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.

 | DOI:10.1163/9789004342217_004

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

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

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.