NEAR EAST UNIVERSITY
GRADUATE SCHOOL OF SOCIAL SCIENCES
INTERNATIONAL LAW PROGRAM

THE PRINCIPLE OF COMPLEMENTARITY AND THE CHALLENGES OF THE SOVEREIGNTY OF NATIONAL COURTS BEFORE THE INTERNATIONAL CRIMINAL COURT

ZANA NASER ABDULLAH

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DEDICATION

I am honored to offer this humble work and modest effort, a wonderful gift to my dear Parents.

And

To My dear Wife, who stood by my side and helped me to finish my studies.

And

To the winds of my children and my liver: Pasar, Koyar, and Kawin.

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ABSTRACT

THE PRINCIPLE OF COMPLEMENTARITY AND THE CHALLENGES OF THE SOVEREIGNTY OF NATIONAL COURTS BEFORE THE INTERNATIONAL CRIMINAL COURT

Determining the relation of the judiciary of International Criminal Court and local courts was a major focus of controversy since the establishment of the statutes of all the International Tribunals. The importance of the study of the Principle of Complementarity (POC) is reflected in two parts: national sovereignty and criminal justice, which are considered issues of concern to the international community recently. The problem of this principle is difficult to achieve even in terms of the protection of human rights or in the pursuit of international justice; Sovereignty is important, but international justice and non-impunity are also important and must not be affected. The study used several scientific approaches, such as the historical approach, and followed by the comparative analytical approach, then the descriptive approach was adopted. The study concluded that Rome Statute adopted the POC, harmonized with the necessities of national sovereignty and International Criminal Justice (ICJ). POC in general is the model that rules the relationship between the ICC and national jurisdictions. This was explained in the preamble of the Statute that States Parties (confirm that the Court is complementary to national judicial systems). The thesis showed that the achievement of ICJ requires the integration of national justice and ICJ. The imposition of national sovereignty necessitates domestic courts to fulfill their duty to international crimes; the idea of sovereignty is motivated only by the reluctance of States to ratify the treaty establishing this international tribunal. The study, also, demonstrated that there is deficiency in the shape of relation between ICC and Security Council, which affect some time the International Justice negatively. Therefore, the study suggested to redraft the relationship between the Security Council and the ICC, and more recommendations have been suggested to enhance POC.

Keywords*:* 'The Principles of Complementarity POC', Sovereignty; ICC, National Courts*.*

ÖZ

TAMAMLAYICILIK ILKESI VE ULUSAL MAHKEMELERIN EGEMENLIĞININ ULUSLARARASI CEZA MAHKEMESI ÖNÜNDEKI ZORLUKLARI

UluslararasıCezaMahkemesinin (ICC) veulusalmahkemelerinyetkialanıarasındakiilişkininbelirlenmesi, tümUluslararasıMahkemelerintüzüklerininkurulmasındanbuyanaönemlibirtartışmakonusuolmuştur. Tamamlayıcılıkİlkesi'ninçalışmasının (POC) önemi, ikibölümdeyansıtılmıştır: son zamanlardauluslararasıtoplumayönelikkaygıkonusuolanulusalegemenlikvecezahukuku, Bu ilkeninproblemi, insanhaklarınınkorunmasıya da uluslararasıadaletarayışlarıaçısından bile, eldeedilmesizordur; Egemenlikönemlidir, ancakuluslararasıadaletvecezasızkalmamak ta önemlidirveetkilenmemelidir. Çalışma, tarihselyaklaşımgibiçeşitlibilimselyaklaşımlarıkullanmış, ardındankarşılaştırmalıanalitikyaklaşımizlemiş, dahasonratanımlayıcıyaklaşımbenimsenmiştir. Çalışma Roma Statüsü'nün, ulusalegemenlikveUluslararasıCezaAdaleti (ICJ) gereklilikleriyleuyumlaştırılmışPOC'yikabulettiğisonucunavarmıştır. Genelolarak POC, ICC veulusalyargıbölgeleriarasındakiilişkiyibelirleyenmodeldir. Bu, TarafDevletlerin (Mahkeme'ninulusalyargısistemlerinitamamlayıcıolduğunuteyiteden) Statü'nünbaşlangıcındaaçıklanmıştır. Tez, ICJ'ninbaşarısınınulusaladaletveICJ'ninentegrasyonunugerektirdiğinigösterdi. Ulusalegemenliğinuygulanması, yerelmahkemelerinuluslararasısuçlarakarşıgörevleriniyerinegetirmelerinigerektirmektedir; egemenlikfikriyalnızcaDevletlerinbuuluslararasımahkemeyikurananlaşmayıonaylamadakiisteksizliğindenkaynaklanmaktadır. AyrıcaÇalışma, UluslararasıAdaletBakanlığı'nıolumsuzyöndeetkileyecekolan ICC veGüvenlikKonseyiarasındakiilişkişeklindekieksikliğinolduğunugöstermiştir. Bu nedenle, çalışma'dagüvenlikKonseyive ICC arasındakiilişkiyiyenidentasarlanmasınıönerilmişvePOC'yigeliştirmekiçindahafazlatavsiyelerdebulunulmuştur.

Anahtarkelimeler: TamamlayıcılıkİlkeleriEgemenlik, UluslararasıCezaMahkemesi, ulusalmahkemeler.

TABLE OF CONTENTS

ABBREVIATIONS

ICC	……..	International Criminal Court
POC	……..	The Principle of Complementarity
ICJ	……..	International Criminal Justice
ICTY	…….	International Criminal Tribunal for the Former Yugoslavia
ICTR	…….	International Criminal Tribunal for Rwanda
UN	……..	United Nations
IHL	……..	International Humanitarian Law
IMTFE	…….	International Military Tribunal for the Far East
SPSC	…….	The Special Panels for Serious Crimes
MNF-Rar	…….	Multi-National Force-Rapid Action Revision
SLA	……..	The Sudan Liberation Army
JEM	……..	Justice and Equality Movement
SC	……..	Security Council

CHAPTER ONE

NATIONAL SOVEREIGNTY OF STATES

1.1 Primary Introduction

Mass wicked or cruel acts and exorbitant breaches of human being rights such as genocide, crimes contra mankind, and war crimes, impact on the entire world. Therefore, there is serious intention to combat the impunity for these types of offenses perpetrators. The firmness of the world to rebuff such culprits have inspired the advancement for types of international criminal law requirement, as what happened with the 'Ad Hoc' trials for Rwanda (ICTR), and Former Yugoslavia (ICTY) and the ICC. However, simultaneously, these signs of progresses escalade the tension between political ambitions in conserve sovereignty of the country and operative ICC. Through the past half century, a foundation of ICC was a significant occurrence of the evolution in the international law. It was precedent to provide a permanent international institution for the criminal judiciary. Moreover, POC was a significant principle the ICC is basing on it. The Rome Statute has enforced in 2002 to terminate the impunity and punish the perpetrators of the serious crimes against the humanity, peace and, security of the world[1]. According to POC the offenses, placed in the Rome Statute essentially will be examined and prosecuted through the local judiciary. Hence, ICC can only confirm its judiciary if, local courts are reluctant or incapable to carry out that.

Hence, the identification of the connection between the jurisdiction of ICC and domestic courts has been a major focus of controversy since the establishment of

[1] Rome Statute's Preamble, para. 5:
"*The States Parties to this Statute […] determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes*."

the statutes of all the ICC. Paragraph 10 of the Rome Statute is confirmed that ICC has been founded based on this Statute ought to be complementary with local Judiciary. Furthermore, article '1' of the Statute addresses that Court will be able to practice its judiciary on the individuals for dangerous offenses of universal attention, and it will be complementary with the domestic criminal judiciary. Whereas, the establishment of a court by a notion to have a power on the essential offenses of universal attention, its power is unified and restricted to the system of complementarity that realized from the Rome Statute.May be the preamble elucidates court function which developed by the drafters and the regime that the Court based on. After banning serious crimes, the preamble firstly emphasizes on the preparation at the domestic grade and improving universal cooperation[2]. Also, it addresses the mission of each country to practice judiciary upon the perpetrators of international crimes[3]. Thus, it could be indicated that the Statute's purpose is practicing legal power on such offenses without touching the sovereignty of the country. Domestic courts might confirm their judiciary on offenses accordance with several types of judiciary. Judiciary is meaning a power that practice by a country on property, individuals, or events[4]. The Jurisdiction is known by "*the authority of states to prescribe their law, to subject persons and things to adjudication in their courts and other tribunals, and to enforce their law, both judicially and non-judicially*."[5].The judiciary criterion is the regional standard, where countries announce jurisdiction on offenses occurred in their regions[6].Judiciary out of the country region is the power of the country for the jurisdiction of the offense occurred out of the country. The country can confirm the right to a trial on any case take place outside of the country when it confirms a connection with that case. Accordance with (personality) rule, a country is allowed to sue its citizens for offenses occurred abroad[7].

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[2] Rome Statute's preamble, para. 4:
"*Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation*"
[3] Ibid, para. 4:
"*crimes, Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes*,"
[4]Malanczuk, Peter, Akehurst's Modern Introduction to International Law, Seventh revised edition, London, 1997, page 109.
[5]Bassiouni, M. Cherif, Crimes Against Humanity in International Criminal Law, Second Revised Edition, The Hague, 1999, page 227.
[6]Bartram S. Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals', *YJIL*, (1998), 23. P.402
[7]Malanczuk, supra note 1, page 111.

The concept of complementarity demonstrates that merely the universal suing by ICC is not sufficient to combat the impunity of wrongdoers of human being rights, so, the main role is driven by the local judiciary. However, the importance of the POC is demonstrated in two parts: national sovereignty and criminal justice, which are significant for the international community, especially nowadays. The internal affairs of States are interrelated under different circumstances; sovereignty is the principle that all nations defend and sacrifice. The principle is elusive even for the protection of human rights or for the achievement of international justice; sovereignty is important, but its concept remains high.

The establishment of ICJ is the dream of the international community and all humanity. Combating international crime, as well as punishing the perpetrators of such crimes wherever they may be and where they have been committed, is necessary, to be the main axis of ICJ.

The importance of the study is that it deals with the POC created by the development of the ICJ system, which has been explicitly promoted in the ICC system, by promoting the principles of justice and ending impunity for the perpetrators of the crime, which are more serious front of the world. Middle East facing many serious challenges in this field, hence it was significant to focus on this part of the world in this study.

The problem of this study is to determine, the range that the establishment of ICJ requires complementarity of national criminal justice with ICJ, without compromising the respect of the national sovereignty of States.

Moreover, the study tries to answer the following questions; Does the ICC is supervising the national law? Is there any contradiction between the POC and the national laws?

Literature survey is the base of the investigation regarding this topic. Several approaches have been conducted for this purpose. In dealing with the Concept of Sovereignty, the historical approach will be implemented by addressing the traditional concept of sovereignty where nations sanctify this latter. This approach has also will be implemented to appear the most important of the ICC, beginning with the trials of the First and Second World Wars, ending to the ICC. Then, the comparative analysis approach, will try to analyze the content of some of the provisions of the statutes of the various international criminal tribunals with the Statute of the Permanent ICC, particularly with respect to the principle of

complementary jurisdiction.Several cases from Arabic countries will be analyzed as case studies. Finally, the descriptive approach will be adopted to demonstrate the state of sovereignty after convey from its absolute concept to the relative concept of modern international developments and their repercussions regarding the classical notion of sovereignty.

A main structure for the study will be the introduction in the chapter one, and national sovereignty of states then, Chapter two will deal with the influence of the notion of sovereignty by the development of ICJ and the POC jurisdiction. Chapter three will involve the Implementation of the principle of complementarity POC between National justice and ICJ. Chapter Four will concern with the practice of ICC of complementarity cases within Arabic countries. Finally, Chapter Five will show the conclusion and recommendations

1.2 Evolution of the concept of sovereignty

Sovereign of the countries is considered as fundamental factor in the country regulation. The term „sovereignty" is came from Latin origin '*superanus*' which means supreme. Hence, sovereign of countries indicates superior potential. The contemporary notion of the country order became outright, when the sovereign notion was inserted. A French writer, Jean Bodin, was pioneer who crystalize sovereignty notion[8]. Sovereignty has been known as a major development throughout the ages, especially since the beginning of the sixteenth century. After it had the absolute concept of freedom of the state in the management of its internal and international affairs, it began to be subject to some restrictions, especially on the external appearance of sovereignty, but the States in that period sanctified the phenomenon of sovereignty, to the extent of refusal to intervene in order to prejudice the requirements of this sovereignty, both its political independence Territorial integrity or jurisdictional competence of national courts[9].

However, these requirements have not been widely welcomed by the contemporary world, which to start believing in the relative importance of restricting the phenomenon of sovereign rights. Thus, at the turn of the twentieth century, global

[8]Arshid Iqbal Dar and Jamsheed Ahmed Sayed, 'The Evolution of State Sovereignty: A historical overview', (2017) 6, *IJHSISI,* 2319.

[9] Giving priority to national courts in punishing the perpetrators of the International Criminal Court falls under the jurisdiction of the International Criminal Court, emphasizing the importance of preserving and ensuring the sovereignty of States.

action, justice and jurisprudence refused to accept the idea of absolute sovereignty. They have imposed some restrictions on absolute sovereignty[10], as well as the growing interest in the common interests of States. In view of the foregoing, the study will highlight the development of the concept of sovereignty in ancient times, as well as the state of sovereignty after the crystallization of its concept recently.

1.2.1 The old concept of sovereignty

Sovereignty emerged with the birth of the state, then developed with the development of the national state in Europe and the emergence of conferences and international organizations. In the eyes of the sixteenth century scholars, sovereignty was absolute, and cannot be limited only by God. Another opinion says that sovereignty as a rule has emerged since 1648 when the Treaty of Westphalia was established. Since the conclusion of this Treaty and the sovereignty of the State, it has served as the guiding principle of international relations, which clearly state that the State has internal affairs that cannot be interfered with[11].In another side, another opinion says that the first to call the concept of sovereignty is the French jurist (Jean Baudan)[12]. His theory is that sovereignty is supreme authority over citizens and nationals, and that the sovereignty of the state in this regard is, its internal appearance and external appearance. Thus, it is crucial to differentiate between the local and the exterior state supremacy. The local state's sovereign is referring to country's potential to practice its function within domestic boundary and to control inner issues without interference. Moreover, inner dominion, therefore, contain all the prerogative and characteristics of state within its area. Whereas, extrinsic sovereignty has been commonly known as rightful freedom of any other overseas powers, thus conserving the state's zone front of any outside intervention. The radical alteration in the late eighteenth and beginning of nineteenth century emerge a modern notion of sovereign that yet consisted of notion of the parity of countries the key factors. The internal issues for the singular country was protected from any

[10]Hendrik Spruyt, *The Sovereign State and Its Competitors: An Analysis of Systems Change* (Princeton University Press, N.J., USA, 1994)
[11]Franz XaverPerrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*. (The Hague: Kluwer Law International, 2000), p. 395.
[12]Jean Baudin, a French philosopher (1529-1596), his name was associated with the modern state, and he developed a theory about the concept of sovereignty in his book - (the six books on the Republic) which published in 1976.

interference of international law[13]. International law was seen as a group of optional basics set in agreements may be provided from custom. In the beginning was two-sided and was not counted for go farther than the obligations of both side's citizens[14].

1.2.1.1 The absolute sovereignty of States

The rule established in international law for centuries is that the sovereignty of the State is absolute and that States are committed only to its rule[15], but this rule has begun to shake in the aftermath of the Second World War. The international organization has entered a new phase[16], by adopting the Charter of the United Nations, the Universal Declaration of Human Rights. Moreover, the International Covenants on Civil and Political Rights, and recognizing the possibility of binding international resolutions even for states that did not agree to these resolutions. This have been clear in accordance with Chapter VII of the Charter, which gave the UN Security Council the right to take decisions to preserve international peace and security against states that did not agree to this resolution[17].

1.2.1.2 Definition of absolute sovereignty

Sovereignty expresses a political legal concept whose existence was associated with the existence for the contemporary nation-country and became one of its most important features and characteristics. When the state is described as a sovereign entity, the state is the political and social organization that is entitled to impose its authority over the entire territory that constitutes its political boundaries, and the people who live in this region[18]

[13]Bardo F. "Article 2(1)" in Simma (ed) The Charter of the United Nations: A Commentary (2002) 70; Steven Lee "A puzzle of sovereignty" (1997) CWILJ 253.
[14]Franz Xaver (n 11).
[15] Anne B., "Weakening the principle of sovereignty in international law: The international tribunal for theFormer Yugoslavia" (1993). NYUJOILP.
[16] Robert Jennings "Sovereignty and international law" in Gerard Kreijen (ed), *State, Sovereignty and International Governance* (Oxford Scholarship online 2002)
[17] UN Charter, 1945, < https://treaties.un.org/doc/publication/ctc/uncharter.pdf > accessed on 29th of Sept., 2018, pp. 9-11.
[18] Anne Bodley (n 14).

1.2.1.3 Manifestations of absolute sovereignty

The sovereign State has the powers to make it in a position to impose its will on its territory, including persons and funds, as a result of its own ownership of the territory and, by virtue of international relations, to deal with different countries on the equivalence principle bases and compliance with the rules of international law. According to 'MacCormick' the difference amidst domestic and exterior sovereign create a possibility for think about determination of state sovereignty[19]. Accordingly, this study will examine the aspects of sovereignty at the internal and external levels, respectively.

1.2.1.3.1 Manifestations of absolute sovereignty at the internal level

It is difficult to limit issues that fall within the purview of the State or the so-called "Jurisdiction of national sovereignty". The original authority of the State is not limited to identifying issues that fall within the purview of its mandate. It has full freedom to choose its own judicial and political system.

The expansion of universal law has produced the fundamental of specific jurisdiction of the country on its own land, which is the starting point for the organization of all matters affecting international relations.

Territorial sovereignty implies the right to be independent in the exercise of government business, which is matched by the obligation to protect the rights of other States, and thus its territorial jurisdiction is governed by the interaction of three main principles, namely:

1. Exploitation of the State and its exclusive jurisdiction over the Territory.
2. The duty not to interfere in the jurisdiction of other States.
3. Commitment of obligations under treaty and customary law with consent of obligor[20].

The International Court of Justice had already ruled on the issue of military and paramilitary activities in Nicaragua in 1986. The ICJ condemned the USA for breaching the principle of international equality through its conduct which caused damage to Nicaragua and in particular the violation of a fundamental principle of

[19]MacCormick Questioning Sovereignty: *Law, State, and Nation in the European Commonwealth* (Oxford Scholarship online 1999)

[20] Bu-Sultan Mohamed, (مبادىء القانون الدولي العلم) [Principles of Public International Law] (trn.) Part I, (Diwan University Press, Algeria, 1994).

international law Customary obligation to refrain from harm and non-infringement of the territorial integrity of States[21]. It can therefore be said that the manifestations of sovereignty at the internal level is the right of the State to extend its authority and administration to its facilities within the territory and subject all who reside on its territory to its legal systems and judicial decisions. The internal competence of the state reflects the highest forms of sovereignty, because it is the state that protects the state, and infringement of these terms of reference violates the principle of international equality[22].

1.2.1.3.2 Manifestations of absolute sovereignty at the external level

The State has the full right to enter into alliances with other countries and conclude pacts and accession to international organizations. Moreover, its connections and external relations with other countries and sovereignty is the one that gives it the right to build up its own military force in order to preserve its internal security and protect its territory from any external aggression[23].

In another words, the manifestations of sovereignty at the external level means the freedom of the State to manage its foreign affairs and to determine its relations with other international entities[24].

1.2.2 The concept of sovereignty, recently

The connotation of dominion has nowadays become a senior issue of dispute in universal law and global theory concerning the relation among countries. On contrary of the presupposing that the notion of sovereignty has an immortal or comprehensive meaning[25]. Where, since the early of 20th century it was clear, the traditional process

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[21]Militarv and Puramilitary Activities in und aguinst Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14.

[22] See Al-Jawzi Al-Din, (مبدأ حق التدخل الإنساني بين إختصاصات السيادة وحقوق الإنسان) The Principle of the Right of Humanitarian Intervention between the Competences of Sovereignty and Human Rights, Master of Law, (Faculty of Law, MouloudMameri University, TiziOuzou, 2008); See Also, UN Charter article '2(1)'.

[23]Franz XaverPerrez (n 11).

[24] Boras Abdel Kader,مبدأ السيادة الوطنية **تراجع و الإنساني الدولي التدخل** [International Humanitarian Intervention and the Reversal of National Sovereignty] (trn.), (New University House, Azaratiya, 2009), <https://pmb.univ-saida.dz/budspopac/index.php?lvl=notice_display&id=766> accessed 30 Sept., 2018.

[25] Hendrik Spruyt, *The Sovereign State and Its Competitors: An Analysis of Systems Change* (Princeton University Press, N.J., USA, 1994)

of sovereign as entire and unlimited power frames an impendence to international peace and to the presence of independent states[26].

In this section, we will address the impact of the idea of sovereignty on the modern developments that were built by the international community, especially with the beginning of the twentieth century, with the emergence of many new issues and developments that contributed to the idea of sovereignty.

1.2.2.1 Recent developments as a necessity to shift from absolute sovereignty to relative sovereignty.

The international community witnessed recent developments especially with the beginning of the twentieth century with the emergence of many new issues and developments that have helped to influence the concept of absolute sovereignty and the need to shift its concept to relative sovereignty.

The most important of these developments are modern international organizations as well as the principle of solidarity which has limited the traditional concept of sovereignty as well as globalization and its implications for the requirements of the national sovereignty of the states[27].

1.2.2.1.1 The emergence of modern international organizations

The traditional meaning of the concept of sovereignty is meaningless in light of the expansion of the network of international relations, especially after the constituting of UN. The relationship between the members of the international community has produced regional blocs that also have an impact on the issue of sovereignty: the European Community and the League of Arab States. To the United Nations is in itself a waiver of the idea of the absolute sovereignty of States[28].

1.2.2.1.2 The principle of international solidarity as a limitation on absolute sovereignty

The peoples and nations have known the phenomenon of solidarity and it is one of the common customs that man has lived with since ancient times. It is in helping

[26]Franz XaverPerrez (n 11).
[27] Robert Jennings (n 16)
[28] D. Nincic, "*The Problem of Sovereignty in the Charter and in the Practice of the United Nations"* (Springer, Netherlands 1970)

man to his fellow man and standing beside him in crises. With the development of human interests, the content of the principle of solidarity evolved from the customs of the ancient tribes to political gatherings or states in the modern sense. This principle, which has become a constraint on sovereignty, because it became the perspective of weak and impoverished countries raises their interests in some cases.In its modern concept, solidarity means the agreement of States on the common interests and mutual benefits which it is always striving to maintain and reciprocity. This solidarity is in the form of material or moral assistance, which clearly shows that it is a moral obligation that states and peoples seek to respect[29].

Sovereignty is among the fundamental rights of States and the principle of sovereign equality is one of the principles enshrined in international instruments, including the Charter of the United Nations[30].

Thus, States cannot live in isolation from other States, there must be no tendency towards the interpretation of the spheres of sovereignty as a negative interpretation of the absence of any higher authority or authority, at home and abroad, which is absolute sovereignty. But, must be interpreted positively, which means limiting the principle of absolute sovereignty of interaction by establishing international relations and solidarity in order to achieve the common advantages of all countries to guarantee the exclusion of the negative concept of sovereignty[31]. In the modern era, solidarity has become widespread in terms of proliferation among nations. It is not logical for states to adhere to their absolute sovereignty. At the same time, their accession to international organizations and regional bodies is imperative, while the latter have the powers of providing security in the international community[32].

1.2.2.1.3 The effect of globalization on absolute sovereignty

Globalization considers the fact that it is the time that boarders of sovereignty cannot be protected against the capital's movements, information and ideas, also, they cannot give serious protection versus harm or damage[33].

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[29] Anne-Marie Slaughter, 'Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform', (2005) 99, The American Journal of International Law, 691-631.
[30] D. Nincic (n 28); Also See, UN Charter article 2(1)
[31] Arshid Iqbal Dar and Jamsheed Ahmed Sayed (n 8).
[32] Anne-Marie Slaughter (n 29).
[33] Roslyn Higgins, 'International Law in a Changing International System', (1999) 58 CAMBRIDGE L. J., 78- 82.

There is no doubt that the repercussions of globalization on all entities of international organization may make the absolute concept of sovereignty questionable, because it is not possible to satisfy all the conditions that achieve and embody the sovereignty of the state, especially with the rapid and interdependent flow of various fields of globalization, whether economic or cultural. In any case, sovereignty cannot be spoken in the absolute old sense, because the legal system of sovereignty evolves and changes because of the new manifestations of the economic, social and cultural spheres, which are logical consequences of the phenomenon of globalization[34].

What can be said at last is that the full sovereignty of states has been reduced by the effects of globalization and many variables, which has affected the principle of sovereignty and emphasized the concept of limited sovereignty.

1.2.2.2 The common interests of States as a basis for the retreat of the concept of sovereignty

The common interests of States are the interests of humanity, which they consider being a focus of the world. Which many of the scholars consider to be restrictions on the principle of sovereignty because of the sensitive preoccupations of political, economic, ideological and social dimensions. Thus, this would reduce the notion of sovereign rights exercised by persons of international law. Among the most important of these are the interest in and promotion of mankind prerogative, the protection and guarantee of international security and protection human dignity during global and non-international conflicts[35].

To illustrate these interests and their impact on the sovereignty of the state, we will address the universal concern about human rights and the extent to which they adhere to the countries sovereign, and then the fundamental of humanitarian interference and its impact on the sovereignty of States. In condition of limitation of independence, commerce actors may sap the state's capability to recognize their commitments in front of humankind by practicing sovereign in complete dominion field. It is special in a practical way in conditions countries rely on them because of the trading actors are significant factor in state revenues and economic

[34] Daniel Drezner, *All Politics Is Local*, (Princeton University Press, 2006).
[35] Arshid Iqbal Dar and Jamsheed Ahmed Sayed (n 8).

development. This condition leads states are limited in their ability to implement laws, and thus to pursuit sovereignty[36].Heinz, debated the compromise among the activities of overseas firms and the application of status related to companies is particularly not easy to fix if the companies are able to move their production to other countries[37].

1.2.2.2.1 Global attention to human rights as a constraint on sovereignty

The United Nations was born, with the end of the Second World War, in 1945, a difficult reality translated by the remnants of this war that left humanity tragedies cannot be erased from the memory of history. It was natural that the issue of human rights took hold of the authors of the Charter of the United Nations, which was the first international document to recognize human rights and fundamental freedoms.

These rights are enshrined in several articles in the preamble to the United Nations Charter in promoting international cooperation to respect human rights and fundamental freedoms[38].In addition to the international community's interest in human rights, the international community's concern for human rights has to be strengthened. In order to strengthen the commitment element, it was necessary to issue declarations as well as to conclude international agreements, in view of pressing demands. Genocide and Punishment on 9 December 1948, and the Universal Declaration of Human Rights on 10 December 1948[39]. Since the proclamation of this Declaration, recognition of the universality of human rights has become recognized, and human rights have thus become an international affair and are no longer internal as one of the purposes of the international community. So as not to recognize the barriers of sovereignty, especially if this threatens the vital interests of the State concerned, because the belief that human rights were in the

[36]WanjaIllerhaus-Bell, *Rethinking Sovereignty and Human Rights: Towards the Realization of Human Rights under Conditions of Challenged State Sovereignty*, (Wageningen University 2015).
[37] Ibid.
[38] Preamble of UN Charter, mentions that; "*We the peoples of the United Nations determined; to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and; to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and; to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and; to promote social progress and better standards of life in larger freedom*."
[39] The Universal Declaration of Human Rights was issued in the form of a recommendation by the United Nations General Assembly on 10 December 1948.

frame of local jurisdiction of countries was not a universal attention, because certain belief is the imposition of competencies and the requirements of that sovereignty[40].

1.2.2.2.2 The principle of humanitarian intervention and its effect on the sovereignty of States

The jurisprudence of international law adopts the principle of non-interference as a basis for international relations in order to protect the sovereignty of states from aggression from other countries, thus providing security and stability to the international community. This principle became an internationally binding rule of law only in the twentieth century. This principle was adopted in Article 2(7) of the Charter of the United Nations[41].

In view of the post-World War II development in the field of human rights, it is possible to say that these rights have become a common heritage of all people. States have become committed to respecting these rights not only within their borders but beyond these borders. This commitment is based on several international documents, the most important of which are the Charter of the United Nations and the Universal Declaration of Human Rights. International conventions on international human rights law[42]. According to 'Mario Bettati', he considers that the humanitarian interference achieved by military force for the stopping dangerous humanitarian prerogatives breaches is a legitimate interference[43]. Therefore, humanitarian intervention has a strong relationship with the principle of humanity, which the international community has the right or duty to intervene in the internal affairs of States in order to, protect human rights and stop the cruel and inhuman treatment of human beings constantly[44].

However, in many cases, the right of humanitarian intervention by the major powers is a pretext for interfering in the domestic matters of countries. This is a

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[40] Al-Jawzi Al-Din, (مبدأ حق التدخل الإنساني بين إختصاصات السيادة وحقوق الإنسان) The fundamental of the Right of Humanitarian interference between the Competences of supremacy and Human Rights, Master of Law, (Faculty of Law, MouloudMameri University, TiziOuzou, 2008).

[41] Article '2(7)', of UN charter, states that; "*Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII*."

[42] See *Geneva.Convention in 12 August 1949*, <https://www.icrc.org/eng/assets/files/publications/icrc-002-0173.pdf> accessed 30 Sept., 2018.

[43] Pierre Van Hoeylandt, *Is There a Duty of Humanitarian Intervention? An Empirical Study with Moral Implications*, (D. Phil thesis, University of Oxford, 2001)

[44] Al-Jawzi Al-Din (n 40).

manifestation of a policy of force that violates the principle of State sovereignty. The exercise of this right has proved beyond the principle of national sovereignty in many cases.

1.3 Summary

This part of the thesis was concerning the investigation of the concept of sovereignty. Also, chapter one dealt with how the concept of sovereignty evolved by the traditional notion of where sovereign was complete for modern or relative concept where it is necessary to sacrifice some of its requirements, such as, globalization, human rights charters, etc. The purpose of this was to give a comprehensive idea of the concept of sovereignty, opinions and legal texts on this principle, old and recent, and the most important reasons for change in the concept of this principle.

CHAPTER TWO

INFLUENCE OF THE SOVEREIGNTY CONCEPT BY THE DEVELOPMENT OF INTERNATIONAL CRIMINAL JUSTICE (ICJ) AND THE PRINCIPLE OF COMPLEMENTARY (POC) JURISDICTION

The discussion of international justice under the basic principles of international criminal law is a talk about the various international crimes that have threatened international peace and security, while at the same time talking about the judicial organs of international criminal tribunals. Thus, the principle of sovereignty has been reduced to the possibility of criminal accountability of individuals and international bodies, which necessitates non-protesting sovereignty to prevent the punishment of international crimes[45].

In order to study the content of this topic, this chapter dealt with ICJ as a basis for the retreat of the concept of sovereignty and also touched upon the principle of complementary jurisdiction and its impact on the sovereignty of states. The final part of this chapter is devoted to the study of the effects of the application of the POC

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2.1 International criminal justice ICJ as a basis for the decline of the concept of sovereignty

The international criminal judiciary has gone through many stages, and each phase express a reflection of certain circumstances. Therefore, many jurists are convinced

[45]Robert Cryer, 'International Criminal Law vs State Sovereignty: Another Round?' [2005], 5 European Journal of International Law, Pages 979.

that an effective and strong system of criminal accountability is the most powerful guarantee of universal justice. This is only through the formation of a permanent criminal court prevent escape from criminal accountability.[46]

2.1.1 Combating international crimes

Since the crime was an illegal act in the text of the law, attention to combating it is necessary, especially since the policy of combating crimes is no longer limited to the domestic sphere. It has become an international criminal policy for serious crimes or international crimes without regard to the principle of sovereignty or imperatives this sovereignty.The current reality is that the establishment of relations between States requires positive cooperation on the basis of giving up this absolute concept of sovereignty accordance with traditional content and placing it within the framework of a new year for human interests. This general framework reveals the limited sovereignty that allows for cooperation and intervention to promote criminal policy aimed at combating international crime[47].

2.1.2 International Criminal Courts

The success of the international community in the trial of the German war criminals was a step towards humanity, as it foreshadowed the universal triumph of justice over the limits of absolute sovereignty. Experience has shown, particularly through the Tokyo and Nuremberg trials, that criminal courts should be established to punish perpetrators of international crimes, In order to escape their extradition[48].

In many cases, some governments resort to the national criminal court in order to evade condemnation of heinous crimes, thereby extending national immunity and widening the circle of protest against sovereignty, thus facilitating the issuance of sentences that are not commensurate with the criminal act committed. In this regard, States refuse to accept international delegations of inquiry and inspection, but in many cases, States consider them interference in internal affairs and in the interest

[46]Broomhall, Bruce, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of law*, (Oxford University Press, 2003), 215.
[47]L. Henkin, *The Mythology of Sovereignty*, in Essays in Honour of Wang Tieya, (R. St. J. Macdonald, ed.), Dordrecht – Boston – London, 1993), 352.
[48]Bassiouni (n 5)

of their supreme interests[49]. When the states recognized that international crimes threaten peace and security, they have undertaken to put an end to the impunity of the perpetrators of these crimes and to contribute to the establishment of ICJ, not only by establishing an ICC with jurisdiction over such crimes, Internal criminal legislation of States by giving up some of its sovereign manifestations. This was confirmed by States during the Rome Conference in 1998[50], that the ICC would be complementary with local jurisdictions[51].

2.2 The principle of complementary and its impact on the sovereignty of States

The issue of national sovereignty was raised during the Rome Conference. Some delegations considered that the ICC remained a foreign body exercising jurisdiction that was originally the judiciary of the domestic felonious courts, in particular the provisions for article 4 in Rome statute[52], particularly the delegations of the Arab countries. Contrary to this, the French and Spanish Constitutional Council have not opposed the jurisdiction of the Court with the constitutions of their countries by saying that there is no contradiction with the humanitarian conditions for the exercise of national sovereignty. The POC on which the Rome Statute is based on the practical solution that was the consensus of delegations that had the honor of first signatures To the Treaty. When the Rome Conference was concluded with the Statute adoption, delegations recognized the POC as a basis for governing the connection of ICC with the local courts, to come to term to give priority to local courts to exercise jurisdiction over crimes within the jurisdiction of the Court[53].

[49]Robert Cryer (n 45).
[50]Report of the Preparatory Committee on the Establishment of an International Criminal Court submitted to the Rome Conference, A/CONF.183/2,14 April 1998.
[51]See article 1 and article 17 of Rome Statute.
[52] Article '4'-"*Legal status and powers of the Court*", states that "*1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes. 2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State*."
[53]See Rome Statute; preamble; article 1, 12 to 15 and 17 to 18, 19 and article 20.

2.2.1 Historical reference to the principle of complementarity POC of jurisdiction

The definition of the relation among the jurisdiction of the ICC and the domestic courts has been the focus of considerable attention and a continuing dispute. When the Normburgh Court was established, the allies agreed to make it limited to the trial of "senior war criminals". Since the court is military, its jurisdiction is based on the system that is placed on it and is more comprehensive than any other judicial system[54].

When the ICTY and ICTR courts were established by resolutions 827[55] and 955[56], respectively, by the Security Council (SC), the concept of jurisdiction of the ICC developed, taking the principle of concurrent jurisdiction or in conjunction with the priority requirement of jurisdiction of national courts.In general, the granting of priority to the international criminal tribunals to national courts was viewed by States as affecting one aspect of national sovereignty. This problem raised considerable debate at the Rome Conference. Many delegations put forward a solution that avoids the threat of State sovereignty on the one hand, as well as the fight against impunity and the need to establish ICJ on the other. Many States felt that even if local courts had priority to punish perpetrators, the ICC remained necessary to avoid immunity in national legislation, as well as the possibility of amnesty[57]. Some delegations recognized that the principle of sovereignty was no longer an absolute principle as it was in traditional international law. All this has marked a significant development in international criminal law to counter the trend to protect the sovereignty of the state in its traditional notion[58].

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[54]Bring, Ove, *International Criminal Law in Historical Perspective, Comments and Materials*, (Stockholm, 2002), page 19.

[55] See Security Council Resolution 827 of 25 May 1993 concerning the establishment of the International Criminal Tribunal for the former Yugoslavia. S/RES/827 (1993).

[56] Security Council resolution 955 of 8 November 1994 concerning the establishment of the International Criminal Tribunal for Rwanda;S/RES/955(1994)<http://dag.un.org/bitstream/handle/11176/45844/S_RES_955%281994%29-EN.pdf?sequence=3&isAllowed=y> accessed 6 October 2018.

[57]Cassese, Antonio**,** "On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law", 1998, 9, *European Journal of International Law*,

[58] Bara Munther Kamal Abdul Latif, النظام القضائي للمحكمة الجنائية الدولية[The Judicial System of the International Criminal Court] (trn.), (Dar al-Jihad for publication. And Distribution, Jordan, 2008).

2.2.2 The Concept of Complementarity principle

The meaning of complementarity shall be transferred to the jurisdiction of the national judiciary. First, if the latter does not exercise his jurisdiction for reasons of unwillingness to conduct the trial or the practical incapability of the court, the legal power of the court is open to the trial of the accused. POC is a fundamental notion governing the system of the ICC and is one of its main features. This principle was adopted in paragraph 6 of the preamble to the Statute, that it is the obligation of each State to practice its criminal jurisdiction over those in charge of international violations[59]

Also in preamble paragraph 10, from the Statute, confirm that the ICC founded under this Statute shall be complementary to domestic criminal jurisdictions,"[60] as affirmed in article 1 of the Statute[61].

The purpose of adopting this principle was to reaffirm the principle of the national sovereignty of States over territorial or criminal offenses committed by their nationals. The idea of the complementary legal power of ICC was formulated inside article 17 (1) of the Statute[62], which indicated that the court's jurisdiction was to hear the case despite its consideration by the domestic courts in two cases: 1) If the State is unwilling or unable to undertake the investigation or prosecution; 2) If the investigation has been conducted by a State which has jurisdiction over it and the latter decides not to prosecute the person concerned, the Criminal Court finds that the decision of the national judiciary has been due to the unwillingness of the State or its inability to prosecute. Thus, Complementary jurisdiction is the intervention of the ICC to ensure justice, in the event of a failure of the national judiciary, or in case of bad faith, thus providing an opportunity for impunity.[63]

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[59] See Preamble of Rome Statute, p.1.
[60] Ibid.
[61] See, Article '1', from Rome statute.
[62] Article 17(1), from Rome Statute, states that; "*1.Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court*."
[63] Oscar Solera, "Complementary Jurisdiction and International Criminal Justice,", (2002), 48, https://www.icrc.org/eng/assets/files/other/145-172-solera.pdf accessed 7 October 2018.

2.2.2.1 Defining the Concept of the principle of Complementarity (POC)

There was no specific definition of the POC in the ICC system but was referred to in paragraph 10 of the preamble to the Statute[64], also, as provided in Article 1 of the Statute, where the article indicated that the jurisdiction of the Court was complementary to the national criminal systems of States that were party to the International Crimes Committed in its jurisdiction: Genocide, Crimes Against Humanity, War Crimes and the Crime of Aggression[65].The Rome Statute gave priority to States to carry out the necessary investigations and to bring to justice the persons responsible for the crimes mentioned, which are of interest to the international community and that affect the human dignity as well as the safety and security of the international community. If States do not play their role in referring and punishing the perpetrators, thus the POC will be applied by the ICC jurisdiction.

What is to be noted is that the criminal court is not considered an alternative to the national courts, because the primary power of jurisdiction is the right of States, and in some cases supplemented by respect for the principle of the sovereignty of States[66].

2.2.2.2 Conditions of complementarity Jurisdiction application

We have previously stated that the priority of jurisdiction for the offenses set forth in article 5 of the Rome Statute is for national courts. If, however, the Court finds that such authorities are unable to carry out that task or unwillingly for reason or ill-intention of subjecting the offender to impunity Jurisdiction is held for the ICC.

This is evident from the text of article 17 concerning the acceptability of the affair, which in its first paragraph [67]states that the jurisdiction of the court is to be heard in the case, despite its consideration by the national courts in two cases:

1. If a study or prosecution of a case is being conducted by a country which has jurisdiction over it, this State is not genuinely ready or capable to undertake the investigation or prosecution.

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[64] See Rome Statute.
[65] Article '1' (n 61).
[66] Bugs Abdelkader, العدالة الجنائية الدولية, معاقبة مرتكبي الجرائم ضد الانسانية [International Criminal Justice, Punishment of Crimes against Humanity], Second Edition, Diwan. University Publications, Algeria, 1116, p. 107
[67] Article '1' (n 61).

2. If the investigation has been conducted by a State which has jurisdiction over it, but has intent not to prosecute the individual involved, unless the resolve is because of country's reluctance or deficiency to sue[68].

It is clear from the text of Article 17 that the Basic Law did not give the jurisdiction of integration of the Court in all cases, in the absolute concept, but rather the integration of some cases of incompetence or unwillingness. This means the inability of internal national systems or their unwillingness to exercise their jurisdiction. In any event, the burden of proof on these cases lies with the ICC, since that is the jurisdiction of any judicial organ. The same article in the second and third paragraph specifies how the court determines the state of unwillingness or incompetence[69].

2.2.3 Personal barriers to the application of the principle of Complementarity (POC)

The attainment of ICJ does not stop at the completion of the complementary jurisdiction of the ICC, but it also needs not to collide with some of the obstacles that usually prevent the prosecution of criminals and the justness for victims and constitute a major cause of the spread of impunity. And the promulgation of amnesty laws by States. Where the issue of immunity is often raised when the perpetrators of any of the crimes affecting human rights are brought to justice[70].

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[68] Oscar Solera (n 63).

[69] Article '17 (2& 3), from Rome statute, mentiones that; "*2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring theperson concerned to justice. 3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."*

[70]Dahamani Abdel Salam, دراسة حول المسائل الحائلة دون إنضمام الدول العربية إلى المحكمة الجنائية الدولية [A Study on Issues Arguing for the Arab Countries' Admission to the International Criminal Court](trn.),(2012, 6(2), The Academic Journal of Legal Research, Faculty of Law and Political Science, University. AbderrahmaneMeira, Baja, p. 60

2.2.3.1 The opposition to the principle of complementarity POC with the immunity of senior state officials

The issue of immunity is one of the greatest obstacles to the course of ICJ. It is aimed at political ends, which aim to preserve the continuity of State institutions at the international level, albeit at the expense of the legitimacy of international criminal accountability. Since the international community's purpose in establishing a legal framework for ICJ is to enshrine the principle of international criminal responsibility for international crimes, whatever their character, whatever position they hold. As a result of the criticisms of the negative effects of impunity, ICJ tried to introduce the principle of non-immunity and the first attempts at the Versailles Convention of 1919, through the 1945 Nuremberg Tribunal, to the Statute of the ICC Standing Committee for 1998[71].

What can be said is that article 27 of the Statute of the ICC lifts the immunity of any criminal and places him on trial[72]. In the same time we can see article 98 of the Statute is opposite to article 27. Where, in the paragraph (1) of this article, admit the global obligation of state under universal law and considers countries' commitment for appreciation of diplomatic impunity compacts carried out by states. Hence, this article demonstrates denial of immunity in Article 27, which provides crucial space for the confession of officials' immunity[73].

Cassese, Antonio, Gaeta and John mentioned that article 98 of the Rome Statute is an important exception, involved to protect some individuals from prosecution before the ICC[74].In the same context, Schabas also, addressed that article 98 is an important excuse to protect some people from prosecution before the ICC[75].

However, another opinion about this issue is saying, people either from party or non-party's countries to Rome Statute must do not depend on universal law impunity

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[71]Talebpour, Mansour, Impunity and (ICC), (SOAS, University of London, 2012)

[72] Article 27, mention; *"1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.*

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

[73]DapoAkande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities', (2009), 7, JICJ, 333-352.

[74] Cassese, Antonio, Paola Gaeta and John R. W. D. Jones (eds),*The Rome Statute of the International Criminal Court: A Commentar*y, (Oxford: Oxford University Press, 2002).

[75] William A. Schabas. 'General Principles of Criminal Law in the International Criminal Court Statute', (1998) 6 European Journal of Crime, Criminal law, and Criminal Justice, 84-112.

through this procedures with regards to ICC's demands. Hence, Cryer *et al.* says the meaning of the word 'third State' is refers to countries are not party only, 'third State' 'is commonly utilized in the agreements of collaboration is not referring the requesting and requested States[76].

However, they debate it is unnecessary for a state to attain a clarify immunity concession form a Statute party country, considering that whole kind of impunity will be neglected when the countries rectified the Statute, thus, being obliged to articles 27[77].

Furthermore, some opinions goes to see that the principle of the removal of immunity and the lack of respect for the official character established by all international criminal tribunals is not contrary to the constitutional provisions of national laws to consider that the commission of international or internal crimes cannot be a function exercised by the Head of State, Acts outside his or her functions, making them not covered by the immunity[78].

2.2.3.2 The opposition to the POC with the enactment by States of amnesty laws

Amnesty laws are laws that grant amnesty to all persons, including those responsible for serious violations of international humanitarian law, usually during armed conflicts or when internal crises are over. Despite the illegality of these laws, countries are still making this move and linking it to a policy aimed at achieving reconciliation. Despite the gravity of these laws, which are considered a clear enshrinement of impunity, most of the IHL is devoid of texts that contain legitimacy or illegality this procedure, although it provides for the prosecution or extradition of criminals to authorities to prosecute them[79].

The application of the POC between the low power of the Court and national judiciary based on article 17, and in coordination with Article 20[80], which provides for

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[76] Robert Cryer, HakanFriman, Darry Robinson, Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, (Cambridge University Press, 2010)

[77] DapoAkande 'International Law Immunities and the International Criminal Court', (2004), 98 the American Journal of International Law, 407-433.

[78] Ahmed BisharaMoussa, المسؤولية الجنائية الدولية للفرد [International Criminal Responsibility for the Individual] (trn.), (Hama House for Printing, Publishing and Distribution. Algeria, 2009)

[79] See Joinet L. &Guisse H., UN Doc. E/CN.4/sub.2/1993/6 (19 July 1993).

[80] See, Article '17 (n 69); See also, Article '20', of Rome Statute, that states; *"1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court. 2. No person shall be*

the inadmissibility of trial twice, raises many problems in the framework of national reconciliation pursued by the newly democratic States. The cruel nature of these crimes, which impose punishment no matter how long they have been committed and wherever they are committed, cannot be overlooked. On the other hand, amnesties do not always return to bad intentions. Many States have tried to achieve this endeavor in order to establish a State Based on the principles of democracy[81].

Thus, argument related to the potential appreciate of forgiveness of offenses within the judiciary of the Rome legislations are dialectical. Despite of way ICC must transact with local forgiveness and the subject was put forward in the preliminary board and in Rome Conference[82], and did not mention clearly in the Statute. Over the preliminary congress some expeditions came across solid opinion that suing was the proper response for offenders of universal offenses at the ICC's authority; many organizations' attorneys of human rights confirmed that the forgiveness should be excluding global offenses wrongdoers[83]. Whereas, different deputations, for instance, United States delegation, demonstrated their worry that the ICC may prevent efforts to limit the violations against human rights and re-establish democracy and peace in many countries as Guatemala, South Africa, and Haiti[84]. Thus, this matter did not perfectly fix through Rome Conference[85].Many sides mentioned that matter of amnesties were not sufficiently argued in the preparatory committee on the Statute, due to the effect of human rights groups[86].Scholars are confirming that the legislation

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tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court. 3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."."

[81]Roht-Arriaza N. 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law, (1990),78 California Law Review, 449, in 482.

[82] Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (15June-17July1998), Vol., 2, at 168, Para 101 and at 216 Para 38.The UN Doc. A/CONF.183/13.

[83] See, Open letter to the Chief Prosecutor of the International Criminal Court: Comments on the concept of the interests of justice, Amnesty International (17 June 2005), <https://www.amnesty.org/download/Documents/84000/ior400232005en.pdf> accessed 8 October 2018.

[84]Preparatory Committee for Establishment of the international Criminal Court (1997), Supra note 3, The US Delegation Draft,State Practice Regarding Amnesties and Pardons.<http://www.iccnow.org/documents/USDraftonAmnestiesPardons.pdf> accessed 8 October 2018

[85] Diplomatic (n 82).

[86]Arsanjani M H., 'The International Court and National Amnesty Law', (1999), 93 American Society of International Law, 65, at 67.

gives some possibility for the jurists of the ICC for acknowledging the forgiveness; the scholars emphasize the limitation of this issue to the Court jurisdiction[87].

Generally, there are three essential condition specified in the Rome Statute that the giving of forgiveness could be given to particular suing. These are: 1) If the Prosecutor did not decide to begin an implementation under paragraph 1 and 2 of articles '53' for the justice interest; 2) if a decision of non-acceptability in terms of the complementary judiciary under paragraph (1,-a &b) of article 17; and 3) when an individual who given a forgiveness by a local court could have post allow him to ask for the fundamental of "*Ne bis in idem*"[88] front of ICC.

2.2.4 Justification of the principle of complementarity (POC)

The preamble to the Statute of the ICC has showed the most important justification for the establishment of the latter and the formulation of the POC. The crimes of war and conflict are threatening humanity and continue to threaten international peace and security. The need for a system that ensures impunity for perpetrators of international crimes is essential, as well as to the need for national judicial systems to ensure universal criminal justice[89]. The rationale for the implementation of the POC in the Statute of the ICC, are;

2.2.4.1 Ensure State's Sovereignty

Over the Rome Consultations on instituting of the ICC, States considered that the establishment of this international judicial body would pose a danger to their interests and would oppose their sovereignty. This belief is not true, since the adoption of the POC is sufficient justification for the sovereignty of States and provisions that would affect the sovereignty of States only apply if States fail to perform their judicial functions.Where, granting the statutes of both the former ICTY and ICTR courts priority to exercise their jurisdiction over the jurisdiction of local courts (primacy over the national courts)[90], has given rise to debate and controversy because States have

[87] Scharf M. P., 'The Amnesty Exception to the Jurisdiction of the International Criminal Court', (1999), 32 Cornell International Law Journal, 507-528.
[88] See Article 20, from Rome Statute.
[89] Carsten S., "Complementarity: a tale of two notions.", (2008), 19, In CLF, pp. 87-113.
[90] See ICTY Statute, Article 9(2), and ICTR Statute, Article 8(2).

felt that their sovereignty has been diminished because the application of the POC has been a prerequisite for them[91].

Therefore, the need arose to find another mechanism for implementing this complementarity in order to comply with the preservation of the sovereignty of States on the one hand and the prevent impunity of criminals. The priority of jurisdiction was given to national courts, and in the absence of its role, the ICC intervened and thus supplemented the national courts. States and their national judiciary. This is why countries sign and ratify the court system because they believe in the POC that it has come to preserve and guarantee its sovereignty. The Rome Statute has tried to reconcile the powers of the Court with the preservation of the sovereignty of States, whether for the parties or non-parties[92].

2.2.4.2 Prevent prosecute the accused twice

The article 20 of the Statute of Rome the court have taken into account articles 10 and 9 of ICTY and ICTR[93], respectively, taking into account the POC that characterizes the ICC.

According to this principle, a person may not be tried twice for the same crime. This principle is recognized in article 20 of the Statute, so as not to be opposite with the national judiciary. This article prohibits the retrial of a person before the ICC, if the latter has convicted or acquitted him by article 20 (1), and no other national court may prosecute a person for the offenses referred to in article 5[94] if the criminal court has been acquitted or convicted by article 20 (2)[95].

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[91] Bartram (n 6)

[92] Oscar Solera (n 63).

[93] See ICTY Statute, and ICTR Statute.

[94] Article 5, of Rome Statute, states that; "*The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.*".

[95] Article 20, of Rome Statute, states that; "*1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court. 2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court. 3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.*".

In front of this, the ICC may not prosecute any person for crimes that are concerned with whether another court has passed judgment.

However, the Court legislation suspends usage of this case on condition that the court which has examined the case exercised its jurisdiction effectively and adjudicated the case objectively. The third paragraph of article 20 [96]provided that the ICC could not be heard in a case previously adjudicated by a court unless it is established to the Court that the proceedings before the national court have been taken with a view to preventing the criminal responsibility of the person concerned or that the trial was not in accordance with the principles of international[97].

2.3 Effects of applying the principle of complementarity (POC) jurisdiction to States

This section attempts to demonstrate the effect of the POC jurisdiction on States, especially with regard to their legislation and basic laws. Where, States are obliged to reformulate their legislation in accordance with the Statute of the ICC.To study this subject, we must address two branches: The first is, the compatibility of the national legislation of States with the Statute of the ICC. While, the second is, the question of international cooperation with the Court because it is one of the issues that determine the relationship between the Court and the national judiciary.

2.3.1 Necessity for national legislation to comply with the Statute of the Court

Particularly, the Rome Statute requires form States to consider the question of amending their legal system in a manner that is appropriate and expedient to the requirements and provisions of this Law. Ratification of this system requires the States that have ratified it to review their legislation and laws, to make them conform to the Statute of the Court.The incompatibility and conformity of the provisions of the

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[96] Para. (3), article 20 of Rome Statute, states; "*3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."*

[97]DridiWafaa, المحكمة الجنائية الدولية ودورها في تنفيذ قواعد القانون الدولي[*International Criminal Court and its role in the implementation of the rules of international law*](trn.), Thesis of Master's Degree in International Humanitarian Law, (Faculty of Law, University of Haj Lakhdar, Batna, 2009), pp. 88-89

Statute of the ICC with the constitutions of States is one of the main reasons for the non-ratification of most of these States, given the complexities required by their amendments. For example, most Arab countries have not ratified this regime because they do not agree with their constitutions[98].

The need to bring national legislation into conformity with the provisions of the Statute of the ICC is based on the POC whereby States are able to follow the international crimes contained in the Rome Statute because the POC is not limited to prosecuting those who have

to be enshrined in the domestic laws of States, so they must be included in the national laws of States[99].

Although the procedures for amending national legislation require complex procedures and require considerable effort, it achieves many advantages, most importantly.

- The provision of the crimes set out in the Rome Statute separately in national laws allows the State to punish such crimes even if it does not join the Rome Statute.
- This method clearly establishes the application of the principle of legality, leads to justice and provides the accused with guarantees of knowledge of the legal provisions to which they are subject, because knowledge of national law is easier than the knowledge of the Rome Statute with its broad backgrounds in international law[100].

2.3.2 Commitment to full cooperation with the ICC

The ICC can only carry out its core functions through the full cooperation of States parties to the Statute and even by non-States parties. Part IX of the Statute" *International Cooperation and Judicial Assistance*", in particular, includes articles 86 to 202[101].

Article 88 of the Statute of the Court requires States parties to ensure that their domestic legislation ensures full cooperation with the Court in its judicial proceedings

[98] Dahamani Abdel Salam (n 70).
[99] Hein, D. P., "Jo Stigen, The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity", (2009), 7(2), Journal of International Criminal Justice, 439–440. <doi:10.1093/jicj/mqp024> accessed 9 of October 2018.
[100] Ibid.
[101] See Rome Statute.

relating to investigation, indictment or trial in the commission of crimes within its jurisdiction[102].

By examining the provisions of the statute on the system of cooperation and judicial assistance, we understand that it must be expeditious and not subject to restrictions on judicial cooperation and judicial assistance between States, primarily through the performance of its functions of the highest standards and impartiality And that States through such cooperation should not consider the Court as a foreign judicial body because the ICC is an impartial and independent international judicial body whose compliance with its decisions is not tantamount to renunciation of national sovereignty. This does not mean that the Court removes its national jurisdiction from the national authorities, The performance of its functions based on the original in cooperation of States parties and assist them and implement the decisions of the Court are through the national authorities and internal systems and this confirms the POC between the jurisdiction of the ICC and national systems. Therefore, States should not consider the criminal court to be a superior body of national sovereignty, but rather a complement to national criminal jurisdiction[103].

2.4 Summary

This chapter deals with the POC created by the development of international criminal law. Although it's most important justification is to guarantee and respect the sovereignty of States and the inadmissibility of trying the accused twice, it contradicts some of the requirements of sovereignty, in particular the granting of immunity to senior state officials. In terms of the impact of this principle on States, it has been shown that the national legislation of States should be reliable with the Statute of the ICC, and in addition the commitment to collaborate completely with the ICC.

[102] Article 88, of Rome Statute, states that; "*States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.*"

[103] Ahmed BisharaMoussa (n 78).

CHAPTER THREE

THE IMPLEMENTATION OF THE PRINCIPLE OF COMPLEMENTARITY (POC) BETWEEN NATIONAL JUSTICE AND INTERNATIONAL CRIMINAL JUSTICE (ICJ)

The first legal basis for the POC in international law dates back to World War I, when the Commission of Inquiry was established in March 1919 during the Treaty of Versailles. The Commission concluded that national courts should prosecute those accused of committing serious violations, or to extradite those accused of war crimes to States requesting extradition for trial.As provided for in the text of article 6 of the Nuremberg Tribunal[104].

[104] Article 228, from Treaty of Versailles, states that "*Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power.*
Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the powers concerned. In every case the accused will be entitled to name his own counsel.".

Article 9 of the Statute of the ICTY [105]and Article 8 of the Rwanda Tribunal[106] provide for the parallel jurisdiction of the Court with national courts, but it has recognized the primacy of the ICC over national courts, as it may at any time request local courts to waive the case in their favor.

The Statute of the ICC adopted the POC, with the tenth principle of preamble, which is defining the principle of complementary jurisdiction[107].

Furthermore, Article 1 added that the establishment of such a court was considered complementary to national jurisdiction[108].

Although the POC has been explicitly stated in the Statute of the ICC, it has been applied in various international criminal tribunals both in the interim criminal courts and in the mixed criminal courts. The study will examine how the POC between national justice and criminal justice is implemented.

Which is represented in its various criminal courts, where examples of the interim criminal courts are mentioned and, to which extent the hybrid criminal courts have been remedied. Then the ICC.

Although the POC has been explicitly stated in the Statute of the ICC, it has been established in various international courts, both in the interim criminal courts and in the mixed criminal courts. It refers to how the POC between national justice and ICJ, represented in its various criminal courts, is applied. The research here refers to the temporary criminal courts of the First World War Courts and the so-called military tribunals, and to which extent, the hybrid criminal courts have been remedied based on that. The study then deals with the study of the ICC.

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[105] Article 9, from ICTY, starts; "*1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.*
2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.".

[106] Article 8, from Statute of ICTR, stastes; "*1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of the neighbouring States, between 1 January 1994 and 31 December 1994.*
2. The International Tribunal for Rwanda shall have the primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda."

[107] Rome Statute, the tenth principle of the Preamble, states; "*The States Parties to this Statute, Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,*".

[108] See article '1', from Rome Statute.

3.1 (Ad hoc) Criminal Courts and Complementarity principle

The twentieth century witnessed many events that contributed to the development of international criminal law. Despite the recent idea of establishing an ICC, and the emergence of practical applications only after the two world wars, the international community established judicial bodies to question individuals for their crimes, which amounted to a limit of the cruelty that have left humanity with great sorrow, from the trial of the German Emperor 'Gliom II' to the trial of the WWII in Nuremberg and Tokyo to the establishment of criminal courts in both ICTY and ICTR, and the establishment of hybrid courts[109].

But the essence of the study in this chapter focuses mainly on the issue of overlapping competence and complementarity of cooperation between these international courts and the local courts of those countries. The study of this part will be concentrated in three directions: First: the study of the courts of the two world wars. Second: investigate the post-war world courts, while, the third will be allocated to the mixed criminal courts.

3.1.1 Courts of the World Wars

The two world wars have resulted in the most horrifying wrongdoings and infringement of the fundamental of global humanitarian law, which necessitated to establish criminal courts for punishing the perpetrators of these crimes, and therefore the study will try to address some of these courts.

3.1.1.1 World War I courts

During the end of the world war and as a result of the losses and violations of human values, as well as exceeded and prepared on the customs of war to use the various weapons that have not been known by the world by renewed interest in the need to punish the perpetrators of these acts, and the international community urgently needed a criminal judicial mechanism to end the impunity This was reflected in the proposal of the Committee of Official Governments, which was later renamed the

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[109] Carsten Stahn, Mohamed M. El Zeidy,*The International Criminal Court and Complementarity: Fro m Theory to Practice*, (Cambridge University Press, 2011).

committee on the determination of the responsibilities of the beginners of war, formed by the Paris Peace Conference in late January 1919, as well as the establishment of an independent international tribunal[110]. As a result, pursuant to article 227 of the Treaty of Versailles, a court was set up to prosecute German war criminals in accordance with articles 228 and 229[111]. Here the study will elucidate the responsibility the German Emperor Gleum II.

3.1.1.1.1 Trial of 'Gliom II' Emperor of Germany

The Versailles treaty contained in article 227 the formation of a special ICC to try former German Emperor Gliom II for the crimes he committed versus universal morality and the sacredness of treaties[112]. The Allies had requested that Netherlands be extradited to Gleum II for trial, but Netherlands refused because the accusation against the emperor was unknown in Dutch law, nor in any of the treaties to which the Netherlands was a party, and even in the agreements concluded with the Allied Powers[113].

Moreover, the trial appeared to be of a political rather than a criminal nature, and Netherlands viewed the breach of the principle of fair trial by Allied States as an inevitable belief[114].

By 1921, it was clear that the Allies had abandoned not only the idea of the trial of Emperor Gleum II but also abandoned the idea of international criminal tribunals provided for in articles 227 to 230 of Versailles, and left it to the German High Court in Leipzig, The Allies have a list of 45 of the 890 defendants listed on the list. The court issued mock judgments ranging from innocence to a maximum of four years[115].

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[110] Nick Shepley, *The Paris Peace Conference 1919: A student's guide to the Treaty of Versailles.,* (Andrews UK Limited, 2015), 59.

[111] See Articles, 227, 228, and 229, from Versailles Treaty.

[112] Ibid (article 227).

[113] Allied countries include; the United States, Britain, France

[114] A. T. Williams, *A Passing Fury: Searching for Justice at the End of World War II*, (Random House, 2016), 496.

[115] DridiWafa, المحكمةالجنائيةالدوليةودورهافيتنفيذقواعدالقانونالدولي [International Criminal Court and its role in the implementation of the rules of international law], (Master thesis in Legal Sciences, Faculty of Law, University of Haj Lakhdar, Batna, 2009)

3.1.1.2 World War II courts

The failure of the criminal justice process during the end of the First World War to try the criminals of this war, as well as the lack of peace in the international community, was sufficient for a second world war (1939-1945)[116]. But in terms of ICJ, this war was the real starting point towards the consolidation of international justice, and the establishment of an international justice system. Where the period after the Second World War was the first courts actually witnessed by the world, which are; the Nuremberg and Tokyo Tribunals, as the basis to constitute ICC. Its specialty is based on the basis of the system to which it is placed on[117].

Although the POC has been explicitly stated in the Rome Statute, it has been applied in these courts but differently, and this is what the study will focus on here, through the Nuremberg Tribunal and the Tokyo Tribunal.

3.1.1.2.1 The Nuremberg Tribunal

Before World War II ended, several statements and warnings were issued condemning the war criminals for warfare offenses and offenses versus mankind. These statements justify the need for establishing an international tribunal to prosecute war criminals. The most important statement issued after the meeting of the foreign ministers of the United States of America, England, in Moscow, 1943 which contains the bases to be followed by the allied countries to prosecute German war criminals after the end of the war and the surrender of the Germans[118].

A conference was held in 1945 for representatives of the Allies to agree on what should be done against German warlords. Later on, an agreement has been held, known as the London Agreement of August 8, 1945, which included the establishment of a military tribunal for the prosecution of war criminals, an agreement known as the Nuremberg Tribunal[119].

It included a set of rules governing the system of work in addition to a list attached to it, where the latter determined the jurisdiction of the Court from Article 6 to Article

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[116] Antony Beevor, *The Second World War*, (Phoenix, 2014), 994 pages

[117] Yuma Totani, *The Tokyo war crimes trial: the pursuit of justice in the wake of World War II*, (Harvard University Asia Center, 2009), 335 pages

[118] M. CherifBassiouni, *Crimes Against Humanity in International Criminal Law*, (2nd Revised Edition, Wolters Kluwer, 1999). p. 32.

[119] See, IMT Nuremburg: Judgment of 1st October 1946,p.12.<https://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf> accessed 24 october 2018.

13[120], each of the personal jurisdiction governed by the major war criminals from States of Axis, as well as not to consider the official post to the accused for his criminal responsibility.

Article 6 also refers to the substantive jurisdiction of the Court, where, it states the relation between the Tribunal and domestic courts in this Convention. This is an explicit recognition of the complementarity[121]. Also, Articles 10[122], and 11 [123]of the Charter of this Tribunal provide for the initial jurisdiction of national courts.

3.1.1.2.2 Tokyo Tribunal

After the signing of the document of surrender by Japan on 02-09-1945, and the Allied countries received power, General "Mac Arthur" issued a declaration in 19-01-1946, concerning the establishment of an international military tribunal for the Far East along the lines of the Nuremberg Tribunal. The same General has approved the list of its establishment on the same date, and the principles of the Tribunal's work were almost identical to that of the Nuremberg Tribunal. The Tokyo court rules state that the court is composed of 6 to 11 judges. They shall be chosen by the Supreme Commander of the Allied Powers from among lists submitted to him by the signatory States to the extradition document[124]. The Court of Tokyo noted that there is no difference between the charter of Nuremberg Tribunal and the Tokyo Tribunal charter or International Military Tribunal for the Far East Charter (IMTFE Charter), either in terms of principles or jurisdiction, nor in terms of procedures, with certain differences such as: the official characterization of the accused as a mitigating

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[120]See, IMT Nuremburg charter, Part II<https://ghum.kuleuven.be/ggs/events/2013/springlectures2013/documents-1/lecture-5-nuremberg-charter.pdf> accessed 24 October 2018.

[121] See article 6-c, from IMT Nuremburg charter.

[122] Article 10 , from IMT Nurnberg, mentions that; "*In cases where a group or organisation is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military, or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned*." <https://ghum.kuleuven.be/ggs/events/2013/springlectures2013/documents-1/lecture-5-nuremberg-charter.pdf> accessed 24 October 2018.

[123] Article 11 , from IMT Nurnberg, mentions that; "*Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership in a criminal group or organisation and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organisation.*." <https://ghum.kuleuven.be/ggs/events/2013/springlectures2013/documents-1/lecture-5-nuremberg-charter.pdf> accessed 24 October 2018.

[124] M. CherifBassiouni,(n 119)

circumstance for the accused according to, Article 7 of the Tokyo Charter[125]. The recognition of the jurisdiction of the national judiciary as a primary competence indicates that the POC in the Tokyo court is enshrined in the style of the Nuremberg Tribunal. The Court of Nuremberg and Tokyo, therefore, emphasize the importance of removing the rules of international law from their theoretical reality to practical reality, in order to establish international justice and to affirm the individual's criminal responsibility for international crimes. The crimes against humanity and crimes against peace have been extended to the scope of international criminal law punishment[126].

3.1.2 (*Ad hoc*) Tribunals

With the end of the tasks assigned to the Nuremberg and Tokyo Tribunals and the horrific events committed in both former Yugoslavia and Rwanda, and in the absence of an international judicial mechanism to punish the perpetrators of these events, the Security Council passed two resolutions establishing two international criminal tribunals known

crimes[127].But there is no doubt that the issue of overlap of jurisdiction and complementarity of cooperation between these courts and the domestic courts of Yugoslavia and Rwanda, as well as the problem of priority of jurisdiction, raises a problem in this regard.

3.1.2.1 Tribunal of Former Yugoslavia (ICTY)

Article 8 of the Statute of the ICTY states that it is competent to hear the crimes that occurred since January 01, 1991, until the issuance of the decision by the Security Council to terminate the work of the Court[128]. The jurisdiction of the Court shall be determined in the territory of the former Yugoslavia. The article 7 was approved the principle of individual criminal responsibility to follow up the natural persons

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[125] Article 7, from (IMTFE Charter), states; "*Rules of Procedure*. The Tribunal may draft and amend rules of procedure consistent with the fundamental provisions of this Charter", p.23

[126]M. CherifBassiouni (n 19)

[127]GuenaelMettraux, *International Crimes and the Ad Hoc Tribunals*, (Oxford Scholarship Online, 2006)

[128] Article 8, from ICTY statute, states that "*The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991."*.

responsible for serious violations of international law[129]. As for the jurisdiction of the substantive court, Article 1 of the legislation of the Court recommended the legal power by Court to consider grave violations[130].

Articles 2, 3, 4 and 5 provide for the range of crimes for which the Court is competent: war crimes, genocide, and crimes against humanity. Under article 9 of the Statute of the Tribunal of Yugoslavia, the Court was given the inherent competence to consider the above-mentioned crimes[131]. Thus, the priority is given to the ICTY for the consideration of the offenses. If the proceedings take place before national courts, the court may at any time request the national court to waive consideration of the case and refer it in accordance with the procedures provided for in the Statute of the Court[132]. This priority was given to her for fear of the complicity of local courts with criminals and the repetition of the trials of the First World War and, in particular, of the Leipzig trials[133].

3.1.2.2 Rwanda Tribunal ITCR

The issue of overlap of jurisdiction and complementarity of cooperation between the Rwanda Criminal Tribunal and the Rwandese National Courts is seriously reflected in the points of convergence of the judicial systems in terms of structures or texts

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[129] Article 7, from ICTY Statute, mentioned the following "*1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime. 2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment. 3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. 4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires*.".

[130] Article 1, from ICTY Statute, mentioned that; "*The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute*.

[131] See; ICTY Statute.

[132] See Article 9, from ICTY Statute, which mentions that; "*1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991. 2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal*.".

[133] Rachel Kerr, *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics, and Diplomacy*, (OUP Oxford, 2004).

adopted by the ICTR. Article 8 of the ICTR [134]provides that the International Criminal Tribunal for Rwanda National jurisdiction to prosecute persons suspected of involvement in serious violations committed in the territory of Rwanda and neighboring States from 1 January to 31 December 1994[135]. Moreover, the priority of the Tribunal for the Rwandese national judicial authorities, through all stages of the proceedings. The Court may also formally request the national judicial authorities to abandon the case in its favor, in accordance with the Statute of the Court[136]. The Rwandan domestic Courts exercise joint or similar jurisdiction with the Court International criminal law, taking into account the importance of the international jurisdiction of this Court to national courts. All this is confirmed by the withdrawal of the International Criminal Tribunal for Rwanda (ICTR) from the Rwandan national courts[137].

The jurists differed in their evaluation of the statutes of both Tribunals (Rwanda Tribunal and the former Yugoslavia), especially in the case of the POC, which raises several political problems, which led to a part of the jurisprudence to not consider it.

However, another jurist called for allowing the trial who recognized their responsibility before the local courts and the jurisdiction of the Tribunals in the event that the court does not recognize the failure of the accused to be responsible, thus achieving the principle of judicial complementarity which is a mechanism for impunity. Whereas, another part of jurists asserted that in the case of the jurisdiction of the domestic courts in addition to the jurisdiction of the ICTY and ICTR, the competence of the ICTY or ICTR is prejudicial to the sovereignty of States[138].

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[134] Article 8, from ITRC Statute, states; "*1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of the neighbouring States, between 1 January 1994 and 31 December 1994. 2. The International Tribunal for Rwanda shall have the primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda*.".

[135] UN Doc. S/RES/955/Annex, Resolution 955 (1994), 8 November 1994.

[136] See Article 8(2), from ITCR Statute, which states that; *"2. The International Tribunal for Rwanda shall have the primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda*.".

[137]L. J. Van Den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law*, Martinus (Nijhoff Publishers, 2005).

[138] Abdul Fattah M. Siraj,مبدأ التكامل في القضاء الجنائي الدولي، دراسة تحليلية تأصيلية [*The Principle of Integration in International Criminal Justice, (Analytical Study)],* (First edition, Dar al-Nahda al-Arabiya, Cairo, 2001).

Also, conciliation in the establishment of ICJ, which gives priority to the jurisdiction of the local courts of States, and remains a backup role, which was already done during the Rome Convention of 1998, which established the ICC, which was adopted the POC, which will be discussed later. In the next part, we will study the hybrid courts and their role in justice and the fight against impunity.

3.1.3 Hybrid Criminal Courts

The past century has seen serious crimes in various parts of the world. As a result of these crimes, which have led to the violation of the rules of international humanitarian law, such as in Cambodia, Sierra Leone, East Timor and Lebanon. This led the international community, represented by the Security Council, to create many establishments either in the form of chambers or international criminal tribunals. These hybrid criminal tribunals, which composed of international and national judges, are a new form of international justice and such courts could be subject to the application of national law[139].Originally, these courts are established under an international pact amidst U N and State concerned, but SC can take a unilateral decision to establish such courts.Two examples of these courts will be discussed in the next part, which are; Sierra Leone court and East Timor Court.

3.1.3.1 Special Court of Sierra Leone

The Sierra Leone Court is a hybrid international court established under an agreement between the Government of Sierra Leone and the United Nations[140] on 16 January 2002 by resolution 1315 (2002), based in Sierra Leone[141].

According to the legislation of Sierra Leone court, articles '11, 12' provided for formation of international judges and national judges[142]. The previous decision clarified the jurisdiction of the Special Court, where it was clarified that the jurisdiction of the Court shall be the follow-up of all senior officials who threatened the security and stability of Sierra Leone and all those who participated in the text of

[139]S. Katzenstein, 'Hybrid Tribunals: Searching for Justice in East Timor', (2003) *Harvard Human Rights Journal*, pp. 245-278, p.245.
[140] See; UN Doc. S/2000/786.
[141] See; Statute of the Special Court for Sierra Leone.
[142] See article 11& 12 from Statute of the Special Court for Sierra Leone.

Article 1 of the Court's Statute[143]. The applicable law is national law, International law, and its budget is lower than that of Yugoslavia. This type of court has also been established in East Timor[144].

The application of these courts to their national laws reduces their conflict with the domestic courts of the States over which the courts have been established. This is in legal terms, but politically it can be said that they maintain the sovereignty of the country concerned, especially if the result of the agreement between the countries concerned and the United Nations[145].

3.1.3.2 The Special Panels for Serious Crimes (SPSC) in East Timor

After the independence of East Timor, the Security Council, by recommendation No. (1972) of October 25, 1999,[146], established an interim administration for East Timor entrusted with the task of reconstructing and rebuilding East Timor and structuring its judicial system. Under the Security Council resolution, has been founded specialized judicial bodies for East- Timor in 6 March 2000[147], known as Special Panels for Serious Crimes (SPSC) in the District Court of Dili (East Timor)[148]. It deals with three crimes: genocide, crimes against humanity, and war crimes, in accordance with sections 4, 5 and 6 of its regulation (15/2000)[149], which replaced the previously applicable criminal code.

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[143] Article 1, from Statute of Court for Sierra Leone, states; "*1. The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone. 2. Any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant to the Status of Mission Agreement in force between the United Nations and the Government of Sierra Leone or agreements between Sierra Leone and other Governments or regional organizations, or, in the absence of such agreement, provided that the peacekeeping operations were undertaken with the consent of the Government of Sierra Leone, shall be within the primary jurisdiction of the sending State. 3. In the event the sending State is unwilling or unable genuinely to carry out an investigation or prosecution, the Court may, if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons*.".

[144] Sarah M.H. Nouwen, ''Hybrid courts' the hybrid category of a new type of international crimes courts', (2006), Vol.2, *Utrecht law Review*, 190-214, p.196.

[145]Cesare P. R. Romano, André Nollkaemper, Jann K. Kleffner, *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia*, (Oxford University Press, 2004), 491 pages

[146] See; S/RES/1272 (1999).

[147] See; UNTAET/REG/2000/11,<https://peacekeeping.un.org/mission/past/etimor/untaetR/Reg11.pdf > accessed 25 October, 2018.

[148] Cesare P. (n 146).

[149] See, UNTAET/REG/2000/15.

In terms of personal jurisdiction, the missing of text of regulation (2000/15) of the definition of personal jurisdiction before the chambers of serious crimes, led to the Committee of Experts for 2005 to consider that one of the most important difficulties faced by the work of private rooms is the failure of the Prosecutor to follow the clear strategies of work. Where it showed that during 2002 it was only follow up report had been made on the military and political leaders who were considered as the planners of the violations committed in 1999. However, no measures had been taken to prevent them. This was one of the reasons that led to the limited results of this court[150]. Another reason for the court's weakness is that this agreement was reached relatively quickly. Sierra Leone's request came while the situation in Sierra Leone was still on the agenda of the Security Council. The Peace Agreement was new and fragile, and the United Nations was deeply involved, inter alia, with troops on the ground. Two months after the resolution, the Council, without invoking Chapter VII of the Charter of the United Nations, requested the Secretary-General "to negotiate an agreement with the Government of Sierra Leone to establish an independent special tribunal."[151] . The resolution contained detailed recommendations for features such as the Special Court. Subsequent deliberations were held primarily between the Council and the Secretary-General[152]. Nevertheless, the crimes chambers formed by agreement between the East Timorese Government and the United Nations were a clear step to consolidate the POC by reconciling the legislated regulations that are essentially laws agreed upon by national courts and international tribunals.

The primary objective of the establishment of these hybrid courts is to eliminate the culture of impunity because of the total collapse or inability of the national judicial system to consider special crimes. In addition, these courts reduce the negative effects of full international courts, which do not allow national justice to intervene or participate. Furthermore, decisions issued by these courts do not affect the internal sovereignty of the State because they are based on an agreement between them and the United Nations United Nations.

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[150]TrikiSharifa, المحاكم الجنائية الدولية المختلطة [Hybrid International Criminal Tribunals], (Master thesis, University of Algiers, 2010).

[151] See UN Doc. S/RES/1315 (2000); See also, J. Cerone 'The Special Court for Sierra Leone: Establishing a New Approach to International Criminal Justice', (2002), *ILSA Journal of International and Comparative Law*, p. 379.

[152]Sarah M.H. Nouwen, (n 145)

3.2 Summary

Through the study of the application of the principle of integration, we find that the principle of integration, although not explicit in its current concept, has been included in all courts. The courts of the two world wars had included that principle and there was no explicit reference to it. But application has made the process of international justice incomplete, as we saw in the Gliom II trials of the First World War, and by invoking the principle of sovereignty that led to the creation of the Leipzig Tribunal which resulted from a major flaw in the achievement of international justice. The courts of the Second World War (Nuremburg and Tokyo) showed the importance of coordination between the military courts legislations and the national law, but the supreme authority in these courts is for them and not for the national law.Jurists differed in their assessment of the statutes of the Tribunals (ICTR and the former Yugoslavia), particularly in the case of the POC. In the case of jurisdiction of local courts in addition to the jurisdiction of ICTY and ICTR, the competence of the ICTY and ICTR is prejudicial to the sovereignty of States, according to the jurists. However, other jurists, see that reconciliation in the administration of ICJ required that priority be given to the jurisdiction of the national courts of States by considering their role as a particular reserve of international tribunals.This result had an influence through what had already been done during the Rome Convention of 1998 during the establishment of ICC and explicitly in including the POC.

Also, through the study of hybrid criminal courts, we have concluded that the POC in these courts is different from military or temporary courts, and this is reflected in the dual legal nature of these international and national courts. This is evidenced by the evolution of international criminal law to combat international crimes and to achieve ICJ on the one hand, and on the other, to respect the sovereignty of States. This can only be achieved through the implementation of the POC of the Rome Statute of the ICC, which will be discussed in Chapter Four.

CHAPTER FOUR

INTERNATIONAL CRIMINAL COURT'S PRINCIPLES OF COMPLEMENTARITY, AND THE APPLICATION IN CASES OF ARAB COUNTRIES

4.1 ICC and the application of the principle of complementarity POC

The idea of establishing a permanent ICC remained a dream for the international community, but the development of the latter was embodied in international reality by the Treaty of Rome 1998, which established a permanent ICC whose Statute

entered into force in 2002[153]. Article 1 of the Statute defined the ICC as a permanent, independent and complementary international judicial body of national jurisdiction over natural persons responsible for the commission of international crimes[154], which contained in article 5 of its Statute[155]. The establishment of this court raised the concerns of the States parties to this Convention because it felt that it would constitute a threat to their sovereignty. The Preparatory Committee for the draft of the Court therefore found an appropriate solution on this issue and endorsed the POC within its Statute[156].

4.1.1 Devote complementarity jurisdiction to the ICC

Jurisdiction subject of ICC is one of the most widely discussed topics before the signing of the Charter of the Court at the Rome Conference[157]. Where the Security Council resolved this issue, the former Yugoslavia and Rwanda have been given concurrent jurisdiction with the national judiciary, with the requirement of precedence to the Tribunals, but the requirement of precedence raised the concerns of many States over their sovereignty, so it was necessary to establish a new relationship between the domestic courts and the ICC to reconcile the two issues are the preservation of the sovereignty of States and second, non-impunity of criminals[158].

4.1.1.1 Definition of the jurisdiction of the ICC

According to statute the jurisdiction of the Court is complied with to local jurisdiction[159] and is eligible to try wrongdoers of, serious universal crimes[160], and that the Court has jurisdiction only with respect to crimes committed after the entry into

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[153] John Hillen, and Bruce Stokes, 'Toward an International Criminal Court?' (Council of Foreign Relations, 1999), <file:///C:/Users/dell/Downloads/International_Criminal_Court.pdf> accessed 30 October 2018.
[154] See article 1, from Rome Statute.
[155] Article 5, from Rome Statute, states; "The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.".
[156] Benjamin N. Schiff, *Building the International Criminal Court*. (Cambridge University Press, 2008)
[157] MichailVagias, *The Territorial Jurisdiction of the International Criminal Court*, (Cambridge University Press, 2014.) pp. 3-7
[158] John Hillen (n 154)
[159] See Article 1, from Rome Statute
[160] See Article 5, from Rome Statute.

force of its Statute. It is also competent to try all natural persons, that is, there is no immunity in this court, which is a principle in its system[161]. More accurately; The ICC has jurisdiction when:

1. Offenses committed by a national of a Member State, any State which has ratified the Statute in accordance with article 12 (2)[162].

2. The offenses were committed on the land of a Member country based on article 12 (2) as well (which means that, under certain circumstances, the Court may exercise jurisdiction over citizens of a country not party); or

3. The Security Council refers a case to the ICC (in such cases, the jurisdiction of the Court is truly universal, which means that the alleged offender is not necessary to be a citizen of a country is part, and even the place of offense is not necessary to be on the area of any country is party, referring to article 13 (b)[163]; or

4. A State which is not a party to the Statute (or was not a party at the time the alleged crimes were committed) issues a declaration ad hoc to the Court with jurisdiction "in respect of the offenses concerned" as set forth in article 12 (3)[164]. Hence, meaning that it is not necessary for the alleged perpetrator of the crime to be citizen of a state party or for the crime to have been committed on the territory of a state party.

4.1.1.2 Adoption of the rule of the Complementarity

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[161] According to Article 27, from Rome Statute, it mentions; "*1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person*.".

[162] Article 12(2), of Rome Statute, states; "In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
(b) The State of which the person accused of the crime is a national."

[163] Article 12(2), of Rome Statute, states; *"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;"*

[164] Article 12(3), of Rome Statute, states; "*If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9*."

The Statute of the ICC reaffirmed the principle of complementary jurisdiction in paragraph (6) of the preamble to the Statute[165], and in the first paragraph (10) of the preamble[166]. Article I further added, in its text, the priority of the national judiciary in combating the offenses set forth in article 5. The relationship of the jurisdiction of the ICC with the national judiciary is supportive relation. Consequently, the ICC is not expected to be a "first-resort" court; it is empowered to exercise its jurisdiction only in the event that States fail to exercise jurisdiction at all when they have not exercised jurisdiction in an equitable legal manner. Thus, relying on the POC, the Statute of the ICC tried to better control the problematic between the sovereignty of States and the prosecution of criminals for international crimes by giving the State the first opportunity to deal legally with crimes committed within the State or on its nationals. For the sensitivity of this issue, the POC and practice is crucial to the ultimate success of the ICC and the enforcement of ICJ[167].

4.1.1.3 Terms of application of the principle of Complementarity POC

We have previously pointed out that the jurisdiction of the criminal court is complementary to national criminal justice systems. In this sense, the POC is the cornerstone of the Statute of the latter, but this will only be achieved if certain conditions specified by the Statute are met, namely; substantive conditions and procedural conditions[168].

4.1.1.3.1 Substantive conditions

Article 5 of the ICC system has defined the crimes which fall within its jurisdiction. The crimes are genocide, crimes against humanity, war crimes and the crime of aggression. Integrative jurisdiction includes the substantive jurisdiction that is the subject of jurisdiction for national criminal courts[169].

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[165] Para. 6 of Rome Statute's preamble, addresses that "*Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes*,"

[166] Para. 10 of Rome Statute's preamble, addresses that; "*Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions*,"

[167] Sarah Williams, "The International Criminal Court and National Courts: A Contentious Relationship by Nidal Nabil Jurdi" [2012], 13(1) Melbourne Journal of International Law, 274

[168] Mohamed El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin,development, and practice*, (BRILL, 2008), 400.

[169] See, Rome Statute,<https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> accessed 31 October, 2018

1. The crime of genocide

The Statute of the ICC defined genocide in article 6 as any act aimed at the destruction of a national or religious group in a quantitative or partial manner[170]. The crime of genocide was referred to in the International Convention on the Prevention of the Crime of Genocide and Punishment Amaya of 1948[171].

2. Crimes against humanity

It have been addressed in paragraph (1) of article 7 of the legislation of ICC[172]. The Statute of the Court did not specify exclusively acts constituting crimes against humanity. This is a positive point for the ICC, given the evolution of the crime and its means. Article 7 set forth several acts, for example, constitute the material element of crimes against humanity. These acts are murder, extermination, enslavement, deportation of the population, torture, rape, imprisonment, etc.[173]

The distinction between the crime of genocide and crimes against humanity is reflected in the basis of their criminalization, so that the basis of criminalization in the crime of genocide is the protection of ethnic, racial or religious groups. While, the basis for criminalization of crimes against humanity is the protection of the civilian population from the attack on their human values[174].

3. War crimes

As defined in article 8 (2) of the Statute of the ICC, war crimes are defined as acts committed during armed conflicts, such as murder, torture and the use of prohibited names, as inhumane treatment of victims of war[175]. In general, those acts that are in violation of the Fourth Geneva Convention of 1949[176].

4. The crime of aggression

The question of including the crime of aggression within the jurisdiction of the ICC was subject to several differences between the States participating in the Rome

[170] Ibid.
[171] See, A/RES/3/260(III), 9 Dec. 1948.
[172] See, Article 7(1), From Rome Statute
[173] Ibid.
[174] Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court*, (Cambridge University Press, 2014)474
[175] See, Article 8 (2), from Rome Statute.
[176] Andrew Clapham, Paola Gaeta, Marco Sassòli, Iris van der Heijden, *The 1949 Geneva Conventions: A Commentary*. (Oxford University Press, 2015), 1651

Conference and although this crime was included in article 5, the Court's jurisdiction over that crime remained merely a principle. However, the United Nations General Assembly, following numerous international efforts to develop an internationally agreed definition of the crime of aggression, confirmed the definition set by the Special Committee in 1967 in resolution 3314 at December, 14th, 1974 on this crime[177], and on the basis of these Regulations, in the second paragraph of Article 8 '*bis*'[178] which was informed by the amendments decided by the Review of Conference in Kampala, in 11 June 2010.[179]

Thus, the study dealt with the crimes of the ICC which have been defined in Article 5, of Rome Statute, and are detailed in the articles defining each crime. The POC jurisdiction is held on these crimes, because the jurisdiction of the Court is restricted only to the crimes set forth in its Statute: genocide, crimes against humanity, war crimes as well as the crime of aggression, so that the integration takes place on these crimes.

4.1.1.3.2 Procedural conditions

After discussing the substantive requirements of the integrated jurisdiction, the study examine the procedural requirements for the application of the POC, through the procedures taken by the Court to adjudicate the cases before it. This principle recognizes the granting of the inherent competence of the national judiciary. The establishment of the jurisdiction of the ICC is an exception, at the request of States, as States parties to the statute which may take place in the face of it automatically because once they join it, means acceptance of its jurisdiction[180]. Taking into account the provisions of article 12 relating to the preconditions for the exercise of jurisdiction, paragraph I and II,[181] which have identified the States parties entitled to

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[177] See, Article 1, from Resolution A/RES/29/3314, that states; "*Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition*." A/RES/29/3314, Definition of Aggression.

[178] Resolution RC/Res.6 of 11 June 2010; See, https://treaties.un.org/doc/source/docs/RC-Res.6-ENG.pdf> accessed 31 October, 2018.

[179] See Articl 8 *bis*, para 2, from Rome Statute.

[180] Florian Razesberger, *International Criminal Court: The principle of Complementarity*, (Peter Lang, 2006), 201.

[181] Article 12(1&2), from Rome Statute, states that; "*A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5. 2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) The State on the territory of which the conduct in question occurred or, if the*

do so, namely those States in whose territory the offenses referred to in article 5 of the Statute of the Court or the accused were nationals, And taking into account Article 13 relating to the referral of a case from a State Party[182] to the Prosecutor under article 15, for the commission of such crimes to carry out the necessary investigations and to determine the circumstances of the cases before them for decision[183].

As well as for States not parties to this Statute if they have made an announcement with the State Registrar in accordance with article 12 (3), which recognizes the jurisdiction of the Court for crimes committed in its territory if it so accepts[184]. The Rome Statute also recognized the authority of the Security Council to refer a case to the Court in accordance with article 13[185].

The ICC must also verify that jurisdiction will be held to the Court in accordance with article 19, so that investigations and prosecutions of cases are not conducted when it is aware that jurisdiction is held for the judicial bodies of States[186].

But the question that arises with regard to the notification of the ICC by the UN Security Council, does that affect the POC as a fundamental principle on which the ICC's judicial system is based?

According to the laws of the Rome legislation, there aren't exception to application the complementarity when it comes to the notification of the Court by the Security Council, which means that the Rome Statute has not accorded priority to the jurisdiction of the ICC even in cases referred by the International Security Council, these is no any explicit provision in the Rome Statute expressly excludes the SC's references to the application of the requirements of the POC. On the contrary, the

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crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national..

[182] Article 13(a,b), from Rome Statute, states that; "*The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) 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*;".

[183] See Article 15, from Rome Statute.

[184] Article 12(3) (n 165).

[185] Article 13, from Rome Statute, states; "The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) 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; or (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.".

[186] See, Article 19, from Rom Statute.

provisions of the Rome Statute emphasize that the requirements of complementarity also apply to Security Council referrals[187].

4.1.2 The relationship of the Security Council with the competencies of the ICC and its impact on the application of the principle of complementarity POC

The UN Security Council is the principal organ of the United Nations in charge of the maintenance of international peace and security. In order to achieve this, it acts on behalf of the international community and has at the same time taken any measures it deems appropriate in base on UN's charter. The ICC the body charged with prosecuting and punishing the perpetrators of serious international crimes that threaten international peace and security, which means that both efforts are in the same objective[188].

Since the jurisdiction of the criminal court is integrative and, as the Rome Statute gave the Security Council the power to notify the criminal court and the power to defer investigation and prosecution, the question here is, of the impact of the notification decision and the decision to defer investigation and prosecution on the POC.

4.1.2.1 The impact of the Security Council referral decision on the principle of complementarity POC

Referring to article 12 (2) of the legislation of ICC, the Court may exercise its jurisdiction if one or more States are party to the Statute and that is in the following cases:

1. The State in whose territory the conduct in question has taken place or the country of recording of the ship or airplane if the offense was occurred on board a ship or aircraft.

2. The State in which the accused is a national. In the same case, the Court shall exercise its jurisdiction in the direction of a State which is not a party to the Statute,

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[187] AmronMurad, العدالة الجنائية الدولية وحفظ الامن والسلم الدوليين[International Criminal Justice and International Peace and Security] (trns.), Memorandum for Master's thesis in Law, (MouloudMameri University, TiziOuzou, Algeria, 2012)

[188] Nidal Nabil Jurdi,*The International Criminal Court and National Courts: A Contentious Relationship*, (Routledge, 2016), 332.

but has declared its acceptance of the jurisdiction of the Court in accordance with article 12, paragraph 3[189].

The situation may go even further since, legally and practically, the Court has no right to reject the Council's request if it is satisfied that the State has already carried out all investigative, search and trial proceedings and has no practical authorization to accept the situation if the Security Council considers that the State is not able. Therefore, the Security Council will oblige the Court to consider the case, even if the State has already adjudicated the case and to prosecute the perpetrators of the offense under its national jurisdiction, because in such cases States are obliged to obey to Security Council resolutions in accordance with the provisions of Chapter VII and more in accordance with article 25 of the Charter[190].

This does not prevent the Court from investigating the existence of elements of complementarity in accordance with its Statute, except in the case of its explicit recognition of the application of Article 103 of the Charter[191], by the Member States of the Statute, in particular the States Members in the United Nations.Moreover, to confirm the strength and dominance of the Security Council's priority, it can be recalled that the Security Council has the obligation to place direct obligations on

[189] See Article 12, from Rome Statute.

[190] Article 25, from UN Charter, states that; "*The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."*.

[191] Article 103, from Rome Statute, stated; "*1. (a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons. (b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with this Part. (c) A State designated in a particular case shall promptly inform the Court whether it accepts the Court's designation.*

2. (a) The State of enforcement shall notify the Court of any circumstances, including the exercise of any conditions agreed under paragraph 1, which could materially affect the terms or extent of the imprisonment. The Court shall be given at least 45 days' notice of any such known or foreseeable circumstances. During this period, the State of enforcement shall take no action that might prejudice its obligations under article 110. (b) Where the Court cannot agree to the circumstances referred to in subparagraph (a), it shall notify the State of enforcement and proceed in accordance with article 104, paragraph 1.

3. In exercising its discretion to make a designation under paragraph 1, the Court shall take into account the following: (a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence; (b) The application of widely accepted international treaty standards governing the treatment of prisoners; (c) The views of the sentenced person; (d) The nationality of the sentenced person; (e) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement.

4. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in article 3, paragraph 2. In such a case, the costs arising out of the enforcement of a sentence of imprisonment shall be borne by the Court."

regional, or international institutions, such as the ICC, all in order to maintain international peace and security[192].

If States are to stand in the face of the request of the Security Council, they may individually refer the accused to the national court or punish them locally, and inform the Attorney-General of such crimes and at the same time avoid the intervention of the Security Council against its will, It must join the Statute of the Court and ratified , Since the Rome Statute gave the Security Council the power to notify the ICC without complying with the requirement of prior consent of the State of jurisdiction of this Court and considering that such notification is based on chapter seven of the UN's Charter[193] and extends to all States Parties to the United Nations, which are not all parties to the Rome Statute Rome Statute.Therefore, many jurists believe that the recognition of the authority of the Security Council to notify the Court would prejudice the sovereignty of States not parties to the Rome Statute[194]. Where, the application of the provisions of the Rome Statute to States not parties to it is an infringement of its sovereignty[195].

4.1.2.2 The Impact of Security Council's authority in postponement of the prosecution on the principle of complementarity POC

In addition to the function exercised by the Security Council vis-à-vis the Court in relation to the convey a case to the Court, the Statute assigned another function of a negative nature, namely, by chapter seven of the charter, to request Court to postpond the implementation or suing proceedings to 12 renewable months, according to article 16 of the Statute of Court[196].Article 16 is the basis of the Security Council's authority to defer investigation and prosecution, but its negative effect lies in its failure to comply with any objective criteria or control from the Assembly of States Parties, because in the case of the exercise by the national judiciary of international crimes in accordance with the POC. If Security Council issued any

[192] Erika De Wet, *The Chapter VII Powers of the United Nations Security Council*, (Hart Publishing, 2004), 413

[193] See Chapter VII, of UN Charter, p.9

[194] Morten Bergsmo and LING Yan, *State Sovereignty and International Criminal Law*, (TorkelOpsahl Academic EPublisher, Beijing, 2012).

[195] AmronMurad (n 188), 106

[196] Article 16, from Rome Statute, states; "*No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions*.".

decision in accordance with Chapter VII, requesting the suspension of investigation or prosecution proceedings, then such a decision would affect or impede the national judiciary from continuing to investigate or prosecute, thus resulting in a negative constraint on the conduct of investigations and the destruction of criminal justice values[197]. In addition, the slow pace of the proceedings could lead to the destruction of evidence, the loss of the effects of the crime, the loss and intimidation of witnesses, the impact of the investigations and the ability of the Court to take the necessary action due to the freezing effect resulting from the stay and delay decision[198].

The negative impact of the powers granted to the Security Council on the POC was further demonstrated after its convening of the 4803rd meeting on the situation in Liberia and its adoption of Regulation 1497,[199] which raised the concern and resentment of States because its seventh item was not consistent with the Rome Statute in general and was not consistent with article 16 in particular, It has not only deferred the investigative procedures of the ICC, such as resolutions 1422 and 1487,[200] which have been harshly criticized for their incompatibility with the requirements of the Rome Statute, but have ended their competence with respect to acts committed by parts of the powers of countries not party in MNF- Rar of the United Nations in Liberia, and did not provide any time limits.Resolution 1497 made no reference to Article 16 to avoid criticism of the above resolutions. This is a clear violation of the Rome Statute. This decision was embodied in resolution 1597 on referral of the situation in Darfur to the ICC[201], which was rejected by the latter. Thus, the authority granted to the Security Council constitutes the greatest obstacle to the establishment of the POC of the criminal court[202].

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[197] ArzakiSaadia, الإعتبا رات السياسية في مجلس الأمن و أثرها على المحكمة الجنائية الدولية[Political Considerations in the Security Council and its Impact on the International Criminal Court], Master's Thesis, Faculty of Law, (MouloudMameri University, TiziOuzou, Algeria 2012)

[198] Ammar Mahmoud, *The International Criminal Court, the Security Council and Darfur: A Critique*, (Anchor Academic Publishing, 2017), 76

[199] See Resolution of UNSC, S/RES/1497(1st, Aug., 2003).

[200] See Resolution of UNSC, S/RES/1422(12, July, 2002).

[201] See Resolution of UNSC, S/RES/1597(20, Apr., 2005), <https://undocs.org/S/RES/1597(2005)> accessed 01 Nov. 2018.

[202] Ammar Mahmoud (n 199).

4.2 Jurisdiction between the International Criminal Court and the national judiciary in case of Arabic Countries

According to the relation amidst the judiciary of ICC established under Rome legislation and the national jurisdiction for the countries which are parties in that legislation, the Rome Statute is based on a general principle called the POC, as provided for in the preamble to article 1 of the Statute, The jurisdiction of the ICC in adjudicating international crimes within its jurisdiction is complementary[203]. There is no doubt that the emphasis on the "POC" in its aforementioned legal content is the confirmation of the inherent and fundamental jurisdiction of the crimes set out in the Rome Statute, namely the national jurisdiction of the State party. From this perspective, therefore, it would appear that there is no possibility of conflict in the competence to hear cases of such crimes between the ICC and the courts of States parties[204].

It should be noted, however, that if we return to the clauses of article 7 of the Rome legislation, we find these provisions dispel a hope that there will be no conflict of jurisdiction between the ICC and the national courts of the States Parties, because it is stipulated in the two items (1) and (2) [205]of two exceptions, under which the jurisdiction of the ICC is established as referred to earlier in chapter II of this thesis.It is no secret that these exceptions disrupt or constrain the general rule laid down by the POC, which may lead to the possible conflict the jurisdiction between ICC and the national jurisdiction of the States parties[206].

The POC applies only between the jurisdiction of the ICC and the national criminal jurisdiction of States parties to the Rome Statute. It is interesting to note that article 13, paragraph (b), grants the Security Council the power to refer a case under chapter 7 of UN Charter[207], where does not require that the case be signed by a State party to the Statute, Of the rule contained in article 34 of the Vienna Convention on the Law of Treaties of 1960, which states that the treaty does not entail any obligations to a third State nor any rights without its consent. This

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[203] See Article 1, from Rome Statute, (n 155).
[204]Hein, (n 100).
[205] See article 7 (1&2), from Rome Statute.
[206] John T. Holmes,*Complementarity: National Courts versus the ICC*, in Antonio Cassese, Paolo Gaeta, John R.W.D. Jones (Eds), The Rome Statute of the International Criminal Court: A Commenta ry, (Oxford University Press, 2002, Vol.) 667, p.683.
[207] Article 13 (b), from Rome Statute, states; "*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*;" .".

approach extends to the expansion of the Security Council in its prerogative under Chapter VII of the Charter without being sanctioned, thus providing opportunities for arbitrariness by the Security Council within the current international political environment[208]. In practice, however, non-States parties may enact legislation providing for the punishment of international crimes within the jurisdiction of the ICC under the Rome Statute for several reasons. One of these reasons may be a manifestation of good faith, such as the need to punish the perpetrators of international crimes under the Rome Statute and the absence of an opportunity for them to evade punishment because of the non-accession of the States of their nationals to the Rome Statute. For these reasons, it may also be based on ill-intention to subject the perpetrators of such crimes to the jurisdiction of local courts in order to help them avoid appearing before the ICC.A problem worthy of reflection might present an obstacle to the jurisdiction of the ICC, a situation where a court of a State not party to the Rome Statute has rendered a conviction and punishment under its national law that was already sentenced to imprisonment in the prisons of that State, Whether or not more than the penalty specified under the Rome Statute could be prosecuted and sentenced again by the ICC despite the clauses of article 20 of the Statute[209], which prevented the accused from being judged twice for a single crime?

The study will address the issue of conflict of jurisdiction between the ICC and the domestic courts through the Sudanese Darfur model, and "Saif al-Islam Gaddafi" case in Libya (as examples of Arab countries), and what raised of the wide controversy, complexity and divergence of views about these cases[210].

4.2.1 Darfur Case

The conflict in Darfur has erupted since February 2003, when armed confrontations broke out between local movements opposed to the existing political system, the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM), on the one hand, and the government army and militias supporting it on the other. As a result of the inter-ethnic tribal nature of the area, civilians have been subjected to

[208] Ammar Mahmoud (n 199).
[209] See article 20, from Rome Statute.
[210] JakobPichon, 'The Principle of Complementarity in the Cases of the Sudanese Nationals *Ahmad Harun*and *Ali Kushayb* before the International Criminal Court' (2008), 8, *International Criminal Law Review,* 185–228.

many of the most violent crimes of murder, shelling, rape and others. Thousands of refugees have been sent to the neighboring State of Chad and the number of displaced persons has been reduced to temporary camps supervised by the Sudanese Government, the United Nations and relevant international and local organizations Human rights.This has created a growing humanitarian problem that has become increasingly complicated as violence and fighting continue to be one of the worst humanitarian disasters in Africa, where more than 2 million people have been displaced. In the face of all of the above, the Security Council, by its resolution 1593 of 31 March 2005, decided to refer the situation in Darfur to the Prosecutor of the ICC[211].

Sudan and other parts in the conflict were requested to collaborate with the court and the organization of African unity for talking about pragmatic courses of action that would encourage the work the Prosecutor and the Court, including the possibility of legal proceedings in the region. The previous referral was made on the instructions of the International Commission of Inquiry in October 2004, [212] which in turn informed the UN in the early beginning of 2005 that there was motivation to trust that wrongdoings against humanity and crimes of war committed in Darfur, also, bespoke that the circumstance should be conveyed to the ICC.

4.2.1.1 Decision Analysis

The Security Council noted that the case of Darfur comprises a risk to the world security and international peace, in line with paragraph (b) in Article 13, of the ICC Statute. The preamble to the resolution also indicates to the International Commission of Inquiry's report[213], which settled its orders on the referral of the dispute to the Court. It is strange that article 13 (b) of the Statute of the court was not involved in the preamble of the resolution. Instead, the resolution refers to article 16 on the adjournment of the investigation and prosecution before the Court or do not initiate them based on the request of the Security Council[214]. Furthermore, the

[211] See Resolution of UNSC, S/RES/1593 (31, March, 2005).
[212] See, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council resolution 1564 of September 2005, Geneva, 25 January 2005, para. 647.
[213] See United Nations document (S/2005/60), 1st of Feb., 2005, <https://undocs.org/S/2005/60> accessed 01 Nov. 2018.
[214]On 14 July 2008, the Prosecutor of the International Criminal Court (ICC) requested an arrest warrant for Sudanese President Omar al-Bashir. It is worthy to mention that the Prosecutor's request is sets a precedent in the history of international criminal jurisdiction that for the first time and arrest warrant is issued against a head of State on his or her own job.

preamble contained a reference to article 98 (2) of the Criminal Court system[215], which is one of the most problematic and controversial articles of the Statute. With regard to the operative paragraphs in the resolution, paragraph (2) stipulates that the Government of the Sudan and all other parties to the conflict in Darfur should cooperate fully with the Court and the Prosecutor and provide the necessary assistance. This paragraph, however, later reverted to a significant contradiction: where contains; "…*Recognizing that States not parties to the Rome Statute have no obligation under the Statute*"[216]. In other words, the resolution calls on the Sudanese government as a non-state party to cooperate with the court, while recognizing that non-state parties actors are not bound by the Court system[217].

Paragraph 6 of resolution 1593 devotes a clear selectivity by excluding certain categories of persons from being subject to the jurisdiction of the Court, including those working in peacekeeping forces in Darfur, where they remain subject to the jurisdiction of local courts in their country[218]. Which would mean that the referral by the Security Council to the Court was no longer considered a case as required by article 13 (b), but has already been referred to the Court. That is, the Court would have no jurisdiction with regard to those persons who had been excluded even if they were charged with crimes within the jurisdiction of the Court, which would enable us to understand the purpose of including the article in the preamble to resolution 98 (2). The preliminary reading of resolution 1593 leads to many questions about the extreme contradiction of its provisions, in particular with regard to its

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[215] Article 98(2),from Rome Statute, states; "*2.The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender*.".

[216] Para. 2, of UNSC resolution (S/RES/1593, (31, March, 2005), states;"*2. Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;*".

[217]Louay Al-Naif, العلاقة التكاملية بين المحكمة الجنائية الدولية والقضاء الوطني ['The Integrative Relationship between the International Criminal Court and the National Judiciary'], (2011), 27(3), *Damascus University Journal of Economic and Legal Sciences*, 527-550

[218] Para.6,of UNSC resolution (S/RES/1593, (31, March, 2005), states; "*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;"*

omission in reference to article 13 (b), on which reference is based, in its entirety, and the replacement of that with reference to article 16 of Rome Statute.

Whatever our position on this decision, the (ICC) has taken advantage of this opportunity, which has enabled the Security Council to begin its actions with regard to the situation in Darfur[219].

4.2.1.2 Court Proceedings following the Decision

The Prosecutor of the Court initiated an investigation into alleged crimes committed in the Darfur region after 1 July 2002, the date of entry into force of the Rome Statute[220].

On the basis of the findings of the investigations, the prosecutor filed a request to issue court orders against two prominent Sudanese officials accused of crimes within the jurisdiction of the Darfur court. On 2 April 2007, the Pre-Trial Chamber of the (ICC) issued two arrest warrants against Sudanese nationals (Muhammad Harun and Ali Kushayb) [221]on the basis of article 58 (1) of the Rome Statute[222]. Sudanese President Omar al-Bashir requested an arrest warrant in 14 July 2008, to prosecute him by the (ICC) in accordance with article 58 (1) of the Rome Statute on charges of 10 counts (five counts of crimes against humanity, three genocide crimes and two war crimes). It is worthy to mention that the Prosecutor's request is sets a precedent in the history of international criminal jurisdiction that for the first time arrest warrant is issued against a head of State on his or her own job[223].

First, it is useful to clarify that, in accordance with the POC, the Rome Statute guarantees a number of safeguards that protect the national criminal jurisdiction in the eyes of the crimes within its jurisdiction through the provisions of articles 17, 18

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[219]Louay Al-Naif (n 218).

[220] Jurisdiction in accordance with article 11, paragraph 1, of the Rome Statute, states; "*1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute*.".

[221] See, Document ICC-02 / 05-01 / 07-1, 27 APRIL 27 (2007).

[222] Article 58(1), from Rome Statute, states; " *1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that: (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and (b) The arrest of the person appears necessary: (i) To ensure the person's appearance at trial; (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances*.".

[223]Ammar Mahmoud (n 199).

and 19[224]. It should also be said that the Rome Statute did not address clearly whether the principle of integration is applicable or not.Article 18 does not suggest that the POC can apply in the case of referral by the Security Council, but this should not lead us to recognize that the POC cannot apply in this case. Unlike article 18 (2)[225], articles 19 and 53 of the Court apply to the referrals of the Security Council. In accordance with article 19 (2), the Statute grants the right to any State which has jurisdiction to deal with the case as it investigates or initiates proceedings in the proceedings or has investigated or initiated the prosecution of the case or the State requesting its acceptance of jurisdiction based on article 12 in Rome legislation, to challenge admissibility of the case under consideration Court[226]. Both subparagraphs 53 (1) (b) and 53 (2) (b) [227]ensure that the Prosecutor can account if the issue was admissible or acceptable according to article 17, including cases considered under referral by the Security Council. Since the POC is one of the fundamental principles underlying the Court's system, the priority of national judicial proceedings must be respected even under the referral of the Security Council, and this is not observed in Article 18[228]. Based on the above, we can decide that the transfer of a case to the Court by the Security Council does not preclude the possibility of applying the POC. Which means that the Sudanese Government can benefit from the provisions of article 17 of the Rome Statute on issues relating to the admissibility of the case. This article requires the court to decide that the case is inadmissible in any case:

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[224] See Articles 17, 18, and19, from Statute of Rome.

[225] Articles 18(2), from Rome Statute, states; "*2. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation*."

[226] Article 19(2), from Rome Statute, states; "*2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by: (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58; (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or (c) A State from which acceptance of jurisdiction is required under article 12*"

[227] Article 53(1-b), states; "*1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:..(b)* The case is or would be admissible under article 17;": Also, Article 53(2-b), states; *2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:..(b) The case is inadmissible under article 17;"*

[228]Louay Al-Naif (n 218).

(1) If the investigation and prosecution of the case is conducted by a State with jurisdiction over it, unless the State is doesn't like to achieve or not able to achieve the investigation or prosecution,

(2) If the state made the investigation and decided to do not trial the person concerned, unless the decision is the result of the incapability or unwilling of the country to sue,

(3) If the involved individual has already been judged for the behavior of complaint, nor by fact that the court may prosecute, in accordance with article 20, paragraph 3[229].

(4) If the case is not sufficiently serious, the Court shall take another action.

In view of the provisions of article 17(1), paragraph (a)[230], which presupposes a concurrent state of jurisdiction and in the exercise of jurisdiction, and therefore the assessment of the admissit

be tantamount to the process of adjudication in case of conflict of jurisdiction. Since the issue of separation of these matters within the framework of national systems is often carried out by a supreme judicial authority to appoint the competent authority. We find that, in the case of the ICC, the matter is entrusted to the Court itself, making it both adversary and arbitrator.This is evident in the case of Darfur, since there are two conflicting jurisdictions in the context of violations in the Darfur region: the national criminal jurisdiction of the Sudan and the ICC. The Security Council, pursuant to resolution 1593, enabled the Court to exercise its jurisdiction over crimes under the inherent jurisdiction of the Sudanese judiciary on the basis of positive regional and personal principles. This leads us to say that the Security Council's action to refer the situation in Darfur to the Court has imposed a positive conflict of jurisdiction between the Sudanese national judiciary and the ICC. The Sudanese government is entitled to an independent investigation and fair trials on the events in Darfur. Moreover, the conduct of such an investigation and the start of the

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[229] Article 20(3), from Rome Statute, states; "*No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."*

[230] Article 17(1-b), from Rome Statute, states; "*1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;…*"

prosecution of the perpetrators guarantee the Sudanese government the prerogative to object the acceptability for the case before or during the trial in accordance with Article 19 of the Statute of the Court [231], Since the Sudanese judiciary is the competent regional and personal specialists, and thus would benefit from the consequences of the POC, both in terms of enabling it to challenge the admissibility of the case before the International Court or to confirm its priority in the consideration of similar cases, truths and prosecutions in accordance with the criteria required by article 17 above so as not to lead to a belief of unwillingness or inability to do so[232].

4.2.2 Libya Case

The Security Council's decision came after the Human Rights Council and the International Fact-Finding Commission investigated allegations of human rights violations, regarding increment of violence reports in Libya. The Arab states league, the Union of African and the others all acts of violence. The United Nations General Assembly froze Libya's men

1 March 2011. Libya is the initial issue that transfers to the ICC by the total vote in the UN SC in Resolution 1970 (2011)[233]. The Prosecutor of the Court was given an open authorization to research any universal offense occurred after 15 /02/ 2011. After preliminary inquiries, three detention memorandums were released in March 2011 for Gaddafi, his son Saif al-Islam and the chief of intelligence body in Libya Abdullah al-Senussi.

4.2.2.1 Decision analysis

The Council's treatment of this dispute is characterized by the rapid and effective intervention in which the actual authorities established under article 13, paragraph (b), of the Statute are used to refer the crimes committed to the Prosecutor. This has convinced defenders of this Court to exercise its jurisdiction, and the Council accepted away from political considerations.Libya is a country that is not approved the Rome legislation, but it is a member of the UN since 1955 and has the primary responsibility for implementing the warrants. Libya must comply with Security

[231]Louay Al-Naif (n 218).
[232] Mohamed Riad Mahmoud Khedour,القضاء الجنائي الدولي بين الاختصاص التكميلي وتنازع الاختصاص [International Criminal Justice between Complementary Jurisdiction and Conflict of Jurisdiction], (Ph.D. thesis, Aleppo University, Syria, 2010.)
[233] See, UNSC Resolution (S/RES/1970), (26, Feb., 2011).

Council resolution 1970/2011, which calls on it to cooperate fully with the Tribunal and with the Prosecutor And provide any necessary assistance to them, as it expressly states that Libyan government will collaborate completely and will supply any crucial assistance to them, thus restricting the hand of the government to the exclusive location of a trial, including the extradition to court[234].

4.2.2.2 Court Proceedings following the Decision

On the basis of resolution 1970, the Prosecutor immediately submits an investigation into the violations committed by the Libyan Government against civilians during the anti-Muammar Gaddafi demonstrations and obtains information and documents of international crimes falling within the jurisdiction of the Court prior to the decision. The Court began to take action on this dispute, beginning on March 4, 2011, where it was transferred to the preparatory Chamber.

Because of the ambiguity in the Rome legislation, deduced through articles 19 (2) and 53 of the Rome legislation that the country involved is entitled to protest the judiciary of the Court under the terms of the Court and the standards contained in articles 17 and 19 of the Statute[235]. Moreover, it was agreed in accordance with the Security Council resolutions that Libya as a country is obliged to collaborate with the Court and the commitment was decided in accordance with Article 25 of the Charter of the United Nations[236]. However, according to the practice of the ICC, it cannot confirm that the country lacks the potential for raising a protest to acceptability. The article 16 of the Rome Statute is stated that.

Based on that, on 1 May 2012, the Transitional Council did not accept the case versus Saif al-Islam al-Qadhafi and Abdullah al-Suniussi. The court then give license to defer the extradition to ICC until a resolution by the judges on admissibility issues[237].

On 1 May 2012, the Libyan Government lodged a formal appeal against the jurisdiction of the Court on the basis of article 19. Based on the fact that the national judiciary was carrying out impartial tasks in the investigation of Mr. Gaddafi for his

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[234] Ibid, Para 5.
[235] See, Rome Statute.
[236] UN Charter, Article 25, states: "*The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter*.
[237] Amin Nouri, The Principle of Complementarity and Libya Challenge to the Admissibility before the International Criminal Court, Thesis, Lund University, Sweden, 2017)

offender liability for various killings and oppression[238]. Moreover, the measures were in line with the obligatory of Libyan Government for promotion of law and internal pacifying in situations of conflict in the transitional period; it also mirror a real desire and potential to investigate and bring to law a democratic Libya in which the rule of law is in force[239]. The government also considered it a historic opportunity for the Libyans to clearly demonstrate the POC in accordance with the Rome Statute, which gives priority to the national judiciary[240]. Accordingly, they asked the court to announce the condition unacceptable and to pull the demand for surrender from (Abdullah al- M Gaddafi) after the fall of the case for President Muammar Gaddafi because of his death.

The Libyan Government invoked Article 17 (1) (a)[241], which provides that the case shall be inspected or sued by the country has a legal power on the case.

The first annex to Libya's application in May 2012[242], states that Libya adopts new laws in the national penal code to investigate offenses included in the authority of ICC by national judiciary, as stated in text of the application presented as an opportunity for the national courts to achieve reconciliation process, while stressing the priority of national jurisdiction against the system of complementarity ICC[243].

However, (ICC) claims that since Libya's Council of State referred the case to the Prosecutor of the (ICC), Libya has not shown the positive aspects of the Court's cooperation with the Libyan authorities and has even confirmed through many of its officials, not to recognize the Court's jurisdiction. Although the ICC has made a slight distinction between non-cooperation with the ICC and between States parties and non-parties to the ICC, as in the case of Libya. In this situation, the case transferred by SC to the ICC. The court can then notify Security Council that Libya is not cooperating with ICC. Thus, the UN Security Council, in accordance with the UN Charter VII, can compel Libya to comply with the court's guidelines or otherwise be subject to sanctions by the UN Security Council and UN laws. However, article 112

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[238] See, "Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute," No: ICC-01/11-01/11, 1 May 2012, Para. 1.
[239] Ibid, Para 2
[240] Ibid.
[241] Article 17-1(a), from Rome Statute, states; "*1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution*;"
[242]Libya Application (n 238).
[243]Amin Nouri (n 237).

(f) (2) of the Rome Statute regulates this issue[244], and does not provide for specific actions that the Court may can take in that regard.

4.2.2.3 Libya and the ICC to confirm their mandate on the issue of Saif al-Islam Gaddafi in Libya Case

The most important legal basis referred to by the defense team of the ICC is the issuance of resolution 1970/2011 by SC, in the sake of confirm jurisdiction of judicial court on the case of the accused Saif al-Islam Gaddafi. There is another argument, however, that the defense team itself argues that the Libyan authorities have retracted their obligations to the rights of the accused in the pre-trial phase[245].While, the defenses of the Libyan defense team are the absence of harmony with the principle of state sovereignty, which is one of the most important principles on which international law is based, which recently demonstrated the need to impose some restrictions on this principle for the work of the POC when conducting trials within the jurisdiction of the ICC, as explained previously in Chapter I, from this thesis[246].

Through studying the case of Libya, the study found that there are one important problem in enforcing the POC, which is the overly strict application of this principle of sovereignty by selective selection of cases from the Security Council sides to the ICC. However, through the course of cases, it affects the dominance of ICJ on national courts.[247]This is not to prevent the Security Council from referring to the Libyan case to the Criminal Court for its justifications, which may be acceptable. Where, the most important of which is that Libya situation after the fall of its regime for 42 years led to the collapse of the state and its judicial authority, cannot ensure justice in the trials.

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[244] Article 2, from Rome Statute, that states; "*The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf*.", ; See also, Article 112, from Rome Statute.

[245]Nizar al-Anbuge, القانون الدولي الانساني[International Humanitarian Law], (Dar Wael, Amman, Jordan, 2010,) p. 586.587

[246] D. Nincic, (n 38).

[247] Mariam bin Zaid, 'The legitimacy of the trial of Saif al-Islam Gaddafi before the International Criminal Court', (2017), 1, *Journal of Thought*, 266-278.

4.3 Summary

In this chapter we have referred to the implementation of the POC between national justice and ICJ. How this principle has been implemented in the various international criminal tribunals, and that although this principle is explicitly enshrined in the ICC system, it has witnessed a different application in the various criminal courts already witnessed by the international community, whether the First World War or the Second World War or Temporary or mixed courts.

We have also pointed out that the POC in the Rome Statute requires procedural conditions. The Rome Statute has adopted this principle in order to establish ICJ on the one hand and respect for the sovereignty of States on the other, but the relationship of the Security Council with the ICC has an impact on the application of the POC. Some cases from Arab countries (Sudan, and Libya) have been taken to study them. The cases demonstrated that there are some problems in application of the POC practically, but from the theoretical view the POC is exist and enforced, hence some rectification on the Rome statute, is important in order to reach successful application to achieve this principle, as well be demonstrated in next chapter.

CHAPTER FIVE

CONCLUSION AND THE RECOMMENDATIONS

The conclusion of this study shows that the principle of sovereignty has been divided between national and international parties as an inevitable outcome of the phenomenon of interaction and cooperation at the international and internal levels, which necessitates avoiding rigid and fanatic attitudes towards traditional sovereignty and adopting a relative concept based on the basis of cooperation and dialogue between States and legal persons at the international level.

What can be inferred from the recent developments in the international community is that limited sovereignty has been widely welcomed by countries that seek to advance development and strengthen cooperation by placing limits on absolute sovereignty, particularly in its outward appearance. International jurisprudence refuse to accept the idea of absolute sovereignty as a basis for international relations and welcome the notion of relative sovereignty that can be expressed as the sovereignty of States within the limits of cooperation between them and the requirements of international peace and security in the application of the rules of international law International human rights law and international criminal law.

However, the establishment of an ICJ body is one of the most important manifestations that affect the exercise of national sovereignty and has therefore prompted a group of States to oppose its establishment, which necessitated the creation of a mechanism to protect the sovereignty of States on the one hand and to combat impunity on the other. The Rome Statute adopted the POC, which came in line with the requirements of national sovereignty and ICJ.The POC in general is controlling the relation between the ICC and national jurisdictions, and the preamble of the Rome Statute mentioned that, explaining that States Parties (confirm, Court is complementary to local judiciary).

In this study, we pointed out that the POC had already been applied before it was actually incorporated into the Statute of the ICC but this was done differently. For example, through ICTY and ICTR, their jurisdiction was complementary to the national criminal courts, but places the ICJ system over national justice. This is a

violation of the sovereignty of States and their right to the priority of their jurisdiction.Thus, the POC in the Statute of the ICC is adopted in a different manner, ensuring that the jurisdiction of the Court is a reserve jurisdiction, and that the original competence is vested in the national judiciary which it must exercise. If the latter does not exercise the jurisdiction assigned to him for reasons of unwillingness or inability to do so, the jurisdiction of the permanent international court shall be exercised. This means that the latter does not have jurisdiction over the national judicial authorities. This principle indicates the completion of gaps in the national judiciary in the case of its collapse or lack thereof. It can be said that the achievement of ICJ requires the integration of national justice and ICJ. Respect for national sovereignty necessitates domestic courts to fulfill their duty to international crimes; and the idea of sovereignty is motivated only by the reluctance of States to ratify the treaty establishing this international court.Therefore, judgments relating to the ICC are binding only on member states and are not considered to be superior to or substitute for States; they are an extension of national criminal jurisdiction established by a treaty which, upon ratifying it, becomes part of national law and therefore does not infringe upon national sovereignty, and this principle, when refined, will clarify the relationship between national justice and ICJ as the pivotal principle on which the Statute of the ICC is based.In another words, the principle of complementary jurisdiction affirmed by article 1 of the Statute and the tenth preamble paragraph is one of the most important pillars of the Statute of the Court. The exercise of the POC in the exercise by the Court of its functions as a permanent international judicial institution preserves the jurisdiction of national criminal jurisdiction and, secondly, enables the Court to exercise its jurisdiction in the event that the national criminal court is unable to do so or the unwillingness of the State concerned to prosecute.

After addressing the experience of the Court in dealing with some issues such as the Darfur issue, which proved that the Court has become a supervisory body that dominates the functioning of the national judiciary and follows it in accordance with harsh criteria, and the case of Libya after the events of January 2011, it was found a referral for issues by SC to ICC for countries not party in the court, led to confusion in the legal interpretation of the performance of the ICC accordance with its Statute. This was the cause of the problems faced by the court by criticizing its performance in the issue of the POC, which provoked countries on the basis of prejudice to

sovereignty, as mentioned earlier, especially States not parties to the Court International criminal and that the Court's jurisdiction in issues on the basis of Security Council referral to these issues. Nevertheless,by extrapolating the admissibility provisions of the Rome Statute and implementing their provisions in the Darfur and Libya cases, it seems to us that the Court's practice of these provisions in these cases suggests a desire to restrict the validity and freedom of prosecution of the national judiciary. This may have been due, in large part, to the lack of clarity on a number of provisions on admissibility in the Rome Statute, particularly those relating to the criteria of unwillingness and incapacity. Therefore several recommendation will be suggested in this study as follow;

5.1 Recommendations

1. The review of the system of complementarity before the International Court and the admissibility provisions and the determination of the criteria on which the Court may base its admissibility report so as to ensure remove the ambiguity of existing standards of unwillingness or incapacity, as well as the need to clarify the non-gravity criterion and define it more precisely, thereby limiting the discretion of the Prosecutor in this regard.
2. To redraft the relationship between the Security Council and the ICC by amending the laws on the Statute of the ICC and finding formulas satisfactory to all states.
3. To urge all countries to ratify the Statute and neutralize the political aspect to reach an acceptable formula for achieving peace and justice in the world and include the principle of integration as a fundamental part of its national judiciary.
4. It would have been more useful for the Governments of the Sudan and Libya to take advantage of the consequences of the POC in terms of whether it would challenge the admissibility of the case before the ICC or to confirm its priority in the consideration of similar cases in accordance with the criteria required by article 17 and to expedite an independent investigation and prosecution, and fair trial on their cases, thereby guaranteeing their right to challenge the admissibility of the case before, or during the trial on the basis of article 19 of the Statute of the Court, based on that the national jurisdiction of those States was the inherent jurisdiction in the consideration of those facts on the basis of the expert Regional and personal.

5. To stimulate the Arab countries to exercise their independence without the influence of governments on them, to prevent the Security Council from dominating the work of their judiciary and undermining their sovereignty.

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Article '1', from Rome Statute, mentions that; "*An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.*"<https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> accessed 23 October 2018.

Article 1, from ICTY Statute, mentioned that; "*The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute."*<http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf> accessed 25 October, 2018.

Article 1, from Statute of the Special Court for Sierra Leone, states; "*1. The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone. 2. Any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant to the Status of Mission Agreement in force between the United Nations and the Government of Sierra Leone or agreements between Sierra Leone and other Governments or regional organizations, or, in the absence of such agreement, provided that the peacekeeping operations were undertaken with the consent of the Government of Sierra Leone, shall be within the primary jurisdiction of the sending State. 3. In the event the sending State is unwilling or unable genuinely to carry out an investigation or prosecution, the Court may, if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons*." <http://www.rscsl.org/Documents/scsl-statute.pdf> accessed 25 October 2018.

Article '2(7)', of UN charter, states that; "*Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such*

matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

Article '4'-"*Legal status and powers of the Court*", states that "*1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes. 2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State*."

Article 5, of Rome Statute, states that; "*The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression."*<https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>, accessed 8 October 2018.

Article 6-c, from IMT Nuremburg charter, states that; *"(c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan*." <https://ghum.kuleuven.be/ggs/events/2013/springlectures2013/documents-1/lecture-5-nuremberg-charter.pdf> accessed 24 October 2018.

Article 7, from (IMTFE Charter), states; "*Rules of Procedure*. The Tribunal may draft and amend rules of procedure consistent with the fundamental provisions of this Charter", p.23 <http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf> accessed 25 October 2018
Article 7, from ICTY Statute, mentioned the following "*1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime. 2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment. 3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. 4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires*."<http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf> accessed 25 October, 2018.

Article 7(1), From Rome Statute, <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>accessed 31 October, 2018

Article 8, from ICTY statute, states that "*The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991."*<http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf>acceseed 25 October, 2018.

Article 8(2), from ITCR Statute, which states that; *"2. The International Tribunal for Rwanda shall have the primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda*." <http://legal.un.org/avl/pdf/ha/ictr_EF.pdf> accessed 25 October, 2018.

Article 8, from Statute of ICTR, stastes; "*1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of the neighbouring States, between 1 January 1994 and 31 December 1994.*
2. The International Tribunal for Rwanda shall have the primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda."<http://legal.un.org/avl/pdf/ha/ictr_EF.pdf> accessed 23 October 2018.

Article 9, from Statute of ICTY, starts that; "*1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.*
2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal."<http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf> accessed 23 October 2018.

Article 10 , from IMT Nurnberg, mentions that; "*In cases where a group or organisation is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military, or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned*."

<https://ghum.kuleuven.be/ggs/events/2013/springlectures2013/documents-1/lecture-5-nuremberg-charter.pdf> accessed 24 October 2018.

Article 11 , from IMT Nurnberg, mentions that; "*Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership in a criminal group or organisation and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organisation.*." <https://ghum.kuleuven.be/ggs/events/2013/springlectures2013/documents-1/lecture-5-nuremberg-charter.pdf> accessed 24 October 2018.

Article 11, from Statute of the Special Court for Sierra Leone, states; "*The Special Court shall consist of the following organs: a. The Chambers, comprising one or more Trial Chambers and an Appeals Chamber; b. The Prosecutor; and c. The Registry*"; Article 12, from Statute of the Special Court for Sierra Leone, states; "*1. The Chambers shall be composed of not less than eight (8) or more than eleven (11) independent judges, who shall serve as follows: a. Three judges shall serve in the Trial Chamber, of whom one shall be a judge appointed by the Government of Sierra Leone, and two judges appointed by the Secretary-General of the United Nations (hereinafter "the Secretary-General"). b. Five judges shall serve in the Appeals Chamber, of whom two shall be judges appointed by the Government of Sierra Leone, and three judges appointed by the Secretary-General. 2. Each judge shall serve only in the Chamber to which he or she has been appointed. 3. The judges of the Appeals Chamber and the judges of the Trial Chamber, respectively, shall elect a presiding judge who shall conduct the proceedings in the Chamber to which he or she was elected. The presiding judge of the Appeals Chamber shall be the President of the Special Court. 4. If, at the request of the President of the Special Court, an alternate judge or judges have been appointed by the Government of Sierra Leone or the Secretary-General, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate such an alternate judge to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting."* <http://www.rscsl.org/Documents/scsl-statute.pdf> accessed 25 October, 2018.

Article 12(2), of Rome Statute, states; "In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
(b) The State of which the person accused of the crime is a national." <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> accessed 31 October, 2018

Article 12(3), of Rome Statute, states; "*If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9*." <https://www.icc-

cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> accessed 31 October, 2018.

Article 13(a,b), from Rome Statute, states that; "*The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) 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*;"<https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> accessed 31 October, 2018.

See Article 15,from Rome Statute, <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> accessed 31 October, 2018.

Article 16, from Rome Statute, states; "*No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions*." <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> accessed 31 October, 2018.

Article 17(1), from Rome Statute, states that; "*1.Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court*."

Article '17 (2& 3), from Rome statute, mentiones that; "*2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring theperson concerned to justice. 3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial*

system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."

Articles 18(2), from Rome Statute, states; "*2. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation*."<https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> accessed 01 Nov., 2018.

Article 19, from Rom Statute, <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> accessed 31 October, 2018.

Article '20', of Rome Statute, that states; *"1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court. 2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court. 3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."."*<https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>, accessed 8 October 2018.

Article 25, from UN Charter, states that; "*The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."*<https://treaties.un.org/doc/publication/ctc/uncharter.pdf> accessed 31 October, 2018.

Article 27, of Rome statute, states; *"1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.*

Article 58(1), from Rome Statute, states; " *1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that: (a) There are*

reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and (b) The arrest of the person appears necessary: (i) To ensure the person's appearance at trial; (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances." <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> accessed 01 Nov., 2018.

Article 88, of Rome Statute, states that; "*States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.*"

Article 98(2), from Rome Statute, states; "*2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender*." <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> accessed 01 Nov., 2018.

Article 103, from Rome Statute, <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> accessed 31 October, 2018.

Article 227, from Treaty of Versailles, states "*The' Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties…*" <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0043.pdf> accessed 24 October 2018.

Article 228, from Treaty of Versailles, states that "*Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power.*
Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the powers concerned. In every case the accused will be entitled to name his own counsel."<https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0043.pdf> accessed 23 October 2018.

A/RES/3/260(III), 9 Dec. 1948, Prevention and Punishment of the Crime of Genocide, <http://www.un-documents.net/a3r260.htm> accessed 31 October 2018

A/RES/29/3314, that states; "*Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State,*

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Para 2, Resolution (S/RES/1593, (31, March, 2005), states; "*2. Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;*" <https://www.icc-

cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf> accessed 01 Nov. 2018.

Para. 6, of UNSC resolution (S/RES/1593, (31, March, 2005), states; "*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;"* <https://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf> accessed 01 Nov. 2018.

Preamble of Rome Statute, p.1, <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> accessed 7 October, 2018.

Preamble of the Rome Statute, paragraph 4: "*Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation*".

Preamble of the Rome Statute, Paragraph 5: "*The States Parties to this Statute […] determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes*."

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Preamble of UN Charter, mentions that; "*We the peoples of the United Nations determined; to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and; to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and; to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and; to promote social progress and better standards of life in larger freedom*." <http://www.un.org/en/sections/un-charter/preamble/index.html> accessed 30 Sept., 2018.

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