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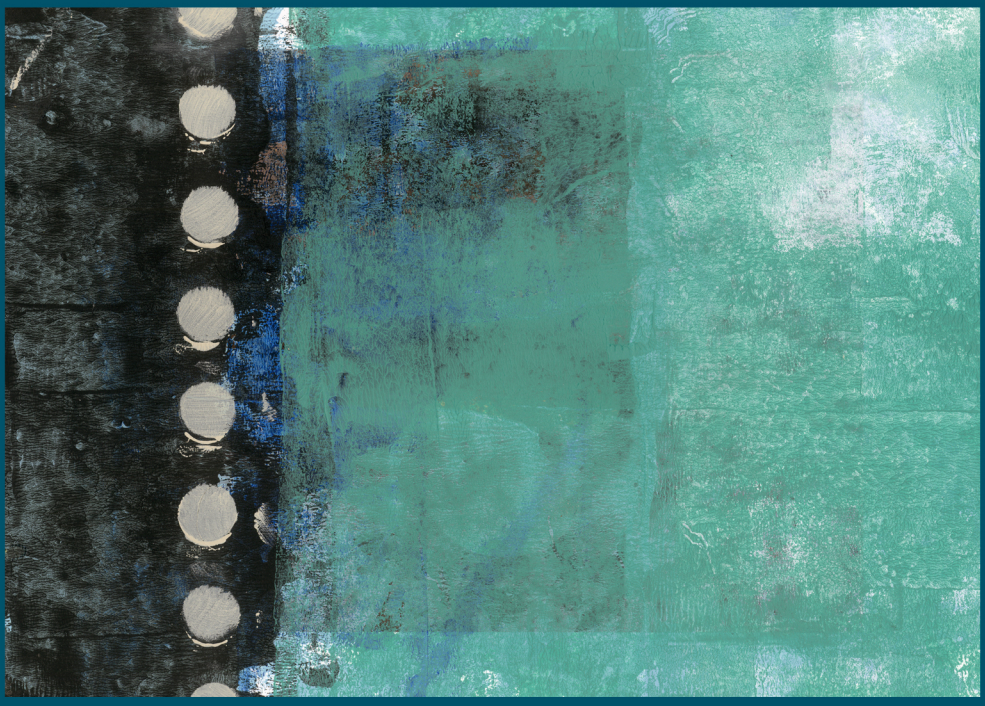
UN Security Council Referrals to the International Criminal Court

Legal Nature, Effects and Limits



Alexandre Skander Galand

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By

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To Aida and Ismail

Contents

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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 jurisdictional limitation seems paradoxical in light of the statement in *Tadic Interlocutory Appeal on Jurisdiction* – three years before the adoption

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, See Report on the Work of its Forty-Eight Session, UN doc. A/51/10, p. 28; Princeton Principles on Universal Jurisdiction, reprinted in Macedo, Universal Jurisdiction, 22, Principle 2 provides for universal jurisdiction over the crime against peace, see also Scharf, "Crime of Aggression," 357.

2 Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S., at 3 (hereinafter the Rome Statute or the Statute). Rome Statute, Art. 5 (2) read 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 now defined in art. 8bis of the Rome Statute, and the conditions for the ICC exercise of jurisdiction in 15*bis* and *ter*. These articles were adopted at the Review Conference in Kampala, Resolution RC/Res.6, June 11, 2010. The Assembly of States Party at its 16th Session adopted the Resolution on the Activation of the Jurisdiction of the Court over the Crime of Aggression, Dec. 14, 2017, ICC-ASP/16/Res.5, which activates the Court's jurisdiction over the crime of aggression as of 17 July 2018.

3 Rome Statute, preamble, par. 5–6.

4 Rome Statute, Art. 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."

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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 the ICC only exercises jurisdiction over the territory and nationals of its 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 active 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 Charter of the United Nations".[7] In addition to the SC referrals, 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, 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). Even though many thought Article 13 (b) would become a dead letter,[9] the SC, by resolutions 1593 (2005) and 1970 (2011), referred the situations in Darfur, Sudan and Libya to the ICC.[10]

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. 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.

But is this really a problem? After all, the *Nuremberg Judgment* established a new relationship between the individual, the State and the international community.[11] 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

5 Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 29, 1997) par. 59 (hereinafter Tadic Interlocutory Appeal Decision).

6 Condorelli and Villalpando, "Can the Security Council extend," 572.

7 Rome Statute, Art. 13 (b).

8 See also Rule 44 of the Rules of Procedure and Evidence, Declaration provided for in Article 12, paragraph 3, UN Doc. PCNICC/2000/1/Add.1 (2000).

9 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.

10 UN Doc. S/RES/1593 of 31 March 2005; UN Doc. S/RES/1970 of 26 February 2011..

11 Broomhall, *International Justice*, 19.

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; 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.[12] As Broomhall notes, these principles would progressively become inextricably linked to the foundation of the post-World War II international legal order.[13]

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. Indeed, the trial of Adolf Eichmann in 1961 reignited the idea that genocide, crimes against humanity and war crimes would not go unpunished.[14] That being said, 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 proceedings such as *Barbie*,[15] *Demjanjuk*,[16] *Finta* [17] and *Pinochet* [18] took place.[19] By the time of the fall of the Berlin wall the idea that perpetrators of international

12 *Ibid.,* at 19; see also ILC, Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Doc. A/1316 (A/5/12), 1950, par. 95–127

13 Broomhall, *International Justice,* 19.

14 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 Judgment); 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).

15 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.

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

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

18 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).

19 See Broomhall, *International Justice*, p. 113.

crimes were *hostis humani generis*, and thus subject to universal jurisdiction, was well established.[20]

Nevertheless, the ICC's exercise of jurisdiction over non-party States remains an extremely contested issue.[21] 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 UN Charter. For instance, Cherif Bassiouni noted 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."[22] 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."[23] Since these conceptions of an Article 13 (b) referral are fundamentally opposed, it is of paramount importance to examine how both respectively interact with other norms of international law in practice.

This book explains that there are two conceptions of an Article 13 (b) referral. As will be further elaborated below, 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',[24] there is consensus that an Article 13 (b) referral can lead to the exercise of jurisdiction over the territories and nationals of non-party States.

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20 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; See also Tadic Interlocutory Appeal Decision, par. 62 ("universal jurisdiction [is] nowadays acknowledged in respect of international crimes"); see also Prosecutor v. Ntuyahaga, Case No. ICTR-98-40-T, Decision on Prosecution Motion to Withdraw the Indictment (March 18, 1999).

21 E.g. Wedgwood, "An American View," 93–107; Hafner et al., "A Response," 108–123; Zwanenburg, "Peacekeepers under Fire?," 124–143; Scheffer, "The Challenge," 68.

22 Bassiouni, *The Legislative History*, 140.

23 Morris, "High Crimes," 36 (2001).

24 UN Doc. S/RES/1422 of 12 July 2002, par. 4; see also S/RES/1487 of 12 June 2003. These resolutions will be further analyzed in Chapter 5.

What is rarely acknowledge however is that Article 13 (b) entails an exercise of prescriptive and adjudicative criminal jurisdictions. 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.[25] 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 international criminal law (e.g., crimes against humanity of apartheid, forced pregnancy, gender persecution, enforced disappearance, the war crimes of transferring, "directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies", attack against peacekeepers, and environmental war crime).[26]

Moreover, the Statute postulates that the ICC's jurisdiction cannot be challenged on the basis of the accused's official capacity.[27] That provision is often 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.[28] The fact that the first serving Head of State to appear before an international criminal court only occurred in 2014 evinces that something new is happening in The Hague – not to mention that this particular case concerned the Head of a State party to the Rome Statute.

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25 For a review of the different positions regarding aggression, see McDougall, *The Crime of Aggression*, 318–319

26 E.g. Sadat, *Transformation of International Law,* 12; Kleffner, *Complementarity*, 246–247; Gilman, "Expanding Environmental Justice," 447 (2011); Cassese, "Preliminary Reflections," 151; Robinson, "Defining," 52–56; Bothe, "War Crimes," 400; Eden, "Criminalization of Apartheid", 171–191 (2014); Bartels, "Legitimacy and ICC Jurisdiction," 165–166; Lawrence and Heller, "Environmental War Crime," 61.

27 Rome Statute, Art. 27.

28 See Chapter 4.

While it is clear that customary international law applies to all States and to all parties to a conflict, can the provisions of a treaty allegedly 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. The two 'conceptions' adopted in this book vie to answer how this can legally operate.

Methodological Approaches

The present study adopts two methodological approaches. Firstly, it is trusted 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.[29] 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 without neither a territorial nor active nationality nexus to a State party to the Rome Statute. There is consensus that an Article 13 (b) referral can lead to the exercise of jurisdiction by the ICC over crimes committed by individuals that are not nationals of a State party to the Statute and in 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.[30] 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 neither the territorial State nor the national State.[31] This will serve "as a kind of plateau" on which further thoughts and arguments can be built.[32] 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.

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29 See Dworkin, *Law's Empire*, 71.

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

31 Dworkin, *Law's Empire,* 71.

32 Ibid., at 70.

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 next chapter will identify the following two conceptions of this concept: (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. By using this distinction, this book intends to offer a critical account of approaches relying on the extraordinary legal nature of either the Rome Statute or the SC's Chapter VII powers. It will be demonstrated that both of these conceptions capture the diverging views of the ICC Judges, the Office of the Prosecutor, States and scholars.

Secondly, it is believed that a comparative conflict of norms approach is a useful tool for this study. By adopting a norm conflict approach this book, 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, when analyzed using a comparative conflict of norms approach we see how each 'conception' of a referral under Article 13 (b) interacts with other norms of international law. For instance, 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, the UN Charter. As we will see, 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.

For the purpose of this study, a broad notion of conflicts is adopted – 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[33]

This definition of norm conflict includes not only scenarios of incompatibility between two norms but also contradictions between permissions and

33 Kelsen, "Derogation", 1438; See also Pauwelyn, *Conflict of Norms*, 199.

obligations.[34] 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 simply an accumulation of norms. If the two norms accumulate, they do not conflict.[35] 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. Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), which calls the interpreter of a treaty to take into account 'any relevant rules of international law applicable in the relations between the parties' can be read in this light. 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.[36]

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"[37] it is time to move on to conflict-resolution methods.

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34 See See Galand, "Custom Identification" 403 (for an even broader definition of norm conflict).

35 Pauwelyn, *Conflict of Norms*, 162.

36 Al-Adsani v. United Kingdom, App. No. 35763/97, Judgment of 21 November 2001, par. 55.

37 Pauwelyn, *Conflict of Norms*, 272.

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*.[38] If the conflict cannot be resolved then the adjudicator has to 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. That is where the comparative conflict of norm approach will draw the line between the two 'conceptions' of Article 13 (b). It will show which conception is able to coherently deal with with other norms of public international law, including the law of treaties, the law of immunities and specialized fields such as international human rights law. 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.

The Goals of the Book

One of the intermediate goals of this book 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, it will be shown 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 this author intuitively sympathized with the 'universal jurisdiction conception' when beginning to draft this book, we will discover that this conception faces many legal flaws that are difficult

38 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, UN Doc. A/CN.4/L.682 (Apr. 13, 2006) (hereinafter Report of the Study Group of the ILC on Fragmentation of International Law). 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, *Conflict of Norms*, 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.

to reconcile. With respect to the 'Chapter VII conception', these difficulties are less insurmountable due to the almost limitless powers we acknowledge the SC possesses when it fulfills its primary responsibility of maintaining international 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)."[39]

The ultimate goals of this book 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 the concept-conception distinction is adopted. To really emphasize how both 'conceptions' treat the 'concept' of this study; a comparative norm conflict approach is taken 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.

Plan of the Book

Chapter 1 will provide the theoretical background to this study. It will explain the various uses of the term 'jurisdiction', through an excursus in the history of international criminal law it will show how we come to the conclusion that there are two 'conceptions' of the 'concept' of this book, it will survey these two conceptions, and, finally, it will address the amendments to the Rome Statute that have been adopted from 2010 onwards and assess them with regard to our 'concept' and its conceptions.

In Chapter 2 our 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 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 the

39 Tadic Interlocutory Appeal Decision, par. 28.

'revolution' of international law necessary for the 'universal jurisdiction conception' to be considered legally valid has not yet occurred.

Chapter 3 confronts both 'conceptions' with a particular problem the Rome Statute poses with respect to individuals 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 4 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.

Finally, Chapter 5 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 that the 'Chapter VII conception' relies on the extraordinary power of the SC, one might wonder whether the SC can command the Court. This chapter will show that while these two international organizations have a 'bond', the SC cannot bind the ICC.

The Conclusion will summarize and offer some general remarks on the findings made throughout this book.

CHAPTER 1

Conceptions of Courts and Their Jurisdiction

In the summer of 1998, 160 States met in Rome to negotiate the drafting of what would become the Rome Statute of the International Criminal Court. After a month long of arduous horse-trading 120 States decided to adopt the Rome Statute. Pursuant to the Rome Statute, as adopted on 17 July 1998, the ICC has jurisdiction over genocide, crimes against humanity, war crimes and aggression. Except for the crime of aggression,[1] the ICC was endowed to exercise jurisdiction over these 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.[2] 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.[3] 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".[4] 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.[5]

There is, however, the view that "[i]t need not have been this way."[6] Due to the nature of the crimes within the ICC's subject-matter jurisdiction, several States and scholars argued that the Court could have exercised universal jurisdiction.[7] In any event, 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 it be will shown below, 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

1 The crime of aggression will also be subject to these three trigger mechanisms as of 17 July 2018, see Section 9 of this chapter.
2 Rome Statute, Art. 13–15.
3 Rome Statute, Art. 12.
4 Rome Statute, Art. 12 (3).
5 Rome Statute, Art. 13 (b).
6 Bekou and Cryer, "Universal Jurisdiction," 51.
7 See e.g. Kaul, "Preconditions,"; see sections 7–8.1 of this chapter for more details.

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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 Chapter VII powers of the SC.

The notion of jurisdiction must to be clarified 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 we will first describe the 'types' of jurisdiction. Secondly, we will differentiate the 'types' of jurisdiction from the 'heads' of jurisdiction. Thirdly, the historical evolution of international criminal law and international criminal jurisdiction from post-World War II trials to 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. Fifthly, the amendments to the Rome Statute adopted from 2010 onwards are touched upon with a view to determine whether they affect our two conceptions of a referral under Article 13 (b).

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."[8] The jurisdiction of a State can be criminal or civil; only the criminal jurisdiction of States will be considered in this book. Three 'types' of jurisdiction can be distinguished: jurisdiction to prescribe, jurisdiction to adjudicate and jurisdiction to enforce.[9] 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."[10] Many believe it is not necessary to separate this type of jurisdiction from jurisdiction to enforce.[11] However as we will see international criminal tribunals adjudicate cases but generally lack enforcement powers.[12] Jurisdiction to enforce

8 O'Keefe, "Universal Jurisdiction," 736.

9 Ibid, at 736.

10 Lowe and Staker, "Jurisdiction," 317.

11 O'Keefe, "Universal Jurisdiction," 736; Lowe and Staker, "Jurisdiction," 317; Williams, *Jurisdictional Issues*, 11–13.

12 See e.g. Cassese, "Current Trends", 10–12; Sadat, *Transformation of International Law*, 120–122. The international tribunals and courts 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, see Chapter 5, section 4.

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

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.[13] According to O'Keefe's terminology, these principles constitute 'heads' of jurisdiction.[14] 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. 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.[15] Another head of jurisdiction based on nationality is the *passive* personality principle which gives a State jurisdiction over crimes committed against its nationals.[16] A further head of jurisdiction is the protective principle. The protective principle as a head of jurisdiction gives a State jurisdiction over acts committed against the "essential interest of the State".[17] The example *par excellence* for the protective principle is the counterfeiting of currency.[18] 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

13 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); Ryngaert, *Jurisdiction*, 24.

14 O'Keefe, "Universal Jurisdiction," 738.

15 Arnell, "Nationality-Based Jurisdiction," Quarterly 955; Williams, *Jurisdictional Issues*, 12.

16 See 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, 14 February 2002, (hereinafter Arrest Warrant Case), Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, par. 47; See also Separate opinion Judge Rezek, par. 5; Separate opinion President Guillaume, par. 4.

17 Lowe and Staker, "Jurisdiction," 325.

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

international community as a whole.[19] 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*.[20] Grotius asserted that every State has jurisdiction over "gross violations of the law on nature and of nations, done to other States and subjects". 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.[21] More recently many States have recognized crimes such as genocide,[22] crimes against humanity,[23] war crimes [24] and torture [25] as capable of triggering universal jurisdiction.[26] The views are divided with respect to the crime of aggression, albeit at least 10 States assume universal jurisdiction over this crime in their domestic legislation.[27]

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

19 Luban, "Fairness to Rightness," 3.

20 Grotius, *De jure belli ac pacis*, 247.

21 Luban, "Fairness to Rightness," 2.

22 The Genocide Convention does not provide for universal jurisdiction, Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 9, 1948), 78 U.N.T.S,277, Art .6 (hereinafter Genocide Convention). Nevertheless, it is considered as giving rise to universal jurisdiction under customary international law, see Morris, "Universal Jurisdiction," 347.

23 See e.g. Eichmann Appeal Judgment.

24 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 (Aug. 12, 1949), 75 U.N.T.S. 970, Art. 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 (Aug. 12, 1949), 75 U.N.T.S. 971, Art. 50 (Geneva Convention II); Geneva Convention relative to the treatment of prisoners of war (Aug. 12, 1949), 75 U.N.T.S. 972, Art. 129 (Geneva Convention III); Geneva Convention relative to the protection of civilian persons in time of war (Aug. 12, 1949), 75 U.N.T.S. 973, Art. 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 (June 8, 1977) 1125 U.N.T.S. 3, Art. 85, 86, 88 (Additional Protocol I); for war crimes committed in non-international armed conflict see Kaul and Kress, "Jurisdiction and Cooperation," 148–150.

25 See Pinochet No. 3; Filartiga v. Pena-Irala, 630 F. 2d 876 (2d Cir.1980).

26 See ILC 1996 Draft Code of Crimes Against the Peace and Security of Mankind, UN doc. A/51/10, p. 28; Tadic Interlocutory Appeal Decision, par. 62; Prosecutor v. Ntuyahaga, Case No. ICTR-98-40-T, Decision on Prosecution Motion to Withdraw the Indictment (March 18, 1999).

27 See McDougall, *The Crime of Aggression*, 318.

upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty."[28] 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.[29] This is not the place to discuss whether the *dictum* in *Lotus* remains applicable today or whether it has been entirely reversed.[30] Suffice to say that 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.[31] Indeed, the PCIJ held that "the territoriality of criminal law [...] is not an absolute principle of international law and by no means coincides with territorial sovereignty".[32] This concerned prescriptive jurisdiction. On the other hand, as Ryngaert observes, "[t]erritorial sovereignty would relate to enforcement jurisdiction."[33] Jurisdictions to adjudicate and to enforce are territorial, unless consent from the extraterritorial State is given.[34] 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.[35]

3 Delegation of Jurisdiction

A State may delegate its head of jurisdiction to another State or to an international tribunal.[36] Indeed, a State can confer its territorial, active nationality, passive nationality, protective and universal jurisdiction to another State or to an international tribunal.[37] These 'heads' of jurisdiction indicate the 'basis' of

28 Lotus Case, par. 19.

29 Reydams, *Universal Jurisdiction*, 14.

30 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. Such approach is adopted in Harvard Research on International Law, Draft Convention on Jurisdiction with Respect to Crime; see also Ryngaert, *Jurisdiction,* 26–31; Reydams, *Universal Jurisdiction*, 14–21.

31 If these are lacking, the jurisdiction may be called exorbitant, see Chapter 2.

32 Lotus Case, p. 20.

33 See Ryngaert, *Jurisdiction,* 24.

34 See Lotus Case, p. 18–19.

35 See O'Keefe, "Universal Jurisdiction," 740.

36 See Akande, "Nationals of Non-Parties," 622–634; Scharf, "Nationals of Non-Party States," 98–110; Danilenko, "Third States," 465; Williams, *Jurisdictional Issues,* 300–314; Sadat and Carden, "An Uneasy Revolution," 412–413; contra Morris, "High Crimes," 52.

37 Ibid.

the jurisdiction conferred on the other State or on the international tribunal. For the sake of clarity, instead of using 'head' of jurisdiction, we 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 to its jurisdiction as the delegating State.[38] Thus, 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 some international criminal jurisdiction may elucidate under which jurisdictional basis their authority to prescribe, adjudicate and enforce derives from.

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.[39] In this manner the Allies "acting in the interests of all the United Nations"[40] established the International Military Tribunal (IMT or Nuremberg Tribunal) "for the trial of war criminals whose offenses have no particular geographical location".[41] The Nuremberg Tribunal had jurisdiction over crimes against peace, crimes against humanity and war crimes.[42] The basis of the jurisdiction of the Nuremberg Tribunal has been the subject of great debate within legal literature.[43] 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. Like 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.

38 Nemo dat quod non habet; Williams, *Jurisdictional Issues*, 408–409.

39 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, (Aug. 8, 1945) 82 U.N.T.S. 279 (hereinafter (London Agreement)).

40 London Agreement, Preamble.

41 London Agreement, Art. 1.

42 Nuremberg Charter, Art. 6.

43 Scharf, "Nationals of Non-Party States," 103–105; Schwelb, "Crimes Against Humanity," 208; Morris, "High Crimes," 13.

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 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.[44]

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',[45] 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".[46] Furthermore, the latter group claimed that the Nuremberg Tribunal was a joint municipal tribunal [47] whilst the former claimed that the IMT was an international tribunal.[48] 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.[49] 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."[50] 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.[51] Indeed, it was assumed that the Allies as occupying powers

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44 Trial of the Major War Criminals before the International Military Tribunal, vol. I, Nürnberg, 1947, at 223 (hereinafter Nuremberg Judgment).

45 Scharf, "Nationals of Non-Party States," 103–106; Schwelb, "Crimes Against Humanity," 208; Woetzel, *The Nuremberg Trials*, 87–89; Randall, "Universal Jurisdiction," 804–806.

46 Morris, "High Crimes," 37–42; Schwarzenberger, "The Judgment of Nuremberg", 170; Kelsen, "The Legal Status of Germany," 518.

47 Schwarzenberger, "The Judgment of Nuremberg", 170; Wright, "Nuremberg Trial," 330–333.

48 Schwelb, "Crimes Against Humanity," 149–152; Kelsen, "Judgment in the Nuremberg Trial," 286–288.

49 Schwelb, "Crimes Against Humanity," 149–152; Kelsen, "Judgment in the Nuremberg Trial," 286–288.

50 Nuremberg Judgment, at 223.

51 Schwarzenberger, "The Judgment of Nuremberg", 170.

of Germany consented in their capacity as the Government of Germany to the Nuremberg Charter and thereby conferred jurisdiction to the Tribunal on the basis of the territorial and active nationality principles.[52]

The UN 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.[53] 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.[54] Indeed, the Control Council Law No. 10 trials did not appeal to their 'sovereign legislative power' only; they also relied in some cases on the universality principle.[55] 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.[56] 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."[57] 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?[58]

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52 See Schwarzenberger, "The Judgment of Nuremberg", 170; Wright, "Nuremberg Trial," 330–333; Kelsen, "Judgment in the Nuremberg Trial," 286–288.

53 The Charter and Judgment of the Nürnberg Tribunal – History and Analysis: Memorandum submitted by the Secretary-General, 1949, UN Doc. A/CN.4/5, at 79–80; see also Morris, "High Crimes," 41.

54 See e.g. United States of America v Josef Altstoetter et al. (Justice), Tribunal War Crimes III, p. 958; see also Ministries, Order, 29 Dec. 1947, XV TWC 325; see Heller, *The Nuremberg Military Tribunals*, 112. Von Knieriem, *The Nuremberg Trials*, 97, 100.

55 Carnegie, "Jurisdiction," 418; However see Heller, *The Nuremberg Military Tribunals*, 134.

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

57 United States of America v Josef Altstoetter et al. (Justice), Blair Separate Opinion, III TWC 1194; see Scharf, "Nationals of Non-Party States," 103–106.

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

Other instances where the universality conception was adopted are the *Hadamar*,[59] *Zyklon B* [60] and *Kesselring* cases.[61]

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. 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 [62] and dissenting Judge Bernard [63] advanced the argument that the basis upon which the Tokyo Charter was created was a general right to enforce international criminal law.[64] 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 universalist propositions with regard to its jurisdictional basis than the Nuremberg Tribunal and the trials conducted under Control Council Law No. 10.

5 The Nuremberg Principles and the Work of the International Law Commission

Following the *Nuremberg judgment* the UN General Assembly adopted Resolution 95 (1) on the Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal.[65] 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.[66] The ILC

59 Law Reports of Trials of War Criminals, Vol. 1, Case 4, at 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.

60 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.

61 Law Reports of Trials of War Criminals, vol. 8., Case No. 44, at 9, The Trial of Albert Kesselring British Military Court at Venice, Italy, 17 February-6 May 1947.

62 Keenan and Brown, *Crimes against International Law,* 18.

63 Dissenting Judgment of the Member from France of the International Military Tribunal for the Far East, p. 2.

64 Boister and Cryer, *The Tokyo International Military Tribunal*, 31.

65 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.

66 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).

submitted its formulation of the Nuremberg principles in 1950[67] and adopted two draft codes in 1950 and 1954.[68] 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".[69] This project was in line with Article VI of the 1948 Genocide Convention which referred to a (future) "international penal tribunal."[70]

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.[71] Alfaro submitted in his report that it was both desirable and possible to establish an international criminal jurisdiction.[72] One objection to the creation of an 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 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 UN's existence and functioning. Sates had to accept that a part of their sovereignty had been relinquished to the UN. Thus, Alfaro considered that the UN should create such international criminal jurisdiction.[73]

On the other hand, Emil Sandström submitted in his report that an international criminal jurisdiction would be ineffective and therefore undesirable.[74]

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67 ILC, Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries, UN Doc. A/1316 (1950).

68 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.

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

70 Genocide Convention, Art. 6; The ILC request and the Genocide Convention were adopted during the same General Assembly plenary meeting.

71 ILC, Report of the ILC on the Work of its First Session, UN Doc. A/925 (A/4/10), par. 32–34.

72 ILC, Report on the Question of International Criminal Jurisdiction by Ricardo J. Alfaro, Special Rapporteur, Doc. A/CN.4/15 and Corr.1 (1950).

73 Ibid., at 17.

74 ILC, Report on the Question of International Criminal Jurisdiction by Emil Sandström, Special Rapporteur, Doc. A/CN.4/20 (1950).

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.[75] Thus, Sandström did not recommend the establishment of an 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 the establishment of an international criminal jurisdiction. However, while Alfaro was optimistic that the community of States would create such jurisdiction, Sandström believed States were too 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.[76] On the base of the ILC report, the General Assembly tasked a committee to draft a Statute for an International Criminal Court.[77] However, the special committee submitted two reports which reflected the increasing reluctance of the international community regarding the establishment of an international criminal jurisdiction.[78]

On 4 December 1954, the General Assembly asked for a draft definition of aggression to be submitted to it.[79] This last request saw the early progress of the ILC succumb to the paralysis of the Cold War. 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.[80] 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.

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75 Ibid., at 21.

76 ILC, Report of the ILC on its Second Session, UN Doc. A/1316 (1950).

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

78 See Official Records of the General Assembly, Seventh Session, Supplement No. 11, UN Doc. A/2136; See Official Records of the General Assembly, Ninth Session, Supplement No. 12, UN Doc. A/2645.

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

80 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.

Around the same time as domestic proceedings against perpetrators of crimes committed during World War II was resurging, 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).[81] 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, universal system and system of international criminal jurisdiction.[82] The Draft Code of Crimes was concluded on first reading in 1991, but it was generally viewed plethoric and inadequate.[83] This led some to express their preference for the question of an international criminal jurisdiction being examined separately from the project of the Draft Code of Crimes.[84]

In 1992 the ILC commenced work substantially on a Draft Statute for an International Criminal Court.[85] In 1994 a Draft Statute was adopted and recommended to the General Assembly.[86] The ILC Draft Statute was modest and limited in its scope. The Statute of the proposed court aimed to be primarily "procedural and adjectival".[87] 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 over the crime of genocide.[88] The principle of 'ceded jurisdiction'

81 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.

82 ILC, Report of the ILC on the Work of its Thirty-Fifth Session, UN. Doc. A/38/10 (1983); ILC, Report of the ILC on the Work of its Thirty-Eighth Session, UN Doc. A/41/10 (1986).

83 See Commentaries on the International Law Commission's 1991 Draft Code of Crimes against the Peace and Security of Mankind (1993).

84 Crawford, "The Work of the International Law Commission," 24.

85 See ILC, Report of the Working Group on the Question of an International Criminal Jurisdiction, UN Doc. A/CN.4/L.471 (1992), par. 99.

86 See ILC, Draft Statute for an International Criminal Court, with commentaries UN Doc. A/49/10 (1994), par. 91.

87 See Ibid, at 36.

88 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, UN Doc. A/49/10 (1994), Art. 21 (1) (a).

was the 'guiding star' for the rest of the crimes within the subject-matter jurisdiction of the Court.[89]

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.[90] 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.[91] 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.[92] 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.

6 The Ad Hoc Tribunals

On 6 October 1992, the SC established a commission of experts to investigate violations of international humanitarian law in the former Yugoslavia.[93] The

89 See ibid., at 36, fn concerning the "inherent" jurisdiction over Genocide.

90 Ibid.

91 See ILC, Draft Statute for an International Criminal Court, Art. 23.

92 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, see UN Doc. A/C.6/49/L.24.

93 SC Res. 780 (1992) of 6 October 1982, establishing a Commission of Experts to Examine and Analyze Information Submitted Pursuant to Resolution 771, UN Doc. S/RES/780.

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.[94]

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 an international criminal jurisdiction was to be established.[95]

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 (ICTY).[96] 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 (ICTR).[97]

The basis of the ad hoc tribunals' jurisdiction was territoriality in the case of the ICTY [98] and territoriality and nationality in the case of the ICTR.[99] Hence, it could be maintained that the ad hoc tribunals' adjudicative jurisdiction derived from a delegation of these jurisdictional bases.[100] This view is supported by the assumption that the SC, when adopting a resolution establishing an

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

95 See e.g. Scharf, "Nationals of Non-Party States,"; Morris, "High Crimes,".

96 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).

97 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).

98 ICTY Statute, Art. 1.

99 ICTR Statute, Art. 1.

100 See Akande, "Nationals of Non-Parties," 628; Dinstein, "The Universality Principle," 17–37. Scharf, "Nationals of Non-Party States," 108.

international criminal tribunal under Chapter VII, exercises powers delegated to it by all the Member States of the UN.[101] However, scholars are divided on which basis of jurisdiction exactly had been delegated. While Scharf argues that the delegated jurisdictional basis was universal jurisdiction,[102] Akande claims it was territorial jurisdiction.[103] Conversely, Morris [104] and former US Ambassador Scheffer [105] contest that the SC was delegating any 'bases' of State jurisdiction to the ad hoc tribunals. In their opinion, the ad hoc tribunals' jurisdiction found its source exclusively in the power of the SC to maintain international peace and security.[106]

In *Milutinovic et al.*, the defendants, who were accused of crimes committed in Kosovo, challenged the ICTY's jurisdiction on the ground that the Federal Republic of Yugoslavia (FRY) was not a UN Member State when the alleged crimes were committed.[107] According to 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 challenge was to assert that the ICTY was exercising universal jurisdiction so that it would not be restricted to the territorial space of UN Members. However, 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.[108] There was hence no need for the Trial Chamber to address the second strand of the motion which challenged the ICTY's universal jurisdiction.[109]

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101 UN Charter, Art. 24 (1); Scharf, "Nationals of Non-Party States," 108–110; Akande, "Nationals of Non-Parties," 628; See *Tadic Interlocutory Appeal Decision*, Judge Sidhwa Separate Opinion, par. 85.

102 Scharf, "Nationals of Non-Party States," 108–110.

103 Akande, "Nationals of Non-Parties," 628.

104 Morris, "High Crimes," 13.

105 Scheffer, "The Challenge," 68.

106 Morris, "High Crimes," 13; see *Tadic Interlocutory Appeal Decision*, par. 38.

107 Prosecutor v. Milutinovic et al., Case No. IT-99–37-PT, Motion Challenging Jurisdiction (May 6, 2003); see Akande, "Nationals of Non-Parties," p. 629–631. The ICTY Statute could apply to States which are not member of the UN by virtue of Article 2 (6) of the UN Charter. The ICJ 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, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 (Advisory Opinion), 1960 ICJ Report 16.

108 Prosecutor v. Milutinovic et al., Case No. IT-99-37-PT, Motion Challenging Jurisdiction (May 6, 2003), par. 44.

109 Ibid., par. 64.

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.[110]

Robinson agreed that the ICTY is adjudicating crimes subject to universal jurisdiction, but that is not the basis under which the Tribunal was acting. In other words, Judge Robinson agrees with Morris and Scheffer; the jurisdiction of the ad hoc tribunals was based on the powers of the SC under Chapter VII *tout court*. The ICTY Appeals Chamber in *Tadic Interlocutory Appeal on Jurisdiction* made clear that the establishment of an international criminal tribunal is consistent with the SC's primary responsibility for the maintenance of international peace and security.[111] But, beside Judge Robinson's separate opinion, the ad hoc tribunals have not clearly tackled their jurisdictional basis.

Following the establishment of the ad hoc tribunals, the idea of a permanent international criminal court began to gain popularity among the international community. Due to a "tribunal fatigue" at the SC,[112] a permanent court established by treaty was needed with possibility for universal application.

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

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

111 Tadic Interlocutory Appeal Decision, par. 32–40, see also Prosecutor v. Kanyabashi, Case No. ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction (June 18, 1997).

112 Scharf, "The Politics of Establishing," 169; Scheffer, *All the Missing Souls*, 168.

(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 were tense and difficult but culminated effectively after five weeks with a vote of 120 to 7, with 21 abstentions.[113]

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.[114] Like Hans-Peter Kaul pointed out, the conflicting principles were universality versus State sovereignty.[115] 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".[116] It was also felt essential that the SC be empowered to refer situations to the future permanent international criminal court.[117] Otherwise, the SC would be forced to continue establishing a succession of ad hoc tribunals in order to discharge its mandate, where the court would not have jurisdiction.[118] 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.[119]

Indeed, the representatives of Germany made a proposal, which was supported by an important number of NGOs and States,[120] 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, i.e. 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

113 Kirsch and Holmes, "The Negotiating Process," 2–12.
114 Kaul and Chatidou, "Reflections on the ICC," 981.
115 Kaul, "Preconditions," 584.
116 Williams and Schabas, "Article 12," 547.
117 Yee, "Article 13 (b) and 16," 146.
118 Bassiouni, *The Legislative History*, 182, par. 84.
119 Kaul, "Preconditions," 584.
120 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; Schabas, *Commentary on the Rome Statute,* 280, fn. 16.

still have been restricted by the principle of complementarity. That is, 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.[121] 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.[122]

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 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.[123] 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.[124] Despite the fact that the Korean proposal was supported by 79% of the States present,[125] 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 currently stands by proposing that the Court have jurisdiction only if both the custodial State and territorial State were States parties. The United Kingdom then amended its proposal to delete custodial State consent so that only territoriality was required.[126] On the other hand, the US required that active nationality be required.[127] 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. Ultimately, the "final compromise" was that the ICC

121 See Rome Statute, Art. 17..

122 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.

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

124 See Cassese, "When May Senior State Officials Be Tried," 855–858; As Cassese defines it a conditional universal jurisdiction is contingent upon the present of the suspect in the forum State.

125 Kaul, "Preconditions," 600.

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

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

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.

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".[128] 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.[129] The issue of the SC triggering a situation remained until the end of the Rome Conference "a controversy with a small but vocal minority opposing any role for it."[130] Despite this opposition there was broad support for providing a role for the SC to play within the triggering mechanism of the Court.[131] Eventually, the SC was provided with the possibility to refer as well as defer situations before the Court.[132]

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.[133] 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;[134] 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;[135] even if it was accepted in Rome to only exercise

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

129 See Yee, "Article 13 (b) and 16," 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, UN Doc. A/CN.4/430, par. 89; ILC, Draft Statute for an International Criminal Court, with commentaries, UN Doc. A/49/10, par. 65–66.

130 Williams and Schabas "Article 12," 549; See 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.

131 Yee, "Article 13 (b) and 16," 149.

132 Rome Statute, Article 13 (b), 16.

133 E.g. Akande, "Nationals of Non-Parties," 628.

134 E.g. Scharf, "Nationals of Non-Party States," 108.

135 E.g. Kress, "Immunities under International Law," 246–250; Sadat, *Transformation of International Law*, 108–110; Ambos, "Punishment without a Sovereign?," 1–23.

this universal jurisdiction where the SC would consent.[136] Fourthly, and finally, the SC's power under Chapter VII forms the ICC's jurisdictional foundation over non-party States.[137]

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 is referred to as the two 'conceptions' of an Article 13 (b) referral.

8 The Two 'Conceptions'

To come back to the 'concept-conception' distinction, the 'trunk' of this book's 'conceptual tree' is the ICC's exercise of prescriptive and adjudicative jurisdiction over the territory and nationals 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 are 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.[138]

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 SC's power to maintain international peace and security. In the next section, these two 'conceptions' are schematically outlined; a more in-depth analysis of their functioning, weaknesses and interactions with other norms of international law will be conducted in the subsequent chapters.

136 Gaeta and Labuda, "Trying Sitting Heads of State," 153–154.
137 Morris, "High Crimes,"; Williams, *Jurisdictional Issues*, 316–317.
138 Guest, *Dworkin*, 74.

8.1 *Universal Jurisdiction Conception*

The theoretical foundations of the 'universal jurisdiction conception' reside in the *jus cogens* status of the crimes, their *erga omnes* character, and the *jus puniendi* of the international community. According to this 'conception', universal jurisdiction over aggression, genocide, crimes against humanity and war crimes arises from the nature of these crimes [139] and from the obligation to exercise criminal jurisdiction when such egregious conduct occur.[140] The obligation to punish perpetrators of international crimes forms the punitive power (*jus puniendi*) of the international community.[141] 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*:[142] There is no need for a State to prescribe the criminality of the act since it is international law that asserts individual criminal responsibility.[143] 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.[144]

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*."[145] Many commentators believe that the prohibitions of aggression, genocide, crimes against humanity and war crimes are *jus cogens*.[146]

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139 Luban, "Fairness to Rightness,".

140 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 (Dec. 10,1984), 85 UNTS 1564, Art. 6 (hereinafter Convention against Torture); International Convention for the Protection of All Persons from Enforced Disappearances (Jan. 12, 2007) General Assembly Resolution 61/177, Annex, 11, UN Doc. A/RES/61/77, Art. 9 (hereinafter Convention on Enforced Disappearances); ILC, Draft Code of Crimes Against Peace and Security of Mankind, 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, "Immunities under International Law," 246–250; See Ambos, "Punishment without a Sovereign?,"; such obligation does not apply to the crime of aggression, see for instance Res. RC/Res.6, Annex III (June 11, 2010), par. 5.

141 Ambos, *International Criminal Law,* 58–60.

142 Schwarzenberger, "The Problem of an International Criminal Law," 264–74 (1950); Kress, "International Criminal Law", par. 10–14.

143 Nuremberg Principles No. 1 and 2.

144 Kress, "Immunities under International Law," 246; see Ambos, "Punishment without a Sovereign?," 1–23.

145 Bassiouni, "Jus Cogens and Obligatio Erga Omnes," 69.

146 *Ibid*., at 68; Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998), par. 153–157; Prosecutor v. Delalic et al., Case No. IT-96-21-T, Judgment (Nov. 16, 1998), par. 453;

Jus cogens norms are characterized as "superior legal norms".[147] 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.[148] Thus, no State can derogate from the prohibition of aggression, genocide, crimes against humanity and war crimes.[149] *Jus cogens* crimes, Orakhelashvili has stated, "entail objective illegality whose redress is a matter of community interest despite the attitudes of or prejudices to individual states".[150] "Universal jurisdiction", he adds, "enables States to prosecute jus cogens crimes in the community interest".[151]

Most of the crimes that are *jus cogens* entail a duty to prosecute or extradite, or the so-called *aut dedere aut judicare* principle.[152] 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.[153] 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 clarified that "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection".[154] Bassiouni maintains that the *jus cogens* and *erga omnes* nature of international crimes obliges the international community to prosecute them.[155] Kress suggests that Article 48(1) (b) of the ILC's Article on the Responsibility of States for Internationally Wrongful Acts [156] confirms that any State may act against a breach of an obligation owed to the international community as a whole.[157] Hence it is argued that any State

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Prosecutor v. Kupreskic et al., Case No. IT-95-16-T (Jan. 14 2000), par. 520; ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries UN Doc. A/56/10 (2001), at 112; Einarsen, *The Concept of Universal Crimes*, 62.

147 Einarsen, *The Concept of Universal Crimes*, 62.

148 Vienna Convention on the Law of Treaties (May, 23 1969) 1155 UNTS 331, Art. 53 (hereinafter VCLT).

149 Torture may also be added to this list.

150 Orakhelashvili, *Peremptory Norms*, 288.

151 *Ibid.*

152 Bassiouni, "Jus Cogens and Obligatio Erga Omnes,".

153 Bassiouni, "Jus Cogens and Obligatio Erga Omnes,".

154 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.

155 Bassiouni, "Jus Cogens and Obligatio Erga Omnes,".

156 ILC, Draft Article on the Responsibility of States for Internationally Wrongful Acts, Art. 48.

157 Kress and Prost, "Article 98," 1612; Kress, "Immunities under International Law," 248.

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.[158] 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."[159] 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.[160] 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.[161] The 'universal jurisdiction conception' conjures the idea of "floating" universal jurisdiction.[162] Indeed, the *jus puniendi* of the international community can be exercised by States or through other organs as designed by the international community.[163] 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."[164]

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.[165] The consensus could not be maintained [166] but an overwhelming majority of the States approved the text of the Rome Statute.[167] Proponents of the 'universal

158 Kress and Prost, "Article 98," 1612; Sadat, *Transformation of International Law,* 107–111; Triffterer, "Preliminary Remarks," 25; Bassiouni, "The Sources and Content," 4–17.

159 Sadat, *Transformation of International Law,* 108.

160 Olasolo, *The Triggering Procedure*, 14.

161 *Ibid*., p. 14.

162 See Williams, *Jurisdictional Issues*, 314–316; discusses Prosecutor v. Kallon and Kamara, Case No. SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (March 13, 2004), par. 88 and Prosecutor v Gbao, SCSL-2004-15-PT, Decision on the Invalidity of the Agreement Between the United Nations the Government of Sierra Leone on the Establishment of the Special Court (May 15, 2004), par. 8; which appear to refer to the existence of floating universal jurisdiction.

163 Olasolo, *The Triggering Procedure*, 15; Bassiouni, *A Draft International Criminal Code*, 107 et ss..

164 Kress, "Immunities under International Law," 246.

165 Olasolo, *The Triggering Procedure,* 17.

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

167 The Rome Statute has been adopted by 120 States, signed by 139 States and at the time of writing ratified by 123 States.

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".[168] 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."[169] Thus, individuals from all over the world are subject to the *jus puniendi* of the international community incarnated by the ICC. The 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.[170] 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 around.

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 primarily understood in light of this purpose.

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. 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 powers that might be necessary to restore or maintain international peace and security.[171] 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

168 Sadat and Carden, "An Uneasy Revolution," 412.
169 Ibid., at 412.
170 Olasolo, *The Triggering Procedure,* 17.
171 UN Charter, Art. 24(1).

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.[172] The SC is a political organ which cannot exercise judicial powers. However, in order to assume its primary responsibility, it enjoys wide discretionary powers.[173] 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,[174] which will exercise judicial functions.[175] 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.[176]

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.[177] Since a SC referral to the ICC is made under Chapter VII of the UN Charter, Members of the UN are obliged, pursuant to Article 25 of the Charter, to accept and carry out the decision 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.[178] Indeed, when a criminal jurisdiction is based on the Chapter VII power of the SC, classical theories of international law on jurisdictional basis are of no avail.[179] Criminal jurisdiction springing out from a Chapter VII resolution does not have to rest on the territoriality, nationality or universality principle. Rather, it is the powers of the SC to take

172 Tadic Interlocutory Appeal Decision, par. 33–36.

173 *Ibid.*

174 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., Case No. STL-11-01,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 (Oct. 24, 2012); Furthermore, the Special Court for Sierra Leone considered it had a Chapter VII status in Prosecutor v. Taylor, SCSL-2003-01-I, Decision on Immunity from Jurisdiction, Special Court for Sierra Leone (May 31, 2004) (hereinafter after Decision on Taylor Immunity).

175 Tadic Interlocutory Appeal Decision, par. 37–38.

176 See Chapter 2, section 1.1 for a further analysis of this aspect.

177 Rome Statute, Art. 12.

178 Williams, *Jurisdictional Issues*, 316–317.

179 Ibid., at 317.

steps necessary to restore or maintain international peace and security that are the sources from which the judicial body's jurisdiction stems.[180]

Predicating the exercise of jurisdiction upon the SC's power has great normative weight. 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".[181] 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".[182] 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.[183]

However, the link between international peace and security and international criminal justice is a vexed one. 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."[184] Nevertheless, acts of genocide, crimes against humanity and war crimes do not necessarily constitute threats to international peace and security.[185] In fact, it may be asked whether international justice really constitutes a suitable means for achieving international peace.[186] 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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180 See Morris, "High Crimes," 36. Williams, *Jurisdictional Issues*, 317.

181 Sarooshi, *Collective Security*, 28.

182 Ibid., p. 29.

183 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; Report of the Study Group of the ILC on Fragmentation of International Law, at 166–180.

184 Rome Statute, preamb. par. 4.

185 Condorelli and Villalpando, "Referral and Deferral," 630–633; see however, General Assembly, Resolution 60/1, 2005 World Summit Outcome (Oct. 24, 2005), UN Doc. A/RES/60/1, par. 138–139.

186 Condorelli and Villalpando, "Referral and Deferral," 632.

The primary concern of the SC is not the upholding of justice and international law but the maintenance of international peace and security.[187] 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.[188] However, as the ICTY Appeals Chamber in the *Tadic Interlocutory Appeal Decision* eloquently put: the SC is not *legibus solutus* (unbound by law); it has to abide by its constituent instrument, the UN Charter.[189]

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.*

9 The Amendments to the Rome Statute

The Rome Conference had ended with the understanding that the Rome Statute was still incomplete. While aggression was listed in Article 5 as one of the crimes within the Court's jurisdiction, such jurisdiction could not be exercised until a definition was adopted.[190] Furthermore, some States believed that the Court should also have had jurisdiction over crimes such as terrorism, drug trafficking and the use of weapons of mass destruction.[191] Article 121 Rome Statute was thus included in the Statute in order to regulate future amendments.

187 See De Wet, *Chapter VII Powers*, 183–184; UN Charter, Art 1, 24.

188 De Wet, *Chapter VII Powers*, 186–187. Akande, "The International Court of Justice," 309–343.

189 Tadic Interlocutory Appeal Decision, par. 28.

190 Rome Statute, Art. 5(2).

191 The Final Act of the Rome Conference, adopted at the same time as the Statute, includes a resolution recommending that the Review Conference consider means to enable the inclusion of crimes of terrorism and drug crimes. Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/13.

Amendments with respect to crimes listed in Articles 5, 6, 7 and 8 are subject to Article 121 (5) of the Rome Statute. The entry into force of such amendments takes place as soon as one State ratifies the amendment, but they enter into force only for those States party that have accepted the amendment. If a State Party does not accept an amendment relating to subject-matter jurisdiction, "the Court shall not exercise its jurisdiction" regarding this 'new' crime "when committed by that State Party's nationals or on its territory." Article 121(5) thus creates an exception to the jurisdictional scheme of Article 12, which provides the Court with personal and territorial jurisdiction over its States parties. It has been argued that the clear wording – "shall not exercising its jurisdiction [...] when committed by that State Party's nationals or on its territory" – entirely prohibits the Court from exercising its jurisdiction over a non-ratifying State party's nationals and territory.[192] Given that Article 121 (5) does not distinguish between the trigger mechanisms, some authors claim that such ban strictly relating to States parties that have not ratified the amendment would also apply in referrals under Article 13 (b).[193] On the other hand, according to Article 121 (5), new crimes apply, irrespective of the trigger mechanism, if: (i) committed by a national of an accepting State Party over the territory of a non-party State; as well as if (ii) committed by a national of a non-party State in the territory of an accepting State party. To put it simply, Article 121 (5) discriminates against non-party States.[194]

9.1 *The Kampala Review Conference*

The first Review Conference held in Kampala in 2010 was planned to address inter alia proposed amendments on a definition of the crime of aggression and adding certain prohibited weapons to the war crimes provisions. But most of the academic debate as well as that among States was focused on the aggression amendment.

As McDougall observed, "the most furious debates were not over the definition of the crime of aggression but rather over who would be subject to the ICC's jurisdiction".[195] Article 5(2) of the Rome Statute provided that "[t]he 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

192 Zimmermann and Şener, "Chemical Weapons," 444–45.
193 *Ibid.*, at 444–45.
194 See Wegdwood, "An American Perspective," 104.
195 McDougall, *The Crime of Aggression*, 205.

respect to this crime." The procedure to be applied for the 'adoption' of the amendments on aggression was indeed subject to several interpretations.

After several rounds of proposal on the Court's jurisdictional scheme to be adopted with regards to the crime of aggression, the 'Kampala Compromise' was reached.[196] Article 8*bis* provides the definition of the crime of aggression, and Article 15*bis* and *ter* determine the conditions under which the ICC will exercise jurisdiction in respect of the crime of aggression, when triggered by a State referral and an investigation *proprio motu* or by a referral under Article 13 (b).[197] The compromise, so to say, consisted in: on the one hand, excluding non-party States from the Court's jurisdiction, absent a SC referral, and, on the other hand, requiring States Parties to actively opt out if they want to avoid jurisdiction over their alleged acts of aggression.[198] Nonetheless, the Kampala Compromise was quickly decried as not conforming with Article 121 (5) Rome Statute, in that the amendment would enter into force for all States parties, and the Court could exercise jurisdiction if the aggressor State had not opted out–two issues which will haunt ASP for the next 7 years. Conversely, the fact that Article 15*bis* (5) excluded the Court's jurisdiction over the territory and nationals of a State not party to the Rome Statute was not strongly objected.

Beside aggression, the States parties present at the Kampala Review Conference were also negotiating an amendment criminalizing–as part of Article 8 'War Crimes'–the use of poisoned weapons, asphyxiating gases, and expanding or flattening bullets in non-international armed conflicts.[199] Though not insignificant–these proscriptions include "many and perhaps all uses of lethal chemical weapons",[200] the war crimes amendment received little (if not at all) attention. The Working Group in charge of the war crimes amendment noted that the procedure for entry into force was related to the debate over the crime of aggression.[201] However, the same type of compromise over the Court jurisdictional scheme as for the crime of aggression did not occur. On the one hand,

196 ICC, Assembly of States Parties, Review Conference, The Crime of Aggression, Resolution RC/Res.6, 11 June 2010 (hereinafter Resolution RC/Res.6).

197 Article 15bis for State referrals and investigations proprio motu. And, Article 15ter for referrals under Article 13(b).

198 Barriga and Blokker, "State Referrals and Proprio Motu Investigations", 652–674.

199 International Criminal Court, Assembly of States Parties, Review Conference, Amendments to Article 8 of the Rome Statute, Res. RC/Res.5, 10 June 2010 (hereinafter Res. RC/Res.5).

200 See Zimmermann and Şener, "Chemical Weapons," 441–442; Akande, "Use of Chemical Weapons," EJIL Talk! (Aug. 23, 2013), available at https://www.ejiltalk.org/can-the-icc-prosecute-for-use-of-chemical-weapons-in-syria/.

201 Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010, 2010, ICC Doc. RC/11, 21 December 2010, p. 72.

it was decided that the expanded war crimes provisions would only enter into force for States that have ratified it – no opt out is necessary for being excluded from the Court jurisdiction. And, on the other hand, the resolution to which the war crimes amendment is annexed states that the Review Conference "confirm[s] its understanding that in respect to this amendment the same principle that applies in respect of a State Party which has not accepted the amendment applies also in respect of States that are not parties to the Statute."[202]

The Kampala Review Conference approach to the war crimes amendment seems to set a pattern for the amendment to the crimes within the jurisdiction of the Court: any new amended crime would only be applicable to the territory and nationals of States that have consented.

9.2 *The New York Session*

The new pattern established with respect to the war crimes amendment will indeed follow on the activation of the Court's jurisdiction over the crime of aggression. The activation decision, which was postponed in Kampala to at least 1 January 2017, was placed on the agenda of the 16th session of the ASP held in December 2017 in New York. In Kampala, it had been agreed that the jurisdictional scheme of Article 12 would apply to the aggression amendment, unless the active nationality State had issued an opt-out declaration, or if either the active nationality State or the territorial State are not parties to the Rome Statute. The text of the amendments, encapsulated in Article 15*bis* (4) and (5), certainly provides for such jurisdictional scheme.[203]

Nonetheless, the New York session was taken as a further opportunity to revisit the conditions for the Court to exercise jurisdiction over the crime of aggression. This time, two States – namely, UK and France – were not ready to compromise.[204] The two permanent members of the SC would only accept that like for the war crimes amendment, in case of a State referral or *proprio motu* investigation the Court would have jurisdiction, only if, the crime was committed in the territory of a State party that ratified the amendment, and by a national of a State party that ratified the amendment. Accordingly, the New York Resolution activating the Court's jurisdiction over the crime of aggression suggests that only the SC can trigger the Court's jurisdiction if either the aggressor State or the victim State have not ratified the Rome Statute and its amendment.[205]

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202 Resolution RC/Res.5, par. 3.

203 Rome Statute, art. 15*bis* (4) and (5). See Zimmermann, "A Victory," 20, 22.

204 See Kress, "On the Activation," 11–12.

205 Resolution on the Activation of the jurisdiction of the Court over the crime of aggression, 14 December 2017, ICC-ASP/16/Res.5, op. par. 2 (hereinafter ICC-ASP/16/Res.5).

A further amendment was also adopted in New York, relating once again to the war crimes provision–this time prohibiting three kinds of weapons in both international and non-international armed conflict.[206] Like its predecessor, the enabling resolution notes that the Court shall not exercise its jurisdiction regarding the crime covered by the amendment when committed by non-ratifying State party's nationals or on its territory, and confirms its understanding that the same exemption applies to non-party States.[207]

Despite the firm wording of the exemption paragraphs in the ASP's resolutions adopting the amendments, it remains unclear whether they will have their expected effects.[208] While States may have expressed their preference for a new jurisdictional scheme, judges remain with the final say.[209] This was certainly what the majority of States believed in New York when facing the UK and France' stumbling block. Indeed, the New York resolution on aggression contains a symbolic paragraph pointing out that ultimately it is the ICC Judges that will have to assess the weight of the resolution against the wording of the amended articles and the Rome Statute.[210] Nonetheless, it is evident that all amendments to the Court's jurisdiction have been accompanied by a text emanating from the State parties 'confirming' their 'understanding' that non-consenting States were exempted.

The resolutions accompanying the amendments to the Rome Statute undoubtedly challenge the foundation of the 'universal jurisdiction conception'– and to a certain extent of the 'Chapter VII conception'. While the new crimes added to the Statute reveal the same nature as the crimes already within the Court's jurisdiction, the resolutions illustrate that such nature might not always justify a jurisdiction solely based on territoriality or active personality – both jurisdictional basis appear to be required for the amended crimes.

Such fragmented regime does not however signify the end of the 'universal jurisdiction conception'. Indeed, the proponents of this conception of Article 13 (b) are still vocal. For example, as recently as 2017, Paola Gaeta and Patryk Labuda argued that "the ICC's jurisdiction exists independently of where or by whom crimes are committed and in this sense it is already 'universal'."[211] Their understanding on whether the immunity of heads of States not party to

206 Resolution on amendments to article 8 of the Rome Statute of the International Criminal Court, Resolution ICC-ASP/16/Res.4, 14 December 2017.
207 Resolution ICC-ASP/16/Res.4, op. par. 2 (hereinafter ICC-ASP/16/Res.4).
208 Trahan, "From Kampala to New York," 197–243.
209 Zimmermann, "A Victory," 24–25.
210 ICC-ASP/16/Res.5, op. par. 3.
211 Gaeta and Labuda, "Trying Sitting Heads of State," 153.

the Rome Statute is relevant before the ICC relies on the distinction between the universal jurisdiction basis of the Court and its exercise of jurisdiction when triggered by a referral under Article 13 (b).[212] Not long ago, Carsten Stahn exposed the same universalist rationale to counter the argument that ICC's possible situations in Palestine and Afghanistan are limited by the *nemo dat quod non habet* doctrine.[213] Despite the challenges the States parties posed to the 'universal jurisdiction conception' through the resolutions accompanying the amendments to the Rome Statute it is generally agreed that "States Parties entrusted the Court to have a final say over certain issues, including the question whether or not the Court is entitled to exercise jurisdiction."[214] While this book shows that the 'universal jurisdiction conception' should be discarded for the 'Chapter VII conception', it also demonstrates that the Court has at times favored the former over the latter. It is thus unclear how (and if) the Court will interpret the jurisdictional scheme governing the amended crimes in strict observance of the law of treaties or will be driven by the raison d'être of the Court.

With the exception of the aggression amendments, the resolutions enabling the amended war crimes are also potentially undermining the reach of the Court's jurisdiction when triggered under Article 13 (b). Given that the war crimes amendments do not explicitly provide for SC referrals, as does Article 15*ter* (1) of the aggression amendments, it has been argued that they do not apply under this trigger mechanism.[215] This argument is reinforced by the 'understanding' that the amendments will not apply to non-party States. Zimmerman suggests that negotiating States might have believed that the SC did not have the power to confer to the ICC jurisdiction over such newly added crimes.[216]

Conversely, and more persuasively, it can be argued that since a referral under Article 13 (b) entitles the Court to "exercise its jurisdiction with respect to a crime referred to in article 5", all crimes listed therein fall within the scope of a referral under Article 13(b).[217] Accordingly, the amendment on aggression contains a specific article regulating the trigger mechanisms because it is subjected to different safeguards than other crimes.[218] Given that the newly

212 *Ibid.*, at 153–154.

213 Stahn, "A Reply to Michael Newton," 446–448.

214 *Ibid.*, at 447.

215 Zimmermann and Şener, "Chemical Weapons," 443–47; contra see Reisinger Coracini, "Amended Most Serious Crimes," 707–708 (2008); Kress and Von Holtzendorff, "The Kampala Compromise," 1197 fn 65.

216 Zimmermann and Şener, "Chemical Weapons," 443–47

217 The current amendments to the war crimes provision are part of the crimes referred to in article 5, paragraph (1) (c).

218 In particular, for Security Council referrals, article 15 ter (2) and (3) regulate the time from which the Court can exercise jurisdiction in a different manner than 121 (5). The

added war crimes provisions are not politically controversial as the crime of aggression, Article 13 (b) applies without prerequisites. With regards to the restrictions provided by Article 121 (5) and the enabling resolutions, Akande argues they solely apply to State referrals and *proprio motu* investigations.[219] Referrals under Article 13 (b) instead are not based on State's consent. Indeed, as this book shows, Article 13 (b) referrals are either based on an already existing universal jurisdiction or on the conferral of jurisdiction by the SC using its Chapter VII powers.

Furthermore, the resolutions on war crimes contradict the Statute by providing that the Court shall not exercise its jurisdiction over a crime covered by the amendments if the conduct took place in the territory or was committed by a national of a non-party State. Given that only an amendment per se can modify the Statute and not their enabling resolutions, it can be claimed that the operative paragraphs conflicting with Article 12 and 121 (5) constitute illegitimate attempts to modify the Statute. Accordingly, only the changes brought through formal amendments, such as Article 15*bis* (4) and (5), would be binding on the Court.[220]

Even if one considers that the resolutions should be taken into account, as "subsequent agreement[s] between the parties regarding the interpretation of the treaty or the application of its provisions",[221] they cannot amend the Rome Statute.[222] A subsequent agreement can however be of assistance when interpreting the text of a provision subject to uncertainties. The resolution activating the crime of aggression might be of use in interpreting the ambiguity in the text of Article 15*bis* (4) – relating to the Court's jurisdiction over the crime of aggression in State referrals and *proprio motu* investigations. With respect to the war crimes amendments, their texts – which only speak of the crimes definition–are sufficiently clear for not requiring the judges to question whether the Statute's trigger mechanisms are subject to a different jurisdictional scheme. That being said, the resolutions might serve the judges to interpret whether a 'new' crime was considered reflective of customary international law at the time of their adoption.[223] This will be crucial as we will

safeguards are however more developed with regards to State referrals and proprio motu investigations.

219 Akande, "Use of Chemical Weapons in Syria?," EJIL Talk! (Aug. 23, 2013), avaiblable at https://www.ejiltalk.org/can-the-icc-prosecute-for-use-of-chemical-weapons-in-syria/.

220 Trahan, "From Kampala to New York," 232–233.

221 VCLT, Article 31(3)(a).

222 Trahan, "From Kampala to New York," 232.

223 The Kampala Review Conference explicitly affirmed that the amendment on war crimes reflected customary international law. See Resolution RC/Res.5, par. 8–9; The other amendments were not accompanied by such affirmation. See Akande, "New War Crimes,"

see later when applying the principle of legality, and assessing whether the immunity of State officials is relevant in situations where the Court exercises jurisdiction over the nationals and territories of States not party to the Rome Statute nor consenting to its jurisdiction. It will also be determinant when scrutinizing whether each of our conception is able to ground its exercise of adjudicative and prescriptive jurisdiction without breaching the sovereign rights of the affected State(s).

Conclusion

The history of international criminal justice is full of uncertainties. One of the most ambivalent issue is the jurisdictional basis of international criminal tribunals and courts. By declaring that their Charter's drafters have done together what could have been done by any one of them singly, the IMT gave a great impulse to the principle of universal jurisdiction. Indeed, from Nuremberg to The Hague and Arusha, (international) criminal jurisdictions have been set up without the explicit consent of the States with primary territorial and national jurisdiction. However, to justify this exercise of jurisdiction power was always in the background: occupying power for the IMT and Chapter VII powers for the ad hoc tribunals. Hence, despite the words of the Commission of Experts on the Former Yugoslavia, a 'universal jurisdiction conception' of these tribunals is contested.

The establishment of a permanent international criminal court with an inherent universal jurisdiction came nail-bitingly close. But, ultimately, the Rome Statute's drafter opted for consensus and predicated the ICC's exercise of jurisdiction on State consent. That is, with the exception of Article 13 (b). Is Article 13 (b) predicated on the nature of the crimes within the Rome Statute – crimes which are essentially subject to universal jurisdiction, at least when exercised by States? Or, simply on the power of the SC to maintain international peace and security?

Article 13 (b) referrals make the universal applicability of the Rome Statute a reality. However, 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

EJIL Talk! (Jan. 2, 2018), available at https://www.ejiltalk.org/customary-international-law-and-the-addition-of-new-war-crimes-to-the-statute-of-the-icc/; See Kress and Von Holtzendorff, "The Kampala Compromise," 2118 (2010) with regards to aggression.

of complementarity) and obligation of States.[224] 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.[225] Depending on the approach taken, 'universal jurisdiction conception' or 'Chapter VII conception', the exercise of jurisdiction by the ICC over a non-party State 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.

This book 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.

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

225 Cryer, "Another Round?," 981.

CHAPTER 2

Article 13 (b) vs State Sovereignty

This book deals with 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 cases 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."[1] 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".[2]

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.[3] In the present study, we 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 – the Rome Statute needed sixty States' ratification to enter into force.

Jurisdiction to adjudicate follows jurisdiction to prescribe.[4] Indeed, the application of the Rome Statute to an individual "is simply the exercise or

1 Lowe and Staker, "Jurisdiction," 317.
2 Rome Statute, Art. 5; preamble, par. 5.
3 O'Keefe, "Universal Jurisdiction," 736.
4 See generally Akehurst, "Jurisdiction," 179.

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actualization of prescription."[5] As Akehurst states "[i]n criminal law legislative jurisdiction and judicial jurisdiction are one and the same."[6] 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 entity and the legal authority of the adjudicative body.

One crucial aspect of this chapter is the right to legislate for others. Since there is "no Parliament for the world community"[7] it may seem an oxymoron to speak of "truly international legislation".[8] However, the term "legislative" needs to be adapted to the particularities of the international legal order.[9] It is possible to consider that some acts in international law have the nature of legislative acts, despite not being enacted by legislative bodies.[10] Three characteristics have been accepted as defining a legislative act in the international setting.[11] 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."[12] 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, 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'. We 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. This analysis will show that the Chapter VII's conceptions may be affected by

5 O'Keefe, "Universal Jurisdiction," 737.

6 Akehurst, "Jurisdiction," 179.

7 Tadic Interlocutory Appeal Decision, par. 44

8 Kirgis, "Fifty Years," 520.

9 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." Hudson, *International Legislation*, xiii.

10 Jutta Brunnée, "International Legislation," (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"). See also Heugas-Darraspen, "Article 22," 785.

11 Yemin, *Legislative Powers*, 6; see also Kirgis, "Fifty Years," 520.

12 Yemin, *Legislative Powers*, 6.

inherent normative conflicts and the 'universal jurisdiction conception' clashes with the sovereignty of States not party to the Rome Statute.

The first potential conflicts that will be addressed in this chapter, however, are 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 crimes 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.

1 Jurisdiction to Adjudicate

The Rome Statute is a treaty. 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 known as *pacta tertiis nec nocent nec prosunt.* This rule codified in Article 34 VCLT provides that "[a] treaty does not create either obligations or rights for a third State without its consent". It may however 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.[13] The non-party States implicated in a prosecution may refuse to consent to any request for cooperation, and, indeed, the Rome Statute does not oblige them to do so.[14]

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.[15] 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."[16] 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'.

13 Akande, "Nationals of Non-Parties," 620, Cryer et al., *International Criminal Law and Procedure*, 140; Liivoja, "Universal Jurisdiction," 302.

14 Kaul and Chatidou, "Reflections on the ICC," 990; Hafner et al., "A Response," 118.

15 O'Keefe, "The United States and the ICC," 343.

16 Crawford, *Brownlie's Principles*, 447.

The *pacta tertiis* rule also gives rise to a jurisdictional principle – *the Monetary Gold Principle* -, which prohibits international judicial proceedings to go on the merits of a case, if it implies determining the rights and obligations of States who are not consenting to the proceedings. Because of the very nature of certain international crimes there is a risk when exercising jurisdiction to adjudicate an individual's criminal responsibility of going beyond the individual case. In the course of determining the individual's guilt, the Court exercising jurisdiction might end 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; thus implicating the latter's responsibility.

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 be pursuant to or in furtherance of a State policy. However, the Rome Statute and Elements of Crimes define the crime of aggression, war crimes, crimes against humanity and genocide as crimes that can require a court to determine the international lawfulness of a governmental policy.[17] The crime of aggression particularly stands out for that matter.[18] Article 8*bis* of the Rome Statute requires that for the crime to have been committed an 'act of aggression' which constitutes "a manifest violation of the Charter of the United Nations" must have occurred. Furthermore, even if the chapeau of a crime 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

17 See 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; Article 7 of the Rome Statute require that attack against the civilian population be pursuant to or in furtherance of a State or organizational policy. See Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir (March 4, 2009), par. 177–133; Cryer et al., *International Criminal Law and Procedure*, 177–179. Schabas, *Genocide*, 245–248; Werle, *Principles*, 191–194.

18 Akande, "Prosecuting Aggression,"; 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, UN Doc. A/51/10 (1996) at 30.

guilt of the accused.[19] This type of crimes, which are often termed 'context crimes',[20] require a complete examination of a State's act and incidentally 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.[21] 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".[22] Similarly, the ICJ in the *East Timor Case* (*Portugal v. Australia*) refused to rule on the merit 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".[23]

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.

In the next sections, we will dissect how each of our 'conception' on the exercise of jurisdiction to adjudicate over non-party States interacts with the legal rights of States deriving from the principles of the sovereignty and equality of States. These sections will assess the jurisdictional basis of each conception, whether such foundations make their adjudicative jurisdiction over

19 Van Alebeek, "Functional Immunity," 14–15, 20–21.

20 *Ibid*.

21 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).

22 Monetary Gold Case, at 32

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

non-consenting State lawful under international law, and how they interplay with the *Monetary Gold Principle*.

1.1 *Chapter VII Conception – Taking Judicial Measures under Article 41 UN Charter*

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.[24] Since the ICC's jurisdiction to adjudicate in situation triggered under Article 13 (b) is (under the 'Chapter VII conception') strictly rooted on the SC's Chapter VII powers, its interplay with the sovereignty of non-consenting States needs to be assessed in light of the UN Charter. In particular, it needs first to be established which powers the UN Charter confers to the SC when it decides under Chapter VII to refer a situation to the ICC.

In this light, it is fundamental to stress out that in order to activate Chapter VII of the UN Charter, the SC must determine that there is a situation that constitutes a "threat to the peace", a "breach of the peace" or an "act of aggression."[25] Pursuant to Article 39 UN Charter, these situations constitute a threat to international peace and security, which the SC has, according to Article 24 (1), the primary responsibility to restore or maintain.[26] The political character of the SC's responsibility requires that its discretion in making such determination be wide.[27] However, 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.[28]

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.[29] The SC can decide to take measures either involving the use of armed forces or other types of coercive measures – indeed, the list of measures contained in Articles 41 and 42 UN Charter is not exhaustive but illustrative.[30] Since measures under Chapter VII "are to be employed

24 See Morris, "High Crimes," 36; Williams, *Jurisdictional Issues*, 317.
25 UN Charter, Art. 39.
26 UN Charter, Art. 24.
27 Bowett, "The Impact of Security Council Decisions," 95.
28 UN Charter, Art. 24(2).
29 Talmon, "World Legislator," 182 (2005); Alvarez, *International Organizations,* 193.
30 Tadic Interlocutory Appeal Decision, par. 35.

to give effect to its decisions",[31] they are generally referred to as 'enforcement measures'.

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, 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."[32] Building on this precedent, the SC explicitly stated in Resolution 1970 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".[33] If one accepts the proposition of the SC that it was indeed acting under Article 41 of the UN Charter, referrals to the ICC are therefore – like the ad hoc tribunals – 'enforcement measures'.

Finding that SC referrals to the ICC are enforcement measures taken under Article 41 of the UN Charter does not however entail that they are entirely identical to the ad hoc tribunals. Unlike the ad hoc tribunals, the ICC, including when it exercises jurisdiction under Article 13 (b) of the Rome Statute, is not (turned into) a subsidiary organ of the SC. The ICC is established and governed by its own constituent treaty, the Rome Statute.[34] It has a separate legal personality with its own rights and obligations. While the ICC and the UN entered a relationship agreement, the Court is not part of the UN System. Nonetheless, these distinctions do not mean that the SC does not have the competence to refer a situation to the ICC. Article 41 is sufficiently broad to encompass the competence to confer adjudicative jurisdictional power to an already existing criminal court.[35] UN Member States have acquiesced in this power. This is confirmed by the wide ratification of the Rome Statute, and the unanimous referral of the situation in Libya to the ICC.

Even if the ICC is not a subsidiary organ like the ad hoc tribunals, its exercise of adjudicative jurisdiction over the territory and nationals of a State neither party to the Rome Statute nor consenting to the Court's jurisdiction is founded like the ad hoc tribunals on the SC's power to devise under Article 41 enforcement measures to restore international peace and security. Given that the ad hoc tribunals' exercise of jurisdiction over the FRY and Rwanda were premised on the same sort of SC's enforcement power, it is worth examining whether the ad hoc tribunals acknowledged a potential clash between their jurisdiction to adjudicate

31 UN Charter, Art. 41.

32 Tadic Interlocutory Appeal Decision, par. 35.

33 SC Res. 1970.

34 With regards to the level of control the SC exercises over the ICC, see Chapter 5, section 3.

35 Zimmermann, "The Creation," 216.

and the sovereignty of the States with primary jurisdiction. The first individual brought before the ICTY, Dusko Tadic, argued that the tribunal's assertion of jurisdiction to adjudicate international crimes violated the sovereignty of the State where the crimes were committed.[36] In particular it was contended that the ICTY was intruding in matters essentially within a State's domestic jurisdiction. The Appeals Chamber responded to the defendant's challenge by first, highlighting that the ICTY was a SC enforcement measure under Chapter VII of the UN Charter. It then referred to Article 2(7) of the UN Charter, which indeed prohibits "the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state".[37] But, concluded, that even if jurisdiction to adjudicate a crime is a matter essentially within a State domestic jurisdiction, the second part of Article 2(7) specifies that "this principle shall not prejudice the application of enforcement measures under Chapter VII".[38]

Conceiving the SC's referrals to the ICC as enforcement measures under Chapter VI implies that the ICC exercise of adjudicative jurisdiction over the territory and nationals of a State neither party to the Rome Statute nor consenting to the Court's jurisdiction does not conflict with the sovereignty of the latter's State. 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.[39] The principle of non-intervention is simply carved out to the extent required by the right of the SC to trigger a mechanism to adjudicate international crimes as an enforcement measure.

With regards to the *Monetary Gold Principle*, if one assumes that it applies to the ICC,[40] a 'Chapter VII conception' of a referral under Article 13 (b), implies 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." There is therefore another accumulation of norms.

Finally, it may be argued that instead of considering that the *Monetary Gold Principles* applies *stricto sensu* to the ICC, the lack of consent of the

36 The challenge regarded especially the primacy of the ICTY over domestic jurisdiction.

37 Tadic Interlocutory Appeal Decision, par. 56

38 UN Charter, Art. 2(7).

39 Pauwelyn, *Conflict of Norms*, 162–163.

40 See Morris, "High Crimes," 14–15, 20–21 (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 Akande, "Prosecuting Aggression,".

concerned State solely vindicates that the Court shows judicial restraint over the former's rights and interests when assessing the individual guilt of the accused.[41] In this regard, it can be added that under the 'Chapter VII conception' such judicial restraint is not needed, since the SC had already determined that the situation referred constitutes a threat to international peace and security.

Clearly, the 'Chapter VII conception' of an Article 13 (b) presents a squarely coherent interplay between the ICC's jurisdiction to adjudicate and the sovereignty of States not party to the Rome Statute. The legal rights and interests deriving from the sovereignty of States, are all subject to specific exceptions when the SC acts under Chapter VII of the UN Charter. The next section shows how the 'universal jurisdiction conception' struggles with the same principles.

1.2 *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. 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 'universal jurisdiction conception' justifies this intrusion in a non-party State's domestic jurisdiction on three grounds.

First, it must be reckoned that the category of crimes within the ICC's jurisdiction are not solely treaty crimes. The category of crimes within the jurisdiction *ratione materiae* of the ICC are war crimes, crimes against humanity, genocide and aggression. These crimes are typically considered 'core' international crimes.[42] It is generally recognized that these 'core' crimes are established in customary international law (some argue that they have *jus cogens*

41 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 Wall in the Occupied Palestinian Territory, International Court of Justice, Advisory Opinion, 2004 ICJ 136, par. 47.

42 Werle, *Principles*, 26; contra, Bassiouni, "Ratione Materiae of International Criminal Law," 132–133 (disagrees on ggression being a core crime), see also Schabas, *Unimaginable Atrocities*, 27.

status),[43] and that they are subject to universal jurisdiction. While it is unclear whether the crime of aggression is also subject to universal jurisdiction under customary international law,[44] its ancestor, crime against peace, is undeniably a crime against (customary) international law.[45] It must be noted in this regard that the very definition of crimes against international law is that they are not crimes within the exclusive jurisdiction of the State concerned.

Second, the outlawing of aggression, genocide, crimes against humanity and war crimes are generally the type of obligations that are *erga omnes* in nature.[46] The ICJ in the *Barcelona Traction Case* recognized the legal interest of all States in seeing obligations *erga omnes* observed.[47] Obligations *erga omnes* are a type of obligations which are the concern of all States and for the protection of which 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.[48] 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*."[49] 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."[50] 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.

Third, national courts exercising universal jurisdiction over these 'core' international crimes conceive themselves in a sort of '*dédoublement fonctionnel*'

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43 Report of the Study Group of the ILC on Fragmentation of International Law, par. 374; Milanovic, "Rome Statute Binding," 49; Bassiouni, *International Criminal Law*, 237–240; Sadat, *Transformation of International Law,* 108.

44 For a review of the different positions, see McDougall, *The Crime of Aggression*, 318–319.

45 Nuremberg Principle, VI(a).

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

47 Ibid.

48 Van Alebeek, "The Pinochet Case," 34 (2000); Boed, "The Effect of a Domestic Amnesty," 299–301; See also Ragazzi, *International Obligations Erga Omnes*; De Hoogh, Obligations Erga Omnes; Bassiouni, "Universal Jurisdiction," 96; Prosecutor v. Furundzija, Case No. IT-95-17/1, Judgment (Dec. 10, 1998), par. 151; contra Higgins and Zimmermann, "Violations of Fundamental Norms," 338–339; Ryngaert, *Jurisdiction,* 107.

49 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina Yugoslavia) I.C.J. Reports 1996, at 616

50 *Ibid.*, at 616.

whereby while sitting in judgment over international crimes they act as organs of the international community.[51] 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."[52] In other words, when prosecuting a crime under international law a State enforces international law.[53] 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.[54] 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.[55] 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.[56]

Bearing these in mind, it must be noted it is not accepted by all that the *erga omnes* character and *jus cogens* status of the norms at stake are sufficient elements to confer jurisdiction over a case. 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.[57] The Court further confirmed in *Jurisdictional Immunities of*

51 See Eichmann Appeal Judgment; Demjanjuk Case; Gaeta, "The Need to Reasonably Expand," 603; Cassese, "Remarks on Scelle's Theory," 210; Arrest Warrant Case, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, par. 51; Kleffner, *Complementarity*, 26–27.

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

53 Colangelo, "The Legal Limits," 5.

54 See Eichmann Appeal Judgment, par. 12; Gaeta, "The Need to Reasonably Expand," 603; Cryer, "The Doctrinal Foundations," 108; Colangelo, "The Legal Limits," 5; Reydams, *Universal Jurisdiction*, 17–18.

55 Nuremberg Judgment, at 223.

56 Tadic Interlocutory Appeal Decision, par. 62; see also Inazumi, *Universal Jurisdiction*, 120.

57 Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, par. 15,. 64; see also Application of the Convention on the Prevention and Punishment of Genocide (Bosnia Herzegovina v. Serbia & Montenegro), ICJ Reports 2007, par. 446.

the State (Germany v Italy) that a *jus cogens* norm cannot in and of itself do away with procedural barriers in relation to jurisdiction.[58] Moreover, *erga omnes* norms, as applied by the ICJ, only concern the extent to which States have a legal interest in a judicial dispute for which jurisdiction is already given. In the *East Timor Case*, the Court clarified that "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things."[59] The distinction stresses that the ICJ's exercise of jurisdiction over alleged breaches of obligations *erga omnes*, is still dependent, at first, on the Court's jurisdiction being established. However, while these considerations are fundamental with respect to inter-State claims before the ICJ, it may be observed that an international criminal jurisdiction setting is entirely different. In contrast with the inter-State nature of ICJ proceedings, States are not parties to an international criminal trial. The *jus cogens* and *erga omnes* character of international crimes can thus be transplanted as a theoretical basis for the exercise of universal jurisdiction but it must be acknowledged that this is deviation of how the concept has been used in international law.

Furthermore, it is often argued that a *jus cogens* status only implies prohibition without enforcement implications.[60] In other words, a *jus cogens* status does not break the dichotomy between substance and consequence. Conversely, Orakhelashvili claims that "once rule X reaches the status of *jus cogens*, it yields the effects and consequences that the doctrine of *jus cogens* provides for."[61] Such claim does of course make a valid point, in that insufficient enforcement undermines the peremptory status of the obligations. Nonetheless, there is not yet much international judicial practice that clearly supports this view.[62] Thus, while the *jus cogens* status of a norm may still provide the conceptual thesis for the exercise of universal adjudicative jurisdiction, it is safer to rely on the fact that such crimes are customarily not within the exclusive jurisdiction of States – a claim that applies to almost all *jus cogens* crimes, with the possible exception of the crime of aggression.

All in all, the 'universal jurisdiction conception' of the ICC's jurisdiction accumulates with the prohibition to intrude in matters that are essentially within a State's domestic jurisdiction. Indeed, the latter prohibition does not

58 Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, par. 93.

59 East Timor (Portugal v. Australia), Judgment, ICJ Reports 1995, para. 29.

60 Fox, *State Immunity*, 524–525; Aust, Complicity and the Law of State Responsibility (2011), 39–40.

61 Orakhelashvili, "A Reply to William E. Conklin," 867.

62 A notable example affirming the consequences of jus cogens is Prosecutor v. Furundzija, Case No. IT-95-17/1, Judgment (Dec. 10, 1998), 155–156.

concern crimes against international law. 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. Thus, the exclusive jurisdiction of States over their territories and nationals and the right to exercise jurisdiction to adjudicate over crimes under international law are norms that can be harmonized. Such harmonization can be further theoretically explained by the *jus cogens* and *erga omnes* character of the crime within the Court jurisdiction. But it is principally the customary character of the category of crimes over which the Court exercise jurisdiction, and the claim that the Court is acting on behalf of the international community which reveal that the ICC's jurisdiction to adjudicate does not genuinely conflict with the sovereignty of non-party States. Given that such grounds for avoiding a genuine conflict with the sovereignty of States over their territory and nationals are based on the customary character of the crimes within the Court jurisdiction, it will be fundamental to assess whether this is a legal reality. Such inquiry will be conducted in the next section.

In response to the *Monetary Gold Principle*, the 'universal jurisdiction conception' deploys two normative arguments – namely, purpose of the ICC, international character of the Court – and one safeguard.

Firstly, in contrast with the ICJ, the objective of the ICC are not to establish the responsibility of States; it is interested in establishing the individual guilt of the accused.[63] In other words, the very subject matter of an ICC case is not the lawfulness of the conduct of a State. Article 25 (4) of the Rome Statute indeed affirms that "[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law." By adopting such approach, it is contested that the *Monetary Gold Principle* as such applies to the ICC.

If one takes, for instance, the *Tadic Judgment*, where the ICTY Appeals Chamber found that acts committed by Bosnian Serbs gave rise to international responsibility of the FRY, we find no glimpses of judicial deference. In this case, the Appeals Chamber had to find whether the conflict in Bosnia and Herzegovina was international in nature in order to assess whether the defendant could be responsible for grave breaches of the Geneva Conventions. This determination thus revolved around the involvement of the Federal Republic of Yugoslavia in this conflict, and especially its level of control over the Bosnian Serbs unit. The FRY was obviously not a party to the proceedings, and formally

63 See also McDougall, *The Crime of Aggression*, 245–246.

refused to recognize the jurisdiction of the ICTY. Nonetheless, what was at stake, in the words of the Chamber, was "the legal imputability to a State of acts performed by individuals not having the status of State officials."[64] While the ICTY was concerned with individual criminal responsibility, its findings that FRY had overall control over the Bosnian Serbs ultimately had some bearings regarding the State responsibility of the FRY.

The issue resurged before the ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia*). With reference to the Appeals Chamber's findings, the ICJ declared:

> the ICTY was not called upon in the *Tadic* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction.[65]

The *Monetary Gold Principle* was not mentioned. But it is clear from this passage that the ICJ called upon international criminal tribunals to apply a principle of judicial restraint regarding questions of State responsibility. The *Monetary Gold Principle* was thus transformed into a deferential principle rather than a jurisdictional bar.

In the same vein, 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.[66] In this light, Pasquale De Sena observes 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.[67] As evidence of this pattern De Sena refers to the *Eichmann*,[68]

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64 Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment (Jul. 15, 1999) par. 104.

65 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, par. 403.

66 Van Alebeek, "Functional Immunity," 37; Van Alebeek, *The Immunity of States and Their Officials*, 257–265; Mann, "International Delinquencies," 181–196 (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."); see also Weil, "Le contrôle par les tribunaux nationaux," 47.

67 De Sena, "Immunità funzionale," 139.

68 Eichmann Appeal Judgment, at 277.

Barbie,[69] *Demjanjuk*,[70] *Finta*[71] and *Karadzic* cases,[72] all of which involved States (Nazi Germany or Former Yugoslavia) that had been unequivocally condemned by the international community. Likewise, with regard to Pinochet, Lord 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."[73] 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."[74] While it is not the immunity *ratione materiae* of the official that precludes the court from exercising jurisdiction,[75] 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, when the facts (and the law) are not clearly established.

The 'universal jurisdiction conception' second and third response to the *Monetary Gold Principle* relies on the international nature of the ICC, and a rule of jurisdictional restraint contained in the Rome Statute. The second response argues that although based on a multilateral treaty, the ICC is an entity distinct from the States constituting it.[76] Hence, the circumstantial restrictions Van Alebeek and De Sena point out do not affect the ICC's jurisdiction to adjudicate 'context crimes' in the same manner as it does with respect to domestic courts. 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.[77] As Kress claims: "an international criminal court, which acts as an organ of the

69 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).

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

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

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

73 Pinochet case No. 3, at 101.

74 Van Alebeek, "Functional Immunity," 37.

75 Ibid., at 37; the issue of immunity will be addressed in Chapter 4.

76 Rome Statute, Art. 4 makes 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, "Preconditions," 591.

77 Triffterer, "Preliminary Remarks," 46.

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."[78] Hence, the judicial restraint a domestic court should show when assessing a contested foreign State's act for the purpose of establishing the guilt of an accused in a criminal trial would not be applicable to the ICC.

Thirdly, and finally, a jurisdictional safeguard contained in the Rome Statute aims to ensure that the ICC will not exercise its jurisdiction to adjudicate over situations where it is disputed that serious international crimes occurred. Indeed, the ICC has the general discretionary power to decline to exercise jurisdiction on the propriety of such exercise if the situation (or case) is not of sufficient gravity. The principle of gravity figures out in the Rome Statute in two different aspects. First, the Statute requires the ICC's Prosecutor and judges to assess the gravity of potential cases before initiating an investigation into a situation.[79] If the situation is "not of sufficient gravity", the Rome Statute proclaims that it should not be deemed admissible before the Court.[80] The gravity threshold is assessed when the Prosecutor opens an investigation, and can be challenged at various stages of the subsequent proceedings, including with respect to a specific case. Thus, through the gravity threshold the ICC would not adjudicate cases that are not universally condemned. Second, the gravity element is comprised in the definition of the crimes provided in Article 6, 7, 8 and 8*bis* and the RPE.[81] The latter jurisdictional limit thus ensures that it is not any international crime that is brought before the Court but the "the most serious crimes of concern to the international community as a whole".

Overall, the function of the ICC, namely, ruling on the criminal liability of an accused, arguably places the ICC outside of the scope of the *Monetary Gold Principle*. Thus, the principle of required consent is instead converted into a principle of judicial restraint applicable when the context of the crime requires that a State's act be legally qualified, and the facts at the heart of the case are far from internationally established. The ICC by its international nature, and the principle of gravity generally answer to these prerequisites. In other words, we can conclude that the 'universal jurisdiction conception' of the exercise of international criminal jurisdiction to adjudicate the individual guilt of an accused for crimes that have some bearings on the sovereignty of a State, without the latter's consent, can be harmonized with the *Monetary Gold Principle*.

78 Kress, "Immunities under International Law," 246.
79 Rome Statute, Art. 15, 17, 53.
80 Rome Statute, Art. 17.
81 Rome Statute, preamble, par. 4, Art. 1, 5.

Having established that the 'universal jurisdiction conception' of an Article 13 (b) exercise of jurisdiction to adjudicate is essentially able to bypass objections made on the basis of State sovereignty and the *Monetary Gold Principle*, we now turn to jurisdiction to prescribe.

2 Jurisdiction to Prescribe

This chapter seeks to elucidate whether both conceptions of Article 13 (b) exercise of jurisdiction interact with the sovereignty of States not party to the Rome Statute without breaching it. The previous section showed that the 'Chapter VII conception' as well as the 'universal jurisdiction conception' are able to legally defend the ICC's jurisdiction to adjudicate vis-à-vis the sovereignty of States on their domestic jurisdiction and the *Monetary Gold Principle*. However, these findings relied on the presumption that the crimes over which the ICC's exercise jurisdiction to adjudicate are grounded in customary international law. If, on the other hand, the Rome Statute prescribes new crimes (not established under customary international law), it entails that the ICC's would be allowed to adjudicate such crimes. It is thus essential to assess whether the Rome Statute prescribes new crimes, and if so, whether both conceptions are able to legally ground such exercise of jurisdiction to prescribe in international law.

2.1 *Does the Rome Statute Impose New Crimes?*

The effort and emphasis at the Rome Conference to define the crimes which would fall within the jurisdiction of the ICC has been called "unprecedented" and even "attest[ing] a veritable obsession".[82] 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.

While Article 5 simply lists the jurisdictional framework of the ICC, Article 6, 7, 8, 8*bis* 25, 28 and 70 provide the substantive criminal law to be applied by the Court. In contrast with the ad hoc tribunals,[83] the law prescribing the offences at the ICC is not found in customary international law

82 Kress, "Turning Point in the History," 146; Schabas, *Commentary on the Rome Statute*, 404.

83 See e.g. Prosecutor v. Milutinovic et al., ICTY, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise (May 21, 2003), par. 9.

but in the Rome Statute itself. Articles 6–8*bis* Rome Statute define the crimes of aggression, genocide, crimes against humanity, war crimes and their underlying acts. Each provision clearly states that the definitions as contained in Article 6, 7, 8 and 8*bis* are "[f]or the purpose of this Statute".[84] Moreover, the "Elements of the Crimes" are according to Article 9 to "assist" the Court in the interpretation and application of Article 6, 7, 8 and 8*bis* Rome Statute.[85] 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.[86] All these provisions, and their detail wording, attempt to ensure that the Court will strictly abide by the principle of legality.

One of the risks in defining precisely each conduct entailing individual criminal responsibility under the Statute was to depart from customary international law. It is true that the large majority of crimes contained in the Rome Statute are 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."[87] This may have been the aim of the negotiators. Kress also recounts "the understanding shared by those formulating the crimes in the ICC Statute to only codify or at best crystallize international criminal law *stricto sensu*."[88] On the other hand, Cassese wrote:

> 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

84 See Rome Statute, Art. 6, 7 and 8; Kress, "International Criminal Law,".

85 See Rome Statute, Art. 9.

86 See Prosecutor v. Bemba et al, Case No. ICC-01/05-01/13-560-Anx2-Corr, Judgment on the appeal of Mr. Jean-Jacques Mangenda Kabongo against the decision of Pre-Trial Chamber II 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 (Jul. 11, 2014), par. 4–12; The offences against the administration of justice will not be covered in this book. 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, IT-94-1-A-AR77, Appeal Judgment on Allegations of Contempt of Court Against Prior Counsel, Milan Vujin (Feb., 27 2001).

87 Kirsch, "Foreword," xiii. See also Robinson and von Hebel, "War Crimes in Internal Conflicts," 194 (1999); Kress, "War Crimes", 109.

88 See also Kress, "International Criminal Law,".

> beyond existing law, whereas in other instances it is narrower in scope than current rules of customary international law.[89]

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.[90] 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."[91] The drafters of the Statute considered that the difficult codification process in Rome should not prejudice the progressive development of international criminal law. However, Article 10 Rome Statute only plays a role when the prescriptive provisions of the Statute are retrogressive; for the progressive parts, Article 10 plays no role.[92]

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.[93] While the definition of the crime of genocide did not pose real problems, the definition of war crimes and crimes against humanity required the delegates to compromise.[94] According to some commentators, the "war crime definition is anything [but] conservative".[95] Some States were not convinced of the customary character of Article 8 (e) and (d) relating to armed conflict not of an international character. In particular, 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.[96] Israel firmly opposed the proposition that the war crime founded on resettlement of population in occupied territory was customary international

89 Cassese, *International Criminal Law*, 43; see also Grover, *Interpreting Crimes*, 341–343; Meron, "Crimes under the Jurisdiction," 49.

90 See Kirsch and Robinson, "Reaching Agreement," 68–69.

91 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."

92 Triffterer, "Article 10," 531–537; contra Sadat and Carden, "An Uneasy Revolution," 423.

93 However, See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Resolution E.

94 Bennouna, "Existing or Developing International Law," 1102.

95 Arsanjani, "The Rome Statute," 36.

96 La Haye, *War Crimes*, 164; Jia, "China," 1–11.

law.[97] 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.[98]

Similarly, the definition of crimes against humanity is much broader than any definition contemplated before.[99] Among others issues, Russia, India and China argued for the retention of an armed conflict nexus for crimes against humanity.[100] Despite recurrent references to customary international law were made in Rome, even the chapeaux adopted in 1998 were not without their dissenters. But the most flagrant innovations were with respect to specific conduct constituting such crimes. For instance, the crimes against humanity of apartheid, forced pregnancy, gender persecution, enforced disappearance, the war crimes of transferring, "directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies", attack against peacekeepers, and environmental war crimes were all new in international criminal law.[101] With the number of ratifications having risen over 123 States, 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 most populous States remain not party to the Statute.[102]

Moreover, the Statute remains subject to amendments that could insert new crimes that do not necessarily reflect customary international law.[103] David Scheffer, negotiator for the United States at the Rome Conference, had written that: "future amendments could effectively create 'new' and unacceptable crimes."[104] While Scheffer might be too alarmist, the new war crimes amendments – prohibiting three kinds of weapons in both international and non-international armed conflict – adopted in New York in 2017 failed to reach consensus on their customary basis.[105] Similarly, the States present in Kampala

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

98 An amendment to delete Article 124 has been adopted at the 14th session of the Assembly of States Parties, See Res. ICC-ASP/14/Res.2. But it needs to be ratified by seven-eight of the States Parties to enter into force, pursuant to article 121 (4) Rome Statute.

99 See e.g. Schabas, *An Introduction*, 127 et seq.; Cassese, *International Criminal Law*, 126; Arsanjani, "The Rome Statute," 36.

100 Van Schaack, "Crimes Against Humanity," 787.

101 See Introduction, fn 26; see also Grover, *Interpreting Crimes*, 341–343.

102 E.g. China, India, Russia, USA, Pakistan, Indonesia and Turkey are not party to the Statute.

103 See Rome Statute, Art. 121–123.

104 Scheffer, "The United States," 18.

105 Resolution ICC-ASP/16/Res.4, 14 December 2017. Compare with Resolution RC/Res.5, C.N.651.2010. See Report of the Working Group on Amendments, ICC-ASP/126/22, 15 November 2017; see Akande, "New War Crimes," EJIL Talk! (Jan. 2, 2018), available at

wished to avoid deviation from customary international law when adopting the definition of the crime of aggression. But, as Kress and Von Holtzendorff acknowledge, "the precise status of customary international law was difficult to ascertain, especially as regards the state component of the crime."[106] McDougall indeed opines that "article 8b*is* criminalises a significantly broader range of conduct than the customary definition of the State act element of the crime".[107]

While the Rome Statute prescribes new conduct, it does not provide that when exercising jurisdiction over a Non-Party State the Court should revert to customary international law. 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.[108] 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.[109] 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."[110] In other words, the Rome Statute posits itself as a treaty based, self-contained regime.[111]

To sum up, although it is generally agreed that aggression, genocide, crimes against humanity and war crimes are embedded in customary international law, their specific definitions need also to be established in customary

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https://www.ejiltalk.org/customary-international-law-and-the-addition-of-new-war-crimes-to-the-statute-of-the-icc/.

106 Kress and Von Holtzendorff, "The Kampala Compromise," 1188.

107 McDougall, *The Crime of Aggression*, 154.

108 See Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges (Sept. 30, 2008), par. 508.

109 Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Al-Bashir (Mar. 4, 2009), par. 126 (Decision to Issue an Arrest Warrant against Al-Bashir) but see Article 21 (3) Rome Statute.

110 Werle, "Individual Criminal Responsibility," 961–962.

111 Cattin, "Approximation or Harmonization," 363–366; Grover, *Interpreting Crimes*, 271.

international law. Some of the crimes defined in the Statute, such as crimes against humanity of apartheid, forced pregnancy, gender persecution, enforced disappearance, environmental war crimes and the (amended) Statute definition of aggression are said to be beyond the current rules of customary international law.[112] 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. In other words, 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 this chapter will not focus but that is also of relevance when going through the rationale each 'conception' offers with regards to jurisdiction to prescribe 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. It will be demonstrated 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 from the ICC is not established under customary international law, one should be aware 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. Bearing this additional issue in mind, the next section will assess whether the 'Chapter VII conception' and the 'universal jurisdiction conception' legally justify their assertion of prescriptive jurisdiction.

2.2 *Chapter VII Conception – Legislating as an Enforcement Measure*

It has been 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 however 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 type of enforcement measures at the disposal of the SC, then the right to adjudicate the proscribed act is also *ultra vires*.

The UN system does not provide for a legislature in the real sense of the word;[113] the body that comes closest to such a function is the General Assembly

112 See Introduction, fn 26; see also Grover, *Interpreting Crimes*, 341–343.

113 Tadic Interlocutory Appeal Decision, par. 43.

which is entrusted to initiate studies and make recommendations for encouraging the progressive development of international law and its codification.[114] The Charter does not explicitly endow legislative competence to the SC. Nonetheless, 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.[115] The ICTY also recognized that the SC, although not a Parliament, has the power, when acting under Chapter VII, to take binding decisions.[116] As a matter of fact, 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.[117]

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.[118] Thus, the SC used its power under Chapter VII to assert jurisdiction to adjudicate; not to prescribe – at least not to prescribe criminal law.[119] 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.[120]

The following sub-section will assess whether, 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 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.[121]

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114 UN Charter, Art. 13 (a).

115 Hans Kelsen, *The Law of the United Nations*, 295; Kirgis, "Fifty Years," 520; Krisch, "Article 41," 1251; Yemin, *Legislative Powers*, 6; See also Prosecutor v. Krajisnik, Case No. IT-00-39-AR73.2, 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 (Sept. 15, 2006), par. 15.

116 *Tadic Interlocutory Appeal Decision*, par. 44; 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.

117 SC Res. 827, UN Doc. S/RES/827 (1993), par. 4.

118 Prosecutor v. Delalic et al., Case No. IT-96-21-A, Judgment (Feb. 20, 2001), par. 178.

119 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 2.2.6.3. of this chapter.

120 Hinojosa Martínez, "The Legislative Role of the Security Council," 341.

121 Yemin, *Legislative Powers*, 6, an extensive review of these criteria with respect to SC referrals has also been provided elsewhere, see Galand, "Quasi-Legislative Acts," 142.

2.2.1 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 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). A SC referral adopted under Chapter VII of the UN Charter thus 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.[122] All these obligations are brought into force without the consent of the concerned State but *qua* the effect of Article 25 UN Charter. Therefore, it may safely be asserted that SC referrals are unilateral in form.

2.2.2 Create or Modify Existing Law

From the outset, it must be emphasized that SC referrals do not only bind States, they also have a direct legal effect on individual persons. Given that the Rome Statute contains new crimes, its application entails that new rules are imposed upon all individuals acting in the situations referred.[123] For instance, many accused in the situations in Darfur and Libya are charged under a mode of responsibility – joint commission through another person – that is neither established under customary international law nor existing in the applicable domestic law.[124] The Chambers have however never questioned by which authority other than the referral these substantive norms unique to the Rome Statute were made applicable to the impugned conduct.[125] This thus entails

122 See SC Res. 1593, par. 2; SC Res. 1970, par. 5

123 Galand, "Quasi-Legislative Acts," 153–154.

124 See e.g., Decision to Issue an Arrest Warrant against Al-Bashir; Prosecutor v. Gaddafi et al. Case No. ICC-01/11-01/11-1I, 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" (Jun. 27, 2011), par. 71.

125 Regarding the principle of legality, see Chapter 3.

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 give rise, through the force of the referral, to individual criminal responsibility for any individual that will be acting within the boundaries of the referred situation. In the international arena such types of actions are normally preceded by a treaty which obliges (consenting) States to implement new rules or that make these new rules directly applicable in the State parties' legal order.

Furthermore, 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.[126] Both referrals of the situation in Darfur and Libya explicitly required that the authorities of the territory where the situation is taking place "cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution".[127] It is evident, that the terms "cooperate fully" are drawn from Article 86 Rome Statute,[128] which reads "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court." Thus, in cases of SC referrals, containing an obligation such as the one provided in SC Resolutions 1593 and 1970, Article 86 must be adapted to include States not party, which shall, in accordance with the relevant resolution of the SC cooperate fully with the Court in its investigation and prosecution of crimes committed in the context of the situation referred. In *Decision on Banda's Application for an order of cooperation request to Sudan*, the Trial Chamber specified that:

> [...] this obligation, as formulated in the Security Council resolution, only expands the boundaries of cooperation in relation to the Court with respect to "who" is obliged to cooperate. It does not provide for an

126 SC Res. 1593, par. 2; SC Res. 1970, par. 5; See Akande, "The Effect of Security Council Resolutions and Domestic Proceedings," 299–324; see also Prosecutor v. Gaddafi and Al-Senussi, Case No. ICC-01/11-01/11, Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi (May 31, 2013), par. 211 (hereinafter Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi).

127 SC Res. 1593 op. par. 2 (also makes this obligation incumbent upon "all other parties to the conflict in Darfur").

128 Akande, "The Effect of Security Council Resolutions and Domestic Proceedings," 309.

> autonomous legal regime for cooperation that would replace the ICC regime or represent an alternative to it.[129]

Thus, a SC resolution requesting States to cooperate fully entails that Part 9, on Cooperation and Judicial Assistance, of the Rome Statute becomes applicable vis-à-vis all the States obliged by the SC to cooperate fully with the Court. In other words, the cooperation regime for the targeted State is no different than for States party to the Statute. Indeed, as Akande put it, the SC referrals put the targeted State "in an analogous position to a party to the Statute."[130]

In order to give proper effect to the SC resolution, 'cooperate fully' entails that the targeted State(s) must take any measures necessary under their domestic law to implement Part 9 of the Statute. Broadly, cooperation and assistance to the Court entails arresting and surrendering an accused, enabling the prosecutor to conduct investigation and gathering evidence, protecting witnesses, enforcing forfeiture orders and fines, providing privileges and immunities to the Court officials and criminalizing offences of administration of justice. Article 88 stipulates that States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under Part 9.[131] Article 88 also applies *mutatis mutandi* to States obliged by a SC referral.[132] Ciampi describes the obligation contained in Article 88 as an obligation of result, which excludes that delays or non-compliance be justified on the lack or deficiencies of domestic legislation.[133] Part 9 provides a number of ground for justifying delays [134] and even refusal [135] (for threat to state security) in implementing a request by the Court but the lack or deficiency of domestic legislation cannot be invoke as a justification for the failure to comply with a

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129 Prosecutor v. Banda and Jerbo, Case No. ICC-02/05-03/09, Decision on "Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an Order for the Preparation and Transmission of a Cooperation Request to the Government of the Republic of the Sudan" (Jul. 1, 2011), par. 15; see also Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan (Mar. 9, 2015), par. 15; Prosecutor v. Hussein, ICC-02/05-01/12, Decision on the Prosecutor's request for a finding of non-compliance against the Republic of the Sudan (Jun. 26, 2015), par. 13.

130 Akande, "Impact on Al-Bashir's Immunities," 342; see also Akande, "The Effect of Security Council Resolutions and Domestic Proceedings," 299.

131 See also ICC ASP 'Resolution on cooperation' (Nov. 26, 2015) Doc. ICC-ASP/14/Res.3, op. par. 7. With regards to immunities, see Chapter 4, section 4.1.

132 See Galand, "Quasi-Legislative Acts," 156 (2016).

133 Ciampi, "Obligation to Cooperate," 1624–1626.

134 Rome Statute, Art. 89 (1) and 93 (1).

135 Rome Statute, Art. 93(4), 72.

request to cooperate.[136] Furthermore, as the ICC asserted at many times in the Kenyatta case: "Any purported deficiency in domestic legal procedures (or interpretation thereof), cannot be raised as a shield to protect a State Party from its obligation to cooperate with the Court".[137] This obviously is a corollary of Article 27 of the Vienna Convention on the Law of Treaties.

Although there is no enforcement mechanism to ensure that States have implemented the necessary legislation, if they fail to comply with a request to cooperate by the Court, the latter may make a finding to that effect and refer the matter to the Assembly of States Parties.[138] The power to refer the matter also exists with respect to non-compliance findings stemming from a SC referrals; however, in such situations, the Statute makes clear in Article 87 (7) that the Court can refer the matter to the Security Council.[139] If there were no obligation for the targeted State to implement cooperation requests of the Court, the mechanism provided in Article 87 (7) would be senseless.[140] Upon such referrals, the SC may decide to impose further sanctions under Chapter VII on the State for its failure to cooperate with the Court. It must be stressed that a failure to cooperate with the Court equates to a non-compliance with a Chapter VII resolution of the Council.

Moreover, in order to 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.[141] Thus, a State is pressured to adopt the same substantive law of the Rome Statute in order to be interested in the same conduct

136 Ciampi, "Obligation to Cooperate," 1625.

137 Prosecutor v. Kenyatta, Case No ICC-01/09-02/11, Decision on Prosecution's Applications for a Finding of Non-Compliance pursuant to Article 87(7) and for an Adjournment of the Provisional Trial Date (Mar. 31, 2014), par. 47.

138 Rome Statute, Art. 87(7).

139 Ibid..

140 But see Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11-577, Decision on the Non-Compliance by Libya with Requests for Cooperation by the Court and Referring the Matter to the United Nations Security Council (Dec. 10, 2014), par. 34 (on reasons to refer to SC).

141 Prosecutor v. Muthaura and Kenyatta, Case No. ICC-01/09-01/11-307, 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" (Aug. 30, 2011), par. 40–43; Prosecutor v. Harun and Kushayb, Case No. ICC-02/05-01/07, Decision on the Prosecution Application under Article 58(7) of the Statute (Apr. 27, 2007), par. 24; Prosecutor v Bemba, Case No. ICC-01/05-01/08, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean Pierre Bemba Gombo (Jun. 10, 2008), par. 21.

as the ICC.[142] Moreover, 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.[143] For instance, in *Prosecutor v. Saif Al-Islam Gaddafi*, Pre-Trial Chamber I found that the lack of specific protection programs for witness under Libya's domestic law resulted in the unavailability of the national judicial system.[144] Thus, beside the possibility that a referral implies that the crimes as referred to in the Rome Statute are applicable in the concerned State's jurisdiction, the SC referrals also imposes other legislative obligations flowing from the obligation to cooperate with the Court..[145] These effects produce a situation akin to that which would have existed had Sudan and Libya became parties to the Rome Statute.

2.2.3 General in Nature

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.[146] 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.[147] That being said, the SC could have decided to bind all UN Member States to cooperate with the Court.[148] 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. As a matter of fact, 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.[149] Thus, it is not improbable that if a new referral is

142 See Terracino, "National Implementation," 421–440 (2007); van der Wilt, "Equal Standards?," 230; see Galand, "Quasi-Legislative Acts," 162–165 (2016) however, see Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi, par. 88 (pointing out that in order to challenge admissibility the conduct needed to be the same not the legal characterization).

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

144 Ibid., 209–211.

145 With regard to prescription of crimes see the section 2.2.5 of this chapter.

146 SC Res. 1593, par. 2; SC Res. 1970, par. 5; generally, on SC Resolution 1593 see Condorelli and Ciampi, "Comments on the Security Council Referral," 590–599.

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

148 See Condorelli and Ciampi, "Comments on the Security Council Referral," 593.

149 See e.g. Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09, Decision on the "Prosecution's Urgent Notification of Travel in the Case of Prosecutor v Omar Al-Bashir" (Nov. 4, 2014), par. 8; see also Statement from the representative of The Netherlands at Security Council,

to happen (or even if subsequent action is taken in relation to a past referral) that the SC turns the obligation to cooperate fully into a general obligation for all States.

With respect to nationals that were neither from the State where the referred situation is taking place nor from a State party to the Rome Statute, the SC decided that they were exempted from the ICC's jurisdiction.[150] Thus, the referrals as they have been used to date may lack one essential feature of a legislative act: they are not addressed to indeterminate addressees.[151] The selectivity of the SC has, nonetheless, been criticized by UN Member States and scholarship.[152] For instance, Vesselin Popovski refers to the exemption paragraphs as "unfortunate, almost shameful texts."[153] It may, however, 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.

On the other hand, it has been claimed that the resolutions containing the SC referrals of the situations in Darfur and Libya are severable.[154] Cryer, for instance, argues that while SC resolution 1593 confers jurisdiction to the ICC over the situation in Darfur, the Court is not bound by the exemption clauses.[155] The ICC has also signalled to referral entities that it does not bow to targeted referrals. In *Mbarushimana* (*Challenge to Jurisdiction*), 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.[156]

UN doc. S/PV.7285 (Resumption 1) (Oct. 21, 2014): See also Statement Bensouda, UN doc. S/PV.7285, at 5.

150 SC Res. 1593, par. 6; SC Res. 1970, par. 6; see also Happold, "Darfur, the Security Council, and the ICC," 226–236 (2006); this issue is analyzed more comprehensively in Chapter 5, section 2, 3.

151 See Yemin, *Legislative Powers*, 6; also adopted by Kirgis, "Fifty Years," 520.

152 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.

153 Popovski, "The Security Council and the ICC," 276.

154 Cryer, "Sudan, Resolution 1593, and International Criminal Justice," 195; Orakhelashvili, *Collective Security*, 339.

155 Cryer, 'Sudan, Resolution 1593, and International Criminal Justice,' 214.

156 Prosecutor v Mbarushimana, Case No. ICC-01/04-01/10-451, Decision on the 'Defence Challenge to the Jurisdiction of the Court' (Oct. 26, 2011), par. 27.

In the footnote 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."[157] In other words, if a crime referred to in Article 5 is committed within the territorial parameter of the referred situation and is sufficiently linked to the situation of crisis that triggered the referral, it falls within the jurisdiction of the Court, irrespective of the attempt to curtail the referral by the referring entity.[158] This entails that the SC referrals are general in nature: they bound any individual (irrespective of his\her nationality) that acts in the territorial parameter of the referred situation.

Accordingly, SC referrals can be qualified as quasi-legislative acts if one accepts that a referral implies that all crimes defined in the Rome Statute – including those not established under customary international law – become applicable in the territory of the State where the referred situation is taking place. It thus remains to be verified whether the SC has the right to prescribe new criminal law.

2.2.4 Right to Prescribe Criminal Law (but Presumption against it)

As the United Kingdom representative 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."[159] 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. On the other hand, 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."[160] 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.[161] 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, intended to remain within the confines of such

157 *Ibid.*, par. 27, fn 41.

158 See Galand, "The Situation Concerning the Islamic State," (May 27, 2015) EJIL Talk, available at http://www.ejiltalk.org/the-situation-concerning-isis-carte-blanche-for-the-icc-if-the-security-council-refers/ (accessed 16 January 2016).

159 Provisional Verbatim Record of the 3217th Meeting, UN Doc S/PV.3217 (May 25, 1993) at 7.

160 Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment (Jul. 15, 1999), par. 296.

161 *Ibid.*, par. 296.

rules."[162] 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.

These interpretive standards are confirmed by the SC approach when establishing the ICTR. According to the Secretary-General, the SC took, "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."[163] The SC, thus, adopted a Statute that could be considered as creating new law.[164] Indeed, it may be said that this time the SC believed that it had the power under Chapter VII to prescribe international criminal law.[165] The ICTR statute provisions on the criminalization of violations of the laws of war committed in non-international armed conflict – especially those regarding norms enshrined in Additional Protocol II – was indeed considered as not established under customary international law.[166]

The next section analyzes whether resolutions referring a situation to the ICC expressed that the SC intended to depart from customary international law.

2.2.5 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".[167] In 2011, the SC adopting the same

162 *Ibid.*, par. 287; See also Prosecutor v. Delalic et al., Case No. IT-96-21-T, Judgment (Nov. 16, 1998), par. 310.

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

164 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-96-4-T, Judgment,, 2 September 1998, par. 611–617; Gallant, "Jurisdiction to Adjudicate and Jurisdiction to Prescribe", 828.

165 Gallant, "Jurisdiction to Adjudicate and Jurisdiction to Prescribe", 828.

166 ICTR Statute, Art. 4.

167 SC Res. 1593, par. 1.

language, stated in Resolution 1970 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".[168] 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.[169] This understanding is further confirmed by the Negotiated Relationship Agreement Between the ICC and the UN, where the UN recognizes the ICC has an independent permanent judicial institution governed by its own Statute.[170] Indeed, 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 statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole.[171]

It is thus implicit, according to the Court, 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.[172] They impose new rules to be observed by the actors in the situations referred. In the international arena such type of actions is 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?

168 SC Res. 1970, par. 4.

169 See also Akande, "Impact on Al-Bashir's Immunities," 333; Akande, "The Effect of Security Council Resolutions and Domestic Proceedings,".

170 UN General Assembly, Relationship Agreement Between the United Nations and the International Criminal Court, (Aug. 20, 2004), UN Doc. A/58/874, Art. 4 (hereinafter Negotiated Relationship Agreement between the ICC and the UN)

171 Decision to Issue an Arrest Warrant against Al-Bashir, par. 45; Situation in Darfur Sudan, Case No. ICC-02/05, Decision on Application under Rule 103 (Feb. 4, 2009), par. 31

172 Concerning the retroactive character of the referrals see chapter 3, section 6.

2.2.6 Substantive Limits to Prescribe Criminal Law as an Enforcement Measure

The UN Charter imposes substantive limits on the SC's right to perform legislative actions. The SC's unilateral prescription of treaty provisions can certainly be criticized as contrary to State sovereignty, to non-intervention in the internal affairs of States and more generally to the principle of State's consent.[173] These three norms are however subject to exceptions. As for the invasion of matters essentially within the domestic jurisdiction of States, we have seen that the UN Charter provides an exception for 'enforcement measures' laid down in Chapter VII. With regards to the principles of sovereignty and State consent, it must first be acknowledged that they are vital principles of international law. However, the SC may decide to contract out of general international law.[174] The primary concern of the SC is not the upholding of international law and justice but the maintenance of international peace and security.[175] 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.[176] Once an international crisis 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.[177]

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".[178] 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.[179] Nevertheless, such implied consent is subject to conditions. In particular, in discharging its duties the SC must act in accordance with the Purposes and Principles of the United Nations.[180] 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

173 On SC Resolutions 1373 and 1540 see e.g. Fremuth and Griebel, "On the Security Council as a Legislator," 354–355.
174 Tzanakopoulos, "Disobeying the Security Council," 72–74.
175 See De Wet, *Chapter VII Powers*, 183; UN Charter, Art 1, 24.
176 Krisch, "Article 41," 1257; Martenczuk, "Lessons from Lockerbie?," 544–546.
177 Martenczuk, "Lessons from Lockerbie?," 544–546.
178 UN Charter, Art. 25.
179 See Akande, "Impact on Al-Bashir's Immunities," 341.
180 UN Charter, Art. 24 (2).

bound by the institutional law of the United Nations when it acts within the framework of its competences.[181]

Even if one considers that SC referrals are quasi-legislative acts, this would not necessarily mean that the SC is acting beyond its powers. 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.[182] Such kinds of resolutions not confined to specific crises were deemed by some not to be in conformity with the Charter.[183] Nonetheless, on the basis that these resolutions were generally accepted by UN Member States, it has been argued that it is "likely to constitute a precedent for further legislative activities".[184] However, while discussing SC Resolution 1540 in 2004 some States started to express reluctance towards the SC legislative endeavor.[185]

It seems that if the SC continues utilizing broad legislative powers, this type of resolution must be subjected to strict procedural and substantive limits.[186] As Zemanek noted "the word 'measures' [...] indicates a specific action intended to achieve a concrete effect and, thus, a temporary, case-related reaction".[187] In other words, the quasi-legislative measure contemplated under Chapter VII cannot be *prima facie* of an abstract and general character; moreover they should be limited to the 'concrete-case' only.[188] Krisch adds that "insofar as the SC goes beyond preliminary, emergency measures and creates longer-term

181 Hinojosa Martínez, "The Legislative Role of the Security Council," 354–355.

182 SC Resolution 1373, 28 September 2001, UN Doc. S/RES/1373; SC Resolution 1540, 28 April 2004, UN Doc SC/RES/1540; See Krisch, "Article 41," 1253.

183 Happold, "Security Council Resolution 1373," 593–610; Elberling, "The Ultra Vires Character of Legislative Actions," 337–360; Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism (Aug. 6, 2010), UN Doc. A/65/258, p. 11–12; see 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/ (resolution of the Security Council on foreign terrorist fighters legislating in a broad manner without being limited to a specific crisis).

184 Szasz, "Legislating", 901–905; see also Talmon, "World Legislator,"179–182.

185 See the debates in Security Council, 4950th meeting (Apr. 22, 2004) UN Doc. S/PV.4950; Security Council, 4956th meeting (Apr. 28, 2004) UN Doc. S/PV.4956.

186 Krisch, "Article 41," 1254.

187 Zemanek, "Judge of its Own Legality,"; see also Arrangio-Ruiz, "Security Council," 629–630.

188 Arrangio-Ruiz, "Security Council," 629–630; contra Talmon, "World Legislator," 182.

obligations and structures, it thus needs to respect principles of justice and international law."[189]

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 was 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. The following sections assesses 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.

2.2.6.1 *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 State territory or an individual case,[190] it cannot be a generic threat to international peace and security.[191] Moreover, Article 13 (b) 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.[192]

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.[193] As for the resolution referring the situation in Libya, the SC considered "that the widespread and systematic attacks currently

189 Krisch, "Article 41," 1257.

190 See Condorelli and Villalpando, "Referral and Deferral," 632–633; foreseeing this possibility but being of the opinion that the Prosecutor would not be obliged to initiate the proceedings.

191 See Chapter 5, esp. section 2.

192 White and Cryer, "The ICC and the Security Council," 468–9; see also Cryer, "Sudan, Resolution 1593, and International Criminal Justice,"195; Orakhelashvili, *Collective Security*, 339; See statement of Canada in Security Council meeting on the adoption of resolution 1422, UN Doc. S/PV.4568.

193 SC Res. 1593, preamb. par. 1; 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 (Jan. 25, 2005).

taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity".[194] 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.

2.2.6.2 *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.[195] 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.[196]

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.[197] 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.[198] Indeed, since

194 See SC Res. 1970, preamb. par 3, 7: However, see Coté, "Independence and Impartiality," 406.

195 SC Res 808, of 22 February 1993, UN Doc. S/RES/80, par. 8–9, 8.

196 See SC Res. 955 of 8 November 1994, UN Doc. S/RES/955, par. 8; note that the aim of the SC when establishing the Residual Mechanims is dubious to say the least, see Galand, "The Residual Mechanims," 5.

197 See UN General Assembly, Sixty-seventh General Assembly, Thematic Debate on International Criminal Justice, 10 April 2013.

198 Krisch, "Article 41," 1320

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".[199] 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."[200] 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."[201] In the 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."[202]

2.2.6.3 *Temporary Measures*

Past practice supports the view that the SC creation of an international criminal jurisdiction should be temporary limited. 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. The comment was, however, 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.[203]

Hence, the ILC ultimately recommended that the court be established via a treaty. Like the ILC Draft Statute for an International Criminal Court, the Rome

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199 Chatham House International Law Meeting Summary, with Parliamentarians for Global Action, The UN Security Council and the International Criminal Court, Mistry and Ruiz Verduzco (Rapporteurs) (Mar. 1, 2012), p. 4.

200 See statements of Romania and Greece in Security Council 5158th meeting (Mar. 31, 2005) UN Doc. S/PV.5158.

201 See statement of India in Security Council 6491st meeting (Feb. 26, 2011) UN Doc. S/PV.6491.

202 See Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11 OA 2, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I on Jurisdiction and Stay of the Proceedings (Dec. 12, 2002), par. 83.

203 ILC, Report of the ILC on the Work of its Forty-Sixth Session, UN Doc. A/49/10 (1994) at 22; se also Tadic Interlocutory Appeal Decision, Separate Opinion Judge Sidhwa, par. 63; See also Cryer, *Prosecuting International Crimes*, 327–328.

Statute is in the form of a treaty, which permits the SC to make use of it with respect to a specific situation.

It nonetheless may be contended that SC referrals are not temporally limited. While both SC referrals (of the situations in Darfur and Libya) provide jurisdiction to the ICC from a date before the adoption of the respective SC resolutions, they are also for an indefinite period of time. 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. Given that the SC also provided the ICTY with an indefinite temporal jurisdiction, it is possible to draw some inference from the latter's practice.

The SC when establishing the ICTY in 1993 took a somewhat similar position as for the current referrals to the ICC. SC resolution 827, which established the ICTY, points out that the jurisdiction of the Tribunal covered the period "between 1 January 1991 and a date to be determined by the Security Council upon restoration of peace."[204] 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.[205] 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."[206] Three years after, the SC endorsed a completion strategy but never determined the end date of the Tribunals jurisdiction *ratione temporis*.[207]

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.[208] The Trial Chamber responded that later crimes were part of the same conflict with which the SC was dealing when establishing the ICTY.[209] In *Ojdanic Decision on Motion Challenging Jurisdiction*,

204 SC Res. 827, par. 2.

205 On Security Council resolution 1329 (2000) see Schabas, *The UN International Criminal Tribunals*, 133.

206 Report of the Secretary-General pursuant to paragraph 6 (Feb. 21, 2001) UN Doc. S/2001/154, par. 15.

207 SC Res. 1503 (Aug. 28, 2003) UN Doc S/RES/1503; SC Res. 1534 (Mar. 26, 2004) S/RES/1534.

208 Prosecutor v. Dordevic, Case No., IT-05-87/1-PT, Decision of Vladimir Dordevic's Preliminary Motion on Jurisdiction (Dec. 6, 2007), par. 10.

209 *Ibid.*

the Trial Chamber held that the temporal jurisdiction was left open-ended, "no doubt because the Security Council foresaw the continuation of the conflict."[210] In *Tarculovski Decision on Interlocutory Appeal on Jurisdiction* the ICTY hastily affirmed that it had jurisdiction over crimes committed in Macedonia in 2001, since the Tribunal's lifespan is linked to the restoration of international peace and security in the territory of the former Yugoslavia.[211]

Although a Residual Mechanism was set up in 2010 to replace the ICTY, the temporal limit of the ICTY has never been fixed.[212] According to the Residual Mechanism Statute it cannot indict new accused; it simply inherits the caseload of the ICTY.[213] 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.[214] Clearly, the SC did 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.[215] Accordingly, it can be concluded that the lifespan of a criminal jurisdiction established by the SC must be linked to a threat to international peace and security, but that the SC may leave to the tribunal or court the responsibility to establish such link.

Like for the ICTY, SC referrals to the ICC have provided jurisdiction to the ICC for an indefinite prospective period of time. SC Resolution 1593 was adopted in 2005 but refers the situation in Darfur to the ICC since 1 July 2002 ad

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210 Prosecutor v. Milutinovic et al., Case No. IT-99-37-PT, Decision on Motion Challenging Jurisdiction (May 6, 2003) par. 61.

211 Prosecutor v. Boskoski and Tarculovski, Case No. IT-04-82-PT, Decision on Johan Tarculovski's Motion Challenging Jurisdiction (June 1, 2005), par. 10, Prosecutor v. Boskoski and Tarculovski, Case No. IT-04-82-AR72.1, Decision on Interlocutory Appeal on Jurisdiction (Jul. 22, 2005), par. 10.

212 SC Res. 1966 of 22 December 2010, UN Doc. S/RES/1966 (provides that the residual mechanism will continue the temporal jurisdiction as set in Article 1 of the ICTY and ICTR Statutes); see also Prosecutor v Karadzic, Case No. IT-95-5/18-T, Decision on Accused's Motion to Dismiss the Indictment (Aug. 28, 2013).

213 Statute of the International Residual Mechanism for Criminal Tribunals, annexed to SC resolution 1966 (Dec. 22, 2010), S/RES/1966, Art. 1 (5); except that it can issue new contempt cases, see Galand, "The Residual Mechanims," 5.

214 SC Res. 1966, preamb. par. 5–6; see also Prosecutor v Karadzic, Case No. IT-95-5/18-T, Decision on Accused's Motion to Dismiss the Indictment (Aug. 28, 2013).

215 Sluiter, "Commentary," p. 26.

infinitum. Resolution 1970 refers the situation in Libya open-endedly from two weeks before its adoption. The end of the jurisdiction of the Court thus seems to be left to the discretion of the Court.

Since the referrals are for a concrete threat, the Court's jurisdiction should be restricted to the given 'situation', which was the object of the referral.[216] The ICC indicated that the situation prevailing at the time of the referral defines the reach of the said referral. 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.[217]

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.[218] The arrest warrant issued in the Libyan situation against Al-Werfalli for war crimes committed in 2016–2017 confirms that the 'sufficiently linked' requirement applies with respect to SC referrals. While assessing its jurisdiction over this case which involved crimes committed at least five years after the SC referral, the Pre-Trial Chamber I stressed:

> the seven incidents occurring in Benghazi or surrounding areas between on or before 3 June 2016 until on or about 17 July 2017 are associated with the ongoing armed conflict underlying the referral by the Security Council pursuant to article 13(b) of the Statute concerning the situation on the territory of Libya since 15 February 2011. Importantly, the Chamber recalls that the Al-Saiqa Brigade has been involved in this non-international armed conflict ever since the days of the revolution against the Gaddafi regime. Therefore the Chamber concludes that the alleged crimes described in the Application are sufficiently linked with the situation that

216 See Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11 OA 2, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I on Jurisdiction and Stay of the Proceedings (Dec. 12, 2012).

217 Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10, Decision on the "Defence Challenge to the Jurisdiction of the Court" (Oct. 26, 2011), par. 16, 41.

218 See also Office of the Prosecutor, Situation in the Central African Republic II, Article 53(1) Report (Sept. 24, 2014), par. 4–5.

> triggered the jurisdiction of the Court through the Security Council referral.[219]

The Chamber certainly took great care in asserting that the conflict in which Al-Werfalli allegedly committed war crimes is a continuation of the conflict that quickly followed the SC referral, and that he is a member of an armed group party to this conflict since the beginning. Through these contextual and membership links, the Pre-Trial Chamber ensured that the basis of the ICC jurisdiction remained an ad hoc measure under Chapter VII legally justified by the threat to international peace and security that compelled the SC to refer the situation.[220] It is indeed 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.

The SC creation of the ICTR can also provide some guidelines on the power of the SC when establishing a criminal jurisdiction. 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. In contrast with the ICTY, the ICTR jurisdiction *ratione temporis* was limited over crimes committed during the year of the Rwandan genocide (1994), which is the concrete case that prompted the SC to use its Chapter VII powers. Although the ICTR only closed its door in December 2015, its temporal jurisdiction had a short lifespan. Restricting the ICTR temporal jurisdiction to the concrete-case that prompted the SC to use its Chapter VII gave a greater margin with respect to the Tribunal's applicable law. While the law applied by the ICTY needed to be beyond any doubt part 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."[221] 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.[222] Accordingly, the prescription of new

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219 Prosecutor v Al-Werfalli, Case No. ICC-01/11-01/17, Warrant of Arrest, (Aug. 15, 2017), par. 23 (footnotes omitted).

220 See Prosperi, "Crimes Committed Against Migrants in Libya," 248.

221 Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), UN Doc S/1995/134 (Feb. 13, 1995) par. 12. However, see Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998), par. 611–617.

222 Krisch, "Article 41," 1323.

crimes in the ICTR Statute by the SC was based on the assumption that as an emergency measure subject to a time limit, it could create new law.[223]

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 UN Charter allows the SC to set aside international law and impose the Statute's norms over a State not party to the Statute. A particularity of the SC referrals to the ICC is that the Court is left with the discretion to decide whether it must stick to customary international law, and until when it can exercise jurisdiction over the referred situation. If the Court fails to exercise jurisdiction in accordance with the substantive limits pending on the SC exercise of quasi-legislative measures, it would result in an inherent normative conflict. That is, the jurisdiction created by the referral has become *ultra vires* because it is exercised beyond what the UN Charter allowed to the SC.

To sum up, the 'Chapter VII conception' is able to legally ground the exercise of prescriptive jurisdiction over non-party States, if such measure is case related, intended to be with concrete effects and temporary. The current principle applied by the ICC to verify whether a crime falls within the referred situation is able to ensure (if not overstretched) that the SC measure remains temporary limited. The next section assesses the arguments the 'universal jurisdiction conception' can put forward in response to the claim that the application of the Rome Statute substantive provisions to the territories and nationals of non-party States violates the sovereignty of these States.

2.3 *Universal Prescriptive Jurisdiction*

The 'universal jurisdiction conception' conceives the Rome Statute as a legislative act of the international community. Indeed, 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."[224] The term legislative appears appropriate as the

223 Gallant, "Jurisdiction to Adjudicate and Jurisdiction to Prescribe," 828.

224 Sadat, *Transformation of International Law,* 11.

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.[225] The crimes within the jurisdiction of the ICC are generally deemed subject to universal jurisdiction.[226] However, as mentioned above, the specific 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.[227] Does that affect the right to exercise universal jurisdiction over these treaty-based crimes?

2.3.1 Treaty-Based Universal Jurisdiction

Treaty-based universal jurisdiction is contended by some not to be 'truly' universal jurisdiction but inter-State jurisdiction.[228] Cassese, for example, was 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."[229] 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.[230] In contrast with treaty-based

225 Higgins, *Problems and Process*, 58; Randall, "Universal Jurisdiction,"; Mann, *The Doctrine of Jurisdiction*, 95 (1964); Ratner et al., *Accountability for Human Rights Atrocities*, 12. See also, Zhu, "Universal Jurisdiction Before the United Nations General Assembly," 503–530.

226 It is however contested whether the crime of aggression is subject to universal jurisdiction under customary international law. For a review of the different positions, see McDougall, *The Crime of Aggression*, 318–319.

227 Institut de droit international (IDI), Resolution on universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes, 2005, par.1; see also Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, ICJ Reports 2012, par. 74.

228 Colangelo, "The Legal Limits," 18–19; See also Crawford, *Brownlie's Principles*, 471; Ryngaert, *Jurisdiction,* 104–105; Higgins, *Problems and Process*, 63–65; Liivoja, "Universal Jurisdiction," 301–302; Kress, "Universal Jurisdiction," 566.

229 Cassese, "Is the bell tolling for Universality?," 594; See Dinstein, "Collective Human Rights," 102–120 (1976); see also US v. Yousef, 327 F3d 56 (US Court of Appeals), 2nd Circuit, 1973, 974 YNTS 177.

230 See Cassese, "Is the bell tolling for Universality?," 594; Crawford, *Brownlie's Principles*, 471; Ryngaert, *Jurisdiction,* 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

universal jurisdiction, universal jurisdiction rooted in customary international law extends to all States.

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.[231] Hence, it may be argued that the treaty-based jurisdiction of the Court should be restricted to territories and nationals of States party to the Rome Statute. Proponents of the 'universal jurisdiction conception' are however asserting that the basis of the ICC's jurisdiction under Article 13 (b) is a *sui generis* universal jurisdiction; neither based on customary international law nor limited to the party to the Statute.[232] Furthermore, the adjudication of the Rome Statute's crimes not part of customary international law that were neither committed in the territory nor by nationals of States party to the Rome Statute is also the actualization of a *sui generis* universal prescriptive act.

It may be contended that the ICC, when it exercises *sui generis* universal jurisdiction over crimes that go beyond customary international law, is exercising 'exorbitant' jurisdiction.[233] The concerned States would indeed have a reasonable argument – based on a violation of sovereignty (and *pacta tertiis*) – to object to the legality of an exorbitant universal jurisdictional assertion of the ICC. That being said, three remarks must be made with regards to the possible exorbitantness of the ICC *sui generis* universal jurisdiction. First, it must be recalled that the Rome Statute assertion of prescription is actualized when the ICC exercises its jurisdiction to adjudicate the crimes as prescribed in the Rome Statute.[234] However, it is the mere passage of the Rome Statute into force and its pretention to apply universally that constitutes the very moment when the exorbitant prescriptive jurisdiction occurs.[235]

Second, to assess whether a jurisdiction is exorbitant it is necessary to see whether it has actually been challenged. The United States has been the most

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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 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).

231 Colangelo, "Universal Jurisdiction," 881.

232 See Crawford, *Brownlie's Principles*, 471 (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, *Jurisdiction,* 105 and Morris, "High Crimes," 64.

233 O'Keefe, *International Criminal Law*, 320.

234 See O'Keefe, "Universal Jurisdiction," 741; Reydams, *Universal Jurisdiction*, 25.

235 See O'Keefe, "Universal Jurisdiction," 741.

vocal opponent to the ICC's exercise of jurisdiction over its nationals. Since the adoption of the Statute, the US has opposed that the ICC cannot exercise jurisdiction on the sole basis of territorial jurisdiction, as foreseen in Article 12 (2) (a).[236] The United States does not stand alone – Israel, for instance, has also decried the Court's jurisdiction over the crime of transfer of population into occupied territory.[237] Apparently, "[t]he issue of the ICC's jurisdiction over nationals of non-party States without State consent has been officially one of the main reasons for the Chinese government's opposition to the Court."[238] It must be noted that these States contest the Court's alleged exorbitant territorial jurisdiction – not even its universal prescriptive jurisdiction. In contrast, following the referral under Article 13 (b) of the situation in Darfur, Sudan constantly challenged the jurisdiction of the Court over its territory and nationals on the ground that it is not a party to the Rome Statute.

Third, 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.[239] The enforcement of this norm, nevertheless, would be practically impossible since the jurisdiction prescribing it would be considered by the third State as groundless.

Given that the Rome Statute's exorbitant jurisdiction has been opposed by some States, it must be acknowledged that the 'universal jurisdiction conception' apparently conflicts with the sovereignty of (these) States not party to the Rome Statute. However, it must be observed that not all claims that a jurisdiction is exorbitant should be granted. For instance, the delegated territorial jurisdiction of the ICC over nationals of non-party States is a jurisdictional basis well established in international law, even if some States have opposed it.[240] True, the fact that the resolutions enabling the war crimes amendment to the Rome Statute do not assert jurisdiction on the basis of territoriality (or active nationality) solely evinces that the States parties reconsidered whether they had a legal basis to entitle the Court to exercise its treaty-based jurisdiction over non-party States.[241] However, given that the amended war crimes provision that entered into force is reflective of customary international law,[242] it was absolutely not necessary to attempt to limit the ICC jurisdictional reach

236 Wedgwood, "An American View", 99.
237 Ibid.
238 Zhu, *China and the International Criminal Court*, 59.
239 Milanovic, "Rome Statute Binding,"51.
240 See Chapter 1, fn 36.
241 Resolution RC/Res.5, preamb. par. 2; Resolution ICC-ASP/16/Res.4, preamb. par. 2.
242 Resolution RC/Res.5, preamb. par. 8–9. (entered into force on 26 September 2012).

over the crimes covered by this amendment.[243] As seen above, crimes against customary international law are not an exercise of prescriptive jurisdiction. Furthermore, they are not within the exclusive jurisdiction of States and thus do not conflict with the sovereignty of States.

On the other hand, crimes that are not established under customary international law do give rise to a conflict, when not based on at least territoriality or active nationality. Such conflict might prove to be genuine and irresolvable given that the impugned crimes are not rendered per se invalid, and that the Statute still asserts that the Court, when triggered under Article 13 (b), can assert jurisdiction over any crime defined in its Statute. While this author believes this to be a fundamental obstacle to the 'universal jurisdiction conception', it may be considered whether the conflict generated by the non-customary character of certain crimes defined in the Rome Statute can be avoided. The next section shows that the 'universal jurisdiction conception' attempts to normatively justify the Rome Statute and ICC' assertion of universal prescriptive and adjudicative authority on two elements that may be deemed to fit the rationale of a '*sui generis* universal jurisdiction'.

2.3.2 A *Sui Generis* Universal Jurisdiction

While not all crimes defined in the Rome Statute may have crystallized in customary international law, their normative character might still make them subject to universal prescriptive jurisdiction. As mentioned above, the specific crimes of the Rome Statute that are not established in customary international can be considered 'crimes under treaty law' of serious concern to the international community.[244] 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".[245] Furthermore, the Rome Statute as well as 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".[246]

243 See Chapter 1.

244 Kress, "International Criminal 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."

245 See Rome Statute, preamb., Art. 5.

246 Negotiated Relationship Agreement between the ICC and the UN, preamb. par. 4.

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.[247] It may thus be contended that 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 for an assertion of universal prescriptive 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.[248] 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.[249]

Some past practice can be taken as indicating that as long as a crime can be considered an international crime it attracts universal jurisdiction even if it is not established under customary international law. 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 Military Tribunal at Nuremberg certainly 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."[250] Although not uncontroversial, the *Hostage Case* position has been significantly relied on to assert universal jurisdiction over international crimes.[251] 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".[252] According to Einarsen, 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.[253] These two elements may be deemed valid reasons

247 Milanovic, "Rome Statute Binding," 51.

248 Cassese, *International Criminal Law,* 126.

249 Gallant, "Jurisdiction to Adjudicate and Jurisdiction to Prescribe," 789; see e.g. Lawrence and Heller, "Environmental War Crime," 61.

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

251 See Kittichaisaree, *International Criminal Law*, 3.

252 Einarsen, *The Concept of Universal Crimes*, 245, 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.".

253 Einarsen, *The Concept of Universal Crimes*, 236.

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.[254]

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" or "on values of paramount important" to the international community; and "that the international community has decided so."[255] Accordingly, if one accepts that the Rome Statute is an act of the international community, and that 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, regardless of their customary basis.

Overall, this case law suggests that universal prescriptive jurisdiction can be legally grounded even if the crimes in question are not established under customary international law. Such claim however relies on the assumption that universal jurisdiction applies to all international crimes, and that a crime can be considered international even if not part of customary international law. Two conditions have been set out by the case law and literature on universal jurisdiction: First, that the crime be grave enough to be considered a crime of international concern, and, second, that the international community recognized such conduct as universally reprehensible. Given that both requirement revolve around the concerns and sanctions of the international community, the latter concept will be addressed first.

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254 Unnamed defendants, Case No. STL – 11-01/I, Decision on the Applicable Law: Terrorism, conspiracy, Homicide, Perpetration, Cumulative Charging (16 Feb. 2011), par. 91.

255 See Schabas, *Unimaginable Atrocities*, 34.

2.3.3 The Rome Statute is an Act of the International Community as a Whole

A necessary requirement for a crime to attract universal jurisdiction is that it be recognized as an international crime by the international community. 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."[256] 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.[257] However, this claim becomes more concrete when asserted by the international community as such. This is what drives the Rome Statute: to be an act of the international community as a whole.

Alas, the 'international community' is an amorphous term.[258] It is often alleged that the UN because of the near-universality of its membership is the most defined representative of the 'international community'.[259] 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. Both institutions certainly 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".[260]

Diverse views have been offered on whether the UN endorsement of the ICC makes the Rome Statute an act of the international community. For Triffterer – who participated in the Rome Conference as an independent academic expert – 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.[261] 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".[262] In the same vein, Sadat – a delegate to the Rome Conference – is of

256 Kittichaisaree, *International Criminal Law*, 3.

257 On a different note see Kress, "Universal Jurisdiction," 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."

258 See Rubin, "Actio Popularis," 267 (2001); President Guillaume, Separate Opinion in Arrest Warrant, ICJ Reports 2002, 35, 43.

259 Gallant, "Jurisdiction to Adjudicate and Jurisdiction to Prescribe," 783; see generallly Fassbender, *The Constitution of the International Community*.

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

261 Triffterer, "Preliminary Remarks," 46.

262 *Ibid*., at 46.

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.[263] While Triffterer believed 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.[264] In contrast, 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 inter-State organ exercising the *jus puniendi* of its States parties solely.[265] 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.[266]

The process by which the Rome Statute was adopted as well as the raison d'être of the ICC illustrate that it was designed to be an organ with universal jurisdiction. 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.[267] 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 ICC 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.

The recognition the Rome Statute received since its entry into force might have made it an act of the international community – if one accepts that the term international community can be quantitatively defined. 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).[268] In 2000, the UN Transitional Administrator for East Timor provided

263 Sadat and Carden, "An Uneasy Revolution," 449.
264 For the interplay with the principle of legality, see Chapter 3.
265 Olasolo, *The Triggering Procedure,* 17.
266 *Ibid*., 17 (at that time 99 States were party to the Statute).
267 Klabbers, *International Institutional Law*, 22.
268 Zimmermann, "Israel and the International Criminal Court," 231.

the Special Courts for Serious Crimes with universal jurisdiction over genocide, crimes against humanity, and war crimes – the definitions of which substantially replicate Articles 6, 7 and 8 of the Rome Statute.[269] The ICC itself considers that the exercise of the "*jus puniendi* of the international community [...] has been entrusted to this Court."[270] With the sheer number of ratification of its Statute and the relationship it has with the UN, it might appears that the ICC has been entrusted to act on behalf of the international community when it applies its Statute.

2.3.4 Gravity of the Crimes

An important element that transpires from the case law and literature is that the crimes subject to universal jurisdiction must be 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".[271] The 'universal jurisdiction conception' follows the same approach.

The Statute describes the crimes within the ICC's 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."[272] 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.[273]

It has been showed earlier that the gravity threshold serves as a safeguard to the ICC's universal adjudicative jurisdiction. The gravity element instead ensures that the Rome Statute crimes be serious enough to warrant universal prescriptive jurisdiction. In particular, it may claimed that it is the chapeaux of

269 UNTAET Regulation 2000/15, UNTAET was established by the SC via resolution 1272 (1999). The Special Court is also endowed with universal jurisdiction over torture.

270 Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09-139, 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 (Dec. 12, 2011), par. 46 (hereinafter Decision on the Failure by Malawi to Arrest and Surrender Al-Bashir).

271 The Princeton Principles on Universal Jurisdiction, Principle 1, reprinted in Macedo, *Universal Jurisdiction*, 21.

272 Rome Statute, preamb.; Sadat, *Transformation of International Law,* 109; deGuzman, "Gravity," 1400.

273 Rome Statute, preamble.

the crimes within the ICC jurisdiction that elevate them to the level of international crimes.[274] 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."[275] 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."[276] 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."[277] The constitutive elements of the crimes listed in Article 5 Rome Statute do indeed act as a 'built-in' gravity requirement.[278] 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."[279] Each particular act must meet the gravity clause contained in the chapeau of the crime category. Although the ICC'sjurisdiction 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 element. 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.[280] And, second, the gravity of the crime

274 Kleffner, *Complementarity*, 122; deGuzman, "Gravity," 1407–1408.

275 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.

276 Rome Statute, Art. 7 (2)(a).

277 Rome Statute, Art. 8 (1).

278 Schabas, *An Introduction*, 94.

279 Kaul and Chatidou, "Reflections on the ICC," 984.

280 See Einarsen, *The Concept of Universal Crimes*, 253; United States of America v Wilhelm List et al. (Hostage), XI TWC 1241.

makes it a matter of 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 element 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."[281] Judge Hans-Peter Kaul – who was the head of the delegation of Germany at the Rome Conference – 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, according to Kaul, the crimes committed would be more of the nature of serious ordinary crimes (not international crimes 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.[282] 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.[283] In other words, the jurisdiction of the ICC might be geographically unlimited but its subject-matter jurisdiction must be restricted to crimes that concern the international community – or it will actualize the universal prescription of crimes that lack the necessary gravity element to be considered an international crime as such.[284]

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281 Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Mar. 31, 2010), par. 117.

282 *Ibid.*, Dissenting Opinion of Judge Hans-Peter Kaul, par. 65: "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.

283 *Ibid.*, Dissenting Opinion of Judge Hans-Peter Kaul, par. 65.

284 Kress, "On the Outer Limits," 855–873 (points out that international criminal jurisdiction is only peremptory where it appears most likely that the concerned states will be unwilling or unable to prosecute).

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 community of States that adopted the Statute obviously did not intend to remove criminal jurisdiction from States' sovereign prerogative – States' sovereignty concerns needed to be accommodated. The gravity threshold and elements were thus designed to reflect the wishes of this '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.[285]

Overall, if one accepts that the exercise of universal jurisdiction is not grounded on the customary status of the crime in question, but on its internationality, it may be acknowledged that the 'universal jurisdiction conception' is able to avoid the conflict it poses with regards to the sovereignty of States not party to the Rome Statute. This, however, also requires to accept that the Rome Statute is an act of the international community. While this author believes that crimes defined within the Rome Statute would be grave enough to warrant universal jurisdiction, serious doubts arise with regards to what is – from a legal perspective – the international community. Indeed, international law as it currently stands does not recognize such legal entity; it does not have a legal personality and cannot incur rights and obligations on its own name. Thus, it is more consistent for the exercise of universal jurisdiction to stick to customary international law – a recognized source of law that applies to all. Accordingly, the only way to make applicable the Rome Statute's norms not grounded in customary international law upon the territories and nationals of non-party States would be through the 'Chapter VII conception'.

Conclusion

The ICC exercise of jurisdiction triggered under Article 13 (b) Rome Statute is an exercise of prescriptive and adjudicative jurisdiction. 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. On first glance, both, the 'universal jurisdiction' and the 'Chapter VII conception' are able to legally rationalize how the ICC's right to adjudicate crimes neither committed by a national nor in the

285 Kress, "On the Outer Limits," 861.

territory of State party can be exercised without conflicting with the sovereign rights of non-party States.

The issue becomes more complex however when it is reckoned that the ICC adjudication of crimes authoritatively defined within the Rome Statute but not established under customary international law constitutes an exercise of prescriptive jurisdiction. 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.[286]

A further particular feature of SC referrals to the ICC is that the ICC is then left with discretion as to until when it can 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.[287] 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.

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

286 See Pauwelyn, *Conflict of Norms*, p. 178.

287 Pauwelyn, *Conflict of Norms*, 285–298 (Inherent normative conflicts are situation where one of the two norms constitutes, in and of itself, a breach of the other norm).

of their consent.[288] The exercise of such treaty-based prescriptive jurisdiction over non-party States (without neither a territorial nor an active nationality link to a State Party) is in apparent conflict with the corollaries of the sovereignty of States. This conflict becomes genuine and irresolvable, unless it is accepted that the exercise of universal jurisdiction does not have to be predicated on the customary status of the crime, but on its internationality. These claims aim to bypass the consent of non-party States by considering that the Rome Statute is a legislative act of the international community, and that the gravity elements ensure that the crimes within the jurisdiction of the ICC are universally reprehensible.

If these claims are refuted – and this author believe they should be – the 'universal jurisdiction conception' does not only fail to explain the prescriptive character of the Rome Statute – and its actualization through an Article 13 (b) referral. It also fails to legally ground the Court's right to adjudicate crimes not established under customary international law, when they are neither committed by a national nor in the territory of a State consenting to the ICC's jurisdiction. Such right to universal adjudicative jurisdiction was indeed premised on an exception for crimes under (customary) international law to the prohibition to intrude in matters that are essentially within the exclusive jurisdiction of States. 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. Indeed, 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 may appear essential that treaties exhibiting the general interest of the 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.[289] However, legal

288 Sadat and Carden, "An Uneasy Revolution,"; 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. McNair, *The Law of Treaties*, 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 Nieto-Nava, "International Peremptory Norms," 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."

289 Rama Rao, "Unilateralism and the Emerging Law," 360.

positivists see such reasoning as an abuse of "a legal-technical means to solve an essentially political question".[290]

In the next two chapters, we will see that the rationale and normative interplay of the 'universal jurisdiction conception' with the principle of legality and the immunity of State officials has been often applied, albeit unconsciously, by scholars, the Court and other institutions. While these positions might be attractive at first glance, it is important to bear in mind that if the ICC community's authority to legislate for the world should be dismissed, as this chapter attempted to show, the 'universal jurisdiction conception' can have no real effect on how to interpret the Statute's provisions on these two issues.

290 Pauwelyn, *Conflict of Norms*, 104.

CHAPTER 3

Article 13 (b) vs Principle of Legality

The crimes of genocide, crimes against humanity, war crimes and aggression have all been crimes within the jurisdiction of at least one of the other international criminal tribunals and courts established prior to the ICC.[1] However, their precise definition as contained in the Rome Statute is in some important respects novel.[2] 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."[3]

Article 10 evidences this possibility of a discrepancy between the substantive criminal provisions of the Statute and customary international law.[4] 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."[5] 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."[6] 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.[7] 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 crystallization of a nascent rule".[8] With the wide ratification of the Rome Statute and its open intent to be universally ratified it is not out of question

1 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.

2 Schabas, *An Introduction*, 90.

3 Sadat, *Transformation of International Law,* 12.

4 Rome Statute, Art. 10; See also Sadat, "Article 10 of the ICC Statute," 909.

5 Broomhall, "Article 22," 719; Lamb, "Nullum Crimen," 754.

6 Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998), par. 227; Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment (Jul. 15, 1999), par. 223.

7 Cassese et al., *Cassese's International Criminal Law,* 98; See also Introduction, fn 26 and Grover, *Interpreting Crimes*, 341–343 for other crimes that might not yet be established under customary international law.

8 Cassese et al., *Cassese's International Criminal Law,* 98.

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that all the Statute's criminal provisions may be reflective of customary international law in the near future.[9] However, several important States from different geographical regions still need to ratify the Statute. Furthermore, the Statute has already been amended three times to adopt a definition of aggression and include some new war crimes within the jurisdiction of the Court.[10] Except for the first amendment to Article 8 – which criminalizes the use of poisoned weapons, asphyxiating gases, and expanding or flattening bullets in non-international armed conflicts – there is no consensus on whether the other amendments reflect customary international law.[11] 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,[12] this chapter focuses on referrals under Article 13 (b) of the Rome Statute. 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 referrals. For instance, Omar Al-Bashir, Head of State of Sudan, is accused of crimes committed between April 2003 and July 2008.[13] Ahmad Harun, Ali Kushayb and Abdel Raheem Muhammad Hussein have all been accused of crimes committed in

9 However, see Cryer, *Prosecuting International Crimes*, 327–328.

10 See Chapter 1, section 9.

11 The Kampala Review Conference explicitly affirmed that the amendment on war crimes reflected customary international law. See Resolution RC/Res.5, par. 8–9; The other amendments were not accompanied by such affirmation.

12 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 .

13 See Decision to Issue an Arrest Warrant against Al-Bashir.

Darfur between 2003 and 2004 – before the adoption of the referral.[14] 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;[15] 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.[16] Another case worth mentioning is the 2014 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.[17] 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.[18] Among the various acts amounting to crimes against humanity that the Commission reported gender-based persecution was singled out.[19] 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.[20]

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

14 Prosecutor v. Harun Kushayb), Case No. ICC-02/05-01/07, Warrant of Arrest for Ali Kuhayb, Warrant of Arrest for Ahmad Harun (Apr. 27, 2007); Prosecutor v. Hussein, Case No. ICC-02/05-01/12,Warrant of Arrest for Abdel Raheem Muhammad Hussein, 1 March 2012.

15 See Prosecutor v. Gaddafi et al. Case No. ICC-01/11-01/11-1I, 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" (Jun. 27, 2011).

16 See UN Doc. S/2014/348, op. par. 2 (vetoed by China and Russia).

17 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 (Dec. 22, 2014), UN Doc. S/PV.7353 (vetoed by China and Russia).

18 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 (Feb. 7, 2014), fn. 1541.

19 *Ibid.,* par. 1059.

20 *Ibid.*, fn. 1576, see also *Ibid.,* par. 1139–1141 and fn. 1624.

(the year when the report was written).[21] 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.

The 'concept' of this book 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 who were outside of the ICC's jurisdiction at the time of the conduct may be a violation of the legality principle – especially non-retroactivity. It will be shown 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 conduct which he or she is charged with was solely criminalized by the Rome Statute and not by any other law applicable to him or her at the time of the relevant conduct.

Section 1 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, situations referred under Article 13 (b) or on the basis of a retroactive Article 12 (3) declaration of acceptance, can subject individuals to *ex-post facto* jurisdiction. Section 2 will examine the contours of the principle of legality. Section 3 will detail the scope and status of the principle of legality under human rights law. Then, section 4 will show how the specificity of international criminal law tainted the ad hoc tribunals' legacy. We will see in sections 5 and 6 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 the drafters barely scratched the surface of the issue of the principle of legality. Section 7 shows how a reading of the Statute under the 'universal jurisdiction conception' interplays with *nullum crimen sine lege*. Section 8 lists the various ways the 'Chapter VII conception' can tackle *nullum crimen sine lege* when the Court is exercising retroactive jurisdiction.

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)

21 See Cassese et al., *Cassese's International Criminal Law,* 108; Cryer, *Prosecuting International Crimes*, 260.

may be avoided or resolved. The two 'conceptions' of a referral under Article 13 (b) Rome Statute adopted in this book 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.

1 The Jurisdiction *Ratione Temporis* of the Court

In 1919 the American delegation to the *Traité de Versailles* 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"[22] 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."[23]

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."[24] The same was done in Tokyo for "the just and prompt trial and punishment of the major war criminals in the Far East."[25] However, the Nuremberg and Tokyo Tribunals were widely criticized for their infringements upon the principle of legality.[26] Both Tribunals exercised retroactive jurisdiction covering acts committed before their establishment. Similarly, the ICTY, the ICTR and the Special Court for Sierra Leone (SCSL) were established with retroactive jurisdiction.[27] Conversely, the ICC is said to be a prospective institution;

22 Lansing and 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).

23 Overy, *The Nuremberg Trials*, 7.

24 London Charter, Art. 1.

25 Tokyo Charter, Art. 1.

26 See e.g. Tomuschat, "Legacy of Nuremberg," 830–837.

27 ICTY Statute Art. 8; ICTR Statute Art. 1; SCSL Statute Art. 1(1); Schabas, *An Introduction,* 70, fn. 35.

the Court can only exercise jurisdiction over acts committed after the entry into force of its Statute.[28]

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.[29] 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.[30] Article 11(2) operates a dichotomy by regulating the jurisdiction of the Court for States that ratify the Rome Statute after its entry into force in a different manner.[31] 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.[32]

Thus, at first reading it appears that the Rome Statute affirms 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 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. It also allows States that ratified the Statute after its entry into force to accept the jurisdiction of the Court for acts committed prior to ratification but after the entry into force of the Statute, 1 July 2002. Thus, read in conjunction with Article 11 (2) Rome Statute, Article 12 (3) Rome Statute allows a State to provide retroactive jurisdiction to the Court.

Article 11 is silent with respect to the jurisdiction *ratione temporis* of the ICC in situations referred under Article 13 (b) except that the Court has no

28 See Rome Statute, art. 11(1). As for the issue of whether the SC is bound by this date, see Schabas, *An Introduction*, 71; Condorelli and Villalpando, "Can the Security Council Extend," 571–582. This issue will be addressed comprehensively in Chapter 5.

29 Heugas-Darraspen, "Article 22," 567.

30 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.

31 See VCLT, Art. 24 (3).

32 Rome Statute, Art. 11(2).

competence before 1 July 2002.[33] Therefore, the temporal jurisdiction of the Court can be retroactively triggered by the SC up to the entry into force of the Rome Statute.

Accordingly, the Rome Statute allows the ICC, especially in situations triggered under Article 13 (b), to exercise its jurisdiction over a situation even if the crime was committed by a national and 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 firmly set 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.

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."[34] 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).[35] *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).

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* poses a challenge to common law jurisprudence and customary criminal law. In order to accommodate these legal systems, written as well as unwritten law are said to satisfy *nullum crimen sine lege*.[36] *Nullum*

33 See Rome Statute, Art. 11 (1); see Chapter 5.

34 Gallant, *The Principle of Legality*, 15.

35 We will not deal with the last rule (i.e. no court without law) in this chapter, but in Chapter 5, section 4. See Gallant, *The Principle of Legality,* 11–12 (for a more exhaustive list).

36 To alleviate the prejudice to the accessibility of case law, the ECtHR replaced its reference to written and unwritten law by "statutory law as well as case-law"; See Cantoni v. France, Grand Chamber, Judgment, ECtHR, Application No. 17862/91, 15 November 1996, par. 29; Sunday Times v. United Kingdom, Court, Judgment, ECtHR, Application No. 6538/74, 26 April 1979, par. 47; see Gallant, *The Principle of Legality,* 261 (nullum crimen sine lege scripta is not necessarily required under international human rights law).

crimen sine lege certa expresses the value of legal certainty. Clarity, precision, certainty and specificity are generally the requirements for a law to be considered in accordance with *nullum crimen sine lege certa*.[37] 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.[38]

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 are tools to ensure that retroactive creation of crimes does not take place.[39] The aim of all these notions is to act as safeguards against an arbitrary exercise of authority.[40]

While *nulla poena sine lege* will not be the focus of this chapter, it will resurface in various parts of it, 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.[41] *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*).[42]

3 The Status and Scope of *Nullum Crimen Sine Lege* in International Human Rights Law

Nullum crimen and *nulla poena sine lege* are contained in Article 11(2) of the Universal Declaration of Human Rights (UDHR),[43] Article 15 of the

37 Prosecutor v. Stakic, Case No. IT-97-24-T, Judgment (Jul. 31, 2003), par. 719.

38 Cassese et al., *Cassese's International Criminal Law,* 33.

39 Gallant, *The Principle of Legality,* 352–355; Bassiouni, "Human Rights in the Context," 290–291; See also Schlutter, *Customary International Law*, 297.

40 See Mokhtar, "Nullum Crimen," 41.

41 See section 8.5 of this chapter.

42 Dana, "Beyond Retroactivity," 868; Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc A/810 at 71 (Dec. 10, 1948), Article 11 (2) (hereinafter UDHR).

43 *Ibid*.

International Covenant on Civil and Political Rights (ICCPR),[44] Article 7 of the European Convention on Human Rights (ECHR),[45] Article 9 of the Inter American Convention on Human Rights (IACHR),[46] Article 6 and 7(2) of the African Charter on Human and People's Rights (ACHPR)[47] and Article 15 of the revised Arab Charter on Human Rights (ACHR).[48] 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,[49] Article 67 of Geneva Convention IV,[50] Article 75(4)(c) of Additional Protocol I[51] and Article 6(2)c) of Additional Protocol II[52] 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.[53]

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.[54] The best expression of *nullum crimen/nulla poena sine lege* is provided in Article 11(2) UDHR, which 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.[55]

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44 International Covenant on Civil and Political Rights (Dec. 16, 1966), 999 U.N.T.S. 171 (hereinafter ICCPR).

45 European Convention for the Protection of Human Rights and Fundamental Freedoms (Nov. 4, 1950) 213 U.N.T.S. 221 (hereinafter ECHR).

46 American Convention on Human Rights (Nov. 21, 1969) 1144 U.N.T.S. 123, (IACHR).

47 African Charter on Human and Peoples' Rights (June 27, 1981) 1520 UNTS 217 (hereinafter ACHPR).

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

49 Geneva Convention III.

50 Geneva Convention IV.

51 Protocol Additional I.

52 Protocol Additional II.

53 Gallant, *The Principle of Legality,* 208.

54 Gallant, *The Principle of Legality,* 3; Lamb, "Nullum Crimen," 734–742. For *nulla poena sine lege* see Gallant, *The Principle of Legality,* 379.

55 UDHR, Art. 11 (2).

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.[56] 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."[57]

The ICCPR and the ECHR contain a provision that is similar to the UDHR's provision on *nullum crimen/nulla poena sine lege*. However, in contrast with the UDHR, the ICCPR has a further paragraph which specifies that the rules contained in the previous paragraph does 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."[58] The ECHR has in essence a similar second paragraph.[59] This second paragraph is also known as the 'Nuremberg clause' as it is claimed to have been drafted to eliminate any doubt about the validity of the post-World War II prosecutions.[60]

These paragraphs 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.[61] As Machteld Boot argues, 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.[62] The ECtHR held in its most recent jurisprudence that the two paragraphs of Article 7 are interlinked and are to be interpreted in a concordant manner.[63] Thus,

56 Spiga, "Non Retroactivity," 13.

57 Nuremberg Principles No. II.

58 ICCPR, Art. 15 (2).

59 ECHR, Art. 7(2).

60 See Gallant, *The Principle of Legality,* 182; Boot, *Nullum Crimen Sine Lege*, 137–140; 158–161, 628.

61 ICJ Statute, Art. 38 (c).

62 See Boot, *Nullum Crimen Sine Lege*, 140; see also Nowak, *CCPR Commentary*, 281

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

Article 7(2) ECHR and 15(2) ICCPR 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 conduct.

4 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."[64] Indeed, the criminalization process in international law is not the same as in national law. While the criminalization process in national law is generally 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".[65] 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. Similarly, 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."[66]

64 Prosecutor v. Karemera et al, Case No. ICTR-98-44-T, 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 (May 11, 2004), par. 43.

65 Treaty of Versailles of 28 June 1919, Art. 227.

66 Tadic Interlocutory Appeal Decision, par. 89.

Nonetheless, some scholars have rejected the Nuremberg Tribunal's holding that violations of the Kellog-Briand Pact and other treaties entailed individual criminal responsibility.[67] 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.[68] It is indeed a truism to state that an illegal act is not necessarily a crime.[69] Furthermore, the question of individual criminal responsibility is in principle distinct from the question of State responsibility.[70] 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.[71] Moreover, the fact that a certain international rule seems to define a crime does not entail *ipso facto* that individual criminal responsibility arises.[72] 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.[73]

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

67 See, e.g., Schick, Crimes against Peace, 770; see Tomuschat, "Legacy of Nuremberg," 832–833.

68 See e.g. Degan, "On the Sources" 64.

69 Bassiouni, *Crimes Against Humanity*, 113.

70 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, p. 143.

71 Tomuschat, "Legacy of Nuremberg," 833.

72 See Kress, "International Criminal Law", par. 12.

73 ILC, Report of the ILC on the Work of its 46th Session, UN Doc. A/49/10 (1994).

specificity entails that the *actus reus*, the *mens rea* and the modes of responsibility must be specified in the *corpus* criminalizing the conduct.[74] The *corpus* of customary international law is rarely that detailed and intelligible. Indeed, 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?[75]

Customary international law by its very nature can be even more imprecise than treaty law.[76] 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.[77]

It is nevertheless recognized that customary international law may be used as source of international law under which individual criminal responsibility arises. The *Tadic Interlocutory Appeal Decision* confirmed that individual criminal responsibility can attach to a breach of a customary prohibition of certain conduct.[78] 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."[79] 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

74 See Blakesley, "Atrocity and Its Prosecution," 206.
75 Verhoeven, "Article 21 of the Rome Statute," 22.
76 Lamb, "Nullum Crimen," 743; see Ambos, "Treaty-Based Universal System," 163.
77 Prosecutor v. Vasiljevic, Case No. IT-98-32-T, Judgment (Nov. 29, 2002), par. 193.
78 Tadic Interlocutory Appeal Decision, par. 134.
79 Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), UN Doc. S/25704 (May 3, 1993), par. 34.

> 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.[80]

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).[81] The same requirements were held for the modes of liabilities.[82]

The ad hoc tribunals have been nevertheless accused of legislating new law under the guise of discovering customary international law[83] – especially through its case law on war crimes,[84] crimes against humanity,[85] command responsibility,[86] and joint criminal enterprise[87] 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,[88] Article 27 Rome Statute does not include the doctrine of joint criminal enterprise III as designed by the ad hoc tribunals,[89] and Article 28 Rome Statute, unlike the ad hoc tribunals, requires a causal link for command responsibility to be found.[90] 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.

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80 Prosecutor v. Milutinovic et al., Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise (May 21, 2003), par. 9.

81 Prosecutor v. Milutinovic et al. Case No. IT-05-87-PT, Decision on Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration (Mar. 22, 2006), par. 15.

82 *Ibid*.

83 See e.g. Zahar and Sluiter, *International Criminal Law*, 93–105.

84 See Darcy, "The Reinvention of War Crimes," 127.

85 See van den Herik, "Using Custom," 80–105; Schabas, *An Introduction*, 109–110.

86 See e.g. Prosecutor v. Delalic et al., Case No. IT-96-21-T, Judgment (Nov. 16, 1998), par. 399; see Mettraux, Command Responsibility, 83.

87 See Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment (Jul. 15, 1999), par. 226; See e.g., Danner and Martinez, "Development of International Criminal Law," 146; Gibson, "Testing the Legitimacy," 522.

88 For war crimes, see Darcy, "The Reinvention of War Crimes," 118; For crimes against humanity, see van den Herik, "Using Custom," 104–105.

89 Oberg, "Fact-Finding without Facts," 319.

90 Mettraux, Command Responsibility, 85.

5 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*)."[91] As the President of Italy noted at the Rome Conference, "[t]he ad hoc tribunals 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."[92] 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.[93] 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, 8 and 8b*is*.[94] Cassese observed 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."[95]

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)[96] and the RPE.[97] 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.[98] Grover observes "that the drafting of Article 21 was motivated by the principle of legality and the desire to limit judicial

91 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, Doc. (A/51/22), 1996, par. 52.

92 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, par. 16, p 62.

93 See Cryer et al., *International Criminal Law and Procedure*, 150–151.

94 Rome Statute, Art. 9 and 21; See Schabas, *Commentary on the Rome Statute,* 407.

95 Cassese, "Preliminary Reflections," 152.

96 Rome Statute, Art. 9(3).

97 Rome Statute, Art. 52(5).

98 Decision to Issue an Arrest Warrant against Al-Bashir, par. 126; Prosecutor v. Katanga, Case No. ICC-01/04-01/07-3436, Jugement rendu en application de l'Article 74 du Statut (Mar. 8, 2014), par. 38–42; See also e.g., Prosecutor v. Ruto et al., Case No. ICC-01/09-01/11-373,

discretion in the interpretation and application of the Rome Statute."[99] 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. 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.[100] 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 favor of the person being investigated, prosecuted or convicted."

While Cassese stated that the Rome Statute "seems to evince a certain mistrust in the Judges",[101] Judge Hunt adds that "[i]t would be more accurate to say that the Statute evinces a deep suspicion of the Court's judges."[102] Schabas comments:

> 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.[103]

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.[104] "This awareness", as Broomhall puts it, "put a premium on the clear delimitation of the Court's jurisdiction."[105]

Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 23, 2012), par. 289; Schlutter, *Customary International Law*, 322.

99 Grover, *Interpreting Crimes*, 116; see also deGuzman, "Article 21," 442.

100 Schabas, "General Principles," 408.

101 Cassese, "Preliminary Reflections," 163.

102 Hunt, "High Hopes," 61.

103 Schabas, "Interpreting the Statutes," 887; See also Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Jugement rendu en application de l'Article 74 du Statut, Minority Opinion of Judge Christine Van den Wyngaert (Mar 8, 2014), par. 19.

104 Grover, "A Call to Arms," 552 (2010); Cryer, *Prosecuting International Crimes*, 236, 287; Broomhall, "Article 22," 714.

105 Broomhall, "Article 22," 714.

However, the drafters might have thrown out the baby with the bathwater in their commitment to circumscribe the Court's powers. 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.

6 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. Regardless of the trigger mechanism used to activate the Court's jurisdiction, and whether such jurisdiction is retroactive, the Statute provides the ICC with jurisdiction over genocide, crimes against humanity, war crimes and aggression.[106] These crimes are defined 'for the purpose of this Statute' in Articles 6, 7, 8 and 8*bis*. The Elements of Crimes drafted by the Assembly of States Parties shall assist the Court in the interpretation and application of Articles 6, 7, 8 and 8*bis*. The modes of liabilities under which the Court can find an accused responsible of a crime defined in Articles 6, 7, 8 and 8*bis* are those listed in Article 25 (3) and (3) *bis*. In addition to the modes listed in Article 25, Article 28 defines how military commanders and other superiors may be found criminally responsible for crimes within the jurisdiction of the Court.

As mentioned above, 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,[107] and the RPE.[108] 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

106 However, temporal Jurisdiction over aggression and other amendment crimes is governed by the respective amendment entry into force, see section 6.1 of this chapter.

107 Rome Statute, Art. 9(3).

108 Rome Statute, Art. 52(5).

methods set out in the VCLT.[109] 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.[110]

One may think that the article on *nullum crimen sine lege* entitles the Court to verify whether a crime or mode of liability provided in the Statute was 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 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, 8 and 8*bis,* at the time when the conduct occurred.[111] 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. In other words, if the crime and the mode of liability were defined in the Statute at the time the conduct took place, Article 22 is of no resort, even if the conduct occurred before the date when the SC referred the situation under Article 13 (b).[112] Indeed, Article 22 does not leave space to argue that although a crime or a mode of liability was within the jurisdiction of the Court, it did not apply to the accused at the time of the conduct in question.

It could be argued that if the crime had been committed by a national of a non-party State in the territory of a non-party State, it was not at the time it took place within the jurisdiction of the Court. Indeed, the Court under such reading of jurisdiction would lack jurisdiction *ratione loci* and *personae* over the conduct. Accordingly, Article 22 would apply and bar the ICC from exercising retroactive jurisdiction. However, *prima facie* that does not seem to be the intention of the drafters, at least in 1998. Article 12 (3) was drafted to ensure

109 Decision to Issue an Arrest Warrant against Al-Bashir, par. 44; See also e.g Prosecutor v. Ruto et al., Case No. ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 23, 2012), par. 289.

110 Prosecutor v. Ruto et al., Case No. ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 23, 2012), par. 289 ("the Chamber should not resort to applying Article 21 (b), unless it has found no answer in paragraph (a).").

111 It is even unsure whether Article 22 applies to modes of liabilities, since it refers only to 'crime'. Broomhall, "Article 22," 723–724; However, see Schabas, *Commentary on the Rome Statute,* 410.

112 See also Bartels, "Legitimacy and ICC Jurisdiction," 159–160.

that States could provide retroactive jurisdiction to the Court up to the Statute's entry into force even if they accessed it at a later stage.[113] Indeed, it has already been used in this manner by Uganda, Côte d'Ivoire, and Palestine.[114] The intention of the drafters cannot have been to render Article 12 (3) – read in conjunction with Article 11 – meaningless. As for referrals under Article 13 (b), the provision itself notes that the SC may refer a "situation in which one or more of such crimes appears to have been committed". It thus contemplates the idea that referrals can capture crimes that occurred in the past. It even requires that one or more crime appear to have been committed for the SC to trigger the jurisdiction of the Court. It would be illogical and legally unsound if the SC had to witness the commission of crimes to refer a situation to the Court while the latter is forbidden by its Statute to investigate and prosecute the crimes that prompted the referral. Furthermore, as mentioned above, Article 13 (b) was always used to provide retroactive jurisdiction to the ICC.[115] Indeed, the Statute would be inconsistent if it allowed, on the one hand, retroactive referrals under Article 13 (b) and retroactive Article 12 (3) declarations while, on the other hand, prohibited the ICC from exercising retroactive jurisdiction. Consequently, the requirement that the crime be "within the jurisdiction of the Court" in Article 22 does not include the jurisdictional prerequisites contained in Article 12 (2) – personal or territorial jurisdiction. Instead the Statute's provision on *nullum crimen sine lege* strictly focuses on whether or not the crime and modes of liability were defined in the Statute 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 criminal responsibility to be found by the Court.[116] 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

113 See Rome Statute, Art. 11.

114 Retroactive declaration of acceptance have been upheld by the Appeals Chamber in particular in Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11 OA 2, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I on Jurisdiction and Stay of the Proceedings (Dec. 12, 2002), para. 84. Ukraine issued two retroactive declaration under Article 12 (3) but has not acceded to the Rome Statute.

115 See VCLT, Art. 31 (3) (b).

116 Lamb, "Nullum Crimen," 751–752.

prior to an act making the Rome Statute applicable in the territorial and national State.[117] 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.[118]

The only unequivocal limit to the jurisdiction of the Court is the entry into force of the Statute *per se*, the 1st July 2002.[119] 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 the basis that the crimes contained in the Statute were not applicable to the accused at the time of the impugned conduct.

6.1 *Exception for the Crimes Adopted after the Entry into Force of the Statute?*

The Court' jurisdiction over the crime of aggression and 'new' war crimes is regulated by the entry into force of each respective amendment. The Court's jurisdiction over the crime of aggression can only be exercised after 17 July 2018.[120] As to the war crimes amendments, Article 8(2)(e) (xiii), (xiv), (xv) entered into force on 26 September 2012 for the Court, and for the first State, San Marino, which ratified the amendment.[121] Articles 8 (2) (b) (xxvii), (xxviii), (xxix) and 8(2)(e)(xvi), (xvii), (xviii) will enter into force for the Court one year after its ratification by at least one State.

Given that the aggression amendments, explicitly provides in Article 15*ter* that the SC can trigger the Court jurisdiction over Article 8*bis*, it is not contested that a SC referral adopted after 17 July 2018 will also provide the Court with jurisdiction over this crime.[122] While an Article 13(b) referral might be

117 Milanovic, "Rome Statute Binding," 49; See Olasolo, "Principle of Legality," 306 (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).

118 Milanovic, "Rome Statute Binding," 49.

119 See *Ibid*. 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 book.

120 ICC-ASP/16/Res.5, Annex III, Understanding 1; Clearwater, "Aggression Amendments Enter into Force,", 31–63.

121 Rome Statute, Art. 121 (5)

122 On the other hand, it is contested whether declarations under Article 12 (3) will not provide the Court with jurisdiction over the crime of aggression and other amended crimes.

retroactive, the Court's jurisdiction will only be able to cover a crime of aggression that happened after 17 July 2018. Indeed, Article 22 (1) plays a crucial role with regards to the amendments to the Rome Statute. It is thanks to this article that the Court will not be able to exercise jurisdiction over a crime that was not into force at the time of the alleged conduct – since it was not "a crime within the jurisdiction of the Court".[123]

It was shown in Chapter 1 that a referral under Article 13 (b) can also trigger the Court's jurisdiction over the other amended crime(s). Article 22 (1) will play the same role with respect to these crimes as for the crime of aggression: an individual cannot be found criminally responsible for a conduct proscribed by an amendment before the entry into force of the said amendment. The distinction between aggression and other amendments is that for the latter, the amendment enters into force, and thus is within the jurisdiction of the Court, as soon as one State ratifies it. However, while Article 22 (1) ensures that the Court does not exercise jurisdiction over amended crimes before they come within the jurisdiction of the Court, the Court remains able to exercise jurisdiction over these crimes when committed after their entry into force even if, at the time they take place, the conduct was not committed by a national or in the territory of a State where the amendments were applicable law. They thus pose the same problem with the principle of legality as other crimes defined in the Rome Statute, but with a different starting date.

We have seen that the very provisions 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. The elephant in the room at the Rome Conference was the application of the Rome Statute in situations triggered retroactively over acts committed in the territory and by nationals of a State not party to the Statute at the time the conduct took place. In order to respect non-retroactivity, as understood in international human rights law, the law must have been in existence but

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The reference to Article 12 (3) was initially part of the 'understandings' attached to the amendment, see Barriga and Kress, *Travaux Préparatoires*, 643–47, 790–796; Kress and Von Holtzendorff, "The Kampala Compromise," 1213, fn 113; Milanovic, "Aggression and Legality," 177–178 (unsure); See Zimmermann and Şener, "Chemical Weapons," 443–47 (for other amended crimes). This is not the place to address this issue. For the sake of this book, we will take the negative view and thus consider that the problem posed by retroactive declarations under article 12 (3) does not apply, at least, to any new crime added to the Rome Statute after its entry into force.

123 Note that it is the date set in the activation decision of the 2017 decision that brought the crime of aggression wihtin the jurisdiciton of the Court. See ICC-ASP/16/Res.5, Annex III, Understanding 1 and 3.

must also have been applicable to the actor and the conduct at the time of the offence.[124] 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. The next sections dive deep into the crucial questions whether the Rome Statute became applicable to all actors in the world at the time of its entry into force, and how the Statute interplays with the principle of legality. The two 'conceptions' adopted in this book of a referral under Article 13 (b) offer contrasting answers to these questions.

7 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*.[125] 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".[126] 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.[127]

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 Statute.[128] Indeed, Hans-Peter Kaul qualified Article 12 (2) as "a regression from the universal jurisdiction approach which is generally recognized in customary

124 Gallant, *The Principle of Legality,* 23–24, 352; Milanovic, "Rome Statute Binding," 27.
125 Kress, "Immunities under International Law," 248; Olasolo, *The Triggering Procedure,* 18–21
126 Rome Statute, Art. 5.
127 Randall, "Universal Jurisdiction," 785.
128 Sadat and Carden, "An Uneasy Revolution," 414; See also Scharf, "Nationals of Non-Party States," 77.

international law".[129] What Kaul criticized was 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.[130]

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.[131] 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 an 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".[132] Indeed, Sadat and Carden argue that the States' delegations at the Rome Conference assumed the role of the international community's legislator.[133] 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.[134] That 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,[135] 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."[136] Accordingly, the Rome Statute would have bound all individuals since its entry into force and would therefore always be applied

129 Kaul, "Preconditions," 607

130 See Olasolo, *The Triggering Procedure,* 39.

131 See Chapter 2, section 2.

132 Sadat, *Transformation of International Law*, 263.

133 Sadat and Carden, "An Uneasy Revolution," fn 35.

134 *Ibid*., at 381, 406–409, 412–413.

135 See Chapter 2, section 2.3 for an extensive assessment of the legal foundations and limits of the universal prescriptive jurisdiction theory.

136 Judgment of the International Military Tribunal for the Trial of German Major War Criminals Nuremberg, 30th September and 1st October, 1946, at 444.

prospectively. This seems to be the view the ICC had of its Statute. In the *Confirmation of Charges against Lubanga,* Pre-Trial Chamber I described how the principle of legality operates before the ICC 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*).[137]

The Pre-Trial Chamber considered 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. On the one hand, the Chamber was suggesting that the Statute 'is effectively constitutive, as a substantive matter, of the crimes it has jurisdiction to try'.[138] On the other hand, the Chamber left opaque whether the Statute approved by the State parties applies worldwide since its entry into force or only with respect to their territories and nationals.

While the *Lubanga*'s take on the principle of legality does not settle the question whether the substantive criminal provisions of the Statute are applicable to all since its entry into force, further practice of the Court in its initial years leaned on this direction. In this respect, it must be noted that the ICC has never distinguished the applicability of the criminal norms contained in the Rome Statute in situations arising under a retroactive Article 13 (b) referral 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.[139] In fact, the same Pre-Trial Chamber I as in Lubanga was not hesitant to use a mode of liability – joint commission through another person – that is unique to the ICC for crimes committed in a territory and by nationals of a non-party State.[140] In *Decision on the Confirmation of Charges against Katanga and*

137 Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Jan. 29, 2007), par. 303.

138 O'Keefe, *International Criminal Law*, 54.

139 However, see Prosecutor v Ntaganda, Case No. ICC-01/04-02/06, Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9 (Jan. 4, 2017), par. 35, fn 74.

140 Few domestic systems recognize this mode of liability, see Prosecutor v. Katanga and Ngudjolo, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges (Sept. 30, 2008), par. 504.

Ngudjolo, Pre-Trial Chamber I 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."[141] This finding is acceptable if only applied to conduct that occurred in a territory or were committed by nationals of a State that had ratified the Statute, as it was the case for Katanga and Ngudjolo. However, Pre-Trial Chamber I also used 'joint commission through another person' in situations triggered under Article 13 (b) as a mode of liability 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 confirmed that it applied to Omar-Al-Bashir, Muammar Gaddafi, Saif Gaddafi and Abdullah Al-Senussi.[142] Given that the Chamber knew the origin of this mode of liability, and repetitively applied it for charges emerging from a retroactive referral, we can presume that the ICC was thereby confirming that it considered its Statute applicable to all since its entry into force.

If the Rome Statute bound all individuals since its entry into force, then it is never applied retroactively. In situations where the jurisdiction of the Court is triggered in relation to a date before the referral under Article 13 (b), the international community essentially uses a mechanism for the prosecution of crimes already the subject of individual criminal responsibility.[143] 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 is seen as simply confirming the right of the international community to universally prosecute crimes that it had criminalized since 2002.

While the Court early case law on the principle of legality evinces that it had adopted the 'universal jurisdiction conception', it is important to stress that such theory is only accepted by a minority of scholars. 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

141 *Ibid.*, par. 508.

142 Decision to Issue an Arrest Warrant against Al-Bashir; Prosecutor v. Gaddafi, Gaddafi and Al-Senussi, Case No. ICC-01/11-01/11-1, 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" (June 27, 2011), par. 71.

143 Prosecutor v. Delalic et al., Case No. IT-96-21-A, Judgment (Feb. 20, 2001), par. 178.

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.

8 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. States that ratified the Rome Statute delegated their territorial and active nationality jurisdiction over genocide, crimes against humanity and war crimes to the ICC.[144] Similarly, those that ratified the amendments delegated their territorial and active nationality jurisdiction over the crimes covered by the amendments. As a multilateral treaty, the Rome Statute binds its State parties only.[145] 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 Security Council 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 criminal law by a Court "is simply the exercise or actualization of prescription."[146] 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 Article 13(b) referral, a retroactive referral

144 See Akande, "Nationals of Non-Parties," 618; O'Keefe, "The United States and the ICC," 343–344.

145 Prosecutor v Ntaganda, Case No. ICC-01/04-02/06, Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9 (Jan. 4, 2017), par. 35

146 O'Keefe, "Universal Jurisdiction," 737.

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.[147] 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 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 within the jurisdiction of the ICC.[148] For conduct 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 we 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 sub-section 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 the opinion of this author 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 will show that the SC is presumed to have intended that the ICC would respect the principle of legality. The following sub-section 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 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

147 See section 3 of this chapter.

148 Grover, *Interpreting Crimes*, 252.

situations referred under Article 13(b) Rome Statute. The clash can also occur in situations where the Court exercises retroactive jurisdiction on the basis of an Article 12 (3) declaration of acceptance. While the latter jurisdiction does not involve the powers and limits of the SC, it nevertheless involves the power of the ICC to infringe customary international human rights law. In this respect, one 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.

8.1 *By Hook or By Crook – A Principle of Justice*

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.[149]

To apply the Statute's substantive criminal provisions in their entirety and entitle challenges to the ICC's retroactive application of criminal law solely on the bases of Articles 22 and 24 as they currently stand would clash with the principle of legality, unless we read down the status and scope of the latter. 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." If one applies non-retroactivity as a principle of justice, the gravity of the crimes within the Rome Statute would make it unjust to see a person accused of such acts go unpunished.

The starting point to held that the principle of legality must be read down when faced with the most serious crimes of concern to the international community is the *Nuremberg judgment*. In *obiter dictum* the Nuremberg Tribunal addressed the issue of *nullum crimen sine lege*, stating that it was not strictly bound by this principle.[150] According to the Tribunal, "*nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice."[151]

149 Schabas, *An Introduction*, 92.

150 Nuremberg Judgment, at 219; See generally Gallant, *The Principle of Legality,* 112–114.

151 Nuremberg Judgment, at 219; even more radically, Dissenting Opinion of Judge Rolling, Tokyo Judgment, Vol, II, at 1059 (nullum crimen sine lege "is not a principle of justice but a rule of policy"; the same reasoning was also applied in United States of America v. Josef Altstoetter et al. (Justice) 14 Annual Digest 278 (1948)).

How can we apply *nullum 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.[152]

In the same fashion as Kelsen proposed, the Nuremberg Tribunal balanced retroactive application of criminal law and impunity of perpetrators of atrocities.[153] 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.[154] At Nuremberg, *nullum crimen sine lege praevia* was trumped by the need to ensure substantive justice.[155] Substantive justice aims to punish acts that harm society deeply and which are regarded as repugnant by all members of society.[156] In other words, even if there were no positive rules of international law specifically criminalizing these acts it would appear unjust to leave them unpunished.[157]

The Nuremberg Tribunal is not the only body that retained the principle of legality as merely a principle of justice. This reasoning has been upheld in many other international criminal cases and more specifically by the Supreme Court of Israel in *Eichmann.*[158] More recently, the Appeals Chamber of the ICTY held in *Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise* that *nullum crimen sine lege* is "first and foremost, a 'principle of justice'."[159] The Appeals Chamber also noted that:

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152 Nuremberg Judgment, at 219.

153 See Hans Kelsen, "Ex Post Facto Laws," 46.

154 Bassiouni, *Crimes against Humanity*, 70.

155 Kress, "Nulla Poena,"; Cassese, *International Criminal Law,* 72.

156 Cassese, *International Criminal Law,* p. 24–26.

157 Kelsen, "Judgment in the Nuremberg Trial," 165.

158 See also Eichmann Appeal Judgment, p. 281; Cassese also cites Peleus and Burgholz (No. 2) Cassese, *International Criminal Law,* 26; see also Streletz and Kessler case, Germany, Federal Court of Justice, 26 July 1994, BGHSt 40, 241 (244).

159 Prosecutor v. Milutinovic et al., Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction–Joint Criminal Enterprise (May 21, 2003), par. 37.

> 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 Defense that it did not know of the criminal nature of the acts.[160]

Accordingly, one could opine that 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.[161] The problem with such view is nonetheless identifying the content of morality and its threshold.[162]

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, 8 and 8*bis*. 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. Indeed, it is acknowledged under the 'Chapter VII conception' that the exercise of jurisdiction under a retroactive 13 (b) referral constitutes a retroactive application of criminal law. Thus a clash between retroactive exercise of jurisdiction and the retroactivity ban exists. The conflict can however be avoided if the principle of legality is read down.

In addition to considering the principle of legality as merely a principle of justice, 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.[163] 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 22

160 *Ibid*., par. 42; See also Prosecutor v. Delalic et al., Case No. IT-96-21-T, Judgment (Nov. 16, 1998), par. 313:

161 See Van Schaack, "Crimen Sine Lege," 119.

162 Juratowitch, "Retroactive Criminal Liability," 359.

163 Heugas-Darraspen, "Article 22," 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.

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."[164] 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.[165] 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 has changed status. Virtually all States have integrated this principle as a binding rule within their national systems.[166] Most agree that it can no longer be said that non-retroactivity is merely "a general principle of justice".[167] 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.[168]

In view of the universal ratification of human rights conventions providing for the principle of legality it may be safely said that non-retroactivity has become a rule of customary international law.[169] 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*)".[170] 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.[171] 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

164 Nuremberg Judgment, at 4; same reasoning was applied in United States of America v. Josef Altstoetter et al. (Justice) 14 Annual Digest 278 (1948).

165 Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment (Jul. 15, 1999), par. 296; Schabas, *The UN International Criminal Tribunals*, 66–67.

166 Gallant, *The Principle of Legality,* 3.

167 *Ibid*., at 3.

168 *Ibid*., at 241–242.

169 *Ibid*., at 3; Lamb, "Nullum Crimen," 734–742.

170 Unnamed Defendant, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Feb. 16, 2011), par. 76; see also Maktouf and Demjanovic v. Bosnia and Herzegovina, Application nos. 2312/08 and 34179/08, ECtHR, Grand Chamber Judgment of 19 July 2013, Concurring Opinion of Judge Pinto de Albuquerque, joined by Judge Vainie, par. 45.

171 Meron, *War Crimes Law*, 244; Gallant, *The Principle of Legality,* 316.

is a customary international norm, or even better a *jus cogens* norm, applying it merely as a principle of justice would be an egregious violation of that norm. In reality, we will see below that Article 21 (3) Rome Statute enjoins the Court not to apply the principle of legality as mere principle of justice.

Finally violating the principle of legality under the authority of the SC power puts the legality of the latter's action in question. 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 Tribunal will not be a 'judicial tribunal' but a mere tool for the manifestation of power".[172] 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 will thus end up in a wrongly attributed jurisdictional power.

8.2 *Presumption of Respect for Human Rights in Relation to the Security Council*

Nullum 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 principle of legality. Such interaction would constitute an apparent normative conflict which would trigger the application of Article 103 UN Charter. As its text makes it clear, Article 103 requires the "event of a conflict" to have effects.[173] The definition of norm conflict that is to be applied is broad.[174] However, SC resolutions must be construed as "producing and intending to produce effects in accordance with existing law and not in violation of it".[175] Thus a strong presumption against conflict exists and calls for techniques of harmonious interpretation to be used so that the conflict does not materialize in a genuine one.[176]

172 United States v. Araki et al., IMTF, Dissenting Opinion of Justice Pal, at 21.
173 UN Charter, Art. 103.
174 Paulus and Leis, "Article 103," 2123.
175 Report of the Study Group of the ILC on Fragmentation of International Law par. 39.
176 Paulus and Leis, "Article 103," 2123; See Report of the Study Group of the ILC on Fragmentation of International Law, par. 37; Pauwelyn, *Conflict of Norms*, 240–244.

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.[177] 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 *nullum crimen sine lege praevia*. Pursuant to Article 25 UN Charter and Chapter VII, the SC can impose obligations on UN Member States. These obligations, when combined with Article 103, prevail over other obligations of UN Member States. In principle the SC cannot impose obligations on international organizations such as the ICC.[178] However this has not prevented the SC from requesting international organizations to cooperate with the ICTY.[179] In the same vein, the ICTY also 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.[180] It could thus be argued that the SC could order the ICC to apply all Rome Statute's substantive criminal provisions, irrespective of nullum crimen sine lege – though this is not the view of this author.[181]

In Chapter 2, 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.[182] The presumption in this case is that, unless it explicitly and

177 Paulus and Leis, "Article 103," 2123; Dinstein, *Customary International Law and Treaties*, 425.

178 Sarooshi, "Peace and Justice," 106–107; see Chapter 5 for more this question.

179 Bank, "Cooperation," 262; Prosecutor v. Milutinovic et al., Case No. IT-05-87-AR108bis.1, Decision on Request of the North Atlantic Treaty Organisation for Review (May 15, 2006), par. 7.

180 See Prosecutor v. Dario Kordic et al. ICTY, Case No. IT-95-14/2-T, Order for the Production of Documents by the European Community Monitoring Mission and its Member States (Aug. 4, 2000); Prosecutor v. Milutinovic et al., Case No. IT-05-87-AR108bis.1, Decision on Request of the North Atlantic Treaty Organisation for Review (May 15, 2006), par. 8; Prosecutor v. Karadzic, Case No. IT-95-5/18-T, Decision on the Accused's Motion for Binding Order (United Nations and NATO) (Feb. 11, 2011), par. 7; see also Prosecutor v. Simic et al., Case No. IT-95-9-PT, Decision on Motion for Judicial Assistance to be provided by SFOR and others (Oct. 18, 2000), par. 46–49.

181 See Scheffer, "Staying the Course," 90 – this argument will be rebutted in chapter 5.

182 Al-Jedda v. United Kingdom, ECtHR, Grand Chamber, Judgment, App. No. 27021/08, 7 July 2011, par. 102; Nada v. Switzerland, ECtHR, Grand Chamber, Judgment, App. No. 10593/08,12 September 2012, par. 172; Al-Dulimi and Montanara Management Inc. v. Switzerland, ECtHR, Grand Chamber, Judgment, App. No. 5809/08, 21 June 2016, par. 139–140; See

clearly states the contrary the SC intended that the rights to non-retroactivity of the accused be respected.[183]

The UN Charter's framework suggests that measures of the SC are presumed to be in accordance with international human rights law. 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."[184] Moreover, in accordance with the principle of harmonization, the UN principles and purposes, provide direction for the interpretation and application of SC resolutions.[185] 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.[186] 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". Thus, according to the UN Charter, the SC referrals to the ICC and the undertaking of the States party to 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.[187]

The ECtHR has indeed tried to avoid conflicts between SC resolutions and the ECHR. in *Al–Jedda v. United Kingdom,* the Court 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

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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.

183 *Ibid*.

184 UN Charter, Art. 24 (2).

185 See Report of the Study Group of the ILC on Fragmentation of International Law, par. 251 (9).

186 See also Al-Jedda, par. 102; Stromseth et al., *Can Might Make Rights?*, 24; Akande, "The International Court of Justice and the Security Council," 323–325.

187 Rome Statute, preamb. par. 11, 7 "Reaffirming the Purposes and Principles of the Charter of the United Nations".

States to breach fundamental principles of human rights."[188] 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.[189] In *Al-Dulimi. v. Switzerland*, the ECtHR rearticulated the *Al-Jedda* presumption as being premised on the principle of systemic harmonization between the SC resolution and human rights law.[190]

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."[191] The Libyan referral essentially uses the same wording with a different date.[192] 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 could 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*.

Furthermore, it must be borne in mind 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*.[193] 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 potentially beyond customary international law.[194] However, the ICTR judged that there were no

188 Al-Jedda v. United Kingdom, ECtHR, Grand Chamber, Judgment, App. No. 27021/08, 7 July 2011, par. 102.

189 Nada v. Switzerland, ECtHR, Grand Chamber, Judgment, App. No. 10593/08,12 September 2012, par. 172.

190 Al-Dulimi and Montanara Management Inc. v. Switzerland, ECtHR, Grand Chamber, Judgment, App. No. 5809/08, 21 June 2016, par. 139–140.

191 SC Res. 1593, par. 1.

192 SC Res. 1970, par. 4 (the situation in Libya is referred since 10 February 2011).

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

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

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."[195] 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.[196] In the same vein, when the SC established the Special Tribunal for Lebanon 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.[197] 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.[198] 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.[199]

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.[200]

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195 See e.g Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, Judgment (May 21, 1999), par. 156, 158.

196 Letter dated 1 October 1994 from the Secretary-General addressed to the President of the Security Council (S/1994/1125), par. 87.

197 Special Tribunal for Lebanon Statute, Art. 2.

198 Jurdi, "The Subject-Matter Jurisdiction," 1125.

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

200 Prosecutor v. Tadic, Case No. IT-94-1-A, (Jul. 15, 1999), par. 223, par. 296; See Paulus and Leis, "Article 103," 2119-2120. See also Condorelli and Villalpando, "Can the Security Council extend," 580 (it is not even a matter of being a jus cogens norm but simply a principle that the SC should not request); Orakhelashvili, "The Impact of Peremptory Norms," 59.

One question however remains: if the ICC is to apply *nullum crimen sine lege* in a different manner than how its Statute provides, 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.[201] The second element which relies on 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 is the requirement that the Court interprets and applies its Statute in accordance with internationally recognized human rights.[202]

8.3 *Here Comes Super-Legality: Article 21 (3) Rome Statute*

Article 21 Rome Statute creates a hierarchy of sources to be applied by the ICC with the Statute at its summit.[203] However, although the Statute seems to posit itself as a self-contained regime,[204] 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.[205] Article 21(3) reflects this reality by creating a regime of "super-legality";[206] a "substantial hierarchy of law which supersedes the formal hierarchy between sources established by Article 21(1)."[207] 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.[208] Hence, Article

201 Milanovic, "An Odd Couple," 1151.

202 E.g. Broomhall, "Article 22," 714 (one of the first authors to note the problem retroactive referrals poses but does not raise Article 21 (3)); for others that invoked Article 21 (3), see Gallant, *The Principle of Legality,* 341; Milanovic, "Rome Statute Binding," 52; Bartels, "Legitimacy and ICC Jurisdiction," 141; de Souza Dias, "Retroactive Application," 65.

203 Cryer, "Royalism and the King," 390.

204 See e.g. Grover, *Interpreting Crimes*, 271 ("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"); van Sliedregt, *Individual Criminal Responsibility*, 13; Cryer, Cryer, "Royalism and the King," 394.

205 Scheinin, "Impact on the Law of Treaties," 23–34.

206 Pellet, "Applicable Law," 1077, Powderly, "Attempted Corseting," 485.

207 Heikkilä, "Article 21," 249; Pellet, "Applicable Law," 1077.

208 Bitti, "Article 21," 303.

21 (3) makes a *renvoi* to customary human rights law, thus rendering the Rome Statute not self-contained but semi-autonomous regime.[209]

Under Article 19 Rome Statute, the Court is required to "satisfy itself that it has jurisdiction in any case brought before it."[210] 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.[211] A challenge to the jurisdiction of the Court can also be made by an 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.[212] 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.[213] 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.[214]

The Statute erects certain barriers to the exercise of the jurisdiction of the Court;[215] 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

209 Gallant, *The Principle of Legality,* 332.

210 Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 (OA4), 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 (Dec. 14, 2006), par. 20–24.

211 Grover, *Interpreting Crimes*, 79; see Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (June 15, 2009), par. 23.

212 Rome Statute, Art. 19 (2).

213 Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 (OA4), 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 (Dec. 14, 2006), par 22.

214 *Ibid*., par 22.

215 *Ibid*., par 22 (referring to the elements listed in Article 17).

ratione materiae or *personae* not established under customary international law.[216] 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 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 [...].[217]

In the *Lubanga* case, Article 21 (3) was used to apply the doctrine of abuse of process despite its absence from the Rome Statute and RPE.[218] 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 recognized human rights.

If the prohibition of the application of retroactive criminal law is considered to be a human right norm firmly established – and this author believes it is – the Court must interpret and apply its provisions in accordance with international human rights law. 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".[219] The ICTY had indeed considered that it "would be wholly unacceptable" for a court of law to breach the principle of legality.[220] Given that the

216 Broomhall, "Article 22," 719–720.

217 Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 (OA4), 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 (Dec. 14, 2006), par. 36–37.

218 *Ibid.*, par. 36–37.

219 *Ibid.*, par. 27; Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11, 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)" (Aug. 15, 2012), par. 89.

220 Prosecutor v. Vasiljevic, Case No. IT-98-32-T, Judgment (Nov. 29, 2002), par. 19.

exercise of jurisdiction in accordance with non-retroactivity as understood in customary human rights law is required by the Statute, a *sui generis* challenge to the jurisdiction of the Court is possible under that premise, and could lead the ICC to decline jurisdiction over the impugned conduct. One word of caution needs to be expressed on why this reasoning is solely applicable to a 'Chapter VII conception' of an Article 13 (b) referral – and not to a 'universal jurisdiction conception'. The ground to invoke Article 21 (3) and bring an additional *nullum crimen* components to the Statute's provisions on *nullum crimen sine lege* and non-retroactivity *ratione personae* does not lie on the Security Council powers. Instead, this extraordinary implant rests on the fact that the 'Chapter VII conception' recognizes that the Rome Statute became applicable law with respect the referred situation from the day of the referral only, not before. To trigger Article 21 (3) there needs to be an apparent conflict between a retroactive referral and the principle of legality – internationally recognized human rights. Given that Articles 22 and 24 do not avoid this norm conflict, it is possible to set aside the jurisdiction of the Court on the basis of a violation of *nullum crimen sine lege praevia,* as understood in international human rights law. This legal 'hat-trick' to avoid a conflict with the principle of legality would apply to retroactive Article 12 (3) referrals as well. Conversely, if one adopts the 'universal jurisdiction conception' there is simply no conflict – nor any lacuna – and thus no need to resort to Article 21 (3) to import an upgraded version of *nullum crimen sine lege* than the one enshrined in the Statute.

8.4 *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 ECtHR and the ad hoc tribunals have given considerable weight to the elements of "accessibility" and "foreseeability".[221] According

221 Tolstoy Miloslavsky v. United Kingdom, Court, Judgment, ECtHR, Application No. 18139/91, 13 July 1995, par. 37; S.W. v. United Kingdom, Court (Chamber), ECtHR, Judgment, Application No. 20166/92, 22 November 1995, par. 35–36; Sunday Times v. United Kingdom, Court, Judgment, ECtHR, Application No. 6538/74, 26 April 1979, par. 49. Groppera Radio AG and others v. Switzerland, Court, Judgment, ECtHR, Application No. 10890/84, 28 March 1990, par. 68. Kononov v. Latvia, Grand Chamber, Judgment, ECtHR, Application No. 36376/04, 17 May 2010; Kolk and Kislyiy v. Estonia, Court (Fourth Section), Decision, ECtHR, Application No. 23052/04, 17 January 2010; K.-H.W. v. Germany, Court, Judgment, ECtHR, Application No. 37201/97, 22 March 2001, par. 73; Prosecutor v. Hadzihasanovic et al., Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (Jul.

to this approach, 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"[222] 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."[223] 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."[224] Taking into account these sets of factors the ECtHR considers whether, with the benefit of legal advice,[225] the applicant should have known that "he ran a real risk of prosecution".[226]

The qualitative requirements of accessibility and foreseeability 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."[227] Thus, the objective elements of the crime and the requisite *mens rea* do not need to have been specifically provided by the law for the conduct to be punished.[228]

16, 2003), par. 35; Prosecutor v. Delalic et al., Case No. IT-96-21-T, Judgment (Nov. 16, 1998), par. 311; Grover, *Interpreting Crimes*, 171; Gallant, *The Principle of Legality,* 364–365; Ferdinandusse*, Direct Application,* 237–238.

222 Cantoni v. France, Grand Chamber, Judgment, ECtHR, Application No. 17862/91, 15 November 1996, par. 35; Tolstoy Miloslavsky v. United Kingdom, Court, Judgment, ECtHR, Application No. 18139/91, 13 July 1995, par. 37; S.W. v. United Kingdom, Court (Chamber), ECtHR, Judgment, Application No. 20166/92, 22 November 1995, par. 35–36.

223 Pessino v. France, Court (Second Section), Judgment, Application No. 40403/02, 10 October 2006, par. 33; see also Kononov v. Latvia, Grand Chamber, Judgment, ECtHR, Application No. 36376/04, 17 May 2010, par. 235.

224 Pessino v. France, Court (Second Section), Judgment, Application No. 40403/02, 10 October 2006, par. 33.

225 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, ECtHR, Application No. 36376/04, 17 May 2010, par. 235.

226 Cantoni v. France, Grand Chamber, Judgment, ECtHR, Application No. 17862/91, 15 November 1996, par. 35.

227 Prosecutor v. Hadzihasanovic et al., Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (Jul. 16, 2003), par. 35.

228 See Swart et al., *The Legacy*, 223–227.

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.[229]

This idea should be taken together with the claim that murder, torture, enslavement and other similar crimes are crimes that are *mala in se* in contrast to crimes that are *mala prohibita*.[230] The principle of legality is thus strained to a question of whether the underlying act was criminal by its nature.[231]

If one uses the qualitative requirements of accessibility and foreseeability, it could be argued that any individual committing one of the crimes in the Statute could foresee that they ran a risk of prosecution.[232] Indeed, 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. The role played by the gravity element can be illustrated with 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 he/she 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.[233] Pursuant to the 'foreseeability' approach, the individual committing these crimes should have foreseen, due to their egregious nature, that this conduct was criminal.[234]

The 'foreseeability' approach is, however, not accepted by all. Kenneth Gallant, for instance, considers that the foreseeability requirement "may swallow the principle of legality whole."[235] The case *Jorgic v. Germany* where the ECtHR had to decide whether a conviction by German Courts for cultural genocide committed in Bosnia and Herzegovina violated Article 7 ECHR shows the difficulty arising from the application of the foreseeability requirement to

229 Meron, *War Crimes Law*, 244–248.

230 See Schabas, *Unimaginable Atrocities*, 34.

231 Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998), par. 165–169; Prosecutor v. Delalic et al., Case No. IT-96-21-A, Judgment (Feb. 20, 2001), par. 178–180.

232 Schabas, *An Introduction*, 74.

233 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.

234 See Schabas, *An Introduction*, 74.

235 Gallant, *The Principle of Legality,* 364.

international crimes.[236] 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.[237] However in the case of *Jorgic* the German Courts interpreted their genocide definition as including cultural genocide.[238] 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.[239] The ICTY in *Krstic* and the ICJ in *Bosnia and Herzegovina v. Serbia* had, on the other hand, struck down down this crime as not established under customary international law.[240] The ECtHR, nonetheless, found that the German courts' innovative 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.[241] The mere fact that judges from specialized international forum disagreed on whether the crime existed casts serious doubt on the objective ascertainability of its existence.[242]

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."[243] The Human Rights Committee and the Inter-American Court of Human Rights have not taken up the ECtHR's qualitative requirements although they dealt with the issue of retroactivity in notable cases.[244]

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236 Jorgic v. Germany, Grand Chamber, Judgment, ECtHR, Application No. 74613/01, 12 July 2007, par. 27, 36, 47.

237 E.g. Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment (Aug. 2, 2001), par. 580.

238 See Jorgic v. Germany, Grand Chamber, Judgment, ECtHR, Application No. 74613/01, 12 July 2007, par. 27, 36, 47, 107.

239 Van Schaack, "Crimen Sine Lege," 171–172; Booms and van der Kroon, "Inconsistent Deliberations,"167.

240 Prosecutor v. Krstic, Case No. IT-98-33-T (Aug. 2, 2001), par. 580; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) ICJ Reports 2007, par. 344.

241 Jorgic v. Germany, Grand Chamber, Judgment, ECtHR, Application No. 74613/01, 12 July 2007, par. 113; see also the opposite result in Vasiliauskas v Lithuania, Grand Chamber, Judgment, ECtHR, Application No 35343/05, 20 October 2015 (*re* political genocide).

242 See van der Wilt, "Nullum Crimen," 515.

243 Grover, *Interpreting Crimes*, 173.

244 Juratowitch, "Retroactive Criminal Liability," 337.

It is thus the view of this author that the accessibility and foreseeability requirements are not appropriate to deal with the issue of non-retroactivity arising from SC referrals and ad hoc declarations under Article 12 (3). 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 at the time of commission.[245] 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.

8.5 *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.[246]

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. 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".[247] In doing so, 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.

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 including, as appropriate,

245 Gallant, *The Principle of Legality,* 364–365; Grover, *Interpreting Crimes*, 171–173; See Schabas, *An Introduction*, 34.

246 Broomhall, "Article 22," 720; Meron, "Revival," 832; Gallant, "Jurisdiction to Adjudicate and Jurisdiction to Prescribe," 826; Gallant, *The Principle of Legality,* 339–341; Grover, *Interpreting Crimes*, 262; Milanovic, "Rome Statute Binding," 51.

247 Arsanjani, "The Rome Statute," 29; Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 (OA4), 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 (Dec. 14, 2006), par. 34.

the national laws of States that would normally exercise jurisdiction over the crime."[248] 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's provision existed under applicable national law.[249] 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.[250] Hence, the offences under domestic law, which criminalize norm contained in the Geneva Convention and the Additional Protocol, 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.[251] 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.[252] 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'.[253] Thus, the principle of non-retroactivity is not necessarily offended. The core of the rule appears to be met since the act was a crime under applicable law when committed.[254]

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248 However, we ought to be cautious when using Article 21 (1) (b) 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. Lubanga, Case No. ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, Separate Opinion of Judge Adrian Fulford (Mar. 14, 2012); see also Prosecutor v. Ngudjolo, Case No. ICC-01/04-02/12-4, Judgment pursuant to Article 74 of the Statute – Concurring Opinion of Judge Christine Van den Wyngaert, 18 December 2012.

249 Van Schaack, "Crimen Sine Lege," 168; Grover, *Interpreting Crimes*, 162; Gallant, *The Principle of Legality,* 131–132.

250 See Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T Judgment (May 21, 1999), par. 156, 158.

251 This technique must be distinguished from the re-characterization of charges, a procedure used at the ICC, under Regulation 55; see Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Jugement rendu en application de l'Article 74 du Statut, Minority Opinion of Judge Christine Van den Wyngaert (Mar. 8, 2014); On reclassification of the crime see Gallant, *The Principle of Legality,* 367–369, contra de Souza Dias, "Retroactive Application," 76–84.

252 United States v. von Leeb (The High Command Case); Rölling, *The Law of War*, 345–46; Van Schaack, "Crimen Sine Lege," 168.

253 Van Schaack, "Crimen Sine Lege," 168–169; Grover, *Interpreting Crimes*, 162; Gallant, *The Principle of Legality* 131–132.

254 Gallant, *The Principle of Legality,* 367; Grover, *Interpreting Crimes*, 183.

However, when 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.[255] Thus, reclassification of crimes remains a tool that, at the very least, must be circumscribed. Furthermore, in order to also 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.[256] Therefore, to be in accordance with these two components of legality (*nullum crimen* and *nulla poena sine lege*), the crime must have existed under domestic applicable law at the time of commission and the sentence cannot be higher than the one provided for by the domestic applicable law.[257]

Finally, it is not clear whether every crime under the Rome Statute contains an underlying act criminalized by applicable domestic law.[258] For instance, enlisting child soldiers is not a crime in every State.[259] 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.[260] If none of this proscription was applicable at the time of the conduct, the Court must decline jurisdiction over the charge.

To sum up, 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 genuine conflict is precluded since the judges are able to interpret away the apparent conflict.[261] In particular, integrating *nullum crimen sine lege praevia* within the Rome Statute through Article 21 (3) is an example of systemic interpretation as enjoined by Article 31(3)(c) of the Vienna Convention on the Law of Treaties. Furthermore, Article 21 (3) Rome Statute also enjoins the Court to resort to Article 21 (1)(b) and (c) as possible sources under which the 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.[262]

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255 Grover, *Interpreting Crimes*, 164; de Souza Dias, "Retroactive Application," 76–84.

256 Gallant, *The Principle of Legality,* 368; See also Meron, *War Crimes Law*, 246.

257 The latter requirement derives from nulla poena sine lege, see Gallant, *The Principle of Legality,* 341.

258 Gallant, *The Principle of Legality,* 367–368.

259 See Van Schaack, "Crimen Sine Lege," 158.

260 Gallant, *The Principle of Legality,* 368.

261 Pauwelyn, *Conflict of Norms*, 334

262 Bitti, "Article 21," 303.

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 from its entry into force.[263] 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 must be acknowledged that the Rome Statute's drafters carefully selected the crimes included in Articles 6 to 8*bis* of the Statute and subjected them to gravity elements and thresholds. Gravity ensures, firstly, that due to its inherent gravity the conduct is universally regarded as punishable.[264] Secondly, 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 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(s) with primary jurisdiction had ratified the Statute, the 'Chapter VII conception' conceives that the Rome Statute becomes applicable law to a specific situation outside of the ICC's ambit but triggered under Article 13 (b) when the SC uses its extraordinary powers to target that specific territory. Under the 'Chapter VII conception', the Rome Statute becomes applicable law in the referred territory's legal order at the time of the referral, not before. There is therefore an apparent conflict between retroactive Article 13 (b) referrals and the principle of legality.

263 Sadat, *Transformation of International Law*, 184–185.

264 See Einarsen, *The Concept of Universal Crimes*, 253; United States of America v Wilhelm List et al. (Hostage), XI TWC 1241.

It has been shown that there are three ways – if one adopts the 'Chapter VII conception' – to interpret the interaction of retroactive referrals under Article 13 (b) with the principle of legality. Firstly, 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. Thus, by reading down the status of the principle of legality, there would be no genuine conflict. While this position might be supported by those in favor of substantive justice, it fails to acknowledge that the principle of legality is now a human rights norm firmly entrenched in customary international law. Accordingly, the correct view according to this author is that the Nuremberg's balancing exercise leads to an unresolvable conflict, where non-retroactivity is breached for the sake of punishing immoral conduct.

Secondly, if one considers that non-retroactivity is a norm firmly established in customary international human rights law: one has to consider 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 a SC 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 (but controversially) national law. In other words, the Court must refer to sources other than its Statute in order to resolve the conflict between its retroactive exercise of jurisdiction and the retroactivity ban.

Thirdly, a way of avoiding 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 the 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 – accused are not treated alike but according to the law applicable to their conduct at the time. 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 legal order of the specific situations at stake? The legitimacy of the Court in such situations could rest on the way conflicts of norms are handled. To avoid a norm conflict between retroactive referrals and non-retroactivity by completely delinking the Rome Statute from international law risks not only resulting in another manifestation of 'victor's justice' but also reflecting the 'identity crisis' affecting international criminal law.[265]

265 See Robinson, "The Identity Crisis," 925.

CHAPTER 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 aggression, 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* and *Tokyo* judgments, the Convention against Genocide, the Geneva Conventions, the *Eichmann Case*, the Convention against Torture, the jurisprudence of the ad hoc tribunals, the *Pinochet Case,* many other national proceedings and the Rome Statute; 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 addresses the immunities under international law of State officials from proceedings before the ICC and from national proceedings enforcing an ICC arrest warrant emanating from a situation referred under Article 13 (b) of the Rome Statute. 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, the next two sections 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 its immunity before the ICC when the latter 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 this analysis will inquire, using both 'conceptions', whether the immunities of State officials are a bar to national authorities enforcing an arrest warrant from the ICC.

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

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when performing official acts; and (2) immunity *ratione personae* which only holders of high office enjoy for any acts.[1] The rationale of both immunities *ratione materiae* and *personae* is to "ensure the effective performance of their functions on behalf of their respective States."[2] Thus, immunities are not for the benefit of the individual exercising the functions.

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 – *par in parem imperium non habet*.[3]

Immunity *ratione personae* is a procedural defense based on the notion that any activity of an incumbent Head of State, Head of government, foreign affair minister and diplomatic agent[4] must be immune from any interference of a foreign State. It covers official and private acts committed prior to and during office.[5] 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

1 This distinction was adopted by France and Djibouti in Certain Questions of Mutual Assistance in Criminal Matters (Djibouti vs France), ICJ Reports 2008, at 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, at 501–502; Pinochet (No. 3), at 581 (in particular: Lord Browne-Wilkinson, at 592; Lord Goff of Chieveley, at 598; Lord Hope of Craighead, at 622; Lord Hutton, at 629; Lord Saville of Newdigate, at 641, and Lord Millet, pp. 644–645). However, the International Court of Justice in the Arrest Warrant Case, did not refer to this classification. See Cassese, "When May Senior State Officials Be Tried," 862–864.

2 Arrest Warrant Case, par. 53.

3 Prosecutor v. Blaskic, Case No. IT-95-14-AR108bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (Oct. 29, 1997), par. 41.

4 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, Art. 40. Conversely, the immunity ratione personae of the other high-ranking State representatives is erga omnes.

5 Gadaffi, Arrêt No. 1414 of 13 March 2001, reprinted in: 105 Revue Générale de Droit International Public (2001) 474.

from exercising jurisdiction. However, immunity *ratione personae* can only be enjoyed by incumbent Heads of States and other high-ranking State representatives;[6] when they cease to hold office immunity *ratione personae* also ceases but immunity *ratione materiae* remains.[7]

Any discussion relating to immunities of State officials and international crimes must refer to the ICJ judgment on the *Case Concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*) (hereinafter *Arrest Warrant Case*). In this 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.[8] Nonetheless, the ICJ then stressed that "immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity".[9] 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 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";[10] and, (4) when the high-ranking State representative is subject to proceedings before "certain international criminal courts, where they have jurisdiction."[11]

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

6 See ILC, Second Report of the Special Rapporteur, Ms. Concepción Escobar Hernández (Apr. 4, 2013) U.N. Doc. A/CN.4/661, provisionally adopted at the 65th session of the International Law Commission.

7 Cassese, "When May Senior State Officials Be Tried," 864–865.

8 Arrest Warrant Case, par. 58.

9 *Ibid.*, par. 60.

10 *Ibid.*, par. 61.

11 *Ibid.*, par. 61.

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 – he then enjoys 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*".[12] 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.[13] As Judge Van den Wyngaert[14] and many commentators have argued,[15] 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."[16] Furthermore, if the authorities of the home State remain in connivance with the former State official, it is highly 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.[17] Cassese, and many others, claimed that the ICJ neglected to recognize that there is a specific exception under customary international law to immunity *ratione materiae* for international crimes.[18] It seems indeed that the third circumstance brings more confusion than clarification.

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12 *Ibid*., par. 61 (emphasis added).

13 Nuremberg Principle No. I.

14 Arrest Warrant Case, Separate opinion of Judge ad hoc Van den Wyngaert, par. 34–36.

15 See e.g. Cassese, "When May Senior State Officials Be Tried,"; Koller, "Immunities of Foreign Ministers," 7; Sassòli, "L'arrêt Yerodia," 791; Wouters, "Critical Remarks," 253–267.

16 Barker, *International Law and International Relations*, 153.

17 Arrest Warrant Case, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, par. 85.

18 Cassese, "When May Senior State Officials Be Tried," 864–866, 870–874; 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, at 742–755.; Gaeta, "Official Capacity," 979–982; Zappala, "Heads of State in Office," 601–602; Akande, "International Law Immunities," 414; Prosecutor v. Karadzic et al., Case No. IT-95-5-D, Decision on the Bosnian Serb Leadership Deferral Proposal

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."[19]

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 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 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,[20] established pursuant to a SC resolution adopted under Chapter VII, or the Lockerbie

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(May 16, 1995), par. 22–24; Prosecutor v. Furundzija, Case No. IT-95-17/1 (Dec. 10, 1998), par. 140; Prosecutor v. Milosevic, Case No. IT-02-54, Decision on Preliminary Motions (Nov. 8, 2001), par. 28; Prosecutor v. Blaskic, Case No. IT-95-14-AR108bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (Oct. 29, 1997), par. 41.

19 Arrest Warrant Case, par. 61 (emphasis added).

20 SC Res. 1757 (2007) of 30 May 2007, UN Doc. S/RES/1757, authorizing the establishment of special tribunal to try suspects in assassination of Rafiq Hariri.

Court,[21] 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.[22] Article 27(2) of the Rome Statute explicitly rejects immunity *ratione personae*; however this explicit provision is new in international criminal law instruments.[23] Conversely, the earlier provisions of the ad hoc tribunals rejected immunity *ratione materiae* but not immunity *ratione personae* (at least not explicitly).[24]

Furthermore, none of the prior international criminal courts was able to try an official entitled to immunity *ratione personae* at the time of the proceedings. The first serving Head of State to appear before an international criminal court was Uhuru Kenyatta and this only happened in 2014.[25] 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*.[26] The provisions as well as the precedents of other international criminal courts and tribunals were essentially focused on establishing that officials bore criminal responsibility for crimes that

21 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 (Sept. 18, 1998) 2062 I-35699 UNTS 82.

22 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."

23 Schabas, *Commentary on the Rome Statute,* 446.

24 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, *Commentary on the Rome Statute,* 450–452; See Bassiouni, "Jus Cogens and Obligatio Erga Omnes," 85.

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

26 See sections 3, 4 of this chapter.

were within these tribunals' jurisdiction, but not at securing the criminal jurisdiction of the tribunals over officials enjoying immunity *ratione personae*.[27]

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.[28] Article 27 (1) ensures that criminal responsibility can be found 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.[29] 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.[30] 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 6 of the Charter of the Tokyo Tribunal, 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,[31] the same cannot be so easily said about Article 27(2) of the Rome Statute.[32] In other words, Article 27 (2) is possibly only a conventional exception to the general rule on immunity *ratione personae*.[33] This would entail that customary international law provides an exception for proceedings before certain international criminal courts only with regard to immunity *ratione materiae*;[34] immunity *ratione personae* would remain applicable, unless the State of the official is deemed to have waived the immunity. Others instead argue Article 7 of the London Charter, Article 6 of the Tokyo Charter, Article 7 (2) of the ICTY Statute, Article 6 (2) of the ICTR Statute

27 Bassiouni, *International Criminal Law*, 75, 82; Kress, "Immunities under International Law," 252; Baban, *La responsabilité pénale du chef d'Etat*, 349.

28 See Van Alebeek, *The Immunity of States and Their Officials*, 265–275; Baban, *La responsabilité pénale du chef d'Etat*, 349.

29 Broomhall, *International Justice*, 138; Van Alebeek, *The Immunity of States and Their Officials*, 265–275.

30 See Schabas, *The UN International Criminal Tribunals,* 328.

31 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 (1993), UN Doc. S/25704 (May 3, 1993).

32 See Kress, "Immunities under International Law," 250–256, Van Alebeek, *The Immunity of States and Their Officials*, 265–275; Aurey, "Article 27," 843–862.

33 Aurey, "Article 27," 843–862; Kiyani, "Al-Bashir & the ICC,".

34 See section 4 of this chapter re foreign domestic jurisdiction.

and Article 27(1) of the Rome Statute are capable of removing immunity *ratione materiae* as well as *ratione personae*.[35] According to Pedretti, for instance, Article 27(2), can "be regarded as a precautionary measure ensuring that the invalidation of the plea of immunity before the ICC is beyond doubt".[36] In the next sections we will see there are strong and soft versions of the 'Chapter VII conception' and 'universal jurisdiction conception' on how to interpret Article 27(2), and how it applies to non-party States.

2 Chapter VII Conception – The Security Council Power to Remove Immunities before International Criminal Courts

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*. Indeed, immunity *ratione personae* becomes irrelevant if the State of the official is deemed to have waived it.[37] Likewise, it can be argued that State parties to the Rome Statute have consented that the immunity their officials, including high-ranking officials, would normally enjoy from the ICC's jurisdiction is inapplicable.

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 seen above, 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.[38] 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 immunity towards an international criminal court.[39]

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.[40] The legal basis of a

35 Pedretti, *Immunity*, 246; Akande, "International Law Immunities," 420.

36 Pedretti, *Immunity*,. 246; Akande, "International Law Immunities," 420; see also ILC, Draft Code of Crimes against the Peace and Security of Mankind, with commentaries, (1996), at 27.

37 Arrest Warrant Case, par. 61.

38 *Ibid*., par. 61.

39 Morris, "High Crimes," 485; arguing that Article 27 is only a waiver of immunity for States parties.

40 Van Alebeek, *The Immunity of States and Their Officials*, 265–295.

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 adopted under Chapter VII of the UN Charter and courts created by a treaty.[41] Upon joining an international organization a State consents to the constituent instrument and to the institutional aspects of the organization.[42] If the constituent instrument provides that immunities are not applicable before this international organization –like the Rome Statute does through Article 27(2) – members of this organization are to be considered as having lifted the right to immunity they had under international law.[43]

In *Prosecutor v. Uhuru 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.[44] 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.[45] Immunity, on the other hand, was never raised.[46] 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 provides the answer as to whether a

41 Koller, "Immunities of Foreign Ministers,"; Tunks, "*Diplomats or Defendants?,*" 654; Van Alebeek, *The Immunity of States and Their Officials*, 265–295.

42 Brownlie, *Principles,* 292.

43 VCLT, Art. 26.

44 Prosecutor v. Muthaura and Kenyatta, Case No. ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, (Jan. 23, 2012); Prosecutor v. Kenyatta, ICC-01/09-02/11, Decision on Defence request for excusal from attendance at, or for adjournment of, the status conference scheduled for 8 October 2014 (Sept. 30, 2014).

45 Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11-830, Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial (Oct. 18, 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 Ruto and Sang, Case No. ICC-01/09-01/11-1066, 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' (Oct. 25, 2013).

46 However, see Prosecutor v Ruto and Sang, Case No. ICC-01/09-01/11-777, Decision on Mr Ruto's request for excusal from continuous presence at trial (Jun. 18, 2013), par. 64–71.

particular State has removed the immunity of its officials in respect of the proceedings in question.

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. However, when drafting the constituent instrument of an organization, States cannot create obligations for States that do not consent to it. 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 said court.[47] 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.[48] Accordingly, international criminal courts are limited to exercising jurisdiction over high-ranking State officials from States that consented to the constituent instrument of the court.

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 officials from non-party States as a bar to the Court's jurisdiction, unless immunity has been removed by the concerned State. Such a removal can be obtained (1) through ratification of the Rome Statute by the concerned State; (2) issuance of an ad hoc declaration under Article 12(3) by the concerned States;(3) issuance of an ad hoc waiver by the concerned State, or (4) implied waiver/removal residing on the Chapter VII obligation to accept the SC decision to refer a situation to the ICC, and the obligation of the concerned State to "cooperate fully with the Court" potentially emanating from a SC resolution to that effect. While the three first examples of a waiver are 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 non-party State, which has not issued a waiver of immunity, is prosecuted by the ICC.

The Court has considered that this apparent conflict can be avoided in two different ways. First, through the tool of effective interpretation (*effet utile*) we can imply that SC referrals to the ICC, with an obligation to cooperate fully with the Court, entail that the immunity of the targeted State is waived by the SC. This is the view the ICC Pre-Trial Chamber II adopted in the *Decision on DRC Failure to Arrest Al-Bashir*. According to the Chamber, Al-Bashir, the head

47 See Morris, "High Crimes," 485; Akande, "International Law Immunities," 419–20; Wirth, "Immunity for Core Crimes," 888; Tunks, *"Diplomats or Defendants?,"* 665 fn 75; Cryer et al., *International Criminal Law and Procedure*, 551.

48 VCLT, Art. 34.

of State of Sudan, a non-party State, did not enjoy immunity under international law, because that immunity had been implicitly waived by the Security Council, which had also imposed on the Sudan a general obligation to cooperate with the Court, when it referred the situation in Darfur to the ICC.[49]

Second, again through the tool of effective interpretation, a Security Council referral, supplemented with an obligation to cooperate with the Court, clearly entail that the legal framework of the Rome Statute, including Article 27 (2), applies to the situation referred. Given that the ICC can only exercise jurisdiction in accordance with the provisions of its Statute, when the SC refers a situation to the ICC it makes the Court's legal regime applicable to the referred State, even if the latter is not a party to the Rome Statute. Hence, the immunities of the referred State are not waived, they are simply made irrelevant, as the wording of Article 27 indicates. This is the view the ICC Pre-Trial Chamber II took in *Decision on South Africa Failure to Arrest Al-Bashir*. In this case, the Chamber found "that, for the limited purpose of the situation in Darfur, Sudan has rights and duties analogous to those of States Parties to the Statute."[50]

Both interpretation start with the assumption that if the constituent instrument of an international organization 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. Both interpretation can also find support in the ICJ advisory opinion on *Legal Consequences for States of the Continental Presence of South Africa in Namibia*.[51] In this decision concerned with SC Resolution 276 that declared South Africa's presence in Namibia illegal, without requiring other UN Member States to do anything, the ICJ found that all States were under the obligation to recognize the illegality of South Arica's presence and to refrain from any acts that would imply the recognition

49 Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09, Decision on the cooperation of the Democratic Republic of the Congo regarding Omar Al Bashir's arrest and surrender to the Court (Apr. 9, 2014), par. 29 (hereinafter Decision on DRC Failure to Arrest Al-Bashir).

50 Prosecutor v Al-Bashir, Case No. ICC-02/05-01/09, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir (Jul. 6, 2017), par. 88 (hereinafter Decision on South Africa Failure to Arrest Al-Bashir).

51 Legal Consequences for States of the Continental Presence of South Africa in Namibia (SouthWest Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ REP. 16 (June 21); Akande, "Impact on Al-Bashir's Immunities," 347; De Wet, "The Implications of President Al-Bashir," 1062.

of the legality of South Africa's occupation.[52] If such purposive effects were not given to the SC resolution, "it would deprive this principal organ of its essential functions and powers under the UN Charter."[53] Both, the *Decision on DRC Failure to Arrest Al-Bashir* and *Decision on South Africa Failure to Arrest Al-Bashir* certainly rely on a similar purposive interpretation of the SC referrals.

One of the distinction between the two interpretations is however that one relies on the intention of the SC to waive immunities, while the other emphasizes that when referring a situation to the Court, the SC accepts that the Court will apply its legal regime to a State that has not ratified the Statute. The latter approach avoids the contention that if the SC intended to waive the immunity of high-ranking State officials, it should have been explicit.

Let us take the examples of the ad hoc tribunals to show how effective interpretation of SC resolutions removes immunities. The ICTY and the ICTR were created by resolutions of the SC adopted under Chapter VII of the UN Charter. When the ad hoc tribunals exercised jurisdiction, their legal bases were the SC resolutions creating them, so the Chapter VII powers.[54] Due to their obligations under the UN Charter, UN Member States had to accept and carry out the ad hoc tribunals' exercise of jurisdiction.[55] In spite of the customary rule that immunities are a bar to a foreign court's exercise of jurisdiction, UN Member States had consented via the Charter to the SC's decision to make immunities irrelevant to the ad hoc tribunals' exercise of jurisdiction.[56]

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

52 Legal Consequences for States of the Continental Presence of South Africa in Namibia (SouthWest Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ Rep 16 (June 21), par. 114–116, 119.

53 *Ibid*., par. 116.

54 The constituent instruments of the ICTY and the ICTR have legal effect over all UN Member States; Akande, "International Law Immunities," 417; Cryer et al., *International Criminal Law and Procedure*, 552–553.

55 Under Art. 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; It may be asked whether the SC can remove the rights of immunity of UN third States parties; see Koller, "Immunities of Foreign Ministers," 33–34; see also Akande, "Nationals of Non-Parties," 628–631; Doria, "Conflicting Interpretations," 278–279 (argues 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)

56 Akande, "International Law Immunities," 417.

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.[57] Even if immunities are generally a bar to ICC's exercise of jurisdiction over the high-ranking official of a non-party State, in a situation triggered by the SC all States have to accept the ICC's exercise of jurisdiction in accordance with its Statute, including Article 27.[58] The ad hoc tribunals jurisdiction is indeed suggesting that the correct way to interpret how immunities are made inapplicable before the ICC is to a certain extent to be found in *Decision on South Africa Failure to Arrest Al-Bashir*.

This reading however suggests that in a situation triggered by the SC the immunities of high-ranking officials from all States, irrespective of whether they are non-party States, are irrelevant for prosecution before the ICC. 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.[59] Yet, the SC could have decided to establish the ad hoc tribunals without specifying that States were to cooperate and consequently take measures domestically to implement the resolutions and the orders of the tribunals. UN Member States would have therefore been under no obligation to cooperate with the tribunals but still they would have had to accept the ad hoc tribunals' exercise of adjudicative jurisdiction.[60] Accordingly, the removal of immunities would have been operated by the obligation, pursuant to Article 25 UN Charter, to accept and carry out the ad hoc tribunals exercise of jurisdiction, and the Statutes establishing them.[61] In this regard, it must be noted that many hold that the provisions of the ad hoc tribunals on immunities, which closely resemble Article 27(1), had the capacity to remove immunity *ratione personae* as well.[62]

The practice of the SC in referrals to the ICC demonstrates that the explicit obligation to cooperate are generally restricted to the territorial State.[63]

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57 UN Charter, Art. 25.

58 Akande, "International Law Immunities," 417.

59 The SC resolutions creating the ad hoc tribunals explicitly obliged every UN Member State to undertake any 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. SC Res. 827 (1993), op. par. 4; SC Res 955 (1994), op. par. 2.

60 Decision on Taylor Immunity, par. 38, 57.

61 Akande, "International Law Immunities," 417.

62 Pedretti, *Immunity*, 246; Akande, "International Law Immunities," 420; Decision on Taylor Immunity, par. 53; ILC, Draft Code of Crimes against the Peace and Security of Mankind, with commentaries, (1996), at 27.

63 SC Res. 1593, par. 1, 2; SC Res. 1970, par. 5, 6.

Indeed, the referrals of Darfur, Sudan and Libya oblige only these two targeted States "to cooperate fully" with the Court. However, all other UN Member States have to accept the SC decision to refer the situations in Darfur and Libya to the ICC, a judicial institution that in the first place considers immunities irrelevant before its jurisdiction. Thus, if a crime takes place within the territory of Darfur or Libya and is sufficiently linked to the situations referred by the SC, no State official from a UN Member State is immune from the Court's jurisdiction.[64] But, except for the States under an obligation to cooperate stemming from either the Rome Statute or the respective SC resolution, States are not obliged to cooperate with the Court. The latter aspect will be particularly important with respect to immunity from arrest and surrender to the Court, as we will see below.

When interpreted in such way, the ICC's exercise of jurisdiction over high-ranking officials in a situation referred by the SC to the ICC does not genuinely conflict with the immunities of officials of non-party States. The apparent conflict can be interpreted away by recognizing that the SC removed certain international law immunities by subjecting the referred situation to the Rome Statute. A softer version is to hold that the referrals of Darfur, Sudan and Libya oblige only these two States.[65] If the high-ranking official prosecuted is not acting on behalf of the State targeted by the referral or on behalf of a State party to the Rome Statute, the Court may find that Article 27 (2) is not applicable in its case.[66]

The softer version fails however to make two significant distinction underlying the nature of a SC referral. First, it is not a State that is referred to the ICC but a a situation, albeit territorially linked.[67] Second, there are different obligations (and different addresses) arising from a SC's conferral of jurisdiction to an institution which has a set of rules designed to govern its jurisdiction, and the obligation of State(s) to cooperate fully with such institution. Indeed, the strong version better reflects the wording and context of the SC resolutions in question, which referred, first, a situation to the Court, and then provided that only certain States have to cooperate with the Court.

To sum up, under current international law, the SC referrals to the ICC override the customary immunity of high-ranking State officials from the Court's

64 O'Keefe, *International Criminal Law*, 109.

65 With regards to the exemptions for nationals of non-party States contained in both referrals, see Chapter 5, section 2–3.

66 Rome Statute, Art. 21(1)(b) calls on the Court to apply customary international law, where appropriate.

67 See Chapter 2, section 2.2.3 and Chapter 5, section 2.

jurisdiction. An assessment of the Chapter VII powers underlying the SC referrals and its purposive effects reveal that the conflict between the ICC's exercise of jurisdiction over high-ranking officials from States not party to the Rome Statute can be interpreted away.

3 Universal Jurisdiction Conception – The Rome Statute Provision on Immunity Applies to All

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. Such assumption relies on the fact that 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. 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, such as the ICC.

This however does not represent the strongest version of the 'universal jurisdiction conception'. In its 2008 *Decision on the Arrest Warrant against Al-Bashir* the Chamber considered that the position of Al-Bashir – the head of Sudan, a State not party to the Rome Statute – has no effect on the Court's jurisdiction over the case. The first reason upheld by the Court for dismissing the relevance of Al-Bashir's immunity was that "according to the Preamble of the Statute, one of 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'."[68] The second reason offered was that Article 27 made clear that immunities are irrelevant before the ICC.[69] The third reason was that other sources of law can only be resorted to if there is a lacuna in the Rome Statute, the Elements of Crimes and the Rules.[70] Thus pointing out that customary international law, especially the international law on immunity, was of no relevance given that Article 27 settled the issue.[71] Finally, the Chamber specified that by

68 Decision to Issue an Arrest Warrant against Al-Bashir, par. 42.
69 *Ibid.*, par. 43.
70 *Ibid.*, par. 44.
71 Gaeta, "Al Bashir Enjoy Immunity," 323.

referring the situation in Darfur to the ICC, the SC had 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".[72] Indeed, the PTC's reasoning to dismiss the immunity of Al-Bashir was predominantly relying on the text of the Rome Statute, which apparently bound all heads of States of the international community. The fact that Article 27 is enshrined in a treaty, which according to the basics of the law of treaties does not create obligations for non-party States did not even arise.[73] It has been shown in Chapter 2 that this position constitutes an exercise of exorbitant treaty-based universal jurisdiction which cannot find a solid legal grounding in contemporary international law.

On the other hand, if Article 27 (2) codifies customary international law, it constitutes an explicit exception to the rule on immunity. In this relationship of "rule-exception" there is simply an accumulation of norms.[74] The customary rule on immunity is carved out by the customary exception for international courts to the extent required to give it effect but both norms continue to apply in their respective scope of application.

This position was adopted in the ICC Pre-Trial Chamber *Decision on Malawi Failure to Arrest Al-Bashir*.[75] In this decision, the Pre-Trial Chamber 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."[76] The Pre-Trial Chamber stated that its reasoning applies to non-party States whenever the Court may exercise jurisdiction.[77] In contrast with the *Decision on DRC Failure to Arrest Al-Bashir*, the Court's jurisdiction

72 Decision to Issue an Arrest Warrant against Al-Bashir, par. 45.

73 VCLT, Art. 34.

74 Pauwelyn, *Conflict of Norms*, 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).

75 See also Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09, Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir (Dec. 13, 2011).

76 Prosecutor v. Al-Bashir, Corrigendum to the 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-Corr (Dec. 15, 2011), par. 36 (hereinafter Decision on Malawi Failure to Arrest Al-Bashir).

77 *Ibid.*, par. 36.

over Al-Bashir did not arise from a waiver (deriving from the SC referral) but from the exceptional customary right of "certain international criminal courts" to declare immunities irrelevant.[78]

Why would there be a specific exception for "certain international criminal courts"? As a matter of principle, the exception to immunity *ratione personae* for proceedings before international courts could simply reside in a court's legal status. To put it simply, it is the legal status of the court as an organ of the international community that 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.[79] The court's international nature would ensure that the exercise of jurisdiction does not clash with the principles underlying the immunity of State officials. Given that one of the rationales of immunities is to ensure that a State does not sit in judgment of another State, this *raison d'être* ceases to apply with international courts, as these are not organs of a particular State.[80] Arguably, 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.[81] Accordingly, it is often asserted that 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.

Why is the ICC falling within the alleged customary exception for "certain international criminal courts"? Three requirements have been spelled out for a court to be considered of a truly international nature. 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. 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.[82] When these

78 *Ibid*., par. 33–34.

79 See Gaeta, "Al Bashir Enjoy Immunity," 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 ".

80 Gaeta, "Al Bashir Enjoy Immunity," 301–32; Decision on Taylor Immunity, par. 52.

81 ILC, Memorandum prepared by the Secretariat, Immunity of State officials from foreign criminal jurisdiction, 31 March 2008, U.N. Doc. A/CN.4/596, at 39–47.

82 Brownlie, *Principles,* 677; see also Draft Articles on Responsibility of International Organizations for Internationally Wrongful Acts, Art. 2(a); Reparations for injuries suffered in

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. 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.[83] Indeed, it is this criterion that boost the court from a horizontal to a vertical relationship with States.

The Rome Statute does not only establish a permanent international criminal jurisdiction, it is also the constitutive instrument of an international organization with an international legal personality.[84] Article 4 Rome Statute clearly establishes that "the Court shall have international legal personality". In the Negotiated Relationship Agreement between the ICC and the UN, the UN explicitly recognizes that the ICC "has international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes."[85] Thus, the ICC is an entity that possesses objective international legal personality and not merely personality recognized by its States parties alone.

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 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.

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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.

83 See Gaeta, "Al Bashir Enjoy Immunity," 321.

84 See Rome Statute, Art. 4.

85 Negotiated Relationship Agreement between the ICC and the United Nations of 4 October 2004, Art. 2.

A third requirement is that if the international community decides to have a specific organ, it must express itself as such.[86] 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.[87] 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."[88] Woetzel adds that the international community must offer its "clear endorsement" of the tribunal and that approval "cannot be simply assumed".[89]

The most convincing evidence that the international community endorses a tribunal would be if part of the UN system. 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.[90] For instance, the Appeals Chamber of the SCSL in the *Decision on Taylor Immunity* considered that the Chapter VII status of the Agreement establishing the SCSL made it "an expression of the will of the international community".[91] Furthermore, according to the SCSL the blessing it received from the SC made it "part of the machinery of international justice".[92] The 'universal jurisdiction conception' however does not claim that the Rome Statute, or a situation triggered under Article 13 (b) of the Statute, has a Chapter VII status. Nonetheless, the ICC "can make a convincing claim to directly embody the "collective" will".[93] Undeniably, the ICC has a universal reach. The Statute has been negotiated at the universal level. While the ICC is not a UN organ, the Rome Conference was organized and hosted by the UN and 160 States 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.[94] The consensus could not be maintained, but an overwhelming majority of the States approved the text

86 Kress, "Immunities under International Law," 246–250.
87 Tunks, "*Diplomats or Defendants?,*" 665; Kress, "Immunities under International Law," 246.
88 Woetzel, *The Nuremberg Trials*, 49; Heller, *The Nuremberg Military Tribunals*, 111.
89 Woetzel, *The Nuremberg Trials*, 49; Heller, *The Nuremberg Military Tribunals,* 111.
90 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.
91 Decision on Taylor Immunity, par. 38.
92 *Ibid.*
93 Kress, "Immunities under International Law," 247.
94 Olasolo, *The Triggering Procedure,* 17.

of the Rome Statute.[95] It contains an open invitation to any State to adhere to it. Furthermore, the Relationship Agreement between the ICC and the UN has been negotiated in accordance with Article 2 of the Rome Statute and General Assembly Resolution 58/79 of the 9th December 2003.[96] Finally, the Relationship Agreement between the ICC and the UN, and the use of referrals under Article 13 (b) for Darfur, Sudan and Libya, demonstrate the UN endorsement of the ICC.[97] Having met the three requirements, the ICC presents itself as the paradigmatic example of a 'truly' international criminal court.

If one accepts that the international nature of the ICC entails that the immunity of high-ranking officials is inapplicable before the Court, Article 27 (2) is indeed a norm that applies to all, irrespective of whether the official is from a State party or not. Indeed, 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 customary international law or is it a travesty of law to avoid a conflict of norms?

The first document where the prosecution of a Head of State before an international criminal jurisdiction is affirmed is 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

95 The Rome Statute has been adopted by 120 States, signed by 139 States and at the time of writing ratified by 123 States.

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

97 See also Decision on Malawi Failure to Arrest Al-Bashir, par. 40.

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 anymore.[98] 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. But, 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.[99] Gaeta thus argues that States did not object because they considered that immunities did not apply before international criminal courts and tribunals, even absent a specific provision to that effect in the ICTY's Statute.[100] However, the arrest warrant was enforced and Milosevic transferred into the custody of the ICTY only in June 2001, i.e. when he enjoyed immunity *ratione materiae*. Furthermore, in the *Decision on Preliminary Motions* the ICTY 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.[101] 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.[102]

The *Arrest Warrant Case* was however relied on by the Special Court for Sierra Leone when it ruled that the – then – incumbent President of Liberia, Charles Taylor, was not entitled to immunity *ratione personae*.[103] The SCSL found that because it qualified as an international criminal court, Taylor's official position as an incumbent head of Sate at the time when the proceedings

98 Prosecutor v. Kambanda, Case No. ICTR-97-23-S, Judgment and Sentence (Sept. 4, 1998); Prosecutor v. Kambanda, Case No. ICTR-97-23-I, Judgment (Oct. 19, 2000).

99 Gaeta, "Al Bashir Enjoy Immunity," 315–322.

100 Gaeta, "Al Bashir Enjoy Immunity," p. 321.

101 Prosecutor v. Milosevic, Case No. IT-02-54, Decision on Preliminary Motions (Nov. 8, 2001), par. 26–34.

102 See also Cimiotta, "Immunità personali dei Capi di Stato," 1105– 1112; Kress, "Immunities under International Law," 253.

103 Decision on Taylor Immunity, par. 37–42.

were initiated against him was not a bar to his prosecution.[104] The Chamber further held that Article 6(2) of the SCSL Statute, which is substantially similar to Article 7 (2) of the ICTY Statute, Article 6 (2) of the ICTR Statute and Article 27(1) of the Rome Statute, relates to immunity *ratione personae*. To sum up, this is the only case before *Decision on Malawi Failure to Arrest Al-Bashir* where the *Arrest Warrant Case*'s customary exception to immunity *ratione personae* for courts of an internal nature is explicitly affirmed.

Claus Kress has nevertheless advocated that the irrelevance of immunity *ratione personae* before the ICC is premised on what he coins as "modern custom."[105] 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 international criminal law exception from the international law immunity *ratione personae* in proceedings before a judicial organ of the international community."[106]

However, it appears that not all States in the international community believe that Article 27 (2) is established in customary international law. In addition to the United States' firm opposition to the ICC's exercise of jurisdiction over its current or former officials, the practice of States party to the African Union (AU) appears to demonstrate that the customary status of Article 27(2) is hotly contested.[107] Following the issuance of the first 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.[108] The central dispute between the AU

104 Decision on Taylor Immunity, par. 53.

105 Kress, "Immunities under International Law," 251.

106 Kress, "Immunities under International Law," 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".

107 African Union, Press Release No. 002/2012 (Jan. 9, 2012).

108 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.

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. The AU Assembly has decided that "no charges shall be commenced or continued before any International 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."[109] 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).[110] The AU furthermore adopted the Malabo Protocol which establishes a criminal section within the African Court of Justice and Human Rights – exercising competing jurisdiction with the ICC – and grants immunity *ratione personae* to high-ranking State officials.[111] 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.

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 latter becomes genuine and the 'universal jurisdiction conception' offers no way to resolve it. The scant evidence of State practice and *opinio juris* are pointing out that a customary exception based on the international nature of the court is not established in customary international law.[112] Accordingly, only the SC is able, thanks to its Chapter VII powers, to remove the immunity of high-ranking State officials without a waiver from his State.

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.[113] Thus, the superior hierarchy of *jus cogens*

5; Ext/Assembly/AU/Dec.1(Oct.2013), Decision on Africa's Relationship with the International Criminal Court (ICC), par. 10 (i).

109 Ext/Assembly/AU/Dec.1(Oct.2013), Decision on Africa's Relationship with the International Criminal Court (ICC), par. 10 (i).

110 Ext/Assembly/AU/Dec.1(Oct.2013), Decision on Africa's Relationship with the International Criminal Court (ICC), par. 10 (vi), (vii).

111 2014 Draft Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, AU EX.CL/846 (XXV), Article 46A bis; see also Pedretti, *Immunity*, 224–229.

112 See also Pedretti, *Immunity*, 295–296.

113 Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), 3 February 2012, Judgment, ICJ Report, par. 95: In Arrest Warrant Case, 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

norms in 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.[114]

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. All previous international(ized) criminal tribunals or courts contained a similar provision and applied them several times to individuals who were in principle entitled to immunity *ratione materiae*.

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. 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."[115] Indeed, if States do not cooperate with the ICC by enforcing the arrest warrants of the Court, any exercise of its jurisdiction will remain a legal fiction.[116] However, in order to enforce an ICC arrest warrant States must exercise jurisdiction over the relevant individual.

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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.

114 Arrest Warrant Case, par. 60.

115 Cassese, "Current Trends," 13.

116 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.

One of the distinguishing features of international crimes is that such crimes are often committed by State officials. For instance, in the case of war crimes, many of the perpetrators will have been acting as soldiers or officials exercising State authority.[117] 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."[118] The chapeau of crimes against humanity requires a widespread or systematic attack against the civilian population.[119] 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."[120] 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."[121] While the ICC case law shows that crimes against humanity 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 State's apparatus.[122]

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.[123] Thus, an ICC arrest warrant calling upon State parties to arrest and surrender an official from a non-party State may conflict with the latter's immunity *ratione personae* and *ratione materiae*.

The ICJ *Arrest Warrant Case* even cast doubt upon the issue of whether there is a specific exception to immunity *ratione materiae* for international crimes.[124] However, most international legal scholarship and jurisprudence considers that it is established under customary international law that

117 Akande, "Nationals of Non-Parties,". 634.

118 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 1.

119 See Rome Statute, Art. 7; ICTY Statute, Art. 5; ICTR Statute, Art. 3.

120 Prosecutor v. Nikolic, Case No. IT-94-2-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence (Oct. 20, 1995), par. 26.

121 See Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Mar. 31, 2010), par. 117; and, Dissenting Opinion of Judge Hans-Peter Kaul, par. 65

122 ILC, Commentary to the Draft Code of Crimes Against the Peace and Security of Mankind U.N. Doc. A/CN.4/SER.A/1991/Add.l (Part 2), Art. 2.

123 Arrest Warrant Case, par. 54, 70.

124 See supra footnotes 12–18 and accompanying texts.

immunity *ratione materiae* is not available in domestic proceedings concerning international crimes.[125] The ILC in its study on the immunity of State officials from foreign criminal jurisdiction provisionally adopted Draft Article 7 which holds that 'Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law: (a) crime of genocide; (b) crimes against humanity; (c) war crimes; (d) crime of apartheid; (e) torture; (f) enforced disappearance.'.[126] The Draft Article 7 was not adopted without debate. Some ILC members asserted that customary international law did not support the existence of limitation and exceptions to immunity *ratione materiae*,[127] while others contended that the crime of aggression should have been added to the list of crimes for which immunity did not apply.[128] It has indeed been argued that if a crime attracts universal jurisdiction under customary international law, immunity *ratione materiae* does not apply to such conduct.[129] Such argument entails that the customary character of the charges against an official from a State not party to the Rome Statute need to be checked for the latter's immunity not being a bar to his arrest and surrender to the Court. As shown earlier, this might prove to be challenging for certain crimes defined in the Rome Statute – aggression is indeed in the list of Rome Statute crimes which are said to be broader than their customary definition.[130]

In any event, the relevance of immunity *ratione materiae* of non-party State officials from arrest and surrender has not been raised before the ICC yet. In contrast with the 'Al-Bashir fiasco', States failing to arrest Abdel Raheem Muhammad Hussein, Minister of National Defense in the Republic of the Sudan, did not invoke the immunity of the latter but their inability to take prompt action.[131] These States' omission to refer to Hussein's immunity can be taken as recognition that immunity *ratione materiae* does not bar the enforcement of an ICC arrest warrant.

125 Pedretti, *Immunity*, 307–308.

126 ILC, Report of the Work of the Sixty-Ninth Session, Doc. A/72/10 (2017), par. 68–141.

127 *Ibid*., par. 102–103.

128 *Ibid*., par. 122.

129 Akande and Shah, "Immunities of State Officials," 815–852.

130 See Chapter 2.

131 See Prosecutor v. Hussein, Case No. ICC-02/05-01/12-21, Decision on the cooperation of the Central African Republic regarding Abdel Raheem Muhammad Hussein's arrest and surrender to the Court (Nov. 13 2013); Prosecutor v. Hussein, Case No. ICC-02/05-01/12-21, Decision on the Cooperation of the Republic of Chad Regarding Abdel Raheem Muhammad Hussein's Arrest and Surrender to the Court (Nov. 13, 2013).

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.[132]

These operative paragraphs clearly attempt to provide immunity for any non-party State's official (outside of Sudan and Libya, respectively) 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 State".[133] During that meeting Mexico, Germany and France abstained from voting in favor 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.[134] 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

132 SC Res. 1593, par. 6; SC Res. 1970, par. 6.

133 SC Res. 1497 of 1 August 2003, UN Doc. S/RES/1497, par. 7.

134 Security Council, 4803rd meeting, UN Doc. S/PV.4803 (Aug. 1, 2003).

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."[135] 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.[136] 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.[137] However, while States parties are to comply with requests for arrest and surrender,[138] the 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

135 SC 5158th meeting, UN Doc. S/PV.5158 (Mar. 31, 2005)

136 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.

137 Rome Statute, Art. 86.

138 Rome Statute, Art. 59 (1) and 89 (1).

> 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.[139] Since a solution needed to be found in order to conclude the drafting of the Statute, States left the issue of the existence of a conflict to the Court.[140] 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.[141]

It is generally accepted that States party to the Rome Statute have removed their immunity in respect of the ICC and of other States parties enforcing an ICC request for arrest and surrender.[142] By ratifying the Rome Statute, in particular the norm contained in Article 27(2) of the Rome Statute, States have renounced invoking the immunity of their high-ranking State officials before the ICC. Further, given that the Statutes provides that the Court can request for the arrest and surrender of their officials while abroad,[143] this removal extends to foreign national authorities enforcing an ICC arrest warrant.[144] Accordingly, a State party can arrest and surrender a high-ranking official of another State

139 Kress, "Immunities under International Law," 232–234.

140 Ibid..

141 See Gaeta, "Al Bashir Enjoy Immunity," 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, see Article 87(5); Kress and Prost, "Article 98," 1606; Kress, "Immunities under International Law," 232–234.

142 Gaeta, "Al Bashir Enjoy Immunity," 328.

143 Rome Statute, Art. 89.

144 Gaeta, "Al Bashir Enjoy Immunity," 325–327; Akande, "International Law Immunities," 422; Schabas, *Commentary on the Rome Statute*, 73–74; Wirth, "Immunity for Core Crimes," 452–454; e.g. 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".

party 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. The next sections assess the interaction of the 'Chapter VII conception' and the 'universal jurisdiction conception' with the latter impediment.

4.1 *Chapter VII Conception*

It is generally acknowledged 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 high-ranking officials from non-party States 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 entails that the concerned State removed the immunity of its officials with respect to the ICC and States enforcing its arrest warrants. Indeed, waivers of immunities are not required with respect to States Parties. Accordingly, Article 98 (1) Rome Statute speaks only of "the State or diplomatic immunity of a person or property of a third State". With respect to third States – i.e. States not party to the Rome Statute – they may issue a waiver of the immunity of the State officials under an arrest warrant and thus the States parties may arrest and surrender the former's official without acting inconsistently with their obligations under international law. The waiver requirement does not apply however to States that issued a declaration of acceptance of the Court's jurisdiction, though they are not States party to the Rome Statute. This is so, because by accepting the Court's jurisdiction they consent to the Statute provisions, including Article 27 and the provisions relating to cooperation and judicial assistance.

The effects of a SC referral, accompanied with an obligation to cooperate fully, are to some extent similar to a declaration of acceptance under Article 12 (3). However, the 'Chapter VII conception' of a referral under Article 13 (b) is that the legal basis of the Court's exercise of jurisdiction and request for cooperation stem directly from the UN Charter. In *Decision on DRC Failure to Arrest Al-Bashir*, Pre-Trial Chamber II held that a referral by the SC acting under Chapter VII of the UN Charter with an explicit obligation "to cooperate fully with the Court" implies that the immunity *ratione personae* of the

high-ranking State official from the targeted State is waived for proceedings before the Court.[145] Furthermore, given that immunities are an impediment to the official's arrest and surrender, the SC by requiring cooperation has also implicitly waived the immunity of the officials from the concerned State in respect of States enforcing an arrest warrant issued by the ICC. Thus, the argument goes, an obligation under Chapter VII to cooperate with the Court – even without explicitly containing the obligation to waive the 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.[146] In other words, the obligation to cooperate with the Court must have horizontal effect due to the Court's reliance on the cooperation of States to exercise jurisdiction and fulfil its mandate.

Accordingly, the apparent conflict can be avoided, thanks to the Chapter VII powers underlying the SC referral. Furthermore, this reading of the effects of the SC resolution upon Sudan's immunity has the advantage of directly answering to Article 98 of the Rome Statute, which requires the Court not to ask States to act inconsistently with international law immunities, unless such immunities are waived. However, such a conflict-avoidance technique has not been accepted by all. Indeed, the SC could have decided in its resolutions referring the situation to the ICC to explicitly lift immunities.[147] If it had done so no ambiguity would have remained as to the relevance of immunities from the execution of an ICC arrest warrant.[148]

The implied waiver theory has its flaws. As South Africa argued during the proceeding on *Decision on South Africa Failure to Arrest Al-Bashir*, Article 32(2) of the Vienna Convention on the Law of Diplomatic Relations specifies that a waiver of immunity must always be express.[149] The claim has also been made that "[i]f the UNSC intended to remove immunity, it could have clarified the situation by adopting another resolution."[150] To resolve such argument, Pre-Trial Chamber II, in *Decision on South Africa Failure to Arrest Al-Bashir*, found that by deciding, under Chapter VII of the UN Charter, that Sudan shall cooperate fully with the Court, the SC has imposed an obligation upon Sudan to

145 Decision on DRC Failure to Arrest Al-Bashir, par. 29.
146 Akande, "Impact on Al-Bashir's Immunities," 333.
147 Aloisi, "A Tale of Two Institutions,"154.
148 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.
149 Decision on South Africa Failure to Arrest Al-Bashir, par. 36.
150 *Ibid*., par. 37; see also Tladi, "The Duty on South Africa," 1043.

abide by the Statute and cooperate with the Court.[151] Although such obligation originates in the SC resolution, its effect is that for the limited purpose of the situation referred, Sudan has rights and duties analogous to those of States party to the Statute.[152] "One consequence of this" writes the Pre-Trial Chamber, "is that Article 27(2) of the Statute applies equally with respect to Sudan, rendering inapplicable any immunity on the ground of official capacity belonging to Sudan that would otherwise exist under international law."[153] Given that immunities which Sudan normally enjoys have been made inapplicable as a result of Article 27 (2) and the SC resolution imposing the Rome Statute over Sudan, Article 98 has no bearings on such type of situations. The Chamber recognized that this was "an expansion of the applicability of an international treaty to a State which has not voluntarily accepted it as such."[154] Nonetheless, according to the Chamber, this finding "is in line with the Charter of the United Nations."[155]

One advantage of this approach is that it does not entirely depend on the SC's actual intention when referring a situation to the Court.[156] The Rome Statute is indeed spelling out the legal framework under which the Court must operate, even when triggered under Article 13 (b) of the Rome Statute.[157] Thus,

> 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.[158]

151 Decision on South Africa Failure to Arrest Al-Bashir, par. 87.
152 *Ibid*., par. 88.
153 *Ibid*., par. 91
154 *Ibid*., par. 89,
155 *Ibid*, par. 89.
156 *Ibid*., par. 85.
157 See Chapter 5.
158 Decision to Issue an Arrest Warrant against Al-Bashir, par. 44; Decision on South Africa Failure to Arrest Al-Bashir, par. 85–86; Prosecutor v. Gaddafi and Al-Senussi, Case No. ICC-01/11-01/11-163, Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute (Jun. 1, 2012), par. 28–29;, The Prosecutor v. Banda and Jerbo, Case No. ICC-02/05-03/09-169, Decision on 'Defence Application pursuant to articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan' (Jul. 1 2011), para. 15.

While this line of reasoning manages to avoid the controversies over the waiver theory, a member of the Chamber,[159] some scholars, States and the AU remain unconvinced that a referral under Article 13 (b), even when accompanied by a Chapter VII obligation to cooperate with the Court, removes ipso facto the immunities of high-ranking State officials from their arrest and surrender by other States.[160] In particular, Jordan has appealed the Pre-Trial Chamber finding – which has the same *ratio decidendi* as the *Decision on South Africa Failure to Arrest Al-Bashir* – that it failed to arrest Al-Bashir.[161] Jordan is indeed arguing that the intent of the SC when referring the situation cannot be 'immaterial' – [162] a view that found support in some amicus curiae submitted to the Court.[163] The Appeals Chamber will thus have to decide whether any of the line of reasoning applied by the Pre-Trial Chambers are correct or whether the SC when referring a situation should have explicitly removed the immunities of the concerned State's officials for the latter not to have bearings on the arrest and cooperation by other States.

Broadly, two main counter-arguments to the Pre-Trial Chambers' interpretations have been spelled out in the literature, which have been to a certain extent used by South Africa and Jordan in their proceedings before the Court. First, the SC does not have the power to remove the immunities of officials from States not party to the Rome Statute, as those immunities are enshrined in customary international law.[164] Kiyani argues that the UN Charter does not have primacy over customary international law, but only over international

159 Decision on South Africa Failure to Arrest Al-Bashir, Minority Opinion of Judge Marc Perrin de Brichambault.

160 See African Union Commission, Press Release N° 002/2012 (Jan. 9, 2012), p. 2.

161 Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09-309, Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir (Dec. 11, 2017); Prosecutor v. Al-Bashir, ICC-02/05-01/09-326, The Hashemite Kingdom of Jordan's appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir", (Mar. 12, 2018).

162 See Prosecutor v. Al Bashir, PTC II, The Hashemite Kingdom of Jordan's Notice of Appeal of the Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir; or, in the Alternative, Leave to Seek Such an Appeal, ICC-02/05-01/09, 18 December 2017, par. 31.

163 E.g. Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09 OA2, Request by Professor Roger O'Keefe for leave to submit observations on the merits of the legal questions presented in 'The Hashemite Kingdom of Jordan's appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir" ' of 12 March 2018 (ICC-02/05-01/09-326) (Apr. 19 2018).

164 Kiyani, "Al-Bashir & the ICC," 478–480.

agreements. Thus, he concludes that the SC cannot impose the conventional exception to the customary rule on immunity of high-ranking State officials to its Member States. Second, even if the SC has such power, the wording of the SC referrals, and the accompanying obligation to cooperate are too vague to entail a waiver or removal of immunity. In other words, the SC should have explicitly waived the international law immunities of State's officials.[165] Both arguments thus lead to a genuine conflict, where immunity prevails.

These counter-arguments are however not convincing. Regarding the first argument, it needs to be highlighted that the SC is entitled to deviate from customary international law when acting under Chapter VII.[166] Article 1(1) of the UN Charter makes clear that the SC is not obliged to act in conformity with the principles of international law when taking measures for the prevention and removal of threats to the peace.[167] Moreover, whether SC obligations will prevail over customary obligations, depends on if a strict understanding of the effect of Article 103 of the UN Charter is adopted – Article 103 speaks of the primacy of the UN Charter over "international agreements". But this legalistic approach has been widely rejected in light of the SC practice.[168] Furthermore, given that the purpose of Article 103 is to ensure that Charter obligations are respected,[169] there is no logical reasons for still presuming that the obligations of the Charter prevail over treaties but not over customs.

With respect to the second argument, De Wet observes that past practice of the SC reveal that resolutions under Chapter VII do not explicitly stipulate what the enforcers of such resolution may do, but what they may not do.[170] For instance, when the SC authorizes Member States to use military force it broadly authorizes 'all necessary means' or 'all necessary measures', specifies the purpose of such measures, and then indicates the limits of such measures.[171] Accordingly, immunities would not have been necessarily waived (or inapplicable) if the SC had specifically provided that the immunities of all State officials, including States obliged to cooperate fully pursuant to the resolution, were not affected. For instance, both SC resolution 1593 and 1970 attempt to exclude the Court's jurisdiction over officials of non-party States (other than

165 Tladi, 'The Duty on South Africa,' 1043; O'Keefe, *International Criminal Law*, par. 14.97.

166 De Wet, *Chapter VII Powers*, 182.

167 O'Keefe, International Criminal Law, par. 12.31.

168 See e.g. Schweigman, *The Authority of the Security Council*, 196; Fassbender, *The Constitution of the International Community* 120; ILC, Fragmentation Study, par. 344–345; Akande, "Impact on Al-Bashir's Immunities," 348.

169 Conforti, *United Nations*, 292.

170 De Wet, "The Implications of President Al-Bashir," 1061.

171 Ibid., at 1061; see also SC Res. 1973 of 11 March 2011, UN Doc. S/RES/1973, par. 4.

Sudan and Libya, respectively).[172] Indeed, the SC did not put such restriction with regards to officials from Sudan or Libya, quite the contrary.

Indeed, this counter-argument fails to acknowledge the scope of the obligation to 'cooperate fully' imposed on Sudan. As seen above, one fundamental difference between the ad hoc tribunals and SC referrals is that the SC decided to refer the situation in Darfur and Libya to the ICC without obliging all UN Members States to cooperate with the Court, but only the territorial State where the situation was taking place. Other States are therefore not obliged to cooperate with the Court, pursuant to the SC resolutions. States parties, however, remain obliged to cooperate with the Court, as provided by the Rome Statute.

One State that clearly has an obligation to arrest and surrender any of its nationals, regardless of their official position is the State ordered by the SC to cooperate fully with the Court. As Akande observes, by requiring Sudan and Libya to cooperate fully with the Court, "the SC resolution explicitly subjects Sudan [and Libya] to the requests and decisions of the Court."[173] It is clear that the terms "cooperate fully" are taken verbatim from Article 86 Rome Statute, the first article of Part 9 on the International Cooperation and Judicial Assistance.[174] In cases of SC referrals, imposing an obligation to cooperate fully, Article 86 must be applied to the targeted non-party State, which pursuant to the relevant resolution of the SC, shall, in "accordance with the provision of [the] Statute, cooperate fully with the Court in its investigation and prosecution of crimes" committed in the context of the referred situation.[175] By reading down Article 86 to include States targeted by the SC, it becomes possible to apply *mutatis mutandis* all the provisions of Part 9 to this State. Article 88 of the Rome Statute is of particular importance here. Article 88 stipulates that States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under Part 9. Article 88 must also be adapted to include the targeted non-party State, which for this particular situation, shall take all required measures under national law, including lifting immunities, to ensure that an ICC request for arrest and surrender can be enforced. It must

172 SC Resoltuion 1593, par. 6; SC Resolution 1970, par. 6. Whether these paragraphs bind the Court is addressed in Chapter 4.

173 Akande, "Impact on Al-Bashir's Immunities," 341.

174 Akande, "The Effect of Security Council Resolutions and Domestic Proceedings," 309.

175 Rome Statute, Art. 86; see also Prosecutor v. Banda and Jerbo, Case No. ICC-02/05-03/09-169, Decision on "Defence Application pursuant to Articles 57(3)(b) & 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan" (Jul. 1, 2011), par. 15.

be noted that even if the State has not undertaken these measures, it cannot serve as a justification for a refusal to comply with a request for arrest and surrender.[176] In other words, an arrest warrant issued by the Court in the context of the referred situation and sent to the State targeted by the Chapter VII obligation to 'cooperate fully' entails that this State even if not party to the Rome Statute must arrest and surrender the suspect, irrespective of his official capacity.

States parties also have such obligation if the official is from the State targeted by the obligation to cooperate fully. Article 89 specifies that States obliged to cooperate fully with the Court must comply with requests for arrest and surrender – which may concern non-nationals. It is in particular though the implementation of this provision that States enforcing an ICC arrest warrant could be violating the immunities owed to another State. By ratifying the Statute, States mutually agree to this provision and are thereby lifting their international law immunities towards other States cooperating with the Court.[177] By imposing an obligation to cooperate fully with the Court, the SC puts upon the targeted State all the provisions of Part 9 of the Statute, including the lifting of international law immunities from foreign criminal jurisdiction enforcing an ICC arrest warrant related to the referred situation. It is this Chapter VII obligation imposed on a non-party State – which would otherwise violate the *pacta tertiis* principle – that puts the targeted State in an analogous position to a State party (or more accurately to a non-party State that issued a declaration of acceptance under Article 12 (3)).

The exception to Article 89 is obviously provided in Article 98. However, the obligation to 'cooperate fully' imposed by the SC on the targeted State implies that Article 98 (1) does not prohibit the arrest of an official from this (third) State.[178] Indeed, Article 98(1) allows the Court to proceed with a request for arrest and surrender of a third State's official entitled to immunity if the cooperation of the relevant third state has been obtained. The SC resolution obliging the targeted State is meant to legally ensure such cooperation.[179] As

176 Reisinger Coracini, "Cooperation," 99; Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09-266, Decision on the non-compliance by the Republic of Djibouti with the request for arrest and surrender Omar Al-Bashir to the Court and referring the matters to the United Nations Security Council and the Assembly of States Parties to the Rome Statute (Jul. 11, 2016), para. 10.

177 Cryer, International Criminal Law, par. 14.92.

178 Boschiero, "Judicial Finding on Non-Cooperation,", 650; De Wet, "The Implications of President Al-Bashir," 1061.

179 De Wet, "The Implications of President Al-Bashir," 1061.

mentioned, the State targeted by the obligation to cooperate fully is theoretically accepting (and carrying out, even if it is recalcitrant) its cooperation with the Court.

Finally, the obligation to 'cooperate fully' makes clear that the Rome Statute, including Article 27(2), is imposed upon the targeted State for the purpose of enforcement as well. Indeed, the international law immunities from foreign domestic jurisdiction of the non-party State obliged to 'cooperate fully' have been lifted by the imposition of Article 27(2) combined with Article 89 upon that State. With regards to other non-party States that are not under the obligation to cooperate fully, Article 27 is not imposed on them at the horizontal level, and thus has no effect on their immunities from foreign domestic jurisdiction.[180] While these non-party States have no obligation to arrest and surrender an official from a State obliged to cooperate fully with the Court, they are permitted to do so given that his/her immunities have been lifted.[181]

Overall, States requested to enforce an arrest warrant against an official from a State obliged to cooperate fully with the Court are not faced with conflicting obligations. The obligation to cooperate imposed by the SC (or by the Rome Statute) acts as a *lex specialis* to the general rule on immunity of State officials from foreign domestic jurisdiction. While a SC clarification on the status of the immunities of the State targeted by the obligation to cooperate is not *a sine qua non* for finding that such immunities do not apply, it could undeniably provide an aid for the ICC to uphold its position. Nonetheless, it would certainly go against logic to presume that while referring a situation to the ICC, the SC had intended that those who bear the greatest responsibility could evade the Court's proceedings, even if their State were obliged to cooperate with the Court. If this was the intention of the SC, it should have been stated explicitly.

In any event, given the alleged ambiguity surrounding the effects of an obligation to cooperate fully with the Court upon the immunities of the targeted State's officials, the AU continues to call on its Member States not to enforce the arrest warrants against Al-Bashir.[182] Member States of the AU have thus argued that the Court request for arrest and cooperation puts them in a situation where they are asked to act inconsistently with their obligations stemming from the decision of the African Union.[183] Other States, claims that the Court's

180 Their officials are however subject to the ICC jurisdiction, see section 4.2 of this chapter.

181 Akande, "Impact on Al Bashir's Immunities," 348.

182 Decision on the International Criminal Court, Doc. EX.CL/1068(XXXII), Assembly/AU/Dec.672(XXX), 30th Ordinary Session of the Assembly, 28–29 January 2018, Addis Ababa, Ethiopia, par. 2(3).

183 E.g. see Decision on DRC Failure to Arrest Al-Bashir.

request to arrest and surrender are in conflict with their obligations – not only to respect Al-Bashir' immunities to which he is entitled under customary international law but also those – enshrined in international agreements.

4.1.1 Conflict between SC Referrals and Other Treaty Obligations

In situations of competing treaty obligations for States that are parties to the Rome Statute and to another treaty which commands them not to comply with their obligation under the Rome Statute, a classical norm conflict appears to arise. Although the SC does not need to explicitly waive (or remove) 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, as decided by AU decision.[184] Let us remind ourselves that the AU has determined 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."[185] The AU had also requested its Member States not to enforce the ICC arrest warrants against Muammar Gaddafi.[186]

The resolutions referring Libya and Darfur, Sudan to the ICC decided that only the territorial 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.[187] 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.[188] 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 to the Statute. 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

184 Constitutive Act of the African Union, Art. 23 (2); see also Assembly/AU/Dec.296(XV); The same was requested for the arrest warrant against Gaddafi, Assembly/AU/Dec.366(XVII), par. 6.

185 Assembly/AU/Dec.245(XIII) Rev.1, par. 10.

186 Assembly/AU/Dec.366(XVII), par. 6. for a comprehensive record of AU actions see Ssenyonjo, "The Rise of the African Union," 385.

187 The SC Resolutions "urge[d] all States and concerned regional and other international organizations to cooperate fully" with the Court.

188 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.

officials the obligation under the Charter would prevail, via Article 103 of the UN Charter.[189]

The above reasoning cannot be so easily applied to Al-Bashir since only Sudan's obligation to cooperate stems from the UN Charter.[190] Nonetheless, the Pre-Trial Chamber in *Decision on DRC Failure to Arrest Al-Bashir* 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."[191]

Akande argues that every UN Member State is bound to accept the decision of the SC to refer a situation to the ICC.[192] Though the SC may choose not to oblige all UN members to cooperate fully with the Court; they remain nonetheless obliged to accept that the SC decided to apply the Rome Statute to Sudan, including Article 27 (2).[193] 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.[194] Accordingly, UN Member States' 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 DRC Failure to Arrest Al-Bashir* – albeit it was not phrased in clear terms.

Other States have also tried to argue that the request to arrest and surrender Al-Bashir was conflicting with other agreements to which they were party. During the proceedings relating to the *Decision on South Africa Failure to Arrest Al-Bashir*, South Africa argued that during his visit in June 2015, Al-Bashir benefitted from immunity from arrest on the basis of the Host Agreement concluded for the purpose of holding the AU Summit in Johannesburg.[195] The argument was however rejected on the ground that Al-Bashir attended the AU Summit in his capacity as Head of State of Sudan and not as a member of the AU Commission, as a staff member of said Commission, or as a delegate

189 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."

190 Du Plessis an Gevers, "Balancing Competing Obligations," 16.

191 Decision on DRC Failure to Arrest Al-Bashir, par. 31

192 Akande, "Impact on Al-Bashir's Immunities," 347–348.

193 *Ibid*., at 347–348.

194 *Ibid*., at 347–348.

195 Decision on South Africa Failure to Arrest Al-Bashir.

or other representative of an inter-governmental organization, as provided by the said Host Agreement –[196] a reading also retained by the Supreme Court of Appeals of South Africa.[197] If, however, the hosting agreement had been found to provide immunity to Al-Bashir, the obligation to arrest Al-Bashir stemming from SC resolution 1593 would have, in accordance with Article 103 of the UN Charter, taken precedence over the said international agreement.

Finally, in the proceedings concerning the *Decision on Jordan Failure to Arrest Al-Bashir*, it has been argued that Al-Bashir was protected by the 1953 Convention on the Privileges of the Arab League, and that such 'international agreement' should be read in the light of Article 98(2) Rome Statute. Article 98(2) of the Rome Statute reads as follows:

> 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.

The Pre-Trial Chamber II responded that this provision does not apply to the 1953 Convention given that the latter "does not refer to a 'sending State' and does not establish or refer to a procedure for seeking and providing consent to surrender."[198] Article 98(2) has indeed been conceived as applying to scenarios in which the Court seeks the arrest and surrender of personnel specifically "sent" to the territory of a State Party pursuant to an agreement concerning their status on that territory, such as a Status of Forces Agreement.[199] In any event, the effect of SC resolution would once again prevail over such international agreements if they were found to exist with regards to a suspect in a situation referred to the Court by the SC.

To sum up, when a treaty 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

196 Decision on South Africa Failure to Arrest Al-Bashir, par. 67.

197 Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others (867/15) [2016] ZASCA 17; 2016 (4) BCLR 487 (SCA); [2016] 2 All SA 365 (SCA); 2016 (3) SA 317 (SCA) (15 March 2016), par. 40–48.

198 Prosecutor v Al-Bashir, ICC-02/05-01/09, Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or Omar Al-Bashir (Dec. 11, 2017), par. 32.

199 Prost, "The Surprises," 3–4.

norm conflict "is merely prohibited from fulfilling an obligation arising under that other norm."[200] Thus, the conflict is resolved without any wrongfulness due to the breach of the conflicting norm.[201]

4.2 *Universal Jurisdiction Conception*

The 'universal jurisdiction conception' of a referral under Article 13 (b) is that this mechanism triggers the *jus puniendi* of the international community. According to this view, 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. Thus, States, when enforcing an ICC arrest warrant, simply act as the 'artificial limbs' of the Court.

Although the arrest and surrender of a suspect have to be operated by national authorities, this exercise of jurisdiction to enforce is done on behalf of the *jus puniendi* entrusted to the ICC.[202] 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.[203] 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 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

200 See Report of the Study Group of the ILC on Fragmentation of International Law, par. 334

201 See Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 59; However, see Report of the Study Group of the ILC on Fragmentation of International Law par. 343; see also Du Plessis and Gevers, "Balancing Competing Obligations," 4–5.

202 Kress, "Immunities under International Law," 257.

203 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."

> this Court when States have failed to prosecute those responsible for the crimes within this jurisdiction.[204]

Under the same assumption as to proceedings before the ICC, it can be 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 for certain international criminal courts is extended to the enforcement apparatus of the institution entrusted with the *jus puniendi* of the international community. Accordingly, the States party to the Rome Statute's acts of arrest and surrender is "part of a vertical cooperation regime which in turn constitutes the external part of those international proceedings."[205]

In terms of norm conflict we are beyond a simple accumulation of norms. 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, this interpretation is even more contested than the 'universal jurisdiction conception' view on the irrelevance of immunity of heads of States from the ICC. In particular, 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.[206] One of the rules when using effective interpretation is that it should not render another norm meaningless.[207] Kress, who participated in the drafting of the provision, enlightens

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204 Decision on Malawi Failure to Arrest Al-Bashir, par. 46.

205 Kress and Prost, "Article 98," 1613.

206 VCLT, Article 31; see Tladi, "The ICC Decisions on Chad and Malawi," 207–209; Iverson, "The Continuing Functions," 140–141.

207 Pauwelyn, *Conflict of Norms*, 250.

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.[208] 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 could have become obsolete. Those supporting such view can rely on the fact that 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.[209] Moreover, it can be claimed that 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.[210] Finally, Article 98 (2) remains relevant for 'host State agreements' and 'status of forces agreements'.[211] Thus, it may be argued that Article 98 Rome Statute is not fully deprived of its content.

Despite the availability of these interpretative tools to avoid a genuine conflict with the immunity of State officials from foreign domestic criminal proceedings, we have seen that the customary exception for certain international criminal courts is far from established. To extend this exception to States enforcing an ICC arrest warrant is even more difficult to defend. 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. Furthermore, it must be acknowledged that Article 98 (1) tacitly recognizes that the ICC might first need to seek a waiver before issuing a request for arrest and surrender of an official entitled to immunities under international law.[212] From the serious challenges AU States have posed to

208 Kress, "Immunities under International Law," 232.

209 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, "The ICC Decisions on Chad and Malawi," 211; contra Daqun, "Non-Immunity for Heads of State," 67.

210 See also Kress, "Immunities under International Law," 232–233, 236–239; Kress and Prost, "Article 98," 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, "The Continuing Functions," 140–141.

211 Rome Statute, Art. 98(2) reads: "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."

212 Daqun, "Non-Immunity for Heads of State," 66.

the ICC, it was indeed 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.[213] The repetitive change of mind of the ICC Pre-Trial Chamber II on the relationship between Article 27(2) and 98(1) demonstrate that the Court has slowly recognized that heads of States not party to the Rome Statute are entitled to immunity from arrest and surrender by a foreign State.

Furthermore, even some of the scholars that consider that Article 27(2) reflects customary international law, believe that officials entitled to immunity *ratione personae* cannot be the object of a request for arrest and surrender, if no waiver is issued by the relevant authorities. In particular, Gaeta and Labuda argue that by having asked its States parties to arrest and surrender Al-Bashir, the ICC is requesting its States parties to commit internationally wrongful acts, and is therefore breaching Article 98(1) of the Rome Statute.[214] In their view, "[a]ffording protection from arrest in foreign countries to a narrow group of officials from States not parties to the Rome Statute, such as Sudan, may shield a few individuals from prosecution in the short term, but this may well be the price to pay for ensuring that other important aspects of the international system remain intact."[215] Certainly, the 'universal jurisdiction conception' would be less under tension if it did not purport to also overwrite the customary immunity of heads of States from foreign domestic jurisdiction.

It may moreover be asked whether the legal tools at the disposal of the 'universal jurisdiction conception' to resolve a conflict with a contradicting obligation arising from another treaty do not risk delegitimizing the whole project. 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. As pointed out above, such a scenario occurred in the *Al-Bashir Case*.[216] 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."[217] Simply, the Pre-Trial Chamber considered that

213 Boschiero, "Judicial Finding on Non-Cooperation," 638–639.
214 Gaeta and Labuda, "Trying Sitting Heads of State," 149–151.
215 Ibid., at 157.
216 See Ssenyonjo, "The Rise of the African Union," 385.
217 Decision on Malawi Failure to Arrest Al-Bashir, par. 43.

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).[218]

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, Malawi is still in an unresolvable norm conflict. Either it decides to follow the ICC's requests and breach its obligation towards the AU (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. Such unresolvable conflict might be one of the reasons the AU call for a mass withdrawal of its Member States from the ICC.

Conclusion

In 2014, the Prosecutor of the ICC announced that she will 'hibernate' investigative activities in Darfur.[219] This decision was admittedly taken because the Prosecutor faced a lack of cooperation from the government of Sudan but also from all other States, including State parties.[220] 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.[221] This decision arose in the context of an unsucessful call by the then Argentinian Presidency of the SC to establish an effective follow-up mechanism for the SC referrals to the Court.[222] During this series of meetings the Russian representative said:

218 Decision on Malawi Failure to Arrest Al-Bashir, par. 37; see Kiyani, "Al-Bashir & the ICC," 506.

219 Office of the Prosecutor, Statement to the United Nations Security Council on the Situation in Darfur, pursuant to SC Resolution 1593 (2005) (Dec. 12, 2014).

220 Office of the Prosecutor, Twentieth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to the SC Resolution 1593 (2005) (Dec. 15, 2014).

221 Office of the Prosecutor, Statement to the United Nations Security Council on the Situation in Darfur, pursuant to SC Resolution 1593 (2005) (Dec. 12, 2014).

222 Letter dated 8 October 2014 from the Permanent Representative of Argentina to the United Nations addressed to the Secretary-General; See also Security Council, 7285th meeting, UN Doc. S/PV.7285, S/PV.7285 (Resumption 1) (Oct. 23, 2014).

> 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.[223]

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 Al-Bashir*.[224] 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.

The reaction of *inter alia* the AU to *Decision on Malawi Failure to Arrest 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 DRC Failure to Arrest Al-Bashir* 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. The waiver theory was however still challenged. The Pre-Trial Chamber thus adopted a new reasoning in *Decision on South Africa Failure to Arrest Al-Bashir*. These changes of mind might be said to prove that the ICC has understood that the 'universal jurisdiction conception' undermines its objective of universality. Indeed, the two last decisions put the emphasis on the fact that the Rome Statute is first and foremost a multilateral treaty that cannot impose obligations on third States without their consent – only the SC can impose such obligations.

While Jordan has brought the reasoning exposed in *Decision on South Africa Failure to Arrest Al Bashir* to the Appeals Chamber, it is the opinion of this author that the object and purpose of a SC referral, accompanied with a Chapter VII obligation to cooperate fully with the Court, cannot but mean that the immunities of the targeted State's officials are inapplicable before the Court as well as before States enforcing an ICC arrest warrant issued in the referred situation. Other non-party States' officials are, according to the view developed above, not immune from the Court's jurisdiction in the situation referred by the SC. But given that they have no obligation to cooperate with the Court they have no obligation to surrender their officials, which also remain immune from foreign domestic jurisdiction. According to this author, such distinction reflects the difference between the SC decision to refer a situation to the ICC, which must be accepted by all UN Members States, and the obligation to cooperate with the Court imposed on specific States.

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223 See also Security Council, 7285th meeting, UN Doc. S/PV.7285 (Oct. 23, 2014).

224 African Union Commission, Press Release Nº 002/2012, (Jan. 9, 2012).

There are great chances that if the AU is not satisfied with the Appeals Chamber judgment, the issue might end up at the ICJ. Indeed, 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."[225] After several years, the AU decided in 2018 to request the African Group in New York to lobby the UN General Assembly to seek an advisory opinion from the ICJ on the "question of immunities of a Head of State and Government and other Senior Officials as it relates to the relationship between Articles 27 and 98 and the obligations of States Parties under International Law".[226] This request clearly expresses the belief that clarification is needed with regard to the applicability of Article 27(2) to States not party to the Rome Statute.

It must also be noted that the SC clearly failed to assume the responsibilities attached to its referrals. The ICC, acting under Article 87 (7) of the Rome Statute, referred to the SC seven instances where a State party had failed to arrest and surrender Al-Bashir. These referrals were not followed up by the SC. The same inertia prevailed when Sudan or Libya were referred back to the SC for failing to arrest and surrender nationals under a warrant for arrest. The SC will not clarify whether it intended to remove the immunities of State officials when triggering the Court's jurisdiction. But nothing in the text and context of the SC referrals evinces an attempt to exclude Article 27 for the nationals of the targeted States – while both SC referring resolutions address explicitly the immunities of officials of non-party States (other than Sudan or Libya).[227]

It has been 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.

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225 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, under Art. 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.

226 Decision on the International Criminal Court, Doc. EX.CL/1068(XXXII)30th Ordinary Session of the Assembly, 28–29 January 2018, Addis Ababa, Ethiopia, Assembly/AU/Dec.672(XXX), par. 5(II).

227 Whether the peacekeepers exemption paragraphs bind the Court is addressed in Chapter 4.

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.[228] 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.[229] 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. Thus, the ICC must take an interpretative approach to the norms contained within its Statute that convinces States that it is in accordance with international law.

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."[230] Only the SC can, with few exceptions. The Rome Statute's sweeping application and interpretation as being applicable to all because its States parties allegedly decided so 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.[231] For these reasons 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

228 Shany, *Effectiveness*, 227.
229 *Ibid.*, p. 141.
230 Pauwelyn, *Conflict of Norms*, 37.
231 Shany, *Effectiveness*, 155–157.

to be included in the wide array of measures it can take under Article 41 UN Charter. The 'Chapter VII conception' has thus proved to offer ways of avoiding and resolving norm conflicts that are in accordance with contemporary international law. The reach of that 'conception' might seem 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 it is enlightening to ask ourselves: what if Article13 (b) did not exist?

CHAPTER 5

If Article 13 (b) Did Not Exist …

It has been shown that a 'universal jurisdiction conception' of Article 13 (b) is not founded under current international law and that the 'Chapter VII conception' evinces a coherent 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.[1] 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). For example, Condorelli and Villalpando qualified Article 13 (b) as a 'gift' to the SC.[2] 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 [3] – "*ce qu'il lui serait d'ailleurs impossible!*"[4]

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 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. Crawford, acting 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

1 Wouters and Odermatt, "Quis custodiet," 79.

2 Condorelli and Villalpando, "Can the Security Council extend," 572.

3 Berman, "Relationship," 176; Gowland-Debbas, "The Functions of the United Nations Security Council," 298; Jain, "A Separate Law for Peacekeepers," 253; Condorelli and Villalpando, "Les juridictions pénales internationals", 229; however, see Zimmermann, "The Creation," 236.

4 Condorelli and Villalpando, "Les juridictions pénales internationals", 229; see also Gowland-Debbas, "The Functions of the United Nations Security Council," 298.

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> *ad hoc* courts, as it had been forced to do at great expense in the case of the former Yugoslavia.[5]

The same conviction was expressed in Rome.[6] 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. 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,[7] if not overwrite, the Rome Statute.[8]

This chapter will first undertake 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 Chapter VII. Secondly, it will show 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, it will show that, arguendo, the SC can bend the Rome Statute when it refers a situation to the Court it could pose a problem as to the lawful establishment of jurisdiction.

1 The SC and the ICC Relationship: An *'Amour Impossible'*

To date the SC has used the two channels listed in the Rome Statute for intervention 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.[9] On the

5 ILC, Summary records of the meetings of the forty-sixth session, Summary record of the 2361st meeting (1994), Doc. A/CN.4/SER.A/1994, at 229, par. 78.

6 See Summary records of the plenary meetings and of the meetings of the Committee of the Whole Vol II, Statement of UK, at 67, par. 38; Statement of Sweden, at67, par. 55; Brazil statement, at 76, par. 47; Ireland Statement, at 97, par. 17; Statement Slovenia, at 207, par. 55; Statement Norway, at 207, par. 55; Statement Malawi, at 207, par. 62; Statement Canada, at 208, par. 66; Statement China, at 209, par. 65; Statement Italy, at 210, par. 92; Statement Spain, at. 212, par. 7.

7 Gowlland-Debbas, "The Functions of the United Nations Security Council," 298.

8 Talmon, "Security Council Treaty Action," 65.

9 Statements of Representatives of Fiji, Ukraine, Canada, Colombia, Samoa, Malaysia, Germany, Syrian Arab Republic, Argentina, Cuba (SC Res. 1422,; SC 4568th mtg., UN Doc. S/

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".[10] 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.[11]

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 jurisdiction.[12] 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.[13] 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.[14]

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.[15] The same paragraph also appeared in the draft resolution to refer the situation in Syria.[16] Each of these paragraphs raised issues as to the legality of the resolution under the Charter but also as to whether it conflicted with the

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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, SC 4772nd mtg., UN Doc. S/PV.4772).

10 SC Res. 1422, UN Doc. S/RES/1422 (2003); SC Res. 1487, UN Doc. S/RES/1487 (2003).

11 Stahn, "The Ambiguities," 85; Jain, "A Separate Law for Peacekeepers,"; Weller, "Undoing the Global Constitution," 693; McGoldrick, "Political and Legal Responses," 415–22; Orakhelashvili, *Collective Security*, 161.

12 SC Res.1497, UN Doc. S/RES/1497 (2003), par. 7.

13 Jain, "A Separate Law for Peacekeepers," 247–248.

14 UN Doc. S/PV.4803 (see Statement of France and Germany); Zappalà, "Are Some Peacekeepers Better Than Others?," 674 (2003) (argues that the SC resolution 1497 was not addressed to the ICC because Liberia was not a State party to the ICC. Liberia ratified the Rome Statute on 22 September 2004).

15 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, see SC Resolution 1973.

16 Draft Resolution S/2014/348 (vetoed by China and Russian Federation, 22 may 2014).

Rome Statute.[17] 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. While deferrals are provided under Article 16 Rome Statute for a limited period of time, the 'immunity for peacekeepers' paragraph inserted in the referring resolutions attempt to exclude some groups from the referred 'situation'. This not only affects Article 27 (1) Rome Statute,[18] under which the "Statute shall apply equally to all persons", but also appears to modify the definition of 'situation'

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."[19] 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.[20] Clearly, 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.[21] 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.[22] The four situations where the prosecutor *proprio motu* sought authorization to conduct an investigation concerned the 'situation in Kenya', the 'situation in Cote d'Ivoire', the 'situation in Burundi' and the 'situation in Afghanistan'. The self-referrals of Uganda, DRC, Central African Republic (I and II), Mali, Gabon, and Palestine referred to the situation occurring in their respective territories.[23] The two SC referrals are also territorially focused.

17 Security Council, 7180th meeting (May 22, 2014) UN Doc. S/PV.7180 (Representative of Argentina 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.').

18 Mokhtar, "Arm-Twisting," 324 (2003).

19 In Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, 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 (Feb. 24, 2006), par. 21; Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-101-tEN-Corr, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Jan. 17, 2006), par. 65.

20 Klamberg, *Evidence*, 229.

21 See generally, Müller and Stegmiller, "Self-Referrals on Trial," 1273.

22 See also Rastan, "Situation and Case," 426.

23 Comoros referred a situation that took place in a vessel that was registed in Comorros.

Although some of the self-referrals tried to indicate to the prosecutor who should be tried by the Court,[24] the real basis of the situation referred were that crimes within the jurisdiction of the Court were being committed within their territory since 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 instructive for that matter.[25] Initially, the Prosecutor responded favorably to the tailored referral by the President of Uganda, Yoweri 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.[26] However, the Prosecutor quickly 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."[27] 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.[28] 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 territorial as well as the personal parameters of the situation.[29] That appears to be the correct meaning of what the Court implied when it

24 The first 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, Case No. ICC-01/05-01-08, Decision on the Admissibility and Abuse of Process Challenges (Jun. 24, 2010), par. 14.

25 ICC Press Release, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC.

26 ICC Press Release, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC.

27 Statement by Luis Moreno-Ocampo, Prosecutor of the ICC – Informal meeting of Legal Advisors of Ministries of Foreign Affairs (Oct. 24, 2005), at 7; Prosecutor v. Joseph Kony et al., Case No. ICC-02/04-01/05-68, Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53 (Feb. 2, 2005), par. 5.

28 Rastan, "Situation and Case," p. 427 (giving the example of the situation of Darfur spilling over in Chad as possibly requiring a new situation to be triggered).

29 The 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, Galand, "The Situation Concerning the Islamic State," EJIL Talk! (May 27, 2015), available at https://www.ejiltalk.org/the-situation-concerning-isis-carte-blanche-for-the-icc-if-the-security-council-refers/.

stated that a situation is defined by "territorial, temporal and possibly personal parameters."

During the drafting of the Statute, the word 'situation' was expressly adopted in order to avoid 'cases' be referred to the Court.[30] Even the word 'matter' was considered "too specific for the independent functioning of the Court."[31] 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' but exclude certain nationals from this jurisdiction? The Prosecutor is not convinced that Article 103 could have set aside the Court's jurisdiction 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."[32] Indeed, the crime of aggression had not entered into force and was thus not within the jurisdiction of the Court to investigate allegations related to the commission of this crime.[33] The Office of the Prosecutor continued and affirmed "[t]he Office does have a mandate, however, to investigate allegations of crimes by all actors".[34] The emphasis on "all actors" evinces that the Office of the Prosecutor considers that the Court has jurisdiction over all Rome Statute crimes committed on the territory of Libya, irrespective of whether the perpetrator was a national of Libya, a State party or a non-party State.

Similarly, the Pre-Trial Chamber I stated "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".[35] The Court was thus implying that it did not considered the 'immunity for peacekeepers paragraph' binding given that the situation

30 See ILC 1994 Final Report, par 44. See also Discussion Paper, Bureau, UN Doc. A/CONE183/C.1/L.53; See also Schabas, *Commentary on the Rome Statute*, 297; See also Williams and Schabas, "Article 13," 568. Zutphen Draft Article 45[25]; Article 25, A/AC.249/1997/L.8/Rev.1; de Gurmendi, "The Role of the Prosecutor," 180.

31 Yee, "Article 13 (b) and 16," 148.

32 Office of the Prosecutor, Third Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to SC Resolution 1970 (2011), par. 53.

33 See Chapter 3, section 6.1.

34 Office of the Prosecutor, Third Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to SC Resolution 1970 (2011), par. 54.

35 Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10, Decision on the "Defence Challenge to the Jurisdiction of the Court" (Oct. 26, 2011), fn. 41, see also Decision to Issue an Arrest Warrant against Al-Bashir, par. 36.

referred by the SC is governed by the statutory framework provided for in the Statute.

Nonetheless, while the Statute prohibits the referral of cases, it also contemplates the referral of a crime. Article 13 (b) provides that the SC can refer to the Prosecutor a situation in which one or more crime appears to have been committed. Thus, on the one hand, the SC could refer a situation where one single crime within the jurisdiction of the Court appears to have been committed. However, on the other hand, according to the Statute, the SC cannot refer a case.[36] How can both of these potentially conflicting reading of what the SC can refer 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.[37]

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. Further crimes that might fall within the same situation may be committed after the act of referral, which triggered the Court's jurisdiction. A 'case', on the other hand, may emerge only after the Prosecutor requests the issuance of an arrest warrant or a summons to appear following an investigation into a 'situation'.[38]

It is nonetheless 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 however be cautious

36 See Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-101-tEN-Corr, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Jan. 17, 2006), par. 65.

37 Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10, Decision on the "Defence Challenge to the Jurisdiction of the Court" (Oct. 26, 2011), par. 27.

38 See Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-101-tEN-Corr, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Jan. 17, 2006), par. 65; See also Olasolo, *Essays*, 42–43.

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-permanent measure while Chapter VII of the Charter envisages actions with respect to specific situations.[39]

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.[40] However, a SC referral to the ICC of all crimes of terrorism, without any temporal and 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 any type of SC resolution, even if it contradicts its Statute.

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 targeted State to accept the jurisdiction of the Court over its territories and nationals despite the lack of explicit consent derives

39 See Chapter 2, section 2.2.6 of this chapter.

40 Cassese, "Terrorism," 220–223.

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 the targeted State to cooperate fully with the Court. However, the right of the ICC to exercise jurisdiction over these non-party States comes from the Statute.[41] While the SC has the power under Chapter VII "to intervene in matters which are essentially within the domestic jurisdiction of any state"[42] – 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.

Since the ICC is an international organization with international legal personality independent of its State parties, the SC does not have authority over it.[43] 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".[44] Article 103, which postulates the primacy of the UN Charter over other obligations, is also strictly addressed to "Members of the United Nations". Although the ICC has a close relationship with the UN, it is neither a member [45] nor one of the 'specialized agencies' of the UN system.[46]

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".[47] 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.[48] The Rome

41 Gallant, "System of States and International Organizations," 582.

42 UN Charter, Art. 2 (7).

43 Cryer and White, "Who's Feeling Threatened?," 150; Gallant, "System of States and International Organizations," 569–573; Cryer, "Sudan, Resolution 1593, and International Criminal Justice," 213–214; Sarooshi, "Peace and Justice," 105–108; Stahn, "The Ambiguities,". 101–102; Jain, "A Separate Law for Peacekeepers," 253. Condorelli and Villalpando, "Can the Security Council extend," 578; Mokhtar, "Arm-Twisting," 326; Rastan, "Testing Cooperation," 441.

44 UN Charter, Art. 25.

45 The membership to the UN is only open to States, see UN Charter, Art. 3, 4.

46 For specialized agencies see UN Charter, Art. 57.

47 See Talmon, "Article 2 (6)," 253–279; e.g. the SC 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."

48 Bank, "Cooperation," 261; Paulus and Leis, "Article 103," 2130–2132; Novak and Reinisch, "Article 48," 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 II-3649, par. 192–195.

Statute, in its preamble, affirms that the ICC is to have a relationship with the UN system and provide the SC in Article 13 (b), 15*ter* and 16 distinct channels through which the SC may influence the Court's business. However, this influence must remain within the confines provided by the Rome Statute.

Moreover, the UN has recognized that the ICC is an independent legal body with a distinct legal personality from its States parties. In particular, the Negotiated Relationship Agreement states that "[t]he United Nations and the Court respect each other's status and mandate."[49] 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."[50] Should the Court abide by a SC resolution requesting it to act contrary to its Statute, it would act *ultra vires*.

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.[51] It is indeed the SC that designed the Statutes of the ad hoc tribunals, including their jurisdiction *ratione materiae*, *territoriae*, *personae* and *temporis*. Furthermore, while, in the case of the ICC, the SC "invites" the Prosecutor to keep it informed on actions taken pursuant to the referrals,[52] the SC clearly obliged the President of the ad hoc tribunals to submit reports.[53] Moreover, 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.[54] Article 115 (b) provided for the possibility that expenses related to SC referrals be covered by the UN, but the SC considered that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily. Certainly, the level of control the SC has over its subsidiary organ is dramatically different from that which it has over the ICC.

The SC weak control over the ICC does not render referrals under Article 13 (b) *ultra vires*. It must be noted that while the SC does not have the same authority and control over the ICC as it had over the ad hoc tribunals, the Court

49 Relationship Agreement Between the United Nations and the International Criminal Court, (Aug. 20, 2004), UN Doc. A/58/874, Art. 2(3).

50 Cryer, "Sudan, Resolution 1593, and International Criminal Justice," 213.

51 See however Tadic Interlocutory Appeal Decision, par. 15; but Sarooshi, *Collective Security*, 103.

52 SC Res. 1593, par. 8; SC Res. 1970, par. 7.

53 ICTY Statute, art. 34; ICTR Statute, art. 32.

54 SC Res. 1593, par. 7; SC Resolution 1970, par. 8.

is not entirely let loose in its exercise of jurisdiction. Firstly, the Court is not entitled to exercise jurisdiction under Article 13(b) unless the SC explicitly refers a situation to the ICC, acting under Chapter VII of the UN Charter. This procedural requirement ensures that Article 13 (b) is not usurped by the Court. Secondly, the SC may determine the end of the jurisdiction *ratione temporis* of a referred situation.[55] The SC determination of the end date, if stated in the referring decision, would be definitive on the Court's jurisdiction over this specific situation.[56] On the other hand, the SC may not terminate the Court jurisdiction *ratione temporis* in a subsequent resolution, as withdrawal of jurisdiction is not provided in the Rome Statute. Thirdly, and related to the last point on termination, the referrals have been interpreted as functionally limited to the situation of crisis that triggered the ICC jurisdiction. Thus, while the terms used by the SC in its referrals may (and have been) broad, the Court checks whether the crimes brought by the prosecutor are sufficiently linked to the situation that prompted the SC to use its Chapter VII. A resolution of the SC declaring that events after a certain date are not part of the original situation could be a persuasive evidence that the situation ended but not determinative of the issue. Fourthly, the SC can bar under Article 16 an investigation or prosecution for a renewable period of 12 months. Such power to suspend the Court's jurisdiction can also be exercised in situations referred by the SC under Article 13 (b). Indeed, the preambles of both resolutions 1593 and 1970 recall the SC power of deferral under Article 16. Fifthly, as mentioned, the Prosecutor reports to the SC on a six-month basis on actions taken pursuant to the referral. While the referring resolutions simply 'invite' the Prosecutor to do so, the Court undertook in the Negotiated Relationship Agreement between the ICC and the UN to keep the SC informed of its actions related to a SC referral.[57] Such commitment implies that the SC keeps an eye on the actions of the ICC. However, given that the ICC is a judicial institution, the SC must not be allowed to influence its day to day business.[58]

The main distinction with other conferral of Chapter VII powers to subsidiary organs or entities distinct from the SC is that some of the control imposed on the ICC are not stipulated by the SC but by the Rome Statute and the

55 The same occurs where a non-party State lodges a declaration accepting the exercise of jurisdiction by the Court under Article 12(3). See Declaration of Ukraine accepting the Court jurisdiction issued on 17 April 2014 and 8 December 2015.

56 See Rod Rastan, 'Jurisdiction', 171.

57 Negotiated Relationship Agreement between the International Criminal Court and the United Nations, Article 17(1).

58 Tadic Interlocutory Appeal Decision, par. 15.

Court's practice. This does not imply however that the ICC exercise of jurisdiction under Article 13 (b) is not subject to a certain form of overall control. The initiation and termination of the ICC exercise of jurisdiction under Article 13 (b) are two crucial elements under the control of the SC.[59] As De Wet argues with respect to enforcement measures involving the use of force, where the SC refrains to set an end date to the measure, a functional limitation must be inferred from the purposes of the authorizing resolution [60] – this is duly done by the Court in cases of SC referrals.

That being said, 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."[61] Under Article 53(1), the prosecutor must consider issues of jurisdiction, admissibility and the interests of justice in making this determination. 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.[62] 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". In this case, the Pre-Trial Chamber must confirm the decision not to investigate or prosecute.[63] 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.[64] The SC can take a decision under Chapter VII sanctioning the concerned State or can decide to use Article 16 to suspend the investigation or prosecution for a renewable period of twelve months.[65] In other words, the only means the SC has to undermine the independence of the Court is to use Article 16 Rome Statute.

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59 De Wet, *Chapter VII Powers*, 268–269 (she posits these elements as a means to keep overall control over States carrying a military operation authorized by the SC).

60 Ibid, at 270.

61 ICC Statute, Art .53; see Ohlin, "Prosecutorial Discretion," 183, arguing that the prosecutor cannot take the decision not investigate or prosecute because that would be challenging the decision of the SC.

62 Rome Statute, Art. 53 (3) (a).

63 *Ibid*.

64 Rome Statute, Art. 87 (7).

65 Côté, "Independence and Impartiality," 407.

The SC cannot alter the 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.[66] 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.[67] However, such an amendment would result from the amendment procedure contemplated in the Rome Statute and not directly from the SC resolution.[68]

The SC could place the ICC States parties in a situation of conflicting obligations. 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.[69] States not abiding by a request to arrest and surrender to the ICC concerning an 'immune peacekeeper' should not incur responsibility towards the ICC, because of the priority the SC resolution enjoys *qua* Article 103 UN Charter.[70]

For the same reasons, the SC cannot request the ICC to prosecute the crimes of terrorism if this is not crimes within the jurisdiction of the Court. Similarly, the SC cannot order the Court to exercise jurisdiction over a situation that took place before 1 July 2002.[71] The obligation lying upon all UN Member Statutes to accept the ICC's exercise of jurisdiction in the referred situation 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. If a SC referral dares to push the ICC towards an inherent normative conflict it will be for the Court to

66 Sarooshi, "International Criminal Tribunals," 164, fn 64.

67 Condorelli and Villalpando, "Can the Security Council extend," 578, fn 19.

68 *Ibid*., at 577.

69 Sarooshi, "Peace and Justice," 98.

70 Note however that this view is not settled. See Report of the Study Group of the ILC on Fragmentation 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, "Article 103," 2130–2132; see Thouvenin, "Article 103," 2133–2147 for the various reasoning that might be applied to circumvent the pacta tertiis rule.

71 Condorelli and Villalpando, "Can the Security Council extend," 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, "Referral and Deferral," 635–636.

judge, in accordance with its Statute, whether it can exercise jurisdiction over a situation and ultimately a case.[72]

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,[73] the SC is indeed subject to incidental judicial review.[74] 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).

4 The 'Chapter VII Conception' and the Lawful Establishment of the Jurisdiction: An '*Amour Interdit*'?

Challenges to the legality of ad hoc tribunals have most often been based on the claim that they were not "established by law".[75] Most of these claims entailed that ad hoc tribunals were not independent and impartial.[76] 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.[77] According to the Appeals Chamber, in the context of international law this was the most appropriate definition of "established by law".[78] The international setting required this adaptation. To be established according to

72 Article 19 Rome Statute requires the Court to satisfy itself that it has jurisdiction in any case brought before it.

73 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.

74 See e.g. Al-Dulimi and Montanara Management Inc. v. Switzerland, ECtHR, Grand Chamber, Judgment, App. No. 5809/08, 21 June 2016; Tadic Interlocutory Appeal Decision. There have been many other courts that reviewed SC actions especially in regards to the target sanctions. See e.g. T-315/01 Kadi [2005] ECR II-3649 (CFI Kadi); T-306/01 Yusuf [2005] ECR II-3533 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, see Alvarez, "Tadic Revisited," 291; Nikolova and Ventura, "Special Tribunal for Lebanon Declines to Review," 615.

75 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."

76 See e.g. Prosecutor v. Kanyabashi, Case No. ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction (June 18, 1997).

77 Tadic Interlocutory Appeal Decision, par. 45.

78 Tadic Interlocutory Appeal Decision, par. 27.

the rule of law, 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."[79] This test has been repeated in many other international fora.[80]

Thus, when assessing the lawfulness of the establishment of an international criminal jurisdiction and whether it was in accordance with the rule of law, it must be verified whether (1) it was established in accordance with the procedures available in international law;[81] and, (2) it provides for all the necessary guarantees of fair trial rights. The impartiality and independence of the tribunal or court are factors necessary to ensure compliance with fair trial rights.

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.[82] 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."[83] 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.[84] 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

79 Tadic Interlocutory Appeal Decision, par. 27.

80 E.g. Prosecutor v. Ayyash et al., Case No. STL-11-01, Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal, (Jul. 27, 2012) par. 66–75; Prosecutor v. Norman et al., Case No. SCSL-2004-14-PT, SCSL-2004-1S-PT, and SCSL-2004-16-PT, Decision on Constitutionality and Lack of Jurisdiction (Mar. 13, 2004), par. 55; Prosecutor v. Kanyabashi, Case No. ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction, (Jun. 18, 1997); also in Naletilic v. Croatia, Court (Fourth Section), Decision Admissibility, ECtHR, Application No. 51891/99, 4 May 2000, the ECtHR declared that the surrender to ICTY satisfied the requirements of Article 6 ECHR because the tribunal was independent and impartial.

81 See Chapter 2, section 1.

82 ICCPR, Art. 14; ECHR, Art. 6; IACHR, Art.8.

83 Miguel Gonzalez del Rio v. Peru, Human Rights Committee, Communication No. 26311987, 28 October 1992, U.N. Doc. CCPRlCl461D1263/1987 (1992), par. 5.2.

84 Demicoli v. Malta, Court (Chamber), Judgment, ECtHR, Application No. 13057/87, 27 August 1991, par. 36–82; Findlay v. United Kingdom, Court (Chamber), Judgment, ECtHR, Application No. 22107/93, 25 February 1997, par. 70–80; Incal v. Turkey, Grand Chamber, Judgment, ECtHR, Application No.22678/93, 09 June 1998, par. 65–74.

be independent from the executive but also from the legislature.[85] 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 ECtHR and the Inter-American Court of Human Rights 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.[86]

The ICC has a bench of eighteen judges who are nationals of States party to the Rome Statute. The judges are elected by the Assembly of States Parties for terms of nine years.[87] They may not stand for re-election.[88] 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 SC 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.[89] They shall have established competence in criminal law and procedure or in in relevant

85 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, ECtHR, Application No. 13057/87, 27 August 1991, par. 40 et seq.

86 Incal v. Turkey, Grand Chamber, Judgment, ECtHR, Application No.22678/93, 09 June 1998, par. 65; see also Findlay v. United Kingdom, Court (Chamber), Judgment, ECtHR, 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, ECtHR, Application No. 8848/80, 23 November 1985, par. 37 et seq.; Assanidze v. Georgia, Grand Chamber, Judgment, ECtHR, Application No. 71503/01, 08 April 2004, par. 182–1844; Obermeier v. Austria, Court (Chamber), Judgment, ECtHR, Application No. 11761/85, 28 June 1990, par. 69 et seq.; Beaumartin v. France, Court (Chamber), Judgment, ECtHR, Application No. 15287/89, 24 November 1994, par. 34 et seq..

87 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.

88 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.

89 Rome Statute, Art. 36 (3).

areas of international law such as international humanitarian law and the law of human rights.[90] Accordingly, the administration of the ICC may be considered sufficiently independent.

The requirement of impartiality is often described as the "absence of prejudice or bias".[91] 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."[92] Impartiality in the jurisprudence of the ECtHR is tested through two approaches: subjective and objective.[93] The objective approach uses the test of the reasonable person to ask whether the judge could be regarded as biased.[94] The subjective approach ascertains whether the judge is prejudiced or partial.[95]

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.[96] 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 ECtHR 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".[97]

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90 Rome 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.

91 E.g. Piersack v. Belgium, Court (Chamber), Judgment, ECtHR, Application No. 8692/79, 1 October 1982, par. 30.

92 Karttunen v. Finland, Human Rights Committee, Communication No. 387/1989, UN Doc. CCPR/C/46/D/387/1989 (1992), par. 7.2.

93 Incal v. Turkey, Grand Chamber, Judgment, ECtHR, 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?", Trechsel, *Criminal Proceedings*, 62.

94 Belilos v. Switzerland, Court (Plenary), Judgment, ECtHR, Application No. 10328/83, 29 April 1988, par. 6.

95 Piersack v. Belgium, Court (Chamber), Judgment, ECtHR, Application No. 8692/79, 01 October 1982, par. 30.

96 Findlay v. United Kingdom, Court (Chamber), Judgment, ECtHR, Application No. 22107/93, 25 February 1997, par. 73.

97 Incal v. Turkey, par. 71.

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.[98] Judges from members of the SC that are States party to the Rome Statute may sit on a case arising from a situation referred to the Court by the SC. However, 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.[99] 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 chamber 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 be greatly affected.[100] For instance, Ohlin claims that when the SC 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 SC already decided so by invoking its special power to restore international peace and security.[101] Thus, the Court becomes a "security court", activated according to the permanent members of the SC wishes.

The power of the SC 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 SC 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

98 Rome Statute, Art. 36 (8).

99 Rome Statute, art. 34 (b).

100 Ohlin, "Prosecutorial Discretion," 189–209; Fletcher and Ohlin, "Two Courts in One?," 428.

101 Ohlin, "Prosecutorial Discretion,"189; the prosecutor is to take this element in consideration according to Article 53 (1) (c) Rome Statute.

> 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.[102]

Though the argument that the SC was not empowered by the Charter to trigger situations was quickly dismissed by the jurisprudence of the ad hoc tribunals, the other criticisms remain.[103] The strategic interests of the permanent members of the SC create the potential for a specific side of a situation being referred under Article 13 (b).[104] 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.[105]

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 members and members of his regime, thus pointing out that these were suspects who committed the alleged crimes against humanity raised in the preamble.[106] 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, seven years after the referral only one arrest warrant pertains to crime committed by an individual who is not from Gaddafi's inner circle.[107] 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.

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102 Williams and Schabas, "Article 13," p. 568; *Ad hoc* Committee Report, par. 121; also Preparatory Committee 1996 Report, Vol. I, par. 130–132.

103 Tadic Interlocutory Appeal Decision; Prosecutor v. Kanyabashi, Case No. ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction (Jun. 18, 1997).

104 Tiemessen, "Politics of Prosecutions," 444 (2014); See Cryer, "Sudan, Resolution 1593, and International Criminal Justice."

105 See General Comment on Article 14, H.R. Comm. 43rd Sess., Supp. No. 40, U.N. Doc. A/43/40 (1988), par. 4.

106 SC Res. 1970, par. 15, 17.

107 See Prosecutor v Al-Werfalli, Case No. ICC-01/11-01/17, Warrant of Arrest (Aug. 15, 2017).

Conversely, independence constrained by the highly political context in which the Court operates is something every international criminal tribunal has to deal with.[108] However, 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.[109] Indeed, 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. The Prosecutor of the ICTY certainly considered that crimes allegedly committed by NATO in Serbia could fall within its jurisdiction.[110] While the SC could have, under Chapter VII, reacted and changed the Statute of the ICTY to exempt NATO officials from the tribunal's jurisdiction,[111] it is not clear whether under such conditions the ICTY would have still qualified as a sufficiently independent judicial institution.[112]

As seen above, a single crime may prompt the SC to trigger the referral of a 'situation' to the ICC.[113] 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.[114] Consequently, if the ICC becomes a 'security court' bound by the SC's command it may fail to abide by the requirement of independence and impartiality. Furthermore, 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.[115] Louise Arbour, the former Prosecutor of the ICTY, observed that the "greatest threat to the legitimacy of the [International Criminal] Court

108 See Shany, *Effectiveness*, 109-115; Côté, "Independence and Impartiality," 407; see also Prosecutor v. Delalic et al., Case No. IT-96-21-A, Judgment (Feb. 20, 2001), par. 602.

109 Still see Cryer, *Prosecuting International Crimes*.

110 See Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia.

111 Sarooshi, Collective Security, 103.

112 *Tadic Interlocutory Appeal Decision*, par. 15; 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; UN Doc. S/l995/134, par. 8; See Sarooshi, *Collective Security*, 147, 150–4.

113 See Condorelli and Villalpando, "Referral and Deferral," 632–633.

114 Moreover, this interference would raise a question as to whether the other accused are equal before the law. In Prosecutor v. Delalic et al., Case No. IT-96-21-A, Judgment (Feb. 20, 2001), par. 611.

115 Cryer, Sudan, "Resolution 1593, and International Criminal Justice," at 217.

would be the credible suggestion of political manipulation of the Office of the Prosecutor, or of the Court itself".[116] 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.

Conclusion

If the Rome Statute had been silent on the question of SC referrals to the ICC, the SC could not have referred situations to the ICC, even if international peace and security demanded so. However, this would not have displaced the SC's power to establish ad hoc tribunals. Indeed, since the adoption of the Rome Statute the SC has taken actions under Chapter VII leading to the establishment of the SCSL and the Special Tribunal for Lebanon.[117] Both of these 'UN tribunals' deal with matters that are not within the jurisdiction of the ICC. The jurisdiction of the SCSL was over war crimes, crimes against humanity and certain crimes under national law committed in the territory of Sierra Leone since 30 November 1996.[118] 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.[119] 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 one is because the crimes concerned did not fall within the jurisdiction ratione *temporis* or *materiae* of the Court. The SC did not, and could not, modify the ICC's jurisdiction.

116 Arbour, "Independent and Effective Prosecutor," 213.

117 See SC Res. 1315 of 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 (Jan. 16, 2002); see also Decision on Taylor Immunity, par. 38; see also Prosecutor v. Ayyash et al., STL-11-01, 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 (Jul. 27, 2012).

118 Special Court for Sierra Leone Statute, Art. 1, 2, 3, 4, 5.

119 Special Tribunal for Lebanon Statute, Art. 1, 2, 3.

In this chapter the question of whether the Statute creates or restricts the power of the SC in its relationship with the ICC has been explored. This question arose due to the conclusion in the previous chapters 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 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 act that amounted to the crime of aggression but occurred before the amendment to the Rome Statute entered into force? We 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, 15*ter*, 16, 19, 53 and 87 (7) 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*.

Conclusion

This book started with a fundamental question: Is the Rome Statute a universal criminal code? Neither the Statute nor the Court itself (at least in its early years) 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. Is a situation triggered by the SC under Article 13 (b) bringing into force the whole Rome Statute or only the parts established under customary international law? It was indeed one of our purposes to address the disagreement over the interpretation and application of the Rome Statute in situations triggered under Article 13 (b). At the heart of this disagreement was the question of whether Article 13 (b) is premised upon a theory of 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. Depending on the approach taken, 'universal jurisdiction' or 'Chapter VII', the exercise of prescriptive and adjudicative jurisdiction by the ICC over a non-party State came with a different normative content, hierarchy and interaction with other norms of international law. The ultimate goal of this book was to examine what a SC referral is, what the legal effects of a SC referral are and finally what a SC referral should be.

The concept which formed the basis of our inquiry is Article 13 (b). An Article 13 (b) referral symbolizes 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. Indeed, an Article 13 (b) referral does not only activate the ICC's jurisdiction to adjudicate crimes without territorial and active nationality nexus but also actualizes the prescription of the many Rome Statute's provisions that are not established under customary international law (e.g. new crimes, irrelevance of official capacity).

It has been shown 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. The SC can, when acting under Chapter VII, refer a situation to a Court, even if the latter is not its subordinate organ. The SC can also prescribe new crimes under Article 41 of the UN Charter. But both of these enforcement measures are inherently limited by the UN Charter. In particular, a SC referral must be a case related reaction, with the aim of achieving concrete effects, and must be temporary. If the SC refers a general and abstract situation, thus going beyond the

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substantive limits pending on the SC exercise of quasi-legislative measures, the ICC should not adjudicate the Rome Statute's norms that are beyond customary international law.

The 'universal jurisdiction conception' called 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. Such *aggiornamento* has however not happened. The 'universal jurisdiction conception' of the treaty-based jurisdiction of the ICC is exorbitant. Despite the claims that the Rome Statute is an act of the international community as a whole, and the crimes defined therein are grave enough not to be left within the exclusive jurisdiction of States, the exercise of universal prescriptive jurisdiction leads to a genuine and irresolvable conflict with the sovereignty of States not party to the Rome Statute. Furthermore, given that only crimes against customary international law are subject to universal adjudicative jurisdiction, the application of a Rome Statute that goes beyond what customary international law prescribes to territory and nationals of non-party States is also in conflict with the sovereignty of these States. Accordingly, we came to the result that a referral under Article 13 (b) should be understood through the 'Chapter VII conception'.

Nonetheless, it was shown that some of Court's decisions illustrate the 'universal jurisdiction conception'. The non-application of the principle of legality with regards to situations retroactively referred under Article 13 (b) of the Rome Statute is troublesome in this regard. The Rome Statute only limits the ICC temporal jurisdiction to conduct that occurred as of its entry into force, that is, 1 July 2002. Hence, a retroactive Article 13 (b) referral poses a problem with respect to individuals that are prosecuted before the ICC for conduct that occurred while the Rome Statute was not formally applicable to such conduct. Yet, the Rome Statute's drafters deeply intended to respect the principle of legality. This is evidenced by the details paid to define the crimes within the jurisdiction of the Court, the articles on the applicable law, on *nullum crimen sine lege*, and on non-retroactivity *ratione personae*. Nonetheless, 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.

The Rome Statute's provisions, including Article 22 on *nullum crimen sine lege* and Article 24 on non-retroactivity *ratione personae*, do not comprehensively address this problem. Accordingly, it was posited that we must either adopt 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. The Court when it issued arrest warrants against suspects in the situation in Darfur and Libya for crimes committed prior to the respective referral but

using a mode of responsibility that is acknowledged as not established under customary international law was inferring that the Statute was applicable to all since its entry into force. Thus, adopting the 'universal jurisdiction conception'.

From a 'Chapter VII conception' perspective, it must be presumed that the retroactive jurisdiction of the Court with respect to this specific crime can be challenged (and declined) under the principle of legality. To exercise jurisdiction over such crimes *ex post facto* (even if the referral allows so) would indeed constitute a violation of the ban on retroactive application of criminal law, as recognized in all major human rights instruments. The ICC must not only abide by its Statute but must also adhere to international law, including human rights law. There are various ways to interpret the principle of legality but it is the opinion of this author that the correct way to ensure respect for it is to apply the strictest standard. 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 applicable 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. With regards to immunities, this is provided in Article 98 of the Rome Statute. It has been shown that it is possible to resolve the normative conflict which arise between the ICC exercise of jurisdiction over a non-party State official and the immunity to which he/she is entitled under customary international law. To do so under the 'universal jurisdiction conception', Article 27 (2) needs to reflect customary international law. However, despite the ICJ *Arrest Warrant Case`s obiter dictum*, the customary status of the Rome Statute provision on immunity *ratione personae* is highly contested. Furthermore, the extension of the alleged customary exception to immunity to States enforcing an ICC arrest warrant has been completely discarded by the international community of States, including States party to the Rome Statute.

The 'Chapter VII conception' considers that Article 27 (2) 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 however 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. The act of referring a situation under Chapter VII of the UN Charter to a Court governed by its own Statute certainly entails, pursuant to

Article 25 UN Charter, that all UN Member States accept that the ICC is conferred jurisdiction over any individual that has committed a crime within the context of the referred situation. Such jurisdiction extends to those who bear the greatest responsibility, even if some suspects are normally protected by the customary rules on the immunities of State officials from foreign criminal jurisdiction. Furthermore, the obligation to cooperate fully with the Court enshrined in the same (or a follow-up) resolution of the SC gives horizontal effects to the immunity's removal. This implies that in a situation triggered by the SC not all arrest warrants from the Court will be enforceable without a waiver of immunity from the concerned State; only those from a State that has an obligation to cooperate fully with the Court will be.

The effects of a SC resolution adopted under Chapter VII are indeed extraordinary. This however does not mean that the SC can do whatever it wants with the ICC. Incidentally, this book touched upon the legitimacy of the ICC when it exercises jurisdiction under Article 13 (b). Legitimacy was understood 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'.[1] The legal legitimacy of the 'universal jurisdiction conception' was seriously called into question on account of the fact that the legal reasoning used to 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.

In this light, it is interesting to refer to the Independent International Commission on Kosovo which famously concluded that "the NATO military intervention was illegal but legitimate."[2] Conversely, SC Resolution 748 imposing sanctions on Libya (regarding the *Lockerbie* case) gave rise to a different conundrum.[3] While the ICJ deemed that SC Resolution 748 was *prima facie* legal,[4] 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

1 Shany, *Effectiveness*, 139; *Whalan, Power, Legitimacy, and Effectiveness*, 66.

2 Independent International Commission on Kosovo, *The Kosovo Report*, 4.

3 SC Res. 748 of 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.

4 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.

regime "violate[s] Article 27 paragraph 3, Article 33 and Article 36 paragraph 3 of the United Nations Charter."[5] 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. The 'universal jurisdiction conception' was rejected in this book 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.[6] 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. The exemption of certain nationals from the Court's jurisdiction when acting under Article 13 (b) as well is not in conformity with the Rome Statute.

But, legality is not the only factor that affects legitimacy. The unfair selectivity of the SC also raises issues of legitimacy.[7] 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 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.[8]

Bearing in mind the various attempts made by the SC to modify the Rome Statute through referrals or deferrals or even resolutions intended for another purpose, the SC is certainly what causes the greatest legitimacy issues to the ICC. It might furthermore be questioned whether the SC, thanks to its Chapter VII powers, governs the Court. While the ICC needs the Chapter VII powers of the SC to exercise jurisdiction over a situation that strictly concerns the territory and nationals of a non-party State, it remains governed by its founding instrument, the Rome Statute. Thus, on the one hand, it is argued that, if Article 13 (b) did not exist, the SC could not refer a situation to the Court; on the other hand, however, the SC cannot refer a situation if it does not fit within

5 See CM/Res.1566 (LXI) (23–27 January 1995); AHG/Dec.127 (XXXIV) (8–10 June 1998); See Tzanakopoulos, *Disobeying*, 187.

6 Ibid.

7 Cryer, *Prosecuting International Crimes,* 197–199.

8 See e.g. Statement Chad in Security Council, 7285th meeting, Security Council Working Methods, 23 October 2014, UN doc. S/PV.7285

the jurisdictional parameter of the Court. A SC referral challenging the limits of the UN Charter or the Rome Statute can indeed be subjected to incidental judicial review. Furthermore, an ICC which would be entirely subservient to the SC would fail to be in accordance with the rule of law.

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 unbound by law.

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