

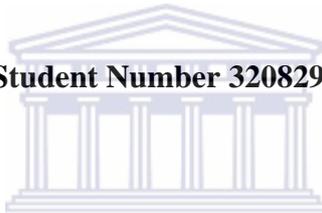
**Legality of the Jurisdiction of the ICC over Nationals of Non-States Parties who  
Commit Offences Within the Jurisdiction of the ICC on Territories of Non-States  
Parties.**

Research Paper submitted in partial fulfilment of the degree of Master  
of Laws: Transnational Criminal Justice and Crime Prevention

**BY**

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## **Key Words**

The International Criminal Court.

The United Nations Security Council.

United Security Council Referral.

Article 13(b) of the Rome Statute.

Jurisdiction *Ratione personae*.

Jurisdiction *Ratione materiae*.

Vienna Convention on the Law of Treaties.

State Parties.

Non-State parties.

Crimes within the jurisdiction of the ICC.

Complementarity.



## PLAGIARISM DECLARATION

I **FOSTINO YANKHO MAELE** hereby declare that this research paper is my own work, that it has never been submitted before any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Student Name: Fostino Yankho Maele.

Signature:

Date:

Supervisor: Prof. G Werle.



Signature

A handwritten signature in blue ink that reads "Werle".

Date:

## List of Abbreviations and Acronyms

AU	: African Union
ICC	: International Criminal Court.
ICJ	: International Court of Justice
ICTR	: International Criminal Tribunal for Rwanda
ICTY	: International Criminal Tribunal for the Former Yugoslavia
PCIJ	: Permanent Court of International Justice.
UN	: United Nations
UNSC	: United Nations Security Council.
US	: United States
VCLT	: Vienna Convention on the Law of Treaties.



## Dedication

To my family

And

To all who thirst for justice

To God be Glory.



## **Acknowledgements**

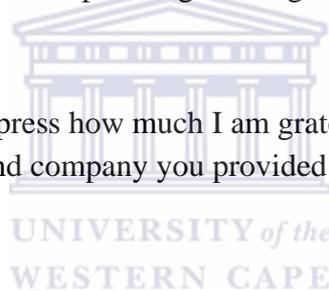
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To my Family and friends too numerous to mention from Malawi who kept me company through calls, text messages, facebook, e-mails, I owe you one....

## CHAPTER 1.

### 1. GENERAL INTRODUCTION AND OVERVIEW OF THE STUDY

#### 1.1. Background to the Study

The coming into force of the Rome Statute on the 1<sup>st</sup> July 2002 signified the birth of the International Criminal Court (ICC).<sup>1</sup> The ICC came into existence as a permanent criminal court for the prosecution of Genocide, Crimes against Humanity, War Crimes and Crime of Aggression.<sup>2</sup> There are 121 states-parties to the Rome Statute.<sup>3</sup> This means there are many states that have not ratified the Rome Statute. The ICC would ordinarily not have jurisdiction over the nationals of these states if they committed offences within the jurisdiction of the ICC on the territories of the non-states parties. This paper intends to analyse whether the ICC has jurisdiction over nationals of non-state parties who commit crimes within the jurisdiction<sup>4</sup> of the ICC on the territories of non-states parties to the Rome Statute.<sup>5</sup> There are situations and cases that are before the ICC involving nationals of non-state parties that committed crimes on territories of non-states parties.<sup>6</sup> These cases have come before the ICC by way of United Nations Security Council (UNSC) referrals. This paper will therefore examine the legality of UNSC referrals under international law in respect of nationals of non-states parties, who commit crimes within the jurisdiction of the ICC, on territories of non-states parties.<sup>7</sup>

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<sup>1</sup> Schabas (2008: 22).

<sup>2</sup> Art. 5 of the Rome Statute. Note however that the Court will not exercise jurisdiction over aggression until a decision is made according to Art. 15 (3) ter.

<sup>3</sup> Available at <http://www.icc-cpi.int/Menus/ASP/states+parties/> (accessed on 02/05/2012).

<sup>4</sup> Crimes created under Art. 5 of the Rome Statute.

<sup>5</sup> The Statute that created the International Criminal Court, adopted in Rome on 17<sup>th</sup> July 1998 and entered into force on 1<sup>st</sup> July 2002.

<sup>6</sup> For example cases arising from the situation in Darfur Sudan and Libyan Arab Jamahiriya.

<sup>7</sup> Reference to non-states parties is with respect to states that have not ratified the Rome Statute.

## 1.2. Research Question

This paper aims at answering the question: what is the legal basis of the jurisdiction of the ICC over nationals from non-states parties to the Rome Statute who commit offences within the jurisdiction of the ICC on the territories of non-states parties.

## 1.3. Significance of the Study

The United Nations (UN) presently has 193 member states<sup>8</sup> whilst the Rome Statute has 121 states-parties.<sup>9</sup> The possibility of the commission of crimes that are within the jurisdiction of the ICC by nationals of non-state parties on territories of non-states parties is always there. Since the Rome Statute is a treaty, this could mean that nationals of non-states parties to the Rome statute who commit offences on the territories of non-states parties are beyond the reach of the ICC. This can clearly undermine the international community's quest to fight impunity.<sup>10</sup> However, the UNSC referral is evidently the only means that national of a non-state party who commits offences within the jurisdiction of the ICC can be indicted before the ICC.<sup>11</sup> It is common knowledge that most serious crimes against humanity are usually committed by governments, and in such cases, it is unthinkable to expect such governments to ratify the Rome statute.<sup>12</sup> The ICC has assumed jurisdiction over nationals of non-states parties to the Rome statute who have committed offences within the jurisdiction of the ICC on the territories of non-party states.<sup>13</sup> The examination of the relationship between the ICC

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<sup>8</sup> <http://www.un.org/apps/news/story.asp?NewsID=39034&Cr=South+Sudan&Cr1> (accessed on 02/05/12).

<sup>9</sup> Available at <http://www.icc-cpi.int/Menus/ASP/states+parties/> (accessed on 02/05/12).

<sup>10</sup> Paragraph 5 of the Preamble to the Rome Statute.

<sup>11</sup> Art. 12 read with Art. 13 (b) of the Rome Statute.

<sup>12</sup> Morris (2001:13).

<sup>13</sup> UNSC referrals of Darfur, Sudan and Libya Situations; *The Prosecutor vs. Ahmad Muhammad Harun* ICC-02/05-01/07, *The Prosecutor v. Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09, *The Prosecutor vs. Bahr Idriss Abu Garda* ICC-02/05-02/09, *The Prosecutor vs. Abdallah Banda Abubaker Nourain and Saleh*

and nationals of non-states parties who commit crimes within the jurisdiction of the ICC, on the territories of non-states parties, is therefore of paramount importance. UNSC resolutions bind all states<sup>14</sup> yet the Rome Statute only binds states-parties to it.

This research will also explore the legality of UNSC referrals under the Law of treaties.<sup>15</sup> Many authors who have discussed the relationship between the UNSC and the ICC have not considered the effect of the Law of treaties on the relationship between the ICC and the UNSC, with respect to nationals from states that are not parties to the ICC.<sup>16</sup> In the same vein, this research is significant in that it will explore whether the UNSC can legally enforce its powers under Chapter VII of the United Nations Charter through a treaty based body, i.e. the ICC, against non-states parties to the treaty.<sup>17</sup>

The Rome statute is a treaty.<sup>18</sup> It came into force because of the ratification of the states-parties. A state becomes bound by the provisions of the ICC by signing and ratifying the statute.<sup>19</sup> If it were not for the ratifications of the states that opted to voluntarily submit to the jurisdiction of the ICC, the ICC could not have been in existence.<sup>20</sup> The UNSC referrals are provided for under article 13 (b) of the Rome statute. This essay intends among other

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*Mohamed Jerbo Jamus*. ICC-02/05-03/09 and *The Prosecutor vs. Abdel Raheem Muhammad Hussein* ICC-02/05-01/12 arrest warrants issued in respect of the situation in Darfur, Sudan. Available at <<http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Cases/>> (accessed on 19<sup>th</sup> April 20120).

<sup>14</sup> This is in view of the fact that it is the UNSC referrals that have brought nationals of non-states parties that are alleged to have committed offences on the territories of non-states parties.

<sup>15</sup> The Vienna Convention on the Law of Treaties (VCLT) adopted on 22 May 1969 and entered into force on 27<sup>th</sup> January 1980.

<sup>16</sup> Akande (2003); Condorelli and Villalpando (2002); Fletcher and Ohlin (2006); Scharf (2001).

<sup>17</sup> Scheffer (1999: 19).

<sup>18</sup> McGoldrick (2008: 47).

<sup>19</sup> Art. 12 (1) of the Rome Statute.

<sup>20</sup> Art. 126 of the Rome Statute.

questions, to examine whether article 13(b) of the Rome statute which should ordinarily bind states-parties only,<sup>21</sup> can give an organ of an international organisation, not party to the Rome Statute, power, to give power to the ICC to exercise jurisdiction over non-states parties. This essay intends to explore at what point, the Rome statute ceases to operate as a treaty, to allow it have jurisdiction over non-states parties.

This essay intends to examine the legality of the jurisdiction of the ICC over such cases under international Law, under the UN Charter and under the Rome Statute.

#### 1.4. **Scope of the Paper**

This paper shall discuss the legality of the jurisdiction of the ICC over nationals from non-states parties who commit offences within the jurisdiction of the ICC on territories of non-states parties.

The United States (US) opposes the jurisdiction of the ICC over nationals of non-states parties. This paper, however, is different from the position taken by the US in the sense that it does not argue against the jurisdiction of the ICC over nationals of non-states parties who commit offences on the territories of states-parties.<sup>22</sup> Based on the territoriality principle, this essay agrees with the jurisdiction of the ICC over nationals of non-states parties who commit offences within the Rome statute on territories of states-parties to the ICC. The scope of this essay, however, is limited to the jurisdiction over nationals of non-states parties who commit offences within the jurisdiction of the ICC on the territories of non-state parties. Essentially the discussion focuses more on situations where there is a referral by the UNSC under article 13(b) of the Rome Statute.

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<sup>21</sup> *Island of Palmas Case* (1928) 2 R.I.A.A. 829, 842.

<sup>22</sup> Morris (2001: 14).

### **1.5. Hypothesis**

This paper proceeds on the assumption that the ICC being a treaty-based court, the court should ordinarily only have jurisdiction over states that have ratified the Rome Statute. However article 13(b) creates a legal regime whereby the UNSC can refer to the ICC, situation from non-states parties to the ICC. This has raised questions as to the legality of the jurisdiction of the ICC in those situations under the Rome Statute. Questions have also been raised as to the legality of the power of a treaty outside the UN system giving powers to the UNSC to refer cases to it.

### **1.6. Research Methodology**

This study will basically be desk research. Reference will be had to relevant legal documents especially the Rome Statute, The UN Charter and the VCLT. Case law from different jurisdictions and International Courts will also be referred to, where necessary. In particular the study will draw examples from cases on going before the ICC.

Books, chapters in books and articles in journals will also be used to supports different positions that will be taken in the course of this paper. Relevant websites on the internet will also be visited in the quest for views and positions of different authors.

### **1.7. Chapter Outlines**

This paper comprises five chapters as follows

#### Chapter 1: Introduction.

This chapter introduces the topic and defines the scope.

## Chapter 2: The Jurisdiction of the ICC

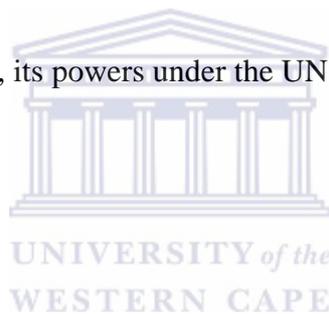
This chapter discusses the general jurisdiction of the ICC.

## Chapter 3: The ICC and the Law of Treaties

This chapter discusses the law of treaties in relation to the Rome Statute and third party states.

## Chapter 4: The ICC and the United Nations Security Council (UNSC)

Chapter four discusses the UNSC, its powers under the UN Charter and the Rome Statute.



## Chapter 5: Conclusions and Recommendations

Chapter five is the conclusion and recommendations.

## CHAPTER 2

### 2. THE JURISDICTION OF THE ICC

#### 2.1. Introduction

The Rome Statute that created the ICC came into force on the 1<sup>st</sup> July 2002. The Statute contains provisions relating to the jurisdiction of the court. At the Rome Conference, the issue of jurisdiction caused a lot of controversy.<sup>23</sup> This controversy continues even ten years after the Rome Statute came into force. This has been apparent in the positions taken by states like United States of America<sup>24</sup>, India<sup>25</sup> and China<sup>26</sup> among other countries. The controversy has also been manifested in UNSC Resolutions 1970 and 1573.<sup>27</sup> The jurisdiction of the ICC has to be understood in different contexts. Jurisdiction *ratione materiae* concerns itself with which crimes can be tried before the ICC.<sup>28</sup> Jurisdiction *ratione personae*, concerns itself with who can be tried before the ICC,<sup>29</sup> and then jurisdiction *ratione temporis*<sup>30</sup> concerns itself with the period within which crimes that are tried before the court, should have been committed.<sup>31</sup> In the Thomas Lubanga Case the Appeals chamber of the ICC puts it as follows:

‘The jurisdiction of the Court is defined by the Statute. The notion of jurisdiction has four different facets: subject-matter jurisdiction also identified by the Latin maxim jurisdiction *ratione materiae*,

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<sup>23</sup> Wilmshurst (1997: 127); Jia (2006: 2).

<sup>24</sup> Brown (1999); Morris (2000); (Morris 2001); Scharf (2001).

<sup>25</sup> Ramanathan (2005).

<sup>26</sup> Jia (2006).

<sup>27</sup> Jia (2006:11).

<sup>28</sup> Art. 5 of the Rome Statute.

<sup>29</sup> Arts. 12 and 26 of the Rome Statute.

<sup>30</sup> Art. 11 of the Rome Statute.

<sup>31</sup> Available at <<http://www.trial-ch.org/en/resources/tribunals/international-criminal-court/the-iccs-jurisdiction.html>> (accessed on 17/06/ 2012).

jurisdiction over persons, symbolized by the Latin maxim jurisdiction *ratione personae*, territorial jurisdiction -jurisdiction *ratione loci* - and lastly jurisdiction *ratione temporis*. These facets find expression in the Statute.<sup>32</sup>

Jurisdiction is defined as ‘the authority to effect legal interests.’<sup>33</sup> This authority includes the right to make rules of law, compel compliance with any of those rules of law and take any enforcement action to ensure compliance.<sup>34</sup> The preamble of the Rome Statute clearly states that the ICC has jurisdiction to try natural persons who commit serious crimes of international concern.<sup>35</sup> It should also be noted that even though the jurisdiction of the ICC can be looked at in different contexts, there are other limitations to the jurisdiction of the ICC that will also be looked at in this chapter.

## 2.2. Understanding Trigger Mechanisms

Before delving into the discussion of the jurisdiction of the ICC, it is imperative to discuss trigger mechanisms under the Rome Statute. Just like the issue of jurisdiction, the issue of trigger mechanisms also caused a lot of controversy during the Rome Conference.<sup>36</sup> A trigger mechanism refers to the ‘ability to direct the courts attention to events in a particular time and place, possibly involving numerous criminal acts with a view of initiating an exercise of jurisdiction over those events.’<sup>37</sup> It has also been described as “the authority to set in motion the jurisdiction of the court.”<sup>38</sup> Under the Rome statute there are three trigger mechanisms.<sup>39</sup>

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<sup>32</sup> *Situation in the Democratic Republic of the Congo in the Case of, The Prosecutor v. Thomas Lubanga Dyilo, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute* Judgment of 3 October 2006 21. No. : ICC-01/04-01/06 (OA4)

<sup>33</sup> Blakeley (2009: 430).

<sup>34</sup> Blakeley (2009: 430).

<sup>35</sup> Art. 5 of the Rome Statute.

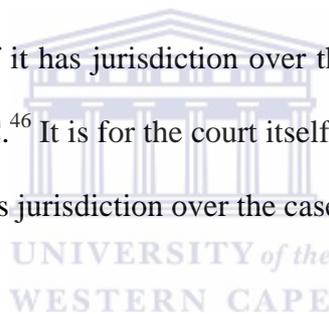
<sup>36</sup> Gallavin (2006: 44); Nsereko (1999: 108).

<sup>37</sup> Kirst and Robinson (2002: 619).

<sup>38</sup> Nsereko (1999: 108).

The jurisdiction of the court can be triggered by a state-party by referring to the prosecutor situations in which crimes within the jurisdiction of the court have been committed.<sup>40</sup> The prosecutor may also investigate *proprio motu*, however, this is subject to review by the Pre-trial Chamber.<sup>41</sup> The Jurisdiction of the court may also be triggered by the UNSC exercising its powers under Chapter VII of the UN Charter where crimes within the jurisdiction of the court have been committed.<sup>42</sup>

It is also notable that all referrals are not specific to an individual case but rather to a situation.<sup>43</sup> The referral does not specify any crimes or persons that are alleged to have committed those crimes. The referral precedes the exercise of jurisdiction.<sup>44</sup> When a referral has been made to the court, it does not follow that the ICC will exercise jurisdiction over the matter. The court has to assess if it has jurisdiction over the case.<sup>45</sup> A referral by itself does not confer jurisdiction on the ICC.<sup>46</sup> It is for the court itself after a case has been taken to it to consider and decide whether it has jurisdiction over the case.



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<sup>39</sup> Art. 13 of the Rome Statute.

<sup>40</sup> Art. 13(a) of the Rome Statute.

<sup>41</sup> Brown (2000: 73).

<sup>42</sup> Brown (2000: 73).

<sup>43</sup> Kirst and Robinson (2002: 621).

<sup>44</sup> Blommestijn and Ryngaert (2012: 435) at note 56.

<sup>45</sup> Art. 19(1) of the Rome Statute.

<sup>46</sup> Blommestijn and Ryngaert (2012: 435) note 56.

## 2.3. General Jurisdiction

### 2.3.1. Jurisdiction *Ratione Materiae*

As already stated above, the jurisdiction *ratione materiae* concerns itself with which crimes can be tried before the ICC.<sup>47</sup> The jurisdiction of the ICC is limited to the most serious crimes of international concern namely, Genocide, Crimes against Humanity, War Crimes and the Crime of Aggression.<sup>48</sup> There are elaborate provisions for each of the crimes in articles 6 to 8 of the Rome Statute. Even though the Rome Statute has an elaborate list of the crimes the court can try, the list is not exhaustive. There are other offences under the customary international law that the ICC can have jurisdiction over that are not provided for in the Rome Statute.

It is also notable that the Rome Statute provides for new crimes that did not exist under customary international law. In some instances the Rome Statute has extended the scope of crimes that have existed under customary international law. The relevance of the non-customary nature of some of the crimes under the Rome Statute in relation to third states will be highlighted in the later chapters.

### 2.3.2. Jurisdiction *Ratione Temporis*

Article 11 of the Rome Statute defines the temporal jurisdiction of the ICC. The ICC only has jurisdiction over crimes that were committed after the entry into force of the Rome Statute.<sup>49</sup> Previous International Criminal Tribunals had jurisdiction to try offences that were committed prior to their creation.<sup>50</sup> This provision is closely related to the prohibition of

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<sup>47</sup> Art. 5 of the Rome Statute.

<sup>48</sup> Art. 5 of the Rome Statute; Nsereko (1999: 93).

<sup>49</sup> i.e. Crimes committed after the 1<sup>st</sup> July 2002.

<sup>50</sup> International Criminal Tribunal for Rwanda (ICTR), International Criminal Tribunal for the former Yugoslavia (ICTY), Special Court for Sierra Leone (SCSL), Nuremberg Tribunal.

retrospective criminalisation.<sup>51</sup> The jurisdiction for the ICC *ratione temporis* is therefore prospective.<sup>52</sup> The ICC has to satisfy itself that the case before it is within its temporal jurisdiction. In the *Lubanga Case*, the Pre Trial Chamber observed as follows;

‘Considering that the [t]he Statute entered into force for the [Democratic Republic of Congo] on 1 July 2002, in conformity with article 126(1) of the statute, the [Democratic Republic of Congo] having ratified the statute on 11 April 2002, the second condition will be met pursuant to article 11 of the Statute if the crimes underlying the case against Mr Thomas Lubanga Dyilo were committed after 1 July 2002. As the case against Mr Thomas Lubanga Dyilo referred to crimes committed between July 2002 and December 2003, the Chamber considers that the second condition has also been met.’<sup>53</sup>

For states that ratify the Rome Statute after its entry into force, they have the option to accept the jurisdiction of the court for the crimes committed between 1<sup>st</sup> July 2002<sup>54</sup> and the time they ratify the Statute.<sup>55</sup> The UNSC referral can trigger the jurisdiction *ratione temporis* of the ICC in cases where a State has neither ratified nor accepted the ad hoc jurisdiction of the ICC. In this case the alleged crimes must have been committed after the entry into force of the Rome Statute.<sup>56</sup>

The ICC can, however, be barred from exercising its jurisdiction *ratione temporis*.<sup>57</sup> This can happen where the UNSC has requested a deferral for a certain period of time.<sup>58</sup> With respect to war crimes, the ICC is also barred from exercising its jurisdiction *ratione temporis* where a

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<sup>51</sup> Art. 24 of the Rome Statute; Schabas (2008: 65).

<sup>52</sup> McGoldrick (2008: 49); Bourgon (2002: 543).

<sup>53</sup> *The Prosecutor vs. Thomas Lubanga Dyilo Decision of the Prosecutors Application for a Warrant of Arrest*, (ICC-01/04-01/06-8) of 10 February 2006, para. 26.

<sup>54</sup> The day the Rome Statute came into operation.

<sup>55</sup> Art. 11 (2) of the Rome Statute.

<sup>56</sup> Bourgon (2002: 553).

<sup>57</sup> Bourgon (2002: 545).

<sup>58</sup> Art. 16 of the Rome Statute.

state-party has, on becoming a party to the Statute, declared that it opts out to the jurisdiction of the Court.<sup>59</sup>

In cases where a national of non-state party commits crimes within the substantive jurisdiction for the court on the territory of a non-state party, the temporal jurisdiction applies from the 1<sup>st</sup> July 2002, the day the Rome statute entered into force. In this case therefore, there is an imposition of the temporal jurisdiction of the court on the individual concerned.

#### 2.4. Pre-Conditions to the Exercise of Jurisdiction

A state that ratifies the Rome Statute accepts the jurisdiction of the ICC with respect to the crimes under article 5 of the Rome Statute.<sup>60</sup> This essentially means that there must be a nationality or territorial connection between the accused person and a state party to the Rome Statute.



##### 2.4.1. Nationality Principle

The ICC can exercise jurisdiction over crimes within its jurisdiction based on the nationality of an individual.<sup>61</sup> If an individual is a national of a state that is a party to the Rome Statute, the ICC can have jurisdiction regardless of the place where the crimes are committed. It has long been recognised that there exists a legal bond between an individual and a state.<sup>62</sup> Under the active personality principle, states have jurisdiction over the crimes committed by their nationals outside their state of origin.<sup>63</sup> Similarly, the ICC has jurisdiction over nationals of

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<sup>59</sup> Art. 124 of the Rome Statute; McGoldrick (2008: 49).

<sup>60</sup> Art. 12 (1) of the Rome Statute.

<sup>61</sup> Art. 12(2) (b) of the Rome Statute; Schabas (2008: 71).

<sup>62</sup> For a thorough discussion of the Nationality Principle and the problems that it raises see Zsuzsanna (2001); *NoteeBohn Case (Liech. v. Guat.)*, Second Phase, 1955 ICJ REP. 4, 23 (Apr. 6).

<sup>63</sup> Cassesse (2003: 281).

all states that have ratified the Rome Statute regardless of the place where they commit an offence.<sup>64</sup>

#### **2.4.2. Territoriality Principle**

The ICC has the jurisdiction to try offenders who commit offences within the jurisdiction of the court when the said offences are committed on the territories of states-parties.<sup>65</sup> In this situation, the nationality of the offender does not matter. It has long been accepted that a state has jurisdiction over crimes committed on its own territory.<sup>66</sup> It is also recognised as fair to judge a person by the law of the place where he or she committed the offence. It was recognised in an American case as follows

‘The territoriality of jurisdiction in criminal cases is based on the reasonable premise that in ordinary criminal cases an offender should be judged by the law of the place where the crime was committed...’<sup>67</sup>

The territorial jurisdiction of the ICC over nationals of states-parties derives from the territorial jurisdiction of the states-parties themselves. This can also be understood from the point of view that the Rome Statute is based on the principle of complementarity.<sup>68</sup> This means the ICC can only exercise jurisdiction where the state-party that had original jurisdiction is unable or unwilling to prosecute the case.

#### **2.4.3. Territoriality and Nationality Jurisdiction on Ad-Hoc Basis**

The Rome Statute has made a provision for the exercise of its jurisdiction on an ad hoc basis. This happens where a non-state party to the Rome Statute accepts to submit to the jurisdiction

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<sup>64</sup> Schabas (2008: 71).

<sup>65</sup> Article 12 (2) (a) of the Rome Statute.

<sup>66</sup> Bottini (2004: 511); Cassese (2003: 277); *SS Lotus Case* PCIJ (1927).

<sup>67</sup> *United States v. Eisentrager et al.*, (1948) 15 L.R.T.W.C. 8 (United States Military Commission), at 15.

<sup>68</sup> Art. 17 of the Rome Statute.

of the court on a temporary basis.<sup>69</sup> The referral to the ICC by Cote D'Ivoire in 2005 is an example of a situation where a state that is not a party to the Rome statute accepted the jurisdiction of the ICC on an ad hoc basis.<sup>70</sup> This provision essentially allows a state that has a territorial or nationality nexus to a crime within the jurisdiction of the court<sup>71</sup> to accept the jurisdiction of the ICC without essentially ratifying the Rome Statute.<sup>72</sup> It is a way in which a non-state party to the Rome Statute agrees to share its jurisdictional powers that are inherent in state sovereignty.<sup>73</sup> In this context some authors have argued that the ICC therefore has unlimited territorial jurisdiction over crimes within its jurisdiction committed on the territory of any state.<sup>74</sup>

## **2.5. Delegated Nature of the Jurisdiction of the ICC**

The ICC exercises delegated national and territorial jurisdiction.<sup>75</sup> Since the ICC is an International Court, it cannot exercise jurisdiction based on the nationality or territoriality principles in their actual senses. Rather the ICC exercises delegated territorial and nationality jurisdiction from the states-parties to the Rome Statute.<sup>76</sup> In the realm of international criminal law, delegation of territorial or nationality jurisdiction is not the same as actual territorial or nationality jurisdiction that states exercise. States have the right to try foreigners who commit offences based on the territoriality or nationality principles. However,

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<sup>69</sup> Article 12 (3) of the Rome Statute; Stahn et al (2005:42); Schabas (2008:71,75).

<sup>70</sup> Stahn et al (2005:421).

<sup>71</sup> Art. 12(2) of the Rome Statute.

<sup>72</sup> Stahn et al (2005: 422).

<sup>73</sup> Stahn et al (2005: 423).

<sup>74</sup> Bourgon (2000: 560).

<sup>75</sup> Morris (2000); Scheffer (2001: 47, 65-66).

<sup>76</sup> Bassiouni (2003: 500).

delegation of this jurisdiction to an international court created by a treaty is novel and has not attained the status of customary international law.<sup>77</sup>

## 2.6. Universal Jurisdiction

### 2.6.1. Rejection of the Universal Jurisdiction of the ICC

During the negotiation of the Rome Statute, states considered the option of giving the ICC universal jurisdiction. Universal jurisdiction is the ability of a state to try a person of a criminal offence even though there is no connection between the offence in question and the state exercising jurisdiction.<sup>78</sup> Generally, the basis upon which a state can assume universal jurisdiction is determined by the nature of the offence other than the nationality of the offender or the place where the offence is committed.<sup>79</sup> Crimes over which states have universal jurisdiction are crimes of a special character that they entitle any state to exercise jurisdiction on behalf of the entire international community.<sup>80</sup> There are few crimes over which states can exercise universal jurisdiction namely, Piracy<sup>81</sup>, Slave Trade<sup>82</sup>, Genocide, War Crimes.

The principle of universal jurisdiction was rejected in the Rome Statute and this rejection is clear from the provisions of Article 12 of the Rome Statute.<sup>83</sup> It was argued by some states

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<sup>77</sup> Morris (2001); Whilst others author like Bassiouni argue that the ICC is complementary to national jurisdiction, one can take note that in the two UNSC referrals before the ICC, neither the UNSC nor the ICC itself has considered the question of complementarity. This would beg the question whether such an argument can be raised, where in the first place no consideration has been made of the same.

<sup>78</sup> Bottini (2004: 510); Werle (2009: 65); Scharf (2001: 368); Nsereko (1999: 98); Cassese (2003: 284).

<sup>79</sup> O'Keefe (2004: 745); Nsereko (1999: 98); Bottini (2004: 511); Werle (2009: 65); Princeton Principles of Universal Jurisdiction.

<sup>80</sup> Bottini (2004: 511); Bassiouni (2001).

<sup>81</sup> Morris (2001: 339); *United States vs. Smith* 18 U.S. (5 Wheat.) 153 (1820).

<sup>82</sup> Morris (2001: 341).

<sup>83</sup> Hall (1998: 549-50).

that since states have universal jurisdiction over core crimes within the jurisdiction of the court, the same jurisdiction should be conferred to the ICC.<sup>84</sup> It was further argued that the ICC should have the jurisdiction to try any individual who has committed the crimes within the jurisdiction of the court whenever they are arrested.<sup>85</sup>

Whilst there was a proposal to have universal jurisdiction of the ICC by Germany and other states, this idea did not go through. This therefore means that the ICC has no universal jurisdiction. There must always exist a link that provides for the jurisdiction of the ICC over a national of any state be it a state-party or not. Apart from the mere fact that states rejected universal jurisdiction of the ICC, some authors have doubted the possibility of delegating universal jurisdiction by states to an international court.<sup>86</sup>

### 2.6.2. Universal Jurisdiction and the Quest to end Impunity

The principle of universal jurisdiction is of paramount importance in the fight against impunity for the commission of crimes of serious international concern. Universal jurisdiction acts like a guarantee that an individual who commits certain type of crimes is prosecuted by any state that arrests them.<sup>87</sup> Furthermore, as Bottini has put it quoting from *The Arrest Warrant Case*,<sup>88</sup> universal jurisdiction prevents the alleged perpetrators of heinous crimes from<sup>89</sup> “finding a safe haven in third countries.”<sup>90</sup> It is notable that the crimes under

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<sup>84</sup> Schabas (2008: 61).

<sup>85</sup> Schabas (2008: 61).

<sup>86</sup> Morris (2001: 29); Werle (2009: 64).

<sup>87</sup> Bottini (2004: 512); Starke (1989: 234) (stating that the purpose of granting universal jurisdiction with respect to certain offenses “is to ensure that no such offence goes unpunished”).

<sup>88</sup> *Democratic Republic of Congo v Belgium* I.C.J. Reports 2002, p. 3.

<sup>89</sup> Bottini (2004: 512).

<sup>90</sup> *The Arrest Warrant Case (Democratic Republic of Congo v Belgium)* I.C.J. Reports 2002, p. 3. Para. 46 (dissenting opinion of Judge Van den Wyngaert).

the jurisdiction of the ICC are very serious crimes that are many a time perpetrated by government officials, hence the need for universal jurisdiction so that the perpetrators are prosecuted.<sup>91</sup> Madeleine Morris in her article argues that

‘The Law should come in where innocent people are being slaughtered, tortured and subjected to other atrocities. If all states have jurisdiction over the relevant crimes, then at least some perpetrators may be prosecuted some of the time, thereby providing more deterrence, retribution, and condemnation of the crimes, and more incapacitation and perhaps even rehabilitation of the perpetrators, than would otherwise exist.’<sup>92</sup>

Crimes under the Rome Statute are all serious crimes under international law and there is strong legal opinion supporting the view that the crimes that under the jurisdiction of the ICC are crimes to which universal jurisdiction should apply.<sup>93</sup> These crimes affect the international community as a whole. It is because of this universal effect that the international community as a whole can assume jurisdiction to try these offences, regardless of the place or the nationality of the offender.<sup>94</sup> However it is clear that even though the plenipotentiaries at the Rome conference recognised the importance of universal jurisdiction of the ICC, the same was rejected.<sup>95</sup> It should be noted that three states that vehemently opposed universal jurisdiction of the ICC, namely USA, Russian Federation and China have not ratified the Rome Statute but they are permanent members of the UNSC.<sup>96</sup> As noted above the UNSC has the power to refer non states-parties to the Rome Statute to the ICC.

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<sup>91</sup> Morris (2001: 2); Al Bashir warrant para 42; Nsereko (1999: 98); *A.G Israel vs Eichman*, (1968) 36 ILR 18 (District Court, Jerusalem) at 50; *United States vs Eisentreger et al* (1948) 15 L.R.T.W.C 8 (United States Commission ) at 15.

<sup>92</sup> Morris (2001: 338).

<sup>93</sup> Nsereko (1999: 102).

<sup>94</sup> Werle G (2009: 64).

<sup>95</sup> Nsereko (1999: 102).

<sup>96</sup> Note should be taken of the fact that these three states are also permanent members of the UNSC, which was given powers to refer cases to the ICC. These states also have veto powers in the UNSC.

## 2.7. Other Limitations to the Jurisdiction

### 2.7.1. Complementarity

Whilst the ad hoc tribunals created by the UNSC had primacy over the national courts, the ICC jurisdiction is complementary to national jurisdictions.<sup>97</sup> In this sense therefore, it is the states-parties to the Rome Statute that have the primary jurisdiction to try offences that are within the jurisdiction of the court. This therefore means that the ICC exists as the court of last resort. It only assumes jurisdiction in cases where a state-party that has primary jurisdiction over the case, is unable or unwilling to prosecute the case.<sup>98</sup>

### 2.7.2. *Ne Bis Idem*

The *ne bis in idem* is the principle of double jeopardy. This principle basically states that legal action can be instituted twice for the same cause of action.<sup>99</sup> Where it is proved that a person was previously tried for the same conduct, the ICC cannot have jurisdiction.

### 2.7.3. Gravity of the Offence

The ICC cannot have jurisdiction over a case where the case is not of sufficient gravity.<sup>100</sup> The case becomes inadmissible. In making this decision the court is called upon to have regard to paragraph 10 of the preamble.<sup>101</sup>

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<sup>97</sup> Art. 1 of the Rome Statute, par. 10 of the Preamble.

<sup>98</sup> Art. 17 of the Rome Statute.

<sup>99</sup> Art. 20 of the Rome Statute.

<sup>100</sup> deGuzman (2008) for a detailed discussion of the concept of gravity under the Rome Statute.

<sup>101</sup> Art. 17(d) of the Rome Statute.

#### 2.7.4. Age

Another important limitation to jurisdiction of the ICC is age. The ICC has no jurisdiction over persons below the age of 18.<sup>102</sup> Since the ICC is based on the principle of complementarity, national systems can assume jurisdiction over those under the age of 18.<sup>103</sup>

#### 2.8. Jurisdiction of the ICC Over Nationals of Non-States Parties who commit Offences within the Jurisdiction of the ICC on the Territories of Non-States Parties

As can be seen from the above discussion, the ICC has jurisdiction to try nationals of states-parties who commit crimes within the jurisdiction of the ICC anywhere.<sup>104</sup> Furthermore, the ICC also has jurisdiction to try any national from any state who commits crimes within the jurisdiction of the ICC on the territory of a state-party.<sup>105</sup> In situations where a non-state party has accepted the jurisdiction of the ICC on an ad hoc basis, the ICC can also exercise jurisdiction.<sup>106</sup>

In all these situations, it is apparent that there is a relationship between the ICC and the offender, based on the territoriality, nationality and in the case of ad hoc jurisdiction, consent of the state from which the national comes from or where the offence has been committed.

The only instance in which the ICC would assume jurisdiction over a national of a non-state party who commits the offences within the jurisdiction of the ICC on the territory of a non-state party is through the UNSC referral.<sup>107</sup> Article 13(b) of the Rome Statute provides that

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<sup>102</sup> Art. 26 of the Rome Statute.

<sup>103</sup> Frulli (2000: 540).

<sup>104</sup> Art. 12 of the Rome Statute.

<sup>105</sup> Art. 12 of the Rome Statute.

<sup>106</sup> Art. 12 (3).

<sup>107</sup> Art. 13 (b) of the Rome Statute; Danner (2003: 516)

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

This jurisdiction over nationals of non-state parties who commit offences within the jurisdiction of the court on the territories of non-state parties has been exemplified in the Sudanese<sup>108</sup> and Libyan<sup>109</sup> situations. Both Sudan and Libya have not ratified the Rome Statute. Ordinarily therefore, they cannot be expected to submit to the jurisdiction of the court.<sup>110</sup> Secondly, there is no territorial or nationality relationship with a state-party to the Rome Statute. There is further no consent from these two countries that the ICC should assume jurisdiction apart from the authority of the UNSC under Chapter VII of the UN Charter.

The question that comes to mind therefore is what is the link that establishes the jurisdiction of the ICC over a national of a non-state party who commits an offence within the jurisdiction of the ICC on the territory of a non-state party. Is it the Rome Statute itself? Or the UN Charter? Or maybe it is the relationship agreement between the ICC and the UN?

In both the Sudanese and the Libyan situations, it is not in contention that crimes within the jurisdiction of the ICC have been committed by nationals of Libya and Sudan. If these countries were parties to the ICC one would not even question the jurisdiction of the ICC over both situations. However, the persons indicted come from non-states parties to the ICC and the offences alleged were committed on the territory of the non-state parties.

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<sup>108</sup> Resolution No. 1593 of 31<sup>st</sup> March, 2005.

<sup>109</sup> Resolution No. 1970 of 26<sup>th</sup> February, 2011.

<sup>110</sup>cf Morris (2001: 14) foot note 3, notes that there the ICC cannot have jurisdiction over a non party national who commit offences on the territories of non states party. Nsereko (1999: 107).

It has already been outlined above that universal jurisdiction of the ICC was rejected by the ICC. This means that the ICC is not exercising its jurisdiction based on the universality principle. Furthermore, territoriality, nationality and active personality principles cannot be relied upon as creating the basis for the jurisdiction of the ICC over nationals of non-states parties. The Sudanese and Libyan situations were referred by the UNSC. It was only article 13(b) that was operative. The referrals were all in a form of UNSC resolutions.

## 2.9. Conclusion

In conclusion this chapter has shown that the ICC only has delegated jurisdiction to try nationals of states that are parties to the Rome Statute. The ICC can also try nationals of any state that commit crimes within the jurisdiction of the court on the territories of states-party to the Rome Statute. The only instance in which the ICC can try nationals of non-states parties to the Rome Statute and have committed crimes within the jurisdiction of the court on the territories of non states party, is where there is a UNSC referral.

This discussion will therefore proceed to examine the UNSC referrals and how the same gives jurisdiction to the ICC. The next chapter will look at the law of treaties and examine whether the Rome Statute, under article 13(b) can bind non-states parties to the ICC and prosecute their national who commit crimes within the jurisdiction of the ICC on the territories of non-states party.

## CHAPTER 3

### 3. THE LAW OF TREATIES AND THE JURISDICTION OF THE ICC

#### 3.1. Introduction

This chapter explores the international law of treaties. The discussion will narrow down to the Rome Statute and the general law of treaties with regard to third party states. The chapter also examines whether the Rome Statute can create law or obligations in respect of third states. This chapter will further explore if the Rome Statute can give an organisation which has not ratified the Rome Statute power to bind third parties under the ICC. Finally, this Chapter seeks to understand the legality of article 13(b) with respect to third states to the Rome Statute.

#### 3.2. The General Law of Treaties

A treaty is ‘an agreement whereby two or more states establish or seek to establish a relationship between themselves, governed by international law.’<sup>111</sup> The Vienna Convention on the Law of treaties (VCLT)<sup>112</sup> codified most of the customary treaty law.<sup>113</sup> The VCLT only applies to treaties between states.<sup>114</sup> The ICC has in several of its decisions recognised the applicability of the VCLT. It was stated in the case concerning the situation of Kenya,

In this context, the Chamber wishes to point out that since the Rome Statute is a multilateral treaty, the interpretation of its provisions is governed by the customary rules of treaty interpretation<sup>115</sup> embodied in articles 31 and 32 of the Vienna Convention on the Law of Treaties.<sup>116</sup>

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<sup>111</sup> Article 2 of the VCLT; Shearer (1994: 397); Shaw (2008: 903).

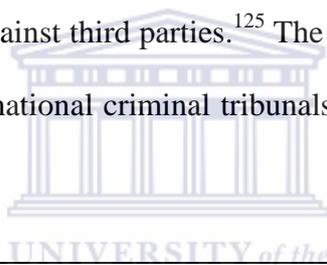
<sup>112</sup> UN Doc. A/CONF.39/27 (1969); 8 ILM 679 (1969).

<sup>113</sup> Concluded on the 23<sup>rd</sup> May 1969 and it entered into force on the 27<sup>th</sup> of January 1980.

<sup>114</sup> Art. 1 of the VCLT, of the Vienna Convention on Law of Treaties between States and International Organisations or between International Organisations of 1986 which was intended to include Organisations and is not yet in force; ILM (1986) p.543.

<sup>115</sup> *The Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of 13 July 2009, para. 47; *Territorial Dispute (Libyan Arab Jamahiriya vs Chad)*, Judgment of 3 February 1994, ICJ

The Rome Statute governs the relationship between states that are parties to it.<sup>117</sup> One of the most basic principles in the law of treaties is the principle of *pacta tertiis nec nocent nec prosunt*, i.e. that a treaty does not create rights or impose obligations against a third party.<sup>118</sup> A third party is a state that is not a party to a treaty.<sup>119</sup> The ICC was created by a treaty that was negotiated at the diplomatic conference in Rome in 1998.<sup>120</sup> The Statute stipulates that it shall come into force on the 1<sup>st</sup> day of the month after the 60<sup>th</sup> day after 60<sup>th</sup> ratification.<sup>121</sup> The jurisdiction of the ICC therefore derives from the states that ratified the Rome Statute which subsequently created the ICC. A state accepts the jurisdiction of the court by ratifying the Rome Statute.<sup>122</sup> Since the Rome Statute is a treaty,<sup>123</sup> it follows that its provisions cannot create law or provide for obligation against states that are not parties to it. The Rome Statute is in fact *res inter alios acta*<sup>124</sup> against third parties.<sup>125</sup> The fact that the ICC was created by a treaty is contrasted to other international criminal tribunals like the ICTR and the ICTY that



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Reports 1994, para. 41; ICJ, *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment of 15 February 1995, ICJ Reports 1995, para. 33.

<sup>116</sup> *Situation in the Republic of Kenya Decision Pursuant to Art. 15 of the Rome Statute on the authorisation of an investigation into the Situation in the Republic of Kenya (ICC-01/09) of 31<sup>st</sup> March 2010*. Para. 19. The Appeals Chamber supported this view in its Judgment on Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, para. 33.

<sup>117</sup> Art. 1 of the Rome Statute.

<sup>118</sup> Art. 34 VCLT; Akande (2012: 305); Shaw (2008: 903); Milaninia (2006).

<sup>119</sup> Art. 2(1) (h) of the VCLT.

<sup>120</sup> Brown (2000: 66).

<sup>121</sup> Art. 126 of the Rome Statute; Brown (2000: 66); Nsereko (1999).

<sup>122</sup> Art. 13 of the Rome Statute.

<sup>123</sup> Art. 1 of the Rome Statute; Bantekas and Nash (2007: 536).

<sup>124</sup> Meaning 'a matter between others is not our business.'

<sup>125</sup> Fitzmaurice (2002: 38).

were created by the UNSC resolution under chapter VII of the UN Charter, and therefore became binding upon all states-parties to the UN by virtue of the UN Charter.<sup>126</sup>

### 3.3. Treaties and Third States

#### 3.3.1. *Pacta Tertiis nec Nocent Nec Prosunt*

As already noted above, a treaty does not impose law, obligations or rights on states that are not parties to the treaty.<sup>127</sup> This principle is based on the sovereignty and the independence of states.<sup>128</sup> It is a long established principle of international law that a state cannot be bound by a law without its consent, express or implied.<sup>129</sup> State consent is important in several aspects. Consent increases compliance to the obligations.<sup>130</sup> Consent further reinforces legitimacy and the state's willingness to enforce the decisions of the court like the ICC.<sup>131</sup> In addition, consent gives states the assurance that the law is in their best interest.<sup>132</sup> Lack of consent, however, increases the risk that the law will be ignored.<sup>133</sup> The principle that a state cannot be bound under international law without its consent is now recognised as part of the customary international law.<sup>134</sup> This position was also emphasized by the International Law Commission

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<sup>126</sup> Art. 25 of the UN Charter.

<sup>127</sup> Art. 34 of the VCLT; Shearer (1994: 405).

<sup>128</sup> Aust (2000: 207); Brownlie (2003: 598); Millaninia (2006: 36); Shaw (2008: 928).

<sup>129</sup> Aust (2005); Buchanan (2004: 243– 52, 301–14); Guzman (2012: 1); Lister (2011: 2).

<sup>130</sup> Lister (2011:11).

<sup>131</sup> Lister (2011: 5).

<sup>132</sup> Guzman (2012: 755).

<sup>133</sup> Guzman (2012: 752).

<sup>134</sup> *Certain German Interests in Polish Upper Silesia (Germany v. Pol.)*, 1926 P.C.I.J. (ser. A) No.7, at 27-29 (May 25); *Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.)*, 1932 P.C.I.J. (ser. A/ B) No. 46, at 141 (June 7); *North Sea Continental Shelf (F.R.G. v. Den. and F.R.G. v. Neth.)* 1969 I.C.J. 3, 26 (Feb. 20); McNair (1961:309).

during the deliberations before the Vienna Convention.<sup>135</sup> The Permanent Court of International Justice (PCIJ) stated that “a treaty only creates law as between states which are parties to it. In case of doubt, no rights can be deduced from it in favour of third states.”<sup>136</sup> This means that it would ordinarily follow that the ICC should not have any jurisdiction over nationals of states that have not ratified the Rome Statute, especially when the offences are committed on the territories of non-states parties.<sup>137</sup> When a national of a state not party to the ICC is indicted before it, the state assumes some obligations. Akande states that, “It is apparent that the UNSC referral creates obligations on the non-state party. The referral subjects the non-state party to the jurisdiction, legality, requests and the decisions of the court that are made in accordance with the Rome Statute.”<sup>138</sup>

It is therefore clear that a referral by the UNSC obliges the referred state to comply with the provisions of the Rome Statute, in the same way that states-parties to the Rome Statute are bound by the treaty.<sup>139</sup> This is in clear contrast to the *pacta tertiis nec nocent nec prosunt* principle. The principle, however, is not an absolute principle.<sup>140</sup> There are some instances when obligations and rights can be created against third parties. This was basically to ensure observance of international norms.<sup>141</sup>

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<sup>135</sup> Shaw (1994: 475) quoting Yearbook of International Law, 1966, Vol. II p.227; Bantekas and Nash (2007: 538).

<sup>136</sup> *Certain German Interests In Polish Upper Silesia*, PCIJ Ser.A, No. 7, 28; *Chorzow Factory Case*, PCIJ Ser. A, No. 17, 45; *Austro-German Customs Union Case*, PCIJ Ser. A/B, No. 41,48; Akande (2012: 306).

<sup>137</sup> Milaninia (2006:36); Chinkin (1993: 27).

<sup>138</sup> Akande (2009: 341).

<sup>139</sup> Dralle (2011).

<sup>140</sup> Shaw (2008: 928).

<sup>141</sup> Chinkin (1993: 134); Millaninia (2006: 37).

### 3.3.2. Exceptions

#### 3.3.2.1. Treaties Reflecting Customary Law

A State that is not a party to a treaty may still be bound by a treaty if the treaty merely expresses an established principle of customary law.<sup>142</sup> In some instances a treaty may have a provision that is later generally accepted by states that are not parties to the treaty.<sup>143</sup> For treaty provisions to be capable of forming part of customary law, it must 'be of a fundamentally norm creating character, such as would be regarded as forming the basis of general rule of law; have passed into general corpus of international law; and be accepted as such by *opinio juris*.'<sup>144</sup> Essentially, the state will be bound by the rule in its nature as a customary rule and not the treaty as such. However, the ICC has only existed for the past ten years hence it is very unlikely that the jurisdictional regime created under article 13(b) could be a reflection of customary international law.<sup>145</sup> Furthermore, even though it is conceded that the Rome Statute contains elements of customary international law, not all the provisions in the Statute reflect customary international law.<sup>146</sup>

#### 3.3.2.2. Treaties conferring Third Party Rights upon Assent

Some treaties can accord right and obligations to third parties. This is reflected in article 35 of the VCLT. Before a treaty may bind a state that is not a party to the same, two conditions must be satisfied. First, the treaty itself must have a provision intending to establish the

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<sup>142</sup> Art. 38 VCLT; *North Sea Continental Shelf* Case, ICJ Reports 1969, 3 et seq., 38-39; *Fisheries Jurisdiction* Case, Merits, ICJ Reports 1974, 3 et seq., (23-26); *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports 1984, 392 et seq., (424, para 73, 93-98) Fitzmaurice (2002:58).

<sup>143</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua. v. U.S.)*, 1986 I.C.J. 14, 97 184 (June 27); Aust (2000: 210); Milaninia (2006: 37).

<sup>144</sup> *North Sea Continental Shelf* Case, para.71.

<sup>145</sup> Milaninia (2006: 38); Bassiouni (2003: 262).

<sup>146</sup> Bantekas (2009: 488-489) for a thorough discussion of the extent of the customary nature of the provisions of the Rome statute.

obligation.<sup>147</sup> Secondly, the third state must consent to the obligation in writing.<sup>148</sup> Mere conduct does not amount to acceptance of the obligation and consent to the obligation does not make the third state a party to the treaty.<sup>149</sup> This can be exemplified by the provisions of article 12(3) of the Rome Statute. Under this article, states that are not parties to the Rome Statute may refer a situation to the ICC after making a declaration under with the registrar. However this does make the state a party to the Rome Statute. In the case of nationals of non-state parties who commit offences on the territories of non-states parties, this exception would equally not be applicable.

### 3.3.2.3. **Third State conferring Third Party Rights upon Presumed Assent**

A treaty may create a right for a non-states party if the intention of the parties was to create rights to a third state with its express or assumed assent.<sup>150</sup> The third state is not required to do anything, and assent is presumed, unless there is a contrary indication.<sup>151</sup> Even under this exception, the ICC would not have jurisdiction over nationals of non-states parties who commit offences on the territories of non-state parties.

### 3.3.2.4. **The Principle in SS Lotus**

The SS Lotus principle basically states that a state can exercise its jurisdiction over nationals of other states who commit crimes outside the states' territory so long as there is no rule under international law prohibiting the exercise of jurisdiction.<sup>152</sup> Other authors have

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<sup>147</sup> Shearer (1994: 405).

<sup>148</sup> Art. 35 of the VCLT.

<sup>149</sup> Aust (2000: 208).

<sup>150</sup> Shearer (1994: 405); Art. 36 of the VCLT.

<sup>151</sup> Aust (2000: 208).

<sup>152</sup> *SS Lotus (France vs. Turkey)*, 1927(P.C.I.J. Ser.A No. 9, at 18 (Sept. 7).

attempted to argue that the jurisdiction of the ICC over nationals of non-states parties under article 13 (b) can be justified on the grounds of SS Lotus.<sup>153</sup> This is because the ICC exercises delegated territorial and nationality jurisdictions. The legal authority of this doctrine has been thrown into serious question. Madeline Morris has convincingly argued of the inapplicability of this doctrine.<sup>154</sup> Milaninia has also argued along similar lines.<sup>155</sup> The SS Lotus principle also has also been heavily criticised by many countries and authors.<sup>156</sup> Furthermore the SS Lotus principle applies more in national contexts hence cannot be easily applied before an international court.<sup>157</sup> Most of all, the *pacta tertiis nec nocent nec prosunt*<sup>158</sup> principle is said to enjoy greater international acceptance and *opinio juris* than the SS Lotus principle hence in this case, the *pacta tertiis nec nocent nec prosunt* rule has stronger force of law than the SS Lotus principle.<sup>159</sup>

### 3.4. Article 13(b) UNSC Trigger Mechanism

#### 3.4.1. Article 13(b) is *Res Inter Alios Acta* to Third

Article 13(b) of the Rome Statute, which gives the UNSC powers of referral, is a provision that should ordinarily apply to states that have accepted to be bound by the provisions of the

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<sup>153</sup> Scharf (2001: 366-368); Scharf (Winter 2001: 72-75).

<sup>154</sup> Morris (2001: 47-53).

<sup>155</sup> Milaninia (2006).

<sup>156</sup> Milaninia (2006:42).

<sup>157</sup> Milaninia (2006:42).

<sup>158</sup> This principle has been recognised as part of customary international law. See *Certain German Interests in Polish Upper Silesia (Germany v. Pol.)*, 1926 P.C.I.J. (ser. A) No.7, at 27-29 (May 25); *Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.)*, 1932 P.C.I.J. (ser. A/ B) No. 46, at 141 (June 7); *North Sea Continental Shelf (F.R.G. v. Den. and F.R.G. v. Neth.)* 1969 I.C.J. 3, 26 (Feb. 20); McNair (1961:309).

<sup>159</sup> Milaninia (2006:42).

Rome Statute.<sup>160</sup> In the *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir*, the ICC stated as follows

‘Finally, in relation to the jurisdiction *ratione personae*, the Chamber considers that, insofar as the Darfur situation has been referred to the Court by the Security Council, acting pursuant to article 13(b) of the Statute, the present case falls within the jurisdiction of the Court despite the fact that it refers to the alleged criminal liability of a national of a State that is not party to the Statute, for crimes which have been allegedly committed in the territory of a State not party to the Statute.’<sup>161</sup>

The ICC did not discuss the basis of its jurisdiction other than mentioning that the case was referred by the UNSC under article 13(b). A similar approach is noticeable in the case of *Ahmed Harun*.<sup>162</sup> This was the time that the court was seized of a matter brought by the UNSC referral. Ordinarily, one would have expected the ICC to give an in-depth analysis of the legal basis upon which it assumes jurisdiction over nationals of non-state parties to the ICC who commit crimes on the territories of non-states parties. However, it is very clear that the court disposed off the issue about jurisdiction much quicker than expected.

It is noticeable, however, that before we even start considering the powers of the UNSC, the provisions in of the Rome Statute are of paramount importance. Pausing here, it is imperative to revert to the question that was posed in the introduction to this chapter. The question is whether article 13(b) being a creation of parties to the Rome Statute can create a right for a non party to the treaty? Further can a non-party state to the Rome Statute compel a non state party to submit to the jurisdiction of the ICC?

To start with the statement of Danilenko clearly puts the position into the proper perspective. He states that “as an international treaty, the Rome statute binds the contracting states. The

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<sup>160</sup> Blommestijn and Ryngaert (2012: 435).

<sup>161</sup> *Situation in Darfur, Sudan the Case of the Prosecutor v Omar Hassa Ahmad Al Bashir. ("Omal Al BASHIR") Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir No.: ICC-02/05-01/09 of 4 March 2009 para. 40.*

<sup>162</sup> This approach is in stark contrast to the Nuremberg Judgments where the court dedicated a lot of pages to provide reasons for their assumption of jurisdiction.

sovereign equality of states excludes any automatic effect of treaties on third States which remain for them *res inter alios acta*.”<sup>163</sup>

Since the Rome Statute is *res inter alios acta* to third states, it follows that the provisions of the Rome Statute article 13(b) inclusive, should also apply to states that have ratified the Rome Statute.<sup>164</sup> This essentially means that the power that the Rome Statute gives the UNSC to refer situations to the court, should ordinarily apply to states that have accepted to be bound by the Rome Statute. It has been alluded to by many authors that under article 13(b) of the Rome Statute, providing for the UNSC referral, the ICC acts as a subsidiary organ of the UNSC. In their article, Fletcher and Ohlin have gone a step further to argue that the ICC is two courts in one.<sup>165</sup> In one breadth it is a treaty based court. On the other hand it is a court that is subsidiary to the UNSC. Even if it argued that at times the ICC acts as a subsidiary organ of the UNSC, it is still the parties to the Rome Statute that have given life to the ‘ICC as a subsidiary of the UNSC’ through article 13 (b) of the Rome Statute. This is supported by the article 4(2) of the Rome Statute that the court ‘may exercise its functions and powers, as provided in this statute...’<sup>166</sup>

Yitiha, recognises that the inclusion of article 13(b) in the Rome Statute article 13(b) creates a paradox. He states as follows

‘It would appear that by including the Security Council option the framers have created a paradox. As a treaty, the obligations in the Rome Statute bind its parties only, whereas Security Council action under Chapter VII binds all UN members states. When the Security Council refers a case to under Chapter VII, states not party to the Rome Statute, nor accepting the ICC’s jurisdiction, may find that they have to accept its jurisdiction because they are members of the UN. It would appear that this provision violates the Treaty Convention as third states will find themselves having to accept treaty obligations

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<sup>163</sup> Danilenko (1999).

<sup>164</sup> Dralle (2011).

<sup>165</sup> Fletcher and Ohlin (2006).

<sup>166</sup> Condorelli and Villalpando (2002: 571-582).

for a treaty that they have not ratified. However their obligation stems from the Security Council resolution rather than the Rome Statute. Nonetheless states will be placed in a difficult situation and just how this problem will be resolved is open to question. Perhaps if all UN members ratified the Rome Statute, it need not be a problem.<sup>167</sup>

Put in another way a non-binding treaty creates a provision that essentially ends up creating a binding obligation. Danilenko has expressed it as follows,

‘According to Article 4 of the Rome Statute, the ICC "shall have international legal personality" and "shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes." The contracting parties have thus expressly conferred international legal personality on the ICC. Under the law of treaties, the legal personality of the ICC operates only *vis-à-vis* Member States. Third States are not legally bound by it because for them this provision is *res inter alios acta*.<sup>168</sup>

The UN is not a party to the Rome Statute hence the provisions of the Rome Statute do not bind members of the UN.<sup>169</sup> The relationship agreement, as will be seen in Chapter 4, does not give the UN or the ICC any more powers than those recognised under their constitutive Acts. The power of referral derives from the Rome Statute, a treaty not applicable to third states.<sup>170</sup> Third states can only recognise the ICC as an international legal person and nothing more.<sup>171</sup> It therefore follows that even before we start discussing the powers of the Security Council, article 13(b) of the Rome Statute does not have any legal binding force on third states.<sup>172</sup>

Let us just imagine The African Union (AU) Convention having a provision that states that the UNSC may refer a case to the court created under it, and the UNSC refers Japan or Germany to the Court. Can Japan or Germany submit to the jurisdiction of that court? Even

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<sup>167</sup> Yitiha (2004: 19).

<sup>168</sup> Danilenko (1999-2000: 450).

<sup>169</sup> Note is taken of the fact the members of the UN are bound by the UNSC Resolution other than the Rome Statute.

<sup>170</sup> Art. 13 (b) of the Rome Statute.

<sup>171</sup> Cryer (2009: 117).

<sup>172</sup> Danilenko (1999-2000: 450).

though Japan and Germany are members of the UN and bound by the UNSC resolution, would they not challenge the legality of the provision that gives the UNSC the power of referral? Surely they would challenge the legality of the provision in the AU convention since they are not parties to the AU Convention. This is a paradox that Yitiha<sup>173</sup> refers to. One part it is perfectly legal, the other part is illegal. A legality coloured with an illegality.

In as far as third states are concerned; the Rome Statute is like a non-existent treaty.<sup>174</sup> This essentially means that the Rome Statute cannot legislate against them.<sup>175</sup> Does it mean that the world is ready to accept that any treaty that in the first place does not bind them can create a right against them?<sup>176</sup> Where the UNSC on its own passes a resolution, it should be distinguished from a situation where an organisation extraneous to the UN that does not bind all UN members, allows the UNSC to refer to it states that are in the first place not legally bound by the organisation. It does not follow that this consent can be extended to consent to the jurisdiction of the court to which a country that has essentially voluntarily declined to submit to the jurisdiction.

### 3.4.2. State Sovereignty and State Consent

The principle of sovereignty is an important principle in international law, worthy of consideration. A State cannot just give up its sovereignty without its consent. This is also

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<sup>173</sup> Yitiha (2004: 19).

<sup>174</sup> Third parties however must recognise the legal status of the ICC even though the provisions thereof do not legally bind them. See *Reparations For Injuries suffered in the Service of the UN* (1949) ICJ Reports 174, 185; Bantekas and Nash (2007: 538).

<sup>175</sup> Unless it is part of customary international law or part of *ius cogens* which article 13(b) has not attained.

<sup>176</sup> A lot of authors rush to argue that the Jurisdiction stems from the UNSC completely ignoring the fact that art. 13(b) is in the first place a creation of the States-parties to the Rome Statute.

exemplified in the Rome Statute.<sup>177</sup> State parties to the Rome Statute voluntarily agree to submit to the jurisdiction of the ICC by ratifying the Rome Statute.<sup>178</sup> A State cannot legislate for the limitation of another state's sovereignty, without the consent of the other state. This is clear in several provisions of the Rome Statute.<sup>179</sup> The Rome Statute operates on behalf of and with the consent of states-parties that have signed and ratified the Rome Statute.<sup>180</sup> It is conceded that several articles in the Rome Statute emphasize the ICC only has jurisdiction over states that have consented to its jurisdiction.<sup>181</sup> Articles 12 (2) and 13(b) create a legal regime that is binding upon only states that have ratified the Rome Statute.

Furthermore, states-parties to the Rome Statute had the power to pool their powers together, and do what each of those states could have individually done.<sup>182</sup> But it is noteworthy that universal jurisdiction was denied.<sup>183</sup> This means that even though the crimes within the jurisdiction of the court are universal crimes, the Rome Statute does not give the ICC universal jurisdiction.<sup>184</sup> Furthermore the ICC was created outside the UN system and several authors have supported the view that the UNSC cannot extend the powers of the ICC.<sup>185</sup> It follows therefore that states-parties to the Rome Statute did not possess powers to make

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<sup>177</sup> Paras. 7 and 8 of the Preamble to the Rome Statute.

<sup>178</sup> Art. 12(1) of the Rome Statute; Cryer (2005: 985).

<sup>179</sup> Arts. 1, 4, 11 and 12 of the Rome Statute.

<sup>180</sup> First line of the Preamble to the Rome Statute.

<sup>181</sup> Arts. 12(1) and 125 of the Rome Statute.

<sup>182</sup> States-parties to the ICC delegated to the ICC their Criminal Jurisdiction in the Crimes the ICC has jurisdiction over.

<sup>183</sup> German Proposal at the Rome Conference for a court with universal jurisdiction. See UN Doc A/AC 249/1998/DP2/1998.

<sup>184</sup> Art. 12 of the Rome Statute.

<sup>185</sup> Condorelli and Villalpando (2002).

provisions for the jurisdiction of the ICC on non-states parties without their consent. This position has been ably articulated by Loughland who states,

‘It is one thing for states to agree to pool some of their powers on a voluntary basis, and have them exercised by a body to which they delegate powers. It is quite another thing for an organisation created by states then to claim powers over states which are not parties to it, and which have not given their consent.’<sup>186</sup>

The UNSC cannot on its own refer situations to the ICC. The power of referral under article 13 (b) derive from the Rome Statute.<sup>187</sup> Commenting on a post of William Schabas on the amendment of article 16 of the Rome Statute it was stated,

‘In both cases the Power of the UNSC vis-à-vis the ICC derives from the Rome Statute. (if article 13(b) and 16 did not exist I believe the UNSC could not refer and/or defer ICC cases). Further in both cases the UNSC is required to act under Chapter VII of the Charter; this in my view has different reasons for each case. In the case of article 13(b) a decision under Chapter VII is needed in order for the resolution to be legally binding upon UN member states; without this, the Court’s exercise of jurisdiction following a UNSC resolution to do so would be futile if a given UN member state not party to the Rome statute had no legal obligation to co-operate with the ICC.’<sup>188</sup>

All these quotes clearly support the position that the Rome Statute of the ICC cannot create law or obligations in respect of states that have not ratified the Rome Statute.

### 3.4.3. Jurisdiction can only be Based on Consent

The Rome Statute by itself is consent-based.<sup>189</sup> However it is clear that article 13(b) creates a non-consensual regime. There is a strong presumption that international courts can only exercise jurisdiction where there is consent from the states involved.<sup>190</sup> As Cryer points out

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<sup>186</sup> Loughland ‘The ICC and Universal Jurisdiction’ available on [http://www.iccwatch.org/pdf/article\\_Mar09.pdf](http://www.iccwatch.org/pdf/article_Mar09.pdf) (accessed on 08/10/2012)

<sup>187</sup> Blommestein and Ryngaert (2012: 435)

<sup>188</sup> Amending article 16 of the Rome Statute. Available on <http://humanrightsdoctorate.blogspot.com/2010/01/amending-article-16-of-rome-statute.html> (accessed 08/10/2012).

<sup>189</sup> Art. 12(1) and 125 of the Rome Statute.

<sup>190</sup> *Milania* (2006:53); *Case of the Monetary Gold Removed from Rome in 1943 (Italy v. Fr., U.K. & U.S.)*, 1954 I.C.J. 19, 32 (June 15); *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 18.

the international legal order remains based on state-consent.<sup>191</sup> Furthermore, Cryer argues the Rome Statute never intended to create a non-consensual regime. He states that ‘there is no reason to assume that the Rome Statute was seen by its drafters as based in such change nor is it advisable to see it as such.’<sup>192</sup>

The general understanding with regard to consent for the jurisdiction of the ICC under article 13 (b) to the Rome Statute is the consent under the UN Charter.<sup>193</sup> As will be argued later in the next chapter, the UNSC referral does not give the ICC any jurisdiction. The jurisdiction is already with the ICC. It is one thing to argue that a group of states, in a treaty among themselves, give the UNSC powers to refer situations to a court. In this case normal principles of treaty law states that only parties may be bound. It is also another argument to say that the UNSC on its own, under Chapter VII of the UN Charter without reference to article 13(b) of the Rome Statute, has ‘ordered’ the ICC to try a national of a non state party who has committed an offence within the jurisdiction of the court on the territory of a non state party. Whilst the UNSC has the power to create ad hoc tribunals, it did not create the ICC and the ICC remains a treaty based court. This does not however mean that the article 13 (b) is of no legal importance in the Rome Statute. The UNSC can refer to the ICC situations in states-parties.<sup>194</sup> Even in situations involving non-states parties, there is a possibility that the offences may actually have been committed by nationals of states-parties.<sup>195</sup>

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<sup>191</sup> Cryer (2009: 116) ; Cryer (2005: 782-785); Sadat (2000); Guzman (2012: 747-790) In his very recent article, ‘Against Consent’, Guzman argues that the only way to deal with some contemporary world problems is to do away with the requirement of consent in international law.

<sup>192</sup> Cryer (2005: 979).

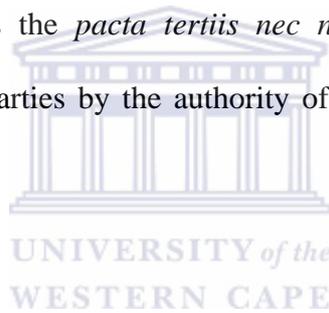
<sup>193</sup> Art. 25 of the UN Charter.

<sup>194</sup> This however may not have been the intention of the drafters.

<sup>195</sup> See the UNSC Referral of Sudan Resolution Number 1593 of 2005.

### 3.5. Conclusion.

This chapter has shown that article 13 (b) of the Rome Statute derives its authority from the states-parties to the Rome Statute. It has also been shown that the states-parties to the Rome Statute could not make a treaty with provisions binding third states without their consent. This chapter has also argued that article 13 (b) does not fall within the exceptions to the *pacta tertiis nec nocent nec prosunt* rule principle article. It is therefore the conclusion in this chapter that 13(b) of the Rome Statute is contrary to the *pacta tertiis nec nocent nec prosunt* rule as it creates a regime that essentially binds third states. If article 13(b) never existed, the UNSC could not refer situations to the ICC. The next chapter will examine whether the powers of the UNSC under Chapter VII of the UN Charter. The chapter will examine whether the UNSC resolutions overrides the *pacta tertiis nec nocent nec prosunt* rule, and the justification to bind non-states parties by the authority of a treaty that does not bind those states in the first place.



## CHAPTER 4

### 4. The UNSC and The ICC

#### 4.1. Introduction

The previous chapter found that article 13(b) of the Rome Statute is contrary to the *pacta tertiis nec nocent nec prosunt* principle. This chapter will discuss the UNSC, especially with regard to the role that it plays in referring situations to the ICC. We will examine the powers that the UNSC has under chapter VII of the UN Charter since a referral under article 13(b) is made under this chapter. This chapter will look at the relationship between the ICC and the UNSC. This Chapter will also consider whether the jurisdiction of the ICC over nationals who commit crimes within the jurisdiction of the court on the territories of third states, derives from the Rome Statute or the UN Charter.

#### 4.2. The UNSC

##### 4.2.1. Composition and Powers of the UNSC

The UNSC is one of the five principal organs of the United Nations.<sup>196</sup> It is vested with the duty to maintain peace and security.<sup>197</sup> The UNSC is composed of five permanent members namely, France, China, Russia, United Kingdom and Northern Ireland and United States of America.<sup>198</sup> The Council is also composed of ten non permanent members. Presently the non permanent members are Azerbaijan, Colombia, Germany, Guatemala, India, Morocco, Pakistan, Portugal, South Africa and Togo elected for two year terms.<sup>199</sup> It should be pointed

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<sup>196</sup> Art. 7(1) of the UN Charter.

<sup>197</sup> Art. 24(1) of the UN Charter.

<sup>198</sup> Art. 23 of the UN Charter.

<sup>199</sup> Available at <<http://www.un.org/en/sc/members/>> (accessed on 03/10/2012).

out that the permanent members of the UNSC have veto powers hence there must be an affirmative vote of all the five permanent members of the UNSC for a resolution to pass.<sup>200</sup>

Generally under Chapter VII of the UN Charter, the UNSC is mandated to take action with respect to the threats to peace, breaches of peace and acts of aggression. The UNSC is empowered to determine the existence of any threat to peace and make recommendations, or decide what measures shall be taken in accordance with articles 41 and 42 to maintain and restore international peace and security.<sup>201</sup> It is the members of the UN that conferred on the UNSC 'primary responsibility for the maintenance of international peace and they agree that in carrying out its duties under this responsibility the UNSC acts on their behalf.'<sup>202</sup> Under article 25 of the UN member states 'agree to accept and carry out decisions of the Security Council in accordance with...'<sup>203</sup> the UN Charter. All states-parties to the UN are under are legally bound by the resolutions made under Chapter VII of the UN Charter. The limit to the powers of the UNSC under Chapter VII of the UN Charter has been a subject of debate for a long time.<sup>204</sup> Some authors argue that the UNSC has unlimited powers when acting under chapter VII, other authors argue that the UNSC does not have unlimited powers under chapter VII.<sup>205</sup>

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<sup>200</sup> Art. 27(3) of the UN Charter..

<sup>201</sup> Art. 39 of the UN Charter.

<sup>202</sup> Art. 24 of the UN Charter.

<sup>203</sup> Art. 25 of the UN Charter.

<sup>204</sup> Davidson (2003: 1-2).

<sup>205</sup> Constantinides p.2 available at <[http://www.esil-sedi.eu/fichiers/en/Constantinides\\_782.pdf](http://www.esil-sedi.eu/fichiers/en/Constantinides_782.pdf)> (accessed on 01/10/12).

#### 4.2.2. Creation of ad-Hoc Tribunals and the Difference with the ICC

The UNSC in its quest to maintain peace and security<sup>206</sup> has in the past, passed resolutions creating ad-hoc tribunals for the trial of individuals accused of committing different international crimes.<sup>207</sup> The UNSC referral has been equated to the creation of ad-hoc tribunals.<sup>208</sup> The UNSC under its powers to create subsidiary organs for the performance of its functions created ad-hoc tribunals.<sup>209</sup> After the ICTR, the idea of creating further ad-hoc tribunals reached a point 'tribunal fatigue.'<sup>210</sup> The ICC was seen as a way to avoid the further creation of resource intensive ad hoc tribunals.<sup>211</sup> While ad hoc tribunals were created as subsidiary organs of the UNSC, the ICC is a treaty based court created by states-parties to the Rome Statute.<sup>212</sup> Mainak provides an enlightening difference between the ICC and ad-hoc tribunals in as far as obligations are concerned. He states that;

'In other words, the creation of a tribunal in the case of the ICTY was an exercise of the Security Council's power to enforce its own decisions, not through the cooperation of its members, but rather by acting on its own accord. The Security Council was not binding its members to the diktats of an independent organization but of a UN subsidiary organization. Hence, members of the United Nations are deemed to have assented to the provisions governing these tribunals... The ICC, on the other hand, is governed by a separate statute and is not established under the UNSC's Ch VII mandate. Thus, the consent of a state, to the provisions governing the ICC, cannot be assumed unless that state ratifies the Rome Statute.'<sup>213</sup>

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<sup>206</sup> Some authors have argued that the UNSC by establishing Ad-Hoc tribunals strayed into matters of criminal justice; Koskeniemi (1995).

<sup>207</sup> By resolution 827 of 23<sup>rd</sup> May 1993 the UNSC created the ICTY and by Resolution 955 of November 1994 the UNSC established the ICTR.

<sup>208</sup> Fletcher and Ohlin (2006).

<sup>209</sup> Art. 29 of the UN Charter.

<sup>210</sup> Cassesse (2002: 15); it is of course not a valid legal argument for the ICC to assume jurisdiction over non-states parties merely because it is cheap so to do if the court in the first place does not have such jurisdiction.

<sup>211</sup> Cassesse (2002: 15).

<sup>212</sup> Art. 1 of the Rome Statute; McGoldrick (2008: 49).

<sup>213</sup> Mainak (2012: 21).

Whilst in the case of the ad-hoc tribunals their jurisdiction derived from the UNSC,<sup>214</sup> for the ICC the jurisdiction derives from the Rome Statute.<sup>215</sup> Even though it is established tradition for the UNSC to create courts,<sup>216</sup> the ICC is unique in that it is a creation of the states-parties to the Rome Statute. This means the ICC is not bound by the resolutions of the UNSC since it is not a party to the UN Charter.<sup>217</sup> Arguments have been made that UNSC may adopt the whole Rome Statute as part of chapter VII resolution thereby making non-states parties obliged to comply with the Rome Statute.<sup>218</sup> If the UNSC were to resolve in this way, which is very unlikely, the UNSC would essentially be creating a new institution altogether. An institution that is a subsidiary of the UNSC other than a treaty based court as it is presently.

#### 4.2.3. Proposed Role of the UNSC at the Rome Conference.

The role of the UNSC proved to be one of the most contentious issues at the Rome Conference. Several delegations had serious reservations with the powers of the UNSC to refer situations to the ICC.<sup>219</sup> It was noted that these referrals would undermine the

‘credibility and the moral authority of the court; excessively limit its role ; undermine its independence, impartiality and autonomy; introduce inappropriate political influence over its functions and confer additional powers on the Security Council which were not provided by the UN Charter ; and enable the permanent members of the UNSC exercise a veto with respect to the work of the court.’<sup>220</sup>

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<sup>214</sup> Note 12 above.

<sup>215</sup> Art. 4 (2) of the Rome Statute.

<sup>216</sup> *Prosecutor v Tadic*, Interlocutory Appeal on Jurisdiction, Case NO. IT-95-IAR72, 2 October 1995, paras 26-40.

<sup>217</sup> Condorelli and Villalpando (2002: 578); McGoldrick (2008:49).

<sup>218</sup> Libya and the ICC: The Legality of any Security Council Referral to the ICC. Available at <<http://dovjacobs.blogspot.com/2011/02/un-security-council-resolution-on-libya.html>>(accessed on 16/10/2012)

<sup>219</sup> The exclusion from the jurisdiction of the ICC of individuals from non-party states, on official duties in UNSC Resolution 1593 referring the Darfur situation to the ICC is a clear example of the reality of how the UNSC undermines the independence of the ICC.

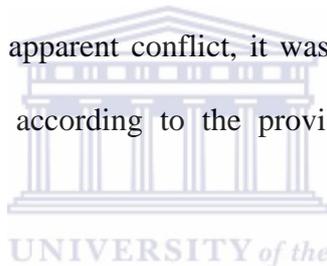
<sup>220</sup> Basiouni (2005: 127).

Other delegations also noted that the ICC was a Court established by the consent of states parties to the statute, and this had to be distinguished from ad-hoc tribunal established under Chapter VII of the UN Charter.<sup>221</sup> Criticism over the role of the UNSC continues even to the present day.<sup>222</sup>

### **4.3. The Relationship between The UNSC and The ICC**

#### **4.3.1. Apparent Conflict of jurisdiction**

The drafters of the Rome Statute anticipated that the work of the ICC and that of the UNSC in the maintenance of peace and security would somewhat overlap.<sup>223</sup> This was due to the fact that the UNSC had gone the direction of establishing ad-hoc tribunals for the trial of individuals accused of committing international crimes.<sup>224</sup> The ICC was created to have a similar role.<sup>225</sup> To overcome this apparent conflict, it was agreed each of the organisations works independent of the other according to the provisions of their respective statutes constituting them.<sup>226</sup>



#### **4.3.2. Independence of the ICC from the UNSC**

The ICC was established as an independent Court<sup>227</sup> with an international legal personality.<sup>228</sup> It was established outside the UN system,<sup>229</sup> as a proposal to establish the ICC as a subsidiary

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<sup>221</sup> Basiouni (2005: 128).

<sup>222</sup> See comments of Louise Arbour available at <http://justiceinconflict.org/2011/05/06/the-un-security-council-and-the-icc-between-a-rock-and-a-hard-place/> (accessed 14/10/12)

<sup>223</sup> Condorelli and Villalpando (2002: 627); White and Cryer (2009: 456); Sarooshi (2008: 255).

<sup>224</sup> Resolutions 827 creating the ICTY and 955 creating the ICTR.

<sup>225</sup> Art. 1 of the Rome Statute.

<sup>226</sup> White and Cryer (2009: 456); Gallant (2003) on the legal personality of the ICC.

<sup>227</sup> Para. 9 Preamble of the Rome Statute; McGoldrick (2008: 49).

<sup>228</sup> Art. 4 of the Rome Statute.

<sup>229</sup> McGoldrick (2008: 49).

organ of the UN was rejected.<sup>230</sup> The jurisdiction of the court is governed by the provisions of the statute.<sup>231</sup> The Relationship Agreement<sup>232</sup> between the ICC and the UN does not give the UN or any of its organs powers to extend or limit the powers of the ICC under the Rome Statute.<sup>233</sup> The powers of the court can only be extended through amendment.<sup>234</sup> As Condorelli and Villapando argue, the ICC is not bound by UNSC resolutions that are *ultravires* its jurisdiction under the Rome Statute.<sup>235</sup> A critical point however is the powers of the UNSC acting under Chapter VII of the UN Charter. The UNSC has very wide powers under Chapter VII of the UN Charter to take measures to maintain peace and security. It is argued that the UNSC can do anything in the quest to maintain peace and security.<sup>236</sup>

It has been recognised that the ICC cannot be a party to the United Nations Charter and neither can the UN become a party to the ICC.<sup>237</sup> This kind of recognition is very significant in as far the legality of the jurisdiction of the ICC over nationals of non-state parties is concerned. As White and Cryer point out, this means the Rome Statute can neither limit nor extend the powers that the UNSC has under the UN Charter.<sup>238</sup> Similarly, the UNSC cannot extend or limit the powers that the ICC has under the Rome Statute.<sup>239</sup> This is recognised under article 1 of the Rome Statute which provides that '[T]he jurisdiction and functioning of

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<sup>230</sup> Condorelli and Villalpando (2002: 573).

<sup>231</sup> Art. 1 last sentence; Art. 4(2) of the Rome Statute.

<sup>232</sup> Art. 2 of the Rome Statute.

<sup>233</sup> Condorelli and Villapando (2002: 575).

<sup>234</sup> Arts. 122 and 123 of the Rome Statute.

<sup>235</sup> Condorelli and Villalpando (2002: 578); Sarooshi (2008: 250).

<sup>236</sup> Rosand (2004: 552-560); Davidson (2003: 2).

<sup>237</sup> White and Cryer (2009: 458).

<sup>238</sup> White and Cryer (2009: 459).

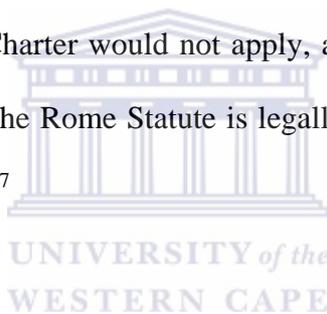
<sup>239</sup> Blommestijn and Ryngaert (2012: 435); White and Cryer (2009: 459).

this Court shall be governed by the provisions of this court.’<sup>240</sup> The UNSC can therefore only exercise those powers that are permissible under the Rome Statute.

If it is agreed that the UNSC cannot extend the jurisdiction of the ICC, it follows that the UNSC cannot give the ICC jurisdiction over cases that the ICC by itself does not have jurisdiction over.<sup>241</sup> White and Cryer describe the interaction as follows;

‘Provisions in the Rome Statute referring to the Security Council and its powers do not make the Security Council Resolutions binding on the ICC as a matter of law by virtue of the UN Charter, they set out the way in which the court must react if Security Council acts in a certain way. Thus the ICC is bound only to react in the ways set out in the Statute as that is the source of the ICC’s obligation, not the powers of the Security Council under the Charter.’<sup>242</sup>

All states-parties to the UN Charter are bound by the decisions of the UNSC.<sup>243</sup> The ICC however is not bound by the UN Charter since it is not a party to the Charter.<sup>244</sup> For the same reason article 103<sup>245</sup> of the UN Charter would not apply, as the ICC is not party to the UN. The powers that article 13(b) of the Rome Statute is legally suspect since<sup>246</sup> this power does not derive from the UN Charter.<sup>247</sup>



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<sup>240</sup> See also Art. 2(3) of the relationship agreement between the ICC and the UN which provides that ‘The United Nations and the Court Respect each other’s Status.’

<sup>241</sup> Condorelli and Villalpando (2002: 578).

<sup>242</sup> White and Cryer (2009: 458).

<sup>243</sup> Art. 25 of the UN Charter.

<sup>244</sup> Condorelli and Villalpando (2002: 578).

<sup>245</sup> Provides that the UN Charter has primacy over other treaties that UN member states are party to.

<sup>246</sup> The UNSC does not have unlimited powers under Chapter VII. It is bound by the UN Charter and principles of International Law. See Davidson (2003).

<sup>247</sup> Jacobs (March 2010) available at <http://www.haguejusticeportal.net/index.php?id=11342> (accessed 14/10/12); Jacobs (May 2010) <http://dovjacobs.blogspot.com/2010/05/scoop-icc-informs-security-council-of.html> (accessed on 13/10/12); Jacobs (Feb 2011) <http://dovjacobs.blogspot.com/2011/02/un-security-council-resolution-on-libya.html> (accessed 14/10/12).

#### 4.4. Article 13(b) of the Rome Statute

##### 4.4.1. The Referral

Article 13(b) of the Rome Statute, was put in the Rome Statute as a way to remove the need to create ad hoc tribunals in the future.<sup>248</sup> The referral was considered less expensive and also less time consuming than creating ad-hoc tribunals.<sup>249</sup> The referral as some authors have argued makes the court act as an ad hoc tribunal and therefore binds all UN member states since the referral is made under chapter VII of the UN Charter.<sup>250</sup> The uncertainty over the actual nature of a referral under article 13(b) of the Rome Statute supports the assertion that it was deliberately left unresolved at the Rome conference.<sup>251</sup> Article 13 (b) of the Rome Statute provides that

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of the statute if:

- (b) A situation in which one or more of such crimes appear to have been committed is referred to the prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.

Two schools of thought can be deduced from article 13(b) of the Rome Statute. The first school of thought argues that that UNSC referral extends the jurisdiction on the ICC. The other school of thought argues that the UNSC referral does not extend the jurisdiction of the ICC.

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<sup>248</sup> Lee (2001: 761); Heyder (2012: 3).

<sup>249</sup> Lee (2001: 762).

<sup>250</sup> Lee (2001: 763); cf. Fletcher and Ohlin (2006).

<sup>251</sup> Jianqiang (2007: 10).

#### 4.4.2. The UNSC Extends Jurisdiction

Some authors argue that article 13(b) of the Rome Statute extends the jurisdiction of the ICC beyond the provisions of the Rome Statute. Rastan has pointed out that the authority derives from UNSC under article 25 of the UN Charter.<sup>252</sup> Similarly Dralle argues that the UNSC extends the jurisdiction of the ICC beyond states-parties to the Rome Statute.<sup>253</sup> Dan Sarooshi writes, “Such referral would in effect allow the ICC to exercise its jurisdiction in relation to non-states parties, a jurisdiction that would not exist but for the Security Council referral.”<sup>254</sup> This school of thought is further supported by authors who argue that the ICC is two courts in one.<sup>255</sup> Phillippe Kirsch et al submit that

‘Article 13(b) of the Rome Statute provides that the Security Council may refer a situation to the ICC. The main purpose, of course, is to make the ICC available to the Council to investigate situations posing a threat to international peace and security. Additionally, ‘*it potentially enlarges the jurisdiction of the court* (emphasis added)’ by allowing the council to refer situations in states that are members of the UN but not parties to the Rome Statute.’<sup>256</sup>

Dapo Akande in his article argues that, “The very decision to refer a situation to the Court is a decision to bring whatever individuals may be covered by the referral [by UNSC] within the jurisdiction of the Court and therefore within the operation of its [Rome] Statute.”<sup>257</sup> He continues to state. “At a minimum, the referral [by UNSC] of a situation to the ICC is a decision to confer jurisdiction on the Court (in circumstances where such jurisdiction may otherwise not exist).”<sup>258</sup> The statements by Akande are essentially saying that it is the UNSC

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<sup>252</sup> Rastan (2009: 177); Akande (2012: 301).

<sup>253</sup> Dralle (2011: 2).

<sup>254</sup> Sarooshi (2008: 251).

<sup>255</sup> Fletcher and Ohlin (2006).

<sup>256</sup> Kirst and Robinson (2002: 289).

<sup>257</sup> Akande (2009: 341).

<sup>258</sup> Akande (2009: 341).

that gives the ICC jurisdiction over nationals of non-states parties when they commit offences on the territories of non-states parties. He further states the jurisdiction of the ICC would otherwise not exist but for the UNSC referral. This can also be read to say that jurisdiction does not exist but for the UNSC referral.

If it is conceded that the UNSC referral ‘enlarges’ or ‘extends’ or ‘gives jurisdiction’ the jurisdiction of the ICC, it means that the court is no longer exercising ‘its jurisdiction’ but the extended or enlarged or the given jurisdiction. The ICC is exercising jurisdiction beyond what is allowed by the Rome Statute. As has already been shown above the UNSC has no power to extend the powers of the ICC beyond the Rome Statute.<sup>259</sup> It is conceded that a non-state party can be bound by the resolution because of its membership to the UN.<sup>260</sup> However, that does not resolve the question of whether the ICC has jurisdiction over non state party since the referral does not give the ICC jurisdiction.<sup>261</sup>

#### 4.4.3. **The UNSC does not Extend the Jurisdiction of the ICC**

Another school of thought can be deduced from the writings of other authors who argue that the UNSC cannot extend the jurisdiction of the ICC.<sup>262</sup> Condorelli and Villalpando<sup>263</sup> have argued about the impossibility of the UNSC extending the jurisdiction of the ICC beyond the Rome Statute.<sup>264</sup> They argue that that the ICC is independent of the UN hence the UNSC

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<sup>259</sup> White and Cryer (2009: 459).

<sup>260</sup> Art. 25 of the Rome Statute.

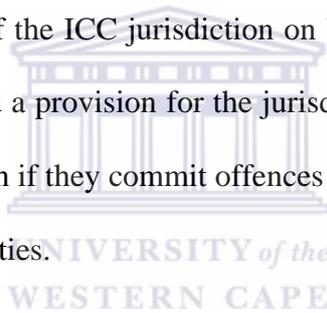
<sup>261</sup> Art. 19 of the Rome Statute call upon the ICC to be satisfied of its Jurisdiction.

<sup>262</sup> Condorelli and Villalpando (2002: 573)

<sup>263</sup> Condorelli and Villalpando (2002: 573)

<sup>264</sup> Condorelli and Villalpando (2002: 571-582)

cannot extend the express powers the Rome Statute gives to the ICC.<sup>265</sup> If it is conceded that the UNSC cannot extend the jurisdiction of the ICC, it follows that the jurisdiction to try nationals of non-states parties who commit offences on the territories of non-states parties can only derive from the Rome Statute.<sup>266</sup> A very prominent statement in article 13(b) is that the ‘the court may exercise *its jurisdiction* (emphasis added)’. The jurisdiction is that of the court and not of the UNSC since the court already has the jurisdiction.<sup>267</sup> The UNSC merely triggers it.<sup>268</sup> The UNSC does not have any criminal jurisdiction to pass to the Court.<sup>269</sup> The article also provides that there should be a referral of a situation as opposed to a specific case.<sup>270</sup> Other provisions in the Rome Statute also support the view that jurisdiction comes from within the Rome Statute. Article 12(2) is the provision that excludes the applicability of nationality and territorial bases of the ICC jurisdiction on UNSC referrals. It is therefore the ICC Statute itself that has created a provision for the jurisdiction of the nationals from states not party to the Rome Statute even if they commit offences within the jurisdiction of the court on the territories of non-states parties.



#### 4.4.4. The ICC already has Jurisdiction

The ICC as it stands already has jurisdiction as defined by the Rome Statute.<sup>271</sup> So to argue that the UNSC extends the powers of the ICC is erroneous. Article 13(b) itself is very

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<sup>265</sup> Condorelli and Villalpando (2002: 578).

<sup>266</sup> This view is supported by the provisions of arts 12 and 13 of the Rome Statute.

<sup>267</sup> Arts. 1, last sentence and 5 of the Rome Statute.

<sup>268</sup> Art. 13(1); White and Cryer (2009:461)

<sup>269</sup> Cryer (1998: 278-279); Jianqiang (2007: 10); White and Cryer (2009: 461).

<sup>270</sup> White and Cryer (2009: 461).

<sup>271</sup> Arts. 5, 11, 12 and 13 of the Rome Statute.

instructive as it provides ‘The Court may exercise *its jurisdiction* (emphasis added) ...’ just shows that the jurisdiction is that of the court and not that from an extraneous.

#### 4.4.5. **Article 13(b) is a creation of States-parties to the Rome Statute**

Article 13 (b) ‘as an inherent provision of the Rome Statute, establishes its powers by virtue of the consent of the States-parties.’<sup>272</sup> States-parties to the Rome Statute voluntarily submit to the jurisdiction of the ICC.<sup>273</sup> As has been argued in the previous chapter, this provision should bind those that ratify the Rome Statute. Mainak’s words clearly capture this scenario by stating, “The ICC on the other hand, is governed by a separate statute and is not established under the UNSC’s Chapter VII mandate. Thus consent of a state, to the provisions governing the ICC cannot be assumed unless the state ratifies the statute.”<sup>274</sup> This means that the legal regime created under article 13(b) is one that non-states parties to the Rome Statute have accepted not and are therefore not bound by it.

#### 4.4.6. **Article 13(b) cannot give the ICC Jurisdiction over nationals from non-states parties who commit Offences on the Territories of non-states parties**

It has been shown in the previous chapter that article 13(b) is inapplicable to non-states parties by virtue of the *pacta tertiis nec nocent nec prosunt* principle.<sup>275</sup> Article 13(b) creates a legal regime that states not parties to the Rome Statute have not accepted.<sup>276</sup> The ICC exercises jurisdiction based on consent of states. It has also been shown above that the UNSC

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<sup>272</sup> Blommestijn and Ryngaert (2012: 435).

<sup>273</sup> Art. 12(1) of the Rome Statute.

<sup>274</sup> Mainak (2012: 21).

<sup>275</sup> Art. 34 of VCLT.

<sup>276</sup> Akande (2003: 623)

referral does not give the ICC any jurisdiction.<sup>277</sup> It merely triggers the ‘dormant’ jurisdiction of the court.<sup>278</sup> The Jurisdiction is already with the Court.<sup>279</sup> There is no universal jurisdiction under the Rome Statute.<sup>280</sup> It follows that the jurisdiction cannot extend to nationals of non states-parties who commit offences within the jurisdiction of the court on the territories of non states-parties.

#### **4.5. No Consensus as to the Legality of the Jurisdiction of the ICC under Art. 13(b) of the Rome Statute**

It is notable that there is no consensus on the legality of the article 13(b) as compared to the other trigger mechanisms.<sup>281</sup> In Resolution 1573 referring Sudan to the ICC China abstained from voting stating ‘we cannot accept the situation that the ICC exercises jurisdiction against a non signatory states’ will, and we can hardly consent that the Security Council authorise the ICC to exercise this right.’<sup>282</sup> The USA and India<sup>283</sup> are other strong opponents of the jurisdiction of the ICC over nationals of non-states parties and this is very clear even in the resolution by the UNSC referring Sudan to the ICC.<sup>284</sup> Other members of the UNSC actually question the UNSC’s authority to refer situations from non-states parties to the Rome Statute

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<sup>277</sup> Condorelli and Villapando (2002: 571).

<sup>278</sup> Blommestijn and Ryngaert (2012: 435) note 56.

<sup>279</sup> Art. 13 of the Rome Statute.

<sup>280</sup> Akande (2003: 623).

<sup>281</sup> See paras. 2.4.1 and 2.4.2 above.

<sup>282</sup> UNSCR No. 1573 para. 5; See also comments of Chinese Delegation by Wang Guangya in Resolution No. 1970 referring Libya to the ICC.

<sup>283</sup> See comments of Indian delegation by Hardeep Singh Puri in SC Resolution No. 1970 referring Libya to the ICC; See also the comments of Brazilian delegation by Maria Luiza Ribeiro Viotti in Resolution No. 1970 referring Libya to the ICC; cf the comments of Japanese delegation by Kenzo Oshima in Resolution No. 1970 referring Libya to the ICC.

<sup>284</sup> Note however the unanimity of UNSR 1970 of 26<sup>th</sup> February 2011 referring Libya to the ICC.

to the ICC.<sup>285</sup> This divergence of opinion supports the assertion that article 13(b) creates a legal regime that does not enjoy a consensus under international law.<sup>286</sup> Furthermore this divergence of opinion, coupled with the fact that article 13(b) should not apply to third states, clearly shows that the legality of UNSC referrals of non-states parties to the ICC is legitimately questionable.

In Resolution 1593 referring Sudan to the ICC, under paragraph 6 it was stated as follows

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

This paragraph excludes only nationals of non-states parties to the Rome Statute from the jurisdiction of the ICC through the referral. Furthermore it recognises the requirement of consent by stating that the sending state may consent to the jurisdiction of the ICC by waiving its jurisdiction.<sup>287</sup> Even though this paragraph was motivated by other reasons<sup>288</sup> but it is instructive of the UNSC readiness to accept that third states cannot be subjected the jurisdiction of the ICC without the consent of the state concerned.

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<sup>285</sup> Comments of Philipines delegation by Lauro Baja in Resolution No. 1970 referring Libya to the ICC who stated 'He shared the concerns of some states regarding the manner in which the resolution was arrived at. Once again, veto threats prevented the expression of a clear and robust signal from the Council. That was why calls for Council reform were growing louder with each passing day. He also believed that the ICC was a fatality in the resolution. Did the Council have the prerogative to mandate the jurisdiction of the Court?'

<sup>286</sup> Mainak (2012: 22).

<sup>287</sup> This was to make sure that United of States citizens should not fall within the jurisdiction of the court since the US is not a member of the ICC.

<sup>288</sup> The quest by the USA to make sure its citizens are not subject to the jurisdiction of the court.

## 4.6. Jurisdiction is Imposed

### 4.6.1. Jurisdiction overrides known Principles of Law

The path travelled so far supports the school of thought that the ICC has no jurisdiction over nationals of non-state parties who commit offences on territories of non-states parties. Akande however argues that the jurisdiction of the ICC over the national of non-state parties is imposed.<sup>289</sup> He goes to state as follows

‘The imposition, by the Security Council, of the obligation of cooperation solves the *pacta tertiis* problem as the Security Council resolution becomes the direct source of the obligation of Sudan and Libya to cooperate with the ICC. Since the Security Council will, in cases of referral under Article 13 of the Statute, be acting under Chapter VII of the UN Charter, the Council will be acting in the mode in which it is capable of imposing binding obligation on states.’<sup>290</sup>

Even though Akande states that the imposition ‘solves’ the *pacta tertiis* problem, in reality, it does not as argued in chapter 3 of this thesis. It overrides this customary principle of international law. This reasoning is in line with the school of thought that the UNSC extends the jurisdiction of the ICC. This also seems to be the approach taken by the pre-trial chamber in the cases of *Harun* and *Al Bashir* and is supported by the argument made by Fletcher and Ohlin.<sup>291</sup> Adopting this approach it becomes abundantly clear that the legality jurisdiction of the ICC over nationals from non-states parties through UNSC referral cannot be measured by any ‘known’ legal standard as will be shown below.

### 4.6.2. Jurisdiction Overrides Consent and Wears away the State Sovereignty Coating

Anne Bodley has made a vehement argument on the weakening of the principle of State Sovereignty with regard to the creation of ad-hoc tribunals under chapter VII of the UN

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<sup>289</sup> Akande (2012).

<sup>290</sup> Akande (2012).

<sup>291</sup> Fletcher and Ohlin (2006).

Charter.<sup>292</sup> She points out that the UNSC has gained “somewhat enlarged powers almost of supranationality in world affairs.”<sup>293</sup> Even though Yugoslavia protested the creation of the ICTY on the grounds that they infringed state sovereignty, the UNSC could not take any of those pleas. Resolution 827 of 1993 was still passed creating the ICTY.

The jurisdiction of the ICC over nationals of non-states parties who commit offences on territories of non-states parties is an all fours with the argument that Bodley makes. It is a UNSC referral so no pleas of state sovereignty, non consensual nature or contrariness to basic principles of international law stand. The State has to submit to the jurisdiction because it is a UNSC resolution under article 25 of the UN Charter. State consent is no longer necessary for the ICC to assume jurisdiction so long as the state is a UN member and the UNSC so decides.

#### 4.7. Legal Nature of the UNSC Referrals

UNSC resolutions are made pursuant to article 39 of the UN Charter. UNSC resolutions have in many instances affirmed established principles of international law.<sup>294</sup> However there have been instances when the UNSC resolutions have in fact altered or modified some established principles of international law. As Orakhelashvili observes, these alterations “constitutes the interference with expectations that international legal actors have in relation to these norms and principles.”<sup>295</sup> This is very telling since by not being party to the Rome Statute, a state ordinarily expects to be beyond the reach of the ICC yet parties to the Rome Statute still created a provision via the UNSC to still bring non-states parties to the jurisdiction of the court. This is where the question comes whether the UNSC has the power to alter established

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<sup>292</sup> Bodley (1999).

<sup>293</sup> Bodley (1999: 469).

<sup>294</sup> Orakhelashvili (2007:144).

<sup>295</sup> Orakhelashvili (2007:145).

international legal principles and in fact state sovereignty as it deems fit.<sup>296</sup> In this case it is apparent there is an interference with state sovereignty of non-states parties to the Rome Statute.

Be this as it may, the ICJ has affirmed that however political the UNSC can be, it is not free to act however it deems fit. It is bound by principles of international law<sup>297</sup> that limit and define its powers. The ICJ observed in the Namibia advisory opinion that the powers of UNSC are defined by the UN charter<sup>298</sup> and this was echoed in the *Tadic* decision as follows

‘...subject to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of jurisdiction of the organisation at large, not to mention other specific limitations or those which may derive from the internal division of power within the organisation. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *Legibus solutus* (unbound by law)’<sup>299</sup>

This essentially means that the UNSC cannot do anything that is outside the confines of the UN Charter.<sup>300</sup> It is, however, very apparent this far that the UNSC referral overrides entrenched principles of international law and state sovereignty. Can we then talk about the legality of the jurisdiction of the ICC over nationals from non-states parties who commit offences on the territories of non-states parties? Bodley notes that it is all within the UNSC to define what constitutes a threat to peace and measures that can be taken. In that regard, ‘the legality of the Security Council’s action is virtually unregulated.’<sup>301</sup> There is further no body that can ‘confirm or shoot down the legality of Security Council action...’<sup>302</sup> This

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<sup>296</sup> Orakhelashvili (2007:146).

<sup>297</sup> Condorelli and Villapando (2002: 579).

<sup>298</sup> *Legal consequences for the states of the Continued Presence of South Africa in Namibia, ICJ Reports 1971*, 16 et seq.

<sup>299</sup> *Tadic, Decision by Appeals Chamber (1995) IT-94-1-AR72, paras 28-29.*

<sup>300</sup> Constantinides note 205.

<sup>301</sup> Bodley (1999: 469).

<sup>302</sup> Bodley (1999: 467).

essentially means that there is no standard by which you can determine the legality of the jurisdiction of the ICC under article 13(b) of the Rome Statute since as the jurisdiction of the ICC over nationals from non-states parties who commit offences on the territories of non-states parties derives from the UNSC powers under UN Chapter VII.

#### 4.8. Conclusion

This chapter has shown that basically the powers of the UNSC under Chapter VII of the UN Charter override the entrenched customary international law principle of *pacta tertiis*. Article 13(b) of the Rome Statute is also a blatant infringement of state sovereignty as non-party states are forced to submit to the jurisdiction of a treaty based court without the state's consent. It has also been shown that there is no international consensus on the legal regime created under article 13(b) of the Rome Statute and even the members of UNSC itself are not sure of the legality of this provision. Whilst the UNSC resolution is perfectly legal in respect of UN members the paradox created by the referral to a treaty based court to which a state is not a party creates a legal obligation that is enforced through a non-legal mechanism. The jurisdiction of the ICC over nationals of non-states parties who commit offences on territories of non-states parties can be described as a legality coloured with an illegality.

## CHAPTER 5

### 5. Conclusions and Recommendations

#### 5.1. Introduction

This chapter sets out to summarise the path so far travelled and make recommendations for the apparent illegality in the UNSC referral under article 13(b) of the Rome Statute with regard to nationals of non-party states who commit offences on the territories of non-states parties. The previous chapters have shown that the ICC has jurisdiction over nationals of non-states parties when they commit offences on territories of non-states parties where there is a UNSC referral. It has also been shown that the jurisdiction of the ICC in this case is contrary to the principle of the *pacta tertiis nec nocent nec prosunt*.

#### 5.2. The Need for an International Criminal Court

##### 5.2.1. Laudable Step in the Fight Against Impunity

The idea of creating a permanent international criminal court was a very laudable idea in the quest to fight impunity and enforce accountability for serious international crimes.<sup>303</sup> Apart from this, the permanent nature of the ICC means that the Court could easily be resorted to in times of need. Furthermore the court has the capacity to set standards for the enforcement of International criminal justice. It is however very surprising that instead of creating a court that could have a non-contentious<sup>304</sup> base of jurisdiction the plenipotentiaries created a treaty based court and ‘sneaked’ a provision essentially also binding non-states parties.

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<sup>303</sup> Sarooshi (2008: 249).

<sup>304</sup> There are several debates among scholars emanating from UNSC referral namely applicability of customary immunity in respect of heads of states, whether complementarity is applicable, whether non-customary crimes can be tried and also the issues to do with co-operation. Even the Rome Statute has not provided for a procedure in cases of UNSC referrals. It remains to be seen how the ICC will resolve these issues.

### 5.2.2. **Why not a court of with universal jurisdiction? Or a court under the UN system?**

The plenipotentiaries at the Rome Conference opted for a consensual regime of the ICC yet made a provision for the UNSC referral which has essentially made the court exercise universal jurisdiction.<sup>305</sup> Instead of adopting the German proposal for a court with universal jurisdiction over the already universal crimes outright, or merely creating the ICC as a court within the UN system, states-parties opted to create a court based on state consent.<sup>306</sup> One would ordinarily have expected the states to proceed on the basis of consent. The provision of article 13(b), however, created a legal regime that non-states parties to the Rome Statute are still brought within the jurisdiction of the ICC.

### 5.2.3. **The Jurisdiction Flouts Known Principles of International Law**

The discussion has shown that the jurisdiction of the ICC over nationals of non-states parties does not rest on a solid legal basis especially with regard to the customary principle of treaty law that a state cannot be bound by a treaty to which it is not a party. The previous chapters have shown that there are a lot of authors, states and even members of the UNSC who have serious reservations and doubt the jurisdiction of the ICC over nationals from non-states parties who commit offences within the jurisdiction of the court on non-states parties. This paper has also shown that the jurisdiction of the ICC over nationals of non-states parties infringes on the sovereignty of the states concerned.

Even though it is claimed the court is outside the UN system, it is apparent as has been shown in this discussion, that the UN still exercises considerable powers on the ICC. States not

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<sup>305</sup> Germany proposed for a Court with universal Jurisdiction.

<sup>306</sup> Art. 12 of the Rome Statute.

parties to the Rome Statute are forced to submit to the ICC merely by virtue of membership to the UN.

### 5.3. The International Community Moving Towards a New World Order

Whilst it has been argued that the jurisdiction of the ICC of non-states parties flouts established principles of international law, it appears that the international community is moving towards a new legal regime. The position is well articulated by Danilenko who states

“However, the *pacta tertiis* principle does not mean that treaties may not have certain indirect effects on non-States Parties. Practice suggests that multilateral treaty arrangements often create legal and political realities that could in one way or another affect political and legal interests of third states and impose certain constraints on the behavior of non-parties. These constraints may result not from imposition of legal obligations upon Third States, but from the fact that a large portion of the international community adopts, in conformity with international law, a decision to deal with contemporary problems of community concern by creating appropriate institutions and procedures.”<sup>307</sup>

There are more states-parties to the Rome Statute than non-states parties.<sup>308</sup> It therefore appears that the larger world community is moving towards a legal regime where UNSC resolutions override the requirement for consent.<sup>309</sup> Even though Rwanda voted against the creation of the ICTR that did not stop the UNSC from the passing the resolution creating the

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<sup>307</sup> Danilenko (1999-2000: 448).

<sup>308</sup> It is notable that China, Russia and USA who are permanent members of the UNSC are not parties to the Rome Statute.

<sup>309</sup> Birdsall (2006: 10-11).

ICTR.<sup>310</sup> Similarly the protestations by Yugoslavia never stopped the creation of ICTY.<sup>311</sup> The powers of the UNSC under Chapter VII are very expansive. Neither the *pacta tertiis* rule can override them. By ratifying the UN Charter a state loses exclusive rights to its sovereignty with regard to the powers of the UNSC under Chapter VII of the UN Charter. It is notable that none of the non-states parties to the Rome Statute whose nationals have been indicted before the ICC, have challenged the jurisdiction of the court. It remains to be seen how the cases arising from the Darfur and Libya situations will proceed before the court.

#### 5.4. Recommendations

##### 5.4.1. Towards the Universal Ratification of the ICC

To propose for a court under the UN or a court with universal jurisdiction at this stage is as Dov Jacobs described, fighting a losing battle.<sup>312</sup> The Crimes within the jurisdiction of the ICC are crimes that have attained the status of *ius cogens*. Since states on their own already have the duty to prosecute these crimes, it could have been easier to delegate these powers to an international court.<sup>313</sup> Apart from this, since almost all states-parties to the ICC are parties to the UN Charter, creating a court with criminal jurisdiction within the UN system could not have been a tall order. This could have even resolved the contentious issue about the overlap of the ICC jurisdiction with the UNSC. These two options are however not viable at this stage.

This discussion proposes the lobbying for the ratification of the Rome Statute by all states so that the apparent legality coloured with illegality in article 13(b) of the Rome Statute is

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<sup>310</sup> Schabas (2004: 719); UN Doc. SV. 3455 (1944).

<sup>311</sup> Birdsall (2006: 11).

<sup>312</sup> <http://dovjacobs.blogspot.com/2011/02/un-security-council-resolution-on-libya.html> (accessed on 11/10/12).

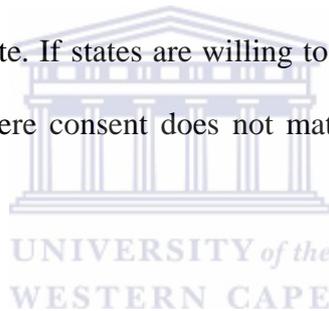
<sup>313</sup> Scharf (2001).

remedied. It cannot be expected that for every international crime that is committed on the territory of non-states parties the international community should wait for the UNSC to make a referral. We have already seen double standards<sup>314</sup> with regard to the UNSC referrals, forcing other non-states parties to submit to the jurisdiction of the court whilst excluding other states in the same resolution.

#### 5.4.2. **Doing away with Consent Before the International Criminal Court**

As Guzman rightly argues in his article, some of the contemporary world problems cannot be sorted if we put emphasis on state consent as a basis for jurisdiction in international law.<sup>315</sup>

Crimes within the jurisdiction of the ICC are international crimes. They are offences that are often committed by officials of a state hence it is unthinkable that those states would voluntarily ratify the Rome Statute. If states are willing to accept, the legality coloured with illegality of UNSC referrals, where consent does not matter, then we may as well just do away with consent altogether.



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<sup>314</sup> Resolution referring the Darfur situation to ICC where officials from non-states parties are excluded yet the ICC does not recognise official or immunity. The parameters of deciding what constitutes a threat to peace or also difficult to comprehend especially when one looks at the situation in Libya nad the situation that prevailed in Syria.

<sup>315</sup> Guzman (2012).

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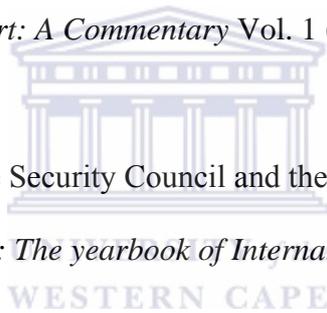
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