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The role of the UN Security Council in front of the ICC

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Abstract

The relationship betweeen the International Criminal Court and the United Nations Security Council holds important value because, as a people, we are striving for a change towards a universal justice system, rather than a nationalistic conflictual one. To assess the progress, a closer look is necessary at the issue at hand. If the ICC does not have a nation to support it, in order to serve as a deterrent, it does need a powerful organization behind it: the UNSC, or the interplay between the SC, ICC and the „executive body“ of the international community. However, their relationship is convoluted in controversy, since it is believed to serve as a tool for the major powers when they see fit, thus deligitimizing its credibility as an overarching judicial organization meant to resolve inter-state conflicts, and punish those who commit the most heinous crimes, regardless of their nationality.

The findings of this research will show that more factors weigh in, and, even though the UNSC does hold a tight grip and has the power to influence the proceedings before the ICC, there is a clear positive trajectory for the International Criminal Justice System; the author of the research believes it will only get better.

Keywords

International Criminal Court; UNSC; Rome Statute; International Criminal Law

Range of thesis: 50 page

Declaration of Authorship

1. The author hereby declares that he compiled this thesis independently, using only the listed resources and literature.

2. The author hereby declares that all the sources and literature used have been properly cited.

3. The author hereby declares that the thesis has not been used to obtain a different or the same degree.

Prague, May 4th, 2018 Vlad Mihai

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Master Thesis Proposal

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Proposed Topic:

The role of the UN Security Council in front of the ICC

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Topic Characteristics:

First and foremost, before choosing a topic I wanted to go over the contemporary issues in today's world that can be linked with International Law. Having said that I would like to point out that the United Nations Security Council is a body directly linked to the International Criminal Court, having a relationship of somewhat co-dependency. While the UNSC is somewhat of a high council with the aim of maintaining international peace and security, the 5 permanent members are sometimes at odds, which may prevent the best course of action. The ICC is a very young institution, its basic instrument having entered into force only in 2002, therefore there is much relevant research to be made and many hypothesis to be tested that can further enhance the field. Since the Rome Statute gives overarching powers considering the ICC, such as stopping investigations and suggesting ones at the request of the UNSC, it is relevant to discover the influence it has had so far in International Criminal Law: is it positive or negative?

My thesis will focus on the relationship between the UNSC and the ICC, according to the Rome Statute strictly on a legal basis with the aim of discovering innovative legal avenues that may be followed. Within many rumors and voices over selective engagement and that the ICC is not a positive evolution in terms of international criminal law, having examples of the tribunals created, I want to explore deeper in regards to more recent cases based on the current norms, namely the Rome Statute drafted in 1998 and entered into force in 2002.

The thesis will look to draw examples and parallels from its history, showing the many obstacles it faces in order to coordinate a singular body in the pursuit of obtaining justice, by trying to overreach previous legal boundaries that are still blocking the current legal framework. By using the law and social sciences to identify patterns I believe it can yield interesting results. An analysis of the current ICC cases will be presented, on the foundation of the Rome Statute and other relevant legal foundations.

Working hypotheses:

1. The UNSC has a strong grip on the ICC.
2. The influence of the UNSC is both positive and negative.
3. It is difficult for the ICC to pursue swift action due to the Rome Statute, since the UNSC must approve/can block or can trigger an investigation as it pleases.

Methodology:

The methodology is a mix between “black letter” analysis and a sociological approach. Black letter analysis will derive from the primary sources such as the Rome Statute, International Law books that govern International Criminal Law and the International Criminal Court, however, the sociological approach will enter due to the high political implications surrounding the dynamic between the UNSC and the ICC, therefore a descriptive analysis based on the multiple but few cases. This will only be to complement the legal analysis of the Rome Statute, which will be the main focus of the thesis. I believe this to be appropriate because only the law cannot explain the shortcomings of the ICC, its detractors, it cannot explain the supposed selective engagement and the supposed selective punishments, therefore the sociological part seeks to fill in the gaps and provide a solid bridge between the two topics where need be. Since it is a young institution and a young field, this particular research can help discover new avenues and patterns that have and can be formed in the future to the benefit of both parties.

Outline:

1. A history of International Criminal Justice
2. Description of the Legal Framework
3. A description of ICC cases
4. The UNSC permanent members and the ICC
    a. USA and the ICC

b. Russia and the ICC
c. China and the ICC
d. UK and the ICC
e. France and the ICC
5. A Legal analysis of the interaction between the UNSC and the ICC
6. Conclusions
7. References / Bibliography

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Introduction

The Relationship between the International Criminal Court and the United Nations Security Council is covered within this thesis from an International Criminal Law perspective. The Methodology used is Black Letter combined with a sociological aspect to factor in more elements, such as geopolitics and economics, focusing primarily on the Rome Statute as the main body of law applicable. The reason for such is to delve deeper into a young nationless institution and to assess whether or not it is heavily influenced by the UNSC. Is it interfering and/or disrupting actions that are meant to be independent? Is it complementing an otherwise toothless institution? Is it helping and developing the future of a sovereignty-free world? What are the positive and negative outcomes of their symbiosis?

The advantage of this research is the ability to point out the upward trajectory of International Criminal Law since its inception and what has led to its creation. The disadvantage is the fact that it is lacking jurisprudence, facing many unanswered questions over how to progress in order to better protect the people as well as serving the interest of justice. The sociological aspects complement the body of law, making recommendations and clarifications over what may or may not be done in the future. Important geopolitical and economic factors are intertwined concerning this, therefore a wider spectrum is needed in order to grasp a more accurate perspective.

Structurally speaking, it will follow a template meant to ease the reader into the topic: how the international criminal justice system started, a review and explanation of the Rome Statute, an analysis of the relevant cases up to date, issues of controversy, the UNSC permanent members and their relation to the ICC and recommendations for the future.

Does the ICC target only African countries? Do the Permanent Members avoid indictment through power play? Is it just a tool to punish the weak? What are the postive facts about the ICC?

These questions are only a few that the skeptics are putting forward, and this thesis intends to give more clarity. The findings are positive, compared to what detractors have to say.

1. A History of the International Criminal Justice

In order to understand how the International Criminal Court came to its existence it is necessary to know the history of the International criminal justice or international criminal law. This is because it will show the willingness of many states and leaders to address issues that were previously damaging to the world as a whole. Indeed, the underlying assumption nowadays is that the ICC is not doing enough, however one must realize that it is still a work in progress, that case law will create further legislation, therefore the history of its core will emphasize on how long of a way it has grown and improved for the better.

It is a very young and difficult field to organize and establish because it requires consensus, willingness, and other characteristics which will fall on one side of the spectrum or the other, depending on how the reader´s personal viewpoint is on the subject matter. As every new revolutionary idea, it will be faced with criticism and divergent approaches. The biggest obstacle in producing a mature legal mechanism with an apt body able to reach and uphold the law everywhere is the sovereign state, which, as a personal opinion, considering it in its current form, is an outdated system that needs adjustements.

A very brief history of the topicality will start with the Nuremberg trials, however the first mention in history books of a superior judicial body chaired by judges from different countries over someone who committed what today is legislated as "*war crimes*" had happened in 1474, what is known as the first international criminal trial.[1] Peter von Hagenbach was tried for what today is essentially called crimes under International Law. Indeed, this historical account is not irrefutable, due to a lack of definitive evidence and a large gap until the next notable event in history that dealt with this sensible matter in a similar way. The Lieber code, written by Francis Lieber in 1863 is a guideline defining how to conduct war.[2] Indeed, the previously mentioned manifest was to address Civil War issues, thus being a domestic warrant, not an international one. What is necessary to be extracted from these historical accounts is that desire was growing, because many national

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[1] Cenap Çakmak (2006) 'Historical Background: Evolution of the International Criminal Law, Individual Criminal Accountability and the Idea of A Permanent International Court' in: A Brief History of International Criminal Law and International Criminal Court. (Palgrave Macmillan, 2006). [online] Available at: http://www.du.edu/korbel/hrhw/workingpapers/2006/39-cakmak-2006.pdf [Accessed 9 Aug. 2017].

[2] *Avalon Project - General Orders No. 100: The Lieber Code*, [1863], [online] Available at: http://avalon.law.yale.edu/19th_century/lieber.asp#sec1 [Accessed 9 Aug. 2017].

judicial bodies implemented legislation that punished the above mentioned crimes. Moreover, they served as inspiration and precedents for drafting future and improved legislation.[3]

Laws governing war conduct go even further back in history as a reaction to the Christian pacifist ideology from the 4th century that war was not allowed. *Jus Ad Bellum* was adopted to deter aggressors, which in the 13th century adopted articles defining when and why acts of war should be conducted, revolving around the principle of justice/war that is just. After World War I the moral values of this have succumbed to stronger forces, therefore the system has tried to regulate how war is conducted "*jus in bello",* a shift from Jus Ad Bellum.[4] Basically, Jus Ad Bellum is the template that defines when it is legal to start a war, while Jus In Bello defines the conduct during war. It is relevant especially in International Humanitarian Law, a branch with the objective to minimze suffering.[5]

In 1868, based on what the Prussian war mastermind Claude von Clausewitz has set in motion, Tsar Alexander II signed *a "declaration banning explosive projectiles weighing less than 400 grams in war".* This also led the path to the Brussels conference, which subsequently led to the Brussels Declaration. Walking in his grandfather's footsteps, Alexander the second initiated the first Peace Conference in 1899 in The Hague. It is important to note that much of the acts agreed upon and implemented, started from the Lieber Code, which was used in the Brussels Declaration and again in the First Peace Conference.

The above mentioned are accounts of sources of law, how it started, evolved, adapted, while the international case of Peter von Hagenbach ruled under 28 foreign judges for international crimes, though under domestic legislation will offer a glimpse of how the international criminal justice tried to push through by ad hoc tribunals.

What it lacked to enforce such laws was an independent, powerful body, and history singles out Gustave Moynier, the president of the International Committee of the Red Cross, as the first person to emphasize the need of a permanent court. He came to the realization of this flaw of the Geneva Convention of 1864 only after the Franco-Prussian

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[3] Cenap Çakmak (n 1).

[4] Beth Van Schaack, B. 'A Concise History of International Criminal Law' (2007) Santa Clara Law Digital Commons. [online] Available at: http://digitalcommons.law.scu.edu/facpubs/626/ [Accessed 9 Aug. 2017].

[5] 'What Are Jus Ad Bellum And Jus In Bello?' (*International Committee of the Red Cross*, 2015) [online]. Available at<https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0> [Accessed 6 Mar 2018].

war in 1870. In order to compel obedience and repercussions on someone, there needs to be a higher authority because a victor will always lack the will of implementation on himself. After researching legal regulation and judicial decisions, in particular those of the US and Great Britain and only 1 internationalized tribunal that decided the free navigation on the Rhine in 1831– also known as the first international organization, he drafted a proposal, . Compared to the precedents that are available today in order to draft pertinent and compelling provisions, Gustave Moynier did the best with the little tools he had.

The proposal contained 10 articles and it stressed to address some critical shortcomings of the 1864 Geneva Convention that were highlighted in the heinous crimes committed during the Franco-Prussian War from 1870 to 1871. High on the list was attributing criminal responsibility, although he did not define and refine the specifics. He had managed to sketch a dynamic of an international body and how it would function, with judges, state involvement, verdicts, a very difficult feat at the time. Indeed, as every new revolutionary idea it was met with both hostility and laurels for being a champion of justice. The detractors were not voicing their opinion due to logic flaws of his intentions, but due to the feasibility of implementation of such an operation, with Lieber included in this group of people.[6] Some argue it was too extreme, combined with the fact that the Geneva Convention was lenient and mostly ignored by states, even though they had signed it, it ultimately failed.

The First Peace Conference was built on the foundations of the 1864 Geneva Convention and was generally addressing the relevant issues more efficiently, however where it could not, it highlighted the need for a future revision because it was still missing important aspects. The Hague Tribunal only had permanent as a denomination, but not in effect. The second Peace Conference from 1907 enjoyed a larger pool of nations who ratified, but again, military budgets and types of arms was still missing. However, at the time it was considered the "*Magna Charta of the coming World State",* an amazing breakthrough in how warfare was conducted and a major step towards the ease adopting peaceful resolutions for conflictual disputes.[7] It was hoped that the next Peace Conference

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[6] The first proposal for a permanent international criminal court. *International Review of the Red Cross,* 322. Available at: https://www.icrc.org/eng/resources/documents/article/other/57jp4m.htm [Accessed 9 Aug. 2017].

[7] James Tryon, 'The Hague Conferences'. *The Yale Law Journal*, (1911) 20, 6. [online] Available at http://digitalcommons.law.yale.edu/ylj/vol20/iss6/3/ [Accessed 9 Aug. 2017].

would finally handle the matter at hand, however due to the First World War, the meeting did not happen.[8] gain, the sovereign state was the stumbling block here because it did not allow individuals to become liable and vulnerable under this legislation, rendering the law unable to prosecute state officials who committed crimes, due to the fact that they were protected by states. Reparations were the primary measures of punishment.[9]

World War I has been a turning point in the development of international criminal justice. German abuses of civilians (soldiers are also citizens of some States), the choice of weaponry, its warfare conduct, along with the alleged genocide committed by the Ottoman Empire against the Armenian population has pushed the Allied powers to prosecute crimes allegedly committed by the Central Powers. The Commission of the Responsibility of the Authors of the War and on Enforcement of Penalties was the body created to deliver justice as seen by the victors.[10] As per Article 3 of the legislation "*The degree of responsibility for those offenses attaching to particular members of the enemy forces, including members of the General Staffs, and other individuals, however highly placed"*[11]gain, the issue had to be threaded lightly because it had its opponents mainly due to some putting forward consequences such as, again, weakening state sovereignty, exacerbating existing delicate situations after the war. This legislation was brought at the Paris Peace Conference in 1919 and it is known as the Versailles Peace Treaty, signed on 28 June 1919.[12]

The creation of a permanent tribunal was met with hostility by the United States, who argued that there is no precedent or procedure to warrant such an institution, that national jurisdiction should not prosecute individuals that are subject to another national jurisdiction because it would create a dangerous precedent. Moreover they argued that the national courts can deal with and prosecute individuals based on existing legislation whether or not humanity laws were breached. Needless to say, the United States were

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[8] Nobuo Hayashi, The Role and Importance of the Hague Conferences: A Historical Perspective, (Conference on Disarmament, Informal Plenary, UNIDIR, 22 February 2017). [online] Available at: http://www.unidir.org/files/publications/pdfs/the-role-and-importance-of-the-hague-conferences-a-historical-perspective-en-674.pdf [Accessed 9 Aug. 2017].

[9] Çakmak (n 1) 11.

[10] Van Schaack (n 4) 21.

[11] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. (1920). *The American Journal of International Law,* 14 1, [Accessed 9 Aug. 2017].

[12] G. Werle, J. Bung, `The evolution of international criminal law` (2010). [online] Available at: http://werle.rewi.hu-berlin.de/01_History-Summary.pdf [Accessed 9 Aug. 2017].

focusing their resources on pursuing another objective, by having a different strategy, the creation of the League of Nations, which, in the end they never joined.[13]

Nevertheless, the United States were supposed to have a judge among the committee which should have tried the former German emperor William II, as per articles 227 but it emerged as the first body to prosecute international individual crimes.[14] (Peace Treaty of Versailles, 1919). Unfortunately, Article 227 does not establish a precedent, because it never entered into effect due to the emperor fleeing to the Netherlands, who refused to extradite him, under the still impenetrable domestic law. It is important to note that as more events unfolded and more international law provisions were written, although still in its early stages, there were less and less gaps and it became more difficult to avoid emerging law.

Needless to say, the actual enforcement was not a success with only 12 trials actually happening against German individuals. The Ottoman Empire avoided such proceedings by conducting national trials, never signed the Versailles Peace Treaty or the Sevres Treaty that incriminated them for the Armenian genocide, therefore they dodged international justice by signing the Treaty of Lausanne which did not mention this. Due to this, the alleged crimes committed by predecessor of now Turkey can only be alleged.[15]

In the aftermath of a gruesome war, during the short peace there were attempts to create international bodies that could prosecute such crimes, however an international criminal court could not be created. The Permanent Court of International Justice (PCIJ), an institution created by the League of Nations, had only the difficult task to handle state disputes, thus preventing them to go to war. The Pact of Paris is another historical step forward international criminal law as the agreement between the US and France about the conduct of war, prisoners of war, modern weaponry began to be regulated and prohibited. This was later open to ratification and entered into force, however as proven by the start of the Second World War, it did not have any deterring impact.[16]

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[13] Van Schaack (n 4) 27.
[14] *Peace Treaty of Versailles, Articles 227-230, Pentalties,* [1919]. [online] Available at: http://net.lib.byu.edu/~rdh7/wwi/versa/versa6.html [Accessed 9 Aug. 2017].
[15] Van Schaack (n 4) 26.

[16] *ibidem*, 27.

1.1 The International Military Tribunal

The major breakthrough in International Criminal Justice, or the inception of it, as many argue, happened after the end of World War II, a horrible stain on the history of the world. It is unfortunate that only a bigger tragedy than the previous has managed to warrant a change, but in the end it is better late than never. Following the birth of the United Nations, the International Military Tribunal in Nuremberg played its role. It introduced new concepts that were previously attempted, but failed:[17]

- Criminal responsibility regardless of official position[18]
- Following orders of a superior was no longer enough as a defence
- Definition of crimes against humanity
- Definition of the crimes against peace[19]
- Definition of the war crimes

It is important to note that the crime of genocide was legally established in the Genocide Convention in 1948[20], a delayed reaction to the Holocaust. 1949 saw the four Geneva Conventions drafted as well, having seen much pressure coming from different sides to speed up the process. Indeed, impartiality is amiss, somewhat a utopian characteristic, having the winning side organize the tribunals, orchestrate the proceedings, make the rules and put the judges – Allied powers conationals. There was no successful precedent of such act, but what gave this procedure somewhat legality is the fact that the German leaders were being tried for violations against its own suffering population as well, which removed slightly the collective guilt of the German people.[21] Another debunked critique as to the trials fairness was the fact that the judges came strictly from the Allied powers side, however after World War I, having German judges, they failed to prosecute and criminalize the perpetrators.[22] Moreover, the violation of the principle of legality, because the Charter of the IMT was drafted after the crimes were committed, and, in turn, the perpetrators claimed they did not know it was illegal, however the

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[17] Andrew Novak, *The International Criminal Court,* (Springer, 2015), p.9.
[18] United Nations, (2008). "*Affirmation of the Principles of International Law Recognized by the Charter of the Nurnberg Tribunal: General Assembly Resolution 95(1)"*
[19] Marco Pedrazzi, (2014). `In the framework of the history of international criminal justice: a brief survey`, *Analysis,* 246, 2014, p.2.
[20] UN General Assembly, "*Convention on the Prevention and Punishment of the Crime of Genocide"* (1949), p.277.
[21] *Ibidem,* p. 2.
[22] Çakmak (n 1) 31.

Tribunal ruled that the crimes were already present in customary international law during the war and the Charter only codified them. The argument against the ruling is the principle of retroactivity, which does seem to have a valid point raised.

"*The IMT Charter can be considered the birth certificate of international criminal law*"[23] (Werle, Bung, 2010, p. 1) Indeed, the process was not perfect, since the victorious side did not face charges for the crimes they committed, and neither was the process something set in stone, because many of the crimes that the defendants were standing accused of, were being legislated step by step as events unfolded, undeniably biased, and certainly with the intent of creating a well-defined precedent. A certain legitimacy was given by the US and their determination to have the trials as fair as possible, following international law objectively, against the pressure of France, the UK and Russia, whom were advocating for maximum sentencing by skipping some of the steps. What has come to be known as the Nuremberg Trials lasted just under a year, from November 14th 1945 to October 1st 1946.[24]

The framing of the newly born denominations of international law meant the following: it was the first time that crimes were prosecuted in a form of retroactive justice, because at the time they happened, international law did not cover such notions. Basically "no crime without law – nullum crimen sine lege" was how things stood at the time, however finally a breakthrough occurred, a much needed one, even though the way was neither straightforward nor law-abiding simply because there was no law. However the Judgment of October 1st of the International Military Tribunal famously said:" '*Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced"*[25].

Later there were there were other proceedings based on the Allied Control Council Law No. 10. 22 high officials were prosecuted by this Tribunal. The work of these tribunals continued for many years, putting to trial over 20.000 German locals. Unfortunately double standards prevented the Allied powers from bringing Italians to justice.[26]

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[23] Werle, Bung (n 12) 1.
[24] Novak (n 17) 9.
[25] Judgement of the International military tribunal for the trial of German major war criminals. [1946]. London: H.M. Stationery Off, p.55.
[26] Çakmak (n 1) 29.

"*The very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.*"[27]

1.2 The International Military Tribunal for the Far East

The second account was the International Military Tribunal for the Far East, as a consequence of the same war, established in 1946, which had the Japanese facing charges for the same crimes, however in this instance it was due to the will of US General Douglas McArthur and not based on an international treaty - Charter as the Nuremberg Trials. "*Procedural irregularities were frequently observed during the proceedings; the defendants were chosen on a political basis and tried in an unfair manner*"[28]. Even so, the rhetoric that followed was not made public because the Emperor Hirohito and General McArthur allegedly made an agreement because the latter did not oppose the paper which cleared the crimes committed by the Japanese during the war. The explanation was that Japan itself was going to prosecute the criminals of World War II internally, perhaps relieving the economic burden off the United States was the main reason they had agreed to it. As expected, these trials were neither fair, nor following the rule of law, as politics triumphed yet again.[29] It is possible to draw a supposition and assume that most progress that has been made, was done outside the rule of law, forcefully, unfair. The lines were needed to be drawn from the outside of a small jurisdiction in order to broaden international law's reach and potency. Basically even though there was strong evidence to pursue legal action even after drawing the lines, spitefulness transformed the process into a mash-up that lost its legality to the detriment of speed.

Unfortunately most of the criminals were released by the end of the 1950s. The Nuremberg Trials are of more significance than the IMTFE due to its international

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[27] Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, 30th September and 1st October, [1946], [online], available at: http://www.yale.edu/lawweb/avalon/imt/proc/judlawch.htm. [Accessed 11 Aug. 2017].
[28] M. Cherif Bassiouni, From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court, 10 Harv. Human Rights J. 11 (1997), p.33.
[29] Çakmak (n 1) 34.

character, however the more efficient trials were the subsequent ones, those specialized in specific crimes, with much less spotlight: The RuSHA Trials, Hostages Trial, The Einsatzgruppen Trial, The Doctors Trial and many more targeting citizens that were indirectly at fault for crimes regardless of their job title. This has allowed the judges and prosecutors to solely focus on a particular case, thus making it easier to reach a correct sentence without the pressure of time. It is important to note that all these above mentioned ad-hoc tribunals are only Trials nonetheless, not part of a permanent overarching international body that would have jurisdiction. Basically they dissolved after the issue was solved.[30]

One strong benefit of the Nuremberg trial in particular is that it "*de-legitimized Holocaust denialism"* in contrast with the Armenian genocide in 1917 where Turkey still avoids accountability and denied that the event happened in such a way. Germany is unable to do so due to the historical records, but also due to its unwillingness to deny it.[31]

1.3 Further Developments

Progress has been made and steps have been taken, therefore International Criminal Law developed significantly this time. The introduction of the crimes of genocide and crimes against humanity within international law and being able to prosecute individuals, created a strong precedent because domestic law and sovereignty had been finally pierced in this aspect. The Cold War proved to be a stumbling block in furthering development on international criminal justice though. The only notable events that followed were:[32]

- Genocide Convention - 1948
- The 4 Geneva Conventions in 1949
- ILC – International Law Commission – 1948
- UDHR – Universal Declaration of Human Rights - 1948
- ICCPR - International Covenant on Civil and Political Rights – 1966

[30] Van Schaack, (n 4) 33-34.
[31] Novak (n 17) 11.
[32] Van Schaack (n 4) 40.

Why could there be no development? Because the tension between the US and USSR and their proxy wars would have had both found guilty under current International Law. Moreover, even with the Conventions and Covenants, without having a judicial body to enforce and prosecute these infringements they were merely guidelines.

International Law Commission

The ILC, commissioned by the UNGA made strides and presented reports to the General Assembly clearly stating that national sovereignty should be "*subordinated to the supremacy of international law"*[33] because they cannot be equals and cannot function together. However while there was a general understanding and agreement on the theoretical benefits of a permanent court, the existing political climate would render it inefficient and even counter-productive. Emil Sandstrom, a special rapporteur had made a good argument that is indeed valid today and quite possibly influenced the progress of today's ICC: "*If states were free to submit to an obligatory international criminal jurisdiction, they had also the power to agree thereto*"[34]

Moreover, the Draft Statute of the International Criminal Court from 1994, published by the International Law Commission[35], stated that the UN General Assembly would have to authorize any action to be pursued by Court. Needless to say, committees and the state have argued for years to find common ground without any success, having the crime of aggression as a major obstacle due to the problem of actually defining it. Up until the end of the Cold War, only small steps have been taken, but their impact cannot be understated. During a time of verbal disagreement even the smallest of agreements on seemingly irrelevant progress would plant the seed for future growth. The creation of such an institution, has not finished even after the building has been built in the Hague, or after the Rome Statute came into force in 2002, but these are merely more steps into the development of the most ambitious and progressive humanitarian project to date. Just as the first Geneva Conventions have not been the finished product, neither the ICC today

[33] Ricardo J. Alfaro, International Law Commission, Report on the Question of International Criminal Jurisdiction, U.N. Doc. A/CN.4/15, reprinted in The Yearbook of International Law Commission, Volume II, [1950].
[34] Emil Sandstrom, International Law Commission, Report on the Question of International Criminal Jurisdiction, U.N. Doc. A/CN.4/20, reprinted in The Yearbook of International Law Commission, Volume II, [1950].
[35] International Law Commission, *Draft Statute for an International Criminal Court with commentaries*, (1994), [online] available at: http://www.refworld.org/docid/47fdfb40d.html [Accessed 8 Mar. 2018].

is the finished product. As history has proved so far, the timeline for International Criminal Law is always progressing, at a different pace, but it is improving. It is true that the need for change and adaptability comes also from the environment and the warfare conduct, terrorism, the ability to inflict mass damage even as an individual, but also because of the desire for a unified body that will deal justly and according to the same rule of law, applicable to everyone. (own analysis)

In 1994 another Draft Statute for an International Criminal Court was created by the ILC at the behest of Latin American and Carribbean countries who were struggling with drug trafficking and violence, however Europe was facing its biggest crisis since World War II in former Yugoslavia, where Bosnian Muslims (but not only) were murdered. These crimes under international law triggered the UNSC to establish the violations committed according to current international law.[36]

Unfortunately, even though progress has been constant in the development of ICL, only tragedies have kickstarted the progress and warranted change. Some scholars argue that it is not the end of the Cold War, but the genocides from former Yugoslavia and Rwanda as the catalysts as well as the technological advancements that happened afterwards. Moreover, the ability of people to travel and commit atrocities outside their own nation's borders at the order of a criminal organization has eased the path towards yielding some rights in order to reinforce security. Sovereignty no longer has such a strong stance during negotiations when facing these new threats.[37] "*The focus was not on war crimes and genocide, but on terrorism and narcotics"*[38].

The Commission of Experts, sponsored by the UN did a fantastic job in former Yugoslavia, maybe too good for their own good, because, according to professor Bassiouni from the International Human Rights Law Institute, the UNSC intervened administratively in order to obstruct and end the mandate (for the Commission) even though they still had substantial funding. This was right before the final report was to be drafted, however the Security Council wanted to stop it.[39]

The evidence they had would not leave room for a negotiation for the criminals, especially for heads of state, therefore, "*it became politically necessary to terminate the*

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[36] Van Schaack (n 4) 43.
[37] Çakmak (n 1) 59.
[38] MacPherson, 'Building an International Criminal Court for the 21st Century' *Human Rights Quarterly*, 33, (2011) p. 12.
[39] Bassiouni (n 26) 42.

work of the Commission while attempting to avoid the negative consequences of such a direct action"[40]. Indeed, there is no paper trail of the Security Council asking to terminate the Council's mandate, it is an alleged theory proposed by professor Bassiouni, however, this can be considered the first case for the purpose of this thesis where the influence of the UNSC has been negative over an institution mandated to deliver international justice. Indeed, it is not the ICC and it will not only contain alleged negative influences, but for the reason of paving an unbiased historical timeline it is necessary to be impartial.

ICTY

Thus, the International Tribunal for the Former Yugoslavia – ICTY was approved in 1993 after the UNSC voted in favor of it, and formed in 1994 (in the Hague), with a Prosecutor only by 1995, but it does not mean it was supporting it thereafter. The massacre in Srebrenica from 1995 can be seen as a failure of the court to try and sentence the evident injustice from before that, however the lack of funding was an impediment in the process in regard to speed. The most important development was that former president of Serbia, Slobodan Milosevic, was tried in 2001, however due to a slow process he died before he could be sentenced in 2006. Nevertheless this is the first case when a head of state was actually apprehended and tried before an international court. The solidity of impunity was significantly weakened for high ranking officials. The ICTY dealt with 161 alleged criminals.[41] The Secretary General at that time acted under the authority of the UN Charter Chapter VII, the laws under which the Security Council can determine threats to peace. It can also be defined as the sets of rules coordinated by the 5 permanent members in order to bypass others sovereignty. A harsh definition, used selectively due to preferred engagement, but nonetheless better than nothing. Indeed, in regards to the Arrest Warrant Case[42], the International Court of Justice did not allow the prosecution of Yerodia because of his immunity as a foreign minister at the time, despite Belgium making strong claims. The ruling was such due to the ICJ not recognizing Universal Jurisdiction as compulsory international law and thus refuted the Belgian warrant.[43]

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[40] *ibidem*, 41.
[41] Novak (n 17) 13.
[42] International Court of Justice, "*Case Concerning the Arrest Warrant of 11 April 2000 Democratic Republic of the Congo v. Belgium"* (2002)
[43] Alberto Zuppi, 'Immunity V. Universal Jurisdiction: The Yerodia Ndombasi Decision Of The International Court Of Justice' 63 *Louisiana Law Review,* (2003)

Yet, the Prosecutors office was independent and could pursue any political avenues it saw fit, it was financially independent from the UNSC, although they did appoint the Prosecutor himself, which could be seen as a form of manipulation by the sceptics. Compared to? to the Draft Statute of the International Criminal Court, the ICTY offered the Prosecutor with considerable legislative freedom, constrained by the fact that it still was an open conflict zone.[44] Professor Bassiouni also puts the blame on the UNSC because they have not funded the ICTY when they could have, therefore indirectly affecting negatively the prosecutorial process.[45]

ICTR

The International Criminal Tribunal for Rwanda – ICTR, that sought to remove a stain on the international history, as approximately 800.000 people were murdered in one of the most recent atrocious genocide. The Hutu were murdering the Tutsi (around 14% of the population but for centuries in power) but also Hutu moderates, while the whole world watched. The eventual UN peacekeeping operation was even asked to leave at one point because it could not offer anything positive, therefore UNAMIR is considered a failure, not because of the troops themselves, but because it did not have sufficient backing from the UN. It was more of a reaction cause by international pressure to intervene and stop the genocide.[46] The ICTR was approved in 1994 after the events, based in Tanzania and in The Hague, however the first actual building in Arusha was built in 1996, therefore only then it started prosecuting. The Statute had the bulk from the ICTY with some major new features. "*This was the first time that the category of crimes against humanity was separated from war crimes, and the first time that the laws of war were prosecuted in a purely internal conflict.*"[47] Moreover the UN could not ignore the situation any longer especially because of their involvement in former Yugoslavia, and some detractors might argue that without the ICTY there would not have been the ICTR,

<https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=5973&context=lalrev> [Accessed 8 Mar. 2018].

[44] Çakmak (n 1) 67.

[45] Bassiouni, (n 26) 44.

[46] 'United Nations Peacekeeping Role In Rwanda International Law Essay'. *Law Teacher* (2013). [online]. Available from: https://www.lawteacher.net/free-law-essays/international-law/united-nations-peacekeeping-role-in-rwanda-international-law-essay.php?cref=1 [Accessed 22 Aug. 2017].

[47] Novak (n 17) 13.

because it needed a precedent.[48] The process was hazardous and questionable, and it yielded only 95 trials with 59 convictions. It did however de-legitimize genocide denialism and further enhanced international criminal law as a whole. One example is that mass rape was thereinafter considered genocide. The jurisprudence that was created because of the ICTR cannot be understated.[49]

Other (hybrid) tribunals

The Hybrid Tribunals were a reaction due to the inefficiency and expensive costs that ICTY and ICTR proved to be, although the voluntary funding of the aforementioned institutions did not instill legitimacy.[50]

In the meantime the International Law Commission was already working on a draft statute for a permanent court, and it served the Preparatory Committee created by the General Assembly to creating the Rome Statute in 1998 at the Rome Conference, which is the legislation that created the International Criminal Court.

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[48] Shraga, Zacklin (1997) 'The International Criminal Tribunal for Rwanda', *European Journal of International Law*, 7 (1996), available at: https://doi.org/10.1093/ejil/7.4.501, [Accessed 22 Aug. 2017]
[49] Novak (n 17) 17.
[50] ibidem, 17.

2. Description of the Legal Framework

2.1 Legal regulation governing ICC jurisdiction that is relevant in the UNSC-ICC dynamic

The Rome Statute of the International Criminal Court[51] is the governing international treaty adopted by 124 countries, which enables an independent and permanent international court, namely the International Criminal Court, to prosecute perpetrators of crimes mentioned and defined under this specific jurisdiction starting July 1st 2002. [52]

The Preamble[53] - in accordance with Article 31 of the Vienna Convention on the Law of Treaties, the Preamble is an important part of the Rome Statute, which shall be taken into account when interpreting the text and will be relevant during judicial application. Indeed, it does not offer specific guidance but it can been used as a moral compass within legal doubt, in order to reinforce the case for the moral choice. It establishes the purpose: to harness and maintain peace, to provide security, to fight against impunity and to prevent crime. Moreover, it gives reference to the UN Charter and declares the "*independent permanent International Criminal Court in relationship with the United Nations System*", while having jurisdiction "*on the most serious of crimes*".

According to **Article 1**[54] the treaty Rome Statute states that the ICC will enforce its jurisdiction complementarily to national ones, therefore when one state party to the Statute is either unwilling or unable to prosecute an individual, it has the legal grounds to step in.

The crime of aggression in **Article 5** (1)(d)[55] is introduced, however it lacked a definition, therefore it caould not have exercised jurisdiction before an official definition was amended. Until then, not even the UNSC can trigger an investigation based on a prior

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[51] *Rome Statute of the International Criminal Court (last amended 2010)*, [1998] [online] available at: http://www.refworld.org/docid/3ae6b3a84.html [Accessed 4 Nov. 2017].
[52] *Understanding the International Criminal Court*, icc-cpi.int. (n.d.). [online] Available at: https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf [Accessed 29 Oct. 2017].
[53] The Preamble – *Rome Statute of the International Criminal Court.* [Accessed 4 Nov. 2017].
[54] Article 1 - *Rome Statute of the International Criminal Court*. [Accessed 4 Nov. 2017].
[55] Article 5 - *Rome Statute of the International Criminal Court*. [Accessed 4 Nov. 2017].

determination.[56] (Human Rights Watch, 2017) The Assembly or State Parties – ASP created the SWGCA – Special Working Group on the Crime of Aggression, tasked with drafting amendments that have been brought up for Review at the Kampala Review Conference in 2010. The ICC would get jurisdiction for the crime of aggression after January 1st 2017 having Palestine to ratify as the 30th required country to reach the threshold, if the ASP will vote and obtain a 2/3 majority in favor.[57] (Trahan, 2016)

After a delayed decision, eventually on December 26th 2017, the ICC has gained jurisdiction over the crime of aggression, however this will come into effect only after July 17th 2018. Fortunately, also Article 8 has been amended, by adding biological, microbial weapons as part of war crimes definition. After a long journey since the Kampala Review Conference, the ICC has won a great victory through this.[58]

Article 11[59] (1) and (2) defines the temporal mechanism (jurisdiction ratione temporis), meaning that crimes will be prosecuted only after the Statute entered into force. Moreover, if a state ratifies the Statute at a later interval, it will only be subject to its jurisdiction only from when it ratifies, unless it wants to enable the Court to exercise jurisdiction from 1st July 2002, according to Article 12(3).[60]

Article 13 paragraph b[61] directly involves the UNSC in regards to the referral process, regardless if the referred State is party to the Statute or not, by acting so according to Chapter VII of the United Nations Charter[62]. This can be viewed as an alternative to the creation of an ad-hoc tribunal, where a crime that may threaten international peace has been referred breaching the above mentioned article. It can lower costs and be acted upon in a faster manner[63]. (Stahn, 2015) Although this might seem as a positive occurrence it cannot be denied that after referral, the jurisdiction would apply retroactively, thus clashing with the *nullum crimen, nulla poena sine praevia lege poenali.*

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[56] *Human Rights Watch. Summary of the Key Provisions of the ICC Statute.* (2017). [online] Available at: https: https://www.hrw.org/news/1998/12/01/summary-key-provisions-icc-statute [Accessed 4 Nov. 2017].
[57] J. Trahan, `Opinio Juris >> blog Archive Implications of the 30th Ratification of the International Criminal Court's Crime of Aggression Amendment by Palestine` (2016). [online] Available at: http://opiniojuris.org/2016/06/30/implications-of-the-30th-ratification-of-the-international-criminal-courts-crime-of-aggression-amendment-by-palestine/ [Accessed 4 Nov. 2017].
[58] C. Johnson, 'ICC: Jurisdiction Over Crime Of Aggression Activated | Global Legal Monitor' (2017). [online] Available at http://www.loc.gov/law/foreign-news/article/icc-jurisdiction-over-crime-of-aggression-activated/ [Accessed 8 Mar. 2018].
[59] Article 11 - *Rome Statute of the International Criminal Court*. [Accessed 4 Nov. 2017].
[60] Article 12(3) - *Rome Statute of the International Criminal Court*. [Accessed 4 Nov. 2017].
[61] Article 13(b) - *Rome Statute of the International Criminal Court*. [Accessed 4 Nov. 2017].
[62] *United Nations Charter Chapter VII, Article 39*. [Accessed 4 Nov. 2017].
[63] C. Stahn, *The Law and Practice of the International Criminal Court,* (OUP, 2015). Pp. 141-178.

This item is but a trigger mechanism, as it does not create jurisdiction and is still bound by the temporal constraint, even if it comes directly from the UNSC.[64] The alternative argument is that the crime is already present in customary law so it obliges individuals regardless of whether their state of nationality is a state party to the Rome Statute or not.

In spite of disagreements, there have been 2 cases so far where the UNSC has referred a situation to the ICC under Article 13(b): Darfur- Resolution 1593 in 2005 and Libya – Resolution 1970 in 2011.

This may not seem a contentious part, however **Article 16**[65] might seem to be more invasive at first glance:

"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."

Disputing the outcome of such provision has both subjective and objective implications, because sometimes a deferral might be in the best interest of a country in the midst of a fragile peace, which might seem threatened of an active investigation coming from foreigners. Thus, in turn might put at risk the lives of many innocents. The subjective implication comes to Court as to when does the cost of pursuing justice outweigh the needs of a suffering people whom they are also trying to shield from further harm. Indeed and undoubtedly, it does suggest also that the UNSC might have political interests or act selectively in writing such deferrals. Unfortunately, as per what the history of International Criminal Law has showed us so far, it has progressed only in the face or after heinous mass scale international crimes. These can be considered both positive and negative, as they can enable both type of actions, however without this compromise, the creation of this legislation would have had a different outcome and impact, possibly much smaller than what it is today.[66] (Stuart, 2008)

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[64] Commentary Rome Statute: Part 2, Articles 11-21: Casematrixnetwork.org. [online] Available at: https://www.casematrixnetwork.org/index.php?id=336#4021 [Accessed 4 Nov. 2017].
[65] Article 16 - *Rome Statute of the International Criminal Court.* [Accessed 4 Nov. 2017].
[66]H. Stuart, `UN and ICC H. Stuart, 'UN and ICC: Not the Easiest of Relationships' (2008). [online] Available http://www.globalpolicy.org/component/content/article/164-icc/28591.html [Accessed 4 Nov. 2017].

It is referred to as the "*Peace vs. Justice*" debate, with its predecessor being written within the ILC Draft Statute at Article 23.[67] Indeed, during the Rome Conference which created the Rome Statute the States involved did not see the problem manifesting itself in such a way, but only in theory. There was a high degree of skepticism and fear of malevolent intervention, disrupting the impartiality principle and judicial independence. However, a compromise had to be reached in order to go through with the Statute in its entirety, because the Security Council does have a more powerful position under Chapter 7 of the Charter. An important remark is that Article 16 is vague when it comes to when the deferral request clause may be activated, whether during investigation or prosecution, it remains unclear. However, Article 15 separates and defines the actions of each step, resulting in a potentially valid interpretation that the Security Council could not intervene in "*Preliminary examinations*", so basically only after the investigation or prosecution phase has been given the green light.[68]

UN Charter Chapter VII and the Rome Statute in combination give authority to the Security Council to invoke Article 16 of the Rome Statute whenever the SC determines that there is a threat to peace, with the ICC able to contest and provide evidence that would counter the SC, although this has been proved to be unlikely. Article 16 has been used both times in order to shield personnel from non-state parties from ICC jurisdiction while on duty, by using Article 16 and by specifically adopting paragraph 6:

"*Decides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State;"* [69]

Resolution 1970 follows in the same respect.

Article 21[70] defines applicable law and hints at its ranking and this in particular becomes very important due to the clash of Articles 27 and 98. After the Statute,

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[67] Article 23 - *Rome Statute of the International Criminal Court*. [Accessed 4 Nov. 2017].
[68] Commentary Rome Statute: Part 2, Articles 11-21: Casematrixnetwork.org. [online] Available at: https://www.casematrixnetwork.org/index.php?id=336#4021 [Accessed 4 Nov. 2017].
[69] SECURITY COUNCIL REFERS SITUATION IN DARFUR, SUDAN, TO PROSECUTOR OF INTERNATIONAL CRIMINAL COURT' Un. org. (2005). Available at: http://www.un.org/press/en/2005/sc8351.doc.htm [Accessed 4 Nov. 2017].
[70] Article 21 - *Rome Statute of the International Criminal Court*. [Accessed 4 Nov. 2017].

customary international law and applicable treaties would come into place, such as the Vienna Convention on the Law of Treaties from 1969. Article 38(1) of the SICJ[71] is used to determine the order, with some changes that fit the purpose of the ICC better and more specific. Customary International Law is created using e.g. case law and National Legislation as State Practice and opinion iuris, therefore this amalgam is complicated to apply in practice: "*interrelationship of sources is more complex than Article 21's apparently rigid hierarchy implies as the overlap between the sources is too complex to reduce to simple formulae, including reference to hierarchy*"[72]

Article 27 [73], an important breakthrough makes all individuals potentially culpable, regardless of any official position one might hold within a state institution, i.e. government. Basically it lays the groundwork for equal treatment based on one's actions. It is very important as it is interlinked with Article 98. There are two types of immunities: ratione materiae – functional immunity, meaning that they count as act of states and ratione personae – personal immunity granted to a select few high ranking state officials: the ICJ has noted that it is granted to three people: the head of the state, the head of the government, and the minister of foreign affairs. After they leave office they can be prosecuted, however not for what has been committed during their time in office and done in official capacity. Customary International Law has guided the process since Nuremberg to the point where officials cannot hide under the ratione materiae when committing international crimes, with the primary example of former Yugoslav President, Slobodan Milosevic, charged after leaving office.[74]

What is important here is the following: immunity ratione personae has been waived by State Parties to the Rome Statute, therefore the progress, considering the history of ICL is major, as it makes a statement of intent, of justice, while weakening the sovereign walls of the globe. It is potentially one of the primary reasons why the United States does not intend to ratify the treaty, but the Thesis will cover this aspect later on.[75]

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[71] United Nations, Statute of the International Court of Justice, [1946], available at: http://www.refworld.org/docid/3deb4b9c0.html [Accessed 4 November 2017].

[72] R. Cryer, 'Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources' New Criminal Law Review, 12 (3), (2009).

[73] Article 27 - *Rome Statute of the International Criminal Court*. [Accessed 4 Nov. 2017].

[74] Commentary Rome Statute: Part 3, Casematrixnetwork.org. Available at: https://www.casematrixnetwork.org/index.php?id=337#4025 [Accessed 4 Nov. 2017].

[75] O. Triffterer, Commentary on the Rome Statute of the International Criminal Court. (München: C.H. Beck, 2008) p. 786.

Article 53, paragraph 3(a)[76] highlights that the UNSC can request the Pre-Trial Chamber to review the Prosecutor's decision not to proceed with investigation. When requesting more clarification, whether to have it presented to the Security Council or a State, the Pre-Trial Chamber must be very cautious and protect the witnesses who are at risk.[77] The judicial control may hinder prosecutorial discretion, however it gives more balance to a process in pursuit of the interests of justice.[78]

Article 59, Paragraphs 1, 2 and 4[79]is of certain relevance in the future analysis of the cases of the thesis. It is about the arrest procedures in the custodial State acting on an ICC warrant. The State in case will have its competent authority decide whether there are any exceptional circumstances to validate a release, however the institution does not have the authority to contest the warrant or the arrest process.

Article 87 – Requests for cooperation: general provisions[80]. Section 5(b) mentions that the ICC may enter into ad-hoc agreements with states not parties to the Rome Statute, and, in case they do not comply after signing the agreement, the ICC can report the issue to the State parties to offer assistance. Moreover in case it is a case referred to by the UNSC and the state does not comply, yet again it has the capacity to inform the Security Council in good faith that this will enact change, according to the law. This may prove to be an avenue where the ICC has wiggle room and some influence, if not just a matter of pressure to apply to the Security Council in order for them to take action. An example in the following chapters will encompass the case where Malawi has failed to comply with the Rome Statute in regards of arresting Omar Hassan Ahmad Al Bashir. This is linked closely to the topic of immunities and Article 98.

Article 98 - Cooperation with respect to waiver of immunity and consent to surrender[81]

"1. *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*

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[76] Article 52(3)(a) - *Rome Statute of the International Criminal Court.* [Accessed 4 Nov. 2017].
[77] Commentary Rome Statute: Part 5, Casematrixnetwork.org. [online] Available at: https://www.casematrixnetwork.org/index.php?id=339#4029 [Accessed 4 Nov. 2017].
[78] Triffterer (n 72) 1068-76.
[79] Article 59(1)(2)(4) - *Rome Statute of the International Criminal Court.* [Accessed 4 Nov. 2017].
[80] Article 87 - *Rome Statute of the International Criminal Court*. [Accessed 4 Nov. 2017].
[81] Article 98 - *Rome Statute of the International Criminal Court*. [Accessed 4 Nov. 2017].

State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity."

"2. *The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender*."

The Article above causes major debates in regards to its interpretation. It is formulated ambiguously, by potentially giving legality to either scenario. According to the ICJ, Heads of state and foreign ministries are protected by international customary law, thus being shielded from prosecution by domestic courts, even though it is not the case for ICC jurisdiction.[82]

This is an inconvenient loophole. It clashes directly with Article 27 as follows. Example: State A (Party to the Rome Statute) has been requested by the ICC to arrest a perpetrator from State Z (non-party to the Rome Statue) according to Article 27. Since State Z is not a party to the Rome Statute, the ICC jurisdiction cannot apply, thus State A cannot lawfully arrest the perpetrator from State Z, because International Customary Law hands immunity *ratione personae* if the perpetrator is a head of state. Therefore, this clash can only be solved by a bilateral agreement (Article 12(3)), where State Z accepts ICC jurisdiction and waives the immunity of the perpetrator. If State A continues with the arrest before an agreement is signed it means it has violated the law.

However, jurisprudence deriving from ICTY renders that functional immunity may only be acceptable in domestic cases, and not while committing international crimes as per Article 5 of the Rome Statute.[83] (Brohmer, 1999) Another example further cementing possibility of putting on trial high-ranking officials was the Democratic Republic of Congo vs Belgium case – Arrest Warrants of April 11th 2000 where one of the reasons was that "*The jus cogens nature of international crimes cannot be allowed to*

[82] Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), International Court of Justice (ICJ), (2002), available at: http://www.refworld.org/cases,ICJ,3c6cd39b4.html p.551, paragraph 61 [Accessed 4 Nov. 2017].

[83] J. Bröhmer, 'Diplomatic Immunity, Head of State Immunity, State Immunity: Misconceptions of a Notorious Human Rights Violator' Leiden Journal of International Law, 12(2), (2007) pp.361-371. [Accessed 4 Nov. 2017].

be eroded by immunities."[84] (Sadushaj et al., 2017, p. 142) Yet another account further enforcing Article 27 comes from Sir Arthur Watts concerning the Pinochet case: "*The idea that individuals who commit international crimes are internationally accountable for them has now become an accepted part of international law. It can no longer be doubted that as a matter of general customary international law a head of state will personally be liable to be called to account if there is sufficient evidence that he authorized or perpetrated such serious international crimes. The question then becomes not whether heads of states can be tried but when and how?*"[85]

The Special Court of Sierra Leone (SCSL) has given itself the legal authority to try former head of state of Liberia, Charles Taylor and it issued an arrest warrant.[86]

Even though apparently Articles 27 and 98, Dapo Akande highlights the possibility of using the *principle of effectiveness* - a treaty giving meaning to all provisions harmoniously without making parts of them inefficient.[87] Therefore according to the Preamble, **Article 86**[88] - "*General obligation to cooperate*" and Article 31 of the Vienna Convention on the Law of Treaties[89], the ICC requires certain help from states because otherwise it does not have any power.[90] (Sadushaj et al., 2017, p. 145). According to Article 60(3) of the Vienna Convention[91] "*violation of a provision essential to the accomplishment of the object or purpose of the treaty*" would be considered a breach, and it can be applied to State parties not acting according to what the ICC asks, however a breach of a treaty cannot be attributed to a State which is not party to.

Coming back to Article 98 paragraph 1, it is relevant to observe the construction of the phrase, containing the word *MAY,* which suggest a discretionary approach to interpretation rather than a clear cut one.[92] Conversely, while this alone cannot constitute

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[84] M. Sadushaj, S. Shatku, F. Pustina, E. Kuka, E. and G. Taraj, 'Interpretation and Application of Article 98 of the Rome Statute' *Academic Journal of Interdisciplinary Studies*, (2017) [Accessed 4 Nov. 2017].

[85] A. Watts, A. (1994). The legal position in international law of heads of states, heads of governments and foreign ministers (Volume 247), p 82-84. [Accessed 4 Nov. 2017].

[86] Prosecutor v Charles Ghankay Taylor case No.SCLSL-2002-01-1 Decision on immunity from jurisdiction, 31st May 2004. [Accessed 4 Nov. 2017].

[87] D. Akande, (2009). 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' Journal of International Criminal Justice, 7(2), (2009) pp.333-352. [Accessed 4 Nov. 2017].

[88] Article 86 - *Rome Statute of the International Criminal Court*. [Accessed 4 Nov. 2017].

[89] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: http://www.refworld.org/docid/3ae6b3a10.html [Accessed 4 November 2017].

[90] Sadushaj et al (n 81) 142.

[91] Article 60 (3) - *Vienna Convention on the Law of Treaties*. [Accessed 4 Nov. 2017].

[92] Rastelli v Warden,Metro-Correctional Centre,782 f.2d 17.23(2d cir.1986). [Accessed 4 Nov. 2017].

sufficient resolution, grammatically speaking, it was complemented by adding the certainty value to the word *SHALL,* creating a legal obligation.[93] Concluding with Article 98, it must be underlined that if it is not used consistently with its purpose and Preamble of the law, then the justice sought cannot emerge.[94] (Sadushaj et al., 2017, p. 146)

2.2 Resolution 1422 – 2002

At the same date that the Rome Statute came into force, the UNSC adopted unanimously Resolution 1422, entering with immediate effect on July 1st, 2002. Invoking Article 16, the UNSC practically decided that the ICC is not to proceed with any investigation or cases against UN peacekeeping personnel that is not party to the Statute.

"1. *Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise;*"[95]

The resolution came at the behest of the United States, wishing to protect its personnel while on UN peacekeeping missions from the jurisdiction of the ICC. The provisions waived were an "all or nothing" compromise because the United States had threatened to veto all current and future peacekeeping missions.[96]

[93] Lexecon,Inc v Millberg Weiss Bershand Hynes & Lerach, 523, U.S 26,35(1988). [Accessed 4 Nov. 2017].
[94] Sadushaj et al (n 81) 148.
[95] UN Security Council, *Security Council resolution 1422 (2002) [on United Nations peacekeeping]*, 12 July 2002, S/RES/1422 (2002), available at: http://www.refworld.org/docid/3d528a612a.html [Accessed 4 November 2017].
[96] Un.org. (2002). SECURITY COUNCIL REQUESTS INTERNATIONAL CRIMINAL COURT NOT TO BRING CASES AGAINST PEACEKEEPING PERSONNEL FROM STATES NOT PARTY TO STATUTE | Meetings Coverage and Press Releases. [online] Available at: http://www.un.org/press/en/2002/sc7450.doc.htm [Accessed 4 Nov. 2017].

2.3 Resolution 1593 – 2005[97]

The UNSC acting under Chapter VII of the UN Charter invoked Article 16 and 98 for the first time in history when referring the Darfur case to the ICC. It was a historic development, with 11 votes in favor and 4 abstentions from China, Brazil, Algeria and the US. According to the UN, Algeria abstained because it believes the African Union should and could solve the situation; the United States because it disagrees with the ICC prosecuting citizens of states that did not ratify; China brought up the sovereign argument that Sudan's own government must punish the perpetrators, not be forced to accept the ICC's jurisdiction; and Brazil was not content with paragraph 6, which gave each contributing country jurisdiction of their citizens over operations in Sudan's territory, basically a shielding method to have countries like the US send aid.[98] However even though they abstained, these countries acknowledged unanimously that collective action must be taken in order to aid a suffering population from the crimes and injustice committed.

> [The Security Council] … "6. *Decides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State;*" [99]

2.4 Resolution 1970 – 2011

The second instance where the UNSC has referred a case to the ICC acting under Chapter VII of the Charter is in Libya.

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[97] UN Security Council, *Security Council resolution 1593 (2005) [on Violations of International Humanitarian Law and Human Rights Law in Darfur, Sudan]*, 31 March 2005, S/RES/1593 (2005), available at: http://www.refworld.org/docid/42bc16434.html [accessed 4 November 2017].
[98] Un.org. (2005). SECURITY COUNCIL REFERS SITUATION IN DARFUR, SUDAN, TO PROSECUTOR OF INTERNATIONAL CRIMINAL COURT | Meetings Coverage and Press Releases. [online] Available at: http://www.un.org/press/en/2005/sc8351.doc.htm [Accessed 4 Nov. 2017].
[99] S/RES/1593 (2005).

4. Decides to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court; [100]

[…]

8. Recognizes that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily; [101]

Paragraph 8 does indeed seem like a hindrance, and while there are scholars who are saying that this rendered the court's ability to investigate and prosecute efficiently, were the UNSC to fund the ICC, there would have been scholars to critic about the biased approach of the Court. The UNSC is already seen in a negative light in rapport with the ICC, therefore if it were to fund a permanent independent court, its legitimacy as such would take a significant loss and its credibility would suffer.

2.5 Review Conference of the Rome Statute – 2010

The Kampala Review Conference held in Uganda's capital has adopted two amendments. Since Articles 5-8 did not have a specific definition for the Crime of Aggression it was impossible to prosecute such a crime, however the application of such jurisdiction is different based on how a certain situations is referred: either by the Prosecutor, a State of by the UNSC invoking Article 13(b). In order for it to enter into force a minimum of 30 countries must ratify it as well as having the Assembly of State Parties to vote for it after January 1st 2017. Palestine became the 30th country to ratify this amendment. [102] This is relevant for the discussion in regard to the Security Council because it enables it to act.

The crime of aggression is defined as:

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[100] UN Security Council, Security Council resolution 1970 (2011) [on establishment of a Security Council Committee to monitor implementation of the arms embargo against the Libyan Arab Jamahiriya], 26 February 2011, S/RES/1970 (2011), available at: http://www.refworld.org/docid/4d6ce9742.html [Accessed 4 November 2017].

[101] S/RES/1970 (2011).

[102] Review Conference of the Rome Statute. Iccnow.org. (n.d.), [online] Available at: http://iccnow.org/?mod=review [Accessed 4 Nov. 2017].

"*the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations*."[103]

The act of aggression is defined as:

"*the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.*"

The second item amended was in regard to War Crimes: ICC jurisdiction would apply now to non-international conflicts as well.

The United States has participated and voiced its concerns in regards to the definition, as it is too broad and it might limit the ability of states to intervene potently in certain situations, ultimately being unable to protect those whose human rights have been violated. The framing of "*most serious and dangerous form of the illegal use of force*" might be necessary to stop the crimes of aggression committed, however it inherently becomes prosecutable as well.[104]

Having a vague description does not mean that a country might commit an act of aggression without knowing, thus its peacekeeping personnel becomes liable in front of the Court. The negative points are that in absence of a well rounded definition some cases may go unprosecuted and some might be even targeted. Irrespective of such, one can contest such a decision much easier and can compile a legal defense in an easier manner.[105]

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[103] Resolution RC/Res.6* (2010) [Accessed 4 Nov. 2017].

[104] American Society of International Law, presentation of Harold Hongju Koh, legal adviser, Department of State at U.S. Policy Toward the upcoming International *Criminal Court Review Conference*, May 14, 2010, p. 7. [Accessed 4 Nov. 2017].

[105] Congressional Research Service, International Criminal Court and the Rome Statute: 2010 Review Conference, (2011) pp. 6-7 [online]. Available at: https://fas.org/sgp/crs/row/R41682.pdf [Accessed 4 Nov. 2017].

3. The UNSC and the ICC cases

As of January 2018, the ICC confirms there are currently 11 active investigations: Burundi, Democratic Republic of the Congo, Uganda, Central African Republic, Kenya, Libya, Cote d'Ivoire, Mali, Central African Republic II and Georgia; and 8 preliminary examinations: Afghanistan, Colombia, Gabon, Guinea, Iraq/UK, Nigeria, Palestine and Ukraine.[106]

Out of all the 11 ongoing investigations, 2 have been referred to the ICC by the UNSC by triggering Article 13: Darfur in 2005 through Resolution 1593 and Libya in 2011 through Resolution 1973. By contrast, the UNSC has not acted on Article 16 so far, thus it has never actively halted an open investigation. Judging solely by this comparison, the suggestion would be that there is a congruence of interest by forming a positive partnership, facilitating the process of pursuing justice. Detractors can point out that the ICC would never actively even try pursuing an investigation under the geopolitical sphere of one of the UNSC's power players because it would be vetoed. Interestingly, as seen above in the list of countries under preliminary investigation, there is the UK, also a member of the UNSC. Indeed, it was shut down in 2006, then reopened again in 2014 due to new evidence, and currently in phase 2: *Subject-matter jurisdiction*. Even if it never reaches to a full-scale investigation it does prove that the ICC has grown in influence and capability and is not simply an instrument at the will of the UNSC.[107]

Unfortunately, even by triggering Article 13, when the Court may otherwise not have the power to pursue injustices, there still is scepticism amongst the people because there is the thought that the UNSC is legitimizing and covering a political manoeuvre through the ICC.[108] Arguing further, if the UNSC has the means of helping the ICC even after referring and opening an investigation as in the case of Darfur and Libya, why haven't they done so already? The ICC does not have the resources and capability to access and investigate high risk areas such as Darfur and Libya, and cannot make high profile arrests that will make a difference. It is not because the ICC has not reached out

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[106] 'Situations And Cases' (*Icc-cpi.int*) <https://www.icc-cpi.int/pages/situation.aspx> [Accessed 15 Jan. 2018].
[107] 'Iraq' (*Icc-cpi.int*) <https://www.icc-cpi.int/iraq> [Accessed 15 Jan. 2018].
[108] Rosa Aloisi (n 80).

for help, but because the UNSC has acted on any reports that the Prosecutor has sent them.[109]

It is argued on the basis that simply because of its power, the UNSC will continue to be vilified regardless of its stance. Were they to use tools outside of the ICC's spectrum as well as the Rome Statute, there would be academics arguing that the UNSC is actively meddling in an investigation that is supposed to be independent, because of political reasons. Some would continue to say that the UNSC would be disregarding laws, which they helped create, thus diminishing their value; conversely, if they would amend the laws that would help the ICC in gathering evidence and serve justice to high profile people then the UNSC would have too much power and the ICC would be considered insignificant because it does not have sufficient independency from political will. On the other hand it is true that imposing obligations for cooperation solely for Sudan and Libya and not for all UN member states (how it normally would be) is inconsistent with the moral goals of the UN.[110]

Article 98 in the case of President Al-Bashir of Sudan represents a large loop-hole that the UNSC could address. There is still debate about whether or not cooperation of parties of the Rome Statute where Al-Bashir has travelled should have happened already, based on Article 87(7). The arrest warrant and Article 98 validates that if Al-Bashir travels to a Rome Statute party then the proceeding can happen lawfully, however paragraph 6 from Resolution 1593[111] states *that "the jurisdiction must be expressly waived by the State"*, which technically means that if the arrest is going to happen then President Al-Bashir must waive his own immunity. Here comes the paradox: in the ICTY and the ICTR, the UNSC has used its power to speed up proceedings, therefore why did the UNSC through paragraph 6 actively enforce Article 98 (at worst) or convey ambiguity (at best) in relation to high profile cases? This indeed constitutes a stain and a negative impact of the UNSC over the ICC because there has been a precedent, and in the interest of serving justice over a case where impunity has been proven, then the UNSC could have done more. It is important to make a distinction that the sentence has already been given

[109] Rosa Aloisi (n 80).
[110] Jennifer Trahan, 'The Relationship Between The International Criminal Court And The U.N. Security Council: Parameters And Best Practices', *Criminal Law Forum* 24, (2013). p. 449.
[111] UN Security Council, *Security Council resolution 1593 (2005) [on Violations of International Humanitarian Law and Human Rights Law in Darfur, Sudan]*, 31 March 2005, S/RES/1593, available at: http://www.refworld.org/docid/42bc16434.html [Accessed 15 January 2018].

in this case, therefore it would not be considered interfering in an active independent ICC investigation.

A consequence that is neither the express ill intent of the UNSC or the ICC is the fact that their symbiosis is by default inherently going to be placed under scrutiny. "*It could have been sufficient in order to enhance the ICC position in the Darfur case that the UNSC had expressly mentioned the removal of Article 98 and the full application of Article 27 of the Rome Statute, which establishes the "irrelevance of the official capacity" for those indicted of the crimes under the ICC jurisdiction. Additionally, compared to the ad hoc tribunals the ICC faces extensive resistance from many nations of the world that portray the ICC as a politically and geographically biased institution. This, and the lack of enforcement mechanisms in cases referred by the UNSC, not only weakens the ability to improve the application of universal justice, but creates disincentives for other states to ratify the ICC statute or implement legislation that could favour the apprehension and prosecution of war criminals*."[112]

Trying to blame the UNSC for all the inefficiency without looking at the other side would be biased. According to Antonio Cassese the ICC Prosecutor has slowed the process down by not acting firmly of requests to allow personnel to investigate Sudan. Their denial would have given leeway to the UNSC to act accordingly because of Sudan not cooperating. It is also true that the UNSC did not take any measure to force cooperation or even give sanctions when there was official notice of Sudan's refusal to cooperate.[113]

Funding is another issue which needs to be tackled for the purpose of a complex analysis. Paragraph 8 of Resolution 1970[114] mentions that the UN will not be funding any investigations, mentioning the State Party members of the Rome Statute as voluntary contributors. Both the UNSC and the ICC could have done more: the ICC could have formed a committee to gather funds instead of waiting on the UNSC for what could have been a precursor for selective engagement and added suspicion over trials. It is also true that the UNSC could have suggested a funding system for the members of the Rome

[112] Rosa Aloisi (n 80) 154.
[113] A. Cassese, 'Is The ICC Still Having Teething Problems?' *Journal of International Criminal Justice*, 4 (2006).
[114] UN Security Council, *Security Council resolution 1970 (2011) [on establishment of a Security Council Committee to monitor implementation of the arms embargo against the Libyan Arab Jamahiriya]*, 26 February 2011, S/RES/1970 (2011), available at: http://www.refworld.org/docid/4d6ce9742.html [Accessed 15 January 2018].

Statute.[115] Because Article 17 of the UN Charter states that the UNSC is not the one in charge of budgetary matters, but the General Assembly, therefore it is not within their competence to tackle budget.

"*The General Assembly shall consider and approve the budget of the Organization*."[116]

Interestingly though, the ICC does have the legal means to put pressure on a passive UN, if the Prosecutor would decide to stop pursuing the referral by invoking Article 53(1)(c):

"*Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice*."[117]

This does constitute a legal basis and would put pressure on the General Assembly, or make them even more liable for the situation.[118] Furthermore, a UNSC Resolution is not binding to the General Assembly, but only to the member states and Article 115(b) of the Rome Statute is consistent with Article 17 of the Charter:

"*Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council*."[119]

To clarify more concisely the budgetary matter, the UNSC does not bear any legal responsibility to the ICC, however if they do make the referral, it is logically in their own interest to see it succeed, therefore potentially they could do more to see it through in order not to have their powerful status diminish in front of the international community.[120]

Whether it is conveniently left out or not with most critics encountered, is that the UNSC is not an organization with a concerted interest or compatible views about what and how justice should be served. There are at least two main factions on the Sovereignty vs. R2P axis, having the USA opposing Russia, or vice versa whenever one their interests would be affected. Therefore the lack of appropriate support that should consist of political and financial assets is tough to be granted, suggesting that the ICC should be

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[115] Rosa Aloisi (n 80).
[116] UN Charter, Art. 17.
[117] Rome Statute, Art. 53(1)(c).
[118] Kevin Heller, 'Opinio Juris » Blog Archive A Few Thoughts On A Syria Referral - Opinio Juris' <http://opiniojuris.org/2013/01/14/a-few-thoughts-on-a-syria-referral/> [Accessed 27 Jan. 2018].
[119] Rome Statute, Art. 115(b)
[120] Jennifer Trahan, (n 107).

actively seeking new avenues to pursue support.[121]

Former Chief Prosecutor of the ICC Luis Moreno Ocampo has criticised the UNSC and stated *"...talk to the Security Council, they can do it, they can decide to refer the case to the ICC; it is their decision, it is their responsibility, not mine [...]. Without a referral I have no jurisdiction, I can do nothing.*"[122] However since then his words should have taken a considerable blow in regard to his credibility as very recent allegations based on internal documents mention him taking around 3 million dollars from a Libyan oil tycoon (as part of a contract) who is also a supporter or the Ghaddafi regime. Since this has only surfaced in October 2017, legal proceedings have not issued a sentence yet. Whether or not he will be found guilty and convicted is not important to the issue at hand. What is important though is that his alleged actions, which are irrefutable as things stand, if proven correct would have a high chance of having impacted the operation or the failure in Libya, which does serve the purpose of this article in the way of highlighting that the UNSC cannot be solely responsible for failure, and the ICC does indeed have powers.[123] His previous words of throwing responsibility will become low value currency if he is proven guilty.

But how can this happen? In the case of Darfur, it consists of an example where geopolitical and financial ties have been neglected for the Resolution 1593 to pass. Considering that China and Sudan had strong economic ties by doing extensive oil and arms trade, some even suggesting that China was supporting the repressive regime. Indeed, both China and the United Stated abstained, but China could have vetoed.[124]

In the case of Resolution 1970 concerning opening an investigation in Libya the result was unanimous, the African Union actively tried to block the efficiency of the investigation requesting countries not to cooperate. This is not because it did not share

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[121] Dorota Gierycz, 'From Humanitarian Intervention (HI) To Responsibility To Protect (R2P)' *Criminal Justice Ethics* 29, (2010).

[122] 'Luis Moreno-Ocampo (ICC) On Libya - Press Conference' (*www.webtv.un.org*, 2011)<http://webtv.un.org/watch/luis-moreno-ocampo-icc-on-libya-press-conference/5237659141001> [Accessed 15 Jan. 2018].

[123] Sven Becker and Dietmar Pieper, 'The Ocampo Affair: A Former ICC Chief's Dubious Links - SPIEGEL ONLINE - International' <http://www.spiegel.de/international/world/ocampo-affair-the-former-icc-chief-s-dubious-libyan-ties-a-1171195.html> [Accessed 15 Jan. 2018].

[124] Nicholas Kristof, 'China And Sudan, Blood And Oil' (*Query.nytimes.com*, 2006) <http://query.nytimes.com/gst/fullpage.html?res=990CE3D9153FF930A15757C0A9609C8B63> [Accessed 15 Jan. 2018].

the same views about justice with the ICC but because they believed it would shatter the chances for a peaceful resolution.[125]

There are many cases where the UNSC is blamed for not having referred it to the ICC. Sri Lanka, Bahrain, Syria, Yemen are only some examples that have been vetoed. In the case of Syria and the recent chemical weapons attack it was the 10th time Russia blocked the investigation due to its strong ties to Bashar al Assad.[126]

I believe it is increasingly important to acknowledge and treat the UNSC as a hydra with 5 disconcerted interests, rather than a homogenous organization. It might prove more effective to search for 5 solutions and then try finding common ground.

There are methods being used to improve the efficiency and relationship of the ICC and the UNSC. One has been through meetings at the International Peace Institute, where suggestions were made to both in order to target their efforts for improvements. The UNSC should create a specific accountability program and apply it consistently and use its tentacles through diplomatic power to facilitate cooperation from states. These are sensible actions that could be taken, however one point is referring to the permanent members to stop using the Veto, which frankly does not resemble a viable constructive solution upon which something can be done. It is obvious and desirable but ultimately it does not work like that.

On the ICC side of the spectrum an interested idea put forward is to develop a caucus of state parties solely with the intent of targeting the UNSC when it should take evident actions of accountability.[127]

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[125] Rosa Aloisi (n 80).

[126] Colum Lynch, 'Russia Vetoes U.N. Effort To Finger Those Responsible For Syrian Chemical Weapons Attacks' (*Foreign Policy*, 2017) <http://foreignpolicy.com/2017/11/16/russia-vetoes-u-n-effort-to-finger-those-responsible-for-syrian-chemical-weapons-attacks/> [Accessed 15 January 2018].

[127] 'The Relationship Between The ICC And The Security Council: Challenges And Opportunities' [2012] International Peace Institute <http://www1.regierung.li/uploads/media/IPI_E-Pub-Relationship_Bet__ICC_and_SC__2__02.pdf> [Accessed 15 Jan, 2018].

4. The Permanent Members of the UNSC and their Relationship with the ICC

This chapter is particularly important because it aims to identify the dynamics of each permanent member of the UNSC and their stance as well as history with the ICC. It is possible to identify which key theories of International Relations govern their interactions and its interplay witht the concept of Balance of Power. A combination between realist and liberal thought are prevalent, such as interdependence and state authority, that often are at odds in regard to the goals of the ICC.

4.1 The United States and the ICC

The United States through the Bush administration formally renounced the Rome Statute in 2002. While they have helped to establish the pillars for International Criminal Law especially by their will of conducting fair trials at the Nuremberg Trials, some are considering that the US is not having the best interest at heart by refusing to ratify the Rome Statute.

The Bush administration has fought tooth and nail the ICC to be independent of its legal reach and it continued under the Obama administration as well, since the terms did not change for the Libya referral. However, this is not consistent over all former US officials as David Scheffer stated:

"*The benefits of support of the ICC far outweigh the presumed costs, particularly in American credibility and leadership in its foreign policy and its commitment to the rule of law globally. This is especially true for the U.S. Armed Forces, which have far more to gain from participating in bringing leading perpetrators of atrocity crimes to justice than from continued U.S. opposition to the ICC and absence from its vital work.*"[128]

First of all, the Rome Statute and the trial process would be inconsistent with their Bill of Rights, as the ICC does not offer a jury trial. The fact that the ICC has all the judicial power come in conflict with the legal tradition in the US. Even if they were to offer a jury trial, in light of the recent War on Terror, many are viewing the US in a negative light. Furthermore, the US is the largest military contributor in peace operations

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[128] David Scheffer and John Hutson, 'Strategy For U.S. Engagement With The International Criminal Court' <https://warcriminalswatch.org/documents/Scheffer.pdf> [Accessed 27 Jan. 2018].

by a considerably high margin, therefore by default there is a much higher chance for their citizens to be indicted.[129]

The US is actively trying to protect its citizens, especially the ones who will be involved in peace operations in high-risk areas, and in order to incentivize both the soldiers and the country in need of aid, they require the State Party of the Rome Statute to sign the Bilateral Immunity Agreement (BIA), if the State Party wants foreign intervention and supplies. This way they are protecting their soldiers in case there is a situation where the respective State Party should normally hand over the perpetrator to the ICC.[130] A Bilateral Immunity Agreement constitutes an international agreement, which, makes a strong claim due to Article 98(2) of the Rome Statute because if breached, then indeed the state would act inconsistent with its obligations, thus making it unlawful.

Regarding funding, the US may very well be a reason as to why the UN General Assembly does not allocate monetary resources after the UNSC makes referrals. Currently US legislation prohibits funding to the ICC and a large chunk of the UN budget comes from the US. There is a teleological case to be made whether this implies direct funding and indirect funding as well.[131]

4.2 Russia and the ICC

Russia, alongside the United States and China, are 3 of the 5 UNSC members that have not ratified and are not intending to ratify the Rome Statute. However, Russia, on November 16th 2016 has withdrawn its signature, meaning it is not even a signatory party anymore. Basically this does not change anything, legally speaking, as it is a more symbolic move due to the fact that the ICC has been outspoken about the Russian intervention in Ukraine. It does not have jurisdiction, even though Russia has signed in 2000, however it came to swords by denouncing the supposed Russian intervention in

[129] Brett Schaefer, 'The International Criminal Court: Threatening U.S. Sovereignty And Security' (*The Heritage Foundation*, 1998) <https://www.heritage.org/report/the-international-criminal-court-threatening-us-sovereignty-and-security> [Accessed 15 Jan. 2018].

[130] S. D. Murphy, 'U.S. Bilateral Agreements Relating To ICC' The American Journal of International Law 97 (2003).

[131] Jennifer Trahan (n 107).

Crimea as an international conflict, whereas Vladimir Putin stated that Crimea joined Russia after a voluntary referendum.[132]

It is worth noting that the ICC has faced serious complaints from African countries as well, with South Africa more prominently threatened to revoke its signature, the general concern being that African countries are more targeted than the rest. Burundi is one example of a country that revoked the Rome Statute. In regard to Vladimir Putin, he instructed the signing of the Rome Statute but it did not pass Parliament in 2000. The current turmoil where the West is backing Ukraine, while Russia continues to claim it is legitimate in its actions, adds to the conflict in Syria, with Russia an ally of Bashar al-Assad. Therefore this may also be another cause of Russia’s action of revoking its signature. It can be viewed as a strong intent of telling the ICC to stop meddling in its affairs. Generally speaking from a political discourse, the right wing leaning countries are critical of impeaching heads of state and sovereignty, while the left wing leaning one may be more accommodating.[133]

By comparison, the US withdrew as a signatory party in 2002. What ultimately changes with this is the fact that any signatory party cannot challenge or oppose the aims of the Court. Therefore Russia, as well as the US and China can have more tools of suppressing the ICC. This does not mean that a country has not defied the ICC before withdrawing as a member: South Africa refused to arrest Sudanese President, Omar Bashir, when legally they were obliged to do so, because they claimed it would have come at the cost of peace and stability. Indeed, the Rome Statute does have provisions where prosecutions and the pursuit of justice can be halted if they threaten a fragile peace and more importantly, an innocent civilian population.[134]

An important notion to remember is that Russia and the US are generally at opposite sides of the table, regarding ways of conduct and interests, for example, it has vetoed UN interventions in Syria and sometimes has China backing when doing so. It is beyond the point of this paper to argue whether the United States’ strategy or the Russian one would be better suited in this specific case, however it does show the true nature of

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[132] Robbie Gramer, 'Why Russia Just Withdrew From The ICC' (*Foreign Policy*, 2016) <http://foreignpolicy.com/2016/11/16/why-russia-just-withdrew-from-icc-putin-treaty-ukraine-law/> [Accessed 25 February 2018].

[133] Ivan Nechepurenko, 'Russia Cuts Ties With International Criminal Court, Calling It ‘One-Sided’' (*Nytimes.com*, 2016) <https://www.nytimes.com/2016/11/17/world/europe/russia-withdraws-from-international-criminal-court-calling-it-one-sided.html> [Accessed 25 February 2018].

[134] Robbie Gramer (n 129).

the UNSC, a divided organ representing what is in International Relations a bipolar power structure at least, if not a multipolar one.

4.3 China and the ICC

A historical aspect of China's foreign policy and stance is that it is against foreign interventionism in domestic matters of other states. On top of this, it has economic ties with countries whose citizens have been indicted by the ICC, both Sudan and Libya and even Syria (althought Syria is not an ICC case it is worth mentioning for perspective purposes). It is highly unlikely that China will ever agree (same as Russia) to a referral made by the UNSC to intervene in Syria and it is very likely to Veto if an attempt is made, just as it has many resolutions concerning the situation there. However, China can be considered differently than both USA and Russia: the tendency is to place it somewhere in-between. Even though a referral to Syria seems unlikely, China has supported indirectly the Tribunals in Yugoslavia and Rwanda, and more surprisingly has not vetoed the referrals in Sudan and Libya. This shows an ambivalent nature with a positive connotation because it these actions were indeed surprising.[135]

Indeed, China is not a party to the Rome Statute but has not declared that it would never ratify it, because it has economic interests in Africa as well as in the Arab countries and (?) it must tread lightly as it does not wish to antagonize neither, since some are openly against the ICC. China is a more viable option than Russia or the United States for the ICC to have as an ally if there can be found a strategy which is both on the side of justice and have economic interests aligned.

But what are some of China's concerns of ICC jurisdiction? Firstly, the Proprio Motu power of the Prosecutor can be politically rigged, then there is no voluntary acceptance of the jurisdiction, combined with the addition of the ICC's ability to determine whether China is able and willing to conduct trials fairly, but also because internal war crimes would also fall under ICC jurisdiction.

China revised its criminal law and is therefore obliged to prosecute crimes according to international treaties to which it is a signatory member of, however it never

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[135]Joel Wuthnow, 'China And The ICC' (*The Diplomat*, 2012) <https://thediplomat.com/2012/12/china-and-the-icc/> [Accessed 25 February 2018].

even signed the Statute despite being a vocal supporter of international justice and actually contributing to the Rome Statute.[136] Going further deep into the reasons China has cited for going against signing the Rome Statute, the principle of sovereignty is paramount, because the obligations imposed by the ICC violate this principle, and consequently, the Vienna Convention on the Law of Treaties. The wording of Article 17 for example is a fruit of compromise where stronger adjectives have been replaced to protect sovereignty, from "*partial collapse*" to "*substantial collapse*" – of a government – as to when the ICC can intervene in domestic state affairs. This is only an example of the careful and thoughtful process the Rome Statute has been subject to. But China is indeed a supporter of international criminal justice, only that the path is not consistent with the way the ICC wants to conduct its operations, however they serve the same purpose. Compared to the US, it does not have many troops and is in no need of BIA's, therefore it can potentially become a party that ratifies in the future, if more communication and compromise is fostered to have the methods aligned as well, not just the interests.[137]

4.4 UK and the ICC

The UK ratified the Statute on October 4th 2001. It has had a more open and supportive stance towards the ICC, thus the fast ratification. However recent developments from late 2017, where Fatou Bensouda – ICC Prosecutor has declared that it may pursue approval for an investigation due to evidence suggesting the UK citizens has committed war crimes and crimes against humanity in Iraq alongside US and Taliban forces. The preliminary investigation closed initially in 2006 before being subject to reassessment in 2014 based on new evidence. Potentially the UK may face an investigation and what will follow in this case will be untested waters and undoubtedly the most important development to date.[138]

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[136] Lu Jianping and Wang Zhixiang, 'China's Attitude Towards The ICC', p. 609 (2005) 3 Journal of International Criminal Justice.
[137] *Ibidem.*
[138] Andrew Buncombe, 'American And Britain Could Face A War Crimes Investigation Over Afghanistan' (*The Independent*, 2017) <http://www.independent.co.uk/news/world/asia/us-uk-war-crimes-afghanistan-investigation-icc-criminal-court-hague-latest-a8035576.html> [Accessed 25 February 2018].

The UK is a permanent member of the UNSC and it is interesting to see if the ICC will follow through if there is evidence that UK troops have committed said crimes, or if the UK will use its power to defer, or if found not guilty at all. It is certain that there is no precedent in International Criminal Law jurisprudence, however it may very well undermine ICC power if the prosecution does not go through and diminish its independency and power as the international judicial organ of the world.

Evidently, the UK is trying to avoid an investigation, claiming that there is no crime of aggression under which Tony Blair could be indicted, and their official stance is backed by France as well, with the official position being that until there is greater clarity over the definition of the "*crimes of aggression*", then the ICC should not act on its jurisdiction because it would devalue its position and face backlash due to an arbitrary judgement. An important factor to take into account is that neither the UK, nor France, have ratified the Kampala amendments on aggression. Traditionally speaking, the UK and France would be on the supportive side of the ICC, but evidently as every country, it does seek to protect its own interests first and foremost.[139]

The UK has an able body of law capable of investigate on its own, but is it willing to do so? This is the challenge the ICC is facing to assess, because the IHAT body and the British government are very likely to be on the side of its own soldiers, which is indeed a valid point, because, in the end, if they were to indict their own, there would be massive internal backlash, a reluctance to join the armed forces and the population would try to change the current political establishment. This said political establishment will not sign its own death warrant.[140]

The ICC is definitely at a crucial point in its development as a young institution. It faces a challenge in terms of credibility because if it chooses not to pursue the UK, it loses it, but then if it does, it might lose one of its few strong and outspoken allies. It is not an easy choice, and what development we will see in the future will impact the public and international opinion of the institution. Even if the lawful and correct pursuit is done, whether the UK nationals are guilty or not, or if they will be indicted or not, the decision

[139] Owen Bowcott, 'UK Calls For 'Greater Clarity' On ICC's New Crime Of Aggression' (*the Guardian*, 2017) <https://www.theguardian.com/law/2017/nov/15/uk-calls-for-greater-clarity-on-iccs-new-of-aggression> [Accessed 25 February 2018].

[140] Carla Ferstman, 'Opinion: Why The ICC Must Investigate UK Crimes In Iraq | Coalition For The International Criminal Court' (2017) <http://www.coalitionfortheicc.org/news/20170719/opinion-why-icc-must-investigate-uk-crimes-iraq> [Accessed 25 February 2018].

will create a precedent and the whole matter will be surrounded by doubt. It is paramount for the ICC to tread lightly and with transparency for it to keep hold of its assumed impartiality and credibility especially in front of the African countries that have contested the way the ICC conducts its affairs.

4.5 France and the ICC

France is the UNSC permanent member that is more supportive of the ICC, with considerably less conflict of interest than even the UK. As early as 2010, France adapted its own Criminal Code to the one of the ICC, so that it can properly prosecute and convict based on the ICC laws. Even the principle of complementarity is included in case the country is unwilling or unable. This has been a positive reaction from an influential superpower of the world, however it is indeed just as true that France is not exposed militarily as any of the other members, thus this might explain their willingness.[141]

Due to historical ties and sharing a common tongue, France has been a bridging force between the ICC and the African countries that feel targeted more than others by the Office of the Prosecutor. The efforts made to promote justice and the justice system on the African continent have yielded controversial results, however the Africa-France summit is at least a platform where more organizations can come together to find adequate solutions. The African Union, the Economic Community of West African States and Heads of States, have come together and promised change for the better, but at the same time they have threatened a collective withdrawal from the ICC. The last Africa-France summit held in 2017, has not been a success, but is at least bringing powerful people together and taking steps to find solutions. If we consider that not even this has happened before, it is progress, however considering the horrors that many people are enduring, it is definitely not enough. France however, is the one member that is involving itself to help.[142]

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[141] Nicole Atwill, 'France: Law To Adapt France'S Criminal Code To The International Criminal Court | Global Legal Monitor' <http://www.loc.gov/law/foreign-news/article/france-law-to-adapt-frances-criminal-code-to-the-international-criminal-court/> [Accessed 27 February 2018].

[142] 'Africa-France: Commit To Genuine International Justice, End To Impunity | Coalition For The International Criminal Court' (*Coalitionfortheicc.org*, 2017) <http://coalitionfortheicc.org/news/20170116/africafrance-commit-genuine-international-justice-end-impunity> [Accessed 27 February 2018].

In the pursuit of justice, France even called the ICC to investigate Russia about what happened in Aleppo in Syria. This example pits two members of the most powerful organization against each other, after Russia turned down a resolution proposed by France. It is difficult to assess what is right or wrong, because the media are subjective and tend to support the left wing. The United States even called France out that it ought to work with Russia, rather than against it, which seems to be a more productive approach. Treading lightly for the sake of the people should be prioritized rather than petty squabbles because France ultimately knew that the ICC couldonot investigate there because first of all neither Syria nor Russia have ratified the Statute, and secondly, a referral would be shut down with Russian Veto. As commendable as it may be, and despite good intentions behind this strategy, the possibility of a political stunt is a real alternative as well. Sometimes good intentions do not translate in good strategy.[143]

An ICC investigation with proper funding would be ideal, because one without the necessary resources will reduce ICC credibility and worse, offer false hope to a suffering people. Currently France and the UK are the only permanent members that have voiced their support for a referral, while Russia claiming it would be a threat to any future peace negotiations. As discussed above, a referral would be unlikely, however, if it happens, the Office of the Prosecutor can claim Article 53(2)(c) if it is inadequately funded, as it might not serve the interest of justice. Considering the previous ones and the often criticized lack of funding as the primary reason for its toothless approach to deliver results, the Russian Veto would only be the first bump on the road.[144]

The recommendation above does not, by all means, suggest that an investigation would be a negative idea, but it serves to highlight that there are more factors to take into account for a positive one, aside of Russian opposition, as discussed in the funding section, the UNSC is not in charge of allocating resources to the ICC.

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[143] Khalil Ashawi, 'France Threatens Damascus & Moscow With ICC War Crimes Probe Over Aleppo' (*RT International*, 2016) <https://www.rt.com/news/362229-france-threatens-icc-aleppo/> [Accessed 27 February 2018].

[144] 'Q&A: Syria And The International Criminal Court' (*Human Rights Watch*, 2013) <https://www.hrw.org/news/2013/09/17/qa-syria-and-international-criminal-court#1> [Accessed 27 February 2018].

5. A Legal analysis of the interaction between the UNSC and the ICC

5.1 Referral

Is the UNSC under legal obligation to refer a situation when it fulfils the conditions stipulated in the Rome Statute? Even when the conditions are met, the answer is no. The UNSC does act under Chapter VII of the Charter as well as according to the Rome Statute, however this offers a legal guidance to the ICC and the Prosecutor only after a referral is made. The UN Charter gives the UNSC legal attributions over members of the UN.[145] [146]

Moreover, according to the Charter, "*promoting and encouraging respect for human rights"* has a more suggestive connotation rather than an enforcing character, and Article 39 of Chapter VII of the UN Charter clearly states that the UNSC "*shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42"*. This language is consistent and the verb "*may act/call/decide"* is prevalent throughout.[147] Indeed, there is point to be made that the language could have been conveniently left out, because without it, it is more difficult to be consistent with the goals of the Charter, namely to protect and uphold human rights, international peace, security and even serve as deterrent. Even though teleologically there is a strong case to be made in regard to phrasing from Articles 36-39, where "*duty" "primary responsibility"* of the Security Council to maintain International Peace, the phrasing from Articles 40-42 unfortunately confirms that there is no legal obligation, i.e. the UNSC cannot be held accountable if it did not take action in the face of atrocities committed. It is also a valid claim when taking into account both forceful and non-forceful means the UNSC has at its disposal.[148]

Responsibility to Protect – R2P has been created due to the inefficiency of the system in place to protect those countries whose populations are suffering grave

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[145] United Nations, *Charter of the United Nations*, Art. 25, 24 October 1945, 1 UNTS XVI, available at: http://www.refworld.org/docid/3ae6b3930.html [Accessed 26 January 2018].
[146] C. Stahn, 'The Ambiguities Of Security Council Resolution 1422 (2002)' (2003) 14 European Journal of International Law.
[147] Eric Rosand, *The Security Council As "Global Legislator": Ultra Vires or Ultra Innovative?*, 28 FORDHAM INT'L L.J. 542 (2004). Available at: http://ir.lawnet.fordham.edu/ilj/vol28/iss3/2
[148] Jennifer Trahan, (n 127).

injustices. According to the UN "*It seeks to narrow the gap between Member States' pre-existing obligations under international humanitarian and human rights law and the reality faced by populations at risk of genocide, war crimes, ethnic cleansing and crimes against humanity.*" [149] The language used inherently acknowledges that there was a discrepancy which prevented legal action due to the wording used.

The Resolution adopted in 2005 has given a more robust framing for to protect its population from international crimes as follows:[150]

138. *Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.*

139. *The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and*

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[149] United Nations, 'United Nations Office On Genocide Prevention And The Responsibility To Protect' <http://www.un.org/en/genocideprevention/about-responsibility-to-protect.html> [Accessed 26 January 2018].

[150] UN General Assembly, *2005 World Summit Outcome : resolution / adopted by the General Assembly*, 24 October 2005, A/RES/60/1, available at: http://www.refworld.org/docid/44168a910.html [Accessed 26 January 2018].

crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

140. *We fully support the mission of the Special Adviser of the Secretary-General on the Prevention of Genocide.*

The UNSC has formally recognized this Resolution, therefore due to having this significant precedent created, the UNSC and member states are under legal obligation to act based on the Articles mentioned above.[151]

In regards to the efficiency of a UNSC referral, there is extensive debate, however there is a general consensus that if done early, it could serve as deterrent. Unfortunately there is not enough data to create a reliable pattern or statistics that can ascertain such a theory.[152] Consequently, there was a tabled recommendation to limit the VETO power if there was only one member of the UNSC blocking a referral back in 2012, and this suggest that despite of a negative outcome, there is a positive trend and that gradually things are indeed getting better.[153]

A positive remark in regards to Resolutions 1593 in Darfur and 1970 in Libya is that they are different from a temporal point of view. Positive because it enhances jurisprudence, case-law and creates precedent. The referral made in Darfur was only after many heinous crimes were committed with confirmed hundreds of thousands deaths, after all articles from the Rome Statute and the UN Charter were irrefutable, whereas in the case of Libya, the referral was made in the initial phase when the crimes were just starting to be committed, although there is no doubt that the referral was made according to both the Rome Statute and the UN Charter. If there is still no clear legal obligation for the UN member states or ICC or the UNSC to act, then the pressure of doing so is justly pilling up, and the Resolutions suggest that even though there is a long way before we can target a desirable target, it is still better than before the inception of the ICC. Accountability is becoming more and more transparent, at a slower pace than those who suffer injustices deserve it, but nevertheless it is happening.[154]

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[151] Anne Peters, 'The Security Council's Responsibility To Protect', International Organizations Law Review 8, (2011), p. 15-16.
[152] Robert Cryer, 'Sudan, Resolution 1593, And International Criminal Justice', Leiden Journal of International Law 19, (2006).
[153] Enhancing the Accountability, Transparency and Effectiveness of the Security Council, U.N. Doc. A/66/L.42/Rev.2 (2012).
[154] Jennifer Trahan (n 127).

To briefly summarize the referral concept: the UNSC can make a referral only if the crime breaches UN Charter VII in addition to the Rome Statute. Without the R2P doctrine, it does not have a legal obligation to make a referral, however when taking R2P into account there seems to be a legal understanding that the UNSC is obliged to do so. Assessing the language in terms of what constitutes a threat to peace or the most serious crimes for example, there is no definition in qualitative or quantitative terms, therefore it is at the discretion of the UNSC.[155]

5.2 Deferral

Resolution 1422[156] and its updated version, Resolution 1487[157] is the only time the UNSC has triggered Article 16, at the behest of the United States who threatened the renewal of all existing peacekeeping operations. There have been calls made to the UNSC to trigger Article 16 made by Kenya, supported by the African Union, and by the African Union itself (against Sudanese President Al Bashir) because it threatened ongoing peace negotiations in Sudan and Kenya, with no success. Legally speaking, the use of Article 16 in the sole case it was triggered seems indeed controversial. Again, in order for the UNSC to be able to trigger and defer with Article 16, it must be consistent with the same Article 39 of the UN Charter Chapter VII, that Article 13(b) - referral is subject to.[158]

More clarification is needed in the future in respect to how Article 39 is triggered, as well as to whom is in charge to assess the validity and legality of such action. Current body of law does not determine whether or not someone needs to verify if Article 39 was triggered with a solid basis, or what solid basis even means for that matter. An example for this case – Deferral – would be what constitutes a "*threat to peace"?* Is it a state that creates it? A government, a person? In the case mentioned above with Sudan President Al Bashir, would it have legal grounds if he created a threat to peace in order to defer his

[155] *Ibidem.*
[156] UN Security Council, *Security Council resolution 1422 (2002) [on United Nations peacekeeping]*, 12 July 2002, S/RES/1422 (2002), available at: http://www.refworld.org/docid/3d528a612a.html [Accessed 26 January 2018].
[157] UN Security Council, *Security Council resolution 1487 (2003) [on the United Nations peacekeeping]*, 12 June 2003, S/RES/1487 (2003), available at: http://www.refworld.org/docid/3f45dbe87.html [Accessed 26 January 2018].
[158] Jennifer Trahan, 'The Relationship Between The International Criminal Court And The U.N. Security Council: Parameters And Best Practices', p. 435, (2013) 24 Criminal Law Forum.

own investigation and arrest warrant? Unfortunately the Rome Statute and the UN Charter cannot solve this contradictory paradox.[159]

Coming back to the legal conundrum of Resolution 1422, the issue at hand is not the reasoning of the United States, because, as mentioned throughout this paper, it does make a fair claim since it is the biggest security provider of all countries as well as a deterrent in the face of impunity, therefore smaller countries who do not expose themselves not even by a fraction the US troops do, should have a different status because of a proportionality principle. The problem here is that whether Article 16 was triggered with a legal basis or not: was there a threat to peace? Amnesty International argues that there was no direct threat to peace, but only a threat on the ability of the UN peacekeeping mission to react efficiently against impunity, which, is not a legal claim for deferral.[160] They go on further by stating that any provision in the Rome Statute must be assessed independently by the ICC because it is their body of law.

"*the ICC could assess whether or not the Council was validly acting pursuant to chapter VII*"[161] Conversely, if the state upon which there is an investigation threatens to commit further crimes in order to trigger the deferral it becomes a vicious circle: would deferral be legal in this case or not? Resolution 1422 did indeed act pre-emptively, which can be consistent with "*threat to peace"*, however it most definitely does not tick the requirement for the most serious crimes having been already committed, although the goal is to preclude them.[162]

Human Rights Watch is another organisation which points out that the Resolutions are inconsistent with the Rome Statute due to a clear violation of Article 27, since its aim is to give immunity to a certain category of people. Legally speaking this is a valid claim, since Art. 27 is one of the pillars of the Rome Statute, however, there have rarely been absolute gains in this field. Bringing the argument for compromise in this situation, I believe that more good has come out with this deal compared to a situation where no peacekeeping missions would be active. Moreover, it is meant to be applied to end impunity, not to create disincentive for the troops that are tasked to do so, which may or

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[159] *Ibidem.*

[160] Jennifer Trahan (n 127).

[161] William Schabas, *An Introduction To The International Criminal Court,* (Cambridge University Press, 2001), p. 6.

[162] William A. Schabas, Carsten Stahn and Mohamed M. El Zeidy, 'The International Criminal Court And Complementarity: Five Years On', *Criminal Law Forum* (2008) p. 767.

may not push them to act inconsistently with the Rome Statute due to the high-risk situations they will find themselves in.

A hierarchy has been established as to what jurisdiction primes over the other, as Article 103 of the UN Charter states that:

"*In the event of a 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*."[163] This reinforces the idea that the Rome Statute can be subdued by the Charter.

Whether or not deferral should have happened in the case of Sudanese President Al Bashir will remain a debatable topic. However it is noteworthy that the claim was backed by China and Russia, countries which could have vetoed the investigation, but did not. It was ruled that the proceeding does not threaten the peace, however they argued that it would critically cripple ongoing peace efforts. We will never know if in this case the pursuit of justice has caused a higher toll than if deferral would have been triggered, however it is clear that the State calling for the Article to be triggered should not be the one causing the "*threat to peace"*. In this case it was, and the request was morally shut down.[164]

An interesting idea put forward by Robert Cryer is for the Resolution in Sudan (and it can also be applied for Libya) to be sectioned as to how they serve all parties. They can be both referrals and deferrals: referrals to the situations at hand and deferrals for the non-member states.[165] From a legal perspective there are major arguments to counter this, however from a sociological point of view this does offer another explanation for the compromise argument, meaning that a compromise is almost always required to pursue an action.

As a recommendation, due to already having a precedent where the UNSC has specifically said all UN member states to cooperate fully with the special tribunals in former Yugoslavia and Rwanda, pressure can be added if another paragraph defines that states not party to the Rome Statute are exempt of any responsibility or duty.[166] The UNSC has not acted on any notifications made by the ICC about non cooperating states,

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[163] UN Charter, Art. 103.
[164] Jennifer Trahan, (n 127).
[165] Robert Cryer, (n 140).
[166] U.N. Doc. S/RES/827 (1993).

therefore maybe changing the setup might prove more effective: provide incentives for cooperation. Laws may or may not prevent undesirable behaviour, but I believe incentive would provide more stimuli for desirable behaviour compared to law, purely because even with law it is difficult to breach the "Sovereign State" in case of non-cooperation. Rewards are more persuasive.[167]

This short-coming of the UNSC to punish non-cooperating states or take action to remedy the situation has been explained by the ICC Pre-Trial Chamber II, also offering some recommendations:

"*Unlike domestic courts, the ICC has no direct enforcement mechanism in the sense that it lacks a police force. As such, the ICC relies mainly on the States' cooperation, without which it cannot fulfil its mandate. When the Security Council, acting under Chapter VII of the UN Charter, refers a situation to the Court as constituting a threat to international peace and security, it is expected that the Council would respond by way of taking such measures which are considered appropriate, if there is an apparent failure on the part of the relevant State Party to the Statute to cooperate in fulfilling the Court's mandate entrusted to it by the Council. Otherwise, if there is no follow up action on the part of the Security Council, any referral by the Council to the ICC under Chapter VII would never achieve its ultimate goal, namely, to put an end to impunity. Accordingly, any such referral would become futile.*"[168]

As a conclusion to this chapter, it is paramount to remember that funding is not part of UNSC duties, while the ICC does have the means to put pressure on the General Assembly. Regarding the referral process, if we take into account R2P, there is a case to be made that the UNSC has a legal obligation to use it more often than it has to date. However, for the deferral, specifically by offering immunity to non-party states nationals to the Rome Statute who offer their support in peacekeeping operations, it is debatable, and most certainly a compromise, because pre-emptively without the US troops, which serve as a deterrent factor, the "*threat to peace*" seemed to be more valid than not in both cases.

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[167] Jennifer Trahan, (n 127).

[168] Decision on the Non-Compliance of Chad.

6. Conclusion

Considering the trajectory of the International Criminal Justice System and the International Criminal Court in particular, the positives must be highlighted in a wider context.

If you are expecting a clean, quick, effective, efficient solution, it does not work now and it will not work in the future either. But that is a utopia because all stable achievements have a solid foundation underneath that took considerable time to cement.

This paper began with a history of the International Criminal Justice and how it emerged, its starting point and how much it grew in such a short amount of time. Unfortunately it kept developing consequencially after atrocious human suffering, which is often required if we are to consider this to stand in a court of law – i.e. creating jurisprudence. Unfortunately this is how the system works, however even in another subject matter such as medicine, it is an area where we do not practice preventive medicine, but in retrospective, in the face of imminent threats or ongoing threaths to one's health.

Disecting the United Nations Security Council and its 5 permanent members in particular highlighted the fact that it is not a united organization and should not be treated as one. It is a hydra with 5 heads, each one having its own interest at heart and at best, serving two conflicting purposes: either the preservation of sovereignty or the gradual removal of it in the face of the International Criminal Court. A pessimist will view the UNSC as the pupeteer and the ICC as the puppet. An optimist will see that China not vetoing the investigation in Lybia despite economic ties as a giant stept forward.

The judicial chapter going through the revelant Articles from the Rome Statute about this thesis has explained the deferral and referral process along with the immunities. Articles 13(b), 16, 27 and 98 of the Rome Statute are arguably the bread and butter since they are the most contentious items, but more are necessary to be read and explained, not only the ones in this thesis.

The Resolutions about the two referrals mark important progresses for the ICC: even though how they have been carried out could have been much better for the people who were suffering. The positive part is that there has been no deferral yet. Again, one

who views this negatively will stand up to mention that the referral process has not been used enough, or that it has been used based on the interest of the great powers.

At least since the Rome Statute was signed in 1998 and the International Criminal Court came into existence in 2002, there have been 16 years of massive progress in the face of adversity.

Another win is the definition of the crime of aggression, which will be activated on 17 July 2018. Many issues were due to the fact that the crime of aggression had no proper definition, thus penalties for it could not have been enforced – „*nullum crimen sine lege*".

Funding has been discussed because as the ICC relies on voluntary contributions since it does not have a state, many have been blaming the UNSC for cutting its wings. But this myth has been debunked because the General Assembly is in fact responsible for this issue. Also if the UNSC were to fund it, there would be even more suspicion because there is more incentive to do the bidding of the great powers if money is involved. But could the ICC do something if it does not have the funding? Yes it could and it does have part of the blame. Article 53 does say that the Office of the Prosecutor can chose not to pursue an action if it does not serve the interest of justice. More often than not, an underfunded investigation does not pursue the interest of justice simply because it does not have the resources/means to do so.

Yes the UNSC holds a strong grip over the ICC and yes it has both positive and negatives influences over what happens, while ultimately deciding what it can or cannot pursue. It is not universal justice yet, but a selective one.

Concluding, I strongly believe that we are moving forward, positively, at a very fast pace. The future of the International Criminal Court will only continue to grow and as globalization continues to bridge the gaps within our society, the creation of large ripple effects due to the smallest of incidents (territorially speaking) will enable this young Institution to gain more notoriety. The UNSC will shift towards cooperation with the ICC, not just to act as its handler. The Rome Statute and Chapter VII of the Charter are potent instruments of an improving international judicial system.

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