Revisiting the International Criminal Law Regime established by the Rome Statute from the perspective of State Sovereignty

A thesis submitted to the University of Manchester for the degree of Doctor of Philosophy in the Faculty of Humanities

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School of Law
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- International Criminal Court (Consequential Amendments) Act 2002 (Canada)

Word Count (main text including footnotes): 78,118
Abstract

Revisiting the International Criminal Law Regime Established by the Rome Statute from the Perspective of State Sovereignty

This thesis looks at the dynamics between the concept of State sovereignty and the new international criminal law regime established by the Rome Statute. The principle of State sovereignty has served as a foundation of the international legal order for centuries because the State is traditionally considered to be the subject as well as the maker of international law. It is, however, a very contentious principle because many attempts have been made to give it a specific content, but this content has to be redefined in the light of modern trends and developments at the international level, which is then reflected at the national level. The concept has therefore always existed within an interstate paradigm, whereby States interact, cooperate and bargain with one another to serve and safeguard their own interests.

However, the human rights movement has changed this state of affairs, and the creation of a permanent international criminal court represents a culmination of this movement. To understand whether and to what extent the content of State sovereignty is changing, the practice of criminal jurisdiction is assessed, both at the national level by the State and at the international level by the ICC. This assessment reveals two important issues. First of all, the international legal regime will be ineffective within the territorial boundaries of the State because, to some extent, State sovereignty remains somehow unchallenged in the context of international crimes, allowing States to retain the ability to grant amnesties or, in the context of State parties to the Rome Statute, to disregard the duty to ensure that perpetrators of international crimes do not go unpunished. Essentially, the balancing exercise concerning the codification of the Statute gives a greater deference to the State. In relation to the exercise of jurisdiction by the ICC, the paradigm changes from horizontal, governing the relationship between equal sovereign States, to a vertical one, centred on the relationship between State parties and the Court. This shift has given rise to some issues regarding cooperation, especially when the rules that apply within the horizontal system do not appear to be reciprocated within the vertical system.

A better understanding of the true content of sovereignty can only be achieved through a clearer and more open evaluation concerning the place of State sovereignty in the intersection between the horizontal and vertical paradigms. A “renewed” understanding and content of sovereignty can lead to a more efficient surrender system in general. In addition, the lack of cooperation of member States in the arrest and surrender of President Al Bashir is indicative of the States’ reluctance to violate another stronghold of international law, namely the immunity of a current Head of State. Without some international judicial collaboration between the relevant international courts, mainly the ICJ and the ICC, regarding a proper interpretation of immunity, cooperation concerning arrest and surrender will not reflect the general aim of the new regime, that is the end of a culture of impunity.

The University of Manchester
Doctor of Philosophy
Patricia Hobbs
2012
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For everyone who exalts himself will be humbled, and he who humbles himself will be exalted
(Luke 14:11)
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<td>AMICC</td>
<td>The American non-Governmental Organisation Coalition for the International Criminal Court</td>
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<td>ASPA</td>
<td>American Servicemembers’ Protection Agreement</td>
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<td>BIA</td>
<td>Bilateral Immunity Agreement</td>
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<td>CAT</td>
<td>Convention Against Torture</td>
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<td>CFI</td>
<td>Court of First Instance</td>
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<td>ECCC</td>
<td>Extraordinary Chambers in the Courts of Cambodia</td>
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<td>European Court of Human Rights</td>
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<td>GA</td>
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<td>MOFA</td>
<td>Ministry of Foreign Affairs for Japan</td>
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<td>MoU</td>
<td>Memorandum of Understanding</td>
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<td>NGO</td>
<td>Non-governmental organisation</td>
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<td>Acronym</td>
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<tr>
<td>PICT</td>
<td>Project on International Courts and Tribunals</td>
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<td>WTO</td>
<td>World Trade Organisation</td>
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Chapter 1

Introduction

1.1 Background and Issues

Following the Peace of Westphalia in 1648 the entity of the State began to emerge, along with its main attribute, the principle of sovereignty. At its inception, the State was mainly a European phenomenon and it represented a departure from the influence of external dominant powers, namely the papacy in this particular case. This led to the development of a perception that the State, through the principle of sovereignty, gains a complete ability to regulate and manage itself, as well as the lives of its citizens and anybody else in its territory. Nevertheless, this newly gained autonomy did come with some specifications, initially contained in the Treaty of Westphalia itself. Article 1 declared that the newly founded States shall maintain a true, perpetual and sincere peace with one another, endeavouring “to procure the Benefit, Honour and Advantage of the other”\(^1\). This is much more than just a simple declaration of peace and an end to hostilities. It is the birth of the international community of States, destined to live side by side and expected to cooperate with one another to further their respective interests and objectives.

This postulation was just part of an ongoing process of the development of the sovereignty principle. As sovereignty was never clearly defined, the concept was left open to different interpretations, leading to the formulation of several misconceptions about the extent of rights and duties of States within the international community. The Peace of Westphalia never clarified the extent of the relationship between the sovereign and its people. Rights and duties of the sovereign State were never spelled out, opening up a potential debate regarding the inexhaustible powers of the sovereign. Moreover, it would be naive to claim that the concept of sovereignty emerged with the Peace of Westphalia. The treaty does not mention anything directly regarding the principle of sovereignty and it does not create a political system of sovereign States \textit{ex nihilo}, as

\(^1\) Article I, Treaty of Westphalia, \textit{Peace Treaty between the Holy Roman Emperor and the King of France and their Respective Allies}, 24 October 1648.
components of this political arrangement had been developing for centuries. Nevertheless, the Peace of Westphalia clarified one important factor, albeit in simple terms: the existence of a particular relationship between the sovereign (or the sovereign State) and its territory, a relationship that established a blueprint for the modern political State. As Krasner put it, the model created by the Peace of Westphalia is “an institutional arrangement for organizing political life that is based on two principles: territoriality and the exclusion of external actors from domestic authority structures”.

A correlation of this relationship is the traditional belief of the existence of an absolute prohibition of any external interference on internal governance, notwithstanding the fact that the source and character of this earliest interference was of a religious kind only. There is also the added dimension brought to this discussion by the development of the human rights ideology, which has led to a transformation of international law whereby sovereignty is no longer the one supreme grundnorm but in fact it may have to compete with jus cogens norms.

The international community of States is not the sum of completely independent entities that occasionally develop the need to interact with one another. The modern day international community is highly interconnected, either through trade, monetary lending, humanitarian aid and travel. There is, in other words, a constant flow of diplomatic, political and economic bargaining to ensure and maintain the States’ best interests, something that is achieved through close collaboration with other members of the international community, even if there is disagreement with their internal policies.

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2 See A.S. Hershey, 'International Law since the Peace of Westphalia', American Journal of International Law, 6 (1912), 30-69. See also Philpott, who States that “The rise of State sovereignty at Westphalia, the robustness of State sovereignty since Westphalia, and the fall of State sovereignty today are all overrated”, in D. Philpott, 'Westphalia, Authority and International Society', Political Studies, 47 (1999), 566-89 at 566. Osiander, in very similar terms, refers to the Westphalia narrative as a myth; see A. Osiander, 'Sovereignty, International Relations, and the Westphalian Myth', International Organization, 55 (2001), 251-87. Cutler adds to this discussion by stating that whatever assumptions were formed at Westphalia, these same assumptions cannot explain the modern arrangements and practice; A. Cutler, 'Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy', Review of International Studies, 27 (2001), 133-50.


4 The adherence to this rule has prompted some academics to point out that it is in fact the weaker States that benefit mostly from it as it imposes a restriction on the actions of more powerful States; see, for example, R.H. Jackson, Quasi-States: Sovereignty, International Relations, and the Third World, ed. S. Smith (Cambridge Studies in International Relations, 12; Cambridge: Cambridge University Press, 1990).

is also particularly interesting that even if the disagreement concerns human rights records and violations, States will still enter into agreements, although they may also attempt to influence and shape the internal sovereignty of other States through a human rights discourse. This state of affairs is suggestive of a degree of indirect interference that has been present within the international community for decades. Moreover, due to the surge of mobile internet technology in the past decade, a so-called “rogue” State cannot hide evidence of human rights violations or atrocities within its territory. The idea, therefore, that outsiders should have no say or opinion in the way another State is conducting its affairs is contested. The human right ideology has become a strong and permanent feature of international law since knowledge of the atrocities of the Second World War became widespread. However, that was just the start of the realization that States cannot and should not be able to hide behind the veil of their alleged autonomy to enable them to conduct their business in a way that has become not just intolerable in the eyes of many in the international community, but also criminal.

An apparent criminal conduct of leaders and State officials has led to the recognition that certain actions and policies that take place within the territory of a State can lead to the possibility of finding the individuals responsible to have crossed the line between what is official and what is in fact illegal. The novel experience of the Nuremberg trials reflects this recognition, namely that State officials and other representatives of the State are not entitled to abuse their position of power in the form of acts that cause harm to people. Despite the often versed accusation that the Nuremberg tribunals reflected victors’ justice, and therefore not completely free from the application of impartiality and due process, they did in fact pave the way to the formation of international criminal law, first in the creation of the ad hoc tribunals of the former Yugoslavia and Rwanda, and then the ICC.

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6 For a non-scholarly account of the trials containing some of the transcripts, see J. Owen, Nuremberg: Evil on Trial (London: Headline, 2007). Heller, on the other hand, presents a thorough scholarly account of the trials as well as their impact on international criminal law; see K.J. Heller, The Nuremberg Military Tribunals and the Origins of International Criminal Law (Oxford: OUP, 2011).

7 Despite the often negative claims, Schwarzenberger believes that the tribunals actually represented the expression of international law existing at the time, and as confirmed in the Nuremberg Charter itself; see G. Schwarzenberger, 'The Judgment of Nuremberg', Tulane Law Journal, 21 (1946-1947), 329-61.

The Rome Statute, which for the first time establishes a permanent international criminal court, represents a leap forward in the entrenchment of this branch of international law. The rules and principles of international criminal law are becoming more embedded and refined through repeated interpretation and application. It is acclaimed to be a major piece of international legislation because of its perceived effect to put an end to a culture of impunity for serious human rights atrocities, a state of affairs that has been attributed to the use and abuse of the sovereignty principle to shield perpetrators from prosecutions.

1.2 Aims and objectives

The central aim of this thesis is to test the validity of the assertion that sovereignty is in decline due to the establishment of a permanent international criminal court by means of the Rome Statute. For the first time in the history of humankind, a permanent international criminal court is established to deal with perpetrators of serious human rights violations if the same Court finds that the State is unable or unwilling to deal effectively with these crimes. The temporary removal or transfer of criminal jurisdiction from a State has often been said to violate one of the most traditional functions of State sovereignty. The reason behind this claim is founded on the social contract theory, whereby citizens choose to obey the laws of the land in exchange for just and fair governance. As Rawls puts it, “...the existence of effective penal machinery serves as men’s security to one another”.

Thus, the principal aim of the thesis is to analyse the extent of any changes affecting the principle of sovereignty, due to the establishment of a permanent international criminal court. The significance of these changes are twofold: first of all, they will confirm the international community resolve to deal with impunity; secondly, they will help to determine further alterations within the actual content and meaning to be attributed to the principle of sovereignty. In other words, the thesis looks to establish whether the new regime is having a significant positive effect in the way States behave, particularly

10 See T. Hobbes, Leviathan (1651), Chapters XIII to XVIII.
within their territorial boundaries. One particular way in which it is intended to carry out this investigation is to divide the discussion on the sovereignty principle between its external (international) and internal (domestic) components.

The proposition tested here is that, on the international level, sovereignty has to contend with other equally important rules of international law, especially international human rights law, and therefore there may be less space for manoeuvre. In other words, despite its claim to sovereignty, the sovereign State may be subject to significant constraints imposed by the international community, and by the ongoing development of international law itself, as a response to the needs and wishes of the same community. It does not mean, however, that the Rome Statute was a sovereign-limiting tool imposed on unwilling or unsuspected sovereigns. Its adoption was carried out in a completely voluntary manner, just like any other multilateral international treaty. In the context of domestic sovereignty, on the other hand, the thesis will aim to demonstrate that, in fact, internal sovereignty is still quite strong because the Rome Statute does not go beyond the minimum requirements to even oblige the State to adopt straightforward domestic legislation to implement the Statute at the domestic level.

1.3 Methodology

This thesis aims to investigate the effects of the new international criminal law regime on the principle of sovereignty through an analysis and interpretation of States’ behaviours and patterns in the light of negotiations, implementation and compliance to the Rome Statute. It is a library-based research study, and aims to construct an argument through the analysis and interpretation of events and theoretical principles. Case studies and examples from different countries will be selected and used to further reveal the challenges of aligning the sovereign State’s practice to the international criminal law idealism.

The underlying principle that runs throughout the length of the thesis is the sovereignty principle. Chapter Two of the thesis defines the framework against which the rest of the thesis should be assessed and evaluated. This framework challenges the interpretation and meaning attributed to sovereignty; it does so by evaluating the way the Rome Statute regime is shaping and affecting the State’s ability to exercise its criminal
jurisdiction mandate, both within its territorial boundaries and in relation to the ICC. In addition, the framework presented in Chapter Two illustrates the tension between sovereignty and international criminal law, and it will be used as a baseline to assess the real difficulties faced by States in the implementation of the plan to end impunity. In essence, this thesis is a discursive analysis of the debate on sovereignty in the context of international criminal law. How can these two entities co-exist in an effective manner and can the latter affect the content and meaning of the former? The semiotic analysis of the concept of sovereignty that takes place in Chapter Two reveals the need to inject this principle with a more contemporary focus that takes into consideration the aim of international criminal law. However, both entities are fuelled by power-related contents, one constructed by a social process (sovereignty) and the other driven by an idealistic mission (ICL).

1.4 Knowledge gap

Despite the existence of a great volume of literature in international criminal law, international public law, sovereignty and human rights, a clear gap exists with regard to the direct and contemporary effect that that the new regime introduced by the Rome Statute is having on the principle of sovereignty. There is no monograph which critically evaluates the impact of Rome Statute on the concept of sovereignty, although much has been written on the principle of complementarity. According to this principle the new ICC will complement the criminal jurisdiction of the State, reversing the jurisdictional role established by the ad hoc criminal tribunals of the former Yugoslavia and Rwanda. However, these writings tend to focus on more practical issues faced by States, either in general terms or when specific States implement the

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Rome Statute into domestic law, and whether the implementation method is sufficient to keep the ICC out of any criminal proceedings that may concern that State.\textsuperscript{14}

This thesis approaches the subject in a different way. Having identified the gap in the literature, it aims to evaluate how the regime is shaping the traditional principle of sovereignty in view of two contrasting claims: the first claim concerns the erosion of the power of the principle of sovereignty in light of the establishment of a new permanent ICC, entitled to claw away the traditional exercise of criminal jurisdiction from the State if the State is not able or willing to exercise this traditional role effectively in the ambit of international crimes.\textsuperscript{15}

The second claim concerns the potential ineffectiveness of the Court and the mechanisms established by the Statute, simply because of their inability to challenge and compete with the still powerful principle of State sovereignty.\textsuperscript{16} Ultimately, the thesis aims to address and confront the current perception of the principle of sovereignty, through the eyes of the Rome Statute. It aims to point towards a more credible framework for the sovereignty principle, one that accommodates a human rights perspective within it, and therefore acknowledges a bundle of rights and duties that are incorporated within this principle.


\textsuperscript{15} For example, Maogoto notes that “sovereignty has been chipped away, both from the outside and from within, as the concept of an international penal process has been increasingly recognised as trumping the right of States to hold sole rights in the exercise of certain prerogatives”, J. N. Maogoto, State Sovereignty and International Criminal Law: Versailles to Rome (International & Comparative Law Series; New York: Transnational Publishers, 2003), 284. Note also that the claim to an erosion of the principle of sovereignty does not come solely from an international criminal law perspective, but from a political perspective, with a particular emphasis in the globalisation phenomenon and cooperation; see J.A. Camilleri and J. Falk, The End of Sovereignty? The Politics of a Shrinking and Fragmenting World (Aldershot: Edward Elgar, 1992), A. Chayes and A.H. Chayes, The New Sovereignty: Compliance with International Regulatory Agreements (Cambridge (MA): Harvard University Press, 1998).

1.5 Thesis outline

Chapter 2 aims to put forward a foundational analysis of the relationship between the principle of sovereignty and the new international criminal law regime. This analysis will be based on the use of language, not in the strict sense of linguistic analysis but from the perspective of ‘meaning’. In other words, it is the meaning attributed to words that will influence our understanding of certain concepts and phenomena. The reason for this analysis is to reveal the acute differences that exist between these two entities, the former pointing towards a realism that is indicative still of a high level of protection towards its self-interested autonomous existence; the latter, on the other hand, is characterised by a utopian nature, giving it an ethical and moral identity. Essentially this chapter aims to compare and contrast the two entities to demonstrate, in an introductory manner, the difficulties that may be encountered in a discourse about a contemporary understanding of sovereignty.

Chapter 3 develops the idea further with regard to this relationship, paying particular attention to the way criminal jurisdiction is being exercised by the State, including mechanisms that could contribute to a culture of impunity, such as amnesties and truth commissions. Essentially, the chapter evaluates State sovereignty within the interstate system, and assesses the impact that the new international criminal law regime has within the territorial boundaries of the State.

In order to evaluate the effectiveness of the ICC jurisdiction, Chapter 4 investigates the surrender mechanism in the light of the vertical relationship between the ICC and the member States. The effectiveness of the ICC will depend on States’ cooperation with the Court, and the emphasis in this chapter is on the surrender of individuals to the Court. Given the lack of an international police force, the Court relies mainly on State parties to facilitate this process whenever the ICC deals with the necessary investigations and prosecution, on the basis of the complementarity principle. The chapter takes a particular interest on the conflict between international law and the States’ obligation to cooperate with the arrest and surrender of an incumbent Head of State. It also examines some of the practice of the ad hoc tribunals in order to evaluate the most effective way forward for the ICC.
Chapter 5, the concluding chapter, brings the main strands of the previous discussions together and makes some observations with regard to the way States perceive the Rome Statute. The notion of complementarity is evaluated again, especially in the light of current developments in the Court’s practice and remarks made by members of the judiciary and academic world.
Chapter 2

The meaning and power of language in the analysis of the relationship between sovereignty and the Rome Statute regime

2.1 Introduction

The aim of this chapter is to identify some fundamental and distinctive characteristics that play a part in evaluating the interaction between the sovereignty principle and the new international criminal law regime. The analysis will help in the evaluation of the ease or difficulty for the new ICL regime to be effectively integrated within State sovereignty. In other words, the concept of State sovereignty should be malleable enough to be able to accommodate fundamental legal changes that affect not only the international community (of States) but also the international community of individuals. If the international community is serious about ending the culture of impunity that follows serious human rights and humanitarian law violations, it is expected that the new international criminal law regime will be effective enough to deal with the ever so powerful principle of sovereignty. Given that the new regime can only operate successfully through effective implementation of the Rome Statute into domestic law, and effective States’ cooperation with the ICC, this chapter will analyse some distinctive characteristics in the relationship between State sovereignty and international criminal law from a language perspective.

The aim is to evaluate the value given to words, and how these values have shaped society’s understanding and interpretation of these words and the concepts they refer to. The analyses of symbols, meaning and shared consciousness provide the background to the discussion on the language of international criminal law, with special reference to the nature of international law in general and to the idealism inherent to the international criminal law regime. This is followed by an evaluation of sovereignty, its meaning and content, along with the developments surrounding the perceptions attached to this concept.
2.2 Language as a study of signs

2.2.1 Words, symbols and reality

Language is a powerful communication tool, not only because it can describe reality but also because it can create and shape reality, even if such linguistic reality fails to reflect the authenticity of a particular situation.\(^{17}\) This is particularly the case when the language used in a situation is given a specific meaning, but such meaning is dependent upon specific historical setting and social developments.\(^{18}\) Moreover, it has often been said that the language of law can be vague or indeterminate, and therefore open to a variety of interpretations.\(^{19}\) This is because language is not always clear. The meaning of words can be altered by the people who interpret them, and the people who interpret the words not always mean what they say.\(^{20}\)

The indeterminacy of language can be summed by Humpty Dumpty’s expression in *Alice in Wonderland*, where he reveals: “When I use a word, it means just what I want it to mean – neither more nor less.”\(^{21}\) The indeterminacy of Humpty Dumpty’s language may be indicative of a highly subjective and non-conformist science or tool that

\(^{17}\) See J. Hilla, ‘The Literary Effect of Sovereignty in International Law’, *Widener Law Review*, 14 (2008-2009), 77-147. The author here specifically refers to the development of sovereignty as a literary concept rather than a political one, thus reflecting Maurice Blanchot’s well known Statement: “[Words] may be imbued with emptiness – but this emptiness is their very meaning” (at 78). See also S. Beaulac, *The Power of Language in the Making of International Law* (Leiden: Brill, 2004). Beaulac further supports the argument regarding the powerful social effect of words by stating that “words like ‘sovereignty’ have their own meaning, which is not only a history of their changing meaning, their changing definition, but a history of the social effect of their changing meaning” (at 3).


\(^{19}\) The indeterminacy of language can be demonstrated by Wittgenstein’s paradox that ‘obeying the rule’ and ‘going against it’ would amount to an interpretation of the rule, although the term interpretation should be avoided and substitute with one expression of the rule (see L. Wittgenstein, *Philosophical Investigations*, trans. G.E.M. Anscombe (3rd edn.; Oxford: Basil Blackwell, 1976) at 201. The so-called ‘open texture’ concept, initially formulated by Waismann, was later adopted and slightly modified by Hart, who argued that rules should be applied in a way which requires judicial discretion. See L.A. Hart, *A Concept of Law* (Oxford University Press: Oxford, 1997) at 135.

\(^{20}\) The idea that it is not always possible to mean what we say – either because one does not want to enter into a specific commitment or because the language itself does not provide the right words – is referred by J.R. Searl as the principle of expressibility in *Speech Acts* (Cambridge University Press: Cambridge, 1980). According to Searl, this principle can be expressed as a formula by stating that “for any meaning X and any speaker S, whenever S means...X then it is possible that there is some expression E such that E is an exact expression of or formulation of X” (at 20). This is not to say, however, that the recipient of E understands it in the same way that X means it!

\(^{21}\) L. Carroll (C.L. Dodgson), *Through the Looking-Glass, and What Alice Found There* (London: Macmillan, 1872), at 124. Humpty Dumpty’s declaration is deemed to be utterly wrong according to Beaulac because, if there is indeed a return to a link between language and mind, then “language is the primary common denominator of signs and symbols for communication in society” (Beaulac, at 19); if language was so ‘unsettled and arbitrary’, then there would be no shared consciousness (at 20).
accompanies the meaning and interpretation of words. This would, in effect, make it quite difficult to identify or formulate a coherent theme about the way language is used. However, modern developments in linguistic studies point to a different usage of language\textsuperscript{22}, and it is this usage that will prove to be a valuable tool for the purpose of this thesis and for understanding the relationship between sovereignty and the new international criminal law regime established by the Rome Statute.

Locke originally identified the notion that words can be used as signposts for ideas so that concepts can be communicated from one person to another. In *Essay Concerning Human Understanding* he stated that there was another purpose behind providing *man* with the ability to speak and make sounds:

\ldots it was further necessary that he should be able to use these sounds as signs of internal conceptions; and to make them stand as marks for the ideas within his own mind, whereby they might be made known to others, and the thoughts of men's minds be conveyed from one to another.\textsuperscript{23}

However, Locke also recognised that words can reflect wrong or imperfect ideas because these ideas originate in the minds of men who perceive them to be the representation of correct ideas but, in fact, contribute to the transmission of imperfect ideas as those words are communicated from one to another, thus perpetuating the communication of the wrong idea:

Words, in their immediate signification, are the sensible signs of his ideas who uses them. The use men have of these marks being either to record their own thoughts, for the assistance of their own memory or, as it were, to bring out their ideas, and lay them before the view of others: words, in their primary or immediate signification, stand for nothing but the ideas in the mind of him that uses them, how imperfectly soever or carelessly those ideas are collected from the things which they are supposed to represent\textsuperscript{24}.

At the beginning of 20\textsuperscript{th} century a new linguistic discipline was established which would move away from the traditional models of investigations of language, in the forms of “grammar”, “philology” and “comparative philology”, to focus instead on the


\textsuperscript{23} J. Locke, *Essay Concerning Human Understanding* (ILT Digital Classics, 1995) at Book III, Chapter 1, para.2.

\textsuperscript{24} Ibid, Book III, Chapter 2, para.2.
use of language as a method of representation. Saussure was especially critical of the latter form of study, comparative philology, because this method of linguistic study never took into consideration any historical or contextual framework, and therefore failed to consider the “meaning of their comparisons or the significance of the relations that they discovered.”

Semiotics was originally a European phenomenon, founded by the Swiss linguist Ferdinand de Saussure and the American philosopher Charles Peirce developed this trend further. Although they differ slightly in their general approaches and models of semiotics, they essentially point to a new interpretative form of language analysis, which takes into consideration context and culture. It must be also be understood, therefore, that this is not just a discipline that applies to the study of language but it has a much wider scope and application, from psychology to anthropology and to media and culture studies. As Beaulac points out, semiotics helps us to identify and examine all the elements that are part of the communication system between people, notably described as “communication within human consciousnesses.” This is an elaboration of Saussure’s analysis of semiotics as communication based on “collective behaviour and convention.” It is therefore based on the shared understanding and the interpretation of a particular society at a particular time in history.

It is therefore plausible to develop this concept of human consciousnesses further by stating that certain significant events that occur within the international society may give rise to new signs and to a new language that is representative of these signs. This, in turn, will help us to understand and interpret the reality of specific developments of international law, relevant to the present study. When it comes to law and semiotics,

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26 Ibid.
28 It is not the purpose of this research to delve into the intricacies of semiotics and the differences between Saussure’s and Peirce’s models, sufficing to say that Saussure’s model was dyadic in nature, whereas Peirce’s model was triadic. This means that Saussure’s sign model comprised of two elements, the signified and the signifier; Peirce’s model, on the other hand, consisted of three elements: the representamen, an interpretant and the object, and is normally represented in a triangular form; it is this particular model that is discussed further in section 2.2.2 below.
30 Saussure, Course in General Linguistics, at 74.
there is no doubt that law can be seen as a symbol because the language used, especially in the context of international criminal law, encapsulates profound and contentious values, which can have a significant impact to our understanding of the process of law and how law relates to individuals and society in general. In other words, semiotics is an interpretative tool that can be used to look beyond any given word or concept and discover hidden meanings or new trends, either to make sense of reality or to find new meanings to the reality that is shaping before us. For example, by substituting the word ‘money’ for the word ‘language’, Hutton reconstructs Simmel’s quotation from the *Philosophy of Money*, with the following result:

There is no more striking symbol of the completely dynamic character of the world than that of *language*. The meaning of *language* lies in the fact that it will be addressed to someone. When *language* stands still, it is no longer *language* according to its specific value and significance. The fact that it occasionally exerts in a State of repose arises out of an anticipation of its further motion. *Language* is nothing but a vehicle for a movement in which everything else that is not in motion is completely extinguished.  

Hutton attempts to demonstrate that language is the “measure of all things”, capable of becoming a “still point of reference for other systems”, especially when other systems, for example politics, morality and public opinion, are constantly changing. Tiefenbrun explains this concept further in the context of evidentiary theory by describing how a witness uses information communicated to him/her:

When a witness perceives an event or hears an utterance, the witness develops a mind picture of that objective reality that is then relayed to a receiver (the jury) by means of the witness’ own language. Distortion of this objective reality can result from ambiguity, insincerity, erroneous memory, or faulty perception. The receiver of the information (the juror) must decode the message sent by the witness in order to arrive at as accurate a reconstruction of the reality as words will allow.

This means that the meaning and interpretation given to a particular event or word will depend on elements of distortion, which derive either from (i) intentional or (ii) inadvertent behaviour. The behaviour is intentional when there is a degree of effort or determination to communicate a specific message, by using particular words with well recognised meanings in order to disseminate or accentuate a distinct message. This

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33 Ibid, at 178.
intentional behaviour is one that fits very well in the context of culture and semiotics, in the sense that the communication process will be determined according to the culture at any given point in time. Eco emphasises this point by stating that “semiotics studies all cultural processes as processes of communication...permitted by an underlying system of signification”\textsuperscript{35}. In other words, when a message is transmitted to a person it will produce an interpretative reaction, and such process is possible because of the existence of a code, that is a “system of signification”. Such process does not rely entirely on the perception and interpretation by the person because its interpretation is relying on an established code, set out by particular circumstances existing at the time\textsuperscript{36}. More importantly, though, this is a top-down approach, adopted by an elite few to influence the majority. Its specific aim, in fact, is to counteract and undo the misconceptions created by ‘inadvertent behaviour’.

In the case of ‘inadvertent behaviour’ the interpretation of a message is more likely to be based on misconceptions, either because the person using the particular word has not quite understood the actual meaning, or because there is a general and widespread mistaken belief about the actual meaning of a word or the message conveyed by a certain word\textsuperscript{37}. Although it is acknowledged that the ‘inadvertent behaviour’ may be caused by external factors, which over time have contributed to the creation of the misconceptions, the process has reached a much deeper internalised level compared with the ‘intentional behaviour’\textsuperscript{38}. This, in turn, will make it difficult to distinguish what is real from something that is not completely accurate, yet it is still used in that way because of custom or a subconscious influence. I will define this approach as a bottom-up approach because of the deep-seated historical association that certain words have acquired over time, and able to pervade all social systems so that its perception is widespread.

\textsuperscript{35} U. Eco, \textit{A Theory of Semiotics} (Bloomington: Indiana University Press, 1976) at 8.
\textsuperscript{36} Ibid; this means that the established code possesses a cultural and historical content, which, in turn, will reflect on the perception and understanding of the individual who is interpreting the message.
\textsuperscript{38} S. Tiefenbrun, \textit{Decoding International Law: Semiotics and the Humanities} (Oxford: OUP, 2010), 20-76.
2.2.2 The instrumentality of words in the creation of reality

As mentioned above, it can sometime be difficult to determine the meaning of what people say, either because the language used is indeterminate or because people attempt to inject words with certain trends or intentions. As Beaulac puts it:

When one resorts to a word, he or she must be deemed to refer to what it is usually and customarily accepted to represent in a highly complex system of (linguistic) signs within his or her society.39

Words, therefore, cannot and should not be interpreted in a complete vacuum because they are deeply connected to the world in which they are used. As Hutton cleverly points out by using the Babel account of the birth of language diversity, this is not just a linguistic disorder but a conceptual one too.40 It is the start of humanity’s struggle to find a linguistic commonality, which can be very difficult to achieve given the cultural and historical differences that exist between peoples and ages. If the use and development of language is to be understood as a free market41, free from any political, legislative or bureaucratic coercion, then we must look elsewhere for some other theoretical explanation regarding its use and development.

One way to achieve a better understanding of the role of words in the creation of reality is to make use of Ogden and Richards’ triangle, represented below.42 The triangle, largely based on Peirce’s triad semiotic model43, is a powerful interpretative tool in the context of the word ‘sovereignty’ because it lends itself to the proposition that the word ‘sovereignty’ does not and has never been elucidated in a coherent and exhaustive manner. Fundamentally, it cannot be established that there is a universally accepted definition of sovereignty, either in a legal definitional sense or one that is based on the practice of the members of the international community. The UN Charter, for example,

39 Beaulac, The Power of Language in the Making of International Law, at 20. Eventually Beaulac applies this linguistic theory to the analysis of the myth of the word ‘sovereignty’ and how this myth has helped to create and shape a new reality of sovereignty.
40 Hutton, Language, Meaning and the Law, at 1-2.
mentions the notion of sovereignty only in relation to the concept of equality but it never spells out clearly what the rights and duties are in the context of a supreme authority within a territory. It is, in fact, in relation to the rights and duties encapsulated within the concept of sovereignty that this investigation into the meaning of sovereignty actually lays because the Rome Statute strongly indicates the existence of certain duties, which would add a new dimension on sovereignty. Consequently, Ogden and Richards’ triangle will serve as a guiding post to evaluate how and why so many different variants of sovereignty have arisen over the years, and it will also help to assess whether a new meaning of sovereignty is emerging in the context of the new international criminal justice regime established by the Rome Statute.

According to Ogden & Richards a “symbol” refers to a word; the “thought or reference” refers to the concept formed in the human mind, and the “referent” is a thing in reality. The important point about Ogden & Richards’ triangular representation of language is that there is no direct relationship between the “symbol” and the “referent”, “...they are not connected directly...round the two sides of the triangle”. In other words, as there is no direct relationship between “symbol” (words) and “referent” (reality), the

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44 1945 Charter of the United Nations, Article 2 (1).
46 Ibid, at 10-11.
relationship between the two elements is a construction which is achieved through human cognitive processes. Put in a different way, the word represents (*stands for*) the reality created by the human thought process.

Essentially, the meaning given to a word ("symbol") derives from human consciousness\(^48\), although this must not be interpreted as an individual’s consciousness but as a *shared consciousness* of society. This means, therefore, that the meaning given to a word does not reside in the word itself but in the people using it. However, the *shared consciousness* of the peoples within a sovereign State is not triggered in the same way as the *shared consciousness* of the peoples within the international community because the force behind each sovereign State, namely its culture and governing machinery, is not the same as the force behind the international community. In the context of the meaning to be attributed to sovereignty, therefore, the analysis presented above with regard to the interpretation of words fits very well with the analysis of what is meant by sovereignty today, and how the meaning of sovereignty has been subjected to several changes.

2.3 **The development of the language of sovereignty**

2.3.1 The beginning of sovereignty as a distorted reality

In order to understand the language of sovereignty it is important to note how the concept of sovereignty itself has been the subject of constant definitions and redefinitions for nearly five centuries. Political philosophers have assessed and evaluated to what extent sovereignty can be considered to be an absolute concept and, if not absolute, what are the elements that limit it and what elements define it. Some of the most relevant accounts of the way these philosophers and political scientists viewed the concept of sovereignty is given below, starting with classical theories of sovereignty, which are characterized by unlimited power.

Bodin’s *De la République\(^49\)* was published in 1576 during the conflict between Catholics and Huguenots, a period of civil and political unrest in France. Bodin’s aim in his publication was the formulation of a theory on sovereignty, representing an attempt


to restore order and security into a society that was becoming highly divided. More specifically he was attempting to evaluate exactly what prerogative powers would be held by a political authority in order to demonstrate that such authority had no one superior or equal within its territory. In other words, the only way to ensure the restoration and maintenance of order and security in society was to endow one authority with sovereign powers, with full knowledge of the extent of those powers. Bodin’s recognition that the only way to achieve the desired order and security within a society was through absolute power. Although he recognised that such power was mitigated by divine rules and natural law, he nevertheless believed that even if the sovereign power breached divine or natural law, there would be no consequences, and full support and obedience were still required by the citizens. To this end he avowed:

If the prince is an absolute sovereign...whose authority is unquestionably their own, and not shared with any of their subjects, then it is in no circumstances permissible either by any of their subjects in particular, or in general, to attempt anything against the life and honour of their king, either by process of law or force of arms, even though he has committed all the evil, impious and cruel deeds imaginable...No process of law is possible, for the subject has no jurisdiction over his prince, for all power and authority to command derives from him...

Bodin’s idea of sovereignty was therefore “supreme power over citizens and subjects unrestrained by law”, albeit limited by divine or natural law. However, in practice, divine or natural thought did not appear to limit Bodin’s notion of sovereignty because it appears that a tyrannical sovereign authority should still demand full obedience. In other words, there seems to be discordance between the theory and practice of sovereignty, leaving many unanswered questions with regard to the tentative limitations that Bodin applied to the principle (divine and natural laws), an issue that has become of real relevance to our modern society. Be that as it may, any timid limitations imposed by Bodin to the principle of sovereignty was later removed by Hobbes, whose belief was that, without a central governing authority, men will descend into a ‘state of nature’, depicted in *Leviathan* as a state of complete misery for

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53 Ibid, 82.
55 Ibid, 19.
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humankind. Only a supreme and all-powerful sovereign authority could provide the optimum conditions for men to prosper and live peacefully within a civil society, instead of enduring the ‘state of nature’:

In such condition, there is no place for industry; because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving, and removing, such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.

An absolute and limitless sovereign authority was a small price to pay in order to avoid the pain and misery brought about by anarchy and conflict. The premise is that to prevent a life of fear and danger of violent death, complete obedience to a sovereign authority would provide a protectionist effect on the citizens; no harm would come to them if they put their trust in the sovereign authority. Hobbes, like Bodin before him, witnessed directly the pain and suffering endured by people in time of internal conflict, and it was precisely these historical settings that contributed to a definition and interpretation of sovereignty that seemed to respond to those particular difficulties. In fact, *Leviathan* was published in 1651, following the execution of Charles I in 1649 and after years of rebellious suppressions in Scotland, Ireland and Wales. It was a period of great struggle and antagonism between the Church and the State, which led to a widespread state of violence because of the lack of political authority and the struggles for power between rival factions. This period of extensive violence, civil unrest and rapidly changing political conditions had affected the whole of Europe and was spearheaded by changed religious values and the disappearance of a religious consensus. Toulmin summarises this period of unrest in 17th century Europe by stating that

57 Ibid, Chapter XIII, Of the Natural Condition of Mankind as concerning their Felicity, and misery.

58 It must be noted also that the level of violence and civil unrest experienced by both Bodin and Hobbes was very similar to the level of violence experienced, for example, in Rwanda, albeit triggered by religious differences rather than ethnic differences. The result, however, and the suffering, was similar: it led to a widespread culture of intolerance and hatred, evidenced by systematic killings and torture, as demonstrated by the events of the St. Bartholomew’s Day Massacre in 1572.


A realistic picture of 17th century life must now include both brilliant lights and dark shadows: both the successes of the intellectual movements, and also the agonies of the religious wars that were their historical background⁶¹.

Though Hobbes recognised that men have rights and that men are all equal, the acknowledgement of the existence of rights and equality is not seen by Hobbes in a positive light, but rather as a potential for internal strife and conflict. “The right of nature...is the liberty that each man hath, to use his own power...for the preservation of his nature...[It is the] absence of external impediments...[and]...because the condition of man...is a condition of war of everyone against everyone...there can be no security to any man”⁶². Therefore, according to Hobbes, these are the rights that men will need to use if they are to protect themselves in a state of nature, the very state that will bring only suffering to men. He went on stating that men must reject these rights in order to avoid living in a permanent condition of war, and must transfer these rights to a sovereign in the form of a contract, where the peoples submit to the State, either by natural force, “as when a man maketh his children”, or on a voluntary basis to be protected by the sovereign against all others⁶³.

Unlike the theories put forward by Bodin and Hobbes, other political theorists formulated a notion of sovereignty that established a relationship between the ruler and the ruled, with the ultimate aim of protecting the rights of peoples. In fact, the new wave of political theorists perceived sovereignty, and the limits of sovereignty, from a different perspective, that is from the rights of men⁶⁴. Constitutional theories of sovereignty lay emphasis on the fact that sovereignty is not indivisible and that it rests with the Constitution. Effectively, constitutional theories of sovereignty represented a direct contradiction to the concept of unlimited power put forward by classical theories of sovereignty. Locke’s conception of sovereignty is similar to Hobbes’, in the sense that he believed that men in a state of nature would come together to form a State, and it is the State that would protect the citizens from any harm to their lives and property. However, according to Locke, government legitimacy derives from the citizens, who

entrust this power to the delegated government, and it is based on the belief that all men have natural rights and these rights must be protected:

In this last age a generation of men has sprung up amongst us, that would flatter princes with an opinion, that they have a divine right to absolute power, let the laws by which they are constituted and are to govern, and the conditions under which they enter upon their authority, be what they will; and their engagements to observe them ever so well ratified by solemn oaths and promises. To make way for this doctrine, they have denied mankind a right to natural freedom [and] exposed all subjects to the utmost misery of tyranny and oppression...  

Locke’s controversial approach was particularly critical of Sir Robert Filmer’s political thought, who declared that “men are not born free, and therefore could never have the liberty to choose either governors, or forms of government... Princes have their power absolute, and by divine right”66. Locke rejects this absolute and paternalistic approach to governance and insists that it is men who decide to give up their natural freedoms in order to join a society which will offer protection against other men, who might interfere with the enjoyment of such freedoms:

If man in the state of Nature be so free as has been said, if he be absolute lord of his own person and possessions, equal to the greatest and subject to nobody, why will he part with his freedom, this empire, and subject himself to the dominion and control of any other power? To which it is obvious to answer, that though in the state of Nature he hath such a right, yet the enjoyment of it is very uncertain and constantly exposed to the invasion of others...This makes him willing to quit this condition which, however free, is full of fears and continual dangers; and it is not without reason that he seeks out and is willing to join in society with others who are already united, or have a mind to unite for the mutual preservation of their lives, liberties and estates...  

In actual fact, Locke envisages a relationship of trust between the sovereign and the peoples, based on agreement and mutual consent. Therefore, any notion of arbitrary and absolute power has no place at all in this new outlook on sovereignty because of the crucial importance that natural rights play in defining the essence and equality of all men68. This is the beginning of social contract theory, according to which government rules by consent and not as a potentially despotic entity. This is a theme that Rousseau develops further and crystallizes the notion that the State does not possess ultimate

65 J. Locke, Two Treatise of Government (London, 1690), Chapter I para.3.
66 Ibid, Chapter I para.5.
67 Ibid at Chapter IX, para.123.
68 Ibid, Chapter XV, paras.171-73 and Chapter VI, para.67.
power because such power derives from the people and not the State. Nevertheless, the notion of absolutism so typical of a classical theory of sovereignty is never too far from Rousseau’s treatise, as he declared that

> It must be further noted that the public deliberation that can obligate all the subjects to the sovereign [...] cannot, for the opposite reason, obligate sovereign to itself, and that consequently it is contrary to the nature of the body politic that the sovereign impose upon itself a law it could not break.

Only a concise outline has been given here on some of the salient features that have characterized different interpretations given to the sovereignty principle. Nevertheless, this is sufficient to demonstrate the fact that sovereignty has been the subject of definitions and redefinitions for almost 500 years. This means that its reality, and the perception of such reality, has become altered and transformed precisely because of this redefining process. Thus, the peace of Westphalia, interpreted by many scholars as one of the most significant historical events regarding the birth of the sovereign State and the corresponding principle of sovereign equality, is also interpreted by others as a mythical construction, perpetuated by orthodox beliefs and writings. Osiander puts this quite aptly by noting that “the prevalence of the Westphalian myth in IR is the result of nineteenth- and twentieth-century historians adopting a certain standard account of 1648.” This is not meant to detract from the historical and political importance of Westphalia, but it is meant to critically appraise the issue that a clear definition of sovereignty was never formulated at Westphalia, thus leaving it open to philosophers and political scientists to determine the contours of such important principle.

There should be no surprise, therefore, that when the human rights lawyer and activist think of sovereignty in the context of impunity, sovereignty’s definition appears to be absolute, uncompromising and negative. In effect, it is sovereignty itself that creates problems, including impunity and, for impunity to be eradicated completely from the domestic and international scene, sovereignty has to disappear or be significantly

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70 Ibid, 149.
reduced. Put in a different way, justice for international crimes is such an idealized concept that sovereignty, as a concept, will always compromise it and any means to address it will most probably be ineffective. However, this may have more to do with the attribution of certain characteristics to the concept of sovereignty, leading to the acquisition of social power, namely the ability to create and transform human reality. Essentially, the shared consciousness of human rights lawyers and activists has been so adversely affected by a mythical definition of sovereignty, that the word itself has become a bad word in the eyes of many.

2.3.2 Sovereignty: between realpolitik and human rights

In its most practical terms, sovereignty is generally not motivated by higher ideals of protecting common values and interests, although it can be used as part of the decision making process or as a guide for policy direction. The reality and complexity of the sovereign State is well acknowledged: it is assigned with the task of regulating behaviour vertically between its citizens and the State, and yet it must be mindful of the horizontal relationships between itself and the international community. Both in its vertical and horizontal dimensions, it is a language that aims to please, win votes and improve its standing in order to further its domestic and foreign policies. Its power changes according to the political direction of the State and the international community order. For example, the values enshrined in the principle of the rule of law, with its checks and balances mechanism, prevent abuses of power or manipulation of the law to

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74 The expression social power is used by Beaulac to explain the myth of sovereignty and, more specifically, Westphalia. ‘Certainty, eternity and even orthodoxy’ can be attributed to a particular historical event; the effect, however, is for the myth to become inflated and actually hide the reality that it professes to represent (see Beaulac, The Power of Language in the Making of International Law at 38-39).
75 By ‘shared consciousness’ it is intended the process of understanding and interpretation of the word sovereignty, potentially affected by a wrong interpretation. However, such interpretation is now so widespread that it can be found within the state of mind of selected groups in society; see for example L. Henkin, That “S” Word: Sovereignty, and Globalization, and Human Rights, Et Cetera, Fordham Law Review, 68 (1999-2000), 1-14.
76 It is important to note that a distinction should be made between a State’s normal everyday language, including its practical usages in its dealings with its citizens and its international counterparts, and its constitutional language. Constitutions, whether written or unwritten, usually contain idealistic values (such as freedom of speech, equal protection, due process etc...) but, as Schauer points out, this language should not be interpreted literally but should be viewed as a metaphor; see F. Schauer, An Essay on Constitutional Language, UCLA Law Review 29 (1982), 797-832.
satisfy personal interests. However, even the values encapsulated by the rule of law can be said to be idealistic and not always capable of maintaining a perfect balance between the executive, the legislative and judiciary branches of the law. Using as an example the United Kingdom model, the principle of parliament supremacy allows parliament to make or unmake any laws it wishes\(^77\), within the limitations imposed by the European Union and the ECHR, and subject to the scrutiny of the courts. However, the UK courts have a tendency to pay due deference to the legislative branch unless there is a clear attempt to breach fundamental rights of citizens, especially with regard to access to courts and judicial review.\(^78\)

Moreover, the interests of the sovereign State are not necessarily coincidental with the interests and objectives of the ones set out by the international community as a whole. The notion of State interests has featured in a prominent scholarly work on international law by Goldsmith and Posner, pointing towards recognition of the limitation of international law in general. According to them, a State interest is a “...State’s preference about outcomes”\(^79\). Specifically in the context of State participation in human rights treaties, the authors comment that “…the government balances a concern for the well-being of persons under its control with concern for security (internal and external) and the government’s own perpetuation”\(^80\). As Koskenniemi points out, the oscillation between State interests and other binding norms is a deep-seated characteristic of international law\(^81\). In terms of human rights protection and accountability, therefore, the oscillation occurs between the ideology of human rights on the one hand and the protection of State interests and State sovereignty on the other\(^82\).

The reality of failed and poor governments is testament to the fact that the concept of

\(^{77}\) The difference between the legality of a legislative act on the one hand, and its moral, ethical and political underpinning can be demonstrated in Madzimbamuto v Lardner-Burke [1969] 1AC 645. Lord Reid stated that “It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard them as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things…the courts could not hold the Act of Parliament invalid” (at 723).

\(^{78}\) See R (Jackson) v A-G [2005] UKHL 56.


\(^{80}\) Ibid, 109.


sovereignty itself lives on, despite the obvious shortcomings related to its internal practice.\(^{83}\)

The development of human rights law, the practice of humanitarian law and the contemporary developments and discussions on humanitarian intervention are indicative of State interests that go beyond the mere concerns of security and economic gains, but it would be far too ambitious to claim that this is, or should be, a reflection of modern practice, and therefore constitute a significant change in the language of sovereignty.\(^{84}\) Indeed, such a state of affairs may appear to go against academic scholarship claims that liberal democracy, and the institutions that derive from it, provide the best foundation for domestic governance.\(^{85}\) However, the general objectives of a sovereign State, namely the regulation of the lives of its citizens and the pursuit of a respectable international status, run counter to the utopian values and objectives predicated by the international criminal law regime. Self-interest and self-preservation are preferred outcomes than the utopian value of justice for the victims of international crimes. The main reason for this claim is that if an international crime has been perpetrated it is usually the State itself that has become complicit in the serious human rights or humanitarian violations and it is therefore not in its interest to pursue justice for the victims.

However, the self-interested nature of sovereignty has gone through an evolution process because a complete disregard for human rights and human rights violations is no longer sustainable. This is not to say that the contribution of the human rights movement to the concept of sovereignty has been uniformly understood and adopted by every member of the international community. The word ‘sovereignty’, as noted above, does not come with its own clearly established meaning and components. Even if it is interpreted as a legal term, it would be very unlikely that an international court, the ICJ for example, would be able to devise a definition that would apply to all members of the community. The ECtHR was called to do just this in the context of the interpretation of


\(^{84}\) See 'The Responsibility to Protect', (Ottawa: International Commission on Intervention and State Sovereignty, 2001), 1-91.

Article 6 ECHR and the proceedings that are included within that provision\textsuperscript{86}. However, the make-up of the Council of Europe and the binding nature of the ECtHR decisions cannot be juxtaposed in the context of the international community and the interpretation of ‘sovereignty’ by the ICJ, adhered to by all members of the community.

Nonetheless, the Second World War marked the intensification of the human rights discourse, a transformation of culture and tradition that has been pervading every branch of human society since. Any conception or misconception about the meaning and interpretation of sovereignty in the 20\textsuperscript{th} century would have been subjected to deep scrutiny and critique because, for the first time in the history of Western Europe, the international community began to question the limits of sovereignty as a concept. At this point the international community, through the establishment of international organisations and regimes, began to adopt a position of responsibility and protection in order to ensure that governments conduct their internal affairs in a way that is conducive to the well-being of their citizens, or at least in a way that does not lead to systematic human rights violations\textsuperscript{87}.

The most important by-product of this new trend was the Universal Declaration of Human Rights\textsuperscript{88}. It became a powerful instrument and a representation of the conscience of the international community, and a warning to the political territorial entities which, before then, were never scrutinised with such enthusiasm by external organizations. The Declaration affirms the value and worth of the human being, endowed with basic rights and fundamental freedoms that no oppressor has the right to take away. Although the document was not legally binding, and therefore did not impose clear obligations on States, its effect was twofold: first of all it served as an educational tool to inform, equip and change traditionally formed mindsets on the role of the State and on the correlated meaning of State sovereignty; secondly, it became a source of inspiration for more tangible legal measures which could be put into place to

\textsuperscript{86} Engel and Others v The Netherlands (1976), Series A No. 22; see also G. Letsas, ‘The Truth in Autonomous Concepts: How to Interpret the ECHR’, \textit{EJIL}, 15 (2004), 279-305.


\textsuperscript{88} Adopted by the UN General Assembly on 10 December 1948.
reign in the power of the sovereign State, namely in the form of the ICCPR and the ICESCR\textsuperscript{89}.

As the international community continued to develop a new vision and a new conscience for the protection of individuals from an all too powerful State, more international agreements followed\textsuperscript{90}. However, the international community vision to put restraints on the State was not matched by effective enforcement mechanisms, partly because of the inherent problem of international law lacking effective enforcement procedures, and partly because the international community continues to facilitate and support the positivist aspect of international law and State consent\textsuperscript{91}. These weaknesses effectively reiterate two important factors: firstly, States still demonstrate a firm resistance to interference into their domestic affairs; therefore international agreements have a tendency to incorporate limitations, especially in the form of reservations. Secondly, there are inevitable ideological differences among the members of the international community, which may lead to agreements based on the lowest common denominators (in terms of values and actions); this, in turn, will appeal to more members and it will lead to more signatories.

\textsuperscript{89} Both treaties were adopted on 16\textsuperscript{th} December 1966 and came into force in 1976. Note also that a very important by-product of the Declaration is the European Convention on Human Rights (ECHR) adopted in 1950. The ECHR is considered to be the most successful and effective human rights protection instrument, not only from the point of view of redressing human rights violations but also as a potential driving force towards ‘constitutional justice’ within individual Member States; see S. Greer, ‘What’s Wrong with the European Convention on Human Rights?’, \textit{Human Rights Quarterly}, 30 (2008), 680-702.

\textsuperscript{90} See, for example, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) adopted on 18 December 1979, and the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment (CAT) adopted on 10 December 1984.

\textsuperscript{91} An example of this can be derived by the fact that the Optional Protocols to the ICCPR which allows for individual petitioning only if the State chooses to ratify the specific protocol, leaving inter-State complaints as the main avenue for complaints of human rights violations. There is also the added problem that if the ICCPR provisions have not been properly incorporated into domestic law, then it becomes a superfluous exercise; see C. Harland, The Status of the International Covenant of Civil and Political Rights (ICCPR) in the Domestic Law of State Parties: An Initial Global Survey through Un Human Rights Committee Documents’, \textit{Human Rights Quarterly}, 22 (2000), 187-260.
2.4 The emergence of a shared consciousness in international criminal law

2.4.1 The idea of an international community

International law is a normative system put in place to regulate activities within the international community, to maximise the common good and avoid chaos\(^92\). The UN Charter stipulates that the United Nations exists to maintain international peace and security, to develop friendly relations among nations, to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character and to be a centre for harmonization of the actions of nations in order to achieve these common ends\(^93\). It can therefore be deduced that international law is a normative system that aims to achieve the goals set out in the UN Charter in order to establish and maintain a peaceful and cooperative international community\(^94\).

The idea of an ‘international community’ is however not straightforward. The concept has been used in international treaties\(^95\), but more famously it was enunciated in the Barcelona Traction case, where a distinction was made between obligations owed to the ‘international community’ as a whole and obligations vis-à-vis another State in the context of diplomatic immunity\(^96\). The former obligations – obligations *erga omnes* – concern rights so fundamental that all States of the international community have an

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\(^92\) R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1993). 1. For a discussion on the link between the idea of ‘common good’ and natural law, see P.G. Carozza, 'The Universal Common Good and the Authority of International Law', *Logos*, 8 (2006), 28-55; Finnis defines the “common good” as a “...a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s) for the sake of which they have reason to collaborate with each other (positively and/or negatively) in a community” (J. Finnis, *Natural Law and Natural Rights* (2nd edn.; Oxford: OUP, 2011), 155.

\(^93\) Article 1, UN Charter (1945)

\(^94\) There are many examples of multi-lateral international treaties that aim to achieve the goals set out by Article 1 of the UN Charter. For example, the 1966 ICESCR, established to ensure a minimum standard of social, economic and cultural rights to all individuals; the 1994 Agreement Establishing the World Trade Organization, with the purpose a common institutional framework for trade activities amongst its members States; the 1969 VCLT, established to regulate State’s behaviour when concluding international agreements; the 2001 ILC Articles on Responsibility of States for Internationally Wrongful Acts, setting out the circumstances of a breach of an obligation and the ensuing reparation procedures; the 1961 Vienna Convention on Diplomatic Relations and the 2004 UN Conventions on Jurisdictional Immunities of States and their Property; the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and the 1982 Convention on the Law of the Sea.

\(^95\) See Article 53 VCLT (in the context of peremptory norms); Article 5 Rome Statute;

\(^96\) Case concerning the Barcelona Traction, Light and Power Company Limited (*Belgium v Spain*), ICJ Reports 1970, 2nd Phase, paras.33-34.
interest in their protection. During a conference addressing the work of NGOs and their interaction with the UN, the then UN Secretary-General Kofi Annan defended the idea of an international community as “...a shared vision of a better world for all people”, with a sense of “common vulnerability” and “shared opportunity”. He went on dismissing critics of the concept of an ‘international community’, stating as an example, that the establishment of the ICC represents the “...international community at work for the rule of law.”

More interestingly, Abi-Saab defines the international community as a fragmented phenomenon due to the fact that a ‘community’ cannot exist until ‘society’ is properly formed. Given that the latter has not happened yet, the idea of a ‘community’ rests between two legal ideologies: co-existence and cooperation. Co-existence aims to establish a

...minimum of order between antagonistic entities that challenge any authority superior to themselves and which perceive their relations as a 'zero sum game' where one's gain is immediately perceived as another's loss.

In contrast to the law of co-existence, Abi-Saab finds that the law of cooperation develops when there is awareness of common interests and common values, and only a concerted approach to protect such interests and values can produce the best results. The ICJ has recognised the existence of these common interests and values in several judgments. In the Corfu Channel case the Court Stated that international law has developed “certain general and well recognised principles, namely: elementary considerations of humanity”.

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99 Ibid.


101 Ibid, 251.

102 Ibid.

103 ICJ Reports 1949, p.4, at 22. The Court used the same expression “elementary considerations of humanity” in its later Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (ICJ Reports 1996, p.257, para. 79).
Convention on the Prevention and Punishment of the Crime of Genocide, the Court affirmed that

The Convention was manifestly adopted for a purely humanitarian and civilizing purpose... to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention\(^{104}\).

Moreover, in his dissenting opinion of the aforementioned case, Judge Alvarez commented that these multilateral conventions reflect a new type of international constitutional law, established for the general interest of the community, imposing only obligations on States, and that national sovereignty has to “bow down to the will of the majority”\(^{105}\).

It is generally agreed that cooperation has become more of a feature of international law, especially after the creation of the League of Nations in 1919, and evidenced by the increased institutional nature of international law\(^{106}\). However, it also means that it is more ambitious and challenging because the idea of cooperation presupposes the identification of common interests and values. In other words, the law of cooperation needs the development of an international society, with shared values and interests. What we should expect, at most, is that the ‘community’, already a relative term, exists only at certain times and only for certain groups\(^{107}\). This may be difficult to achieve because a universal moral consensus does not yet exist. It could also be argued that moral values are best protected within the territorial boundaries of the State, making the establishment of any international regulatory system a “vain exercises in idealism and legalism”\(^{108}\). More importantly, the notion of ‘common interests and values’ may be deemed to be an “essentially contestable concept”, defined as

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\(^{104}\) ICJ Reports 1951, p.15, at 23.

\(^{105}\) Dissenting Opinion of Judge Alvarez (Reservations to the Genocide Convention), 52.


\(^{107}\) Abi-Saab, ‘Wither the International Community’, 249. This means that there is a level of fragmentation within the term ‘community’ itself because a particular interest is not necessarily shared by every single member of the community with the same level of interest and intensity.

...a concept that not only expresses a normative standard and whose conceptions differ from one person to the other, but whose correct application is to create disagreement over its correct application or, in other words, over what the concept itself is...It is [the concept’s] nature not only to be contested, but to be contestable in [its] essence, so that not only [its] applications, but also [its] core elements or criteria are contestable.

The trend appears to be that people tend to agree on the general parameters of these concepts, but when it comes to the fine details concerning their meaning and application, this is when disagreement occurs. The correlation of this argument is that it will be very difficult to produce a coherent practice at the international level when parties cannot agree on the details, and eventually do not support international legal rules adequately. Of particular interest here is Koskenniemi’s critical analysis of international law as regularly oscillating between apology and utopia, and it is this critical approach that is adopted here in the context of international law in general and the Rome Statute in particular. Koskenniemi argues that, in order to demonstrate the existence of international law, the lawyer needs to show that it is both “normative and concrete”. By “normative and concrete” it is intended that the law is able to bind “...a State, regardless of that State’s behaviour, will or interest but that its content can nevertheless be verified by actual State behaviour, will or interest”.

In essence, an interesting interplay exists between law and politics, where law emanates from politics but it is at the same time independent from it. If the law is regularly subjected to the will and whim of politics, it will lose its objectivity and the State will lapse into an “apology for politics”. How much more difficult, therefore, it is for the State to maintain a perfect balance between the apologetic characteristic of the State, and the utopian objective characteristic of international law in general.

This objective is even harder to achieve when faced with the aim to end impunity for international crimes as set out in the Rome Statute. This is because the apolitical neutrality of the Statute derives its legal status and force from a human rights political

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112 Ibid, 17.
113 Ibid.
114 Ibid.
perspective, but this is a perspective that has not yet developed within many territories of members of the international community.

2.4.2 The shared consciousness of the international society

The notion of a shared consciousness originally derives from Durkheim’s 19th century concept of a collective consciousness\(^\text{115}\). It refers to the idea of shared beliefs and moral attitudes, which are needed and utilised to create a unified society.

Originally, Durkheim’s theory of collective consciousness was developed and applied with the aim of understanding how society develops, thus envisaging two types of solidarity, mechanical and organic\(^\text{116}\), with the purpose of maintaining social order and stability in society. In modern times, the term ‘collective consciousness’ has been analysed from a sociological and social psychological perspective, and it has been linked to a community’s self-reflecting activity\(^\text{117}\). Elgin developed this concept further by conceiving the reflective activity\(^\text{118}\) as the possibility of a society’s awakening experience:

“when a group “knows that it knows”, it has the ability of being self-observing and to take responsibility for its actions. The ability to collectively observe or witness our own knowing – as a tribe, nation, or species – represents a powerful evolutionary advance, because it enables us to take charge of our behaviour with a new level of clarity and intentionality. When a nation, for example, can see itself in the mirror of reflective knowing, it becomes more accountable to itself and takes charge of its future”\(^\text{119}\).

The aim is therefore to create a well integrated society, where solidarity is created or promoted to achieve certain common goals. There can be two starting points to a collective or shared consciousness: it can start from the individual and spread outward

\(^{115}\) See É. Durkheim, *The Division of Labour in Society* (1893). The terms ‘collective consciousness’ and ‘shared consciousness’ will be used interchangeably, as the term ‘collective’ presupposes a shared element, and, if it is shared, it is held collectively by a group of individuals.

\(^{116}\) Durkheim refers to mechanical solidarity where there already exists strong homogeneity in that particular society, leading to a high level of integration because of shared values and interests; mechanical solidarity works occurs in very small societies, characterized by kinship affiliations. Organic solidarity, on the other hand, occurs in a larger society that has become more complex and therefore needs division of labour and specialization; this type of society needs interaction and integration, and leads to interdependence (see Durkheim, *ibid*, 31-67).


\(^{118}\) By “reflective activity” it is intended the society’s process of identifying, evaluating and developing its common values, thus reflecting its own identity.

to the community or it can be an outward collective sign or belief that is eventually acquired by the individual. While most sociologists tend to agree that individual consciousness is triggered first and it is then followed by the collective, Krippner proposes that it is in fact the collective consciousness that is triggered first, and individual consciousness is prompted as a result of a sense of belonging or identifying oneself to a particular group or culture. Whether one holds the belief that the collective consciousness is the primary or secondary trigger, it is a scientific fact that the notion of collective consciousness actually exists, and this is a truism that has been affecting the international society too. In international law generally the discourse revolves around the international community (of States), because, as a rule it is the State that is the maker and the subject of international law. However, the term ‘international society’ will be intentionally used to denote a paradigm shift in international law, from the nation State to the individual, and therefore from a community of nations to a community of people. It is within this context of an international society of people, connected by their common humanity, that I place this model of shared consciousness.

The idea of collective interests, that is interests that are considered fundamental to the whole international community, has been around for some time. Although there are some critical opinions of the potential disruption to the neutrality of international law, these higher fundamental interests are widely accepted. Contemporary discourse on the responsibility to protect has fuelled the notion of collective consciousness further, in the sense that nations cannot any longer exist as bystanders when witnessing mass human rights violations elsewhere. A relevant Human Rights Resolution, adopted by the Office of the High Commissioner for Human Rights, concerning the decision to

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appoint an independent expert on human rights and international solidarity, again conveys and reiterates the message of solidarity and common humanity:

Determined to take new steps forward in the commitment of the international community with a view to achieving substantial progress in human rights endeavours by an increased and sustained effort of international cooperation and solidarity…

The premise that a common or shared consciousness has been and is continuing to develop is not difficult to surmise, although it must regularly be evaluated against the reality of State sovereignty and State consent. Indeed, the shared consciousness of the international society can affect the content of State sovereignty, namely by producing a trickle-down effect from the international regime to the domestic context. Likewise, shared consciousness, being a product of the idealism of the international community, will always have to compete to gain some recognition at the domestic level, and it is only when such recognition is gained that the concept of sovereignty is enhanced.

2.4.3 An overview of the nature of international legal language

The indeterminacy of language is a feature of legal discourse, especially in the case of international legal language. According to Fastenrath, this is a distinct necessity because of the multilingual international legal texts adopted in international law. This means that national authorities will apply their own terminology and meaning to the legal concepts used, advocating that “the greater the degree of cultural diversity the less likely it is that concepts will have a common meaning.” It would certainly not be possible to create a singular unifying language that all nation States could understand and, most of all, agree with clear precision before entering into international agreements. The issue here concerns the understanding of the function and nature of international law itself. If international law exists to aid cooperation and peaceful coexistence amongst nation States within the international community, then international law has to be malleable enough to be adapted and adaptable within the domestic governing systems of the nation State. This is mainly because international

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127 Ibid, 311.
legal language uses a top-down approach to shape and influence domestic law\textsuperscript{128}, allowing the State a certain margin of discretion with regard to the substance and form of implementation.

A critical analysis of the ways the language of international law relates to and differs from municipal law facilitates our understanding as to how the former will support the latter in its aims and purposes. As international criminal law is often described as a subset of international law, understanding its language will help us to understand the potential effectiveness of the international criminal law regime and its effect on the \textit{practice} of sovereignty. In other words, the search is for similarities between the two systems in order to provide a better understanding of their efficacy to complement each other\textsuperscript{129}.

As international legal language aims to regulate intra-State and inter-State behaviour, its character can sometimes look more political than legal and can therefore lack the necessary elements of legal language that are normally associated with domestic or municipal law and rules. For example, it is a well known fact that municipal law is characterised by what Austin calls the ‘command and control’ theory\textsuperscript{130}. Hart clarifies the \textit{command} concept by stating that this is not power to inflict harm on people but it is the exercise of authority over them. He goes on saying that “though it may be combined with threats of harm a command is primarily an appeal not to fear but to respect authority”\textsuperscript{131}. However, municipal law is not just about commands and threats, but it is also made up of secondary rules of recognition, change and adjudication – a structure identified by Hart as primary and secondary rules and utilized to identify and analyse the country’s internal governance\textsuperscript{132}.

International legal language, on the other hand, does not behave in the same way and does not display the same complexity that its municipal counterpart possesses\textsuperscript{133}. There is, first of all, no equivalent domestic pyramid structure where power emanates from the

\textsuperscript{129} See Hart, \textit{A Concept of Law}, 14.
\textsuperscript{130} Austin, \textit{Province of Jurisprudence Determined}
\textsuperscript{131} Hart, \textit{A Concept of Law}, 20.
\textsuperscript{132} Ibid, 98.
\textsuperscript{133} For a discussion of this particular perspective see J.P. Humphrey, 'On the Foundations of International Law', \textit{American Journal of International Law}, 39 (1945), 231-43.
sovereign or the elected government. The international community is a community of equal States with equal power and equal right to participate in the making of international law to regulate their relationships with neighbouring States or with the international community as a whole. In its simplest and most general terms, it is the consent of the State that allows the State to accept the rules of international law and to integrate them into the domestic system.

Like all systems and rules, there are exceptions. The Lotus case is a reminder that, as international law governs relations between equal and independent States, the rules of law that bind the States emanate from their own free will as expressed in conventions or through State practice. However, the international human rights movement and the subsequent development of *jus cogens* norms and *erga omnes* obligations, has led to a tendency to put a certain amount of moral pressure on States, either to behave in a way that conforms to the human rights requirements or to adopt certain rules automatically because of lack of choice. The trickledown effect of international human rights law can have significant implications to the way sovereignty is perceived, practiced and transformed and, as it will be argued in this thesis, to the way a *shared consciousness* can spread.

As international law is an evolving system, its character has changed with time, and so has its language. The system that for decades directed its communications to States with the specific purpose to regulate their behaviour has now evolved to include individuals. The aim of the Rome Statute is to ensure that individuals who behave in

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135 The system created by the United Nations encompasses a legislative body (General Assembly) and a judicial body which hears petitions from States, but only with their consent (International Court of Justice).
137 Turkey is a case in point. In order to qualify for EU membership, Turkey has to satisfy a number of criteria, one of them being its human rights record, providing therefore a real opportunity for change. According to Yildiz and Muller, “the EU accession bid offers the international community a unique opportunity to improve the human rights situation in Turkey through political and diplomatic means” (K. Yildiz and M. Muller, *The European Union and Turkish Accession* (London: Pluto Press, 2008), 2. See also the scrutiny and criticism voiced in 2009 by the Commission of the European Communities report concerning Turkey’s progress of its human rights implementation strategy in preparation for accession to the EU (COM (2009) 533) (section 2.2) at [http://ec.europa.eu/enlargement/index_en.htm](http://ec.europa.eu/enlargement/index_en.htm) (last accessed on 6 August 2010).
138 The regulation of the individuals’ behaviour can be traced back to the establishment of the Nuremberg Tribunal; according to Article 6 Nuremberg Charter, “the Tribunal...shall have the power to try and
a certain way do not escape criminal liability, and the State bears the main responsibility for the prosecution of these rogue individuals. It is only when the State is either unable or unwilling to investigate or prosecute international crimes that international law will intervene to punish the selected individuals through the new permanent ICC.

The idea of an international society, where men and women are connected by their common humanity may be some distance away before (if ever) becoming fully realized. Territorial boundaries still play a major role in the way the international community interacts, although, as Allott puts it, it is precisely these territorial boundaries that prevent

...international society from conceiving of its possibilities and from actualising its own possibilities. International law, as it has been and as it is, cannot function as the legal system of an international society which is learning to know itself as a society.

However, there is no doubt that, just like domestic law, the individual is now incorporated into the language and communication system of international law, a process that started with the Nuremberg trials and the Universal Declaration of Human Rights. This development eventually led to a variety of international human right treaties designed to send a strong message that State boundaries do not represent a justification or a shield for ill-treating individuals or ignoring serious human rights violations. The Rome Statute represents the culmination of this process. Moreover, States are reminded (though no legal duty exists, as it will be seen later on in the discussion) that they have a duty to investigate and prosecute individuals who have committed serious international crimes. In other words, the ‘duty to investigate and punish persons who...whether as individuals or as members of organizations, committed any of the following crimes...” A notorious pronouncement of the Tribunal reiterates this point: “Crimes against international law are committed by men, not by abstract entities [of States], and only by punishing individuals who commit such crimes can the provisions of international law be enforced” (Nuremberg Judgement (1948) 22 Trial of the Major War Criminals before the International Military Tribunal 466).

139 Article 1 Rome Statute.
140 Allott, Eunomia: New Order for a New World, 298.
141 Adopted by the General Assembly Resolution 217A (III) of 10 December 1948. The poignancy of Article 1 of such Declaration is difficult to miss as it evokes feelings of common humanity and brotherhood, the same feelings used by Allott to argue for an international society.
142 Amongst the most relevant treaties see the International Convention on the Elimination of All Forms of Racial Discrimination (1965); International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Right (both treaties adopted in 1966); Convention on the Elimination of All Forms of Discrimination against Women (1979); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (1984); Rome Statute of the International Criminal Court (1998).
prosecute’ appears to have become part of the content of sovereignty, or rather part of the obligations that are acquired when the principle is used. The Preamble to the Rome Statute does not introduce a new duty, it just reminds States that this duty exists and they must exercise it. The question remains as to whether this strong reminder will affect the State and its sovereignty, given that there has always been a tendency in international law for States to do anything they wish in order to protect their self-interests, and hoping to get away with it\textsuperscript{143}.

2.4.4 The normative language of international human right law

Normativity does not just concern the belief in certain values. It also concerns the belief that we should hold certain values and should behave in certain ways\textsuperscript{144}. There is, on the one hand, conduct that is regulated by law because it emanates from the will of the sovereign and therefore must be followed and obeyed, irrespective of our beliefs, values and needs\textsuperscript{145}; on the other hand, there are rules that emanate from a different source, and aim to steer us towards a specific mode of conduct. As Korsgaard stated:

> When I say that an action is right I am saying that you ought to do it: when I say that something is good I am recommending it as worthy of your choice...Concepts like knowledge ...meaning, as well as virtue and justice, all have normative dimensions, for they tell us what to think, what to like, what to say, what to do and what to be\textsuperscript{146}.

There is an inherent inspirational and aspiring message built within normativity because it motivates us to question why we behave in the way we do. This is not due to the fact that we experience normative values throughout life, but rather because such an inherent inquisitive approach stems from the fact that “...we are normative animals who can question our experience”\textsuperscript{147}. In the context of human rights, why do we have to treat other human beings in a certain way? Or rather, why do I want to be treated in a particular way? It is not part of this discussion to evaluate the source of this

\textsuperscript{143} See P. Allott, 'Language, Method and the Nature of International Law', \textit{British Yearbook of International Law}, 45 (1971), 79-135. For an up-to-date thorough analysis on the State’s interests and the way this limits the applicability and effectiveness of international law see Goldsmith and Posner, \textit{The Limits of International Law}.

\textsuperscript{144} C.M. Korsgaard, \textit{The Sources of Normativity} (Cambridge: Cambridge University Press, 1996), xi.

\textsuperscript{145} This proposition would aptly apply to a classical theory of sovereignty, as demonstrated by Hobbes in \textit{Leviathan}, Chapter XVIII p.115.

\textsuperscript{146} Korsgaard, \textit{The Sources of Normativity}, 8-9.

\textsuperscript{147} Ibid, 48.
moral/ethical questioning; what is relevant is that this moral platform has been the impetus for a human rights movement, which has had a significant impact on international law, and in the way international law interacts with, and interprets the concept of sovereignty.

Normativity can also cause some difficulties and controversy. First of all, there is the issue of international law as a *normative process*[^148]. This means that international law is not just about rules which are created within the context of a positivist framework, shaped by the consent of States. Rules do exist in international law, and treaties are typical representations of this form of international legislation dictated by the will and interests of States. However, there is also a body of opinion[^149] that consider international law should not be limited just to the formulation of rules but there should also be an evaluation as to how it can reflect and embody certain values. For this reason, and in order to address what O’Connell dubs the “normative deficit”[^150] in the international legal process, she proposes that the values held within the process can be different or in addition to positivism. This will be achieved by encouraging international institutions to support those values in order to achieve “society’s normative values”[^151]. Indeed, respect for human rights and achievement of peace are among the values that international law should aspire to protect[^152]; in turn, these values can shape and influence international society and the international community, intensifying the interest of normativity in international law.

Secondly, while rules tend to offer clarity and precision, normative language can be vague and uncertain, and needs to be interpreted according to modern trends and according to the values that we choose to attribute to normative concepts[^153]. This is especially the case when the norms and language refer to concepts that are highly idealized, leading to a hierarchy of norms within the system itself, famously criticised by Prosper Weil as a threat capable of destabilizing “the whole international normative

[^151]: Ibid.
[^152]: Ibid, 339.
system and turn it into an instrument that can no longer serve its purpose." However, Weil’s analysis of the international normative system is not shared by all scholars; perhaps the words of one of the most prominent international judges and scholar can shed some light on this issue by referring to the international normative system as

...harnessed to the achievement of common values – values that speak to us all, whether we are rich or poor, black or white, of any religion or none, or come from countries that are industrialized or developing.  

Especially in the context of human rights, the international normative system seeks to achieve universality and harmonisation. No distinction is made with regard to people’s backgrounds, religions and beliefs. As a normative system is more than just rules, the legal dimension cannot be separated completely from other systems and disciplines, and this is especially the case in international law. It is the interaction of the political, social, ethical and scientific disciplines with the legal discipline that characterizes international law as a process, and as a constant evolving system that changes according to trends and contexts. The aim of this process is to achieve common goals in order to secure the international community’s common interests.  

This process has been referred by some as “authoritative decision making”, able to change and shape the values of our world community. According to Chen, these values or common interests are needed to set out a “minimum” and “optimum” world order: the minimum world order refers to the absence of “unauthorised coercion and violence”, whereas the optimum world order refers to “fostering the widest possible

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154 See P. Weil, ‘Towards Relative Normativity in International Law’, American Journal of International Law, (1983), 413-42. In this well-known article Prosper Weil criticises the emerging doctrine of jus cogens norms and obligation erga omnes, arguing that the distinction between different international norms on the basis of their content will bring the international regime into disrepute because it fails to comply to classic international theory.


156 Higgins, Problems and Process: International Law and How We Use It, 1-2.


158 See Higgins, above In.1, and M.S. McDougal and H.D. Lasswell, ‘Legal Education and Public Policy: Professional Training in the Public Interest’, Yale Law Journal, 52 (1942-1943), 203-95. McDougal and Lasswell write specifically in the context of reforming legal education, charging law schools with the task of training policy-makers for the “...achievement of democratic values...”, defining policy as the “making of important decisions which affect the distribution of values” (206-207).
shaping and sharing of all values”\textsuperscript{159}. At the same time, the harmonization of values within the international community equips it towards a \textit{shared consciousness} phenomenon, aided by the powerful symbolism of the human rights discourse.

The \textit{shared consciousness} approach, though, must not be confused with the active process of making human rights universal. The universality of human rights is a process often linked to western culture, society and colonization\textsuperscript{160}. It is a heavily top-down approach that relies on some powerful emotive human rights theory, derived from theology and natural law, but it also makes use of political and diplomatic tools to exert pressure\textsuperscript{161}. The \textit{shared consciousness} approach, on the other hand, is a more subtle approach that relies on a psychological realization and acknowledgement of the reality of human rights violations, centred on the significance of respect for human dignity. This is eventually processed as a powerful symbolic language.

2.4.5 The idealism of international criminal law language

Since the end of the Second World War the international community, through the UN, has engaged in a concerted campaign to bring individuals to the forefront of the international legal system, from the point of view of protection from human rights violations and in the form of justice for participation in international crimes. The International Law Commission (ILC) was established in 1947 with the clear mandate to promote the development of international law and its codification\textsuperscript{162}. It was in fact the ILC that initially formulated the idea about the possibility and need for a permanent international criminal court; the General Assembly then established a committee, and a draft statute was initially drawn up in 1951 and revised in 1953\textsuperscript{163}.

\textsuperscript{159} Chen, \textit{An Introduction to Contemporary International Law}, xii.
\textsuperscript{163} See \texttt{http://untreaty.un.org/cod/icc/general/overview.htm} (last accessed on 5 October 2012). The General Assembly, however, decided to postpone the project until 1989.
This focus has led to the emergence of a variety of multilateral treaties and mechanisms forming an international human rights protection system, and the development of an international criminal law regime that deals with individual perpetrators of serious crimes. The trend has also contributed to the universal character of certain values that are deemed to be fundamental and therefore important to all States and to all citizens. *Jus cogens* norms, also called ‘peremptory norms’, aim at protecting certain fundamental values, irrespective of the will of the State. Codified by the VCLT under Article 53, it is clear that States are not permitted to conclude treaties that infringe peremptory norms, and if they do the treaty will be deemed to be void. It is also stated that

For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.¹⁶⁴

Consequently, there are certain values that are always worthy of protection, irrespective of any reason given by the State. As Grotius stated in his treatise on war and peace, there are rights that are founded on natural law and, as such, they are commanded by God; however, these rights are so ‘unalterable’ that not even God himself, the creator of the law of nature, could change them.¹⁶⁵ In more modern times, D’Amato expressed the view that if an “[i]nternational Oscar were awarded for the category of Best Norms, the winner would surely be *jus cogens*,”¹⁶⁶ possibly because of its rhetorical power and attraction, especially when linked to human rights discourse.¹⁶⁷ In fact, it is the link with human rights that has brought *jus cogens* norms to the forefront of international law, distinguishing them from other norms of international law because of their content and values.¹⁶⁸ Though there is no universally agreed list of what norms can be classified as *jus cogens*, some of the most important human rights prohibitions are generally considered to be included. For example, the Restatement on Foreign Relations of the United States lists as *jus cogens* the prohibition on genocide; slavery; murder or

¹⁶⁴ Article 53 VCLT.
¹⁶⁵ H. Grotius, *De Juri Belli Ac Paci* (1625), Book 1, Chapter 1, X.
disappearance; torture or other cruel, inhuman, degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination and the prohibition of the use of force, as set out also in the United Nations Charter\(^\text{169}\).

Soon after the inclusion of *jus cogens* norms in the VCLT the ICJ formulated the principle that some obligations are obligations *erga omnes* because they are owed to the international community as a whole; therefore every member of the community has an interest in the protection against such a breach\(^\text{170}\). Though it can be said that breaches of *jus cogens* norms can lead to *erga omnes* obligations, not all *erga omnes* obligations involve breaches of *jus cogens* norms. Although in some instances the two principles coincide, it is not always the case because the essence of *jus cogens* norms is their non-derogability, whereas the essence of *erga omnes* obligations is the “generality of standing”, that is the State’s ability to make a claim if a violation occurs\(^\text{171}\).

In the context of international crimes it is not difficult to find a link between the two principles, given the values protected, for instance, within genocide, and the interests of all members of the community to make a claim. However, as Bassiouni points out, there is no agreement concerning which international crime has achieved the *jus cogens* status and also, whether the finding of the existence of an obligation *erga omnes* places the State under an actual legal obligation or whether the concept is devalued and only confers a right to make a claim\(^\text{172}\). Further uncertainty is noted by the fact that it may be the international community as a whole, in an institutionalised sense, on which the obligation to make a claim rests, as opposed to each individual State\(^\text{173}\).

Therefore, the language of *jus cogens* norms already invokes the idea of higher values and higher norms. Despite the academic criticism\(^\text{174}\) regarding the establishment of a different tier of norms within international law, the fact remains that these values and norms point towards the protection of individuals, usually from an over-powerful State.


\(^{170}\) *Barcelona Traction Case*, ICJ Reports (1970), 32.


\(^{174}\) P. Weil, ‘Towards Relative Normativity in International Law’.
or State officials. Words like ‘impunity’ and ‘never-again’ have contributed to the phenomenon of *jus cogens* and the protection of human dignity. It is therefore perfectly logical that the normative language of individual criminal responsibility maintains such a high and virtuous objective. Its objective is to bring justice to all individuals who have suffered from crimes so heinous and unimaginable that has prompted the international community to put something permanent in place to deal with the problem. At the same time, the objective is to end a culture of impunity perpetuated by many nations, which shied away from taking effective actions to bring the responsible ones to justice. Impunity itself has been defined as

...the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims\(^{175}\).

The realization that the domestic legal structures were incapable of dealing with this issue (or unwilling to), coupled with the seriousness of these crimes, led to the creation of a permanent International Criminal Court, with the accompanying international criminal system established by the Rome Statute\(^{176}\). The new regime is designed to send a strong message of what is acceptable and what is not, and it is a reminder that the State has the duty to prosecute international crimes. Its aim is to end impunity for international crimes, and it tries to achieve this through a delicate balancing exercise that, theoretically, takes due regard to principles of State sovereignty, consent and non-intervention. The effectiveness of the regime rests on the language used in the Rome Statute, and its subsequent interpretation and application by the State and by the ICC. However, this balancing exercise can be very problematic because the language of international law tends to pull towards an ideal society where every perpetrator of


\(^{176}\) Although international human rights treaties are directed at States in order to regulate the State’s conduct towards its citizens, the Rome Statute can be treated in exactly the same way, namely the regulation of the State’s conduct towards its citizen. The main difference between the former and the latter is that international human right treaties oblige the State to provide a positive environment and enforcement of human rights, whereas the Rome Statute directs the State to provide a negative environment for human rights violations (that is punishment and imprisonment).
serious international crimes should be investigated and prosecuted\textsuperscript{177}. The language of sovereignty, on the other hand, will endeavour to achieve a realistic interpretation and application, which will serve the interests of the State\textsuperscript{178}. For this very reason, the language of the international criminal law regime is a language of compromise and rich in ambiguities. It is a language of compromise because, like any multilateral treaty, it needs the support of the States to make it effective and relevant\textsuperscript{179}. It is also a language of ambiguities because it deals with words and concepts that are open to a variety of interpretations and practical implementations. Effectively, it is the actual protean nature of these words that lead to different interpretations because there are too many variations and interpretations, due to cultural and linguistic variations.

For example, concepts like ‘impunity’ and ‘justice’, in the context of serious international crimes and in the face of the brutalities occasionally reported by the media, have been used abundantly and have provoked the consciousness of humanity at large. However, media reporting must satisfy the needs and preferences of local/national readers. Therefore, a divergence of reporting and views may be seen within the international community. As Simons put it, though, the reporting narrative of the West focuses on catching the ‘bad guy’ and in seeing justice done\textsuperscript{180}. There is in general no

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\textsuperscript{177} The efforts of the ICC prosecutor in ensuring that crimes are investigated and prosecuted by the ICC rather than by national courts may also contribute to the highly idealistic motivation of the international criminal law regime. Therefore, the method of interpretation of the language of the Rome Statute by the ICC bodies will play a part in the balancing exercise between the State and the ICC. It has also been suggested, on the other hand, that the ICC prosecutor’s eagerness to accept self-referral from States and prosecute their citizens may be due to a desire to give credibility to an institution that has already received a lot of criticism; see for example A. Rubin, 'The International Criminal Court: Possibilities for Prosecutorial Abuse', \textit{Law & Contemporary Problems}, 64 (2001), 153-66. For a US critical perspective see J.R. Bolton, 'The Risks and Weaknesses of the International Criminal Court from America’s Perspective', \textit{Virginia Journal of International Law}, 41 (2000-2001), 186-203; R. Wedgwood, 'The International Criminal Court: An American View', \textit{EJIL}, 10 (1999), 93-107 and A.J. Walker, 'When a Good Idea Is Poorly Implemented: How the International Criminal Court Fails to Be Insulated from International Politics and to Protect Basic Due Process Guarantees', \textit{West Virginia Law Review}, 106 (2003), 245-304.

\textsuperscript{178} This pull between idealism and realism (or apologetics as Koskenniemi defines it) is an inherent part of the law of sovereignty. The apologetics side derives from the fact that (international) law emanates from the State only and therefore that is the only law that is concrete; on the other hand, the normativity side of the law aims to achieve common aims amongst members of the international community. See Koskenniemi, \textit{From Apology to Utopia - the Structure of International Legal Argument}, 167.

\textsuperscript{179} It is perhaps because of this compromising exercise that the Rome Statute came into force earlier than expected, as it attracted the sufficient number of ratifications (sixty) and came into force on 1\textsuperscript{st} July 2002. See also W.A. Schabas, 'The International Criminal Court: The Secret of Its Success', \textit{Criminal Law Forum}, 12 (2001), 415-28.

\textsuperscript{180} M. Simons, 'International Criminal Tribunals and the Media', \textit{IICJ}, 7 (2009), 83-88, 85. It must be noted that, although concepts like ‘justice’ and ‘impunity’ have reached universal status and approval, it

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interest in the various processes that go on before and after the arrest of the bad guy, we just want the bad guy apprehended and punished! Due process, therefore, has no significant meaning or importance to the public in general and to the victims in particular. Justice, in the context of international criminal law, is the significant word. It is the symbol that will bring the other symbol, impunity, to a crippling end. But how should this concept be interpreted, given its localized understandings and applications? Is it possible to form a universal understanding of justice and the correlative concept of impunity? One of the problems with international criminal law is that it supports concepts at the global level – like justice and impunity – but these concepts cannot be considered to be completely neutral and void of any moral, political and geographical implications and meanings. For example, French refers to similar concepts as meta-principles, namely concepts that attempt to achieve a universal scope, but are ridden with a high level of conceptual indeterminacy. Part of the problem with the correct interpretation of these concepts stems from the fact that the universality of their appeal hides a range of intrinsic and unanswered tensions. [They] include over-use in the policy arena, intentional political ambivalence, philosophical uncertainty and, consequent upon all of this, indeterminacy in not only scope and content, but also the means, methods and operational principles which might otherwise comprise a framework of implementation.

For example, justice is indeed a term that is difficult to conceptualize and define as a single unitary concept and it is probable that ‘justice’ in the Western world is conceptualized differently than in the developing countries. For Bassiouni, for example, justice, as accountability for serious crimes (breaches of jus cogens norms), can take two different forms: (1) strict and legal, incorporating the usual prosecution and

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182 Ibid, 594.
punishment; (2) non-strict and non-legal, which may include prosecutorial-type trials without punishment (as in truth commissions). Different approaches and understandings of justice can naturally lead to a variety of implementation of international criminal law at the national level, potentially reducing the success of the Rome Statute and the new international criminal law regime. However, it can also be argued that the indeterminacy of the word ‘justice’ itself may be insignificant because what is important is that it actually exists, providing a driving force towards a more unitary system of interpretation and application. In other words, the various members of the international community may achieve a more uniform understanding and appreciation of justice once the shared consciousness of the international society becomes more mature.

2.5 Complementarity: a bridge between the realism of sovereignty and the idealism of the international criminal law regime

The Preamble to the Rome Statute and Article 1 refer to the ICC as an international institution that ‘shall be complementary to national criminal jurisdictions’. Although not defined in the Statute itself, the principle has been widely adopted by international legal experts as a tool that defines the relationship between the sovereign State and the ICC in the context of criminal jurisdiction for serious international crimes. The ICC Trial Chamber further clarified the way in which complementarity works by stating that the determination as to whether the State is able to carry out criminal proceedings properly does not depend on a singular moment in time but it is in fact a process, subject to “multiple determinations” and “multiple challenges”, concluding that

184 See Franck, Fairness in International Law and Institutions. The problem of textual indeterminacy is addressed by Franck as causing problems of compliance, and therefore States will find it easier to justify a certain conduct and avoid their responsibilities (30-31). Indeterminacy, on the other hand, does not suffer from the same problem because there is no fixed definition of what justice is; however, the same argument can be applied when it comes to a State’s deviant behaviour.
185 Rome Statute Preamble, Para. 10.
Considered as a whole, the corpus of these provisions delineates a system whereby the determination of admissibility is meant to be an ongoing process throughout the pre-trial phase, the outcome of which is subject to review depending on the evolution of the relevant factual scenario. Otherwise stated, the Statute as a whole enshrines the idea that a change in circumstances allows (or even, in some scenarios, compels) the Court to determine admissibility anew.\(^\text{188}\)

Therefore, the State’s ability to deal with criminal prosecutions following the perpetration of international crimes is heavily scrutinised by the ICC Pre-Trial Chamber. After an admissibility decision has been made by the Court, the State concerned has the opportunity to challenge such decision once, or more than once in exceptional circumstances.\(^\text{189}\) In effect, this procedure ensures that a good working relationship is maintained between the Court and the State, theoretically giving the State sufficient opportunity to exercise or reclaim the exercise of criminal jurisdiction.

The structure established by the Rome Statute is significantly different from the previously established *ad hoc* international criminal tribunals and it is for this reason that Van der Vyver opines that the ICC negotiations

...added a new word to the English language – or a new meaning to the word as defined by American English...Within the meaning of ICC usage, ‘complementarity denotes a secondary role – not in importance but in the sequence of events. In other words national courts have the first right and obligation to prosecute perpetrators of international crimes, and because ICC jurisdiction is complementary to national courts, ICC jurisdiction can only be invoked if the national court is unable or unwilling to prosecute.\(^\text{191}\)

The function of the complementarity principle has been spelled out clearly, that is to enable member States to exercise primary jurisdiction over international crimes.\(^\text{192}\)

\(^{188}\) Ibid, para. 25 et seq.

\(^{189}\) This challenge, as set out in Article 19(4), can occur either before or at the start of criminal proceedings; Article 18(7) also allows for a challenge to be made at the preliminary stage and under Article 19 on the grounds of ‘additional significant facts’ or ‘change in circumstances’; see J. Pichon, The Principle of Complementarity in the Cases of the Sudanese Nationals Ahmad Harun and Ali Kushayb before the International Criminal Court, *International Criminal Law Review*, 8 (2008), 185-228 at 199-200.

\(^{190}\) The ICTY and the ICTR were created by order of the Security Council and their mandate was to have primary jurisdiction over international crimes committed in the territories of the Former Yugoslavia and Rwanda; see the Statute of the International Criminal Tribunal of the Former Yugoslavia, established by SC Res. 827 (1993) and the Statute of the International Criminal Tribunal for Rwanda, established by SC Res. 955 (1994).


\(^{192}\) Some comprehensive works have been carried out in the area of complementarity; see for example Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*; F. Gioia, ‘State
Complementarity, though, lacks a proper definition. International criminal lawyers understand what it does but the word does not have an exact meaning and it is also possible that its meaning could be construed differently by different parties to the Rome Statute. The different construction manifests itself in practical terms, in the sense that States perceive their obligations to prosecute international crimes differently; a typical example relates to a State’s priorities of its duties, preferring to delegate the prosecution of international crimes to the ICC rather than dealing with the crime within the State’s jurisdiction (i.e. self-referrals). As a relatively new principle of international criminal law, complementarity is a malleable concept which, in the language of international legal discourse, has no precise legal meaning, and it can lead to multiple contradictory meanings. On the one hand, complementarity represents an incentive for the sovereign State to avoid the jurisdiction of an international court to extend to its internal affairs, citizens and residents. On the other hand, it can act as a disciplinary tool to chastise the State for its ineffectiveness in dealing with such an important mandate, namely the exercise of criminal jurisdiction\textsuperscript{193}. It can also be interpreted as a tool to extend the content of the sovereignty principle by integrating human rights protection and punishment as inherent duties of the sovereign State towards its people, potentially transforming the discourse on sovereignty\textsuperscript{194}. Lastly, complementarity has been interpreted by some as a tool to limit sovereignty and contribute to the formation of an international society, free from the traditional institutional constraints that have characterized international law\textsuperscript{195}.

\textsuperscript{193} See I. Brownlie, Principles of Public International Law (6th edn.; Oxford: Oxford University Press, 2003), 287. It is also worth mentioning at this point that the practice of self-referral was not envisaged by the Rome Statute but it is the self-referral of several African States that have made it possible for the ICC to start becoming operational. This practice, however, may have distorted the concept of complementarity; see T. Muller and I. Stegmiller, 'Self-Referrals on Trial - from Panacea to Patient', Journal of International Criminal Justice, 8 (2010), 1267-94.


\textsuperscript{195} See Allott, Eunomia: New Order for a New World. The claim that the Rome Statute has effectively reduced the power of the sovereignty principle has been made by many scholars and human rights activists; see I. Ward, Justice, Humanity and the New World Order (Aldershot: Ashgate, 2003); P. Sands (eds.) Justice for Crimes Against Humanity (Oxford: Hart, 2003); see also A. Cassese, 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', European Journal of International Law, 9 (1998), 2-17; here Cassese argues that either one supports the international rule of law or State sovereignty, as there is 'a basic dilemma facing international tribunals: prosecution and punishment or continued respect for State sovereignty?' (p. 9).
Complementarity can therefore be regarded as a descriptive and as a normative term. In its descriptive sense, it tells us what it is and what it does. Who has primary jurisdiction over international crimes? When does the ICC exercise jurisdiction? The answers to these questions provide a neutral content of complementarity, which can be extrapolated from the ordinary meaning of the language contained in the Rome Statute, in the ICC Rules of Procedure and Evidence, and eventually in the implementation methods by member States’ domestic legislation. The normative sense of complementarity, on the other hand, is tantamount with values attached to its content. It concerns questions as to whether complementarity is good, what complementarity ought to achieve and whether the use of complementarity is the best way to achieve it. It aims to maximize our common interests and protect our common values, specifically in the area of human rights protection and justice. Effectively, complementarity will aim to become the instrument that will bring the culture of impunity to an end.

The question posed here is whether the language of the sovereign State and the language of the international criminal regime can be integrated in a purposeful and coherent way for complementarity to achieve its objectives and for the international criminal law regime to have a beneficial effect on the sovereignty principle. In other words, there is a tacit expectation that, through the principle of complementarity, the culture of impunity that has permeated the international community for so long will come to an end because the sovereign States will fulfil their duties concerning the prosecution of individuals for serious crimes.

The descriptive language, on the other hand, is the language of the sovereign State. It is not motivated by higher ideas of protecting common values and interests, although it can be used as part of the decision making process. The reality and complexity of the sovereign State is well acknowledged: it is assigned with the task of regulating behaviour vertically between its citizens, and yet it must be mindful of the horizontal relationships in the international community. It is a language shaped and influenced by a variety of factors, included political, economical and commercial. The normative language of international law, with regard to individual criminal responsibility, has a higher and virtuous objective. Nevertheless, the creation of a utopian international
community has no practical value, as sovereign States will merely decide not to comply with international law in order to protect their own interests.

2.6 Conclusion

The purpose of this chapter is to set the scene and the context of the chapters that follow. The analysis of the relationship between State sovereignty and international criminal law through a language perspective serves as an insight to understand how best to manoeuvre around State sovereignty in order to produce the desired results for the new regime. There are flaws and strengths on both sides, as demonstrated by the misconceptions inherent to the sovereignty principle and the idealism of the international criminal law regime. The language perspective adopted in this chapter is not intended to be a traditional linguistic analysis of different legal texts. The intention is to look at words as symbols, and the meaning given to these symbols depends on the understanding and awareness of the people interpreting them. This understanding and awareness can be construed as a *shared consciousness*, which will eventually lead to a more coherent understanding and application of the law.

A successful implementation of the Rome Statute depends on the actions of the sovereign State. However, without a *shared consciousness* of certain principles and norms of international criminal law, each sovereign State is left to decide how best to interpret and implement international criminal law into their domestic jurisdiction. Without a correct and coherent understanding, interpretation and incorporation of international criminal law into domestic law there will be no effective implementation of the Rome Statute into domestic law. It is therefore important to ensure that a concept like ‘complementarity’, intended to bridge the gap between the egocentricity of the sovereign State and the idealism of international criminal law, is understood clearly by all parties to the Rome Statute, thus improving its success and coherent application.
Chapter 3

National approaches to the exercise of international criminal jurisdiction

3.1 Introduction

One of the main contentions of the new international criminal law regime is that the establishment of a permanent international criminal court will interfere with one of the most traditional manifestations of sovereignty, namely the exercise of criminal jurisdiction. This chapter will seek to demonstrate that such exclusive exercise has long been transformed by extradition practices and the establishment of international and hybrid criminal courts. The extradition practices have proved to be valuable in an increasingly interconnected international community, whereby States have recognised a certain degree of hierarchy when deciding which State should prosecute. Extradition, therefore, allows States to collaborate and share in the exercise of criminal jurisdiction, as the prosecution of crimes, international crimes in particular, tend to serve the common good and therefore protect the interests of the international community as a whole.

There is, however, another upshot to the idea of exclusivity of the exercise of criminal jurisdiction, and that is the State’s ability, through the principle of sovereignty, to offer amnesties or establish truth commissions in place of pursuing justice for the crimes committed. It has long been recognised that it is only through a concerted effort by the international community, through the establishment of international courts, that the use of sovereignty to shield perpetrators has to come to an end. However, there is a conceptual and practical difference between what the State can do within its territorial boundaries, and how the international community can act in order to achieve the aims of the Rome Statute. In essence, this chapter lays an emphasis on the inter-state horizontal paradigm concerning the exercise of criminal jurisdiction. This particular paradigm favours the State in two particular ways: first of all, when States enter into reciprocal extradition agreements, they would normally tend to protect their interests or the interests of their citizens, for example by refusing to extradite a national. This does not mean, in itself that the State favours impunity, but such conclusion could be easily
construed, especially if the person concerned is a State official or has acted under the authority of the State. Secondly, even if alternative justice mechanisms, like amnesties and truth commission, are generally considered to run counter to the spirit and objectives of the Rome Statute, there is essentially very little that the international community can do to stop a State from adopting such mechanisms domestically. It will be noted, however, that the decisions taken by the sovereign State cannot bind other States or international courts, or even a future government of the same State that offered the amnesty or TC.

3.2 The concept of international sovereignty

3.2.1 Sovereignty and Statehood

In the context of international law there are certain entities that are capable of being endowed with international rights and duties, and have the ability to exercise those rights by bringing international claims. As part of these powers, the entity – or legal person – has the capacity to enter into international agreements, make claims in case of a breach of international agreements, and enjoy an array of immunities and privileges. The autonomous territory of the State is the entity which is endowed with these rights and duties. Sovereignty can therefore be defined as a characteristic of statehood or an attribute of States, though it is not a right or a criterion for statehood.

The basic criteria for Statehood have been clearly laid down by the Montevideo Convention on the Rights and Duties of States. According to Article 1 the State, as a

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197 Brownlie, Principles of Public International Law, 57.
198 Although the State is still the main legal person in the international community, there are other entities that enjoy a similar range of rights and duties as the States, and are able to enter into international agreements (see Reparation for Injuries case, 179).
199 J. Crawford, The Creation of States in International Law (Oxford: Clarendon Press, 2011), 32. Academics have for a long time resented the strong association that exists between sovereignty and the territorial State due to the old-fashioned suggestion that the State is completely autonomous and independent; in particular, Henkin’s diatribe against the ‘s’ word is particularly memorable because it captures the confusion and myth that have transformed a 17th century concept into an ‘illegitimate offspring’; Henkin, That ‘S’ Word: Sovereignty, and Globalization, and Human Rights, Et Cetera’, 2.
200 26 December 1933. Although this was originally a regional agreement it is generally accepted that the criteria of Statehood listed in the convention are now part of customary international law; see Crawford, The Creation of States in International Law, 45 et seq.
person of international law, should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) a government; and (d) capacity to enter into relations with other States.

In the context of this thesis it is the notion of government that is most relevant because this criterion is intrinsically related to the type of sovereignty exercised within the territorial boundaries of the State, in the way that this sovereignty is interpreted, and in the reaction by the international community. Although the Montevideo Convention never qualified the notion of government, academic commentaries complemented the notion with the idea of ‘effective government’, even though the actual content of effectiveness has never been clearly spelled out. There is, however, some consensus that effectiveness may in fact weaken in the context of self-determination and in countries emerging from post-colonial rule, rendering the notion of effectiveness as less important than other principles of international law, as self-determination.

Although no serious attempt has been made to redefine these criteria, which were laid down nearly a century ago, some efforts have been made to take into consideration international events that have led either to the disintegration of States or to the appreciation that certain States could not possess all the criteria at a certain moment in time. For example, in 2008 a report produced by the Council of Europe Independent Fact-finding Mission on the Conflict in Georgia listed three minimal pre-conditions for Statehood, namely (1) a permanent population, (2) a defined territory and (3) effective government. In respect to the latter, the report stated that

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201 The criterion of a ‘permanent population’ has also been described as a ‘stable community’ or ‘organised community’ as evidence of the existence of the State (Brownlie, Principles of Public International Law, 70-71.). There is no minimum requirement in the number itself, allowing very small entities to succeed as a State; for example, the small republic of San Marino is evidence of this, with a population below 30,000 it was admitted to the UN in 1992.

202 The capacity to enter into relations with other States is synonymous with the State’s independence, believed by many jurists to be a decisive factor for the criteria of Statehood.


204 C. Warbrick, ‘States and Recognition in International Law’, in M. Evans (ed.), International Law (Oxford: OUP, 2003), 222-23; Higgins, Problems and Process: International Law and How We Use It, 40; Higgins for example points out to the fact that countries like Rwanda, Burundi and Congo were admitted to the UN even where there was clearly no effective control within those territories.

205 Higgins, Problems and Process: International Law and How We Use It, 39.

206 EU Council Decision 2008/901/CFSP.
These objective criteria for determining Statehood are very general and flexible, and their application to concrete cases always remains a question of appreciation. Especially the “effectiveness” of government is a question of degree. The emergence of a new State, especially as a result of secession from an existing State, is usually a process extended through time. Throughout this process, independence can decrease or increase, depending on a number of factors207.

Two issues can be deduced from this report: first of all, the notion of independence or autonomy is missing from this preliminary list of criteria for the determination of Statehood. Whilst it is acknowledged that the criteria of ‘government’ and ‘ability to enter into international agreements’ are two sides of the same coin – namely internal and external sovereignty – that is not to say that both sides should develop at the same rate in order to gain the recognition as a legal person, and therefore a State. A striking example of this disparity is the political situation in Kosovo following the Yugoslavian conflict and the desire for Kosovo, originally an autonomous region within Serbia, to gain full independent status. Kosovo’s unilateral declaration of independence (UDI) in February 2008208 was recognized by the majority of Western nations209. However, due to the refusal of some members of the international community to accept Kosovo’s unilateral independence, Kosovo is not yet a UN member, although it is a member of the International Monetary Fund and the World Bank. Moreover, the Kosovo territory was subject to a controlled and supervised plan, initially by the UN210, and later on by the EU211. Kosovo, therefore, is an example of the complexities and fluctuations of this area of international law212, whereby its international status is disputed by some States, and internally, its sovereignty is reduced because of the ‘supervised or controlled supervision of Kosovo’213.

208 See the full text at http://www.assembly-kosova.org/?cid=2,128,1635 (last accessed on 12 October 2012).
209 Note, however, that Serbia rejected the Declaration and continued to claim its sovereignty over the Kosovo territory. The ICJ, in its Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence in Respect Of Kosovo (22 July 2010), decided that the Kosovo’s UDI did not contravene international law; the decision, however, did not investigate the wider question as to whether Kosovo had in fact achieved statehood (para. 51).
210 The UN Mission in Kosovo (UNMIK) was established by SC Res. 1244 (1999) of 10 June 1999.
211 The EU Rule of Law Mission in Kosovo (EULEX) was established by the Council Joint Action 2009/445/CFSP of 9 June 2009, amending Joint Action 2008/124/CFSP on EULEX Kosovo.
213 Ibid, at 37.
Secondly, there is no coherent level of effectiveness of government, there is just an understanding that the effectiveness fluctuates depending on certain internal political factors. However, it is also becoming increasingly noticeable that other factors may determine whether government is effective, not just in the context of control but also in the context of legitimacy. In fact, the same report on the fact-finding mission in Georgia stated that respect for basic international obligations, particularly in the area of human rights, was taken into consideration in the overall evaluation of the Statehood of those new States, although it is not clear whether this consideration was due to a legal requirement or to political discretion. Warbrick too reiterates the current view and practice, namely that it is international law that defines the criteria for Statehood, setting out the rights and privileges along with the duties that States must carry out. Therefore, even though sovereignty may not have been a traditional criterion for statehood, “government” can be interpreted as being synonymous with sovereignty:

There is in every independent political community – that is, in every political community not in the habit of obedience to a superior above itself – some single person or some combination of persons which has the power of compelling the other members of the community to do exactly as it pleases. This single person or group – this individual or this collegiate sovereign (to employ Austin’s phrase) – may be found in every independent political community as certainly as the center of gravity in a mass of matter.

In similar terms, Justice Holmes declared that “a word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used”. This is particularly relevant given the fact that “sovereignty” can lead to a variety of definitions depending on whether one looks at it as a legal term or a political one. Therefore, it is contended that the criteria for Statehood should be further developed in order to take into proper consideration the rights and duties of States. In essence, the word “effectiveness” should not be applied just in the context of territorial control, because the notion of “control” actually carries with it negative connotations, resembling more and more the notions of

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214 Although in general ‘effectiveness’ is deemed to relate to the exercise of effective authority and control within a territory, noting in particular that such authority cannot be indirectly inferred (Western Sahara case, ICJ Advisory Opinion 16 October 1975, para. 93).
216 Warbrick, ‘States and Recognition in International Law’, at 207.
218 Towne v Eisner, 245 U.S. 418 (1918), 425.
sovereignty laid down by classical theorists of sovereignty rather than the constitutional ones, who constructed a more contractual relationship between States and citizens. In fact, in the context of serious human rights violations, it should be applied as “effectiveness to protect” its own citizens within its own territorial boundaries, an interpretation that better reflects the current approach and development of the responsibility to protect as opposed to the older and more traditional understanding of sovereignty as “right to control”.

3.2.2 International sovereignty and autonomy

The concept of ‘international sovereignty’ refers to the State’s independence from any authority outside the territory of that State\(^\text{219}\). According to this notion, no other international entity, either in the form of another State or organisation, can legitimately dictate a State’s activities, thus creating an anarchical system where each and every State has the same legal right to affirm its ‘international sovereignty’ without usurping the same right from other States\(^\text{220}\). The system is therefore anarchical not because there is complete lack of authority within the international community of States, but because the relationship occurs among authoritative actors, and none of them has authority over others\(^\text{221}\).

A correlation of ‘international sovereignty’ is the State’s capacity to enter into negotiations and international agreements with other States or international organizations within the international community. In other words, it is a clear recognition that each sovereign State possesses the necessary attributes to enter into legally binding agreements with equal sovereign States, thus supporting the principle of sovereign equality, as expressed in Article 2 of the UN Charter. This state of affairs supports the principle of autonomy or independence, in the sense that there should not be any outside interference in the internal affairs of the State. The principles of non-intervention and non-interference represent clear manifestations of the State’s autonomy within the international community, but their meaning and application have been subject to change over time. In 1981 the General Assembly issued a Resolution which,


in very clear and strong terms, stated that the two principles of non-intervention and non-interference are vital to the maintenance of international peace and security. It declared that:

1. No State or group of States has the right to intervene or interfere in any form or for any reason whatsoever in the internal and external affairs of other States.
2. The principle of non-intervention and non-interference in the internal and external affairs of States comprehends the following rights and duties:
   (a) Sovereignty, political independence, territorial integrity, national unity and security of all States, as well as national identity and cultural heritage of their peoples;
   (b) The sovereign and inalienable right of a State freely to determine its own political, economic, cultural and social system, to develop its international relations and to exercise permanent sovereignty over its natural resources, in accordance with the will of its people, without outside intervention, interference, subversion, coercion or threat in any form whatsoever;
   (c) The right of States and peoples to have free access to information and to develop fully, without interference, their system of information and mass media and to use their information media in order to promote their political, social, economic and cultural interests and aspirations, based, inter alia, on the relevant articles of the Universal Declaration of Human Rights and the principles of the new international information order...

In the context of this discussion on sovereignty and the new international criminal law regime, however, the following paragraph from the same Resolution is exceptionally relevant because it demonstrates the changing priorities within the international community, and the changing boundaries of non-intervention and non-interference:

The duty of States to refrain in their international relations from the threat or use of force in any form whatsoever to violate the existing internationally recognized boundaries of another State, to disrupt the political, social or economic order of other States, to overthrow or change the political system of another State or its Government, to cause tension between or among States or to deprive peoples of their national identity and cultural heritage.

However, in practice, international law and international politics offer many examples of such interference, making State’s autonomy a relative issue as opposed to an absolute reality. The notion of ‘overthrowing’ or changing the internal political system of

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223 Ibid.
224 Ibid, II (a).
225 In the context of this chapter, State autonomy is especially relevant because it refers to the State’s actual ability to exercise its traditional criminal jurisdiction mandate, without any outside interference.
another State may have been unacceptable back in 1981 but a present-day tyrannical regime that carries out systematic human rights violations against its own citizens and within its own territory may be treated in a different way. The Responsibility to Protect doctrine, originated in the report published in 2001, suggests that the international community is indeed adopting a different view of sovereignty. Although this does not amount to a precise definition, it reflects a view of a renewed sense of its boundaries, and it may affect the way the international community interacts, and also the way that the new international criminal law regime applies. For example, the report includes the notion of responsibility within the principle of sovereignty, thus capturing the essence of, and developing, the social contract theory introduced by Rousseau, whereby citizens enter into a relationship with the State and entrust the State with the protection of their rights:

Thinking of sovereignty as responsibility, in a way that is being increasingly recognized in State practice, has a threefold significance. First, it implies that the State authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare. Secondly, it suggests that the national political authorities are responsible to the citizens internally and to the international community through the UN. And thirdly, it means that the agents of State are responsible for their actions; that is to say, they are accountable for their acts of commission and omission. The case for thinking of sovereignty in these terms is strengthened by the ever-increasing impact of international human rights norms, and the increasing impact in international discourse of the concept of human security.

The international community’s response to the repression in Libya in 2011 is evidence to the fact that it is becoming more and more untenable for nations to stand by and watch systematic human rights violations unfold on our television screens and newspapers reports. Stahn goes further and contends that the international community response to Libya represents a “...test case of shared responsibility, embraced by the responsibility to protect (R2P) doctrine and the principle of complementarity under the Rome Statute”. Specifically, this is because the SC referral of the Libya situation to the ICC took place in the context of the responsibility to protect, in the sense that it

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226 ‘The Responsibility to Protect’.
227 Ibid., para. 2.15. Arbour contends that, even though there is much public support for SC intervention to prevent atrocities, the least we can expect for now is the punishment of the individuals responsible, a chain of events that started with the ad hoc international criminal tribunals of Rwanda and the Former Yugoslavia, and has culminated with the creation of a permanent ICC; see Arbour, ‘The Responsibility to Protect as a Duty of Care in International Law and Practice’, 446.
228 C. Stahn, ‘Libya, the International Criminal Court and Complementarity’, JICJ, 10 (2012), 325-349.
arose out of General Gaddafi’s failure to protect its own population\textsuperscript{229}. The notion of “shared responsibility” prescribes the attribution of fault for failure to intervene or act in a specific way\textsuperscript{230}. However, it can also be said that the omission or failure to act, leading to physical harm or destruction of property, has always been a tenet of international law, as it is also in many national jurisdictions. For example, in the Corfu Channel case, the ICJ found that Albania was partly responsible for the deaths and injuries caused to the British vessel because they (Albania) had knowledge that mines were laid in those waters by Yugoslavia, but failed to give any warning. The Court reasoned that such obligation, to take the necessary steps to inform another party of a dangerous situation, does not arise out of the Hague Convention of 1907 but it is based on, inter alia, “basic elements of humanity”\textsuperscript{231}.

The fact that the language of a State’s failure to act is extended, or it is trying to be extended, to the context of systematic human rights violations, demonstrates that “basic elements of humanity” are seeping into the realm of international law and national law, causing a re-think with regards to the extent of autonomy. This is because the responsibility to protect extends to the national State’s relationship towards its citizens, and towards other States for failing to intervene to stop human rights violations in another State. Given this new developing norm, it can also be said that whatever application may ultimately be given to the crime of aggression\textsuperscript{232}, it will need to encapsulate or consider the fact that the traditional notion of non-intervention and non-interference will become more and more obsolete at worse or a very obscure and indeterminate concept at best\textsuperscript{233}. However, although it is apparent that humanitarian interventions, properly sanctioned by the Security Council and properly conducted by relevant forces, will not incur any criminal liability, it is also possible that these interventions may not, in fact, become normalised features of the international legal order. This is due to the reluctance of certain members of the international community

\textsuperscript{229} Ibid, 326.
\textsuperscript{231} Corfu Channel Case, Judgment of April 9 1949, ICJ Reports, 4, at 41.
\textsuperscript{232} Rome Statute, Article 5(d). According to the Understanding 6 on the crime of aggression, adopted by consensus in Kampala in 2010, the aggressive act must contain sufficient ‘character, gravity and scale’ in order to justify the ICC jurisdiction; see K. J. Heller, ‘The Uncertain Legal Status of the Aggression Understandings’, \textit{JICJ}, 10 (2012), 229-48 at 233.
to exercise a new mandate to protect individuals from international crimes at the cost of the principle of non-interference, and it is reflected in China and Russia’s use of their veto powers to stop any UN intervention in Syria.\textsuperscript{234}

The words “manifest violation of the Charter of the United Nations” contained in the definition of aggression may lead to a situation that it is also “conceivable that the Court would exclude unilateral humanitarian intervention from the crime of aggression solely on the basis of Understanding 6”\textsuperscript{235}. This state of affairs confirms the stronger emphasis on, the responsibility to protect as a new developing norm but the word “manifest” injects yet again an element of uncertainty into international legal parlance. It is plausible that, because of this uncertainty and because of the current trend concerning the “responsibility to protect”, that the word “manifest” will be interpreted in such a way to take this new trend into strict consideration, allowing interventions of a humanitarian character, even without a clear mandate from the Security Council\textsuperscript{236}.

The events that unfolded in Libya during the fall of one of the most reprehensible regimes that had endured for decades demonstrate the seriousness of humanitarian despair as well as the need for intervention. The Security Council adopted a Resolution that contained a strong message of concern and condemnation of such events and the regime that perpetrated them\textsuperscript{237}. The apprehension and killing of Colonel Gaddafi will undoubtedly represent a disappointment, not just from the perspective that his own death should raise questions of potential criminal liability, but also because international criminal justice and the international community is yet again deprived of witnessing the

\textsuperscript{234} SC Resolution 1973 (2011), adopted by a vote of 10 in favour and five abstentions (none against), approved a no-fly zone over Libya and the taking of any necessary measures to protect civilians, apart from the use of ground troops. However, the campaign in Libya was not straightforward because some of the actions taken by NATO were subject to criticism; see “Report of the International Commission of Inquiry on Libya” (Advance Unedited Version) UN A/HRC/19/68, 2 March 2012. In contrast and maybe following the lessons from Libya, the proposed SC Resolution to end the atrocities in Syria demanding President Bashar al-Assad to stand down was subject to a veto from both China and the Russian Federation.

\textsuperscript{235} Heller, ‘The Uncertain Legal Status of the Aggression Understandings’, 234. Understanding 6 sets out that “...aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations” (Annex III of Resolution RC/Res.6, 2010).


\textsuperscript{237} SC Resolution 1970 (2011).
accountability of another Head of State for the perpetration of international crimes\textsuperscript{238}. There will be, undoubtedly for years to come, many critical appraisals of the Libya’s intervention: whether aiding a country to change the regime was the correct path, whether the new regime represents a better deal for the people of Libya, and whether the Western nations would be prepared to do this again. The past failures of Somalia, Rwanda and Bosnia are a reminder that humanitarian intervention does not succeed and could in fact make matters worse\textsuperscript{239}. For example, is the protection of civilians from imminent attacks synonymous with demanding and aiding a regime change? Is it correct to use morality as a tool to support military intervention to protect people, as it was done when NATO launched attacks on Bosnia? It is for these reasons that this form of intervention is still shrouded in a cloud of doubts. In other words, the responsibility to protect is not yet a recognised norm of international law. In fact, given its potential for interference with State sovereignty, it sits between enthusiastic acceptance and categorical rejection\textsuperscript{240}, although there is no doubt that the normative value of this doctrine is slowly proceeding forward, especially as a Special Adviser on the Responsibility to Protect was appointed in 2007 by the UN Secretary-General, entrusted with the specific tasks of “conceptual development and consensus building”\textsuperscript{241}. Interestingly, the idea of a “conceptual development” may sit uneasily with the proper form of international law creation because it appears to be established for the very purpose of persuading and inspiring States to behave in a manner that is not strictly conforming to the traditional theory and practice of State sovereignty. If the rules of international law are created through the will and consent of the sovereign State, the “consensual development and consensus building” of the norm “responsibility to

\textsuperscript{238} Among other Heads of States who avoided the accountability process are Hitler and Milosevic, who both died before proceedings took place in Hitler’s case whilst Milosevic died of natural causes during the course of proceedings. Also, Sudan’s President Al Bashir remains at large, despite two arrest warrants issued by the ICC. At the present time, though, former Liberia’s President Charles Taylor has just been found criminally responsible for aiding and abetting the commission of war crimes and crimes against humanity perpetrated in neighbouring Sierra Leone.


protect” supports the notion that the State is not completely autonomous in the setting of its internal or external agenda.

3.3    Sovereignty and the adjudication of criminal liability

3.3.1   Exclusivity and criminal jurisdiction

Historically, it is the State, through its sovereign powers, that has the mandate to investigate, prosecute and punish persons that commit a crime within its territorial jurisdiction. However, why should the State be in this privileged position to punish individuals who have committed crimes? One of the most accepted theories put forward is the one that views the State as a protector of its own citizens, and therefore the State will generally ensure that the perpetrator gets his/her deserved punishment. As Morris put it,

> Crime gives its perpetrator an ‘unfair advantage’ over fellow citizens – the benefits of their compliance with society's rules without the burden of his own restraint – which punishment eliminates, thus ‘restor[ing] the equilibrium of benefits and burdens by taking from the individual what he owes’.

In fact, the State’s claim is even deeper than this, in the sense that the State has the claim to the exercise of an exclusive right to criminal jurisdiction, including the right to determine the type of punishment, and even the right to pardon the person that has committed the crime. This exclusivity of criminal jurisdiction also leads to the vigilante scenario; that is the idea that within the territory of the sovereign State only the State – or State officials or representative – is entitled to prosecute and mete out individuals with an adequate punishment for their crimes. Nobody else, within the boundaries of the sovereign State, is entitled to take the law in their hands and take over the mandate that belongs to the State only. This exclusive mandate, in other words, seems to be entrusted to the State because it is generally the State that has put into place the necessary policies, laws, mechanisms and human resources to ensure that the punishment for the crimes committed serves particular purposes in society, usually

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244 Ibid, 465.
justified through theories of retribution, deterrence, moral education, expressionism and restitution. This is why the idea of vigilante type of justice is frowned upon, not only because the necessary investigations are not carried out effectively, but also because vigilante justice can never perfectly meet the State’s mandate towards its citizens. In fact, vigilante-type justice is synonymous with the frustration that arises out of an unwilling or unable sovereign State to deal effectively with perpetrators of crimes.

However, the State is not a perfect organization and, in its dealing with the criminal justice system, it has demonstrated a major weakness, shaped in the occasional reluctance to investigate and prosecute individuals for crimes that are often linked to the way the State, or any authority representing the State, exercises its sovereign powers. This is not to say that the State always punishes all individuals for all crimes perpetrated within its territory. This does not happen for a variety of reasons, including the interest of justice.

Another important issue that is pertinent to the State’s exercise of criminal jurisdiction is the fact that the State’s internal political make-up can have an effect on the traditional formula of responsibility, crime and punishment. In other words, the idea and the idealism of criminal justice remains something more tangible within certain societies where such ideal is within their easy reach. This is not necessarily true for transitional societies where responsibility, crime and punishment may represent a real hindrance to the success of its transition. Transitional justice theories have therefore taken into account these limitations and the non-idealism that these situations create, leading to ‘hybrid’ programs of justice that tend to incorporate a limited number of criminal trials for the principal leaders, amnesties, truth commissions and reparations. Despite some opinion that the provision of justice in these societies should not differ at all from more

245 Ibid, 467.
248 By ‘certain societies’ the author intends to refer to liberal democracies, where the notions of human rights, rule of law and justice are generally more developed and scrutinized; see also Slaughter, ‘International Law in a World of Liberal States’.
249 Gray (no. 229), at 2622.
250 Ibid.
stable societies\textsuperscript{251}, the reality of transitional societies is that mass atrocities tend to be “...correlated with a public face of law that provides abusers, in their roles as public agents, warrant for believing that their acts are right, necessary, or at least not subject to punishment”\textsuperscript{252}. Therefore, instead of exercising its sovereign powers related to criminal justice, the sovereign State becomes the \textit{face of law} that makes the mass atrocities possible\textsuperscript{253}.

3.3.2 The extradition regime and sovereignty

Black’s Law Dictionary defines ‘extradition’ as

\begin{quote}
[t]he surrender by one State or country to another of an individual accused or convicted of an offense outside its own territory and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender\textsuperscript{254}.
\end{quote}

The first multilateral treaty, the Treaty on Extradition, was prepared and approved in 1879 in Lima by the American Congress of Jurists, and signed by nine American countries\textsuperscript{255}. Even though the treaty never gained legal force, it represented a new type of law making for the international community in order to deal effectively with impunity\textsuperscript{256}. This is especially the case as the community becomes more interconnected and interdependent, where people and crime move freely from one country to another. Extradition, therefore, represent a useful tool to share criminal jurisdiction and to aid other countries to apprehend perpetrators.

Extradition is a practice that is based on the principle of reciprocity because it is a horizontal-relational paradigm, which means that it is concerned solely with the surrender of accused persons from one State to another, usually based on extradition treaties. Reciprocity is fundamental to the effectiveness of international law because

\begin{footnotes}
\footnotetext{252}{Gray, 'An Excuse-Centred Approach to Transitional Justice', 2624.}
\footnotetext{253}{This is not to say that mass atrocities can only occur in a transitional society, although this has been largely the case in the past thirty years or so.}
\footnotetext{255}{I. Zanotti, \textit{Extradition in Multilateral Treaties and Conventions} (Koninklijke: Martinus Nijhoff, 2006), 1.}
\footnotetext{256}{Ibid.}
\end{footnotes}
States generally perceive that adherence to international obligations works to their advantage. According to Guzman, reciprocity is one of the three Rs of compliance; it has been described either as a principle or a policy and it is most evident in the law of treaties. It is a strategy for the maintenance of effective cooperation amongst self-centred nations. Reciprocity, in a strict sense, can be understood as providing a platform for the fair exchange or rights and duties, and will therefore facilitate and encourage a fair extradition practice among equal-sovereign States. Keohane also suggests that reciprocity “involves conforming to generally accepted standards of behaviour”, where obligations never quite balance out but continue to apply “in the context of shared commitments and values”. Franck adds to this argument by stating that reciprocity in international law is not just about rights and rules, but also about “shared moral imperatives and values”. In other words, the members of the international community are not just expected to apply the rules that they are legally required to apply; they are also required to fulfil those obligations that arise towards others, out of a “shared moral sense”. On the basis of the reciprocity principle, therefore, extradition can be an effective interstate mechanism to deal with international crimes, especially as the shared moral values become entrenched within the international community.

The level of extradition, and any other forms of inter-state cooperation, is also influenced by the principle of “sovereignty, equality...the existence or absence of mutual interests and...the need to protect individual persons against unfair treatment”.

257 Higgins, Problems and Process: International Law and How We Use It, 16. The principle of reciprocity is also considered as a fundamental principle of the laws of war; see L. Watts, 'Reciprocity and the Law of War', Harvard International Law Journal, 50 (2009), 365-434.  
258 The other two Rs being Reputation and Retaliation; Andrew T. Guzman, How International Law Works: A Rational Choice Theory (New York: Oxford University Press, 2008), 9.  
259 According to Byers, for example, reciprocity is a principle of international law; see M. Byers, Custom, Power and the Power of Rules: International Relations and Customary International Law (Cambridge: Cambridge University Press, 1999), 88. Keohane, on the other hand, refers to reciprocity either as a policy adopted by a State or as a systemic pattern of action – see R.O. Keohane, 'Reciprocity in International Relations', International Organization, 40/01 (1986), 1-27 at 3.  
260 See Article 21(1)(b) VCLT.  
261 Keohane, 'Reciprocity in International Relations', 1.  
262 Ibid, 4.  
263 Ibid.  
264 Franck, Fairness in International Law and Institutions, 10-11.  
265 Ibid, 11.  
The exercise of criminal jurisdiction is a clear manifestation of state sovereignty. The nationality link still provides for a strong nexus between the State and the individual, not just for protection purposes but also as a regulatory mechanism. Furthermore, even where there are strong links between neighbouring States, as the very close-knit community of States in the European Union, trust and mutual recognition may be deemed to be higher but in reality, in the case of extradition, this may just be a fiction. This has been a common argument for many States, namely that extradition of nationals would constitute a violation of sovereignty because nationals should be tried in their own courts.

The argument, however, that the extradition practice weakens the sovereignty principle can be rebutted with a counterargument that in fact the extradition of nationals reinforces the sovereignty principle because impunity has the effect of weakening the essence and structure of the sovereign State. This is a particular consideration of the fact that many States have traditionally refused to extradite their own nationals for fear that their sovereignty was compromised. However, if a restricted extradition policy is followed by a poor record of effective domestic prosecutions, then the fabric of the State is compromised. This was the lesson learnt by the Colombian’s authorities, whereby extradition can become a useful tool in the re-conceptualisation of sovereignty and bring its definition closer to a modern understanding of this principle that reflects both the transnational nature of human activities as well as the harm caused by such criminal activities.

It is a well established practice within the international community to ensure that individuals are brought to justice even if they have physically left the territory where the alleged crime has taken place. This means that the exercise of criminal jurisdiction can become a contentious one, depending on the competing interests played by the

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268 Zanotti, Extradition in Multilateral Treaties and Conventions, ix.


270 Ibid, 2416.
principles of territoriality, nationality, protection, universality and passive nationality. It can be surmised, therefore, that even though the exercise of criminal jurisdiction is a manifestation of State sovereignty, a different State may have priority to exercise such power. In the presence of an agreement between States, and in the absence of any circumstances that may render the extradition unjust for the perpetrator, the hosting State will extradite the individual, in the knowledge that the justice system in the receiving State will apply similar principles of criminal justice. It follows that the practice of extradition acts as a limitation to the traditional manifestation of sovereignty by acknowledging a range of competing interests amongst members of the international community. Kelly illustrates this range of competing interests with a persuasive example of a former Nazi camp commander discovered in Dushanbe, Tajikistan:

...the Tajikistan government would be able to exercise personal jurisdiction over him, buttressed by the universal jurisdiction accorded all nations over perpetrators of genocide. However, Israel may have a stronger interest in prosecuting the commander, as an overwhelmingly high percentage of Jews were extinguished at his camp, the survivors of which reside in Tel Aviv, and the Israeli government is clearly more motivated to commit prosecutorial resources to his case than are the Tajik authorities. Israel would lodge a request for extradition with the Justice Ministry in Dushanbe through diplomatic channels, and an extradition process would ensue. Tajikistan has not joined the Genocide Convention, so it is under no treaty obligation to either extradite or prosecute this commander. Thus, in the absence of a customary legal obligation to do so, the Tajik government's decision is ultimately a political one.

There is no doubt that the level of extradition practice between countries depend on a variety of factors, including political and economic advantages, and respect for human rights. For example, the practice of capital punishment within certain jurisdictions has led to an objection to extradite individuals to those States, unless a clear promise is given that such punishment will not apply. There are, therefore, some limitations to extradition. It is the presence of these limitations that allow the extradition practice to

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272 Ibid, 496.
273 This is a practice that has particularly frustrated the U.S. war on terror policy, particularly as State parties to the ECHR have refused on several occasions to extradite individuals to the U.S.; see A. Clarke, 'Terrorism, Extradition, and the Death Penalty', Wm. Mitchell Law Review, 29 (2003), 783 at 802-08.
274 Note that in some jurisdictions the extradition of nationals is explicitly prohibited by their own constitutions. For example, Article 16 (2) of the German Constitution included such prohibition, although this provision was revised in 2000 to allow for “for extraditions to a member state of the European Union or to an international court, provided that the rule of law is observed”. The amendment was included in order to enable the new extradition procedure established by the EU Arrest Warrant introduced in 2004.
meet the needs, interests and requirements of States. Apart from the nationality link, there are other contexts that demand a limitation to the extradition procedure, namely for political, military and fiscal offences, and with regard to certain penalties and treatment. For example, abolitionist countries may also withdraw other types of legal assistance, apart from extradition if, as a result to such assistance, death penalty might ensue\textsuperscript{275}. It is also the case that some countries will not extradite individuals to States where there might be possibility of the use torture, either as a punishment or as a method to extract incriminating information, or the use of inhumane and degrading treatment\textsuperscript{276}. The UN model Treaty on Extradition and the UN Model Treaty on Mutual Assistance on Criminal Matters generally reflect, at their most basic level, the practice adopted by States concerning their extradition policies, and the Extradition Model itself does contain seven mandatory and eight optional grounds for refusal\textsuperscript{277}.

In order to further advance the States’ extradition regime, and achieve a common reciprocal policy, the concept of \textit{aut dedere aut judicare}\textsuperscript{278} – to extradite or to prosecute – imposes a duty on the State, where the accused is present, either to extradite the individual to a requesting State in order to be prosecuted or, instead of extradition, the State holding the individual can carry out the prosecution itself. For example, the obligation to extradite or prosecute contained in the Draft Code of Crimes against the Peace and Security of Mankind, adopted by the International Law Commission, affirms that


\textsuperscript{276} See Soering v UK, 11 Eur. Ct. H.R. (Ser. A) 1989, where the ECtHR declined to allow the extradition of a German citizen to the U.S. because of the possibility of the death penalty, which would have been a contravention of Article 3 ECHR due to the personal circumstances of the accused, the sentence’s disproportionality to the gravity of the crime and prison condition (paras. 93-111); see also Article 3 CAT which forbids extradition to a State where there is suspicion that torture may be used. The current situation concerning Abu Qatada and his return to Jordan to face trial for crimes committed in Jordan is attempting to circumvent the torture dilemma due to the promise given by Jordan to the UK Government.


\textsuperscript{278} The literal meaning, to extradite or prosecute, is an adaptation of a phrase originally used by Grotius, \textit{aut dedere aut punire} (to extradite or punish).
Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in articles 17, 18, 19 or 20 is found shall extradite or prosecute that individual. This is a duty that is perceived to be intrinsically connected with serious breaches of human rights and humanitarian law, whether they are committed during an internal or international conflict, or in peace situation. There is a general acceptance that crimes against humanity, genocide and war crimes – within the jurisdiction of the ICC – give rise to obligations to investigate and prosecute. State parties to the CAT Convention must ensure a prompt and impartial investigation, ensuring that competent authorities will investigate impartially and effective redress is offered to the victims. The Genocide Convention reaffirms that state parties must prevent and punish acts of genocide, committed either in time of war or peace, and must provide effective remedies. Moreover, the ICJ confirmed that the prohibition of genocide has evolved into an international customary rule, binding on all members of the international community. The Geneva Conventions codify the rules relating to the treatment of prisoners of war and civilians during international conflict, and they incorporate grave offences which give rise to the duty to extradite or prosecute.

Although there is a general understanding that this principle tends to apply to certain categories of crimes only – namely crimes against the peace and security of mankind – there is no coherent application. One of the contentious issues remains as to whether a

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280 Convention against Torture and Other Cruel and Inhumane or Degrading Treatment or Punishment (10 December 1984), Articles 12-14.
281 Convention on the Prevention and Punishment of the crime of Genocide (9 December 1948), Articles 1, 3 and 4. Article 4 in particular makes it clear that the provision applies to any person who commits crimes of this kind, whether they are public officials or private citizens.
282 Reservations to the Convention on Genocide, ICJ Reports (Advisory Opinion) 1951, p.15. The court affirmed that “it was the intention of the United Nations to condemn and punish genocide as ‘a crime under international law’ involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity...The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character...of the condemnation of genocide and of the co-operation required” (p.23).
283 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), Articles 49 and 50. According to Article 50, grave breaches include “wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”.

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certain act is capable of attracting criminal liability if the State concerned has not enacted legislation to criminalise such act. This was indeed an issue in the landmark House of Lords appeal in the *Pinochet* case, where six out of seven judges agreed that torture became an extraterritorial crime in the UK only when the crime was incorporated into domestic legislation. Lord Millet, on the other hand, believed that the gravity and systematic use of torture was on a par with piracy, war crimes and crimes against peace; therefore there was no need to enact a piece of domestic legislation to allow the courts to rule on such a crime. In addition, an existing study carried out by the ILC into the practice of this principle within the actual domestic jurisdictions of States has revealed that there is no coherent practice. The ILC is currently investigating four main areas of practice that involve the principle of *aut dedere aut judicare*: (1) International treaties by which a State is bound; (2) Domestic legal regulation adopted and applied by the State; (3) judicial practice that reflects the application of this principle and (4) Domestic crimes to which the principle is applied. Although only a small number of States have replied so far (more responses are awaited), they reveal some disparities of practice but they also reveal that State practice goes beyond the main classes of international crimes listed by the Rome Statute. For example, counterfeiting, traffic of people, terrorism, hostage taking, financing of mercenaries, corruption and traffic of narcotics are among the crimes that impose a duty to extradite or prosecute, according to the treaties concluded by the States that have so far replied to the ILC study. Therefore, the uncertainty related to which crimes can be properly classified as giving rise to an obligation to extradite or prosecute is complicating the actual obligation itself.

In the context of the new international legal regime established by the Rome Statute the extradition practice offers another interesting perspective. Just like complementarity can

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284 [1999] 2 WLR 827; ILR 119, 135
285 [1999] 2 WLR 904-913. Although this example relates to the prosecution limb of *aut dedere aut judicare*, the principle remains the same in the sense that it is only selected types of crimes which would activate this principle.
286 See UNGA, ILC 62nd Session, 2010 (A/CN.4/630) for a detailed list of crimes where the ILC has found that the principle of *aut dedere aut judicare* will apply; the 1949 Geneva Conventions and the 1977 Additional Protocol I are indeed listed as international treaties to which the principle applies.
288 Ibid.
289 C. Mitchell, ‘*Aut Dedere Aut Judicare: The Extradite or Prosecute Clause in International Law*, eCahiers (The Graduate Institute, 2009).
be used as a mechanism to enable the State to avoid the jurisdiction of the Court by ensuring a proper domestic implementation of the Statute, extradition can offer the same opportunity, namely the avoidance of the ICC jurisdiction. This opportunity has been facilitated by the Statute itself, which, according to Article 98(2), creates a new category of interstate arrangements based on extradition:

The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

This means that the surrender of an individual to the Court’s jurisdiction is subject to that member state’s obligations arising from other international agreements. The crux of this matter arises in the context of third party States, which may not want their nationals to be surrendered to the jurisdiction of the Court and instead prefer to exercise their criminal jurisdiction over them. Moreover, given the wording of Article 98(2), it is generally accepted that the raison d’être of this provision stems from the fact that States involved in humanitarian and peacekeeping operations seek to ensure the retention of criminal jurisdiction over their forces. This interpretation stems from the unwillingness to surrender individuals to the ICC could easily be rectified by the State’s decision to prosecute; this would exclude the ICC jurisdiction because of the principle of complementarity. In effect, however, this mechanism could also be used to avoid prosecutions altogether. It must also be noted that the BIAs have been concluded both with ICC member States and non-member States. According to the ICC coalition, 46 of total number of BIAs have been concluded with ICC member States. Also, 54 States have publicly refused to sign the agreements, despite the withdrawal, or threat of withdrawal, of financial aid, a provision introduced by the U.S. as the Nethercutt Amendment, Section 574 of the FY2005 Consolidated Appropriations Act (H.R. 4818/P.L. 108-447). Although President Obama did not include such amendment in the new Public Law No.111-8 of 2009, the existing BIAs will remain unaffected until the agreement between the parties concerned comes to an end (L. Di Cicco, The Non-Renewal of the “Nethercutt Amendment” and its Impact on the Bilateral Immunity Agreement (BIA) Campaign (AMICC, 2009).

290 The reference to ‘sending State’ indicates that the individual has been sent to the territory of another State (a member State for our purposes) for a specific purpose (e.g. military, peacekeeping etc...); see C. Keitner, ‘Crafting the International Criminal Court: Trials and Tribulations in Article 98(2)’, UCLA Journal of International Law & Foreign Affairs, 6 (2001-2002), 215-64 at 233.

fact that the word “sending State” is used to denote a State whose forces have been sent to another State for humanitarian purposes.

The original draft of Article 98(2) provided for a State Party’s refusal to surrender a person to the Court only if “compliance with the request would put it in breach of an existing obligation that arises from [a peremptory norm of] general international law [treaty] obligation undertaken to another State”\(^{294}\). However, in the Report of the Committee of the Whole, the existing Article 98(2) took its shape from article 90 \textit{quarter}, where the option regarding peremptory norms was dropped in favour of a more general international obligation\(^{295}\). Although the re-drafting of this provision was the product of the Working Group on International Cooperation and Judicial Assistance\(^{296}\), the U.S. Administration wanted to ensure that its existing international agreements, especially the ones arising from the North Atlantic Treaty, would be consistent with the new ICC rules. The U.S., therefore, put a lot of effort into the ICC Rules of Procedure and Evidence to ensure that the interpretation of Article 98(2) would be consistent with the U.S. SOFAs\(^{297}\), resulting in Rule 195, which stipulates that

\begin{quote}
The Court may not proceed with a request for the surrender of a person without the consent of a sending State if, under article 98, paragraph 2, such a request would be inconsistent with obligations under an international agreement pursuant to which the consent of a sending State is required prior to the surrender of a person of that State to the Court.
\end{quote}

In this way, to ensure as much consensus as possible, and with a view that the U.S. would eventually join the ICC, the U.S. was given a guarantee that the existing agreements would be compatible with the Rome Statute provisions\(^{298}\), and possibly even future ones could be stipulated to further protect U.S. interests\(^{299}\). However, the

\begin{footnotes}
\footnote{Note that the PrepCom met on six occasions after the adoption of the Rome Statute in order to formulate the Rules of Procedure and Evidence and the Elements of Crime, documents that would eventually provide the Court with clear guidance regarding the application of the Statute.}
\footnote{\cite{Scheffer2001} See D. Scheffer, ‘Staying the Course with the International Criminal Court’, \textit{Cornell International Law Journal}, 35 (2001-2002), 47-100. Scheffer proposes the possibility that international agreements could be
}
\end{footnotes}
U.S. did not ratify the Statute\textsuperscript{300} and decided instead, in the light of the 9/11 events and the subsequent military operations, that its aim was not only to protect its forces overseas through existing agreements, but to establish new ones with ICC member states. In 2002 Congress passed a much criticised piece of legislation, the American Servicemembers’ Protection Act (ASPA), which includes a provision that prohibits the United States from providing military assistance to a state party to the ICC unless the State has entered into an Article 98 agreement, also known as bilateral immunity agreement (BIA)\textsuperscript{301}. Although much debate has been generated regarding the validity of BIAs in the light of Article 98(2), the U.S. insists that these agreements go beyond the scope of SOFAs and actually protect all U.S. citizens, not just military personnel\textsuperscript{302}.

To date, the U.S. has signed BIAs with over one hundred States, entitling any American nationals to be extradited back to the U.S. in case of a potential investigation and prosecution of international crimes. Fundamentally, bilateral agreement between a member state and a third state will take priority over the commitments that arise from the membership to the Statute. In this way the U.S. are avoiding the risk of any member of its armed forces being either prosecuted by the member state or sent to the ICC for prosecution of international crimes\textsuperscript{303}. More importantly, even though it seems that it is mainly U.S. nationals that are benefiting from the Article 98(2) provision, the reality is that the practice of extradition appears to take priority over the \textit{surrendering} of individuals to the ICC\textsuperscript{304}.

\textsuperscript{300} The Bush administration sent a communication to the UN in May 2002 that it would not ratify the Rome Statute, practically \textit{unsigning} the Treaty; see R. Wedgwood, 'The Irresolution of Rome', \textit{Law \\& Contemporary Problems}, 64 (2001), 193-294.

\textsuperscript{301} ASPA S.2007 (a). Note, though, that Section 2007(c) includes an Article 98 waiver, which allows the U.S. President to waive the prohibition of military assistance set out in Section 2007(a).


\textsuperscript{304} The surrender mechanism will be discussed in more depth in the next chapter.
3.4 Primary jurisdiction and complementarity: implementation of the Rome Statute into domestic legislation

3.4.1 General trends during the negotiations process

It was stated in the previous chapter that sovereignty has been interpreted in different ways due to the fact that there is no single overarching definition, compounded by the fact that the principle itself has been the subject of definitional processes by academics, theorists and philosophers. The manner in which the Rome Statute was negotiated and then implemented within the domestic legislative structures of the member states can be said to be a reflection of their own perception of sovereignty, as well as an expression of their national identity and needs. Needless to say that some of the suggestions and proposals put forward were not accepted and therefore not incorporated within the final text of the Statute. The negotiation process itself serves as a glimpse of international law-making in action and ultimately States have to be satisfied with agreeing on minimum requirements in order to allow for maximum participation.

In this context, several trends can be identified from the negotiation process of the Rome Statute itself. For example, during the negotiation process some States believed that the future international court should be afforded with more powers in order to send a clear message that the international community was resolute about impunity. One of the suggestions put forward was that the use of dangerous weapons should be included within the future court’s jurisdiction over war crimes, taking inspiration from the 1996 ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, which stated that the use of nuclear weapons

...would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future.

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305 A/Conf.183/SR.6, Agenda Item 11 (Cont.), 17 June 1998, para.60.
306 Advisory Opinion, ICJ Reports 1996, para.86. It is perhaps unfortunate that the Court never reached a definite conclusion regarding the use of nuclear weapons, especially as it goes on stating that it is the right of every State to survival and to self-defence (para.96). In terms of the ratification of the Rome Statute, when New Zealand ratified it in 2000 a declaration was entered with regard to the belief that nuclear weapons should be included in Article 8 of the Rome Statute. To view the declarations see http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en (last accessed on 6 June 2012). For a discussion on New Zealand’s implementation of the Rome Statute.
There was also a suggestion that a link should be established between the United Nations human rights machinery and the new Court, and that a referral by the U.N. Commission on Human Rights could provide such a link.\(^{307}\) This suggestion is in itself remarkable and forward-looking because it actually tries to make a link between individual criminal responsibility and State responsibility. Given that in most serious human rights atrocities a link can usually be found to an official national instruction or policy, and given that attempts to criminalize State behaviour proved extremely problematic, such a link could be used as a reminder that normally individuals (committing international crimes) do not operate in a political or social vacuum. An added benefit of such a link would be to encourage the nation State as a whole to take stock of its human rights record, and political pressure from the international community could bear some weight on this issue. Also, the establishment of a dialogue between the victims of the atrocities and the ICC outreach programme\(^ {308}\), which tends to occur once a situation has been referred to the ICC, could be strengthened by a concurrent dialogue established between the local communities and NGOs in order to raise knowledge and understanding of human rights protection. This is particularly relevant because generally the pattern of widespread human rights atrocities consists of ideas and practices generated by an elite and eventually assimilated and reproduced by the masses.

The paradigm of State consent can also provide a strong indication of the State’s position regarding sovereignty and impunity. Although State’s consent has always been at the heart of international law, there is a suggestion that this traditional principle has led to a type of \textit{a la carte} law, where individual States are left to decide which international norms they are willing and able to accept, on a case by case basis, mostly into its domestic legal regime see J. Hay, ‘New Zealand’, in C. Kress et al. (eds.), \textit{The Rome Statute and Domestic Legal Orders - Volume 2: Constitutional Issues, Cooperation and Enforcement} (Baden-Baden: Sirente, 2005). Ukraine, once a nuclear power State, voluntarily gave up its nuclear potential, was among the States that favoured the inclusion of the use of nuclear weapons (other States included the Philippines, Bangladesh, Thailand, Samoa, Benin, Nigeria, Sudan, Egypt, Iraq, Iran, Lebanon, India, Mexico and Cuba); on the other hand, Russia claimed that international law was still developing with regard to the use of nuclear weapons.\(^{307}\) A/Conf.183/C.1/SR.9, Agenda Item 11 (Cont.), Monday 22 June 1998, para.6. Note that the Human Rights Council replaced the U.N. Commission on Human Rights in 2006.\(^{308}\) The aim of this programme is in fact to “…ensure that affected communities in situations subject to investigation or proceedings can understand and follow the work of the Court through the different phases of its activities”, at \url{http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Outreach} (last accessed on 30 July 2012).
based on traditional bilateral treaties\textsuperscript{309}. However, the proliferation of multilateral treaties may be construed as a practice whereby “...within limited but well defined areas of international law, States have begun to recognize the authority of collective international consensus over individual State consent as the source of certain rules”\textsuperscript{310}. This is not to suggest that treaties can bind third States because, according to the Vienna Convention on the Law of Treaties, consent is still a necessary requirement\textsuperscript{311}. It is suggested, nevertheless, that multilateral treaty agreements can more speedily deal with fundamental issues of concern to the whole international community precisely because a collective international consensus is developing over norms that every member of the community has an interest in protecting\textsuperscript{312}.

Another of the proposals put forward concerned the Court’s ability to possess “inherent or universal jurisdiction without a need for express State consent”\textsuperscript{313}, irrespective of whether the State concerned was a party to the Rome Statute\textsuperscript{314}. Essentially, this suggestion supports the claim that the Court should adopt the concept of universal jurisdiction whenever the State concerned was not able or willing to fulfil its obligations; the Court was therefore to act as an extension of the criminal jurisdiction of the State, whether or not that State was a party to the Statute or whether it consented to its jurisdiction. The idea of establishing a Court with inherent or universal jurisdiction is very progressive and a clear reminder that no obstacles or difficulties (including State

\textsuperscript{309} B. Cronin, ‘Virtual Legislation: Creating International Law by Consensus’, \textit{International Studies Association Convention} (San Diego, CA, 2006). The exception to this rule is the formation of international customary law, according to which all States will be bound by a particular international rule if a significant number of States adheres to a certain practice, supported by \textit{opinio juris}, although the presence of these two notions is not always straightforward; for further discussions in the area of customary international law see J.L. Goldsmith and E.A. Posner, ‘A Theory of Customary International Law’, \textit{University of Chicago Law Review}, 66 (1999), 1113; E. Swaine, ‘Rational Custom’, \textit{Duke Law Journal}, 52 (2002), 559.

\textsuperscript{310} Cronin, ‘Virtual Legislation: Creating International Law by Consensus’, 3.

\textsuperscript{311} Articles 34-38 VCLT 1969. There are, naturally, circumstances that will bound a third State; for example, the Rome Statute contains clear provisions whereby a third State can accept the ICC jurisdiction on an \textit{ad hoc} basis (Article 12 (2) Rome Statute); also, according to Article 13, the Security Council can refer a situation to the ICC – as the Security Council acts under Chapter VII, its decisions will bind member and non-member States alike.

\textsuperscript{312} See J. Charney, ‘Universal International Law’, \textit{AJIL} 87 (1993), 529-551; typical examples of multilateral treaties that are reached with the aim of achieving a collective international consensus include the 1966 ICCPR and the 1948 Genocide Convention.

\textsuperscript{313} A/Conf.183/13 (Vol.2), at 213.

\textsuperscript{314} Ibid; the Czech Republic, Latvia, Bosnia and Herzegovina, Costa Rica, Albania, Germany, Belgium and Luxembourg and New Zealand supported the notion of UJ, even for third-State parties without their consent; the U.S. and China decisively rejected the proposal that the new Court should have such powers.
consent) should be placed within a renewed international policy to stop impunity for international crimes. The notion, therefore, according to some States’ delegates, that the territorial State (where the violation occurred) or the State of nationality (of the perpetrator) must give its consent (unless there is a SC referral) before any action is taken against the perpetrator runs counter to the spirit of the new court. Amongst the most vehement critics of this proposal was India, whose delegates maintained a very traditional stance on State’s consent and claimed that the only long-lasting and proper way to set up an international organization of this kind was to pay ‘scrupulous regard’ to the UN Charter and to the fundamental principles supported by such document, chiefly the principles of sovereign equality of States and the principle of non-interference in the internal affairs of other States. With this in mind, State consent was an indispensable element for the acceptance of a statute establishing an international criminal court, ruling out any concept of inherent or compulsory jurisdiction, and favouring the adoption of optional jurisdiction, originally set out by the International Law Commission in its draft Statute. In addition, in accordance with the principle of territorial sovereignty of the State, a clear justification for the retention of criminal jurisdiction should be overridden only in exceptional circumstances.

Closely associated with the issue of State consent, the role of the Security Council and its relationship with the future court (strongly related to the proposed *proprio motu* powers of the court’s prosecutor) featured prominently in the discussions.

This was due mainly to the fact that an adequate balance had to be maintained between the States’ ability to conduct their prosecutions and the powers of the new court, although some opposition was put forward with regard to the possible political bias that could arise if an added trigger mechanism was exercised by the prosecutor acting

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315 Ibid.
317 The issue of State consent has always been central to the scope and formation of international law, confirmed by the PCIJ dictum in the *Lotus case*, PCIJ 7 September 1927, The Case of S.S. “Lotus”, Judgment No.9, Ser.A-No.10), p.18.
318 A/CONF.183/SR.4, (n 158), paras. 47 and 48.
319 A/Conf.183/13 (Vol.2). This was the reasoning put forward by Japan (p.67), India (p.86), China (p.124); Qatar and Omar rejected the idea on the basis of the Security Council’s powers to establish the ICTY and ICTR, making the Security Council competent to trigger the court’s jurisdiction and not the prosecutor (p.110).
proprius motu. The general tendency, though, seems to arise out of the fact that a preference remained in maintaining the status quo regarding the triggering mechanism, namely allowing the Security Council to continue a practice that started with the establishment of the ICTY and ICTR, thus confirming the Security Council’s ability to trigger the mechanism of an international court.

3.4.2 Constitutional issues

A State’s constitution represents the authority that governs that particular State. It is the expression of what the State stands for, its aims and objectives. It is also a reflection of its domestic governance and ultimately of its own sovereignty. Occasionally, one would find commonalities in different constitutions, especially if the States concerned share similar histories and ideologies. However, as the examples below will demonstrate, this is not always the case, and that is why a constitutional document can be very useful in discerning the type of authority that it seeks to describe. As Professor Hannun explains:

[the] concept of sovereignty...is not in terms of its history or in terms of political science a concept which may properly be used to explain – let alone to justify – whatever the state or the political society does or may choose to do. It is a principle which maintains no more than there must be a supreme authority within the political community if the community is to exist at all.

If sovereignty can be expressed as authority, then the constitution is itself an expression of that authority. Of particular interest concerning the decision to implement and adopt the Statute or not, some States stand out with reference to their general domestic situations. This may shed some light on the State’s interpretation of their perception of sovereignty, and how they reacted when faced with the establishment of the ICC. The two case studies reported below, Japan and China, demonstrate some of the difficulties encountered by States when challenged with the incorporation of the Rome Statute into domestic law (Japan) or with the decision to become a State Party (China). A fleeting reference was made in Chapter two regarding States’ constitutions, namely that

320 Ibid; Malaysia and Turkey cited the issue of political bias as a reason to reject the proposed prosecutorial proprio motu powers (p.109 and p.124 respectively).
321 Ibid; see, for example, the U.S. opposition (p.97) as well as Qatar and Omar (p.110). Pakistan went even further and decided that only member States could make a referral.
occasionally constitutional language, being representative of the sovereign State, can be idealistic in nature and therefore not necessarily reflective of the reality of domestic governance. Constitutional language is often vague and “open-textured”, but aims to give a glimpse of the structure and nature of the nation that it purports to define and represent. Precisely because of this “open-textured” language, Schauer contends that constitutions should be viewed as metaphors because they prompt us to think in different ways or from different perspectives, providing a relief from day-to-day thought processes. Moreover, constitutions, unlike other domestic laws, are much more difficult to modify because they incorporate another important value: they represent the culture of that particular nation. In other words, the nation’s identity is reflected within the constitution (whether written or otherwise), and that is why the changes required through the Rome Statute may prove to be quite challenging tasks.

3.4.2.1 Case study: Japan

Because of its constitutional tradition, Japan was one of those countries that required more intense scrutiny in its negotiations and eventual accession to the Rome Treaty. Meierhenrich & Ko put this quite aptly by stating that

One of the scenarios feared by those who were party to the deliberations in Tokyo was the possible prosecution of Japanese nationals before the ICC as a result of the inability of the Japanese legal system (for lack of relevant provisions) to put Japanese nationals on trial at home. MOFA [Ministry of Foreign Affairs of Japan] representatives, for understandable reasons, wanted to avoid at all costs a situation where the government would be obligated to transfer any Japanese citizen, civilian or otherwise, to The Hague.

This statement summarizes Japan’s fear regarding the potential situation of transferring Japanese nationals to the ICC and therefore the need to scrutinize how the Rome Statute provisions could be implemented in order to retain the necessary criminal jurisdiction over Japanese individuals, given the particular constitutional arrangement of Japan. Such constitutional arrangement, we will see, in fact prohibited Japan from initiating

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323 Supra, p. 45.
any legislation about war, a situation derived from its historical involvement in the Second World War. The reason for Japan’s delay in the ratification of the Rome Statute and for the high level of scrutiny of its own domestic laws was not necessarily due to a reluctance to participate in the new international criminal law regime or serious misgivings about the Rome Statute itself. Rather, it was mainly to do with Japan’s self-conception of sovereignty. This was a conception or a ‘convention’ born out of national experience, a nation that was itself entangled in one of the worst episodes of human rights atrocities in the history of humankind. For this reason it is worth reproducing a section of the Preamble to the 1947 Japanese Constitution, as well as Article 9 of the same Constitution.

The Preamble states that Japan is

...resolved that never again shall we be visited with the horrors of war through the action of government... We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. We desire to occupy an honoured place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth. We recognize that all peoples of the world have the right to live in peace, free from fear and want. We believe that no nation is responsible to itself alone, but that laws of political morality are universal; and that obedience to such laws is incumbent upon all nations who would sustain their own sovereignty and justify their sovereign relationship with other nations. We, the Japanese people, pledge our national honour to accomplish these high ideals and purposes with all our resources.

The experience, horror and conduct of the Second World War changed the Japanese understanding of what it means to be a sovereign nation. This is a preamble that talks about honour, high ideals and responsibility as a nation; and it is this sense of responsibility as a nation that gives substance to the concept of sovereignty. This sense of responsibility and honour manifests itself through Article 9 of the Constitution, where it is Stated that

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the State will not be recognized.

326 See the Preamble and Article 9 of the Japanese Constitution below.
Obviously, Japan has not actually adhered to such a strict interpretation and implementation of the Preamble and Article 9 because, out of necessity, common sense and even responsibility to protect its own people, Japan does possess a significant military and self defence programme. In fact, according to Chinen, there are three specific areas which may give rise to constitutional problems: first, the constitutionality of the Self Defence Army, and therefore Japan’s right to use force in the case of self-defence; secondly, Japan’s relationship with the U.S. in the context of collective self-defence, something which is authorized, in limited circumstances and under strict criteria, by Article 51 of the UN Charter; thirdly, Japan’s possible role in peacekeeping operations, an activity that received legislative authority in 1992.

Modern-day international events, particularly with regard to security, anti-terrorism and humanitarian engagement, have led Japan to question any possible violations of Article 9 of its own Constitution. This situation has led to calls for constitutional amendments. However, despite the potential discrepancy between the language of the constitution and State’s practice, Japan’s notion of sovereignty rests on a clear self-imposed restriction to act aggressively towards other nations. Even if it is acknowledged that the Constitution was a by-product of the Second World War and the demands of the allied forces at the time, Japan’s position is quite unique in its decision to frame a strong pacifist principle within its Constitution. It was this constitutional arrangement that in effect prevented Japan from enacting any domestic laws relating to war, something which was eventually rectified in 2004 with the passing of emergency legislation, the

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329 This issue was fuelled by the dispatch of the Japanese Self-Defence Force to Iraq.
330 The Bill Concerning Cooperation for United Nations Peacekeeping Operations and Other Operations was approved by the Diet on 16 June 1992. The Japanese Prime Minister stressed the fact that the new legislation “...is in accord with the ideals of the Peace Constitution which seeks permanent peace under international cooperation, and not in contravention of it”; see the statement by the Prime Minister in ‘Japan Passes Legislation Allowing Military in U.N. Peacekeeping and Other Operations’, Foreign Policy Bulletin, 3/1 (1992).
This eventually paved the way, after much scrutiny and deliberations, to the accession to the Rome Statute in 2007. Within the context of this thesis, though, it is important to point out that a nation’s ‘convention’ about its own sovereignty can be shaped and modified by external factors. In an ideal international community of amicable nations the absolute notion of ‘no war’ may be realized. However, international terrorism and security are modern threats that cannot be ignored; international pressure and criticism from other nations also play a part in the decision making process of a nation. Therefore, Japan’s scrutinizing process of the Rome Statute also represented a renewed scrutinizing process of its own constitution and the meaning of sovereignty.

3.4.2.2 Case study: China

The constitution of the Communist Party of China, on the other hand, speaks of communism as the “highest ideal and ultimate goal of the Party”. The principles and ideology of communism and socialism run through the length and breadth of the Chinese Constitution, laying particular emphasis on Chinese culture and society. Specifically in the context of this thesis, China safeguards

...independence and sovereignty, opposes hegemonism and power politics, defends world peace, promotes human progress, and pushes for the building of a harmonious world of lasting peace and common prosperity. It develops relations between China and other countries on the basis of the five principles of mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other’s internal affairs, equality and mutual benefit, and peaceful coexistence.

The cultural identity of China is imprinted within the pages of its Constitution, especially with regard to the respect of sovereignty and non-interference in other States’ internal affairs. However, despite the numerous areas of disagreement, which eventually led China to vote against the Statute, there are reasons to believe that China’s relationship with the Rome Statute, and the ICC, is not completely negative. In fact,

333 The emergency legislation passed in 2004 also allowed Japan to ratify the 1977 Additional Protocols to the 1949 Geneva Convention. For a thorough discussion on Yujihosei and its significance to Japan’s constitution and culture, see Meierhenrich and Ko, ‘How Do States Join the International Criminal Court? The Implementation of the Rome Statute in Japan’.


335 CPC, General Program, para. 22.
according to Jia, China was actually actively involved in the Rome Conference\textsuperscript{336}. Some of the delegates served during the conference as vice-president of the conference and as members on the Drafting and Credentials Committees, and the deputy head of the Chinese delegation later went on to become a judge of the International Criminal Tribunal for the former Yugoslavia\textsuperscript{337}. Moreover, there is also reason to believe that China still retains some interest in the ICC and in its development, noting in particular, from the following statement, that the idea of accession is not completely beyond the realm of possibilities:

"Though it is hard to anticipate the operation of the Court, if the Court can get the general support and cooperation by its effective operation, it will be undoubtedly positive and useful to the international community and is also what China wants to see. As to the question of acceding to the Statute, the Chinese Government adopts an open attitude and the actual performance of the Court is undoubtedly an important factor for consideration. We do not exclude the possibility of considering the accession to the Statute at an appropriate time. In future, the Chinese Government will, as an observer State, continue to adopt a serious and responsible attitude to follow carefully the progress and operation of the International Criminal Court. China is willing to make due contributions to the realization of the rule of law in the international community\textsuperscript{338}."

In a position paper published in 2005, the Chinese government reiterated its support of the ICC and its role to end impunity. However, because of some specific deficiencies, including the Security Council’s referral system of a non-member State, China is not yet ready to accede to the treaty\textsuperscript{339}. In fact, the Security Council’s referral of Sudan to the ICC\textsuperscript{340}, which led to the issue of an arrest warrant against Sudan’s President Al Bashir\textsuperscript{341}, proved highly controversial for China\textsuperscript{342}, and a real infringement of Sudan’s sovereignty and sovereign equality. The main issue for China appeared to be that, in the context of internal conflict, the international community should refrain from an

\begin{itemize}
\item \textsuperscript{337} H.E. Judge Liu Daqun.
\item \textsuperscript{340} SC Resolution 1593 (2005).
\item \textsuperscript{341} Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-1 (4 March 2009)
\item \textsuperscript{342} See Foreign Ministry Spokesperson Qin Gang’s Remarks on the Issuance of Arrest Warrant to Sudanese President by the International Criminal Court (7 March 2009), at www.fmprc.gov.cn/eng/xwfw/s2510/2535/s540971.htm (last accessed on 13 October 2012).
\end{itemize}
interventionist approach and should instead consider a more cautionary approach, offering help only if required, and should also prioritize the achievement of peace over impunity and justice\textsuperscript{343}.

In the context of China’s understanding of the concept of ‘sovereignty’, it is also important to note that until thirty years ago China was still a closed country and reluctant to participate in the development of the international community and international law\textsuperscript{344}. According to Zonglai and Bin, in the last three decades, China has witnessed a “rapid, comprehensive and peaceful development” and has been playing a deeper participatory role in the international legal system\textsuperscript{345}. Whilst being a party to some major international treaties, China is a committed advocate of the Five Principles of Peaceful Coexistence\textsuperscript{346} and established the concept of “harmonious world”, to be realized by observing the aim and principles of the UN Charter, by obeying international rules and promoting cooperation\textsuperscript{347}. Despite the widespread knowledge regarding the poor human rights record in China\textsuperscript{348}, it is submitted that the Chinese culture and philosophy must be taken into consideration to get a real and proportionate understanding of their rejection of the Rome Statute. In other words, China’s

\textsuperscript{347} Zonglai and Bin, 'China's Reform and Opening-up and International Law', at 197.
interpretation of sovereignty, especially in the context of an international criminal law regime, must be carefully evaluated and juxtaposed in relation to their rejection vote at the Rome Conference.\textsuperscript{349}

3.4.3 Implementation issues: a duty to legislate?

This section deals specifically with the implementation of the Rome Statute into domestic law in order to fully satisfy its primary role of criminal jurisdiction as set out within the complementarity principle. The principle dictates that the exercise of criminal jurisdiction over the international crimes within the Rome Statute rests primarily with the State. Article 1 of the Statute indicates that the exercise of jurisdiction by the ICC “shall be complementary to national criminal jurisdictions”. Therefore, what does the State have to do to retain that primary jurisdiction so that to avoid the arm of the ICC reaching into the sovereign State’s space?

When the State consents to enter into an international agreement, the signature in itself is not sufficient to give rise to any obligations that arise from that treaty. According to Article 18 VCLT a

\begin{quote}
State is obliged to refrain from acts which would defeat the object and purpose of the treaty when (a) it has signed the treaty...until it has made its intention clear not to become a party to the treaty; or (b) when it has expressed its consent to be bound by the treaty...
\end{quote}

This is further supported by Article 125 of the Rome Statute which requires “...ratification, acceptance or approval by signatory States”\textsuperscript{350}. Therefore in becoming a signatory to the Rome Statute, the State enters into the first phase of the consent process but any obligations that arise at this early stage arise by virtue of the VCLT general

\textsuperscript{349} For instance, Koh comments that “Asian governments tend to be more sensitive about their sovereignty than governments in the contemporary West”, in T. Koh, 'International Law and the Peaceful Resolution of Disputes: Asian Perspectives, Contributions and Challenges', \textit{Asian Journal of International Law}, 1 (2010), 1-4. For a general discussion on the underpinning of Chinese culture, see J. Pan, 'Chinese Philosophy and International Law', \textit{Asian Journal of International Law}, 1 (2010), 1-16. By focussing on the impact on State sovereignty from the point of view of WTO membership, Wang clarifies that any restrictions on sovereignty are ‘man made’, i.e. the State itself is choosing to impose these restrictions in order to further its interests, G. Wang, 'The Impact of Globalisation on State Sovereignty', \textit{Chinese Journal of International Law}, 3 (2004), 473-84.

\textsuperscript{350} Article 125 (2) Rome Statute
obligation and not the Rome Statute’s obligations\textsuperscript{351}. Effectively, to ensure that it can exercise criminal jurisdiction over these crimes, the State must pursue certain legislative actions to ensure it can competently adjudicate on international crimes. In essence, adequate legislation must be enacted to bring its national criminal laws in line with the aims of the Rome Statute\textsuperscript{352}. However, the need to enact legislation arises only in the context of enabling the State to fulfil its exercise of criminal jurisdiction over international crimes; it is not a reference to a legal duty to enact domestic laws. In fact, the Rome statute never sets out a compulsory duty to enact national laws in order to realise the complementarity principle. The general rules of interpretation set out in the VCLT point towards an interpretation “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”\textsuperscript{353}. The Rome Statute does not contain any direct or indirect textual reference to the ‘need to enact legislation’; it only contains a reference to the State’s duty to exercise criminal jurisdiction over international crimes\textsuperscript{354} as well as a reference that the jurisdiction of the new Court will be complementary to national criminal jurisdictions\textsuperscript{355}. The Statute does provide rules regarding the admissibility of a case. This means that the ICC can exercise jurisdiction only if the State is unable or unwilling\textsuperscript{356}, noting specifically that inability and unwillingness do not just refer to the start of prosecution but also to investigations that have started but have been abandoned because of an “inability or unwillingness” to continue\textsuperscript{357}.

Does it mean, however, that the State cannot exercise its jurisdiction if changes to its domestic laws are not carried out? Robinson makes this point clear by reiterating that

\begin{quote}
The Rome Statute does not oblige State Parties to explicitly incorporate genocide, crimes against humanity, or war crimes into domestic law. A State Party could in theory satisfy the complementarity test by relying only on existing national offences, such as murder or assault. However, there are risks in that approach. For example, if the penalties or stigma attached to a certain national offence do not reflect the grave seriousness of the crime in
\end{quote}

\textsuperscript{351} Also note that Articles 11 and 12 of the VCLT specify that the signature alone can have the effect of binding the State, if that procedure is provided for under the agreement or it is the intention of the State that the signature shall have such effect.

\textsuperscript{352} Specifically, the crimes listed in Articles 6-8 of the Rome Statute must be criminalised under domestic laws, so as to allow the State Parties to investigate and prosecute individuals suspected of these crimes.

\textsuperscript{353} Article 31 (1) VCLT (1969)

\textsuperscript{354} Rome Statute Preamble, para. 6.

\textsuperscript{355} Rome Statute, Article 1.

\textsuperscript{356} Rome Statute, Articles 17 to 19.

\textsuperscript{357} Rome Statute, Article 17 (1) (a) and (b).
international law, then this might contribute to a finding of unwillingness or inability to genuinely prosecute. A worse situation would be where no national law could be found that corresponds to the international crime, in which case the State would clearly be unable to prosecute.\footnote{D. Robinson, 'The Rome Statute and Its Impact on National Law', in A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds.), The Rome Statute of the International Criminal Court: A Commentary (II; Oxford: OUP, 2009) at 1861.}

There are two issues that emerge from this situation. First of all, there is the scenario of a lack of national laws that correspond to international crimes. Generally, a State would not be able to exercise criminal jurisdiction over crimes that do not exist in its domestic laws. This is due to the principle of \textit{nullum crimen sine lege, nulla poena sine lege}, according to which an individual can only be found criminally responsible for conduct which was unequivocally criminal at the time when the offence was committed\footnote{See A. Mokhtar, ‘Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects’, Statute Law Review, 26 (2005), 41-55.}. This is a general principle of criminal law that aims to ensure individuals are free to enjoy their rights and freedoms, with clear and advance knowledge as to when a particular act or conduct can incur criminal liability, due to the fact that criminal offences usually lead to severe penalties, including the loss of liberty\footnote{See S. Lamb, ‘Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law’, in A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds.), The Rome Statute of the International Criminal Court: A Commentary (IB: Oxford: OUP, 2009), 733-65. The corresponding principle of non-retroactivity adds further to the substance of \textit{nullum crimen} as it ensures that an act is deemed criminal only if it was in existence at the time of the crime, although an exception may exist in the context of conduct which “is criminal according to the general principles of law recognised by the community of nations”, as set out in Article 15(2) ICCPR (These principles are included in the Rome Statute under Articles 22, 23 and 24). For example, in \textit{Kononov v Latvia} (App. No. 36376/04, Grand Chamber Judgement 17 May 2010) the ECHR, on appeal from the Latvian Government, reversed the ruling of the ECHR Chamber that found the conviction of Mr Kononov a violation of Article 7 ECHR (retroactivity principle). According to the Grand Chamber, the crimes perpetrated by the defendant constituted a violation of the “fundamental rule of the laws and customs of war” (para. 216).}. Secondly, there is the scenario whereby criminal laws have been enacted to deal with the international crimes as set out in the Statute, but they may not be comprehensive enough to cover all the offences specified in Articles 6 to 8. In this scenario it would be conceivable that the State could lose its ability to investigate and prosecute, paving the way for the ICC to fulfil its role under the complementarity principle.

The safest method seems to be the actual incorporation of Articles 6, 7 and 8 into domestic legislation\footnote{D. Robinson, 'The Rome Statute and Its Impact on National Law', at 1861. According to Robinson, Article 8 (1) does not need to be included into domestic law as it is a reference to the Court’s jurisdiction}, a preferred method of numerous States, which have included the
Statute or sections of the Statute into their domestic legislation as annexes or schedules. Bosnia and Herzegovina, on the other hand, has included new offences within the definition of war crimes. Italy, however, is an example of a State party that has adopted no legislative provisions at all, in the belief that their existing criminal laws would deal effectively with the crimes set out in the Rome Statute.

In fact, out of the 121 member States ratifying the Statute to date, only half of them have actually adopted domestic legislation to criminalise international crimes. Using the crimes against humanity as an example, the Legal Tools Database lists twenty-two member States that have actually adopted legislative provisions to deal with one of the main international crimes addressed by the Statute. However, the legislative provisions enacted differ widely from State to State. According to the legislation put forward by Uganda, a crime against humanity is defined as “...an act specified in article 7 of the Statute...The penalty...is imprisonment for life or a lesser term”. Although not very specific with regard to sentencing, the substance and content of the definition of this crime has been transposed from the actual Rome Statute in its entirety. In a very similar note, the Netherlands have transposed most of the content of Article 7 of the Rome Statute, omitting clarifying explanations for the crime of apartheid, torture,
deportation and forced pregnancy, as they appear in Article 7(2). Trinidad & Tobago’s implementation is similar to the Netherlands’ definition, but omits any explanatory notes regarding the various offences within this crime. Canada, on the other hand, does not reproduce the text of the Statute, but its definition of ‘crimes against humanity’ aims to ensure that the perpetrator will be found criminally liable, irrespective of whether or not these crimes have been legislated against or not, adding customary international law, conventional international law and general principles of law recognized by the community of nations as the sources for the criminal process.

Moreover, Canada’s approach was to widen the offences by criminalising other actions in connection with crimes against humanity, namely with regard to proceeds of crimes, either for possession of property or for money laundering. The stance taken by Australia, on the other hand, is very descriptive and comprehensive. It would be impractical to reproduce the whole section devoted to crimes against humanity here, but suffice it to say that Australia’s approach to this offence, and many other provisions of the Rome Statute, reflects an intense legislative process in order to ensure that all possible scenarios are included in the provision. This, in turn, will ensure that Australia maintains the necessary primacy in the prosecution of international crimes. It does also reflect something that is characteristic of Australia, its history and its sovereignty. When Australia ratified the Rome Statute, the Australian Prime Minister declared that

...the decision to ratify does not compromise Australia’s sovereignty...It is proposed that the declaration reaffirms the primacy of Australian law and the Australian legal system...Additionally, the declaration will provide that it is Australia’s understanding that the offences of genocide, crimes against humanity and war crimes under the International

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368 Act of 19 June 2003 containing rules concerning serious violations of international humanitarian law (International Crimes Act), s.4.
369 Crimes Against Humanity and War Crimes Act 2000, s.4, “crime against humanity means murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission”. The reference to international customary law clearly represents an example of potential over or under-inclusiveness, as discussed earlier, which may run the risk of not including all the offences set out in the Statute itself.
370 Ibid, ss. 27 & 28.
371 The whole section is reproduced in the Appendix.
Criminal Court Statute will be interpreted and applied in a way that accords with the way they are implemented in Australian law... 372

Australia’s painstakingly and detailed legislative provisions are intended to send a clear message to Australian citizens and the international community at large that this work emanates from Australia itself and it is therefore developed in a way that suits Australia’s legislative needs 373. Essentially, it is intended to encapsulate the fact that it embraces wholeheartedly the aims of the Rome Statute but it also ensures the protection of Australia’s sovereignty 374.

Kenya provides another useful example regarding the enactment of national laws and will be discussed more in depth. It will further demonstrate the importance to enact clear domestic laws to empower the State to exercise primary criminal jurisdiction over the international crimes within the Rome Statute. The lack of appropriate national laws following a civil unrest episode was the exact situation that faced Kenya. The day after the Kenya Government approved the ratification of the Rome Statute, Commissioner Lawrence Mute of the Kenya National Commission on Human Rights declared that

This ratification sends a signal that Kenya will not condone impunity for serious human rights violations in step with other human rights respecting States in the world community. The National Commission assures the Government that this is the right step to take in order to better facilitate the promotion and protection of the rights, not just of Kenyans, but of citizens of the world...by ratifying the Rome Statute on the International Criminal Court, the Government of Kenya was sending a strong message nationally that it will not allow impunity to reign, and that the Government will make a break from the past of impunity in this country 375.

This statement is full of promises and reassurances. It is a message sent to the Kenyan people and to the international community that Kenya is changing and that impunity for serious human rights violations will no longer be tolerated. The civil unrest that followed the 2007-2008 elections in Kenya left over a thousand people dead. Kenya had been a party to the Rome Statute since March 2005, and therefore there were no relevant

374 Boas comments, however, that such concern for sovereignty conceals a well-known reluctance to cooperate at the international level, given Australia’s history of compliance with obligations that arise from international treaties and customary law; see G. Boas, ‘An Overview of Implementation by Australia of the Statute of the International Criminal Court’, JICJ, 2 (2004), 179-90.
375 See http://www.knchr.org (last accessed on 1 July 2011).
concerns regarding the principles of legality and justice embodied within the notions of retroactivity, *nullum crimen sine lege* and *nulla poena sine lege*\(^{376}\). There were, however, legislative issues. After the civil unrest a Commission of Inquiry was set up to investigate the event and make recommendations. The results were published in the Waki Report\(^{377}\), which determined that crimes against humanity may have been committed and recommended the set up of a Special Tribunal for Kenya to deal with the perpetrators. Moreover, it also advised that if these proposals were not followed, a list of suspects would be forwarded to the ICC for investigation\(^{378}\). At that moment in time Kenya did not have any legislation capable of dealing with international crimes, since the Rome Statute had not yet been implemented into domestic legislation\(^{379}\). There were, of course, national penal laws that dealt with the crime of murder, which could easily have applied in the context of the crimes perpetrated during this particular event\(^{380}\). However, one contentious issue was that the penalty for murder was the death penalty, whereas the penalty for the equivalent crime, in the Draft Statute (implementing the Rome Statute), committed in the context of the civil unrest, was life imprisonment\(^{381}\). There was, essentially, an inconsistency between Kenyan domestic laws and the new provisions (in draft), which would have made the Kenyan position untenable from the viewpoint of fairness and justice\(^{382}\). Attempts to set up a Special Tribunal failed, and in the end the Kenyan Government resolved to use the ordinary criminal courts and established a Truth and Justice Commission\(^{383}\).

Nonetheless, these attempts did not resonate with the recommendations of the Waki Commission, leading the ICC prosecutor to initiate an investigation *proprio motu*,


\(^{378}\) Waki Report, at 18.

\(^{379}\) The International Crimes Act, adopted in January 2009, has now implemented the Rome Statute but the retroactive principle prevents the application of this legislation to the 2007 events. For a detailed discussion of the attempts made by Kenya to meet its obligations, see A. Okuta, 'National Legislation for Prosecution of International Crimes in Kenya'.


\(^{382}\) Ibid, 1069.

according to Article 15 of the Rome Statute\(^\text{384}\). On 18 February 2010 the ICC Pre-Trial Chamber II requested the Prosecutor\(^\text{385}\) to provide additional information in order to assess the Prosecutor’s demand to prosecute, according to rule 50 (4) of the Rules of Procedure and Evidence, and according to Article 15(4), which requires the Prosecutor to seek an authorization from the ICC Pre-Trial Chamber before proceeding. On 3 March 2010 the Prosecutor responded to such request by clarifying that the attacks on the civilian population were organized and/or financed by senior political and business leaders, on account of their political or ethnic affiliation\(^\text{386}\). On 31 March 2010 the ICC Pre-Trial Chamber II, by a majority, decided that there was sufficient evidence to demonstrate that the attacks on the civilian population, in particular against the non-Kikuyu speaking population, were systematically planned and amounted to crimes against humanity\(^\text{387}\). It therefore concluded that the case was admissible under Article 17 of the Rome Statute\(^\text{388}\).

Of particular importance is the dissenting opinion by Judge Hans-Peter Kaul, who emphasized the need to retain a clear demarcation line between international crimes, which, by their very nature, are the concern of the whole international community, and common crimes, which are prosecuted by national criminal justice systems\(^\text{389}\). He then added that the notion of characterizing a common crime, albeit serious, as an international crime, might infringe on State sovereignty\(^\text{390}\). Given the principle of complementarity, one would suppose that Judge Kaul was referring to the need to ensure the protection of sovereignty so that the State could carry out the necessary investigations and prosecutions in fulfilment of its primary role within the new international criminal law regime. In fact, nothing was said with regard to the State’s primary duty to investigate and prosecute international crimes as the primary aim of the Rome Statute.

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\(^{384}\) ICC Prosecutor’s Application for Authorization to Open an Investigation in the Situation of Kenya (26 November 2009).

\(^{385}\) ICC Pre-Trial Chamber II Decision Requesting Clarification and Additional Information, ICC-01/09 (18 February 2010).

\(^{386}\) See [http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/](http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/) (last accessed on 6 June 2012).

\(^{387}\) ICC-01/09-19, 31 March 2010.

\(^{388}\) Ibid.

\(^{389}\) Ibid, para. 8.

\(^{390}\) Ibid, para.10.
However, it seems more likely that the comment on the potential infringement on State sovereignty emanates from a desire to protect the ICC from becoming a “hopelessly overstretched, inefficient international court, with related risks for its standing and credibility”\textsuperscript{391}, noting in particular that the ICC depends on State cooperation\textsuperscript{392}. It is also plausible that Judge Kaul was referring to the fact that, if the Court appears to infringe State sovereignty, the State, in retaliation, may decide not to cooperate with the Court, thus severely weakening its mandate. In other words, his assertion on State sovereignty is suggestive of the existence of an antagonistic relationship between the State and the ICC, exacerbated by the fact that the ICC is still at a very early stage of development, and it is therefore tested by the need to find its boundaries and the need to lead the fight against impunity.

In accordance with Article 19(2) of the Rome Statute, Kenya filed an appeal with the Appeals Chamber against the admissibility decision of the Trial Chamber on the basis that, in reaching its decision, it had carried out legal, factual and procedural errors, thus interfering with the State’s ability to retain jurisdiction over these cases\textsuperscript{393}. Although the appeal was dismissed, the dissenting opinion of Judge Anita Usacka echoed Judge Kaul’s dissenting voice, albeit with stronger emphasis placed directly on complementarity. Given that an admissibility challenge brought under Article 19(2)(b) must be made “...on the ground that it is investigating or prosecuting the case or has investigated or prosecuted”, Judge Usacka contends that this provision brings to the fore the State’s right to investigate and prosecute the case itself, thus triggering one of the most important principles of the Statute itself\textsuperscript{394}.

The principle of complementarity maintains that it is the State’s right to exercise primary criminal jurisdiction over international crimes, albeit allowing the Court to exercise a supervisory function\textsuperscript{395}. The issue is not about the Kenyan’s argument carrying more weight than the Appeals Chamber, but it is about a proper and serious engagement with the State’s primary right to exercise or develop the exercise of such jurisdiction. In other words, although the Appeals Chamber briefly discussed the

\textsuperscript{391} Ibid, para. 18.
\textsuperscript{392} Ibid, para. 10.
\textsuperscript{393} ICC Appeals Chamber, ICC-01/09-02/11 OA, 30 August 2011.
\textsuperscript{394} ICC Appeals Chamber Dissenting Opinion, ICC-01/09-02/11 OA, 20 September 2011, para.18.
\textsuperscript{395} Ibid, para.19.
principle of complementarity, it did so in a very narrow way by limiting it to whether the suspect or conduct had been or was being investigated by the national courts\textsuperscript{396}. It is submitted that a more rigorous discussion should have taken place on the role of the State as the primary basis for the prosecution of international crimes, thus enhancing the sovereignty principle by reiterating the State’s duty to prosecute.

By ratifying the Rome Statute, Kenya must have agreed with its aims, namely the need and the willingness for the State to take specific steps to end the culture of impunity for serious human rights violations. However, as already mentioned above, international law does not often operate within strict rule-based regimes, and therefore allows a margin of discretion for the State to implement the treaty in the most suitable way. For example, the Rome Statute is silent with regard to the time framework given to the State to adopt the Statute as a domestic piece of legislation, something that the State must do if it intends to exercise jurisdiction over international crimes and therefore fulfil the aims of complementarity.

There should be no surprise, therefore, in the circumstances that finds Kenya unable to deal effectively with the 2007 post-election events, as no appropriate substantive and procedural legislation was in place at the time\textsuperscript{397}. Research carried out just before the 2007 elections concluded that Kenya’s delay in the implementation of the Rome Statute was due to higher priority given to other legal and constitutional matters. For example, organized crime and terrorism are considered as more urgent issues by the Kenya’s authorities and, incidentally, they also attract more foreign encouragement and assistance\textsuperscript{398}. The research also revealed that there was a general lack of interest and enthusiasm for implementation, by the legal profession, the politicians and human rights activists\textsuperscript{399}. Among the reasons cited for this apparent disinterest is firstly, the perception that the ICC, and the regime that comes with its creation, is more concerned with Western interests; secondly, there is a higher concern about poverty and therefore

\textsuperscript{396} ICC Appeals Chamber, para.44.

\textsuperscript{397} Kenya is not the only African member State to have ratified the Rome Statute but has failed to incorporate it into domestic law; see M. Du Plessis and J. Ford, ‘Unable or Unwilling – Case Studies on the Implementation of the ICC Statute in Selected African Countries, Institute of Security Studies Monographs Series’, Institute of Security Studies Monographs (141: Institute of Security Studies 2008).

\textsuperscript{398} Ibid at 68.

\textsuperscript{399} Ibid at 69.
violation of socio-economic human rights; thirdly, the African approach to conflict is
different and they tend to favour peace rather than justice.\footnote{Ibid at 69.}

The question at this point remains this: if the State was given the primary role to
investigate and prosecute international crimes, why did the Rome Statute not specify a
clear duty for the State parties to incorporate such crimes into their domestic legal
systems? After all, some of the most relevant international conventions that deal with
serious human rights violations have incorporated the obligation to enact specific
legislature methods to deal effectively with these abuses, as it will be noted in the
discussion below. Moreover, if such an obligation is actually missing from the Statute,
can other international rules be used in order to impose the obligation?

In the \textit{Furundzija} case, the ICTY Trial Chamber argued that there are some situations
where the duty to implement international law derives from other rules of international
law. For example, international rules regarding torture “...prohibit not only torture but
also (i) the failure to adopt the national measures necessary for implementing the
prohibition and (ii) the maintenance in force or passage of laws which are contrary to
the prohibition”\footnote{Judgment, \textit{Furundzija} (IT-95-17/1), Trial Chamber II, 10 December 1998, para.148.}. It then added that

\begin{quote}
Normally States, when they undertake international obligations through treaties or
customary rules, adopt all the legislative and administrative measures necessary for
implementing such obligations. However, subject to obvious exceptions, failure to pass
the required implementing legislation has only a potential effect: the wrongful fact occurs
only when administrative or judicial measures are taken which, being contrary to
international rules due to the lack of implementing legislation, generate State
responsibility. By contrast, in the case of torture, the requirement that States expeditiously
institute national implementing measures is an integral part of the international obligation
to prohibit this practice. Consequently, States must immediately set in motion all those
procedures and measures that may make it possible, within their municipal legal system,
to forestall any act of torture or expeditiously put an end to any torture that is
occurring.\footnote{Ibid, para.149}
\end{quote}

The Trial Chamber also observed that the prohibition of torture gives rise to an
obligation \textit{erga omnes}, that is an obligation owed to the rest of the international
community\footnote{Ibid, para.151}, as well as having acquired the status of a \textit{jus cogens} norm and it
therefore demands a more rigid approach\textsuperscript{404}. There is some academic opinion\textsuperscript{405} that war crimes, crimes against humanity and genocide have reached the same status as the prohibition of torture\textsuperscript{406}, which could lead to the inference that failure to implement domestic legislation to prevent and punish international crimes could lead to State responsibility for this omission.

However, the Torture Convention\textsuperscript{407} sets out a clear duty for the State party to enact the necessary legislation to prevent acts of torture\textsuperscript{408} and to ensure that the State can exercise criminal jurisdiction over the crimes contained in such convention\textsuperscript{409}. This means that prior to a State becoming party to the Torture Convention, no duty exists to enact such legislation, a fact that became clear at the time of the Pinochet litigation in light of the fact that Pinochet could not be indicted for any crimes of torture committed before 29 September 1988, when torture became a crime within the UK legislative system\textsuperscript{410}.

\textsuperscript{404} Ibid, paras. 153-156. In a discussion on the nature of a hierarchy of human rights in international law, Koji tries to avoid any philosophical debates about the nature of certain rights, but devotes his analysis to the derogation function that some rights possess; see T. Koji, 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights', \textit{EJIL}, 12 (2001), 5; see also Meron, 'From Nuremberg to the Hague'.

\textsuperscript{405} See Bassiouni, 'International Crimes: Jus Cogens and Obligations Erga Omnes'; also,

\textsuperscript{406} It must be acknowledged, however, that there is no absolute consensus on the status of torture. See also the \textit{Restatement on Foreign Relations of the United States} (\textit{Restatement} § 702 cmts. d-i, § 102 cmt. k (1987)) defines \textit{jus cogens} to include, at a minimum, the prohibitions against genocide; slavery or slave trade; murder or disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and the UN prohibition of the use of force. There is some academic consensus regarding the nature of the prohibition of torture as a \textit{jus cogens} norm; see Bianchi, 'Human Rights and the Magic of Jus Cogens'; U. Linderfalk, 'The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box', \textit{EJIL}, 18 (2008), 198-212. De Wet, however, claims that "this deepened consensus nonetheless remains fragile...reflected by the fact that that the consensus about the normative superior quality of the prohibition of torture does not yet encompass the consequences to be attributed to \textit{jus cogens} norms within the national legal order", citing as an example the obligation to compensate victims of torture; see E. De Wet, 'The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law', \textit{EJIL}, 15 (2004), 97-121 at 120.

\textsuperscript{407} Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) (henceforth Torture Convention).

\textsuperscript{408} Article 2(1) Torture Convention.

\textsuperscript{409} Articles 4 and 5 Torture Convention.

\textsuperscript{410} \textit{Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte} (No.3) [2000] 1 A.C. 147 [1999] (Pinochet No.3).
Moreover, the texts of the Genocide Convention and the Geneva Conventions contain specific provisions that the State party is under obligation to incorporate the treaty obligations into domestic law. For example, the Genocide Convention clearly states that the Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3.

In the Genocide Case the ICJ examined the general meaning to be attributed to the word “undertake” contained in the Genocide Convention and stated that:

The ordinary meaning of the word “undertake” is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties...

As the Genocide convention did not establish any international mechanism to ensure the proper implementation of the obligations therein, the obligation rested primarily and solely on the States, through enactment of domestic laws to prevent and punish genocide within their territorial jurisdictions. The language used in Article 5 is a language of obligation, which “at a minimum...read with the other provisions of the Convention, requires a State to legislate to criminalize and prosecute genocide committed within its territory”. Earlier conventions on counterfeiting, slavery and the traffic of women and children provided a blueprint for the obligation to enact domestic laws to prevent and punish.

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411 See Article 49 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Article 50 of the Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Article 129 of the Convention (III) relative to the Treatment of Prisoners of War and Article 146 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War (12 August 1949). Also, the Geneva Conventions allow State parties the flexibility either to prosecute or to extradite to another concerned party; the text common to all the Geneva Conventions texts in the previous footnote stipulates that the contracting party “… shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case”.


414 The Convention may have envisaged an international court, as Article VI stipulates that “persons charged with genocide or any of the other acts enumerated in article III shall be tried…by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction”; see P. Gaeta, ‘On What Conditions Can a State Be Held Responsible for Genocide?’, EJIL, 18 (2007), 631-48.

domestic legislation to deal with these particular crimes. However, as Gaeta points out, the novelty of the Genocide Convention obligations stems from the fact that genocide can be perpetrated wholly within the State, and by State officials. The other crimes – counterfeiting, slavery, and the traffic of women and children – deal with acts of a transnational nature which affect a number of States and therefore States have an interest to work together. It was also envisaged that, by enacting domestic legislation, States will incorporate a protection of minority groups in their Constitutions and criminal codes.

The provision “...in accordance with their respective Constitutions” may indicate a Constitutional restriction on the State’s ability to enact such legislation. This may mean that the State’s Constitution itself does not allow it to enact the necessary legislation, though Article 27 VCLT clearly states that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”. However, given the aims and objectives of the Genocide Convention, the inclusion of an apparent limitation due to national Constitutions may be due to the fact that States need to consider their particular domestic constitutional system regarding the domestic implementation of international treaty laws. In particular, this seemed to be a particular reminder for monist States to enact specific provisions as the Genocide convention was not a self-executing Treaty.

An inference could be made that the duty to enact domestic legislation derives from the nature of the prohibitions, but without such clear duty embedded in the text of the actual treaty there is no clarity with regard to the State’s actual obligations. Be that as it may, there is no reference to a duty or legal obligation to implement the international crimes listed in Articles 6-8 of the Rome Statute. There is, however, a reminder in the Preamble of the Rome Statute, that “...it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”. This reminder

416 Gaeta, ‘On What Conditions Can a State Be Held Responsible for Genocide?’, at 634.
418 Article 36 VCLT further provides that the consent to be bound by a treaty can only be invalidated if the violation of domestic law was manifest and it concerned a fundamental rule of national law.
419 Schabas, Genocide in International Law - the Crime of Crimes at 347-53; Saul, 'Article 5: Giving Domestic Effect to the Genocide Convention' at 14-17.
420 Paragraph 6 of the Preamble to the Rome Statute.
clearly points to an activity that should already be taking place within the domestic legislative frameworks of member States. There is no suggestion here that the preamble to the Rome Statute, or indeed to any international agreements, has any legally binding force. It is just suggestive of an existing condition or situation. From the international criminal law perspective, it appears that the members of the international community should already be actively engaged with the criminalisation of international crimes without the need for the Rome Statute. This is the general context of the Rome Statute and therefore the text of the preamble can be used to understand and interpret the text of the Statute itself.

If the preamble to the Rome Statute is analysed further from the viewpoint of modern trends and in the context of international crimes, the Trial Chamber in the Furundzija case maintained that “...every State has the right to prosecute and punish the authors of such crimes”. It went on saying that “…it is the universal character of the crimes in question [i.e. international crimes] which vests in every State the authority to try and punish those who participated in their commission”. Moreover, a policy paper published by the ICC Office of the Prosecutor confirms that “developments in the last ten or fifteen years point to a consistent trend imposing a duty on States to prosecute crimes of international concern committed within their jurisdiction.

Therefore, even though the concepts of universal jurisdiction and the duty to prosecute international crimes have become more prominent, the Rome Statute does not advocate either positions but attempts to keep a very balanced approach in order not to encroach on States’ sovereignty. In the Katanga case the ICC Appeals Chamber had the

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422 Article 31 VCLT.
423 Furundzija, para.156.
426 With regard to the principle of universal jurisdiction, Spain and Belgium have been at the forefront of this practice. Although Spain initially maintained a nationality link with victims of the crimes, this link was removed by Article 23(4) of the Ley Organica del Poder Judicial (Organic Law of the Judicial Branch, hereinafter ‘LOPJ’) of 1985, giving Spain the ability to investigate and prosecute perpetrators of international crimes, irrespective of where they have been committed and irrespective of the nationality of the victims or the perpetrator. However, in 2003, the High Court of Spain re-established the nationality link, and affirmed that the practice must consider the principle of subsidiarity, according to which the third State can exercise universal jurisdiction only if the relevant State decides not to. Belgium too had
opportunity to touch on this particular issue when discussing the validity of self-referrals in light of Article 14 of the Rome Statute. According to this provision, “a State party may refer to the prosecutor a situation where one or more crimes within the jurisdiction of the Court may have been committed”. Given that the ICC is complementary to the domestic courts’ jurisdictions, and given the Preamble provides a reminder that States have a duty to prosecute international crimes, Mr Katanga argued that such auto-referral situations should be prohibited on the basis that States should not be permitted to relinquish their criminal jurisdiction. Whilst the Trial Chamber acknowledged that States have a duty to investigate and prosecute these crimes, the decision to relinquish the jurisdiction in favour of the Court may be seen as “complying with the duty to exercise [its] criminal jurisdiction”. It also added that

...the general prohibition of a relinquishment of jurisdiction in favour of the Court is not a suitable tool for fostering compliance by States with the duty to exercise criminal jurisdiction. This is so because under the Rome Statute, the Court does not have the power to order States to open investigations or prosecutions domestically.

However, the lack of clarity and the presence of assumptions point to a disparity of understanding between what the member States should do and what they are actually doing. This is also suggestive of a steady rift in the relationship between sovereignty and the ICL regime, caused by the use of a top-down approach – in the shape of the ICL regime – accommodating a bottom-up approach – in the shape of sovereignty.

At the same time, the somehow *laisser-faire* approach adopted by the Rome Statute could also be suggestive of a certain amount of deference towards the member State, and therefore towards the principle of sovereignty. In other words, the suggestion is that there might be a confidence that member States will ensure it performs its duty towards developed an international authority with its bold universal jurisdiction practice, which, due to U.S. pressure and complaints, was reduced significantly in 2003 and 2004, to the point that Belgium now needs to prove a nationality link before the exercise of its criminal jurisdiction; see A. Cassese, *Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction*. *JICJ*, 1 (2003), 589-95; A. Cassese, *The Belgian Court of Cassation V the International Court of Justice: The Sharon and Others Cases*. *JICJ*, 1 (2003), 437-52.


428 Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19 (2) (a) of the Statute (11 March 2009), ICC-01/04-01/07-949.


430 *The Prosecutor v. Germain Katanga*, para.86.
its citizens. However, given that international crimes are routinely committed by States or States’ officials, and given that it is the State itself that usually interferes with the effective investigations and prosecutions of these crimes, is this deference the correct interpretation in the context of the lack of clear mandatory language to implement the prohibitions of international crimes? The situation certainly lacks clarity and sends a very ambivalent message to the member States regarding the implementation of international crimes at the domestic level.

The ambivalence of this situation is coupled by the fact that there is no clarity with regard to the consequences, if any, incurred by member States for failure to implement the international crimes. There does not seem to be any evidence, either from the text of the Rome Statute or judicial opinions, that failure to implement the international crimes at the domestic level will lead to State responsibility. The only outcome is that the ICC will take over a criminal jurisdiction which has traditionally been the domain of the sovereign State. There may not be serious consequences for the State itself, but the symbolism attached to the transfer of criminal jurisdiction from the State to the ICC is very powerful.

It is not surprising, therefore, that some of the most established and emerging powers of the international community are refusing to ratify the Rome Statute. The perception of a loss of the traditional sovereignty symbolism attached to the sovereign State may constitute a step too compromising, according to their level of understanding of what sovereignty actually means. As the Inter-American Court of Human Rights affirmed:

Under the law of nations, a customary law prescribes that a State that has concluded an international agreement must introduce into its domestic laws whatever changes are

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431 The notion of the existence of a ‘duty’ in the context of sovereignty may be a novel concept but it is one that is being rediscovered more and more in this area of international law, particularly following the Responsibility to Protect Report. Also, for an innovative theory on sovereignty and jus cogens norms see E.J. Criddle and E. Fox-Decent, ‘A Fiduciary Theory of Jus Cogens’, Yale Journal of International Law, 34 (2009), 331-87.

432 In fact, it appears that most discussions regarding a potential responsibility of the State for international crimes only arises after the crime has been committed and not because there has been a lack of domestic implementation; see N. Jorgensen, The Responsibility of States of International Crimes (Oxford: Oxford University Press, 2000).
needed to ensure execution of the obligations it has undertaken. This principle is universally valid... 433

However, even though the duty to enact and/or modify national laws, in order to give effect to the obligations undertaken in international agreements, is a recognised principle of international law, States’ practice does not appear to be either straightforward or compliant. More to the point, this duty is not clearly specified in the Rome Statute and therefore it cannot be said, with any degree of certainty, that there is a mandate to enact domestic laws for international crimes. In a way, the duty to investigate and prosecute is shared between the member States and the ICC: if the former fails, the latter will continue until the duty is fulfilled. To surmise, therefore, there is no actual legal duty to enact the international crimes as set out in the Rome Statute within the domestic jurisdictions of the member States and no international responsibility will arise if the State does not carry out its primary duty to investigate and prosecute international crimes 434.

It is a fact that the establishment of a permanent international criminal court, empowered to investigate and prosecute international crimes, is central to the Rome Statute. However, the ‘State’s duty to investigate and prosecute’ should have been given more weight, specifically by obliging the State to enact adequate legislative procedures to prosecute international crimes. The Rome Statute itself sets out the proviso that a case will not be admissible before the ICC unless the State is unable or unwilling to carry out the investigation and prosecution 435, making it clear that the investigation and prosecution of an international crime can, and will, be carried out by the ICC if a State does not fulfil its responsibilities. Essentially, it is the ICC that is empowered by the Statute, and not the State, and this new system can be interpreted as a re-balancing exercise in the fight against impunity. Given that the culture of impunity is synonymous with the State’s reluctance to prosecute, as quite often it is the State or its officials that are the perpetrators or the architects of the international crimes, the creation of a strong

433 Inter-American Court of Human Rights, Case of Garrido and Baigorria v. Argentina; Judgment of August 27, 1998 (Reparations and Costs).
434 International responsibility for the State may still arise if the international criminal acts can be attributed fully or in part to the State, as set out in Article 4 of the ILC Articles on State Responsibility; see Application of the Convention on the Prevention and Punishment of the Crimes of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p.43.
435 Article 17 Rome Statute.
Court equipped with the task to prosecute international crimes perpetrated within the territorial boundaries of the State, readdresses the balance that was missing for such a long time. Also, in view of the fact that States have habitually used other mechanisms, as discussed below, to avoid their obligations to investigate and prosecute, the new Court constructs the concept of “unwillingness” in such a way that it takes into consideration such alternative mechanisms of justice.

3.5  Dealing with international crimes through alternative mechanisms

3.5.1  Truth Commissions

The context of a Truth Commission (TC) is a reconciliation process, that is to say a practice that aims to aid a State’s transition from one regime to another, following internal civil and political unrest, usually accompanied by systematic killing of the population, motivated either by political beliefs or racial tensions. Although the concept itself can be traced back to classical Greece, TCs gained prominence in the 1980s due to political changes that took place in that decade, including the transition from military regimes in Africa and South America, the disintegration of the communist regimes in Eastern Europe and the end of the apartheid regime in South Africa. These events led to systematic human rights abuses of the civil population. More to the point, and for the first time in modern history, attempts were made to deal with crimes committed by the State, using a method that encourages and promotes “collective responsibility and forgiveness” in order to stabilise society.

Hayner describes a truth commission as a mechanism made up of four components:

First, a truth commission focuses on the past. Second, a truth commission is not focused on a specific event, but attempts to paint the overall picture of certain human rights abuses, or violations of international humanitarian law, over a period of time. Third, a truth commission usually exists temporarily and for a pre-defined period of time, ceasing to exist with the submission of a report of its findings. Finally, a truth commission is always vested with some sort of authority, by way of its sponsor, that allows it greater

access to information, greater security or protection to dig into sensitive issues, and a greater impact with its report.\textsuperscript{439}

Essentially, truth commissions aim to heal through truth-telling. Although they do not necessarily exclude traditional criminal prosecutions, in practice they tend to replace them either because of the unavailability of the necessary domestic structures following a change of regime or because the establishment of a truth commission represents a compromise in the context of transitional regimes.\textsuperscript{440} In fact, truth commissions tend to epitomize a tacit understanding that prosecutions will not occur, upholding an amnesty in substance but not in form.\textsuperscript{441}

It has been recognised that one of the objectives of thorough criminal prosecutions is to provide a narrative of the heinous crimes as historical evidence that nobody can ever refute.\textsuperscript{442} As Chief Justice Jackson surmised, just like the actions of the Nazi regime were too horrific to be believable, the Nuremberg trials provided clear and undisputed evidence of the atrocities committed by the Nazi regime, which would be impossible to be rebutted by present and future generations.\textsuperscript{443} Truth commissions, set up to grant amnesty to all or to a selected number of perpetrators who willingly disclose all the crimes committed, can provide a similar result, including a moral educational process and the shaming of the perpetrators.\textsuperscript{444}

Perhaps the most memorable use of the truth commission mechanism was the South African Truth and Reconciliation Commission (TRC), which served as a model for future truth commissions and generated a great deal of academic interest.\textsuperscript{445} The question does remain, however, whether the truth and reconciliation process that took place in post-apartheid South Africa reached a sufficient level of justice for the families.

\textsuperscript{444} Gray, ‘An Excuse-Centred Approach to Transitional Justice’, (at 2684.
\textsuperscript{445} See for example, A.R. Chapman and H. Van Der Merwe (eds.), Truth and Reconciliation in South Africa: Did the Trc Deliver? (University of Pennsylvania Press, 2008), Moon, Narrating Political Reconciliation: South Africa’s Truth and Reconciliation Commission.
and victims of the crimes. Chapman and Van der Merwe surmised that these conclusions were never made in the final report of the Commission. They emphasised the fact that the amnesty process that led to the establishment of the TRC was a necessary political move in order to bring peace and stability in the country\(^{446}\), segregating justice to the background\(^{447}\). Moreover, what is significant in the findings of this very long study in the TRC process, is the fact that the authors did not believe that this mechanism told a clear, truthful and complete narrative about the apartheid regime, citing that

\[\text{[It] has not resulted in an uncontested public memory of apartheid and the liberation struggle. Whilst there is broader public acceptance about the extent and nature of abuses, a general understanding of institutional responsibility and the causes of exploitation and abuse is still lacking.}\(^{448}\)

This is a major flaw of the process because, not only did the South Africa State avoid the usual prosecutorial system to deal with these crimes, thus not fulfilling its duty to exercise its criminal jurisdiction over those crimes. It also did not appear to have reached the goal that had become such a central theme of the Nuremberg trials\(^{449}\), that is the public, accurate and historical exposure of the crimes committed so that they will always be remembered and no one could dispute their existence\(^{450}\).

The idea therefore that the State can avoid the use of proper and adequate criminal procedures in order to achieve peace and stability quickly may in fact produce undesired results in the long term, especially from the point of view of the victims and their

\(^{446}\) Chapman and Merwe (eds.), *Truth and Reconciliation in South Africa: Did the TRC Deliver?* at 116-17.

\(^{447}\) One of the interviewees in the research carried out stated that the process was ‘perpetrator-friendly’, whilst others were still trying to persuade the public prosecuting authorities to readdress the situation in the present day (Ibid at 127). Moon makes the same conclusion with respect to the victims and their families, who are now trying to pursue some form of financial reparation through South African and US Courts. One of the main reasons for this development was due to the fact that the amnesty was granted immediately to the perpetrators, whereas compensation for the victims became a long drawn-out process (Moon, *Narrating Political Reconciliation: South Africa’s Truth and Reconciliation Commission* at 144 et seq.)

\(^{448}\) Chapman and Merwe (eds.), *Truth and Reconciliation in South Africa: Did the TRC Deliver?* at 283.

\(^{449}\) The International Military Tribunal for Germany, established by the London Charter of the International Military Tribunal (Nuremberg Charter), 8 August 1945.

\(^{450}\) For example, Osie1 talks about the use of legal processes as aids to the ‘transformation of collective identity’ and therefore encouraging a sense of solidarity within a society; M.J. Osie1, ‘Ever Again: Legal Remembrance of Administrative Massacre’, *University of Pennsylvania Law Review*, 144 (1995), 463-704, at 465.
families\textsuperscript{451}. Despite the often cited success, the South Africa TRC clearly demonstrated that financial compensation should be central to a truth commission discourse, although this does not mean that financial compensation will always be the preferred option for the victims of serious human rights violations\textsuperscript{452}. There is also no doubt that since then victims have become more central to the legal process, especially in the case of international criminal courts, thus making their views and voices more central to a process of justice\textsuperscript{453}. However, truth commissions tend to go hand in hand with amnesties and, as mentioned above, these mechanisms can give the appearance of the State forfeiting its duty towards victims of systemic human rights violations.

3.5.2 Amnesties

Even though the sovereign State has a clear mandate to exercise criminal jurisdiction for crimes committed in its territory, it does not necessarily ensue that it is always in its best interest to do so. On certain occasions the State will use special mechanisms called amnesties. The word \textit{amnesty} derives from the Greek \textit{amnestia}, which translates as \textit{forgetfulness} or \textit{oblivion}\textsuperscript{454}. It is an act that reflects the sovereign power to bestow immunity from criminal prosecution for past offences, and it is sometimes used in conjunction with the TC mechanism to grant amnesty in exchange for truth, as in South Africa\textsuperscript{455}. It is a tool that easily demonstrates the far reaching powers of the governing authorities, and a symbolic gesture to the rest of the international community that pardoning individuals from criminal prosecutions is a sovereign prerogative. Amnesties have been justified in order to reach a speedy peaceful conclusion to a period of domestic political turmoil and human rights atrocities. They have often been applied to

\textsuperscript{451} The age-old debate about peace versus justice has dominated the discourse of international criminal law for a long time and has proved to be particularly persuasive among developing States, and even more specifically amongst transitional societies; see J. N. Clark, 'Peace, Justice and the International Criminal Court', \textit{JICJ}, 9 (2011), 521-545; N. Waddell and P. Clark (eds.), \textit{Courting Conflict? Justice, Peace and the ICC in Africa} (Royal African Society, 2008) (Royal African Society, 2008).

\textsuperscript{452} See Moon, \textit{Narrating Political Reconciliation: South Africa's Truth and Reconciliation Commission} at 153. For example, in the case of the families of the “disappeared” in Chile, the creation of the legal status of “forcibly disappeared” was more important to the victims’ families than financial compensation (P. Hayner, \textit{Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions} (New York: Routledge, 2011) at 171.)


\textsuperscript{455} Moon, \textit{Narrating Political Reconciliation: South Africa’s Truth and Reconciliation Commission}, 15.
transitional societies, where the need to bring stability and peace has been regarded above the need to bring selected individuals to justice. However, the fact that the sovereign State has the power to grant an amnesty does not necessarily mean that the international community will abide by the State’s decision, an issue that will be explored further on in this chapter.

Amnesty laws have been used to pardon a great deal of individuals. Within the context of international sovereignty, the treatment of the pardoned perpetrator depends on other States’ willingness to interfere with the amnesty laws of a member of the international community. In turn, this level of interference will affect the development of international law. It was, in fact, the notion of the State’s ability to grant amnesty laws, amongst other reasons, that have prompted the international community to devise a way to deal with these grievous crimes and with this particular mechanism.

For example, amnesty laws were famously declared by General Pinochet in Chile to grant amnesty to himself; the people of Uruguay voted to grant amnesty to their leaders; South Africa granted amnesty to individuals who were prepared to offer a full confession; the Lomé Agreement between the Government of Sierra Leone and the Revolutionary United Front (RUF) in 1999 provided a blanket amnesty to everyone involved in the decade-long conflict in order to bring peace to the region; in 2000 the Ugandan government passed an amnesty law granting amnesty to all rebel fighters who put down their arms, after a twenty year long conflict; in 2005 the government of Indonesia and the Free Aceh Movement (GAM – Gerakan Aceh Merdeka) signed the

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459 1986 Ley de Caducidad de la Pretensión Punitiva del Estado (also Amnesty Law or Expiry Law).
Helsinki Memorandum of Understanding (MoU) granting amnesty to GAM combatants, bringing three decades of civil conflict to an end 463.

Prima facie, the granting of amnesties gives the appearance that the State is primarily interested in avoiding its criminal justice mandate, either because it is too onerous or because it is unwilling to prosecute individuals amongst its own ranks. The practice has prompted José Ayala Lasso, former UN High Commissioner for Human Rights, to declare that “[a] person stands a better chance of being tried and judged for killing one human being than for killing 100,000” 464. If one looks at the concept of amnesties in a positive light, it could be considered as a potentially effective tool to bring peace in a territory or region that has been ravaged by internal conflict for many years. Once an amnesty has been granted the people can look forward towards rebuilding their nation and their relationships. However, this is no consolation for the victims, who may be under the apprehension that impunity is the price to pay for peace, and who will undergo a “secondary victimisation” process due to the fact that their voices and experiences were never heard after the perpetration of the crimes 465.

That is not to say, however, that amnesty and justice are mutually exclusive concepts. There is a proposition that amnesties can offer different types of accountability mechanisms less invasive than national and international prosecutions, but they are still able to achieve similar objectives to the ones that justice through prosecutions aim to achieve 466. For example, the Government granting the amnesty can offer compensation to the victims, set up employment bans from positions of trust in society or set up truth commissions to document the atrocities that have taken place 467.

Whatever benefits that may derive from the amnesty regime, the issue of impunity still remains, even if the establishment of an amnesty regime was instituted with the best possible motives, specifically the immediate cessation of hostilities. Given that the

467 Scharf, ‘The Amnesty Exception to the Jurisdiction of the International Criminal Court’, (at 512.)
State’s authority is absolute within its territorial boundaries, a preliminary assumption can be made that there can be no other consequence to the beneficiaries of an amnesty declared by the sovereign State. However, in the Furundzija case it was said, in the context of torture only, that the granting of an amnesty is no bar to prosecution by an international court, another State or a subsequent regime. Further on in this discussion examples drawn from situations in Sierra Leone and Uganda also support the contention that international criminal courts have decided against decisions previously supported or enacted by the State, thus reducing the exclusivity of jurisdiction traditionally accorded to the State and ensuring that amnesties are not used as a bar to prosecution for the most serious crimes. In other words, the overall effect may be that the amnesty granted will only be effective within a specific moment in time and space. It is not permanent, as a different regime or government may decide that prosecutions are warranted, and it is not binding outside of the territorial boundaries of the State, as international courts can override the decision taken at national level.

3.5.2.1       Amnesty and the ICC

Despite the granting of blanket amnesties in the 1980s, one rule that is clearly developing in international law is that a valid amnesty cannot be granted in the context of serious international crimes – crimes against humanity, war crimes and genocide – a rule that derives from States’ obligations that arise out of membership to human rights treaties, decisions of international and regional courts and customary international law. Although the Rome Statute is silent regarding the granting of amnesties, there is an implied understanding that blanket amnesties cannot be granted with regard to the international crimes listed in article 5. The Statute clearly indicates

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468 The Prosecutor v. Anto Furundzija, ICTY IT-95-17/1-T, Judgement (Trial Chamber, 10 December 1998), para. 155.
469 Crimes against humanity include acts such as murder, torture, forced deportation, rape, enforced disappearance, and other serious crimes that are committed as part of a ‘widespread or systematic attack’ against a civilian population (whether in a time of war or peace).
470 War crimes are defined in the 1949 Geneva Conventions (and Additional Protocols of 1977).
471 According to the Genocide Convention of 1949, genocide includes acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group.
473 See the Preamble to the Rome Statute: the most serious crimes must not go unpunished (para. 4, determined to put an end to impunity (para. 5); see also Meisenberg, ‘The Legality of Amnesties in International Humanitarian Law: The Lome’ Amnesty Decision of the Special Court for Sierra Leone’, In
the existence of a duty to investigate and prosecute such crimes, a duty that rests primarily on the States but it will be exercised by the Court in accordance to the complementarity principle.

Also, the principle of \textit{ne bis in idem}, according to which a court may not institute proceedings against an individual for a crime that has already been the object of previous criminal proceedings and for which the accused has been found guilty or acquitted, the granting of an amnesty can be said to be “inconsistent with an intent to bring the person concerned to justice”.\textsuperscript{475} Article 20 does not make any direct or indirect reference to amnesties, but it reaffirms the purpose of the Rome Statute regime, suggesting therefore that amnesties would be inconsistent with such regime. There is, however, the possibility that the principle of \textit{ne bis in idem}, grounded in “finality and fairness”,\textsuperscript{476} may in fact interfere with the granting of an amnesty. This issue emerged in the ECCC case of Ieng Sari, Pol Pot’s brother-in-law, who, during the Khmer Rouge regime between 1975 and 1979, persuaded many educated Cambodians to return to the country but were eventually tortured and killed.\textsuperscript{477} By Royal Decree of 14 September 1996, Ieng Sari was pardoned and granted an amnesty for his involvement in the Cambodia’s ‘killing fields’ atrocities. The court found itself under a duty to question whether the present prosecution contravened the \textit{ne bis in idem} rule and, if not, whether the amnesty was consistent with the ECCC.\textsuperscript{478} The words of the Decree itself became the focus of the court’s adjudication regarding the legality of the amnesty:

An amnesty to Mr. Sari...for the sentence of death and confiscation of all his property imposed by order of the People’s Revolutionary Tribunal of Phnom Penh, dated 19th

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\textsuperscript{474} Preamble to the Rome Statute, para. 6 and Article 1.
\textsuperscript{475} Article 20 (3) (b) Rome Statute.
\textsuperscript{476} A. Cassese et al., \textit{International Criminal Law} (Oxford: OUP, 2011) at 108.
\textsuperscript{478} ECCC Ieng Seri, para.11. It is important to note that Ieng Sari was prosecuted \textit{in absentia} in 1979 and sentenced to death.
August 1979; and an amnesty for prosecution under the Law to Outlaw the Democratic Kampuchea Group...479

According to the court, “amnesty for the sentence” and “amnesty from prosecution” were not consistent with the amnesty provision in Article 27 of the Cambodian Constitution480. On the basis of this inconsistency the court could not be certain that it was either “manifest or evident” that an amnesty could be granted for a conviction for genocide. It further noted that the offences set out in the Law to Outlaw the Democratic Kampuchea Group were not crimes within the jurisdiction of the ECCC481.

This particular case reveals the tension that exists between international criminal prosecutions and the granting of amnesties in order to achieve speedy peaceful resolutions. However, as Cassese et al point out, there must be some room for manoeuvre otherwise there will be no point at all in the amnesty mechanism, concluding that the approach used by the ECCC in the strict analysis of amnesty and ne bis in idem proved successful482. Also, international law does not impose a complete ban on amnesties. For example, Protocol II to the Geneva Conventions states that amnesty laws can be conceded in the context of less serious crimes, for example in non-international conflicts where “...the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict”483.

The actions of the U.N., actively supporting the granting of amnesties in Cambodia, El Salvador, Haiti and South Africa for the sake of achieving a swift end to internal strife484, can be construed as a tacit understanding that the international community, represented through the U.N., would generally prefer this action rather than prosecutions in certain circumstances. During the preparatory conference for the establishment of the ICC the U.S. delegates suggested that the new Court should take into consideration the granting of amnesty in the interest of international peace and

479 Royal Decree NS/RKT/0996/72, proclamation made by Preah Bat Norodom Sihanouk Varma, King of Cambodia.
480 ECCC Ieng Seri, para. 57. According to Article 27, “the King shall have the right to grant partial or complete amnesty”.
481 Ibid, para. 58 and 59.
482 Cassese et al., International Criminal Law at 111.
483 Article 6(5) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted on 8 June 1977.
national reconciliation\textsuperscript{485}. Bearing in mind that the aim and spirit of the Rome Statute is to put an end to impunity and prosecute individuals for the most heinous crimes\textsuperscript{486}, there are some ambiguous references in the Statute itself whereby the Court, and therefore criminal prosecutions, may take a surreptitious position:

1) Article 16 of the Rome Statute stipulates that

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

The history behind Article 16 finds its origin in the drive to find the correct and appropriate role for the Security Council, in the context of the new international criminal law regime. The ILC envisaged three specific roles for the SC under Article 23 of the Draft Statute, and it was section three which provided for the exception rule for the initiation of prosecution\textsuperscript{487}. The ILC provision required that

No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.

This procedure was one of the most controversial and debated provision of the negotiation process because of the nature and purpose of the Security Council as the organ entrusted to maintain peace and security within the international community, a responsibility that had been accepted by all members of the community under Articles 103 and 24 (1)\textsuperscript{488}. At the same time there were fears, amongst the delegates, that the impartiality of the Court could be interfered with by the SC\textsuperscript{489}. For this reason a

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\textsuperscript{485} Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court', at 508.
\textsuperscript{486} It is clear from the Preamble that these crimes must not go unpunished (Para. 4); that the culture of impunity must come to an end (Para.5), and that the primary duty to prosecute rests with the State (Para.6); this is further supported by the principle of complementarity as set out in Articles 1 and 17.
\textsuperscript{487} ILC Report on the work of its Forty-sixth Session, UNGA Official Records, Forty-nine Session, Supplement No.10, A/49/10 (1994). Article 23(1) dealt with the SC referral to the ICC and section, eventually incorporated into Article 13 (b) and section (2) empowered the SC to make a finding of aggression before a case concerning aggression was brought before the ICC.
\textsuperscript{489} Ibid.
compromise was proposed and agreed upon\textsuperscript{490}, which caused the opposite effect of the ILC draft provision and removed any possibility by a permanent SC member to veto Court’s proceedings; in effect, only a “concerted effort” by the SC could stop the Court’s proceedings\textsuperscript{491}.

Needless to say that the compromise reached with regard to article 16 was welcomed by the U.S. delegation, and it provided the first instrument used by the U.S. administration to protect its peacekeeping troops. SC Resolution 1422 achieved unanimous approval by the Security Council\textsuperscript{492}, although its relationship to the text and spirit of Article 16 was not without criticism\textsuperscript{493}. In fact, Article 39 of the UN Charter stipulates that actions taken under Chapter VII are taken because the SC has made a determination of the existence of a threat to the peace, a breach of the peace or an act of aggression. It is difficult to see a connection to a breach to the peace by exempting peacekeeping personnel from non-member States from any investigations or prosecutions for a period of twelve months, unless one considers that the U.S. had in fact threatened not to deploy any of its peacekeeping troops, thus causing a potential threat to the peace\textsuperscript{494}.

Perhaps the main controversy regarding the use of Article 16 stems from the fact that it was originally intended to provide a balanced approach to situations where the pursuit of justice should be temporarily stalled in order to achieve more stability and peace in a specific territory or region. In other words, this provision was originally intended to balance the traditional debate between peace versus justice. As Stahn points out, Article 16

\begin{quote}
...was negotiated to enable the Council to delay the exercise of jurisdiction by the ICC in situations where the solution to a specific conflict warrants a deferral of prosecution.
\end{quote}

\textsuperscript{490} This became known as the ‘Singapore Compromise’ as it was put forward by the Singapore delegation.
\textsuperscript{491} Yee, ‘The International Criminal Court and the Security Council: Articles 13(B) and 16’, at 150.
\textsuperscript{492} Note that after SC Resolution 1422 expired, it was renewed for a further twelve months with the adoption of SC Resolution 1487. Whilst being identical to SC Resolution 1422, it also expressed its intention, as it had done before, to renew the resolution ‘under the same conditions each 1st July for further 12-month periods for as long as may be necessary’ (Germany, France and Syria abstained). At the end of this period the U.S. tried to ensure the passing of a third Resolution, which, due to much criticism, was eventually abandoned.
Perhaps the most classical example is the suspension or omission of proceedings that might destabilise peace negotiations.\(^{495}\)

Therefore, notwithstanding the fact that there is no direct reference to the possibility of the State granting an amnesty, the assumption is that in some situations it may be in the interests of the international community to delay the start of prosecutions, noting that this mechanism only delays the start of prosecutions and is not meant to provide for an absolute exoneration. The suggestion that the ICC could decide not to follow a SC Resolution requesting the deferral of investigation and prosecution, according to Article 16, is highly unlikely.\(^{496}\) This is due to the fact that that the relationship between the UN and the ICC is based on mutual respect and recognition of each other’s mandates and responsibilities.\(^{497}\) Article 17(2) of the ICC-UN Agreement does not specify the actions that would be taken by the Court in the case of an Article 16 deferral request. However, given the much needed relationship between the Court and the SC, a refusal to comply with such request would not reflect the intention behind Article 16, an intention that was agreed by the negotiating parties to the Rome Statute.\(^{498}\)

2) Article 53 of the Rome Statute introduces the notion of prosecutorial discretion. In particular, the prosecutor can decide not to initiate criminal proceedings if he believes that it will not serve the interests of justice.\(^{499}\) The notion of selective investigations and prosecutions is not just a feature of international criminal justice but also features in national prosecutorial systems, even in the stricter German model which requires the mandatory prosecution of all crimes.\(^{500}\) This is mainly an issue of capacity and resources, and the question is whether the granting of amnesty would activate prosecutorial discretion under Article 53 – namely ‘in the interest of justice’. In view of

\(^{495}\) Ibid, 89-90.  
\(^{496}\) See Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court', at 523.  
\(^{498}\) This situation can be contrasted to the ICTY Tadić decision, whereby the Appeals Chamber stated that it has the power to determine its own jurisdiction and competence (Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, Case No. IT-94-1-AR72, 2 October 1995, para. 18).  
\(^{499}\) Article 53 (1) (c). Note, however, that this decision is subject to review by the Pre-Trial Chamber (Article 53(3)).  
\(^{500}\) See Cryer, Prosecuting International Crimes - Selectivity and the International Law Regime, at 191 et seq.  
\(^{501}\) Ibid at 192.
the example presented below from Uganda it is contended that this would not be the case.

3.5.2.2 Sierra Leone

In 1999, after a decade of civil war, the government of Sierra Leone and the Revolutionary United Front (RUF) signed a peace agreement in Lomé,\textsuperscript{502} which, \textit{inter alia}, granted “...an absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives”\textsuperscript{503}. The Government of Sierra Leone also ensured that “...no official or judicial action is taken against any member...in respect of anything done by them in pursuit of their objectives as members of those organisations, since March 1991”\textsuperscript{504}. Although no reference is made to international crimes, the U.N. Secretary General inserted a reservation that the U.N. did not support an amnesty for genocide, crimes against humanity, war crimes and other serious violation of international humanitarian law\textsuperscript{505}.

As the RUF continued to engage in more conflict activities, a Special Court for Sierra Leone (SCSL) was established in 2002 to deal with serious violations of humanitarian law committed in Sierra Leone during the conflict\textsuperscript{506}, and a challenge to the Lomé Agreement amnesty provision soon followed in the \textit{Kallon case}\textsuperscript{507}. The Appeal Chamber agreed that the granting of amnesties fell under the authority of the State in its exercise of its sovereign powers\textsuperscript{508}. However, it also stated that if the jurisdiction of a particular situation is universal in nature, then a State cannot deprive another State of its

\textsuperscript{502} Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone of 7\textsuperscript{th} July 1999, Lomé, UN Doc. S/1999/777 (Lomé Agreement).
\textsuperscript{503} Lomé Agreement Article IX (2).
\textsuperscript{504} Lomé Agreement Article IX (3).
\textsuperscript{506} Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000. The court represents a departure from the \textit{ad hoc} tribunals set up by the Security Council in the sense that it was not part of the Sierra Leone judiciary system but was not part of the UN either – a \textit{hybrid} Court; see R. Cryer, ‘A “Special Court” for Sierra Leone?’, \textit{ICLQ}, 50 (2001), 435-46, S. Linton, ‘Cambodia, East Timor and Sierra Leone: Experiments in International Justice’, \textit{Criminal Law Forum}, 12 (2001), 185-246.
\textsuperscript{507} The Prosecutor v. Morris Kallon and Brima Buzzy Kamara, Special Court for Sierra Leone, SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Appeals Chamber, 13 March 2004).
\textsuperscript{508} Ibid, para. 66
jurisdiction to prosecute individuals who have been granted amnesty\textsuperscript{509}, and noted that “a State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember”\textsuperscript{510}. In other words, the SCSL Appeal Chamber made a clear link between international crimes, peremptory norms and obligations \textit{erga omnes}\textsuperscript{511}; moreover, it limited the effect of a decision taken within the territory of a sovereign State in the sense that such decision could not bind the actions of other States.

Even though this decision appears to clarify the issue of amnesty and international crimes, some doubts remain. Given that Article X of the SCSL Statute revokes the immunity from prosecution for international crimes, questions arise regarding the strength of the court’s conclusion in view of the fact that it refused to give an opinion on the legality of Article X, declaring not to have the authority to do so\textsuperscript{512}. Moreover, the centrality of the doctrine of universal jurisdiction in the court’s reasoning regarding amnesty and international crimes leads to the dilemma about the applicability of the principle of universal jurisdiction to war crimes in non-international conflicts, as universal jurisdiction tends to apply only to grave breaches of international crimes where there is a duty to prosecute or extradite\textsuperscript{513}.

3.5.2.3 Uganda

Conflict erupted in Uganda due to disputed national election results in 1981, leading to the formation of the Lord’s Resistance Army (LRA) and nearly two decades of internal conflict and serious human rights violations committed both by the LRA and the Ugandan military forces\textsuperscript{514}. Several twists and turns developed between the LRA, the elected government of Uganda and the ICC as amnesties were granted, peace negotiations were established, then broke down, followed by referrals to the ICC and by

\textsuperscript{509} Ibid, para. 67
\textsuperscript{510} Ibid
\textsuperscript{511} Ibid, para.71
\textsuperscript{512} Meisenberg, 'The Legality of Amnesties in International Humanitarian Law: The Lome’ Amnesty Decision of the Special Court for Sierra Leone', at 845.
\textsuperscript{513} Ibid; see also L. Reydams, \textit{Universal Jurisdiction: International and Municipal Legal Perspectives} (Oxford: Oxford University Press, 2003) at 55.
\textsuperscript{514} See Macmillan, 'The Practicability of Amnesty as a Non-Prosecutory Alternative in Post-Conflict Uganda', at 203-04.
more peace negotiations with potential compromises regarding prosecutions\textsuperscript{515}. The crucial point is that Uganda, just like Sierra Leone, offered amnesty to the LRA rebels in order to bring about a cessation of hostilities and the desperate conditions that had affected millions of Ugandan innocent peoples\textsuperscript{516}. However, following President Museveni’s referral of the situation to the ICC, the ICC issued arrest warrants in 2005 in the case of Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen\textsuperscript{517}. Nevertheless, due to the complex relationship between President Museveni and the LRA, and the renewed promise of amnesty by Museveni in 2006\textsuperscript{518}, all four alleged perpetrators of international crimes are still at large.

In other words, without the cooperation of the Ugandan government, the arrest warrants issued by the ICC have no significance or power. The ICC relies on the cooperation of the State parties. Without an appropriate level of assistance to make the arrests possible, the looming prosecutions are stripped away of any relevant significance. The debate generated by this stalemate situation is interesting because it does not seem to have any relevance to the protection of victims or ending the conflict, but it has more to do with the effectiveness and reputation of the ICC as a new judicial institution\textsuperscript{519}. It is also evocative of a common problem that affects international organisations, namely that they become too concerned with their own limitations and lose sight of the reasons for their original creation\textsuperscript{520}. This is not a claim that the ICC has lost sight of its original mandate; it is rather a proposition that the mandate should take into consideration particular cases in transitional societies, for example by facilitating an immediate peace process before moving to the prosecutorial stage. Macmillan goes as far as stating that the ICC should in fact respect the decision of the legitimately elected Ugandan government and that the amnesty granted by Musuveni represents the will of the people,

\textsuperscript{515} Ibid at 201-06. .
\textsuperscript{517} ICC-02/04-01/05 Warrants of Arrests issued under seal by Pre-Trial Chamber II on 8 July 2005.
\textsuperscript{518} Macmillan, 'The Practicability of Amnesty as a Non-Prosecutory Alternative in Post-Conflict Uganda', at 199-200.
\textsuperscript{519} Macmillan, 'The Practicability of Amnesty as a Non-Prosecutory Alternative in Post-Conflict Uganda', at 210.
including the victims of the conflict. There is a cultural element to Macmillan’s argument, however, in the sense that she seems to favour a justice model that is understood, practiced and accepted by the local people, rather than been imposed by a Western model of Kantian moral imperative theory. Blumenson supports this aspect too, citing as an example the plea of the Northern Ugandan community to forgo criminal prosecutions in favour of a reconciliation process called mato oput, which entails recognition of responsibility, forgiveness and peace.

The application of a justice model that reflects the local culture may attract the support of the cultural relativist perspective, and therefore defeat the notion of universality in the context of justice. However, the model itself may not be adequate to deal with serious human rights violations. Moreover, the mato oput model could be in danger of becoming a shield to protect perpetrators from justice, similar to the proposition whereby the support of cultural rights should be favoured instead of imposing universal rights for fear that such action may resemble a colonialist practice.

3.6 Conclusion

The State has traditionally been endowed with the exercise of criminal jurisdiction within its territorial boundaries in order to protect the individuals within those boundaries. However, in an ever-increasing interdependent international community

521 Macmillan, 'The Practicability of Amnesty as a Non-Prosecutory Alternative in Post-Conflict Uganda', at 211.
522 Ibid. According to this theory, the non-prosecution of offenders is indicative that national Governments ignore the victims; as a consequence of this, the victims play no part in the transitional justice process.
524 The literal meaning of mato oput is ‘drinking of a bitter root from a common cup’. It is an Acholi (a Northern Ugandan community) traditional ritual performed to cleanse the perpetrator and reconcile him with the victims; see Roco Wat I Acoli: Restoring Relationships in Acholiland: Traditional Approaches to Justice and Reconciliation', (Liu Institute for Global Issues, 2005), available at http://www.ligi.ubc.ca/?p2=modules/ifi/publications/view.jsp&id=16 (last accessed on 6 June 2012).
there are times and situations when it is more beneficial, in order to achieve common objectives, to work together rather than in isolation. It is for this reason that extradition practices have developed in order to allow States to collaborate together in the exercise of criminal jurisdiction, and within the strict boundaries of reciprocity. This means that at times States will contend with one another as to who has more interest in investigating and prosecuting a crime; in order to facilitate this cooperation States have for a long time entered into extradition agreements, which allow even an alleged perpetrator with the nationality of the extraditing State to be removed and taken to a requesting State.

Apart from the extradition practices, accompanied by the principle *aut dedere aut judicare*, States have been offered primary jurisdiction over the international crimes set out in the Rome Statute. The contention arises from the fact that, although States have a primary duty to investigate and prosecute the crimes\(^{528}\), there is no clear legal duty to enact the necessary laws to make such investigation and prosecution possible within the territorial boundaries of the State. The reasoning for this may be due to the fact that, despite the fact that States retain the primary duty to prosecute, there is still much doubt surrounding its willingness and ability to do so, particularly in consideration of the fact that States have far too often made use of alternative mechanisms to deal with justice, or rather bypass justice by using amnesties and truth commissions.

These alternative mechanisms may indeed at times provide the necessary respite from years or decades of violence and systematic human rights violations. On the other hand, it is also clear that these mechanisms should not be offered to perpetrators of international crimes. Even though the Rome Statute is silent regarding these alternative methods of justice, and even if some elements of the Statute itself could offer temporary amnesties, it would be incompatible with the spirit and aims of the Rome Statute to allow States to continue to use them and avoid complete accountability. It follows that, even though States are still at liberty to adopt these measures, the decisions taken at the State’s level will not bar other States or international courts (including the ICC) to fight impunity and proceed with investigations and prosecutions. Essentially, this chapter

\(^{528}\) Para. 6 Preamble and Article 1 Rome Statute; see also Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity', at 592.
examined the extent of the State’s ability to deal with international crimes, either within its own territory or within a horizontal relationship paradigm with other members of the international community. The next chapter will examine the vertical relationship between the State and the ICC, shedding some light at the inherent difficulties that exist at this level.
Chapter 4

The surrender mechanism between the State and the ICC

4.1 Introduction

In the previous chapter the discussion focussed on the State’s ability to deal with international crimes within its own territorial boundaries, given that the exercise of criminal jurisdiction represents a clear manifestation of State’s sovereignty. However, because of the need for collaboration in order to deal with serious crimes, States have devised extradition mechanisms, thus giving rise to an interstate procedure whereby certain individuals can easily be transferred from one State to another to face criminal charges, as well as alternative mechanisms usually to achieve a speedy peace settlement. This is essentially a horizontal paradigm created by States and for States only.

In this chapter a different paradigm is discussed, that is the vertical paradigm between the State and the ICC. The ICTY and ICTR were the first international tribunals that put into effect a true vertical system because of the Security Council mandate behind the establishment of these two tribunals. The ICC regime follows a similar patterns; a clear and separate system was set up to differentiate it from the extradition system and, it is contended, that the main reason for this intentional distinction is to send a strong message that the relationship between the State and the ICC differs from the horizontal relationship between States. The focus shifts from States’ interests, which underlies the extradition system or even any other alternative mechanisms used by the State, to a focus centred on the fight against impunity, which underlies the ICC system.

Nevertheless, this is not so straightforward because of the strong reliance that the ICC has on the State, both in the context of cooperation and especially the transfer, or surrender, of individuals to the ICC. As a matter of common sense, the fight against impunity will be tested and evaluated against the ICC actual ability to effectively investigate, prosecute and punish individuals accused of international crimes as, due to principle of complementarity, these are the same individuals who are escaping justice because of the State’s unwillingness or inability to prosecute, thus opening the way for the Court to act. A particular problem highlighted in this chapter is demonstrated by the
friction between the ICC mandate to prosecute selected individuals, and the principle of immunity which appear still to offer some protection.

4.2 The State’s duty to cooperate with the Court

Unlike the lack of provisions regarding the enactment of national laws to deal with international crimes, the Rome Statute has put clear provisions in place concerning the State’s duty to cooperate with the ICC. Essentially, due to the fact that the ICC is not accompanied by an international enforcement police force, it has to rely heavily on the States in the pursuit of justice.

It is for this reason that Part 9 of the Rome Statute is the cornerstone of this international treaty regime\(^{529}\). The ratification of the Rome Statute must be followed by a legislative will to enact laws (or modify existing ones) that will facilitate the cooperation with the ICC\(^ {530}\). Article 86 contains a general obligation to “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court”. Article 88 summarises the mood of this process by stating in a clear and mandatory language, that “State Parties shall ensure that there are procedures available under their national law for all of their forms of cooperation which are specified under this Part”. In particular, the duty to surrender individuals to the ICC is clearly spelled out in Article 89, with clear procedures in place set out in Articles 91 and 92, with regard to the request for arrest and surrender and provisional arrest\(^{531}\). Article 93 lays out more forms of cooperation, including the taking or production of evidence\(^ {532}\), the questioning of any person being investigated or prosecuted\(^ {533}\), the examination of places, including exhumation and examinations of grave sites\(^ {534}\), searches and seizures\(^ {535}\), protection of victims\(^ {536}\), and seizing of property or assets\(^ {537}\). These are not


\(^{532}\) Article 93 (b)

\(^{533}\) Article 93 (c)

\(^{534}\) Article 93 (g)

\(^{535}\) Article 93 (h)

\(^{536}\) Article 93 (j)

\(^{537}\) Article 93 (k).
optional requests but clear obligations imposed on State Parties to enact laws or modify existing laws to facilitate the process.\textsuperscript{538}

The fact that so many of these procedures, enabling the process of cooperation between the member State and the ICC, are clearly spelled out in the Statute as obligations for the State to enact legislative measures, reinforces the international objective to end impunity for international crimes. History has clearly demonstrated that States will at times sacrifice justice for the sake of peace, and yet the Court must have the State’s support and cooperation in order to become an efficient judicial instrument to end impunity for international crimes. This situation can be confirmed by the vagueness attached to the ‘duty to prosecute’, as implementation of this duty at domestic level has been inconsistent and it will be impossible to evaluate whether the State has taken effective domestic measures unless a particular situation arises.\textsuperscript{539} However, this may support the proposition that international law can only stipulate that the State is to achieve certain aims and objectives; it cannot, therefore, order the State the specific methods to achieve those objectives.\textsuperscript{540} Nevertheless, similar doubts arose in the context of deciding the nature of the cooperation procedures during the Rome negotiation process, as the delegates were divided as to whether there should be a clear legal duty

\textsuperscript{538} A difference in the language used in the Statute can be noted when the provisions are directed to non-member States. For example, in Article 87(5), a provision directed to the assistance and cooperation from non-member States, ‘shall’ becomes ‘may’, denoting a State’s wider freedom to offer help and assistance to the Court.

\textsuperscript{539} Implementation of the Rome Statute at the domestic level has not been consistent or coherent, despite the development of facilitative programmes to ensure correct and effective implementation. See, for example, ‘The International Criminal Court: Checklist for Effective Implementation (AI Index: IOR 40/11/00)’, (Amnesty International 2000). It is also important to note the projects set up by many NGOs and academic institutions that aim to facilitate implementation of the Rome Statute through dissemination of knowledge and advice to national governments. See also the work of the Coalition for the International Criminal Court (CICC), an NGO that includes 2,500 civil society organizations in 150 different countries, working together to strengthen international cooperation with the ICC and further the case for strong national laws to deal with international crimes effectively (for more information on the work of the CICC visit their website at \url{http://www.iccnow.org}). Amongst the academic institutions involved in the assistance given to governments to implement the Rome Statute effectively are the Human Rights Law Centre (based at the University of Nottingham) and the Norwegian Centre for Human Rights (based at the University of Oslo). These academic institutions are also partners of the Legal Tools Project for the ICC, an online database of international criminal justice; for further information see \url{http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Legal+Tools/} (last accessed 20 January 2012).

that States must comply with and the Court can rely on, or whether more discretion should be given to States, just like the ‘duty to prosecute’\(^{541}\).

Essentially, the clear mandatory language included in the Rome Statute on the issue of cooperation suggests that this was the preferred option\(^ {542}\), ensuring that in the case of the State’s inability or unwillingness to prosecute, the Court would be enabled, according to Article 17 Rome Statute, to carry out such investigations and prosecutions\(^ {543}\). This was also the most sensible option as wide discretion had already been given to States regarding the ‘duty to prosecute’; if the same discretion had been given with regard to the cooperation procedures, the balance would have leant towards States’ interests. Still, the Court’s powers will depend on the State’s effective enactment or modification of national laws to aid its potential cooperation with the Court, but at times the State’s constitutional arrangements are such that, unless properly modified, a conflict may arise and this may be another stumbling block for cooperation. Some general constitutional issues were explored in the previous chapter but here more specific issues are explored. National constitutional difficulties have arisen in the general context of ratification of the Rome Statute, especially in areas concerning the exercise of investigative powers, immunity and amnesty mechanisms. Essentially, therefore, there is a need at the domestic level to ensure that States can cooperate with the ICC without dealing with internal normative conflicts, and it will be noted below that States have adopted several methods to deal with potential constitutional conflicts.

A clear reminder of this conflict is demonstrated by Kenya’s inability to ensure that the constitutional arrangements take into consideration current trends of international law. Particularly with regards to ‘crimes against humanity’, the Constitution of Kenya clearly states that where there is a discrepancy between international law and Kenyan law, the latter prevails. This was stated in the *Okunda* case\(^ {544}\), and later reaffirmed in the

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\(^{542}\) The other option, according to the Rome Statute negotiations, would have allowed States more discretion as to how they wished to comply with the ICC requests of cooperation; this level of discretion would have led to legal uncertainty and was driven by State interests (ibid).

\(^{543}\) The Court’s ability to carry out the necessary investigations and prosecutions is, clearly subject to the caveat that the State would in fact be willing to cooperate with the ICC.

\(^{544}\) *Okunda v Republic* [1970] EA 453.
Pattni case\(^ {545} \), where, in reference to some leading international human rights instruments, the High Court reiterated that “the Constitution...is paramount”, although the Court can “…in appropriate cases, take account of the emerging international consensus of values in this area”\(^ {546} \). The original intention for the Statute establishing the Special Tribunal for Kenya was for it to contain a provision which would have reversed the Okunda judgment, allowing international criminal law to take precedence over domestic law\(^ {547} \). However, this provision would have required a change of the Constitution, which, despite some efforts, failed to be accepted by Parliament\(^ {548} \), leading to the failure of the Special Tribunal and to the Kenyan inability to carry out their investigations and prosecutions. On the other hand, when France examined possible conflicts between the Constitution and the Rome Statute, three areas were identified\(^ {549} \):

1. The absence of immunity for heads of State, as per Article 27 of the Statute, contradicted three Articles of the French Constitution;

2. The infringement of French sovereignty; this may occur, for example, in the case France decided to grant an amnesty but then the ICC would attempt to prosecute the individuals that were subject to the amnesty;

3. Prosecutorial powers under Article 57 (3) (d) would affect the rule that only the French judicial authorities have the power to conduct investigations within their territory.

France solved these issues by inserting the following provision into their constitution in order to bring France in line with the aims of the Statute: “The Republic may recognize the jurisdiction of the International Criminal Court as provided by the treaty signed on

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\(^ {546} \) Ibid, 274.


\(^ {548} \) Ibid.

18 July 1998”. It is a general and somehow vague amendment, but it is sufficient to bring France in line with its duties under the Statute.

The issue of life imprisonment (Article 77 (1) (b)) as a potential sentence passed by the ICC represented another constitutional problem for some States; Article 30 of the Portuguese Constitution stipulated that “no sentence or security measure that deprives or restricts freedom shall be perpetual in nature or possess an unlimited or undefined duration”.

Portugal adopted a solution very similar to the French constitutional amendment by modifying Article 7 of the Constitution, stating that “...Portugal may accept the jurisdiction of the International Criminal Court”.

The issues faced by France and Portugal are certainly not unique as other States presented with very similar constitutional problems; however, not all States proved to have such a readiness to introduce constitutional changes in order to enable them to ratify the Rome Statute, as demonstrated by Albania and Ukraine. Another suggestion put forward by several commentators, though, is to interpret Constitutions in a way that is compatible with the Rome Statute, especially as “domestic constitutions’ provisions...do not collide in their meaning with provisions of the International Criminal Court Statute”. The interpretative method is one adopted by the Republic of Moldova which, after signing the Rome Statute in 2000, in 2007 asked its constitutional court to determine whether the ratification of the Rome Statute would be in line with the constitutional setting of Moldova. Although article 115 of the Moldavian Constitution, for example, prohibits the establishment of extraordinary tribunals, the constitutional court found that the establishment of the ICC should not be considered as an extraordinary tribunal because its jurisdiction is complementary to the national jurisdiction and, when exercised, it is confined to the most serious crimes only. It also

declared that any discrepancies between the interpretation of international human rights norms and national norms, the international interpretation will prevail. In the same token, Guatemala ratified the Rome Statute on 2 April 2012 following an Advisory Opinion by the Guatemalan Constitutional Court that the Rome Statute is compatible with the Constitution. More specifically, the Constitutional Court considered the Rome Statute to be a human rights treaty, and according to Article 46 of the Constitution “Se establece el principio general de que en materia de derechos humanos, los tratados y convenciones aceptados y ratificados por Guatemala, tienen preeminencia sobre el derecho interno.”

Notwithstanding any constitutional difficulties, even if the Court has the power to make requests to State parties, failure to comply with such a request may lead the Court to refer the matter to the Assembly of State Parties, or, if the situation arose through a Security Council referral, the matter will be referred to the Security Council. Neither the Statute nor the Rules of Evidence contain any further provisions or clarifications regarding the potential consequences following the State’s non-cooperative actions, unlike Article 71, which clearly stipulates the application of sanctions to individuals who either disrupt proceedings or refuse to comply with its directions. This is further evidence that the ICC needs the States’ cooperation in order to be an effective international judicial organ. The need to enact domestic legislation is further demonstrated by the difficulties experienced by the previous ad hoc international tribunals. In 1994 the ICTY requested that Germany suspended its proceedings

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554 Republic of Guatemala 1985 Constitution, as amended by Legislative Agreement No. 18-93 of 17 November 1983 (Translation by author: It is established, in the subject area of human rights, that treaties and conventions accepted and ratified by Guatemala have prominence over domestic legislation).
555 Article 87 (1) (a) Rome Statute.
556 Article 87 (7) Rome Statute.
557 This provision clearly applies to misconduct during a trial, and the sanction may range from the removal from the Court itself to the payment of a fine.
558 The ad hoc criminal tribunals of Rwanda and the Former Yugoslavia were established by the Security Council, acting under Chapter VII UN Charter (SC Resolution 955 of 8 November 1994 and SC Resolution 827 of 25 May 1993 respectively). The modality of their creation – unlike the Rome Statute treaty agreement that demands the consent of States to be bound by it – indicates that States were bound by the requests of the tribunals. However, the Statutes and the Rules of Procedure and Evidence for the respective tribunals did not provide for the domestic legislative enactment of procedures that would enable cooperation (see Article 28 ICTR Statute, Article 29 ICTY Statute, Rules 56, 58 and 59 ICTR and ICTY Rules of Procedure and Evidence). Therefore, despite the obligation to comply with requests from
against Mr Tadić in order to carry out its primary jurisdiction as set out in the ICTY Statute. Although Germany suspended its proceedings, it could not surrender Tadić to the ICTY initially because it had not implemented the ICTY Statute into domestic law. In a similar way, a US District Court in Texas denied the surrender of Elizaphan Ntakirutimana to the ICTR on the ground that the surrender was unconstitutional in the absence of a treaty. It was not until 1999 that the U.S. Supreme Court declared that the surrender of Mr Ntakirutimana was not unconstitutional. Although this was a landmark decision, it was also a significant delay in terms of cooperation with the ICTR.

Nevertheless, this is not to say that the enactment of national laws to facilitate cooperation with the ICC will inevitably lead to perfect compliance with the Court whenever the need for cooperation arises. The tension between international tribunals and national jurisdictions has already been tried and tested at the time of the ICTY and ICTR; the discussion below will evaluate this tension more and how the ICC cooperation regime has tried to avoid this major difficulty.

4.3 The establishment of a new regime: surrender

4.3.1 Horizontal versus Vertical methods of cooperation

Central to the discussion about the new cooperation regime was the issue as to whether the regime should be horizontal, and therefore reflecting the existing interstate regime based on extradition and mutual legal assistance, or whether the regime should be of a vertical nature, creating a sui generis relationship between the State parties and the new Court. In order to ensure the States’ cooperation with the ICC, and avoid undermining existing domestic procedures, the new cooperation procedures amount to a
compromise whereby the Rome Statute will contain specific obligatory provisions on arrest and surrender, but existing national laws can also be relied upon\textsuperscript{563}.

Also, given that the ‘horizontal’ regime is central to extradition, States could easily apply the same limitations that are applied to interstate transfers, thus seriously hindering the aim of the new Court by placing the interests of the sovereign State before the aims of the new regime\textsuperscript{564}. Fundamentally, the extradition mechanism is a state-centric approach that allows States to enter into reciprocal agreements with other States in order to meet the desired aims and objectives set by the same States regarding extradition. It is a practice that conforms to the ‘horizontal’ relationship model, which enables States to enter into agreements with equal sovereign States, reiterating the principles of sovereign equality and State’s consent. The vertical model, on the other hand, gives rise to a specific cooperation relationship between the State and the international court. As Cassese pointed out:

Extradition to a state and surrender to an international jurisdiction are two totally different and separate mechanisms. The former concerns relations between two sovereign States and is therefore a reflection of the principle of equality of States; it gives rise to a horizontal relationship. The latter, instead, concerns the relation between a State and an international judicial body endowed with binding authority; it is therefore the expression of a vertical relationship\textsuperscript{565}.

The outcome of the Rome Statute negotiations was a carefully crafted cooperation regime that took “account of concerns about sovereignty”\textsuperscript{566}, but tried to distance itself (as far as possible) from the state-centric and interest-centric approach that is so characteristic of the horizontal system, namely extradition. Essentially, this was another delicate balancing exercise to ensure the maximum uptake and compliance by State parties. It was a sui generis regime that was loosely based on a similar cooperation procedure originally set up when the ICTY and ICTR international tribunals were

\textsuperscript{563} See Oosterveld, Perry, and Mcmanus, 'The Cooperation of States with the International Criminal Court', 770.

\textsuperscript{564} Several States supported the need of cooperation procedures and the obligation to comply with them; see UN Doc. A/Conf.183/SR2 para. 25 (Check Republic); para. 36 (UK); para. 57 (Sweden), para. 41 (Japan; however, in para. 47 Japan seemed to imply that the Court could set out clear grounds on the basis on which the request can be declined); para. 93 (Slovenia). There were other countries that preferred a system of cooperation closely based to the traditional interstate system; see UN Doc. A/Conf.183/SR3 para. 38 (China).


established through a Security Council mandate, adopted on the basis of Chapter VII of the UN Charter.\textsuperscript{567} In fact, in order to achieve the desired judicial effect of these two temporary tribunals, the Security Council stipulated that

all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber [under Article 29 of the Statute]\textsuperscript{568} [under Article 28 of the Statute]\textsuperscript{569}.

To this end, Article 29 ICTY Statute and Article 28 ICTR Statute required that

1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
   (a) the identification and location of persons;
   (b) the taking of testimony and the production of evidence;
   (c) the service of documents;
   (d) the arrest or detention of persons;
   (e) the surrender or the transfer of the accused to the International Tribunal.

Essentially, the Rome Statute has taken inspiration from the previous \textit{ad hoc} tribunals and the new international criminal law regime is embedding two novel mechanisms, tested by the \textit{ad hoc} tribunals, into international law: cooperation and surrender. These two mechanisms, however, have a particular dynamic structure that intends to signify a difference from the interstate system of cooperation and extradition. For example, Stroth points out that words like ‘orders’ and ‘requests’ contained in the ICTY and ICTR Statutes, are legally binding terms; this means, therefore, that ‘requests’ from “the International Tribunals carry a different meaning from those made by states within the traditional framework of international assistance in criminal matters”\textsuperscript{570}. This is because a request within the context of the interstate extradition model is based on reciprocity and mutual respect, ensuing from the general principle of sovereign equality. In a similar manner, the term ‘cooperate’ refers to a mutual action between parties on an equal footing, with similar aims and interests. This is clearly not the case and therefore

\textsuperscript{567} Given the nature of Chapter VII, all UN member States are bound by the terms of these \textit{ad hoc} tribunals, whether or not they played any part in the situations in the Former Yugoslavia or Rwanda.
\textsuperscript{569} Paragraph 2 UN SC S/Res/955 (1994).
\textsuperscript{570} Stroh, 'State Cooperation with the International Criminal Tribunals for the Former Yugoslavia and Rwanda', 266.
‘cooperation’ should rather read as ‘national assistance’\textsuperscript{571}. This ‘national assistance’ gives rise to a vertical regime, but it is important to remember that the vertical regime originally created and applied to the \textit{ad hoc} tribunals was of a perfect nature, in the sense that it was regulated solely by the ICTY and ICTR legislative provisions, including the rules of evidence set up especially for this process. However, despite the description of this system as an obligation imposed on States, Cassese captures the reality of this perfect vertical system by contending that

\begin{quote}
...the ICTY remains very much like a giant without arms and legs – it needs artificial limbs to walk and work. And these artificial limbs are state authorities. If the cooperation of states is not forthcoming, the ICTY cannot fulfil its functions. It has no means at its disposal to force states to cooperate with it\textsuperscript{572}.
\end{quote}

Therefore, even though the \textit{ad hoc} regimes were established through SC Resolutions\textsuperscript{573} based on UN Chapter VII, the \textit{realpolitik} of sovereignty still managed to infiltrate and cause setbacks to a SC initiative. As the Rome Statute cooperation procedure takes its inspiration from the \textit{ad hoc} one, the same reality and the same criticism could easily apply to the regime established by the Rome Statute. However, certain lessons have been learnt and efforts made to redress certain mistakes. For example, both the ICTY and ICTR Statutes adopt the language that States’ obligations can arise from “orders issued by the Trial Chamber”\textsuperscript{574}, a terminology that is not taken up in the Rome Statute. Given the difficulties concerning compliance experienced by these two \textit{ad hoc} tribunals (something that will be discussed more later on), the Rome Statute tried to incorporate more flexibility in order to counterbalance the ‘loss of sovereignty’ effect. More importantly, the flexibility discussed below is also demonstrative of the fact that the ICC is not an international court established by the Security Council acting under Chapter VII of the UN Charter, as the ICTY and ICTR. It is a treaty-based regime that will, in general, only bind its members States and any other member of the international community that wishes to enter into an \textit{ad hoc} arrangement with the Court by lodging a

\textsuperscript{571} Ibid.  
\textsuperscript{573} SC Resolution 955 of 8 November 1994 (Rwanda) and SC Resolution 827 of 25 May 1993 (Former Yugoslavia).  
\textsuperscript{574} Article 19 (2) ICTY Statute, Adopted on 25 May1993 by Resolution 827; Article 18 (2) ICTR Statute, Adopted by Resolution 955 (1994).
declaration with the Registrar and accepting the jurisdiction of the Court\textsuperscript{575}. Therefore, only a situation initiated by the Security Council acting under Chapter VII of the UN Charter, according to Article 13 (b) of the Statute, can give rise to obligations binding on all members of the international community, thus producing a true vertical relationship between the Court and the State.

This is not to say that State parties have a wide margin of discretion concerning cooperation and reservations cannot be made regarding any of the provisions or procedure contained in the Statute\textsuperscript{576}. However, the cooperation procedures set out in the Rome Statute allow for some flexibility\textsuperscript{577}. For example, Article 72 allows for flexibility if the disclosure of requested documents “may prejudice its national security interests”: this provision allows the State to take any reasonable steps to resolve the situation, including the modification of the request\textsuperscript{578}, delay of the request until by the Court makes a determination regarding the relevance of the evidence or that the evidence can be obtained through another source\textsuperscript{579} or by reaching an acceptable agreement concerning the use of limitations or protective measures to protect the information\textsuperscript{580}. Also, Article 73 applies the same protective measures to confidential information in possession by the State but originating from another State or organization – the consent of that State or organization is required. If the originator is a State party, then the same considerations contained in Article 72 will apply. However, there is no obligation on non-State parties to consent to the use of the information, a situation that is mirrored in Article 93 (9) (b) concerning other forms of cooperation. Also, Article 97 allows for consultation with the Court in case the request impinges on existing international obligations with other States, and Article 98 reiterates the same limitation to cooperation with ICC requests if this encourages or demands the State to act inconsistently with other obligations of international law in the context of State immunity.

\textsuperscript{575} Article 12 (3) Rome Statute.
\textsuperscript{576} Article 120 Rome Statute.
\textsuperscript{578} Article 72 (5) (a) Rome Statute.
\textsuperscript{579} Article 72 (5) (b) and (c) Rome Statute.
\textsuperscript{580} Article 72 (5) (d) Rome Statute.
Together with other terms concerning national laws acting as a driving force as to what the State will and will not do concerning ICC requests\(^{581}\), is indicative of a system that is not completely vertical because it is mindful of the State parties’ national laws and their existing international obligations\(^{582}\). This co-existence presupposes that the national legislation is “mutually compatible” with Part 9 of the Rome Statute because it is quite clear that the State party cannot invoke national laws in order to avoid its responsibilities arising out of the Statute\(^{583}\).

### 4.3.2 The birth of the surrender mechanism

Unlike the apportioning of criminal jurisdiction through the extradition regime mechanism among equal sovereign States, the “surrender” mechanism is a regime that applies only to the exercise of criminal jurisdiction by an international court\(^{584}\). The term “surrender” was first adopted by the ICTY and ICTR Statutes where, in identical provisions, it was stated that

...the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons and any other orders as may be required for the conduct of the trial\(^{585}\).

States shall comply without undue delay with any request for assistance, including...the surrender or the transfer of the accused to the International Tribunal [for Rwanda]\(^{586}\).

The use of the words ‘surrender’ and ‘transfer’, rather than ‘extradition’, was implemented in order to distinguish the procedure between the international tribunal and the State from the similar procedure that takes place between sovereign States\(^{587}\). Rule 58 of the ICTY and ICTR Statutes clearly maintains that the obligation to cooperate set out in the Statute will prevail over any legal impediments to the surrender of the accused which may exist under national law. Difficulties, however, did occur, as both Serbia and Croatia claimed that they could not comply with surrender requests because

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\(^{581}\) See Article 91 (4), 99 (1) and 96 (3) Rome Statute.


\(^{583}\) Ibid.

\(^{584}\) It is acknowledged that, although Black’s definition of ‘extradition’ reproduced above on p. 82 does contain the word ‘surrender’, the purpose behind the difference in terminology points to a difference in regimes in substance, as explained in the discussion that follows.


\(^{586}\) ICTY Statute, Article 29 (2) (e); ICTR Statute, Article 28 (2) (e).

their constitutions did not allow the extradition of nationals. The Trial Chamber, in response to the argument put forward during the Milošović trial proceedings, declared that

The purpose of Rule 58 is to ensure that domestic procedures relating to the surrender and transfer of a person, from a State in respect of whom a request for arrest and transfer has been made, are not used as a basis for not complying with the request.\(^{588}\)

However, this is not to say that the surrender of accused individuals during the ICTY and ICTR proceedings was straightforward. In fact, in order to fully appreciate the extent of the horizontal versus vertical relationships, the decision taken by the ICTY Appeals Chamber in the Blaskic case will provide a useful case in point.\(^{589}\) In January 1997 ICTY Trial Chamber Judge Gabrielle Kirk McDonald issued *subpoenae duces tecum* \(^{590}\) to Croatia and its Defence Minister, Mr Susak, on the basis of Articles 18 (2) and 19 (2) of the Statute and Rules 39 (ii) and (iv) and 54 in the Rules of Procedure and Evidence.\(^{591}\) Croatia, however, challenged the authority of an international tribunal to issue subpoena to a sovereign State and also objected to the naming of a high ranking Government official in pursuance of assistance under Article 29.\(^{592}\) Due to the importance of the objection put forward by Croatia, the orders were suspended pending a decision by the Trial Chamber II, which upheld the subpoena and ordered Croatia to comply within 30 days, asserting in particular the nature of the international tribunal and the obligation on States to comply with the tribunal’s orders.\(^{593}\) On the basis of Rule 108, Croatia asked the Appeals Chamber to review the Trial Chamber’s decision, and some very important determinations were made.\(^{594}\) First of all, the Appeals Chamber stated that subpoena cannot be addressed to States because the

\(^{588}\) Milošović (IT-02-54-PT) Decision on Preliminary Motions, 8 November 2001, para. 45.

\(^{589}\) *Prosecutor v Tihomir Blaskic*, ICTY Trial Chamber, Order of a Judge to Ensure Compliance with Subpoena Duces Tecum, 20 February 1997.

\(^{590}\) The literal translation is ‘under penalty to bring with you’. This is a judicial order compelling an individual to appear in court with certain documents required by the court.

\(^{591}\) The subpoena was also issued to Bosnia and Herzegovina and the Custodian of the Records of the Central Archive of what was formerly the Ministry of Defence of the Croatian community of Herceg-Bosna (Blaskic, para. 2).


Tribunal does not possess any enforcement powers against States, holding therefore that the actual term “subpoena” cannot be applied in this context, but terms like “orders” and “requests” should be used instead. The issue that arises following this determination concerns the applicable legal remedies that the tribunal can apply in case of non-compliance, and the answer lies in the powers of the Security Council acting under Chapter VII, following a judicial finding by the Tribunal that the State has clearly failed to comply.

It follows, therefore, that subpoena cannot be issued to States or to State officials, but orders can be issued instead. Although the form behind the terminology used is the same, the substance differs because it clearly indicates that only the State’s judiciary, acting for and within the umbrella of State sovereignty, can issue a subpoena. In fact, the Tribunal has no mechanism to punish the State or its officials for lack of compliance, apart from making a judicial finding. One issue that the Trial Chamber reiterated again and again, though, was the nature of the Tribunal itself, as seen in the following passage:

Normally, individuals subject to the sovereign authority of States may only be tried by national courts. If a national court intends to bring to trial an individual subject to the jurisdiction of another State...it relies on treaties of judicial cooperation or...voluntary interstate cooperation. Thus, the relationship between national courts of different States is “horizontal” in nature. In 1993 the Security Council for the first time established an international criminal court endowed with jurisdiction over individuals living within sovereign States...By the same token, the Statute granted the International Tribunal the powers to address to States binding orders...Clearly, a “vertical” relationship was thus established, at least as far as the judicial and injunctory powers of the International Tribunal are concerned (whereas in the area of enforcement the International Tribunal is still dependent upon States and the Security Council).

It appears therefore that the ‘vertical’ relationship created between an international court and the State is rather limited, in the sense that even if the international court can issue orders – for example an arrest order or an order for the production of evidence – the State’s cooperation is a necessary requirement. However, the Trial Chamber bypassed this apparent limitation by stating that subpoena and orders can be issued to individuals

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596 Blaskic, para. 25. The Chamber makes it clear that the same reasoning regarding the issue of subpoena applies to State officials acting in their official capacity as they are merely representative of the State (para. 38); in the same way, although the tribunal can ask for the assistance of State officials, the request cannot be binding on the particular official (para.42).

597 Blaskic, paras. 33-35.

598 Ibid, para.47.
acting in their private capacity, and that includes State officials who may be involved in a particular situation *qua* private individuals \(^5\). For the reasons given above, the Trial Chamber unanimously decided to quash the *subpoena duces tecum* but left it open for the Prosecutor to issue a “request for a binding order” to Croatia alone \(^6\). In substance, therefore, the ICTY proved its ability to issue orders to a State, an ability that is clearly endorsed through the strength of the Security Council \(^7\). This system is not, however, mirrored within the ICC regime, as discussed below.

4.3.3 The ICC and the surrender mechanism

It is this ‘vertical’ relationship that is of particular interest here because it is the effectiveness of the relationship between the State and the ICC that will determine the success of the ICC process. In essence, this is the manifestation of the complementarity principle which, despite its malleable meaning, incorporates as a primary objective the effective prosecution of perpetrators of international crimes. If the State is unable or unwilling, then complementarity permits the ICC to complement the criminal jurisdiction of the State by establishing a ‘vertical’ relationship model between the State and the Court \(^8\). For this reason, the Rome Statute maintains a clear distinction between extradition and surrender in the context of the Statute itself. Article 102 sets out that:

(a) ‘Surrender’ means the delivering up of a person by a State to the Court, pursuant to this Statute.
(b) ‘Extradition’ means the delivering up of a person by one State to another as provided by treaty, convention or national legislation

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599 Ibid, paras. 49-51. In the case of private individuals not complying with the Tribunal’s orders, then the State can take appropriate measures or contempt proceedings can be instigated by the Tribunal itself; *Blaskic* Disposition, para. (3).
600 *Blaskic* Disposition, para. (5).
602 The term ‘vertical’ is used to distinguish this regime from a horizontal one, whereby States enter into reciprocal agreements to extradite individuals, retaining the powers, according to State sovereignty, to decide not to allow certain individuals (e.g. nationals) to be extradited. In the context of the surrender mechanism, the ICC does not have a reciprocal arrangement; however, at the same time, it is not suggested that the ICC is a supranational body either, because the relationship between itself and the State parties is based on cooperation and not on coercion; see G. Sluiter, ‘The Surrender of War Criminals to the International Criminal Court’, *Loy. L.A. International & Comparative Law Review*, 25 (2003), 605-51.
This is not just about an issue of terminology but it is put in place to ensure that the traditional extradition model does not apply to the surrender regime\textsuperscript{603}. This is because, as discussed earlier, the extradition practice contains several limitations, one of them being the nationality of the individual. Such limitations do not, and should not, apply to the ‘surrender’ mechanism and that is why it is important for the State party to provide, within its national laws, clear and separate provisions concerning extradition and surrender, or modify existing ones. Member States have used a variety of methods to enact these changes domestically. Canada, for example, enacted the Extradition Act 1999\textsuperscript{604} to include provisions for the surrender of an accused to the ICC, with similar national legislative safeguards that also apply to the interstate extradition process. On the other hand, Switzerland offers an example of the enactment of a legislative procedure that deals solely with cooperation with the ICC, also establishing a Central Authority that deals with requests from the Court and decides on admissibility issues\textsuperscript{605}.

The ICC’s powers are limited to informing the Assembly of State Parties of the State’s non-compliance; if the particular situation was referred to the Court by the Security Council, then the Security Council will be informed of the non-compliance too\textsuperscript{606}. It is for this reason, and for the number of exceptions contained in Part 9 of the Statute, that the section has been dubbed the “least supranational section of the Treaty”, altering the obligation in Article 86 into an “exhortation”\textsuperscript{607}.

According to Article 89, the Court can “request the arrest and surrender of a person...to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person”. The provision addresses exclusively states Parties which “shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender”\textsuperscript{608}. The provision is clearly directed to State parties and it is apparent that the

\begin{thebibliography}{9}
\bibitem{603} Ibid, at 607.
\bibitem{604} Extradition Act 1999, S.C. 1999, c.18, An Act respecting extradition, to amend the Canada Evidence Act, the Criminal Code, the Immigration Act and the Mutual Legal Assistance in Criminal Matters Act and to amend and repeal other Acts in consequence.
\bibitem{605} Federal Law on Cooperation with the International Criminal Court, 2001.
\bibitem{606} Article 87 (7) Rome Statute.
\bibitem{608} According to Article 87 (5) Rome Statute, if a State not party to the Statute enters into an agreement with the ICC, then it too will have to comply with such requests.
\end{thebibliography}
expectation is that State parties will enact national procedures to follow and apply in case of such requests. If the requested State brings a *ne bis in idem* challenge, the State will be able to consult with the Court to ensure that there is a relevant determination on admissibility\(^\text{609}\). In addition, there are two other provisions that may seriously impinge on the surrender process with the ICC: existing international obligations with non-member States and the State’s international obligations *vis-a-vis* State immunity.

4.3.3.1 Existing international obligations

A situation may arise whereby an accused may be requested concurrently by the ICC and another State. A successful surrender to the ICC will depend on two factors: first of all, whether the requesting State is a party to the Statute; secondly, whether the conduct which forms the subject of the ICC request is the same as the requesting State’s request. According to Article 90 (2) the ICC will have priority if the requesting State is a party to the Statute and if the conduct is the same. In the case of extradition requests from non-member States, with whom the requesting State has an existing international obligation, the request of extradition will take priority over any requests from the ICC itself\(^\text{610}\). The same process will apply if the request for surrender by the ICC concerns a different conduct from the extradition request, for the same individual but different crime, made by “any State”, as long as there is an international obligation in existence between the two States\(^\text{611}\). Put in a different way, if there are concurrent requests for surrender of an accused by the ICC and another requesting State, the ICC request will only be successful in the following scenarios:

1. If the conduct is the same in both requests and the requesting State is not a party to the Rome Statute and it does not have an existing international obligation with the requested State, then priority will be given to the ICC;

2. If the conduct is the same in both requests and the requesting State is a party to the Rome Statute, then priority will be given to the ICC;

\(^{609}\) Article 89 (2) Rome Statute.

\(^{610}\) Such priority will be reversed if there is no existing international obligation between the requested and the requesting States; it will also be reversed if both requested and requesting States are parties to the Rome Statute, as per Article 90 (1).

\(^{611}\) Article 90 (7) Rome Statute.
3. The requesting State may or may not be a party to the Rome Statute and the crime specified in both requests (by the ICC and the requesting State) is not the same:

I. Priority will be given to the ICC request if the requested State has no international obligation with the requesting State;

II. If there is an existing international obligation with the requesting State, priority will be given to the ICC only after making a determination to such conclusion based, *inter alia*, on the dates of the requests, the interests of the requesting States, the possibility of subsequent surrender between the requesting State and the ICC, as well as the nature and gravity of the conduct.\(^{612}\)

The balancing exercise regarding concurrent requests does appear, therefore, to be in line with international treaties’ practice. The wording of the Statute fits within the paradigm of international treaty rules concerning the principle of *pacta sunt servanda*, according to which a “treaty in force is binding upon the parties to it and must be performed by them in good faith”\(^{613}\). In other words, the Rome Statute does not appear to constitute an international multilateral treaty with a higher status than other international multilateral treaties. When it comes to surrender, though, the Court’s request seeks prioritization over other requests, especially when the accused wanted by the ICC is also wanted by another State. The Statute stops short of specifying the nature and gravity of the conduct of the accused wanted by the requesting State, and it is also silent regarding the need for consent if the requested State decides, upon determination, that it should give priority to the ICC request even if it is under an existing international obligation to extradite to the requesting State. This simple fact demonstrates, in itself, an increased degree of support towards the ICC request rather than the requesting State, at the cost of a potential breach of an international obligation if the requested State does not act according to the set rules on treaty suspension\(^{614}\). In fact, among the “relevant factors” to be taken into consideration by the requested State, the consent of the requesting State does not seem to feature into the consideration to surrender to the ICC.

There may be a presumption that a requesting State, particularly one that is not a party

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\(^{612}\) Articles 90 (6) and 90 (7) (a) and (b) Rome Statute.

\(^{613}\) Article 26 VCLT.

\(^{614}\) See Articles 57 and 58 VCLT. It is this author’s contention that a preference, on determination, to fulfil the ICC request can only be justified on the basis of a suspension of the (extradition) treaty (and its ensuing obligations) with the consent of the State concerned.
to the Statute, will consider that a conduct involving an international crime (and therefore under the jurisdiction of the Court) may be more worthy of immediate prosecution than other types of ‘criminal’ conducts. However, given the potential for lengthy sentences delivered by the ICC, this scenario may also leave open the possibility that the less serious conduct, for which the accused is wanted by the requesting State, may never be properly investigated and prosecuted. Fundamentally, this situation could give rise to a novel type of ‘minor impunity’, created as a spin-off of the fight against ‘major impunity’ caused by the lack of prosecution for international crimes.\textsuperscript{615} From the international perspective, this situation may be trivial, but from the State sovereignty, and in particular from the perspective of the victim of the crime for which the request was made, the State will not be able to fulfil its obligations in terms of protection and punishment as part of its exercise of criminal jurisdiction. There is another aspect of obligations that arise out of the Rome Statute which may be in conflict with the international obligations arising out of Article 103 UN Statute; this issue will be discussed in the next section, with particular reference to immunity.

4.3.3.2 States’ Immunity, the Rome Statute and surrender

One of the issues surrounding the surrender of an accused to the ICC concerns the States’ international obligation regarding immunity. This is due to the fact that one of the accused indicted and wanted by the ICC, Sudan’s President Al Bashir, is a serving Head of State. Nevertheless, the argument is being put forward by the AU\textsuperscript{616} that, as a serving Head of State, he enjoys immunity from prosecution on the basis of customary international law. Article 98 (1) appears to set out an important limitation to the surrender mechanism, that is that a request cannot proceed if

\textsuperscript{615} The notion of ‘minor impunity’ refers here to the State’s inability to conduct investigations and prosecutions of crimes other than international crimes (for example, theft, grievous bodily harm...) because the perpetrator is also accused and wanted, in a different State, for the perpetration of international crimes. The victim of the ‘minor’ crime may not, therefore obtain the necessary legal redress and justice because the request from a different jurisdiction, or from the ICC, would be prioritized.

\textsuperscript{616} See AU Press Release 002/2012, On the Decisions Of Pre-Trial Chamber I of the International Criminal Court (ICC) Pursuant To Article 87(7) Of The Rome Statute On the Alleged Failure by the Republic of Chad and the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of President Omar Hassan Al Bashir of the Republic of The Sudan.
...the requested State [acts] inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person...of a third State, unless the Court can first obtain the cooperation of that first State for the waiver of that immunity.

To understand the context of this provision it is important to make some preliminary remarks. First of all, Article 27 (1) clearly states that the Statute applies “equally to all persons without any distinction based on official capacity”, adding that individual criminal responsibility applies to Heads of State or Government, members of Government or Parliament and other State officials. In Article 27 (2) the Statute affirms that any immunities that apply to the official capacity of a person, arising under national or international law, will not bar the Court from the exercise of its jurisdiction. It is therefore clear that a State party to the Rome Statute will not be affected by the waiver requirement set out in Article 98 (1) and, by virtue of its ratification of the Statute, would have consented to the fact that even a Head of State would not enjoy any immunity to investigations and prosecutions by the Court.

Nevertheless, if one was to follow the reasoning that Article 98 (1) creates an exception to the rule created in Article 27 (2), whereby certain individuals would be able to escape criminal liability due to their official status, it would lead to the conclusion that there are two sets of immunity rules, one for the parties to the Rome Statute, and another for non-parties. This interpretation would lead to an unfair and illogical interpretation of immunity rules, and it is submitted that it cannot be the one envisaged during the Rome proceedings, which regrettably do not provide more clarity with regard to the exact scope of the limitation. The solution lies in the correct understanding of immunity rules that take into consideration developments in the law of human rights, state practice and the practice of international criminal tribunals. Although rules on State immunity can be traced back to the nineteenth century, it would be incorrect to conclude that the concept of absolute State immunity has always been part of a correct understanding.

617 It was noted above, in the general context of cooperation, for which surrender is a part of, that the ratification of the Statute could cause constitutional problems and France was in fact one of the few States that recognised the potential conflict between a constitutional immunity rule and Article 27 of the Statute. Van Alebeek suggests that States have not spent much time thinking about the possibility of surrendering a Head of State to the ICC and the minor constitutional changes may be insufficient for such a transfer, if the issue arises; see R. Van Alebeek, 'From Rome to the Hague: Recent Developments on Immunity Issues in the ICC Statute', Leiden Journal of International Law, 13 (2000), 485-93 at 488.

and application of this principle, as States’ practice has shown that some have adopted a restrictive policy on State immunity. The next relevant point concerns the fact that Article 98 (1) never actually mentions “Head of State” but it simply refers to “State or diplomatic immunity”, which leads to the following question: is Head of State immunity the same as State immunity? If the answer is positive, it would mean that the Head of State and the State constitute one and the same entity. However, this is not an interpretation that would satisfy current developments in international law, as individual criminal responsibility attaches itself to the individual only, as the State cannot be found criminally liable. The two types of immunities are however related in the sense that immunity *rationae materiae* originates from immunity *rationae personae*, and it was the latter that was enjoyed by the Head of State; however, this was at the time when the ruler or Head of State actually personified the State. Therefore, when the HL had to decide on Pinochet’s criminal liability, and whether he could be extradited to Spain for acts of torture perpetrated in Chile whilst he was the Head of State, by a majority of 3:2 the HL decided that General Pinochet could not claim immunity for an international crime and could therefore be extradited to Spain. Not long after the Pinochet decision, the ICJ had to decide a similar issue on immunity, specifically whether and to what extent a minister for foreign affairs (Congo’s Minister Mr Yerodia) enjoys immunity, following Belgium’s issuance of an international arrest warrant for Mr Yerodia for crimes committed in Congo. The ICJ determined that Mr Yerodia, in his capacity as minister of foreign affairs, and in order to allow him to fulfil his diplomatic role abroad, “enjoys full immunity from criminal jurisdiction and inviolability”, noting in particular that there was no distinction made by the ICJ between acts of a

619 According to Van Alebeek, a restrictive approach to State immunity was initially practiced by Belgium and Italy in the nineteenth century, and in a study carried out by Allen and published in 1933, she suggested that the restrictive practice originally adopted by Italy and Belgium should also include Switzerland, Egypt, Romania, France, Austria and Greece; see R. Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, 13-15.


621 R v Bow Street Stipendiary Magistrate and Others, *ex parte* Pinochet Ugarte (1998) All ER 897. As one of the judges had an affiliation with Amnesty International, which took part in the proceedings, the HL set aside the decision in a second hearing, and then reconvened for a third time, as a panel of seven, to decide on the matter again, and concluded again that General Pinochet could not avoid criminal responsibility through the use of immunity rules.


623 Ibid, para. 54.
“private” nature and acts of a “public” nature, a distinction that was originally considered significant by the HL in the Pinochet case. Although it may be difficult to reconcile the ICJ decision with the previous HL ruling and the jurisprudence of international criminal tribunals, it must be noted that the ICJ was in fact ruling on Belgium’s ability to exercise its criminal jurisdiction over a foreign Minister, rather than the exercise of criminal jurisdiction by an international criminal court. Consequently, if international customary law on immunity is examined from the interstate perspective, then international customary law governing immunity privileges will be applied without any restrictions. The ICJ decision therefore supports the notion of sovereign equality and cooperation amongst member States. This is further evidenced by the fact that, when the ICJ looked briefly at the relevant provisions contained in international criminal statutes (including Article 27 Rome Statute), it found that they “do not enable it to conclude that any such an exception exists in customary international law in regard to national courts”. The emphasis here is on national courts and not on the practice of international criminal tribunals, including the ICC. The ICJ made another important distinction, and that is between jurisdictional immunity and individual criminal responsibility, the former being a procedural law whereas the latter constitutes substantive law. One of the situations whereby an incumbent or former Minister will forfeit jurisdictional immunity is when he or she is the subject to criminal proceedings before certain international courts, as specified by Article 27 (2) Rome Statute.

One of the main purposes for the establishment of the ICC was to create a system that would fight impunity by creating a vertical juridical system, whereby States are not answerable to each other but to a permanent international criminal court. It would be an absurdity if the ICC included a provision that would de facto re-confirm the impunity culture, quite often perpetrated by Heads of State or other officials in control. A

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625 The ICJ also noted that the immunities of foreign officials will remain even when national jurisdictions extend their criminal laws in response to obligations undertaken under international law (para.59). See Van Alebeek, The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law, 169; M. Ssenyonjo, ‘The International Criminal Court Arrest Warrant Decision for President Al Bashir of Sudan’, ICLQ, 59 (2010), 205-25 at 209.
626 Arrest Warrant case, para. 58.
627 Ibid, para. 60.
628 Ibid, para. 61.
correlation of this argument is that the absolute immunity rules applicable within a horizontal interstate system, in order to respect the principle of sovereign equality, cannot be applicable to a vertical system that governs the relationship between the Court and the State. Sovereign equality, a fundamental rule of the international legal order, is irrelevant when an individual, Head of State or otherwise, is accused of an international crime by the ICC because the ICC action (issuing an arrest warrant for example) does not disrupt the relationship between States. However, it will be demonstrated below in the context of President Al Bashir’s arrest warrant, that such relationship will be jeopardized when States are requested to cooperate with the Court, especially as there is no clarity concerning the relationship between jurisdictional immunity in the context of customary international law and jurisdictional immunity in the context of international criminal law.

In fact, the Charters of the International Military Tribunals of Nuremberg and Tokyo both confirmed the rule that the official status of the accused was not a bar to criminal prosecutions. The same stance was taken by the ad hoc international criminal tribunals of the ICTY and ICTR and it was put into practice when Yugoslavian President Milošević was indicted by the ICTY and subsequently tried for serious crimes committed during the Yugoslavian conflict. The Statute of the Special Court for Sierra Leone reiterates the same principle, namely that the official position of the accused is not a bar to prosecution; when Liberian President was indicted for war crimes and crimes against humanity by the SCSL, an attempt to quash the indictment, on the basis of his official position, led the SCSL to declare that “the principle seems

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629 As Gaeta points out, the jurisdictional immunity can be violated by issuing an arrest warrant against an official of another State, not just when the foreign official is present in a foreign territory; see P. Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', JICJ, 7 (2009), 315-32 at 319.


631 ICTY Statute Article 7 (2) and ICTR Statute Article 6 (2).

632 ICTY, The Prosecutor v. Slobodan Milošević and others, Case No. IT-99-37, Trial Chamber, Indictment, 22 May 1999. Mr Milošević was indicted on sixty-six counts, including war crimes, crimes against humanity and genocide, but after four years of trial proceedings, he was found dead in his cell on 11 March 2006, bringing the trial to an untimely end; see G. Higgins, The Impact of the Size, Scope, and Scale of the Milosevic Trial and the Development of Rule 73bis before the ICTY, Northwestern Journal of International Human Rights, 7 (2009), 239-60.

now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court. On 26 April 2012 Charles Taylor was found guilty of aiding and abetting war crimes and crimes against humanity and on 30 May 2012 he was sentenced to 50 years in prison: this was a landmark judgement in the context of immunity for Heads of States against any claims that such immunity still exists. The SCSL is not a strict international tribunal in the same category of the ICTY, ICTR or ICC, but it is a hybrid court, part national and part international, established through a Security Council resolution requesting the UN Secretary-General to negotiate an agreement with the Government of Sierra Leone to set up a special court. Nevertheless, the Charles Taylor judgment sheds more light on a serving Head of State claiming immunity from criminal jurisdiction. As a serving President when the indictment was issued, he claimed to be entitled to immunity and one of the arguments put forward by his defence was that the SCSL was not an international tribunal and therefore it should be subjected to the immunity rule set out by the ICJ in the Arrest Warrant case. The Appeals Trial Chamber disagreed and confirmed that the SCSL is in fact an international tribunal and, in line with the Constitutionality Decision, it is not a national court of Sierra Leone and it is not part of the judicial system of Sierra Leone. Therefore, it concluded that the immunity granted in international customary law will not apply in the context of an international tribunal in its exercise of jurisdiction for serious international crimes.

Consequently, international jurisprudence seems to point towards a restricted application of immunity in the context of officials who have been accused of international crimes and have been indicted by the ICC. However, regarding the issue of the arrest warrant and the surrender request for Sudan’s President Al Bashir and the scope of Article 98 (1), the tension between immunity and international crimes has surfaced again and continues to occupy the dialogue between the ICC and, in particular,

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634 Special Court for Sierra Leone, Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 31 May 2004, Appeals Chamber, para. 52.
636 Applicant’s Motion made under Protest and without waiving of Immunity accorded to a head of State President Charles Ghankay Taylor requesting the Trial Chamber do quash the said approved indictment of 7 March 2003of Judge Bankole Thompson and that the aforesaid purported Warrant of Arrest and Order of transfer and detention...be declared null and void...(23 July 2003).
637 Decision on Immunity from Jurisdiction, SCSL Appeals Chamber, 31 May 2004, paras. 40-41; see also Decision on Constitutionality and Lack of Jurisdiction, SCSL Appeals Chamber, 13 March 2004.
638 Ibid, para. 53.
the African Union. First of all, the issue of arrest is becoming problematic because President Al Bashir visited countries that are parties to the Rome Statute, and they have an obligation to cooperate with the Court. When he visited Chad and then Kenya, both State parties to the Rome Statute, they were both urged, by the ICC and the EU, to arrest and surrender President Al Bashir, in line with their obligations under Article 87 (7) Rome Statute. Both States refused to do so, and such omission led the ICC Pre-Trial Chamber to refer both Chad and Kenya to the Assembly of State Parties and the Security Council for refusal to cooperate with the Court. Given that the ICC had issued arrest warrants against President Al Bashir, both Kenya and Chad were duty bound to cooperate with the ICC requests, but refused to do so, mentioning, inter alia, the need to continue to play a vital role in the region to ensure continued peace and stability. The referrals to the Assembly and the Security Council prompted a strong reaction from the African Union, urging all AU members not to cooperate with the ICC in view of Article 98 (1) of the Rome Statute regarding immunities. Later on Al Bashir visited Malawi, another member State to the Rome Statute, but it too refused to comply with its duty to arrest and surrender the Sudanese President. This refusal prompted another strong reaction from the ICC Trial Chamber and another referral to the Assembly and Security Council. On this occasion, though, the Chamber took the opportunity to clarify the law concerning immunity once and for all and stated “that immunity of either former or sitting Heads of State cannot be invoked to oppose a

639 Decision requesting observations from the Republic of Kenya, ICC-02/05-01/09 (25 October 2010); see also the European Parliament Resolution urging both Kenya and Chad to arrest President Al Bashir (Official Journal of the European Union, 2011/C 308 E/15).
640 ‘Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al Bashir’s recent visit to the Republic of Chad’, Pre-Trial Chamber I, ICC-02/05-01/09, 27 August 2010. In 2009 and 2010 the Registry, at the Chamber request, sent a request and a supplementary request for the arrest and surrender of President Al Bashir to all State parties to the Rome Statute (ICC-02/05-01/09-7 and ICC-02/05-01/09-96).
641 See SC Resolution 1593 and the arrest warrants issued by the ICC Pre-Trial Chamber I (ICC-02/05-01/09 and ICC-02/05-01/09).
645 ICC Pre-Trial Chamber I 02/05-01/09, 12 December 2011.
prosecution by an international court”646. With regard to Malawi’s obligation to arrest and surrender President Al Bashir, the Chamber recognised a possible conflict between Article 27 (2) and 98 (1) and immunity rules, but reiterated that

Customary international law creates an exception to Head of State immunity when international courts seek a Head of State’s arrest for the commission of international crimes. There is no conflict between Malawi’s obligations towards the Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply647.

The African Union responded by issuing a Press Release whereby it expressed the opinion that Article 98 (1) had been made ineffective and redundant by the Trial Chamber’s interpretation of immunity rules, and clarified its position regarding the two controversial articles: Article 27 concerns general principles of criminal law, whereas Article 98 (1) concerns the relationship between the ICC and the State parties, and the immunity protection applies not only to national foreign courts but also to international courts648. It s submitted that the standoff between the ICC and the AU (and their respective member States) will continue for some time, and it is rather unfortunate that the Court, in urgent need of the cooperation of States parties in order to become an effective judicial organ to end a culture of impunity, has inadvertently alienated the AU and its member States. The request made in January 2012 by the AU Assembly for an ICJ Advisory Opinion to decide on the question of immunity of State officials under international law may go unnoticed649. This is partly because the request must come either from the GA or the SC, or from “other organs of the United Nations and specialized agencies...authorized by the General Assembly...within the scope of their activities”650. Also, an ICJ Advisory Opinion on a question concerning immunity and the jurisdiction of another international court may create a difficult situation for the ICJ if asked to decide on the ICC jurisdiction. There is also the option given by Article 119 of the Rome Statute:

646 Ibid. para. 36.
647 Ibid. para. 44.
650 See Articles 65 and 96 UN Charter. See also M. Amr, The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations (The Hague: Kluwer Law International 2003), 47-72.
1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.

2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

First of all, it would need to be determined, therefore, whether the interpretation of the immunity rules constitutes a ‘dispute’ and whether this determination is part of the judicial functions of the Court. However, the Trial Chamber has already given its opinion regarding this matter, an opinion that has not been appreciated by the AU, so Article 119 (2) may have more applicability. The issue though seems to concern a dispute between State Parties. Sudan is not a State party, and even though Chad, Kenya and Malawi are State parties, they are not in dispute, or at least not openly. The dispute here is essentially not between State parties, but between State parties and the ICC, or more specifically between the AU and the ICC. It is possible that a State party to the AU is willing to arrest and surrender President Al Bashir, but wanted first to obtain reassurances about its international obligations. On the other hand, if the mechanism contained within Article 119 (2) is to be used at all, it is more likely to be initiated by a non-AU State party to the Rome Statute, thus avoiding the proximity between Sudan and other AU member States. The use of the procedure under Article 119 and subsequent referral to the ICJ to resolve an issue that arises from the interpretation of the Rome Statute may seem remote or even impossible. However, the fact that the AU has considered it as a viable option may indicate that it would be willing to abide by its decision or at least persuade its members to follow the correct interpretation on the immunity rules.

In any case, it is regrettable that on this occasion the Trial Chamber never attempted to clarify the exact circumstances of Article 98 (1) applicability, especially with regard to its relevance towards State parties and non-State parties. Also, given the international criminal jurisprudence discussed above, the point of contestation is not whether

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652 Ibid, 77.
President Al Bashir is entitled to immunity because it can be deduced with a high
degree of confidence that he is not able to claim that the ICC criminal proceedings
against him should be barred on the basis of international customary rules on immunity.
The issue is whether members of the international community, parties and non-parties to
the Rome Statute, are under an obligation to cooperate with the arrest and surrender of
Al Bashir, and whether this cooperation violates other international law obligations.
This issue brings Article 103 UN Charter to the fore because, according to this
provision, if there is “a conflict between the obligation of the Members of the United
Nations under the present Charter and their obligations under any other international
agreement, their obligations under the present Charter shall prevail”. In the context of
the arrest warrant and the surrender request of President Al Bashir in particular, as the
situation of the Sudan was referred to the ICC by the Security Council acting under
Chapter VII, it obliges the Sudan and all other parties to the conflict to comply with its
mandate.

The obligations of the members of the international community, therefore, operate at
different levels and an evaluation in respect to how these levels interact with each other
may clarify the obligation to cooperate with the ICC. For example, it is an established
fact that decisions taken by the Security Council acting under Chapter VII will take
priority over other international treaty obligations653, but there is some jurisprudence
that may point to a re-evaluation of this position, especially when Security Council’s
resolutions contravene fundamental human rights. In the Kadi654 case the ECJ had to
decide whether Mr Kadi was able to successfully appeal against a previous CFI
decision655 relating to an EC Regulation implementing a Security Council’s Resolution
freezing its financial assets and property in the belief that he was a supporter of
terrorism activities linked to Qaeda656. The argument put forward by Mr Kadi related to
the fact that the EC Regulation, and therefore the SC Resolution, did not take into

653 Article 25 UN Charter.
654 Joined Cases C-402/05 and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International
Foundation v Council of the European Union and Commission of the European Union, Judgment of the
Court (Grand Chamber), E.C.R. I-6351, 3 September 2008.
656 Council Regulation (EC) No. 881/2002 of 27 May 2002 was adopted following SC Resolution 1390
(2002) and EC Council Regulation No. 467/2001 of 6 March 2001 was adopted in pursuance to SC
Resolution 1333 (2000).
consideration some fundamental rights protected within the EC system. The CFI maintained the traditional position that States’ obligations under Article 103 UN Charter prevail over any other international obligations, and then concluded that it had no jurisdiction to decide on the legality of acts by the Security Council. Soon after, though, it claimed that it could indirectly review whether the Security Council’s resolution complies with *jus cogens* norms. The ECJ, on the other hand, allowed the appeal and annulled the EC Regulations on the basis that the restrictive measures applied to Mr Kadi constituted unjustified restrictions of his right to be heard, right to an effective remedy and right to property. Against the backdrop of these decisions and between the CFI and the ECJ *Kadi* decisions, the ECtHR had to decide on a conflict between human rights protection afforded by the ECHR and specific measures to be taken by UNMIK and KFOR forces in Kosovo, following another Security Council Resolution. Unlike the Kadi decisions, in *Behrati* and *Saramati* the ECtHR concluded that the UN, and therefore the SC, hold a primary position in international law by virtue of their aims to maintain peace and security. For this reason, the actions of the SC should not be scrutinised because it could interfere with the UN mission. In a different case concerning the decision to allow a group of women, related to the men and boys killed in Srebrenica, to make a claim against the UN for their failure to prevent the genocide, the Dutch Court of Appeal reiterated that Article 103

...was not intended to allow the Charter to just set aside like that fundamental rights recognised by international (customary) law or in international conventions. The development of international law since 1945, the year the Charter was signed, has not stopped and shows an increasing attention for and recognition of fundamental rights, that cannot be ignored by the Court of Appeal. Moreover, as is clear from the preamble to the Charter and Article 1 subsection 3 of the Charter, the UN explicitly has as its purpose the promotion and encouragement of respect for human rights and for fundamental freedoms.

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657 Mr Kadi claimed that the EC Regulations infringed Article 1 of Protocol 1 ECHR, the right to a fair hearing and the right of due process under Article 6 ECHR and ECJ jurisprudence.

658 *Kadi* (CFI), paras. 218-225.


660 *Kadi* (ECJ), paras. 368-370.

661 ECtHR Grand Chamber Decision as to the Admissibility of Application no. 71412/01 (Behrami v. France) and Application no. 78166/01 (Saramati v. France, Germany & Norway), 2 May 2007.

662 Ibid. para. 149.
It is implausible that article 103 of the Charter intends to impair the enforcement of such fundamental rights.

Just like the ECtHR, the Dutch court demonstrated a degree of deference towards the UN structure, including an implied inference that it would be against the nature of the UN to act in a way that would violate fundamental human rights because it was in fact the serious violation of human rights that led to its creation and mandate.

In addition, in June 2012 the ICC Pre-Trial Chamber I made the decision to grant a suspension of the request concerning Libya’s surrender of Saif Al-Islam Gaddafi and Abdullah Al-Senussi to the ICC for trial. There are similarities between the Libya and Sudan’s situations: the Libya situation, just like Sudan, arose out of a SC referral to the ICC and, like the Sudan, it is not a party to the Rome Statute. Arrest warrants were issued and then a request of cooperation was made concerning the arrest and surrender of the named individuals to the Court. Despite previous failed demands by Libya to suspend the request because of an admissibility challenge based on Article 18 and 19 Rome Statute, the Trial Chamber on this occasion decided, on the basis of Article 95, that such request for surrender will be suspended until the admissibility issue is resolved. For the purposes of this discussion, the Chamber made it clear that the regime established by the Statute still represents the legal framework within which Libya must cooperate, even if the situation arose out of a Security Council Resolution. Therefore the principle of complementarity still applies, allowing national courts the priority to exercise criminal jurisdiction, an argument that was also previously made in the case of the Sudan situation.

In light of the examples discussed above and the obligation of States to cooperate with the ICC requests, despite the existence of other international obligations in respect to

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663 Court of Appeal The Hague, Judgment of 30 March 2010 (Mothers of Srebrenica et al. v State of the Netherlands and United Nations), Case No. 200.022.151/01, para. 5.5 (English translation to be found at http://www.haguejusticeportal.net/index.php?id=9659) (last accessed on 20 June 2012).
664 ICC Pre-Trial Chamber I, Situation in Libya in the Case of Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi, No. ICC-01/11-01/11, 1 June 2012 (henceforth Libya Situation).
666 ICC-01/11-01/11-5 and ICC-01/11-01/11-25-Conf.
667 Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute, ICC Trial Chamber, ICC-01/11-01/11, 1 June 2012.
668 Libya Situation, para. 27.
669 Ibid, para. 28.
immunity, it seems that States will have a number of options. There is no doubt that any requests for cooperation that emanate from a SC Resolution will prevail over other obligations, even if this is an obligation that relates to the immunity privileges. If the reasoning of the ECtHR and the Dutch court is applied, then it must be inferred that States can refuse to abide by orders that derive from SC Resolutions only if such Resolutions contravene *jus cogens* norms. Despite the interpretation of the content of *jus cogens* norms by the CFI in the *Kadi* decision, it is submitted that the analysis in that case did not follow the general international judicial and academic consensus, and therefore immunity cannot be considered as a *jus cogens* norm. Moreover, a SC referral of a situation to the ICC does not appear to require the State to relinquish its exercise of criminal jurisdiction in a particular situation; it just implies that the situation is brought within the ICC regime, but the same rules about admissibility and complementarity will apply, as the Libya situation is demonstrating.

The last issue on this discussion concerning the conflict of international obligations is provided by a better scrutiny of the Security Council itself. Notwithstanding the fact that the Sudan indictments include one for a current Head of State, the Sudan and Libya situations share similarities because they have emerged in response to a referral by the SC to the ICC. The important aspect of these referrals lies in the motive for the SC action, which is to bring to an end a culture of impunity perpetuated by Head of States and State officials or any other person in *de facto* control of a territorial entity or with the intention of gaining such control. The difficulty with the arrest and surrender of President Al Bashir is that he is the first ever serving President to be issued with an arrest warrant; he did not stand down when the ICC arrest warrant was issued, as President Charles Taylor did when the SCSL issued the arrest warrant for his arrest, and he is not a former President like Laurent Gbagbo, former President of the Côte d’Ivoire who was transferred to the ICC in November 2011. To understand the delicate international relations balance at stake, the overall picture must be considered. Therefore, just because the SC has a specific mandate to ensure peace and security, it

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670 The Côte d’Ivoire is not a party to the ICC but agreed to accept the jurisdiction of the Court, according to Article 12 (3) Rome Statute (18 April 2003) and later reconfirmed such acceptance on 14 December 2010 (see [http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/](http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/), last accessed 20 June 2012).
does not mean that it always understands all the issues involved. As Orakhelashvili points out:


This criticism was specifically directed at the Kosovo situation, which protracted for nine years and culminated in a mixed response to the Ahtisaari Plan as some of the SC members believed it could lead to instability in the area.\footnote{Ibid, 146. Marti Ahtisaari was the UN Special envoy to Kosovo and prepared the report about the future status of that territory; see UN SC S/2007/168 and S/2007/168 Add.1 (26 March 2007).} However, it is also worth noting that, although the SC is to act at all times within the UN constitutional make-up, Article 103 only speaks of international agreements and not international customary law. Therefore, it is possible to argue that in the context of cooperating with the request to arrest and surrender President Al Bashir, the request, originating from a SC Resolution under Chapter VII, should take precedence over other States’ international obligations that derive from international customary law. Without such clarity, however, members of the international community may rely on traditional and well established customary rules on immunity rather on emerging new ones as potential exceptions. This is not to say that the traditional international customary rules on immunity have changed, but rather that a new dimension to the immunity rules is emerging in light of the practice of international criminal law.

Nevertheless, immunity is not the only impediment to the prompt and effective surrender of accused individuals to the ICC. In fact, there are currently eight individuals wanted by the ICC but the relevant States are refusing to comply with the requests.\footnote{In the case of Uganda, arrest warrants were issued in 2005 for Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen; an arrest warrant was issued for Bosco Ntaganda in 2006 (Congo); Ahamad Harun, Ali Kushaib and Omar Al Bashir are still at large in Sudan (arrest warrants were issued in 2007 for the first two accused and two more arrest warrants were issued in 2009 and 2010 for President Al Bashir).} It is, in fact, the cooperation or otherwise of these States that could alter the delicate balance of sovereign equality and that is why the arrest and surrender of accused individuals wanted by the ICC is not as forthcoming as the ICC may wish. The
discussion below will explore this issue further and evaluate what else can be done to ensure that individuals are effectively surrendered to the ICC, whilst retaining the delicate balance with State sovereignty.

4.4 Enforcement Powers and Jurisdiction

The principle of *mala captus bene detentus* (wrongly captured, properly detained) relates to the legality of the apprehension of an accused person wanted by a Court, national or international. It is a principle that inherently interferes with procedural rules that must be followed and respected by legal authority whilst arresting the accused, thus upholding the rule of law. It also refers to the principle that a State cannot exercise its jurisdiction in the territory of another State without the latter’s consent. The principle, therefore aims to ensure the procedural protection of the accused and the jurisdictional integrity of the State in the case a person is taken from one jurisdiction to another. In the strict sense, *mala captus bene detentus* refers to the ability of the accused to challenge the validity of court proceedings if he believes that his appearance in court has occurred through illegal means. The cases below will reveal the extent to which this principle has been relied upon, and whether the ICC could use it in order to facilitate its surrender requests.

The most notorious case where this principle was put into practice and then challenged was in the Eichmann case. Mr Eichmann, wanted by Israel for war crimes and crimes against humanity perpetrated during the Second World War, was apprehended from Argentina and taken to Israel to stand trial. Argentina objected to Israel’s action and the Security Council confirmed that the transfer of Adolf Eichmann constituted a violation of Argentina’s sovereignty; Israel was requested to make adequate reparation to Argentina, in line with the UN Charter and rules of international law. When the Israeli Supreme Court tried Mr Eichmann, the issue of the illegal arrest was

678 Ibid.
raised, but the Court did not express any interest in the way that Mr Eichmann was abducted. Relying on decision from UK, Israeli and U.S. courts, it went on stating that

...it was an established rule of law that a person being tried for an offence against the laws of a State may not oppose his trial by reason of the illegality of his arrest or of the means whereby he was brought within the jurisdiction of that State, whether the illegality was under municipal or international law. A violation of sovereignty constituted an international tort, giving rise to a duty to make reparation which might be waived by the State injured, and the accused could not claim rights which the State had waived – as Argentina had done.679

The court reiterated the practice of foreign courts in this matter, noting that the circumstances of his arrest had no bearing whatsoever on the court’s jurisdiction to try him for the offences that he had been accused of.680 The use of this practice is clearly not an isolated one and the ICTY made use of it too.

At the very beginning of the establishment of the ad hoc tribunals of the ICTY and the ICTR, the transfer of the accused requested by the tribunals proved to be a very difficult and slow process. This was due partly to a general reluctance to the transfer of individuals to a new and, for all intents and purposes, unknown tribunal, and partly because some States’ domestic laws did not allow for such a mechanism without enacting suitable legislative changes at the domestic level to allow for individuals to be transferred to the tribunals without breaching national laws.681 In the context of the ICTY in particular, the lack of success may have been due to the fact that the individuals wanted by the ICTY were in fact still in charge of the country, and they were therefore instrumental to the spreading of doubts and criticism about the tribunal.682 The eventual success of the ICTY rested on two distinct methods: SFOR and bargaining. SFOR, the NATO-led stabilization force, was originally set up for a year as IFOR, an implementation force established to ensure the cessation of hostilities and provide a safe and secure environment.683 Due to IFOR’s early success and the peaceful

679 Eichmann Case, 12.
680 Eichmann Case, p.58; see also J.E.S. Fawcett, 'The Eichmann Case', British Yearbook of International Law, 38 (1962), 181-215.
cessation of hostilities, it was felt that more could be done to restore civil life in this war-torn region. A multinational stabilization force (SFOR) took on the legal mandate from IFOR for eighteen months in order to continue the implementation of the peace process, and this included the arrest and delivery of indicted individuals to the ICTY. This was indeed the fate of Dragan Nikolic, who was indicted on 4 November 1994 but remained at large until 21 April 2000. On this particular day he was apprehended in the FRY territory by individuals who claimed to be police officers and not related to SFOR forces; he was then taken to Bosnia and Herzegovina and delivered to SFOR personnel, who then proceeded to transfer him to the ICTY. He later challenged the validity of his arrest and the case was heard by the Trial Chamber II. The Chamber noted that seven men were involved in this abduction and they were subsequently charged by a Serbian court for the offences related to the abduction. The assertion in a way acknowledged the illegality of the arrest, including the action that was taken by Serbia to punish the individuals concerned. However, Mr Nikolic aimed to deal with the illegal arrest in two ways: first of all, he claimed that his abduction infringed FRY’s sovereignty and international human rights and due process, and therefore the Trial Chamber had no jurisdiction over him and he should be sent back to the FRY territory. Secondly, if the first challenge failed, and based on the previous case of Prosecutor v Todorović, he aimed to force the Chamber to reveal the names of the individuals, and any associations they had, including States, behind his illegal capture. However, in the case of Slavko Dokmanović, the first ever ICTY case where deception was used to lure the defendant into a situation to facilitate his arrest, the
Trial Chamber agreed that the OTP had used trickery but found that the method used did not amount to “forcible abduction or kidnapping”\textsuperscript{693}. In the Todorović, on the other hand, there was some reluctance to reveal information about the individuals and the States behind his capture, and to avoid any revelations the defendant was offered to plea bargain on reduced charges.

In Nikolic’s case, the Trial Chamber decided that it was important to evaluate two issues with regard to the claim of the illegal arrest: first of all the Chamber had to find out whether and who was behind the illegal arrest (SFOR, the OTP, the Tribunals or any other organisation) and then they had to determine whether SFOR was acting as an agent of the tribunal\textsuperscript{694}. The Chamber concluded that SFOR had not participated in the illegal arrest and that, although SFOR had a clear mandate to arrest and surrender individuals to the Tribunal, it was not an agent for the tribunal, adding that SFOR had acted well within the legal rules that dictate that an individual should be arrested by SFOR only when he “comes into contact” with SFOR personnel\textsuperscript{695}. On the principle of \textit{mala captus bene detentus}, the Chamber reiterated that the exercise of the tribunal’s jurisdiction is not compromised, partly because they were not persuaded that national practice made this principle illegal\textsuperscript{696}. The Chamber also stressed the fact that the international tribunal does not operate in the same way as national courts, and that the vertical relationship between the States and the tribunal necessitated a different system of rules and priorities. For example, if the accused had been subjected to torture or inhumane treatment when captured, with or without SFOR participation or knowledge, then the validity of the jurisdiction of the tribunal will be questioned\textsuperscript{697}.

In view of the ICTY practice in proceeding with the exercise of their jurisdiction after acknowledging that the arrest and surrender of certain individuals was illegal, it is now left to determine whether the ICC could or would use similar methods in order to deal

\textsuperscript{693} Ibid, para. 57.
\textsuperscript{694} Nikolic Case, para. 17.
\textsuperscript{695} Ibid, para. 69.
\textsuperscript{696} There are, however, some notable national differences; for example, in \textit{United States v. Alvarez-Machain} (Supreme Court), 504 US 655 (1992), the Supreme Court stated that the forcible abduction of an individual does not prevent the Court from the exercise of its jurisdiction, even if the action may be contrary to general principles of international law (at 669); in \textit{R v. Horseferry Road Magistrates’ Court (ex parte Bennett)} (HL [1994] 1 AC 42), on the other hand, the HL rejected the principle of \textit{mala captus bene detentus} as it disregarded proper extradition procedures (p. 64).
\textsuperscript{697} Nikolic Case, para. 114.
with the lack of State cooperation. Mindful of legitimacy and legality issues, the Rome Statute contains several provisions in order to ensure due process rules are applied and maintained throughout the arrest procedure. In particular, the Statute forbids arbitrary arrests and detentions\(^{698}\) and allows States to arrest suspect individuals only according to their national laws and Part 9 of the Statute, which deals with the cooperation procedures with the Court\(^{699}\). Article 85 deals with the compensation to a victim for unlawful arrest or detention in the case of a reversal of a conviction on the basis of a miscarriage of justice. It is possible that, if the ICC divests itself of any association with the unlawful detention, just like the ICTY jurisprudence has demonstrated, then the defendant may just be entitled to compensation. Also, having learnt from the mistakes of its \textit{ad hoc} predecessors, the ICC is more likely to ensure the rights of the defendant are respected at all times: this will increase its effectiveness and legitimacy, and attract the trust from national jurisdictions, which could lead to increased cooperation between sovereign States and the Court\(^{700}\).

The bargaining option offers another potential avenue to persuade States to arrest and surrender individuals to an international court. A case in point arose in the context of the arrest and surrender of General Ratko Mladic, who was wanted by the ICTY in relation to the massacre of 7,500 boys and men at Srebrenica in 1995\(^{701}\). It seems that Mr Mladic had been living in Serbia for a number of years, a fact that was known both by Serbian authorities and amongst the international community\(^{702}\). Although not confirmed by official Serbian authorities, it also transpires that Mladic’s arrest could produce a great benefit for Serbia, namely Serbia’s bid for EU accession. The move to arrest Mladic attracted praises and positive statements by many EU leaders\(^{703}\) and put

\(^{698}\) Article 55 (1) (d).
\(^{699}\) Article 59 (1) and (2).
\(^{700}\) For example, the ICTR experienced lengthy delays, and the defendants, likewise, were subjected with very long detentions before appearing in court. This led to reduction of sentences, as in the case of \textit{Prosecutor v Semanza}, Case No. ICTR-97-20-A, 31 May 2000, or a complete dismissal, as in \textit{Prosecutor v Barayagwiza}, Case No. ICTR-97-19-AR72, Appeals Chamber, 2 November 1999.
\(^{701}\) ICTY Press Release, Radovan Karadzic and Ratko Mladic accused of genocide following the takeover of Srebrenica (16 November 1995).
\(^{702}\) See \url{http://www.guardian.co.uk/commentisfree/2011/may/26/ratko-mladic-arrest-srebrenica-refugees} (last accessed on 16 October 2012).
\(^{703}\) See \url{http://www.guardian.co.uk/world/2011/may/26/ratko-mladic-serbia-eu-membership} (last accessed on 30 July 2012).
Serbia on the right trajectory for candidacy as an EU member\textsuperscript{704}. In fact, given the history behind Turkey’s bid for EU candidacy in light of its human rights violations record, it would be unthinkable that any consideration would be given to a country that is sheltering an individual wanted for genocide by an international criminal tribunal. Although there is much speculation behind the assertion that some amount of bargaining may have occurred to finally induce the Serbian authorities to carry out the arrest, one fact remains valid: there is much persuasive strength within the context of a regional organization. States unite together in order to achieve common purposes but the benefits that are accrued go beyond the interests of the States. A case in point is the EU strife to improve human rights standards, both within the member States but also with third States\textsuperscript{705}.

If one is to follow the argument above in the context of the ICC, it may fail straight away given that this is an international arrangement and not a regional one. However, the proposition that persuasive political pressure can still be adopted within regional arrangements in order to strengthen the international regime would not be illogical. After all, this is how the human rights movement started in the first place, from the UN Universal Declaration of Human Rights in 1948 to the absorption of those ideas within the American, African, European and Asian regions\textsuperscript{706}. Moreover, given that all individuals currently wanted by the ICC originate from the African region, the AU is in fact in a very good position to exert such political pressure, as long as there is a real ideological conviction that such pressure is for the common good and does not derive from residual Western colonial values. Unfortunately, unlike the EU, whereby membership promises significant economic benefits for the member State and its citizens, the AU membership may not be so beneficial.

Another mechanism that could be used by both State parties and the ICC to apprehend wanted suspects is Interpol. This is a UN agency set up “to ensure the widest possible


\textsuperscript{705} A prominent example of this influencing practice has been established by the EU in their human rights clauses contained in agreements with third States; see L. Bartels, Human Rights Conditionality in the EU’s International Agreements (New York: OUP, 2005).

mutual assistance between all criminal police authorities"\(^{707}\), and it boasts a membership of 190 States. The neutrality aspect of its work, embedded in Article 3 of the Constitution, ensures that no activities are undertaken for political, military, religious or racial reasons, and therefore concentrate on the prevention and suppression of “ordinary law crimes”. Despite the use of “ordinary crimes” language, Interpol deals with fugitive investigations and it is through the Fugitive Investigative Support Unit that Interpol deals with international crimes of genocide, crimes against humanity and war crimes. Operational Infra-Red aims to locate and arrest long-standing serious criminals and Red Notices are issued in the case of individuals wanted for extradition, either to national authorities or to international courts, including the ICC. At present, all individuals wanted by the ICC, but still at large, appear on the Red Notices website, with the notable absence of President Al Bashir\(^{708}\). Despite several reports of an impending issue of a Red Notice for President Al Bashir, these reports appear to be unfounded. However, a Red Notice was effective in the swift arrest of former Liberian President Charles Taylor and surrender to the SCSL, noting however that Charles Taylor resigned as President on 11 August 2003 and it was only after his resignation that the agreement between Interpol and the SCSL was concluded. In November 2003 the SCSL requested Interpol to issue a Red Notice, according to Article 3 of such agreement. Moreover, it was the quick and organized reaction of the Interpol machinery soon after Taylor’s escape from the Nigerian authorities that enabled his swift capture\(^{709}\). The ICC OPT and Interpol have concluded a similar agreement, with a similar power to request Interpol to issue a Red Notice\(^{710}\). The lack of a Red Notice, or even a request by the OTP for such notice for the arrest of President Al Bashir may be indicative of the indecisiveness that still exist within the international community concerning immunity rules for incumbent Heads of States. The Interpol machinery would offer better protection of due process rights for the defendant than the recourse to illegal methods of apprehension of defendants, which could potentially discourage member States’ cooperation with the Court and even lead to an acquittal. If an

\(^{707}\) Interpol Constitution, adopted by the GA in June 1956, Article 2.

\(^{708}\) See http://www.interpol.int/INTERPOL-expertise/Notices (last accessed on 20 June 2012).


\(^{710}\) The Agreement came into force on 22 March 2005; see http://www.interpol.int/About-INTERPOL/Legal-materials/International-Cooperation-Agreements (last accessed on 20 June 2012).
incumbent Head of State is the ultimate emblem of State sovereignty, then the immunity question needs to be resolved in order to create certainty. It is not just the certainty related to the legality of an action, but the certainty related to the criminal liability of an incumbent Head of State. This certainty would also create coherency and expectation in the context of cooperation.

At this point in time, both State parties and non-State parties to the Rome Statute are refusing to cooperate with the Court with regard to the arrest of an incumbent President, and so far there has been no SC Resolution declaring the refusal to cooperate as illegal. There has also been no request by the OTP for Interpol to issue a Red Notice concerning President Al Bashir. This multi-faceted lack of progress can only lead to two conclusions: first, it may imply that an incumbent President enjoys immunity from international crimes until he steps down. Therefore, although an arrest warrant can be issued, it is technically suspended, even though, as it was discussed above in the context of Libya, the suspension can only occur in the case of an admissibility challenge. The second conclusion is that, without clear legal guidance and certainty, cooperation will not be forthcoming, as the member States to the Statute will continue to recognize the obligation to cooperate trumped by the obligation to respect the immunity of an incumbent President, as derived from international customary law.

4.5 Conclusion

The aim of the new regime is to ensure that the perpetrators of international crimes are properly apprehended and prosecuted. If States are unwillingly or unable to deal with the perpetrators of these crimes, then it is up to the Court to carry out the criminal jurisdiction that should have been performed by the State. The discussion above clearly showed, however, that the Court needs the full cooperation of its member States, or any other States that are willing to accept its jurisdiction. The provisions built into the Statute aim to ensure that the Court is considered as a pillar of legality, upholding the rule of law and aiming to gain the trust from States. To this end, lessons have been learnt from the ad hoc tribunals and procedures modified accordingly. However, one issue that remains clear, albeit slightly modified from the previous tribunals, is that the relationship between the Court and the States is (mainly) a vertical one. States do not
bargain with each other to ensure the extradition of individuals but they negotiate instead with an international Court, whereby the amount of discretion is very limited.

Also, an emerging problem of this vertical structure is that at times it creates a conflict with the horizontal structure put in place by the UN and, if new rules of international criminal law are emerging, then there is a need for clarity of dialogue to reassure and persuade States to cooperate. The rules surrounding the immunity of an existing Head of State have not been reassessed in the light of President Al Bashir’s arrest warrants, accompanied by a general reluctance by the Security Council, the ICC and even Interpol to take any action to rectify the situation.
Chapter 5

Conclusion

5.1 Summary of the thesis

The issue running through the entire length of this thesis was to determine to what extent State sovereignty is challenged by the establishment of the new international criminal law regime. The aim to end a culture of impunity has prompted the international community to work together to establish the first ever permanent international criminal court. However, the main proviso, and the main difference from the previously established ad hoc criminal tribunals, was that the primary jurisdiction for the investigation and prosecution of international crimes resides with the State, and not with the international court. In a way, the simple fact that the State was given the opportunity to extend and improve the exercise of its criminal jurisdiction to include international crimes signifies an improvement for the concept of sovereignty, or even a transformation of sovereignty, from contributing to a culture of impunity to punishing individuals for heinous crimes.

Chapter one provided the background for this thesis. More specifically, this particular piece of research is motivated by a concern regarding the true extent of a possible decline of the power of the sovereignty principle in view of the new international criminal law regime. In chapter two the discussion moved to the analysis of the meaning and power of language in the relationship between sovereignty and the new regime, and revealed several interesting points. There is a fundamental issue with the way the concept of sovereignty has been repeatedly interpreted and reinterpreted by political theorists for about four hundred years. This defining and redefining process has led to distortions of the meaning of sovereignty, a particular problem in the context of the State’s desire to be able to deal with its domestic affairs without any interference from the outside. The self-centred interests of the State are contrasted with the language used in international criminal law. International criminal law aims for utopian values, filled with moral and normative substance, which seek to put the person first and seek to protect the human integrity and dignity. It is difficult to see how real change could take place within the principle of sovereignty when the two components of this study are so
inherently different and moving towards opposite objectives. One of the contentions is that real change can only occur when the consciousness of the State (made up by a variety of groups representing different needs, interests, leaders and ideologies) is awoken and remodelled to meet the interests that drive the consciousness at the international level in the context of human rights protection and an end to impunity. In chapter three the topic under examination is the exercise of criminal jurisdiction. The inclusion of this discussion is to evaluate the State’s exclusiveness to the exercise of such jurisdiction as a response to the criticism that it is in fact the potential transfer of the traditional criminal jurisdiction to the ICC that causes a reduction in the power of sovereignty. However, the practice of extradition, which has existed for a very long time, points to an existing practice of sharing criminal jurisdiction amongst States with similar claims to the perpetrator but with different levels of interests. In this scenario it is the State with the highest interest that will be able to conduct the prosecution, even if the perpetrator does not reside in that territory or there is no nationality link between the prosecuting State and the perpetrator. As the international community becomes more interdependent and globalised, States share the prosecutions and enact laws that allow them to do so. However, the extradition system is built within a horizontal relational structure between equal sovereign States. This means that States can bargain with each other and set their own limitations regarding extradition, particularly in the case of nationality. Also, States still retain the power to grant amnesties and therefore perpetuate the culture of impunity. The international community has responded and tried to limit this practice through the establishment of rules (such as universal jurisdiction) and international tribunals. Therefore, even though the State remains fairly free within its territorial boundaries, its decisions regarding alternative mechanisms that would avoid criminal prosecutions could be undermined at the international level. An important issue that attracted much attention is also presented by the fact that there is no obligation to implement the Rome Statute provisions at the domestic level with regard to the prosecution of international crimes. It follows that the notion of primary jurisdiction, set out in the complementarity principle, resembles a semantic exercise rather than a clear attempt to bring about the end of the impunity culture home, that is within the territorial boundaries of the State. In turn, the ICC will become so overburdened
with investigations and prosecutions that its effectiveness will be severely impaired. Chapter four analyses the new system of surrendering individuals to the ICC. The vertical paradigm was originally established in the context of the ICTY and ICTR in order to ensure the cooperation between States and the tribunals. Having learned some of the lessons from the ad hoc tribunals, the ICC regime slightly modifies the structure of the cooperative procedures by allowing State provisions to exist alongside the procedures that apply vertically between the Court and the States. These measures have been taken to facilitate the cooperation procedures as much as possible in order to realize the aims of the Court. However, one particular issue highlighted here is the surrendering of individuals to the Court and some proposals are investigated, drawing from the ICTY practice. However, one particular problem has occurred when the request for arrest and surrender concerned a presiding Head of State, causing a drift between the AU and the ICC concerning the interpretation of immunity rules.

5.2 Opening observations

Despite the fact that the 20\textsuperscript{th} century witnessed some of the most heinous conflicts and serious crimes perpetrated against the human race, the concept of State sovereignty remains the cornerstone of international law. The creation and development of international law and international institutions will not occur if States objected. State consent is still a necessary ingredient of international law formation, and it is perhaps for this very reason that the creation of a permanent international criminal court has been heralded as a significant development, one that may, once and for all, put clear restraints on the power and authority claimed to be possessed by the State under the guise of the principle of sovereignty.

However, State consent is a powerful reminder of positive law. The echo of positive law resonates throughout the whole discussion because the creation of the ICC would not have occurred if States did not agree to it. The \textit{Lotus} principle lives on and continues to have a significant impact on international law formation and on States’ behaviour: “The

\footnote{Critical opinions regarding the effectiveness of the Court also include claims of lack of due process, political nature of the ICC prosecutor appointment and the undermining of the international system of governance led by the Security Council; see Walker, 'When a Good Idea Is Poorly Implemented: How the International Criminal Court Fails to Be Insulated from International Politics and to Protect Basic Due Process Guarantees', 259.}
rules of law binding upon States…emanate from their own free will” represents the cornerstone of international law and State sovereignty. Despite the fact that the regime established by the Rome Statute deals with an issue that has gripped the conscience of the international community for several decades, it is only binding on those States that have agreed to be bound by it. The will of States encapsulates their needs and interests. In essence, the whole notion of the language of State sovereignty, expounded at the beginning of this thesis, finds its expression within the context of positive law. The perfect example is provided by the Rome Statute negotiations where States’ delegates engaged in discussions, suggestions and proposals about the extent of the powers to be granted to the new Court. How far were States willing to compromise and how much of their interests and authority were they able to consensually give up? This is the extent of positive law, reflecting the real measure of realpolitik and interests.

It is possible to reach the conclusion that both natural law and positive law have actually contributed to the international criminal law regime established by the Rome Statute. Natural law, characterized by its idealistic and universal values, has provided the substance of the regime; the protection of human dignity and integrity transcends cultures, societies, nations and norms. If a question is asked as to why this is done or why it is necessary that human dignity and integrity is protected, with guarantees of justice if violated, it would be difficult to articulate a rational and coherent answer. Indeed, it would be difficult to articulate answers that are consistent with one another.

When the maxim “never again” was formulated with reference to the mass atrocities perpetrated during World War II, the substance of natural law was behind it and prompted nations to come together to ensure that “never again” became a reality. However, positive law is playing a part too because it provides the form; this form manifests itself through the will of the States and leads to the creation of international law, the Rome Statute, that is established in a way that suits the community of nations. The Rome Statute, in essence, is a perfect marriage of form and substance. It is full of compromises but it is also full of promises. The reminder that States have a duty to

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712 The Case of the S.S. Lotus, Series A No. 10, 7 September 1927 (PCIJ).
prosecute but allowing them to exercise discretion whether or not they implement or act on such duty, is a compromise in favour of the State. Allowing the State to exercise primary jurisdiction is another compromise, and that is the same for the continuing use of national laws in the context of cooperation. These were the compromises in exchange for a step forward in the fight against impunity. This is also a reminder that international law develops incrementally, from one degree to the next, over a very long period of time. This is not to claim that there will be a return to natural law and to some fundamental values that cannot be logically and conclusively explained, but it is a re-balancing exercise that seeks to act as a persuasive tool to identify the correct balance between the rights of individuals on the one hand and the perpetrators who shield behind the veil of State sovereignty on the other.

By no means, the symbolism attached to the creation of the ICC is very strong because, by accepting such an institution, with all the rules that accompany it, States appear to agree with two specific propositions: first of all, nobody is entitled to perpetrate crimes against individuals on the basis that they have the power or authority to do so; secondly, nobody is entitled to escape criminal liability on the basis of a claim of protection conferred to them by State sovereignty. However, despite the influence of the human rights movement, sovereignty is still a concept that is capable of eluding people. This is because, even though it is recognised that sovereignty is not synonymous with absolute power, the internal governing regime tends to set its own laws, policies and objectives.

On the face of it, therefore, it appears that such an overwhelming acceptance of the Rome Statute has led to a synchronised approach between the State and the new international criminal law regime. However, domestic compliance to the Rome Statute has been far from perfect and questions still remain as to the reasons for an international piece of legislation which leaves far too much discretion to the State. There is no evidence that the existence of the Rome Statute or the ICC serve as deterrence to the perpetration of international crimes. There is some evidence though, that more has to be done to encourage States to take more control over the prosecution of crimes, to cooperate with the Court and to enable them to become proactive in order not to overburden the ICC.
5.3 Considerations for future developments

5.3.1 Proactive complementarity

The role of the ICC is to complement domestic jurisdictions and its role is vital towards ending the culture of impunity that has been tolerated for so long. However, if one of the aims of complementarity is its role as a ‘process of norm internalization’\textsuperscript{715}, then all member States should, in theory, be empowered to participate equally and achieve a similar level of internalization in order to establish coherent and effective domestic implementations of international criminal law. The prevailing, shared and agreed meaning of complementarity is that primary responsibility for the investigation and prosecution of international crimes rests with the State; therefore “...their capacity to do so should be strengthened”\textsuperscript{716}.

The notion that the member States’ capacity to investigate and prosecute should be strengthened may be interpreted as the need for a structured and methodological approach to examine the specific circumstances of the State and provide appropriate assistance for that State to meet its demands under international law. The idea that all States are equal is not the same as the notion that all States are sufficiently developed and evolved to meet the demands of international criminal law. This is even more so in the case of States that, through the principle of self-determination, have acquired independent sovereign status. Just like the case from Kenya reported in this thesis, these new States, emerging from long periods of European governance, had to automatically conform to the State’s model created by international law, and heavily influenced by the European State, irrespective of the fact that this model may well clash with the local culture and tradition\textsuperscript{717}. Also, a number of States still hold on very tightly to a classical conception of sovereignty, where any notion of interference in the internal affairs of

\textsuperscript{715} See Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions, 332-39.
\textsuperscript{716} Ibid, 333.
\textsuperscript{717} The principle of self-determination was considered so important that it was incorporated in the U.N. Charter under Articles 1, 55 and 73, although there has been much academic criticism regarding its interpretation and its often cited connection to political independence (see Higgins, Problems and Process: International Law and How We Use It 111-127. Moreover, in order to help certain territories and facilitate their transition process, a system of international trusteeship was created under Chapter XII of the U.N. Charter. Of the original eleven territories placed under this trusteeship system, all of them have either become independent or have associated themselves with a State, leading to the end of the trusteeship system in 1994. For a discussion on the experience of some specific African States, see N.L. Wallace-Bruce, ‘Of Collapsed, Dysfunctional and Disoriented States: Challenges to International Law’, Netherlands International Law Review, 47/01 (2000), 53-73.
their own State is practically unthinkable, even if the nature of the interference is to protect fundamental human rights.

Moreover, the principle of sovereign equality established in the UN Charter allows States to acquire a specific set of juridical rights. At the time, the principal aim was the establishment of the juridical principle of sovereign equality. It was the conviction that all States should be able to participate in international law making, either multilaterally or bilaterally, and that no State should interfere in the internal affairs of other States. Nevertheless, the principle of sovereign equality must be able to create and represent a fair and just international community\textsuperscript{718}, capable of offering not only the same level of optimal conditions to achieve stability and well-being, necessary for peaceful and friendly relations among States\textsuperscript{719}, but also stability and well-being within the boundaries of the State.

In an interview given in 2011 by Cristina Pellandini, head of the ICRC Advisory Service on international humanitarian law, she emphasised the role of States and domestic implementation of necessary legislation in order to make it possible for domestic courts to prosecute:

Pushing forward the enactment of such legislation requires close cooperation between many different entities, both within the government and civil society. National committees for the implementation of international humanitarian law, because they are inter-ministerial or inter-institutional working groups, bringing together various national agencies with responsibilities in the field of international humanitarian law, have proved to be a very useful mechanism. Their main purpose is to advise and assist the government in implementing and spreading knowledge of international humanitarian law\textsuperscript{720}.

If the ICC coalition is serious regarding the principle of complementarity, then a model could be put in place to raise awareness of the duty to investigate and prosecute, enabling States to internalize international criminal law effectively, but remaining sensitive to the principles of State sovereignty and non-intervention. This approach to complementarity is proactive\textsuperscript{721}, in the sense that it positively encourages the national

\textsuperscript{718} See Franck, \textit{Fairness in International Law and Institutions}.

\textsuperscript{719} Article 55 U.N. Charter

\textsuperscript{720} http://www.icrc.org/eng/resources/documents/interview/2010/penal-repression-interview-2010-10-26.htm (last accessed on 3rd November 2011)

\textsuperscript{721} The term ‘proactive complementarity’ was first used by W. Burke-White, ‘Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice’, \textit{Harvard International Law Journal}, 49 (2008), 53-108. He points out to the limited legal mandate and
jurisdictions to implement international criminal law. It should not wait for international crimes to occur before putting the necessary legislation in place, only to get caught by the inability or unwillingness mechanism, and eventually paving the way for the ICC to take over jurisdiction. Given the number of States that have not yet implemented the Rome Statute at the domestic level, this model would also help to dismiss feelings of distrust towards international institutions. Also, the ICC outreach programme, which normally takes place in post-conflict areas, aims at educating and empowering the victims of human rights violations. The aim of the Programme is to make the ICC role and judicial activities understood by a variety of audiences, so that the victims of international crimes are made aware of the procedures and investigations that need to take place to bring perpetrators to justice. Together with a strategy of External Relations and Public Information, it aims at communicating actively with the relevant communities in order to build support and maintain a high level of cooperation. It is submitted that this programme should be extended to situations where there is a history of political unrest or in transitional societies. The aim is to better equip the lawyers, the judiciary, and government officials and to instil concepts of justice and the rule of law in order to deal with impunity for international crimes. Moreover, given that the ICC can only deal with the most serious offenders, other perpetrators could potentially escape criminal liability if the State does not have the adequate domestic laws to investigate and prosecute them. In this case, the ICC OTP, whilst carrying their own investigations in a State where violations have taken place, could offer assistance to the local judges and lawyers to enable them to prosecute other

resources available to the ICC, making its mission to fulfil the world’s high expectations impossible (p. 54).

722 It seems that this idea was also supported by the ICC prosecutor, who, back in 2004 pointed to the need “...to take a positive approach to complementarity. Rather than competing with national systems for jurisdiction, we will encourage national proceedings as soon as possible”, Luis Moreno-Ocampo, ICC Prosecutor, Statement of the Prosecutor to Diplomatic Corps (The Hague, 12 February 2004), available at http://www.iccnow.org/?mod=prosecutor&uiductp=14&order=dateasc (last accessed on 6 June 2012).

723 According to the latest figures form the ICC Coalition, there are now 139 signatories and 121 ratifications. Of these, sixty five States have enacted domestic legislation containing either complementarity or cooperation provisions, or both; thirty five States have some form of advanced draft implementing legislation (http://www.iccnow.org/?mod=romeratification&uiductp=20&show=all, last accessed on 15 October 2012).

724 See http://www.icc-cpi.int/_menus/ICC/Structure+of+the+Court/Outreach/ (last accessed on 15 October 2012).

proponents. This process should be carried out with sensitivity towards the local customs and working practices, and should lead to a stronger dialogue with local human rights NGOs and agencies in order to gain trust and dispel doubts and concerns of a post-colonial interference practice. Moreover, this approach would support the development of dialogue at the national level, and therefore enables the psychological processes that are needed to rethink the State’s relationship to its citizens at the local level.

Proactive complementarity also supports the emerging doctrine of earned sovereignty, an approach that aims to resolve “...sovereignty-based conflicts by providing for the managed devolution of sovereign authority and functions from a state to a substate entity.” This approach rests on the notion that the traditional principle of State sovereignty (or the acquisition of sovereignty through self-determination for many former colonies) may not provide the best basis to enable the concerned State to exercise its sovereign powers according to a more contemporary understanding of sovereignty.

According to this modern understanding of sovereignty, the development of domestic legislative procedures and judicial processes will be more in line with modern conceptions of human rights protection and effective punishment for international

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726 Ibid, 58. The situation in the Democratic Republic of Congo in fact reflected the willingness and eagerness of the local judicial patterns to work close with and be assisted by the OTP; however, this cooperation did not take place, despite the fact that both sides (OTP and local judiciary) were keen for this to happen.

727 The claims of post-colonialism through the international criminal law regime have been amongst the main criticisms, especially as it tends to be developing countries that tend to attract the attention of the ICC. See, for example, R. Cryer, ‘Sudan, Resolution 1593, and International Criminal Justice’, Leiden Journal of International Law, 19 (2006), 195-222. The indictment of Sudan’s President Al Bashir led the Sudanese government to declare that the ICC itself was a mechanism which perpetuated colonial dominance, “… It is a tool for those who believe that they have a monopoly on virtues in this world, rife with injustice and tyranny” (p.219). However, as the Congo situation demonstrated (above, fn. 678) it would be presumptuous to assume that all States would be against closer collaboration with outside agencies and OTP officials, in order to improve their domestic situations (including impunity and deterrence).

crimes. This can be achieved through closer collaboration between the State, the OTP and NGOs. The OTP’s collaboration could be strengthened at the time of any investigations are carried out by the OTP, therefore requiring more resources in order not to detract from the necessary investigations in the case of the most serious offenders. The development of internal legal structures, in order to enable the State to carry out investigations and prosecutions of international crimes, will occur through a joint effort, thus fulfilling the mandate that primary jurisdiction rests with the State.

Cherif Bassiouni, an eminent Professor of International Human Rights Law with vast expertise in international criminal law, has recognised the need to make national prosecutions of international crimes a reality. In a speech at an international law conference in Washington D.C. in 2011 he expressed doubts concerning the success of international criminal tribunals. In particular, he recognised that the ICC will not be able to meet the expectation of the international community, mainly because of the “exorbitant” economic and administration infrastructure, citing 1,100 staff, a budget of $145 million (2010 only) and only four cases in 7 years since it started operating. He concluded, perhaps surprisingly, that it will be the States that will take up the responsibility for the prosecution of international crimes.

At the same time, one of the key points that emerged from the ICC Review conference is the realisation that national jurisdictions need to be strengthened. To this end a new resolution on complementarity was adopted, which, inter alia, reaffirmed that effective prosecution for international crimes will be ensured by taking measures at national level and encouraged the Court, State parties, international organisations and civil society to explore ways to enhance the capacity of national jurisdictions to prosecute international crimes.

729 A summary of the speech can be found at http://www.insidejustice.com/law/index.php/intl/2010/03/31/p256 (last accessed on 10 January 2011).
730 Ibid
731 The first ever ICC Review Conference took place in Kampala, Uganda, from 31 May to 11 June 2010. The Assembly adopted resolution ICC-ASP/9/Res.3, which requested the Secretariat of the Assembly of States Parties “…in accordance with resolution ICC-ASP/2/Res.3… to facilitate the exchange of information between the Court, States Parties and other stakeholders, including international organizations and civil society, aimed at strengthening domestic jurisdictions, and requests the Secretariat of the Assembly of States Parties to report to the tenth session of the Assembly on progress in this regard”.

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5.3.2 The future of State sovereignty and ICL

The aim of this thesis was to discover something new about State sovereignty in light of its interaction with the new international criminal law regime. This aim in itself can be a daunting task given the plethora of academic writing on the subject of sovereignty itself and the challenges already encountered by State sovereignty, either in the shape of human rights\textsuperscript{732} or globalization\textsuperscript{733}. However, this is not to say that there is any agreement that these phenomena have undermined or curbed State sovereignty. In fact, there are some academic opinions that contend that these events can actually transform State sovereignty. According to Nagan & Hammer, “sovereignty may indeed be strengthened as it changes to meet new needs and opportunities”;\textsuperscript{734} Melandri asserts that sovereignty is not taken away, but it is being transformed\textsuperscript{735}; in the context of international economic law and the effects of the WTO Agreements on sovereignty, Raustalia writes about sovereignty being “enabled rather than weakened by these cooperative efforts”;\textsuperscript{736} Raustalia in fact claims that any debate about the demise of sovereignty is really about the power to make decisions, and this power is never relinquished on a permanent basis\textsuperscript{737}. States are in fact free to leave organisations and international regimes, being the EU and even the Rome Regime\textsuperscript{738}. It is therefore a fallacy to contend that international organizations are jeopardizing the sovereign State because States scrutinize and challenge the powers that it entrusts to international


\textsuperscript{733} Nagan and Hammer contend, for example, that certain elements that support the globalization phenomenon, such as technological advances, communication, business organisation, terrorism and organised crime all undermine the territorial boundaries of the State, see W. P. Nagan and C. Hammer, 'The Changing Character of Sovereignty in International Law and International Relations', \textit{Columbia Journal Of Transnational Law}, 43/Part 1 (2004), 141-88 at 155. See also P.R. Trimble, 'Globalization, International Institutions and the Erosion of National Sovereignty and Democracy', \textit{Michigan Law Review}, 95 (1997), 1944-1969.

\textsuperscript{734} Nagan and Hammer, 'The Changing Character of Sovereignty in International Law and International Relations', 155.


\textsuperscript{736} K. Raustalia, 'Rethinking the Sovereignty Debate in International Economic Law', \textit{Journal of International Economic Law}, 6 (2003), 841-78 at 857.

\textsuperscript{737} Ibid, 847.

\textsuperscript{738} See Article 50 TEU (as amended by the Lisbon Treaty) and Article 127 Rome Statute.
organizations. This is also in line with the UN Charter’s affirmation that it is the peoples that determine the course of actions taken by the States, as Nagan & Hammer explain

...the people of the world are the ultimate source of international authority; moreover, the people have determined, or made an affirmative decision, to adopt a Charter of the UN because of certain problems and conditions of global salience. The member States comprising the UN are sovereign; the idea that sovereign legitimacy and authority under the Charter is derived from the Peoples ultimately assumes that in the international community, sovereign national authority is itself in some degree constrained by the authority of the people it seeks to symbolize or represent.\(^{739}\)

This leads to another important point for discussion. In chapter two of this thesis the analysis revealed a conceptual gap between State sovereignty and the international criminal law regime, due to the disparities of the aims and objectives shared by them. Academics like Allott propose that it is only when the territorial boundaries are removed that the international society, made up of people and not States, can truly realize itself and achieve much more than could be achieved whilst the territorial boundaries remain in place.\(^{740}\) However, the notion of an international society is not a practical or credible one, mainly because classical theories of sovereignty are so entrenched in the history of humankind that it would be impossible to create. Raustalia’s proposition, mentioned above, that the concept of sovereignty can be enhanced through greater cooperation, can be applied in the context of the new international criminal law regime. However, it is only when the sovereign States assimilate and internalise the concept of ending impunity for international crimes that sovereignty can be enhanced and strengthened. It is only then that the State will be truly transformed, namely when the consciousness of the international community is acquired by the State’s citizens and then transferred to the governing authority. However, for this process to work effectively, given that the ICC has complementary jurisdiction to the national ones, the relationship between the horizontal paradigm and the vertical one need to be appraised and clarified, especially in view of potentially conflicting norm concerning immunity existing within international customary law and the arrest and surrender of an incumbent Head of State. Essentially, State sovereignty in the context of the traditional interstate regime needs to be reconciled with State sovereignty within the


\(^{740}\) Allott, Eunomia: New Order for a New World, 298.
ambit of the new international criminal law regime. One way to move this forward is to de-fragment international law so that it will apply coherently horizontally and vertically. More specifically, one way to carry this process out effectively is to engage with Article 119 of the Rome Statute in order to involve the ICJ constructively towards a measured solution of the immunity question.

741 The issue of fragmentation of international law has arisen out of the expansion and diversification of international law as a concern that there ought to be a coherent approach and application of international rules in every applicable area of activity within the international community. However, this is not to say that fragmentation should be seen always in a negative light, because the phenomenon can also be viewed in a positive light by reaffirming the vitality and evolution of international law as a living mechanism; see ILC Report 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’, finalized by M. Koskenniemi, UNGA A/CN.4/L.682 (13 April 2006); S. Singh, The Potential of International Law’, 24 Leiden Journal of International Law (2011), 23-43.
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Appendix
**International Criminal Court**
*(Consequential Amendments) Act 2002, No. 42*

An Act to amend the *Criminal Code Act 1995* and certain other Acts in consequence of the enactment of the *International Criminal Court Act 2002*, and for other purposes

**Subdivision C – Crimes against humanity**

**268.8 Crime against humanity – murder**

A person (the *perpetrator*) commits an offence if:

(a) the perpetrator causes the death of one or more persons; and
(b) the perpetrator’s conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for life.

**268.9 Crime against humanity – extermination**

(1) A person (the *perpetrator*) commits an offence if:

(a) the perpetrator causes the death of one or more persons; and
(b) the perpetrator’s conduct constitutes, or takes place as part of, a mass killing of members of a civilian population; and
(c) the perpetrator’s conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for life.

**268.10 Crime against humanity – enslavement**

(1) A person (the *perpetrator*) commits an offence if:

(a) the perpetrator exercises any or all of the powers attaching to the right of ownership over one or more persons (including the exercise of a power in the course of trafficking in persons, in particular women and children); and
(b) the perpetrator’s conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 25 years.

(2) In subsection (1):

*exercises any or all of the powers attaching to the right of ownership* over a person includes purchases, sells, lends or barters a person or imposes on a person a similar deprivation of liberty and also includes exercise a power arising from a debt incurred or contract made by a person.
268.11 Crime against humanity – deportation or forcible transfer of population

(1) A person (the perpetrator) commits an offence if:
(a) the perpetrator forcibly displaces one or more persons, by expulsion or other coercive acts, from an area in which the person or persons are lawfully present to another country or location; and
(b) the forcible displacement is contrary to paragraph 4 of article 12 or article 13 of the Covenant; and
(c) the perpetrator knows of, or is reckless as to, the factual circumstances that establish the lawfulness of the presence of the person or persons in the area; and
(d) the perpetrator’s conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 17 years.

(2) Strict liability applies to paragraph (1)(b).
(3) In subsection (1):

forcibly displaces one or more persons includes displaces one or more persons:

(a) by threat of force or coercion (such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power) against the person or persons or against another person; or
(b) by taking advantage of a coercive environment.

268.12 Crime against humanity – imprisonment or other severe deprivation of physical liberty

(1) A person (the perpetrator) commits an offence if:
(a) the perpetrator imprisons one or more persons or otherwise severely deprives one or more persons of physical liberty; and
(b) the perpetrator’s conduct violates article 9, 14 or 15 of the Covenant; and
(c) the perpetrator’s conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 17 years.

(2) Strict liability applies to paragraph (1)(b).

268.13 Crime against humanity – torture

A person (the perpetrator) commits an offence if:
(a) the perpetrator inflicts severe physical or mental pain or
suffering upon one or more persons who are in the custody or under the control of the perpetrator; and
(b) the pain or suffering does not arise only from, and is not inherent in or incidental to, lawful sanctions; and
(c) the perpetrator’s conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 25 years.

268.14 Crime against humanity – rape

(1) A person (the perpetrator) commits an offence if:
(a) the perpetrator sexually penetrates another person without the consent of that person; and
(b) the perpetrator knows of, or is reckless as to, the lack of consent; and
(c) the perpetrator’s conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 25 years.

(2) A person (the perpetrator) commits an offence if:
(a) the perpetrator causes another person to sexually penetrate the perpetrator without the consent of the other person; and
(b) the perpetrator knows of, or is reckless as to, the lack of consent; and
(c) the perpetrator’s conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 25 years.

(3) In this section:
*consent* means free and voluntary agreement.

The following are examples of circumstances in which a person does not consent to an act:
(a) the person submits to the act because of force or the fear of force to the person or to someone else;
(b) the person submits to the act because the person is unlawfully detained;
(c) the person is asleep or unconscious, or is so affected by alcohol or another drug as to be incapable of consenting;
(d) the person is incapable of understanding the essential nature of the act;
(e) the person is mistaken about the essential nature of the act (for example, the person mistakenly believes that the act is for medical or hygienic purposes);
(f) the person submits to the act because of psychological oppression or abuse of power;
(g) the person submits to the act because of the perpetrator taking advantage of a coercive environment.

(4) In this section:
*sexually penetrate* means:
(a) penetrate (to any extent) the genitalia or anus of a person by any part of the body of another person or by any object manipulated by that other person; or
(b) penetrate (to any extent) the mouth of a person by the penis of another person; or
(c) continue to sexually penetrate as defined in paragraph (a) or (b).
(5) In this section, being reckless as to a lack of consent to sexual penetration includes not giving any thought to whether or not the person is consenting to sexual penetration.
(6) In this section, the genitalia or other parts of the body of a person include surgically constructed genitalia or other parts of the body of the person.

268.15 Crime against humanity – sexual slavery

(1) A person (the perpetrator) commits an offence if:
(a) the perpetrator causes another person to enter into or remain in sexual slavery; and
(b) the perpetrator intends to cause, or is reckless as to causing, that sexual slavery; and
(c) the perpetrator’s conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 25 years.

(2) For the purposes of this section, sexual slavery is the condition of a person who provides sexual services and who, because of the use of force or threats:
(a) is not free to cease providing sexual services; or
(b) is not free to leave the place or area where the person provides sexual services.

(3) In this section:
sexual service means the use or display of the body of the person providing the service for the sexual gratification of others.
threat means:
(a) a threat of force; or
(b) a threat to cause a person’s deportation; or
(c) a threat of any other detrimental action unless there are reasonable grounds for the threat of that action in connection with the provision of sexual services by a person.

268.16 Crime against humanity – enforced prostitution

(1) A person (the perpetrator) commits an offence if:
(a) the perpetrator causes one or more persons to engage in one or more acts of a sexual nature without the consent of the person or persons, including by being reckless as to whether there is consent; and
(b) the perpetrator intends that he or she, or another person, will obtain pecuniary or other advantage in exchange for, or in connection with, the acts of a sexual nature; and
(c) the perpetrator’s conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 25 years.
(2) In subsection (1):

**consent** means free and voluntary agreement. The following are examples of circumstances in which a person does not consent to an act:
(a) the person submits to the act because of force or the fear of force to the person or to someone else;
(b) the person submits to the act because the person is unlawfully detained;
(c) the person is asleep or unconscious, or is so affected by alcohol or another drug as to be incapable of consenting;
(d) the person is incapable of understanding the essential nature of the act;
(e) the person is mistaken about the essential nature of the act (for example, the person mistakenly believes that the act is for medical or hygienic purposes);
(f) the person submits to the act because of psychological oppression or abuse of power;
(g) the person submits to the act because of the perpetrator taking advantage of a coercive environment.

**threat of force or coercion** includes:
(a) a threat of force or coercion such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power; or
(b) taking advantage of a coercive environment.

(3) In subsection (1), being reckless as to whether there is consent to one or more acts of a sexual nature includes not giving any thought to whether or not the person or persons are consenting to engaging in the act or acts of a sexual nature.

**268.17 Crime against humanity – forced pregnancy**

(1) A person (the **perpetrator**) commits an offence if:
(a) the perpetrator unlawfully confines one or more women forcibly made pregnant; and
(b) the perpetrator intends to affect the ethnic composition of any population or to destroy, wholly or partly, a national, ethnical, racial or religious group, as such; and
(c) the perpetrator’s conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 25 years.

(2) In subsection (1):

**forcibly made pregnant** includes made pregnant by a consent that was affected by deception or by natural, induced or age-related incapacity.

(3) To avoid doubt, this section does not affect any other law of the Commonwealth or any law of a State or Territory.

**268.18 Crime against humanity – enforced sterilisation**

(1) A person (the **perpetrator**) commits an offence if:
(a) the perpetrator deprives one or more persons of biological reproductive capacity; and
(b) the deprivation is not effected by a birth-control measure that has a non-permanent effect in practice; and
(c) the perpetrator’s conduct is neither justified by the medical or hospital treatment of the person or persons nor carried out with the consent of the person or persons; and
(d) the perpetrator’s conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 25 years.

(2) In subsection (1):

consent does not include consent effected by deception or by natural, induced or age-related incapacity.

268.19 Crime against humanity – sexual violence

(1) A person (the perpetrator) commits an offence if:

(a) the perpetrator does either of the following:
   (i) commits an act or acts of a sexual nature against one or more persons;
   (ii) causes one or more persons to engage in an act or acts of a sexual nature;

without the consent of the person or persons, including by being reckless as to whether there is consent; and

(b) the perpetrator’s conduct is of a gravity comparable to the offences referred to in sections 268.14 to 268.18; and

(c) the perpetrator’s conduct is committed intentionally or knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 25 years.

(2) Strict liability applies to paragraph (1)(b).

(3) In subsection (1):

consent means free and voluntary agreement.

The following are examples of circumstances in which a person does not consent to an act:

(a) the person submits to the act because of force or the fear of force to the person or to someone else;
(b) the person submits to the act because the person is unlawfully detained;
(c) the person is asleep or unconscious, or is so affected by alcohol or another drug as to be incapable of consenting;
(d) the person is incapable of understanding the essential nature of the act;
(e) the person is mistaken about the essential nature of the act (for example, the person mistakenly believes that the act is for medical or hygienic purposes);
(f) the person submits to the act because of psychological oppression or abuse of power;
(g) the person submits to the act because of the perpetrator taking advantage of a coercive environment.

threat of force or coercion includes:
(a) a threat of force or coercion such as that caused by fear of
violence, duress, detention, psychological oppression or
abuse of power; or
(b) taking advantage of a coercive environment.
(4) In subsection (1), being reckless as to whether there is consent to
one or more acts of a sexual nature includes not giving any thought
to whether or not the person is consenting to the act or acts of a
sexual nature.

268.20 Crime against humanity – persecution

(1) A person (the perpetrator) commits an offence if:
(a) the perpetrator severely deprives one or more persons of any
of the rights referred to in paragraph (b); and
(b) the rights are those guaranteed in articles 6, 7, 8 and 9,
paragraph 2 of article 14, article 18, paragraph 2 of article 20,
paragraph 2 of article 23 and article 27 of the Covenant; and
(c) the perpetrator targets the person or persons by reason of the
identity of a group or collectivity or targets the group or
collectivity as such; and
(d) the grounds on which the targeting is based are political,
racial, national, ethnic, cultural, religious, gender or other
grounds that are recognised in paragraph 1 of article 2 of the
Covenant; and
(e) the perpetrator’s conduct is committed in connection with
another act that is:
(i) a proscribed inhumane act; or
(ii) genocide; or
(iii) a war crime; and
(f) the perpetrator’s conduct is committed intentionally or
knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 17 years.

(2) Strict liability applies to:
(a) the physical element of the offence referred to in
paragraph (1)(a) that the rights are those referred to in
paragraph (1)(b); and
(b) paragraphs (1)(b) and (d).

268.21 Crime against humanity – enforced disappearance of persons

(1) A person (the perpetrator) commits an offence if:
(a) the perpetrator arrests, detains or abducts one or more
persons; and
(b) the arrest, detention or abduction is carried out by, or with
the authorisation, support or acquiescence of, the government
of a country or a political organisation; and
(c) the perpetrator intends to remove the person or persons from
the protection of the law for a prolonged period of time; and
(d) the perpetrator’s conduct is committed intentionally or
knowingly as part of a widespread or systematic attack
directed against a civilian population; and
(e) after the arrest, detention or abduction, the government or
organisation refuses to acknowledge the deprivation of
freedom of, or to give information on the fate or whereabouts of, the person or persons.

Penalty: Imprisonment for 17 years.

(2) A person (the perpetrator) commits an offence if:
(a) one or more persons have been arrested, detained or
abducted; and
(b) the arrest, detention or abduction was carried out by, or with
the authorisation, support or acquiescence of, the government
of a country or a political organisation; and
(c) the perpetrator refuses to acknowledge the deprivation of
freedom, or to give information on the fate or whereabouts,
of the person or persons; and
(d) the refusal occurs with the authorisation, support or
acquiescence of the government of the country or the
political organisation; and
(e) the perpetrator knows that, or is reckless as to whether, the
refusal was preceded or accompanied by the deprivation of
freedom; and
(f) the perpetrator intends that the person or persons be removed
from the protection of the law for a prolonged period of time;
and
(g) the arrest, detention or abduction occurred, and the refusal
occurs, as part of a widespread or systematic attack directed
against a civilian population; and
(h) the perpetrator knows that the refusal is part of, or intends the refusal to be part of, such an
attack.

Penalty: Imprisonment for 17 years.

268.22 Crime against humanity – apartheid

A person (the perpetrator) commits an offence if:

(a) the perpetrator commits against one or more persons an act
that is a proscribed inhumane act (as defined by the
Dictionary) or an act that is of a nature and gravity similar to
any such proscribed inhumane act; and
(b) the perpetrator’s conduct is committed in the context of an
institutionalised regime of systematic oppression and
domination by one racial group over any other racial group or
groups; and
(c) the perpetrator knows of, or is reckless as to, the factual
circumstances that establish the character of the act; and
(d) the perpetrator intends to maintain the regime by the conduct;
and
(e) the perpetrator’s conduct is committed intentionally or
knowingly as part of a widespread or systematic attack directed against a civilian population.
Penalty: Imprisonment for 17 years.

268.23 Crime against humanity – other inhumane act

A person (the perpetrator) commits an offence if:
(a) the perpetrator causes great suffering, or serious injury to
body or to mental or physical health, by means of an
inhumane act; and
(b) the act is of a character similar to another proscribed
inhumane act as defined by the Dictionary; and
(c) the perpetrator’s conduct is committed intentionally or
knowingly as part of a widespread or systematic attack directed against a civilian population.

Penalty: Imprisonment for 25 years.