Conflicts of Norms in Situations Referred to the International Criminal Court by the United Nations Security Council

Alexandre Skander Galand

Thesis submitted for assessment with a view to obtaining the degree of Doctor of Laws of the European University Institute

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Department of Law

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Abstract

In 1998, the Rome Statute (Statute) of the International Criminal Court (ICC) was adopted with the aim of putting an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole. This thesis assesses conflicts of norms in situations where the ICC exercises jurisdiction without the consent of the State where the crimes have been committed and from where the accused is a national. According to Article 13 (b) of the Statute, if the Security Council (SC) refers a situation under Chapter VII of the UN Charter, the ICC is entitled to exercise jurisdiction over the territory and nationals of a State neither party to the Statute nor consenting to its jurisdiction. This thesis uses the concept-conception distinction to demonstrate that there are different conceptions of the concept of a referral under Article 13 (b) to the ICC. The thesis demonstrates that a referral under article 13 (b) results in the exercise of prescriptive and adjudicative criminal jurisdictions over a situation without being based on the nationality and territoriality principles. The two conceptions that are proposed of this concept are: (1) universal jurisdiction arising from the nature of the crimes; and, (2) jurisdiction based on the powers of the SC under Chapter VII of the UN Charter. The thesis confronts these two conceptions with legal barriers to the ICC's exercise of jurisdiction over nationals and territories of States neither party to the Statute nor consenting to its jurisdiction. The legal barriers examined are the sovereignty of States, the principle of legality and the immunity of State officials. Each conception of the origin of the ICC's jurisdiction over a situation necessarily entails an entirely different relationship with these legal barriers. These relationships are analysed in a comparative conflicts of norms approach. From this comparative analysis the thesis shows which conception seems to interact in the most coherent manner with the sovereignty of States, the principle of legality and the immunity of State officials. On the one hand, the thesis concludes that the universal jurisdiction conception does not cohere with international law as it currently stands. On the other hand, while the Chapter VII powers of the SC are found necessary for the Court to exercise jurisdiction over the territory and nationals of a State not consenting to its jurisdiction, they imply that the Court, when triggered under Article 13 (b), needs to adjust its exercise of jurisdiction to UN law. The thesis however argues that such adjustment does not mean that the ICC is subordinated to the SC.

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Introduction

Crimes such as genocide, crimes against humanity and war crimes are often described as being international crimes punishable by any State regardless of any territorial or nationality link to the perpetrator or the victim.[1] Under Article 5 of the Rome Statute of the International Criminal Court (Rome Statute) these crimes fall within the subject matter jurisdiction of the International Criminal Court (ICC).[2] This international organization, which was established "to put an end to impunity for the perpetrator" of "the most serious crimes of concern to the international community as a whole",[3] is according to Article 12(2) of its Statute (Rome Statute), *prima facie* limited to exercising jurisdiction if one of these crimes is committed within the territory of a State party or by a national of a State party.[4]

This limitation based on the sovereignty of States seems paradoxical in light of the statement in *Tadic Interlocutory Appeal on Jurisdiction* - three years before the adoption of the Rome Statute - that this category of crimes "are really crimes which are universal in nature [...] transcending the interest of any one State".[5] However, to say that ICC only exercises jurisdiction over the territory and nationals of

1 The International Law Commission (ILC) concluded in its 1996 Draft Code of Crimes Against the Peace and Security of Mankind that genocide, crimes against humanity and war crimes attract universal jurisdiction; Text adopted by the Commission at the forty-eighth session, in 1996, and submitted to the General Assembly in its Report on the work of its forty-eight session 6 May - 26 July 1996, GAOR, Fifty-first session, Supplement No. 10, UN doc. A/51/10, Commentary on Articles 8, 17, 19 & 20 (hereinafter ILC Draft Code of Crimes Against the Peace and Security of Mankind with commentary)

2 Rome Statute of the International Criminal Court (17 July 1998), United Nations, Treaty Series, vol. 2187, p. 3 (hereinafter the Rome Statute or the Statute). Rome Statute, art. 5 (2) reads as follows: "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." The crime of aggression is defined in art. 8bis in the Rome Statute of the ICC adopted at the 2010 Review Conference in Kampala. The Court may exercise jurisdiction over the crime of aggression, subject to a decision to be taken after 1 January 2017 by a two-thirds majority of States Parties and subject to the ratification of the amendment concerning this crime by at least 30 States Parties. As of March 2015, 23 States ratified the amendment. Since the amendment is not into force it is not covered in this thesis.

3 Rome Statute, preamble, par. 5-6.

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

5 Prosecutor v. Dusko Tadic aka "Dule", International Criminal Tribunal for the former Yugoslavia (ICTY), Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995, par. 59, (hereinafter Tadic Interlocutory Appeal Decision).

States parties' is erroneous as the drafters of the Rome Statute made, as some have termed it, a "gift" to the Security Council (SC) of the United Nations (UN).[6] Indeed, Article 13(b) of the Rome Statute provides that the preconditions of Article 12 (2) – territoriality or nationality - do not apply if "a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the United Nations".[7] In addition to the SC referral, Article 12 (3) of the Rome Statute provides that a State not party to the Statute "may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court".[8] Thus, it appears that not only can the SC take advantage of the existence of the ICC, States – like Côte d'Ivoire, Palestine and Ukraine who have done so in practice - may also do so by issuing a declaration of acceptance under Article 12 (3).[9] Even though many thought Article 13 (b) would become a dead

6 Luigi Condorelli and Santiago Villalpando, Referral and Deferral by the Security Council, in Antonio Cassese et al., The Rome Statute of the International Criminal Court: A Commentary (Oxford University Press, 2002), p. 572.

7 Rome Statute, Article 13 (b).

8 Rome Statute reads as follows: "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." See also Rule 44 of the Rules of Procedure and Evidence concerning the Declaration provided for in Article 12, paragraph 3. International Criminal Court, Rules of Procedure and Evidence, UN Doc. PCNICC/2000/1/Add.1 (2000).

9 See Ivory Coast Declaration under Article 12-3 of the Rome Statute, 18 April 2003; Ivory Coast Letter reconfirming the acceptance of the ICC jurisdiction, 14 December 2010; Situation in the Republic of Cote d'Ivoire, International Criminal Court (ICC), Pre-Trial Chamber III, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, ICC-02/11, 3 October 2011, par. 10-14; Situation in the Republic of Cote d'Ivoire, ICC, Pre-Trial Chamber III, Decision on the Prosecution's provision of further information regarding potentially relevant crimes committed between 2002 and 2010, ICC-02/11, 22 February 2012; Prosecutor v. Laurent Gbagbo, ICC, Appeals Chamber, Judgment on the appeal of Mr. Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings, ICC-02/11-01/11-321, 12 December 2012; Côte d'Ivoire ratified the Rome Statute on 15 February 2013. On 22 January 2009, the Palestinian National Authority lodged a declaration by hand recognizing the jurisdiction of the Court under Article 12, paragraph 3 with respect to acts committed on the territory of Palestine since 1 July 2002. However, the Office of the Prosecutor concluded in April 2012 that it could not proceed on the basis of this declaration since there was an indeterminacy as to the status of Palestine in the international community; See Office of the Prosecutor, Situation in Palestine, 3 April 2012. Following UN General Assembly Resolution 67/19 (29 November 2012) granting Palestine "non-member observer State" status in the UN, Palestine, on 1 January 2015 lodged with the ICC Registrar another declaration under Article 12 (3) accepting the jurisdiction of the Court over alleged crimes committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014". The Office of the Prosecutor considers that this time the declaration under Article 12 (3) is valid; See Office of the Prosecutor, Press Release 16 January 2014, The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine, ICC-OTP-20150116-PR1083. On 2 January 2015, Palestine deposited its instrument of accession to the Rome Statute with the UN Secretary General. On 1 April 2015, Palestine was welcomed as the 123rd State Party to the Rome Statute. On 17 April 2014, a declaration under Article 12 (3) was lodged by Ukraine.

letter,[10] the SC, by resolutions 1593 (2005) and 1970 (2011), referred the situations in Darfur, Sudan and Libya to the ICC.[11]

For reasons that are intrinsically related to the fact that they concern non-party States to the Rome Statute, the Darfur and Libya referrals have attracted significant attention.[12] Indeed, neither Sudan nor Libya is a State party to the Rome Statute; thus neither has consented to implementing the provision of the Rome Statute in their domestic law nor have they consented to the ICC trying their nationals for acts committed within their territories.

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10 The United States and China are among the seven States that voted against the adoption of the Statute. Considering that they are Permanent members of the Security Council with a veto power it was deemed improbable that the SC would refer a situation to the ICC.

11 Security Council Resolution 1593 (2005) of 31 March 2005 refers the situation prevailing in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court, UN Doc. S/RES/1593 (hereinafter SC Res. 1593); Security Council Resolution 1970 (2011) of 26 February 2011 refers the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court, UN Doc. S/RES/1970 (hereinafter SC Res. 1970). On 22 May 2014, the SC also attempted to refer the situation in Syria to the ICC, co-sponsored by 65 Member States, vetoed by China and Russia. All other Council members voted in favour of the referral; Security Council 7180th meeting, 22 May 2014, UN Doc. S/PV.7180.

12 Both resolutions led to the issuance of Arrest Warrants against Omar Al-Bashir, the incumbent Head of State of Sudan and late Muammar Gaddafi, the then incumbent Head of State of Libya; Prosecutor v. Omar Hassan Ahmad Al-Bashir, ICC, Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Al-Bashir, ICC-02/05-01/09, 4 March 2009 (hereinafter Decision to Issue an Arrest Warrant against Al-Bashir); Prosecutor v. Gaddafi et al., ICC, Pre-Trial Chamber I, Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al- Senussi", ICC-01/11, 27 June 2011 (hereinafter Decision Gaddafi et al. Arrest Warrant). Omar Al-Bashir, travelled over Qatar, Kenya, Chad, Djibouti and Malawi without fearing to be arrested and surrendered to the ICC by any of its hosts. See decisions Prosecutor v. Omar Hassan Ahmad Al-Bashir, ICC, Pre-Trial Chamber I, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09-139, 12 December 2011 (hereinafter Decision on the Failure by Malawi to Arrest and Surrender Al-Bashir); Prosecutor v. Omar Hassan Ahmad Al-Bashir, ICC, Pre-Trial Chamber II, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al-Bashir's Arrest and Surrender to the Court, 9 April 2014 (hereinafter Decision on the Cooperation of the DRC Regarding Al-Bashir's Arrest and Surrender). To stress the disdain, the African Union and the Arab League issued decisions where they called their member not to enforce the Arrest Warrant. The African Union has decided that African states will not cooperate in the arrest and surrender of Bashir, see Max du Plessis and Christopher Gevers, Making amend(ment)s: South Africa and the International Criminal Court from 2009 to 2010, South African Yearbook of International Law, (2010), 1; see also Max du Plessis and Christopher Gevers, Balancing Competing Obligations: The Rome Statute and AU Decisions, Institute for Security Studies, paper 225, October 2011. The case against Muammar Gaddafi is terminated since the death of the accused. Prosecutor v. Muammar Gaddafi, ICC, Pre-Trial Chamber I, Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi, ICC-01/11-01/11-28, 22 November 2011. The case against Saif al Islam Gaddafi has been declared admissible despite the challenge from Libya; Prosecutor v. Saif Al Islam Gaddafi, Appeals Chamber, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al Islam Gaddafi', ICC-01/11-01/11-547-Red, 21 May 2014. The case against Abdullah Al-Senussi was declared inadmissible; Prosecutor v. Abdullah Al-Senussi, ICC, Appeals Chamber, Judgment on the appeal of Mr. Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the admissibility of the case against Abdullah Al-Senussi', ICC-01/11-01/11-565, 24 July 2014.

But is this really a problem? After all, the *Nuremberg Judgment* established a new relationship between the individual, the State and the international community.[13] The following features stand out from the landscape fashioned by Nuremberg: (1) individuals are immediately responsible under international law for the crimes of aggression, genocide, crimes against humanity and war crimes; (2) individuals are criminally responsible regardless of whether they acted in an official capacity; (3) individuals cannot be relieved of their responsibility under international law even if internal law is silent, condones or orders the conduct in question;[14] and (4) that international criminal responsibility gives rise to the potential for prosecution by international criminal jurisdiction and national criminal jurisdiction through the exercise *inter alia* of universal jurisdiction.[15] As Broomhall notes, these principles would progressively become inextricably linked to the foundation of the post-World War II international legal order.[16]

Eventually, the Cold War risked freezing the development of the principles avowed at Nuremberg entirely. The international deadlock, nevertheless, did not prevent domestic courts from keeping the field of international criminal law alive through the principle of universality.[17] Indeed, the trial of Adlolf Eichmann in 1961 reignited the idea that genocide, crimes against humanity and war crimes would not go unpunished.[18] The *Eichmann* 'saga' did not lead to direct arraignment of similar types of cases in the short term. Rather, it took nearly two decades before legislative reforms and thus

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13 Bruce Broomhall, International Justice and the International Criminal Court: between Sovereignty and the Rule of Law (Oxford University Press, 2004), p. 19.

14 Broomhall, supra note 13, p. 19, writes that "responsibility reaches the individual regardless of whether national law is silent, condones, or actually requires the behaviour in question (through superior orders or otherwise)". However, art. 33 of the Rome Statute allows for the defence of superior order for war crimes. This exception is claimed not to be based on customary international law, see Mark Klamberg, Article 33 - Superior orders and prescription of law, in Mark Klamberg, The Rome Statute: The Commentary on the Law of the International Criminal Court (Case Matrix Network) available at www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc.

15 Broomhall, supra note 13, p. 19; see also ILC, Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries 1950, Yearbook of the ILC, 1950, vol. II.

16 Bruce Broomhall, supra note 13, p. 19.

17 ILC, Fourth report on the Draft Code of Offences against the peace and security of mankind, by Mr. Doudou Thiam, Special Rapporteur, A/CN.4/398 and Corr. 1-3, Yearbook of the ILC 1986 ,vol. II(1); As Doudou Thiam wrote in its report to the ILC: "in the absence of an international criminal jurisdiction, the system of universal competence must be accepted for offences against the peace and security of mankind. Because of their nature, they clearly affect the human race wherever they are committed and irrespective of the nationality of the perpetrators or the victims."

18 Attorney-General of the Government of Israel v. Adolf Eichmann, Israel, Supreme Court (sitting as a Court of Criminal Appeal), Judgment of 29 May 1962, reproduced in International Law Reports, vol. 36, pp. 277-343 (hereinafter Eichmann Appeal); Attorney-General of the Government of Israel v. Adolf Eichmann, Israel, District Court of Jerusalem, Judgment of 12 December 1961, reproduced in International Law Reports, vol. 36, pp. 5-276. (hereinafter Eichmann Judgment).

proceedings such as *Barbie*,[19] *Demjanjuk*,[20] *Finta*[21] and *Pinochet*[22] took place.[23] By the time of the fall of the Berlin wall the idea that perpetrators of international crimes were *hostis humani generis* and thus subject to universal jurisdiction was well established.[24]

Nevertheless, the ICC's exercise of jurisdiction over non-party States remains an extremely contested issue.[25] Indeed, it remains unclear whether the ICC's exercise of criminal jurisdiction over non-party States in situations triggered under Article 13 (b) is based on universal jurisdiction or on the power of the SC under Chapter VII of the United Nations Charter. For instance, Cherif Bassiouni notes that "[the Security] Council's right to refer 'situations' to the ICC, irrespective of the crime's location and the nationality of the perpetrator or victim, [is] based on the theory of universal jurisdiction."[26] Conversely, Madeline Morris argues that "the tribunals' jurisdiction is more properly viewed as arising from the powers of the Security Council to take such steps as are required to restore or maintain international peace and security."[27] Since these conceptions of an Article 13 (b) referral are

19 Fédération Nationale des Déportées et Internés Résistants et Patriotes and Others v. Barbie, Court of Cassation (Criminal Chamber), 20 December 1985, reproduced in International Law Report, vol. 78, pp. 124-148.

20 Demjanjuk v. Petrovsky, 776 F. 2d 571 - Court of Appeals, 6th Circuit 1985.

21 Regina v. Finta, Supreme Court of Canada, 24 March 1994.

22 Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Ugarte, United Kingdom, House of Lords, 25 November 1998, reproduced in International Legal Materials, vol. 37 (1998), pp. 1302-1339 (hereinafter Pinochet No. 1); Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Ugarte, United Kingdom, House of Lords, 24 March 1999, reproduced in International Legal Materials, vol. 38 (1999), pp. 581-663 (hereinafter Pinochet No. 3).

23 See Bruce Broomhall, supra note 13, p. 113.

24 The ILC concluded in its 1996 Draft Code of Crimes Against the Peace and Security of Mankind that genocide, crimes against humanity and war crimes attract universal jurisdiction; supra note 1; Furthermore, in Tadic Interlocutory Appeal Decision the Appeals Chamber when considering the question of whether the accused should be tried by his national court under national laws, concluded that "universal jurisdiction [is] nowadays acknowledged in respect of international crimes.", par. 62. The ICTR also held in Ntuyahaga genocide, crimes against humanity and war crimes attracted universal jurisdiction. Prosecutor v. Ntuyahaga, International Criminal Tribunal for Rwanda, Trial Chamber I, Decision on Prosecution Motion to Withdraw the Indictment, ICTR-98-40-T, 18 March 1999.

25 E.g. Ruth Wedgwood, The International Criminal Court: An American View, 10 European Journal of International Law 93-107 (1999); Gerhard Hafner, Kristen Boon, Anne Rübesame and Jonathan Huston, A Response to the American View as Presented by Ruth Wedgwood, 10 European Journal of International Law 108-123 (1999); Marten Zwanenburg, The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?, 10 European Journal of International Law 124-143 (1999); Hans-Peter Kaul, Preconditions to the Exercise of Jurisdiction in supra note 6, p. 584; David Scheffer, The International Criminal Court: The Challenge of Jurisdiction, 93 American Society of International Law Proceedings 68 (1999); Leyla N. Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millenium (Transnational Law Publishers, 2002).

26 M. Cherif Bassiouni, The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text (Transnational Publishers, 2005) p. 140.

27 Madeline Morris, High Crimes and Misconceptions: The ICC and Non Party States, 64 Law and Contemporary Problems 36 (2001).

fundamentally opposed, it is of paramount importance to examine how both conceptions interact with other norms of international law in practice.

In this thesis I will explain that there are two conceptions of an Article 13 (b) referral. As will be further elaborated, these two conceptions are: (1) universal jurisdiction arising from the nature of the crimes and (2) jurisdiction based on the powers of the SC under Chapter VII. These are 'conceptions' of a 'concept'. In the context of an Article 13 (b) referral, the 'concept' at stake is the exercise of jurisdiction over States which are neither party to the Rome Statute nor consent to the ICC's exercise of jurisdiction. While only twelve days after the entry into force of the Rome Statute the SC passed an 'hostile' resolution in which it noted that 'not all States are parties to the Rome Statute',[28] there is consensus that an Article 13 (b) referral can lead to the exercise of jurisdiction by the ICC over nationals and territories of States not party to the Statute. More precisely, Article 13 (b) entails an exercise of prescriptive and adjudicative criminal jurisdictions over a situation without being based on the nationality and territoriality principles.

The Rome Statute establishes a permanent international criminal court with the jurisdiction to prosecute individuals responsible for having committed the most serious crimes of concern to the international community as a whole. This is the exercise of adjudicative jurisdiction. In contrast with the *ad hoc* tribunals, the Rome Statute goes further than establishing a Court; it also authoritatively defines the crimes the Court is to apply. Although customary international law is not the primary source of law to be applied by the Court – the Statute itself is – the averred ambition of the drafters of the Rome Statute was to codify customary international law. Most commentators are ready to recognize this as the case for the broad categories of crimes which fall under the general jurisdiction of the Court – aggression, genocide, crimes against humanity and war crimes.[29] However, as the saying goes, 'the devil is in the detail' – what is contested is not the customary status of these core crimes but some of the specific acts that may constitute their *actus reus*. As many observers argue, the negotiations culminating in the Rome Statute may have brought into effect some new crimes within the realm of

28 Security Council Resolution 1422, 12 July 2002, par. 4, UN Doc. S/RES/1422 (hereinafter SC Res. 1422; see also Security Council Resolution 1487, 12 June 2003, par. 4 (hereinafter SC Res. 1487). These resolutions will be further analyzed in Chapter 5.

29 For aggression see supra note 2.

international criminal law (e.g., crimes against humanity of apartheid, forced pregnancy, gender persecution and enforced disappearance and environmental war crime).[30]

Moreover, the Statute postulates that no one can challenge the jurisdiction of the ICC on the basis of its official capacity.[31] That provision is said to apply to all, even high-ranking officials of States not party to the Rome Statute. Once again, many observers argue that this provision is not reflective of customary international law.[32] The fact that the first serving Head of State to appear before an international criminal court only occurred in 2014 seems to evince that something new is happening in The Hague – not to mention the fact that that this particular case concerned the Head of a State party to the Statute.[33]

While it is clear in international law that customary international law applies to all States and to all parties to a conflict, can the provisions of a treaty made in the interest of the international community as a whole also have the same dramatic effect? Article 13 (b) of the Rome Statute answers that question in the affirmative. My two 'conceptions' vie to answer how this can legally operate.

One of the intermediate goals of this thesis is to signal to those that apply the substantive provisions of the Rome Statute evenly in all situations – irrespective of whether at the time of the impugned conduct the Rome Statute was formally an applicable law for these individuals and territories – that they are espousing the 'universal jurisdiction conception'. Moreover, I will show that the Court itself seems to have adopted this particular approach. Another intermediate goal is to show how the ICC should exercise its jurisdiction if it adopts a 'Chapter VII conception'. While I intuitively sympathized with the 'universal jurisdiction conception' when beginning to draft this thesis, I discovered that it faces many legal flaws that are difficult to reconcile. With respect to the 'Chapter VII conception', these difficulties were less insurmountable due to the almost limitless powers we acknowledge the SC possesses when it fulfills its primary responsibility of maintaining international

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30 Sadat, supra note 25, p. 12; Jann K. Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions (Oxford University Press, 2008), p. 246-247; Ryan Gilman, Expanding Environmental Justice after War: The Need for Universal Jurisdiction over Environmental War Crimes, 22 Colorado Journal of International Law and Policy 447 (2011); Antonio Cassese, Crimes Against Humanity in supra note 6, p. 353–378, 37–377; Darryl Robinson, Defining "Crimes Against Humanity" at the Rome Conference, 93 American Journal of International Law 43–57, 52–56 (1999); Michael Bothe, War Crimes in supra note 6, p. 379–426, 400; See also on apartheid as a crime against humanity Paul Eden, The Role of the Rome Statute in the Criminalization of Apartheid, 12 Journal of International Criminal Justice 171-191 (2014); Kevin Jon Heller and Jessica C. Lawrence, The Limits of Article 8(2)(b)(iv) of the Rome Statute, the First Ecocentric Environmental War Crime, 20 Georgetown International Environmental Law Review (2007).

31 Rome Statute, art. 27.

32 See chapter 4.

33 BBC News, Kenyatta Appears at ICC in Hague for Landmark Hearing, 8 October 2014.

peace and security. However, one has to always remember that, as Antonio Cassese so eloquently put it in the *Tadic Interlocutory Appeal on Jurisdiction*, "neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law)."[34]

The ultimate goals of this thesis are to examine what an Article 13 (b) referral is, what the legal effects of an Article 13 (b) referral are and finally what an Article 13 (b) referral should be. This is the main reason why I adopt the concept-conception distinction. To really emphasize how both 'conceptions' treat the 'concept' of this study; I take a comparative norm conflict approach to analyze their interaction with three legal barriers. These three legal barriers are (1) the sovereignty of States not party to the Rome Statute; (2) the principle of legality, and; (3) the immunity of State officials. These three legal barriers occur when the ICC exercises 'universal' prescriptive and adjudicative criminal jurisdictions. By adopting a norm conflict approach I, firstly, offer a 'toolbox' to academics and practitioners dealing with the ICC's exercise of jurisdiction over a crime committed by nationals and in territories of States not party to the Rome Statute. Secondly, the norm conflict approach shows to what extent each 'conception' needs to be stretched in order to avoid or resolve a norm conflict with one or more of these legal barriers. One should, however, always bear in mind that there are limits to legal reasoning.

Chapter one will provide the theoretical background to this study. It will explain at greater length the concept-conception distinction, the various uses of the term 'jurisdiction', how I come to the conclusion that there are two 'conceptions' of the 'concept' of this thesis, and, finally, how to use the conflict of norms approach with regard to our 'concept'.

In chapter two my two 'conceptions' will be faced with the first legal barrier to the ICC's exercise of jurisdiction under Article 13 (b) Rome Statute: that is the sovereignty of States. It will show that there is has been attempt on the part of the Rome Statute drafters to prescribe crimes for others and entitle the ICC to adjudicate these crimes wherever they are committed. How this assertion of authority operates will be analyzed under our two 'conceptions'. Both 'conceptions' must necessarily use all available legal tools to avoid or resolve the conflicts they face with the various facets of sovereignty, including *pacta tertiis nec nocent* and the *Monetary Gold Principle*. This chapter will show that while the 'Chapter VII conception' is inherently limited by the powers assigned to the SC according to the UN Charter, the sovereignty of States does not create an unresolvable normative conflict. Conversely,

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34 Tadic Interlocutory Appeal Decision, par. 28.

the 'universal jurisdiction conception' calls for an *aggiornamento* of international law, otherwise it fails to resolve the conflict of norms that emerges when this *sui generis* jurisdiction is exercised over non-consenting States.

Chapter three confronts both 'conceptions' with a particular problem the Rome Statute poses with respect to individuals that are prosecuted before the ICC for conduct that occurred while the Rome Statute was not formally an applicable law in relation to the conduct in question. This Chapter will demonstrate that one of the pitfalls of not codifying customary international law is that the ICC's retroactive exercise of jurisdiction potentially clashes with the principle of legality. Moreover, it will show that provisions of the Rome Statute do not comprehensively address this problem and that we must necessarily adopt either the universal jurisdiction conception to avoid that challenge or implant a norm that is exterior to the Statute to fully abide by the principle of legality.

Chapter four will address the immunity of State officials. It will show that the status under customary international law of the Statute provisions on this issue is highly contested. One can resolve the normative conflicts which arise by adopting a 'Chapter VII conception' or a 'universal jurisdiction conception'. While the ICC initially adopted a 'universal jurisdiction conception' of this question, the strong objections that were raised both by States party and not party to the Statute appear to have convinced the ICC that 'not all States are party to the Statute' and that a 'Chapter VII conception' was less detrimental to its objectives. In this chapter we will conclude that the 'revolution' of international law necessary for the 'universal jurisdiction' to be considered legally valid has not yet occurred.

Finally, chapter five will ask: what if Article 13 (b) did not exist? We will see that between the SC and the ICC there is an '*amour impossible*' if not '*interdit*'. Bearing in mind the various attempts by the SC to modify the Rome Statute through referrals or deferrals or even resolutions that intended for another purpose, one might wonder whether the SC governs the Court. This last chapter will show that while these two international organizations have a 'bond', the SC cannot bind the ICC.

1. Setting the Scene: Conceptions of Courts and their Jurisdiction

In July 1998, 160 States met in Rome to negotiate the drafting of what would become the Rome Statute of the International Criminal Court. After an arduous horsetrading 120 States decided to adopt the Rome Statute. According to the Rome Statute, the ICC can exercise its jurisdiction over genocide, crimes against humanity and war crimes through three distinct channels: (1) State referral; (2) the prosecutor initiating an investigation *proprio motu*; and, (3) the SC referring a situation to the Prosecutor under Chapter VII of the UN Charter.[35] The first two trigger mechanisms can be exercised only in situations where crimes were committed in the territory of a State party or by the national of a State party.[36] A territorial or national State that is not party to the Rome Statute can still confer jurisdiction on the ICC by lodging a declaration with the Registrar of the ICC in which it "accept[s] the exercise of jurisdiction by the Court".[37] In contrast, the third trigger mechanism – Article 13 (b) – does not require the consent of either the territorial or national State, but only that the SC acts under Chapter VII of the UN Charter.[38]

There is, however, the view that "[i]t need not have been this way."[39] Due to the nature of the crimes within the ICC's subject-matter jurisdiction some argue that the Court could have exercised universal jurisdiction.[40] In any case, article 13 (b) provides the ICC with universal jurisdiction – article 13 (b) does not require the consent of either the territorial or national State. Neither the Statute nor the Court itself seem to make a clear distinction between cases that are triggered by the SC, States or by the Prosecutor - all cases are treated alike – as if the Statute applies to all since its entry into force. As I will show later, there is indeed a disagreement over the interpretation and application of the Rome Statute in situations triggered under article 13 (b). At the heart of this disagreement is the question of

35 Rome Statute, Articles 13-15.
36 Rome Statute, Article 12.
37 Rome Statute, Article 12 (3).
38 Rome Statute, Article 13 (b).
39 Olympia Bekou and Robert Cryer, The International Criminal Court and Universal Jurisdiction: A Close Encounter? 56 International and Comparative Law Quarterly 51 (2007).
40 See e.g. Kaul, supra note 25.

whether article 13 (b) symbolizes universal jurisdiction arising from the nature of the crimes within the jurisdiction of the ICC or whether it is a manifestation of the powers of the SC under Chapter VII.

I believe that the concept-conception distinction developed by Dworkin offers the best tool for clarifying the nature of disagreements about what an Article 13 (b) referral is, what the effects of an Article 13 (b) referral are and what an Article 13 (b) referral should be.[41] According to the concept-conception distinction we can agree on a concept but each of us will have our own conception of the same concept. Thus, in the context of an Article 13 (b) referral, the concept at stake is the exercise of jurisdiction over non-party States. There is consensus that an Article 13 (b) referral can lead to the exercise of jurisdiction by the ICC over individuals that are not nationals of a State party to the Statute and territories that are not of a State party to the Statute. If there were no Article 13 (b) referrals, the ICC would not be entitled to exercise jurisdiction over such situations unless the crimes were either committed in the territory of a State party or by a national of a State party.[42] Admittedly, according to Article 12 (3) the ICC can exercise jurisdiction over non-party States if either the territorial State or national State issued a declaration of acceptance. As such, the "very meaning" of an Article 13 (b) referral is the exercise of jurisdiction without the consent of either the territorial State or the national State.[43] This will serve "as a kind of plateau" on which further thoughts and arguments can be built.[44] The exercise of jurisdiction over nationals and territories of a State neither party to the Statute nor consenting to the jurisdiction provides the 'concept' of an Article 13 (b) referral and competing positions about the nature of this jurisdiction are 'conceptions' of that concept.

However, the crux of our concept is not simply the exercise of jurisdiction over nationals and territories of a State neither party to the Statute nor consenting to the jurisdiction. The crux of our concept is the exercise of prescriptive and adjudicative criminal jurisdictions over a situation without being based on the nationality and territoriality principle. The notion of jurisdiction must to be clarified

41 See concept-conception distinction as applied by Dworkin. "The contrast between concept and conception is here a contrast between levels of abstraction at which the interpretation of the practice can be studied. At the first level agreement collects around discrete ideas that are uncontroversially employed in all interpretations; at the second the controversy latent in this abstraction is identified and taken up. Exposing this structure may help to sharpen argument and will in any case improve the community's understanding of its intellectual environment." Ronald Dworkin, Law's Empire (Fontana Press, 1986), p. 71; I use this methodology in the sense that there are two ways of perceiving the contested concept and that each way offers different solution to the same concept. To know more about essentially contested concept see William B. Gallie, Essentially Contested Concepts, 56 Proceedings of the Aristotelian Society 167 (1956) and John Rawls, A Theory of Justice (Belknap Press, 1999).

42 See Chapter 5 on whether the SC could use the ICC if there were no Article 13 (b) in the Rome Statute.

43 Dworkin, supra note 41, p. 71.

44 Ibid., p. 70.

before proceeding further in our analysis. Indeed, this term is at the heart of the concept identified and is used differently in various contexts and thus understood in many divergent ways.

In the following sections I will first describe the 'types' of jurisdiction. Secondly, I will differentiate the 'types' of jurisdiction from the 'heads' of jurisdiction. Thirdly, the historical evolution of international criminal law and international criminal jurisdiction between World War II and the establishment of the ICC will be addressed in relation to the notion of delegation of jurisdiction. Fourthly, against this background the two 'conceptions' of our 'concept' will be briefly described. Finally, I will explain why a comparative conflict of norms approach is a useful tool for this study and how it works.

1.1. Types of jurisdiction

The jurisdiction of a State, in the present context, "refers to its authority under international law to regulate the conduct of persons, natural and legal, and to regulate property in accordance with its municipal law."[45] The jurisdiction of a State can be criminal or civil; only the criminal jurisdiction of States will be considered in this study. Three 'types' of jurisdiction can be distinguished: jurisdiction to prescribe, jurisdiction to adjudicate and jurisdiction to enforce.[46] Jurisdiction to prescribe refers to the authority of a State to prescribe rules. Jurisdiction to adjudicate refers to "the rights of Courts to receive, try and determine cases referred to them."[47] Many believe that it is not necessary to separate this type of jurisdiction from jurisdiction to enforce.[48] However as we will see international criminal tribunals adjudicate cases but generally lack enforcement powers.[49] Jurisdiction to enforce refers to

45 Roger O'Keefe, Universal Jurisdiction: Clarifying the Basic Concept, 2 Journal of International Criminal Justice 736 (2004) See Luc Reydams, Universal Jurisdiction: International and Municipal Legal Perspectives (Oxford University Press, 2006), p. 21-22, which say that the doctrine identifies up to seven bases: (1) the principle of territoriality, (2) the principle of the nationality of the offender (or active personality principle), (3) the principle of the nationality of the victim (or passive personality principle), (4) the principle of the flag, (5) the principle of protection, (6) the principle of universality, and (7) the representation principle.

46 O'Keefe, supra note 45, p. 736; Vaughan Lowe and Christopher Staker, Jurisdiction in Malcolm Evans, International Law (Oxford University Press 2010) p. 317; American Law Institute, Restatement of the Law Third: The Foreign Relation Law of the United States (American Law Publishers, 1986), p. 231.

47 Lowe and Staker, supra note 46, p. 317.

48 O'Keefe, supra note 45, p. 736; Lowe and Staker, supra note 31, p. 317; Sarah Williams, Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues (Hart publishing, 2012), p. 11-13.

49 See e.g. Antonio Cassese, On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law, 9 European Journal of International Law 10-12 (1998); Sadat, supra note 24, p. 120-

the authority of a State to enforce the rules it has prescribed and adjudicated.[50] These are 'types' of jurisdiction.

1.2. Heads of jurisdiction

Jurisdiction to prescribe is not territorially limited; depending on the category of crimes it can also be exercised based on the active and passive nationality principles, protective principle, and universality principle.[51] According to O'Keefe's terminology, these principles constitute 'heads' of jurisdiction.[52] The most important 'head' of jurisdiction is territoriality. Territorial jurisdiction is the authority of a State to exercise jurisdiction over acts committed on its territory.[53] To put it simply, territorial jurisdiction as a 'head' of jurisdiction is based on the principle of territorial integrity. This 'head' of jurisdiction is unquestionably available to States to exercise any 'type' of jurisdiction, i.e. jurisdiction to prescribe, adjudicate and enforce. The nationality of the offender, or the so-called *active* nationality, is, after territoriality, the most widely accepted head of jurisdiction.[54] Another head of jurisdiction based on nationality is the *passive* personality principle which gives a State jurisdiction over crimes committed against its nationals.[55] A further head of jurisdiction is the protective principle.

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122. The international tribunals do not have their own police forces, they entirely rely on States to enforce their orders, arrest warrants, judgments, orders to seize assets, sentences, etc.

50 The American Law Institute, Restatement of the Law Third: The Foreign Relation Law of the United States (American Law Publishers, 1986), p. 320-325.

51 Lotus (SS) Case (France v Turkey,) Permanent Court of International Justice (PCIJ), PCIJ Rep Series A No 9, p. 20, 7 September 1927 (hereinafter Lotus Case); Brierly also said: "[t]he territorial basis of jurisdiction is not a mere dogma; it is justified normally because it is convenient that crimes should be dealt with by the State whose social order they affect most closely and this in general is the State on whose territory they are committed': James L. Brierly, Report on Jurisdiction over Extraterritorial Crime, 20 American Journal of International Law 255 (1926); Cedric Ryngaert, Jurisdiction in International Law (Oxford University Press, 2008), p. 24; Moreover, international law recognizes (multiple) concurrent jurisdiction. Many States can assert the applicability of their criminal laws beyond their territory. Thus, one conduct may have fallen within the criminal jurisdiction of many States; See also Luc Reydams, supra note 30.

52 O'Keefe, supra note 45, p. 738.

53 This head of jurisdiction includes objective and subjective territorial jurisdiction. The territorial jurisdiction may also include the effect doctrine. Lotus Case, p. 23; American Law Institute, Restatement of the Law Third: The Foreign Relation Law of the United States (American Law Publishers, 1986); Williams, supra note 48, p. 12.

54 Paul Arnell, The Case for Nationality-Based Jurisdiction, 50 International Comparative Law Quarterly 955 (2001); Williams, supra note 48, p. 12.

55 Judges Higgins, Kooijmans and Buergenthal in their join separate opinion declared: "[p]assive personality jurisdiction, for so long regarded as controversial, is now reflected . . . in the legislation of various countries . . . and today meets with relatively little opposition, at least so far as a particular category of offences is concerned". Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), International Court of Justice, Joint separate opinion of Judges

The protective principle as a head of jurisdiction gives a State jurisdiction over acts committed against the "essential interest of the State".[56] The example *par excellence* for the protective principle is the counterfeiting of currency.[57] Finally, universal jurisdiction, or the so-called universality principle, is the jurisdiction of States irrespective of the place of perpetration, the nationality of the suspect or the victim.

In contrast to the protective principle, the universality principle is jurisdiction over acts committed not against any State itself but against the international community as a whole.[58] Under the head of universal jurisdiction, there is no nexus between the State in question and the act, except that the nature of the act makes the perpetrator a *hostis humani generis*.[59] Grotius asserted that every State has jurisdiction over "gross violations of the law on nature and of nations, done to other States and subjects".[60] Piracy was for many years the only crime giving rise to universal jurisdiction, not because it was a heinous act but because it is committed outside the territorial jurisdiction of all States.[61] More recently, as mentioned above, many States have recognized crimes such as genocide,[62] crimes against humanity,[63] war crimes[64] and torture[65] as capable of triggering universal jurisdiction.[66]

Higgins, Kooijmans and Buergenthal, I.C.J. Reports 2002, par. 47 (hereinafter Arrest Warrant Case); See also Separate opinion Judge Rezek, par. 5; Separate opinion President Guillaume, par. 4.

56 Lowe and Staker, supra note 46, p. 325

57 The Charter and Judgment of the Nürnberg Tribunal – History and Analysis: Memorandum submitted by the Secretary-General, 1949, p. 80, UN Doc. A/CN.4/5.

58 David J. Luban, Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law, 1154117 Georgetown Public Law Research Paper 3 (2008).

59 The Institute of International Law, in 1931, adopted a resolution on criminal jurisdiction with a provision that reads as follows: "Article 5. Every State has the right to punish acts committed abroad by a foreigner who is found on its territory, provided these acts violate general interests protected by international law (such as piracy, trade in negroes, trade in white women, propagation of contagious diseases, attacks on international communication means and destruction of undersea cables, counterfeiting of currency and securities, etc.), if extradition of the accused is not requested or if the territorial State or the State of nationality of the offender do not accept an extradition offer." Pirates, trade in negroes, trade in white women, propagation of contagious disease, etc. were subject to universal jurisdiction because these acts "violate general interests protected by international law". Institut de Droit International, 2 Annuaire de l'institut de Droit International, 235 (1931).

60 Hugo Grotius, De jure belli ac pacis, Book II, chap. XVIII, sect. 4. (Translated by A. C. Campbell London, 1814), p. 247

61 David J. Luban, supra note 58, p. 2.

62 The Genocide Convention does not provide for universal jurisdiction. Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948), United Nations, Treaty Series, vol. 78, p. 277, Article 6. Nevertheless, it appears that it is considered as giving rise to universal jurisdiction under customary international law. Madeline Morris, Universal Jurisdiction in a Divided World, 35 New England Law Review 347 (2001).

63 See e.g. Eichmann Appeal.

64 At least the Grave Breaches of the Geneva Convention, Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field (Geneva, 12 August 1949), United Nations, Treaty Series, vol. 75-970, Article 49 (Geneva Convention I); Geneva Convention for the amelioration of the condition of the wounded, sick and shipwrecked members of the armed forces at sea (Geneva, 12 August 1949), United Nations, Treaty Series, vol. 75-971, Article 50 (Geneva Convention II); Geneva Convention relative to the treatment of prisoners of war (Geneva, 12 August

The various ‘types’ of jurisdiction available to States cannot be exercised in respect of all ‘heads’ of jurisdiction. In 1927, the Permanent Court of International Justice (PCIJ) held in the *Lotus Case* that “all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.”[67] The sovereign principle as expressed by *Lotus* is that a sovereign State may act in any way it wishes so long as it does not contravene an explicit prohibition.[68] I will not discuss whether the *dictum* in *Lotus* remains applicable today or whether it has been entirely reversed but it is generally recognized that as regards jurisdiction to prescribe, States may exercise their criminal jurisdiction on the basis of various heads as long as there is sufficient link between the conduct in question and the interest of the State.[69] Indeed, the Court held that “the territoriality of criminal law […] is not an absolute principle of international law and by no means coincides with territorial sovereignty”.[70] This concerned prescriptive jurisdiction. On the other hand, as Ryngaert observes, “[t]erritorial sovereignty

1949), United Nations, Treaty Series, vol. 75-972, Article 129 (Geneva Convention III); Geneva Convention relative to the protection of civilian persons in time of war (Geneva, 12 August 1949), United Nations, Treaty Series, vol. 75-973, Article 146 (Geneva Convention IV); Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Geneva, 8 June 1977) United Nations, Treaty Series, vol. 1125-3, art. 85, 86, 88 (Additional Protocol I); for war crimes committed in non-international armed conflict see Hans Peter Kaul and Claus Kress, Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises, 2 Yearbook International Humanitarian Law 148-150 (1999)

65 See Pinochet No. 3; In Filartiga v. Pena-Irala, 630 F. 2d 876 (2d Cir.1980), "the torturer has become, like the pirate and the slave trader before him, hostis humani generis, an enemy of all mankind".

66 See ILC 1996 Draft Code of Crimes Against the Peace and Security of Mankind and *Tadic Interlocutory Appeal Decision* and Prosecutor v. Ntuyahaga, ICTR, Trial Chamber I, Decision on the Prosecutor's Motion to Withdraw the Indictment, ICTR-98-40-T, Mar. 18, 1999.

67 Lotus Case, par. 18–19: “It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.”

68 For an excellent explanation of the legal-philosophical question arising from the Lotus dicta and the division it caused among scholar see Reydams, supra note 45, p. 14.

69 In contrast to the position taken in Lotus it is generally held that in order to exercise extraterritorial jurisdiction a State needs to show the permissive rule. The 1935 Harvard Research on International Law adopts such an approach, Harvard Research on International Law, Draft Convention on Jurisdiction with Respect to Crime, 29 American Journal of International Law 444 (1935); see also Ryngaert, supra note 51, p. 26-31; Reydams, supra 45, p. 14-21. The third restatement speaks of principles of reasonableness and fairness, p. 235-237.

70 Lotus Case, p. 20.

would relate to enforcement jurisdiction."[71] Jurisdictions to adjudicate and to enforce are territorial, unless consent from the extraterritorial State is given.[72] Thus, in order to adjudicate and enforce its criminal law extraterritorially a State needs the consent of the territorial State; otherwise, it impinges on the territorial sovereignty of the latter State.[73]

1.3. Delegation of jurisdiction

A State may delegate its head of jurisdiction to another State or to an international tribunal.[74] Indeed, a State can confer its territorial, active nationality, passive nationality, protective and universal jurisdiction to another State or to an international tribunal.[75] These 'heads' of jurisdiction indicate the 'basis' of the jurisdiction conferred on the other State or on the international tribunal. For the sake of clarity, instead of using 'head' of jurisdiction, I will use the term 'basis' of jurisdiction when a State delegates its right to exercise jurisdiction. In situations of transfer of jurisdiction, the State or international tribunal to which jurisdiction has been delegated remains bound to respect the same limits

71 See Ryngaert, supra note 51, p. 24.

72 As to enforcement jurisdiction the PCIJ held: [T]he first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention." Lotus Case, p. 18-19.

73 The prohibition to adjudicate or enforce criminal law extraterritorially means, for instance, that the courts of one State cannot sit in judgment in the territory of another State; or, that the police of one State cannot arrest individuals in the territory of another State. The few exceptions to this general rule of international law arise in situations of armed conflict. Indeed, military forces are allowed under the laws of armed conflict to capture or otherwise take into custody and detain hostile combatants, as well as civilians accompanying regular armed forces, when such persons fall into their power in the course hostilities. Furthermore, in accordance with rules codified in the Convention (IV) relative to the Protection of Civilian Persons in Time of War, during occupation the occupying power is permitted to exercise over the occupied territory some extraterritorial powers of prescriptive, adjudicative and enforcement jurisdiction; Convention (IV) relative to the Protection of Civilian Persons in Time of War, Arts 64–78. However, these are extraordinary examples of the extraterritorial exercise of adjudicative and enforcement powers permitted under international law without the consent of the territorial state; see O'Keefe, supra note 45, p. 740.

74 See Dapo Akande, The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits, 1 Journal of International Criminal Justice 622-634 (2003); Michael Scharf, The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position, 64 Law & Contemporary Problems 98-110 (2001); Gennady M. Danilenko, The Statute of the International Criminal Court and Third States, 21 Michigan Journal of International Law 445, 465 (2000); Williams, supra note 48, p. 300-314; Leila Nadya Sadat and S. Richard Carden, The New International Criminal Court: An Uneasy Revolution, 88 Georgetown Law Journal 412-413 (2000); contra Morris, supra note 23, saying that jurisdiction can be delegated to another state but not to an international tribunal.

75 Ibid.

to its jurisdiction as the delegating State.[76] One may ask: since jurisdiction to adjudicate and to enforce are restricted territorially, under which basis of jurisdiction do international criminal bodies act? An inquiry into the legal basis of the international criminal jurisdiction may elucidate which jurisdictional basis the authority to prescribe, adjudicate and enforce derives from.

1.4. The Nuremberg & Tokyo trials

On 8 August 1945, the United States, Great Britain, the Soviet Union and France signed the Agreement for the Prosecution and the Punishment of the Major War Criminals of the European Axis (London Agreement) to which the Charter of the International Military Tribunal (Nuremberg Charter) was annexed.[77] In this manner the Allies "acting in the interests of all the United Nations"[78] established the International Military Tribunal (Nuremberg Tribunal) "for the trial of war criminals whose offenses have no particular geographical location".[79] The Nuremberg Tribunal had jurisdiction over crimes against peace, crimes against humanity and war crimes.[80] The basis of the jurisdiction of the Nuremberg Tribunal has been the subject of great debate within legal literature.[81] Indeed, the Nuremberg Tribunal was based on a treaty between the four Allied Powers which conferred jurisdiction over territory and nationals of Germany without the formal consent of Germany. As for the ICC, the 'concept' at stake is the exercise of jurisdiction over the territory and nationals of a State not party to the treaty establishing the tribunal. Addressing the propriety of the arrangement made by the Allies, the Tribunal stated:

> The making of the Charter is the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world […] The signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one

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76 Nemo dat quod non habet; Williams, supra note 48, p. 408-409 addresses the issues of the principle of legality; immunity under customary international law; amnesties; ne bis in idem, statutes of limitation and suggest that the legal basis and the constituent instrument will determine whether the tribunal is bound by domestic barriers.

77 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and the Charter of the International Military Tribunal annexed thereto, (London, 8 August 1945) United Nations, Treaty Series, vol. 82, p. 279.

78 London Agreement, Preamble.

79 London Agreement, art. 1.

80 Nuremberg Charter, art. 6.

81 Scharf, supra note 74, p. 103-105; Egon Schwelb, Crimes Against Humanity, 23 British Yearbook of International Law 208 (1946); Morris, supra note 27, p. 13.

> of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.[82]

This statement spawned a debate about the jurisdictional basis and the legal character of the Nuremberg Tribunal. While some argued that the Nuremberg Tribunal was exercising universal jurisdiction delegated by the 'signatory Powers',[83] others argued it was exercising national and territorial jurisdiction based on the sovereign consent of Germany as expressed "by the countries to which the German Reich unconditionally surrendered".[84] Furthermore, the latter group claimed that the Nuremberg Tribunal was a joint municipal tribunal[85] whilst the others claimed that the IMT was an international tribunal.[86] For those who had a conception of the Nuremberg Tribunal as an international judicial body, its legal character mostly entailed that its basis of jurisdiction was universal jurisdiction.[87] Each of the signatory powers had delegated its universal jurisdiction over the crimes to the Tribunal. Thus, by establishing the Tribunal "they have done together what any of them might have done singly."[88] For those who had a conception of the Nuremberg Tribunal as a joint municipal tribunal, like Georg Schwarzenberger, the Allies were co-sovereigns of Germany and they handled the Nuremberg tribunal in that capacity.[89] Indeed, it was assumed that the Allies as occupying powers of Germany consented in their capacity as the Government of Germany to the Nuremberg Charter and

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82 Trial of the Major War Criminals before the International Military Tribunal, vol. I, Nürnberg, 1947, p. 223.

83 Scharf, supra note 74, p. 103-106; Schwelb, supra note 81, p. 208; Robert K. Woetzel, The Nuremberg Trials in International Law (Stevens, 1960), p. 87-89; Kenneth Randall, Universal Jurisdiction Under International Law, 66 Texas Law Review 804-806 (1988); Gennady Danilenko, The ICC and Third States in supra note 6, p. 1881-1882.

84 Morris, supra note 26, p. 37-42; Georg Schwarzenberger, The Judgment of Nuremberg, 21 Tulane Law Review 329, reprinted in Guénaël Mettraux, Perspectives on the Nuremberg Trial (Oxford University Press, 2008), p. 170; Hans Kelsen, The Legal Status of Germany According to the Declaration of Berlin, 39 American Journal of International Law 518 (1945).

85 Schwarzenberger, supra note 84, p. 170; Quincy Wright, The Law of Nuremberg Trial, 41 American Journal of International Law (1947), reprinted in Guénaël Mettraux, Perspectives on the Nuremberg Trial (Oxford University Press, 2008), p.330-333.

86 Egon Schwelb, supra note 81, p. 149-152; Hans Kelsen, Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law? 1 International and Comparative Law Quarterly 153, reprinted in Guénaël Mettraux, Perspectives on the Nuremberg Trial (Oxford University Press, 2008), p. 286-288. According to Egon Schwelb, such an holding is supported by the following elements: The London agreement and the Nuremberg Charter describe the Tribunal as a "international" military tribunal; the preamble of the London agreement states that the Four signatories are acting "in the interest of all the United Nations"; Article 5 of the London agreement invites any member of the United Nations to adhere to the agreement; Article 6 of the Nuremberg Charter provides that the IMT has jurisdiction not only over Germans but over "major war criminals of the European Axis countries"; the nature of the crimes provided in Article 7 of the Nuremberg Charter, and; the intention of the Allies and of the Tribunal to place the trial on an international legal basis; Accordingly, the IMT was an international court, which jurisdiction was based on the universality principle.

87 Schwelb, supra note 81, p. 149-152; Kelsen, supra note 86, p. 286-288.

88 Trial of the Major War Criminals before the International Military Tribunal, vol. I, Nürnberg 1947, p. 223

89 Schwarzenberger, supra note 84, p. 170

thereby conferred jurisdiction to the Tribunal on the basis of the territorial and active nationality principles.[90]

The U.N. Secretary General in its 1949 Report on the Nuremberg Tribunal confirmed that the meaning of "had done together what any one of them might have done singly" can be interpreted as supporting the universal jurisdiction conception as much as the sovereign consent conception.[91] The indeterminacy concerning the legal basis under which the Nuremberg Tribunal exercised jurisdiction persists to this day.

The same 'concept' as for the Nuremberg Tribunal applies in respect of the trials conducted under Control Council Law No. 10 – absence of formal consent of the German State to the law establishing the Tribunals - and thus the same conceptions resurge.[92] Indeed, the Control Council Law

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90 The four Allies were entitled under international law to legislate for Germany since the latter was occupied by the formers. The sovereign powers of Germany were relinquished to the Allies which considered that the London Agreement was an appropriate means to establish a joint institution to exercise their powers over this co-imperium. Even though the London agreement may be characterized as an international treaty, the powers of the Tribunal were originating from municipal law. The powers conferred on the Tribunal by the Allies were the powers of the de facto sovereigns of Germany. Hence, many refer to the IMT as an "occupation" court which jurisdiction was based on the territorial and nationality principle. The Allies as de facto sovereigns of Germany expressed the consent of the latter to the exercise of jurisdiction; See Schwarzenberger, supra note 69, p. 170; Quincy Wright, supra note 85, p. 330-333; Kelsen, supra note 86, p. 286-288.

91 The Charter and Judgment of the Nuremberg Tribunal 80, UN Doc. A/CN/4/5, (1949) (memorandum submitted by the Secretary General of the United Nations), p. 79-80; see also Morris, supra note 27, p. 41.

92 On 20 December 1945, the Allied Control Council enacted Control Council Law No. 10, which was a multilateral agreement enacted in order to try war criminals other than those dealt with by the Nuremberg Tribunal. Article III of Control Council Law No. 10 authorized each occupying authority of Germany to bring to trial, before an "appropriate tribunal", persons suspected of having committed crimes. Article II recognized as crimes, acts that constituted crimes against peace, crimes against humanity and war crimes. On 18 October 1946, the commander of the US Zone adopted Ordinance No. 7 which provided for the establishment of "military tribunals which shall have the power to try and punish persons charged with offenses recognized as crimes in Article II of the Control Council Law No. 10." The Military Tribunals themselves generally considered that "the tribunals authorized by Ordinance No. 7 are dependent upon the substantive jurisdictional provisions of C.C. Law 10 and are thus based upon international authority and retain international characteristics." United States of America v Josef Altstoetter et al. (Justice), Tribunal War Crimes III, p. 958; see also Ministries, where Tribunal IV held that "[t]his is not a tribunal of the United States of America, but is an International Military Tribunal, established and exercising jurisdiction pursuant to authority given for such establishment and jurisdiction by Control Council Law No. 10." Ministries, Order, 29 Dec. 1947, XV TWC 325; This view fits with the assessment that the military tribunals were created pursuant to Control Council Law No. 10 which is a multilateral agreement enacted by the Allied Control Council as the supreme legislative authority in Germany. Nonetheless, Heller argues that the supposition that the military tribunals were international tribunals because they were "dependent upon the substantive jurisdictional provisions of C. C. Law No. 10" leads to illogical results, see Kevin Jon Heller, The Nuremberg Military Tribunals and the Origins of International Criminal Law (Oxford University Press, 2011), p. 112. Conversely, many argued that the military Tribunals were American courts. Von Knieriem claimed it was "incontestable" that "[t]he Nuremberg Tribunals were not international but American tribunals." August Von Knieriem, The Nuremberg trials (H. Regnery Co., 1959), p. 100; In Farben, Judge Curtis Shake observed from the bench that "this Tribunal is an American Court constituted under American Law.", quoted in Von Kniriem, p. 97; Telford Taylor told Tribunal III that "[a]lthough this Tribunal is internationally constituted, it is an American court. The obligations which derive from these proceedings are, therefore, particularly binding on the United States.", quoted in Von Kniriem, p. 97.

No. 10 trials did not appeal to their 'sovereign legislative power' only; they also relied in some cases on the universality principle. [93] For instance, in the *Hostage* case, the military tribunal relied on universal jurisdiction to assert authority over the defendants who were accused of war crimes.[94] The *Hostage* tribunal opinion was not uncontroversial but found support in other judgments of the military tribunals. In *Justice* Judge Blair declared - reminding us of the debated Nuremberg Tribunal statement - that "the Allied Powers, or either of them, have the right to try and punish individual defendants in this case."[95] The majority in *Einsatzgruppen* added that

> "[t]here is no authority which denies any belligerent nation jurisdiction over individuals in its actual custody charged with violation of international law. And if a single nation may legally take jurisdiction in such instances, with what more reason may a number of nations agree, in the interest of justice, to try alleged violations of the international code of war?"[96]

Other instances where the universality conception was adopted are the *Hadamar*,[97] *Zyklon B*[98] and *Kesselring* cases.[99]

However, this would have meant that the decisions of the military tribunals were reviewable by the American federal courts, a claim specifically rejected by the United States Court of Appeals for the D.C. Circuit in Flick v. Johnson: "[Military Tribunal IV's] power and jurisdiction arose out of the joint sovereignty of the Four victorious Powers. The exercise of their supreme authority became vested in the Control Council. That body enacted Law No. 10, for the prosecution of war crimes…Pursuant to that power, and agreeably to rules duly promulgated by Ordinance No. 7, the Zone Commander constituted Military Tribunal IV, under whose judgment Flick is now confined. Thus the power and jurisdiction of that Tribunal stemmed directly from the Control Council, the supreme governing body of Germany, exercising its authority in behalf of the Four Allied Powers…Accordingly, we are led to the final conclusion that the tribunal which tried and sentenced Flick was not a tribunal of the United States." Flick v. Johnson, 174 F.2d 983, 986 (D.C. Cir. 1949); The military tribunals' jurisprudence remains ambivalent as to the legal basis for exercising jurisdiction over the German war criminals. The Tribunal relied on various heads of jurisdiction: active nationality, territoriality passive personality, protective and universal jurisdiction.

93 A.R. Carnegie, Jurisdiction over Violations of the Laws and Customs of War, 39 British Yearbook of International Law 418 (1963); However see Heller, supra note 92, p. 134 who says that these heads of jurisdiction were not at issue in the trials under Control Council Law No. 10.

94 "An international crime is such an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances. The inherent nature of a war crime is ordinarily itself sufficient justification for jurisdiction to attach in the courts of the belligerent into whose hands the alleged criminal has fallen. Such crimes are punishable by the country where the crime was committed or by the belligerent into whose hands the criminals have fallen, the jurisdiction being concurrent." United States of America v Wilhelm List et al. (Hostage), XI TWC 1241.

95 United States of America v Josef Altstoetter et al. (Justice), Blair Separate Opinion, III TWC 1194; Hence, it can be proposed that the Allies through Control Council Law No. 10 pooled their jurisdiction over the international crimes committed by the German war criminals, Scharf, supra note 74, p. 103-106.

96 United States of America v Otto Ohlendorf (Einsatzgruppen), IV TWC 460.

97 According to the United Nations War Crimes Commission (UNWCC), the United States Commission 'jurisdiction in the Hadamar Trial jurisdiction can be "(a) the general doctrine recently expounded and called" universality of jurisdiction over war crimes," which has the support of the United Nations War Crimes Commission and according to which every independent State has, under International Law, jurisdiction to punish not only pirates but also war criminals in its custody, regardless of the nationality of the victim or of the place where the offence was committed, particularly where,

The International Military Tribunal for the Far East (Tokyo Tribunal) appears less contested as to its jurisdictional basis. Indeed, the Tokyo Tribunal was acting with the consent of the Japanese who had formally signed an instrument of surrender.[100] Nevertheless, there were two conceptions of the Tokyo Tribunal's jurisdiction over the territory and nationals of Japan: one based on the universal jurisdiction arising from nature of the crimes and another one based on the sovereign consent of Japan expressed by the Allied powers. Unlike the IMT, the sovereign consent conception seems to be the most commonly adopted position regarding the legal basis of the Tokyo Tribunal. Nevertheless, the Chief of Prosecution[101] and dissenting Judge Bernard[102] advanced the argument that the basis upon

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for some reason, the criminal would otherwise go unpunished." Law Reports of Trials of War Criminals, Vol. 1, Case 4, p. 46, Trial of Alfons Klein et al., United States Military Commission Appointed by the Commanding General Western District, U.S.F.E.T., Wiesbaden, Germany, 8-15th October 1945.

98 According to the UNWCC Report, the British Military Court in the Zyklon B case stated that jurisdiction could be based on "(a) the general doctrine called Universality of Jurisdiction over War Crimes, under which every independent State has in International Law jurisdiction to punish pirates and war criminals in its custody regardless of the nationality of the victim or the place where the offence was committed…" Law Reports of Trials of War Criminals, Vol. 1, Case no. 9, Trial of Bruno Tesch and two Others, British Military Court, Hamburg, 1-8th March 1946.

99 The defendant, a German, was tried and convicted by a British military court in Venice on a charge of committing war crimes against Italian nationals in Italy. Law Reports of Trials of War Criminals, vol. 8., Case No. 44, p. 9, The Trial of Albert Kesselring British Military Court at Venice, Italy, 17 February-6 May 1947.

100 In August 1954 Japan accepted the Potsdam Declaration which provided that "stern justice shall be meted out to all war criminals" and signed a formal instrument of surrender which stated that "the authority of the Emperor and the Japanese government to rule the state shall be subject to the Supreme Commander for Allied Powers." This instrument of surrender was between the Allies and Japan. At the Moscow Conference a Far Eastern Committee was established to review the orders of the Supreme Commander for Allied Powers; however, it was also agreed that the latter would be a military officer operating under United States command. While the Far Eastern Committee had the power to review the directives and decisions of the Supreme Commander for Allied Powers, it was also provided that the latter could issue such directives and decisions on his own initiative. On 6 October, the US State, War and Navy Departments Coordinating Committee issued a directive stating that General MacArthur had the power "to appoint special international military tribunals [for trial] of far Eastern war criminals". The directive stressed "in the appointment of any such international court and in all trials before it the international character of the Court and the authority by which it is appointed should be properly recognized and emphasized, particularly in dealing with the Japanese people." On 19 January 1946, General McArthur, acting as the Supreme Commander for Allied Powers, issued the special proclamation establishing the Tokyo Tribunal and its Charter. As a result of the relation between the US State, War and Navy Departments Coordinating Committee, the Far Eastern Committee and the Supreme Commander for Allied Powers, the never-ending issue as to whether the post Second World War Tribunal was an occupation court or an international tribunal resurfaces; See Neil Boister and Robert Cryer, The Tokyo International Military Tribunal - A Reappraisal (Oxford University Press, 2008).

101 Joseph B. Keenan and Brendan F. Brown, Crimes against International Law (Public Affairs, 1950), p. 18.

102 "It is to a superior authority recognized as such by all the parties concerned or most of them that belongs the right of settling differences among parties. The acceptance of this principle within each nation is sufficient proof of its conformity to natural and universal law, respect of which indeed supplies the very foundation of law and civil society. A Universal authority would be the one competent to create tribunals to judge individuals accused of crimes against universal order. But for want of an organism endowed with such universal authority, he who possessed of actual power and moral authority sufficient to assume that duty can set up the necessary tribunals for the trial of persons suspected of acts supposed to be in criminal infringement of natural and international law. For this purpose he can give the rules of procedure for securing the appearance of the Accused before the Tribunal for the judgment of the Accused is also for

which the Tokyo Charter was created was a general right to enforce international criminal law.[103] Hence, even though Japan gave its consent to the making of the Tokyo Tribunal Charter and jurisdiction, the Tokyo Tribunal gave rise to the same propositions with regard to its jurisdictional basis than the Nuremberg Tribunal and the trials conducted under Control Council Law No. 10.

1.5. The Nuremberg principles and the work of the International Law Commission

Following the Nuremberg judgment the General Assembly of the UN adopted Resolution 95 (1) on the Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal.[104] In order to have these principles firmly established in international law and thoroughly defined, the General Assembly requested the International Law Commission (ILC) on 21 November 1947 to formulate the Nuremberg principles and to prepare a Draft Code of Offences against the Peace and Security of Mankind.[105] The ILC submitted its formulation of the Nuremberg principles in 1950[106] and adopted two draft codes in 1950 and 1954.[107] On 9 December 1948, the General Assembly invited the ILC "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions".[108] This project was in line with Article VI of the 1948 Genocide Convention which referred to a (future) "international penal tribunal."[109]

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execution of the judgment. [...] The crimes committed against the peoples of a particular nation are also crimes committed against members of the universal community. Thus, the de facto authority which can organize the trial of crimes against and peace and humanity can, if it finds it opportune, prosecute for crimes against peoples of particular nations also along with them. The law to be applied in such case, however, will not then be of a particular nation, the victor or the defeated, but that of all nations." Dissenting Judgment of the Member from France of the International Military Tribunal for the Far East, p. 2.

103 Neil Boister and Robert Cryer, supra note 100, p. 31.

104 General Assembly Resolution 95 (I) of 11 December 1946, Affirmation of the Principles of International Law recognized by the Charter of Nürnberg Tribunal, UN Doc. A/236.

105 General Assembly resolution 177 (II) of 21 November 1947, Formulation of the principles recognized in the Charter of the Nurnberg Tribunal and in the judgment of the Tribunal, UN Doc. A/RES/177(II).

106 ILC, Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries 1950, Yearbook of the ILC, 1950, vol. II.

107 The Code was originally titled a code of offences: the change from 'offences' to 'crimes' was made by General Assembly Resolution 42/151 of 7 December 1987, UN Doc. A/42/49.

108 General Assembly Resolution 260 B (III) of 9 December 1948, Study by the ILC of the Question of an International Criminal Tribunal, A/RES/3/260 B.

109 Genocide Convention, art. 6 reads as follows: "Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such

The ILC appointed two *Special Rapporteurs* - Ricardo J. Alfaro and Emil Sandström - to draft working papers on the question of the desirability and possibility of establishing an international judicial organ.[110] Alfaro submitted in his report that it was both desirable and possible to establish international criminal jurisdiction.[111] One objection to the creation of international criminal jurisdiction that Alfaro recognized as worthy of consideration was the question of sovereignty. Indeed, States objected that to relinquish their domestic criminal jurisdiction was contrary to the traditional principle of sovereignty. Alfaro considered that there were two counterarguments to what he referred to as the "absolute sovereignty" objection. First, crimes against the peace, war crimes, crimes against humanity and genocide are perpetrated by Governments or by individuals as representatives of Governments. Thus, their repression by territorial courts is so improbable that only an international criminal court could properly try these international crimes. Second, absolute sovereignty is incompatible with the existence and functioning of the United Nations. Sates had to accept that a part of their sovereignty had been relinquished to the United Nations. Thus, Alfaro considered that international criminal jurisdiction should be created by the United Nations.[112]

On the other hand, Emil Sandström submitted in his report that international criminal jurisdiction would be ineffective and therefore undesirable.[113] According to the Special Rapporteur, too many States considered that the repression of crimes was a matter within the competence of the State and not a matter to be dealt with by the international community.[114] Thus, Sandström did not recommend the establishment of international criminal jurisdiction until the attitude of States in this regard changed.

The two Special Rapporteurs agreed that delegation of criminal jurisdiction was a necessary element for international criminal jurisdiction to be established. However, while Alfaro was optimistic that the community of States would create such jurisdiction, Sandström believed States were too

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international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." The ILC request and the Genocide Convention were adopted during the same General Assembly plenary meeting.

110 ILC, Report of the ILC on the work of its first session, 12 April to 9 June 1949, part I, chap. IV, paras.32-34, Yearbook of the ILC 1949, UN Doc. A/925 (A/4/10).

111 ILC, Report on the Question of International Criminal Jurisdiction by Ricardo J. Alfaro, Special Rapporteur, Yearbook of ILC (Vol II) 1950.

112 Report on the Question of International Criminal Jurisdiction by Ricardo J. Alfaro, supra note 97, p. 17.

113 ILC, Report on the Question of International Criminal Jurisdiction by Emil Sandström, Special Rapporteur, Yearbook of ILC (Vol II) 1950, par. 131-134, UN Doc. A/1316 (A/5/12).

114 Report on the Question of International Criminal Jurisdiction by Emil Sandström, supra note 99, p. 21.

jealous of their adjudicative and enforcement jurisdiction to delegate them to an international body. The ILC discussed the reports presented by Alfaro and Sandström and decided by eight votes to one, with two abstentions, that the establishment of an international judicial organ was desirable and possible.[115] On the base of the ILC report, the General Assembly tasked a committee to draft a Statute for an International Criminal Court.[116] However, the special committee submitted two reports which reflected the increasing reluctance of the international community regarding the establishment of an international criminal jurisdiction.[117]

Finally, on 4 December 1954 the General Assembly asked for a draft definition of aggression to be submitted to it.[118] This last request saw the early progress of the ILC succumb to the paralysis of the Cold War. Due to the relationship between the definition of aggression and the question of international criminal jurisdiction, the General Assembly considered that the Draft Code of Offenses against the Peace and Security of Mankind and the draft Statute for an International Criminal Court be postponed until a draft definition of aggression was submitted.[119] Hence, until 1981 the process of drafting the Draft Code of Offences against the Peace and Security of Mankind and establishing an international criminal jurisdiction was blocked.

Around the same time as the resurgence of domestic proceedings against perpetrators of crimes committed during World War II,[120] the General Assembly by Resolution 36/106 of 10 December 1981 invited the ILC to resume its work in elaborating the Draft Code of Offences against the Peace and Security of Mankind, which would become the Draft Code of Crimes Against the Peace and Security of Mankind (Draft Code of Crimes).[121] The drafting of the Code of Crimes again raised the problem of its implementation and the various possible options: system of territoriality, system of personality,

115 ILC, Report of the ILC on its Second Session, 5 June to 29 July 1950, Yearbook of the ILC (Vol II) 1950, p. 378, UN Doc. A/1316.

116 General Assembly Resolution 489 (V) of 12 December 1950, International Criminal Jurisdiction, UN Doc. A/RES/5/489.

117 See Official Records of the General Assembly, Seventh Session, Supplement No. 11 (A/2136); See Official Records of the General Assembly, Ninth Session, Supplement No. 12 (A/2645).

118 General Assembly Resolution 895 (IX) of 4 December 1954, Question of Defining Aggression, UN. Doc. A/RES/9/895.

119 General Assembly Resolution 897 (IX) of 4 December 1954 Question of Defining Aggression, UN. Doc. A/RES/9/895; General Assembly Resolution 898 (IX) of 14 December 1954, International Criminal Jurisdiction, UN. Doc. A/RES/9/898.

120 E.g. Barbie; Demjanjuk; Finta.

121 General Assembly Resolution 36/106 of 10 December 1981, Draft Code of Offences against the Peace and Security of Mankind, UN Doc. A/RES/36/106.

universal system and system of international criminal jurisdiction.[122] It was not until the complete end of the political stagnation caused by the Cold War that the issue of international criminal jurisdiction could be addressed. The Draft Code of Crimes was concluded on first reading in 1991, but it was generally viewed plethoric and inadequate. [123] This led some to express their preference for international criminal jurisdiction being examined separately from the project of the Draft Code of Crimes.[124] In 1989 the General Assembly asked the ILC to further consider the issue of international criminal jurisdiction.[125]

In 1992 the ILC commenced work substantially on a Draft Statute for an International Criminal Court.[126] In 1994 a Draft Statute was adopted and recommended to the General Assembly.[127] The ILC Draft Statute was modest and limited in its scope. The Statute of the proposed court aimed to be primarily "procedural and adjectival".[128] The envisaged international criminal court was provided with jurisdiction over (1) genocide; (2) aggression; (3) serious violations of the laws and customs applicable in armed conflict; (4) crimes against humanity; and (5) crimes, established under or pursuant to the treaty provisions listed in the Annex to the Statute. However, the court had 'inherent jurisdiction' only

122 ILC, Report of the ILC on the work of its thirty-fifth session, (3 May-22 July 1983), 2 Yearbook of the ILC 1983, UN. Doc. A/38/10; ILC, Report of the ILC on the work of its thirty-eighth session (5 May - 11 July 1986) 2 Yearbook of the ILC 1986.

123 See Commentaries on the International Law Commission's 1991 Draft Code of Crimes against the Peace and Security of Mankind (1993). Work on the second reading of the Draft Code recommenced in 1994 and was completed in 1996, leading to a much more modest proposal; see the Twelfth report on the draft code of crimes against the peace and security of mankind, by Mr. Doudou Thiam, Special Rapporteur, 2 Yearbook of the ILC 99 (1994) UN Doc. A/CN.4/460; ILC, Report of the ILC on the work of its forty-sixth session (2 May-22 July 1994), 2 Yearbook of the ILC 74-87 (1994); Thirteenth report on the draft code of crimes against the peace and security of mankind, by Mr. Doudou Thiam, Special Rapporteur, 2 Yearbook of ILC 35 (1995) UN Doc. A/CN.4/466; see also Yearbook of ILC 1996, Vol. I, p. 151.

124 James Crawford, The Work of the International Law Commission, in supra note 6, p. 24.

125 General Assembly Resolution 44/39 of 4 December 1989, International criminal responsibility of individuals and entities engaged in illicit trafficking in narcotic drugs across national frontiers and other transnational criminal activities: establishment of an international criminal court with jurisdiction over such crimes, UN Doc. A/RES/44/39. At the request of Trinidad and Tobago the GA asked the ILC to consider when working on the Draft Code of Crimes to establish an international criminal court to deal with of international illicit trafficking in narcotic drugs. Later on, the General Assembly Resolution 45/41 of 28 November 1990, Report of the ILC on the work of its 42nd session UN Doc. A/RES/45/41, noting that the elaboration of the Code could contribute to the strengthening of international peace and security invited the ILC to consider further the issue of an international criminal jurisdiction including the possibility of establishing an international criminal court, but this time without a specific interest in international illicit trafficking in narcotic drugs.

126 See ILC, Report of the Working Group on the question of an international criminal jurisdiction, 2 Yearbook of the ILC 58, par. 99 (1992), UN Doc. A/CN.4/L.471.

127 See ILC, Draft Statute for an international criminal court, with commentaries, Report of the ILC on the work of its forty-sixth session, 2 May-22 July 1994, 2 Yearbook of international law commission 26, par. 91 (1994).

128 See ILC, Draft Statute for an International Criminal Court, with Commentaries, supra note 113, p. 36.

over the crime of genocide.[129] The principle of 'ceded jurisdiction' was the 'guiding star' for the rest of the crimes within the subject matter jurisdiction of the Court.[130]

The principle of 'ceded jurisdiction' meant that the international criminal jurisdiction would only proceed if the custodial and the territorial States had ceded their jurisdiction to the Court.[131] In other words, the Court was envisaged as a facility available to States who wished to delegate their jurisdiction over a situation to the international court. On the other hand, the Court would not seek whether jurisdiction was 'ceded' if it gained jurisdiction over the matter as a consequence of a referral by the SC acting under Chapter VII of the UN Charter.[132] In its commentary, the ILC wrote:

> The Commission felt that such a provision was necessary in order to enable the Council to make use of the court, as an alternative to establishing *ad hoc* tribunals and as a response to crimes which affront the conscience of mankind. On the other hand it did not intend in any way to add to or increase the powers of the Council as defined in the Charter, as distinct from making available to it the jurisdiction mechanism created by the statute.

The Draft Statute of the International Criminal Court was submitted to the General Assembly in November 1994.[133] In the General Assembly most delegations endorsed the establishment of a permanent international criminal court. The SC had only recently created an *ad hoc* tribunal for the Former Yugoslavia and was being pressed to create a second *ad hoc* tribunal to prosecute those responsible for genocide and other serious violations of international humanitarian law in Rwanda.

1.6. The Security Council *ad hoc* tribunals

129 The court had "inherent jurisdiction" only over the crime of Genocide. Even though the ILC used the term "inherent" jurisdiction, it meant "that the court ought, exceptionally, to have inherent jurisdiction over it by virtue solely of the States participating in the Statute, without any further requirement of consent or acceptance by any particular State." However, the State making the complaint needs to be a party to the Convention on Genocide and to the Statute of the Court. See ILC, Draft Statute for an International Criminal Court, with Commentaries, art. 21 (1) (a); p. 37.

130 See ILC, Draft Statute for an International Criminal Court, with Commentaries, p. 36, fn concerning the ''inherent'' jurisdiction over Genocide.

131 Ibid..

132 See ILC, Draft Statute for an international criminal court, art. 23.

133 At the 49th session of the General Assembly it was decided that the ILC Draft Code would be considered during the 50th session but that first an *ad hoc* committee for the Establishment of an International Criminal Court needed to be set up. UN GAOR 6th Comm., 49th Sess., 23 November 1994, UN Doc. A/C.6/49/L.24.

On 6 October 1992 the SC established a commission of experts to investigate violations of international humanitarian law in the former Yugoslavia.[134] The report of the Commission of experts on the Former Yugoslavia stated that it was led to consider the idea of the establishment of an *ad hoc* international tribunal. According to the Commission:

> States may choose to combine their jurisdictions under the universality principle and vest this combined jurisdiction in an international tribunal. The Nuremberg International Military Tribunal may be said to have derived its jurisdiction from such a combination of the national jurisdiction of the states parties to the London Agreement setting up that Tribunal.[135]

Not only did this legal opinion rejuvenate the disagreement over the jurisdictional basis of the Nuremberg Tribunal, it also cast doubt on the procedure by which international criminal jurisdiction was to be established.[136]

On 25 May 1993, following the Commission's recommendation, the SC adopted under Chapter VII of the UN Charter Resolution 827 which established the International Criminal Tribunal for the Former Yugoslavia for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 (ICTY).[137] Similarly, on 8 November 1994 the SC adopted, again under Chapter VII of the UN Charter, Resolution 955, which established the International Criminal Tribunal for Rwanda for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and by Rwandan nationals in the territory of neighboring States, during 1994 (ICTR).[138]

The basis of the *ad hoc* tribunals' jurisdiction is territoriality in the case of the ICTY[139] and

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134 Security Council Resolution 780 (1992), establishing a Commission of Experts to Examine and Analyze Information Submitted Pursuant to Resolution 771, UN Doc. S/RES/780.

135 Interim Report of the Independent Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), par. 73, UN Doc. S/25274 (1993).

136 See e.g. Scharf, supra note 74, Morris, supra note 27.

137 Security Council Resolution 827 (1993) of 25 May 1993, adopting the Statute of 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, UN Doc. S/RES/827 (hereinafter ICTY Statute).

138 Security Council Resolution 955 (1994) of 8 November 1994, with annex containing the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994., UN Doc. S/RES/955 (hereinafter ICTR Statute).

139 Schabas maintains that the jurisdiction of the ICTY is territorial in nature; it is restricted to the territory of the former Yugoslavia, William Schabas, An Introduction to the International Criminal Court (Cambridge University Press, 2011),

territoriality and nationality in the case of the ICTR.[140] Hence, it could be maintained that the *ad hoc* tribunals' adjudicative jurisdiction derives from a delegation of these jurisdictional bases.[141] The SC, when adopting a resolution establishing an international criminal tribunal under Chapter VII, exercises powers delegated to it by all the Member States of the UN.[142] While Scharf argues that the delegated jurisdictional basis is universal jurisdiction, Akande claims it is territorial jurisdiction.[143] Conversely, Morris[144] and former US Ambassador Scheffer[145] contest that the SC is delegating any 'bases' of State jurisdiction to the *ad hoc* tribunals. In their opinion, the *ad hoc* tribunals' jurisdiction finds its source exclusively in the power of the SC to maintain international peace and security.[146]

In *Milutinovic et al.*, the Defendants, who were accused of crimes committed in Kosovo, challenged the jurisdiction of the ICTY on the basis that the Federal Republic of Yugoslavia (FRY) was not a Member State of the UN in 1999 when the alleged crimes were committed.[147] According to

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p. 63; ICTY Statute, art. 1:"The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute."

140 Schabas argues that the jurisdiction of the ICTR is both territorial and personal; it is restricted to crimes committed in Rwanda or by Rwandans; Schabas, supra note 139, p. 63; ICTR Statute, art. 1:"The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute."

141 Akande says that the tribunals "constitute examples of the delegation by States of criminal jurisdiction to international tribunals, Akande, supra note 74, p. 628; Scharf and Dinstein maintain that the *ad hoc* tribunals represent a "collective exercise of universal jurisdiction of States." Yoram Dinstein, The Universality Principle and War Crimes, in Michael Schmitt and Leslie Green, The Law of Armed Conflict: Into the Next Millenium (U.S. Naval War College, 1998), p. 17-37. Scharf, supra note 74, p. 108.

142 Charter of the United Nations (San Francisco, 26 June 1945) (hereinafter the UN Charter), art. 24(1); Scharf, supra note 74, p. 296; Akande, supra note 74, p. 628; Judge Sidhwa of the ICTY Appeals Chamber, states in his separate opinion on the *Tadic Interlocutory Appeal Decision* as follows: "It cannot be denied that under Article 24(1) of the Charter, Member States transferred their sovereign rights to the Security Council when it took Chapter VII proceedings on their behalf to establish the Tribunal and agreed to be bound by the Council's decisions. In the instant case the transfer of sovereign rights included the rights which States had in respect of trial of accused persons for serious offences against international humanitarian law which they may have committed and for which they were liable within their respective jurisdictions. In view of Article 2(7) of the Charter, the intrusion of the United Nations in matters affecting the sovereign rights of Member States is legal and permissible, if the matters pertain to Chapter VII proceedings." See *Tadic Interlocutory Appeal Decision*, Judge Sidhwa separate opinion, par. 85.

143 Akande, supra note 74, p. 628; Scharf, supra note 74, p. 108.

144 Morris, supra note 27, p. 13.

145 Scheffer, supra note 25, 68.

146 Morris, supra note 27, p. 13; see *Tadic Interlocutory Appeal Decision*, par. 38. " The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia."

147 Prosecutor v. Milutinovic et al., ICTY, Trial Chamber, Motion Challenging Jurisdiction, IT-99-37-PT, 6 May 2003; see Akande's critique of the decision, supra note 74, p. 629-631. The ICTY Statute would normally apply to members of the

the defendants, the ICTY, a court created by the SC, could not have jurisdiction over crimes committed in a non-UN Member State. A potential solution to this issue was that the ICTY was exercising universal jurisdiction so that it would not be restricted to the territorial space of UN Members. The Trial Chamber eschewed the issue by stating that the FRY retained sufficient indicia of UN membership during that period to be amenable to the regime of the SC resolutions adopted for the maintenance of international peace and security.[148] Since the jurisdiction of the ICTY over events that occurred in the FRY was confirmed, there was no need for the Trial Chamber to address the second strand of the motion which challenged the ICTY's universal jurisdiction.[149]

Judge Robinson, however, addressed this question in his separate opinion. According to Robinson:

> It seems that when it is said that the ICTY is an example of universal jurisdiction, what is meant is that since the crimes in respect of which it has jurisdiction attract universal jurisdiction, the Security Council relied on such jurisdiction in establishing the Tribunal. It may be that this is said on the basis of a comparison with the manner in which the Allies combined the universal jurisdiction each of them had over the specified crimes to establish the Nuremberg Tribunal. But the comparison between the establishment of a criminal tribunal by States on the one hand, and the Security Council on the other, is not apt, because in respect of the latter, the source of the Council's power is its right under Chapter VII of the United Nations Charter to adopt measures for the maintenance of international peace and security.[150]

It appears that Judge Robinson agrees with Morris and Scheffer; the jurisdiction of the *ad hoc* tribunals is based on the powers of the SC under Chapter VII *tout court*. As the Appeals Chamber of the ICTY

UN by virtue of Article 25 of the UN Charter, which 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." The ICTY Statute would apply to states which are not member of the UN by virtue of Article 2 (6) of the UN Charter which provides, "The Organization shall ensure that states which are not members of the United Nations act in accordance with these Principles as far as may be necessary for the maintenance of international peace and security." The International Court of Justice in its advisory opinion in the Namibia Case declared that the non-Member States of the UN must "act in accordance with" the decisions of the UN, which terminated the mandate for Namibia and declared the presence of South Africa in Namibia illegal; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 (Advisory Opinion), International Court of Justice, 1960 ICJ Report 16.

148 Ibid., par. 44: "General Assembly resolution 47/1 made clear that the FRY was not to be considered as continuing the membership of SFRY to the UN. On the other hand, the ICJ in the Genocide Case ruled in its Judgment on the application for revision on 3 February 2003: "... the difficulties which arose regarding the FRY's status between the adoption of that resolution and its admission to the United Nations on 1 November 2000 resulted from the fact that, although the FRY's claim to continue the international legal personality of the Former Yugoslavia was not "generally accepted" (see Security Council resolution 777 of 19 September 1992), the precise consequences of this situation were determined on a case-by-case basis (for example, non-participation in the work of the General Assembly and ECOSOC). Resolution 47/1 did not inter alia affect the FRY's right to appear before the Court or to be a party to a dispute before the Court under the conditions laid down by the Statute. Nor did it affect the position of the FRY in relation to the Genocide Convention."

149 Ibid., par. 64.

150 Ibid., Separate Opinion of Judge Patrick Robinson, par. 46.

made clear in the *Tadic Interlocutory Appeal on Jurisdiction*, this role is consistent with the SC's primary responsibility for the maintenance of international peace and security.[151]

Since the SC may only establish a tribunal in response to a threat to international peace and security,[152] the idea of a permanent international criminal court began to gain popularity among the international community. Due to "tribunal fatigue"[153] a permanent court established by treaty was needed with possibility for universal application.

1.7. The international criminal court

Between the 15th June and 17th July 1998 the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference) took place. As the Chairman of the Rome Conference – Philippe Kirsch – reported, the negotiations regarding the adoption of the Statute of the International Criminal Court in Rome were tense and difficult but culminated effectively after five weeks with a vote of 120 to 7, with 21 abstentions.[154]

The most controversial issue at the negotiation of the Rome Statute was the jurisdiction of the Court. The "question of questions of the entire project" was whether the Court would exercise universal jurisdiction or would need the consent of every State concerned with the crime.[155] As Hans-Peter Kaul points out, the conflicting principles were universality versus State sovereignty.[156] Article 12, which provides for the preconditions for the exercise of jurisdiction, was until the last minute before the adoption of the Statute "a make or break provision".[157] Ultimately, the "final compromise" was that the ICC would have inherent jurisdiction only in situations where crimes were committed by a national of a State party or in the territory of a State party. Nevertheless, it was felt essential that the SC be

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151 *Tadic Interlocutory Appeal Decision*, par. 32-40, see also Prosecutor v. Kanyabashi, Trial Chamber, Decision on the Defence Motion on Jurisdiction, ICTR, ICTR-96-15-T, 18 June 1997.

152 UN Charter, art. 39.

153 Michael P. Scharf, The Politics of Establishing an International Criminal Court, 6 Duke Journal of Comparative & International Law 169 (1995); David Scheffer, All the Missing Souls: a Personal History of the War Crimes Tribunals (Princeton University Press, 2012), p. 168.

154 Philippe Kirsch and John T. Holmes, The Rome Conference on an International Criminal Court: The Negotiating Process, 93 American Journal of International Law 2-12 (1999).

155 Sharon A. Williams. Article 12, in Otto Triffterer, Commentary on the Rome Statute of the International Criminal Court (Hart Publishing, 1999), p. 329.

156 Kaul, supra note 25, p. 584.

157 Williams, supra note 155, p. 329.

empowered to refer situations to this permanent international criminal court.[158] Otherwise, the SC be forced to continue establishing a succession of *ad hoc* tribunals in order to discharge its mandate, where the court would not have jurisdiction.[159] Many consider, however, that because of the nature of the subject matter jurisdiction of the ICC, it could have exercised jurisdiction anywhere in the world without the consent of the territorial State, the national State or the referral of the SC under Chapter VII of the UN Charter.[160]

Indeed, the representatives of Germany made a proposal, which was supported by an important number of NGOs[161] and States,[162] that the Court would have inherent jurisdiction wherever a crime within its subject matter jurisdiction had been committed. In other words, the Court would have had universal jurisdiction over aggression, genocide, crimes against humanity and war crimes. To be sure, no nexus with a State party and the crimes would have been needed for the ICC to have competence over a case. However, this competence would still have been restricted by the principle of complementarity. If a national system was able and willing to carry out the investigation or prosecution, the national system would keep its primary jurisdiction over the crime.[163] Furthermore, even though the court's inherent jurisdiction over any crime within its subject matter could have been exercised without the need to establish a link between the crime and a State party, States not party to the Statute were under no obligation to cooperate with the Court.[164]

At the other end of the spectrum, some delegations proposed that the mandatory consent of all of the interested States be required in order for proceedings to be initiated by the Court. South Korea

158 Lionel Yee, The International Criminal Court and the Security Council: Article 13 (b) and 16, in Roy S. Lee, The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results (Kluwer Law International, 1999), p. 146.

159 M. Cherif Bassiouni, The Legislative History of the International Criminal Court: Summary Records of the 1998 Diplomatic Conference (Volume 3), (2005, Transnational Publishers), p. 182, par 84, see comment of China.

160 Kaul, supra note 25, p. 584.

161 E.g. International Committee of the Red Cross, International Commission of Jurist, Lawyers Committee for Human Rights, Amnesty International and Human Rights Watch.

162 Schabas lists all the following as examples of States supporting Germany's proposal: UN Doc. A/CONF.183/SR.2, par. 54 (Sweden); UN Doc. A/CONF.183/SR.3, par. 21 (Czech Republic); par. 42 (Latvia); par. 76 (Costa Rica); UN Doc. A/CONF.183/SR.4/, par. 12 (Albania); par. 38 (Ghana); par. 57 (Namibia); UN Doc. A/CONF.183/SR.5 (Italy); par. 21 (Hungary); par. 32 (Azerbaijan); UN Doc. A/CONF.183/SR.6, par. 4 (Belgium); par. 16 (Ireland); par. 51-52 (Netherlands); par. 69 (Luxembourg); UN Doc. A/CONF.183 /SR.8, par. 18; (Bosnia and Herzegovina); par. 62 (Ecuador). To read Germany's defence of its proposal see UN DOC. A/CONF.183/SR.4, par. 20-21; William A. Schabas, The International Criminal Court: A Commentary on the Rome Statute (Oxford University Press, 2010), p. 280, fn. 16.

163 See Article 17 of the Rome Statute.

164 Article 9 (2) of the German proposal provided the possibility for the non-party States to accept to cooperate on an *ad hoc* basis with the Court.

made a proposal that it thought to be a "compromise formula" whereby the court would have jurisdiction if either the State that had territorial, active nationality, passive personality, or custodial jurisdiction was party to the Court.[165] If one of those States was a State party, the nexus with the Court would become sufficient for the latter to seize jurisdiction. By including the custodial State as one of the States that would link the Court to the crimes, the Korean proposal equated in essence to *conditional* universal jurisdiction.[166] Despite the fact that the Korean proposal was supported by 79% of the States present,[167] an opposition led by the United States resisted this proposal, describing it indeed as 'universal jurisdiction'.

The United Kingdom paved the way for the Statute as it is currently stands by proposing that the Court would have jurisdiction only if both the custodial State and territorial State were State parties. The United Kingdom then amended its proposal to delete custodial State consent so that only territoriality was required. [168] On the contrary, the US required that active nationality be required.[169] The United States proposal was that the Court could only exercise jurisdiction over a case if (1) either the State of nationality of the suspect was a party to the Statute or (2) the jurisdiction of the Court had been triggered by the Security Council.

The SC referral of a situation under Chapter VII of the UN Charter as provided for in Article 13 (b) of the Rome Statute was in the view of the United States the only way "to impose the court's jurisdiction on a non-party State".[170] Conversely, some States were of the opinion that the General Assembly was the appropriate organ to refer situations or even that the SC could refer cases under Chapter VI of the UN Charter.[171] The issue of the SC triggering a situation remained until the end of

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165 Republic of Korea: proposal regarding Articles 6[9], 7[6], UN Doc. A/CONF.183/C.1/L.6, par. 4.

166 See Antonio Cassese, When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case, 13 European Journal of International Law 855-858 (2002); As Cassese defines it a conditional universal jurisdiction is contingent upon the present of the suspect in the forum State.

167 See Williams, supra note 142.

168 Proposal by the United Kingdom of Great Britain and Northern Ireland, Trigger mechanism, UN Doc. A/AC.249/1998/WG.3/DP.1.

169 Proposal submitted by the United States of America, UN Doc. A/CONF.183/C.1/L.70.

170 Ambassador Scheffer, Head of the United States Delegation in Rome, before the United States Senate Foreign Relations Committee, 23 July 1998.

171 See Yee, supra note 158, p. 149; see also Article 10 (3), Prep Com Draft Statute; ILC, and Add.1, Eighth report on the draft Code of Crimes Against the Peace and Security of Mankind by Mr. Doudou Thiam, Special Rapporteur, 2 Yearbook of the ILC par. 89 (1990) UN Doc. A/CN.4/430; ILC, Draft Statute for an international criminal court, with commentaries, Report of the ILC on the work of its forty-sixth session, 2 May-22 July 1994, 2 Yearbook of international law commission 26,par. 65-66 (1994), UN Doc. A/49/10.

the Rome Conference "a controversy with a small but vocal minority opposing any role for it."[172] Despite this opposition there was broad support for providing a role for the SC to play within the triggering mechanism of the Court.[173]

Undeniably, the ICC has universal reach. The Statute has been negotiated at a universal level. The Rome Conference was organized and hosted by the United Nations and 160 States participated in the drafting of the Statute. It contains an open invitation to any State to adhere to it.[174] Furthermore, even though the ICC is not an organ of the UN, a Relationship Agreement between the International Criminal Court and the United Nations has been negotiated in accordance with Article 2 of the Rome Statute and General Assembly resolution 58/79 of the 9th December 2003.[175] Finally, SC referrals make the universal applicability of the Rome Statute a reality.

There appears to be four main views with regard to the jurisdictional basis of the ICC when it acts under an Article 13 (b) referral. First, territorial and active nationality jurisdictions are delegated to the ICC by the SC acting under Chapter VII.[176] Due to the obligation States have under the UN Charter, they have to accept and carry out the referral and thus delegate their jurisdictions to the ICC. Second, the States that created the ICC and the others that have acceded to it have delegated their universal jurisdiction to the Court;[177] even if during the negotiation in Rome, it was decided to limit this delegated universal jurisdiction to situations where the SC would consent. Third, due to the nature of the crimes within the ICC subject-matter jurisdiction the ICC is endowed with universal jurisdiction;[178] even if it was accepted in Rome to only exercise this universal jurisdiction where the SC would

172 Williams, supra note 155, p. 349; Indeed, these states felt that the SC's triggering authority would: "reduce the credibility and moral authority of the court, excessively limit its role; undermine its independence, impartiality and autonomy; introduce an appropriate political influence over the functioning of the institution; confer additional powers on the Security Council that were not provided for in the Charter; and enable the permanent members of the Security Council to exercise a veto with respect to the work of the court." Report of the *Ad hoc* Committee on the Establishment of an International Criminal Court, 6 September 1995, UN Doc. A/50/22, par. 121; see also Report of the Preparatory Committee, par. 130. 132 (1996) UN Doc. A/Conf/183/2, Add. 1 and Add. 2.

173 Lionel Yee, supra note 158, p. 149.

174 At the time of writing, 123 States are party to the Statute. http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx

175 UN General Assembly, Relationship Agreement Between the United Nations and the International Criminal Court, 20 August 2004, UN Doc. A/58/874.

176 E.g. Akande, supra note 74.

177 E.g. Scharf, supra note 74.

178 E.g. Claus Kress, The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute, in Morten Bergsmo and LING Yan, State Sovereignty and International Criminal Law (Torkel Opsahl Academic EPublisher, 2012), p. 246-250; Sadat, supra note 25; Kai Ambos, Punishment without a Sovereign? The Ius Puniendi Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law, 33 Oxford Journal Legal Studies 1-23 (2013).

consent. Fourthly, and finally, the SC's power under Chapter VII forms the ICC’s jurisdictional foundation over non-party States.[179]

The first and second views have already been addressed in the previous section. The first view was expressed by Akande’s proposition about the delegation of jurisdiction concerning the *ad hoc* tribunals and the second view by Scharf’s proposition of delegation of universal jurisdiction. The third and fourth views are actually extensions of the delegation theories. However, instead of being delegations from States they are delegations from the international community. The next section will develop this idea of a ‘delegation from the international community’ and, more specifically, will focus on what I refer to as the two ‘conceptions’ of an Article 13 (b) referral.

1.8. The two ‘conceptions’

To come back to the ‘concept-conception’ distinction, the ‘trunk’ of this study’s ‘conceptual tree’ is the ICC’s exercise of prescriptive and adjudicative jurisdiction over the territory and nationals and of a State neither party to the Statute nor consenting to ICC jurisdiction. This abstract idea provides the ‘concept’ of Article 13(b) referrals to the ICC. The competing propositions about the jurisdictional basis of the ICC’s exercise of jurisdiction without the consent of the territorial and the national State are ‘conceptions’ of Article 13 (b) referrals. The two ‘conceptions’ that I have retained of this ‘concept’ are (1) universal jurisdiction arising from the nature of the crimes and (2) jurisdiction based on the powers of the SC under Chapter VII. These two ‘conceptions’ are obviously more controversial than the ‘concept’ as such, but that is exactly the purpose of using the ‘concept-conception’ distinction.[180]

The ‘universal jurisdiction conceptions’ and the ‘Chapter VII conception’ find their origin in international criminal law *stricto sensu* and UN law respectively. More specifically, the first criminal jurisdiction finds its origin in the *jus puniendi* of the international community and the second in the maintenance of international peace and security. In the next section, these two ‘conceptions’ will be briefly outlined; a more in-depth analysis of their interactions with other norms of international law will be conducted in the subsequent chapters.

179 Morris, supra note 27; Williams, supra note 48, p. 316-317.
180 Stephen Guest, Ronald Dworkin: Third Edition (Stanford University Press, 2013), p. 74.

1.8.1. ‘Universal jurisdiction conception’

The ‘universal jurisdiction conception’ conjures the idea of “floating” universal jurisdiction.[181] According to this ‘conception’, universal jurisdiction over genocide, crimes against humanity and war crimes arises from the nature of these crimes[182] and from the obligation to exercise criminal jurisdiction when such egregious conduct occur.[183] This obligation to punish perpetrators of international crimes forms the punitive power (*jus puniendi*) of the international community.[184] The notion that individual criminal responsibility is established directly under international law for crimes of an international character brings forward the notion of international criminal law *stricto sensu*.[185] Hence, there is no need for a State to prescribe the criminality of the act since it is international law that asserts individual criminal responsibility.[186] Ultimately, international criminal law *stricto sensu* is based on the idea of a *jus puniendi* of the international community to punish perpetrators of crimes under international law that shock the conscience of mankind.[187]

181 Williams, supra note 48, p. 314-316; discusses Prosecutor v. Kallon and Kamara, Special Court for Sierra Leone, Appeals Chamber, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), 13 march 2004, par. 88 and Prosecutor v Gbao, Special Court for Sierra Leone, Appeals Chamber, Decision on the Invalidity of the Agreement Between the United Nations the Government of Sierra Leone on the Establishment of the Special Court, SCSL-2004-15-PT15 May 2004, par. 8; which appear to refer to the existence of floating universal jurisdiction.

182 Luban, supra note 58.

183 See e.g. Geneva Convention I, art. 49-50; Geneva Convention II, art. 50-51; Geneva Convention III, art. 129-130; Geneva Convention IV, art. 146-147; Additional Protocol, art. 85, 86, 88; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), United Nations, Treaty Series vol. 1564-85, art. 6; International Convention for the Protection of All Persons from Enforced Disappearances, General Assembly Resolution 61/177, Annex, art. 9, 11, UN Doc. A/RES/61/77; The ILC in its 1996 Draft Code of Crimes Against the Peace and Security of Mankind included an obligation to extradite or prosecute individuals accused of genocide, crimes against humanity and war crimes, ILC, Draft Code of Crimes Against Peace and Security of Mankind, supra note, p. 17, art. 18-19; furthermore, the preamble of the Rome Statute “recalls the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes; Kress, supra note 178, p. 246-250; See Ambos, supra note 178.

184 Kai Ambos, Treatise on International Criminal Law, Volume I (Oxford University Press, 2013), p. 58-60.

185 Georg Schwarzenberger, The Problem of an International Criminal Law, 3 Current Legal Problems 263, 264–74 (1950); Claus Kreß, International Criminal Law, in Rüdiger Wolfrum, The Max Planck Encyclopedia of Public International Law, vol. V (Oxford University Press, 2012) par. 10–14.

186 Nuremberg Principle No. 1 states: “Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.” Principle No. 2: “The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.”

187 Kress, supra note 178, p. 246; see Kai Ambos, supra note 178.

Bassiouni states that if a given crime "threaten[s] the peace and security of humankind" and "shock[s] the conscience of humanity" its prohibition is "part of *jus cogens*."[188] Many other commentators also believe that the prohibitions of aggression, genocide, crimes against humanity and war crimes are *jus cogens*.[189] *Jus cogens* norms are characterized as "superior legal norms".[190] These superior legal norms are norms accepted and recognized by the international community of States as a whole as norms from which no derogation are permitted.[191] These crimes, Orakhelashvili has stated, "entail objective illegality whose redress is a matter of community interest despite the attitudes of or prejudices to individual states".[192]

Most of the crimes that are *jus cogens* entail a duty to prosecute or extradite, or the so-called *aut dedere aut judicare* principle.[193] The *aut dedere aut judicare* principle reinforces the idea of an obligation (or a right) of the international community to assert jurisdiction over the crimes giving rise to this norm.[194] The International Court of Justice (ICJ) in the *Barcelona Traction Case* stated that there are "obligations *erga omnes*" which by their very nature are the concern of all States. The ICJ stated that "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection".[195] Bassiouni maintains that the *jus cogens* and *erga omnes* nature of international crimes obliges the international community to prosecute them.[196] As Kress suggests, Article 48(1) (b) of the International Law Commission's Article on the Responsibility of States for

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188 Cherif Bassiouni, International Crimes: Jus Cogens and Obligatio Erga Omnes, 59 Law and Contemporary Problems 69 (1996).

189 Bassiouni, supra note 188, p. 68; Prosecutor v. Anto Furundzija, ICTY, Trial Chamber II, Judgment, IT-95-17/1-T, 10 December 1998, par. 153-157; Prosecutor v. Zejnil Delalic et al., ICTY, Trial Chamber, Judgment, IT-96-21-T, 16 November 1998, par. 453; Prosecutor v. Zoran Kupreskic et al., Trial Chamber, Judgment, IT-95-16-T, 14 January 2000, par. 520; ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2 Yearbook of the ILC 112 (2001) UN Doc. A/56/10), Terje Einarsen, The Concept of Universal Crimes in International Law (Torkel Opsahl Academic EPublisher, 2012), p. 62.

190 Einarsen, supra note 189, p. 62.

191 Vienna Convention on the Law of Treaties (Vienna,23 May 1969), United Nations, Treaty Series, vol. 1155-331, art. 53.

192 Alexander Orakhelashvili, Peremptory Norms in International Law (Oxford University Press, 2008), p. 288,

193 Bassiouni, supra note 188,

194 Bassiouni, supra note 188.

195 Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain), 1970 ICJ Reports 32, par. 32-33; East Timor Case (Portugal v. Australia), 1995 ICJ Reports 90; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) 2004 ICJ Rep. 136; According to the Court, examples of such obligations are outlawing of acts of aggression and of genocide or principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.

196 Bassiouni, supra note 188.

Internationally Wrongful Acts[197] confirms that any State may act against a breach of an obligation owed to the international community as a whole.[198] Hence it is argued that any State may assert jurisdiction over a breach of an obligation owed to the international community as a whole.

More importantly, the international community itself may assert that authority.[199] Because of the fundamental values at stake, "the international community […] may prescribe international rules of conduct, adjudicate breaches of those rules, and enforce those adjudications."[200] Thus, the international community would work side by side with national jurisdictions in order to investigate and prosecute crimes that concern the international community as a whole.[201] Jurisdiction over crimes of such a nature would float to any entity ready to assert authority over perpetrators of crimes of such an international character.[202] Indeed, the *jus puniendi* of the international community can be exercised by States or through other organs as designed by the international community.[203] This *jus puniendi* if exercised by organs of the international community gives them wider power than "a national criminal court, which acts as a mere fiduciary of the common good."[204]

The ICC pertains to assume that role of exercising the *jus puniendi* of the international community. A significant majority of States were invited by the United Nations at the Rome Conference to draft the founding instrument of this organ of the international community. During a notable part of the negotiation of the Rome Statute efforts were made to reach decisions by consensus.[205] The consensus could not be maintained[206] but an overwhelming majority of the States

197 ILC, Responsibility of States for Internationally Wrongful Acts, 2 Yearbook of the ILC (2001), art. 48: "Invocation of responsibility by a State other than an injured State 1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (b) the obligation breached is owed to the international community as a whole."

198 Claus Kress and Kimberly Prost, Article 98: Cooperation with respect to waiver of immunity and consent to Surrender in Otto Triffterer, Commentary on the Rome Statute of the International Criminal Court (Hart, 2008) p. 1612; Kress, supra note 178, p. 248.

199 Prost and Kress, supra note 188, p. 1612; Sadat, supra note 25, p. 107-111.Otto Trifftеterer, Preliminary Remarks in Otto Triffterer, Commentary on the Rome Statute of the International Criminal Court, (Hart Publishing , 1999), p. 25; Bassiouni, The Sources and Content of International Criminal Law in Cherif Bassiouni, International Criminal Law (Transnational Publishers, 1999), p. 4-17.

200 Sadat, supra note 24, p. 108.

201 Hector Olasolo, The Triggering Procedure of the International Criminal Court (Martinus Nijhoff Publishers, 2005), p. 14.

202 Ibid., p. 14.

203 Ibid., p. 15; Bassiouni, International Criminal Law : A Draft International Criminal Code (Brill, 2005), p. 107 et ss..

204 Kress, supra note 178, p. 246.

205 Hector Olasolo, supra note 201, p. 17.

206 Seven States voted against the adoption of the Rome Statute.

approved the text of the Rome Statute.[207] Proponents of the 'universal jurisdiction conception' argue that the Rome Statute is a legislative act of the international community, which defines the crimes it considers "the most serious crimes of concern to the international community as a whole".[208] Leyla Sadat affirms that in Rome the "universality principle has been extended from a principle governing inter-State relations to one of general prescriptive international law."[209] Thus, individuals from all over the world are subject to the *jus puniendi* of the international community incarnated by the ICC. This jurisdictional power of the ICC does indeed have universal reach when the SC gives the *laissez-passer* to the ICC to act outside of its States parties' territories and nationals.[210] As mentioned above, according to the 'universal jurisdiction conception' of Article 13 (b), the ICC is endowed with universal jurisdiction arising from the nature of the crimes within its subject-natter jurisdiction, that it will exercise where the SC would consent – not the other way round.

All these elements – *jus puniendi* of the international community, *jus cogens*, *and erga omnes* norms – are latent in the 'concept' of the exercise of jurisdiction without the consent of neither the territorial State nor the national State. These norms form the legal regime underlying the 'universal jurisdiction conception'. Accordingly, when ICC jurisdiction is triggered under Article 13 (b) this entire regime is brought into action. As emphasized by the fourth paragraph of the preamble of the Rome Statute, the *telos* of the 'universal jurisdiction conception' is to ensure that the most serious crimes of concern to the international community as a whole do not go unpunished. The 'universal jurisdiction conception' has to be understood in light of this purpose.

1.8.2. 'Chapter VII conception'

The second 'conception' of the referrals under Article 13 (b) Rome Statute is jurisdiction based on the powers of the SC under Chapter VII of the UN Charter. To be more precise, this 'conception' conceives that the jurisdiction over the territory and nationals of a State neither party to the Rome Statute nor consenting to the ICC exercise of jurisdiction is strictly based on the Chapter VII powers of the SC. States have vested, *qua* the UN Charter, the SC with the competence to invoke extraordinary

207 The Rome Statute has been adopted by 120 States, signed by 139 States and at the time of writing ratified by 123 States.
208 Sadat and Carden, supra note 65.
209 Sadat and Carden, supra note 74, p. 412.
210 Olasolo, supra note 201, p. 17.

powers that might be necessary to restore or maintain international peace and security.[211] These extraordinary powers are the so-called Chapter VII powers. Once the SC has established the existence of a threat to international peace and security under Article 39 of the UN Charter, it can trigger its Chapter VII powers. While the establishment of criminal tribunals is not included in the list of measures open to the SC under Article 41, it has been recognized that this list is not exhaustive.[212] According to the UN Charter the SC is a political organ which cannot exercise judicial powers. However, in order to assume its primary responsibility, it enjoys wide discretionary powers.[213] Thus, as instruments for the exercise of its principal function of maintenance of peace and security, the SC can establish subsidiary organs, such as the ICTY and ICTR[214] which will exercise judicial functions.[215] The ICC is not a subsidiary organ of the SC but a referral under article 13 (b) can be conceived as an enforcement measure of the SC.

Article 13 (b) of the Rome Statute provides that the referral needs to be “by the Security Council acting under Chapter VII of the Charter of the United Nations.” A referral not based on a Chapter VII resolution will not confer jurisdiction on the Court unless it concerns a crime committed by a national or on the territory of State party to the Rome Statute or that has issued a declaration of acceptance.[216] Since SC referrals to the ICC are made under Chapter VII of the UN Charter, in accordance with Article 25 of the Charter, Members of the UN are obliged to accept and carry out the decisions of the SC to refer the situation to the ICC.

The SC is not restrained by the jurisdictional bases relied upon by States to justify their exercise of jurisdiction.[217] Rather, it is the powers of the SC to take steps necessary to restore or maintain international peace and security that are the sources from which the tribunals’ jurisdiction stems.[218]

211 UN Charter, art. 24(1).

212 *Tadic Interlocutory Appeal Decision*, par. 33-36. The UN Charter provides the SC with broad discretion as to which measures appropriately give effect to its decisions; UN Charter, art 40, 41, 42.

213 Ibid..

214 According to the Appeals Chamber of the Special Tribunal for Lebanon (STL), the STL as well was established by the SC, Prosecutor v. Ayyash et al., STL, Appeals Chamber, Decision on the Defence Appeals Against the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal", Separate and Partially Dissenting opinion of Judge Baragwanath and Judge Riachy, Special Tribunal for Lebanon, STL-11-01, 24 October 2012; Furthermore, the Special Court for Sierra Leone considered it had a Chapter VII status in Taylor Decision, Prosecutor v. Taylor, SCSL, Appeals Chamber, Decision on Immunity from Jurisdiction, Special Court for Sierra Leone, SCSL-2003-01-I, 31 May 2004.

215 *Tadic Interlocutory Appeal Decision*, par. 37-38.

216 Rome Statute, Article 12.

217 Williams, supra note 48, p. 316-317.

218 See Morris, supra note 27, p. 36. Williams, supra note 48, p. 317.

When criminal jurisdiction is based on the Chapter VII power of the SC, classical theories of international law on jurisdictional basis are of no avail.[219] This criminal jurisdiction springing out from a Chapter VII resolution does not have to rest on the territoriality, nationality or universality principle.

According to Sarooshi, what the UN Member States have delegated to the SC through the mechanism of the UN Charter "was not sovereignty *per se* but an international police power of States".[220] In the name of this "international police power" the SC possesses a competence that is greater than that possessed by an individual State. Indeed, "when the international community acts then it can confer powers on an international organization which sovereign States acting individually could not".[221] Moreover, in accordance with Article 103 of the Charter, the obligations of UN Members in fulfillment of SC resolution under Chapter VII prevail over their obligations under any other international agreement.[222]

The Preamble of the Rome Statute asserts that the crimes within the subject-matter jurisdiction of the ICC "threaten the peace, security and well-being of the world."[223] Nevertheless, acts of genocide, crimes against humanity and war crimes do not necessarily constitute threats to international peace and security.[224] In fact, it may be asked whether international justice really constitutes a suitable means for achieving international peace.[225] Article 16 of the Rome Statute shows the flipside of the SC role within the international criminal justice system. According to this provision, the ICC may not commence or proceed with an investigation or prosecution for a period of 12 months after the SC, in a resolution adopted under Chapter VII of the UN Charter, has requested the Court to that effect. Thus, it is acknowledged that the maintenance or restoration of international peace and security may sometimes require that the process of international criminal justice be suspended.

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219 Williams, supra note 48, p. 317.
220 Danesh Sarooshi, The United Nations and the Development of the Collective Security (Oxford University Press, 2000), p. 28.
221 Ibid., p. 29.
222 Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Order of 14 April 1992 Request for the indication of Provisional Measures, 1992 ICJ Rep 126-127. ILC, Report of the Study Group of the ILC on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, p. 166-180, 13 Avril 2006, UN Doc. A/CN.4/L.682.
223 Rome Statute, preamb. par. 4.
224 Condorelli and Villalpando, supra note 6, p. 630-633.
225 Ibid, p. 632.

The primary concern of the SC is not the upholding of justice and international law but the maintenance of international peace and security.[226] The omissions of the terms "justice and international law" in the first part of Article 1 (1) of the UN Charter means that, when adopting enforcement measures, the SC can deviate from these when acting in the interest of peace and security.[227] However, the SC is not *legibus solutus* (unbound by law); it has to abide by its constituent instrument, the UN Charter.[228]

The "international police power", Article 25 and 103 of the UN Charter; the purposes and principles of the UN are part of the legal regime applicable when we consider the 'concept' of an Article 13 (b) referral under the 'Chapter VII conception'. Thus, when the ICC exercises jurisdiction without the consent of either the territorial State or the national State, this legal regime is brought into play. The *telos* of the 'Chapter VII conception' is obviously the maintenance of international peace and security. Hence, the 'Chapter VII conception' of an ICC exercise of jurisdiction without the consent of the territorial and national State should be viewed through the lens of this *telos.*

1.9. Comparative conflicts of norms approach

The complexity and the novelty of the Rome Statute make its universal reach problematic. The Rome Statute endows the Court with international legal personality and its own definition of crimes, list of defenses, modes of liability, relation with domestic jurisdiction (i.e., principle of complementarity) and obligation of States.[229] All these aspects spawn complex and divergent views when put into the context of a referral under Article 13 (b) of a situation with respect to a State that has not ratified the Statute. Obviously, the first issue at stake is the "bête-noire of the international criminal lawyer"; State sovereignty.[230] Depending on the approach taken, 'universal jurisdiction conception' or 'Chapter VII conception', the exercise of prescriptive and adjudicative jurisdiction by the ICC over a non-party State

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226 See Erika De Wet, The Chapter Seven Powers of the United Nations Security Council (Hart Publishing, 2004), p. 183-184; UN Charter, art 1, 24.

227 De wet, supra note 226, p. 186-187. However, according to De Wet, "enforcement measures are subjected to the norms of justice and international law to the extent that they constitute norms of jus cogens and/or core elements of the principles and purposes of the United Nations."Akande, The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?, 46 International and Comparative Law Quarterly 309-343 (1997).

228 *Tadic Interlocutory Appeal Decision,* par. 28.

229 The Court also has its own rules of procedure and evidence but this will not be covered in this thesis.

230 Robert Cryer, International Criminal Law vs Sovereignty: Another Round? 15 European Journal of International Law 979, 981 (2005).

comes with different normative content and hierarchy. The universality doctrine is based on principles, such as obligations *erga omnes, jus cogens* norms and *aut dedere aut judicare*, but also comes with its own limitations. Chapter VII of the UN Charter also comes with its own rationale, e.g. binding powers of the SC, Article 103 and Purpose and Principles of the UN. These two 'conceptions' of the exercise of criminal jurisdiction by the ICC over non-party States present fundamental differences when confronted with other norms of international law (such as immunity of States officials) or human rights law (such as the principle of legality). Moreover, while the 'universal jurisdiction conception' is based on universality and equal application of the law, the 'Chapter VII conception' is tainted by selectivity.

When analyzed using a comparative conflict of norms approach we see how each 'conception' of referral under Article 13 (b) interacts with other norms of international law. The ICC, especially under the 'universal jurisdiction conception' may be affected by inherent conflicts, that is, situations where norms of its Statute are alleged to constitute, in and of themselves, breaches of other norms. The validity of a SC referral under the "Chapter VII conception" may also be troubled by an inherent normative conflict, on the basis of an inconsistency between the act of the SC and its constituent instrument.

I consider that by adopting a comparative conflict of norms resolution approach both 'conceptions' of a referral under Article 13 (b) Rome Statute are exposed in their most detailed relation and impact on other norms of international law. I adopt in this thesis the broad notion of conflicts, similar to that defined by Hans Kelsen:

> "[a] conflict between two norms occurs if in obeying or applying one norm, the other one is necessarily or possibly violated'[231]

This definition of norm conflict includes not only scenarios of incompatibility between two norms but also contradictions between permissions and obligations. If the two norms can be applied together without contradiction in all circumstances, they accumulate. One form of accumulation that is particularly relevant for us here is when "one norm […] sets out a general rule and another norm […] explicitly provides for an exception to that rule". In a relation of explicit "rule-exception" there is

231 Hans Kelsen, Derogation, in H. Klecatsky, R. Marcic, and H. Schambeck (eds), Die Wiener Rechtstheoretische Schule (1968) p. 1438; Pauwelin also defines conflict of norms 'as a situation where one norm breaches, has led to or may lead to breach of, another norm' in Joost Pauwelyn, Conflict of Norms in Public International law: How WTO Law Relates to Other Rules of International Law (Cambridge University Press, 2003), p.199.

simply an accumulation of norms. If the two norms accumulate, they do not conflict.[232] For instance, consider immunity of State officials from foreign jurisdiction: the general rule – immunity of State officials – applies 'unless' immunity is waived. This is a 'rule-exception' situation. Are immunities of State officials relevant when the ICC exercises jurisdiction over the Head of State of a State neither party to the Rome Statute nor consenting to the ICC jurisdiction? Both of our 'conceptions' address this issue in a different manner.

When a norm conflict is recognized, legal reasoning requires us to either seek to harmonize the norms in conflict through interpretation or, if that seems impossible, to apply norm conflict resolution methods. There are, indeed, different norm conflicts, apparent and genuine. An apparent norm conflict can be avoided, most often by interpretative means. What appeared to be two contradictory norms are then construed as two rules that are part of the same legal system. There is in international law a strong presumption against norm conflict. A good example of this presumption can be found in the European Court of Human Rights (ECtHR) decision *Al-Adsani v. United Kingdom:*

> The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.[233]

However, we should note that there is a limit to harmonious interpretations especially where a treaty exposes clearly formulated rights or obligations that lead unequivocally to a breach of another norm. When "the role of interpretation of treaty terms as a conflict-avoidance technique stops"[234] it is time to move on to conflict-resolution methods.

A genuine conflict can be resolved by establishing definite relationship of priority between concurring norms. Conflict resolution necessitates that one conflicting norm prevails or has priority over another. Now, in order to justify a particular choice of the applicable norm and a particular conclusion legal reasoning has recourse to conflict resolution maxims such as the *lex specialis*, *lex posterior, lex prior* and *lex superior*.[235] If the conflict cannot be resolved then the adjudicator has to

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232 Pauwelyn, supra note 231, p. 162.

233 Al-Adsani v. United Kingdom, European Court of Human Rights, App. No. 35763/97, Judgment of 21 November 2001.

234 Pauwelyn, supra note 231, p. 272.

235 Lex specialis means that a law governing a specific subject matter (lex specialis) overrides a law which only governs general matters (lex generalis). For further explanation of these concepts see ILC, Report of the Study Group of the ILC on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International

accept that he is in a *non liquet* and that to push further would be a travesty of law that may affect the legitimacy of his own institution.

Conclusion

This study invites the reader to reflect on which 'conception' of a referral under 13 (b) they support, and to then visualize how this 'conception' interacts with other norms of international law. If this interaction is based on genuine assessment of an accumulation of norms, use of conflict-avoidance techniques, application of conflict resolution rules, and, eventually, acceptance that a certain conflict cannot be resolved, then this conception should be the one adopted to understand the 'concept' of a referral under Article 13 (b) Rome Statute. On the other hand, if a 'conception' misuses legal reasoning in order to avoid an irresolvable norm conflict, then this 'conception' should be discarded.

Law, p. 166-180, 13 Avril 2006, UN Doc. A/CN.4/L.682. The lex specialis may also be used to 'interpret away' a conflict, meaning that lex specialis supplements lex generalis, as in the Advisory Opinion on Threat or Use of Nuclear Weapons ICJ Reports 1996, par. 34; Pauwelyn, supra note 231, par. 410-411; 414-415. For lex specialis to apply as an accumulation of norm, one norm must explicitly delimit the scope of application of the other. Otherwise, an apparent conflict arises and then lex specialis can be used to avoid a genuine conflict or to resolve. Thus, it can be used as a rule of technique avoidance and as a rule of conflict resolution.

2. Article 13 (b) vs State Sovereignty

This study is framed around the ICC's exercise of criminal jurisdiction over the territory and nationals of a State neither party to the Statute nor consenting to its exercise of jurisdiction. Under Article 12 (2) Rome Statute, territory and nationality are the two preconditions for the ICC to exercise jurisdiction. Under Article 13 (b) Rome Statute, the ICC is entitled to exercise jurisdiction over the territory and nationals of States not party to the Statute. This study conceives such exercise of jurisdiction under two 'conceptions': the 'universal jurisdiction conception' and the 'Chapter VII conception'. In this chapter, these two 'conceptions' will be developed with a particular emphasis on the jurisdiction to prescribe criminal rules and adjudicate a case and how this interacts with the sovereignty of States not party to the Rome Statute.

The exercise of jurisdiction by the ICC over a situation relates to jurisdiction to adjudicate. As mentioned in the previous chapter, jurisdiction to adjudicate refers to "the rights of Courts to receive, try and determine cases referred to them."[236] When the ICC exercises jurisdiction over a case, it exercises 'jurisdiction to adjudicate' allegations of crimes committed by individuals. The drafters of the Rome Statute have decided to confer on the ICC the jurisdiction to adjudicate what they considered "the most serious crimes of concern to the international community as a whole".[237]

The process of drafting the Rome Statute relates to jurisdiction to prescribe. Jurisdiction to prescribe refers to the authority to prescribe rules and assert the applicability of these rules to given conduct.[238] In the case at hand, I refer to the authority to prescribe the criminal law enshrined in the Rome Statute and assert the applicability of the Rome Statute to given conduct. In theory, by ratifying the Statute and thereby making it enter into force States have exercised jurisdiction to prescribe in relation to their territories and nationals.

Jurisdiction to adjudicate follows jurisdiction to prescribe.[239] Indeed, the application of the Rome Statute to an individual "is simply the exercise or actualization of prescription."[240] As Akehurst

236 Lowe and Staker, supra note 38, p. 317.
237 Rome Statute, Article 5; preamble, par. 5.
238 O'Keefe, supra note 45, p. 736.
239 See generally Michael Akehurst, Jurisdiction in International Law, 46 British Yearbook of International Law 145, 179 (1972-73). It was mentioned in chapter 1 that jurisdiction to adjudicate is territorial, unless consent from the extraterritorial State is given. What was meant is that a State court cannot sit in judgment in the territory of another

states "[i]n criminal law legislative jurisdiction and judicial jurisdiction are one and the same."[241] Once the authority to prescribe any given conduct is asserted, the authority to adjudicate this conduct is assumed. Thus, the assertion that any particular conduct is criminalized by the Rome Statute presumes that the ICC has jurisdiction to adjudicate this conduct, and vice versa. The two 'conceptions' under examination of the 'concept' of a referral under article 13 (b) offer diverging narratives of the jurisdiction to prescribe the Rome Statute and the jurisdiction to adjudicate of the ICC. Both diverge on the identity of the prescribing and legal authority of the adjudicative entity.

One crucial aspect of this chapter is the right to legislate for others. Since there is "no Parliament for the world community"[242] it may seem an oxymoron to speak of "truly international legislation".[243] However, the term "legislative" needs to be adapted to the particularities of the international legal order.[244] It is possible to consider that some acts in international law have the nature of legislative acts, despite not being enacted by legislative bodies.[245] Three characteristics have been accepted as defining a legislative act in the international setting.[246] In a nutshell, legislative acts "are unilateral in form, they create or modify some element of a legal norm, and the legal norm in question is general in nature, that is, directed to indeterminate addressees and capable of repeated application in

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State; however, a State may adjudicate conduct that occurred in the territory of another state in its own territory. As for the ICC it sits in the Netherlands, the latter has given its consent for the Court to sit there. However, the Statute also provides that the Court may sit elsewhere, if the State consents. See Article 3 and 62 Rome Statute and Rule 100 of the Rules of Procedure and Evidence.

240 O'Keefe, supra note 45, p. 737.

241 Akehurst supra note 239.

242 Tadic Interlocutory Appeal Decision, 44

243 Frederic L. Kirgis, Jr., The Security Council's First Fifty Years, 89 The American Journal of International Law 520 (1995).

244 In the literature, the term 'international legislation' has been employed in a broad sense to cover "both the process and the product of the conscious effort to make additions to, or changes in, the law of nations." Manley O. Hudson, International Legislation. A Collection of the Texts of Multipartite International Instruments of General Interest, (Carnegie Endowment for International Peace, 1931), p. xiii.

245 Legislative acts are, in contrast with executive and judicial acts, legal acts that "establish obligations of a general and abstract nature and for an open-ended range of addressees over time. […] Of course, this substantive dimension also distinguishes international legislation from binding judicial or arbitral decisions, which are by definition concerned with specific disputes and situations." Jutta Brunnée, International Legislation, Max Planck Encyclopedia of Public International Law; See also Emmanuel Heugas-Darraspen, Article 22, in Julian Fernandez et Xavier Pacreau, Statut de Rome de la Cour Pénale Internationale : Commentaire Article par Article (Pedone, 2012), p. 785.

246 Edward Yemin, Legislative powers in the United Nations and specialized agencies (Sijthoff, 1969), p. 6; see also Frederic L. Kirgis, Jr., The Security Council's First Fifty Years, 89 The American Journal of International Law 520 (1995).

time."[247] If the nature of an act corresponds to these criteria it would be sufficient for it to be considered at least a quasi-legislative act.

In the second part of this chapter (section 2.2), it will be shown that the application of the Rome Statute to non-consenting States may be considered as fitting within this definition of 'international legislation'. I will then assess whether the authority behind both of our 'conceptions', respectively, had the power to prescribe this 'international legislation' and if so under which conditions (section 2.3. and 2.4.). This analysis will show that Chapter VII's conceptions may be affected by inherent normative conflicts and the 'universal jurisdiction conception' clashes with the sovereignty of States not party to the Rome Statute.

The first question that will be addressed, however, is the normative interplay with the various facets of sovereignty, including *pacta tertiis nec nocent* and the *Monetary Gold Principle,* when our 'conceptions' assert jurisdiction to adjudicate a crime committed by a national and in the territory of a State that is neither party to the Rome Statute nor consenting to the ICC's jurisdiction.

2.1. Rome Statute asserts right to adjudicate universally while Treaties are only applicable between parties

The assertion of treaty-based jurisdiction over nationals and territories of States not party to the treaty may be seen as apparently conflicting with the rule of customary international law codified in Article 34 Vienna Convention on Law of Treaties, which provides that [a] treaty does not create either obligations or rights for a third State without its consent" – *pacta tertiis nec nocent nec prosunt*.[248] It may be counter-argued that the exercise of criminal jurisdiction over nationals and territories of States neither party to the Statute nor consenting to the ICC does not create any obligation for other States than for the ICC itself.[249] The non-party States implicated in a prosecution may refuse to consent to any

247 Yemin, supra note 246, p. 6.

248 David Scheffer, International Criminal Court: The Challenge of Jurisdiction, Address at the Annual Meeting of the American Society of International Law (Mar. 26, 1999), p. 3, citing Vienna Convention on the Law of Treaties, art. 34.

249 Akande, supra note 74, p. 620, Robert Cryer et al., An introduction to International Criminal Law and Procedure (Cambridge University Press, 2007), p. 140; Danilenko, supra note 74; Rain Liivoja, Treaties, Custom and Universal Jurisdiction, in Rain Liivoja and Jarna Petman, International Law-making: Essays in Honour of Jan Klabbers (Routledge, 2013), p. 302.

request for cooperation, and, indeed, the Rome Statute does not oblige them to do so.[250] Nonetheless, O'Keefe contends that under customary international law the *pacta tertiis* rule also forbids a treaty to infringe the 'legal rights' of third states.[251]

The legal rights at stake here are derived from the principles of the sovereignty and equality of States. The principal corollaries of these principles are "(1) a jurisdiction, prima facie exclusive, over a territory and the permanent population living there; (2) a duty of non-intervention in the area of exclusive jurisdiction of other states; and (3) the ultimate dependence upon consent of obligations arising whether from customary law or treaties."[252] The exercise of prescriptive and adjudicative jurisdiction over States that neither ratified nor consented to the Rome Statute will inevitably interact with these 'legal rights'.

2.1.1. Monetary Gold Principle

Because of the very nature of certain international crimes there is a risk of going beyond the individual case and ending up actually judging a State policy and by extension a State's responsibility for conduct that amount to an international crime. Hence, a breach of international law is incidentally attributed to the state. Indeed, the chapeau of certain international crimes may require that an internationally wrongful act of the State occurred. Not all international crimes have a contextual element requiring that the crime materialized on a large scale or that it be pursuant to or in furtherance of a State policy. However, the crime of aggression,[253] war crimes, crimes against humanity and genocide are crimes that

250 Hans-Peter Kaul, and Eleni Chaitidou, Balancing Individual and Community Interests: Reflections on the International Criminal Court, in Ulrich Fastenrath et al., From Bilateralism to Community Interest: Essays in Honour of Bruno Simma (Oxford University Press, 2011), p. 990; Hafner et al., supra note 25, p. 118.

251 Roger O'Keefe, The United States and the ICC: the Force and Farce of the Legal Arguments, 24 Cambridge Review of International Affairs 343 (2011).

252 James Crawford, Brownlie's Principles of Public International Law (Oxford University Press, 2012), p. 447.

253 The ILC stated: "The aggression attributed to a State is a sine qua non for the responsibility of an individual for his participation in the crime of aggression. An individual cannot incur responsibility for this crime in the absence of aggression committed by a State. Thus a court cannot determine the question of individual criminal responsibility for this crime without considering as a preliminary matter the aggression by a State. The determination by a national court of one State of the question of whether another State had committed aggression would be contrary to the fundamental principle of international law par in parem imperium non habet. Moreover, the exercise of jurisdiction by the national court of a State which entails consideration of the commission of aggression by another State would have serious implications for international relations and international peace and security." ILC, Draft Code of Crimes Against the Peace and Security of Mankind, Report of the International Law Commission on the Work of its Forty-Eight Session, p. 30, UN Doc. A/51/10 (1996).

can require a court to determine the international lawfulness of a governmental policy.[254] Furthermore, even if the chapeau does not necessarily require that an internationally wrongful act of a State occurred, we can easily imagine that, for example, the assessment of the legality of a particular military intervention, the use of certain weapons in an armed conflict, or certain strategies of warfare could, in certain cases, constitute a necessary prerequisite for a judge to determine the individual guilt of the accused.[255] This type of crimes, which are termed 'context crimes',[256] require a complete examination of a State act and a legal determination as to the lawfulness of such an act to prove that the crimes have been committed. The State is not the nominal accused as such, but for context crimes a court may have to determine that a State policy is illegal under international law. Therefore, the judge goes beyond the actual guilt of the accused and has to judge a State's acts.

The ICJ in the *Monetary Gold Case* ruled that it would not go into the merits of the case brought before it, as it would involve adjudication on the rights and responsibilities of a State not party to the proceedings which, crucially, did not consent to the Court's exercise of jurisdiction.[257] The Court declared that the principle of consent requires it to abstain from deciding a case where the legal interest of the non-consenting State "would not only be affected by a decision, but would form the very subject matter of the decision".[258] Similarly, the ICJ in the *East Timor Case* refused to rule on the claim because "in order to decide the claims of Portugal, it would have to rule, as a prerequisite, on the lawfulness of Indonesia's conduct in the absence of that state's consent".[259]

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254 Although the ICTY held that it is not required to prove that the crimes were related to a State policy, it recognized that "in the conventional sense of the term, they cannot be the work of isolated individuals alone." Prosecutor v. Nikolic, ICTY, Trial Chamber, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, IT-94-2-R61, 20 October 1995, par. 26; see also Article 7 of the Rome Statute which does require that attack against the civilian population be pursuant to or in furtherance of a State or organizational policy. Concerning genocide, while the Convention on the Prevention and Punishment of the Crime of Genocide of 1949 does not expressly require any contextual element, there is certain controversy as to whether it needs to be proved that the conduct of the accused took place in the context of a genocidal policy or plan. See Prosecutor v. Al-Bashir, ICC, Pre-Trial Chamber 1, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09, 4 March 2009 par. 177-133; see also Robert Cryer et al., An introduction to International Criminal Law and Procedure (Cambridge University Press, 2010), p. 177-179. William A. Schabas, Genocide in International Law: The Crime of Crimes (Cambridge University Press, 2009), p. 245-248; Gerhard Werle, Principles of International Criminal Law (TMC Asser Press, 2005), p.191-194.

255 Rosanne Van Alebeek, National Courts, International Crimes and the Functional Immunity of State Officials, 59 Netherlands International Law Review 37 (2012); see also Morris, supra note 27, p. 14-15, 20-21 (2001).

256 Ibid..

257 Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question), Judgment of June 15th 1954, ICJ Reports 1954, p. 19 (hereinafter Monetary Gold Case.

258 Monetary Gold Case, p. 32

259 East Timor (Portugal v. Australia), Judgment, ICJ Reports 1995, p. 90, par. 35.

Hence, when the context of a crime requires the ICC to adjudicate as a prerequisite to the individual guilt of the accused the lawfulness of a third State's act, the *Monetary Gold Principle* could preclude the ICC from doing so, unless the concerned State consented (or its consent can be implied) to the proceedings. The legal qualification of a State act in situations concerning a State party to the Rome Statute would not be problematic. States that ratified the Statute accepted that the ICC, as a prerequisite to an individual's guilt, may rule on the lawfulness of their State policies. Conversely, States not party the Statute nor consenting to its jurisdiction cannot be said to have conferred such competence on the ICC.

2.1.2. 'Chapter VII conception' - Taking measures under Article 41

The 'Chapter VII conception' of the SC referral is that, when acting under Article 13 (b), the ICC is exercising jurisdiction based on the powers of the SC under Chapter VII to adopt measures for the maintenance of international peace and security.[260] Thus, the jurisdiction of the ICC is not rooted in a delegation of jurisdiction by States but on the Chapter VII powers.

Under the UN Charter the SC enjoys broad but not unfettered discretion when it assumes its primary responsibility to maintain international peace and security. As the ICTY famously stated in its *Tadic Interlocutory Appeal on Jurisdiction,* "neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law)."[261] The SC activation of its power under Chapter VII has to be preceded by a determination that there is a situation that constitutes a "threat to the peace", a "breach of the peace" or an "act of aggression."[262] These situations constitute a threat to international peace and security, which the SC has the primary responsibility to restore or maintain.[263] The political character of the SC's responsibility requires that its discretion in making such

260 See Morris, supra note 27, p. 36. Williams, supra note 48, p. 317.
261 *Tadic Interlocutory Appeal on Jurisdiction*, par. 28.
262 Article 39 UN Charter.
263 Article 24 UN Charter.

determination be wide.[264] However, once more, the SC does not operate in a complete vacuum; this determination has to remain within the limits of the Purposes and Principles of the Charter.[265]

The SC after determining that a situation under Article 39 UN Charter exists may decide what measures may be taken to maintain or restore international peace and security. The action taken must be "reasonably necessary" for the restoration or maintenance of international peace and security, and must be invoked only for such purposes.[266] The SC can decide to take measures either involving the use of armed forces or not. The list of measures contained in Articles 41 and 42 UN Charter is not exhaustive but illustrative.[267]

The ICTY in the *Tadic Interlocutory Appeal Decision* considered that "the establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41."[268] While the SC did not refer to a specific Article of the UN Charter –apart from invoking its Chapter VII powers - when establishing the *ad hoc* tribunals it explicitly stated in the resolution referring the situation in Libya to the ICC that it was "[a]cting under Chapter VII of the Charter of the United Nations, and taking measures under its Article 41".[269]

2.1.2.1. The right to adjudicate as an enforcement measure

SC referrals provide the ICC with jurisdiction to adjudicate as an enforcement measure under Chapter VII. Such practice is not new; the *ad hoc* tribunals were based on the same power and their rights to adjudicate international crimes were deemed lawful. In its first case the authority of the ICTY's assertion of jurisdiction to adjudicate crimes was challenged on the basis a violation of the sovereignty of the State where the crimes were committed.[270] In particular it was contended that the ICTY was intruding in matters essentially within a State's domestic jurisdiction. Rightly, the Appeals Chamber in

264 Derek Bowett, The Impact of Security Council Decisions on Dispute Settlement Procedures, 5 European Journal of International Law 95 (1994).
265 Article 24(2) UN Charter.
266 Stefan Talmon, The Security Council as a World Legislator, 99 American Journal of International Law 182 (2005); "The open contours of the Council's authority to "restore" or "maintain" the international peace, as noted, has been read to permit the Council to take actions not specifically mentioned in the Charter that are "reasonably necessary" to achieve such ends." José Alvarez, International Organizations as Law-Makers (Oxford University Press, 2005), p. 193.
267 *Tadic Interlocutory Appeal Decision*, par. 35.
268 *Tadic Interlocutory Appeal Decision*, par. 35.
269 SC Res. 1970.
270 It must be specified that the challenge regarded especially the primacy of the ICTY over domestic jurisdiction.

the *Tadic Interlocutory Appeal Decision* responded that the ICTY was a SC enforcement measure under Chapter VII and that Article 2(7) of the UN Charter allowed such intrusions in areas essentially within the domestic jurisdiction of States.[271] There seems to be no doubt that if jurisdiction to adjudicate a crime is a matter essentially within a State domestic jurisdiction, "this principle shall not prejudice the application of enforcement measures under Chapter VII".[272]

Like the ICTY and the ICTR, the SC's referrals to the ICC can be conceived of as enforcement measures under Chapter VII. Article 2(7) UN Charter (which provides for the principle of non-intervention in the domestic jurisdiction of a State) creates an explicit exception for enforcement measures under Chapter VII of the UN Charter. While the principle of non-intervention is a general rule of international law, Chapter VII measures are an explicit exception to that rule. Thus, both norms accumulate.[273] The principle of non-intervention is simply carved out to the extent required by the right of the SC to establish a mechanism to adjudicate international crimes as an enforcement measure.

The Rome Statute explicitly provides that SC referrals are to be made under Chapter VII of the UN Chapter. If the SC does not act under Chapter VII the referral would simply be a recommendation or, in the words of the Statute, an "information".[274] There would be no trigger under Article 13 (b), but the possibility for the initiation of an investigation by the prosecutor *proprio motu*, if the requirement of territoriality and nationality are satisfied according to Article 12 (b) Rome Statute.[275]

If one assumes that the *Monetary Gold Principle* applies to the ICC,[276] it may be counter-argued that in referring the situation to the Court, the consent of the concerned State has been waived by the SC decision under Chapter VII. This waiver is operated via Article 25 UN Charter, which states that "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." Furthermore, the judicial restraint the ICC should demonstrate when considering a situation that affects the legal interest of a State not party to its Statute is not needed since the SC determined that the situation referred constitutes a threat to international

271 *Tadic Interlocutory Appeal Decision*, par. 56

272 Article 2(7) UN Charter.

273 Pauwelyn, supra note 231, p. 162-163.

274 Rome Statute, Articles 15 and 53; for a more detailed analysis of this issue see chapter 5.

275 If the territorial or nationality states are party to the Statute or have issued a declaration under Article 12 (3) Rome Statute.

276 See Morris, supra note 27 p. 14-15, 20-21 where Morris writes that the rule applies to the international courts and takes as an example the International Tribunal for the Law of the Sea and WTO dispute settlement mechanism; See also Dapo Akande, Prosecuting Aggression: The Consent Problem and the Role of the Security Council, Oxford Legal Studies Research Paper No. 10/2011 (February 16, 2011).

peace and security.[277]

2.1.3. 'Universal jurisdiction conception' - The international community's right to adjudicate international crimes

The 'universal jurisdiction conception' of a referral under Article 13 (b) is that this trigger mechanism activates the international community's jurisdiction to adjudicate serious international crimes. The jurisdiction of the ICC is not rooted in a delegation of jurisdiction by States but emerges from the nature of the crimes contained in the Rome Statute, which are a concern of the international community as a whole. Despite its multilateral-treaty character, the Rome Statute asserts that the ICC, when acting under Article 13 (b), can exercise jurisdiction to adjudicate beyond its states parties' territories and nationals. The crimes within the jurisdiction *ratione materiae* of the ICC are, in accordance with Article 5 Rome Statute, war crimes, crimes against humanity, genocide and aggression.[278] These crimes are typically considered 'core' international crimes.[279] It is generally recognized that these 'core' crimes are established in customary international law and some argue that they even reached the status of *jus cogens*.[280]

National courts exercising universal jurisdiction over these 'core' international crimes conceive themselves in a sort of '*dédoublement fonctionnel'* whereby while sitting in judgment over

277 The rulings of the ICJ on the applicability of the principle of consent in advisory opinions are enlightening with regard to decisions that are neither taken in the context of inter-State proceedings nor binding per se for the interested State. Instead of considering the lack of consent of the interested State as affecting its competence, the ICJ sees it as relevant for the appreciation of the propriety of exercising its advisory jurisdiction. See Western Sahara, International Court of Justice, Advisory Opinion, 1975 ICJ Reports 25, par. 32-33; Legal Consequences of the Construction of a Wa1l in the Occupied Palestinian Territory, International Court of Justice, Advisory Opinion, 2004 ICJ 136, par. 47.

278 Gerhard Werle, Principles of International Criminal Law, (TMC Asser Press, 2009), p. 26; Bassiouni disagrees on whether aggression is a core crime, M. Cherif Bassiouni, International Crimes: The Ratione Materiae of International Criminal Law, in Cherif Bassiouni, International Criminal Law (Martinus Nijhoff Publishers, 2008), p. 132–133, see also William Schabas, Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals (Oxford University Press, 2012 p. 27. Aggression is not covered in this thesis, see supra note 2.

279 Werle lists these so-called core crimes as "the most serious crimes of concern to the international community as a whole", as specified in preamble and Article 5 of the Rome Statute; Werle, supra note 278, p. 26; Bassiouni disagrees on whether aggression is a core crime, Bassiouni, supra note 278, pp. 132–133, see also Schabas, supra note 278, p. 27.

280 ILC, Report of the Study Group of the ILC on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, par. 374; Marko Milanovic, Is the Rome Statute Binding on Individuals? (And Why We Should Care), 9 Journal of International Criminal Justice 49 (2011); Cherif Bassiouni, Introduction to International Criminal Law (Martinus Nijhoff Publishers, 2013), p. 237-240; Sadat, supra note 25, p. 108.

international crimes they act as organs of the international community.[281] As it was stated in *Demjanjuk*, [t]he underlying assumption is that [these] crimes are offenses against the law of nations or against humanity and that the prosecuting nation is acting for all nations."[282] In other words, when prosecuting a crime under international law a State enforces international law.[283] Nuremberg principle I reads, "[a]ny person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment." The person who commits an international crime is directly responsible under international law. Therefore, a judicial organ adjudicating a crime under international law is not proscribing a new offence; it is adjudicating an offence proscribed by international law.[284] Like national courts, international courts can exercise jurisdiction to adjudicate international crimes. It is indeed a legacy of Nuremberg that nations together may create a court to try cases they could each try in their own courts.[285] The ICTY even stated that with the rise of universal jurisdiction exercised by States an accused should be pleased with the idea that he will be tried by an international judicial body which is free from political considerations.[286]

The outlawing of aggression, genocide, crimes against humanity and war crimes are generally the type of obligations that are *erga omnes* in nature.[287] The ICJ in the *Barcelona Traction Case* recognized the legal interest of all states in seeing obligations *erga omnes* observed.[288] Obligations *erga omnes* are a type of obligations which are the concern of all States and for the protection of which

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281 See Eichmann Appeal Judgment; Demjanjuk Case; Paola Gaeta, The Need to Reasonably Expand National Criminal Jurisdiction over International Crimes in Antonio Cassese, Realizing Utopia: The Future of International Law (Oxford University Press, 2012), p. 603; Antonio Cassese, Remarks on Scelle's Theory of "Role Splitting" (dedoublement fonctionnel) in International Law, 1 European Journal of International Law 210 (1990); Arrest Warrant Case, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, par. 51; Kleffner, supra note 30, p. 26-27.

282 Demjanjuk v. Petrovsky, 776 F.2d 571, United States Court of Appeals, Sixth Circuit (Oct. 31, 1985).

283 Anthony J. Colangelo, The Legal Limits of Universal Jurisdiction, 47 Virginia Journal of International Law 5 (2005).

284 See Eichmann Appeals Judgment, par. 12; Gaeta, supra note 281, p. 603; Robert Cryer, The Doctrinal Foundations of International Criminalization in Bassiouni, supra note 278, p. 108; Colangelo, supra note 283, p. 5; Reydams, supra note 45, p. 17-18.

285 Trial of the Major War Criminals before the International Military Tribunal, vol. I, Nürnberg, 1947, p. 223.

286 The ICTY Appeals Chamber declared: "one cannot but rejoice at the thought that, universal jurisdiction being nowadays acknowledged in the case of international crimes, a person suspected of such offences may finally be brought before an international judicial body for a dispassionate consideration of his indictment by impartial, independent and disinterested judges coming, as it happens here, from all continents of the world." Tadic Interlocutory Appeal Decision, par. 62; see also Mitsue Inazumi, Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law (Intersentia, 2005), p. 120: explaining that at the drafting of the Genocide Convention states favored an international criminal jurisdiction to universal jurisdiction exercised by States, because of a distrust towards proceedings conducted in other states.

287 Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain).

288 Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase) I.C.J. Reports 1970 p. 32.

all States have a legal interest. Some have claimed, indeed, that States exercising universal jurisdiction can base their jurisdiction in the concept of *erga omnes* obligations.[289] The ICJ stated in the *1996 Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* that "the rights and obligations enshrined in the [Genocide] Convention are rights and obligations *erga omnes*."[290] Although the Genocide Convention establishes the obligation to exercise jurisdiction of the territorial State, the ICJ noted that "the obligation each state […] has to prevent and to punish the crime of genocide is not territorially limited by the Convention."[291] In other words, a norm that creates obligations *erga omnes* is owed to the "international community as a whole" and the international community thus has an interest in prosecuting such crimes.

The asserted jurisdiction of the ICC to adjudicate crimes committed in the territory and by nationals of States not consenting to its jurisdiction may be said to be a violation of the sovereignty of non-party States. Despite its status as a subsidiary of the SC, the ICTY stated in obiter dictum that crimes of concern to the international community as a whole are not matters essentially in the domestic jurisdiction of States. As such, the ICTY implied that the exercise of jurisdiction by an international tribunal without the consent of the States with primary jurisdiction does not need to be legally based on a Chapter VII resolution.[292]

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289 Rosanne Van Alebeek The Pinochet Case: International Human Rights Law on Trial, 71 British Yearbook of International Law 34 (2000); Roman Boed, The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations, 33 Cornell International Law Journal 299-301 (2000). See also Maurizio Ragazzi, The Concept of International Obligations Erga Omnes (Clarendon, 1997); Andre De Hoogh, Obligations Erga Omnes and International Crimes (Kluwer International Law, 1996); Cherif Bassiouni, Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice, 42 Virginia Journal of International Law 96 (2001); Prosecutor v. Anto Furundžija, ICTY, Trial Chamber II, Judgment, IT-95-17/1, 10 December 1998, par. 151; contra Rosalyn Higgins and Andreas Zimmermann, Violations of Fundamental Norms of International Law and the Exercise of Universal Jurisdiction in Criminal Matters, in Christian Tomuschat and Jean-Marc Thouvenin, The Fundamental Rules of the International Legal Order, Jus Cogens and Obligations Erga Omnes (Martinus Nijhoff Publishers, 2006), p. 338-339; Ryngaert, supra note 51, p. 107; Nehal Bhuta, How Shall We Punish the Perpetrators? Human Rights, Alien Wrongs and the March of International Criminal Law, 27 Melbourne University Law Review 261 (2003).

290 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.) 1996 I.C.J. 595, 616 (July 11); Cf. Barcelona Traction, Light and Power Company, Limited (BeIg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5).

291 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (1996), p. 616.

292 *Tadic Interlocutory Appeal Decision* although pointing out that the tribunal was an enforcement measure stated that "[i] It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity." Further, the Trial Chamber in Tadic Interlocutory Motion on Jurisdiction stated: "the crimes which the International Tribunal has been called upon to try are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognised in international law as serious breaches of international humanitarian law, and transcending the interest of

In contrast with the ICJ - and in response to the *Monetary Gold Principle* - the objective of the ICC has a broader frame of reference than establishing the responsibility of States; it is interested in establishing the individual guilt of the accused. Nonetheless, Van Alebeek maintains that when the context of a crime legally requires a national court to qualify a foreign State policy, international law may prevent this if the facts at the heart of the case are controversial.[293] In the same vein, Mann has argued that a national judge may only find that a foreign State's law is an international "delinquency" when "both the law and the facts are clearly established."[294] While it is not the immunity *ratione materiae* of the official that precludes the Court from exercising jurisdiction,[295] it appears that prosecutions requiring the qualification of a foreign state policy in terms of international lawfulness call for, at the very least, judicial restraints from the Court.

This issue has been considered by Pasquale De Sena, who maintains that "context crimes" have been adjudicated by foreign domestic courts only in cases where the State potentially implicated by the prosecution had already been condemned by the international community.[296] As evidence of this pattern De Sena refers to the *Eichmann Case*,[297] *Barbie Case*,[298] *Demjanjuk Case*,[299] *Finta Case*[300] and *Karadžić Case*,[301] all of which involved States (Nazi Germany or Former Yugoslavia) that have been unequivocally condemned by the international community. Likewise, with regard to Pinochet, Lord

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any one State. The Trial Chamber agrees that in such circumstances, the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community."" Tadic, Decision at Trial, at par. 42, 57-59; However, note that in Armed activities on the territory of the Congo (DR Congo v. Rwanda) the ICJ decided that: "the mere fact that rights and obligations erga omnes or peremptory norms of general international law (jus cogens) are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties." Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 6, par. 15, see also par. 64; see also Application of the Convention on the Prevention and Punishment of Genocide (Bosnia Herzegovina v. Serbia & Montenegro), ICJ Reports 2007, par. 446.

293 Van Alebeek, supra note 255, p. 37; Rosanne Van Alebeek, The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law (Oxford University Press, 2008), p. 257-265.

294 F.A. Mann, International Delinquencies before Municipal Courts, 70 Law Quarterly Review 181-196 (1954); See in the same sense Prosper Weil, Le contrôle par les tribunaux nationaux de la licéité internationale des actes des États étrangers, 23 Association Française de Droit International 47 (1977); Van Alebeek, supra note 255, p. 38.

295 Van Alebeek, supra note 255, p. 37; the issue of immunity will be addressed in Chapter 4.

296 Pasquale De Sena, Diritto internazionale e immunità funzionale degli organi statali (Giuffrè, 1996) p. 139.

297 Eichmann Appeal, p. 277.

298 Féderation National des Déportées et Internés Résistants et Patriotes and Others v. Barbie, France, Court de Cassation, (1983 and 1984), 78 International Law Review 125 (1985), 78 International Law Review 124, (1988).

299 Demjanjuk v. Petrovky, US, Court of Appeals (6th Cir.), 79 International Law Review 538 (1985).

300 Regina v. Finta, Canada, Supreme Court, 93 International Law Review 424 (1989).

301 Kadic v. Karadic, US, 2nd Cir. 70 F.3d 232 (1995).

Browne-Wilkinson noted that "[t]here is no real dispute that during the period of the Senator Pinochet regime appalling acts of barbarism were committed in Chile and elsewhere in the world: torture, murder and the unexplained disappearance of individuals, all on a large scale." [302] For cases involving States that have not been universally condemned for a particular policy, Van Alebeek writes "the Nuremberg principles have been developed without sufficiently taking into account the fact that allegations of international crimes may also arise in less clear-cut factual and legal circumstances."[303]

The 'universal jurisdiction conception' response to such an impediment to the exercise of its jurisdiction is that although based on a multilateral treaty, the ICC is an entity distinct from the States constituting it.[304] The purpose of the Rome Conference was to create an institution to exercise the inherent jurisdiction of the international community over the most serious crimes of concern under international criminal law.[305] As Kress claims: "an international criminal court, which acts as an organ of the international community in conducting proceedings for crimes under international law, has wider powers than a national criminal court, which acts as a mere fiduciary of the common good."[306] Under the auspices of the United Nations, a treaty was drafted, which proclaims in its first Article that [a]n International Criminal Court ("the Court") is hereby established."[307] This Court "shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute."[308]

Furthermore, the ICC has the general discretionary power to decline to exercise jurisdiction on the propriety of such exercise if the situation is not of sufficient gravity. Under the principles of complementarity as enshrined in the Rome Statute a case can be declared inadmissible if the crimes are "not of sufficient gravity."[309] In addition to the gravity element in the definition of the crimes provided in Article 6, 7 and 8 and the RPE, the Statute also requires the Prosecutor and judges to assess the gravity of actual or potential cases before initiating an investigation or declaring that the Court should

302 Pinochet case No. 3, p. 101.
303 Van Alebeek, supra note 255, p. 37.
304 Article 4 Rome Statute makes it clear that the ICC is not a 'common organ' of the States parties but an international organization with a distinct international legal personality. See also Kaul, in supra note 25, p. 591.
305 Triffterer, supra note 198, p. 46; Otto Triffterer, Legal and Political Implications of Domestic Ratification and Implementation Processes, in Claus Kress and Flavia Lattanzi, The Rome Statute and Domestic Legal Orders: General aspects and constitutional issues (il Sirente / Nomos, 2000), p.20.
306 Kress, supra note 178, p. 246.
307 Rome Statute, art. 1.
308 Rome Statute, art.1.
309 Rome Statute, art. 17; see also Hafner et al., supra note 25, p. 118.

exercise jurisdiction.[310] Although any crime defined in the Rome Statute is serious,[311] the principle of complementarity requires the ICC to assess as an admissibility test whether a case is of sufficient gravity to justify further action by the Court.[312]

The gravity threshold must be distinguished from the gravity element contained in the Court's jurisdiction *ratione materiae*, as defined in Articles 6, 7 and 8.[313] While the former relates to jurisdiction to adjudicate, the latter is specific to jurisdiction to prescribe.[314] Both 'types' of jurisdictions have been subjected to this threshold so that sovereignty of States is not unduly impinged upon.

2.2. Does the Rome Statute impose new crimes?

The effort and emphasis in Rome to define the crimes which would fall within the jurisdiction of the ICC has been called "unprecedented" and even "attest[ing] a veritable obsession".[315] Article 5 of the Rome Statute provides that the ICC's jurisdiction is limited to "the most serious crimes of concern to the international community as a whole" which are, according to the Statute, the crimes of genocide, crimes against humanity, war crimes and aggression. As for aggression, Article 5 (2) Rome Statute states that the Court will have jurisdiction over this crime once an amendment that defines the crime is adopted by the Assembly of States Parties.[316] Articles 6-8 Rome Statute define the crimes of genocide, crimes against humanity, war crimes and their underlying acts. Each provision clearly states that the

310 Article 15, 17, 53; In the Lubanga case, Pre-Trial Chamber I adopted a similar approach when it stated: "[The] gravity threshold is in addition to the drafters' careful selection of crimes included in Articles 6 to 8 of the Statute [...]. Hence, the fact that a case addresses one of the most serious crimes for the international community as a whole is not sufficient for it to be admissible before the Court." Prosecutor v. Lubanga, ICC, Pre-Trial Chamber I, Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, ICC-01/04-01/06-8-Corr, 10 February 2006, par. 41.

311 According to ICC Statute, Preamble par. 4, art. 1; 5.

312 Rome Statute, art.17 (1) (d).

313 Kleffner, supra note 30, p. 125.

314 See Sadat and Carden, supra note 74, p. 419–421.

315 Claus Kress, The International Criminal Court as a Turning Point in the History of International Criminal Justice, in Antonio Cassese, The Oxford Companion to International Criminal Justice (Oxford University Press, 2009), p. 146; Schabas, supra note 162, p. 404.

316 See supra note 2.

definitions as contained in Article 6, 7 and 8 are "[f]or the purpose of this Statute".[317] Moreover, the "Elements of the Crimes" are according to Article 9 to 'assist' the Court in the interpretation and application of Article 6, 7 and 8 Rome Statute.[318] Articles 25 and 28 Rome Statute delineate how individuals may be held criminally responsible of a crime within the jurisdiction of the Court. Article 70 sets out the specific offences against the administration of justice over which the Court shall have jurisdiction.[319]

While Article 5 simply lists the jurisdictional framework of the ICC, Article 6, 7, 8, 25, 28 and 70 provide the substantive criminal law to be applied by the Court. In contrast with previous *ad hoc* tribunals,[320] the law prescribing the offences at the ICC is not found in customary international law but in the Rome Statute itself. The ICC is not called upon, as it was the case for the ICTY, to "apply rules of international humanitarian law that are beyond any doubt part of customary law so that the problem of adherence of some but not all states to specific conventions does not arise."[321] It is true that the large majority of crimes contained in the Rome Statute are also reflective of customary international law. Philippe Kirsch, indeed, reports there was "general agreement that the definitions of crimes in the ICC Statute were to reflect existing customary international law, and not to create new law."[322] This may have been the aim of the negotiators. Kress also recounts "the understanding shared by those

317 See Rome Statute, art. 6, 7 and 8; Claus Kress, International Criminal Law, Max Planck Encyclopedia of Public International Law.

318 See Rome Statute, art. 9.

319 See Prosecutor v. Jean-Pierre Bemba Gombo et al, ICC, Appeals Chamber, Judgment on the appeal of Mr. Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber IT of 17 March 2014 entitled "Decision on the 'Requete de mise en Iiberte' submitted by the Defence for Jean-Jacques Mangenda", Dissenting Opinion of Judge Anita Usacka, ICC-01/05-01/13-560-Anx2-Corr, 11 July 2014, par. 4-12; The offences against the administration of justice will not be covered in this thesis. While the Rome Statute explicitly provides for these, the ad hoc tribunals considered that offences against the administration of justice were inherent powers derived from the judicial function of the tribunal. See Prosecutor v. Tadic, Appeal Judgment on Allegations of Contempt of Court Against Prior Counsel, Milan Vujin, ICTY, Appeals Chamber, IT-94-1-A-AR77, 27 February 2001.

320 See e.g. Prosecutor v. Milutinovic et al., ICTY, Appeals Chamber, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction — Joint Criminal Enterprise, IT-99-37-AR72, 21 May 2003, par. 9; the crimes must have been within the jurisdiction of the tribunal according to its Statute but it must also have been established under customary international law.

321 Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), UN Doc. S/25704, 3 May 1993, par. 34.

322 Philippe Kirsch, Foreword, in Knutt Dormann, Elements of War Crimes under the Rome Statute of the International Criminal Court (Cambridge University Press, 2003), p. xiii. See also Darry Robinson and Herman von Hebel, War Crimes in Internal Conflicts: Art. 8 of the ICC Statute, 2 Yearbook of International Humanitarian Law 194 (1999): "Delegations agreed that definitions of these crimes must be articulated in the Statute and that those definitions must reflect existing customary law"; Claus Kress, War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice, 30 Israel Yearbook on Human Rights 109 (2000): "States have, in their overwhelming and steadily growing majority solemnly expressed the view that the war crimes list [in the Statute] is based on customary law."

formulating the crimes in the ICC Statute to only codify or at best crystallize international criminal law *stricto sensu*."[323] On the other hand, Cassese declares:

> as the Statute is not intended to codify international customary law, one ought always to take it with a pinch of salt, for in some cases it may go beyond existing law, whereas in other instances it is narrower in scope than current rules of customary international law.[324]

Indeed, the drafting of the Rome Statute required painstaking efforts to find compromises over which crimes should fall within the jurisdiction of the ICC and what were the single definitions of these crimes.[325] Article 10 Rome Statute reflects the difficulty the negotiators had to reach compromises on the definition of crimes. This saving clause holds that nothing in the part defining the crimes within the jurisdiction of the Court "shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."[326] The drafters of the Statute considered that the difficult codification process in Rome should not prejudice the progressive development of international criminal law.

Although the negotiators in Rome quickly agreed which category of crimes should be considered "most serious crimes of international concern", some matters remained controversial until the last day of the Conference.[327] A common agreement on the definition of the crime of aggression was never reached. It was decided that it should be set aside and re-discussed at a future review conference seven years after the Statute's entry into force.[328]

While the definition of the crime of genocide did not pose real problems,[329] the definition of war crimes and crimes against humanity required the delegates to compromise.[330] Notwithstanding that.

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323 See also Claus Kress, International Criminal Law, Max Planck Encyclopedia of Public International Law

324 Antonio Cassese, International Criminal Law (Oxford University Press, 2008), p. 43; see also Leena Grover, Interpreting Crimes in the Rome Statute of the International Criminal Court (Cambridge University Press, 2014), chapter 8; Theodor Meron, Crimes under the Jurisdiction of the International Criminal Court, in Herman von Hebel et al., Reflections on the International Criminal Court (TMC. Asser, 1999), p. 49.

325 Philippe Kirsch and Darryl Robinson, Reaching Agreement at the Rome Conference, in supra note 6, p. 68-69.

326 Rome Statute, art. 10: Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

327 However, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Resolution E: Recommends that a Review Conference pursuant to Article 123 of the Statute of the International Criminal Court consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court.

328 Rome Statute, art 5 (2); see supra note 2.

329 Essentially replicating the wording of the 1948 Convention on Genocide.

330 Mohammed Bennouna, The Statute's Rules on Crimes and Existing or Developing International Law, in supra note 6, p. 1102.

according to some commentators, the "war crime definition is anything [but] conservative",[331] Syria, the United Arab Emirates, Bahrain, Jordan, Sudan, India, Turkey and China had reservations concerning the inclusion of war crimes committed in armed conflict not of an international character.[332] Israel firmly opposed the proposition that the war crime founded on resettlement of population in occupied territory was customary international law.[333] Ultimately, it was decided that the jurisdiction of the Court over any type of war crime can be opted-out of for a period of seven years after the entry into force of the Statute – France and Colombia have issued opt-out declarations under Article 124 Rome Statute.[334] The definition of crimes against humanity is much broader than any definition contemplated before.[335] Among others issues, Russia, India and China argued for the retention of an armed conflict nexus for crimes against humanity.[336] Article 10 Rome Statute plays a role when the prescriptive provisions of the Statute are retrogressive; for the progressive parts, Article 10 plays no role.[337]

With the number of ratifications having risen to 123 at the time of writing, the Statute may be said to have come closer to universal acceptance and therefore representing the views of the majority of States in the international community. However, the Statute has not yet been universally ratified. The

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331 Mahnoush H. Arsanjani, The Rome Statute of the International Criminal Court, 93 American Journal of International Law 36 (1999).

332 Eve La Haye, War Crimes in Internal Armed Conflict (Cambridge University Press, 2008) p. 164; Bing Bing Jia, China and the International Criminal Court: Current Situation, 10 Singapore Yearbook of International Law 1–11 (2006).

333 UN Doc. A/CONF.183/SR.9, par. 34.

334 Rome Statute, Article 124, reads as follows: "Notwithstanding Article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in Article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this Article may be withdrawn at any time. The provisions of this Article shall be reviewed at the Review Conference convened in accordance with Article 123, paragraph 1." See France Declarations to the Rome Statute of the International Criminal Court, pt. III, June 21, 2000; France withdrew its declaration after six years; See Colombia Declarations to the Rome Statute of the International Criminal Court, par.5, Aug. 16, 2002.

335 See e.g. Schabas, An Introduction to the International Criminal Court (Cambridge University Press, 2007), p. 127 et seq.; Cassese, supra note 324, p. 126.; Arsanjani, supra note 331, p. 36.

336 Beth Van Schaack, The Definition of Crimes Against Humanity: Resolving the Incoherence, 37 Columbia Journal of Transnational Law 787 (1999).

337 Triffterer, Article 10, in supra note 198, p. 531-537; Contra Sadat and Carden, supra note 74, p. 423; Bennouna, in supra note 330, p. 1101; On the effect of the Rome Statute on customary international law, the International Criminal Tribunal for the former Yugoslavia (ICTY), stated: "In many areas the Statute may be regarded as indicative of the legal views, i.e. opinio juris of a great number of States. Notwithstanding Article 10 of the Statute, the purpose of which is to ensure that existing or developing law is not "limited" or "prejudiced" by the Statute's provisions, resort may be had cum grano salis to these provisions to help elucidate customary international law. Depending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law. At any event, the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States." Prosecutor v. Furundzija, ICTY, Trial Chamber II, Judgment, IT-95-17/1-T, 10 December 1998, par. 227.

most populous States remain not party to the Statute.[338] Moreover, the Statute remains subject to amendments that could insert new crimes that do not necessarily reflect customary international law.[339] David Scheffer, negotiator for the United States at the Rome Conference, has written that: "future amendments could effectively create 'new' and unacceptable crimes."[340]

The Articles defining the crimes within the jurisdiction of the Court read in conjunction with Article 21 Rome Statute on the applicable law provide that it is *prima facie* irrelevant if the Rome Statute prescribes a crime not existing under customary international law.[341] According to Article 21 (1), the Court must apply "in the first place" its Statute, Elements of Crimes and its Rules of Procedure and Evidence (RPE), secondly, applicable treaties and the principles and rules of international law and thirdly general principles of law derived from national laws of legal systems of the world. In contrast with Article 38 ICJ Statute, Article 21 Rome Statute clearly imposes a hierarchy in the sources that can be applied by the Court. According to the ICC, the sources of law other than the Statute, the elements of crimes and the RPE are to be applied only if these sources leave a lacuna and this lacuna cannot be filled by the application of the rules of interpretation as contained in the Vienna Convention on the Law of Treaties.[342] Thus, there is a high threshold for the Court to apply other sources of law than the Statute. As Werle notes "the ICC Statute must be seen on its own as an independent set of rules."[343] It may be argued that the Rome Statute posits itself as a treaty based, self-contained regime.[344]

Although it is generally agreed that aggression, genocide, crimes against humanity and war crimes are embedded in customary international law, their definitions need also to be established in customary international law. Some of the crimes defined in the Statute, such as crimes against humanity of apartheid, forced pregnancy, gender persecution and enforced disappearance and environmental war crimes are said to be potentially beyond the current rules of customary international

338 E.g. China, India, Russia, USA, Pakistan, Indonesia, Turkey are not party to the Statute.
339 See Rome Statute, art. 121-123.
340 David Scheffer, The United States and the International Criminal Court, 93 American Journal of International Law 18 (1999).
341 See Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC, Pre-Trial Chamber I, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, 30 September 2008, par. 508.
342 Decision to Issue an Arrest Warrant against Al-Bashir, par. 126.
343 Gerhard Werle, Individual Criminal Responsibility in Article 25 ICC Statute, 5 Journal of International Criminal Justice 961-962 (2007).
344 David Donat Cattin, Approximation or Harmonization as a Result of Implementation of the Rome Statute in Larissa van den Herik and Carsten Stahn, The Diversification and Fragmentation of International Criminal Law (Martinus Nijhoff Publishers, 2012) p. 363-366; however see section 3.7.3.

law.[345] This is where the Rome Statute poses a problem. It provides the definition of crimes 'for the purpose of this Statute' notwithstanding that it might be applied to territories and nationals of States neither party to the Statute nor consenting to ICC jurisdiction. Hence, the Statute provides that crimes under treaty law can be universal in scope, despite the non-adherence of many States, including world powers such as China, India, the Russian Federation and the United States.

An issue on which I will not focus in this chapter but that is also of relevance when going through the rationale each 'conception' offers is the immunity of State officials. Article 27 Rome Statute provides that the immunity of any State official, including Heads of State, is irrelevant before the Court. The provision does not differentiate between officials of State parties and non-parties. I will demonstrate in Chapter 4 that there is great debate over the customary status of this provision. While the purpose of the present chapter is not to argue that the irrelevance of immunities of State officials - especially Heads of States - from the ICC is not established under customary international law, one should bear in mind that the application of Article 27 over the Head of a State not party to the Rome Statute could also be considered as a prescription of a new norm. Now let us see how the 'Chapter VII conception' and the 'universal jurisdiction conception' legally justify their assertion of prescriptive jurisdiction.

2.3. 'Chapter VII conception' - Legislating as an enforcement measure

While I showed that the establishment of international criminal jurisdiction has been considered as fitting squarely within the measures the SC can take under Article 41 UN Charter, the issue becomes more intricate if we ask whether (as seems the case for the ICC referrals) the SC has the right to prescribe new crimes to be adjudicated by an international tribunal. If the prescription of criminal rules is not contained within the SC enforcement measures then the right to adjudicate the proscribed act is also *ultra vires*.

While the UN system does not provide for a legislature in the real sense of the word, the body that comes closest to such a function is the General Assembly which is entrusted to initiate studies and make recommendations for encouraging the progressive development of international law and its

345 See supra note 30.

codification.[346] The Charter does not explicitly endow legislative competence to the SC. However, it seems to be agreed that the Charter leaves space for the SC to unilaterally impose new obligations and thus to act, in a certain manner, as a legislator.[347]

As the ICTY noted in the *Tadic Interlocutory Appeal Decision* "[t]here is … no legislature, in the technical sense of the term, in the United Nations system …. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects"[348] Nonetheless, the ICTY also recognized that the SC, although not a Parliament, has the power, when acting under Chapter VII, to take binding decisions.[349] Indeed, the SC did not hesitate to oblige all UN Member States to cooperate fully with both *ad hoc* tribunals and to take any measures necessary under their domestic law to implement the provisions of the Statutes.[350]

In establishing the ICTY, the SC did not create new rules but basically created an international mechanism for the prosecution of crimes already the subject of individual criminal responsibility.[351] Thus, the SC used its power under Chapter VII to assert jurisdiction to adjudicate; not to prescribe – at least not to prescribe criminal law.[352] Admittedly, the procedural norms set out in the ad hoc tribunal's Statute and the obligation on States to cooperate with them are in a certain manner legislative actions.[353] Let us now see if, under the prism of the 'Chapter VII conception', the SC referrals to the ICC can also be qualified as quasi-legislative acts. The following analysis will draw upon the

346 UN Charter, art. 13 (a).

347 Hans Kelsen, The Law of the United Nations: A Critical Analysis of Its Fundamental Problems (Frederick A. Praeger, 1950), p. 295; Kirgis, supra note 246, p. 520; Nico Krisch, Article 41 in Bruno Simma, The Charter of the United Nations : a Commentary, (Oxford University Press, 2012), p. 1251; Three characteristics have been accepted as defining a legislative act in the international setting. In a nutshell, legislative acts "are unilateral in form, they create or modify some element of a legal norm, and the legal norm in question is general in nature, that is, directed to indeterminate addressees and capable of repeated application in time." Yemin, supra note 246, p. 6; See also Prosecutor v. Krajisnik, ICTY, Appeals Chamber, Decision on Krajisnik's Appeal Against the Trial Chamber's Decision Dismissing the Defense Motion for a Ruling that Judge Canivell is Unable to Continue Sitting in this Case, IT-00-39-AR73.2, 15 September 2006, par. 15.

348 *Tadic Interlocutory Appeal Decision*, par. 43.

349 *Tadic Interlocutory Appeal Decision*, par. 44; Jutta Brunnée, International Legislation, Max Planck Encyclopedia of Public International Law; However, since the resolution establishing the ICTY was a situation-specific resolution, it has been considered by some not to conform to the general aspects of a legislative act.

350 SC Res. 827 (1993) par. 4.

351 Prosecutor v. Delalic et al., ICTY, Appeals Chamber, Judgment, IT-96-21-A, 20 February 2001, par. 178 (hereinafter Celebici Appeals Chamber Judgment).

352 However, it may be contended that the structure of the ICTY is a long time measure and that its jurisdiction is also indefinite in time; See section on temporal measures.

353 Luis Miguel Hinojosa Martínez, The Legislative Role of the Security Council in its Fight against Terrorism: Legal, Political and Practical Limits, 57 International and Comparative Law Quarterly 341 (2008).

characteristics put forward by Yemin as defining a legislative act in the international setting: namely that it be unilateral in form; creating or modifying existing law; and general in nature.[354]

2.3.1. Unilateral in form

When the SC refers a situation to the ICC under Chapter VII it neither decides to render it a State party to the Rome Statute nor to turn the ICC into a UN subsidiary judicial organ. It simply uses a mechanism contained in the Rome Statute to trigger the jurisdiction of the Court over a specific situation. The State over which jurisdiction is triggered is to accept the jurisdiction of the ICC, even though it did not ratify the Statute or issue a declaration of acceptance under Article 12 (3). In general the SC referrals imply that the concerned State is consenting to the ICC exercise of adjudicative jurisdiction, although in practice it never did so. Moreover, it implies that the substantive criminal provisions of the Statute that were neither existing in the domestic law of the concerned state nor reflective of customary international law have become, through the force of the referral, applicable law in that State. The resolutions referring the situations to the ICC may also provide that States are to cooperate with the Court, thus bringing into force for the concerned States Part 9 of the Statute: International Cooperation and Judicial Assistance. All these obligations are brought into force without the consent of the concerned State but *qua* the effect of Article 25 UN Charter. Thus, it may safely be asserted that SC referrals are unilateral in form.

2.3.2. Create or modify existing law

Compliance with the SC resolutions referring a situation to the ICC requires significant implementing legislation by the States concerned. Since the ICC does not have its own police force to secure the arrests of individuals or to secure production of evidence, the States obliged by the resolution are coopted to enact domestic legislation to fulfill this enforcement function.[355] Moreover, in order to

354 See supra note 246.

355 See Dapo Akande, The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC, 10 Journal of International Criminal Justice 299-324 (2012); see also Prosecutor v. Saif al Islam Gaddafi and Abdullah Al-Senussi, ICC, Pre-Trial Chamber I, Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi, ICC-01/11-01/11, 31 May 2013, par. 211.

challenge the admissibility of a case before the ICC, a State has to prove that it is or has undertaken national proceedings directed towards the same person and addressing the same conduct that is the subject of the case before the Court.[356] Thus, a State is pressured to adopt the same substantive law of the Rome Statute in order to be interested in the same conduct as the ICC.[357] Furthermore, the State where the situation has been triggered has to ensure that its judicial system conforms to standards, which according to the ICC, will demonstrate whether the State is able to genuinely carry out the investigations or prosecution.[358] For instance, in *Prosecutor v. Saif Al-Islam Gaddafi*, Pre-Trial Chamber I found that the lack of specific protection programs for witness under domestic law resulted in the unavailability of the national judicial system.[359] Thus, beside the possibility that a referral implies that the crimes as referred to in the Rome Statute are applicable in the concerned States, the SC referrals also imposes other legislative obligations on the concerned States.[360] These effects produce a situation akin to that which would have existed had Sudan and Libya became parties to the Rome Statute. Indeed, Akande says that SC referrals put the targeted states "in an analogous position to a party to the Statute."[361]

2.3.3. General in nature

356 Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, ICC, Appeals Chamber, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", ICC-01/09-01/11-307, 30 August 2011, par.1, 40-43; Prosecutor v. Muhammad Harun (''Ahmad Harun'') and Ali Abd-Al-Rahman (''Ali Kushayb''), ICC, Pre-Trial Chamber I, Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/07, 27 April 2007, par. 24; Prosecutor v Jean-Pierre Bemba Gombo, ICC, Pre-Trial Chamber III, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean Pierre Bemba Gombo, ICC-01/05-01/08, 10 June 2008, par. 21.

357 See Julio Bacio Terracino, National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC, 5 Journal of International Criminal Justice 421-440 (2007); Harrmen van der Wilt, Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court, 8 International Criminal Law Review 230 (2008); however, see Prosecutor v. Saif Al Islam Gaddafi, ICC, Pre-Trial Chamber I, Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi, ICC-01/11-01/11, 31 May 2013, par. 88 (hereinafter Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi): pointing out that in order to challenge admissibility the conduct needed to be the same not the legal characterization.

358 Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi par. 204-214.

359 Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi, par. 209-211.

360 With regard to prescription of crimes see the section on 'Presumption rebutted in case of Rome Statute'.

361 Dapo Akande, The Legal Nature of Security Council Referrals to the ICC and its Impact on Al-Bashir's Immunities, 7 Journal International Criminal Justice 342 (2009), p. 342.

In the SC referrals of the situations in Darfur and Libya the SC has not placed obligations on any States other than Sudan and Libya.[362] The SC opted for simply referring the situations to the ICC and to oblige only the Sudanese and Libyan authorities respectively to cooperate fully with the ICC and provide any necessary assistance to the Prosecutor and the Court.[363] The SC decided that nationals that were neither from the specific State referred to the ICC nor from a State party to the Rome Statute were exempted from the ICC's jurisdiction.[364] Thus, the referrals as they have been used to date lack one essential feature of a legislative act; they are not addressed to indeterminate addressees.[365] The selectivity of the SC has, nonetheless, been criticized by UN Member States and scholarship.[366] It may be argued that this 'selectivity' conforms to the 'executive' or 'enforcement powers' of the Council, acting in its 'police' capacity by using coercive measures against a particular State to maintain international peace and security.

Nonetheless, the SC could have decided to bind all UN Member States to cooperate with the Court.[367] Article 48 of the UN Charter leaves the discretion to the SC to determine whether its measures should be carried out by all the Members of the United Nations or by some of them. There were serious discussions in 2014 during the Argentinian Presidency of the SC regarding whether or not to compel the SC to oblige all States to cooperate with the ICC when it refers a situation.[368] Thus, it is not improbable that if a new referral is to happen (or even if subsequent action is taken in relation to a past

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362 SC Res. 1593, par. 2; SC Res. 1970, par. 5; generally on SC Resolution 1593 see Luigi Condorelli and Annalisa Ciampi, Comments on the Security Council Referral of the Situation in Darfur to the ICC, 3 Journal of International Criminal Justice 590-599 (2005).

363 SC Res. 1593, par. 2 ; SC Res. 1970, par. 5.

364 SC Res. 1593, par. 6; SC Res. 1970, par. 6; see also Matthew Happold, Darfur, the Security Council, and the International Criminal Court, 55 International and Comparative Law Quarterly 226-236 (2006); this issue is analyzed more comprehensively in chapter 5.

365 See Yemin definition in supra note 246; also adopted by Kirgis supra note 246.

366 See Statements of Argentina, Brazil and the Philippines in Security Council, 5158th Meeting, 31 March 2005, UN Doc. S./PC.5158; and see statement of Brazil in Security Council, 6491st meeting, 26 February 2011, UN Doc. S/PV.6491.

367 See Condorelli and Ciampi, supra note 362, p. 593.

368 See e.g. Prosecutor v. Al-Bashir, ICC, Pre-Trial Chamber II, Decision on the "Prosecution's Urgent Notification of Travel in the Case of Prosecutor v Omar Al-Bashir", ICC-02/05-01/09, 4 November 2014, par. 8 where Pre-Trial Chamber II seems to call for the SC to do so; See also Statement from the representative of The Netherlands at Security Council, 7285th meeting, Security Council Working Methods, 23 October 2014, UN doc. S/PV.7285 (Resumption 1): "As to the non-State parties, the Council has the capacity to oblige them by adopting resolutions to cooperate with the Court. We would like to see the Council apply that option more frequently"; See also Statement Bensouda, p. 5 I "respectfully call on the Council to consider using stronger language in its referrals, similar to the language used in past Council resolutions requiring cooperation from all States with the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda." UN doc. S/PV.7285.

referral) that the SC turns the referral into a general obligation for all States – at least in respect of international cooperation and judicial assistance with the Court.

While we have seen that SC referrals create or modify existing law with the incidental result of the complementarity principle and with the direct result for the State obliged to cooperate with the ICC, it remains to be verified whether the SC has the right to prescribe new criminal law.

2.3.4. Right to prescribe criminal law (but presumption against it)

As the United Kingdom representative David Hannay declared at the SC meeting during which the ICTY was established: "[t]he Statute does not, of course, create new law, but reflects existing international law in this field."[369] It may seem that the SC did not believe at the time that it had the power to prescribe new criminal law for the former Yugoslavia. However the SC while establishing the ICTR took, according to the Secretary-General, "a more expansive approach to the choice of applicable law" than it did for the ICTY and included in the ICTR Statute instruments "regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime."[370] The SC, thus, adopted a Statute that could be considered as creating new law.[371] At least, it may be said that this time the SC believed that it had the power under Chapter VII to prescribe international criminal law.[372]

The ICTY Appeals Chamber in the *Tadic Judgment* wrote: "it is open to the Security Council - subject to respect for peremptory norms of international law (jus cogens) – to adopt definitions of crimes in the Statute which deviate from customary international law."[373] The Chamber added that if the SC sought to deviate from customary international law it needs to be expressed in the terms of the Statute or in other authoritative sources.[374] In the words of the Chamber "it must be presumed that the Security Council, where it did not explicitly or implicitly depart from customary international law,

369 Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting, UN Doc S/PV.3217 (25 May 1993) 7.

370 Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), UN Doc S/1995/134 (13 February 1995) par. 12.

371 However, it should be noted that all the offences enumerated in Article 4 ICTR Statute constituted crimes under Rwandan Law. See Prosecutor v. Akayesu, ICTR, Trial Chamber I, Judgment, ICTR-96-4-T, 2 September 1998, par. 611-617; Kenneth S. Gallant, Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts, 48 Villanova Law Review 828 (2003).

372 Gallant, supra note 371.

373 Prosecutor v. Tadic, ICTY, Appeals Chamber, Judgment, IT-94-1-A, 15 July 1999, par. 296.

374 Prosecutor v. Tadic, ICTY, Appeals Chamber, Judgment, IT-94-1-A, 15 July 1999, par. 296.

intended to remain within the confines of such rules." [375] Thus, the SC has the power to criminalize certain conduct but it must be expressed either implicitly or explicitly. Furthermore, such prescriptive measures must be made with the goal of restoring or maintaining international peace and security. For the purposes of our study it must therefore be analyzed whether resolutions referring a situation to the ICC expressed that the SC intended to depart from customary international law.

2.3.5. Presumption rebutted in case of Rome Statute

The Rome Statute simply requires that the SC refer a situation under Chapter VII, in which one or more crimes as referred to in Article 5 of the Rome Statute appear to have been committed, to the Prosecutor of the ICC. The SC, at the time of writing, has referred two situations to the ICC. In 2005, the SC adopted resolution 1593 under Chapter VII of the UN Charter in which it "[d]ecides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court".[376] In 2011, the SC adopting the same language, stated that it "[d]ecides to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court".[377] The terms of the resolutions do not express an explicit intention to create new law nor do they incorporate the Rome Statute. However, the referral of a situation to a court that considers its founding instrument as its primary source of law implies that the Court will not apply customary international law but the Rome Statute.[378] Moreover, the negotiated relationship agreement between the ICC and the UN refers to the crimes as defined in the Rome Statute as crimes that "threaten the peace, security and well-being of the world."[379] In the various decisions emanating from the use of Article 13 (b), the ICC stated that in making such referrals:

> the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the

375 Prosecutor v. Tadic, ICTY, Appeals Chamber, Judgment, IT-94-1-A, 15 July 1999, par. 287; See also Prosecutor v. Zejnil Delalic et al., ICTY, Trial Chamber, Judgment, IT-96-21-T, 16 November 1998, par. 310.
376 SC Res. 1593, par. 1.
377 SC Res. 1970, par. 4.
378 See also Akande, supra note 361, p. 333; Akande, supra note 355.
379 UN General Assembly, Relationship Agreement Between the United Nations and the International Criminal Court, 20 August 2004, UN Doc. A/58/874, preamb. par. 4 (hereinafter Negotiated Relationship Agreement between the ICC and the UN)

statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole.[380]

It is thus implicit that the SC decided to apply the substantive criminal law of the Rome Statute to the situation referred to the ICC. Since the Rome Statute may go beyond existing law, the referrals to the ICC are normative in their character.[381] They impose new rules to be observed by the actors in the situations referred. In the international arena such type of actions are normally preceded by a treaty which obliges States to implement new rules. If the SC has decided to assume such normative powers, are there any substantial limits or does it have 'carte blanche'? And, if there are substantial limits, is the SC acting in accordance with them when it uses its Chapter VII to refer a situation to the ICC?

2.3.6. Substantive limits to prescribe criminal law as an enforcement measure

The SC's unilateral prescription of treaty provisions can be criticized as contrary to State sovereignty, to non-intervention in the internal affairs of States and more generally to the principle of consent of states.[382] As for the invasion of matters essentially within the domestic jurisdiction of States, we have seen that the Charter provides an exception for 'enforcement measures' laid down in Chapter VII. The principles of sovereignty and its derivative State consent are vital principles of international law. However, the SC may decide to contract out of general international law.[383] The primary concern of the SC is not the upholding of international law and justice but the maintenance of international peace and security.[384] Article 1(1) of the Charter exempts the SC from complying with international law when it takes enforcement measures to maintain international peace and security.[385] Once an international crisis

380 *Decision to Issue an Arrest Warrant against Al-Bashir*, par. 45; Situation in Darfur Sudan, ICC, Pre-Trial Chamber I, Decision on Application under Rule 103, ICC-02/05, 4 February 2009, par. 31;

381 Concerning the retroactive character of the referrals see chapter 3, section 7.

382 On Resolutions 1373 and 1540 see e.g. Michael Fremuth and Jörn Griebel, On the Security Council as a Legislator: A Blessing or a Curse for the International Community? 76 Nordic Journal of International Law 354-355 (2007).

383 Antonios Tzanakopoulos, Disobeying the Security Council: Countermeasures against Wrongful Sanctions (Oxford University Press, 2011), p. 72-74.

384 See De Wet, supra note 226; UN Charter, art 1, 24.

385 Nico Krisch, Article 41 in Bruno Simma et al, The Charter of the United Nations : a Commentary, (Oxford University Press, 2012), p. 1257 ; Bernd Martenczuk, The Security Council, the International Court and judicial review: what lessons from Lockerbie? 10 European Journal of International Law 544-546 (1999); Evelyne Lagrange, Le Conseil de sécurité des Nations Unies peut-il violer le droit international? 37 Revue belge de droit international 563 (2004); does not apply to dispute settlements.

has been determined to be a threat to international peace and security the SC may set aside otherwise existing rights of any state to the extent that this is necessary to remove the threat.[386]

The consent of states is, moreover, something that the SC can dispose of. Clearly, according to Article 24, UN Members states agree that in carrying its primary responsibility the SC acts on their behalf. Pursuant to Article 25 UN Charter, Member States to the UN consented "to accept and carry out the decisions of the Security Council in accordance with the present Charter".[387] Even the UN Member State targeted by the enforcement measure is in theory considered to have consented to the resolution referring the situation to the ICC.[388] Nevertheless, in discharging its duties the SC must act in accordance with the Purposes and Principles of the United Nations.[389] If the SC fails to act in accordance with its constituent instrument, it is acting *ultra vires*, i.e. the resolution is null and void. Behind this principle lies the consent of States that accepted to be bound by the institutional law of the United Nations when it acts within the framework of its competences.[390]

The SC has in the post-9/11 era adopted measures that were openly of a legislative nature. In Resolutions 1373 (2001) (on terrorist financing) and 1540 (2004) (on proliferation of weapons of mass destruction) the SC acting under Chapter VII adopted resolutions which created general and abstract obligations on all states for generic threats.[391] Such kinds of resolutions not confined to specific crises were deemed by some not to be in conformity with the Charter.[392] Nonetheless, on the basis that these resolutions were generally accepted by UN Member States, it has been argued that it is "likely to

386 Martenczuk, supra note 385, p. 544-546.
387 UN Charter, art. 25.
388 See Akande, supra note 361, p. 341.
389 UN Charter, article 24 (2).
390 Martinez, supra note 353, p. 354-355.
391 SC Resolution 1373, 28 September 2001, UN Doc. S/RES/1373; SC Resolution 1540, 28 April 2004, UN Doc SC/RES/1540; See Krisch, supra note 385, p. 1253.
392 Matthew Happold, Security Council Resolution 1373 and the Constitution of the United Nations, 16 Leiden Journal of International Law 593-610 (2003); Bjorn Elberling, The ultra vires character of legislative actions by the Security Council, 2 International Organization Law Review 337-360 (2005); Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, 6 August 2010, UN Doc. A/65/258, p. 11-12; a recent resolution of the Security Council on foreign terrorist fighters is also legislating in a broad manner without being limited to a specific crisis. Security Council Resolution 2178, 24 September 2014, UN Doc. S/RES/2178 (2014); see Martin Scheinin, Back to post-9/11 panic? Security Council resolution on foreign terrorist fighters, Just Security, Blog post, 23 September 2014, retrieved from http://justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/ .

constitute a precedent for further legislative activities".[393] However, while discussing SC Resolution 1540 in 2004 some States started to express reluctance towards the SC legislative endeavor.[394]

It seems that if the SC continues utilizing broad legislative powers, this type of resolution must be subjected to strict procedural and substantive limits.[395] As Zemanek noted "the word 'measures' […] indicates a specific action intended to achieve a concrete effect and, thus, a temporary, case-related reaction".[396] Thus, the quasi-legislative measure contemplated under Charter VII cannot be *prima facie* of an abstract and general character; moreover they should be limited to the 'concrete-case' only.[397] Krisch adds that "insofar as the SC goes beyond preliminary, emergency measures and creates longer-term obligations and structures, it thus needs to respect principles of justice and international law."[398]

Did the SC respect these substantive limitations to its action under Chapter VII when it established *ad hoc* tribunals or referred situations to the ICC? If it did respect these substantive limits, the SC was empowered not to look at whether Rwanda or the States of the former Yugoslavia were party to Additional protocol II, or if the situations referred to the ICC concerned a State party to the Rome Statute. However, in order to take measures outside of the boundaries of international law, the SC needs to act within the confines of its Charter. In the following sections we will see whether the SC referrals were (and are generally conceived as): case-related reactions, intended to achieve a concrete effect and were in general of a temporary nature.

2.3.6.1. Case related reaction

In theory referrals to the ICC are actions taken with respect to specific situations the SC determined to be concrete threats to international peace and security. The Rome Statute provides that the Security Council can only refer '[a] situation in which one or more of such crimes [referred to in Article 5] appears to have been committed. Although a situation may concern a geographic zone wider than a

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393 Paul C. Szasz, The Security Council Starts Legislating, 96 American Journal of International Law 901-905 (2002); see also Talmon, supra note 266, p. 179-182.

394 See the debates in Security Council, 4950th meeting, 22 April 2004, UN Doc. S/PV.4950; Security Council, 4956th meeting, 28 April 2004, UN Doc. S/PV.4956.

395 Krisch, supra note 385 1254.

396 Karl Zemanek, Is the Security Council the judge of its own legality? In Emile K.M. Yakpo et al., Liber Amicorum: Judge Mohammed Bedjaoui (Martinus Nijhoff Publishers, 1999); see also Gaetano Arrangio-Ruiz, On the Security Council's "Law-Making", 83 Rivista di diritto internazionale 629-630 (2000)

397 Arrangio-Ruiz, supra note 396, p. 629-630; contra Talmon, supra note 266, p. 182.

398 Krisch, supra note 385, p. 1257; Krisch further argues that the SC decision not to "legislate" when establishing the ICTY reflects this limitation; Krisch, supra note 385, p. 1323.

State territory or an individual case,[399] it cannot be a generic threat to international peace and security.[400] Moreover, the Statute requires that 'one or more of such crimes' as referred to in the Statute appear to have been committed, thus excluding that a hypothetical situation be referred.[401]

In the resolution referring the situation in Darfur, Sudan the SC took note of the report of the Commission of Inquiry on Darfur, which concluded that war crimes and crimes against humanity were committed by the Government of Sudan and the Janjaweed.[402] As for the resolution referring the situation in Libya, the SC considered "that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity".[403] Both situations were concerned with specific situations where crimes appeared to be committed, and which, according to the SC constituted a threat to international peace and security.

If the SC was to refer every act of enlistment of child soldiers to the ICC claiming that these constituted a threat to international peace and security, such referrals would be related to an abstract problem and hypothetical situation and as such would fail the "concrete-case" test. In such cases the SC would either be acting *ultra vires* or at the very least not entitled to contract out of international law.

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399 See Condorelli and Villalpando, supra note 6, p. 632-633; foreseeing this possibility but being of the opinion that the Prosecutor would not be obliged to initiate the proceedings.

400 See chapter 5, esp. section on Refer a 'situation'

401 Nigel White and Robert Cryer, The ICC and the Security Council: An Uncomfortable Relationship in José Doria et al., The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko (Martinus Nijhoff Publishers, 2009), p. 468–9; see also Robert Cryer, Sudan, Resolution 1593, and International Criminal Justice, 19 Leiden Journal of International Law 195 (2006); Alexander Orakhelashvili, Collective security (Oxford University Press, 2011), p. 339; See statement of Canada in Security Council meeting on the adoption of resolution 1422, UN SCOR, 57th Sess., 4568th mtg., UN Doc. S/PV.4568: "in the absence of a threat to international peace and security, the Council's passing a Chapter VII draft resolution on the ICC of the kind currently circulating would in our view be ultra vires."

402 SC Res. 1593 take notes of the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur which found that that the Government of Sudan and the janjaweed were responsible for serious violations of international human rights and humanitarian law. See International Commission of Inquiry on Darfur, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Resolution 1564 of 18 September 2004, UN Doc. S/2005/60 (January 25, 2005).

403 See Res. 1970 (2011), preamb. par 3,7: "Deploring the gross and systematic violation of human rights, including the repression of peaceful demonstrators, expressing deep concern at the deaths of civilians, and rejecting unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government; […] Considering that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity". However see Luc Coté, Independence and Impartiality, in Luc Reydams et al., International Prosecutors (Oxford University Press, 2012), p. 406: "Libya […] arguably seems more the result of political expediency in the wake of NATO intervention than a measure of justice."

2.3.6.2. *Concrete effect*

What is the concrete effect of a SC referral to the ICC? The ICTY was established during the conflict in the former Yugoslavia and the conflict lasted for several years following the establishment of the Tribunal. The SC, nonetheless, stated that it was convinced that the establishment of an international tribunal would enable the aim to put an end to grave violations of humanitarian law within the territory of former Yugoslavia to be achieved and that this would contribute to international peace and security. The ICTR, on the other hand, was established after the Rwandan Genocide. The SC declared that the establishment of an international tribunal would contribute to the process of national reconciliation and to the restoration and maintenance of international peace and security.[404]

Although the ultimate purpose of the SC when establishing the *ad hoc* tribunals was to restore and maintain international peace and security, the means were to deter further violations of international humanitarian law, fight impunity and contribute to national reconciliation. It can hardly be said whether these aims were ultimately reached.[405] Nonetheless, the SC has broad discretion in deciding which means it will undertake to fulfill its primary responsibility. It seems that as the slogan 'no peace without justice' suggests, the prosecution of those violating international criminal law is related to the SC's function of maintenance of international peace and security.[406] Indeed, since the establishment of the *ad hoc* tribunals, the general view is "that commission of core crimes threatens international peace and security, thus international accountability contributes to international peace and security".[407] During the SC meeting where resolution 1593 was adopted, two State delegations expressed the conviction that "by deciding to refer the case of reported crimes in Darfur to the ICC, the Security Council enhances its conflict prevention and resolution capabilities."[408] The prompt referral of the situation in Libya was even more directly based on the belief that the "referral to the Court would have the effect of an immediate cessation of violence and the restoration of calm and stability.[409] In the

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404 See SC Res. 955, 8 November 1994, par. 8, UN Doc. S/RES/955.
405 See UN General Assembly, Sixty-seventh General Assembly, Thematic Debate on International Criminal Justice, 10 April 2013.
406 Krisch, supra note 385, p. 1320
407 Hemi Mistry and Deborah Ruiz Verduzco (Rapporteurs), The UN Security Council and the International Criminal Court, Chatham House International Law Meeting Summary, with Parliamentarians for Global Action, 1 March 2012, p. 4.
408 See statements of Romania and Greece, in Security Council 5158th meeting, 31 March 2005, UN Doc. S/PV.5158.
409 See statement of India in Security Council 6491st meeting, 26 February 2011, UN Doc. S/PV.6491.

same vein, the ICC Appeals Chamber declared that "the Statute also serves the purpose of deterring the commission of crimes in the future, and not only of addressing crimes committed in the past."[410]

2.3.6.3. *Temporary measures*

During the drafting of the Statute for an International Criminal Court, some members of the ILC considered that the Court should be established by a SC resolution. Ultimately the ILC Draft Statute recommended that a court be established via a treaty. The comment was, indeed, made that there was a distinction:

> between the authority of the Council to establish an *ad hoc* tribunal in response to a particular situation under Chapter VII of the Charter and the authority to establish a permanent institution with general powers and competence. Chapter VII of the Charter only envisaged action with respect to a particular situation.[411]

Like the ILC Draft Statute for an International Criminal Court, the Rome Statute is in the form of a treaty, which permits the SC to make use of it with respect to a specific situation. Nonetheless, it may be contended that the referrals are not temporally limited. While both referrals provide jurisdiction to the ICC from a date before the adoption of the respective SC resolutions, they are for an indefinite period of time.[412]

The SC when establishing the ICTY took a similar position as for the current referrals. SC resolution 827, which established the ICTY, points out that the jurisdiction of the Tribunal covers the period "between 1 January 1991 and a date to be determined by the Security Council upon restoration

410 See Prosecutor v. Laurent Koudou Gbagbo, ICC, Appeals Chamber Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I on Jurisdiction and Stay of the Proceedings, ICC-02/11-01/11 OA 2, 12 December 2012, par. 83.

411 ILC, Report of the International Law Commission on the work of its forty-sixth session (2May–22 July 1994), UN Doc. A/49/10; 2 Yearbook of the International Law Commission 1994, p. 22; se also Judge Sidhwa, *Tadic Interlocutory Appeal Decision,* par. 63: "Had the Security Council attempted to set up an international criminal court with general jurisdiction covering international criminal offences committed within or without the territories of its Member States, perhaps an objection could have been validly taken that the decision had no nexus with the restoration and maintenance of peace". See also Robert Cryer, Prosecuting International Crimes: Selectivity and the International Criminal Law Regime (Cambridge University Press, 2005), p. 327-328.

412 SC Res. 1593 is referring the situation in Darfur since 1 July 2002 and SC Res. 1970 is referring the situation in Libya since 15 February 2011.

of peace."[413] Seven years later, the SC in resolution 1329 requested the Secretary-General to submit a report containing an assessment and proposals regarding the date ending the temporal jurisdiction of the ICTY. However, the SG considered that he was "not in a position to make an assessment to the effect that peace has been restored in the former Yugoslavia."[414] Three years after, the SC endorsed a completion strategy but never determined the end date of the Tribunals jurisdiction *ratione temporis*.[415]

Inevitably the open-ended jurisdiction of the ICTY was challenged by many defendants who stood accused of crimes committed almost a decade after the eruption of the conflict in the former Yugoslavia. However, the Tribunal interpreted its jurisdiction *ratione temporis* with great deference to the SC. In *Djordevic Preliminary Motion on Jurisdiction* it was argued by the defendant that the ICTY's temporal jurisdiction ended after the signing of the Dayton Agreement on 14 December 1995 and thus the Tribunal lacked jurisdiction over crimes committed in Kosovo in 1999.[416] The Trial Chamber responded that later crimes were part of the same conflict with which the SC was dealing when establishing the ICTY.[417] In *Ojdanic Decision on Motion Challenging Jurisdiction*, the Trial Chamber held that the temporal jurisdiction was left open-ended, "no doubt because the Security Council foresaw the continuation of the conflict."[418] In *Tarculovski Decision on Interlocutory Appeal on Jurisdiction* the ICTY hastily affirmed that it had jurisdiction over crimes committed in Macedonia

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413 SC Res. 827, par. 2; see however, on the ICTY indefinite jurisdiction Prosecutor v. Ljube Boskoski and Johan Tarculovski, ICTY, Trial Chamber, Decision on Johan Tarculovski's Motion Challenging Jurisdiction, IT-04-82-PT, 1 June 2005, par. 10; Prosecutor v. Milutinovic et al., ICTY, Appeals Chamber, Decision on Interlocutory Appeal on Jurisdiction, IT-04-82-AR72.1, 22 July 2005, par. 10; Prosecutor v. Milutinovic et al., ICTY, Decision on Motion Challenging Jurisdiction, IT-99-37-PT, T. Ch. III, 6 May 2003, par. 61; Prosecutor v. Dordevic, ICTY, Trial Chamber III, Decision of Vladimir Dordevic's Preliminary Motion on Jurisdiction, IT-05-87/1-PT, 6 December 2007, par. 10; nonetheless, the SC in resolution 1329 (2000), par. 6 requested the Secretary-General to submit to the Security Council, as soon as possible, a report containing an assessment and proposals regarding the date ending the temporal jurisdiction of the International Tribunal for the Former Yugoslavia; 30 November 2000; however the secretary general considered that since the SC was still adopting a resolution in which the situation in former-Yugoslavia constituted a threat to international peace and security he was not "not in a position to make an assessment to the effect that peace has been restored in the former Yugoslavia." Report of the Secretary-General pursuant to paragraph 6, 21 February 2001, S/2001/154, par. 15; On Security Council resolution 1329 (2000) see William A. Schabas, The UN International Criminal Tribunals: the former Yugoslavia, Rwanda, and Sierra Leone (Cambridge University Press, 2006), p. 133.

414 Report of the Secretary-General pursuant to paragraph 6, 21 February 2001, S/2001/154, par. 15.

415 SC Res. 1503, 28 August 2003, UN Doc S/RES/1503; SC Res. 1534, 26 March 2004, S/RES/1534.

416 Prosecutor v. Dordevic, ICTY, Trial Chamber III, Decision of Vladimir Dordevic's Preliminary Motion on Jurisdiction, IT-05-87/1-PT, 6 December 2007, par. 10.

417 Ibid.

418 Prosecutor v. Milutinovic et al., ICTY, Decision on Motion Challenging Jurisdiction, IT-99-37-PT, T. Ch. III, 6 May 2003, par. 61, see Göran Sluiter, Commentary, Published in Annotated Leading Cases of International Criminal Tribunals, Vol 27 p. 26; See Harmen van der Wilt, Commentary by Annotated Leading Cases of International Criminal Tribunals, Vol 14 - p. 115; David Bryden, Commentary, Annotated Leading Cases of International Criminal Tribunals 34 - p. 24; who all agree that the SC should have set an end date.

in 2001, since the Tribunal's lifespan is linked to the restoration of international peace and security in the territory of the former Yugoslavia.[419]

Although a Residual Mechanism was set up in 2010 to replace the ICTY, the temporal limit of the ICTY has never been fixed.[420] Clearly, the SC does not have the power to create a permanent international criminal court for the former Yugoslavia. The UN charter requires that the ICTY's exercise of jurisdiction continues to be 'reasonably necessary' for the restoration or maintenance of international peace and security.[421]According to the Residual Mechanism Statute it cannot indict new accused; it simply inherits the caseload of the ICTY.[422] Thus, the establishment of the Residual Mechanism in principle puts an end to the ICTY's indefinite jurisdiction. In the preamble to the resolution establishing the Residual Mechanism the SC recalls that the ICTY was a measure to restore international peace and security in the former Yugoslavia and that the SC is determined that it is necessary that all persons indicted by the ICTY are brought to justice.[423]

As with the ICTY referrals to the ICC provide jurisdiction to the ICC for an indefinite prospective period of time.[424] SC Resolution 1593 was adopted in 2005 but refers the situation in Darfur to the ICC since 1 July 2002 ad infinitum. Resolution 1970 refers the situation in Libya open-endedly from two weeks before its adoption. The absence of a date setting the end of the jurisdiction of the Court over the situation is an element that may deprive the referrals of their *ad hoc* character. The end of the jurisdiction of the Court seems to be left to the discretion of the Court.[425]

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419 Prosecutor v. Ljube Boskoski and Johan Tarculovski, ICTY, Trial Chamber, Decision on Johan Tarculovski's Motion Challenging Jurisdiction, IT-04-82-PT, 1 June 2005, par. 10, Prosecutor v. Ljube Boskoski and Johan Tarculovski, ICTY, Appeals Chamber, Decision on Interlocutory Appeal on Jurisdiction, IT-04-82-AR72.1, 22 July 2005, par. 10

420 SC Res. 1966, 22 December 2010, UN Doc. S/RES/1966 which provides that the residual mechanism will continue the temporal jurisdiction as set in Article 1 of the ICTY Statute; see also Prosecutor v Karadzic, ICTY, Trial Chamber, Decision on Accused's Motion to Dismiss the Indictment, IT-95-5/18-T, 28 August 2013.

421 Sluiter, supra note 418, p. 26.

422 Statute of the International Residual Mechanism for Criminal Tribunals, annexed to SC resolution 1966 (2010), S/RES/1966, 22 December 2010, Article 1 (5).

423 SC Res. 1966, preamb. par. 5-6; see also Prosecutor v Karadzic, ICTY, Trial Chamber, Decision on Accused's Motion to Dismiss the Indictment, IT-95-5/18-T, 28 August 2013.

424 SC Res. 1593 is referring the situation in Darfur since 1 July 2002 and SC resolution 1970 is referring the situation in Libya since 15 February 2011.

425 Schabas, supra note 154, p. 298-299.

Since the referrals are for a concrete threat the Court should have jurisdiction restricted to the given 'situation', which was the object of the referral.[426] In *Mbarushimana Challenge to Jurisdiction*, the Pre-Trial Chamber held that:

> a situation can include not only crimes that had already been or were being committed at the time of the referral, but also crimes committed after that time, in so far as they are sufficiently linked to the situation of crisis referred to the Court as ongoing at the time of the referral.[427]

Thus, if the crimes were not part of the same situation due to their not being 'sufficiently linked' to the situation of crisis referred to the Court, the Court would have to decline authority as not being within the scope of the referral. The *Mbarushimana* case arose from the referral by DRC to the ICC in accordance with Article 13 (a) Rome Statute.[428] In a certain manner, a SC referral under Article 13 (b) may be compared to a State referral under Article 13(a); however, the basis of jurisdiction in the former case is an *ad hoc* measure under Chapter VII legally justified by a threat to international peace and security. Hence, it is essential that the ICC's exercise of jurisdiction over a specific case be sufficiently linked to the original situation that constituted a threat to international peace and security. Otherwise, the jurisdiction of the Court becomes groundless.

In contrast with the ICTY, the ICTR jurisdiction *ratione temporis* is limited over crimes committed during the year (1994) of the Rwandan genocide, which is the concrete case that prompted the SC to use its Chapter VII powers. Although the structure of the ICTR still exists, its temporal jurisdiction has a short lifespan.[429] Thus, the law created by the SC when establishing the ICTR was restricted to the concrete-case that prompted it to use its Chapter VII. The practice of the SC when establishing the ICTY and the ICTR shows that different subject matter and temporal limitations were assigned to the *ad hoc* tribunals. While the law applied by the ICTY needs to be beyond any doubt part

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426 See Prosecutor v. Laurent Koudou Gbagbo, ICC, Appeals Chamber Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I on Jurisdiction and Stay of the Proceedings, ICC-02/11-01/11 OA 2, 12 December 2012, par. 81; on the difference between the referral of the SC or of a State party under Article 13(a) of a "situation" and the declaration of acceptance of State under 12(3); see also Prosecutor v. Callixte Mbarushimana, Pre-Trial Chamber I, Decision on the "Defence Challenge to the Jurisdiction of the Court", ICC-01/04-01/10, 26 October 2011.

427 Prosecutor v. Callixte Mbarushimana, Pre-Trial Chamber I, Decision on the "Defence Challenge to the Jurisdiction of the Court", ICC-01/04-01/10, 26 October 2011, par. 16, 41.

428 See Paola Gaeta, Does President Al-Bashir Enjoy Immunity form Arrest?, 7 Journal of International Criminal Justice 330 (2009): "a referral by the Security Council is simply a mechanism envisaged in the Statute to trigger the jurisdiction of the ICC: it does not and cannot turn a State non-party to the Statute into a state party, and it has not turned Sudan into a State party to the Statute".

429 To be noted that a residual mechanism was established in 2010, SC Res. 1966.

of customary international law, the ICTR applied laws “regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime.”[430] Nico Krisch argues that the SC decision not to “legislate” when establishing the ICTY reflects the limitation of the SC when it goes beyond preliminary, emergency measures, creating long-term obligations and structures.[431] The prescription of new crimes in the ICTR Statute by the SC was possibly based on the assumption that as an emergency measure subject to a time limit, it could create new law.[432] The same type of reasoning has to be applied to the SC referrals to the ICC. If the SC refers an abstract and general situation, the Rome Statute’s provisions beyond existing law cannot be applied as this would be contrary to international law. If on the other hand the referral is an *ad hoc* enforcement measure to restore and maintain international peace and security in a concrete case the Charter allows the SC to set aside international law and impose the Statute on its entirety over a State not party to the Statute.

2.4. Universal prescriptive jurisdiction

The concept of ‘universal jurisdiction conception’ conceives the Rome Statute as a legislative act of the international community. A fundamental factor for the selection of the crimes to be within the jurisdiction of the ICC was that they constitute “the most serious crimes of international concern.” Even though the four categories of crimes within the Statute did not have agreed precise definitions, a wide majority of States adopted their definition and made them applicable universally. In the view of Sadat, the “Rome Conference was a quasi-legislative process during which the international community ‘legislated’ by a non-unanimous vote.”[433] The term legislative appears appropriate as the Statute indeed is unilateral in form; it modifies existing criminal law and is universal in scope.

Most agree that the offences subject to the universality principle are very limited in number.[434] The crimes within the jurisdiction of the ICC are generally deemed subject to universal jurisdiction.

430 Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), UN Doc S/1995/134 (13 February 1995) par. 12. However, it needs to be noted that all the offences enumerated in Article 4 ICTR Statute constituted crimes under Rwandan Law. See Prosecutor v. Akayesu, ICTR, Trial Chamber I, Judgment, ICTR-96-4-T, 2 September 1998, par. 611- 617.

431 Krisch, supra note 385, p. 1323.

432Gallant, supra note 371, p. 828.

433 Sadat, supra note 25, p. 11.

434 Rosalyn Higgins, Problems and Process: International Law and How We Use it, (Oxford University Press, 1994), p. 58; Randall, supra note 83; F.A. P. Mann, The doctrine of jurisdiction in international law, Collected Courses of the Hague

However, as mentioned above, the definition of these crimes does not, in some cases, rest entirely on customary international law. Nevertheless, this does not deprive these crimes of their status as crimes under international law but posits them as crimes under treaty law.[435] Does that affect the right to exercise universal jurisdiction over these crimes?

2.4.1. Treaty-based universal jurisdiction

Treaty-based universal jurisdiction is contended by some not to be 'truly' universal jurisdiction but inter-state jurisdiction.[436] Cassese, for example, is of the opinion that "treaties do not provide for universal jurisdiction proper, for only the contracting states are entitled to exercise extraterritorial jurisdiction over offenders present on their territory."[437] In principle, offences committed by nationals of States not party to the treaty in question do not fall within the scope of this treaty-based jurisdiction.[438] In contrast with treaty-based universal jurisdiction, universal jurisdiction rooted in customary international law extends to all states.

Academy of International Law 95 (1964); Steven Ratner et al., Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy (Oxford University Press, 2009), p. 12. One commentator on the current work at the Sixth Committee on the scope and application of universal jurisdiction argues that there is disagreement between States as to whether genocide, crimes against humanity and war crimes – piracy notwithstanding - fall within the scope of universal jurisdiction; Lijian Zhu, Universal Jurisdiction Before the United Nations General Assembly: Seeking Common Understanding under International Law in supra note 178, p. 216; see also Sienho Yee, Universal Jurisdiction: Concept, Logic, and Reality, 10 Chinese Journal of International Law 503-530 (2011).

435 The Institut de droit international stated in its resolution on universal jurisdiction that: "Universal jurisdiction is primarily based on customary international law. It can also be established under a multilateral treaty in the relations between the contracting parties, in particular by virtue of clauses which provide that a State party in the territory of which an alleged offender is found shall either extradite or try that person." Institut de droit international (IDI), Resolution on universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes, adopted in Krakow, 2005, par.1; see also Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, ICJ Reports 2012, p. 422, par. 74.

436 Colangelo, supra note 283, p. 18-19; See also Crawford, supra note 252, p. 471; Ryngaert, 51, p. 104-105; Higgins, supra note 434, p. 63-65; Liivoja, supra note 249 , 301-302; Claus Kress, Universal Jurisdiction over International Crimes and the Institut de Droit international, 4 Journal of International Criminal Justice 566 (2006).

437 Antonio Cassese, Is the bell tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction", 1 Journal of International Criminal Justice 594 (2003); See Yoram Dinstein, Collective Human Rights of Peoples and Minorities, 25 International and Comparative Law Quarterly 102-120 (1976); see also US v. Yousef, 327 F3d 56 (US Court of Appeals, 2nd Circuit, 1973, 974 YNTS 177) citing Higgins, supra note 434, p. 64.

438 See Cassese, supra note 437, p. 594; Crawford, supra note 252, p. 471; Ryngaert, supra note 51, p. 105; however, it is acknowledged that the US have taken a different position in many terrorist cases, United States v Yunis, 681 F Supp 896 (DDC 1988); United States v Yunis, 924 F 2d 1086 (DC Cir 1991)(Lebanon not a party to the Hostage-Taking Convention). United States v Rezaq, 899 F Supp 697 (DDC 1995); United States v Rezaq, 134 F 3d 1121 (DC Cir 1998) (the Palestine Territories not a party to the Hijacking Convention); United States v Wang Kun Lue, 134 F 3d 79 (2nd Cir 1997); United States v Lin, 101 F 3d 760 (DC Cir 1996); United States v Ni Fa Yi, 951 F Supp 42 (SDNY 1997); United States v Chen De Yian, 905 F Supp 160 (SDNY 1995) (China not a party to the Hostage-Taking Convention). See also United States v Marino-Garcia, 679 F 2d 1373, 1386–7 (11th Cir 1982) (Honduran and

The ICC, when it exercises jurisdiction over a crime under international law with an *actus reus* not part of customary international law, is exercising treaty-based jurisdiction.[439] Hence, the jurisdiction of the Court should be restricted to territories and nationals of States party to the Rome Statute. Thus, the basis of the ICC's jurisdiction under Article 13 (b) is metamorphosed into *sui generis* universal jurisdiction; neither based on customary international law nor limited to the party to the Statute.[440] The application of these new crimes to territories and nationals of States not party to the Rome Statute is consequently a prescriptive act.

The ICC, when it exercises jurisdiction over crimes that go beyond customary international law, may be exercising 'exorbitant' jurisdiction. The concerned territorial and national state would, therefore, on the basis of a violation of sovereignty have a reasonable argument to object to the legality of an exorbitant universal jurisdictional assertion of the ICC. The Rome Statute assertion of prescription is actualized when the ICC exercises its jurisdiction to adjudicate the crimes as prescribed in the Rome Statute.[441] However, the mere passage of the Rome Statute into force and its pretention to apply universally constitutes the very moment when the exorbitant prescriptive jurisdiction occurs.[442] The violation of sovereignty of third state parties by the Rome Statute's exorbitant prescriptive jurisdiction does not necessarily mean that the prescribed norm is invalid.[443] The enforcement of this norm, nevertheless, would be practically impossible since the jurisdiction prescribing it would be considered by the third state as groundless. Furthermore, to assess whether a jurisdiction is exorbitant it is necessary to see whether it has actually been challenged.

That being said, after the ICC Prosecutor considered crimes committed by United States nationals in its 'preliminary examination' of the situation in Afghanistan, the United States reiterated its policy that the ICC cannot have jurisdiction over non-party States.[444] While the United States is the

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Columbian crew members of stateless vessels prosecuted for trafficking in marijuana under the Law of the Sea Convention, although Honduras and Columbia were not parties to this Convention).

439 See Anthony Colangelo, Universal Jurisdiction as an International "False Conflict" of Laws, 30 Michigan Journal of International Law 881 (2009).

440 See Crawford supra note 252, p. 471; who refers to a sui generis jurisdiction for prosecution on basis of a treaty over nationals not party to the treaty in terrorist case in the U.S., more particularly United States v. Yunis (No.2), 681 F.Supp. 896, 901 (DDC), 1988); See also Ryngaert, supra note 51, p. 105 and Morris, supra note 27, p. 64.

441 See O'Keefe, supra note 45, p. 741; see also on responsibility Reydams, supra note 45, p. 25.

442 See O'Keefe, supra note 45, p. 741.

443 Milanovic, supra note 280, p. 51.

444 Office of the Prosecutor, Report on Preliminary Examination Activities 2014, 2 December 2014, p. 22; See David Bosco, The War Over U.S. War Crimes in Afghanistan Is Heating Up, Foreign Policy, 3 December 2014, http://foreignpolicy.com/2014/12/03/the-war-over-u-s-war-crimes-in-afghanistan-is-heating-up-icc-hague/

most vocal opponent to the ICC's exercise of jurisdiction over its nationals, they do not stand alone. Nonetheless, in the next section I will show that the 'universal jurisdiction conception' normatively justifies the Rome Statute and ICC' assertion of universal prescriptive and adjudicative authority on three elements that may be deemed to fit the rationale of a '*sui generis* universal jurisdiction'.

2.4.2. A *sui generis* universal jurisdiction

As mentioned above, the specific crimes of the Rome Statute that are not established in customary international law may still be considered 'crimes under treaty law' of serious concern to the international community.[445] Indeed, their criminalization is provided by an international instrument ratified by an ample majority of States which asserts that they constitute the "most serious crimes of concern to the international community as a whole".[446] Furthermore, the negotiated agreement between the UN and ICC recognizes that the commission of crimes as defined in the Statute "threaten[s] the peace, security and well-being of the world".[447]

Milanovic suggests that universal prescriptive jurisdiction may be asserted for acts that are not core customary crimes but for which there is a community interest in their suppression.[448] Although some of the *actus rei* of the crimes contained in the Rome Statute might be customary international law in *statu nascendi*, they still suit the rationale of crimes subject to universal jurisdiction. For instance, that persecution based on gender as a crime against humanity has not yet crystallized in customary international law, does not mean that there is not a general interest to consider this crime as one of the most serious international crimes.[449] Similarly, war crimes against the environment might not be established in customary international law, but it is undeniable that intentionally using chemical weapons to destroy the environment is a crime of international concern.[450]

In the *Hostage Case*, universal jurisdiction was seen as a procedural consequence of an international crime and even more so as a legal criterion to identify international crimes. The US

445 Kress acknowledges this possibility in Claus Kress, International Criminal Law, Max Planck Encyclopedia of Public International Law: "It is thus conceivable that the ICC Statute contains crimes that are exclusively conventional in character and thus form part of the broader concept of supranational criminal law without encroaching upon the hard core of international criminal law stricto sensu."
446 See Rome Statute, preamb., art. 5.
447 Negotiated Relationship Agreement between the ICC and the UN, preamb. par. 4
448 Milanovic, supra note 280, p. 51.
449 Cassese, supra note 324, p. 126
450 Gallant, supra note 371, p. 789; see e.g. Heller and Lawrence supra note 30.

Military Tribunal at Nuremberg defined an international crime as "such act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances."[451] Although not uncontroversial, the *Hostage Case* position was significantly relied on to assert universal jurisdiction over international crimes.[452]

It has been noticed that the *Hostage Case* is not clear on the source of law to look for when assessing whether an act is "universally recognized as criminal".[453] According to Einersen, the *Hostage Case* posits that a crime rises to the level of an international crime if the conduct is universally recognized as inherently criminal and the crime is considered a grave matter of international concern.[454] These two elements may be deemed valid reasons according to which the crime cannot be left exclusively within the jurisdiction of a particular state; *i.e.,* universal jurisdiction.

Likewise, the Special Tribunal for Lebanon defined an international crime as such:

> "[t]o turn into an international crime, a domestic offence needs to be regarded by the world community as an attack on universal values (such as peace or human rights) or on values held to be of paramount importance in that community; in addition, it is necessary that States and intergovernmental organizations, through their acts and pronouncements, sanction this attitude by clearly expressing the view that the world community considers the offence at issue as amounting to an international crime."[455]

Thus, the STL was of the view that it was necessary for a crime to rise to the status of international crime, that it constitutes an 'attack on universal values'; and "that the international community has decided so."[456] If one accepts that the Rome Statute is an act of the international community, and that

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451 United States of America v Wilhelm List et al. (hereinafter Hostage Case), XI TWC 1241

452 See Kriangsak Kittichaisaree, International Criminal Law, (Oxford University Press, 2001), p. 3

453 Einarsen, supra note 189, p. 245; the author links this view to the sentence following the quote above of the Hostage Case which states: "The inherent nature of a war crime is ordinarily itself sufficient justification for jurisdiction to attach in the courts of the belligerent into whose hands the alleged criminal has fallen."

454 Einersen, nonetheless, proposes that international crimes are conducts that: first, manifestly violate a fundamental universal value or interest; second, are universally regarded as punishable due to its inherent gravity; third, are recognized as matters of serious international concern; fourth, are proscribed by international law, and; fifth, liability and prosecution must not require the consent of any concerned state. The accumulation of these criteria renders a crime not only an international crime, but more accurately, according to Einersen, a universal crime. Einersen, supra note 189, p. 236.

455 Unnamed defendants (STL – 11-01/I) Decision on the Applicable Law: Terrorism, conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, par. 91.

456 See Schabas, supra note 278, p. 34; but he uses "or" instead of "and"; The STL did not stop short on lex ferenda, but required that, additionally, the international criminalization must be clearly stated by the law lex lata. The law in which the international criminalization must be anchored appears to be, according to the STL, customary international law.

the crimes within its jurisdiction constitute attacks on universal values, then we can consider that all crimes within the jurisdiction of the ICC are international crimes subject to universal jurisdiction.

Kittichaisare writes that: "[i]t is the international community of nations that determines which crimes fall within this definition [of international crime] in light of the latest developments in law, morality, and the sense of criminal justice at the relevant time."[457] Determining which crimes are really crimes of concern to the international community as a whole seems tenuous – if not presumptuous - when claimed by a State.[458] However, this claim becomes more concrete when asserted by the international community as such. This is what drives the Rome Statute.

2.4.3. The Rome Statute is an act of the international community as a whole

Alas, the 'international community' is an amorphous term.[459] It is often alleged that the UN because of the near-universality of its membership is the most defined representative of the 'international community'.[460] The ICC is not an organ of the United Nations. Yet, the negotiation processes leading to the adoption of the Rome Statute were hosted by the United Nations.[461] Both institutions agree on "the important role assigned to the International Criminal Court in dealing with the most serious crimes of concern to the international community as a whole, as referred to in the Rome Statute, and which threaten the peace, security and well-being of the world".[462]

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indeed the STL sought to establish that a definition of terrorism existed in this customary international law. The decision has been criticized in its finding that terrorism was established in customary international law, see e.g. Kai Ambos, Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law? 24 Leiden Journal of International Law 655 (2011)

457 See Kittichaisaree, supra note 452, p.3.

458 On a different note see Kress, supra note 436, p. 572: "the raison d' être of true universal jurisdiction renders this principle inapplicable in that regard. For it is impossible for a state to unilaterally call into being a fundamental international community value that it can then protect through the existence of universal jurisdiction."

459 See Alfred P. Rubin, Actio Popularis, Jus Cogens and Offenses Erga Omnes?, 35 New England Law Review, 265, 267 (2001); President Guillaume, Separate Opinion in Arrest Warrant, ICJ Reports 2002, 35, 43.

460 Gallant, supra note 371, p. 783; see generallly Bardo Fassbender, The United Nations Charter as the Constitution of the International Community, (Leiden, Martinus Nijhoff, 2009).

461 In 1995, the General Assembly established the *Ad hoc* Committee on the Establishment of an International Criminal Court. Then, the General Assembly created the Preparatory Committee on the Establishment of an International Criminal Court to prepare a widely acceptable consolidated draft text for submission to a diplomatic conference. The Preparatory Committee completed the drafting of the text in 1998. Finally, the General Assembly decided to convene the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, subsequently held in Rome, Italy, from 15 June to 17 July 1998, "to finalize and adopt a convention on the establishment of an international criminal court".

462 Negotiated Relationship Agreement between the ICC and the UN, preamb. Par. 4.

For Triffterer – who participated in the Rome Conference as an independent academic expert – has stated the high involvement of the UN in the Rome Statute drafting process makes the ICC an organ exercising directly the *jus puniendi* of the international community.[463] Due to the near-universality of the UN membership, the treaty that emanated from the Rome Conference is 'on behalf of the community of nations'.[464] In the same vein, Sadat - a delegate to the Rome Conference - is of the opinion that when the ICC jurisdiction is triggered under Article 13 (b) the international community is exercising jurisdiction to adjudicate in lieu of the concerned state.[465] While Triffterer believes that the ICC has universal adjudicative jurisdiction *tout court*, Sadat is of the opinion that the Rome Statute is as well an exercise of universal prescriptive jurisdiction. Indeed, when the Court adjudicates a case it applies its Statute, including the new crimes contained therein.[466] Olasolo - member of the Spanish Delegation to the ICC Preparatory Commission – argued that unless an ample majority of the States of the international community becomes party to the Statute it cannot be an international jurisdiction organ directly exercising the *jus puniendi* of the international community, but an interstate organ exercising the *jus puniendi* of its State parties solely.[467] Olasolo, thus, was ready to concede that if the Statute gets ratified by an ample majority of States it can become an act of the international community.[468]

To date 123 States are party to the Rome Statute and the SC has allowed Article 13 (b) to be used twice, thereby implying Russia, China and the United States' acquiescence to the codification contained in the Rome Statute (despite their non-party status).[469] In 2000, the UN Transitional Administrator for East Timor provided the Special Courts for Serious Crimes with universal jurisdiction over genocide, crimes against humanity – the definitions of which substantially replicate Articles 6, 7 and 8 of the Rome Statute.[470] The ICC itself considers that the exercise of the "*jus*

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463 Triffterer, Preliminary Remarks: The permanent ICC- Ideal and Reality, in supra note 198, p. 46
464 Triffterer, supra note 198, p. 46
465 Sadat and Carden, supra note 74 p. 449.
466 For the interplay with the principle of legality see chapter 3.
467 Olasolo, supra note 201, p. 17; although negotiators tried hard to achieve consensus for the adoption of the text of the Statute, a vote on the text was requested by the delegation of the United States. The Statute was adopted, in conformity with the rules of procedure, with a majority of 120 States in favor, twenty-one abstentions and seven against. The United States, Israel, Iraq and Qatar and China stated that they voted against the adoption of the treaty
468 Olasolo, supra note 201, p. 17; at that time 99 States were party to the Statute.
469 Andreas Zimmermann, Israel and the International Criminal Court – an Outsider's Perspective, 36 Israel Yearbook on Human Rights 231 (2006).
470 UNTAET Regulation 2000/15, UNTAET was established by the SC via resolution 1272 (1999).

puniendi of the international community […] has been entrusted to this Court."[471] The negotiations at the Rome Conference were open to every State of the international community and its Statute invites any entity that is a State to ratify its Statute; thus, corresponding to the *ratione personae* of a universal organization.[472] Moreover, the *ratione materiae* of the ICC - to ensure that the most serious crimes of concern to the international community as a whole do not go unpunished - is also an interest that is of universal value. The Rome Statute was indeed conceived as a permanent international criminal court to exercise jurisdiction to adjudicate crimes of a universal scope, what remained to be satisfied is whether it would receive the approval of the international community of States. With the sheer number of ratification of its Statute and the relationship it has with the UN, it appears that the ICC has been entrusted to act on behalf of the international community when it applies its Statute.

2.4.4. Gravity of the crimes

An important element that transpires from the cases and literature on universal jurisdiction is that the crimes subject to universal jurisdiction are of such gravity that they cannot be left within the exclusive jurisdiction of the concerned State. Indeed, universal jurisdiction is often pictured as a sequel arising from the nature of the crimes contemplated. The Princeton Principles on Universal Jurisdiction state that "universal jurisdiction is criminal jurisdiction based solely on the nature of the crime".[473] The 'universal jurisdiction conception' follows the same approach.

The Statute describes the crimes within its jurisdiction as "unimaginable atrocities," and "grave crimes" that "deeply shock the conscience of humanity" and "threaten the peace, security and well-being of the world."[474] The Statute regime has indeed been adopted with the idea that "the most serious crimes of concern to the international community as a whole must not go unpunished" and that the ICC jurisdiction is limited to such type of crimes.[475]

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471 Decision on the Failure by Malawi to Arrest and Surrender Al-Bashir, par. 46.

472 Jan Klabbers, An Introduction to International Institutional Law, (Cambridge University Press, 2008), p. 22; concerning Palestine see supra note 9.

473 Princeton University Program in Law and Public Affairs, The Princeton Principles on Universal Jurisdiction 28 (2001): Principle 1 -- Fundamentals of Universal Jurisdiction: "For purposes of these Principles, universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction."

474 Rome Statute, preamb., Sadat, supra note 25, p. 109; Margaret M. deGuzman, Gravity and the Legitimacy of the International Criminal Court, 32 Fordham International Law Journal 1400 (2009).

475 Rome Statute, preamb.

The chapeaux of the crimes within the ICC jurisdiction elevate them to the level of international crimes.[476] Article 6 of the Statute requires that to constitute genocide the accused needs to have the specific intent (*dolus specialis)* to destroy a listed group in whole or in part, and the Elements of Crimes mandate that the conduct occurred "in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction."[477] Likewise, Article 7 defines crimes against humanity as one or more enumerated inhumane acts "committed as part of a widespread or systematic attack" against a civilian population. The requisite "attack" is "a course of conduct involving the multiple commission of [enumerated] acts against any civilian population pursuant to or in furtherance of a State or organizational policy to commit such attack."[478] Article 8, directs the jurisdiction of the Court over war crimes "in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes."[479] The idiosyncrasy of the constitutive elements of the crimes listed in Article 5 Rome Statute is a 'built-in' gravity threshold.[480] The requisite that the crimes be large scale or systematic ensures that the crimes within the court jurisdiction be limited, as Article 5 mandates, to the most serious crimes of concern to the international community as a whole.

As Kaul and Chaitidou argue "[a] close inspection of the statutory definitions of these crimes (together with the elements of crimes) reveals that they have been fitted with certain qualifiers or have been subjected to thresholds, again in an attempt to safeguard State interests and restrict the jurisdictional ambit of the Court."[481] Each particular act must meet the gravity clause contained in the chapeau of the crime category. Although jurisdiction might for some of the underlying acts of the core crimes be treaty-based, the Statute requires that these concrete acts reach the required gravity threshold. The gravity of the act will serve two purposes. First, due to its inherent gravity the type of conduct will be universally regarded as punishable.[482] And, second, the gravity of the crime makes it a matter of

476 Kleffner, supra note 30, p. 122; DeGuzman, supra note 474, p. 1407-1408.
477 See Assembly of State Parties to the Rome Statute of the International Criminal Court [ICC-ASP], Elements of Crimes, art. 6, ICC-ASP/1/3 (part II-B) (Sept. 9, 2002) (hereinafter Elements of Crimes); See also Decision to Issue an Arrest Warrant against Al-Bashir, par. 124.
478 Rome Statute, art. 7 (2)(a).
479 Although this threshold is not a prerequisite for jurisdiction, it does, however, provide statutory guidance indicating that the Court should focus on cases meeting these requirements.
480 Schabas, supra note 139, p. 94.
481 Kaul and Chaitidou, supra note 250, p. 984.
482 See Einersen, supra note 189; Hostage Case.

such serious international concern that it cannot be left to the discretion of even the most directly concerned state.

One enlightening example of the importance of the gravity threshold is the internal debate at the ICC which surrounded the decision to authorize the Prosecutor *proprio motu* to conduct an investigation into the situation in Kenya. The *proprio motu* investigation into the situation in Kenya raised the concern as to whether the post-election violence that occurred in Kenya in 2007-2008 constituted crimes of concern to the international community as a whole. The majority of the Pre-Trial Chamber concluded that the "organization policy" element to constitute crimes against humanity as prescribed by the Rome Statute included "various group such as local leaders, businessmen and politicians."[483] Judge Hans-Peter Kaul – who was the head of the delegation of Germany at the Rome Conference, which advocated for a permanent international criminal court with universal jurisdiction – wrote a harsh dissenting opinion in which he argued that the organization needed to be assessed more strictly in order to fit within the contextual elements of crimes against humanity, otherwise the crimes committed would be more of the nature of a serious ordinary crimes (not an international crime of concern to the international community as a whole). While ordinary crimes fall solely within the jurisdiction of States, international crimes are subject to international jurisdiction.[484] Kaul raised a legitimate concern; if the Court starts to interpret its statute broadly and waters it down to include crimes that are not of a sufficient gravity the purpose of the Court's jurisdiction becomes questionable.[485] The jurisdiction of the ICC might be geographically unlimited but its subject matter jurisdiction must be restricted to the crimes that concern the international community.[486]

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483 Situation in the Republic of Kenya, ICC, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, 31 March 2010, par. 117.

484 Situation in the Republic of Kenya, ICC, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Dissenting Opinion of Judge Hans-Peter Kaul, ICC-01/09, 31 March 2010, par. 65; In his dissent, Kaul raised his concern on trivializing the crimes within the jurisdiction of the ICC as follows: "a demarcation line must be drawn between international crimes and human rights infractions; between international crimes and ordinary crimes; between those crimes subject to international jurisdiction and those punishable under domestic penal legislation. One concludes that the ICC serves as a beacon of justice intervening in limited cases where the most serious crimes of concern to the international community as a whole have been committed." See also par. 10 of the same decision.

485 Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Dissenting Opinion of Judge Hans-Peter Kaul, par. 65.

486 Claus Kress, in support of Judge Kaul dissenting opinion, point out that international criminal jurisdiction is only peremptory where it appears most likely that the concerned states will be unwilling or unable to prosecute. Claus Kress, On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision, 23 Leiden Journal of International Law 855-873 (2010).

The gravity threshold and elements come as the *sine qua non* condition to ensure that the risk of an undue interference in a State domestic jurisdiction does not occur. The international community of States obviously did not intend to remove criminal jurisdiction from States' sovereign prerogative. States' sovereignty concerns needed to be accommodated. Thus, the gravity threshold and elements were designed to reflect the wishes of the international community that the intrusion in the internal affairs of States be restricted to particular instances of grave crimes that shock the conscience of humanity.[487]

Conclusion

That a right to exercise universal jurisdiction exists is no longer contested. However, the possibility that the corollaries of the principles of sovereignty and equality of States may prohibit such exercise of jurisdiction cannot yet be excluded. The principal corollaries of these principles are "(1) a jurisdiction prima facie exclusive, over a territory and the permanent population living there; (2) a duty of non-intervention in the area of exclusive jurisdiction of other states; and (3) the ultimate dependence upon consent of obligations arising whether from customary or treaties."[488] The exercise of jurisdiction over States that neither ratified nor consented to the Rome Statute will inevitably interact with these norms. Indeed, the right to exercise universal jurisdiction may conflict with the obligation not to intervene in the areas of exclusive jurisdiction of other states. The State in which the crime was committed or of which the suspect is a national may claim that this exercise of jurisdiction conflicts with its right to have exclusive jurisdiction over its territory and nationals. However, these two apparent conflicts may be carved out by an explicit exception. While States have a duty not to intervene in matters that are essentially within the exclusive jurisdiction of other States, criminal jurisdiction over their territories and nationals is 'prima facie' exclusive. Crimes under international law are outside of the purview of the 'exclusive' jurisdiction of States. The exclusive jurisdiction of States over their territories and nationals and the right to exercise jurisdiction over crimes under international law are norms that accumulate. Hence, there is no conflict of norms.

However, we have seen that some of the specific crimes within the Rome Statute are not grounded on customary international law but are more germane to treaty-based crimes. The exercise of

487 Kress, supra note 486, p. 861.
488 Crawford, supra note 252, p. 447.

treaty-based jurisdiction over non-party States apparently conflicts with the principle *pacta tertiis nec nocent nec prosunt.*

While the prescription of new crimes is not explicitly within the functions of the SC, there is some room for this new competence within the UN Charter. The practice of the SC has indeed demonstrated that States have not refused such entitlement. Nevertheless, substantive limits have to be imposed on the competence of the SC to assume jurisdiction to prescribe. If the SC acts outside of these substantive limits, its power to legislate has to be exercised in accordance with international law. Thus an inherent normative conflict may arise within the UN Charter between the SC's power to prescribe and the limits imposed on this power.[489]

A further particular feature of SC referrals to the ICC is that the ICC is then left with discretion as to how to exercise its jurisdiction to adjudicate over the territory and nationals of a State neither party nor consenting to the Rome Statute. Thus, if the ICC stretches the referral to include crimes that are not related to the situation that prompted the SC to exercise its Chapter VII, the exercise of jurisdiction also becomes affected by an inherent normative conflict. Where an act of an international organization is inconsistent with the constituent instrument of that organization an inherent normative conflict arises.[490] While the constituent instrument of the ICC is the Rome Statute, its exercise of jurisdiction under article 13 (b) is grounded, according to the 'Chapter VII conception', in the Chapter VII powers of the SC. It depends therefore on whether the ICC exercises its jurisdiction under Article 13 (b) in accordance with the substantive limits imposed on the Chapter VII power of the SC by the UN Charter for this exercise of jurisdiction to be grounded in this normative power. A breach of the sovereignty of States will become unavoidable if the Court acts outside of this periphery, as its jurisdiction will not be within the confines of the exception provided in Articles 1 (1) and 2 (7) of the UN Charter.

Under the premise of exercising the *jus puniendi* of the international community and the Rome Statute being an expression of it, the 'universal jurisdiction conception' attempts to trump the will and interests of individual states. Clearly, the objective of ensuring that perpetrators of crimes that are the concern of the international community do not remain unpunished cannot be achieved unless there is universal cooperation. Thus, it appears essential that treaties exhibiting the general interest of the

489 For inherent normative conflicts see Pauwelyn, supra note 231, p. 178.

490 Pauwelyn, supra note 231, p. 285-298; One of the two norms constitutes, in and of itself, a breach of the other norm. This is what Pauwelyn calls an inherent normative conflict.

international community bind all States irrespective of their specific consent. A similar claim was made with regards to the UN Convention on the Law of the Sea, since "the international community order" required it.[491] However, legal positivists see such reasoning as an abuse of "a legal-technical means to solve an essentially political question".[492]

The only norms that are overtly hierarchically superior to other norms of international law are *jus cogens* norms.[493] The category of crimes within the ICC's jurisdiction *ratione materiae* - genocide, crimes against humanity and war crimes - are *jus cogens*. The definition of these crimes provided in the Rome Statute, on the other hand, appears in some instances to go beyond what *jus cogens* prohibits. While all *jus cogens* norms have an *erga omnes* effect, an *erga omnes* effect can also be attached to norms that are not *jus cogens*.[494] State sovereignty is withering;[495] thus, it is argued, the significance of the *pacta tertiis* rule with regards to multilateral treaties embodying the general interest of the international community is also in decline.[496] The Rome Conference intended to create an objective regime; a legal regime valid and binding *erga omnes*.[497] Norms in the general interest of the international community, like those in the Rome Statute, are heralded by the proponents of the

491 S. Rama Rao, Unilateralism and the emerging Law of Seabed Exploitation, in S. K. Agrawala et al., New horizons of international law and developing countries (Tripathi, 1983) p. 360.

492 Pauwelyn, supra note 231, p. 104; Indeed, arguing that all the crimes within the Rome Statute - regardless of their status as jus cogens or customary international law – are crimes of international concern aims to induce more States to ratify the Statute and avoid non-parties States 'free-riding' too much on increased accountability agreed upon by others. Danilenko observes that "judgments on the question of what constitutes general or community interests will always be subjective and political." Gennady Danilenko, Law-Making in the International Community (Martinus Nijhoff Publishers, 1993), p. 66-68. The objective character of the norms in the Rome Statute is checked and balanced by the gravity threshold, articulated in the jurisdiction ratione materiae of the Court and the admissibility test.

493 Vienna Convention on the Law of Treaties, art. 53 and 64.

494 Jure Vidmar, Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System? in Erika De Wet and Jure Vidmar, Hierarchy in International Law: The Place of Human Rights (Oxford University Press, 2012) p. 23; An obligation erga omnes can arise from treaty law and not only from custom: Institut de Droit International (IDI), Obligations and Rights Erga Omnes in International Law, (Krakow Session 2005) 71-11 Annuaire de l'Institut de Droit International 289, art. 1.

495 Corfu Channel Case (the United Kingdom v. Albania), ICJ Reports 1949, 22.

496 Christian Tams et al., A Research Handbook on the Law of Treaties, (Edward Elgar Publishing, 2014), p. 224; The UN Charter is sometimes seen as the paradigmatic example of a treaty binding on third parties, UN Charter, Article 2 (6), See Stefan Talmon, Article 2 (6), in Simma, supra note 385.

497 Bruno Simma, From bilateralism to community interest in international law, Collected Courses of the Hague Academy of International Law (Brill Online, 2015), p. 358; The norms contained in the Statute defining what the most serious crimes of concern to the international community as a whole are not of the bilateral type; they are not of a reciprocal character, Grover, p. 247; Maurizio Ragazzi proposes that erga omnes obligations have two important components: 'the moral content' and the 'required degree of support by the international community'. Ragazzi, supra note 289, p. 163.The universal jurisdiction conception attempts to fit within this description.

‘universal jurisdiction conception’ as ‘more important’ than other norms such as the consent of States which flow from the broader concept of State sovereignty.[498]

Proponents of the ‘universal jurisdiction conception’ argue that a revolution took place in Rome and that the international community imposed the substantive criminal provisions of the Rome Statute over all States regardless of their consent.[499] If one accepts such *aggiornamento* then the ‘universal jurisdiction conception’ offers a unitary interpretation of the Rome Statute where each provision supplements general international law. On the other hand, if the ICC community’s authority to legislate for the world is dismissed, the ‘universal jurisdiction conception’ can have no real effect on how to interpret the Statute’s provisions on the principle of legality and the immunity of State officials. We will however see in the next two chapters that the rationale and normative interplay of the ‘universal jurisdiction conception’ with these issues has been often applied, albeit unconsciously, by scholars, the Court and other institutions.

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498 ILC, Report of the Study Group of the ILC on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 13 Avril 2006, UN Doc. A/CN.4/L.682, par. 326–327.

499 Sadat and Carden, supra note 74; In a way States adopting the Statute and then ratifying it to put it into force, assumed a power to act “in a semi-legislative capacity for the whole world” as Lord McNair put it in case ‘public’ interests are involved. A.D. McNair, The Law of Treaties (Clarendon Press, 1961), p. 266; Similarly, Kelsen stated that “general multilateral treaties to which the overwhelming majority of the states are contracting parties, and which aim at an international order of the world” are exceptions of the to the pacta tertiis rule, Quoted from Rafael Nieto-Nava, International Peremptory Norms (jus Cogens) and International Humanitarian Law, Lal Chand Vohrah et al., Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese (Martinus Nijhoff Publishers, 2003), p. 613, fn 86; The ILC while working on the Law of treaties also faced this problem when addressing the notion of “general multilateral treaties”, 2 Yearbook of the International Law Commission 161 (1962): “Article 1 (c) "General multilateral treaty" means a multilateral treaty which concerns general norms of international law or deals with matters of general interest to States as a whole.”

3. Article 13 (b) vs Principle of Legality

The crimes of genocide, crimes against humanity and war crimes have all been crimes within the jurisdiction of at least one of the other international criminal tribunals and courts established prior to the ICC.[500] However, their precise definition as contained in the Rome Statute is in some important respects novel.[501] Despite the averred intention of the Rome Statute's drafters to follow customary international law, "drafting the Statute required clarifying and elucidating the precise content of offenses in a way that often moved the 'law' of the Statute far beyond existing customary international law understandings."[502]

Article 10 evidences this possibility of a discrepancy between the substantive criminal provisions of the Statute and customary international law.[503] It has been said that Article 22 (3) further "prevents any misconceptions that might arise as to whether the Statute exclusively codifies or exhausts international criminal prohibitions."[504]As the ICTY stated in *Prosecutor v. Furundzija*, "[d]epending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law."[505] An example of where the Statute creates new law might be, as maintained in *Cassese's International Criminal Law* edited in 2013, Article 7 (2) (i) Rome Statute.[506] According to the authors, the Statute's provision on enforced disappearance of persons as a crime against humanity "has not codified customary international law but contributed to the crystallisation of a nascent rule".[507] With the wide ratification of the Rome Statute and its open intent to be universally ratified it is not out of question that all the Statute's criminal provisions may be reflective of customary international law in the near future.[508]

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500 See Nuremberg Charter, art. 7; Tokyo Charter, art. 5; ICTY Statute, art. 2,3, 4 and 5; ICTR Statute, art. 2,3 and 4; SCSL Statute, art. 2, 3, and 4.

501 Schabas, supra note 139, p. 90.

502 Sadat, supra note 25, p. 12.

503 See chapter 2 and Leila Nadya Sadat, Custom, Codification and Some Thoughts about the Relationship Between the Two: Article 10 of the ICC Statute, 49 DePaul Law Review 909 (2000).

504 Bruce Broomhall, Article 22, in Triffterer, supra note 198, p. 719; Susan Lamb, Nullum Crimen Nulla Poena Sine Lege, in Cassese et al., supra note 6, p. 754; Article 22(3) provides: 'This Article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.'

505 Prosecutor v. Anto Furundžija, ICTY, Trial Chamber II, Judgment, IT-95-17/1-T, 10 December 1998, par. 227; Prosecutor v. Tadic, ICTY, Appeals Chamber, Judgment, IT-94-1-A, 15 July 1999, par. 223.

506 Antonio Cassese et al., Cassese's International Criminal Law (Oxford University Press, 2013), p. 98; See also supra note 30 concerning other crimes that might not yet be established under customary international law.

507 Cassese et al., supra note 506.

508 However, see Cryer, supra note 411, p. 327-328.

However, at the time of writing several important States from different geographical regions still need to ratify the Statute and the Statute remains subject to amendments that may concern only some States.[509] Thus, a discrepancy between the Statute and customary international law remains a legal issue that is particularly problematic when the ICC exercises retroactive jurisdiction over individuals for crimes under the Rome Statute while they were neither nationals nor had been acting in the territories of States party to the Statute at the time of the conduct in question.

While a clash between retroactive referrals and non-retroactivity of criminal prohibition can also arise in situations where the ICC exercises retroactive jurisdiction on the basis of an Article 12 (3) declaration of acceptance,[510] I focus on referrals under Article 13 (b) of the Rome Statute. As of today, referrals under Article 13 (b) have always been retroactive. The referral of the situation in Darfur was adopted on the 31st March 2005 but refers the situation back to the 1st July 2002. The referral of the situation in Libya was adopted on the 26th February 2011 and refers the situation to the Court back to the 15th February 2011. Some of the arrest warrants that emerged from these referrals indeed concerned conduct occurring before the adoption of the referral. For instance, Omar Al-Bashir, Head of State of Sudan, is accused of crimes committed between April 2003 and July 2008. Further, in the Libyan situation, the arrest warrants against Muammar Gaddafi, Saif Gaddafi and Abdullah Al-Senussi were for crimes committed between 15th February 2011 and 28th February 2011;[511] thus focusing mostly (or even exclusively in the case of Al-Senussi) on conduct that occurred before the referral.

The other situations where Article 13 (b) was considered were also intended to involve retroactive jurisdiction. The draft resolution to refer the situation in Syria to the ICC, presented before the SC in May 2014, proposed that the Court's jurisdiction extend back to March 2011.[512] Another case

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509 E.g. the Rome Statute now has a new Article 8 bis defining the crime of aggression.

510 The former ICC Prosecutor, Moreno Ocampo, has also suggested that retroactive jurisdiction could occur when a State has exempted itself from jurisdiction over war crimes for seven years under Article 124 Rome Statute, and then withdraws that exemption with retroactive effect; Andres Garibello and Jhon Torres Martınez, Corte Penal Internacional sigue pista a la parapolitica, asegura su fiscal jefe, Luis Moreno Ocampo, ElTiempo.com, 21 October 2007, available at http://www.eltiempo.com/justicia/2007-10-22/ARTICULO-WEB-NOTA_INTERIOR-3776563.html .

511 See Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ICC, Pre-Trial Chamber I, Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah ALSENUSSI", ICC-01/11-01/11-1, 27 June 2011.

512 This was the French draft resolution referring Syria to the ICC, co-sponsored by 65 Member States, vetoed by China and Russia. All other Council members voted in favour of the referral. See S/2014/348, op. par. 2. The Report of the independent international commission of inquiry on the Syrian Arab Republic, 13 August 2014, A/HRC/2, par. 117: "The use of chemical weapons is prohibited in all circumstances under customary international humanitarian law and is a war crime under the Rome Statute of the International Criminal Court." However, Akande, believes it is only covered

worth mentioning is the UN General Assembly resolution to urge the SC to refer the situation in North Korea since 1 July 2002 to the ICC under Article 13 (b) of the Rome Statute.[513] This resolution followed a UN Commission of Inquiry report – issued in February 2014 – documenting crimes against humanity committed in North Korea by the North Korean regime as far back as the 1950s.[514] Among the various acts amounting to crimes against humanity that the Commission reported gender-based persecution was singled out.[515] In a footnote the report reads:

> The Rome Statute introduced gender-based persecution as a crime against humanity, which was not yet included in the statutes of the ICTY and ICTR. In the opinion of the Commission, this norm is crystalizing into customary international law.[516]

Here, the Commission is not saying that gender-based persecution as a crime against humanity crystalized into customary international law in 2002 but that it is currently crystalizing into customary international law. In other words, the crime is not yet firmly established as a customary international norm in 2014 (the year when the report was written).[517] A referral to the ICC under Article 13 (b) would however entail that conduct that occurred more than a decade ago but that is still in the process of crystallizing into customary international law in 2014 could be prosecuted before the ICC today.

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in the Kampala amendment: Dapo Akande, Can the ICC Prosecute for Use of Chemical Weapons in Syria?, EJIL Talk, 23 August 2013, http://www.ejiltalk.org/can-the-icc-prosecute-for-use-of-chemical-weapons-in-syria/ .

513 See the General Assembly resolution adopted on 18 December 2014 following action by its Third Committee (Social, Humanitarian and Cultural). See Press Release GA/11604. See also SC 7353rd Meeting, 22 December 2014. The resolution was vetoed by China and Russia but it was decided for the first time to put North Korea in the SC agenda.

514 See Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea, UN Doc. A/HRC/25/CRP.1, 7 February 2014; See also fn. 1541: "Where the definitions under the Rome Statute and customary international law apparently diverge from another, this has been noted. Considering that crimes against humanity could become subject to prosecution before the International Criminal court on the basis of the Rome Statute or prosecution before another international or national court that applies customary international law (see section VI.B), the commission has followed a "lowest common denominator" approach, Thus, it has applied the Rome Statute where it is narrower than customary international law and vice versa. Therefore, all crimes against humanity established by the Commission would amount to crimes under the definitions of crimes against humanity under both the Rome Statute and customary international law."

515 See Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea UN Doc. A/HRC/25/CRP.1, par. 1059.

516 See Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea UN Doc. A/HRC/25/CRP.1, 7 February 2014, fn. 1576. Similarly, the Commission for the crime against humanity of enforced disappearance of person, preferred to categorize it as other inhumane acts which arguably has been recognized as a form of crime against humanity under international criminal law since Nuremberg. The detailed definition of enforced disappearance as a crime against humanity contained in Article 7 (2) (i) Rome statute was not used since it was contended by some to be a "new" crime. See Report, par. 1139-1141 and fn. 1624.

517 See Cassese, supra note 507, p. 108; Cryer, supra note 411, p. 260; See also supra note 30 concerning other crimes that may not yet be established under customary international law.

The ‘concept’ of this thesis is the exercise of jurisdiction under Article 13 (b) over the territory and nationals of a State neither party to the Statute nor consenting to the ICC jurisdiction. The question that is addressed in this chapter is whether a full retroactive application of the Rome Statute’s substantive criminal provisions to those accused that were neither nationals nor acted in the territory of a State party to the Statute at the time of the conduct may be a violation of the legality principle – especially non-retroactivity. We will see that the references in Article 22 (entitled *nullum crimen sine lege*) to “crimes within the jurisdiction of the Court” and to “entry into force of the Statute” in Article 24 (entitled non-retroactivity *ratione personae*) appear to sweep away the possibility for an accused to claim that the act which he or she is charged with was solely criminalized by the Rome Statute and not by any other law applicable at the time of the relevant conduct. This seems to stand even in cases of retroactive referrals.

In section 1, I will address the jurisdiction *ratione temporis* of the Court. This section will show that although the drafters of the Rome Statute wanted to establish the first international criminal jurisdiction strictly endowed with prospective jurisdiction, it may be argued that when a situation is retroactively referred under Article 13 (b) or on the basis of a retroactive Article 12 (3) declaration of acceptance, individuals are subject to *ex-post facto* jurisdiction. Section 2 will examine the contours of the principle of legality. Then, in section 3, I will show how the specificity of international criminal law has been problematic before the *ad hoc* tribunals. We will see in section 4 that the drafters of the Rome Statute had intended to cure the various problems faced by previous international criminal tribunals by drafting a ‘new international criminal code’ to be applied prospectively. However, despite their lofty ambitions it seems they barely scratched the surface of the issue of the principle of legality. The elephant in the room at the Rome Conference was the application of this ‘international criminal code’ in situations triggered retroactively over acts committed in the territory and by nationals of a State neither party to the Statute at the time the conduct took place. While the Rome Statute constitutes a progressive development of international criminal law that might be praised in the fight against impunity, its application to any individual in the world potentially clashes with the principle of legality – especially non-retroactivity. This problem may be a result of the failure to strictly codify customary international law or of the drafters’ ambition to establish a Court with universal jurisdiction. After explaining in section 5 how a reading of the Statute under the ‘universal jurisdiction conception’

interplays with *nullum crimen sine lege*, I will list the various ways the 'Chapter VII conception' can tackle *nullum crimen sine lege* when the Court is exercising retroactive jurisdiction in section 7.

The purpose of this Chapter is to assess whether referrals under Article 13 (b) clash with the principle of legality and how these clashes (if they exist) may be avoided or resolved. The two 'conceptions' of a referral under Article 13 (b) Rome Statute that I adopt in this thesis will offer a different narrative of the Rome Statute's substantive criminal law and the ICC's exercise of jurisdiction, hence proffering a different assessment of whether there are clashes between Article 13 (b) referrals and the principle of legality.

3.1. The jurisdiction ratione temporis of the Court

In 1919 the American delegation argued against the creation of an international criminal tribunal to try the crimes committed during World War I because it would be "the creation of a new tribunal, of a new law, of a new penalty, which would be *ex post facto* in nature and thus […] in conflict with the law and practice of civilized communities"[518] Two decades later some of the Allies, especially the British government, initially believed that the leaders of the Nazi regime should be punished by death without trial in order to avoid a trial in relation to which they "remained skeptical that a proper legal foundation could be found in existing international law."[519]

Eventually France, the United Kingdom, the United States and the Soviet Union agreed in 1945 to establish the Nuremberg Tribunal "for the just and prompt trial and punishment of the major war criminals of the European Axis."[520] The same was done in Tokyo for "the just and prompt trial and punishment of the major war criminals in the Far East."[521] However, the Nuremberg and Tokyo

518 Robert Lansing and James Brown Scott, Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities, 4 April 1919, Annex II to Commission on the Responsibility of the Authors the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference (Versailles, 29 march 1919), 14 American Journal of International Law 95 (1920).

519 Richard Overy, The Nuremberg Trials: International Law in the Making in Philippe Sands, From Nuremberg to the Hague: The Future of International Criminal Justice (Cambridge, 2003), p. 7; See Aide-Mémoire from the United Kingdom, April 23, 1945, in Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, Washington: US Government Printing Office, 1949, p. 18.

520 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and the Charter of the International Military Tribunal annexed thereto, (London, 8 August 1945) United Nations Treaty Series, vol. 82, p. 279, art. 1.

521 Charter of the International Military Tribunal for the Far East (Tokyo, 19 January 1946), art. 1.

Tribunals were widely criticized for their infringements upon the principle of legality.[522] Both Tribunals exercised retroactive jurisdiction covering acts committed before their establishment. Similarly, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone were established with retroactive jurisdiction.[523] Conversely, the International Criminal Court is said to be a prospective institution; the Court can only exercise jurisdiction over acts committed after the entry into force of its Statute.[524]

The two paragraphs of Article 11 of the Rome Statute - stipulating the jurisdiction *ratione temporis* of the ICC - make a distinction between the entry into force of the multilateral treaty that is the Rome Statute and the entry into force of the Rome Statute for a specific State.[525] Article 11 (1) states that "[t]he Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute." The Rome Statute entered into force on 1 July 2002.[526] Article 11(2) operates a dichotomy by regulating the jurisdiction of the Court for States that accede or accept to be bound by the Rome Statute after its entry into force in a different manner.[527] Article 11 (2) reads as follows:

> "If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under Article 12, paragraph 3."[528]

Thus, at first reading it appears that the Rome Statute states that the ICC's jurisdiction can only be exercised *ad futurum*. Nevertheless, Article 11 (2) is subjected to an internal exception. Indeed, the last part of Article 11 (2) Rome Statute makes clear that the ICC can only exercise jurisdiction with respect to crimes committed after the entry into force of the Statute for that State, "unless that State has made a

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522 See e.g. Christian Tomuschat, The Legacy of Nuremberg, 4 Journal of International Criminal Justice 830-837 (2006).

523 ICTY Statute art. 8; ICTR Statute art. 1; SCSL Statute art. 1(1); Schabas, supra note 139 p. 70, fn. 35. The ICTY and ICTR are also provided with prospective jurisdiction.

524 See Rome Statute, art. 11(1). As for the issue of whether the SC is bound by this date, see Schabas, supra note 139, p. 71. Luigi Condorelli and Santiago Villalpando, Can the Security Council extend the ICC's Jurisdiction?, supra note 6, p. 571-582. This issue will be addressed comprehensively in Chapter 5.

525 Heugas-Darraspen, supra note 245, p. 567; Article 11 (1) Rome Statute answers the article on the non-retroactivity of treaties contained on the Vienna Convention on the Law of Treaties. Article 28 Vienna Convention on the Law of Treaties provides that "[u]nless a different intention appears from the treaty or is otherwise established" non-retroactivity is the rule.

526 On the 11 April 2002, in addition to the fifty States that had already ratified the Statute, ten States simultaneously deposited their instruments of ratification as provided by Article 126 and consequently the Rome Statute entered into force on 1 July 2002.

527 See Article 24 (3) Vienna Convention on the Law of Treaties which reads as follows: When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.

528 Rome Statute, art. 11(2).

declaration under Article 12, paragraph 3." Article 12 (3) of the Rome Statute permits States not party to the Rome Statute to accept *ad hoc* the exercise of the Court's jurisdiction and States that acceded to the Statute after its entry into force to accept the jurisdiction of the Court for acts committed prior to accession but after the entry into force of the Statute.[529] Read in conjunction with Article 11 (2) Rome Statute, Article 12 (3) Rome Statute allows a State to provide retroactive jurisdiction to the Court.[530]

Article 11 is silent with respect to the jurisdiction *ratione temporis* of the ICC in situations referred under Article 13 (b) except to the extent that it states that the Court has no competence before July 2002.[531] Thus, the temporal jurisdiction of the Court can be retroactively imposed up to the entry into force of the Rome Statute.[532]

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529 Rome Statute, art. 12(3) reads as follows: "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." It is to be noted that Article 12 (3) speaks of the acceptance of the Court's jurisdiction "with respect to the crime in question". It has been contested whether the declaration can be only for specific crimes; see Carsten Stahn et al., The International Criminal Court's *Ad hoc* Jurisdiction, 99 American Journal of International Law 421, 427-28 (2005). For scholars arguing that indeed Article 12 (3) declaration can be restricted to specific crimes of the Rome Statute see Elizabeth Wilmshurst, Jurisdiction of the Court, in Lee, supra note 149, p. 139-140; Giuseppe Palmisano, The ICC and Third States, in Flavia Lattanzi and William A. Schabas Essays on the Rome of the International Criminal Court (Il Sirente, 1999), p. 393-394. Palmisano argues that Article 12 (3) is a "treaty stipulation in favour of Third States"; It takes advantage of the ICC's impartiality and competence, but, by doing so it consents that the ICC applies its jurisdiction in accordance with its Statute, procedures and rules. See Vienna Convention on the Law of Treaties, art. 36. This rule of customary international law is reflected by the last sentence of Article 12 (3) which states that "the accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9."

530 The Republic of Côte d'Ivoire made use of such a declaration on 1 October 2003 providing retroactive jurisdiction to the ICC since 19 September 2002. At the time Côte d'Ivoire had signed but not ratified the Statute, nevertheless it decided to make use of Article 12 (3) Rome Statute. In 2011, the Prosecutor decided to open an investigation into the situation in Côte d'Ivoire for crimes committed from 19 September 2002. The Pre-Trial Chamber authorized the investigation into the situation in Côte d'Ivoire stating "that the Court has jurisdiction over crimes allegedly committed in Côte d'Ivoire since 19 September 2002." It is generally accepted that a State which becomes party to the Rome Statute after the 1st July 2002 can use the declaration of acceptance under Article 12 (3) Rome Statute. Thus, a State becoming party subsequent to the entry into force of the Statute can provide retroactive jurisdiction to the Court from 1 July 2002. The ICC in the case of Prosecutor v. Joseph Kony accepted that a state can make a retroactive acceptance of jurisdiction. Uganda, the State from which the accused is a national and in which the crimes were committed, became a state party to the Rome Statute on 14 June 2002. According to Article 126(2), the Rome Statute was to enter into force in Uganda on 1 September 2002. Nevertheless, the Prosecutor applied for an arrest warrant against Kony for crimes committed from 1 July 2002. Indeed, the Prosecutor relied on a "Declaration on Temporal Jurisdiction" made by Uganda on 27 February 2004 which purported to retroactively accept the ICC's jurisdiction from 1 July 2002. The Pre-Trial Chamber acknowledged that Uganda made the retroactive declaration and issued the arrest warrant against Kony in respect of crimes committed since 1 July 2002. Hence, it appears that the entry into force of the Statute for a particular state does not necessarily entail that the Court is temporally limited to that date. The jurisdiction over a State can be retroactively exercised with the limit of 1 July 2002.

531 See Rome Statute, art. 11 (1). As for the issue whether SC is bound by this date, see Schabas, supra note 139, p. 71. Condorelli and Villalpando, Can the Security Council extend the ICC's Jurisdiction?, supra note 524, p. 571-582. This issue will be addressed in Chapter 5.

532 See SC Res. 1593 and 1970 which provide retroactive jurisdiction to the Court.

Accordingly, the provisions of the Rome Statute allow the ICC, including those situations when it acts under Article 13 (b), to exercise its jurisdiction over a situation even if the crime was committed by a national or in the territory of State in which the Statute was not into force at the time of the conduct. The only temporal limit that is sets on the ICC exercise of jurisdiction is the entry into force of the Statute, that is 1 July 2002. The question that is asked in this Chapter is whether such retroactive exercise of jurisdiction conflicts with the principle of legality. As such, it is necessary to define the contours of the principle of legality.

3.2. The Principle of Legality

The principle of legality, as Kenneth S. Gallant has defined it, "is a requirement that the specific crimes, punishments and courts be established legally - within the prevailing legal system."[533] This definition can be broken down into three rules: (1) no crime without law (*nullum crimen sine lege*); (2) no punishment without law (*nulla poena sine lege*); and, (3) no court without law.

The most important precept of the principle of legality for the purpose of this chapter is *nullum crimen sine lege* (no crime without law).[534] *Nullum crimen sine lege* encapsulates four basic notions: (1) *nullum crimen sine lege praevia* (non-retroactivity); (2) *nullum crimen sine lege scripta* (written law); (3) *nullum crimen sine lege certa* (specificity)*;* (4) *nullum crimen sine lege stricta* (strict construction).[535]

533 Kenneth S. Gallant, The Principle of Legality in International and Comparative Criminal Law (Cambridge University Press, 2009), p. 15.

534 I will not deal with the last rule in this Chapter, but in chapter 5. Kenneth Gallant makes a more exhaustive list in supra note 533, p. 11-12: "1. No act that was not criminal under a law applicable to the actor (pursuant to a previously promulgated statute). 2. at the time of the act may be punished as a crime. 2. No act may be punished by a penalty that was not authorized by a law applicable to the actor (pursuant to a previously promulgated statute) at the time of the act. 3. No act may be punished by a court whose jurisdiction was not established at the time of the act. 4. No act may be punished on the basis of lesser or different evidence from that which could have been used at the time of the act. 5. No act may be punished except by a law that is sufficiently clear to provide notice that the act was prohibited at the time it was committed. 6. Interpretation and application of the law should be done on the basis of consistent principles. 7. Punishment is personal to the wrongdoer. Collective punishments may not be imposed for individual crime. 8. Everything not prohibited by law is permitted."

535 Almost identically, nulla poena sine lege encapsulates the same four basic notions, plus the rule of lex mitior (retroactivity in mitius); Sharam Dana, Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing, 99 Journal of Criminal Law and Criminology 868 (2009). The right to be judged by a tribunal established by law can also be broken down in the right to be judged by a tribunal previously established by law (non-retroactivity) and the right to be judged by an independent and impartial tribunal established by law. See Tadic Interlocutory Appeal Decision and Chapter 5 of this thesis.

According to *nullum crimen sine lege scripta*, the law needs to be written and enacted otherwise there is no law and therefore no criminal liability. *Nullum crimen sine lege scripta* seems to pose a challenge to common law jurisprudence and customary criminal provisions. Many states from the common law tradition do not require that the law be written. Indeed, to require that law be written would go against the fundamental nature of common law. As the ECrtHR has stated, this "would strike at the very roots of th[ese] State's legal system."[536] In order to accommodate these legal systems, written as well as unwritten law are said to satisfy *nullum crimen sine lege*.[537] We will see in the next section that the principle of *nullum crimen sine lege* took in the rise of international criminal law some distances from the requirement of written law but then came back to it.[538]

Nullum crimen sine lege certa expresses the value of legal certainty. The law must define the crimes with precision. An offence is clearly defined in law when an individual can know from the wording of the criminal provision which conduct will incur liability.[539] Clarity, precision, certainty and specificity are generally the requirements for a law to be considered in accordance with *nullum crimen sine lege certa*.[540] The "law" can be written or unwritten but it must define the crime in a way that the application of the crime to the act is not unpredictable. Vague laws are susceptible to be read expansively and applied in an unpredictable manner to new acts. This is what the notion of *nullum crimen sine lege certa* aims to prevent. It postulates that there must be certainty as to the content of the law. Thus, the law must be specific.

In order to alleviate the risks posed by vague laws or general definitions, criminal provisions must be interpreted strictly. *Nullum crimen sine lege stricta* encompasses two principles, first the judiciary cannot broadly or extensively interpret a criminal rule and, relatedly, it cannot define criminal acts by analogy to existing crimes. These prohibitions imply that criminal rules must be strictly construed.[541] While the rule of specificity (*nullum crimen sine lege certa*) is addressed to the originator

536 Sunday Times v. United Kingdom, Court, Judgment, ECrtHR, Application No. 6538/74, 26 April 1979, par. 47.

537 To alleviate the prejudice to the accessibility of case law, the ECrtHR replaced its reference to written and unwritten law by "statutory law as well as case-law"; Cantoni v. France, Grand Chamber, Judgment, ECtHR , Application No. 17862/91, 15 November 1996, par. 29.

538 Susan Lamb, supra note 6, p. 734; see also Claus Kress, Nulla Poena Nullum Crimen Sine Lege, in Max Planck Encyclopedia of International Law.

539 Kokkinakis v. Greece, Court, Judgment, ECtHR, Application No. 14307/88, 25 May 1993, par. 52.

540 Prosecutor v. Stakic, ICTY, Trial Chamber, Judgment, IT-97-24-T, 31 July 2003, par. 719.

541 Cassese, supra note 507, p. 33; while strict construction can also apply to procedural rules only substantive rule are considered here.

of the criminal provision, the rule of strict construction is addressed to the judge.[542] This notion suggests that judges are not allowed to fill gaps in criminal law by extensively interpreting a statute beyond its wording or by extending a precedent in a form resulting into a retroactive creation of criminal law. In this sense, strict construction is an extension of the value of legal certainty.[543] While the rule of specificity and the value of legal certainty aim to have norms that are written in a clear, precise and definite fashion, the rule of strict construction aims to limit the result of judicial interpretation.

Clearly, the most prevalent notion of the principle of *nullum crimen sine lege* is the rule of non-retroactivity. *Nullum crimen sine lege praevia* is the notion that there is no crime without preexisting law. A behavior can be held criminal only if at the time it was committed there was a law providing for its criminalization. The law must have been in force at the time the conduct took place and must have been applicable to the conduct in question. The core of *nullum crimen sine lege* is in non-retroactivity, while the concept of written law, the rule of specificity, and the rule of strict construction contain tools of how to ensure that retroactive creation of crimes does not take place.[544] The aim of all these notions is to act as safeguards against an arbitrary exercise of authority.[545]

While *nulla poena sine lege* will not be the focus of my inquiry, it will resurface in various parts of my analysis, especially if in order to comply with non-retroactivity one has to look to domestic legislation to determine whether the acts were criminal according to the law applicable at the time of the impugned conduct.[546] *Nulla poena sine lege* encapsulates the same basic notions as its counterpart (*nullum crimen sine lege*) plus the rule of *lex mitior* (retroactivity *in mitius)*.[547]

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542 Kress, supra note 538, p. 7-8.

543 That might be the reason why these two notions are often confused; see also Prosecutor v. Furundzija, ICTY Trial Chamber, Judgment, ICTY, IT-95-17/1-T, 10 December 1998, par. 177.

544 Gallant, supra note 533, p. 352-355; Cherif Bassiouni, Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protection in National Constitutions, 3 Duke Journal of Comparative and International Law (1993), p. 290-291; See also Birgit Schlutter, Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International *Ad hoc* Criminal Tribunals for Rwanda and Yugoslavia (Martinus Nijhoff Publishers, 2010), p. 297: "In its narrowest interpretation, the nullum crimen sine lege principle is comprised of the prohibition of criminal prosecution without an underlying legal basis (prohibition of retroactivity)."

545 See Aly Mokhtar, 'Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects', 26 Statute Law Review 41 (2005).

546 See section: "A Strict Application of the Principle of Legality".

547 Dana, supra note 535, p. 868; Article 11 (2) UDHR reads as follows: No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Nullum crimen and *Nulla poena sine lege* are contained in Article 11(2) of the Universal Declaration of Human Rights (UDHR),[548] Article 15 of the International Covenant on Civil and Political Rights (ICCPR),[549] Article 7 of the European Convention on Human Rights (ECHR),[550] Article 9 of the Inter American Convention on Human Rights (ACHR),[551] Article 6 and 7(2) of the African Charter on Human and People's Rights (ACHPR)[552] and Article 15 of the revised Arab Charter on Human Rights (ACHR).[553] Article 4 ICCPR, Article 15 (2) ECHR and Article 27 IACHR stipulate that even in a state of emergency the principle of legality cannot be derogated from. Furthermore, Article 99(1) of the Geneva Convention III,[554] Article 67 of Geneva Convention IV, [555] Article 75(4)(c) of Additional Protocol I[556] and Article 6(2)c) of Additional Protocol II[557] also provide for the application of *nullum crimen/nulla poena sine lege* in times of armed conflict – both international and non-international. Accordingly, it appears that the international community agreed that *nullum crimen/nulla poena sine lege* must be respected even at times when the rule of law is at utmost risk.[558]

On the basis of the universal ratification of these treaties it is generally considered that *nullum crimen/ nulla poena sine lege* are customary international norms.[559] The best expression of *nullum crimen/nulla poena sine lege* is provided in Article 11(2) UDHR, which reads as follows:

548 Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc A/810 at 71 (December 10, 1948).

549 International Covenant on Civil and Political Rights, opened to signature December 16, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976).

550 Convention for the Protection of Human Rights and Fundamental Freedoms, opened to signature November 4, 1950. 213 U.N.T.S. 221 (entered into force September 3,1953).

551 American Convention on Human Rights, opened to signature November 21, 1969, 1144 U.N.T.S. 123, (entered into force July 18, 1978).

552 African Charter on Human and Peoples' Rights, opened to signature June 27, 1981, 1520 UNTS 217 (entered into force October 21, 1986).

553 Arab Charter on Human Rights, opened to signature May 22, 2004, reprinted in 12 International Human Rights Report 893 (2005), (entered into force March 15, 2008)

554 Geneva Convention III Relative to the Treatment of Prisoners of War, opened to signature August 12, 1949, 75 U.N.T.S. (entered into force October 21, 1950).

555 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, opened to signature August 12, 1949, 75 U.N.T.S. (entered into force October 21, 1950).

556 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), opened to signature June 8, 1977, 1125 U.N.T.S. 3, (entered into force December 7, 1978).

557 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), opened to signature June 8, 1977, 1125 U.N.T.S. 609, (entered into force December 7, 1978).

558 Gallant, supra note 533, p. 208.

559 Gallant, supra note 533, p. 3; Lamb, supra note 504, p. 734 – 742. For nulla poena sine lege see Gallant, supra note 533, p. 379.

> "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."[560]

This provision recognizes that international law as much as national law is a relevant source of law for the criminalization and punishment of a conduct. Hence, if an act was lawful according to national law but criminal under international law the perpetrator can be prosecuted and punished without violating the principle of non-retroactivity.[561] This formulation of *nullum crimen/nulla poena sine lege praevia* must be understood in accordance with Nuremberg Principle No. 2 which states that "[t]he fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law."[562]

The ICCPR and the ECHR contain a provision that is similar to the UDHR's provision on *nullum crimen/nulla poena sine lege*.[563] However, in contrast with the UDHR, the ICCPR has a further paragraph which specifies that the rules contained in the previous paragraph do not "prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."[564] The ECHR has in essence a similar second paragraph.[565] This second paragraph is also known as the

560 Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc A/810 at 71 (December 10, 1948).

561 Valentina Spiga, Non Retroactivity in International Criminal Law: A New Chapter in the Hissène Habré Saga, 9 Journal of International Criminal Justice 13 (2011).

562 Nuremberg Principles No. 2 in International Law Commission, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, 2 Yearbook of the International Law Commission (1950).

563 In fact, a similar provision was dropped at the time of drafting the UDHR: See Machteld Boot, Genocide, Crimes against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court (Intersentia, 2002), p.137.

564 ICCPR, Article 15 (2); to the knowledge of the author there are 4 countries which have included the "Nuremberg/Tokyo clause" in their Constitutions: Canada (Article 11 (g) of the Constitution), Cape Verde (Article 30 of the Constitution), Poland (Article 42 (1) of the Constitution) and Sri Lanka (Article 13 (6) of the Constitution). The IACHR and the ACHPR differ in their formulation of nullum crimen sine lege praevia. The IACHR avoids the polemical issue concerning the sources of international law. Instead of referring to "national or international law" it refers to "applicable law". Likewise, the ACHPR articulates its retroactivity prohibition by referring to "legally punishable offence". Thus, both rules on non-retroactivity leave the discretion to the court to determine what the "applicable law" is or what source of law could be taken into account to define a "legally punishable offence".

565 Article 7(2) ECHR reads as follows: "This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according the general principles of law recognized by civilized nations." There is no difference between civilized nations and community of nations except that the former is a colonial formulation which is no more appropriate or admissible in today's world. In this thesis I will use the ICCPR formulation of criminal according to the community of nations.

'Nuremberg clause' as it is claimed to have been drafted to eliminate any doubt about the validity of the post-World War II prosecutions.[566]

These paragraphs referring to "criminal according to the general principles of law recognized by the community of nations" are in fact repeating a source – international law - contained in the first paragraphs of the non-retroactivity provisions. General principles of law are a recognized source of international law, indeed they are explicitly listed in Article 38 (1) (c) of the Statute of the International Court of Justice.[567] As Machteld Boot claims, the 'Nuremberg clause' was inserted in order to secure and confirm the findings of the Nuremberg Tribunal but it does not add anything to the sources for the criminalization of conducts.[568] The ECrtHR held in its most recent jurisprudence that the two paragraphs of Article 7 are interlinked and are to be interpreted in a concordant manner.[569] Thus, Article 7(2) ECHR and 15(2) ICCP do not provide exceptions to *nullum crimen/nulla poena sine lege* but simply reiterate that general principles of law – although an unwritten source of law – can also be used as a source of law in the assessment of the applicable law at the time of the offence.[570]

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566 See Gallant, supra note 533, p. 182; Boot, supra note 563, p. 137-140; 158-161, 628; in fact, some believed that the prohibition of nullum crimen sine lege as contained in the UDHR seemed too absolute and could appear as a condemnation of the various legislations enacted after World War II to prosecute Nazi crimes; see e.g. Louis-Edmond Petiti, Emmanuel Decaux and Pierre-Henri Imbert, La Convention Européene des Droits de l'Homme : Commentaire Article par Article (Economica, 1995), p. 299-301. The travaux préparatoires to the ECHR indicate that the purpose of Article 7(2) was to make clear that Article 7 did not affect laws which, in the wholly exceptional circumstances at the end of the Second World War, were passed in order to punish, inter alia war crimes, and it is not aimed at either moral or legal disapproval of such laws. See X. v. Belgium, Commission, Decision, European Commission of Human Rights, Application No. 268/57, 20 July 1957, p. 241.

567 ICJ Statute, Article 38 reads as follows: 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

568 See Boot, supra note 563, p.140; see also Manfred Nowak, U.N. Convention on Civil and Political Rights: CCPR Commentary (Engel, 1993), p. 281

569 Kononov v. Latvia, Grand Chamber, Judgment, ECrtHR, Application No. 36376/04, 17 May 2010, par. 186; Maktouf and Damjanovic v. Bosnia and Herzegovina, Grand Chamber, Judgment, ECrtHR, Application No. 2312/08, 18 July 2013, par. 72.

570 However, this last interpretation is exposed to the criticism of making Article 7(2) and Article 15(2) redundant, something which is contrary to a basic principle of treaty interpretation. According to Article 38 of the Statute of the International Court of Justice, international conventions, customary international law and general principles of law recognized by the international community are all sources of international law. In other words, "general principles of law recognized by the community of nations" are as treaties and customary international law a source of international law. Thus, since the first paragraphs of Article 7 ECHR and 15 ICCPR state that an individual can be held liable under international law, which in theory includes general principles of law, their second paragraphs may appear redundant and meaningless.

3.3. The specificity of international criminal law

The strict application of the notions of written law (*lex scritpa*), specificity (*lex certa*), strict construction (*lex stricta*) and non-retroactivity (*lex praevia*) to international criminal law is often challenged on the ground that the peculiarity of international law needs to be taken into account. For instance, the ICTR said that "given the specificity of international criminal law, the principle of legality does not apply to international criminal law to the same extent as it applies in certain national legal systems."[571] Certainly, the criminalization process in international law is not the same as in national law.[572] While the method of criminalization of conduct in national law is through legislative acts, in international law there is no international legislature. On an *ad hoc* basis States may agree to draft a treaty which will regulate inter-State affairs. Rarely do those treaties directly criminalize the conduct of individuals.

Nevertheless, there have been various instances where courts were given jurisdiction to prosecute individuals for having violated treaties. According to Article 227 of the 1919 Versailles Peace Treaty, the Allied and Associated Powers accused the former German Emperor William II of ''a supreme offence against international morality and sanctity of treaties''.[573] Article 5 of the Nuremberg Charter and Article 6 of the Tokyo Charter also provided, among the crimes against peace, waging war ''in violation of international treaties, agreements and assurances''. The Nuremberg Tribunal established that although there were no provisions on punishment in the Kellogg-Briand Pact this did not mean that individual criminal responsibility could not ensue from its violation.[574] The ICTY relied on this case law to find that violations of common Article 3 of the Geneva Conventions and of

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571 Prosecutor v. Karemera et al, ICTR, Trial Chamber III, Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Edouard Karemera, Andre Rwamakuba and Mathieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, ICTR-98-44-T, 11 May 2004, par. 43.

572 Cherif Bassiouni, Crimes Against Humanity in International Criminal Law (Martinus Nijhoff Publishers, 1992), p. 110-112; The Trial Chamber in Celebici stated with regard to the principle nullum crimen sine lege: "Whereas the criminalisation process in a national criminal justice system depends upon legislation which dictates the time when conduct is prohibited and the content of such prohibition, the international criminal justice system attains the same objective through treaties or conventions, or after a customary practice of the unilateral enforcement of a prohibition by States. It could be postulated, therefore, that the principles of legality in international criminal law are different from their related national legal systems with respect to their application and standards. They appear to be distinctive, in the obvious objective of maintaining balance between the preservation of justice and fairness towards the accused and taking into account the preservation of world order." Prosecutor v. Zejnil Delalic et al., ICTY, Trial Chamber, Judgment, IT-96-21-T, 16 November 1998, par. 405.

573 Treaty of Versailles of 28 June 1919, art. 227.

574 See for instance, Vladimir-Djuro Degan, On the Sources of International Criminal Law, 4 Chinese Journal of International Law 64 (2005); it must be noted that the ICTY never applied this judge made provision.

Additional Protocol II entailed individual criminal responsibility, although this was not explicitly provided.[575] Furthermore, the ICTY found that it had jurisdiction over ''violations of agreements binding upon the parties to the conflict, considered qua treaty law, i.e. agreements which have not turned into customary international law."[576]

Nonetheless, some scholars have rejected the Nuremberg Tribunal's holding that violations of the Kellog-Briand Pact and other treaties entailed individual criminal responsibility for those who planned and waged war in contravention of these treaties.[577] The same criticism has been expressed as to the ICTY's holding that there is individual criminal responsibility for violations of agreements binding upon the parties to a conflict.[578] It is indeed a truism to state that an illegal act is not necessarily a crime.[579] Furthermore, the question of individual criminal responsibility is in principle distinct from the question of State responsibility.[580] Unlawful acts of states may possibly result in the international responsibility of the State, but this unlawful act of the State will not necessarily entail that the agents of the State are criminally responsible. Most international law does not directly bind individuals.[581] Moreover, the fact that a certain international rules seem to define the crime does not entail *ipso facto* that individual criminal responsibility arises.[582] The ILC in its commentary to its Draft Code of Crimes against the Peace and Security of Mankind (1994) stated the following:

> the mere existence of a treaty definition of a crime may be insufficient to make the treaty applicable to the conduct of individuals. No doubt such cases (which are also likely to be rare, and may be hypothetical) might raise issues of the failure of a State to comply with its treaty obligations, but that is not a matter which should prejudice the rights of an individual accused.[583]

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575 Tadic Interlocutory Appeal Decision, par. 128-136; Celebici Appeals Chamber Judgment, Prosecutor v. Kordic & Cerkez, ICTY, Trial Chamber, Judgment, IT—95-14/2-T, 26 February 2001; Prosecutor v Kunarac et al., ICTY, Appeals Chamber, Judgment, IT-96-23, 12 June 2003.

576 Tadic Interlocutory Appeal Decision, par.89.

577 See, e.g., F.B. Schick, Crimes against Peace, 38 Journal of Criminal Law and Criminology 770 (1947–48), Tomuschat, supra note 522, p. 832-833.

578 See for instance, Degan, supra note 574, p. 64.

579 Bassiouni, supra note 572, p. 113.

580 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, Yearbook of the International Law Commission, 2001, vol. II, Part Two, p. 143.

581 Tomuschat, supra note 522, p. 833.

582 See Kress, International Criminal Law, in Max Planck Encyclopedia of International Law, par. 12.

583 ILC, Report of the International Law Commission on the Work of its 46th Session, UN Doc. A/49/10 (1994); See also Prosecutor v. Vasiljevic, ICTY, Trial Chamber, Judgment, IT-98-32-T, 29 November 2002, par. 199, where the ICTY stated: "For criminal liability to attach, it is not sufficient, however, merely to establish that the act in question was illegal under international law, in the sense of being liable to engage the responsibility of a state which breaches that prohibition".

Indeed, for individual criminal responsibility to arise the treaty needs to be properly applicable to the conduct of the accused in question according to its terms or because the treaty was part of the domestic law. The same contention exists as to customary international law, the violation of a customary norm may entail the responsibility of the State but this violation in itself does not necessarily entail that the criminal liability of the individual who committed the act is engaged.

In principle, the requirement of a specific law entails that the *actus reus*, the *mens rea* and the modes of responsibility must be specified in the *corpus* criminalizing the conduct.[584] Nevertheless, it is recognized that customary international law may also be used as source of international law under which individual criminal responsibility arises. The *Tadic Interlocutory Appeal Decision* shows that individual criminal responsibility can attach to a breach of a customary prohibition of certain conduct.[585] Moreover, the report of the Secretary General on the establishment of the ICTY had determined that "the application of the principle *nullum crimen sine lege* requires that the tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary international law."[586] Thus, the ICTY exercised its jurisdiction according to the following rules:

> [T]he Tribunal only has jurisdiction over a listed crime [in the Statute] if that crime was recognised as such under customary international law at the time it was allegedly committed. The scope of the Tribunal's jurisdiction *ratione materiae* may therefore be said to be determined both by the Statute, insofar as it sets out the jurisdictional framework of the International Tribunal, and by customary international law, insofar as the Tribunal's power to convict an accused of any crime listed in the Statute depends on its existence *qua* custom at the time this crime was allegedly committed."[587]

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584 See Christopher L. Blakesley, Atrocity and Its Prosecution: The *Ad hoc* Tribunals for the Former Yugoslavia and Rwanda, in Timothy L.H. McCormack and Gerry J. Simpson, The Law of War Crimes: National and International Approaches (Martinus Nijhoff Publishers, 1997), p. 206.

585 Tadic Interlocutory Appeal Decision, par. 134.

586 Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), UN Doc. S/25704, 3 May 1993, par. 34.

587 Prosecutor v. Milutinovic et al., ICTY, Appeals Chamber, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction — Joint Criminal Enterprise, IT-99-37-AR72, 21 May 2003, par. 9; as for crimes under treaty law, see the Appeals Chamber in Tadic held that "the International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law"; Tadic Interlocutory Appeal Decision, par 143; It added that: 'We conclude that, in general, such agreements fall within our jurisdiction under Article 3 of the Statute", Tadic Interlocutory Appeal Decision, par 144. See also, e.g., Prosecutor v. Tihomir Blaskic, ICTY, Trial Chamber, Judgment, IT-95-14-T, 3 March 2000, par 169; see Prosecutor v. Laurent Semanza, ICTR, Trial Chamber, Judgment and Sentence, ICTR-97-20-T, 15 May 2003, par. 353 and references quoted therein.

The second condition was designed to ensure that the ICTY complies with the obligation to apply the principle of *nullum crimen sine lege praevia* (non-retroactivity).[588] The same requirements were held for the modes of liabilities.[589]

Nonetheless, Verhoeven asks:

> how could a private person be satisfactorily informed of the existence or exact content of a customary international rule or of a general principle of law, which the states themselves very often remain largely ignorant of and which are far from constituting for the individuals 'clear' and 'accessible' norms satisfying the nullum crimen, nulla poena requirements?[590]

Customary international law by its very nature can be even more imprecise than treaty law.[591] The refusal by a Trial Chamber of the ICTY in *Prosecutor v. Vasiljevic* to convict an accused for the war crime of violence to life and person as it was deemed not to be sufficiently defined in customary international law shows the challenges customary international law poses to the principle of legality.[592]

Through its various decisions on *inter alia* war crimes,[593] crimes against humanity,[594] command responsibility,[595] and joint criminal enterprise[596] the *ad hoc* tribunals have been accused of legislating

588 Prosecutor v. Milutinovic et al., ICTY, Trial Chamber, Decision on Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration, IT-05-87-PT, 22 March 2006, par. 15.

589 Prosecutor v. Milutinovic et al., ICTY, Trial Chamber, Decision on Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration, IT-05-87-PT, 22 March 2006, par. 15: "the determination of whether the jurisdiction of the International Tribunal extends to a purported form of responsibility is twofold : (1) the form of responsibility "must be provided for in the Statute, explicitly or implicitly"; and (2) the form of responsibility "must have existed under customary international law at the relevant time".

590 Joe Verhoeven, Article 21 of the Rome Statute and the Ambiguities of Applicable Law, 33 Netherlands Yearbook of International Law 22 (2002).

591 Lamb, supra note 504, p. 743; see Kai Ambos, International Criminal Law at the Crossroads: From *ad hoc* Imposition to a Treaty-Based Universal System, in Carsten Stahn and Larissa van den Herik, Future Perspectives on International Criminal Justice (TMC Asser Press, 2010), p. 163.

592 In Prosecutor v. Vasiljevic, the ICTY, in one rare instance where it found that a crime – war crime of violence to life – not to be sufficiently defined in customary international law, stated the following: "it would be wholly unacceptable for a Trial Chamber to convict an accused person on the basis of a prohibition which, taking into account the specificity of customary international law and allowing for the gradual clarification of the rules of criminal law, is either insufficiently precise to determine conduct and distinguish the criminal from the permissible, or was not sufficiently accessible at the relevant time. A criminal conviction should indeed never be based upon a norm which an accused could not reasonably have been aware of at the time of the acts, and this norm must make it sufficiently clear what act or omission could engage his criminal responsibility."; Prosecutor v. Vasiljevic, ICTY, Trial Chamber, Judgment, IT-98-32-T, 29 November 2002, par. 193.

593 Tadic Interlocutory Appeal Decision; Shane Darcy, The Reinvention of War Crimes by the International Criminal Tribunals, in Shane Darcy and Joseph Powderly, Judicial creativity at the International Criminal Tribunals (Oxford University Press, 2011), p. 127.

594 Tadic Interlocutory Appeal Decision, par .141. See also Tadic Trial Judgment, par. 627, holding that the inclusion of this requirement deviated from the development of the doctrine after the Nuremberg Charter; Prosecutor v. Kupreskic et al., ICTY, Trial Chamber, Judgment, IT-95-16-T, 14 January 2000, par. 577, 581, stating that the link between crimes against humanity and any other crimes has disappeared under customary international law; Prosecutor v. Jean-Paul

new law under the excuse of discovering customary international law.[597] The finding of the ICTY that customary international law imposes criminal liability for serious violations committed in internal armed conflict was qualified by Judge Li, in his dissenting opinion, as "an unwarranted assumption of legislative power which has never been given to this Tribunal by any authority."[598] While Judge Shahabuddeen sat on the bench which found that joint criminal enterprise is established in customary international law (which was repeatedly used in other cases to dismiss the claim that this doctrine violated *nullum crimen sine lege*[599]) he admitted in a recent publication that "[o]n reflection, the writer would respectfully doubt the Tadić finding (to which he was a party) that joint criminal enterprise [III] is customary international law".[600] The *ad hoc* tribunals' elimination of the nexus with an armed conflict requirement from the chapeau of crimes against humanity also raised concerns. Schabas notes that the opposition of some States at the Rome Conference to the removal of the nexus with an armed conflict requirement might imply that the *ad hoc* tribunals were wrong in their identification of

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Akayesu, ICTR, Trial Chamber, Judgment, ICTR-96-4-T, par. 464–469, 595; Larissa van den Herik, Using Custom to Reconceptualize Crimes Against Humanity, in supra note 593, p. 80-105; Schabas, supra note 139, p. 109-110.

595 See e.g. Prosecutor v. Delalic et al., ICTY, Trial Chamber, Judgment, IT-96-21-T, 16 November 1998, par. 399: asserting that a causal relationship between the failure of the superior to fulfil his duties and the crimes of his subordinates is not required under international law. According to Mettraux "[t]his position appears to fall short of the requirements of customary international law." Guénaël Mettraux, The Law of Command Responsibility (Oxford University Press, 2009), p. 83.

596 Prosecutor v. Tadic, ICTY, Appeals Chamber, Judgment, IT-94-1-A, 15 July 1999, par. 226; See e.g., Allison Marston Danner and Jenny Martinez, Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law, 93 California Law Review 146 (2005); Catherine H. Gibson, Testing the Legitimacy of the Joint Criminal Enterprise Doctrine in the ICTY: A Comparison of Individual Liability for Group Conduct in International and Domestic Law, 18 Duke Journal of Comparative and International Law 522 (2008).

597 See e.g. Alexander Zahar and Göran Sluiter, International Criminal Law: a critical introduction (Oxford University Press, 2008), p. 93- 105.

598 See Tadic Interlocutory Appeal Decision, Separate Opinion of Judge Li, par. 13; see also Degan, supra note 574; Although the ICTY considered that: "[t]he scope of the Tribunal's jurisdiction ratione materiae may therefore be said to be determined both by the Statute, insofar as it sets out the jurisdictional framework of the International Tribunal, and by customary international law, insofar as the Tribunal's power to convict an accused of any crime listed in the Statute depends on its existence qua custom at the time this crime was allegedly committed." Prosecutor v. Milutinovic et al., ICTY, Appeals Chamber, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction — Joint Criminal Enterprise, IT-99-37-AR72, 21 May 2003, par. 9; Nonetheless, in Tadic Interlocutory Appeal Decision the ICTY expanded the tribunal jurisdiction over war crimes not committed in an international armed conflict - although not listed in the Statute the ICTY.

599 Prosecutor v. Milutinovic et al., ICTY, Appeals Chamber, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction — Joint Criminal Enterprise, IT-99-37-AR72, 21 May 2003, par. 21; Prosecutor v. Milomir Stakic, ICTY, Appeals Chamber, Judgment, IT-97-24-A, 22 March 2006, par. 101; but see Prosecutor v. IENG Sary IENG Thirith KHIEU Samphan, Extraordinary Chambers in the Courts of Cambodia, Pre-Trial Chamber, Decision on the Appeals against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), D97/15/9, May 20 2010 where it is rejected.

600 Mohamed Shahabuddeen, Judicial Creativity and Joint Criminal Enterprise, in supra note 593, p. 199.

customary international law.[601] Cryer, referring to the ICTY's case law on the nature of command responsibility, claims that "the ICTY has embarked on a course of seismic legislative activity, which is neither clearly referable to customary law nor within a legitimate theory of the judicial function."[602] Darcy opines that "it was the skeletal nature of the Statute and the character of customary international law that facilitated such law-making by the judges."[603] One has to bear in mind, that these cases do not only raise the issue of judicial law-making, they also imply that *nullum crimen sine lege* was violated via extensive judicial creativity.[604]

While the progressive findings of the *ad hoc* tribunals on war crimes and crimes against humanity greatly contributed to the codification process at the Rome Conference,[605] Article 27 Rome Statute does not include the doctrine of joint criminal enterprise III as designed by the ad hoc tribunals,[606] and Article 28 Rome Statute, unlike the ad hoc tribunals, requires a causal link for command responsibility to be found.[607] Undeniably, the *ad hoc* tribunals participated in the development of international law; however, it was felt in Rome that if a permanent international criminal court was to be established, States should make the law and not the judges.

3.4. The Rome Statute distances itself from the previous international criminal tribunals

At the 1996 Preparatory Committee on the Establishment of an International Criminal Court, there was broad agreement that "the crimes within the jurisdiction of the Court should be defined with clarity, precision, and specificity required for criminal law in accordance with the principle of legality (*nullum crimen sine lege*)."[608] As the President of Italy noted at the Rome Conference, "[t]he *ad hoc* tribunals

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601 Schabas, supra note 139, p. 109-110; see also Daphna Shraga and Ralph Zacklin, The International Criminal Tribunal for Rwanda, 5 European Journal of International Law 508-509 (1996); claiming that the nexus with an armed conflict requirement was subject to debate at the creation of the ICTR.

602 Robert Cryer, The *Ad hoc* Tribunals and the Law of Command Responsibility: A Quiet Earthquake in Darcy and Powderly, supra note 593, p. 183.

603 Shane Darcy, Judges, Law and War: The Judicial Development of International Humanitarian Law (Cambridge University Press, 2014), p. 290.

604 See Darcy and Powderly, supra note 593; Mettraux, supra note 595, p. 12.

605 For war crimes see Shane Darcy, The Reinvention of War Crimes by the International Criminal Tribunals in supra note 593, p. 118; For crimes against humanity see van den Herik, supra note 593, p. 104-105.

606 Marko Divac Oberg, Fact-Finding without Facts from the Perspective of the Fact-Finder, 105 American Society of International Law Proceedings 319 (2011).

607 Mettraux, supra note 595, p. 85.

608 Report of the Preparatory Committee on the Establishment of an International Criminal Court (Vol I, Proceedings of the Preparatory Committee), in UN GAOR, 51st Session, Supp. No. 22A (A/51/22), 1996, par. 52; see also Comments of

set up for the former Yugoslavia and Rwanda represented positive advances, but […] [c]riminal law should always precede crimes; it should be known that the crimes were punishable by law and what the penalties would be."[609] The Rome Statute reflected this conviction by setting out a 'new code of international criminal law', which defines the crimes within the jurisdiction of the Court and the general principles of liability in unprecedented detail.[610] The definitions of the crimes are even further elaborated in the Elements of Crimes which are to be used by the Court in the interpretation and application of Articles 6, 7 and 8.[611] Cassese observes that the framers of the Rome Statute attempted "to set out in detail all the classes of crimes falling under the jurisdiction of the Court, so as to have a lex scripta laying down the substantive criminal rules to be applied by the ICC."[612]

Article 21 of the Rome Statute sets out that the primary sources upon which the ICC can base a finding that certain conduct is punishable is the Statute itself, the Elements of Crimes (which have to be consistent with the Statute)[613] and the RPE.[614] Customary international law and general principles of law can only be considered if these sources leave a lacuna and this lacuna cannot be filled by the application of the rules of interpretation as contained in the Vienna Convention on the Law of Treaties.[615] Grover observes "that the drafting of Article 21 was motivated by the principle of legality

Yankov at the ILC that the ICC should only apply conventional law "since it was inconceivable, at least for a lawyer trained in the civil law, that customary law could provide a reliable legal basis for judgements delivered in criminal cases." Par. 23

609 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome (June 1998) Official Records, Vol II, Summary records of the plenary meetings, 1st Plenary Meeting, 15 June 1998, para 16, p 62.

610 See Robert Cryer et al., An introduction to International Criminal Law and Procedure (Cambridge University Press, 2014), p. 150-151. According to these authors, "the negotiators cited reasons of certainty and the principle of legality, having in mind also that clear definitions would help to limit unexpected exposure to prosecution"

611 Rome Statute, Articles 9 and 21; The need for the Element of Crimes was observed in the Preparatory Committee by the United States that argued that the Elements of Crime were consistent with "the need to define crimes with the clarity, precision and specificity many jurisdictions require for criminal law" Schabas, supra note 162, p. 407, citing the Proposal submitted by the United States of America, Elements of offences of the International Criminal Court, UN Doc. A/AC.249/1998/DP.11.

612 Antonio Cassese, The Statute of the International Criminal Court: Some Preliminary Reflections, 10 European Journal of International Law 152 (1999).

613 Rome Statute, art. 9(3).

614 Rome Statute, art. 52(5).

615 Decision to Issue an Arrest Warrant against Al-Bashir, par. 126; Prosecutor v. Germain Katanga, ICC, Trial Chamber II, Judgment rendu en application de l'Article 74 du Statut, ICC-01/04-01/07-3436, 8 March 2014, par. 38-42; See also e.g., Prosecutor v. Ruto et al., Pre-Trial Chamber, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, 23 January 2012, par. 289; Schlutter, supra note 544, p. 322: "within the realm of the Statute and of Article 22 in particular, it may be invoked only indirectly, providing interpretative assistance for the application of the norms of the Statute."

and the desire to limit judicial discretion in the interpretation and application of the Rome Statute."[616] The degree of discretion afforded to judges by the hierarchy established in Article 21 is further limited by Article 22 - the first provisions on '*nullum crimen sine lege'* ever inserted in the Statute of an international criminal jurisdiction.[617] The *nullum crimen sine lege* principle as adopted under the Rome Statute is intended to exclude any possibility that the Court tries customary law offences.[618] Moreover, Article 22 (2) further limits the possibility for judicial law-making by providing that "[t]he definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."[619]

While Cassese stated that the Rome Statute 'seems to evince a certain mistrust in the Judges',[620] Judge Hunt adds that "[i]t would be more accurate to say that the Statute evinces a deep suspicion of the Court's judges."[621] Schabas comments:

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616 Grover, supra note 324, p. 116; see also deGuzman, Article 21, in supra note 198.

617 Although the ICTY, ICTR and the SCSL said their jurisdictions were to be exercised in accordance with nullum crimen sine lege, none of the Statute included a provision imposing it.

618 William A. Schabas, General Principles of Criminal Law in the International Criminal Court (Part III),6 European Journal of Crime, Criminal Law and Criminal Justice 408-498 (1998).

619 Although the provision of Article 22 (2) is clear this has not stopped some judges from extending the provisions of Article 25 (3) (a) to include the form of criminal responsibility of "control of the crime theory" and "indirect co-perpetration" in the Prosecutor v. Thomas Lubanga Dyilo, ICC, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012; see also Separate Opinion of Judge Adrian Fulford; Prosecutor v. German Katanga and Mathieu Ngudjolo Chui, Pre-Trial Chamber, Decision on the Confirmation of charges, ICC-01/04-01/07, 30 September 2008; see Concurring Opinion of Judge Christine Van den Wyngaert to the Judgment pursuant to Article 74 of the Statute in the case of Prosecutor v. Mathieu Ngudjolo Chui. Moreover, the Rome Statute contains residual clauses that pose a significant risk to the rule of specificity, indeed. It can be mentioned, for instance, that "imprisonment or other severe deprivation of physical liberty in violation of fundamental rules or international law", "other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health" as crimes against humanity are crimes definition that do not entirely meet nullum crimen sine lege certa. Nevertheless, the Statute imposes on the judges to respect nullum crimen sine lege stricta. In Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, ICC, Pre-Trial Chamber II, stated that in regards with other inhumane acts under Article 7(l)(k) of the Statute: "that the language of the relevant statutory provision and the Elements of Crimes, as well as the fundamental principles of criminal law, make it plain that this residual category of crimes against humanity must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity." Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11, 23 January 2012, par.269; also Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Confirmation of Charges, ICC-01/04-01/07-717 (Pre-Trial Chamber I), 30 September 2008, par. 448-453; Prosecutor v. Germain Katanga, Trial Chamber II, Jugement rendu en application de l'Article 74 du Statut , 8 march 2014, par. 50-57. Thus, although the Rome Statute contains residual clauses, the judges are bound by the Statute to strictly construe those Articles and to refrain from using gaps to create new crimes by analogy. See Broomhall, supra note 504, p. 458; Grover, supra note 324 p. 214; Lamb, supra note 487, p. 753.

620 Cassese, supra note 612, p. 163.

621 David Hunt, The International Criminal Court: High Hopes, "creative ambiguity" and an Unfortunate Mistrust in International Judges, 2 Journal of International Criminal Justice 61 (2004).

> we may well ask if the elaborate subject matter jurisdiction provisions in the Rome Statute, not to mention the obsessive exercise in legal positivism known as the Element of Crimes, as well as the entranchement of the 'strict construction' principle in Article 22 (1), were reactions to the innovations of Judge Cassese and his colleagues in their interpretation of the *ad hoc* Tribunal Statutes.[622]

It is true that the Rome Statute significantly departs from the previous international criminal tribunals' Statutes, as it attempts to strictly comply with the notions of written law (*lex scritpa*), specificity (*lex certa*), strict construction (*lex stricta*) and non-retroactivity (*lex praevia*). After all, the Rome Statute is establishing an international criminal court endowed with a jurisdiction that can be used to try the drafters' own state agents.[623] "This awareness", as Broomhall puts it, "put a premium on the clear delimitation of the Court's jurisdiction."[624]

However, the drafters might have thrown out the baby with the bathwater in their commitment to circumscribe the Court's limitations. [625] Paradoxically, as we will see in the next section, the very provisions drafted to ensure compliance with the principle of legality might lead the ICC - in situations triggered under a retroactive Article 13 (b) referral or on the basis of a retroactive Article 12 (3) declaration of acceptance - to convict individuals for conduct that was criminal only according to the Rome Statute but not under the law applicable to the accused.

3.5. A Statute applicable since its entry into force

Although the Rome Statute states that the ICC can only exercise jurisdiction over a crime committed after the entry into force of the Rome Statute, it also provides permission for retroactive referrals to the ICC if a situation is triggered under Article 13 (b) or a State has issued a retroactive Article 12 (3) declaration of acceptance. In any type of situation the ICC can exercise jurisdiction over genocide, crimes against humanity and war crimes. The law delimiting the jurisdiction of the Court is very clear.

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622 William Schabas, Interpreting the Statutes of the International of the *Ad hoc* Tribunals, in Cassese and Vohrah, supra note 499, p. 887; See also Prosecutor v. Germain Katanga, Trial Chamber II, Jugement rendu en application de l'Article 74 du Statut, Minority Opinion of Judge Christine Van den Wyngaert, ICC-01/04-01/07, 8 March 2014, par. 19: "By including this principle in Part III [Article 22] of the Statute, the drafters wanted to make sure that the Court could not engage in the kind of 'judicial creativity' of which other jurisdictions may at times have been suspected."

623 Leena Grover, A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court, 21 European Journal International Law 552 (2010); Cryer, supra note 411, p. 236, 287; Broomhall, supra note 504, p. 714.

624 Broomhall, supra note 504, p. 714,

625 Some commentators argued that the excessive zeal to mark out the Court's jurisdiction has significantly limited the chance for the Court to fulfill its mandate of fighting against impunity; Alain Pellet, Applicable Law in Cassese et al., supra note 6, p. 1051-1084, see also Hunt, supra note 621.

These crimes are defined 'for the purpose of this Statute' in Article 6, 7 and 8. The Elements of Crimes drafted by Assembly of States Parties shall assist the Court in the interpretation and application of Articles 6, 7 and 8. The modes of liabilities under which the Court can find an accused responsible of a crime defined in Articles 6, 7 and 8 are those listed in Article 25 (3). In addition to the modes listed in Article 25 (3), Article 28 defines how military commanders and other superiors may be found criminally responsible for crimes within the jurisdiction of the Court. Article 21 (1) (a) of the Rome Statute sets that the primary sources for the ICC to find a conduct punishable is the Statute itself, the Elements of Crime,[626] and the RPE.[627] Other sources of law – Article 21 (1) (b) and (c) - can only be resorted to when two conditions are met: (i) there is a lacuna in the written law contained in the Statute, the Elements and the RPE; and (ii) the lacuna cannot be filled by the application of the interpretive methods set out in the Vienna Convention.[628] In other words, if a crime or a mode of liability is defined in the Statute the Court has no reason to resort to other sources of international law.[629]

One may think that the article on *nullum crimen sine lege* entitles the Court to verify whether its jurisdiction over a crime or mode of liability is established under a customary international norm or another norm applicable to the conduct in question at the time it occurred. However, Article 22 (1) of the Rome Statute entitled '*nullum crimen sine lege'* only states that "[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court." To be within the jurisdiction of the Court, the crime has to be within the jurisdiction *ratione materiae* of the Court, as spelled out in Article 5, 6, 7 and 8.[630] Further, if the individual can be held responsible for this crime according to one of the modes of liability listed in Article 25 or is responsible under Article 28 the conduct falls within the jurisdiction of the Court.[631] In other words, if the crime is defined in Articles 6, 7 or 8 and the mode of liability is listed in the Statute, Article 22 is of no resort, even if the conduct occurred before an Article 12 (3)

626 Rome Statute, art. 9(3).
627 Rome Statute, art. 52(5).
628 Decision to Issue an Arrest Warrant against Al-Bashir, par. 44. See also e.g Prosecutor v. Ruto et al., Pre-Trial Chamber, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, 23 January 2012, par. 289.
629 As Trial Chamber III said, [i]n other words, the Chamber should not resort to applying Article 21 (b), unless it has found no answer in paragraph (a)." Prosecutor v. Ruto et al., ICC, Pre-Trial Chamber, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, 23 January 2012, par. 289.
630 It is even unsure whether Article 22 applies to modes of liabilities, since it refers only to 'crime'. Broomhall, supra note 504, p. 723-724; However, Schabas says that it needs to be extended to Articles that relate to the application of crimes such as the modes of liability; Schabas, supra note 162, p. 410.
631 Ibid.

declaration of acceptance or a referral under Article 13 (b) referral. Indeed, Article 22 does not seem to leave space to argue that although a crime or a mode of liability is within the jurisdiction of the Court, it did not apply to the accused at the time of the conduct in question.

Article 24 (1) Rome Statute governs non-retroactivity *ratione personae* as follows: "[n]o person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute." Simply, Article 24 (1) specifies that the Statute must be in force prior to the relevant conduct in order for criminally responsibility to be found by the Court.[632] The Statute entered into force in July 2002. For any conduct occurring after that date, Article 24 is of no avail. Indeed, it seems that Article 24 does not prevent the ICC from finding an individual criminally responsible for conduct that, at the time it took place, was criminalized under the Rome Statute solely, even if the conduct occurred prior to an act making the Rome Statute applicable in the territorial and national State.[633] As Milanovic observes:

> the irony is that the very provision that is meant to establish 'non-retroactivity ratione personae' appears to allow for precisely such retroactivity, since an individual could be prosecuted for an act committed while he was not a national of a State Party, nor in a State Party's territory.[634]

The only unequivocal limit to the jurisdiction of the Court is the entry into force of the Statute *per se*, the 1st July 2002.[635] While the *ratio legis* behind these provisions was to ensure that the Court abides by the strictest standard of legality, they actually leave no room for a challenge to the ICC's jurisdiction on

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632 Lamb, supra note 504, p. 751-752; This Article may seem redundant if we interpret it as forbidding the Court to exercise judicial authority before the entry into force of the Statute per se, when Article 11(1) of the Rome Statute (jurisdiction ratione temporis) stipulates also that the Court has jurisdiction only with respect to crimes committed after the entry into force of the Statute. Both provisions were actually parts of the same provisions at the beginning of the negotiations in Rome. They were then separated in order to put the provision on jurisdiction ratione temporis in the part concerning "jurisdiction, admissibility, and applicable law" and the provision on non-retroactivity ratione personae in the part relating to the "general principles of criminal law". Thus, the provision on jurisdiction ratione temporis regulates a procedural issue that is the capacity of the Court to be seized with a matter after the entry into force of the Statute. Further, the provision on non-retroactivity ratione personae is concerned with the non-retroactivity of substantive rules. Julien Cazala, Article 11, in Pacreau, supra note 245, p. 567; Article 24 (2) is even more revealing in that sense, as it proclaims that "[i]n the event of a change in the law applicable to a given case prior to a final judgment, the law most favourable to the person being investigated, prosecuted or convicted shall apply." Thus, an amendment to the substantive rules of the Statute would not be applicable to conduct that occurred before that amendment, unless that change is favorable to the accused – retroactivity in mitius.

633 Milanovic, supra note 280, p. 49; the purpose of this provision is that the Court cannot find criminal responsibility under the Statute for continuous crimes that occurred before the entry into force of the Statute such as enforced disappearance. Only the crimes committed after the entry into force of the Statute give rise to individual criminal responsibility under the Statute; see Hector Olasolo, A Note on the Evolution of the Principle of Legality in International Criminal Law, 18 Criminal Law Forum 306 (2007).

634 Milanovic, supra note 280 p. 49.

635 See Milanovic, supra note 280 p. 49; an analysis of whether the SC can set aside this provision by using its Chapter VII is undertaken in chapter 5 of this thesis.

the basis that the crimes contained in the Statute were not established under customary international law at the time they were committed and thus not applicable to the accused.

We have seen that the very provision drafted to ensure that the ICC respect the principle of legality do not allow the Court to answer whether the law of the Rome Statute was applicable to the actor at the time of the impugned conduct, even if committed by a national and in the territory of a non-party State. In order to respect non-retroactivity, the law must have been in existence but must also have been applicable to the actor and the conduct at the time of the offence.[636] Hence, a crucial question is whether the Rome Statute became applicable to all actors in the world at the time of its entry into force. The two 'conceptions' adopted in this thesis of a referral under Article 13 (b) offer contrasting answers to that question. The 'universal jurisdiction conception' answers the question of whether the Rome Statute became applicable to all actors in the world at the time of its entry into force in the affirmative.

3.6. 'Universal jurisdiction conception' - A law applicable to all since its entry into force

The 'universal jurisdiction conception' of a referral under Article 13 (b) conceives the Rome Statute as a legislative act of the international community to establish an organ that directly exercises its *jus puniendi*.[637] The 'type' of jurisdiction referred to here is jurisdiction to adjudicate. Further, the power to exercise this 'type' of jurisdiction is under the 'basis' of the Court's subject-matter. The jurisdiction *ratione materiae* of the Court is "limited to the most serious crimes of concern to the international community as a whole".[638] Indeed, a fundamental characteristic of jurisdiction to adjudicate based on the universality principle is that it is over a limited category of crimes that are of universal concern.[639]

According to the 'universal jurisdiction conception' the provision contained in Article 12 (2) limiting the ICC's jurisdiction to adjudicate on the basis of territoriality or nationality, absent a referral by the SC, was not required by international law but was a compromise of the States negotiating the

636 Gallant, supra note 533, p. 23-24, 352; Milanovic, supra note 280, p. 27.
637 Kress in supra note 178, p. 248; Olasolo, supra note 201, p. 18-21
638 Rome Statute, art. 5.
639 The universality principle "provides every State with jurisdiction over a limited category of offences generally recognized as of universal concern, regardless of the situs of the offence and the nationality of the offender and the offended"; Randall, supra note 83, p. 785.

Statute.[640] Indeed, Hans-Peter Kaul qualified Article 12 (2) as "a regression from the universal jurisdiction approach which is generally recognized in customary international law".[641] What Kaul criticizes is the limitation of the universal jurisdiction to adjudicate of the Court without being triggered by Article 13 (b). Conversely Article 13 (b) is qualified by Olasolo as the mechanism to trigger the ICC's 'dormant' universal jurisdiction to adjudicate.[642]

Under the 'universal jurisdiction conception' the Rome Statute's substantive criminal law is, however, neither 'dormant' nor constrained by territoriality and nationality. As previously observed, jurisdiction to adjudicate follows jurisdiction to prescribe. The use of Article 13 (b) sets in motion the jurisdiction of the Court to adjudicate a specific situation. The Statute, on the other hand, is in motion since its entry into force, i.e. 1 July 2002. Accordingly, the Rome Statute would be a universally applicable law since its entry into force; it is solely the Court right to adjudicate universally that is dormant.

The 'universal jurisdiction conception' conceives that jurisdiction to prescribe has been asserted at the time of the Statute's entry into force and that jurisdiction to adjudicate is lagging until the time it is activated through Article 13 (b) referral. The establishment of the ICC has prompted some scholars to affirm that the definition process at Rome was a "quasi-legislative event that produced a criminal code for the world".[643] Indeed, Sadat and Carden argue that the States' delegations at the Rome Conference assumed the role of the international community's legislator.[644] According to this narrative the Rome Statute asserts prescriptive jurisdiction beyond its state parties. This overreach of the law contained in the Rome Statute is premised on the theory of universal prescriptive jurisdiction.[645] That

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640 Sadat and Carden, supra note 74, p. 414; See also "the drafters [of the Rome Statute] did not view the consent of the state of territoriality or nationality as necessary as a matter of international law to confer jurisdiction on the court. Rather, they adopted the consent regime as a limit to the exercise of the court's inherent jurisdiction as a politically expedient concession to the sovereignty of states in order to garner broad support for the statute. Michael Scharf, The ICC's Jurisdiction over the Nationals of Non-Party states: A Critique of the U.S. Position, 64 Law and Contemporary Problems 77 (2001).

641 Kaul, supra note 25, p. 607

642 See Olasolo, supra note 201, p. 39.

643 Sadat, supra note 503, p. 923.

644 Sadat, "It is possible, of course, to view the government representatives in Rome merely as scribes writing down existing customary international law, rather than legislators prescribing new laws for the international community. Indeed, this is partly true, as all revolutions build upon pre-existing ideas. But it would be disingenuous to suggest that the Rome process was in no way legislative, given that most of the crimes were very poorly defined in customary international law. Moreover, even where there was general agreement on the existence of a particular crime, drafting the Statute required clarifying and elucidating the precise content of the offense in a way that often moved the "law" of the Statute far beyond existing customary international law understandings." Sadat and Carden, supra note 74, fn 35.

645 Sadat and Carden, supra note 66, p. 381, 406-409, 412-413.

is to say, that the Rome Statute defines crimes and modes of responsibility that are applicable to any individual without geographical limits since 1 July 2002.

If the legal foundations of this ‘conception’ are accepted[646] the Court may declare as in Nuremberg that the Statute is “is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.[647] If the Rome Statute bound all individuals since its entry into force it is always applied prospectively. Indeed, this seems to be the view the ICC has of its Statute. The reasoning of Pre-Trial Chamber I in the *Confirmation of Charges against Lubanga* as to how the principle of legality operates before the ICC is as follows:

> there is no infringement of the principle of legality if the Chamber exercises its power to decide whether Thomas Lubanga ought to be committed for trial on the basis of written (*lex scripta*) pre-existing criminal norms approved by the States Parties to the Rome Statute (*lex praevia*), defining prohibited conduct and setting out the related sentence (*lex certa*), which cannot be interpreted by analogy *in malam partem* (*lex stricta*).[648]

The Pre-Trial Chamber considers that if the Court exercises its power on the basis of “pre-existing criminal norm approved by the States Parties to the Rome Statute” *lex praevia* is satisfied. The applicability of the criminal norms contained in the Rome Statute in situations arising under a retroactive Article 13 (b) referral has never been distinguished by the ICC from situations where the accused, at the time of the conduct, was a national or had committed the alleged crime in the territory of a State party to the Statute

Under Article 21 (1)(a) Rome Statute the first source of applicable law is the Statute and the Court seems to limit itself to determining whether or not its internal law provides for an offence or mode of liability to justify its jurisdiction. Pre-Trial Chamber I in *Decision on the Confirmation of Charges against Katanga and Chui* when faced with the challenge that the mode of liability used by the prosecution was not part of customary international law responded as follows: “since the Rome Statute expressly provides for this specific mode of liability, the question as to whether customary law admits or discards the 'joint commission through another person' is not relevant for this Court.”[649]

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646 See chapter 2.

647 Judgment of the International Military Tribunal for the Trial of German Major War Criminals Nuremberg, 30th September and 1st October, 1946.

648 Prosecutor v. Lubanga, ICC, Pre-Trial Chamber I, Decision on the Confirmation of Charges, ICC-01/04-01/06, 29 January 2007, par. 304.

649 Prosecutor v. German Katanga and Mathieu Ngudjolo Chui, Pre-Trial Chamber, Decision on the Confirmation of charges, ICC-01/04-01/07, 30 September 2008, par. 508.

Strikingly, 'joint commission through another person' was also used as a mode of liability by Pre-Trial Chamber I to issue arrest warrants in situations triggered under Article 13 (b) for crimes that occurred before the referral. Indeed, without questioning the applicability of this allegedly non-customary mode of liability when exercising jurisdiction under a retroactive Article 13 (b) referral, Pre-Trial Chamber I used it to find that there are reasonable grounds to believe that Omar-Al-Bashir, Muammar Gaddafi, Saif Gaddafi and Abdullah Al-Senussi had committed crimes within the jurisdiction of the Court.[650] Presumably, the ICC was confirming that it considers its Statute applicable to all since its entry into force.[651]

If the Rome Statute bound all individuals since its entry into force then the Rome Statute is never applied retroactively. In situations where the jurisdiction of the court is triggered in relation to a date before the referral, the international community essentially uses a mechanism for the prosecution of crimes already the subject of individual criminal responsibility.[652] Thus, it may be argued that since the entry into force of the Rome Statute "all "would-be" accused were on notice […] to refrain from committing such crimes. If they chose to do so, they cannot complain of a statute that now pursues their heinous action."[653] Hence, under the 'universal jurisdiction conception' no conflict of norms between retroactive referrals and *nullum crimen sine lege praevia* exists. The status of an apparent conflict of norms is not even reached. Article 13 (b) Rome Statute simply confirms the right of the international community to universally prosecute crimes that it had criminalized since 2002.

The 'universal jurisdiction conception' might not be accepted by all. It may indeed be contested that the States adopting the Rome Statute, hence prompting its entry into force, have no authority to prescribe new criminal law for the rest of the world unless this law reaches the status of customary international law. Conversely, the 'Chapter VII conception' claims that the SC can have such authority.

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650 Decision to Issue an Arrest Warrant against Al-Bashir, and Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ICC, Pre-Trial Chamber I, Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah ALSENUSSI", ICC-01/11-01/11-1, 27 June 2011, par. 71.

651 Since the Court has the obligation to ensure that its jurisdiction is exercised in accordance with international human rights law, the Court should have satisfy itself that the acts charged were established in customary international law at the time they were committed. See Rome Statute, art. 21 (3) and section below.

652 Celebici Appeals Chamber, par. 178.

653 *Tadic Interlocutory Appeal Decision*, Separate Opinion Judge Sidhwa, par. 72; in a rather similar vein see Schabas: "from the moment the Statute was adopted, or at the very least from the moment it entered into force, individuals have received sufficient warning that they risk being prosecuted for such offences, and that the Statute itself (in Article 12(3)) contemplates such prosecution even with respect to States that are not yet parties to the Statute." Schabas, supra note 139, p. 74.

3.7. 'Chapter VII conception' – Refers the situation since…

The 'Chapter VII conception' of a referral under Article 13 (b) conceives the Rome Statute simply as a multilateral treaty. The Court's jurisdictional bases are territoriality or active nationality, as provided for by Article 12 (2) Rome Statute. And, indeed, these are the two traditional heads of prescriptive jurisdiction of States.[654] States that ratified the Rome Statute delegated their territorial and active nationality jurisdiction over genocide, crimes against humanity and war crimes to the ICC.[655] As a multilateral treaty, the Rome Statute binds its State parties only. Thus, the Statute is the applicable law only for its State parties.

Article 13 (b) states that the ICC "may exercise its jurisdiction with respect to a crime referred to in Article 5" if a situation is referred to the Prosecutor by the SC acting under Chapter VII of the Charter of the United Nations. The exercise of jurisdiction explicitly referred to in Article 13 (b) is jurisdiction to adjudicate allegations of crimes listed in Article 5 of the Rome Statute. As O'Keefe has put it, the application of the Statute to an individual "is simply the exercise or actualization of prescription."[656] Thus, when the ICC adjudicates allegations of crimes it actualizes the prescription contained in the Rome Statute. Until the time of the referral, the Rome Statute consists primarily of an exercise of jurisdiction to prescribe by its State parties over their nationals and territory. The Rome Statute becomes applicable law outside of these confines when the SC adopts a resolution referring a situation to the ICC under Chapter VII. In other words, jurisdiction to prescribe and to adjudicate is asserted concomitantly by the SC at the time of the referral.

Since the Statute only becomes applicable law for the nationals and territories concerned at the time of the referral, a retroactive referral provides not only retroactive adjudicative jurisdiction but also constitutes retroactive prescription. It is certainly recognized that international law as much as national law is a relevant source of law for the criminalization of conduct. However, for international law to be a relevant source it must have been applicable to the person at the time of the relevant act. The 'Chapter

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654 Although the delegation of the United States were especially vocal in their opposition to a Court that would exercise jurisdiction without the consent of the State of nationality of the accused, these two heads of jurisdiction did not pose a major problem to the other delegations.

655 See Akande, supra note 74, p. 618-650; O'Keefe, supra note 251, p.343-344; Moreover, by ratifying the Rome Statute, States accept to criminalize genocide, crimes against humanity and war crimes as defined by Articles 6, 7 and 8.

656 O'Keefe, supra note 45, p. 737.

VII conception' of a referral under Article 13 (b) makes the Rome Statute's substantive criminal provisions applicable to the accused when the SC resolution is adopted and not before. For the acts already criminalized under customary international law before the referral the non-retroactivity prohibition is not infringed; the individual is punished for having committed a crime that was criminalized *qua* customary international law and that is within the jurisdiction of the ICC.[657] For crimes that were solely criminal under the Rome Statute, on the other hand, the referral retroactively provides for their criminalization. Hence, the individual is accused of an act that did not constitute a penal offence under applicable national or international law when it was committed. *Prima facie*, the prohibition on non-retroactivity appears to be disregarded in such circumstances.

In the following subsections I will list the various ways the ICC can deal with the principle of legality when it exercises jurisdiction on the basis of a retroactive referral under Article 13 (b). The first subsections will show that the Court may decide to read down the principle of legality as a principle of justice. However, adopting such a strategy is in my opinion not in conformity with international law since non-retroactivity is a norm enshrined in customary international human rights law. Moreover, it is not clear whether the SC has the power to infringe the prohibition on non-retroactivity or to say the least had the intention to refer a situation to an institution that would infringe human rights law. The next sub-section (3.7.2) will show that the SC is presumed to have intended that the right of the accused not to be held criminally responsible for conduct that did not constitute a criminal offence under the applicable law at the time it was committed be respected. The following sub-section (3.7.3) will try to establishing the statutory basis upon which the Court's jurisdiction may be challenged by an accused claiming that the application of a Statutory criminal provision infringes their right not to be held criminally responsible for conduct that was not a crime at the time it was committed. The two last subsections (3.7.4 and 3.7.5) will describe how the Court may exercise its jurisdiction in respect of *nullum crimen sine lege praevia* as contained in customary international human rights law.

It must be emphasized that the potential clash between retroactive jurisdiction and non-retroactivity of criminal prohibition does not only exist in situations referred under Article 13(b) Rome Statute but also in situations where the Court exercises retroactive jurisdiction on the basis of an Article 12 (3) declaration of acceptance. While the latter does not involve the powers and limits of the SC, it nevertheless involves the power of a Court to infringe customary international human rights law. One

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657 Grover, supra note 324, p. 252.

should bear in mind that the drafters of the Rome Statute inserted a clause which states that international human rights law govern the whole exercise of ICC's jurisdiction. Moreover, as described above, the 'common intention' of the Rome Statute's drafters was indeed that the ICC should abide by the highest standard of legality.

3.7.1. By hook or by crook

From a cursory reading of the list of crimes in the Statute, most are established in customary international law. The substance of genocide, crimes against humanity and war crimes as contained in the Rome Statute is *prima facie* consistent with the essence of these crimes in customary international law.[658]

Despite the alleged failure of the Rome Statute's drafters to codify customary international law, the drafters made sure to attune the crimes contained in the Statute to the status of "the most serious crimes of concern to the international community as a whole." I have demonstrated in Chapter 2 that all crimes included in the Statute which fall within the jurisdiction of the ICC are subjected to the gravity threshold. Thus, the immorality of the crimes contained in the Statute is not to be doubted. If one applies non-retroactivity as a principle of justice, the gravity of the crimes would make it unjust to see a person accused of such acts go unpunished.

In *obiter dictum* the Nuremberg Tribunal addressed the issue of *nullum crimen sine lege*, stating that it was not strictly bound by this principle.[659] According to the Tribunal, "*nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice."[660] How can we apply *nullum*

658 Schabas, supra note 139, p. 92.

659 Nuremberg Judgment, p. 219. The Allies, as de facto sovereigns of Germany, possessed a right to legislate, and it is this right that they exercised when drafting the Charter and its jurisdiction ratione materiae. In the mind of the judges sovereign will overrides nullum crimen sine lege. In the mind of the judges, sovereign will overrides nullum crimen sine lege. The latter was not a rule that limits the authority of a State to prescribe criminal laws; it is simply a principle of justice. See generally Gallant, supra note 533, p. 112-114.

660 Ibid.; Even more radically Judge Rolling, in his dissenting opinion in the Tokyo trial, held that nullum crimen sine lege "is not a principle of justice but a rule of policy". Indeed, according to Rolling, the prohibition of ex post facto law was applicable only if a State decided to be bound by it. This decision would be an "expression of wisdom" but was not necessary. He further delineated two classes of criminal offence: "Crime in international law is applied to concepts with different meanings. Apart from those indicated above [war crimes], it can also indicate acts comparable to political crimes in domestic law, where the decisive element is the danger rather than the guilt, where the criminal is considered an enemy rather than a villain and where the punishment emphasizes the political measure rather than the judicial retribution." Dissenting Opinion of Judge Rolling, Tokyo Judgment, Vol, II, p. 1059; the same reasoning was also applied in United States of America v. Josef Altstoetter et al. (Justice) 14 Annual Digest 278 (1948).

crimen sine lege in the terms of a principle of justice? The tribunal explained why it was not unjust to condemn the defendants for crimes against peace even though at the material time it was not properly criminally sanctioned:

> To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.[661]

In the same fashion as Kelsen proposed, the Nuremberg Tribunal thus balanced retroactive application of criminal law and impunity of perpetrators of atrocities.[662] The moral dilemma is whether punishing individuals for acts that were not crimes when committed is a greater or lesser breach of justice than to leave the accused unpunished.[663] At Nuremberg, *nullum crimen sine lege praevia* was trumped by the need to ensure substantive justice.[664] Substantive justice aims to punish acts that harm society deeply and which are regarded as repugnant by all members of society.[665] Even if there were no positive rules of international law specifically criminalizing these acts it would appear unjust to leave them unpunished.[666] This reasoning has been upheld in many other international criminal cases and more specifically by the Supreme Court of Israel in *Eichmann.*[667] More recently, the Appeals Chamber of the ICTY held in *Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal*

661 Nuremberg Judgment, p. 219.

662 In the same fashion as Kelsen did with regard to the Nazi crimes; see Hans Kelsen, The Rule Against Ex post facto Laws and the Prosecution of the Axis War Criminals, 11 The Judge Advocate Journal 46 (1945)

663 Bassiouni, supra note 572, p. 70

664 Claus Kress, Nulla poena nullum crimen sine lege, Max Planck Encyclopedia of Public International Law; also Cassese wrote "immediately after the Second World War, the nullum crimen sine lege principle could be regarded as a moral maxim destined to yield to superior exigencies whenever it would have been contrary to justice not to hold persons accountable for appalling atrocities." Antonio Cassese, International Criminal Law (Oxford University Press, 2003), p. 72.

665 Cassese, supra note 507, p. 24-26.

666 Hans Kelsen, Will the judgment in the Nuremberg Trial Constitute a precedent? 1 The International Law Quarterly 165 (1947): "Since the internationally illegal acts for which the London Agreement established individual criminal responsibility were certainly also morally most objectionable, and the persons who committed these acts were certainly aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice. Justice required the punishment of these men, in spite of the fact that under positive law they were not punishable with retroactive force."

667 See also Attorney-General of the Government of Israel v. Adolf Eichmann, Israel, Supreme Court (sitting as a Court of Criminal Appeal), Judgment of 29 May 1962, reproduced in International Law Reports, vol. 36, pp. 277-343, p. 281; Cassese also cites Peleus and Burgholz (No. 2) in Cassese, supra note 507, p. 26; see also Streletz and Kessler case, Germany, Federal Court of Justice, 26 July 1994, BGHSt 40, 241 (244).

Enterprise that the *nullum crimen sine lege* is "first and foremost, a 'principle of justice'."[668] The Appeals Chamber also noted that:

> Although the immorality or appalling character of an act is not a sufficient factor to warrant its criminalization under customary international law, it may in fact play a role in that respect, insofar as it may refute any claim by the Defence that it did not know of the criminal nature of the acts.[669]

If the accused is capable of recognizing the criminal nature of the acts because of their abhorrent character, substantive justice requires that he or she be held accountable. The obvious immorality of an act makes a presumption of fair notice to the accused that the act was criminal in nature.[670] The problem is identifying the content of morality and its threshold.[671]

The jurisdiction of the ICC is defined in the Rome Statute and the crimes coming within the jurisdiction of the Court, for which there shall be individual responsibility, are set out in Articles 5,6,7 and 8. These crimes are labeled as "the most serious crimes of concern to the international community as a whole." It may be argued that the content of immorality and its threshold have been set in the Statute, and that the SC endorses this view when it refers a case to the ICC (note that this comes extremely close to the 'universal jurisdiction conception'), however, the ascertainment of when the Statute becomes applicable in relation to the accused differs.

Furthermore, one may argue that the Statute is in accordance with *nullum crimen sine lege* as generally understood since the ICC cannot find the law applicable to the accused outside of the Statute.[672] No new crimes can be created by the judges, indeed; Article 22 is clear on that matter, the law of the Rome Statute is binding upon the ICC. A charge can be struck down on the basis of Articles

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668 Prosecutor v. Milutinovic et al., Appeals Chamber, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, ICTY, IT-99-37-AR72, 21 May 2003, par. 37.

669 Ibid., par. 42: "due to the lack of any written norms or standards, war crimes courts have often relied upon the atrocious nature of the crimes charged to conclude that the perpetrator of such an act must have known that he was committing a crime." See also Prosecutor v. Delalic et al., Trial Chamber, Judgment, ICTY, IT-96-21-T, 16 November 1998, par. 313: "[t]he purpose of this principle [NCSL] is to prevent the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission. It strains credibility to contend that the accused would not recognize the criminal nature of the acts alleged in the Indictment."

670 See Beth Van Schaack, Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals, 97 Georgetown Law Journal 119 (2008).

671 Ben Juratowitch, Retroactive Criminal Liability and International Human Rights Law, British Yearbook of International Law, 75 British Yearbook of International Law 359 (2004).

672 Heugas-Darraspen, supra note 245, p. 786:"La violation du principe nullum crimen n'aurait été constituée que dans l'hypothèse où le crime contre l'humanité n'aurait pas été défini dans la charte de Nuremberg mais aurait été appliqué par le juge." However, this reasoning goes for nullum crimen not for non-retroactivity which Heugas-Darraspen says is an entirely different concept.

22 and 24 but not on the ground that some crimes were beyond existing customary international law. In Nuremberg it was held that "[t]he Law of the Charter is decisive, and binding upon the Tribunal."[673] This view that an international tribunal has no authority in questioning the crimes enshrined in their Charter can also be read in some of the cases of the ICTY and is still supported by some scholars.[674] Accordingly, if one interprets the apparently conflicting norms in these ways there is no genuine conflict between the Statute and the principle of legality.

However, it must be acknowledged that this extremely relaxed application of the principle of legality is open to significant criticism. It was most likely true at the time of the Nuremberg judgment that non-retroactivity was merely a principle of justice. However, more than half of century later non-retroactivity seems to have changed status. Virtually all states have integrated this principle as a binding rule within their national systems.[675] Most agree that it can no longer be said that non-retroactivity is merely "a general principle of justice".[676] According to Kenneth Gallant, who undertook a comprehensive study on the principle of legality, States almost unanimously recognize non-retroactivity in their constitutions, other domestic law provisions or via treaties.[677]

In view of the universal ratification of these conventions it may be safely said that non-retroactivity has become a rule of customary international law.[678] The Special Tribunal for Lebanon has gone so far as to claim "that it is warranted to hold that by now it has the status of a peremptory norm (jus cogens)".[679] Theodor Meron also claims that the rule against retroactivity has reached the status of *jus cogens* and Kenneth Gallant recognizes that at least it is beginning to emerge as such a norm.[680]

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673 Nuremberg Judgment, p.4; same reasoning applied in United States of America v. Josef Altstoetter et al. (Justice) 14 Annual Digest 278 (1948).

674 Prosecutor v. Tadic, Appeals Chamber, Judgment, ICTY, IT-94-1-A, 15 July 1999, par. 296; Schabas, supra note 413 p. 66-67.

675 Gallant, supra note 533, p. 3; Therefore, it may be recognized that this worldwide standard is a general principle of law recognized by the community of nations, within the meaning of Article 38 (1)(c) of the Statute of the International Court of Justice.

676 Gallant, supra note 513.

677 Gallant, supra note 533, p. 241, 242.

678 Gallant, supra note 533, p. 3; Lamb, supra note 504, p. 734 – 742.

679 Unnamed Defendant, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL, STL-11-01/I, 16 February 2011, par. 76; see also Maktouf and Demjanovic v. Bosnia and Herzegovina, Application nos. 2312/08 and 34179/08, European Court of Human Rights, Grand Chamber Judgment of 19 July 2013, Concurring Opinion of Judge Pinto de Albuquerque, joined by Judge Vainie, par. 45.

680 Theodor Meron, War Crimes Law Comes of Age (Oxford University Press, 1998), p. 244; Gallant, supra note 533, p. 316.

Judge Pal in his dissenting opinion at the Tokyo Tribunal claimed that if the crimes charged were not law at the time of their commission it could not convict the accused "for otherwise the [Tokyo] Tribunal will not be a 'judicial tribunal' but a mere tool for the manifestation of power".[681] If the right of the accused not to be held criminally responsible for conduct that was not a criminal offence under applicable law at the time it was committed is a customary international norm, or even better a *jus cogens* norm, applying it merely as a principle of justice would be a violation of that norm. Under the 'Chapter VII conception' a referral under Article 13 (b) to the ICC is a manifestation of the Chapter VII powers of the SC. The ICC's failure to strictly abide by *nullum crimen sine lege praevia* when the SC refers a situation may end up in a wrongly attributed jurisdictional power.

3.7.2. Presumption of respect for human rights in relation to the Security Council

N*ullum crimen sine lege* has become a customary international human rights norm and a general principle of law. Although its contours (written law, specificity and strict construction) are re-designed in international criminal law, its core – non-retroactivity - remains unaffected. No one shall be convicted of any act or omission that did not constitute a criminal offense under the applicable law at the time it was committed.

A resolution of the SC retroactively referring a situation to the ICC could potentially conflict with the right not to be held criminally responsible for conduct that did not constitute a criminal offence under the applicable law at the time it was committed. Such interaction could potentially constitute a normative conflict which could trigger the application of Article 103 UN Charter. As its text makes it clear, Article 103 requires the 'event of a conflict'.[682] The definition of norm conflict that is to be applied is broad.[683] However, SC resolutions must be construed as "producing and intending to produce effects in accordance with existing law and not in violation of it".[684] Thus a strong presumption against conflict exists and calls for techniques of harmonious interpretation to be used so that the

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681 United States v. Araki et al., IMTF, Dissenting Opinion of Justice Pal in The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East (Edward Mellen Press, 1981), p. 21.

682 Article 103 reads: "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."

683 Andreas Paulus and Johan Leis, Article 103, in Simma, supra note 385, p. 2123.

684 ILC, Report of the Study Group of the ILC on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, p. 166-180, 13 Avril 2006, UN Doc. A/CN.4/L.682, par. 39.

conflict does not materialize in a genuine one.[685] We will see that the ECrtHR has indeed tried to avoid conflicts between SC resolution and the ECHR.

Although the wording of Article 103 refers to treaties only, the dominant view is that the Charter also prevails over other sources of international law including customary international law.[686] Hence, the SC could impose obligations whereby even customary international law would be set aside. An auxiliary question – and one that will be further developed in Chapter 5 – is whether the SC could oblige the ICC to do something. For instance, could the SC oblige the ICC to breach the rights of the defendants to be found not criminally responsible for conduct that was not a criminal offence, under applicable law, at the time it was committed. Pursuant to Article 25 and Chapter VII, the SC can impose obligations on UN Member States. These obligations, when combined with Article 103, prevail over other obligations of Member State. In principle the SC cannot impose obligations on international organizations such as the ICC.[687] However this has not prevented the SC from requesting international organizations to cooperate with the ICTY.[688] In the same vein, the latter used the power vested in it under Chapter VII to issue binding orders to international organizations such as NATO or the European Community Monitoring Mission. [689] It could thus be argued that the SC could tailor the jurisdiction of the ICC when it refers a situation under Chapter VII.[690]

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685 Paulus and Leis, supra note 683, p. 2123; See ILC, Report of the Study Group of the ILC on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, p. 166-180, 13 Avril 2006, UN Doc. A/CN.4/L.682, par. 37; Pauwelyn, supra note 231, at 240-244.

686 Paulus and Leis, supra note 683, p. 2123; Yoram Dinstein, The Interaction between Customary International Law and Treaties, Collected Courses of the Hague Academy of International Law (Brill Online, 2015), p. 425.

687 Danesh Sarooshi, The Peace and Justice Paradox, in Dominic McGoldrick et al. , The Permanent International Criminal Court: Legal and Policy Issues (Hart Publishing, 2004) p. 106-107; see chapter 5 for more this question.

688 Rolan Bank, Cooperation with the International Criminal Tribunal for the Former Yugoslavia in the Production of Evidence, 4 Max Planck Yearbook of United Nations Law 262 (2000), referring to Security Council Resolution 1244 (1999) where "The Security Council (...) 14. Demands full cooperation by all concerned, including the international security presence, with the International Tribunal for the Former Yugoslavia"; See also Prosecutor v. Milutinovic et al., ICTY, Appeals Chamber, Decision on request of the North Atlantic Treaty Organisation for review, IT-05-87-AR108bis.1, 15 May 2006, par. 7; where it is deemed that the Security Council, acting by resolution under Chapter VII of the UN Charter, has applied the obligation to co-operate with the Tribunal to NATO as an international organization, (citing UN Doc. S/RES/ 1088 (1996) (establishing multinational stabilization force SFOR); For other examples where the SC issued decisions addressed to non-UN Member States and International Organization see Talmon, in Simma, supra note 496, p. 267-279

689 See Prosecutor v. Dario Kordic et al. ICTY, Trial Chamber III, Order for the Production of Documents by the European Community Monitoring Mission and its Member States, IT-95-14/2-T, 4 August 2000; Prosecutor v. Milutinovic et al., ICTY, Appeals Chamber, Decision on request of the North Atlantic Treaty Organisation for review, IT-05-87-AR108bis.1, 15 May 2006, par. 8; "The Appeals Chamber has held that "states" under Article 29 refers to all Member States of the United Nations, whether acting individually or collectively, and therefore, under a purposive construction of the Statute, Article 29 also applies to "collective enterprises undertaken by States" such as an international organisation or its competent organs." quoted from Prosecutor v. Karadzic, ICTY, Trial Chamber, Decision on the

In Chapter II, it was demonstrated that the presumption that the SC did not intend to prescribe new criminal law can be rebutted by a referral to the ICC. This presumption applied in terms of limiting the powers of the SC versus the sovereignty of States. However, this rebutted presumption did not concern human rights. The presumption in this case is stronger; an implicit intent is not sufficient.[691] The presumption in this case is that, unless it explicitly and clearly states the contrary the SC intended that the rights to non-retroactivity of the accused be respected.[692]

In the course of carrying out its primary responsibility of maintaining international peace and security the SC "shall act in accordance with the Purposes and Principles of the United Nations."[693] Moreover, in accordance with the principle of harmonization, the UN principles and purposes, provide direction for the interpretation and application of SC resolutions.[694] As Article 1 (3) UN Charter makes clear, "promoting and encouraging respect for human rights and for fundamental freedoms" is one of the purposes of the United Nations.[695] Furthermore, Article 55 (c) provides that the United Nations shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all" and all UN Member States pledge in Article 56, "to take joint and separate action in co-operation with the Organization" to achieve that purpose. In light of the latter provision, it becomes clear that the creation of an International Criminal Court by some UN Member States, which offers to the United Nations the possibility to use this revolutionary judicial institution in an *ad hoc* basis, is an act in pursuance of "universal respect for, and observance of, human rights and fundamental freedoms for all". Taken together, referrals under Article 13 (b) to the ICC and the undertaking of the States party to

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Accused's Motion for Binding Order (United Nations and NATO), IT-95-5/18-T, 11 February 2011, par. 7; see also Prosecutor v. Blagoje Simic et al., ICTY, Trial Chamber III, Decision on Motion for Judicial Assistance to be provided by SFOR and others, IT-95-9-PT, 18 October 2000, par. 46-49.

690 See David Scheffer, Staying the Course with the International Criminal Court, 35 Cornell International Law Journal 90 (2001).

691 Al-Jedda v. United Kingdom, ECrtHR, Grand Chamber, Judgment, App. No. 27021/08, 7 July 2011, par. 102; Nada v. Switzerland, ECrtHR, Grand Chamber, Judgment, App. No. 10593/08,12 September 2012, par. 172; See also Nabil Sayadi and Patricia Vinck (authors) v. Belgium, CCPR/C/94/1472/2006, Human Rights Committee 2008, Individual opinion of Committee member Sir Nigel Rodley (concurring), p. 36-38.

692 Ibid.

693 UN Charter, art. 24 (2).

694 See ILC, Report of the Study Group of the ILC on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, p. 166-180, 13 Avril 2006, UN Doc. A/CN.4/L.682, par. 251 (9).

695 The third sub-paragraph provides that the United Nations was established to "achieve international cooperation in ... promoting and encouraging respect for human rights and for fundamental freedoms". See also Al-Jedda, par. 102; Jane Stromseth, David Wippman, Rosa Brooks Can Might Make Rights?: Building the Rule of Law after Military Interventions (Cambridge University Press, 2006), p. 24; Dapo Akande, 'The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?', 46 International and Comparative Law Quarterly 323-325 (1997).

the Rome Statute to provide a forum "to guarantee lasting respect for and the enforcement of international justice" must be read in conjunction and in accordance with international human rights.[696]

The ECrtHR in *Al–Jedda v. United Kingdom* found that in the absence of clear and explicit language to the contrary "there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights."[697] This principle of interpretation was reiterated in *Nada v. Switzerland* although the presumption was rebutted due to the clear and explicit language that was used in the SC resolution.[698]

Although the SC referrals of the situations in Darfur and Libya were retroactive they did not clearly and explicitly provide that the ICC is to breach the rule of non-retroactivity. In SC resolution 1593 the SC merely: "[d]ecides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court."[699] The Libyan referral essentially uses the same wording with a different date.[700] Put simply, the resolutions respond to Article 13 (b) which states that the ICC "may exercise its jurisdiction with respect to a crime referred to in Article 5" if a situation "is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations". The resolutions restrict themselves to refer the situation to the Prosecutor retroactively; they do not take any position on the applicability of *nullum crimen sine lege praevia*. Although the referrals imply that the Statute in its entirety should be applied, this should not preclude the possibility that the jurisdiction of the Court can be challenged on the basis of *nullum crimen sine lege praevia*.

It ought to be noted that the SC, while establishing previous *ad hoc* mechanisms for the prosecution of perpetrators of international crimes, decided to abide by the principle of non-retroactivity. This was indeed the purpose of the SC when it adopted the Statute of the ICTY, including the report of the Secretary General, asserting that the Tribunal must abide by the principle of *nullum crimen sine lege*.[701] It could be argued that in relation to the ICTR the SC took "a more expansive approach to the choice of law" and included within the tribunal's jurisdiction crimes that were

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696 Rome Statute, supra note 1, preamb. par. 11, 7 "Reaffirming the Purposes and Principles of the Charter of the United Nations".
697 Al-Jedda v. United Kingdom, ECrtHR, Grand Chamber, Judgment, App. No. 27021/08, 7 July 2011, par. 102.
698 Nada v. Switzerland, ECrtHR, Grand Chamber, Judgment, App. No. 10593/08,12 September 2012, par. 172.
699 SC Res. 1593, par. 1.
700 SC Res. 1970, par. 4; the situation in Libya is referred since 10 February 2011.
701 Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), UN Doc. S/25704, 3 May 1993, par. 34.

potentially beyond customary international law.[702] However, the ICTR judged that there were no infringements on *nullum crimen sine lege* and that the debate on the customary nature of the impugned offences 'seems superfluous' since "all the offences enumerated in Article 4 of the Statute, also constituted crimes under the laws of Rwanda."[703] Furthermore, the Rwandan succession to the Geneva Conventions of 12 August 1949 on 5 May 1964 and accession to Protocols additional thereto of 1977 on 19 November 1984 were also noted by the Secretary General in a letter to the President of the SC before the adoption of the resolution creating the ICTR.[704] In the same vein, when the SC established the STL it decided that the tribunal's subject-matter jurisdiction would be limited to the provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism as well as other ordinary offences against life, related to personal integrity or illicit associations.[705] Presumably, this decision to only apply domestic law was due to the debate over whether terrorism is a crime under customary international law and the contours of its definition.

This excursus in the other situations where the SC provided jurisdiction to an international or hybrid criminal tribunal shows that the non-retroactivity prohibition was never overlooked. Hence, it could be maintained that, as in the case of the ICTY, when a SC resolution retroactively refers a situation to the ICC:

> the application of the principle *nullum crimen sine lege [praevia]* requires that the [ICC] should apply rules of international [criminal] law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to [the Rome Statute] does not arise.[706]

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702 Report of the Secretary General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), UN Doc. S/1995/134, 13 February 1995, par. 12.

703 See e.g Prosecutor v. Kayishema and Rutaganda, ICTR, Trial Chamber, Judgment, 21 May 1999, par. 156, 158.

704 Letter dated 1 October 1994 from the Secretary-General addressed to the President of the Security Council (S/1994/1125), par. 87.

705 STL Statute, Article 2; See Nidal Nabil Jurdi, The Crime of Terrorism in Lebanese and International Law, in Amal Alamudin, Nidal Nabil Jurdi and David Tolbert, The Special Tribunal for Lebanon: Law and Practice (Oxford University Press, 2014); Nidal Nabil Jurdi, The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon, 5 Journal of International Criminal Justice 1125 (2007); See generally, Ben Saul, Defining Terrorism in International Law (Oxford: Oxford University Press, 2006). But see Unnamed defendants (STL – 11-01/I) Decision on the Applicable Law: Terrorism, conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011; concerning modes of responsibility see also Marko Milanovic, An Odd Couple: Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon, 5 Journal of International Criminal Justice 1139-1152 (2007).

706 Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), UN Doc. S/25704, 3 May 1993, par. 34; The ICTY recognized in many instances that its Statute merely listed the jurisdictional framework of the International Tribunal, but did not proscribe the offences it had the power to adjudicate; See Prosecutor v. Milutinovic et al., ICTY, Appeals Chamber, Ojdanic Appeal Decision on Joint Criminal Enterprise, IT-99-37-AR72, 21 May 2003, par. 9; Prosecutor v. Tihomir Blaskic, ICTY, Appeals Chamber, Judgment, IT-95-14-A, 29 July 2004, par. 141; See Cassese, supra note 324, p. 5: 'the crimes were not enumerated [in the statutes] as in a criminal code, but simply as a specification of the jurisdictional authority of the relevant court'; The offences needed to be either prescribed

Moreover, if one recognizes that the non-retroactivity prohibition is *jus cogens* then the SC cannot have adopted definitions of crimes that were beyond customary international law to be applied retroactively.[707] As the Court of First Instance of the European Union held in 2005, in the *Kadi Case*,

> there exists one limit to the principle that resolutions of the Security Council have binding effect : namely, that they must observe the fundamental peremptory provisions of jus cogens. If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the Community.[708]

One question remains, if the ICC is to apply *nullum crimen sine lege* in a different manner than how its Statute provides then on which basis is it to do so? One element of the answer lies in the jurisprudence of the *ad hoc* tribunals which allowed defendants to make legality challenges even if the respective statutes did not incorporate the principle of legality.[709] Furthermore, one aspect of the Rome Statute that is generally overlooked in the assessment of *nullum crimen sine lege* in retroactive referrals over non-party States[710] is the requirement that the Court interprets and applies its Statute in accordance with internationally recognized human rights.

3.7.3. Here comes Super-legality: Article 21 (3) Rome Statute

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by customary international law or by treaty law applicable to the accused. For treaty crimes see Tadic Appeal Decision on Jurisdiction, par. 143; Prosecutor v. Kordic and Cerkez, Appeals Chamber, Judgment, IT-95-14/2-A, 17 December 2004, par. 44-46. In the same vein as the ICTY, the ILC proposed that the future international criminal court be based on a Statute that is "primarily an adjectival and procedural instrument. It is not its function to define new crimes." See Report of the Working Group on a draft statute for an international criminal court, in ILC, Report of the International Law Commission on the work of its forty-sixth session, p. 38.

707 The ICTY Appeals Chamber in Tadic Judgment wrote: "it is open to the Security Council - subject to respect for peremptory norms of international law (jus cogens) – to adopt definitions of crimes in the Statute which deviate from customary international law." Prosecutor v. Tadic, ICTY, Appeals Chamber, Judgment, IT-94-1-A, 15 July 1999, par. 223, par. 296; See Paulus and Leis, supra note 683, p. 2119-2120. See also Condorelli and Viallapando, supra note 524, p. 580; for them it is not even a matter of being a jus cogens norm but simply a principle that the SC should not request.

708 Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities, Judgment of the Court of First Instance (Second Chamber, extended composition) of 21 September 2005, par. 230; see also Yusuf and al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities (Court of First Instance of the European Communities, 2005), par. 281.

709 Milanovic, supra note 681, p. 1151.

710 Gallant notes this possible avenue in Gallant, supra note 533, p. 341.

Article 21 Rome Statute creates a hierarchy of sources to be applied by the ICC with the Statute at its summit.[711] Although the Rome Statute seems to posit itself as a self-contained regime,[712] the ICC cannot operate in a vacuum without respecting any rules of international law. There are some norms, especially in the age of human rights, which should not be violated.[713] Article 21(3) reflects this reality by creating a regime of "super-legality"; [714] a "substantial hierarchy of law which supersedes the formal hierarchy between sources established by Article 21(1)." [715] Article 21 (3) posits that "[t]he application and interpretation of law pursuant to [Article 21] must be consistent with internationally recognized human rights". Gilbert Bitti argues that the 'application' of the applicable law, hence the Statute, implies that the result of any of its provisions will "always have to produce a result compatible with internationally recognized human rights law, even if such an objective does not appear from the application" of the provision contained within it.[716] Hence, Article 21 (3) makes a *renvoi* to customary human rights law, thus rendering the Rome Statute not self-contained but semi-autonomous regime.[717]

Under Article 19 Rome Statute, the Court is required to "satisfy itself that it has jurisdiction in any case brought before it."[718] Thus, the competence of the ICC to determine its jurisdiction is not only inherent (as for the *ad hoc* tribunals which invoked the principle of *Kompetenz-kompetenz/compétence de la compétence*) but explicit.[719] A challenge to the jurisdiction of the Court can also be made by an

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711 Robert Cryer, Royalism and the King: Article 21 and the Politics of Sources, 12 New Criminal Law Review 390 (2009).

712 See e.g. Grover saying: the absence of any conflict clause and the phrase 'For the purpose of this Statute' suggest that the Rome Statute was conceived of as a self-contained regime with the definitions contained therein at the top of the legal hierarchy", Grover, supra note 324, p. 271; Elies van Sliedregt, Individual Criminal Responsibility in International Law (Oxford University Press, 2012), p. 13; Cryer, supra note 711, p. 394.

713 Martin Scheinin, Impact on the Law of Treaties, in Menno T. Kamminga and Martin Scheinin, The Impact of Human Rights Law on General International Law (Oxford University Press, 2009), p. 23-34.

714 Pellet, supra note 625, p. 1077.

715 Mikaela Heikkilä,, Article 21 - Applicable Law, Mark Klamberg, The Rome Statute: The Commentary on the Law of the International Criminal Court (Case Matrix Network) available at www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc; Pellet, supra note 625, p. 1077.

716 Gilbert Bitti, Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC, in Carsten Stahn and Goran Sluiter, The Emerging Practice of the International Criminal court (Martinus Nijhoff Publishers, 2009), p. 303.

717 Gallant, supra note 533, p. 332.

718 Prosecutor v. Lubanga Dyilo, ICC, Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, ICC-01/04-01/06 (OA4), 14 December 2006, par. 20-24.

719 Grover, supra note 324, p. 79; see Prosecutor v. Jean-Pierre Bemba Gombo, ICC, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08, 15 June 2009,par. 23; see Tadic Interlocutory Appeal Decision, par. 18; where Appeals Chamber stated the power of the ICTY to determine its own competence "is part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial (...) tribunal".

accused person, a State with jurisdiction over the case on the ground that it is investigating or prosecuting the matter or has investigated or prosecuted it, and a State from which acceptance of jurisdiction is required under Article 12. [720] In order to challenge the jurisdiction of the Court one has to identify the jurisdictional ground that is lacking for the Court to be vested with jurisdiction to take cognizance of the crimes involved in the accusation.[721] The *ad hoc* tribunals have treated the issue of non-retroactivity as mostly a jurisdictional issue.[722] The Rome Statute treats non-retroactivity as both a jurisdictional and substantive issue; Articles 5, 6, 7, 8 and 11 are jurisdictional while Articles 22, 23 and 24 are substantive.[723] Pre-Trial Chamber I has defined the jurisdiction of the Court as follows:

> The jurisdiction of the Court is laid down in the Statute: Article 5 specifies the subject-matter of the jurisdiction of the Court, namely the crimes over which the Court has jurisdiction, sequentially defined in Articles 6, 7, and 8. Jurisdiction over persons is dealt with in Articles 12 and 26, while territorial jurisdiction is specified by Articles 12 and 13 (b), depending on the origin of the proceedings. Lastly, jurisdiction ratione temporis is defined by Article 11.[724]

The Statute erects certain barriers to the exercise of the jurisdiction of the Court;[725] however, as we have seen those set up in Articles 11, 22 and 24 do not prevent the Court from exercising jurisdiction on the basis of a jurisdiction *ratione materiae* or *personae* not established under customary international law.[726] As long as the crimes are provided by the Statute and were committed after its entry into force, there seems to be little place to argue that the Court lacks jurisdiction.

Nonetheless, the Appeals Chamber of the ICC noted, in regards to Article 21 (3), that:

> Article 21 (3) of the Statute makes the interpretation as well as the application of the law applicable under the Statute subject to internationally recognised human rights. It requires the exercise of the jurisdiction of the Court in accordance with internationally recognized human

720 Rome Statute, art. 19 (2)

721 Prosecutor v. Lubanga Dyilo, ICC, Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, ICC-01/04-01/06 (OA4), 14 December 2006, par 22.

722 Gallant, supra note 533, p. 312.

723 In its first case, the Court has allowed the accused to invoke Article 22 as a matter of substantive criminal law, Prosecutor v. Lubanga, ICC, Pre-Trial Chamber I, Decision on the Confirmation of Charges, ICC-01/04-01/06, 29 January 2007, par. 294–316.

724 Prosecutor v. Lubanga Dyilo, ICC, Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, ICC-01/04-01/06 (OA4), 14 December 2006, par 22.

725 Prosecutor v. Lubanga Dyilo, ICC, Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, ICC-01/04-01/06 (OA4), 14 December 2006, par 22: referring to the elements listed in Article 17.

726 Broomhall, supra note 504, p. 719-720.

rights norms. […] Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety.”[727]

Article 21 (3) thus allows the Court to import norms that are not necessarily written down in its Statute and to allow for a *sui generis* challenge to its jurisdiction on the basis of these norms, provided that they are internationally recognised human rights.

If the prohibition of retroactive criminal law is considered to be a human right norm firmly established – and I believe it is – the Court must interpret and apply its provisions in accordance with international human rights law.[728] In light of Article 21 (3) Rome Statute the ICC is vested with the authority to stop judicial proceedings “by declining jurisdiction, when to do otherwise would be odious with the administration of justice”.[729] The exercise of the jurisdiction in accordance with non-retroactivity as understood in customary human rights law is required by the Statute. Thus, a *sui generis* challenge to the jurisdiction of the Court is possible under that premise.

3.7.4. Accessibility and Foreseeability – a relaxed application of the principle of legality

In the assessment of whether a legal innovation is in conformity with the rule of non-retroactivity, the ECrtHR and the *ad hoc* tribunals have given considerable weight to the elements of "accessibility" and

727 Prosecutor v. Lubanga Dyilo, ICC, Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, ICC-01/04-01/06 (OA4), 14 December 2006, par. 36-37.

728 While when given literal reading Article 22 (1) forbids that an individual be held criminally responsible for a conduct that occurred before the Statute entered into force, the rule of non-retroactivity as contained in human rights law, forbids that an individual be held criminally responsible for a conduct that was not criminal, under the applicable law, at the time it was committed. Arsanjani has noted that: “While the original intention behind this paragraph may have been to limit the court’s powers in the application and interpretation of the relevant law, it could have the opposite effect and broaden the competence of the court on these matters. It provides a standard against which all the law applied by the court should be tested.” Arsanjani, supra note 331, p. 29.

729 Prosecutor v. Lubanga Dyilo, ICC, Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, ICC-01/04-01/06 (OA4), 14 December 2006, par. 27; Prosecutor v. Gbagbo, ICC, Pre-Trial Chamber I, Decision on the "Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of Articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)", ICC-02/11-01/11, 15 August 2012, par. 89.

"foreseeability".[730] The person concerned must be able "to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail"[731] The concept of foreseeability will depend "to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed."[732] Thus, "[p]ersons carrying on a professional activity must proceed with a high degree of caution when pursuing their occupation and can be expected to take special care in assessing the risks that such activity entails."[733] Taking into account these sets of factors the Strasbourg Court considers whether, with the benefit of legal advice,[734] the applicant should have known that "he ran a real risk of prosecution".[735]

The qualitative requirements of accessibility and foreseeability of the norm have been used to encompass various trends to justify the retroactive criminalization of certain conduct. In general, if the conduct was of such a nature that the accused could not have been innocent when committing it, its criminalization was accordingly reasonably foreseeable. The ICTY Appeals Chamber stated in *Prosecutor v. Hadzihasanovic* that "as to foreseeability, the conduct in question is the concrete conduct of the accused; he must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision."[736] Thus, the objective elements of the crime

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730 Tolstoy Miloslavsky v. United Kingdom, Court, Judgment, ECrtHR, Application No. 18139/91, 13 July 1995, par. 37; S.W. v. United Kingdom, Court (Chamber), ECrtHR, Judgment, Application No. 20166/92, 22 November 1995, par. 35-36; Prosecutor v. Hadzihasanovic et al., Appeals Chamber, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ICTY, IT-01-47-AR72, 16 July 2003, par. 35; Delalic, Trial Chamber, par. 311 ; For a law to be accessible "the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case." Sunday Times v. United Kingdom, Court, Judgment, ECrtHR, Application No. 6538/74, 26 April 1979, par. 49. Groppera Radio AG and others v. Switzerland, Court, Judgment, ECrtHR, Application No. 10890/84, 28 March 1990, par. 68. The standard for assessing whether the person had access to the law is whether the law was publicly available.; Kononov v. Latvia, Grand Chamber, Judgment, ECrtHR, Application No. 36376/04, 17 May 2010; Kolk and Kislyiy v. Estonia, Court (Fourth Section), Decision, ECrtHR, Application No. 23052/04, 17 January 2010; K.-H.W. v. Germany, Court, Judgment, ECrtHR, Application No. 37201/97, 22 March 2001, par. 73; Grover, supra note 324, p. 171; Gallant, supra note 533, p. 364-365;. As the requirement of accessibility is mostly conflated with foreseeability, the better view is to consider accessibility to the law as a step in the assessment of the foreseeability of the prohibition. Ward N. Ferdinandusse*, Direct Application of International Criminal Law in National Courts* (Cambridge University Press, 2006), p. 237-238.

731 Cantoni v. France, Grand Chamber, Judgment, ECtHR, Application No. 17862/91, 15 November 1996, par. 35; Tolstoy Miloslavsky v. United Kingdom, Court, Judgment, ECrtHR, Application No. 18139/91, 13 July 1995, par. 37; S.W. v. United Kingdom, Court (Chamber), ECrtHR, Judgment, Application No. 20166/92, 22 November 1995, par. 35-36.

732 Pessino v. France, Court (Second Section), Judgment, Application No. 40403/02, 10 October 2006, par. 33; see also Kononov v. Latvia, Grand Chamber, Judgment, ECrtHR, Application No. 36376/04, 17 May 2010, par. 235.

733 Pessino v. France, Court (Second Section), Judgment, Application No. 40403/02, 10 October 2006, par. 33

734 See also Pessino v. France, Court (Second Section), Judgment, Application No. 40403/02, 10 October 2006, par. 33; see Kononov v. Latvia, Grand Chamber, Judgment, ECrtHR, Application No. 36376/04, 17 May 2010, par. 235

735 Cantoni v. France, Grand Chamber, Judgment, ECtHR, Application No. 17862/91, 15 November 1996, par. 35.

736 Prosecutor v. Hadzihasanovic et al., ICTY, Appeals Chamber, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, IT-01-47-AR72, 16 July 2003, par. 35.

and the requisite *mens rea* do not need to have been specifically provided by the law for the conduct to be punished.[737] As seen above, many advocate that the criminal nature of the crimes that are the subject matter of international criminal law do not need a specific description.[738]

This idea should be taken together with the fact that murder, torture, enslavement and other similar crimes are crimes that are *mala in se* in contrast to crimes that are *mala prohibita*.[739] The requirement of legality is thus strained to a question of whether the underlying act was criminal by its nature.[740] Accordingly, a factor to consider whether the individual could have foreseen the criminal character of his act is "the egregious nature of the crimes charged."[741]

If one uses the qualitative requirements of accessibility and foreseeability, any individual committing one of the crimes in the Statute could foresee that they ran a risk of prosecution.[742] The drafters of the Statute subjected all the crimes within the Statute to gravity elements and the jurisdiction of the ICC to adjudicate these crimes to gravity thresholds. Let us come back to the example provided in the introduction of this chapter of gender-persecution as a crime against humanity. That gender persecution is not a crime firmly established under customary international law might be a reality, but it cannot be reasonably believed that an individual did not know that he was committing an act of criminal nature when (here I broadly list the elements of the crime of gender-persecution) they severely deprived one or more persons of fundamental rights by reason of these persons' gender, as part of a widespread or systematic attack directed against a civilian population.[743] Pursuant to the 'foreseeability' approach, the individual committing these crimes should have foreseen, due to their egregious nature, that this conduct was criminal.[744]

737 See Bert Swart et al., The Legacy of the International Criminal Tribunal for the Former Yugoslavia (Oxford University Press, 2011), p. 223-227.

738 Meron, supra note 680, p. 244-248.

739 See Schabas, supra note 278, p. 34.

740 Prosecutor v. Furundzija, ICTY, Trial Chamber, Judgment, IT-95-17/1-T, 10 December 1998, par. 165-169; Prosecutor v. Delalic et al., ICTY, Appeals Chamber, Judgment, IT-96-21-A, 20 February 2001, par. 178-180.

741 Prosecutor v. Milutinovic et al., ICTY, Appeals Chamber, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, ICTY, IT-99-37-AR72, 21 May 2003, par. 40, 43; See Swart, 737, p. 227.

742 Schabas, supra note 139, p. 74.

743 For a full account of the elements of the crime of gender persecution as a crime against humanity, see Article 7 (1) (h) Crime against humanity of persecution, Elements of Crimes.

744 See Schabas, supra note 139, p. 74: "The standard adopted by the European Court of Human Rights with respect to retroactive crimes is that they must be both accessible and reasonably foreseeable by an off ender. Inevitably, the Prosecutor will adopt this reasoning, and argue that, from the moment the Statute was adopted, or at the very least from the moment it entered into force, individuals have received sufficient warning that they risk being prosecuted for such offences, and that the Statute itself (in Article 12(3)) contemplates such prosecution even with respect to States that are not yet parties to the Statute." (footnote omitted)

The accessibility and foreseeability approach is, however, not accepted by all. Kenneth Gallant, for instance, deems that the foreseeability requirement "may swallow the principle of legality whole."[745] Let us take the example of the case *Jorgic v. Germany* where the ECrtHR had to decide whether a conviction by German Courts for cultural genocide committed in Bosnia and Herzegovina violated Article 7 ECHR.[746] Article 220a of the German Criminal Code reads in the same fashion as Article 2 of the Genocide Convention, which is normally understood as excluding cultural genocide.[747] However in the case of Jorgic the German Courts interpreted their genocide definition as including cultural genocide.[748] The only source that could have provided Jorgic with notice of this interpretation to be adopted by the German Courts was the writings of some scholars.[749] The ECrtHR, nonetheless, found that the German courts' interpretation of the crime of genocide could reasonably be regarded as consistent with the essence of that offence and that with the assistance of a lawyer Jorgic could reasonably have foreseen that he risked being charged with and convicted of genocide.[750] Evidently, the specificity of law, the value of legal certainty and the rule of strict construction are seriously challenged when foreseeability is valued more than non-retroactivity. Grover writes "there does not seem to be a sufficiently certain way to circumscribe the concept of foreseeability apart from the existence of the same criminal prohibition under applicable national law."[751] The Human Rights Committee and the Inter-American Court of Human Rights have not taken up these qualitative requirements although they dealt with the issue of retroactivity in notable cases.[752]

If one wishes to pay more than lip service to the rule on non-retroactivity one has to reject the plea that the conduct was of such an egregious nature that the accused should have known that they ran a risk of prosecution. There is a risk, indeed, that the accessibility and foreseeability requirements can be over-stretched to include all conduct that was *mala in se* but not criminalized by the law applicable

745 Gallant, supra note 533, p. 364.
746 Jorgic v. Germany, Grand Chamber, Judgment, ECrtHR, Application No. 74613/01, 12 July 2007, par. 27, 36, 47.
747 E.g. Prosecutor v. Krstic, ICTY, Trial Chamber, Judgment, IT-98-33-T, 2 August 2001.
748 Especially due to a General Assembly resolution equating ethnic cleansing with genocide and also to some German scholars advocating for this interpretation of the treaty, see Jorgic v. Germany, Grand Chamber, Judgment, ECrtHR, Application No. 74613/01, par. 27, 36, 47, 12 July 2007, par. 107.
749 Van Schaak, supra note 670, p. 171-172; Tom Booms and Carrie van der Kroon, Inconsistent Deliberations or Deliberate Inconsistencies? The Consistency of the ECtHR's Assessment of Convictions based on International Norms, 7 Utrecht Law Review 167 (2011).
750 Jorgic v. Germany, Grand Chamber, Judgment, ECrtHR, Application No. 74613/01, 12 July 2007, par. 113.
751 Grover, supra note 324, p. 173.
752 Juratowitch, supra note 671.

at the time of commission.[753] In the long run, this assessment of foreseeability is equal to assessment of whether it would be unjust to let the perpetrator of an abhorrent conduct go free as stated in the Nuremberg judgment.

3.7.5. A Strict application of legality

A better way to assess whether the Court while exercising jurisdiction on the basis of retroactive referrals violates the prohibition of non-retroactivity is to inquire whether the conduct constitutes a penal offence under applicable international law at the time of the alleged offence. Thus, the Court would need to confirm that the crime's definition and mode of liability under which the accused is charged is reflective of custom existing at the time of the commission.[754] In addition to customary international law, the Court can look at other sources of international law (i.e. applicable treaties and general principles of law) if they entailed individual criminal responsibility at the time of the conduct in question.[755] Thus, the individual is punished for conduct that was indeed criminal at the relevant time but by a source of law other than the Rome Statute. Hence, the retroactive referral would not clash with the rule on non-retroactivity.

Article 21 (1) (b) Rome Statute opens the door for judges to look at "applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict".[756] Failing that the conduct was not criminalized by customary international law, treaties or general principles of international criminal law, Article 21 (1) (c) allows the Court to apply "general principles of law derived by the Court from national laws of legal systems of the world

753 Gallant, supra note 533, p. 364-365; Grover, supra note 324, p. 171-173; See Schabas, supra note 139, p. 34.

754 Broomhall, supra note 504, p. 720; Theodor Meron, Revival of Customary International Humanitarian Law, 99 American Journal of International Law 832 (2005); Gallant, supra note 371, p. 821, 826; Gallant, supra note 533, p. 339-341; Grover, supra note 324, p. 262; supra note 280, p. 51.

755 If nulla poena sine lege praevia is also taken into account, reclassification of the crimes contained in the Statute in other sources of law that were binding on the accused at the relevant time would not offend the principle of legality. See Gallant, supra note 533, p. 340.

756 Arsanjani, supra note 331,p. 29; In Lubanga, Prosecutor v. Lubanga Dyilo, ICC, Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, ICC-01/04-01/06 (OA4), 14 December 2006, the appeals chamber considered that Article 21 (3) commands that the Statute be interpreted but also applied in conformity with human rights. The Court found that there was a lacuna in the Statute as it did not provide for stay of proceedings in the case of breach of accused's fundamental rights, and that it had the power under 21 (3) to still impose such stay although not provided by the Statute.

including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime."[757]

Thus, the Court could also look at the domestic law applicable to the conduct to see whether a crime sufficiently similar to the Rome Statute provision existed under applicable national law.[758] The ICTR's jurisdiction over 'common Article 3' and Additional Protocol II was also based on the fact that these conventions were in force at the time of the conflict and that the offences within the tribunal's jurisdiction were crimes under the laws of Rwanda.[759] Hence, the offences under domestic law were essentially reclassified as an international crime.

More controversially, if the Court finds that the underlying acts were criminalized under applicable national law, the offence can also be reclassified as an international crime.[760] That 'ordinary' crimes are committed in a wider context as either crimes against humanity or genocide or in nexus with an armed conflict does not entail that an individual can believe that these acts were not criminal.[761] The accused was committing a crime at the time of the commission; the additional factors required to make the domestic crime an international one are qualified as 'jurisdictional' or 'aggravating.[762] Thus, the principle of non-retroactivity is not offended. The core of the rule appears to be met since the act was a crime under applicable law when committed.[763]

However, when an international crime is reclassified as an ordinary crime, the crime is not properly labeled and the stigma for committing an international crime is not recognized.[764] Thus, reclassification of crimes remains a tool that must be circumscribed. Furthermore, in order to also

757 However, we ought to be cautious when using Article 21 (1) and (c) Rome Statute. There is indeed the danger that subsidiary sources be used in contradiction with the principle of strict construction contained in Article 22(2); See Prosecutor v. Thomas Lubanga Dyilo, ICC, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, Separate Opinion of Judge Adrian Fulford ICC-01/04-01/06-2842, 14 March 2012; see also; Prosecutor v. Mathieu Ngudjolo Chui, Trial Chamber, Judgment pursuant to Article 74 of the Statute - Concurring Opinion of Judge Christine Van den Wyngaert, ICC-01/04-02/12-4, 18 December 2012.

758 Van Schaack, supra note 649, p. 168; Grover, supra note 312, p. 162; Gallant, supra note 513, p. 131-132.

759 See Prosecutor v. Kayishema and Rutaganda, ICTR, Trial Chamber, Judgment, 21 May 1999, par.156, 158.

760 This technique must be distinguished from the re-characterization of charges, a procedure used at the ICC, under Regulation 55; see also Prosecutor v. Germain Katanga, Trial Chamber II, Jugement rendu en application de l'Article 74 du Statut, Minority Opinion of Judge Christine Van den Wyngaert, ICC-01/04-01/07, 8 March 2014; On reclassification of the crime see Gallant, supra note 533, p. 367-369.

761 United States v. von Leeb (The High Command Case); B. V. A. Rölling, The Law of War and the National Jurisdiction Since 1945, 100 Recueil des Cours 345–46 (1960); Van Schaack, supra note 670, p. 168; However, one has to be prudent in applying this technique since an act, such as murder, can be a crime when committed in peacetime but is not classified as such in an armed conflict when committed by belligerents who enjoys a 'combatant privilege' .

762 Van Schaack, supra note 670, p. 168-169; Grover, supra note 324, p. 162; Gallant, supra note 533, p. 131-132.

763 Gallant, supra note 533, p. 367; Grover, supra note 324, p. 183.

764 Grover, supra note 324, p. 164.

respect *nulla poena sine lege praevia*, only the sentence applicable under national law for the underlying conduct at the time of commission should be applied.[765] Therefore, to be in accordance with these two components of legality (*nullum crimen* and *nulla poena sine lege)*, the crime must have existed under applicable law at the time of commission and the sentence cannot be higher than the one provided for by the applicable law at the time of commission.[766]

Finally, it is not clear whether every crime under the Rome Statute[767] contains an underlying act criminalized by applicable national law. For instance, enlisting child soldiers is not a crime in every State.[768] In this circumstance the reclassification of the offence would be of no avail unless the act was criminal under customary international law (which is probably the case now) or applicable treaty law providing for direct criminal liability.[769]

Despite the lack of a specific provision in the Rome Statute allowing an accused to challenge the jurisdiction on the ground that the Statute was not applicable to them - even though it was in force - retroactive referrals do not genuinely conflict with the rule of non-retroactivity. Applying Article 21 (3) as an interpretative clause gives the same result as a conflict clause; however the existence of conflict is precluded since the judges are able to interpret away the apparent conflict.[770] Thanks to Article 21 (3) Rome Statute[771] the Court can resort to Article 21 (2) and (3) as possible sources under which the

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765 Gallant, supra note 533, p. 368; See also Meron, supra note 680, p. 246; Before a punishment can be exacted it needs to have been part of the law. This is a necessary implication of what is explicitly prohibited by nulla poena sine lege praevia. The rule on non-retroactivity of punishment, as provided by the UDHR, ICCPR, ECHR and IACHR prohibits the imposition of heavier punishment then the one applicable at the time of the crime.

766 The latter requirement derives from nulla poena sine lege, Gallant, supra note 533, p. 341.

767 Gallant, supra note 533. p. 367-368.

768 I am not necessarily arguing that 'enlistment of child soldier' has not reached the status of a customary crime. However, in 2002, the Special Court of Sierra Leone issued a decision in which it struggled to find that enlisting child soldier constituted a crime under customary international law in 1996; Prosecutor v. Norman, SCSL, Appeals Chamber, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), SCSL-2004–14-AR72(E), 31 May 2004. This difficulty came from the fact, inter alia, that the UN Secretary General was doubtful on whether the enlistment of child soldiers was criminalized under international law in 1996, see Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, S/2000/915, 4 October 2000, par. 17-18. Indeed, the Secretary General observed that "it is far less clear whether it is customarily recognised as a war crime entailing the individual responsibility of the accused". The dissenting opinion of Judge Robertson remains one of the most quoted one from an international criminal tribunal on the issue of non-retroactivity. Robertson harshly criticized his colleagues for finding that enlisting child soldiers constituted a crime under customary international law. See particularly Dissenting opinion Judge Robertson, par. 11-17. However, Robertson believed that enlistment of child soldiers became criminal universally since the adoption of the Rome Statute in 1998. Van Schaack writes that "the number of child soldiers in Africa could suggest the existence of a regional custom with respect to the practice." Van Schaack, supra note 670, p. 158.

769 Gallant, supra note 533, p. 368.

770 Pauwelyn, supra note 231, p. 334

771 Bitti, supra note 716, p. 303.

accused committed a crime and can if the conduct was not criminalized under any law applicable to the accused, at the time of the conduct, decline to exercise jurisdiction.

Conclusion

Although the Rome Statute was adopted by a non-unanimous vote, it is argued under the 'universal jurisdiction conception' that the international community decided to make it universally applicable.[772] While it is true that the Statute speaks of 'crimes of international concern', is this sufficient to establish the authority to universally prescribe all the crimes contained in the Statute. The answer begs the question. If the Statute can be considered an act of the international community then it has the authority and legitimacy to universally prescribe crimes of international concern. Or, is the Rome Statute assertion to be an act of the international community a false pretension? Should we refer to the 'ICC community'?

It is true that the Rome Statute drafters carefully selected the crimes included in Articles 6 to 8 of the Statute and subjected them to gravity elements and thresholds. Gravity ensures that due to its inherent gravity the conduct is universally regarded as punishable.[773] Second, the gravity of the crime makes it a matter of such serious international concern that it cannot be left to the discretion of even the most directly concerned state. The Statute was adopted and ratified by an ample majority of States and more importantly is embedded in the UN system. The proponents of the 'universal jurisdiction conception' claim that, for these reasons, the crimes contained in the Rome Statute were made universally applicable at the time of its entry into force. If this reasoning is accepted then the Rome Statute provisions on the Court's jurisdiction *ratione temporis*, *nullum crimen sine lege*, *nulla poena sine lege* and non-retroactivity *ratione personae* are fully consistent with the principle of legality even in situations retroactively referred under Article 13 (b).

While the 'universal jurisdiction conception' considers that the Rome Statute can be applied uniformly to all accused, regardless of whether the State with primary jurisdiction had ratified the

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772 Sadat, supra note 25.
773 See Einersen, supra note 189; Hostage Case.

Statute, the 'Chapter VII conception' conceives that the Rome Statute becomes applicable law to a specific situation when the SC uses its extraordinary powers to target a specific State and oblige it to abide by the rules contained within the Statute. Under the 'Chapter VII conception', the Rome Statute becomes applicable law in the referred State's legal order at the time of the referral. As of now, the two instances where Article 13 (b) Rome Statute has been used to refer a situation to the Court both had retroactive effects.

I have shown that there are three ways - if one adopts the 'Chapter VII conception' - to interpret retroactive referrals under Article 13 (b) without creating a genuine breach of non-retroactivity. First, if one applies non-retroactivity like in Nuremberg as a general principle of justice, a retroactive application of the 'most serious crimes of concern to the international community' would not be unjust. Second, if one considers that non-retroactivity is a norm firmly established in customary international human rights law: one has to consider that the SC did not intend to violate it, and that the ICC must interpret its Statute in light of this norm. Thus, in situations where the Court exercises jurisdiction over conduct that occurred prior to the referral, it can only find an accused guilty if the conduct was criminal under applicable treaty law, customary international law, general principles of law or national law. In other words the Court must refer to sources other than its Statute. Thirdly, a way of resolving the apparent conflict between retroactive referrals and non-retroactivity of criminal law that is in between the two previous solutions is to assess whether the accused could have reasonably foreseen, at the relevant time, that they were committing a crime. Although some courts which consider non-retroactivity as a human right adopted the 'foreseeability' element, this element when used in the context of 'the most serious crimes of concern to the international community as a whole' risks being reduced to a simple evaluation of the gravity of the crime. Hence, it may end up being a simple application of non-retroactivity as a principle of justice under another formula. All in all, only the second way to resolve this conflict between retroactive referrals and non-retroactivity of criminal law sharply differs with the 'universal jurisdiction conception'.

Contrary to the 'universal jurisdiction conception', under the 'Chapter VII conception' selectivity appears to be part of the judicial process. One may have concerns that the term selectivity resonates too much with 'victor's justice', a term that is reminiscent of the criticisms made against the Nuremberg and Tokyo Tribunals. On the other hand, does the Rome Statute really have the legal capacity to be imposed upon any State, and more specifically against any accused without any

accommodation to the special status of the specific situations at stake**?** The legitimacy of the Court in such situations could rest on the way conflicts of norms with non-retroactivity are handled. To avoid norm conflict between retroactive referrals and non-retroactivity by completely delinking one or other of the conflicting norms from international law risks not only resulting in another manifestation of 'victor's justice' but also reflecting the 'identity crisis' affecting international criminal law.[774]

774 See Darryl Robinson, The Identity Crisis of International Criminal Law, 21 Leiden Journal of International Law, 925–963 (2008).

4. Article 13 (b) vs Immunity of State Officials

Rarely is there a subject that attracts more antagonism than the immunity of State officials for crimes such as genocide, crimes against humanity and war crimes. The debate on whether foreign criminal *fora* can exercise jurisdiction over individuals that act in the name of a State revolves around the interplay between international criminal law and the international law on immunities. The latter regime, on the one hand, proceeds from the well-established rule that declares the State and its officials immune from the jurisdiction of other States. The former, on the other hand, is predicated on humanitarian values contained *inter alia* in the Nuremberg[775] and Tokyo[776] judgments, the Convention against Genocide,[777] the Geneva Conventions,[778] the *Eichmann Case*,[779] the Convention against Torture,[780] the jurisprudence of the *ad hoc* tribunals, the *Pinochet Case,*[781] many other national proceedings and the Rome Statute;[782] all of which call for the accountability of perpetrators of international crimes, regardless of their official position. International law seeks to accommodate both of these regimes.

This chapter will address the immunities under international law of State officials from proceedings before the ICC but also from national proceedings enforcing an ICC arrest warrant. The immunities of high and low ranking officials will be described in the first section. The first section will also show that there is a measure of indeterminacy as to whether the immunity of high-ranking State officials from States not party to the Rome Statute is relevant before the ICC. Against this background,

775 Nuremberg Judgment.

776 Judgment of International Military Tribunal for the Far East, 12 November 1948, in John Pritchard and Sonia M. Zaide (eds.), The Tokyo War Crimes Trial, Vol. 22.

777 Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948), United Nations, Treaty Series, vol. 78-277.

778 Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field (Geneva, 12 August 1949); Geneva Convention for the amelioration of the condition of the wounded, sick and shipwrecked members of the armed forces at sea (Geneva, 12 August 1949; Geneva Convention relative to the treatment of prisoners of war (Geneva, 12 August 1949); Geneva Convention relative to the protection of civilian persons in time of war (Geneva, 12 August 1949; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (Geneva, 9 June 1977; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II) (Geneva, 9 June 1977).

779 Eichmann Appeal; Eichmann Judgment.

780 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), United Nations, Treaty Series, vol. 1465, p. 85.

781 Pinochet No. 1; Pinochet No. 3.

782 Rome Statute of the International Criminal Court, art. 27.

the next two sections (4.2. and 4.3.) will analyze under the 'Chapter VII conception' and the 'universal jurisdiction conception' whether a State official from a State not party to the Rome Statute is entitled to invoke their immunity before the ICC when it exercises jurisdiction under Article 13 (b). Finally, as it is highly improbable that a State official from a State not party to the Statute would appear voluntarily before the ICC, the last part of my analysis (section 4.4) will inquire, using both 'conceptions', as to whether the immunities of State officials are a bar to national authorities enforcing an arrest warrant from the ICC.

4.1. Immunities of State officials under international law

The immunities of State officials under international law can be separated into two categories: (1) immunity *ratione materiae* which any State official enjoys when performing official acts; and (2) immunity *ratione personae* which only holders of high office enjoy for any acts performed while in office.[783] The rationale of both immunities *ratione materiae* and *personae* is to "ensure the effective performance of their functions on behalf of their respective States."[784] Thus, immunities are not for the benefit of the individual exercising the functions. Nevertheless, immunity *ratione materiae* is attached to the functions of the official, while immunity *ratione personae* relates to the position of the official. Immunity *ratione materiae* does not cover personal acts, but continues to subsist even after the official ceases to perform his or her official functions. It is for this reason that we speak of immunity attached to the acts of the official while performing his or her functions. Hence the qualification that this immunity is based on the principle of equality of States: a State does not judge the acts of another State

783 This distinction was adopted by France and Djibouti in Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), supra note 17, p. 177. Al-Adsani v. United Kingdom, European Court of Human Rights, Judgment, Application No. 35763/97, 21 November 2001, par. 65; Ferdinand et Imelda Marcos c. Office fédéral de la police (recours de droit administratif), Switzerland, Tribunal fédéral, ATF 115 Ib 496, p. 501-502 ; Pinochet (No. 3), p. 581 (in particular: Lord Browne-Wilkinson, p. 592; Lord Goff of Chieveley, p. 598; Lord Hope of Craighead, p. 622; Lord Hutton, p. 629; and Lord Saville of Newdigate, p. 641, Lord Millet, pp. 644-645). However, the International Court of Justice in the Arrest Warrant Case, did not refer to this classification. See also e.g. Cassese, supra note 166, p. 862-864; Vanessa Klingberg, (Former) Heads of State before international(ized) criminal courts: the case of Charles Taylor before the Special Court for Sierra Leone, 46 German Yearbook of International Law 544 (2003); Andrew D. Mitchell, Leave Your Hat On? Head of State Immunity and Pinochet, 25 Monash University Law Review 230-231 (1999).

784 the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) International Court of Justice, Judgment, I.C.J. Reports 2002, p. 3,* par. 53 (hereinafter *Arrest Warrant Case*).

- *par in parem imperium non habet*.[785] Immunity *ratione personae* is a procedural defense based on the notion that any activity of an incumbent Head of State, Head of government, foreign minister and diplomatic agent[786] must be immune from any interference of a foreign State. It covers official and private acts committed prior to and during office.[787] It does not exculpate high-ranking State representatives from their responsibility as immunity *ratione materiae* does but it does grant procedural immunity. Put simply, a high-ranking State representative enjoying immunity *ratione personae* is liable but foreign domestic courts are barred from exercising jurisdiction. However, immunity *ratione personae* can only be enjoyed by incumbent Heads of States and other high-ranking State representatives;[788] when they cease to hold office immunity *ratione personae* also ceases but immunity *ratione materiae* remains.[789]

On the 14 February 2002 the ICJ issued its judgment in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (hereinafter *Arrest Warrant Case*). The ICJ, after reviewing national and international case law and instruments, declared that customary international law does not provide any exception to the immunity of a foreign affairs minister before foreign criminal jurisdiction even where suspected of war crimes and crimes against humanity.[790] Nonetheless, the ICJ then stressed that "immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity".[791] In order to exemplify this statement, the ICJ enumerated four circumstances where the immunity of a sitting high-ranking State representative would not represent a bar to criminal prosecution: (1) when the national authorities of the State they represent institute proceedings; (2) when the State they represent or have represented

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785 *Prosecutor v. Blaskic*, ICTY, Appeals Chamber, *Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, IT-95-14-AR108bis, 29 October 1997, par. 41.

786 Nevertheless, diplomatic immunity is confined to the States where the agent is accredited and to the States where he passes while proceeding to or returning from his post; see Vienna Convention on Diplomatic Relations, Article 40. Conversely, the immunity ratione personae of the other high-ranking State representatives is erga omnes.

787 Gadaffi, Arrêt No. 1414 of 13 March 2001, reprinted in: 105 Revue Générale de Droit International Public (2001) 474; on this decision Salvatore Zappala, *Do Heads of State in Office enjoy Immunity from Jurisdiction for International Crimes? The Ghadaffi Case before the French Cour de Cassation*, 12 European Journal International Law 595-612 (2001).

788 See Draft article 4, ILC, Second Report of the Special Rapporteur, Ms. Concepción Escobar Hernández, 4 April 2013, U.N. Doc. A/CN.4/661, provisionally adopted at the 65th session of the International Law Commission.

789 Cassese, supra note 166, p. 864-865.

790 Arrest Warrant Case par. 58.

791 Arrest Warrant Case, par. 60. The ICJ further added: "Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility."

waives the immunity; (3) when the high-ranking State representative does not hold office anymore, other States "may try the former high-ranking officials in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity";[792] and, (4) when the high-ranking State representative is subject to proceedings before "certain international criminal courts, where they have jurisdiction."[793]

The first and second circumstances, i.e. national proceedings and waiver of immunity, have not created significant disagreement. They rest upon fundamental principles of international law: sovereignty and consent. In this sense they confirm principles that were well established in international law and that arguably did not need any clarification. However, the third and the fourth circumstances, namely prosecution of former officials for acts committed in a private capacity and prosecution before "certain international criminal courts, where they have jurisdiction" have been the subject of a hot debate between scholars and of varying interpretation by international courts.

The third circumstance applies when the high-ranking State official no longer holds office – immunity *ratione materiae*; other States "may try the former high-ranking officials in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office *in a private capacity*".[794] In other words, the former high-ranking official is still immune from foreign criminal jurisdiction for the acts committed *in an official capacity*. Obviously, this is difficult to reconcile with the principle of individual criminal responsibility for international crimes committed in the name of the State.[795] As Judge Van den Wyngaert[796] and many commentators have argued,[797] most international crimes are committed on behalf of the State, and to negate the official character of such crimes would "be to fly in the face of reality."[798] Furthermore, if the authorities of the home State remain in connivance with the former State official, it is highly

792 Arrest Warrant Case, par. 61.
793 Arrest Warrant Case, par. 61.
794 Arrest Warrant Case, par. 61 (emphasis added).
795 Nuremberg principle No. 1.
796 Arrest Warrant Case, Separate opinion of Judge *ad hoc* Van den Wyngaert, par. 34-36.
797 See e.g. Cassese supra note 166; David S. Koller, Immunities of Foreign Ministers: Paragraph 61 of the Yerodia Judgment As It Pertains to the Security Council and the International Criminal Court, 20 American University International Law Review 7-42 (2004); Marco Sassòli, L'arrêt Yerodia: quelques remarques sur une affaire au point de collision entre les deux couches du droit international, 106 Revue belge de droit international 791-818 (2002); Jan Wouters, The Judgment of the International Court of Justice in the Arrest Warrant Case: Some Critical Remarks, 16 Leiden Journal of International Law 253-267 (2003).
798 Craig Barker, International Law and International Relations: International Relations for the 21st Century (Continuum, 2000), p. 153.

unlikely that national proceeding will be instituted against the former official (first circumstance) or that a waiver of immunity from foreign criminal jurisdiction will be issued (second circumstance). Consequently, impunity is almost ensured. While Judges Higgins, Kooijmans and Buergenthal in their separate opinion underline that international crimes cannot be regarded as official acts, the silence of the majority judgment on this point leaves the issue unsettled and at risk of being interpreted to the contrary.[799] Cassese, and many others, claim that the ICJ neglected to recognize that there is a specific exception under customary international law to immunity *ratione materiae* for international crimes.[800] It seems indeed that the third circumstance brings more confusion than clarification.

The significance of the words used in the *Arrest Warrant Case's obiter dictum* to delineate the fourth circumstance merit its quotation in full:

> an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before *certain international criminal courts, where they have jurisdiction*. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, *established pursuant to Security Council resolutions under Chapter VII* of the United Nations Charter, and the future International Criminal Court *created by the 1998 Rome Convention*. The [Rome] Statute *expressly provides*, in Article 27, paragraph 2, that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.[801]

Was the ICJ, in the present case, providing a general exception to the immunity of State officials for proceedings before international criminal courts? Or can this exception be qualified?

From the outset, it is worth emphasizing that it appears that not every international criminal court can exercise jurisdiction over an official entitled to immunity but only "certain international criminal courts''. Instead of detailing the conditions and criteria required to qualify as one of "certain

799 Arrest Warrant Case, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, par. 85.

800 Cassese, supra note 166, p. 864-865; Institut de droit international, Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law, adopted by the Institut at its Vancouver session in 2001, in Annuaire de l'Institut de droit international, vol. 69 (2000-2001), pp. 742-755. Cassese, supra note 73, p. 864-866, 870-874; Paola Gaeta, Official Capacity and Immunities, in Cassese et al., supra note 6, p. 979-982; Zappala, supra note 787, p. 601-602; Dapo Akande, International Law Immunities and the International Criminal Court, 98 American Journal of International Law 414 (2004); Prosecutor v. Karadzic and others, ICTY, Trial Chamber, Decision on the Bosnian Serb Leadership Deferral Proposal, IT-95-5-D, 16 May 1995, par. 22-24; Prosecutor v. Furundzija, Trial Chamber, Judgment, IT-95-17/1, 10 December 1998, par. 140; Prosecutor v. Slobodan Milosevic, Trial Chamber, Decision on preliminary motions, IT-02-54, 8 November 2001, par. 28; *Prosecutor v. Blaskic*, ICTY, Appeals Chamber, *Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, IT-95-14-AR108bis, 29 October 1997, par. 41; International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973) United Nations, Treaty Series, vol. 1015, p. 243, art. 3.

801 Arrest Warrant Case, par. 61 (emphasis added).

international criminal courts", the ICJ offered examples of tribunals and courts it considered to be within what one might call a privileged category. According to the ICJ, the ICTY and the ICTR, established pursuant to SC resolutions adopted under Chapter VII of the UN Charter, and the ICC, created by the Rome Statute, may submit to criminal proceedings officials entitled to immunity *ratione materiae* and *ratione personae*. Yet, the Court provided no guidance as to what makes these courts more entitled to overrule immunities of State officials than other international criminal courts. For instance, can the Special Tribunal for Lebanon,[802] established pursuant to a SC resolution adopted under Chapter VII, or the Lockerbie Court,[803] created by a treaty, submit any State officials to criminal proceedings? Furthermore, according to the ICJ it is not enough to fit within the category of "certain international criminal courts". Indeed, it is also required to "have jurisdiction". Does this mean that even if the ICC is part of these "certain international criminal courts", there are still some cases where it would lack jurisdiction over certain State officials? Or, is this additional criterion pleonastic?

The ICJ cited Article 27(2) of the Rome Statute to evidence the prototype of a provision that bestows jurisdiction over any State official, irrespective of their immunity.[804] Article 27(2) of the Rome Statute explicitly rejects immunity *ratione personae*; however this explicit provision is new in international criminal law instruments.[805] Conversely, the earlier provisions of the *ad hoc* tribunals rejected immunity *ratione materiae* but not immunity *ratione personae* (at least not explicitly).[806] Furthermore, none of the prior international criminal courts exercised jurisdiction over officials really entitled to immunity *ratione personae* at the time of the proceedings. The first serving Head of State to

802 Security Council Resolution 1757 (2007) of 30 May 2007, authorizing the establishment of special tribunal to try suspects in assassination of Rafiq Hariri, S/RES/1757; on this topic see William A. Schabas, The Special Tribunal for Lebanon: Is a 'Tribunal of an International Character' Equivalent to an 'International Criminal Court'?, 21 Leiden Journal of International Law 513-528 (2008).

803 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Netherlands concerning a Scottish Trial in the Netherlands (18 September 1998) 2062 I-35699 UNTS 82.

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

805 Schabas, supra note 162, p. 446.

806 The provisions of the *ad hoc* tribunals are substantially reflecting Article 7 of the London Charter and the resulting Nuremberg Principle No. 3 which states that "[t]he fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.'' See Schabas, supra note 162, p. 450-452; Schabas, supra note 802, p. 526-527; See Bassiouni, supra note 289, p. 85.

appear before an international criminal court was Uhuru Kenyatta and this only happened in 2014.[807] Before this groundbreaking case all trials involving high-ranking State officials occurred when the official ceased to hold office, i.e. when they could only possibly invoke their immunity *ratione materiae*.[808] The provisions as well as the precedents of the international criminal courts were essentially focused on establishing that officials bore criminal responsibility for crimes that were within these tribunals' jurisdiction, but not at securing the criminal jurisdiction of the tribunals over officials enjoying immunity *ratione personae*.[809] The principle that an official position cannot relieve the accused of their criminal responsibility for international crimes is contained in Article 27(1), not in Article 27(2) of the Rome Statute.[810] Article 27 (1) ensures that criminal responsibility can be found

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807 BBC News, Kenyatta Appears at ICC in Hague for Landmark Hearing, 8 October 2014.

808 The first instance where the prosecution of a Head of State before an international criminal jurisdiction is contained in the Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (29 March 1919). Although the Commission recommended the establishment of a High Tribunal for the prosecution of the Emperor William II, the report was drafted at a time where the German Kaiser was no longer Head of State. Furthermore, the resultant Article 227 of the Treaty of Versailles noted that "[t]he Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial". The request was never acceded to by the Netherlands. The Nuremberg Tribunal did not prosecute any serving high-ranking officials either. Joachim Von Ribbentrop, Reich Minister of Foreign Affairs (1938-1945), and Karl Doenitz, Reich Head of State (2 May 1945 - 23 May 1945) were tried and sentenced by the Nuremberg Tribunal but the proceedings took place after they ceased to be in office, accordingly they, then, only enjoyed immunity ratione materiae. The same applies to Mamoru Shigemitsu, Japanese Minister of Foreign Affair (1943-1945) and Hiroshi Oshima, Japanese Ambassador to Berlin (1938-1945), who were tried and sentenced by the International Military Tribunal for the Far East. Similarly, the ICTR did not address the immunity of Jean Kambanda, former Prime Minister of Rwanda from April 1994 to July 1994, sentenced to life imprisonment for crimes against humanity and genocide, as when indicted in 1997 he was not Prime Minister since 3 years; Prosecutor v. Kambanda, Trial Chamber, Judgment and Sentence, ICTR-97-23-S, 4 September, 1998; Prosecutor v. Kambanda, Appeals Chamber, Judgment, ICTR-97-23-I, 19 October 2000. The ICTY indicted Slobodan Milosevic in May 1999 while he was the head of State of the Federal Republic of Yugoslavia from July 1997 to October 2000. The issuance and circulation of this arrest warrant arguably infringed the immunity and inviolability then enjoyed by Milosevic under international law. No State objected that the ICTY violated the rule on immunity ratione personae by issuing and circulating the arrest warrant on the then President of the FRY; see Gaeta, supra note 428, p. 315-322. The arrest warrant was enforced and Milosevic was transferred into the custody of the ICTY only in June 2001, i.e. when he enjoyed immunity ratione materiae. In the Decision on Preliminary Motions the Trial Chamber refers to Milosevic's criminal responsibility not to its amenability to the jurisdiction of the Tribunal when the indictment was first issued. The ICTY did not review whether the indictment of June 1999 was in accordance with international law, but whether it lacked competence by reason of Milosevic's status as former Head of State; Prosecutor v. Milosevic, Trial Chamber, Decision on Preliminary Motions, IT-02-54, 8 November 2001 par. 26-34. Accordingly, it is debatable whether there were any precedents at the time of the Arrest Warrant Case of an international criminal court explicitly overruling the immunity ratione personae of an incumbent high-ranking State official. See also, Emmanuele Cimiotta, Immunità personali dei Capi di Stato dalla giurisdizione della Corte penale internazionale e responsabilità statale per gravi illeciti internazionali, 4 Rivista di diritto internazionale 1105- 1112 (2011); Kress, supra note 178, p. 253.

809 Cherif Bassiouni, Introduction to International Criminal Law (Transnational Law Publishers, 2003), p. 75, 82; Kress, supra note 178, p. 252; Bryar S. Baban, La mise en oeuvre de la responsabilité pénale du chef d'Etat (Larcier, 2012), p. 349.

810 Can both principles be conflated in one provision? The ILC in the commentaries to the Draft Code of Crimes against the Peace and Security of Mankind states as follows: "The absence of any procedural immunity with respect to

without any distinction based on official capacity and Article 27 (2) ensures that the Court has jurisdiction over officials normally entitled to procedural immunity from criminal jurisdiction.[811] However, as the ICJ noted "immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts." Indeed, the difference between these two separate concepts is encapsulated in Article 27 of the Rome Statute.[812] Nevertheless, this dichotomy is a novelty of the Rome Statute.

Allegedly, the Rome Statute as a treaty can only bind its States parties unless it embodies a norm of customary international law. While Article 7 of the London Charter, Article 7 (2) of the ICTY Statute, Article 6 (2) of the ICTR Statute and Article 27(1) of the Rome Statute reflect customary international law,[813] the same cannot be so easily said about Article 27(2) of the Rome Statute.[814] In other words, Article 27 (2) is possibly only a conventional exception to the general rule on immunity *ratione personae*.[815] This would entail that customary international law provides an exception for proceedings before certain international criminal courts only with regard to immunity *ratione materiae*; immunity *ratione personae* would remain applicable, unless the State of the official is deemed to have waived the immunity. In the next section (4.2.) we will see that the latter reasoning is adopted by the proponents of the 'Chapter VII conception'. In the following section (4.3) the 'universal jurisdiction conception' will attempt to defend the opposite view.

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prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defence. It would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility." ILC, Draft Code of Crimes against the Peace and Security of Mankind, with commentaries, 2 Yearbook of the International Law Commission 27 (1996); However, this appears improbable, especially when we recall that the ICJ noted that "immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts." Arrest Warrant Case, par. 60. The difference between these two separate concepts is encapsulated in Article 27 of the Rome Statute; Alebeek, supra note 124,p. 265-275; Baban, supra note 809, p. 349; Asad G. Kiyani, Al-Bashir & the ICC: The Problem of Head of State Immunity, 12 Chinese Journal of International Law 457-508 (2013).

811 Broomhall, supra note 13, p. 138; Van Alebeek, supra note 293, p. 265-275.

812 See Schabas, supra note 413, p. 328: "The issue of immunity from prosecution must be treated as distinct from of the defence of the defence of official capacity. That this is so can be seen in Article 27 of the Rome Statute, with its two opposable paragraphs, the first addressing the defence of official status and the second the matter of head of State Immunity. The Statutes of the [ICTY, ICTR, SCSL] contain no similar provision on the issue of head of State immunity."

813 They all substantially reflect the Nuremberg Principle No. 3 which has been adopted by the United Nations and reiterated by the Secretary General in its report on the Statute of the ICTY has being a norm that all states that issued written comments on the Statute agreed that there should be such a provision, Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808, 3 May 1993, par. 55, UN Doc. S/25704.

814 See Kress, supra note 178, p. 250-256, Van Alebeek, supra note 293, p. 265-275; Xavier Aurey, Article 27 : Défaut de pertinence de la qualité officielle, in Julian Fernandez and Xavier Pacreau, Statut de Rome de la Cour pénale Internationale : Commentaire Article par Article (Pedone, 2012), p. 843-862.

815 Ibid., Kiyani, supra note 810.

4.2. The Security Council power to waive immunities before international criminal courts

As seen above, the immunity of high-ranking State officials is a rule of international law with exceptions. The 'Chapter VII conception' proceeds on the assumption that Article 27(2) of the Rome Statute is only a conventional exception to the general rule on immunity *ratione personae*. Nevertheless, immunity *ratione personae* becomes irrelevant if the State of the official is deemed to have waived it.[816] In *Prosecutor v. Uhuru Muigai Kenyatta*, the first case where an incumbent Head of State appeared before an international criminal court the ICC never addressed the immunity of the defendant.[817] It is true that, on the one hand, the Court considered that, in exceptional circumstances, a Chamber may exercise its discretion to excuse an accused on a case-by-case basis in order to enable him to perform his functions of State from continuous presence at trial.[818] Immunity, on the other hand, was never raised. That can be simply explained by the fact that by ratifying the Rome Statute, including Article 27 (2), Kenya, of which Kenyatta was the Head of State, is considered to have waived this right it was entitled to under international law. Accordingly, the legal basis of the court to exercise jurisdiction over a situation would provide an answer as to whether a particular State has waived the immunity of its officials in respect of the proceedings in question.

According to a strict positivistic view international criminal courts' rights to exercise jurisdiction over an official entitled to *immunity ratione personae* is grounded on the same rationale as national courts. As we have seen, the ICJ stated in the *Arrest Warrant Case* that a foreign national court may exercise jurisdiction over the State official of another State if the latter waives its immunity.[819] In such cases jurisdiction can be exercised because the State's right to immunity has been relinquished. The same applies *mutatis mutandis* when a State is considered to have relinquished its right to

816 Arrest Warrant Case, par. 61.

817 Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, ICC, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, 23 January 2012; Prosecutor v. Uhuru Muigai Kenyatta, ICC, Trial Chamber V(B), Decision on Defence request for excusal from attendance at, or for adjournment of, the status conference scheduled for 8 October 2014, ICC-01/09-02/11, 30 September 2014.

818 Prosecutor v. Uhuru Muigai Kenyatta, ICC, Trial Chamber V(B), Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial, ICC-01/09-02/11-830, 18 October 2013.However, the Appeals Chamber found that the Trial Chamber had not properly exercised its discretion, as it had granted the accused a 'blanket excusal before the trial had even commenced, effectively making his absence the general rule and his presence an exception'. Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled 'Decision on Mr. Ruto's Request for Excusal from Continuous Presence at Trial', ICC-01/09-01/11-1066, 25 October 2013.

819 Arrest Warrant Case, par. 61.

immunity towards an international criminal court.[820] If customary international law does not provide an exception to immunity *ratione personae* for proceedings before international criminal courts, such an exception has to be found in the legal basis of the court.[821]

The legal basis of a court to exercise jurisdiction over a high-ranking official will determine whether the State from which the individual derives their immunity is bound to accept the court's jurisdiction. In this respect, there is a significant difference between international criminal courts established pursuant to SC resolutions under Chapter VII of the UN Charter and courts created by a treaty.[822] Upon joining an international organization a State consents to the constituent instrument and to the institutional aspects of the organization.[823] If the constituent instrument provides that immunities are not applicable before this international organization – such as the Rome Statute - members of this organization are to be considered as having waived the right to immunity they had under international law.[824]

If the constituent instrument provides that an organ of the international organization can issue decisions that are binding upon each member - such as the UN Charter regarding the SC powers - each member has to perform its obligations in good faith and accept and carry out the decisions of the organ. The constituent instrument is, indeed, what regulates the obligations of States and of the international organization itself.

On the other hand, when drafting the constituent instrument of an organization, States cannot create obligations for States that do not consent to it. This canon is expressed by the Latin maxim *pacta tertiis nec nocent nec prosunt*. The *pacta tertiis* rule is the most important objection to a treaty-based court's exercise of jurisdiction over officials of a State not party to the treaty establishing the court.[825] States while ratifying the Statute of a treaty-based court are only entitled to waive their own right to immunity not the rights of others.[826] Accordingly, international criminal courts are limited to exercising

820 Morris, supra note 27, p. 485; arguing that Article 27 is only a waiver of immunity for State-parties.
821 Van Alebeek, supra note 124, p. 265-295; Aurey, supra note 814.
822 Akande, supra note 361; Koller, supra note 797; Michael A. Tunks, *Diplomats or Defendants? Defining the Future of Head-of-State Immunity*, 52 Duke Law Journal 654 (2003); Van Alebeek, supra note 293, 265-295.
823 Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 1998), p. 292.
824 Vienna Convention on the Law of Treaties (Vienna, 1969), United Nations, Treaty Series, vol. 1155-331, art. 26.
825 ILC, Vienna Convention on the Law of Treaties, with commentaries, 2 Yearbook of the International Law Commission 226-227 (1966). According to Article 34 of the Vienna Convention on the Laws of Treaties, "[a] treaty does not create either obligations or rights for a third State without its consent."
826 Vienna Convention on the Law of Treaties, art. 34; Free Zones of Upper Savoy and the District of Gex (France v Switzerland) Permanent Court of International Justice, 1932 PCIJ Series A/B, No. 46; See Morris, supra note 27, p. 485;

jurisdiction over high-ranking State officials from States that consented to the constituent instrument of the court.[827]

The ICJ did provide for an exception to the rule on immunity for "certain international criminal courts, where they have jurisdiction". Thus, *prima facie*, we seem to be in a rule 'rule-exception' relationship. In a relationship of "rule-exception" between two norms there is simply an accumulation of norms.[828] If the two norms accumulate, they do not conflict. When the SC refers a situation to the ICC under Chapter VII with an explicit obligation to "cooperate fully with the Court", are we in a situation of conflict of norms or of accumulation of norms?

The 'Chapter VII conception' does not consider that in every situation where the ICC exercises jurisdiction the immunity of State officials is not a bar to prosecution. Quite the contrary, it views the immunity of high-ranking State officials from the jurisdiction of the Court as a bar to prosecution, unless immunity has been waived by the concerned State. The general rule – immunity of State officials – applies 'unless' immunity is waived. Such a waiver can be obtained through ratification of the Rome Statute by the concerned State, issuance of an *ad hoc* waiver by the concerned State, or implied waiver residing on the obligation of the concerned State to "cooperate fully with the Court" according to a Chapter VII resolution. While the two first examples of a waiver appear explicit, the last is implied. Interpretation is thus needed. What is required for a simple accumulation of norms is that no room be left for interpretation. Hence, an apparent conflict arises when a high-ranking official of a State not party to the Rome Statute and which has not issued a waiver of immunity is prosecuted by the ICC.

However, through the tool of effective interpretation we can imply that SC referrals to the ICC, with an obligation to cooperate fully with the Court, including Article 27 (2) Rome Statute, entail that the immunity of the targeted State is waived by the SC. Let us take the examples of the *ad hoc* tribunals to show how waivers implied by the SC resolutions operate. The ICTY and the ICTR were created by resolutions of the SC adopted under Chapter VII of the UN Charter.[829] When the *ad hoc* tribunals

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Akande, supra note 800, p. 419-20; See Steffen Wirth, Immunity for Core Crimes? The ICJ's judgment in the Congo v. Belgium Case, 13 European Journal of International Law 888 (2002); Tunks, supra note 822, p. 665 fn 75; Cryer et al., supra note 254, p. 551.

827 The immunity of President Kenyatta, the first incumbent head of State to appear before an international criminal court, has not even been addressed in the proceedings that were taken against him. As the head of a State party to the Statute, there was no need to determine whether Article 27 applied or not.

828 Pauwelyn, supra note 231, p. 162.

829 Thus, they are subsidiary organs of the SC, see *Tadic Interlocutory Appeal Decision*, par. 38.

exercise jurisdiction, their legal bases are the SC resolutions creating them, so the Chapter VII powers.[830] Due to their obligations under the UN Charter, UN Member States have to accept and carry out the *ad hoc* tribunals' exercise of jurisdiction.[831] Immunities being a bar to a court's exercise of jurisdiction, States have to remove the immunities of their officials in order to effectively accept and carry out the *ad hoc* tribunals' exercise of jurisdiction.[832]

Similarly, under the 'Chapter VII conception' of a referral under Article 13 (b), the legal basis of the ICC over a Head of State is the SC resolution referring the situation to the ICC. Due to their obligations under the UN Charter, UN Member States have to accept and carry out the decision of the SC taken under Chapter VII to grant jurisdiction to the ICC over a certain situation.[833] Immunities being a bar to ICC's exercise of jurisdiction, States have to remove the immunities of their officials in order to effectively accept and carry out the ICC's exercise of jurisdiction.[834]

Article 48 specifies that the SC may determine whether the actions required to carry out its decisions shall be taken by all the UN Member States or only by some of them. Both SC resolutions creating the *ad hoc* tribunals explicitly obliged all States to cooperate fully with the *ad hoc* tribunals. Thus, the SC unequivocally bound all UN Member States to accept and carry out the ICTY and ICTR's exercise of jurisdiction. However, it could have adopted another approach. It could have decided to oblige only the States over which the Tribunals were exercising jurisdiction. Moreover, the SC resolutions creating the *ad hoc* tribunals explicitly obliged every UN Member State to undertake any

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830 The constituent instruments of the ICTY and the ICTR have legal effect over all UN Member States; Akande, supra note 800, p. 417; Cryer et al., supra note 254, p. 552-553; and some argue that the SC decisions taken under Chapter VII are also binding States not party to the UN because of Article 2(6) of the UN Charter, see José Doria, Conflicting Interpretations of the ICC Statute - Are the Rules of Interpretation of the Vienna Convention Still Relevant? in Malgosia Fitzmaurice, Olufemi Elias, and Panos Merkouris, Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On (Martinus Nijhoff Publisher, 2010) p. 278-279; Prosecutor v. Blaskic, ICTY, Appeals Chamber, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, IT-95-14-AR108bis, 29 Oct. 1997 par. 26: the Appeals Chamber reaffirming the obligation of States to cooperate with the Tribunal states as follows: "This obligation is laid down in Article 29 and restated in paragraph 4 of Security Council resolution 827 (1993). Its binding force derives from the provisions of Chapter VII and Article 25 of the United Nations Charter and from the Security Council resolution adopted pursuant to those provisions."

831 Under Article 25 and 48 of the UN Charter, members must accept and carry out decisions of the SC taken under Chapter VII. See Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. the United Kingdom) (Provisional Measures) 1992 ICJ Reports 15, par. 39; Michael J. Matheson, United Nations Governance of Post conflict Societies, 95 American Journal of International Law 84 (2001); It may be asked whether the Security Council can waive the rights of immunity of UN third States parties; see Koller, supra note 797, p. 33-34; see also Akande, Akande, supra note 74, p. 628-631.

832 Akande, supra note 800, p. 417.

833 UN Charter, Article 25.

834 Akande, supra note 800, p. 417.

measures necessary under their domestic law to implement the provisions of the Statutes and to enforce any order to arrest and surrender an accused to the Tribunals.[835] Yet, it could have decided to only establish the tribunals without specifying that States were to cooperate with the tribunals and consequently take measures domestically to implement the resolutions and the orders of the tribunals. With such degree of precision regarding the obligations of all States to cooperate with the *ad hoc* tribunals, the SC clearly intended to waive the immunity of any officials from any UN Member States.

In contrast to the SC's *ad hoc* Tribunals the ICC does not necessarily benefit from the same Chapter VII powers.[836] The practice of the SC in referrals to the ICC demonstrates that the explicit obligation to carry out and cooperate has been restricted to the territorial State.[837] The referrals of Sudan and Libya oblige only these two targeted States "to cooperate fully" with the Court. If the official prosecuted is not acting on behalf of one of the targeted States or at least on behalf of a State party to the Rome Statute, then the high-ranking official may claim that Article 27 (2) is not applicable in its case. Thus, there is a conflict of norms that is unresolvable, if immunity is not waived.

4.3. The Rome Statute provision on immunity expresses customary international law

The 'universal jurisdiction conception' proceeds on the basis that Article 27(2) of the Rome Statute is declaratory of a rule of customary international law. The ICJ in the *Arrest Warrant Case* stated that "an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction." The ICC and Article 27(2) Rome Statute were cited by the 'World Court' as examples of this specific exception to the general rule on immunity.

If we can assert that Article 27 (2) codifies customary international law we definitely have an explicit exception to the rule on immunity. In this relationship of "rule-exception" there is simply an

835 See op. Par. 4 of the Security Council Resolution 827 (1993) of 25 May 1993: "Decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute;". See also Security Council Resolution 955 (1994) of 8 November 1994, establishing the ICTR, operative paragraph 2 which reads similarly.

836 See Prosecutor v. Charles Ghankay Taylor, Special Court for Sierra Leone, Appeals Chamber,. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 31 May 2004, par. 38.

837 SC Res. 1593, par. 1,2; SC Res. 1970, par. 5,6.

accumulation of norms.[838] The rule is carved out by the exception to the extent required to give it effect. Both norms continue to apply in their respective scope of application. The immunity of State officials is carved out to leave a place for prosecution by an international court. The ICC in its *Decision on the Failure by Malawi to Arrest and Surrender Al-Bashir* declared that "the principle in international law is that immunity of either former or sitting Heads of State cannot be invoked to oppose a prosecution by an international court."[839] The Pre-Trial Chamber stated that its reasoning applies to non-party States whenever the Court may exercise jurisdiction.[840] The normative power of the Court over the high-ranking official normally entitled to immunity does not arise from a waiver from the concerned State but from the exceptional customary right of "certain international criminal courts" to declare immunities irrelevant.

As a matter of principle, the exception to immunity *ratione personae* for proceedings before the ICC could simply reside in the court's legal status. The legal status of the ICC as an organ of the international community would allow it to overrule the immunity of State officials. According to this line of reasoning, the international nature of a certain criminal court is sufficient *per se* to make the plea of immunity *ratione personae* unavailable.[841] The Court's international nature would ensure that the exercise of jurisdiction does not clash with the principles underlying the immunity of State officials. One of the rationales of immunities is to ensure that a State does not sit in judgment of another State. Arguably, this *raison d'être* ceases to apply with international courts, as these are not organs of a particular State.[842] Indeed, the principle *par in parem non habet imperium* loses its significance when the jurisdiction over the acts of a sovereign State is not exercised by an equal sovereign State.[843] Accordingly, an international court cannot run counter to the principle of equality as it is not a State that is judging another State, but the international community.

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838 Pauwelyn, supra note 231, p. 162.If the two norms accumulate, they do not conflict. One form of accumulation that is particularly relevant for us, here, is when "one norm […] sets out a general rule and another norm […] explicitly provides for an exception to that rule". In such a case there is no conflict, but accumulation. In accordance with the principle of effectiveness the exception shapes the rule. Corfu Channel case, Judgment of April 9th, 1949, I.C. J. Reports 1949, p. 24.

839 Corfu Channel case, Judgment of April 9th, 1949, I.C. J. Reports 1949, p. 24, par. 36.

840 Corfu Channel case, Judgment of April 9th, 1949, I.C. J. Reports 1949, p. 24, par. 36.

841 See Gaeta, *supra note 428*, p. 322 : "the international nature of a criminal court constitutes per se a sufficient ground to assert the unavailability of personal immunities before those international bodies ".

842 Gaeta, supra note 428, p. 301-32; Prosecutor v. Taylor, Appeals Chamber, Decision on Immunity from Jurisdiction, Special Court for Sierra Leone, SCSL-2003-01-I, 31 May 2004.

843 ILC, Memorandum prepared by the Secretariat, Immunity of State officials from foreign criminal jurisdiction, 31 March 2008, p. 39-47, U.N. Doc. A/CN.4/596.

The first test to elucidate which court constitutes an international criminal court is whether the court is situated within the legal order of international law, rather than the legal order of any specific state. This test can be met by the possession under international law of distinct legal personality. This distinct legal personality is the legal status of the court. If the court is endowed with international legal personality distinct from a State or a group of States then it would be "truly international in nature".[844] A number of legal mechanisms can be used to establish a court of an international nature.[845] The criteria of international legal personality of an organization are generally considered to be as follows: an association of States equipped with organs; a distinction, in terms of legal powers and purposes, between the organization and its Member States; the existence of legal powers which can be made use of on the international plane.[846] When these criteria are fulfilled, the organization is considered to have its own personality which entails that it is a subject of international law with its own rights and duties and legal capacity.[847] The legal capacity to enter into agreements with other international persons governed by international law and an autonomous will distinct from that of its members are determinant in respect of immunity.[848] Indeed, it is these two criteria that boost the court from a horizontal to a vertical relationship with States.

An inquiry into the legal mechanism used to establish the ICC determines whether the ICC is autonomous and independent from its Member States.[849] The Rome Statute does not only establish a

844 Gaeta, supra note 428, p. 322.

845 These various legal mechanisms can vary from SC resolutions adopted under Chapter VII of the UN Charter, (e.g. ICTY, ICTR, STL, an agreement between the UN and a State, an agreement between another international organization and a State, an agreement between international organizations and an agreement between States; see also Williams, supra note 48, p. 212-213.

846 Brownlie, supra note 823, p 677; see also Draft Articles on Responsibility of International Organizations for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2011, vol. II, Part Two, art. 2(a); Reparations for injuries suffered in the service of the United Nations (Advisory opinion) 1949 ICJ Reports 174, the constitutive instrument is not determinative of the international organization possession of legal personality, regard should also be paid to the intention of the drafters of the constitutive instrument; see Jan Klabbers, An Introduction to International Institutional Law (Cambridge University Press, 2009), p. 52-7: for a more elaborated explanation of the theoretical debate underlying the possession of international legal personality.

847 Ibid.

848 See Taylor Decision on Immunity, Philippe Sands amicus curiae brief, page 32; Gaeta maintains that a criminal jurisdiction with an independent legal personality that protects universal value and punishes perpetrators of serious international crimes qualifies as an organ not of a State or a collection of states but of the international community. Gaeta, supra note 428, p. 321.

849 In Prosecutor v. Kaing Guek Eav, Pre-Trial Chamber, Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav Alias "Duch", Extraordinary Chambers in the Courts of Cambodia (ECCC), 002/19-09-2007-ECCC/OCIJ, par. 18-20, 4 December 2007; Prosecutor v. Ieng Sary, Pre-Trial Chamber, Decision on Ieng Sary's Appeal against the Closing Order, ECCC, 002/19-09-2007-ECCC/OCIJ, 11 April 2011, the ECCC referred to itself as an internationalized court functioning separately from the Cambodian court structure. However, the ECCC is established by

permanent international criminal jurisdiction, it is also the constitutive instrument of an international organization with an international legal personality.[850] Article 4 Rome Statute clearly establishes that "the Court shall have international legal personality". The International Court of Justice in *Advisory Opinion on Reparations for Injuries Suffered in the Service of the United Nations* found that "that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone".[851] The Rome Statute required that it be ratified by sixty states to enter into force.[852] At time of writing, the Statute has been ratified by 123 States. It may reasonably be claimed that 123 States represent the "majority of the members of the international community". Moreover, in the Negotiated Relationship Agreement between the ICC and the UN, the UN explicitly recognizes that "has international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes."[853] Thus, the ICC is an entity that possesses objective international legal personality and not merely personality recognized by its States parties alone. Moreover, under the 'universal jurisdiction conception', the jurisdiction of the ICC arises due to the nature of the relevant crimes. Therefore, the Court is only led by its core goal of putting an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole and not by the will of its States parties.[854]

A second element that might be required for a court to qualify as truly international in nature is that the court exercises jurisdiction over matters of concern to the international community as a whole. The 'universal jurisdiction conception' is based on this very idea. According to the Preamble of the Statute, the core goals of the Statute is to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, which "must not go unpunished". Furthermore Article 5 Rome Statute makes it clear that "[t]he jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole". The Rome Statute

the ECCC Law which is a domestic law. Even though there is a ECCC agreement between the UN and Cambodia, this document does not establish the ECCC. It only regulates the assistance of the UN to Cambodia. Thus the ECCC does not have an international legal personality which endows it with an entirely autonomous will from Cambodia. It is a tribunal established under national law operating with international assistance. See Williams, supra note 185, p. 298-299.

850 See Rome Statute, art. 4.

851 Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion: ICJ Reports 1949, p. 185.

852 Rome Statute, art. 126 (1).

853 Negotiated Relationship Agreement between the ICC and the United Nations of 4 October 2004, art. 2.

854 Rome Statute, preamb. par. 4, 5.

indeed is not a classical treaty with reciprocal obligations; rather it establishes an international regime where the common intention is in the interest of the international community as a whole.

One might point out that, if the international community decides to have a specific organ, it must express itself as such.[855] Otherwise, any criminal jurisdiction that has a legal personality under international law might claim and abuse this position in order to derogate from rules of international law such as immunity *ratione personae.* Two States can create criminal jurisdiction and assert themselves as guardians of the fundamental interests of the international community.[856] Robert Woetzel has written that a tribunal is international if it is "instituted by one or a group of nations with the consent and approval of the international community."[857] Woetzel adds that the international community must offer its "clear endorsement" of the tribunal and that approval "cannot be simply assumed".[858]

Due to the universal membership of the UN, an act undertaken by all the UN Member States is indeed what most represents the will of the international community.[859] The Appeals Chamber of the SCSL in the *Taylor Decision on Immunity* considered that the Chapter VII status of the Agreement establishing the SCSL made it "an expression of the will of the international community".[860] Furthermore, according to the SCSL the blessing it received from the SC made it "part of the machinery of international justice".[861]

According to Woetzel, if such an organization as the United Nations was "paralysed in its activity due to unforeseen circumstances or non-existent," the consent and approval of the international community could also be offered by a "combination of states that represent the 'quasi-totality of civilised nations'".[862] In the words of Kress, the ICC "can make a convincing claim to directly embody the "collective" will".[863] Undeniably, the ICC has a universal reach. The Statute has been negotiated at the universal level. The Rome Conference was organized and hosted by the UN and 160 States

855 Kress, supra note 178, p. 246-250.
856 Taylor Decision on Immunity, Philippe Sands amicus curiae brief, par. 78'; Akande, supra note 87, p. 418; Tunks, supra note 106, p. 665; Kress, supra note 172, p. 246.
857 Woetzel, supra note 83, p. 49; Heller, supra note 92, p.111.
858 Woetzel, supra note 83, p. 49; see also Heller, supra note 92, p. 111.
859 The SC when it acts under Chapter VII of the UN charter is, as the supreme organ of the UN, taking decisions that are deemed as the actions of all the UN Member States; UN Charter, Article 24.
860 Taylor Decision on Immunity, par. 38.
861 Ibid.
862 Woetzel, supra note 83, p. 49; see also Heller, supra note 197, p. 111.
863 Kress, supra note 178, p. 247.

participated to the drafting of the Statute. During a good part of the negotiations of the Rome Statute efforts were made to reach decisions by consensus.[864] The consensus could not be maintained,[865] but an overwhelming majority of the States approved the text of the Rome Statute.[866] It contains an open invitation to any State to adhere to it.[867] Furthermore, even though the ICC is not an organ of the UN, a Relationship Agreement between the International Criminal Court and the United Nations has been negotiated in accordance with Article 2 of the Rome Statute and General Assembly Resolution 58/79 of the 9th December 2003.[868] Finally, the referrals under Article 13 (b) not only make the universal applicability of the Rome Statute a reality but also further demonstrate the UN endorsement of the ICC.[869]

Drawing upon the examples of Nuremberg, Tokyo, ICTY, ICTR and the SCSL it is argued that customary international law provides that the immunity of State officials cannot be invoked to oppose a prosecution before a court of an international nature. The ICC presents itself as the paradigmatic example of a 'truly' international criminal court.

4.3.1. Self-serving reasoning?

The recognition that Article 27 (2) codifies customary international law serves the 'universal jurisdiction conception' to close the accountability loop which exists for perpetrators of international crimes. However, the crucial point remains. Is the exception for international criminal courts really established under international law or is it a travesty of law to avoid a conflict of norms? A distinguished commentator has advocated that the irrelevance of immunity *ratione personae* before the international criminal court is premised on what he coins as "modern custom."[870] Under this approach, which consists of focusing more on the *opinio juris* element of customary international law than on State practice, it is claimed that "a weighty case can be made for the crystallization of a customary

864 Olasolo, supra note 201, p. 17.
865 Seven States voted against the adoption of the Rome Statute.
866 The Rome Statute has been adopted by 120 States, signed by 139 States and at the time of writing ratified by 122 States.
867 At the time of writing, one hundred and twenty three States are party to the Statute. http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx
868 UN General Assembly, Relationship Agreement Between the United Nations and the International Criminal Court, 20 August 2004, UN Doc. A/58/874.
869 See also Decision on the Failure by Malawi to Arrest and Surrender Al-Bashir, par. 40.
870 Kress, supra note 178, p. 251.

international criminal law exception from the international law immunity *ratione personae* in proceedings before a judicial organ of the international community."[871]

However, it appears that not all States in the international community believe that Article 27 (2) is established in customary international law. Notwithstanding the United States' firm opposition to the ICC's exercise of jurisdiction over its current or former officials, [872] the practice of States party to the African Union (AU) appears to demonstrate that the customary status of Article 27(2) is hotly contested. [873] Following the issuance of an arrest warrant by the ICC for the President of Sudan, Omar Al-Bashir, the AU took a number of decisions calling upon its State parties, especially States party to the Rome Statute, not to arrest and surrender Al-Bashir.[874] The Al-Bashir arrest warrant emerged from a situation referred to the ICC under Article 13 (b) Rome Statute. The central dispute between the AU and the ICC is Al-Bashir's immunity as a Head of State which Al-Bashir and the AU opine protects heads of States not party to the Statute from ICC jurisdiction. At the 18th Ordinary Session of the Assembly of the AU, the AU Commission was requested to "consider seeking an advisory opinion from the International Court of Justice regarding the immunities of state officials under international law."[875] This request clearly expressed the belief that clarification was needed with regard to the applicability of Article 27(2) to States not party to the Rome Statute. However, almost a year later, the AU Assembly decided that "no charges shall be commenced or continued before any International

871 Kress, supra note 178, p. 254; Nonetheless, he remains duly cautious and acknowledges that the custom he believes to have come into existence is affected by a "relatively high vulnerability to change because the hard practice that contributed to its crystallization is fairly scarce".

872 See supra note 444; See also the Statement of the representative of Russia at Security Council, 7285th meeting, Security Council Working Methods, 23 October 2014, UN doc. S/PV.7285, p. 13, which seems to show that Russia adopts the same position.

873 African Union, Press Release No. 002/2012, 9 January 2012.

874 African Union, Assembly, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal, Doc. Assembly/AU/13(XIII), 3 July 2009, Assembly/AU/Dec.245(XIII) Rev. 1, par. 10; African Union, Assembly, Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/10(XV), 27 July 2010, Assembly/AU/Dec.296(XV), paras. 5-6; African Union, Assembly, "Decision on the Implementation of the Decisions on the International Criminal Court (ICC) Doc. EX.CL/639(XVIII)", 30-31 January 2011, Assembly/AU/Dec.334(XVI), par. 5; African Union, Assembly, Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Doc. EX.CL/670(XIX), 30 June-1 July. 2011 Assembly/AU/Dec.366(XVII), 30 June-1 July 2011, par. 5; Ext/Assembly/AU/Dec.1(Oct.2013), Decision on Africa's Relationship with the International Criminal Court (ICC), par. 10 (i).

875 Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the ICC, Doc, EX. EX.CL/710 (XX), Assembly /AU/Dec.397, XVIII, 29-30 January 2012, par. 10; the AU does not have the capacity to request Advisory Opinion to the ICJ, however, the General Assembly can see also Assembly/AU/Dec.419(XIX), p. 1 (par. 3), 15/16.7.2012; Under Article 96 of the UN Charter and Art. 65 of the Statute of the ICJ, only organs of the United Nations or UN specialized agencies may be authorised by the UN General Assembly to request advisory opinions.

Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office.“[876] In the same decision the Assembly voted that AU States parties to the ICC propose at the 12th session of the ICC Assembly of States Parties an amendment to Article 27 (2).[877] Finally, the AU intends to fast track the establishment a criminal section within the African Court of Justice and Human Rights - exercising competing jurisdiction with the ICC – which would grant immunity *ratione personae* to high-ranking state officials.[878] The *opinio juris* of States party to the AU, which includes States party to Rome Statute, shows that the customary nature of Article 27 (2) Rome Statute is seriously disputed.[879]

If the customary status of Article 27 (2) is not recognized, the conflict between the ICC's exercise of jurisdiction over a high-ranking State official not party to the Statute and the immunity of the lattter becomes genuine and the 'universal jurisdiction conception' offers no way to resolve it. Even the claim that the crimes of which the accused is charged are prohibited by *jus cogens* norms is to no avail. In *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* the ICJ clearly stated that the *jus cogens* nature of a norm cannot deprive a State from the procedural immunity it is entitled to under international law.[880] Thus, it seems that the superior hierarchy of *jus cogens* norms in

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876 Ext/Assembly/AU/Dec.1(Oct.2013), Decision on Africa's Relationship with the International Criminal Court (ICC), par. 10 (i).

877 Ext/Assembly/AU/Dec.1(Oct.2013), Decision on Africa's Relationship with the International Criminal Court (ICC), par. 10 (vi), (vii).

878 Assembly of the African Union, Decision on the Draft Legal Instruments Doc. Assembly/AU/8 (XXIII), 26-27 June 2014, Assembly/AU/Dec.529 (XXIII), par. 2 (2), Article 46A bis of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights reads as follows: "no charges shall be commenced or continued before the Court against any serving [AU] Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office." ; see also Ramona Pedretti, Immunity of Heads of State and State Officials for International Crimes (Martinus Nijhoff Publishers, 2015), p. 224-229.

879 Vienna convention, Article 31 (3) (b), Kress recognizes that Article 27 (2) establishment in customary international law is vulnerable. He adopts the modern custom theory to find that the irrelevance of immunity ratione personae before international tribunals is part of custom, and that the practice of the AU up to 2011 does not challenge the customary international law exception codified by Article 27 (2). Kress, supra note 178, p. 254-256. If it was established in customary international law, this subsequent state practice might evidence that some states want to modify the scope of this Article. See the ICJ Namibia Case, ICJ Reports 1971, 22: voting practice at the SC was found to have changed the Charter provision.

880 Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), 3 February 2012, Judgment, ICJ Report, par. 95: In Arrest Warrant par. 58, 78., the Court held, albeit without express reference to the concept of jus cogens, that the fact that a Minister for Foreign Affairs was accused of criminal violations of rules which undoubtedly possess the character of jus cogens did not deprive the Democratic Republic of the Congo of the entitlement which it possessed as a matter of customary international law to demand immunity on his behalf.

international law cannot be used in order to resolve the conflict with the immunity *ratione personae* of high-ranking State officials. Indeed, j*us cogens* norms and procedural immunities do not clash.[881]

If Article 27 (2) is not recognized as reflective of customary international law jurisdiction over high-ranking State officials from States not party to the Rome Statute cannot be exercised without breaching international law. Hence, only the SC is able, thanks to its Chapter VII powers, to waive the immunity of a high-ranking State official against the will of his state.

However, one should always bear in mind that immunity from jurisdiction does not mean impunity. Immunity *ratione personae* ceases when the high-ranking State official stops holding office. Subsequently, the official may claim immunity *ratione materiae* for the acts he or she committed on behalf of the State. Immunity *ratione materiae*, on the other hand, is a substantive immunity that exempts the official to whom it applies from all criminal responsibility for their official acts. In such cases one may claim that immunity *ratione materiae* is of no avail for prohibitions that are *jus cogens*. However, such a claim is not even necessary since it is uncontested that Article 27 (1) codifies customary international law.

4.4. The arrest and surrender of an official entitled to immunity to the ICC

The exercise of jurisdiction by international criminal courts over officials entitled to immunity is often separated from the cooperation of States to arrest and surrender those same officials. However, international criminal courts do not have their own enforcement authorities. As such, they rely on States to enforce their arrest warrants.[882] To use Antonio Cassese's analogy international tribunals are "like a giant without arms and legs - [they] need artificial limbs to walk and work. And these artificial limbs are state authorities. If the cooperation of states is not forthcoming, the [international tribunal] cannot fulfil its functions."[883] If States do not cooperate with the ICC by enforcing the arrest warrants

881 Arrest Warrant Case, par. 60.

882 They may also rely on peacekeeping forces, e.g of Resolution 1638 which included in the mandate of the United Mission in Liberia the apprehension of Charles Taylor; Security Council Resolution 1638 of 11 November 2005, the situation in Liberia, UN Doc. S/RES/1638; see also Security Council Resolution 2098 (2013) of 28 March 2013, enabling 'Offensive' Combat Force To 'Neutralize and Disarm' Congolese Rebels, Foreign Armed Groups, par 12, UN Doc. S/RES/2098.

883 Antonio Cassese, On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law, 9 European Journal of International Law 13 (1998).

of the Court, any exercise of its jurisdiction will remain a legal fiction.[884] In order to enforce the arrest warrant of the ICC, States must exercise jurisdiction over the relevant individual.

One of the distinguishing features of international crimes is that such crimes are often committed by State officials. In the case of war crimes, many of the perpetrators will have been acting as soldiers or officials exercising State authority.[885] The definition of torture in the Convention against Torture requires that the act be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[886] The chapeau of crimes against humanity requires a widespread or systematic attack against the civilian population.[887] Although the ICTY held that it is not required to prove that the crimes were related to a State policy, it recognized that "in the conventional sense of the term, they cannot be the work of isolated individuals alone."[888] The Rome Statute, for its part, in Article 7(2) (a) requires that the attack against any civilian population "must be pursuant to or in furtherance of a State or organizational policy."[889] Even though international crimes can be committed by non-State actors, the contextual elements and gravity of patterns of conduct that constitute international crimes make it more likely than not that they have been committed by individuals with access to the machinery or apparatus of the State.[890]

Notwithstanding that contextual element, the ICJ in the *Arrest Warrant Case* found that States violate their obligation under international law towards another State if they fail to respect the immunities of the latter State's officials.[891] The ICJ even cast doubt upon the issue of whether there is a specific exception to immunity *ratione materiae* for international crimes.[892] However, most international legal scholarship and jurisprudence considers that it is firmly established under customary international law that immunity *ratione materiae* is not available in proceedings concerning

884 Note that the ICC can also issue a summons under Article 58 (7) Rome Statute if it believes that it is sufficient to ensure the person's appearance.
885 Akande, supra note 74, p. 634 (2003).
886 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1.
887 See Rome Statute, art. 7; ICTY Statute, art. 5; ICTR Statute, art. 3.
888 Prosecutor v. Nikolic, ICTY, Trial Chamber, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, IT-94-2-R61, 20 October 1995, par. 26.
889 See Situation in Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Pre-trial Chamber, ICC-01/09-19, 31 March 2010, and dissenting opinion of Judge Hans-Peter Kaul.
890 ILC, Commentary to the Draft Code of Crimes Against the Peace and Security of Mankind (Part II), 2 Yearbook of the International Law Commission 103 (1991), Article 2, U.N. Doc. A/CN.4/SER.A/1991/Add.l (Part 2).
891 Arrest Warrant Case.
892 See supra note 794- 800 and accompanying text.

international crimes.[893] In contrast with the 'Al-Bashir saga', States failing to arrest Abdel Raheem Muhammad Hussein, Minister of National Defence in the Republic of the Sudan, did not invoke the immunity of the latter but their inability to take prompt action.[894]

Nonetheless, the confusion caused by the *Arrest Warrant Case's obiter dicta* is exacerbated by the paragraphs in SC Resolutions 1593 and 1970, referring the situations in Darfur and Libya to the ICC, by which the SC:

> *Decides* that nationals, current or former officials or personnel from a contributing State outside Sudan [the Libyan Arab Jamahiriya, in SC 1970] which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan [Libyan Arab Jamahiriya, in SC 1970] established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that State.[895]

These operative paragraphs clearly attempt to provide immunity for any State official outside of the referred State (and of States party to the Rome Statute) from the ICC's jurisdiction and from foreign domestic criminal jurisdiction.

The effects on the ICC of these 'immunity for peacekeepers' paragraphs will be discussed in the next chapter. Nevertheless, two aspects deserve attention as to immunity *ratione materiae*. First, if international crimes were within the scope of immunity *ratione materiae*, the SC would not have needed to 'decide' that current and former officials entitled to such immunity were subject to the 'excusive jurisdiction' of their States. Indeed, in these resolutions the SC attempts by using its Chapter VII powers to change the state of the international law on immunities. In other words, these paragraphs imply that by default the ICC had jurisdiction over these current or former officials.

Secondly, the use of 'exclusive jurisdiction' in the SC resolutions is rather disturbing as it attempts to once again create new law. The SC used similar language in SC Resolution 1487 which established a Multinational Force for Liberia but also decided that current or former officials or personnel from a contributing State "shall be subject to the exclusive jurisdiction of that contributing

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893 Pedretti, supra note 878, p. 307-308.

894 See Prosecutor v. Abdel Raheem Muhammad Hussein, ICC, Pre-Trial Chamber II, Decision on the cooperation of the Central African Republic regarding Abdel Raheem Muhammad Hussein's arrest and surrender to the Court, ICC-02/05-01/12-21, 13 November 2013; Prosecutor v. Abdel Raheem Muhammad Hussein, ICC, Pre-Trial Chamber II, Decision on the Cooperation of the Republic of Chad Regarding Abdel Raheem Muhammad Hussein's Arrest and Surrender to the Court, ICC-02/05-01/12-21, 13 November 2013; There is an uncertainty concerning the immunity of Ministers of Defence but it is mostly not understood to be *ratione personae*; See Pedretti, supra note 878, p. 41-45; see also supra note 788.

895 SC Res. 1593, par. 6; SC Res. 1970, par. 6.

State".[896] During that meeting Mexico, Germany and France abstained from voting in favour of the resolution despite their support for the Multinational Force on the basis that the 'immunity for peacekeepers' paragraph was not in accordance with international law and their domestic law.[897] Indeed, they contested that any State had 'exclusive jurisdiction' over their current or former officials or personnel. At the meeting on the adoption of SC Resolution 1593, France emphasized "that the jurisdictional immunity provided for in the text we have just adopted obviously cannot run counter to other international obligations of States and will be subject, where appropriate, to the interpretation of the courts of my country."[898] The obligations France referred to were those arising *inter alia* from the Geneva Conventions, the Convention against Torture and obviously the Rome Statute. Clearly, if one applies Article 103 UN Charter, the obligation of France arising from the SC Resolution prevails over its obligations under any other international agreement.[899] Thus, it is not international law on immunities that recognizes that immunity *ratione materiae* is a bar to foreign criminal proceedings even for international crimes but the SC resolutions providing for immunity in respect of specific operations established or authorized by the SC. However, as we will see in chapter 5, it is for the ICC to consider whether the immunity provided in these SC resolutions is an admissible bar to its jurisdiction.

As we have seen above, the ICJ also held in the *Arrest Warrant Case* that high-ranking State officials entitled to immunity *ratione personae*, enjoy full immunity from criminal jurisdiction and inviolability when travelling abroad. While the ICJ referred in *obiter dicta* to the unavailability of immunities in proceedings before certain international criminal courts, it did not address the issue of whether the same immunities are available when a State enforces an ICC arrest warrant.

The Rome Statute makes it clear that its States parties are under a general obligation to cooperate fully with the ICC in the investigation and prosecution of crimes within the jurisdiction of the Court.[900] However, while States parties are to comply with requests for arrest and surrender,[901] the

896 Security Council Resolution 1497, 1 August 2003, UN Doc. S/RES/1497, par. 7.
897 Security Council 4803rd meeting, 1 August 2003, UN Doc. S/PV.4803.
898 Security Council Security Council 5158th meeting, 31 march 2005, UN Doc. S/PV.5158
899 This would apply even if France had voted against the resolution, see Advisory Opinion, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports, p. 16, par. 116.
900 Rome Statute, art. 86.
901 Rome Statute, art. 59 (1) and 89 (1).

drafters of the Rome Statute restricted the discretion of the Court to issue requests for arrest and surrender of an official from a non-party State. Indeed, according to Article 98 (1) Rome Statute:

> The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

The purpose of this provision is to restrict the ICC's power to request a State to act inconsistently with its obligation under international law. Indeed, there was an uncertainty in Rome at the time of drafting the Statute as to whether international law provided an exception to immunities of high-ranking State officials when States had to enforce the decision of an international criminal court.[902] Since a solution needed to be found in order to conclude the drafting of the Statutes, States left the issue of the existence of a conflict to the Court.[903] Article 98 of the Rome Statute leaves to the Court the competence to determine, as the case arises, whether international law provides an exception to State and diplomatic immunity and whether it should obtain a waiver of immunity. Thus, if the ICC assesses that a request for surrender or assistance forces the requested State to violate its obligation under international law towards a third State, the ICC has to either first obtain a waiver of immunity from the third State or not issue the request.[904]

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902 Prost and Kress, supra note 198; Kress, supra note 178, p. 232-234.

903 Ibid..

904 See Gaeta, supra note 428, p. 327-329; see also Arrest Warrant Case, par. 70, 71, about the issuance and circulation of an arrest warrant against a person entitled to immunity and inviolability under international law; However, Prost and Kress say that the notion of third State as used in this Article is referring to "States other than the requested State" and not to "State not party to the treaty". Indeed, this has been the interpretation favoured by the doctrine even if Article 2(1)(h) of the Vienna Convention on the Laws of Treaties states that "third State" means a State not a party to the treaty. This interpretation has been favoured since other Articles of the Statute make explicit references to "a State not party to the Statute" and not to third State, e.g. Article 87(5); Prost and Kress, supra note 198, p. 1606; Kress, supra note 178, p. 232-234; In addition to the immunity from criminal jurisdiction of State officials of third States, Article 98 (1) is also directed at the inviolability of diplomatic premises. Admittedly, States parties to the Rome Statute have lifted the immunity from criminal jurisdiction and the inviolability normally enjoyed by their officials under international law with regards to the ICC and to other States party to the Rome Statute enforcing a request for arrest and surrender. However, such renouncement to immunity of State officials does not entail that they lifted their right to inviolability of diplomatic premises, as contained in Article 22 of the Vienna Convention on Diplomatic Relations; Jens Iverson, The Continuing Functions of Article 98 of the Rome Statute 4 Gottingen Journal of International Law 140-141 (2012); Contrarily to Article 27 of the Rome Statute for the immunity of State officials no provision in the Statute forces a State to relinquish its immunity of property. For this reason, when Article 98 (1) refers to third States in the context of the immunity of State property it refers to the immunity of any State other than the requested State.

It is generally accepted that States party to the Rome Statute have waived their immunity in respect of the ICC and of other States parties enforcing an ICC request for arrest and surrender.[905] By implementing the Rome Statute in their national law and in particular the norm contained in Article 27(2) of the Rome Statute[906] States have renounced invoking the immunity of their high-ranking State officials before the ICC. Further, this waiver extends to foreign national authorities enforcing an ICC arrest warrant.[907] Accordingly, a State party to the ICC can arrest and surrender a high-ranking official of another State party to the ICC without violating the immunity from criminal jurisdiction and the inviolability normally enjoyed by the official under international law.

On the other hand, States not party to the Rome Statute have not renounced to the immunity and inviolability their officials enjoy under international law. Thus, their high-ranking officials would be immune from prosecution before international criminal courts – if one considers that such immunity exists – and even more so from arrest and surrender by a foreign national authority. Let us now see how both 'conceptions' interact with the latter impediment. I will first assess the reasoning of the 'Chapter VII conception' (section 4.4.1.) and then turn to the 'universal jurisdiction conception' (section 4.4.2.).

4.4.1. Security Council decided immunity is waived towards all

It appears accepted that the immunity *ratione personae* of high-ranking State officials under customary international law is a bar to any act of authority from a foreign domestic court. Thus, the arrest and surrender to the ICC of foreign officials is apparently in conflict with this rule of customary international law. A clear exception to this rule is that the State of the official has waived its immunity. Ratification of the Rome Statute is considered to imply that the State waived the immunity of its officials with respect to the ICC and States enforcing its arrest warrant. This waiver appears explicit since Article 98 (1) Rome Statute speaks only of "the State or diplomatic immunity of a person or

905 Gaeta, supra note 428, p. 328; Prost and Kress, supra note 198.

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

907 Gaeta, supra note 428, p. 325-327; Akande, supra note 800, p. 422; Schabas, supra note 162, p. 73-74; Wirth, supra note 826, p. 452-454; See the United Kingdom's International Criminal Court Act (2001), art. 23 (1) which reads: "[a]ny state or diplomatic immunity attaching to a person by reason of a connection with a state party to the ICC Statute does not prevent proceedings… [related to arrest and surrender] in relation to that person".

property of a third State". Third States – States not party to the Rome Statute - may issue a waiver of the immunity of the State officials under an arrest warrant and thus the other States may arrest and surrender the official without acting inconsistently with their obligations under international law.

The 'Chapter VII conception' of a referral under Article 13 (b) is that the legal basis of the Court's exercise of jurisdiction stems directly from the UN Charter. The SC resolution referring the situation to the ICC and its language specify the scope of the obligations States have towards the Court. A referral under Article 13 (b) by the SC with an explicit obligation "to cooperate fully with the Court" has been interpreted as implying that the immunity *ratione personae* of the high-ranking State official from the targeted State is waived for proceedings before the Court. In such a situation, the immunity of the high-ranking State official concerned is impliedly waived by the effect of the Chapter VII powers of the SC and Article 27(2) Rome Statute. Through the same logic – using effective interpretation – the immunity of the State officials from the concerned States is also considered waived in respect of States enforcing an arrest warrant issued by the ICC. Thus, once again, the apparent conflict can be avoided, thanks to the Chapter VII powers underlying the SC referral. Let us see how this interaction of norms functions in the case of the *ad hoc* tribunals.

In the case of the ICTY and ICTR, it is generally recognized that since the SC ordered all States to comply with requests from the *ad hoc* tribunals, including requests for arrest and surrender, immunities were no bar to national authorities enforcing the *ad hoc* tribunals' requests.[908] Article 48 of the UN Charter specifies that the SC may determine whether the actions required to carry out its decisions shall be taken by all the UN Member States or by some of them. Both SC resolutions creating the *ad hoc* tribunals explicitly obliged all States to cooperate fully with the tribunals and to undertake any measures necessary under their domestic law to implement the provisions of the Statutes.[909]

The State from which the official enjoys the right to immunity must, via its obligation under the UN Charter, accept and carry out the decision of the *ad hoc* tribunal to prosecute the indicted

908 SC Res. 827, par. 2; SC Res. 955, par. 2; See Danesh Sarooshi, The Statute of the International Criminal Court, 48 International and Comparative Law Quarterly 390 (1999).

909 See SC Res. 827, par. 4: "Decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute;"

individual.[910] It is implied that the State from which the official enjoys the right to immunity has by its ratification of the UN Charter accepted that the SC, when acting under Chapter VII, can take actions that affect its sovereignty, including waiving the immunity of its officials.[911] Accordingly, UN Member States have indirectly consented to remove their immunity when the SC creates an international tribunal.[912] Since the immunity of officials is considered waived, any UN Member State can arrest and surrender any official of a UN Member State accused by SC-created tribunals without violating its obligation under international law.

The two SC referrals at the time of writing – SC Resolutions 1593 and 1970 – merely refer the situations of Darfur and Libya to the ICC and oblige the respective territorial State to "cooperate fully with and provide any necessary assistance to the Court and the Prosecutor".[913] By virtue of Article 25 UN Charter, this obligation to cooperate has been construed as an implicit waiver of immunity.[914] An obligation to cooperate with the Court implies that the concerned State must take domestic measures to eliminate any procedural impediments to the Court's exercise of jurisdiction. In order to comply with the provisions of the Statute, especially the ICC decisions to issue arrest warrants and orders to enforce them, a State has no choice but to waive the immunity of its officials with regard to this jurisdiction. Since the Court lacks a direct enforcement mechanism it has to rely on the cooperation of States in order to exercise jurisdiction and fulfil its mandate. Thus, the argument goes, an obligation under Chapter VII to cooperate with the Court even without explicitly containing the obligation to waive the

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910 The Chapter VII obligation to accept and carry out the arrest and surrender of those indicted by the *ad hoc* tribunals is understood in the literature from two different standpoints. The first line of reasoning is the one described in the main text. The second line of reasoning takes another stance: instead of relying on a waiver of immunity it relies on a hierarchy of obligations for the UN Member States. See Gaeta, supra note 800, p. 989: "they lay down the obligation of all UN Member States to cooperate with the International Tribunals, in particular by executing the Arrest warrants. This obligation, being based on a Security Council binding decision made under Charter VII of the UN Charter, by virtue of Article 103 of the UN Charter takes precedence over customary and treaty obligations concerning personal immunities." See also Gaeta; supra note 428, p. 326-327. Indeed, on the one hand, UN Member States must, via their obligations under the UN Charter, carry out the orders of the *ad hoc* Tribunals to arrest and surrender an indicted official; and, on the other, States are obliged to respect the immunity from criminal jurisdiction and the inviolability enjoyed by the officials under international law. In such a conflicting situation, the obligation under the Charter would prevail, via Article 103 of the UN Charter, over the obligation to respect the immunity of a foreign State official. The first line focuses on the obligation of the State from which the official derives his immunity, while the second line focuses on the obligations of the arresting and surrendering state. As for the SC referrals to the ICC, the second line of reasoning is of limited assistance in such situation since only the territorial state is obliged to carry out the resolution.

911 UN Charter, Article 2(7); It may be asked whether the Security Council can waive the rights of immunity of UN third States parties. See Koller, supra note 797, p. 33-34; see also Akande, supra note 74, p. 628-631.

912 Akande, supra note 800, p. 417.

913 SC Res. 1593, par. 1, 2; SC Res. 1970, par. 5, 6.

914 *Decision on the Cooperation of the DRC Regarding Al-Bashir's Arrest and Surrender*, par. 29.

immunity of State officials implies a waiver of immunity. Such waivers, if they are not to be futile, must extend to any proceedings related to the ICC's exercise of jurisdiction including States enforcing ICC arrest warrants.[915]

However, such a conflict-avoidance technique has not been accepted by all. Although under an ICC arrest warrant the President of Sudan, Omar Al-Bashir, traveled through many States party to the Rome Statute without fear of being arrested and surrendered to the ICC by any of its hosts, e.g. DRC, Kenya, Chad, Djibouti and Malawi.[916] To stress its derision the AU issued decisions in which it called upon its members not to enforce the arrest warrant against Al-Bashir.[917] In 2012 the AU Commission issued a press release stating:

> "The Security Council has not lifted President Bashir's immunity either; any such lifting should have been explicit, mere referral of a "situation" by the SC to the ICC or requesting a state to cooperate with the ICC cannot be interpreted as lifting immunities granted under international law. The consequence of the referral is that the Rome Statute, including Article 98, is applicable to the situation in Darfur."[918]

Indeed, the SC could have decided in its resolutions referring the situation to the ICC to explicitly lift immunities.[919] If it had done so no ambiguity would have remained as to the relevance of immunities from the execution of an ICC arrest warrant. [920] Thanks to this ambiguity, the AU called on its Member

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915 Akande, supra note 361, p. 333.

916 See e.g. Prosecutor v. Al-Bashir, ICC, Pre-Trial Chamber I, Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya, ICC-02/05-01/09, 27 August 2010; Prosecutor v. Al-Bashir, ICC, Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad, ICC-02/05-01/09, 27 August 2010; Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti, ICC-02/05-01/09, 12 May 2011.

917 Assembly/AU/Dec.245(XIII) Rev.1, par. 10; The African Union has decided that African states will not cooperate in the arrest and surrender of Bashir, See Max du Plessis and Christopher Gevers, Making amend(ment)s: South Africa and the International Criminal Court from 2009 to 2010, South African Yearbook of International Law, (2010), 1; see also Max du Plessis and Christopher Gevers, Balancing Competing Obligations: The Rome Statute and AU Decisions, Institute for Security Studies, paper 225, October 2011.

918 African Union Commission, Press Release Nº 002/2012, On the Decisions of Pre-Trial Chamber I of the International Criminal Court (ICC) Pursuant to Article 87 (7) of the Rome Statute on the Alleged Failure by the Republic of Chad and the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of President Omar Hassan Al-Bashir of the Republic of the Sudan, Addis Ababa, 9 January 2012, p. 2.

919 Rosa Aloisi, A Tale of Two Institutions: The United Nations Security Council and the International Criminal Court, 13 International Criminal Law Review 154 (2013).

920 Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the ICC, Doc, EX. EX.CL/710 (XX), Assembly /AU/Dec.397 (XVIII, 29-30 January 2012, par. 10.

States not to enforce the arrest warrants against Al-Bashir. Can the 'Chapter VII conception' tackle this challenge?

4.4.1.1. Conflict between SC referrals and other treaty obligations

In situations of competing treaty obligations for States party to the Rome Statute and party to another treaty which commands them not to comply with their obligation under the Rome Statute, a classical norm conflict appears to arise. Although it may be contended that the SC does not need to explicitly waive the immunities of high-ranking officials of the targeted States as this is a necessary implication of the obligation to cooperate fully with the court, States party to the AU also find themselves under the obligation to retain the immunity of the Head of State of Sudan.[921] Let us remind ourselves that the AU has decided that "AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan." [922]

The resolution referring Libya and Sudan to the ICC decided that only the targeted State was to "cooperate fully with the Court". States not party to the Statute (apart from Libya and Sudan) had no obligation under the Statute.[923] Thus, other States are either obliged by the Statute because of their status as States parties or, if they are not party to the Statute, simply invited to cooperate with the Court in the fulfilment of its mission.[924] However, none of these obligations – except in the case of the targeted States – arise from the UN Charter.

Nevertheless, the SC could have adopted the referrals under Chapter VII of the UN Charter to impose an obligation to cooperate with the Court on all UN Member States, including States not party

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921 Assembly/AU/Dec.296(XV); The same was done for the arrest warrant against Gaddafi, Assembly/AU/Dec.366(XVII), par. 6. for a comprehensive record of AU actions see Manisuli Ssenyonjo, The Rise of the African Union Opposition to the International Criminal Court's Investigations and Prosecutions of African Leaders, 13 International Criminal Law Review 385 - 428 (2013).

922 Assembly/AU/Dec.245(XIII) Rev.1, par. 10; Schabas notes that 'with respect to Member States of the African Union that are also States Parties to the Rome Statute, there would appear to be a conflict between the binding obligations imposed by the Rome Statute and the binding obligations imposed by the Decisions of the African Union' Bill Schabas, Obligations of Contracting Parties to the Genocide Convention to implement arrest warrants issued by the International Criminal Court, UCLA online forum.

923 Still, the SC Resolutions "urge[d] all States and concerned regional and other international organizations to cooperate fully" with the Court.

924 Non-party States may decide to cooperate with the Court on an *ad hoc* basis, as foreseen in Article 87(5)(a) of the Statute.

to the Statute.[925] In such cases the obligation to cooperate would have stemmed directly from the UN Charter. In case of conflict with another treaty that obliges a State not to arrest and surrender officials to other jurisdictions the obligation under the Charter would prevail, via Article 103 of the UN Charter, over the obligation not to arrest and surrender an individual to the ICC.[926]

However, the above reasoning cannot be so easily applied to Al-Bashir since only Sudan's obligation to cooperate stems from the UN Charter.[927] Nonetheless, the Pre-Trial Chamber in *Decision on the Cooperation of the DRC Regarding Al-Bashir's Arrest and Surrender* considered that since "the SC acting under Chapter VII, has implicitly lifted the immunities of Omar Al-Bashir by virtue of resolution 1593 (2005), the DRC cannot invoke any other decision, including that of the African Union, providing any obligation to the contrary." [928]

Akande argues that every Member State of the UN is bound to accept the decision of the SC to refer a situation to the ICC. [929] Though the SC may choose not to oblige all UN members to "fully cooperate" with the Court; they remain nonetheless obliged to accept that the SC decided to apply the Rome Statute to the targeted State, including Article 27 (2). [930] Thus, Akande frames the referrals in terms of obligations which create the possibility of invoking Article 103 UN Charter in the case of norm conflict. [931] Accordingly, UN members' obligation to accept that the immunities of officials from the targeted States are lifted prevails over their obligation to retain the immunities of Heads of States arising from another treaty. This seems to have been the reasoning of the Pre-Trial Chamber while issuing *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al-Bashir's Arrest and Surrender to the Court* – albeit it was not phrased in clear terms.

When a norm conflicts with a UN Charter obligation, including obligations arising from a SC resolution under Chapter VII, the former is set aside to the extent of its inconsistency with the latter. The State facing such a norm conflict "is merely prohibited from fulfilling an obligation arising under

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925 See e.g. supra note 368.
926 UN Charter, art. 103 reads 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."
927 Du Plessis an Gevers, supra note 917, p. 16.
928 *Decision on the Cooperation of the DRC Regarding Al-Bashir's Arrest and Surrender*, par. 31
929 Akande, supra note 361, p. 347-348.
930 Akande, supra note 361, p. 347-348.
931 Akande, supra note 361, p. 347-348.

that other norm."[932] Thus, the conflict is resolved without any wrongfulness due to the breach of the conflicting norm.[933]

4.4.2. The customary nature of the exception extends to the artificial limbs

The 'universal jurisdiction conception' of a referral under Article 13 (b) is that this mechanism triggers the *jus puniendi* of the international community. The Rome Statute was designed by the international community as a codification of the most serious crimes of concern which must not go unpunished. Although the international community assumed a legislative role and entrusted the Court with the right to adjudicate the crimes it prescribed, it left jurisdiction to enforce to States. States, when enforcing an ICC arrest warrant, simply act as the 'artificial limbs' of the Court.

Although the arrest and surrender has to be operated by national authorities, this exercise of jurisdiction to enforce is done on behalf of the *jus puniendi* entrusted to the ICC.[934] Formally, it can be argued that, jurisdiction to adjudicate the crimes committed by the high-ranking State official is not exercised by national authorities. This does not mean that the immunity and inviolability of a high-ranking State official is not a bar to such an act of State.[935] However, States enforcing an ICC arrest warrant are not acting contrary to *par in parem imperium non habet*. It is the ICC - an international criminal jurisdiction representing the "collective will" - that adjudicates the conduct of the high-ranking State official. States, in other words, provide what is lacking to the ICC: a police force that can

932 See ILC, Report of the Study Group of the ILC on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 13 Avril 2006, UN Doc. A/CN.4/L.682**,** par. 334

933 Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 59 provides that the said Draft Articles are without prejudice to the UN Charter. Therefore, while complying with its obligation under the Charter a State cannot be called to account for violations of other norms. However, see also ILC, Report of the Study Group of the ILC on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 13 Avril 2006, UN Doc. A/CN.4/L.682, par. 343 states that "In any case, this leaves open any responsibility that will occur towards non-members as a result of the application of Article 103." The AU Charter makes only to the UN Charter, among the objectives the AU is to "encouraging cooperation, taking due account of the Charter of the United Nation", AU Charter, art. 3(e); the AU Protocol Relating to the Establishment of the Peace and Security Council of the African Union, adopted on 9 July 2002, reads in art. 4: "The Peace and Security Council shall be guided by the principles enshrined in the Constitutive Act, the Charter of the United Nations and the Universal Declaration of Human Rights". See chapter 5, section 'Is the ICC bound by Security Council resolutions? Or, are they simply bond together?'; see also Du Plessis an Gevers, supra note 917, p. 4-5.

934 Kress, supra note 178, p. 257.

935 The ICJ in Certain Questions of Mutual Assistance in Criminal Matters (Djibouti vs France), ICJ Reports 2008, par. 170, held: "the determining factor in assessing whether or not there has been an attack on the immunity of the head of State lies in the in the subjection of the latter to a constraining act of authority."

arrest and surrender the suspected criminals the Court seeks. The Pre-Trial Chamber in *Decision on the Failure of Malawi to Arrest and Surrender Al-Bashir* has indeed declared that

> "when cooperating with this Court and therefore acting on its behalf, States Parties are instruments for the enforcement of the *jus puniendi* of the international community whose exercise has been entrusted to this Court when States have failed to prosecute those responsible for the crimes within this jurisdiction."[936]

Under the same assumption as to proceedings before an international criminal court, it is contended that immunities of state officials under international law do not apply when a State is enforcing an arrest warrant issued by the ICC. The customary exception to the rule on immunity is extended to the enforcement apparatus of this institution entrusted with the *jus puniendi* of the international community. The States party to the Rome Statute's acts of arrest and surrender would be "part of a vertical cooperation regime which in turn constitutes the external part of those international proceedings."[937]

In terms of norm conflict a simple accumulation of norms does not seem to arise. While the ICJ did state that immunities are no bar to prosecution when "certain international criminal courts" exercise jurisdiction, it did not explicitly extend this exception to States executing an arrest warrant from these courts. The solution to the apparent conflict is however provided by effective interpretation of the alleged customary international law exception – codified in Article 27 (2) - to immunities under international law for proceedings related to an international criminal jurisdiction. If we consider that customary international law provides an exception to immunity for international criminal proceedings, the principle of effectiveness warrants that this exception to immunity extends to States' measures of arrest and surrender to the international criminal courts. Such a construction renders the application of Article 27 (2) fully operational. Indeed, no immunities could be raised when the ICC seeks through its 'artificial limbs' to exercise jurisdiction; this would apply equally to all, including high-ranking officials of a State not party to the Rome Statute.

However, it has been contended that to extend Article 27 (2) to immunities of third States from arrest and surrender by foreign national authorities would deprive Article 98 of its content.[938] One of

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936 Decision on the Failure by Malawi to Arrest and Surrender Al-Bashir, par. 46.
937 Kress and Prost, supra note 198, p. 1613.
938 To render Article 98(1) completely inapplicable runs counter to a canon of treaty interpretation advancing that each provision contained in a treaty should be interpreted in good faith Vienna convention, Article 31. However, as

the rules when using effective interpretation is that it should not render another norm meaningless.[939] Kress, who participated in the drafting of the provision, enlightens the discussion by informing us that at the Rome Conference no decision could be reached on the immunity of State officials from national courts enforcing an arrest warrant.[940] Thus, the drafters left the issue to be decided by the Court. Arguably, the relevance of Article 98 with regard to immunity from arrest and surrender to the ICC may have become obsolete. Indeed, the Statute has been ratified by an ample majority of States and several national legislations implementing the Statute do not distinguish between immunities of officials of States parties and non-party States.[941] Moreover, Article 98 (1) is not rendered completely inapplicable. In addition to the immunity from criminal jurisdiction of State officials of third States, Article 98 (1) is also directed at the inviolability of diplomatic premises, as contained in Article 22 of the Vienna Convention on Diplomatic Relations.[942] Finally, Article 98 (2) remains relevant for 'host State agreements' and 'status of forces agreements'.[943] Thus, it may be argued that Article 98 Rome Statute is not fully deprived of its content.

Despite the availability of all these tools to avoid a genuine conflict with the immunity of State officials from foreign domestic criminal proceedings, it appears that many States, including States party to the Rome Statute, disagree with the ICC on the content of Article 98(1) and the scope of immunity *ratione personae* under customary international law. Article 98 (1) tacitly recognizes that the

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explained in supra note 260, in addition to the immunity from criminal jurisdiction of State officials of third States, Article 98 (1) is also directed at the inviolability of diplomatic premises. Admittedly, States parties to the Rome Statute have lifted the immunity from criminal jurisdiction and the inviolability normally enjoyed by their officials under international law with regards to the ICC and to other States party to the Rome Statute enforcing a request for arrest and surrender. However, such renouncement to immunity of State officials does not entail that they lifted their right to inviolability of diplomatic premises, as contained in Article 22 of the Vienna Convention on Diplomatic Relations. See also Dire Tladi, The ICC Decisions on Chad and Malawi On Cooperation, Immunities, and Article 98, 11 Journal of International Criminal Justice 207-209 (2013).

939 Pauwelyn, supra note 231, p. 250.

940 Kress, supra note 178, p. 232.

941 See e.g. the Mauritius International Criminal Court Act of 2011 (in particular section 14), the Kenya International Crimes Act of 2004 (in particular section 62), the Trinidad and Tobago International Criminal Act of 2006 (in particular section 66); see also the South African Implementation of the Rome Statute Act of 2002. See also Tladi, supra note 938; contra Liu Daqun, Has Non-Immunity for Heads of State Become a Rule of Customary International Law?, in Bergsmo and Ling, supra note 178, p. 67.

942 See also Kress, supra note 178, p. 232-233, 236-239 ; Prost and Kress, supra note 198, 1607, both delegates at the Rome Conference writes that "it was the inviolability of diplomatic premises that was at the heart of the debate on Article 98 para. 1"; See also Iverson, supra note 904.

943 Rome Statute, art. 98(2) The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender." David Scheffer, Article 98(2) of the Rome Statute: America's Original Intent, 3 Journal of International Criminal Justice 333 (2005).

ICC might first need to seek a waiver before issuing a request for arrest and surrender of an official entitled to immunity *ratione personae*.[944] This article, as Kress observed is "a remarkable decision by states Parties to entrust the Court with the power to make a decision about the existence or non-existence of 'legal obligations [of those states] under international law with respect to the state or diplomatic immunity of a person or property'"[945] From the serious challenges AU States have posed to the ICC, it might indeed be advisable for the Court to reconsider whether its States parties have a legal obligation under international law with respect to the immunity of high-ranking officials of States not party to the Rome Statute. It may moreover, be asked whether the 'universal jurisdiction conception' has the legal tools to resolve a conflict with a contradicting obligation arising from another treaty.

4.4.2.1. Conflict between Rome Statute and other treaties

In situations where a State party is requested by the ICC to enforce an arrest warrant and is also obliged under another treaty not to comply with the ICC's requests, the State party appears to be put in a norm conflict situation.[946] As pointed out above, such a scenario occurred in the *Al-Bashir Case*.[947] In *Decision on the Failure of Malawi to Arrest and Surrender Al-Bashir*, Pre-Trial Chamber I considered that since it was established under customary international law that no immunity existed for proceedings related to an arrest warrant by the ICC, "[t]here is no conflict between Malawi's obligations towards the Court and its obligation under customary international law; therefore, Article 98(1) of the Statute does not apply."[948] Simply, the Pre-Trial Chamber considered that the AU obligation was invalid – as it (in the opinion of the ICC) incorrectly held that immunity existed under customary international law - and thus did not fit within the situations foreseen in Article 98 (1).[949]

944 Daqun, supra note 941, p. 66.
945 Kress, supra note 169, p. 234.
946 Schabas, supra note 922.
947 See supra note 874.
948 Decision on the Failure by Malawi to Arrest and Surrender Al-Bashir, par. 43.
949 Decision on the Failure by Malawi to Arrest and Surrender Al-Bashir, par. 37 ; see Kiyani, supra note 810, p. 506, criticizing the court for assuming the right to declare an other international organization act as of no legal force; it may be argued that the decision was illegal since the AU decisions, an international organization which is made of non-party States and some States party to the ICC, might be viewed as an inter se agreement incompatible with the very object and purpose of the Rome Statute. The ILC Commentary on the Vienna Convention on the Law of Treaties stated that "an inter se agreement incompatible with the object and purpose of the treaty may be said to be impliedly prohibited by the treaty."; Reports of the Commission to the General Assembly, Draft Articles on the Law of Treaties with commentaries, Yearbook of the International Law Commission, 1966, vol. II, p. 235. The object of the Rome Statute is "ending impunity". The nature of the obligation that States party have under Article 89 (1) is not of a reciprocal character but of an integral one. Thus, the obligation cannot be deviated without the agreement of all States party to the Rome Statute.

Although the ICC offered to Malawi to avoid the norm conflict it was facing by considering that AU obligation not to arrest and surrender Al-Bashir did not have any legal force, the State of Malawi is still in an unresolvable norm conflict. Either it decides to follow the ICC's requests and breach its obligation towards the African Union (with the counter-argument that the AU resolutions are invalid) or it decides to abide by the AU resolution (with the counter-argument of Article 98 (1)) and breach its obligation to arrest and surrender to the ICC. Since none of these obligations is hierarchically superior to the other there is no easy way out to this norm conflict. An opinion of the ICJ on this question would be welcomed.

Conclusion

The Prosecutor of the ICC has recently announced that she will 'hibernate' investigative activities in Darfur.[950] This decision was admittedly taken because the Prosecutor faced a lack of cooperation from the government of Sudan but also from all other States.[951] The Prosecutor also addressed the SC, blaming it for its absence of responses to the numerous calls to take actions in order to ensure States' compliance with the Court requests for cooperation.[952] This decision arose in the context of a recent call by the then Argentinian Presidency of the SC to establish an effective follow-up mechanism for the SC referrals to the Court.[953] During this series of meetings the Russian representative said:

In other words, the States party to the Rome Statute who are part of the AU should have attempted to stop the Assembly from imposing obligations on them requiring not to cooperate with the Court. André de Hoogh, Regionalism and the Unity of International Law from a Positivist Perspective, European Society of International Law, Conference Paper Series No. 3/2012, (2012), p. 18; only Chad entered a reservation to the obligation not to cooperate in the arrest warrant against Bashir. However, Botswana, South Africa, and Zambia express their disconcert with respect to this obligation as well. According to Article 18 Vienna Convention on the Law of Treaties, "[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when it has expressed its consent to be bound by the treaty." Article 41 also states that "Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: […] does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole." Pauwelyn, supra note 231 p. 306-307; However, Article 98 (2) shows that ICC States party are permitted not to arrest and surrender nationals of third States sent on their territory on official missions, if they have ratified an international agreement providing so.

950 Office of the Prosecutor, Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005), 12 December 2014.

951 Office of the Prosecutor, Twentieth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to the UNSC 1593 (2005), 15 December 2014.

952 Office of the Prosecutor, Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005), 12 December 2014.

953 Letter dated 8 October 2014 from the Permanent Representative of Argentina to the United Nations addressed to the Secretary-General, 8 October 2014; See also Security Council, 7285th meeting, 23 October 2014, S/PV.7285, S/PV.7285 (Resumption 1)

> In our view, the reasons for States' lack of willingness to cooperate with the ICC to a large extent lie within the Rome Statute itself, as well as with the Court's accumulated practice, including on bringing to justice senior public officials of States. For example the Court's interpretation of the immunity of these individuals has been somewhat ambiguous."[954]

Clearly, the Russian representative was pointing to the various AU resolutions not to cooperate with the Court in response to the *Decision on the Failure of Malawi to Arrest and Surrender Al-Bashir.* This lack of cooperation with the arrest warrant of Al-Bashir shows that the international community, including States party to the Rome Statute, disagrees with the ICC's interpretation of its Statute. It seems that the reaction of *inter alia* the AU to *Decision on the Failure of Malawi to Arrest and Surrender Al-Bashir* has prompted the Court to change its reasoning with respect to the effect of Article 27 Rome Statute towards non-party States. Thus, in *Decision on the Cooperation of the DRC Regarding Al-Bashir's Arrest and Surrender* Pre-Trial Chamber II took a more considered approach by putting the emphasis on the effect of Article 25 and 103 of the UN Charter. This change of mind might be said to prove that the ICC has understood that the 'universal jurisdiction conception' undermines its objective of universality.

I have shown in the preceding chapters that the 'universal jurisdiction conception' can put forward plenty of legal arguments to avoid most of the normative conflicts arising from an exercise of jurisdiction over nationals and territories neither party to the Statute nor consenting to the ICC's jurisdiction. However, despite the principled approach of treating cases alike, the legal tools available to the 'universal jurisdiction conception' seem to be on the edge of the international legal system as it currently stands. Even if the 'fight against impunity' is one of the overarching *raisons d'être* of the ICC, over-stretching legal reasoning to attain this goal risks provoking strong contestation that might wreck the whole ICC project. One of the goals of the ICC is to support international criminal law, including compliance with its norms.[955] Lack of cooperation is undoubtedly one of the most serious challenges the Court is facing. The refusal to cooperate with the Court obviously affects its effectiveness.[956] Ending impunity and strengthening deterrence against the commission of international crimes can only be achieved if international criminal law and the institutions that have been established to enforce it are seen as legitimate.

954 See also Security Council, 7285th meeting, 23 October 2014, S/PV.7285.
955 Yuval Shany, Assessing the Effectiveness of International Courts (Oxford University Press, 2014), p. 227.
956 Ibid., p. 141.

There are certainly many ways to define legitimacy. Nonetheless, one widespread method is to focus on the process by which rules are created.[957] Avoiding and resolving normative conflicts between the ICC's exercise of jurisdiction over nationals and territories neither party to the Statute nor consenting to its jurisdiction and other norms of international law can be seen as legitimate if the legal authority of the tool used is accepted as law.[958] According to Thomas Franck, "[l]egitimacy is that attribute of a rule which conduces to the belief that it is fair because it was made and is applied in accordance with 'right process."[959] There are four paradigms, in Frank's view, that legitimate the international system of rules and rulemaking: that states are sovereign and equal; that their sovereignty can only be restricted by consent; that consent binds; and that states, in joining the international community, are bound by the ground rules of community.[960]

Customary international norms can be formed without the explicit consent of each individual State. These norms, nonetheless, may be deemed to result from the implicit consent of States to participate in the international community.[961] It is widely held that customary international law requires an assessment of both practice and *opinio juris*, e.g. the acceptance of that practice as law.[962] As Chinkin and Boyle observed, "[w]hen courts ignore the traditional requirements for customary international law or fail to subject them to any strict scrutiny they risk giving tacit weight to what has been called 'the rush to champion new rules of law'."[963] It is one of my conclusions that the 'universal jurisdiction conception' and to a certain extent the 'modern' approach to customary international law may discredit the norms enshrined in the Rome Statute through this 'rush to champion new rules of law'.

957 Thomas M. Franck, Fairness in international law and institutions (Oxford University Press, 1998)

958 Franck, supra note 957, p. 26.

959 Thomas M. Franck, The Power of Legitimacy among Nations (Oxford University Press, 1990) Note that Franck adds that "Each rule, whether a law of the state or a customary law or treaty of the international community, is likely to be perceived as more or less legitimate in accordance with four variables. These four indicators of legitimacy are: determinacy, symbolic validation, coherence, and adherence." Franck, supra note 957, p. 30.

960 Franck, supra note 957, p. 29

961 Karol Wolfke, Custom in Present International Law (Martinus Nijhoff Publishers, 1993), p. 160-168; Grigory Tunkin, Theory of International Law (Harvard University Press, 1974), p. 123; For a relaxed version see Gerald Gray Fitzmaurice, The Foundations of The Authority of International Law and The Problem of Enforcement, 17 Modern Law Review 8 (1956); Franck, supra note 959, p. 190 : "this capacity of custom to bind non-acquiescent states is even more dramatic evidence that obligations are perceived to arise in the international community, as an incident of a State's status as a member of the community."

962 See ILC, Special Rapporteur Michael Wood, Second Report on Identification of Customary International Law, UN Doc. A/CN.4/672, 22 May 2014, par 28.

963 Alan Boyle and Christine Chinkin, The Making of International Law (Oxford University Press, 2007), p. 285.

States that have ratified the Rome Statute may 'contract out' inter se of certain norms of international law. For instance, the crimes defined within the Rome Statute are 'for the purpose of this Statute'. The law of the Statute thus becomes the *lex specialis* the Court is supposed to apply. However, in their treaty relations States "cannot contract out of the system of international law."[964] The Rome Statute's sweeping application and interpretation as being applicable to all has been decried as not being in accordance with the 'right process'. Hence, the refusal of its State parties to comply with the Court's requests to arrest and surrender Al-Bashir. Legitimacy exerts a pull towards compliance and in turn provides legitimacy to international courts.[965] For these reasons, I believe that the 'universal jurisdiction conception' should not be used to explain what an Article 13 (b) referral is, what its effects are and what it should be.

This is not to say that the 'Chapter VII conception' does not face other legitimacy problems. However, the legal authority of the SC to refer a situation to the ICC seems to be an issue that is no longer open to contestation. While it has been claimed that the SC should be more explicit in its referrals about the immunity of heads of States, the power to remove such immunities appears to be included in the wide array of measures it can take under Article 41 UN Charter. The 'Chapter VII conception' has proved to offer ways of avoiding and resolving norm conflicts that are in accordance with contemporary international law. However, the reach of that 'conception' might be limitless. In the next chapter, we will address where the Chapter VII powers end when the SC refers a situation to the ICC. To properly understand the relationship between the SC and ICC I believe it is enlightening to ask ourselves: what if Article13 (b) did not exist?

964 Pauwelyn, supra note 231, p. 37.
965 Shany, supra note 955, p. 155-157.

5. If Article 13 (b) did not Exist…

This study has shown that a 'universal jurisdiction conception' of Article 13 (b) is not founded under current international law and that the 'Chapter VII conception' appears to evince a more plausible legal foundation for the Court's exercise of jurisdiction over nationals and territories neither party to the Statute nor consenting to its jurisdiction. However, the 'Chapter VII conception' still gives rise to some indeterminacy as to the role of the SC within the ICC structure. If the 'Chapter VII conception' is fully stretched there would be no need for Article 13 (b) or 16 Rome Statute.[966] Put simply, the Statute could say that its jurisdictional rules are without prejudice to the powers of the SC under Chapter VII of the UN Charter.

It is generally asserted that the Rome Statute offers to the SC the trigger mechanism provided in Article 13 (b). As stated in the introduction to this thesis, Condorelli and Villalpando qualified Article 13 (b) as a 'gift' to the SC.[967] Similarly, Article 16 provides the SC with the possibility to stall the jurisdiction of the ICC "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". The Rome Statute is said not to extend nor limit the powers of the SC.[968] As Condorelli and Villalpando have emphasized "*ce qu'il lui serait d'ailleurs impossible!*"[969] Since the drafting of the ILC Statute for an International Criminal Court, the rationale for enabling the SC to trigger the Court's exercise of

966 Kevin John Heller has asked whether the SC, acting under Chapter VII, could refer a situation to the ICC if Article 13 (b) did not exist. Kevin Jon Heller, Can the Security Council Implicitly Amend the Rome Statute? Opinio Juris, blog post, 15 January 2013, retrieved from http://opiniojuris.org/2013/01/15/can-the-security-council-implicitly-amend-the-rome-statute/ ; see also Jan Wouters and Jed Odermatt, Quis custodiet consilium securitatis? Reflections on the law-making powers of the Security Council, in Vesselin Popovic and Trudy Fraser, The Security Council as Global Legislator (Routledge, 2014), p. 79.

967 Condorelli and Villalpando, supra note 6.

968 Franklin Berman, The Relationship between the International Criminal Court and the Security Council, in von Hebel et al., supra note 324, p. 176; Vera Gowlland-Debbas, The Functions of the United Nations Security Council in the International Legal System, in Michael Byers, The Role of International Law in International Politics: Essays in International Relations and International Law (Oxford University Press, 2000), p. 298; Neha Jain, A Separate Law for Peacekeepers, 16 European Journal of International Law 253 (2005); Luigi Condorelli and Salvatore Villalpando, Les Nations Unies et les juridictions pénales internationales, in Jean-Pierre Cot et al., La Charte des Nations Unies : Commentaire Article par Article, (Economica, 2005), p. 229; However, see Andreas Zimmermann, The Creation of a Permanent International Criminal Court, 2 Max Planck Yearbook of United Nations Law 236 (1998): "It is worth noting that the powers of the Security Council to act under Chapter VII of the Charter have thereby for the first time been limited in an international instrument since the Security Council would eventually by virtue of Article 16 of the Statute of the ICC be forced to renew any such request for deferral but could not provide for such a referral sine die."

969 Condorelli and Villalpando, supra note 968, p. 229; see also Gowlland-Debbas, supra note 968, p. 298.

jurisdiction was to spare it the need to continuously establish other *ad hoc* tribunals having the same jurisdiction *ratione materiae* and *temporis* as the projected ICC.[970] Crawford, speaking as the Chairman of the ILC Working Group stated:

> it would be most undesirable if the Security Council were compelled, owing to the absence of a provision such as that which appeared in Article 23, paragraph 1 [similar to Article 13 (b) Rome Statute], to create further *ad hoc* courts, as it had been forced to do at great expense in the case of the former Yugoslavia.[971]

The same conviction was expressed in Rome: Article 13 (b) would obviate the need to create new *ad hoc* tribunals.[972] What seems to transpire from the various debates on the inclusion of a referral mechanism for the SC is that if this crucial 'window' was not inserted into the Statute the SC would have to create new *ad hoc* tribunals.[973] In other words, it could not refer a situation to the ICC, even if it used its Chapter VII to do so. This position seems at odds with the extraordinary power the SC is acknowledged to possess under Chapter VII to actually 'create' criminal jurisdictions and design the structures that will exercise these criminal jurisdictions. Indeed, it has also been argued that the SC's power under Chapter VII can override,[974] if not overwrite, the Rome Statute.[975]

In this concluding chapter I will first do an excursus on the various resolutions of the SC which either attempted to trump the provisions of the Rome Statute or to misuse the powers it has under

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970 ILC, Summary record of the 2361st meeting, p. 229, par. 78; see also Summary record of the 2329th meeting, Comment Crawford, A/CN.4/SR.2329, p. 5, par. 31; Summary record of the 2333rd meeting, A/CN.4/SR.2333, p. 30-31: "Otherwise, what would happen if, in several years' time, the painful events in the former Yugoslavia were to repeat themselves in some part of the world and the statute drafted by the Commission could not be applied because the State concerned had not recognized the court's jurisdiction in accordance with one or the other of the wordings of Article 23 of the statute (Acceptance by States of jurisdiction over crimes listed in Article 22)? Would the Commission not be discredited if the Council was again required to draft a new statute to deal with that particular situation, which the statute prepared by the Commission was unable to resolve?"; Summary record of the 2356th meeting, A/CN.4/SR.2356, p. 192, par. 69; 2359th meeting, p. 215, par. 32; 2360th meeting, p. 221, par. 33; same reasons were expressed in Rome, see Summary records of the plenary meetings, Statement of UK, p. 67, par. 38; Statement of Sweden, p. 67, par. 55; Brazil statement, p. 76, par. 47; Ireland Statement, p. 97, par. 17; Statement Slovenia, p. 207, par. 55; Statement Norway, p. 207, par. 55; Statement Malawi, p. 207, par. 62; Statement Canada, p. 208, par. 66; Statement China, p. 209, par. 65; Statement Italy, p. 210, par. 92; Statement Spain, p. 212, par. 7.

971 ILC, Summary records of the meetings of the forty-sixth session, Summary record of the 2361st meeting, Yearbook of the International Law Commission (1994), p. 229, par. 78, A/CN.4/SER.A/1994.

972 See Summary records of the plenary meetings and of the meetings of the Committee of the Whole Vol II, Statement of UK, p. 67, par. 38; Statement of Sweden, p. 67, par. 55; Brazil statement, p. 76, par. 47; Ireland Statement, p. 97, par. 17; Statement Slovenia, p. 207, par. 55; Statement Norway, p. 207, par. 55; Statement Malawi, p. 207, par. 62; Statement Canada, p. 208, par. 66; Statement China, p. 209, par. 65; Statement Italy, p. 210, par. 92; Statement Spain, p. 212, par. 7.

973 ILC, Summary record 2360th meeting, comment Crawford.

974 Gowlland-Debbas, supra note 968, p. 298L

975 Stefan Talmon, Security Council Treaty Action, 62 Revue Hellénique de Droit International 65-116 (2009).

Chapter VII. Secondly, we will see that the word 'situation' as defined in the Rome Statute appears to be different from what the SC refers as situations. Thirdly, the question of whether the SC has the power to curtail or expand the ICC's jurisdiction when it triggers its jurisdiction will be addressed. Finally, we will see that, arguendo, the SC can bend the Rome Statute when it refers a situation to the Court and that this could pose a problem as to the lawful establishment of jurisdiction.

5.1. The SC and the ICC relationship: an *'amour impossible'*

To date the SC has used the two channels listed in the Rome Statute in a dubious manner. From the early days of the ICC's existence the SC adopted two resolutions invoking Article 16 Rome Statute. Both were critically considered by some representatives as attempts to amend the Statute.[976] On the insistence of the United States, the SC through Resolutions 1422 and 1487, requested the ICC not to investigate or prosecute any peacekeeper from States not party to the Rome Statute, and expressed its "intention to renew […] the request[s] under the same conditions each 1 July for further 12-month periods".[977] The resolutions were met with great criticism and even deemed illegal by many since they did not invoke any specific threat to international peace and security justifying the use of Chapter VII and Article 16 Rome Statute.[978]

Almost two months after renewing Resolution 1422 through Resolution 1487 the SC adopted Resolution 1497 where, acting under Chapter VII, it 'decided' in paragraph 7 that contributing States to the Multinational Force in Liberia have exclusive jurisdiction over the acts of their personnel, unless the contributing state is a party to the Rome Statute or has explicitly waived its exclusive

976 Statements of Representatives of Fiji, Ukraine, Canada, Colombia, Samoa, Malaysia, Germany, Syrian Arab Republic, Argentina, Cuba (SC Res. 1422,; UN SCOR, 57th Sess., 4568th mtg., UN Doc. S/PV.4568); Statement of the Secretary General, New Zealand, Jordan, Switzerland, Liechtenstein, Greece, Islamic Republic of Iran, Uruguay, Malawi, Brazil, Trinidad and Tobago, Argentina, South Africa, Nigeria, Pakistan, Netherlands, France, Syrian Arab Republic (SC Res. 1487, supra note 4; UN SCOR, 58th Sess., 4772nd mtg., UN Doc. S/PV.4772).

977 Security Council Resolution 1422, UN Doc. S/RES/1422 (2003) (hereinafter SC Res. 1422); Security Council Resolution 1487, UN Doc. S/RES/1487 (2003) (hereinafter SC Res. 1487).

978 Carsten Stahn, The Ambiguities of Security Council Resolution 1422, 14 European Journal of International Law 85-104 (2003); Jain, supra note 968; Marc Weller, Undoing the Global Constitution: UN Security Council Action on the International Criminal Court, 78 International Affairs 693 (2002); Dominic McGoldrick, Political and Legal Responses to the ICC, in McGoldrick et al., supra note 687 at 415–22; Orakhelashvili, supra note 401, p. 161; supra note 976 for statements of representatives on the adoption of the resolutions.

jurisdiction.[979] It is not clear how this last resolution fits within the regime of the ICC as it is not in the nature of a request under Article 16; actually it does not even attempt to be.[980] The purpose of Resolution 1497 is more specifically to permanently shield interested States contributing to the Multinational Force in Liberia from the jurisdiction of other States and ultimately from the ICC.[981]

In order to placate the United States, the 'immunity for peacekeepers' paragraph was re-used in the referrals of the situations in Darfur, Sudan and Libya to the ICC.[982] The same paragraph also appeared in the draft resolution to refer the situation in Syria.[983] Each of these resolutions raised issues as to the legality of the resolution under the Charter but also as to whether it conflicted with the Rome Statute.[984] Indeed, in each one of them the SC is clearly trying to tailor the jurisdiction of the Court, under the premise of its Chapter VII powers.[985] While this is provided under Article 16 Rome Statute for a limited period of time, the 'immunity for peacekeepers' paragraph inserted in the referrals the SC attempted to exclude some groups from the 'situation'. This not only affects Article 27 (1) Rome Statute,[986] under which the "Statute shall apply equally to all persons", but also appears to modify the definition of 'situation'

979 Security Council Resolution 1497, UN Doc. S/RES/1497 (2003), par. 7. The Multinational Force in Liberia was established by the same resolution; see also section 'The arrest and surrender of an official entitled to immunity to the ICC ' of this thesis on the effect of this resolution over immunity ratione materiae.

980 Jain, supra note 968, p. 247-248.

981 UN Doc. S/PV.4803, See Statement of France and Germany; Zappala argues that the SC resolution 1497 is not addressed to the ICC because Liberia was not a State party to the ICC, Salvatore Zappalà, Are Some Peacekeepers Better Than Others? UN Security Council Resolution 1497 (2003) and the ICC, 1 Journal of International Criminal Justice 674 (2003); However, Liberia ratified the Rome Statute on 22 September 2004, and therefore the ICC could exercise jurisdiction over acts committed in its territory from the entry into force of the Statute.

982 SC Res. 1593, par. 6; SC Res. 1970, par. 6. Note that par. 6 of SC Resolution 1970 does not refer any more to peacekeeping missions but to operations established or authorized by the SC.

983 Draft Resolution S/2014/348 vetoed by China and Russian Federation, 22 may 2014; Moreover, in all these resolutions, the SC required that no UN funds could be used in connection with the referrals, which is ordering the UN General Assembly not to contribute to the financial scheme provided in Article 115 (b) Rome Statute. Moreover, the United Nations and the ICC, however, agreed that 'the conditions under which any funds may be provided to the Court by a decision of the General Assembly of the United Nations pursuant to Article 115 of the Statute shall be subject to separate arrangements'; Negotiated Relationship Agreement between the ICC and the United Nations of 4 October 2004, art. 13; see Condorelli and Ciampi, supra note 362, p. 594.

984 The representative of Argentina referring to the resolution put forward the SC in the attempt to refer the situation in Syria, but also mentioning resolution 1593 and 1970, argued that: 'the Security Council does not have the power to declare an amendment to the Statute in order to grant immunity to nationals of States non-parties who commit crimes under the Statute in a situation referred to the Court." Security Council, 7180th meeting, 22 May 2014, UN Doc. S/PV.7180.

985 Scheffer, supra note 690, p. 90.

986 Aly Mokhtar, The Fine Art of Arm-Twisting: The US, Resolution 1422 and Security Council Deferral Power under the Rome Statute, 3 International Criminal Law Review 324 (2003); See also Chapter 4 of this thesis.

5.2. Refer a 'situation'

In a decision unrelated to a SC referral but issued after SC Resolution 1593, ICC Pre-Trial Chamber I stated that a situation is defined by "territorial, temporal and possibly personal parameters."[987] It has been asked whether the Court's reference to 'possibly personal parameters' indicates that a referring entity could exempt some individuals from the ICC jurisdiction.[988] However, the Court was not implying that cases could be selected by the referring entities. Rather, the Court was inferring that a situation is typically territorially conceived.[989] At the time of writing, all the situations referred to the Court or initiated by the prosecutor *proprio motu* were defined by the territory where the crimes were occurring.[990] The two situations where the prosecutor *proprio motu* sought authorization to conduct an investigation concerned 'the situation in Kenya' and the 'situation in Cote d'Ivoire'.[991] The self-referrals of Uganda, DRC, Central African Republic (I and II)[992] and Mali referred to the situation occurring in their respective territories. The two SC referrals are also territorially focused. Although some of the self-referrals tried to indicate to the prosecutor who should be tried by the Court,[993] the real

987 In Prosecutor v. Lubanga Dyilo, ICC, Pre-Trial Chamber I, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, 24 February 2006, par. 21; the Court also said in Situation in the Democratic Republic of the Congo, ICC, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Corr, 17 January 2006, par. 65: "[s]ituations, […] are generally defined in terms of temporal, territorial and in some cases personal parameters".

988 Mark Klamberg, Evidence in International Criminal Trials: Confronting Legal Gaps and the Reconstruction of Disputed Events (Martinus Nijhoff Publishers, 2013), p. 229.

989 As to the understanding of situation as being primarily territorially conceived, see Andreas Müller and Ignaz Stegmiller, Self-Referrals on Trial: From Panacea to Patient, 8 Journal of International Criminal Justice 1273 (2010).

990 See also Rod Rastan, Situation and Case: Defining the Parameter, in Carsten Stahn and Mohamed M. El Zeidy, The International Criminal Court and Complementarity: From Theory to Practice (Cambridge University Press, 2011), p. 426.

991 Situation in the Republic of Cote d'Ivoire, ICC, Pre-Trial Chamber Corrigendum to ''Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote d'Ivoire'', ICC-02/11-14-Corr, 15 November 2011; Situation in the Republic of Kenya, Pre-Trial Chamber, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, 31 March 2010.

992 See referral of the Central African Republic, annexed to the Situation in the Central African Republic, ICC, Decision Assigning the Situation in the Central African Republic II to Pre-Trial Chamber II, ICC-01/14-1-Anx1, 18 June 2014. See also ICC OTP, Statement by the ICC Prosecutor, Fatou Bensouda, on the referral of the situation since 1 August 2012 in the Central African Republic, 12 June 2014).

993 The letter of referral submitted by CAR specifically requested the Prosecutor to open an investigation into this situation with a view to determining whether Mr. Patassé, Mr. Bemba, Mr. Koumtamadji alias Miskine or others, should be charged with these crimes. See Prosecutor v. Bemba, ICC, Pre-Trial Chamber III, Decision on the Admissibility and Abuse of Process Challenges, ICC-01/05-01-08, 24 June 2010, par. 14; See also ICC Press Release: President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC

basis of the situation referred were that crimes within the jurisdiction of the Court were being committed within their territory during a certain period.

The example of Uganda's letter of referral to the Prosecutor of the "situation concerning the Lord's Resistance Army [LRA]" is also instructive.[994] Initially, the Prosecutor responded favorably to the tailored referral by Museveni, emphasizing that the "key issue will be locating and arresting the LRA leadership" as if the referral did not concern crimes committed by others than the LRA.[995] However, the Prosecutor retracted his initial position by averring that "the scope of the referral encompasses all crimes committed in Northern Uganda in the context of the ongoing conflict involving the LRA."[996] Thus, other parties to the conflict with the LRA were also subject to investigation and prosecution before the ICC.

When a situation is referred to the Court there is, nevertheless, the possibility that a situation taking place in one country extends beyond its borders.[997] In such a setting, the crimes committed could still fall within the jurisdictional parameters of the Court, if it was committed by nationals of a State Party or a State accepting jurisdiction of the Court under Article 12(3). If not, the crimes exceed the personal parameters of the situation.[998] That appears to be the correct meaning of what the Court implied when it stated that a situation is defined by "territorial, temporal and possibly personal parameters."[999]

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994 ICC Press Release, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC; See also Cryer, supra note 401, p. 212.

995 ICC Press Release, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC

996 Prosecutor v. Joseph Kony et al., ICC, Pre-Trial Chamber II, Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53, ICC-02/04-01/05-68, 2 February 2005, par. 5; See also Statement by Luis Moreno-Ocampo, Prosecutor of the ICC - Informal meeting of Legal Advisors of Ministries of Foreign Affairs, 24 October 2005, p.7.

997 Rastan, supra note 990, p. 427; giving the example of the situation of Darfur spilling over in Chad as possibly requiring a new situation to be triggered.

998 The recent discussions concerning a referral of the situation concerning the Islamic State shows that there is still confusion with whether referrals can be territorial or personal. In the SC meeting where such referral was discussed many states referred to the referral of the situation in Syria and Iraq, or to the referral of the situation Syria, with a declaration under Article 12 (3) Rome Statute from Iraq to accept the jurisdiction of the ICC. Thus showing that the referral of the situation in one country could be limited by the territorial boundaries of a State. See Security Council 7420th meeting , 27 March 2015, Un Doc. S/PV.7420; see also Carsten Stahn, Why the ICC Should Be Cautious to Use the Islamic State to Get Out of Africa: Part 1, EJIL Talk, blog post, 3 December 2014, retrieved at http://www.ejiltalk.org/why-the-icc-should-be-cautious-to-use-the-islamic-state-to-get-out-of-africa-part-1/ ; Elinor Fry, The ICC's Problematic Jurisdiction over Foreign IS Fighters. Center for International Criminal Justice, blog post, 10 January 2015, retrieved at http://cicj.org/2015/01/the-iccs-problematic-jurisdiction-over-foreign-islamic-state-fighters/

999 Prosecutor v. Lubanga Dyilo, ICC, Pre-Trial Chamber I, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, 24 February 2006, par. 21.

During the drafting of the Statute, the word 'situation' was expressly adopted in order to avoid 'cases' be referred to the Court.[1000] Even the word 'matter' was considered "too specific for the independent functioning of the Court." [1001] While it appears that a State cannot circumscribe the jurisdiction *ratione personae* of the Court when it refers a situation, can the SC under Chapter VII refer 'a situation in which one or more of such crimes [as referred in Article 5 Rome Statute] appears to have been committed', but exclude peacekeepers from this jurisdiction? It seems that the Prosecutor is not convinced that Article 103 could have set aside the particular sections of the Rome Statute for peacekeepers from a State not party to the Rome Statute. In its third report to the SC pursuant to Resolution 1970, the Office of the Prosecutor correctly affirmed that it "does not have jurisdiction to assess the legality of the use of force and evaluate the proper scope of NATO's mandate in relation to UNSC resolution 1973."[1002] Indeed, the crime of aggression has not entered into force and is thus not within the jurisdiction of the Court to investigate allegations related to the commission of this crime. The Office of the Prosecutor continued and affirmed "[t]he Office does have a mandate, however, to investigate allegations of crimes by all actors''.[1003]

Article 13 (b) provides that the SC can refer to the Prosecutor a situation in which one single crime within the jurisdiction of the Court appears to have been committed. However, according to the

1000 The ILC, in its Draft Statute, "understood that the Security Council would not normally refer to the court a 'case' in the sense of an allegation against named individuals. Article 23, paragraph 1, envisages that the Council would refer to the court a 'matter', that is to say, a situation to which Chapter VII of the Charter applies. It would then be the responsibility of the Prosecutor to determine which individuals should be charged". ILC 1994 Final Report, par 44. See also Discussion Paper, Bureau, UN Doc. A/CONE183/C.1/L.53; See also Schabas, commentary, p. 297; See also Sharon A. Williams and William A. Schabas, Article 13, in Triffterer, supra note 198, p.568. Zutphen Draft Article 45[25]; Article 25, A/AC.249/1997/L.8/Rev.1; Silvia Fernandez de Gurmendi, The Role of the Prosecutor, in Lee, supra note 158, p. 180.

1001 Yee, supra note 158, p. 148.

1002 Office of the Prosecutor, Third Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1970 (2011), par. 53.

1003 Office of the Prosecutor, Third Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1970 (2011), par. 54; in the same vein see Decision to Issue an Arrest Warrant against Al-Bashir, par. 36; see also Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and AH Muhammad Al Abd-Al Rahman ("AH Kushayb"), ICC, Pre-Trial Chamber I, Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, ICC-02/05-01/07-l-Corr, par. 16; see also Decision to Issue an Arrest Warrant against Al-Bashir, par. 45: "by referring the Darfur situation to the Court, pursuant to Article 13(b) of the Statute, the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the rules as a whole."

Statute, the SC cannot refer a case.[1004] How can both of these potentially conflicting principles be reconciled? In *Mbarushima Challenge to Jurisdiction* ICC Pre-Trial Chamber I held that

> a referral cannot limit the Prosecutor to investigate only certain crimes, e.g. crimes committed by certain persons or crimes committed before or after a given date; as long as crimes are committed within the context of the situation of crisis that triggered the jurisdiction of the Court, investigations and prosecutions can be initiated.[1005]

Thus, the fact that it appears that a crime within the jurisdiction of the Court has been committed gives the right to a State party to the Rome Statute or to the SC, acting under Chapter VII, to refer a situation to the Prosecutor. However, the crime is taken as one element of the 'situation of crisis' that is referred. A 'case' may emerge only after the Prosecutor requests the issuance of an arrest warrant or a summons to appear following an investigation into a 'situation'.[1006] In the footnote to the quote above it was specified, mentioning the *Decision to Issue an Arrest Warrant against Al-Bashir*, "that the referring party (the Security Council in [the situation of Darfur]) when referring a situation to the Court submits that situation to the entire legal framework of the Court, not to its own interests".[1007]

While it appears that it is the opinion of the Court that when the SC refers a situation to the ICC, this situation will be governed by the statutory framework provided for in the Statute, it is also important that the Court constrains its exercise of jurisdiction to crimes that are sufficiently linked to the original situation that constituted a threat to international peace and security. This is not to say that the ICC cannot exercise jurisdiction over individuals that were not committing crimes at the time of the SC resolution. The Court must nevertheless be cautious in not extending the temporal parameters of the situation to events that are not sufficiently linked to the situation of crisis that the SC qualified as a threat to international peace and security. Otherwise, the SC referral could turn out to be a quasi-

1004 See Situation in the Democratic Republic of the Congo, ICC, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Corr, 17 January 2006, par. 65, "Cases, which comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects, entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear."

1005 Prosecutor v. Callixte Mbarushimana, ICC, Pre-Trial Chamber I, Decision on the ''Defence Challenge to the Jurisdiction of the Court'', ICC-01/04-01/10-451, 26 October 2011, par. 27.

1006 See Democratic Republic of the Congo, ICC, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101-tEN-Corr, 17 January 2006, par. 65; See also Hector Olasolo, Essays on International Criminal Justice (Hart Publishing, 2012), p. 42-43.

1007 Prosecutor v. Callixte Mbarushimana, ICC, Pre-Trial Chamber I, Decision on the ''Defence Challenge to the Jurisdiction of the Court'', ICC-01/04-01/10-451, 26 October 2011, fn. 41.

permanent measure while Chapter VII of the Charter envisages actions with respect to particular situations.[1008]

As we have seen, SC referrals equate to quasi-legislative measures since they impose in some cases new crimes to be applied to individuals and territories of States neither party to the Rome Statute nor consenting to the ICC jurisdiction. If the Court overextends the temporal parameter of the situation, the substantive limits the Charter imposes on the SC when it 'legislates' will consequently be jeopardized. The same holds true for abstract or general referrals such as, for instance, a referral of all crimes of terrorism. Leaving aside (until the next section) the question of whether the SC could require the ICC to apply a definition of terrorism that could for instance be annexed to the referral, some acts of terrorism may amount to war crimes or crimes against humanity as defined in the Rome Statute.[1009] However, a SC referral to the ICC of all crimes of terrorism, without any territorial parameters, would indeed constitute a general and abstract situation incompatible with, on the one hand, the substantive limits set by the Charter on the SC and, on the other hand, the referral scheme provided by the Rome Statute. While the SC might show some 'self-restraint' and not adopt such 'ultra innovative' referral, it may nevertheless be asked whether the ICC would be bound to abide by it, even if it contradicts its Statute.

5.3. Is the ICC bound by Security Council resolutions? Or, are they simply bound together?

The SC has the power under Chapter VII to create *ad hoc* tribunals which act as its subsidiary organs and determine their jurisdiction. These measures are taken under Article 41 UN Charter and are formally labeled enforcement measures. While SC referrals to the ICC are also enforcement measures under Article 41 they operate under another framework. SC referrals do not transform the ICC into a subsidiary organ to which the SC has delegated its Chapter VII powers. The obligation of the referred State to accept the jurisdiction of the Court over its territories and nationals despite the lack of explicit consent derives from the Chapter VII nature of the SC referral. Likewise, the obligation to comply with ICC requests emanates from the Chapter VII powers of the SC resolution obliging it to cooperate with the Court. However, the right of the ICC to exercise jurisdiction over these non-party States comes

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1008 See section 2.3.6 of this thesis.

1009 Antonio Cassese, Terrorism as an International Crime, in Andrea Bianchi, Enforcing International Norms against Terrorism (Hart Publishing, 2004), p. 220-223.

from the Statute.[1010] While the SC has the power under Chapter VII "to intervene in matters which are essentially within the domestic jurisdiction of any state" [1011] - thus enabling the SC to refer a situation of a non-consenting State to the ICC - the Court is, in principle, not bound by SC resolutions.[1012]

Since the ICC is an international organization with international legal personality independent of its State parties, the SC does not have authority over it.[1013] Article 25 UN Charter, which forms the basis of the authority of the SC when it acts under Chapter VII, is indeed directed to the 'Members of the United Nations'.[1014] Article 103, which postulates the primacy of the UN Charter over other obligations, is also addressed to 'Members of the United Nations'. Although the ICC has a close relationship with the UN,[1015] it is neither a member[1016] nor one of the 'specialized agencies' of the UN system.[1017]

It is true that the limitation in the UN Charter with regard to the addressees of SC obligations has not stopped the SC from making demands on other actors than 'Member States of the United Nations'.[1018] However, international organizations do not see themselves as subordinate to the SC unless it is provided as such in their constitutional instruments or they sign an agreement in which they pledge to act in accordance with SC resolutions.[1019] The Rome Statute, in its preamble, affirms that the

1010 Gallant, supra note 1012, p. 582.

1011 UN Charter, art. 2 (7).

1012 Robert Cryer and Nigel White, The Security Council and the International Criminal Court: Who's Feeling Threatened? 8 International Peacekeeping 150 (2004); Kenneth Gallant, The International Criminal Court in the System of States and International Organizations, 16 Leiden Journal of International Law 569-573 (2003); Cryer, supra note 401, p. 213-214; Sarooshi, supra note 687, p. 105-108; Stahn, supra note 978, p. 101-102; Jain, supra note 968, p. 253. Condorelli and Villalpando, supra note 524, p. 578; Heller, supra note 966; however, if one adopts the view that the UN charter is the constitution of the international legal order, it can legally justify the power of the SC to bind international organizations, see Fassbender, supra note 460.

1013 Cryer and White, supra note 1012, p. 150; Gallant, supra note 1012 p. 569-573; Cryer, supra note 401, 213-214; Sarooshi, supra note 687, p. 105-108; Stahn, supra note 978, p. 101-102; Jain, supra note 968, 253. Condorelli and Villalpando, supra note 524, p. 578; Mokhtar, supra note 986, p. 326; Rod Rastan, Testing Co-operation: The International Criminal Court and National Authorities, 21 Leiden Journal of International Law 441 (2008); Heller, supra note 966.

1014 UN Charter, art. 25.

1015 Rome Statute, art. 2; see also UN General Assembly, Relationship Agreement Between the United Nations and the International Criminal Court, 20 August 2004, UN Doc. A/58/874.

1016 The membership to the UN is only open to States, see UN Charter, art. 3, 4.

1017 For specialized agencies see UN Charter, art. 57; See also Gallant, supra note 1012.

1018 See Talmon, in Simma, supra note 496, p. 253-279; the Security Council in S/RES/670 (1990) of 25 September 1990, acting under Chapter VII, stated that "the United Nations Organization, the specialized agencies and other international organizations in the United Nations system are required to take such measures as may be necessary to give effect to the terms of resolution 661 (1990) and this resolution."

1019 Bank, supra note 688, p. 261; Paulus and Leis, supra note 683, p. 2130-2132; Gregor Novak and August Reinisch, Article 48, in Simma, supra note 385, p. 1380-1384; see e.g. Kadi v. Council and Commission, Case T-315/01, Judgment of the Court of First Instance (Second Chamber, Extended Composition) of 21 September 2005, [2005] ECR

ICC is to have a relationship with the UN system and provide the SC in Article 13 (b) and 16 two distinct channels through which the SC may influence the Court's business.[1020] However, this influence must remain within the confines provided by the Statute.

Moreover, the Negotiated Relationship Agreement between the International Criminal Court and the United Nations states that "[t]he United Nations and the Court respect each other's status and mandate."[1021] The ICC is bound by its own Statute including Article 1 which reads "[t]he jurisdiction and functioning of the Court shall be governed by the provisions of this Statute."[1022]

Indeed, one of the great differences between the creation of an *ad hoc* tribunal and a referral under Article 13 (b) is that the SC uses its enforcement power to refer situations to a Court which has its own structure and competences and is not tailored by it.[1023] The SC in its referrals to the ICC has "invite[d] the Prosecutor to address the Council within three months of the date of adoption of this resolution and every six months thereafter".[1024] This is in contrast with the *ad hoc* tribunals, the statutes of which provide that "[t]he President of the International Tribunal shall submit an annual report of the International Tribunal to the Security Council and to the General Assembly." [1025] While, in the case of the ICC, the SC 'invites' the Prosecutor to keep it informed on actions taken pursuant to the referral, the SC clearly obliged the President of its subsidiary organs to submit reports. Moreover,

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II-3649, par. 192-195, esp. "the Community must be considered to be bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the Treaty establishing it. [..]Their desire to fulfil their obligations under that Charter follows from the very provisions of the Treaty establishing the European Economic Community and is made clear in particular by Article 224 and the first paragraph of Article 234."; See also Shuichi Furuya, Commentary, Annotated Leading Cases of International Criminal Tribunals, Vol. 4, p. 224 on Prosecutor v. Krstic, ICTY, Trial Chamber I, Binding Order to the Republik Srpska for the Production of Documents, IT-98-33-PT, T., 12 March 1999; Prosecutor v. Krstic, ICTY, Trial Chamber I, Binding Order to the Republik Srpska for the Production of Documents, IT-98-33-PT, 13 August 1999; Prosecutor v. Kordic and Cerkez, ICTY, Appeals Chamber, Decision on the Request of the Republic of Croatia for Review of a Binding Order, IT-95-14/2-AR108bis, 9 September 1999; Prosecutor v. Simic et al., ICTY, Trial Chamber I, Order on Defence Requests for Judicial Assistance for the Production of Information, IT-95-9-PT, 7 March 2000; Prosecutor v. Kordic and Cerkez, ICTY, Trial Chamber III, Decision ex parte Application for the Issuance of an Order to the European Community Monitoring Mission, IT-95-14/2-T, 3 May 2000.

1020 Spain proposed at the Rome Conference that the two following paragraph should be added to the preamble: "Mindful that this Statute should not be interpreted as affecting in any way the scope of the provisions of the Charter relating to the functions and the powers of the organs of the United Nations, Affirming that the relevant norms of general international law will continue to govern those questions not expressly regulated in this Statute," Spain: proposal regarding the preamble, UN. Doc. A/CONF.183/C.1/L.22.

1021 UN General Assembly, Relationship Agreement Between the United Nations and the International Criminal Court, 20 August 2004, UN Doc. A/58/874, art. 2(3).

1022 Cryer, supra note 401, p. 213.

1023 See however Tadic Interlocutory Appeal Decision, par. 15; but Sarooshi, supra note 220, p. 103.

1024 SC Res. 1593, par. 8; SC Res. 1970, par. 7.

1025 ICTY Statute, art. 34; ICTR Statute, art. 32.

the funding scheme for both types of measures is entirely different. While the budgets of the *ad hoc* tribunals were approved by the General Assembly, the SC decided in its past referrals to the ICC that none of the expenses incurred in connection with the referral should be borne by the UN.[1026] Certainly, the level of control the SC has over its subsidiary organ is dramatically different from that which it has over the ICC.

Once a situation is referred to the Prosecutor of the ICC it is out the hands of the SC. When a referral is made by the SC the 'prosecutor shall initiate an investigation unless he determines that there is no reasonable basis to proceed under the Statute.'[1027] If the Prosecutor decides not to proceed with an investigation or prosecution the SC may request the Pre-Trial Chamber to review the decision of the Prosecutor and request that this decision be reconsidered.[1028] Following this requested reconsideration the Prosecutor's decision is not capable of being challenged unless the decision is solely based on the "interest of justice".[1029] In this case it is argued that the Pre-Trial Chamber must confirm the decision not to investigate or prosecute.[1030] Nevertheless, the decision of the Chamber is always governed by the principles established in the Statute of the ICC and not the SC resolution.

Where the SC has referred a situation and a State fails to cooperate with the Court thereby preventing the Court from exercising its functions and powers under the Statute the Court may refer the matter to the SC.[1031] The SC can take a decision under Chapter VII sanctioning the concerned State or

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1026 SC Res. 1593, par. 7; SC Resolution 1970, par. 8.

1027 ICC Statute, art 53; see Jens David Ohlin, Peace, Security, and Prosecutorial Discretion, in Stahn and Sluitter, supra note 716, arguing that the prosecutor cannot take the decision not investigate or prosecute because that would be challenging the decision of the SC.

1028 Rome Statute, art. 53 (3) (a).

1029 De Meester says that "if a negative decision is solely based on Article 53(1)(c) or Article 53(2)(c) the Prosecution's decision may only become effective if the Pre-Trial Chamber confirms it. It follows that the Pre-Trial Chamber's revision may lead to a judicial order to investigate or prosecute ('shall') (Rule 110(2) ICC RPE)." Karel De Meester, Article 53 (3), in Mark Klamberg, The Rome Statute: The Commentary on the Law of the International Criminal Court (Case Matrix Network) available at www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc; In the referral of Darfur, the Prosecutor first considered to take into account the various national and international efforts to achieve peace and security in his assessment of whether a prosecution is in the interest of justice; Second Report of the Prosecutor of the International Criminal Court Mr. Luis Moreno-Ocampo, to the Security Council pursuant to UNSC Res 1593, 13 December 2005, p. 6; However, in its policy paper on the interest of justice the Office of the Prosecutor backtracked and affirmed "the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions." Policy Paper on the Interests of Justice, September 2007, ICC-OTP 2007 , p. 9; also in the policy paper on preliminary examination, the Prosecutor further emphasized, "the interests of justice provision should not be considered a conflict management tool requiring the Prosecutor to assume the role of a mediator in political negotiations: such an outcome would run contrary to the explicit judicial functions of the Office and the Court as a whole." Policy Paper on Preliminary Examinations, November 2013, ICC-OTP 2013, par 69.

1030 Ibid.

1031 Rome Statute, art. 87 (7), see also Decision on the Failure by Malawi to Arrest and Surrender Al-Bashir

can decide to use Article 16 to suspend the investigation or prosecution for a renewable period of twelve months.[1032] In other words, the only means the SC has to undermine the independence of the Court is to use Article 16 Rome Statute.

Admittedly, the UN Charter requires in Article 48 (2) that decisions of the SC be carried out by UN Member States "through their action in the appropriate international agencies of which they are members." Article 48 (2) is not addressed to the international organization as such but to the UN Member States.[1033] Hence, the States that are members of the UN and of the ICC could feel compelled to amend the Rome Statute in order to carry out a SC decision under Chapter VII.[1034] However, such an amendment would result from the amendment proceedings contemplated in the Rome Statute and not directly from the SC resolution.[1035]

While a State may have conflicting obligations if subject to a request by the Court to arrest and surrender a peacekeeper in relation to the 'immunity for peacekeepers' paragraphs discussed previously, the Court itself is not bound to abide by it.[1036] States not abiding by a request to arrest and surrender to the ICC concerning an 'immune peacekeeper' could still incur responsibility towards the ICC, despite the priority the SC resolution enjoys *qua* Article 103 UN Charter. The ICC is a third party to the UN Charter and thus, in principle, the *pacta tertiis* rule would apply.[1037]

For the same reasons, the SC cannot request the ICC to prosecute the crimes of terrorism or aggression if these are not crimes within the jurisdiction of the Court. Similarly, the SC cannot order

1032 Côté observes: "Ironically, the first discussions in the Security Council about a possible deferral—but never put to the vote—concerned the case against Sudan President Al- Bashir, which resulted from a situation referred to the Prosecutor by the same Security Council four years earlier." Luc Côté, Independence and Impartiality in Luc Reydams et al., International Prosecutors (Oxford University Press, 2012), p. 407. Communiqué of the 142nd Meeting of the Peace and Security Council, PSC/MIN/Comm (CXLII), par. 11 (i); AU Assembly's Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of the Sudan, 12th Ordinary Session, 1-3 February 2009, Addis Ababa, Ethiopia, Assembly/AU/Dec.221(XII), par. 1, 3.

1033 Danesh Sarooshi, The Powers of the United Nations International Criminal Tribunals. 2 Max Planck Yearbook of United Nations Law 164, fn 64 (1998).

1034 Condorelli and Villalpando, supra note 524, p. 578, fn 19.

1035 Condorelli and Villalpando, supra note 524, p. 577.

1036 Sarooshi, supra note 687, p. 98.

1037 Article 103 UN Charter prevents any wrongfulness due to the breach of conflicting norms between UN Member States. See ILC, Report of the Study Group of the ILC on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, par. 343, "In any case, this leaves open any responsibility that will occur towards non-members as a result of the application of Article 103." See also Paulus and Leis, supra note 683, p. 2130-2132; see Jean-Marc Thouvenin, Article 103 in Cot et al., supra note 968, p. 2133-2147 for the various reasoning that might be applied to circumvent the pacta tertiis rule.

the Court to exercise jurisdiction over a situation that took place before 1 July 2002.[1038] The obligation of the referred State to accept the ICC's exercise of jurisdiction certainly emerges from the Charter; however, this jurisdiction when exercised by the ICC is limited by the Statute. Otherwise, the ICC would be acting *ultra vires*. As much as the SC could be faced with an inherent normative conflict if it takes a measure that is not in accordance with the Purposes and Principles of the UN, the ICC is also to act in accordance with its Statute. Wouters and Odermatt have written that "[i]t seems today that the main limit on Security Council action is the Council itself."[1039] However, if a SC referral dares to push the ICC towards an inherent normative conflict it will be for the Court to judge, in accordance with its Statute, whether it can exercise jurisdiction over a situation and ultimately a case.[1040]

A risk to which the SC exposes itself when it takes actions that challenge the limits of its powers is judicial review. Although formally no organ is expressly assigned to judicially review SC actions,[1041] the *Tadic Interlocutory Appeal Decision* and *Kadi Case* demonstrate that the SC is indeed subject to incidental judicial review.[1042] Moreover, as will be shown in the next section, conceiving the ICC as being bound by SC decisions imperils the legality of the Court's exercise of jurisdiction under Article 13 (b). Challenges to the legality of *ad hoc* tribunals have most often been based on the claim

1038 Condorelli and Villalpando, supra note 524, p. 580; however, they are of the opinion that the SC can use the Court for crimes committed before 1 July 2002 that were established under customary international law at the time of their commission; see also Condorelli and Villalpando, supra note 6, p. 635-636.

1039 Wouters and Odermatt, supra note 966, p. 90.

1040 Article 19 Rome Statute requires the Court to satisfy itself that it has jurisdiction in any case brought before it.

1041 See Advisory Opinion of the International Court in Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970), I.C.J. Reports 1971, p. 16

1042 T-315/01 Kadi [2005] ECR II-3649 (CFI Kadi); T-306/01 Yusuf [2005] ECR II-3533 is in substance identical, but reference is always to Kadi; C-402/05P and C-415/05P Kadi [2008] ECR I-6351. There have been many other courts that reviewed SC actions especially in regards to the target sanctions. However, the Special Tribunal for Lebanon demonstrated that Courts are indeed extremely deferential to SC actions even when it may be said to be within their inherent jurisdiction to judge their own legality; Prosecutor v. Ayyash et al., Special Tribunal for Lebanon (STL), Trial Chamber, Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal, STL-11-01/PT/TC, 27 July 2012; Prosecutor v. Ayyash et al., STL, Appeals Chamber, Decision on the Defence Appeals Against the Trial Chamber's 'Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal', STL-11-O1/PT/AC/AR90.1), 24 October 2012; see José E. Alvarez, Tadic Revisited: The Ayyash Decisions of the Special Tribunal for Lebanon, 11 Journal of International Criminal Justice 291 (2013); Mariya Nikolova and Manuel J. Ventura, The Special Tribunal for Lebanon Declines to Review UN Security Council Action: Retreating from Tadic's Legacy in the Ayyash Jurisdiction and Legality Decisions, 11 Journal of International Criminal Justice 615 (2013); These widely criticized decision not only fragments international law but also contradicts the terms of its previous decision in Prosecutor v. Al-Sayed, STL, Appeals Chamber, Decision on Appeal of the Pre-Trial Judge's Order Regarding Jurisdiction and Standing, CH/AC/2010/02, 10 November 2010.

that they were not "established by law".[1043] Most of these claims entailed that *ad hoc* tribunals were not independent and impartial.[1044]

5.4. The 'Chapter VII conception' and the lawful establishment of the jurisdiction: an '*amour interdit*'?

In the famous *Tadic Interlocutory Appeal Decision* the ICTY declared that for an international tribunal to be lawful its establishment needed to be in accordance with the rule of law.[1045] According to the Appeals Chamber, in the context of international law this was the most appropriate definition of "established by law".[1046] The international setting required this adaptation. To be established according to the rule of law, the ICTY Appeals Chamber decided that the international tribunal "must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments."[1047] This test has been repeated in many other international fora.[1048]

Thus, when assessing the lawfulness of the establishment of an international tribunal and whether it was in accordance with the rule of law, it must be verified whether (1) it was established in

1043 See Tadic Interlocutory Appeal Decision, par. 41-48. Article 14 ICCPR on fair trial rights states that "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." It has also been claimed that, in light of the prohibition of ex post facto criminal law, these jurisdictions needed to be "previously established by law", see Castillo Petruzzi and Others v. Peru, Court, Judgment, IACHR, 30 May 1999; . Except for the IACHR, international human rights treaties do not include the word "previously", but still they provide that tribunals must be established by law.

1044 See e.g. Prosecutor v. Kanyabashi, ICTR, Trial Chamber, Decision on the Defence Motion on Jurisdiction, ICTR-96-15-T, 18 June 1997.

1045 Tadic Interlocutory Appeal Decision, par. 45; this question was preceded by 3 other questions: "1. was there really a threat to the peace justifying the invocation of Chapter VII as a legal basis for the establishment of the International Tribunal? 2. assuming such a threat existed, was the Security Council authorized, with a view to restoring or maintaining peace, to take any measures at its own discretion, or was it bound to choose among those expressly provided for in Articles 41 and 42 (and possibly Article 40 as well)? 3. in the latter case, how can the establishment of an international criminal tribunal be justified, as it does not figure among the ones mentioned in those Articles, and is of a different nature?" Tadic Interlocutory Appeal Decision, par. 27.

1046 Tadic Interlocutory Appeal Decision, par. 27.

1047 Tadic Interlocutory Appeal Decision, par. 27.

1048 E.g. Prosecutor v. Ayyash et al., STL, Trial Chamber, Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal, STL, STL-11-01, 27 July 2012, par. 66-75; Prosecutor v. Norman et al., SCSL, Appeals Chamber, SCSL-2004-14-PT, SCSL-2004-1S-PT, and SCSL-2004-16- PT, Decision on Constitutionality and Lack of Jurisdiction, 13 March 2004, par. 55; Prosecutor v. Kanyabashi, Trial Chamber, Decision on the Defence Motion on Jurisdiction, ICTR, ICTR-96-15-T, 18 June 1997; also in Naletilic v. Croatia, Court (Fourth Section), Decision Admissibility, ECrtHR, Application No. 51891/99, 4 May 2000, the ECrtHR declared that the surrender to ICTY satisfied the requirements of Article 6 ECHR because the tribunal was independent and impartial.

accordance with the procedures available in international law; and, (2) it provides for all the necessary guarantees of fair trial rights. The impartiality and independence of the tribunal are factors necessary to ensure compliance with fair trial rights.

5.4.1. Independence and impartiality

The impartiality and independence of a tribunal are requirements accompanying the guarantee in human rights law that a tribunal be established by law.[1049] The Human Rights Committee stated that the right to be tried by "an independent and impartial tribunal is an absolute right that may suffer no exception."[1050] If a tribunal is not independent and impartial there is no reason to proceed further on the examination of whether it respects other fair trial rights.[1051] The independence and impartiality of a tribunal aim to ensure that individuals are judged by neutral authorities. Independence means that the judicial organ is not subordinated to any other organ. In other words, the judiciary must be independent from the executive but also from the legislature.[1052] If the SC is entitled to bind the ICC and invent new crimes, or target individuals, for a specific situation it may be viewed as representing the legislature as well as the executive. The ECrtHR and the IACrthHR consider that for a tribunal to be independent the following criteria should be taken into account: (a) the manner of appointment of the judges; (b) the term of office of the judges, (c) the existence of safeguards against outside pressures; (d) whether the tribunal presents an appearance of independence; and, (e) the authority of its judgments.[1053]

1049 Article 14 ICCPR; Article 6 ECHR; Article 8 IACHR.

1050 Miguel Gonzalez del Rio v. Peru, Human Rights Committee, Communication No. 26311987, 28 October 1992, U.N. Doc. CCPRlCl461D1263/1987 (1992), par. 5.2.

1051 Demicoli v. Malta, Court (Chamber), Judgment, ECrtHR, Application No. 13057/87, 27 August 1991, par. 36-82; Findlay v. United Kingdom, Court (Chamber), Judgment, ECrtHR, Application No. 22107/93, 25 February 1997, par. 70-80; Incal v. Turkey, Grand Chamber, Judgment, ECrtHR, Application No.22678/93, 09 June 1998, par. 65-74.

1052 While the legislature provides the law and establish the judiciary, it "cannot arrogate to itself judicial functions; Ibid., p. 53; Demicoli v. Malta, Court (Chamber), Judgment, ECrtHR, Application No. 13057/87, 27 August 1991, par. 40 et seq.

1053 Incal v. Turkey, Grand Chamber, Judgment, ECrtHR, Application No.22678/93, 09 June 1998, par. 65; see also Findlay v. United Kingdom, Court (Chamber), Judgment, ECrtHR, Application No. 22107/93, 25 February 1997, par. 73; The same approach is taken by the IACHR, see e.g. Garcia v. Peru, Court, IACHR, Judgment (1995); For the two last elements see Benthem v. Netherlands, Court (Plenary), Judgment, ECrtHR, Application No. 8848/80, 23 November 1985, par. 37 et seq.; Assanidze v. Georgia, Grand Chamber, Judgment, ECrtHR, Application No. 71503/01, 08 April 2004, par. 182-1844; Obermeier v. Austria, Court (Chamber), Judgment, ECrtHR, Application No. 11761/85, 28 June

The ICC has a bench of eighteen judges who are nationals of States Parties to the Rome Statute. The judges are elected by the Assembly of States Parties for terms of nine years.[1054] They may not stand for re-election.[1055] Although appointed by governments the impossibility of re-election ensures that the judges do not take decisions in order to secure their positions. Furthermore, the UNSC has neither a special say in the election of the judges or in the identity of the judges who preside over a particular case arising from a situation referred under Article 13 (b). The Statute provides that judges must be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices.[1056] They shall have established competence in criminal law and procedure or in in relevant areas of international law such as international humanitarian law and the law of human rights.[1057] Accordingly, the administration of the ICC may be considered sufficiently independent. However, if the SC is allowed to select cases or modify the Statute to be applied by the Court, the independence of the Court can be called into question.

The requirement of impartiality is often described as the "absence of prejudice or bias".[1058] It relates to the judges' state of mind. The Human Rights Committee described "impartiality" as implying "that judges must not harbor preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties."[1059] Impartiality in the jurisprudence of the ECrtHR is tested through two approaches: subjective and objective.[1060] The objective approach uses the

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1990, par. 69 et seq.; Beaumartin v. France, Court (Chamber), Judgment, ECrtHR, Application No. 15287/89, 24 November 1994, par. 34 et seq..

1054 Rome Statute, art. 36 (9), 16 (9), Procedure for the nomination and election of judges, the Prosecutor and the Deputy Prosecutors of the International Criminal Court; However, at the first election judges were elected for terms of 3,6 and 9 years.

1055 However, judges that were elected at the first election for a term of 3 years could be a candidate for re-election; Rome Statute, art. 36(9) (a), (c); there is also a possibility under Article 37 (2) to stand for re-election if a judge was appointed to fill a judicial vacancy.

1056 Rome Statute, art. 36 (3)

1057Rome Statute, art. 36 (3); However, Afua Hirsch, System for Appointing Judges 'undermining international courts', The Guardian, 8 September 2010, critics concerning the competences of the Japanese judge.

1058 E.g. Piersack v. Belgium, Court (Chamber), Judgment, ECrtHR, Application No. 8692/79, 1 October 1982, par. 30.

1059 Karttunen v. Finland, Human Rights Committee, Communication No. 387/1989, UN Doc. CCPR/C/46/D/387/1989 (1992), par. 7.2.

1060 Incal v. Turkey, Grand Chamber, Judgment, ECrtHR, Application No.22678/93, 09 June 1998, par.; Instead, Trechsel defines them as follows: "an 'objective' test—is the judge objectively biased?—and a 'subjective' test—does the judge appear to be biased in the eyes of the accused?", Stefan Trechsel, Human Rights in Criminal Proceedings (Oxford University Press, 2005), p. 62.

test of the reasonable person to ask whether the judge could be regarded as biased.[1061] The subjective approach ascertains whether the judge is prejudiced or partial.[1062]

The objective approach to determining whether a judge appears biased is extremely close to the criteria of whether the tribunal presents an appearance of independence.[1063] The difference between these two is that while the latter pertains to the institution, the former is about the individual judge. In any case, both are the expression of the dictum "justice must not only be done; it must also be seen to be done". Indeed, as the ECrtHR has stated: "[w]hat is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused".[1064]

The drafters of the Statute were cautious in ensuring that the Court does not appear to be a unilateral or biased judicial institution. The election of the judges at the ICC takes into account the need for the representation of the principal legal systems of the world, a fair representation of men and women, and equitable geographical distribution.[1065] Judges from members of the UNSC that are States party to the Rome Statute may sit on a case arising from a situation referred to the Court by the UNSC. This cannot be construed as being the result of a command from the latter, unless one asserts that the SC can order the ICC to put Judge X and Y on the bench. The Chambers are divided between the Appeal, Trial and Pre-Trial divisions.[1066] The Judges meet in plenary to decide how they are assigned among the three divisions according to their qualifications and experience, and not according to their political interests. The Prosecutor or any person being investigated or prosecuted may request the disqualification of a judge. According to Article 41 Rome Statute a judge may be disqualified from "any case in which his or her impartiality might reasonably be doubted on any ground". In principle, the Statute appears to provide enough safeguards against the possibility that a Court or a judge is partial.

However, if the SC can bind the Prosecutor or the judges through the framing of its referrals, the prosecutorial discretion of the Prosecutor and the independence and impartiality of the Court will

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1061 Belilos v. Switzerland, Court (Plenary), Judgment, ECrtHR, Application No. 10328/83, 29 April 1988, par. 6.
1062 Piersack v. Belgium, Court (Chamber), Judgment, ECrtHR, Application No. 8692/79, 01 October 1982, par. 30.
1063 Findlay v. United Kingdom, Court (Chamber), Judgment, ECrtHR, Application No. 22107/93, 25 February 1997, par. 73.
1064 Incal v. Turkey, par. 71.
1065 Rome Statute, art. 36 (8).
1066 Rome Statute, art. 34 (b).

be greatly affected.[1067] For instance, Ohlin claims that when the UNSC refers a situation the Prosecutor is not to determine whether an investigation is "in the interest of justice" or "in the interest of victims" as the UNSC already decided so by invoking its special power to restore international peace and security.[1068] Thus, the Court becomes a 'security court', activated according to the permanent members of the UNSC wishes.

The power of the UNSC to trigger situations was already a matter of great controversy at the Rome Conference. The political nature of this body was obviously perceived as a risk threatening the independent nature of the Court. The "small but vocal minority opposing any role" for the UNSC believed that its involvement would

> reduce the credibility and moral authority of the Court; excessively limit its role; undermine its independence, impartiality and autonomy; introduce an inappropriate political influence over the functioning of the institution; confer additional power on the Security Council that were not provided for in the Charter; and enable the permanent members of the Security Council to exercise a veto with respect to the work of the Court.[1069]

Though the argument that the UNSC was not empowered by the Charter to trigger situations was quickly dismissed by the jurisprudence of the *ad hoc* tribunals, the other criticisms remain.[1070] The strategic interests of the permanent members of the UNSC create the potential of a specific situation to being referred under Article 13 (b).[1071] While 'extraordinary' tribunals or 'special' courts are not incompatible with the requirement that a tribunal be independent and impartial, the Human Rights Committee held that these guarantees cannot be limited or modified by the special character of these courts.[1072]

Admittedly, the resolutions referring a situation may point out which side to the conflict should be prosecuted. In addition to exempting peacekeepers from the jurisdiction of the Court, the referral of the situation in Libya also contained several targeted sanctions against Colonel Gaddafi, his family

1067 Ohlin, supra note 1027, p. 189-209; George P. Fletcher and Jens David Ohlin, The ICC — Two Courts in One? 4 Journal of International Criminal Justice 428 (2006).

1068 Ohlin, supra note 1027, p. 189; the prosecutor is to take this element in consideration according to Article 53 (1) (c) Rome Statute

1069 Williams and Schabas, supra note 1000, p. 568; *Ad hoc* Committee Report, par. 121; also Preparatory Committee 1996 Report, Vol. I, par. 130-132.

1070 Tadic Interlocutory Appeal Decision; Prosecutor v. Kanyabashi, ICTR, Trial Chamber, Decision on the Defence Motion on Jurisdiction, ICTR-96-15-T, 18 June 1997.

1071 Alana Tiemessen, The International Criminal Court and the Politics of Prosecutions, 18 International Journal of Human Rights 444 (2014); See Cryer, supra note 401.

1072 See General Comment on Article 14, H.R. Comm. 43rd Sess., Supp. No. 40, U.N. Doc. A/43/40 (1988), par. 4.

members and members of his regime, thus pointing out that these were suspects who committed the alleged crimes against humanity raised in the preamble.[1073] Three months after the referral, the ICC issued an arrest warrant for crimes against humanity against Gaddafi, his son Saif Al-Islam Gaddafi, and the intelligence chief of its government, Abdullah Al-Senussi. Despite the allegations that various crimes within the ICC's jurisdiction have been committed on both sides of the conflict, as well as by NATO, three years after the referral no other arrest warrant has been issued.[1074] There are indeed risks that a reasonable observer could conclude that the ICC is not entirely independent with respect to the Libyan situation. Legal subordination of the ICC to SC decisions would possibly suggest that the Court is not at the very least structurally independent and impartial. Conversely, independence constrained by the highly political context in which the Court operates is something every international criminal tribunal has to deal with.[1075]

In some way the demands of the SC placed on the ICC's jurisdiction have been more exigent than towards its own subsidiary organs. The SC, when establishing the *ad hoc* tribunals, was cautious to afford the Tribunals a certain degree of independence. Although the *ad hoc* tribunals were established for specific situation their jurisdictions were not framed to target specific individuals.[1076] The object and scope of the *ad hoc* tribunals jurisdiction remained within the ambit of what constituted a threat to international peace and security, e.g. the situation in the former Yugoslavia or the genocide in Rwanda. Furthermore, the ICTY found that it had the "inherent powers" of a judicial tribunal, including the ability to establish its own jurisdiction.[1077] While the SC could have, under Chapter VII,

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1073 SC Res. 1970, par. 15, 17.

1074 The Prosecutor has however affirmed that it has investigated crimes committed by NATO but found no evidences of war crimes. Office of the Prosecutor, Third Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1970 (2011).The Prosecutor is also still investigation crimes committed by the other side to the conflict, Office of the Prosecutor, Eighth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to the UNSCR 1970 (2011), 11 November 2014.

1075 See Shany, supra note 955, p. 109-115; Côté, supra note 1032, Chapter VI; see also Celebici Appeals Chamber Judgment, par. 602, "indeed in many criminal justice systems, the entity responsible for prosecutions has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction.."

1076 Still see Cryer, supra note 411.

1077 The ICTY held, with reference to the ICJ advisory opinion on the Effect of Awards of the United Nations Administrative Tribunal Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 1954 I.C.J. Reports 47, at 60-1 (Advisory Opinion of 13 July): To assume that the jurisdiction of the International Tribunal is absolutely limited to what the Security Council 'intended' to entrust it with, is to envisage the International Tribunal exclusively as a 'subsidiary organ' of the Security Council … a 'creation' totally fashioned to the smallest detail by its 'creator' and remaining totally in its power and at its mercy. But the Security Council not only decided to establish a subsidiary organ (the only legal means available to it for setting up such a body), it also clearly intended to establish a special kind of 'subsidiary organ': a tribunal"; *Tadic Interlocutory Appeal Decision*, par. 15; Still, Sarooshi replies: This

changed the Statute of the ICTY to exempt NATO officials from the tribunal's jurisdiction it is not clear whether under such conditions the ICTY would have still qualified as a sufficiently independent judicial institution. A single crime may prompt the SC to trigger the referral of a 'situation' to the ICC.[1078] However, a category of individuals cannot be exempted *ab initio* from the jurisdiction of the Court. Otherwise this would definitely raise the issue of equality before the law.[1079]

If the ICC becomes a 'security court' it may fail to abide by the requirement of independence and impartiality. This not only raises the question of whether the exercise of jurisdiction under Article 13 (b) is established in accordance with the rule of law but also concerns the legitimacy of the Court.[1080] Louise Arbour, the former Prosecutor of the ICTY, observed that the "greatest threat to the legitimacy of the [International Criminal] Court would be the credible suggestion of political manipulation of the Office of the Prosecutor, or of the Court itself".[1081] The SC undeniably has a broad margin of discretion to determine what constitutes a threat to international peace and security. The powers resulting from such political decisions can lead to a referral or deferral in accordance with the UN Charter. However, under the Rome Statute, the judicial process that follows a referral or deferral is determined by the rules governing the jurisdiction of the Court.

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does not mean, however, that the Security Council could not change a statute at any time and thus change the scope of a Tribunal's delegated mandate. This competence of the Council is part of the authority and control that a principal organ possesses over its subsidiary." Sarooshi, supra note 220, p. 103; See also Prosecutor v. Tihomir Blaskic, ICTY, Trial Chamber, Decision on the Objection of the Republic of Croatia to the issuance of subpoena duces tecum, IT-95-14-PT, 18 July 1997, p. 11 "As a subsidiary organ of a judicial nature, it cannot be overemphasized that a fundamental prerequisite for its fair and effective functioning is its capacity to act autonomously. The Security Council does not perform judicial functions, although it has the authority to establish a judicial body. This serves to illustrate that a subsidiary organ is not an integral part of its creator but rather a satellite of it, complete and of independent character." The Secretary-General stated in his report dealing with the establishment of the Tribunal for the former Yugoslavia: "that it [the Tribunal] should perform its functions independently of political considerations and not be subject to the authority or control of the Council with regard to the performance of its judicial functions" UN Doc. S/25705 and Add. 1; Similarly, in the case of the Rwanda Tribunal the Secretary-General stated: "The International Tribunal for Rwanda is a subsidiary organ of the Security Council…. As such, it is dependent in administrative and financial matters on various United Nations organs; as a judicial body, however, it is independent of any one particular State or group of States, including its parent body, the Security Council." UN Doc. S/l995/134, par. 8; See Sarooshi, supra note 1033, p. 147, 150–4.

1078 See Condorelli and Villalpando, supra note 6, p. 632-633.

1079 Moreover, this interference would raise a question as to whether the other accused are equal before the law. In the Celebici Case, Appeals Chamber, par. 611, it was stated "Because the principle is one of equality of persons before the law, it involves a comparison with the legal treatment of other persons who must be similarly situated for such a comparison to be a meaningful one."

1080 Cryer, supra note 401, p. 217.

1081 Louise Arbour, The Need for an Independent and Effective Prosecutor in the Permanent International Criminal Court, 17 Windsor Yearbook of Access to Justice 213 (1999).

Conclusion

Can the SC do whatever it deems necessary to maintain international peace and security? There is certainly a presumption that the acts of the SC are legally valid. In the *Certain Expense Case* the ICJ stated that:

> when the Organisation takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organisation.[1082]

In the *Lockerbie Case*, the ICJ used similar language to hold that *prima facie* the obligation to accept and carry out the decisions of the SC [i.e. Article 25] extends to the decision contained in Resolution 748 (1992).[1083] The SC's swift determination that Libya's failure to comply with extradition request – Libya invoked the Montreal Convention to assert its right to try the requested individual - constituted a 'threat to international peace and security' was challenged by several judges of the 'World Court'.[1084] Judge Shahabuddeen, for instance, asked in his separate opinion: "[a]re there any limits to the Council's powers of appreciation?"[1085] In carrying out its mandate of maintaining international peace and security the SC deals with situations where international crimes are perpetrated. However, not all those situations qualify as a threat to international peace and security and neither does the SC consider all situations as such even when they could potentially be classed as such.

Incidentally, this study touched upon the legitimacy of the ICC when it exercises jurisdiction under Article 13 (b). Legitimacy was understood in this thesis mainly as 'legal legitimacy'. The ICC's interpretation and application of its Statute in accordance with international law is certainly an important facet of its 'legitimacy capital'.[1086] The legal legitimacy of the 'universal jurisdiction conception' was seriously called into question on account of the fact that the legal reasoning used to

1082 Certain Expenses of the United Nations, ICJ Reports (1962) 151, p. 168.

1083 Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident of Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order of 14 April1992, ICJ Reports 1992, par. 42.

1084 Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident of Lockerbie, Dissenting Opinion by Judge Bedjaoui; Dissenting Opinion by Judge Ajibola; Dissenting Opinion by Judge *ad hoc* El-Kosheri.

1085 Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident of Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order of 14 April1992, I.C.J. Reports 1992, separate opinion Judge Shahabuddeen, p. 33; see also Separate Opinion by Judge Lachs.

1086 Shany, supra note 955, p. 139; Jeni Whalan, How Peace Operations Work: Power, Legitimacy, and Effectiveness (Oxford University Press, 2014), p 66.

justify jurisdictional power over non-consenting States did not cohere with the existing system of legal norms. However, the 'universal jurisdiction conception' stood for a fundamental moral value, namely ending impunity for perpetrators of international crimes. Famously, the Independent International Commission on Kosovo concluded that "the NATO military intervention was illegal but legitimate."[1087] Conversely, SC Resolution 748 imposing sanctions on Libya gave rise to a different conundrum.[1088] While the ICJ deemed that SC Resolution 748 was *prima facie* legal, the (then) Organization of African Unity (OAU) condemned the sanctions regime as 'unjust' and eventually its 53 Member States decided not to comply with the SC resolution. The OAU notified the SC and declared that the sanctions regime "violate[s] Article 27 paragraph 3, Article 33 and Article 36 paragraph 3 of the United Nations Charter."[1089] Likewise, the AU's resolutions calling on its members not to comply with the ICC's arrest warrant for Al-Bashir were concerned both with the risk the arrest warrant posed to stability in the region and also with the applicability of Article 27 Rome Statute to non-party States.[1090] The 'universal jurisdiction conception' was rejected in this thesis as it was shown to provide States not party to the Rome Statute with the opportunity to seriously challenge the ICC's jurisdiction on the basis that it does not comply with international law and thus provide an incentive not to recognize its exercise of jurisdiction over genocide, crimes against humanity and war crimes.[1091] An abstract and general SC referral to the ICC would raise similar doubts with regard to its accordance with the UN Charter and ultimately the Rome Statute.

Legality is not the only factor that affects legitimacy. The unfair selectivity of the SC also raises issues of legitimacy.[1092] The SC is a political organ, admittedly crippled by the veto powers of its permanent members, which can potentially use the ICC as a forum to pursue national political interests

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1087 Independent International Commission on Kosovo: The Kosovo Report: Conflict, International Response, Lessons Learned (Oxford University Press, 2000). p. 4.

1088 Security Council Resolution 748, 31 March 1992, UN Doc. S/RES/748; Question of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), International Court of Justice (ICJ), Provisional Measures, Order of April 14, ICJ Reports 1992, 3.

1089 See CM/Res.1566 (LXI) (23–27 January 1995); AHG/Dec.127 (XXXIV) (8–10 June 1998); See Tzanakopoulos, supra note 383, p. 187.

1090 I draw this parallel from the exchange between Tom Dannenbaum, Legality, Legitimacy, and Member State Cooperation in International Organisations, EJIL Talk!, Blog Post, 24 March 2015, retrieved from http://www.ejiltalk.org/legality-legitimacy-and-member-state-cooperation-in-international-organisations/ and Kristina Daugirdas, Response, EJIL Talk!, Blog Post, 27 March 2015, retrieved from http://www.ejiltalk.org/response/#more-13238; see also Kristina Daugirdas, Reputation and the Responsibility of International Organizations, 25 European Journal of International Law 991-1018 (2014).

1091 Ibid.

1092 Cryer, supra note 411, p. 197-199; referring to Franck's indicator of legitimacy, coherence, see Franck, supra note 957, p. 38-41.

and agendas. Moreover, we should bear in mind that three out of five permanent members are not party to the Rome Statute. More than a decade after the entry into force of the Statute some States still opine that Articles 13 (b) and 16 of the Statute prevent the ICC from carrying out its judicial mandate in a completely independent manner free from political influence.[1093]

If the Rome Statute had been silent on the question of SC referrals to the ICC this could not have displaced the SC power to establish *ad hoc* tribunals. Indeed, since the adoption of the Rome Statute the SC has taken action under Chapter VII leading to the establishment of the Special Court for Sierra Leone and the Special Tribunal for Lebanon.[1094] Both of these 'UN tribunals' deal with matters that are not within the jurisdiction of the ICC. The jurisdiction of the Special Court for Sierra Leone is over war crimes, crimes against humanity and certain crimes under national law committed in the territory of Sierra Leone since 30 November 1996.[1095] The jurisdiction of the Special Tribunal for Lebanon is generally over the crime of terrorism as defined in Lebanese criminal law for the persons responsible for the attack of 14 February 2005 resulting in the death of former Prime Minister Rafiq Hariri and in the death or injury of other persons.[1096] There may be various reasons which explain why the SC decided to establish these hybrid mechanisms instead of referring the respective situations to the ICC but the most obvious reason is that it did so because the crimes concerned did not fall within the jurisdiction ratione *temporis* or *materiae* of the Court.

In this last chapter I explored the question of whether the Statute creates or restricts the power of the SC. This question arose due to the conclusion in the previous chapter that the 'universal jurisdiction conception' is an assumption of jurisdiction that is not in accordance with the international legal system. Unless the Rome Statute is either amended to be entirely reflective of customary international law or due to its (quasi) universal ratification becomes accepted as being entirely reflective of customary international law, the 'Chapter VII conception' seems to be the only viable

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1093 See e.g. Statement Chad in Security Council, 7285th meeting, Security Council Working Methods, 23 October 2014, UN doc. S/PV.7285

1094 See Security Council Resolution 1315, 14 August 2000 UN Doc. S/RES/1315; Agreement between the United Nations and the Government of Sierra Leone and Statute of the Special Court for Sierra Leone, 16 January 2002; see also Prosecutor v. Charles Ghankay Taylor, Special Court for Sierra Leone, Appeals Chamber, SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 31 May 2004, par. 38, Security Council resolution 1757, 30 May 2007, UN Doc. S/RES/1757; see also Prosecutor v. Ayyash et al., STL, Appeals Chamber, Decision on the Defence Appeals Against the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal", Separate and Partially Dissenting opinion of Judge Baragwanath and Judge Riachy, Special Tribunal for Lebanon, STL-11-01, 27 Juillet 2012.

1095 Special Court for Sierra Leone Statute, art. 1, 2, 3, 4, 5.

1096 Special Tribunal for Lebanon Statute, art. 1, 2, 3.

option to understand Article 13 (b) of the Rome Statute. A greater challenge may, however, emerge if one conceptualizes the Rome Statute as a blunt instrument of international peace and security. Can the 'international police power' of the SC be used to force the ICC to target individuals, prosecute crimes that occurred before 1 July 2002, or prosecute the crime of aggression before the amendment to the Rome Statute enters into force? I came to the conclusion that the status of the ICC as an independent legal body (with legal personality) which is not a State and as such not party to the UN Charter entails that the jurisdiction and functioning of the Court is governed by the Rome Statute and not by the SC resolutions addressed to it. The relationship between the ICC and the SC is defined in Articles 13, 16, 19 and 53 of the Rome Statute and the Negotiated Agreement between the ICC and the UN. The SC, thanks to its extraordinary powers, can activate the ICC's jurisdiction over non-party States however the rest of the process is governed by the Rome Statute. Conversely, the ICC cannot exercise jurisdiction over the territory and nationals of a State neither party to the Rome Statute nor accepting its jurisdiction without the help of the SC. The crux of the relationship between the ICC and the UN lies in the confines of both institutions' powers respectively. Put simply, the ICC and the SC are not *legibus soliti*.

This last issue also means that the ICC must not only abide by its Statute but must also adhere to international law. The Court's exercise of jurisdiction over individuals for crimes that constitute a crime under international law solely under the Rome Statute is limited to crimes subsequent to any Article 13 (b) referral. To exercise jurisdiction over such crimes *ex ante* (even if the referral allows so) would constitute a violation of the principle of legality. There are various ways to interpret the principle of legality but in my opinion the correct way to ensure respect for it is to apply the strictest standard. The drafters of the Rome Statute seem to have been oblivious of the possibility that the 'international criminal code' they were designing would not be entirely reflective of customary international law upon its entry into force. Thus, the principle of legality was not fully integrated into the Statute. However, thanks to the conscious undertaking to implant internationally recognized human rights law in the Statute (without the need to refer to the theory of implied powers) the right of the accused not to be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence under national or international law at the time when it was committed can be respected.

Similarly, respect of international law with regard to the immunity of State officials is another issue the drafters left to the Court to determine. Article 27 of the Rome Statute does not operate in a complete vacuum. The ICC is not only obliged by its Statute but also has to exercise its jurisdiction in accordance with binding rules of international law. Article 27 is a *lex specialis* for the States party to the Rome Statute; other States did not waive the right of their high-ranking officials to be immune from foreign criminal jurisdiction, including the ICC. Such a right can be subject to an exception under customary international law, thus would apply to all, or may be suspended by the SC under Chapter VII. This is one of the effects of a referral under Article 13 (b) of the Rome Statute.

While the SC may contract out of international law when it takes ad hoc action intended to achieve a concrete effect under Chapter VII, the ICC does not benefit of the same extraordinary powers. Its exercise of jurisdiction over the territory and nationals of a State neither party to the Rome Statute nor accepting its jurisdiction must remain within the limits of international law. The SC can stretch some of the limits that international law imposes on the ICC's exercise of jurisdiction. However, in doing so it must remain within the limits the UN Charter imposes on enforcement measures. In this sense, the ICC is responsible for not usurping the exceptional regime the SC has created for its exercise of jurisdiction. Moreover, the norms that the SC did not or could not have contracted out of remain applicable to the ICC's exercise of jurisdiction under Article 13 (b). The fact that individuals who committed crimes in a territory of, and that are nationals of, a State neither party to the Rome Statute nor consenting to the ICC's jurisdiction are brought to justice may well be deemed a manifestation of the powers of the international community. However, it cannot be a manifestation of power unbounded by law.

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