Principle" (2018) *International Criminal Law* at 251-252. See also Michael Carcia & Charles Doyle "*Extradition To and From the United States: Overview of the Law and Recent Treaties" in Brenden Zimmer (ed) "Extradition and Rendition: Background and Issues"* (Nove Science Publishers, 2011) at 2. See further Art 8(3) of Convention for the Suppression of Unlawful Seizure of Aircraft of 16 Dec 1970 and the Obligation to Extradite or Prosecute (*aut dedere aut judicare*): Final Report of the International Law Commission 2014 at para 3. Art V, VI and VII of the Genocide Convention of 1949. See also Principle of International Cooperation in the Detection, Arrest and Extradition and Punishment of Person Found Guilty of War Crimes and Crimes against Humanity (UNGAR 3074 (XXVIII) of 3 Dec 1973 at para 5.

120 ILC the Obligation to Extradite or Prosecute (n 119 above) at paras 27-29, 34-35. See also Costa (n 117 above) at 4. See further Art 25(5) & (9) of the African Charter on Democracy, Elections and Governance 2007 and Art VII of the Genocide Convention of 1949, Art 11 of 2006 International Convention for the Protection of All Persons from Enforced Disappearance and art 9 of the 1996 Draft Code of Crimes Against the Peace of Mankind. From this Convention it appears the word extradite and surrenders and transfers can be used interchangeably, and the ILC appears to be in agreement with this notion. See also *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* Judgment (Dissenting Opinion of Judge Xue), ICJ Reports (2012) at 582 para 42. In terms of Art 102 wherein the term surrender is define as delivering of a person by a State to the Court while extradition is defined to delivering of a person by a State to another State as provided for by a treaty, convention or national legislation.

121 Art 88 of the First Additional Protocol to the Geneva Convention of 1949. ILC the Obligation to Extradite or Prosecute (n 119 above) at para 1. See also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* Judgment, ICJ Report (2012) at 449-450 para 68 -69 and *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* ICJ 1951 at 26. See further Kenneth Randall "Universal Jurisdiction under International Law" (1988) *Texas Law Review* at 802 & 805, Cherif Bassiouni "*International Criminal Law*" vol. III. 3rd Ed (Brill/Nijhoff, 2008) at 10-11. For argument on for and against common interest/good and or community of mankind see Bassiouni & Wise (n 118 above) at 28-36 & 63.

5.3.2 The Duty to Extradite or Prosecute (aut dedere aut judicare)

The duty to extradite (or surrender or transfer if extradition is applied in the broad sense) further finds expression in the legal maxim *aut dedere aut judicare*, which translates into the duty to extradite or prosecute.[122] At its most rudimentary form, it requires States in custody of a person who has allegedly committed an (international) crime to be extradited or surrendered or transferred to a State or international judicial institution having jurisdiction. Alternatively, if it cannot, take such steps to have the same person prosecuted before its national courts.[123] With this modality of cooperation, it is hoped that the impunity gap will further be closed.[124] As with extradition, the duty to prosecute becomes more compelling in respect of core international crimes.[125]

5.3.3 Surrenders and Transfers

Another form of cooperation in criminal matters that is closely related to extradition is the surrender or transfer of a suspected offender from the forum State to an international judicial institution having jurisdiction and or established for that purpose.[126] The "surrender" or "transfer" is mainly relevant in respect of international crimes and under the terms and conditions prescribed by the founding documents of the relevant international judicial institution.[127] As with extraditions, surrenders or transfers are generally carried out in accordance with the national legislation of the

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122 Cherif Bassiouni "*International Extradition: United States Law and Practice*" (Oxford University Press, 2014) *at* 7.

123 *Belgium v. Senegal* (n 121 above) at 443 para 50. See also Laura Olson "*Reinforcing Enforcement in Specialised Convention on Crime against Humanity: Inter-State Cooperation, Mutual Legal Assistance, and the Aut Dedere Aut Judicare Obligation*" in Leila Sadat (ed) *Forging a Convention for Crimes Against Humanity* (Cambridge University Press, 2013) at 324.

124 *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* Judgment, ICJ Reports (2012) at 443 para 50.

125 Lee Steven "Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of Its International Obligations" (1999) *Virginia Journal of International Law* at 441-442.

126 Art 28(e) of the ICTR Statute and art 29(e) of ICTY Statute. Art VII of the Genocide Convention of 1949, art 11 of 2006 International Convention for the Protection of All Persons from Enforced Disappearance and art 9 of the 1996 Draft Code of Crimes Against the Peace of Mankind. ILC the Obligation to Extradite or Prosecute (n 119 above) at paras 27-29, 34-35. In terms of Art 102 Rome Statute the terms surrender and extradition are clearly distinguished meaning the terms cannot be used interchangeably, in other word extradition cannot be defined to include the surrender of a person to the Court, similarly surrender cannot be interpreted to include the extradition of a person to another State.

127 Art 28(e) of the ICTR Statute, Art 29(e) of ICTY Statute and art 89 of the Rome Statute. The Rome Statute does not use the term transfer but only the term surrender. See also Art 11 of 2006 International Convention for the Protection of All Persons from Enforced Disappearance. See also ILC the Obligation to Extradite or Prosecute (n 119 above) at para 1, 27 & 34.

custodial State, meaning some of the cooperation challenges associated with extradition will most probably be experienced with surrenders or transfers of persons to an international tribunal or court.[128]

5.3.4 International Judicial Assistance

Another form of cooperation in international criminal matters that is closely related to extradition is judicial assistance.[129] This form of cooperation covers both mutual assistance for criminal proceedings conducted abroad and the execution of foreign criminal sentences.[130] Judicial assistance may be afforded for the purpose of identifying and locating alleged offenders, victims and witnesses, and executing searches and seizures.[131] Like extradition, the effectiveness of judicial assistance is heavily dependent on a flexible legal framework at the national level.[132] In addition, the duty to offer judicial assistance becomes more compelling in respect of core international crimes.[133] In this regard, Article 88(1) of Additional Protocol I provides that:[134]

> "The High Contracting Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol."

128 Art 88(3) of the First Additional Protocol of 1977. See amongst other para 4 of UNSR 827 and para 2 of the ICTR, Art 90 of the Rome Statute and art 46L (g) of Malabo Protocol. See also Karin Oellers-Frahm "Cooperation: The Indispensable Prerequisite to the Efficiency of International Criminal Tribunals" (1995) at 307-308 *American Society of International Law* where the author postulate that one of the challenges which will be faced by surrenders and transfers is in respect of nationals as most of the extradition treaties prohibit such extraditions.

129 ICRC "Cooperation in extradition and judicial assistance in criminal matters: Advisory Service on International Humanitarian Law" available at file:///C:/Users/user/Downloads/cooperation-in-extradition-and-judicial-assistance-in-criminal-matters-icrc-eng%20(1).pdf (accessed 01 April 2023).

130 Art 88(3) of the First Additional Protocol of 1977. See also Chapter IV (Crimes Against Humanity): Report of the International Law Commission on the Sixty-ninth Session at 23-24 & 79-83.

131 Chapter IV (Crimes Against Humanity): Report of the International Law Commission on the Sixty-ninth Session (2018) at 79-83.

132 ICRC (n 129 above).

133 Steven (n 125 above) at 441-442.

134 Art 88(1) of the First Additional Protocol to the Geneva Convention of 1949.

6 NEW INSTRUMENT ON COOPERATION FOR INTERNATIONAL CRIMINAL MATTERS

In order to provide the legal framework for cooperation in international criminal matters, the ILC adopted Draft Articles on Prevention and Punishment of Crimes against Humanity (Draft Articles on Crimes against Humanity).[135] The main purpose of the Draft Articles is to amongst others, address various important elements of mutual assistance that will apply between States in respect of crimes against humanity. The reason for the Draft Articles was that at the time there was no global or regional treaty addressing mutual legal assistance specifically in the context of crimes against humanity. In the absence of such treaty the Draft Articles aim was to provide the legal framework to facilitate cooperation between States.[136] In this regard Article 14 provides that:[137]

> States shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the present draft articles […]

Mutual legal assistance in respect of the aforementioned Article includes assistance for the purpose of identifying and locating alleged offenders, taking evidence or statements from persons, effecting service of judicial documents and executing searches and seizures.[138] By going into this finer details on how assistance should be rendered it was hoped that the provisions will provide extensive guidance to States especially when there exists no mutual legal assistance treaty between the requesting and requested States.[139]

Subsequent to the Draft Articles and in order to close the cooperation gap, a Diplomatic Conference of Plenipotentiaries was held to draft a modern, procedural, multilateral treaty on mutual legal assistance and extradition.[140] The initiative resulted in the adoption of the Ljubjana – The Hague Convention on International Cooperation in the Investigation and Prosecution of the

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135 ILC Draft Articles on Prevention and Punishment of Crimes Against Humanity, with commentaries 2019.
136 Article 14 of ILC Draft Articles on Crimes Against Humanity at 123 para 2-3.
137 Article 14(1) of the ILC Draft Articles on Crimes Against Humanity.
138 Article 14(3) of the ILC Draft Articles on Crimes against Humanity.
139 Article 14 of the ILC Draft Articles on Crimes against Humanity at 124 para 5.
140 Republic of Slovenia: MLA Diplomatic Conference. See also Alison Bisset "The Mutual Legal Assistance Treaty for Core Crimes: Filling the Gap" (2022) *European Journal of International Law*. See further Leila Sadat & Douglas Pivnichny "Towards a New Global Treaty on Crimes against Humanity (2014) *European Journal of International Law* and MLA (Mutual Legal Assistance and Extradition): The relationship of the MLA initiative to the ILC Draft Articles on Crimes against Humanity. https://www.gov.si/assets/ministrstva/MZZ/projekti/MLA-pobuda/Relationship-between-the-ILC-and-MLA-Initiative-English.pdf (accessed 22 Aug 2023).

Crime of Genocide, Crimes against Humanity, War Crimes and Other International Crimes (Ljubjana - The Hague Convention).[141] The main objective of the Convention is to facilitate international cooperation in criminal matters between States Parties with a view of strengthening the fight against impunity for the stated international crimes.[142] On cooperation, the Convention is premised on the general obligation of State Parties to execute request for cooperation.[143] This general obligation is given effect to by modalities of cooperation in the form of extradition and mutual legal assistance.[144]

According to Amani the implications of the above treaty is that it closes a gap in the international legal system by regulating in sufficient detail mutual legal assistance and extradition for the domestic investigation and prosecution of core international crimes.[145] However for the cooperation gap to close it will require States especially those outside the Rome Statute to ratify the treaty.[146]

7 IMPEDIMENTS TO COOPERATION IN INTERNATIONAL CRIMINAL MATTERS

Notwithstanding intentions in closing the impunity gap, numerous requirements must be satisfied before an extradition, judicial assistance, surrender or transfer is granted or affected.[147] These requirements are both legal and non-legal, and concerning the former, the requirements may include legal principles such as the immunity of State officials, double criminality, *ne bis in idem, nullem crimen sine lege* and other legal issues, such as non-extradition of nationals.[148] However, even in respect of these legal requirements, Costa argues that non-legal issues such as the relationship between the requesting and the requested State and or the judicial institution may

141 Ibid.
142 Article 1 of Ljubjana - The Hague Convention.
143 Article 10 of Ljubjana - The Hague Convention.
144 Article 14 & 23 of Ljubjana - The Hague Convention.
145 Bruno de Oliveira Biazatti & Ezechiel Amani "Ljubjana - The Hague Convention on Mutual Legal Assistance: Was the Gap Closed" (2023) *European Journal of International Law*.
146 Ibid. See also Bisset (n 140 above).
147 *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections* Judgment ICJ Reports 1998 at 124-125 paras 25-26.
148 ILC the Obligation to Extradite or Prosecute (n 119 above) at 10 para 22. See also International Law Commission Seventy-third session (5 Aug 2022): Immunity of State officials from foreign criminal jurisdiction Draft Articles 1-5.

influence a decision on whether any judicial assistance is going to be offered, whether a person is going to be extradited, surrendered or transferred.[149]

When States are confronted with a situation where they have to fulfil the treaty obligations, such as extraditing or surrendering, assisting or transferring an offender to another State or international judicial institution, Magnuson posits that decision-makers may similarly factor in non-legal considerations. This includes whether the suspected offender has domestic or international support, or is a member of a powerful or popular group, factors which may in the circumstance be at variant with the spirit of the treaty and or the common interest of the international community.[150] Bassiouni surmises this by postulating that States may, under certain circumstances, reduce procedural barriers to international cooperation with friendly nations or institutions, and increase them with less friendly nations or institutions. This results in cooperation in criminal matters being reduced to more of a political accommodation process rather than being a legal system based on the common interest of the international community.[151]

8 COOPERATION UNDER THE UNSC AD HOC TRIBUNALS (ICTY AND ICTR)

8.1 Background

Against the aforementioned background, international cooperation in criminal matters with specific reference to international crimes first came to the fore with the establishment of the NMT and MTFE.[152] The two Military Tribunals were established outside the UN system by the Allied Powers to prosecute those accused of committing crimes against peace, war crimes and crimes against humanity in the Far East and the European Axis countries.[153] The reason the Allied Powers established the two Tribunals was because, at the time, there was no permanent international court with jurisdiction to prosecute those alleged to have committed atrocities.

Building on the precedent set by the Military Tribunals, the UNSC established the ICTY and the ICTR pursuant to Resolutions 827 and 955 after determining that the situations in the former

149 Costa (n 117 above) at 31.
150 William Magnuson "The Domestic Politics of International Extradition" *Journal of International Law* (2012) at 843-844 & 89.
151 Bassiouni (n 5 above) at 30.
152 Art 1 of Nuremberg Trial Proceedings Vol. 1.Charter of the International Military Tribunal and of Charter of the International Military Tribunal for the Far East.
153 Art 6 of NMT and Art 5 of IMTFE.

Yugoslavia and Rwanda constituted threats to international peace.[154] The reason for their establishment was similar to that of the Military Tribunals, in that there was still no permanent international court with jurisdiction to prosecute those alleged to have committed atrocities in the two situations States. Among the crimes that fell under the jurisdiction of the Tribunals were grave breaches of the Geneva Convention, war crimes, the crime of genocide and crimes against humanity – all serious crimes of international concern.[155] A related point was that even though the Tribunals had concurrent jurisdiction with the situation States, they could at any stage of the proceedings request the national courts to defer such proceedings to their competency.[156]

A striking feature of the Tribunals was that even though they had an enforcement mechanism in the form of the UNSC, the overall enforcement mechanism, as compared to the NMT and MTFE, was not so direct, relying extensively on cooperation by States to achieve their mandate.[157] As the founding entity, the UNSC was expected to act as some form of enforcement mechanism by taking actions against recalcitrant States or facilitate cooperation with other international actors like the EU and AU.[158]

8.2 Legislative Framework

In respect of cooperation, Resolutions 827 and 955 are similar in wording and provide that:[159]

> [a]ll States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber […]

154 UNSCR 827 (1993) of 1993 and 955 of 1994.
155 Art 1-4 of the ICTY Statute.
156 Art 9 of the ICTY Statute and Art 8 of the ICTR Statute. See also Rule 10 of both the ICTY and ICTR Rules of Procedure and Evidence.
157 Antonio Cassese "On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law" (1998) *European Journal of International* at 10. See also ICTY Fourth Annual Report at 37 para 148. See further Gabrielle Kirk McDonald "Problems, Obstacles and Achievements of the ICTY" (2004) *Journal of International Criminal Justice* at 559.
158 Cassese (n 168 below) at 10. See also ICTY Fourth Annual Report at 37 para 148. See further Gabrielle Kirk McDonald "Problems, Obstacles and Achievements of the ICTY" (2004) *Journal of International Criminal Justice* at 559.
159 UNSCR 827 of 25 May 1993 at para 4 & UNSCR 955 at para 2.

The above cooperation obligations are taken further by Article 29 of the ICTY and Article 28 of the ICTR Statute, which provides that States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of the law.[160]

To operationalise these general obligations, Articles 29 and 28 provide concrete guidelines on handling cooperation requests. This includes prompt compliance with any order or request for assistance issued by the Tribunals, such as the identification and location of persons, the taking of testimony and the production of evidence, the service of documents, the arrest or detention of persons, or the surrender/transfer of the accused person to the seat of the Tribunals.[161] In addition, States must take all measures under their domestic laws to implement the Tribunals' cooperation obligations. This means that, as a matter of the resolutions, States must enact implementing legislation that will enhance cooperation and or remove provisions in their domestic laws that may impede cooperation.[162]

These cooperation obligations were enhanced with the adoption of Rules 7*bis*, 11, 13, 59 and 61(E) of the Rules of Procedure and Evidence.[163] In terms of these Rules, the Presidents of the Tribunals can, after certain judicial processes have been followed, report various forms of non-cooperation by States to the UNSC.[164] The reporting procedure had the effect of transforming the Tribunals' enforcement mechanism from an indirect to a more direct enforcement system akin to that applied in the Military Tribunals.[165] As a result of these Rules, the UNSC could act as an executive arm of the Tribunals by completely or partially interrupting economic relations with the recalcitrant State.[166] Another innovation in respect of the ICTY that enhanced and broadened international cooperation was the adoption of Rule 59 *bis*.[167] This Rule allowed the Tribunal to, in

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160 Art 29(1) of ICTY Statute & [international humanitarian] Art 28(1) of the ICTR Statute. See also Ramesh Thakur & Peter Malcontent "*From Sovereignty Impunity to International Accountability*" (New York, 2004) at 25-26. See also Robert Cryer "*Prosecuting International Crimes Selectivity and the International Criminal Law Regime*" (Cambridge University Press, 2005) at 39.

161 Art 29(2) of the ICTY Statute & Art 28(2) of the ICTR Statute. See also Rule 8 & 40*bis* (B) & (C) of the ICTY & ICTR Rules of Procedure and Evidence of 08 July 2015.

162 UNSCR 827 at para 4 & UNSCR 955 at para 2. See also *Senegal v Belgium* (n 124 above) at para 76 & ILC the Obligation to Extradite or Prosecute (n 119 above) at para 28.

163 Rule 11 of the ICTY & ICTR allows the Presidents of the Tribunals to report a State's failure to comply with a deferral request to the Security Council. Rules 7*bis* is a catch all phrase in that it provides the means for the President to report non-compliance that is not covered by the other mentioned rules.

164 In terms of Rules 59.

165 Bassiouni (n 5 above) at 7.

166 Art 41 of the UN Charter. See also ICTY Third Annual Report at para 61 and Fourth Annual Report at para 142.

167 ITCY Doc/32/Rev. 43 of 24 July 2009.

addition to the powers to transmit requests, transmit such requests to appropriate authorities or other international bodies.[168] With these innovations, the scope of cooperation in the ICTY was broadened to include international actors other than the States.[169]

Another salient point concerning international cooperation is the language employed by UNSC in passing the resolutions i.e. the entity uses mandatory language like "State shall" and "comply without delay". By using this language, States have no discretion on whether to cooperate with the Tribunals – they must, as a matter of the resolutions, cooperate with the Tribunals.[170] The obligatory nature of the resolutions is further supported by the fact that the UNSC invoked Chapter VII of the UN Charter, meaning they are binding on all UN Member States because, in terms of Article 25 of the UN Charter, Members agree to accept and carry out the decisions of the UNSC.[171] Bellelli succinctly captured the obligatory nature of the resolutions when he postulated that:[172]

> The relationship between the UN *ad hoc* Tribunals and the Security Council results in the Tribunals' legitimacy resting on the *erga omnes* binding Security Council's resolutions adopted under Chapter VII of the UN Charter. As subsidiary bodies of the Security Council, the Tribunals enjoy the strong mandatory nature of the obligation to cooperate […] the arrest and surrender orders of the *ad hoc* Tribunals […] under Chapter VII – cannot be disregarded without exposing states to the systematic consequences of breaching an obligation established under the UN Charter.

The aforementioned assertion by Bellelli finds some support in the *Blaskic Case*.[173] In explaining the nature of cooperation as encapsulated in the Statute and framing cooperation as a vertical model, the Appeal Chamber found that the UNSC, when establishing the Tribunal, stated that it should be vested with jurisdiction over persons living within sovereign States and:[174]

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168 Rule 59 A*bis* of the ICTY & ICTR Rule of Procedure and Evidence. See also Cassese (n 157 above) at 12-13.

169 ICTY Fourth Annual Report at para 133.

170 UNSCR 827 and 955 at para 4 and 2. See also Lana Ljuboja "Justice in an Uncooperative World: ICTY and ICTR Foreshadow ICC Ineffectiveness" (2010) *Houston Journal of International Law* at 770.

171 See also UNGA/49/342. S/1994/1007 of 29 Aug 1994. See further ICTY First Annual Report at 27 and Gabriel McDonald "Problems, Obstacle and Achievements of the ICTY" (2004) *Journal of International Criminal Justice* at 559.

172 Roberto Bellelli (ed) "*International Criminal Justice, Law and Practice from the Rome Statute to its Review*" (Routledge, 2010) at 223.

173 Goran Sluiter "*International Criminal Adjudication and the Collection of Evidence: Obligations of States*" (Intersentia, 2002) at 82.

174 *Prosecutor v. Tihomir Blaskic Judgement (Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber* ICTY (18 July 1997) at para 47.

> By the same token, the Statute granted the International Tribunal the power to address to States binding orders concerning a broad variety of judicial matters (including the identification and location of persons, the taking of testimony and the production of evidence, the service of documents, the arrest or detention of persons, and the surrender or transfer of indictees to the International Tribunal). Clearly, a "vertical" relationship was thus established […]

The Appeal Chamber concluded that the vertical model of cooperation is exclusively aimed towards the effective functioning of the Tribunal, meaning States are under a mandatory obligation to cooperate.[175] The foregoing is further supported by the ILC when in its Draft Conclusion concluded that:[176]

> States shall cooperate to bring to an end through lawful means any serious breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*).

Cooperation with the Tribunals for the purpose of ending impunity will fall within the “lawful means” part of the Draft Conclusion 19(1) of the ILC.

Despite the mandatory or *erga omnes* nature of the resolutions and the decision in the *Blaskic Case*, the ICTY and ICTR cooperation framework appears to share some features with the modalities of cooperation as discussed in the preceding paragraph, especially extradition. For example, arrests, surrenders or transfer of offenders are subjected to domestic procedures of the custodial State, meaning it could be expected that some of the impediments and challenges experienced with extradition between States are likely to impact the Tribunals.[177] To support this assertion, Oellers-Frahm opines that even though the Tribunals’ resolutions were adopted under Chapter VII of the UN Charter, the decision is not directly applicable to the Members. In other words, the decision merely creates obligations toward Members to conform with the aim of the resolutions. In order to conform, Members must still adapt their domestic laws to be in consonant with the resolutions, meaning, if Members do not want to cooperate with the Tribunals, they can exploit the provisions by delaying the adaptation of domestic laws.[178]

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175 Ibid.

176 ILC Report of 05 Aug 2022 (A/CN.4/L.967): Peremptory norms of general international law (*jus cogens*) at Draft Conclusion 19(1). See further ILC Report Aug 2009 at 204, 207 and Draft Conclusion 2 at 148-150.

177 For example and like in the *Senegal v Belgium Case*, Senegal took almost 7 years to adopt legislation required to prosecute Mr Habre domestically even though all along it was under a legal obligation to do so (at paras 74-77).

178 Oellers-Frahm (n 128 above) at 305-306.

The first President of the ICTY succinctly captured the centrality of State cooperation with the Tribunals when he postulated that:[179]

> The ICTY Statute places excessive reliance on state cooperation as the primary means of achieving the mandated objectives of prosecuting persons for violations of international humanitarian law. ICTY, having no police force of its own, must rely on international cooperation in order to effect arrests [...]

8.3 Implementing Legislative Framework

According to Second ICTY Annual Report, international cooperation took on different formats. First, and in preparation for their cooperative obligations in line with the resolution and the Statute, States removed or enacted legislative or regulatory provisions required to give effect to the Tribunal's cooperative framework.[180] For example, Germany after receiving a request from the ICTY, adopted a domestic rule allowing transfer of aliens to the Tribunal.[181] This new rule enabled Germany to fulfil its cooperation obligations by becoming the first State to transfer a suspect, Dusko Tadic to the seat of the Tribunal.[182] Similarly, Croatia enacted cooperation legislation that enabled it to arrest and deliver suspects to the Tribunal.[183] To a certain extent, Serbia cooperated with the Tribunal in the arrest and surrender of suspects, an example being Erdemovic, who was the fourth suspect to be surrendered to the Tribunal.[184] As the work of the Tribunal progressed, cooperation with the Tribunal improved immensely. For example, Bosnia and Herzegovina established a Special War Crimes Chamber section in the Office of the State Prosecutor that resulted in concrete cooperation activities with the ICTY Prosecutor.[185]

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179 Address to the UNSC by the President of the ICTY of 4 Nov 1997. See also ICTY Third Annual Report (A/51/292 S/1996/665) of 16 Aug 1996 at para 167. See further the Twenty-fourth and final annual report of ICTY (A/72/266–S/2017/662) at 13. Victor Peskin "*International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*" (Cambridge University Press, 2008) at 43.

180 ICTY Second Annual Report (A/50/365 S/1995/728 of 14 Aug 1995) at 31 para 132. Amongst the States that enacted implementing legislation were Finland, Italy, the Netherlands, Norway, Spain and Sweden.

181 *Prosecutor v. Dusko Tadic ICTY* (1997) at para 9. See also ICTY Second Annual Report at para 171.

182 Oellers-Frahm (n 128 above) at 305.

183 ICTY Third Annual Report (A/51/292 S/1996/665 of 16 Aug 1996) at 31 para 132 & 167. The suspect deliver by Croatia is Delic and Landzo.

184 Konstantinos Magliveras "The Interplay between the Transfer of Slobodan Milosevic to the ICTY and Yugoslav Constitutional Law" (2002) *European Journal of International Law* at 663-664.

185 ICTY Twelve Annual Report (A/60/267 S/2005/532 of 17 Aug 2005) at 37-38 paras 193-195. Other States that cooperated in the arrest and surrender of suspect are Macedonia, Serbia and Montenegro.

Likewise, during the ICTR, States outside the situation State and in line with Article 28 and the Rules of Procedure, cooperated with the Tribunal.[186] For example, the first suspect to be convicted of genocide, Jean-Paul Akayesu was arrested and transferred by Zambia to the seat of the Tribunal.[187] Cameroon also transferred one of the alleged masterminds, Col Bogosora, to the seat of the Tribunal in Arusha.[188] Equally so, Kenya in collaboration with ICTR investigators arrested and delivered the biggest number of suspects to the UN detention facilities in Arusha.[189] In other clear cases of international cooperation, States arrested forty-five suspects in seventeen different countries making these arrests the biggest collaboration by States with the ICTR.[190] On the other form of cooperation, Mali signed an agreement on the enforcement of sentencing of the Tribunal, thereby making it the first country to provide prison facilities for the ICTR.[191]

8.4 Non-Cooperation by States

186 ICTR Second Annual Report (A/52/582/- S/1997/868 of 13 Nov 1997) para 62 at 16. See also Kate Gibson "Reliance Upon and Complications with State Cooperation" in *A compendium on the Legacy of the ICTR and the Development of International Law* at 2.

187 *The Prosecutor v Jean-Paul Akayeshu (Case No. ICTR-96-4-T): The Trial (procedural background)* at para 9.

188 *Decision on the Application by the Prosecutor for a Formal Request for Deferral by the Kingdom of Belgium in the Matter of: Theoneste Bagosora (Case Number: ICTR-96-7-D)* (1996) ICTR at 30-31 & 80. See also Art 8(2) of the ICTR Statute. See further Jose Alvarez "Crimes of States/Crimes of Hate: Lessons from Rwanda" (1999) *Yale Journal of International Law* at 401-403.

189 ICTR Third Annual Report at 7. See further ICTR Fourth Annual Report at 24-25.

190 International Crisis Group Africa Report No: 30 "International Criminal Tribunal for Rwanda: Justice Delayed" (17 June 2001) at 13.

191 United Nations: Cooperation and Assistance of States Key to Success of ICTR. Press Release 9 March 1999 http://unictr.irmct.org/en/news/cooperation-and-assistance-states-key-success-ictr. (accessed 23 May 2020). See also ICTR Fourth Annual Report at para 121.

Notwithstanding the above compliance by States and various international actors, and contrary to *erga omnes* character of the resolutions and the Statutes, there were many cases of non-cooperation.[192] In the case of ICTY, Republika Srpska failed to execute any of the arrest warrants addressed to it most notably that of Radovan Karadzic and Ratko Mladic, men dubbed the masterminds of the Bosnian genocide.[193] Equally so, the Federal Republic of Yugoslavia (Serbia and Montenegro) had a dismal record of cooperation with the Tribunal.[194] Croatia on the other hand, employed various tactics to avoid cooperating with the Tribunal.[195]

Similarly, Serbia did not fully cooperate with the Court in various ways. Over and above the refusal to arrest and surrender, amongst others, Sljivancanin, Mrksic and Radic (Vukovar Three), Serbia refused ICTY investigators access to documents relevant to crimes being investigated.[196] To up the ante on their non-cooperation, widely circulated footage shows its authorities refusing the ICTY Prosecutor access to its territory by returning her at the border.[197]

In respect of the ICTR and even though cooperation by States was deemed to be excellent, there were some incidents of non-cooperation.[198] Kenya for example, despite generally cooperating with the Tribunal, was accused of harbouring fugitives.[199] Similarly, the Democratic Republic of Congo (DRC) was accused by then Prosecutor, Carla del Ponte, of stifling cooperation by

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192 ICTY Twenty-fourth and Final Annual Report at para 47. See also ICTY Fourth Annual Report at para 150 & 187. See also Oellers-Frahm (n 128 above) at 304. See further Daryl Mundis "*Reporting Non-Compliance*" in Richard May et al (eds) "*Essays on the ICTY Procedure and Evidence, in Honour of Gabrielle Kirk McDonald*" (Kluwer Law International, 2001*)* at 422.

193 ICTY Third Annual Report at para 168. See also ICTY Fourth Annual Report at para 187. See further *The Prosecutor v Radovan Karadzic & Ratko Mladic (Indictment)* ICTY (1995): CASE NO. IT-95-5-I. See further Alan Clarke & David Gespass "Successes and Failures: Assessing the ICTY after Prosecutor v. Radovan Karadzic" (2016) *National Lawyers Guild Review* at 232.

194 Third ICTY Annual Report at para 169. To further support this non-cooperation by States it took Serbia 16 years to arrest and hand over Ratko Mladic to the Tribunal.

195 Peskin (n 179 above) at 218.

196 *The Prosecutor v Milemsksic Mirolsa et al: Case No IT-95-13-R61 (Review of Indictment Pursuant to Rule 61 of the Rules of Procedure)* ICTY (3 April 1996) at para 39. See also Faiza Patel &Anne-Marie La Rosa "The Jurisprudence of the Yugoslavia Tribunal: 1994-1996" (1997) *European Journal of International Law* at 135. The arrest warrant for the The Vukovar Three was issued on 8 March 1996 and they were only transferred to the Tribunal in 15 May 2002 (Milan Martic and Mile Mrksic transferred to The Hague press release) https://www.icty.org/en/sid/8099 (accessed 17 Nov 2022). See further Peskin (n 179 above) at 45-49.

197 Peskin (n 179 above) at 56.

198 See also ICTR Seventh Annual Report at 12. See also William Schabas "Barayagwiza v Prosecutor" (2000) *American Journal of International Law* at 566. International Crisis Group Africa Report at 13.

199 Paul Magnarella "Judicial Responses to Genocide: The International Criminal Tribunal for Rwanda and the Rwandan Genocide Courts" (1997) *African Studies Quarterly* at 26.

protecting some of the suspects wanted by her office.[200] The biggest challenge in respect of non-cooperation came from the situation State, Rwanda. In the case of Karamina, the non-cooperation came in the form of Rwanda asserting its concurrent jurisdiction under Article 8(2) of the ICTR Statute, even in cases where the Tribunal had indicated its desire to exercise its primary jurisdiction.[201]

In this regard, Zeidy posits that in the absence of any legally plausible reason from the Prosecutor why she allowed Rwanda to exercise its concurrent jurisdiction and not insist on the primary jurisdiction of the Tribunal, like in the *Bogosora Case*, it stands to reason that she was fully aware that the work of the Tribunal depended heavily on future cooperation by Rwanda.[202] In other words, the Prosecutor could not afford to lose Rwanda's cooperation by insisting on the primacy over national courts. Therefore, to secure cooperation, trade-offs had to be made in the form of deferring prosecution in the Karamina case to Rwandan national courts.[203] The interface between Article 8(1) and 8(2) (concurrent and primary jurisdiction) of the ICTR Statute further became apparent when the Prosecutor started investigating atrocities alleged to have been committed by the Rwandan Patriotic Front (RPF).[204] In these RPF cases, Rwanda insisted on exercising its concurrent jurisdiction in the same way that civilian perpetrators of genocide were dealt with by the Rwandan national courts.[205] The proposal by Rwanda appears to have been acknowledged by the OTP – wherein the second Prosecutor confirmed to the UNSC as part of the completion strategy and in line with Rule 11 *bis* of ICTR Rules of Evidence and Procedure – that he had engaged with the Rwandan government as to the options available for dealing with RPF cases in the context of concurrent jurisdiction.[206] As Mundis put it, Del Ponte realised that notwithstanding

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200 Ibid.

201 Kate Gibson "Reliance Upon and Complications with State Cooperation" in *A Compendium on the Legacy of the ICTR and the Development of International Law* at 2. See also Madeline Morris "The Trials of Concurrent Jurisdiction: The Case of Rwanda" (1997) *Duke Journal of Comparative & international Law* at n 91. Mohamed El Zeidy "From Primacy to Complementary and Backwards: (Re)-Visiting Rule 11Bis of the Ad Hoc Tribunals" (2008) *International and Comparative Law Quarterly* at 408.

202 Peskin (n 179 above above) at 175.

203 Gibson (n 201) at 2.

204 Rwanda: The Preventable Genocide International Panel of Eminent Personalities at para 22-17. Chiedu Moghalu "*Rwanda's Genocide: The Politics of Global Justice*" (Palgrave Macmillan, 2005) at 138-140. See also Leslie Haskell & Lars Waldorf "The Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences" (2011) *Hastings International & Comparative Law Review* at 56-57.

205 UN Doc. S/2002/842, Letter dated 26 July 2002 from the Permanent Representative of Rwanda to the United Nations addressed to the President of the Security Council at 6.

206 Statement by Justice Hassan Jallow, Prosecutor of the International Criminal Tribunal for Rwanda, to the United Nations Security Council of Jun 29 2004.

the *erga omnes* nature of the resolution and the primacy of the Tribunal, certain concessions have to be made to ensure continued cooperation by the situation State.[207]

9 ROLE OF THE UNSC AND OTHER INTERNATIONAL ENTITIES IN SECURING COOPERATION FOR THE TRIBUNALS

9.1 The UNSC

Having established the Tribunals, it was incumbent upon the UNSC to proactively assist and support the Tribunals in fulfilling their judicial mandates.[208] The obligations were further clarified when the UNSC requested the UNSG to urgently implement the resolutions and make practical arrangements for the effective functioning of the Tribunals.[209] True to the call, the UNGA assisted the Tribunals in setting up the necessary infrastructure and in appointing the necessary personnel for the Tribunals.[210] Furthermore, by 1994 the UNGA had allocated almost US$ 11million for the ICTY and entered into a four-year lease agreement with the host nation for the premises of the Tribunal.[211] Moreover, the budget allocation continued for the duration of the Tribunals and at some point, they were the only entities within the UN system to receive an increase in budget while other UN programs' budget allocations were slashed.[212]

Similarly, when some cases of non-cooperation were reported to the UNSC, this entity followed through on its undertaking and called upon recalcitrant States to cooperate with the Tribunal.[213] For example, when the ICTY lodged a complaint against Dragan Nikolic in 1995, the UNSC

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https://unictr.irmct.org/sites/unictr.org/files/statements/040629-prosecutor-jallow-sc-en.pdf (accessed 29 April 2023). See also Kate Gibson "Reliance Upon and Complications with State Cooperation" in *A Compendium on the Legacy of the ICTR and the Development of International Law* at para 3.2 wherein the author posits that the tussle between Rwanda and the ICTR led to a proposed agreement which provided amongst others that the Rwandan courts would have the first opportunity to prosecute RPF cases.

207 Gibson (n 206 above) at para 1.

208 Address to UNSC by the ICTY President McDonald (8 Dec 1998) https://www.icty.org/en/press/judge-gabrielle-kirk-mcdonald-president-international-criminal-tribunal-former-yugoslavia (accessed 15 Jan 2021).

209 Para 5 & 8 of UNSC resolution 827 (1993) and 955 (1994). ICTY Third Annual report at para 127-128 and 131. See also UNSC resolutions 978. ICTR Second Annual Report at 13.

210 UNSC Resolution 1165 (n 224 above).

211 ICTY First Annual Report at para 34-36.

212 See the Cost of Justice https://www.icty.org/en/about/tribunal/the-cost-of-justice (accessed 18 Jan 2021). See also Erna Paris "*Long Shadows: True, Lies and History*" (Toronto: Alfred Knopf, Canada, 2000) at 417.

213 ICTY Third Annual Report at para 200.

responded by adopting a resolution that demanded that the Bosnian-Serb government and other States of former Yugoslavia comply with the Tribunal cooperation request.[214] The strongest response to non-cooperation in relation to ICTY was with the adoption of Resolution 1207, wherein the UNSC condemned the failure of the Federal Republic of Yugoslavia to execute the arrest warrants issued against the Vukovar Three. In that resolution, the entity demanded the immediate and unconditional execution of the arrest warrants, including the transfer of the accused to the seat of the Tribunal.[215]

In addition, the UNSC established the United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES) and the multinational stabilisation force (SFOR).[216] Among the mandates given to the international forces was cooperation with the ICTY in the execution of its mandate. In this regard, paragraph 21 of Resolution 1037 provides that:[217]

> [U]NTAES shall cooperate with the International Tribunal in the performance of its mandate, including with regard to the protection of the sites identified by the Prosecutor and persons conducting investigations for the International Tribunal;

From the above paragraph it is clear that UNTAES, as a subsidiary organ of the UNSC, was under a general obligation to cooperate with the Tribunal. What is not apparent from the resolution is whether the cooperation obligations extended to the critical obligation of arrests and surrenders, as these activities are not explicitly mentioned.[218] Despite this uncertainty, during the deliberations leading to the adoption of the resolution, some Members interpreted the resolution to include the obligation to arrest and surrender.[219] For example, the representative of Egypt, while commenting on paragraph 21 of Draft Resolution 1037, and with no objection from other representatives stated that:[220]

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214 Mundis (n 192 above) at 425. See also UNSC resolution 1031 (15 Dec 1995).
215 UNSC resolution 1207 of 17 Nov 1998.
216 UNSC resolutions 1037 of 15 Jan 1996 at para 14 and UNSC resolution 1088 of 12 Dec 1996 at para 18.
217 UNSC Resolution 1037 of 15 Jan 1996 at para 21.
218 Susan Lamb "The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia" (2000) *The British Year Book of International Law* at 183.
219 See also speech by the Representative of United State during the UNSC 3607th Meeting (S/PV.3607) of 15 Dec 1995 at 20 on the deliberation on the adoption of UNSC Resolution 1031.
220 Security Council 3619th meeting 15 January 1996 (S/PV.3619) at 8. See also the speech by the representative of Italy speaking on behalf of the EU and other European countries at 7. See also *Prosecutor v Slavko Dokmanovic et al*: *Motion for the Release by the Accused Slavko Dokmanovic* Trial Chamber, ICTY, (case no. IT - 95-13a-PT, 22 Oct 1997) at 22-23 para 46. See also Lamb (n 218 above) at 183.

> [c]ooperation between UNTAES and the International Tribunal for the Former Yugoslavia should be comprehensive, with a view to arresting those indicted by the Tribunal and handing them over for trial […]

The aforementioned interpretation by Egypt was confirmed by the Trial Chamber in the *Dokmanovic Case,* wherein the Tribunal held that:[221]

> [D]okmanovic was arrested in the region of Croatia administered by UNTAES, by the forces of UNTAES, and with the participation of the Office of the Prosecutor. UNTAES legitimately executed the warrant of arrest, which had been directed to it pursuant to Rule 59 *bis* of the Rules […] Rule 59 *bis* provides for a method of arrest additional to that contemplated by Rule 55 and is fully supported by the Statute.

The Chamber concluded that in effecting the arrest of Dokmanovic, UNTAES never violated any principle of international law, instead it has discharged its cooperation obligations with the Tribunal in accordance with Rule 59 *bis* of ICTY. These actions by UNTAES, the Chamber reasoned, assured the effectiveness of the Tribunal and contributed to the maintenance of international peace and security.[222]

The implications of the *Dokmanovic Case* is that even though the founding Resolution 827 only required States to cooperate with the Tribunal, subsequent resolutions, i.e. Resolution 1037, read together with Rule 59 *bis* expanded the cooperation framework of the Tribunal to include cooperation by UN forces.[223] The cumulative effect of the foregoing was that the ICTY had some form of executive arm that could arrest and surrender those indicted by the Tribunal.

Regarding the ICTR, the UNSC had, to an extent, demonstrated its support for the Tribunal by further passing Resolutions 978 and 1165.[224] Resolution 978 reiterated the earlier cooperation obligations with the addition that States should arrest and detain those within their territory suspected of committing ICTR crimes.[225] Resolution 1165 on the other hand, established a third

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221 *Prosecutor v Slavko Dokmanovic* (n 220 above) at para 86. The decision of the Trial Chamber was confirmed by the Appeal Chamber (*Prosecutor v Slavko Dokmanovic et al: Decision on Application for Leave to Appeal by the Accused Slavko Dokmanovic* [Case No.: IT-95-13a-AR 72 of 11 Nov 1997] at 6). The reasoning in the *Dokmanovic Case* will equally be applicable in any Motion brought by any person arrested by SFOR. See also Lamb (n 218 above) at 194.

222 Ibid at para 88.

223 UNSC 3607th Meeting (S/PV.3607) (n 219 above) at 20.

224 UNSC resolutions 978 (1995) and 1165 (1998).

225 UNSC resolutions 978.

Trial Chamber in response to the difficulties encountered by the trial judges in discharging their duties.[226]

9.2 Other International Entities

To contribute to the peace process and the justice project, the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement) was signed outside the UN System by the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia under the auspices and or pressure from major world power.[227] Amongst the measures provided for in the Dayton Agreement was the establishment of the Implementing Force (IFOR) under the command of the North Atlantic Treaty Organisation (NATO) with the secondary mandate of assisting the ICTY with its primary mandate.[228]

To give effect to the aforementioned agreement, a Memorandum of Understanding was signed between the Tribunal and the Supreme Headquarters Allied Powers Europe (ICTY SHAPE MoU).[229] The ICTY SHAPE MoU spelt out the practical arrangements for support to the Tribunal that included, amongst others, the arrest and transfer of indictees by IFOR to the seat of the Tribunal.[230]

These NATO initiatives were welcomed by the UNSC in Resolution 1031 wherein the entity recognised that all parties to the Dayton Agreement should cooperate fully with the Tribunal.[231] Furthermore, the UNSC took cognisance of the fact that the parties to the Dayton Agreement have authorised IFOR to take such actions as required including the use of necessary force to

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226 UNSC Resolution 1165 (n 224 above).

227 Preamble to the Dayton Accord. See also ICTY Twelve Annual Report (A/60/267 S/2005/532 of 17 Aug 2005) at 38 para 196.

228 Art I & X of Annexure A1 to the Dayton Accord. See also ICTY Fourth Annual Report at para 76. SFOR was established by UNSC resolution 1088 which succeeded the NATO IFOR. See also Han-Ru Zhou "The Enforcement of Arrest Warrants by International Forces" (2006) *Journal of International Criminal Justice* at 209.

229 Press Statement on Signing of the Memorandum of Understanding between SHAPE and the International Criminal Tribunal for Former Yugoslavia of 09 May 1996 https://www.nato.int/cps/en/SID-49C0A60C-5CF4F0F6/natolive/news_24933.htm (accessed 13 Nov 2022).

230 Art V(4) & VII of the Annexure - 1A (Agreement on the Military Aspect of the Peace Settlement) to Dayton Agreement. ICTY Seventh Annual Report of 2000 at para 180See also Thomas Henquet "*Accountability for Arrest: The Relationship between the ICTY and NATO's NAC and SFOR* in Gideon Boas & William Schabas (eds) *International Criminal Law Developments in the Case Law of the ICTY* (Brill, 2003) at 128-133.

231 Preamble & para 5 of UNSC Resolution 1031(1995).

ensure compliance with the Agreement.[232] In expounding on the powers of IFOR during the deliberation on UNSC Resolution 1031, the representative of the United States stated that NATO "can now underscore this obligation by explicitly authorising IFOR to transfer indicted persons it comes across to the Tribunal and to detain such persons for the same purpose".[233] NATO confirmed this position by adopting a supplementary rule that allowed IFOR, in the execution of its assigned tasks, to detain and transfer any persons indicted by the ICTY who it come into contact with. [234]

The result of the abovementioned UNSC-approved NATO activities was that even though personnel from SFOR/IFOR were not under any strict legal obligation to cooperate with the Tribunal in terms of Resolution 827, they could as a result of these developments assists (under the stated condition) in the arrest and surrender of some of the indicted persons.[235] The aforementioned assistance by NATO Forces, like with the arrests by UNTAES, appears to be in line with Rule 59 *bis* of the Rules of Procedure in that, it allowed the Tribunal to transmit a copy of the warrant of arrest to appropriate authorities or an international bodies.[236]

The lawfulness of the arrest by NATO came before the Tribunal in *Mrksk* and *Simic Cases*.[237] The Trial Chamber, in deciding on the powers conferred by Articles 19(2) and 20(2) of the Statute as given effect to by Rule 59 *bis*, held that the powers are phrased in discretionary terms and clearly indicates that arrest warrants may also be directed to authorities of other international bodies like

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232 Ibid at para 5.

233 UNSC 3607th Meeting (S/PV.3607) (n 219 above) at 20. See also the Statement of representative of the United Kingdom and France at 8 & 21.

234 *Prosecutor v. Blagoje Simic et al: Decision on Motion for Judicial Assistance to be Provide by SFOR and Others* ICTY (2000) at para 43-44.

235 ICTY Seventh Annual Report (2000) at paras 157 & 183 and ICTY Fifth Annual Report at 32 para 124-125. See also Sean Murphy "Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia" (1999) *The American Journal of International Law* at 75-76. Among the accused detained by SFOR are Furundzija, Jelisic, Kos and Radic. For a different interpretation see *Prosecutor v Blagoje Simic et al (Decision on Motion for Judicial Assistance to be Provided by SFOR and Others)* ICTY (2000) at paras 58-63 wherein the Tribunal decided that SFOR and other international entities are under a mandatory legal obligation to cooperate with the Tribunal.

236 Zhou (n 228 above) at 205-206. See also Art 19(2) of the ICTY Statute wherein it provides that "Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial". See also para 5 of UNSCR 827.

237 *Prosecutor v Milemrksic Mirolsav et al (Decision on the Motion for Release by the Accused Slavko IDokmanovic)* ICTY Reports (1997). *Prosecutor v Blagoje Simic et al* (n 235 above) at para 58. See also Zhou (n 236 above) at 205-206.

SFOR/IFOR.[238] The principle in the *Mrksk* and *Simic Cases* was confirmed by the Appeal Chamber in the *Milutinovic Case,* wherein the Chamber held that:[239]

> "States" refers to all Member States of the United Nations, whether acting individually or collectively and, under a "purposive construction" of the Statute of the International Tribunal, Article 29 applies to "collective enterprise undertaken by States" such as an international organisation or its competent organ [...]

With this interpretation, the Appeal Chamber went further and held that the fact that Article 29 of the ICTY Statute is confined to States and does not mention other collective entities of States does not mean that the Tribunal should not also benefit from the assistance of States acting through such collective entities.[240] In addition, Rule 39 of the Rule of Procedure, the Chamber reasoned, allows the Prosecutor in the conduct of an investigation to seek the assistance of any State authority concerned, as well as of any relevant international body.[241] Similarly, Rules 40 *bis* and 59 *bis* allow the Tribunal to transmit either an order of transfer to provisional detention or a copy of the warrant of arrest of a suspect to an international organisation.[242] The Appeal Chamber concluded that Article 29 together with the relevant Rules of Procedure empower the Tribunal to issue binding orders to international organisations as collective enterprises of States, as it is to individual Member States.[243]

The decision implied that the Chamber did not make any distinction between obligations owed by individual or collective States, meaning that NATO and other relevant international organisations are, as per the *Milutinovic Case* decision, obliged to cooperate with the Tribunal.

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238 *Prosecutor v Milemrksic Mirolsav et al (Decision on the Motion for Release by the Accused Slavko Dokmanovic* ICTY Reports (1997) at paras 36-38. *Prosecutor v Blagoje Simic et al* (n 235 above) at para 58. See also Zhou (n 236 above) at 205-206.

239 *Prosecutor v Milan Mulitinovic et al (Decision on the North Atlantic Treaty Organisation* for Review) ICTY (2006) at para 8.

240 Ibid. See also Jacob Cogan "Cooperation with International Tribunals" (2007) *American Journal of International Law* at 166 & n 26. For a criticism of this judgment, see Henquet (n 230 above) at 139-142. See further *Prosecutor v Milan Kovacevic (Decision Refusing Defence Motion for Subpoena)* ICTY (23 July 1998) wherein the Trial Chamber held that Tribunal has no authority to issue a subpoena to the Organisation for Security and Cooperation in Europe (OSCE), it being an international organisation and not a State, pursuant to Rule 54.

241 Rule 39(iii) of ICTY Rules of Procedure.

242 Rule 40 *bis* (A), (B) & (E) & 59 *bis* (A) of the Rules of Procedure. See also *Prosecutor v Milan Mulitinovic et al* (n 239 above) at para 10.

243 *Prosecutor v Milan Mulitinovic et al* (n 239 above) at 8.

Notwithstanding the aforementioned decision by the ICTY, Figa-Talamanca posits that the obligation to cooperate is only incumbent on States acting individually, not on NATO as an organisation.[244] To advance his argument, Figa-Talamanca postulates that while States have the right to collectively do what they can do individually, NATO as an organisation does not necessarily acquire the obligations of each of its Member States, it is for the physically capable contributing States that are authorised to effect any arrest in the territories they control.[245] According to Figa-Talamanca, this observation is clarified by the fact that the obligation to cooperate with the Tribunal by the contributing States is not conditional upon NATO's Rules of Engagement; States cannot rely on collective action to forego their individual obligations.[246]

Gaeta, on the other hand, holds a slightly different view by postulating that the authority of NATO to effect arrests is not in terms of UNSC 827 but is arguably grounded on a treaty provision, namely Article VI, paragraphs 4 and 5 of Annex 1-A to the Dayton Agreement. Under these Articles, the North Atlantic Council is entitled to confer upon the multinational force's additional powers, aimed at ensuring cooperation with the Tribunal.[247] Whilst NATO has the authority to arrest persons accused by the Tribunal, neither IFOR/SFOR nor States participating in the multinational force are, in terms of Resolution 827, obliged to execute arrest warrants.[248] Such a duty can only be imposed by a UNSC resolution. Alternatively, it can derive from a conventional undertaking between NATO and the competent authorities of Bosnia and Herzegovina.[249]

Despite the arguments by the aforementioned authors, the arrests by the international forces and contributing States and the "purposive construction" by the Tribunal were heralded as a critical turning point in the functioning of the Tribunal. These actions had the effect of transforming the enforcement system of the ICTY from a not-so-comprehensive direct system of cooperation to a comprehensive direct enforcement system akin to the two Military Tribunals, meaning Cassese's giant had some form of limbs to walk and work.[250]

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244 Niccolo Figa-Talamanca "The Role of NATO in the Peace Agreement for Bosnia and Herzegovina" (1996) *European Journal of International Law* at 173-174.

245 Ibid.

246 Ibid. See also John Jones "The Implications of the Peace Agreement for the International Criminal Tribunal for the former Yugoslavia" (1996) *European Journal of International Law* at 239.

247 Paola Gaeta "Is NATO Authorized or Obliged to Arrest Persons Indicted by the International Criminal Tribunal for the Former Yugoslavia?" (1998) *European Journal of International Law* at 180-181.

248 Ibid.

249 Ibid.

250 ICTY Fourth Annual Report at para 133 and Fifth Annual Report at para 123. See also Sean Murphy "Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia" (1999) *The American Journal of International Law* at 13 and Victor Peskin & Mieczysław Boduszyński

9.3 Support by the OAU/AU and the EU to the ICTR

The establishment of the ICTR was adopted with the supporting vote of one of the OAU Member States, Nigeria. In his statement after the positive vote, the Nigerian delegate appealed for cooperation by all States and relevant intergovernmental organisations.[251] The delegate further stated that cooperation obligations with the Tribunals should not only include taking measures necessary under domestic laws to implement the provisions of the Resolution and the Statute, but should also include contributing the necessary financial resources, equipment and expert personnel to enable the Tribunal to function effectively and expeditiously.[252]

It is against the aforementioned background that OAU rallied behind the Tribunal.[253] For example, the OAU Council of Ministers, in its sixty-first session, resolved that the international community, the UN and the UNSC should accelerate the operationalisation of the ICTR. Furthermore, the Ministers requested the OAU and African countries to cooperate fully with the Tribunal.[254] Equally so, the Secretary-General of the OAU pledged his support and cooperation with the Tribunal.[255] In the same breath, the International Panel on Eminent Personalities established by the OAU to investigate the genocide in Rwanda lauded the work being done by the Tribunal.[256]

The European Union, on the other hand, entered into an agreement with the ICTR with the aim of funding projects strengthening the managerial and operational capacity of the Tribunal. Amongst the projects funded were those that facilitated testimony from witnesses, expedite judicial proceedings and information technology projects intended to remedy technical

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"International Justice and Domestic Politics: Post-Tudjman Croatia and the International Criminal Tribunal for the Former Yugoslavia" (2003) *Europe-Asia Studies* at 1120.

251 UNSC Forty-ninth Year 3453rd Meeting 8 Nov 1994: Statement by the delegate of Nigeria at 13.

252 Ibid.

253 African Commission on Human and People Rights: Resolution on Rwanda (ACHPR/Res.12(XVI)94) of 03 Nov 1994. See also

254 OAU Council of Minister Sixty-first Ordinary Session 23 – 27 Jan 1995: Resolution on the situation in Rwanda (CM/Res/1559 (LXI)).

255 ICTR Second Annual Report at 13.

256 Press release: OAU International Panel of Eminent Personalities visit to the Tribunal (05 Dec 1999). https://unictr.irmct.org/en/news/oau-international-panel-eminent-persons-visits-tribunal (accessed 05 May 2023). See also UN: EU Statement on Reports of the ICTR and the ICTY 61st session of the UNGA of 10 Sep 2006. See also Communique of Regional Summit on Rwanda, Nairobi (7 Jan 1995) at 2. https://search.archives.un.org/uploads/r/united-nations-archives/e/1/9/e199b60bf0dd4101a60065b0710d5d8d26eb6b4b33091b16ade780df20a930cb/S-1063-0018-0002-00001.pdf (accessed 04 May 2023).

limitations.[257] Against this backdrop, European countries assisted with the arrest and surrender of some of the suspects who had taken refuge in their respective countries.[258] Belgium had, for example, arrested and transferred Elie Ndayambaje and Joseph Kanyabashi to the seat of the Tribunal in Arusha. Germany also arrested and transferred ex-Rwandan minister Augustin Ngirabatware to the Tribunal.[259]

From the above actions by both the OAU/AU and the EU, it could be argued that the arrests and surrenders by both African and European countries were in some ways influenced by the support from the mother bodies, meaning once there are no conflicting messages by relevant international organisations cooperation with international tribunals becomes easy to achieve.

10 PARALYSIS WITHIN THE UNSC

Notwithstanding the above assistance by the UNSC and other entities, Paris posits that much was expected, especially from the UNSC.[260] As subsidiary organs of the UNSC, the Tribunals could only look up to this entity to enforce their orders. With its wide-ranging powers under Chapter VII, the UNSC has various options to deal with non-compliance by States with the Tribunals' orders.[261] The assistance by UNSC is important because according to Mundis, every developed criminal justice system in the world relies on an effective means of compliance in order to enforce its judicial orders, decisions and judgments.[262] In the event like the one discussed in the preceding paragraphs wherein States contrary to their cooperation obligations, fail to comply with orders and decisions, the Tribunals, with no independent military or police force of their own, they should be able to look elsewhere for assistance.

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257 Press release "The European Commission to Fund Tribunal Projects" 05 Oct 2004 https://unictr.irmct.org/en/news/european-commission-fund-tribunal-projects (accessed 13 June 2023).

258 ICTR Press release (21 May1997): Alfred Musema Transferred to Arusha. https://unictr.irmct.org/en/news/alfred-musema-transferred-arusha (accessed 15 June 2023). See also ICTR Eighth Annual Report at 17.

259 ICTR Press release (11 Nov 1996) https://unictr.irmct.org/en/news/elie-ndayambaje-and-joseph-kanyabashi-transferred-arusha (accessed 15 June 2023).

260 Address to the Security Council by Carla Del Ponte 30 Oct 2002. See further the address to the UNSC of 08 Dec 1998 by the President of ICTY, Gabrielle MacDonald. Erna Paris "*Long Shadows: True, Lies and History*" (Toronto: Alfred Knopf, Canada, 2000) at 417.

261 See also Art 41 of the UN Charter.

262 Mundis (n 192 above) at 421.

Contrary to these expectations, Mundis states that the UNSC did not adequately assist the Tribunals in their cooperation battles with some of the States.[263] To illustrate this lackadaisical approach, the first President of ICTY transmitted five cases of non-cooperation by Serbia to the UNSC, with only one case eliciting a response.[264]

According to the President of the ICTR, the Tribunal reported Rwanda to the UNSC after Rwanda withdrew its cooperation in the RPF investigations.[265] After this reporting, it took the UNSC almost six months to respond to ICTR's complaint and when it did, the message was subdued as it only reminded Rwanda of its cooperation obligations under Resolution 955 without any further actions.[266] Peskin makes the same point that when it comes to non-compliance, the UNSC did not raise the issue of non-cooperation to the status of major international concern and or was not willing to invoke its wide-ranging powers under Chapter VII by for example, imposing or threatening to impose further economic sanctions. To further compound matters the UNSC lifted the already imposed sanctions against Serbia as a bargain for a peace agreement.[267] This lacklustre approach by the UNSC was summed up by the Tribunal Prosecutor Arbour, when she lambasted the entity by stating:[268]

> The buck stops with the Security Council. That's where we finally have to denounce non-compliance. They created us. Either they are going to back us up or they are spending a lot of good money for nothing.

As a result of this lacklustre approach, Arbour further posits that the Tribunals' cooperation framework was weakened and States' non-cooperative posture with the Tribunals was emboldened.[269] On Arbour's assertion, it could be argued that the inactions of the UNSC transformed the enforcement systems of the Tribunals from non-comprehensive direct to indirect

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263 Ibid.

264 UNSC Resolution 1022 (1995) of 22 Nov 1995 at para 1. See also Mundis (n 192 above) at 425-427 and Gabriel McDonald "Problems, Obstacle and Achievements of the ICTY" (2004) *Journal of International Criminal Justice* at 462-463. See further ICTY Third Annual Report at para 200. Cases reported to the UNSC were that of the Vukovar Three, Radovan Karadzic and Ratko Mladic. Only the case of the Vukovar Three elicited a respond from the UNSC.

265 Statement by the President of the Security Council 18 Dec 2002 (UNSC Doc: S/PRST/2002/39). See also UNSC resolution 1503 (2003) at para 3. See also Peskin (n 179 above above) at 217.

266 Moghalu "*Rwanda's Genocide: The Politics of Global Justice*" (Palgrave Macmillan, 2005) at 140.

267 UNSC Resolution 1031(1995) at para 19. See also Peskin (n 179 above) at 47 & 49.

268 Paris (n 260 above) at 417. See also Peskin (n 179 above) at 49. See further the address to the UNSC of 08 Dec 1998 by the President of ICTY, Gabrielle MacDonald.

269 Ibid.

enforcement systems because, in respect of cooperation, the Tribunals were left to the goodwill of States to decide whether to cooperate or not.

11 REASONS ADVANCED BY STATES FOR NON-COOPERATION

According to the Second ICTY Annual Report States advanced various reasons for non-cooperation with the Tribunal, some plausible and some not so plausible. For example, Croatia invoked the absence of implementing legislation for delayed or partial non-cooperation with the Tribunal.[270] The requirement for implementing legislation, as with extradition, appears to be the weakness in the two Resolutions, because States exploited these requirements by delaying or not enacting legislation in an attempt to stifle or delay cooperation with the Tribunals. In other words, if States do not adopt legislation and absent any UNSC actions, the Tribunals could not discharge their mandate.

According to Cassese, other reasons which impeded cooperation with the Tribunals were political considerations.[271] This political expediency was succinctly captured by Peskin and Boduszynski when they opined that:[272]

> [o]ne cannot understand the process of international justice without examining the domestic politics surrounding state cooperation. The United Nations ad hoc criminal tribunals are highly dependent on domestic political dynamics to fulfil their mandates to prosecute violations of international humanitarian law.

Nice and Tromp agreeing with the above authors, state that the political reasons manifested in the investigations of the RPF and arrest warrants issued against Erdemovic, Karadzic, Mladic, Croatian Generals, and the Vukovar Three.[273] According to the authors, the profile of the indictees appears to play a role, in that the higher the rank of the indictees, the more difficult it became for the requested States to fulfil their cooperative obligations.[274]

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270 ICTY Second Annual Report at para 134.
271 Cassese (n 168 above) at 17.
272 Peskin & Boduszynski (n 250 above) at 1117.
273 ICTY Third Annual Report at paras 56-57 and 203. See also Mundis (n 192 above) at 425-7.
274 Geoffrey Nice & Novenka Tromp "International Criminal Tribunals and Cooperation with States: Serbia and the Provision of Evidence for the Slobodan Milosevic Trial at the ICTY" (2018) *Arcs of Global Justice* at 455. See also Juan Mendez "The Arrest of Ratko Mladic and Its Impact on International Justice and Prevention of Genocide and Other International Crimes" in The Holocaust and the United Nations Outreach Programme (2012) *Discussion Paper Journal* at 89-91.

From the abovementioned analysis, and as with other models of cooperation in international penal matters, such as extradition, it appears other factors determine the level of cooperation by States. These factors are considered notwithstanding the *erga omnes* nature of the resolutions and the acceptance by the international community that the establishment of the Tribunals would contribute to the common purpose of international peace and security. This point underscores the fact that international tribunals/courts operate in an unpredictable political environment and are expected to navigate the said environment without necessarily compromising the credibility of the institution.

12 CONCLUSION

It is clear from the above legal framework that the principle of cooperation plays an important role in international law. In fact, almost the whole of public international law appears to be anchored on international cooperation, it is even suggested by some authors that apart from the law of coexistence there is a new structure of international law called 'international law of cooperation'. This new structure of law is no longer concerned with rules of abstention or peaceful coexistence but with positive actions to achieve the common good. The international law of cooperation manifests itself in States entering into agreement and establishing international organisations to advance the common good. This law is also defined to include cooperation for development or as a form of solidarity. Proponents of the law of international cooperation appear to be from the developing countries, the primary reason being their need to use international law of cooperation to achieve substantive equality in the form of development. For cooperation to happen, development is framed as a common good to be pursued by the international community. Alternatively, the developed world should show solidarity with the underdeveloped world to assist them in their development agenda.

Countering the international law of cooperation suggestion is the argument that the law of coexistence, as conceived in Westphalia, continues to endure and reproduce itself in its original form. For this grouping, States have always voluntarily entered into agreements to advance their national interests, meaning cooperation has always been part of international law to advance national interests. Therefore, the argument that there is a new structure of international law called 'the law of international cooperation' is misplaced.

As a principle of international law, cooperation is not defined and does not have meaning in itself, i.e. it can only be understood by the outcome it wants to achieve. It is, therefore, an obligation of means, not of result. The principle finds extensive application in, amongst others, the Law of the Sea and during disasters. In times of disaster, the principle of cooperation appears to be closely related to solidarity because they tend to bring people together.

Though the structure of the law as encapsulated in the UN Charter tends to follow classical international law, cooperation plays a pivotal role and is adopted as one of the purposes to be achieved. Cooperation as a purpose finds application in various field-specific UN instruments. For the principle of cooperation to achieve what it set to achieve, it requires the establishment of international institutions to coordinate and enforce obligations arising out of the agreements.

Cooperation in the form of extradition, mutual legal assistance and transfers or surrenders also plays a critical role in international criminal law. The role of cooperation became clear during the ad hoc tribunals, where the founding authority, the UNSC, unequivocally decided that States should cooperate with the Tribunals. On account of the resolutions, States played a pivotal role in assisting the Tribunals to discharge their mandates. Germany, for example, enacted a law that allowed aliens to be transferred to the ICTR. Equally so, Kenya in cooperation with the ICTR Prosecutor rounded up suspects and surrendered them to the seat of the Tribunal. Situation States on the other hand adopted a dual posture, assessing individual cases and basing their decision to cooperate (or not) on various factors.

The UNSC was central to the Tribunals as they were established under the entity's resolutions. However, and contrary to expectations, the UNSC did not adequately assist the Tribunals to achieve their primary mandates. For example, where cases of non-cooperation were reported, the entity failed to invoke its wide-ranging powers to coerce recalcitrant States to fulfil their cooperation obligations with the Tribunals. This posture by the UNSC brings forth the motive behind the establishment of the Tribunals. If the Tribunals were going to contribute to the UNSC's primary mandate of international peace (common good), it follows that cooperation or assistance to the Tribunals should be one of the priorities of the UNSC. From the posture adopted by the UNSC, it appears other factors which fell outside the judicial mandates of the Tribunals were taken into account before any action could be taken against recalcitrant States, meaning the entity was complacent in the proper function of the Tribunals.

Other international players like the EU and the OAU played a key role in assisting or exerting pressure on situation States to fulfil their cooperation obligations. The arrests and surrenders by UNTAES and NATO in the ICTY were heralded as a turning point in international criminal law, as it transformed the enforcement system of the Tribunal to a direct enforcement system similar to the Military Tribunal. The Tribunals, over and above their territorial and temporal jurisdiction, laid the foundation for the establishment of the ICC.

CHAPTER THREE

THE FRAMEWORK FOR COOPERATION UNDER THE ROME STATUTE

1 INTRODUCTION

The cooperation framework of the Rome Statute is a key component of the ICC system. It builds on the foundation laid down in international cooperation in criminal matters and by other international tribunals.[1] As a treaty body, the ICC does not have an enforcement body of its own, meaning for a successful implementation of its mandate, the ICC heavily depends on the support generated from its stakeholders.[2] For States Parties, the cooperation obligations are far-reaching since its jurisdiction is created to investigate and prosecute the most serious crimes of international concern.[3]

This chapter analyses the cooperation framework of the Statute and how this framework functions in the context of the conflictual triangular relationship between the ICC, the AU and the UNSC. To achieve this aim, the chapter first looks into the legislative framework as provided for in Part 9 of the Statute. Secondly, to put the cooperation framework into its proper context, a conceptual foundation of the framework as a model of cooperation, is analysed. Thirdly, the cases that came within the jurisdiction of the Court are analysed to determine how these decisions may have contributed or contribute to the conflictual triangular relationship. Lastly, the chapter ends with concluding remarks.

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1 Clause Kress "*The International Criminal Court as a Turning Point in the History of International Criminal Justice*" in in Antonio Cassese, Dapo Akande & Acquaviva Guido (eds) "*The Oxford Companion to International Criminal Justice*" (Oxford, 2009) at 152.

2 Pascal Turlan "*The International Criminal Court Cooperation Regime*" in Olympia Bekou & Daley Birkett (eds) "*Cooperation and the International Criminal Court: Perspectives from Theory and Practice*" (Brill, 2016) at 59.

3 Robert Cryer *et al* "*An Introduction to International Criminal Law and Procedure*" (Cambridge University Press, 2007) at 405.

2 THE ROME STATUTE PROVISIONS ON COOPERATION

The cooperation framework of the Rome Statute is contained in Part 9 of the Rome Statute. The framework is premised on a general obligation of States Parties to cooperate with the Court authorities.[4] In this regard, Article 86 is clear that:[5]

> 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.

Article 87 of the Rome Statute, however, gives effect to the aforementioned general obligation by detailing the procedures to follow when requesting cooperation from States Parties and how the requested State should respond to such request.[6] The procedures include amongst others, the method of delivery, the language requirement for transmission of the request, the confidentiality of such a request and the protection of information in order to ensure the safety of witnesses and victims.[7] In addition, the Court may also request any intergovernmental organisation to, within its mandate, provide information or documents, or other forms of cooperation and assistance which may be agreed upon with such an organisation.[8] Article 87 concludes by providing that where a State Party fails to comply with a cooperation request contrary to the provision of the Statute and thereby preventing the Court from carrying out its mandate, the Court may make a finding and refer the recalcitrant State to the Assembly of States or to the UNSC where the matter emanates from that entity.[9]

Article 88 similarly gives effect to the abovementioned general obligation by calling upon States Parties to ensure that there are procedures available under their national laws for all forms of cooperation.[10] The ultimate tool for cooperation is capped by the crucial responsibility given to States Parties to arrest and surrender to the Court those indicted for Rome Statute crimes.[11] In this regard, Article 89(1) is unequivocal, providing that once the request for arrest and surrender

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4 Georghios Pikis "*The Rome Statute for the International Criminal Court: Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments*" (Brill, 2010) at 639.

5 Art 86 of the Rome Statute. See also Hans-Peter Kaul "*The ICC and International Cooperation - Key Aspects and Fundamental Necessities*" in Mauro Politi & Federica Gioia (eds) "*The International Criminal Court and National Jurisdiction*" (Routledge, 2016) at 86.

6 Art 87 of the Rome Statute.

7 Art 87(1)-(4) of the Rome Statute.

8 Art 87(6) of the Rome Statute.

9 Art 87(7) of the Rome Statute.

10 Art 88 of the Rome Statute.

11 Art 89 of the Rome Statute. See also Kaul (n 5 above) at 89-90.

is transmitted, States Parties shall, in accordance with the provisions of the Statute and the procedure under their national laws, comply with requests for such arrests and surrenders.[12] Article 89(1) further provides that if there are any challenges experienced by the requested State, it must inform the Court promptly, which will then make a determination regarding the said challenges.[13]

On the other hand, Article 93 provides for other forms of cooperation in addition to those mentioned in the aforementioned articles.[14] These include identifying and establishing the whereabouts of persons, the taking of evidence, the questioning of persons, facilitating the voluntary appearance of persons as witnesses, the service of documents, execution of searches and seizures, the freezing of assets and the catch-all phrase "any other type of assistance which is not prohibited by the law of the requested State."[15] Closely related to Article 93 is Article 87(6). In terms of the Article, the Court may ask assistance from any intergovernmental organisation over and above the request to States as provided for in Article 93. This can include the provision of information or documents or, like the catch-all phrase in Article 93, "any assistance which may be agreed upon with such an organisation and which are in accordance with its competence or mandate."[16]

Concerning the matter of cooperation related to immunities, Article 98 provides that:[17]

> The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

Closely related to the above provision is that in similar circumstances, the Court may not proceed with a request for arrest and surrender if it cannot obtain the upfront consent and cooperation of a sending State if it is not a Party to the Statute.[18]

12 See also 90, 91 and 92 of the Rome Statute.
13 Art 89(2) and (4) of the Rome Statute.
14 Art 93 of the Rome Statute.
15 Art 93(1) of the Rome Statute.
16 Ibid.
17 Art 98(1) of the Rome Statute.
18 Art 98(2) of the Rome Statute.

By putting together this elaborate cooperation framework, the drafters seem to be fully aware that the Court is wholly dependent on full, effective, and timely cooperation, especially from States Parties. Without it, the Court will simply be a so-called "giant without limbs".[19]

3 MODEL OF COOPERATION AS ENCAPSULATED IN THE ROME STATUTE

3.1 Background

Kress and Prost opine that some of the cooperation challenges experienced by the ICC may be traced back to the negotiation of the Rome Statute.[20] According to the authors, Part 9 of the Statute was one of the most challenging, in that consensus was difficult to achieve, resulting in its final text only being finalised shortly before the end of the conference.[21] During the deliberations, various models of cooperation in criminal matters were considered for the nascent court. Firstly, the inter-state model, also referred to as a horizontal model of cooperation, was considered.[22] In an inter-state model, the relationship between States and the international court was supposed to be shaped by the pattern of inter-state cooperation in criminal matters, as with extradition.[23] Under this model, the Court will not have had any superior authority over States except for the legal power to adjudicate crimes committed by individuals subject to State authority.[24] Cassese asserts that apart from this power over an individual, the Court will not in any way order States or international organisations to lend their cooperation, let alone exercise coercive powers within the territory of the said States or over international organisations.[25]

The second model considered for the court was what Cassese termed the "supra-state" model or the vertical model of cooperation. This model assumes that the envisioned court will be vested with sweeping powers over both the individual subjected to the sovereignty of a State and towards States.[26] According to Cassese, in this model of cooperation, the court will be empowered to,

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19 Antonio Cassese "On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law" (1998) *European Journal of International Law* at 13.

20 Clause Kress and Kimberly Prost "*Part 9 International Cooperation and Judicial Assistance*" in Otto Triffterer and Kai Ambos "*The Rome Statute of the International Criminal Court: A Commentary*" (Hart Publishing, 2016) at 2004 and 2008.

21 Ibid. See also Kress (n 1 above) at 152.

22 Ibid.

23 Ibid.

24 Ibid.

25 Antonio Cassese "The Statute of the International Criminal Court: Some Preliminary Reflections" (1999) *European Journal of International Law* at 164-165.

26 Ibid.

amongst others, issue binding orders to States and set in motion enforcement mechanisms where there are cases of non-compliance with orders. In addition, the court will be the final arbiter on evidentiary matters, such as States not being allowed to withhold evidence on grounds of self-defined national interests or to refuse to execute arrest warrants or other court orders. In short, Cassese's supra-state model would have endowed the international court with authority over States, markedly distinguishing it from other international institutions.[27]

Kaul surmises the abovementioned divergent views by stating that the Rome Statute's cooperation framework may be regarded as a kind of a compromise or hybrid system, containing both elements of the inter-state model of cooperation and Cassese's "supra-state" model.[28] As a compromise, Kaul argues that the Court's creators' wishes were that the issue of cooperation should be handled in such a way that the principle of State sovereignty is still respected.[29]

3.2 Rome Statute Cooperation Framework as an Inter-State Model of Cooperation (Horizontal Model)

As an inter-state model of cooperation, Kaul asserts that even though there is, in terms of Article 86, a general obligation on States Parties to cooperate with the Court, there remains in practice a lot of discretion on the part of States Parties to choose either to cooperate or not with the Court.[30] For example, when a States Party receives competing requests for extradition from a State that's not a Party to the Statute, for the same conduct for which the Court is seeking that person's surrender, the requested States Party may refuse to surrender that person to the Court and instead extradite that person to the requesting non-State Party. Equally so, a State Party may refuse to surrender a person to the Court when the cooperation request will make the requested State Party act inconsistent with its obligations under international law or diplomatic immunity of

27 Ibid. See also Olympia Bekou & Daley Birkett "*Cooperation and the International Criminal Court: Perspective from Theory to Practice*" (Brill, 2016) at 11.

28 Kaul (n 5 above) at 87. See also Rod Rastan "Testing Co-operation: The International Criminal Court and National Authorities" (2008) *Leiden Journal of International Law* at 432. See further Annalisa Ciampi *"Legal Rules, Policy Choices and Political Realities in the functioning of the Cooperation Regime of the International Court"* in Olympia Bekou & Daley Birkitt *"Cooperation and the International Criminal Court: Perspective from Theory and Practice"* (Brill, 2016) at 11.

29 Kaul (n 5 above) at 87. See also Cherif Bassiouni "The ICC - Quo Vadis" (2006) *Journal of International Criminal Justice* at 422.

30 Kaul (n 5 above) at 87. See also Ciampi (n 28 above) at 12-13.

a person or property of a third State, and lastly when States put forward sovereignty claim, that State may similarly refuse to surrender that person to the Court.[31]

Rastan argues that the Rome Statute cooperative framework, as an inter-state model, is partly supported by the fact that some articles dealing with cooperation do not use obligatory and compliance language but that which appears to reflect the practice of inter-state cooperation.[32] Rastan further points out that even though the Rome Statute does not allow reservations to the treaty, cooperation is subject to various qualifications and conditions. Having received a request for cooperation, a State may seek consultation, modification, or postponement of the said cooperation request.[33] Rastan concludes by asserting that most of the aforementioned conditions reflect that the Statute's cooperative framework intends to regulate the relationship between States Parties and the Court, with no intention to drastically change the existing international cooperation in criminal matters.[34]

Bassiouni sums up the inter-state cooperation framework by asserting that:[35]

> The ICC was never intended to be a supra-national legal institution nor would it have been accepted as such by most states. It was conceived as a treaty-based inter-national legal institution of last resort that would preserve the primacy of national legal systems of the contracting parties […]

From the above analysis, the Rome Statute clearly follows the established structure of international law in that it is based on, amongst others, sovereign equality and consent of States Parties. This observation is supported by Article 90, wherein the Statute appears to leave the law of extradition untouched. Related to Article 90 is the States Parties' rights to refuse cooperation in the competing extradition request and the fact that the Court is not empowered to issue orders

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31 Art 93(9), 97 & 98 of the Statute. See further Goran Sluiter "*Cooperation of States with International Tribunals*" in Antonio Cassese, Dapo Akande & Acquaviva Guido "*The Oxford Companion to International Criminal Justice*" (Oxford, 2009) at 165.

32 Rastan (n 28 above) at 433. See also art 87(1)(b), (4), (5) & (6) amongst others.

33 Ibid. See also art 72(7)(a)(1), 89(2), 91(4), 93(3) and (9)(a)(i), 96(3), 94(4)(b) of the Rome Statute

34 Rastan (n 29 above) at 433-434. See also Sluiter (n 31 above) at 84 and 173-174. See further Bert Swart "*General Problems*" in Antonio Cassese, Paulo Gaeta & John Jones (eds) "*The Rome Statute of the International Criminal Court: A Commentary*" (2002) at 1595 and William Schabas "*Complementarity in Practice: Creative Solutions or a Trap for the Court?*" in Mauro Polity and Federica Gioia (eds) "*The International Criminal Court and National Jurisdictions*" (Ashgate, 2008) at 25-26, Louise Arbour "The Relationship Between the ICC and the UN Security Council" (2014) *Global Governance* at 198 and Hakan Friman "*Cooperation with the International Criminal Court: Some Thoughts on Improvement Under the Current Regime*" in Mauro Politi & Federica Gioia (eds) "*The International Criminal Court and National Jurisdiction*" (Routledge, 2016) at 93.

35 Bassiouni (n 29 above) at 422.

to that effect. Notwithstanding the foregoing, the Statute strengthens the cooperation obligations by making it somewhat onerous for States Parties to exercise their discretion. One example is urging States Parties to always give priority to the Court in case of competing cooperation request from both States Parties and non-States Parties.[36]

3.3 Rome Statute Cooperative Framework as Supra-State Model of Cooperation (Vertical Model)

Regarding the Rome Statute's cooperation framework as a supra-state model, Rastan quotes various articles to show its supra-state characteristics. Article 86 of the Rome Statute, which provides that "States Parties shall […] cooperate fully with the Court […]", is an indication of such a supra-state model of cooperation.[37] That is because, despite the ensuing articles not all employing mandatory language, their interpretation is guided by the aforementioned general obligation.[38] Furthermore, by using such mandatory language in the general obligation, the drafters of the Statute's wishes were that the Court should enjoy a measure of superior powers to that of States.[39] In addition to the general provisions, the Court is also the final arbiter of disputes over the extent of cooperation owed to it by States Parties.[40] Once a finding is made, the Court may report the recalcitrant States Party to the Assembly of States Parties or to the UNSC, where this entity has triggered the jurisdiction of the Court.[41] Rastan concludes by stating that all these factors, taken cumulatively, indicate a kind of supra-state model of cooperation.[42]

Swart, concurring with Rastan, argues that the first thing which stands out in the Rome Statute is that it tries to avoid terminology that is generally associated with inter-state cooperation.[43] In order to substantiate his argument, Swart cites Article 93, which employs the term "other forms of

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36 See art 93(4).
37 Rastan (n 29 above) at 432-433. See also Ciampi (n 28 above) at 12-13. See also Alexis Demirdjian "Armless Giants: Cooperation, State Responsibility and Suggestions for the ICC Review Conference" (2010) *International Criminal Law Review* at 197.
38 Ciampi (n 28 above) at 11-12. See also art 89(1) of the Statute.
39 Rastan (n 29 above) at 432-433. See also Ciampi (n 28 above) at 12-13. See also Demirdjian (n 37 above) at 197.
40 Rastan (n 29 above) at 432-433. Art 119(1) of the Rome Statute. See also Kress and Prost (n 27 above) at 2009.
41 Art 87(7) & 119(1) of the Rome Statute. Art of the Rome Statute. See also Kress and Prost (n 27 above) at 2009.
42 Rastan (n 29 above) at 432-433. See also Kress and Prost (n 27 above) at 2009.
43 Swart (n 34 above) at 1594-1595 and 2081.

cooperation" as opposed to the term "mutual assistance," to denote a supra-state model.[44] Employing such terminology is, according to Swart, a clear indication that the drafters of the Statute wanted its cooperate framework to be different from that which is generally applied in inter-state relations.[45] Furthermore, it was hoped that phrasing the articles in such general language will allow, as juxtaposed to inter-state cooperation, for a broad range of assistance and flexible application.[46] Swart surmises the above by stating that apart from the three limited exceptions, States Parties are obliged to comply with requests presented by the Court, meaning the Statute's cooperative framework has clear supra-state features.[47]

From the above authors' analysis, the Rome Statute's cooperation framework has features of both the inter- and supra-state models. However, as per Bassiouni, the ICC "was never intended to be a supra-national legal institution nor would it have been accepted as such by most states". Therefore, the supra-state model argument can best be described as a statement of intent akin to Article 1 of the UN Charter and not necessarily as a general obligation.

4 IMPLEMENTING THE LEGISLATIVE FRAMEWORK

4.1 Darfur Referral

The Rome Statute cooperation framework came to the fore with the referral of the situation in Darfur to the Court by the UNSC.[48] The referral resolution was adopted following a determination by the UNSC that the situation in Darfur constituted a threat to the common purpose of international peace and security.[49] With this referral, Sudan came under the jurisdiction of the Court.[50] In respect of cooperation, the resolution provides that:[51]

> [S]udan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor […] and, while recognising that States not

44 Ibid.
45 Ibid. See also Kaul at (n 5 above) 90-91.
46 Ibid. See also Kress and Prost (n 27 above) at 2009.
47 Swart (n 34 above) at 2081. See also art 93 of the Rome Statute. The same could be said for art 102. The art makes a distinction between the term "surrender" and "extradition".
48 UNSCR 1593 (2005). See also art 13(b) of the Rome Statute.
49 Preamble to UNSCR 1593 (2005). See also art 13(b) of the Rome Statute.
50 Art 13(b) of the Rome Statute.
51 Preamble to UNSCR 1593 (2005).

party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organisations to cooperate fully.

From the resolution, the cooperation model espouses elements of the supra- and inter-state model. For the situation State and other parties to the conflict, the model is more of a supra-state one, as they are legally obliged to cooperate with the Court. Concerning non-States Parties and other international organisations, it resembles an inter-state model, as the choice of whether to cooperate or not is at their discretion. Lastly, States Parties are expected to cooperate with the Court not as a matter of the resolutions but by virtue of them being Parties to the Rome Statute, meaning Part 9 of the Statute applies *mutatis mutandis*.[52]

4.2 The Triangular Relationship

A critical point in respect of Resolution 1593 is that even though the AU is not a party to the Statute, the resolution foresaw the importance of cooperation between the ICC and the AU. In this regard, the resolution invited the Court and the AU to discuss practical arrangements that will facilitate the work of the Prosecutor and the Court.[53] With this call, a triangular relationship centred on cooperation between the three entities was established. For the ICC and the UNSC, the relationship is governed by Articles 13(b) and 87(7) of the Statute. In respect of Article 87(7) relationship, it may manifest in the form of the Court "reversing the referral" by referring any recalcitrant State to the UNSC. For the ICC and the AU the invitation to discuss "practical arrangements" means the two organisations need to agree on some form of working relationship in respect of the Darfur situation. Furthermore, the call appears to be in accordance with the provisions of Article 87(6) of the Statute in that the Court may ask, in addition to States Parties, other forms of cooperation and assistance from any intergovernmental organisation. The said forms of cooperation are with the proviso that the request for assistance should be within that international organisation's competence or mandate.[54] For the AU, the call falls within the provisions of Articles 3 and 4 of the AU Act which encourages amongst others, international cooperation, the promotion of peace, security, and the rejection of impunity.[55]

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52 Para 5 of UNSCR 1970 (2011). Art 86 of the Rome Statute. Luigi Condorelli and Annalisa Ciampi "Comments on the Security Council Referral of the Situation in Darfur to the ICC" (2005) *Journal of International Criminal Justice* at 593.

53 UNSC resolution 1593 para 1 and 3.

54 Art 87(6) of the Rome Statute.

55 Art 3(e), (f) & 4 of the Constitutive Act of the AU.

As interested entities in the attainment of peace in the Darfur situation in the form of The African Union-United Nations Hybrid Operation in Darfur, the AU and UNSC are expected to interact to ensure that the mandate of the Court in respect of the referral is realised.[56] The assistance from these political entities might be in the form of authorising their peacekeepers to arrest and surrender indicted individuals.

4.3 Cordial relationship between the AU and ICC

The importance of cooperation with the common purpose of peace through justice in the Darfur situation was equally acknowledged by the Prosecutor, Moreno-Ocampo, when he postulated that:[57]

> The investigation will require sustained cooperation from national and international authorities. It will form part of a collective effort, complementing African Union and other initiatives to end the violence in Darfur and to promote justice.

Equally so, the AU acknowledged the importance of cooperation for the common purpose of peace through justice when in its communiqué of 10 March 2006 stated that it: [58]

> [U]rges the Government of the Sudan and the rebel movements, to cooperate with the Office of the Prosecutor of the International Criminal Court (ICC) as called for by UN Security Council Resolution 1593 (2005) of 31 March 2005 and to take all necessary steps to combat impunity to ensure lasting peace and reconciliation in Darfur, and requests the Commission to cooperate with the ICC.

In addition, according to the Prosecutor, Ambassador Konare confirmed in writing that the AU is committed to full cooperation with the ICC in the Sudan situation.[59] From the above statements, it is clear that both the Court and the AU were fully aware that for impunity to end and for peace to prevail in Darfur, both entities needed to cooperate.

5 THE CONFLICTUAL RELATIONSHIP BETWEEN THE ICC AND THE AU

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56 UNSC resolution 1769 (2007).
57 ICC Prosecutor Press release of 6 June 2005. https://www.icc-cpi.int/news/icc-prosecutor-icc-opens-investigation-darfur-0 (accessed 28 Nov 2022).
58 Peace and Security Council communiqué of 10 March 2006 at para 4(ix). http://www.peaceau.org/uploads/communiqueeng-46th.pdf. (accessed 26 May 2019).
59 Third Prosecutor Annual Report at 8-9.

The cordial relationship between the ICC and the AU continued until there was an indication from the OTP that the investigation is leading to the Sudan President. Firstly, while reiterating its unflinching commitment to combating impunity in accordance with Article 3(e) of the AU Act, the AU:[60]

> [e]xpressed its strong conviction that the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace and reiterated AU's concern with the misuse of indictments against African leaders [...]

To further reinforce its efforts aimed at promoting lasting peace, the AU requested the UNSC, in accordance with the provisions of Article 16 of the Rome Statute, to defer the process initiated by the ICC.[61] When the warrant of arrest was issued and the UNSC did not act on the AU deferral request, the AU decided that all AU Member States (which by implication included the situation State, Sudan) should not cooperate with the Court in the arrest and surrender of Al Bashir.[62] With this call for non-cooperation by the AU, the conflictual relationship between the ICC and the AU was established.

The OTP on the other hand, was resolute in that it apply the law, nothing more, nothing less.[63] The implications of the foregoing were that the common purpose of ensuring lasting peace by ending impunity was no longer "common", meaning there was nothing bringing the two organisations together. As a result, the need for cooperation (practical arrangements) similarly fell away.

For the AU, the call for non-cooperation in the arrest of Al Bashir is problematic for a few reasons. First, the resolution is clear that Sudan shall cooperate fully with and provide any necessary

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60 Communique of 142nd Meeting of AU Peace and Security Council at para 2-3.

61 Communique of 142nd Meeting of AU Peace and Security Council at para 11(i). Assembly/AU/Dec.221(XII) of July 2009 at para 10. The posture of the AU in respect of the Libya and Kenya situation is almost similar. What is said in respect of Darfur situation applies *mutatis mutandis.* The Kenyan *proprio motu* situation was supposed to be strait forward, because Kenya as a State Party to the Rome Statute is in terms of Article 86 under a general obligation to cooperate with the Court. The matter was supposed to be between Kenya and the Court without necessarily involving the AU. However, the ground having being laid in the Sudan situation, Kenya appears to have exploited the already fraught relationship between the two entities to further mobilise the AU against the ICC in relation to its own situation. It therefore came as no a surprise when the AU repeated its non-cooperation posture with Court in relation to Kenya situation.

62 Communique of 142nd Meeting of AU Peace and Security Council at para 11(i).

63 Statement by the ICC Prosecutor Luis Moreno-Ocampo at the 10-year Anniversary celebration since the establishment of the ICC at 2.

assistance to the Court since, as a Member of the UN, it has agreed to carry out the decision of the UNSC.[64] Secondly, even though the AU has wide-ranging powers under Article 9 of the AU Constitutive Act, including the competency to determine common policies, Tladi posits that it cannot in terms of the Statute and the resolution, decide on behalf of Sudan and African States Parties that they must not fulfil their cooperation obligations owed to other international institutions.[65] Lastly, the call is irregular, as the AU itself is not a party to the Rome Statute, nor does it have any agreement with the Court.[66] Therefore, the only legally plausible option for the AU in relation to the work of the ICC in the Sudan situation was to urge African States Parties and Sudan to raise the AU's concerns through the proper channels of the Court, or diplomatically in the Assembly of States Parties or the meetings of the UNSC.[67] On the other hand, any dissatisfaction with the UNSC in relation to the request for deferral should be directed at that entity, as non-cooperation with the ICC for the failures of the UNSC seem counterintuitive.[68] The non-cooperation decision of the AU with ICC because of the UNSC's failures similarly brings forth the conflictual triangular relationship between the three entities.

6 THE ROLE OF UNSC IN THE CONFLICTUAL RELATIONSHIP

On the matter of the AU's request to the UNSC for deferral in the Sudan situation, Tladi posits that the request appeared to fall within the situations envisaged by Article 16, in other words, once it was accepted that the warrant of arrest for Al Bashir constituted a threat to international peace, it was incumbent upon the UNSC to invoke its powers under Chapter VII and defer the situation. However, contrary to Article 16, Tladi avers that the UNSC did not even formally consider the matter.[69] These actions by the UNSC highlight the role it plays in the conflictual triangular relationship because it is on this basis that the AU decided that Member States should not cooperate with the Court.[70] Another related point is that if the maintenance of international peace is the common good pursued by the UNSC and the request by the AU was to contribute to the same common good, then it was incumbent upon the UNSC to, at the very least, formally consider

64 Art 25 of the UN Chapter.
65 Dire Tladi "The African Union and the International Criminal Court: The Battle for the Soul of International Law" (2009) *South African Yearbook of international Law* at 60. See also Patrick Labuda "The African Union's Collective Withdrawal from the ICC: Does Bad Law make Good for Politics" (2017) *European Journal of International Law*. See further Art 86 of the Rome Statute.
66 Tladi (n 65 above) at 60. See also Art 87(6) of the Rome Statute.
67 Art 119(2) of the Rome Statute.
68 Tladi (n 71 above) 391-392.
69 Ibid at 397. See also Labuda (n 65 above).
70 AU Assembly Decision (Assembly/AU/Dec.245(XIII) Rev.1) of July 2009 at para 10.

the AU's deferral request. To do otherwise renders Article 16 inoperative in the context of the Sudan situation. According to Tladi, the UNSC cannot selectively rely on the Statute when it is convenient, such as referring situations in Sudan and Libya to the Court but disregard the same Statute when the time comes to consider deferral requests by the AU.[71] This observation is further supported by the fact that, following the referral in the Sudan situation, the Court transmitted numerous communications regarding non-cooperation by both the situation State and some African States Parties to the UNSC with virtually no response from the UNSC, meaning this entity does not – in accordance with its own resolution and its primary mandate – consider cooperation with the Court important.[72] Flowing from these actions, a reasonable conclusion is that the entity is an active participant in the triangular conflictual relationship.

7 AU MEMBER STATES' RESPONSE TO THE AU'S CALL FOR NON-COOPERATION

True to the AU's non-cooperation call, some African States Parties heeded the call and refused to arrest and surrender Al Bashir.[73] Malawi, in its non-cooperation submission to the Court, argued that it "fully aligns itself with the position adopted by the African Union" that Member States should not cooperate with the Court.[74] Equally so, the Democratic Republic of Congo (DRC) invoked the AU's follow-up non-cooperation decision that no serving AU Head of State or Government shall be required to appear before any international court or tribunal as one of the reasons for not executing the arrest warrant against Al Bashir.[75]

On the other hand, some African States never indicated the AU's non-cooperation decision as their reason for non-cooperation with the Court. South Africa, in its submission for not arresting Al Bashir, never invoked the AU's non-cooperation decision, but based its argument on the

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71 Tladi (n 71 above) at 397. See also Labuda (n 65 above).

72 Lorraine Smith-van Lin "*Non-Compliance and the Law and Politics of State Cooperation" in Bekou & Birkitt "Cooperation and the International Criminal Court: Perspective from Theory and Practice"* (Brill, 2016) at 141.

73 *The Prosecutor v Omar Hassan Ahmad Al Bashir:* Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir 2011 (No.: ICC-02/05-01/09) at 5-7.

74 *The Prosecutor v Omar Hassan Ahmad Al Bashir: Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir* 2011 (No.: ICC-02/05-01/09) at 7-9.

75 *The Prosecutor v Omar Hassan Ahmad Al Bashir: Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court* 2014 (No.: ICC-02/05-01/09) at 9.

Statute and the referral resolution.[76] Equally so did Sudan, notwithstanding that the situation was referred to the Court by the UNSC, it contested the jurisdiction of the Court over the Sudan situation.[77] From these two cases it cannot be conclusively determined that the AU non-cooperation decision had any influence on the posture adopted.[78]

The aforementioned non-cooperation posture by some of the African States Parties was equally acknowledged by the AU in its Assembly Decision of January 2012, which reaffirmed:[79]

> [t]hat by receiving President Bashir, the Republic of Malawi, like Djibouti, Chad and Kenya before her, were implementing various AU Assembly Decisions on non-cooperation with the ICC on the arrest and surrender of President Omar Hassan Al Bashir of The Sudan.

In the case of South Africa, though it never cited the AU's decisions of non-cooperation in its failure to arrest and surrender Al Bashir, the AU nevertheless commended South Africa for complying and implementing the AU Decisions on non-cooperation.[80]

Despite the non-cooperation decisions by the AU and the failure to arrest Al Bashir by some African States Parties, some indicated their willingness to cooperate with the Court in its investigations and requests for assistance.[81] The clearest form of intention to cooperate with the Court came from Botswana, who in its letter addressed to the UNSG reaffirmed:[82]

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76 *The Prosecutor v Omar Hassan Ahmad Al Bashir: Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir* 2017 (No.: ICC-02/05-01/09) at 11-16.

77 Finding of Non-Compliance Against the Republic of the Sudan (09 March 2015) at para 11 and 12. See also Lorraine Smith-van Lin "*Non-Compliance and the Law and Politics of State Cooperation" in Bekou & Birkitt "Cooperation and the International Criminal Court: Perspective from Theory and Practice"* (Brill, 2016) at 115.

78 *The Prosecutor v Omar Hassan Ahmad Al Bashir: Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court* 2014 (No.: ICC-02/05-01/09) at 9.

79 AU Assembly Decision (Assembly/AU/Dec.397(XVIII)) of 30 Jan 2012 at para 7.

80 AU Assembly Decision (Assembly/AU/Dec.270(XIV) of 2 Feb 2010 at para 6.

81 Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/13(XIII). See also Jennifer Doak & David Creenberg "African Union Declaration Against the ICC Not What it Seems" (2009) *Foreign Policy in Focus* https://fpif.org/african_union_declaration_against_the_icc_not_what_it_seems/ (accessed 27 Nov 2021). Uganda Pledges to Arrest Sudanese President, Star (Toronto) 13 July 2009 https://www.thestar.com/news/world/2009/07/13/uganda_pledges_to_arrest_sudanese_president.html (accessed 28 Nov 2021).

82 Letter dated 8 July 2009 from the Permanent Representative of Botswana to the United Nations Secretary-General (A/63/926).

> [i]ts position that as a State party to the Rome Statute on the International Criminal Court, it has treaty obligations to fully cooperate with the Court in the arrest and transfer of the President of the Sudan to the International Criminal Court.

The consequences of non-cooperation by the African States Parties were that Court could not discharge its primary mandate because, without the presence of the accused, the trial could not continue.[83] All these facts help underscore the centrality of cooperation in the proper functioning of the Court. With the failure to arrest and surrender Al Bashir by African States Parties, the approval of these non-cooperation actions by the AU, and the insistence by the Court that it apply only the law and the interpretation of Article 98(1), meant the conflictual relationship between the ICC and AU was completed.

8 CONCLUSION

From the above analysis it is clear that the Rome Statute follows a hybrid model type of cooperation, with characteristics of both the inter-state and supra-state model of cooperation. As an inter-state model, the Statute allows States Parties to exercise discretion and, in certain circumstances, to even refuse cooperation requests from the Court.[84] As a supra-state model of cooperation, the Statute is underpinned by a general obligation imposed on States Parties to fully comply with the Court's request for assistance.[85]

The triangular relationship between the ICC, the UNSC and the AU was brought about with the referral of the situation in Sudan to the Court. UNSC resolution 1593, among others, called on the Court and the AU to discuss practical arrangements to enable the work of the Prosecutor. The call meant that the two organisations needed to cooperate to ensure the work of the Prosecutor in Darfur continued unhindered. However, contrary to the UNSC's call, the relationship between the two organisations was characterised by confrontation with the AU calling on Member States not to cooperate with the ICC. The Court insisted that it only applies the law. Where the Court was called upon to clarify Article 98(1) cooperation obligations, the Court was found wanting.

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83 Art 63 of the Rome Statute.

84 See art 72(7)(a)(1), 89(2), 91(4), 93(3) and (9)(a)(i), 96(3), 94(4)(b) of the Rome Statute. See also Kaul (n 5 above) at 87.

85 Ciampi (n 28 above) at 11-12.

Equally so, the UNSC was complicit in the conflictual relationship between the Court and the ICC. Regarding the AU's request for deferral in the Sudan situation, the UNSC never formally considered the request even though it fell within the ambit of Article 16 of the Statute. Secondly, where cases of non-cooperation were reported to the entity by the Court, no actions were ever taken. It appears the entity is an active participant in the conflictual relationship.

CHAPTER FOUR

COOPERATION BETWEEN THE UNITED NATIONS SECURITY COUNCIL AND INTERNATIONAL CRIMINAL COURT

1 INTRODUCTION

One of the distinct features of the ICC and the UNSC is that the two entities share the common purpose of peace and security with the difference being the method used to achieve that common purpose. In respect of the ICC, the preamble to the Statute recognises that the commission of grave crimes threaten the peace and security of the world. To deal with the threat, the ICC is determined to put an end to impunity for the perpetrators of these crimes and to help prevent such crimes.[1] On the other hand, the primary mandate of the UNSC is to maintain international peace and security. In discharging its mandate, the UNSC is expected to act according to the Purposes and Principles of the United Nations, including international cooperation.[2] It is within this context that Articles 13(b) and 16 of the Rome Statute were adopted. The main purpose of the two Articles is to help reconcile and regulate the interaction between the two entities in respect of the common purpose of peace and security through justice. For the common purpose to be realised, the two entities are expected to cooperate in line with the Purposes of the UN Charter and the Statute.[3] However, the relationship between the ICC and the UNSC lacks cooperation and assistance, especially from the UNSC.

This chapter analyses cooperation between the UNSC and the ICC arising from the invocation of Articles 13(b), 16 and other related articles. To unravel this relationship, the chapter looks at the background to the adoption and the nature and content of the two Articles. The analysis will help determine to what extent the legal framework contributes to the conflictual relationship. The chapter also considers the practical application of the two Articles with a specific focus on cooperation arising from such application. In the next section, the mandates of the two entities are studied to determine whether they promote cooperation or non-cooperation.

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1 Para 3 & 5 of the Preamble to the Rome Statute.
2 Art 24(1) & (2) of the UN Charter.
3 The Preamble to the Rome Statute affirms "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures […] and by enhancing international cooperation". The Preamble further reaffirms the Purposes and Principles of the UN Charter.

2 LEGISLATIVE FRAMEWORK

2.1 Background

During the Rome Conference, the majority of States attending believed that the UNSC had an appropriate role to play in enabling the Court to exercise jurisdiction.[4] Despite this belief, the delegates envisioned a Court that should be independent from the UN with its powers defined by its treaty.[5] The Court could not be a Party to the UN Charter and the UN could similarly not be a Party to the statute establishing the Court.[6] In practical terms, independence meant that the UN could not alter or limit the powers of the envisaged Court. [7]

For the UNSC having previously established the ad hoc Tribunals to deal with almost the same crime as the envisioned Court, the major powers were already concerned at the negotiation level about the type of relationship the Court would have with the UNSC.[8] Their main concern was that an international court with no relationship with the UNSC could complicate UNSC attempts to manage such situations.[9] The reason for this concern was that previously, the entity used ad hoc Tribunals as a way of achieving its primary mandate of maintaining peace and security.[10] If there was not going to be any form of relationship between the two entities, it meant that the UNSC would have to establish a succession of ad hoc tribunals to discharge its mandate under the Charter.[11] However, Bassiouni posits that not so publicly stated was the fear that an independent Court that is not controlled by the UNSC might target the Permanent Members and their allies.[12] Notwithstanding these major powers' concerns and Bassiouni's assertion, what was not in contention during the Rome Conference was that the crimes which will come under the jurisdiction

4 UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (1998) Official Records Volume II Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole at 208-210.
5 Ibid.
6 Kenneth Gallant "The International Criminal Court in the System of States and International Organizations" (2003) *Leiden Journal of International Law* at 569. Nigel White and Robert Cryer "*The ICC and the Security Council: An Uncomfortable Relationship*" in Jose Doria, Hans-Peter Gasser & Cherif Bassiouni "*The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blischenko*" (Brill/Nijhoff, 2009) at 465.
7 UN Diplomatic Conference of Plenipotentiaries (n 4 above) at 208-210.
8 Ibid at 209 para 84.
9 UN Diplomatic Conference of Plenipotentiaries (n 4 above) at 209 para 84.
10 UN Diplomatic Conference of Plenipotentiaries (n 4 above) at 210 para 95.
11 Ibid. See also commentary on Art 23 of the ICL Draft Statute of the International Criminal Court at 44 para 1.
12 Cherif Bassiouni "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court" (1997) *Harvard Human Rights Journal* at 57.

of the Court usually take place in the context of a threat to or a breach of international peace and security, thus placing them under the concurrent competence of the UNSC.[13] With this overlap, the need for cooperation or coordination was therefore going to be inevitable.[14] As the Russian Federation delegation said, "The Council was intended to have a political impact on States and the Court would be playing an essential role in the maintenance of peace and security."[15]

White and Cryer posit that even at this conceptual level, it was already cautioned that if the relationship between the Court and the UNSC was handled improperly, it could lead to conflict.[16] Entities could, for argument's sake, take opposing positions and compete against each other, or simply pursue their own mandates without regard for the other, even though they may be dealing with the same situation.[17]

These concerns were equally acknowledged by the ILC Draft Statute for an International Criminal Court.[18] To avoid a potential conflict or overlap in the case of two entities dealing with the same situation, Article 23 of the Draft Statute added conditions before the envisaged Court could exercise jurisdiction.[19] For example, regarding the crime of aggression, the Article provided that the Court could only exercise jurisdiction if the UNSC first determined that the State in question has committed aggression.[20] Similarly, no prosecution could commence under the Statute arising from a situation which was being dealt with by the UNSC as a threat to or breach of the peace.[21] If Article 23 of the Draft Statute was accepted, there would have been no conflict between the two

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13 UN Diplomatic Conference of Plenipotentiaries (n 4 above) at 209 para 97. See also Martti Koskenniemi "The Police in the Temple Order, Justice and the UN: A Dialectical View" (1995) *European Journal of International Law* 344-346. See further Eran Sthoeger "*International Courts and Tribunals*" in David Malone, Sebastian von Einsiedel & Bruno Stagno "*The UN Security Council in the 21st Century*" (Lynne Rienner Publishers, 2015) at 507. David Bosco "*Rough Justice: The International Criminal Court in a World of Power Politics*" (Oxford University Press, 2014) at 40.

14 UN Diplomatic Conference of Plenipotentiaries (n 4 above) at 209 para 97.

15 Ibid at 212 para 9.

16 White & Cryer (n 5 above) at 455-456.

17 Ibid.

18 ILC Draft Statute for an International Criminal Court with commentaries (1994) at 44-45. See also Louise Arbour "The Relationship Between the ICC and the UN Security Council" (2014) *Global Governance* at 196. See further Mahnoush Arsanjani "The Rome Statute of the International Criminal" (1999) *The American Journal of International Law* at 27, Rosa Aloisi "A Tale of Two Institutions: The United Nations Security Council and the International Criminal Court" (2013) *International Criminal Law Review* at 148.

19 Art 23(2) & (3) of ILC Draft Statute for ICC (n 18 above).

20 Art 23(2) of ILC Draft Statute for ICC (n 18 above).

21 Art 23(2) & (3) of ILC Draft Statute for ICC (n 18 above). See also William Schabas "United States Hostility to the International Criminal Court: It's All about the Security Council" (2004) *European Journal of International Law* at 712.

entities as the envisioned Court would essentially have been an instrument at the disposal of the UNSC.[22]

Article 23 of the ILC Draft Statute seemingly resonated with the Permanent Members of the UNSC, as it left their powers largely untouched.[23] For example, during negotiations the delegate of China said that her "delegation did not agree that the Prosecutor should be given powers of investigation ex officio," meaning if China's position was accepted, no prosecution arising from a situation being dealt with by the UNSC could commence unless the entity decided otherwise.[24] In other words, the Permanent Members envisioned a Court that would be a kind of permanent version of the ad hoc tribunals.

However, not all delegates were in favour of the UNSC's extensive involvement in the functioning of the Court. This grouping was extremely suspicious of the intention of the UNSC, a political entity whose record as an impartial arbiter in disputes was questionable.[25] For example, Libya stated that:[26]

> "To give the Security Council, which was a political body, the right to trigger action would destroy confidence in the impartiality and independence of the Court, and thus detract from its credibility.[27]

Similarly, South Africa stated that "neither [its] delegation nor the SADC countries would like to see a situation in which the Prosecutor was dictated to either by individual States or by the

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22 Appendix III to the ICL Draft Statute on the Establishment of the ICC: Outline of Possible ways whereby a Permanent International Court may enter into Relationship with the United Nations (A Court as an Organ of the UN). See also Art 23 of the Draft Statute of the ICC (1994) at 44 para 1 and 10. See further Louise Arbour "The Relationship Between the ICC and the UN Security Council" (2014) *Global Governance* at 196. See further Mahnoush Arsanjani "The Rome Statute of the International Criminal" (1999) *The American Journal of International Law* at 27, Rosa Aloisi "A Tale of Two Institutions: The United Nations Security Council and the International Criminal Court" (2013) *International Criminal Law Review* at 148.

23 UN Diplomatic Conference of Plenipotentiaries (n 4 above) at 210 para 95.

24 UN Diplomatic Conference of Plenipotentiaries (n 4 above) at 196, 203, 204 & 206. See also David Scheffer "The United States and the International Criminal Court" (1999) *The American Journal of International Law* at 13. See further Johan van der Vyver "American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness" (2001) *Emory Law Journal* at 797-799 and David Scheffer "The Rome Conference on an International Criminal Court: The Negotiating Process" (1999) *The American Journal of International Law* at 4-5.

25 UN Diplomatic Conference of Plenipotentiaries (n 4 above) at 204, 205, 206 para 6, 27, 45 amongst others. See also Scheffer (n 24 above) at 4-5. See also Aloisi (n 24 above) at 148. See further Arbour (n 22 above) at 196. See also Philippe Kirsch & John Holmes "The Birth of the International Criminal Court: The 1998 Rome Conference" (1998) *Canadian Yearbook of International Law* at 8-9. The most organised grouping was the like-minded group who were opposed to the permanent members' vision.

26 UN Diplomatic Conference of Plenipotentiaries (n 4 above) at 208-209 para 77.

27 UN Diplomatic Conference of Plenipotentiaries (n 4 above) at 208-209 para 77.

Security Council".[28] With these statements, the concern was that should the two entities be closely linked, the ICC could become subject to political manoeuvring that would undermine its independence and credibility.[29] Kirsch and Holmes surmise that these States essentially sought to include provisions in the ICC Statute that would safeguard the Court's independence and shelter it from the inherently political interests of the UNSC.[30]

Notwithstanding this apprehension, Arbour argues that as the Rome conference progressed, it became clear that the vast majority of delegates supported a provision giving the UNSC some form of power, albeit not very extensive, to trigger the Court's jurisdiction.[31] The trigger seemed inevitable because in most situations, the commission of international crimes occurs in the context of a breach, or a threat to international peace and security, placing the two entities in the same space.[32] There was also a concern that without regularising the relationship, the Court could potentially encroach on the mandate of the UNSC by investigating a situation already being dealt with by the UNSC.[33] With these considerations and the added pressure on the international community to create a politically independent international court, the delegates opted for a compromise between the two sets of expectations – political independence and political subordination.[34] These considerations are manifested in the preamble, which provides that grave crimes threaten the peace, security and well-being of the world. The preambular paragraph is further given effect by Articles 13(b) and 16 of the Rome Statute.

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28 UN Diplomatic Conference of Plenipotentiaries (n 4 above) at 204 para 3.

29 Ibid.

30 Kirsch & Holmes (n 25 above) at 8-9. See also Arbour (n 22 above) at 196. See further David Bosco "*Rough Justice: The International Criminal Court in a World of Power Politics*" (Oxford University Press, Incorporated, 2014) at 1-9.

31 Arbour (n 22 above) at 197. See also Kirsch & Holmes (n 25 above) at 8-9. See further Alexander Galand "*Un Security Council Referrals to the International Court*" (Brill, 2018) at 20.

32 UN Diplomatic Conference of Plenipotentiaries (n 4 above) at 207 para 56. See also Chris Gallavin "The Security Council and the ICC: Delineating the Scope of Security Council Referrals and Deferrals" (2005) *New Zealand Armed Forces Law Review* at 27. See also Kerstin Blome & Nora Markard "Contested Collisions: Conditions for a Successful Collision Management - The Example of Article 16 of the Rome Statute" (2016) *Leiden Journal of International Law* at 560.

33 UN Diplomatic Conference of Plenipotentiaries (n 4 above) at 209 para 85. See also Arsanjani (n 22 above) at 26, Otto *Triffterer* "*Commentary on the Rome Statute of the International Criminal Court: Observers"* (München, 2008) at 596. See further Arbour (n 22 above) at 196, Yearbook of the International Law Commission vol 1 (1994) summary records of the meeting of the forty-six session at 229 para 78, Galland (n 31 above) at 202-203, Jose Doria, Hans-Peter Gasser & Cherif Bassiouni "*The Legal Regime of the International Criminal Court* (Brill/Nijhoff, 2009) at 460 and Luigi Condorelli and Santiago Villapando "*Referral and Deferral by the Security Council*" in Antonio Cassese, Paola Gaeta & John Jones "*The Rome Statute of the International Criminal Court: A Commentary*" (vol I) (Oxford, University Press, 200) at 628.

34 Aloisi (n 22 above) at 148. See also Carsten Stahn & Goran Sluiter "*The Ermerging Practice of the International Court*" (Brill & Nijhoff, 2009) at foreword.

2.2 Article 13(b) of the Rome Statute

Article 13(b) of the Statute, which is one of the Court jurisdiction trigger mechanisms, provides that:[35]

> The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if [A] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.

Gallavin postulates that through Article 13(b), the Statute seems to pay homage to the UNSC's past contributions to the revitalisation of international criminal law and situate the ICC as a continuation of the ad hoc international criminal tribunals.[36] Conderelli and Villapando in agreeing with Gallavin, argue that by allowing the UNSC to trigger the jurisdiction of the Court, the Statute puts a judicial instrument at the disposal of the UNSC without the need for the entity to create a new tribunal, seeing that Article 13(b) has the propensity to turn the ICC into an "ad hoc permanent international criminal tribunal", at least in situations that fall within the mandate of the UNSC.[37]

Notwithstanding the abovementioned referral powers under Article 13(b), the authors posit that the Court remains independent, bound only by its Statute.[38] Another way of ensuring such independence is by inserting the word "situation" in Article 13(b). By inserting the word, the belief was that the more generic the UNSC referral, the less chances of this entity encroaching on the independent mandate of the Court.[39] In other words, having referred the "wider situation" to the Court, it will then be up to the Prosecutor to independently assess the situation by determining which crimes were committed, which individuals should be charged, or even determine if there is a reasonable basis for proceeding with the investigations.[40] Arsanjani opines that by adopting this

35 Chapter VII of the UN Charter deals with actions with respect threat to peace, breaches of peace and acts of aggressions.
36 Gallavin (n 32 above) at 27. See also Blome & Markard (n 32 above) at 560.
37 Conderelli & Villapando (n 33 above) at 628-630.
38 Ibid.
39 Arbour (n 22 above) at 197. See also Draft Statute of the ICC (n 24 above) at 44 para 2. Conderelli & Villapando (n 33 above) at 632.
40 Draft Statute of the ICC (n above) at 44 para 2. See also Arsanjani (n 22 above) at 27. See further Conderelli & Villapando (n 33 above) at 633. See also Article 19(1) wherein the Court should independently satisfy itself that it has jurisdiction even where the situation was referred to it by the UNSC.

line of construct, it was hoped that the UNSC Chapter VII mandate will remain intact and the Court's independence will be protected.[41]

Arbour, commenting on Article 13(b) of the Statute, argues that the primary benefit of UNSC referrals is that it expands the reach of accountability to cases where the ICC would not normally have jurisdiction because the suspects are either not nationals of a country that has ratified the Statute, or the crimes were not committed in the territory of a States Party.[42] This observation is shared by Aloisi, who posits that, notwithstanding their status as non-parties to the ICC, the UNSC referral creates obligations for all UN Member States that go beyond the obligations descending from the Statute.[43] In essence, the referral has the potential to close the cooperation gap in the sense that the UNSC may on referral elect to put all UN Members under cooperation obligations with the Court. This course of action by the UNSC is supported by the fact that if peace and security is the common purpose for the international community (as represented by the UN) it will therefore be prudent for all UN Members to be put under such cooperation obligations. This possible course of action by the UNSC will be in line with Friedmann's law of international cooperation that States cooperate as a result of the common good to be achieved.

2.3 Article 16 of the Rome Statute

Article 16 of the Statute, which is a deferral mechanism, provides that:

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

The Article is mainly intended to synchronise or reconcile the judicial functions of the Court (as a way of advancing peace) with the UNSC's fulfilment of its primary responsibility of maintenance of international peace and security.[44] The rationale for this approach was that in certain

41 Arsanjani (n 22 above) at 27.
42 Arbour (n 22 above) at 196. See also William Schabas "*An Introduction to the International Criminal Court*" (Cambridge University Press, 2017) at 150.
43 Aloisi (n 22 above) at 149. See also Corrina Heyder "The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court's Functions and Status" (2006) *Journal of International Law* at 652-3.
44 UN Diplomatic Conference of Plenipotentiaries (n 4 above) at 209 para 79. See also Conderelli & Villapando (n 33 above) at 644. Aloisi (n 22 above) at 150. See also Arsanji (n 22 above) at 27.

circumscribed circumstances, criminal prosecution may not necessarily serve the interests of international peace and security, therefore justice has to be deferred in favour of peace initiatives.[45] However, even in this situation, the deferral is not *ad infinitum* but subjected to a time limit. This means that if the peace situation improves, investigations and or prosecution of the alleged perpetrators of crimes will resume.[46]

Blome and Markard while commenting on Article 16 refer to the Article as a sort of "collision rule". The authors define the "collision rule" as:[47]

> a solution for the issues caused by overlapping normative regimes. Ideally a collision rule would either resolve the collision in substance, or it would prescribe the conditions for prioritising one regime's solution over the other. However, as regimes represent different logics and sets of interests such a rule would have to be considered legitimate by the parties involved in order to provide for a successful collision management.

Expanding on the collision rule, the authors posit that maintaining international peace and security is primarily a political matter, it can also involve legal assessments by the UNSC, such as determining whether a crime of aggression has been committed.[48] Equally so, while investigating and prosecuting "the most serious crimes of international concern", the Court can involve itself in strategic choices that have little to do with simply applying the law, both when it comes to securing the support of States and in managing its institutional relationship with other international bodies, such as the UNSC. By applying the "collision rule" (Article 16), the "collision" will be averted or better managed.[49] In addition, it was hoped that Article 16 will enjoin the highly judicialised area of competence of the ICC with the political rationality of the UNSC, while also tying the politically motivated UNSC to the logic of law enforcement by prosecution.[50] Applied to both the UNSC and the Court, Blome and Markard conclude that the two entities should accept as legitimate the

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45 Sun Kim "Maintaining the Independence of the International Criminal Court: The Legal and Procedural Implications of an Article 16 Deferral Request" (2011) *Agenda International* at 178. See also Morten Bergsmo & Jelena Pejid "*Deferral of Investigation or Prosecution*" in Otto Triffterer (ed) "*Commentary on the Rome Statute of the International Criminal Court*" (Nomos Verlagsgesellschaft, 1999) at 378. See further Johan van der Vyver "Deferrals of Investigations and Prosecutions in the International Criminal Court" (2018) *Comparative and International Law Journal of Southern Africa* at 9.

46 Kim (n 45 above) at 179-180.

47 Blome & Markard (n 32 above) at 552.

48 Ibid.

49 Ibid. Blome & Markard (n 32 above) at 552.

50 Blome & Markard (n 32 above) at 561.

other's mandate and interest for them to have a mutually beneficial relationship (collision management).[51]

Notwithstanding the balancing act by the delegates as encapsulated in Articles 13(b) and 16, Arbour maintains that the two Articles were some of the most contentious during the Rome Conference as many felt they provided an unwelcome opportunity for political interference in the functioning of a judicial body.[52] Jalloh *et al* agree with this view and further submit that many at the Conference warned that any political interference in the functioning of the Court will negatively affect its credibility and moral authority, thus rendering its work ineffective.[53]

2.4 The Peace (politics) versus Justice Argument within Articles 13(b) and 16 of Rome Statute

As stated in the preceding paragraphs, a related argument advanced for Articles 13(b) and 16 of the Statute is the interface or conflict, or in the words of Blome and Markard, the "collision" between peace and justice.[54] This is because both Articles are only invoked by the UNSC when acting under Chapter VII of the UN Charter and only after a determination has been made in terms of Article 39 that there is a threat to or breach of the peace, or an act of aggression, or in the context of the Statute, "grave crimes that threaten the peace, security and well-being of the world" were or are being committed.[55]

On Article 13(b), Conderelli and Villapando aver that the UNSC, having determined that a situation constitutes a threat to peace, then invokes Article 13(b) and employs the ICC as a means to pursue its primary objective of maintaining or restoring international peace and security.[56] Seen in this way, the authors surmise that there is no apparent conflict between peace and justice, as espoused in Article 13(b), as the two objectives seem mutually reinforcing, meaning the prosecution of persons responsible for serious violations of international law contributes to the common purpose of international peace and security.[57] Used in this way, a referral is not an end in itself, but a means towards international accountability, which will in turn contribute towards the

51 Ibid. Blome & Markard (n 32 above) at 552.
52 Arbour (n 42 above) at 196.
53 Jalloh *et al* (n 62 above) at 16.
54 Conderelli & Villapando (n 33 above) at 627-628.
55 Chapter VII art 39 and 41 of the UN Charter. See also the preamble to the Rome Statute.
56 Conderelli & Villapando (n 33 above) at 630.
57 Ibid. See also the preamble to UNSCR 955.

end that is the common good of international peace and security. According to Conderelli and Villapando, the referral powers under Article 13(b) did not attract much controversy during the negotiations of the Rome Statute as it could be logically linked to the powers of the UNSC to create the ad hoc tribunals. [58]

Aloise on the other hand, postulates that Article 16 was the more controversial of the two.[59] Roughly put, in certain circumstances peace efforts may completely exclude the pursuit of international criminal justice.[60] By inserting Article 16, the drafters hoped that the Article would bridge the gap between impunity and accountability.[61] In other words, Article 16 is used to resolve conflicts between peace and justice where the UNSC has determined that for a limited time, peace efforts need to be given priority over international criminal justice. This peace-versus-justice sentiment is shared by Jalloh *et al* when the authors posit that there is an acceptance in Article 16 that there might be circumstances wherein the demands of peace require or permit suspension of an investigation or prosecution.[62]

However, not everyone is convinced by the peace-versus-justice argument in Article 16. Ballelli posits that Article 16 has nothing to do with peace and justice conflict but was added by the UNSC to counterbalance the independence of the Court and the width of its jurisdiction.[63] Triffterer appears to agree with Ballelli when he argues that the UNSC had previously established the ad hoc tribunals with the justification that the tribunals will help maintain international peace.[64]

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58 Mistry & Verduzco (n 89 below) at 5. ICC President Statement (n 117 below) at 2.

59 Morten Bergsmo & Jelena Pejic "*Deferral of Investigation or Prosecution*" in Otto Triffterer (ed) "*Commentary on the Rome Statute of the International Criminal Court*" (Nomos Verlagsgesellschaft, 1999) at 599. See also Johan van der Vyver "Deferrals of Investigations and Prosecutions in the International Criminal Court" (2018) *Comparative and International Law Journal of Southern Africa* at 9. See also Arbour (n 42 above) at 275.

60 Bergsmo & Pejic (n 59 above) at 599.

61 Aloisi (n 22 above) at 150. See also Evelyne Asaala "Rule of Law of Realpolitik: The Role of the United Nations Security Council in the International Criminal Court Processes in Africa" (2017) *African Human Rights Law Journal* at 272.

62 Charles Jalloh, Dapo Akande & Max du Plessis "Assessing the African Union Concerns about Article 16 of the Rome State of the International Criminal Court" (2011) *African Journal of Legal Studies* at 11. See also Roberto Bellilli "*The Establishment of the System of the International Court*" in Roberto Bellilli (ed) "*International Criminal Justice*" (Ashgate Publishing Limited, 2010) at 40. See further David Bosco "*Rough Justice*: *The International Criminal Court in a World of Power Politics*" (Oxford University Press, 2014) at 33.

63 Ballelli (n 62 above) at 40.

64 Bergsmo & Pejic (n 59 above) at 598. For example, UNSCR 808(1993) (UN Doc. S/RES/8o8(1993)) establishing the ICTY was passed because the UNSC was [C]onvinced that in the particular circumstances of the former Yugoslavia the establishment of an international tribunal would […] contribute to the restoration and maintenance of peace […] Equally so UNSCR 955(1994) follows

Bassiouni concurs that peace and justice are not in opposition, but good judgement and wisdom, especially from the OTP, are required to advance justice without necessarily contributing to ongoing harm or hampering the prospects of peace.[65]

These arguments by various authors appear to resonate with the office of the UNSG. The former Secretary General, Kofi Annan, was unequivocal when he said:[66]

> [t]he choice between justice and peace is no longer an option. We must be ambitious enough to pursue both, and wise enough to recognise, respect and protect the independence of justice.

Equally so, Ban Ki-moon referred to the balance between peace and justice as "a false choice". He went on to say that the time has passed when we might speak of peace versus justice, or think of them as somehow opposed to each other, they must be pursued hand in hand.[67]

Koskenniemi, while mostly agreeing with the above authors, professes that sophisticated contemporary legal and political theory concedes the interdependence of the problems of order (peace) and justice.[68] Therefore, a single-minded pursuit of justice will create self-destructive politics, and similarly, a single-minded pursuit of peace at the cost of the tremendous injustice of its institutions will finally account for its breakdown. In addition to a single-minded pursuit of justice in secular conditions, failing to pay regard to the effectiveness of existing institutions degenerates into Utopian politics that will sooner or later lead to anarchy or dictatorship.[69] Where Koskenniemi disagrees with these authors is that the relationship between peace and justice cannot be conceptualised as internal to the chosen approach or instrumental, so justice as a means to

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the same construct. See also Michael Wood "The Security Council and International Criminal Law" (2007) *Romanian Journal of International Law* at 160-172.

65 Cherif Bassiouni "The ICC - Quo Vadis" (2006) *Journal of International Criminal Justice* at 423. See also Aloisi (n 22 above) 148-149. The only issue for Bassiouni is the timing.

66 Kofi Annan Address to the Review Conference of the International Court (Kampala, 31 May 2010) https://www.kofiannanfoundation.org/speeches/kofi-annan-addresses-the-first-review-conference-of-the-assembly-of-states-parties-to-the-rome-statute-of-the-international-criminal-court/ (accessed 20 March 2022).

67 The Secretary-General "An Age of Accountability' Address to the Review Conference of the International Criminal Court" (Kampala, 31 May 2010) https://www.un.org/sg/en/content/sg/statement/2010-05-31/secretary-generals-age-accountability-address-review-conference (accessed 20 March 2022). See also Carsten Stahn "*More than a Court, Less than a Court, Several Courts in One*" in Carsten Stahn "*The Law and Practice of the International Criminal Court*" (Oxford, 2015) at introduction xc.

68 Koskenniemi (n 13 above) at 329.

69 Ibid.

uphold peace or peace as a means to realise justice, the relationship between the two is external to the extent that both are constitutive of each other.[70]

Ballelli sums up the interface between peace and justice when he posits that:[71]

> [w]hile different situations may call for different solutions, it seems that the collective practice of States has affirmed that the principle of legality as a basis for international order and, in this respect, the building of peace cannot be detrimental to international and individual accountability established under both customary and treaty law […]

Like Blome and Markard have said, "international criminal justice has usually been considered to serve the good peace, the rule of law being part of a positive concept of peace and or an essential step towards lasting world peace".[72]

From the above analysis, it is clear that there has always been an intersection between peace and justice, with Koskenniemi even suggesting that both are constitutive of each other, meaning the classification is misplaced. The intersection is further supported by the UN when it established the ad hoc tribunals, i.e. their establishment was to contribute to international peace.

The above interface between peace and justice is transferred to the ICC with the adoption of Articles 13(b) and 16. In respect of Article 13(b), the intention is to use justice to achieve "just" and lasting peace. On the other hand, Article 16 prioritises peace over justice where it is determined that the continued prosecution or investigations by the ICC threaten international peace. However, the prioritisation is only for a limited period. From the two Articles, it is clear that if the interdependent common good of peace and justice is to be realised, the entities tasked with their realisation are obliged to cooperate.

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70 Ibid.

71 Ballelli (n 62 above) at 38. For a counter argument see Koskenniemi n 13 at 330.

72 Blome and Markard (n 32 above) at 561. See also Johan Galtung "Violence, Peace, and Peace" (1969) Journal of Peace Research at 67. Priscilla Hayner "The Challenge of Justice in Negotiating Peace: Lessons from Liberia & Sierra Leone" Expert Paper "Workshop 6 – Negotiating Justice" at 3-4. For a comprehensive analysis of the peace versus justice argument see Human Rights Watch "Selling Justice Short: Why Accountability Matters for Peace" (2009). See further Leslie Vinjamuri "*The ICC and the Politics of Peace and Justice*" in Carsten Stahn (ed) "*The Law and Practice of the International Criminal Court*" (Oxford, 2015) at 15.

3 IMPLEMENTING THE LEGISLATIVE FRAMEWORK

3.1 Invocation of Article 13(b) of the Rome Statute by the UNSC

Contrary to earlier assertions that Article 13(b)'s referral powers will hardly ever be used owing to the veto powers of the Permanent Members, the UNSC invoked Article 13(b) powers in passing resolutions 1593 and 1970, referring the situations both in Sudan and Libya to the ICC.[73] These referrals followed the determination, as per Article 39 of the UN Charter, that the situations in both countries constituted a threat to international peace and security.[74] However, contrary to that expectation, and that all States should cooperate once such a situation has been determined, only the situations States and parties to the conflict were called to cooperate. Non-State Parties and other concerned international organisations were merely urged to cooperate with the Court.[75] States Parties were expected to cooperate not only as a matter of the resolution but as a result of ratifying the Statute.[76]

The cooperation language of the two resolutions was heavily criticised by various commentators as it appears to interfere with the proper functioning of the Court and to a lesser extent, the mandate of the UNSC itself.[77] For example, Happold contends that the resolutions are clear that only the two situation States are under a mandatory obligation to cooperate with the Court, States not Parties to the Statute and other international actors are not under such legal obligation.[78] Furthermore, as a fundamental principle under treaty law that parties to a treaty cannot impose obligations on a third State, the UNSC has those powers under Chapter VII and can, if it so

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73 UNSC Resolution 1593 of 2005 and UNSC Resolution 1970 of 2011. See also Antonio Cassese "*The International Criminal Court five years on: Andante or Moderato*" in Carsten Stahn & Goran Sluiter "*The Emerging Practice of the International Criminal Court*" (Brill & Nijhoff, 2009) at 25. See further Jose Doria, Hans-Peter Gasser & Cherif Bassiouni "*The Legal Regime of the International Criminal Court*" (Brill/Nijhoff, 2009) at 456, White and Cryer (n 5 above) at 456 and William Schabas "United States Hostility to the International Criminal Court: It's All about the Security Council" (2004) *European Journal of International Law* at 702.

74 Preamble to UNSC Resolution 1593 and 1970. This is in line with UNSC resolutions 955 (1994) and 827 (1993) which provided amongst others that the situation in former Yugoslavia and Rwanda constituted a threat to international peace and security.

75 UNSCR 1593 (2005) at para 2 & UNSCR 1970 (2011) at para 5.

76 Art 86 of the Rome Staute.

77 Aloisi (n 22 above) at I47-168. See also Dire Tladi "When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic" African Journal of Legal Studies. See further Max du Plessis "Exploring Efforts to Resolve the Tension between the AU and the Bashir Saga" (2016) African Legal Aid. Matthew Happold "Darfur, the Security Council, and the International Criminal Court" (2006) International Comparative Law Quarterly at 230.

78 Happold (n 77 above) at 230.

wishes, impose such cooperation obligations on non-Parties, as it did with Sudan and Libya, which are not Parties to the Statute.[79] However, in these two situations and for reasons only known to the UNSC, it elected not to put other third States under such cooperation obligations.

According to Happold, these differential obligations for non-Parties to the Statute are, in themselves, problematic.[80] Aloisi also concludes that the two referrals bear some considerable problems associated with the wording of the requested cooperation.[81] Du Plessis seems to agree with the above arguments when he surmises that if the Al Bashir saga teaches us anything, it is that in the context of the UNSC referrals to the ICC, resolutions taken in pursuance of such referrals take on a higher order of legal significance and as such the cooperation obligations must be well-crafted to avoid the current legal wrangling.[82]

Tladi shares the same sentiments and further questions the probity of calling for a UNSC referral in situations like Syria, if the experience in Sudan and Libya referrals is anything to go by.[83] He argues that the referrals did very little to the victims of atrocities, and more harm to the reputation of the ICC by only obligating situation States to cooperate with the Court thus creating a cooperation gap.[84] Akande, on the other hand, appears to hold a slightly different view, he posits that although the UNSC has extensive powers to compel all States to cooperate with the Court under Chapter VII, it does not always have to use mandatory language, because to do so will deprive the entity of the necessary flexibility in taking action under the Chapter.[85] Akande concludes that there may be good reasons for the UNSC not to require other non-Parties to cooperate with the Court, namely, that such a proposal may make a referral resolution difficult to adopt.[86]

Commenting on the Sudan and the Libya referrals, Arbour opines that “the Security Council has so far acted exactly as would be expected of the quintessential political body”, i.e. not as an entity tasked to advance the common good of peace and justice, but Permanent Members’ national

79 Art 34 of the Vienna Convention on the Law of Treaties (1969). See also Art 25 of the UN Charter. UNSCR 1593 (2005) at para 2 & UNSCR 1970 (2011) at para 5.
80 Happold (n 77 above) at 230. See also Tladi (n 115 above) at 13-14. See also Schabas (n 114 above) at 152-153.
81 Aloisi (n 22 above) at 150.
82 Du Plessis (n 77 above) at 256-258.
83 Tladi (n 77 above).
84 Ibid.
85 Akande supra n 113 at 346.
86 *Ibid* at 356.

interests.[87] Arbour's assertion is made clear by the failure of the entity to refer the situation in Syria to the Court despite reports concluding that serious violations of international humanitarian law were committed by mostly the Syrian government.[88]

As to the foregoing, Mistry and Verduzco argue that it is often questioned how some of the Permanent Members can, in all fairness, justify their exceptionalism, namely that of subjecting other States that are not Parties to the Statute, to the Court through Article 13(b) referrals while they do not accept the Court's jurisdiction. The exceptionalism, the two authors argue, undermines the legitimacy of the Court, if it is considered that the legitimacy of the Court is derived from State consent.[89]

Considering the above, the question that can be asked at this juncture is why did the UNSC choose the language it used in the Sudan and Libya referral resolutions, which appears to limit or impede the scope of cooperation with the ICC by the broader UN Member States? Put slightly differently, why would the UNSC interfere with the proper functioning of the Court if these referrals were intended to assist the same entity in achieving its primary mandate of peace and security, or in the words of Happold, subcontracted the ICC to do its work of maintaining international peace and security?[90] This interference is further exacerbated by the fact that the resolution purported to deprive the ICC of the necessary funding contrary to the Charter and the Statute, suggesting that the UNSC does not take cooperation in the investigations and prosecutions of international

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87 Arbour (n 22 above) at 199. See also UNSC Doc: S/PV. 7180 of 22 May 2014. Statement by Russian and Chinese representatives at 4-5. See further Robert Cryer "*The ICC and its Relationship to Non-States Parties*" in Carsten Stahn (ed) "*The Law and Practice of the International Criminal Court*" (Oxford, 2015) at 275-277.

88 It was expected that the UNSC will take into account the Reports of the Commission of Inquiry which document all crimes committed and its recommendation for a possible referral (Human Rights Council: Report of the independent international commission of inquiry on the Syrian Arab Republic of 16 August 2013). As of 2021 the Human Rights Council have compiled 23 reports documenting all violations in relation to situation in Syrian Arab Republic. See also UNSC resolution 2042 and 2043 of (2012) were some form of consensus was reached in the UNSC that the situation constitute threat to international peace, hence the deployment of some military observers.

89 Hemi Mistry & Debora Verduzco "*The UN Security Council and the International Criminal Court" Chatham House and Parliamentary for Global Action*" (Chatham House, 2012) at 3.

90 Happold (n 77 above) at 234.

crimes seriously.[91] Schabas asserts that the interference seems arbitrary, in that the ICC's entire machinery cannot be offered to the UNSC free of charge.[92]

Tladi argues that the abovementioned limitations were not an oversight by the UNSC, but were done purposefully to shield some Permanent Members who are not Parties to the Statute from obligation to cooperate and to contribute towards the Court's expenses.[93] Moreover, the ambiguity in the language of the resolutions created a legally plausible avenue where States Parties can and are currently arguing that the exception to cooperate in Article 98 is applicable.[94] These observations are further supported by the post-referral actions by the UNSC i.e. it was expected that after referring the situations the entity will assist the OTP in its investigations and the execution of the subsequent arrest warrants.[95] The reason for this expectation is that a decision by the UNSC to refer a situation to the Court is made mostly without the consent of the territorial State, meaning cases arising from such referral are by their very nature highly contentious.[96] It is therefore important that the ICC should be able to count on the unwavering support and assistance of the UNSC because the Court does not have the authority to decide on remedies or consequences arising from the failure to cooperate after the referral. The only recourse the Court has is the provisions on non-cooperation, making it imperative for the UNSC to keep its side of the bargain, by for example, invoking some of its Chapter VII powers and acting as an executive arm of the Court.[97] However, the reaction of the UNSC towards the ICC's call for assistance has

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91 Para 7 of UNSCR 1593 (2005). See also Art 115(a) of the Rome Statute, which provides that expenses of the Court will be provided by the UN, subjected to the approval of the General Assembly where such expenses are as a result of UNSC referral. See further Tladi (n 115 above) at 14-15. See also Happold (n 77 above) at 234.

92 William Schabas "*An Introduction to the International Criminal Court*" (Cambridge University Press, 2017) at 154. See also art 115(b) of the Rome Statute. See also ICC-President Judge Sang-Hyun Song "Remarks at United Nations Security Council Open Debate: Peace and Justice, with a Special Focus on the Role of the International Criminal Court at 4.

93 Dire Tladi "When Elephants Collide it is the Grass that Suffer: Cooperation and the UNSC in the Context of the AU/ICC Dynamic" (2014) *African Journal of Legal Studies* at 394. See also Makau Mutua "The International Criminal Court: Promise and Politics" (2015) "Proceedings of the Annual Meeting" *American Society of International Law* at 270-271.

94 Tladi (n 93 above) at 393-394. Du Plessis (n 77 above) at 256-258.

95 See also the Statement by Judge Sang-Hyun Song President of the ICC to the UNSC of 17 Oct 2012 at 3. See further Statement by Luis Moreno-Ocampo https://asp.icc-cpi.int/iccdocs/asp_docs/ASP7/10th/ICC-ASP-10thAnni-Ocampo-ENG.pdf at 3 (accessed 30 March 2022) at 4.

96 UNSC Doc: S/PV.5158 (31 March 2005) Statement by the representative of Sudan at 12-13.

97 Sang-Hyun Song (n 95 above) at 4. See also Deborah Verduzco "*The Relationship between the ICC and the United Nations Security Council*" in Carsten Stahn (ed) "*The Law and Practice of the International Criminal Court*" (Oxford, 2015) at at 45. See also art 87(5)(b), 87(7) of the Statute and art 41 of the UN Charter. See further UNSC Doc: S/PV.7080 of 11 Dec 2013 "Reports of the Secretary-General on the Sudan and South Sudan" at 3.

been indifference.[98] For example, in the Darfur situation, the Court has transmitted numerous communications regarding non-cooperation by both the situation States and State Parties to the UNSC with virtually no response from the UNSC.[99] From the approach adopted by the UNSC during the passing of the resolution and after referral actions, it seems this entity is not necessarily driven by the common good of peace and justice, but by self-interest, and in the process making it an equal participant in the triangular conflictual relationship.

3.2 Invocation of Article 16 of the Rome Statute

According to Van der Vyver, even before the Court became operational, there were already concerted efforts from certain quarters to pre-emptively constrain the nascent Court.[100] The first indication of such an attempt was when the UNSC passed a general resolution which, amongst others, exempted peacekeepers from Non-States Parties from the jurisdiction of the Court.[101] In this regard, UNSC 1422 provides that:[102]

> [i]f a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorised operation, shall for a twelve-month period […] not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.

During the meeting preceding the adoption of the aforementioned resolution, the UN Secretary-General (UNSG) and some invited UN Members criticised the language of the draft resolution for amongst others, trying to modify a treaty that conforms with the UN Charter.[103] Moreover, the

98 ICC-OTP "Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)" (12 Dec 2014) https://www.icc-cpi.int/iccdocs/otp/stmt-20threport-darfur.pdf. (accessed 30 March 2022). See also Lorraine Smith-van Lin "*Non-Compliance and the Law and Politics of State Cooperation: Lesson from the Al Bashir and Kenyatta Cases*" in Olympia Bekou & Daley Birkett (ed) "*Cooperation and the International Criminal Court: Perspective from Theory and Practice*" (Brill/Nijhoff, 2016) at 141.

99 Lorraine Smith-van Lin "*Non-Compliance and the Law and Politics of State Cooperation: Lesson from the Al Bashir and Kenyatta Cases*" in Olympia Bekou & Daley Birkett (ed) "*Cooperation and the International Criminal Court: Perspective from Theory and Practice*" (Brill/Nijhoff, 2016) at 141.

100 Van der Vyver (n 59 above) at 796.

101 UNSCR 1422 (2002). Zsuzsanna Deen-Racsmany "The ICC, Peacekeepers and Resolution 1422: Will the Court Defer to the Council?" (2002) Netherlands International Law Review at 357.

102 UNSCR 1422 at para 1. A slightly different paragraph is contained in UNSC resolution 1497 (2003) authorising the establishment of Multinational Force in Liberia to support a cease fire agreement. Para 7 of the resolution without invoking Art 16 of the Statute subject the former and current officials and personnel from a contributing State to the exclusive jurisdiction of that contributing State.

103 UNSC Doc. S/PV.4568 (2002) Statement by representative of Switzerland at 23. Statement by representative of Canada at 3 See also Zsuzsanna Deen-Racsmany (n 101 above) at 359. See also Carsten Stahn "The Ambiguities of Security Council Resolution 1422 (2002)" (2003) *European*

UNSG expressed his concern over the invocation of Article 16 in a way contrary to its original intention.[104] France, a permanent member, equally voiced her reservation with the language contained in the draft resolution by stating that:[105]

> [i]t cannot accept modification, by means of a Security Council resolution, of a provision of the treaty. Furthermore, even if the […] majority of the Council […] take that course of action, one may question the effect of such a resolution on the decisions to be taken by the Court. It is certainly not in the Council's interest to see any conflict of norms arise.

The representative of Canada agreed with the above sentiment and added that in the absence of any threat to international peace, passing a Chapter VII Article 16 draft deferral resolution on the ICC seems to be *ultra vires*, setting a bad precedent that implies the UNSC could if it so wishes and at any time, arbitrarily change the negotiated terms of other international treaties.[106]

Notwithstanding the above criticism, the resolution was passed unanimously, including the provision purporting to invoke Article 16, excluding peacekeepers from non-Party States from the jurisdiction of the Court. In addition, the UNSC decided that Members shall take no action inconsistent with Article 16.[107] The implications of the decision is that if peacekeepers were to be found in one of States Parties' territory, and the ICC wished to investigate or prosecute that peacekeeper, the UNSC would have those States Parties refuse to surrender them to the Court.[108] This position is untenable as it goes against the cooperation regime of the Rome Statute and the cooperation principles encapsulated in the Statute of the ad hoc tribunals.[109]

The resolution was equally criticised by various authors.[110] For example, Stahn posits that Paragraph 1 of Resolution 1422 is based on the assumption that a request under Article 16 of the

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Journal of International Law at 86. See also Neha Jain "A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court" (2005) *European Journal of International Law* at 244.

104 UNSC Doc. S/PV.4772 (2003)) Statement by the UN General Secretary.

105 UNSC Doc. S/PV.4568 (2002)) Statement by representative of France at 10-11. See also Bosco (n 62 above) at 103.

106 UN Doc. S/PV.4568 (2002)) Statement by representative of Canada at 3. China and Russia were neutral on the question of immunity by acknowledging both side of the arguments at 16-17. See also Stahn (n 103 above) at 86.

107 UNSCR 1487 (2004). See also Jain (n 103 above) at 241-242.

108 See UNSC Press release of 12 July 2002.

109 UNSCR 955 (1994) and 827 (1993).

110 Deen-Racsmany (n 101 above) at 366, 370 and 374. For a contrary argument see Stahn (n 103 above) at 98. Marco Roscini "The Efforts to Limit the International Criminal Court's Jurisdiction over Nationals of Non-party States: A Comparative Study" (2006) *Law and Practice of International Courts*

Statute may be made in generic terms, even in the absence of a specific conflict. According to Stahn, this assumption is hard to reconcile with the purpose of the Article and its systematic position in the Statute, i.e. on contextual reading of the Article it is clear that the UNSC may only defer the exercise of jurisdiction by the Court once a concrete investigation or prosecution is undertaken.[111]

Happold agrees with Stahn and argues that the provision is unfortunate because, firstly, it is doubtful whether it falls within the UNSC's powers under Article 13(b) of the Rome Statute, *i.e.*, Article 13(b) refers to broader "situations" leaving the finer details to the OTP, therefore the UNSC cannot in its referral, invoke Article 16 to "salami-slice" a situation to exempt some Parties or persons from the jurisdiction of the Court.[112] Article 16 only permits the UNSC to defer investigations or prosecutions of persons otherwise caught in a referral under Article 13(b) of the Statute.[113] Despite the reference to Article 16 of the Statute, the two authors are doubtful whether the UNSC's exemption of peacekeepers from non-Party States to the Rome Statute is a valid deferral under the said Article.[114]

This precedent was, to an extent, followed in UNSC Resolutions 1593 and 1970 referring the situations in both Sudan and Libya to the Court. Like with Resolution 1422, these resolutions attempted to insulate personnel from contributing non-Party States from the jurisdiction of the Court.[115]

The question arising is, why will some members of the UNSC attempt to exercise, in the words of Mistry and Verduzco, exceptionalism by trying to insulate personnel from contributing third States

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and Tribunals at 505. See further Arbour (n 22 above) 200, Jain (n 108 above) at 239-254, Evelyne Asaala "Rule of Law of Realpolitik: The Role of the United Nations Security Council in the International Criminal Court Processes in Africa" (2017) *African Human Rights Law Journal* at 276-277.

111 Stahn (n 103 above) at 89-90.

112 Happold (n 77 above) at 230. See also Cryer (n 5 above) at 461.

113 Ibid.

114 Ibid. See also William Schabas "*An Introduction to the International Criminal Court*" (Cambridge University Press, 2017) at 153. See also Patrick Labuda "The African Union's Collective Withdrawal from the ICC: Does Bad Law make Good for Politics" (2017) *European Journal of International Law*.

115 Para 6 of UNSCR 1593 (2005). The paragraph is exactly the same as para 6 of UNSCR 1970 (2011), what is said about Sudan applies *mutatis mutandis* to Libya. Sharon Williams & William Schabas "*Jurisdiction, Admissibility and Applicable Law*" in Otto Triffterer (ed) "*Commentary on the Rome Statute of the International Criminal Court*" (Nomos Verlagsgesellschaft, 1999) at 571-572. See also Verduzco (n 97 above) at 35-37. See also Dire Tladi "ICC and UNSC: Point Scoring and the Cemetery of Good Intentions" (2014) *Institute for Security Studies*. Max du Plessis "Exploring Efforts to Resolve the Tension between the AU and the Bashir Saga" (2016) *African Legal Aid*.

from the jurisdiction of the Court while subjecting others, like Sudan and Libya, to its jurisdiction? As with Article 13(b) referrals, it appears that Article 16 deferral concerns sounded at Rome, which discouraged the involvement of the UNSC as a political entity whose past questionable record as an impartial arbiter in disputes, have come to pass. With these actions by the UNSC, the statement by the Sudanese Ambassador to the UN that Sudan is not going to cooperate with the ICC, since Sudan is not, like other Permanent Members, a party to the Rome Statute and therefore owes no cooperation obligations to the Court, appears to have merits. By invoking Article 16 in a manner, it was never intended to, the UNSC appears to be an active participant in the conflictual relationship, thus exacerbating non-cooperation by the AU with the ICC.

4 THE MANDATE OF THE UNSC AND THE ICC

4.1 Background

One of the contributing factors to the conflictual relationship between the UNSC and the ICC is their mandates, with the former being a political entity and the latter being a judicial entity. It can therefore be expected that in dealing with Articles 13(b) and 16 of the Statute, the UNSC will prioritise political expediency focusing mainly on peace and security while neglecting justice. As a permanent judicial institution with the powers to exercise jurisdiction over persons for the most serious crimes of international concern, the ICC's activities will focus mainly on justice.

4.2 The Mandate of the UNSC

Notwithstanding the wide-ranging powers of the UNSC, Graefrath submits that while exercising its powers the UNSC is required to act in conformity with the principles and purposes of the Charter and other relevant international instruments. These principles include that of justice and international law.[116] Graefrath's observations are shared by the UNSC itself when declaring in its "commitment to collective security" that:[117]

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116 Bernhard Graefrath "Leave to the Court What Belongs to the Court the Libyan Case" (1993) *European Journal of International* Law at 205. See also para 3 of the preamble, art 1(1) and 2(3) of the UN Charter.

117 UNSC Doc: S/PV.3046 31 Jan 1992 at 143. See also UNSC resolution 242 (1967). See further the preamble to UNSC resolution 667 and 670 (1990).

> The members of the Council pledge their commitment to international law and to the United Nations Charter. All disputes […] should be […] resolved in accordance with the provisions of the Charter.

Similarly, in its "Open Debate on Peace and Justice" the UNSC reiterated the aforementioned commitment by stating that:[118]

> [t]he relationship between the Security Council and the International Criminal Court promotes the rule of law […] contributes to the achievement of sustainable peace, in accordance with international law and the purposes and principles of the Charter. In broader terms, the mere existence of the Court, which tries to address impunity at the international level, should act as a deterrent of mass atrocities. This preventive function is entirely consistent with the spirit and letter of the role of the Council.

According to Higgins, the implications of the above are that, while exercising its powers, the UNSC is expected to operate within the confines of the law, for example Articles 13(b) and 16 of the Rome Statute, rather than basing a decision purely on the law aspect.[119] Acting this way allows the entity to address a variety of multi-faceted problems with a range of possible solutions. In such cases, a political body may be better placed to provide a solution within a broader framework of legally acceptable solutions, for example establishing the ad hoc tribunals and referring or deferring situations to and from the ICC. Therefore, even though the law is used differently by the UNSC, the law should always be an element in the solutions offered by the UNSC.[120] Agreeing with Graefrath, Higgins concludes that despite the UNSC being a political body, its role is defined by the UN Charter, so whether a legal instrument or a treaty between nations, it must always endeavour to act within those legal constrain.[121]

Koskenniemi does not appear convinced by the above authors' idealistic arguments.[122] Regarding the principles and purposes of the Charter as some form of restriction on the UNSC conduct, Koskenniemi argues that the principles and purposes of the Charter are numerous, indeterminate,

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118 UNSC President Statement (S/2012/731, 2012) at 2.

119 Rosalyn Higgins "The Place of International Law in the Settlement of Disputes by the Security Council" (1970) *American Journal of International Law* at 16. It was within this powers that the UNSC established the ad hoc tribunals to deal with situation which constituted a threat to peace. These powers were further confirmed by the ICTY in the *Prosecutor v Dusco Tadic (Dule): Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* (1995) ICTR at para 21-40. See further Alexander Galland "*UN Security Council Referral to the International Criminal Court*" (Brill, 2018) at 27. See also Verduzco (n 115 above) at 32.

120 Ibid.

121 Higgins (n 119 above) at 339, 341-345.

122 Koskenniemi (n 13 above) at 327.

ambiguous and conflicting.[123] For this argument, he cites the relationship between domestic jurisdiction in Article 2(7) and human rights under Articles 1(2) and (3), 55 and 56. This, Koskenniemi argues, can only be determined by successive acts of UN political organs in line with the political logic of the moment, any attempt at textual constraint is practically pointless. Moreover, since each UN organ is the judge of its own competence, any procedural constraint seems not to matter, as many have come to accept that relevant issues within the UNSC are settled through the political possibilities of the time *i.e.*, if the UNSC or the Permanent Members can agree there is little more anyone can do or say, meaning what the UNSC say is the law.[124]

From the above, the powers of the UNSC are clearly supposed to be constrained by the legal framework as encapsulated in the UN Charter and other international legal instruments such as Articles 13(b) and 16 of the Rome Statute. As an entity bestowed with the huge responsibility of maintaining international peace and security (the common good), its decisions making was not supposed to suffer from legitimacy concerns. However, from the cooperation obligations as provided for in Resolutions 1593 and 1970, the indifferent posture adopted after cases of non-cooperation were reported, including the purported deferral in Resolution 1422, it appears that decision-making within the Council does not conform to the principle of justice and international law but is guided by the political logic of the moment.

4.3 The Mandate of the ICC

One of the distinguishing features of the Statute is that, like the ad hoc tribunals, it recognises that the commission of international crimes not only shocks the conscience of humanity, but also threatens the peace, security and wellbeing of the world.[125] In other words, it is precisely during war and such conflicts that crimes falling within the jurisdiction of the Court are committed.[126] It is for this reason that Verduzco argues that the Court's establishment was within the traditions of peace maintenance.[127] This observation is made clear in the preamble wherein the drafters

123 Ibid. See also Rosalyn Higgins "*Problems and Process: International Law and How We Use It*" (Oxford University Press, 1994) at 183-184. See further Marc Weller "The Kuwait Crisis: A Survey of Some Legal Issues" (1991) *African Journal of International and Comparative Law* at 35.
124 Ibid. See also UNSC resolution 674 (1990) at para 8-9. See UNSC 648 (1992).
125 Para 2 and 3 of the preamble to the Rome Statute.
126 Ibid. See also Morten Bergsmo & Otto Triffeterer "*Rome Statute of the International Criminal Court*" in Otto Triffeterer (ed) "*Commentary on the Rome Statute of the International Criminal Court*" (Verlag C.H. Beck, 1999) at 12.
127 Verduzco (n 115 above) at 31.

reaffirm the purposes and principles of the UN Charter.[128] In restating these purposes and principles, the aim is to enhance international peace and security by prosecuting perpetrators of international crimes.[129] According to Bergsmo and Triffterer, maintaining and restoring international peace and security bears directly on the need to undertake international judicial intervention in the face of crimes of international concern.[130] To the extent necessary, the authors posit that the reaffirmation of the Charter's purposes and principles may also serve as a reminder to States to effectively prevent or stop conflicts according to the settlement regimes of the Charter. These objectives, if realised, will similarly help prevent crimes within the jurisdiction of the Court.[131] Bergsmo and Triffterer surmise that the end-result will be international peace and criminal justice gradually developing more mature modes of coexistence based on the fundamental values of human life underpinning both the Charter and the ICC Statute.[132]

To give impetus to Bergsmo and Triffterer, commonality and the "interplay between the two institutions", the Statute called on the Court to enter into a relationship agreement with the UN (the ICC-UN Relationship Agreement).[133] The main purpose of the ICC-UN Relationship Agreement is to concretise the aforementioned coexistence through close cooperation on issues of mutual concern.[134] According to Stahn and Sluiter, the ICC like the ad hoc tribunals, sees its enforcement of international justice as an integral part of and or contributing to the UNSC's primary purpose of maintaining lasting international peace and security, which is to say, the common good.[135]

Nonetheless, the Court is not necessarily an enforcement tool of the UNSC, as it remains independent, with its own international legal personality and only bound by its founding document,

128 Para 7 of the preamble to the Rome Statute. See also art 1, 2 and 24 of the UN Charter.
129 Ibid.
130 Bergsmo & Triffterer (n 126 above) at 12.
131 Ibid.
132 Ibid. This is in line with the preambular paragraph of the ICC-UN Relationship Agreement wherein the desire is to make provision for a mutually beneficial relationship whereby the discharge of the respective responsibilities may be facilitated.
133 Art 2 of the Rome Statute.
134 Art 3 of the ICC-UN Agreement.
135 Carsten Stahn & Goran Sluiter "*The Emerging Practice of the International Court*" (Brill & Nijhoff, 2009) at 2.

the Rome Statute.[136] This is reiterated by the UN in the ICC-UN Relationship Agreement, wherein the UN recognises the Court as an independent permanent judicial institution.[137]

Verduzco posits that despite the ICC-UN Relationship Agreement, the biggest challenge facing the ICC is how it will practically manage its relationship with the UNSC or concretise the justice-peace objectives.[138] This observation is shared by Stahn and Sluiters who believe that one of the challenges the Court will face is being active in ongoing conflict situations wherein crimes within the jurisdiction of the Court continue to be committed, thus bringing its relationship with the UNSC to the fore.[139] This will present significant challenges to the Court in terms of investigations, security and logistics and in the process underscoring the importance of international cooperation with the UNSC.[140]

5 CONCLUSION

In terms of the Statute, the relationship between the ICC and the UNSC was to be mutually beneficial. In respect of Article 13(b), the powers were going to expand the reach of accountability to situations where the ICC would normally not have jurisdiction, such as when the situation State is not a Party to the Rome Statute.[141] Similarly, the UNSC would benefit from the referral to the ICC, as holding those accused of committing heinous crimes accountable is intrinsically linked to the UNSC's primary mandate of maintaining peace and security.[142] For this to happen, it required that the two entities work together in a spirit of cooperation, especially on the part of the UNSC as it wields greater power than the nascent Court.[143] However, the two referral resolutions make it appear that political factors determine whether a situation is referred or deferred.

In respect of deferral, the article was supposed to be a temporary measure at the disposal of the UNSC in situations where the continued investigations or prosecution by the ICC was adjudged

136 Para 9 of the preamble and Art 1, 2 & 4 of the Rome Statute. See also Conderelli & Villapando (n 33 above) at 220-223 & 630.
137 Para 9 of the preamble and art 2 of the ICC-UN Relationship Agreement.
138 Verduzco (n 115 above) at 30-31.
139 Stahn & Sluiter (n 135 above) at 11-12.
140 Ibid. See also Makau Mutua "The International Criminal Court: Promise and Politics" (2015) "Proceedings of the Annual Meeting" *American Society of International Law* at 270-271.
141 Stephane Borgon "Jurisdiction *Ratione Loci*" in Antonio Cassese *et al* (eds) "*The Rome Statute of the International Criminal Court: A Commentary*" (Oxford, 2002) at 566.
142 Blome and Markard (n 47 above) at 552.
143 Ibid.

to be a threat to international peace and security. However, as with Article 13(b) it is seemingly used for reasons other than the intended purpose. With these actions by the UNSC, cooperation with the Court suffers because of perceived double standards.

From the above analysis, the UNSC clearly contributes to the conflictual triangular relationship, as those outside the Council see the Court as just another political tool at the disposal of the UNSC to be used against some of them. It would appear that the warnings by sceptical commentators about introducing the highly politicised UNSC into the work of the ICC have come to pass. Unless something drastic happens within the UNSC, it appears the Court will, for the foreseeable future, struggle to get cooperation from States Parties and other relevant international organisations like the AU.

CHAPTER FIVE

RELATIONSHIP BETWEEN THE AU AND THE ICC

1 INTRODUCTION

In recent times, the relationship between the AU and the ICC has come into sharp focus as a result of decisions of the AU to withdraw cooperation for African States Parties against the Court.[1] Unlike the UNSC and the ICC, the relationship between the two entities is not formalised in any kind of international agreement.[2] Similarly, the primary mandates of the two entities differ in many respects, the AU mandate being political, whilst that of the ICC is judicial.[3] Despite these differences, there are some overlaps between their mandates.[4]

The chapter first looks at the mandate of the AU to determine if this mandate could be the possible source of the conflictual relationship with the ICC. Secondly, the role of African States and the AU in the establishment of the Court is analysed. The role is followed by the actions taken by the African States Parties in the operationalisation of the Court. The actions include the initial cordial relationship between the Court and the AU regarding self-referral cases. Thirdly, the chapter looks into the conflictual relationship between the two entities emanating from the UNSC referral cases. The analysis focuses mainly on cooperation and non-cooperation emanating from the Prosecutor's investigations and the resultant arrest warrant application in the Darfur referral, as the relationship between the AU and the ICC came into sharp focus following the referral. The deferral request to the UNSC is then reviewed to determine how the request contributed to the conflictual relationship, as are the arguments advanced for cooperation/non-cooperation.

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1 AU Assembly Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (Assembly/AU/Dec.245(XIII) of 3 July 2009 at 2.

2 See ICC-Prosecutor Fifth Report to UNSCR 1593 (2005) of 27 April 2016. Report of the International Criminal Court to the United Nations for 2009/10 (UNGA Doc: A/65/313) 103. See the preamble and Art 2 of the Statute. The Statutes of both entities do not refer to each other's founding documents.

3 Art 3 of the AU Act provides that the objectives of the Union is to amongst others promote peace and security on the continent while one of the ideals of ICC is to put an end to impunity and the enforcement of international justice (preamble to the Statute).

4 Preambles to AU Constitutive Act and Rome Statute.

2 MANDATE OF THE AU

The AU is a political body guided by a common vision of a united and strong Africa with the purpose of building partnerships between African governments.[5] Some of the objectives of the AU are to promote peace, security, and stability on the continent.[6] To achieve the said objectives, it holds to principles such as respecting human rights, the rule of law and good governance, and condemnation and rejection of impunity.[7] Furthermore, the AU is determined to, amongst others, monitor the implementation and compliance with common decisions.[8]

3 AFRICA'S ROLE IN THE ESTABLISHMENT OF THE ICC

Against that background, the establishment of the ICC was a matter of extreme priority for the AU as, according to Mbizvo, the envisioned court was not only expected to contribute to measures already adopted by the AU but was also expected to, in the long run, contribute towards the maintenance of regional peace and security.[9] There was a realisation amongst African leaders that the dream of Africa's rebirth was intrinsically linked to AU Member States committing themselves to the principle of democracy, respect for human rights and the basic tenets of good governance.[10] These noble goals, it was argued, could not be achieved in an environment of violent crimes and civil wars, therefore investigating and prosecuting those responsible for such violations was amongst the measures touted to assist the AU in its rebirth agenda. The establishment of ICC was therefore seen as fitting within this agenda.[11]

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5 Preambles to AU Constitutive Act.
6 Art 3(b) & (f) AU Constitutive Act.
7 Art 4 (h), (m) & (o) of the AU Constitutive Act.
8 Art 9(a) & (e) of the AU Constitutive Act.
9 Shamiso Mbizvo "*The ICC in Africa, the Fight against Impunity*" in Kamar Clarke *et al* (eds) "*Africa and the ICC: Perceptions of Justice*" (Cambridge, 2016) at 41. Konstantinos Magliveras and Gino Naldi "The International Criminal Court's Involvement with Africa: Evaluation of a Fractious Relationship" (2013) Nordic Journal of International Law at 423. Charles Jalloh "Africa and the International Criminal Court: Collision Course or Cooperation? *Northern Carolina Centre of Law* (2012) at 204.
10 Phakiso Mochochoko "*Africa and the International Criminal Court*" in Evelyn Ankumah & Edward Kwakwa (eds) "*African Perspective on International Criminal Justice*" (African Legal Aid, 2005) at 242.
11 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome (15 June -1 7 July 1998, Official Records Volume II), Summary records of the plenary meetings and of the meetings of the Committee of the Whole Statement by Mr Maluwa speaking on behalf of the OAU at the Rome Conference at 104 para 117 https://legal.un.org/diplomaticconferences/1998_icc/docs/english/vol_2.pdf (accessed 13 Dec 2022) See also Mochochoko (n 10 above) at 246-247. Abel Knottnerus & Eefie de Volder "*International Criminal Justice and the Early Formation of an African Criminal Court*" in Kamari Clarke *et al* (eds)

To give impetus to the rebirth agenda, the process leading to the establishment of the Court saw regional coordination by African States in support of it.[12] For example, in May 1997, the International Commission of Jurists held a workshop in Kenya to discuss various issues on the draft statute and to develop a regional approach towards the establishment of the Court.[13] The Southern African Development Community (SADC) came together to discuss negotiation strategies and agree on a common position.[14] Similarly, a conference on the Establishment of the International Criminal Court was held in Dakar, Senegal to consolidate the African position on the establishment of the ICC.[15] These sub-regional conferences adopted principles and a declaration on which the statute of the envisioned Court should be founded.[16] A common theme emerging from these documents was that the nascent Court should be independent of the United Nations Security Council, with an independent prosecutor, and should be fair and have inherent jurisdiction over serious international crimes.[17] To make the Court more effective, it was suggested that it should enjoy maximum cooperation of all States.[18] These sub-regional efforts were similarly acknowledged by the mother body, which encouraged Member States to support the creation of the Court.[19]

"*Africa and the ICC: Perceptions of Justice"* (2016) at 376. See also Art 87(b) of the Rome Statute which provides that a request may also be transmitted through any appropriate regional organisation. For the AU and its predecessor OAU the idea of a permanent criminal court within the African continent was always under consideration especially for the prosecution of the crime of apartheid, however the idea never came to fruition. See also Ademola Abass "Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges" (2013) *The European Journal of International Law* at 937. See further Godfrey Musila "*The Role of the African Union in International Criminal Justice: Force for Good or Bad*" in Evelyn Ankumah (ed) "*The International Criminal Court and Africa: One Decade On*" (Intersentia, 2016) at 317-318. See further Line Engbo Gissel "A Different Kind of Court: Africa's Support for the International Criminal Court, 1993–2003" (2018) *European Journal of International Law* at 732. See also Art 4(h) of the AU Constitutive Act and art 5 of the Rome Statute.

12 Makau Mutua "Africa and the ICC, Hypocrisy, Impunity, and Perversion" in Kamari Clarke *et al* (eds) "*Africa and the ICC: Perceptions of Justice*" (Cambridge, 2016) at 52.

13 Mochochoko (n 10 above) at 248.

14 Statement by Ambassador Khiphusizi Jele: SADC Principles 21 Oct 1997. See also United Nations Diplomatic Conference of Plenipotentiaries (n 11 above) at 65 paras 13-16. See also Sivu Maqungo "The Establishment of the International Criminal Court: SADC's Participation in the Negotiations" (2000) *African Security Review* at 43-44.

15 Dakar Declaration on the Establishment of the International Criminal Court 1998 of 6 Feb 1998. See also Gissel (n 11 above) at 733.

16 Ibid.

17 SADC Principle on the Establishment ICC & Dakar Declaration on Establishment of the ICC. See also Max du Plessis "The International Criminal Court that Africa Want" (2010) *Institute for Security Studies* at 7. See also Mochochoko (n 10 above) at 247-249.

18 SADC Principle 7. Dakar Declaration Principle 7 (under "Affirming" para 9) 1998 of 6 Feb 1998. See also Gissel (n 11 above) at 733.

19 African Commission on Human and People's Rights "27 Resolution on the Ratification of Treaty on the International Criminal Court: ACHPR/Res.27 (XXIV) 98" (1998). See also Mochochoko (n 10 above) at 249. See also du Plessis (n 17 above) at 7.

These initiatives were taken into the Rome Conference with AU Member States joining other like-minded States and actively participating in drafting the Statute.[20] The Africans' coordinated approach was succinctly captured by the AU Observer to the Conference, who stated that Africa has a special interest in the establishment of the Court because its people had for centuries suffered human rights atrocities.[21] When the Statute was later put to a vote, forty-one African States voted in favour, with only Libya voting against adopting the Statute.[22] As it currently stands, thirty-three African States are State Parties to the Rome Statute, making Africa the biggest regional block accounting for about one-third of the grouping on the Assembly of States Parties (ASP) to the Rome Statute.[23] Symbolically, Senegal's speedy ratification of the Rome Statute capped African support for a permanent court having jurisdiction over the most serious crimes of concern to the international community.[24]

The African support was further demonstrated after the ICC came into being, with Africans filling key positions within the Court.[25] In addition, several African States Parties enacted legislations to give effect to their treaty obligations, thus indicating their willingness to cooperate with the nascent Court.[26]

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20 Mbizvo (n 9 above) at 41. See also Mochochoko (n 10 above) at 249-250. See further Mutua (n 12 above) at 52-53, Solomon Derso "*The ICC's Africa Problem*" in in Kamari Clarke *et al* (eds) "*Africa and the ICC, Perceptions of Justice*" (Cambridge, 2016) at 62 and du Plessis (n 17 above) at 7.

21 United Nations Diplomatic Conference (n 11 above) at 104 para 115-116. See also Derso (n 20 above) at 62.

22 Human Rights Watch: Q & A The International Criminal Court and the United. https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states (accessed 10 Feb 2023). See also Mbizvo (n 9 above) at 41, Mochochoko (n 10 above) at 249-250. See further Mutua (n 12 above) at 52-53 and Derso (n 20 above) at 62, ICC Assembly of State Parties. https://asp.icc-cpi.int/states-parties/african-states (accessed 28 April 2022) and see also du Plessis (n 17 above) at 1.

23 Fatou Bensouda "Lessons from Africa Paper by the then Prosecutor Elect, at an International Conference: 10 years review of the ICC. Justice for All? (2012) *International Criminal Court*" at 4. See also du Plessis (n 17 above) at 5-6. See further Mutua (n 12 above) at 52-53.

24 Jalloh (n 9 above) at 204. See also Mochochoko (n 10 above) at 246. Thirty-Sixth Ordinary Session of the Assembly of Heads of State and Government (AHG/Decl.1 (XXXVI) 10-12 July 2000): Stability at para (l). See also Rowland Cole "Africa's Relationship with the International Criminal Court: More Political than Legal" (2013) *Melbourne Journal International Law* at 672-3.

25 Mbizvo (n 9 above) at 41. See also du Plessis (n 17 above) at 5.

26 Anna Triponel & Stephen Pearson "African States and the International Criminal Court: A Silent Revolution in International Criminal Law" (2010) *Journal of Law and Social Challenges* at 74-76. See also Du Plessis (n 17 above) at 10. See further Alebachew Enyew "The Relationship between the International Criminal Court and Africa: From Cooperation to Confrontation" (2012) *Bahir Dar University Journal of Law* at 127 wherein quite a few African States resisted the US pressure to enter into bilateral immunity agreements whereby States Parties to the Rome Statute agreed not to send US citizens for trial at the ICC thus interfering with the cooperative framework of the Statute.

The African contribution was equally captured by the second Prosecutor when she postulated that "African institutions and African people are largely responsible for building the system of international justice designed by the Rome Statute".[27] In the same breath, ICC President Sang-Hyun Song empathetically stated that the African States "played a very important role prior to and during the establishment of the Court and perhaps, without Africa's support, the Rome Statute would never have been adopted".[28]

It could be asked why Africa was so interested in the establishment of the Court. This question calls to mind why States enter into agreements with other States or establish international organisations in the first place: to advance and protect common or national interests. For African States, even though the support for the establishment of the Court may have started on a national level, the individual States managed to transform their individual support into regional support. The various sub-regional initiatives by SADC, as well as in Kenya and Senegal, could be explained within this context. Ultimately, the sub-regional support (interests) became the basis on which the AU Observer could say that "Africa has a special interest in the establishment of the Court". These all support Friedmann's international law of cooperation, in that if there are clearly defined common goals, cooperation becomes easy to obtain.

The statement that the Court's establishment supports the "rebirth agenda" falls within the international law of cooperation for development, or the principle of solidarity. From the AU's side, the establishment of the Court therefore seems to be a continuance of the struggle that started with the negotiation and adoption of the UN Friendly Relations Declaration, wherein they advocated for greater international cooperation to promote and maintain peace, security and economic growth. In supporting the establishment of the Court, Africa is essentially trying to achieve substantive equality as compared to formal equality. In other words, Africa's support for the Court is, in a way, trying to balance the unequal law of coexistence as firstly developed in Westphalia and restated in Article 2 of the UN Charter.

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27 Bensouda (n 23 above) at 3.

28 ICC President Praises Botswana, *Mmegionline*, 5 June 2009. https://www.mmegi.bw/features/icc-president-praises-botswana/news (accessed 01 May 2022). See also Manisuli Ssenyonjo "The Rise of the African Union Opposition to the International Criminal Court's Investigations and Prosecutions of African Leaders" (2013) *International Criminal Law Review* at 386. See further Jean-Baptiste Jeangène Vilmer "The African Union and the International Criminal Court: Counteracting the Crisis" (2016) *Royal Institute of International Affairs* at 1321.

4 CORDIAL RELATIONSHIP BETWEEN AU AND THE ICC

The cordial relationship between the Court and AU continued in the early days of the Court's operations with a number of African States Parties self-referring situations in their respective countries to the ICC, making these situations the first to be investigated by the Court.[29] Equally so, and even though by then the Ivory Coast was not a State Party to the Statute, it accepted the jurisdiction of the Court for acts committed on its territory since the events of 19 September 2002.[30] By self-referring the situations and accepting the jurisdiction of the Court, it was an indication by African States Parties that they are prepared to cooperate or offer assistance to the Court in its investigations and orders.[31] The cooperative spirit was concretised when self-referring States acquiesced in the arrest and surrender of, amongst others, Thomas Lubanga Dyilo, Germain Katanga, Mathieu Ngudjolo Chui, Pierre Bemba and Laurent Gbagbo.[32] Throughout

29 Uganda, the Central African Republic (CAR) and the Democratic Republic of Congo (DRC) became the first AU Member States to refer situations in their respective countries to the Court. See also ICC: President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC (ICC-20040129-44): Press release 29 Jan 2004. ICC – Prosecutor receives referral concerning Central African Republic (ICC-OTP-20050107-86): Press release 7 Jan 2005. See also Mbizvo (n 9 above) at 45.

30 Republic of Côte d'Ivoire: Declaration Accepting the Jurisdiction of the International Criminal Court (18 April 2003) https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279844/ICDEENG.pdf (accessed 01 May 2022). Ivory Coast ratified the Rome Statute on the 15 Feb 2013 and became the 122nd State Party thus further showing African support to the Court. https://www.icc-cpi.int/news/cote-divoire-ratifies-rome-statute (accessed 01 May 2022).

31 William Schabas "'Complementarity in Practice': Some Uncomplimentary Thoughts" 20th Anniversary Conference of the International Society for the Reform of Criminal Law, Vancouver, 23 June 2007 at 3. See also Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications, Sep 2003. Mahnoush Arsanjani and Michael Reisman "The Law-in-Action of the International Criminal Court" (2005) *American Journal of International Law* at 395.

32 Information to the Chamber on the execution of the Request for the arrest and surrender of Germain Katanga" (ICC-01/04-01/07-40) of 22 Oct 2007. See also "Report of the Registry on the voluntary surrender of Dominic Ongwen and his transfer to the Court" (ICC-02/04-01/05) of 22 Jan 2015. See also Payam Akhavan "*International Criminal Justice in the Era of Failed States: The ICC and the Self-referral Debate*" in Carsten Stahn & Mohamed M. El Zeidy "*The International Criminal Court and Complementarity: From Theory to Practice*" (Cambridge University Press, 2011) at 290-292. See further Manuel Ventura & Amelia Bleeker "*Universal Jurisdiction, African Perceptions of the International Criminal Court and the new AU Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*" in Evelyn Ankumah (ed) "*The International Criminal Court and Africa: One Decade On*" (Intersentia, 2016) at 443-444. See also Case Information Sheet: Situation in Côte d'Ivoire, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé* (ICC-02/11-01/15) https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/gbagbo-goudeEng.pdf (accessed 20 May 2022).

these self-referrals, acceptance of jurisdiction, arrests and surrenders, the AU never protested, and in fact reiterated the need to fight impunity on the African continent in its assembly decisions.[33] The initial cordial relationship between Africa and the ICC can be classified as a clear manifestation of the law of international cooperation. The reason for this is that for African Sates to cooperate in the abovementioned cases, they were motivated by the common goal of attaining peace and security on the African continent through justice. Notwithstanding this assertion, an equally valid argument can be made that in actively participating in the establishment of the ICC, in self-referring the situations in their countries and in ultimately arresting and surrendering the mentioned suspects, African States were not necessarily driven by the common good but by national and regional interests. This is further supported by the fact that at the time of their arrest or surrender, the implicated persons had no political power. Put differently, Seymor argues that in the mentioned cases, cooperation with the Court was instrumentalised in ways at odds with the legal and ethical vision of the Court.[34] In other words, cooperation was done to advance the national and political interests of those referring, arresting or surrendering.

5 COOPERATION BETWEEN THE AU AND ICC IN RESPECT OF UNSC REFERRALS

5.1 AU Posture towards the UNSC Referral

The second time the importance of cooperation between the AU and the ICC was brought to the fore was when the UNSC passed Resolution 1593, referring the situation in Darfur to the ICC.[35] The resolution was adopted with eleven votes in favour and four abstentions.[36] Even though some Members voted for the resolution, they expressed concern with the text of the resolution, for example the delegate of Tanzania, while explaining the reason for the positive vote, stated that they are:[37]

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33 Vilmer (n 28 above) at 1330. See also Musila (n 11 above) at 322. See further Lee Seymour "*Rhetoric, Hypocrisy Management, and Legitimacy*" in Clarke et al (eds) "*Africa and the ICC: Perception of Justice*" (Cambridge University Press, 2016) at 113.

34 Seymour (n 33 above) at 113.

35 Resolution 1593 (2005).

36 UNSC 5158th Meeting of 31 March 2005 (UNSC Doc: S/PV.5158) at 1. Voted in favour are Argentina, Benin, Denmark, France, Greece, Japan, Philippines, Romania, Russian Federation, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania. Abstentions Algeria, Brazil, China, United States of America.

37 Ibid.

> [c]oncerned that the resolution also addresses other issues that are, in our view, extraneous to the imperative at hand. We are therefore unable to accept that the resolution should in any way be interpreted as seeking to circumvent the jurisdiction of the Court.

Similarly, in explaining the reason for the positive vote and its concern, the delegate of Benin expressed regret that the text of the resolution contains a provision of immunity from jurisdiction, which runs counter to the spirit of the Rome Statute.[38] China, in clarifying its position, indicated that it would have preferred that the situation in Darfur be dealt with by the African panel for criminal justice and reconciliation as proposed by Nigeria on behalf of the African Union. While pointing out that China is not a State Party, it concluded that it "cannot accept any exercise of the ICC's jurisdiction against the will of non-State parties" and therefore finds it difficult to endorse any UNSC authorisation of such an exercise of jurisdiction by the ICC.[39] Algeria, following China's example, abstained because it believed the AU was better placed than the ICC to deal with the situation.[40]

Sudan's delegate was scathing in his statement to the UNSC, criticising the unwise decision to refer the matter to the ICC. He went further and also pointed out that the exception in the resolution, which excluded some Members who are not Parties to the Rome Statute from the jurisdiction of the Court, suggests that justice is based on the exploitation of the developing countries by the major hegemonies. As such, the Court faced procedural impediments and legitimate reservations because Sudan, like some of the Permanent Members, is also not a Party to the Rome Statute.[41]

From the Tanzanian, the Benin and Sudan statements it is clear that the struggle for substantive equality as encapsulated in the UN Friendly Relations continues in that the resolution should not assail the principle of equality before the law by trying to insulate some nationals of contributing countries from the reach of the Court. As discussed in the preceding chapters, the law of international cooperation is a response to the inequality as perpetuated by the law of coexistence. China's statement supports the classical law of coexistence when saying that it "cannot accept any exercise of the ICC's jurisdiction against the will of non-State parties". The argument by Sudan also supports the mentioned law of coexistence because as a non-State Party and despite the

38 UNSC 5158th (n 36 above): Statements by delegates of Tanzania and Benin at 9 and 10.
39 Ibid at 5.
40 Ibid at 4, 9 & 10.
41 UNSC 5158th (n 40 above): Statements by delegates of Sudan at 12.

powers of the UNSC under Article 13(b), Sudan cannot be subjected to the jurisdiction of the Court without its consent. The different statements within the UNSC in respect of Sudan lay bare the contestation between the law of cooperation and the law of coexistence.

In the final analysis, the law of international cooperation appears to have won the day. The resolution referring Sudan to the ICC was passed because the situation threatened the common good of international peace and security and not because Sudan accepted the jurisdiction of the Court. Furthermore, Sudan was put under a mandatory obligation to cooperate with the Court without its consent.

Notwithstanding the earlier reservations by Tanzania and Benin and the protest by Sudan, the AU reciprocated the UNSC call for practical arrangements by urging:[42]

> [t]he Government of the Sudan and the rebel movements, to cooperate with the Office of the Prosecutor of the International Criminal Court (ICC) as called for by UN Security Council Resolution 1593 (2005) of 31 March 2005 and to take all necessary steps to combat impunity to ensure lasting peace and reconciliation in Darfur, and requests the Commission to cooperate with the ICC.

According to the Prosecutor, the call by the AU was also reiterated by the AU Commission Chairperson, Ambassador Konare, who assured the OTP that the AU is committed to full cooperation with the ICC in the Darfur situation.[43] Similarly Ambassador Kingibe, the Special Representative and Head of the African Union Mission in Sudan, assured the Prosecutor of the AU's commitment to fully cooperate with the ICC and the determination to assist in the fight against impunity.[44]

5.2 ICC Posture towards the Referral

The importance of "practical arrangements" between the Court and the AU was equally not lost to the OTP. In his first report, the Prosecutor made it clear that a strong relationship between the Court and AU is critical not only because of the leading role played by the AU in seeking peace

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42 AU Peace and Security Council communiqué of 10 March 2006 at para 4(b)(ix). http://www.peaceau.org/uploads/communiqueeng-46th.pdf. (accessed 05 May 2022).

43 ICC-Prosecutor Third Report at 8.

44 Ibid. See also Manisuli Ssenyonyo "State Withdrawal from the Rome Statute of the International Criminal Court: South Africa, Burundi and The Gambia" in Charles Jalloh & Illias Bantekas "The International Criminal Court and Africa" (Oxford University Press, 2017) at 223.

and security in Darfur, but also to ensure that the contribution to justice by the ICC is made more meaningful.[45] In accordance with Article 97 of the Statute to operationalise the referral, the OTP scheduled consultative meetings with various AU representatives, to build a working relationship with the AU and proactively identify problems which may impede the work of the ICC in respect of the Darfur situation.[46]

To concretise the aforementioned relationship within the provisions of Article 87(6) of the Statute, the OTP undertook a joint mission to the AU headquarters in Addis Ababa to finalise the relationship agreement between the Court and the AU.[47] If finalised, the agreement would have allowed the Prosecutor to ask for other forms of cooperation and assistance. The Prosecutor also believed that the agreement would have provided the framework and modalities for cooperation in respect of the Darfur situation. However, due to the impasse in the Darfur situation, the agreement was never finalised.[48] Despite the failure of the ICC and the AU to conclude the relationship agreement, the Prosecutor was still convinced that:[49]

> [A]frican states have consistently helped us at each step of our activities: in the opening the investigations, in conducting the investigations, in pursuing and arresting individuals sought by the Court, in protecting our witnesses, etc. These are not just words. African States receive more than 50 per cent of our requests for cooperation. 85 per cent are met with a positive response.

Regardless of the statement made by the delegate of Sudan after the adoption of Resolution 1593, the initial relationship between Sudan and the ICC was cordial. For example, as part of the Article 97 consultation, the OTP managed to visit Sudan with the assistance of the Sudanese government.[50] During this visit, the Sudanese government allowed the OTP unfettered access to government institutions and officials.[51] These actions infer that despite its initial protest about the

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45 First Report of the Prosecutor of the ICC to the UNSC pursuant to UNSCR 1593 (2005) (29 June 2005) at 6. https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/CC6D24F9-473F-4A4F-896B-01A2B5A8A59A/0/ICC_Darfur_UNSC_Report_290605_EN.pdf (accessed 08 May 2022).

46 ICC-Prosecutor First Report at 7.

47 Ibid at 6.

48 Ibid.

49 Bensouda n 23 above.

50 Third ICC-Prosecutor Report at 8. See also art 97 of the Statute. UNSC 5158th (n 40 above): Statements by delegates of Sudan at 12.

51 Art 93(1)(l) of the Rome Statute. Lee Seymour "*Rhetoric, Hypocrisy Management, and Legitimacy*" in Clarke et al (eds) "*Africa and the ICC: Perceptions of Justice*" (Cambridge University Press, 2016) at 113. For example, in the Assembly decision of 02 Feb 2008 and 01 July 2008 no mentioned is made of the situation in Darfur nor arrest warrant of Ahmad Harun and Ali Kushayb.

jurisdiction of the Court over the situation in Darfur, Sudan seems to have accepted the jurisdiction of the Court.

6 CONFLICTUAL RELATIONSHIP BETWEEN THE AU AND THE ICC

The abovementioned cooperation posture by the AU changed with the application for a warrant of arrest of President Al Bashir.[52] The AU, among others, warned the ICC that the need for international justice must be conducted transparently and fairly to avoid any perception of double standards.[53] The AU further reiterated its concern about the misuse of the principle of universal jurisdiction, wherein African leaders are indicted in foreign courts. It also cautioned that the application for a warrant of arrest by the ICC Prosecutor could seriously undermine the AU's ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur. Against this backdrop the AU requested:[54]

> [t]he United Nations Security Council, in accordance with the provisions of Article 16 of the Rome Statute of the ICC, to defer the process initiated by the ICC, taking into account the need to ensure that the ongoing peace efforts are not jeopardised, as well as the fact that, in the current circumstances, a prosecution may not be in the interest of the victims and justice …

Following the referral, the visit to Sudan and the gathering of evidence from other various sources, which included having access to the UNSG International Inquiry on Darfur, the Prosecutor was ready with the first indictment and application of warrant of arrest of Ahmad Harun and Ali Kushayb.[55] The pair were charged with war crimes and crimes against humanity.[56] During all these developments, the AU never commented or protested.[57] The Prosecutor continued with his investigations until the evidence pointed towards Al Bashir, the President of Sudan, the evidence

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52 AU Peace and Security Council Press Statement [PSC/PR/BR(CXLI)] of 11 July 2008. See further *The Prosecutor v Omar Hassan Al Bashir (Omar Al Bashir): Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir* (No.: ICC-02/05-01/09) of 04 March 2009 at para 4.

53 AU Peace and Security Council Communiqué at para 7 & 9. See also Dire Tladi "The African Union and the International Criminal Court: The Battle for the Soul of International Law" (2009) *South African Yearbook of international Law* at 59.

54 AU Peace and Security Council Communiqué at para 3, 7 & 9.

55 The Commission was established pursuant to UNSCR 1564 (S/RES/1564 (2004) of 18 Sep 2004. In terms of art 15(2) of the Rome Statute the Prosecutor may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organisations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

56 Arrest Warrant for Ahmad Harun and Ali Kushayb: ICC-02/05-01/07 (27 April 2007).

57 AU Assembly Decisions of 3 July 2007 and 02 Feb 2008.

revealed that there were reasonable grounds to believe that Al Bashir acted with specific intent to destroy in part the Fur, Masalit and Zaghawa ethnic groups. Bashir was then charged with war crimes, crimes against humanity, and genocide. The first warrant of arrest was issued on 4 March 2009 for war crimes and crimes against humanity, followed by a second one for three counts of genocide on 12 July 2010.[58]

The implications of these warrants of arrest on Sudan were that, in accordance with Resolution 1593 and its earlier undertaking, Sudan was under a mandatory obligation to assist the Court in apprehending and surrendering the indicted persons to the Court. For (African) States Parties, it could be expected that if the accused persons were ever to enter their territory, and the Court requests assistance, African States Parties will fulfil their cooperation obligations by executing the arrest and surrender. As for the AU, it would also be expected to act on the undertakings by Ambassador Konare and Kingibe, and assist the Court in calling on Member States to arrest and surrender those accused in the Darfur situation.

Other actions that could have been undertaken was to authorise the African Union Mission in Sudan (AMIS) to arrest and surrender the indicted person to the Court. The action would have required the mandate of the mission to include such provisions. In addition, an agreement between the AU (AMIS) and ICC could have delineated the modalities of such cooperation, including a provision stating that AMIS is only allowed to arrest suspects who they come across or even go further and authorise searching and capturing (hunting down) of ICC suspects. On the AU's part, such provisions would have aligned with Article 4(h) of the AU Constitutive Act in that authorising the arrest and surrender of suspects accused of grave breaches such as crimes against humanity and genocide would have been in line with the right of intervention by the AU. This would have assisted the AU to realise its ideal of peace through ending of impunity.[59]

However, AMIS was primarily established to monitor and observe compliance with the Humanitarian Ceasefire Agreement of 8 April 2004, to assist in the process of confidence building and to contribute to a secure environment for delivering humanitarian relief. Without provisions on arrest and surrender, AMIS could not carry out such activities. Furthermore, AMIS was

58 Case Information Sheet: The Prosecutor v. Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09).
59 See Art 4(o) of the AU Constitutive Act.

insufficiently resourced to carry out its primary mandate, and would therefore have needed additional capacity.[60]

The above analysis is equally relevant to the subsequent African Union-United Nations Hybrid Operation in Darfur (UNAMID) with the proviso that the authorisation will be from the UNSC, as the Mission was established under this entity resolution. The resolution, like AMIS, would have required the inclusion of provisions stating that UNAMID must cooperate in the arrest and surrender of ICC suspects. As UNAMID was a joint mission between the AU and the UN the buy-in by the former would have been imperative for the arrest and surrenders to succeed. This is partly because the force composition of UNAMID was mainly from AMIS and the AU was given extensive powers under the resolution. Like AMIS, UNAMID had almost the same mandate as the AMIS with no mention of ICC, meaning UNAMID could not as per resolution cooperate with the ICC in the arrest and surrender of any indicted suspect.[61] With its wide-ranging powers under Chapter VII of the UN Charter, the UNSC will be within its mandate to authorise such actions. Furthermore, having referred the situation in Sudan to the ICC it would have strengthened the cooperation obligations as enunciated in the resolution.

From the ICC's side, the arrangement would have been in accordance with Article 87(6) of the Statute, wherein the Court can ask for other forms of cooperation and assistance from an intergovernmental organisation. The use of AU peacekeepers to arrest and surrender suspects to the ICC will have built on the precedent established by the ICTY wherein UN and NATO forces were authorised to arrest and surrender some of the indicted persons in the Former Yugoslavia.[62] The arrest by AMIS and UNAMID will further be in line with the principle as established in *Mrksk* and *Simic Cases* and confirmed by the Appeal Chamber in the *Milutinovic Case* wherein the Chamber held that: "States" refers to all Member States of the United Nations, whether acting individually or collectively […] such as an international organisation or its competent organ [...]."[63]

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60 AU Communique of Seventeen Meeting of the Peace and Security Council (PSC/PR/Comm.(XVII) of 20 Oct 2004 at 1-2. See also Paul Williams "The African Union's Peace Operations: A Comparative Analysis" (2009) *African Security* at 102-105.

61 See also Cécile Aptel Williamson "Justice Empowered or Justice Hampered: The International Criminal Court in Darfur" (2006) *Institute for Security Studies* at 27-28.

62 *Prosecutor v Milan Mulitinovic et al (Decision on the North Atlantic Treaty Organisation* for Review) ICTY (2006) at para 8.

63 ibid at 207-208.

This course of action would have further given impetus to the undertaking by the Head of African Union Mission in Sudan, Ambassador Kingibe to the Prosecutor that the AU will fully cooperate with the ICC in the fight against impunity.[64] Using peacekeepers in the Darfur situation, like in the ICTY could have been hailed as the turning point in the cooperation framework of ICC in that it could have transformed the Court from a hybrid model of cooperation into a supra-state model of cooperation proper.

However, with the application of the arrest warrant of Al Bashir there appeared to have been a change of heart by the AU. First, it warned against the abuse and misuse of universal jurisdiction against African leaders.[65] Being involved in peacekeeping operations in Darfur, the AU also raised concerns about such an application undermining the AU's efforts to facilitate the early resolution of the conflict in Darfur.[66] To not jeopardise the peace process, the AU urged the UNSC to invoke its powers under Article 16 and defer the process initiated against Al Bashir.[67] When the UNSC failed to act upon the AU's request for the deferral, the AU decided that Member States should not cooperate with the ICC. [68]

In all the AU requests for deferral and non-cooperation, the ICC insisted it was applying the law without political or peace considerations, but it could be asked whether the ICC would not do well to appreciate the political environment it operates in. This is because States and international organisations, being stakeholders of the Court, will always tend to advance their interests and objectives. Koh postulates that the advancement of national or organisational interests is so entrenched in the system of international law that any attack on these interests are deemed as an attack on the State or the organisation itself.[69] Inflammatory statements will not assist the Court

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64 ICC Prosecutor Third Annual Report to the UNSC at 8. See also Manisuli Ssenyonyo "State Withdrawal from the Rome Statute of the International Criminal Court: South Africa, Burundi and The Gambia" in Charles Jalloh & Illias Bantekas "The International Criminal Court and Africa" (Oxford University Press, 2017) at 223.

65 AU Assembly Decision (Assembly/AU/Dec.221(XII) of 3 Feb 2009 at para. AU Peace and Security Council 142nd Meeting: Communique of JULY 2008 (PSC/MIN/Comm (CXLII)) at 1.

66 AU Assembly: Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of the Sudan (Assembly/AU/Dec.221(XII) of 3 Feb 2009 at 1-2. The non-cooperation decisions were repeated in, amongst others, AU Assembly of 27 July 2010 (Assembly/AU/Dec.296(XV)), 30 Jan 2012 (Assembly/AU/Dec.397(XVIII)). See also Dire Tladi "The African Union and the International Criminal Court: The Battle for the Soul of International Law" (2009) *South African Yearbook of international Law* at 64.

67 Ibid.

68 AU Assembly Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (Assembly/AU/Dec.245(XIII) of 3 July 2009 at 2.

69 Harold Hongju Koh "Why Do Nations Obey International Law?" (1997) *Yale Law Journal* at 2632.

in getting cooperation from States or international organisations.[70] Bassiouni commented that good judgement and wisdom, especially from the OTP, would be required to advance justice without necessarily contributing to ongoing harm or hampering the prospects of peace,[71] therefore the relationship between the AU and the ICC has to be managed properly. This observation is further supported by the approach adopted in the ad hoc tribunal wherein the Prosecutor had to skilfully make concessions, like for example, not insisting on primary jurisdiction of the ICTR, to ensure cooperation by the situation State Rwanda.

The AU's decision added to the complex triangular relationship between the three entities.[72] First, the request for deferral was not directed at the ICC but at the UNSC, while in terms of Article 16, a response can only come from the issuing entity. Dissatisfaction with the UNSC should logically be directed at the same entity, as anything else would be disingenuous or indicative of double standards.[73] The AU, however, directed its non-cooperation decision mainly to the ICC,[74] making the ICC a 'cooperation victim' of a quarrel between the AU and the UNSC.[75]

On their part, the ICC could not act on the refusal to defer, as it is constrained by the Rome Statute. In terms of Article 16, a request for deferral can only be directed at the UNSC.[76] The only possible avenue for the Court to stop prosecution and the resultant cooperation obligations outside the deferral article is in terms of Article 53(2)(c) of the Statute, which provides that the Prosecutor can on investigation and having taken all relevant factors into account, decide that a prosecution in the circumstances is not in the interests of justice.[77] However, relying on Article

70 See Statement by Moreno-Ocampo "I follow Evidence, Not Politics" (2012) https://www.ipinst.org/2012/01/moreno-ocampo-i-follow-evidence-not-politics (accessed 11 June 2023)

71 Cherif Bassiouni "The ICC - Quo Vadis" (2006) *Journal of International Criminal Justice* at 423. See also Aloisi (n 22 above) 148-149. The only issue for Bassiouni is the timing.

72 Dire Tladi "When Elephants Collide It Is the Grass That Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic" (2014) *African Journal of Legal Studies* at 381.

73 In terms of Art 16 of the Rome Statute only the UNSC have the powers to defer investigation or prosecution.

74 AU Assembly Decision (n 68 above) at 2.

75 Tladi (n 72 above) at 391-392.

76 Art 1 & 16 of the Rome Statute.

77 Art 53(2)(c) of the Rome Statute.See ICC Policy Paper on the Interests of Justice 2007. See also Lovisa Badagard & Mark Klamberg "The Gatekeeper of the ICC: Prosecutorial Strategies for Selecting Situations and Cases at International Criminal Court" (2017) *Georgetown Journal of International Law* at 656.

53(2)(c) in the Darfur situation will only be academic, as the Court had already decided that it is in the interest of justice to continue with prosecution, hence the warrant of arrest for Al Bashir.[78]

Despite the legal framework, when two Organisations consider peace and justice to be the common good and not mutually exclusive, they could have made practical arrangements (at least in the short term) of how to handle the arrest warrant without necessarily jeopardising the peace process. This suggestion is supported by the fact that before the application and issuance of the warrant of arrest, the AU was heavily involved in the Darfur situation, meaning that it could have assisted the Court in its investigations.

In respect of the AU's non-cooperation decision, Magliveras and Naldi ask as to whether the AU could unilaterally determine what the obligations of African States Parties to the Rome Statute are.[79] According to Tladi the question is important because the call by AU seems irregular as the Organisation is not a party to the Rome Statute nor is the Statute adopted under its auspices.[80] Any cooperation challenges experienced by African States Parties regarding the arrest and surrender in the Sudan situation can only be resolved through mechanisms provided for by the Statute, the AU cannot usurp the sovereign rights of African States Parties and decide on their behalf that they must not cooperate with the Court, any complaints about the Court must be pursued by the African States Parties themselves through proper channels of the Court or diplomatically in the Assembly of States Parties.[81] Equally so, African States Parties cannot as a defence advance the fact that they were following and or aligning themselves with the decisions of the AU in refusing to arrest and surrender Al Bashir, as sovereign States the cooperation obligations are not owed to the AU but to the ICC.[82]

From the above analysis, it can be argued that the application and the subsequent warrant of arrest for Al Bashir changed the posture of the AU from that of international law of cooperation to that of international law of coexistence. The reason for this assertion is that the actions by the Prosecutor is seen as an abuse of universal jurisdiction, in that by applying for a warrant of arrest, the Court is interfering in issues which are within the regional or domestic domain of the AU or

78 Arrest Warrant for Ahmad Harun and Ali Kushayb: ICC-02/05-01/07 (27 April 2007). Case Information Sheet: The Prosecutor v. Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09).
79 Magliveras and Naldi (n 9 above) at 428.
80 Tladi (n 66 above) at 60. See also Patrick Labuda "The African Union's Collective Withdrawal from the ICC: Does Bad Law make Good for Politics" (2017) *European Journal of International Law*.
81 *ICC Malawi Decision* at para 8 & 13.
82 Art 119(2) of the Rome Statute.

Sudan. Furthermore, the statement that the mentioned actions are complicating the AU's peace process has the effect of delinking the previously agreed common purpose of peace through justice (international law of cooperation), which in itself was the reason why the AU supported the establishment of the ICC. Once the common purpose was no longer "common", it then follows that non-cooperation would characterise the relationship between the two. This meant that the status quo was "re-established" in the form of the law of coexistence based on consent, sovereign equality and non-interference in the domestic affairs of another sovereign State.

7 CRITICISM LEVELLED AGAINST THE COURT

Anyew postulate that notwithstanding the OTP's position that when making decisions the Prosecutor did not factor in any peace and or political considerations, one of the criticisms levelled against the Court is its apparent imbalances in the selection of cases by the OTP.[83] In this regard Khan argues that the investigations conducted in DRC, Uganda and the Central African Republic (CAR) no charges were brought against government officials or forces despite widely circulated allegations of serious abuses amongst them.[84] In the DRC situation, for example, while there was little doubt about the graveness of atrocities committed in Ituri, it appeared that enormous political consideration characterised the ICC's strategy, raising questions about OTP case selection criteria.[85] This is mainly because Ituri is the most isolated province from the main political arena in Kinshasa, so there was less clear evidence to connect those in authority to atrocities committed.[86] Therefore, investigations and prosecutions in the Ituri province were least likely to destabilise the government, making it more convenient for the Prosecutor to focus on it, so as to maintain good relations with the DRC government and sustain its investigation.[87]

In Uganda, Peskin posits that the political considerations were made clear when the Prosecutor, in announcing the opening of investigations, appeared jointly with the President of Uganda,

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83 Anyew (n 26 above) at 129-130.

84 Akbar Khan "Ten Years of International Criminal Court Practice – Trials, Achievements and Tribulations: Is the ICC Today what Africa Expect or Wants" in Ankumah (ed) *The International Criminal Court and Africa: One Decade On* (Cambridge, 2016) at 435.

85 Ibi. See also Michael Otim and Marieke Wierda "*Justice at Juba: International Obligations and Local Demands in Northern Uganda*" in Nicholas Waddell and Phil Clark (eds) "*Courting Conflict? Justice, Peace and the ICC in Africa*" (Royal African Society, 2008) at 435.

86 Ibid.

87 Victor Peskin "Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan" (2009) *Human Rights Quarterly* at 658.

Yoweri Museveni.[88] With this appearance, many felt that the Prosecutor was associating too closely with one party to the conflict, thus undermining the Prosecutor's supposed impartiality.[89] In the Darfur situation, and despite the difficulty associated with the arrest and surrender of Heads of State, no (peace or political) considerations were considered in the request to States Parties to arrest and surrender Al Bashir.[90]

This conflictual relationship was further exacerbated by the fact that where the Court was called upon to give an authoritative interpretation of Article 98(1) of the Statute, it was found wanting.[91] In addressing the interface and without making any distinction between the exercise of jurisdiction in terms of Article 27 and the scope of the request for cooperation in terms of Article 98(1), the Court held that the general principle in international law is that immunity of either former or sitting Heads of State cannot be invoked to oppose a prosecution by an international court.[92] The Court concluded States Parties are not entitled to rely on Article 98(1) to refuse to arrest and surrender a head of State of a non-Party.[93] These factors taken cumulatively can exacerbate the conflictual relationship.

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88 Ibid at 656 & 679.

89 Victor Peskin "*International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation"* (Cambridge University Press, 2008) at 10. Sarah Nouwen & Wouter Werner "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan" *The European Journal of International Law* (2011) at 962.

90 *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court* at para 16. *Decision under Art 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir. Judgment in the Jordan Referral re Al-Bashir Appeal* (6 May 2019) at para 113 and 121.

91 *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court. Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (ICC Malawi Decision). Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir* (13 Dec 2011) (ICC Chad Decision). For a criticism of the judgment see Dapo Akande "ICC Issues Detailed Decision on Bashir's Immunity (. . . At long Last . . .) But Gets the Law Wrong" (2011) *European Journal of International Law*, Dov Jacobs "A Sad Homage to Antonio Cassese: The ICC's Confused Pronouncement on State Compliance and Head of State Immunity" (2011) *Spreading the Jam blog*.

92 *Judgment in the Jordan Referral re Al-Bashir Appeal (6 May 2019) at para 54. Malawi Case* at para 36. See also *Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir*.

93 *Malawi Case* at para 37.

8 CONCLUSION

Africa was instrumental in the establishment of the International Criminal Court because its people had for centuries suffered gross human rights atrocities.[94] It was thought that the establishment of the Court would assist Africa in its socio-economic development and rebirth agenda. Therefore, an effective and independent Court was a necessary element of peace and security in a contemporary world where universal respect for human rights is of vital importance.[95]

Even though the Rome Statute does not mention the AU, the entity remains an important player within the ICC justice project because most of the situations the ICC dealt with are from the African continent. The initial relationship between the Court and the AU was cordial, with States Parties referring situations in their respective countries to the Court. This relationship deteriorated to the point of non-cooperation with the issuing of a warrant of arrest for President Al Bashir. The AU was concerned that the warrant of arrest could affect its peace initiatives, which were underway in the Darfur region. To preserve the peace process, the AU requested the UNSC to defer the ICC process. Contrary to Article 16, the UNSC failed to formally consider the request. The conflictual relationship was then further exacerbated by the conflicting interpretation given to Article 98(1) of the Statute. Even though the relationship between the three entities somewhat improved after Al Bashir was removed as the president of Sudan, it is clear from the above analysis that unless the three entities find some “common ground”, the conflictual triangular relationship will persist if another African leader is indicted by the Court pursuant to a UNSC referral.

94 United Nations Diplomatic Conference (n 11 above) at 104 para 115-116. See also Derso (n 20 above) at 62.

95 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome (15 June -1 7 July 1998, Official Records Volume II): Statement by Mr. Maluwa speaking on behalf of the OAU at the Rome Conference at 104 para 117. See also Mochochoko (n 10 above) at 246-247.

CHAPTER SIX

COOPERATION BETWEEN THE AU AND THE UNSC

1 INTRODUCTION

With the establishment of international organisations to coordinate and enforce cooperation, it could be expected that entities sharing the same purpose or objectives will enter into cooperative agreements to advance their shared purposes or common objectives.[1] The trend towards enhanced institutionalised cooperation to advance shared purposes and common objectives manifests in international organisations establishing organs within their mother body to deal with specific focus areas. In this context, the UN established the Security Council, and the AU, the Peace and Security Council to deal specifically with issues related to maintaining international peace and security.[2]

This chapter analyses the relationship between the AU and the UNSC to determine to what extent it adds to the conflictual relationship between the three entities. To put this relationship into perspective, previous cooperation activities between the two entities in maintaining peace and security situations are analysed. Secondly, the chapter considers cooperation between the two entities as a result of situations arising from Article 13(b) and 16 of the Rome Statute.

2 PREVIOUS COOPERATION ACTIVITIES BETWEEN THE AU AND THE UN IN TERMS OF ARTICLE 1 AND CHAPTER VIII OF THE UN CHARTER AND ARTICLE 3 OF THE AU CONSTITUTIVE ACT

The relationship between the AU and the UN in respect of international peace is generally regulated by Article 1 and Chapter VIII of the UN Charter. Article 52(1) provides that:

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1 Laurence Boisson de Chazournes and Jason Rudall "*Co-Operation*" in Jorge Vinuales (ed) "*The UN Friendly Relations Declaration at 50 - An Assessment of the Fundamental Principles of International Law*" (Cambridge University Press, 2020) at 106.

2 Article 7(1) of the UN Charter and Article 5(2) of the AU Constitutive Act. See also Robert Keohane "*Sovereignty in International Society*" in David Held & Anthony (eds) "*The Global Transformation Reader: An Introduction to the Globalisation Debate*" (Blackwell Publishers Inc, 2000) at 114-115.

> Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security […] provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

From the above paragraph it is clear that the UN acknowledges the autonomy of regional institutions with the proviso that their activities should further the mandate of the UN. However, in respect of enforcement measures, the Charter subordinate regional entities to the UNSC enforcement mandate.[3] This subordination is made clear by Article 53(1) which provides that no enforcement actions shall be taken under regional entities without the authorisation of the UNSC.[4] The subordination is further acknowledged by the AU Peace and Security Council wherein it provides that the primary mandate of the UNSC is to maintain international peace and security.[5] For AU Member States, their obligations under the Charter are unambiguous that:[6]

> In the event of conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

The aforementioned cooperation framework are given effect to by the Joint UN-AU Framework for Enhanced Partnership in Peace and Security in Africa.[7]

The operationalisation of the legal framework came to the fore in, amongst others, the United Nations Operation in Burundi (ONUB) and AU/UN Hybrid Operation in Darfur (UNAMID).[8] Firstly, ONUB was preceded by the AU's African Mission in Burundi (AMIB) following the Arusha Peace and Reconciliation Agreement for Burundi.[9] Even though AMIB was not established in terms of a

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3 Evelyne Asaala and Dire Tladi "Assessing the Respective Mandates of the UN and the AU in the Maintenance of International Peace and Security: Partnership and Cooperative Division of Labour or Competition? (2022) *Kazan Journal of International Law and International Relations* at 36.

4 Article 53(1) of the UN Charter.

5 Article 17(1) of AU Protocol on Establishment of Peace and Security Council.

6 Article 103 of the UN Charter.

7 See also UNSCR 2320 (2016) of 18 Nov 2016. Other cooperative arrangements between the UN and AU includes the establishment of UN Office to the African Union (UNOAU) in Addis Ababa in July 2010 and UN-AU Joint Task Force on Peace and Security. See also Dawn Nagar and Fritz Nganje "The AU's Relations with the United Nations, the European Union, and China" (2016) *Centre for Conflict Resolution* at 37-38.

8 UNSCR 1545 (2004) of 21 May 2004 and UNSCR 1769 (2007) of 31 July 2007.

9 UNSC (S/PV.4655) 4655th meeting of 4 Dec 2002. See also the Report of the Secretary-General to the Security Council on the situation in Burundi (S/2003/1146) at 3-7. See further Paul Williams "The

UNSC resolution but through the AU, the UNSC welcomed the deployment of AU forces.[10] To further ensure the cooperative spirit, the resolution authorising the subsequent transition from the AU to UN peacekeeping mission, ONUB was adopted after a request by, amongst others, the Chairperson of the Commission of the AU to the UNSG.[11] The same AMIB forces also constituted the bulk of the ONUB peacekeeping force. The cooperation between UNSC and the AU was succinctly captured by the then Deputy President of South Africa, Jacob Zuma, when briefing the UNSC that the AU "consider the introduction of the African mission as a bridging instrument, opening the situation for the United Nations to come in when we have perfected the conditions."[12] The statement by Zuma is in line with Article 52(1) of the UN Charter in that any regional action and activities should be consistence with the Purpose and Principle of the United Nations.

The next example of cooperation was with the establishment of the AU/UN Hybrid operation in Darfur (UNAMID) following UNSC Resolution 1769.[13] In terms of cooperation, UNAMID was a peculiar (hybrid) mission, in that unlike the mission in Burundi where the peacekeeping mission transited from being an AU Mission to a UN Mission, the two entities worked jointly on an almost equal footing – hence the name.[14] For example, UNAMID had a Joint Special Representative reporting to both the AU and UN, had joint headquarters, shared labour, and the appointment of the Force Commander was not done by the UN, but deferred to the AU.[15]

Despite the above cooperative spirit, the relationship between the entities is not always amicable. For example, in one UNAMID meeting, the AU accused the UNSC of not always respecting

African Union's Peace Operations: A Comparative Analysis The African Union's Peace Operations" *Taylor & Francis Group* (2009) at 99.

10 Preamble to UNSCR 1545 (2004) of 21 May 2004 at 2.

11 UNSCR 1545 (2004) of 21 May 2004 at 3.

12 UNSC 4655th meeting (S/PV.4655) of 4 Dec 2002 at 4. See also Paul Williams "The African Union's Peace Operations: A Comparative Analysis The African Union's Peace Operations" *Taylor & Francis Group* (2009) at 99.

13 UNSCR 1769 (2007) of 31 July 2007 at para 1.

14 See also UNSCR 2149 (2014), 2556 (2020) authorising the deployment of UN peacekeepers in both the Central African Republic and The Democratic Republic of Congo where deployments were done with prior authorization of the UNSC (amongst others).

15 UNSCR 1769 (2007) of 31 July 2007 at para 3. See also Report of the Secretary-General and the Chairperson of the African Union Commission on the hybrid operation in Darfur (S/2007/307/Rev.1) at 3 para 10.

African views and recommendations.[16] Responding to the criticism, the delegate from the United States stated that:[17]

> [U]nder the Charter, the Security Council has a unique, universal and primary mandate to maintain international peace and security. The Security Council is not subordinate to other bodies, or to the schedules or capacities of regional or sub-regional groups. Nonetheless, the Security Council wants and needs to cooperate closely with regional organisations, as demonstrated by our growing collaboration with the African Union over nearly a decade. Such collaboration, however, needs to be based on the exigencies of the issue at hand, and that cooperation cannot be on the basis that the regional organisation independently decides the policy and that United Nations Member States simply bless it and pay for it […]

From the above, and even though the two entities appear to share a common purpose, it is apparent that there are divisions or divergent views in respect of the form and content in which such cooperation obligations should take. For the UNSC, it is clear that the entity does not hesitate to assert its superiority over regional organisations over matters related to peace and security.

3 COOPERATION IN THE CONTEXT OF ARTICLE 16 OF THE STATUTE

It is against this backdrop that the Article 16 relationship between the AU and the UN should be understood. Even though according to the Statute, the AU was not supposed to feature anywhere in the relationship between the ICC and the UNSC, it first came into the equation when the UNSC passed the referral resolution calling on the AU and the ICC to discuss practical arrangements to facilitate the work of the Prosecutor. Secondly, it was because the AU requested the UNSC to defer the investigation and prosecution in the Darfur and Libya situations.[18] In respect of Darfur, the AU requested:[19]

> [t]he United Nations Security Council, in accordance with the provisions of Article 16 of the Rome Statute of the ICC, to defer the process initiated by the ICC […]

16 UNSC 6702nd meeting (S/PV.6702) of 12 Jan 2012 at 9. See also Paul Williams & Arthur Boutellis "Partnership Peacekeeping: Challenges and Opportunities in the United Nations-African Union Relationship" (2014) *Oxford University Press* at 261.

17 UNSC 6702nd meeting (S/PV.6702) of 12 Jan 2012 at 15.

18 AU PSC Communique of July 2008 at para 9. See also Alexis Arieff *et al* "International Criminal Court Cases in Africa: Status and Policy Issues" (2011) *Congressional Research Service* at 28-29.

19 AU Peace and Security Council Communique (n 18 above) at para 11(i). AU Assembly Decision (Assembly/AU/Dec.221(XII)) of 3 Feb 2009 at para 3. See also Morten Bergsmo & Jelena Pejid "*Deferral of Investigation or Prosecution*" in Otto Triffterer (ed) "*Commentary on the Rome Statute of the International Criminal Court*" (Nomos Verlagsgesellschaft, 1999) at 378.

This deferral request came before the UNSC meeting on the extension of the mandate of UNAMID. During this meeting, the UNSC was divided on the matter, with China, Russia, Libya, South Africa, Burkina Faso and Indonesia supporting the deferral request, while France, the United Kingdom, Belgium and the United States (amongst others) not supporting the deferral request.[20] In its statement supporting the request China stated that "no progress would be possible on Darfur without the full cooperation of the Sudanese Government." On the other hand, the latter countries argued that there is no prospect of peace in Sudan without justice.[21] However, at the end of the meeting a kind of compromise was reached as the preambular to resolution 1828 takes note of the:[22]

> [A]frican Union (AU) communiqué of the 142nd Peace and Security Council (PSC) Meeting dated 21 July (S/2008/481, annex), having in mind concerns raised by members of the Council regarding potential developments subsequent to the application by the Prosecutor of the International Criminal Court of 14 July 2008, and *taking note* of their intention to consider these matters further […]

After the passing of the resolution, the delegate of Burkina Faso implored the UNSC that it should make good on its undertaking and that it should act with speed.[23] However, that was the last time the UNSC engaged with the AU deferral request.[24] Left with no option, the AU decided that its Member States should not cooperate with the Court in the arrest and surrender of Al Bashir.[25]

From the aforementioned decision, there is no indication as to what actions or further actions are going to be taken by the AU against the UNSC except for deeply regretting that the entity never acted upon the deferral request, meaning the relationship between the two entities appears to be unaffected. This observation again brings to the fore the conflictual triangular relationship between the three entities, the request for deferral was not directed at the ICC but to the UNSC however, the entity which bore the brunt of non-cooperation was the ICC, not the UNSC.

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20 5947th Meeting of the UNSC of 31 July 2008 (SC/9412).

21 Ibid.

22 UNSCR 1828 of 2008 at para 11.

23 The delegate of Burkina Faso posited that it was absolutely crucial that the Council take up preambular paragraph 9 (to consider the matter further) of the resolution as soon as possible. The AU members were consistence during all UNSC meetings that the UNSC should consider deferral request. See for example UNSC 6028th Meeting of 3 December 2008 (statement by Libyan delegate). See further UNSC Meeting 6230th of 3 December 2009 (statement by Burkina Faso).

24 UNSCR 1881 is silent on the deferral request by the AU.

25 AU Assembly Decision: Assembly/AU/Dec.245(XIII) of 3 July 2009 at para 9 & 10. See also AU Assembly: Assembly/AU/Dec.296 (XV) (Kampala 27 July 2010 para 4 and 5. Assembly/AU/Dec.366(XVII).

Peculiarly, in respect of Resolution 1828, the two entities could cooperate on the peace side of the resolution (extension of UNAMID) and not on the justice part of the resolution (deferral request) even though the two activities arise out of the same situation, meaning peace and justice are no longer intrinsically linked. With this non-cooperation decision, the conflictual triangular relationship between the ICC, the AU and the UNSC was completed.

A further question in the context of AU decision is: what is or should the status of cooperation obligations for African States Parties be, following the failure by the UNSC to act on the AU's deferral request? The question is relevant because the UNSC's failure to act on the request does not necessarily change the situation being a threat to international peace. In other words, the situation continues to threaten peace despite the UNSC not pronouncing itself to that effect. This observation is supported by the fact that before the referral of the situation in Darfur to the ICC, the UNSG International Commission on Darfur (UNSG Report) had already investigated the situation and came to the conclusion that the situation in Darfur constituted a threat to international peace and therefore should be referred to the ICC by the UNSC. The subsequent UNSC Darfur referral resolution was based on the same recommendation.[26] In other words, the actual adoption of the referral resolution was only a confirmation of the already existing situation.[27] In subsequent resolutions following the deferral refusal, the UNSC acknowledged that the situation in Darfur continued to constitute a threat to international peace.[28] The same UNSC Article 16 deferral paralysis argument can also be made for Article 13(b) of the Statute. If the UNSC fails to refer the situation, no cooperation obligations will ensue as the Court will not have any jurisdiction. Despite there being no cooperation obligations, the non-referral of a deserving situation coupled with the refusal to defer deserving situations, will strengthen the argument by the AU that the UNSC applies double standards, leading to further non-cooperation with the Court.

But why would the UNSC not defer a situation which falls precisely within Article 16 of the Statute? The answer to this question seems to be linked to the argument between proponents of

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26 UNSG International Commission of Inquiry Report on Darfur at 5.

27 UNSCR 1593 preamble. See also Briefing for United Nations Security Council by Navi Pillay, High Commissioner for Human Rights, delivered by Ivan Šimonović, Assistant Secretary-General for Human Rights: The Situation in the Middle East [Syria], 16 July 2013 wherein the Commissioner recommended that the situation in Syria should be referred to the ICC but it was vetoed by China and Russia. See further UN Human Rights Council: Report of the Independent International Commission of Inquiry on the Syrian Arab Republic of 19 March 2021 at 16-17.

28 Preamble to UNSCR 1828 (2008) 31 July 2008.

international law of cooperation, and the law of coexistence. From the international law of cooperation perspective, once it was determined that the warrant of arrest of Al Bashir was a threat to international peace, and the AU made a request to that effect, the UNSC was supposed to act upon such request and defer the investigation and prosecution. In other words, cooperation regarding the deferral request was not supposed to depend on the consent or interests of the UNSC Members but on the situation being a threat to international peace and security. However, it appears that other criteria were applied, meaning that the international law of coexistence reproduced itself.

From this action by the UNSC, it is clear that unless the dynamics within the Council concerning Articles 13(b) and 16 change or the Statute is amended to cater for a situation where there is paralysis within the entity, a general non-cooperation posture by the AU towards the ICC in similar situations like that of Darfur and Libya will continue.

4 CONCLUSION

The relationship between the AU and the UNSC in the context of the ICC came to the fore with the referral of the Darfur situation to the ICC, and with the request for deferral by the AU to the UNSC of the prosecution of Al Bashir. Before this referral and deferral, the entities cooperated in peacekeeping missions on the African continent. Even though there were some differences, the entities worked fairly during these peacekeeping missions, especially during UNAMID.

The deferral requests generated conflict from the onset. As consensus could not be reached, Article 16 of the Statute was effectively rendered obsolete in the circumstances. The requirements of Article 16 that investigation or prosecution could constitute a threat to peace seems to play no role in deciding whether to defer or not defer. This approach further underscores the fact that the UNSC, in performing its primary function of maintaining international peace and security, is not necessarily guided by the common good but by other interests. Faced with no alternative, the AU decided that its Member States must not cooperate with the Court.

CHAPTER SEVEN

CONCLUSIONS AND RECOMMENDATIONS

1 CONCLUSIONS

International cooperation is at the centre of the regime of the ICC.[1] Without cooperation, the Court could rightfully be described as a "giant without arms and legs".[2] The strained cooperation relationship between the Court, the AU and the UNSC has been in the spotlight and has dominated the international criminal justice discourse for some time.

The main questions this thesis sought to answer were to determine which legal rules govern the relationship between the three entities and to what extent their individual mandates facilitate or hamper cooperation.

The answers to these questions are outlined in the seven chapters of the study, starting with the general introduction which set out the background and reviewed literature on the subject matter, indicating the gaps the study wanted to fill. The section described the methodology used to feel the gaps and clarify the concept of cooperation.

In the background to cooperation under international criminal law, the analysis included the nature and content of the concept of cooperation. It was found that the principle of cooperation plays an important role in international law, with some authors suggesting that in addition to the law of coexistence, a new structure of international law exists – the international law of cooperation. Even though the concept is not defined, there is unanimity among various scholars that the principle of cooperation is an obligation of means, not of result, meaning that a specific outcome must be achieved before the principle can be applied. According to the law of coexistence, the argument is that sovereign States have always cooperated to advance some national interests, thus dispelling the notion that there might be a new structure of international law. Despite this

1 Part IX of the Rome Statute.

2 Antonio Cassese, Paula Gaeta & John Jones (eds) "*The Rome Statute of the International Criminal Court: A Commentary*" (Vol II) (Oxford University Press, 2002) at 1589. Mia Swart & Karin Krisch "An Analysis of Standoff between the African Union and the International Criminal Court" (2014) *African Journal of International Law* at 267. See also Charles Jalloh "Africa and the International Criminal Court: Collision Course or Cooperation" (2012) *North Carolina Central Law Review* at 215.

state-centric law of coexistence, it was found that cooperation can lead to the achievement of some common good. The principle of cooperation is sometimes applied or interpreted to include solidarity. Solidarity is introduced to the law of international cooperation to try and close the divide between the developing and the developed countries, meaning that as an act of solidarity, the developed countries are encouraged to assist the developing countries to achieve their developmental goals.

Even though the structure of the law as encapsulated in the UN Charter follows classical international law, in terms of Article 1, cooperation plays a pivotal role and is one of the purposes of the Organisation. This purpose finds application in various field-specific UN instruments like the law of the sea and during disasters. Within the UN system, developed countries support the law of coexistence while developing countries appear to support the international law of cooperation, a disposition driven by a need for substantive rather than formal equality.

In the context of peremptory norms of international law, the ILC concluded that the principle of cooperation is a general principle of international law with the result that no cooperation derogation emanating from those norms is allowed. This means that peremptory norms of international law tend to support the argument that there is a new structure in which international law is moving. For the principle of cooperation to yield results, it requires institutions to coordinate and enforce the agreed cooperation obligations. However, in the final analysis, the classical international law (of coexistence) continues to endure with minimal adaptations.

The principle of cooperation in criminal matters is concretised in the form of extradition, surrenders or transfer and judicial assistance between States. Related to the models is the different enforcement system, namely the direct, partially-direct and indirect systems. The direct method is where a tribunal or a court has all the means to directly investigate, prosecute, adjudicate and enforce their judgement. The indirect enforcement system is where international tribunals or courts use States to enforce their orders. Lastly, the partial direct is where the international tribunals have some form of executive means while also relying on States' machinery to assist it in the investigations and prosecution. It was found that even though States generally cooperate in criminal matters, there are impediments to all the models, including the immunity of State officials.

Notwithstanding the different criminal enforcement systems, modalities of cooperation such as extradition (or prosecution), surrenders, transfer and judicial assistance remain the same, with the difference being the source of the legal obligations. For the direct system, the legal obligations arise from treaties, customary international law and *jus cogens*. For partially-direct and indirect systems, the source of cooperation is derived from treaties and national law.

Extradition is the oldest and the most effective form of inter-state cooperation in criminal matters. It allows the State whose substantive laws have been breached to affect criminal justice under its own laws. Extradition serves to close the impunity gap in the criminal justice system in that it gives both States the incentive that in future they might find themselves as either the requesting or the requested State. Another related matter is the duty to prosecute if the requested Stated denies the requesting State extradition, in which case, the requesting State must still assist with investigations.

Surrenders and transfers are closely related to extradition with the main difference being that instead of a person being extradited to another State, a person is surrendered and or transferred to an international tribunal or court having jurisdiction. Judicial assistance covers both mutual assistance for criminal proceedings conducted abroad and the execution of foreign criminal sentences.

Despite all these initiatives, it was found that there are impediments to the models of cooperation, both legal and non-legal. From the legal perspective, the impediments may include non-extradition of nationals and immunities of State officials, and with the non-legal, States may distort the interpretation of treaties because of political interests at both national and international levels.

Further initiatives in closing the cooperation gap are the ICL Draft Articles on Prevention and Punishment of Crimes against Humanity (Draft Articles on Crimes against Humanity) and the adoption of the Ljubjana - The Hague Convention. The main objective of the initiatives is to facilitate international cooperation in criminal matters between States with a view of strengthening the fight against impunity for the stated international crimes. The implication of the two initiatives is that it will close the gap in the international legal system by regulating in sufficient detail mutual legal assistance and extradition for the domestic investigation and prosecution of core international crimes.

Cooperation during the ad hoc tribunal was next to be considered. To understand the concept, the study looked at the legislative framework, examples of cooperation and non-cooperation by States, and the role of the UNSC and other international entities in securing cooperation in both the ICTY and the ICTR. Because Tribunals were established in terms of Chapter VII of the UN Charter, all UN Members were mandated to cooperate with the Tribunals. States played a pivotal role in surrendering and transferring suspects to the seat of the Tribunals, thereby assisting them to discharge their mandates. It was also found that the decision to cooperate (or not) was not always dependent on the legislative framework of the respective Statute, but to a certain extent, on political dynamics within States.

However, it was found that the situation States in both Tribunals adopted dual postures, choosing to either cooperate or not, depending on various factors. Notwithstanding this posture in the case of ICTY, other international players like NATO played a key role in assisting the Tribunal to fulfil its mandate. In addition, the arrests and surrenders by NATO forces were heralded as a turning point in the evolution of international criminal law as it transformed the enforcement system of the ICTY from that of an indirect to a direct enforcement system similar to that of Military Tribunals.

Even though the UN mother body assisted the Tribunals in setting up the infrastructure, including the allocation of budgets, the UNSC, as the entity responsible for peace and security, did not adequately assist the Tribunals where cases of non-cooperation were reported. The entity failed to invoke its wide-ranging powers under Chapter VII of the UN Charter to coerce recalcitrant States to fulfil their cooperation obligations.

As with the ad hoc tribunals, the legislative framework of the Rome Statute is anchored on international cooperation by States Parties. It was found that the Statute cooperation framework follows a hybrid model of cooperation encompassing the characteristics of both the inter-state model and supra-state model of cooperation. As an inter-state model, the Statute allows States Parties to exercise discretion and in certain circumstances to refuse cooperation requests from the Court. As a supra-state model, the Statute is underpinned by a general obligation imposed on States Parties to fully comply with the Court's request for assistance. However, from the cases discussed in the thesis, it appears that States Parties and those affected by cooperation obligations prefer the inter-state model of cooperation, while the Court's approach to cooperation is that of a supra-state model. This 'dual approach' is the root of contestation between the international law of cooperation and the law of coexistence.

The law of coexistence was vociferously supported by the AU, as it viewed cooperation with the Court as an encroachment on African States Parties and Africa's sovereignty. To preserve African sovereignty, the AU requested the UNSC to defer the investigation. When the request was not acted upon, the AU adopted a non-cooperation posture toward the ICC.

Regarding the UNSC, it was found to be inconsistent in dealing with the request for deferral. Where convenient, it dismissed the request formally and expeditiously, but where it was not so convenient, the entity refused to formally consider the AU deferral request. In addition, where cases of non-cooperation were reported by the ICC, no actions were ever taken. The UNSC is, therefore, an active participant in the conflictual relationship.

Where the Court had the opportunity to clarify the substance and nature of the Statute's cooperation framework and win the trust of the international community, it made conflicting decisions. Instead of applying the law as agreed by the founders, it appeared to apply the law as it would like it to be, being that of a supra-state model of cooperation.

Concerning Africa, it was found that the continent was instrumental in establishing the Court because its people had for centuries suffered gross human rights atrocities. It was thought that the establishment of an independent Court with a strong cooperation regime would assist the continent in its socio-economic development and rebirth agenda. For many Africans, an effective, independent Court is a necessary element of peace and security in a contemporary world where universal respect for human rights is vitally important. The initial relationship between the Court and the AU was cordial, with African States Parties referring situations in their respective countries to the Court.

The relationship between the AU and the ICC changed from cordial to confrontation and outright non-cooperation with the arrest warrant of Al Bashir. The AU was concerned about the developments in Darfur, as the warrant of arrest could have affected its peace initiatives there. The confrontation was further exacerbated with the interpretation and application of Article 98(1) of the Statute, as the AU felt the ICC misdirected itself in expecting African States Parties to cooperate contrary to the said Article.

From the Court's side, African States Parties' cooperation in the arrest and surrender of suspects is seen as obligatory, notwithstanding the provision of Article 98(1) and the resulting difficulties and political challenges.

The relationship between the ICC and the UNSC was supposed to be of mutual benefit to both entities because the power of referral by the UNSC was going to expand the reach of the Court to situations where the ICC will have no jurisdiction because the situation State is not a States Party to the Statute. Similarly, the UNSC would benefit from the referral to the ICC as holding those accused of committing heinous crimes accountable is intrinsically linked to the UNSC's primary mandate of maintaining peace and security. These reciprocal benefits would, however, depend on the entities engaging in a spirit of cooperation. This cooperativeness is even more important for the UNSC as the entity has wide-ranging powers under Chapter VII of the UN Charter.

However, in the mentioned referral resolutions, the UNSC restricted cooperation obligations to situation States and parties to the conflict instead of expanding the cooperation regime of the ICC to include all UN Members. This created an ambiguity in respect of cooperation obligations and a plausible reason for some States not to cooperate with the Court. The conundrum was further exacerbated by the fact that the entity invoked Article 16 for purposes it was not intended for, while failing to invoke the Article in situations where it was supposed to.

The relationship between the AU and the UNSC in the context of the ICC came about with the request for deferral by the AU to the UNSC of the prosecution of Al Bashir. The two entities share the same mandate, which is maintaining international peace and security – the difference being that the AU mandate is restricted to the African region, while the UNSC extends to the international community. Over and above cooperation with the ICC, the two entities have cooperated in peacekeeping missions on the African continent. In respect of the Darfur situation, the peacekeeping activities and the ICC process overlapped because both arose out of the same situation. Even though there were some differences during peacekeeping activities in the Darfur situation, the two entities worked fairly well. The conflictual relationship was mainly due to justice activities because of the UNSC's refusal to consider the AU's deferral request. The conflictual relationship could mainly be attributed to the competing interests within the UNSC and the fact that the three Permanent Members are not States Parties to the Rome Statute. As such, consensus was not reached on the justice activities, with the result that Article 16 of the Statute

was effectively rendered obsolete in the Darfur case. This approach further underscores the fact that the UNSC is not necessarily guided by its primary function, being the common purpose of international peace and security. Having no shared objective with the UNSC, the AU decided that its Member States should not cooperate with the Court.

2 RECOMMENDATIONS

As per the conclusions of the thesis, the following recommendations are put forth.

a. The ICC

The ICC must appreciate the political environment in which it operates. Where it has to make concessions to better serve the common good of justice without compromising the credibility of the Court, it would be wise to do so. This is because States and international organisations, as stakeholders of the Court, will always try to advance their interests. These interests are so entrenched, that any threat will be deemed as an attack on the State or organisation itself. Inflammatory statements will not assist the Court in getting cooperation from States or international organisations. The relationship must be carefully managed for cooperation to ensue.

Though some scholars point to a new structure of law, the international law of cooperation which is based on the common good and not on sovereignty, it remains more of an aspiration. Therefore, when applying the law, the ICC should do so in line with the Rome Statute's provisions and not at its discretion. Judgments should also be consistent, as failure to do so will result in the continuation of a conflictual relationship between the three entities.

b. The AU

The AU must endeavour to separate its Member States' obligations to other international organisations from those owed to it as the mother body. Put simply, the AU cannot, on behalf of African States Parties, decide what actions to take or not. At the very least, it should encourage African States Parties to raise their concerns via the channel provided in the Statute. It must consider finalising the relationship agreement with Court to resolve some of its concerns. In this way, both entities will benefit from the relationship and the common good of ending impunity and human rights violations on the continent will be realised. A general obligation not to cooperate

with the ICC will not assist the continent in its rebirth agenda, instead, each case must be decided on its own merits. A “one size fits all” non-cooperation approach will undermine the AU’s own case, which is why disagreements with the UNSC should be directed at the entity, as the need for transformation of the UNSC will be advanced in the appropriate forum.

c. The UNSC

If the UNSC regards the maintenance of international peace through justice as the common good, it should act in accordance with the said common good. To assist the entity, objective criteria for determining whether a situation qualifies for referral or deferral in terms of Articles 13(b) and 16 should be adopted. Though these may be difficult to agree on, it remains almost the only hope to ensure the two Articles are properly applied. Other alternatives, like amending the Statute, seem farfetched.

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