

# The Rule of Law

## The Institutional Framework: International Criminal Courts and Tribunals



A woman mourns among graves in Memorial Center Potocari, near Srebrenica.

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This is Security Council Report's third report on the Security Council and the rule of law. It focuses on the institutional architecture that the Security Council has established and utilised to advance the rule of law as part of its primary responsibility to maintain international peace and security.

The report analyses in detail the establishment of the two ad hoc tribunals, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda as well as their International Residual Mechanism and their relationship with the Security Council. It further examines the mixed tribunals (Special Court for Sierra Leone and Special Tribunal for Lebanon), which the Council has been involved

in establishing. It also reflects on the Council's relatively short yet complex relationship with the International Criminal Court.

Through these case studies, the report concludes that the Council has proven resourceful in establishing over the last 20 years a diverse framework to contribute to international peace and security through institutional innovation and creativity. At the same time, the report finds that the Council has been inconsistent in following up on these significant steps and providing the proper institutional support to these bodies to enforce its own decisions and ensure the successful completion of the tasks it has entrusted to these judicial institutions. •

# Introduction

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The subject of Security Council Report's third report on the rule of law is the institutional architecture that the Security Council has established and used to advance the rule of law.

The report analyses in detail the establishment of the two ad hoc international criminal Tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as well as their International Residual Mechanism (MICT), and their relationship with the Security Council. It also examines the mixed tribunals, Special Court for Sierra Leone and Special Tribunal for Lebanon, which the Council has been involved in establishing. The report also reflects on the Council's relatively short yet complex relationship with the International Criminal Court (ICC).

Through these case studies, the report concludes that the Council has proven resourceful over the last 20 years in establishing a framework, or "tool box", to contribute to international peace and security through institutional innovation and creativity. It has

established subsidiary bodies in the form of ad hoc criminal tribunals, has provided support to the Secretary-General in concluding an agreement with Sierra Leone to establish the Special Court for Sierra Leone and has brought into force the agreement between the UN and Lebanon on the establishment of the Special Tribunal for Lebanon. It has also taken advantage of the legal power given to it in the ICC Statute to refer situations to the Court under Chapter VII of the UN Charter.

At the same time, the Council has been inconsistent in following up on these significant steps and providing the proper institutional support to these bodies to enforce its own decisions and ensure the successful completion of the tasks it has entrusted to these judicial institutions. However, its August 2014 visit to The Hague, the international law capital of the world, where the judicial bodies have been located, seems to signal a degree of Council consensus about the importance of the rule of law in addressing international peace and security.

## The Council and the Rule of Law

In our first report on the rule of law published in 2011, we examined the relationship between international law and the Council, and its treatment of the rule of law. The report examined the appearance in the last 20 years or so of a broad new body of work collectively labelled "rule of law" in Security Council deliberations and actions, including as a thematic agenda item, first appearing in 2003.

The 2011 report showed that following the end of the Cold War, as the Council became more active, and as the content of what is perceived as related to international peace and security expanded, so did the Council's interest in the concept of the rule of law. In 1992, at the first Security Council summit meeting, "the rule of law" was a term used by several leaders participating in the debate (S/PV.3046). The then-US President George H. W. Bush, for example, declared that "democracy, human rights, the rule of law—these are the building blocks of peace and freedom". Secretary-General Boutros

Boutros Ghali commented that "democratization at the national level dictates a corresponding process at the global level. At both levels, it aims at the rule of law. For national societies, democracy means strengthening the institutions of popular participation and consent, political pluralism and the defence of human rights, including those of minorities. For global society, it means the democratization of international relations and the participation of all states in developing new norms of international life".

The Council held its first thematic debate on "Justice and the Rule of Law: The United Nations Role" on 24 September 2003, under the presidency of the UK (S/PV.4833). In the presidential statement following the debate, the Council highlighted the relevance of the rule of law in its work in such areas as protection of civilians, peacekeeping and international criminal justice (S/PRST/2003/15). The statement also welcomed the preparation of a report by the Secretary-General on this topic. During the debate, the Russian

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representative said that rule of law is “an imperative for the entire system of international relations” and that “for the sake of justice and the rule of law, the Security Council must continue to act on the bases of legality that provide support for its mandate”. Since that debate, the rule of law has appeared regularly as a thematic issue on the Council’s programme of work.

The interest of the Council in the concept of the rule of law can be understood as part of a more general trend within the UN system, recognising the rule of law, in its various facets, as integral to achieving peace and security, development and the protection of human rights. As for the Council, supporting the rule of law when law and order collapse within states on its agenda has become one of its important objectives over the past years.

In the context of this now-established Council recognition of the rule of law as a thematic issue on its agenda, our first report on the rule of law examined two main aspects of the rule of law. First, it gauged the degree to which the rule of law had been incorporated into the Council’s work on country-specific issues, including ways to incorporate human rights-related action. It did so through a statistical analysis of the Council’s resolutions and presidential statements, and the Secretary-General’s reports submitted to the Council. It also took an in-depth look at two of the country-specific situations on the Council’s agenda, those of Liberia and the Democratic Republic of the Congo (DRC).

Second, it examined the degree to which the Council has been guided by the rule of law—taking into account the due-process rights of those affected by Council measures—in the course of its resort to sanctions, under Chapter VII of the UN Charter.

The report found that the Council has embraced the notion that establishing and improving the rule of law in conflict and post-conflict situations is an integral part of mandates. This integration takes on different forms in different contexts, including institutional reforms, ensuring the security of civilians and in particular improving human rights conditions as part of peacekeeping and peacebuilding efforts. But, while incorporating rule of law elements into its mandates and actions has become more prevalent, the Council has been inconsistent in adjusting its actions and approach on rule of law issues

when situations developed on the ground.

As regards the standards upheld by the Council in its sanctions regimes, the report found that due to legal and political pressures, the Council has been in the process of expanding the scope of due-process rights it affords individuals and entities affected by its sanctions.

Our second report on the rule of law, published in 2013, focused on the Council’s work in upholding individual criminal accountability as an aspect of its rule of law agenda. An analysis of the history found that even before the rule of law had become integral to the peacekeeping and peacebuilding efforts of the Security Council, the issue of accountability for serious human rights violations and international crimes had appeared regularly in the rhetoric of the Council. Transitioning from discourse to practice has not been a simple task, although the Council has expanded its toolkit of options to promote accountability for such violations and crimes when fulfilling its primary responsibility for the maintenance of international peace and security.

The 2013 report examined the recent practice of the Security Council regarding accountability and ending impunity for serious crimes as an aspect of the rule of law. The report found that despite its rhetorical commitment to accountability as a principle and an understanding that accountability is a practical tool that can promote peace and security, the Council has been inconsistent in its approach to this matter.

As several of the case studies demonstrated, the Council at times used the tools available to it to ensure accountability and had a positive impact on the ground as well as on long-term improvement in country situations. But it has been inconsistent in emphasising the importance of accountability mechanisms and measures and in following up on its own previous decisions regarding individual accountability. In some situations, when it has ignored issues of accountability, whether as a strategic decision in addressing a conflict or because it was divided or lacked the political resolve, the Council may have negatively impacted the conflicts dealt with. While many variables are always at play in a given conflict, the cases examined showed that at times, the willingness or unwillingness of the Council to back its own rhetoric with action could make a difference. Therefore, the report concluded,

a more consistent approach by the Council, with an added emphasis on accountability issues, could have a positive impact on situations on its agenda and its effectiveness in maintaining international peace and security.

Building on our previous reports on the rule of law, the subject of Security Council Report’s third report on the rule of law will be the institutional architecture that the Security Council has established and used to advance the rule of law.

As the Council has intensified its interest in individual accountability on the normative level, at least rhetorically, the last two decades have seen the rise of international criminal institutions to implement these norms, starting with the establishment of the ad hoc Tribunals, followed by the Council’s involvement in the establishment of the Special Court for Sierra Leone and the Special Tribunal for Lebanon and its institutional relationship with the ICC.

During a 12 June 2013 Council debate on the ad hoc Tribunals on the occasion of the 20th anniversary of the ICTY (S/PV.6977), the US representative observed the following about the relationship between the rule of law and international criminal tribunals:

*“In the 20 years since the Security Council established the ICTY, the Tribunal has made a significant contribution to international justice. The body of work of both the ICTY and the ICTR, established a year later, reflects the bedrock principle of providing fair trials for the accused and the opportunity for every defendant to have his day in court. That has been a hallmark of international justice since the Nuremberg trials and remains critical to advancing the rule of law internationally”.*

The representative of the EU observed:

*“The International Criminal Tribunal for Rwanda has made an invaluable contribution to our shared goal of ending impunity for genocide crimes and has played a key role in strengthening the rule of law and promoting long-term stability and reconciliation”.*

The representative of The Netherlands, which hosts the ICTY, further reflected on the place of institutional justice mechanisms

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to uphold accountability in the context of the rule of law:

*“The historical importance of those two United Nations Tribunals cannot be [over] estimated. Their legitimacy and their legacy are beyond dispute and will continue to shape international relations for many years to come. The Tribunals have confirmed the principle of accountability for the most serious international crimes by imposing punishment on those responsible and giving victims unprecedented access to justice. They have demonstrated the*

*prevalence of the rule of law in communities affected by such heinous crimes”.*

The relationship of the Council with the ICC was the focus of the 17 October 2012 open debate on the rule of law (S/PV.6849 and Resumption 1). In his remarks, Secretary-General Ban Ki Moon observed that:

*“The Council and the Court frequently operate in the same political space. They share a common interest. The Court can help advance the purposes of the United Nations — above all, to maintain*

*international peace and security. The Council, by understanding and respecting the work of the Court, can advance its own cause and better discharge its responsibilities ... Let us do everything we can to see that the Council and the Court work together to deliver both justice and peace.”*

This report's goal is to examine the Council's achievements and shortcomings in establishing the institutional framework for its interaction with judicial bodies as an aspect of the rule of law work.

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## Key Developments on the Rule of Law

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Since the publication of our last report on the rule of law, there have been several rule of law-related developments in the Council, both in country-specific situations and at the thematic level.

### Thematic Developments

Under the agenda item “the promotion and strengthening of the rule of law in the maintenance of international peace and security”, on 30 January 2013, Deputy Secretary-General Jan Eliasson briefed the Council on the rule of law, followed by consultations among members (S/PV.6913). The briefing was to coincide with the Secretary-General's report requested in the 2012 presidential statement, but the production of the report was delayed and it was eventually submitted to the Council on 11 June 2013 (S/2013/341). The report concluded that a UN strategy for evaluating the rule of law did not exist and that developing such a strategy should be a goal of the UN system, a task the Secretary-General intended to undertake.

On 19 February 2014, under the presidency of Lithuania, the Council held an open debate on “the promotion and strengthening of the rule of law in the maintenance of international peace and security”, chaired

by the Foreign Minister of Lithuania, Linas Linkevičius (S/PV.7113). The Secretary-General briefed the Council and representatives of 63 member states (including the 15 Council members), the EU and Palestine participated. On 21 February, the Council adopted a presidential statement underlining the importance of support to strengthening the rule of law institutions of the host country by a number of peacekeeping operations and special political missions within the scope of their mandates (S/PRST/2014/5).

### Visit to The Hague

The Security Council undertook a visiting mission to Europe and Africa in August 2014. During the Europe leg, one day (11 August) was devoted to justice and accountability issues as Council members engaged with representatives of the various international legal institutions headquartered in The Hague.

Council members spent most of the day in the Peace Palace, home to the International Court of Justice (ICJ) and the Permanent Court of Arbitration. Council members had a discussion with the principals of the ICTY, the MICT, the Special Tribunal for Lebanon (STL) and the Residual Special Court for Sierra Leone (RSCSL). In addition to

Council members, participants included Judge Theodor Meron, President of the ICTY and the MICT; Judge David Baragwanath, President of the STL; Hassan B. Jallow, Prosecutor of the MICT; John Hocking, Registrar of the ICTY; Michelle Jarvis, Office of the Prosecutor of the ICTY; Norman Farrell, Prosecutor of the STL; Daryl Mundis, Registrar of the STL; Francois Roux, Head of the Defence Office of the STL; and Binta Mansaray, Acting Registrar of the RSCSL.

The principals of the different tribunals at the discussion presented an overview of their work. They focused primarily on how these tribunals function and what challenges they face. One overarching observation was that the tribunals face financial constraints, particularly as some of them are funded through voluntary contributions. There was also a discussion of the length of time that it takes for tribunals to complete their work. In this respect, one of the judges commented that achieving due process and fairness in legal proceedings often takes time but is necessary, even though it may create tension with the desirability for cases to take place expeditiously. Some members of the Council were particularly interested in the update on the work of the STL, as the

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**UN DOCUMENTS ON THE RULE OF LAW** Security Council Resolutions S/RES/2217 (28 April 2015) renewed MINUSCA's mandate at current authorised troop levels until 30 April 2016. S/RES/2206 (3 March 2015) created a sanctions regime for South Sudan. S/RES/2185 (20 November 2014) was the first stand-alone resolution on UN policing. S/RES/2182 (24 October 2014) authorised naval interdiction of illicit charcoal and illicit arms being exported from Somalia, renewed authorisation for AMISOM and renewed sanctions measures. S/RES/2178 (24 September 2014) expanded the counter-terrorism framework by imposing obligations on member states to respond to the threat of foreign terrorist fighters. S/RES/2155 (27 May 2014) revised the mandate of UNMISS to focus on protection of civilians, facilitation of humanitarian access and human rights verification and monitoring. S/RES/2127 (5 December 2013) authorised MISCA and a French intervention force. S/RES/2187 (25 November 2011) renewed the mandate of UNMISS for an additional six months. S/RES/1757 (30 May 2007) decided on the entry into force of the agreement between the UN and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon. S/RES/1315 (14 August 2000) requested the Secretary-General to negotiate an agreement to create the Special Court for Sierra Leone. S/RES/955 (8 November 1994) established the International Criminal Tribunal for Rwanda. S/RES/827 (25 May 1993) established the International Criminal Tribunal for the former Yugoslavia.

## Key Developments on the Rule of Law (con't)

Council does not regularly receive briefings on this particular tribunal.

In the afternoon, Council members met with three representatives of the ICC: President Judge Sang-Hyun Song, Registrar Herman von Hevel and Deputy Prosecutor James Stewart. Some Council members highlighted the importance of cooperation between the Security Council and the ICC, while others argued that the ICC's work should be independent from the Council's work because the Council is a political body. One Council member argued in favour of greater cooperation between the ICC and the sanctions committees that are mandated by the Council. During the meeting, one of the ICC officials underscored that informal meetings could be used as a way of enhancing communication between the Council and the Court.

Council members also met with the President of the ICJ, Peter Tomka, and its other judges. Tomka provided Council members with a historical overview of the Court, which was followed by an interactive session between Council members and the ICJ judges, co-chaired by Chile and Luxembourg. The discussion focused on the work of the ICJ and the challenges of achieving international acceptance of its advisory opinions and the compulsory jurisdiction of the Court. It was noted that currently only about one-third of UN member states accept the compulsory jurisdiction of the Court and that increasing the number of member states accepting its compulsory jurisdiction would strengthen the international justice system. (Of the P5, only the UK accepts the compulsory jurisdiction of the Court at present.)

It was also observed that the ICJ's emphasis on conflict prevention and the peaceful settlement of disputes overlaps with the work of the Security Council. One of the judges further argued that the annual budget of the ICJ is only about \$25 million and that the Court thus represents a cost-effective way of

pursuing conflict prevention. The ICJ's relationship with the Council was discussed.

In a meeting with Netherlands Prime Minister Mark Rutte, he noted The Hague's role as the capital of international justice and told Council members that he valued their visit to The Netherlands. He said that, considering the Council's busy agenda, it is noteworthy and speaks to the importance of these institutions and the importance of accountability to the Council's work that the Council took the time to visit The Hague.

### Courts and Tribunals

Since our last report, there have been some ICC-related developments in the Council. The Council saw the culmination of the recurring issue of Kenya's request that the ICC proceedings against President Uhuru Kenyatta and Deputy President William Ruto be deferred from the jurisdiction of the Court. Council members held an interactive dialogue with Kenya on 23 May 2013 and with an AU high-level contact group regarding an AU request for a deferral on 31 October. Council members discussed the issue again under "any other business" during consultations on 11 November, and consultations on the matter were held on 12 November. A draft resolution to defer (S/2013/660) was finally put to a vote on 15 November by Morocco, Rwanda and Togo but was not adopted as only seven Council members voted in favour and the remaining eight abstained (S/PV.7060).

Regarding the DRC, Bosco Ntaganda, for whom there had been an ICC arrest warrant since 7 August 2006, surrendered voluntarily to the US embassy in Kigali, Rwanda, on 18 March 2013. On 22 March he was transferred to the custody of the ICC in The Hague. Ntaganda is facing charges of war crimes and crimes against humanity. On the day of his transfer, the Council issued a press statement welcoming Ntaganda's surrender and expressing concern that another ICC

indictée Sylvestre Mudacumura, commander of the Forces démocratiques de libération du Rwanda, was still at large (SC/10956).

Elsewhere in the Great Lakes region, another ICC indictée, Dominic Ongwen, a Lord's Resistance Army top commander, was taken into US custody in the Central African Republic (CAR) in January. On 20 January, Ongwen was transferred to stand trial before the ICC, where he will face charges of war crimes and crimes against humanity for his alleged part in attacks against civilians in Uganda in 2004. The Council issued a press statement on 20 January welcoming his transfer to The Hague (SC/11744).

There have been several proposals to refer new cases to the ICC; none of them, however, have been carried out as of this writing:

- On Syria, a draft resolution referring the situation in Syria to the ICC, co-sponsored by 65 states (S/2014/348), was put to a vote on 22 May 2014. It received 13 votes in favour, including from the three African Council members. The resolution failed, however, as it was vetoed by China and Russia.
- Regarding the Democratic People's Republic of Korea (DPRK), an Arria-formula meeting with Council members was held on 17 April 2014 to hear from a Human Rights Council-mandated commission of inquiry, which had recommended that the Council refer the situation to the ICC. On 22 December 2014, the Council held a meeting on the human rights situation in the DPRK, during which a majority of Council members said that the Council should consider the Commission of Inquiry's recommendation to refer the situation in the DPRK to the ICC. However, no further action was taken in light of China's known opposition to a referral.
- During a 2 May 2014 briefing on the situation in South Sudan, several Council

**UN DOCUMENTS ON THE RULE OF LAW** **Security Council Presidential Statements** S/PRST/2015/9 (24 March 2015) was a presidential statement regarding South Sudan that reiterated the intent to impose sanctions, including an arms embargo or targeted measures against senior figures who have threatened South Sudan's peace, security and stability. S/PRST/2014/5 (21 February 2014) underlined the importance of support to strengthening the rule of law institutions of the host country by a number of peacekeeping operations and special political missions within the scope of their mandates. S/PRST/2003/15 (24 September 2003) welcomed the offer by the Secretary-General to provide a report to guide further consultations on justice and the rule of law. **Security Council Press Statements** SC/11744 (20 January 2015) was a press statement welcoming the arrival of Dominic Ongwen, deputy commander of the Lord's Resistance Army and wanted by ICC, to the Court that day. SC/10956 (22 March 2015) welcomed the surrender of Bosco Ntaganda to the ICC. **Security Council Meeting Records** S/PV.7317 (20 November 2014) was a briefing on the role of policing in peacekeeping and post-conflict peacebuilding. S/PV.7313 (17 November 2014) was the meeting record for the election of the fifth judge to the ICJ. S/PV.7298, 7299, 7300, 7301, 7302, 7303, 7304 (7 November 2014) were the meeting records for the election of the fifth judge to the ICJ. S/PV.7297 and **Resumption 1** (6 November 2014) was the meeting record for the election of five judges to the ICJ. S/PV.7113 (19 February 2014) was an open debate on the promotion and strengthening of the rule of law in the maintenance of international peace and security, chaired by the Foreign Minister of Lithuania, Linas Linkevičius. S/PV.6977 (12 June 2013) featured briefings from the presidents and prosecutors of the ICTY and ICTR. S/PV.6913 (30 January 2013) was a meeting where Deputy Secretary-General Jan Eliasson briefed the Council on the rule of law. S/PV.4833 (24 September 2003) was an open meeting on the role of the UN with regard to justice and the rule of law. S/PV.3217 (25 May 1993) was the meeting in which resolution 827 was adopted, establishing the ICTY and adopting its Statute. S/PV.3175 (22 February 1993) was the meeting in which resolution 808 was adopted, in which it was decided to establish an ad hoc tribunal for the former Yugoslavia. S/PV.3046 (31 January 1992) was the first Security Council meeting held at the level of heads of state.

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## Key Developments on the Rule of Law (con't)

members raised the possibility of referring the situation there to the ICC (S/PV.7168), though such action does not seem likely at the time of writing.

Meanwhile, the ICC issued notices of non-compliance against Libya and Sudan (related to Darfur), which were submitted to the Council (S/2014/953 of 10 December 2014 and S/2015/202 of 9 March 2015, respectively).

In the case of the situation in Darfur, the ICC prosecutor notified the Council on 12 December 2014 that she was suspending her investigation into the situation in order to apply the limited resources of the Court elsewhere. On 19 June, the US organised a closed Arria-formula meeting on the human rights situation in Darfur, to mark the 10th anniversary of the Commission of Inquiry (COI) report, which was submitted to the Council on 31 January 2005 (S/2005/60), in which it recommended that the Council refer the matter to the ICC. The three panellists—former COI member Hina Jilani, Abdelrahman Gasim of the Darfur Bar Association and Hawa Abdalla, an IDP camp leader and activist on women's issue—noted that the human rights situation in Darfur remains grave and that accountability measures, including vis-à-vis the ICC, must be pursued. Chad, China, Russia and Venezuela did not attend the meeting.

Detailed information and analysis of some of these issues is provided in the report's case study on the Council's relationship with the ICC.

### Election of ICJ Judges

On 6 November 2014, the Council and the General Assembly held simultaneous and independent votes in accordance with the UN Charter to fill four out of five vacancies on the ICJ (S/PV.7297). Those elected to nine-year terms beginning on 6 February 2015 were: Mohamed Bennouna (Morocco), James Richard Crawford (Australia), Joan E. Donoghue

(US) and Kirill Gevorgian (Russia).

After seven rounds of voting in the General Assembly and four rounds in the Security Council, the fifth vacancy remained open. Patrick Lipton Robinson (Jamaica) consistently garnered the absolute majority required in the General Assembly while the Council selected Susana Ruiz Cerutti (Argentina). The following day, several rounds of simultaneous voting failed to produce agreement to fill the remaining seat (S/PV.7298, 7299, 7300, 7301, 7302, 7303 and 7304). On 11 November, Cerutti withdrew (S/2014/808), and Robinson was elected on 17 November to fill the fifth seat (S/PV.7313).

### Counter-Terrorism

Additional elements were added during this period to the legal framework of the Council's counter-terrorism agenda. The Council held a summit meeting on 24 September 2014 on the issue of foreign terrorist fighters that was chaired by US President Barack Obama. Resolution 2178, which was adopted unanimously at the meeting, included several innovations in the Council's counter-terrorism framework. It adopted a definition of foreign terrorist fighters as individuals who travel or attempt to travel to a state other than their states of residence or nationality "for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training". The resolution introduced an international legal obligation that requires member states to establish criminal offenses so that would-be terrorist fighters can be prosecuted for their intention to travel in order to participate in terrorist acts.

### Policing

Australian Foreign Minister Julie Bishop presided over a meeting on 20 November 2014 during which Under-Secretary-General for

Peacekeeping Operations Hervé Ladsous and three police commissioners briefed on challenges faced by police components when implementing Council mandates on the ground (S/PV.7317). At the meeting, resolution 2185 was unanimously adopted, the first stand-alone resolution on UN policing. The resolution highlights the important role that UN police components can play in strengthening the rule of law in conflict and post-conflict situations, in various contexts.

### Country Situations

Several rule of law-related developments in country-specific situations also unfolded in the Council over the last two years.

#### *Somalia*

On 24 October 2014, the Council adopted resolution 2182 on Somalia, which contained an authorisation for interdiction of charcoal exports and arms imports violating the 751/1907 Somalia-Eritrea sanctions, including beyond Somalia's coastal waters and by counter-piracy naval deployments of individual member states. Russia and Jordan abstained during the vote. The resolution was an example of the Council's authority to impose binding legal obligations on States that take precedence over other treaties under Article 103 of the UN Charter: The resolution specifies that these legal authorisations only apply with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of member states under international law, including any rights or obligations under the UN Convention for the Law of the Sea or customary law, particularly the general principle of exclusive jurisdiction of a Flag State over its vessels on the high seas.

#### *Central African Republic*

Regarding the Central African Republic

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**UN DOCUMENTS ON THE RULE OF LAW** **Security Council Letters** S/2015/202 (20 March 2015) transmitted the ICC's Pre-Trial Chamber finding of non-compliance. S/2014/953 (29 December 2014) transmitted the ICC decision on the non-compliance of Libya to the Security Council. S/2014/808 (11 November 2014) was from Argentina communicating the withdrawal of Susana Ruiz Cerutti (Argentina) as a candidate for election as a judge of the ICJ. S/2014/373 (26 June 2014) was from the Secretary-General to the Council President containing the reissued version of the CAR Col interim report. S/25801 (19 May 1993) was from the Permanent Mission of Yugoslavia to the UN addressed to the Secretary-General on the establishment of the ICTY. S/25540 (6 April 1993) was from the Permanent Representative of Brazil to the Secretary-General on the formation of the ad hoc Tribunals. **Secretary General's Reports** S/2015/227 (29 April 2015) was on the situation in the CAR. S/2013/341 (11 June 2013) was the annual rule of law report on measuring the effectiveness of the support provided by the UN for the promotion of the rule of law in conflict and post-conflict situations. S/2004/616 (23 August 2004) was on the rule of law and transitional justice in conflict and post-conflict societies. The report included a working definition of the rule of law and recommendations for the Council's future work. **Other** S/2014/928 (19 December 2014) was the final report of the CAR Commission of Inquiry. S/2014/348 (22 May 2014) was the French draft resolution referring Syria to the ICC, co-sponsored by 65 member states, which was vetoed by China and Russia. All other Council members voted in favour of the referral. S/2013/660 (15 November 2013) was a draft resolution on a deferral of the ICC proceedings against President Uhuru Kenyatta and his deputy.

**OTHER DOCUMENTS** Resolution RC/RES.6 (11 June 2014) was the Amendment to the Rome Statute of the International Criminal Court on the crime of aggression adopted by the Assembly of State Parties. PSC/AHG/COMM.1 (CDXI) (30 December 2013) was the AU communiqué establishing a Col for South Sudan. **Prosecutor v. Tadić, Appeal on Jurisdiction, No. IT941AR72** (Oct. 2, 1995) was the ICTY Appeals Chamber decision on its constitution and jurisdiction. **Prosecutor v. Taylor, SCSL-2003-01-I** (31 May 2004) was the SCSL decision on former Liberian President Charles Taylor's motion for head of state immunity.

## Key Developments on the Rule of Law (con't)

(CAR), the Council established in resolution 2127 of 5 December 2013 an International Commission of Inquiry (CoI) to investigate reports of violations of international humanitarian law, international human rights law and abuses of human rights in the CAR (an ICC investigation into the situation is also ongoing). The CoI did not get off to a good start. The CoI's preliminary report was circulated to Council members on 28 May 2014. Council members raised concerns about the quality of the report and the lack of coordination between the CoI and the Office of the High Commissioner for Human Rights (OHCHR) with respect to its publication. In response, the CoI requested that it be able to reissue the report to allow for updates on the situation on the ground and editing. The reissued preliminary report was released on 26 June 2014 (S/2014/373).

The Council received the CoI's final report on 19 December 2014 (S/2014/928). On 20 January, Council members met for an informal interactive dialogue with two of the three commissioners, Fatimata M'Baye and Philip Alston, to discuss the report. The report concluded that government forces under former President François Bozizé, as well as the Séléka and anti-balaka groups, were involved in serious violations of international humanitarian law and gross abuses of human rights since January 2013. The Commission said that it could not establish genocidal intent by any party to the conflict but that this did not diminish the seriousness of crimes committed and documented in the report, nor should anyone assume that the risk of grave crimes, including genocide, had subsided. The CoI also concluded that a pattern of ethnic cleansing was executed by the anti-balaka in the areas in which Muslims had been living, amounting to a crime against humanity.

One set of the CoI's recommendations concerned its support for the establishment of a Special Criminal Court—a “hybrid” court with international elements within the CAR court system—to try perpetrators for crimes committed during the conflict. The CoI noted

that the “proximity of the national courts to the populace, their ability to send a meaningful message in relation to accountability and their potential for dealing with a much larger number of perpetrators, argues strongly in favour of the international community making every effort to facilitate their primary role in upholding criminal accountability and providing remedies for victims”. The CoI in essence observed that the ongoing ICC investigation into the situation in the CAR can play a complementary role to such a special court but is insufficient to uphold accountability in the context of the CAR conflict.

Another important development related to the CAR concerns the mandate of the Multidimensional Integrated Stabilization Mission in the CAR (MINUSCA). The mandate of the mission, contained in resolution 2217 of 28 April 2015, authorises it to adopt urgent temporary measures “on an exceptional basis” and at the formal request of the CAR, to arrest and detain individuals in order to fight impunity and maintain law and order. (A memorandum of intent to this effect was signed between the CAR Minister of Justice Gabriel Ngbodou and Special Representative of the Secretary-General to the CAR Babacar Gaye on 7 August 2014.) In accordance with the recommendation of the Secretary-General (S/2015/227), the resolution includes a specific provision mandating MINUSCA to assist the CAR in establishing a national Special Criminal Court (SCC). The SCC was put into law by the National Transitional Council on 22 April to prosecute those responsible for war crimes and crimes against humanity in the CAR since 2003, and is to be composed of both local and international judges and staff.

### *South Sudan*

In a communiqué (PSC/AHG/COMM.1 (CDXI)) adopted at an AU Peace and Security Council (PSC) summit in Banjul, The Gambia, on 30 December 2013, the first ever AU-authorized commission of inquiry of this kind was established to “investigate the human rights violations and other

abuses committed during the armed conflict in South Sudan and make recommendations on the best ways and means to ensure accountability, reconciliation and healing among all Sudanese communities”. The Commission was mandated just two weeks after the civil war erupted in South Sudan on 15 December 2013. The Council has been keen to support the commission, welcoming or recognising its work in several formal decisions (e.g., S/RES/2155 of 27 May 2014).

In resolution 2187 of 25 November 2014, the Council stated that it was “anticipating with interest its [the Commission's] findings and recommendations”. There was discussion among some UN Security Council members of the possibility of receiving a briefing from Olusegun Obasanjo, the AU Commission of Inquiry's chair, on the findings of the report in an interactive dialogue—an informal, closed-meeting format—in February after he first presented the report to the AU PSC. However, the publication of the report was delayed and consequently the Council encouraged “the public release of (the Commission's) final report as soon as possible” in resolution 2206 and again in the presidential statement adopted on 24 March 2015 (S/PRST/2015/9). (Although, as of this writing, the report has yet to be publicly released.) It is interesting to note the contrast between the attention the Council has been giving this report to its lacklustre interest and follow-up in the findings of the CAR CoI set up by the Council itself.

In addition, in resolution 2187, the Council asked the Secretary-General to provide two written reports by 16 February and 30 April, “which could include the issues of accountability in South Sudan”. Accordingly, the UN Office of Legal Affairs (OLA), DPKO, OHCHR and the Office of the Special Adviser on the Prevention of Genocide collaborated in the preparation of a Secretary-General's report detailing such options on accountability. Council members met under “any other business” on 12 May, after receiving a private document from the Secretary-General outlining options for accountability.

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## 2013-2014 Statistical Analysis on the Rule of Law

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For statistical methodology, please see our previous *Cross-Cutting Report on the Rule of Law* of October 2011 and *Rule of Law: The Security Council and Accountability* of January 2013.

### Resolutions

With some exceptions, our previous analysis showed a gradual increase in the integration of rule of law elements in relevant Council resolutions, from about 69 percent in 2003 to 93 percent in 2012. The trend did not continue in 2011, when only 66 percent of relevant resolutions contained rule of law elements and in 2013, when only 70 percent of relevant resolutions contained rule of law elements. However, in 2014, all of the relevant resolutions integrated rule of law elements. Despite the interruptions recorded in 2011 and 2013, it would seem that the integration of rule of law elements into Council resolutions has increased and become consistent where reasonably relevant.

Regarding the specific language used, 2013 and 2014 show an increase of the use of the term ‘rule of law’ in resolutions. After 42 percent in resolutions in 2011 and 44 percent in 2012, it was used in 53 percent of relevant resolutions in 2013 and 60 percent in 2014, continuing an overall increase in the use of the term since 2003 (22 percent), when the rule of law was first added as a thematic issue to the Council’s agenda. References to human rights in relevant resolutions slightly

declined in 2013: from 74 percent in 2012 (to 62 percent in 2013. Notably, however, all relevant resolutions adopted in 2014 (numbering 43) contained human rights language.

### Presidential Statements

In presidential statements, the inclusion of rule of law language showed a slightly different pattern. Relevant presidential statements in 2009 and 2010 presented a high integration of rule of law elements, with 80 percent and 85 percent respectively containing such language. This trend did not continue in 2011, with roughly 52 percent, while 2012 showed a “bounce back” of rule of law elements to 86 percent. This trend continued with a remarkable 100 percent in 2013 (21 out of 21 relevant presidential statements) integrating rule of law elements, and 94 percent (17 out of 18) in 2014. With respect to specific references to human rights, 50 percent of the relevant presidential statements in 2012 have included such references, considerably higher than the 38 percent registered in 2011. This upwards trend continued with 100 percent in 2013 and 89 percent in 2014. With respect to the phrase the “rule of law”, both 2013 and 2014 showed a similar pattern to that of 2012 when the number stood at 46 percent, while in 2013 52 percent of presidential statements contained the phrase and 44 percent in 2014.

### Secretary-General’s Reports

The inclusion of rule of law elements in the Secretary-General’s reports since 2003 continues to be high. Since 2005, more than 90 percent of these reports have included references to rule of law issues each year, with a slight dip in 2008 (to about 88 percent). This continued to be the case in 2013, when rule of law elements were included in 94 percent of the reports, and even more so in 2014 with almost 97 percent inclusion of rule of law elements. Our last report noted that since 2006 all relevant thematic reports, with no exception, have addressed rule of law issues. This continued to be the case throughout 2014.

The patterns have been different with respect to recommendations and observations sections included in the Secretary-General’s reports, both thematic and country-specific. With the exception of 2007 (58 percent) and 2010 (62 percent), less than 40 percent of the Secretary-General’s reports since 2003 have included rule of law related recommendations and observations. In 2012, only 37 percent of the reports included rule of law elements among their recommendations and observations, and in 2011 even fewer, with only 15 percent, the lowest recorded period since 2003. In contrast, in 2013 this trend changed as 83 percent of the reports included rule of law related recommendations and observations, and 86 percent in 2014.

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## The Security Council and the Legal Basis for International Criminal Courts and Tribunals

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Modern international law has developed in parallel to the rise of the nation state. As such, states were traditionally the main subjects of international law, i.e. those possessing rights and obligations under the law. International law was concerned with individual rights and obligations only inasmuch as they derived from the rights of their state of nationality. Though international law is still, arguably, primarily concerned with state relations, today the rights of individuals (and to a certain extent their obligations) are recognised in various contexts. Three closely interrelated and at times overlapping

subsets of international law are particularly focused on the protection of the individual: international humanitarian law, international human rights law and international criminal law (for a short explanation of these bodies of law and their development, see our 2013 *Cross-Cutting Report on the Rule of Law*, focusing on accountability).

At the institutional level, the first modern international judicial institution envisaged to try perpetrators for their conduct during armed conflict was contemplated in the wake of World War I, when the Treaty of Versailles included provisions for the establishment of

an Allied Military Tribunal to try Kaiser Wilhelm II of Germany for a “supreme offence against international morality and the sanctity of treaties”, and other individuals for violations of the laws of war (what today is more commonly referred to as international humanitarian law). Yet the Kaiser was never tried, and little materialised from the few trials held in German courts under Allied Powers’ pressure, rather than by the Allied Powers themselves.

The scale and horrific nature of the acts committed during World War II saw a renewed interest in international justice and significant resolve to uphold individual



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accountability for international crimes. At the end of the war, the Allied forces established the International Military Tribunal (IMT) to try Third Reich leaders in Nuremberg and then the International Military Tribunal for the Far East in Tokyo to try Japanese leaders. From November 1945 to October 1946, 24 Nazi defendants were tried for war crimes, crimes against humanity related to the war and for crimes against the peace (today known as the crime of aggression). The Allied forces in control of Germany also tried lower-ranked Third Reich officials in military courts established in Germany, and trials of Nazi war criminals were conducted under domestic law in various European countries.

The rationale for individual accountability was eloquently stated by the Nuremberg Tribunal:

*“Individuals have international duties which transcend the national obligations of obedience imposed by the individual State ... 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”.*

The significance of this rationale as stated by the Nuremberg Tribunal is not only its appreciation of the importance of justice and accountability, but also that such concepts must be enforced by the international community, thus justifying the establishment of the Tribunal itself.

The Cold War period saw continued normative developments of international humanitarian law and international human rights law, yet no development of international bodies to enforce international crimes.

A significant institutional breakthrough occurred following the Cold War, when the lifting of the Iron Curtain allowed for certain convergences between East and West, including among the permanent members of the Security Council. As the magnitude and nature of the atrocities in the war in the Balkans were becoming more apparent in the early 1990s, the Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) on 25 May 1993, seated in The Hague. Adopted unanimously under Chapter VII, resolution 827 established the ICTY as a subsidiary body of the

Council, set out its statute and obliged all states to cooperate with it.

Though unmentioned in the resolution itself, the basis for this measure was the Council’s authority to establish subsidiary bodies under Articles 29 and 41 of the UN Charter. Under Article 41 the Council “may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations”.

The jurisdiction of the Tribunal extended to war crimes, crimes against humanity and genocide. Its Statute contained also a “supremacy clause”, allowing the ICTY to order states to defer to it any criminal proceedings taking place in their domestic jurisdiction.

Following the genocide in Rwanda, the Council adopted resolution 955 (1994) on 8 November 1994, establishing the International Criminal Tribunal for Rwanda (ICTR). The ICTR was given jurisdiction over crimes against humanity, genocide and war crimes applicable to a non-international armed conflict, and states were obliged to cooperate with it under terms similar to those relating to the ICTY.

The approach taken by the international community in the former Yugoslavia and Rwanda was not without its critics, even within the Council. While voting in favour of resolution 827, China stated in its explanation of vote that its vote “should not be construed as our endorsement of the legal approach involved” and expressed the need “to avoid setting any precedent for abusing Chapter VII of the Charter”. China added that to adopt by a Security Council resolution the statute of the International Tribunal, giving the Tribunal both preferential and exclusive jurisdiction, does not comply with the principle of state judicial sovereignty. Therefore, it took the position that “an international tribunal should be established by concluding a treaty so as to provide a solid legal foundation for it and ensure its effective functioning” (S/PV.3217).

In a letter sent to the Secretary-General on 6 April 1993 and circulated to the General

Assembly and the Security Council, Brazil took the position that “the role of the Security Council regarding the establishment and functioning of the tribunal should remain within the limits of the very considerable powers expressly entrusted to it by the Members of the United Nations in accordance with the Charter. The Government of Brazil is not convinced that the competence to establish and/or exercise a criminal jurisdiction is among the constitutional powers of the Security Council” (S/25540). To that end, while Brazil voted in favour of the resolution, in its explanation of vote it expressed its agreement with China that the ICTY should have been established by an international treaty with the states involved.

The Federal Republic of Yugoslavia (FRY) also questioned the legality of the ICTY: “In view of the fact that, under the Charter of the United Nations, the Security Council has no mandate to set up such a tribunal or to adopt its statute, it is quite legitimate to question the legal basis for the establishment of the ad hoc tribunal” (Yugoslavia’s letter to the Secretary-General of 21 May 1993, S/25801).

In light of these positions expressed by the FRY and other member states, it is not surprising that in the first case before the Tribunal, the Prosecutor v. Duško Tadić (Prosecutor v. Tadic, Appeal on Jurisdiction, No. IT941AR72, Oct. 2, 1995), the defendant challenged the legality of the Council’s decision to establish the Tribunal. Tadic, a Bosnian Serb, was accused of committing atrocities on the territory of Bosnia and Herzegovina in 1992 against Bosnian Muslims. Among other claims, Tadic argued that:

- to be duly established by law, the ICTY should have been created by treaty, by the consensual act of nations or by amendment of the UN Charter, not by a resolution of the Security Council;
- before the creation of the International Tribunal in 1993 it was never envisaged that such an ad hoc criminal tribunal might be set up;
- the General Assembly, whose participation would at least have guaranteed full representation of the international community, was not involved in its creation;
- it was never intended by the Charter that the Security Council should, under Chapter VII, establish a judicial body, let alone a criminal tribunal;

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## The Security Council and the Legal Basis for International Criminal Courts and Tribunals (con't)

- the Security Council can impose obligations on States but it cannot create criminal liability on the part of individuals, even through the Tribunal;
- no political organ such as the Security Council is capable of establishing an independent and impartial tribunal; and
- to give the International Tribunal primacy over national courts is, in any event and in itself, inherently wrong.

In a legal opinion filed before the Tribunal, the US defended the actions of the Council. It pointed out the fact that over the years the Council had resorted to a wide variety of actions under Chapter VII that are not specifically enumerated in the illustrative list in Article 41, including creating “no-fly zones”, the creation of “safe areas” and humanitarian corridors, the granting of compensation to the victims of armed attack, the delimitation of disputed borders and the prohibition on the acquisition or possession of weapons of mass destruction by a particular State. It further noted that under Article 29, the Council has created a wide variety of bodies, including observer teams and peace-keeping forces, investigation commissions, commissions charged with demarcation of boundaries and even the quasi-judicial UN Compensation Commission.

The Appeals Chamber rejected Tadic’s claims against the legality of the resolution creating it. The basis of its findings were that the Council enjoys very wide discretion in making a determination that there exists a threat to the peace, a breach of the peace or an act of aggression under Article 39 of the Charter and in deciding the appropriate measure to take to address such threats.

The Tribunal found that “it is evident that the measures set out in Article 41 are merely illustrative examples which obviously do not exclude other measures. All the Article requires is that they do not involve ‘the use of force’. It is a negative definition”.

The Tribunal also found that the fact that the Council is itself a political organ does not mean that it cannot resort “to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, i.e. as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia”. Thus, the creation of

the Tribunals was not an issue of delegation of judicial powers which the Council does not possess, but rather, an exercise of the Council’s authority to do what is necessary to maintain peace and security. At the same time, the Tribunals—like some of the other Council subsidiary bodies, such as sanctions committees—were delegated the power to make binding decisions on member states, as the latter were obliged by the Council to cooperate with the Tribunals.

As for the primacy of the Tribunal over national courts, the Tribunal concluded that the interest of trying perpetrators for international crimes outweighs considerations of sovereignty, including trials by domestic courts.

The trials conducted by the Allies in the 1940s were criticised for applying legal standards that were unclear at the time. The establishment in the 1990s of the two ad hoc Tribunals by the Council still raised concerns over the clarity of the applicable legal norms under customary international law, since the extent of criminality of various violations of international humanitarian law and international human rights law was not completely coherent at the time, nor was their applicability to non-international armed conflicts. In fact, many Council members still found it necessary to explain their own views as to the meaning and legal parameters of crimes contained in the ICTY statute in their explanation of vote (e.g., US, France, Russia, Brazil in S/PV.3217).

Some dubbed the Nuremberg and Tokyo Tribunals as “victors’ justice”, as only the nationals of the Axis states were put on trial by the Allies. Some Council members explained that the new ad hoc Tribunals were a different “animal”. France was of the view “[T]oday, through the Security Council, it is the international community that is establishing the International Tribunal for Yugoslavia”, and the US said: “[T]his will be no victors’ tribunal. The only victor that will prevail in this endeavour is the truth.” (S/PV.3175). Russia, in a later meeting, said that “it is of particular importance that for the first time in history, it is not the victors who are judging the vanquished, but the entire international community” (S/PV.3217).

Brazil was of a different view: “If the tribunal were to be established as a subsidiary organ of the Security Council or as an organ otherwise subordinated to the Council, its

independence and impartiality could be questioned” (S/25540). The FRY noted that “[W]ar crimes are not committed in the territory of one State alone and are not subject to the statute of limitations, so that the selective approach to the former Yugoslavia is all the more difficult to understand ... Yugoslavia has its doubts about the impartiality of the ad hoc tribunal ... numerous initiators and advocates of the idea of its establishment have openly stated that this was going to be a tribunal for Serbs”. Yugoslavia pointed to many other crimes and atrocities occurring in the world that were left untouched by the Council and the international community at large (S/25801).

In the Tadić case, the accused argued that “the Security Council had been inconsistent in creating this Tribunal while not taking a similar step in the case of other areas of conflict in which violations of international humanitarian law may have occurred”. The US, in its legal opinion, noted that “the Council’s failure to take similar action with respect to conflicts of past decades in Korea, Vietnam, Algeria, Cambodia and the Belgian Congo” does not limit its options to respond to the current conflict. It added:

*“As a matter of law, there is no requirement under Chapter VII that the Council take similar action in dealing with all comparable threats to the peace, nor a prohibition on Council action if it has failed to take such action in similar previous cases. The Council has the discretion, as it must in cases involving such great consequences, to judge in each particular case whether action is prudent and appropriate, based on its own evaluation of all relevant considerations”.*

The Tribunal indeed took the view that it was acting on behalf of the international community as a whole. It further emphasised that the tribunal was established as an independent body in such a way as to provide a fair trial in accordance with international human rights and due process rights.

Despite this contested legal birth for the Tribunals, nowadays the legality of the Council’s establishing criminal tribunals is not considered a controversial issue. The majority of member states accepted the legality of the Tribunals, including through the General

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## The Security Council and the Legal Basis for International Criminal Courts and Tribunals (con't)

Assembly, which is directly in charge of the Tribunals' funding through the UN's budget. However, the political and legal discomfords of some regarding the ad hoc Tribunals' establishment invigorated the idea of setting up a permanent, standing criminal court independent of Council politics and, for some, on more solid legal grounds. Such a court could also ensure that the P5 would be subject to the scrutiny of the court along with all other states.

Taking into account these controversies, the adoption of the Rome Statute on 17 July 1998, establishing the International Criminal Court, attempted to address the issue of clarity of applicable law and impartiality. First, it was a permanent court. Second, it was open to all states through ratification of the Rome Statute. Third, the ICC was given jurisdiction over the crimes of genocide, war crimes and crimes against humanity while elaborating on the specifics of each category of offences. (Under contemporary international law, these crimes are all undisputedly recognised as international crimes, even by non-signatories to the ICC.) Unlike the ad hoc Tribunals established by the Council, the Rome Statute introduced the concept of “complementarity”, with the ICC exercising its jurisdiction when a national court is “unwilling or unable” to prosecute a case by itself.

The Court was also given jurisdiction over the crime of aggression, but unlike the other crimes enumerated in the Rome Statute, the definition of the crime of aggression was left to be decided at a later date. After years of preparatory work, the Assembly of State Parties to the Rome Statute adopted Resolution RC/Res.6 in June 2010, defining the crime of aggression for the purposes of the Statute and inviting ratifications of this amendment of the Statute. Perhaps the most contentious and politically sensitive issue in the negotiations was the Council's role with respect to the crime of aggression. This should not have come as a surprise, since determining that an act of aggression was committed is at the core of the Council's functions—such a determination is envisioned by Article 39 and can lead to enforcement action under Chapter VII. The P5 argued that the determination of an act of aggression was the exclusive competence of the Council. Jurisdiction over this crime should therefore be dependent on a prior

determination by the Council. Other states argued that this solution would create an inequity between the P5 and other parties and allow the P5 to politically control and interfere with the judicial process.

A compromise solution gave the Council an elevated yet purely procedural role with respect to the crime, while maintaining the independence of the prosecutor and the Court: it was agreed that the Court may exercise jurisdiction over the crime without a Council referral, and that, vice versa, a prior determination of the Council that an act of aggression has occurred should not prejudice the findings of the Court, even in the case of a Council referral. One final concession to convince the permanent members (P5) to agree to the compromise was that only in the case of a Council referral could the Court exercise its jurisdiction for aggression over states that have not accepted the amendment defining the crime of aggression. The amendment will enter into force when seven-eighths of the parties to the statute have ratified it, but no earlier than 2017.

One of the more difficult issues during the negotiations over the Statute was the role the Council should play in establishing jurisdiction and the relationship between the two bodies. For some, a key element of the Court's purpose was to obviate the need for the Council to establish ad hoc institutions. Rather, the Council would be able to refer situations to the Court. At the same time, the Court would need to be able to maintain its independence from the highly political and influential Council so as to remain impartial.

For some countries, the issue of Council interaction with the Court related to the wider discussion of Council reform and discontent regarding the existence of permanent members with veto powers. For these states, the Council in its current state should play no role with respect to the ICC. Eventually the Rome Statute gave the Council a unique and important role with respect to its jurisdiction to try crimes, as it can, acting under Chapter VII of the Charter, refer certain situations to the jurisdiction of the Court or temporarily defer them (as will be explained in the ICC case study). However, not all states agreed to sign and ratify the Statute, including three of the P5—China, Russia and the US. India refrained from joining the Court, stating that this is due to the role given to the Security Council in its Statute.

Unlike national jurisdictions, the ICC Statute (as was also the case with the ad hoc Tribunals) does not afford any immunity to incumbent heads of state and other high-ranking officials. Under customary international law, it is recognised that there is a category of high-ranking officials who enjoy complete immunity from criminal procedures in other states—including international crimes—for the duration of their terms. Such officials include incumbent heads of state or government and foreign ministers and may include other high-ranking officials as well. Thus, as the International Court of Justice has pointed out in the *Congo v. Belgium* case in its 14 February 2002 judgment, these high-ranking officials can only be tried for international crimes after their terms have ended or by an international tribunal not bound by such immunities. This was highly relevant to the indictment of incumbent Sudanese president, Omar al-Bashir, by the ICC, which will also be discussed below.

The Council has not established any ad hoc tribunals since the ICC's establishment and has referred two situations to the Court. Yet it has also played a role in establishing two other judicial institutions. On 14 August 2000, the Council adopted resolution 1315, requesting the Secretary-General to negotiate an agreement with Sierra Leone “to create an independent special court consistent with this resolution” to address crimes committed during the civil war in that country. The Council was also very much involved in the process of drafting the statute of the Court and its funding. The Secretary-General then reached an agreement with Sierra Leone on the establishment of the Special Court for Sierra Leone (SCSL), composed of both international and local judges and officials, to try perpetrators for crimes under international law and domestic law. (The SCSL is one of several quasi-international courts and tribunals that have been established to address individual accountability for atrocities committed, all with a varying degree of international and national components. Examples include the Special Tribunal for Lebanon [STL], the special panels in East Timor/Timor-Leste and the Khmer Rouge Tribunal [officially known as the Extraordinary Chambers in the Courts of Cambodia]. These are widely referred to as mixed or “hybrid” tribunals and have had a varying degree of success.)

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# The Security Council and the Legal Basis for International Criminal Courts and Tribunals (con't)

As a body with both international and national components, a key issue that faced the SCSL early in its existence was the question of immunity of heads of state, after Liberian President Charles Taylor was indicted (Prosecutor v. Taylor, SCSL-2003-01-I, 31 May 2004). The attorney for Taylor filed a motion before the SCSL to quash the indictment on the basis that at the time it was issued, Taylor was an incumbent head of state who enjoyed personal immunity under international law. The Court rejected the motion, finding that it was established by an international treaty and is an international tribunal. It is also not part of the Sierra Leone judicial system. Thus, the immunity for high-ranking

officials that would apply in a domestic court does not apply before an international court such as the SCSL.

The Council brought into existence the Special Tribunal for Lebanon, established to prosecute the perpetrators of the assassination of then-Lebanese Prime Minister Rafiq Hariri and other crimes. As will be further elaborated in the case study, the Secretary-General signed an agreement with Lebanon at the request of the government on 23 January 2007 to establish the Court. Internal politics kept the agreement from being ratified by parliament, and subsequently a majority of the parliament members requested the Security Council to form the STL by a Council

resolution. Despite protest from other Lebanese officials, including the president, the Council adopted resolution 1757 on 30 May 2007, bringing into force the agreement to establish the STL and circumventing the ratification process.

Thus, between the establishment of the ad hoc Tribunals, requesting the Secretary-General to establish a court by agreement with the host state, and establishing the STL by giving legal force to an unratified treaty, the Council has demonstrated legal flexibility and creativity in establishing institutional frameworks to uphold individual accountability.

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## Case Studies

### International Criminal Tribunals

The Council created the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994. In the years immediately following the ethnic cleansing and genocide in the former Yugoslavia and Rwanda respectively, the ICTY and ICTR struggled to achieve their goals and were hampered by poor member state cooperation with an institutional model that relied on states to arrest accused criminals. However, with time, both Tribunals were able to successfully bring to justice some of the key high-ranking perpetrators of the crimes committed in both conflicts.

As the challenges inherent in tribunals became better understood by the pioneering subsidiary institutions and by the Council—and, as it became clear that the Tribunals would not fulfil their mandates in the near-term—the Council made several institutional adjustments and adopted completion strategies for the Tribunals that focused on finishing the Tribunals' work as quickly as possible.

The institutional adjustments were not major and consisted of slight alterations to the procedures, structures and personnel of the Tribunals that would allow them to continue functioning until their operations came to a close. The emphasis on speedy completion—with a continued disregard for member state non-cooperation, inadequate funding and at times a perceived indifference towards accountability—was manifested both in the official completion strategy of the Tribunals and in frequent expressions of concern from Council members over the length of time the Tribunals were taking to complete their work and the accompanying financial burdens. Political grievances regarding the jurisprudence of the Tribunals have also been a factor.

Eventually, the Council was forced to address one of the central challenges of the tribunal model—the difficulty of closing down a temporary institution—by establishing the Residual Mechanisms to complete the Tribunals' outstanding work and preserve their archives.

### *The Establishment of the International Criminal Tribunal for the former Yugoslavia*

Following the collapse of the former Yugoslavia, the Council initially struggled to obtain information about events on the ground, and then to generate the political will to intervene after it became clear that mass atrocities were occurring. Faced with the reality of ethnic cleansing, the Council adopted resolutions 752 and 764 on 15 May and 13 July 1992 respectively, urging compliance with international humanitarian law, to no avail. Resolution 771 adopted on 13 August explicitly named and condemned “ethnic cleansing” and threatened further action under Chapter VII if the Council's calls for respect for international humanitarian law went unheeded. The Council set up “safe areas” under resolutions 819 and 824 on 16 April and 6 May 1993 but did not provide enough military capacity and backing to the UN Protection Force (UNPROFOR, established in resolution 743 of 21 February 1992) for it to be able to enforce and protect them, eventually allowing the massacres at Srebrenica and other “safe” areas of the region.

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**UN DOCUMENTS ON TRIBUNALS** Security Council Resolutions S/RES/2194 (18 December 2014) extended two ICTR judges' terms until 31 July 2015 and four judges' terms until 31 December 2015 and reappointing the ICTR Prosecutor Hassan Bubacar Jallow until 31 December 2015. S/RES/2193 (18 December 2014) extended 16 ICTY judges' terms until 31 December 2015, with Russia abstaining. S/RES/2081 (17 December 2012) extended the terms of 13 permanent judges of the ICTY until 31 December 2013 and the terms of eight ad litem judges for different periods of time. S/RES/2013 (14 October 2011) allowed an ICTR ad litem judge to engage in another occupation part-time, on an exceptional basis. S/RES/1995 (6 July 2011) said that an ad litem judge may be elected president of the ICTR and authorised Judge Dennis Byron to serve as part-time judge from 1 September. S/RES/1966 (22 December 2010) established the residual mechanism. S/RES/1955 and S/RES/1954 (14 December 2010) authorised certain judges of the Tribunals to complete the cases on which they are working after the expiry of their terms of office and reiterated the Council's call for the Secretariat and other relevant UN bodies to address the staffing situation. S/RES/1932 (29 June 2010) extended the mandates of the ICTR judges, amended the ICTR statute and called on the Secretariat and other relevant UN bodies to address the staffing situation. S/RES/1915 (18 March 2010) extended the authorisation for the ICTY to exceed the maximum number of ad litem judges allowed by its statute until 30 June 2010. S/RES/1900 (16 December 2009) authorised the ICTY to temporarily exceed the maximum number of ad litem judges allowed by its statute. S/RES/1878 (7 July 2010) extended the terms of ICTR permanent and ad litem judges until 31 December 2010 and decided to review by 31 December 2009 the terms of office of permanent judges who are members of the appeals chamber.

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## Case Studies (con't)

Amidst the ongoing conflict in the Balkans, the Council unanimously established the ICTY in resolution 827 on 25 May 1993. This step was preceded by establishing a Commission of Experts through resolution 780 on 6 October 1992, which recommended the creation of an ad hoc criminal tribunal in its first interim report (S/25274) issued on 9 February 1993. Lacking the political will to effectively prevent ongoing breaches of international humanitarian law, the Council, on the initiative of the US, resolved to hold accountable those who committed them. In many ways, the establishment of the ICTY was a substitute, if an awkward one, for more effective preventive measures that were not taken at the time. Even in hindsight, it is hard to find signs that the establishment of the ICTY influenced the actors committing atrocities during the war in the Balkans, which only ended two and a half years later. In that sense, even though figures like Serbian President Slobodan Milošević were eventually apprehended and transferred to the ICTY years later, it ultimately failed in deterring leaders and other individuals from perpetrating further crimes during the conflict. It was only after the Dayton Accords two years later that the conflict ended and the focus shifted to achieving justice for the victims in the former Yugoslavia and rebuilding Bosnia and Herzegovina in particular.

The statute of the ICTY, annexed to the Chapter VII resolution, gave the ICTY jurisdiction over war crimes, genocide and crimes against humanity committed in the territory of the former Yugoslavia since 1 January 1991. One forceful feature of the statute formulated by the Council was the primacy of the tribunal over national courts with concurrent jurisdiction over these crimes. In contrast to the principle of complementarity later on in the Rome Statute of the ICC, primacy allowed the ICTY to formally request national courts to defer to its competence. Moreover, resolution 827 decided that “all States

shall cooperate fully with the International Tribunal and its organs”. The resolution also obligated states to amend their domestic laws as necessary in order to be able to cooperate with the Tribunal, including the obligation in the resolution to comply with requests for assistance from the ICTY. This feature was subsequently incorporated into the ICTR Statute.

### *The Establishment of the International Criminal Tribunal for Rwanda*

As the Council tried to manage the conflict in the former Yugoslavia, a new acute crisis arose in Rwanda. After Rwandan President Juvenal Habyarimana, a member of the Hutu ethnic group, was killed when his airplane was shot down on 6 April 1994, the Hutu-led government unleashed a brutal backlash on members of the Tutsi ethnic group and moderate Hutus. In a devastating three month period, 800,000 were killed before the rebel Rwandan Patriotic Front (RPF) took Kigali on 4 July. Acts of retribution resulted in a wave of Hutu refugees fleeing to neighbouring states, notably the Democratic Republic of the Congo. The Council had established the UN Assistance Mission for Rwanda (UNAMIR) through resolution 872 on 5 October 1993, prior to Habyarimana’s death, in order to monitor the August 1993 peace agreement intended to end a bloody civil war between the government and the RPF that erupted in October 1990. But UNAMIR forces were not sufficient to protect their civilian charges, according to the Secretary-General’s 20 April 1994 report to the Council. In one of the most criticised moves in UN history, the Council decided, against the recommendation of the Secretary-General, to withdraw rather than reinforce UNAMIR troops, ordering a scale-down in resolution 912 on 21 April. Throughout the bloody crisis, the Council was informed of the atrocities being committed but did not take any action to stop the genocide and other atrocities. The

Council’s response to the mass atrocities in Rwanda was complicated by the fact that Rwanda—represented by the Habyarimana government—was an elected member of the Council during the genocide.

Unlike the situation in the former Yugoslavia, Rwanda itself requested that the Council establish an ad hoc tribunal after the RPF took control of the government (S/1994/1115). The Council established the ICTR and adopted its statute in resolution 955 of 8 November 1994. Rwanda, an elected Council member at the time, now represented by the new government, despite its initial request, voted against resolution 955 because it opposed, among other things, the absence of the death penalty in ICTR’s statute and the tribunal’s location outside Rwanda (China abstained in the vote). To maintain the real and perceived impartiality of the tribunal, the Secretary-General recommended in his 13 February 1995 report (S/1995/134) that the ICTR should be located in Arusha, Tanzania. The Council approved this step in resolution 977 on 22 February. As the ICTR was put into place, the Council decided that the ICTR could share a prosecutor with the ICTY. Though this approach may have had practical justification in the early years when the tribunal’s workload was relatively small, over the years it proved practically cumbersome and politically problematic, as will be explained below.

### *The Council and the Ad Hoc Tribunals*

To date, the ICTY has indicted 161 individuals, of whom 80 were convicted and sentenced, 18 were acquitted, 36 proceedings were terminated or the indictments were withdrawn and 13 individuals were transferred for trial in Bosnia and Herzegovina, Croatia or Serbia. Fourteen individuals are still undergoing trials and appeals, while no indicted fugitives are at large.

The ICTR has indicted 93 individuals, of whom 61 were convicted and sentenced, 14

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**UN DOCUMENTS ON TRIBUNALS Security Council Resolutions (continued)** S/RES/1534 (26 March 2004) called on the ICTY and ICTR to review their respective case loads and requested both Tribunals to provide the Council with a progress assessment of their completion strategies every six months. S/RES/1503 (28 August 2003) called on the ICTY and ICTR to complete all trial activities in the first instance by the end of 2008 and to complete all work in 2010. S/RES/1431 (14 August 2002) established a pool of ad litem judges for the ICTR. S/RES/1329 (5 December 2000) established a pool of ad litem judges for the ICTY and allowed ad litem judges to run and vote in elections for the presidency of the Tribunal. S/RES/1165 (30 April 1998) established a third trial chamber for the ICTY. S/RES/1031 (15 December 1995) was on the implementation of the Peace Agreement for Bosnia and Herzegovina and transfer of authority from UN Protection Force to the multinational implementation force (IFOR). S/RES/977 (22 February 1995) decided that the ICTR should be located in Arusha, Tanzania. S/RES/955 (8 November 1994) established the International Criminal Tribunal for Rwanda. S/RES/935 (1 July 1984) requested the Secretary-General to establish a commission of experts to obtain information regarding grave violations of international law in Rwanda. S/RES/925 (8 June 1994) expressed outrage at crimes being committed in Rwanda. S/RES/918 (17 May 1994) referenced individual accountability for crimes committed in Rwanda. S/RES/912 (21 April 1994) scaled down UNAMIR. S/RES/827 (25 May 1993) established the International Criminal Tribunal for the former Yugoslavia. S/RSE/824 and S/RES/819 (16 April 1993) established “safe areas” in Bosnia and Herzegovina. S/RES/780 (6 October 1992) called on the Secretary-General to establish an impartial Commission of Experts to provide conclusions about accounts of gross human rights violations in the former Yugoslavia. S/RES/764 (13 July 1992) called for adherence to international humanitarian law in the former Yugoslavia. S/RES/752 (15 May 1992) called for adherence to international humanitarian law in the former Yugoslavia. S/RES/743 (21 February 1992) established UNPROFOR.

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acquitted, two proceedings were terminated or the indictments were withdrawn and ten cases were transferred for trial in Rwanda or France (including the prospective cases of six fugitives at large). The cases against three other fugitives at large have been transferred to the residual mechanism. Six convicted individuals are undergoing the appeal process at the time of publication. These figures, though extending over a period of over 20 years of operation, represent a substantial number of cases to hold accountable the perpetrators of some of the most atrocious crimes committed since the Second World War.

The institutional relationship between the Council and its two subsidiary bodies was and continues to be complex and multifaceted. Though it would seem that the Council was united in its firm stance on the establishment of the ad hoc Tribunals and the obligation of states to cooperate with these newly established subsidiary bodies, divisions among Council members soon followed, weakening the resolve to back the Tribunals.

The early years of the Tribunals were marked by struggles to secure cooperation from key member states. Although important legal questions were addressed—including the Tribunals' own legal status and authority as subsidiary institutions of the Security Council—and international criminal law developed, most of the main perpetrators of the atrocities in Rwanda and the former Yugoslavia remained at large, and the Tribunals were left to deal with lower-level perpetrators who would not have been prosecuted in later years, when the Tribunals focused more on high-level perpetrators and referred less culpable defendants to national jurisdictions. The lack of cooperation early in the Tribunals' tenure contributed to prolonging the time that it would take to build cases against, prosecute and judge the appeals of many of the major perpetrators.

Despite the obligation to cooperate with the Tribunals resulting from the invocation of

Chapter VII, the Council in reality took very little action when faced with non-cooperation with its subsidiary bodies. For example, the Council repeatedly heard about the lack of cooperation with the ICTY on the part of several former Yugoslav republics, most notably the Federal Republic of Yugoslavia (FRY). The ICTY President sent the Council three letters in the fall of 1998 informing the Council that the FRY refused to issue visas for investigators to enter the then province of Kosovo or to apprehend fugitives within its territory (S/1998/839 of 8 September 1998, S/1998/990 of 23 October 1998 and S/1998/1040 of 6 November 1998). The President tried to convince Council members that the FRY's noncompliance with the tribunal was "an affront to the Security Council and to all law-abiding nations", arguing that it was the Council's responsibility "to bring non-cooperating States into compliance" and to "provide the support necessary to enable the Tribunal to discharge its mandate".

The Council, in response, reiterated the obligation of states to assist the tribunal and demanded that the FRY comply with the arrest warrants, in resolution 1207 of 17 November 1998. Over the next few years the Council was informed time and again of noncompliance by the FRY with the ICTY but did not pursue the matter further. The Prosecutor complained about the Council's muted reaction to the lack of cooperation with the ICTY, pointing to the fact that it was vocal about other situations (such as those wanted for the Lockerbie bombing case). Later, in his 21 May 2004 report, the ICTY President declared non-cooperation a key obstacle to completion of the Tribunals' work (S/2004/420).

This dynamic regarding fugitives changed somewhat for the ICTY when NATO forces in Bosnia and Herzegovina became more proactive in apprehending indicted individuals and handing them over to the ICTY. (NATO forces were deployed under the authorisation

of the Council in resolution 1031 of 15 December 1995, in accordance with the Dayton Peace Accords. The multinational implementation force [IFOR], comprised of NATO countries and others, relieved the UN of its peacekeeping duties.) A memorandum of understanding was signed between NATO and the ICTY on the procedures governing such assistance on 9 May 1996. Its implementation was inconsistent. Cooperation from other countries in the region eventually improved to allow the capture of the final fugitives yet, over the years, the Council has shown little interest in the apprehension of fugitives wanted by the ICTY. When they were eventually captured, for the most part, economic pressure and incentives from the EU and the US were the catalyst for their capture and transfer to the ICTY.

For the ICTR, cooperation from neighbouring states saw highs and lows. For example, after an ICTR tracking team was able to locate several fugitives in Kenya, under international pressure, the Kenyan police apprehended seven individuals and turned them over to the ICTR on 18 July 1997. However, both Kenya and the DRC, which had been supportive of the Habyarimana regime, were uncooperative with the ICTR. In resolution 1534 of 26 March 2004, the Council made a rare explicit call on Kenya and the DRC to cooperate with the ICTR. However, non-cooperation persisted and follow-up was lacking. When the Prosecutor raised the issue of Kenyan and DRC non-cooperation before the Council in a letter (S/2008/356 of 3 June 2008), the Council was ambivalent. The letter requested that the Secretary-General ask the Council to call on Kenya and the DRC to cooperate with the Court and ensure that fugitives in their territory are transferred to the ICTR. In the case of Kenya, particular attention was given to the presence in Kenya of Rwandan businessman Félicien Kabuga (who was believed to be the "financier" of the genocide and is still at large) and steps

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**UN DOCUMENTS ON TRIBUNALS** Security Council Presidential Statements S/PRST/2008/47 (19 December 2008) acknowledged the progress made in the consideration of a possible residual mechanism or mechanisms by the Working Group. S/PRST/2003/18 (27 October 2003) empowered the ICTR to fund prison renovations. S/PRST/2002/39 (18 December 2002) recalled the obligation of Rwanda to fully cooperate with the ICTR. S/PRST/2002/21 (23 July 2002) endorsed the ICTY's completion strategy. S/PRST/1994/21 (30 April 1994) stated that those who committed violations of international humanitarian law in Rwanda would be held accountable. Security Council Meeting Records S/PV.6880 (5 December 2012) was a briefing by the presidents and prosecutors of the ICTY and ICTR. S/PV.4229 (21 November 2000) was a briefing by the presidents and prosecutors of the ICTY and ICTR. S/PV.4161 (20 June 2000) was a briefing by the president of the ICTY calling on the Council to amend the Tribunal's statute to facilitate the creation of a pool of ad litem judges. S/PV.4150 (2 June 2000) was a briefing by the prosecutors of the Tribunals. Security Council Letters S/2008/356 (3 June 2008) was from the ICTR regarding fugitives in Kenya and the DRC. S/2004/420 (24 May 2004) transmitted a report from the ICTY. S/2003/766 (29 July 2003) was from the Secretary-General proposing appointing two prosecutors for the Tribunals, one in The Hague and one in Arusha. S/2002/938 (14 August 2002) was from the ICTR prosecutor on lack of Rwandan cooperation. S/2002/847 (26 July 2002) was on lack of Rwandan cooperation with the ICTR. S/2002/842 (26 July 2002) was Rwanda's response to allegations of non-cooperation. S/1998/1040 (6 November 1998), S/1998/990 (23 October 1998) and S/1998/839 (8 September 1998) was from the ICTY president to the Council informing it that the FRY refused to issue visas for investigators to enter Kosovo or to apprehend fugitives within its territory. S/1994/1115 (28 September 1994) was the request of Rwanda to establish a tribunal. Secretary-General's Reports S/1995/134 (13 February 1995) was on the establishment of the ICTR. S/1994/470 (20 April 1994) was on the situation in Rwanda. S/25274 (9 February 1993) was the first interim report of the Commission of Experts, which recommended the creation of an ad hoc criminal tribunal.

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to be taken to freeze his bank accounts. In a presidential statement adopted in December that year, the Council merely called “on all States, especially States where fugitives are suspected to be at large, to further intensify cooperation with and render all necessary assistance to the ICTY and ICTR, as appropriate, in particular to achieve the arrest and surrender of all remaining fugitive indictees” (S/PRST/2008/47 of 18 December 2008). This statement is representative of the generally lacklustre response of the Council to send strong messages and take concrete action on non-cooperation.

Rwanda was at times at odds with the ICTR and its jurisprudence, causing problems related to the Court’s ability operate free of undue influence. In one incident, the ICTR and Rwanda were in conflict regarding the extradition from Ethiopia of Froduald Karamira. After being tracked down by Rwandan agents, in June 1996 Karamira was en route from India through Ethiopia, to stand trial in Kigali, when news of his extradition became public. At that point, the Prosecutor requested Ethiopia to extradite him to the ICTR. With Rwanda threatening to no longer cooperate with the Court, the Prosecutor retracted the ICTR extradition request. Karamira was sentenced to death in a Rwandan court for his part in the genocide and executed by a firing squad in a Kigali stadium in April 1999.

Another incident concerned the case of Jean-Bosco Barayagwiza. Barayagwiza was transferred from Cameroon to the ICTR on 19 November 1997. On 3 November 1999, the Appeals Chamber decided to release Barayagwiza and drop the charges against him, due to egregious violations of his due process rights by the Office of the Prosecutor that caused significant delays in the case against him. Outraged by this decision, Rwanda announced the suspension of all cooperation with the Tribunal, refused to allow the Prosecutor to enter Rwanda and to allow Rwandan witnesses to travel to Arusha in another case. Prosecutor Carla Del Ponte filed a request for revision of the decision before the Appeals Chamber, stating bluntly: “Whether we want it or not, we must come to terms with the fact that our ability to continue with our prosecution and investigations depend[s] on the government of Rwanda. That is the reality that we face. What is the

reality? Either Barayagwiza can be tried by this Tribunal, in the alternative; or the only other solution that you have is for Barayagwiza to be handed over to the state of Rwanda to his natural judge, *judex naturalis* ... In other words we can as well put the key to that door, close the door and then open that of the prison. And in that case the Rwandan government will not be involved in any manner”.

On 31 March 2000, the Appeals Chamber reversed the 1999 decision. Barayagwiza was eventually tried and convicted by the ICTR for instigating the perpetration of acts of genocide, among other crimes, and sentenced on appeal to 32 years of imprisonment. Whatever the legal validity of either of the Appeals Chamber’s decisions, the Council did not intervene to counter Rwandan pressure and influence on the ICTR. The ICTR had to come to terms with the fact that Rwandan cooperation was critical to its ability to function.

Rwanda further proved troublesome when the Prosecutor attempted to investigate alleged crimes committed by members of the RPF in retaliation for the genocide perpetrated by the Hutus. The Prosecutor chastised Rwanda for its non-cooperation in RPF cases in a note circulated to the members of the Council during a 23 July 2002 meeting organised under UK presidency and later transmitted to the Council by the UK on 15 August (S/2002/938). This came after the President of the ICTR, in a 26 July letter (S/2002/847), accused Rwanda of non-cooperation in the production of witnesses that led to the premature adjournment of three trials. Rwanda disputed the various contentions that it was not cooperating with the tribunal (S/2002/842).

The Council’s response to Rwanda’s alleged non-compliance was to adopt a presidential statement reiterating the mandatory nature of cooperation with the Tribunals as subsidiary institutions of the Council (S/PRST/2002/39). This response—a rhetorical emphasis on member state cooperation obligations but refraining from stronger language or concrete action—is typical of the Council regarding non-cooperation with the ICTR and in response to similar problems plaguing the ICTY’s relationship with the FRY, Croatia, the “Republika Srpska” and other regional actors. It was only when a separate Prosecutor for the ICTR—who did

not pursue action against the RPF leadership—was appointed by resolution 1503 (on 28 August 2003) that this issue faded away.

The Tribunals, therefore, have often received rhetorical rather than practical support from the Council. In addition, despite the Council’s rhetoric on non-cooperation and other woes of the Tribunals, by the turn of the century, the P5 and some in the Secretariat became frustrated with the fact that the Tribunals were not meeting their own deadlines for ending various proceedings, resulting in the need to regularly extend judges’ terms. Russia was vocal in its criticism of the ICTY and its jurisprudence (see more below), others were cautious about openly criticising the ICTY for fear of being accused of interfering in the judicial process. This was part of the dynamic of the inevitable friction between fast-paced political interests and lengthy judicial processes.

It became clear relatively early in the Tribunals’ lifespans that increased capacity was necessary if they were to finish their work on time. The Council took action to increase the ICTY’s capabilities on 30 April 1998 by adopting resolution 1165, establishing a third trial chamber in the ICTY, which allowed the tribunal to keep up with the swell of trials that followed the apprehension of some of the fugitives who had previously eluded it. By the early 2000s, however, it became evident that this would not be sufficient to completely eliminate delays.

It was not only non-cooperation from Rwanda and the former Yugoslavia (or their neighbours) that hampered the Tribunals. The Secretary-General on 24 June 2004 circulated letters to the president of the General Assembly and the president of the Council complaining that the Tribunals were in dire financial straits because of member states’ failure to pay their assessed contributions in full and on time (S/2004/512). The fact that the Council has not taken strong action to ensure member-state cooperation also affected the timelines as fugitives remained beyond the Tribunals’ reach.

While the Council did not directly address a major underlying cause of the extension of the Tribunals’ timelines—member state non-cooperation—except rhetorically, the Council did react to the outcome of that non-cooperation. It responded in two ways: by implementing changes to the institutional structure and

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operation of the Tribunals and by pushing a completion strategy focused on bringing the work of the Tribunals to an end as quickly as possible to limit costs.

The institutional changes that the Council implemented during the early 2000s were designed to address some of the challenges of the ad hoc tribunal model. One of the fundamental challenges to the Tribunals is their capacity for retention of experienced personnel, from judges to courtroom employees. The Tribunals' temporary nature has meant that talented staff members have been reluctant to commit themselves to an institution that will, if all goes to plan, cease to exist in a few years.

Because of the premium that the Council placed on speed and efficiency, it became critical that the Tribunals have enough judges to maintain a full operating capacity in each trial chamber. On 14 August 2002, the Council took a step to address that problem by establishing a pool of ad litem judges (judges appointed to adjudicate a specific case) for the tribunals in resolutions 1329 and 1431. Having these judges allowed the Tribunals to be prepared for additional trials as fugitives trickled into custody and investigations were completed. The powers and responsibilities of ad litem judges have increased over time; for instance, the Council enhanced ad litem powers regarding pre-trial proceedings in resolution 1512 on 27 October 2003. The Council has also consistently extended the terms of permanent judges as they expired in order to assure that the Tribunals could continue functioning at peak capacity.

While the ICTY and ICTR are first and foremost courts, they have played an important role in the promotion of the rule of law in the former Yugoslavia and Rwanda. This aspect of their function has expanded over the years, to include interacting with the criminal justice systems in the relevant countries. This has been an institutional evolution generally supported by the Council because of the bearing that developed domestic judicial institutions have on reducing the case load of the Tribunals.

Despite the Council's focus on preventing impunity for violators of international humanitarian law, other values crucial to the rule of law have received attention: for example, concerns about local prison facilities, especially in Rwanda. The Council affirmed

in a presidential statement on 27 October 2003 (S/PRST/2003/18) that the ICTR is empowered to fund prison renovations. Such a willingness to countenance an extension of the Tribunals' roles might seem surprising for a Council increasingly concerned with the financial burdens, but given that the majority of the costs generated by the Tribunals are related to their core functions, the smaller amount of money spent on peripheral activities is viewed as a good investment if those capacity-building initiatives can increase the efficacy of national jurisdictions and therefore lessen the case burden and, ultimately, lifespan of the Tribunals.

One institutional step that was taken by the Council was the establishment of an informal Council working group on international criminal tribunals in June 2000 to discuss a specific technical issue relating to the ICTY statute. This became over time a regular venue for private Council discussions regarding the Tribunals, in particular when a completion strategy for the Tribunals was formed and being monitored.

Perhaps the largest institutional change during the early 2000s involved the relationship between the two Tribunals. The ICTY and ICTR had been closely linked since the latter's inception, and they remain so today. The initial decision to have the prosecutor of the ICTY also serve as the prosecutor for the ICTR proved a poor one, logistically and otherwise. In practical terms, as the Tribunals became busier, each one needed its own prosecutor to handle the caseload. Politically, there was regional discomfort with the fact that the ICTR did not have an African prosecutor and that the single prosecutor was essentially based in The Hague, while spending limited time in Arusha. The Secretary-General in a 28 July 2003 letter proposed amending the statute to allow for two prosecutors, one in The Hague and one in Arusha, in the hope that the change would allow for greater focus on the particular challenges of each Tribunal (S/2003/766). The Council agreed with the proposal and created a second prosecutor position on 28 August 2003 in resolution 1503. This institutional reconfiguration was a welcome, if overdue, change, though its timing was not absent political motivations: it also sent an implicit message to Rwanda that a new prosecutor would not pursue indictments against RPF members, as

mentioned above, thus promising its continued cooperation with the Court.

Resolution 1503 also pressed the Council's second response to the delays and challenges that had materialised over the Tribunals' first decade of operation: a focus on speed of completion. That resolution, applicable to both ad hoc Tribunals, followed up on a 23 July 2002 presidential statement that had laid out a completion strategy for the ICTY (S/PRST/2002/21). The completion strategy that the Council charted in resolution 1503 and pressed the Tribunals on thereafter had several key elements:

- focusing the Tribunals' efforts on bringing "the most senior leaders" suspected of perpetrating crimes to justice;
- transferring other "low level" perpetrators to competent national jurisdictions for trial; and
- strengthening the capacity of such jurisdictions.

These three pillars were intertwined: by improving national capacity in the former conflict regions, the Tribunals would be able to focus on a limited number of "high profile" criminals and complete their work.

Council members continued to reiterate the importance of the prevention of impunity for international criminals and even called on their fellow member states to cooperate with the Tribunals to that end. On the whole, though, interventions during Council meetings on the Tribunals began to place increasing focus on speed of completion.

Transferring cases to national courts gave the Council a solution to its potentially conflicting aspirations: on the one hand, to uphold its commitment to accountability and on the other, to conclude the work of the Tribunals as soon as possible for financial reasons. Although a handful of cases were transferred to national courts outside the Balkans and Rwanda, that was never done in any significant numbers. There were very good reasons pertaining to restorative justice for preferring local jurisdictions, along with the obvious concern about the optics of outsourcing justice to, at least in the case of Rwanda, far-off Western countries. Because of limited capacity in local jurisdictions, transferring cases to national jurisdictions meant developing that capacity. A capacity building process began in the mid-1990s but became a major focus in the new millennium as part of the completion strategy.



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Building national capacity also had the positive side effect of strengthening the overall rule of law in the two former conflict areas. Justice systems that needed to be built up to deal adequately with cases transferred from the ad hoc Tribunals would benefit from those improvements long after the Tribunals were gone. This logic was appealing to the Council, and so calls for transferring lower-priority cases to national jurisdictions and for building increased capacity in those jurisdictions became commonplace in Council rhetoric. The abolition of the death penalty in Rwanda, in this context, in June 2007 can be viewed as a positive effect of the ICTR's influence on the national judicial system on the one hand, and on the other hand a change that allowed the ICTR to consider seriously the transfer of indictees to stand for fair trial in Rwanda.

The Council's timeline strategy faltered somewhat out of the gate, and less than a year after the completion strategy was articulated in resolution 1503, the Council adopted a second resolution on the topic. In resolution 1534 of 26 March 2004 the Council, concerned that the non-cooperation of regional states threatened to derail the completion strategy, called on member states, including specific regional actors relevant to each of the Tribunals, to "intensify cooperation" with the courts. The resolution also set up an institutional mechanism to encourage compliance with the completion strategy, requesting that the Tribunals each provide biannual reports to the Council on the progress made in implementing the completion strategy. Despite the concern regarding non-cooperation of member states and its effect on the completion strategy, the Council held fast to its objective of speed.

More recently, as the Tribunals approached 20 years of operation, the Council made several other institutional adjustments to allow them to continue functioning while beginning to address institutional issues specific to their wind-down phase.

Beginning in 2009 with resolution 1878, the Council made several changes to the procedures governing ad litem and permanent judges in light of the increased staffing difficulties as the Tribunals crept slowly closer to completion. Resolution 1878 on the ICTR, adopted on 7 July, allowed several specific judges to work part time while serving in another judicial position. The Council was

careful to assert that resolution 1878 did not set a precedent but adopted nearly identical resolutions two years later (resolution 1995 of 6 July 2011 and resolution 2013 of 14 October 2011). Over the years, the Council also increased the number of ad litem judges for the ICTY (resolution 1915 of 18 March 2010 and resolution 1900 of 16 December 2009), allowed the Secretary-General to reappoint former Tribunal judges to the ICTR (resolution 1932 of 29 June 2010), allowed judges to complete ongoing cases after the expiration of their terms in both tribunals (resolutions 1954 and 1955 of 14 December 2010) and allowed ad litem judges to run and vote in elections for the presidencies of the Tribunals (resolution 1329 of 30 November 2000 and resolution 1995 of 6 July 2011). These measures provided the Tribunals with flexibility in the face of increasingly difficult challenges in retaining competence as the Tribunals approached completion and aligned the privileges ad litem judges with their ever-increasing responsibilities.

Meanwhile, the Council continued to stress adherence to the completion strategy, reiterating its key points in a presidential statement on 19 December 2008 (S/PRST/2008/47). That same presidential statement recognised the need for establishing a Residual Mechanism to handle outstanding issues after the Tribunals closed their doors. On 22 December 2010, in resolution 1966, the Council established such a mechanism to handle any issues related to the Tribunals' work that would arise after they are closed. In essence, the Residual Mechanism is to perform the functions of the Tribunals, albeit on a much smaller scale, through two branches, a successor to ICTR in Arusha and a successor to ICTY in The Hague. The two branches were inaugurated in July 2012 and July 2013, respectively. In the short term, the mechanism's responsibilities include securing the arrest, transfer and prosecution of the nine remaining fugitives still wanted for trial by the ICTR and attending to the expected appeals in several cases from the Tribunals. Longer-term responsibilities include the maintenance of archives, protection of witnesses and supervision of sentences. Resolution 1966 also touched on the Tribunals' legacy by requesting that the Secretary-General make plans for housing and maintaining the Tribunals' archives.

Resolution 1966 stipulated that all remaining work by the Tribunals should be completed no later than 31 December 2014, to prepare their closure and to ensure a smooth transition to the Residual Mechanism. The Residual Mechanism delivered its first appeal judgment on 18 December 2014 in the appeal of Augustin Ndirabatware against the judgment of the Trial Chamber of the ICTR. At present, the mechanism continues to face two long-standing challenges. The first is to ensure that the nine people indicted by the ICTR but not yet arrested are apprehended (the three most senior individuals are to be tried by the Residual Mechanism and the other six by Rwanda). The second challenge involves the long-standing issue of relocation of individuals the ICTR has acquitted or released but who are unable or afraid to return to their country of citizenship. Since 2011, the Council has regularly called on member states to assist with their relocation, but not much progress has been made. The number of acquitted persons still in Arusha was recently reduced to eight after Belgium agreed to accept one person. As of 1 January 2015, the Residual Mechanism took over the formal responsibility for relocation.

The continuing activity of the Tribunals into their third decade, well beyond what was initially anticipated, and requiring far more from assessed contributions than the Council initially imagined, has been intertwined with another source of tension, that of the political dimension of their existence and jurisprudence. One factor here is non-cooperation of member states; however, in the case of the ICTY, the political tensions surrounding its work have gone far beyond the Balkans. Russia, in particular, has been consistent throughout the years in its dissatisfaction with what it views as the ICTY's focus on Serbian and Bosnian-Serb perpetrators over Croats and other Bosnians.

In Russia's view, this stood in stark contrast to the position of the ICTY on events in Kosovo, which the Prosecutor announced she was investigating in March 1998 and thereafter. A major deterioration in the attitude of Russia towards this Tribunal came in the aftermath of the political tensions surrounding the NATO campaign against the FRY in March-June 1999, in response to atrocities committed by Serbian forces against the ethnic Albanian population in Kosovo. Russia

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strongly opposed the operation, which was carried out without Council authorisation. The campaign is said to have resulted in the deaths of approximately 500 civilians and the injury of hundreds of others. Since the bombings took place within the territory of the former Yugoslavia, the ICTY had jurisdiction to look into the acts. Nevertheless, in a widely controversial decision, ICTY Prosecutor Carla del Ponte concluded on 2 June 2000 that there was no basis for an investigation into actions related to the NATO air campaign.

Russia, speaking at a Council meeting on the Tribunals on 2 June 2000, stated in the Council that the ICTY was being partial when it decided to take no action against participants of the NATO campaign, “even though last year’s bombing campaign ... had resulted in the deaths of innocent civilians and the destruction of non-military targets” (S/PV.4150). The Russian representative also took the opportunity to criticise the ICTY for signing the 1996 memorandum of understanding with NATO on cooperation regarding fugitives, without bringing the matter to the Council beforehand.

In this context, then-Russian Ambassador Sergey Lavrov said in the Council on 20 June 2000 that the Tribunal has adopted, “a clear anti-Serb line” and that “[h]aving predetermined for itself the main culprit in the Yugoslav tragedy, the Tribunal nevertheless often turns a blind eye to cases of noncompliance with the norms of international humanitarian law by other parties to the conflicts. When it comes to reports of violations committed by the Federal Republic of Yugoslavia, the Tribunal immediately issues indictments and gets down to work, as, for example, in the case of the situation in Kosovo. However, if questions arise — for instance, concerning the actions of the North Atlantic Treaty Organization (NATO) — the Tribunal, even in the face of such obvious facts as the deaths of innocent civilians, the destruction by air strike of civilian targets, finds no grounds for launching an investigation. We are appalled by the Tribunal’s failure to act in response to ongoing ethnic cleansing against Serbs and other national minorities in Kosovo” (S/PV.4161).

On 21 November 2000, China joined Russia in taking the position that the ICTY was not acting in a just manner regarding the NATO bombings. China stated its serious

reservations about the assessment of the Prosecutor that there was no basis for investigating crimes against humanitarian law during NATO’s bombing of the FRY (S/PV.4229).

Russian rhetoric and action in support of its ally the FRY (and later Serbia), intensified as the ICTY extended its expected completion schedule and brought to the Council requests for extending judges terms. Though the P5 are united in their dismay over the financial burden of the Tribunals, Russia has made a connection between its political objection to the ICTY’s jurisprudence and the financial frustrations. Over the last few years, Russia has backed its rhetoric with concrete steps to display its dismay at the ICTY, some symbolic and some more concrete.

Thus, outraged by a recent acquittal and release of two Croatian generals by the ICTY’s Appeals Chamber, Russia tied this issue to the Council’s consideration of a pending request from the ICTY for an extension of judges’ terms attached to a notification from the Tribunal that it would not be able to end its proceedings by 2014, as required by the completion strategy (this was already a postponement from the original 2010 end date). Russia commented on the appeal decision on 5 December 2012, “Such actions of the ICTY only generate mutual distrust among peoples across the former Yugoslavia. In that situation, a legitimate question arises: how to deal with the ongoing requests of the ICTY for indefinite extensions of the terms of its judges?” (S/PV.6880).

And indeed, later that month Russia postponed an adoption of a resolution to extend the judges’ terms, insisting on an independent analysis of the “legal and administrative activities of the ICTY”. A technical request on the part of the Tribunal, therefore, became a complicated negotiation, due to the fact that the Council is both a highly political body and the parent body to which the ICTY, an independent judicial body, must look for its continuing function and existence. In an eventual compromise, resolution 2081, adopted on 17 December 2012, requested the ICTY itself to produce a comprehensive plan on the completion strategy, but extended the judges’ terms. Russia abstained in the vote.

Thereafter, as the Tribunals presented further requests for extensions of their judges’ terms, Russia would only agree to short-term extensions, and a pattern of abstentions by

Russia on resolutions concerning the ICTY has emerged. The Tribunals notified the Council that they would not meet the 31 December 2014 completion date, leading to more criticism of their lack of effectiveness, in particular of the ICTY, which expects to complete its work only in 2017. On 18 December 2014, the Council adopted resolutions 2193 and 2194, which extended the terms of several judges of both Tribunals and reappointed the Tribunals’ respective Prosecutors for one year, urging the two bodies to intensify their efforts to complete their work. Russia abstained on resolution 2193 on the ICTY. Furthermore, even though the ICTY requested that some judges’ terms be extended until 2017, Russia made sure during negotiations that the extensions were granted only until December 2015. This gives the Council annual oversight over the ICTY’s progress and allows Russia to voice its criticism of the ICTY regularly and use it as leverage for certain concessions from other Council members. Political questions also caused delays in what were technical requests. The Council was asked to act to fill a vacancy on the ICTY Appeals Chamber in March 2013, but disagreements on procedure between Russia and other Council members made the process cumbersome. The appointment only occurred on 18 November of that year. Such delays, ironically, work to the detriment of the completion strategy.

Russia’s disapproval of the ICTY’s body of work also manifested itself when the UK planned on having an open debate to mark the Tribunal’s 20th anniversary in June 2013. In a 15 May letter, sent on behalf of 15 countries, Ambassador Christian Wenaweser (Liechtenstein) asked the President of the Council that the June debate on the Tribunals be opened to the participation of member states. However, Russia took a firm position against having an open debate on the Tribunals. Despite the support of most Council members for holding an open debate, no Council member was willing to request a procedural vote by the Council to allow all those interested to speak during the debate. Eventually, Russia agreed to allow Liechtenstein to speak during the debate on behalf of the interested countries “on an exceptional basis”, but the debate was not open to the wider membership.

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### *Conclusions and Analysis*

By establishing the ICTY and later the ICTR, the Council created innovative institutions to address grave violations of international humanitarian law that the Council had been unable or unwilling to prevent. In the case of the ICTY, this was a measure taken as the conflict was ongoing. The lack of real capacity in the first few years of the ICTY to try high-ranking perpetrators ultimately meant the ICTY lacked a deterring element to hasten the end of the conflict in the former Yugoslavia. In the case of the ICTR, deterrence was not an issue as the Tribunal was established after the conflict was over.

The strengths and weaknesses of this institutional model could not be known at the time of the ICTY's founding, and the Council would learn them, sometimes the hard way, over the next decades. The Tribunals would play a significant role in developing international criminal law from a normative standpoint and providing an institutional framework to promote accountability in the two war-torn regions. They were also, at least in the early years, a testament to the fact that the Council can in a significant way address accountability in areas of conflict where mass atrocities are committed.

Consistency has proved to be as important as the creation of the Tribunals themselves. Undoubtedly, when the Tribunals were set up, Council members were not fully aware of the focus and attention that would be needed to ensure the Tribunals' success in upholding accountability. The Council's responses to the various practical and conceptual challenges inherent to the Tribunals were of different kinds. On an administrative level, the Council has been generally responsive to requests coming from the Tribunals, such as extensions of judges' terms. The Council was also responsive in modifying the Tribunals' statutes and organisation to adapt to various situations and ensure continuity and efficiency—for example, when a separate prosecutor position for the ICTR was created or when the number of chambers was expanded.

Another practical response is the transfer of cases to national jurisdictions which became a major part of the Council's and the Tribunals' completion strategy, and while the Council and its subsidiary organs have been criticised for abdicating responsibility on less high-profile cases, a positive side effect has

been the Council's shaping of national legal systems in post-crisis areas—including the elimination of the death penalty—and the building of national capacities in those same areas. Certainly the Council cannot claim all credit for those advances, and the states themselves have dedicated substantial efforts to improving their capacity. But it is undeniable that the Council influenced those developments. The fact that Rwanda went from voting against the resolution establishing the ICTR in part because of the absence of the death penalty to outlawing the death penalty altogether is an achievement in and of itself.

Nevertheless, not all of the administrative needs were met. The Tribunals faced special challenges as a result of their temporary nature. Staffing proved a crucial concern. Retaining staff became increasingly difficult as the Tribunals crept closer to completion, and losing experienced judges and staff exacerbated the delays and difficulty of completing the Tribunals' mission.

One of the biggest challenges plaguing the ad hoc Tribunals was their reliance on member states for cooperation, such as apprehension of the accused and allowing investigations. The fact that this crucial and preliminary step was largely outside the Tribunals' control impacted them deeply in the early years, preventing them from trying the most culpable of the accused and causing them to take on cases that they would not have pursued had they arisen later in the Tribunals' life cycle. Even after NATO action and political pressure from other non-Council members led to high-profile apprehensions, prosecutions and ultimately convictions, fugitive problems continued to plague the process, and non-cooperation from important regional member states hamstrung the Tribunals.

The Council failed to follow up on the cooperation of states, obligatory under the Chapter VII resolutions establishing the Tribunals. It refrained from confronting non-cooperation as a violation of its resolutions. Even though this undermined its legitimacy, the Council chose to distance itself from the problem by merely reiterating states' obligations and leaving its subsidiary bodies to deal with the ramifications of this non-cooperation. This shows that as important as it was to require state cooperation under Chapter VII and give the Tribunals supremacy over national jurisdictions in their statutes,

ensuring that such cooperation is in fact given over time and that supremacy is respected is equally important. Without follow-up, these obligations become a dead letter.

Non-cooperation in the Balkans hampered and delayed the ICTY's work, as did non-cooperation by certain African countries where perpetrators were taking refuge from the ICTR. Rwanda, though supportive of the idea of an international tribunal, used its political leverage to try and persuade the ICTR to refrain from pursuing RPF members and from taking other actions or decisions. The ICTR, lacking any serious backing from the Council, was left to face these pressures by itself and at times had to adjust its policies to ensure more productive behaviour. Thus, while the Council itself mitigated the ability of local governments to interfere with the judicial process by placing the Tribunals outside the relevant countries, these countries were able to continue to exert political pressure on the Tribunals, which for the most part was not countered by Council action or strong messaging.

The Security Council's promotion of speed-enhancing institutional choices can be viewed as prudence in the face of the efficiency challenges inherent to the tribunal model. However, had the Tribunals enjoyed greater support from the Council, they might have been able to achieve their goals sooner and more effectively. The Council intentionally and rightly stayed out of the substance of judicial proceedings and allowed the Tribunals to develop international criminal law without undue political influence, but pressure from the Council to pursue completion above all, its refusal to take meaningful steps to address non-cooperation and emphasis on financial concerns impacted the work of the Tribunals in undesirable ways. While the lack of comprehensive oversight of the Tribunals' work likely contributed to its achievements in developing international criminal law, it also made it difficult to ascertain any hidden negative impact of the practical and rhetorical pressure exerted by the Council on the Tribunals to finish cases and minimize their activities. However, the message given by the Council—that the institutional financial imperatives outweigh accountability—is at odds with sincere commitment towards accountability.

Despite the successes of the Tribunals—which include the development of

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international criminal law, the accountability of perpetrators and the increased prominence of the rule of law in national legal systems—their experience has demonstrated the difficulties of the ad hoc tribunal model, especially when support for the institutions from their parent body is tepid. Specialised tribunals under the auspices of the Security Council had the potential to be a valuable institutional model for addressing serious violations of international humanitarian law and for promoting the rule of law, but they require a level of Council engagement that has been noticeably absent in the case of the ICTY and ICTR.

The Council developed a strategic response to the challenges inherent in the ad hoc Tribunals that sought to balance the Council's commitment to preventing impunity with member states' concern for costs. Although the Council has stressed the mandatory nature of member state obligations to the Tribunals, it has demonstrated a consistent unwillingness to address the problem of member-state non-cooperation beyond occasionally singling out the most extreme cases. Instead of addressing this underlying cause of delay, the Council made speed of resolution a priority by pressuring the Tribunals to execute completion strategies emphasising triage and referral to national jurisdictions.

Overall, the creation of the Tribunals was a positive development that brought about a substantial institutional and financial commitment. An ad hoc tribunal, if adequately supported, has the potential to be an effective tool in developing international law and promoting accountability and the rule of law during and in the aftermath of conflicts that include egregious violations of international humanitarian law. The cost issue may be a reason that the Council is unlikely to create another ad hoc tribunal in the near future. High cost of conflict-specific tribunals was one of the incentives for creating the ICC.

Indeed, the existence of an international permanent criminal jurisdiction would negate, in theory, the need for an ad hoc tribunal. However, it is important to bear in mind that some of grievances about the “wastefulness” of the Tribunals were caused by misconceptions. Better understanding the model of the ad hoc tribunals and setting the correct expectations may lead to better results if the Council goes this route again.

There will always be a dissonance between ever-shifting political priorities and the slow wheels of justice. While the Council was no longer politically concerned with the former Yugoslavia and Rwanda and had moved on to other pressing issues, its subsidiary bodies were slowly pursuing justice. Without Council support, their task was doomed to stall and be less efficient.

Council members should have a better understanding that a judicial body, expected to be independent of the political manoeuvring of the Council, is a different kind of institution than other Council subsidiary bodies, most of which are inherently political in nature. Council members were frustrated, at times, with their lack of control over the operations and jurisprudence of the Tribunals. But unlike a subsidiary body such as a sanctions committee, which is structured to represent Council members, a judicial subsidiary organ must be independent to enjoy legitimacy and achieve its purpose. An additional factor leading some to frustration may have been that Council members felt that they had lost control over the process they had set in motion.

Finally, as with other ad hoc bodies created to prosecute perpetrators in a particular conflict, issues of political considerations and biases will inevitably be raised by some. The Council needs to strike the correct balance between political backing for its subsidiary body and non-interference in the substance of the work itself.

### Special Court for Sierra Leone

The establishment of the Special Court for Sierra Leone (SCSL) was prompted by one of the bloodiest and most vicious civil wars of the modern era, marred by the active participation of acting heads of state and fuelled in part by the desire to gain control over the country's vast diamond deposits (which came to be popularly known as “blood diamonds”).

The civil war began in March 1991 when the Revolutionary United Front (RUF) led by former low-ranking soldier Foday Sankoh, accompanied by Liberians loyal to warlord Charles Taylor as well as mercenaries from neighbouring Burkina Faso, invaded Sierra Leone from Liberia.

Despite a peace agreement signed in 1996, the Armed Forces Revolutionary Council (AFRC), a group of army officers allied to the rebels and led by Johnny Paul Koroma, overthrew newly elected President Ahmad Kabbah in May 1997 and joined forces with the RUF. The Security Council's first action on 8 October 1997 was the creation of a sanctions regime (and sanctions committee) including a travel ban on the military junta in power and an oil and arms embargo with the adoption of resolution 1132. The resolution authorised the Economic Community of West African States (ECOWAS) to ensure its implementation.

The government and the RUF returned to the negotiating table in Lomé, Togo, in mid-1999, and the two sides signed the Lomé Peace Accord in July of that year. The Lomé agreement provided amnesty for the RUF and was based on the government's sharing power with the RUF, including a position for RUF head Sankoh as chairman of a new Commission for the Management of Strategic Resources, National Reconstruction and Development. However, a handwritten annotation by the Secretary-General's Special Envoy to Sierra Leone Berhanu Dinka, on the instructions of the Secretary-General,

**UN DOCUMENTS ON THE SPECIAL COURT FOR SIERRA LEONE** Security Council Resolutions S/RES/2097 (26 March 2013) renewed the UN Integrated Peacebuilding Office in Sierra Leone (UNIPSIL) for 12 months. S/RES/2008 (16 September 2011) extended the mandate of UNMIL until 30 September 2012 and called on UNOCI and UNMIL to coordinate strategies and operations in the Liberia-Cote d'Ivoire border regions. S/RES/1938 (15 September 2010) extended the mandate of UNMIL until 30 September 2011. S/RES/1885 (15 September 2009) extended UNMIL's mandate until 30 September 2010. S/RES/1793 (21 December 2007) extended the mandate of UNIOSIL until 30 September 2008. It also granted exemption from the Council's travel ban for witnesses who might need to appear before the Special Court for Sierra Leone (dealing with the trial of former Liberian President Charles Taylor). S/RES/1688 (16 June 2006) requested the Secretary-General to assist in the transfer of former Liberian President Charles Taylor to the SCSL's special outpost in the Netherlands. S/RES/1667 (31 March 2006) extended the UNMIL's mandate, reaffirmed its intention to deploy troops between UNMIL and UNOCI and to review the tasks and troop level of UNOCI. S/RES/1638 (11 November 2005) mandated UNMIL to apprehend Charles Taylor. S/RES/1626 (19 September 2005) authorised a temporary redeployment in Sierra Leone of UNMIL troops. S/RES/1620 (31 August 2005) established UNIOSIL. S/RES/1562 (17 September 2004) amended the mandate of UNAMSIL. S/RES/1537 (30 March 2004) authorised the drawdown of UNAMSIL. S/RES/1508 (19 September 2003) extended the mandate of UNAMSIL for a period of six months from 30 September 2003. S/RES/1470 (28 March 2003) extended the mandate of UNAMSIL for six months and called on states to contribute to the SCSL and fulfil pledges given for its funding. S/RES/1436 (24 September 2002) authorised UNAMSIL's drawdown. S/RES/1370 (18 September 2001) expressed the Council's continued deep concern at the reports of human rights abuses and attacks committed by the RUF, the CDF and other armed groups and individuals, against the civilian population, in particular the widespread violation of the human rights of women and children, including sexual violence. S/RES/1315 (14 August 2000) requested the Secretary-General to negotiate an agreement to create the Special Court for Sierra Leone. S/RES/1270 (22 October 1999) established UNAMSIL. S/RES/1132 (8 October 1997) imposed an embargo on diamonds and petroleum.

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was added to the original document, asserting that the UN was of the view that the amnesty provision would not apply to genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law (S/1999/836). Alongside the introduction of amnesty as a basis for moving forward, Article XXVI of the Accord provided for a truth and reconciliation commission (TRC) to be established, covering the period since the beginning of the civil war in 1991. The TRC was put into Sierra Leonean law by an Act adopted by parliament on 10 February 2000.

On 22 October 1999, the Security Council authorised the establishment of the UN Mission in Sierra Leone (UNAMSIL), with a maximum strength of 6,000 military personnel, including 260 military observers, to oversee the agreement (S/RES/1270). However, the RUF did not abide by the agreement, resisted disarmament efforts and in April and May 2000 attacked UN peacekeepers, taking several hundred of them hostage. The Council responded by increasing the authorised strength of UNAMSIL in resolution 1299 of 19 May 2000. The abduction of UN peacekeepers prompted an intervention by UK forces that, along with the UNAMSIL presence, brought the parties back to the negotiating table and focused the international community's resolve to end the conflict, which was officially declared over in January 2002.

It was at this point, after the RUF failed to abide by the Lomé Accords, President Kabbah requested that the Secretary-General assist in the establishment of a special court to try the RUF senior leadership for crimes against Sierra Leoneans and UN peacekeepers.

Kabbah made an official request in a letter to the Council to establish a special criminal court on 12 June, reasoning that Sierra Leone was ill equipped to try the RUF criminals on its own (S/2000/786). His request included a general framework for a court to be established by the Council along the following lines:

- The mandate of the court should be narrow in order to prosecute “the most responsible violators and the leadership of

the Revolutionary United Front”, limiting the trials to a few dozen.

- The applicable law should be international law for international crimes and domestic criminal law.
- The court should be seated in Sierra Leone for the pre-trial and trial phases but have the ability to relocate if security so requires. The court of appeals for the ICTR and ICTY in The Hague could be used as the court of appeals for the special court for Sierra Leone.
- The court should have two chief co-prosecutors, one of which would be the Attorney-General of Sierra Leone. It should also have provisions for defence attorneys and investigators.
- UNAMSIL should be able to apprehend indictees and provide security if needed.
- Sentences of the convicted should be served in Sierra Leone in proper facilities constructed with international assistance.

The Secretary-General's initial observations, contained in his 31 July report on UNAMSIL were that the court should try “those most responsible for the serious violations of international humanitarian law committed in Sierra Leone”, under both international and domestic law (S/2000/751). He noted that the UN would not associate itself with a court that under Sierra Leonean law could impose the death penalty. He further noted that the local justice system was fair, yet severely understaffed and underfunded and hence would require substantial assistance. At the same time, he told the Council that there were enough barristers available to serve as defence counsel if provided with adequate security guarantees.

Several Council members, including the UK, US and The Netherlands (which served on the Council in 1999 and 2000) were very supportive of the proposition to establish the SCSL. At the same time, there was a general consensus among the P5 that the Council would not establish the SCSL as a subsidiary body of the Council, mainly given the financial implications involved, based on the experience of the ad hoc Tribunals. On 14 August 2000, the Council adopted resolution 1315,

requesting the Secretary-General to negotiate an agreement with Sierra Leone “to create an independent special court consistent with this resolution” and to report to the Council within 30 days on the negotiations and any recommendations he might have. Among other things, the Secretary-General was requested to report on the amount of voluntary contributions that would be needed to operate the Court, the comment thus indicating the Council's objection to using assessed contributions for this purpose.

In his 4 October report, the Secretary-General presented the Council with a draft agreement negotiated with Sierra Leone and his observations (S/2000/915). He noted that the agreement would establish the SCSL as a standalone court, not part of the UN and not anchored in domestic law. As it would not be created by the Council, but by agreement with Sierra Leone, other states would not be obligated to cooperate with it. The Secretary-General therefore recommended that the Council consider endowing the SCSL with Chapter VII powers in order to request foreign governments to surrender accused persons to it.

In his report, the Secretary-General told the Council that he considered it appropriate that the temporal jurisdiction of the Court be set to begin with events that occurred from 30 November 1996 onwards (the date of the Abidjan Peace Accords, the first peace accord signed between warring parties, which failed to end the civil war in the country), since going back to the beginning of the civil war would overburden the SCSL. As for amnesty, both the UN and Sierra Leone maintained that the Lomé Accords did not affect the personal jurisdiction for the SCSL. Another element with institutional implications was the view that having jurisdiction over those bearing “the greatest responsibility”—as stipulated by the Council in resolution 1315—would limit the prosecutor to pursue convictions only against high-ranking officials. The Secretary-General recommended the phrase “persons most responsible”, which would guide the prosecutor to consider the gravity and scale of the act, not only the high rank or political position of the suspect.

**UN DOCUMENTS ON THE SPECIAL COURT FOR SIERRA LEONE** [Security Council Presidential Statement S/PRST/2014/6](#) (26 March 2014) welcomed the conclusion of UNIPSI and commended Sierra Leone for its achievements in consolidating peace 12 years after the conclusion of its civil war. [Security Council Visiting Mission Reports S/2014/242](#) (3 April 2014) was on the 19-23 May mission to West Africa including Sierra Leone. [S/2004/525](#) (2 July 2004) was on the 20-29 June mission to West Africa including Sierra Leone. [S/2003/688](#) (7 July 2003) was on the 26 June- 5 July mission to West Africa including Sierra Leone. [S/2000/992](#) (16 October 2000) was on the 7-14 October mission to Sierra Leone. [Security Council Meeting Records S/PV.4835](#) (30 September 2003) was the debate on the UN's role in promoting justice and the rule of law in post-conflict situations. [S/PV.4833](#) (24 September 2003) was an open meeting on the role of the UN with regard to justice and the rule of law. [S/PV.4785](#) (9 July 2003) was on the report of the Security Council mission to West Africa from 26 June to 5 July 2003. [S/PV.4439](#) (18 December 2001) was on the report of a UN-ECOWAS mission to West Africa. [S/PV.4340](#) (28 June 2001) was on the situation in Sierra Leone.

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The Secretary-General further advised against sharing institutional resources between the ad-hoc Tribunals and the SCSL, as the burden on a possible joint appeals chamber would be beyond its capacity. He suggested two trial chambers and one appeals chamber for the Court.

A key point of contention in the report revolved around financing. The Secretary-General was concerned that voluntary contributions for the SCSL would not provide a reliable and continuous source of funding for the Court and that Sierra Leone lacked the resources to fund the SCSL itself. He said bluntly that “the only realistic solution is financing through assessed contributions”. The request to use assessed contributions was further emphasised by Kabbah during the Council’s 9-12 October 2000 visit to the country (S/2000/992).

Nevertheless, in a 22 December 2000 letter from the president of the Council to the Secretary-General, the Council reiterated its position that the Court be funded by voluntary contributions (S/2000/1234). It suggested the creation of a management committee to assist the court in obtaining adequate funding and provide advice on matters of court administration. It further took the position that the Secretary-General will not open the Court before funding was available for its first year of operation, with further pledges for a second year.

The Council further requested that the agreement with Sierra Leone exclude jurisdiction over peacekeepers, unless the state of nationality was “unwilling or unable genuinely to carry out an investigation or prosecution”, and the Council, “on the proposal of any State”, authorised the court to exercise its jurisdiction. The Council also insisted that jurisdiction remain over “persons who bear the greatest responsibility for serious violations of international humanitarian law and

Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone”, as it was appropriate for the SCSL to focus on the leaders and their crimes. Finally, the Council took the position that one trial chamber, not two, was sufficient.

The exchange of views continued when the Secretary-General in a 12 January 2001 letter to the Council’s president reluctantly conceded on several issues (S/2001/40). He said that the language on those bearing the “greatest responsibility” could be used, though it was up to the SCSL to interpret the meaning of this wording through its own jurisdiction. He suggested that the president of the SCSL have the authority to ask the Security Council to induce home states to prosecute or extradite to the SCSL peacekeepers who were accused of committing crimes in Sierra Leone.

Furthermore, although he cautioned “against the establishment of the Court on the basis of availability of funds for one year and pledges for the following year”, he accepted that the SCSL would be funded from voluntary contributions but said that he would not move forward with commencement of the SCSL until it had funds for a full year and pledges for another two years.

In a 31 January letter from the president of the Council to the Secretary-General, the Council accepted the Secretary-General’s positions, with the exception of the proposition that the president of the SCSL have the authority to address the Council (S/2001/95).

This issue of funding—or lack thereof—continued to be a topic of discussion among the Secretariat, the Council and member states. Some elected Council members raised concerns about using voluntary contributions.

For example, Mauritius stated on 18 December 2001 that, given the difficulties in finding funds for the SCSL to that point, the Council should have learned not to rely on voluntary contributions (S/PV.4439).

In consultation with Council members, the Secretary-General had to scale down the predicted operation of the Court to be commensurate with the amount of funds likely to be made available (S/2001/693). Under pressure from Council members throughout 2001 (see for example comments made by the US on 28 June 2001 in S/PV.4340), and despite significant shortfalls in contributions and pledges, the Secretary-General informed the Council on 26 December that he would initiate the process of commencing the operations of the SCSL (S/2001/1320).

The Agreement between the UN and Sierra Leone on the Establishment of a Special Court for Sierra Leone, with the statute of the Court included as an annex, was signed in Freetown on 16 January 2002 and entered into force on 12 April 2002. A management committee was created to assist the Secretary-General in obtaining funding and provide policy guidance on non-judicial functions of the Court. Its members were the US, the UK, Canada, Nigeria, the Netherlands, Sierra Leone and the Secretary-General (represented by the Office of Legal Affairs).

About a year later, in March 2003, the Prosecutor submitted to the Court the first of what within the following months would become a total of 13 indictments against leaders of the RUF, the AFRC and the Civil Defence Forces (CDF)—a group formed during the war by senior government officials to fight the RUF—and then-Liberian President Charles Taylor. The Liberian president, who had supported the RUF and profited from the war, went into exile in Nigeria in August 2003 as part of a deal struck to restore peace in that war-torn country.

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**UN DOCUMENTS ON THE SPECIAL COURT FOR SIERRA LEONE** Security Council Letters S/2012/891 and S/2012/892 (28 November 2012) was an exchange of letters between the president of the Council and the Secretary-General regarding the Secretary-General’s proposal for alternative means of financing the Special Court for Sierra Leone. S/2012/160 (14 March 2012) was a mid-term report of the Secretary-General on UNIPSIL. S/2011/74 (11 February 2011) was from the Secretary-General recommending the withdrawal of UNMIL guard forces from the Special Court for Sierra Leone premises in Freetown. S/2010/560 (6 October 2010) and S/2010/561 (29 October 2010) was an exchange of letters between the Secretary-General and the president of the Council on supplementing the funds of the SCSL from assessed contributions. S/2006/207 (31 March 2006) was from the Netherlands to the president of the Council indicating the willingness of the Netherlands to host the Special Court for Sierra Leone for the trial of Charles Taylor. S/2004/724 (9 September 2004) was the Secretary-General’s report on UNAMSIL. S/2004/183 and S/2004/182 (10 March 2004) was an exchange of letters between the Secretary-General and the president of the Council on supplementing the funds of the SCSL from assessed contributions. S/2001/693 (13 July 2001) was from the Secretary-General addressed to the president of the Council regarding revised budget estimates for operation of the Court S/2001/40 (12 January 2001) and S/2001/95 (31 January 2001) was an exchange of letters between the Secretary-General and the president of the Council on funding and other elements pertaining to the SCSL’s proposed statute. S/2000/1234 (22 December 2000) was from the president of the Council addressed to the Secretary-General reaffirming the Council’s support for resolution 1315 (2000) and suggesting amendments to the draft agreement between the UN and the government of Sierra Leone. S/2000/786 (10 August 2000) was the request of President Kabbah to the Council to establish a special criminal court to try the RUF criminals. S/1999/777 (12 July 1999) was from Togo to the Council president containing the Lomé Peace Accord. Secretary-General’s Reports S/2011/119 (9 March 2011) was on UNIPSIL. S/2000/915 (4 October 2000) was on the establishment of a Special Court for Sierra Leone. S/2000/751 (31 July 2000) was on UNAMSIL. S/1999/836 (30 July 1999) was on the UNIPSIL.

**OTHER DOCUMENTS** ICC-PRERS/03-01-06 (13 April 2006) was a Memorandum of Understanding on Administrative Arrangements between the ICC and the SCSL regarding the Taylor trial.

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It was not until March 2006 that Liberia officially requested the extradition of Taylor, who was eventually handed over by Nigeria to the SCSL. This was preceded by an authorisation by the Council to the UN Mission in Liberia (UNMIL), established in September 2003 to replace the ECOWAS forces in the country, to apprehend and detain Charles Taylor in the event of his return to Liberia and transfer to the SCSL (S/RES/1638).

Taylor had been given asylum in Nigeria as part of an unofficial understanding and with support of some P5 members. And although Council members, including the P5, stated on occasion that he should be brought to justice, the Council was ambivalent on this issue. For example, before the indicted Taylor left Liberia for Nigeria, the UK, reporting on Council's 26 June-5 July 2003 Council mission to West Africa which it led, stated that "President Obasanjo told us of his intention to offer to receive President Taylor in Nigeria, but we made it clear that it was not for the mission—and probably not for the Security Council—to get involved in specific political decisions in the region" (S/PV.4785 of 9 July 2003). The tacit support for the Nigerian asylum was also evident when the Council adopted resolution 1667 (31 March 2006) after Taylor's arrest, welcoming the transfer of Taylor to the SCSL and "renewing its expression of appreciation to Nigeria ... for providing for former President Taylor's temporary stay in Nigeria".

The prospects of Taylor's trial in Freetown raised serious concerns for the local government and moreover in neighbouring Liberia over safety and security. Measures were taken to try Taylor elsewhere, and the Netherlands agreed to host the SCSL proceedings in The Hague (S/2006/207). The ICC agreed to have the SCSL hold the trial on its premises (ICC-PRERS/03-01-06). The Council, noting that Taylor's presence in the region was an impediment to stability and to international peace and security in the region, lifted the travel ban on Taylor—established under the Liberia sanctions regime in resolution 1521—to facilitate this arrangement and decided that the SCSL would retain jurisdiction over Taylor in the Netherlands (S/RES/1688). Later, it decided to lift the travel ban on any individual whose presence was needed to testify in Taylor's trial in The Hague (S/RES/1793).

The SCSL convicted Taylor of war crimes

and crimes against humanity and on 30 May 2012 sentenced him to 50 years of imprisonment. On 10 December 2013, the Council adopted resolution 2128, acknowledging the 26 September 2013 decision of the SCSL's appeals chamber to uphold Taylor's verdict and the UK's willingness to have Taylor serve his sentence in its territory (the other eight prisoners convicted by the SCSL are serving their sentences in Rwanda, in accordance with an agreement reached between the Court and Rwanda).

The Council was integral to the operations of the Court in several ways, in particular with its security arrangements. On 17 September 2004, as UNAMSIL was winding down, it was authorised to support local police in maintaining security for the SCSL (S/RES/1562). With UNAMSIL ending operations, the Council, under Chapter VII, authorised UNMIL on 19 September 2005 to deploy from November 2005 up to 250 UN military personnel in Sierra Leone to provide security for the Court, subject to the consent of the troop-contributing countries and the government of Sierra Leone (resolutions 1626, 1885, 1938 and 2008). The Council was consistent on this issue until the Secretary-General recommended on 11 February 2011 that the UNMIL military guard force be withdrawn since the archives of the SCSL would be transferred to The Hague (S/2011/74).

Originally, it was thought that the SCSL's lifespan would be three or so years. Yet the Court went on to operate until the end of 2013. Throughout that period, lack of funding plagued the SCSL, and was the major topic of discussion in the management committee. Despite significant contributions from countries such as the UK, the US and The Netherlands, the SCSL consistently operated under budget as voluntary contributions and pledges proved not only to be insufficient but, perhaps as importantly, unpredictable and unreliable. As early as on 24 September 2003, for example, the UK appealed to states to provide further contributions or else "the court will be bankrupt" before its first trial (S/PV.4833). In a debate on the rule of law on 30 September of that year, Sierra Leone further pleaded with states for essential contributions. Canada warned that without further resources the Court would not be able to fulfil its task (S/PV.4835).

These recurring shortages have been

argued by commentators to have affected the quality of the work of the Court to an extent—for example, possibly affecting the ability of the prosecutor to pursue charges against more than 13 perpetrators. There were complaints that because of budgetary constraints the Court could not carry out important communication and outreach to the local population about its work, thus frustrating one of the benefits of holding most of the trials in Sierra Leone itself. In some cases, the accused challenged the impartiality of a Court that was funded (including its judges' salaries) by specific donor states. Another point raised was the fact that the Defence Office of the Court, under the auspices of the Registrar, did not enjoy the same independence as the Prosecutor and that the defence counsel were underfunded in their efforts to represent their clients.

The Council also noted with concern in a number of resolutions adopted between 2000 and 2004 the financial woes of the Court and called on states to contribute to the SCSL and fulfil pledges given for funding (resolutions 1370, 1436, 1470, 1508, 1537 and 1620). But despite these supportive words, the problematic funding structure persisted.

Both in 2004 and in 2010, the Secretary-General asked the Council to support his bringing to the attention of the General Assembly the need for assessed contributions to complement the SCSL budget, and the Council responded in the affirmative (S/2004/182, S/2004/183, S/2004/724, S/2010/560, S/2010/561, S/2011/119, S/2012/160 and S/RES/1537).

Yet the Council was not always forthcoming on such requests. On 8 November 2012, the Secretary-General informed the Council that there was a \$14 million estimated shortage in the SCSL budget until expected closure in 2013 (S/2012/891). Reflecting impatience with the fact that the Court had yet to complete its work, the Council replied in a 28 November 2012 letter that the members had reservations about the Secretary-General's intentions and asked that efforts be intensified to fund the Court through voluntary contributions (S/2012/892). However, the Secretary-General proceeded to request successfully that the General Assembly approve that the budgetary gap be filled by assessed contributions (A/67/606 and A/67/677).

No doubt this attitude by the Council

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was related to the fact that the SCSL, like the ad hoc Tribunals, continued to operate well beyond its expected completion date. For example, in resolution 1829 of 4 August 2008, the Council reiterated “its expectation that the Court will finish its work expeditiously”. In another example, in resolution 2097 of 26 March 2013, the Council requested “the Court to make every effort to complete its remaining work by 30 September 2013” and noted the exceptional approval by the General Assembly of assessed contributions to fund the Court through 2013.

According to the estimates of the Secretary-General and Council members, the Court’s lifespan was expected to be about three years (S/2001/40). The General Assembly requested that the SCSL adopt a completion strategy on 8 April 2004, two years into its existence (A/RES/58/284). The Secretary-General submitted the first completion strategy to the General Assembly and the Council on 26 May 2005. It provided for a winding-down period of the operations of the Court, rendering final judgments and making arrangements for serving sentences, and then a period when residual tasks would need to be carried out, such as supervision over the serving of sentences and the continued protection of witnesses. It was suggested that a residual mechanism be put in place to carry out such remaining tasks (S/2005/350). At that point, it was estimated that all appeals would be final by mid-2007. Yet as with the ad hoc Tribunals, delays in the progress of judgements occurred. With the exception of the Taylor trial, trials were completed in 2009. Taylor’s trial eventually lasted until the latter part of 2013, and the Court ended its activities at the end of that year.

The Council’s direct involvement in the setting up of the residual mechanism was very limited compared to its involvement in the establishment of the Court. The agreement creating the SCSL and its statute did not provide any guidance on residual responsibilities that would outlast the trial activities of the Court, yet it became clear later that an arrangement to that effect was needed. Consultations among SCSL officials, the management committee, the Sierra Leonean government and Council members were held in Freetown in February 2008 on the parameters of residual functions. Consequently, the deputy registrar of the SCSL, Fidelma

Donlon, was given the task of producing a report on such matters for the Court and the management committee.

On 9 July 2010, the Secretary-General informed the Council of his intention to conclude an agreement with Sierra Leone establishing a residual mechanism for the Special Court for Sierra Leone (RSCSL) and a statute for the residual mechanism.

The RSCSL agreement was signed on 11 August 2010, and the mechanism commenced its work on 1 January 2014. This new international institution was also to be funded from voluntary contributions, and an oversight committee, with functions similar to that of the SCSL’s management committee, was established. The RSCSL is temporarily seated in The Hague, where it shares certain administrative functions with the ICTY in order to lower costs, but it is to transfer in the future to its permanent seat in Freetown. Its small staff deal with the day-to-day management of residual issues, and the RSCSL administration is expected to expand for a limited time if necessary—for example, if Johnny Paul Koroma, head of the AFRC, was to be captured and put on trial (although Koroma or his remains have never been found and the charges against him are pending, many believe he died in Liberia around 2003).

As with the SCSL, funding proved to be a point of contention between the Council and the Secretary-General. On 8 November 2012, the Secretary-General stated in a letter to the Council that, given the difficult experiences of the SCSL, funding the residual mechanism through voluntary contributions would not be prudent. Therefore, he informed the Council that he intended to submit a proposal to the General Assembly for alternate means of financing for the mechanism (S/2012/891). The Council replied tersely that “there is no agreement with respect to the possible need for alternate means of financing of the Residual Special Court for Sierra Leone” (S/2012/892). In its resolution 2097 of 26 March 2013 and presidential statement of 26 March 2014, the Council called on states to contribute “generously” to the RSCSL, thus mimicking its language calling for contributions to its predecessor. The RSCSL, like its predecessor during most of its existence, is funded by voluntary contributions.

### *Conclusions and Analysis*

The Council was slow to take action in the face of the brutal civil war in Sierra Leone. Once focused, however, the Council, on the initiative of the US and the UK, with much involvement from The Netherlands, and in collaboration with the Sierra Leone government, acted swiftly and persistently (including by visiting the country and discussing the issue directly with the president of Liberia in October 2000), and pushed for the establishment of an accountability mechanism to complement other transitional justice mechanisms, notably the truth and reconciliation commission (TRC). If it were not for the issue of funding for the SCSL, the Court might have been up and running in a very brief period.

The SCSL was the innovative creation of a stand-alone international institution by treaty between the UN and Sierra Leone. It was not part of the UN system, as the Council refused to establish it as a subsidiary body, and equally it was not part of the Sierra Leone domestic legal system. Its jurisdiction extended over crimes under international law as well as under Sierra Leonean law. Its personnel were a mix of international and local judges and officials.

The establishment of the SCSL as an international court rather than a domestic one proved to be legally significant. It allowed for an indictment against a sitting head of state, Charles Taylor; it rendered the amnesties to individuals agreed to in the Lomé Accords by Sierra Leone irrelevant to its jurisdiction; and it helped the UN avoid cooperation with a Court that could potentially sentence perpetrators to death under Sierra Leonean law.

At the same time, Sierra Leone envisioned a special court that would function within its own system and assist in rebuilding its capacities and training its own legal professionals. Since, however, the SCSL was a completely separate entity and tried to uphold international standards, its positive affect on the local judicial system does not seem to have been significant (as this left less room and resources for training local staff on the job). This was probably exacerbated by the fact that lack of secure and adequate funding meant very limited resources for non-essential and non-judicial activities, such as outreach and connecting the local population to the work of the Court.



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Its separation from the local judicial system and the fact that the majority of its staff was international made its day-to-day function similar to that of the ad hoc Tribunals in several ways. And while it was not established by the Council, the terms of its establishment were essentially dictated by the Council.

First, with the exception of the Taylor trial in The Hague, the seat of the Court was in Freetown, thus bringing justice closer to the people of Sierra Leone and making it more visible to them. The cooperation of the local government was key in this regard. It is notable that even when the prosecutor decided to indict pro-government and former government officials, causing a public outcry in Sierra Leone, cooperation with the SCSL remained strong. As for the Taylor trial, it was decided that the security and stability interests outweighed the benefits of holding the trial in Freetown. The appropriateness of this decision in the end is open to argument since one can only speculate how a trial in Freetown would have affected the region.

The creation and operation of the SCSL gave rise to several contentious disagreements between the Council and the Secretary-General, most noticeably with respect to funding. The SCSL was funded by voluntary contributions as Council members refused to create the Court as a subsidiary body and agree to its being funded from assessed contributions, no doubt due to their experience with the ad hoc Tribunals. The Council essentially forced the Secretary-General to agree on such a funding structure against his own recommendations and wishes. Coming to terms with this fact, the Secretary-General insisted that the Court start its operations only after it had obtained proper funding for what was expected to be its roughly three-year lifespan. Council members, though agreeing to this position in theory, pushed the Secretary-General to commence Court

operations as soon as possible to demonstrate their political resolve to rebuild the country and hold perpetrators of crimes accountable. The Secretary-General was also forced to decrease the budget of the SCSL and accordingly its planned operations.

The SCSL eventually operated for almost 14 years, during which it was constantly underfunded. This was the case prior to the commencement of its operations and continues to be so for the RSCSL, against the clear recommendation of the Secretary-General. The expectations that the Court would finish its work in three years were unrealistic. As the Court's operations continued beyond the projected closing date, the Council became more focused on its expenditure, and was weary of the Secretary-General's repeated requests for assessed contributions to cover budgetary gaps in voluntary contributions.

The lack of funding was a constant theme throughout the life of the Court. It was regularly discussed in the management committee and at times threatened the continuing work of the Court itself. Only 13 indictments were pursued and nine trials held, as opposed to initial expectations that several dozen perpetrators would be tried by the SCSL. Though this fact is also related to prosecutorial discretion, the limited budget of the Court no doubt affected the policies pursued.

The Council, for financial reasons, was only amenable to having one trial chamber and not two as recommended by the Secretary-General, and dictated language in the SCSL statute to pursue those bearing the "greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law". As noted above, the Secretary-General wished to refrain from such a formula that could limit prosecutions to a few high-ranking officials, which ended up being the case.

The Council refrained from setting up the SCSL as a subsidiary body for financial

reasons, but it also refrained from obligating states other than Sierra Leone to cooperate with the Court. Instead, it left the door open to take action if it deemed it necessary. Thus, Nigeria was not legally obligated to turn over Taylor despite his indictment. The loophole created in the Council's relationship with the SCSL allowed for political considerations to be taken into account at the expense of accountability. Notably, Nigeria gave Taylor asylum as part of an implicit agreement to remove him from Liberia and advance a peaceful solution. The assumption was that if the SCSL tried Taylor, this could have affected Sierra Leone's stability and the stability of the government of Liberia (taking into account the suspected personal relations between the new leaders of Liberia and Charles Taylor). Of course, it is open for debate whether the delay in his trial allowed for the potential for instability in the region to diminish, or whether these fears based on considerations of peace versus justice proved to be unwarranted.

Other forms of cooperation were apparent in the relationship between the Council and the SCSL. The Council authorised UNAMSIL and later UNMIL to provide security for the Court, although not the power to apprehend suspects as Sierra Leone initially requested. The one exception was the authorisation for UNMIL to apprehend Taylor if he was extradited back to Liberia. The Council also assisted the SCSL by lifting the travel ban on Charles Taylor and on potential witnesses in order to facilitate Taylor's trial in The Hague, and contributed to the agreement to have the Netherlands host his trial.

### Special Tribunal for Lebanon

The only other tribunal of an international character established to date by the Security Council is the Special Tribunal for Lebanon (STL). On 14 February 2005, a large

**UN DOCUMENTS ON THE SPECIAL TRIBUNAL FOR LEBANON** Security Council Resolutions S/RES/1757 (30 May 2007) decided on the entry into force of the agreement between the UN and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon. S/RES/1644 (15 December 2005) extended UNIIIC's mandate by six months, requested reports on the progress of the investigation every three months and requested the Secretary-General to identify the nature and scope of assistance needed by Lebanon. S/RES/1636 (31 October 2005) urged Syria to cooperate with the investigation and established sanctions against suspects in the assassination and renewed the mandate of UNIIIC. S/RES/1595 (7 April 2005) established UNIIIC to investigate the 14 February 2005 assassination of former Lebanese Prime Minister Rafiq Hariri. S/RES/1559 (2 September 2004) urged withdrawal of all foreign forces from Lebanon, disarmament of all Lebanese and non-Lebanese militias, extension of the Lebanese government's control over all Lebanese territory and free and fair presidential elections. Security Council Presidential Statement S/PRST/2005/4 (15 February 2015) condemned the Hariri assassination. Security Council Meeting Record S/PV.5329 (15 December 2005) was the meeting at which resolution 1644 was adopted, extending UNIIIC's mandate by six months. Security Council Letters S/2012/101 (16 February 2012) and S/2012/102 (17 February 2012) was an exchange of letters between the Secretary-General and the president of the Council regarding the extension of the Tribunal's mandate through 1 March 2015. S/2007/286 (16 May 2007) was from President Lahoud opposing the involvement of the Security Council in Lebanese internal affairs with the establishment of the Tribunal under Chapter VII. S/2007/281 (15 May 2007) was from Prime Minister Siniora requesting a binding action by the Council to establish the Tribunal. S/2006/911 (21 November 2006) confirmed Council support for the international Tribunal. S/2005/762 (5 December 2002) was from Lebanon requesting an extension of the UNIIIC's mandate. S/2005/662 (20 October 2005) contained the first UNIIIC report. Secretary General's Reports S/2009/106 (24 February 2009) was the final report of the Secretary-General on the Special Tribunal for Lebanon before it commenced functioning as an independent judicial body on 1 March 2009. S/2006/893 (15 November 2006) was on the establishment of a special tribunal for Lebanon. S/2006/176 (21 March 2006) identified the nature and scope of the international assistance needed to try those eventually charged with the Hariri assassination before a tribunal of an international character. S/2005/203 (24 March 2005) was a report of the Mission of Inquiry into the circumstances, causes and consequences of the 14 February Beirut bombing that killed Hariri and 22 others.

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explosion in downtown Beirut killed 23 people, including former Lebanese Prime Minister Rafik Hariri, and injured many others. National and international condemnation of the bombing was quick to follow.

Having already called for the withdrawal of all foreign forces from Lebanon in resolution 1559 of September 2004, Western powers were presented with a political opportunity to exert pressure on Syria, the suspected culprit. Led by France and the US, the Council set up the UN International Independent Investigative Commission (UNIIC), which eventually led to the establishment of the STL, both of which were widely seen as part of a broader political effort to strengthen pro-Western Lebanese factions and undermine Syrian influence in the country.

On 15 February 2005, the day after the Hariri assassination, the Secretary-General briefed the Council in consultations. In a presidential statement condemning the attacks, the Council requested the Secretary-General “to report urgently on the circumstances, causes and consequences of this terrorist act” (S/PRST/2005/4). The Secretary-General then proceeded to establish a fact-finding mission, and acting on its conclusions, recommended that the Council set up an independent international investigation to establish responsibility for the attack (S/2005/203).

In resolution 1595 of 7 April 2005, the Council established the UNIIC for an initial period of three months to assist the Lebanese authorities with their investigation into the assassination. A key to reaching agreement on this step was the Lebanese government’s approval of the establishment of the Commission. The UNIIC would eventually produce 11 reports and its mandate ended on 28 February 2009.

The initial report of the UNIIC, on 20 October 2005, concluded that the assassination of Hariri could not have taken place without the involvement of Lebanese and Syrian security officials (S/2005/662). Syria in the meantime declared that it was ready to hand over any Syrian involved in the assassination to an international court, while at the same time rejecting the work of the UNIIC and its conclusions as politically biased.

On 31 October, the Council adopted resolution 1636, extending the mandate of the UNIIC until 15 December and establishing

a sanctions regime (consisting of a travel ban and asset freeze) to target suspects in the Hariri assassination (though no individual was ever actually listed by the 1636 Sanctions Committee). It also decided under Chapter VII that Syria must fully cooperate with UNIIC. The head of the UNIIC, Commissioner Detlev Mehlis, was given extensive responsibility to report to the Council on Syrian non-cooperation and also to suggest individuals for designation by the newly established Sanctions Committee in such cases.

The resolution, adopted unanimously, signalled a firm expectation that Syria should cooperate promptly and substantively. There was a clear threat of “further action” if the requirements of the resolution were not met. However, during the negotiations over the resolution, language implicating Syria in the Hariri assassination was either taken out or softened from the French text in order to achieve unanimity for the resolution.

Throughout the UNIIC’s existence, the Lebanese government continued to formally welcome its work and asked that its mandate be extended to political assassination attempts that occurred in Lebanon after 1 October 2004 (S/2005/762 of 5 December 2005). Furthermore, on 13 December 2005, it made its first formal request that perpetrators of the acts under investigation be tried by a tribunal of international character.

The Council responded unanimously with resolution 1644 of 15 December 2005, in which it urged Syria to cooperate, extended the mandate of UNIIC by six months, allowed the Commission to provide technical assistance to Lebanon for the investigation of other assassinations and cautiously requested the Secretary-General to assist Lebanon in identifying the nature and scope of international assistance needed for the investigation and report back to the Council. Led by France and the US, several Council members viewed the resolution as an expression of commitment towards Lebanon, though the language on the establishment of a tribunal at this point was very non-committal. This reflected the hesitancy of Russia and China about establishing a new international tribunal that could further jeopardise the already limited Syrian cooperation. Russia, while voting for the resolution, expressed its concerns over the continued negativity towards Syria (S/PV.5329).

The report of the Secretary-General pursuant to resolution 1644 on the scope and nature of international assistance for the Tribunal was published on 21 March 2006 (S/2006/176). It recommended the establishment of a “mixed” tribunal, comprising both Lebanese and international officials, paid for jointly by the UN and Lebanon, to be based outside Lebanon and constituted by an agreement between the UN and Lebanon. The report further recommended that the Tribunal have personal jurisdiction over all individuals responsible for the Hariri assassination and apply Lebanese criminal law.

The Council responded by asking the Secretary-General to negotiate an agreement with the government of Lebanon taking into consideration the views expressed by member states (resolution 1664 of 29 March 2006). The Secretary-General was to report back to the Council on the negotiations, with particular attention given to the issue of funding.

The Secretary-General’s report on the establishment of a Special Tribunal for Lebanon was submitted to the Council on 15 November 2006 (S/2006/893). It contained the agreement between the UN and Lebanon on the creation of the Tribunal and its statute. The Tribunal would be competent to prosecute the perpetrators of other attacks with “similar characteristics” to the Hariri assassination (criminal intent, purpose behind the attacks, nature of the victims targeted, pattern of the attacks and perpetrators all being elements necessary to establish the connection) that occurred in Lebanon from 1 October 2004 to 12 December 2005.

With respect to funding, on top of funding that Lebanon agreed to provide the Tribunal, the Secretary-General recommended UN funding through assessed contributions, drawing on the experience of establishing the ICTR, ICTY and the SCSL. That said, given the difficulties on achieving agreement on assessed contributions for new tribunals, the Secretary-General also presented options that combined assessed with voluntary member state contributions and an option based on a combination of Lebanese and voluntary funding.

In a 21 November 2006 letter, the president of the Council informed the Secretary-General that members welcomed the conclusion of the negotiations with Lebanon and informed him that the Council recommended that the STL be financed from voluntary

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contributions (51 percent) and by Lebanon itself (49 percent), rather than from assessed contributions (S/2006/911).

On 23 January 2007, the UN and the Lebanese government signed an agreement for the establishment of the STL. Nevertheless, Lebanese internal politics were to surface and eventually would force the Council to take an unprecedented decision regarding the establishment of the Tribunal. It was soon evident that the process of ratifying the treaty in Lebanon was not going smoothly.

In a 15 May 2007 letter to the Secretary-General (S/2007/281), Lebanese Prime Minister Fouad Siniora informed the Secretary-General that although a majority of the Lebanese parliament had expressed support for the Tribunal, the Speaker of the Parliament of Lebanon (under the power sharing system in Lebanon, the speaker is a Shi'a Muslim, affiliated with the Hezbollah led bloc) refused to convene a session to formally ratify the statutes of the Tribunal and the bilateral agreement with the UN. Siniora asked that the Council establish the Tribunal through a binding decision.

Under-Secretary-General for Legal Affairs Nicolas Michel briefed the Council on 2 May 2007 on this issue after a visit to Lebanon. His assessment was that a political solution was unlikely and that the UN should consider other options, since several suspects were in detention awaiting trial and further delays were detrimental to the rule of law and the efficacy of the current investigation. He also noted that all parliamentary leaders supported the Tribunal. (However, some were clearly opposed to its being imposed by the Security Council.)

The Council was also presented with a letter by pro-Syrian president Émile Lahoud, reiterating what he had already said in a similar letter to the Secretary-General on 5 February 2007, namely that authorisation of the Tribunal by the Council would override Lebanese constitutional mechanisms and would contribute to the further destabilising of Lebanon (S/2007/286). The letter also accused Siniora of using falsifications and distortions of the facts to convince the Council to establish the Tribunal through a binding decision.

On 30 May 2007, the Council adopted resolution 1757 sponsored by Belgium, Italy, France, Slovakia, the UK and the US under Chapter VII, bringing into force on 10 June

2007 the STL—for an initial period of three years—to try, under Lebanese criminal law, the alleged murderers of Hariri and others. The resolution applied the terms of the agreement signed between the UN and Lebanon, circumventing Lebanese ratification of the treaty due to the parliamentary impasse in Beirut. The unique circumstances and the internal Lebanese dissents brought about five abstentions (China, Indonesia, Qatar, Russia and South Africa). The Chapter VII resolution obligates Lebanon to cooperate with the STL, seated in The Hague, though the resolution refrains from obligating other countries—such as Syria—to do so.

The need to resort to Chapter VII to substitute for the failed Lebanese ratification of an international treaty served as an indication of the fraught political environment in which the STL would have to operate.

The STL statute is unique in several respects. First, it allows for trial in absentia. Second, at the insistence of Russia in particular, jurisdiction was limited, with the applicable law based on specific provisions of the Lebanese criminal code rather than the much more broadly defined “crimes against humanity” under international criminal law. Third, it is a mixed tribunal composed of both Lebanese and international judges.

As for funding, the statute adopts the mixture of voluntary contributions and Lebanese funding as explained above. The resolution also provides that “the Secretary-General and the Security Council shall explore alternate means of financing the Tribunal” if voluntary contributions are insufficient.

After the Council established the STL, it took a step back from involvement in the Tribunal's functions. Resolution 1757, adopted in May 2007, requested the Secretary-General to “report to the Council within 90 days and thereafter periodically on the implementation of this resolution”, but this was understood as an obligation to report on his work to facilitate the establishment of the Tribunal and not on the work of the Tribunal itself. The Secretary-General submitted four reports to the Council, the final one on 24 February 2009, as the Tribunal commenced its functions in The Hague (S/2009/106). Since then, the Secretary-General only informs the Council of the activities of the STL sporadically and minimally through his reports on the implementation of resolution 1559 on the

withdrawal of foreign forces from Lebanon.

Resolution 1757 also required the parties (Lebanon and the UN) to review the work of the Tribunal “in consultation with the Security Council” within three years before extending its mandate, if necessary. However, as the three-year period approached, the issue was not discussed in the Council, and the extension of the STL's mandate was done through an exchange of letters, by which the Secretary-General informed the Council of his intention to extend the STL mandate by a further three years (S/2012/101 and S/2012/102).

The STL commenced its operations as the sectarian and political violence in Lebanon continued. In one incident on 25 January 2008, Captain Wissam Eid of the Lebanese Internal Security Forces was killed along with three other individuals in a car bomb in Beirut. Eid, who survived a previous assignment attempt in 2006, specialised in tracking electronic data and was believed to have previously played a crucial role in gathering evidence on the killing of former Prime Minister Rafik Hariri in 2005, as well other bombings. Council members condemned the attack in a press statement on 30 January 2008 (though the STL was not mentioned).

As for the latest operations of the STL, the trial against four Hezbollah members commenced in January 2014 in absentia (their whereabouts are unknown, with some speculating that all are in fact deceased), in the context of continued heightened sectarian tensions and the destabilising impact of the crisis in Syria. A fifth indictee was later joined to the case.

Since the establishment of the STL, several issues have arisen, which could have resulted in Council action or statements if Council members had so chosen. For example, the Council was silent when Syria issued 33 arrest warrants on 4 October 2010 against Lebanese and international officials as “false witnesses” relating to the four year detention of the former head of Lebanese security, Jamil al-Sayyed, for his alleged involvement in the Hariri assassination. Sayyed was released by the STL in 2009 for lack of evidence.

Rising political tensions in Lebanon were brought to the attention of the Council by the Secretary-General in his reports on the implementation of resolution 1559 on 19 April 2011, a few months after the Prosecutor

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of the STL submitted a confidential indictment to the STL. The Council did not follow up on this issue.

In January 2013, a newspaper associated with Hezbollah published a confidential list of 17 potential witnesses who might be called to testify in the trial, possibly endangering their lives. The Council did not react to this either.

The Council has also remained silent on the fact that the Lebanese authorities have yet to produce the individuals connected to the Hezbollah who were indicted by the STL, or report on their whereabouts, as their trials in absentia continue.

On the other hand, an incident that caught the Council's attention was an attack on STL investigators in Beirut on 27 October 2010. The STL provided information on the attack to the Council through the Office of Legal Affairs, the head of which briefed the Council on the incident in consultations on 5 November 2010. The French Ambassador then told the press that the meeting was an expression of the common concern of the Council regarding the attacks and was an opportunity to reaffirm its support for the work of the Tribunal. He also stressed that the Tribunal is an independent body and that the Council would not like to politicise the judicial process involved. To date, no other attacks on STL staff have occurred.

### *Conclusions and Analysis*

The Council established the STL via resolution 1757, demonstrating a proactive approach towards using its powers to advance accountability for a particular set of events and against a limited number of individuals. While this upholds individual accountability, it also raises questions regarding other—possibly much graver—scenarios in which the Council has not assisted in setting up an international judicial institution to advance accountability.

The Chapter VII resolution essentially bypassed the ratification process usually required for a state to be obligated by a treaty. This demonstrates an innovative approach that the Council can adopt when a member state is experiencing difficulty—due to internal political reasons—to ratify a treaty about which it had already expressed agreement. On the other hand, in a different context, it may seem as too invasive and interfering with the internal politics of member states.

Despite the fact that the Lebanese Parliament was unable to ratify the treaty establishing the STL without the Council's adoption of resolution 1757, Lebanese cooperation with the Tribunal (and Syrian cooperation after the first few years) has, on the whole, not been a serious issue, or at least, the issue of non-cooperation has not been brought to the attention of the Council. (It is unclear if the five fugitives from the STL have not been caught due to unwillingness or just genuine inability to locate them. In fact, some believe that they are deceased or have fled the country.)

The Council, having established the STL, did not express its interest in following up on the Tribunal's operations, though to be fair, it has not been called on to do so by the STL or Lebanon. This reflected the view that while the Council de facto established the Tribunal in resolution 1757, it is not a subsidiary body of the Council and was expected to operate independently, similar to the SCSL. The use of a Chapter VII resolution as a substitute for Lebanese ratification of a treaty gave rise to the concern that the work of the STL is likely to encounter several hurdles. The Council's involvement was temporary, with all parties concerned interested in minimising Council involvement for fear that it would feed into the political discourse in Lebanon.

The Council could have substantively reviewed the work of the Tribunal under resolution 1757 when its mandate was to expire after three years. This was an opportunity to express support, if not inquire into the work of the STL. Instead, the Council chose to view the matter as a procedural obligation, and the STL mandate was renewed by an exchange of letters with the Secretary-General.

A major factor in the Council's generally detached approach relates to the concern that Council action may play into the hands of those in Lebanon who perceive the STL as a political tool of the West and certain Gulf states to undermine Hezbollah and pro-Syrian forces. There is a fear that Council action might, as a result, affect the general cooperation of the Lebanese authorities with the STL, given Hezbollah's presence in the cabinet. To date, the STL itself has refrained from calling on the Council to use its powers to assist it, for the very same reasons.

That the STL can try and is trying individuals in absentia raises questions of judicial fairness, in particular in light of the high due

process standards that other international criminal tribunals are required to uphold. However, the lack of significant political ramifications and backlash to the ongoing trials is perhaps partly related to the fact that the accused are not present and their whereabouts are unknown to the Tribunal.

When compared to the situation concerning the operations of the SCSL, the STL has thus far not suffered from serious delays or absence in funding that have affected its operations or necessitated alternate funding sources. This is true both for the voluntary contributions and the Lebanese contributions to its budget. It may be that due to the STL's relatively small scale of operations, this financing structure has proven satisfactory.

Resolution 1757 does not go far in terms of follow-up. No reporting to the Council on the actual work of the Tribunal is required, and the resolution refrained from obligating states other than Lebanon to cooperate with the Tribunal, despite the possible involvement of other states or non-state actors affiliated with them in the events in Lebanon (or the possibility that suspects will flee to another country, which may have been the case). Since the STL's establishment, the Council has had a discussion dedicated to the work of the Tribunal only once. These signs do not paint a positive picture for the Council's interest in the successful conclusion of the STL's work. Although, unlike the ICTY or ICTR, the STL is not a subsidiary body of the Council, one could expect the Council to take more interest in a body it has de facto created.

One follow-up mechanism that the Council did set up was a sanctions regime. But this expression of commitment to the success of the STL was not followed up. As the Tribunal entered into operation, the UNIIC concluded its work in February 2009. By that time, no individual had been placed on the sanctions list. Moreover, a Panel of Experts to assist the Sanctions Committee—a common fixture in Council sanctions committees—was never established, perhaps signalling the Council's lack of intent to seriously pursue sanctions. However, the UNIIC reported a substantial improvement in Syrian cooperation after the establishment of the commission. It may be argued that the Council was able to alter Syrian behaviour by deterrence, though in reality it never showed an intention to actually apply sanctions and the sanctions regime

## Case Studies (con't)

remains dormant. Nevertheless, the notion of a sanctions regime “to assist in the investigation of this crime” is an interesting development in the context of the Council’s different approaches to the issue of the rule of law.

For the Council, the initial investigation and eventual establishment of the STL were part of a wider political dynamic to strengthen pro-Western Lebanese factions and undermine Syrian influence in the country. A political opportunity presented itself for Western powers—led by France, with its history and ties to

Lebanon and with the strong support of the US—to exert pressure on Syria, the suspected culprit in the assassination of an anti-Syrian prime minister. However, the nature of legal procedures is that they are time-consuming and slow-paced, whereas political scenarios and interests change much faster. In this particular context, the political dynamics vis-à-vis Syria that led to the establishment of the Tribunal were overtaken by the ongoing political dynamics and rift in the Council concerning the Syrian civil war. In addition, it would seem

that the investigation has gone in the direction of the Hezbollah rather than Syria. A question remains how the Council would respond if certain states or other actors interfered and undermined the work of the Tribunal. Would the Council then react strongly to ensure that the STL fulfils its task? Does its passiveness reflect a reluctance if called upon to act? Will the Council take action to ensure this body, which it put into force, will be effective?

## Relationship with the ICC

The relationship between the Council and the ICC is unique in many ways. The ICC was established by treaty and not by the Council, yet its statute reserves a unique role for the Council in granting jurisdiction to the ICC or otherwise affecting the jurisdiction of the ICC. Thus far, the Council has used its powers under the ICC (or Rome) Statute to refer two situations to the ICC. It has also on a few occasions resorted to Article 16, deferring situations from the jurisdiction of the Court, always in the context of considerable controversy and not always successfully. Beyond those points of action, the relationship between the Council and the ICC touches upon the various interactions and tensions between peace and justice.

The idea of a permanent international criminal court first came about after the horrendous events of World War II and criticism of the Nuremberg and Tokyo tribunals as reflecting “victors’ justice”, when in 1948 the General Assembly asked the International Law Commission to consider the desirability and possibility of establishing such a body (A/RES/3/260). The issue became dormant during the Cold War. However, the establishment of the ad hoc Tribunals, their extended existence and their heavy costs to the UN

budget revived the idea of creating a permanent international criminal court, instead of these ad hoc institutions.

The Rome Statute was adopted on 17 July 1998, and came into force on 1 July 2002, granting the Hague-based ICC jurisdiction over war crimes, crimes against humanity, genocide and the crime of aggression (though the latter crime was to be defined at a later time). As of 31 July, 123 states were parties to the statute, not including three of the P5: China, Russia and the US (the US signed the statute but has made it clear that it will not ratify it).

One of the tougher negotiating points over the Rome Statute was the role the Council would play vis-à-vis the Court. What would eventually be agreed upon was a central, though not exclusive, role for the Council, recognising the connection between international peace and security and accountability for the most heinous crimes. The statute also tries to strike a balance between the Council’s political role, with primary responsibility for international peace and security, and the function of the ICC as an independent judicial body not subject to political influence.

### The Security Council and the Rome

### Statute

The most important feature of the institutional relationship between the two bodies is the power of the Council to refer situations to the jurisdiction of the Court and to defer situations from the jurisdiction of the Court.

Article 13(b) enables the ICC to exercise jurisdiction if a “situation in which one or more crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations”. This power potentially expands the jurisdiction of the Court over crimes committed in the territory of states which are not party to the Rome Statute and their nationals. A salient feature of the article is that it requires the Council to refer a “situation,” thus aiming to exclude the Council’s ability to refer a specific act committed by just one party to the conflict and discriminate among perpetrators in a given scenario.

After a referral, the ICC Prosecutor and the Court itself each retain their discretion: the prosecutor may decide not to proceed with the investigation under Article 53.2(c), but must inform the Council, which may choose to ask the Court to reconsider this decision (Article 53.3). The Court, for its

**UN DOCUMENTS ON THE ICC Security Council Resolutions** S/RES/2213 (27 March 2015) renewed the mandate of UNSMIL and the 1970 Libya Panel of Experts. S/RES/2098 (28 March 2013) renewed MONUSCO’s mandate, including an intervention brigade to neutralise rebel groups in eastern DRC, until 31 March 2014. S/RES/2016 (27 October 2011) lifted the no-fly zone and the provisions for the use of force for the protection of civilians in Libya. S/RES/1975 (30 March 2011) imposed sanctions on Gbagbo and his circle. S/RES/1973 (17 March 2011) was adopted with ten votes in favour and five abstentions and authorised an occupation force to protect civilians in Libya and enforce the arms embargo, imposed a no-fly zone, strengthened the sanctions regime and established a panel of experts. S/RES/1970 (26 February 2011) referred the situation in Libya to the ICC, imposed an arms embargo and targeted sanctions (assets freeze and travel ban) and established a sanctions committee. S/RES/1828 (31 July 2008) renewed UNAMID for one year. S/RES/1593 (31 March 2005) referred the situation in Darfur to the ICC. S/RES/1572 (15 November 2004) established an arms embargo on Côte d’Ivoire and called for sanctions against individuals found to be obstructing the peace process, violating human rights, publicly inciting hatred and violence and violating the embargo. S/RES/1564 (18 September 2004) established the International Commission of Inquiry on Darfur. S/RES/1497 (1 August 2003) authorised the deployment of a multinational force in Liberia. S/RES/1487 (12 June 2003) extended for another 12 months the immunity of nationals of non-state parties to the Rome Statute participating in Council-mandated and Council-authorized operations, referring to Article 16 as its legal basis. S/RES/1422 (12 July 2002) was on immunity for peacekeepers from non-State Parties to the Rome Statute from the jurisdiction of the Court for 12 months, referring to Article 16 as its legal basis.

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## Relationship with the ICC (con't)

part, is to inform the Council of non-cooperation of states with investigations initiated by a Council referral. Furthermore, the Prosecutor may take into account certain political considerations: under Article 53.1(c), he or she can weigh if “there are . . . substantial reasons to believe that an investigation would not serve the interests of justice”.

When the Council has referred a situation to the Court, the Court can notify the Council if a state refuses to cooperate with the Court regarding that situation (Article 87.5(b) and Article 87.7). As for funding, the Rome Statute envisioned that the financial responsibility for Council referrals to the Court would be borne by the UN itself (Article 115(b)).

As will be seen, many of the features surrounding referrals have become a point of contention with respect to the Council's relationship with the Court.

In addition to the power to refer situations to the Court, Article 16 of the Statute provides the Council with the authority to defer investigations or prosecutions, acting under Chapter VII of the Charter, for periods of up to one year. Such exercise can be repeated at will. The Article in essence accepts that in particular circumstances, political considerations may outweigh (at least temporarily) individual accountability.

### The Security Council and Referrals to the ICC

The relationship between the Council and the ICC got off to a difficult start. The US, unhappy about the fact that its nationals may find themselves subject to the ICC's jurisdiction for acts committed in the territory of other states, took action to limit this possibility. Bilaterally, the US extended its network of Statute of Forces Agreements (SOFAs) with other states. These SOFAs commonly granted the US exclusive criminal jurisdiction over its forces acting in the host state. With a binding SOFA between the US and a state-party in place, article 98(2) of the Rome Statute would, arguably, require the US to agree for its nationals to be surrendered to the Court.

Within the Council, shortly after the Rome Statute entered into force, the US

vetoed a draft resolution extending the UN mission in Bosnia to press further on this issue (S/2002/712, 30 June 2002). Thereafter, on 12 July 2002, the Council adopted resolution 1422, under strong US pressure (which was subsequently renewed in resolution 1487 in 2003), providing immunity for 12 months to nationals of non-state parties to the Rome Statute participating in all Council-mandated or Council-authorized peacekeeping operations, referring to Article 16 as the legal basis for these deferrals. It granted the same immunity to peacekeepers in Sierra Leone in 2003 (resolution 1497). A number of states and many NGOs criticised the Council for these steps as seemingly a misuse of Article 16, which was not meant to be used as a blanket immunity for certain nationals in a given situation, but rather as a tool to allow for political resolution of a conflict that might be jeopardised by criminal prosecution. From 2004 onwards, the US refrained from pushing the Council to repeat this exercise, possibly related to the political backlash in the aftermath of the reports of the abuse of Iraqi prisoners by US military personnel in Abu Ghraib prison.

The first ICC referral came about in 2005. It was reminiscent of how the ad hoc Tribunal for the former Yugoslavia came into existence: the Council was unsuccessful in stopping atrocities against civilians in Darfur by the Sudanese government and allied Janjaweed militia. In resolution 1564 of 18 September 2004, it requested the Secretary-General to establish a commission of inquiry to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine whether or not acts of genocide had occurred and to identify the perpetrators of such violations. It also called on all parties to cooperate fully with the commission.

The commission of inquiry found that crimes had been committed (though it did not find evidence of genocidal intent) and recommended a Council referral of the situation in Darfur to the ICC (S/2005/60). The Council obliged and on 31 March 2005, by a vote of 11 in favour (with Algeria, Brazil, China and the US abstaining), referred the

situation in Darfur to the ICC (S/RES/1593).

The resolution obligated parties in Darfur to cooperate with the Court and the Prosecutor, yet only “urged”—not obligated—other states to do the same. As with the “immunity” resolutions mentioned previously, the referral contained provisions excluding non-Sudanese personnel from a state not party to the Rome Statute, acting under authorisation of the Council or the AU, from the jurisdiction of the ICC. It established a regular bi-annual reporting schedule for the ICC Prosecutor to the Council and resolved—disregarding provisions to the contrary in the Rome Statute—that the ICC, not the UN, would incur the costs stemming from the referral. These concessions were essential to secure the abstaining votes, particularly of the US, which was adamantly opposed to the ICC at the time (later on the US shifted from this policy of opposition, to one of limited support and cooperation with the ICC).

The Council has referred one other situation to the ICC. On 26 February 2011, following a violent government crackdown on demonstrators in Benghazi and elsewhere in Libya, beginning on 15 February, the Council imposed sanctions on Libya and referred the situation to the ICC by unanimously adopting resolution 1970. Taking into account a request from the Libyan permanent mission in New York (no longer representing the Muammar Qaddafi regime) and just days after reports of widespread violence and systematic attacks against civilians by the regime, the Council imposed travel and financial sanctions on Libya as well as an arms embargo. Resolution 1970 was adopted unanimously, showing a certain shift among non-parties to the Rome Statute among the P5 in their willingness to use the ICC to promote peace and security. The resolution contained the same limiting clauses on the terms of ICC jurisdiction as those for the Darfur referral.

On 17 March, the Council adopted resolution 1973, which in addition to authorising all necessary measures—excluding an occupation force—to protect civilians in Libya and enforce the arms embargo, also extended the sanctions regime. The resolution imposed

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UN DOCUMENTS ON THE ICC Security Council Presidential Statement S/PRST/2008/21 (15 June 2008) was on Sudan's cooperation with the ICC. Security Council Press Statements SC/10674 (15 June 2012) expressed concern at the detention of the ICC staff members. Security Council Meeting Records S/PV.7337 (12 December 2014) was a semi-annual briefing by the ICC Prosecutor on the Court's work in Darfur. S/PV.7306 (11 November 2014) was the eighth briefing by the ICC Prosecutor on Libya. S/PV.7285 and Resumption 1 (23 October 2014) was the fifth annual open debate on working methods. S/PV.7172 (12 May 2014) was the briefing by the Secretary-General on his trip to South Sudan. S/PV.6974 (5 June 2013) was a briefing by the ICC Prosecutor on Sudan. S/PV.6849 and Resumption 1 (17 October 2012) was the open debate on the promotion and strengthening of the rule of law, with a focus on the ICC.

## Relationship with the ICC (con't)

a no-fly zone, strengthened the sanctions, established a Panel of Experts to support the 1970 Sanctions Committee and listed several additional individuals and entities. Recalling its decision to refer the situation in Libya to the ICC, the Council stressed that those responsible for or complicit in attacks targeting the civilian population, including aerial and naval attacks, must be held accountable. Resolution 1973 was adopted, with ten members in support (Bosnia and Herzegovina, Colombia, France, Gabon, Lebanon, Nigeria, Portugal, South Africa, the UK and the US) and five abstaining (Brazil, China, Germany, India and Russia).

### Implementation of Security Council Referrals and Cooperation

On 6 June 2005, the ICC Prosecutor officially opened an investigation into crimes committed in Darfur. Khartoum retorted that it would not cooperate with the investigation, beginning a pattern of non-cooperation that has remained unchanged. On 2 May 2007, the ICC issued three arrest warrants for Ali Kushayb and Ali Muhammad Ali Abd-al-Rahman, two Janjaweed commanders wanted for war crimes, and former Interior Minister Ahmed Haroun. Having made clear its refusal to cooperate with the ICC from the very beginning, Sudan announced that it would not surrender Kushayb or Haroun to the Court. (Indeed, Kushayb, who had been in government custody at the time, was released, while Haroun was soon chosen as head of an official human rights commission of inquiry, and after that was appointed governor of South Kordofan state.)

On 14 July 2008, the ICC Prosecutor presented an application for a warrant of arrest against Sudan's President Omar al-Bashir alleging genocide, crimes against humanity and war crimes. Sudan launched a domestic and diplomatic campaign to counter the warrant request. On 21 July, the AU Peace and Security Council (PSC) issued a communiqué appealing to the Security Council to defer the proceedings, asserting that such action would promote stability and peace and security (PSC/MIN/Comm (CLXII) Rev. 1).

Meanwhile, ICC proceedings continued when the Pre-Trial Chamber issued an arrest warrant against Bashir for war crimes and crimes against humanity in Darfur on 4 March 2009 (ICC-02/05-01/09). On the same day, the Council of the League of Arab States expressed regret that the Council had not applied Article 16 of the Rome Statute to defer the ICC proceedings. On 5 March, the AU PSC issued a communiqué requesting a deferral, and a letter with the communiqué was sent to the Council on the following day. Also on 4 March, Sudan itself retaliated by expelling from Sudan 13 international humanitarian organisations, alleging that they cooperated with the ICC. The Secretary-General repeatedly called on Sudan to reverse its decision to expel the organisations, and eventually some were allowed to return. As for further cooperation with the Court, Sudan made it clear that “[n]o Sudanese, not Al-Bashir and not a non-Al-Bashir, will appear before the [Court], and we will not even send a lawyer to represent us there” (ICC-02/05-01/09-219).

On 25 May 2010, the Court issued a decision of non-compliance in the cases against Harun and Abd-Al-Rahman (ICC-02/05-01/07-57), but no action from the Council followed.

Some AU member states adhered to the AU decisions on non-cooperation with the ICC in the context of the Bashir indictment, allowing him to make visits to Chad, Kenya and Malawi notwithstanding their obligations as states parties to the Rome Statute to arrest him. The ICC formally complained to the Council about these visits, and on 12 May 2012 informed the Council of an additional visit by Bashir to Djibouti. Most recently, Bashir attended the June AU summit in South Africa. When civil society organisations filed in court for his arrest and extradition to the ICC, the High Court issued an interim order that he cannot leave the country while the issue is pending. Nevertheless, the government allowed Bashir to depart the country in defiance of the interim order. (This signals a shift from the previous South African position that it would extradite Bashir if he came to South

Africa. For example, in 2009 South Africa reportedly requested Bashir not to attend President Jacob Zuma's inauguration. The same year it assured the ICC Prosecutor of its commitment to its obligations under the ICC Statute [S/PV.6230 of 4 December 2009]). The Council refrained from condemning or taking action—such as sanctions—against the several states that hosted President Bashir, some of which are ICC members.

The Council did not accede to the AU requests for deferral but was far from unequivocal. For example, the first renewal of the UNAMID mandate on 31 July 2008 in resolution 1828 had been preceded by intense negotiations on a proposal to include language suspending ICC proceedings under Article 16 of the Rome Statute. The majority opposed this, but compromise was found in mentioning some Council members' concerns related to the request for an arrest warrant against Bashir, while emphasising the need to bring the perpetrators of serious crimes to justice. The resolution took note of those members' intention to consider these matters further. The US remained resolutely opposed to any compromise and abstained in the vote, signalling its opposition to reopening the ICC issue. Ambassador Alejandro Wolff (US) said that this would “send the wrong signal” to Bashir and “undermine efforts to bring him and others to justice”.

More ambivalence was displayed when the Council was not able to agree on including ICC cooperation in its terms of reference for its mission to Sudan in June 2008. Instead, there was a general reference to implementing Council resolutions and respect for the rule of law and due process, and the issue was, unsurprisingly, a central point of contention when Council members raised the issue with Sudanese officials during the mission itself (report of the Council visiting mission of 31 May-10 June 2008, S/2008/460).

The Council was also noticeably silent in the face of the promotion of ICC indictees to official posts, including the 8 May 2009 appointment of Haroun as governor of South Kordofan state. Similarly, the Council has not addressed the fact that since 1 March 2012,

**UN DOCUMENTS ON THE ICC Security Council Letters** S/2015/202 (20 March 2015) transmitted the ICC Pre-Trial Chamber's finding of non-compliance against Sudan. S/2014/953 (29 December 2014) transmitted the ICC decision on the non-compliance of Libya to the Security Council. S/2013/210 (3 April 2013) was from the Secretary-General to the president of the Council, including the text of guidelines on contacts with persons who are the subject of arrest warrants or summonses issued by the ICC. S/2013/19 (14 January 2013) was from Switzerland requesting the Council to refer the situation in Syria since March 2011 to the ICC. The letter was co-signed by 56 other member states, including Council members Australia, France, Luxembourg, the Republic of Korea and the UK. S/2012/860 (20 November 2012) was to the Council proposing the establishment of a body to systematically address questions arising from the relationship of the Council and the ICC or to expand the mandate of its informal working group on international tribunals to this effect. S/2012/731 (1 October 2012) transmitted the concept note prepared by Guatemala for an open debate on the ICC. S/2005/60 (31 January 2005) was the report of the International Commission of Inquiry on Darfur to the Secretary-General.

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## Relationship with the ICC (con't)

Defence Minister Abdelrahim Mohamed Hussein has been wanted by the ICC for crimes against humanity and war crimes allegedly committed between August 2003 and March 2004 while serving as Interior Minister and Special Representative of the President in Darfur.

One notable exception to the silence or ambivalence of the Council was an initiative by Costa Rica that, following difficult negotiations, led to the adoption of a presidential statement on 16 June 2008, which—invo­king resolution 1593—urged Sudan and all other parties to cooperate with the Court (S/PRST/2008/21). Yet on the whole, while some Council members pay lip service to the idea that Sudan must cooperate with the Court, the Council has been weak on this point, even rhetorically. Sudan, in contrast, is anything but ambiguous in its statements, including in the Council Chamber. For example, during a debate on 5 June 2013, the Sudanese representative stated that the “Prosecutor’s demand that we implement the arrest warrants issued against President Omer Hassan A. Al-Bashir and other Sudanese officials is unacceptable because it is based on faulty logic. What is based on wrong is of necessity wrong itself” (S/PV.6974).

The ICC Prosecutor has repeatedly argued that lack of implementation of arrest warrants manifests itself in negative developments on the ground. On 8 June 2011 the Council received a briefing in which then ICC Prosecutor Moreno Ocampo said crimes against humanity and genocide continued unabated in Darfur, citing attacks on the Fur, Masalit and Zaghawa ethnic groups. He added that actions of Harun as governor of Southern Kordofan provided a chilling example of the consequences of ignoring information about serious crimes, saying that in the 1990s, Haroun had used local militia to attack civilians in the Nuba Mountains in Southern Kordofan and used the same tactics between 2003 and 2005 in Darfur.

ICC Prosecutor Fatouh Bensouda forewarned that the Council’s lack of action on non-compliance, compounded by the

limited budget of her office, might have practical ramifications. Briefing the Council on 23 October 2014 during a debate on working methods, Bensouda argued for the Council to use stronger language in its referrals to counter the current ambiguity as to whether all states are obliged to cooperate and for the Council to support carrying out the arrest warrants issued by the Court. She informed the Council how the lack of bilateral or UN financing for Council referrals negatively impacts the ability of her office to conduct investigations in both Darfur and Libya (S/PV.7285).

A few months later, in her semi-annual briefing to the Council on Darfur on 12 December, Bensouda bluntly stated that in the “almost 10 years that my office has been reporting to the Council, no strategic recommendation has ever been provided to my office, and neither have there been any discussions resulting in concrete solutions to the problems we face in the Darfur situation”. Consequently, she declared, the ICC was suspending its investigations in Darfur and would apply its limited resources elsewhere (S/PV.7337).

The ICC issued another decision on non-compliance by Sudan on 9 March 2015 (S/2015/202). Trying to come up with even a technical response to the ICC decision on non-compliance, Chile and Lithuania suggested issuing a press statement or sending a letter to the Secretary-General taking note or acknowledging the notice provided by the Court (Australia had suggested sending a letter to the prosecutor on Sudanese non-compliance in the fall of 2014 as well). But the split among Council members, including those that are parties to the ICC Statute, prevents any agreement on this issue at present.

In her latest briefing to the Council on 29 June (S/PV.7478), Bensouda emphasised that her office’s investigations into the alleged crimes committed in Darfur are continuing, though she stressed that her office has finite resources and a heavy caseload and is therefore struggling to commit to full, active investigations of the ongoing crimes in Darfur.

The dynamic regarding cooperation with the ICC investigation on the situation in Libya has suffered similarly from non-cooperation by the state, accompanied by the Council’s disengagement. The ICC issued arrest warrants on 27 June 2011 for Libyan leader Col. Muammar Qaddafi, his son Saif Al-Islam Qaddafi and intelligence chief Abdullah Al-Senussi for alleged war crimes and crimes against humanity, including murder and persecution of civilians, recruitment of mercenaries and authorising attacks against protestors.

Since the removal of the Qaddafi regime, Libya has slipped into political instability and internal armed conflict. Interim governments before and after the election of a General National Congress in July 2012 struggled to assert authority over the country as a whole. Further elections for a House of Representatives in June 2014 were followed by a division between two rival governments—one based on the newly elected House of Representatives, in Tobruk and al-Bayda in eastern Libya, which enjoyed international recognition, and the other on the General National Congress in Tripoli, which refused to dissolve and recognise the former. Amid fighting between militias supporting one or other government, groups identifying themselves with the Islamic State in Iraq and al-Sham (ISIS) established dominance in some areas. At the time of writing, the UN Support Mission in Libya (UNSMIL) continues to be engaged in trying to mediate a national unity government.

Against this background, the Council’s decisiveness against the Qaddafi regime stood in contrast to its passive stance toward the tensions between post-Qaddafi Libya and the ICC. On 1 May 2012, Libya submitted an inadmissibility application before the ICC under Article 19, challenging the jurisdiction of the Court on the basis of complementarity (i.e. that this was not a situation in which the home country was unwilling or unable to conduct its own fair criminal proceedings, and thus the individuals should be tried in a Libyan Court and not by the ICC itself). Both Saif Qaddafi and Senussi were

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**UN DOCUMENTS ON THE ICC Security Council Visiting Mission Report S/2008/460** (15 July 2008) was on the Council’s visit to Djibouti (on Somalia), the Sudan, Chad, the Democratic Republic of the Congo and Côte d’Ivoire, 31 May to 10 June 2008. **Other S/2014/348** (22 May 2014) was the French draft resolution referring Syria to the ICC, co-sponsored by 65 member states, which was vetoed by China and Russia. All other Council members voted in favour of the referral. **S/2013/660** (15 November 2013) was a draft resolution on a deferral of the ICC proceedings against President Uhuru Kenyatta and his deputy. **S/2002/712** (30 June 2002) was a draft resolution extending the UN mission in Bosnia, vetoed by the US. In addition, Bulgaria abstained in the vote.

**OTHER DOCUMENTS PSC/MIN/Comm (CLXII) Rev. 1** (21 July 2008) was a communiqué issued by the AU PSC appealing to the Security Council to defer the proceedings against Bashir. **ICC-02/05-01/09** (4 March 2009) was the ICC Pre-Trial Chamber decision issuing an arrest warrant against Bashir for war crimes and crimes against humanity in Darfur **ICC-02/05-01/09-219** (19 December 2014) was the ICC Prosecutor’s request for a finding of non-compliance against the Republic of the Sudan in the case of Bashir. **CC-02/05-01/07-57** (25 May 2010) was the ICC decision of non-compliance against Sudan in the cases against Harun and Abd-Al-Rahman



## Relationship with the ICC (con't)

in Libyan custody for more than six months before Libya filed the application (Qaddafi was being held by a Zintan-based militia). During that interval, Xavier-Jean Keita, the ICC Defence Counsel, called on 12 April for the Court to make a formal complaint to the Council over the non-surrender of the younger Qaddafi to the ICC. On 11 November 2013, the Court relinquished jurisdiction over Senussi. Despite the fact that prior to the filing of these applications of admissibility, Libya was not complying with its duties under resolution 1970 to cooperate with the Court, the Council did not take action on the new Libyan government's refusal to cooperate with the ICC.

The Council's silence became all the more problematic when the Court rejected the Libyan application regarding Saif Qaddafi on 31 May 2013 and held that he is to be tried before the ICC. The ICC Appeals Chamber confirmed this decision on 21 May 2014.

While Libya was in non-compliance, difficulties related to the trial continued to surface. A four-person, ICC-appointed team (a defence counsel, translator and two individuals from the registrar's office) was detained by the Zintan militia holding Qaddafi on 7 June 2012, accusing Defence Counsel Melinda Taylor of clandestinely passing Qaddafi a coded letter from a fugitive former aide, Mohammed Ismail. Council members issued a press statement on 15 June, expressing serious concern over the detention of the ICC staff members and calling on Libya to abide by its legal obligation under resolution 1970 "to cooperate fully with and provide any necessary assistance to the ICC" (SC/10674). While the team denied any wrongdoing and was eventually released on 2 July (not before the ICC President promised an internal inquiry into the team's conduct), documents seized from the team by the militia have yet to be returned. In fact, some of these documents are said to be used by the Libyan prosecution against Saif Qaddafi in Zintan. During all of this time, Saif Qaddafi has not been granted access to his ICC defence team.

On 28 July, the Libyan court in Tripoli sentenced Saif Qaddafi, Senussi and seven other former regime officials to death for war crimes. The trial had commenced in April 2014, and in sessions at the start of trial, Qaddafi appeared by video link though communications between the Zintan militia and the

Tripoli government later broke down during the trial, which continued in his absence. The internationally recognised Libya authorities had assured the ICC at one point that the trial would be terminated.

Libya was granted several extensions by the Court to comply and surrender Qaddafi and the documents, but eventually the ICC lost patience with Libya. In her semi-annual briefing before the Council on 11 November 2014, ICC Prosecutor Fatou Bensouda reiterated yet again that Libya had not yet surrendered Qaddafi to the custody of the ICC, acknowledged the limited extent of her office's interaction with the Libyan government and highlighted how the combined effect of instability in Libya and lack of resources has severely undermined the ICC's investigative efforts, including of new instances of international crimes (S/PV.7306).

Then on 10 December 2014, the ICC's Pre-Trial Chamber issued a decision on the non-compliance of Libya with the Court in the case against Qaddafi, by which the matter was referred back to the Council (S/2014/953). On 27 March 2015, the Council adopted resolution 2213, in which it noted the ICC decision and emphasised strongly the importance of the Libyan government's full cooperation with the ICC and the Prosecutor. Although the initial draft noted the decision on non-compliance with concern, some Council members thought it was too negative and pushed for a more neutral formulation. Thus the resolution notes the decision without specifying that it was a finding of non-compliance or that it was related to the case against Qaddafi. However, as the weak language indicates, the Council has not followed up on this issue, and currently its members give it little priority in view of the political climate in Libya.

On 11 May 2015, Council members held an informal interactive dialogue at the request of Chile with ICC Prosecutor Bensouda in an attempt to have a frank discussion and exchange on the situation in Libya with the Council. A similar exchange on Libya had taken place on 8 May 2013, and some Council members felt the need to engage again in this format with the Prosecutor, given key developments in ICC proceedings, as well as the grim picture she painted of her accountability efforts in Libya during her briefing in November 2014. Yet the dialogue did not

bring Council members any closer to a consensus about how to approach the notice of non-compliance, let alone take any action. Certain Council members that are suspicious of the ICC, such as China and Russia, are unsurprisingly against an official response by the Council, which might in turn put pressure on the Council to act upon the official notice. However, what is of even greater concern is the lack of consensus among Council members that are parties to the Rome Statute on the proper response. This split among the ICC caucus, in this case most notably Chad, stems from the African states' dissatisfaction with the ICC which they perceive as overly focused on African conflicts and in particular African heads of state.

### Other Instances of International Cooperation

Although the referrals in the cases of Sudan and Libya form the core of the Council's relationship with the ICC, this interaction has evolved beyond referrals. It has become more common for Council resolutions to include references to cooperation with the ICC where the country concerned has accepted the ICC's jurisdiction. For example, one of the tasks of the UN Organization Stabilization Mission in the DRC (MONUSCO) is to assist the country in bringing perpetrators of war crimes and crimes against humanity to justice, including through cooperation with the ICC (see resolution 2098 of 28 March 2013) (the DRC ratified the Rome Statute on 11 April 2002). While the mission has provided the Prosecutor with information regarding several indictees, it was also criticised for failing to act on the arrest of Bosco Ntaganda, who was eventually found and extradited to the ICC after surrendering in the US embassy in Rwanda.

With respect to Côte d'Ivoire (Côte d'Ivoire accepted the jurisdiction of the ICC on 18 April 2003, a decision that was reconfirmed by President Alassane Ouattara on 14 December 2011), on 30 March 2011, nearly four months after the outbreak of post-election violence and renewed civil war, the Council adopted resolution 1975. While considering a draft introduced by France and Nigeria, divergences emerged during the negotiations, including reservations by China, India and Russia, on the wording of references to the ICC and on the status of Côte

## Relationship with the ICC (con't)

d'Ivoire's acceptance of its jurisdiction. The Council was careful not to intervene in the ongoing judicial process when it noted that the ICC "may decide on its jurisdiction over the situation in Côte d'Ivoire on the basis of article 12, paragraph 3 of the Rome Statute". On the other hand, the Council could have used stronger language than merely "noting" the ICC actions regarding the situation in Côte d'Ivoire and could have included more references to the ICC in operative paragraphs, rather than solely in the preamble. The Council stopped short of welcoming the activities of the ICC or of expressing support for the Court.

On 23 November 2011, the ICC issued an arrest warrant against former President Gbagbo for four counts of crimes against humanity as an indirect co-perpetrator of murder, rape, persecution and other inhuman acts. Gbagbo, who had been in detention in Côte d'Ivoire, was transferred to The Hague on 30 November after the 1572 Côte d'Ivoire Sanctions Committee decided to lift the travel ban against him on 29 November. This was done pursuant to paragraph 10 of resolution 1572 (2004), which provides that a travel ban shall not apply when the Committee "concludes that an exemption would further the objectives of the Council's resolutions, for peace and national reconciliation in Côte d'Ivoire and stability in the region".

Some Council members have tried to find other ways to enhance cooperation with the ICC. On 17 October 2012, at the initiative of Guatemala, the Security Council held an open debate on "the promotion and strengthening of the rule of law in the maintenance of international peace and security" (S/PV.6849). The debate was on the subject of peace and justice with a special focus on the relationship of the Council with the ICC.

The concept note circulated by Guatemala before the debate states that the relationship between the Council and the ICC should be comprehensively discussed in the Council to achieve two goals: first, to explore how the ICC, as a tool of preventive diplomacy, can assist the Council in carrying out its mandate to uphold the rule of law, and second, to examine how the relationship between the two bodies has developed since the entry into force of the Rome Statute in 2002 in order to consider the way forward in strengthening their synergies (S/2012/731).

To secure the agreement of all Council members to holding the debate, Guatemala did not seek an outcome to the meeting. Fifty states (including the Council members) and the EU participated.

Interestingly, the debate did not produce many critical views about the ICC. China, India and Pakistan had the strongest reservations, with China arguing that the ICC "must not be reduced to a tool" available to some to pursue individual goals and interests or to impede the work of the Security Council in seeking the political settlement of conflicts. India stressed that neither the ICC nor the ad hoc criminal Tribunals were the solution to ensuring peace and justice at the national and international levels. It contended that "the solution lies in building national institutions through capacity-building efforts so that they can function in a way consistent with the rule of law". In a similar vein, Pakistan argued for the primacy of national jurisdiction and for ending impunity through strengthening local courts and national capacity.

The US, likewise not a state party to the Rome Statute, acknowledged nonetheless that the ICC can be "an important tool for accountability". It furthermore stated that it has engaged with the ICC Prosecutor and Registrar to consider how to support specific prosecutions already underway and that it has responded positively to informal requests for assistance. Russia recognised "the great potential" of the Court as "a serious new tool" with which to achieve international justice. It did, however, caution that the accumulated experience showed that a Council referral to the ICC "often gives rise to serious political and legal consequences that do not lead to any straightforward solution".

As for practical measures to improve the institutional relationship with the Council, several suggestions were put forward by participants, including:

- ensuring effective follow-up by the Council on its referrals to protect its own credibility and the legitimacy of international criminal justice, especially regarding cooperation with the ICC in securing arrest warrants;
- avoiding language recusing the UN from any financial obligation regarding referrals, or including a budget for such purposes in the UN's regular budget;
- deleting language exempting certain

categories of individuals from ICC jurisdiction in future referral decisions;

- establishing an indicative checklist or protocol for ICC referrals;
- establishing a committee or working group of the Council on the ICC or the current scope of the work of the informal working group on the ad hoc Tribunals to include the ICC (on 20 November 2012, Costa Rica, Jordan and Lichtenstein wrote to the President of the Security Council proposing the establishment of such a body to systematically address questions arising from the relationship between the Council and the ICC or to expand the mandate of the Informal Working Group to this effect [S/2012/860]); and
- considering whether ICC indictees should be designated for sanctions purposes or automatically listing ICC indictees by the sanctions committees (present practice indicates the Council does not make a correlation between its sanctions regimes and ICC indictees).

Some proposals raised during this open debate were later reiterated during the open debate on working methods held under the Argentinian presidency on 23 October 2014 which focused on several rule of law-related issues and included a briefing by Bensouda.

Regarding the appropriate forum for the ICC Prosecutor's briefing, several Council members, including Russia and China, see the Working Group on International Tribunals as an inappropriate forum for ICC briefings, as originally it was set up to cover the work of the Tribunals established by the Council. Others see the working group as a convenient forum for discussions on cooperation with the Court and do not object to expanding the current scope of the working group. While the Council is at an impasse on this issue, Bensouda was twice able to meet with Council members in an informal interactive dialogue. However, these discussions to date have not translated into concrete action or changes in the Council's willingness to support the Court, as the recent dynamics between Bensouda and the Council demonstrate.

At the same time, despite the fact that China, Russia and the US are not parties to the Rome Statute, Council decisions in recent years have increasingly included statements in support of the ICC in both thematic and

## Relationship with the ICC (con't)

country-specific resolutions. The mere fact that holding an open debate on the Council's relationship with the ICC proved uncontroversial testifies to a certain shift in attitude from the ICC's harshest critics on the Council. This trend, however, shifted again in the last few years, when certain elected Council members, such as Rwanda (and to a lesser extent Azerbaijan and Pakistan) during most of its tenure on the Council, joined China and Russia in seeking to limit ICC-related language in Council resolutions or eliminate it completely.

Negative attitudes towards the ICC became particularly evident when a proposed deferral of the Kenya situation came to the fore on 15 November 2013. In March and April 2011, Council members held two informal meetings in which they heard Kenya's request for the Council to defer the ICC's prosecution against its nationals under Article 16. The Council decided not to act upon the request, as Kenya essentially raised issues of complementarity that should be argued before the Court itself. At this point, while some Council members expressed sympathy for the Kenyan position, there was a general consensus that the Council should not get involved in this issue.

Following the 21 September 2013 terrorist attack in Nairobi, the AU and the vast majority of its members renewed their efforts to defer the cases against President Uhuru Kenyatta and Deputy President William Samoei Ruto. This renewed effort highlighted the claim that the ICC is overly focused on Africa and imposes a new form of Western colonialism on the continent. The most vocal Council member in this regard was Rwanda, which with Morocco and Togo tabled the deferral resolution (S/2013/660).

Since 2011, Kenya had urged the Council to defer its case from the ICC but was told firmly by Council members that no action would be taken. The 2013 draft received only seven votes in favour and failed, but it symbolised African willingness to push the issue and force Council members to choose sides on this matter. The other eight Council members abstained. Thus, the resolution did not gather the nine necessary votes for a resolution to pass, with Azerbaijan, China, Morocco, Pakistan, Russia, Rwanda and Togo voting in favour, and Argentina, Australia, France, Guatemala, Luxemburg, South Korea, the

UK and the US abstaining. The decision by the eight to abstain may be seen as an attempt to appease the African countries by refraining from voting "against" them, but the result remained the same.

On 5 December 2014, Bensouda filed a notice of withdrawal of the charges against Kenyatta, and the proceedings were thus terminated by the Court on 13 March 2015. Bensouda conceded that the evidence in her hands could not prove Kenyatta's alleged criminal responsibility beyond a reasonable doubt. Though Kenya's lack of cooperation probably contributed significantly to the difficulties of the Prosecutor to obtain evidence, this decision decreases the odds that Kenya will raise the issue of deferral before the Council again. Meanwhile, the trial against Ruto continues.

### Situations not Referred to the Court by the Council

Finally, it is important to mention the lack of action in other situations where mass crimes were allegedly committed. Leading examples include the situation in Syria, where calls for the Council to refer the situation to the ICC have been longstanding, including in a 14 January 2013 letter to the Council from Switzerland on behalf of 57 member states (S/2013/19).

France, with the support of several other Council members, drafted a resolution to refer the situation in Syria to the ICC (S/2014/348). The referral was limited to widespread violations of human rights and international humanitarian law by the Syrian authorities and pro-government militias, as well as the human rights abuses and violations of international humanitarian law by non-state armed groups in order to address US concerns about establishing jurisdiction over other perpetrators (mainly relating to the Israeli occupation of the Golan Heights).

While containing some of the same language used in previous referrals, new elements included recalling the 8 April 2013 guidance issued by the Secretary-General on contacts with persons who are the subject of arrest warrants, a guidance that several UN officials failed to follow with respect to other ICC indictees (the guidelines state that contact with indictees should be limited to that which is strictly required for carrying out essential UN mandated activities). The draft

also expressed the Council's commitment "to an effective follow-up" of the referral.

Cosponsored by 65 states, the draft resolution was put to a vote on 22 May 2014. It received 13 votes in favour, including from the African Council members but was vetoed by China and Russia. The failed Syria referral contained language that reflected lessons learned from previous referrals, while at the same time perpetuating some problematic elements of past referrals regarding financial implications and jurisdictional exclusions. Its failure also exemplified the intersection between justice and politics in the relations of the Council with the ICC.

Another example is the case of the DPRK. Australia, France and the US convened an Arria-formula meeting on 17 April 2014 with a Human Rights Council commission of inquiry, which had recommended a referral of the situation by the Security Council to the ICC. On 22 December 2014, the Council held a meeting on the situation in the DPRK at the request of Australia, Chile, France, Jordan, Lithuania, Luxembourg, the Republic of Korea, Rwanda, the UK and the US. The meeting was held after a rare procedural vote at the start of the meeting to adopt the agenda, following an objection by China that the Council was not mandated to consider human rights issues and that the inclusion of the proposed item on the Council's agenda would do more harm than good. (It was the first procedural vote in the Council since 15 September 2006, when the Council decided to add the situation in Myanmar to its agenda [S/PV.5526]. Procedural decisions are not subject to veto.)

A majority of Council members said in the meeting that the Council should consider the commission of inquiry's recommendation to refer the situation in the DPRK to the ICC, and some expressed support for the imposition of targeted sanctions against those found to be most responsible for crimes against humanity. Several members also stressed the importance of the Council's receiving regular updates on the human rights situation. However, while most Council members expressed support for a referral in principle, there was little appetite to push for Council action in the face of strong opposition expected from China (and Russia), especially when their support with respect to DPRK was needed for Council action regarding nuclear

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## Relationship with the ICC (con't)

non-proliferation.

The possibility of referring the situation in South Sudan after the outbreak of civil war in December 2013 has been mentioned by some Council members during various meetings, as well as by then High Commissioner for Human Rights Navi Pillay and Adama Dieng, the Special Adviser of the Secretary-General on the Prevention of Genocide, during their 2 May 2014 briefing to the Council (S/PV.7168) and by Secretary-General Ban Ki-moon during his 12 May 2014 Council briefing (S/PV.7172).

During the 2 May briefing, Australia, France, Jordan, Lithuania and Luxembourg floated the possibility of a Council referral of the situation in South Sudan to the ICC, although Australia and France placed some caveats on such a referral. Australia said that consideration of an ICC referral should begin once the Council had considered the recommendations of the AU Commission of Inquiry on South Sudan (see section 3 above), and France argued that an ICC referral should be considered within the framework of a dialogue with the regional and subregional actors. However, at the time of writing, it seems that a follow up on this issue is highly unlikely.

### Conclusions and Analysis

The ICC was established to provide a permanent jurisdiction, thus negating claims of “victors’ justice” and, for the wider membership, relief from the financial burden that the ad hoc Tribunals brought about. It was to allow the Council to refer situations to an already-existing body that could act as a constant deterrent to perpetrators, surpassing tough negotiations over the establishment of an ad hoc tribunal and the related costs. Both ICC referrals are a positive sign that the Council can and will use its referral powers to promote individual accountability in its efforts to maintain international peace and security. Moreover, the fact that the Libya referral was unanimous demonstrates the degree to which the relevance of individual accountability to the Council’s work has now been accepted, even by non-ICC members China, Russia and the US.

In addition, while any Council involvement in the judicial process inevitably brings about a degree of politicisation, the terms of Council referrals, promising that non-parties

among the P5 will enjoy immunity for their citizens, have cast some doubt on the Council’s commitment to successful prosecution of perpetrators of heinous crimes and the legitimacy of its referrals. Granting immunity to the nationals of one state acting under Council authorisation while the nationals of another state under the same authorisation fall under the ICC’s jurisdiction stands in contrast to the idea behind Article 13(b), referring to a “situation” at large so as not to discriminate between warring parties in a dispute. Yet this is exactly what the Council prescribed in both its referrals to the Court. Indeed, this may be more of a principle issue than one that will come up in practice. Yet, the Council’s practice taints the perception of the ICC as an independent judicial institution by limiting the discretion of the Prosecutor for obvious political considerations.

As for the funding of referrals, the ICC statute anticipates that the UN will cover the costs of Council referrals. By shifting the financial burden of referrals back to the Court, the Council has provided the ICC jurisdiction but not the resources to implement it.

Perhaps the most fundamental of institutional deficiencies is the issue of Council response to non-cooperation by UN member states with the ICC regarding referrals. The first sign of such ambivalence was the fact that other than Sudan and Libya, states were not obliged to cooperate with the ICC in the resolutions referring the situations to the Court. In the case of Sudan, this turned out to be highly relevant, as Bashir has visited several countries without any problems, including some that are parties to the Rome Statute, and the Council did not take any action or express itself against these occurrences.

Even more troublesome is the passivity of the Council despite being notified frequently by the Court and its officials about lack of state cooperation with the ICC. This continues to cast serious doubt on the Council’s resolve and commitment to back its rhetoric on accountability and cooperation with action. It also shows lack of a fundamental understanding that when Council referrals are disregarded, it reflects as badly on the Council as it does on the ICC. In the case of Sudan, the Council’s unwillingness to follow up on the implementation of ICC warrants has amounted to a de facto deferral of the Darfur situation thus far. And the initial

rationale for turning a “blind eye” to Khar-toum, to ensure its cooperation on other issues, has proven an unsuccessful tactic on the part of the Council. On Libya, in principle the Council showed assertiveness when it came to individual accountability. Yet a closer look reveals that the Council did not follow up on its commitment to accountability and its own resolutions on several occasions, casting doubt on its resolve to end impunity for crimes committed in Libya.

Ironically, lack of cooperation on the arrest warrants regarding Darfur has allowed the Prosecutor to allocate her office’s resources to cases that she can actually pursue. Indeed, considering the lacklustre Council follow up on the arrest warrants, one may wonder if such an outcome is not welcomed by several Council members that may view the ongoing case against Bashir as a political burden rather than an opportunity to enhance accountability.

When the highly volatile and political issue of the Kenyan deferral came before it, the Council eventually declined to intervene in a procedure that had a limited connection to peace and security and everything to do with political tensions between African governments and the ICC. However, the fact that the Kenyan deferral resolution failed only due to eight abstentions – with no votes against – could be a worrying sign for similar cases in the future.

Despite the legal framework, the Council-Court relationship still seems nascent today. No formal structure provides for consistent, professional interaction between the two bodies. In this context, the Council’s expressions of support belie the reality that, apart from a few rare exceptions, it does not offer concrete assistance to the Court, even (or especially) in the context of referred situations.

Further, it is distressing to some that the Council has not articulated criteria by which it considers whether threats to peace and security warrant referral to the Court. The Council is a political body unlikely to adopt legal rules to guide its decisions. But when political rather than humanitarian considerations are seen to drive referral decisions, both the Council and the Court come under criticism: the Council for protecting its members’ allies, the Court for being unavailable in those situations that most warrant investigation and prosecution.

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## Relationship with the ICC (con't)

As with the Tribunals, criticism over selective justice at the ICC continues despite the intentions of its founders. A key advantage of the ICC over an ad hoc court is that its permanency was meant to remove accusations of “victors’ justice”. However, the Council itself has contributed to the politicisation of the Court by referring only two situations to it while ignoring several other situations that could justify a referral for crimes that would fall under the ICC’s jurisdiction.

But this issue is much wider than the Council. The ICC has found itself at odds with the vast majority of the African states which accuse it of political bias. As shown above, many AU members are of the view that the ICC is biased in exclusively targeting

Africa and its leaders. Indeed, all situations in which the Court has issued indictments are on that continent, and warrants have been issued against two heads of African states. However, one must acknowledge that as long as the ICC lacks truly universal jurisdiction, even if more Council referrals had taken place or will in the future, there will always be those who would view such decisions as political. And, of course, the Council is a political—not judicial—body, and as such its decisions will primarily be based on politics rather than law.

At times, the Council has found a way to interact positively with the ICC and provide practical assistance, as with the case of Gbagbo. States’ attitudes, on the whole, show

a greater appreciation (even if only rhetorically) not for the Court as such but as a useful institution that has a role to play in the maintenance of international peace and security and the promotion of accountability. Political alliances and positions regarding particular situations may continue to guide Council members, thus limiting the utilisation of the Court. Council members may nevertheless further see the ICC as an institution that exists within the Council’s toolbox to ensure international peace and security and may make better use of it when the agenda of both bodies align.

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## Conclusions

Security Council discourse and practice in the last two decades strongly suggest a general understanding that promoting accountability is an important tool at its disposal in discharging its primary responsibility for the maintenance of international peace and security and that, conversely, impunity and immunity can undermine international peace and security. Over the years, responding to a variety of situations and demands, the Council has displayed considerable flexibility and creativity adopting a variety of institutional measures to make use of this tool:

- In establishing the two ad hoc criminal Tribunals, the Council proved both innovative and resourceful in creating institutions to try the perpetrators of heinous crimes, albeit after failing to prevent or stop them by other means. Despite initial questions of legality from some, the Tribunals would play a most significant role in developing international criminal law from a normative standpoint. From an institutional standpoint, they provided a forum to promote accountability in two war-torn regions where atrocious crimes were committed and many of the worst offenders were prosecuted and convicted.
- When Sierra Leone requested the Council to establish an internationalised criminal court to try RUF members for crimes committed during the civil war, the

Council worked with the Secretary-General and in turn requested him to conclude an agreement to that effect with Sierra Leone. With the blessing of the Council, the SCSL was established and brought to justice several perpetrators from all sides of the conflict, including Liberian President Charles Taylor.

- The Council attempted to follow the Sierra Leone model when it was requested to establish a tribunal to try those responsible for the Hariri assassination. However, when internal politics prevented the ratification of the agreement with the Secretary-General to establish the tribunal, the Council took another innovative and proactive step. At the request of the Lebanese prime minister (with the backing of the majority of the Parliament) and against the wishes of the Lebanese president, the Council brought the agreement into force, thus establishing the STL and eliminating the need for Lebanon to ratify it.
- The Council was given a unique role in the ICC Statute to refer and defer certain situations to and from the Court. Despite a rocky start in the relationship between the two institutions, the Council referred the situations in Darfur and Libya to the ICC, thus taking advantage of the existing institutional framework to promote accountability. Furthermore, the creation

of the ad hoc Tribunals was a catalyst for the renewed interest of the international community in establishing a permanent international criminal court.

On the other hand, although the Council has been decisive in establishing or using institutional tools to uphold the rule of law and accountability, it has also taken certain action (or refrained from action) that has hindered these institutions in their quest for accountability. It has often subsequently failed to follow through, or in some cases, it has shown indifference to impunity. This was evident in several case studies:

- Following the establishment of the ad hoc international Tribunals, the Council was slow to ensure state cooperation. On several occasions, it answered the request of the Tribunals’ officials for assistance with enforcing state cooperation with vague and meaningless rhetoric, leaving them to their own devices. Instead, the Council focused on completion and minimizing financial expenditures. This latter goal is of course a valid and important objective, but the Council did so while disregarding, so it seems, the primary goal of these Tribunals—upholding individual accountability.
- After its Article 13(b) referrals of the situations in Darfur and Libya to the ICC, the Council has not followed through with any consistency to pressure the relevant states

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## Conclusions (con't)

to abide by their obligations to cooperate with the Court. In both cases, the Court has transmitted official findings of non-compliance to the Council.

- There have been several situations and conflicts in which the Council should have reasonably taken action to uphold accountability, but it has failed to do so. In this context, it has failed to resort to the institutional “tool box” that is at its disposal for this very purpose. Thus, for example, a draft resolution referring the situation in Syria to the ICC failed, and discussions regarding referrals of other situations, such as the DPRK and South Sudan, have gained no traction in the Council.

The Council, for both political and financial reasons, also created institutional and procedural difficulties for the various courts by the terms of its conduct:

- With respect to the SCSL, against the protest of the Secretary-General, the Council insisted that the Court be funded by voluntary contributions. This proved to be highly problematic as the Court kept running out of funds, which possibly affected the quality of its work.
- With respect to the STL, a similar approach was taken whereby the Tribunal is funded by voluntary contributions and the Lebanese government, thus creating a permanent risk of shortage of funds.
- With respect to the ICC referrals, the referrals included several conditions that were problematic in their own way. First, the financial burden of the referrals was to be borne by the ICC and not the UN. Second, the nationals of non-parties to the Rome Statute participating in UN peacekeeping missions were excluded from the jurisdiction of the ICC. Third, the referrals did not obligate member states (beyond Sudan and Libya) to cooperate with the ICC.
- The Council has yet to decide on a proper forum to regularly communicate and exchange information with the ICC Prosecutor in a meaningful way.
- With respect to the ad hoc Tribunals, in recent years the Council has only been able to agree on the extension of judges’ terms for limited amounts of time, despite the needs of the Tribunals for extensions in order to finalise their work. This is related both to frustration about the pace of

work of the Tribunals and Russia’s objection to the jurisprudence of the ICTY.

Indeed, at the time of the creation of the ad hoc Tribunals, the Council was probably unaware of the financial support they would require over the years. The estimates of the life span of the ad hoc Tribunals, as with the SCSL, were unreasonably short, creating much frustration when deadlines were not met. However, some of these frustrations were at least somewhat due to the Council’s own questionable decisions and actions. For example, the Council was indifferent on the whole to states’ lack of cooperation with the Tribunals in apprehending fugitives, their lack of assistance and at times their interference with the investigations of the Office of the Prosecutor, all of which contributed to delays in the Tribunals’ work. With the SCSL, the Council insisted that the Secretary-General reduce its planned budget (and foreseen activity) in such a way that extended its life span. For example, by only allowing one trial chamber, it was inevitable that the SCSL would operate much longer than the original three-year estimate.

A more fundamental dissonance is the difference between fast-shifting political priorities, which means the Council must direct its attention to new crises on a regular basis, and the much slower pace of the wheels of justice. What the Council has come to realize, perhaps the hard way, is that while it has moved on to the next crisis, the criminal institution it created, or the ICC in other cases, will still be in the midst of fulfilling its task of bringing perpetrators to justice while granting them the full due process that the law requires. This process takes time and requires the support of the Council. Without that support, justice is either slowed down or in other cases completely dormant.

That said, the Council has proved capable of taking action to support the work of these judicial institutions and cooperate with them in various ways, albeit not always consistently. Here are some examples:

- The Council has on many occasions attentively taken into account the requests of the principals of the ad hoc Tribunals, introduced amendments to their statutes and authorised various steps to assist their proper function—for example, by adding a trial chamber to the ICTY, by creating a pool of ad litem judges and by

extending judges’ terms on various occasions upon the request of the principals of the Tribunals.

- The Council created the informal working group on the international criminal tribunals to discretely meet with the Tribunals’ principals on a regular basis.
  - The Council has authorised its peacekeeping mission in the DRC to cooperate with the ICC to apprehend fugitives.
  - The Council provided for a guard unit to the SCSL from its peacekeeping forces at the request of the Secretary-General.
  - With respect to both the ad hoc Tribunals and the SCSL, the Council was involved in creating residual mechanisms to continue the necessary tasks that remain as these former institutions finish their work.
  - The Council has refrained from deferring the situation in Darfur from the ICC despite political pressure to do so. On the other hand, its lack of action on Sudanese non-cooperation has created a de facto state of deferral. Indeed, the ICC Prosecutor has become so desperate that she informed the Council that she is suspending her investigations regarding Darfur and shifting her limited resources elsewhere.
  - The Council has consistently refrained from deferring the situation in Kenya from the ICC, despite repeated pressure from Kenya and the AU. When a draft resolution deferring the situation came to a vote, only seven Council members voted in favour while eight abstained, and the resolution failed. However, what was initially a consensus position against a deferral of a situation, which the Council was not responsible for referring to the ICC in the first place, turned into a slim majority. Moreover, those not voting for the deferral abstained rather than dissented, thus failing to send a strong message in support of the ICC with their vote.
- These examples demonstrate that the Council is capable of providing these various institutions with political backing and practical solutions when there is a political will among its members. Looking forward, the Council has shown that it is resourceful in coming up with institutional tools to maintain peace and security. The Council can create its own subsidiary bodies, bring into force agreements establishing tribunals or support

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## Conclusions (con't)

the Secretary-General in his endeavours to establish a court. The Council has also been provided with the ability to refer situations to the ICC, including in the future for the crime of aggression.

With its power to refer situations to the ICC, in the future it could contemplate doing so in several more cases than it has so far. In general, this means that the Council no longer has the need to create ad hoc tribunals as it did in the 1990s. Council members would be particularly uninterested in another ad hoc tribunal due to the financial burden involved in creating such a body. Nevertheless, until the ICC establishes itself as a truly credible criminal court, capable of fulfilling the tasks entrusted to it, such an option cannot be completely disregarded.

Another viable option is a “hybrid”, “mixed” or internationalised” criminal court, combining both national and international

attributes, such as the STL and the SCSL. In the case of the SCSL, it was able, with the exception of the Taylor trial, to operate within the community it was serving. However, if the Council does choose to go down this road, ensuring that the body has the financial resources it needs to fulfil its tasks will be key.

Although the ad hoc tribunals are at their final stage of existence and the SCSL operations have ended, phasing in both cases into their respective residual mechanisms, they must not be viewed as institutions of past history. Even though the existence of the ICC lowered significantly the odds that the Council will replicate the ad hoc tribunals, these bodies offer the Council and others an opportunity to draw lessons from the Council’s establishment of and interaction with these institutions for future scenarios where accountability mechanisms may be contemplated. This is because international

criminal judicial organs are bound to share certain commonalities in structure, logistics and procedure that are transferable from one conflict to another. Thus the experience from past institutions is likely to provide valid guidance for future situations requiring accountability measures where the Council responds.

Whatever form or institutional measure the Council decides to take, it will be critically important for the Council to follow through on its own decisions and provide support and assistance where needed to the judicial institution. It will also be important to obligate member states to cooperate with these institutions. Without such consistent institutional cooperation and backing, the court or tribunal will find it hard to fulfil the task entrusted to it by the Council. As for the Council, if the judicial institution fails to deliver, the Council is bound to realise that its own legitimacy and authority will be in jeopardy.

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