



NEAR EAST UNIVERSITY
GRADUATE SCHOOL OF SOCIAL SCIENCES
INTERNATIONAL LAW PROGRAMME

**APPLICATION OF JURISDICTION OF THE INTERNATIONAL
CRIMINAL COURT TO NATIONALS AND TERRITORIES OF
STATES NOT PARTY TO THE ROME STATUTE**

HUSSEIN HASAN BABAKR

MASTER THESIS

NICOSIA
(2019)

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MASTER THESIS

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NICOSIA

2019

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DECLARATION

I hereby declare that this master's thesis titled as "Application of Jurisdiction of the International Criminal Court to Nationals and Territories of States Not Party to the Rome Statute" has been written by myself in accordance with the academic rules and ethical conduct in partial fulfilment of The Near East University, Graduate School of Social Sciences regulations and does not to the best of my knowledge breach any Law of Copyrights and has been tested for plagiarism and a copy of the result can be found in the Thesis. I also declare that all the materials benefited in this thesis consist of the mentioned resources in the reference list. I verify all these with my honour

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Hussein Hasan Bbabakr

DEDICATION

1. To all victims of international crimes in the world history.
2. To my parents and my family who always have supported me in every step of my life.

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ABSTRACT

APPLICATION OF JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT TO NATIONALS AND TERRITORIES OF STATES NOT PARTY TO THE ROME STATUTE

The thesis investigates the possible ways of applying the ICC's jurisdiction over nationals and territory of non-member states to the court. The negative effect of brutal crimes and humanitarian violations made this attitude stronger. So after WWII; and after the world was the witness of the danger and brutal crimes have been committed during that war around the world, the event leads the global community to think about establishing a global judicial body to limit the violation around the world. The research relied on a qualitative research design to collect data. The study focused on the case study as a model for analysis. Moreover, In this research, the thematic analysis qualitative method was applicable, because in this method the research will look at indigenous typologies, repetitions, metaphors and analogies, transitions, similarities and differences, missing data, linguistic connectors use of concepts and theories. The findings of the study suggest that in spite of suitable and powerful possible ways to apply the ICC's jurisdiction over the non-member states to the court, the court such a universal criminal court lost its independence, and in most cases affected by political influences and it is controlled by the UNSC. In addition, the global community is not supportive to the court's action, and the political benefits are always above of the judicial interest, especially by the powerful states who are always performance to ban the court's action, and it becomes the important cause to release the courts action due to the right of veto and due to support the allies of them in this regard. The Rome statute have powerful and possible legal ways in order to apply the ICC's jurisdiction over nationals and the territory of non-member states to the court such as; Articles 12 and 13(b) of the court's Statute; by using the UNSC power under Chapter seven of the UN regarding to the peacekeeping process.

Keywords: ICC, Rome Statute, nationals territories not party to ICC

ÖZ

ULUSLARARASI KRİTER MAHKEMESİNİN YARGILANMASI

Tez, ICC'nin yargı yetkisini vatandaşları ve üye olmayan devletlerin toprakları üzerinde mahkemeye uygulama yollarını araştırıyor. Acımasız suçların ve insani ihlallerin olumsuz etkisi bu tutumu daha da güçlendirdi. Böylece İkinci Dünya Savaşı'ndan sonra; ve dünya bu savaş sırasında işlenen tehlike ve acımasız suçlara tanık olduktan sonra, olay, küresel topluluğun, dünyadaki ihlali sınırlamak için küresel bir yargı organı kurmayı düşünmesine yol açıyor. Araştırma veri toplamak için nitel bir araştırma tasarımına dayanıyordu. Çalışma örnek olay incelemesine analiz modeli olarak odaklanmıştır. Dahası, bu araştırmada tematik analiz nitel yöntemi uygulanabilirdi, çünkü bu yöntemde araştırma yerli tipolojilere, tekrarlamalara, metaforlara ve analogilere, geçişlere, benzerlik ve farklılıklara, eksik verilere, dilbilimsel kavramların ve teorilerin kullanımına bakacak. Çalışmanın bulguları, ICC'nin üye olmayan ülkeler üzerindeki yargı yetkisini mahkemeye uygulamak için uygun ve güçlü olası yollara rağmen, mahkemenin böyle bir evrensel ceza mahkemesinin bağımsızlığını kaybettiğini ve çoğu durumda siyasi etkilerden ve UNSC tarafından kontrol edilir. Ayrıca, küresel topluluk, mahkemenin eylemine destek vermemektedir ve politik yararlar, özellikle de mahkemenin eylemini yasaklamak için her zaman performans gösteren güçlü devletler tarafından, yargının çıkarlarının her zaman üzerindedir ve veto hakkı ve bu konuda müttefiklerini destekledikleri için dava açmaktadır. Roma Statüsü, ICC'nin yargı yetkisini vatandaşlara ve üye olmayan devletlerin topraklarına mahkemeye uygulamak için güçlü ve olası yasal yollara sahiptir; Mahkemenin Tüzüğü'nün 12 ve 13(b). maddeleri; barışı koruma süreciyle ilgili olarak BM'nin 7. Bölümündeki UNSC gücünü kullanarak.

Anahtar Kelimeler: ICC, Roma Statüsü, vatandaşların bölgeleri ICC'ye taraf değil

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ABBREVIATIONS

ASP- Assembly of State Parties

ICC- International Criminal Court

ICL- International Criminal Law

ICJ- International Court of Justice

ICTY- International Criminal Tribunal for the Former Yugoslavia

ICTR- International Criminal Tribunal for Rwanda

ILC- International Law Commission

IPI- International Peace Institution

NATO- North Atlantic Treaty Organization

OTP- Office of the Prosecutor

PrepCom- Preparatory Committee

UNGA- United Nation General Assembly

UNSC- United Nation Security Council

US- United States

CHAPTER 1

INTRODUCTION

1.1 Historical background

The idea to build a permanent international criminal court has an old history its idea turns back to the 15th century, but no practical steps were taken until the 19th century.¹ Moreover, most modern narratives of the improvement of ICL clearly demonstrate the fact which the primary establishment steps of ICC start with the Nuremberg Trials during World War II.² On July 17, 1998, in favor of creating an international judicial body to punish the international criminals, 120 members were elected from the international community to adopt the Rome Statute draft.³ There were only seven states which voted against the Rome treaty for establishment a permanent court. These states were the United States, Yemen, China, Israel, Qatar, Libya, and Iraq.⁴

The ICC is different from national courts because the ICC has neither a police force nor its armed forces under its jurisdiction.⁵ Also, the ICC has a different legal basis than the previous ad hoc tribunals because it made by an international treaty between states.⁶ The main idea of the foundation of the ICC was that the court should

¹ Laura Barnett, 'The International Criminal Court: History and Role' (2013) No. 2002-11-E, Library of Parliament <
https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/200211E> accessed on 18 January 2019.

² M.C. Bassiouni, 'Combating Impunity for International Crimes,' U. Colo. L. Rev., 71 (2000), 409.

³ United Nations, 'Rome Statute of the International Criminal Court Overview,' p1 <
<http://www.un.org/law/icc/index.html>> accessed on 8 January 2019.

⁴ Scharf, M, 'The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position' (2001) 44(14) LCP < <https://www.jstor.org/stable/1192355>> accessed on 6 January 2019.

⁵ Zhu Wenqi, 'On co-operation by states not party to the International Criminal Court' (2006) Volume 88 Number 861 International review of the Red Cross 87.

⁶ Baros, M, 'The Establishment of the International Criminal Court: Institutionalizing Expedience?' (2003) 1(1), ISSN 1479-4195, Hertfordshire Law Journal
 <https://www.herts.ac.uk/__data/assets/pdf_file/0007/38626/HLJ_V111_Baros.pdf> accessed on 6 January 2019.

be pure from political interference because an international criminal justice should deal with the legal matter and applying the neutral legal rules independently.⁷ The ICC will hear those crimes that breach the Rome Statute as a permanent international criminal court in the globe.⁸ It appears the ICC had the effect of increasing the respect of the international humanitarian law before the court held the first trial in the court.⁹ The establishing of the ICC could be assumed as a part of the worldwide regime of the human rights, which was developed to earning the power by the international treaty and institutions in the 20th century.¹⁰ Moreover, establishment of ICC was of the valiant moves in the history of International Relations.¹¹ Since the formation of the United Nations, the most interesting expansion and important invention in international law has been the international criminal court was possibly.¹² Moreover, the Rome Statute of the ICC is considered a successful model of the “humanitarian security agenda,” which adopted by both member and non-member states alike.¹³ Because, based on the Rome Statute, the court is not specified only to the member states, but also the court's jurisdiction applies over the non-member states territory in

⁷ Alexander K.A, Greenawalt, ‘Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court’ (2009) 50(1), Pace Law Faculty Publications <<https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1624&context=lawfaculty>> accessed on 6 January 2019.

⁸ Mary Dean, ‘Sovereignty and the International Criminal Court: An analysis of the submissions opposed to Australia’s ratification’ (2002) 6 Southern Cross University Law Review 249.

⁹ Tim, M, C, ‘The Contribution of The International Criminal Court to Increasing Respect for International Humanitarian Law’ (n.d.) <https://www.monash.edu/__data/assets/pdf_file/0005/138578/mccormack-paper.pdf> accessed on 6 January 2019.

¹⁰ Marchuk I, ‘The Fundamental Concept of Crime in International Criminal Law: A Comparative Law Analysis’ (Springer, 2014) 121.

¹¹ Vinjamuri, L, ‘The International Criminal Court and The Paradox of Authority’ (2016) 79(27), Law and Contemporary Problems <<https://Scholarship.Law.Duke.Edu/Cgi/Viewcontent.Cgi?Article=4774&Context=Lcp>> accessed on 6 January 2019.

¹² Schabas, W, ‘An introduction to the international criminal court’ Cambridge university press (London, 2011) 85.

¹³ Balasco, M, L, ‘the International Criminal Court as a Human Security Agent’ (2013) Xxviii, The ICC as a Human Security Agent <http://fletcher.tufts.edu/Praxis/~media/Fletcher/Microsites/praxis/xxviii/article3_Balasco_ICC.pdf> accessed on 6 January 2019.

some limited circumstances.¹⁴ The capacity to project or reinforce a credible threat that criminals of war crimes, crimes against humanity, genocide, and crimes of aggression would be punished for their violations was the subject matter which demonstrates the strength and effects of the court.¹⁵ Currently, the ICC has jurisdiction over four categories of crimes which are considered internationally “the most serious and dangerous crimes as a whole.” The main object of the court's jurisdiction is to end impunity for perpetrators and find justice for victims so as to help end violations and battles, treat the lacks of arbitrary tribunals and also to become the court of last resort when the national court cannot or unwilling to apply the justice; also to prevent the future international violations.¹⁶ The ICC can apply its jurisdiction on the individuals, not states such as the head of states and governmental officials when those individuals commit the international crimes directly or indirectly and the national court unwilling or cannot apply the jurisdiction.¹⁷ The ICC’s investigation can be applied by one of these three ways. First, it will refer the situations by the UNSC under the name of resolution in the council after taking the adoption process in the council by the council’s member states. Second, it will refer the situations by the member states of the court under the name of self-referral to the ICC. Third, it will refer the situations to the court by the prosecutors after collecting the evidence during the primary examination process of the court. Also, the ICC judges has a significant role in determining what kind of situations the court should deal with it.¹⁸ The jurisdiction of ICC has different forms of jurisdiction under the court such as territorial

¹⁴ Morris, M, ‘The Jurisdiction of the International Criminal Court over Nationals of Nonparty States (Conference Remarks)’ (2000) 6(363) ILSA Journal of International & Comparative Law <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2746&context=faculty_scholarship> accessed on 6 January 2019.

¹⁵ Jamie Mayerfeld, ‘The Democratic Legacy of the International Criminal Court’ (2004) 28(2) The Fletcher forum of world affairs 147.

¹⁶ ‘Overview’ page on the website of the Rome Statute of the International Criminal Court at <<http://untreaty.un.org/cod/icc/general/overview.htm>>

¹⁷ Gwen P. Barnes, ‘The International Criminal Court's Ineffective Enforcement Mechanism: The Indictment of President Omar Al Bashir’ (2011) 34(6) Fordham International Law 147.

¹⁸ Margaret M. deGuzman, ‘Choosing to Prosecute: Expressive Selection at the International Criminal Court’ (2012) 33(2), Fordham International Law Journal <<https://repository.law.umich.edu/mjil/vol33/iss2/2/>> accessed on 9 January 2019.

jurisdiction “(ratione loci)”, personal jurisdiction “(ratione personae)”, temporal jurisdiction “(ratione temporis)”, and acceptance jurisdiction by the non-state parties “(ad hoc jurisdiction)”, subject matter jurisdiction “(ratione materiae)”.¹⁹ Also, it should be mentioned that the ICC has no authority to apply its power directly or do enforcement because its function depends on national authorities’ action.²⁰ It seems the lack of coercive power of the court made the inferior court’s capacity to gain the court’s objects and function. Also, the court was defeated for cooperation with states several times.²¹ The association between ICC and national jurisdictions in both applauded and criticized was shaped by the principle of “complementarity”.²² It can be stated that Article 17 is, probably in conjunction with Article 12, the most significant article of the entire Statute. Especially the principle of complementarity, which was provided in Article 17 of the Statute of the court, is the ultimate basis of the whole system of ICC.²³ However, Article 12 empowers the court’s jurisdiction by exercising the jurisdiction of the court over the territory of member and non-member states of the court, in the cases when those states committed international crimes in instances when those states have lodged a declaration of acceptance of jurisdiction.²⁴ But the preamble and Articles 19, 18, 17 and 1 of the Statute confirm that the jurisdiction of the ICC will be utilized only in the case when a state is dissenting or incapable to deal

¹⁹ Felix E Eboibi, ‘JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT: ANALYSIS, LOOPHOLES AND CHALLENGES’ (2012) NAUJILJ <
<https://www.ajol.info/index.php/naujilj/article/view/136309> > accessed on 15 March 2019.

²⁰ Reana Bezić, ‘State cooperation with the ICC’ (The Faculty of Law, University of Zagreb).

²¹ Dutton, M, B, ‘Bridging the Legitimacy Divide: The International Criminal Court’s Domestic Perception Challenge’ (2017) 56(71), Columbia Journal of Transnational Law <<http://jtl.columbia.edu/bridging-the-legitimacy-divide-the-international-criminal-courts-domestic-perception-challenge/>> accessed on 6 January 2019.

²² Linda E. Carter, ‘The Future of the International Criminal Court: Complementarity as a Strength or a Weakness?’ (2013) 12(3) Washington University Global Studies Law Review <
https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1446&context=law_globalstudies>
 accessed on 9 January 2019.

²³ H.E. Judge and Dr. jur. h. c. Hans-Peter Kaul, ‘The International Criminal Court –Current Challenges and Perspectives’ (International Criminal Court, 8 August 2011) <<https://www.icc-cpi.int/nr/rdonlyres/289b449a-347d-4360-a854-3b7d0a4b9f06/283740/010911salzburglawschool.pdf>>
 accessed on 9 January 2019.

²⁴ D. Scheffer, ‘International Criminal Court: The Challenge of Jurisdiction’ (1999) Ambassador at Large for War Crimes Issues <<http://www.iccnw.org/documents/DavidSchefferAddressOnICC.pdf>>
 >accessed on 9 January 2019.

with the claimed offense.²⁵ In the other words, the jurisdiction of the ICC can be applied as a last solution when the national court system fails to take the jurisdiction.²⁶ In cases when a State is sincerely willing and capable to exercise that jurisdiction (i.e. investigate or prosecute) instead then the Court is not generally competent to apply the court's jurisdiction over persons, neither from state parties nor non-parties.²⁷ Generally, by the rule, the provisions of the Rome treaty of ICC only bind the court's member states. From the Non-member States view, the international legal personality of those organizations relies on their implicit or explicit recognition by those States.²⁸ It was a surprise for a lot of observers when the ICC has provided "self-referrals" to expand the court's jurisdiction.²⁹

According to the Rome treaty's provisions, the ICC could apply its jurisdiction over nationals and territory of non-member states by limited circumstance when these states have not otherwise been satisfied to apply the jurisdiction over committed international crimes by that states.³⁰ The jurisdiction is based on the action of UNSC under the United Nations Charter's Chapter VII and the jurisdiction following consent from the respondent's nationality state. Based on Article 12, the ICC has competence

²⁵ V. Toon, 'International Criminal Court: Reservations of Non-State Parties in Southeast Asia' (2004) 26(2) ISEAS <https://www.jstor.org/stable/25798686?seq=1#metadata_info_tab_contents> accessed on 9 January 2019.

²⁶ See, e.g., Luis Moreno-Ocampo, Prosecutor, Int'l Criminal Court, Address at Nuremberg: Building a Future on Peace and Justice (June 24–25, 2007), available at http://www.iccpi.int/NR/rdonlyres/4E466EDB-2B38-4BAF-AF5F-005461711149/143825/LMO_nuremberg_20070625_English.pdf [hereinafter Moreno-Ocampo Address at Nuremberg] (explaining that "a system of complementarity was designed whereby the Court intervenes as a last resort when States are unable or unwilling to act").

²⁷ Christian Eriksson, 'ICC Jurisdiction over Nationals of Non-Party States: An ultra vires abomination, or legitimate judicial conduct?' (Bachelor thesis, Örebro University 2017).

²⁸ Sascha Rolf Lüder, 'The legal nature of the International Criminal Court and the emergence of supranational elements in international criminal justice' (2002) 84(845) RICR Mars 79.

²⁹ Frédéric Mégret, 'Is the ICC Focusing Too Much on Non--- State Actors?' (Ph.D. thesis, McGill University 2016).

³⁰ Morris, M, 'The Jurisdiction of the International Criminal Court over Nationals of Nonparty States (Conference Remarks)' (2000) 6(363) ILSA Journal of International & Comparative Law <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2746&context=faculty_scholarship> accessed on 6 January 2019.

by its jurisdiction to deal with all national criminals of any member states of the court when the individuals committed the international crimes on its territory.³¹

The ICC's interference to the Darfur conflict in Sudan was a notable example to demonstrate the capacity and the jurisdiction power of the court because Sudan was not a Rome Statute's member and did not consent that the ICC applies its jurisdiction.³² It was the first time since the existing of the court to apply the court's jurisdiction over the non-member states' territory. Also, it was the first time in spite of rejecting the ICC jurisdiction by a national state, the ICC interfered a state.³³ Among nine cases which existed in front of the court, two of them were referred by the Security Council. One of them was Darfur, Sudan that we mentioned before another one was Libyan case. Both of them were not a member of ICC.³⁴ Authors who support the idea to achieve to universal jurisdiction mentioned that the universal jurisdiction does not result out from the right of referral of part or non-state parties of ICC. But it resulted out from the UNSC's power to send the situations to the court in order to apply peace and international security.³⁵

Surely the ICC cannot apply its jurisdiction over the non-member states without the UNSC's referral power. But it appears the states which have the veto rights in the Security Council reducing the ICC ability to act effectively.³⁶ The ICC has a tight

³¹ Madeline Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States' (2018) 64(1), Duke University School of Law
<://www.jstor.org/stable/1192354?seq=1#metadata_info_tab_contents>accessed on 9 January 2019.

³² Heyder, C, 'The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court's Functions and status' (2006) 24(2) BJIL
<https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1317&context=bjil>accessed on 9 January 2019.

³³ Castillo, P, 'Rethinking Deterrence: The International Criminal Court in Sudan' (2007) ISSN 1696-2206, UNISCI Discussion Papers <https://www.ucm.es/data/cont/media/www/pag-72528/Castillo13.pdf> accessed on 6 January 2019.

³⁴ GOZDE, T, 'A Critique of the International Criminal Court: The Making of the "International Community" Through International Criminal Prosecutions' (Ph.D. Dissertation, İhsan Doğramacı Bilkent University 2015).

³⁵ C. Burke, 'A CRITICAL ASSESSMENT OF THE EXERCISE OF UNIVERSAL JURISDICTION BY SOUTH AFRICAN COURTS' (master thesis, Stellenbosch University 2015).

³⁶ Yvonne, M, Tessa, A, 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 91(105) ST. JOHN'S LAW REVIEW

relation with the Security Council. The ICC could be recognized as an essential source of legality of UNSC action; this relation brings a lot of moral and political benefits for both institutions. Also, those institutes made an effective reaction to humanitarian crises.³⁷

The relationship resulted in some critical decisions such as; firstly, the UNSC referred the cases of Sudan, Darfur, and Libya to the ICC. Secondly, the Security Council passed resolutions 1487(2003) and 1422(2002), which caused the Court to postpone prosecuting and investigating the situations, as a result of the peacekeeping operations of the UN.³⁸ When one or more international crimes occur, the prosecutor can be demanded by UNSC to investigate a situation. Although if the crimes happened in the territory of non-member states to the ICC, or if it was perpetrated by the national of such a state.³⁹

One of the concerns point over the ICC is the possibility of political interference by the five permanent members of the UNSC. Another notable point is that the court cannot have jurisdiction over the cases which occurred before the court was entered into force.⁴⁰ Also one of the most criticisms about the ICC is the act of court covered by the political benefits and political interference, which lead the court to miss the sovereignty.⁴¹ Another negative point about ICC was the unrealistically high expectations from who support the court. Because the court's action was not as much as affected with the expectations of them which the court can address the act of

<<https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=6787&context=lawreview>> accessed on 21 March 2019.

³⁷ Roach S, 'Humanitarian Emergencies and the International Criminal Court: Toward a Cooperative Arrangement between the ICC and UN Security Council' (2005) 6(4) International Studies Perspectives 431.

³⁸ Jullie Ingrid Lugulu, 'A critical examination of the relationship between the International Criminal Court and the United Nations Security Council, in the light of referrals and deferrals' (master thesis, University of Cape Town 2014).

³⁹ 'The International Criminal Court' (Amnesty International USA, 2007-2008)

<https://www.amnestyusa.org/pdfs/IJA_Factsheet_1_International_Criminal_Court.pdf> accessed on 10 January 2019.

⁴⁰ 'Overview' page on the website of the Rome Statute of the International Criminal Court at <<http://untreaty.un.org/cod/icc/general/overview.html>>

⁴¹ Abby, R, 'The International Criminal Court: An Exploration of the Politics at Play' (Senior Honors Thesis, Brandeis University 2015).

violence and limit impunity against such crimes.⁴² Taking a few actions by the ICC was another criticism of the court. Also some other noted that the court's structure content had lacked the restricted resources, it comes across institutional limitations and states manipulate it. Also, the court is selective to take the investigation over the international violation cases.⁴³ Moreover, who criticize of the court noted that the court applies the jurisdiction over the innocents of distant wars. Also, they mentioned that the court is acting to support the powerful states and control weak ones. Additionally, they mentioned that the ICC is a deeply political body and it is an institution which is used to punish the rest.⁴⁴ Since the creation of the court, the court applied its jurisdiction over nine cases which all of them were from the African continent.⁴⁵ More focusing of the court to the African continent brings a question to whether this is a model of the international criminal law's selectivity.⁴⁶ The debates about the ICC act as selective enforcement of the international criminal law which targeting African, recently is a negative point of the court's operation.⁴⁷ The ICC's act demonstrates that the court is discriminatory because of suing the crimes committed in Africa while ignoring crimes committed by powerful states such as the crimes of hegemony in Iraq, Afghanistan, and Pakistan by US and international violations committed by

⁴² Marieke de Hoon, 'The Future of the International Criminal Court. On Critique, Legalism and Strengthening the ICC's Legitimacy' (2017), *International Criminal Law* 591
review<https://rechten.vu.nl/nl/Images/Dr-mr-Marieke-de-Hoon-Cursusmateriaal-alumnidag_tcm247-878477.pdf> accessed on 10 January 2019.

⁴³ C. Gegout, 'The International Criminal Court: limits, potential and conditions for the promotion of justice and peace' (2013) 35(5) *Taylor & Francis*<<https://www.tandfonline.com/doi/abs/10.1080/01436597.2013.800737>> accessed on 10 January 2019.

⁴⁴ Kirsten Ainley, 'The International Criminal Court on Trial'(2011) 24 (3) *Cambridge Review of International Affairs* <<http://eprints.lse.ac.uk/42694/>> accessed on 10 January 2019.

⁴⁵ Katarína, M, 'Is International Criminal Court Biased Against Africa?' (Bachelor Thesis, Bratislava International School of Liberal Arts 2013).

⁴⁶ Max du, P, Tiyanjana, M, Annie, O, 'Africa and the International Criminal Court' (2013), Chatham House
<https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/0713pp_iccaf_icafrica.pdf> accessed on 6 January 2019.

⁴⁷ Torque Mude, 'Demystifying the International Criminal Court ICC Target Africa Political Rhetoric' (2017) 7, *Journal of Political Science*
<https://www.researchgate.net/publication/312875009_Demystifying_the_International_Criminal_Court_ICC_Target_Africa_Political_Rhetoric> accessed on 10 January 2019.

Syria, and the crimes by Israel against the Palestinian society.⁴⁸ Also, some noted that the ICC target the “small fish” while the court is ignoring the more serious perpetrators of crimes.⁴⁹

Formally, a major reason for US opposition to the court is the matter of the ICC’s jurisdiction capacity over nationals of non-state parties.⁵⁰ The non-member states such as the US, Russia, China; have more focus on the court Statute’s Article 12 because they argued that the article leads to a dangerous draft toward universal jurisdiction by making the ICC able to apply its jurisdiction over the non-member states’ nationals.⁵¹ In this regard, Akande pointed out that the sovereignty of those states is not violated by the ICC’s jurisdiction over non-member states, since “the doctrine is only properly applicable in cases where pronouncement by the court on the rights and responsibilities of the third state is a necessary prerequisite for the determination of the case”.⁵² In spite of all these criticisms still, the ICC is a unique institution in the framework of protecting human rights, as it is a Criminal Court while most regional judicial bodies are civil courts. Nowadays, there is no direct regional alternative to the ICC.⁵³

1.2 Problem of the study

This research focuses on the question of how the ICC can through its jurisdiction prosecute the violator of the international crimes in the nationals and territories of

⁴⁸ Irene W, M, ‘A Critical Analysis of the International Criminal Court and Africa’ (master dissertation, University of Nairobi 2014).

⁴⁹ ‘Establishing Performance Indicators for the International Criminal Court,’ (2015) Open Society Justice Initiative <<https://www.opensocietyfoundations.org/sites/default/files/briefing-icc-perforamnce-indicators-20151208.pdf>> accessed on 6 January 2019.

⁵⁰ Frederic Megret, ‘Epilogue to an endless debate: The international criminal courts third party jurisdiction and the looming revolution of international law’ (2001) 12(2), EJIL 248.

⁵¹ Scheffer, David J, ‘The United States and the International Criminal Court’ (2017) 93(1) The American Journal of International Criminal Law <<https://www.jstor.org/stable/pdf/2997953.pdf?refreqid=excelsior%3A20fc0ef6082cd0feb1ed84ebb2744b6a>> accessed on 10 January 2019.

⁵² Christian Eriksson, ‘ICC Jurisdiction over Nationals of Non-Party States: An ultra vires abomination, or legitimate judicial conduct?’ (Bachelor thesis, Örebro University 2017).

⁵³ Saccord, ‘Zambia’s Membership to the International Criminal Court a Civil Society Position’ <http://www.coalitionfortheicc.org/sites/default/files/cicc_documents/saccords_position_on_zambias_membership_to_the_icc_final_12_april_2017.pdf> accessed on 6 January 2019.

non-member states of the Rome Statute. Before this research people answered it in the following manner; The ICC can apply its jurisdiction on the individuals, not states such as the head of states and governmental officials when those individuals commit the international crimes directly or indirectly and the national court unwilling or cannot apply the jurisdiction.⁵⁴ Moreover, According to the Rome treaty's provision, the ICC is likely to exercise its jurisdiction over nationals and territory of non-member states by limited circumstance when those states are not otherwise satisfied to apply the jurisdiction of the court over committed international crimes by those states.⁵⁵ However, this research will show the capacity of the court by referring to the provision that is provided in the Rome Statute treaty to demonstrate the reality which to what extent the court can prosecute the individuals who committed the crimes by nationals or territory of non-state parties, to this working hypothesis of the International Criminal Court apply its jurisdiction, which will be explored at the global level of analysis. Because persecute the violator of international crimes commits in non-state parties are the universal cooperation and effort to prosecute the perpetrator of international crimes by facing the criminals.⁵⁶

1.3 Objectives of the study

The dissertation aims to fulfill the below objectives;

1. This dissertation will demonstrate the role of the ICC to finding a durable solution for the international violations which is committed by nationals and territories of non-member states in the Rome Statute.

⁵⁴ Gwen P. Barnes, 'The International Criminal Court's Ineffective Enforcement Mechanism: The Indictment Of President Omar Al Bashir' (2011) 34(6) Fordham International Law 147 <<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2313&context=ilj>>accessed on 6 January 2019.

⁵⁵ See the "Article 13" of the Rome Statute of the international criminal court.

⁵⁶ Morris, M, 'The Jurisdiction of the International Criminal Court over Nationals of Nonparty States (Conference Remarks)' (2000) 6(363) ILSA Journal of International & Comparative Law <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2746&context=faculty_scholarship> accessed on 6 January 2019.

2. It will find out to what extent the ICC can prosecute perpetrators (those violating the international criminal laws).
3. It will determine the ICC's jurisdiction capacity to apply the jurisdiction of the court over non-member states during the violation times.
4. It will investigate how can the ICC apply its Jurisdiction to prosecute the violator of the international crimes in the nationals and the territories of non-member states of the court?

1.4 Significance of the study

There is no doubt that every research's which taken during the study aims to find the part of solutions. Moreover, the current paper efforts to illustrate the ICC's jurisdiction capacity over nationals and territory of non-member states of the Statute. Also, the research attempts to describe the legal provision as an instrument to gain this goal. Furthermore, it can be the answer for who says the ICC is only for the African continent and the court always focus on African states, because according to this current paper we can realize the real capacity of the court. And demonstrate the ways that declared in the Rome Statute to face the impunity of international criminals. Additionally, to show this reality that the court can by its jurisdiction limits the international violations in the territories of nationals and non-state parties of the Rome Statute. Also, this paper can be the guideline for people who live in the non-state parties to the court which have a lot of international criminal violations to know them rights, even to cooperate with the court and bring them cases to ICC and taking the practice act for facing the impunity of those international criminals.

1.5 Methodology

The research will rely on qualitative research design to collect data. The author will use the case study as a model to explain the research design. Moreover, In this research, the thematic analysis qualitative method will be applicable, because in this method the research will look at indigenous typologies, repetitions, metaphors and

analogies, transitions, similarities and differences, missing data, linguistic connectors use of concepts and theories.⁵⁷ The type of data in the research will be secondary source data which have been written about the court's history, jurisdiction, applicability, capability, competence, cases, and sentences. The researcher will search for these sources in books, journals, texts, articles, web sides, every secondary source which related to the research. During the searching proses in the documents, the researcher will try to look at the capability of this court according to the Rome Statute Articles. Then result out to what extent the court can persecute the violators of the international crimes in the territories of Rome Statute's non-state parties. Additionally, the researcher tries to look for the cases of non-state parties which have been sentenced by the ICC as a model for supporting the validity and reliability of the research question.⁵⁸

⁵⁷ W. Creswell, John, 'Research Design. 4th Edition: Qualitative, Quantitative, Mixed Methods Approaches' (SAGE 2016) 69.

⁵⁸ Jess Gifkins, 'R2P in the UN Security Council: Darfur, Libya and beyond'(2015) 51(2) Cooperation and Conflict, 148.

CHAPTER 2

THE PERSPECTIVE ON INTERNATIONAL CRIMINAL COURT

2.1 The Historical Background of ICC

During the past 500 years from now, the community in the world has tried and thought several times about determining the most serious crimes around the world which have the horrifying impact in every society in the world.⁵⁹ According to Bassiouni, there are some pieces of evidence back to 405 BC in Greek which prove holding tribunals to address the war crimes and persecute the perpetrators.⁶⁰ Also, Schabas explain his perspective about this view which set “war criminals have been prosecuted at least since the time of ancient Greece, and probably well before that”⁶¹

According to the explanation above, it determines that the universal community always had demined for set and establishment the law body which delegates like a universal court. However, it has claimed that which the period of beginning the idea of setting the international criminal court dates back to the 15th century. However, we should mention that both of international lawyers and historians stated the reality which the body of an international court has not come to exist and there is no practical action until the 19th century.⁶²

The idea for establishing the universal justice body began with the army conflict rules such as Brussels' protocol in 1874 this was the initial struggle to establish the rule for the army conflicts. However, it should be stated that in the protocol no ideas are mentioned about how to establish the arm conflict rules, how to bring them into

⁵⁹ Sandra L. Jamison, 'A Permanent International Criminal Court: A Proposal that Overcomes Past Objections' (1995) 23(2) *Denver Journal of International Law & Policy* 419.

⁶⁰ M. Cherif Bassiouni, 'Crimes Against Humanity in International Criminal Law' (Cambridge, MA :Kluwer Law International, 1999) 517.

⁶¹ William A. Schabas, 'An Introduction to the International Criminal Court' (Cambridge, UK, and New York, NY: Cambridge University Press, 2001) 1.

⁶² Brook Sari Moshan, 'Women, War, and Words: The Gender Component in The Permanent International Criminal Court's Definition of Crimes Against Humanity' (1998) 22(1), *Fordham International Law Journal* 165.

force, and how to prosecute the perpetrators. The structure that The Hague conference was established on was named as "manual on the laws of war on land" in 1880. The establishment of the Hague conference was an important development phase in the international law during the years 1899-1907, especially the Hague convention in 1907, which mentioned and specified the responsibilities for any party that commit international law violations.⁶³

The next step of improvement of the international criminal law was the World War II. Throughout the Second World War, the crimes that were committed by the Nazi government against the allied powers resulted in the establishment of the military tribunal by the victorious allied powers to punish those who were committed and responsible for those acts of violations. The international military tribunal was created in Nuremberg and Tokyo in 1945 these tribunals were seen as the statue of the recent international criminal law.⁶⁴

The United Nations used the Nuremberg chart as a resource during the war situations. Then later, in 1948, the Nuremberg chart was accepted by United Nation General Assembly (UNGA). The main reason for the acceptance of the chart was to chastise the criminals of the genocide crimes and to prevent these crimes. One year later in 1949, the Geneva conventions and its edition protocol I were established, it mentioned a list of war crimes. But, it should be said that the term "war crimes" was not used in the protocol, but the term "grave breaches" was used.⁶⁵

In 1992 and 1994, UNSC established the International Criminal Tribunal for the former Rwanda and Yugoslavia (ad hoc) in the United Nations. The ad hoc tribunals played an essential and positive role in the international criminal law development.⁶⁶

⁶³ Barnett L, 'The International Criminal Court: History and Role' (2013) Library of Parliament <<https://lop.parl.ca/Content/LOP/ResearchPublications/2002-11-e.pdf>> accessed 3 November 2018.

⁶⁴ Schabas William A & Bernaz N, 'Routledge Handbook of International Criminal Law' (2nd ed, Routledge 2011) 85.

⁶⁵ Sadat, L, 'The International Criminal Court: Past, Present and Future' (2014) 'World Law Institute' <<https://law.wustl.edu/harris/documents/ICC-PastPresentFuture4-16-14.pdf>> accessed 3 November 2018.

⁶⁶ Dame, F, 'The effect of international criminal tribunals on local judicial culture: the superiority of the hybrid tribunal' (2015) 'Michigan State International Law Review'

The United Nations had the idea for creating a long-lasting international judicial court to have the authority of arbitration over the crimes that occur around the world. Moreover,, it prevents the crimes and prosecute the criminals. This idea developed step by step before and after the first and second World Wars. In these steps of the establishment of the permanent international court, the experience of tribunals that were established before was taken into consideration. Moreover, the jurisdiction of the committers in the ad hoc courts, which were the genocide violations that were committed in Rwanda, and the international humanitarian law's serious infringements and other violations that were committed in Yugoslavia were also useful experiences for the formation of the enduring international judicial court. All in all, the points mentioned above were reasons to corporate and supported the idea to create the permanent international court.⁶⁷

Under the name of Rome Statute, a treaty was signed among one hundred and sixty different states on July 17, 1998 in order to establish the permanent ICC. In this treaty, some mechanisms were set up of how the states support the court and the types of crimes that the court has jurisdiction over them. Any country can only become a member of the assembly of this court after it accepts the rules of this court. More than one hundred and twenty states adopted the Rome Statute, but only 60 of them ratified it. The members of the court are from various reigns, such as the Asian Pacific, Africa, North American, Western European, Eastern Europe, and also, Latin America and the Caribbean. Under the name of the ICC, the Rome statute came into force on July 1, 2002.⁶⁸ The permanent international criminal court's foundation with possibly global jurisdiction is a vital step in the ICC's developments. The international court was established not just to investigate and try international offenses, but it also

<<https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1187&context=ilr>> accessed 3 November 2018.

⁶⁷ Crystal R, Friman H, Robinson D & Wilmshurst E, 'An Introduction to International Criminal Law and Procedure' (2nd ed, Cambridge University Press 2010) 77.

⁶⁸ 'Understanding the International Criminal Court' <<https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>> accessed 3 November 2018.

established a novel code of international criminal law.⁶⁹ Additionally, the primary aim of establishing the ICC is to apply the peace, justice, and stability around the world. The court operates with the mechanism of self-binding. The mechanisms are binding the member states to spread the justice and peace in the world.⁷⁰

2.2 The Rome Statute of the ICC

After the World War II ended, the Nuremberg court was established by the struggle of some idealistic states and non-member state actors by pushing the idea of adopting the international human right. However, the idea of building the permanent universal court was alive in vague by the (UN) study commissions. But the end of the cold war led to some terrible situations in some states such as Yugoslavia and Somalia. It was the cause of pushing some states to think about establishing the permanent international court by practical steps.⁷¹

In 1989 the international community was interested in the proposal of the president Robinson of Trinidad and Tobago which demand to establish an international criminal tribunal. The demand was measured by the United Nations General Assembly which concluded six committees.⁷²

In 1992 the General Assembly demanded the International Law Commission (ILC) to set a constitutive statute for creating a universal body of law under the name of the ICC. Moreover, in 1994 a statute of a draft had been succumbed by the ILC according to the General Assembly request to collect the works and establish a convention. But the states couldn't reach an agreement with each other on the draft.⁷³

⁶⁹ Crystal R, Friman H, Robinson D & Wilmshurst E, 'An Introduction to International Criminal Law and Procedure' (2nd ed, Cambridge University Press 2010) 90.

⁷⁰ Beth A Simmons, Allison Danner, 'Credible Commitments and the International Criminal Court' (2010) 64(2) International Organization 225-256.

⁷¹ Jay Goodliffe, Darren Hawkins, 'A Funny Thing Happened on the Way to Rome: Explaining International Criminal Court Negotiations' (2009) 71(3) The Journal of Politics
<https://www.jstor.org/stable/10.1017/s0022381609090835?seq=1#page_scan_tab_contents>
accessed on 17 January 2019.

⁷² Christiane E Philipp, 'The international criminal court- A brief introduction' (Max Planck, 2003) 332

⁷³ Nicole Eva Erb, 'Gender-Based Crimes under the Draft Statute for the Permanent International Criminal Court' (1998) 29 Colum. Hum. Rts. L. Rev. 401, Heinonline<

From 1995 to 1998, two committees were established by the UNGA to approve the draft of the creation of the ICC under the name of "consolidated text." But the committees under the name of (Ad Hoc Committee) couldn't agree on the functional and the administrative issue during the meetings to set a draft.⁷⁴

A committee was recognized by the General Assembly under the name of Preparatory Committee PrepCom on the creation of the international court after Ad Hoc Committee. The main cause of the committee was to generate a draft which state could adopt. A broadly appropriate consolidated text of a convention for an international criminal tribunal had to be arranged by the PrepCom.⁷⁵ During three years of negotiations in sixth PrepCom the decision for holding the Rome Diplomatic Conference had been taken. Agreeing on the final text of the treaty for creation the last great international organization was the main purpose under the name of ICC.⁷⁶

The status of the Rome Conference and the PrepCom was the subject of the General Assembly bodies. By the meaning of that, they started with the rules of procedure, institutional memory, the Assembly's internal politics, and traditions and parliamentary practices.⁷⁷

On 3rd April 1998 in the headquarters building of the UN in New York the last term of the (PrepCom) have been held in Conference Room I. Nearly 130 delegations of governments moreover, the representatives of NGO participated in the conference. In the conference, head of Netherlands announced to the PrepCom which the founding

<https://heinonline.org/HOL/LandingPage?handle=hein.journals/colhr29&div=15&id=&page=>> accessed on 17 January 2019.

⁷⁴ M. Cherif Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court' (1999) 32 Cornell International Law Journal
<<https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1449&context=cilj>> accessed on 17 January 2019.

⁷⁵ John Washburn, 'The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century' (1999) 11(2) Pace International Law Review
<<https://digitalcommons.pace.edu/cgi/viewcontent.cgi?referer=https://www.google.com.cy/&httpsredir=1&article=1238&context=pilr>> accessed on 17 January 2019.

⁷⁶ Bartram S. Brown, 'U.S. Objections To The Statute Of The International Criminal Court: A Brief Response' (1999) 31 INTERNATIONAL LAW AND POLITICS 855.

⁷⁷ John Washburn, 'The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century' (1999) 11(2) Pace International Law Review
<<https://digitalcommons.pace.edu/cgi/viewcontent.cgi?referer=https://www.google.com.cy/&httpsredir=1&article=1238&context=pilr>> accessed on 17 January 2019.

treaty of the ICC had been reached on the final draft. Also, he mentioned that the upcoming diplomatic conference would be the last negotiation to adopt the treaty of the ICC which was planned to hold in Rome.⁷⁸

The final diplomatic conference had been held in the Rome on 17th July 1998. In the meeting, the Statute of establishing the ICC had been adopted by the state members. On 1st July 2002, the mentioned Statute came into power. After nearly a year of adoption, the court was completely operative. The court's first issued arrest warrants in June 2005, and the first trial was begun in January 2009. Furthermore, the delivery of the first judgment was on 14th March 2012. Also, the amount of participation by the states reached 122 countries on 1st May 2013.⁷⁹

In 2016, three African states submitted their written notification to remove their names from the ICC's Rome Statute to UNSC following the Rome Statute's Article 127. These countries included the Gambia, South Africa, and Burundi. African union supported their withdrawal from the ICC by encouraging them to be pioneers of its 'Withdrawal Strategy'. However, the Gambia and South Africa took back their withdrawal. These withdrawals also created threats for the other states to submit their notifications for the withdrawal from the ICC.

At the end of 2017, the court's authority was expanded to meet the new challenges raised due to the crime of international aggression along with modern war crimes. It was due to the latest technological developments which impacted the war crimes and its modified techniques. Different tools were defined to meet new challenges. Accordingly, the support of countries has a critical role. It is observed that the EU has given the maximum possible support to ICC. The withdrawals have also impacted the

⁷⁸ Fanny Benedetti, John L. Washburn, 'Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference' (1999) 5(1) Global Governance <https://www.jstor.org/stable/27800218?seq=1#page_scan_tab_contents>accessed on 17 January 2019.

⁷⁹ YVETTE BORG CARDONA, 'A CRITICAL ANALYSIS OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT' (Ph.D. thesis, University of Malta May 2013).

performance of the ICC. The lack of participation of few countries and states has limited the authority of the Rome Statute globally.⁸⁰

2.3 The structure of the ICC

The ICC's body was stated in the Rome multilateral treaty between the states. The state members of the treaty are structured under the ASP. Also, it acts like an organization oversight and judicial body of the court. Moreover, The Assembly is not only acting as a governing body of the court but also it has a special significance because of the closely involved negotiation which had the member states between them on the issues of the Rome Statute and other important Court's issue which related to the court documents.⁸¹

Moreover, every nine years the majority vote of the assembly elects 18 judges for each term. Election of judges is based on a certain number of criteria such as having experience either in international law or criminal law, should have individual nationality, two judges cannot share the same nationality, and also should be a citizen of one of the member countries. These judges are divided between Appeals Chamber, Pre-Trial Chamber, and the Trial Chamber. The judges select the court president and the first and second deputy president.⁸²

The assembly occasionally held meetings to approve the budget, elect officials, and carry out other administrative oversight functions. Additionally, it has the authority to change or remove Court officials, to agree and vote on necessary amendments to the Rome Statute, Evidence, Rule of Procedures, and Elements of Crimes. The Assembly has been given the authority by the Rome Statute to call a conference for

⁸⁰ I. Zamfir, 'International Criminal Court: Achievements and challenges 20 years after the adoption of the Rome Statute' [2018].

⁸¹ 'ICC Structure' (n.d)

IBA<https://www.ibanet.org/ICC_ICL_Programme/About_the_ICC/ICC_Structure.aspx> accessed on 17 January 2019.

⁸² 'The Judges of the Court' (2015) International Criminal Court <<https://www.icc-cpi.int/iccdocs/pids/publications/judgeseng.pdf>> accessed on 17 January 2019.

reviewing the Rome Statute after seven years passed on the treaty to take into account the necessary amendments to it.⁸³

The court is acting as a sovereign international organization which has the international legal character in the international laws. Moreover, the court has the complex administrative body which works and struggle as a fixed judicial entity to investigate the severest international crimes and end the impunity in the world as we mentioned before. According to the Rome Statute's Article 34, the court included four organs; two of them are judicial organs such as; Presidency and the chambers divisions, and other one is the OTP and the Registry.⁸⁴

2.3.1 The presidency

ICC body is divided into four parts. Among them, one is the presidency. Every three-year, a plurality of the 18 judges of the chambers selected by the assembly of the court vote for and select the renewable-term president of the court and first and second vice presidents. The judges who are working in the presidency organ are working by full-time serve.⁸⁵

The Presidency organ responsibility includes three main areas: judicial/legal functions which are organized and assigns the cases that are presented to the chambers of the court. Also takes the judicial review of the cases which are decided in the court by the certain decisions and it is responsible for concluding the cooperation agreements which are holding with states. Also, administration and external relations, the right of the administration of the Court and observe the work of the Registry are the other responsibilities of the Presidency organ, the exclusion of the prosecutor's office. The prosecutor's settlements on all critical issues of common concern are sought and coordinated by the presidency. Additionally, in the exercise of

⁸³ Schabas, W, 'An introduction to the international criminal court' Cambridge university press (London, 2011) 101.

⁸⁴ Hans-Peter Kaul, 'International Criminal Court ICC' (2010) Oxford Public International Law <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e42#law-9780199231690-e42-div1-2>> accessed on 17 January 2019.

⁸⁵ 'The Presidency' (n.d) International Criminal Court <<https://www.icc-cpi.int/about/presidency>> accessed on 17 January 2019.

external relations, the Presidency promotes public awareness and understanding of the Court by maintaining relationships with States and other entities.⁸⁶

Philippe Kirsch from Canada was elected as the first president of the court in 2003; also he has led the conference of Rome for the establishment of the ICC. The mentioned president led the court for two terms.⁸⁷ The most recent president which was elected by judges in 11 March 2018 to become the president of the court was Judge Chile Eboe-Osuji from Nigeria.⁸⁸

2.3.2 The chambers divisions

The judicial division or chambers of the division is another organ of ICC judicial body. The chamber includes the judges who were elected by the ASP.

Six of the judges are women, and the remainder number are men which are 18 judges.⁸⁹ The judges are divided by three divisions, and each of them has individual competencies that are the third one pre-trial division, the trial division, and the appeal division.⁹⁰

The pre-trial division; composes of three judges usually. The competence of the division is investigated and find out on the cases which donate to the court has enough evidence to refer the cases to the chamber of trial. The pre-trial chamber can be assumed as a filter of the cases which is brought to the court after the process of investigation by the office of prosecuting and before the cases are going to the trial will be examined by this division. Also, the deferral cases should be going by this filter to make sure there is a necessary reason to deferral the mentioned case to the court by checking and investigating the evidence and the background of the cases.⁹¹

⁸⁶ 'Structure of the ICC' (n.d) ABA-ICC<<https://www.aba-icc.org/about-the-icc/structure-of-the-icc/>> accessed on 17 January 2019.

⁸⁷ Andrew Novak, 'The International Criminal Court an Introduction' (Springer 2015) 49.

⁸⁸ See the International Criminal Courts website .

⁸⁹ Alec Samuels, 'The International Criminal Court' (2006) 70(4) The Journal of Criminal Law.

⁹⁰ Ron Synovitz, 'Explainer: Why Does The U.S. Have It Out For The International Criminal Court?' (Radio Free Europe Radio Liberty, September 11, 2018)< <https://www.rferl.org/a/explainer-why-does-u-s-have-it-out-for-international-criminal-court-/29484529.html>>accessed on 18 January 2019.

⁹¹ David Admire, 'The International Criminal Court: Our Differences in Jurisprudence' (2011) 47 American Judges Association<

Also, the trial division includes three judges usually which hear the pre-trial chamber refers the cases to the division. The trial division is responsible for conducting a fair trial and takes the charge sentences if there is enough evidence to make the cases or the persons guilty, or take the innocent sentences if the evidence is not strong enough to accuse the person or the cases.⁹²

The third division of the judges is appeal division; the division includes five judges. Among them, one is the president of the chamber who is electing by the judges in the chamber. The responsibility of this division is to revise the decisions which are decided by the trial chamber to make sure the sentence is proportionate to the crimes. Also to ensure the truth, rightness, and fairness of these sentences and the division can edit the sentences or demand for a new trial on the different trial chamber.⁹³

2.3.3 Office of the Prosecutor (OTP)

This unit of the court operates as an autonomous organ of the court according to the exclusive article of Rome statute. The organ-like other organs of the court elected the members by ASP, which includes the prosecutor and the prosecutor's deputy. The Prosecution Division, the Jurisdiction, and the Investigation Division are the three central division of the organ. The organ is responsible for investigation on the violation international cases which we mentioned before.⁹⁴

Moreover, according to the court Statute's Article 13, the organ can investigate the international violation cases which were committed beneath the court's jurisdiction.

<https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1364&context=ajacourtreview>>accessed on 18 January 2019.

⁹² Hans-Peter Kaul, 'International Criminal Court ICC' (2010) Oxford Public International Law<<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e42#law-9780199231690-e42-div1-2>>accessed on 17 January 2019.

'The Presidency' (n.d) International Criminal Court <<https://www.icc-cpi.int/about/presidency>>accessed on 17 January 2019.

⁹³ Laura Barnett, 'The International Criminal Court: History and Role' (2013) Library of Parliament<https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/200211E>accessed on 18 January 2019.

⁹⁴ 'Office of the Prosecutor' United Nations International Residual Mechanism for Criminal Tribunals<<http://unictr.irmct.org/en/tribunal/office-prosecutor>>accessed on 18 January 2019.

Also according to the court's Statute, the organ has the right to investigate the territory of the nationals and the court's non-member states, in the circumstances which the serious international violation committed and the states and nationals are unwilling to prosecute the cases.⁹⁵

The organ takes the investigation on the violation cases by sending the experts and the investigators to collect the evidence to prove the violation. Then the organs transfers the achievement evidence of the cases to the pre-trial chamber which decides on the validity of the evidence on each international violation cases and then sends the cases to the trial chamber for the decisions.⁹⁶

2.3.4 Registry

The registry organ provides the service as a natural organ to all other organs in the court. The organ is responsible for recording all information and recording all hearing cases. Also, the organ translates and interprets the court pleading of the court during the court trial. According to the Rome statue the official language in the court is English and French, so the organ should interpret or translate the hearing court to these languages in case if it is necessary. Moreover, the organ register and archive all possess in the court it works like an archive of the ICC. The registry organ is also accountable for taking the witnesses who are demanded by the court to exist in hearing proses of the court and to protect them from the threats.⁹⁷

2.4 The ICC's operation

The ICC's legal operation as a universal criminal court is different from the other courts. Because in the ICTY and ICTR, the courts could apply the court's jurisdiction to individuals who committed the crimes against humanity only by a specific period and the judicial capacity of these courts was restricted to the territory of those states.

⁹⁵ Antonio Coco, 'ARTICLE 13 in 'Commentary on the Law of the International Criminal Court' (Ed: Mark Klamberg)'(2017) Academia 1-13.

⁹⁶'Report on Preliminary Examination Activities 2018' (International Criminal Court, 5 December 2018) < <https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf>>accessed on 18 January 2019.

⁹⁷'Registry' (n.d) International Criminal Tribunal for the former Yugoslavia< <http://www.icty.org/en/about/registry>>accessed on 18 January 2019.

But unlike that the ICC, as an international court, can apply its jurisdiction on the international crimes, when the crimes perpetrated after the court's interred into force on 1st July 2002. Also, the ICC has different legal procedure from ICJ, since the role of the ICJ is to rule on disputes that occur between states and it cannot try individuals like ICC.⁹⁸

Moreover, the ICC has a deferent legal form from the Ad Hoc Tribunals because the UNSC established the tribunals based the binding provisions of "Chapter VII of the UN Charter" for the specific period of time. But unlike the tribunals, the ICC like an international institute is not part of UNSC, and the international treaty was the foundation of the court. Unlike other tribunals, it was not established by the UNSC, but the primary relationship between the ICC and UNSC is cooperation agreement.⁹⁹

The ICC is working by the complementarity principle which provided in the court's Statute. In this regard, one can say the mentioned principle is one of the most important clauses in the Statute of the court. Because according to the complementarity principle the ICC will complete the national court's action and it will never act as an alternative to the national jurisdictions.¹⁰⁰

Referring to the court Statute's Article 17 which declared the complementarity principle, only when the domestic courts are "unwilling or unable" to deliver justice against criminals, the ICC can have jurisdiction. In case of willing and taking the sufficient action to the crimes by the national court, the ICC has no rights to apply its jurisdiction to the states.¹⁰¹

⁹⁸ Claire Calzonetti, 'Frequently Asked Questions about the International Criminal Court' (Council on Foreign Relations, July 23, 2012) <<https://www.cfr.org/background/frequently-asked-questions-about-international-criminal-court>>accessed on 18 January 2019.

⁹⁹ 'Investigation Manual for War Crimes, Crimes Against Humanity and Genocide in Bosnia and Herzegovina' (2013) OSCE October 2013
<<https://www.osce.org/bih/281491?download=true>>accessed on 18 January 2019.

¹⁰⁰ Steven Freeland, 'International Courts and Domestic Politics' (Cambridge University Press, June 2018) 68.

¹⁰¹ 'INTERNATIONAL CRIMINAL JUSTICE The ICC and Complementarity' (ICJ Kenya, 2014) <http://www.iccnw.org/documents/complementarity_journal.pdf>accessed on 18 January 2019.

"Inability" means when the state cannot prosecute the criminals or approach to the sufficient evidences due to falling or inaccessibility of the domestic judicial system.¹⁰²

The court can determine the unwillingness of the state during the national jurisdiction process by the elements which provided in the Rome statute for the unwillingness of the state by the following elements:

1. When the national court is acting to protect the criminals, by another country when the court uses the courts sentences to make a shelter for criminals who violated the international crimes which provided in the Rome statute's Article 5.
2. In case of unjustified delay of bringing the criminals to the court by various excuses.
3. Once the national court's decision is unfair, and the court's process is not conducted by independently or impartially, when the courts dictions are not consistent with the criminal cases.¹⁰³

Jurisdictional Triggers

The ICC jurisdiction capacity according to Article 13 of Rome treaty will apply only through these three situations, so whether while committing the atrocity crimes or after that. The situations are the following:¹⁰⁴

1. Self-referral; it means when the cases of atrocity offenses referred to the court's prosecutors by the act of states. Whether the crimes are perpetrated in the State Parties' territories that make the referral or whether it perpetrated on

¹⁰² 'The Rule of Law and the ICC' (Rule of Law Institute of Australia, 9 November 2015) <<https://www.ruleoflaw.org.au/rule-of-law-icc/>>accessed on 18 January 2019.

¹⁰³ Abreha Z Mesele, 'International Criminal Court and African Union: Selective Justice?' (2018) Abyssinia Law < <https://www.abysiniaw.com/blog-posts/item/1513-international-criminal-court-and-african-union-selective-justice>> accessed on 18 January 2019.

¹⁰⁴ Bartram S. Brown, 'GETTING A CASE TO THE ICC' (1999) Chicago-Kent College of Law <<http://www.kentlaw.edu/faculty/bbrown/classes/HumanRightsSP10/CourseDocs/13ICCJxFlowChart.pdf>>accessed on 18 January 2019.

the territories of other State Parties or committed by residents from the referring State Parties or another State Parties.¹⁰⁵

The ICC cases mostly are the cases which committed atrocity crimes inside the territory of states and submitted to the court by the state itself such as the case of “2013 Comoros Referral” and “2012 Mali Self-Referral”¹⁰⁶

2. Referral of the Security Council (UNSC); according to Article 13-b provided in the Rome statute, UNSC may transfer the criminal cases to ICC, in the situations when one or more atrocity international crimes are committed. The provision of the court’s Statute under the UN Charter’s Chapter VII had given the authority to UNSC to refer the criminal cases in the territory of non-member states to the ICC even if the non-member states are not in agreement of that.¹⁰⁷

But if a permanent UNSC member vetoes the resolution of criminal referral cases, the ICC cannot apply its jurisdiction, like Syrian case. So for applying the referral provisions in each criminal case, it needs the vote of all permanent members of UNSC. Moreover, The Libyan referral in 2011 and the Sudan referral in 2005 were two notable and exclusive cases which had been referred to the ICC by the UNSC under this provision.¹⁰⁸

3. "Proprio Motu Investigations"; when atrocity criminal cases occur, whether in the territory or by the member states’ nationals to the ICC, or by the non-member states’ nationals or in the territory, which are consist to apply the court’s jurisdiction. In these situations, the ICC’s prosecutor can take the preliminary examination and after approval this step by judges of court they

¹⁰⁵ ‘Definition of the crime of aggression’ the Global Institute for the Prevention of Aggression <<https://crimeofaggression.info/role-of-the-icc/definition-of-the-crime-of-aggression/>> accessed on 17 March 2019.

¹⁰⁶ See the International Criminal Court website.

¹⁰⁷ SEJLA DURBUZOVIC, ‘International Criminal Court and the UN Security Council – a difficult relationship’ LAW-INT1 < <https://www.euclid.int/papers/Sejla%20Durbuzovic%20-%20ICC%20UNSC.pdf> >accessed on 18 January 2019.

¹⁰⁸ Jennifer Trahan, ‘The Relationship Between the International Criminal Court and The U.N. Security Council: Parameters and Best Practices’ (2013) Criminal Law Forum 417.

open the investigation process. The 2015 Preliminary Examination–Afghanistan and 2015 Preliminary Examination–Iraq was two example cases under this provision.¹⁰⁹

After referring the criminal cases to the ICC by the three situations that we mentioned above, the ICC prosecutors may take the preliminary examination. The fundamental examination is not an investigation, but it is to examine prosés according to the achievement evidences and available information about the criminal cases, in order to reach the reality of the criminal issue, a full ICC investigation is also warranted so as to define whether.¹¹⁰

Therefore, according to the Rome Statute's Article 53(1), the ICC's prosecutors might move to open a formal investigation in the criminal cases. If all of these following requirements satisfied the prosecutors to believe that there is a sensible basis to move the cases to the ICC:

Jurisdiction: the prosecutors should determine whether the criminal cases which referred to the court are under the jurisdiction of the court by comparing these four elements of investigation:

1. *Temporal Jurisdiction*; whether the criminal cases are perpetrated after the court's come into force on July 1, 2002, if the criminal cases are committed before this period of time then the ICC cannot make justice over the criminal cases.
2. *Territorial Jurisdiction*; it should be the criminal cases committed under the territory of the court according to Article 13 which are the; state referral, UNSC referral, and Proprio Motu Investigations. If the criminal cases do not come

¹⁰⁹ Elizabeth White, 'THE INTERNATIONAL CRIMINAL COURT – A LOST POTENTIAL OR ENDURING ASSET?'(THE KENAN INSTITUTE FOR ETHICS, February 15, 2018)<<https://kenan.ethics.duke.edu/the-international-criminal-court-a-lost-potential-or-enduring-asset/>>accessed on 18 January 2019.

¹¹⁰ 'ICC preliminary examinations' (n.d) Coalition for the International Criminal Court <<http://www.coalitionfortheicc.org/explore/icc-preliminary-examinations>>accessed on 18 January 2019.

under this provision so the ICC cannot apply the court's jurisdiction over the criminal cases.

3. *Subject Matter Jurisdiction*; the prosecutors should examine whether the committed crimes are the four serious crimes which provided in the Rome Statute's Article 5. In the case when the committed crimes are not the serious crimes the court has not capacity to justify the criminal cases.
4. *Personal Jurisdiction*; the prosecutors should examine the perpetrators of the criminal cases to define the personality of criminals because the ICC has jurisdiction only over persons who are older than 18. Also the court cannot punish the rebel groups, governments, states, institutes inside the states, or political parties. However, the court can prosecute the individuals who are inside these parties or groups.¹¹¹

Admissibility: the criminal referral cases to the court should be examined from the prosecutors by the admissibility phase which comprises both of complementarity and gravity.

Complementarity; the criminal cases which are moved to the ICC should have complementarity principle. The principal determines the ICC as a last solution court, so according to the principle the moved criminal cases should be unwilling or enabling to authorize over them by the national courts. In case of willingness or able from the national courts to prosecute the criminals then the ICC cannot apply the court's jurisdiction over the criminal cases.

Gravity; the prosecutors should determine whether the criminal cases are the gravest crime or by another word whether the crimes are the atrocity crimes by looking on the

¹¹¹ Alexa Koenig, Felim McMahon, Nikita Mehandru, Shikha S Bhattacharjee, 'Quality Control in Preliminary Examination: Volume 2' (Torkel Opsahl Academic E-Publisher ,2018) 681.

scale, nature, manner, and also the rate of impact of the criminal cases, according to that the prosecutor can define whether the cases should move to the ICC or not.¹¹²

Interests of justice; after approving all of those requirements that above mentioned the prosecutors in next step would examine the criminal cases to result out whether there is an interest of justice to move the cases to the national court. In the situations when the prosecutors noted that there is no interest for justice to prosecute the criminal cases, and then may the prosecutors reject the proses of movement of the criminal cases to the ICC.

After approving of all these requirements, the office of prosecutors may decide to move the criminal cases from the preliminary examination to the formal investigations which called the situations, like the situation of Libyan.¹¹³

There is no specific period to move the criminal cases from the preliminary examination to the formal investigations (situations). It depends on the office of the prosecutor's decision, whether they decide that the criminal cases does not fulfill the needed requirement to move to formal investigation steps, or may the prosecutors needs more evidences to make the decisions, or else may the office of prosecutor decide to change the preliminary examinations to situations in circumstance that they approve and noted that the cases fulfill the needed requirements.¹¹⁴

After the preliminary examination changed to formal investigations in this step the OTP will gathering as much as the evidences in the territory of criminal cases such as witness, interviews, videos, images, and etc. later the achievement evidence will be transferred to the pre-trial chamber then the chamber according to the evidence will decide whether there is a reasonable ground to prove the guiltiness of the criminals.

¹¹² 'Report on Preliminary Examination Activities 2018' (International Criminal Court, 5 December 2018) <<https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf>>accessed on 18 January 2019.

¹¹³ 'Policy Paper on Preliminary Examinations' (2013) International Criminal Court <https://www.icc-cpi.int/iccdocs/otp/otp-policy_paper_preliminary_examinations_2013-eng.pdf> accessed on 18 January 2019.

¹¹⁴ 'Preliminary Examinations by the Prosecutor of the International Criminal Court' Coalition For The International Criminal Court <http://www.iccnw.org/documents/CICC_Factsheet_PrelimExamQA.pdf>accessed On 18 January 2019.

In situation of doubt of the achievement evidences or shortage of them, the pre-trial chamber can demand the OTP for collecting more evidences for that. After satisfying the judges in this trial about the guiltiness of criminals and result out the fact which the persons are responsible for the violations of criminal cases, then may they decide to issue an order of arrest and summon the criminals to attend the court. After presenting the criminals in the court during the hearing process, the pre-trial may decide whether they approve the cases or reject them in the period of 60 days. Because the ICC does not have any power; all these steps are taken through the cooperation and assistance with states.¹¹⁵

In the criminal cases, following the approval via the chamber of pre-trial and referral to the trial, the trial may compare all evidence with the fact of the criminal cases through the hearing process. Whether the court accuses the criminals which responsible of crimes and sentences them, or whether they decide that the individuals are not responsible for the crimes according to the achievement evidences. The sentences may up to 30 years or life sentences, but the court cannot make death sentences because it will be adverse of the principles of international humanity.¹¹⁶

After making sentences over the criminal cases by the judges in trial chamber, both of criminals and prosecutors are authorized to appeal the sentences in the appeal chamber court for amendments or revise the decisions. The appeal may approve the sentences which provides by the trial chamber or may amend some part of them or may decide to open another trial. It depends in the criminal cases and the situations of each case.¹¹⁷

¹¹⁵ "WHAT HAPPENS AFTER THE ICC'S PRELIMINARY EXAMINATION CONCERNING THE UKRAINE SITUATION?' (2015) NO. 6, GRC
<<https://globalrightscpliance.files.wordpress.com/2015/11/issue-brief-6-engfinal.pdf>>accessed on 18 January 2019.

¹¹⁶ Volker Roben, 'The procedure of the ICC: status and function of the prosecutor 7' (Max Planck UNYB ,2003) 513.

¹¹⁷ Rachel S. Taylor, 'Tribunal Law Made Simple' (n.d) GPF <<https://www.globalpolicy.org/component/content/article/163/29333.html>> accessed on 18 January 2019.

CHAPTER 3

THE COOPERATION BETWEEN ICC AND THE UN

3.1 Relationship Agreement between ICC and the UN

Like an intergovernmental organization, the UN was founded to address and deal with the human rights essential issues along with the justice concerns. Moreover, it will provide and ensure the freedom and liberty for citizens of its member states.¹¹⁸

In spite of many proposals about the creation of the ICC, it was created outside the UN as a separate international judicial body. The idea for creating an international judicial body to deal with international crimes and punish the criminals has a long tradition.¹¹⁹ Struggles to find a suitable proposal for the establishment of the ICC were continued to work by the ILC through the cold war. The work finally gets the harvest at the end of the previous century. One of the proposed issues was the option of an amendment of the UN which includes the ICC as a principal organ of the UN beside other structures of the UN.¹²⁰ The amendment proposal was not a viable solution because of the rigid amendment requirements as well as the same was true for the creation of the ICC by an international treaty. Due to these difficulties of the mentioned proposal, there were some other suggestions like the creation of the court by the Security Council like other previous courts which were created by the UNSC like ICTR, ICTY. According to D.Krieger after the amendment of UN charter proposal, the creation of the court by the UNSC without any special excellence for the permanent members of the UNSC was the best secondary solution for this issue.¹²¹ There were arguments on the creation of the court by the UNSC because one could

¹¹⁸ Dr Tirab, Mohamed, 'Ethics and Social Justice Issues in the United Nations Whistle Blowing' (2015) 3(1) Journal of International Relations and Foreign Policy 1,15.

¹¹⁹ Pella VV, "Towards an International Criminal Court" (1950) 44 American Journal of International Law 37

¹²⁰ R.S. Clark, 'the Proposed International Criminal Court: Its Establishment and Its Relationship with the United Nations' (1997) 8(3) Criminal Law Forum 417.

¹²¹ Najeeb Al-Nauimi and Richard Meese 'International Legal Issues Arising under the United Nations Decade of International Law' (The Hague; Boston, Martinus Nijhoff, 1995) 96.

point out the court could be terminated its existence in case of creating the court by UNSC as well as one could pay attention to the distinction between the competence of the UNSC to create the ad hoc tribunals and creation an international court as a permanent judicial body which was voiced by the ILC as well as some scholars.¹²² But at the end, the significance was lost of the disagreement and discussions about the mentioned proposals for the creation of the court because of the creation of the court by a special model which prepared the draft of the model by the preparatory commission. The court was established as a separate judicial body from the UN with an international legal personality.¹²³ And none of the mentioned proposals was approved because of the particular nature of the proposed ICC entity. In spite of mentioned proposals, the court was created like an autonomous judicial entity with a tight relation under the title of relationship agreement with the UN. The relationship agreement stated that point which the court will remain as an independent judicial working and it would not be a place for including essential details about the working of the court. In spite of that, the agreement mentioned the issue related to the representation within the UN and exchanging the document and information as well as the cooperation issues between the UN and the ICC.¹²⁴ According to the agreement draft of relationship submitted to the preparatory commission by the secretariat of the UN, the draft was interred to the discussion by the preparatory commission at its meetings six, seven, and eight. By consensus, at the eight sessions of the commission on 5th October 2001, the draft of relationship agreement was adopted by the preparatory commission. After that when the Statute of the court was arrived into force in its first session adopted the draft of relationship agreement by the ASP on 9th September 2002. Then the assembly accepted ICC-ASP/2/Res.7 resolution in the second session under the title of “Strengthening the International Criminal Court and the Assembly of States Parties”. According to the 7th section of

¹²² Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, para 25, p. 9.

¹²³ Antonio Cassese, ‘The Rome Statute of the International Criminal Court: A Commentary, (Oxford University Press, Oxford: 2002) 73.

¹²⁴ 1996Report of Preparatory Committee, supra note 1, at 10. The ITLOS Draft, supra note 36,

this resolution, it is stated that the Assembly “looks forward to rapid progress in the negotiations between the Court and the United Nations and requests the Court to keep the Assembly of States Parties to the Rome Statute of the International Criminal Court informed thereon”.¹²⁵ After three months, the UNGA adopted the resolution 58/79 on 9th December 2003, and inviting the Secretary-General to take steps to reach to the conclusion of the ICC-UN Relationship Agreement and then to provide the UNGA with the discussed outline agreement for approval.¹²⁶ On 10th December 2003 both of organizations decided to start the negotiations on the adoption draft of the relationship agreement. In this regard, the ICC mentioned that the delegation of the court would include the members of all three court structures, moreover the manager of the assembly secretariat could also be run by the court’s presidency organ. The court determined that the main object of the discussion would be held as near as possible to the previous draft which was approved by the ASP in September 2002, as more as, solving any UN concerns and adding explanations if it needed.¹²⁷

The first meeting between two institutions was held in the first round of negotiations on the relationship agreement on 26 and 27 February 2004 at the Headquarter of the UN in New York. The meeting was allowed both parts to illustrate their opinions about a number of matters. The second meeting as the second round of the negotiation was started on 20 and 21 May 2004 and it was leaded by both sides to solve all remaining issues between them. On 7th June 2004, the negotiated Draft of the Relationship Agreement was initialed by the heads of each delegation in Hague¹²⁸ According to Article 23 of the ICC and UNs relationship agreement, the draft of the agreement shall attain power after the draft will be accepted by the ASP to

¹²⁵ William A. Schabas, ‘The International Criminal Court: A Commentary on the Rome Statute’(first edition, Oxford University Press, New York 2010), the Rome Statute; Article 44,

¹²⁶ Resolution adopted by the General Assembly on 13 September 2004 [without reference to a Main Committee (A/58/L.68)].

¹²⁷ Third session The Hague 6-10 September 2004, ‘Report on the negotiated Draft Relationship Agreement between the International Criminal Court and the United Nations’.

¹²⁸ ‘International Criminal Court and UN to Sign Historic Agreement on Monday New Agreement Allows for Vital UN Support of Court’s Work’ (2004) Coalition for the International Criminal Court < http://www.iccnw.org/documents/UN-ICCagreement_01oct04.pdf > accessed 27 February 2019.

the General Assembly and the court's Statute.¹²⁹ Following Article 2 of the court's Statute, the president of the ICC, Philippe Kirsch, and Kofi Annan, the Secretary-General of the UN, signed an agreement which determines the structure relationship between two institutions. The agreement illustrates the scope of the relationship between them and also set the conditions and situations which bound both sides to cooperate with each other in both issues; institutional matters and issues related to judicial help, as well as the cooperation and communication between the court and the organs of the UN especially the UNSC as the important and essential organ of the UN which has the tight relationship with the court according to the special articles which are determined in the relationship agreement, the Statute of the court and chapter seven of the UN.¹³⁰

The relationship agreement contains a preface and twenty-three articles which split into four divisions (Articles 1–3) is included in General Provisions, (Articles 4–14) in Institutional Relations, (Articles 15–20) in Cooperation and Judicial Assistance, and (Articles 21–23) in Final Provisions.¹³¹ Also, the relationship agreement determines many obligations and a lot of institutional collaboration between both sides. It comprises, inter alia, like the capacity of the court to participate and observe the work of the UNGA. Also, both sides are obligated to exchange the documents and information between both of them. Moreover, to consult each other on the essential matters which is related and has a link with both of the institutions. As well as, the issue of administration and exchanging of the representatives between each other is another matter of cooperation. Also, the financial matter and the possibility to provide the laissez-passers by the UN for the ICC officials as a valid travel document are the

¹²⁹ Fifty-eighth session Agenda item 154 International Criminal Court Relationship agreement between the United Nations and the International Criminal Court.

¹³⁰ AMELIA COUTURE, 'The Politics of International Justice: the Security Council's Impact on the Independence, Effectiveness and Legitimacy of the International Criminal Court' (2015) International Human Rights Internship Working Paper Series <
https://www.mcgill.ca/humanrights/files/humanrights/ihri_wps_v3n2-amelia_couture.pdf >accessed on 27 February 2019.

¹³¹ Relationship agreement between ICC and UN.

other aspects of cooperation.¹³² Additionally, the agreement covers unique procedures which give the court that capacity to act as an independent judicial institution to transact with the issues of the international criminal law. These unique procedures result out by the special nature of the cooperation between the court and other organs of the UN.¹³³ In spite of binding the court with the UN also the agreement establishes the legal obligations of the UN vis-a-vis the Court.¹³⁴ Also, the agreement determines that both institutions should respect each other's mandate and Status in spite of the cooperation and close working which is provided as the binding in the relationship agreement.¹³⁵ Moreover, the agreement affords many opportunities for mutually beneficial collaborative efforts in order to establish the rule of law and end impunity.¹³⁶ Hence, both of the organizations will share the common value as it has been recognized in the mentioned agreement.¹³⁷ Also, the court is bound with the UN charter's purposes and principle in spite of the fact that the court is independent in its relation with the system of the UN.¹³⁸

It could be mentioned that those states which were members of the preparatory commission and worked on the proposals for making the court understand that the ICC required remaining judicially independent from the UN's political effects. On another side, they realized the reality that the ICC needed the backing of the UN to become more powerful and more effective.¹³⁹ Furthermore, in the court Statute's

¹³² 'A Universal Court with Global Support > Cooperation Agreements and Enforcement > Cooperation with the United Nations' Coalition for the International Criminal Court
<<http://iccnw.org/?mod=agreementsun>> accessed on 27 February 2019.

¹³³ Negotiated Relationship Agreement between the International Criminal Court and the United Nations

¹³⁴ Antonio Cassese, 'the Rome Statute of the International Criminal Court: A Commentary, (Oxford University Press, Oxford: 2002) 88.

¹³⁵ Negotiated Relationship Agreement between the International Criminal Court and the United Nations, Arts. 2 and 3.

¹³⁶ 'Translation of "relationship agreement between the united nations" in Arabic' Reverso Context
<<https://context.reverso.net/translation/english-arabic/relationship+agreement+between+the+united+nations>>accessed on 27 February 2019.

¹³⁷ Otto Triffterer, Kai Ambos, 'Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article', (e.d, Hardback 2016).

¹³⁸ See Preamble of the Rome Statute, paras. 7 and 9.

¹³⁹ 'THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND THE UNITED NATIONS' (2009) the War Crimes Research Office American University Washington College of Law

Article 2, it is mandated that the court needs to come to an agreement with the UN which is adopted by the satisfaction of both institutions under the title of the relationship agreement in October 2004. Despite Article 2, Rome statute includes many provisions which determine the relationship and cooperation between both institutions. But it should be mentioned that two important themes illustrated in both the ICC-UNs relationship agreement and Article 2 of the court's Statute. The first of these themes is the ICC reminds such an independent judicial body from the UN in spite of the strong cooperation and relation between them. The second theme is that the creation and existence of the ICC bring the bound principles for the UN to cooperate and works with the court also support it.¹⁴⁰ Moreover, the Relationship Agreement was held to respecting the sovereignty and confidentiality of both organizations as well as reflects an accurate equilibrium between independence and collaboration.¹⁴¹ Particularly, the relationship agreement provides the detail information for both institutions in a broad spectrum of matters, inter alia, the issue of transferring the referral matter by the UNSC and request for deferral, also the issue which the court should inform the security council in the cases which the court fails to cooperate with its request to the states which has the link to the issues. Moreover, the agreement addresses the issues of confidentiality protection, immunities, and privileges. It should be mentioned that one of the most important aspects of the relationship between two institutions was the UN's cooperation with its offices, funds, and programs as well as the ICC. The experts worked in collaboration for peace keeping and ensuring human rights that also helped them to gather more information that can be used as an experience to develop further strengthening policies. The

<<https://www.wcl.american.edu/impact/initiatives-programs/warcrimes/our-projects/icc-legal-analysis-and-education-project/reports/report-8-the-relationship-between-the-international-criminal-court-and-the-united-nations/>> accessed on 27 February 2019.

¹⁴⁰ Rome Statute of the International Criminal Court

¹⁴¹ See the Preamble of the Rome Statute of the International Criminal Court, which recognizes that "such grave crimes threaten the peace, security and well-being of the world," and the Preamble of the Charter of the United Nations, which pledges to "unite our strength to maintain international peace and security."

representatives of peace keeping and the peace keepers also developed agreements and interactions for more sustainable operations.¹⁴²

3.2 Mutual Cooperation between ICC and the UN

The cooperation and support with the ICC by the UN included a wide degree of grounds which is determined by details in relationship agreement. The agreement between two institutions was the result of the struggling of both sides persuading to Article 2 of the Rome statute to cooperating and working with each other. Moreover, according to the mentioned article the UN should support and cooperate with the court also to determine the court as an autonomous organization.¹⁴³ Moreover, in Article 2, paragraph 1 of relationship agreement it provided that the UN admits the court as an organization which has the international personality according to Articles 1 and 4 of the Statute of the creation of the ICC. The mentioned article could be persuaded as the most important provision in the relationship agreement which has an important influence to strengthen the exercise function and action of the court.¹⁴⁴ It should be mentioned that in 2005 the office of legal affairs was designed by the secretary-general of the UN as the focal point for the issue and matter with related to the cooperation between the UN and ICC. The mentioned office was shaped to ensuring liability for the most brutal crimes which are the war crime, aggression, genocide, and crimes against humanity according to Article 5 of the Statute of the ICC.¹⁴⁵ The supporting and cooperation from the UN to the ICC includes many fields which divided into four parts according to provisions of the relationship agreement;

¹⁴² 'Best Practices Manual for United Nations – International Criminal Court Cooperation pursuant to The Relationship Agreement between the United Nations and the International Criminal Court (entry-into-force 4 October 2004) and General Assembly resolution 58/318' (26 September 2016) < http://legal.un.org/ola/media/UN-ICC_Cooperation/Best%20Practice%20Guidance%20for%20UN-ICC%20cooperation%20-public.docx.pdf> accessed on 27 February 2019.

¹⁴³ Article 2 of the Rome Statute.

¹⁴⁴ Article 2 of the relationship agreement between ICC and UN.

¹⁴⁵ Mr Miguel de Serpa Soares, 'The United Nations and the International Criminal Court Partners of Shared Value Statement' (2014) UNITED NATIONS OFFICE OF LEGAL AFFAIRS< http://legal.un.org/ola/media/info_from_ic/mss/speeches/MSS_Intl_Crim_Justice_Day_10th_anniv_UN-ICC-RA-17-July-2014.pdf > accessed on 3 February 2019.

that includes cooperation and judicial assistance, institutional relations, general provisions, and final provisions.¹⁴⁶

The Institutional relation of the ICC-UN

Mutual representation

The secretary general of the UN should be invited to the public hearing in the chamber of the court also to any public meetings which are related to the interest of the UN; according to the Rules of Procedure and Evidence which are the applicable provisions of the court. Moreover, the UN may invite and give the capacity of observation to the ICC to attend and contribute in the work of the UNGA. It should send invitations to the court for the conferences and meetings of the UN when the observing is allowed also in the issues related to the court. Similarly, the court should be invited to the UNSC in the case that is relevant to the jurisdiction of the ICC to attend the court's president or the court's prosecutor as the assistance of the matter.¹⁴⁷

Information Exchange between two organizations

In spite of other provision which set as possible as close the cooperation between both institutions, the court and the UN should cooperate as a partner and work in order to exchange and transfer the document and information in the matters which related to mutual interest. In order to succeed the mentioned process, the following steps should be taken:

Firstly; the Secretary General of the UN shall transfer wholly information that related to the development of the statute to the court. Also, transfer the information related to the agreements that secretary-general is the depositary of those agreements or depositary of the statute. Also, inform the court about the articles which related to the review of the conferences that noted in article 123 paragraphs 1 and 2. Additionally, inform the court about any amendments that related to article 121 of the court's

¹⁴⁶ William A. Schabas, 'The International Criminal Court: A Commentary on the Rome Statute' (second edition, Oxford University Press, New York 2016) 102.

¹⁴⁷ The relationship agreement between ICC and UN; article 4.

Statute which noted in section 7 of the mentioned article of the Statute. Furthermore, the court's responsibility is to transfer any information about the act of the court which include; the pledging oral proceeding and hearing of the court as well as, any evidence and proving information about the cases that relates to the personal of the UN or the cases which result of death or injuring by using the flag or uniform of the UN that mentioned in; article 16, 17, or 18, section 1 or 2, of the relationship agreement.

Secondly, both of organizations should struggle and make effort to get close to each other as much as possible and try to donate the valid and utilizable information which related to mutual interest to each other according to provisions that mentioned in the current agreement.¹⁴⁸

Agenda items and Reports to the United Nations

On agenda item which is the ICC's report to the UNGA, the member states of the UN consult annually to adopt a resolution as a framework to continue the cooperation between ICC and UN. Also, it motivates and facilitates the conclusion of supplementary agreements and arrangements, as required. The mentioned annual resolution is not specifically for cooperation of ICC with UN, but as well as for cooperation and working between the state parties and non-state parties also regional and international organizations and the ICC.¹⁴⁹ Furthermore, According to Article 6 of the relationship agreement, the general assembly resolution invites the ICC to prepare and submit the report of working and activities for the whole year. Under the cover of a note by the Secretary-General, the mentioned report will be conveyed. Moreover, the UNGA might be invited by the General Assembly to arrange and submit two types of the report according to the cooperation principle between both institutions; one of these reports is the report which connection with assistance

¹⁴⁸ 'United Nations Juridical Yearbook 2004'(United Nation, New York 2007), Article 121and 123 of Rome Statute, Article 5 of the relationship agreement between ICC-UN.

¹⁴⁹ 'ICC-ASP/17/Res.5 Strengthening the International Criminal Court and the Assembly of States Parties' (2018) ICC-ASP < https://asp.icc-cpi.int/iccdocs/asp_docs/ASP17/RES-5-ENG.pdf > accessed on 3 February 2019.

provided to the ICC on reimbursements received and expenses incurred by the UN. Another one is the Report on the application of Article 3 of the ICC-UN Relationship Agreement. The application of Article 3 of the agreement includes the matter and activities that related to the cooperation between both of them such as meetings that held between UN officials and persons that ICC demand them and made the decision to arrest them.¹⁵⁰

Cooperation in matters related to administration and personal arrangements

In the field of administration, both institutions agreed to counsel each other from time to time about the issues related to mutual interest. such as; the issue of officers and staff, including conditions of service, salary scale and allowances, the duration of appointments, classification, staff rules and regulations and pension and retirement rights. In order to get the result about the mentioned matter, both institutions may use of the facilities, staff and services can also be interchanged between each other for maximum level of cooperation.¹⁵¹

Providing Services and facilities

According to the request of the court, the UN agrees to provide as much as possible of service and facility to the court which may include; the translation, interpretation also the conference and document service. Moreover, it may request meetings of the ASP, its Bureau, or subsidiary entities. In case if the UN is not capable to provide those facilities it should clear the reason for that.¹⁵²

“Laissez-passer”

Following the court Statute's Article 44 and also according to section 3 of the Appendix of ICC-ASP/2/Res.3 Resolution, the court has the right to utilize the UN's laissez-passer as a valid travel document in case that related to the court's issue. So

¹⁵⁰ Article 3, 6 and 7 of the relationship agreement between ICC and UN, 'Report of the Court on the status of ongoing cooperation between the International Criminal Court and the United Nations, including in the field' (2013) Assembly of States Parties <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-42-ENG.pdf> accessed on 3 February 2019.

¹⁵¹ Article 8,9 of the relationship agreement between UN-ICC.

¹⁵² Article 10 of the relationship agreement between ICC-UN.

according to the mentioned provision, the privilege and immunity includes the presidency staff and staff of chambers of the court also the personnel of secretary of the assembly of the parties.¹⁵³

The financial subject between two organizations

As determined in the court Statute's Article 115 which mentioned the UN as one of the financial sources for ICC, also according to Article 13 of the ICC-UN relationship agreement, cost and expenses which are provided to the court should be separately arranged by UNGA by request of register organ. Furthermore, according to mentioned article paragraph 2, the UN may provide financial and fiscal advice and counsel to the court by request of the court to the UN.¹⁵⁴

Cooperation of both institutions in the field of judicial assistance

One can say that judicial assistance and cooperation could be a major and important development in the provision of the relationship agreement between ICC-UN. As pursuant in article 87(6) in the court's Statute the court has the right and capacity to request the document or information and request to provide judicial assistance from any intergovernmental organizations which are in accord with its capability and mandate.¹⁵⁵ Moreover, in cases which disclosing of the information and document or provisions of UN could be the fact of danger to the current or previous personnel of UN or any other organ of the organization, the court may apply the measure of protection to that document and information by request of the UN.¹⁵⁶

¹⁵³ Flavia Lattanzi, William Schabas, 'Essays on the Rome Statute of the International Criminal Court' (ed, il Sirente, 2003), 'ICC-ASP/2/Res.3 Establishment of the Permanent Secretariat of the Assembly of States Parties to the International Criminal Court' (2003) ICC-ASP < https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP2-Res-03-ENG.pdf> accessed on 3 March 2019, Article 44 of the Rome Statute.

¹⁵⁴ Katarina Uhalova, 'The Financial Challenges of the International Criminal Court' (2013) Quid Justitiae < <https://www.quidjustitiae.ca/blogue/financial-challenges-international-criminal-court> > accessed on 4 March 2019.

¹⁵⁵ The Rome Statute; Article 87 paragraph 6.

¹⁵⁶ The relationship agreement between ICC-UN; Article 15 paragraph 3.

Testimony to the court by the staff of the United Nation

According to the provision of the ICC-UN relationship agreement, the court has the authority to request to the United Nations personnel and office workers to present and testimony in front of the court. It could be mentioned that the same provisions mentioned that the Secretary General of UN may set an official of the organization as a representative of the organization to present as witness in the court.¹⁵⁷ Moreover, the privilege and immunity of the United Nations official workers and any organ of the UN should be protected according to the Privileges and Immunities Convention of the UN. But in circumstances of death and injuring that happened by the UN personnel against others under the ICC's jurisdiction, in such cases the UN has given the authority to the court to apply its jurisdiction after the court announced the UN about the mentioned cases.¹⁵⁸

Protection of confidential information between both organizations

As stated in the provision of relationship agreement and as we mentioned the main responsibility of UN is bind to cooperate and provide the document and information to the court by the request of the court. But in a case when the court demand information from each of United Nations organ, discloses of this information to others should be by consent of that organ. If the organ declared that the provided information and document should be undisclosed the court should follow that request and apply the principle of protection of confidentiality which mentioned by a separate provision in the relationship agreement.¹⁵⁹

¹⁵⁷ Paul C. Szasz, 'The UN and the ICC: The Immunity of the UN and Its Officials' (2001) LJIL <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/2C1FA9A9448918D0D4093BC398A0BB39/S0922156501000413a.pdf/un_and_the_icc_the_immunity_of_the_un_and_its_officials_in_memoriam_paul_c_szasz_19292002.pdf> accessed on 4 March 2019.

¹⁵⁸ Relationship agreement between ICC-UN; Article 16, 19.

¹⁵⁹ 'Draft Relationship Agreement between the Court and the United Nations' (2004) ICC-ASP/1/3, 243 <http://legal.un.org/icc/asp/1stsession/report/english/part_ii_g_e.pdf> accessed on 4 March 5, 2019.

The cooperation between prosecutors of the ICC and the UN

The UN pursuant to its competence and roles under the chapters and provisions of the UN, in binding to cooperate with the prosecutor's office as well as the ICC's prosecutors, according to the provisions of the court's Statute that has given the authority to the court to; demand the information and documents from any organs of the UN in case of needed to improve and find new evidence to the cases. So to get such documents and information; the request of the prosecutor should be transferred to the UN's Secretary-General and then from the Secretary-General to the organs. In order to arrange such cooperation, the united nation and the court agreed on that which the United Nation and organs that included; provide the document, information and any other facilities to the prosecutors in case of necessary, according to the request of the prosecutors of the court that mentioned in Article 54 of Rome Statute. Furthermore, according to Article 15 section 2 of the court's Statute, the court shall be bound to protect the documents and information from the disclosing for another organ of the court or any other organization or third party states before the consent of the United Nations. Moreover, as we mentioned before the court should apply the principle of confidentiality in case that the demanded documents and information could threaten to the current system of the United Nation or threaten to the present or previous office workers in the UN.¹⁶⁰

"To date, the United Nations has provided a wide range of administrative and logistical assistance including:

- i. Meeting-related services (e.g. for meetings of the ASP)
- ii. Telecommunication services
- iii. Air and ground transportation services
- iv. Storage of Court-owned equipment
- v. Temporary overnight accommodation
- vi. Assistance with entry and exit formalities

¹⁶⁰ William Schabas, 'The International Criminal Court: A Commentary on the Rome Statute' (Oxford University Press, 2010) the Rome Statute; Article 54, 15.

- vii. Assistance in arranging rental agreements, and shipping contracts
- viii. Engineering and construction services
- ix. Training for Court staff
- x. Office space
- xi. Maintenance of court-owned vehicles
- xii. Cartography and satellite imagery
- xiii. Sale of petrol, oil and lubricants (POL), water, meals-ready-to-eat (MRE), Post-Exposure Prophylaxis (PEP) kits, etc.
- xiv. Medical services”¹⁶¹

Last but not least the court is highly appreciated by the resent cooperation and support of the UN. Because as we mentioned before the UN and the organs that included in; are the supporters and the source of the power of the court's activity. Moreover, the mentioned agreement was a highly important and effective step in regard to giving the legal cover to the ICC and its statute and to success the court in the practice steps.¹⁶² Furthermore, the hope and expectations of the court are continuations of the cooperation and support from the UN and its organs according to mentioned agreement, as well as the member state of the court and the member states of the UN; to more cooperation with the court in order to maximize the cooperation level as much as possible in the future relationship between two organizations.¹⁶³

¹⁶¹ ‘Best Practices Manual for United Nations – International Criminal Court Cooperation pursuant to The Relationship Agreement between the United Nations and the International Criminal Court (entry-into-force 4 October 2004) and General Assembly resolution 58/318’ (26 September 2016) <http://legal.un.org/ola/media/UN-ICC_Cooperation/Best%20Practice%20Guidance%20for%20UN-ICC%20cooperation%20-public.docx.pdf> accessed on 27 February 2019.

¹⁶² Report of the Court on the status of ongoing cooperation between the International Criminal Court and the United Nations, including in the field’ (2013) Assembly of States Parties <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-42-ENG.pdf> accessed on 3 February 2019.

¹⁶³ Hans-Peter Kaul, ‘Developments at the international criminal court construction site for more justice: the international criminal court after two years’ (2005) 99(2), Cambridge University Press.

3.3 The Security Council's Operation with ICC

According to UN charter, the UNSC the most powerful and main organ to maintain the security and peace in the world.¹⁶⁴ Also, according to paragraph 1 of the UN charter's Article 24, the UNSC is the initial and the main responsible organ in the UN to deal with the peace and security in the world.¹⁶⁵

The relation between UNSC and ICC was the main and most negotiation part in debates on creating the court's Statute.¹⁶⁶ The relationship link between ICC as a judicial organ and the UNSC as a political organ is the matter of keeping the world's security and peace via the peacekeeping process of the UN. Also, the UNSC has experience in this regard particularly in creating the ICTR and ICTY and recently the ICC. But the main difference between the recent court with previous ones was the independence of the recent court because the council have not had any role of creating the court, unlike both previous tribunals which created by the UNSC. Maintain peace for the world through the peacekeeping process is the main object of both ICC-UNSC institutions.¹⁶⁷ Regarding the creation of the relationship between ICC and UNSC during the debates which held regarding creation of the ICC-UN relationship agreement; on 8 Nov 2012 the Permanent Mission of Liechtenstein to the UN and the IPI held the meeting in order to; get agree on the relationship between ICC and UNSC and to set some principles for working both institutions with each other and to provide the support and facilitate to the court by the UNSC. The meeting couldn't get the consent of all present members, in spite of that, it was a good event regarding the peacekeeping process because the meeting collected all ICC member states and the other states that interested about the work of the court. In the mentioned meeting some recommendations were proposed to both institutions in

¹⁶⁴ Article 1 of the united nation charter.

¹⁶⁵ DANN MWANGI, 'Deferral and Enforcement Powers of the United Nations Security Council under the Rome Statute: A Case Study of Kenya' (2017) 4(7) International Journal of Education and Research < <http://www.ijern.com/journal/2016/July-2016/02.pdf>>accessed on 12 March 2019.

¹⁶⁶ ZHU Dan, 'Who Politicizes the International Criminal Court?'(Torkel Opsahl Academic E-Publisher , 2014) 141.

¹⁶⁷ Vera Gowlland-Debbas, 'The Relationship between the Security Council and'(2001) Global Policy Forum < <https://www.globalpolicy.org/component/content/article/164/28588.html>>accessed on 12 March 2019.

order to cooperate with each other regarding to the provisions and articles of the court's statute which demonstrates the UNSC working with the court.¹⁶⁸

The UN gives the authority to the UNSC inside its provision sections to keep peace and security in the world if there is any threat to world's peace and security. Under chapter seven of the UN charter's Article 39, the act of UNSC provides authority to UNSC to deal and interfere to all situations and cases around the world, in a case when the council notes that there is a menace to the peace and safety of the world. Moreover, Article 41, 42, 43 of the mentioned chapter gives more authority to the UNSC to use the power of demonstrations, blockade or air and sea force power, also to request the members of UNSC to support and prevent facilities in order to interfere and deal with situations that threaten to security and peace of the world.¹⁶⁹ One can easily note that there is a link between ICC and the UNSC regarding the peacekeeping process by notes to Article 5 of the court's Statute. Because the four crimes stated in this article are determined as the most atrocity crimes which are under the ICC jurisdiction also are the crimes which intimidate the world's safety and peace.¹⁷⁰ According to the crimes that are under the ICC; one can note that in spite of justice the other main subject of the ICC is peace to the world and it has the same object as the UNSC to keep the security and peace in the world through the peacekeeping of the UN.¹⁷¹

¹⁶⁸ 'The Relationship Between the ICC and the Security Council: Challenges and Opportunities' (2013) International Peace Institute (IPI) <<https://www.ipinst.org/2013/03/the-relationship-between-the-icc-and-the-security-council-challenges-and-opportunities>>accessed on 12 March 2019.

¹⁶⁹ LAWRENCE MOSS, 'The UN Security Council and the International Criminal Court Towards a More Principled Relationship' (2012) Friedrich-Ebert-Stiftung< <https://library.fes.de/pdf-files/iez/08948.pdf> >accessed on 12 March 2019.

¹⁷⁰ Article 5 of the Rome Statute of the creation of the ICC.

¹⁷¹ 'The UN Security Council and the International Criminal Court: How Should They Relate? Report of the Twenty-Ninth United Nations Issues Conference' (1998) The Stanley Foundation < <https://www.stanleyfoundation.org/publications/archive/Issues98.pdf> >accessed on 12 March 2019.

The UNSC's power under the ICC

The Power of Referral

The UNSC has been authorized by the court to exercise its jurisdiction and to act under the laws of the United Nation and according to Article 13 paragraph (b). When one or more international crimes which are specified in the court Statute's Article 5 are perpetrated, then the court can act under the mentioned article to exercise the jurisdiction. The main object of the mentioned article is to support the peacekeeping process of the UN. Moreover, pursuant to Article 17 paragraph 1 of the relationship agreement between ICC-UN; the UN has authorized the UNSC to act according to chapter seven of the UN charter. Furthermore, according to the UN's chapter seven, the UNSC has the authority to send the cases to the ICC; in the cases when one or more crimes that are determined in the Rome Statute's Articles 5, 6, 7, and 8 have been committed by the states irrespective of whether the states are the members of the ICC or not.¹⁷² The referral process of the UNSC will be explained with case laws and details in chapter four of the research.

The power of Deferral

According to the court Statute's Article 16, the UNSC has been authorized to defer the investigation process and the prosecutor's act of the court or to postpone all investigation process of the court for the interval of 12 months with the right of renewable the deferral period, after the UNSC approve the resolution of the criminal cases in the council.¹⁷³

The Power of Enforcement

According to section 5 (b), the statute's Article 87, the UNSC has the power to enforce the ICC's non-member states if the states have an arbitrary arrangement or any other agreements with court and refuse to collaborate with court, in these cases the UNSC should support the ICC and enforce those states to participate with the

¹⁷² Article 13,5,6,7,8 of the Rome Statute of the creation of the ICC, Article 17 of the relationship agreement between ICC-UN, chapter seven of the UN charter.

¹⁷³ Article 16 of the Rome Statute of the creation of the ICC.

court. Moreover, according to the same article in section 7; in the referral of non-member state criminal cases to the court by the UNSC, when the court's non-member states refuse to collaborate with the court, the UNSC has the power to enforce those states to collaborate with the court.¹⁷⁴

Aggression crime

According to Article 5 section 2 of the ICC's statute; the UNSC is responsible to decide whether the aggression act occurred or not in the case when the court exercises its jurisdiction because it demonstrates as the precondition for the court to practice its jurisdiction in cases of aggression crimes.¹⁷⁵

¹⁷⁴ Article 87 of the Rome Statute of the creation of the ICC.

¹⁷⁵ Article 5 of the Rome Statute of the creation of the ICC.

CHAPTER 4

THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

4.1 The Jurisdiction of the ICC

To determine the scope of the ICC's authority, the term of jurisdiction was utilized in several places in the court's Statute for various meanings. The matter of jurisdiction was the essential legal matter which determined by the ICC to punish the international perpetrators. Also, one of the most significant aspects of the Statute is the nature of the mentioned statute like a constitutive document to merge each of jurisdictions, adjudicate and enforcement together. In this regard may be the implementation of the jurisdiction of the court and its implications are the most revolutionary features.¹⁷⁶

The capacity of the ICC to jurisdiction is not included all crimes and is not included all criminals like the group of rebels, political organizations, states, etc.¹⁷⁷ But the ICC's capacity to jurisdiction over the criminal cases according to Article 5 of the court's Statute is restricted to the harshest crimes in the world which determined by details in Article 6 to 8 as the subject matter of the jurisdiction of the court.¹⁷⁸ Moreover, the jurisdiction of the court is applying on the individuals who committed international crimes directly or indirectly which determined on Article 5 to 8 of the Rome Statute.¹⁷⁹ In this regard pursuant to crimes that stated in Article 5 each of the state party, UNSC and the prosecutors could refer the criminal cases to the court following the Statute's Article 53. Also, it should be mentioned that any act of the court should be by the complementarity principle of the court, so without applying this

¹⁷⁶ Felix E Eboibi, 'Jurisdiction of the International Criminal Court: Analysis, Loopholes and Challenges' (2012) 3 AJOL.

¹⁷⁷ Felix Mukwiza NDAHINDA, 'Considerations on the ICC exercise of jurisdiction in the light of past International Criminal Law experience' (master thesis, Lund University, spring 2008).

¹⁷⁸ Eileen Skinnider, 'ENSURING THE INDEPENDENCE OF THE INTERNATIONAL CRIMINAL COURT' (2006) International Centre for Criminal Law Reform and Criminal Justice Policy <<https://icclr.law.ubc.ca/wp-content/uploads/2017/06/ES-paper-ICC-and-China.pdf> > accessed on 15 March 2019.

¹⁷⁹ Gwen P. Barnes, 'The International Criminal Court's Ineffective Enforcement Mechanism: The Indictment of President Omar Al Bashir' (2011) 34(6) Fordham International Law 147.

principle, the ICC is not able to apply its jurisdiction on any criminal cases.¹⁸⁰ As we mentioned before there are some elements that the court have to follow it under the proses of preliminary examination as the precondition to decide whether the referral of criminal cases are under the court's jurisdiction or not. These elements include the importance of the crimes, the justice interest by the national court, the Temporal, individual, Local, Subject matter of the jurisdiction. These are the main elements which are applied by the court to all criminal cases which referred to the court to decide whether the court has the capacity to judge the criminal cases or reject them.¹⁸¹ Articles 15(3), 53(1), 17, 18, 11, 19, 24 of the Rome statute are explaining by details the issue of elements as the preconditions of the jurisdiction of the court. Furthermore, according to provisions that stated in the Rome Statute, the jurisdiction of the court is divided into two kinds of jurisdictions which are; the territorial jurisdiction; that means the capacity of the court to judge the criminals on the place of member states of the court and non-territorial jurisdiction; which means the capacity of the court to judge the criminals in all states or by the other meaning the court's jurisdiction to the court's non-member states, as it is explained below pursuant to articles that are stated in the Rome statute.¹⁸²

4.1.1 Territorial Jurisdiction

The ICC has jurisdiction influence to Article 4(2), 12 of the court's Statute over the states who are members of the treaty of Statute of the court. As a general rule, whenever a state ratifies the principles and the rules of this statute it becomes an ICC member. Therefore, the ICC has capacity to apply the jurisdiction over every member of the state. The court also has authority to investigate about every violation which is perpetrated in the territory of those court state parties.¹⁸³ Moreover, based on Article 12 (2), the court has jurisdiction over that vessels and aircrafts. These are the state of

¹⁸⁰ Schabas William A & Bernaz N, 'Routledge Handbook of International Criminal Law' (2nd ed, Routledge 2011) 27.

¹⁸¹ 'Report on Preliminary Examination Activities 2014' (International Criminal Court, 2 December 2014) < <https://www.icc-cpi.int/iccdocs/otp/otp-pre-exam-2014.pdf> > accessed on 15 March 2019.

¹⁸² Rome Statute, arts 12, 13, 16.

¹⁸³ Rome Statute, arts 4 (2), 12.

registrations are the member states of the court's state and that the accused person is a national, so every crime that determined in Article 5 that committed in the mentioned places should be under the jurisdiction of the ICC.¹⁸⁴ As well as based on the court Statute's Article 14, every member states of the court can refer the criminal cases to the court and the court should investigate and use the legal power of the court and act in regard to prosecute the perpetrators of the criminal cases based on the court Statute provisions.¹⁸⁵

4.1.2 Non-territorial jurisdiction

In spite of territorial jurisdictions, there are three additional situations of non-territorial jurisdiction which ICC has the authority to apply the jurisdiction of the court over non-member states in the ICC, as well. Below are the three situations:

First, if a non-member state commits crime that demonstrated in Article 5 of the Statute and then on its own, the situation will be referred to the court.

Second, if those violations committed by the non-member states are against one of the ICC's member states, in this situation the ICC also has jurisdiction over the non-member states to take the investigation for those violations.

Third, if any non-member of court's statute countries commit a national or international serious violation of the international criminal law, also in this situation the ICC has jurisdiction over the non-member states to take the investigation and prosecute the criminals, this can be done only when the security council's referral get a complete vote during the referral resolution of criminal situations to the court according to the chapter seven of the United Nation charter and Article 13(b) of the court's statute.¹⁸⁶

4.2 Crimes within the ICC's Jurisdiction

While determining the type of crimes which the court should prosecute and had the jurisdiction over them, during the negotiation that held to creation the court; the

¹⁸⁴ Rome Statute, arts 12(2).

¹⁸⁵ Rome Statute, arts 14.

¹⁸⁶ Rome Statute, arts 12, 13(b).

ICC was the result of long experience in the previous conventions, tribunals like serious breaches of common Article 3, grave violation of the Geneva Conventions, and other sources of struggle of the international community; regarding to prosecute the perpetrators of international crimes that intimidate the world's safety and peace.¹⁸⁷ In this regard, the ICC provides a judicial mechanism to punish the gravest international crimes which are determined by the international community among the Rome conference of the creation of the court. The crimes determined in Article 5 under the title of subject matter includes; the genocide crimes, war crimes, aggression crimes, and crimes against humanity, which are divided on a wide range of crimes that includes nearly fifty offences explained by details in Article 5 to 8 of the statute; as the most and dangerous crimes as threaten against the international community by the consent of most community of the world.¹⁸⁸

4.3 The Jurisdiction of the Court over the Non-member States of the court

32 out of 139 of states that signed the treaty of Rome statute were not ratified the agreement and some states were not signed the mentioned agreement, among them there were three power states that have an essential influence to empower the court; such as the US as a unsigned state to the agreement, Russia and China as states that signed but was not ratified the agreement. Regarding the matter of signing the agreements; pursuant to the Vienna convention of international treaties; the unsigned states to the international agreements obligated to do not act any action to ban or defeat the object and purpose of such agreements. Also regarding this matter in the provisions of the court statute particularly in Article 87 declared that the non-member states obligate to have cooperation with the ICC after cooperation request from those states by the court and by the consent of such states.¹⁸⁹ Furthermore, regarding the issue of cooperation of non-member states to the court in case of non-cooperation

¹⁸⁷ Cryer R, Friman H, Robinson D & Wilmschurst E, *An Introduction to International Criminal Law and Procedure* (2nd ed, Cambridge University Press 2010) 121.

¹⁸⁸ Marchuk I, 'The Fundamental Concept of Crime in International Criminal Law: A Comparative Law Analysis' (Springer, 2014) 130.

¹⁸⁹ Andrew Morgan, 'Non-Signatory Countries' (JURIST Legal News & Research Services, JULY 20, 2013) 71.

with the court by those states and does not consent about that, the court statute's provisions declared that matter especially in Article 87, section 5 (b), and 7; has provided the UNSC with the power, and the UNSC was authorized for the matter of cooperation to enforce those states to have cooperation with the ICC regarding to request of the court about the cooperation.¹⁹⁰

The issue of jurisdiction and the question about this matter which to what extent the ICC has jurisdiction over nationals and non-member states territory; creates a genuine dilemma because there are disagreements between states about the mentioned issue.¹⁹¹ The non-member states to the ICC and the states who are against the act of the court particularly the US, China, and India are criticizing the court's action; especially under article 12 of the court's Statute which exclusive to the application of the court's jurisdiction over non-member states; to refer the criminal cases by the resolution of the UNSC to the court without those states consent. Those states more persuaded that the act of the court under the mentioned article is a violation act to the law of treaties which stated in the Vienna Convention's Article 34; which definite that under the international law; the third parties of the treaties will not bind to treaties without their consent. The legal disagreements between the court and the Non-members to the court make some difficulties to the act of the court.¹⁹² Furthermore, Article 98 is another point of disagreement between the ICC and the US as a non-member state; regarding the legality of the bilateral agreement that held by the US under the title of; Article 98 agreement" or "US Bilateral Immunity Agreements". The agreement was held by the request of the US to its allies to non-surrender the US accused members to the ICC. Moreover, after holding the agreement it was criticized by the ICC and commentators who support the court;

¹⁹⁰ Article 87, paragraph 5, 7 of the Rome Statute of the creation of the ICC.

¹⁹¹ Morris, M, 'The Jurisdiction of the International Criminal Court over Nationals of Nonparty States (Conference Remarks)' (2000) 6(363) ILSA Journal of International & Comparative Law <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2746&context=faculty_scholarship> accessed on 6 January 2019.

¹⁹² Steven W. Becker, 'THE OBJECTIONS OF LARGER NATIONS TO THE INTERNATIONAL CRIMINAL COURT' (2010) 81 International Review of Penal Law 47 <[file:///C:/Users/h/Downloads/RIDP_811_0047%20\(2\).pdf](file:///C:/Users/h/Downloads/RIDP_811_0047%20(2).pdf)> accessed on 21 March 2019.

because legal experts persuade that the misusing of article 98 by the US as a tool that the US is using to shield the citizen of USA and troops. The court has used the Article 98 to prevent the legal conflicts may arise in the future because some states had the previous agreements to send the criminals to the court without the states' consent that the accused is its citizenship.¹⁹³ According to the mentioned article which stated in the Rome statute the surrender of criminals will not be possible before the consent of the third parties and cooperation consent of the second parties. The US has persuaded the legality of the agreement pursuant to Article 98. Whereas, on other side; the ICC has persuaded the illegality of the agreement referring to the statute's Article 27 which states that no immunity exists could ban the act of the court. Another accusing of the illegality of the US agreement by the ICC is the period of the mentioned agreement because the ICC declared that the article which the US used as the source of the agreement was specialized for previous agreements, not recent agreements. Nowadays a lot of non-member and member states of the ICC have signed this agreement with the US, and till now the matter of legality or illegality of the declared agreement is continuing between commentators and remained ambiguous. But the only clear thing is the ICC members that signed this agreement remains bound to the principle of the ICC according to the court Statute's provisions.¹⁹⁴ It seems the statute of the Rome conference which was the foundation of the court has missed a number of opportunities regarding the languages and the type of script, so as to prove that which of the court's acts to non-member states, under Article 12, are legal in the international laws. In this regard, the essential act for the court to do is to completely explain the answer to the questions about how and why the act of the

¹⁹³ 'US BILATERAL IMMUNITY AGREEMENTS OR SO CALLED "ARTICLE 98" AGREEMENTS' (2012) factsheet <https://eradicatingecocide.com/wp-content/uploads/2012/06/CICC-BLAs_QA_current.pdf>accessed on 23 March 2019.

¹⁹⁴ Anna Rosén, Veronica Jorméus Gruner, 'Article 98 Agreements: Legal or Not?' (Bachelor Dissertation, University of Örebro 2007), Verónica Torres Marengo, 'UNITED STATES' SPECIAL AGREEMENTS: CONSISTENCY WITH THE OBJECT AND PURPOSE OF THE ROME STATUTE' (2008) <http://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S0121-86972008000100009>accessed on 23 March 2019.

court under the mentioned article is legal in the international laws.¹⁹⁵ Since the act of the court under the mentioned article makes the possible ways for the international community to act against the impunity of criminals. moreover, the court's jurisdiction over the accused individuals in the non-member states territory and binding those states to have cooperation with the court; is considered an essential attempt regarding peacekeeping proses of the UN through the UNSC cooperation with the ICC.¹⁹⁶ Furthermore, the court clearly has full jurisdiction over the territory of state parties over crimes that determined in the court's statute with conditions that are mentioned in the court's statue and by applying the principle of complementarity. Moreover, some provisions in the court's statute provide such authority to the court to apply the jurisdiction over non-member states to the court in some special circumstance, particular in article 12 and 13.¹⁹⁷

The special circumstances and preconditions which allow the court to apply the jurisdiction over nationals and territory of non-member states to the court pursuant to the statute are the followings;

According to the court Statute's Article 12, the nationals and non-member states of the court are given the right to request the court to juristic over the territory of revealed states referring to crimes that mentioned in the court Statute's Article 5. According to the declared article particular in "Rule 44 Declaration provided for in Article 12, paragraph 3" when the non-member states admit the court's jurisdiction, the state will be binding to fully collaborate with the ICC, and the court will uses its jurisdiction to examine and prosecute the committers of crimes that are mentioned in the court Statute's Article 5, rather the criminal cases referred by the states itself or by

¹⁹⁵ Cormier, Monique, 'The jurisdiction of the International Criminal Court over nationals of non-party states'(PhD thesis, University Library 2017).

¹⁹⁶ Tamás Lattmann, 'Situations Referred to the International Criminal Court by the United Nations Security Council – "ad hoc Tribunalisation" of the Court and its Dangers' (2016) Pécs Journal of International and European Law 68.

¹⁹⁷ Judge Antoine Kesia-Mbe Mindua, 'PRESIDENT OF THE PRE-TRIAL DIVISION' (2018) ICC-RoC46(3)-01/18-1 09-04-2018 2/31 NM PT < https://www.icc-cpi.int/CourtRecords/CR2018_02057.pdf>accessed on 21 March 2019.

the prosecutor investigation process of the court.¹⁹⁸ The court's experience regarding the mentioned article in Palestine can also be of example. The government of Palestine on 13th June 2014 requested the court to apply the jurisdiction over the territory of declared state regarding violation which perpetrated in the territory of the occupied Palestinian including East Jerusalem.¹⁹⁹ Also, Uganda was another example regarding this issue.²⁰⁰

Article 13 of the Statute has given the authority to the UNSC pursuant to chapter seven of the peacekeeping process of the UN to act and refer the criminal cases to the court for cases that have one or more crimes stated in Article 5 committed by those states. And it should be mentioned that all the court's action will be by the principle of complementarity without applying this principle the court cannot apply its jurisdiction rather over member states or non-member ones.²⁰¹ Referring the situation of Libya and Sudan by the resolution of the UNSC to the ICC are the essential examples to the court's experience regarding the mentioned article.²⁰² In the declared circumstance, the UNSC plays the essential roles to refer those matters to the court; because as we mentioned earlier the ICC will not be able to apply its jurisdiction over the court's non-member states deprived of the UNSC's power and support.²⁰³

¹⁹⁸ Dominik Zimmerman, revised by Mark Klamburg, 'ICC Commentary (CLICC) » Commentary Rome Statute » Commentary Rome Statute: Part 2, Articles 11-21'(2016) Case Matrix Network < <https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-2-articles-11-21/>>accessed on 21 March 2019., William A. Schabas, 'THE INTERNATIONAL CRIMINAL COURT AND NON-PARTY STATES'(2010) Vol. 28(1), Windsor Yearbook of Access to Justice 1.

¹⁹⁹ 'Preliminary examination Palestine Ongoing' (ICC,n.d)< <https://www.icc-cpi.int/palestine>>accessed on 21 March 2019.

²⁰⁰ William A. Schabas, 'THE INTERNATIONAL CRIMINAL COURT AND NON-PARTY STATES'(2010) 28(1) Windsor Yearbook of Access to Justice 1.

²⁰¹ Zhu Wenqi, 'On co-operation by states not party to the International Criminal Court' (2006) 88(861) International review of the Red Cross 87.

²⁰² BETHEL AREGAWI, 'The Politicisation of the International Criminal Court by United Nations Security Council Referrals' (21 JUL 2017) ACCORD< <https://www.accord.org.za/conflict-trends/politicisation-international-criminal-court-united-nations-security-council-referrals/>>accessed on 21 March 2019.

²⁰³ Yvonne, M, Tessa, A, 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 91(105) ST. JOHN'S LAW REVIEW <<https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=6787&context=lawreview>> accessed on 6 January 2019.

Referral the criminal cases of non-state parties to the ICC by UNSC under the UN's chapter seven as an essential process of the court:

The power of jurisdiction of the court; as an international criminal court also as an intergovernmental organization comes from the fundamental treaty of the court. Moreover, the cooperation to the court by the state parties was the only ICC power since the court does not have any authority.²⁰⁴ In this regard, the act of the court under the UN charter's chapter seven which is determined in the Statute's Article 13 (b) considered the most important part of the court's jurisdiction. The mentioned article gives the power to the court to exercise the jurisdiction over every committed crime that stated in the Statute's Article 5 regardless whether the crimes occurred in the territory of state parties of the court or non-member states.²⁰⁵ Therefore, in each case when the UNSC realized that there is any danger to peace and security of the world, it may use its power under chapter seven of the UN charter's Article 39.²⁰⁶ The referral by the UNSC is different from both other referrals like state parties' referral and referral by the prosecutors (*proprio motu*). Although, both of other referrals needs the consent of states but the UNSC referral has more power without the consent of states.²⁰⁷ Furthermore, in the case when the UNSC refer the criminal cases to ICC it will act according to Article 13 (b) of the Court's Statute, Article 39 of chapter seven of the UN charter, Article 17 paragraph 1 of the relationship agreement between ICC-UN; which all of those articles gives the power to the UNSC to act in this regard.²⁰⁸ Also, it should be mentioned that in spite of given the power of referral to the UNSC by the ICC statute the independent of the court remained as stated in the court's Statute and

²⁰⁴ Gabriel M. Lentner, 'Why the ICC won't get it right – The Legal Nature of UN Security Council Referrals and Al-Bashir Immunities' (2017) EJIL <<https://www.ejiltalk.org/why-the-icc-wont-get-it-right-the-legal-nature-of-un-security-council-referrals-and-al-bashir-immunities/>>accessed on 24 March 2019.

²⁰⁵ 'UN Security Council: Address Inconsistency in ICC Referrals Use Debate on International Court to Forge a More Principled Relationship' (Human Rights Watch, October 16, 2012) <<https://www.hrw.org/news/2012/10/16/un-security-council-address-inconsistency-icc-referrals>>accessed on 24 March 2019.

²⁰⁶ article 39 chapter seven UN charter.

²⁰⁷ 'Start of Jurisdiction'(ICC, n.d)< <https://how-the-icc-works.aba-icc.org/>>accessed on 24 March 2019.

²⁰⁸ Rome Statute, UN charter, relationship agreement between ICC-UN.

in the ICC-UN relationship agreement as well. In this regard, any referral process to the ICC will be examined by the prosecutors according to the precondition of the ICC jurisdiction. It is also crucial that referral should fit to the principles that are mentioned as a condition of the jurisdiction of the court as we mentioned before such as; the subject matter, gravity, complementarity, etc.²⁰⁹ Additionally, the referral criminal cases after transferred to the UNSC it covers under the title of resolution which needs approval by the member states of the UNSC. The 15 members of the UNSC have to vote in order to pass the resolutions. The number of votes to pass each resolution is 9 states without power state vetoes, because veto against the resolutions by each of the permanent state of the UNSC will ban the resolution from the approval.²¹⁰ The ICC has experience of the referring situations to the court by the UNSC. The UNSC transferred two situations of the court's non-member states to the ICC; under the power of the UN charter's chapter seven in order to keep the world's security and peace. The referral situations are; the referral of Darfur, Sudan, in 2005, and the referral of Libyan case in 2011.²¹¹ The less number of the referral criminal cases by the UNSC to the court in spite having such strong power is the other criticism of this court. The only two referral cases by the UNSC raise the question of whether the court' act by the UNSC is a judicial or political action. Moreover, the selective states or selective continent by the court is the other question whether the court is the universal court or political tools used by the powerful states. In order to respond to these questions by observing the actions of the court; one may notice that the rejection to join the court by the three permanent UNSC members; and using the exceptional right of veto could be the main reason for that. Also, by observing recent cases such as; Syrian war as a simple example regarding answer those mentioned

²⁰⁹ Jennifer Trahan, 'The Relationship Between The International Criminal Court And The U.N. Security Council: Parameters And Best Practices' (2013) Criminal Law Forum 418.

²¹⁰ KATE TAYLOR, 'How Does a U.N. Security Council Resolution Get Passed?' (Slate Group, OCT 02, 2002).

²¹¹ Corrina Heyder, 'The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court's Functions and Status'(2006) 24(2), Berkeley Journal of International Law 650.

question; one may realize that how the UNSC is weak against the power of veto by the council's permanent member states in order to pass the resolutions in the UNSC.²¹² In the below research, two referral situations by the UNSC will be explained in order to specifically answer the mentioned questions.

4.4 Cases of non-state parties which were referred to the ICC with cooperation by the UNSC

4.4.1 The Darfur, Sudan Case

On 31st March 2005 the court acted for the first time in the history under Article 13 (b) and used the power of referral by UNSC under the UN charter's chapter seven. The referral was held on the Darfur- Sudan as a non-member of the court under the 1593 resolution; regarding the crimes which were committed in its territory by the rebel troops and military forces against each other and against civilian people as well.²¹³ During crises which was raised in Sudan's territory such as the al-Bashir fights southern rebels Ethnic, religious and regional tensions; has given a good opportunity to Omar Al- Basher to took the power and announce Sudan as an Islamic state after 1989 onward. After that, during 2003 to at least 2008 armed conflicts was occurred between the government forces, and its allied troops in one hand and the rebels group who fought against the government on the other hand.²¹⁴ Referring the mentioned situation resulted by following several resolutions regarding condemn the crimes which were committed by parties during the conflicts. It came after that when The United States, Britain and France have said the suffering in Darfur was at its

²¹² Hemi Mistry, 'International Law Meeting Summary, with Parliamentarians for Global Action The UN Security Council and the International Criminal Court' (2012) Chatham House, 16 March 2012 <<https://www.pgaction.org/pdf/activity/Chatham-ICC-SC.pdf>> accessed on 25 March 2019, Lydia A. Nkansah, 'International Criminal Court in the Trenches of Africa' (2014) African Journal of International Criminal Justice <https://www.elevenjournals.com/tijdschrift/AJ/2014/0/AJ_2352-068X_2014_001_000_002> accessed on 25 March 2019, 'Russia's 12 UN vetoes on Syria', Arab News (Jeddah, 10 April 2018) <http://www.arabnews.com/node/1282481/middle-east> accessed 15 April 2018.

²¹³ Mariana Rodriguez Pareja, 'UNSC: Darfur's Referral Turns 10 Years' (Verizon Media, May 09, 2015) <https://www.huffingtonpost.com/mariana-rodriguez-pareja/unsc-darfurs-referral-tur_b_6824062.html> accessed on 26 March 2019.

²¹⁴ Omar al-Bashir' Coalition for the International Criminal Court <<http://www.coalitionfortheicc.org/cases/omar-albashir>> accessed on 26 March 2019.

worst level in a decade. In this regard, the UNSC declared that according to the crimes has been committed in the mentioned conflict the ongoing this situation would threaten to the world's security and peace and determined the situation as a humanitarian crisis. Under the name of International Commission of Inquiry on Darfur, a commission was established by the UN's Secretary-General for examining the situation so as to inform whether the violation against human rights has been committed in Sudanese conflicts or not. After examining the situation by the mentioned commission during the report that submitted to the ICC the prosecutors declared that the violation has been committed against the human rights and international violations occurred as well such as genocide, crimes against humanity, and war crimes.²¹⁵ In this regard, the resolution after proposed for voting in the UNSC, the Sudanese government expected from its ally China as a power state to use the right of veto against the adoption of the resolution, but the decision of China was a serious threaten for Sudan. It also criticized its ally China when in spite of using veto power it had abstained from voting on the resolution.²¹⁶ On other side, the universal community expects the US to veto against the resolution, as it declared before that it will ban all peacekeeping process in the UNSC such an act of revenge against the ICC regarding disagreements on the Statute's Article 13 (b). but unlike that expectation, the US declared that in spite of that the US suggest a hybrid tribunal in Africa as a better alternative but it will stay as a part of the universal coalition against the violation and to protect the peacekeeping proses of the UN. The decision came out after the ICC exempted some of the court's non-member states; regarding the ICC fear from three power states in UNSC; who were a non-member of the court to veto against the resolution and particularly the USA.²¹⁷ The decision for an

²¹⁵ Oliver Ulich, OCHA, 'The UN Security Council's response to Darfur: a humanitarian perspective' (2005) Humanitarian Practice Network <<https://odhpn.org/magazine/the-un-security-councils-response-to-darfur-a-humanitarian-perspective/>>accessed on 26 March 2019.

²¹⁶ John Prendergast, 'IRRESOLUTION: The U.N. Security Council on Darfur' (Enough, July 24, 2008) <<https://enoughproject.org/reports/irresolution-un-security-council-darfur>>accessed on 26 March 2019.

²¹⁷ Heyder, C, 'The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court's Functions' (2006) 'Berkeley Journal of International Law'

exception designed for the court's non-member states in the resolution which gives the non-members "exclusive jurisdiction over nationals, current or former officials, and personnel they contribute to operations in Sudan mandated by the Security Council or the African Union", it results many criticism by the international organizations and particularly the human rights protectors.²¹⁸ Finally, the draft resolution of the referral was adopted by the vote of 11 in favors and 4 votes of abstention and without any veto votes against the resolution by the council's permanent member. Moreover, under the resolution 1593, after the adoption of the situation, the government of Sudan and all parties in the territory of the mentioned state were demanded by the ICC to cooperate with ICC prosecutor and investigations. Also, ICC demanded to cooperate and facilitate for the court from all member states and united African.²¹⁹ Furthermore, after the ICC prosecutors of the court brought the sufficient of the evidence to the judges in the court in order to arrest the criminals of international crimes who violate the crimes that are mentioned in Article 5 of the Sudanese Statute. The court decided to warrant arrest for the individuals who were accused as the main perpetrators of those crimes in Sudan conflicts. Among the perpetrators there were the persons who had a high position in the government of Sudan and among them; the president of Sudan and the minister of defense were accused in this regard.²²⁰ In addition, on 4th March 2009, the first warrant for arrest for Omar al-Bashir, the president of Sudan, was issued. It was for the first time the head of states wanted by international courts and he was accused of international crimes which determined the

<<https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1317&context=bjil> > accessed on 25 March 2019. , JOHN R., 'CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW'(2005) 99(3) The American Journal of International Law 691.

²¹⁸ 'U.N. Security Council Refers Darfur to the ICC' (Human Rights Watch, March 31, 2005) <<https://www.hrw.org/news/2005/03/31/un-security-council-refers-darfur-icc>>accessed on 26 March 2019.

²¹⁹ 'SECURITY COUNCIL REFERS SITUATION IN DARFUR, SUDAN, TO PROSECUTOR OF INTERNATIONAL CRIMINAL COURT' (UN, 31 March 2005)

<<https://www.un.org/press/en/2005/sc8351.doc.htm>>accessed on 26 March 2019.

²²⁰ 'Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)' (ICC, 14 December 2018) < <https://www.icc-cpi.int/Pages/item.aspx?name=181214-stat-otp-UNSC-1593>>accessed on 26 March 2019, 'Former UN rights chief says UNSC referral of Darfur case to ICC a 'very bad idea'' (SudanTribune, 22 JULY 2013)

<<http://www.sudantribune.com/spip.php?article47363>>accessed on 26 March 2019.

ICC; regarding two counts of war crimes and five counts of crimes against humanity. After that on 12th July 2010; the next warrant for arrest occurred for the president regarding three counts of genocide crimes by the shared of evidence which provided to the court by the prosecutors. Also, it should be mentioned that it was the first decision for arrest warrant regarding the genocide crimes in the court history.²²¹ As regards the decision of the ICC's arrest warrant, the Sudanese government rejected to collaborate with the court. Moreover, a lot of the court's member and non-member states rejected the cooperation in order to surround Omer al-Bashir to the court. The breaching of the obligation of the court many times happened regarding arresting of the mentioned president and transfer to the ICC. The president was travelled many times to a lot of member states and non-member states to the court and none of them was bound to the obligations of the court and rejected the cooperation with the court. Likewise, the UNSC was not taken any essential steps in this regard and till now the criminals are not arrested and are acting freely.²²² In addition, cooperation with Sudanese government in spite of the ICC as an accused regime who act against the peacekeeping process in the world; also choosing the political benefits and ignoring the moral standards by the universal community; leads the Sudanese government to continue the violation acts, and result out of remaining the cases ambiguous in front of the ICC and criminals freely move in the outside of the court.²²³ Furthermore, the disappointment of victims from the court results out to withdraws eight cases from the court regarding this case. Because the victims declared that they cannot wait until the end of their life to achieve their rights.²²⁴

²²¹ Omar al-Bashir' Coalition for the International Criminal Court

<<http://www.coalitionfortheicc.org/cases/omar-albashir>>accessed on 26 March 2019.

²²² 'The Crisis in Darfur' (International Coalition for the Responsibility to Protect, n.d) <<http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-darfur>>accessed on 26 March 2019.

²²³ Ahmed H. Adam, 'Displaced in Darfur' (ReliefWeb, 03 Apr 2018) <<https://reliefweb.int/report/sudan/displaced-darfur>>accessed on 26 March 2019.

²²⁴ 'Lithuania's statement at the UN Security Council briefing on ICC-Sudan' (PMLUNNY, 2015.12.15) <<http://www.urm.lt/missionny/en/news/lithuanias-statement-at-the-un-security-council-briefing-on-icc-sudan-1>>accessed on 26 March 2019.

4.4.2 Libyan case

On 26th February 2011, the UNSC acted its second missions under the UN charter's chapter seven; and referred the situation of Libyan as the court's non-member states to the ICC under the resolution of 1970. The referral came after the first referral situation in Sudan by the UNSC to the court, but this one was so speedily processed in the UNSC comparing with the first one. Because it was for the first time all members were agreed together, without using the right of veto by the permanent members against the referral resolution. Also, the adoption process of the referral of Libya situation was an important act of the council; because it was a unanimous act of the UNSC in this regard.²²⁵

After the wave of demonstrates was held in a lot of states in the world; especially in Arabian countries under the Arabian spring; regarding changing the governments who leads those states for a long time. In 2011, the protest and demonstrates was begun in Libya among civilian people to end the leadership of Muammar Al-Gaddafi's regime who leaded the mentioned state for 41 years. The protests were covered in the country so speedily; in this regard, the government of the state decided to act against the protesters and declared that they act with no mercy against those civilian people who participated in the demonstrations.²²⁶ After that, the demonstration from the small group of protesters in the Libyan streets had become a small army group. Then after from a short period of time; it becomes a strong opposition who stand against the regime of Gaddafi and then it resulted up to end its regime. This act resulted in using military power by the government against demonstrators. In this regard; Gaddafi was declared the act as a threat to the Libyan government and decide to execute all Libyan people who hold the arms against the government.²²⁷ Furthermore, after six months of civil war between both government and troops of opposition, it became a reason for the death of a lot of soldiers and civilian people.

²²⁵ Harry Orr Hobbs, 'The Security Council and the Complementary Regime of the International Criminal Court Lessons From Libya'(2012) 9(1) Eyes on the ICC 21.

²²⁶ 'Backgrounder on the referral of Libyan to the international criminal court' (ICRtoP, APRIL 22, 2016) < <http://responsibilitytoprotect.org/libya-referral.pdf> >accessed on 28 March 2019.

²²⁷ Marie-Joe Domestici-Met, 'Protecting in Libya on Behalf of the International Community' (2011) 861.

Moreover, the conflict was a reason in the wide violations of international laws and the act of violation against humanity by the government against the protesters.²²⁸ In this regard; the ICC was condemning the Libyan government regarding violating the international laws and act against civilian people by cruelty and it was the result of a huge number of deaths of civilian and other protestors. As it came in the draft of the resolution 1970 which exclusive to referring the Libyan situation to the ICC by the UNSC; the court had accused the government committed the systematic attacks against the civilian people and was a reason for the act of inhumanity against the civilian people in the Libyan territory. For this reason, February 26, 2011, the UNSC referred the situation to the ICC, and the investigation was started by the prosecutors of the court in March 2011.²²⁹ Also, in spite of referred the situation to the court and started the investigation, the court also decided to apply some sanctions such as; the travelling ban on the high leaders of the government, embargo arms and froze the assets of them as well.²³⁰ It should also be mentioned that the draft of resolution like the previous one had the exception jurisdiction for the court' non-member states, it could be the main reason for speedy adoption of the resolution by the UNSC.²³¹ In addition, after examining the situations by the international commission of inquiry of the court which include the prosecutors of the court and afterwards it will provide the evidence to the court during the stated time. The chamber of pre-trial declared that reasonable evidence existed which demonstrated that the government violated the international laws and it was made the act of humanitarian violations against civilian protests, for that reason the court made the decision.²³² On Monday, 27th June 2011,

²²⁸ Sarah Warburg-Johnson, 'LIBYA & THE INTERNATIONAL CRIMINAL COURT Locating Due Process as a Component of Admissibility Analysis'(2015) vole 11, Eyes on the ICC 105.

²²⁹ 'Libya' (Coalition for the International Criminal Court, n.d)

<<http://www.coalitionfortheicc.org/country/libya>>accessed on 28 March 2019.

²³⁰ 'UN: Security Council Refers Libya to ICC Resolution Aimed at Stemming Violence and Bringing Justice'(Human Rights Watch, February 27, 2011)< <https://www.hrw.org/news/2011/02/27/un-security-council-refers-libya-icc>>accessed on 29 March 2019.

²³¹ Ibrahim O. A. Dabbashi, 'UN Resolution 1970 imposing sanctions on Libya'(Voltaire, 26 FEBRUARY 2011)< <https://www.voltairenet.org/article168645.html>>accessed on 29 March 2019.

²³² 'Libya Situation in Libya ICC-01/11' (ICC, n.d) <<https://www.icc-cpi.int/libya>>accessed on 28 March 2019.

the court decided for a warrant of arrest for some people in the Libyan territory by accusing; war crimes and crimes against humanity. Among the individuals who decided to arrest by the court like a previous Sudanese referral, there were persons who had a high position in the government, such as the Libyan leader, and his son who worked as a spokesman in the government and the de facto prime minister.²³³ Furthermore, only a few weeks after adoption the 1970 resolution by the UNSC which demanded the Libyan government to respect the civilian rights and end the humanitarian violation against civilian persons. But the government has not followed this demand and denies protecting civilian people and it was continued the violation. Soon after, the UNSC decided to adopt the resolution 1973 which gave the authority to UNSC to act military interference to the territory of Libyan in order to protect the civilian people and end up the humanitarian violations. The first step was begun with the decision of a no-fly zone in Libyan territory. The NATO force applied this mission regarding the 1973 resolution which gave the authority in this regard. The interfering by the NATO in Libyan by targeting the government forces; resulted up to end the Gaddafi's regime. Then, after the NATO's action regards to this mission, was criticized by the Russian, China, and South Africa; they have announced their surprise regarding NATO's action and declared that the act exceeded the mandate of the 1973 resolution.²³⁴ "The Security Council's decision to refer the case was a political rather than a legal one," said Simon Jennings. Also, he mentioned that; by observing the UNSC action regarding this situation and the speedy reaction; one can realize clearly the act was political because the violation by the Libyan government was not as much as brutal comparing with other places in the world such as Gaza.²³⁵

²³³ 'Libya: ICC Decision on OTP Arrest Warrants Request to be Released on 27 June; Related Statements and News' (coalition for the international criminal court, 24 June 2011) < <http://iccnow.org/?mod=newsdetail&news=4644&lang=en>>accessed on 29 March 2019.

²³⁴ Ryan Goodman, Beth Van Schaack and Alex Whiting, 'Does the Int'l Criminal Court Have Jurisdiction Over U.S. Forces in Libya?'(Just Security, September 7, 2016) < <https://www.justsecurity.org/32760/intl-criminal-court-jurisdiction-u-s-forces-libya/>>accessed on 29 March 2019.

²³⁵ Simon Jennings, 'Playing Politics With the ICC: The Security Council's referral of Libya to the Hague court highlights the limitations of international justice.'(ReliefWeb,8 Mar 2011)<

Furthermore, regarding the arrest warrant of the highest individuals in the government, the decision for arresting the head of state was withdrawn by the court due to death of Muammar Gaddafi the head of Libya on 22nd November 2011. Also, on 24th July 2014, the issue of the arrest warrant of the Abdullah Al-Senussi who worked as head of intelligence in government was ended up after announcing the appeal chamber that they accepted the pre-trial chambers decision on the inadmissibility of the case in the ICC.²³⁶ In addition, after 2 years of a first arrest warrant; on 2013 then in 2017 the court was announced another warrant of arrest against two other persons in the previous government of Libyan regarding inhumanity violation action such as crimes against humanity and war crimes.²³⁷ Obviously, since Libyan situation was referred to ICC by UNSC and after passage of six years, none of the accused individuals who ICC announced arrest warrants transferred to the ICC.²³⁸ Since the ICC many times demand from the Libyan by announcing that criminals should be transferred to the ICC in order to judge them. But the Libyan government denied that and declares that the domestic courts can act against the impunity and the criminals will be trialed by the domestic courts.²³⁹ Additionally, in this regard, each of head of intelligence Abdullah Al-Senussi and the son of Gaddafi Saif al-Islam Gaddafi who was the spoke person of the government and de facto prime minister of the Gaddafi's government with seven former officials of the government; was sentenced to death by the domestic Tripoli court in Libya. The act was criticized by

<https://reliefweb.int/report/libya/playing-politics-icc-security-councils-referral-libya-hague-court-highlights> >accessed on 29 March 2019.

²³⁶ 'ICC: Libya's Bids to Try Gaddafi, Sanussi'(Human Rights Watch, May 13, 2013)< <https://www.hrw.org/news/2013/05/13/icc-libyas-bids-try-gaddafi-sanussi>>accessed on 29 March 2019.

²³⁷ Ilia Xypolia, 'Libya and ICC: not indicting Khalifa Haftar makes mockery of international justice'(2017) The Conversation < <https://theconversation.com/libya-and-icc-not-indicting-khalifa-haftar-makes-mockery-of-international-justice-87907> >accessed on 29 March 2019., Michael G. Karnavas, 'ICC Prosecutor to UNSC on the situation in Libya: yes we can, but how can we?'(Michael g karnavas , 13 November 2017)< <http://michaelgkarnavas.net/blog/2017/11/13/icc-prosecutor-to-unscl/> >accessed on 29 March 2019.

²³⁸ Mark Kersten, 'Will the International Criminal Court's latest target in Libya be brought to justice?' (the Washington Post, 2017)<https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/31/will-the-international-criminal-courts-latest-target-in-libya-be-brought-to-justice/?utm_term=.b1e0d945a2ff>accessed on 29 March 2019.

²³⁹ Harry Orr Hobbs, 'The Security Council and the Complementary Regime of the International Criminal Court Lessons From Libya'(2012) 9(1) Eyes on the ICC 21.

the ICC due to lack of cooperation with the court by Libya's domestic trials, and the warrant of arrest has remained in the ICC regarding criminals, and the ICC persist of arresting the criminals and referring them to ICC.²⁴⁰ But recent development regarding this case was shocked everyone when Saif al-Islam Gaddafi was released after six years of jail on 10th June 2017. And in spite of arrested warrant by ICC and death-sentenced by the Tripoli domestic court; he announced he will participate as a candidate of the Libyan presidential elections. Unfortunately, none of the ICC and domestic decisions could arrest the mentioned individuals and he is living freely and both decisions have remained in both of courts regarding him sentences.²⁴¹ Finally, it should be mentioned that currently, all cases before the ICC are the cases of states which pretend the states outside of the international societies such as, African states. So in this regard, unfortunately, referring Libyan situation to the court will not help to make the global society to think positively about the court and it will not hide the political interference and sensitiveness between the power states and other states.²⁴²

²⁴⁰ 'Saif al-Islam Gaddafi' (Coalition for the international criminal court, n.d)< <http://www.coalitionfortheicc.org/cases/saif-alislam-gaddafi>>accessed on 29 March 2019.

²⁴¹ Julian Borger, 'After six years in jail, Gaddafi's son Saif plots return to Libya's turbulent politics'(the Guardian, 6 Dec 2017) < <https://www.theguardian.com/world/2017/dec/06/saif-gaddafi-libya-politics-son-muammar> >accessed on 29 March 2019.

²⁴² Kirsten J. Fisher, 'Libya, the ICC, and Securing Post-Conflict Justice'(2013) Middle East Institute < <https://www.mei.edu/publications/libya-icc-and-securing-post-conflict-justice>>accessed on 29 March 2019.

CHAPTER 5

CONCLUSIONS

Conclusion

This study has addressed the subject of possible ways to apply the ICC's jurisdiction over nationals and territory of the court's non-member states. There is no doubt that the global community always was in favor to establish an international judicial body to limit the impunity of criminals and it has historical favor. The negative effect of brutal crimes and humanitarian violation act made that favor stronger. So after WWII; and after the world was the witness of the danger and brutal crimes have been committed during that war around the world, the event leads the global community to think about establishing a global judicial body to limit the violation around the world. Since the favor always existed but the practice steps were taken by; the Yugoslavia tribunal and Rwanda tribunal, then it concluded in the conference of Rome that was caused the Rome treaty of the creation of the recent court.

The conference of Rome was the foundation of the court which resulted out a treaty between states. It was a special model which differs from the other attempts in this regard because the court was established by treaty and independently with special international legal personality as well. Moreover, the structure of the court was so strong and effective and has a wide-ranging of authorities and a modern body of judicial, which was a new innovation regarding establishing the universal judicial courts; by a different model and special authority and special action. Because the court was established as a final source of the jurisdiction; which will be active the court's jurisdiction only by the principle of complementarity.

Furthermore, the most significant part of the Court's Statute; was the relationships with the UN, because the court has a tight relationship with the UN. The relationship is wide world in various fields which concluded in the special agreement between both of ICC-UN. and the scope of the agreement is supporting and facility for each other, also it should be mentioned that, the most important part of this relationship

agreement is the cooperation of the court with the UNSC as an important organ of the UN, the support and act of the court among this organ according to Article 13(b); is a special and new invention in the international judicial body which never existed before. The UNSC is the most powerful point of the court's support. Since the ICC has not any power of enforcement, so the only power of the court is the principle of the states' cooperation with the court on the one hand, and on the other hand the UNSC's cooperation and support. Additionally, the UNSC is the supporter of the court in every situation which was stated in the provisions of the Rome. In addition, the act of the court among the UNSC; under chapter seven over non-member states was the most important action which was stated in Article 13 (b) of Statute, and pretend the essential way to apply the court's jurisdiction without any limits, because the court's jurisdiction without this provision is limited to the state members to the Statute and the court without this article will not be able to apply its jurisdiction without consent. In this regard, this special authority by the mentioned article is an amazing and unique act against the impunity of criminals in the territory of non-member states, and it supports the peacekeeping process of the UN. For that reason, the ICC was acted in this regards two times, one of them was the referral of Sudan; it was the first time that the court acted under this article. Unfortunately, it was pretended a failure action regarding non-power of the court to arrest of the criminals, because of lack of cooperation of the states and non-states party with the court. On the other hand, non-supporting behavior against the court by the UNSC may enforce the states to collaborate with the ICC regarding arresting the criminals. Another referral of the court was the Libyan situation; which was an expected failure, because of the non-cooperation of the states and non-support of the UNSC to the court such as the previous referral of Sudan. Since the court has no power of enforcement to arrest and transfer the criminals of those two situations, the cases remained in the outside of the court, and still, the court was not able to bring the criminals in front of the court. And those referrals were not effective to end the conflicts, humanitarian violations and protect the civilians as well and the violations and conflicts are continuing in those

territories. In this regard, one can notice that, during the observing of those cases that the referral of the criminal cases in the territory of non-member states by such ways was not suitable, and could not change anything given the states' failure to cooperate with the court. On the other hand, the lack of support to the court by the UNSC can be noticed.

Finally, this study came to that point; in spite of suitable and powerful possible ways to apply the court's jurisdiction over non-member states to the court, the court such a universal criminal court lost their independence, and in most cases affected by political influences and it is controlled by the UNSC. In addition, the global community is not supportive to the court's action, and the political benefits are always above of the judicial interest, especially by the powerful states who are always performance to ban the court's action, and it becomes the important cause to release the court's action due to the right of veto and due to support the allies of them in this regard.

The Rome statute have a powerful and possible legal ways in order to apply the ICC's jurisdiction over nationals and the territory of the court's non-member states such as; the court Statute's Articles 12 and 13(b); using the UNSC's power under the UN's chapter seven regarding the peacekeeping process.

In spite of having the suitable and possible ways for the court to apply the jurisdiction over nationals and the territory of the court's non-member states, the Statue of the court has some shortcomings. It seems that the Statute during the establishment of the court forgot many essential points to declare, especially due to the vagueness of some issues, which lead to the recent disagreements such as; the disagreement between ICC and US regarding to Article 98, also the disagreements between non-member states especially power states with the court; regarding the court Statute's Articles 13 (b) and 16.

Lack of the power of the enforcement of the court is another point of weakness of the court, because hanging on with a political body like the UNSC was the point of weakness. On contrary, absence of power of the UNSC according chapter seven of the UN charter action in the Statute of the court, leads the UNSC as a political body to

act without limiting and use the court as a political tool. The other point of weakness of the court; was the non-cooperation to the court by each of the court's non-member states and state parties, in this regard; one can realize that reality during observing the two referred situations to the court.

The other point of releasing the court's action; is the non-supporting the UNSC to the court, in order to arrest the criminals and enforcing the states to collaborate with the ICC. For that reason, the act of UNSC is pretending as a political interest action rather than a judicial one. Non-independent of the court due to selective of the situations to refer to the ICC, and the few numbers of the referral; is another point which demonstrates the non-independence of the court, and it shows that the court becomes such a tool used by the power states to select the situation for referral due to the political benefits. The veto of power states; due to the political interest to ban the referral situations to the court, is the most significant point of weakness of the court's action.

In order to solve those disagreements which were rising between the court and states, attempt to do some amendments of some provisions of the court is recommended. The effort to solve the disagreements between non-member power states of the court is required in order to join the court which will be the most support for the court. It is recommended to separate the court's action from the political interests, and try to act and refer to all situations by fairly rather than by political interest. It will support in making fair decisions. Efforts should be done by the UNSC's enforcement power to enforce the court's states and non-states to have cooperation with the court and force the UNSC to take steps in this regard. The efforts are required to change the court's scope of the jurisdiction over the states which pretend outside of the global society such as; the African continent and more focus on the other situation in the world in need. Attempts are required to change the negative thinking of the global community about the court by acting fairly overall situation regarding the statute of the court regardless of political benefits.

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APPLICATION OF JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT TO NATIONALS AND TERRITORIES OF STATES NOT PARTY TO THE ROME STATUTE

by Hüssein Hasan Babakr

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2019

APPROVAL

We as the jury members certify the "Application of Jurisdiction of the International Criminal Court to Nationals and Territories of States Not Party to the Rome Statute"

prepared by (HUSSEIN HASAN BABAKR) defended on

22/MAY/2019

Has been found satisfactory for the award of degree of

JURY MEMBERS

Title, Name, Surname (Supervisor)
Name of University/Department

Title, Name, Surname (Head of Jury)
Name of University/Department

Title, Name, Surname
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ABSTRACT

**APPLICATION OF JURISDICTION OF THE INTERNATIONAL CRIMINAL
COURT TO NATIONALS AND TERRITORIES OF STATES NOT PARTY TO THE
ROME STATUTE**

The thesis investigates the possible ways of applying the ICC's jurisdiction over nationals and territory of non-member states to the court. The negative effect of brutal crimes and humanitarian violations made this attitude stronger. So after WWII; and after the world was the witness of the danger and brutal crimes have been committed during that war around the world, the event leads the global community to think about establishing a global judicial body to limit the violation around the world. The research relied on qualitative research design to collect data. The study focused on case study as a model for analysis. Moreover, In this research, the thematic analysis qualitative method was applicable, because in this method the research will looked at indigenous typologies, repetitions, metaphors and analogies, transitions, similarities and differences, missing data, linguistic connectors use of concepts and theories. The findings of the study suggest that in spite of suitable and powerful possible ways to apply the ICC's jurisdiction over the non-member states to the court, the court such a universal criminal court lost its independence, and in most cases affected by political influences and it is controlled by the UNSC. In addition, the global community is not supportive to the court's action, and the political benefits are always above of the judicial interest, especially by the powerful states who are always performance to ban the court's action, and it becomes the important cause to release the courts action due to the right of veto and due to support the allies of them in this regard. The Rome statute have powerful and possible legal ways in order to apply the ICC's jurisdiction over nationals and the territory of non-member states to the court such as; Articles 13(b) and 14 of the court's Statute; by using the UNSC power under Chapter seven of the UN regarding to the peacekeeping process.

Keywords: ICC, Rome Statute, nationals territories not party to ICC

DEDICATION

1. To all victims of international crimes in the world history.
2. To my parents and my family who always have supported me in every step of my life.

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ABBREVIATIONS

ASP-	⁴ Assembly of State Parties
ICC-	International Criminal Court
ICL-	International Criminal Law
ICJ-	⁴⁶ International Court of Justice
ICTY-	International Criminal Tribunal for the Former Yugoslavia
ICTR-	International Criminal Tribunal for Rwanda
ILC-	International Law Commission
IPI-	International Peace Institution
NATO-	North Atlantic Treaty Organization
OTP-	Office of the Prosecutor
PrepCom-	Preparatory Committee
UNGA-	¹⁵ United Nation General Assembly
UNSC-	United Nation Security Council
US-	United States

CHAPTER ONE

INTRODUCTION

1.1 Historical background

The idea to build a permanent international criminal court has an old history its idea turns back to the 15th century, but no practical steps were taken until the 19th century.¹ Moreover, most modern narratives of the improvement of ICL clearly demonstrate the fact which the primary establishment steps of ICC start with the Nuremberg Trials during World War II.² On July 17, 1998, in favor of creating an international judicial body to punish the international criminals, 120 members were elected from the international community to adopt the Rome Statute draft.³ There were only seven states which voted against the Rome treaty for establishment a permanent court. These states were the United States, Yemen, China, Israel, Qatar, Libya, and Iraq.⁴

The ICC is different from national courts because the ICC has neither a police force nor its armed forces under its jurisdiction.⁵ Also, the ICC has a different legal basis than the previous ad hoc tribunals because it made by an international treaty between states.⁶ The main idea of the foundation of the ICC was that the court should be pure from political interference because an international criminal justice should deal with the legal matter and applying the neutral legal rules independently.⁷ The ICC will hear those crimes that breach the Rome Statute as a

¹ Laura Barnett, 'The International Criminal Court: History and Role' (2013) No. 2002-11-E, Library of Parliament < https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/200211E > accessed on 127 January 2019.

² M. Jassouini, 'Combating Impunity for International Crimes,' U. Colo. L. Rev., 71 (2000), 409.

³ United Nations, 'Rome Statute of the International Criminal Court Overview,' p1 < <https://www.un.org/law/icc/index.html> > accessed on 8 January 2019.

⁴ Scharf, M., 'The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position' (2001) 44(14) < <https://www.jstor.org/stable/1192355> > accessed on 6 January 2019.

⁵ Zhu Wenqi, 'On co-operation by states not party to the International Criminal Court' (2006) Volume 88 Number 861 International review of the Red Cross 87

⁶ Baros, M., 'The Establishment of the International Criminal Court: Institutionalizing Expedience?' (2003) 1(1), 1479-4195, Hertfordshire Law Journal < https://www.herts.ac.uk/_data/assets/pdf_file/0007/38626/HLJ_VIII_Baros.pdf > accessed on 6 January 2019.

⁷ Alexander K.A. Greenawalt, 'Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court' (2009) 50(1), Pace Law Faculty Publications < <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1624&context=lawfaculty> > accessed on 6 January 2019.

3 permanent international criminal court in the globe.⁸ It appears the ICC had the effect of increasing the respect of the international humanitarian law before the court held the first trial in the court.⁹ The establishing of the ICC could be assumed as a part of the worldwide regime of the human rights, which was developed to earning the power by the international treaty and institutions in the 20th century.¹⁰ Moreover, establishment of ICC was of the valiant moves in the history of International Relations.¹¹ Since the formation of the United Nations, the most interesting expansion and important invention in international law has been the international criminal court was possibly.¹² Moreover, the Rome Statute of the ICC is considered a successful model of the “humanitarian security agenda,” which adopted by both member and non-member states alike.¹³ Because, based on the Rome Statute, the court is not specified only to the member states, but also the court's jurisdiction applies over the non-member states territory in some limited circumstances.¹⁴ The capacity to project or reinforce a credible threat that criminals of war crimes, crimes against humanity, genocide, and crimes of aggression would be punished for their violations was the subject matter which demonstrates the strength and effects of the court.¹⁵ Currently, the ICC has jurisdiction over four categories of crimes which are considered internationally “the most serious and dangerous crimes as a whole.” The

⁸ Mary Dean, ‘Sovereignty and the International Criminal Court: An analysis of the submissions opposed to Australia’s ratification’ 6 Southern Cross University Law Review 249

⁹ Tim, M, C, ‘The Contribution of The International Criminal Court to Increasing Respect for International Humanitarian Law’ (n.d.) <https://www.monash.edu/_data/assets/pdf_file/0005/138578/mccormack-paper.pdf> accessed on 6 January 2019.

¹⁰ Marchuk I, ‘The Fundamental Concept of Crime in International Criminal Law: A Comparative Law Analysis’ (Springer, 2014).

¹¹ Vinjamuri, L, ‘The International Criminal Court and The Paradox of Authority’ (2016) 79(27), Law and Contemporary Problems <<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4774&context=lcp>> accessed on 6 January 2019

¹² Schabas, W, ‘An introduction to the international criminal court’ Cambridge university press (London, 2011)

¹³ Balasco, M, L, ‘the International Criminal Court as a Human Security Agent’ (2013) Xxviii, The ICC as a Human Security Agent <http://fletcher.tufts.edu/Praxis/~media/Fletcher/Microsites/praxis/xxviii/article3_Balasco_ICC.pdf> accessed on 6 January 2019.

¹⁴ Morris, M, ‘The Jurisdiction of the International Criminal Court over Nationals of Nonparty States’ (2000) 6(363) ILSA Journal of International & Comparative Law <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2746&context=faculty_scholarship> accessed on 6 January 2019.

¹⁵ Jamie Mayerfeld, ‘The Democratic Legacy of the International Criminal Court’ (2004) 28(2) The Fletcher forum of world affairs 147

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 main object of the court's jurisdiction is to end impunity for perpetrators and find justice for victims so as to help end violations and battles, treat the lacks of arbitrary tribunals and also to become the court of last resort when the national court cannot or unwilling to apply the justice; also to prevent the future international violations.¹⁶ The ICC can apply its jurisdiction on the individuals, not states such as the head of states and governmental officials when those individuals commit the international crimes directly or indirectly and the national court unwilling or cannot apply the jurisdiction.¹⁷ The ICCs investigation can be applied by one of these three ways. First, it will refer the situations by the UNSC under the name of resolution in the council after taking the adoption process in the council by the council's member states. Second, it will refer the situations by the member states of the court under the name of self-referral to the ICC. Third, it will refer the situations to the court by the prosecutors after collecting the evidence during the primary examination process of the court. Also, the ICC judges has a significant role in determining what kind of situations the court should deal with it.¹⁸ The jurisdiction of ICC has different forms of jurisdiction under the court such as territorial jurisdiction "(ratione loci)", personal jurisdiction "(ratione personae)", temporal jurisdiction "(ratione temporis)", and acceptance jurisdiction by the non-state parties "(ad hoc jurisdiction)", subject matter jurisdiction "(ratione materiae)".¹⁹ Also, it should be mentioned that the ICC has no authority to apply its power directly or do enforcement because its function depends on national authorities' action.²⁰ It seems the lack of coercive power of the court made the inferior courts capacity to gain the court's objects and function. Also, the court was defeated for cooperation with states several times.²¹ The association between ICC and national jurisdictions in both applauded and criticized was shaped by the principle of

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¹⁶ 'Overview' page on the website of the Rome Statute of the International Criminal Court at <<http://untr6y.un.org/cod/icc/general/overview.htm>>

¹⁷ Gwen P. Barnes, 'The International Criminal Court's Ineffective Enforcement Mechanism: The Indictment of President Omar al Bashir' (2011) 34(6) Fordham International Law 147

¹⁸ Margaret M. deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2012) 33(2), Fordham International Law Journal <<https://repository.law.umich.edu/mjil/vol33/iss2/2/>> accessed on 9 January 2019.

¹⁹ Felix E Eboibi, 'JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT: ANALYSIS, LOOPHOLES AND CHALLENGES' (2012) NAUJILJ <<https://www.ajol.info/index.php/aujilj/article/view/136309>> accessed on 15 March 2019.

²⁰ Reana Bezić, 'S3 cooperation with the ICC' (The Faculty of Law, University of Zagreb)

²¹ Dutton, M. B, 'Bridging the Legitimacy Divide: The International Criminal Court's Domestic Perception Challenge' (2017) 56(71), Columbia Journal of Transnational Law <<http://jtl.columbia.edu/bridging-the-legitimacy-divide-the-international-criminal-courts-domestic-perception-challenge/>> accessed on 6 January 2019.

"complementarity."²² It can be stated that Article 17 is, probably in conjunction with Article 12, the most significant article of the entire Statute. Especially the principle of complementarity, which was provided in Article 17 of the Statute of the court, is the ultimate basis of the whole system of ICC.²³ However, Article 12 empowers the court's jurisdiction by exercising the jurisdiction of the court over the territory of member and non-member states of the court, in the cases when those states committed international crimes in instances when those states have lodged a declaration of acceptance of jurisdiction.²⁴ But the preamble and Articles 19, 18, 17 and 1 of the Statute confirm that the jurisdiction of the ICC will be utilized only in the case when a state is dissenting or incapable to deal with the claimed offense.²⁵ In the other words, the jurisdiction of the ICC can be applied as a last solution when the national court system fails to take the jurisdiction.²⁶ In cases when a State is sincerely willing and capable to exercise that jurisdiction (i.e. investigate or prosecute) instead then the Court is not generally competent to apply the court's jurisdiction over persons, neither from state parties nor non-parties.²⁷ Generally, by the rule, the provisions of the Rome treaty of ICC only bind the court's member states. From the Non-member States view, the international legal personality of those organizations relies on their implicit or explicit recognition by those States.²⁸ It was a surprise

²² Linda E. Carter, 'The Future of the International Criminal Court: Complementarity as a Strength or a Weakness?' (2013) 12(30) Washington University Global Studies Law Review <https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1446&context=law_globalstudies> accessed on 9 January 2019.

²³ H.E. Judge and Dr. jur. h. c. Hans-Peter Kaul, 'The International Criminal Court –Current Challenges and Perspectives' (International Criminal Court, 8 August 2011) <<https://www.icc-cpi.int/nr/rdonlyres/289b449a-347d-4360-a854-7d0a4b9f06/283740/010911salzburglawschool.pdf>> accessed on 9 January 2019.

²⁴ D. Scheffer, 'International Criminal Court: The Challenge of Jurisdiction' (1999) Ambassador at Large for War Crimes Issues <<http://www.iccnw.org/documents/DavidSchefferAddressOnICC.pdf>> accessed on 9 January 2019.

²⁵ V. Toon, 'International Criminal Court: Reservations of Non-State Parties in Southeast Asia' (2004) 26(2) ISEAS <https://www.jstor.org/stable/25798686?seq=1#metadata_info_tab_contents> accessed on 9 January 2019.

²⁶ See, e.g., Luis Moreno-Ocampo, Prosecutor, Int'l Criminal Court, Address at Nuremberg: Building a Future on Peace and Justice (June 24–25, 2007), available at http://www.iccpi.int/NR/rdonlyres/4E466EDB-2B38-4BAF-AF5F-005461711149/143825/LMO_nuremberg_20070625_English.pdf [hereinafter Moreno-Ocampo Address at Nuremberg] (explaining that "a system of complementarity was designed whereby the Court intervenes as a last resort when States are unable or unwilling to act").

²⁷ Christian Eriksson, 'ICC Jurisdiction over Nationals of Non-Party States: An ultra vires abomination, or legitimate judicial conduct?' (Bachelor thesis, Örebro University 2017)

²⁸ Sascha Rolf Lüder, 'The legal nature of the International Criminal Court and the emergence of supranational elements in international criminal justice' (2002) 84(845) RICC Mars 79

for a lot of observers when the ICC has provided "self-referrals" to expand the court's jurisdiction.²⁹

According to the Rome treaty's provisions, the ICC could apply its jurisdiction over nationals and territory of non-member states by limited circumstance when these states have not otherwise been satisfied to apply the jurisdiction over committed international crimes by that states.³⁰ The jurisdiction is based on the action of UNSC under the United Nations Charter's Chapter VII and the jurisdiction following consent from the respondent's nationality state. Based on Article 12, the ICC has competence by its jurisdiction to deal with all national criminals of any member states of the court when the states committed the international crimes on its territory.³¹

The ICCs interference to the Darfur conflict in Sudan was a notable example to demonstrate the capacity and the jurisdiction power of the court because Sudan was not a Rome Statute's member and did not consent that the ICC applies its jurisdiction.³² It was the first time since the existing of the court to apply the court's jurisdiction over the non-member states' territory. Also, it was the first time in spite of rejecting the ICC jurisdiction by a national state, the ICC interfered a state.³³ Among nine cases which existed in front of the court, two of them were referred by the Security Council. One of them was Darfur, Sudan that we mentioned before another one was Libyan case. Both of them were not a member of ICC.³⁴ Authors who support the idea to achieve to universal jurisdiction mentioned that the universal

²⁹ Frédéric Mégret, 'Is the ICC Focusing Too Much on Non--- State Actors?'(Ph.D. thesis, McGill University 2012).

³⁰ Morris, M, 'The Jurisdiction of the International Criminal Court over Nationals of Nonparty States (Reference Remarks)' (2000) 6(363) ILSA Journal of International & Comparative Law <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2746&context=faculty_scholarship> accessed on 6 January 2019.

³¹ Madeline Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States' (2018) 64(1), Duke University School of Law <http://www.jstor.org/stable/1192354?seq=1#metadata_info_tab_contents>accessed on 9 January 2019.

³² Heyder, C, 'The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court's Functions and status' (2006) 27(8) BJIL <<https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1317&context=bjil>>accessed on 9 January 2019.

³³ Castillo, P, 'Rethinking Deterrence: The International Criminal Court in Sudan' (2007) ISSN 1696-2206, UNISCI Discussion Papers <<https://www.ucm.es/data/cont/media/www/pag-72528/Castillo13.pdf>> accessed on 6 January 2019.

³⁴ GOZDE, T, 'A Critique of the International Criminal Court: The Making of the "International Community" Through International Criminal Prosecutions' (Ph.D. Dissertation, İhsan Doğramacı Bilkent University 2015)

jurisdiction does not result out from the right of referral of part or non-state parties of ICC. But it resulted out from the UNSC's power to send the situations to the court in order to apply peace and international security.³⁵

Surely the ICC cannot apply its jurisdiction over the non-member states without the UNSC's referral power. But it appears the states which have the veto rights in the Security Council reducing the ICC ability to act effectively.³⁶ The ICC has a tight relation with the Security Council. The ICC could be recognized as an essential source of legality of UNSC action; this relation brings a lot of moral and political benefits for both institutions. Also, those institutes made an effective reaction to humanitarian crises.³⁷

The relationship resulted in some critical decisions such as; firstly, the UNSC referred the cases of Sudan, Darfur, and Libya to the ICC. Secondly, the Security Council passed resolutions 1487(2003) and 1422(2002), which caused the Court to postpone prosecuting and investigating the situations, as a result of the peacekeeping operations of the UN.³⁸ When one or more international crimes occur, the prosecutor can be demanded by UNSC to investigate a situation. Although if the crimes happened in the territory of non-member states to the ICC, or if it was perpetrated by the national of such a state.³⁹

One of the concerns point over the ICC is the possibility of political interference by the five permanent members of the UNSC. Another notable point is that the court cannot have jurisdiction over the cases which occurred before the court was entered into force.⁴⁰ Also one of the most criticisms about the ICC is the act of court covered by the political benefits and

³⁵ C. Burke, 'A CRITICAL ASSESSMENT OF THE EXERCISE OF UNIVERSAL JURISDICTION BY SOUTH AFRICAN COURTS' (master thesis, Stellenbosch University 2015)

³⁶ Yvonne, M. Tessa, A, 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya' (2017) 91(105) ST. JOHN'S LAW REVIEW
<<https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=6787&context=lawreview>> accessed on 21 March 2019.

³⁷ Roach S, 'Humanitarian Emergencies and the International Criminal Court: Toward a Cooperative Arrangement between the ICC and UN Security Council' (2005) 6(4) International Studies Perspectives 431

³⁸ Jullie Ingrid Lugulu, 'A critical examination of the relationship between the International Criminal Court and the United Nations Security Council, in the light of referrals and deferrals' (master thesis, University of Cape Town 2014)

³⁹ 'The International Criminal Court' (Amnesty International USA, 2007-2008)
<https://www.amnestyusa.org/pdfs/IJA_Factsheet_1_International_Criminal_Court.pdf> accessed on 10 January 2019.

⁴⁰ 'Overview' page on the website of the Rome Statute of the International Criminal Court at
<<http://untreaty.un.org/cod/icc/general/overview.html>>

political interference, which lead the court to miss the sovereignty.⁴¹ Another negative point about ICC was the unrealistically high expectations from who support the court. Because the court's action was not as much as affected with the expectations of them which the court can address the act of violence and limit impunity against such crimes.⁴² Taking a few actions by the ICC was another criticism of the court. Also some other noted that the court's structure content had lacked the restricted resources, it comes across institutional limitations and states manipulate it. Also, the court is selective to take the investigation over the international violation cases.⁴³ Moreover, who criticize of the court noted that the court applies the jurisdiction over the innocents of distant wars. Also, they mentioned that the court is acting to support the powerful states and control weak ones. Additionally, they mentioned that the ICC is a deeply political body and it is an institution which is used to punish the rest.⁴⁴ Since the creation of the court, the court applied its jurisdiction over nine cases which all of them were from the African continent.⁴⁵ More focusing of the court to the African continent brings a question to whether this is a model of the international criminal law's selectivity.⁴⁶ The debates about the ICC act as selective enforcement of the international criminal law which targeting African, recently is a negative point of the court's operation.⁴⁷ The ICC's act demonstrates that the court is discriminatory because of suing the crimes committed in Africa while ignoring crimes committed by powerful states such as the crimes of hegemony in Iraq, Afghanistan, and Pakistan by US and international violations committed by Syria, and the

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⁴¹ Abby, R, 'The International Criminal Court: An Exploration of the Politics at Play' (Senior Honors Thesis, Brandeis University 2015)

⁴² Marieke de Hoon, 'The Future of the International Criminal Court. On Critique, Legalism and Strengthening the ICC's Legitimacy' (2017), International Criminal Law 591 review<https://rechten.vu.nl/nl/Images/Dr-mr-Mieke-de-Hoon-Cursusmateriaal-alumnidag_tcm247-878477.pdf> accessed on 10 January 2019.

⁴³ C. Gegout, 'The International Criminal Court: Limits, potential and conditions for the promotion of justice and peace' (2013) 35(5) Taylor & Francis<<https://www.tandfonline.com/doi/abs/10.1080/01436597.2013.800737>> accessed on 10 January 2019.

⁴⁴ Kirsten Ainley, 'The International Criminal Court on Trial' (2011) 24 (3) Cambridge Review of International Affairs <<http://eprints.lse.ac.uk/42694/>> accessed on 10 January 2019.

⁴⁵ Katarina, M, 'Is International Criminal Court Biased Against Africa?' (Bachelor Thesis, Bratislava International School of Liberal Arts 2013)

⁴⁶ Max du, P, Tiyanjana, M, Annie, O, 'Africa and the International Criminal Court' (2013), Chatham House <https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/0713pp_iccafrica.pdf> accessed on 6 Jan 2019.

⁴⁷ Torque Mude, 'Demystifying the International Criminal Court ICC Target Africa Political Rhetoric' (2017) 7, Journal of Political Science <https://www.researchgate.net/publication/312875009_Demystifying_the_International_Criminal_Court_ICC_Target_Africa_Political_Rhetoric> accessed on 10 January 2019.

crimes by Israel against the Palestinian society.⁴⁸ Also, some noted that the ICC target the “small fish” while the court is ignoring the more serious perpetrators of crimes.⁴⁹

Formally, a major reason for US opposition to the court is the matter of the ICC’s jurisdiction capacity over nationals of non-state parties.⁵⁰ The non-member states such as the US, Russia, China; have more focus on the court Statute’s Article 12 because they argued that the article leads to a dangerous draft toward universal jurisdiction by making the ICC able to apply its jurisdiction over the non-member states’ nationals.⁵¹ In this regard, Akande pointed out that the sovereignty of those states is not violated by the ICC’s jurisdiction over non-member states, since “the doctrine is only properly applicable in cases where pronouncement by the court on the rights and responsibilities of the third state is a necessary prerequisite for the determination of the case”.⁵² In spite of all these criticisms still, the ICC is a unique institution in the framework of protecting human rights, as it is a Criminal Court while most regional judicial bodies are civil courts. Nowadays, there is no direct regional alternative to the ICC.⁵³

1.2 Problem of the study

This research focuses on the question of how the ICC can through its jurisdiction prosecute the violator of the international crimes in the nationals and territories of non-member states of the Rome Statute? Before this research people answered it in the following manner; The ICC can apply its jurisdiction on the individuals, not states such as the head of states and governmental officials when those individuals commit the international crimes directly or

⁴⁸ Irene W, M, ‘A Critical Analysis of the International Criminal Court and Africa’ (master dissertation, University of Nairobi 2014)

⁴⁹ ‘Establishing Performance Indicators for the International Criminal Court,’ (2015) Open Society Justice Initiative <<https://www.opensocietyfoundations.org/sites/default/files/briefing-icc-performance-indicators-2015-1208.pdf>> accessed on 6 January 2019.

⁵⁰ Frederic Megret, ‘Epilogue to an endless debate: The international criminal courts third party jurisdiction and the looming revolution of international law’ (2001) 12(2), EJIL 248

⁵¹ Scheffer, David J, ‘The United States and the International Criminal Court’ (2017) 93(1) The American Journal of International Criminal Law <<https://www.jstor.org/stable/pdf/2997953.pdf?refreqid=excelsior%3A20fc0ef6082cd0feb1ed84ebb2744b6a>> accessed on 10 January 2019

⁵² Christian Eriksson, ‘ICC Jurisdiction over Nationals of Non-Party States: An ultra vires abomination, or legitimate judicial conduct?’ (Bachelor thesis, Örebro University 2017)

⁵³ Saccord, ‘Zambia’s Membership to the International Criminal Court a Civil Society Position’ <http://www.coalitionfortheicc.org/sites/default/files/cicc_documents/saccords_position_on_zambias_membership_to_the_icc_final_12_april_2017.pdf> accessed on 6 January 2019.

indirectly and the national court unwilling or cannot apply the jurisdiction.⁵⁴ Moreover, According to the Rome treaty's provision, the ICC is likely to exercise its jurisdiction over nationals and territory of non-member states by limited circumstance when those states are not otherwise satisfied to apply the jurisdiction of the court over committed international crimes by those states.⁵⁵ However, this research will show the capacity of the court by referring to the provision that is provided in the Rome Statute treaty to demonstrate the reality which to what extent the court can prosecute the individuals who committed the crimes by nationals or territory of non-state parties, to this working hypothesis of the International Criminal Court apply its jurisdiction, which will be explored at the global level of analysis. Because persecute the violator of international crimes commits in non-state parties are the universal cooperation and effort to prosecute the perpetrator of international crimes by facing the criminals.⁵⁶

1.3 Objectives of the study

The dissertation aims to fulfill the below objectives;

1. This dissertation will demonstrate the role of the ICC to finding a durable solution for the international violations which is committed by nationals and territories of non-member states in the Rome Statute.
2. It will find out to what extent the ICC can prosecute perpetrators (those violating the international criminal laws).
3. It will determine the ICC's jurisdiction capacity to apply the jurisdiction of the court over non-member states during the violation times.

⁵⁴ Gwen P. Barnes, 'The International Criminal Court's Ineffective Enforcement Mechanism: The Indictment Of Preside Omar Al Bashir' (2011) 34(6) Fordham International Law 147 <<https://ir.lawnet.fordham.edu/11/viewcontent.cgi?article=2313&context=ilj>>

⁵⁵ See the "Article 13" of the Rome Statute of the international criminal court

⁵⁶ Morris, M, 'The Jurisdiction of the International Criminal Court over Nationals of Nonparty States (Conference Remarks)' (2000) 6(363) ILSA Journal of International & Comparative Law <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2746&context=faculty_scholarship> accessed on 6 January 2019.

4. It will investigate how can the ICC apply its Jurisdiction to prosecute the violator of the international crimes in the nationals and the territories of non-member states of the court?

1.4 Significance of the study

There is no doubt that every research's which taken during the study aims to find the part of solutions. Moreover, the current paper efforts to illustrate the ICC's jurisdiction capacity over nationals and territory of non-member states of the Statute. Also, the research attempts to describe the legal provision as an instrument to gain this goal. Furthermore, it can be the answer for who says the ICC is only for the African continent and the court always focus on African states, because according to this current paper we can realize the real capacity of the court. And demonstrate the ways that declared in the Rome Statute to face the impunity of international criminals. Additionally, to show this reality that the court can by its jurisdiction limit the international violations in the territories of nationals and non-state parties of the Rome Statute. Also, this paper can be the guideline for people who live in the non-state parties to the court which have a lot of international criminal violations to know them rights, even to cooperate with the court and bring them cases to ICC and taking the practice act for facing the impunity of those international criminals.

1.5 Methodology

The research will rely on qualitative research design to collect data. The author will use the case study as a model to explain the research design. Moreover, In this research, the thematic analysis qualitative method will be applicable, because in this method the research will look at indigenous typologies, repetitions, metaphors and analogies, transitions, similarities and differences, missing data, linguistic connectors use of concepts and theories.⁵⁷ The type of data in my research will be secondary source data which have been written about the court's history, jurisdiction, applicability, capability, competence, cases, and sentences. The researcher will search for these sources in books, journals, texts, articles, web sides, every secondary source which related to the research. During the searching proses in the documents, the researcher will try to look at the capability of this court according to the Rome Statute

⁵⁷ W. Creswell, John, 'Research Design. 4th Edition: Qualitative, Quantitative, Mixed Methods Approaches' (SAGE 2016)

Articles. Then result out to what extent the court can persecute the violators of the international crimes in the territories of Rome Statute's non-state parties. Additionally, the researcher tries to look for the cases of non-state parties which have been sentenced by the ICC as a model for supporting the validity and reliability of the research question.⁵⁸

⁵⁸ Jess Gifkins, 'R2P in the UN Security Council: Darfur, Libya and beyond' (2015) 51(2) *Cooperation and Conflict*, 148

CHAPTER TWO

THE PERSPECTIVE ON INTERNATIONAL CRIMINAL COURT

2.1 The Historical Background of ICC

During the past 500 years from now, the community in the world has tried and thought several times about determining the most serious crimes around the world which have the horrifying impact in every society in the world.⁵⁹ According to Bassiouni, there are some pieces of evidence back to 405 BC in Greek which prove holding tribunals to address the war crimes and persecute the perpetrators.⁶⁰ Also, Schabas explain his perspective about this view which set "war criminals have been prosecuted at least since the time of ancient Greece, and probably well before that"⁶¹

According to the explanation above, it determines that the universal community always had demined for set and establishment the law body which delegates like a universal court. However, it has claimed that which the period of beginning the idea of setting the international criminal court dates back to the 13th century. However, we should mention that both of international lawyers and historians stated the reality which the body of an international court has not come to exist and there is no practical action until the 15th century.⁶²

The idea for establishing the universal justice body began with the army conflict rules such as Brussels' protocol in 1874 this was the initial struggle to establish the rule for the army conflicts. However, it should be stated that in the protocol no ideas are mentioned about how to establish the arm conflict rules, how to bring them into force, and how to prosecute the perpetrators. The structure that The Hague conference was established on was named as "manual on the laws of war on land" in 1880. The establishment of the Hague conference was an important development phase in the international law during the years 1899-1907,

⁵⁹ Sandra L. Jamison, 'A Permanent International Criminal Court: A Proposal that Overcomes Past Objections' (1941) 23(2) *Denver Journal of International Law & Policy* 419

⁶⁰ M. Cherif Bassiouni, 'Crimes Against Humanity in International Criminal Law' (Cambridge, MA :Kluwer La 41nternational, 1999) 517.

⁶¹ William A. Schabas, 'An Introduction to the International Criminal Court' (Cambridge, UK, and New York, N 4 Cambridge University Press, 2001) 1

⁶² Brook Sari Moshan, 'Women, War, and Words: The Gender Component in The Permanent International Criminal Court's Definition of Crimes Against Humanity' (1998) 22(1), *Fordham International Law Journal* 165.

especially the Hague convention in 1907, which mentioned and specified the responsibilities for any party that commit international law violations.⁶³

The next step of improvement of the international criminal law was the World War II. Throughout the second World War, the crimes that were committed by the Nazi government against the allied powers resulted in the establishment of the military tribunal by the victorious allied powers to punish those who were committed and responsible for those acts of violations. The international military tribunal was created in Nuremberg and Tokyo in 1945 these tribunals were seen as the statue of the recent international criminal law.⁶⁴

The United Nations used the Nuremberg chart as a resource during the war situations. Then later, in 1948, the Nuremberg chart was accepted by United Nation General Assembly (UNGA). The main reason for the acceptance of the chart was to chastise the criminals of the genocide crimes and to prevent these crimes. One year later in 1949, the Geneva conventions and its edition protocol I were established, it mentioned a list of war crimes. But, it should be said that the term "war crimes" was not used in the protocol, but the term "grave breaches" was used.⁶⁵

In 1992 and 1994, UNSC established the International Criminal Tribunal for the former Rwanda and Yugoslavia (ad hoc) in the United Nations. The ad hoc tribunals played an essential and positive role in the international criminal law development.⁶⁶ The United Nations had the idea for creating a long-lasting international judicial court to have the authority of arbitration over the crimes that occur around the world. Moreover,, it prevents the crimes and prosecute the criminals. This idea developed step by step before and after the first and second World Wars. In these steps of the establishment of the permanent international court, the experience of tribunals that were established before was taken into consideration. Moreover, the jurisdiction of the committers in the ad hoc courts, which were the genocide violations that

⁶³ Barnett L, 'The International Criminal Court: History and Role' (2013) Library of Parliament <<https://lop.parl.ca/content/LOP/ResearchPublications/2002-11-e.pdf>> accessed 3 November 2018.

⁶⁴ Schabas William A & Bernaz N, 'Routledge Handbook of International Criminal Law' (2nd ed, Routledge 2011).

⁶⁵ Sadat, L, 'The International Criminal Court: Past, Present and Future' (2014) 'World Law Institute' <<https://law.wustl.edu/harris/documents/ICC-PastPresentFuture4-16-14.pdf>> accessed 3 November 2018.

⁶⁶ Dame, F, 'The effect of international criminal tribunals on local judicial culture: the superiority of the hybrid trial' (2015) 'Michigan State International Law Review' <<https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1187&context=ilr>> accessed 3 November 2018.

were committed in Rwanda, and the international humanitarian law's serious infringements and other violations that were committed in Yugoslavia were also useful experiences for the formation of the enduring international judicial court. All in all, the points mentioned above were reasons to corporate and supported the idea to create **the permanent international court**.⁶⁷

Under **the name of Rome Statute**, a treaty was signed among one hundred and sixty different states on July 17, 1998 in order to establish the permanent ICC. In this treaty, some mechanisms were set up of how the states support the court and the types of crimes that the court has jurisdiction over them. Any country can only become a member of the assembly of this court after it accepts the rules of this court. More than one hundred and twenty states adopted the Rome Statute, but only 60 of them ratified it. The members of the court are from various reigns, such as the Asian Pacific, Africa, North American, Western European, Eastern Europe, and also, Latin America and the Caribbean. Under the name of the ICC, the **Rome statute** came into force on July 1, 2002.⁶⁸ The permanent international criminal court's foundation with possibly global jurisdiction is a vital step in the ICC's developments. The international court was established not just to **investigate and try international offenses**, but it also established a novel **code of international criminal law**.⁶⁹ Additionally, the **primary aim of establishing the ICC is to apply the peace, justice, and stability around the world**. The court operates with the mechanism of self-binding. The mechanisms are binding the member states to spread the **justice and peace in the world**.⁷⁰

2.2 The Rome Statute of the ICC

After the World War II ended, the Nuremberg court was established by the struggle of some idealistic states and non-member state actors by pushing the idea of adopting the international human right. However, the idea of building the permanent universal court was alive in vague by the (UN) study commissions. But the **end of the cold war** led to some terrible

⁶⁷ Crystal R, Friman H, Robinson D & Wilmschurst E, 'An Introduction to International Criminal Law and Procedure' (2nd ed, Cambridge University Press 2010).

⁶⁸ 'Understanding the International Criminal Court' <<https://www.icc-cpi.int/icc2/es/PIDS/publications/UICCEng.pdf>> accessed 3 November 2018.

⁶⁹ Crystal R, Friman H, Robinson D & Wilmschurst E, 'An Introduction to International Criminal Law and Procedure' (2nd ed, Cambridge University Press 2010).

⁷⁰ Beth A Simmons, Allison Danner, 'Credible Commitments and the International Criminal Court' (2010) 64(2) International Organization 225-256.

situations in some states such as Yugoslavia and Somalia. It was the cause of pushing some states to think about establishing the permanent international court by practical steps.⁷¹

In 1989 the international community was interested in the proposal of the president Robinson of Trinidad and Tobago which demand to establish an international criminal tribunal. The demand was measured by the United Nations General Assembly which concluded six committees.⁷²

In 1992 the General Assembly demanded the International Law Commission (ILC) to set a constitutive statute for creating a universal body of law under the name of the ICC. Moreover, in 1994 a statute of a draft had been succumbed by the ILC according to the General Assembly request to collect the works and establish a convention. But the states couldn't reach an agreement with each other on the draft.⁷³

From 1995 to 1998, two committees were established by the UNGA to approve the draft of the creation of the ICC under the name of "consolidated text." But the committees under the name of (Ad Hoc Committee) couldn't agree on the functional and the administrative issue during the meetings to set a draft.⁷⁴

A committee was recognized by the General Assembly under the name of Preparatory Committee PrepCom on the creation of the international court after Ad Hoc Committee. The main cause of the committee was to generate a draft which state could adopt. A broadly appropriate consolidated text of a convention for an international criminal tribunal had to be arranged by the PrepCom.⁷⁵ During three years of negotiations in sixth PrepCom the decision

⁷¹ Jay Goodliffe, Darren Hawkins, 'A Funny Thing Happened on the Way to Rome: Explaining International Criminal Court Negotiations' (2009) 71(3) The Journal of Politics
<https://www.jstor.org/stable/10.1017/s0022381609090835?seq=1#page_scan_tab_contents> accessed on 17 January 2019.

⁷² Christine E Philipp, 'The international criminal court- A brief introduction' (Max Planck, 2003) 332

⁷³ Nicole Eva Erb, 'Gender-Based Crimes under the Draft Statute for the Permanent International Criminal Court' (1998) 9 Colum. Hum. Rts. L. Rev. 401, Heinonline
<<https://heinonline.org/HOL/LandingPage?handle=hein.journals/colhr29&div=15&id=&page=>> accessed on 17 January 2019.

⁷⁴ M. Cherif Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court' (1999) 59 Cornell International Law Journal
<<https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1449&context=cilj>> accessed on 17 January 2019.

⁷⁵ John Washburn, 'The Negotiation of the Rome Statute for the International Criminal Court and International Law making in the 21st Century' (1999) 11(2) Pace International Law Review
<<https://digitalcommons.pace.edu/cgi/viewcontent.cgi?referer=https://www.google.com.cy/&httpsredir=1&article=1238&context=pilr>> accessed on 17 January 2019.

for holding the Rome Diplomatic Conference had been taken. Agreeing on the final text of the treaty for creation the last great international organization was the main purpose under the name of ICC.⁷⁶

The status of the Rome Conference and the PrepCom was the subject of the General Assembly bodies. By the meaning of that, they started with the rules of procedure, institutional memory, the Assembly's internal politics, and traditions and parliamentary practices.⁷⁷

On 3rd April 1998 in the headquarters building of the UN in New York the last term of the (PrepCom) have been held in Conference Room I. Nearly 130 delegations of governments moreover, the representatives of NGO participated in the conference. In the conference, head of Netherlands announced to the PrepCom which the founding treaty of the ICC had been reached on the final draft. Also, he mentioned that the upcoming diplomatic conference would be the last negotiation to adopt the treaty of the ICC which was planned to hold in Rome.⁷⁸

The final diplomatic conference had been held in the Rome on 17th July 1998. In the meeting, the Statute of establishing the ICC had been adopted by the state members. On 1st July 2002, the mentioned Statute came into power. After nearly a year of adoption, the court was completely operative. The courts first issued arrest warrants in June 2005, and the first trial was begun in January 2009. Furthermore, the delivery of the first judgment was on 14th March 2012. Also, the amount of participation by the states reached 122 countries on 1st May 2013.⁷⁹

In 2016, three Africans states submitted their written notification to remove their names from the ICC's Rome Statute to UNSC following the Rome Statute's Article 127. These countries included the Gambia, South Africa, and Burundi. African union supported their withdrawal from the ICC by encouraging them to be pioneers of its 'Withdrawal Strategy'. However, the

⁷⁶ Bartram S. Brown, 'U.S. Objections To The Statute Of The International Criminal Court: A Brief Response' (1999) 31 INTERNATIONAL LAW AND POLITICS 855

⁷⁷ John Washburn, 'The Negotiation of the Rome Statute for the International Criminal Court and International Law making in the 21st Century' (1999) 11(2) Pace International Law Review
<<https://digitalcommons.pace.edu/cgi/viewcontent.cgi?referer=https://www.google.com.cy/&httpsredir=1&article=1238&context=pilr>> accessed on 17 January 2019.

⁷⁸ Fanny Benedetti, John L. Washburn, 'Drafting the International Criminal Court Treaty: Two Years to Rome and at 9 Afterword on the Rome Diplomatic Conference' (1999) 5(1) Global Governance
<https://www.jstor.org/stable/27800218?seq=1#page_scan_tab_contents> accessed on 17 January 2019.

⁷⁹ YVETTE BORG CARDONA, 'A CRITICAL ANALYSIS OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT' (Ph.D. thesis, University of Malta May 2013)

Gambia and South Africa took back their withdrawal. These withdrawals also created threats for the other states to submit their notifications for the withdrawal from the ICC.

At the end of 2017, the court's authority was expanded to meet the new challenges raised due to the crime of international aggression along with modern war crimes. It was due to the latest technological developments which impacted the war crimes and its modified techniques. Different tools were defined to meet new challenges. Accordingly, the support of countries has a critical role. It is observed that the EU has given the maximum possible support to ICC. The withdrawals have also impacted the performance of the ICC. The lack of participation of few countries and states has limited the authority of the Rome Statute globally.⁸⁰

2.3 The structure of the ICC

The ICC's body was stated in the Rome multilateral treaty between the states. The state members of the treaty are structured under the ASP. Also, it acts like an organization oversight and judicial body of the court. Moreover, The Assembly is not only acting as a governing body of the court but also it has a special significance because of the closely involved negotiation which had the member states between them on the issues of the Rome Statute and other important Courts issue which related to the court documents.⁸¹

Moreover, every nine years the majority vote of the assembly elects 18 judges for each term. Election of judges is based on a certain number of criteria such as having experience either in international law or criminal law, should have individual nationality, two judges cannot share the same nationality, and also should be a citizen of one of the member countries. These judges are divided between Appeals Chamber, Pre-Trial Chamber, and the Trial Chamber. The judges select the court president and the first and second deputy president.⁸²

The assembly occasionally held meetings to approve the budget, elect officials, and carry out other administrative oversight functions. Additionally, it has the authority to change or remove Court officials, to agree and vote on necessary amendments to the Rome Statute, Evidence, Rule of Procedures, and Elements of Crimes. The Assembly has been given the

¹⁴⁶ I. Zamfir, 'International Criminal Court: Achievements and challenges 20 years after the adoption of the Rome Statute' [2018]

⁸¹ 'ICC Structure' (n.d) IBA <https://www.ibanet.org/ICC_ICL_Programme/About_the_ICC/ICC_Structure.aspx> accessed on 17 January 2019.

⁸² 'The Judges of the Court' (2015) International Criminal Court <<https://www.icc-cpi.int/iccdocs/pids/publications/judgeseng.pdf>> accessed on 17 January 2019.

authority by the Rome Statute to call a conference for reviewing the Rome Statute after seven years passed on the treaty to take into account the necessary amendments to it.⁸³

The court is acting as a sovereign international organization which has the international legal character in the international laws. Moreover, the court has the complex administrative body which works and struggle as a fixed judicial entity to investigate the severest international crimes and end the impunity in the world as we mentioned before. According to the Rome Statute's Article 34, the court included four organs; two of them are judicial organs such as; Presidency and the chambers divisions, and other one is the OTP and the Registry.⁸⁴

2.3.1 The presidency

ICC body is divided into four parts. Among them, one is the presidency. Every three-year, a plurality of the 18 judges of the chambers selected by the assembly of the court vote for and select the renewable-term ⁵⁷ president of the court and first and second vice presidents. The judges ⁵⁷ who are working in the presidency organ are working by full-time serve.⁸⁵

The Presidency organ responsibility includes three main areas: judicial/legal functions which are organized and assigns the cases that are presented to the chambers of the court. Also takes the judicial review of the cases which are decided in the court by the certain decisions and it is responsible for concluding the cooperation agreements which are holding with states. Also, administration and external relations, the right of the administration of the Court and observe the ³¹ work of the Registry are the other responsibilities of the Presidency organ, the exclusion ³¹ of the prosecutor's office. The prosecutor's settlements on all critical issues of common concern are sought and coordinated by the presidency. Additionally, in the exercise of external relations, the Presidency promotes public awareness and understanding of the Court by maintaining relationships with States and other entities.⁸⁶

⁶⁸ Philippe Kirsch from ⁶⁸ Canada was elected as the first president of the court in 2003; also he has led the conference of Rome for the establishment of the ICC. The mentioned president led

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⁸³ Schabas, W, 'An introduction ³⁴ to the international criminal court' Cambridge university press (London, 2011)

⁸⁴ Hans-Peter Kaul, 'International Criminal Court ICC' (2010) Oxford Public International Law <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e42#law-9780199231690-e42-div-93>> accessed on 17 January 2019.

⁸⁵ 'The Presidency' (n.d) International Criminal Court <<https://www.icc-cpi.int/about/presidency>> accessed on 17 January 2019.

⁸⁶ 'Structure of the ICC' (n.d) ABA-ICC <<https://www.aba-icc.org/about-the-icc/structure-of-the-icc/>> accessed on 17 January 2019.

the court for two terms.⁸⁷ The most recent president which was elected by judges in 11 March 2018 to become the president of the court was Judge Chile Eboe-Osuji from Nigeria.⁸⁸

2.3.2 The chambers divisions

The judicial division or chambers of the division is another organ of ICC judicial body. The chamber includes the judges who were elected by the ASP.

Six of the judges are women, and the remainder number are men which are 18 judges.⁸⁹ The judges are divided by three divisions, and each of them has individual competencies that are the third one ¹⁵⁷ pre-trial division, the trial division, and the appeal division.⁹⁰

² The pre-trial division; composes of three judges usually. The competence of the division is investigated and find out on the cases which donate to the court has enough evidence to refer the cases to the chamber of trial. The pre-trial chamber can be assumed as a filter of the cases which is brought to the court after the process of investigation by the office of prosecuting and before the cases are going to the trial will be examined by this division. Also, the deferral cases should be going by this filter to make sure there is a necessary reason to deferral the mentioned case to the court by checking and investigating the evidence and the background of the cases.⁹¹

Also, the trial division includes three judges usually which hear the pre-trial chamber refers the cases to the division. The trial division is responsible for conducting a fair trial and takes the charge sentences if there is enough evidence to make the cases or the persons guilty, or take the innocent sentences if the evidence is not strong enough to accuse the person or the cases.⁹²

¹⁹ Andrew Novak, 'The International Criminal Court an Introduction' (Springer 2015)

⁸⁷ See the International Criminal Courts website

⁸⁸ Alec Samuels, 'International Criminal Court' (2006) 70(4) The Journal of Criminal Law

⁸⁹ Ron Synovitz, 'Explainer: Why Does The U.S. Have It Out For The International Criminal Court?' (Radio Free Europe Radio Liberty, September 11, 2018) <<https://www.rferl.org/a/explainer-why-does-u-s-have-it-out-for-international-criminal-court-/29484529.html>> accessed on 18 January 2019.

⁹⁰ David Admire, 'The International Criminal Court: Our Differences in Jurisprudence' (2011) 47 American Judges Association <<https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1364&context=ajacourtreview>> accessed on 18 January 2019.

⁹¹ Hans-Peter Kaul, 'International Criminal Court ICC' (2010) Oxford Public International Law <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e42#law-9780199231690-e42-d932>> accessed on 17 January 2019.

⁹² 'The Presidency' (n.d) International Criminal Court <<https://www.icc-cpi.int/about/presidency>> accessed on 17 January 2019.

The third division of the judges is appeal division; the division includes five judges. Among them, one is the president of the chamber who is electing by the judges in the chamber. The responsibility of this division is to revise the decisions which are decided by the trial chamber to make sure the sentence is proportionate to the crimes. Also to ensure the truth, rightness, and fairness of these sentences and the division can edit the sentences or demand for a new trial on the different trial chamber.⁹³

2.3.3 Office of the Prosecutor (OTP)

This unit of the court operates as an autonomous organ of the court according to the exclusive article of Rome statute. The organ-like other organs of the court elected the members by ASP, which includes the prosecutor and the prosecutor's deputy. The Prosecution Division, the Jurisdiction, and the Investigation Division are the three central division of the organ. The organ is responsible for investigation on the violation international cases which we mentioned before.⁹⁴

Moreover, according to the court Statute's Article 13, the organ can investigate the international violation cases which were committed beneath the court's jurisdiction. Also according to the court's Statute, the organ has the right to investigate the territory of the nationals and the court's non-member states, in the circumstances which the serious international violation committed and the states and nationals are unwilling to prosecute the cases.⁹⁵

The organ takes the investigation on the violation cases by sending the experts and the investigators to collect the evidence to prove the violation. Then the organ transfers the achievement evidence of the cases to the pre-trial chamber which decides on the validity of the evidence on each international violation cases and then send the cases to the trial chamber for the decisions.⁹⁶

⁹³ Laura Barnett, 'The International Criminal Court: History and Role' (2013) Library of Parliament <https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/200211E>accessed on 18 January 2019.

⁹⁴ 'Office of the Prosecutor' United Nations International Residual Mechanism for Criminal Tribunals <<http://unictr.irmct.org/en/tribunal/office-prosecutor>>accessed on 18 January 2019.

⁹⁵ Antonio Coco, 'ARTICLE 13 in 'Commentary on the Law of the International Criminal Court' (Ed: Mark Klberg)' (2017) Academia 1-13

⁹⁶ 'Report on Preliminary Examination Activities 2018' (International Criminal Court, 5 December 2018) <<https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf>>accessed on 18 January 2019.

2.3.4 Registry

The registry organ provides the service as a natural organ to all other organs in the court. The organ is responsible for recording all information and recording all hearing cases. Also, the organ translates and interprets the court pleading of the court during the court trial. According to the Rome statute the official language in the court is English and French, so the organ should interpret or translate the hearing court to these languages in case if it is necessary. Moreover, the organ register and archive all possess in the court it works like an archive of the ICC. The registry organ is also accountable for taking the witnesses who are demanded by the court to exist in hearing proses of the court and to protect them from the threats.⁹⁷

2.4 The ICCs operation

The ICCs legal operation as a universal criminal court is different from the other courts. Because in the ICTY and ICTR, the courts could apply the court's jurisdiction to individuals who committed the crimes against humanity only by a specific period and the judicial capacity of these courts was restricted to the territory of those states. But unlike that the ICC, as an international court, can apply its jurisdiction on the international crimes, when the crimes perpetrated after the courts interred into force on 1st July 2002. Also, the ICC has different legal procedure from ICJ, since the role of the ICJ is to rule on disputes that occur between states and it cannot try individuals like ICC.⁹⁸

Moreover, the ICC has a deferent legal form from the ⁵Ad Hoc Tribunals because ⁷the UNSC established ⁷the tribunals based the binding provisions of "Chapter VII of the UN Charter" for ⁷the specific period of time. But unlike ⁷the tribunals, ⁷the ICC like an international institute is not part of UNSC, and the international treaty was the foundation of the court. Unlike other tribunals, it was not established by the UNSC, but the primary ²⁹relationship between the ICC and UNSC is cooperation agreement.⁹⁹

⁹⁷ 'Registry' (n.d) ³⁷International Criminal Tribunal for the former Yugoslavia<ht ⁵⁰www.icty.org/en/about/registry>accessed on 18 January 2019.

⁹⁸ Claire Calzonetti, 'Frequently Asked Questions about the Inte ⁵⁰tional Criminal Court' (Council on Foreign Relations, July 23, 2012) <https://www.cfr.org/backgrounder/frequently-asked-questions-about-international-cri ¹⁴⁵-court>accessed on 18 January 2019.

⁹⁹ 'Investigation Manual for ¹⁰³Crimes, Crimes Against Humanity and Genocide in Bosnia and Herzegovina' (2013) OSCE October 2013 <https://www.osce.org/bih/281491?download=true>accessed on 18 January 2019.

The ICC is working by the complementarity principle which provided in the court's Statute. In this regard, one can say the mentioned principle is one of the most important clauses in the Statute of the court. Because according to the complementarity principle the ICC will complete the national court's action and it will never act as an alternative to the national jurisdictions.¹⁰⁰

Referring to the court Statute's Article 17 which declared the complementarity principle, only when the domestic courts are "unwilling or unable" to deliver justice against criminals, the ICC can have jurisdiction. In case of willing and taking the sufficient action to the crimes by the national court, the ICC has no rights to apply its jurisdiction to the states.¹⁰¹ "Inability" means when the state cannot prosecute the criminals or approach to the sufficient evidences due to falling or inaccessibility of the domestic judicial system.¹⁰²

The court can determine the unwillingness of the state during the national jurisdiction process by the elements which provided in the Rome statute for the unwillingness of the state by the following elements:

1. When the national court is acting to protect the criminals, by another country when the court uses the courts sentences to make a shelter for criminals who violated the international crimes which provided in the Rome statute's Article 5.
2. In case of unjustified delay of bringing the criminals to the court by various excuses.
3. Once the national court's decision is unfair, and the court's process is not conducted by independently or impartially, when the courts dictions are not consistent with the criminal cases.¹⁰³

¹⁰⁰ Steven Freeland, 'International Courts and Domestic Politics' (Cambridge University Press, June 2018).

⁶ 'INTERNATIONAL CRIMINAL JUSTICE The ICC and Complementarity' (ICJ Kenya, 2014) < http://www.35now.org/documents/complementarity_journal.pdf> accessed on 18 January 2019.

¹⁰² 'The Rule of Law and the ICC' (Rule of Law Institute of Australia, 9 November 2015) < <http://www.ruleoflaw.org.au/rule-of-law-icc/>> accessed on 18 January 2019.

¹⁰³ Abreha Z Mesele, 'International Criminal Court and an Union: Selective Justice?' (2018) Abyssinia Law < <https://www.abysiniaw.com/blog-posts/item/1513-international-criminal-court-and-african-union-selective-justice>> accessed on 18 January 2019

Jurisdictional Triggers

The ICC jurisdiction capacity according to Article 13 of Rome treaty will apply only through these three situations, so whether while committing the atrocity crimes or after that. The situations are the following:¹⁰⁴

1. Self-referral; it means when the cases of atrocity offenses referred to the courts prosecutors by the act of states. Whether the crimes are perpetrated in the State Parties' territories that make the referral or whether it perpetrated ² on the territories of other State Parties or committed by residents from the referring State Parties or another State Parties.¹⁰⁵

The ICC cases mostly are the cases which committed atrocity crimes inside the territory of states and submitted to the court by the state itself such as the case of "2013 Comoros Referral" and "2012 Mali Self-Referral"¹⁰⁶

2. Referral of the Security Council (UNSC); according to Article 13-b provided in the Rome statute, UNSC may transfer the criminal cases to ICC, in the situations when one or more ³⁹ atrocity international crimes are committed. The provision of the court's Statute ²⁹ under the UN Charter's Chapter VII had given the authority to UNSC to refer the criminal cases in the territory of non-member states to the ICC even if the non-member states are not in agreement of that.¹⁰⁷

But if a permanent UNSC member veto the resolution of criminal referral cases, the ICC cannot apply its jurisdiction, like Syrian case. So for applying the referral provisions in each criminal case, it needs the vote of all permanent members of UNSC. Moreover, The Libyan

¹⁰⁴ Bartram S. Brown, 'GETTING A CASE TO THE ICC' (1999) ¹ Chicago-Kent College of Law <<http://www.kentlaw.edu/faculty/bbrown/classes/HumanRightsSP10/CourseDocs/13ICCJxFlowChart.pdf>> accessed ³⁰ 8 January 2019.

¹⁰⁵ 'Definition of the crime of aggression' the Global Institute for the Prevention of Aggression <<https://crimeofaggression.info/role-of-the-icc/definition-of-the-crime-of-aggression/>> accessed on 17 March 2019.

¹⁰⁶ See the International Criminal ⁴⁵ Court website.

¹⁰⁷ SEJLA DURBUZOVIC, 'International Criminal Court and the UN Security Council – a difficult relationship' LAW-INT1 <<https://www.euclid.int/papers/Sejla%20Durbuzovic%20-%20ICC%20UNSC.pdf>> accessed on 18 January 2019..

referral in 2011 and the Sudan referral in 2005 were two notable and exclusive cases which had been referred to the ICC by the UNSC under this provision.¹⁰⁸

3. "Proprio Motu Investigations"; when atrocity criminal cases occur, whether in the territory or by the member states' nationals to the ICC, or by the non-member states' nationals or in the territory, which are consist to apply the court's jurisdiction. In these situations, the ICC's prosecutor can take the preliminary examination and after approval this step by judges of court they open the investigation process. The 2015 Preliminary Examination–Afghanistan and 2015 Preliminary Examination–Iraq was two example cases under this provision.¹⁰⁹

After referring the criminal cases to the ICC by the three situations that we mentioned above, the ICC prosecutors may take the preliminary examination. The fundamental examination is not an investigation, but it is to examine proses according to the achievement evidences and available information about the criminal cases, in order to reach the reality of the criminal issue, a full ICC investigation is also warranted so as to define whether.¹¹⁰

Therefore, according to the Rome Statute's Article 53(1), the ICC's prosecutors might move to open a formal investigation in the criminal cases. If all of these following requirements satisfied the prosecutors to believe that there is a sensible basis to move the cases to the ICC:

Jurisdiction: the prosecutors should determine whether the criminal cases which referred to the court are under the jurisdiction of the court by comparing these four elements of investigation:

1. *Temporal Jurisdiction*; whether the criminal cases are perpetrated after the courts come into force on July 1, 2002, if the criminal cases are committed before this period of time then the ICC cannot make justice over the criminal cases.

¹⁰⁸ Jennifer Trahan, 'The Relationship Between the International Criminal Court and The U.N. Security Council: Parameters and Best Practices' (2013) Criminal Law Forum 417

¹⁰⁹ Elizabeth White, 'THE INTERNATIONAL CRIMINAL COURT – A LOST POTENTIAL OR ENDURING ASSET?'(THE KENAN INSTITUTE FOR ETHICS, February 15, 2018)< <https://kenan.ethics.duke.edu/the-international-criminal-court-a-lost-potential-or-enduring-asset/>>accessed on 18 January 2019.

¹¹⁰ 'ICC preliminary examinations' (n.d) Coalition for the International Criminal Court <<http://www.coalitionfortheicc.org/explore/icc-preliminary-examinations>>accessed on 18 January 2019.

2. *Territorial Jurisdiction*; it should be the criminal cases committed under the territory of the court according to Article 13 which are the; state referral, UNSC referral, and Proprio Motu Investigations. If the criminal cases do not come under this provision so the ICC cannot apply the court's jurisdiction over the criminal cases.
3. *Subject Matter Jurisdiction*; the prosecutors should examine whether the committed crimes are the four serious crimes which provided in the Rome Statute's Article 5. In the case when the committed crimes are not the serious crimes the court has not capacity to justify the criminal cases.
4. *Personal Jurisdiction*; the prosecutors should examine the perpetrators of the criminal cases to define the personality of criminals because the ICC has jurisdiction only over persons who are older than 18. Also the court cannot punish the rebel groups, governments, states, institutes inside the states, or political parties. However, the court can prosecute the individuals who are inside these parties or groups.¹¹¹

Admissibility: the criminal referral cases to the court should be examined from the prosecutors by the admissibility phase which comprises both of complementarity and gravity.

Complementarity; the criminal cases which are moved to the ICC should have complementarity principle. The principal determines the ICC as a last solution court, so according to the principle the moved criminal cases should be unwilling or enabling to authorize over them by the national courts. In case of willingness or able from the national courts to prosecute the criminals then the ICC cannot apply the court's jurisdiction over the criminal cases.

Gravity; the prosecutors should determine whether the criminal cases are the gravest crime or by another world whether the crimes are the atrocity crimes by looking on the scale, nature,

¹¹¹ Alexa Koenig, Felim McMahon, Nikita Mehandru, Shikha S Bhattacharjee, 'Quality Control in Preliminary Examination: Volume 2' (Torkel Opsahl Academic E-Publisher ,2018) 681

manner, and also the rate of impact of the criminal cases, according to that the prosecutor can define whether the cases should move to the ICC or not.¹¹²

Interests of justice; after approving all of those requirements that above mentioned the prosecutors in next step would examine the criminal cases to result out whether there is an interest of justice to move the cases to the court. In the situations when the prosecutors noted that there is no interest for justice to prosecute the criminal cases, and then may the prosecutors reject the proses of movement of the criminal cases to the ICC.

After approving of all these requirements, the office of prosecutors may decide to move the criminal cases from the preliminary examination to the formal investigations which called the situations, like the situation of Libyan.¹¹³

There is no specific period to move the criminal cases from the preliminary examination to the formal investigations (situations). It depends on the office of the prosecutor's decision, whether they decide that the criminal cases does not fulfill the needed requirement to move to formal investigation steps, or may the prosecutors needs more evidences to make the decisions, or else may the office of prosecutor decide to change the preliminary examinations to situations in circumstance that they approve and noted that the cases fulfill the needed requirements.¹¹⁴

After the preliminary examination changed to formal investigations in this step the OTP will gathering as much as the evidences in the territory of criminal cases such as witness, interviews, videos, images, and etc. later the achievement evidence will be transferred to the pre-trial chamber then the chamber according to the evidence will decide whether there is a reasonable ground to prove the guiltiness of the criminals. In situation of doubt of the achievement evidences or shortage of them, the pre-trial chamber can demand the OTP for collecting more evidences for that. After satisfying the judges in this trial about the guiltiness of criminals and result out the fact which the persons are responsible for the violations of criminal cases, then may they decide to issue an order of arrest and summon the criminals to

¹¹² 'Report on Preliminary Examination Activities 2018' (International Criminal Court, 5 December 2018) <<https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf>> accessed on 18 January 2019.

¹¹³ 'Policy Paper on Preliminary Examinations' (2013) International Criminal Court <https://www.icc-cpi.int/iccdocs/otp/otp-policy_paper_preliminary_exam_2013-eng.pdf> accessed on 18 January 2019.

¹¹⁴ 'Preliminary Examinations by the Prosecutor of the International Criminal Court' Coalition For The International Criminal Court <http://www.iccnw.org/documents/CICC_Factsheet_PrelimExamQA.pdf> accessed On 18 January 2019.

attend the court. After presenting the criminals in the court during the hearing process, the trial may decide whether they approve the cases or reject them in the period of 60 days. Because the ICC does not have any power; all these steps are taken through the cooperation and assistance with states.¹¹⁵

In the criminal cases, following the approval via the chamber of pre-trial and referral to the trial, the trial may compare all evidence with the fact of the criminal cases through the hearing process. Whether the court accuses the criminals which responsible of crimes and sentences them, or whether they decide that the individuals are not responsible for the crimes according to the achievement evidences. The sentences may up to 30 years or life sentences, but the court cannot make death sentences because it will be adverse of the principles of international humanity.¹¹⁶

After making sentences over the criminal cases by the judges in trial chamber, both of criminals and prosecutors are authorized to appeal the sentences in the appeal chamber court for amendments or revise the decisions. The appeal may approve the sentences which provides by the trial chamber or may amend some part of them or may decide to open another trial. It depends in the criminal cases and the situations of each case.¹¹⁷

¹¹⁵ 'WHAT HAPPENS AFTER THE ICC'S PRELIMINARY EXAMINATION CONCERNING THE UKRAINE SITUATION?' (2015) NO. 6, GRC

<<https://globalrightscompliance.files.wordpress.com/2015/11/issue-brief-6-engfinal.pdf>> accessed on 18 January 2014

¹¹⁶ Volker Roben, 'The procedure of the ICC: status and function of the prosecutor' 7' (Max Planck UNYB ,2003) 513

¹¹⁷ Rachel S. Taylor, 'Tribunal Law Made Simple' (n.d) GPF <<https://www.globalpolicy.org/component/content/article/163/29333.html>> accessed on 18 January 2019

CHAPTER THREE

THE COOPERATION BETWEEN ICC AND THE UN

3.1 Relationship Agreement between ICC and the UN

Like an intergovernmental organization, the UN was founded to address and deal with the human rights essential issues along with the justice concerns. Moreover, it will provide and ensure the freedom and liberty for citizens of its member states.¹¹⁸

In spite of many proposals about the creation of the ICC, it was created outside the UN as a separate international judicial body. The idea for creating an international judicial body to deal with international crimes and punish the criminals has a long tradition.¹¹⁹ Struggles to find a suitable proposal for the establishment of the ICC were continued to work by the ILC through the cold war. The work finally gets the harvest at the end of the previous century. One of the proposed issues was the option of an amendment of the UN which includes the ICC as a principal organ of the UN beside other structures of the UN.¹²⁰ The amendment proposal was not a viable solution because of the rigid amendment requirements as well as the same was true for the creation of the ICC by an international treaty. Due to these difficulties of the mentioned proposal, there were some other suggestions like the creation of the court by the Security Council like other previous courts which were created by the UNSC like ICTR, ICTY. According to D.Krieger after the amendment of UN charter proposal, the creation of the court by the UNSC without any special excellence for the permanent members of the UNSC was the best secondary solution for this issue.¹²¹ There were arguments on the creation of the court by the UNSC because one could point out the court could be terminated its existence in case of creating the court by UNSC as well as one could pay attention to the distinction between the competence of the UNSC to create the ad hoc tribunals and creation an international court as a permanent judicial body which was voiced by the ILC as well as some

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¹¹⁸ Dr Tirab, Mohamed, 'Ethics and Social Justice Issues in the United Nations Whistle Blowing' (2015) 3(1) *Journal of International Relations and Foreign Policy* 1,15 24

¹¹⁹ Pella 66, 'Towards an International Criminal Court' (1950) 44 *American Journal of International Law* 37

¹²⁰ R.S. Clark, 'the Proposed International Criminal Court: Its Establishment and Its Relationship with the United Nations' (1997) 8(3) *Criminal Law Forum* 417.

¹²¹ Najeeb Al-Nauimi and Richard Meese 'International Legal Issues Arising under the United Nations Decade of International Law' (The Hague; Boston, Martinus Nijhoff, 1995).

scholars.¹²² But at the end, the significance was lost of the disagreement and discussions about the mentioned proposals for the creation of the court because of the creation of the court by a special model which prepared the draft of the model by the preparatory commission. The court was established as a separate judicial body from the UN with an international legal personality.¹²³ And none of the mentioned proposals was approved because of the particular nature of the proposed ICC entity. In spite of mentioned proposals, the court was created like an autonomous judicial entity with a tight relation under the title of relationship agreement with the UN. The relationship agreement stated that point which the court will remain as an independent judicial working and it would not be a place for including essential details about the working of the court. In spite of that, the agreement mentioned the issue related to the representation within the UN and exchanging the document and information as well as the cooperation issues between the UN and the ICC.¹²⁴ According to the agreement draft of relationship submitted to the preparatory commission by the secretariat of the UN, the draft was interred to the discussion by the preparatory commission at its meetings six, seven, and eight. By consensus, at the eight sessions of the commission on 5th October 2001, the draft of relationship agreement was adopted by the preparatory commission. After that when the Statute of the court was arrived into force in its first session adopted the draft of relationship agreement by the ASP on 9th September 2002. Then the assembly accepted ICC-ASP/2/Res.7 resolution in the second session under the title of “Strengthening the International Criminal Court and the Assembly of States Parties”. According to the 7th section of this resolution, it is stated that the Assembly “looks forward to rapid progress in the negotiations between the Court and the United Nations and requests the Court to keep the Assembly of States Parties to the Rome Statute of the International Criminal Court informed thereon”.¹²⁵ After three months, the UNGA adopted the resolution 58/79 on 9th December 2003, and inviting the Secretary-General to take steps to reach to the conclusion of the ICC-UN Relationship Agreement and then to provide the UNGA with the discussed outline agreement for

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¹²² Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, para 25, p. 9.

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¹²³ Antonio Cassese, ‘The Rome Statute of the International Criminal Court: A Commentary’, (Oxford University Press, Oxford: 2002).

¹²⁴ [21] Report of Preparatory Committee, supra note 1, at 10. The ITLOS Draft, supra note 36,

¹²⁵ William A. Schabas, ‘The International Criminal Court: A Commentary on the Rome Statute’ (first edition, Oxford University Press, New York 2010), the Rome Statute; Article 54,

approval.¹²⁶ On 10th December 2003 both of organizations decided to start the negotiations on the adoption draft of the relationship agreement. In this regard, the ICC mentioned that the delegation of the court would include the members of all three court structures, moreover the manager of the assembly secretariat could also be run by the court's presidency organ. The court determined that the main object of the discussion would be held as near as possible to the previous draft which was approved by the ASP in September 2002, as more as, solving any UN concerns and adding explanations if it needed.¹²⁷

The first meeting between two institutions was held in the first round of negotiations on the relationship agreement on 26 and 27 February 2004 at the Headquarter of the UN in New York. The meeting was allowed both parts to illustrate their opinions about a number of matters. The second meeting as the second round of the negotiation was started on 20 and 21 May 2004 and it was leaded by both sides to solve all remaining issues between them. On 7th June 2004, the negotiated Draft of the Relationship Agreement was initialed by the heads of each delegation in Hague.¹²⁸ According to Article 23 of the ICC and UNs relationship agreement, the draft of the agreement shall attain power after the draft will be accepted by the ASP to the General Assembly and the court's Statute.¹²⁹ Following Article 2 of the court's Statute, the president of the ICC, Philippe Kirsch, and Kofi Annan, the Secretary-General of the UN, signed an agreement which determines the structure relationship between two institutions. The agreement illustrates the scope of the relationship between them and also set the conditions and situations which bound both sides to cooperate with each other in both issues; institutional matters and issues related to judicial help, as well as the cooperation and communication between the court and the organs of the UN especially the UNSC as the important and essential organ of the UN which has the tight relationship with the court

¹²⁶ Resolution adopted by the General Assembly on 13 September 2004 [without reference to a Main Committee (A/536.68)]

¹²⁷ Third session The Hague 6-10 September 2004, 'Report on the negotiated Draft Relationship Agreement betw 42 the International Criminal Court and the United Nations'

¹²⁸ 'International Criminal Court and UN to Sign Historic Agree 24 t on Monday New Agreement Allows for Vital UN Support of Court's Work' (2004) Coalition for the International Criminal Court < http://www.iccnw.org/documents/UN-ICCagreement_01oct04.pdf > accessed 27 February 2019.

¹²⁹ Fifty-eighth session Agenda item 154 International Criminal Court Relationship agreement between the United Nations and the International Criminal Court.

according to the special articles which are determined in the relationship agreement, the Statute of the court and chapter seven of the UN.¹³⁰

The relationship agreement contains a preface and twenty-three articles which split into four divisions (Articles 1–3) is included in General Provisions, (Articles 4–14) in Institutional Relations, (Articles 15–20) in Cooperation and Judicial Assistance, and (Articles 21–23) in Final Provisions.¹³¹ Also, the relationship agreement determines many obligations and a lot of institutional collaboration between both sides. It comprises, inter alia, like the capacity of the court to participate and observe the work of the UNGA. Also, both sides are obligated to exchange the documents and information between both of them. Moreover, to consult each other on the essential matters which is related and has a link with both of the institutions. As well as, the issue of administration and exchanging of the representatives between each other is another matter of cooperation. Also, the financial matter and the possibility to provide the laissez-passer by the UN for the ICC officials as a valid travel document are the other aspects of cooperation.¹³² Additionally, the agreement covers unique procedures which give the court that capacity to act as an independent judicial institution to transact with the issues of the international criminal law. These unique procedures result out by the special nature of the cooperation between the court and other organs of the UN.¹³³ In spite of binding the court with the UN also the agreement establishes the legal obligations of the UN vis-a-vis the Court.¹³⁴ Also, the agreement determines that both institutions should respect each other's mandate and Status in spite of the cooperation and close working which is provided as the binding in the relationship agreement.¹³⁵ Moreover, the agreement affords many opportunities for mutually

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¹³⁰ AMELIA COUTURE, 'The Politics of International Justice: the Security Council's Impact on the Independence, Effectiveness and Legitimacy of the International Criminal Court' (2015) International Human Rights Internship Working Paper Series < https://www.mcgill.ca/humanrights/files/humanrights/ihri_wps_v3n2-am433couture.pdf > accessed on 27 February 2019.

¹³¹ Relationship agreement between ICC and UN

¹³² 'A Universal Court with Global Support > Cooperation Agreements and Enforcement > Cooperation with the United Nations' Coalition for the International Criminal Court <<http://iccnw.org/?mod=agreementsun>> accessed on 21 February 2019

¹³³ Negotiated Relationship Agreement between the International Criminal Court and the United Nations

¹³⁴ Antonio Cassese, 'the Rome Statute of the International Criminal Court: A Commentary, (Oxford University Press Oxford: 2002).

¹³⁵ Negotiated Relationship Agreement between the International Criminal Court and the United Nations, Arts. 2 and 3.

beneficial collaborative efforts in order to establish the rule of law and end impunity.¹³⁶ Hence, both of the organizations will share the common value as it has been recognized in the mentioned agreement.¹³⁷ Also, the court is bound with the UN charter's purposes and principle in spite of the fact that the court is independent in its relation with the system of the UN.¹³⁸

It could be mentioned that those states which were members of the preparatory commission and worked on the proposals for making the court understand that the ICC required to remain judicially independent from the UN's political effects. On another side, they realized the reality that the ICC needed the backing of the UN to become more powerful and more effective.¹³⁹ Furthermore, in the court Statute's Article 2, it is mandated that the court needs to come to an agreement with the UN which is adopted by the satisfaction of both institutions under the title of the relationship agreement in October 2004. Despite Article 2, Rome statute includes many provisions which determine the relationship and cooperation between both institutions. But it should be mentioned that two important themes illustrated in both the ICC-UNs relationship agreement and Article 2 of the court's Statute. The first of these themes is the ICC reminds such an independent judicial body from the UN in spite of the strong cooperation and relation between them. The second theme is that the creation and existence of the ICC bring the bound principles for the UN to cooperate and works with the court also support it.¹⁴⁰ Moreover, the Relationship Agreement was held to respecting the sovereignty and confidentiality of both organizations as well as reflects an accurate equilibrium between independence and collaboration.¹⁴¹ Particularly, the relationship agreement provides the detail information for both institutions in a broad spectrum of matters, inter alia, the issue of transferring the referral matter by the UNSC and request for deferral, also the issue which the

¹³⁶ 'Translation of "relationship agreement between the united nations" in Arabic' Reverso Context <<https://context.reverso.net/translation/english-arabic/relationship+agreement+between+the+united+nations>> accessed on 27 February 2019.

¹³⁷ Otto Triffterer, Kai Ambos, 'Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article', (e.d, Hardback 2016)

¹³⁸ See Preamble of the Rome Statute, paras. 7 and 9.

¹³⁹ 'THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND THE UNITED NATIONS' (2009) the War Crimes Research Office American University Washington College of Law <<https://www.wcl.american.edu/impacts/initiatives-programs/warcrimes/our-projects/icc-legal-analysis-and-education-project/reports/report-8-the-relationship-between-the-international-criminal-court-and-the-united-nations/>> accessed on 27 February 2019.

¹⁴⁰ Rome Statute of the International Criminal Court

¹⁴¹ See the Preamble of the Rome Statute of the International Criminal Court, which recognizes that "such grave crimes threaten the peace, security and well-being of the world," and the Preamble of the Charter of the United Nations, which pledges to "unite our strength to maintain international peace and security."

court should inform the security council in the cases which the court fails to cooperate with its request to the states which has the link to the issues. Moreover, the agreement addresses the issues of confidentiality protection, immunities, and privileges. It should be mentioned that one of the most important aspects of the relationship between two institutions was the UN's cooperation with its offices, funds, and programs as well as the ICC. The experts worked in collaboration for peace keeping and ensuring human rights that also helped them to gather more information that can be used as an experience to develop further strengthening policies. The representatives of peace keeping and the peace keepers also developed agreements and interactions for more sustainable operations.¹⁴²

3.2 Mutual Cooperation between ICC and the UN

The cooperation and support with the ICC by the UN included a wide degree of grounds which is determined by details in relationship agreement. The agreement between two institutions was the result of the struggling of both sides persuading to Article 2 of the Rome statute to cooperating and working with each other. Moreover, according to the mentioned article the UN should support and cooperate with the court also to determine the court as an autonomous organization.¹⁴³ Moreover, in Article 2, paragraph 1 of relationship agreement it provided that the UN admits the court as an organization which has the international personality according to Articles 1 and 4 of the Statute of the creation of the ICC. The mentioned article could be persuaded as of the most important provision in the relationship agreement which has an important influence to strengthen the exercise function and action of the court.¹⁴⁴ It should be mentioned that in 2005 the office of legal affairs was designed by the secretary-general of the UN as the focal point for the issue and matter with related to the cooperation between the UN and ICC. The mentioned office was shaped to ensuring liability for the most brutal crimes which are the war crime, aggression, genocide, and crimes against

¹⁴² 'Best Practices Manual for United Nations – International Criminal Court Cooperation pursuant to The Relationship Agreement between the United Nations and the International Criminal Court (entry-into-force 4 October 2004) and General Assembly resolution 58/318' (26 September 2016) <http://legal.un.org/ola/media/UN-ICC_Cooperation/Best%20Practice%20Guidance%20for%20UN-ICC%20cooperation%20-public.docx.pdf> accessed on 27 February 2019.

¹⁴³ Article 2 of the Rome Statute

¹⁴⁴ Article 2 of the relationship agreement between ICC and UN

humanity according to Article 5 of the Statute of the ICC.¹⁴⁵ The supporting and cooperation from the UN to the ICC includes many fields which divided into four parts according to provisions of the relationship agreement; that includes cooperation and judicial assistance, institutional relations, general provisions, and final provisions.¹⁴⁶

The Institutional relation of the ICC-UN

Mutual representation

The secretary general of the UN should be invited to the public hearing in the chamber of the court also to any public meetings which are related to the interest of the UN; according to the ¹⁰ Rules of Procedure and Evidence which are the applicable provisions of the court. Moreover, the UN may invite and give the capacity of observation to the ICC to attend and contribute in the work of the UNGA. It should send invitations to the court for the conferences and meetings of the UN when the observing is allowed also in the issues related to the court. Similarly, the court should be invited to the UNSC in the case that is relevant to the ¹² jurisdiction of the ICC to attend the courts president or the court's prosecutor as the assistance of the matter.¹⁴⁷

Information Exchange between two organizations

In spite of other provision which set as possible as close the cooperation between both institutions, the court and the UN should cooperate as a partner and work in order to exchange and transfer the document and information in the matters which related to mutual interest. In order to succeed the mentioned process, the following steps should be taken: Firstly; the Secretary General of the UN shall transfer wholly information that related to the development of the statute to the court. Also, transfer the information related to the agreements that secretary-general is the depositary of those agreements or depositary of the statute. Also, inform the court about the articles which related to the review of the conferences that noted in article 123 paragraphs 1 and 2. Additionally, inform the court about any

¹⁴⁵ Mr Miguel de Serpa Soares, 'The United Nations and the International Criminal Court Partners of Shared ⁸ Statement' (2014) UNITED NATIONS OFFICE OF LEGAL AFFAIRS< ¹⁶⁸ http://legal.un.org/ola/media/info_from_lc/mss/speeches/MSS_Intl_Crim_Justice_Day_10th_anniv_UN-ICC-RA21-July-2014.pdf> accessed on 3 February 2019.

¹⁴⁶ William A. Schabas, 'The International Criminal Court: A Commentary on the Rome Statute'(second edition, Oxford University Press, New York 2016)

¹⁴⁷ The relationship agreement between ICC and UN; article 4

amendments that related to article 121 of the court's Statute which noted in section 7 of the mentioned article of the Statute. Furthermore, the court's responsibility is to transfer any information about the act of the court which include; the pledging oral proceeding and hearing of the court as well as, any evidence and proving information about the cases that relates to the personal of the UN or the cases which result of death or injuring by using the flag or uniform of the UN that mentioned in; article 16, 17, or 18, section 1 or 2, of the relationship agreement. Secondly, both of organizations should struggle and make effort to get close to each other as much as possible and try to donate the valid and utilizable information which related to mutual interest to each according to provisions that mentioned in the current agreement.¹⁴⁸

Agenda items and Reports to the United Nations

On agenda item which is the ICCs report to the UNGA, the member states of the UN consult annually to adopt a resolution as a framework to continue the cooperation between ICC and UN. Also, it motivates and facilitates the conclusion of supplementary agreements and arrangements, as required. The mentioned annual resolution is not specifically for cooperation of ICC with UN, but as well as for cooperation and working between the state parties and non-state parties also regional and international organizations and the ICC.¹⁴⁹ Furthermore, According to Article 6 of the relationship agreement, the general assembly resolution invites the ICC to prepare and submit the report of working and activities for the whole year. Under the ⁸cover of a note by the Secretary-General, the mentioned report will be conveyed. Moreover, the UNGA might be invited by the General Assembly to arrange and submit two types of the report according to the cooperation principle between both institutions; one of these reports is the report which connection with assistance provided to the ICC on reimbursements received and expenses incurred by the UN. Another one is the ⁸Report on the application of Article 3 of the ICC-UN Relationship Agreement. The application of Article 3 of the agreement includes the matter and activities that related to the cooperation

¹⁴⁸ 'United Nations Juridical Yearbook 2004'(United Nation, New York 2007), Article 121and 123 of Rome Stat¹¹ Article 5 of the relationship agreement between ICC-UN

¹⁴⁹ 'ICC-ASP/17/Res.5 Strengthening the International Criminal Court and the Assembly of States Parties' (2018) ICC-ASP < https://asp.icc-cpi.int/iccdocs/asp_docs/ASP17/RES-5-ENG.pdf > accessed on 3 February 2019.

between both of them such as meetings that held between UN officials and persons that ICC demand them and made the decision to arrest them.¹⁵⁰

Cooperation in matters related to administration and personal arrangements

In the field of administration, both institutions agreed to counsel each other from time to time about the issues related to mutual interest. such as; the issue of officers and staff, including conditions of service, salary scale and allowances, the duration of appointments, classification, staff rules and regulations and pension and retirement rights. In order to get the result about the mentioned matter, both institutions may use of the facilities, staff and services can also be interchanged between each other for maximum level of cooperation.¹⁵¹

Providing Services and facilities

According to the request of the court, the UN agrees to provide as much as possible of service and facility to the court which may include; the translation, interpretation also the conference and document service. Moreover, it may request meetings of the ASP, its Bureau, or subsidiary entities. In case if the UN is not capable to provide those facilities it should clear the reason for that.¹⁵²

“Laissez-passer”

Following the court Statute's Article 44 and also according to section 36 of the Appendix of ICC-ASP/2/Res.3 Resolution, the court has the right to utilize the UN's laissez-passer as a valid travel document in case that related to the court's issue. So according to the mentioned provision, the privilege and immunity includes the presidency staff and staff of chambers of the court also the personnel of secretary of the assembly of the parties.¹⁵³

¹⁵⁰ Article 3, 6 and 7 of the relationship agreement between ICC and UN, 'Report of the Court on the status of ongoing cooperation between the International Criminal Court and the United Nations, including in the field' (2013) Assembly of States Parties <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-42-ENG.pdf> accessed on 3 February 2019.

¹⁵¹ Article 8,9 of the relationship agreement between UN-ICC

¹⁵² Article 10 of the relationship agreement between ICC-UN

¹⁵³ Flavia Lattar, William Schabas, 'Essays on the Rome Statute of the International Criminal Court' (ed, il Sirente, 2003), 'ICC-ASP/2/Res.3 Establishment of the Permanent Secretariat of the Assembly of States Parties to the International Criminal Court' (2003) ICC-ASP <https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP2-Res-03-ENG.pdf> accessed on 3 March 2019, Article 44 of the Rome Statute

The financial subject between two organizations

As determined in the court Statute's Article 115 which mentioned the UN as one of the financial sources for ICC, also according to Article 13 of the ICC-UN relationship agreement, cost and expenses which are provided to the court should be separately arranged by UNGA by request of register organ. Furthermore, according to mentioned article paragraph 2, the UN may provide financial and fiscal advice and counsel to the court by request of the court to the UN.¹⁵⁴

Cooperation of both institutions in the field of judicial assistance

One can say that judicial assistance and cooperation could be a major and important development in the provision of the relationship agreement between ICC-UN. As pursuant in article 87(6) in the court's Statute the court has the right and capacity to request the document or information and request to provide judicial assistance from any intergovernmental organizations which are in accord with its capability and mandate.¹⁵⁵ Moreover, in cases which disclosing of the information and document or provisions of UN could be the fact of danger to the current or previous personnel of UN or any other organ of the organization, the court may apply the measure of protection to that document and information by request of the UN.¹⁵⁶

Testimony to the court by the staff of the United Nation

According to the provision of the ICC-UN relationship agreement, the court has the authority to request to the United Nations personnel and office workers to present and testimony in front of the court. It could be mentioned that the same provisions mentioned that the Secretary General of UN may set an official of the organization as a representative of the organization to present as witness in the court.¹⁵⁷ Moreover, the privilege and immunity of the United Nations official workers and any organ of the UN should be protected according to the

¹⁵⁴ Katarina Uhalova, 'The Financial Challenges of the International Criminal Court' (2013) Quid Justitiae < <https://www.quidjustitiae.ca/blogue/financial-challenges-international-criminal-court> > accessed on 4 March 2019.

¹⁵⁵ The Rome Statute; Article 87 paragraph 6

¹⁵⁶ The relationship agreement between ICC-UN; Article 15 paragraph 3

¹⁵⁷ Paul C. Szasz, 'The UN and the ICC: The Immunity of the UN and Its Officials' (2001) LJIL < https://www.cambridge.org/core/services/aop-cambridge-core/content/view/2C1FA9A9448918D0D4093BC398A0BB39/S0922156501000413a.pdf/un_and_the_icc_the_immunity_of_the_un_and_its_officials_in_memoriam_paul_c_szasz_19292002.pdf > accessed on 4 March 2019.

Privileges and Immunities Convention of the UN. But in circumstances of death and injuring that happened by the UN personnel against others under the ICC's jurisdiction, in such cases the UN has given the authority to the court to apply its jurisdiction after the court announced the UN about the mentioned cases.¹⁵⁸

Protection of confidential information between both organizations

As stated in the provision of relationship agreement and as we mentioned the main responsibility of UN is bind to cooperate and provide the document and information to the court by the request of the court. But in a case when the court demand information from each of United Nations organ, discloses of this information to others should be by consent of that organ. If the organ declared that the provided information and document should be undisclosed the court should follow that request and apply the principle of protection of confidentiality which mentioned by a separate provision in the relationship agreement.¹⁵⁹

The cooperation between prosecutors of the ICC and the UN

The UN pursuant to its competence and roles under the chapters and provisions of the UN, in binding to cooperate with the prosecutor's office as well as the ICC's prosecutors, according to the provisions of the court's Statute that has given the authority to the court to; demand the information and documents from any organs of the UN in case of needed to improve and find new evidence to the cases. So to get such documents and information; the request of the prosecutor should be transferred to the UN's Secretary-General and then from the Secretary-General to the organs. In order to arrange such cooperation, the united nation and the court agreed on that which the United Nation and organs that included; provide the document, information and any other facilities to the prosecutors in case of necessary, according to the request of the prosecutors of the court that mentioned in Article 54 of Rome Statute. Furthermore, according to Article 15 section 2 of the court's Statute, the court shall be bound to protect the documents and information from the disclosing for another organ of the court or any other organization or third party states before the consent of the United Nations. Moreover, as we mentioned before the court should apply the principle of confidentiality in

¹⁵⁸ Relationship agreement between ICC-UN; Article 16, 19

¹⁵⁹ 'Draft Relationship Agreement between the Court and the United Nations' (2004) ICC-ASP/1/3, 243 <http://legal.un.org/icc/asp/1stsession/report/english/part_ii_g_e.pdf>accessed on 4 March 5, 2019.

case that the demanded documents and information could threaten to the current system of the United Nation or threaten to the present or previous office workers in the UN.¹⁶⁰

“To date, the United Nations has provided a wide range of administrative and logistical assistance including:

- i. Meeting-related services (e.g. for meetings of the ASP)
- ii. Telecommunication services
- iii. Air and ground transportation services
- iv. Storage of Court-owned equipment
- v. Temporary overnight accommodation
- vi. Assistance with entry and exit formalities
- vii. Assistance in arranging rental agreements, and shipping contracts
- viii. Engineering and construction services
- ix. Training for Court staff
- x. Office space
- xi. Maintenance of court-owned vehicles
- xii. Cartography and satellite imagery
- xiii. Sale of petrol, oil and lubricants (POL), water, meals-ready-to-eat (MRE), Post-Exposure Prophylaxis (PEP) kits, etc.
- xiv. Medical services”¹⁶¹

Last but not least the court is highly appreciated by the resent cooperation and support of the UN. Because as we mentioned before the UN and the organs that included in; are the supporters and the source of the power of the court's activity. Moreover, the mentioned agreement was a highly important and effective step in regard to giving the legal cover to the ICC and its statute and to success the court in the practice steps.¹⁶² Furthermore, the hope and

¹⁶⁰ William Schabas, ‘The International Criminal Court: A Commentary on the Rome Statute’ (Oxford University Press 8 2010) the Rome Statute; Article 54, 15

¹⁶¹ ‘Best Practices Manual for United Nations – International Criminal Court Cooperation pursuant to The Relationship Agreement between the United Nations and the International Criminal Court (entry-into-force 4 26 ober 2004) and General Assembly resolution 58/318’ (26 September 2016) <http://legal.un.org/ola/media/UN-ICC_Cooperation/Best%20Practice%20Guidance%20for%20UN-ICC%20cooperation%20-public.docx.pdf> accessed on 27 February 2019.

¹⁶² Report of the Court on the status of ongoing cooperation⁴ between the International Criminal Court and the United Nations, including in the field’ (2013) Assembly of States Parties <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-42-ENG.pdf> accessed on 3 February 2019.

expectations of the court are continuations of the cooperation and support from the UN and its organs according to mentioned agreement, as well as the ⁹⁹ member state of the court and the member states of the UN; to more cooperation with the court in order to maximize the cooperation level as much as possible in the future relationship between two organizations.¹⁶³

3.3 The Security Council's Operation with ICC

According to UN charter, the UNSC the most powerful and main organ to maintain the security and peace in the world.¹⁶⁴ Also, according to paragraph 1 of the UN charter's Article 24, the UNSC is the initial and the main responsible organ in the UN to deal with the ¹⁶ peace and security in the world.¹⁶⁵

The relations between UNSC and ICC was the main and most negotiation part in debates on creating the court's Statute.⁵³ The relationship link between ICC as a judicial organ and the UNSC as a political organ is the matter of keeping the world's security and peace via the peacekeeping process of the UN. Also, the UNSC has experience in this regard particularly in creating the ICTR and ICTY and recently the ICC. But the main difference between the recent court with previous ones was the independence of the recent court because the council have not had any role of creating the court, unlike both previous tribunals which created by the UNSC. Maintain peace for the world through the peacekeeping process is the main object of both ICC-UNSC institutions.¹⁶⁷ Regarding the creation of the relationship between ICC and UNSC during the debates which held regarding creation of the ICC-UN relationship agreement; on 8 Nov 2012 the Permanent Mission of Liechtenstein to the UN and the IPI held the meeting in order to; get agree on the relationship between ICC and UNSC and to set some principles for working both institutions with each other and to provide the support and facilitate to the court by the UNSC. The meeting couldn't get the consent of all present members, in spite of that, it was a good event regarding the peacekeeping process because the

¹⁶³ Hans-Peter Kaul, 'Developments at the international criminal court construction site for more justice: the international criminal court after two years' (2005) 99(2), Cambridge University Press

¹⁶⁴ Article 1 of the united ¹⁰¹ on charter

¹⁶⁵ DANN MWANGI, 'Deferral and Enforcement Powers of the United Nations Security Council under the Rome Statute: A Case Study of Kenya' (2017) 4(7) International Journal of Education and Research < ⁵⁶ <http://www.ijem.com/journal/2016/July-2016/02.pdf>>accessed on 12 March 2019.

¹⁶⁶ U Dan, 'Who Politicizes the International Criminal Court?' (Torkel Opsahl Academ ¹⁶⁷ Publisher, 2014)

¹⁶⁷ Vera Gowlland-Debbas, 'The Relationship between the Security Council and' (2001) Global Policy Forum < <https://www.globalpolicy.org/component/content/article/164/28588.html>>accessed on 12 March 2019.

meeting collected all ICC member states and the other states that interested about the work of the court. In the mentioned meeting some recommendations were proposed to both institutions in order to cooperate with each other regarding to the provisions and articles of the court's statute which demonstrates the UNSC working with the court.¹⁶⁸

The UN gives the authority to the UNSC inside its provision sections to keep peace and security in the world if there is any threat to world's peace and security. Under chapter seven of the UN charter's Article 39, the act of UNSC provides authority to UNSC to deal and interfere to all situations and cases around the world, in a case when the council notes that there is a menace to the peace and safety of the world. Moreover, Article 41, 42, 43 of the mentioned chapter gives more authority to the UNSC to use the power of demonstrations, blockade or air and sea force power, also to request the members of UNSC to support and prevent facilities in order to interfere and deal with situations that threaten to security and peace of the world.¹⁶⁹ One can easily note that there is a link between ICC and the UNSC regarding the peacekeeping process by notes to Article 5 of the court's Statute. Because the four crimes stated in this article are determined as the most atrocity crimes which are under the ICC jurisdiction also are the crimes which intimidate the world's safety and peace.¹⁷⁰ According to the crimes that are under the ICC; one can note that in spite of justice the other main subject of the ICC is peace to the world and it has the same object as the UNSC to keep the security and peace in the world through the peacekeeping of the UN.¹⁷¹

¹⁶⁸ 'The Relationship Between the ICC and the Security Council: Challenges and Opportunities' (2013) International Peace Institute (IPI) <<https://www.ipinst.org/2013/03/the-relationship-between-the-icc-and-the-security-council-challenges-and-opportunities>>accessed on 12 March 2019.

¹⁶⁹ LAWRENCE MOSS, 'The UN Security Council and the International Criminal Court Towards a More Principled Relationship' (2012) Friedrich-Ebert-Stiftung <<https://library.fes.de/pdf-files/iez/08948.pdf>>accessed on 12 March 2019.

¹⁷⁰ Article 61 of the Rome Statute of the creation of the ICC

¹⁷¹ 'The UN Security Council and the International Criminal Court: How Should They Relate? Report of the Twenty-Ninth United Nations Issues Conference' (1998) The Stanley Foundation <<https://www.stanleyfoundation.org/publications/archive/Issues98.pdf>>accessed on 12 March 2019.

The UNSC's power under the ICC

The Power of Referral

The UNSC has been authorized by the court to exercise its jurisdiction and to act under the laws of the United Nation and according to Article 13 paragraph 2. When one or more international crimes which are specified in the court Statute's Article 5 are perpetrated, then the court can act under the mentioned article to exercise the jurisdiction. The main object of the mentioned article is to support the peacekeeping process of the UN. Moreover, pursuant to Article 17 paragraph 1 of the relationship agreement between ICC-UN; the UN has authorized the UNSC to act according to chapter seven of the UN charter. Furthermore, according to the UN's chapter seven, the UNSC has the authority to send the cases to the ICC; in the cases when one or more crimes that are determined in the Rome Statute's Articles 5, 6, 7, and 8 have been committed by the states irrespective of whether the states are the members of the ICC or not.¹⁷² The referral process of the UNSC will be explained with case laws and details in chapter four of the research.

The power of Deferral

According to the court Statute's Article 16, the UNSC has been authorized to defer the investigation process and the prosecutor's act of the court or to postpone all investigation process of the court for the interval of 12 months with the right of renewable the deferral period, after the UNSC approve the resolution of the criminal cases in the council.¹⁷³

The Power of Enforcement

According to section 5 (b), the statute's Article 87, the UNSC has the power to enforce the ICC's non-member states if the states have an arbitrary arrangement or any other agreements with court and refuse to collaborate with court, in these cases the UNSC should support the ICC and enforce those states to participate with the court. Moreover, according to the same article in section 7; in the referral of non-member state criminal cases to the court by the

¹⁷² Article 13, 5, 6, 7, 8 of the Rome Statute of the creation of the ICC, Article 17 of the relationship agreement between ICC-UN, chapter seven of the UN charter

¹⁷³ Article 16 of the Rome Statute of the creation of the ICC

UNSC, when ⁵ the court's non-member states refuse to collaborate with the court, the ⁶ UNSC has the power to enforce those states to collaborate with the court.¹⁷⁴

Aggression crime

According to Article 5 section 2; the UNSC is responsible to decide whether the aggression act occurred or not in the case when the court exercises its jurisdiction because it demonstrates as the precondition for the court to practice its jurisdiction in cases of aggression crimes.¹⁷⁵

¹⁷⁴ Article 87 of ¹ the Rome Statute of the creation of the ICC
¹⁷⁵ Article 5 of the Rome Statute of the creation of the ICC

CHAPTER FOUR

THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

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4.1 The Jurisdiction of the ICC

To determine the scope of the ICC's authority, the term of jurisdiction was utilized in several places in the court's Statute for various meanings. The matter of jurisdiction was the essential legal matter which determined by the ICC to punish the international perpetrators. Also, one of the most significant aspects of the Statute is the nature of the mentioned statute like a constitutive document to merge each of jurisdictions, adjudicate and enforcement together. In this regard may be the implementation of the jurisdiction of the court and its implications are the most revolutionary features.¹⁷⁶

The capacity of the ICC to jurisdiction is not included all crimes and is not included all criminals like the group of rebels, political organizations, states, etc.¹⁷⁷ But the ICC's capacity to jurisdiction over the criminal cases according to Article 5 of the court's Statute is restricted to the harshest crimes in the world which determined by details in Article 6 to 8 as the subject matter of the jurisdiction of the court.¹⁷⁸ Moreover, the jurisdiction of the court is applying on the individuals who committed international crimes directly or indirectly which determined on Article 5 to 8 of the Rome Statute.¹⁷⁹ In this regard pursuant to crimes that stated in Article 5 each of the state party, UNSC and the prosecutors could refer the criminal cases to the court following the Statute's Article 53. Also, it should be mentioned that any act of the court should be by the complementarity principle of the court, so without applying this principle, the ICC is not able to apply its jurisdiction on any criminal cases.¹⁸⁰ As we mentioned before there are some elements that the court have to follow it under the proses of preliminary examination as the precondition to decide whether the referral of criminal cases are under the court's

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¹⁷⁶ Felix E Eboibi, 'Jurisdiction of the International Criminal Court: Analysis, Loopholes and Challenges' (2012) 3 A 15.

¹⁷⁷ Felix Mukwiza NDAHINDA, 'Considerations on the ICC exercise of jurisdiction in the light of past International Criminal Law experience' (master thesis, Lund University, spring 2008)

¹⁷⁸ Eile Kinnider, 'ENSURING THE INDEPENDENCE OF THE INTERNATIONAL CRIMINAL COURT' (2006) International Centre for Criminal Law Reform and Criminal Justice Policy <<https://icclr.law.ubc.ca/wp-content/uploads/2017/06/ES-paper-ICC-and-China.pdf>> accessed on 15 March 2019.

¹⁷⁹ Gwen P. Barnes, 'The International Criminal Court's Ineffective Enforcement Mechanism: The Indictment of President Omar Al Bashir' (2011) 34(6) Fordham International Law 147

¹⁸⁰ Schabas William A & Bernaz N, 'Routledge Handbook of International Criminal Law' (2nd ed, Routledge 2011).

jurisdiction or not. These elements include the importance of the crimes, the justice interest by the national court, the Temporal, individual, Local, Subject matter of the jurisdiction. These are the main elements which are applied by the court to all criminal cases which referred to the court to decide whether the court has the capacity to judge the criminal cases or reject them.¹⁸¹ Articles 15(3), 53(1), 17, 18, 11, 19, 24 of the Rome statute are explaining by details the issue of elements as the preconditions of the jurisdiction of the court. Furthermore, according to provisions that stated in the Rome Statute, the jurisdiction of the court is divided into two kinds of jurisdictions which are; the territorial jurisdiction; that means the capacity of the court to judge the criminals on the place of member states of the court and non-territorial jurisdiction; which means the capacity of the court to judge the criminals in all states or by the other meaning the court's jurisdiction to the court's non-member states, as it is explained below pursuant to articles that are stated in the Rome statute.¹⁸²

4.1.1 Territorial Jurisdiction

The ICC has jurisdiction influence to Article 4(2), 12 of the court's Statute over the states who are members of the treaty of Statute of the court. As a general rule, whenever a state ratifies the principles and the rules of this statute it becomes an ICC member. Therefore, the ICC has capacity to apply the jurisdiction over every member of the state. The court also has authority to investigate about every violation which is perpetrated in the territory of those court state parties.¹⁸³ Moreover, based on Article 12 (2), the court has jurisdiction over that vessels and aircrafts. These are the state of registrations are the member states of the court's state and that the accused person is a national, so every crime that determined in Article 5 that committed in the mentioned places should be under the jurisdiction of the ICC.¹⁸⁴ As well as based on the court Statute's Article 14, every member states of the court can refer the criminal cases to the court and the court should investigate and use the legal power of the court and act in regard to prosecute the perpetrators of the criminal cases based on the court Statute provisions.¹⁸⁵

¹⁸¹ 'Report on Preliminary Examination Activities 2014' (International Criminal Court, 2 December 2014) <<https://www.icc-cpi.int/iccdocs/otp/otp-pre-exam-2014.pdf>> accessed on 15 March 2019.

¹⁸² Rome Statute, arts 12, 13, 16

¹⁸³ Rome Statute, arts 4 (2), 12

¹⁸⁴ Rome Statute, arts 12(2)

¹⁸⁵ Rome Statute, arts 14

4.1.2 Non-territorial jurisdiction

In spite of territorial jurisdictions, there are three additional situations of non-territorial jurisdiction which ICC has the authority to apply the jurisdiction of the court over non-member states in the ICC, as well. Below are the three situations:

First, if a non-member state commits crime that demonstrated in Article 5 of the Statute and then on its own, the situation will be referred to the court.

Second, if those violations committed by the non-member states are against one of the ICC's member states, in this situation the ICC also has jurisdiction over the non-member states to take the investigation for those violations.

Third, if any non-member of court's statute countries commit a national or international serious violation of the international criminal law, also in this situation the ICC has jurisdiction over the non-member states to take the investigation and prosecute the criminals, this can be done only when the security council's referral get a complete vote during the referral resolution of criminal situations to the court according to the United Nation charter's Article 13(b) and chapter 7.¹⁸⁶

4.2 Crimes within the ICC's Jurisdiction

While determining the type of crimes which the court should prosecute and had the jurisdiction over them, during the negotiation that held to creation the court; the ICC was the result of long experience in the previous conventions, tribunals like serious breaches of common Article 3, grave violation of the Geneva Conventions, and other sources of struggle of the international community; regarding to prosecute the perpetrators of international crimes that intimidate the world's safety and peace.¹⁸⁷ In this regard, the ICC provides a judicial mechanism to punish the gravest international crimes which are determined by the international community among the Rome conference of the creation of the court. The crimes determined in Article 5 under the title of subject matter includes; the genocide crimes, war crimes, aggression crimes, and crimes against humanity, which are divided on a wide range of crimes that includes nearly fifty offences explained by details in Article 5 to 8 of the statute; as

¹⁸⁶ Rome Statute, arts 12, 13(b)

¹⁸⁷ Cryer R, Friman H, Robinson D & Wilmschurst E, An Introduction to International Criminal Law and Procedure (2nd ed, Cambridge University Press 2010).

the most and dangerous crimes as threaten against the international community by the consent of most community of the world.¹⁸⁸

4.3 The Jurisdiction of the Court over the Non-member States of the court

32 out of 139 of states that signed the treaty of Rome statute were not ratified the agreement and some states were not signed the mentioned agreement, among them there were three power states that have an essential influence to empower the court; such as the US as a unsigned state to the agreement, Russia and China as states that signed but was not ratified the agreement. Regarding the matter of signing the agreements; pursuant to the Vienna convention of international treaties; the unsigned states to the international agreements obligated to do not act any action to ban or defeat the object and purpose of such agreements. Also regarding this matter in the provisions of the court statute particularly in Article 87 declared that the non-member states obligate to have cooperation with the ICC after cooperation request from those states by the court and by the consent of such states.¹⁸⁹ Furthermore, regarding the issue of cooperation of non-member states to the court in case of non-cooperation with the court by those states and does not consent about that, the court statute's provisions declared that matter especially in Article 87, section 5 (b), and 7; has provided the UNSC with the power, and the UNSC was authorized for the matter of cooperation to enforce those states to have cooperation with the ICC regarding to request of the court about the cooperation.¹⁹⁰

The issue of jurisdiction and the question about this matter which to what extent the ICC has jurisdiction over nationals and non-member states territory; creates a genuine dilemma because there are disagreements between states about the mentioned issue.¹⁹¹ The non-member states to the ICC and the states who are against the act of the court particularly the US, China, and India are criticizing the court's action; especially under article 12 of the court's Statute which exclusive to the application of the court's jurisdiction over non-member states; to refer

¹⁸⁸ Marchuk I, 'The Fundamental Concept of Crime in International Criminal Law: A Comparative Law Analysis' (Springer, 2014).

¹⁸⁹ Andrew Morgan, 'Non-signatory Countries' (JURIST Legal News & Research Services, JULY 20, 2013)

¹⁹⁰ Article 87, paragraph 5, 7 of the Rome Statute of the creation of the ICC

¹⁹¹ Morris, M, 'The Jurisdiction of the International Criminal Court over Nationals of Nonparty States' (28) *ference Remarks* (2000) 6(363) *ILSA Journal of International & Comparative Law* <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2746&context=faculty_scholarship> accessed on 6 January 2019.

the criminal cases by the resolution of the UNSC to the court without those states consent. Those states more persuaded that the act of the court under the mentioned article is a violation ⁸⁵ act to the law of treaties which stated in the Vienna Convention's Article 34; which definite that under the international law; the third parties of the treaties will not bind to treaties without their consent. The legal disagreements between the court and the Non-members to the court make some difficulties to the act of the court.¹⁹² Furthermore, Article 98 is another point of disagreement ⁵ between the ICC and the US as a non-member state; regarding the legality of the bilateral agreement that held by the US under the title of; Article 98 agreement" or "US Bilateral Immunity Agreements". The agreement was held by the request of the US to its allies to non-surrender the US accused members to the ICC. Moreover, after holding the agreement it was criticized by the ICC and commentators who support the court; because legal experts persuade that the misusing of article 98 by the US as a tool that the US is using to shield the citizen of USA and troops. The court has used the Article 98 to prevent the legal conflicts may arise in the future because some states had the previous agreements to send the criminals to the court without the states' consent that the accused is its citizenship.¹⁹³ According to the mentioned article which stated in the Rome statute the surrender of criminals will not be possible before the consent of the third parties and cooperation consent of the second parties. The US has persuaded the legality of the agreement pursuant to Article 98. Whereas, on other side; the ICC has persuaded the illegality of the agreement referring to the statute's Article 27 which states that no immunity exists could ban the act of the court. Another accusing of the illegality of the US agreement by the ICC is the period of the mentioned agreement because the ICC declared that the article which the US used as the source of the agreement ⁵ was specialized for previous agreements, not recent agreements. Nowadays a lot of non-member and member states of the ICC have signed this agreement with the US, and till now the matter of legality or illegality of the declared agreement is continuing between commentators and remained ambiguous. But the only clear thing is the ICC members that signed this agreement

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¹⁹² Steven W. Becker, 'THE OBJECTIONS OF LARGER NATIONS TO THE INTERNATIONAL CRIMINAL COURT' (2010) 81 International Review of Penal Law 47 <file:151/Users/h/Downloads/RIDP_811_0047%20(2).pdf>accessed on 21 March 2019.

¹⁹³ 'US BILATERAL IMMUNITY AGREEMENTS OR SO CALLED "ARTICLE 98" AGREEMENTS' (2012) factsheet<https://eradicatingecocide.com/wp-content/uploads/2012/06/CICC-BLAs_QA_current.pdf>accessed on 23 March 2019.

remains bound to the principle of the ICC according to the court Statute's provisions.¹⁹⁴ It seems the statute of the Rome conference which was the foundation of the court has missed a number of opportunities regarding the languages and the type of script, so as to prove that which of the court's acts to non-member states, under Article 12, are legal in the international laws. In this regard, the essential act for the court to do is to completely explain the answer to the questions about how and why the act of the court under the mentioned article is legal in the international laws.¹⁹⁵ Since the act of the court under the mentioned article makes the possible ways for the international community to act against the impunity of criminals. moreover, the court's jurisdiction over the accused individuals in the non-member states territory and binding those states to have cooperation with the court; is considered an essential attempt regarding peacekeeping proses of the UN through the UNSC cooperation with the ICC.¹⁹⁶ Furthermore, the court clearly has full jurisdiction over the territory of state parties over crimes that determined in the court's statute with conditions that are mentioned in the court's statute and by applying the principle of complementarity. Moreover, some provisions in the court's statute provide such authority to the court to apply the jurisdiction over non-member states to the court in some special circumstance, particular in article 12 and 13.¹⁹⁷

The special circumstances and preconditions which allow the court to apply the jurisdiction over nationals and territory of non-member states to the court pursuant to the statute are the followings;

According to the court Statute's Article 12, the nationals and non-member states of the court are given the right to request the court to juristic over the territory of revealed states referring to crimes that mentioned in the court Statute's Article 5. According to the declared article particular in "Rule 44 Declaration provided for in Article 12, paragraph 3" when the

¹⁹⁴ Anna Rosén, Veronica Jorméus Gruner, 'Article 98 Agreements: Legal or Not?' (Bachelor Dissertation, University of Örebro 2007), Verónica Torres Marengo, 'UNITED STATES' SPECIAL AGREEMENTS: CONSISTENCY WITH THE OBJECT AND PURPOSE OF THE ROME STATUTE' (2008) <http://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S0121-86972008000100009>accessed on 23 March 2019.

¹⁹⁵ Cormier, Monique, 'The jurisdiction of the International Criminal Court over nationals of non-party states' PhD thesis, University Library 2017)

¹⁹⁶ Tamás Lattmann, 'Situations Referred to the International Criminal Court by the United Nations Security Council – "ad hoc Tribunalisation" of the Court and its Dangers' (2016) Pécs Journal of International and European Law 68

¹⁹⁷ Judge Antoine Kesia-Mbe Mindua, 'RESIDENT OF THE PRE-TRIAL DIVISION' (2018) ICC-RoC46(3)-01/18-1 09-04-2018 2/31 NM PT <https://www.icc-cpi.int/CourtRecords/CR2018_02057.pdf>accessed on 21 March 2019.

non-member states admit the court's jurisdiction, the state will be binding to fully collaborate with the ICC, and the court will use its jurisdiction to examine and prosecute the committers of crimes that are mentioned in the court Statute's Article 5, rather the criminal cases referred by the states itself or by the prosecutor investigation proses of the court.¹⁹⁸ The court's experience regarding the mentioned article in Palestine can also be of example. The government of Palestine on 13th June 2014 requested the court to apply the jurisdiction over the territory of declared state regarding violation which perpetrated in the territory of the occupied Palestinian including East Jerusalem.¹⁹⁹ Also, Uganda was another example regarding this issue.²⁰⁰

Article 13 of the Statute has given the authority to the UNSC pursuant to chapter seven of the peacekeeping process of the UN to act and refer the criminal cases to the court for cases that have one or more crimes stated in Article 5 committed by those states. And it should be mentioned that all the court's action will be by the principle of complementarity without applying this principle the court cannot apply its jurisdiction rather over member states or non-member ones.²⁰¹ Referring the situation of Libya and Sudan by the resolution of the UNSC to the ICC are the essential examples to the court's experience regarding the mentioned article.²⁰² In the declared circumstance, the UNSC plays the essential roles to refer those matters to the court; because as we mentioned earlier the ICC will not be able to apply its jurisdiction over the court's non-member states deprived of the UNSC's power and support.²⁰³

¹⁹⁸ Dominik Zimmerman, revised by Mark Klamburg, 'ICC Commentary (CLIC) Commentary Rome Statute » Commentary Rome Statute: Part 2, Articles 11-21'(2016) Case Matrix Network <<https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clic/commentary-rome-statute/commentary-rome-statute-part-2-articles-11-21/>>accessed on 21 March 2019., William A. Schabas, 'THE INTERNATIONAL CRIMINAL COURT AND NON-PARTY STATES'(2010) Vol. 28(1), Windsor Yearbook of Access to Justice 1

¹⁹⁹ 'Preliminary examination Palestine Ongoing' (ICC,n.d)< <https://www.icc-cpi.int/palestine>>accessed on 21 March 2019.

²⁰⁰ William A. Schabas, 'THE INTERNATIONAL CRIMINAL COURT AND NON-PARTY STATES'(2010) 28(1) Windsor Yearbook of Access to Justice 1

²⁰¹ Zhu Wenqi, 'On co-operation by states not party to the International Criminal Court' (2006) 88(861) International review of the Red Cross 87

²⁰² BETHEL AREGAWI, 'The Politicisation of the International Criminal Court by United Nations Security Council Referrals' (21 JUL 2017) ACCORD< <https://www.accord.org.za/conflict-trends/politicisation-international-criminal-court-united-nations-security-council-referrals/>>accessed on 21 March 2019.

²⁰³ Yvonne, M, Tessa, A, 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kordoba' (2017) 91(105) ST. JOHN'S LAW REVIEW <<https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=6787&context=lawreview>> accessed on 6 January 2019.

Referral the criminal cases of non-state parties to the ICC by UNSC under the UN's chapter seven as an essential process of the court:

The power of jurisdiction of the court; as an international criminal court also as an intergovernmental organization comes from the fundamental treaty of the court. Moreover, the cooperation to the court by the state parties was the only ICC power since the court does not have any authority.²⁰⁴ In this regard, the act of the court under the UN charter's chapter seven which is determined in the Statute's Article 13 (b) considered the most important part of the court's jurisdiction. The mentioned article gives the power to the court to exercise the jurisdiction over every committed crime that stated in the Statute's Article 5 regardless whether the crimes occurred in the territory of state parties of the court or non-member states.²⁰⁵ Therefore, in each case when the UNSC realized that there is any danger to peace and security of the world, it may use its power under chapter seven of the UN charter's Article 39.²⁰⁶ The referral by the UNSC is different from both other referrals like state parties' referral and referral by the prosecutors (proprio motu). Although, both of other referrals needs the consent of states but the UNSC referral has more power without the consent of states.²⁰⁷ Furthermore, in the case when the UNSC refer the criminal cases to ICC it will act according to Article 13 (b) of the Court's Statute, Article 39 of chapter seven of the UN charter, Article 17 paragraph 1 of the relationship agreement between ICC-UN; which all of those articles gives the power to the UNSC to act in this regard.²⁰⁸ Also, it should be mentioned that in spite of given the power of referral to the UNSC by the ICC statute the independent of the court remained as stated in the court's Statute and in the ICC-UN relationship agreement as well. In this regard, any referral process to the ICC will be examined by the prosecutors according to the precondition of the ICC jurisdiction. It is also crucial that referral should fit to the principles that are mentioned as a condition of the jurisdiction of the court as we

²⁰⁴ Gabriel M. Lentner, 'Why the ICC v 13't get it right – The Legal Nature of UN Security Council Referrals and Al-Bashir Immunities' (2017) EJIL <<https://www.ejiltalk.org/why-the-icc-wont-get-it-right-the-legal-nature-of-un-security-council-referrals-and-al-bashir-immunities/>> accessed on 24 March 2019.

²⁰⁵ 'UN Security Council: Address Inconsistency in ICC Referrals Use Debate on International Court to Forge a More Principled Relationship' (Human Rights Watch, October 16, 2012) <<https://www.hrw.org/news/2012/10/16/un-security-council-address-inconsistency-icc-referrals>> accessed on 24 March 2019.

²⁰⁶ article 39 chapter seven UN charter

²⁰⁷ 'Start of Jurisdiction' (ICC, n.d) <<https://how-the-icc-works.aba-icc.org/>> accessed on 24 March 2019.

²⁰⁸ Rome Statute, UN charter, relationship agreement between ICC-UN

mentioned before such as; the subject matter, gravity, complementarity, etc.²⁰⁹ Additionally, the referral criminal cases after transferred to the UNSC it covers under the title of resolution which needs approval by the member states of the UNSC. The 15 members of the UNSC have to vote in order to pass the resolutions. The number of votes to pass each resolution is 9 states without power state vetoes, because veto against the resolutions by each of the permanent state of the UNSC will ban the resolution from the approval.²¹⁰ The ICC has experience of the referring situations to the court by the UNSC. The UNSC transferred two situations of the court's ³¹ non-member states to the ICC; under the power of the UN charter's chapter seven in order to keep the world's security and peace. The referral situations are; the referral of Darfur, Sudan, in 2005, and the referral of Libyan case in 2011.²¹¹ The less number of the referral criminal cases by the UNSC to the court in spite having such strong power is the other criticism of this court. The only two referral cases by the UNSC raise the question of whether the court's act by the UNSC is a judicial or political action. Moreover, the selective states or selective continent by the court is the other question whether the court is the universal court or political tools used by the powerful states. In order to respond to these questions by observing the actions of the court; one may notice that the rejection to join the court by the three permanent UNSC members; and using the exceptional right of veto could be the main reason for that. Also, by observing recent cases such as; Syrian war as a simple example regarding answer those mentioned question; one may realize that how the UNSC is weak against the power of veto by the council's permanent member states in order to pass the resolutions in the UNSC.²¹² In the below research, two referral situations by the UNSC will be explained in order to specifically answer the mentioned questions.

²⁰⁹ Jennifer Trahan, 'The Relationship Between The International Criminal Court And The U.N. Security Council: Parameters And Best Practices' (2013) *Criminal Law Forum* 418

²¹⁰ KATE TAYLOR, 'How Does a U.N. Security Council Resolution Get Passed?' (Slate Group, OCT 02, 2002)

²¹¹ Corrina Heyder, 'The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court's Functions and Status' (2006) 24(2) *Georgetown Journal of International Law* 650

²¹² Hemi Mistry, 'International Law Meeting Summary, with Parliamentarians for Global Action' *The UN Security Council and the International Criminal Court* (2012) Chatham House, 16 March 2012 <<https://www.pgaction.org/pdf/activity/Chatham-ICC-SC.pdf>> accessed on 25 March 2019, Lydia A. Nkansah, 'International Criminal Court in the Trenches of Africa' (2014) *African Journal of International Criminal Justice* <https://www.elevenjournals.com/tijdschrift/AJ/2014/0/AJ_2352-068X_2014_001_000_002> accessed on 25 March 2019, 'Russia's 12 UN vetoes on Syria', Arab News (Jeddah, 10 April 2018) <http://www.arabnews.com/node/1282481/middle-east> accessed 15 April 2018.

4.4 Cases of non-state parties which were referred to the ICC with cooperation by the UNSC

4.4.1 The Darfur, Sudan Case

On 31st March 2005 the court acted for the first time in the history under Article 13 (b) and used the power of referral by UNSC under the UN charter's chapter seven. The referral was held on the Darfur- Sudan as a non-member of the court under the 1593 resolution; regarding the crimes which were committed in its territory by the rebel troops and military forces against each other and against civilian people as well.²¹³ During crises which was raised in Sudan's territory such as the al-Bashir fights southern rebels Ethnic, religious and regional tensions; has given a good opportunity to Omar Al- Basher to took the power and announce Sudan as an Islamic state after 1989 onward. After that, during 2003 to at least 2008 armed conflicts was occurred between the government forces, and its allied troops in one hand and the rebels group who fought against the government on the other hand.²¹⁴ Referring the mentioned situation resulted by following several resolutions regarding condemn the crimes which were committed by parties during the conflicts. It came after that when The United States, Britain and France have said the suffering in Darfur was at its worst level in a decade. In this regard, the UNSC declared that according to the crimes has been committed in the mentioned conflict the ongoing this situation would threaten to the world's security and peace and determined the situation as a humanitarian crisis. Under the name of International Commission of Inquiry on Darfur, a commission was established by the UN's Secretary-General for examining the situation so as to inform whether the violation against human rights has been committed in Sudanese conflicts or not. After examining the situation by the mentioned commission during the report that submitted to the ICC the prosecutors declared that the violation has been committed against the human rights and international violations occurred as well such as genocide, crimes against humanity, and war crimes.²¹⁵ In this regard, the resolution after proposed for voting in the UNSC, the Sudanese government expected from its ally China as a

²¹³ Mariana Rodriguez Pareja, 'UNSC: Darfur's Referral Turns 10 Years' (Verizon Media, May 09, 2015) <https://www.huffingtonpost.com/mariana-rodriguez-pareja/unsc-darfurs-referral-tur_b_6824062.html>accessed on 26 March 2019.

²¹⁴ Omar al-Bashir' Coalition for the International Criminal Court

<<http://www.coalitionfortheicc.org/cases/omar-albashir>>accessed on 26 March 2019.

²¹⁵ Oliver Ulich, OCHA, 'The UN Security Council's response to Darfur: a humanitarian perspective' (2005) Humanitarian Practice Network <<https://odihpn.org/magazine/the-un-security-councils-response-to-darfur-a-humanitarian-perspective/>>accessed on 26 March 2019.

power state to use the right of veto against the adoption of the resolution, but the decision of China was a serious threaten for Sudan. It also criticized its ally China when in spite of using veto power it had abstained from voting on the resolution.²¹⁶ On other side, the universal community expects the US to veto against the resolution, as it declared before that it will ban all peacekeeping process in the UNSC such an act of revenge against the ICC regarding disagreements on the Statute's Article 13 (b). but unlike that expectation, the US declared that in spite of that the US suggest a hybrid tribunal in Africa as a better alternative but it will stay as a part of the universal coalition against the violation and to protect the peacekeeping proses of the UN. The decision came out after the ICC exempted some of the court's non-member states; regarding the ICC fear from three power states in UNSC; who were a non-member of the court to veto against the resolution and particularly the USA.²¹⁷ The decision for an exception designed for the court's non-member states in the resolution which gives the non-members "exclusive jurisdiction over nationals, current or former officials, and personnel they contribute to operations in Sudan mandated by the Security Council or the African Union", it results many criticism by the international organizations and particularly the human rights protectors.²¹⁸ Finally, the draft resolution of the referral was adopted by the vote of 11 in favors and 4 votes of abstention and without any veto votes against the resolution by the council's permanent member. Moreover, under the resolution 1593, after the adoption of the situation, the government of Sudan and all parties in the territory of the mentioned state were demanded by the ICC to cooperate with ICC prosecutor and investigations. Also, ICC demanded to cooperate and facilitate for the court from all member states and united African.²¹⁹ Furthermore, after the ICC prosecutors of the court brought the sufficient of the evidence to the judges in the court in order to arrest the criminals of international crimes who

²¹⁶ John Prendergast, 'IRRESOLUTION: The U.N. Security Council on Darfur' (Enough, July 24, 2008) <<http://enoughproject.org/reports/irresolution-un-security-council-darfur>>accessed on 26 March 2019.

²¹⁷ Heyder, C, 'The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court's Functions' (2006) 'Berkeley Journal of International Law' <<https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1317&context=bjil>> accessed on 25 March 2019. , JOHN R., 'CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW' (2005) 99(3) The American Journal of International Law 691

²¹⁸ 'U.N. Security Council Refers Darfur to the ICC' (Human Rights Watch, March 31, 2005) <<http://www.hrw.org/news/2005/03/31/un-security-council-refers-darfur-icc>>accessed on 26 March 2019.

²¹⁹ 'SECURITY COUNCIL REFERS SITUATION IN DARFUR, SUDAN, TO PROSECUTOR OF INTERNATIONAL CRIMINAL COURT' (UN, 31 March 2005) <<https://www.un.org/press/en/2005/sc8351.doc.htm>>accessed on 26 March 2019.

violate the crimes that are mentioned in Article 5 of the Sudanese Statute. The court decided to warrant arrest for the individuals who were accused as the main perpetrators of those crimes in Sudan conflicts. Among the perpetrators there were the persons who had a high position in the government of Sudan and among them; the president of Sudan and the minister of defense were accused in this regard.²²⁰ In addition, on 4th March 2009, the first warrant for arrest for Omar al-Bashir, the president of Sudan, was issued. It was for the first time the head of states wanted by international courts and he was accused of international crimes which determined the ICC; regarding two counts of war crimes and five counts of crimes against humanity. After that on 12th July 2010; the next warrant for arrest occurred for the president regarding three counts of genocide crimes by the shared of evidence which provided to the court by the prosecutors. Also, it should be mentioned that it was the first decision for arrest warrant regarding the genocide crimes in the court history.²²¹ As regards the decision of the ICC's arrest warrant, the Sudanese government rejected to collaborate with the court. Moreover, a lot of the court's member and non-member states rejected the cooperation in order to surround Omer al-Bashir to the court. The breaching of the obligation of the court many times happened regarding arresting of the mentioned president and transfer to the ICC. The president was travelled many times to a lot of member states and non-member states to the court and none of them was bound to the obligations of the court and rejected the cooperation with the court. Likewise, the UNSC was not taken any essential steps in this regard and till now the criminals are not arrested and are acting freely.²²² In addition, cooperation with Sudanese government in spite of the ICC as an accused regime who act against the peacekeeping process in the world; also choosing the political benefits and ignoring the moral standards by the universal community; leads the Sudanese government to continue the violation acts, and result out of remaining the cases ambiguous in front of the ICC and criminals freely move in the outside of

²²⁰ 'Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)' (ICC, 14 December 2018) <https://www.icc-cpi.int/Pages/item.aspx?name=181214-stat-otp-UNSC-1593> accessed on 26 March 2019, 'Former UN rights chief says UNSC referral of Darfur case to ICC a 'very bad idea'' (SudanTribune, 22 JULY 2013) <<http://www.sudantribune.com/spip.php?article47363>> accessed on 26 March 2019.

²²¹ Omar al-Bashir' Coalition for the International Criminal Court <<http://www.coalitionfortheicc.org/c/113-omar-albashir>> accessed on 26 March 2019.

²²² 'The Crisis in Darfur' (International Coalition for the Responsibility to Protect, n.d) <<http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-darfur>> accessed on 26 March 2019.

the court.²²³ Furthermore, the disappointment of victims from the court results out to withdraws eight cases from the court regarding this case. Because the victims declared that they cannot wait until the end of their life to achieve their rights.²²⁴

4.4.2 Libyan case

On 26th February 2011, the UNSC acted its second missions under the UN charter's chapter seven; and referred the situation of Libyan as the court's non-member states to the ICC under the resolution of 1970. The referral came after the first referral situation in Sudan by the UNSC to the court, but this one was so speedily processed in the UNSC comparing with the first one. Because it was for the first time all members were agreed together, without using the right of veto by the permanent members against the referral resolution. Also, the adoption process of the referral of Libya situation was an important act of the council; because it was a unanimous act of the UNSC in this regard.²²⁵

After the wave of demonstrates was held in a lot of states in the world; especially in Arabian countries under the Arabian spring; regarding changing the governments who leads those states for a long time. In 2011, the protest and demonstrates was begun in Libya among civilian people to end the leadership of Muammar Al-Gaddafi's regime who leaded the mentioned state for 41 years. The protests were covered in the country so speedily; in this regard, the government of the state decided to act against the protesters and declared that they act with no mercy against those civilian people who participated in the demonstrations.²²⁶ After that, the demonstration from the small group of protesters in the Libyan streets had become a small army group. Then after from a short period of time; it becomes a strong opposition who stand against the regime of Gaddafi and then it resulted up to end its regime. This act resulted in using military power by the government against demonstrators. In this regard; Gaddafi was declared the act as a threat to the Libyan government and decide to

²²³ Ahmed H. Adam, 'Displaced in Darfur' (ReliefWeb, 03 Apr 2018) <<http://reliefweb.int/report/sudan/displaced-darfur>>accessed on 26 March 2019.

¹¹² Lithuania's statement at the UN Security Council briefing on ICC-Sudan' (PMLUNNY, 2015.12.15) <<http://www.urm.lt/missionny/en/news/lithuanias-statement-at-the-un-security-council-briefing-on-icc-sudan-1>>accessed on 26 March 2019..

²²⁵ Harry Orr Hobbs, 'The Security Council and the Complementary Regime of the International Criminal Court Lessons From Libya' (2012) 9(1) *Eyes on the ICC* 21

²²⁶ 'Background on the referral of Libyan to the international criminal court' (ICRtoP, APRIL 22, 2016) <<http://responsibilitytoprotect.org/libya-referral.pdf>>accessed on 28 March 2019.

execute all Libyan people who hold the arms against the government.²²⁷ Furthermore, after six months of civil war between both government and troops of opposition, it became a reason for the death of a lot of soldiers and civilian people. Moreover, the conflict was a reason in the wide violations of international laws and the act of violation against humanity by the government against the protesters.²²⁸ In this regard; the ICC was condemning the Libyan government regarding violating the international laws and act against civilian people by cruelty and it was the result of a huge number of deaths of civilian and other protestors. As it came in the draft of the resolution 1970 which exclusive to ¹³⁵referring the Libyan situation to the ICC by the UNSC; ⁴⁸the court had accused the government committed the systematic attacks against the civilian people and was a reason for the act of inhumanity against the civilian people in the Libyan territory. For this reason, February 26, 2011, the UNSC ³⁹referred the situation to the ICC, and the investigation was started by the prosecutors of the court in March 2011.²²⁹ Also, in spite of ⁵referred the situation to the court and started the investigation, the court also decided to apply some sanctions such as; the travelling ban on the high leaders of the government, embargo arms and froze the assets of them as well.²³⁰ It should also be mentioned that the draft of resolution like the previous one had the exception jurisdiction for the court' non-member states, it could be the main reason for speedy adoption of the resolution by the UNSC.²³¹ In addition, after examining the situations by the international commission of inquiry of the court which include the prosecutors of the court and afterwards it will provide the ¹⁰evidence to the court during the stated time. The chamber of pre-trial declared that reasonable evidence existed which demonstrated that the government violated the international laws and it was made the act of humanitarian violations against civilian protests, for that reason the court made the decision.²³² On Monday, 27th June 2011, the court decided for a warrant of arrest for some people in the Libyan territory by accusing; war crimes and crimes

²²⁷ Marie-Joe Domestici-Met, 'Protecting in Libya on Behalf of the International Community' (2011) 861

²²⁸ Sarah Warburg-Johnson, 'LIBYA & THE INTERNATIONAL CRIMINAL COURT Locating Due Process as a Component of Admissibility Analysis' (2015) vole 11, Eyes on the ICC 105

²²⁹ 'Libya' (Coalition for the International Criminal Court, n.d) <¹⁰⁴<http://www.coalitionfortheicc.org/country/libya>>accessed on 28 March 2019.

²³⁰ 'UN: Security Council Refers Libya to ICC Resolu¹⁵⁶ Aimed at Stemming Violence and Bringing Justice' (Human Rights Watch, February 27, 2011)< <https://www.hrw.org/news/2011/02/27/un-security-council-refers-libya-icc>>accessed on 29 March 2019.

²³¹ Ibrahim O. A. Dabbashi, 'UN Resolution 1970 imposing sanctions on Libya' (Voltaire, 26 FEBRUARY 2011)< <http://www.voltairenet.org/article168645.html>>accessed on 29 March 2019.

²³² 'Libya Situation in Libya ICC-01/11' (ICC, n.d) <<https://www.icc-cpi.int/libya>>accessed on 28 March 2019.

against humanity. Among the individuals who decided to arrest by the court like a previous Sudanese referral, there were persons who had a high position in the government, such as the Libyan leader, and his son who worked as a spokesman in the government also the head of Libyan intelligence.²³³ Furthermore, only a few weeks after adoption the 1970 resolution by the UNSC which demanded the Libyan government to respect the civilian rights and end the humanitarian violation against civilian persons. But the government has not followed this demand and denies protecting civilian people and it was continued the violation. Soon after, the UNSC decided to adopt the resolution 1973 which gave the authority to UNSC to act military interference to the territory of Libyan in order to protect the civilian people and end up the humanitarian violations. The first step was begun with the decision of a no-fly zone in Libyan territory. The NATO force applied this mission regarding the 1973 resolution which gave the authority in this regard. The interfering by the NATO in Libyan by targeting the government forces; resulted up to end the Gaddafi's regime. Then, after the NATO's action regards to this mission, was criticized by the Russian, China, and South Africa; they have announced their surprise regarding NATO's action and declared that the act was exceeded the mandate of the 1973 resolution.²³⁴ "The Security Council's decision to refer the case was a political rather than a legal one," said Simon Jennings. Also, he mentioned that; by observing the UNSC action regarding this situation and the speedy reaction; one can realize clearly the act was political because the violation by the Libyan government was not as much as brutal comparing with other places in the world such as Gaza.²³⁵ Furthermore, regarding the arrest warrant of the highest individuals in the government, the decision for arresting the head of state was withdrawn by the court due to death of Muammar Gaddafi the head of Libya on 22nd November 2011. Also, on 24th July 2014, the issue of the arrest warrant of the Abdullah Al-Senussi who worked as head of intelligence in government was ended up after announcing the

²³³ 'Libya: 161 Decision on OTP Arrest Warrants Request to be Released on 27 June; Related Statements and News' (coalition for the international criminal court, 24 June 2011) < <http://www.ccnw.org/?mod=newsdetail&news=4644&lang=en> > accessed on 29 March 2019.

²³⁴ Ryan Goodman, Beth Van Schaack and Alex Whiting, 'Does the Int'l Criminal Court Have Jurisdiction Over U.S. Forces in Libya?' (Just Security, September 7, 2016) < <https://www.justsecurity.org/32760/intl-criminal-court-jurisdiction-u-s-72ces-libya/> > accessed on 29 March 2019.

²³⁵ Simon Jennings, 'Playing Politics With the ICC: The Security Council's referral of Libya to the Hague court highlights the limitations of international justice.' (ReliefWeb, 8 Mar 2011) < <https://reliefweb.int/report/libya/playing-politics-icc-security-councils-referral-libya-hague-court-highlights> > accessed on 29 March 2019.

appeal chamber that they accepted the ¹⁶pre-trial chambers decision on the inadmissibility of the case in the ICC.²³⁶ In addition, after 2 years of a first arrest warrant; on 2013 then in 2017 the court was announced another warrant of arrest against two other persons in the previous government of Libyan regarding inhumanity violation action such as ¹⁰crimes against humanity and war crimes.²³⁷ Obviously, since Libyan situation was referred to ICC by UNSC and after passage of six years, none of the accused individuals who ICC announced arrest warrants transferred to the ICC.²³⁸ Since the ICC many times demand from the Libyan by announcing that criminals should be transferred to the ICC in order to judge them. But the Libyan government denied that and declares that the domestic courts can act against the impunity and the criminals will be trialed by the domestic courts.²³⁹ Additionally, in this regard, each of head of intelligence Abdullah Al-Senussi and the son of Gaddafi Saif al-Islam Gaddafi who was the spoke person of the government and de facto prime minister of the Gaddafi's government with seven former officials of the government; was sentenced to death by the domestic Tripoli court in Libya. The act was criticized by the ICC due to lack of cooperation with the court by Libya's domestic trials, and the warrant of arrest has remained in the ICC regarding criminals, and the ICC persist of arresting the criminals and referring them to ICC.²⁴⁰ But recent development regarding this case was shocked everyone when Saif al-Islam Gaddafi was released after six years of jail on 10th June 2017. And in spite of arrested warrant by ICC and death-sentenced by the Tripoli domestic court; he announced he will participate as a candidate of the Libyan presidential elections. Unfortunately, none of the ICC and domestic decisions could arrest the mentioned individuals and he is living freely and both decisions

²³⁶ 'ICC: Libya's Bids to Try Gaddafi, Sanussi' (Human Rights Watch, May 13, 2013)< <https://www.hrw.org/news/2013/05/13/icc-libyas-bids-try-gaddafi-sanussi>>accessed on 29 March 2019.

²³⁷ Ilia Xypolia, 'Libya and ICC: not indicting Khalifa Haftar makes mockery of international justice' (2017) The Conversation < <https://theconversation.com/libya-and-icc-not-indicting-khalifa-haftar-makes-mockery-of-international-justice-87907> >accessed on 29 March 2019., Michael G. Karnavas, 'ICC Prosecutor to UNSC on the situation in Libya: yes we can, but how can we?' (Michael g karnavas , 13 November 2017)< <http://mic.gkarnavas.net/blog/2017/11/13/icc-prosecutor-to-unscc/> >accessed on 29 March 2019.

²³⁸ Mark Kersten, 'Will the International Criminal Court's latest target in Libya be brought to justice?' (the Washington Post, 2017)< https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/31/will-the-international-criminal-courts-latest-target-in-libya-be-brought-to-justice/?utm_term=.b1e0d945a2ff >accessed on 29 March 2019.

²³⁹ Harry Orr Hobbs, 'The Security Council and the Complementary Regime of the International Criminal Court Lessons From Libya' (2012) 9(1) *Eyes of the ICC* 21

²⁴⁰ 'Saif al-Islam Gaddafi' (Coalition for the international criminal court, n.d) < <http://www.coalitionfortheicc.org/cases/saif-alislam-gaddafi>>accessed on 29 March 2019

have remained in both of courts regarding him sentences.²⁴¹ Finally, it should be mentioned that currently, all cases before the ICC are the cases of states which pretend the states outside of the international societies such as, African states. So in this regard, unfortunately, referring Libyan situation to the court will not help to make the global society to think positively about the court and it will not hide the political interference and sensitiveness between the power states and other states.²⁴²

²⁴¹ Julian Borger, '47 or six years in jail, Gaddafi's son Saif plots return to Libya's turbulent politics'(the Guardian, 6 Dec 2017) < <https://www.theguardian.com/world/2017/dec/06/saif-gaddafi-libya-politics-son-muammar> >accessed on 29 March 2019.

²⁴² Kirsten J. Fisher, 'Libya, the ICC, and Securing Post-Conflict Justice'(2013) Middle East Institute < <https://www.mei.edu/publications/libya-icc-and-securing-post-conflict-justice>>accessed on 29 March 29, 2019.

CHAPTER FIVE

CONCLUSIONS

Conclusion

This study has addressed the subject of possible ways to apply the ICC's jurisdiction over nationals and territory of the court's non-member states. There is no doubt that the global community always was in favor to establish an international judicial body to limit the impunity of criminals and it has historical favor. The negative effect of brutal crimes and humanitarian violation act made that favor stronger. So after WWII; and after the world was the witness of the danger and brutal crimes have been committed during that war around the world, the event leads the global community to think about establishing a global judicial body to limit the violation around the world. Since the favor always existed but the practice steps were taken by; the Yugoslavia tribunal and Rwanda tribunal, then it concluded in the conference of Rome that was caused the Rome treaty of the creation of the recent court.

The conference of Rome was the foundation of the court which resulted out a treaty between states. It was a special model which differs from the other attempts in this regard because the court was established by treaty and independently with special international legal personality as well. Moreover, the structure of the court was so strong and effective and has a wide-ranging of authorities and a modern body of judicial, which was a new innovation regarding establishing the universal judicial courts; by a different model and special authority and special action. Because the court was established as a final source of the jurisdiction; which will be active the court's jurisdiction only by the principle of complementarity.

Furthermore, the most significant part of the Court's Statute; was the relationships with the UN, because the court has a tight relationship with the UN. The relationship is wide world in various fields which concluded in the special agreement between both of ICC-UN. and the scope of the agreement is supporting and facility for each other, also it should be mentioned that, the most important part of this relationship agreement is the cooperation of the court with the UNSC as an important organ of the UN, the support and act of the court among this organ according to Article 13(b); is a special and new invention in the international judicial body which never existed before. The UNSC is the most powerful point of the court's support. Since the ICC has not any power of enforcement, so the only power of the court is the principle of

the states' cooperation with the court on the one hand, and on the other hand the UNSC's cooperation and support. Additionally, the UNSC is the supporter of the court in every situation which was stated in the provisions of the Rome. In addition, the act of the court among the UNSC; under chapter seven over non-member states was the most important action which was stated in Article 13 (b) of Statute, and pretend the essential way to apply the court's jurisdiction without any limits, because the court's jurisdiction without this provision is limited to the state members to the Statute and the court without this article will not be able to apply its jurisdiction without consent. In this regard, this special authority by the mentioned article is an amazing and unique act against the impunity of criminals in the territory of non-member states, and it supports the peacekeeping process of the UN. For that reason, the ICC was acted in this regards two times, one of them was the referral of Sudan; it was the first time that the court acted under this article. Unfortunately, it was pretended a failure action regarding non-power of the court to arrest of the criminals, because of lack of cooperation of the states and non-states party with the court. On the other hand, non-supporting behavior against the court by the UNSC may enforce the states to collaborate with the ICC regarding arresting the criminals. Another referral of the court was the Libyan situation; which was an expected failure, because of the non-cooperation of the states and non-support of the UNSC to the court such as the previous referral of Sudan. Since the court has no power of enforcement to arrest and transfer the criminals of those two situations, the cases remained in the outside of the court, and still, the court was not able to bring the criminals in front of the court. And those referrals were not effective to end the conflicts, humanitarian violations and protect the civilians as well and the violations and conflicts are continuing in those territories. In this regard, one can notice that, during the observing of those cases that the referral of the criminal cases in the territory of non-member states by such ways was not suitable, and could not change anything given the states' failure to cooperate with the court. On the other hand, the lack of support to the court by the UNSC can be noticed.

Finally, this study came to that point; in spite of suitable and powerful possible ways to apply the court's jurisdiction over non-member states to the court, the court such a universal criminal court lost their independence, and in most cases affected by political influences and it is controlled by the UNSC. In addition, the global community is not supportive to the court's action, and the political benefits are always above of the judicial interest, especially by the

powerful states who are always performance to ban the court's action, and it becomes the important cause to release the courts action due to the right of veto and due to support the allies of them in this regard.

The Rome statute have a powerful and possible legal ways in order to apply the ICC's jurisdiction over nationals and the territory ⁵ of the court's non-member states such as; the court Statute's Articles 13(b) and 14; using the UNSC's power under the UN's chapter seven regarding the peacekeeping process.

In spite of having the suitable and possible ways for the court to apply the jurisdiction over nationals and the territory of the court's ⁵ non-member states, the Statue of the court has some shortcomings. It seems that the Statute during the establishment of the court forgot many essential points to declare, especially due to the vagueness of some issues, which lead to the recent disagreements such as; the disagreement between ICC and US regarding to Article 98, also the disagreements between non-member states especially power states with the court; regarding the court Statute's ⁶ Articles 13 (b) and 16.

Lack of the power of the enforcement of the court is another point of weakness of the court, because hanging on with a political body like the UNSC was the point of weakness. On contrary, absence of power of the UNSC according chapter seven of the UN charter action in the Statute of the court, leads the UNSC as a political body to act without limiting and use the court as a political tool. The other point of weakness of the court; was the non-cooperation to the court by each of the court's non-member states and state parties, in this regard; one can realize that reality during observing the two referred ²⁰ situations to the court.

The other point of releasing the court's action; is the non-supporting the UNSC to the court, in order to arrest the criminals and enforcing the states to collaborate with the ICC. For that reason, the act of UNSC is pretending as a political interest action rather than a judicial one. Non-independent of the court due to selective of the situations to refer to the ICC, and the few numbers of the referral; is another point which demonstrates the non-independence of the court, and it shows that the court becomes such a tool used by the power states to select the situation for referral due to the political benefits. The veto of power states; due to the political interest to bun the referral situations to the court, is the most significant point of weakness of the court's action.

In order to solve those disagreements which were rising between the court and states, attempt to do some amendments of some provisions of the court is recommended. The effort to solve the disagreements between non-member power states ¹¹⁶ of the court is required in order to join the court which will be the most support for the court. It is recommended to separate the court's action from the political interests, and try to act and refer to all situations by fairly rather than by political interest. It will support in making fair decisions. Efforts should be done by the UNSC's enforcement power to enforce the court's states and non-states to have cooperation with the court and force the UNSC to take steps in this regard. The efforts are required to change the court's scope of the jurisdiction over the states which pretend outside of the global society such as; the African continent and more focus on the other situation in the world in need. Attempts are required to change the negative thinking of the global community about the court by acting fairly overall situation regarding the statute of the court regardless of political benefits.

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12.06.2019

Dear Hussein Hasan Babakr

Your project “**Application of Jurisdiction of the International Criminal Court to Nationals and Territories of States not Party to The Rome Statute**” has been evaluated. Since only secondary data will be used the project it does not need to go through the ethics committee. You can start your research on the condition that you will use only secondary data.

Assoc. Prof. Dr. Direnç Kanol

Rapporteur of the Scientific Research Ethics Committee



YAKIN DOĞU ÜNİVERSİTESİ

BİLİMSEL ARAŞTIRMALAR ETİK KURULU

Note: If you need to provide an official letter to an institution with the signature of the Head of NEU Scientific Research Ethics Committee, please apply to the secretariat of the ethics committee by showing this document.