To my father Gabriel Uahenua Tjipahura

A B S T R A C T

The need for a permanent international criminal court was first considered at the United Nations when the Genocide Convention of 1948 was adopted. The nations acknowledged and saw the need for a permanent tribunal which will punish those responsible for committing the most serious crimes of international concern and which would at the same time deter the same occurrences from happening in the future. The International Criminal Court (ICC) was established by the Rome Statute and subsequently became the first permanent international criminal tribunal.

Under the Rome Statute, article 13 (b) provides that the Security Council is empowered to refer a situation for investigation and prosecution if it is of the opinion that crimes referred to in article 5 are or have been committed. On the face of it this article is in conformity with the mandate of the Security Council to maintain international peace and security. However closer scrutiny reveals that the Security Council can in fact refer an individual who is a national of a non-state party to stand trial at ICC. The problem is that the ICC is creature of statute and a state can only gain rights and obligations under a statute if it has signed and ratified such treaty. To refer a national of a non-state party or the state itself to the ICC violates the essence of state sovereignty, undermines the independence and impartiality of the ICC and goes against the spirit of international treaty law.

The powers conferred on the Security Council by virtue of article 13 (b) makes room for the misuse their veto powers provided for by Article 27 of the UN Charter. This work seeks to critically analyse the full legal implications of article 13 (b) of the Rome Statute. It is argued that the involvement of an over-politicised organ such as the Security Council challenges the independence of the court, the concept of state sovereignty and the international law of treaties. This powers should thus be limited.

TABLE OF CONTENTS

Chapter One: Introduction and background to the study

The need for a permanent international criminal court was first considered at the United Nations when the Genocide Convention of 1948 was adopted. This need existed due to the atrocities which occurred on the rights of human beings during both World Wars. The nations acknowledged and saw the need for a permanent tribunal which will punish those responsible and which would at the same time deter the same occurrences from happening in the future.[1]

Ad hoc tribunals such as International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) were established to prosecute individuals who committed serious violations of humanitarian law in the respective territories.[2] These tribunals however were created solely to try crimes committed within a specific time-frame and relating to a specific conflict. The International Criminal Court was thus the first permanent international criminal court with jurisdiction over the most serious crimes of concern to the international community as a whole. With its location in The Hague, Netherlands the ICC became established by the Rome Statute which was adopted on 17 July 1998 and came into force in 2002 after 106 delegates to the Statute.

The jurisdiction of the court is clearly outlined in the Statute. In its Article 1 it declare that it is established as a permanent institution and it shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern. These *inter alia* include genocide, crimes of aggression, war crimes and crimes against humanity.[3]

In terms of article 4 (2) the ICC may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, only by special agreement, on the territory of any other State.[4]

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[1]Meyer E. 2009. *International Law: The Compatibility of the Rome Statute of the International Criminal Court with the U.S. Bilateral Immunity Agreements Included in the American Service Members Protection Act*. Oklahoma: Oklahoma Law Review. Vol No.58:97.
[2] X. Bangamwabo. 2008. 'International criminal justice and the protection of human rights in Africa'
[3] Article 5 of the Rome Statute of the International Criminal Court (2002)
[4] Article 4 (2) of the Rome Statute of the International Criminal Court (2002)

What needs to be highlighted is that the ICC is not a court of universal jurisdiction that can prosecute anyone who has committed an atrocity anywhere in the world. There are usually certain preconditions to personal jurisdiction: the individual charged with atrocity crimes must be a national of a State Party to the ICC, or the territory on which the crime was committed must belong to a State Party to the ICC.[5] If the Security Council refers the situation to the ICC, however, these preconditions do not apply: a national of a non-party State may be prosecuted, and the crimes need not be committed on the territory of a State Party.[6]

The Security Council of the United Nations is involved with the ICC in that it can opt to act under Chapter VII of the United Nations Charter and refer a situation for prosecution. It is empowered to do this in pursuant to article 13, paragraph (b) of the Statute. These referrals can include individuals who are from non-member states to the Statute, a provision which forms centre point of discussion for this dissertation.[7] The Security Council may further defer prosecutions or investigations in terms of article 16 of the Statue.[8] This challenges the independence of the court greatly.

1.1. Background to the problem

Before the ICC was created, the world lacked an international criminal court which would have jurisdiction to bring perpetrators to justice for their actions that violate international criminal court. As such the ICC was created to remedy and avoid future atrocities at the hands of the powerful. However the problem which coupled the ICC was politics and the fact that the world most powerful nations are somewhat controlling the actions of the Court. With that in mind it is inevitable that these power houses will guard their interests at all cost and at times to the disadvantage of the poorer nations and justice as a whole. It is for these reasons

[5] *Ibid* article 12.

[6] Scheffer D & Cox A. 2008. '*The Constitutionality of the Rome Statute of the International Criminal Court.*' 98 *JCLC* Vol No. 98, 983-994.

[7] Politi, M, Nesi, G. 2002. '*The Rome Statute of the International Criminal Court: A Challenge to Impunity.'* Aldershot: Ashgate Publishing Limited, pg60.

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

that some developing nations such as Zimbabwe has failed to even sign the Rome Statute. Some States such as United States, China, India and Israel all opposed the Rome Statute. Their reasoning was based on the conventional realist approach which views international law and legal institutions such as the ICC as creations of powerful states to further their political purposes.[9] The most powerful nations view an international court as a constraint to their actions and affairs and this is but one of the few reasons why they oppose the establishment of an international court.

1.2. Legal problem

One of the fundamental principles in international law is that all states are equal and therefore enjoys sovereignty. Sovereignty empowers a state to exercise the functions of a state within a particular territory to the exclusion of other states.[10] The legal problem which pertains to the International Criminal Court is the role of the Security Council in this tribunal.

Issues:

- Whether referrals made by the Security Council do not violate state sovereignty if they involve individuals from countries who are not member states to the Rome Statute.
- Would the Security Council not use their veto powers to their advantage by preventing referrals which impinged on their interests?
- Do the powers given to the Security Council not undermine the court's independence and creditability?

1.3. Basis of legal problem

The basis of the legal problem stem from two angels:

[9]Wippman, D. 2004.'*The Politics of International Law: The International Criminal Court.'* Cambridge University Press: Cambridge, pg152.
[10]Dugard, J. (3Ed). 2008. '*International Law: A South African Perspective*.' Cape Town: Juta& Company Ltd, pg838. *Island of Palmas Case* (Netherlands v United States) 2 RIAA 829 (1928)

1. The ICC is not a creature of the United Nations and despite this an auspice of the UN has the authority to either refer or defer a prosecution. This undermines the independence and creditability of a permanent international court due to its controlled action or inaction. The author argues that the involvement of the Security Council as a highly politically strained organ could negatively impact the strengths and success of the court. This involvement further weakens the trust and respect an international court such as the ICC demands.
2. Further, the involvement of the Security Council in the affairs of the ICC creates a legal monstrosity to the principle of state sovereignty in international law. The author will argue that the principle of state sovereignty in international law is so imperative that it should not be tampered with in any form. It is thus inconceivable that the Security Council is mandated to refer individuals of non-State parties for prosecution in ICC. This violates the very essence of statehood.

1.4. Objectives of Study

The objective of this dissertation would be to unveil the legal implications of the said article 13 (b). Through this, a clear understanding would be revealed as to the obligations of the member states to the Rome Statute and the position and powers of the Security Council as an international agent of peace-keeping for the United Nations.

A clear implication of the article will enable the reader to comprehend the firm hand the Security Council has on the jurisdiction of the ICC. This will further enlighten the reader on the veto powers the Security Council has and how (if at all) they can use these powers to the disadvantage of their allies and to their own advantage. It is these powers that destabilize the strengths of the court.

1.5. Methodology

The history of international law is extensive and so too is the work that has been written on the subject. Focus will be placed on the various literatures written on

the subject. Due to the fact that this area of law develops considerably and rapidly, internet resources would be extremely beneficial to catch the latest developments on the subject and to subsequently submit a dissertation which is reporting current affairs in international law. The writer will thus make use of statutes, court cases and court records. Various materials such as text books, journal articles, documentary reports and archival materials will give support to this work.

Due to the on-going international clashes and relations which take place on a daily basis, the dissertation will examine two case studies. The possible case studies to be looked at are the situation in Libya and The Sudan.

It is imperative to understand how the Security Council became involved in the affairs of non- UN organisation and as such Chapter VII of the United Nations Charter is of crucial importance in this regard.

1.6. Literature Review

The subject of international law has been extensively written about by some of the greatest jurist on the subject. These are a possible list of literature which could be used to writing and completing the dissertation.

Dugard, J. (3rd Ed). 2008. *International Law: A South African Perspective*. Cape Town: Juta & Company Ltd.

John Dugard is one renowned South African jurist on international law. In this book, he draws his attention to a South African perspective on international law. This book will thus be very useful to laying the foundation of the dissertation. From pages 485 to 495, he discusses the Security Council as an agent responsible for maintaining international peace. Chapter 10 discusses the International Criminal Court, the International Criminal Court and South Africa's Implementation of the Rome Statute. The author commences by tracing the history, establishment and development of the ICC and continues to discuss the crimes which fall under the jurisdiction of the ICC and how they became defined. Further the author discusses the jurisdiction of the court and makes it clear that the Rome Statute strictly defines the jurisdiction of the Court and states that

investigations and prosecutions under the Rome Statute are premised on the principle of 'complementarity' whereby the Court is required to rule a case inadmissible when it is being appropriately dealt with by a national justice system.[11]

Hereto, South Africa's implementation of the Rome Statue is discussed and mention is made to the incorporation of ICC crimes and the grounds of jurisdiction. South Africa implemented the Rome Statute into its domestic laws by means of The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.[12]

Brownlie, I. 2003.*Public International Law.*England: Oxford University Press.

This book is very broad as it covers all or most aspects of international law. However it will be extremely helpful in understanding the principle of jurisdiction and state sovereignty. The sixth edition is a fresh update to include subjects such as the use of force and the subject of international environmental law. Chapter 15 is of particular interest as it covers jurisdiction which will be looked at and more particularly Chapter 26 which has covered international criminal justice and the International Criminal Court. This chapter also has an extensive coverage of immunity from jurisdiction amongst other things.

Szafarz, R. 1993. *The Compulsory Jurisdiction of the International Court of Justice.*Dordrecht/ Boston/London: Martinus Nijhoff Publishers.

In contemporary international law there is a customary norm which provides for an obligation to settle international dispute in a peaceful manner. This book therefore gives a clear concept of jurisdiction under the International Court of Justice which will be used to make a comparison to the International Criminal Court.

[11] See page 193.

[12]Interestingly the jurisdiction of a South African court will be triggered when a person commits an ICC crime outside the territory of the Republic and: (a) that person is a South African citizen;

Lee, R.S. 1999. *The International Criminal Court: The making of the Rome Statute. Issues, Negotiations and Results. Kluwer Law International*. Dordrecht/ Boston/London: Martinus Nijhoff Publishers.

This book covers the drafting and commentaries of the Rome Statute. In its chapter four (4) it examines the relationship between the ICC and the Security Council. Particular interest is paid to Article 13 (b) and 16 which is exactly on point in reference to this dissertation.

Politi, M, Nesi, G. 2002.*The Rome Statute of the International Criminal Court: A challenge to impunity.*Aldershot: Ashgate Publishing Limited.

This book examines the main features of the Statute, highlighting its strength and weaknesses. Work written by Elizabeth Wilmshurst who works for the Legal Service, Foreign and Commonwealth Office in London covers the International Criminal Court and the role of the Security Council. The work done in chapters 6 and 7 is also of particular interest to this paper.

Struett, M. J. 2008.*The politics of constructing the International Criminal Court: NGOs, Discourse and Agency*. England: Palgrave MacMillan.

This book analysis the political process that lead to the establishment of the International Criminal Court. Chapter six (6) of this book discusses building the Rome Statute with particular reference to the role of the Security Council and the independent prosecutor. It will therefore contribute tremendously to this work.

Williams, A Shiner, P. 2008.*The Iraq War and International Law*. Oxford and Portland, Oregon: Hart Publishing.

Interestingly this book looks at the decision by the USA and the UK governments to use military force against Iraq in 2003 and the subsequent occupation and administration of the State. That decision brought into focus sharp fundamental fault lines in international law. According to the authors the decision to invade, the conduct of the war and occupation, and the mechanisms used to administer the country all challenge the international legal community and places it at a crossroads.

This dissertation wishes to unravel the fact that this invasion and the fact that no one has yet been held accountable is a clear indication of the violation of the veto powers of the Security Council by the powerful nations. Suffice it to say that the invasion was done by two of the five permanent members of the Security Council. In chapter six of this book, the authors look at the Complicity before the International Criminal Tribunals and Jurisdiction over Iraq and more particularly the Complicity and the ICC. The Court may exercise jurisdiction over the territory of a state that has neither signed nor ratified the Statute where a situation concerning the territory of that state is referred by the Security Council. A precedent for this is Resolution 1693 (2005), by which the Security Council referred the situation in Darfur, Sudan to the Court. The United States and the United Kingdom were the two key players in the invasion of the Iraq. No one has yet been held accountable and therefore neither the UK nor the US has been referred by the other three permanent members. Interestingly the authors agree that such a referral is highly unlikely because the United States and the United Kingdom have the power to veto such action by the Security Council.[13]

Politi, M, Nesi, G. 2002. *The International Criminal Court and the Crime of Aggression.* Hants, England: Ashgate Publishing Limited.

The crime of aggression is important to note because finding a definition for that crime was one of the major obstacles which faced the establishment of the ICC. Nations could not agree on a suitable definition and as such the draft of what became the Rome Statute was prolonged. According to the author the reason for the difficulty can be pinned down to the overshadowing by political *bras de fer.*

Furthermore the article explores the question of the relationship between the International Criminal Court and the Security Council, with a view to clarify the conditions for the exercise of the Court's jurisdiction over the crime of aggression. The relationship between the ICC and the Security Council with respect to the crime have been made difficult as a result of the fact that at the time of constructing the Charter design the international judicial system did not include a permanent international criminal instance. Thus, the drafting of the wide and

[13] See page 151.

powerful prerogatives of the Council did not necessarily foresee the role of other future institutions such as the ICC.[14]

Reus-Smit, C.2004. *The Politics of International Law.*Cambridge, UK:Cambridge University Press.

This book is of particular importance to this dissertation as it brings out the fact that there is a close link between the Security Council and hence politics and international law as a whole.

Attention is drawn to the permanent five and more particularly the USA of the Security Council. The author maintains that for the USA, the ICC represented both an opportunity and a risk. The USA fully subscribes to the notions of human dignity inherent in the assertion of international criminal jurisdiction over genocide, crimes against humanity, and war crimes. Moreover, the United States conceives of itself as a nation dedicated to the rule of law, both at home and abroad. Accordingly at the same time, the US generally resists surrendering ultimate decision-making authority to international tribunaland institutions. This I believe is one of the reasons why the USA plays such a powerful role in the UN Security Council.

Dugard J & Van den Wyngaert, 1996.*International Criminal Law and Procedure.* Dartmouth: Aldershot, England.

Although this book was written some time back it is important and helpful in the understanding of the need for an International Criminal Court in the New International World Order.

Articles

Joseph, D. 2009.'Human Rights in Africa: Legal Perspective on their own Protection and Promotion.' Windhoek: Konrad Adenauer Stiftung & Individual Authors.

[14] See page 77.

Bangamwabo,X.2008.'International Criminal Justice and the Protection of Human Rights in Africa'. *Namibian Law Journal,* Vol 4, 98.

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Chapter Two: Establishment of the International Criminal Court

The establishment of an International Criminal Court (ICC) has been dominating the international agenda for much of the many centuries. While efforts to create a global criminal court can be traced back to the early 19th century, the story began in earnest in 1872 with Gustav Moynier – one of the founders of the International Committee of the Red Cross, who proposed a permanent court in response to the crimes of the Franco-Prussian War.[15] The world witnessed two wars which contributed immensely to the degradation and loss of humanity on a great scale. After World War I, unsuccessful attempts were made to bring the German Emperor to trial before an international tribunal and later to try Turks responsible for the genocide of Armenians before a tribunal designated by the Allied Powers.[16] One of the earliest conventions was the Convention for the Prevention and Punishment of Terrorism which was drafted in response to the assassination of King Alexander I of Yugoslavia by Croatian nationalists in Marseilles and thereafter treaties were drafted to outlaw international terrorism and to provide for the trial of terrorist before an international tribunal.[17] However states lost interest as war approached and no state ratified the treaty for an international criminal court and only one ratified the treaty outlawing international terrorism.[18]

After 1945 two monumental tribunals arose out of the ashes of World War II: The International Military Tribunals at Nuremberg, Germany and Tokyo, Japan.The establishment of these international military tribunals led to the prosecution of the principal leaders of the Nazi and Japanese regimes after World War II for crimes against the peace, war crimes and crimes against humanity was a natural culmination of the pre-war debate over an international criminal court.[19] It was these two tribunals which motivated the United Nations to commission the

[15]Mehr Iran, '*History of the Establishment of the International Criminal Court'*http://mehr.org/History.htm; last accessed on 10 October 2011.

[16]Dugard J, *International Law: A South African Perspective*, 3rd Ed (2008), 148, Cape Town: Juta and Company Ltd at 174. In the 20th century, the world witnessed a multitude of wars and humanitarian issues. Starting with the genocide of the Jewish population at the hands of Hitler's Third Reich, an unprecedented number of such acts of genocide have reached the eyes and ears of the global community.

[17]*Ibid.*

[18]*Ibid.*

[19]*Ibid*.

International Law Commission to begin work on the draft statute of an international criminal court.[20]

Following the Nuremberg Judgment, an international congress met in October 1946 in Paris and talks were raised for the adoption of an international criminal code prohibiting crimes against humanity and for the prompt establishment of an international criminal court (ICC).[21]

Following this in 1948 the United Nations adopted the Genocide Convention in which it called for criminals to be tried "by such international penal tribunals as may have jurisdiction" and invited the International Law Commission (ILC) "to study the desirability and possibility of establishing an international judicial organ for the trials of persons charged with genocide."[22] While the ILC drafted such a statute in the early 1950s, the Cold War stymied these efforts and the General Assembly effectively abandoned the effort pending agreement on a definition for the crime of aggression and an international Code of Crimes and as such through this acknowledged that there was a need for a permanent international criminal court. Since that time the need to establish an international criminal tribunal which would establish a permanent court has been debated on periodically an continuously.

Between the period of 1949 and 1954 the ILC drafted statutes for an ICC, but there as opposition from powerful states on both sides of the Cold War and the General Assembly mainly because the nations could not agree on a definition for the crime of aggression and a Code of Crimes, however in 1974 an agreement was reached.[23]

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[20] *ibid;*

[21] Mehr Iran, *History of the Establishment of the International Criminal Court'* http://mehr.org/History.htm; last accessed on 10 October 2011

[22] In resolution 260 of 9 December 1948, the General Assembly, "Recognizing that at all periods of history genocide has inflicted great losses on humanity; and being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required", adopted the Convention on the Prevention and Punishment of the Crime of Genocide. Article I of that convention characterizes genocide as "a crime under international law", and article VI provides that persons charged with genocide "shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction . . ." In the same resolution, the General Assembly also invited the International Law Commission "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide . . ." www.un.org/icc-established.htm; last accessed on 10 October 2011.

[23] S Banuri 'The establishment of the international criminal court: a game-theoretic approach' (2007) Richardson, Texas. For a discussion including the crime of aggression seeDugard J, *International Law: A South African Perspective*, 3rd Ed (2008), 148, Cape Town: Juta and Company Ltd at 501-510.

By the 1980's a wide range of factors such as the increase in the number of international crimes in treaties outlawing hijacking, hostage-taking, torture, seizure of ships on the high seas amongst others combined to strengthen the case for an international criminal court.[24] The Cold War was the final contributing factor and as such the idea of a permanent criminal court for the world was placed back on the international agenda. This was through a proposal by Latin American States who envisaged such a court as their last resort to prosecute international drug-traffickers.[25]

At the end of the Cold War from the period of 1989, there was an increase in the number of United Nations peacekeeping forces. Even though these were active since the peacekeeping missions of the United Nations Emergency Force in the Middle East (UNEF), they increased following other atrocities. Following the conflict in the former Yugoslavia in which war crimes, crimes against humanity and genocide-in the guise of 'ethnic cleansing' the attention of the international community was urgently drawn to focus on the establishment of an international court. Wars in Bosnia-Herzegovina and Croatia, including clear violations of the *Genocide* and *Geneva Conventions*, lead the UN Security Council to establish a temporary *ad hoc* tribunal for the Former Yugoslavia (in 1993) and strengthen discussions for a permanent Court. Resolution 827 of 25 May 1993 set up the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.[26] Mention can be made here that the *ad hoc* tribunal for the Former Yugoslavia is a sister tribunal to the International Criminal Tribunal for Rwanda (ICTR) was born by virtue of Resolution 955 on the 8th of November 1994 and which was established in response to the atrocities committed respectively in the territory of Rwanda.[27]The creation of these tribunals forms part of the obligations of the Security Council as a peace-keeping body. However *ad hoc* tribunals takes time to establish and are costly and therefore

[24] *ibid;*
[25] *ibid*;
[26] See further the article by X. Bangamwabo. International criminal justice and the protection of human rights in Africa' 485
[27] Available at http://www.ictr.org/default.htm; last accessed on 10 October 2011. Atrocities at the hands of Slobodan Milosevic in the former Yugoslavia and the ethnic Hutu tribe militia groups in Rwanda occurred in the 1990's. These events led to the establishment of the two *ad hoc* tribunals.

some authors argue that this is why the drafters of the ICC included the Security Council.[28] The Rome treaty was from this stance also motivated by a desire to solve collective action problems and to reduce the transaction costs inherent in the establishment of theses *ad hoc* tribunals.[29]

Following this from June 15 – July 17, 1998, 160 countries participated in the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court in Rome, Italy. Member states overwhelmingly voted in favour of the Rome Statute of the ICC, creating the treaty establishing the first permanent international court capable of trying individuals accused of *inter alia* genocide, war crimes and crimes against humanity.[30]

2.1. Why an international tribunal?

According Bassiouni[31] any inquiry into the merits of an international criminal court must start with resolving three basic issues:

a. Can the tribunal improve international cooperation in law enforcement, add to the capabilities of the various nations in matters of international criminal law, or contribute in any incremental way to the solution of international and transitional criminal law problems by improving the current practise and enhancing the effectiveness of all concerned?
b. Will the recommended system have a better or equal chance of operating as effectively as the best existing systems of national criminal justice?
c. Will the recommended system improve efficiency and cooperation without cuasing additional problems of a magnitude as great or greater than the solutions it presents?[32]

[28]Jianqiang, S. 2007. '*Article 13 (b): Intentionally left unresolved by the Rome Statue? An on-the-spot focus on Darfur's situation'*. China: Harbin Institute of Technology Harbin, pg2.
[29]Wippman, D. 2004. *The Politics of International Law: The International Criminal Court*. Cambridge: Cambridge University Press, pg153.
[30]Mehr Iran, *History of the Establishment of the International Criminal Court'*Available at http://mehr.org/History.htm; last accessed on 10 October 2011.
[31]CherifBassiouni M, Blakesly C L. 1992. 'The Need for an International Criminal Court in the New International World Order.'*Vanderbilt Journal of Transnational Law,* 25, pp 151-80.
[32]*ibid*

When Bassiouni[33] wrote his article 1992, he was of the opinion that if the tribunal is burned with the unrealistic expectation that it will resolve all problems of international and transnational criminality, then it is set for failure. I agree with the author because the burden is too heavy and it was not guaranteed that all persons responsible for the crimes over which the court would have jurisdiction will be found and brought to justice. It is imperative to know who the key players to the ICC were, their interests, objections and how they generally contributed to the establishment of the ICC. In establishing an international criminal court, all nations present had certain hopes and expectations relating to the possibilities and success the court would bring.

2.2. Key players in the establishment of the ICC

To understand what transpired in Rome, one must consider the reasons for the actions of the various actors' involved and their interests. These actors included both States and NGO's alike.

At the adoption of the Rome Statute at the Rome Conference in 1998, most if not all nations were present since the establishment of such tribunal had the potential to impact all nations. It is thus true that all nations were key players contributing to the court. After five weeks of negotiations, 120 countries voted to adopt the treaty with only seven (7) countries voting against it.[34] Interestingly Banuri[35] classify the key players into four main categories, namely the "Like-Minded" group (led by the Western European countries), the "Nonaligned Movement" (led by India and the Gulf nations), the P-5 (led by the United States), and the "Nongovernmental Organization Coalition for an International Criminal Court (CICC)", which was led mainly by humanitarian-work based international organizations[36]

[33] *ibid.*

[34] Dugard J, *International Law: A South African Perspective*, 3rd Ed (2008), 148, Cape Town: Juta and Company Ltd at 177. The countries which voted against it included China, Israel, Iraq and the United States and 21 countries abstained.

[35] S Banuri 'The establishment of the international criminal court: a game-theoretic approach' (2007) Richardson, Texas. 162

[36] *ibid.*

2.2.1. Interests

All the countries that were present at the Rome Conference were in favour of the creation of an international court. All the countries present further understood that they were creating a legal institution- a criminal court with a defined jurisdiction over specified crimes and with formal procedures for the initiation and conduct of investigations, the indictment and trial of alleged offenders, and the sentencing and incarnation of those convicted.[37] However, while the Like-Minded group and the CICC were clearly in favour of the court, the nonaligned nations and the P-5 had concerns over granting the body too much power. The main reason for the P-5's hesitation was that of state sovereignty wherein they claimed that an all-powerful judicial body could be misused as a political tool and thus must not be allowed to interfere with the internal workings of states.[38] According to Wippman[39] the entire enterprise of creating the ICC did not fit comfortably within the realistic framework. He contends further that States wishing to maximise their freedom of action internally and internationally in general have an interest in insulating their conduct from any authoritative external review and assessment.[40]

One of the main concerns of the nations classified under the nonaligned movement was against the court because of the enormous influence the UN Security Council would have over the court. Clearly, they could not trust the veto-power states of the Security Council with overseeing the court. Furthermore, they also wanted nuclear weapons prohibited as well, which directly went against the interests of both the P-5 and the Like-Minded groups. Eventually, however, the nonaligned movement dissolved as most of the countries in question decided to abstain from voting for the court. Finally, while the CICC had no direct role in the vote for the establishment for the ICC, their support was nevertheless quite valuable to the Like-Minded states. The trusted NGO's not only provided technical expertise (though it was biased in favour of establishing the courts),

[37]Wippman D (2004). The Politics of International Law: The International Criminal Court. Cambridge University Press: Cambridge, pg154.
[38]Supra.
[39]*ibid.*
[40]*ibid.*

they were also in a clear position to sway the opposing nations voting decision on this issue by mobilizing grass-roots movements in the democratic countries.[41]

Further, the countries which opposed the court opposed the jurisdiction of the court on the basis of the crimes it had the jurisdiction over. Under article 5 crimes which falls into the jurisdiction of the ICC includes the crime of genocide, crimes against humanity, war crimes, and the crime of aggression", collectively referred to as "the core crimes of international humanitarian law."[42] This was solely because of the inclusion of nuclear weapons and internal conflicts (under war crimes) and the definition of a "crime of aggression".[43]

2.2.2. The ICC established

The events that led to the creation of the ICC are thoroughly discussed above. However the outcome of the ICC and what it is today is somewhat debated in a negative light. According to Wippman[44] if politics is understood broadly, to encompass, as suggested by Rues-Smit, purposive and identity-constitutive form of reason and action as well as those based on material interests, then the outcome in Rome was determined by politics.

The Rome Statute came into force upon 106 countries ratifying same. On May 13 1999 the Coalition for the International Criminal Court launched a campaign from The Hague calling for the world-wide ratification of the Statute.[45] The deadline for signatures to the Statute was December 31 2000 and on 11 April 2002, 66 countries ratified and as such the International Criminal Court came to live.

[41] *ibid*.
[42] Article 5 'Crimes within the jurisdiction of the Court.'The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.
[43] Article 5 (2) of the Rome Statute states: The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.
[44] Wippman, D. 2004. 'The International Criminal Court.'Reus-Smit, C. (Ed.)*The Politics of International Law*. Cambridge, UK: Cambridge University Press, 153.
[45] Banuri S. 2007. '*The establishment of the international criminal court: a game-theoretic approach.'* Texas: Richardson Publishers,162.

Interestingly Senegal was the first country in the world to ratify the Rome Statute on 2 February 1999.[46] One significant absentee as a ratifier is the United States.

The ICC is situated in The Hague, in the Netherlands. On March 11 2003 the first 18 judges of the court were sworn in during a high-level ceremony in The Hague, the Netherlands and subsequent to the first Prosecutor, Mr Luis Moreno-Ocampo was also sworn in.[47] Of the 18 judges, three are from Africa, including Judge NaviPillay who is South African.[48]

2.2.3. Objects

'In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through till the end. We ask you . . . to do yours in our struggle to ensure that no ruler, no State, no junta and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished.'[49]

The main object of the ICC is clear from reading this chapter and it is simply a tribunal which was established to prosecute any person who is responsible for any of the crimes mentioned in the Statute establishing it. The objects can thus be summarised as follows:

1. To promote peace and justice. The ICC is special in the sense that it prosecutes individuals for crimes committed as opposed to the ICJ which deals with states only. This is evident when one looks at some of the

[46]Dugard, J. (3rd Ed). 2008.'*International Law: A South African Perspective.*' Cape Town: Juta and Company Ltd at 177. May 6, 2002 The U.S. government under the Bush Administration formally announces to the United Nations its intention *not* to ratify the Rome Statute, and its view that it is no longer bound by the terms of the treaty, implied by its signature under the Clinton Administration in December 2001.

[47]Banuri S. 2007. 'The establishment of the international criminal court: a game-theoretic approach' Texas: Richardson Publishing, pg162

[48]Dugard J, *International Law: A South African Perspective*, 3rd Ed (2008), 148, Cape Town: Juta and Company Ltd at 178.

[49] *-Kofi Annan, United Nations Secretary-General.*

atrocities committed but for which no individuals were held accounted for.[50]

2. To end impunities.
3. To aid in ending conflicts[51]
4. To remedy the deficiencies of ad hoc tribunals[52]
5. To take over when national criminal justice institutions are unwilling or unable to act.[53]

2.2.4. Jurisdiction

The Rome Statute established the ICC and as such it sets out the perimeter within which the court exercises jurisdiction. This is regulated by Article 5 which provides as follows:

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

   (a) The crime of genocide;
   (b) Crimes against humanity;
   (c) War crimes;

[50] In the last 50 years, there have been many instances of crimes against humanity and war crimes for which no individuals have been held accountable. In Cambodia in the 1970s, an estimated 2 million people were killed by the Khmer Rouge. In armed conflicts in Mozambique, Liberia, El Salvador and other countries, there has been tremendous loss of civilian life, including horrifying numbers of unarmed women and children. Massacres of civilians continue in Algeria and the Great Lakes region of Africa. Available at www.un.org.html; last accessed on 10 October 2011. 'For nearly half a century -- almost as long as the United Nations has been in existence -- the General Assembly has recognized the need to establish such a court to prosecute and punish persons responsible for crimes such as genocide. Many thought . . . that the horrors of the Second World War -- the camps, the cruelty, the exterminations, the Holocaust -- could never happen again. And yet they have. In Cambodia, in Bosnia and Herzegovina, in Rwanda. Our time -- this decade even -- has shown us that man's capacity for evil knows no limits. Genocide . . . is now a word of our time, too, a heinous reality that calls for a historic response.'-- Kofi Annan, United Nations Secretary-General

[51] 'There can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstance.' -- Benjamin B. Ferencz, a former Nürnberg prosecutor.

[52] *Ad hoc* tribunals are normally limited to time and place and this creates problems as certain individuals escapes prosecution in this way.

[53] 'Crimes under international law by their very nature often require the direct or indirect participation of a number of individuals at least some of whom are in positions of governmental authority or military command.' -- Report of the International Law Commission, 1996

(d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

This topic will be discussed thoroughly in the preceding chapters.

2.2.5. Conclusion

This chapter aimed at looking at the establishment and development of the ICC. I discussed the initial reasons why there was a need for a permanent institution which would cater for the international community to preserve, uphold and stretch the cover of justice to all human beings. It became clear that the idea of such an institution was opposed by the most powerful nations, simply because of the constraint it might bring to their actions and affairs. Be that as it may, the court became established and came into force in July 2002. Its success and failures are yet to be measured in due time.

Chapter Three: IMPLICATIONS OF ARTICLE 13 (b) OF THE ROME STATUTE

The Rome Statute which establishes the ICC grants the United Nations Security Council (UNSC) certain powers pertaining to prosecutions before the ICC. Article 13 in its entirety deals with instances in which the ICC can exercise jurisdiction and how this jurisdiction would be triggered. Article 13 (b) specifically provides as follows:

> 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:
>
> (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the UNSC acting under Chapter VII of the Charter of the United Nations.[54]

This article thus makes it clear that the UNSC is empowered to make referrals for prosecution of individuals if it is of the opinion that one or more of the above mentioned crimes have been committed. This is a trigger mechanism which is parallel to the powers of the Prosecutor and State parties to the Rome Statute.[55]

The most important departure in understanding this power is with reference to Article 103 of the UN Charter read together with Article 39. These provide as follows:

1. Firstly the United Nations Charter under article 103 is posed to be above all treaties privately entered into by the Member States.[56]
2. Article 39 of the UN Charter gives the UNSC the duty to determine the existence of any threat to the peace, breach of the peace, or act of aggression and to make any recommendations, or decide what measures to be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

[54] Article 12 of Rome Statute of the International Criminal Court (2002) For ease of reference the crimes referred to in article 5 are the crime of genocide, crimes against humanity, war crimes and crimes of aggression. It should be borne in mind that the ICC does not have universal as it is restricted under article 12 of the Statute to try those cases only which are referred to it by the member states for which the place of crime and the nationality of the criminal should be associated with the member states.
[55] Article 13 of the Rome Statute of the International Criminal Court (2002)
[56] Article 103 of the United Nations Charter (1948)

This means that article 39 will in most cases override any treaty so entered between any member states to the UN. The UNSC can therefore take an action against any member of the UN. One might say that this amounts to universal jurisdiction, but this article does not give exclusive power to the UNSC but imposes only a primary duty.[57]

The involvement of the UNSC in the affairs of the ICC invites several questions. Firstly why is the Security Council; an organ that is popular for being a political playground for a few big powers of the world given such a special power tool? One must bear in mind that of the five permanent members of the UNSC only two have actually ratified the Rome Statute yet they are bestowed with the ability to refer others to prosecution. The fundamental question is: would they ever make referrals of cases involving their own nationals? Lastly why can the UNSC ignore the provisions of article 12 of the Rome Statute?

The involvement and the powers given to UNSC are disadvantageous to the progress of international criminal law and relations on three grounds:

1. The UNSC is an overly politicised organ, which serves mainly the interest of the rich and powerful nations of the world.
2. The fact that the UNSC can make referrals of individuals or states who are not state parties to the Rome Statute is in direct violation of the set principle of State Sovereignty and indirectly against article 4 of the Rome Statute. It is also in violation of the law of treaties.
3. The powers given to the UNSC in terms of article 13 (b) undermines the courts independence and creditability.

3.1. The Security Council

The UNSC is the executive body of the United Nations and under the Charter its primary responsibility is to maintain international peace and security.[58] It is one of the worlds' most powerful forums devoted to peace and security issues and

[57]Ashutosh Tripathi '*Intervention of Security Council in International Criminal Court'*Available at http://www.legalindia.in/intervention-of-security-council-in-international-criminal-court; last accessed on 28 July 2011.
[58]Dugard J. (3Ed). 2008. *International Law: A South African Perspective*, Cape Town: Juta and Company Ltd, 485.

because it is so gigantic it is impossible to sum up it total its entire structure, procedure and resolutions. Therefore a snapshot of its composition will be outlined here.

The UNSC was established in 1945 and since then it has contributed immensely to the development of international law. According to Sir Michael Wood[59] the UNSC has made significant contributions in many fields such as statehood, recognition and non-recognition; the law of treaties; state responsibility; international criminal law; international humanitarian law, and international human rights law.

The UNSC is made up of 15 members of which 5 are permanent and 10 are not.[60] The five permanent members are the United Kingdom, United States, China, France and Russia and are commonly referred to as the P-5.[61] Each member has one vote and decisions on procedural matters are made by an affirmative vote of at least 9 of the 15 members. Decisions on substantive matters require nine votes and the absence of a negative vote by any of the five permanent members.

The powers and functions of the UNSC are entrenched in the UN Charter and particular focus is on Chapter VII which outlines the actions the UNSC can take to ensure that the international community enjoys peace and security. This primary object to maintain international peace and security assumes precedence over all other commitments of the Organizations.[62] Accordingly when a situation that concerns a threat to peace is brought before it, the Council's first action is usually to recommend to the parties to try to reach an agreement by peaceful means.[63]

According to K Mahbubani[64] the Council is a dynamic institution, constantly changing and adapting to new realities and demands. He argues that expectations of the Council have shifted over the decades. In the early years its

[59] Wood, M. 2006.'*The United Nations Security Council & International Law.'KCMG,* VolNo. 1, 1.
[60] United Nations Charter, article 23.
[61] *ibid.*
[62] Jain N. 2005. '*A Separate Law for Peacekeepers: The Clash between the UNSC and the International Criminal Court.'* EJIL Vol No.239, 242.
[63] Available at http://www.un.org/Docs/sc/unsc_background.html;last accessed on July 28 2011.
[64] MahbubaniK. 2004. '*The Permanent and Elected Council Members'* D M Malone, *The UN Security Council: From the Cold War to the 21st Century,* 254.

main function appeared to be the institutionalization of a concert of powers, legitimizing the great power status of the permanent five and ensuring that the UN did not undertake a collision course with any of them.[65] In the 1900's following the end of the Cold War, the Council gradually transformed itself into a problem-solving institution, living up partially to the founders' vision of providing collective security.[66]

Under Article 25 of the United Nations Charter, all members of the UN agree to accept and carry out the decisions of the UNSC and as such the Council alone has the power to take decisions which member states are obliged under the Charter to implement.[67] Even though the UNSC enjoys an extensive range of powers under the UN Charter, it cannot act outside the law.[68]

3.1.1. The UNSC as a Political Organ

"Power without Law is despotism. But the efficacy of the protection exercised by a judicial organ is, of course, in the last analysis always dependent on the support of the dominant part of the community."[69]

The UNSC is a creature of Statute and as such it is bound by that Statute but it is overly criticised by many for being a political body which mostly serves the interests of the permanent members. Sir Michael Wood refers to Rosalyn Higgins who said in her book '*The development of international law through the Political Organs of the United Nations'* that the voting patterns of the UNSC to some extent conform to political pressures rather than to legal beliefs.[70] The preceding chapter mentioned that as an independent permanent institution, the ICC will only be able to guarantee a fair trial when it cannot be pressured or manipulated by political, religious or other external powers. This means that the involvements of a political organ in the affairs of an independent institution will undoubtly taint the effectiveness and partiality of the said institution. The ICC commands

[65] *ibid.*
[66] *ibid.*
[67] 2008. *The United Nations Today*. Available at www.un.org; last accessed on 28 August 2011.
[68] Jain N. 2005. '*A Separate Law for Peacekeepers: The Clash between the UNSC and the International Criminal Court.'* EJIL Vol No.239, 242.
[69] *Ibid*.
[70] *ibid.*

widespread respect and it is thus paradoxical that its legitimacy should be undermined by the Security Council, an organ entrusted with the maintenance of international peace.[71]

Mention should be made here that the UNSC is an auspice of the United Nations and there are 216 member states to the UN Charter. However there are only 106 delegates to the Rome Statute as at July 2002. The natural anticipation was that most if not all members of the UN would support a permanent international court that would guard against crimes committed against the common human family. However this has not found the support it should have when one look at the amount of states that has signed and ratified the Rome Statute. Most nations of the world have refused to sign because they are hesitant enough to recognize the amount of control that the UNSC exercises over the functioning of the ICC.[72] They are of the view that how a political organ like the UNSC can exercise control over a judicial organ like the ICC raises doubts about the independency of the ICC as they fear that it ultimately leads to ICC being controlled by few powerful nations of the World. Apart from this it also leads to a situation in which the ICC is being controlled by those States which are not even the members of the ICC.[73]

3.1.2. The UNSC and the International Criminal Court

The Rome Conference aimed at hammering out a treaty that would create a court with a defined structure, composition, and powers, identify proscribed behaviour, and the circumstances under which the court could adjudicate that behaviour, and establish obligations on state parties to support the work of the institution. With that in mind however, the drafters of the Rome Statute of the ICC incorporated the UNSC in the affairs of the ICC this despite the fact the ICC is not a creature of the UN. The Statute provides for a prominent and wide-ranging involvement of the UNSC in the proceedings of the ICC as a powerful over-

[71] Jain N. 2005. '*A Separate Law for Peacekeepers: The Clash between the UNSC and the International Criminal Court.'* EJIL Vol No.239, 242.
[72] Available at http://www.legalindia.in/intervention-of-security-council-in-international-criminal-court; last accessed on 28 July 2011.
[73] *ibid.*

politicized organ with an established record of side-lining legal considerations.[74] In article 17 of the Negotiated Agreement between the International Criminal Court and the United Nations the relationship between the SC and the ICC is outlined.[75] It refers particularly to articles 13 (b), 16, and 87 (5) (b) or (7). It is with reference to these articles that this work will discuss how the UNSC is involved in the affairs of the ICC.

Article 13 (b) is of particular importance as it acknowledges the enforcement powers of the UNSC acting under the United Nations Charter to refer a situation for prosecution to the ICC.

Lionel Yee[76] puts as follows:

> The legislative target of Article 13 (b) is to avoid a special tribunal by the Security Council. Although there were some representatives drastically opposing the Security Council's referral power because of their concerns over the independence and the reliability of the Court, the potential issues of discrimination against smaller countries and the exception of big powers, and the lack of judicial powers of the Security Council, most representatives accepted the Security Council's situation referral power according to the existing stipulations of the UN Charter.

3.2. State Sovereignty and Law of Treaties in International Law

The second crucial implication of article 13 (b) is the fact that the UNSC can ignore the provision of article 12 which deals with preconditions to be met before the ICC can exercise jurisdiction. Article 12 provides as follows:

> 1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
> 2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

[74] M Politi, G Nesi. The Rome Statute of the International Criminal Court: A challenge to impunity (2002) Ashgate Publishing Limited 43.

[75] *Negotiated Relationship Agreement between the International Criminal Court and the United Nations*.Available at www.un.org; last accessed on 28 July 2011.

[76] Lionel Y, 2002. "*The International Criminal Court and the Security Council: Article 13 (b) and 16*.'In Roy S L (Ed.) *The International Criminal Court: the Making of the Rome Statute, Issues, Negotiations, Results*. Kluwer Law International p. 143-152.

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
(b) The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Subsection 2 specifically leaves out article 13 (b). This has important implication on State consent as under this article the UNSC may refer any situation to the Prosecutor irrespective of whether it involves the territory or nationals of a State party. This allows the Council to initiate a process leading to the prosecution of individuals who have committed a crime on the territory of, or who are nationals of, States which are not party to the Statute, and in the absence of those States consent.

This is a direct violation of sovereignty and given the political nature of the Security Council, and the existence of the veto power, it would mean that some states especially the permanent members of the UNSC will be protected by the referral. Therefore this part of the Statute should be altered or limited. Other authors such as S Jianqiang[77] contend that the referral stipulation is crucial in the creation and development of international criminal justice, in order to relieve the UNSC from its "fatigue", and to establish a flexible mechanism of "uniform criminal judicial order". If the crimes in non-signatory states could be left alone because of the "complementarity principle" of the Statute, it would deviate from the universal justice of jus cogens, even though it keeps an equal distance from the power politics.[78]

Article 4 of the Statute which is entitled "Legal Status and Powers of the Court" provides:

The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other state.

[77]JianqiangS. 2007. '*Article 13 (b): intentionally left unresolved by the Rome Statue?An on-the-spot focus on Darfur's situation'*. China: Harbin Institute of Technology Harbin, p2.
[78]Supra.

Article 4 implies that before the ICC can exercise its functions and powers on a territory of a state which is not a party to the Statute, then there should be a special agreement between the ICC and that particular state wherein it accepts the jurisdiction of the ICC. It should be noted that the ICC does not have universal jurisdiction under its statute and can thus not prosecute any individual anywhere in the world at any time.[79]

3.2.1. The law of Treaties

International law may be defined as a body of rules and principles which are binding upon states in their relations with one another.[80] A treaty is a contract that regulates the relations between two states. According to Dugard[81] international organizations are created, peace is made and disputes are settled, air and sea transport is facilitated, trade is conducted, and a wide range of inter-state relations are fostered through the medium of the treaty, a written agreement between states. A State can only be bound by a treaty if it has signed and ratified the said treaty. Therefore it can be said that where no contract exists between two states there can be no obligations *inter se.*

With that backdrop in mind, how is it that States are bound by the Rome Statute which is a treaty establishing the ICC if they have neither signed nor ratified it? The answer can be found in Article 103 of the UN Charter. It provides as follows:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Under the UN Charter all member states have a general obligation to maintain peace and security.[82] This means that at all times all members to the UN shall

[79] Article 12 of the Rome Statute of the International Criminal Court (2002)
[80] Dugard J. (3Ed). 2008. *International Law: A South African Perspective*, Cape Town: Juta and Company Ltd, 485.
[81] *ibid*.
[82] Article 1 provide for the purpose of the Un to be *inter alia: '*To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.'

respect and maintain international peace, justice and security. Therefore where any member violates the principles of international law, then because it is bound by the UN Charter it shall be automatically bound by the actions and decisions of the Security Council.[83]

3.2.2. State sovereignty

New States acquire sovereignty once they become recognized as States. New States are emerging as the result of political and juridical developments in the international community to stabilize global conditions of independence, statehood, and governing sovereignty.[84] According to P Nagan, C Hammer[85] Sovereignty may refer to:

- Sovereignty as a personalized monarch (real or ritualized);
- Sovereignty as a symbol for absolute, unlimited control or power;
- Sovereignty as a symbol of political legitimacy;
- Sovereignty as a symbol of political authority;
- Sovereignty as a symbol of self-determined, national independence;
- Sovereignty as a symbol of governance and constitutional order;

Suffice it to say that sovereignty combines most of these concepts to form a state that is independent from any other power, influence or group. Another important meaning associated with the concept of sovereignty identifies it with ultimate effective political power. It has also been identified with the nature of law itself.[86] It is important to consider what a state is in order to understand how a state is recognised and how it attains sovereignty. Subjects of international law are States, inter-governmental organizations and as such they are accepted as international persons with rights and duties under international law.[87] According to the Montevideo Convention of 1933 a state is defined as:

[83] Article 25 provides: The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.
[84]Nagan, P, Hammer C. '*The* C*hanging character of sovereignty in international law and international Relations'* Eritrea: University of Asmara.
[85]*ibid*.
[86]*ibid.*
[87]Dugard J. (3Ed). 2008. *International Law: A South African Perspective*, Cape Town: Juta and Company Ltd.

The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.[88]

Once a state is sovereign it enjoys control over its boundaries and people. Accordingly traditional international law requires a State to control a territorial base with determinable boundaries. It further requires a State to control a population connected by solidarity, loyalty, and primary notions of group affiliation and identity. There is further the related aspect of internal governance that requires controlling internal power and competencies as well. The fourth traditional criterion is the requirement of a controlling competence to represent the State or territorially organized body politic in the international environment.[89]

The domestic affairs of a sovereign state may not be interfered with according to the UN Charter.[90] It is for this reason that some international criminal law scholars see sovereignty as the enemy. It is seen as the sibling of *realpolitik*, thwarting international criminal justice at every turn.[91] This non-interference principle which is deeply rooted in international law can be seen an obstacle to justice in the international arena. It is for this reason that a permanent international criminal court was needed.

However is the ICC not a threat to sovereignty given the powers granted to a body such as the Security Council? SIt is submitted that the threat is not the ICC but the UNSC in the affairs of the ICC. Some authors argue that the ICC significantly alters the charter and international law generally while other contends that it does not. Cryer R[92] is of the view that it does not. He states that:

[i]t is not a supranational body, but an international body similar to existing ones . . . The ICC does no more than what each and every State can do under existing international law . . . The ICC is therefore an extension of national criminal jurisdiction . . . Consequently the ICC . . .[does not] . . . infring[e] on national sovereignty.

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[88] *ibid*.

[89] Nagan, P, Hammer C. '*The Changing character of sovereignty in international law and international Relations'* Eritrea: University of Asmara.

[90] H.E. Judge Sang-hyunSong '*The Independence of the ICC and Safeguards Against Political Influence'.* Judge at Appeals Chamber of the ICC, The Hague, the Netherlands.Available from www.iccnow.org; lastaccessed on 28 July 2011.

[91] CryerR. 2005. '*International Criminal Law* vs*State Sovereignty: AnotherRound?*' 16 EJIL979, 980

[92] *ibid.*

3.3. INDEPENDENCE OF THE ICC

Lastly the involvement of the UNSC in the affairs of the ICC undermines the independence and creditability of the court. It installs a lack of trust in the ICC simply because of the control the Security Council. This is true when one looks at article 16 of the Rome Statute which allows the UNSC to defer a situation for a period of 12 months. Article 16 provides:

No investigation or prosecution may be commenced or proceeded with under this Statute for aperiod of 12 months after the Security Council, in a resolution adopted under Chapter VII ofthe Charter of the United Nations, has requested the Court to that effect; that request may berenewed by the Council under the same conditions.

This means that if there is case before the ICC for prosecution, then the UNSC can defer prosecution for a period which is renewable. This gives the Council serious powers which can have devastating consequences if misused.

The fact that the UNSC is an overly politicized organ is one of the arguments presented against the involvement of the UNSC in the affairs of the ICC.

The influence of the UNSC that pertains to the ICC oversteps and undermines the independence and partiality of the tribunal.

3.4. Conclusion

This chapter sought to highlight the implications of article 13 (b) of the Rome Statute. It found that the UNSC can make referrals for any individual of any state, irrespective of whether or not that state has ratified the Rome Statue for prosecution. This was found to violate the principle of state sovereignty and the principle of the law of treaties. Further it was contended that the UNSC powers of referral undermines the competence and partiality of the court. It is common that the ICC was established as independent court; however the fact that the UNSC can refer and defer prosecution makes the courts actions and inactions dependent on the whims of the UNSC.

Chapter Four: Case Study One

4.1. Darfur, Sudan

The era of the Nazi and the Jews came and went, the South African apartheid era came and went and now the world is seeing yet another conflict stemming from an ethnic division. The situation in Darfur, Sudan was no different and it raised serious apprehensions to the international community as a whole due to the atrocities that were committed on that territory.

The conflict in the region of Darfur stems from time immemorial when seasonal fluctuations in water and grazing land had led to conflict over natural resources.[93] From the mid-1980s to the outbreak of rebellion in 2003, Darfur suffered high-intensity, large-scale armed conflicts fought with modern weapons - many of them brought across Darfur's long and virtually un-policed desert borders with Chad and Libya. When Arab nomads attempted to occupy traditional Fur land with the support of the government, the Fur responded with the mass burning of pastureland.[94] The ethnicisation of the conflict has grown more rapidly since the military coup in 1989 that brought to power the regime of Umar al-Bashir, which is not only Islamist but also Arab-centric. This has injected an ideological and racist dimension to the conflict, with the sides defining themselves as "Arab" or "Zurq" (black).[95]

The recent conflict forming centre point here began in 2003. Early on the morning of April 25, 2003, rebels from the Darfur Liberation Army, later becoming the Sudan Liberation Army (SLA), attacked the Sudan government's air base in El Fasher, capital of North Darfur state. The force destroyed multiple Antonov bombers and helicopter gunships, and seized a large amount of ammunition and heavy weapons.[96] This group later became known as the Janjaweed which comprised mainly of Darfur's Arab tribes and therefore the campaign was directed against non-Arab tribes. What ensued from this point on would be recorded as genocide because what came to the fore were reports of rape and

[93] Available at http://www.eyesondarfur.org/; last accessed on 14 August 2011.
[94] *ibid*.
[95] R.S. O'Fahey, Darfur: A complex ethnic reality with a long history. (2004).Bergen, Norway, Northwestern University.
[96] Available at http://www.eyesondarfur.org/; last accessed on 14 August 2011

mass killings, cynically supported by the Khartoum government, which was determined to retain control over the area. The reason is simple: a possible oil pipeline through Darfur.[97]

Two and a half million people were displaced with over 200 000 dead as a result of direct conflict.[98] The Fur, Zaghawa and Massalit tribal groups have been the worst affected. All these atrocities were committed on the territory of Darfur and the Janjaweed and the Government forces headed by President Omar Al Bashir emptied wide swathes of land with a scorched-earth campaign war that destroyed everything that made life possible, including wells, pumps, orchards and mosques. As international criticism of the conflict grew, the Sudanese Army took a back seat and the militias became the spearhead of the government's strategy, as they had in southern Sudan.[99] The international community were aware of this crisis and their response was initially slow because of the difficulty to access Darfur. However on 4 March 2009, Pre-Trial Chamber I of the International Criminal Court ("ICC") issued a warrant of arrest for President Omar Al Bashir for war crimes and crimes against humanity, including intentionally directing attacks against an important part of the civilian population of Darfur, Sudan, murdering, exterminating, raping, torturing, forcibly transferring large numbers of civilians and pillaging their property.[100]

Pre-Trial Chamber I found that there are reasonable grounds to believe that *inter alia* that:

A. A common plan was agreed upon at the highest level of the GoS by Omar Al Bashir and other high-ranking Sudanese political and military leaders and according to this the said civilian population was to be subjected to unlawful attacks, forcible transfers and acts of murder, extermination, rape, torture, and pillaging by GoS forces, including the Sudanese Armed Forces and their allied *Janjaweed* Militia, the Sudanese Police Force, the National Intelligence and Security Service ("NISS") and the Humanitarian Aid Commission ("HAC");

[97] *ibid.*
[98] *ibid.*
[99] *ibid.*
[100] Available at www.icc-cpi.int; last accessed on July 28 2011.

These attacks were mainly directed against Fur, Masalit and Zaghawa groups – perceived by the GoS as being close to the SLM/A, the JEM and the other armed groups opposing the GoS in the ongoing armed conflict in Darfur;

The atrocities committed against some of the people of Darfur are undoubtly grave and individuals responsible ought to be brought to justice and punished. This case highlights an instance where the powers of the Security Council pursuant to Article 13 (b) are used in accordance with the rule of law and international law. However this does not move away from the fact that the Security Council has a hand in the affairs of an independent international tribunal. It is submitted that there is opposition against the ICC because of the involvement the Security Council has in the courts affairs and as such many States have refrained from ratifying the Rome Statute due to this.

On 27 April 2007, the judges in Pre-Trial Chamber I ruled as follows:

Regarding the territorial and personal parameters, the Chamber notes that Sudan is not a State Party to the Statute. However, article 12 (2) does not apply where a situation is referred to the Court by the Security Council acting under Chapter VII of the Charter, pursuant to article 13(b) of the Statute. Thus, the Court may, where a situation is referred to it by the Security Council, exercise jurisdiction over crimes committed in the territory of States which are not Party to the Statute and by nationals of States not Party to the Statute.

Darfur, Sudan is not a member state of the Rome Statute and therefore it is technically not subject to the jurisdiction of the ICC. However the UNSC acted under article 13 (b) and an arrest warrant was against the then President Omar Al Bashir. He has not yet been arrested. What is important to note is that this is a case which involves a head of a State not a party to the Statute but the Prosecutor of the ICC Mr Luis Moreno-Ocampo clearly stated that this has no effect on the Courts jurisdiction. This was a case referred to the ICC by the Security Council under Resolution 1593 which was adopted under Chapter VII of the UN Charter. [101]

[101] Available at www.icc-cpi.int;last accessed on 28 July 2011

4.2. The United States and United Kingdom Situations

The United States and United Kingdom with several otherevaded Iraq in 2003 and thereafter occupied the territory of Iraq. The reason for this evasion was pinned down to several reasons including the disarmament of weapons of a mass distraction believed to be in the hands of the Iraq government. The US government was further of the view that Iraq has not complied with UN Resolution 1441.[102]

According to Schabas[103] there was little doubt that crimes of aggression and serious violations of international humanitarian law have been committed by armed forces of the US and UK. In February 2006 the prosecutor responded to complaints made pursuant to article 15 but he contended that the crimes committed were not sufficiently serious, in terms of the scale of their perpetrators to justify prosecution.[104]

No one has till date been held accountable for this evasion. This highlights the point made that the Security Council and especially the permanent members are favoured by the veto powers they have.

4.3. Misuse of Power?

This paper seeks to highlight the fact that the Security Council and more particularly the permanent members are prone to abusing the veto powers they are bestowed with. On December 20, 2002 during the UN Security Council session, Ambassador Martin ChungongAyafor, deputy permanent representative of Cameroon said the following in this regard:

The presence of permanent members in an institution is in itself a decisive advantage. It implies an almost perfect mastery of issues, procedures, and practices and even of what is not said. When that permanent membership is accompanied by a particular favourable relationship with

[102]United Nations Resolution 1441 Adopted by the Security Council at its 4644th meeting, on 8 November 2002. Available at http://www.un.org/Docs/scres/2002/sc2002.htm; last accessed on 29 October 2011.
[103]Schabas, W.A. 2008. '*The Iraq War and International Law'*Oxford and Portland,Oregon: Hart Publishing, 145
[104]*Ibid.*

power, there is a tendency to take advantage of that position to advance one's views and interest, sometimes to the detriment of missions of general interest that led to the establishment of the institution in the first place. Despite appearances, there is a pattern of behaviour that is shared by the members of the Council, who, willingly or not, are often tempted to believe that agreement between five is the same as agreement between 15. The Security Council would benefit from returning to its initial composition. It is composed of 15 members, but little by little, it is becoming a body of five plus 10 members. That dichotomy can only affect the transparency and the legitimacy to which we all aspire.[105]

It is against this backdrop that one should understand how if at all the powers of the Security Council are misused. This can be achieved by comprehending how the veto and voting powers work.

In terms of the Article 25 of the UN Charter the Security Council is empowered to take decisions which bind all the member states of the United Nations.[106] According to J Dugard[107] the price paid for this advance towards world government is high- the veto power vested in the five permanent members. The voting power of the members of the Security Council is regulated under Article 27 of the Charter. To veto translates to bar or prohibit and the five permanent can veto any decision taken by the Council as a whole and such decision would then have to be review or withdrawn.

Inis Claude offers a greater understanding of the privilege the five permanent members have under Article 27 of the Charter.[108] He says:

The most celebrated of the special privileges granted to the Big Five, the right to veto in the Security Council, was not so much an instrument of great power dictatorship over small states as a factor injected into the relationships of the great powers among themselves... At San Francisco the small states accepted the superiority of the mighty as a fact of life. Their first objective was to ensure that all of the great powers would accept their place in the leadership corps of the new organisation; in this they were successful, and this fact was perhaps the major basis for the hope that the objective was to constitutionalise the power of the international oligarchy; towards this end they achieved the incorporation in the Charter of a surprising array of limitations upon

[105] K Mahbubani 'The Permanent and Elected Council Members' D M Malone, *The UN Security Council: From the Cold War to the 21st Century*, 2004, 253. S/PV.4677, December 20, 2002, New York.
[106] Dugard J, *International Law: A South African Perspective*, 3rd Ed (2008), 486,Cape Town: Juta and Company Ltd.
[107] *ibid*.
[108] K Mahbubani 'The Permanent and Elected Council Members' D M Malone, *The UN Security Council: From the Cold War to the 21st Century*, 2004, 254. L I Claude Jr. *Swords into Plowshares: The Problems and Progress of International Organisation*,1963, 265.

arbitrary behaviour, including the procedural brake upon collective decisions by the great powers which was implicit in the rule of unanimity. Their third objective was to gain assurance that the most powerful members would initiate and support positive collective action within and on behalf of the organization in times of crisis; in this respect there were serious apprehensions of failure, based largely upon the fact that the veto rule foreshadowed the possible paralysis of such undertaking.

In his 1973 book *The Security Council: A Study in Adolescence* Richard Hiscocks says the veto accurately reflected the divided world in which it was so often used. It reflected also the deliberate choice of the great powers to pursue methods of diplomacy based on national power rather than to cultivate the high principles of international cooperation and tolerance on which the United Nation's Charter is based. [109]

The veto powers have been used by the permanent powers and at times inappropriately so. These veto powers have been bestowed on the Council by the Charter and originally they were designed to remedy the main weaknesses of the first half of the twentieth century: the failure to anchor the major powers in a collective security system and to ensure that no decisions were taken against their interests.[110] Accordingly Mahbubani is of the view that these powers had a negative rather than a positive function. This is true especially when one looks at Resolution 1422/1487 adopted by the Security Council 12 July 2002. In May 2002, the United Nations government announced that it would oppose the renewal of all UN Security Council mandates for peacekeeping operations unless the Council granted immunity from prosecution by the International Criminal Court (ICC) for all US peacekeeping personnel. The US vetoed renewal of the Bosnia & Herzegovina peacekeeping mission and further threatened to shut down all UN peacekeeping operations unless their demands for ICC immunity were met.[111] Resolution 1422 purported to give the Security Council the right to defer the ICC's jurisdiction in cases against personnel of non-States Parties involved in operations established or authorized by the UN. Their demands basically were that immunity be granted to all US peacekeeping personnel deployed. Many members of the UN were out outraged that the US would pit

[109] *ibid*.
[110] *ibid*.
[111] Available at http://www.iccnow.org; last accessed on 14 August 2011.

international peacekeeping against international justice. They strenuously objected to the US effort to misuse the Security Council and UN Chapter VII authority to amend a treaty that the US opposed. [112]

The position of the US in this matter illustrates more clearly how the veto powers are misused. The US has not ratified the Rome Statute but under article 13 (b) the Security Council can refer situation for prosecution even if the individual being referred is not a national of a state party. Further The Executive Branch of the United States apparently considers that a U.S. national could not be tried before the ICC if the United States does not ratify the treaty.[113]This contradicts the fact that the UNSC has referred nationals of non-state parties for prosecution, yet US nationals were granted immunity under Resolution 1422. Does this mean that some nations are exempt from the jurisdiction of the ICC?

This means that the Security Council can refer anyone to be investigated and prosecuted before the ICC irrespective of where they come from. It would seem that the US were aware of this and were even more aware of the fact that they might face a situation where one or more of their nationals face a referral. This it seems they wanted to avoid at all cost, however in so doing they have misused their veto powers.

Despite vocal opposition from representatives of over 50 governments, the Council unanimously adopted Resolution 1422.[114] Regardless of the objections from the various governments the Resolution was adopted however the Secretary-General Kofi Annan himself expressed concern, sending an extraordinary and angry letter to US Secretary of State Colin Powell. In this letter, the Secretary-General stated that the US proposal was a dangerous and irresponsible threat to peacekeeping, and would violate the Charter and international treaty law.[115] Resolution 1422 came up for renewal the following year and again this was met with much objection but it was renewed to Resolution 1487 for an additional year.[116]

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[112]*ibid.*
[113]Paust et al. 1996. 'International Criminal Law: Cases and Materials'
[114]*ibid.*
[115]Available at http://www.iccnow.org; last accessed on 14 August 2011.
[116]*ibid.*

This is but one of the few examples on how one of the permanent members of the Security Council has abused the veto powers to suit their interests. During the Cold War, both the Soviet Union and the United States used their vetoes liberally to protect their interests.[117] It is for these reasons that the configuration of the Security Council should changed. It is recommended that the number of permanent members should be expanded to include any number of states that contribute the most to the United Nations.[118] If this recommendation is too farfetched then the permanent members should be rotated. Previously the United States have made recommendations to include Japan and Germany into the permanent five but they have cautiously intimated that other states should be joined if they were to enjoy universal support.[119] They have however strictly opposed the idea of granting any developing country the right of veto. Many governments oppose the veto for its violation of the principle of sovereign equality among states and as such it is recommended that the veto powers be reformed to allow all member states a chance to rule the world.

[117]Dugard, J.(3rd Ed) 2008.'*International Law: A South African Perspective*' Cape Town: Juta& Company Ltd.
[118]*ibid.*
[119]Fassebender, B. 2004.'*Pressure for Security Council Reform*' D M Malone, *The UN Security Council: From the Cold War to the 21st Century*, 254.

Chapter Five: Conclusions and Recommendations

This paper sought to argue that the powers conferred on the Security Council in terms of Article 13 (b), are prone to weakening the independence and partiality of the court. Not only do they affect the courts independence, but they further reduce the trust nations ought to have in an international court.

This paper found that the UNSC can make referrals for any individual of any state, irrespective of whether or not that state has ratified the Rome Statue for prosecution. This was found to violate the principle of state sovereignty and the principle of the law of treaties. It is common that the ICC was established as independent court; however the fact that the UNSC can refer and defer prosecution makes the courts actions and inactions dependent on the whims of the UNSC.

As an independent permanent institution, the ICC will only be able to guarantee a fair trial when it cannot be pressured or manipulated by political, religious or other external powers.

It would be ludicrous to propose a second draft of the Rome Statute; however what can be proposed is the alteration of the involvement of the Security Council in the affairs and jurisdiction of the International Criminal Court. This includes prohibiting the Security Council from deferring prosecutions while allowing it to refer prosecution of individuals of member states only. Alternatively it is proposed that the five (5) permanent members are to rotate in order to avoid the misuse of the veto powers. Dugard[120] moreover writes that there are serious efforts to change the composition of the Security Council by expanding the number of permanent members to include states that contribute most to the United Nations financially, militarily and diplomatically and to achieve a fairer geographical distribution.

The proposals and arguments embodied in this paper are leaning towards an understanding that there should be no referrals made by the Security Council of individuals who are not member states to the Rome Statute. This is true; however

[120]Dugard, J. (3rd Ed). 2008. *International Law: A South African Perspective.*' Cape Town: Juta& Company Ltd, 148.

all individuals should stand before court for their wrongdoing, irrespective of whether or not the country from which they come from is a member state or not. The power to bring these individauls however should not be given to the Security Council. If the Security Council should play a role, then it should be an advisory role. All decisions pertaining to the prosecution ofindividuals should be left to the prosecutor and the ICC as a whole. This will ensure that the court remainsindependent, partial and will serve the interests of all nations.

One of the failures of the court is the time frame. The court's powers and therefore jurisdiction kickstarted in 2002 only after 106 ratifications and as such the court can only prosecute crimes which took place from that date onwards. It is fact that most crimes over which the court has jurisdiction took place before that date.The jurisdiction of the court should have been that it will prosecute all individuals who were responsible for violating customary international law. Therefore it is recommended that the ICC should have universal jurisdiction and should be responsible and competence to entertain matters which took place before the said date.

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