

**UNITED NATIONS SECURITY COUNCIL DECISIONS ON THIRD STATES’
COOPERATION WITH THE INTERNATIONAL CRIMINAL COURT**

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**A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE
REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS OF THE
OPEN UNIVERSITY OF TANZANIA**

2017

CERTIFICATION

The undersigned certifies that he has read and hereby recommends for the acceptance by the Open University of Tanzania a dissertation entitled *United Nations Security Council Decisions on Third States' Cooperation with the International Criminal Court*, submitted in partial fulfillment of the requirements for the degree of Master of Laws of the Open University of Tanzania.

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.....

Moses Cyril Masami

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Date

DEDICATION

To my wife and sons, Jaisen and Nielsen

ACKNOWLEDGMENT

I wish to express my sincere gratitude to all the people who assisted me in conducting this study.

I wish to extend my sincere appreciation to Prof. Barker C.J (Sussex University) whom I first shared my ambition to conduct the study on researched subject matter.

In a special way, I wish to thank my supervisor Dr. Chacha Bhoke Murungu, Advocate of the High Court of Tanzania and visiting Senior Lecturer at the Open University of Tanzania, for his time, for the comments he made on my proposal and initial drafts of this study; and for a number of authorities and constructive discussions that he shared to shape this study.

Wish also to thank my friends, fellow staff members at the Open University of Tanzania–Dodoma Regional Centre: Dr. Cosmas Haule, Dr. Maulid J. Maulid, Dr. Hashil Abdallah, Dr. Anna I. Wawa, Mr. Shelard Mukama, Ms. Nanzia Toroko, Irene Mduma, Isabela M. Thomas, Gracehilda B. Urassa, Mr. Christopher Charles, and Jeddy Mzungu; those at the University of Dodoma: Mr. Deogratius I. Gasto and Naufal Kintoka; and those at St. Johns University of Tanzania: Allen Mtetemela and Felix Mshana, for their cooperation and moral support.

I here also wish to send my admiration to the service of the librarians at the Open University of Tanzania: Dr. Athuman S. Samzugui, Ms. Chausiku Mwinyimbegu (at the HQ), and Ms. Asia A. Kassim (at Dodoma Mini Library) who trained me on use of online libraries and how to access them; those at the University of Dodoma:

Madam. Florah Ndunguru and Mr. Juma Mbaga, for a handful collection of soft and hard copies of textbooks on international law; and those at St. Johns University of Tanzania: Mr. Victor Kitinya and Erick Mkane for allowing me to use their library to write my research even during later hours.

Finally, I wish to thank my family members for their prayers and support during my LL.M classes and in the course of writing this study.

ABSTRACT

This study embarks to investigate whether in accordance with the United Nations Security Council's resolutions referring the situations in Darfur, Sudan and Libya to the International Criminal Court (ICC), Resolution 1593 (2005) and Resolution 1970 (2011), United Nations member States not parties to the establishing Statute of the International Criminal Court ('the Rome Statute') may be compelled to cooperate with the ICC beyond what is envisaged under Article 87(5)(a) of the Rome Statute. While acknowledging the binding nature of Security Council decisions under Article 25 of the Charter of the United Nations, 1945. This study observes, that it might be a misleading view to consider the imposition of the cooperation obligations underlying operative paragraphs 2 and 5 of Resolutions 1593 (2005) and 1970 (2011) as having an automatic and direct enforcement against the respective UN member States. This study concludes, to that effect, that since by referring situations to the ICC in accordance with Article 13(b), the Security Council is presumed to have accepted that all issues relating to investigation, prosecution and cooperation into the referred situations shall be enforced in accordance with the procedural framework provided for in the Statute. Then in as long as long the ICC does not comply with the cooperation provisions underlying Part IX of its Statutes or as it stands, there is no proof that it has triggered Article 87(5)(a); the decisions underlying paragraphs 2, 3 and 5 in the above resolutions *remain highly persuasive* irrespective of the authority such decisions exert against the respective third States and the African Union in view of Chapter VII powers of the Security Council under the UN Charter.

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LIST OF ABBREVIATIONS

Art (s)	Article (s)
AU	African Union
ASP	Assembly of State Parties to the Rome Statute
PSC	Peace and Security Council (African Union)
CAR	Central African Republic
DRC	Democratic Republic of Congo
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International Law Commission
ICTY	International Criminal Tribunals for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IMTs	International Military Tribunals
NRA	Negotiated Relationship Agreement between the International Criminal Court and the United Nations
OTP	Office of the Prosecutor
PTC	Pre-Trial Chamber
Rome Statute	Statute establishing the International Criminal Court
Res.	Resolution
Ress.	Resolutions
UN	United Nations
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution
VCLT	Vienna Convention on the Law of Treaties between States, 1969

CHAPTER ONE

1.0 INTRODUCTION TO THE STUDY

1.1. General Overview

The idea of establishing a permanent international criminal court is perhaps older than what currently exists of the International Criminal Court ('the ICC').¹ For the past several decades, the pursuit for such a global institution almost proved elusive simply because there was no clear political will and support amongst States.²

Today a great part of the international community celebrates the fruits of the ICC because it took time to learn from the practices and shortcomings of the Nuremberg and Tokyo International Military Tribunals, and of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). It basically saw it important, during the negotiation of the Statute of the International Criminal Court ('the Rome Statute'), that it is high time that the persons responsible for commission of serious international crimes are prosecuted before a permanent and independent international judicial organ vested with powers to prosecute such crimes.

Indeed, it was out of States' political will and support, this time, and not by force or coercion, that the adopted text of the Rome Statute obtained the ratifications needed to make the Court operational. It is from the same will, equally, that States ratified the

¹ If it is to be drawn from the history of development of International Criminal Law (ICL) then the idea can be traced in Gustav Moynier's proposal of 1872 and from the discussions made by the Assembly of States during the negotiations on the Convention on the Prevention and Punishment of Crime of Genocide, ('the Genocide Convention, 1948'), No. 1021, UNTS 1951, adopted at by the General Assembly of the United Nations on 9 December 1948 (See, R. Cryer, D. Robinson and H. Friman, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2007, at pp. 118-119; D. McGoldrick, 'Criminal Trials Before International Tribunals: *Legality and Legitimacy*,' in D. McGoldrick, P. Rowe, and E. Donnely (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Oxford and Portland, 2004, at pp. 40-43.

² R. Cole, 'Africa's Relationship with the International Criminal Court: More Political than Legal', 1 (2013) 14 Melbourne Journal of International Law, at p. 1.

Rome Statute and where appropriate, consented to the jurisdiction of the Court as per Art. 12(3) and comply with the obligations emerging from such assent.³

Not only that; when examining the success of the ICC in rendering a conviction against *Thomas Lubanga Dyilo*,⁴ for instance, you can hardly deny the cooperation that the Government of the Democratic Republic of the Congo (DRC) gave to the Court though it also complied with its obligation under Art. 86 of the Rome Statute. This is an article that imposes a general obligation on States parties to the Rome Statute to cooperate with the ICC in its investigation and prosecution of crimes referred to under Art. 5 in accordance with the provisions of the Statute.

Therefore, under circumstances where the Court itself adheres to the provisions of its establishing Statute, the chances of motivating and attracting States that are no parties to the Statute to cooperate with it are quite positive. The acceptance of the Court's jurisdiction by Ivory Coast (a State that was not a party to the Rome Statute at the time of such acceptance)⁵ may best explain this assertion, for it did also influence more other governments to invoke Art. 12(3) or accept the jurisdiction of the Court in the form of *ratione temporis*.

For example, being a non-State party, the Palestine authority also did lodge a declaration on 21 January 2009 that *inter alia*, recognised the jurisdiction of the Court as per Art. 12(3) and allowed the latter to identify, prosecute and judge the authors and

³ See, in this regard, Situation in the Republic of Côte d' Ivoire (ICC 02/11-14), *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d' Ivoire*, ICC, PT-Ch.III Decision, 3 March 2011; See also, R. Cole, note 2 above, at pp. 6, 7; As a hint, Art. 12(3) covers an instance where a non-State party accepts ICC jurisdiction and the resulting cooperation obligation by of a declaration.

⁴ See, *Prosecutor v. Dyilo*, (ICC-01/04-01/06-2), *Warrant of Arrest*, ICC, PT-Ch.I Decision, 10 February 2006; *Prosecutor v. Dyilo*, (ICC-01/04-01/06-2842), *Judgment*, ICC, PT-Ch.I Decision, 4 April 2012.

⁵ See, Situation in the Republic of Côte d' Ivoire, (ICC 02/11-14), *Ibid*.

accomplices of the acts committed in the territory of Palestine since 1 July 2002.⁶ This is a period of three years after Ivory Coast had lodged its declaration on 18 April 2003 before ratifying the Rome Statute on 15 February 2013.⁷

Serious challenges emerge when these States, non-States parties, are demanded to act in a way that arguably appears to be against what Art. 87(5)(a) of the Rome Statute asserts. It is even more confusing when the ICC itself supports the execution of the envisaged cooperation obligation while they are in clear violation of the rule set out under Art. 34 of the Vienna Convention on the Law of Treaties between States, 1969 ('the VCLT, 1969'), a convention to which the same Court affirms as governing the Rome Statute.

Notably, it is difficult to apprehend, just for purposes of referrals made by the United Nations Security Council (UNSC) under Art. 13(b) and in reflect of the latter's decisions under operative paras. 2, 3 and 5 of Res. 1593 (2005) and 1970 (2011) respectively, that the Court can implicitly deny application of its own decisions and the provisions of its establishing Statute which define and govern the cooperation of non-States parties and States parties under Part IX of the same Statute.

1.2. Background Information

On March 31, 2005, the UNSC referred the situation in Darfur, Sudan to the ICC.⁸ The referral was made under Art. 13(b) of the Rome Statute, an Article that gives the UNSC can express power, when acting under Chapter VII of the Charter of the United Nations,

⁶ Palestine National Authority, Ministry of Justice, Office of the Minister, *Declaration Recognizing the Jurisdiction of the International Criminal Court*, 21 January 2009 available at <<https://www.icc-cpi.int/nr/rdonlyres/74ee201-0fed-4481-95d4-c8071087102c/279777/20090122palestiniandeclaration2.pdf>> (Last visited on 12 May 2017).

⁷ <<https://www.icc-cpi.int/cdi>> (Last visited on 13 October 2017); See also, W.A. Schabas, *An Introduction to International Criminal Court*, 4th Edition, Cambridge University Press, 2011, at pp. 86, 87.

⁸ See, Res. 1593 (2005), operative para. 1.

to refer cases to the ICC Prosecutor if there happens a situation in which one or more of the crimes referred to under Art. 5 of the Rome Statute appear to have been committed.⁹

Indeed, this is one of the ways in which the ICC Prosecutor may be seized of a situation under the Statute. The other two ways, contained in Art. 13(a),(c), are:

- (i) when a reference to the Prosecutor is made by a State Party in accordance with Art. 14;
- (ii) and where the Prosecutor initiates an investigation at his or her discretion in accordance with Art. 15 of the Statute.¹⁰

What is generally not understood of the nature of these referrals in practices is, firstly, as ‘triggering mechanisms’, that they present a separate question from that of the ‘pre-conditions’ which must be met by the Court before it can exercise jurisdiction on the referred situations.¹¹ These conditions are specifically provided under Art. 12. But as the ICC decision in the Situation in the Democratic Republic of Congo is concerned,¹² it is not expected to that effect, that one would read into Art. 12 in isolation of the preceding or subsequent provisions within the same Statute say, Arts. 4(1),(2), 17, 19(1), 21(1), 42(1), 54(2),(3)(c)(d) and 87(5),(6).

Secondly; that, as requests to the Court,¹³ the ICC Prosecutor has the power at least in theory, to decide whether or not to initiate an investigation or prosecution pursuant to

⁹ D. Sarooshi, ‘The Peace and Justice Paradox: *the International Criminal Court and the UN Security Council*’, in D. McGoldrick, P. Rowe, and E. Donnely (eds.), *supra* note 1, at p. 96.

¹⁰ D. Sarooshi, *Ibid.*

¹¹ These conditions are specifically provided under Art. 12. But as the ICC decision in the Situation in the Democratic Republic of the Congo, (ICC-01/04-168) is concerned, it is not expected that one would read into Art. 12 in isolation of the preceding or subsequent provisions within the same Statute say, Arts. 4(1),(2), 17, 19(1), 21(1), 42(1), 54(2),(3)(c)(d) and 87(5),(6) (See, Situation in the Democratic Republic of the Congo, (ICC-01/04-168), *Judgment on the Prosecutor’s Application for Extraordinary Review of the Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal*, ICC, Appeal Chamber Decision, 24 July 2006, para. 33).

¹² See, Situation in the Democratic Republic of the Congo, (ICC-01/04-168), *Ibid.*

¹³ See, in this context, Art. 53(1),(2) of the Statute of the International Criminal Court, UNTS, Vol.2187, No.28544 (‘the Rome Statute’); See, also, D. Sarooshi, *supra* note 1, at pp. 98, 107.

Art. 53 of the Statute.¹⁴ This is because the referral under Art. 13(b) is not considered as an obligation to which the ICC Prosecutor must comply but which he or she must assess, in accordance with the Statute, whether or not there are reasonable grounds to initiate an investigation or a prosecution thereon.

If it may be inferred from the independence the OTP of the ICC enjoys under the Statutes *vis-à-vis* States parties, non-States parties (whether UN member States or not) and other international legal entities having an interest in the operation of the Court,¹⁵ the above explains as well why a UNSC referral does not necessarily mean the Prosecutor will initiate an investigation or prosecute a case. Have used the phrase albeit in theory because the UNSC may request the Pre-Trial Chamber to review the Prosecutor's decisions not to initiate investigation, a review whose decision is binding on the Prosecutor.¹⁶

For those reading the Rome Statute as a whole, no doubt, they will find, that the 'pre-conditions' underlying Art. 12 are not restricted to situations falling under paragraphs (a) and (c) of Art. 12 but rather, they extend to include paragraph (b) of Art. 12. This is because there is an obligation on the part of the Court to satisfy itself, in accordance with the Statute, that it has jurisdiction in any case brought before it: whether made under Art. 13(a),(c) or under Art. 13(b).¹⁷ To achieving this object, certainly, the Court needs to consider a number of issues.

¹⁴ See also, Art. 42(1) of the Rome Statute; D. Sarooshi, *Ibid*, at pp. 98-100; D. McGoldrick, 'Criminal Trials Before International Tribunals: *Legality and Legitimacy*,' *supra* note 1, at p. 133.

¹⁵ See, on this independence, D. Sarooshi, *Ibid*, at pp. 98, 99; See also, Art. 42(1) of the Rome Statute, read together with Art. 2(1),(3) of the agreement governing UN-ICC relationship under Art. 2 of the Rome Statute International Criminal Court (UN General Assembly, *Negotiated Relationship Agreement Between the United Nations and the International Criminal Court*, A/58/874, 20 August 2004('the NRA')).

and compare them with Arts. 16(2) and 15(2) of the ICTY and ICTR Statutes. For a quick reference, Art. 16(2) of the ICTY Statute (similar to Art. 15(2) of the ICTR Statute) provides: "2. The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source".

¹⁶ See, Art. 53(3)(b) read together with paragraph (a) of the same sub-paragraph 3 of Art. 53, of Rome Statute; D. Sarooshi, *supra* note 9 above, at pp. 99, 100.

¹⁷ Art. 19(1) of the Rome Statute.

In as far as the cooperation of third States and international organisations such as the African Union is concerned, the Court would have to comply with the requirements of Arts. 4(2), 17, 54(2),(3)(c)(d) and 87(5),(6), of the Rome Statute because the competence of the Prosecutor (and of the Court at large) to act in accordance with the Statute is largely untouched even where the Prosecutor has become involved as a result of a UNSC referral.¹⁸ Other issues are as is recommended under Chapter 4, para. 4.3, pp. 94-95 of this study.

So, you would only end up drawing an exception under Art. 12(1),(2) that the Court is, in respect of Art. 13(b) and in consideration of the authority constituting the referral, not under obligation to obtain the consent of the State where the crimes occurred¹⁹ because you have decided to confine your interpretation of 'Art. 13(b) referral' to the context of Art. 12 and not the Statute as a whole. It would help to resolve the controversy, suggestively, when and if the Rome Statute is read as a whole than when is read in parts.

But what has the ICC itself said about these attempts as they are reflected under operative paras. 3 and 5, and common operative paras. 6 in the resolutions above cited, respectively? Because you have here the UNSC attempting to demand UN member States parties and non-States parties and the African Union to cooperate with the ICC in accordance with the 'resolutions' and not in accordance with the terms of Part IX of the Statute: Art. 87(5),(6) for this case. Not only that, you also the same organ publicly and in blanket terms declining the Court to exercise jurisdiction on the nationals of

¹⁸ D. Sarooshi, *supra* note 9, at p. 99; See also, for a list of such other requirements, Arts. 4(2), 17, 19(1), 42(1), 54(2),(3)(c)(d) and 87(5),(6), of the Rome Statute; On the admissibility of Art. 17, even to a referral made under Art. 13(b) see, A. Cassese, *International Criminal Law*, 2nd Edition, Oxford University Press, 2004, at p. 344; W.A. Schabas, *supra* note 7, at p. 189.

¹⁹ C. 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 Function and Status*', 2 (2006) 24 Berkeley Journal of International Law 10, at p. 653.

‘contributing States’ or demand the governments of the respective States to cooperate. Is this not a contravention of the terms of the agreement governing UN–ICC relationship under Art. 2 of the Statute particularly Arts. 1, and 2(1),(3) of the NRA?²⁰

It is most possible, from the preceding, that the resistance shown by African States parties and non-States parties to the Rome Statute in the enforcement of the decisions taken by the UNSC under Res. 1593 (2005) and 1970 (2011) does also emanate from the attempts by the ICC itself to re-define Art. 13(b) on the basis of Res. 1593 (2005) and 1870(2011), as an avenue upon which the UNSC vests the Court with primacy over national prosecution, and the mandate to demand the cooperation of States (whether parties or non-parties) and international organisations, beyond the requirements of the Statute, those under Art. 4(2) and 87(5).

The decision in *Prosecutor v. Bashir*, (ICC-02/05-01/09-195) speaks it all. And it also shows, with no hesitation, that the Court does support the dictates of the UNSC under operative paras. 6 and paras. 5, 6 of Res. 1593 (2005) and 1970 (2011) respectively, most probable, in lieu of the procedures under Arts. 4(2), 87(5)(a),(6) of its Statute: for the case of third States cooperation, and under Arts. 17, 19(1), 42(1), 53, and 54(1),(2),(3)(c)(d): for the case of its powers in respect of a referral under Art. 13(b).

This is the reasoning of the ICC; it says and here is a quote:

“[...] by issuing Resolution 1593 (2005) the SC decided that the ‘Government of Sudan [...] shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution’. Since immunities attached to Omar Al Bashir are a procedural bar from prosecution before the Court, the cooperation envisaged in said resolution was meant to eliminate any impediment

²⁰ NRA, *supra* note 15.

to the proceedings before the Court, including the lifting of immunities. Any other interpretation would render the SC decision requiring that Sudan “cooperate fully” and “provide any necessary assistance to the Court” senseless. Accordingly, the “cooperation of that third State [Sudan] for the waiver of the immunity”, as required under the last sentence of article 98(1) of the Statute, was already ensured by the language used in paragraph 2 of SC Resolution 1593 (2005). By virtue of said paragraph, the SC implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State. Consequently, there also exists no impediment at the horizontal level between the DRC and Sudan as regards the execution of the 2009 and 2010 Requests”.²¹

Despite what the Court argues in this case, it remains seriously doubtful if Res. 1593 (2005) alone can compel the cooperation of third States beyond what the Rome Statute provides. While it may be correct that the cooperation envisaged in Res. 1593 (2005) was meant to eliminate any impediment to the proceedings before the Court, the question is whether or not such elimination includes ICC’s obligations to comply with the provisions of its constituent treaty, the Rome Statute.

You may wish to read here the provision of Art. 3 of the NRA and question, whether in the interest of referrals under Article 13(b) the Court is as well compelled to respond to the referred situations in accordance with the decisions of the UNSC even such decisions are only compatible with the provisions of the UN Charter.²² But should a

²¹ *Prosecutor v. Omar Hassan Al Bashir*, (ICC-02/05-01/09-195), *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court*, ICC, PT-Ch.II, 9 April 2014, para. 29.

²² See, Art. 25 of the Charter of the United Nations, 1945 (‘the UN Charter’), 1 UNTS, XVI, TS 993; See also, on ICC’s submission to Art. 25 of the UN Charter, *Prosecutor v. Bashir*, (ICC-02/05-01/09-195), *Ibid*, paras. 29-31 and compare such submission with the text of Arts. 31, 32, 34 and 35 of the Vienna Convention on the Law of Treaties between States, 1969, UNTS Vol. 1155 (‘the VCLT, 1969’).

thorough scrutiny be made to the terms and conditions governing the relationship between the International Criminal Court and the United Nations (and so does the Security Council)²³ it would seem, on their face, that the scope to which such decisions apply is much clearer than what is construed of the same decisions by the Court and the majority of scholars writing on the subject.²⁴

1.3 Statement of the Problem

When examining the question whether or not third States have an express obligation to cooperate with the ICC, the approach often used to respond to the matter is that having reference to Art. 87(5)(a) of the Rome Statute. Why? Because, unlike what is constituted of the ICTY and ICTR Statutes,²⁵ the Rome Statute is a treaty in the nature of a Statute.²⁶ Being a treaty, it means as a consequence, that its provisions have to be interpreted in light of the guidelines provided for under the VCLT, 1969, Arts. 34 and 35 to this effect.

Now, while the law provides under Art. 87(5)(a) that these States may become under obligation to cooperate with the Court if, when invited by the ICC to render their cooperation, they agree to render cooperation to the Court. Views have emerged, recently drawn from the content of Res. 1593 (2005) and 1970 (2011), that the UNSC can,

²³ See, in this respect, Arts. 1, 2(1),(3) and 3 of the NRA.

²⁴ See, D. Akande, 'The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities', (2009) 7 *Journal of International Criminal Justice*, at pp. 333, 335; D. Nsereko, 'The International Criminal Court: Jurisdictional and Related Issues', (1999) 10 *Criminal Law Forum* 87, at p. 113; Z. Wenqi, 'On Co-Operation by States not Party to the International Criminal Court', (2006) 88 *International Review of the Red Cross* 861, at pp. 89-91; D. Nsereko, 'Triggering the Jurisdiction of the International Criminal Court', (2004) 4 *African Human Rights Law Journal*, at p. 268; C. Jalloh, 'Regionalizing International Criminal Law?', (2009) 9 *International Criminal Law Review*, at p. 483. For further discussion on the decision in *Prosecutor v. Bashir*, (ICC-02/05-01/09-195) *supra* see, W. A. Schabas, *International Criminal Court: A Commentary on the Rome Statute*, 2nd Edition, 2016, Oxford University Press, 2016, at pp. 600-604.

²⁵ See, para. 11 of the preamble to Res. 827 (1993) read together with operative para. 2 of the same Resolution, and para. 11 of preamble to Res. 955 (1994) read together with operative para. 1 of the same Resolution: the Statutes are good as the decrees of the Security Council; not international treaties.

²⁶ C.B Murungu, 'Obligations on African Non-States Parties to the Rome Statute to Cooperate with the International Criminal Court', (on file with the author), at p. 3; D.J Scheffer, 'U.S Policy and the International Criminal Court', 3 (1999) 32 *Cornell International Law Journal*, at p. 532.

when referring situations under Art. 13(b) of the Rome Statute, compel UN member States to cooperate with the ICC beyond what the Statute requires under Art. 87(5)(a).²⁷

It is undeniable that the UNSC may, pursuant to Article 25 of the UN Charter, impose binding obligations on UN Member States.²⁸ However, the question is whether the authority the UNSC has under Art. 25 can, for purposes of investigation and prosecution of the crimes referred under Art. 13(b) of the Rome Statute before the ICC, (i) be enforced beyond what Art. 87(5)(a) of the Rome Statute expresses or, (ii) be taken to decline²⁹ or extend³⁰ the powers that the ICC has in the exercise of its judicial functions, the cooperation of third States and international organisations under Part IX of the Statute being part of such judicial functions.³¹

While there may stand to be other views in response to the above issue, this study considers it as a dangerous move to assume that in case of a UNSC referral under Art. 13(b) the power that the Court can exercise against States parties, non–States parties and international organisations is much stronger and universal³² than the power the same Court can exercise when the cooperation of such entities in respect of referrals made under Art. 13(a) and Art. 13(c).

Unless there is another agreement entered by the Assembly of States Parties to the Rome Statute and the United Nations which in effect of the relationship sought under

²⁷ C. Heyder, *supra* note 19, at .653; D. McGoldrick, ‘Criminal Trials Before International Tribunals: *Legality and Legitimacy*,’ *supra* note 1, at p. 133; D. Sarooshi, *supra* note 9, ap. 98; D. Akande, *supra* note 24; D. Nsereko, ‘The International Criminal Court: Jurisdictional and Related Issues’, *supra* note 24; Z. Wenqi, *supra* note 24; D. Nsereko, ‘Triggering the Jurisdiction of the International Criminal Court’, *supra* note 24; C. Jalloh, *supra* note 24; See also, *Prosecutor v. Omar Al Bashir*, (ICC-02/05-01/09-3), *Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir*, ICC, PT-Ch.I Decision, 4 March 2009, paras. 41 and 240-245; *Prosecutor v. Bashir*, (ICC-02/05-01/09-195), *supra* note 21, paras. 29-31.

²⁸ See, on the commentary on Art. 25 in B. Simma, D.E Khan, G. Nolte, and A. (eds.), *The Charter of the United Nations: A Commentary*, 2nd Edition, Oxford University Press, 2002, at pp. 726–727.

²⁹ See, operative para. 6 in Res. 1593 (2005) and in Res. 1970 (2011); See, for similar decisions to para. 6, paras. 1 and 3 in Res. 1422 (2002) and 1487 (2003) respectively, and para. 7 in Res. 1497 (2003); See also, D. Sarooshi, *supra* note 47.

³⁰ See, operative paras. 2, 3 and 5 of Res. 1593 (2005) and 1970 (2011).

³¹ See, on what constitutes ‘judicial function’, R. Clark, ‘Article 119’, in O. Triffterer, (ed.), *Commentary on the Rome Statute*, Hart Publishing, 2008, at p. 1245; A. Zahar and G. Sluiter, *International Criminal Law*, Oxford University Press, 2012, at pp. 460, 461.

³² C. Heyder, *supra* note 19, at pp. 652,653; See, for an opposing view as to the status of the referrals under Art. 13(b), J. Crawford, ‘The ILC’s Draft Statute for an International Criminal Tribunal’, (1994) 88 AJIL, at p. 147.

Art. 2 of the Rome Statute, declines the ICC to comply with the provisions of Part IX of its Statute and other admissibility requirements³³ precedent to its exercise of jurisdiction on the referred situations, which is doubtful. Otherwise there is arguably nothing that operative paras. 2 and 5 of Res. 1593 (2005) and 1970 (2011) play, respectively, in changing the cooperation procedures set out by the Assembly of States parties (ASP) under Part X of the Rome Statute.

But this would be a sound argument when due respect is given to strict interpretation of the Rome Statute and the NRA.³⁴ That is, despite the pressure a referral made under Art. 13(b) may exert on the Prosecutor or the Court to investigate and prosecute, this provision leaves wholly undisturbed the obligations the Assembly of States Parties charged the ICC with under Part IX of the Rome Statute.³⁵

1.4 Objectives of the Study

This study was designed to examine at large whether or not, by virtue of a referral made under Art. 13(b) of the Rome Statute, UN member States not parties to the Rome Statute may become under duty, when so compelled by the Security Council under Art. 25 of the UN Charter, to cooperate with the International Criminal Court beyond the requirements of Art. 87(5) of the Rome Statute.

In line with this the study sought also to determine whether or not by virtue of the same referral and its supporting decisions, the ICC may be declined or relieved of its mandate to comply with the provisions of Part IX of its Statute and other jurisdictional and

³³ See, A. Cassese, *supra* note 18; W.A Schabas, *supra* note 18.

³⁴ For further discussion on the matter see, D. Sarooshi, *supra* note 9, at pp. 97, 106, 107; H.G Schermers and N.M Blokker, *International Institutional Law: Unity Within Diversity*, 3rd Edition, Nijhoff, The Hague, 1995, at p. 141.

³⁵ D. Sarooshi, *Ibid.*

admissibility requirements necessary for its exercise of jurisdiction on the crimes referred to under Art. 5 of the Statute.

In particular, the study intended to make a critical assessment, in light of the Rome Statute, the VCLT, 1969, and of the ‘agreement’ governing the relationship between the ICC and the United Nations; and in light of ICC, ICTY and ICTR case laws and the Charter of the United Nations, of the scope to which the decisions in support of UNSC referrals under Art. 13(b) are applicable in enforcing the cooperation of third States with the ICC.

Of crucial concern to the above assessment was the effects these decisions bare in enforcing the cooperation of the respective States with the ICC. As a supplement; the study intended to analyse the difference in operation between the ICC and the *ad hoc* tribunals: the ICTY and ICTR, special focus being on the reasons for their establishment and the basis of the law on which they operate.

1.5 Research Questions

Taking into account that this study undertook to examine whether or not the UNSC can compel UN member States not parties to the Rome Statute to cooperate with the ICC beyond the requirements of the Rome Statute, the study will aim at answering the following pertinent questions:

- (i) Whether the decisions taken by the UNSC in support of its referral under Art. 13(b) can be enforced beyond the requirements of Part IX of the of the Rome Statute;
- (ii) Whether the decisions taken by the UNSC in support of its referral under Art. 13(b) can decline or relieve the ICC from complying with the

provisions of the Statute governing its cooperation relationship with third States;

- (iii) Whether, for purposes of peace and security under the UN Charter, the provisions of the same Charter can override the provisions of the Rome Statute; can override ICC decisions regarding the interpretation of Art. 21 of the Rome Statute; and or can also override the Court's independence to determine, in accordance with the provisions of its Statute, as to what State or States, when and how such State or States are to render their cooperation.

1.6 Assumptions

This study proceeds with the following assumptions, informed by the above background and research questions:

1. That whether it is for purposes of peace and security as is provided under the UN Charter³⁶ or for purposes of peace and justice as the preamble of the Rome Statutes asserts;³⁷ the duty by the ICC to act in accordance with the provisions of its establishing treaty Statute remains an obligation which the UNSC cannot, in absence of a justification as to existence of any *ambiguity* or *inadequacy* under Part IX of the Rome Statute regarding the position of third States to cooperate with the ICC in accordance with the Statute,³⁸ decline or relieve the Court from complying.
2. That taking into account that the UNSC has also undertaken, in the exercise of its powers under Art. 13(b), to conform with the provisions of the Rome

³⁶ See, Arts. 1(1), 24(1), 39, 41 and 42 of the UN Charter.

³⁷ See, paras. 3, 4 and 5 of the preamble to the Rome Statute.

³⁸ I. Caracciolo, 'Applicable Law', in F. Lattanzi and W. A. Schabas, (eds.), *Essays on the Rome Statute of the ICC*, Rome: Editrice II Sirente, 2000, at pp. 211; W.A Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, *supra* note 24, at p. 601; W.A Schabas, 'The International Criminal Court and Non-Party States', 1 (2010) 28 Windsor Y.B. Access Just., at p. 6; *Prosecutor v. Omar Al Bashir*, (ICC-02/05-01/09-3), *supra* note 27, at para 44.

Statute,³⁹ it means, as a consequence, that the decisions of the UNSC cannot on their own: (i) enforce the cooperation of third States with the ICC, whether being UN member States or not, beyond what the Rome Statute permits or;⁴⁰(ii) impose binding obligations on the ICC to act in a certain way,⁴¹ or dictate as to what law or procedure applies to the investigation of the referred situation.

The same position applies to decisions taken under para.3 of Res. 1593 (2005) against the African Union as an alleged concerned regional organisation.

1.7 Literature Review

There are several authors and scholars who have written on the implication of the decisions taken by the UNSC under operative paras. 3 and 5 of Res. 1593 (2005)⁴² and 1970 (2011) respectively. For the purpose of this study it only merits to position them into three major groups namely: (i) those supporting the enforcement of the obligations imposed by the UNSC in the respective resolutions beyond the requirements of Arts. 4(2), 17, 19(1), 42(1), 53, 54(2),(3)(c)(d), 87(5) and Art. 87(6), of the Rome Statute; (ii) those insisting for compliance of the Articles in (i) above in order to conform with the fundamental principles of international law as they are coded under Arts. 26 and 34 of the VCLT, 1969; (iii) and those taking a neutral position, partly supporting the arguments in (i) and partly supporting the arguments in (ii), above.

David J. Scheffer, Dapo Akande, Charles Jalloh, Corrina Heyder, Daniel Nsereko⁴³ are in support of the arguments falling under the first position, herein to be referred to as the

³⁹ See, Art. 3 of the UN General Assembly, *Negotiated Relationship Agreement Between the International Criminal Court and the United Nations*, 20 August 2004, A/58/874 ('the NRA').

⁴⁰ Situation in Uganda, (ICC-02/04-01/15-37), *Decisions on the Prosecutor's Position on the Decision of the Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrant of Arrest, Motion for Reconsideration, and Motion for Clarification*, ICC, PT-Ch.II Decision, 29 October 2005.

⁴¹ D. Sarooshi, *supra* note 9, at p. 106.

⁴² See also, on the obligation imposed upon the African Union, operative para. 3 of Res. 1593 (2005).

⁴³ D.J Scheffer, 'Staying the Course with the International Criminal Court', note 62, at p. 90; D. Akande, *supra* note 37, at pp. 333, 335; C. Jalloh, *supra* note 24, at p. 483; C. Heyder, *supra* note 19, at pp. 652,653; D. Nsereko, 'The International Criminal Court:

‘Jalloh’s position’. These, having a great part of the arguments confined to the expressions of Arts. 24(1),(2) and 25 of the UN Charter they insist, as a consequence, that when the UNSC adopts a resolution to refer a situation to Prosecutor of the ICC then a request for cooperation that comes as a result of the referral decision, whether made by the UNSC or by the ICC, imposes a mandatory obligation on the respective UN member States to cooperate with the ICC even if they are not parties to the Rome Statute and have not consented to the obligations in question.⁴⁴ Taking quite an extreme position of the legal consequences that flow from Art. 13(b) of the Statute, Scheffer argues:

“The power of the Security Council to refer situations under Art. 13(b) enables the Security Council to nature the Court’s jurisdiction in any particular situation provided sufficient support is found in the Council to refer the situation under a Chapter VII resolution. [if] the Council seizes the opportunity, particularly in a situation that has already betrothed the Council as a threat to international peace and security, to refer a situation to the ICC, then such referral can be tailored to minimise the exposure to ICC jurisdiction of military forces deployed to confront the threat. The Chapter VII resolution would determine the parameters of the Court’s investigations in the particular situation. The Security Council also could use the power of referral to insulate domestic amnesty arrangements from the reach of the ICC by specifying in a referral, for example, that those individuals who have received or will receive amnesty in accordance with domestic procedures fall outside the scope of the referral. This may be

Jurisdictional and Related Issues’, *supra* note 24, at p. 113; D. Nsereko, ‘Triggering the Jurisdiction of the International Criminal Court’, *supra* note 24, at p. 268.

⁴⁴ R. Cryer, D. Robinson and H. Friman, *supra* note 1, at p. 135; See also, in support of the same arguments, C. Heyder, *Ibid*; C. Jalloh, *Ibid*; C.B Murungu , *supra* note 24, at pp. 1 , 8, 13, 16, 17, 19-21, 24-27; D.J Scheffer, ‘Staying the Course with the International Criminal Court’, *Ibid*.

particularly relevant for amnesties of low and mid-level personnel who normally would be of little interest to an ICC Prosecutor anyway”.⁴⁵

The point here is, from the words of Scheffer, that the UNSC has the authority in the course of making the referral, to restrict or extend the power of the Court in respect of the referral or, even impose on it binding obligations to do or refrain from doing certain acts. It is definitely beyond doubt as per Arts. 24(1), (2) and 25 of the UN Charter that the decisions of the UNSC are binding on all States members of the United Nations; there is no question also that the UNSC can, pursuant to the same Art. 25 impose a binding obligation on UN member States.

And that, when this is read with Art. 103 of the same Charter an argument may arise, that the Council has the competence to waive in effect, the sovereignty immunity of States to comply with the requirements of Art. 87(5)(a) or largely overrule the provisions of the Rome Statute requiring the Court to demand the cooperation of States in accordance with Art. 87(5)(a).⁴⁶ The question is, however, whether or not the ‘authority’ that Art. 25 exert on UN member States does also extend to or bind the Court in the manner it binds such States or, has a far more consequence of overruling, in the particular situation, the mandate of the Court under Arts. 19(1), 42(1) and 53 and its status as an independent international judicial organ.

Because, you have here a Court that the United Nations has agreed to respect its status and mandate under the Statute⁴⁷ and so does the exercise of its powers under Art. 13(b). Where then do such views as Scheffer suggest come into line? Unless argued in the

⁴⁵ D.J Scheffer, ‘Staying the Course with the International Criminal Court’, *Ibid.*

⁴⁶ D. Sarooshi, *supra* note 41; See also, *Prosecutor v. Omar Al Bashir*, (ICC-02/05-01/09-3), *supra* note 27; *Prosecutor v. Omar Hassan Al Bashir*, (ICC-02/05-01/09-195), *supra* note 21, paras. 29-31.

⁴⁷ See, Art. 1 of the NRA read together with Arts. 2(3), 2(1).

interest of academic criticisms. Because there is certainly nothing under the Rome Statute, or the NRA that provides for any special treatment to be accorded a UNSC referral as opposed to the other two ways in which the Prosecutor can be seized of a case.⁴⁸

If one accepts this reasoning, it follows then that, it is immaterial if a State is a UN member State or not; as long as the Council's decisions under Art. 13(b) do not bind the Court to refrain from acting in accordance with Statute, decline or extend its powers beyond what the Statute vests to, the position of third States under the Statute in respect of cooperation requests remains as well undisturbed.

W. Schabas, A. Cassese, Dan Sarooshi, A. Zahar and G. Sluiter, D.J. Scheffer, J. Crawford⁴⁹ constitutes the second position, herein to be referred to as the Schabas's position. These simply call in for compliance, by the Court and the Security Council, with the rules of international law governing the application of international treaties on the territories of third States: Arts. 34, 35 of the VCLT, 1969 and Arts. 4(2), 87(5)(a) of the Rome Statute in this respect.

While stressing for the judicial independence that the ICC⁵⁰ and most tribunals enjoy under their establishing Statutes these scholars find no room, as a consequence, under which a referral of situations under Art. 13(b) can escape the sieve of *jurisdictional* and *admissibility tests* that the Rome Statute imposes.⁵¹ It is their position, to that end, that since in drawing up the Rome Statute the Assembly of States parties had their

⁴⁸ D. Sarooshi, *supra* note 27.

⁴⁹ W.A. Schabas, *supra* note 7; W.A. Schabas, 'The International Criminal Court and Non-Party States', *supra* note 38, at p. 7; A. Cassese, *supra* note 18; D. Sarooshi, *supra* note 9, at pp. 96-108; A. Zahar and G. Sluiter, *supra* note 31, at pp. 23, 24; D.J. Scheffer, 'U.S Policy and the International Criminal Court', *supra* note 26, at pp. 532, 533; J. Crawford, 'The ILC's Draft Statute for an International Criminal Tribunal', (1994) 88 AJIL, at p. 147.

⁵⁰ See, W.A. Schabas, *supra* note 7, at p. 169; D. Sarooshi, *supra* note 9, at pp. 97-100.

⁵¹ A. Cassese, *supra* note 18; W.A. Schabas, *supra* note 18.

opportunity to express their wishes, in no uncertain terms, about how they want international justice to work⁵² then the insistence that the Court must exercise its functions and powers in accordance with the Rome Statute becomes an inevitable requirement.⁵³

It worth pointing here, as a take to analysing this view, that much as UN member States authorised the UNSC by virtue of Arts. 24(1), 39 and 41 of the UN Charter to establish the ICTY and ICTR, the ICC was equally created by the consent of States that were themselves subject to the Court's jurisdiction.⁵⁴ Being essentially a product of instruments that are themselves international treaties in nature,⁵⁵ the obligations imposed by UN Charter and the Rome Statute are, as a rule of international law,⁵⁶ only binding on States that are parties to such instruments.⁵⁷ It is only when such other States(third States) accept the terms of the instruments in question that a duty to enforce the obligations arising from such instruments may arise.⁵⁸

However, when you consider the legal basis of the duty to cooperate with the ICC, it is often imperative to take into account the special peacekeeping role of the UNSC under Chapter VII of the UN Charter.⁵⁹ Because it is this role that poses a great deal on a referral of situations under Art. 13(b). That being the case, it is of crucial concern that

⁵² A. Cassese, *supra* note 18, at p. 349.

⁵³ See, for a list of provisions that press for compliance by the Court with the Rome Statute: Arts. 4(2), 13, 17, 21, 19(1), 42(1), 54(2),(3)(c)(d), 57(1), 64(1), 78(1), of the Rome Statute.

⁵⁴ W.A. Schabas, *supra* note 7, at p. 65.

⁵⁵ C.B Murungu, *supra* note 26, at p. 29.

⁵⁶ Arts. 34,35 of the VCLT, 1969.

⁵⁷ W.A. Schabas, 'The International Criminal Court and Non-Party States', *supra* note 38, at p. 12; C.B Murungu, *supra* note 26, at pp. 3, 4, 7; D.J Scheffer, *supra* note 26, at pp. 532, 533; See also, on the position of the ICTY as to the obligation by non-UN member States to cooperate, Decision on Review of Indictment and Application for the Consequential Orders, *Prosecutor v. Milošević et al.*, Case No. IT-99-37-I, ICTY, T.Ch., 24 May 1999, para. 26—where the ICTY ruled out the Confederation of Switzerland from complying with the order of the tribunal to arrest Slobodan Milošević because it is a UN member State; See also, ICTR decision, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, *Decision on Defence of Motion to Obtain Cooperation from the Vatican Pursuant to Article 28*, ICTR, T.Ch. 13 May 2004, para. 3—where the ICTR refused to order Vatican to provide assistance because it is also not a UN member State; See also, Art. 2 (5) of the UN Charter and 2(6) of the same Charter for the case of non-UN members.

⁵⁸ Art. 35 of the VCLT, 1969; See also, Arts. 4(2) and 87(5)(a) of the Rome Statute; A. Zahar and G. Sluiter, *supra* note 31, at p. 465.

⁵⁹ A. Zahar and G. Sluiter, *Ibid*, at p. 466.

such a referral is not taken lightly. Firstly, because the authority of the UNSC to act under Chapter VII does not come from the Rome Statute but from the UN Charter.

Secondly, as it serves the purposes which are also of interest to the Security Council, a referral of situations under Art. 13(b) thus composes itself as measure not involving use of force and this, as per Art. 48(2) of the UN Charter read together with Art. 41, must be carried out by all UN member States directly and through their actions in the appropriate international [institutions] to which they are members. By the use of the term ‘directly’ it means, that UN member States not parties to the Statute cannot invoke Art. 87(5)(a) as an excuse to refuse rendering their assistance to the ICC.

It is on such understanding, suggestively, that the ICC did not enter or rather has not opted to enter into any special agreement or arrangement with the Government of Sudan⁶⁰ or that of Libya. The critic made against the UNSC by the current Prosecutor of the ICC, Fatou Bensouda, that the Council has failed to provide to her Office strategic recommendations⁶¹ on how to enforce the cooperation of Sudan and Libya further explains that the Court does also rely on the support of the UNSC to ensuring that Sudan and Libya and many other States not parties to the Statute comply with the Council’s decisions as they stand in Res. 1593 (2005) and 1970 (2011).⁶²

So it can generally be concluded here, that in so far as Art. 12(2) of the Rome Statute applies to situations falling under Art. 13(a) and (c) and not those under Art. 13(b) then the ICC can, by such omission, when triggered by the Security Council, exercise jurisdiction over crimes committed on the territory of non-States parties and issue

⁶⁰ See arguments made by the Pre-Trial Chamber I in *Prosecutor v. Omar Al Bashir*, (ICC-02/05-01/09-3), *supra* note 27, paras. 240-246 and assess them against *ICC Cooperation Agreement of 2nd October, 2005 with Sudan, in relation to the Investigation in Uganda* (Report of the International Criminal Court to the United Nations General Assembly pursuant to Article 6 of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 3 August 2006, at p. 7 para. 22).

⁶¹ M. Dougherty ‘The relationship between the ICC and the UN Security Council’, American NGO Coalition for the International Criminal Court, 12 August 2015, at p. 3.

⁶² See, Art. 87(7) of the Rome Statute; Dapo Akande, *supra* note 31.

binding requests for cooperation by virtue of the Council's Chapter VII powers and the resolutions in question.⁶³

As for the third position; this is composed of views by Chacha B. Murungu, Zhu Wenqi, Ilias Bantekas and Susana Nash, and Rowland Cole.⁶⁴ While sharing a similar view to what is contended by Schabas and his fellow scholars,⁶⁵ their arguments on the subject suggest, in addition, that they also support the position taken by Jalloh and his fellow scholars.⁶⁶ Making quite an exceptional take from the positions above discussed, these scholars explain the views made by Jalloh and his fellow scholars, and those made by Schabas and his fellow scholars as presenting, each one of them, a correct position to defining the effects the decisions of UNSC under Art. 13(b) bare against UN member States.⁶⁷

For example, at one hand these scholars argue that since what the UNSC asserts under Res. 1593 (2005) and 1970 (2011) stems from the powers the Council has under Chapter VII of the UN Charter (and not from Part IX of the Rome Statute) then in the same manner UNSC decisions under the respective Chapter bind UN member States, the decisions taken under operative paras and 5 of the said resolutions do as well bind the States in question to the same heights: without further exceptions,⁶⁸ as if such States are parties to the Statute.⁶⁹

⁶³ C. Heyder, *supra* note 19, at pp. pp. 652,653.

⁶⁴ C.B Murungu, *supra* note 26; Z. Wenqi, *supra* note 24, at pp. 87, 89, 91, 93; I. Bantekas and S. Nash, *International Criminal Law*, 3rd Edition, Routledge-Cavendish, 2007 at p. 514; R. Cole, *supra* note 2).

⁶⁵ See, C.B Murungu, *Ibid*, at pp. 1, 7, 8, 27, 28, 34, 35; I. Bantekas and S. Nash, *Ibid*, at pp. 549, 550

⁶⁶ C.B Murungu, *Ibid*, at pp. 13,14, 17, 20, 21, 24, 26, 27; I. Bantekas and S. Nash, *Ibid*, at pp. 542, 543.

⁶⁷ C.B Murungu, *Ibid*, at p. 29.

⁶⁸ C.B Murungu, *Ibid*, at p. 20; Z. Wenqi, *supra* note 24, at pp. 87, 91.

⁶⁹ D. Akande, 'The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?' (Working Paper, Oxford University, 30 July 2008) 3 available at <<https://www.law.ox.ac.uk/sites/files/oxlaw/akande1.pdf>> (Last visited on 12 May 2017).

While these arguments persist, Murungu, Bantekas and Susan argue, on the contrary, that treaty obligations can arise for a third States if that treaty expressly (not impliedly or even constructively) provides so in its provisions and the third State expressly accepts that obligation in writing. That's is, third States like Rwanda, Libya, and Sudan in this regard will have obligations towards the ICC only if they enter into agreements on *ad hoc* basis with the Court pursuant to Art. 87(5)(a) of the Rome Statute.⁷⁰

It is good to read that these scholars do support the positions taken by 'the Jalloh's' and 'the Schabas' but it must be admitted in the end that what is now asserted by Murungu and his fellow scholars does not resolve the controversy; it deepens the matter instead. There may be other words to say this but in consideration of the confusion that may emerge if Art. 13(b) is interpreted beyond the premises of the Rome Statute, and if both positions are held viable, it may sound wise to side either with the Jalloh's or the Schabas' school than suggesting a room from which one can consider both positions as being applicable as he or she deems it appropriate.

You may wish here to borrow arguments from James Crawford, to which this study also supports. That, once the UNSC refers a situation to the ICC, the normal requirements of the Statute applies: those under Art. 4(2), Arts. 17, 19, 42(1), 54(2),(3)(c)(d), and under Art. 87(5)(a),(6).⁷¹ There is no room, under these circumstances, in which Art. 25 of the UN Charter and Art. 87(5)(a),(6) of the Rome Statute can operate side by side as being the appropriate provisions governing the cooperation of third States and international organisations with the ICC. As a fact, one must prevail over the other.

⁷⁰ C.B Murungu, *supra* note 26, at pp. 27, 28; I. Bantekas and S. Nash, note 64 above, at p. 549; Z. Wenqi, *Ibid*, at p. 89.

⁷¹ J. Crawford, *supra* note 49.

1.8 Significance of the Study

It is expected, in the end, that the study will draw the attention of scholars under international law to consider the implications that Arts. 4(2), 12(3), 19(1), 42(1), 54(2),(3)(c)(d),87(5) and 125 of the Rome Statute on Arts. 34 and 35 of the VCLT, 1969 in their discussion on Art. 13(b). Now that it appears there are two conflicting positions, the author believes the study will help assessing the arguments in support of both positions and recommend for a precise position to address the subject at hand.

Again, since the study makes an intensive survey on different writings on the subject then it is obvious that the study will be of future significance in terms of references and analysis of the arguments in those writings. In line with intensive survey, this study expected to contribute on the discussion on the relation that exists between the ICC and the United Nations. It is expected, on the basis of such discussion, that a clear understanding of the character of referrals under Art. 13(b) will be made.

It is worth to note, above all, that the majority of scholars on the subject have simply asserted, on general terms, that the decisions of the UNSC compelling States not parties to the Rome Statute to co-operate with the ICC are binding. This study, on an understanding of such generalization, expects to make a useful clarification on the limits to invoking the provisions of Arts. 24 and 25 of the UN Charter.

Unlike other studies, this study expects also to make a critical discussion on the Agreement that is stated under Art. 2 of the Rome Statute to which the UN-ICC relation is founded. This 'agreement' is of importance in understanding the character of referrals under Art. 13(b) and the scope of matters that the ICC and the UN have agreed to assist one another in effecting their objects under the UN Charter and under the Rome Statute

respectively. It is expected, in this regard, that the discussion on this ‘agreement’ will be a key decisive factor in determining the *intra-vires* or otherwise, behind the passage of Res. 1593 (2005) and 1970 (2011).

1.9 Scope of the Study

This study was limited to determining whether by virtue of Art. 25 of the UN Charter and a referral made by the Security Council under Art. 13(b) of the Rome Statute, UN member States not parties to the Rome Statute may be directly compelled to cooperate with the ICC beyond the terms underlying Part IX of the ICC Statute. It embarked to explore the effects UNSC decisions under Res. 1593 (2005) and 1970 (2011) have on such States when the latter are interpreted in light of the agreement governing ICC-UN relationship under Art. 2 of the Rome Statute; in light of the provisions of the Rome Statutes when read as a whole; and in light of ICC decisions as Art. 21(2) of the ICC Statute articulate.

To achieving all these, this study had its focus guided to evaluate the extent to which ICC–UN relationship empowers the UNSC to dictate on the Court or impose obligations on UN member States not parties to the Statute.

1.10 Research Methodology

This study was conducted significantly as a doctrinal and exploratory research. Because it evolved around a review, analysis and interpretation of the provisions governing the imposition of obligations on third States: those under the Rome Statute; under the Statutes of the ICTY and ICTR; under the UN Charter, the Negotiated Relationship Agreement (NRA), and the VCLT, 1969.

Taking into account that the field of international criminal justice bare quite a minimal concern in a country like Tanzania, the researcher had to significantly rely on a handy of international and regional secondary sources such as the ICC's Rules of Evidence and Procedure, ICC Assembly procedures relating to non-cooperation (ICC-ASP/10/Res.5), and AU decisions and declarations on cooperation with the ICC, ICC policy papers regarding cooperation of States, and a number of decisions from the ICTY, ICTR and the ICC itself regarding the cooperation of third States.

With the adoption of research questions, this study can thus be categorized as a qualitative desktop–work research, for internet materials from varying online sources have played a considerable role in benefiting the researcher with a good number of international journal articles, textbooks, decisions and declaration of the African Union, and reports from the OTP of the ICC.

1.11 Limitations of the Study

It is quite possible that the study might have failed to include useful discussions that would have directly been obtained from a number scholars and jurists having an expert knowledge on the subject under investigation, this is because the study was carried in Tanzania where such experts do not reside or could not have been easily found for questioning.

Besides, most people in the country are also not well informed about the operation of the ICC, its relationship with the United Nations organs and the potential rules governing its relationship with non-States parties—whether UN member States or not. The same experiences manifested in the operation of the ICTR when still in force in Arusha. Being of recent development in the history of international criminal tribunals,

one can notice, that less has been locally written on the operation of the ICC and on the subject at hand that the researcher could have accessed in hard or soft copies.

It be known also that this study was a self-funding study. It is anticipated therefore that the limited financial sources that the researcher had may have contributed to him failing to access very recent journal articles and a number of textbooks sold online. It also possible, by the same token, that the researcher failed to visit the least of scholars in East Africa region conversant with the subject matter for discussion say, those who have participated in proceedings before the ICC in cases involving President Uhuru Kenyatta and his Deputy, Rutto.

1.12 Chapter Outline

The study contains a sum of four chapters. The first chapter is composed of an introduction to the study, background to the problem, statement of the problem, objectives of the study, research question, hypothesis, literature review, significance of the study, scope and limitation. Being designed to examine at large whether or not, by virtue of a referral made under Art. 13(b) of the Rome Statute, UN member States not parties to the Rome Statute may become under duty, when so compelled by the Security Council, to cooperate with the International Criminal Court beyond the requirements of Art. 87(5) of the Statute, this chapter marks an introductory part the basis of which the problem stands.

It gives a hint to the development of international criminal tribunals and attempts to assess the place of States' contribution to the functioning and operation of supranational criminal tribunal and so does the ICC. At the core, the chapter presents three main issues for investigation as they are reflected under paragraph 1.5, at p. 14 of this study.

Chapter Two, titled ‘Imposition on third States of the obligation to cooperate with the ICC: *Chapter VII of the UN Charter vis-à-vis Part IX of the Rome Statute*’, presents, in specific, by reference to the Rome Statute, the NRA, the VCLT, 1969, the UN Charter, ICC, ICTY and ICTR case laws, UN UNSC decisions under Res. 1593 (2005) and 1970 (2011), a discussion on the mode by which obligations are created on third States. It compares the practices of the ICTY and ICTR in imposing obligations on UN member States and non-UN member States and argue, from them, the position that the ICC has in imposing the same obligations either by virtue of UNSC resolutions or pursuant to the provisions of its Statute.

Mainly, the chapter discusses, in particular, the terms governing and the extent to which, ICC–UN relationship under Art. 2 of the Rome Statute is applicable. It looks at the implication the law governing such relationship has on UN member States not parties to the Rome Statute and examines the status the treaty of Rome has in light of the VCLT, 1969 and against the UN Charter.

Chapter Three is specifically dedicated to address the effects UNSC decisions under Res. 1593 (2005) and 1970 (2011) have on UN member States not parties to the Rome Statute in respect of their cooperation relationship with the ICC. It responds at lengthly on the adopted research questions and makes an analysis, in light of the referral power enjoyed by the UNSC under Art. 13(b), to determine whether such referral power exert any overriding effect on the Court’s obligation to comply with the provisions of the Rome Statute governing the cooperation of third States.

Chapter Four marks the end of this study. So you will definitely have general conclusions followed by appropriate recommendations. As a highlight; this study has failed to hold the first position (Jalloh's position) and second position (Schabas's position) as being rational approaches, *simultaneously*, in addressing the position of UN member States not parties to the Statute in their response to UNSC decisions under Res. 1593 (2005) and 1970 (2011).

CHAPTER TWO

2.0 IMPOSITION ON THIRD STATES OF THE OBLIGATION TO COOPERATE WITH THE ICC: CHAPTER VII OF THE UN CHARTER VIS-À- VIS PART IX OF THE ROME STATUTE

2.1 Introduction

It is argued by Dapo Akande that the United Nations Security Council (UNSC) can imperatively withdraw immunity from any person when exercising its powers under Chapter VII of the Charter of the United Nations, 1945 ('the UN Charter') by for example, passing a resolution referring a situation to the International Criminal Court ('the ICC') under Art. 13(b) of the Statute of the ICC ('the Rome Statute') as is the case with Res. 1593 (2005) and 1970 (2011) on the situations in Darfur, Sudan and Libya respectively.⁷² According to him, operative paras. 2 of Res. 1593 (2005) had irrevocably lifted the immunity of the Sudan's President when it required the Government of Sudan to cooperate with the ICC.⁷³

As already introduced in the 'Abstract' of this study, the position above made clearly reflect that there are scholars who still think, by virtue of Art. 13(b), even if temporarily, that perhaps the ICC is a subsidiary organ of the UNSC as Art. 29 of the UN Charter expresses. And as a result, the Court can as well operate in the manner the International Criminal Tribunal for the former Yugoslavia (ICTY) or International Criminal Tribunal for Rwanda (ICTR) operate, or that the UNSC itself can exercise certain supervisory or operational powers on the ICC.

⁷² D Akande, 'The Bashir Indictment: Are serving heads of states immune from ICC prosecution?' Oxford Transitional Justice Research Working Paper Series, 30 July 2008, at p. 3 available <<https://www.law.ox.ac.uk/sites/files/oxlaw/akande1.pdf>> (Last visited on 12 May 2017).

⁷³ D Akande, *Ibid.*

It is an impressive argument what Akande tries to put forth. But it may also be, that he does appreciate, in light of Arts. 1, 2(1),(3) and 3 of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations ('the NRA')—the status that the ICC has under Arts. 1, 2, 4(1) of, and para 9 of the Preamble to the Rome Statute in its relationship with the United Nations system.

More importantly, it is not Akande's concern, as under Arts. 27(2) and 98(1) of the Rome Statute, that the immunity of States officials stands wholly a separate question from the immunity attached to States.⁷⁴ Indeed, we need not confuse the responsibility of an individual, whether national of a State party or non-State party to the Rome Statute, for jurisdictional issues underlying Art. 27(2) of the Rome Statute with the question of State cooperation, whether party State or not, as manifested under Part IX of the Rome Statute.⁷⁵

For a reference; Art. 1(1) of the NRA considers the same agreement as an instrument defining the terms on which the United Nations and the Court has been brought into relationship as Art.2 of the Rome Statute expresses. Some of these terms are as they are provided under Arts. 2(1)(3) and 3 of the agreement. The latter impose an obligation on the United Nations (and so does the UNS) to respect the Court's legal personality and such legal capacity as may be necessary for the exercise of its functions.

Article 3 on the other hand, demands all concerned parties to NRA to cooperate closely, whenever appropriate, with each other and consult each other on matters of mutual interest pursuant to the provisions of the NRA and in conformity with the respective

⁷⁴ See generally, C.B Murungu, 'Immunity of State Officials and Prosecution of International Crimes in Africa', a thesis submitted in fulfilment of the requirement of the degree Doctor *Legum* (LL.D) in the Faculty of Law of the University of Pretoria, 2011, at pp. 64-70 available at <<http://repository.up.ac.za/bitstream/handle/2263/25163/Complete.pdf?sequence=9>> (Last visited on 19 April 2017).

⁷⁵ C.B Murungu, *Ibid*, at p. 69.

provisions of the Charter and the Statute.

As with Arts. 1, 2 and para. 9 of the Preamble to the Rome; these simply designate the ICC as an independent permanent international criminal Court in relationship with the United Nations system as defined by the NRA, with jurisdiction over the most serious crimes of concern to the international community as a whole. Art. 4(1) is an extension of Arts. 1, 2 and para 9 of the Preamble, for it considers the ICC as having in excess, international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

2.2 Imposition on third States of the obligation to cooperate with the ICC: the question of referrals under Art. 13(b) and States' positions in response to the request to cooperate

It must be noted from the preceding, by virtue of the decision reached by the ICC in the Situation in the Democratic Republic of the Congo, (ICC-01/04-168), that States cooperation under Part IX of the Rome Statute is subject to the rules of the Vienna Convention on the Law of Treaties between States, 1969 (the VCLT, 1969').⁷⁶ So much as questions relating to individual criminal responsibility under international law, from the practice in the International Military Tribunals (IMTs), the ICTY or ICTR, are normally dealt in accordance with the statutes of the respective criminal courts or instruments establishing such courts.⁷⁷ The same applies with the prosecution of individuals alleged responsible for commission of crimes referred to under Art. 5 of the Rome Statute.

⁷⁶ Vienna Convention on the Law of Treaties between States, 1969, UNTS Vol. 1155 ('the VCLT, 1969'); See, Situation in the Democratic Republic of the Congo, (ICC-01/04-168), *Judgment on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal*, ICC, Appeal Chamber Decision, 24 July 2006, at. para 33; *Prosecutor v. Omar Hassan Al Bashir*, (ICC-02/05-01/09-195), *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court*, ICC, PT-Ch.II, 9 April 2014, para. 26.

⁷⁷ C.B Murungu, note 4 above.

So in connection to the shortcomings identified in Akande's arguments, one can say, for the case of the situation in Darfur, that it is possible for President Omar Al Bashir, irrespective of his nationality or official capacity, to be held responsible before the ICC. But yet, that does not necessarily mean, even in terms of operative para. 2 of Res. 1593 (2005), that the Government of Sudan is under obligation to surrender him to the ICC. It can also choose not to comply, as per Arts. 87(5)(a), 88, 93(1)(4), 98 and 99(1) of the Rome Statute direct, or as para. 26 of the decision in *Prosecutor v. Omar Hassan Al Bashir*, (ICC-02/05-01/09-195), *supra*, expresses.

The point here is; that issues of referrals of situations under Art. 13 are dealt separately from issues of cooperation. Had it been that by a State party referring the situation to the ICC under Art. 13(a) it becomes automatically under obligation to cooperate without exceptions then there was no essence of any of the provisions under Part IX of the Statute providing for circumstances under which States parties could deny requests for cooperation from the Court.

It certainly for the case of acceptances made in accordance with Art. 12(3) that States may be said to become under automatic obligation to cooperate. But they can also deny the resulting cooperation obligation on the basis of avenues provided under Arts. 88, 93(1),(4), 98 and 99(1) of the Rome Statute.

Should one take this argument to define the context of referrals under Art. 13(b), it would mean, even for the case of third States, that a UNSC referral under Art. 13(b) cannot deny UN member States not parties to the Rome Statute to enjoy the set of limits provided under Arts. 87(5), 88, 93(1)(4), 98 and 99(1). And this would tell us in the end, that is illogical to suggest that by referring the situation in Sudan or Libya to the

ICC, the UNSC possibly mandated the ICC to, or assumed the ICC would apply Art. 25 of the UN Charter while at the same time the ICC itself subjects the interpretation of its Statute to the rules of the VCLT, 1969: Arts. 34 and 35 in this case.

Even if there could be an implied waiver of immunity on the States in question through the referrals pursuant to Arts. 24 and 25 of the UN Charter, it remains highly contestable whether such is the understandable position in respect of the relationship ascribed under Art. 2 of the Rome Statute.⁷⁸ So, it is sometimes not a question whether the arguments against the use of Art. 25 of the UN Charter to enforce the cooperation of States under Art. 87(5)(a), (6) may lead to impunity for individuals from States not party to the Rome Statute, but what the Rome Statute itself expresses of its relationship with such third States.

So, there is no doubt, that being a State member to the United Nations a third State like Sudan and Libya would be compelled to accept and carry out the decisions of the UNSC under Res. 1593 (2005) and 1970 (2011) in accordance with Art. 25 of the UN Charter.⁷⁹ But for as long the decisions in the context of Res. 1593 (2005) and 1970 (2011) aim to support investigation and prosecution of crimes under Art. 5 of the Rome Statute, the question is whether such decisions are in themselves an order to the Court and stand to impede, with their Chapter VII character, compliance by the ICC of the procedural framework set out in the Rome Statute.

Besides, under circumstances where the same decisions ostensibly subject Sudan and Libya to cooperate with the ICC while excluding similar third States—*the contributing States*—from enforcing the same decisions, the ethical authority compelling such other

⁷⁸ C.B Murungu, *Ibid.*, p. 68

⁷⁹ C.B Murungu, *Ibid.*

States to cooperate renders itself questionable whether it is indeed directed to secure the objects of the United Nations or simply operates to politically victimise the compelled States.

It is from the preceding where it is argued, that the UNSC probably did not create an express obligation on Sudan, Libya or other States: parties and non-parties; it rather requested them to cooperate because you cannot, logically, compel States to cooperate but then proceed to exclude some of such third States from complying with the same decision. It is argued, therefore, on the basis of terms of Arts. 1, 2(1),(3) and 3 of the NRA, that a referral under Art. 13(b) cannot change basic provisions in the Rome Statute governing the relationship between the Court and third States, whether UN member States or not.⁸⁰

And since the conclusion of treaties is a matter within the domain of national States, then much as it not expected that the UNSC can cause an international treaty to be binding on a third state beyond what that treaty provides or Arts. 34 and 35 of the VCLT, 1969 assert, the Council cannot as well be invited under Art. 87(5)(a) or Art. 87(6) of the Rome Statute, to contract on behalf of a UN member State not party to the Rome Statute, or the African Union.⁸¹

2.3 Imposition on third States of the obligation to cooperate with the ICC: a view from the point of immunity under Arts. 27(2) and 98

It is maintained by those in support of the use of Art. 25 of the UN Charter and paras.2 and 5 of Res. 1593 (2005) and 1970 (2011) to enforce the cooperation of UN member

⁸⁰ See, W.A Schabas, *The international Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2016, at p. 604.

⁸¹ C.B Murungu, *supra* note 7.

States not parties to the Rome Statute with the ICC, that since a referral of situations under Art. 13(b) results from a determination by the UNSC that the situation constitutes a threat to international peace and security, the referral may thus have the effect of triggering the jurisdiction of the ICC even over the territory of third States and their nationals including Heads of State, alleged responsible for the crimes under Art. 5 of the Rome Statute.⁸²

As once argued by Corrina Heyder; where the ICC obtains jurisdiction over a situation by virtue of such a UNSC referral, its jurisdiction on the situation is considered much stronger and truly universal, rendering irrelevant the consent of the State where the crime occurred, to the Court's jurisdiction and requests for cooperation thereof.⁸³ This means, in other words, that the State in question and their nationals cannot plea any provision within the Rome Statute (Arts. 4 (2), 17, 87(5), 88, 93(1)(4), 98 and 99(1)) let alone Arts. 34 and 35 of the VCLT, 1969, to exclude their territories or their national from the jurisdiction of the Court and the cooperation obligations arising thereon.

And it is contended on the same basis, as for Art. 27(2) and so does Art. 98, that a referral under Art. 13(b) stands to subject the immunity attached to Arts. 27(2) and 98 to the authority underlying Arts. 24(1) and 25 of the UN Charter. Meaning, once the UNSC has referred a situation to the ICC then no State or Head of State can invoke Arts. 27(2) or 98 for the immunity attached to the Articles becomes waived altogether by virtue of Arts. 24(1) and 25 of the UN Charter. A troubling question is whether such waiver disturbs the status of third States under customary international law.

⁸² C.B Murungu, *Ibid*, p. 67.

⁸³ C. 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 Function and Status*', 2 (2006) 24 Berkeley Journal of International Law, at pp. 652, 653.

W. Schabas has argued, arguments to which the author of this study also agrees. That Article 27(2) concerns immunity that exists by virtue of customary international law rather than the principles enshrined in some national law (as is the case in Art. 27(1)). Hence by agreeing to become party to the Rome Statute, States parties renounce or rather renounced their right to invoke immunity on behalf of their Heads of States.⁸⁴ This, they are free to do under international law, against their State officials including their Heads of State, as States party to the respective treaty. But they cannot use the same treaty to deny immunity to State officials or Heads of States who, by that treaty, their immunity has not been renounced by their States. Since the latter still retain their immunity under customary international law then they should, for that reason, not be subjected to Art. 27(2).⁸⁵

True; to affirm this is the Pre-Trial Chamber I's decision, albeit ironic. It says and here is a quote, that:

“by referring situations to the ICC in accordance with Art. 13(b), the Security Council accepts that the investigation into the referred situations, the prosecutions arising therefrom, and all cooperation processes underlying Part IX of the Statute—whether applicable to States party or third States—shall be enforced in accordance with the procedural framework provided for in the Statute, the Elements of Crimes and the Rules of Procedure and Evidence as a whole”.⁸⁶

If it may be commented; the observation above made by the Pre-Trial Chamber I though in contradiction with other assertions within the same decisions, is a clear attempt to

⁸⁴ See, W. A Schabas, *supra* note 9, at pp. 599, 600.

⁸⁵ W. A Schabas, *Ibid.*

⁸⁶ *Prosecutor v. Omar Al Bashir*, (ICC-02/05-01/09-3), *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Al Bashir*, ICC, PT-Ch.I Decision, 4 March 2009, para. 45; Situation in Darfur, (ICC-02/05-185), *Decision on Application under Rule 103*, ICC, PT-Ch. I Decision, 4 February 2009, para. 31; See also, W.A Schabas, *supra* note 9, at p. 601.

define the status that a referral under Art. 13(b) bare under the Rome Statute. It is a mere request inviting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes referred under Art. 5 of the Statute.⁸⁷ Hence, it cannot stand to override, absent of lacuna in the same Statute,⁸⁸ the provisions governing the relationship between the Court and third States it be for jurisdictional issues, that of immunity under Art. 27(2), or for cooperation requirements under Part IX of the Statute.⁸⁹

And it may be added as an extension, that since the ICC subjects the interpretation of the Rome Statute to the rules of the VCLT, 1969 then the Court needs to take into account, in light of Arts. 26, 34 and 35 of the Convention, that a literal reading of Art. 27(1)(2) would as well apply to State officials of States parties to the Rome Statute or their Heads of State. Not those of third States unless the latter have consented to the jurisdiction of the Court in accordance with Arts. 4(2) and 12(3) of its Statute.

So it is insisted from the preceding, that since Art. 27(2) concerns immunity that exist by virtue of customary international law rather than principles enshrined in some national law then the fact the Pre-Trial Chamber in *Prosecutor v. Omar Al Bashir* (ICC-02/05-01/09-3) does not recognise the immunity of such Heads of State under Art. 27(2) that in itself does not preclude the recognition of the immunity under customary international law.

It suggested by the same token but this time in reflect of Arts. 1(1), 2(1)(3) and 3 of the NRA, that even if a UNSC referral under Art. 13(b) would be said to have waived the

⁸⁷ See, Art. 14(1) of the Statute of the International Criminal Court, UNTS, Vol. 2187, No. 28544 ('the Rome Statute').

⁸⁸ *Prosecutor v. Omar Al Bashir*, (ICC-02/05-01/09-3), *Ibid*.

⁸⁹ W.A Schabas, *Ibid*; See generally, C.B Murungu, *supra* note 3.

right by Sudan, Libya or other thirds State to consent to the cooperation obligation arising under Part IX of the Rome Statute, such waiver leaves unscathed the status and mandate of the ICC under the Rome Statute. More or less interesting, it also leaves undisturbed the obligation by the ICC to comply with the provisions of its treaty Statute: Arts. 4(2), 42(1), 87(5) or Art. 87(6) and Arts. 26, 34 and 35 of the VCLT, 1969.⁹⁰

2.4 Imposition on third States of the obligation to cooperate with the ICC: a view from an understanding of the Negotiated Relationship Agreement

It worth noting under this part, as per Art. 1(1) of the 'Relationship Agreement between the International Criminal Court and the United Nations ('the NRA')⁹¹, that the NRA remains the only instrument in force that defines the terms on which the ICC and the United Nations have been brought into relationship.

One would have expected, in broader sense of the agreement, that this would at least attempt to define the powers of the UNSC under Art. 13(b) or, even provide for certain exceptions in respect of the application of Art. 4(2), 17, 19(1), 87(5)(a) of the Rome Statute against UN member States not parties to the Rome Statute. Unfortunately; being an international treaty itself, the NRA too seems not to have derogated the rules of customary international law governing the conduct of third States under international treaties, Arts. 26, 34 and 35 of the VCLT, 1969 in this case.

The NRA provides to that effect, pursuant to Art. 3, that the United Nations and the Court shall, with a view to facilitating the effective discharge of their respective

⁹⁰ See, Situation in Uganda, (ICC-02/04-01/15-37), *Decisions on the Prosecutor's Position on the Decision of the Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrant of Arrest, Motion for Reconsideration, and Motion for Clarification*, ICC, PT-Ch.II Decision, 29 October 2005, para. 19.

⁹¹ UN General Assembly, *Negotiated Relationship Agreement Between the International Criminal Court and the United Nations*, 20 August 2004, A/58/874 ('the NRA').

responsibilities [under the UN Charter and the Rome Statute], cooperate closely, whenever appropriate, with each other and consult each other on matters of mutual interest pursuant to the provisions of the present agreement and in conformity with the respective provisions of the Charter and the Statute.

So contrary to what is argued of the application of Art. 25 in respect of referrals made under Art. 13(b), there is also no provision under the NRA that vests the UNSC with the mandate to decline the ICC from complying with the *modus operandi* provided by the Rome Statute under Arts. 4(2), 12(3) and 87(5)(a), or cause UN member States whether parties to the Rome Statute or not, to cooperate with the ICC solely in accordance with dictates of operative paras. 3 and 5 of Res. 1593 (2005) and 1970 (2011), respectively.⁹²

And as the ICC is not a creature of the UNSC or subject to its dictates, then pursuant to Art. 2(1),(3) of the NRA, it would be illogical to suggest that by referring the situations in Darfur, Sudan or Libya to the ICC the UNSC mandated the ICC to, or assumed it would apply Art. 25 of the UN Charter (in place of Part IX of the Rome Statute or Art. 21 of the same Statute) and at the same time assert that Arts. 34 and 35 of the VCLT, 1969 could apply in respect of the Rome Statute as an international treaty Statute.⁹³

The understanding of the author of this study on Arts. 1, 2(1),(3) and 3 of the NRA is, which shall also be a preposition summarizing this part, that the cooperation of UN member States under the NRA, for matters arising under the Rome Statute and under the UN Charter whether involving a State party to the Rome Statute or not, *incarnate*, for the interests of both organisations—for a compatibility between the provisions of the

⁹² See, Art. 3 of the NRA. It expressly confines the procession of matters provided.

⁹³ C.B Murungu, *supra* note 3, at p. 67.

UN Charter to which such cooperation obligation is founded and the provisions of the Rome Statute, from which the ICC is empowered to act in response to the cooperation obligation imposed under operative paras. 2, 3 and 5 of Res. 1593 (2005) and 1970 (2011), respectively.

An inverse position applies when it is the ICC that initiates to render assistance to the UN General Assembly or the UNSC in particular. A subsequent position under this part may also be, that a UNSC referral under Art. 13(b) let alone its Chapter VII powers under the UN Charter cannot, on itself, change the established rules under customary international law as they are provided under Art. 34 of the VCLT, 1969 or those already set out in the Rome Statute by the Assembly of States Parties to the Rome Statute (ASP). And as such, a referral under Art. 13(b) cannot cause UNSC decisions under operative paras. 2, 6 and 5, 6 of Res. 1593 (2005) and 1970 (2011) respectively, bind such third States or decline the Court of its mandate under the Statute beyond what the same Statute or the NRA provide.⁹⁴

Even a read on Art. 17(3) of the NRA still demands for compliance by the ICC of the procedures manifest under Art. 87(5)(a). It directs the Court to inform the UNSC of a failure by a State whether party or non-party to the Rome Statute, after the Court has made a finding of such failure pursuant to Art. 87, paragraph 7 or paragraph 5(b), of the Rome Statute. Not in accordance with the dictates of the UNSC under the said resolutions.

So as per Art. 87(5)(b), third States are said to have failed to cooperate when they fail to execute request for cooperation pursuant to the arrangement or agreement agreed or

⁹⁴ See, C.B Murungu, *Ibid*, at p. 68.

concluded under Art. 87(5)(a). Not as is dictated under the resolutions in question. And as per Art. 87(7), State party are said to have failed to cooperate when they fail to comply with a request to cooperate contrary to the provisions of Rome Statute. Not contrary to the same dictates under the Res. 1593 (2005) and 1970 (2011).

But you would also see, even under the ‘Great Lakes Protocol’,⁹⁵ that States member to the Protocol only become under duty to implement the Rome Statute and the obligations of the Protocol arising under the Rome Statute if they have ratified to the Rome Statute. There is nothing as such as an automatic obligation to cooperate with the ICC. It is stated under Art. 25 of the Protocol, on the applicability of Arts. 22, 23 and 24 of the same Protocol:

“Articles 22, 23 and 24 are binding only upon those Member States that have, or will have, ratified the Statute of the International Criminal Court when this Protocol will come into force”.

Hence, it is not by virtue of their membership to the original Protocol that they automatically become bound to cooperate with the Court in the arrest and surrender of the perpetrators. They must have ratified the Rome Statute to conform to the provision of the VCLT, 1969, particularly Arts. 26, 34 and 35.

This is also the essence of Arts. 3 and 17(3) in the NRA and it means as per Art. 2(1),(3) of the same ‘agreement’, that the Court is not under any obligation to enforce the cooperation of UN member States not parties to the Statute in accordance with the adopted resolutions(unless it complies with the Arts. 4(2) and 87(5)(a) of its Statute).

⁹⁵ Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination, adopted on 29 November 2006 by Heads of State and Governments of the International Conference on the Great Lakes Region in Kigali, Rwanda (‘Great Lakes Protocol’).

Similarly, the Court is not subjected to comply with the restriction embedded in operative para. 6 of both Res. 1593 (2005) and Res. 1970 (2011).⁹⁶ Because by so doing the Court would accede to the violation of its status, mandate and judicial independence under the Rome Statute.

It is from the proceeding also where you would note, in reflect of Akande's submission on the powers of the Security Council, that there is a clear conflict between the content of operative paras. 2, 3, and 5 of Res. 1593 (2005) and 1970 (2011) respectively when they read in light of UNSC Chapter VII powers under the UN Charter, and Arts. 4(2) and 87(5)(6) of the Rome Statute.

That, while such paragraphs in the adopted resolutions exert, as argued, for a dispensation of right by a UN member State not party to the Rome Statute to consent to the obligations under Part IX of the Rome Statute in accordance with Arts. 4(2) and 87(5)(a) of the Rome Statute and Arts. 26, 34 and 34 of the VCLT, 1969, Arts. 4(2) and 87(5)(a) of the Rome Statute, on contrast, do require, without any exception or categorisation of States, the Court and the invited third State to agree on the terms for cooperation and the obligation in question as the concluded agreement or arrangement would determine or indicate—before the ICC becomes empowered, by the same agreement or arrangement, to exercise its powers and functions against such third States.

It is certainly in conclusion of such arrangement or agreement, in view of Arts. 3 and 15(2) of the NRA, that the dictates of the UNSC under operative paras. 3 and 5 of Res.

⁹⁶ In essence, operative para. 6 ousts the ICC from exercising its jurisdiction on the nationals, current or former officials or personnel from a contributing State or States which is or are not party to the Rome Statute unless such contributing State or States waive their rights.

1593 (2005) and 1970 (2011) would become compatible both with the provisions of the UN Charter and those of the Rome Statute.

A question now becomes, that in such a prevailing conflict, what would be the applicable law in terms of Art. 21 of the Rome Statute: the decisions of the UNSC under the said resolutions, Art. 25 of the UN Charter or the provisions of Rome Statute governing the cooperation of third States with the ICC?

2.5 Subjection of third States to the jurisdiction of the ICC

There may be questions in light of Arts. 13(b) and 16 of the Rome Statute whether or not the ICC is truly an independent international judicial organ. But it must be admitted here, however, that it often draws serious uncertainties when the UNSC is considered to have a residual power which it can exercise against the Court as well. It does raise such concern because not only that the Rome Statute does not support for such power but also, because there are views that perhaps just because the Court is directed to report to the UNSC of the action it takes in response to the referral lodged under Art. 13(b)⁹⁷ or, of a failure by a State to cooperate⁹⁸ then that leaves it with no choice but to investigate and prosecute the referred crimes without any further excuse.

It is quite correct that the Court has a duty to report to the UNSC about the progress of the investigation or prosecution initiated as a result of a UNSC referral under Art. 13(b) but as Art. 6 of the NRA asserts, it is only if the Court deems it appropriate to report, and in accordance with the Statute that it can report such progress. It is on the same undertaking where it is sometimes argued, that the UNSC did not create any express obligation on (i) Sudan, Libya and other States (parties and non-parties to the Rome

⁹⁷ Art. 17(1) of the NRA.

⁹⁸ Arts. 87(5) (b), 87(7), of the Rome Statute read together with Art. 17(3) of the NRA.

Statute) or concerned regional and other international organisations when it urged them to cooperate fully with the ICC.⁹⁹

Similarly; the UNSC did not create any express obligation on the Court and the African Union in specific, when it invited the latter to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court¹⁰⁰ Instead, in both situations, the Council rather *requested* them to cooperate because the language used in operative paras. 2, 3 and 5 of Res. 1593 (2005) and 1970 (2011), respectively, is so soft to press for such an express obligation on the entities in question.¹⁰¹

This implies, in other words, if you examine the extent to which Security Council's powers under Chapter VII of the UN Charter are associated with Arts. 13(b) and 16, that the Court can as well, albeit in theory,¹⁰² reject a UNSC referral because, as it is for a referral under Art. 13(a) of the Rome Statute, a UNSC referral under Art. 13(b) does also come as a request. There is no logic, in terms of Arts. 1, 4(2) of, and para. 9 of the Preamble to the Rome Statute read together with Arts. 1(1), 2(1) and (3) of the NRA, to consider a UNSC referral under Art. 13(b) as having the status of a command or being imposition of an obligation on the ICC while referrals made by States under Art. 13(a) simply operate as '*requests*'. It is stated under Art. 14(1) of the Rome Statute that:

“A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed ‘requesting’ the Prosecutor to investigate the situation for the purpose of

⁹⁹ See, operative paras. 2 and 5 of Res. 1593 (2005) and 1970 (2011), respectively.

¹⁰⁰ See, operative para. 3 of the Resolution 1593 (2005).

¹⁰¹ P. Gaeta, ‘Does President Al Bashir enjoy immunity from arrest?’ (2009) 7 Journal of International Criminal Justice, at p. 315 cited in C.B Murungu, *supra* note 3, at pp. 64-65; On the effects of the language used under operative paras and 5 of Res. 1593 (2005) and 1970 (2011) respectively see, C.B Murungu, *supra* note 3, at pp. 64-65.

¹⁰² Have used the term *albeit in theory* because there is a room for the Security Council to challenge the decision of the Prosecutor not to initiate an investigation or a prosecution on the referred situation (See, Art. 53(2)(3) of the Rome Statute; See also, D. Sarooshi, ‘The Peace and Justice Paradox: the International Criminal Court and the UN Security Council’, in D. McGoldrick, P. Rowe, and E. Donnely (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Oxford and Portland, 2004, at pp. 98, 99.

determining whether one or more specific persons should be charged with the commission of such crimes”.

Of interest on the above quoted provision is the phrase ‘requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes’. That why would a referral by States parties to the Statute be requests to the Court but a referral under Art. 13(b) be a command or imposition of an obligation on the Court to investigate or prosecute the crimes in question?

It is acknowledged, that the nature of the decisions underlying Art. 25 of the UN Charter in pursue for international peace and justice pose a mandatory obligation. But since the ICC is not a State as such or a subsidiary organ of the Security Council, such mandate may have a different interpretation when assessed in light of Art. 2(1),(3) of the NRA.

Having its powers and jurisdiction on crimes under Art. 5 solely defined within the Statute; and being a treaty-based Court whose mandate, as a matter of international law, extends only to States that are parties¹⁰³ and by special agreements or arrangements,¹⁰⁴ to States that are not parties then the best approach one can take to interpreting Art. 13(b) and the obligations accruing from the decisions taken by the UNSC in support of its referral under the same Article is to read the Rome Statute as a whole and not to confine one’s findings to a single provision,¹⁰⁵ it be under the Rome Statute or the UN

¹⁰³ D.J Scheffer, ‘U.S Policy and the International Criminal Court’, 3 (1999) 32 Cornell International Law Journal, at pp. 532, 533; Arts. 34, 35 of the VCLT, 1969; Art. 4(2) read together with Art. 12(1), of the Rome Statute.

¹⁰⁴ Art. 4(2) read together with Art. 12(3), of the Rome Statute.

¹⁰⁵ M. Fitzmaurice, ‘The Practical Working of the Law of Treaties,’ in M.D Evans, (ed.), *International Law*, 3rd Edition, Oxford University Press, 2010, at p. 183.

Charter. In support of this assertion is the decision reached by the ICC Appeals Chamber in the situation in the Democratic Republic of Congo. It said:

“The principal rule of interpretation is set out in Article 31(1) [of the VCLT, 1969] that reads: ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ The Appeal Chamber shall not divert to the definition of good faith, save to mention that it is linked to what follows and that is the wording of the Statute. The rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety. Its object may be gathered from the chapter of the law in which the particular section is included and its purpose from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty”.¹⁰⁶

It follows from here, if at all this decision exerts any reasoning, that one cannot read Art. 13(b), ‘a sub-section’, in isolation to the enacting section, ‘Art. 13,’¹⁰⁷ other chapters of the Statute (Parts I, II, V and IX) or subsequent provisions within the same Statute. So it runs from the preamble going to particular sections of the law; from the sections to their sub-sections and then to the chapters in which such sections or sub-sections are included.

¹⁰⁶ Situation in the Democratic Republic of the Congo (ICC-01/04-168), *supra* note 5.

¹⁰⁷ Article 13: ‘The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the UN Charter; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.’

The bolded part speaks for itself; it puts a benchmark that the Court cannot assume jurisdiction on any of the situations under paragraph (a), (b) or (c), whether involving a States parties or a non-parties. If such assumption exists the it is either inconsistency or generally not in accordance with the provisions of the Statute as a whole (See, on insistence that the Statute should be read as a whole, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, (ICC-01/09-01/11-777), *Decision on Mr. Ruto’s Request for Excusal from Continuous presence at Trial*, ICC, TCh.V(a) Decision, 18 June 2013, paras. 2, 31,32, 42,-44, 46,47, 101 and 104.

This tells you, suggestively, that it was never the intent of the framers of the Rome Statute when they opted to retain the UNSC with a referral power under the Statute, that such power shall, when triggered by the Security Council, enable the Court to ignore the terms of the Statute or act beyond what the Statute provides.

2.6 Chapter Conclusion

Many of the scholars largely and generally talk about the competence of the UNSC to impose obligations on UN member States. Very rare you would read from them making attempts to examine how rights and obligations are established under a treaty let alone the under the Rome Statute. Should this be one of the primary concerns in addressing the extent to which UNSC decisions under Art. 13(b) are applicable against third States no doubt, the following must be noted with a keen eye.

First it needs be acknowledged, that the fundamental rule concerning the relationship between treaties and third States is that expressed by the maxim *pacta tertiis nec nocent nec prosunt*.¹⁰⁸ But secondly, it must be underscored, that the establishment of a right under a treaty is quite different from that of an obligation.¹⁰⁹ That while a right can at certain instances be presumed,¹¹⁰ it is a must for an obligation to be accepted in writing¹¹¹ because it is from this latter ‘acceptance in writing’ rather than the original treaty, where the legal basis for the third State’s obligation is enforced.¹¹²

But it worth noting as well, that when you look at the content of a referral made under Art. 13(b) of the Rome Statute you would discover, quite clearly, that more often than

¹⁰⁸ Art. 34 of the VCLT, 1969; See also, M. Fitzmaurice, *supra* note 34, at p. 182.

¹⁰⁹ VCLT, 1969, *Ibid*.

¹¹⁰ VCLT, 1969, *Ibid*, Art. 36.

¹¹¹ VCLT, 1969, *Ibid*, Art. 35.

¹¹² M. Fitzmaurice, *Ibid*; See also A. Zahar and G. Sluiter, *International Criminal Law*, Oxford University Press, 2012, at p. 465.

not the UNSC would refer situations to the ICC and support the Court to investigate and prosecute the referred crimes because it believes the prosecution of such crimes before the ICC would contribute to its efforts to restore and maintain international peace and security.¹¹³ This is a responsibility that UN member States have conferred on the UNSC and have agreed that in carrying out its duties under such responsibility the UNSC acts on their behalf.¹¹⁴

So for whatever decisions the Council takes in accordance with the purposes and principles of the UN Charter it means, that UN member States are presumed to have agreed, and that they are also under obligation to carry out the decisions of the UNSC in accordance with the present Charter.¹¹⁵ This means, in combination, that it is immaterial whether the ICC is not a creature of the UNSC as ICTY and ICTR did. It only matters that a referral of the situation under Art. 13(b) is in accordance with the determination made by the UNSC under Arts. 39 and 41 of the UN Charter. And as such, it is never a ground for such UN member States not parties to the Rome to refuse cooperating with the ICC just because they are not parties or have not accepted the obligation in writing, in accordance with the Rome Statute.

It is cautioned here, however, that it is only when you view the relationship between UN member States and the Court from the premises of the UN Charter and UNSC Chapter VII under the same Charter that such argument finds justification. Not when you view the same relationship in light of the Rome Statute, the NRA, the VCLT, 1969, and a

¹¹³ See, on reasons why the Darfur situation was referred to the ICC, the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to UN Security Council Res. 1564 of 18 September 2004, Geneva, 25 January, 2005, at paras. 571-572; W.A Schabas, *An Introduction to International Criminal Court*, 4th Edition, Cambridge University Press, 2011, at p. 170.

¹¹⁴ Art. 24(1) of the UN Charter.

¹¹⁵ See, *Prosecutor v. Bashir*, (ICC-02/05-01/09-195), *supra* note 5, at para 30; ICJ, “*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*”, Advisory Opinion, 21 June 1971, para. 116; *Prosecutor v. Omar Al Bashir*, (ICC-02/05-01/09-3), *supra* note 15, paras. 41 and 240-245.

number of ICC's decisions defining its mandate under the Statute on the applicability of the laws and practices of other jurisdictions.

And remember you, that should you wish to hold both views as being rational then you stand to create a serious confusion. Because, if the UNSC had no control over the judicial exercise of powers by the ICTY and ICTR then, it certainly exercises no authority to dictate on the Court as to how the latter should discharge its powers in response to a referral(s) under Article 13(b) or the obligations imposed by the former under operative paras and 5 of Res. 1593 (2005) and 1970 (2011).

It be observed to this end, for purposes of a discussion under this chapter, that if the provisions of Arts. 1, 2(1),(3) and 3 of the NRA bare any significance in limiting the powers of the UNSC under the Rome Statute then it might quite be misleading to think that it is only the ICTY and ICTR that had the mandate to determine and decide what State or States were under obligation to cooperate, but not the ICC. So it is concluded to this end, that the UNSC can support the referral by compelling UN member States not parties to the Rome Statute to cooperate.

But then it is not expected, that the Council would use the same referral let alone its Chapter VII powers, to dispense with the requirement of the ICC Statute governing the cooperation of third States with the Court. This extends even to the cooperation of international organisations with the same Court under Art. 87(6) of the Rome Statute read together with Art. 54(2),(3)(c)(d), in this respect.

CHAPTER THREE

3.0 THE EFFECTS OF THE DECISIONS OF THE UNITED NATIONS SECURITY COUNCIL (UNSC) COMPELLING UN-MEMBER STATES NOT PARTY TO THE ROME STATUTE TO COOPERATE WITH THE ICC: A CAPITULATION ON THE ADOPTED RESEARCH QUESTIONS

3.1 Introduction

The objective of this study was to examine, at large, whether or not by virtue of a referral made under Art. 13(b) of the Rome Statute, UN member States not party to the Rome Statute may be under duty, when so compelled by the Security Council, to cooperate with the International Criminal Court ('the ICC') beyond the requirements of Arts. 4(2) and 87(5) of the ICC Statute ('the Rome Statute').

So taking into account that the chosen topic for the study demanded a critical finding and analysis on the relationship between the ICC and the UNSC and the extent to which UN member States not parties to the Statute may become under obligation to cooperate with the ICC, three major questions were proposed as a guide to shape the focus of the study and these are as herein below stated:

- (i) Can the decisions taken by the UNSC in support of its referral under Art. 3(b) be enforced beyond the requirements of Part IX of the Rome Statute?
- (ii) Can the decisions taken by the UNSC in support of its referral under Art. 13(b) decline or relieve the ICC from complying with the provisions of Statute governing its cooperation relationship with third States?

- (iv) Can for purposes of peace and security, the provisions of the Charter of the United Nations, 1945 ('the UN Charter'), override the provisions of the Rome Statute, ICC decisions regarding the interpretation of Art. 21 of the Rome Statute, and the Court's independence to determine, in accordance with the provisions of the Rome Statute, as to what State or States, when and how such State or States are to render their cooperation?

It was revealed in respect of the first research question, that there are currently two positions that one can take in response to the matter. First is the position that sees the 'decisions' and 'the law' of the UNSC under Art. 13(b) of the Rome Statute as being absolute and above the provisions of the Rome Statute and the Court itself. And second is the position that sees the same 'decisions' and 'law' of the UNSC as being a subject of the compatibility test provided for under Art. 3 of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations ('the NRA'), an agreement governing the relationship between the United Nations and the ICC.¹¹⁶

3.2 The 'decisions' and 'the law' of the UNSC under Art. 13(b) of the Rome Statute: the ideal to absoluteness

As for arguments in support of the position that sees the 'decisions' and 'the law' of the UNSC under Art. 13(b) of the Rome Statute as being absolute and above the provisions of the Rome Statute and the Court. It was discovered, that most of the scholars in support of the Jalloh's position still look at the ICC in the manner the International Law Commission (ILC) draft proposal for the Statute had firstly visualised the Court.¹¹⁷

¹¹⁶ Art. 2 of the Statute of the International Criminal Court ('the Rome Statute'), UNTS, Vol. 2187, No. 28544.

¹¹⁷ The International Law Commission (ILC) envisaged a court that would have primacy much like the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR); a court that fitted neatly

True, it has never been their concern that the ICC is an independent international judicial organ with international legal personality. And that, this Court has its own hierarchical system of laws and does possess, as it was with the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), attributed and inherent judicial independence.

Though at some points they define the Court as being a treaty-based Court yet, they failed to explain how such basis may agony the exercise of the Council's referral power under Art. 13(b). Similarly, they have failed to explain how such basis affects the interpretation of the Statute in general; how such basis defines ICC's cooperation relationships with third States and international organisations; and how such basis defines the status and the mandate that the Court has under its establishing Statute *vis-à-vis* the power that the UNSC has under Arts. 13(b), 87(5)(b), 87(7).

So it mostly blaze from their assumptions that since in the interest of international peace and security what the UNSC refers under Art. 13(b) represents the will and concern of the entire international community¹¹⁸ then the duty to assist the ICC in the case of such referral extends to all UN member States and the required regional and international without exceptions.¹¹⁹ But since the same assumptions have also stand out to make a position in response to the problem under investigation then it worth giving credit to it because sometimes it may be the approach that these scholars use to construct their arguments that creates controversy and not the drive that lies behind their arguments.

within the UN Charter and that was accordingly subordinate to the Security Council (W. A. Schabas, *An Introduction to International Criminal Court*, 4th Edition, Cambridge University Press, 2011, at pp. 16, 26).

¹¹⁸ See, C. 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 Function and Status*', 2 (2006) 24 Berkeley Journal of International Law, at pp. 654, 655.

¹¹⁹ That is, there exists nothing as a ground for refusal. So States cannot, on that effect, use the provisions of Arts. 4(2), 17, 53, 87(5)(a) or 98(1) of the Rome Statute, to deny the imposed obligations or challenge the Court on grounds of jurisdiction and admissibility issues.

For instance, if it is agreed that the referral of the situations in Darfur, Sudan and in Libya did meet the requirements of Art. 39 of the UN Charter.¹²⁰ And that, pursuant to Art. 41 such referrals constitute a measure not involving use of force.¹²¹ Then it was a matter of understanding, on the basis of the reasons made in the report of the International Commission of Inquiry concerning the Darfur crisis,¹²² that it was the ‘adopted measure’¹²³ and the ‘object’¹²⁴ behind the same measure that constituted or rather constitutes the authority binding on all UN member States to render their assistance to the ICC and not the *lex loci* to which such measure and the object behind the measure is implemented.

And since it is illogical to just adhere to the measure recommended or decided upon by the UNSC and then proceed to ignore or refuse cooperation to the ‘organ entrusted to enforce that measure’ albeit in accordance with the terms of its establishing instrument. Then there is a possibility, for cases of referrals under Art. 13(b), that it is not only the measure or the purposes for which the UNSC referred the situations in Darfur, Sudan and Libya to the ICC that bind UN member States. But also the *forum conveniens*, at which such crimes are prosecuted.

The question is, however, under what terms the States in question would finally adhere when they plan to implement the decisions of the UNSC under Res. 1593 (2005) and 1970 (2011): those asserted under the same resolutions or those primarily preserved

¹²⁰ See, operative para. 6 of Resolution 1593 (UN Doc. S/RES/1593 (2005) adopted by the Security Council at its 1558th meeting on 31 March 2005, and para. 16 of Resolution 1970 (UN Doc. S/RES/1970 (2011) adopted by the Security Council at its 6491st meeting on 26 February 2011).

¹²¹ See, para. 16 of Res. 1970 (2011).

¹²² See, the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General pursuant to Security Council Resolution 1564 of 18 September 2004, Geneva, 25 January 2005, at paras. 571-572; See also on the recommendation to refer the Darfur situation to the ICC, UN Doc. S/RES/1564 (2004), at para. 569; Resolution 1564 (2004) was adopted by the Security Council on 18 September 2004 mandating for the establishment of ‘an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, and to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable (UN Doc. S/RES/1564 (2004), at para. 12); L. Condorelli and A. Ciampi, ‘Comments on the Security Council Referral of the Situation in Darfur to the ICC’, (2005) 3 Journal of International Criminal Justice, at p. 590; W.A Schabas, ‘Darfur and the “Odious Scourge”: The Commission of Inquiry’s Findings on Genocide’, (2005) 18 Leiden Journal of International Law, at p. 871.

¹²³ See, Arts. 39 and 41 of the UN Charter, 1 UNTS, XVI, TS 993 and para. 16 of Res. 1970 (2011).

¹²⁴ Arts. 1(1), and 24(1),(2) of the UN Charter.

under Part IX of the Rome Statute? Because if one is to resort only to operative paras and 5 of Res. 1593 (2005) and 1970 (2011), there is still nothing of exhaustion under the same paragraphs that may clearly states the content for cooperation at lengthly hence leaving us in dark.¹²⁵

Article Art. 87(5)(a),(6) of the Rome Statute. on the other hand, calls upon the Court and the respective States or intergovernmental to conclude an agreement. So at least it is expected here, in light of Art. 35 of the Vienna Convention on the Law of Treaties between States, 1969 ('the VCLT, 1969'), that the concluded agreement or arrangement would state the content for cooperation. And as per the same Article; third States or intergovernmental organisations have the discretion to refuse cooperating with the ICC if the terms adopted by the ICC for cooperation are not in their favour. For an effective investigation and prosecution of the matters falling under Art. 13(b), however, Art. 87(5)(a), (6) is drastically a hindrance and therefore not commended by the Security Council.

It is from here, arguably, and I also think, that a justification to using Art. 25 of the UN Charter makes a crucial bargain. Because it grounds UN member States to carry out the decisions of the UNSC in accordance with the terms of the Charter. Not in accordance with terms of their national laws or of treaties to which they are either parties or non-parties. This is the essence of operative paras. 3 and 5 of Res. 1593 (2005) and 1970 (2005).

To cut the matter short; it would be such an absurd result to have a State declining its obligations under the UN Charter¹²⁶ on ground that it violates its sovereignty immunity

¹²⁵ See, on the contradictions incumbent on both resolutions, A. Zahar and G. Sluiter, *International Criminal Law*, Oxford University Press, 2012, at pp. 466, 467; W.A. Schabas, *supra* note 2, at pp. 172-176, C. Heyder, *supra* note 3, at pp. 655.

¹²⁶ Arts. 2(2),(5), 25, 40, 41, 43(1), of the UN Charter.

under international law¹²⁷ while for purposes preserved under Arts. 1(1) and 24(1) of the same Charter that State has (i) agreed to surrender such sovereignty immunity to the UNSC¹²⁸ and has also (ii) undertaken to act, for the same purpose, in accordance with the terms of the UN Charter.¹²⁹

Perhaps this is made clear; that when it comes to recommending or deciding what measures shall be taken in accordance with Art. 41 of the UN Charter, the UNSC has the discretion to extend the list of measures given under Art. 41. For example, it may choose to invoke Art. 29 of the Charter or simply decide to use the service of another judicial organ that has the competence to yield the results that would have been reached if it had invoked Art. 29. Indeed, this is what you read on the Report of the International Commission of Inquiry concerning the Darfur situation and it is exactly what is reflected under operative para. 2 of Res. 1970 (2011).

So it is generally not the ICC that binds UN member States not parties to the Statute to cooperate but the measure taken by the UNSC to resolve the Darfur situation, and so does the Libyan situation. And as the law says by virtue of Art. 48(2) of the Charter; it may critically not be of a requirement in the context of Arts. 39, 41, and 25 of the same Charter, for such States or for the ICC to comply with the stipulations of Part IX of the Statute. Because these States are under obligation already, to carry out the decisions of the UNSC either directly or through their actions in the appropriate international agencies of which they are members.¹³⁰

¹²⁷ Art. 34, 35 of the Vienna Convention on the Law of Treaties between States, 1969 ('the VCLT, 1969), UNTS Vol. 1155.

¹²⁸ See, Art. 24(1),(2), Arts. 2(2),(5) and 48(2), of the same Charter.

¹²⁹ Art. 25 of the UN Charter; See also Art. 2(2) of the same Charter.

¹³⁰ A good example of these agencies is the 'Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes, Crimes Against Humanity and all forms of Discrimination', adopted on 29 November 2006 by Heads of State and Governments of the International Conference on the Great Lakes Region in Kigali, Rwanda ('the Great Lakes Protocol') to which Sudan is a signatory (See, C.B Murungu, *supra* note 5, at pp. 8-12). See also, Art. 8 of the 'Pact on Security, Stability and Development in the Great Lakes Region', adopted by the Heads of State and Government of the member States of the International Conference on the Great Lakes Region, 14 and 15 December 2006 Nairobi, Kenya.

So, no doubt; they have waived their rights and sovereignty to invoke the provisions of any other treaty, whether binding to them or not, to defuse carrying out the decisions of the UNSC in accordance with the terms of the Charter.¹³¹

And as operative paras and 5 of Res. 1593 (2005) and 1970 (2011) are concerned; it may now be of less concern to argue that such paragraphs are inadequate to providing clearly defined terms for cooperation because, depending on the nature of the measures that the UNSC takes in light of Art. 39, the possibility of having defined terms and undefined term is unavoidable.

For example, take the case where UN member States are called upon to apply complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and severance of diplomatic relations;¹³² it is difficult to have a set of terms for every action recommended hence States would simply have to implement the measure by deploying the relevant action or actions in good faith.¹³³ But consider also a situation where the UNSC calls in for the measure to use force;¹³⁴ you will definitely have it suggesting *inter alia*, to deploying actions as demonstrations, blockade, and other operations by air, sea, or land forces– which are typical military activities.¹³⁵

And should these be the appropriate actions then the conclusion of agreements to define the numbers and types of forces, to define the degree of readiness of the forces, their general location, the nature of the facilities and assistance to be provided—are

¹³¹ C. Jalloh, 'Regionalizing International Criminal Law?', (2009) 9 International Criminal Law Review, at p. 483.

¹³² Art. 41 of the UN Charter.

¹³³ See, Art. 2(2) of the UN Charter.

¹³⁴ Art. 42 of the UN Charter.

¹³⁵ See, Art. 45 of the UN Charter.

indispensable.¹³⁶ This tells you in the end, that it is not at all time that the UNSC will have to state the terms on which UN member States are to enforce the measures recommended or decided upon under Art. 39 and this includes, for the case of Res. 1593 (2005) and 1970 (2011), the decisions preserved under operative paras and 5.

But it can also be argued, in addition; that since there is a requirement under Art. 2(2) of the Charter for UN member States to carry out their obligations in good faith then the assumption is, even for matters falling under Art. 13(b) of the Rome Statute, that such States are under obligation pursuant to Art. 25 of the UN Charter, to execute the text of operative paras and 5 within the co-operative context of the Charter.¹³⁷ That is, to the extent that is most effective to execute the purposes and principles of the United Nations.

You have read of the benefits a UNSC referral can attribute to the ICC's jurisdictional reach to situations that it would not have reached;¹³⁸ though it can also lead to the same game of 'biased-referrals'. But at least there is an alert, from the Darfur and Libya referrals, that sometimes an investigation can and perhaps should result from a general position of neutrality¹³⁹ and help put to justice those who would often want to use the 'self-referrals' to outlaw their enemies.

Indeed, it may also remain an argument by those opposed to trials, that the investigation and prosecution of the Darfur and Libyan situations scuttles peace process. But under circumstances where you have such an argument ostensibly aggravated not endure international justice but to facilitate a soft landing to perpetrators to escape justice on

¹³⁶ Art. 43 (2) (3) read together with Art. 45, of the UN Charter.

¹³⁷ M. Fitzmaurice, 'The Practical Working of the Law of Treaties,' in M.D Evans (ed.), *International Law*, 3rd Edition, Oxford University Press, 2010 at p. 182.

¹³⁸ D. Sarooshi, 'The Peace and Justice Paradox: the International Criminal Court and the Security Council', in D. McGoldrick., P. Rowe, and E. Donnely, *The Permanent International Criminal Court: Legal and Policy Issues*, Oxford and Portland, 2004, at p. 98.

¹³⁹ See, E. Wilmschurst, 'Jurisdiction of the Court,' in Roy S.K Lee (ed.), *The International Criminal Court: The Making of the Rome Statute—Issues, Negotiations, Results*, supra note 68, at pp. 127, 131.

grounds of immunity, amnesties, or use of the referral power to dictate the regional focus¹⁴⁰ of the Court by preventing referrals in respect of some regions, I think it would in the interest of the international community that justice comes.

First, because you already have the ICTY and ICTR experience as a study case which may strongly help to demonstrate the role international criminal justice can play in on-going and post conflict situations—where the judiciary of most countries are usually severely weakened, have inadequate manpower within their respective legal profession or may generally be unwilling to take actions against the perpetrators.¹⁴¹

But secondly; if in the interest of the same peace it is the UNSC that has decided, pursuant to Arts. 52, 53 and 54 of the UN Charter read together with Arts. 34, 35(1)(2), 37 and 39,¹⁴² that the peace negotiation processes in Darfur or Libya be declined in favour of the prosecutions before the ICC then it all reverts to Art. 25 of the same Charter. And this time the decisions will not only have a binding effect but will also have to be carried out by the States in question beyond the requirements of Part IX of the Rome Statute(Art. 87(7)(a)).

As for the Court, this will too be under obligation to investigate and prosecute because the decisions are supported by a Chapter VII determination. And should this make any sense it means, as a consequence, in the context of a referral made under Art. 13(b) and on the basis of the waiver suggested under Arts. 25 and 48(2) of the Charter, that the ICC is not required to (i) obtain the consent of a State where the referred crimes under

¹⁴⁰ See, on the effects of the veto power by States having permanent membership in the Security Council, R. Cole, 'Africa's Relationship with the International Criminal Court: More Political than Legal', 1 (2013) 14 Melbourne Journal of International Law, at p. 19; W. A. Schabas, *supra* note 2, at p. 168, C. Heyder, *supra* note 3, at pp. 653, 655.

¹⁴¹ See, K. Samuels, 'Rule of Law Reform in Post-Conflict Countries: *Operational Initiatives and Lessons Learnt*,' (Social Development Paper No 37, World Bank, 2006) at pp. 6,7; D. Nsereko, 'The International Criminal Court: Jurisdictional and Related Issues' (1999) 10 *Criminal Law Forum* 87, at p. 113; See generally, R. Cole, *supra* note 6, at pp. 15, 41; R. Cryer, 'Sudan, Resolution 1593, and International Criminal Justice, Leiden Journal of International Law, (2006) 19, at p. 201.

¹⁴² UN Charter.

Art. 13(b) occurred or,¹⁴³ of the regional or international organisation that has been compelled by the UNSC to cooperate. Similarly; the Court will need not to (ii) seek to enforce the principle of complementarity¹⁴⁴ as this would hinder the carrying out of UNSC decisions if not complicating the matter.

Whether these make a convincing position, it is vital to read not only Art. 25 of the UN Charter but also, not to confine one's mind to the dictates of the UNSC under Res. 1593 (2005) and 1970 (2011).

3.3 The 'decisions' and 'law' of the UNSC in view of the compatibility test provided under Art. 3 of the NRA

The arguments in support of the position that sees the 'decisions' and 'law' of the UNSC as being a subject of the compatibility test provided under Art. 3 of the NRA are attractively short, straight and have their basis founded upon the maxim *pacta tertiis nec nocent nec prosunt*.¹⁴⁵ In specific; the concern of those in support of this position is on how the Rome Statute was drafted.

They argue, while comparing the Rome Statute with the Statutes of the ICTY and ICTR, that unlike the legal framework of the *ad hoc* tribunals which attributes to judges a rule making power, the power that allows them to adopt rules of procedures and evidence to regulate procedural and other appropriate matters,¹⁴⁶ the Rome Statute appears somehow restrictive of the power attributed to judges. It has, to that respect, sought to provide in much more detail all the matters that are important for the functioning of the Court

¹⁴³ C. Heyder, *supra* note 3, at p. 653; On the aspect of the ICC being under obligation to investigate and prosecute see, I. Bantekas and S. Nash, *International Criminal Law*, 3rd Edition, Routledge-Cavendish, 2007, at pp. 542, 543.

¹⁴⁴ For arguments in support of the view that the principle of complementarity does not apply to Security Council referrals see, G.P Fletcher and J.D Ohlin, 'The ICC-Two Courts in One?' (2006) 4 JICJ, at pp. 428-433.

¹⁴⁵ Art. 34 of the VCLT, 1969; See also, M. Fitzmaurice, note 22.

¹⁴⁶ A. Zahar and G. Sluiter, *supra* note 10, at p. 20.

hence making it difficult for the judges to unnecessarily import into the Court's procedural framework remedies other than those enshrined in the Statute.¹⁴⁷

Having in mind the idea that the drafters of the Statute wanted to limit the powers of the Court to those of the Statute,¹⁴⁸ it has now become their concern, to this end:

(a) that it is an illusion to think in the case of Art. 13(b) that the ICC operates essentially, perhaps in the interest of international peace and security, like a permanent version of the *ad hoc* tribunals;¹⁴⁹

(b) that the Court cannot exercise its powers and functions on crimes referred to under Art. 5 of the Statute beyond what the Statute permits, or by reference to the law and the decisions of the UNSC *per se*;

(c) that being a treaty-based Court, the interpretation of the Statute cannot fall beyond what is envisaged under Arts. 31 and 32 of the VCLT, 1969¹⁵⁰ and that means, in effect, that the requirements of Art. 4(2) and 87(5)(a) are a mandatory procedure irrespective of the obligations a State has under the UN Charter or any other international treaty.

There are a number of reasons to support the above prepositions. One concerns the independence and the international legal personality that the ICC has under its establishing Statute, the independence and the personality that the United Nations

¹⁴⁷ Situation in Uganda, (ICC-02/04-01/15-37), *Decisions on the Prosecutor's Position on the Decision of the Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrant of Arrest, Motion for Reconsideration, and Motion for Clarification*, ICC, PT-Ch.II Decision, 29 October 2005, para. 19.

¹⁴⁸ B. Swart and G. Sluiter, 'The International Criminal Court and International Criminal Cooperation', in H.A.M. von Hebel, J.G. Lammers, and J. Shuckking (eds.), *Reflections on the International Criminal Court—Essays in honour of Adriaan Bos*, T.M.C Asser Press, 1999, at pp. 102, 103.

¹⁴⁹ W.A. Schabas, *supra* note 2, at p. 198.

¹⁵⁰ See, Situation in the Democratic Republic of Congo, (ICC-01/04-168), *Judgment on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber's 131 March 2006 Decision Denying Leave to Appeal*, ICC, Appeal Chamber Decision, 24 July 2006, para. 33; W.A. Schabas, *supra* note 2, at pp. 213, 214.

recognises and respects.¹⁵¹ That taking into account that the ICC is neither a creation of the UNSC nor a product of its resolution then much as it exercises no control over the judicial functions of the ICTY and ICTR which are its own creations,¹⁵² it cannot as well interfere into the judicial business of the ICC or seek to exercise specific instructions on how the Court should deal with Art. 13(b)–referrals and the accruing requests for cooperation made to States(third States) and international organisations.¹⁵³

As it was held by the ICC Pre-Trial Chamber I on the application by the Prosecutor for a warrant of arrest directed against President Omar Al-Bashir of Sudan, the position this study overwhelmingly supports. This study acknowledges, as a consequence, in as long as the UNSC considered the ICC being the right forum to embark on the Darfur situation [and even that of Libya], that all the UNSC can do in response to a failure by Sudan to cooperate is to request the Court to trigger its compliance with the provision of its Statute.

Because, having referred the respective situation(s) in accordance with Art. 13(b) it is presumed, quite certain, that the UNSC accepted that the investigation into the said situation(s) as well as any prosecution [or cooperation] arising thereon, will be carried out by the Court in accordance with the statutory framework provided for in the Rome Statute, or the Elements of Crimes and the Rules of Procedure and Evidence as the case may be.¹⁵⁴

¹⁵¹ Art. 2(1)(2) of the Negotiated Relationship Agreement Between the International Criminal Court and the United Nations (UN General Assembly, *Negotiated Relationship Agreement Between the International Criminal Court and the United Nations*, 20 August 2004, A/58/874 ('the NRA')).

¹⁵² See generally, A. Zahar and G. Sluiter, *supra* note 10, at pp. 9, 10.

¹⁵³ See, W.A. Schabas, 'The International Criminal Court and Non-Party States', 1 (2010) 28 Windsor Y.B Access Just., at p. 7; *Prosecutor v. Omar Al Bashir*, (ICC-02/05-01/09-3), *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Al Bashir*, ICC, PT-Ch.I Decision, 4 March 2009, paras. 41 and 45; See also, ICC decision in the Situation in Uganda, (ICC-02/04-01/15-37), *supra* note 32

¹⁵⁴ *Prosecutor v. Bashir*, (ICC-02/05-01/09-3), *Ibid*; See, for a similar view, W.A. Schabas, *supra* note 2, at p. 169; J. Crawford, 'The ILC's Draft Statute for an International Criminal Tribunal', (199) 88 AJIL, at p. 147.

True; if only with the operation of the ICTY and ICTR the United Nations acknowledged the need to have the tribunals performing their functions independently of political considerations and publicly declared that such tribunals would not be subject to the authority or control of the UNSC with regard to the performance of their judicial functions¹⁵⁵ then the fact that the ICC is never a subsidiary organ of the Security Council¹⁵⁶ that makes it more restrictive that the UNSC has no justification, even for the case of the ICC, pursuant to Art. 2(1)(2) and Art. 3 of the NRA, to compel States and intergovernmental organisations to cooperate with the Court beyond what the Rome Statute permits.

And it is even clearer, given the meaning of a subsidiary organ of the United Nations, that since the ICC is not a subsidiary organ of the UN General Assembly¹⁵⁷ or the Security Council¹⁵⁸ then its terms of reference in respect of the referrals made under Art. 13(b) cannot be determined by any of these two UN organs.¹⁵⁹ It is on this understanding, albeit ironic, that the ICC claims to have the sole authority to decide whether or not the immunities generally attached to Omar Al Bashir as a sitting Head of State is applicable.¹⁶⁰

¹⁵⁵ See, the Report of the UN Secretary General pursuant to Article 2 of UNSCR 808 (1993), UN Doc S/25704, 3 May 1993, at para. 28, it says, and here is a quote:

“In this particular case, the Security Council would be establishing, as an enforcement measure under Chapter VII, a subsidiary organ within the terms of Article 29 of the Charter, but one of a judicial nature. This organ would, of course, have to perform its functions independently of political considerations; it would not be subjected to the authority or control of the Security Council with regard to the performance of its judicial functions”; said the Secretary General”. (See for further discussion on the report, W.A Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone*, Cambridge University Press, 2006, at pp. 48-50; J. Genser, B.S Ugarte (eds.), *The United Nations Security Council in the Age of Human Rights*, Cambridge University Press, 2014, at pp. 13-175.

¹⁵⁶ For a definition as to what is subsidiary organ of the United Nations see, the Repertory of Practice of the United Nations Organs, Vol. I, at p. 228:

“(a) A subsidiary organ is created by, or under the authority of, a principal organ of the United Nations;

(b) The membership, structure and terms of reference of a subsidiary organ are determined, and may be modified by, or under the authority of, a principal organ;

(c) A subsidiary may be terminated by, or under the authority of, a principal organ”.

¹⁵⁷ Art. 22 of the UN Charter.

¹⁵⁸ Art. 29 of the UN Charter.

¹⁵⁹ F. Berman, ‘The Relationship between the International Criminal Court and the Security Council’, in H.A.M. von Hebel, J.G Lammers, and J. Shuckling (eds), *supra* note 345, at p. 174.

¹⁶⁰ See, *Prosecutor v. Omar Hassan Al Bashir*, (ICC-02/05-01/09-195), *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court*, ICC, PT-Ch.II, 9 April 2014, para. 16.

So, the UN General Assembly or the UNSC can in the interest of international peace and security support the referrals by calling and obliging UN member States to cooperate, the positive pillar of ICC–UN relationship.¹⁶¹ But yet, it is the terms of the Rome Statute that would finally be applicable to govern the requested or compelled cooperation, respectively.¹⁶² It would be a violation of the international legal personality and the autonomy the Court has under the Statute and even more, of the voluntary relationship the Statute creates between the Court and third States or international organisations,¹⁶³ if the ICC were to receive instructions in the exercise of its powers under the Statute from the UNSC contrary to Art. 42(2) of the same Statute.

The second reason concerns the power that the ICC has over third States and intergovernmental organisations when it seeks their cooperation. That we often tended to interpret Art. 13(b) solely by reference to the UN Charter and make it appear as if there are no provisions within the Rome Statute that govern the ICC on how it should exercise its functions and powers on crimes referred under Art. 13(b).

It may be true that there is no detailed provision in the Statute concerning UNSC referrals.¹⁶⁴ But as it has just been pointed out, this only applies if you read Art. 13(b) in isolation to other provisions within the same Statute and ICC's own decisions as they are ascribed under Art. 21(2) of the Statute. So should it be a considered opinion that one borrows the decision reached by the ICC's Appeals Chamber¹⁶⁵ on how the Rome

¹⁶¹ A. Zahar and G. Sluiter, *supra* note 10, at p. 33.

¹⁶² *Prosecutor v. Bashir*, (ICC-02/05-01/09-3), *supra* note 38; W.A. Schabas, 'The International Criminal Court and Non-Party States', *supra* note 38.

¹⁶³ See, Arts. 87(5),(6) and 54(2),(3)(c)(d), of the Rome Statute.

¹⁶⁴ W.A. Schabas, *supra* note 2, at p. 168.

¹⁶⁵ See, Situation in the Democratic Republic of Congo, (ICC-01/04-168), *supra* note 35; W.A. Schabas, *supra* note 2, at pp. 213-216; On insistence that the Statute should be read as a whole see, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, (ICC-01/09-01/11-777), *Decision on Mr. Ruto's Request for Excusal from Continuous presence at Trial*, ICC, TCh.V(a) Decision, 18 June 2013, paras. 2, 31, 32, 42, 44, 46, 47, 101 and 104.

Statute is interpreted, the following stands to be the consequences of the position under discussion:

- (i) that there is no *lacuna* in the Statute let alone under Arts. 13(b), 4(2), 87(5)(a),(6) and 54(2),(3)(c)(d) that may justify the Court to decline applying the Rome Statute in favour of the provisions of the UN Charter; it is only when the Statute is read in parts and not as whole that one can find such lacuna¹⁶⁶
- (ii) that in so far as the Statute does not categorise States as being either UN member States or non-UN member States, the UNSC has no mandate to single out UN member States and use their undertakings to the UN Charter as a justification for them to render their cooperation to the ICC beyond the terms of the Statute.¹⁶⁷
- (iii) that since the powers attributed to ICC judges are limited to those of the Statute then States and intergovernmental organisations may only be under obligation to render their cooperation if the Court finally triggers the provisions governing the mode by which such States and such intergovernmental organisations are to render their cooperation, including those providing for admissibility of jurisdiction.¹⁶⁸

As for international organisations: Ilias Bantekas and Susan Nash, and Dan Sarooshi agree, that the Council's mandatory powers under Chapter VII of the UN Charter and so does under Art. 13(b) of the Rome Statute, extend only against UN member States and not international organisations such as the ICC. Should this position be taken to include

¹⁶⁶ See, on the avenues that may influence the ICC to depart from applying the provisions of the Rome Statute in the first place, W.A. Schabas, *supra* note 2, at pp. 206-212.

¹⁶⁷ See, Arts. 87(5)(a), 54(2),(3)(c)(d) of the Rome Statute.

¹⁶⁸ On the position of third States see, I. Bantekas and S. Nash, *supra* note 28, at p. 549; For 'complementarity' requirements see, I. Bantekas and S. Nash, *supra* note 340; A. Cassese, *International Criminal Law*, 2nd Edition, Oxford University Press, 2004, at p. 344; W.A. Schabas, *supra* note 2, at p. 189; Refer also to a statement given by Moreno Ocampo, former ICC Chief Prosecutor, that he is required to determine whether the Darfur case is admissible pursuant to Art. 17 of the Rome Statute (See, UN Doc. S/PV.5216, at p. 2; UN Doc. S/PV.5312, at p. 3; UN Doc. S/PV.5459, at p. 4; UN Doc. S/PV.55589, at p. 2).

the African Union and other regional agencies or arrangement, it means, as they also possess international legal personality, that neither the UNSC nor the Court in this respect can compel the African Union to cooperate beyond the terms of the Rome Statute or beyond its mandate and competence under the ‘Constitutive Act.’¹⁶⁹

- (v) that the law and practices of the UNSC or of the *ad hoc* tribunals can never, on their own, form a sufficient basis for importing into the Court’s procedural framework remedies other than those already preserved in the Statute.¹⁷⁰ That is, they cannot justify the waiver of States’ sovereignty under Art. 25 of the UN Charter as a ground to compel the Court or UN member States not parties to the Statute to act beyond what the Statute permits.

The *Assembly Procedures relating to non-cooperation*¹⁷¹ may help sum the above consequences in that: first, non-cooperation by a State Party or by a State which has entered into an *ad hoc* arrangement or agreement (hereafter: “the requested States”) can be understood as the failure by such ‘requested States’ to comply with a specific Court request for cooperation (Arts. 89 and 93 of the Rome Statute), as defined and agreed in Art. 86 and 87(7), and Art. 87(5)(a),(b) respectively.¹⁷² Secondly; that the procedures outlined under the *Assembly Procedures relating to non-cooperation* under Part IX of the Statute only refer to ‘requested States’ as is ascribed under Arts. 86 and 87(5), and

¹⁶⁹ See in this case, I. Bantekas and S. Nash, *Ibid*, at p. 549, 550; M. Benzing, ‘The Complementarity Regime of the International Criminal Court: International Criminal Justice Between States Sovereignty and Fight Against Impunity’, (2003) 7 Max Planck Yearbook of United Nations Law, at p. 627; J.K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdiction*, Oxford University Press, 2008, at pp. 165, 166.

¹⁷⁰ Situation in Uganda, (ICC-02/04-01/15-37), *supra* note 32.

¹⁷¹ See, para. 9 of Resolution ICC-ASP/10/Res.5, (*Assembly Procedures relating to Non-cooperation* (ICC-ASP/10/Res.5, annex adopted at the 9th plenary meeting, on 21 December 2011, by consensus), adopted at 10th Session, 2011 (ICC-ASP/10/20), Vol. I, Part III, ICC-ASP/10/Res.5, at operative para. 9 available at <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP10/Resolutions/ICC-ASP-10-Res.5-ENG.pdf> (Last visited on 30 April 2017).

¹⁷² *Assembly Procedures relating to Non-cooperation* (ICC-ASP/10/Res.5, annex), *Ibid*, para. 4.

would not refer to non-States parties that have not entered into any relevant arrangements or agreements with the Court.¹⁷³

This means, in effect and as shall be discussed below, that the ICC cannot proceed to make a finding under Art. 87(7) and Art. 87(5)(b) of a failure by a State to cooperate if such State is not a Party to the Statute and has not entered into any relevant arrangements or agreements with the Court. If you take these procedures as the position that the Court cannot divert, can it possibly be maintained, still, that the UNSC has the power under Art. 13(b) to overrule or defeat the requirement of Art. 87(5)(a)?

Because, as it may be read of the Rome Statute and the NRA, there is no provision as such within these instruments which either expressly or impliedly authorises the UNSC to act in this manner or say, it empowers the Court to seek or obtain the cooperation of non-States parties without recourse to the requirement of Art. 87(5)(a).

You may wish here to compare the text of paragraph 2 of rule 44 of the Rules of Procedure and Evidence of the ICC¹⁷⁴ and Art. 87(5)(a) of the Rome Statute. The law says under rule 44(2) that '[w]hen a State lodges, or declares to the Registrar its intent to lodge, a declaration with the Registrar pursuant to article 12, paragraph 3, or when the Registrar acts pursuant to sub-rule 1 [of Rule 44] , the Registrar shall inform the State concerned, [the respective third State], that the declaration under article 12, paragraph 3, has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation and the provisions of Part IX, and any rules thereunder concerning States Parties, shall apply'.

¹⁷³ *Assembly Procedures relating to Non-cooperation* (ICC-ASP/10/Res.5, annex), *Ibid*, para. 8.

¹⁷⁴ Rules of Procedure and Evidence of the International Criminal Court (Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, *Rules of Procedure and Evidence of the International Criminal Court*, (ICC-ASP/1/3, at 10, and Corr. 1 (2002), UN. Doc. PCNICC/2000/1/Add.1 (2000)) adopted at the First Session, New York).

The question is: what does Art. 87(5)(a) say for the case of a referral made under Art. 13(b), about the consequences of a third State to accept the Court's invitation and enter into an *ad hoc* agreement or arrangement to cooperate with it? Does it expressly or impliedly state anything as Art. 25 of the UN Charter or UNSC resolutions as being the laws applicable in governing the cooperation of UN member States with the Court; or that UN member States shall, in specific and on exceptional terms, abide to the request for cooperation in accordance with the referring resolutions, as per Art. 25 of the UN Charter or by virtue of their undertakings to the UN Charter?

Though the ICC itself has in *Prosecutor v. Omar Al Bashir*, (ICC-02/05-01/09-3)¹⁷⁵ and in *Prosecutor v. Omar Hassan Al Bashir*, (ICC-02/05-01/09-195),¹⁷⁶ tried to support for a recourse to be made to UNSC decisions and waiver of immunity under Res 1593 (2005) and 1970 (2011), there is still no room one can ignore the fact that the question of jurisdiction is differentiated from that of cooperation. Because under Art. 12(3) the question of cooperation comes as a consequence of a State accepting the Court's exercise of jurisdiction on crimes referred under Art. 5 of the Statute. It would have been illogical if a State was allowed to accept the Court's jurisdiction by means of a declaration while it wishes not to cooperate with the Court in the investigation or prosecution of the crimes in question.

Article 87(5)(a) on contrast, presents a situation where a State has not accepted the Court's jurisdiction and wishes not be part of the Court but may be willing to cooperate in the Court's investigation or prosecution. As constructed by the framers, the Assembly of States Parties to the Rome Statute: Art. 87(5)(a) incarnate a conclusion of an *ad hoc* agreement or arrangement which, by their very nature (unlike the declaration sought

¹⁷⁵ *Prosecutor v. Omar Al Bashir*, (ICC-02/05-01/09-3), *supra* note 38, paras. 41 and 240-245.

¹⁷⁶ *Prosecutor v. Omar Hassan Al Bashir*, (ICC-02/05-01/09-195), *supra* note 45, paras. 29-31.

under 12(3) which must be subjected to the terms of cooperation applying to States parties), constitute to the existence of a collateral agreement between the parties to the Rome Statute and the third States.

As rightly stated by Fitzmaurice, it is this collateral agreement rather than the original treaty [the Rome Statute in this respect], which is the legal basis for the third States' obligation¹⁷⁷. In other words; it is the entered agreement or arrangement rather than the Rome Statute which the requested third States are required to abide and perform, and shall be said to have failed to cooperate if they dishonour or act contrary to their terms. So while States parties cooperate in accordance with the provisions of the Rome Statute, third States are expected to either cooperate either in accordance with the same provisions or such other terms as would be agreed between them and the Court. Not the between the Court and UNSC on their behalf.

The third reason is about the content of paragraphs (5)(b) and (6) of Art. 87 and what they actually represent. As above seen in the review of the *Assembly Procedures relating to non-cooperation*; when you analyse the content of Art. 87(5)(b) and read it together with Art. 87(5)(a) you will definitely come to a consensus that the failure by a third State to cooperate under Art. 87(5)(b) pre-supposes for an engagement between the Court and such third State, of an *ad hoc* arrangement or agreement which or that would state the terms for cooperation in response to the assistance requested by the Court under Part IX of the Statute.¹⁷⁸ So the Court cannot report a failure by a non-State party to cooperate if such failure has not resulted from a breach of a term or terms agreed in the concluded or undertaken agreement or arrangement as shall be the case.

¹⁷⁷ M. Fitzmaurice, *supra* note 22.

¹⁷⁸ A. Zahar and G. Sluiter, *supra* note 10, at p. 475.

The use of the phrase “[...] which has entered into an ad hoc arrangement or an agreement with the Court”¹⁷⁹ speaks for itself. And the fact that the respective subparagraph makes no distinction between UN member States and non-UN member States, that makes it even more strong to assert that the decisions of the UNSC enforcing the cooperation of third States are as well subject to the terms to be reached in the *ad hoc* agreements or arrangements by the Court and such third States.

So as it is for the Court, the UNSC cannot take actions under Art. 17(3) of the NRA against the State or States in failure to cooperate if it is not proved that such State or States had agreed, by conclusion of the agreement or arrangement envisaged under Art. 87(5)(a) of the Rome Statute to cooperate with the ICC.¹⁸⁰ The assertions under this part can be supported by a discussion made on the intent of the drafters to include Arts. 4(2) and 87(5)(a),(6), and that of the discussion to be made next: ‘the position that third States and intergovernmental organisations generally have under international treaties and under the Rome Statute when their cooperation is at stake.

It is believed, when drafting the Rome Statute, that the Assembly of States that took part in the negotiation of the Statute did see the possibility of the ICC being confronted by a big number of non-States parties which are in principle, not bound by the Statute to cooperate with the Court but whose assistance may in certain investigations and prosecutions be crucial to effective functioning of the Court.¹⁸¹ So taking into account the fact that the proposed *text* for negotiation was in fact going to be an international

¹⁷⁹ Art. 87(5)(b) of the Rome Statute; See also, on the question of an *ad hoc* agreement or arrangement, *Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, (ICC-02/05-01/07-57), *Decision informing the United Nations Security Council about the lack of cooperation by the Republic of Sudan*, ICC, PT-Ch.I Decision, 25 May 2010, at p. 7 para. 19.

¹⁸⁰ See, Art. 17(3) of the NRA; See also A. Zahar and G. Sluiter, *Ibid*, p. 465.

¹⁸¹ Arts. 34, 35 of the VCLT, 1969; See also, the decision reached by the ICC in the DRC’s Situation (ICC-01/04-168), *supra* note 35 on how to interpret the Rome Statute; A. Zahar and G. Sluiter, *Ibid*.

treaty in the form of a Statute¹⁸² the need to regulate how the Court would exercise its jurisdiction on the territories and over the nationals of non-States parties or obtain their cooperation became an agenda and the results were the inclusion of Art. 4(2) for matters of jurisdiction, and Art. 87(5)(a) for matters of cooperation.¹⁸³

It has never crossed the mind of the author of this study that the content of Arts. 4(2) and 87(5)(a) bare any significant ambiguity to explaining how the Court is to exercise its jurisdiction on the territory of, or seek the cooperation of, a third State.¹⁸⁴ And under circumstances where not only Art. 13 but a number of other provisions within the Statute do also direct the Court to exercise its jurisdiction in accordance with the Statute.¹⁸⁵ The conclusion is basically simple; that this is what the drafters of the Rome Statute intended to be the means by which non-States parties would render their cooperation to the Court, and the means by which the Court would be activated to demand the cooperation of such States.

Had they intended a UNSC referral and the decisions taken by it in support of the referral to be a means by which third States may be directly subjected to the jurisdiction of the Court, or become under an automatic obligation to cooperate with the Court, they would have so stated.

A similar view may also be held to constitute the content of paragraph (6) of Art. 87 in two major aspects. First, that the drafters of the Statute did not as well retain any power to the Court to compel the cooperation of intergovernmental organisations by any

¹⁸² C.B Murungu, 'Obligations on African Non-States Parties to the Rome Statute to Cooperate with the International Criminal Court', (on file with the author), at p. 3.

¹⁸³ A. Zahar and G. Sluiter, note 63 above.

¹⁸⁴ If at all there is a provision that sounds somehow ambiguous then that would probably be Art. 12 (3) because it directs a State that has lodged a declaration to cooperate without delay or exception in accordance with Part IX of the Statute while in fact under that Part a State or States can cooperate on the basis of Art. 86 or Art. 87(5).

¹⁸⁵ See, Arts. 1, 5, 54(2), 54(3)(c)(d), and 86, of the Rome Statute.

forceful means so, as it is for the nature of the cooperation relationship set in under Art. 87(5)(a), the assistance that the Court can get from intergovernmental organisations does also depend on the terms of the agreement or arrangement undertaken by the Court and the respective organisations for rendering such assistance.¹⁸⁶

Secondly; that the Rome Statute gives intergovernmental organisations the discretion to decide, in accordance with their competence or mandate(not that of the UNSC or even on their behalf), whether they should provide ICC Prosecutor with information, document or other forms of cooperation as agreed upon.

So as it is also the position under Art. 54(3)(c),(d), it would mean in the end when Art. 87(6) is read together with Art. 54(3)(c),(d) that ICC Prosecutor can only procure the cooperation of the African Union if the latter finally agrees and in accordance with its competence or mandate, decides to provide him or her with the information, document, or other forms of cooperation requested by the Court. The law says under Art. 54(3)(c),(d) and here is a quote:

“The Prosecutor may:

[...]

(c) Seek the cooperation of any State or intergovernmental organisation or arrangement in accordance with its respective competence and/or mandate;

(d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organisation or person”;

¹⁸⁶ See, Art. 54(3)(d) read together with paragraph (c) of the same Art. 54(3) and Art. 87(6), of the Rome Statute.

As it can be read; it needs no special legal skills or knowledge to interpret the above Article and so does Art. 87(6). They speak for themselves and as it is for Art. 87(5)(a), Art. 87(6) does also address a cooperation relationship that is voluntary in nature. So it all depends on how one interprets the Rome Statute.

Murungu has once asserted the possibility of having a strict interpretation of the Rome Statute in response to the subject under investigation¹⁸⁷ which means, there are occasions when scholars take a rather general view to interpreting the same Statute. It is his views generally, if one chooses to interpret the Rome Statute in strict sense, that since States are sovereign then they cannot be forced to act or perform certain conducts or obligations to which they have not expressly agreed through ratification, accession [or by means of *ad hoc* agreements or arrangements], to carry out.¹⁸⁸

A. Zahar and G. Sluiter are in support of this assertion and the discussion under this part is inclined to their argument. They argue, in light of Art. 87(5), that the existence and extent of the duty to cooperate on the basis of an *ad hoc* arrangement depend entirely on its content, [the terms of the arrangement]. It could vary from assistance at the discretion of the third State with respect to a particular case, or even a particular act of assistance,¹⁸⁹ to full cooperation by a State in accordance with the terms applicable to party States.¹⁹⁰

But remember, States parties are allowed to deny request for assistance, in whole or in part,¹⁹¹ and they are required, in order facilitate cooperation, to ensure that there are procedures available under their national law for all of the forms of cooperation which

¹⁸⁷ C.B Murungu, *supra* note 67, at p. 8.

¹⁸⁸ C.B Murungu, *Ibid.*

¹⁸⁹ Because it is in a strong negotiating position and can easily impose its own conditions of assistance (A. Zahar and G. Sluiter, *supra* note 10, at pp. 465,475).

¹⁹⁰ A. Zahar and G. Sluiter, *Ibid.*, note 63 above.

¹⁹¹ Art. 93(4) of the Rome Statute.

are specified under Part IX of the Statute.¹⁹² So if you intend non-States parties to cooperate in the manner States parties cooperate it means, even if it is for the case of a UNSC referral, that all of the provisions that are applicable to States parties are also applicable to third States hence they can as well refuse request for assistance and they are too under obligation to comply with the requirements of Art. 88.¹⁹³

If it is still maintained that such States are, by virtue of Arts. 24 and 25 of the UN Charter, under obligation to cooperate directly without exceptions that means the grounds for refusal as under Arts. 93(4), 89(2)(3)¹⁹⁴ and 98 of the Rome Statute are never applicable and it is not a requirement for the requested State or States to have procedures under their national laws as Art. 88 specifies, or for the Court to obtain the consent of the third State or States¹⁹⁵ as is provided under Art. 87(5)—which is quite illogical because you will definitely have these States subjected to the jurisdiction of the Court and the obligations of the Statute than how States parties are exposed to the same Court and the same Statute.¹⁹⁶

It is basically from these absurdities that a look at the fourth reason becomes important: the mode by which rights and obligations are imposed to third States. But at least it can now be confirmed that it is quite a critical challenge to interpret Art. 13(b) and Art. 87(5),(6) by reference to Chapter VII of the UN Charter and let the rest of the text of the Rome Statute be a subject of interpretation by reference to the VCLT, 1969 particularly

¹⁹² Art. 88 of the Rome Statute; See also Art. 89(3) and Art. 98 of the same Statute.

¹⁹³ Those in support of the arguments that the decisions of the Security Council are binding on all States without exceptions would for sure not want this because it is against the cooperation regime that exists under the ICTY and ICTR Statutes (See, Blaškić (Subpoena) Appeal Decision, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14, *Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, 29 October 1997, paras. 54, 65).

¹⁹⁴ For Art. 89(2) see also, Art. 20 of the Rome Statute: the *ne bis in idem* rule (See, A. Zahar and G. Sluiter, *supra* note 10, at p. 469).

¹⁹⁵ C. Heyder, *supra* note 3; R. Cryer, D. Robinson and H. Friman, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2007 at p. 144.

¹⁹⁶ D.J. Scheffer, 'U.S Policy and the International Criminal Court', 3 (199) 32 Cornell International Law Journal 9, at .533.

Arts. 31 and 32.¹⁹⁷ However, under circumstances where you have the ICC itself asserting as to how the Statute should be interpreted¹⁹⁸ it would simply raise an unnecessary controversy, for the case of referrals under Art. 13(b), if one still maintains to define the obligations imposed by the UNSC by reference to Art. 24 of the UN Charter as if the latter is the governing or supplementing means of interpreting the imposed obligations.

As already said, you have at hand a Court that was designed to operate as a treaty-based Court.¹⁹⁹ So, if it is a treaty-based Court it means its Statute must be interpreted in light of the provisions of the VCLT, 1969.²⁰⁰ So whether it is Art. 24 of the UN Charter or Art. 87(5)(a) of the Rome Statute that is applicable to governing the mode by which States are to render their cooperation to the ICC, the requirement to have the requested State or States consenting to the obligation falling under Part IX the Rome Statute in writing is inevitable.

As already said, again, the fundamental rule governing the relationship between treaties and third States is expressed by the maxim *pacta tertiis nec nocent nec prosunt*, enshrined in Art. 34 of the VCLT, 1969. It needs be scored, however, for the case of imposition of obligations, that the requirements underlying Art. 35 of the VCLT, 1969 are so strict that, when fulfilled, they amount to the establishment of a collateral agreement between the parties to the treaty and third States.²⁰¹ Unlike the imposition of rights under the same treaty, which can be presumed (Art. 36 of the VCLT, 1969), it is the collateral agreement [say an agreement concluded under Art. 87(5)(a) of the Rome

¹⁹⁷ See, W.A. Schabas, *supra* note 2, at pp. 213, 214.

¹⁹⁸ See, Situation in the Democratic Republic of the Congo, (ICC-01/04-168), *supra* note 35; W.A. Schabas, *Ibid*.

¹⁹⁹ D.J. Scheffer, *Ibid*, at p. 532.

²⁰⁰ C.B. Murungu, *supra* note 67; Situation in the Democratic Republic of the Congo, (ICC-01/04-168), *Ibid*; *Prosecutor v. Omar Al Bashir*, (ICC-02/05-01/09-3), *supra* note 38, para. 44.

²⁰¹ M. Fitzmaurice, *supra* note 22.

Statute] rather than the original treaty [the Rome Statute itself], which is legal basis for the third State's obligation under a given treaty.²⁰²

It is argued therefore, from the wording of Art. 35 of the VCLT, 1969, that treaty obligations may be imposed against a third State by means of acceptance in writing, but the acceptance of a right can be presumed so long as the contrary is not indicated, unless the treaty otherwise provides (Art. 36(1) of the same Convention). And remember, in the sense of the agreement concluded—the collateral agreement—that any obligation arising for a third State in that manner can be revoked or modified only with the consent of the States parties and of the third State unless it is established that they had agreed otherwise (Art. 37(1) of the same Convention).²⁰³

One may assert, for this matter, in relation to the issues raised for investigation under this study, that neither referrals made under Art. 13(b) of the Rome Statute nor Chapter VII powers of the UNSC may empower the UNSC to contract, under Part IX of the Rome Statute, on behalf of UN member States not parties to the Statute because neither the Rome Statute nor the NRA provides for such power. Similarly, the UNSC cannot revoke or modify the terms of Art. 87(5)(a), to which the imposition of obligations arising under Part IX of the Statute on third State incarnate.

So, unless you simply want to ignore how obligations on third States are created and assume, perhaps they are also created in the same way rights are created. But if at all the provision of Art. 35 of the Convention makes sense then the Governments of Sudan and Libya must be afforded the opportunity to accept the obligations imposed by the UNSC under Res. 1593 (2005) and 1970 (2011) as Art. 87(5)(a) requires. Because the essence

²⁰² See, Art. 36(1) of the VCLT, 1969; M. Fitzmaurice, *Ibid.*

²⁰³ See, Arts. 36(1), 37(1) of the VCLT, 1969; M. Fitzmaurice, *Ibid.*

of the agreements under Art. 87(5)(a) is to conform with acceptance envisaged under Art. 35 of the Convention. The same code of position applies to obligation alleged to have been imposed by the UNSC on the African Union and other regional agencies or arrangement under paras. 2 and 5 of Res. 1593 (2005) and 1970 (2011) respectively.

3.4 The authority of UNSC under Art. 13(b) to decline or relieve the ICC from complying with the provisions of the Statute governing its relationship with third States

This part responds to the second research question: whether or not the decisions taken by the UNSC in support of its referral under Art. 13(b) can decline or relieve the ICC from complying with the provisions of Statute governing its relationship with third States. In this it was observed; that it may quite be correct to assert that the ICC is accountable to the UNSC when it reports a failure by States or intergovernmental organisations to cooperate pursuant to Art. 87(5)(b),(6).

A caution was made here, however; that while the Court may be assumed to be accountable to the Security Council, it worth noting as well, that there is no provision under the NRA or a under the Rome Statute that at least suggests to subject the Court to the mandate of the Security Council. That said, it questionable if the same organ has the mandate to decline or relieve the Court from complying with the procedures already preserved within the Statute.²⁰⁴

The least instance where the Court may be said to be under obligation to act as per the Security Council's request is perhaps when the UNSC makes a deferral as per Art. 16 of the Rome Statute. This is because the initiated investigation or prosecution—whether

²⁰⁴ The decision taken by the ICC in the Situation in Uganda, (ICC-02/04-01/15-37), *supra* note 32, is a clear benchmark to explaining how far the decisions of the Security Council, the law and practices of the *ad hoc* tribunals may be applicable before the Court.

made under Art. 13(a), 13(c) or 13(b)—may at certain point act as a threat to international peace and security, a responsibility which the UNSC has mandate to maintain.²⁰⁵ Clearly; this is the basis of the argument that the Court can refuse a referral but not a deferral.²⁰⁶

But you may also learn from the practices of the *ad hoc* tribunals; that they have all struggled to define their positions and assert among other things that they are not just subsidiary organs of United Nations, but a special kind of subsidiary organs—a tribunal.²⁰⁷ Their demonstration is, that they possess certain inherent and attributed judicial powers, the powers that make them operate independently of their parent organ. Wouldn't it be a violation of their independence and the autonomy of the judiciary if these tribunals were to receive instructions in the exercise of their powers from their parent organ, the Security Council, which is clearly a political organ?²⁰⁸

It certainly would have been. This why the United Nations acknowledged the need to have the tribunals performing their functions independently of political considerations and publicly declared that such tribunals would not be subject to the authority or control of the UNSC with regard to the performance of their judicial function²⁰⁹ and so does the determination as to what State or States are under obligation to cooperate.

Now, if this is how the United Nations perceived the ICTY and ICTR one would expect, for a Court that represents itself as an independent judicial organ with international legal personality,²¹⁰ that the United Nations would learn to live within the parameters of

²⁰⁵ Berman denotes this as a negative pillar of ICC-UNSC relationship (See, F. Berman, *supra* note 44).

²⁰⁶ M. Dougherty, 'The Relationship between the ICC and the UN Security Council, American NGOs Coalition for the International Criminal Court' (12 August 2015) at p. 1.

²⁰⁷ Tadic Jurisdiction Appeal Decision, *Prosecutor v. Dusko Tadic*, Case No. IT-94-IA, *Decision on the Defence of Motion for Interlocutory Appeal on Jurisdiction*, ICTY, Appeal.Ch., 2 October 1995, para. 15.

²⁰⁸ See generally, Zahar and G. Sluiter, *supra* note 10, at p. 10.

²⁰⁹ See, the Report of the UN Secretary General pursuant to Article 2 of UNSCR 808 (1993), *supra* note 40.

²¹⁰ Art. 4(1) of the Rome Statute.

Rome Statute with respect to such matters as jurisdiction and cooperation questions.²¹¹ That is, much as the ICTY²¹² and ICTR²¹³ were let to determine, in accordance with their Statutes, as to what State or States are under obligation to cooperate, the ICC should as well be left to determine, in accordance with the its Statute, what State or States are under obligation to cooperate.

As an extension from the above preceding; if in the practice of the ICTY and ICTR still these tribunals assert that their coercive authority cannot exceed Chapter VII powers²¹⁴ then there is certainly no justification for the ICC to use a UNSC referral or be inclined to consider the peace and security agenda, to depart from the terms of its own Statute or even benefit from the cooperation regime of the ICTY and ICTR.²¹⁵

Similarly, if the UNSC has no control over the exercise of judicial powers by its own organs—the ICTY and ICTR—then it certainly has no control as well over the exercise of judicial powers by the ICC,²¹⁶ a Court that stands independently of the United Nations practices on subsidiary organs.²¹⁷ It is possible at a times, that the Court may find it appropriate to use applicable treaties and the principles and rules of international law, or even resort to the law and practices of the *ad hoc* tribunals. However, there must be reasons so to do,²¹⁸ for it cannot just result from the dictates of the UNSC in its referral under Art. 13(b) of the Statute.

So you can even conclude here in response to the third research question. That since the ICC is not a creation of the United Nations and was mainly established to support the

²¹¹ W.A. Schabas, *supra* note 2, at p. 169; See also, Arts. 2(1)(3) and 3 of the NRA.

²¹² *Prosecutor v. Milošević et al.*, Case No. IT-99-37-I, *Decision on Review of Indictment and Application for the Consequential Orders*, Case No. IT-99-37-I, ICTY, T.Ch., 24 May 1999, para. 23.

²¹³ *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, *Decision on Defence of Motion to Obtain Cooperation from the Vatican Pursuant to Article 28*, ICTR, T.Ch. 13 May 2004, para. 3.

²¹⁴ *Decision on Defence Motion to Obtain Cooperation from the Vatican pursuant to Art. 28, Prosecutor v. Bagosora et al.*, *Ibid.*

²¹⁵ Zahar and G. Sluiter, *supra* note 10, at p. 461.

²¹⁶ See, for this case, Art. 42(1) read together with Art. 19(1), of the Rome Statute.

²¹⁷ See, in this respect, the Repertory of Practice of the United Nations Organs, Vol. I, at p. 228, *supra* note 353.

²¹⁸ See, Art. 32(a)(b) of the VCLT, 1969.

prosecution of international crimes by national jurisdictions then,²¹⁹ the question of restoring international peace and security is thus a subsidiary role. As a result, the UNSC cannot use its referral power under Art. 13(b) let alone its Chapter VII powers under the UN Charter, to decline the Court of its mandate, status and the obligation to act in accordance with the Rome Statute.

As already said, the Council cannot transfer the powers of the existing *ad hoc* tribunals to the new Court²²⁰ or import into the Court's procedural framework remedies other than those already enshrined in the Statute.²²¹ Much as the UNSC is bound by the UN Charter, the ICC—as an independent international judicial organ—must act in accordance to what its Statute requires and not simply in the way in which the UNSC would like it to.²²²

When weighing the arguments in support of the position that sees the 'decisions' and 'the law' of the UNSC under Art. 13(b) of the Rome Statute as being *absolute* and above the provisions of the Rome Statute and the Court against the arguments in support of the position that sees the same 'decisions' and 'law' of the UNSC as being a subject of the compatibility test provided under Art. 3 of the NRA, the most notable part for concern under the first position (the Jalloh's position) was on the reasons that made the UNSC refer the situations in Darfur, Sudan and in Libya to the ICC.²²³ Here the study examined how such reasons fit into the premises of Arts. 39 and 41 of the UN Charter in order to make Art. 25 of the same Charter become enforceable beyond the terms of Rome Statute.

²¹⁹ See, A. Zahar and G. Sluiter, *supra* note 10, at p. 449; See also, W.A. Schabas, *supra* note 2, at p. 35; Arts. 1, 17, 18 and 19 of the Rome Statute.

²²⁰ W.A. Schabas, *Ibid*, at p. 188.

²²¹ Situation in Uganda, (ICC-02/04-01/15-37), *supra* note 32.

²²² R. Cryer, D. Robinson and H. Friman, *An Introduction to International Criminal Law and Procedure* *supra* note 80, at p. 206.

²²³ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, *supra* note 7.

Now, while agreeing to the fact that the decision taken by the UNSC to refer both situations to the ICC fell within the ambit of Arts. 39, 41 and 25.²²⁴ It was still found unconvincing, to a great part, that the Security Could or rather can use the same referrals, in the interest of peace and security, to act beyond the terms of the Rome Statute and of the NRA,²²⁵ or rule on the Court as to what law or procedures should be used to respond to the dictates of Res. 1593 (2005) and 1970 (2011).²²⁶ The reason for it not having the authority so to act is based on the principle of attribution: that ‘an international organisation cannot act beyond those powers attributed to it by member States as set out in the constituent treaty’.²²⁷

Being limited by the same ‘principle’ the ICC can equally not exercise its functions and powers beyond what is set out in its constituent treaty, the Rome Statute, or the agreement governing its relationship with the United Nations, the NRA. In other words, it cannot use the authority of the UNSC has under Res. 1593 (2005) and 1970 (2011) or under Art. 25 of the UN Charter *per se*, as a substitute of the authority given to it by the Assembly of States Parties under the Statute.

As such, the Court cannot exercise its jurisdiction on the territory of third States or demand their cooperation and that of international organisations pursuant to the decisions of the UNSC in the respective resolutions.²²⁸ But should it wish to exercise this ‘extended jurisdiction’ then it would correct to assert that the Court is acting *ultra-vires* its own Statute,²²⁹ and has chosen to defy the primacy the Rome Statute, or the

²²⁴ See, operative paras. 6 and 6 of Res. 1593 (2005) and 1970 (2011) respectively.

²²⁵ See, Art. 3 of the Rome Statute.

²²⁶ See, Arts. 19(1), 42(1) of the Rome Statute; See also, ICC decision in the Uganda’s situation, (ICC-02/04-01/15-37), *supra* note 32.

²²⁷ D. Sarooshi, *supra* note 23, at pp. 106, 197; H.G Schermers and N.M Blokker, *International Institutional Law: Unity Within Diversity*, 3rd Edition, Nijhoff, the Hague, 1995, at p. 10.

²²⁸ I. Bantekas and S. Nash, *supra* note 28, at pp. 549, 550.

²²⁹ D. Sarooshi, *Ibid*, at p. 107.

Elements of Crimes and its Rules of Procedure and Evidence enjoy under Art. 21 in favour of the Security Council's Chapter VII powers under the UN Charter.

But as already pointed out, there is no provision under the Rome Statute or the NRA as such, which authorises the UNSC to extend the jurisdiction of the Court to such reach or impose binding obligations on a distinct international organisation as the ICC or the African Union unless it is one of the United Nations as per Arts. 7, 22 and 29 of the UN Charter.²³⁰ In as far as Arts. 2(5), 24(1)(2), 25, 39, 41, 42, 43(1), 48 and 49 of the UN Charter are concerned, the Council's mandatory powers extend only against UN member States.²³¹

So, if the ICC implicitly admits as under para. 26 of the decision in *Prosecutor v. Omar Hassan Al Bashir*, (ICC-02/05-01/09-195),²³² that the Rome Statute does not impose obligations on third States unless they consent, then it suffices to asset to that effect that probably the Court has no mandate to determine a failure by such States to cooperate because the obligations in question do not originate from the Rome Statute or rather, has not been imposed in accordance with the provisions of Arts. 4(2) and 87(5)(a), the latter Articles largely conforming with the rules of the VCLT, 1969 as they are expressed under Arts. 26, 34 and 35.

It may generally be argued in recap of the matters falling under the Rome Statute, it be under Art. 13(b) or 13(a), that the UNSC cannot extend the jurisdiction of the Court to include crimes, procedural rules and remedies not set out in the Statute.²³³ Much as the Democratic Republic of Congo (DRC) cannot rely on the visits of President Omar Al

²³⁰ D. Sarooshi, *Ibid*, at pp. 106, 107, I. Bantekas and S. Nash, *Ibid*, at p. 542.

²³¹ I. Bantekas and S. Nash, *supra* note 28.

²³² *Prosecutor v. Bashir*, (ICC-02/05-01/09-195), *supra* note 45.

²³³ D. Sarooshi, note 414 above.

Bashir to some States parties to deny its obligation to execute the 2009 and 2010 requests,²³⁴ a UNSC referral under Art. 13(b) and the decisions in its support cannot, by the same token, relieve the Court of its obligation to comply with the requirements of Arts. 4(2), 17, 21, 54(2),(3)(c)(d) and 87(5)(a),(6) of its Statute, or said to have declined the Court in sheer, from complying with the same requirements.²³⁵

As an extension, the same referral cannot be said to have an effect of authorising the Court to act in a dubious way or beyond the scope of its powers as set in the Statute.²³⁶ In short, the UNSC cannot simply use the ICC as it sees it fit;²³⁷ it is either it defers the referrals and establishes another *ad hoc* tribunal or simply utilises the services of the ICC by means of its Chapter VII resolutions but again, subject to the framework set by the Rome Statute.²³⁸ The same rule would certainly apply to obligations imposed under para. 3 of Res. 1593 (2005).

If this reasoning makes sense, it follows then that, since the Assembly of States parties to the Statute created the ICC as a complementarity judicial organ and constrained the power of the Court exercise jurisdiction and seek the cooperation of States parties and non-States parties and intergovernmental organisations to the premise of Part I (Arts. 4(2)), Part II (Arts. 5, 12, 17), Part V (Arts. 53, 54(2),(3)(c)(d)), and Part IX (Arts. 86, 87(5),(6)) of its Statute, the UNSC cannot simply choose to ignore or waive such restriction on the Court's scope of action in response to situations under Art. 13(b).²³⁹

²³⁴ See, *Prosecutor v. Bashir*, (ICC-02/05-01/09-195), note 117 above, paras. 1-3 and 21.

²³⁵ On the applicability of Art. 17 against third States see, I. Bantekas and S. Nash, note 115 above; W.A Schabas, *supra* note 2; A. Cassese, *supra* note 54..

²³⁶ D. Sarooshi, note 115 above .

²³⁷ R. Cryer, 'Sudan, Resolution 1593, and International Criminal Justice', *supra* note 26, at p. 206.

²³⁸ M. Benzing, *supra* note 54; See also, Art. 53 of the UN Charter: It does not authorise the Council to issue binding orders to regional arrangement or agencies, it be under the auspice of the African Union, SADC or the East African Community (EAC). Instead, it only allows the Council, where appropriate, to utilise such regional arrangement for enforcement actions, actions that these regional arrangement or agencies may only render in accordance with their competence or mandate; they cannot be forced. Read this with Arts. 87(6) and 54(3)(c)(d) of the Rome Statute.

²³⁹ M. Benzing, *Ibid*.

So it follows from here, as a matter of clarity, that if for the same reasons the UNSC has no authority to dictate on the Court then it certainly cannot (i) compel States to cooperate with the ICC, for purposes of investigation and prosecution before the ICC, beyond the terms of the Statute²⁴⁰ or, (ii) decline the Court of its mandate to comply with jurisdiction and admissibility procedures underlying Arts. 15, 17, 18 and 20 (*ne bis in idem*) of the Rome Statute.²⁴¹ A look at the contemporary jurisprudential approaches guarding the cooperation of States with international criminal courts may help justify these assertions.

3.5 Chapter Conclusion

This study proceeded with an assumption that whether it is for purposes of peace and security as is provided under the UN Charter,²⁴² or for purposes of peace and justice as the preamble of the Rome Statute asserts,²⁴³ the duty by the ICC to act in accordance with the provisions of its establishing Statute remains an obligation which the UNSC cannot, pursuant to the provision of Art. 21(1) of the Statute, Art. 3 of the NRA, and in absence of a justification as to existence of any ambiguity or inadequacy in the Rome Statute regarding the position of third States to cooperating with the ICC in accordance with the Statute²⁴⁴—dispense, decline or relieve the Court from complying.

And taking into account that the UNSC has also undertaken to conform, in the exercise of its powers under Arts. 13(b) and under the NRA, with the provisions of the Charter

²⁴⁰ Art. 3 of the NRA.

²⁴¹ See, M. Benzing, *Ibid*, at p. 625; A. Cassese, *supra* note 53, at pp. 343, 344, W.A. Schabas, *supra* note 2, at pp. 189, 190. All of these scholars do agree that the admissibility procedure under Art. 17 of the Statute applies to all situations that come before the Court, even those resulting from referral by the Security Council; See also, a statement by ICC Prosecutor in his reports to the Security Council with respect to the Situation in Darfur, where he publicly stated that he is required to determine whether the case is admissible pursuant to Art. 17(UN Doc. S/PV. 5216, at p. 2; UN Doc. S/PV.5321, at p. 3; UN Doc. S/PV.5459, at p. 4; UN Doc. S/PV.5589, at p. 2).

²⁴² See, Arts. 1(1), 24(1), 39, 41 and 42 of the UN Charter.

²⁴³ See, paras. 3, 4 and 5 of the Preamble to the Rome Statute.

²⁴⁴ I. Caracciolo, 'Applicable Law', in F. Lattanzi and W.A. Schabas, (eds.), *Essays on the Rome Statute of the ICC*, Rome: Editrice Il Sirente, 1999, pp. 211–232.

and of the Rome Statute²⁴⁵ it means, as a consequence, that the decisions of the UNSC cannot on their own, (i) enforce the cooperation of third States or international organisations with the ICC beyond what the Rome Statute permits,²⁴⁶ or (ii) dictate as to what procedure underlies the compliance of the imposed obligations.

As the discussions on both positions are concerned, it would be another hectic study of serious bewilderment if the author of this study affirms both positions, each by its supporting arguments, as constituting a rational approach to address the effects of UNSC decisions obliging UN member States not parties to the Rome Statute to cooperate with the Court. It is the study's observation to this respect, having evaluated the arguments in support of both positions, that the first position (the Jalloh's position) may best apply if the ICC was one of a series of the tribunals established by the UNSC under Chapter VII of the UN Charter because, it is in the law and practices of such tribunals where:

- (a) jurisdiction on international crimes is assumed as of a right, without having to demonstrate the failure or inadequacy of the domestic system: the primacy rule;²⁴⁷
- (b) on the basis of Arts. 24 and 25 of the UN Charter, contemporary international criminal justice has the justification to erode, though in accordance with Art. 34 of the VCLT, 1969,²⁴⁸ the right of States to freely

²⁴⁵ Art. 3 of the NRA.

²⁴⁶ Situation in Uganda, (ICC-02/04-01/15-37), *supra* note 32.

²⁴⁷ B.S. Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of the National Courts and International Criminal Tribunals', (1998) 23 Yale Journal of International Law, at p. 383; A.G. Karibi-Whyte, 'The Twin *Ad Hoc* Tribunals and Primacy over National Courts', (1998) 9 Criminal Law Forum 55; F. Lattanzi, 'The Complementary Character of the Jurisdiction of the Court with Respect to National Jurisdictions', in F. Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute*, Napoli: Editoriale Scientifica, 1998, pp. 1, 18; P. Benvenuti, 'Complementarity of the International Criminal Court to National Criminal Jurisdictions', in F. Lattanzi and W.A. Schabas, *Essays on the Rome Statute*, note 129 above, pp. 21–50; See also, Arts. 29 and 28 of the ICTY and ICTR Statutes, respectively.

²⁴⁸ See, Arts. 2(2)(5), 24, 25, and 39 read together with Arts. 41, 43, 48, and 49, of the UN Charter.

invoke the principle of domestic jurisdiction as a ground to refuse cooperation with tribunals;²⁴⁹

(c) given the fact that the tribunals are one of their own, part of the United Nations, the Prosecutor is authorised, albeit in theory,²⁵⁰ to undertake investigations and gather evidence directly (i.e., without going through the official channels) on the territory of the States in conflict, as well as on the territory of those which have passed implementing legislation authorizing such tribunals' activities;²⁵¹

(d) given the primacy that the tribunals enjoy under their establishing Statutes, the duty to cooperate may be extended to international organisations on ground that those organisations are composed of UN member States which have the duty, both individually and collectively, to cooperate with the tribunals.²⁵²

Being not a creature of the United Nations or specifically a product of a UNSC resolution, a UNSC referral under Art. 13(b) of the Statute cannot in light of Art. 4(1) of the Rome Statute, Arts. 1, 2(1),(3) and 3 of the NRA, and in view of the decision reached by the ICC itself in the Uganda's situation, make the Court benefit from the legal framework prevailing on the ICTY²⁵³ and ICTR²⁵⁴ Statutes as characterised by

²⁴⁹ See, I. Bantekas and S. Nash, *supra* note 28, at p. 539; As it is contended under the first position (Jalloh's position) it may also be true in respect of the ICTY and ICTR that the duty to cooperate is absolute and unconditional but given the fact the Statutes of the ICTY and ICTR attribute to judges a rule making power (A. Zahar and G. Sluiter, *supra* note 10, at p. 20; Art. 15 and 14 of the ICTY and ICT Statutes, respectively), it may be a generalization to assert that States cannot unilaterally invoke a ground of refusal and deny a request or order for cooperation on that ground. (Blaškić (Subpoena) Appeal Decision, *Prosecutor v. Tihomir Blaškić*, *supra* note 78, para. 65). The tribunals may adopt the same view as States and rule that there is indeed a legitimate ground to deny a request for cooperation (A. Zahar and G. Sluiter, *supra* note 10, p. 468).

²⁵⁰ Because it is practically beyond reach that a Prosecutor of the ICTY or ICTR would enter into the territory of a UN member State without proper documentation or, even without being granted visa by the concerned authorities. (See, on the restriction by the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state, Art. 2 (1)(7) of the UN Charter read together with Art. 43 of the same Charter).

²⁵¹ Blaškić (Subpoena) Appeal Decision, *Ibid*, paras. 53, 54.

²⁵² *Order for the Production of Document by the European Community Monitoring Mission and its Member States, Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14-/2-T, ICTY, T.Ch. III, 4 August 2000; *Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, Prosecutor v. Simić et al.*, Case No.IT-95-9-T, ICTY, T.Ch. III, 18 October 2000.

²⁵³ Art. 29 of the ICTY Statute.

²⁵⁴ Art. 28 of the ICTY Statute.

Art. 103 of the UN Charter. But if it does then, being an international legal entity, the ICC can enjoy the practice of the *ad hoc* tribunals or affect States parties, non-States parties as well as international organisations but in expressly defined and specifically limited circumstances.²⁵⁵

That is, it cannot generally rely on the decisions of the UNSC let alone the provisions of the UN Charter, as substitute to applying the terms of its Statute. Similarly, the Security can, because it is not the authority given to it by the Rome Statute or the NRA, neither relieve the Court of its obligation to act in accordance with the Statute, demand the latter to depart from the terms of the Statute which are in conformity with the fundamental principles of international treaty, nor introduce into the Court's procedural framework remedies other than already enshrined in the Statute.²⁵⁶

That said, it follows from here that it may quite be a weak argument to read into Art. 13(b) of the Rome Statute and Art. 25 of the UN Charter and conclude, just on the face of the two provisions, that the decisions of the UNSC under Res. 1593 (2005) and 1970 (2011) are binding on all UN member States without exceptions. So with due account of the discussion made on the arguments in support of the first and second position, the study considered the second position (the Schabas's position) as constituting the precise approach to address the subject under investigation.

Given the findings underlying the second position and the reasons made in its support. It may now be justified, to a great part, for purposes of investigation and prosecution

²⁵⁵ I. Bantekas and S. Nash, *supra* note 28, at p. 538; See, for a possible suggestion on such expressly defined and specifically limited circumstances, Arts. 4(2), 17, 19, 21, 42(1), 54(2),(3)(c)(d), 86, and 87(5)(6)(7) of the Rome Statute; On interpretation of the effects Res. 1593(2005) exerts on third States see, *Prosecutor v. Omar Al Bashir*, (ICC-02/05-01/09-3), *supra* note 38, paras. 41 and 240-245; *Prosecutor v. Omar Hassan Al Bashir*, (ICC-02/05-01/09-195), *supra* note 45, paras. 29-31.

²⁵⁶ In order to be able to relieve the Court of such obligation or demand it to depart from the terms of its Statute such power must be provided in the Rome Statute or the NRA (I. Bantekas and S. Nash, *supra* note 115).

before the ICC—it be in the interest of international peace and security or international peace and justice—that in so far as the decisions taken UNSC under Res. 1593 (2005) and 1970 (2011) remain apparently incompatible with the Arts. 4(2), 87(5)(a) and 87(6) of the Rome Statute²⁵⁷ then the effects the decisions contained in the resolutions exert to the Governments of Sudan, Libya, and of other third States and even the against the African Union are merely persuasive.

That is, it is only when the ICC complies with the terms of its own Statute, that such decisions would have the basis, finally, but for purposes of investigation and prosecution before the ICC and in accordance with the Rome Statute, to empower the Court to (i) demand the cooperation of the States in question, and of the organisations impliedly identified under the same resolutions: the African Union is specific or, (ii) report the failure of such States to cooperate, with the exception of the African Union.

²⁵⁷ That, while operative paras. 2 and 5 demand the States and the organisations in question to cooperate with the Court and the Prosecutor pursuant to the resolutions, the Statute demands the Court to seek the cooperation of the same entities in accordance with its terms: those underlying Part IX, and those found under Part. 5, II and I of the same Statute. Again, while operative para. 6 of both resolutions attempts to restrict the Court to exercise jurisdiction on the territory and over the nationals of the contributing States, Art. 42(1) of the Statute demands the Court not to seek or act on instructions from any external source.

CHAPTER FOUR

4.0 CONCLUSION AND RECOMMENDATIONS

4.1 Introduction

In account of the objectives this study undertook, the study aimed to address three key issues.²⁵⁸ Firstly, whether the decisions taken by the United Nations Security Council (UNSC) in support of its referral under Art. 13(b) can be enforced beyond the requirements of Part IX of the Statute of the International Criminal Court ('the Rome Statute'), and secondly, whether the decisions taken by the UNSC in support of its referral under Art. 13(b) can decline or relieve the International Criminal Court ('the ICC') from complying with the provisions of the Statute governing its cooperation relationship with third States.

Lastly is whether, for purposes of peace and security under the Charter of the United Nations, 1945 ('the UN Charter'), the provisions of the same Charter can override the provisions of the Rome Statute; can override ICC decisions regarding the interpretation of Art. 21 of the Rome Statute; and or can also override the Court's independence to determine, in accordance with the provisions of its Statute, as to what State or States, when and how such State or States are to render their cooperation.

As a result, this chapter presents findings on the above issues the object being to indicate whether the assumption²⁵⁹ by the study are proven or not. Next would be recommendations on the issues.

²⁵⁸ See, para. 1.5, Chapter 1, pp. 12-13 of this study.

²⁵⁹ See, para. 1.6, Chapter 1, pp. 14-15 of this study.

4.2 Findings

Since every chapter has its own conclusion in reflect of the identified issues, it is not necessary to repeat the said conclusions here. Rather, this chapter gives general conclusions cutting across the whole of this study. In short, the conclusions presented here confirm the assumptions underlying this study. Far reaching such conclusions it may worth noting a few remarks, in no chronological order.

It is quite undeniable that in the interests of international peace and security the UNSC may demand an effective investigation and prosecution of the situations referred under Art. 13(b).²⁶⁰ But given the limits underlying Arts. 1, 2(1),(3) and 3 of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations ('the NRA'); and given the fact that the ICC is not a creature of the United Nations or as discussed, is not under any obligation to seek or act on instructions from any external source,²⁶¹ the chances that the investigation or prosecution in question would be actuated beyond the terms of the Rome Statute remains highly skeptical if not impracticable.

So while it remains undisputed that the decisions of the UNSC are binding on all UN member States and that, in certain circumstances the UNSC may impose obligations on non-States parties to cooperate with the ICC, you can still not interpret Art. 13(b) referral as providing for an exception under which the UNSC can demand the Court to consider Art. 25 of the UN Charter, Ress. 1593 (2005) and 1970 (2011) or its Chapter VII powers under the UN Charter alone, as a term for reference in demanding the cooperation of non-States parties.

²⁶⁰ A. Zahar and G. Sluiter, *International Criminal Law*, Oxford University Press, 2012, at p. 475.

²⁶¹ Arts. 42(1)) and 87(5) read together with Art. 54(2),(3)(c)(d) of the Statute of the International Criminal Court, UNTS, Vol.2187, No.28544 ('the Rome Statute'); See also, *Prosecutor v. Omar Al Bashir*, (ICC-02/05-01/09-3), *Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Al Bashir*, ICC, PT-Ch.I Decision, 4 March 2009, paras. 35, 46.

Similarly, being not a subsidiary organ of the Security Council, the ICC cannot and perhaps on strict interpretation of the Statute, has no competence to use the same referral to benefit from the cooperation regime established under the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR): *the vertical model*. But if at all these avenues apply then, as already stated by the ICC in the Situation in Uganda (ICC-02/04-01/15-37), they must be assessed against the provision governing the law applicable before the Court: Art. 21 of the Statute.²⁶²

It certainly might be an argument that there is no detailed provision in the Statute concerning UNSC referral²⁶³ but again, this best works as a complement to the aims that the drafters of the Statute had when they opted to limit the powers of the Court to those of the Statute. And since one has to read Art. 13(b) in context and in light of the object and purpose of the Statute²⁶⁴ and not in the context or in light of UN Charter then, it makes quite a weak argument to assert, in reflect of such compliment and in support of the position taken by the ICC itself in defining the Rome Statute, that perhaps the Statute provides little on how UNSC exercises its powers under Art. 13(b) particularly, when such powers concern the imposition of obligations on third States to cooperate with the Court.

Having variably seen the impacts that UNSC decisions under Res. 1593 (2005) and 1970 (2011) exert on the cooperation relationship between the ICC and non-States parties and between the ICC and the African Union, it is expected, this time, that the

²⁶² See, Situation in Uganda, (ICC-02/04-01/15-37), *Decisions on the Prosecutor's Position on the Decision of the Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrant of Arrest, Motion for Reconsideration, and Motion for Clarification*, ICC, PT-Ch.II Decision, 29 October 2005, para. 19; *Prosecutor v. Omar Al Bashir*, (ICC-02/05-01/09-3), note 4 above, para. 44.

²⁶³ W.A Schabas, *An Introduction to International Criminal Court*, 4th Edition, Cambridge University Press, 2011, at p. 168.

²⁶⁴ See, Situation in the Democratic Republic of Congo, (ICC-01/04-168), *Judgment on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber's 131 March 2006 Decision Denying Leave to Appeal*, ICC, Appeal Chamber Decision, 24 July 2006, para. 33.

Court would remind itself of the obligations it has under the Statute, and the mandate it may exercise to regulate the Council's exercise of its referral power under Art. 13(b). As a summary, this is what the study found as an account of the issues raised and in reflect of the adopted assumptions.

4.2.1 No special treatment to is accorded to a UNSC referral

That the ICC Statute does not provide for any special treatment to be accorded to a UNSC referral as opposed to the other two ways in which the Prosecutor can be seized of a case: those under paragraphs (a) and (c) of Art. 13.²⁶⁵ Once a crime has been referred by the Security Council, the normal requirements of the statute will apply—those governing independent prosecution²⁶⁶ those demanding for the admissibility of the situations under the Art. 13 in accordance with Art. 17,²⁶⁷ those warranting for the applicability of such other rules as the principle of legality (*nullum crimen sine lege*),²⁶⁸ the principle underlying Art. 87(5): *pacta tertiis nec nocent nes prosunt* and *etcetera*.²⁶⁹

4.2.2 A referral under Art. 13(b) cannot entirely change ICC regime

As an extension in para 4.2.1 above; if a State party referral or the power of the Prosecutor to act *proprio motu* cannot change the immunity enjoyed by Heads of State of non-States parties under customary international law then a UNSC referral cannot as

²⁶⁵ D. Sarooshi, 'The Peace and Justice Paradox: *the International Criminal Court and the UN Security Council*', in D. McGoldrick, P. Rowe, and E. Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Oxford and Portland, 2004 at p. 98.

²⁶⁶ Arts. 19(1) and 42(1), of the Rome Statute.

²⁶⁷ See, statement given by Moreno Ocampo, former ICC Chief Prosecutor, that he is required to determine whether the Darfur case is admissible pursuant to Art. 17 of the Rome Statute (UN Doc. S/PV.5216, at p. 2; UN Doc. S/PV.5312, at p. 3; UN Doc. S/PV.5459, at p. 4; UN Doc. S/PV.55589, at p. 2).

²⁶⁸ Art. 20 of the Rome Statute.

²⁶⁹ See, on this assertion, J. Crawford, 'The ILC's Draft Statute for an International Criminal Tribunal', (199) 88 AJIL, at p. 147.

well create a different legal regime from that existing in the State party referral or the power of the Prosecutor to act *proprio motu*.²⁷⁰

4.2.3 A referral under Art. 13(b) is a request; not an obligation on the Court

That as it is for State referrals under Art. 13(a) of the Statute, a UNSC referral does not as well operate against the ICC as an obligation but as a request because the Court is not bound by a UNSC resolution²⁷¹ and has the authority, in accordance with the Statute, to initiate or decline an investigation or prosecution on grounds of gravity or complementarity.²⁷² If a referral under Art. 13(b) were indeed a ‘command’ then the Statute would not have demanded the Prosecutor to satisfy itself that it has jurisdiction in any case brought before it.

4.2.4 UNSC cannot decline ICC’s powers under the Rome Statute

That, as a consequence of the findings under para. 4.2.3 above, the ICC may, pursuant to Art. 16 of its Statute, be prevented from acting.²⁷³ However, it cannot be declined to comply with jurisdiction and admissibility requirements under Arts. 17, 18 and 19,²⁷⁴ or seek the cooperation of some third States and international organisations such as the African Union, in accordance with the Arts. 87(5),(6) and 54(2),(3) (c)(d), of the same Statute.²⁷⁵

Having been mandated that it shall satisfy itself that it has jurisdiction for any case brought before it and that, it is not supposed to seek or act on instructions from any

²⁷⁰ W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2nd Edition, 2016 at p. 604.

²⁷¹ R. Cryer, D. Robinson and H. Friman, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2007 at p. 144.

²⁷² R. Cryer, D. Robinson and H. Friman, *ibid*, at p. 135; I. Bantekas and S. Nash, *International Criminal Law*, 3rd Edition, Routledge-Cavendish, 2007 at pp. 542, 549, 550; See also, Arts. 17, 18, 19, 42, 52-54, of the Rome Statute.

²⁷³ W.A. Schabas, *supra* note 6, at pp. 182, 183.

²⁷⁴ See, W.A. Schabas, *Ibid*, at p. 189; A. Cassese, *International Criminal Law*, 2nd Edition, Oxford University Press, 2004, at p. 344.

²⁷⁵ See, generally, W.A. Schabas, *Ibid*, at pp. 182, 188-1901.

external source, ICC Prosecutor has the discretion, in reflect of such mandate, to decide, in accordance with the Statute, whether or not to initiate an investigation or a prosecution on the basis of the information made available to him or her. If a referral under Art. 13(b) were indeed a ‘command’ then the Statute would not have demanded the Prosecutor to subject such referrals to the jurisdiction and admissibility requirements as Arts. 19(1) and 53(1) of the Statute assert.

4.3 Recommendations

Based on findings above, the following are recommended. They are directed to the international community as a whole, the ICC itself, States parties and non-States parties to the Rome Statute, the African Union, the UNSC and Non-Governmental Organisations.

4.3.1 Rome Statute be interpreted as other international treaties

Taking into account the fact that the ICC is a treaty based Court, the interpretation of its Statute should thus be subjected to the provisions of Arts. 31 and 32 of the VCLT, 1969 as was the disposed of in the Situation in the Democratic Republic of Congo (ICC-01/04-168), *supra*, para. 33 and in *Prosecutor v. Omar Hassan Al Bashir*, (ICC-02/05-01/09-195), *supra*, para. 26.

4.3.2 Terms of reference for cooperation be that under Part IX of the Rome Statute

For purposes of cooperation relationships either with States parties, non-States parties, or international organisations such as the African Union, the terms for reference should be those underlined under Part IX of the Statute (Arts. 86, 87(5),(6)), under Part V (Art. 54(2),(3)(c)(d)), or Part I (Art. 4(2)).

4.3.3 The terms under the NRA be strictly up held

The UNSC and the Court should abide to the terms agreed under the NRA and consider the same terms as being a point of reference to governing the relationship sought under Art. 2 of the Rome Statute, and not the UN Charter *per se* as it is frequently argued.

4.3.4 Review of the powers of the UNSC under Art. 13(b)

There is a need to review the powers enjoyed by the UNSC under Art. 13(b) by stating clearly the extent to which such power may affect the Court's status under Arts. 4(1), and 42(2) and the exercise of its functions and mandate under the Statute when read as a whole. Conceivably, the Court should engage to assess whether or not the UNSC was validly acting pursuant to Chapter VII of the UN Charter just as it must assess that the referring resolution is adopted under Chapter VII of the UN Charter.

4.3.5 Need to expressly ascertain the extent to which UNSC referral under Art. 13(b) is applicable

Noting that the UNSC has a Chapter VII power to compel UN member States to cooperate with the ICC by virtue of their undertakings to the UN Charter, there is a need also to ascertain, for purposes of investigation and prosecution under the Rome Statute, how such undertakings do compromise with the provisions of the Statute governing the cooperation of third States with the Court, irrespective of their memberships to the United Nations. If it involves 'amending' the Statute then it be. So that in the end you can have the matters expressly provided in the Statute than drawing assumptions that perhaps such undertakings do waive the sovereignty immunity which States have to the obligations to which they have not consented. Word count 36, 854 exclusive of preliminary pages.

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