Universiteit
Leiden
The Netherlands

The Territorial Jurisdiction of the International Criminal Court: Certain Contested Issues

Vagias, M.

Citation
Vagias, M. (2011, May 25). *The Territorial Jurisdiction of the International Criminal Court: Certain Contested Issues*. Bynkers Hoek Publishing. Retrieved from https://hdl.handle.net/1887/17669

Version:	Not Applicable (or Unknown)
License:	Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden
Downloaded from:	https://hdl.handle.net/1887/17669

Note: To cite this publication please use the final published version (if applicable).

MICHAIL VAGIAS

/ THE TERRITORIAL JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

CERTAIN CONTESTED ISSUES

BYNKERS
HOEK
PUBLISHING

PH. D. THESIS

THE TERRITORIAL JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

CERTAIN CONTESTED ISSUES

PROEFSCHRIFT

ter verkrijging van
de graad van Doctor aan de Universiteit Leiden,
op gezag van Rector Magnificus prof. mr. P.F. van der Heijden,
volgens besluit van het College voor Promoties
te verdedigen op woensdag 25 mei 2011
klokke 16.15 uur

door

Michail Vagias
geboren te Thessaloniki, Greece
in 1980

Promotiecommissie:

Promotor:	prof. dr. C.J.R. Dugard
Co-Promotor:	dr. L.J. van den Herik
Overige leden:	prof. dr. L. Zegveld
	prof. dr. C. Stahn
	prof. dr. E. van Sliedregt (Vrije Universiteit Amsterdam)
	dr. C.M.J. Ryngaert (K. U. Leuven, Belgium en Universiteit Utrecht)

Design cover: © Studio Meike Ziegler, Amsterdam

This Ph.D. Thesis was financed by the
State Scholarship Foundation of the Hellenic Republic (Greece)
(Scholarship Program for International Law Studies Abroad, 2007-2010)

ACKNOWLEDGMENTS

During the five years of this thesis (2005-2010), the Center of International and European Economic Law in Thessaloniki, the Peace Palace Library (especially Niels van Tol), the New Business School, Amsterdam, The Hague University of Applied Sciences and the Bynkershoek Institut, The Hague helped each in its own way in its production. I am grateful for the financial support of the Greek State Scholarship Foundation (2007-2010) and Prof. Stilianos Perrakis, for his co-operation as the Scholarship Foundation's Academic Supervisor.

I was extremely fortunate to have John Dugard as my supervisor and Larissa van den Herik as co-supervisor. I am thankful for the discussions of different aspects of my work and the ICC in general with Judge Georghios Pikis, as well as Virginia Lindsay and Melanie O'Brien.

My gratitude for their unwavering support and encouragement to all my friends, including Magnus Lejon, Linus Knutsson and Dennis Persson; from Greece, Hara Aroni, Alex Sarris, Christos Kleisiaris, Sotiris Tezias, Nicholas Bezirgiannis and Agapi Gouziouri, who always kept in touch. The Kyriazis family, Ioannis Kyriazis and Diah Tan, as well as Vasiliki Magoula helped a friend in need of getting out of the phd-way of life.

I was lucky to benefit from the wisdom of Paroula Perraki and Costas Antonopoulos. They made sure I stayed the course in times of ambivalence and doubt. The last few years a number of people put things in perspective; my students, my colleagues at The Hague, including William Worster, Ernst van Bemmelen van Gent and Joris Sprakel from the Bynkershoek Institut, who also assisted greatly with the Dutch summary and the editing of this book. On that note, a warm 'thank you' goes also to Sotiria Tsoukala.

To my Ph.D. witnesses and friends Axelle Cartier and David Dekker I owe a special debt of gratitude. Last, Thomas Skouteris is largely responsible as a mentor, a friend and a colleague for forming my legal thinking – and professional development.

My family was the solid foundation that made this thesis possible. Nicholas, Niki, Vagias and Sophia Vagias, Anastasios, Cristie, Demosthenis, Barbara, Athena and the late Thomas Teneketzis, as well as Maria Kirtsani, Dimitris Kirtsanis and Stella Stavrousis; they gave me their love, support and unconditional faith in my abilities. Thank you.

The memory of my father, Stergios Vagias, steeled my determination to make this thesis a reality. I will always remember him lovingly.

My sister Efi reminded me through her example that the only way to move forward in life is with hope, perseverence and a good cheer. Words do not suffice to express my gratitude and love for her and my mother, Aliki.

M.V., The Hague, 13 March 2011

This Ph.D. Thesis is dedicated to my mother, Aliki,
my sister, Efthimia
and the memory of my father, Stergios.

TABLE OF CONTENTS

CHAPTER 1 /
INTRODUCTION

The adoption of the Rome Statute of the International Criminal Court on 17 July 1998[1] constitutes a landmark in the historical development of international law, and more specifically, of international criminal law.

The birth of the International Criminal Court was not uneventful. Historical accounts in international literature contain examples of earlier – failed – attempts to create a permanent international criminal institution.[2] The issue received particular attention following the Nuremberg trials, although ultimately the Cold War led to a stalemate that lasted for almost 50 years.[3] It was not until the end of the Cold War that there was sufficient momentum again in the international community to seriously contemplate the creation of appropriate international mechanisms to address large scale atrocities. The events in the former Yugoslavia and Rwanda in the 1990's proved catalytic in this respect. The creation of the International Criminal Tribunals for Yugoslavia[4] and Rwanda[5] by the UN Security Council served as evidence that international criminal justice is possible and strengthened the voices calling for the creation of a permanent International Criminal Court. However, the example of the Tribunals was not enough to assuage the concerns of the international community connected to the creation of this Court. In fact, it is a mark of the extensive legal, social and political difficulties attached to the ICC project that, even in this euphoric environment, it took nothing short of almost a decade of protracted, multilateral negotiations fueled by extensive civil society lobbying for the Court to become a reality.[6]

One of the most important objects of negotiation, the "question of questions of the entire project",[7] was the jurisdiction of the Court. Although the issue fluctuated significantly throughout the negotiating process, in the end the delegates at Rome opted mainly for territorial and nationality jurisdiction.[8] Universal jurisdiction was reserved solely for Security Council referrals, in an effort to gain support for the Court from more reluctant states.[9]

As a result, political expediency led to what seems to be, at first glance, a double paradox. On the one hand, the ICC Statute, one of the most recent international instruments for the repression of 'core crimes', provides for the jurisdiction of the first permanent International Criminal Court in world history not on the basis of the newest and most expansive rules on jurisdiction offered by the science of international law (e.g. universality, passive personality, custodial state jurisdiction), but rather on the basis of rules that exist approximately since the Peace of Westphalia, if not well before that.[10] The adoption of territoriality and nationality over the modern approaches to criminal jurisdiction are best attributable to what may be called the 'one step at a time' approach; create a Court first and make any improvements required later.

1 The Rome Statute of the Internatio*nal Cri*minal Court, July 7, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002) (hereinafter: the Rome Statute/ the ICC Statute).

2 Dominic McGoldrick, *Criminal Trials before International Tribunals: Legality and Legitimacy, in* 14 The Permanent International Criminal Court, Legal and Policy Issues 40 (2004); Mahmoud Ch. Bassiouni, *International Criminal Justice in Historical Perspective*, in International Criminal Law 32-39 (3rd ed. 2008); Robert Cryer, Prosecuting International Crimes 25 (2005); Bradley E. Berg, *The 1994 I.L.C. Draft Statute for an International Criminal Court: A Principled Appraisal of Jurisdictional Structure*, 28 Case W. Res. J. Int'l L. 221 (1996).

3 Antonio Cassese, *From Nuremberg to Rome: International Military Tribunals to the International Criminal Court*, in I The Rome Statute of the International Criminal Court: A Commentary 9-10 (A. Cassese et al. eds. 2002).

4 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827, 48 U.N. SCOR, U.N. Doc. S/RES/827 (1993) (hereinafter ICTY Statute).

5 Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, 49 U.N. SCOR, U.N. Doc. S/RES/955 (1994) (hereinafter: ICTR Statute).

6 Officially, at least, the ICC saga kicked off with G.A. Res. 44/39 ¶1, U.N. Doc. A/RES/44/39 (Dec. 4, 1989). *See infra* Part 3.1. in detail.

7 Hans-Peter Kaul & Claus Kress, *Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises*, 2 Y.B. Int'l Humanitarian Law 143, 145 (1999).

8 For the negotiations in Rome, see generally Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court, The Negotiating Process*, 93 Am. J. Int'L L. 2 (1999). *See infra* Part 3.4 in detail.

9 The Rome Statute, *supra* note 1, art. 13(b),12(2).

10 Reference is frequently made to the Digest of Justinian and the proposition that "one who administers justice beyond the limits of his territory may be disobeyed with impunity". *See* 1 The Digest of Justinian 42 (Theodor Mommsen & Paul Krueger eds. 1985); On the history of territorial jurisdiction see Henry S. Maine, *Ancient Law,* 98 (reprint 1986) (1905); Richard T. Ford, *Law's Territory (A History of Jurisdiction),* 97 Mich. L. Rev. 843 (1998-1999); Cedric Ryngaert, Jurisdiction in International Law, 44 (2008).

On the other hand, the International Criminal Court was ostensibly created as the guardian of certain values shared by the international community as a whole.[11] This guardian of community interests, however, will not – barring Security Council intervention – exercise jurisdiction on the basis of jurisdictional rules premised on principles of 'international solidarity'[12] and 'universality',[13] such that would guarantee equality before the law for all human beings on matters as important as genocide, war crimes and crimes against humanity. On the contrary, its jurisdiction will normally be based on the rule of territorial jurisdiction, a rule that played a leading role in the consolidation of the authority of the territorial sovereign during the rise of the Nation State.[14] Thus, it would seem that while the values are shared by all, the enforcement of such values on the international plane is reserved only for some, along the lines of traditional state consent doctrine.[15]

It would seem therefore that the Rome negotiations offered to the world an international mechanism for the protection of universal values through the use of sovereign tools of governance. This situation suggests that states have succeeded through the adoption of the Statute, in the name of the protection of community values, to assert once again indirectly, yet effectively, the prominence of state sovereignty on the international plane.

Naturally, although the selection of territoriality appears to be at odds with the progressive development of international law, it was a choice made in the framework of a greater compromise. The adoption of territoriality in article 12 of the Statute was not an isolated decision, but rather one of the many elements – along with complementarity and the transitional 7-year opt-out period for war crimes in article 124, to name a few – of the final 'package deal' made at the last possible moment in Rome.[16] After all, it is no secret that the Rome Statute demonstrates "an underlying tension between state sovereignty and the demands of international justice", "a contrast between consensualism and community interests."[17]

The solution finally adopted on territoriality is today contained in article 12(2) of the ICC Statute, which provides that, in the event of a state referral or action *proprio motu* by the Prosecutor, the Court has jurisdiction only if "the following States are Parties to this Statute or have accepted the jurisdiction of the

11 Otto Triffterer, *Preamble,* to Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article, 8-9, (O. Triffterer ed. 2nd ed. 2008), for a classification of these as "basic, inherent values of the international community as a whole." The Preamble of the Court is replete with such references, for example, "The States Parties to this Statute . . . . Recognizing that such grave crimes threaten the peace, security and well-being of the world . . . . "; Bassiouni, *supra* note 2, at 29 "The goals and purposes of the ICC, thus stated, reflect what international criminal justice is intended to embody as values and policies of the international community."

12 European Committee on Crime Problems, Extraterritorial Criminal Jurisdiction 26-27 (Council of Europe, 1990).

13 G.E. Langermeijer, *Le principe de territorialité, in* Le Droit Pénal International Recueil d' Études en hommage à Jacob Maarten Van Bemmelen, 21-22 (Jacob Maarten van Bemmelen 1965); Durmus Tezcan, Territorialité et conflits de juridiction en droit Pénal International 21 (1983); Iain Cameron, The Protective Principle of International Criminal Jurisdiction 22 (1994). *See infra* Chapter 2 in detail on the relationship between rules and principles.

14 Tezcan, *supra* note 13 at 77-78; Ford, *supra* note 10, at 866-868, 873-874; Walter Ullmann, *Roman Public Law and Medieval Monarchy: Norman rulership in Sicily,* in Jurisprudence in the Middle Ages 170 (1980), on royal territorial dominion as an opposite to papal authority. The use of territoriality as an instrument for the establishment of state secular jurisdiction as opposed to ecclesiastical or guild (trade) jurisdiction is further explained by 2 Paul Viollet, L' Histoire des institutions politiques et administratives de la France 453, (1890, reprint 1966); Adhémar Esmein, History of Continental Criminal Procedure with special reference to France 47-56 (1913); Carl-Ludwig Von Bar, A History of Continental Criminal Law 85-86 (1916); 3 Philip Hughes, A History of the Church 150-151 (1955).

15 Record of 2209th Meeting, [1991] 1 Y.B. Int'l L. Comm'n 15-16, ¶ 12, U.N. Doc. A/CN.4/SER.A/1991, where Pellet noted that, in light of the international nature of the crimes involved, "[i]t did not therefore seem right to accord privileged status to the State in whose territory the crime had been committed. It was the entire international community which was affected and it seemed sufficient that the State in whose territory the alleged perpetrator was found should bring the case before the court." This rationale was used in some of the very first cases of universal jurisdiction for war crimes; *See* U.S. v. Lothar Eisentrager, 14 L. Rep. of Trials of War Crim. 8, 15 (US Military Commission 1948), "The territoriality of jurisdiction in criminal cases is based on the reasonable premise that in ordinary criminal cases an offender should be judged by the law of the place where the crime was committed . . . . A war crime, however, is not a crime against the law or criminal code of any individual nation, but a crime against the *jus gentium*. The laws and usages of war are of universal application, and do not depend for their existence upon national laws and frontiers. Arguments to the effect that only a sovereign of the *locus criminis* has jurisdiction and that only the *lex loci* can be applied, are therefore without any foundation"; Daniel D. N. Nsereko, *The International Criminal Court: Jurisdictional and Related Issues*, 10 Crim. L. Forum 87, 98-99 (1999).

16 Kirsch & Holmes, *supra* note 8, at 9-11; Philip Kirsch & Darryl Robinson, *Reaching Agreement at the Rome Conference*, in Cassese, *supra* note 3, at 75; Morten Bergsmo, *The Jurisdictional Régime of the International Criminal Court (Part II, Articles 11-19),* 6 Eur. J. Crime Crim. L. & Crim. J. 345, 346-348 (1998).

17 These were some of the comments of the ICTY judges in plenary on the draft Statute in the *ad hoc* Committee on the Establishment of an International Criminal Court, G.A. Res. 49/53, at 26-27, UN Doc. A/AC.244/1 (Mar. 20, 1995).

Court in accordance with paragraph 3; (a) The State on the territory of which the conduct in question occurred...."[18]

This final compromise did not go unnoticed in the literature. Authorities have extensively discussed whether endorsing territoriality at the expense of universal, custodial or other jurisdiction was the right thing to do in Rome. Obviously, in the prevailing political atmosphere of the day, there was some merit in the view that adopting universal jurisdiction under the Statute would likely jeopardize the Court's existence, "[…] owing to the difficulties that passing universal jurisdiction would have created in practice, and the hostility it would probably have caused to the ICC and to universal jurisdiction […]."[19] On the other hand, however, it is difficult to disregard the argument that the final compromise left beyond the Court's reach the typical internal conflict scenario in a state not party. The Court would be unable to address Darfur, for example, without a Security Council referral. In those circumstances, the Court's reach depends heavily on political action, in the form of a Security Council referral.[20]

Moreover, it is yet unclear whether this crucial legal-political concession has succeeded in allaying state concerns of 'jurisdictional overreach' on the part of the Court.[21] The ultimately unconvincing allegations that the existence of ICC jurisdiction would violate the *pacta tertiis rule*, in the event that state not party nationals commit 'core' crimes in the territory of a state party, are well documented in international literature.[22] On a more positive note, the conclusion of the UN-ICC relationship agreement[23] and the referral of the Darfur situation by the Security Council to the ICC[24] may be indications of a change of state attitude towards the Court. These positive developments were not however without their own compromises. In fact, the exemption of peacekeepers from the Court's reach by SC Resolution 1593 and the use of article 16 by the Council in the past[25] suggest a lingering suspicion over the Court's jurisdiction. That said, while the Council seems to retain certain misgivings over the Court, more than 110 states have become parties to the Rome Statute up to date,[26] including two permanent members of the Security Council. The Court became operational on 1 July 2002 and continues to operate to date. A certain degree of optimism for the future of the ICC seems therefore warranted.

Notwithstanding these interesting academic perspectives, the fact remains that article 12 (2)(a) is part of the Statute. This is the world, in which the Court has lived so far and apparently will continue to live in for some time in the future.[27]

18 The Rome Statute, *supra* note 1, art. 12, ¶ 2(a).

19 Olympia Bekou & Robert Cryer, *The International Criminal Court and Universal Jurisdiction: A Close Encounter?,* 56 Int'l and Comp. L. Q. 49, 68 (2007).

20 H-P. Kaul, *Preconditions to the Exercise of Jurisdiction*, in Cassese, *supra* note 3, at 583, 612-613; Luc Willemarck, *La Cour pénale internationale partagée entre les exigences de l'indépendance judiciaire, de la souveraineté des États et du maintien de la paix*, 83 Revue de Droit Penal et de Criminologie 3, 11-12 (2003); For similar argumentation and the issue of the 'traveling tyrants', Leila N. Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millennium 118 (2002).

21 Louise Arbour & Morten Bergsmo, *Conspicuous Absence of Jurisdictional Overreach*, in Reflections on the International Criminal Court, Essays in Honour of Adriaan Bos 134-137 (H.A.M. von Hebel et al. eds., 1999); The U.S., Indian and Chinese concerns are particularly well-known. The opposition of the US is expressed mostly through the conclusion of bilateral agreements, providing for the inability of states parties to surrender US citizens to the Court, without US consent, according to article 98 ¶ 2 of the Rome Statute. Among others, David Scheffer, *The United States and the International Criminal Court*, 93 Am. J. Int'l. L. 12 (1999). For the position of India and China, Lu Jiangping & Wang Zhixiang, *China's attitude towards the ICC*, 3 J. Int'l. Crim. Just. 608 (2005), Usha Ramanathan, *India and the ICC*, 3 J. Int'l. Crim. Just. 627 (2005).

22 *See infra* part 6.3.5 for an extensive discussion.

23 For the U.N.-ICC Relationship agreement and its adoption, see U.N. G.A. Res. A/58/318 (Sept. 20, 2004). The Relationship Agreement entered into force on October 4th, 2004. The text of the agreement is available at www.icc-cpi.int (last visited Sept. 29, 2010).

24 Nsogurua J. Udombana, *Pay back time in Sudan? Darfur in the International Criminal Court*, 13 Tulsa J. Comp. & Int'l L. 1, 8 (2006), where he even accepts that "Resolution 1593 is a tacit recognition of the ICC by the U.S. and China – their abstentions notwithstanding; and such a recognition is a vital first step towards giving the ICC the legitimacy it needs to achieve true universality".

25 *See* S.C. Res. 1422, UN Doc. S/RES/1422 (July 12, 2002); Carsten Stahn, *The Ambiguities of SC Resolution 1422 (2002),* 14 Eur. J. Int'l. L. 85 (2003).

26 As of September 29, 2010, 113 states are parties to the Rome Statute, according to the official website of the Court, at www.icc-cpi.int (last visited Sept. 29, 2010).

27 Although the possibility of amending the Statute remains an option under art. 121-122, it seems significantly curtailed by the increased two-thirds majority required by those provisions. Alain Pellet, *Applicable Law*, in Cassese, *supra* note 3, at 1059; The latest official discussions on territorial jurisdiction have taken place in the context of the Working Group on Aggression. The topic was however not considered ripe for consideration in the form of an amendment of article 12(2)(a) by the 2010 Review Conference and was not included in its agenda. See in detail *infra Part* 5.1.1.

It is therefore this provision, and specifically its first part ("in the territory of which the conduct in question occurred") that is the focus of the present work. Territoriality under article 12(2) (a) of the ICC Statute has not been analyzed in detail in the otherwise vast literature dedicated to the ICC Statute. It is the ambition of the present dissertation to make a contribution to the academic debate on this topic and afford to this provision part of the doctrinal attention it merits.

1.1 / OBJECTIVE

It may be true that endorsing territorial jurisdiction offers to the Court the opportunity to take its first steps on the basis of an established, 'legally unassailable' rule of international law.[28] However, notwithstanding the rule's normative maturity, its application is not free of controversy. Each national criminal system has written its own legal history in addressing questions of territoriality.[29] It is only natural that the application of territoriality by the Court would raise similar concerns.

From this perspective, it is obvious that the novelty lies not with the phenomena themselves, but rather with the entity seeking to address them. After all, the world of criminal justice is only too familiar with transboundary criminal activity, be it terrorist bombings or drug trafficking, and the use of legal constructions of territoriality used to address them. Well-known examples of such constructions are the juridical localization of crimes or the expansion of the territorial scope of application of criminal laws.[30] It is therefore the way that such jurisdictional issues can be addressed through the lens of the Rome Statute, which constitutes the principal legal novelty, taking into account that "the permissive nature and scope of jurisdiction under international law vary with the international legal person whose jurisdiction is at issue".[31]

In light of the above, it is the submission of the present author that the key problem with ICC territoriality is not the existence of jurisdiction. This was finally resolved in Rome with the inclusion of article 12(2) (a) in the Statute.

On the contrary, the main issue for the Court appears to be the determination of the precise scope of the territorial parameter of its jurisdiction. As such, the question is one of interpretation, or more appropriately of identification of the limits to the interpretation of this provision. Accordingly, the primary objective of the present dissertation is an in-depth examination of the possible interpretations of article 12 (2)(a) ICC Statute concerning the exercise of jurisdiction based on territory under international law.

This general purpose will be served by following the structure of the key jurisdictional provision under examination – article 12 paragraph 2(a) of the Statute of the Court. In doing so, the aim stated above may be usefully divided in two critical questions;

1) How could jurisdictional questions concerning criminal activity, which cannot be isolated in a specific territory, be addressed by the Court?
2) How could the Court tackle jurisdictional questions under article 12(2)(a) in the case of occupied territories?

This study will not discuss therefore a number of issues. For example, the issues of crimes occurring on board vessels or aircrafts and the topic of vessel registration and flag state jurisdiction are excluded. This selection is justified primarily on grounds of space and cohesion, taking also into account that matters relating to registration and the flag state of ships and aircrafts belong more appropriately to the field of nationality, rather than territorial jurisdiction.[32] Additionally, the present analysis will not generally delve into the exercise of territorial jurisdiction in certain particular situations, such as conspiracy criminality, crimes committed on disputed territories or over the internet. Most of these issues have a distinct national law

28 Kirsch & Robinson, *supra* note 16, at 84.

29 I. Cameron, *Jurisdiction and Admissibility Issues under the I.C.C. Statute*, in McGoldrick *supra* note 2, at 73, "State practice will probably show that the great majority, if not all, States take jurisdiction over an offence if an essential component element of it takes place in the territory of the State."

30 Hein D. Wolswijk, *Locus Delicti and Criminal Jurisdiction,* 66 Neth. Int'l. L. Rev. 361, 380-381 (1999).

31 Louis Henkin, International Law, Cases and Materials 1048 (1993).

32 On the nationality of ships, *see* United Nations Convention on the Law of the Sea, art. 91, Dec. 10, 1982, 1833 U.N.T.S. 397; M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, 120 I.L.R.. 143, 4-5.

flavor, appear to be worthy of more extensive case-specific analysis, or have yet to be addressed clearly on the interstate level. Therefore, they have not been considered appropriate for inclusion in this work.

The particular issues, however, that will be examined in the present dissertation shall be addressed under two main conceptual headings. First, specific problems relating to the localization of a criminal activity will be examined. Under this chapeau, the principal task is to ascertain the meaning of 'conduct' in article 12 (2) (a) through the Court's means of interpretation and juxtapose it with the 'effects' or 'consequences' of a crime. The emphasis in this part will be to identify certain doctrinal devices available to the Court under contemporary international law for the localization of criminal activities involving more than one state's territory.

Secondly, as far as territory itself is concerned, an effort will be made to provide the legal framework for the exercise of jurisdiction by the Court in territories under military occupation. At the outset, it should be recalled that this is an examination focused on article 12(2)(a); therefore, the issue of Palestine will not be examined, as it has yet to be determined if Palestine qualifies as a 'State' for the purposes of article 12(3).

1.2 / STRUCTURE

Chapter 2 explains briefly a topic well rehearsed in international literature, the territorial reach of state criminal jurisdiction. Basic notions and terms that will be used frequently in the present dissertation will be identified in this section, including the distinction between principles and rules of jurisdiction, prescriptive and enforcement jurisdiction, territoriality and territorial fictions.

Chapter 3 will then trace the steps that led to the promulgation of article 12(2)(a) of the Rome Statute. Following a cursory reference to important historical precedents, such as Nuremberg and the *ad hoc* Tribunals, it is here that the preparatory works of the Statute will be analyzed, starting from the 1989 discussions in the International Law Commission and leading all the way to the Rome Conference.

The fourth Chapter of the present dissertation will be dedicated to a preliminary issue of paramount importance, namely the instruments of interpretation of the Rome Statute. Since the position is assumed that the extent of the Court's territorial reach is primarily a question of interpretation rather than legislation, it is only natural that some space should be dedicated to an analysis of the tools of interpretation at the disposal of the Court. In this context, taking into account the jurisprudence of the Court, this Chapter will identify the instruments to be employed in the interpretation of article 12(2)(a), and particularly the rules of interpretation of the Statute and articles 31-32 of the Vienna Convention on the Law of Treaties. In doing so, this part will further attempt to answer the following difficult question; should the territorial scope of the Court's jurisdiction be interpreted by recourse to the principle of legality?

Chapters 5 and 6 will then address one of the main aspects of this dissertation, the possible use of localization constructions by the Court, particularly what has been named in international literature 'subjective territoriality', 'objective territoriality' or 'ubiquity' and finally the 'effects doctrine'. Taking the wording of the Statute as a starting point, Chapter 5 first explores whether 'conduct' in article 12(2)(a) should be read so as to exclude consequences and objective territoriality or ubiquity from the possible permissible connections to the Court's territorial reach.

Chapter 6 subsequently attempts to broaden up the discussion further and contemplates the possibility of 'reading' in article 12(2)(a) the effects doctrine of jurisdiction, developed mostly in the context of antitrust law. Policy and legal aspects will be touched upon in this innovative and controversial discussion. A special place is reserved in the Chapter for the analysis of certain important aspects of this question, such as the form of liability, the territorial nature of jurisdiction and the classification of effects.

Concerning the notion of 'territory' itself, where a crime is said to take place for the purposes of article 12(2)(a), Chapter 7 deals with the issue of the territorial parameter of the Court's jurisdiction in cases of military occupation. The topic is treated as one intertwined with the territorial scope of application of the Rome Statute as an international treaty. The Chapter initially addresses the legal framework of occupation under classic humanitarian law and subsequently divides the legal analysis of the Statute in three component parts; the occupation of state party territory by another state party (the Ituri scenario) or by a state not party (the North Cyprus situation), as well as the occupation of state not party territory by a state party (e.g Iraq and the UK).

Finally, Chapter 8 summarizes the above analysis and offers certain concluding observations on the topics at hand.

1.3 / METHODOLOGY

International criminal law is authoritatively said to be "a blend of legal disciplines which differ as to their nature, values, goals, contents, methods, subjects and techniques."[33] There is accordingly more than one ways to approach legally the same subject-matter. Within the framework of the general theme of the territorial parameter of the Court's jurisdiction and the specific issues identified above, the present work proceeds initially to explain the applicable law as it stands at the time of writing (*de lege lata*), and secondly to develop this law through the means of interpretation at the disposal of the Court (*de lege ferenda)*. In order to explain the law as it stands, use of the Court's constitutive documents and classic international law sources (treaties and customary rules) are routinely employed. On the other hand, the parts dedicated to the development of the law largely benefit from the writings of authorities and case-law, be it of the Court's or of other international or national judicial institutions.

In more detail, the first step of this general process is to explain the applicable law *de lege lata*. In doing so, the dominant perspective of the present work is that of public international law, following mostly the footsteps of European positivism and the scholarship of Francis Mann and Michael Akehurst. This becomes evident from the very beginning in the analysis pursued in Chapters 2 and 3 and the exposition of the introductory concepts of this dissertation.

Yet, at the outset, certain qualifications are required. While the Statute undoubtedly forms part of international law as an international treaty, at the same time it seems also to stand apart from general international law, as evidenced by the specific regime established by the hierarchy of the sources listed in article 21 ICC Statute. Notwithstanding its shortcomings,[34] this provision is the cornerstone of any investigation concerning the Court's applicable law. Accordingly, the present analysis necessarily follows article 21 of the Statute. Emphasis therefore is placed in Chapters III-VI primarily to the Rome Statute, the Court's Rules of Procedure and Evidence and the Elements of Crimes.[35] However, while these documents contain a plethora of provisions regulating the function of the Court, they do not seem to address issues at the heart of article 12(2)(a). In fact, to the great disappointment of any researcher on the specific subject, this provision has not been elaborated upon in the Court's principal sources.

Understandably, this renders necessary an examination of rules of customary and treaty law, either as means of interpretation, in accordance with article 31(3)(c) VCLT, or as sources of law under article 21(1)(b) of the Statute.[36] Drawing from the case-law of the ICJ on the interpretation and application of article 38 ICJ Statute, the present thesis relies extensively on existing international agreements, official state practice and indications of *opinio juris* in the field of general international law, as well as international humanitarian law. These materials constitute the main research body of the present work.

In order to assist in the clarification of these rules, some reference is made also to general principles, as well as to some national laws, as ordained by article 21(1)(c). Evidently, it is not possible or even useful in the limited confines of this dissertation to conduct a comparative analysis of the laws of the currently 113 states parties to the Statute. Reference to some national provisions is however made selectively at certain parts as an indication of different state approaches to issues that may appear on the Court's radar in the foreseeable future. These national approaches are referred to mostly as potential solutions to the Court's potential future predicaments.

The main part of the present research, however, is dedicated to an analysis of article 12(2)(a) of the Rome Statute on the basis of the Court's case-law. While the Court has the right – rather than the duty – to utilize its own case-law,[37] its decisions so far seem to indicate that judges dutifully follow precedent,

33 Bassiouni, *The Discipline of International Criminal Law*, *in* Bassiouni, *supra* note 2, at 9.

34 Indicatively, Pellet, *supra* note 27, at 1053, 1077-1079.

35 Although the Court's Regulations do not feature in article 21 ¶1(a), they will be included also in the analysis, where relevant, as a subsidiary means.

36 On the importance of general international law on questions of jurisdiction in international criminal law, Bassiouni, *Discipline supra* note 33, at 5-6.

37 Pellet, *supra* note 27, at 1066.

particularly as regards decisions of the Appeals Chamber. That said, however, one of the greatest difficulties of the present research has been the absence of specific case-law analyzing this provision, a phenomenon best attributed to the practice of self-referrals. Consequently, all conclusions drawn on the basis of existing case-law should be seen entirely as tentative deductions from existing trends in the Court's case-law. Most – if not all – of the issues addressed in the present dissertation are therefore blessed and cursed in equal measure by the absence of authoritative pronouncements by the Court.

Additionally, extensive references will be made to international human rights law. This course of action is mandated by article 21(3) ICC Statute, insofar as it reads "the application and interpretation of law pursuant to this article must be consistent with international recognized human rights…". In this framework, human rights treaties, as well as the jurisprudence of international and regional human rights monitoring organs are extensively consulted. Human rights law is also used in order to decipher the dialectic relationship between the existence or exercise of territorial jurisdiction, on the one hand, and the rights to a fair trial and to personal liberty, as well as the principle of legality on the other.

Ultimately, a number of other research materials will be employed, such as resolutions of international organizations – particularly of UN Bodies – and the preparatory works of the Statute (including the ILC debates and draft Statute and the subsequent committees). These materials will play a dual role in the present dissertation. On the one hand, they will serve as evidence of sources of law, as they mirror state practice or document agreements; on the other, they are extensively used as instruments of interpretation, according to the Court's own rules of interpretation.

In closing, two methodological/theoretical points should be clarified.

The first relates to the usefulness of the sources as outlined in article 38 of the ICJ Statute. In a thesis of a predominantly public international law perspective, readers might inquire over the position of general international law sources in the context of the present work. As indicated above, article 21 is faithfully followed throughout this dissertation. How is then the use of this provision intertwined with the traditional sources of international law?

At this juncture, two observations are called for. Initially, article 38 lies at the background – and occasionally at the forefront – of the present dissertation, insofar as it largely informs the interpretation and application of article 12(2)(a), under article 31(3)(c) VCLT and particularly article 21 ICC Statute. Although the normative relationship of the two provisions (article 38 ICJ Statute and article 21 ICC Statute) is far from clear, it may be said to *prima facie* correspond to the connection between general international law and international criminal law. Since international criminal law is one of the branches of international law,[38] it would be only reasonable that the sources of international law under article 38 ICJ Statute would constitute the foundation, on which article 21 ICC Statute is called to operate. The International Criminal Court is, after all, an international organization created by means of an international treaty. It is a subject of international law with the corresponding rights and duties.[39] Its operation cannot be seen in isolation from the greater body of law, within which it performs its functions.

That does not mean, however, that the sources in the two provisions are identical, or that the substantial differences in the relationships and purposes of the two fields of law are overlooked.[40] While the parallels between article 38 ICJ Statute and article 21 ICC Statute are numerous and easily identifiable, it is striking that the writings of publicists, for one, do not feature in the Rome Statute, not even as a subsidiary source of law (neither do the Court's own Regulations for that matter). Obviously, under the guise of the principle of legality[41] and motivated by a certain degree of "unfortunate mistrust" in international judges,[42] the drafters have excluded from the Court's 'applicable law' most legal sources not effectively controlled by states, such as the Regulations of the Court or the writings of international and criminal law authorities. This situation, however, has not discouraged the Court from having recourse to writings of criminal lawyers

38 Antonio Cassese, International Criminal Law 4 (2008).

39 On the Court's legal personality, *see* the Rome Statute, *supra* note 1, art. 4; For international organizations in general and international law, *see* Interpretation of Agreement of Mar. 25, 1951 between World Health Organization and Egypt, Advisory Opinion, 1980 I.C.J. Rep. 73, 89-90 (Dec. 20).

40 Bassiouni, *Discipline supra* note 33, at 10-12, "Inter-state processes, however, are primarily designed for states, and as a result they are not particularly well-suited to the needs of ICL, whose subjects are individuals."

41 Pellet, *supra* note 27, at 1057-1059.

42 David Hunt, *The International Criminal Court – High Hopes,"Creative Ambiguity" and an Unfortunate Mistrust in International Judges*, 2 J. Int'l. Crim. Just. 56, 60-61 (2004); Mahnoush H. Arsanjani, *Reflections on the Jurisdiction and Trigger Mechanism of the International Criminal Court*, *in* von Hebel et al eds., supra note 21, at 58, "A main concern of many of the negotiators of the Statute was to leave as little ambiguity as possible that would require the Court's judges to interpret."

and publicists, as well as to the judgments of the World Court.[43] Accordingly, the present thesis as an academic work follows closely on the Court's own footsteps and makes extensive references to the relevant literature and international case-law. In this sense, the 'classic' sources listed in the ICJ Statute continuously permeate and inform the entire discussion.

Secondly, this work follows a public international law approach. This approach is largely dictated by the nature of the subject-matter itself, involving questions of sovereignty, consent and authority. This is evident mostly in the innovative aspects of the present thesis (*de lege ferenda*) in two ways mainly.

The first is the emphasis on the writings of publicists as a source of inspiration and legal authority. This approach is one of the hallmarks of general international law and has received recognition under article 38(1)(d) ICJ Statute as a subsidiary source of law. As the Court's main texts are largely silently on issues of territorial jurisdiction, it is necessary to address the corresponding issues by recourse to public international law doctrine, including not only the sources as such, but also the academic discussion surrounding their application. It is firmly believed that this approach is also consistent with the Court's status as an international intergovernmental organization.

The second involves a strong preference for the competence of the Court to interpret its jurisdiction. In general, the analysis of article 12(2)(a) involves in essence a selection between the two underlying ways of thinking on ICC jurisdiction by emphasizing *compétence de la compétence*, on the one hand, or the principle of legality, on the other. This choice is not only influenced by the author's own disciplinary background.[44] It is also subscribed to, because it is believed that, while subtle, this difference of perspective is significant. It represents the corresponding conceptual difference in selecting to start the analysis from the question what the Court can do when interpreting article 12(2)(a), as opposed to what the Court cannot or should not do.

It is true that, ultimately, notwithstanding the selection of the starting point of analysis, all roads may lead to the same conclusion. However, a different perspective on the same issue may yield more solutions and broaden up the discussion with a restrained measure of legal imagination. It is primarily in an effort to explore such otherwise remote possibilities that this point of view is adopted.

Accordingly, the present international law analysis selects to identify the Court primarily as an able international actor, with the inherent power to decide on its jurisdiction, rather than as a largely circumscribed actor, whose actions are clinically delimited by the principle of legality of substantive criminal law and the drafters' attention to minute detail. Therefore, the position is assumed in this work that it falls upon the Court to interpret the Statute's provisions in such a way, so as to formulate appropriate responses to the multiple and variable issues of territorial jurisdiction that may arise in the future. The different interpretations of territoriality are not – and arguably should not – be the subject of further legislation by the states parties. Flexibility in interpretation of the existing framework suffices to address any legal issues that may arise in the context of this provision.

Obviously, that does not mean that the principle of legality is altogether disregarded or that law *de lege lata* is marginalized. It is, however, an important perspective that underlies the entire work, one that is hopefully paving the way for an examination of classic problems of international jurisdiction through an alternative point of view.

43 The Court's jurisprudence in fact routinely makes use of international literature. Indicatively, for a discussion in the context of the *Lubanga Confirmation of Charges decision*, *see infra* Part 7.4.

44 Ruth Wedgwood has suggested that each commentator's approach depends on his/her professional-disciplinary perspective; "The idea of a "progressive development" of the law in an autonomous international forum may be received with differing perceptions of legitimacy among criminal lawyers, compared to international lawyers. Some would assert that international lawyers and judges have been willing, historically, to take a more flexible view of jurisdiction, in order to promote the use of international forums, claiming *compétence de la compétence*. Criminal lawyers are schooled, instead, to resolve any doubtful question in favour of the defendant, including an abstemious reading of jurisdiction." R. Wedgwood, *The Present State of Research Carried Out By The English-Speaking Section of the Centre for Studies and Research*, *in* The Hague Academy of International Law, Centre for Studies and Research in International Law and International Relations, International Criminal Justice 2002*,* 27 (2007).

CHAPTER 2 / DEFINITIONS AND STATE TERRITORIAL JURISDICTION

2.1 / INTRODUCTION

Before proceeding with the analysis of the main subject-matter of the present dissertation, certain definitions should be provided, in order to clarify the meaning of legal terms that will be used extensively. In this part, the terms to be defined include the notion of 'the jurisdiction of the ICC', 'territorial jurisdiction', as well as prescriptive, enforcement and adjudicative jurisdiction. This chapter will further proceed to examine the rules and principles of public international law relating to state jurisdiction.

This course of action is considered necessary for the present work, in light of the sources available to the International Criminal Court under article 21 ICC Statute. This is particularly due to the fact that, as it will be shown later on, the Court's main instruments as enumerated in article 21(1)(a) are silent on the question of the Court's territorial jurisdiction under article 12(2)(a). It follows therefore from this provision that the Court, in its interpretation of the relevant provisions of the Statute, will need to explore the related issues on the basis of general international law, including general principles of law.

2.1.1. / JURISDICTION

Jurisdiction as a concept is not easy to define. International law is rife with definitions. Treatises on positive modern international law approach jurisdiction from the perspective of a state prerogative intimately connected with state sovereignty.[1] Other enlightened scholars go further, defining jurisdiction also through the international lens of international law. Francis Mann famously defined jurisdiction as both "a State's right under international law to regulate conduct in matters not exclusively of domestic concern"[2] and "as one of the fundamental functions of public international law, *viz.* the function of regulating and delimiting the respective competences of states."[3] For the purposes of the present dissertation, the terms 'state jurisdiction' will be used as shorthand for the scope of the authority of a state to regulate a certain aspect or sphere of human activity.[4]

The definition of jurisdiction as regards international courts and tribunals is more complex, since these courts are not sovereign entities. The discussion of the ICTY Appeals Chamber concerning the legal definition of jurisdiction, in its broad and narrow scope is well-known and does not need to be repeated here.[5] For the purposes of the present dissertation, the terms 'the jurisdiction of the International Criminal Court' will be applied as indicative of the authority of the Court under its constitution to pronounce judgment upon a specific set of facts and issue orders addressed to the relevant parties, in accordance with its applicable law;[6] or, in the words of the Appeals Chamber, as the Court's "competence to deal with a criminal cause or matter under the Statute."[7]

2.1.2. / TERRITORIAL JURISDICTION

As regards international courts, a popular classification is the distinction of jurisdiction on the basis of certain dimensions, such as time, space, subject-matter and legal subjects. The Court's Appeals Chamber

1 For a useful summary of these approaches, *see* Cedric Ryngaert, Jurisdiction in International Law, 5-10 (2008).

2 Francis A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 Recueil des Cours de l' Academie de Droit Internationale 1, 9 (1964-I).

3 *Id.* at 15.

4 1 Lassa Oppenheim, Oppenheim's International Law 456 (Robert Jennings & Arthur Watts eds. 9th ed. 1992).

5 Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶10-12 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); *See infra* Part 5.1.2.2.

6 Vaughan Lowe, *Jurisdiction*, *in* International Law 314 (M. D. Evans ed. 3rd ed. 2010); For an analysis of the meaning and its dinstictions as regards international courts, *see* Chittharanjan F. Amerasinghe, Jurisdiction of International Tribunals, (2nd ed.) (2005), at 49 *et seq.*

7 Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-772, Judgment on Appeal against Decision on Defense Challenge to Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, ¶ 24 (Dec. 14, 2006), explaining the term *jurisdiction* in article 19 of the Statute.

has subscribed to this classification in one of its first rulings, where it stated that "[t]he notion of jurisdiction has four different facets; subject-matter jurisdiction also identified by the Latin maxim jurisdiction *ratione materiae,* jurisdiction over persons, symbolized by the Latin maxim jurisdiction *ratione personae,* territorial jurisdiction – jurisdiction *ratione loci* – and lastly jurisdiction *ratione temporis*. These facets find expression in the Statute."[8]

It is the Court's 'jurisdiction *ratione loci'* or the Court's territorial jurisdiction that will be analyzed in depth in the present dissertation. Accordingly, the term 'territorial jurisdiction' will be used here to denote the territorial parameter of the Court's jurisdiction as defined in article 12(2)(a) of the Rome Statute. Consequently, this work will not refer in any detail to the legal contours of the geographical scope of the Court's reach in the event of a Security Council referral under article 13(b) ICC Statute.

2.1.3. / PRESCRIPTIVE, ENFORCEMENT AND ADJUDICATIVE JURISDICTION

Particularly when discussing state jurisdiction, it is common to differentiate between prescriptive (or legislative or substantive) and enforcement jurisdiction. Recently, it has been suggested that another distinction of jurisdiction should be added, namely jurisdiction to adjudicate.

This doctrinal approach has been endorsed by the Third Restatement of United States Foreign Relations Law[9], the Council of Europe[10] and several authorities.[11] The authors of the latest version of the Restatement decided to depart from the original two-pronged approach of the Second Restatement by introducing the distinction of 'jurisdiction to adjudicate'. This position was justified on the grounds that, first, enforcement involves normally in state practice not only judicial, but also non-judicial means (administrative and executive decisions), which are in principle governed by different rules of jurisdiction, and, second, due to the fact that "…adjudication is often used for purposes that are not strictly 'enforcement', but rather for declaration of rights and vindication of private interests."[12] It was on the basis of these premises, as well as certain national considerations,[13] that the authors of the Restatement included a separate heading on jurisdiction to adjudicate, or "the authority of a State to subject particular persons or things to its judicial process."[14] It was, however, clarified in this context that, despite any obvious similarities to the division of governmental authority to executive, judicial and legislative branches, this separation does not fall squarely into one of those categories.[15]

The present author does not subscribe to the view that jurisdiction to adjudicate should form a new class of jurisdiction, for the following main reasons; first, by virtue of the acceptance of the prescriptive/enforcement distinction in international law literature,[16] secondly, due to the fact that matters arising under a heading of adjudicative jurisdiction may be already dealt with quite effectively under the existing

8 *Id*. at ¶ 21.

9 American Law Institute, Restatement of the Law Third, Restatement of the Foreign Relations Law of the United States 230 Part IV (1986).

10 Council of Europe Recommendation, No. R (97)11/E of the Committee of Ministers to Member States on the Amended Model Plan for the Classification of Documents Concerning State Practice in the Field of Public International Law (June 12, 1997), 60, 64, which distinguishes in Part Eight: Jurisdiction of the State, under *Types of Jurisdiction*, between jurisdiction to prescribe, to adjudicate and to enforce.

11 *See* among others, Michael Akehurst, *Jurisdiction in International Law*, 46 Brit. Y.B. Int'l. L. 145 (1972-1973); Bernard H. Oxman, *Jurisdiction of States*, in 3 Encyclopedia Pub. Int'l. L. 55 (Rudolf Bernhardt ed. 1997); Malcolm N. Shaw, International Law 651 (6th ed. 2008); Antonio Cassese, International Law 49 (2nd ed. 2005), referring to "The power to settle legal disputes through binding decisions, or to interpret the law with binding force for all the persons and entities concerned"; Ryngaert, *supra* note 1, at 10; Peter Malanczuk, Akehurst's Modern Introduction to International Law 109 (7th ed. 1997), who notes however that the distinction between the forms of jurisdiction is not always rigid in practice.

12 Restatement of the Law Third, *supra* note 9, at 230.

13 *Id*. at 231, "The process of adjudication, whatever the purposes for which it is used, is a significant category in the foreign relations law of the United States."

14 *Id*. at 231-232.

15 *Id*. at § 401, at 233.

16 *See* among others, Anthony Aust, Handbook of International Law 42 (2nd ed. 2010); Mann, *Jurisdiction*, *supra* note 2, at 1; David J. Harris, Cases and Materials in International Law 227-228 (7th ed. 2010); Derek W. Bowett, *Jurisdiction: Changing Patterns of Authority over Activities and Resources*, 53 Brit. Y.B. Int'l. L 1 (1982); Ian Brownlie, Principles of Public International Law 299 (7th ed. 2008); from older authorities, Georges Scelle, Précis du Droit de Gens 86-87 (*reprint* 1982) (1932).

distinctions and the rules developed thereof, without rendering necessary any further theoretical dichotomies on the matter[17] and thirdly because "[i]nternational law,[…], employs the term 'legislation' in a very wide sense indicating regulation rather than merely enactment."[18] It is thus believed that Mann described the situation accurately when he stated that "[t]his conception, which did not appear in the original version [of the Statement of Foreign Relations of the United States] is really no more than an aspect or emanation of legislative jurisdiction or what the Americans call jurisdiction to prescribe. It therefore does not deserve to be treated as a distinct category equal to legislative jurisdiction."[19]

2.2 / THE LOTUS CASE

A discussion of the 1927 *Lotus Case*[20] is a 'necessary evil' in any attempt to engage in an analysis of the international law of jurisdiction. This is not attributable only to the fact that this case is the only authoritative ruling by the ICJ or its predecessor on the topic.[21] It is also due to its all-pervasive influence in legal thinking from the date of its adoption till today, as experienced in many works of distinguished legal scholars dedicated to its analysis. This discussion cannot be repeated here, save for the establishment of certain fundamental legal propositions that appear to retain their validity today in state criminal jurisdiction.

In that case, the Permanent Court of International Justice was called upon to settle a dispute between France and Turkey concerning a collision on the high seas involving the French ship *Lotus* and the Turkish ship *Boz Court*, which resulted to the death of several seamen of Turkish nationality. Upon the arrival of the *Lotus* in Istanbul, a French officer of the ship and the Turkish captain were arrested, charged and eventually convicted for involuntary manslaughter. Following protests on the part of the French Government, relating to the exercise of criminal jurisdiction by Turkish authorities, the two Governments submitted the case to the Court by means of an agreement, whereby the latter was called upon to adjudge and declare whether the criminal proceedings instituted in Turkey against a French national were contrary to article 15 of the Treaty of Lausanne.[22]

The Court, initially, sought to formulate the issue at hand; *i.e.* whether or not the principles of international law prevented Turkey from instituting criminal proceedings against the French officer under Turkish law.[23] Subsequently, the Court turned to the interpretation of article 15 of the Treaty of Lausanne, and then it considered "a matter of principle", namely which party had the burden of proof. The Court noted that in the French position, Turkey had the burden of proving that its exercise of jurisdiction was based on a rule of customary law, permitting such action. Turkey, on the other hand, contended that, according to article 15 of the Treaty of Lausanne, it had the right to exercise such jurisdiction to the extent that it was in conformity with the principles of international law, thus claiming that it was France which, in fact, should demonstrate that the Turkish assertion of criminal jurisdiction was *not* in conformity with a rule of international law on the matter.[24]

The Court, eventually, found in favour of Turkey on three separate grounds; the formulation of the *compromis*, '…the very nature and existing conditions of international law"[25] and last on the basis of an *argumentum a contrario,* namely that, in fact, should the Court follow the French view, that would " in

17 Lowe, *supra* note 6, at 339. In any event, one might add that, as a matter of *de lege lata* rules of customary international law, adhering to such a distinction might present additional difficulties, since it remains doubtful at what extent the inter-relationship between the relevant rules of prescriptive, enforcement and adjudicative jurisdiction has sufficiently crystallized in state practice.

18 F. A. Mann, *The Doctrine of Jurisdiction Revisited After 20 Years*, in Further Studies in International Law, 5 (F. A. Mann, ed. 1990).

19 *Id.* at 18, n. 47.

20 S.S. *Lotus* (Fr. v. Turk.), 1927 PCIJ (Ser. A), No. 10, 9.

21 Certain Criminal Proceedings in France (Dem. Rep. Congo v. Fr.), currently pending before the International Court of Justice may shed some light on these questions.

22 Treaty of Peace with Turkey, July 24, 1923, art. 15, 128 L.N.T.S. 111, which provides that "[S]ubject to the provisions of Article 16, all questions of jurisdiction shall, as between Turkey and the other contacting Powers, be decided in accordance with the principles of international law."

23 *Lotus* Case, *supra* note 20, at 15.

24 *Id.* at 16-17.

25 *Id.* at 17-18.

practice, […], in many cases result in paralyzing the action of the courts, owing to the impossibility of citing a universally accepted rule on which to support the exercise of their jurisdiction."[26]

These were, in broad strokes, some of the main points of the judgment of the Court. This ruling is usually employed as authority for certain important legal propositions.

The first concerns the lawful exercise of enforcement jurisdiction by states (and *a fortiori* by international organizations). The fundamental norm[27] is that a state may not enforce its laws by taking an administrative, police, military or any coercive or non-coercive step in general, within the territory of another state, without the latter's consent.[28] This was affirmed by the Permanent Court of International Justice in one of its famous *dicta* in *Lotus*; "The first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State."[29] State actions to the contrary would likely constitute an unlawful intervention, in violation of the customary law prohibition of interference with the internal affairs of another state,[30] and give rise to international responsibility.[31] This proposition is affirmed by international[32] and national case-law,[33] as well as international treaties.[34] Similarly, the Preamble of the Rome Statute emphasizes that "nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State, […]", while it also provides in other clauses that the Court will be able to conduct investigations, collect evidence and affect arrests only with the co-operation of states parties.[35]

The second, often-quoted main passage relates to the permissible scope of prescriptive jurisdiction and has been read occasionally as a statement on the nature of international law at large. The Court, by the casting vote of its President, concluded that "[…] Restrictions upon the independence of States cannot therefore be presumed";[36] and that "[i]t does not follow, however, that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of

26 *Id*. at 20.

27 *Id*. at 35, Dissenting Opinion of Judge Loder, on the non-application of criminal law outside national territory as a 'logical principle of law', rather than a rule of custom.

28 Mann, *supra* note 2, at 127, with further references.

29 *Lotus* Case, *supra* note 20, at 18-19.

30 On the customary law nature of this prohibition, *Military and Paramilitary Activities in and Against Nicaragua*, (Nicar. v. U.S.), Judgment, Merits, 1986 I.C.J. Rep. ¶ 202.

31 Thus, for example, in the *Eichmann Case,* the abduction of Eichmann from Argentina by Israeli agents was considered by the Security Council as a regrettable act of illegality, which engaged Israel's responsibility. The issue between the two States was, however, considered settled by the two Governments by virtue of a Joint Communique. J.E.S. Fawcett, *The Eichmann Case*, 38 Brit. Y.B. Int'l. L. 181 (1962); S.C. Res. 138/1960, U.N. Doc. S/RES/138 (June 23, 1960); Also *Eichmann* Case*,* Judgment, 36 I.L.R. 26-27 ¶13 (Supreme Court of Israel); 1 Oppenheim *supra* note 4, at 386-388; F.A. Mann, *Reflections on the Prosecution of Persons Abducted in Breach of International Law*, in International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne 407 (Yoram Dinstein ed. 1989).

32 *E.g., Corfu* Channel, (U.K. v. Alb.), Judgment, Merits, 1949 I.C.J. Rep. 35 (April 9, 1949) (concerning U.K.'s claim of right to collect evidence from Albania's territory without the latter's consent).

33 Indicatively, R. v. Hape, [2007] 2 S.C.R. 292 (Can.); Public Prosecutor v. Taw Cheng Kong, [1998] 2 S.L.R. 410 ¶ 30, http://www.singaporelaw.sg/rss/judg/8595.html (last visited June 30, 2010).

34 *E.g.* United Nations Convention against Transational Organized Crime article 4 (entitled 'Protection of Sovereignty') ¶ 2, Dec. 12-15, 2000, 40 I.L.M. 335, 355 (2001); Inter-American Convention against Terrorism, art. 19, (June 3, 2002), 42 I.L.M. 19, 25 (2003).

35 In addition to states parties' general duty to co-operate under article 86 ICC Statute, note that under article 89 of the Statute, "States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender", whereas under article 59 the arrest of a suspect is effected by the authorities of the state party, which undertake to verify the person's identity and take relevant steps. As regards states non-parties to the ICC Statute, under article 12 paragraph 3 of the Statute the duty of co-operation with the International Criminal Court becomes incumbent upon them from the moment the relevant declaration of acceptance of the jurisdiction of the Court has been lodged with the Registrar. The duty of states not parties to co-operate may arise also by virtue of the text of a Security Council referral resolution. *See* indicatively S.C. Res. 1593, ¶ 2, U.N. Doc. S/RES/1593 (Mar. 31, 2005) and further analysis in Prosecutor v. Ahmad Muhammad Harun & Ali Muhammad Ali Abd-Al Rahman, Case No. ICC-02/51-01/07, 6-8 Decision Informing the United Nations Security Council about the lack of cooperation by the Republic of Sudan (May 25, 2010).

36 *Lotus* Case, *supra* note 20, at 18.

discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable."[37] Under these conditions, the Court concluded, "all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty."[38]

This lengthy passage has given rise to much controversy, different readings and a variety of conclusions. In its essence, it has affirmed "the voluntary nature of international law"[39] by establishing what Hersch Lauterpacht first labeled as the "presumptive freedom of action of Sovereign States."[40] Authorities have suggested that one should tread carefully on this *Lotus* passage, due to the inconsistencies in the Court's analysis,[41] or its generality and vagueness.[42] For others, this passage of the judgment, as it refers to "the whole gamut of jurisdiction", is not exceptional, as a matter of legal principle.[43] For Mann, the criticism against the *Lotus* case, and in particular the states' wide measure of discretion in adopting diverse rules or principles of jurisdiction, should be assessed in the light of the Court's intention to depart from the strict territorial concept of jurisdiction and to adopt a more flexible rule of criminal jurisdiction, rather than to deny altogether the existence of restraints imposed by international law on state action in that context. This, in Mann's view, might not comply with the prevalent Huber-Storyan conception of jurisdiction, "but would not be inconsistent with the requirements of modern life."[44] Finally, other authors accept that this dictum of the Court implies in fact that what is not prohibited, is permitted, at least as a matter of legislative jurisdiction, if not for international law in general.[45]

Notwithstanding the impact of this debate on the nature of international law at large, in the context of prescriptive jurisdiction it cannot be denied that the *Lotus* Case had, and still produces controversial effects.[46] The "persisting influence"[47] of *Lotus* on the legal question of state jurisdictional authority seems difficult to refute.

Be that as it may, while the view that a state enjoys virtually unlimited prescriptive powers is still considered by some as the classic approach on the matter,[48] the argument against that position appears to be convincing, at least to the extent that it is supported by *Lotus* itself. A frequent oversight in this respect is that the Permanent Court in the end did not dismiss the French application merely on the grounds that France had failed to meet its burden of proof, but rather due to the argument that the Turkish authorities had rightly exercised criminal jurisdiction in that case, based on the principle of objective territorial jurisdiction, through the assimilation of the Turkish vessel with Turkish territory.[49] Thus, the Court itself apparently acknowledged that, irrespective of its earlier remarks, the exercise of criminal jurisdiction should be based on a certain connection accepted by international law.[50]

In view of the above, certain conclusions may be drawn.

37 *Id.* at 18-19.
38 *Id.* at 19.
39 Ryngaert, *supra* note 1, at 25.
40 Hersch Lauterpacht, The Development of International Law by the International Court, 359-361 (2nd ed. 1958).
41 *Id.* at 361; 1 Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice 142, 146-147 (Grotius 1986). Concurring with Fitzmaurice's critique to a certain extent, 1 Oppenheim *supra* note 4, at 12. From the perspective of legislative jurisdiction, this position on the part of the Court has been contested by Lowe, *supra* note 6, at 340-342. Finally, Rosalyn Higgins, Problems and Process; International Law and How we use it 77 (1994) also cautions against making too much out of an *obiter* read outside of its context.
42 Brownlie, *supra* note 16, at 302.
43 Robert Jennings, *General Course on Principles of International law*, 121 Recueil des Cours de l' Academie de Droit Internationale 322, 516-517 (1967-II).
44 Mann, *Jurisdiction, supra* note 2, at 35-36.
45 Leslie Green, *Legal Issues of the Eichmann Trial*, 37 *Tulane Law Review* 641, 642 (1962-1963). It is interesting to note in this respect that the Supreme Court of Israel in the *Eichmann Case*, while quoting *Lotus* and declaring that no rule of international law prohibited the exercise of jurisdiction over the accused by virtue of the Nazi Collabolators (Punishment) Law 5710 (1950) of Israel, however in the end it upheld that it could exercise jurisdiction based on the principle of universal jurisdiction. Supreme Court of Israel, Attorney-General of Israel v. Adolf Eichmann, [1962] reprinted in 36 ILR 277, 299-304. On anti-trust law in particular, *cf.* Kingman Brewster, Antitrust and American Business Abroad, 286-287 (1958), who claims that "the decision to restrict jurisdiction is a matter of national policy."
46 As such, Hugh Thirlway has suggested that the *Lotus* problem and the controversy surrounding it have not yet been definitely resolved or exhausted. Hugh Thirlway, *The Law and Procedure of the International Court of Justice, 1960-1989*, 60 Brit.Y.B.I.nt'l.L. 1, 84-91, 87 (1989).
47 Ryngaert, *supra* note 1, at 26-27.
48 Louis Henkin et al., International Law, Cases and Materials 1048 (3rd ed. 1993).
49 *Lotus* Case, *supra* note 20, at 19-20.
50 Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 L. Contemp. Probs. 13, 49-50 (2001).

First, a state may assert that it has the right of regulation of a certain act or situation only on the basis of an established ground of jurisdiction under international law, with due regard to any limitations imposed by international law.[51]

Secondly, irrespective of the position one assumes regarding criminal jurisdiction (pro- or contra-*Lotus*), both approaches treat jurisdiction as an aspect of state sovereignty.[52] This point assumes particular significance concerning the exercise of criminal jurisdiction in certain circumstances and in particular in conditions of military occupation of national territory.[53]

Thirdly, the relationship between rules of prescriptive and enforcement jurisdiction is sufficiently clear; "There can be no enforcement jurisdiction unless there is prescriptive jurisdiction; yet there may be a prescriptive jurisdiction without the possibility of an enforcement jurisdiction, as for example, where the accused is outside the territory of the prescribing State and not amenable to extradition."[54]

The soundness of these conclusions is not undermined by the judgment of the ICJ in the *Arrest Warrant* case, since the ICJ's refusal to examine Belgian prescriptive jurisdiction (in that case universal jurisdiction) before tackling issues of enforcement jurisdiction was justified on the basis of the claims of the parties and the Court's own procedural rules (*non ultra petita*), rather than general international law as such.[55]

2.3 / PRINCIPLES AND RULES OF STATE JURISDICTION

In the chapter dedicated to the treatment of state jurisdiction in international law textbooks, one usually encounters the expressions 'territorial principle', 'nationality principle', 'universality principle' and so on.[56] This may be attributed to the confusing use of the terms by the Permanent Court in *Lotus*, when the Court referred to the freedom of every State "to adopt the principles which it regards as best and most suitable."[57]

51 *See* on this position also Prosper Weil, *International Law Limitations on State Jurisdiction*, in Extraterritorial Application of Law and Responses Thereto 101-102 (Cecil Olmstead ed. 1983); Morris, *supra* note 50 at 48-51, makes the argument that this position is applicable also with regard to international tribunals and in particular the International Criminal Court. Finally, *see* the position of Colin Warbrick, *The principle of sovereign equality,* in The UN and Principles of International Law. Essays in Memory of Michael Akehurst 204 (V. Lowe & C. Warbrick eds. 1994), who states that, from the point of view of general international law and sovereignty, ". . . it may be that the less the business of the state has a direct effect on other states, the greater will be the burden of demonstrating that there are rules of international law which bear on its conduct."

52 Ryngaert, *supra* note 1, at 29. This proposition is well-established in case-law; *Lotus* Case, *supra* note 20, at 19 (state's "title to exercise jurisdiction rests in its sovereignty"); Legal Status of Eastern Greenland Case (Denmark/Norway), 1933 PCIJ (Ser. A/B), No. 53, at 48 (April 5) (jurisdiction ". . . is one of the most obvious forms of the exercise of sovereign power"). Further, *Central American Court of Justice, The Republic of El Salvador – The Republic of Nicaragua Case, Opinion and Decision of the Court of 9 March 1917*, 11 Am.J.Int'l.L. 718, 718-719 (1917). On the relationship between sovereignty and jurisdiction, *see* Cassese, *supra* note 10, at 48-49 (the principle of sovereign equality of states is the source, from which a number of state rights flow, prominent among which is the right to exercise jurisdiction over certain territory and population); 1 Georg Schwarzenberger, International Law as applied by International Courts and Tribunals 184 (3rd ed. 1957) (jurisdiction and sovereignty are complementary and co-extensive terms); Milan Sahovi & William W. Bishop, *The Authority of the State: Its Range with Respect to Persons and Places*, in Manual of Public International Law 314 (Max Sørensen ed. 1968) (the jurisdiction of a state over its territory is synonymous in essence with territorial sovereignty); James Brierly, The Law of Nations 162 (Humphrey Waldocked ed. 6th ed. 1963) (contrasting territorial sovereignty as an expression of the "fullest rights over territory known to law" with other, "minor" territorial rights and connecting it with the notion of ownership of roman private law).

53 *See infra* Chapter 7.

54 Bowett, *supra* note 17, at 1.

55 Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep. 3, 19, ¶ 46 (Feb. 14, 2002); *See* also on the matter, the Dissenting Opinion of Judge van den Wyngaert, ¶ 40; Separate Opinion of Judge Guillaume, ¶ 1-17, Dissenting Opinion of Judge Oda, ¶ 12-13; The treatment of the legal issue of immunities prior to the question of jurisdiction was criticised also by Judges Kooijmans, Buergenthal and Higgins in their Joint Separate Opinion, 2002 I.C.J. Rep. *3,* 63-64, ¶ 1-5.

56 Indicatively, Shaw, *supra* note 11, at 652-668.

57 *Lotus* Case, *supra* note 20, at 18-19.

While both rules and principles indicate the existence of legally binding international norms,[58] which fall within the Court's applicable law under article 21(1)(b) and (c) ICC Statute respectively, the use of these terms may have important repercussions. In the present work, beyond the treaty rule of territorial jurisdiction of article 12(2)(a) ICC Statute, reference is made to the rule of territorial jurisdiction under general international law, as well as the principle of connecting links ('the Mann doctrine'). The following lines attempt to explain these terms.

The starting point is the approach developed mostly by Fitzmaurice concerning the rules and principles of international law. According to that author, as general principles may be primarily construed those legal propositions, which underlie the rules and explain why the rules are applicable, whereas 'rules' can be understood as those legal norms that spring from the principles and provide an answer to the question "what the law is".[59] It is from this point of view that one can identify different general principles and rules of criminal jurisdiction under international law.

Criminal lawyers have in the course of time identified different principles, which are said to underlie the rules of state criminal jurisdiction. One position is that only the principles of 'protection' and the principle of 'universality' may be properly called 'principles' of state jurisdiction, in the sense that they do not indicate solely a criterion for the delimitation of the application of a legal rule, but also the reasons that necessitate and justify in the eyes of the legislator the selection of this criterion.[60] From this point of view, both territoriality and nationality are rules stemming from the general principle of protection of state interests. Therefore, criminal activity occuring in a state's territory or by/against its nationals constitutes an attack against its interests, which the state must protect by endorsing the rules of territorial and nationality jurisdiction.[61]

The European Committee on Crime Problems in its seminal study on extraterritorial criminal jurisdiction followed a similar approach, although it opted for the terms "international solidarity" and "protection of a state's own interests".[62] The occasional reference to such principles may also be found in case-law. The Supreme Court of Israel, for example, in a ruling concerning the extradition of a suspected drug trafficker to the United States explained that, although not a rule of customary law, the responsibility of one state towards other legal systems in the context of co-operation in the fight against crime should "serve among the internal principles which guide each state in interpreting its law."[63]

On the other hand, the Supreme Court of India, after quoting the *Lotus* case on the constituent elements of the crime,[64] noted that "the principles recognized in international law in this behalf are virtually based on the recognition of those principles in the municipal law of various countries and [are] really part of the general jurisprudence relating to criminal responsibility under municipal law."[65]

The position under contemporary international law has been authoritatively explained by Brownlie. In his view, as far as jurisdiction is concerned, "the law, which is still rather unsettled, is developing in the light of two principles. First, that the territorial theory, while remaining the best foundation for the law, fails to provide ready-made solutions for some modern jurisdictional conflicts. Secondly, that a principle of substantial and genuine connection between the subject-matter of jurisdiction, and the territorial base and reasonable interests of the jurisdiction sought to be exercised, should be observed."[66] In the following parts an analysis of these two principles will be performed.

58 Statute the International Court of Justice art. 38 ¶ 1, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

59 Gerald Fitzmaurice, *The General Principles of International Law considered from the standpoint of the rule of law*, 92 Recueil des Cours de l'Academie de Droit International 1, 7 (1957-II); For this approach was espoused also by the I.L.C. in the drafting of the 1949 Draft Declaration on the Rights and Duties of States, [1949] Y.B. Int'l. L. Comm'n. 290, ¶ 52. Further, Maziar Jamnejad & Michael Wood, *The Principle of Non-Intervention*, 22 Leiden J. Int'l. L. 345, 358 (2009).

60 G.E. Langermeijer, Le principe de territorialité, *in* Le Droit Pénal International Recueil d' Études en hommage à Jacob Maarten Van Bemmelen 21-22 (Jacob Maarten Van Bemmelen ed. 1965).

61 *Id.*; Further, Durmus Tezcan, Territorialité et conflits de juridiction en droit Pénal International 21 (Faculté des sciences politiques de l'Université d'Ankara 1983);

62 European Committee on Crime Problems, Extraterritorial Criminal Jurisdiction 26-27 (Council of Europe, 1990); Iain Cameron, The Protective Principle of International Criminal Jurisdiction 22, 23 (Dartmouth Pub. 1994).

63 Ze'ev Rosenstein v. Israel, Appeal Judgment of 30 November 2005 (Extradition), Crim. A. 4596/05, Int'l. L. Domestic Ct. 159 ¶ 33 (IL 2005) (Nov. 30, 2005).

64 *Lotus* Case, *supra* note 20, at 23. *See* in detail, *infra,* Part 2.4.2.

65 Mobarik Ali Ahmed v. State of Bombay, 24 I.L.R. 156, 159 (S.C.) (India).

66 Brownlie, *supra* note 16, at 299.

2.3.1. / THE TERRITORIAL PRINCIPLE

The basic proposition of the territorial principle is that jurisdiction is territorial, i.e. each state may exercise its jurisdictional authority over persons irrespective of their nationality within its own territory. This basic proposition is a key component of the Huber-Storyan maxims of jurisdiction.[67] From this perspective, jurisdiction is firstly territorial; all other bases for the exercise of jurisdiction may be validly considered as exceptions to this norm and they are applicable only if they are duly recognised by national law. In the well-known *The Schooner Exchange v. McFaddon & Others Case,* Chief Justice Marshall stated that "The jurisdiction of the state within its own territory is necessarily exclusive and absolute. It is susceptible to no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its own sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restrictions. All exceptions, therefore, to the full and compete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source."[68]

According to this model, the entire world may be conveniently compartmentalised into separate watertight jurisdictional spheres, following strictly the boundaries of each sovereign state, within which the territorial state may exercise its criminal jurisdiction. The efficiency of this model was premised on the dominant assumption of the pre-industrial age that the preparation of a crime, its completion and the criminal himself would be situated in the territory of a single state.[69] Later on, this approach, based on the primacy of territoriality, accepted the existence of certain exceptions,[70] as new rules of customary law emerged, most importantly jurisdiction based on the nationality of the offender, in order to accommodate the need of states to combat transnational criminal activity, as well as rules on immunity from jurisdiction.

From this perspective, the sovereign state may decide to limit its exclusive territorial jurisdiction within its borders by delegating parts of its jurisdictional prerogative to other states[71] or by introducing into its national law any other rule of jurisdiction it considers appropriate. It is the sovereign state that will decide on the particular rule, its extent and its limitations. Therefore, the rules of jurisdiction exist because the state itself has chosen to include them into its national law, as acceptable limitations to the exclusive territorial jurisdiction it enjoys within its borders and correspondingly acceptable extensions in the territory of other states.

The Permanent Court seems to have opted in the *Lotus* case for a less stringent variable of this principle. The Court did accept that "all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State[…]";[72] since that date, therefore, it was accepted that states may extend the application of their laws, as well as the jurisdiction of their courts to persons and property outside of their territory and that, in doing so, they enjoy a 'wide measure of discretion'. The most important contribution of this judgment, however, appears to have been the point where the Court underlined that this 'wide measure of discretion' may only be exercised to the extent that it is not restricted by prohibitive rules of international law, and it concluded that "[t]he territoriality of criminal law, therefore, is not an absolute principle of international

67 Ernest G. Lorenzen, *Huber's De Conflictu Legum*, 13 Illinois L. Rev. 375, 401 (1919), on the three 'illustrious axioms' of jurisdiction developed by the Dutch scholar and judge Ulrich Huber in his famous work *De Coflictu Legum Diversarium in Diversiis Imperiis*; Davies D.J. Llewelyn, *The Influence of Huber's De Conflictu Legum on English Private International Law*, 18 Brit. Y.B. Int'l. L. 49, 64 (1937); Eduard M. Meijers, *L'Histoire des Principes Fondamentaux du Droit International Privé à partir de Moyen Âge*, 49 Recueil des Cours de l' Academie de Droit Internationale 547, 654 (1934-III).

68 7 *Cranch Reports* 116, 136 (1812).

69 Lotika Sarkar, *The Proper Law of Crime in International Law*, 11 Int'l. Comp. L. Q. 446 (1962).

70 *Id.* at 447; *See* also the Rapport Provisoire of the Special Rapporteur of the Institut de Droit International François Rigaux, Compétence Extraterritoriale des Etats, 68-I Annuaire IDI 507, 523 (1999), who, in discussing the notions of extraterritoriality and territoriality, noted that "l' exercise d' une compétence extraterritoriale est à première vue une anomalie qui a besoin d' être justifiée."

71 For an early examination of this position and the distinction between cession and delegation of jurisdiction *see* P. W. Thornely, *Extraterritoriality*, 7 Brit. Y.B. Int'l. L. 121, 131 (1926), with reference to the agreements concluded between the United Kingdom, Zanzibar and Siam in 1886 and 1903 respectively. For delegation of state authority to other states, *see* Allied Forces (Czechoslovakia), 10 Annual Digest 123-8 (1941-1942), at 123-128; *See infra* parts 5.1.2.3. & 7.3.2.

72 *Lotus* Case, *supra* note 20, at 20.

law[..,]"[73], thus signaling a departure from the strict interpretation of the tenets of the principle of territoriality solely on the basis of consensualism and national law.

In this way, it appears that as early as 1927 it was clearly explained that, while states enjoy a wide margin of discretion in the endorsement of rules of prescriptive jurisdiction, which in effect brought conduct committed abroad within the reach of their judicial machinery, their discretion is circumscribed by rules of international law, rather than rules of national law. This 'modernised' model of territoriality appears to have reformulated the basic issue of criminal jurisdiction along the following lines; "…although the territorial principle is not absolute, an exercise of extraterritorial jurisdiction requires a justifying principle, whether nationality; the requirements of security; the universality principle as in piracy *jure gentium*; or finally that interpretation of territoriality which has become known as the objective territorial principle […]."[74]

The instances, at which the extension of the jurisdiction of a state beyond its borders infringed upon the rights of other subjects of international law and violated rules of intenational law were to be regulated on a case by case basis.[75] The practical solution in cases of conflict was to be found in the exclusive character of enforcement jurisdiction enjoyed by the territorial state.[76] Accordingly, no matter what the particular legal basis invoked by a state may be, the actual foundation of criminal jurisdiction, in practice, was the presence or custody of the accused in the state's territory, or in a place assimilated to it.[77]

2.3.2. / THE PRINCIPLE OF CONNECTING LINKS ('THE MANN DOCTRINE')

In the aftermath of the Second World War, it became evident that new doctrinal solutions were required on the question of jurisdiction under international law. This was largely due to the increase in the number of states, as well as in jurisdictional conflicts resulting from extensions of state jurisdiction, particularly as regards crime and trade regulation. It is in this background that the second doctrinal position was developed by Mann in his well-known work on state jurisdiction.

Mann considered that the Huber-Storyan maxim of jurisdiction, notwithstanding the occasional efforts to modernise it, in order to maintain its effectiveness, could not adequately address the new issues that constantly emerge in a contemporary globalised and technologically advanced international society. He therefore contended that the time has come "for the international law of jurisdiction to liberate itself from the shackles of the Huber-Storyan maxims rather than devote its energies to their modernisation and improvement."[78]

Thus, Mann reformulated the principal issue of jurisdiction; in his view, "[t]he problem, properly defined, involves the search for the State or States whose contact with the facts is such as to make the allocation of legislative competence just and reasonable. It is, accordingly, not the character and scope inherent in national legislation or attributed to it by its authors, but rather the legally relevant contact between such legislation and the given set of international facts that decides upon the existence of jurisdiction."[79] Drawing mostly from the teachings and the developments in the field of private international law during the 19th century,[80] Mann argued that the time has come for international lawyers to discard the question whether the nature of territorial jurisdiction allows certain facts to be made subject to a state's legislation, and address

73 *Id.* at 19-20.

74 R. Jennings, *General Course on Principles of International Law*, 121 Recueil des Cours de l' Academie de Droit Internationale 322, 518 (1967-II).

75 This is primarily due to the fact that this modernised model seems to endorse "a loose criterion of a purely negative character rather than a positive rule of public international law"; Eduardo Jiménez de Arechaga, *International Law in the Past Third of the Century*, 159 Recueil des Cours de l' Academie de Droit Internationale 1, 182-183 (1978-I).

76 G. Schwarzenberger, *The Problem of an International Criminal Law*, 3 *Current Legal Problems* 263, 265 (1950).

77 In the words of O. W. Holmes, "the foundation of jurisdiction is physical power"; McDonald v. Mabee, 243 U.S. 90, 91 (1917); for the fiction of constructive presence and its justification, *see infra* Part 2.4.1.

78 Mann, *supra* note 2, at 43.

79 *Id*., at 44.

80 It should be noted that the issue of 'real and substantial connection' for the exercise of jurisdiction is still a critical factor in common law private international law. Indicatively, *see* Bouzari and others v. Islamic Republic of Iran, (2002) 124 I.L.R. 428, 432-433 (Can. Ont. Sup. Ct.).

the matter from a different point of view; namely, "whether the legally relevant facts are such that they "*belong"* to this or that jurisdiction."[81]

Mann's revolutionary – for its day at least – proposition is constructed on an alternative view of the relationship between jurisdiction, sovereignty, national and international law. His basic position is that the doctrine of legislative jurisdiction is "the higher law which decides upon the rightful existence of a power" and answers the question "whether and in what circumstances a State has the right of regulation" over a certain set of facts.[82] From this point of view, sovereignty is considered as the 'subordinate instrument', by virtue of which a state gives effect to that power bestowed upon it by international law. As such, the power of jurisdiction may be exercised only if and to the extent that international law recognizes such a right.[83]

However, that does not mean that state sovereignty is irrelevant. As a matter of substance of the law of jurisdiction, Mann accepts that jurisdiction may be determined by sovereignty and be considered as co-extensive with it, from the point of view of international law. Thus, he concludes that "jurisdiction is an aspect of sovereignty, it is co-extensive with, and, indeed, incidental to, but also limited by the State's sovereignty."[84] This interconnection between the two concepts is attributable, in Mann's view, to the development of the territorial theory of jurisdiction and the convenient compartmentalization it advanced as an appropriate vehicle for the settlement of the states' respective spheres of jurisdictional competence.[85]

As a result, this new legal orientation presents the connection of facts to certain states as the new fundamental principle for the exercise of state jurisdiction, to the effect that the key issue becomes to identify the state, "which has a close, […], connection with the facts, a genuine link, a sufficiently strong interest."[86]

The next step in this doctrine is how to distinguish between the connections which may be said to be legally acceptable. In this context, Mann firmly believed that, whether the connection of certain facts to a national legal order is sufficiently close to that jurisdiction, so as to enable the national authorities to exercise their sovereign powers, "though a question of degree, is answered not by the idiosyncrasies or the discretion of States or judges, but by the objective standards of international law."[87]

In these cases, "all the circumstances will have to be taken into account, including, particularly, those to which the territorial doctrine attaches significance. These are in no sense to be discarded, but their presence is not invariably necessary or sufficient to support international jurisdiction. It must be possible to point to a reasonable relation, that is to say, to the absence of abuse of rights or arbitrariness. In the final analysis, however, the question will be whether international law, as embodied in the sources enumerated by Art. 38 of the Statute of the International Court of Justice, sanctions the exercise of jurisdiction, special regard being had to the practice of States and the general principles of law recognised by civilised nations. There will thus be definite barriers beyond which the exercise of jurisdiction is unlawful, there will be safeguards against any inclination to exaggerate flexibility."[88]

In short, the Mann doctrine of international jurisdiction sets as an underlying general principle the quest for a reasonable connection of factual situations to national jurisdictions. In this model, only the states with a close connection with the facts of a case would be in a position to validly exercise jurisdiction in a particular case and in the event of conflict, the state having the closest connection, taking into account all the relevant circumstances. The existence of those connections and their limitations are matters regulated by international law, and constitute its rules, thus allowing for a certain degree of 'objectivity', which would render unlawful all jurisdictional assertions going beyond these limits, qualifying them as unlawful interference in the internal affairs of states.[89] Under this doctrinal approach, therefore, nationality, territory and other jurisdictional connecting links are made available to states by international law as rules of international law indicating a certain degree of connection between a set of facts and a specific legal order.

81 Mann, *supra* note 2, at 44-45.
82 *Id.* at 16.
83 *Id*.
84 *Id.* at 30.
85 *Id.*
86 *Id.* at 46.
87 *Id*.
88 *Id.* at 46-47.
89 *Id.* at 47.

Notwithstanding the shortcomings of this doctrine, especially as regards considerations of 'reasonableness'[90] and the distinct approaches that lawyers from different national systems may adhere to,[91] it allows for jurisdictional flexibility with respect for international rights and obligations, in terms of the links used by states, the wide margin allowed for interpretation beyond the strict conceptualisation of territory, and finally the possibility of its use by international courts. In a sense, this doctrine may be said to constitute the next step in the evolution of law in international jurisdiction, namely of the move from strictly national delimitation of jurisdiction to an increasingly internationally oriented approach to criminal jurisdiction. This step appears to be consistent with the development of international relations; after all, "it is perfectly conceivable that as the world order changes from libertarianism among states to cooperation, so might the applicable rule with respect to criminal jurisdiction be seen to change."[92]

Thus, Mann appears to state that, at least as far as criminal jurisdiction is concerned, the crucial hypothesis is not 'if a certain jurisdictional assertion is not prohibited by international law, it is permitted', but rather that 'if it is not permitted by international law, it is prohibited'. In this context, the rules and principles of international law occupy a central position in the analytical process. Under Mann's doctrine, the rules of jurisdiction are applicable because they constitute valid connecting links under international law of equal legal value, connecting certain activity to a national legal order.

90 *Cf.* here the Restatement (Third), *supra* note 9 at 254 § 403. The authors of the Restatement took the view that "reasonableness is understood here not as a basis for requiring that states consider moderating their enforcement of laws, which they are authorised to prescribe, but as an essential element in determining whether, as a matter of international law, the state has jurisdiction to prescribe." The reasonableness analysis, in the opinion of those authors, "has emerged as a principle of international law as well"; *Id.* at 245. However, the authors do acknowledge that it is possible for more than one state to exercise jurisdiction "reasonably"; *Id.* at 246. In that event, a list of factors is provided, which can be considered in the performance of a "reasonable" examination of a state's jurisdiction. The jurisdictional rule of reason "would *require* nations to refrain from applying their laws to conduct principally occurring abroad when doing so would unreasonably interfere with the interests of other states and of private parties"; Dieter Lange & Gary Bord The Extraterritorial Application of National Laws 38-39, (1987), for references to the endorsement of this approach by the E.C. Commission and the Federal Republic of Germany; For a discussion of 'reasonableness' as a prerequisite of jurisdiction or as a ground to abstain from exercising jurisdiction, 1 Barry E. Hawk, United States, Common Market and International Antitrust: A Comparative Guide, 78.1-2. (1996). The adoption of lists of factors and criteria appears not particularly helpful, mainly because the application of an open-ended list of criteria may lead to the endorsement of completely contradictory positions, since they may be employed with equal facility to support both points of view; Mann, *supra* note 2, at 72-75; Hartford Fire Insurance Co. v. California, 113 S. Ct. 2891 (1993); A. Lowenfeld, *International Litigation and the Quest for Reasonableness*, 245 Recueil des Cours de l' Academie de Droit Internationale 9, 49-54 (1994-I), where the author demonstrates this point. In his view, "That the process has not yielded a single unequivocal answer should not surprise those of us accustomed to search for the law of the State which has the most significant relationship to the transaction in question, or with which the contract is most closely connected." In fact, what this 'rule of reason' is trying to say has already been explained generally by the Central American Court of Justice in 1917; if jurisdiction is considered as an attribute of sovereignty, "To invoke the attributes of sovereignty in justification of acts that may result in injury or danger to another country is to ignore the principle of the independence of States, which imposes upon them mutual respect and requires them to abstain from any act that might involve injury, even though merely potential, to the fundamental rights of the other international entities which, as in the case of individuals, possess the right to live and develop themselves without injury to each other", Central American Court of Justice, supra note 52 at 718-719.

91 Christopher L. Blakesley, *Extraterritorial Jurisdiction*, in 2 International Criminal Law 94-95 (M. Ch. Bassiouni ed. 3rd ed. 2008); "The rule of reasonableness poses some difficulty internationally because, although the rule of reasonableness has become a term of art in Anglo-American jurisprudence, other legal systems have no historical or theoretical background or frame of reference from which the term makes sense. Moreover, American decisions applying the rule of reasonableness have been criticized as arbitrary and discriminatory to foreign states."

92 Edward M. Morgan, *Criminal Process, International Law and Extraterritorial Crime*, 38 U. Toronto L. J. 245, 250 (1988).

The reception of Mann's work has been mixed. Although in the work of several publicists Mann's doctrine is cited with approval,[93] there are also those who do not appear entirely convinced of its position in positive law,[94] while others are sceptical about the risk of giving rise to jurisdictional conflicts.[95]

Equally, state practice does not appear to uniformly indicate a certain preference, as a matter of principle. Thus, for example, as the Agent for the French Republic noted in the hearings before the International Court of Justice in the *Case Concerning Certain Criminal Proceedings,* "the jurisdiction of the French courts is always subject to the verification of a link with France, whose operation is circumscribed by conditions strictly laid down by law",[96] only to mention, a little later, that, at least for French law, "[t]he principle is unambiguous: normally, the French courts have jurisdiction to prosecute offences punishable under French criminal law where those offences have been committed on French territory. French criminal law is dominated by the principle of territoriality, since its principal purpose is to provide for the punishment of offences committed on French territory, the situation being that an offence is deemed to be committed on French territory if one of the elements constituting the offence took place there. It is therefore only exceptionally that French law recognizes, and only within certain limits, that French courts have jurisdiction in respect of offences committed outside French territory."[97]

As regards the United Kingdom, the position was expressed quite clearly in the debate in the House of Commons on the Jurisdiction (Conspiracy and Incitement) Bill, where the parliamentary Under-Secretary of State, stated that "[g]enerally, criminal jurisdiction in the UK is territorially based. That means that conduct that would constitute an offence must have some connection with United Kingdom territory. Offences committed abroad by British nationals, unless they fall within a particular statutory provision, cannot normally be prosecuted in the UK."[98] However, immediately afterwards, it is admitted that "[n]evertheless, that principle has had to be modified in recent years" due to the need to "co-operate further with other countries in the continuing battle for frontierless crime."[99]

93 Anthony Aust, *supra* note 16, at 42, "It may be that a general principle has now emerged that a state may exercise jurisdiction if there is a sufficiently close connection between the subject matter and the state to override the interests of a competing state"; Lowe, *supra* note 6, at 336; 1 Oppenheim *supra* note 4, at 457-458; Higgins *supra* note 41, at 58, seems to follow the same pattern of analysis as regards universal jurisdiction; Bowett *supra* note 16, at 3-4; John Dugard, International Law: A South African Perspective 150 (2005), with references to South African jurisprudence; Brownlie *supra* note 16, at 308, 310-311. Last, but not least, notwithstanding certain differences, the Restatement (Third), *supra* note 9, at §402, seems to be in the same frame of mind. The authors of that work indicate in a non-exhaustive list the criteria to be considered for the 'reasonable' exercise of extraterritorial jurisdiction. These include, among others, the territory of the commission of the act, the nationality of the persons and property involved and the character of the act. Lowenfeld, *supra* note 90, at 46-48.

94 *See* among others, Jean Combacau & Serge Sur, Droit International Public 346, 347 (1993) "A la question de savoir si l' État peut prétendre soumettre à ses règles toute personne, tout bien, toute activité, ... , sur la seule base de leur rattachement à son territoire, le droit international répond de façon affirmative, sous réserve de la notion de rattachement raisonnable, dont à vrai dire le statut positif est incertain."

95 Morgan, *supra* note 92, at 274 (commenting on the endorsement of the Mann approach by the Libman judgment of the Canadian Supreme Court).

96 Certain Criminal Proceedings in France, *supra* note 21, 2003 I.C.J. Rep., Pleadings, 4, ¶ 10 (April 28).

97 *Id*. at 4, ¶11.

98 Timothy Kirkhope, *Debates on the Jurisdiction (Conspiracy and Incitement) Bill, House of Commons*, reported in 68 Brit. Y.B. Int'l. L. 575, 576 (1997).

99 *Id*. at 577; Somchai Liangsiripraesert v. U.S. [1990] 29 I.L.M. 1390, 1396 (P.C.) (Eng.), "As a broad general statement it is true to say that English criminal law is local in its effect and that the common law does not concern itself with crimes committed abroad."

On the other hand, however, national courts have demonstrated a willingness to adopt this doctrine more fully. The decision of the Supreme Court of Canada in *Libman*,[100] the New Zealand Court of Appeals in *Reid* ("real and substantial link")[101] the German Constitutional Court in *Jorgic* ("reasonable nexus")[102] and even the Supreme Court of Israel in *Rosenstein* ("majority of links")[103] have clearly indicated that the doctrine of connecting links as a principle of international jurisdiction offers perhaps the best doctrinal interpretation of the principle of non-intervention and the limits to state jurisdiction.

2.3.3. / SYNTHESIS

In reviewing the matter from Fitzmaurice's point of view, the two principles may be summarized as follows.

The classic territoriality principle explains that the reason behind the existence of rules of jurisdiction is state sovereignty over territory. Since a state is sovereign over its territory, it has the right to regulate human activity therein. The content of the rules and the priority of claims in cases of jurisdictional conflicts is informed by this underlying principle, at least insofar as jurisdiction is considered permissible only if based on territory. Consequently, other jurisdictional claims are therefore exceptions to the rule, whose validity depends on their direct acceptance by states in their national law.

Mann's doctrine does not seek the demise of state sovereignty as such. He accepts that states are sovereign and that sovereignty plays an important part in delimiting a state's jurisdictional powers. However, from his point of view, emphasis should be placed on international law, rather than national law. The law of

100 Libman v. The Queen [1985] 2 S.C.R. 178, 200 (Can.). The case involved telephone solicitation from the suspect's employees in Canada to potential investors in the U.S., selling virtually worthless shares of gold mines in Central America. The victims wired the money to Panama and Costa Rica, where the suspect collected his share. The issue was whether the Canadian courts had jurisdiction to try the telephone fraud, considering that the victims were U.S. nationals, the money was sent to Central America and the actual deprivation of property took place beyond Canada. The Court found that it had jurisdiction on the basis of a 'real and substantial link' to the case. The Canadian Supreme Court however seems to have made an important oversight when it stated that "Just what may constitute a real and substantial link in a particular case, I need not explore. There are ample links here. The outer limits of the test may, however, well be coterminous with the requirements of international *comity* (emphasis added)." As explained in the work of H. Lauterpacht, R. Jennings and F. Mann, comity indicates discretion, whereas law signifies legal obligation. It is international law that provides the limits to jurisdictional assertions, rather than a question of courtesy, amity, neighbourly feeling and reciprocity. H. Lauterpacht, *Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens,* 9 Cambridge L. J. 330, 331 (1947); Mann, supra note 18 at 72; 2 R. Jennings, *The Limits of State Jurisdiction*, in The Collected Writings of Sir Robert Jennings 887-888, note 5 (1998); For a clearer example of application *see* US v. Lépine, Judgment ¶ 4 [1994] 1 S.C.R. 286 (Can.), where the Supreme Court of Canada considered that the refurbishing in Florida of an aircraft that would carry cocaine from Colombia to Canada via the U.S., the agreement to do so and to fly it to Colombia to pick up drugs for delivery in Nova Scotia, together with the fact that the aircraft landed in US territory even before the landing that led to the arrest, constituted "a real and substantial link" to the U.S., which were considered thus to have legitimately exercised jurisdiction against the appellant for conspiracy to distribute cocaine. In the same spirit, R. v. Hape, [2007] 2 S.C.R. 292 (Can. Ont. 3563), (investigation by Canadian authorities for money-laundering abroad and applicability of the guarantees of the Canadian Constitution to extra-territorial evidence retrieval).

101 Solicitor-General v. Reid [1997] 3 NZLR 617, 631-632 (1997) (C.A.) (NN).

102 Entscheidungen des Bundesverfassungsgerichts [BVerwGe] [Federal Constitutional Court] Dec. 12, 2000, 135 I.L.R. 152, 165 (Ger.), reiterating the position under German law "With regard to the prohibition on interference with State sovereignty that is enshrined in both customary and treaty law (Article 2(1) of the UN Charter), the Federal Constitutional Court has required some reasonable nexus with Germany when subjecting to German law all acts performed in a foreign territory and therefore outside German territory. What constitutes a reasonable nexus is dependent on the particular nature of the subject of regulation . . . ."

103 Rosenstein *supra* note 63 at ¶ 46. In that case, the question was whether Israel should extradite to the US a suspect of drug trafficking, when both Israel and the US had territorial links with the crime and the conspiracy behind it and the suspect was an Israeli national. In this case, the Court, *per* Levy J., considered that there were two competing jurisdictional claims on the basis of the rule of territorial jurisdiction, those of the requesting (U.S.) and of the requested (Israel) States respectively; *id*. at ¶ 42. In order to reach a decision, the Supreme Court used a variety of criteria, including what the Court called the "majority of links" or the "center of gravity" or "natural legal system" test. The gist of that test is that ". . . as far as criminal law is concerned, a person's "natural" legal system is the system to which the alleged crime has the most links. This approach, sometimes called the "majority of links"or "center of gravity" approach, is the one that best expresses the relationship between the criminal conduct and the legal systems which should apply." *Id*. at ¶ 46. That said however, the Supreme Court – and herein lies one key difference with the Canadian and German approach - quickly acknowledged that this was simply one of many criteria ("a rule of preference") to be considered and not a hard and fast rule to decide the case ("a rule of decision"). Ultimately, the Supreme Court decided to extradite the suspect. On this criterion, it was said that "it is uncontroversial that the center of gravity of the affair is in [the U.S.]", as that State was where the conspiracy was consummated and its fruits produced. *Id*. at ¶ 61.

jurisdiction is seen as part of international law. Correspondingly, the right of states to exercise jurisdiction flows from international law and may be exercised only in accordance with international rules. This body of international rules is "the higher law which decides upon the rightful existence of a power" and explains "whether and in what circumstances a State has the right of regulation" over a certain set of facts.[104]

The consequence of this perspective would be that, since all rules of jurisdiction flow from the same source, they exist within the limits imposed by international law and enjoy formal equality under international law. Accordingly, the priority of jurisdictional claims in cases of jurisdictional conflicts – and therefore the meaning of non-intervention – is not provided by a formalist hierarchy deduced by a positivist perception of territorial sovereignty, but rather by taking into account each state's jurisdictional claim and its factual connection(s) to the case at hand.

As far as state practice is concerned, while national courts seem more willing to endorse Mann's doctrine than state executive branches, even the latter cannot turn a blind eye to its evident benefits. There seems to exist a growing tendency in state practice to legislate and rely increasingly on rules for the exercise of jurisdiction other than strict territoriality. There is no judicial decision affirming on the international plane that this practice has crystallised yet to an overriding acceptance of the doctrine of connecting links. In any event, it is submitted that state practice certainly seems to be moving to that direction. As a consequence, Mann's theory will serve as the foundation for the understanding of the exercise of jurisdiction and the principle of non-intervention in the present work.

Having briefly delineated the two primary theoretical perspectives as regards principles of jurisdiction, it is time to turn to the rule of territorial criminal jurisdiction under customary law and its classifications.

2.4 / RULES OF JURISDICTION

It is usual in public international law literature to analyze state criminal jurisdiction on the basis of certain rules of jurisdiction, namely territoriality, nationality, passive personality, protective and universal jurisdiction. The critical connecting link alluded to by these titles are the nationality of the offender (nationality jurisdiction), the nationality of the victim (passive personality), the protection of certain important state interests violated for example by the crimes of counterfeiting national currencies or espionage (protective) and the gravity of the offence visible in cases of genocide or war crimes (universal jurisdiction).

In the context of this dissertation, extensive reference will be made only to the analysis of territorial jurisdiction, as it forms the main object of the present study in the context of the ICC Statute.

2.4.1. / TERRITORIALITY AND TERRITORIAL FICTIONS

Under contemporary international law every state has the right to exercise jurisdiction for a crime that was committed within its territory, irrespective of the nationality of the offender. This constitutes one of the best established rules of customary international law and treaty law.[105] This rule was considered in the past as

104 Mann *supra* note 2, at 16.

105 For the historical development of this rule, Ryngaert, *supra* note 1 at 44; from the recent international instruments, *see* Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art. 1, S.C. Res. 827, 48 U.N. SCOR, U.N. Doc. S/RES/827 (1993); Statute of the International Criminal Tribunal for Rwanda, art. 1, S.C. Res. 955, 49 U.N. SCOR, U.N. Doc. S/RES/955 (1994); The Rome Statute of the International Criminal Court, art. 12 ¶ 2(a), July 7, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002); Convention on the Prevention and Punishment of the Crime of Genocide, art. VI, Dec. 9, 1948, 78 U.N.T.S. 277, 279; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, Dec. 10, 1984, 23 I.L.M. 1027, 1028; International Convention against the Recruitment, Use, Financing and Training of Mercenaries, art. 9 ¶ 1(a), Dec. 4, 1989, U.N. Doc. A/RES/44/34 (1989); International Convention against the Taking of Hostages, art. 5, Dec. 17, 1979, 1316 U.N.T.S. 205; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 3(a), Dec. 13, 1973, 1035 U.N.T.S. 167; Convention on the Safety of United Nations and Associated Personnel, art. 10, U.N. Doc A/49/742 (1994); From general works on the territorial jurisdiction of the Tribunals, M. Ch. Bassiouni & P. Manikas, The Law of the International Criminal Tribunal for the Former Yugoslavia 296-7, 305 (1996); John R.W.D. Jones & Steven Powles, International Criminal Practice 354-357 (3rd ed. 2003).

the exclusive basis for the exercise of criminal jurisdiction in common law countries.[106] Although the same cannot be said today,[107] there is still a presumption in the interpretation of statutes in favour of territoriality, unless a contrary intent of the legislating authority may be clearly discerned.[108]

There is no shortage of convincing sociological, legal and other explanations for the adoption and continuing application of territorial jurisdiction as a rule of criminal jurisdiction.[109] That said, while the legal status of the rule itself is universally accepted, the content of the rule seems to have undergone substantial changes in order to address the challenges posed to the effective exercise of criminal jurisdiction by technological advancement and new forms of cross-border criminal activity. An important factor in this development was "the increasing complexity of the "act or omission" which constitutes crime under modern penal legislation. The "act or omission" need not consist of an isolated action or failure to act. Not infrequently it appears as an event consisting of a series of separate acts or omissions."[110] Therefore, while initially at least the content of the rule acknowledged the power of a state to exercise criminal jurisdiction within its territory for all crimes completed *in toto* therein, soon it became evident that this approach deprived criminal law of its effective application to a significant extent.[111]

A useful example can be provided from the rigidly territorial interpretation of state jurisdiction in the United States. In what appears today as a textbook case for the exercise of criminal jurisdiction based on territoriality,[112] H., standing in North Carolina, fired across a state line a shot, which hit and ultimately

106 McLeod v. Attorney General for New South Wales, [1891] A.C. 453, 455, 458; From international literature, 2 Daniel P. O' Connell, Intenational Law 824-825 (DPO Connell ed. 2nd ed. 1970); William E. Beckett, *The Exercise of Criminal Jurisdiction over Foreigners*, 6 Brit. Y.B. Int'l. L. 44, 48-50 (1925), at (using the term 'strict territorial theory'); Rollin M. Perkins, *The Territorial Principle in Criminal Law,* 22 Hastings L. J. 1155, 1156, 1167 (1970-1971); Restatement (Third), *supra* note 9 at §402, "Apart from its tax law, ... the United States has only sparingly applied law to individuals residing abroad on the basis of their United States nationality."

For the civil law perspective and the French approach to criminal jurisdiction, Tezcan *supra* note 61, at 78-80, with further references to French and Belgian law; Exhaustive analysis by Ryngaert *supra* note 1, at 55.

107 R. v. Page, [1953] QB 170 (Queen's Bench Division, *per* Lord Goddard, "Crimes of the present day which though committed abroad can be tried in England are treason, homicide, bigamy and offences against the Foreign Enlistment Act"; further, Sarkar, *supra* note 69, at 451; Lawrence Preuss, *American Conception of Jurisdiction with Respect to Conflicts of Laws on Crime*, 30 *Transactions of the Grotius Society* 184 (1944), "[T]he territorial principle is basic to the common law, but it has in practice undergone so many exceptions that it is inaccurate to ascribe it, without numerous qualifications, to the British and American legal systems."

108 Somchai Liangsiripraesert v. U.S., *supra* note 99 at 1402, "When approaching the construction of a statute, particularly a criminal statute there is a strong presumption that it is not intended to have extraterritorial effect and clear and specific words are required to show the contrary; this presumption arises from the assumption that the legislature does not intend to intrude upon the affairs of other countries which should be left to order affairs within their own boundaries by their own laws." From U.S. case-law, American Banana Co. v. United Fruit Company, 213 U.S. 347. 358 (1909), where Mr. Justice Holmes stated that "The foregoing considerations would lead, in case of doubt, to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. All legislation is *prima facie* territorial." For the reasoning behind this presumption under customary law, F. Hoffman-LaRoche Ltd. et al. v. Empargan S.A. et al., 124 S.C. 2359, 2366 "First, the Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. This rule of construction reflects principles of customary international law – law that (we must assume) – Congress ordinarily seeks to follow." For common law in general, Lynden Hall, *'Territorial' Jurisdiction and the Criminal Law,* 1972 *Crim. L. Rep.* 276, 276-7; Libman v. the Queen*, supra* note 100, at 179; Public Prosecutor v. Taw Cheng Kong, Judgment, 2 S.L.R. 410 ¶ 66 (Sing. Court of Appeal 1998), on the origins and the application of the presumptions; Dugard, *supra* note 93, at 151; Ryngaert *supra* note 1, at 63-64.

109 Among others, note as grounds for establishing territorial jurisdiction the need to ensure the due process rights of the accused, mostly in common law countries, Ryngaert *supra* note 1, at 57-58, 83-84. For the perception of territorial criminal jurisdiction as "a logical outgrowth of the conception of law enforcement as a means of keeping the peace" among a social group sharing common values, which constitutes a paramount interest of every state, Somchai Liangsiripraesert v. U.S., *supra* note 99, at 1396, explaining the exclusive territorial nature of English criminal law; "The reason for this is obvious; the criminal law is developed to protect English society and not that of other nations which must be left to their own societies. To put the matter bluntly it is no direct concern of English society if a crime is committed in another country. It was for this reason that the law of extradition was introduced between civilized nations . . . . "; Perkins, *supra* note 106, at 1155; Cassese, *supra* note 11, at 336-337, n. 1. For the view that territorial criminal jurisdiction is supported by the exclusive competence of the territorial state to collect evidence from the location of the criminal activity and ensure the effective prosecution and punishment of a crime, Arrest Warrant*, supra* note 55, at Separate Opinion of President Guillaume, at 37-38 ¶ 4; Shaw *supra* note 11, at 652-653.

110 Harvard Law School, Draft Convention on Jurisdiction with respect to Crime, 29 Am. J. Int'l. L. Supplement 435, 484 (1935).

111 Sarkar, *supra* note 69, at 447-448; In common law jurisdictions this realisation appears to have come somewhat more recently; Somchai Liangsiripraesert v. U.S., *supra* note 99 at 1401, "Unfortunately, in this century crime has ceased to be largely local in origin and effect. Crime is now established on an intrenational scale and the common law must face this new reality"; Michael Hirst, Jurisdiction and the Ambit of Criminal Law 29 (2003).

112 Brownlie, *supra* note 16, at 301; Dugard, *supra* note 93, at 152.

resulted to the death of B., in the state of Tennessee. While H. was arrested, tried and convicted in North Carolina for the murder of B., his conviction was quashed on appeal, as the Court of Appeals held that, since the fatal force took effect in Tennessee, it was that state, being the territorial state, which was exclusively competent to try him.[113]

In search of "the convenient way to handle jurisdiction over mobile things"[114] in the world of strict territoriality, authors and judges attempted to accommodate these novel legal phenomena of the day by resorting to legal fictions. Such popular fictions were the assimilation of embassy grounds with the territory of the state of diplomatic representation,[115] the treatment of a ship as 'floating territory' of the flag state,[116] or the jurisdiction of the territorial state of completion of the crime on the basis of the perpetrator's constructive presence there.[117]

Eventually, some of these fictions were discarded.[118] However, the theoretical fiction of 'constructive presence'[119], the exercise of jurisdiction based on the place of origin or of the consequences of the crime, has been widely endorsed by states. This development took the form of what has become widely known as

113 State v. Hall, 114 N.C. 909, 19 S.E. 602 (1894); Perkins, *supra* note 106, at 1158, where he mentions this case to be "one of the most bizarre miscarriages of justice on record." For another interesting approach to identical facts, County Council of Fermanagh v. Farrendon, 2 I.L.R. 109, 109-110 (1933), where the Court of Appeal of Northern Ireland held that the Northern Ireland Courts had jurisdiction to award compensation in the context of criminal procedings for injury resulting from gun fire that was shot from the Irish Free State to Northern Ireland, on the grounds of the continuous nature of the intent to commit a crime. As that Court stated, ". . . . if a man fires at another with intent to wound, the intent is present during every fraction of space and moment of time that is traversed by the bullet from the moment it leaves the leathal weapon until it strikes or passes the victim. There, therefore, was continuous malice in the 'intent' of the bullet, not only in Donegal, till it crossed the border, but in Fermanagh, from the border till it struck the applicant . . . ."

114 Bowett, *supra* note 9, at 4-5.

115 According to the original form of 'extraterritoriality' or 'exterritoriality', ambassadors and heads of foreign states enjoyed immunity from jurisdiction, because they were considered not to be within the territory of another state, *i.e.* due to the juridical fiction that they were considered never to have left the soil of their country, no matter where they actually were. This theory was attributed to Bynkershoek and strongly criticised in modern times. In detail, André Weiss, *Compétence ou Incompétence des Tribunaux à l'égard des États Étrangers,* 1 Recueil des Cours de l' Academie de Droit Internationale 525, 527 (1923); E. R. Adair, The Exterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries 220-223 (1929); Leo Strisower, *L' exterritorialité et ses principales applications*, 1 Recueil des Cours de l' Academie de Droit Internationale 233 (1923). The term was used interchangeably with extraterritoriality; Thornely *supra* note 71, at 122-124, where he identified four different meanings attached at that time to the term, ranging from consular jurisdiction to the exercise of jurisdiction by one sovereign over activities conducted in the territory of another, while noting that exterritoriality and extraterritoriality as terms were used indiscriminately in treaties and other documents, at 121, note 1; From recent international law literature on the matter, Jordan J. Paust, *Non-Extraterritoriality of 'Special Territorial Jursdiction' of the United States: Forgotten History and the Errors of Erdos*, 24 Yale J. Int'l L. 305, 310-311 (1999); J. Craig Barker, The protection of Diplomatic Personnel 42 (2006); From case-law, Maffezini v. Kingdom of Spain Arbitration, 124 I.L.R. 2, 22-23 (explaining the purpose of such jurisdiction and its function).

116 For support to this fiction and references to US case-law, Perkins, *supra* note 106 at 1168-1169.

117 For a judgment explaining why recourse to this fiction was considered necessary at the time, In Re Quiros, Court of Cassation of Costa Rica, *reported in* 3 Annual Digest 196 (1933). There, the crime of bigamy occurred when the defendant was married for the second time in the United States, the first wedding having been validly wedded in Costa Rica. The Court of Cassation held that it was unable to exercise jurisdiction, since, in its view, "the legally indispensable prerequisite for the jurisdiction of this court in cases of crimes committed aboard" was the presence of the accused in the state; it is this presence that "would produce a social disturbance which justifies the intervention of the national justices"; Further, Strassheim v. Daily, 211 U.S. 280, 285 (1911), where it was held, *per* Justice Holmes, that "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of harm as if he had been present at the effect, if the state should succeed in getting him within its power"; *Lotus* case *supra* note 20, Dissenting Opinion of Judge Moore, at 73, "it appears now to be universally admitted that, where a crime is committed in the territorial jurisdiction of one State as the direct result of the act of a person at the time corporeally present in another State, international law, by reason of the principle of constructive presence of the offender at the place where his act took effect, does not forbid the prosecution of the offender by the former State, should he come within its jurisdiction."

118 The theory of diplomatic exterritoriality appears to have been discarded early in the beginning of the 20th centrury. *See* indicatively, 4 Jan H. W. Verzijl, International Law in Historical Perspective 53-54 (1971), with criticism against the use of the fiction 'ship is territory'; 4 Charles Rousseau, Droit International Public 174-175 (1980); Barker, *supra* note 115, at 42-43; Convention on International Civil Aviation art. 17, Dec. 7, 1944, 15 U.N.T.S. 295, for aircrafts; United Nations Convention on the Law of the Sea art. 91, Dec. 10, 1982, 1833 U.N.T.S. 397, for ships. According to these instruments, the matter falls under the rule of nationality jurisdiction; M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Order of Jan. 20, 1998, 2 ITLOS Rep. 4, 5. 38 I.L.M. 1323, 1342-1343 ¶ 75-88 (1999); Labels notwithstanding, the substance of state jurisdiction over ships was explained by in The People v. Robert J. Thomas, [1954] 22 I.L.R. 295, 298 (S.C.) (Ir.); "The basis of the jurisdiction [over ships] is the right of the country to which the ships belong to control the conduct of those on board from the point of good order and the prevention of crime by virtue of the protection afforded to such persons while sailing in such ship."

119 For an example analyzing the permissibility of the prosecution of an accused as a matter of general principles of law, even when he is 'not corporeally present' in the territory of the state at the time of the commission of the crime, Mobarik Ali Ahmed v. State of Bombay, 24 I.L.R. 156, 159 (S.C.) (India).

the subjective and objective aspects of the rule of territorial jurisdiction,[120] which are said to be "universally recognised as a legitimate application of the territorial principle."[121]

It is interesting to note here that the use of objective and subjective territoriality are not relics of the past, but very much in use in state practice, although not for massive human rights violations. This conservatism is particularly surprising, when the adoption of other rules of criminal jurisdiction, such as nationality or passive personality, would offer easy solutions to relevant questions. This insistence on the part of states is arguably best explained through the intricate connection between statehood, territory and jurisdiction and the weight this connection lends to the legitimization of jurisdictional claims. It is the language of territorial jurisdiction itself that enables states "to act within an accepted conceptual framework of legality."[122]

This distinction, it should be noted, is not a very rigid one and does seem at times somewhat artificial, particularly when certain forms of criminal activity are punishable without regard to consequences (conduct crimes), or their 'consequences' are more remote and indeterminate (e.g. 'abstract endangerment offences' –offences committed through transmission/broadcasting); in fact, different authors may (and do) assume different positions as to whether, for example, ubiquity constitutes a separate theory of jurisdiction altogether or it should be properly considered under subjective territoriality;[123] whether protective jurisdiction and objective territoriality overlap;[124] similarly, the effects doctrine of jurisdiction has been considered mostly as a 'grey zone', half way between civil and criminal jurisdiction, for some more closely related to the rule of protective jurisdiction rather than territoriality.[125] Considering that the lines are not as clear-cut as one would like to believe,[126] there is some merit in presenting all these different approaches as falling under a single heading of 'qualified territoriality', without attaching too much attention to individual labels.[127]

It is therefore without prejudice to any theoretical claims of autonomy or dichomoty of the relevant terms that the next few pages will explain briefly for the purposes of the present dissertation the subjective and objective territorial approaches, while reference will also be made to the doctrine of ubiquity, the main criterion of which is whether 'a crime was committed in whole or in part within that state's territory'. This doctrine will be analysed together with objective territoriality, as they appear to be very closely related.[128] Last, but not least, reference will be made to the effects doctrine on jurisdiction.

120 From common law jurisprudence on the use of the terms, R. v. Duncan Wallace Smith (No.2), [2004] E.W.C.A. 631, ¶ 54.

121 Hirst *supra* note 111, at 113.

122 Michael Byers, Custom, Power and the Power of Rules 64 (1999).

123 Ilias Bantekas & Susan Nash, International Criminal Law 73-74 (3rd ed. 2007); C. Blakesley, *Jurisdictional Issues and Conflicts of Jurisdiction*, in Legal Responses to International Terrorism, US Procedural Aspects 156-7 (M.C. Bassiouni ed.1988).

124 Bantekas & Nash, *supra* note 123 at 75; For a discussion on the distinction between the two, *see* Akehurst, *supra* note 11 at 159, note 1; Cameron *supra* note 62, at 64-67.

125 Cameron *supra* note 62, at 64-67; Brownlie *supra* note 16, at 308.

126 Cameron *supra* note 62, at 53, "Confusion has been caused because writers, in different states and during different times, have used different terms to describe the same method, or worse, the same term when they mean different methods", with examples.

127 For this approach, Geoff Gilbert, *Crimes sans frontières: Jurisdictional Problems in English Law*, 63 Brit. Y.B. Int'l. L. 415, 430 (1992). As regards the ICC Statute, Stéphane Bourgon, *Jurisdiction Ratione Loci*, in Cassese, *supra* note 11, at 559, 567; similarly, Markus Wagner, *The ICC and its Jurisdiction – Myths, Misperceptions and Realities*, 7 Max Planck U.N. Y.B. 409, 485 (2004), seem to favour the view that, notwithstanding the theoretical distinction, what is actually required by the law is a state connection to the conduct in question.

128 A very interesting approach to this analysis is presented by Hein D. Wolswijk, *Locus Delicti and Criminal Jurisdiction,* 66 Neth. Int'l. L. Rev. 361, 367 (1999). In that author's view, "Four *locus delicti* theories are generally applied. These theories link up with the different constituent elements of an offence: its beginning, its in-between stage and its completion. According to the '(physical) act theory', the offence is committed where the offender has (physically) acted. The 'instrument' theory is connected to the in-between stage, as it designates as the *locus delicti* the place where an instrument which is used by the offender takes effect. . . . . According to the 'result theory' . . . . *locus delicti* is the place where the effect, which is a constituent element of the offence occurs, i.e. where the offence is completed. Finally, the 'ubiquity theory' is a combination of the above theories; according to this theory, an offence can be committed at more than one place"; For French doctrine on the theories, André Huét and Renée Koering-Joulin, Droit Pénal International 203 (2000), mentioning the theories of action, of result and of ubiquity.

2.4.2. / SUBJECTIVE TERRITORIALITY

Subjective territoriality[129] has been explained as the aspect of territoriality, "which establishes the jurisdiction of the State to prosecute and punish for crime commenced within the State but completed or consummated abroad."[130]

There is generally little doubt on the competence of states to prosecute and punish individuals for criminal activities, which commenced within their territory and were completed abroad.[131] As Akehurst noted, while the option 'subjective or objective' territoriality was frequently discussed in the beginning of the 20th century, eventually it became evident that "there was no logical reason for preferring the claims of one State over the claims of the other; and the only alternative to granting jurisdiction to neither state, […] was to grant jurisdiction to both States."[132]

From the point of view of international law, the usefulness of this theoretical division is probably diminished today. This is due to the development of ubiquity and objective territoriality, which provide for jurisdiction when a constituent element or 'part' of a crime takes place on national territory. To the extent therefore that preparatory acts, attempts or the commencement of the commission of a crime may be properly classified as a 'constituent element' thereof, the relevant issues may be properly addressed through those approaches to the territorial rule.

Naturally, this begs the question of when exactly a certain part of a criminal activity may be said to qualify as the 'beginning' of a crime for jurisdictional purposes and how to distinguish for the purposes of territorial criminal jurisdiction between preparatory acts, attempt and constituent elements. At the outset, it should be stressed that the problem of classification is endemic in all aspects of territorial jurisdiction, as there seems to exist no generally accepted yardstick for the determination of the 'elements' of crimes and their characterisation as 'constituent' or otherwise.[133]

As regards subjective territoriality, this issue is important as regards the need to distinguish between preparatory acts for the commission of a crime or attempts, on the one hand, and the commission of a crime proper on the other. An answer in the abstract appears unavailable, as the treatment of territorial jurisdiction over attempts varies between legal systems[134] and different types of criminal activity, taking into account the legal nature of a crime (continuous/instant, crime of conduct/result etc). The matter of preparatory acts itself is even more doctrinally challenging.[135] That said, however, it is submitted that, from the perspective of international law, the decisive element is a matter of legal principle. Accordingly, any answer would depend largely on what extent – if any at all – national judges accept that rules of international law impose limitations on the classification of constituent elements under national law and the interpretation of national statutes by national courts.

129 Also called the "initiatory theory"; Glanville Williams, *Venue and the Ambit of Criminal Law*, 81 L.Q.Rev. 518, 520 (1965).

130 Harvard Draft Convention, *supra* note 110 at 484.

131 Brownlie, *supra* note 16, at 301 with further references; 1 Oppenheim, *supra* note 4, at 460.

132 Akehurst, *supra* note 11, at 152.

133 This issue is developed under Part 2.4.3. in detail. Note, however, that in certain international conventions, preparatory acts are criminalised *per se*; *see* 1971 Convention on Psychotropic Substances art. 22 (2)(a)(ii), Feb. 21, 1971, 1019 U.N.T.S. 175, which provides that "Intentional participation in, conspiracy to commit and attempts to commit, any such offences, and preparatory acts and financial operations in connection with the offences referred to in this article shall be punishable offences as provided in paragraph 1."

134 On territorial jurisdiction over attempts, see *infra* Part 2.4.3.2.

135 On French doctrine on the matter see *infra* note 163 at Part 2.4.3.2.

2.4.3. / OBJECTIVE TERRITORIALITY/UBIQUITY

2.4.3.1. / MEANING, STATUS

Although the rule of objective territoriality is said to have originated from common law jurisdictions and especially the United States and the United Kingdom,[136] as early as 1887, it was authoritatively asserted that this interpretation of territoriality was recognised in the criminal jurisprudence of all states.[137]

In 1927 the Permanent Court in the *Lotus* Case gave its endorsement to this rule. The Court held that, as the effects of the collision of the two ships at the high seas took place on the Turkish vessel, which could be assimilated to Turkish territory, Turkey was entitled to exercise jurisdiction on the basis of objective territoriality. In the Court's view, international law did not forbid Turkey to "…take into consideration the fact that the offence produced its effects on the Turkish vessel and consequently in a place assimilated to Turkish territory in which the application of Turkish criminal law cannot be challenged, even in regard to offences committed there by foreigners." On the contrary, the Court asserted that "the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there."[138]

The Court conluded that "the offence for which Lieutenant Demons appears to have been prosecuted was an act- of negligence or imprudence- having its origin on board the *Lotus*, whilst its effects made themselves felt on board the *Boz-Kourt*. These two elements are, legally, entirely inseparable, so much so that their separation renders the offence non-existent. Neither the exclusive jurisdiction of either state, not the limitation of the jurisdiction of each to the occurrences which took place on the respective ships, would appear calculated to satisfy the requirements of justice and effectively to protect the interests of the two states. It is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole. It is, therefore, a case of concurrent jurisdiction."[139]

Therefore, in the view of the Court, a state may validly exercise jurisdiction, when an effect, in the sense of "a direct physical result which is itself a constituent or essential element in the offence charged" occurs in its territory.[140]

2.4.3.2. / SCOPE; DEFINING CONSTITUENT ELEMENTS; MENS REA, AIDING AND ABETTING, INCITEMENT TO COMMIT A CRIME

Naturally, this position of the Court that may be said to reflect customary law was not endorsed immediately or fully by all states in the world. Certain jurisdictions had – and to some extent continue to have – some

136 Harvard Draft Convention, *supra* note 110 at 488.

137 John Moore, US Dept. of State, Report on Extraterritorial Crime and the Cutting Case 23 (Gov't print. off 1887); Strassheim v. Daily, 211 U.S. 280, 285 (1911).

138 *Lotus* case, *supra* note 20, at 23.

139 *Id*. at 30-31. Note, however, the dissenting opinion of Judge Loder on this point. In his view, the offence occurred at the place where the guilty person was, namely, on board the French vessel, whose officer was negligent in the performance of his duties. Any other decision would only result to the use of a fiction; *Id*. at 36-37, Judge Loder, Dissenting Opinion.

140 Jennings, *supra* note 100, at 892-893.

difficulty in the application of this rule.[141] Accordingly, the precise scope of objective territoriality may be said to vary between states. However, certain legal trends in its implementation are nonetheless available in state practice.

First, there seems to exist no general rule of international law on what exactly qualifies as a 'constituent element' of a crime. The few authorities commenting on the matter are unanimous in the view that the qualification of an element as constituent or otherwise is a matter of domestic law.[142]

A pattern may be said to emerge from national approaches on the matter. French jurisprudence has explained in the interpretation of its national law[143] that an element is deemed 'constituent' of an offence, when without it an offence would not be characterised as such.[144] Similarly, in English law, Section 2 of the 1993 Criminal Justice Act provided that a person may be found guilty for certain listed crimes, "if any of the events which are relevant events in relation to the offence occurred in England and Wales." As a 'relevant event' is considered "any act or omission or other event (including any result of one or more acts or omissions) proof of which is required for conviction of the offence."[145] A similar approach is evidenced also

141 This can be properly considered as a "self-imposed limitation" by states on their jurisdiction; Richard R. Baxter, *Extraterritorial Application of Domestic Law*, (1960) U. Brit. Colum. L. Rev. 333, 334. The proverbial example would be English law, notwithstanding the attempts made by Lord Diplock in Treacy v. Director of Public Prosecutions, [1971] 2 W.L.R. 112, 127F (H.L.), Lord Griffiths in Liangsiripraesert v. U.S., [1990] 29 I.L.M. 1390, 1401 (P.C.) and 1993 Criminal Justice Act §2 to offer a broader perspective on English strict territoriality; today one still finds cases in English criminal law, where charges are dismissed, on account of the argument that the last act of *actus reus* of the offence takes place abroad; *cf.* R. v. Manning, [1999] QB 980, *per* Buxton LJ., where the Court of Appeal considered that it did not have jurisdiction, on the basis of the application of the gist of the offence and the last constituent element approaches in a case of fraud committed by securities cheques issued and cashed in Greece. "Secondly, we cannot agree that the state of the authorities is such that this court is free to choose between the last act or "gist of the offence" rule and a "comity rule" based on the general observations of Lord Diplock in *Treacy* . . . . . The latter has never been accepted as a rule of jurisdiction . . . ", at 989. This judgment was overturned on this point of law by the ruling of the Court of Appeal in R. v. Smith (Wallace Duncan), [2004] EWCA Crim. 631, where the Manning approach was considered to be mistaken, since it was decided that the judges who handled the case in 1996 were entitled to develop the law in that direction, in view of the fact that the earlier approaches were considered, among others, to "lead to a wholly unsatisfactory situation in contemporary circumstances" at ¶64 (iii). Interestingly, all this took place after the 1993 Criminal Justice Act in England, which came into force in 1999; *cf.* L.H. Leigh *Territorial Jurisdiction and Fraud,* (1988) Crim. L.Rep. 280, 282-3, who explains that, what English courts did in practice was simply to make sure that an accused does not escape trial. In this effort, the use of 'blatant fictions', without clinging so forcefully, as is sometimes presented, on subjective or objective territoriality, appears to have been mainly a means to that end; From the literature on the jurisdictional "gap" in English criminal law and attempts to rectify it, Wendell Berge, *Criminal Jurisdiction and the Territorial Principle*, 30 Mich. L. Rev. 238 (1931-1932); Colin Warbrick & G. R. Sullivan, *Current Developments: Criminal Jurisdiction*, 43 Int'l & Comp. L.Q. 460, 461 (1994); M. Hirst, *Jurisdiction over Cross-Frontier Offences*, 97 L.Q.Rev. 80 (1981) with further references; Also, note the very thorough analysis of the relevant case-law by La Forest J. in Libman v. the Queen, *supra* note 100, at 178-189. On the other hand, *see* U.S. v. Rodriguez, 182 F. Supp. 479, 488, (S.D. Cal. 1960), where at least as early as 1960 it had already been accepted in the U.S. that "Despite the prevalence of the territorial concept of jurisdiction in our jurisprudence, studies in international law indicate that as a statement of the entire international law of jurisdiction it is inadequate." Civil law jurisdictions, on the other hand were more rigorous in its application. Thus, it was held in Germany that the crime of sedition had occurred there, when a French national shouted from the French side of the Franco-German Border "Vive la France!", because the cry was heard in Germany and accordingly took effect there. Lauterpacht, *supra* note 100, at 345.

142 C. Ryngaert, *Territorial Jurisdiction over Cross-Frontier Offences: Revisiting a Classic Problem of International Criminal Law*, 9 Int'l. Crim. L. Rev. 187, 188 (2009); Wolswijk, *supra* note 128, at 366, note 8; Bantekas and Nash, *supra* note 123, at 75.

143 French law has a much longer history than English law on the matter. The critical provisions are Code de procédure pénale [C. pr. pén.] art. 693 (Fr.) and Code Pénal [C. pén.] (Fr.) art. 113-2, according to which "An offence is deemed to have been committed on the territory of the French Republic where one of its constituent elements was committed on that territory", available at www.legifrance.gouv.fr (last visited June 30, 2010), "L'infraction est réputée commise sur le territoire de la République dès lors qu'un de ses faits constitutifs a eu lieu sur ce territoire"; Roger Merle & André Vitu, Traité de Droit Criminel 402-403 (7th ed. 1997), according to who, the commission of only an act or omission in French territory that forms part of a constituent element of a crime will suffice for French criminal jurisdiction under article 113-2 Code Pénal in much the same way as it did under the previous regime under article 693 of the French Code of Criminal Procedure; Frédéric Desportes & Francis Le Gunehec, Droit Pénal Général 338-339 (14th ed. 2007).

144 In Re Feld and Newman, Cour de Cassation, May 25, 1967, 48 I.L.R. at 88 (Fr.), where that Court, interpreting Article 693 of the French Code of Criminal Procedure at the time, held that "the status of a supplier to the Armed Forces is one of the elements of the offence under Article 433 without which this offence would not be characterised." Therefore, as the agreement to supply the French military was concluded in Paris, the acquisition of the supplier status by the defendants and therefore the crime of fraud against the French military were held to have constructively occurred in France. For newer tendencies, including preparatory acts in the application of article 113-2 of the Code Pénal and *faits constitutifs*, *see infra* note 163.

145 *See* the 1993 Criminal Justice Act, available at http://www.opsi.gov.uk/ACTS/acts1993/ukpga_19930036_36_en_1 (last visited June 30, 2010); Warbrick & Sullivan, *supra* note 142, at 462-3.

in international conventions.[146] Notwithstanding the difference in the wording, the convergence is evident in these definitions. That said, the issue of the compatibility of certain national classifications of elements as constituent or otherwise with international law is an entirely different matter, one that remains largely unresolved by jurisprudence.[147]

Secondly, the element of intent presents equally complicated problems. Today it seems to be settled law that the application of objective territoriality is not affected by the intent element of the crime. The issue was disputed at the time of the *Lotus*.[148] The Permanent Court took the view that objective territorial jurisdiction is equally applicable to manslaughter, a crime of negligence. Any other decision, said the Court, would render the offence 'non-existent', as effects and intent are inseparable elements of a crime.[149] Therefore, the location of the result suffices for the purposes of state territorial criminal jurisdiction, irrespective of whether it is the *intended* location of the result or not. This solution enhances legal certainty, since to hold otherwise, as Brierly explained, would be tantamount to making state criminal jurisdiction dependent on the intent of the perpetrator, rather than the manifestation of the criminal result.[150] Accordingly, the position in positive law is today that "intentions and motives are irrelevant; many crimes, after all, do not require *mens rea*."[151]

It should be noted here that the question of intent as a 'constituent element' as such is a separate issue that should not be confused with the issue of the application of objective territoriality to the location of the intended consequences of the crime.[152]

As regards co-perpetratorship, aiding and abetting, and incitement to commit a crime, these are complicated issues and their resolution could vary significantly from one state to another. They require an in-depth comparative study that cannot be undertaken here.[153]

146 International Convention for the Protection of All Persons from Enforced Disappearance, art. IV, June 9, 1994, U.N. Doc. A/RES/47/133, which provides for state party territorial jurisdiction, also when "any act constituting such offence was committed within its jurisdiction."

147 Ian Hunter, *Specific Application to Antitrust Matters of General Principles of International Law Governing the Assumption and Exercise of Jurisdiction*, in Int'l L. Association, Report of the 54th Conference, 221, at 227 (1970); Cameron, *supra* note 62, at 58.

148 Early English and U.S. doctrine had taken the position that objective territorial jurisdiction could be exercised only if the crime was wilfully committed. *See* indicatively W. E. Beckett, *Criminal Jurisdiction over Foreigners, The Franconia and the Lotus*, 8 Brit. Y.B. Int'l. L. 108, 127-8 (1927); Harvard Draft Convention, *supra* note 110, at 488.

149 *Lotus* Case, *supra* note 20, at 23, 37 Judge Loder's Dissenting Opinion. In his view, the implementation of the objective territorial fiction went too far, as in such cases the necessary 'direct connection' between the act and the effect is missing; *See* also the discussion in Judge Moore's Dissenting Opinion, *id*. at 82.

150 J. L. Brierly, *The 'Lotus' Case*, in The Basis of Obligation in International Law and other papers 146 (H. Lauterpacht ed. 1958).

151 Akehurst, *supra* note 11, at 155.

152 It is difficult to find clear national approaches to this question. The issue has been debated in the context of French criminal law, where it is authoritatively stated that only 'éléments materiels' may qualify as constituent elements for the purposes of constructive localisation; intent, *per se*, does not suffice, unless it is manifested through material acts at least to such an extent as to constitute an attempt; Merle & Vitu, *supra* note 143, at 402, note 13 with further references; Merle & Vitu, *supra* note 143, at 404, for crimes of ommission.

153 Such studies have been recently undertaken in the context of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Relations, Nov. 21, 1997, 37 I.L.M. 1, 5 (1998) and its authoritative commentary; Mark Pieth, The OECD Convention on Bribery: A Commentary (M2007) with extensive resources and references. For a recent comparative study, *see* Ryngaert, *supra* note 142 at 187-209.

As regards participation, there is ample authority[154] to support the view that, if the main offence is committed in the territory of the prosecuting state, all other acts relating to it must be considered to have been constructively committed there as well.

On the issue of incitement to commit a crime, the Swiss Court of Cassation for example has decided that Swiss courts had jurisdiction to try the crime of incitement to commit forgery (in that case passport forgery).[155] The Court of Cassation ruled on this issue that article 7 of the Swiss Penal Code, allowing for jurisdiction on the basis of the place where a crime has its effects, "applies also to incitement to commit an offence."[156] It underlined that the collaborator of the accused, who was convinced to forge the passport renewal in France, executed the intention to commit the crime in Switzerland. Therefore, "[s]ince Novic's incitement thus took effect in Switzerland, his offence must, according to article 7 of the Penal Code, be regarded as having been committed there."[157] Approaches to territorial jurisdiction may differ substantially, depending on whether incitement is considered as a form of accessory liability or a substantive crime.[158]

Thirdly, as regards territorial jurisdiction in cases of attempt to commit a crime, there is evidence of a variety of positions in national criminal laws.[159] While there is authority for the view that the target state of the crime should have jurisdiction, irrespective of whether the attempt manifested through any acts for the

154 From international treaty law, *see* Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 4(1)(b)(iii), 28 I.L.M. 493 (1989) (entered into force Nov. 11, 1990) stipulates that each State Party shall optionally establish its jurisdiction when "(iii) the offence is one of those established in accordance with article 3, paragraph 1, subparagraph (c)(iv), and is committed outside its territory, *with a view to the commission, within its territory, of an offence established in accordance with article 3 paragraph 1*" (emphasis added). Therefore, under this Convention, states parties undertake to establish their criminal jurisdiction over the "participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, faciltating and councelling the commission of any of the offences established under article 3" of that Convention, when these acts take place outside of the territory of the State Party and they are committed "with a view to the commission, within its territory," of illicit drug production and trafficking; Further, Bribery Convention, art. 4, *supra* note 153; Pieth, *supra* note 153 at 278-279, where it is summarised that in cases of aiding and abetting, if the main perpetrator acts at home and the accessory is acting abroad, the States Parties to that Convention would legitimately exercise territorial jurisdiction. The same is true in reverse; "[M]ere aiding or abetting is sufficient to create the territorial link. Only Supreme Court practice in Switzerland has so far insisted that, since the main offender is acting abroad, the crime is considered foreign," with references to UK, French, German, Italian and Japanese practice; For a clear national position, Cour de Cassation [Cass] [Court of Cassation] Bertchmann v. Société Anonyme des Charbonnages d' Argenteau, 22 I.L.R. 207, 208 (1958) (Belg.); From the literature, Mann, *supra* note 2, at 98.

155 Cour de Cassation [Cass] [Court of Cassation] Novic v. Public Prosecutor of the Canton of Basel-Stadt, 22 I.L.R. 515 (1955) (Switz.).

156 *Id*. at 517.

157 *Id*.

158 This would be the case for example with crimes such as public incitement to hatred, incitement to racism etc. For the application of territorial jurisdiction in such cases, *see* for example Bundesverwaltungsgericht [B.Verw.G.] [Federal Administrative Court], Dec. 12, 2000, BVerfGE 90, 241-255 (Germ.) (hereinafter The Auschwitz Lie Case) (also available at http://www.jurpc.de/rechtspr/20010038.html) (last visited 30 June 2010). The case concerned the conviction of an Australian for publishing online in English certain statements denying the Holocaust. In the position of that Court, Strafgesetzbuch [StGB] [Penal Code] art. 9 is applicable to crimes, whose *actus reus* occurred abroad or online, whenever the infringement or the endangerment, the avoidance of which is the purpose of the relevant provision, occurs within the country. *See* in English with further analysis on German Law the Report of the Republic of Germany before the European Commission against Racism and Intolerance, *Legal Measures to Combat Racism and Intolerance in the member States of the Council of Europe*, (2002) at 29-30 (available at http://www.coe.int/t/dghl/monitoring/ecri/legal_research/national_legal_measures/germany/germany%20sr_EN.asp#P659_60055) (last visited June 30, 2010). Incitement to genocide under international criminal law seems to be particularly affected by the dichotomy substantive (inchoate) crime versus accessory liability; *Cf.* here ICTY Statute, art. 4(3)(c) and ICC Statute, art. 25(3)(e), supra note 105; I.C.T.R. case-law demonstrates certain confusion on the matter; William Schabas, The UN International Criminal Tribunals, The Former Yugoslavia, Rwanda and Sierra Leone 181-2 (2006).

159 Ryngaert, *supra* note 142 at 209 (comparing 6 national criminal jurisdictions); Cameron, *supra* note 62, at 68, according to whom, territorial jurisdiction over attempts is further complicated by constructions relating to continuity.

commission of the crime within its territory,[160] others require the manifestation of some overt acts on state territory.[161] International treaties do not seem to offer any clear solutions on the point.[162]

160 There is state practice to support the proposition that objective territoriality applies to criminal attempts, when the territory of the state exercising jurisdiction is the location where the crime would have been taken place, even if no overt acts take place there; For English Law, the best-known common law decision is arguably Somchai Liangsiripraesert v. U.S., *supra* note 99; more recently, R. v. Latif, R. v. Shahzad, [1996] 1 All E.R. 353, 365, "The English courts have jurisdiction over such criminal attempts even though the overt acts take place abroad. The rationale is that the effect of the criminal attempt is directed at this country . . . . [a]s a matter of policy, jurisdiction over criminal attempts ought to rest with the country where it was intended that the full offence should take place"; from U.S. law, U.S. v. Yousef, 327 F.3d 56, 112 (2nd Cir. 2003); U.S. v. Davis, 905 F.2d 245, 248 (9th Cir. 1990); U.S. v. Peterson, 812 F.2d 486, 493 (9th Cir. 1987), ("if an attempted transaction is aimed at causing criminal acts within the United States, there is a sufficient basis for the United States to exercise its jurisdiction"); in Israel an unsuccessful attempt to commit a crime outside of Israel, when the place of intended result was Israel brings the crime within the territorial jurisdiction of Israeli courts. *See* Israeli Penal Code art. 7(a)(2) and the discussion in Ze'ev Rosenstein v. Israel, *supra* note 63, at ¶23, as well as "Israel", in *OECD*, *Review of Implementation of the Convention* and 1997 Revised Recommendation, 19 March 2009, ¶ 89-93, available at http://www.oecd.org/document/24/0,3343, en_2649_34859_1933144_1_1_1_1,00.html (last visited June 30, 2010); S. v. Mwinga, High Court of Namibia, 1994/10/27,13-14 (attempted homicide at the river border between two states - location of substantial elements of the attempt in attempted homicide is the key element in deciding the issue of territorial jurisdiction); from civil law jurisdictions, *see* Code pénal suisse [CS] [Swiss Criminal Code] art. 8 ¶ 2, which provides that "Une tentative est réputée commise tant au lieu où son auteur l'a faite qu'au lieu où le résultat devait se produire", available at http://www.admin.ch/ch/f/rs/311_0/a8.html (last visited June 30, 2010); in French law, the situation is probably changing. Merle & Vitu, *supra* note 143 at 403, note 2, the older doctrine, seemed to accept the constituent elements approach for attempts as well, but argue that, in case a crime commenced abroad, although it was not completed in France as originally planned but in another country, the location of the result of the crimes cannot be assimilated to the location where the results were attempted to occur but never did; Huet & Koering-Joulin, *supra* note 128, at 220, outline the arguments for and against without supporting either position; from international literature, *see* further Blakesley, *supra* note 123, at 160, who agrees with Merle & Vitu.

161 Akehurst, *supra* note 11, at 154, note 2, who claims that the constituent elements approach is not applicable in cases of attempts or conspiracies; Christiane Hennau & Jacques Verhaegen, Droit Pénal Général 78 (2003), it seems that in Belgium it is not accepted that an attempt, which did not produce the intended results in Belgium can be considered as committed in part in that country.

162 Note that the issue which appears in international conventions with the flexibility in the description of territoriality is evidenced also with regard to the definition of attempt; *e.g.* Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the 2000 UN Convention against Transnational Organised Crime art. 6(2)(a), G.A. Res. 55/25 55 U.N. GAOR Supp. (No. 49) at 44, U.N. Doc. A/45/49 (2001), where the criminalisation of attempts to commit an offence prescribed in the Protocol is made "Subject to the basic concepts of its [the State Party's] legal system"; in the same spirit The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition art. 5, G.A. Res. 55/255, U.N. Doc. A/RES/55/255 (2001), provides that each state party shall criminalise attempt and complicity to traffic in firearms and other related offences defined therein, "subject to the basic concepts of its legal system"; for international crimes, Draft Code of Crimes against the Peace and Security of Mankind art. 2(3)(g), 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/1996, which provides for the responsibility of an individual who "attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions".

The problem of territorial jurisdiction over attempt is further complicated when jurisdictions are called upon to distinguish between preparatory acts and attempts to commit crimes.[163] It is noteworthy that different positions can be supported as regards also the definition of attempt as a substantial step and the question of preparatory acts under the Rome Statute.[164]

These are only some indications of state practice. There are also issues concerning the doctrine of connexitè/indivisibility of the offence,[165] as well as commission by proxy.[166] In conclusion, the issue under customary law may be said to be unclear in the specifics, which means that resort to general principles may

163 Wolswijk, *supra* note 128, at 372, on the issue of preparatory acts and territorial jurisdiction in general; Pieth, *supra* note 153, at 278, with references to comparative criminal national practice on preparatory acts and attempts; In certain international conventions, preparatory acts are criminalised *per se*. *See* for example Convention on Psychotropic Substances, *supra* note 133, at art. 22 (2)(a)(ii), which provides that "[i]ntentional participation in, conspiracy to commit and attempts to commit, any such offences, and preparatory acts and financial operations in connection with the offences referred to in this article shall be punishable offences as provided in paragraph 1." On the other hand, *cf.* U.N. Convention against Corruption art. 27, Oct. 31, 2003, U.N. Doc. A/RES/58/4 (2003), which provides for the compulsory criminalisation under state party laws of participation as an "accomplice, assistant or instigator" to the commission of an offence under that Convention, while criminalisation of attempts to commit such offences, as well as "the preparation for an offence" are optional. From Canadian case-law, indicatively, R. v. Deutsch [1986] S.C.R. 2, (Can.), concerning advertisements asking for a secretary/sales assistant; the women interviewed were informed that if employed, having sex to 'close the deal' might be necessary – no acceptance from employees – attempt to procure person to have illicit sexual intercourse with another person. "No satisfactory general criterion has been, or can be, formulated for drawing the line between preparation and attempt. The application of this distinction to the facts of a particular case must be left to common sense judgment.", while using additional criteria. Preparatory acts or *conditions préalables* according to the (older) French doctrine indicates a legal or factual situation, which takes place before the activity properly criminalised under national law, but whose pre-existence is nevertheless indispensable, or at the very least useful for the development of the reprehensible activity proper. Under older French law, there were those who favoured the distinction between constituent elements and preparatory acts, but accepted that the existence of only the latter does not suffice for the constructive localisation of the crime in France, Merle & Vitu, *supra* note 143 at 402-403, with extensive references to case-law and literature. New literature, however, suggests that the trend has changed. It is hence now said that the distinction between constituent elements and preparatory acts has been rejected by the Chambre Criminel of the Cour de Cassation and that even the perpetration of preparatory acts suffices for the constructive localisation of criminal activity in France; Desportes & LeGunehec, *supra* note 143, at 338-339.

164 As regards the Rome Statute *supra* note 105, at art. 25(3)(f), Ferrando Mantovani, *The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer,* 1 J. Int'l. Crim. Just. 26, 33-34 (2003), who considers that the Statute's notion of attempt is teleological, in that "attempt would cover all acts concretely threatening the interests protected by a criminal rule. Such acts can include those which are not by definition part of a criminal conduct, such as preparatory acts (for example, taking a truck to a location where there are persons awaiting deportation)"; *contra,* Kai Ambos, *Article 25*, in Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article 763 (O. Triffterer ed. 2nd ed. 2008), "It is clear that preparatory acts are not included since they do not represent a "commencement of execution". In fact, this was the only issue which was not controversial within the ILC when discussing attempt. It is not clear, however, whether the German concept of the commencement of attempt by "immediately proceeding to the accomplishment of the elements of the offence" . . . falls within the terms of this sub-paragraph."

165 Connexité indicates joint prosecution or connexity of two crimes before the same court, on account of their 'connection'; *Lotus* Case, *supra* note 20, at 31, for example, Turkey argued in the alternative that it had jurisdiction under territoriality, on the basis of the fact that the two crimes of manslaughter, against the Turkish captain and Mr. Demons, were connected, a principle already recognised by France at that point. This position was not considered by the Court. Individual judges dismissed it, on the grounds that "[j]oinder on the ground of "connexity" is a proceeding under municipal law, "connexity" does not create *jurisdiction*," Judge Loder, Dissenting Opinion, at 38 and Dissenting Opinion of Judge Weiss, at 43; Coëme et als v. Belgium, 2000-VII Eur. Ct. H.R. 75, for the issue from a human rights perspective, to be discussed in detail *infra*; Merle & Vitu, *supra* note 143, at 403-4, for the debate in French criminal law on whether and when French courts have territorial jurisdiction, on the grounds that commission of one crime within one state with a view to commit another serious crime within another entitles the latter state to exercise criminal jurisdiction over both crimes, noting also the tendency of the French jurisprudence to 'baptise' as "indivisibilité des cas indiscutables de connexité"; Desportes & Gunehec, *supra* note 143 at 343-4. For the endorsement of State jurisdiction on the basis that the commission of one crime within one state with a view to commit another serious crime within another entitles the latter state to exercise criminal jurisdiction over both crimes as an optional ground for jurisdiction in international treaties, *See* UN Transnational Organised Crime Convention art. 15 (2)(c), Nov. 15, 2000, G.A. Res. 55/25 55 U.N. GAOR Supp. (No. 49), U.N. Doc. A/45/49 (2001), according to which state parties may establish their jurisdiction when the offence is among those defined in certain of its provisions, "and is committed outside its territory with a view to the commission of a serious crime within its territory"; similarly, International Convention for the Suppressing of the Financing of Terrorism art. 7(2)(a-c), Dec. 9, 1999, G.A. Res. 54/109, U.N. Doc. A/RES/54/109 (1999).

166 It has been suggested for example that "a person who is himself in one country may, by the hands of an innocent agent, commit a crime in another country though, of course he cannot be tried till he comes there"; Musisi v. Republic, (1969), 48 I.L.R. 91 (H.C.K.) (Kenya), with further references to common law jurisprudence.

be called for.[167] It is at this point that Mann's approach to international law and the principle of non-intervention as the general threshold norm for the legality of state action may be also uesful. Mann's theory, as interpreted by the German and Canadian Supreme Courts, explains that state action is to be treated as lawful, provided that a sufficiently close connection exists between the state exercising jurisdiction and the crime.[168]

Contemporary international law, therefore, recognizes the right of states to exercise jurisdiction on the basis of objective territorial jurisdiction, namely on the premise that a crime is committed where a constituent element of the crime has taken place, or alternatively, that a state has jurisdiction over crimes completed in its territory.[169] The means and processes for the resolution of conflicts arising from formally equal jurisdictional claims, however, is an entirely separate matter, one which the Permanent Court failed to address. It is the absence of authoritative guidance by the Court on this matter that has fueled the legal imagination of authorities, courts and legislators.

2.4.3.3. / UBIQUITY

Evidently, objective territoriality is not without its shortcomings. There are questions that remain without authoritative guidance in international law, such as "how does one define the constituent elements of an offence?"[170] Similarly, where does a crime 'commence', and where is it 'completed'? As it was put in no uncertain terms in the context of English law on account of Lord Diplock's 'conduct or consequences' approach, "there is no general guide which would separate the relevant occurrences into formally exclusive categories providing a basis for the choice, such as, in Lord Diplock's terms, "acts" and "consequences"."[171] If such a 'general guide' does not exist within a single criminal legal system, one can easily understand just how complex the situation is in the event that a single set of activities is considered as criminal by the laws of more than one states, with different statutes and constituent elements (let alone aiding and abetting, co-perpetration and attempt).

Most of the classification difficulties of objective territoriality are arguably rendered moot by the re-formulation of the objective territorial rule through the familiar today approach to territorial jurisdiction concerning the commission of a crime 'in whole or in part' within state territory. This approach has been

167 Note in this context the divergencies in the approach followed by national criminal law systems identified by Ryngaert, *supra* note 142, at 202-9, where, after a comparative examination of 6 national criminal law systems, that author concludes that "[t]he most complicated questions of jurisdiction over cross-frontier offences probably relate to criminal participation and inchoate offences. While some common principles could be discerned, especially as far as participation is concerned, the different States studied all espouse (sometimes only slightly) different solutions, with, for instance, some States exercising jurisdiction over cross-frontier attempts, and others not doing so."

168 More on this point *supra* Part 2.3.2.

169 Akehurst, *supra* note 11, at 152; National statutes provide for different formulations of objective territoriality. Code Pénal [C. pén.] (Fr.) art. 113-2; Criminal Justice Act, 1993, §2 (Eng.); Strafgesetzbuch [StGB] [Penal Code], §2 (Ger.), which provides "(1) An act is committed at every place the perpetrator acted or, in case of omission, should have acted, or at which the result, which is an element of the offence, occurs or should occur according to the understanding of the perpetrator", available at http://www.iuscomp.org/gla/statutes/StGB.htm (last visited June 30, 2010); Brottsbalken [BrB] [Criminal Code] chapter 2, §1 (Swed.) , on the other hand, provides that "Crimes committed in this Realm shall be adjudged in accordance with Swedish law and by a Swedish court. The same applies when it is uncertain where the crime was committed but grounds exist for assuming that it was committed within the Realm", available at www.sweden.gov.se/sb/d/3926/a/27777 (last visited June 30, 2010); Code pénal Suisse [CP] [Criminal Code] art. 8, (Switz.) available at http://www.admin.ch/ch/f/rs/311_0/a8.html (last visited June 30, 2010) stipulates in paragraph 1 that "Un crime ou un délit est réputé commis tant au lieu où l'auteur a agi ou aurait dû agir qu' au lieu où le resultat s'est produit"; Criminal Code of the People's Republic of China art. 6, provides in part that "When either the act or consequence of a crime takes place within PRC territory, a crime is deemed to be committed within PRC territory", available at http://www.colaw.cn/findlaw/crime/criminallaw1.html (last visited June 30, 2010); There are also codifications of criminal law that make no explicit reference to this approach, but leave the matter to judicial interpretation; in that spirit, Ugolovnyi Kodeks Rossiiskoi Federatsii [UK RF] [Criminal Code] art. 11 (Russ.), provides that "(1) Any person who has committed a crime in the territory of the Russian Federation shall be brought to criminal responsibility under this Code", available at http://www.russian-criminal-code.com (last visited June 30, 2010); Finally, for an application of this rule from a not strictly national court, see the Control Commission Court of Appeal in Germany (British Zone), Director of Prosecutions v. Hobbs, April 27, 1950, 17 I.L.R. 138, 139 (1956), (smuggling by post in occupied Germany).

170 Hirst, *supra* note 111, at 46; Wolswijk, *supra* note 128, at 368-370.

171 Peter G. Fitzpatrick, *The Location of a Crime, A Comment on Treacy v. Director of Public Prosecutions*, 21 Int'l. Comp. L.Q. 160, 163 (1972).

called the doctrine of ubiquity, which means that "an offence as a whole may be considered to have been committed in the place where a part of it has been committed."[172]

The inter-relation between the objective territoriality approach and the doctrine of obiquity is not always easy to discern. In the opinion of the European Committee on Crime Problems, objective territoriality may today be properly considered as one of the forms of the doctrine of ubiquity.[173] Obviously, what qualifies as 'part' of an offence is a matter for interpretation. In this context, its main advantage may be said to be its flexibility; by considering as the critical element for the exercise of criminal jurisdiction "whether 'part of the whole story' – part of the totality of the offender's activities – took place within the territory of the state, irrespective of whether this act is a constituent element of the crime", national courts may take into account all the factual circumstances, in deciding whether that state has a sufficient interest in prosecuting a case, including "preparatory (non-constituent) acts as well as non-constituent effects".[174]

The main criticism addressed against this doctrine is that it extends too far the number of states competent to exercise jurisdiction and opens up the possibility for jurisdictional conflicts and multiple convictions of the offender for the same offence, in violation of the principle *ne bis in idem*. Thus, while this theory appears to be 'le système idéal', since it vests jurisdiction in national courts in cases where the other approaches would fail to do so, there have been calls for moderating its application, in order to avoid excessive jurisdictional claims.[175]

Be that as it may, international practice appears to demonstrate a growing acceptance of ubiquity.[176] In the light of these developments, it appears that the doctrine of ubiquity is increasingly accepted as a permissible manifestation of the rule of territorial jurisdiction under customary law.

2.4.4. / THE EFFECTS DOCTRINE

The effects doctrine is the most recently developed variant of territorial jurisdiction, according to which a state has jurisdiction over conduct that takes place abroad that produces effects within its territory. The notion of 'effects', however, is to be differentiated from the 'constituent elements' approach. Effects, in this context, are understood as "economic repercussions or consequences", which may or may not be physically readily identifiable.[177]

The birth of this application of territoriality took place basically in a somewhat clumsy attempt of US courts to address antitrust violations in the aluminium market in the end of the Second World War in the *ALCOA* judgment.[178] The Court of Appeals of the Second Circuit was called upon to decide whether the *Aluminium Company of America* was monopolizing interstate and foreign commerce particularly in the manufacture and sale of 'virgin' aluminium ingot and whether it had entered into a conspiracy in restraint of such commerce.[179] One of the issues was whether the participation of one of the Canadian defendants in the formation of a Swiss company and the conclusion of two agreements, which provided limitations on

172 European Committee on Crime Problems, *supra* note 62 at 8; from U.S. practice, Perkins, *supra* note 106 at 1162, providing the "in whole or in part statute" as an example of "modern legislation", with further references to case-law.

173 European Committee on Crime Problems, *supra* note 62 at 8.

174 Wolswijk, *supra* note 128, at 372 (commenting particularly on the Canadian *Libman* approach to Mann's theory of jurisdiction).

175 Huét & Koering-Joulin, *supra* note 128, at 204; European Committee on Crime Problems, *supra* note 62 at 25; Hall, *supra* note 108, at 284-285.

176 Convention on Combating Bribery, *supra* note 153 at art. 4(1); Pieth, *supra* note 153, at 278-280; Council of Europe Criminal Law Convention on Corruption art. 17 (1)(a), Jan. 27, 1999, C.E.T.S. No. 173, available at http://conventions.coe.int/Treaty/eu/treaties/Html/173.html (last visited June 30, 2010); Treaty on Extradition art. 4(f), Dec. 14, 1990, U.N. Doc. A/RES/45/116 (1990), 30 I.L.M. 1407 (1991); Council of Europe European Convention on Extradition art. 7, Dec. 12, 1957, C.E.T.S. No. 24, available at http://conventions.coe.int/Treaty/eu/treaties/Html/24.html and a number of international and other instruments adopted in the framework of the European Union; E.U. Council Framework Decision on the Protection of the Environment through Criminal Law art. 8, 2003 O.J. (L. 29) 55; E.U. Council Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography art. 8, 2004 OJ (L. 13) 44; E.U. Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States art. 4, 2002 O.J. (L. 190) 1; Convention drawn up on the basis of Article K.3 of the Treaty of European Union on the protection of the European Communities financial interests art. 7, 10(2)(a), 1997 O.J. (C. 195) 2; E.U. Council Framework Decision on Combating Terrorism art. 9 (1)(a), (4), 2002 O.J. (L.164) 3; South Africa Development Community's (S.A.D.C.) Luanda Protocol on Extradition, art. 5(e), October 3, 2002, available at www.sadc.int/english/documents/legal/protocols/extradition.php (last visited June 30, 2010).

177 Cedric Ryngaert, Jurisdiction over Antitrust Violations in International Law 17 (2008).

178 United States v. Aluminum Company of America et al., 148 F.2d 416, (Mar. 12, 1945).

179 *Id.* at 421.

production and price-fixing between the participating undertakings, constituted violations of section 1 of the Sherman Act.[180] It was in this context that the Court of Appeals famously stated that "it is settled law- as "Limited" itself agrees- that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders, which the state reprehends; and these liabilities other states will ordinarily recognise."[181] The Court of Appeals went on to explain that, in its interpretation of the Sherman Act, the agreements would be unlawful, "though made abroad, if they were intended to affect imports and did affect them."[182] The Court of Appeals however failed to articulate clearly what the effect was in that case.[183]

From 1945 until 1982, the effects doctrine was therefore premised for US authorities on the existence of two main elements; that the anti-competitive conduct was intended to affect the US market and that it actually did affect it.

Within the span of this period of time, the application of the effects doctrine gave rise to a well-documented legal conflict between the state seeking to regulate the conduct (notably the US) and the states, whose nationals (natural or legal persons) were threatened with the severe criminal and civil penalties of US antitrust laws.[184] The implementation of this jurisdictional assertion has been extensively discussed in the international literature of the day[185] and gave rise to strong criticism.[186] The friction between the US and other national authorities[187] became particularly tense in the 1980s due to the use of the effects doctrine by US Courts and government agencies in an attempt to regulate worldwide a variety of trade-

180 Sherman Antitrust Act, 15 U.S.C. §§ 1-6 (1890).

181 United States v. Aluminum Company of America et al, *supra* note 178, at 443.

182 *Id*. at 444.

183 *Id*. at 445. This occurred because the Appeals Court decided that once intent was proven, the burden to prove the existence of effects should be reversed, so that the defendants had to prove that effects did not take place.

184 The Sherman Act at §1, as currently in force, stipulates that any person engaging in the activities mentioned therein, including the formation of trusts and monopolies and other activities 'in restraint of trade', shall be deemed guilty of a felony and if convicted, shall be punished by a large fine or by imprisonment not exceeding three years or by both punishments. The Clayton Antitrust Act, 15 U.S.C. §15. (1914), on the other hand, threatens severe damages against companies who act in violation of US anti-trust laws, the so-called treble damages, which may be claimed by any person which has been injured by "anything forbidden in the antitrust laws"; the requirement of injury is not present in the Sherman Act. As it has been held recently, "The conduct and injury requirements of the Sherman and Clayton Acts operate independently. The existence of a Sherman Act violation does not depend on whether anyone has actually suffered an injury. Conduct may violate the Sherman Act but not be actionable under section 4 of the Clayton Act because it did not cause injury"; Kruman et al v. Christie's International et al, 284 F.3d 384, 386 (2nd Circ. 2002). *See* indicatively Roger D. Blair & Christine A. Piette, *Antitrust Damages: Theory and Practice*, 51 *Antitrust Bulletin* 449, 449-453 (2006), for class action suits and treble damages.

185 International Chamber of Commerce, The Extraterritorial Application of National Laws 36-37 (Dieter Lange & Gary Born eds. 1987); indicatively, Hendrik Zwarensteyn, Some Aspects of the Extraterritorial Reach of the American Antitrust Laws (1970); Karl M. Meessen, Extraterritorial Jurisdiction in Theory and in Practice, (1996); further, R. Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws,* 33 Brit. Y.B. Int'l. L. 146 (1957); George Van Hecke, *Le Droit Antitrust – aspects comparatifs et internationaux*, 106 Recueil des Cours de l' Academie de Droit Internationale 253 (1962-II); Jean Gabriel Castel, *The effects of antitrust laws*, 179 Recueil des Cours de l' Academie de Droit Internationale 9 (1983-I); Evelyne Friedel-Souchu, Extraterritorialité de droit de la concurrence aux Etats-Unis et dans la Communauté Européenne, (1994); Erik Nerep, Extraterritorial Control of Competition in International Law with Special Regard to U.S. Antitrust Laws, (1983); F. A. Mann, *The Extremism of American Extraterritorial Jurisdiction*, 39 Int'l. Comp. L. Q. 410 (1990), to name but a few of the numerous works on the topic; The issue is recently analyzed by Ryngaert, *supra* note 177 at 179-194.

186 Jennings, *supra* note 185, at 175, " . . . . these cases still offend against the ultimate limit because they are an attempt to export into other countries and to make operate there what are after all peculiarly American political notions"; Mann, *supra* note 2, at 104-105; Hirst, *supra* note 111, at 47.

187 The relevant state practice is usefully provided by V. Lowe, Extraterritorial Jurisdiction, An Annotated Collection of Legal Materials (1983) including the diplomatic notes and mostly U.K. reactions to U.S. jurisdictional assertions based on the effects doctrine; Wilbur F. Fugate, Foreign Commerce and the Antitrust Laws 68, 126-133 (1991) for another point of view. The well-known British opposition was expressed in an Aide-Memoire to the Commission of the European Communities, 20 October 1969, reproduced in Brownlie, *supra* note 16, at 313-315. The conflict between the U.S. and the E.E.C. became intense in the 1980s, when the U.S. enacted legislation in order to effectively punish European companies for supplying materials to the construction of a Soviet pipeline. The E.C. response, alleging a breach of international law, is available at European Communities, Comments on the U.S. Regulations concerning trade with the U.S.S.R., 21 I.L.M. 891, 897 (1982), "It cannot conceivably be argued that exports from the European Community to the U.S.S.R. for the Siberian Gas Pipeline have within the US direct, foreseeable and substantial effects, which are not merely undesirable, but which constitute an element of a crime or tort prescribed by U.S. Law"; from the literature, *see* indicatively Joseph P. Griffin, *Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction,* 19 Eur. Competition L. Rev. 64, 64-73 (1998); Y. Ohara, *New US Policy on the Extraterritorial Application of Antitrust Law and Foreign Responses,* in Meessen, supra note 185, at 166-172, on Japanese and other reactions.

related activities.[188] This caused strong reactions on behalf of the affected states, which took the form of blocking-statutes, *i.e.* legislation aimed to prevent US authorities from compelling foreign companies to produce evidence in the context of an anti-trust litigation before them,[189] as well as legislation aimed at recovering damages paid in satisfaction of US antitrust judgments.[190]

In the light of extensive international reactions, US Courts attempted to accommodate the concerns of foreign states by producing legal standards based on the notion of 'comity'.[191] The US legislature, on the other hand, tried to ameliorate the situation through the incorporation of the 1982 Foreign Trade Antitrust Improvements Act[192] amendments and the conclusion of a number of international agreements.[193]

Through the 1982 Act, the United States legislative authorities made an attempt to address foreign complaints by removing the element of intent and classifying the effects as 'direct, substantial and

188 The most notorious litigations include the U.S. v. Imperial Chemical Industries, 105 F. Supp. 215 (1952); the well-known intervention in the Swiss Watch Industry, U.S. v. the Watchmakers of Switzerland Information Center, [1963] Trade Cases (CCH) §70, 600 (S. D. N. Y., 1962); the uranium litigation, Westinghouse Electric Corp. Uranium Contracts Litigation, Subpoena Duces Tecum, 563 F.2d. 992 (10th Circ., 1977); Westinghouse Electric Corporation v. Rio Algom Ltd., 617 F.2d 1248 (7th Circ., 1980). The most critical aspects of this litigation are presented by Lowe, *supra* note 187 at 156, with references to the foreign governments' amicus briefs.

189 The first blocking statutes go back to the 1947 Business Records Protection Act, enacted by Canada, in response to a U.S. investigation in the Canadian newsprint industry; *Comment, Judicial Cooperation and the Taking of Evidence Abroad – the Canada and Ontario Evidence Acts,* 8 Texas Int'l L. J. 57 (1978); In re Grand Jury Subpoenas Duces Tecum Addressed to Canadian Int'l Paper Co. 72 F. Supp. 1013 (S. D. N. Y., 1947); In the UK, the first blocking Statute, the 1964 Shipping Contracts and Commercial Documents Act was later superseded by the 1980 Protection of Trading Interests Act; In detail, F. A. Mann, *Anglo-American Conflict of Jurisdiction,* 13 Int'l. Comp. L. Q. 1460, 1460-5 (1964); V. Lowe, *Blocking Extra-territorial Jurisdiction: The British Protection of Trading Interests Act, 1980,* 75 Am. J. Int'l. L. 257, 257-282 (1981); A. F. Lowenfeld, *Sovereignty, Jurisdiction and Reasonableness: A Reply to A. V. Lowe*, 75 Am. J. Int'l. L. 629-638; The Netherlands were also at the forefront of this development, when a Dutch company was prosecuted in the context of antitrust litigation concerning the lamp industry in the early 1950s in the case of U.S. v. General Electric Co., 115 F. Supp. 835 (D. N. J. 1953). As a consequence, the Dutch Government adopted the 1956 Economic Competition Action, reprinted in V. Lowe, *supra* note 187, at 123 (particularly article 39 thereof on blocking).

190 Foreign Extraterritorial Measures Act, F-29, 24 I.L.M. 794 (1985) (Can.); Foreign Proceedings (Excess of Jurisdiction) Act, 23 I.L.M. 1038 (1984) (Austl); At that time, there were "five diplomatic protests of U.S. antitrust cases for every instance of express diplomatic support , and three blocking statutes for every co-operation agreement"; Joel Davidow, *Extraterritorial Antitrust and the Concept of Comity,* 15 J. World Trade L. 500, 502 (1981).

191 Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Circ., 1976), which ruled clearly that the ALCOA judgment does not provide for a complete solution, in the sense that the effects doctrine "fails to consider other nations interests. Nor does it expressly take into account the full nature of the relationship between the actors and this country". *Id.* at 611-612. It therefore considered that U.S. courts should balance the competing jurisdictional interests of the competing jurisdictions and decline to exercise jurisdiction, when foreign interests outweighed U.S. ones. The question was "[w]hether the interests of, and links to, the United States – including the magnitude of the effect on American foreign commerce – are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority". *Id.* at 613; Mannington Mills v. Congoleum Corporation, 595 F.2d 1287, 1297-8 (3rd Circ., 1979), which refined even more this solution.

192 Foreign Trade Antitrust Improvements Act 15 U.S.C. § 6a (2006).

193 *See* indicatively Agreement between the Government of the US and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, Jun. 23, 1976, 27 U.S.T. 1956; Agreement between the Government of the US and the Commission of the European Communities Regarding the Application of their Competition Laws, Sept. 23, 1991, 30 I.L.M. 1487 (1991); Agreement between the Government of the US and the Government of Canada Regarding the Application of their Competition and Deceptive Marketing Practices Laws, available at http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01592e.html; International Antitrust Enforcement Assistance Act, Publ. L. 103-438, 108 U.S. 4597 (1994), for the application of these agreements within the U.S. was further assisted by this Act, which paved the way for stronger international enforcement co-operation as for example in the Agreement between the Government of the US and the Government of Australia on mutual Antitrust Enforcement Assistance, April 27, 1999, available at http://www.usdoj.gov/atr/public/international/docs/usaus7.htm (last visited June 30, 2010); *See* further North American Free Trade Agreement (NAFTA) (U.S., Can. Mex.) chapter 15, 32 I.L.M. 605, 663 (1993); Larry Fullerton & Camelia C. Mazard, *International Antitrust Co-operation Agreements*, 24 *World Competition* 405, 406-423 (2001), with more thorough analysis; Cornelis Canenbley & Michael Rosenthal, *Co-operation between Antitrust Authorities in – and outside the EU: What does it mean for Multinational Corporations? Part 2,* 26 Eur. Comp. L. Rev. 178, 178-187 (2005); 1 American Bar Association, Section of Antitrust Law, Competition Laws Outside the United States 113 (2001), at 113 *et seq.*

reasonably foreseeable',[194] whereas at the same time they countered the difficulty of requiring proof of intent for the commission of an act in the jurisdictional phase of a case.[195]

While the limits that US courts accept to this exercise of jurisdiction still seem to be a cause of concern,[196] much of the controversy surrounding the effects doctrine as a matter of principle today seems to have subsided. This appears to be mainly due to the fact that the substantive antitrust law and policy underlying the application of the doctrine have been increasingly endorsed in state practice.[197]

As regards state practice, the US Supreme Court has affirmed recently that "it is well-established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[198] As to what the effects are, US courts have accepted that they may exercise jurisdiction if the conduct caused the "effect" of "injuries to United States commerce which reflect the anticompetitive effect either of the violation or of the anticompetitive acts made possible by the violation."[199]

It is indicative that even the European Court of Justice, which were at pains to avoid endorsing the effects doctrine in its formative antitrust jurisprudence by adopting certain interesting legal constructions,[200] eventually accepted in the *Gencor* Case that "[a]pplication of the [Merger] Regulation is justified under

194 The critical part reads as follows; "Sect. 6a. Conduct involving trade or commerce with foreign nations Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless--
(1) such conduct has a direct, substantial, and reasonably foreseeable effect--
(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States;
(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States".

195 Herbert Hovencamp, Federal Antitrust Policy, The Law of Competition and Its Practice 751-753 ¶21.2 (2nd ed. 1999). As the U.S. Supreme Court's summary of the legislative discussions on the adoption of the 1982 Foreign Trade Antitrust Improvement Act (FTAIA) amendment reveals, "The FTAIA seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements, (say, joing-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets . . . . . It does so by removing from the Sherman Act's reach (1) export activities and (2) other commercial activities taking place abroad, unless those activities adversely affect domestic commerce, imports to the United States, or exporting activities if one engaged in such activities within the United States". The Supreme Court concluded that the situation stands as follows: "This technical language initially lays down a general rule placing all (non-import) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach provided that the conduct both (1) sufficiently affects American commerce, American domestic, import, or (certain) export commerce, and (2) has an effect of a kind that antitrust law considers harmful, i.e., the "effect" must "give rise to a Sherman Act claim"; F. Hoffman – La Roche Ltd. Et al. v. Empargan S.A. et al., 124 U.S. 2359, 2364-5 (2004).

196 The root of the problem in U.S. Courts seems to be mostly due to their approach to the effects doctrine through national interpretation and the use of comity and 'the foreign compulsion' defense, as opposed to an interpretation on the basis of international law and international norms.

197 In detail *infra* Part 6.3.1.

198 Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993).

199 National Bank of Canada v. Interbank Card Association, 666 F.2d 6, 8(2nd Circ., 1981). The *Bank of Canada* test has been further explained in more recent case-law, and particularly the auction price-fixing case Kruman et al v. Christie's International et al, 284 F.3d 384, 390 (2nd Circ. 2002). Thus, "The 'conduct' could be an agreement to fix prices in both foreign and domestic auction markets. Such acts have an effect on domestic commerce because they include conduct directed at a domestic market. The plaintiffs allege that this 'conduct' actually reduced competitiveness in the domestic auction market. The domestic effect of the conduct clearly violates the Sherman Act. Alternatively, the 'conduct' could be described as an agreement to fix prices in a foreign auction market that made possible an agreement to fix prices in the domestic auction market. The 'effect' of the foreign agreements, the negotiation of the explicit domestic price-fixing agreement that clearly violate section 1 of the Sherman Act, 'gives rise to a claim' under the Act."

200 The well-known cases are the 'single economic unity' approach, attributing the action of a subsidiary within the common market to its parent company outside the E.U. in Case 48/69, Imperial Chemical Industries Ltd. v. Commission ('Dyestuffs'), 1972 E.C.R. ¶ 131-2; Cases C-89, 104, 114, 116, 117, 125-129/85, Wood Pulp Cases, A. Alstrom Osakeyhtio et als v. Commission (Joined Cases), 1988 E.C.R. ¶12-13, for the 'implementation doctrine' (territorial implementation rather than territorial effects as the appropriate connecting link for the exercise of jurisdiction). This decision affirmed that the territorial implementation nexus of the conduct with the common market means that it is covered by "the territoriality principle as universally recognized in public international law"; Ryngaert, *supra* note 177, at 25-44.

public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community."[201]

These developments seem to have inspired Judges Higgins, Kooijmans and Buergenthal when affirming that " "[e]ffects or "impact" jurisdiction is embraced both by the United States and, with certain qualifications, by the European Union."[202] Today, on the basis of extensive state practice, authorities increasingly accept that the effects doctrine is an accepted approach to territorial jurisdiction under

201 Case T-102/96, Gencor Ltd. v. Commission of the European Communities, 1999 E.C.R. II-753 ¶90. In that case, the C.F.I. of the E.C. found that the merger of two major companies in the world platinum market, a South African and an English one, in order to take over South African companies and create an oligopoly in the world platinum market, infringed the provisions of Regulation 4064/1989 regulating Mergers. The competent authorities of South Africa however had already approved the merger. As regards the argument that the exercise of jurisdiction was inappropriate in this case taking into account the stand of the South African authorities, which had a greater connection with the case, the Court attached particular weight to the fact that the South African Government did not challenge the capacity of the Commission (or of the Court itself for that matter) to decide on the case at hand in its communications with the E.C. organs. *Id.* ¶104; Morten P. Broberg, *The European Commission's Extraterritorial Powers in Merger Control; The Court of First Instance's Judgment in Gencor v. Commission*, 49 Int'l. Comp. L. Q. 172, 176 (2000), takes the view that this ruling of the C.F.I. "allows the Commission to apply the Merger Regulation to the limits of what is possible under public international law." However, as far as classic anti-competitive behaviour (not mergers) is concerned, the E.C.J. has yet to endorse the effects doctrine unequivocally. For support for the proposition that the effects jurisdiction applies to all aspects of competition cases under E.U. law; Cyntia D. Wallace, *Extraterritorial Discovery: Ongoing Challenges for Antitrust Litigation in an Environment of Global Investment*, 5 J. Int'l Econ. L. 353 (2003); Ivo van Bael & Jean François Bellis, Competition Law of the European Community 154-156, (4th ed. 2004), for E.U. Competition Law development in this context. It should be noted that the European Commission has taken a pro-effects approach – clearly since the *Woodpulp* cases – which was adhered to by the Advocate-General but not the ECJ; Ryngaert, *supra* note 177, at 42-4, for current Commission practice in favour of the effects doctrine; On mergers, Andre R. Fiebig, *International Law Limits on the Extraterritorial Application of the European Merger Control Regulation and Suggestions of Reform*, (1998) Eur. Competition L. Rev. 323, 325-327; Eleanor M. Fox, *The Merger Regulation and its Territorial Reach:* Gencor Ltd. v. Commission, (1999) Eur. Competition L. Rev. 334, 335, ". . . the CFI's expressed understanding corresponds precisely with the United States' understanding of appropriate jurisdiction (and with the US understanding of the effects test)"; Yves van Gerven & Lorelien Hoet, *Gencor: Some Notes on Transnational Competition Law Issues*, 28 *Legal Issues of European Integration* 195, 201-6 (2001).

202 Arrest Warrant Case, *supra* note 55 at 77, ¶ 47.

international law.[203] The remaining friction, if any, centers largely on the most appropriate standards and mechanisms for the settlement of jurisdictional conflicts arising from its implementation.[204]

As such, it seems appropriate to conclude that under contemporary international law, the debate on effects jurisdiction is focused on the use of the criteria for its exercise, rather than its existence.[205]

Before concluding this introductory chapter, a word on the developments on the scope of application of the doctrine is required. Recent literature and case-law contain interesting attempts to extent its implementation beyond the field of antitrust criminal law, so as to address human rights violations,[206]

203 This proposition was accepted as early as 1972 with some reservation by the International Law Association, Resolution on Extra-Territorial Application of Anti-Trust Legislation, Int'l. L. Association Rep. 55th Conference, art. 5, New York, 1972, XIX; Gencor Ltd. v. Commission, supra note 201, at ¶ 90-91; For extensive comparative analysis, Ryngaert, *supra* note 177, at 45-56 provides state practice from each E.U. member state. Ryngaert entertains the possibility that effects jurisdiction may already be seen as a rule of customary law, taking into account that, in the view of the International Court of Justice in the North Sea Continental Shelf Cases, the creation of rules of customary law is possible on the basis of the practice of a few states that are particularly interested – or greatly affected by the implementation of a certain rule – arguably, in this respect by states such as the U.S. and certain E.U. Member States. As such, if the validity of this doctrine is proven to be accepted in the practice of certain states, it may be convincingly argued to constitute a rule of customary law, binding on all States, with the possible exception of persistent objectors; Further, with references to comparative research, Jens Adolphsen, *The Conflict of Laws in Cartel Matters in a Globalised World: Alternatives to the Effects Doctrine,* 1 J. Priv. Int'l L. 151, 158-159 (2005), "Internationally, the effects doctrine has set out to win over the world: not only European countries such as Switzerland (Art 2(2) Cartel Law), Austria (para 6(1) Cartel Law), Spain, Greece, Norway, Sweden, Italy and France should be mentioned but so should Australia and countries in Latin America"; Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 L. Pol'y in Int'l Bus. 1, 67-68 (1992); Einer Elhauge & Damien Geradin, Global Competition Law and Economics 1057 (2007).

204 Over the years, several solutions have been proposed; For the creation of an international organisation in the model of ICSID, which would assist in the resolution of jurisdictional conflicts through arbitration panels, Karl M. Meessen, *Antritrust Jurisdiction under Customary International Law*, 78 Am. J. Int'l. L. 783, 809-810 (1984) and his proposal for an 'International Center for the Settlement of Antitrust Disputes' (ICSAD); U.S. judges have occasionally had recourse to the so-called 'interest balancing analysis', which involved interest-balancing of competing jurisdictional claims on the basis of divergent national interests. This position was amply criticised by U.S. courts, the U.S. executive and authorities. For the position that national courts are not the best judges for such issues, which should be properly resolved through inter-state negotiations *see* Laker Airways Ltd. v. Sabena*,* 731 F.2d 909, 937-938, 950 (D.C. Cir., 1984), "there is no evidence that interest balancing represents a rule of international law"; Further, Westinghouse Electric Corporation v. Rio Algom Ltd., 480 F.Supp. 1138, 1148 (1979), *per* Judge Marshall, who stated in the famous uranium litigation that "such a balancing test is inherently unworkable in this case. The competing interests here display an irreconcilable conflict on precisely the same plane of national policy . . . . It is simply impossible to judicially 'balance' these totally contradictory and mutually negating actions." On U.S. Executive's position on the matter, *see* the United States Department of Justice and Federal Trade Commission, Antitrust Enforcement Guidelines*,* April 1995, *reprinted in* 34 I.L.M. 1081, 1103-4 (1995), "In cases where the United States decides to prosecute an antitrust action, such a decision represents a determination by the Executive Branch that the importance of antitrust enforcement outweighs any relevant foreign policy concerns. The Department does not believe that it is the role of the courts to 'second guess the executive branch's judgment as to the proper role of comity concerns under these circumstances.'" [footnotes omitted] From literature, Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An intersection between public and private international law*, 76 Am. J. Int'l. L. 280 (1982), "For a court to balance objectively the United States interest in applying U.S. antitrust laws to foreign activity against a foreign state's interest in permitting anticompetitive activity to achieve rationalization of production is difficult at best. . . . . The result of such interest balancing will usually reflect an understandable bias in favour of the forum's policy, grounded in unsophisticated analysis, overt chauvinism, or erroneous perceptions of a constitutional duty to advance legislative policies described in broad language but designed primarily for use in a domestic context." See also the Diplomatic Note of the UK Government to the US Government expressing the UK's "serious reservations" on the propriety of having a national court balance the interests of two or more sovereign states, 53 Brit. Y.B. Int'l. L. 430, 431 (1982); Mann, *supra* note 18, at 15,74, "[W]hether one speaks of analysis or of balancing, interests are in law a bad and misleading guide. It is contact that matters . . . . The so-called balancing of interests is nothing more but a political consideration: it is not the subjective or political interest, but the objective test of the closeness of connection, of a sufficiently weighty point of contact between the facts and their legal assessment that is relevant. The lawyer balances contacts rather than interests." Therefore, "[I]f one considers the act complained of, i.e., the agreement, and asks with which country it has the closest contact, the answer is obvious and entirely independent of any political or legally irrelevant aspect." Bowett, *supra* note 16, at 22, 24, has taken the position in this regard that "if the balancing of interests between states is to be thorough and perceptive, it becomes impossible to arrive at such a balance by the application of a set of principles or rules. The principles or rules on which jurisdiction is commonly based – territorial, personal, protective, universal- cannot, in themselves, provide the necessary balance of interests . . . What these principles of law can provide is the legal context within which the many factors have to be assessed."

205 Ryngaert, *supra* note 177, at 195.

206 Yuval Shany, *The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. Prime Minister of Israel,* 42 Isr. L. Rev. 101, 111-2 (2009).

international terrorism,[207] breaches of the law of the sea,[208] ordinary criminal law violations.[209] Judges have also called for the adoption legislation to that direction.[210] It is in the light of this growing acceptance of effects jurisdiction that the topic of the interpretation of the territorial jurisdiction of the International Criminal Court will be addressed in the subsequent chapters.

207 Robert Kolb, *The Exercise of Criminal Jurisdiction over International Terrorists*, in Andrea Bianchi, Enforcing International Law Norms Against Terrorism 244-245 (A. Bianchi ed. 2004), who notes that while "There is no means to assign a limited and precise scope to such 'effects' which are by their very nature vaguely defined", nevertheless "it could easily be said that such acts [terrorist acts] by definition (or legal fiction) have 'effects' felt in other States, to the extent that fundamental common interests are infringed."

208 Oxman, *supra* note 11, at 58, "In limited circumstances, the effects doctrine may be the basis for enforcement jurisdiction at sea, for example with respect to non-economic installations, pollution and illicit broadcasting (1982 Law of the Sea Convention, Arts. 60(1)(c), 109, 220(6), 221)."

209 For application of the effects doctrine in a case of theft, S. v. Mharapara, 84 I.L.R. 1, 17 Supreme Court of Zimbabwe, Judgment of 17 October 1985, (theft by a Zimbabwe diplomatic agent in that state's embassy in Brussels; "…[a]lthough all the constituent elements of the theft occurred in Belgium, in particular the obtaining of the money there, the State is nonetheless entitled to proceed upon the present indictment and adduce evidence at the trial, ... , to establish the fact that the harmful effect of the appellant's crime was felt by the Zimbabwean Government within this country." In deciding whether it was so, the Supreme Court indicated that the crime was committed by a national of that state, in the premises of that state's Embassy in Brussels, that the funds may have been used for meeting maintenance costs of the Embassy, as well as that the theft resulted in further transfer of foreign currency from Zimbabwe, thereby depleting that state's "much needed external reserves."

210 Public Prosecutor v. Taw Cheng Kong, 2 S.L.R. 410, ¶88, Singapore Court of Appeal [1998], "As Singapore becomes increasingly cosmopolitan in the modern age of technology, electronics and communications, it may well be more compelling and effective for Parliament to adopt the effects doctrine as the foundation of our extraterritorial laws in addressing potential mischief."

CHAPTER 3 /
THE PREPARATORY WORKS OF ARTICLE 12(2)(A)

3.1. / PURPOSE OF THE CHAPTER – SOURCES – STRUCTURE

In the framework of the present dissertation, a necessary step prior to the examination of the content of article 12 (2) (a) of the Rome Statute is the research and analysis of the negotiating process that led ultimately to its adoption.

Why is this step so important? As a matter of positive law, ever since the adoption of the Vienna Convention on the Law of Treaties, preparatory works are considered as a supplementary means for the interpretation of international agreements,[1] including agreements establishing international organisations.[2] Both the International Court of Justice[3] and the International Criminal Court[4] have affirmed the existence of the rules of customary law reflected in articles 31 and 32 of the Vienna Convention on the Law of Treaties as regards treaty interpretation.

The Vienna Convention does not stipulate what the term 'preparatory works' stands for. The Commission did not define the term, in order not to exclude "relevant evidence".[5] Publicists in general have considered that a wide range of documents fall to be considered under this heading.[6] Oral material is controversial.[7] The best position seems to be that the term "is generally understood to include written material, such as successive drafts of the treaty, conference records, explanatory statements by an expert consultant at a codification conference, uncontested interpretative statements by the chairman of a drafting committee and the ILC Commentaries […]".[8] It is these documents that will be chiefly consulted as 'preparatory works' in the context of the present work.

1 Vienna Convention on the Law of Treaties, art. 32, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, provides that "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure, or (b) leads to a result which is manifestly absurd or unreasonable".

2 *Id.* at art. 5 on 'Treaties constituting international organizations and treaties adopted within an international organization', stipulates that "The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization". The rules of interpretation in art. 31-32 are on the basis of this provision "expressly applicable to the constituent instruments of IOs"; Jose E. Alvarez, International Organizations as Law-Makers 83 (2005).

3 Certain Questions of Mutual Assistance in Criminal Matters, (Djib. v. Fr.), Judgment, 2008 I.C.J. Rep. 177, 232 ¶153.

4 Recently in Situation in the Republic of Kenya, Case No. ICC-01/09-19 Decision, ¶10 (March 31, 2010); For earlier rulings to the same effect, see *infra* Part 4.2.1.

5 *Draft Articles on the Law of Treaties*, [1966] 2 Y.B. Int'l L. Comm'n 223, art. 70.

6 1 Lassa Oppenheim, Oppenheim's International Law 1277 *(*Robert Jennings & Arthur Watts eds. 9th ed. 1992); Arnold McNair, Law of Treaties 411 (2nd ed. 1961), who describes preparatory works as "an omnibus expression which is used rather loosely to indicate all documents, such as memoranda, minutes of conferences, and drafts of the treaty under negotiation, for the purposes of interpreting the treaty"; Ulf Linderfalk, On the Interpretation of Treaties, The Modern International Law as expressed in the 1969 Vienna Convention on the Law of Treaties 240 (2007), accurately says that, while it is easy to *exemplify* what the term includes, it is difficult to define it, primarily because "in international law, no general rule can be found stating in more detail the procedure for making a treaty."

7 The use of oral material is generally considered permissible only in very exceptional circumstances; Oppenheim*, supra* note 6 at 1277, n. 9; Young Loan Arbitration*,* (Belg. et al/ Fed. Rep. Ger.), 59 I.L.R. 495 (1980); *Cf.* Linderfalk, *supra* note 6 at 241, who proposes that "By "the preparatory work of the treaty" we should understand any representation, whether textual or non-textual, produced during the drafting of a treaty."

8 Anthony Aust, Modern Treaty Law and Practice 246, (2nd ed. 2007); Yves Le Bouthillier, *Article 32*, in 2 Les Conventions de Vienne sur le Droits des Traités, Commentaire Articles par Article 1353-7 (O. Corten & P. Klein eds. 2006) with further references. The issue is normally put in negative terms, namely what is *not* considered *merely* as *travaux*; Gerald G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 28 Brit. Y.B. Int'l L. 1, 12 (1951), in this context, particularly as regards agreements on the interpretation of certain terms made during the negotiations and possibly recorded in the minutes, which were crucial for the acceptance of the provision; Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989,* 62 Brit. Y.B. Int'l L. 1, 36-37 (1991), for more recent case-law on the point; S. Torrez Bernàndez, *Interpretation of Treaties by the International Court of Justice Following the Adoption of the 1969 Vienna Convention on the Law of Treaties*, in Liber Amicorum: Professor Ignaz Seidl-Hohenveldern 743, n. 46 (Gerhard Hafner et al eds. 1998), for the issue of whether national documentation from a treaty's ratification procedure may be used in treaty interpretation as preparatory works.

Under general international law, the value of the preparatory works in the interpretation of a treaty can be of substantial importance in either confirming or clarifying the meaning of a treaty provision.[9] As such, in treaty law theory preparatory works are considered as an indispensable part of the 'intention of the parties' or 'subjective' school of interpretation, since they are commonly used to ascertain the intentions of the negotiating parties.[10] As such, they can contribute in the process of treaty interpretation by providing at times useful insights in the intentions of the negotiators, to the extent practicable, and thus, from a historical perspective, assist in drawing a complete picture of the grounds that led to the specific formulations embodied in the treaty text.[11] The critical question in this procedure then becomes "one not of either excluding or including all possible materials, but rather to figure out which documents and materials could possibly be relevant and which ones are not, and this is an open-ended, evidently political, process."[12]

Requirements of completeness render therefore indispensable in this academic work the engagement in this 'open-ended, evidently political, process', in order to explain[13] the meaning of article 12 (2) (a) ICC Statute.

The Court itself has had recourse to preparatory works in the process of interpretation of certain provisions of the Rome Statute, particularly for the confirmation of its findings following interpretation.[14] Unfortunately, neither article 12(2)(a) and its preparatory works, nor in general the jurisdictional clauses of the Statute have been up to date the object of any in-depth judicial analysis.

It is necessary therefore to engage in this process of selection and analysis of the relevant materials of the preparatory works, starting from the work of the ILC in the early 90's and leading to the Rome Conference of June-July 1998, in order to establish as clear a picture as possible of the historical process that led to the adoption of the Rome Statute and in particular article 12 (2) (a) thereof.

In doing so, however, certain caveats should be kept in mind, which lie at the root of the generally reserved approach of authorities[15] and courts[16] towards the use of preparatory works in treaty interpretation – especially when they are employed in contentious litigation in order to support opposite points of view.[17]

9 Vienna Convention, *supra* note 1, at art. 32; Further, Stephen Schwebel, *May preparatory work be used to correct rather than confirm the 'clear' meaning of a treaty provision?,* in Theory of International Law at the Threshold of the 21st century, Essays in Honour of of Krysztof Skubiszewski 542-3 (Jerzy Makarczyk ed. 1996); U. Linderfalk, *Is the Hierarchical Structure of Articles 31 and 32 of the Vienna Convention real or not? Interpreting the Rules of Interpretation*, 54 Neth. Int'l L. Rev. 133, 138-140 (2007).

10 Eduardo J. de Arechaga, *International Law in the Past Third of a Century*, 159 Recueil des Cours de l' Academie de Droit Iinternationale 1, 43-43 (1978-I); Further, Le Bouthillier, *supra* note 8, at 1341-3.

11 Jan Klabbers, *International Legal Histories: The Declining Importance of Travaux Préparatoires in Treaty Interpretation?,* 50 Neth. Int'l L. Rev 267, 281 (2003).

12 *Id.* at 278.

13 De Arechaga, *supra* note 10, at 48, "It may be difficult in practice to establish the borderline between confirming a view previously reached and actually forming it, since this belongs to the mental process of the interpreter".

14 Indicatively, Situation in Dem. Rep. Congo, Case No. ICC-01/04, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ¶ 40-41 (July 13, 2006), where the Appeals Chamber confirmed its interpretation of Article 82(1)(d) of the Statute refusing the right to appeal a decision denying leave to appeal, on the basis of the rejection of a Kenyan proposal to that effect during the Rome negotiations; Prosecutor v. Katanga, Case No. ICC-01/04-01/07 (OA 3), Judgment on the Appeal of Mr. Germain Katanga Against the Decision of the Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages", ¶ 50-57 (May 27, 2008), where the Appeals Chamber uses extensively the history of the negotiations to confirm its interpretation of the language that the accused 'fully understands and speaks' under Article 67(1)(a) and (f) of the Statute; Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 (OA 15 OA 16), Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", ¶ 91 (Dec. 8, 2009), where the Appeals Chamber employed preparatory works to confirm the interpretation of Article 74(2) of the Statute and its relation to Regulation 55.

15 Chittharanjan F. Amerasinghe, *Interpretation of Texts in Open International Organisations*, 65 Brit. Y.B. Int'l L. 173, 202 (1994); Aust, *supra* note 8, at 246-247; Ian Brownlie, Principles of Public International Law 634-5 (7th ed. 2008); Malgosia Fitzmaurice, *The Practical Working of the Law of Treaties*, in International Law 186-7 (Malcolm D. Evans ed. 3rd ed. 2010); Claire Ovey & Robin C.A. White, Jacob's, White and Ovey, The European Convention on Human Rights 66-67 (5th ed. 2010), who conclude that "[p]reparatory work is notoriously unreliable . . . . ".

16 McNair, *supra* note 6 at 413; Maritime Delimitation and Territorial Questions between Qatar and Bahrain, (Qatar v. Bahr.), Judgment, Jurisdiction and Admissibility, 1995 ICJ 6, ¶ 40-41, (Feb. 15, 1995) and Dissenting Opinion of Judge Schwebel on that point, at 27, 32, 36; Young, James and Webster v. United Kingdom, 44 Eur. Ct. H.R. (ser. A), at 44, ¶ 51-52 (1981) from the jurisprudence of the European Court of Human Rights; Sigurjonsson v. Iceland, 264 Eur. Ct. H.R. (ser. A), at 264, ¶ 34-35, including the Dissenting Opinion of Judge Thor Vilhjálmsson.

17 Indicatively, Qatar v. Bahrain, supra note 16 at 6, ¶ 40-41; Klabbers, *supra* note 11, at 287, for the result of the 'political selection' process, to which Professor Klabbers referred, namely of the possibility that lawyers will 'pick and choose' some parts of the preparatory works in support of their argument, while ignoring others.

Some of the reasons[18] for this reserved approach – and the corresponding caveats – relate to the 'clarity' of the legal provision under analysis, its legal nature as part of the constituent instrument of an international organization, and finally the proper keeping of the negotiating records, in terms of accuracy, completeness and accessibility.

As regards the first issue, this stems mostly from the function of preparatory works under article 32 VCLT as an instrument for the determination of the meaning of a treaty provision, when the use of previous instruments of interpretation leaves the text unclear or leads to manifestly unreasonable and absurd results. The World Court and its predecessor have accordingly explained that the examination of the preparatory works should be avoided when the text is 'sufficiently clear'.[19] Can it be said, therefore, that article 12(2)(a) is 'sufficiently clear' for the purposes of the use of preparatory works?

Obviously, what may be 'sufficiently clear' in terms of law depends largely on the eye of the beholder. For the purposes of the present work, it is submitted that the final formulation[20] of article 12(2)(a) leaves certain questions of interpretation open, such as the qualification of 'conduct in question' and 'territory of State Party' and the use of localization devices under territoriality. Preparatory works may shed some light to the negotiators' approach to these issues. In any event, preparatory works could assist in the confirmation of any conclusions reached.

The other caveats relate arguably more to the weight to be accorded to preparatory works in treaty interpretation, rather than to their use as such. In this framework, one should not lose sight of the fact that the Rome Statute is the constitution of an international organization, the International Criminal Court, set up to achieve certain goals. As such, its dynamic interpretation is deemed more appropriate with the 'living' character of the institution, as it was forcefully advocated by Judge Alvarez in his Opinions in the two *Admissions* Cases,[21] and compellingly reasoned by Judge Spender in his Separate Opinion in the *Certain Expenses* Case.[22] Today it is authoritatively stated that as regards the constitutions of international organizations, "[o]n the whole, […], intention has not been regarded as relevant in any important way for the interpretation of such texts."[23]

Finally, the quality of the conclusions to be reached through the research and analysis of preparatory works depends also on the availability and the completeness of the historical record.[24] The process leading to the endorsement of a treaty provision may not be thoroughly documented, either due to insufficient secretarial support, or because of the need to maintain the informal character of the negotiations in order to achieve agreement on difficult issues involving critical state interests.[25] In those circumstances, the quality and quantity of the preparatory works may not allow for clear conclusions to be drawn. It is primarily these concerns that have prompted Aust to state that the "*[t]ravaux* must therefore always be approached with care. Their investigation is time-consuming, and their usefulness often marginal and very seldom decisive."[26]

18 Klabbers, *supra* note 11, at 280-1, for a number of other grounds for the rejection of preparatory works in the process of treaty interpretation, such as political arguments relating to the number of states, which existed and negotiated treaties in the past and others.

19 Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, 1948 I.C.J. Rep. 63; Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. Rep. 8; Further, Mahasen M. Aljaghoub, The Advisory Function of the International Court of Justice 1946-2005 169-172 (2006); In general, Fitzmaurice, *supra* note 8, at 12; Thirlway, *supra* note 8, at 36-37; Prosecutor v. Tadic, Case No. IT-94-1, Appeals Chamber, Judgment, ¶ 303 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999), for the approach of the ICTY to this rule; Alvarez, *supra* note 2, at 83, "Article 31 is commonly interpreted as preferring text over negotiating history, a result achieved in article 32's seeming direction to resort to originalism only when text and context fail".

20 David Hunt, *The International Criminal Court, High Hopes, 'Creative Ambiguity' and an Unfortunate Mistrust in International Judges*, 2 J. Int'l Crim. Just. 56, 67 (2004), for 'creative ambiguity' as a legislative technique used to achieve compromise when drafting the Rome Statute; Alvarez, *supra* note 2, at 84, with regard to the constitutions of international organizations, "[l]anguage is rarely precise enough to be unambiguous, especially in a constitution. Provisions are often left consciously vague to permit initial agreement or to permit change as conditions warrant", with the result that "charter interpreters have considerable discretion to resort to "supplementary means" of interpretation".

21 Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, 1948 I.C.J. Rep., 57, 67-68 (Individual Opinion of Judge Alvarez) (May 28); Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. Rep. 4, 18 (Dissenting Opinion of Judge Alvarez) (Mar. 3).

22 Certain Expenses of the United Nations, (Article 17 paragraph 2 of the Charter), Advisory Opinion, 1962 I.C.J. Rep. 151, 184-5 (July 20).

23 Amerasinghe, *supra* note 15, at 200.

24 Aust, *supra* note 8, at 246, who takes the view that, the most important factors, when assessing the value of the materials, are authenticity, completeness and availability.

25 *Id.*

26 *Id.* at 247.

This seems particularly important as regards the ICC Statute and the issue of the jurisdiction of the Court in particular. Although recent publications contain a wealth of information that facilitate the difficult task of the academic researcher,[27] the informal character of the negotiations on the issue of jurisdiction, admittedly one of the most crucial issues of the negotiations that remained unresolved until the very last hour of the Rome Conference, appears to have had a certain impact on the completeness of the historical record in significant parts of the process.[28] Bearing in mind that the negotiations on jurisdiction were entangled with a variety of critical issues, such as the legal relationship of the Court with national jurisdictions (complementarity) and the Security Council, this should not come as a surprise. It is in order to overcome these difficulties and present as complete a picture as possible that reference will be made extensively here not only to the primary sources/material of the negotiations (official documents), but also to the publications of some of the negotiators. That said, however, the use of personal publications of individual negotiators is not formally sufficient to make up for the absence of an official record on state positions in critical negotiating moments of the last week of the Rome Conference. It is primarily this silence that makes any conclusions drawn from the preparatory works on jurisdiction tentative at best.

To sum up, it is submitted that the preparatory works of the negotiations leading to the adoption of article 12(2)(a) could provide helpful insights in addressing complex issues arising from its interpretation. However, taking into account the nature of the Statute as a constitution of an international organization, as well as the incompleteness of the official record at the final crucial stages of the negotiation, it is suggested that the value attached to the preparatory works should be moderated.

As regards issues of structure, the best course to follow appears to be an analysis of the process that led to the endorsement of article 12 (2) (a) ICC Statute in chronological order. Accordingly, in the first part the work of the International Law Commission (1990-1994) will be reviewed, while the second part will be focused on the work of the Ad Hoc Committee (1994-1995) and the Preparatory Committee (1996-1998). Finally, the last parts of the Chapter will be dedicated to the negotiations of the Rome Conference (June-July 1998) and certain concluding observations.

27 The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text, (Mahmoud Ch. Bassiouni ed. 2005); United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court: Rome, 15 June-17 July 1998, Official Records, 2002, (Vol. I: Final Documents, Vol. II: Summary Records of the Plenary Meetings of the Committee and of the Meetings of the Committee of the Whole, Vol. III: Reports and Other Documents) (hereinafter Official Records, Vol. I, II, III respectively).

28 Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections,* 10 Eur. J. Int'l L. 144, 145 (1999); *See* further Christopher K. Hall, *The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 91 Am. J. Int'l L. 177, 178, n. 4 (1997), who mentions in his thorough personal accounts of the work of the 1996-1998 UN Preparatory Committee, "[N]o Summary Records of the Preparatory Committee have been kept"; This caveat is repeated by that author in his review of the subsequent sessions of the Preparatory Committee at 92 Am. J. Int'l L. 124, 125, n. 6, 331-2, n. 2, 548-9, n. 5 (1998).

3.2 / THE INTERNATIONAL LAW COMMISSION'S WORK ON THE STATUTE OF AN INTERNATIONAL CRIMINAL COURT – TERRITORIAL JURISDICTION

Although the debate concerning the establishment of an international criminal court may be traced back to the early 1920s, it appears that the first serious efforts were made after the Second World War and the Nuremberg and Tokyo trials, although they reached practically a dead-end in the mid-1950's in the United Nations.[29]

The issue appears to have been brought back in the spotlight by the UN General Assembly in 1989, through Resolution 44/39, when the General Assembly requested the ILC, in the context of the latter's work on the Draft Code of Crimes against the Peace and Security of Mankind to "address the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to have committed crimes which may be covered under such a code, including persons engaged in illicit trafficking in narcotic drugs across national frontiers, and to devote particular attention to that question in its report on that session."[30]

From thereon, the ILC took up the discussion of the subject, which resulted in the 1994 ILC Draft Statute. The work of the Commission may be separated into two phases; the first one, from 1990 till 1992, was primarily concerned with the question of whether the creation of an International Criminal Court was desirable and feasible. The second phase, in 1993-1994, after a renewed and specific General Assembly mandate to that effect, comprises the main *corpus* of the Commission's work on the elaboration of the provisions of a Draft Statute.

In 1990, during the first steps of the Commission's work, the Special Rapporteur of the Commission for the Draft Code of Crimes against the Peace and Security of Mankind prepared a separate part dedicated to the creation of an international criminal judicial institution.[31] On the issue of jurisdiction, under the heading "*Necessity or non-necessity of the agreement of other States*", he offered two versions, in both of which the territorial state was included in the list of states, whose consent would be needed for the trial of

29 *Report of the International Law Commission,* [1990] 2 Y.B. Int'l L. Comm'n 20-21, ¶ 103-115, U.N. Doc. A/C.N.4/SER.A/ADD.1, where the history of these procedures is summarized; G.A. Res. 898 (IX), U.N. GAOR 8th Sess. Supp. No. 21, U.N. Doc. A/2890 (Dec. 14, 1954), on the postponement of consideration of the topic after the first work in the 1950's; G.A. Res. 1187 (XII), U.N. Doc A/7250 (Dec. 11, 1957); Revised Draft Statute for an International Criminal Court, Committee on International Criminal Jurisdiction 1951-1953, U.N. GAOR, 9th Session, Supp. No. 12 U.N. Doc. A/2645, Annex, which was the latest Draft produced at that time. That draft statute also provided for territorial jurisdiction in article 27. The members of the Committee were 17 member states of the U.N. As the International Law Commission noted in n. 64 in its 1990 Report, *id.* at 20, although the General Assembly did make progress on both these issues with the adoption of Resolutions 3314 of 14 December 1974 and 36/106 of 10 December 1981, "No mention was made, however, in either resolution, of the question concerning the establishment of an international criminal jurisdiction"; further, Bradley E. Berg, *The 1994 I.L.C. Draft Statute for an International Criminal Court: A Principled Appraisal of Jurisdictional Structure*, 28 Case West. J. Int'l L. 221 (1996); Bassiouni, *supra* note 27, at 60; International Convention on the Suppression and Punishment of the Crime of Apartheid, U.N. Doc. E/CN.4/1426, at 21 (1981), the elaboration of a Draft Statute for an International Criminal Court in the 1978 Apartheid Convention was probably the most interesting attempt.

30 International Criminal Responsibility of individuals and entities engaged in illicit trafficking in narcotic drugs across national frontiers and other transnational criminal activities: establishment of an international criminal court with jurisdiction over such crimes, G.A. Res. 44/39, ¶ 1, U.N. Doc. A/RES/44/39 (Dec. 4, 1989); Bassiouni, supra note 27, at 62, for further details. The General Assembly's request was prompted by Trinidad and Tobago's appeal for the creation of an International Criminal Court for the prosecution of persons involved in drug trafficking; G.A. Res. 43/164, U.N. Doc. A/RES/43/164 (Dec. 9, 1988); G.A. Res. 44/32, ¶ 2 U.N. Doc. A/RES/44/32 (Dec. 4, 1989), which provided in para. 2 that the General Assembly "*Notes* the approach currently envisaged by the Commission in dealing with the judicial authority to be assigned for the implementation of the provisions of the draft Code, and encourages the Commission to explore further all possible alternatives on the question."

31 Special Rapporteur, *Eighth Report on the Draft Code of Crimes Against the Peace and Security of Mankind,* [1990] 2 Y.B. Int'l L. Comm'n, UN. Doc. A/CN.4/430/ADD. 1 (by Doudou Thiam).

a suspect, or which would be in a position to set in motion the Court's trigger mechanism.[32] The ILC created a Working Group to discuss the matter and ultimately examined the jurisdiction and competence issue under four headings; subject-matter jurisdiction, jurisdiction over persons, the nature of the Court's jurisdiction (exclusive/concurrent or review jurisdiction) and the issue of submission of cases.[33] The Commission did not go into detail, at this stage, in the question of whether the consent of states would be required for the Court to have jurisdiction. It did, however, note, while outlining the three models that could be adopted, that this is an issue that should be addressed.[34]

In the next session, the Special Rapporteur decided to focus on two issues, in his view at the centre of the discussion; the first one was the jurisdiction of the proposed Court and the second "the requirements for instituting criminal proceedings".[35] As regards the jurisdiction of the Court, the Rapporteur suggested two possible draft provisions, the first of which allowed for the Court's jurisdiction only upon 'conferment' of jurisdiction by the territorial state, whereas the second provided that the state of nationality of the victim, of nationality of the perpetrator or the state against which the crime was directed would also need to 'confer' jurisdiction, "only if such States also have jurisdiction, under their domestic legislation, over such individuals."[36]

In his comments, the Rapporteur underlined that, although he paid due respect to the principle of sovereignty and the principle of territoriality, as "the principle generally applied", he took into account the "complexity of the matter" and "the state of existing law" through the inclusion of the active and passive personality and protective 'principles' of jurisdiction.[37]

The Report gave rise to an interesting discussion in the Commission on a number of issues.[38] First, the concept of the state-consent regime apparently did not sit well with some Commission members, who took the view that the new Court should have jurisdiction over all the crimes under the Code. In their position, "[t]here seemed to be no reason to grant privileged status to the State in whose territory the crime had been committed, since it was the whole of the international community that was affected."[39] On the other hand, the members of the Commission who did accept the state-consent regime and territorial jurisdiction, were divided over the issue of whether the ratification of the Court's statute would suffice for the latter's jurisdiction, or whether an additional expression of the states' 'specific consent' would be

32 *Id*. at 36-37, ¶ 84. The two versions read as follows; Version A; "No person shall be tried before the Court unless jurisdiction has been conferred upon the Court by the State in which the crime was committed, or by the State of which such person is a national, or by the State against which the crime was directed, or of which the victims were nationals." Version B; "Any State may bring before the Court a complaint against a person if the crime of which he is accused was committed in that State, or if it was directed against that State, or if the victims are nationals of that State. If one of the said States disagrees as to the jurisdiction of the Court, the Court shall resolve the issue."

33 1990 *Report of the International Law Commission, supra* note 29, at 8, ¶ 7 & 22-23, ¶ 123-137, on the establishment and composition of the Working Group.

34 *Id*. at 25, ¶ 155, under (i) *An International Criminal Court with exclusive jurisdiction*, where the Commission notes that this model "also raises . . . . the question that the jurisdiction of the court may depend on the consent of the States concerned (territorial State, State whose national is accused, State where the accused is found)"; *Summary Records of the 2155th Meeting*, [1990] 1 Y.B. Int'l L. Comm'n, 40, ¶ 31, U.N. Doc. A/CN.4/SER.4/1990, where problems with territorial jurisdiction were identified by Christian Tomuschat, who underlined the fact that the application of the territorial rule would present difficulties of application in cases of threat of aggression or "where the organizer of an aggression did not leave his national territory."

35 Special Rapporteur, *Ninth Report on the Draft Code of Crimes against the Peace and Security of Mankind*, [1991] 2 Y.B. Int'l L. Comm'n, 41, ¶ 36, U.N. Doc. A/CN.4/SER.A/199 I/Add.1, (by D. Thiam) for the question of the Establishment of an International Criminal Jurisdiction.

36 *Id*. The provisions read in full as follows; "1. The Court shall try individuals accused of the crimes defined in the code of crimes against the peace and security [accused of crimes defined in the annex to the present statute] in respect of which the State or States in which the crime is alleged to have been committed has or have conferred jurisdiction upon it. 2. Conferment of jurisdiction by the State or States of which the perpetrator is a national, or by the victim State or the State against which the crime was directed, or by the State whose nationals have been the victims of the crime shall be required only if such States also have jurisdiction, under their domestic legislation, over such individuals."

37 Thiam, *Ninth Report, supra* note 35, at 42-43 ¶ 47-48 & at 43, ¶ 50, where, interestingly, the Rapporteur admitted that he grudgingly adopted the 'principle of conferment of jurisdiction' as merely "a makeshift solution, a necessary concession to State sovereignty", hoping that it would only be of an "entirely temporary nature" in the formation of international criminal law.

38 *Report of the International Law Commission*, [1991] 2 Y.B. Int'l L. Comm'n, Chapter IV, U.N. Doc. A/CN.4/SER.A/199 I/Add.1; G.A. Res. 45/41, U.N. Doc. A/RES/45/41 (Nov. 28, 1990); GA Res. 46/54, U.N. Doc. A/RES/46/54, ¶3 (Dec. 9, 1991), where the General Assembly encouraged the Commission to examine the issues involved further in its Resolutions.

39 Report of the International Law Commission on the work of its forty-third session, [1991] 2 Y.B. Int'l L. Comm'n 88, ¶ 126; *Summary Records of 2209th Meeting,* [1991] 1 Y.B. Int'l L. Comm'n 15-16, ¶12, U.N. Doc. A/CN.4/SR. 2209, for Allain Pellet; *Summary Records of the 2212th Meeting*, *id*. 15-16, ¶42, for Yuri Barsegov; *Summary Records of the 2212th Meeting*, *id*. at 15-16, ¶42, for D. Thiam.

required, in the form of a convention, special agreement or unilateral declaration.[40] In any event, at least certain members "agreed that the criterion of territoriality should play an essential role in the conferment of jurisdiction on the court."[41]

In 1992, the Special Rapporteur for the Draft Code of Crimes proposed a two-level system, whereby certain crimes would be subject to the exclusive and compulsory jurisdiction of the Court, while for the rest the consent of the territorial state or the state of nationality of the perpetrator or the victims would be required.[42] The Commission created a Working Group for the particular topic; its report did touch on some issues concerning the requirement of the consent of the territorial state. In particular, it posed the question of whether the consent of the state of nationality of an offender would be required, should he commit an offence entirely and without leaving the territory of a state party. To this, the Working Group replied that in such cases the consent of the state of nationality should not be required, "since it is difficult to contest the primary jurisdictional claim" of the territorial State, while underlining that in such cases the state of nationality usually does not claim jurisdiction.[43] In the Commission's final report to the General Assembly, however, some disagreement was duly recorded by certain members against the territorial jurisdiction of the Court; in their view, "[i]t would be preferable not to have to secure the consent of the State in the territory of which the crime had been committed, for, otherwise, persons who committed atrocities in their own country might evade all responsibility."[44]

The following year the Commission was called upon to deal with the issue also in light of the creation of the International Criminal Tribunal for the Former Yugoslavia.[45] State replies and observations to the 1992 Working Group's Report[46] and the Draft Code adopted by the Commission on first reading,[47] respectively, only exceptionally contained comments on the issue of jurisdiction. In this background, the Special Rapporteur of the Draft Code in his 11th report proposed a provision, according to which the court's jurisdiction would be premised on the consent of both the territorial state and the state of nationality of the perpetrator;[48] in his view, "This draft, if it is not to be totally lacking in realism, cannot exclude either of the two rules in favour of the other."[49] The discussions in the Commission on the latest report of the Special

40 1991 *Report of the International Law Commission, supra* note 38, at 87-88, ¶123-5.

41 *Id.* at 88, ¶ 124.

42 Special Rapporteur, *Tenth Report on the Draft Code of crimes against the Peace and Security of Mankind*, [1992] 2 Y.B. Int'l L. Comm'n 55, U.N. Doc. A/CN.4/SER.A/1992/Add.1 (by D. Thiam).

43 *Report of the International Law Commission*, [1992] 2 Y.B. Int'l L. Comm'n 67, ¶ 63, for the report of the Working Group on the Question of an International Criminal Jurisdiction. The Working Group concluded that this issue required more detailed consideration.

44 *Id.* at 13, ¶ 66.

45 Following the clear mandate to the International Law Commission by the General Assembly to "continue its work on the question by undertaking the project for the elaboration of a draft statute for an international criminal court as a matter of priority as from its next session", the Commission entered the next phase of its deliberations on the matter, devoted to the drafting of a Statute. G.A. Res. 47/33, U.N. GAOR, 47th Sess. Supp. No. 49, ¶ 6, U.N. Doc. A/47/49 (1992) provided the mandate.

46 [1993] 2 Y.B. Int'l L. Comm'n, UN Doc. A/CN.4/452/1993/Add.1-3, for comments of Governments on the Report of the Working Group on the Question of an International Criminal Jurisdiction. Among the few states that submitted written comments, Italy referred to the possibility of Contracting States to submit declarations for the acceptance of the jurisdiction of the court *ratione loci*, at 137, ¶ 8. The Nordic Countries, on the other hand, took the view that "As regards the personal jurisdiction (jurisdiction ratione personae) of a court, the consent of the State of which the accused is a national should not be required. Nor should the consent of the State where the offence was committed be required unless the perpetrator is under the jurisdiction of that State. Generally speaking, the jurisdiction of a court should be very wide; if the consent of the various States involved is required, this could easily impair the effectiveness of such a court". *Id.* at 140, ¶ 9.

47 *Draft Code of crimes against the Peace and Security of Mankind (Part II),* [1993] 2 Y.B. Int'l L. Commission, U.N. Doc. A/CN.4/448/1993/Add.1, including the draft statute for an international criminal court, Comments and Observations received from Governments. Among the very few states to even comment upon the International Law Commision's work on the draft statute and the issue of jurisdiction, the Government of the Netherlands took the view that "the criminal court should be competent in respect of any person guilty of any of the crimes specified in the Code, even if that person is in a country or is a national of a country which is not a party to this instrument", at 84, ¶ 21; interestingly enough, in the light of subsequent developments, it was the Government of Sudan, which stated that "The provisions of the draft Code do not distinguish between crimes committed by a person in the territory of his own country and those committed in another country. A distinction must be drawn between these two types of crime, and it must be determined which court is competent to rule on crimes committed by nationals of a given country on foreign soil", *id.* at 96, ¶ 2.

48 Special Rapporteur, *Eleventh Report on the draft Code of Crimes against the Peace and Security of Mankind, Draft Statute for an International Criminal Court*, [1993] 1 Y.B. Int'l L. Comm'n 115, ¶ 32, U.N. Doc. A/CN.4/SER.A/1993 (by D. Thiam), where it is provided in Draft Article 5 ¶ 2 that "The Court shall have jurisdiction over every individual, provided that the State of which he is a national, and the State in whose territory the crime is presumed to have been committed, have accepted its jurisdiction".

49 *Id.* at 116, ¶ 36.

Rapporteur show a significant variety of opinions on the matter, ranging from full endorsement[50] to outright rejection[51] of the requirement of consent by the territorial state.

The Commission established a new Working Group on the topic, which prepared a Draft Statute for an International Criminal Tribunal, with commentaries.[52]

The Working Group's approach demonstrated that the question of state consent for the exercise of jurisdiction was considered an issue very closely related to the subject-matter jurisdiction of the Court, *i.e.* the crimes over which the Court would have jurisdiction. In an approach apparently intended to gather as much state support as possible, the 1993 Working Group followed the suggestion of the Special Rapporteur in his 1992 Report, as well as the approach of the 1992 Working Group, and set aside much of the work of the ILC on the Draft Code of Crimes, in order to focus on already widely accepted treaty crimes, such as genocide, war crimes, hostage-taking, aircraft-hijacking and crimes against internationally protected persons.

The Working Group's Report made detailed reference in part II, articles 22-28 thereof, to the rules appertaining to applicable law and jurisdiction; it laid down a number of treaty crimes over which the Court could have jurisdiction,[53] different systems for the acceptance of the Court's jurisdiction by states[54] and distinguished between the states, whose consent would be required for the exercise of jurisdiction on the basis of the nature of the crime, *i.e.* by reference to whether a certain act constituted a crime under the Statute or another crime not codified therein.[55]

This structural approach became known as the "two strands of jurisdiction", depending on the type or nature of the crime.[56] Thus, for the crimes listed in article 22 of the 1993 Working Group's Draft, the first strand of jurisdiction provided that "[1]. The Court has jurisdiction under this Statute in respect of a crime referred to in article 22 provided that its jurisdiction has been accepted under article 23: (a) by any State which has jurisdiction under the relevant treaty to try the suspect of that crime before its own courts; (b) in relation to a suspected case of genocide, by any State party to the Convention on the Prevention and Punishment of the Crime of Genocide, of 9 December 1948. [2.] If the suspect is present on the territory of the State of his nationality or of the State where the alleged offence was committed, the acceptance of the jurisdiction of the Court by that state is also required."[57]

50 *Summary Records of 2299th Meeting*, [1993] 1 Y.B. Int'l L. Comm'n 13-14, ¶ 22, U.N. Doc. A/CN.4/SER.A/1993, where Ahmed Mahiou, for example, considered that the consent of the territorial state should not only be required, but it should be awarded priority vis-à-vis that of other interested states, which should be applied only "as secondary rules in specific cases".

51 *Summary Records of the 2298th Meeting, id.* at 8, ¶ 28, where Calero Rodriguez is attacking the restrictiveness to the Court's operation of the cumulative state consent requirements; *Summary Records of the 2300th Meeting, id.* at 18, ¶ 14, for the opinion of A. Pellet and *id.* at 21 ¶ 43, where Julio Barboza is asking for exercise of the Court's jurisdiction 'by default', without state consent requirements.

52 *Report of the International Law Commission,* [1993] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/1993, for the Report of the Working Group on a Draft Statute for an International Criminal Court, (hereinafter referred to as the 1993 Working Group Draft). The Working Group was divided into three sub-groups, on jurisdiction and applicable law, investigation and prosecution, cooperation and judicial assistance respectively; *Summary Records of the 2325th Meeting*, [1993] 1 Y.B. Int'l L. Comm'n 179, ¶ 2, U.N. Doc. A/CN.4/SER.A/1993 (*per* Koroma).

53 1993 *Report*, *id*. at 106-107, the crimes covered by this draft Statute were stipulated in article 22 and included treaty crimes, among others genocide and related crimes under the 1948 Genocide Convention, grave breaches of the four 1949 Geneva Conventions and the 1977 Additional Protocol I, drug trafficking, maritime and air piracy and terrorism crimes; *Summary Records of the 2325th Meeting,* [1993] 1 Y.B. Int'l L. Comm'n, supra note 52 at 186-7, ¶ 70, for the disagreement within the Commission on this approach, e.g. A. Pellet.

54 1993 Working Group Report, *supra* note 52, at 108, ¶ 2, 4, these systems for declaration of consent became known as the 'opt-in' and the 'opt-out' approaches. 'Opt-in', in the sense that "jurisdiction is not conferred automatically on the Court by the sole fact of becoming a party to the Statute but, in addition, a special declaration is needed to that effect", which could limit the jurisdiction of the Court with regard to the subject-matter, the period of time or other factors. On the other hand, under the 'opt-out' approach, by becoming a party to the Statute of the Court, the States Parties would accept ipso facto the full power of the Court to exercise jurisdiction over all crimes provided in its Statute (here in draft article 22), but the states parties could exclude some crimes from the Court's jurisdiction by means of a subsequent declaration.

55 Jurisdiction over draft article 22 crimes were regulated by draft article 24, whereas for 'other' crimes, which included crimes under both general international law and national law, the jurisdictional regime was laid down in draft article 26.

56 1993 Working Group Draft, *supra* note 52, at 107, ¶ 1, as the Working Group commented in full, the 1993 Draft Statute provides for "two strands of jurisdiction, which are based on a distinction drawn by the Working Group between treaties which define crimes as international crimes and treaties which merely provide for the suppression of undesirable conduct constituting crimes under national law". In this context, the referral of cases by the Security Council to the Court was not considered as "a separate strand of jurisdiction", but rather as an expansion of the category of subjects, which could bring a case to the Court. *Id*. at 109, ¶ 1; further, James Crawford, *The ILC's Draft Statute for an International Criminal Court*, 88 Am. J. Int'l L. 140, 143-4 (1994).

57 1993 Working Group Draft, *supra* note 52, at draft art. 24.

On the other hand, for crimes not listed in the Working Group's Draft article 22, the consent of the territorial and the custodial state, or, for certain crimes, of the custodial state, which had jurisdiction under the relevant international treaty to try the accused, would be required.[58] Although the Commission did not discuss the matter thoroughly due to lack of time, the Working Group followed this approach, i.e. the two strands of jurisdiction, in order to "give priority to the written law, which, in criminal matters, occupied a special place."[59] The Commission ultimately considered this draft Statute as "a basis for consideration"[60] and passed it on to the General Assembly for comments.

In 1994, the ILC revisited the topic, determined to complete the draft. State replies to the 1993 Working Group Draft mostly underlined that the jurisdictional regime envisaged therein was unnecessarily complicated.[61] The difficult task of the production of a final draft was then delegated to a Working Group, which produced an initial draft statute for discussion and later on a revised draft that was ultimately adopted by the Commission and became the 1994 ILC Draft Statute.

The discussions in the Commission in 1994 reveal that the issue of the jurisdiction of the ICC on the basis of territoriality was intertwined with a matter of principle, the question of state consent for the exercise of international criminal jurisdiction, its scope and even its necessity. In this context, the sovereignty-oriented or internationalist-oriented approach of each of the members of the Commission on the consent requirements for the exercise of jurisdiction, is said to have "generated perhaps the most heated debate of any associated with the Draft Statute."[62]

The first argued that realism dictated adherence to traditional state consent formulas, requiring in particular the consent of the territorial state and the custodial state, in order to ensure state acceptance of the draft statute,[63] whereas the second took the view that the Court should have *ipso jure* jurisdiction over all the core crimes in the statute, *i.e.* jurisdiction solely due to the fact of the ratification of the statute by a state, without any further preconditions attached thereto by reference to custody of the accused, location of the crime, nationality and other criteria. In their view, this option was necessary, in order to prevent states from blocking prosecutions and interfering with the work of the court.[64] From a more legal perspective, they stressed that, since international crimes existed independently of international treaties, the requisite enforcement international mechanism should also exist unhindered by jurisdictional restrictions based on

58 *Id*. at art. 26, ¶ 3, provides in this respect; "The State or States referred to paragraph 1 are: (a) in relation to a crime referred to in paragraph 2 (a), the State on whose territory the suspect is present, and the State on whose territory the act or omission in question occurred, (b) in relation to a crime referred to in paragraph 2 (b), the State on whose territory the suspect is present and which has jurisdiction in conformity with the treaty to try the suspect for that crime before its own courts"; *Summary Records of the 2325th Meeting*, supra note 52, at 180, ¶ 6, as the Chairman of the Working Group E. Koroma specified, "The Working Group recommended two criteria for the consent required for the jurisdiction of the Court to be effective under article 26. For crimes under national law giving effect to a multilateral treaty to suppress such crimes, the only consent required was that of the State on whose territory the suspect was present and which had jurisdiction under a treaty to try the suspect in its own courts. For crimes under general international law, the criterion was more restrictive, requiring the consent both of the State on whose territory the suspect was present and of the State on whose territory the act in question occurred"; 1993 Working Group, *supra* note 52, at 111, ¶ 8-9; Note that, under this jurisdictional regime, crimes against humanity, as crimes under general international law would fall under 2 (a) as crimes under general international law, in distinction to genocide and war crimes, which would be regulated under article 24.

59 *Summary Records of the 2325th Meeting*, *supra* note 52, at 186, ¶ 78, for C. Tomuschat.

60 1993 *Report*, *supra* note 52, at 20, ¶ 99.

61 *Observations of Governments on the report of the Working Group on a draft statute for an International Criminal Court*, [1994] 2 Y.B. Int'l L. Comm'n, 23-96, UN Doc. A/CN.4/458/Add. 1-8. Particular reference may be made to the position of Australia, at 27, ¶19, 22-23, Japan, at 49, ¶ 11, Nordic Countries, at 62, ¶ 17-18. Other states made some interesting points, for example Panama argued against the requirement of consent on the premise that it would not offer a solution in cases of aggression, at 66, para. 2, and Slovenia expressed a reservation "against the territorial scope of the jurisdiction of the court in relation to its own nationals, who by our Constitution cannot be surrendered for trial outside the country," at 68, ¶ 9. The United States advocated for strengthening the consensual nature of the court's jurisdiction, at 84, ¶ 48, whereas Algeria, at 25, ¶ 9, considered that creating an international criminal court merely as an option to the existing *aut dedere aut judicare* scheme rendered it "solely dependent on the good will of states."

62 James Crawford, *The ILC adopts a Statute for an International Criminal Court*, 89 Am. J. Int'l L. 404, 412 (1995).

63 Indicatively, *Summary Records of the 2330th Meeting*, [1994] 1 Y.B. Int'l L. Comm'n, supra note 61, at 7, ¶ 2, for J. Crawford; *Summary Records of the 2359th Meeting, id*. at 213, ¶ 12, for Sethuramiah Rao; *Summary Record of the 2334th Meeting, id*. at 37, ¶ 6, for Qizhi He.

64 *Summary Recors of the 2331st Meeting,* [1994] 1 Y.B. Int'l L. Comm'n, supra note 61, at 15 ¶ 3, for Pellet's comments on the lack of internationalism in the 1993 draft; *Summary Records of the 2332nd Meeting, id*. at 27, ¶ 63, for C. Rodriguez; *Summary Record of 2359th Meeting, id*. at 211, ¶ 4, where the issue was revisited by Pellet this time with regard to the 1994 Working Group Draft and by Peter Kabatsi in the same meeting, ¶ 3, who considered the restrictions imposed by the then article 21 "inappropriate for a court for which the international community had been waiting for so long."

consent.[65] As regards the consent of the territorial state, they argued that since a state, which conferred jurisdiction on the Court, did not need the consent of other states to proceed in prosecutions, then correspondingly the Court should also not need such additional consent by other states.[66]

The compromise solution that was ultimately adopted as article 21 of the ILC Draft Statute provided that the Court could exercise jurisdiction over a case of genocide, if a complaint was brought by a state party to the Statute, which was also a state party to the Genocide Convention. For any other crime, a complaint should be presented by a state party and the jurisdiction of the Court for that crime should be accepted by the State, which had custody of the suspect and additionally by the State "on the territory of which the act or omission in question occurred."[67] Under paragraph 2, if a third state duly requested the suspect's extradition from the custodial state, the requesting state's consent would also be required, unless the extradition was refused. The text of the article was repeated verbatim in the 1994 ILC Draft Statute.[68]

The commentary of the provision reports that for some members the consent of the state of nationality in addition to or instead of that of the territorial state should be required as a precondition for the exercise of jurisdiction, since, "the location of the crime could be fortuitous and might even be difficult to determine, whereas nationality represented a determinate and significant link for the purposes of allegiance and jurisdiction."[69] Others seemed to prefer also the consent of the state, which was the 'victim' of the act in question.[70]

It was to be expected that the Commission's Draft would give rise to lengthy discussions and significantly divergent positions. The Commission itself noted in its Report that the Draft Statute constituted "an unprecedented exercise in creative legislation", which needed a "strong sense of practicality", in order to receive state support.[71]

Crawford wrote in defence of the draft that the strictness of the consent requirements was in fact mitigated in the end result in a number of aspects, considering for example the obligation of the state, which withholds its consent, to try the suspect, or the possibility that the custodial and territorial state will be the same, thus limiting the required number of consenting states.[72]

There was no shortage of criticism of the ILC Draft Statute. Warbrick noted that, as regards the application of the territoriality requirement, "[i]dentifying the *locus* of crimes, especially ones as complex as some which will come within the jurisdiction of the court, may be far from easy; likewise, the *locus* of omissions. Where conduct has occurred in more than one State, the statute does not indicate whether the acceptance by one of them will be sufficient to vest the court with jurisdiction or whether there must be acceptances by all of them."[73] He further accentuated the fact that "[t]he Commission as a whole has not been able to agree on the theoretical basis for the jurisdiction of the international criminal court",[74] *i.e.* whether it would be a separate, international jurisdiction or a form of ceded jurisdiction, but in the end he did acknowledge that "the Commission's achievement in presenting a coherent model for the States to consider so soon is a demonstration of its value."[75]

Amnesty International considered that the cumulative consent requirements envisaged in article 21 meant in fact that the proposed court would have less power than the territorial or the custodial state to

65 *Summary Records of the 2332nd Meeting,* [1994] 1 Y.B. Int'l L. Comm'n, supra note 61, at 28, ¶ 70, for Villagrán Kramer, "if international crimes did exist, a mechanism with the requisite jurisdiction must exist to try them. International treaties were another matter. The crimes defined therein would be crimes only for those States that had ratified the treaties."

66 *Summary Records of the 2333rd Meeting,* [1994] 1 Y.B. Int'l L. Comm'n, supra note 61, at 36 ¶ 46, for Chusei Yamada.

67 Working Group on a Draft Statute for an International Criminal Court, *Report of the Working Group*, art. 21 of the Revised Draft Statute, U.N. Doc. A/CN.4/L.491/Rev. 2, 16 (July 14, 1994); *Draft Commentary*, U.N. Doc. A/CN.4/L.491/Rev.2/Add.1-3 (July 19, 1994).

68 *Report of the International Law Commission,* [1994] 2 Y.B. Int'l L. Comm'n, *supra* note 61, at 79, on art. 21 of the Draft Statute for an International Criminal Court.

69 *Id.* at 81, ¶ 6.

70 *Id.*

71 *1994 Report of the International Law Commission*, *supra* note 68, at 21 ¶ 48; Further, J. Crawford, *The Work of the International Law Commission*, *in* 1 The Rome Statute of the International Criminal Court: A Commentary 27 (A. Cassese et al. eds. 2002), who basically underlines that the International Law Commission was required to perform, while preparing its Draft, a delicate exercise, balancing between the pragmatism dictated by the need to ensure broad state acceptance and the juridical challenge of ensuring respect for the principle of legality.

72 Crawford, *supra* note 62, at 412-3.

73 Colin Warbrick, *Current Developments: International Criminal Law*, 44 Int'l Comp. L. Q. 466, 476 (1995).

74 *Id.* at 477.

75 *Id.* at 478.

bring the suspect to justice, since each of them "could bring the suspect to justice without the consent of any other state"[76].

David considered that "the ILC cautiously spared state sovereignty", by subordinating the existence and operation of the ICC to the goodwill of states or of the Security Council,[77] taking into account, among others, the limitations imposed on the 'saisin' of the Court, the cumulative requirement of consent and the need for a separate declaration of acceptance of the court's jurisdiction under the Draft Statute.[78] For that authority, "[t]o say that the system is compatible with the sovereignty of States is cynical or naïve and is in both cases incorrect", since on the basis of this jurisdictional system, " [I]t could be said that the States on whose territory crimes against humanity are committed- […]-would in some way be justified not only in covering up these crimes, but even in preventing – in the name of their sovereignty- an international jurisdiction to take cognisance of those crimes",[79] a proposition entirely at odds with the modern concept of sovereignty, because "[s]overeignty does not allow states to conduct themselves as they see fit, and it certainly does not allow for the prevention of the repression of crimes such as the more serious ones coming within the competence of the ICC."[80]

In the same spirit, Dugard, while largely subscribing to the view of Amnesty International, further explained that, although the consent requirements were necessary for the ICJ and inter-state disputes, "there is no sound reason why this homage to state sovereignty should extend to an international criminal court to try individuals and not states."[81] In his view, "there is no convincing reason – other than obeisance to state sovereignty – for a permanent international criminal court to require the consent of all interested states for the exercise of criminal jurisdiction."[82]

Notwithstanding these approaches to the ILC Draft, Warbrick was probably right when he said, "[i]t is too much to expect that the Commission will satisfy all its critics among the States and non-governmental organisations."[83] The Commission's Draft did give rise to the discussion, and to that extent, it seems to have served its purpose. It can be safely said that it constituted the key starting point for the entire debate, which, after the Sixth Committee deliberations in 1994, was delegated in an Ad Hoc Committee and later on a Preparatory Committee with a view to prepare an international conference for the signature of the Statute of the International Criminal Court.

3.3. / THE AD HOC COMMITTEE (1995) AND THE PREPARATORY COMMITTEE (1996-1998)

The ILC Draft was considered in the General Assembly and the Sixth Committee.[84] It was ultimately decided to refer the matter to an Ad Hoc Committee, which would be tasked to "review the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, in the light of that review, to consider arrangements for the convening of an international conference of

76 Amnesty Int'l, *The International Criminal Court: Making the Right Choices*, AI Index IOR 40/01/1997, 17-18.

77 Eric David, *The International Criminal Court: What is the Point?,* in International Law: Theory and Practice, Essays in Honour of Eric Suy 632 (Karel Wellens ed. 1998).

78 *Id.* at 640-644.

79 *Id.* at 643.

80 *Id.* at 644.

81 John Dugard, *Obstacles in the way of an International Criminal Court*, 56 Cambridge L. J. 329, 337 (1997).

82 *Id.*

83 Warbrick, *supra* note 73, at 478.

84 *Summary Record of the 17th Meeting of the Sixth Committee*, UN Doc. A/C.6/49/SR. 16-28, 41 (1994), for the discussions in the Sixth Committee on the ILC Draft and the various opinions; Virginia Morris & M. Christiane Bourloyannis-Vrailas, *The Work of the Sixth Committee at the Forty-Ninth Session of the UN General Assembly*, 89 Am. J. Int'l L. 607, 614 (1995), from the literature; Adriaan Bos, *From the International Law Commission to the Rome Conference (1994-1998),* in Cassese, *supra* note 71, at 35-65, for more detail.

plenipotentiaries."[85] The Assembly further invited member states to submit comments on the ILC Draft Statute.[86]

The Ad Hoc Committee's work in April and August 1995 resulted in the production of a report, which detailed the critical issues discussed on the basis of the ILC draft.[87]

As regards the issue of the state consent requirement of the territorial state, the report reveals a variety of opinions. Although the argument against the territorial state's consent, which was regularly repeated in ILC discussions, is not clearly articulated in the relevant part of the Report,[88] there were calls for minimising the number of states whose consent would be required for the exercise of jurisdiction,[89] while at the same time nationality jurisdiction gathered support.[90]

In these discussions, it would seem that delegates were focused not only on the formal establishment of jurisdiction as such, but also – or perhaps mostly – on practical aspects of its exercise, considering the factual difficulties involved with a criminal investigation, when the territorial state does not have entirely (or at all) control over parts of its territory. Thus, the Report contains the view that "in cases of international conflict it was not acceptable to give all control to the territorial State, which might be only one party to the conflict."[91] Moreover, it was further noted that, insofar as consent implied cooperation, "[T]he consent of the territorial State might not be crucial in certain circumstances, e.g. peace-keeping operations or belligerent occupation", or even in cases of belligerency between two states, where the same state was the custodial, the territorial and the state of nationality at the same time.[92]

Overall, although the work of the Ad Hoc Committee had certainly an 'educative value', in that it familiarised delegates with the issues involved,[93] it still left a number of issues unresolved, prominent among which was the issue of jurisdiction of the Court. In light of this situation, and upon the recommendation of the Ad Hoc Committee, the General Assembly took note of the 'considerable progress' achieved and established a Preparatory Committee, in order to "discuss further the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, taking into account the different views expressed during the meetings, to draft texts, with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries, […]", on the basis of the work of the ILC, the Ad Hoc Committee and other contributions.[94]

The Preparatory Committee convened in 6 sessions throughout the years 1996-1998.[95] The record on the PrepCom's work appears to have been guided by the need to maintain the informal character of the negotiations. As Hall reports, formal summary records of the discussions were not kept, while meetings were also held at times behind closed doors.[96]

85 G. A. Res. 49/53, U.N. GAOR Supp. No. 49, ¶ 2, U.N. Doc. A/49/49 (Feb. 17, 1995).

86 *Id.* at ¶ 4; In reply, see Comments received pursuant to paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Criminal Court, U.N. Doc. A/AC.244/1/Add.2 (20 March 1995).

87 *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 50th Sess. Supp. No. 22, U.N. Doc. A/50/22 (hereinafter: The Ad Hoc Committee Report).

88 Ad Hoc Committee Report, at 23-25, ¶ 103-111, This argument related to the problem of requiring the consent of the territorial state, i.e. the state whose authorities may have participated, in one way or another, to the commission of a crime, in order to start a criminal investigation against them before the Court.

89 *Id.* at 23, ¶ 104.

90 *Id.* at 24, ¶ 105.

91 *Id.* at 24, ¶ 106.

92 *Id.* at 25, ¶ 111.

93 1 Bassiouni, *supra* note 27, at 66; Bos, *supra* note 84, at 64.

94 G.A. Res. 50/46, ¶ 2, U.N. Doc. A/RES/50/46 (Dec. 11, 1995), on the Establishment of an International Criminal Court; Morris & Bourloyannis-Vrailas, supra note 84 at 496-7, for the Sixth Committee's approach.

95 This number is without taking into account inter-sessional and informal meetings. The Preparatory Committee's mandate was originally for one year under G.A. Res. 50/46, *supra* note 94, at ¶ 3; G.A. Res. 51/207, ¶ 3-4, U.N. Doc. A/RES/51/207 (Dec. 17, 1996), renewed it subsequently, until April 1998.

96 C.K. Hall, *The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 92 Am. J. Int'l L. 124, 125 (1998); further, C.K. Hall, *The Fifth Session of the UN Preparatory Committee on the Establishment of the International Criminal Court, id.* at 331, 332, n.2; C.K. Hall, *The Sixth Session of the UN Preparatory Committee on the Establishment of the International Criminal Court*, *id.* at 548, 549, "[M]ost of its work took place in closed meetings", while "Some of the most significant developments at the session concerned questions of jurisdiction, definitions of crimes and admissibility in part 2, which were not in the agenda of the committee, but were discussed in the informal meetings"; Report of the Preparatory Committee on the Establishment of an International Criminal Court, vol. 2 Compilation of Proposals, U.N. Doc. A/51/22/Supp. No. 22A, for an available collection of the proposals filed by the States participating the in Preparatory Committee.

The issue of jurisdiction and the requirements of state consent were mostly considered in the first, the fourth and the sixth session of the PrepCom, as well as in the Inter-Sessional Meeting at Zutphen prior to the last meeting of the Committee.

At the outset, it should be noted that, while NGO's lobbied for the elimination of article 21 and the preconditions for the exercise of jurisdiction provided therein, on the grounds that "no single state should be able to block the adjudication of these crimes,"[97] state delegations were not entirely convinced of this approach.

The discussions in the PrepCom on this issue appear to have moved in two levels; the first concerned the appropriateness of maintaining state consent requirements, and the second the choice among the requirements themselves, namely whether it would be better to require, alternatively or cumulatively, the consent of the custodial state, of the territorial state, the state of nationality of the perpetrator or others.[98]

As regards the issue of the consent of the territorial state, there was some discussion on the inclusion of territoriality, although not particularly lengthy, at least in comparison to other issues. In the first session of the PrepCom, for example, it was suggested to add the words 'if applicable' in article 21 (1) (b) (ii), in order to "cover situations where the crime might have been committed outside the territory of any State, such as on the high seas."[99] On the other hand, it was also argued that "in certain types of conflict, in order to determine the States whose consent were necessary for the proceedings of the court, one should look at the whole situation and not just the State where the crime was committed", for example in cases where the situation involved an inter-state conflict and the war crimes in question had occurred in the territory of the aggressor state.[100] In such conditions, it was argued that the requirement of the consent of the state of nationality of the victim or of the perpetrator should also be considered.[101]

As the negotiations moved on, the reports of the Preparatory Committee reveal the very limited progress achieved in the sessions where the matter of the preconditions for the exercise of jurisdiction was discussed. The 1996 PrepCom report, in what was then article 26, did not contain significant variations in comparison to the ILC Draft.[102] In August 1996 France tabled a proposal, on the basis of which all 'affected States' would have to give their consent for the exercise of jurisdiction.[103]

97 Indicatively, *see* Human Right's Watch Commentary for the Preparatory Committee on the Establishment of an International Criminal Court, March 1996, at 6, available at http://www.iccnow.org/documents/1PrepCmtCommentaryHRW.pdf (last visited June 30, 2010); International Commission of Jurists, *The International Criminal Court, Third ICJ Position Paper, August 1995*, 39-40, for the comments of the International Committee of Jurists on the discussions in the Ad Hoc Committee, (available at http://www.iccnow.org/documents/1PrepCmt3rdPositionPaperICJ.pdf) (last visited June 30, 2010); Amnesty Int'l, *Challenges Ahead for the United Nations Preparatory Committee drafting a Statute for a Permanent International Criminal Court*, AI Index IOR 40/03/96, 7 (Feb. 1, 1996), (available at http://www.iccnow.org/documents/AIPreCommittee1996_en.pdf.) (last visited June 30, 2010); Further, Marlies Glasius, The International Criminal Court: A Global Civil Society Achievement 63-65 (2006).

98 Indicatively, Preparatory Committee on the Establishment of an International Criminal Court, Summary of the Proceedings of the Preparatory Committee during the Period 25 March – 12 April 1996, U.N. Doc. A/AC.249/1, 36-38, ¶ 134-145 (May 7, 1996) (by Jirushi Yoshida); Hall, *Third and Fourth Sessions*, *supra* note 96, at 131.

99 Summary of the Proceedings, *supra* note 98, at 38, ¶143.

100 *Id.* at 38, ¶144.

101 *Id.*

102 It provided that "The Court (may exercise) [shall have] jurisdiction (over a person with respect to a crime) referred to in article 20 (f): (a) in a case of genocide, a complaint is brought under article 25 (1), (b) in any other case, a complaint is brought under article 25 (2) and the jurisdiction of the Court with respect to the crime is accepted under article 22: (i) by the State which has custody of the suspect with respect to the crime ("the custodial State") [in accordance with international law] (and) (ii) by the State in the territory of which the act or omission in question occurred [if applicable]"; M. C. Bassiouni, *Observations concerning the 1997-1998 Preparatory Committee's Work*, 13 *Nouvelles Études Pénales* 1, 10 (1997), where he remarked that "The 1996 PrepCom did not, […], produce a "consolidated" text of a draft statute and only succeeded in creating a report which compiled various proposals."

103 Including, the territorial state and the state of nationality of the accused and the state of nationality of the victim. Draft Statute Of the International Criminal Court, Working Paper submitted by France, U.N. Doc. A/AC.249/L.3, (Aug. 6, 1996), which provided at 35, under art. 34 – Consent of States, as follows: "The jurisdiction of the Court extends to all crimes referred to in articles 27 to 32 when the following have expressed their agreement: (a) the State(s) on whose territory the acts were committed; (b) the State(s) of nationality of the victim(s) of those acts; and (c) the State(s) of nationality of the person(s) suspected of having committed the acts." This is referred to as "the state consent regime"; Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, in 1 The Rome Statute of the International Criminal Court: A Commentary 594 (A. Cassese et al. eds. 2002); Hall, *The Third and Fourth Sessions*, *supra* note 96, at 131.

The August 1997 PrepCom conclusions demonstrated a definite turn to the acceptance of 'ceded' jurisdiction, without however dealing with the question of the type of state consent regime.[104] The Zutphen Draft, which consolidated and brought cohesion to the text, further illustrates that the issue remained largely contentious. The two options contained in that draft left undecided the selection of the states, whose consent would be required for the exercise of jurisdiction.[105]

In the last session of the PrepCom, events took an interesting turn following the proposals submitted by the United Kingdom and Germany.

The United Kingdom presented a comprehensive position, which provided, among others, for 'automatic jurisdiction' of the Court and required the consent of both the custodial and the territorial state.[106] Germany, on the other hand, advocated for universal jurisdiction of the Court, making the argument that, as under international law all states could permissibly exercise universal jurisdiction over the 'core crimes', "there is no reason why the ICC – established on the basis of a Treaty concluded by the largest possible number of States – should not be in the very same position to exercise universal jurisdiction for genocide, crimes against humanity and war crimes in the same manner as the Contracting States themselves…."[107] Therefore, "…like the Contracting States, the ICC should be competent to prosecute persons which have committed one of these core crimes, regardless of whether the territorial State, the custodial State or any other State has accepted the jurisdiction of the Court."[108]

Ultimately, the 1998 PrepCom report largely endorsed the Zutphen Report. In spite of the Chairman's best efforts, [109] the basic issue on the preconditions for the exercise of jurisdiction remained open in draft

104 Decisions taken by the Preparatory Committee at its session held from August 4 to 15, 1997, U.N. Doc. A/AC.249/1997/L.8/Rev.1, in 2 Bassiouni, *supra* note 27, at 102; Hall, *The Third and Fourth Sessions*, *supra* note 96, at 131, refers also to a statement by Samoa, in August 1997, supporting universal jurisdiction for the Court, on the premise that the Court should be able to do what individual states may do under international law, as well as to the discussion of the french position on the 'state consent regime'. The lack of progress in these negotiations is explained by Elizabeth Wilmshurst, *Jurisdiction of the Court*, *in* The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results 131 (Roy S. Lee ed. 1999), along the following lines; "It was apparent that most delegations believed that many of the issues were too sensitive, and too closely linked with other major provisions in the draft, to be resolvable before the final days of the negotiations"; Bos, *supra* note 84, at 57, "The outcome of those discussions was not very satisfactory. Delegations were evidently not prepared to make any major concessions."

105 Zutphen Draft Statute for the International Criminal Court, Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands, U.N. Doc. A/AC.249/1998/L.13 (Feb. 3, 1998) (hereinafter the Zutphen Draft). The two options read as follows in their pertinent parts; "[Article 7 [21 bis] *Preconditions to the exercise of jurisdiction*
Option 1
[In the case of article 6 [21], subparagraphs 1 (b) [and (c)],] The Court [may exercise its] [shall have] jurisdiction [over a person] if the following State(s) has/have accepted [the exercise of] the jurisdiction of the Court over the crimes referred to in [article 5 [20] (a) to (e) or any combination thereof] in accordance with article 9 [22]:
Option 2
[In the case of article 6 [21], subparagraphs 1 (b) [and (c)],] The Court [may exercise its] [shall have] jurisdiction [over a person] if the following State(s) has/have accepted [the exercise of] the jurisdiction of the Court with respect to a case in question which is the subject of a complaint lodged by a State:
[(a) the State that has custody of the suspect with respect to the crime ("custodial state") [by the State on whose territory the person is resident at the time the complaint is lodged] [in accordance with international law];]
[(b) the State on the territory of which the act [or omission] in question occurred [or if the crime was committed on board a vessel or aircraft, the State of registration of the vessel or aircraft;]
[(c) if applicable, the State that has requested, under an international agreement, the custodial State to surrender a suspect for the purpose of prosecution [unless the request is rejected];
[(d) the State of which the victim is a national;]
[(e) the State of which the [accused] [suspect] of the crime is a national]"; Leila S. Wexler, *Commentary on Parts 1 and 2 of the Zutphen Intersessional Draft: Establishment of the Court, Complementarity, Jurisdiction and Admissibility*, 13bis *Nouvelles Études Pénales* 17, 21 (1998) (for criticism on the Zutphen approach), who considered that the jurisdictional regime envisaged in articles 6[21] and 7[21bis] respectively was too complex. In her view, in light of the fact that the three core crimes would be within the 'inherent' jurisdiction of the Court, "the options in article 7[21bis] concerning state consent should be deleted", and the Court should have jurisdiction solely upon referral.

106 U.N. Doc. A/AC.249/1998/WG.3/DP.1 (Mar. 25, 1998), which appeared in the Draft Statute of the PrepCom, U.N. Doc. A/CONF.183/2/Add.1, 37-38, as "further option for articles 6, 7, 10 and 11". As the proposal mentions, the reference to the custodial state was placed in brackets, "because there may be disagreement as to whether it is the right state in this context", at 2 ¶ 6; Further, Wilmshurst, *supra* note 104, at 132.

107 U.N. Doc. A/AC.249/1998/DP.2 (Mar. 23, 1998); Morten Bergsmo, *Occasional Remarks on certain state concerns about the jurisdictional reach of the international criminal court, and their possible implications for the relationship between the Court and the Security Council,* 69 Nordic J. Int'l L. 87, 100 (2000), in detail; Kaul, *supra* note 103, at 597-598.

108 UN Doc. A/AC.249/1998/DP.2 (March 23, 1998).

109 Bos, *supra* note 84, at 64.

article 7 on the Preconditions to the exercise of Jurisdiction.[110] It was in this form that the issue was referred to the Rome Conference.

3.4. / NEGOTIATIONS AT THE ROME CONFERENCE

At the Rome Conference, the issue proved to be among the most controversial, decided only at the last possible moment.

The positions at the beginning of the Conference, as regards the question of the jurisdiction of the Court, were succinctly summarised in the Committee of the Whole by the co-ordinator. They comprised four jurisdictional models. The first, proposed by the UK, involved 'automatic' jurisdiction of the Court for the core crimes, while the cumulative consent of the territorial state and the 'custodial' state were the necessary preconditions for the exercise of the Court's jurisdiction. The second alternative, known as the German proposal, advocated for universal jurisdiction over the core crimes, regardless of any further consent even for states not parties. The third option called for additional declarations of acceptance of the Court's jurisdiction, which could vary both in substance and in duration. The territorial, nationality of the suspect and of the victim and 'custodial' states, as well as in the event of extradition, the requesting state, would have to consent to the Court's jurisdiction. The last option involved 'automatic' jurisdiction for the Court and provided for the consent of all the states enumerated in option 3.[111]

In the opening discussion on jurisdiction,[112] the UK changed its earlier position and proposed the consent of the territorial state as the sole precondition for the exercise of jurisdiction.[113] The German

110 The 1998 PrepCom Draft Statute reads as follows in its relevant parts: "[Article 7 *Preconditions to the exercise of jurisdiction*
Option 1
[In the case of article 6, subparagraphs 1 (b) [and (c)],] The Court [may exercise its] [shall have] jurisdiction [over a person] if the following State(s) has/have accepted [the exercise of] the jurisdiction of the Court over the crimes referred to in [article 5 paragraphs (a) to (e) or any combination thereof] in accordance with article 9:
Option 2
[In the case of article 6, subparagraphs 1 (b) [and (c)],] The Court [may exercise its] [shall have] jurisdiction [over a person] if the following State(s) has/have accepted the exercise of the jurisdiction of the Court with respect to a case in question which is the subject of a complaint by a State:
[(a) the State that has custody of the suspect with respect to the crime ("custodial state") [by the State on whose territory the person is resident at the time the complaint is lodged] [in accordance with international law];]
[(b) the State on the territory of which the act [or omission] in question occurred [or if the crime was committed on board a vessel or aircraft, the State of registration of the vessel or aircraft;]
[(c) if applicable, the State that has requested, under an international agreement, the custodial State to surrender a suspect for the purpose of prosecution [unless the request is rejected];
[(d) the State of which the victim is a national;]
[(e) the State of which the [accused] [suspect] of the crime is a national]," Report of the Preparatory Committee on the Establishment of an International Criminal Court, Apr. 14, 1998, U.N. Doc. A/CONF.183/2/Add.1, at 30-31.

111 Official Records, Vol. II, 7th Meeting of the Committee of the Whole, A/CONF.183/C.1/SR.7 (June 19, 1998); Summary Records, Erkii Kourula (Co-ordinator), at 182, ¶ 32-35. In particular as regards the U.K. proposal, Kourula mentioned that the U.K. had proposed, in addition to the custodial and territorial state's consent, that the consent of the state of nationality would also be required. *Id.,* at 182, para. 32, "Under the first proposal, referred to as the United Kingdom proposal,…, the text provided that the Court might exercise jurisdiction only if the territorial and custodial State and the State of nationality of the accused were parties to the Statute"; Sharon A. Williams & William Schabas, *Article 12*, in Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article 553 (O. Triffterer ed., 2nd ed. 2008); Flavia Lattanzi, *The Rome Statute and State Sovereignty. ICC Competence, Jurisdictional Links, Trigger Mechanism,* in 1 Essays on the Rome Statute of the International Criminal Court 56 (F. Lattanzi & W. Schabas eds. 1999).

112 Reference of course is made here only to the official discussions; Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court, The Negotiating Process*, 3, n. 4, Am. J. Int'l L. 2 (1999), informal negotiations were held in parallel to the official discussions, throughout the negotiations at Rome.

113 Official Records, vol. II, 7th Meeting of the Committee of the Whole, U.N. Doc. A/CONF.183/C.1/SR.7 (June 19, 1998), Summary Records, E. Wilmshurst, at 184, ¶45, n. 27; Eve La Haye, *The Jurisdiction of the International Criminal Court: Controversies over the Preconditions for Exercising its Jurisdiction*, 46 Neth. Int'l L. Rev. 1, 5-6 (1999), which provides details over the number of states supporting the UK proposal in its original formulation, as well as after its subsequent alteration later on.

delegation, on its part, further developed its own proposal on universal jurisdiction.[114] The delegation of the Republic of Korea made public its own approach.[115] The Korean proposal provided that the Court could have jurisdiction through conferral on the basis of state consent; however, the consent of only one of 'interested' states, i.e. the territorial state, the state of nationality of the perpetrator, the 'custodial' state, or the state of nationality of the victim, would suffice for the exercise of jurisdiction by the Court;[116] the jurisdictional nexus requirement, therefore, "should not be cumulative, but selective."[117]

The debates in the Committee of the Whole that followed focused basically on the approach espoused by each delegation, although the positions expressed did not vary singificantly, considering each state's affiliation to one or another of the negotiating groups.[118] It would be counter-productive for present purposes to enumerate and discuss each state position. From the perspective of territoriality, it is interesting to note that, while for some states, as evidenced from the UK proposal, territoriality was essential, for others it was not considered as an absolutely necessary precondition; Algeria, for example, took the view that, "the consent of at least two states should be required; the State of nationality and the State of custody."[119]

The debates were mostly focused on the appropriateness of following the universal or quasi-universal models advocated by Germany and Korea respectively, or a more consent-based approach, similar to the UK proposal. The United States on its part strongly opposed the German and Korean proposals; in its view, "the universal jurisdiction proposal for the Court would represent an extraordinary principle, in conflict with certain fundamental values of international law and would undermine the Statute generally", since it would have the effect of "applying a treaty to a State without that State's consent, and in the absence of any action by the Security Council under Chapter VII of the Charter of the United Nations."[120] Instead, the US argued for the requirement of the consent of the non-state party, "whose official actions were alleged to be crimes." In this spirit, the US delegation accepted the inclusion of the consent of the state of nationality, the territorial state, as well as "in the case of peacekeeping or international conflict, […], the State which had sent the troops concerned. That State should be responsible for their prosecution or for consenting to their prosecution by the Court."[121]

On July 6th, 1998, the Bureau presented a discussion paper, in order to streamline the debate.[122] It contained four options under article 7, paragraph 1; the Korean proposal (option 1), the consent of only the territorial state and the state of registration for ships and aircrafts (option 2), the consent of both the territorial and the custodial state (option 3), the consent of only the state of nationality (option 4).[123] This discussion paper left out the German proposal – a fact that did not go unnoticed by the delegations

114 7th Meeting, *supra* note 113, at 184, ¶ 50-51, the German proposal was mainly premised on the reasons expressed in the Preparatory Committee's discussions.(H.P. Kaul); In the same spirit, 9th Meeting of the Committee of the Whole, U.N. Doc. A/CONF.183/C.1/SR.9, 193, ¶ 9 (for Hon P. Wong, New Zealand) and at 194, ¶ 20 (for Politi, Italy) (June 22, 1998); Williams & Schabas, *supra* note 111, at 550-552; H.P. Kaul & Clau Kress, *Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises*, 2 Y.B. Int'l Humanitarian L. 143, 145-157 (1999).

115 Official Records, vol. III, UN Doc. A/CONF.183/C.1/L.6, 227, 229 (June 18, 1998); Summary Records, vol. II, 7th Meeting of the Committee of the Whole, U.N. Doc. A/CONF.183/C.1/SR.7, 184, ¶ 52-54 (by Choi Tae-huyn) (June 19, 1998); Young Sok Kim, The International Criminal Court, A Commentary to the Rome Statute 211-215 (2003).

116 *Id.* Choi Tae-huyn, at 184, ¶ 52-54.

117 *Id.,* at 184, ¶ 53.

118 It appears that certain blocs or groups of states consolidated for the purposes of negotiating the ICC statute both before and during the Rome Conference and, accordingly, took similar or identical positions on certain issues. In more detail on the composition and positions of the so-called Like-Minded Group, Non-Aligned Movement, the P-5, the South Aftican Development Community group and others, Ph. Kirsch, *Introduction*, Reflections on the International Criminal Court, Essays in Honour of Adriaan Bos 1-4 (H.A.M. von Hebel et al. eds., 1999); Kirsch & Holmes, *supra* note 112, at 3-5; Wilmshurst, *supra* note 104, at 135; Glasius, *supra* note 97, at 22-26.

119 9th Meeting, *supra* note 114, at 197, ¶ 58 for Ahcène Kerma.

120 *Id.* at 195, ¶ 23, for David Scheffer, the U.S. supported retaining the consent of the state of nationality as a precondition. The Russian Federation took the view in the same meeting that, while in cases of war crimes and crimes against humanity the consent of the territorial and the custodial state was required, in cases of genocide and aggression "the agreement of the State affected was not necessary"; *id.* at 196, ¶ 41, for I.A. Panin; Later on, this position appears to have been somewhat reversed, as in the 29th meeting U.N. Doc. A/CONF.183/C.1/SR.29, 301, ¶ 113 (July 9, 1998), Mr. Gevorgian; Russia accepted as preconditions the consent of both the territorial and the custodial state, with the possibility of including the "preliminary agreement" of the state of nationality of the perpetrator.

121 9th Meeting, *supra* note 114, at 195, ¶ 24, for D. Scheffer.

122 Bureau Discussion Paper Regarding Part 2, U.N. Doc. A/CONF.183/C.1/L.53 (July 6, 1998). The document is reproduced in Official Records, vol. III, at 204 [Article 7 is at at 208-209]. The paper was introduced for discussion at the 25th meeting of the Committee of the Whole on 8 July 1998, Summary Records, A/CONF.183/C.1/SR.25, 267, ¶ 1.

123 Official Records, vol. III, at 204-5.

supporting it.[124] The US on the other hand, opposed fiercely the Korean option; "If the principle of universal jurisdiction were adopted, many Governments would never sign the treaty and the United States would have to actively oppose the Court", because it would erode fundamental principles of treaty law and allow for the possibility that the Court would "prosecute the officials of a State that was not a party to the treaty" or had not otherwise consented, a fact which would amount to "a form of extraterritorial jurisdiction that would be quite unorthodox."[125]

Following the discussion on the working paper, the Bureau presented a proposal on part 2 a week before the conclusion of the negotiations.[126] The Bureau Proposal distinguished in draft article 7 on the preconditions for the exercise of jurisdiction between cases involving charges of genocide, which followed the Korean proposal, and cases involving war crimes and crimes against humanity. For the latter case, the draft contained 3 options; option 1 repeated the Korean proposal, option 2 provided for the cumulative consent of the territorial and the custodial state and option 3 required exclusively the consent of the state of nationality of the perpetrator[127].

The proposed jurisdictional model was discussed in the Committee of the Whole. The EU supported the Korean proposal for all crimes, while the US again reiterated its strong objection on the endorsement of the Korean proposal for any of the crimes in the Statute.[128] The main criticism against the Bureau proposal was that it divided the jurisdictional regime depending on the crime. In this respect, it was argued that the jurisdictional regime advocated was too complicated and that a uniform and coherent regime for all three core crimes was required.[129] In light of these discussions, the United States made a proposal on 14 July 1998, requiring the consent of both the territorial and the nationality state for the exercise of jurisdiction.[130]

From this point onwards, the official records provide little, if any, useful information on the issue under consideration. Unofficial sources, however, give their own version of events. Certain commentators have suggested – and up to now, this version of the facts has not been contested – that at the last week of the negotiations, the Korean proposal seemed to gather significant support, in terms of the number of states willing to accept it.[131] At this point – and in particular the last few days of the negotiations – unofficial confidential negotiations were undertaken by the delegations of the so-called P-5 (Permanent Members of

124 Indicatively, Official Records, vol. II, 29th Meeting of the Committee of the Whole, U.N. Doc. A/CONF.183/C.1/SR.29, 296, ¶ 23, for Hazel Brown (Trinidad and Tobago) and 304 ¶ 183, for H.P. Kaul (Germany), whose delegation was "dismayed that its proposal on universal jurisdiction had not been put forward as an option in the discussion paper" (July 9, 1998); Official Records, vol. II, 31st Meeting of the Committee of the Whole, U.N. Doc. A/CONF.183/C.1/SR.31, 315, ¶ 16, for Paul Ngatse (Congo) (July 9, 1998); Official Records, vol. II, 36th Meeting of the Committee of the Whole, U.N. Doc. A/CONF. 183/C.1/SR.36, 348, ¶ 51, for the ICRC position in this respect.

125 29th Meeting, supra note 124, at 297, ¶ 42 for D. Scheffer.

126 Bureau Proposal: Regarding Part 2, 10 July 1998, UN Doc. A/CONF.183/C.1/L.59, *in* Official Records, vol. III, at 212.

127 *Id*. at 216.

128 Official Records, vol. II, 33rd Meeting of the Committee of the Whole, U.N. Doc. A/CONF.183/C.1/SR.33, 321, ¶ 20, for G. Hafner and at 322, ¶ 27, for D. Scheffer (July 13, 1998). The U.S. considered that the solution should be found by combining options 2 and 3, requiring the cumulative consent of the territorial state and the state of nationality of the perpetrator; Of the same view were also India, *id*. at 322-323, ¶ 36, which required custodial and territorial state consent, as well as China, *id*. at 323, ¶ 41, which preferred the cumulative consent of the state of nationality of the perpetrator and the territorial state.

129 33rd Meeting, *supra* note 128, at 325, ¶ 70; *Id*. Franklin Berman at 326, ¶ 79; 34th Meeting of the Committee of the Whole, U.N. Doc. A/CONF.183/C.1/SR.34, 328 ¶ 12, for Delia Chatoor, at 329 ¶ 29 for Theo Van Boven, at 329 ¶ 35 for Juan A. Yáñez-Barnuevo, at 332 ¶ 89 for Verne Saboia (July 13, 1998);
35th Meeting of the Committee of the Whole, U.N. Doc. A/CONF.183/C.1/SR.33, 336 ¶ 21 for Benoit Bihamiriza, at 338 ¶ 38 for Marja Lehto, at 339 ¶ 51 for Christian Wenaweser (July 13, 1998); 36th Meeting of the Committee of the Whole, U.N. Doc. A/CONF.183/C.1/SR.36, 343, ¶ 1 for Rolf Fife, at 345 ¶ 25 for Leslie Agius, at 346 ¶ 28 for Eva Tomin, at 347 ¶ 37 for Rhénan Segura, at 348 ¶ 48 for Peter Tomka (July 13, 1998).

130 United States of America: Proposal regarding article 7, in Official Records, vol. III, at 247, U.N. Doc. A/CONF.183/C.1/L.70 (July 14, 1998)

131 Commentators generally refer to different numbers produced by certain periodicals circulated by NGOs at the time of the Conference. Thus, Richard Phillips, *on account of The Rome Treaty Conference Monitor,* 23 Special Issue of the NGO Coalition for an International Criminal Court (July 15, 1998), who mentions that "Among States that spoke out on the Bureau proposal on Monday, July 13, 1998, 89% supported the Korean proposal and 75% supported automatic jurisdiction for all core crimes"; Ruth Phillips, *The International Criminal Court Statute: Jurisdiction and Admissibility*, 10 Crim. L. Forum 61, 69 (1999); Further, Williams & Schabas, *supra* note 11, at 553, mention that 79% of the States present supported the Korean proposal, according to the July 10, 1998 The International Criminal Court Monitor, at 1; Glasius, *supra* note 97, at 75, refers to the last Coalition for the ICC 'vote count' of 13 July 1998, which, she states, gave the Korean proposal an 85% acceptance rate; Kaul, *supra* note 103, at 600.

the Security Council), in order to reach a common position. Interestingly enough, these negotiations were kept confidential not only vis-à-vis the NGOs in Rome, but also with regard to other state delegations.[132]

The outcome of the last week of intensive negotiations between the P-5 culminated in an unofficial proposal on 15 July 1998, the most important feature of which, for present purposes, was that the Court would have jurisdiction solely on the basis of territoriality, but it would not exercise its jurisdiction over nationals of states not parties, when "the activity alleged to constitute the crime is an act of the State in question acknowledged by it [the State not party in question] as such."[133] Upon presentation of this proposal to the Bureau and a few, selected states, another unofficial counter-proposal was presented by Germany, which insisted, as regards the preconditions for the exercise of jurisdiction, on the proposal contained in article 7, option 1 of the Bureau Proposal, *i.e.* the requirement of the consent of one or more of the following states; territorial, custodial, nationality of the victim or of the suspect.[134]

The research in the available official documentation reveals further that on July 16th, 1998, the Chairman of the Committee stated that, due to lack of time, the Bureau would "put together in a single document the texts of the articles of the adopted by the Drafting Committee, the texts formulated by the Working Groups and the Coordinators and the texts that had emerged through consultations, in order to facilitate the work of the Committee of the Whole."[135] In the hours that intervened between this session and the last session of the Committee, which took part the following day, the issue was discussed informally within the Bureau and among the representatives of the delegations.[136]

At the last session of the Committee of the Whole, on 17 July 1998, the Bureau officially[137] presented a single text,[138] which became ultimately the Rome Statute of the International Criminal Court.[139] As the Chairman observed, "[t]he text reflected a very delicate balance between the views of the delegations, and it was essential that that balance was preserved."[140] Accordingly, the Bureau recommended the adoption of the text "as a complete package".[141]

As regards the preconditions for the exercise of jurisdiction,[142] the United States re-introduced its earlier proposal,[143] according to which the Court would have jurisdiction only if both the territorial and the

132 Glasius, *supra* note 97, at 72, with references, who mentions that the leader of the Spanish delegation complained publicly about a 'lack of transparency regarding the package that will be presented to delegations', and makes further reference to NGO ignorance of the content of the P-5 meetings; Kaul, *supra* note 103, at 602-603.

133 This version of events is primarily based on the writings on Hans Peter Kaul, *Special Note: The Struggle for the International Criminal Court's Jurisdiction*, 6 Eur. J. of Crime, Crim. L. and Crim. Just. 364, 374-375 (1998), which reproduces in full the document in question, entitled as "Informal Paper put together by the permanent members of the Security Council on 15 July 1998 in Rome"; same descriptions are provided, to a greater or lesser extent, by David J. Scheffer, *The United States and the International Criminal Court*, 93 Am. J. Int'l L. 12, 19-20 (1999); Wilmshurst, *supra* note 104, at 137; other important issues raised in the proposal related to the possibility of an opt-out, inserted through a protocol to the Statute, for a 10-year renewable period over war crimes and crimes against humanity.

134 Kaul, *supra* note 133, at 59-60, containing what is entitled "Informal Counter-proposal elaborated by the German side on 16 July, in Rome."

135 Official Records, vol. II, 40th Meeting of the Committee of the Whole, U.N. Doc. A/CONF.183/C.1/SR.40, 355, ¶ 1 (July 16, 1998).

136 Naturally, the issues were discussed informally in the previous days as well. For personal accounts of the process and the role of the informal negotiators, among many others, Kirsch & Holmes, *supra* note 112, at 3-6, 8-10; Kaul, *supra* note 103, at 600-605; Wilmshurst, *supra* note 104, at 136-139, referring also to informal non-papers that appeared in the last days of the negotiations; H.A.M. Von Hebel, *An International Criminal Court – A Historical Perspective*, in Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos 35-38 (H.A.M. Von Hebel et al. eds. 1999) at 35-38.

137 Ph. Kirsch & Daniel Robinson, *Reaching Agreement at the Rome Conference*, in Cassese, *supra* note 71, at 75, who mention that the Bureau made the text (UN Doc. A/CONF.183/C.1/L.76 and Add. 1 to Add. 14, July 16, 1998), available to the delegates "in the late hours of 16 July".

138 *See* the Official Records, vol. II Summary Records of the 42nd Meeting of the Committee of the Whole, U.N. Doc. A/CONF.183/C.1/SR.42, 360 (July 17, 1998); the text for the Statute of the ICC proposed by the Bureau of the Committee of the Whole was contained in documents A/CONF.183/C.1/L.76 and Add.l, Add.2 and Corr.l, Add.3 and 4, Add.5 and Corr.l, Add.6 and Corr.l, Add.7 and 8, Add.9 and Corr.l and Add.10-14.

139 As included in Report of the Committee of the Whole, U.N. Doc. A/CONF. 183/C.1/L.92 and Corr.l, Summary Records of the 42nd Meeting of the Committee of the Whole, *supra* note 138, at 362 and adopted in the 9th Plenary Meeting, U.N. Doc. A/CONF.183/9 (July 17, 1998); *see* further the Summary Records of the last session of plenary, U.N. Doc. A/CONF.183/SR.9.

140 Summary Records, Vol. II, 42nd Meeting, *supra* note 138, at 360, ¶ 5.

141 *Id.*

142 *Id.* ¶ 6-19, for other last-minute proposals tabled, which related to different issues, particularly the role of the Security Council and its relationship to the Court, introduced by India and Mexico, which were ultimately not voted upon.

143 U.N. Doc. A/CONF.183/C.1/L.70, for the earlier proposal dated July 14, 1998.

state of nationality of the perpetrator had cumulatively consented to the Court's jurisdiction.[144] The United States further proposed that "[w]ith respect to States not Party to the Statute, the Court shall have jurisdiction over acts committed in the territory of a State not Party, or committed by officials or agents of a State not Party in the course of official duties and acknowledged by the State as such, only if the State or States in question have acccepted jurisdiction in accordance with this article."[145] These proposals, however, were ultimately not put to a vote due to a successful no-action motion proposed by Norway.[146]

At the last plenary meeting of the Conference, the text, as proposed by the Bureau and endorsed by the Committee of the Whole was adopted as a whole, with 120 votes for, 7 against and 21 abstentions.[147]

3.5. / CONCLUSIONS

This brief overview of the preparatory works of the Rome Statute on the topic at hand clearly reveals that the promulgation and adoption of article 12 on the preconditions for the exercise of jurisdiction was an integral part of the 'take it or leave it' package-deal at the very end of the Rome Conference. As such, its adoption was intimately connected with provisions aimed at allaying certain states' concerns over what they perceived as necessary jurisdictional safeguards against the potential abuse of the Court's jurisdiction, such as articles 98 and 124 of the Statute.[148] The provision on the preconditions for the exercise of jurisdiction was, after all, always part of a system. The influential Bureau Paper and Proposal included options on that provision in the context of an entire system of adjudication, which also made reference to options on the way that states would express their consent (opt-in, opt-out and automatic jurisdiction approaches) and the crimes over which the Court would have jurisdiction. The interpretation and application of article 12, therefore, should be considered in this background.

The main hesitation in awarding particular significance to these preparatory works, however, stems from the fact that the official record is at a critical juncture far from complete. It appears that article 12 of the Statute is the official, state-endorsed version of the text prepared by the Bureau the last night of the negotiations and presented to the Committee of the Whole in its last session. Whatever occurred between and beyond the discussions, as officially documented, which proved to be vital for the formulation, the wording and the underlying legal choices made in article 12 of the ICC Statute between the 16th and 17th July 1998 (or even during the last week of the negotiations) has not been officially recorded and therefore remains a topic open to speculation, even though there are – up to now, uncontested – unofficial personal accounts of what really happened in the last critical hours of the negotiations. At the outset, it appears that the choice of territoriality or nationality of the suspect jurisdiction was made by the Bureau not only due to its 'legal unassailability',[149] but also – or mostly – under the pressure of gathering state support, achieving a compromise and concluding the negotiations successfully within a limited period of time. This account does not lend itself to uncontested legal conclusions for the scope of application of territorial jurisdiction, for example, in cases of crimes committed in territories under military occupation.

144 Summary Records, Vol. II, 42nd Meeting, *supra* note 138, at 361, ¶ 22, for D. Scheffer, [Mr. Liu Daqun (China) argued in favour of the vote, since in its view "[a]rticle 12 concerning the issue of jurisdiction was the most important article in the whole Statute", at 362, ¶ 28].

145 *Id.*

146 *Id.* at 361-2, ¶ 24-31.

147 9th Plenary Meeting of the Rome Conference, U.N. Doc. A/CONF.183/SR.9, 121 (July 17, 1998). The document was circulated in the Conference as U.N. Doc. A/CONF.183/9 (July 17, 1998).

148 Article 98 refers to the impossibility for the Court to request the surrender of a suspect from a State Party, if that would require from the requested State to act inconsistently with its obligations under international agreements, such as SOFAs, when under the bilateral agreement the consent of the sending State is required. Article 124, on the other hand, provides for the possibility to States Parties to exclude war crimes from the jurisdiction of the Court for 7 years after the Statute's entry into force. Particularly the opt-out clause was negotiated until the very last moment, formally and informally. Kaul, *supra* note 103, at 602-604; M. Bergsmo, *The Jurisdictional Regime of the International Criminal Court* (Part II: Articles 11-19), 6 Eur. J. of Crime, Crim. L. and Crim. Just. 29, 31 (1998), "Article 124 played an essential role in securing support for the final draft of the Statute put forward by the Bureau of the Committee of the Whole of the Diplomatic Conference".

149 Kirsch & Robinson, *supra* note 137, at 84, "These two bases [territoriality and nationality of the suspect] were chosen, because they were the two most firmly established bases for the exercise of criminal jurisdiction, thereby starting the ICC off on a foundation that was considered to be legally unassailable".

Finally, in this context, the positions adopted and the choices made at the Rome Conference would perhaps be better qualified as political, rather than strictly legal, at least to the extent that such a distinction is feasible. As it has been put in no uncertain terms, "[a]rticle 12 is a product of compromise supported by the overwhelming majority of States. It endeavours to satisfy the many interests that were evidenced in the Rome Conference and before. It is far from perfect but was all that was possible at the time"[150], or, alternatively, "[t]he philosophy of the final package was to reflect the strong majority trends, but with efforts to accommodate minority views to the extent possible."[151]

It is unfortunate that the legal argumentation developed in the International Law Commission over years of intense debates did not seem to occupy the prominent place one would hope at the minds of the negotiators, but rather seems to have given away before other considerations, when the time came to reach a decision. In this framework, it is difficult not to espouse Bergsmo's position, who argues that the whole debate on jurisdiction in the Rome Conference, as ultimately evidenced by both the negotiations and the final result, seems to have centered on the wish of certain states to acquire a veto power over the jurisdiction of the Court and the question of how to best accommodate their concerns over what they perceived as the potential for jurisdictional overreach of the Court's authority.[152]

Be that as it may, it appears that ultimately the issue of consent of the territorial state, as such, did not give rise to the anxiety and debate that the proposals for universal or quasi-universal jurisdiction did – although it was, admittedly, closely connected to these proposals to a certain extent. Most, if not all, delegations ultimately did not object to the inclusion of the requirement of the consent of the territorial state in the Statute. The question was rather whether the consent of the territorial state by itself would be sufficient for the Court's jurisdiction, without the consent of the state of nationality of the accused. This was an important question as regards the prosecution of crimes involving elements of state policy, as well as the possible prosecution of nationals of states not parties to the Statute for crimes committed during peacekeeping operations or 'humanitarian interventions'.

150 Williams & Schabas, *supra* note 111, at 560.

151 Kirsch & Robinson, *supra* note 137, at 76.

152 Bergsmo, supra note 107, at 100, 101, "[T]he battle for what became Article 12 essentially centred on whether it should accommodate the States for whom a veto mechanism was the articulated panacea. The quest for a veto drove the process. The possible anatomy and usefulness of a veto was fully explored by the negotiating States through the diligent and persistent efforts by a minority which cannot be criticised for having left stones unturned"; as regards the United States in particular, Michael J. Struett, The Politics of Constructing the International Criminal Court 100,101 (2008).

CHAPTER 4 / INSTRUMENTS OF INTERPRETATION OF THE ROME STATUTE AND ARTICLE 12(2)(A)

4.1. / INTRODUCTION

Having briefly reviewed the history of the negotiations that led to the adoption of article 12(2)(a) ICC Statute, the next step is the substantive analysis of that provision. This process however would not be complete or cohesive, without clarifying previously the means of interpretation that may or should be used, in order to reach any conclusions. This discussion is important, because, as it will be shown in the next chapters, any concluding observations to be made on the scope of Article 12(2)(a) involving situations of occupation, as well as the use of localization rules under international law, will depend heavily on the means of interpretation selected and the weight awarded to them.

Accordingly, the following pages will make reference to the instruments of interpretation available to the Court, in accordance with the Rome Statute and the Court's first jurisprudence. In so doing, this Chapter will not touch only upon the well-rehearsed themes of grammatical, contextual and teleological interpretation under the Vienna Convention on the Law of Treaties, but will further endeavour to provide insights in the application of rules of interpretation provided by the Statute itself and in particular article 21(3) and the principle of legality. In closing, certain foundational submissions will be made, explaining the selection of rules of interpretation that will be used in the subsequent chapters.

4.2. / INTERPRETATION AND

TERRITORIALITY UNDER ARTICLE 12(2)(A)

A preliminary question relates to whether the interpretation of article 12(2)(a) is sufficient to address through judicial interpretation a wide number of cross-border activities and related legal questions, in a way similar to the national courts in the exercise of national jurisdiction.

Particularly in civil law jurisdictions, when one reads a national criminal code, some of the very first provisions encountered are dedicated to the delimitation of territorial jurisdiction. Their importance is evident, since they are said to perform, in the national context, a dual function; on the one hand, "these provisions have a procedural function: they indicate which state's courts have the international competence to consider penal issues and other consequences of an offence under criminal law. In other words, the provisions decide the international competence of a court in a criminal case."[1]

On the other hand, however, the same provisions decide the scope of application of criminal law within a given state. In this sense, "[t]he provisions on jurisdiction determine what criminal acts are punishable according to the criminal law of a state."[2] As far as provisions on jurisdiction *ratione loci* are concerned, this function is seemingly performed by determining the applicable *locus delicti commissi*,[3] through provisions such as for example section 9 of the German Criminal Code[4] or article 8 of the Swiss Criminal Code.[5]

However, the existence of both types of provisions is not a *conditio sine qua non* for the lawful application of national criminal law. In a number of state systems, ostensibly even civil law ones, only a general declaration to the effect that the criminal law of a State is applicable to any person who commits a criminal offence within that state, is considered sufficient. From that point onwards, national courts assume

1 Ole Träskman, *Provisions on Jurisdiction in Criminal Law – The Reform of Law caught in the Tension between Tradition and Dynamism*, *in*, Criminal Law Theory in Transition, Finnish and Comparative Perspectives 511 (Raimo Lahti & Kimmo Nuotio eds. 1992).

2 *Id*.

3 R. v. Finta [1994] 1 SCR 701 (Can.), 104 ILR 284, 309, where Judge LaForest eloquently put it "the technical ability to demarcate the location of the relevant act".

4 Strafgesetzbuch [StGB] [Penal Code], Nov. 13, 1998, Reichsgesetzblatt [RGBl.] I, 945, 3322, § 9 (Ger.), provides as follows:
"Section 9 Place of the Act
(1) An act is committed at every place the perpetrator acted or, in case of an omission, should have acted, or at which the result, which is an element of the offense, occurs or should occur according to the understanding of the perpetrator.
(2) Incitement or accessoryship is committed not only at the place where the act was committed, but also at every place where the inciter or accessory acted or, in case of an omission, should have acted or where, according to his understanding, the act should have been committed. If the inciter or accessory in an act abroad acted domestically, then German criminal law shall apply to the incitement or accessoryship, even if the act is not punishable according to the law of the place of its commission". The official translation is reproduced at http://www.iuscomp.org/gla/statutes/StGB.htm#9 (last visited June 30, 2010).

5 Schweizerisches Strafgesetzbuch [StGB] [Criminal Code] Dec. 21, 1937, SR 757 (1938), as amended by Gesetz, Oct. 4, 1991, AS 2465 (1992), art. 8 (Switz.), provides as follows:
"Article 8
1. Un crime ou un délit est réputé commis tant au lieu où l'auteur a agi ou aurait dû agir qu'au lieu où le résultat s'est produit.
2. Une tentative est réputée commise tant au lieu où son auteur l'a faite qu'au lieu où, dans l'idée de l'auteur, le résultat devait se produire". The official text is reproduced at http://www.admin.ch/ch/f/rs/c311_0.html (last visited June 30, 2010).

the task of determining where the crime may be localized in each case before them, through judicial interpretation of the general provision.[6]

On the other hand, there are also national criminal law systems, where, in the absence of codification, there is no equivalent provision prescribing the territorial application of criminal law. In these states, the limits of a national criminal justice system as regards territory are determined primarily by the judiciary, although the legislator may make specific provision in certain cases for selected crimes, particularly when their application is extraterritorial.[7] In such occasions, national interpretative devices are developed to resolve the relevant riddles.[8]

Similarly, bearing in mind the extensive codification in the Rome Statute, one would expect to encounter two provisions on territorial jurisdiction; one provision declaratory of the outer limits of the Court's jurisdiction *vis-à-vis* states (a function which article 12(2)(a) seems to perform), and another on the *locus delicti commissi,* clarifying where a crime occurs in cases of, for instance, commission of a crime in part within state territory. It is evident, however, that the Rome Statute does not contain such a provision. Under these circumstances, it is suggested that, similarly to the task performed by national courts, the determination of the *locus delicti commissi* is a matter to be decided by the judges through interpretation of article 12(2)(a) ICC Statute.

4.2.1. / INTERPRETATION OF THE ROME STATUTE IN ACCORDANCE WITH THE VIENNA CONVENTION

6 This would be the case for example for the following states;
Belgium: Code Pénal [C.Pén.] art. 3 (Belg.), "l'infraction commise sur le territoire du royaume, par des Belges ou par des étrangers, est punie conformément aux dispositions des lois belges", available at http://www.juridat.be/cgi_loi/loi_F.pl?cn=1867060801 (last visited June 30, 2010). On its development in national jurisprudence *see* Christiane Hennau & Jacques Verhaegen, Droit Pénal Général 76-79 (2003); Cerdic Ryngaert, *Territorial Jurisdiction over Cross-Frontier Offences: Revisiting a Classic Problem of International Criminal Law*, 9 Int'l Comp. L. Rev. 187, 201-2 (2009); *Belgium*, OECD Review of the Implementation of the OECD Anti-Bribery Convention, Working Group on Bribery in International Business Transactions ¶ 4.1., available at http://www.oecd.org/document/24/0,3343,en_2649_34859_1933144_1_1_1_1,00.html (last visited June 30, 2010) (hereinafter OECD Anti-Bribery Convention); Bulgaria: Bulgarian Criminal Code art. 3, "(1) The Penal Code shall apply for every crime committed on the territory of the Republic of Bulgaria", available at www.mvr.bg/NR/rdonlyres/330B548F-7504-433A-BE65-5686B7D7FCBB/0/04_Penal_Code_EN.pdf (last visited June 30, 2010); *Bulgaria*, Anti-Bribery Convention, at ¶ 4.1; Hungary: Hungarian Criminal Code § 3; *Hungary*, Anti-Bribery Convention, at ¶ 4.1; Republic of Korea, Criminal Code, Article 2, "This Code shall apply both to Korean nationals and to aliens who commit crimes within the territory of the Republic of Korea"; The Korean Criminal Code 33 (Gerhard Mueller ed. 1960); *Korea*, Anti-Bribery Convention, at ¶ 4.1; The Netherlands: Dutch Penal Code art. 2, "The criminal law of the Netherlands is applicable to any person who commits a criminal offence within the Netherlands" – art. 3 refers to Dutch ships and aircrafts; Ryngaert, *id*. at 200-201; *The Netherlands*, Anti-Bribery Convention, at ¶ 4.1, Report on the Application of the Convention, ¶ 174-177 (June 15, 2006); The Dutch Penal Code 35 (Grat van den Heuvel et als. eds. 1997).

7 That would be the case for example under English law. Michael Hirst, Jurisdiction and the Ambit of Criminal Law 3-8 (2003), underlines that, notwithstanding exceptions and qualifications rendered necessary mostly by subsequent developments, the general rule of territoriality under English law remains the one expounded by Viscount Simonds in Cox v. Army Council, [1963] A.C. 48, 67, "Apart from those exceptional cases in which specific provision is made in respect of acts committed abroad, the whole body of the criminal law of England deals only with acts committed in England"; for examples of the forms of extraterritorial jurisdiction in English law, *id.* Hirst at 202-3, analysing the development of such rules through judicial interpretation. Note in this respect the position of English law as expressed in the reports on bribery, United Kingdom, Anti-Bribery Convention, at ¶ 4.1, available at http://www.oecd.org/document/24/0,3343,en_2649_34859_1933144_1_1_1_1,00.html (last visited June 30, 2010); *United Kingdom,* Working Group on Bribery, Report on the Application of the Convention, March 2005, *id.* ¶ 207, and the relevant issues in *United Kingdom, Phase 2bis*, Report on the Application of the Convention, ¶ 263-5 (October 2008); *cf. Canada*, Review of the Implementation of the Convention, *id*. ¶ 4.1 (July 1999); *Canada: Phase 2*, Report on the Application of the Convention, ¶ 75-77 (March 2004) and Follow-up Report on the Implementation of Phase 2, *id*. at ¶ 9 (June 2006); further, Libman v. The Queen [1985] 2 S.C.R. 178 ¶ 15 (Can.).

8 For example, in United States law the presumption that when interpreting an Act of Congress, it "ought never to be construed to violate the law of nations, if any other possible construction remains", Murray v. the Schooner Charming Betsey, 6 U.S. 2 Cranch 64, 117-118 (1804), or the presumption that unless otherwise indicated, legislation passed by Congress is meant to apply only within the territorial jurisdiction of the United States, unless a contrary intent appears; Jordan J. Paust, *Non-Extraterritoriality of Special Territorial Jurisdiction of the United States: Forgotten History and the Errors of Erdos*, 24 Yale J. Int'l L. 305, 307-8 (1998-1999), in detail with references; For a critique of the presumption of territoriality on the grounds that it no longer reflects principles of public international law, Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law,* 24 *Law and Policy in International Business* 1, 61-71 (1992).

ON THE LAW OF TREATIES – TELEOLOGICAL INTERPRETATION

For the purposes of this examination, the relevant rules of interpretation appear to stem from the Vienna Convention on the Law of Treaties, and in particular articles 31 and 32 thereof. The Appeals Chamber has early in its jurisprudence admitted that "[t]he interpretation of treaties, and the Rome Statute is no exception, is governed by the Vienna Convention on the Law of Treaties (23 May 1969) specifically the provisions of articles 31 and 32."[9] It has then proceeded to set the tone for the interpretation of the Statute in a paragraph which, in the words of the Chamber, has been perceived by both the Prosecutor and the defense in that case "as the authentic guide to the interpretation of the Statute"[10]: "The rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and the general tenor of the treaty."[11]

It is through this *dictum* of the Appeals Chamber that the main rules of interpretation of the Vienna Convention have been incorporated into the system of the ICC[12] and will be considered in the present thesis.

In this context, the teleological approach of the Court to the interpretation of the Statute deserves particular attention, as it will be at the center of the present analysis.

The Court has stated that teleological interpretation, "is mirrored in the principle of effectiveness and based on the object and purpose of a treaty[…]".[13] The Court is said to have recourse to this rule of interpretation, particularly in order to "enable the system to (…) attain its appropriate effects, while preventing any *restrictions* of interpretation that would render the provisions of the treaty inoperative (emphasis in the original)."[14] The usefulness of teleological interpretation is said to be important for certain provisions in the Rome Statute, as "the truth of the matter is that a certain number of the provisions of the Statute and the Rules are written in very general or ambiguous terms and that it is not possible to clearly answer the

9 Situation in Dem. Rep. Congo, Case No. ICC-01/04, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ¶ 33 (July 13, 2006) (hereinafter the Extraordinary Review Appeal).

10 Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 OA 8, Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of the Pre-Trial Chamber I entitled "Décision sur la confirmation des charges of 29 January 2007", ¶ 8 (June 13, 2007). It is interesting to note perhaps that, while both parties did rely in this provision in their submissions, neither of them classified this approach as an 'authentic guide'. This seems rather to constitute the opinion of the Chamber itself, albeit expressed in a somewhat circuitous manner; for the Prosecution's and the Defence's approach to the matter, see respectively Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-825, Prosecution's Response to the Directions and Decisions of the Appeals Chamber of 1February 2007, ¶ 17, (Feb. 13 2007); Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-812, Defence Submissions on the scope of the right to appeal within the meaning of article 82 (1) (d) of the Statute, ¶ 11 (Feb. 7, 2007).

11 The Extraordinary Review Appeal, *supra* note 9, at ¶ 33; This dictum is frequently encountered thereafter in the Court's jurisprudence. Indicatively, Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Adjourning the Hearing pursuant to Article 67(7)(c)(ii) of the Rome Statute, ¶ 31 (Mar. 3, 2009).

12 The Court's Regulations, however, although part of the ICC system as such, seem not to have been interpreted on the basis of this 'authentic guide'. For example, the Appeals Chamber itself has consistently interpreted the concept of 'good cause' under Regulation 35 (2) of the Court's Regulations, without any clear reference to either articles 31-32 of the Vienna Convention, or article 21 (3) of the ICC Statute; Regulations of the Court, ICC-BD/01-02-07, amend. 2 (entered into force Dec. 18, 2007). That may be due to the fact that the Court's Regulations are not part of the Court's Applicable Law under article 21. For the case-law on Regulation 35, ¶ 2, 'Variation of Time Limits' ("The Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard)", Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06 OA 8, Reasons for the "Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007" issued on 16 February 2007", ¶ 7, n. 14 (Feb. 21 2007); For the standardization of this interpretation, *id.* Case No. ICC-01/04-01/07 (OA), Appeals Chamber's Decision on the "Prosecutor's Urgent Application for Extension of Time to File Document in Support of Appeal", ¶ 5 (Dec. 18, 2007); Prosecutor v. Germain Katanga and Mathieu Ngodjolo Chui, Case No. ICC-01/04-01/07/OA 7, Reasons of the "Decision on the 'Application for extension of time limits pursuant to Regulation 35 of the Court to allow the Defence to submit its observations on the Prosecutor's Appeal regarding the decision on evidentiary scope of the confirmation hearing and preventive relocation'" ¶ 5 (June 27, 2008).

13 Prosecutor v. Jean-Pierre Bemba Gombo, supra note 11 at ¶ 36.

14 *Id*. citing with approval the ruling of the case Fairen Garbi & Solis Corrales, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser.C) No. 2 ¶ 35 (June 26, 1987).

question, by simply reading them, in the French or English version, and referring to their ordinary meaning."[15]

The first decisions of the Court offer interesting examples of teleology. In the Lubanga Confirmation Decision, the Pre-Trial Chamber was confronted with the interpretation of the requirement of prohibited conscription or enlistment into the national armed forces, under article 8(2)(b)(xxvi) of the Rome Statute.[16] The implication was that, if the Chamber adhered to a strictly grammatical approach to this provision, this crime would be not be punishable if committed by members of any other non-national (non-governmental) armed forces. On that occasion, the Pre-Trial Chamber, inspired by the ICTY approach on the requirement of nationality for protected persons under international humanitarian law,[17] ruled that "[u]nder article 8(2)(b)(xxvi) of the Statute, the term "the national armed forces" is not limited to the armed forces of a State."[18] The Court's reasoning appears to have been drastically influenced in this respect by the desire to ensure that its conclusion serves the objects and purposes it was set out to achieve.[19] The Court's case-law contains numerous other examples where teleological considerations have featured prominently.[20]

In conclusion, notwithstanding possible allegations of judicial legislation in disguise, teleological interpretation is part of the Court's emerging practice on interpretation. The possibility of its application will also be considered with regard to the Court's jurisdiction under article 12(2)(a).

4.2.2. / INTERPRETATION OF THE ROME STATUTE IN ACCORDANCE WITH THE STATUTE'S RULES OF INTERPRETATION

Notwithstanding the Court's reliance on the rules of interpretation under the Vienna Convention and the Appeals Chamber's 'authentic' guide, it is important to note that the Rome Statute itself provides for certain rules concerning the interpretation of its provisions.

These rules are derived mostly from the provisions of article 21 (3), 22 (principle of legality), 128[21] and 9 of the Statute.[22] In light of the controversy surrounding article 9, which seems to relate only to the subject-

15 Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ¶ 36 (June 16, 2009) (hereinafter referred to as the Katanga Admissibility Decision); David Hunt, *The International Criminal Court, High Hopes, 'Creative Ambiguity' and an Unfortunate Mistrust in International Judges*, 2 J. Int'l Crim. Just. 56, 67 (2004), on 'creative ambiguity' in the Rome Statute drafting.

16 Prosecutor v. Thomas Lubanga Dyilo,Case No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, (Jan. 29, 2007) (hereinafter: the Lubanga Confirmation Decision), art. 8 (2)(b)(xxvi) reads: "Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities".

17 Prosecutor v. Tadic, Case No. IT-94-1-A, ¶ 166 (Feb. 20, 2001); Prosecutor v. Delalic et al. (Celebici), Case No. IT-96-21-A, ¶ 98 (Feb. 20, 2001), where the I.C.T.Y. ruled that the requirement of nationality was no longer determinative, in the context of an inter-ethnic armed conflict, for the acquisition of the status of a protected person.

18 Lubanga Confirmation Decision, *supra* note 16, at ¶ 285.

19 *Id.* at ¶ 278, 281, 284, "interpreting the term "national" to mean "governmental" can only undermine the object and purpose of the Statute of the Court, which is none other than to ensure that "the most serious crimes of concern to the international community as a whole" must no longer go unpunished".

20 For examples particularly on procedure, Prosecutor v. Jean-Pierre Bemba Gombo, *supra* note 11, at ¶ 37, on the question of when a hearing is adjourned; Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 OA9, OA10, ¶ 97, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber 'I's Decision on Victim's Participation of 18 January 2008 (July 11, 2008), on the right of victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge admissibility or relevance of evidence; The Katanga Admissibility Decision, *supra* note 15, at ¶ 77-78, where it was held that an interpretation of Article 17 to the direction that State unwillingness may be premised on motives other than those prescribed in the Statute, was compatible with the purpose and object of the Statute.

21 Article 128, Authentic Texts, provides: "The original of this Statute, of which the Arabic, Chinese, English, French, Russian, and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States"; For an example of the value of the authentic texts provision to the interpretation of the Statute, Prosecutor v. Katanga, Case No. ICC-01/04-01/07 OA 3, Judgment on the Appeal of Katanga Against the Decision of the Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages", ¶ 23, 40 (May 27, 2008) (hereinafter the Katanga Languages Appeal).

22 "Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8.[…]".

matter jurisdiction of the Court,[23] the following pages will be dedicated to the question of whether article 21(3) and the principle of legality may be applied for the interpretation of the Court's jurisdiction under Article 12(2)(a).[24]

4.2.2.1. / INTERPRETATION OF ARTICLE 12(2)(A) OF THE ROME STATUTE IN ACCORDANCE WITH ARTICLE 21(3)?

Under article 21(3) of the Rome Statute, "[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights" and with due respect to the principle of non-discrimination."[25] While the distinction between interpretation and application is not always easy to make,[26] it is clear that the Court is duty bound ('must') to interpret the Statute consistently with internationally recognized human rights. The function of this provision as a source of applicable law for the Court is a different matter, one that will not be dealt with here.[27]

In this respect, it may be suggested that since this rule of interpretation is explicitly provided for in the Statute, it should be afforded priority in its interpretation over the classic rules of the Vienna Convention.[28] It is surprising, however, that this 'human rights interpretation' is not clearly reflected in the Court's 'authentic' guide. In fact, while the Court refers in its guide as a matter of course to the 'classic' rules of interpretation under the Vienna Convention, the importance of article 21(3) ICC Statute in the interpretation of the Statute varies significantly.

On the one hand, there are cases where the human rights interpretation has proved decisive for the interpretation of the Statute. It has been described in this sense as a "general principle of interpretation" of the Statute.[29] The Court's chambers have relied on human rights jurisprudence to define the evidentiary

23 *See* in this regard the Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir, 46, ¶ 131 (Mar. 3, 2009) (hereinafter: Al-Bashir Arrest Warrant Decision), where the Majority took the view that the purpose and object of Article 9 was entwined with the principle of legality, aiming to ensure that the law was sufficiently clear and foreseeable to the accused. Therefore, the use of the Elements of Crimes was seen as obligatory for the Court; Judge Ušacka dissented on this point, *id.* at 9, ¶ 18, Separate and Partly Dissenting Opinion of Judge Anita Ušacka, "Since article 9(3) of the Statute requires that the Elements of Crimes be consistent with the Statute, it can be inferred that only the Statute outlines the operative definition of the crime. Again, I recall that the introduction to the Elements of Crimes state only that the Elements of Crimes "shall assist" the Court in the interpretation of the Statute."

24 The authentic texts of the Statute will be duly taken into account in the relevant parts of the analysis.

25 On Article 21 (3) as an instrument of interpretation of the Statute, *see* generally, Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Cour*t, 93 Am. J. Int'l L. 22, 28-29 (1999); Julio Barboza, *International Criminal Law*, 278 Recueil des Cours de l' Academie de Droit International 9, 144-5 (1999); Alain Pellet, *Applicable Law* in The Rome Statute of the International Criminal Court: A Commentary 1079-1082 (Antonio Cassese et al. eds. 2002); Joe Verhoeven, *Article 21 of the Rome Statute and the Ambiguities of Applicable Law*, 33 Neth. Y.B. Int'l L. 3, 14-21 (2002); Gerhard Hafner & Christina Binder, *The Interpretation of Article 21 (3) ICC Statute Opinion Reviewed*, 9 Austrian Rev. Int'l and Eur. Law 163, 168-172 (2004); Margaret McAuliffe DeGuzman, Article 21, *Applicable Law,* in Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article 711-2 (Otto Triffterer ed. 2nd ed. 2008).

26 As Scelle famously said, "Il n'y a pas d'application sans interprétation", 2 Georges Scelle, Précis de droit des gens 488 (1934).

27 On this issue, see Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Practices of Witness Familiarization and Witness Proofing, ¶ 10 (Nov. 8, 2006) (hereinafter the Lubanga Witness Proofing Decision*)*, where the Pre-Trial Chamber underlined that an interpretation under Article 21(3) depends largely on whether a rule or principle is found to exist, under article 21(1)(a)-(c), regulating the topic at hand; Al-Bashir Arrest Warrant Decision, *supra* note 23, at 16, ¶ 44, for the approach espoused by the Pre-Trial Chamber.

28 This observation has its roots in international institutional law and Vienna Convention on the Law of Treaties, art. 5, ¶ 3, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 ('without prejudice to the rules of the organization'), which suggests "the primacy to be given to "any relevant rules of the organization" "; Philippe Sands & Pierre Klein, Bowett's Law of International Institutions 448 (6th ed. 2009); Henry Schermers, *Interpretation of the constituent instruments*, *in* A Handbook on International Organisations 406 (Renè J. Dupuy ed., 2nd ed. 1998); For the capacity of the International Criminal Court as an international organization, Francesca Martinez, *Legal Powers and Status of the Court,* in Cassese, *supra* note 25, at 208; Gerard A.M. Strijards, *Article 3, Seat of the Court,* in Triffterer *supra* note 25, at 73-74; Wiebke Rückert, *Article 4, Legal Status and Powers of the Court,* in Triffterer, *supra* note 25, at 122.

29 Prosecutor v. Lubanga, Case no. ICC-01/04-01/06-108, Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence, ¶ 7(i) (May 19, 2006); Further, Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-679, Decision on the Practices of Witness Familiarisation and Witness Proofing, ¶ 10 (Nov. 8, 2006) (hereinafter Lubanga Witness Proofing Decision); from the literature, Sergey Vasiliev, *General Rules and Principles of International Criminal Procedure: Definition, Legal Nature and Identification*, in International Criminal Procedure: Towards a Coherent Body of Law 68-69 (S. Vasiliev & Göran Sluiter eds. 2009) (hereinafter Vasiliev, *General Rules and Principles*).

standards 'reasonable grounds to believe'[30] and 'substantial grounds to believe'[31] in articles 58(1) and 61(7) of the Statute respectively. Moreover, in at least one case the Appeals Chamber seems to have hinted that, if a solution could have been reached by reference to a human rights approach, the issue of the language, which the accused 'fully understands and speaks' under article 67(1)(a) and (f) of the Statute, would probably not warrant too thorough an examination under the rules of interpretation of the Vienna Convention.[32]

On the other side of the spectrum, the Appeals Chamber seems to have reserved occasionally for the 'human rights interpretation' a secondary position in comparison to the rules of article 31 of the Vienna Convention. Thus, when the Appeals Chamber was confronted with the issue of whether the word 'ruling', in article 60(3) of the Statute,[33] should be interpreted in such a way, as to include also the decision approving an arrest warrant under article 58 of the Statute, after consideration of the issue textually and contextually, the Chamber all but referred the reader for an interpretation under article 21(3) to the separate opinion of one of the judges. "The majority of the Appeals Chamber notes the intention of Judge Pikis to deliver a separate opinion, in which he proposes to consider the human rights aspects of the Appellant's pre-trial detention. In view of its above conclusions, which are based on its interpretation of the fundamental legal texts of the Court, the majority of the Appeals Chamber does not consider it necessary, for a determination of the Appeal the subject of this Judgment, to consider this issue."[34] The implication appears to be that, when the meaning of a provision can be ascertained by recourse to the rules of the Vienna Convention, an examination of the issue under article 21(3) becomes redundant.

Naturally, there are also examples in the Court's jurisprudence where all elements of interpretation are considered.[35]

Accordingly, it seems that as far as the need to resort to a 'human rights interpretation' is concerned, the Appeals Chamber has not definitively ruled on a hierarchy of means of interpretation, *i.e.* whether certain interpretative approaches should be awarded priority over others in the resolution of specific issues,

30 Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad al Abd-al-Rahman ("Ali Kushayb"), Case No. ICC-02/05-01/07, Decision on the Prosecution Application under Article 58 (7) of the Statute, ¶ 28 (Apr. 27, 2007) ("The Chamber is of the view that, as required by article 21(3) of the Statute, the expression "reasonable grounds to believe" must be interpreted and applied in accordance with internationally recognised human rights. Thus, in interpreting and applying the expression "reasonable grounds to believe", the Chamber will be guided by the "reasonable suspicion" standard under article 5 (1) (c) of the *European Convention on Human Rights* and the jurisprudence of the *Inter-American Court of Human Rights* on the fundamental right of personal liberty under article 7 of the *American Convention on Human Rights*").

31 Lubanga Confirmation Decision, *supra* note 16, at ¶ 38 ("To define the concept of "substantial grounds to believe", the Chamber relies on internationally recognised human rights jurisprudence. In this regard, in its judgement of 7 July 1987 in Soering v. United Kingdom, the European Court of Human Rights defined this standard as meaning that "substantial grounds have been shown for believing". In a joint partially dissenting opinion appended to the judgement in Mamatkulov and Askarov v. Turkey, Judges Bratza, Bonello and Hedigan considered that "substantial grounds to believe" should be defined as "strong grounds for believing". Moreover, in that case the Grand Chamber of the ECHR assessed the material placed before it as a whole"); this approach was approved in Prosecutor v. Katanga, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶ 65 (hereinafter Katanga Confirmation Decision); In the Situation in the Republic of Kenya, Case No. ICC-01/09-19, Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 15, ¶ 31 (Mar. 31, 2010) (hereinafter Kenya Authorization Decision) ("The Court's case-law has equated the "reasonable grounds to believe standard" with the "reasonable suspicion" standard under article 5(1)(c) of the European Convention on Human Rights").

32 Prosecutor v. Katanga, Case No. ICC-01/04-01/07 OA 3, Judgment on the Appeal of Mr. Germain Katanga Against the Decision of the Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages", ¶ 38 (May 27, 2008) ("The key question in this ground of appeal is how to interpret the phrase "fully understands and speaks" as it appears in both article 67 (1) (a) and article 67 (1) (f) of the Statute in relation to a request for interpretation. *In addition to applying article 21 (3) of the Statute*, as has been previously recalled, article 67 (1) (a) and (g) are to interpreted in light of the Vienna Convention on the Law of Treaties, in particular, article 31(1), which provides:…[emphasis added]").

33 Article 60 (3) reads: "The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release if it is satisfied that changed circumstances so require".

34 Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-824, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo"", ¶ 107 (Feb. 13, 2007) (The key issue in this respect, was whether the word 'ruling' in article 60 (3) included also the decision issuing an arrest warrant or not, and the consequential obligation to review the suspect's pre-trial detention at least every 120 days according to rule 118 (2)).

35 Extraordinary Review Appeal, *supra* note 9, at ¶ 34-37, where the Court first considered the interpretation of article 82 (1) (d) of the Statute on account of its text, context and purpose, then turned to article 21(3) of the Statute for an interpretation based on 'internationally recognised human rights' (¶ 38-39) and in the end employed the preparatory works of the Rome Conference, in order to confirm the conclusion it had already reached through the use of the previous means (¶ 40-41).

in particular whether a hierarchy exists between the means of interpretation stipulated in articles 21(3) of the Statute and 31 of the Vienna Convention.

Notwithstanding, however, the primary or secondary position reserved for the 'human rights interpretation' of the clauses of the Rome Statute and the use of article 21(3) as a source of law or an instrument of interpretation, the Court has nonetheless affirmed that this interpretation should be employed *throughout* the Statute. While this should be expected, as article 21 (3) states explicitly that *all* the sources of applicable law detailed therein are to be interpreted consistently with internationally recognized human rights, it is a point of particular importance as far as the preconditions for the exercise of jurisdiction – the ultimate vestige of state sovereignty in the Statute – are concerned. This is due to the fact that article 12(2)(a) relates to a matter regularly addressed under classic international law, i.e. the exercise of criminal jurisdiction based on territoriality and the state consent requirements for the exercise of international jurisdiction. In this respect, state territorial criminal jurisdiction appears to be a field of international law where human rights considerations have traditionally played not a very significant role, if any at all. The matter has rather been dealt with from the perspective of state rights (or state interests) under international law and the exercise of jurisdiction over territory as an aspect of a state's sovereignty.[36]

The Appeals Chamber appears to have incidentally addressed this issue in the Lubanga 'Jurisdictional' Appeal.[37] While presented as a jurisdictional challenge, this appeal sought to address the grievance of the defense that the suspect was allegedly subjected to ill-treatment and unlawful detention by the Congolese authorities prior to his surrender to the Court, thus raising essentially a claim of abuse of process and demanding a stay of proceedings and release on that ground.

The Appeals Chamber examined the appeal by reference to the parameters of the jurisdiction of the Court under the Statute and ruled that, while labeled as such, this appeal was not in reality a challenge of jurisdiction, but rather "a *sui generis* application, an atypical motion," seeking the stay of the proceedings and the suspect's release.[38] The Chamber subsequently examined whether abuse of process could be used for staying the proceedings under the Statute and replied in the negative.[39] It then went on to review the matter from the point of view of article 21(3).

In this context, the Appeals Chamber made the following pronouncements; "More importantly, article 21(3) makes the interpretation as well as the application of the law applicable under the Statute subject to internationally recognised human rights. *It requires the exercise of the jurisdiction of the Court in accordance with internationally recognised human rights norms* (emphasis added)."[40] The Court's reasoning deserves a more detailed citation on this part; "Breach of the right to freedom by illegal arrest or retention confers a right to compensation to the victim (see article 85(1) of the Statute). Does the victim have any other remedy for or protection against breaches of his/her basic rights? The answer depends on the interpretation of article 21(3) of the Statute, its compass and its ambit. Article 21(3) of the Statute stipulates that the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognised human rights. *Human rights underpin the Statute; every aspect of it, including the exercise of jurisdiction by the Court*. Its provisions must be interpreted and more importantly applied in accordance with internationally recognised human rights*;* first and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied embracing the judicial process in its entirety [emphasis added]."[41] The Appeals Chamber then concluded that on the basis of this provision it had the power, in accordance with article 21(3) of the Statute, to stay proceedings in cases of 'abuse of

36 In this spirit, Luc Reydams, Universal Jurisdiction, International and Municipal Legal Perspectives 17, chapters 1-2 (2003); a notable exception would seem to be extradition law, where human rights considerations are becoming increasingly important. John Dugard & Christine van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 Am. J. Int'l L. 187-212 (1998); A. Alam, *Extradition and Human Rights*, 48 Indian J. Int'l L. 87-104 (2008).

37 Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 OA 4, Judgment on the Appeal of Lubanga against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006 (Dec. 14, 2006).

38 *Id*. at ¶ 24; similar issues relating to violations of the rights of the accused (lack of counsel) while in the custody of national authorities prior to his surrender to the Court arose in the case of The Prosecutor v. Bemba Combo, Case No. ICC-01/05-01/08, Decision on Application for Interim Release, ¶ 42-49 (Aug. 20 2008), where the defence's allegations were dismissed as insufficiently substantiated.

39 *Id*. at ¶ 26-35.

40 *Id*. at ¶ 36.

41 *Id*. at ¶ 37; note also, Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 OA 12, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the release of Thomas Lubanga Dyilo," ¶ 12 (Oct. 21, 2008) Judge Pikis' Dissenting Opinion, "Article 58 (1) must like every article of the Statute be construed and applied in accordance with internationally recognised human rights (article 21 (3) of the Statute)."

process' that negate the right of the accused to a fair trial, but in the end it rejected the appeal as (factually) unfounded.[42]

Perhaps it would be unjustified to attach too great importance to this pronouncement, employed by the Appeals Chamber in that case as the source of its legal power to order a stay of proceedings in cases of human rights violations in the arrest or surrender of the suspect. After all, article 12 lays down the *preconditions* to the exercise of jurisdiction of the Court and therefore it may be construed as referring to a stage of proceedings prior to the 'exercise of jurisdiction' proper.[43] This position, however, would appear flawed, at least to the extent that the determination of the issue of whether the Court has jurisdiction demands *in itself* an exercise of judicial power of appreciation, an exercise of jurisdiction inherent to the powers of any judicial institution, most commonly referred to as 'kompetenz-kompetenz', 'la compétence de la compétence' or the "jurisdiction to determine its own jurisdiction".[44] Thus, even in those circumstances, article 21(3) of the Statute would appear to have a role to play. In any event, the position of the Appeals Chamber cited above should be seen, at the very least, as an indication of the Court's willingness to keep human rights considerations in sight when interpreting any provision of the Statute, including those relating to jurisdiction.[45] This may be seen as the substantive side with the right of the accused or the suspect to raise objections to the Court's jurisdiction under article 19(2)(a).

The importance of a 'human rights interpretation' of article 12(2)(a) ICC Statute is evident, for the purposes of the present discussion, insofar as the treatment of the silence of the Court's documents on questions of territorial jurisdiction is concerned. From the side of the accused, in its more restrictive dimension, the significance of this approach is intertwined with the principle of legality, the presumption of innocence of the accused and the prohibition of analogy. From this perspective, as it will be indicated below, human rights law would seem to prohibit any interpretation of article 12(2)(a) that is not explicitly laid down.

On the other hand, from the point of view of the human rights of the victims, this approach may lead to the expansive interpretation of 'jurisdiction', along the lines suggested by human rights monitoring organs and authorities. The purpose would be in this context not to leave large scale human rights violations without effective redress. This perspective will be examined in the next chapters concerning the effects doctrine, as well as situations of military occupation.

4.2.2.2. / INTERPRETATION OF ARTICLE 12(2)(A) OF THE ROME STATUTE IN ACCORDANCE WITH THE PRINCIPLE OF LEGALITY?

A question of interpretation that does seem to deserve a more extended treatment relates to the issue of whether the principle of legality, as articulated in articles 22-24 of the Rome Statute, may be considered applicable as regards the interpretation of article 12(2)(a). In this framework, the main question is not how to reconcile a conflicting interpretation with the Court's text. The issue properly defined related to the interpretation of the silence of the Court's documents on questions of territorial jurisdiction. If there are more than one acceptable approaches to the interpretation of the Court's territorial jurisdiction, should the Court select the answer that is in line with a strict interpretation under the principle of legality? For example,

42 *Id*. at ¶ 40-45.

43 Markus Benzing, *The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity*, 7 Max Planck U.N. Y.B 591, 594, n. 16 (2003), considers that "the heading of article 12 of the Statute is strictly speaking a misnomer, since it does not concern the exercise of jurisdiction, but the *existence* of it."

44 Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 14, 18-19 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); Effect of Awards of Compensation made by the Untied Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. Rep. 47, 51; Further, Chittharanjan F. Amerasinghe, Jurisdiction of International Tribunals 121-164 (Kluver Law Int'l 2003); for the I.C.T.R. case-law on the matter, Prosecutor v. Kanyabashi, Case No. ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction (June 18, 1997); Prosecutor v. Karemera, Case no. ICTR-98-44-T, Decision on the Defence Motion, pursuant to Rule 72 of Rules of Procedure and Evidence, pertaining to, inter alia, lack of jurisdiction and defects in the form of the Indictment, ¶ 25 (Apr. 25, 2001); further, Larissa J. van den Herik, The Contribution of the Rwanda Tribunal to the Development of International Law 33-33 (2005); the matter under the ICC Statute will be discussed at length *infra* at Part 5.1.2.2.

45 Perhaps it would not be an exaggeration to say that article 21 (3) in reality operates as a window, through which the Court makes use of international human rights jurisprudence. In addition to the above, see also: Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-OA 13, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", ¶ 46 (Oct. 21, 2008).

in the absence of a provision in the Statute to that effect, should the Court decide that it is barred from 'reading' in article 12(2)(a) objective territorial jurisdiction, relying on the principle of legality, to the effect that such an interpretation (a) is not 'written' law and (b) in any event, in case of ambiguity, the Court should select that interpretation, which is more favourable to the accused, as required by the principle of legality and *in dubio pro reo*?[46] In this sense, does *lex* (in the *nullum crimen nulla poena sine lege scripta/certa/praevia/stricta*) include also the provisions on the territorial jurisdiction of the Court, a procedural issue, or is it limited only to substantive law?

In the ICC framework, reference must be made, first and foremost, to the provisions of the Rome Statute. In this respect, it is clearly provided in the wording of the provisions codifying the principle of legality, namely articles 22-24 of the Rome Statute, that this principle is applicable only insofar as "the conduct in question", "[T]he definition of a crime" and the "conduct" are concerned.[47]

It would seem therefore that the principle of legality is used exclusively for the determination of the substantive law of the Statute. This is considered to be in line with the Pre-Trial Chamber's ruling in Lubanga, when it noted that "[a]ccordingly, there is no infringement of the principle of legality if the Chamber exercises its power to decide whether Thomas Lubanga Dyilo ought to be committed for trial on the basis of written (*lex scripta*) pre-existing criminal norms approved by the States Parties to the Rome Statute (*lex praevia*), defining prohibited conduct and setting out the related sentence (*lex certa*), which cannot be interpreted by analogy *in malam partem* (*lex scripta*)."[48] In any event, this reading is supported by academic commentary,[49] as well as by Judge Ušacka's Dissenting Opinion in the *Al-Bashir Arrest Warrant Decision*.[50] Particularly as far as the preconditions to the exercise of jurisdiction of the Court are concerned, it has been noted that "[n]*ullum crimen sine lege* as formulated in the Rome Statute has no bearing on the preconditions to the exercise of jurisdiction, nor on issues of admissibility."[51]

On the other hand, however, there are also doubts. William Schabas understands article 22(2) to confirm 'strict construction' "at least with regard with the definitions of crimes";[52] for that author, "[t]he

46 See The Rome Statute of the International Criminal Court, July 7, 1998, art. 22 ¶ 2, 2187 U.N.T.S. 3 (entered into force July 1, 2002).

47 *Id.* at art. 22 ¶ 1, 2 and art. 24 ¶ 1 respectively.
Articles 22-24 of the Rome Statute read as follows;
Article 22 – *Nullum Crimen Sine Lege*
1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.
Article 23 – *Nulla Poena Sine Lege*
A person convicted by the Court may be punished only in accordance with this Statute.
Article 24 – Non-retroactivity *Ratione Personae*
1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.
2. In the event of a change in the law applicable to a given case prior to a final judgment, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

48 Lubanga Confirmation Decision, *supra* note 16, ¶ 303.

49 Susan Lamb, *Nullum crimen, nulla poena sine lege in International Criminal Law*, in Cassese, *supra* note 25 at 749-756, 751, "[T]he result enshrined within the Rome Statute reflected a vision of a Court whose subject-matter jurisdiction is exhaustively defined in its constituent instrument"; Gerhard Werle, Principles of International Criminal Law 37-38 (2nd ed., 2009); Machteld Boot, Genocide, Crimes Against Humanity, War Crimes - Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court 374-5 (2002); Robert Cryer et al. An Introduction to International Criminal Law and Procedure 20 (2nd ed., 2010), identifying the need of the States to know "what they were signing up for" as a strong motivating factor for the inclusion of the principle; Héctor Olásolo, *A Note on the Evolution of the Principle of Legality in International Criminal Law*, 18 Crim. L. Forum 301, 303, 308-313 (2007), recognizing the inclusion of the legality principle as "an important effort to define precisely the actions from which individual criminal responsibility arises under the Rome Statute"; for doubts on the precise scope of article 22, Elies van Sliedregt, The Criminal Responsibility of Individuals for Violations of International Humanitarian Law 56, 66 (2003), "Article 22 of the ICC Statute does not relate to (modes of) criminal responsibility but to crimes", with further references; Mauro Catenacci, *The Principle of Legality*, in 2 Essays on the Rome Statute of the International Criminal Court 96 (Flavia Lattanzi & William Schabas eds. 2004), "The prohibition [of analogy] applies only to interpretation of those specific phrases in which criminal conduct is defined"; for a further general discussion, A. Cassese, International Criminal Law 36 (2008).

50 Al-Bashir Arrest Warrant Decision, *supra* note 23, at 9, ¶ 18, Separate and Partly Dissenting Opinion of Judge Anita Ušacka.

51 Boot, *supra* note 49, at 378-9.

52 W. Schabas, An Introduction to the International Criminal Court 201 (3rd ed. 2007).

wording of Article 22(2) is precise enough to leave open the question of whether or not strict construction applies to provisions of the Statute other than those that define the offences themselves."[53]

It is also possible to find statements made by the Court that create certain ambiguity in what would otherwise seem to be a clear-cut issue. Thus, in the *Bemba Confirmation of Charges Decision,* the Pre-Trial Chamber ruled as follows; "Lastly, in making this determination [on the confirmation of charges] the Chamber wishes to underline that it is guided by the principle in dubio pro reo as a component of the presumption of innocence, which as a general principle in criminal procedure applies, mutatis mutandis, to all stages of the proceedings, including the pre-trial stage."[54] The plain meaning of this statement seems to suggest that article 22(2) of the Statute, which "fully embraces the general principle of interpretation *in dubio pro reo*",[55] might be applicable in proceedings relating to jurisdictional objections as well. However, taking into account that this general statement was made in the context of the identification and assessment of the evidentiary threshold in a confirmation of charges hearing, it would seem that its extension to issues of jurisdiction might be exaggerated.[56]

Finally, the preparatory works are not particularly helpful. While the relevant reports suggest that emphasis was placed on the definitions of crimes, reference was made also to the need to clearly define certain important rules of procedure and evidence.[57]

As regards state practice, it would seem that in state systems where there are only generally worded provisions of territorial jurisdiction in criminal law, the use of objective territoriality or other localization rules does not seem to support the contention that such judicial practice should be reviewed under the lens of the principle of legality.[58]

That said, however, a very different picture emerges where *extraterritorial* assertions of jurisdiction are at stake, and particularly the exercise of universal jurisdiction. Thus, for territorial jurisdiction, higher national Courts appear prepared to deal with cases without demanding prior written law declaring, for example, that the respective state has territorial jurisdiction based on the location of the criminal result. They seem content to deduce far reaching interpretations of territorial jurisdiction from generally worded provisions. On the contrary, prior explicit legislation is considered necessary for the exercise of universal jurisdiction.

The cases of *R. v. Finta* in Canada,[59] *R. Wijngaarde and R. A. Hoost v. Bouterse*[60] in the Netherlands and *Erdal v. Council of Ministers*[61] in Belgium point to that conclusion.

In *Finta,* national judges had to come to terms with a national law that gave universal and retroactive jurisdiction to national courts for crimes committed during the Second World War. The case divided the judges. Some accepted the division between retroactive law, which entailed the *ex post facto* criminalization

53 *Id.* at 202.

54 Prosecutor v. Jean-Pierre Bemba Gombo*,* Case No. ICC-01/05-01/08*, Decision Pursuant to Article 61 (7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo*, ¶ 31 (June 15, 2009).

55 Al-Bashir Arrest Warrant Decision*, supra* note 23, at ¶ 156.

56 There has been some argumentation before the Appeals Chamber on whether article 22 (2) of the Statute and especially the principle of *in dubio pro reo* should be applicable in issues relating to criminal procedure. From the jurisprudence of the Court, see the Katanga Languages Appeal, *supra* note 21, where the Court took note in paragraph 25 of the judgment of the argument of the Defence that article 22 (2) should be applied by analogy also to questions of procedural law; Prosecutor v. Katanga, Case No. ICC-01/04-01/07-175, Defence Document in Support of Appeal against "Decision on the Defence Request Concerning Languages", ¶ 58 (Jan. 31, 2008), "Although it [*in dubio pro reo*] is generally referred to in the context of substantive criminal law, it is submitted that it must also apply in the realm of criminal proceedings," with further references to the jurisprudence of the ICTY and the ICTR. The Prosecution argued that even if the *in dubio pro reo* principle applied in procedural law, it would not apply to the present case, *id.* at Judgment, ¶ 29, 38. The Court refrained from pronouncing on the issue and chose to address the matter mostly through a textual interpretation of article 67 (1) (a) and (f) and the preparatory works of the Rome Conference.

57 Compare the Int'l Law Commission's original formulation under Article 39(a) in the ILC Draft Statute, and the Commentary, 113-114, art. 39, ¶ 2, 4, which delimited clearly the application of the principle to the definitions of crimes with the *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 50th Sess. Supp. No. 22, U.N. Doc. A/50/22, 10, 12, ¶ 52, 57 and the 1996 Preparatory Committee Report, at 13, 41, 42, ¶ 52, 180, 185; further, Bruce Broomhall, *Article 22*, in Triffterer, *supra* note 25, at 715-6.

58 *See* on this topic *supra* at 4.2.

59 R. v. Finta, Canada, [1989] 82 I.L.R. 425, Judgment (High Court of Justice); R. v. Finta, [1992] 98 I.L.R. 520, Judgment (Can. Ont. C.A.); R. v. Finta, [1994] 104 I.L.R. 284, Judgment (S.C.C.).

60 R. Wijngaarde & R.A. Hoost v. Desire Delano Bouterse, Court of Appeal of Amsterdam, (Nov. 20, 2000) 32 Neth. Y.B. Int'l L. 266; *id.* Appeal in Cassation in the Interests of the Law, Supreme Court of the Netherlands, (Sept. 18, 2001) 32 Neth. Y.B. Int'l L. 282.

61 Arbitragehof [Constitutional Court], decision no. 73/2005, Apr. 20, 2005*,* Oxford Reports on International Law in Domestic Courts, ILDC 9 (BE 2005) (Bel.).

of certain conduct and was prohibited by law, and the retrospective application of criminal law, which vested jurisdiction in national courts to prosecute in the future acts that were committed in the past and were already crimes according to the (international) law in force at the time they were committed. For them, the relevant Section of the Canadian criminal code was procedural in nature, and considerations of legality did not apply.[62] For other judges – and the majority of the Supreme Court eventually – however, the same provision was read as establishing in substance two new crimes, thus rendering necessary the recourse to innovative arguments, in order to overcome the legality obstacle.[63]

In *Bouterse,* however, there was no national law to that effect. Notwithstanding this fact, the Dutch judges were clearly divided on the matter. While the Amsterdam Court of Appeals accepted that once torture was classified as a crime under international law, the retrospective application of universal jurisdiction did not raise any issues of legality, being essentially a procedural matter,[64] the Supreme Court disagreed. In its view, the provision of universal jurisdiction by written law was apparently required under the principle of legality as applicable in national law.[65]

Finally, in the *Erdal* Case,[66] Turkey issued an arrest warrant against Mrs. Erdal, alleging that in her capacity as a member of a Marxist movement ('*Dev Sol*') she was involved in murder. After fleeing to Belgium, Turkey asked for her extradition under the 1977 European Convention on the Suppression of Terrorism.[67] Belgium refused her extradition under the political offence exception, but could not try her according to national law. Thus, a new national law was adopted, particularly in light of this situation, amending the Belgian Code of Criminal Procedure, which provided for universal jurisdiction, whereas its application was extended retroactively by further legislation.[68] In this background, the Belgian Constitutional Court ('Arbitagehof') ruled that the exercise of universal jurisdiction in question was of substantive criminal

62 R. v. Finta [1989], *supra* note 59 at 432-3, *per* Callaghan A.C.J.H.C ". . . there is clearly a difference between a retroactive and a retrospective application. A retroactive application takes an act or omission that was not previously criminal, and retroactively deems that act or omission to be criminal as at a later date. A retrospective statute, on the other hand, does not create new offences. Rather, as in this case, it merely operates to retrospectively give Canadian courts jurisdiction over criminal offences committed outside of Canada"; R. v. Finta, [1992], *supra* note 59 at 571, 574-5, *per* Tarnopolsky J.A. and at 531 Dubin C.J.O, the other dissenting judge in the 5-member Court, dissenting on the point, stated that "In my opinion, that subsection does not create two new offences, ... (Section 7.71) provides a mechanism for persons to be convicted in Canada for violating the *Criminal Code* of Canada for acts or omissions committed abroad, if those acts or omissions are deemed to have been committed in Canada and thus subject to the *Criminal Code* of Canada"; R. v. Finta, [1994], *supra* note 59 at 303, *per* LaForest J. "In his [Callaghan's] view, s. 7(3.71) is of a procedural nature and does not create new offences, but merely confers retrospective and extraterritorial jurisdiction to Canadian courts over acts that would have been offences under Canadian law at the time of their occurrence if they had taken place in Canada, so long as those acts constitute war crimes or crimes against humanity" and at 304-308 (*per* LaForest J.), considering the relevant requirement in the national law as clearly jurisdictional.

63 R. v. Finta, [1994], *supra* note 59 at 399-402, *per* Cory J., where the majority accepted that the relevant part of the Criminal Code created two new offences, a crime against humanity and a war crime, but considered their application not to be barred by the principle of legality on the basis that, first, such activities were already criminalized at the time they were committed, and in the alternative, quoting Kelsen, that in cases of conflict between two postulates of justice, the higher one prevails – in this case, the need to punish World War II criminals overruled the "rather relative rule of ex post facto" laws. Note also the comments by Irwin Cotler, *R. v. Finta*, 90 Am. J. Int'l L. 460, 463-4 (1996); W. Schabas, *Canadian Implementing Legislation for the Rome Statute*, 3 Yearbook Int'l Humanitarian L. 337, 339-340 (2000), who explained that in *Finta*, the Supreme Court of Canada "seemed to concede the argument that prosecution of crimes against humanity committed in 1944 was indeed a form of retroactive criminality, albeit an acceptable one."

64 Bouterse, *supra* note 60 at ¶ 6.3-6.4.

65 *Id.,* Appeal in Cassation in the Interests of the Law, Supreme Court, 18 September 2001, Institute's Collection No. 5255, 32 Neth. Y.B. Int'l L. 282, 292-3, ¶ 4.1-4.4. Further, Bouterse, *per* Zegveld, *supra* note 60, at 105-8, particularly at 106, "The Supreme Court's determination with regard to both arguments seems to be based on the assumption that the national principle of legality is equally applicable to punishability and jurisdiction."

66 Erdal case, supra note 61.

67 European Convention on the Suppression of Terrorism, Jan. 27, 1977, 90 E.T.S. 3.

68 Erdal case, *supra* note 61, at ¶ F5.

law nature and thus fell within the scope of application of the principle of legality. As such, universal jurisdiction could not be retrospectively applied for these alleged crimes.[69]

These cases, however, do not seem to lend themselves to easy conclusions for the purposes of customary law and their transposition to the ICC context for the following reasons.

First, as mentioned also above, the rule under examination in these cases was not that of territorial jurisdiction, but rather national variables of universal jurisdiction. This distinction appears to have played a significant role, since in international law as it stands at present, contrary to territorial jurisdiction, universal jurisdiction is said to play a complementary/auxiliary role for the prosecution of certain international crimes and require explicit authorization by national law.[70] Upon closer scrutiny, it would seem that national courts are inclined to adopt a stricter stance when it comes to universal jurisdiction for a number of reasons pertaining also to the rights of the accused.[71]

Secondly, national-procedural issues were also influential in the final determination of these cases. Thus, for example, in *Finta*, the classification of a certain requirement as procedural or substantive was important because of the division of competences in the Canadian criminal procedure between the roles of the judge and the jury, where questions of jurisdiction proper should be decided exclusively by the judge. The answer therefore to the question of whether an element was jurisdictional or substantive played an important role in determining on appeal whether a national judge erred materially when he asked the jury to decide the application of a certain issue, which would otherwise need to be decided exclusively by him.[72]

69 Erdal case, *supra* note 61, at ¶ B7. In that case, the key issue was whether the retroactive application of laws extending the *ratione loci* jurisdiction of domestic criminal laws to crimes committed abroad was lawful. As the Constitutional Court of Belgium explained, the new law, which extended retrospectively the criminal jurisdiction of the Belgian courts for certain terrorist acts committed in the past extraterritorially, provided the legal basis for prosecution in Belgium ("donne une base légale à une poursuite exercée en Belgique") and should accordingly be considered as a provision of substantive criminal law ("Par conséquent, la loi du 13 mars 2003 doit être considérée comme une disposition de droit pénal matériel") which was therefore to be interpreted in accordance with the principle of legality and in particular the principle of non-retroactivity of criminal law. As Rapporteur Cedric Ryngaert noted in his analysis of this ruling, this decision of the Belgian Constitutional Court "finally put to rest a long-standing controversy in Belgian law concerning the question of whether laws that extended the scope *ratio loci* of crimes already listed in the Penal Code were laws of procedure/competence or substantive laws. The court held these laws to be substantive in that they created a legal basis for prosecution in Belgium, and that they therefore could not be applied retroactively" *id.* at ¶ A1.

70 Institute of Int'l Law, *Universal Criminal Jurisdiction with Respect to the Crime of Genocide, Crimes against Humanity and War Crimes*, Resolution, Seventh Commission, Session de Cracovie, 71-II Annuaire IDI 297 (2006) (Rapporteur: C. Tomuschat), "*Recalling* that all States bear primary responsibility for effectively prosecuting the international crimes committed within their jurisdiction or by persons under their control; . . .; *Noting* that universal jurisdiction is an additional effective means to prevent impunity for international crimes"; from the discussions in the Commission, note particularly the position of Orrega Vicuña, *id.* at 212-213 who explained that universal jurisdiction was "the most exceptional title to jurisdiction and only operated in the absence of other recognised grounds", a form of "last resort" jurisdiction. In his view, "a national judge needed express authorisation under national law in order to exercise universal jurisdiction"; but note also the view of Santiago Torrez Bernández, *id.* at 229-230, who accepted the complementary nature of universal jurisdiction, while rejecting the endorsement of a fixed hierarchy with the other rules of jurisdiction.

71 The problem is described clearly, insofar as the differentiation in legal treatment is concerned, by Harmen van der Wilt, *Equal Standards? On the dialectics between National Jurisdictions and the International Criminal Court*, 8 J. Int'l Crim. Just. 229, 259 (2008); More critically, from the point of view of the rights of the accused and the principle *ne bis in idem*, George Fletcher, *Against Universal Jurisdiction*, 1 J. Int'l Crim. Just. 580, 582-4 (2003); as regards the general argument made frequently in cases of extraterritorial jurisdiction, that such jurisdictional assertions are prejudicial to the rights of the defense in terms of, e.g. language, collection of evidence, witness examination etc., courts have generally been unsympathetic. *See* Yousef v. U.S., 327 F.3d 56, 112 (2nd Circ. 2003), where such claims were dismissed in the absence of specific allegations; Further, Sawoniuk v. United Kingdom, App. No. 63716/00, 2001-III Eur. Ct. H.R. (2001), where the same argument under Article 6 Eur. Conv. H. R. was dismissed as the relevant allegations were considered to be manifestly unfounded.

72 Canadian Criminal Code, § 7(3.71) as then in force, read in part: "Notwithstanding anything in this Act or any other Act, every person who, either before or after the coming into force of this subsection, commits an act or omission outside Canada that constitutes a war crime or a crime against humanity and that, if committed in Canada, would constitute an offence against the laws of Canada in force at the time of the act or omission shall be deemed to commit that act or omission in Canada at that time, if, ... "; R. v. Finta, [1992], *supra* note 59, at 526, 528-9. The critical issue was that, in the opinion of the trial judge, the element of the suspect having committed a war crime or a crime against humanity meant that the exercise of jurisdiction by Canadian Courts under this act was dependent upon a prior finding of guilt for the commission of a war crime or crime against humanity. Thus the trial judge determined that this finding should be reached properly on the basis of proof beyond reasonable doubt by a jury following his directions, even if it is a jurisdictional precondition and as such amenable only to a decision by the judge. The trial judge considered this solution more appropriate, as "these are findings of fact that relate to his very guilt or innocence, not to some technical question as to the territorial jurisdiction of this court as opposed to some other court"; further, R. v. Finta, [1994], *supra* note 59, at 310-311, *per* LaForest J., dissenting.

Furthermore, it would seem that in most of these cases, emphasis was placed on the national interpretation of the principle of legality, rather than its international dimension. In this respect, there are important differences, duly noted in the literature,[73] and case-law,[74] not least of which is that "*nullum crimen nulla poena sine lege* as a general principle of law encompasses only two requirements, namely the prohibition of retroactive laws (*lex praevia*) and the specificity of criminal laws […] (*lex certa*)."[75] The Dutch Supreme Court in *Bouterse*, for example, demonstrated a particularly close attachment to the national principle of legality, implicitly refusing to accept the view that universal jurisdiction could be exercised as long as it was provided for in customary international law but not in national law.[76]

Even in cases of universal jurisdiction, however, the position is not uniform. In the United Kingdom, for example, the War Crimes Act 1991 provided for universal jurisdiction.[77]

Additionally, from the point of view of international human rights law, decisions of regional human rights courts could be construed against reading the Court's provision on jurisdiction under the principle of legality. As it will be shown in detail below,[78] these courts seem to generally consider claims of jurisdiction under the right to a fair trial or a justified deprivation of liberty, rather than in light of the strict principle of legality. In this context, the European Court of Human Rights has explained that "[i]f a tribunal does not have jurisdiction to try a defendant, in accordance with the provisions applicable under domestic law, it is not "established by law" within the meaning of Article 6 §1";[79] considerations of foreseeability and accessibility of national law on jurisdiction and article 7 ECHR have not been influential in the determination

73 For the 'qualified' aspect of legality in international criminal law, Cassese, *supra* note 49 at 41; further, Mahmoud Ch. Bassiouni, *Principles of Legality in International and Comparative Criminal Law,* in 1 International Criminal Law 88 (3rd ed. 2008) (Vol. I), "the principles of legality in international criminal law are different from their counterparts in the national legal systems with respect to their standards and application. They are necessarily *sui generis* . . . . It is this writer's conclusion that, ... , the most appropriate articulation of international criminal law's counterpart to *nullum crimen sine lege* is *nullum crimen sine jure*"; Leila Sadat, The ICC and the Transformation of Transnational Law 181-2 (2002) referring to the looser view of specificity in ICL legality, due to the acceptance of customary law; Broomhall, *supra* note 57, at 717-720; Hector Olàsolo, *A Note on the Evolution of the Principle of Legality in International Criminal Law*, 18 Crim. L. Forum 301, 303 (2007).

74 Prosecutor v. Delalic, Case No. IT-96-21, Judgment, ¶ 405 (Nov. 16, 1998), "It could be postulated therefore, that the principles of legality in international criminal law are different from their related national legal systems with respect to their application and standards. They appear to be distinctive, in the obvious objective of maintaining a balance between the preservation of justice and fairness towards the accused and taking into account the preservation of world order. To this end, the affected State or States must take into account the following factors, inter alia: the nature of international law; the absence of international legislative policies and standards; the ad hoc processes of technical drafting; and the basic assumption that international criminal law norms will be embodied into the national criminal law of the various States"; further, Fabiàn O. Raimondo, General Principles of Law in the Decisions of International Criminal Courts and Tribunals 111-114 (2007).

75 Raimondo, *supra* note 74, at 108. The author reaches that conclusion as in his view "these are the only two requirements of the principle *nullum crimen nulla poena sine lege* common to the two main legal families of the world"; further, *id.* at 107 "it should be noted that in the Common Law legal family *lex scripta* is not a formal requirement of the *nullum crimen nulla poena sine lege* principle"; *id.* at 108 "While the prohibition of recourse to analogy *in malam partem* is characteristic of the national legal systems of the Romano-Germanic legal family, it is not distinctive of those national legal systems in which judges have the power to create law."

76 Bouterse, *supra* note 60 at 286-292.

77 Entirely indicatively, for a national perspective, when the United Kingdom adopted the 1991 War Crimes Act, giving jurisdiction to its courts for the trial of crimes committed during the Second World War, there were voices alleging that this constituted retroactive criminalization, in violation of the principle of legality; Rosalyn Higgins, *Time and the Law: International Perspective on an Old Problem*, 46 Int'l Comp. L. Q. 501, 509 (1997). Higgins was adamant in rejecting such accusations: "I am, of course, aware that in the debates in the House of Lords several of the United Kingdom's most distinguished judges referred to this as a proposal for retrospective penal legislation. With all respect, this clearly is not so, in the sense that all the (narrowly defined) offences were manifestly unlawful as war crimes, throughout 1939-1945. What one *did* have in the 1991 Act, however, was a tardy assertion under English law of a jurisdiction already permitted to the United Kingdom under international law, for the purpose of trying offences known to have been offences at the time of their commission. One may or may not think that desirable—but it is certainly *not* a retrospective application of criminal law.[emphasis in the original]"; for the debate in the United Kingdom between those favoring a distinction between jurisdiction and substantive law as far as legality is concerned, and those dismissing it, A.T. Richardson, *War Crimes Act 1991*, 55 Modern L. Rev. 73, 76-78 (1992); Further, Christopher Greenwood, *The United Kingdom War Crimes Act 1991*, *in* Essays on War in International Law 435-455 (2006); Sawoniuk v. United Kingdom, *supra* note 71. The Act was applied in the case of Antony Sawoniuk, born in Belarus, who committed crimes in Poland against Jews. He was convicted by the English courts for murder and sentenced to life imprisonment. His application to the European Court of Human Rights, alleging also violations of his right to a fair trial, *inter alia* because of the great time distance between his trial and the time of commission of the offences, was dismissed as inadmissible; the European Court emphasized particularly that the burden of proof was placed upon the Prosecution and it was satisfied as to the proper conduct of the proceedings.

78 *See infra* Part 5.5.3.

79 Jorgic v. Germany, App. No. 74613/01, Eur. Ct. H.R. ¶ 64 (July 12, 2007), para. 64.

of these issues. As long as the basic organizational framework is laid down by law, human rights monitoring organs allow a very wide margin of interpretation to national judges.[80]

In any event, article 12(2)(a) is a provision on territorial jurisdiction, and therefore should probably be best considered as a procedural provision, rather than one of substantive law, describing an unlawful form of conduct. While the legal nature of the provision does not appear to constitute a very clear yardstick,[81] it is suggested that in the case of article 12(2)(a) the principle of legality should not be applied, since the criminalization of an activity is an entirely separate question to its prosecution.[82]

In conclusion, the position is assumed in this dissertation that the principle of legality in its different manifestations in articles 22-24 is not applicable in the interpretation and application of article 12(2)(a) of the Rome Statute. As such, the emphasis of the ICC principle of legality seems to be on the conduct as described in the Rome Statute's substantive provisions and its progressive development,[83] rather than on the territorial parameter of the Court's jurisdiction. Moreover, from the point of view of the customary law principle of legality, the type of jurisdiction in question (territorial, universal) appears to have influenced state practice.

In the absence of a decision by the Court to that effect and taking into account the hierarchy established under article 21 ICC Statute, this work will attempt an analysis of certain aspects of article 12(2)(a) on the understanding that the principle of legality is not appropriate for the interpretation of this provision.

4.2.2.3. / INTERPRETATION OF THE ROME STATUTE IN ACCORDANCE WITH THE LEGAL NATURE OF THE PROVISION?

In the literature it has been frequently underlined that the Rome Statute is a unique international instrument, in that it combines in a single text the constitution of an international organisation, a criminal code and a

80 In detail, *infra* Part 5.5.3.

81 *See* the next section on this issue.

82 In that direction, Raul C. Pangalangan, *Article 24*, in Triffterer, *supra* note 25, at 736; On the same topic, Bouterse, *supra* note 60, at 107, per L. Zegveld; *Id.* at ¶ 5.7.7, J. Dugard Opinion to the Amsterdam Court of Appeals (July 7, 2000), where Professor Dugard mentioned with regard to the principle *aut dedere aut judicare* of the Torture Convention that this obligation "is procedural and its extension to cover an act of torture committed before 1989 in terms of a multilateral extradition agreement . . . . does not offend the rule of legality any more that does the application of a bilateral extradition treaty that entered into force in 1989 to a crime committed in 1982"; Eric S. Kobrick, *Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction over International Crimes*, 87 Colum. L. Rev. 1515, 1524-35 (1987), for the possibility of applying universal jurisdiction retrospectively, once an international crime has been codified in national statute and the tension between the requirement of a criminal prescription in national statute and its provision in customary law; *contra*, Julian J. E. Schutte, *Enforcement Measures in International Criminal Law*, 52 Revue Int'l de Droit Pénal 441, 451 (1981), "In my opinion, provisions on jurisdiction belong to the domain of substantive criminal law, since they determine the punishability and prosecutability of offenders, so that giving a retroactive effect to those provisions would violate the principle *nullum poena sine lege praevia*"; Robert Kolb, Droit International Pénal 246 (Helbing 2008), distinguishing between material and organic legality with reference also to article 24 ICC Statute; for a similar perspective from the point of view of extradition law and the retroactive application of extradition treaties, a well-known phenomenon since the 1800s, 5 Jan H.W. Verzijl, International Law in Historical Perspective 327-8 (Leiden 1972), with examples from the relevant case-law of the U.S. and French courts; International Criminal Law in the Netherlands 92 (Albert H.J.Swart & André H. Klip eds. 1997); Bouterse, *supra* note 60, at 108, per L. Zegveld; M.C. Bassiouni, International Extradition, United States Law and Practice 748 (5th ed. 2007); *see* further from classic law of treaties, Vienna Convention, *supra* note 28, at art. 28, which prohibits the retroactive application of treaties, "unless a different intention appears from the treaty or is otherwise established"; further, Frédéric Dopagne, *Convention de Vienne de 1969 – Article 28 – Non-rétroactivité des Traités*, *in* 2 Les Conventions de Vienne sur le Droit des Traités, Commentaire Article par Article 1181-2 (Olivier Corten & Pierre Klein dir. 2006); Anthony Aust, Modern Treaty Law and Practice 176 (2nd ed. 2007); Adrian Chua & Rohan Hardcastle, *Retroactive Application of Treaties Revisited: Bosnia Herzegovina v. Yugoslavia*, 44 Neth. Int'l L. Rev. 414, 415(1997).

83 This seems to be the position of at least one Trial Chamber of the ICTY. Prosecutor v. Hadzihasanovic, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, ¶ 62 (Nov. 12, 2002); Mohamed Shahabudeen, *Does the Principle of Legality Stand in the Way of Progressive Development of Law,* 2 J. Int'l Crim. Just. 1007, 1010 (2004), reads this statement to the effect that "provided that the acts alleged bore the fundamental criminality of the crime charged, it does not appear to be necessary to show that, at the time at which they were done, they exhibited every detail of that crime"; further interesting perspectives are offered by Catenacci, *supra* note 49, at 91-94, discussing whether the beneficiaries of legality are persons or states parties; Sadat, *supra* note 73, at 183 considers that the principle of legality in the ICC Statute has "a dualistic role, serving as both a constitutional directive to the Court's various organs regarding their respective roles, as well as shielding the accused from retrospective prosecution or punishment."

code of criminal procedure.[84] As such, it is suggested that each provision should be interpreted by laying emphasis on different rules of interpretation drawn from the Vienna Convention on the Law of Treaties and the Statute, taking into account the provision's specific legal nature, as a substantive criminal law provision, a criminal procedure rule or a provision regarding the constitution of the Court.[85] Thus, for example, rules relating to the organisation of the Court would be arguably better addressed through a more teleological interpretation, in keeping with what appears to be a [main] trend in international law jurisprudence,[86] which emphasizes the 'special character' of the organisation's constitution vis-à-vis other international treaties and the need to ensure its effectiveness in the face of novel legal issues. On the other hand, substantive criminal law rules would be more appropriately approached with due respect to the principle of legality and the rule of strict interpretation.[87] The inherent danger in this exercise would be to err in the classification of the provisions, the exact nature and function of which may not be always manifestly distinctive[88] or, in any event, may be subjected to different (nationally inspired) perspectives. Therefore, one may construe for example the Statute's provision on territorial jurisdiction to constitute part and parcel of the constitution of the Court or even one of criminal procedure,[89] and therefore to be more suitable perhaps for teleological interpretation. Others, however, may actually consider it as a substantive criminal law provision and subject to interpretation under the principle of legality.[90] Additionally, the multiple roles, which provisions on territorial jurisdiction in general and article 12(2)(a) in particular are expected to perform in the context of any criminal codification, do not clarify the situation.[91]

These primarily theoretical concerns stem from an apparent desire to classify and thus render more foreseeable the means (and outcomes) of an interpretative process. The Court, however, does not seem to adhere to any rigid standard of distinction between the rules of the Rome Statute and their respective content or their classification as procedural, substantive or organizational. Accordingly, although the present author subscribes to the view that article 12(2)(a) should be best seen as a procedural/constitutional provision in the Court's system, the issue of the precise legal nature of this provision will not be awarded decisive importance in the present analysis.

84 Pellet, *supra* note 25, at 1054-1055; Verhoeven, *supra* note 25, at 15, distinguishing between substantial, procedural and organisational provisions of the Statute; Mahnoush H. Arsanjani & William M.Reisman, The Law-in-Action of the International Criminal Court, 99 Am. J. Int'l L. 385, 389 (2005); note also the distinction between the amendment procedures provided for in articles 121 and 122 of the Statute, and in particular the more 'flexible' mechanism – as to the 7-year time limit at least – reserved in article 122 for provisions "of an exclusively institutional nature".

85 In that direction, Verhoeven, *supra* note 25, at 15; Archbold, International Criminal Courts – Practice, Procedure and Evidence 155 (K.A.A. Khan et al. eds. 2005), "As with other international (and domestic) legal instruments, a varying degree of flexibility is available to judges when interpreting different Articles of the Statute or applicable provision of the Rules of Procedure and Evidence, depending upon the nature of the Article or rule, its drafting, and the problem encountered in a particular case", writing on the experience of the ad hoc tribunals).

86 Entirely indicatively, Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. Rep. 66, 74-75, ¶ 19 (July 8, 1996); *id.* at 148, Judge Weeramantry's Dissenting Opinion; From the literature, with extensive analysis of the case-law, Tetsuo Sato, Evolving Constitutions of International Organisations 39-155 (1996); Henry G. Schermers and Niels M. Blokker, International Institutional Law, Unity within Diversity 840-845 (4th ed. 2003); C.F. Amerasinghe, Principles of the institutional law of international organizations 45-49 (2nd ed. 2005); Jan Klabbers, An Introduction to International Institutional Law 86-90 (2nd ed. 2009); From earlier studies, Denys Simon, L'interpretation judiciaire des traités d'organisations internationales (1981); it should be noted that, notwithstanding certain rulings – particularly of the I.C.J. – to that direction, most of the authors referred to here seem to conclude that, although international courts 'are in the habit', as Klabbers put it, *id*. at 87, of following this approach, they nevertheless do not hesitate to mingle different canons of interpretation to achieve their desired result and that in reality "there is no fundamental difference between the means employed for the interpretation of constitutions and those for the interpretation of ordinary treaties", as stated by Schermers & Blokker, *id*. at 845-846; see also Amerasinghe, *id*. at 33, 59-61, with further references.

87 On this matter generally, Boot, *supra* note 49, at 365.

88 Arguably, the provisions which have been already identified in article 122 of the Statute as "exclusively institutional" should be authentically considered as such and interpreted accordingly.

89 For this classification, Pellet, *supra* note 25, at 1055.

90 In detail, *infra* Part 4.2.2.2. particularly as regards the Erdal case.

91 Träskman, *supra* note 1, at 511.

4.3. / CONCLUSION

In conclusion, the International Criminal Court is the key – judicial – organ of an international organisation created on the basis of the Rome Statute. As such, a certain degree of eclecticism is to be expected in its methods of judicial interpretation. This is hardly a novel or even troubling prospect in the field. As for the novelty, international organizations practice indicates that the desired result often underpins the selection of the means of interpretation.[92]

With regard to the 'troubling' aspect of such fluctuation, article 12(2)(a) ICC Statute is a provision difficult to interpret. Similarly to other provisions in the Statute (e.g. on the state referral regime, the jurisdiction and admissibility of the case, and state cooperation), it presents complex legal issues of both criminal and public international law. As a result, these provisions bring to the forefront conflicts between state interests, usually camouflaged as claims of sovereignty, and individual interests, be they of the defence or of the victims. In order to effectively address such complicated and original issues, it is only reasonable that the Court would retain for itself an arsenal of interpretative ammunition as diverse and flexible as possible,[93] considering that, absent a Security Council referral, its effective operation depends on the formal (ratification) and actual (co-operation) consent of States.[94]

How should one approach therefore the issue of interpretation of article 12(2)(a)? The proponents for a restrictive interpretation would make a convincing argument. From this perspective, the Court should be 'extra cautious' when interpreting the provisions on admissibility and jurisdiction. It should adopt a restrictive approach to their interpretation for a number of reasons.[95] First, the drafters, through the meticulous treatment of the documents regulating the operation of the Court, are said to have left "as little opportunity as possible for later judicial interpretation", thus demonstrating their intention in that direction.[96] Secondly, they underline the danger that a "contextual and policy-oriented hermeneutic" may violate the legality

92 Schermers & Blokker, *supra* note 86, at 871; Sato, *supra* note 85, at 154-155, who concludes after an extensive review of the I.C.J.'s case-law, that, "[t]he Court, under the guiding principle of promoting the effectiveness of international organizations, applied either the teleological approach, or the textual approach, whenever the occasion requires"; for a similar perspective on the ad hoc tribunals, Archbold, *supra* note 85, at 155, with further references to the case-law; from the jurisprudence, Prosecutor v. Delalic, Case No. IT-96-21, Judgment, ¶ 158-170 (Nov. 16, 1998).

93 Note however that, notwithstanding this plethora of interpretative instruments at the disposal of the Court, in one of its earliest rulings the Appeals Chamber has demonstrated that it is quite capable of entirely sidestepping an issue, when it deems it appropriate to do so. Observe in this conjunction the treatment of the issue of article 17(1)(d), concerning the criterion of gravity of the offence in the admissibility of a case, as addressed by the Court in the Situation in Dem. Rep. Congo, Case No. ICC-04-01-169, *Judgment on the Prosecutor's Appeal against the decision of the Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58",* ¶ 36 (July 13, 2006) (hereinafter the Lubanga Arrest Warrant Appeal) and the interpretative approach of the Court. It is perhaps interesting to note that, while the Court ruled in that case that the three-prong test produced by the Pre-Trial Chamber for assessing the admissibility of a case was erroneous, it did not explain exactly what Article 17(1)(d) and gravity in this provision means, how it should be approached and consequently whether the case was admissible, apparently in order to avoid a pre-determination of the issue in proceedings without the participation of the suspect.

94 Ph. Kirsch, *The Role of the International Criminal Court in Enforcing International Criminal Law*, *in* International Law, Classic and Contemporary Readings 242 (Charlotte Ku & Paul Francis Diehl eds. 2009), "Co-operation is absolutely crucial. . . . . What States wanted when they created the ICC was a strong judicial institution, but not an institution that had at its disposal the normal tools of any national court. The ICC has no army. The ICC has no police. That's what States wanted, and – having wanted that system – now State need to cooperate with the Court to ensure that the system works"; Further, Eric David, *La Cour Pénale Internationale*, 313 Recueil des Cours de l' Academie de Droit International 325, 358 (2005).

95 Arsanjani & Reisman, *supra* note 84, at 385. The authors deal in their article mostly with admissibility, it is submitted that the same concerns / arguments could be used mutatis mutandis for jurisdiction; Benzing, *supra* note 43, at 594, for the relationship between jurisdiction and admissibility.

96 Arsanjani and Reisman, *supra* note 84, at 389; And, one might add, as Judge Hunt has duly noted, the international community's "unfortunate mistrust" to the ICC Judges. Hunt, *supra* note 15, at 61; A. Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections,* 10 Eur. J. Int'l L. 144, 163 (1999); Roger Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Law Court and the Elements of Offences*, 12 Crim. L. Forum 291, 298, n. 24 (2001), who underscores this conclusion with reference to the decision of the Conference that the Elements of Crimes be adopted by the Assembly of States Parties and not by the Court, in order to "satisfy a small minority of states that wanted to keep the Court on short leash"; The same point is made by Pellet, *supra* note 25, at 1061; David, *supra* note 94, at 339, 348.

principle and the non-retroactivity of criminal law.[97] Third, due to the application of article 10 of the Statute,[98] whose last phrase, "for purposes other than this Statute", "…insulates at least Part 2 from any further development of international law; hence it substantially narrows the latitude for interpretation."[99] This approach is said to conform with the objects and purposes of the Statute in general and the principle of complementarity in particular.

Although these arguments are certainly not without some merit, their validity remains to be tested. In any event, one could always meet such arguments by countering, first, that the intention of the drafters is to be deduced primarily from the text of the treaty. As such, when approaching a particular provision, it is important to specify how that intent manifested itself in its wording,[100] rather than allude to the overall intent surrounding the circumstances of conclusion of a series of international agreements.[101] Therefore, should a provision be drafted in such a manner, so as to leave certain leeway for extensive judicial interpretation, notwithstanding the 128 articles of the Statute, 225 rules of procedure and evidence, 126 regulations of the Court and 50 pages of Elements of Crimes, the adoption of which required the agreement of all states parties (and even non-Parties at the Rome Conference) to one or another degree,[102] one would probably be entitled to legitimately presume that, if the drafters wished to further curtail the Court's authority in this respect, they would have explicitly done so.[103]

Secondly, as the Statute itself provides, the principle of legality is applicable with regard to the definition of the crimes.[104] Taking into account the preceding analysis, it would seem that there is sufficient clarity in the wording of the Statute and the work of authorities to accept as a tentative conclusion, in the absence of a final ruling by the Court, that the Court's territorial jurisdiction under article 12(2)(a) is not to be subjected to a strict interpretation under the principle of legality, whose application seems to be restricted to issues concerning the definitions of the crimes under the Statute.[105]

Furthermore, it does seem that, while the original – external – purpose of article 10 "is to ensure that existing or developing law is not 'limited' or 'prejudiced' by the Statute's provisions;"[106] its wording as such

97 Arsanjani & Reisman, *supra* note 84, at 389; Further, *infra*, Part 4.2.2.2.

98 Article 10 reads in whole "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute." Article 10 is primarily considered as a provision aimed at avoiding any influence on the development of customary law by the Statute's provisions. The comment made by the Pre-Trial Chamber in the *Al-Bashir Arrest Warrant Decision, supra* note 23, at 45, ¶ 127 seems to point to that direction; there the Chamber seemed to imply that, although it was forced to apply the 'contextual element' of genocide, as it was included in the Elements of Crimes and heavily criticised in the literature ("the conduct for which the suspect is allegedly responsible, must have taken place in the context of a manifest pattern of similar conduct directed against the targeted group or must have had such a nature so as to itself effect, the total or partial destruction of the targeted group"), its obligation to follow the Elements should not be read as affecting the development of the definition of genocide in customary law.

99 Arsanjani & Reisman, *supra* note 84, at 390. The authors conclude; "While this limitation may not exclude interpretation involving the reasonable adaptation of a particular provision to specific circumstances, it appears, in our view, to be a far cry from a general license to engage in extensive interpretation of the Statute."

100 This appears to have been the choice made in any event by the International Law Commission, which noted in the Commentary on the Articles of the Law of Treaties, which later became the Vienna Convention, that "the text must be presumed to be the authentic expression of the intentions of the parties; and, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties." *Report of the International Law Commission to the General Assembly*, [1966] 2 Y.B. Int'l L. Comm'n 220, ¶ 11; for the ILC discussion on the doctrines of *volonté déclarée*, evidenced from the letter of the treaty, and *volonté réelle*, reverting to the intentions of the negotiators, Jean M. Sorel, *Article 31 – Convention de 1969*, *in* Corten & Klein, *supra* note 82, at 1297, 1301.

101 Such intent could arguably be used when examining preparatory works, as supplementary means of interpretation. *Supra,* Chapter 3.

102 *See* The Rome Staute, *supra* note 46, art. 51 (RPE), 52 (Regulations), and 9 (Elements) for the respective consent requirements.

103 For this line of reasoning on issues of admissibility, *see* Lubanga Arrest Warrant Appeal, *supra* note, at ¶ 79, where the Appeals Chamber, while refuting the position of the Pre-Trial Chamber that the 'gravity' criterion of article 17 excluded from the Court's reach every person, except the 'most senior perpetrators', added that "In addition, the Preamble to the Rome Statute mentions "most serious crimes" but not "most serious perpetrators". . . . Such language does not appear elsewhere in the Statute in relation to the category of perpetrators. Had the drafters of the Statute intended to limit its application to only the most senior leaders suspected of being most responsible, they could have done so expressly."

104 See *infra* Part 5.2.2.2. in detail.

105 The first case where this question arose was the Lubanga Confirmation Decision*, supra* note 16, ¶ 302-303 where the Pre-Trial Chamber ruled that the crimes charged were sufficiently defined in the Rome Statute; Further, Broomhall, *supra* note 57, at 719.

106 Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, Trial Chamber, ¶ 227 (Dec. 10 1998); Further, Arsanjani & Reisman, *supra* note 84, at 390; Mohammed Bennouna, *The Statute's Rules on Crimes and Existing or Developing International Law,* in Cassese, *supra* note 25, at 1101; O. Triffterer, *Article 10*, in Triffterer *supra* note 25, at 531-4.

may be seen also as having an 'internal' effect, insulating the provisions of the Statute from subsequent customary law developments.[107] Such an approach would, however, need to be viewed in the light of – and probably reconciled with – other provisions of the Statute and notably articles 21 (1) (b) and 21 (3) thereof on applicable law. In these circumstances, in light of the silence of the sources in article 21(1)(a) on the interpretation of article 12(2)(a), it is submitted that, when notions, such as territoriality, are included in the Statute but left entirely undefined, recourse to rules of customary law and general principles of law as they stand at the time that judgment is rendered, becomes imperative either as instruments of interpretation under article 31(3)(c) VCLT, employed to discern the exact meaning and application of such rules, or as sources of law.[108]

In addition, one could add that too restrictive an approach would arguably raise issues also under article 21 (3) of the same part of the Statute, to the extent that it mandates that the interpretation and application of the Court's applicable law must be consistent with internationally recognised human rights. As human rights norms are not static, but constantly evolving, an interpretation of Part 2 without considering subsequent evolutions in related customary law of norms in accordance with international human rights law would risk causing a conflict between the two provisions. Since article 21 (3) seems to be "of a *jus cogens* character, this guarantee plays, on the international level, a similar role as that of some constitutional guarantees in the internal legal orders,"[109] which would indicate that "[I]f various interpretations are possible, Article 21 (3) as interpreted in the light of Article 31 (3.c) VCLT obliges the Court to apply the interpretation that is in conformity with human rights standards."[110]

Last, but not least, a more expansive interpretation would arguably be more in line with the key purpose and object of the Statute, to ensure that "the most serious crimes of concern to the international community as a whole must not go unpunished,"[111] while enhancing its preventive or deterrent role, "which is a cornerstone of the creation of the International Criminal Court."[112]

This discussion may continue interminably, without too much practical effect, absent a clear determination by the Court in this respect.[113] Up to date, the interpretation of the preconditions on the exercise of the Court's jurisdiction and particularly the issue of territorial jurisdiction may hardly be said to have been at the forefront of the Court's jurisprudence. This surprising development[114] should be probably

107 Triffterer, *id*. at 536, "The formulation "for purposes other than this Statute" implies that for purposes of the Statute every admissible interpretation of any article or rule may limit or prejudice the applicability of other "existing or developing rules".

108 See *infra* Part 5.1.2.4.

109 Barboza, *supra* note 25, at 145.

110 Hafner & Binder, *supra* note 25, at 171; Similarly, Pellet, *supra* note 25, at 1079-1081, "Without doubt, Article 21 (3) of the Statute does not give the ICC express jurisdiction to declare null and void the totality of a treaty, or even one of its provisions, which is contrary to 'internationally recognised human rights', although this would be the effect of a breach of *jus cogens* under Article 53 of the Vienna Convention. Nevertheless, it creates a sort of international 'super-legality', by clearly authorising the Court to hold such a norm *ultra vires* and thus inapplicable"; *contra*, Verhoeven, *supra* note 25, at 15, "If Article 21 were to be construed as systematically giving primacy to so called human rights over the general rules governing the judicial function which have an *ordre public* character, it would be hardly reconcilable with the general practice of states".

111 The Rome Staute, *supra* note 46, Preamble, ¶ 4.

112 Lubanga Arrest Warrant Appeal, *supra* note 93, at ¶ 75.

113 To date, notwithstanding the Lubanga 'Jurisdictional' Appeal, the Court has rendered one other decision on jurisdiction in the Sudan situation, Situation in Darfur, Sudan, Case No. ICC-02/05, Decision on the Submissions Challenging Jurisdiction and Admissibility, 3 (Nov. 22, 2006), where the Pre-Trial Chamber I rejected the submissions of the Ad Hoc Counsel for the Defence for lack of procedural standing under article 19(2)(a) of the Statute; this ruling was confirmed in Situation in Darfur, Sudan,Case No. ICC-02/05-111-Corr., Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, ¶ 25 (Dec. 14, 2007); other issues of jurisdiction, unrelated to article 12(2)(a) have also arisen incidentally. Situation in Darfur, Sudan, Case No. **ICC-02/05-138 OA, OA2, OA3, Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 6 December 2007, ¶ 19 (June 18, 2008), where the Appeals Chamber rejected a request of the Office of Public Counsel for the Defence (OPCV), which required an indication of the appropriate procedure to be followed for participation in appeals proceedings of persons granted the status of victims, as well as persons whose status had yet to be determined by the competent PTC. The Appeals Chamber dismissed the request, on the grounds that "[**I]f the Appeals Chamber were to answer such a request it would have to assume the role of an advisory body which it considers to be beyond and outside the scope of its authority. The Request of the OPCV is therefore dismissed for lack of jurisdiction".

114 Eve La Haye, War Crimes in Internal Armed Conflicts 343 (2008) at 343.

attributed to the practice of 'self-referrals',[115] whereby "[t]he Prosecutor adopted the policy of inviting and welcoming voluntary referrals by territorial states as a first step in triggering the jurisdiction of the Court",[116] which seems to have minimised – if not made altogether redundant – any objections to the Court's jurisdiction, at least on the part of states.

Be that as it may, one should not lose sight of the fact that, ultimately, the International Criminal Court is a Court dedicated to the punishment of individual criminals for "the most serious crimes of concern to the international community as a whole."[117] As such, it would seem appropriate in this context to highlight the ICJ's approach in the *ILO Administrative Tribunal* Advisory Opinion; "The Court does not deny that the Administrative Tribunal is an international tribunal. However, the question submitted to the Tribunal was not a dispute between States. It was a controversy between UNESCO and one of its officials. The arguments, deduced from the sovereignty of States, which might have been invoked in favour of a restrictive interpretation of provisions governing the jurisdiction of a Tribunal adjudicating between States are not relevant in a situation in which a tribunal is called upon to adjudicate upon a complaint of an official against an international organization."[118]

If this is the situation before an international tribunal dealing with complaints of international civil servants against international organisations, it is submitted that this reasoning should apply *a fortiori* to issues concerning the jurisdiction of the International Criminal Court, in light of the overarchingly criminal nature of the function of the Court, relating to individual criminal responsibility and the gravity of the crimes involved. Even if one were to accept that state sovereignty argumentation retains in this context a certain degree of relevance, "[i]t would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be used as a shield against the reach of law and as a protection for those who trample underfoot the most elementary rights of humanity."[119]

Bearing in mind these preliminary observations, it becomes evident that the crucial 'guides' to the interpretation of this provision of the Statute are article 31 of the Vienna Convention, article 21(3) and the preparatory works of the Statute.[120] It is therefore these instruments that will guide the present attempt to elucidate the meaning of article 12(2)(a) of the Rome Statute. In performing this academic exercise, the words of the Trial Chamber in the *Katanga Confirmation* decision encapsulate perhaps an equally important duty; "[A]pplication of the Statute requires not only resorting to a group of norms by applying any of the possible meaning of these words in the Statute, but also requires excluding at least those interpretations of the Statute in which application would engender an asystematic opinio juris of unrelated norms."[121]

115 The thorny issue of self-referrals is extensively reviewed and criticised in the literature. Indicatively, Claus Kress, *"Self-referrals" and "Waivers of Complementarity": Some Considerations in Law and Policy*, 2 J. Int'l Crim. Just. 944 (2004); Paola Gaeta, *Is the Practice of "Self-Referrals" a Sound Start for the ICC?,* 2 J. Int'l Crim. Just. 949 (2004); Giorgio Gaja, *Issues of Admissibility in Cases of Self-Referrals*, in The International Criminal Court and National Jurisdictions 49 (Mauro Politi & Federica Gioia eds. 2008); W. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court,* 6 J. Int'l Crim. Just 731, 749, 753 (2008), who concludes on the basis of the DRC and Uganda situations that "Prosecutions of only one side in the conflict seem to be the price of the self-referral strategy of the Office of the Prosecutor"; comments thereto of Kenneth Roth, *Discussion – Court from the Lobby: an NGO View*, 6 J. Int'l Crim. Just 764-765; Mona Rishmawi, *The ICC viewed from the Office of the High Commissioner for Human Rights*, 6 J. Int'l Crim. Just 769, 775-776 (2008).

116 Office of the Prosecutor, *Report on the Activities Performed During the First Three Years (June 2003-June 2006)*, 7 (Sept. 12, 2006).

117 *See* The Rome Staute, *supra* note 46, at Preamble, ¶ 4

118 Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the UNESCO, Advisory Opinion of October 23rd, 1956 I.C.J. Rep. 77, 97.

119 Prosecutor v. Tadić, *supra* note 44, at ¶ 328; Critically, Alexander Zahar & Goran Sluiter, International Criminal Law 328 (Oxford Univ. Press 2008), "This is akin to a manifesto by a human-rights NGO."

120 This is of course without prejudice to specific interpretative directives contained in certain parts of the Court's documents, relating to very specific issues. As an example of such a guideline reference may be made to the Introduction of war crimes, in the Elements of Crimes, which provides in part that "the Elements of Crimes for war crimes under art. 8, paragraph 2, of the Statute, shall be interpreted within the established framework of international law of armed conflict, including as appropriate, the international law of armed conflict applicable to armed conflict at sea"; further, Knut Dörmann, Elements of War Crimes under the Rome Statute of the International Criminal Court 16 (2003); E. La Haye, *The Elaboration of the Elements of War Crimes*, in Lattanzi & Schabas, *supra* note 49, at 309-310.

121 Katanga Confirmation Decision, *supra* note 31, at ¶ 481. Of course, this approach begs the question of what exactly is the appropriate context for the interpretation of a given statutory norm. While the Appeals Chamber, in the 'authentic guide' paragraph mentioned above, considered as 'context' the relevant 'sub-sections and sections' of the law, this is somewhat confusing, since the Statute is divided in Parts, not sections and sub-sections.

CHAPTER 5 / 'THE CONDUCT IN QUESTION'

5.1. / INTRODUCTION

Having outlined in the previous chapters some of the main perspectives on the interpretation of the Statute in the Court's jurisprudence, the substantive analysis of article 12(2)(a) will be addressed next.

In doing so, the following chapters will examine possible extensions of the Court's territorial reach. In national criminal law such extensions are said to be achieved in many ways, such as through the '*localisation juridique*' of the criminal activity, by " 'stretching the elements of the offence, which in fact comes down to creating a new offence"[1] or, one might add, through the extension of the territorial scope of application of a criminal statute. In the context of the ICC Statute, a similar endeavor will be pursued here.

This exercise will be performed in two analytical units, in keeping with the structure of the provision. The first unit relates to the interpretation of 'the conduct in question', which will be developed in the next two chapters and will deal with the localization of criminal activity using objective territoriality (present Chapter) and the effects doctrine (next Chapter). The second unit relates to the analysis of the terms 'in the territory of [states parties]' and the territorial scope of application of the Statute, with emphasis on conditions of military occupation. This will be considered later on in this work, before offering certain concluding observations.

5.1.1. / THE PROBLEM – POST-ROME NEGOTIATIONS IN THE 2008-2009 AGGRESSION WORKING GROUP

Article 12(2)(a) provides for the Court's jurisdiction in cases of state referral or prosecutorial *proprio motu* action, when 'the conduct in question' occurs in state party territory. The meaning of this sentence is puzzling and may have important repercussions for the Court's future operation. The interpretation of this sentence and the use of localization rules of territorial jurisdiction under international law are the main issues to be explored here.

To illustrate the problem with a brief example from the literature, this work attempts to investigate how to legally address a situation, where the only connection between a war crime or crime against humanity and the Court is for example the fact that the missiles traversed state party air space, after their launch from a state not party's ship and prior to their detonation in another state not party's territory, resulting to thousands of civilian casualties there.[2]

The legal situation could be even more intriguing, where the main crime takes place in the territory of a state not party, whereas the acts of assistance, aiding, abetting, or preparatory acts take place within the territory of a state party. That would be the case when the funds (or the purchase of weapons) used to assist in the performance of crimes within the territory of states not parties are made available via Switzerland or Liechtenstein for example. In these cases, is the use of funds in such circumstances enough to assert the Court's jurisdiction under article 12(2)(a), on the basis of commission 'in whole or in part' and constituent elements,[3] so as to prosecute third state nationals on charges of war crimes, crimes against humanity or genocide committed within the territory of a state not party?

In these jurisdictionally challenging situations, what is the Court's reach under article 12(2)(a) ICC Statute?

1 Hein D. Wolswijk, *Locus Delicti and Criminal Jurisdiction,* 66 Neth. Int'l. L. Rev. 361, 380-1 (1999).

2 Markus Wagner, *The ICC and its Jurisdiction – Myths, Misperceptions and Realities*, 7 Max Planck U.N. Y.B. 409, 485 (2004); W. Schabas, The International Criminal Court, A Commentary on the Rome Statute 285 (2010); for the legal definition of transit state, *see* Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 1(u), 28 I.L.M. 493 (1989) (entered into force Nov. 11, 1990), which provides that a transit state, for that convention, is "a State through the territory of which illicit narcotic drugs, psychotropic substances and substances in Table I and Table II are being moved, which is neither the place of origin nor the place of ultimate destination thereof"; for another generally similar definition, Convention on the Safety of United Nations and Associated Personnel, art. 1(e), U.N. Doc A/49/742 (1994).

3 Such acts could of course be considered also as 'preparatory acts' necessary for the commission of the offence. On the issue, *see supra* Chapter 2.

From a policy perspective, it is easy to see why the need to ensure the Statute's effectiveness in the face of technological advancements in remote weapons delivery systems and electronic transactions would outweigh the risk of jurisdictional conflicts and complementarity complications; to accept the alternative would just leave too large a loophole in the Court's jurisdictional scheme and foster impunity.[4]

From a legal perspective, however, it is not difficult to anticipate a hearing on jurisdictional objections, where lawyers from around the world, depending largely on their national legal background, would be prepared to object and argue such issues on many levels, such as whether there is one crime or many separate crimes, depending on the mode of liability (i.e. whether the crime can be divided in individual parts on the basis of the connection of the alleged participants to the commission of the crime);[5] whether it is a conduct or result crime; whether there is a single, continuous crime or many instantaneous ones;[6] whether intent qualifies as a 'constituent element' for the commission of a crime; and so on.

It is evident that the Statute does not provide clear-cut solutions to these questions, if any at all.

Post-Rome negotiations show that states parties are not indifferent to such jurisdictional predicaments and their implications. In the November 2008 session of the Assembly of States Parties' Working Group on the Crime of Aggression, the question was raised for the first time (at least formally), since the adoption of the Rome Statute, as to whether the Court would have jurisdiction under article 12 (2) (a) of the Statute, in the case of aggression. As the Report states, "given that the conduct of a leader responsible for the crime of aggression would typically occur on the territory of the aggressor state, the question was raised whether the crime could also be considered to be committed whether its consequences were felt, namely the territory of the victim state."[7] When faced with this question, some delegations answered confidently that it did, others considered necessary further legislation on the matter, either through amendments in the Statute or in the Elements of the Crimes, while for other delegations more time was requested to consider the issue.[8]

The issue was revisited during the February 2009 session of the Working Group, where delegations felt the need to make suggestions, in order to clarify the scope of the provision.[9] It was suggested to add text, to the effect that "[i]t is understood that the notion of "conduct" in article 12, paragraph 2 (a) of the Statute encompasses both the conduct in question and its consequence."[10] Although there was broad support for this suggestion, the issue remained under discussion, in light of another, alternative proposal, which provided that "[i]t is understood that jurisdiction based on the territoriality principle relates both to the territory in which the conduct itself occurred and the territory in which its consequences occurred", which gathered significant support, although there were also delegations who took the view that the issue was best left for determination by the Court itself.[11] Finally, it is important to note that there were voices in earlier

4 Wagner, *supra* note 2, notes on the cross-border missile scenario that it is necessary, once there has been some effect in a state party's territory, that the Court would have territorial jurisdiction, "[A] different construction would lead to the absurd result that countries would aim for such acts to be conducted this way, relying exclusively on long-distance delivery systems".

5 A key issue here would be whether there is a 'different crime' for the purposes of assessing jurisdiction, depending on the mode of liability employed. *See* Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Adjourning the Hearing pursuant to Article 67(7)(c)(ii) of the Rome Statute, ¶ 26-27 (Mar. 3, 2009), where the Pre-Trial Chamber accepted that for the purposes of Article 61(7)(c)(ii), different modes of liability mean a 'different crime', as the differentiation of the modes affects the objective elements of the crime. Whether this ruling will apply also as regards jurisdiction under Article 12(2)(a) remains to be seen. Further on the notion on 'commission' in Article 58 of the Statute, *see* Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir, 10, ¶ 27 (Mar. 3, 2009).

6 This is an important question intertwined with issues of jurisdiction *ratione temporis*. Different Courts would arguably assume different positions/approaches to the matter. For example, Rosalyn Higgins, *Time and the Law: International Perspective on an Old Problem*, 46 Int'l Comp. L. Q. 501, 506-7 (1997), where Higgins has explained how, while the I.C.J. and the Eur. Ct. H.R. have been more willing than the Human Rights Committee to apply jurisdictional retrospectivity on the basis of acceptance of jurisdiction, on the other hand, the Eur. Ct. H.R and the Human Rights Committee have been bolder than the I.C.J. in accepting the continuing nature of acts or omissions of interest – and thus in effect extending retrospectively their jurisdiction.

7 Assembly of States Parties, *Report of the Special Working Group on the Crime of* Aggression, ICC-ASP/7/20, Annex III, ¶ 28, Seventh Session of the Assembly of States Parties (Nov. 14-22, 2008).

8 *Id*.

9 Assembly of States Parties, *Report of the Special Working Group on the Crime of Aggression*, ICC-ASP/7/SWGCA/2, ¶ 38-39, 7th Session of the Assembly of States Parties (Second Resumption) (Feb. 9-13 2009); Assembly of States Parties, *Informal Inter-sessional Meeting on the Crime of Aggression hosted by the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at the Princeton Club, New York, from 8 to 10 June 2009,* ICC-ASP/8/INF.2, ¶ 5, Non-Paper by the Chairman on the conditions for the exercise of jurisdiction.

10 Seventh Session (Second Resumption), *supra* note 9, at ¶ 38.

11 *Id*. at ¶ 39.

meetings of the Special Working Group, who underlined that article 30 of the Statute should also be consulted on the matter.[12]

Ultimately, the negotiators failed to reach a decision and this provision was not amended by the 2010 Review Conference. Thus, in the absence of legislative guidance, to paraphrase Gilbert, the following pages will attempt to identify and analyze the elements that may be used by the Court in its determination of how little of an international offence need take place or have effect in the territory of a state party to the ICC Statute under international law, before the Court can claim such territorial jurisdiction.[13]

5.1.2. / THE DOCTRINAL CONDITIONS

It seems therefore that the responsibility is vested in the Court to decide this issue through interpretation, particularly since additional legislation is not forthcoming. In this context, it will be shown in this chapter that two main interpretations are possible as regards the words 'the conduct in question'. From a stricter perspective, these words may be understood as 'conduct' alone, meaning that the Court may interpret article 12(2)(a) to the effect that it has jurisdiction only when the prohibited conduct (as opposed to the consequences) takes place within the territory of a state party. On the other hand, from a broader perspective, 'the conduct in question' may be construed as 'the crime(s) in question', which entails that the Court will have jurisdiction under article 12(2)(a) when any part of the prohibited conduct or its consequences are manifested in the territory of a state party.

While both possible outcomes will be fully explored, this chapter concludes that the second – broader – approach is more appropriate, in light of the Court's purpose and objects, its initial jurisprudence and the prevailing conditions during the drafting of this provision.

Having reached this interim conclusion, the remaining part of this chapter will then address the issue of localization of criminal activity and commission in part under localization techniques encountered in state practice.

This entire academic exercise will be premised on the certain important doctrinal conditions, which are outlined below.

5.1.2.1. / STATE TERRITORY AS CONNECTING LINK

The underlying principle behind the entire analysis is the understanding that under article 12(2)(a) of the Statute the substantial connecting link, as Mann would stress, between the criminal activity, on the one hand, and the exercise of jurisdiction, on the other, is the territory of a state party. Starting from this theoretical premise, although the terms objective territoriality or ubiquity will be used in accordance with the definitions in chapter 2, the main perspective will not be to rigidly adhere to specific labeling, but rather to treat all related incidences as formulations of the same phenomenon of 'qualified territoriality'.[14] In this spirit, the emphasis will be on the nexus of the crime to the territory in its entirety, rather than solely on account of the location of its beginning or its completion.

12 Seventh Session, *supra* note 7, at ¶ 28.

13 Geoff Gilbert, *Crimes sans frontières: Jurisdictional Problems in English Law*, 63 Brit. Y.B. Int'l. L. 415, 430 (1992).

14 *Id.*; as regards the ICC Statute, Stéphane Bourgon, *Jurisdiction Ratione Loci*, in The Rome Statute of the International Criminal Court: A Commentary, 559, 567 (Antonio Cassese et al. eds. 2002); Similarly, Wagner, *supra* note 2, at 485, seems to favour the view that, notwithstanding the theoretical distinction, what is actually required by the law is a state connection to the conduct in question.

5.1.2.2. / THE INHERENT POWER OF THE COURT TO DECIDE ON ITS JURISDICTION (COMPÉTENCE DE LA COMPÉTENCE/ KOMPETENZ KOMPETENZ)

The power of an international court or tribunal to examine objections to its jurisdiction, to decide on them and the limitations thereto has been addressed in recent international jurisprudence and scholarly writings.[15]

In the past, there was some discussion over the possibility of delimiting an arbitral tribunal's power to decide on its jurisdiction through what became known as a *clause contraire*, i.e. a clause providing that matters of jurisdiction will be decided by the two parties and not the tribunal itself.[16]

This possibility, closely connected with the ad hoc character of early arbitration tribunals, is considered particularly inappropriate for standing, permanent international courts. Today the *locus classicus* insofar as international criminal institutions are concerned is the ICTY Appeals Chamber's ruling in the *Tadić Jurisdictional Appeal*; "[I]t is true that this power (to determine the tribunal's own jurisdiction) can be limited by an express provision in the arbitration agreement or in the constituent instruments of standing tribunals, though the latter possibility is controversial, particularly where the limitation risks undermining the judicial character or the independence of the Tribunal. But it is absolutely clear that such a limitation, to the extent to which it is admissible, cannot be inferred without an express provision allowing for the waiver or the shrinking of such a well-entrenched principle of general international law."[17]

As far as the International Criminal Court is concerned, it is uncontroversial that the Court possesses the power to decide the outcome of disputes concerning its own jurisdiction.[18] The provision of article 19 (1) ICC Statute confirms expressly the Court's inherent power to decide any disputes concerning its jurisdiction; "The Court shall satisfy itself that it has jurisdiction in any case brought before it." It is therefore not necessary to embark upon a discussion similar to that engaged by the Appeals Chamber of the ICTY in the *Tadić Interlocutory Appeal*, as the ICC is not confronted with the key issue that troubled the ICTY and rendered necessary the recourse to the theory of the Tribunal's inherent powers, namely the lack of a clear provision in its Statute as regards the Tribunal's *kompetenz kompetenz*.[19]

In the ICC context, the Pre-Trial Chamber in the *Bemba Confirmation of Charges Decision* has made it clear that the power of the Court to define its jurisdiction exists independently of article 19. "The Chamber considers that, notwithstanding the language of article 19(1) of the Statute, any judicial body has the power to determine its own jurisdiction, even in the absence of an explicit reference to that effect. This is an

15 Indicatively, Paola Gaeta, *Inherent Powers of International Tribunals*, in Man's Inhumanity to Man: Essays of International Law in Honour of Antonio Cassese 353, 372 (Lal C. Vohrah et al. eds. 2003); Chester Brown, *The Inherent Powers of International Courts and Tribunals*, 76 Brit. Y.B. Int'l L. 195 (2006); Chittharanjan F. Amerasinghe, Jurisdiction of International Tribunals 121-163 (2003).

16 Amerasinghe, *supra* note 15 at 142-143.

17 Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 19 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); the argument of *compétence de la compétence* as a general principle of law is substantiated in Gaeta's study, *supra* note 15, at 367; Hazel Fox, *The Objection to Transfer of Criminal Jurisdiction to the UN Tribunal*, 46 Int'l Comp L. Q. 434, 435-6 (1997), for criticism against the Tadić approach to jurisdiction; Yusuf Aksar, Implementing International Humanitarian Law: From the Ad Hoc Tribunals to a Permanent International Criminal Court 36-37 (2004); further, Luigi Condorelli, *Jurisdictio et (dés)ordre judiciaire en droit international: quelques remarques au sujet de l'arrêt du 2 octobre 1995 de la Chambre d'appel du tribunal pénal international pour l'ex Yugoslavie dans l'affaire Tadić*, in Mélanges Valticos, Droit et Justice, 280, 285-6 (1999); for the proposition that this power is very important due to the decentralized character of the international system and the nature of each international judicial organ as 'une monade juridique', Pierre-Marie Martin, *La compétence de la compétence (à propos de l'arrêt Tadić, Tribunal pénal international, chambre d' appel, 2 octobre 1995*, 19e cahier Recueil Dalloz 157, 158 (1996); Salvatore Zappalà, Human Rights in International Criminal Proceedings 12-14 (2003).

18 Christopher K. Hall, *Article 19*, in Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article 640 (Otto Triffterer ed. 2nd ed. 2008); Robert Kolb, Droit International Pénal 248 (2008).

19 Tadić Interlocutory Appeal, *supra* note 17, at ¶ 18, "This power, known as the principle of "*Kompetenz-Kompetenz*" in German or "*la compétence de la compétence*" in French, is part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its "jurisdiction to determine its own jurisdiction." It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals, although this is often done [references omitted]".

essential element in the exercise by any judicial body of its functions. Such power is derived by the well-recognized principle of "la compétence de la compétence."[20]

It is therefore clear that under article 19(1), the Court's organs[21] are under a duty to examine whether the jurisdictional requirements are satisfied in any case/situation before them, starting as early as the request of the Prosecutor to open an investigation under articles 15 and 53,[22] or the examination of the requirements for the issuance of an arrest warrant under article 58 of the Statute, with due respect to the allocation of tasks among them according to the Statute.[23] In this context, the Appeals Chamber has made it clear that, while the examination of admissibility requirements at this stage is to be pursued only exceptionally by the Pre-Trial Chambers, on the contrary, the Statute imposes a duty upon them to satisfy themselves as to their jurisdiction.[24] The content of that duty was further elaborated upon by the Pre-Trial Chamber in the *Bemba Confirmation of Charges Decision*, where it was clarified that "The Chamber considers that the phrase "satisfy itself that it has jurisdiction" also 'implies' that the Court must 'attain the degree of certainty' that the jurisdictional parameters set out in the Statute have been met. Thus, the Chamber's determination as to whether it has jurisdiction over the case against Mr Jean-Pierre Bemba is certainly a prerequisite for the issuance of the present decision under article 61(7)(a) and (b) of the Statute."[25]

It becomes therefore evident that, in the absence of any specific provision in the Statute,[26] stripping the Court of its authority to decide on its jurisdiction and delegating this duty to another body, the ICC is vested with full authority to rule definitively on any matter pertaining to the different facets of its jurisdiction, including jurisdiction as regards territory.[27] This is an inherent power, in the sense of "an indispensable power of a court of law, an inseverable attribute of the judicial power."[28] Therefore, it is for the Court, and the Court alone, to authoritatively rule on whether article 12(2)(a) ICC Statute can be interpreted broadly so as to accept the Court's jurisdiction when a crime is committed in part in state party territory or has effects there.

20 Prosecutor v. Gombo*,* Case No. ICC-01/05-01/08, Decision Pursuant to Article 61 (7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 10, ¶ 23 (June 15, 2009) (hereinafter Bemba Confirmation of Charges Decision); for further examples and extensive discussion as regards other courts/tribunals, Brown, *supra* note 14, at 212-5.

21 Including, naturally, the Office of the Prosecutor when assessing whether or not to open an investigation.

The Rome Statute of the International Criminal Court, July 7, 1998, art. 34, 53 ¶ 1(a), 2187 U.N.T.S. 3 (entered into force July 1, 2002).

22 Situation in the Republic of Kenya, Case No. ICC-01/09-19, Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 17-18, ¶ 37-39 (Mar. 31, 2010) (hereinafter Kenya Authorization Decision). In that decision, the Pre-Trial Chamber, through a contextual and teleological interpretation of article 53(1) of the Statute, decided that the examination of whether the 'crime in question' fell within the Court's jurisdiction meant that the Court had to assess all parameters of its jurisdiction, as opposed to its jurisdiction *ratione materiae* alone.

23 Situation in Uganda, Case No. ICC-02/04-01/05, Decision on the Prosecutor's Application that the Pre-Trial chamber Disregard as Irrelevant the Submission Filed by the Registry on 5 December 2005, 14, ¶ 23 (Mar. 9, 2006).

24 Situation in Dem. Rep. Congo, Case No. ICC-04-01-169, Judgment on the Prosecutor's Appeal against the decision of the Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58," ¶ 51-52 (July 13, 2006) (hereinafter the Lubanga Arrest Warrant Appeal).

25 Bemba Confirmation of Charges Decision*, supra* note 20*,* at 10, ¶ 24, the Chamber affirmed its jurisdiction on the premise that nothing had changed since its previous ruling on June 10, 2008 on the arrest warrant that it had jurisdiction to hear the case.

26 As regards article 4(2) of the Statute, which provides that the Court "may exercise its functions and powers, *as provided in the Statute*, on the territory of any State Party . . . . ," Gaeta, *supra* note 15 at 372, stresses that this provision should be read "under the proviso that the Court will also be authorised to use all those powers which, although not laid down in the Statute, are conferred by the general principle of inherent powers. This proposition is warranted, first, by the fact that Article 4, para. 2 does not take away from the Court powers already inherent in its judicial functions, and, second, by the need the Court will undoubtedly feel to resort to "unexpressed" powers for the proper administration of criminal justice and the safeguarding of its own judicial nature"; further, Francesca Martinez, *Legal Status and Powers of the Court*, in Cassese, *supra* note 14, at 216 "It is submitted that a limitation as such contained in Article 4 of the ICC Statute cannot apply to those powers defined as inherent but excludes only the application of the implied powers doctrine."

27 For the different facets of the Court's jurisdiction, *see supra* Chapter 2.1.2, Situation in Dem. Rep. Congo, Case No. ICC-01/04, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ¶ 33 (July 13, 2006) (hereinafter the Extraordinary Review Appeal). The Court's power is duly recognized by national courts; *see* Avis du Conseil d'Etat, *Projet de loi portant approbation du Statut de Rome de la Cour Pénale Internationale*, fait à Rome, le 17 juillet 1998, Conseil d'Etat de Luxembourg, 4.5.1999, No. 4502 (12.5.1999), at 2, admitting that on objections under article 19(2)(b), the Court has the power to decide definitely the matter of its competence.

28 Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 OA4, Judgment on the appeal of Lubanga against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, 18, ¶ 35 (Dec. 14, 2006), where the Appeals Chamber explained why staying proceedings due to abuse of process is not an inherent power of the Court.

5.1.2.3. / INTERPRETATION OF ICC JURISDICTION, DELEGATION OF AUTHORITY AND LIMITATIONS

One important preliminary issue as regards the jurisdiction of the Court under article 12(2)(a) of the Statute concerns its international legal personality and the nature of its jurisdiction, juxtaposed to that of a state.

In short, the argument could be made that the International Criminal Court is a typical creature of state consent, in the sense that it was created by means of a multilateral international treaty. As such, the ICC can be conceived as an international organization and a court of limited, attributed jurisdiction premised on state consent.[29] Its operation should be seen as one governed by the "principle of speciality".[30] The Court's competence should be contrasted with the full powers that states enjoy on the international plane and the corresponding benefits they obtain from the application of the *Lotus* dictum. Consequently, what is permissible for a state, and by extension for a national court, which ultimately constitutes a manifestation of state sovereignty, is not permissible for an international organization – international court, whose jurisdiction is clearly functional;[31] it is beyond its powers.

In reply to this approach, one would have to admit that the ICC is not a 'super-state' and indeed its jurisdiction is functional, rather than sovereign. The main doctrine supporting the Court's existence is the delegation of the corresponding authority by states parties.[32] In this framework, the point is not for the Court to do more than national courts, but rather to be able to do the same – if not less – than those courts, at least in the sense that states always retain the capacity to exercise universal jurisdiction. Under this light, one fails to see why a national court could be in a position to interpret national law on territorial jurisdiction as expansively as for example to allow jurisdiction over attempted terrorist attacks intended to take place in state territory, which never materialized, whereas the ICC would not.

This perspective relies on the Court's power to decide finally on its jurisdiction, its *compétence de la compétence* (or *kompetenz kompetenz*), as a power that exists in the Court inherently, rather than as a prerogative arising by delegation of authority from states.

Accordingly, it is submitted here that objections premised on delegation of authority and the principle of 'speciality' are irrelevant, at least insofar as they would attempt to cast doubt on the incidence of a power that the Court already possesses by operation of general principles of law.[33] Consequently, the critical issue is not whether one perceives the Court as "an 'extension' of national jurisdiction, that is an organ performing 'internal state activities' "[34] and the rationale that states parties are in a position to do collectively, through

29 David Donat-Cattin, *Decision-Making in the International Criminal Court: Functions of the Assembly of States Parties and Independence of the Judicial Organs*, in, 2 Essays on the Rome Statute of the International Criminal Court 70 (Flavia Lattanzi & William Schabas eds. 2004); in general for international courts and tribunals, C.F. Amerasinghe, Jurisdiction of Specific International Tribunals 6-7 (2009); Further, Interpretation of Agreement of 25 March 1951 between WHO and Egypt, Advisory Opinion, 1980 I.C.J. Rep. 104 (separate opinion of Judge Gros), "In the absence of a "super-State", each international organization has only the competence which has been conferred on it by the States which founded it, and its powers are strictly limited to whatever is necessary to perform the functions which its constitutive charter has defined. This is thus a *competence d'attribution,* i.e., only such competence as States have "attributed" to the organization. . . . . Anything outside that competence and not calculated to further the performance of the task assigned lies outside the powers of the organization, and would be an act *ultra* vires, which must be regarded as without legal effect."

30 Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. Rep. 78, ¶ 25.

31 Leila Sadat, The ICC and the Transformation of Transnational Law 107-8 (2002), for an interesting perspective; Ilias Bantekas & Susan Nash, International Criminal Law 96 (3rd ed. 2007), note, for their part, that the *Lotus* dictum does not apply to the subject-matter jurisdiction of the Court.

32 Sharon Williams & W. Schabas, *Article 12*, in Triffterer, *supra* note 18, at 557; very clear the arguments of Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 J. Int'l Crim. j. 618, 625-634 (2003); Michael P. Scharf, *The United States and the International Criminal Court: The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. position*, 64 L. Contemp. Probs. 67, 110-7 (2001); *contra* Madeleine Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 Law Contemp. Probs. 13, 43-52 (2001), who argues that under customary international law, delegation of territorial jurisdiction from states to international courts is not recognised or permitted; an overall picture of the different views is presented by Mitsue Inazumi, *The Meaning of the State Consent Precondition in Article 12(2) of the Rome Statute of the International Criminal Court: A Theoretical Analysis of the Source of International Criminal Jurisdiction*, 49 Neth. Int'l L. Rev. 159, 185 (2002).

33 Tadić Interlocutory Appeal, *supra* note 17, at ¶ 18.

34 Martinez, *supra* note 26, at 211.

the Court, what each one can do individually, through their national courts.[35] Equally, it is not important that the legal nature of the Court may be seen as an international organization,[36] instead of an 'extension' of state courts – a special joint 'national' court.

On the contrary, what is significant is that, irrespective of the underlying doctrinal approach adhered to concerning the Court's legal nature, its power to interpret finally its Statute stems from its nature as a judicial institution as such. Accordingly, arguments alleging that the Court is prevented from adopting a certain constructive interpretation of territorial jurisdiction under article 12(2)(a) ICC Statute on grounds of the distinction between state court/international court, full powers/attributed or express/implied powers and so on are irrelevant, at least insofar as the Court's judicial function remains its defining characteristic in deciding the limits of its jurisdiction under the rule of territoriality.

To conclude, it is submitted that, since the Court possesses the inherent power to determine the reach of its jurisdiction in the same way as any criminal court, its decision on how exactly to apply this power is a matter of interpretation of the Statute, rather than an issue to be decided on the premise of limitations of delegation and express-implied powers. As such, the interpretation of article 12(2)(a) becomes less a question revolving around the Court's powers or the lack thereof, and more an issue concerning the limits to that interpretation under the Statute and the rules of interpretation employed by the Court. It is in this sense that the ensuing analysis will consider the territorial jurisdiction of the ICC as co-extensive with the territorial jurisdiction of states parties.[37]

That does not mean however – and it is certainly not suggested here – that the Court has a completely free hand when interpreting this provision. It is perfectly conceivable that too extensive an interpretation of the Court may violate international law.

For one, the Court does not acquire a law-making capacity, through its *compétence de la compétence*. It does not mean, for example, that the Court may through this inherent power read article 12(2)(a) in such a way as to apply the rule of universal jurisdiction,[38] any more than it can extend its subject matter jurisdiction to include new crimes beyond those in articles 5-8 of the Statute.[39]

Moreover, this power is further restrained by constitutional limitations included in the Statute[40] and particularly the principle of non-intervention, as stipulated in the Preamble of the Rome Statute[41] and general international law.[42] It is true that the precise content of this chameleonic rule of customary law is

35 U.N. Doc. A/AC.249/1998/DP.2 (Mar. 23, 1998), the argument as regards universal jurisdiction in this respect was articulated clearly by the German Delegation during the negotiations; Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction,* in Cassese, *supra* note 14*,* at 587-8; further, Wagner, *supra* note 2, at 481; the argument is mostly used in order to refute mostly U.S. objections to ICC jurisdiction on the basis of the *pacta tertiis* argument. The argument is drawn from the famous *dictum* of the Nuremberg Tribunal that "The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right to set up special courts to administer law". International Military Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946, reprint. in. 41 Am. J. Int'l L. 172, 216 (1947).

36 *See* in this respect the Rome Statute, *supra* note 21, at art. 4; Wiebke Rückert, *Article 4, Legal Status and Powers of the Court,* in Triffterer, *supra* note 18*,* at 122-3. The different perspectives are summarily discussed by Martinez, *supra* note 26*,* at 211-2.

37 Lubanga Arrest Warrant Appeal, *supra* note 24, at ¶ 31, 41 as Judge Pikis mentioned, albeit with regard to complementarity and jurisdiction, in his Partly Separate and Partly Dissenting Opinion thereto, N"The range of the jurisdiction of the State Parties and that of the Court is coextensive. The Court as an organic entity is put in the position of an overseer of the investigatory, prosecutorial and judicial process of national authorities with regard to crimes falling within the jurisdiction of the Court, assuming jurisdiction in case of inability or unwillingness on the part of a State to carry out its duties under the Statute"N NThe jurisdiction of national courts of States Parties and the complementary jurisdiction of the International Criminal Court are coincidentalN

38 Martinez, *supra* note 26*,* at 212.

39 Bantekas and Nash, *supra* note 31, at 96.

40 This is inspired by Christopher L. Blakesley, *Jurisdiction Ratione Personae or the Personal Reach of the Court's Jurisdiction*, in The Legal Regime of the ICC: Essays in Honour of Prof. I. P. Blishchenko 430 (José Doria et al. eds. 2009), "The Rome Statute for the ICC limits the jurisdiction of the International Criminal Court (the breadth of prescriptive jurisdiction and the persons to whom it applies), just as domestic constitutional law limits the jurisdiction of its judicial bodies and the scope of the state's legislation".

41 The Rome Statute, *supra* note 21, at Preamble, ¶ 8, "*Emphasizing* in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State . . . .".

42 Agreement between WHO and Egypt, *supra* note 29, at 89-90, ¶ 37, "As was pointed out by the Court in one of its early Advisory Opinions, there is nothing in the character of international organizations to justify their being considered as some form of "super-State" *(*Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 179). International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties".

difficult to decipher.[43] The present work therefore selects to operate on the basis of the doctrinal position, which is believed to be consistent with Mann's scholarship as interpreted and applied by the Canadian and German Supreme Courts, that a sufficient connecting link – a reasonable nexus must be shown to exist between the crime and the territory of a state party, to justify the exercise of jurisdiction by the Court under article 12(2)(a) and satisfy the requirements of non-intervention. It is therefore submitted that, questions of power aside, unless otherwise provided for in the Court's sources under article 21(1)(a), the limits to the Court's jurisdiction under article 12(2)(a) are to be deduced by recourse to general international law in a way similar to state courts and state jurisdiction.

Finally, the constructive interpretation of article 12(2)(a) should not be confused with the question of the territorial scope of application of the Statute as such. Issues of delegation of authority may have an important role to play in the latter, particularly in situations concerning military occupation of state party territory and the application of the general principle of law *nemo dat quod non habet*. This specific topic is especially important as regards the territorial scope of application of the Statute as such and the co-extensive character of the jurisdiction of the Court to that of states parties. These issues will be properly addressed in the chapter on military occupation.[44]

5.1.2.4. / THE USEFULNESS OF INTERNATIONAL LAW RULES

In the discussion concerning the localization options of territorial jurisdiction available to the Court under international law and the interpretation of article 12(2)(a), reference will be made also to rules and principles international law.

The use of these provisions is justified by two main reasons in this analysis. First, since "relevant rules of international law applicable in the relations between the parties" are used as an instrument of interpretation of an international treaty, according to article 31(3)(c) of the Vienna Convention on the Law of Treaties, rules and principles of international law may be applied for the interpretation of article 12(2)(a) of the Rome Statute.[45] Secondly, one may take the view that the sources of law enumerated in article 21(1)(a) are inadequate to address questions of 'commission in part' – a position to which the present author is not unsympathetic – and that accordingly the matter is not "exhaustively dealt with" in these instruments.[46] If one therefore accedes to the view that in these circumstances there is absence of regulation (a legislative gap), which is not attributable to a conscious choice to that effect on the part of the drafters and which cannot be bridged by recourse to interpretation, this would indicate the need to look for a solution in other sources of law and particularly rules and principles of general international law.[47] This course of action is justified by the structure of article 21 and has already been implemented by the Court in its first rulings, for

43 Recently, Maziar Jamnejad & Michael Wood, *The Principle of Non-Intervention,* 22 Leiden J. Int'l L. 345, 347 (2009); Also Wolswijk, *supra* note 1, at 381.

44 *Infra*, at Part 7.3.2.

45 Vienna Convention on the Law of Treaties, art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, which provides that "3. There shall be taken into account, together with the context: […] (*c*) any relevant rules of international law applicable in the relations between the parties." From I.C.J. jurisprudence on the topic, Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. Rep. 161, 182, ¶ 41. *See supra* 4.2.1.

46 Prosecutor v. Lubanga, *supra* note 28, at 17, ¶ 34 (Dec. 14, 2006), where the Appeals Chamber indicated that if a matter is exhaustively dealt with in the sources in article 21(1)(a), "in that case no room is left for recourse to the second or third source of law to determine the presence or absence of a rule governing a given subject."

47 Al-Bashir Arrest Warrant Decision, *supra* note 5, ¶ 44, made the following remark; " . . . . the consistent case law of the Chamber on the applicable law before the Court has held that, according to article 21 of the Statute, those other sources of law provided for in paragraphs (l)(b) and (l)(c) of article 21 of the Statute, can only be resorted to when the following two conditions are met: (i) there is a lacuna in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such lacuna cannot be filled by the application of the criteria of interpretation provided in articles 31 and 32 of the Vienna Convention on the Law of the Treaties and article 21(3) of the Statute", referring to its previous decision, Prosecutor v. Al Bashir, Case No. ICC-01/04-168, ¶ 22-24, 32-33, 39; Extraordinary Review Appeal, *supra* note 27, at ¶ 39, the Appeals Chamber has explained the term *lacuna* in the Statute as follows: "No gap is noticeable in the Statute with regard to the power claimed [the power to file appeals against decisions of the Pre-Trial Chamber refusing leave to appeal], in the sense of an objective not being given effect to by its provisions. The lacuna postulated by the Prosecutor is inexistent."

example on the definition of the armed conflict in article 8(2)(b) in the *Lubanga Confirmation Decision*.[48] In this context, the analysis under articles 21(1)(b) and (c) is employed basically as an argument in the alternative, the primary argument being that issues under article 12(2)(a) of the Statute may be properly addressed through interpretation. In this context, article 21(3) has an independent role to play as an instrument of interpretation, whose application is explicitly mandated by the Statute itself.

Finally, this analysis lays the necessary groundwork for the next chapter, where the possibility of interpreting 'conduct in question' so as to 'read' the effects doctrine in the Court's jurisdiction will be examined.

5.1.2.5. / THE USEFULNESS OF NATIONAL LAW

In the context of the present examination of the topic, emphasis will be given to international law, rather than to one specific national law tradition, although references to particular solutions adopted by certain legal orders will be made, where appropriate.

This choice is dictated primarily by the wording of article 21(1)(c) and the hierarchy of sources established in article 21 ICC Statute. Notwithstanding the fact that the development of customary law approaches to the localization of criminal activity under territorial jurisdiction are developed to such an extent, that recourse to article 21(1)(c) will probably not be necessary,[49] this provision refers to 'general principles of law', as opposed to a specific national law provision/solution.[50]

This approach finds support also in general positive international law, where the use of national legal norms for the interpretation and application of legal undertakings[51] in international treaties seems to be fairly limited to cases where the international treaty itself refers in the context of a specific matter to a party's national law[52] and even then only to the extent that the application of national law does not have the effect of absolving a state from the performance of its international obligations altogether[53] and subject to the requirements of good faith and reasonableness.[54] Particularly in the field of international criminal law, it would seem especially important to avoid the dangers inherent in the mechanical transplant of national

48 Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, ¶ 205 (Jan. 29, 2007). "The Chamber observes that neither the Statute nor the Elements of Crimes provide a definition of an international armed conflict for the purposes of article 8(2)(b). Only n. 34 of the Elements of Crimes states that the terms "international armed conflict includes military occupation". Accordingly, the Chamber finds that, pursuant to article 21(1)(b) of the Statute, and with due regard to article 21(3) of the Statute, it is useful to rely on the applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict"; *id*. ¶ 206-225, the Chamber then had recourse to Common Article 2 of the Geneva Conventions, I.C.T.Y. and I.C.J. jurisprudence; Eve La Haye, War Crimes in Internal Armed Conflicts 6-21 (2008), for a thorough discussion in general humanitarian law over the notion of armed conflict.

49 The case-law contains numerous examples where the Court has upheld the hierarchy of article 21. For example, Prosecutor v. Katanga, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶ 505-8 (hereinafter Katanga Confirmation Decision), where, the inclusion of co-perpetration through another person in article 25(3)(a) of the Statute was considered sufficient for the Court to render irrelevant the issue of its existence under customary law, since recourse to the sources in 21(1)(b) was not necessary.

50 See *infra* in detail, under Part 5.5.2.

51 Bearing always in mind that "an undertaking in which the applicant party reserves for itself the exclusive answer to determine the extent or very existence of its obligation is not a legal undertaking". Certain Norwegian Loans Case (Fr. v. Nor.), 1957 I.C.J. Rep. 48 (Separate Opinion of Judge Lauterpacht). In the ICC national law would be used, if at all, by the Court, rather than an 'applicant state'.

52 European Convention on Mutual Assistance in Criminal Matters, art. 2(b), Apr. 20, 1959, CETS 030. A common example subjecting the performance of treaty obligations to national law may be found in Mutual Legal Assistance Treaties, where typically the requested state(s) reserves the right to refuse the provision of legal assistance, "if the requested Party considers the execution of the request if likely to prejudice sovereignty, security, ordre public or essential interests of its country"; Rome Statute, *supra* note 21, at art. 93(4), on national security denials; Certain Questions of Mutual Assistance in Criminal Matters, (Djib. v. Fr.), Judgment, 2008 I.C.J. Rep. 145, ¶ 120-4, for one of the latest discussions of such (self-judging) clauses; further, from the same case, Transcript of Jan. 22, 2008, CR 2008/2, at 11 (*per* Prof. Condorelli), transcript of Jan, 25, 2008, CR 2008/5, at 4 (*per* Prof. Ascencio).

53 Vienna Convention, *supra* note 45, at art. 27.

54 Mutual Legal Assistance, (Djib. v. Fr.), *supra* note 52, at ¶ 145, with extensive references to the I.C.J.'s case law (the discretionary right to refuse the provision of mutual legal assistance in a bilateral treaty is subject to the obligation of good faith); for 'reasonableness', Application of the Convention of 1902 Concerning the Guardianship of Infants, (Neth. v. Swed.), 1958 I.C.J. Rep. 121 (Separate Opinion of Judge Spender); *id.* at 99, Separate Opinion of Judge Lauterpacht; Rights of Nationals of the United States of America in Morocco, Judgment (Fr. v. U.S.), 1952 I.C.J. Rep.212.

approaches in this emerging branch of the law.[55] This means that while the Court has the power to interpret its own jurisdictional provisions, there is a limit to that power insofar as article 21(1)(c) is concerned; 'lock, stock and barrel'[56] transposition of a national rule in the system of the ICC is not in conformity with the Rome Statute.

Bearing in mind the hierarchy of article 21, the over-arching guarantee of article 21(3) in the interpretation and application of the Statute and general international law, it would seem therefore that the Court's role, properly understood in this context, is not that of the international defender of a given state's and/or legal tradition's notions of territorial jurisdiction. Far from it, the ambit of its jurisdiction should be measured first and foremost by recourse to the interpretation of the rule of territorial jurisdiction under international law, in the absence of relevant rules in the Statute, the Rules of Procedure and the Elements of Crimes, taking into account the relevant instruments of interpretation. Accordingly, irrespective of what a specific national law provides and whether it adheres to a broader or stricter approach to objective territoriality,[57] the present analysis shall refer primarily to international law norms, in order to address the issue of the territorial reach of the Court's jurisdiction.[58]

5.2. / "CONDUCT IN QUESTION" AS CONDUCT, INCLUDING ACT OR OMISSION

It should be stated at the outset that, neither article 12, nor any other provisions of the Rome Statute contain a definition of what the term 'conduct' ('comportement' in the French text, 'conducta' in the Spanish text) stands for, as one might expect to find in the general part of a criminal code.

In the preparatory works of the Statute there is evidence of efforts to that direction. The Preparatory Committee processed a relevant provision that initially appeared in 1996[59] and submitted it to the Rome

55 Notably, Prosecutor v. Drazen Erdemovic, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese (Oct. 7, 1997).

56 To borrow a well-known expression from International Status of South-West Africa, Advisory Opinion, I.C.J. Rep. 1950, 128, 148 (separate Opinion by Sir Arnold McNair).

57 For a comparative study of the laws and practice of 6 states (Eng., U.S., Fr., Germ., Neth., Belg.) on the subject, Cedric Ryngaert, *Territorial Jurisdiction over Cross-Frontier Offences: Revisiting a Classic Problem of International Criminal Law*, 9 Int'l. Crim. L. Rev. 187, 190-202 (2009).

58 Another interesting perspective is provided by Bantekas & Nash, *supra* note 31, at 93-96. From their point of view, as regards international courts and tribunals, "[t]heir competence is derived from their constituent instrument and is not at all confined by the jurisdictional principles and constraints applicable to municipal courts"; *id.* particularly as regards the ICC, the authors assert that, similarly to the case of the Tribunals, where the SC could in theory endow them with very wide jurisdictional competence, which would be *ultra vires* for national courts, "[t]he same would apply to a tribunal established through treaty, such as the ICC, but only where its Statute received global ratification. Since every international tribunal is a self-contained system, its jurisdictional powers can only be limited by its constitutive instrument, but only to the extent that such limitation does not endanger its judicial character."

59 Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, U.N. GAOR, 50th Sess. Supp. No. 22, U.N. Doc. A/50/22, 90-1, Compilation of Proposals, Draft Article G, "Actus Reus" (Act and/or Omission) (1996).

Conference as draft Article 28, in brackets.[60] The provision was not adopted, however, apparently due to lack of agreement on commission by omission.[61]

While, however a general provision on the material[62] elements was not included in the Statute, the negotiators at Rome did manage to agree on what is today Article 30 of the Statute, entitled 'Mental Element'[63]. This provision refers primarily to the subjective or mental elements of the crimes and indicates by implication that the 'material' or objective elements of the crimes (or *actus reus*[64]) in the Statute are to be construed as comprising three, distinct components; conduct, consequences and circumstances.

60 *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N. Doc. A/CONF.183/2, ¶ 54-55. [Article 28
Actus reus (act and/or omission)
1. Conduct for which a person may be criminally responsible and liable for punishment as a crime can constitute either an act or an omission, or a combination thereof.
2. Unless otherwise provided and for the purposes of paragraph 1, a person may be criminally responsible and liable for punishment for an omission where the person [could] [has the ability], [without unreasonable risk of danger to him/herself or others,] but intentionally [with the intention to facilitate a crime] or knowingly fails to avoid the result of an offence where:
(a) the omission is specified in the definition of the crime under this Statute; or
(b) in the circumstances, [the result of the omission corresponds to the result of a crime committed by means of an act] [the degree of unlawfulness realized by such omission corresponds to the degree of unlawfulness to be realized by the commission of such act], and the person is [either] under a pre-existing [legal] obligation under this Statute to avoid the result of such crime [or creates a particular risk or danger that subsequently leads to the commission of such crime].
[3. A person is only criminally responsible under this Statute for committing a crime if the harm required for the commission of the crime is caused by and [accountable] [attributable] to his or her act or omission.]".
The draft provision was accompanied by two footnotes; the first contained doubts as to the need for an explicit formulation of the requirement of causality and the second explained with regard to the whole article that "These brackets reflect the view expressed that, although much progress has been made on the definition of omission, the question whether omission should be inserted in the Statute depends upon the final drafting of this article."

61 Donald K. Piragoff & Daryll Robinson, *Article 30-Mental Element*, in Triffterer, *supra* note 18, at 858-9, "it was decided to delete it [draft article 28] from the Statute with the understanding that the question of when, and if, omissions might constitute or be equivalent to conduct would have to be resolved in future by the Court"; Report of the Working Group on General Principles of Law, Official Records, U.N. Doc. A/CONF.183/C.1/WGGP/L.4, 255, which noted article 28 as 'deleted' and explained in footnote 60 that "[s]ome delegations were of the view that the deletion of article 28 required further consideration and reserved their right to reopen the issue at an appropriate time"; also, William Schabas, An Introduction to the International Criminal Court 225 (2007); Roger S. Clark, *Drafting a General Part to a Penal Code: Some Thoughts inspired by the Negotiations on the Rome Statute of the International Criminal Court and by the Court's first Substantive Law discussion in the Lubanga Dyilo Confirmation Proceedings*, 19 Crim. L. Forum 519, 523 (2008); further, Ferrando Mantovani, *The General Principles of International Criminal Law: the Viewpoint of a National Criminal Lawyer,* 1 J. Int'l Crim. Just. 26, 32 (2003); Mahmoud Ch. Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 Cornell Int'l L. J. 443, 454 (1999), considers the resulting situation particularly problematic, as "[L]acking a provision on the elements of crimes, the Court will have to determine what constitutes an act or omission by analogy to national legal systems. However, Article 22 (2) specifically excludes interpretation by analogy."

62 The discussion on the use of the term "material/physical/objective elements", exemplifying the facts of the case and separating them from the "mental elements" is long in both the literature and the *travaux*. Among others, Albin Eser, *Mental Elements – Mistake of Fact and Mistake of Law*, in Cassese *supra* note 14, at 908-910; Piragoff & Robinson, *supra* note 61, at 851-3; Sadat, *supra* note 31, at 208-9; Clark, *supra* note 61 at 526, n. 19. The usefulness of the discussion in the actual practice of the Court seems diminished, as the Chambers seem to employ the terms material – objective interchangeably, without attaching too great a significance on the selection of the terminology as such; note in this regard the Lubanga Confirmation Decision, *supra* note 48, at 116-124, where the term "objective" is also employed (particularly at 122 – other objective elements), whereas in the French version of the judgment the terms 'subjectif' and 'objectif' appear, rather than the Statute's 'psychologique' and 'matérial'; Clark, (Drafting a *id.* at 527, n. 25; The same approach is followed in the Katanga Confirmation Decision, *supra* note 49, at 75, ¶ 245, where the Chamber routinely distinguishes between the objective and subjective elements (éléments objectifs et subjectifs in the French version) of the crimes charged.

63 "1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
(a) In relation to conduct, that person means to engage in the conduct;
(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly."

64 R.S. Clark, The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences, 12 Crim. L. Forum 291, 294, n. 10 (2001), the warning of Professor Clark is duly acknowledged here, "Opportunities for confusion abound with the traditional terms; sometimes the term *actus reus* is used to describe conduct alone; sometimes conduct plus consequences; sometimes conduct plus attendant circumstances plus consequences. These ambiguities were rampant in the ICC debates and the reader needs to be wary of context."

This construction appears to have been influenced by relevant common law usage.[65] In this provision, the term 'conduct' is said to have been employed to address "the question of the role that omissions would play in the material element. The issue was resolved by replacing "act or omission" with the word "conduct". It was understood that the issue of omission would be resolved in connection with the proposal for a special article on *actus reus* which was never adopted."[66] Authorities seem to agree that 'conduct' in the context of article 30 is shorthand for 'act or omission'.[67]

This reading appears to be further corroborated by the Elements of Crimes,[68] which follow faithfully the distinction between conduct, consequences and circumstances in their analysis of each crime.[69] However, since under article 9 of the Statute the Elements of the Crimes are to be employed exclusively for the interpretation of the provisions of the Statute relating to the definitions of the crimes, specifically articles 6-8 thereof, any further analysis of the general structure and provisions of the Elements would appear of limited value for the purposes of the present discussion.[70] That said, it is interesting that some ambiguity as to the meaning of the term 'conduct' still lingered on in the negotiations for the Elements of Crimes[71], while some commentators even after their adoption confess some puzzlement over what exactly constitutes conduct

65 *Id.* at 304-7, with references to the U.S. Model Penal Code and the distinctions provided therein; Eser, *supra* note 61, at 911; it has been suggested that, while the Statute's general principles provisions were created under mainly common law influence, their application seems to be dominated by civil law – and in particular German criminal law doctrine. *Cf.* in this respect the comments by Fletcher and Jessberger. George P. Fletcher, The Grammar of Criminal Law – American, Comparative and International 107 (2007), "In formulating the general part of the statute, however, the Rome drafters suffered from a limited comparative perspective. The provisions of the statute reflect common law influences and ignore the potential contributions of the vast number of jurisdictions that follow German and other European theories and doctrines"; Florian Jessberger, *A Substantive Criminal Law Perspective*, in *Discussion,* 6 J. Int'l Crim. Just. 763, 778 (2008), notes as regards the Lubanga Confirmation Decision that the Pre-Trial Chamber relied practically exclusively as regards the modes of liability in particular in German doctrine and concludes that " . . . . in *Lubanga*, the ICC's (extensive) reference to domestic law and doctrine is based on an extremely limited basis of national jurisdictions and traditions".

66 Per Saland, *International Criminal Law Principles*, in The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results 205 (Roy S. Lee ed. 1999).

67 Eser, *supra* note 61, at 912, while expressing his doubts on the utility of the solution finally chosen, explains that "[t]hus, the term "conduct" in this article . . . . seems to be a forgotten remnant, which would have to be understood as a positive act which is to be intended by the perpetrator"; Further, Gerhard Werle, Principles of International Criminal Law 144 (2nd ed., 2009), "Objectively, every international crime presumes some conduct that is more precisely delineated in the definition of the crime. This can consist of an action or – to the extent this is provided for in the definition – an omission"; Saland, *supra* note 66, at 195; Piragoff & Robinson, *supra* note 61, at 859, "Therefore, for the purposes of article 30, the term "conduct" denotes positive action and may also include *intentional* omission, where the causal result and moral culpability of the intentional omission is equivalent to the achievement of the same result caused by an intentional act"; G. Werle & F. Jessberger, *'Unless Otherwise Provided': Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law*, 3 J. Int'l Crim. Just. 35, 39 (2005); Clark, *supra* note 64, at 306, with references to the Model Penal Code; Maria Kelt & Herman von Hebel, *What are Elements of Crimes?, in* The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence (Roy S. Lee ed. 2001), "The conduct relates to the prohibited act or omission".

68 Elements of Crimes, ICC-ASP/1/3 (part II-B), Sept. 9, 2002; further, Clark, *supra* note 61, at 526-7.

69 Note the classification advanced by ¶ 7 of the General Introduction of the Elements and the rigid, it seems at times, adherence to the classification between conduct, consequences and circumstances; "The elements of the crimes are generally structured in accordance with the following principles. As the elements of crimes focus on the conduct, consequences and circumstances associated with each crime, they are generally listed in that order . . . . ", while on the other hand, under ¶ 9 of the General Introduction, "A particular conduct may constitute one or more crimes". In detail on the 'super-chapeau' of the Elements and its legal significance, William K. Lietzau, *A General Introduction to the General Introduction: Animating Principles behind the Elements of Crimes, in* Lattanzi & Schabas, *supra* note 29, at 299. For a different perspective, Knut Dörmann, Elements of War Crimes under the Rome Statute of the International Criminal Court at 9-14, 13 (2003), "Paragraph 7 of the General Introduction describes the structure of the EOC document. It has no additional substantive meaning".

70 Even for these articles, however, the Elements are only to provide "assistance"; they do not enjoy "force juridique obligatoire". *See* the discussion in the Al-Bashir Arrest Warrant Decision *supra* note 5 and from the literature, Eric David, *La Cour Pénale Internationale*, 313 Recueil des Cours de l' Academie de Droit International 325, 340 (2005).

71 Kelt & Hebel, *supra* note 67, at 15, "[i]t should also be noted that the dividing line between these classes of material elements (conduct, consequence and circumstance) is not always clear, and that sometimes views on where to draw the line between them differed. For example, with respect to a requirement that the perpetrator "killed" a person, one may debate whether "killing" is the *conduct*, *i.e.* the act of killing the person, or whether it is a *consequence*, i.e., the bringing about of the death of a person"; *id.* at 22, "Different legal systems often use different concepts, or concepts which may appear to be similar at first but then turn out to have divergent connotations. Miscommunication between delegations regularly occurred. These factors complicated the negotiations and a lot of time was needed for explanations and for seeking a general understanding of terms such as "specific intent" or "conduct"."

and consequence and circumstance in each crime.[72] Similar concerns were expressed during the negotiations,[73] as well as in the literature[74] over the propriety of treating the contextual elements[75] surrounding the commission of a crime as an element of a crime or a jurisdictional precondition.

The wording used in other parts of article 12 may be read as offering further evidence in that direction, i.e. the interpretation of 'conduct in question' as 'act or omission in question'. This approach would seem appropriate also if one were to consider article 12 (2) for the purposes of interpretation as an "autonomous provision", without connection or association to any other provisions of the Statute, that should hence be applied and interpreted in the context of its own article, illuminated, to the extent that light may be thrown upon it by the general purposes of the Statute.[76]

In particular, as far as ships and aircrafts are concerned, article 12 (2) (a) specifies "the State on the territory of which the conduct in question occurred, or, if the *crime was committed* on board a vessel or aircraft, the State of registration of that vessel or aircraft [emphasis added]". Similarly, 12 (2) (b) refers to "the State of which the person accused of *the crime* is a national", whereas paragraph 3 provides in a very troubling formulation[77] that "[i]f the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar accept the exercise of jurisdiction by the Court with respect to the *crime in question*. The accepting State shall co-operate with the Court without any delay or exception in accordance with Part 9." Indeed, it is quite striking that the only instance in article 12, where reference is made to 'conduct in question' is the sentence of the 'territorial jurisdiction' clause. That would imply, in an *a contrario* reading of this provision, that the drafters intended to distinguish between cases involving the exercise of jurisdiction, where the crucial factor would be the crime in question, such as cases of ships, aircrafts and ad hoc acceptance of jurisdiction, from those, where jurisdiction would be assumed on the basis of the conduct in question, as in the case of commission in the territory of a state party.

Consequently, the two terms – conduct and crimes – used in article 12 could very well be construed as having a different meaning for the purposes of the interpretation of this provision, the alternative being to consider 'conduct in question' as referring to 'act or omission in question'.

After all, one cannot exclude the possibility, considering the nebulous conditions surrounding the drafting of article 12 (2) in the late hours of the last night prior to the conclusion of the Rome Conference, that this selection in the wording of article 12 (2) (a) did not happen by accident, but was in fact intended to produce certain legal results.

72 Indicatively, Clark, *supra* note 64, at 325, who classifies disjunctively as conduct/consequence the 'killing-causing death' element of article 7 (1) (a) as a crime against humanity, and similarly at 330 as regards 'inflicting severe physical or mental pain or suffering upon one or more persons' as the 'conduct/consequence' element of the war crime of torture under article 8(2)(a)(ii)-1.

73 Kelt & Hebel, *supra* note 67, at 15.

74 For a discussion, *see* Clark, *supra* note 64, at 326-7; Werle, *supra* note 67, at 146, 272-273.

75 As such are meant notably the existence of an armed conflict for war crimes, the widespread or systematic attack directed against a civilian population for crimes against humanity and genocidal policy for genocide; Kelt & Hebel, *supra* note 67, at 15.

76 Lubanga Arrest Warrant Appeal, *supra* note 24, at ¶ 29, Separate and Partly Dissenting Opinion of Judge Pikis; In the literature, it has been suggested that there are certain 'stand-alone' provisions in the Statute, without, however, apparently drawing from such a conclusion any consequences as regards their appropriate interpretation. Chris Gallavin, *Delineating the Scope of Security Council Referrals and Deferrals*, 5 N.Z. Armed Forces Rev. 19, 28 (2005), "This Article (Article 16) is a stand-alone provision of the Rome Statute. It is not referred to by any other provision of the Statute, and no procedural provisions relating to it appear in the Rules of Procedure and Evidence".

77 John T. Holmes, Jurisdiction and Admissibility, in. R.S. Lee, *supra* note 66, at 326-327, for the dangers for targeted referrals inherent in the formulation and the solution advanced through the adoption of Rule 44, sub-rule 2 of the Court's RPE in detail; further, in general, Williams & Schabas, *supra* note 32, at 558-560; Ruth Wedgwood, *The International Criminal Court: An American View*, 10 Eur. J. Int'l L. 93, 102 (1999); Gerhard Hafner et al., *A Response to the American View as presented by Ruth Wegdwood*, 10 Eur. J. Int'l L. 108, 118 (1999); Kaul, *supra* note 35, at 611; W. Schabas, *supra* note 61, at 78-81; Carsten Stahn et al., *The International Criminal Court's Ad Hoc Jurisdiction revisited*, 99 Am. J. Int'l L. 421, 427 (2005); recently, Steven Freeland, *How open should the doors be? – Declarations by non-States Parties under Article 12 (3) of the Rome Statute of the International Criminal Court*, 75 Nordic J. Int'l L. 211, 233-4 (2006), with criticism on the solution adopted –through the adoption of Rule 44, sub-rule 2 – on the grounds that this solution could arguably lead to a reversal of the proper role of the Rules and the Statute, contrary to article 21 (1) of the Statute and the position that the Rules should be read subject to the Statute; further criticism by Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. Chicago L. Rev. 89, 92, n. 11 (2003); David, *supra* note 70, at 343, takes the view that, as Rule 44 (2) purports to modify "le sens clair de l'article 12, paragraphe 3", there is in fact a conflict between the two provisions that should be resolved according to Article 51 (5) of the Statute, which stipulates that "[i]n the event of a conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail" – thus concluding that the proper way to resolve the problem is through amendment of the Statute.

This would not constitute an innovation. The interplay between 'conduct' and 'crime' in the Statute appears in a number of provisions and was intended to have legal consequences. As regards temporal jurisdiction and continuous crimes, for example, it has been authoritatively explained that the otherwise subtle linguistic difference in articles 11(1)[78] and 24(1)[79] of the Statute and its elaboration in the Elements document for the crime of enforced disappearances denotes a deeper political compromise, intended to exclude from the Court's jurisdiction conduct committed or crimes transpired (particularly enforced disappearances and generally continuous crimes) prior to the Statute's entry into force.[80]

Correspondingly, when defining the *idem* in the framework of the principle *ne bis in idem* in article 20 of the Rome Statute, the distinction between 'crime' and 'conduct' has significant legal repercussions.[81] By selecting to differentiate in the wording of the paragraphs of the provision,[82] the makers of the Statute seem to indicate that, if a person is convicted or acquitted by the Court for charges alleging the commission of crimes within its jurisdiction, this does not necessarily prohibit national courts from re-trying the accused for the same conduct, provided that it is not classified and prosecuted as one of the crimes stipulated in article 5 of the Statute.[83]

From a similar contextual point of view, the use of the term "conduct" in the chapeau of article 31 is said to have had serious ramifications, to the extent that it provides that "[…] a person shall not be criminally responsible, if, at the time of that person's conduct:[…]" s/he is mentally unstable, intoxicated, or acting under self-defence or duress. The selection of the term 'conduct' in this specific instance seems to constitute another example of a conscious choice as regards the time, at which the relevant justification or excuse raised by the defence under article 31, must have been present, *i.e.* at the time that the conduct took place, rather than the time of the manifestation of the consequences of the crime. As it has been noted in the literature, "[i]n stating the "person's conduct" as the decisive time at which a ground for excluding criminal responsibility must be given, the Statute takes a rather narrow view by, implicitly, declaring the time at which

78 "The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute."

79 "No person shall be criminally responsible under this Statute for conduct prior to the entry into force of this Statute."

80 Sadat, *supra* note 31, at 186, "[A]lthough one could read article 11(1) as permitting the Court to pursue disappearances occurring prior to the Statute's entry into force on grounds that the crime continues to be "committed" until the disappeared have been found, the use of the term "conduct" in article 24 (1) suggests that conduct which led to the disappearances is outside the jurisdiction of the Court if it occurred prior to the Statute's entry into force. This was the view taken by the Preparatory Commission in the Draft Elements of Crimes and underscores that one of the political compromises required to bring the ICC into existence was the exclusion from its jurisdiction [of] crimes committed, or conduct which transpired, prior to the Statute's entry into force"; there is however authority for the view that the question of continuous crimes still remains unresolved as far as other crimes are concerned. Stahn, *supra* note 77, at 429, examine the relevant practice and conclude that "The question [of continuity] was thereby resolved, or at least clarified, in relation to Article 7 (1) (i), but not in relation to other crimes of a continuing nature."

81 In general, Christine Van den Wyngaert & Tom Ongena, *Ne bis in idem principle, including the issue of amnesty*, in Cassese, *supra* note 14, at 705, 714-5, on the narrow and broad interpretation of the *idem*, depending on whether the emphasis is placed on previous conduct in law and/or in fact; further, Immi Tallgren & Astrid R. Coracini, *Article 20, Ne bis in idem*, in Triffterer, *supra* note 18, at 669; Schabas, *supra* note 61, at 191-193; W. Schabas, The UN International Criminal Tribunals: the Former Yugoslavia, Rwanda and Sierra leone 535-7 (2006); Alexander Zahar & Goran Sluiter, International Criminal Law 29-31 (2008); from the case-law of the ad hoc Tribunals, particularly educational is the Declaration of Judge Nieto-Navia in the Appeals Chamber's judgment in Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 1 (July 15, 1999).

82 Article 20 reads as follows;
"1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

83 This point and its implications especially for the rights of the accused is amply highlighted in the literature. Wyngaert & Ongena, *supra* note 81, at 723-4; Tallgren & Coracini, *supra* note 81, at 686-7; from the perspective of general international law, C. van den Wyngaert & Guy Stessens, *The International Non bis in Idem Principle: Resolving some of the Unanswered Questions*, 48 Int'l Comp. L. Q. 779, 788-794 (1999); Zahar & Sluiter, *supra* note 81 at 30, 478, indicate, 'another court' for the purposes of this provision can be considered only national courts of States-Parties, and not those of non-States Parties, since the Rome Statute is not applicable to them, unless and to the extent that the rule of article 20(2) is considered to codify customary law, which in their view does not (yet).

the statutory result of the conduct [occurs] as irrelevant."[84] Hence, "…the Statute follows the 'act theory' instead of the so-called 'ubiquity principle', according to which the place of the result of the conduct and the place of the actual conduct are equally relevant."[85] Therefore, duress, for example, must be (proven to be) present at the time the conduct takes place, rather than at the time that the consequence manifests, in order to be lawfully invoked by the accused under article 31 of the Statute.

To sum up, while no definition of 'conduct' is included in the Statute, nevertheless there are certain indications as to what the term stands for and particularly as to what the term does *not* include. In this light, 'conduct in question' may be considered as 'act or omission in question'.

In this framework, one could possibly argue that it would be difficult to accept that the exact same term – conduct – is employed in different Parts or articles of the Statute encompassing a variety of meanings, depending on the provision.[86] It would rather seem more sensible to adhere to the view that "[a]n aspect which was not removed from the Rome Statute is the consistently used terminology of "conduct", which was chosen and generally accepted to denote a criminal act or omission. The term is used systematically in the Rome Statute and throughout the Elements of Crimes drafted on the basis of art. 9 of the Statute."[87]

Moreover, it may be further argued that the concept of 'conduct in question' does *not* include the consequences or the circumstances of a crime. These are distinct elements of each definition of crime, accompanied by a separate and at times different mental threshold, according to article 30 and the Elements of Crimes. Arguably, if the drafters of the Statute wished all the objective elements of a crime to be included when considering the precondition of territoriality, they would have employed the same language used elsewhere in the same provision, referred to as 'the crimes in question' or 'the crimes committed' or 'the crimes charged'. Their selection – unique in article 12 – of 'conduct in question' could therefore be construed as distinctive from the general formulation 'crimes in question', thus excluding from consideration the consequences and circumstances of the crime. In fact, the position has been taken in the past, at least by some delegations in the Special Working Group for the Crime of Aggression that "the drafters of article 12 intended for it to be consistent with article 30, which referred to conduct, consequences and circumstances."[88]

If one accepts this analysis as valid, what is its legal significance for article 12 (2) (a)? It seems that in light of the above, under these circumstances the Court would be able to exercise jurisdiction based on the rule of territoriality only if, and to the extent that, the criminal conduct in question, and not the consequences or circumstances thereof, takes place in the territory of a state party.

Taking this line of thinking to its conclusion, the implication would be that for the purposes of territorial jurisdiction the Court could not be lawfully seized of a situation or a case unless the conduct, or in the alternative act or omission in question, took place in the territory of a state party. The danger of such a restrictive approach would be that the occurrence solely of the consequences or the circumstances of the act or omission in question within such territory would therefore not suffice. Thus, for example, in the proverbial transboundary shooting example, the Court would have jurisdiction only if the state, where the trigger was pulled, was a party to the Statute, irrespective of where the death occurred. This approach would mean that the Court's jurisdiction under this provision is strictly delimited, so as to exclude from its reach, in the absence a Security Council referral, cases or situations where the conduct took place outside the territory of a state party (e.g. launching projectiles, shooting etc.), whereas the consequences of the crime, (e.g death, injury, destruction of property etc.) took place within such territory.

84 A. Eser, *Article 31*, in Triffterer, *supra* note 18, at 872.

85 *Id.*; Kai Ambos, *Other Grounds for excluding criminal responsibility*, in Cassese, *supra* note 14, at 1028-9; Elies van Sliedregt, The Criminal Responsibility of Individuals for Violations of International Humanitarian Law 242-243 (2003), seems to suggest that, as article 31 is the "central provision in the Rome Statute that deals with the possible exclusion of criminal responsibility", it should be used as a guide to fill in certain gaps of other relevant provisions in the Statute, particularly articles 32 and 33 thereof concerning mistakes of fact or law and superior orders. In her view, as neither article 32 nor article 33 specify the time, at which the relevant defense would need to be established, this should be the time stipulated in article 31, *i.e.* the time of the commission of the conduct.

86 That is at least to the extent that article 31 (4) of the Vienna Convention is not applicable, insofar as it stipulates that "A special meaning shall be given to a term if it is established that the Parties so intended".

87 Michael Duttwiler, *Liability for Omission in International Criminal Law*, 6 Int'l Crim. L. Rev. 1, 58 (2006).

88 Assembly of States Parties, *Report of the Special Working Group on the Crime of Aggression*, 7th Session of the Assembly of States Parties, Annex III, ¶ 28 (Nov. 14-22, 2008). This position does not appear in any of the subsequent documents of the Working Group on the matter.

5.3. / 'CONDUCT IN QUESTION' AS 'CRIMES IN QUESTION'

On the other hand, there are probably a series of other considerations that should be taken into account when examining this provision. As Leo Gross insightfully noted, "the text is the starting point of the interpretation. Whether it will become its "end point" depends upon other elements of interpretation."[89]

The starting point for the discussion is the chapeau of article 12(2), which provides that "[i]n the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:[…]." Therefore, when interpreting this provision, one should also consider article 13, paragraphs (a) and (c) – the trigger mechanisms[90] of state referral and Prosecutor's *proprio motu* action. This approach would appear warranted also since reference is made to 'the conduct *in question*' in paragraph 2 (a) of the article.

Article 13, reads in its relevant parts as follows; "Article 13 – Exercise of jurisdiction; The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of the Statute if:

a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

[…]

The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15."

As evidenced from paragraph (a) of article 13, as well as article 14, when a state makes a referral,[91] it brings to the attention of the Court[92] an entire situation, "in which one or more crimes appears to have been committed", not simply a certain conduct. Thereafter, "it is the duty of the prosecutor to investigate and determine which, if any, crime or crimes have been committed and by whom."[93] The existing state referrals

89 Leo Gross, *Treaty Interpretation: The proper rôle of an international tribunal*, *in* 1 Essays on International Law and Organization 422 (1984).

90 On the meaning of the term 'trigger mechanisms', Flavia Lattanzi, "Compétence de la Cour Pénale Internationale et Consentement des États », 103 Revue Générale de Droit Int'l Public 425, 436 (1999), explaining it as "le mécanisme d' activation de la procedure devant la Cour"; Philippe Kirsch & Daniel Robinson, *Referral by States Parties*, in Cassese, *supra* note 14, at 619, define the term as "the ability to direct the Court's attention to events in a particular time and place, possibly involving numerous criminal acts, with a view to initiating an exercise of jurisdiction over those events"; for the trigger mechanisms as the transmission of a *notitia criminis*, *i.e.* the transmission of a notice of alleged criminal activities, without however rendering the referring entity a *partie civile*, Héctor Olàsolo, *The Prosecutor of the ICC before the initiation of investigations: a quasi-judicial or a political body?,* 3 Int'l Crim. L. Rev. 87, 92 (2003); Giuliano Turone, *Powers and Duties of the Prosecutor*, in Cassese, *supra* note 14, at 1143-1145.

91 Although there is no definitive approach to the matter, the legal nature of the referral, under international law, would probably seem to be that of a unilateral declaration of a state addressed to the ICC, drawing the latter's attention to a critical situation. As such, a state referral under 13 (a) should comply –in addition to and notwithstanding the specific requirements of the Statute and the other documents of the Court – with certain requirements under general international law, such as good faith and seriousness of intent. To the extent that these requirements are not met – as for example in cases of bad faith referrals initiated by a desire to politically manipulate the function of the Court – the referral should be considered arguably as non-existent or in the alternative as 'information' at the disposal of the Prosecutor under article 15 of the Statute. This would entail by implication the power of the Court to 'strike out' *mala fide* referrals. For the requirements of the validity of unilateral declarations under international law, Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253 at 267, ¶ 43-45; Frontier Dispute, (Burk. Faso v. Mali), Judgment, 1986 I.C.J. Rep. 554, 574-5, ¶ 39.

92 The Rome Statute, *supra* note 21, at article 42(1), the Office of the Prosecutor is responsible for receiving referrals.

93 Daniel D.N. Nsereko, *Triggering the Jurisdiction of the International Criminal Court*, 4 Afr. Hum. Rts. J. 256, 267 (2004).

seem to call for the examination of situations where crimes appear to have been committed within the Court's subject-matter jurisdiction.[94]

The same appears to apply with the *proprio motu* action of the Prosecutor -"in respect of such a crime",[95] as evidenced recently in the decision authorizing the opening of an investigation in the Kenya situation. In that decision, the Pre-Trial Chamber explained that the critical issue under article 12 is "that the crime occurs on the territory of a State Party to the Statute"[96] and finally agreed with the Prosecutor that "the alleged crimes against humanity occurred on the territory of the Republic of Kenya, for which reason the Court's jurisdiction (*ratione loci*) under article 12(2)(a) of the Statute is satisfied."[97]

This approach makes sense also in light of the conditions, in which the compromise of the Court's jurisdiction was achieved in Rome, where articles 12-16[98] seemed to form part of a 'package-deal' endorsed at the very end of the Conference.[99] Hence, the interpretation of article 12 should be properly placed in the context of the provisions of Part II of the Statute and in particular of articles 13-16 thereof,[100] with due regard to the definition of the 'crimes within the jurisdiction of the Court' in article 5 of the Statute, and, more importantly, to the exclusion of relevant interpretative approaches in other Parts of the Statute, and particularly Part III.

This course of action would seem consistent with the affirmation of the Appeals Chamber that "[t]he context of a given legislative provision is defined by the particular sub-section of the law read as a whole in

94 Unfortunately, the text of the referrals as such remains confidential. From the relevant rulings of the Court and the letters of the Office of the Prosecutor, however, the language seems to be standardized and to follow more or less faithfully the wording of article 13 (a). For the Uganda and DRC referrals, *see* the letter of the Prosecutor to President Kirsch of 17 June 2004, attached to the Situation in Uganda, Case No. ICC-02/04, Decision Assigning the Situation in Uganda to Pre-Trial Chamber II (July 5, 2004), and in Situation in Dem. Rep. Congo, Case no. ICC-01/04, Decision assigning the Situation in the Dem. Rep. Congo to Pre-Trial Chamber I (July 5, 2004), where reference is made consistently to "crimes within the situation of Northern Uganda by whomever committed" (as opposed to crimes concerning solely the LRA mentioned therein) and "crimes within the jurisdiction of the Court committed within the territory of the Dem. Rep. Congo since July 1, 2002" for the Dem. Rep. Congo. The Dem. Rep. Congo referral letter was dated March 3, 2004 and announced on April 19, 2004. For the Central African Republic Referral, see the letter of the Prosecutor to President Kirsch of December 22, 2004 attached to the Situation in Cent. Afr. Rep., Case No. ICC-01/05, Decision Assigning the situation in the Centr. Afr. Rep. to Pre-Trial Chamber III (Jan. 19, 2005), wherein it is said that "In a letter presented by a representative of President Bozizé, my Office has been asked to investigate crimes under the jurisdiction of the Court that may have been committed since July 1, 2002, anywhere on the territory of the Central African Republic".

95 The Rome Statute, *supra* note 21, at art. 13(c); *Cf.* Rome Statute art. 15(1), referring to the power of the Prosecutor to "initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court" and article 53(1)(a) on the "reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed"; generally, Ph. Kirsch & D. Robinson, *Initiation of Proceedings by the Prosecutor, in* Cassese, *supra* note 14, at 661-4; Turone, *supra* note 90, at 1150-1; Perhaps it would be useful to note that also in other relevant documents, the emphasis is on the 'crimes in question', rather than 'conduct'; *see* indicatively Regulation 49 on the elements that the Prosecutor's request for authorization should contain, as well as Regulation 52 for the document containing the charges. Further, article 53 (1)(a) – (c) of the Statute, as a provision relating also to the determination made by the Prosecutor of whether a reasonable basis exists to proceed with a 'preliminary examination' under article 15 according to Rule 48, makes clear reference to the duty of the Prosecutor to consider whether "the information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed"; Morten Bergsmo & Jelena Pejić, *Article 15,* in Triffterer, *supra* note 18, at 589; M. Bergsmo & Pieter Kruger, *Article 53*, *id.* at 1070; Holmes, *supra* note 77, at 331.

96 Kenya Authorization Decision, *supra* note 22, at 18, ¶ 39.

97 *Id.* at 68, ¶ 178.

98 Interestingly, article 16 acknowledges the right of the Security Council, acting under Chapter VII, to obtain a yearly deferral of investigations or prosecutions without reference to conduct, act or omissions. On the contrary, the deferral documents themselves seem to have used such language. Note S.C. Res. 1422/2002, U.N. Doc. S/RES/1422 (July 12, 2002), which states that the Security Council "*Requests*, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting July 1, 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise"; S.C. Res. 1487/2003, U.N. Doc. S/RES/1487 (June 12, 2003) with the exact same wording, changing the starting point of the period to July 1, 2003; Generally on these resolutions, C. Stahn, *The Ambiguities of Security Council Resolution 1422 (2002),* 14 Eur. J. Int'l L. 85 (2002); Salvatore Zappalá, *The Reaction of the US to the entry into force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements*, 1 J. Int'l Crim. Just. 114 (2003); S.C. Res. 1593/2005, U.N. Doc. S/RES/1593 (Mar. 25, 2005), ¶ 6 referring to the Court the situation in Sudan used similar language; L. Condorelli & A. Ciampi, *Comments on the Security Council Referral of the Situation in Darfur to the ICC*, 3 J. Int'l Crim. Just. 590, 594-7 (2005), for a legal analysis thereof.

99 i.e. as part of the entire jurisdictional 'package deal'. Williams & Schabas, *supra* note 32, at 555, "Article 13"; M. Ch. Bassiouni, Introduction to International Criminal Law 504, n. 30 (2003) and *supra* Chapter 3.

100 Williams & Schabas, *supra* note 32, at 564, "In order to comprehend the inextricably intertwined nature of these provisions [articles 12-16], they should be read together".

conjunction with the section of an enactment in its entirety"[101] – Part II of the Statute being for present purposes the relevant "section of the enactment".[102]

Having regard therefore to this wording and its position in the jurisdictional system of the Court, it becomes evident that the 'conduct *in question'* refers to the conduct described in the two paragraphs referred to in article 13 – *i.e.* the one or more crimes, in accordance with article 5 of the Statute, which appear to have been committed in the situation referred by a State Party or examined by the Prosecutor under article 15, rather than solely a certain conduct.[103] In this context, therefore, references to the provisions of other Parts of the Statute, and in particular those in Part III concerning General Principles – an entirely different subject altogether, which was negotiated and concluded well before the jurisdictional regime at Rome[104] – would appear to "engender an asystematic opinio juris", to the detriment of the effective operation of the Statute's jurisdictional system.

The practice of the Court up to now sheds some light in the determination of this issue, although the lack of challenges to the territorial aspect of the Court's jurisdiction has not given to the Chambers cause to deal with it in depth. As such, the Chambers of the Court in cases arising from referral by states parties have summarily addressed the topic of jurisdiction mostly in the framework of their *proprio motu* examination of jurisdiction in decisions on the issuance of an arrest warrant or a summons to appear under article 58 of the Statute, as well as in confirmation of charges decisions.[105] In these cases, the terminology is not particularly helpful, as the Pre-Trial Chambers simply note – in more or less the same wording – that on the

101 Extraordinary Review Appeal, *supra* note 27, at ¶ 33; it should be noted however that in earlier case-law on admissibility, the Court has had recourse for the purposes of the interpretation of a provision in Part II of the Statute also to the relevant provisions of Part III on General Principles of Law; Lubanga Arrest Warrant Appeal, *supra* note 24, at ¶ 78, where the Court, in order to overrule the position of the Pre-Trial Chamber that the gravity requirement of article 17(1)(d) in effect rendered inadmissible all cases other than those concerning 'the most senior leaders', had recourse to articles 33 and 27 (1) of the Statute on the irrelevance of superior orders and of official capacity for the purposes of prosecution before the Court; *id.* at ¶ 35-36, Separate and Partly Dissenting Opinion of Judge Pikis, who appears to have gone even further, referring to articles 25, 27, 28, 30, 31 and 33 of the Statute.

102 A certain degree of ambivalence in this respect seems inevitable, particularly as the judgment speaks in terms of sections and sub-sections, which do not exist in the Statute. The sub-section could arguably be articles 12-16 of the Statute in the present case.

103 *Cf.* here the position of states parties to that of the Security Council in the referral process. While the Security Council can refer under the Statute only situations "acting under Chapter VII of the United Nations", involving a threat to international peace and security, states parties may refer any situation in which one or more crimes within the Court's jurisdiction appear to have been committed. The referral power of the States Parties therefore is clearly centering on the notion of 'crimes' in question. Antonio Marchesi, *Article 14*, in Triffterer, *supra* note 18, at 579.

104 Bassiouni, *supra* note 61, at 453-4, 457-8, whereas Part II was completed and settled at the very end of the Conference, without even the benefit of possible corrections by the Drafting Committee, which is said to have received it under the instructions to read it but not alter it. Part III was concluded well in advance; as Saland reports, the relevant Working Group of the Conference concluded its business on 7 July 1998 and became the first to finish its task. Saland, *supra* note 66, at 194; Kenya Authorization Decision, *supra* note 22, where this has been highlighted as regards the difference in the wording of articles 15 and 53 of the Rome Statute at 29-30, ¶ 67.

105 Prosecutor v. Lubanga, Confirmation of Charges Decision, *supra* note 62, ¶ 164-5; the Pre-Trial Chamber dismissed the issue summarily. It observed first, that the case's temporal, geographical, material and personal jurisdictional elements had not been altered since it gave its preliminary ruling on jurisdiction at the issuance of the arrest warrant of February 10, 2006, as well as in its subsequent determination of October 3, 2006 and secondly that "nothing new has been submitted to the chamber in respect of jurisdiction and admissibility in the instant case". It should be observed here that, as the Appeals Chamber later decided, the ruling on certain alleged procedural shortcomings concerning Lubanga's detention in the Dem. Rep. Congo of October 3, 2006 did not in fact concern jurisdiction, but was rather "a *sui generis* application, an atypical motion" seeking the stay of the proceedings and the suspect's release; Prosecutor v. Lubanga, Defence Challenge Decision, *supra* note 28, at 13, ¶ 24; in the Katanga Confirmation Decision, *supra* note 49, issues of jurisdiction and admissibility of the case do not appear in the 200-page ruling.

basis of the information provided by the Prosecution, the case against a named individual falls within the jurisdiction of the Court.[106]

Oddly enough, one of the clearest pronouncement yet seems to be the one espoused by the Court in the Sudan-Darfur situation, referred to by the Security Council. In this framework, it has been noted that "[r]egarding the territorial and personal parameters, the Chamber notes that Sudan is not a State Party to the Statute. However, article 12 (2) does not apply where a situation is referred to the Court by the Security Council acting under Chapter VII of the Charter, pursuant to article 13(b) of the Statute. Thus, the Court may, where a situation is referred to it by the Security Council, exercise jurisdiction over crimes committed in the territory of States which are not Party to the Statute and by nationals of States not Party to the Statute"[107]- whereas, apparently, in the absence of such a referral, the Court would not be able to exercise jurisdiction over 'crimes committed' in the territory of states not parties.

Recent jurisprudence mentions in passing that, in the eyes of the Court, 'conduct' in article 12(2)(a) in fact means 'crimes'.[108] This position finds support also in the *Al-Bashir Arrest Warrant Decision* of Pre-Trial Chamber I,[109] as well as in the *Kenya Authorization Decision*[110] and has been implicitly supported in the literature.[111]

106 Prosecutor v. Lubanga, Arrest Warrant Decision, *supra* note 24 at 2; Prosecutor v. Bosco Ntaganda, case No. ICC-01/04-02/06, 2, Warrant of Arrest (Aug. 22, 2006); Prosecutor v. Katanga, Case No. ICC-01/04-01/07, 3, Warrant of Arrest (July 2, 2007), which provides in a slightly modified version as follows "on the basis of the evidence and information submitted by the Prosecution and without prejudice to the filing of any challenge to the admissibility of the case under articles 19(2)(a) and (b) of the Statute and without prejudice to any subsequent decision in this regard, the case against Katanga falls within the jurisdiction of the Court and is admissible"; the same formulation appears in Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/07, 3, Warrant of Arrest (July 6, 2007); from the Uganda arrest warrants, although the treatment of the Court's temporal jurisdiction receives some attention, due to Uganda's Declaration of Temporal Jurisdiction of February 27, 2004, the territorial jurisdiction of the Court is overcome in similar general statements as in the Dem. Rep. Congo cases. Situation in Uganda, Case No. ICC-02/04, Warrant of Arrest for Joseph Cony issued on 8 July 2005 as amended on 27 September 2005, ¶ 34 (Sept. 27, 2005), " . . . . such crimes are alleged to have taken place after the 1st day of July 2002 and within the context of the situation in Uganda as referred to the Court" and ¶ 38, "and without prejudice to subsequent determination, the case against Dominic Ongwen falls within the jurisdiction of the Court and appears to be admissible"; The text of these paragraphs is repeated verbatim in the other arrest warrants issued as regards the Situation in Uganda in the respective paragraphs; Case No. ICC-02/04, Warrant of Arrest for Vincent Otti, ¶ 34, 38 (July 8, 2005); *id.* Warrant of Arrest for Raska Lukwiya, ¶ 22, 26 (July 8, 2005) (the case was terminated on July 11, 2007 due to the suspect's death), Prosecutor v. Joseph Kony et al., Case No. ICC-02/04-01/05, Decision to terminate the proceedings against Raska Lukwiya, (July 11, 2007); *id.* Warrant of Arrest for Okot Odhiambo, ¶ 24, 28 (July 8, 2005); *id*. Warrant of Arrest for Dominic Ongwen, ¶ 22, 26 (July 8, 2005); Similarly, Situation in Centr. Afr. Rep., Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, ¶ 11 (June 10, 2008), "The Chamber considers that, on the basis of all of the evidence and information submitted by the Prosecutor, and without prejudice to the filing of a challenge to the admissibility of the case under articles 19(2)(a) and (b) of the Statute and to any subsequent decision in connection therewith, the case against Jean-Pierre Bemba falls within the jurisdiction of the Court and is admissible"; almost identical wording to that in the Bemba Arrest Warrant is used in the Sudan-Darfur Arrest Warrants, without any further elaboration; Prosecutor v. Ahmad Muhammad Harun (Ahmud Harun) and Ali Muhammad Al Abd Al Rahman (Ali-Kushayb), Case No. ICC-02/05-01/07, Warrant of Arrest for Ali Kushayb, 2 (Apr. 27, 2007) and the *Corrigendum* of the same ruling, "CONSIDERING that, on the basis of the evidence and information provided by the Prosecution and without prejudice to any challenge to the admissibility of the case under article 19(2)(a) and (b) of the Statute and without prejudice to any subsequent determination, the case against Ali Kushayb and Ahmad Harun falls within the jurisdiction of the Court and is admissible"; *id*. Warrant of Arrest for Ahmad Harun, 2 (Apr. 27, 2007) and the *Corrigendum*; Almost identically, Al-Bashir Arrest Warrant Desicion, *supra* note 5, at 3.

107 Situation in Darfur, Sudan, in Prosecutor v. Ahmud Harun and Ali-Kushayb, Case no. ICC-02/05-01/07, Decision of the Prosecution Application under Article 58(7) of the Statute, ¶ 16 (April 27, 2007); *cf.* from the literature, Chris Gallavin, The Security Council and the ICC: Delineating the Scope of Security Council Referrals and Deferrals, 5 N.Z. Armed Forces L. Rev. 30, for a position on the 'recommendatory character' of the Court's jurisdiction on the basis of a SC referral; "Any UNSC referral that purports to provide the ICC with a basis of jurisdiction outside that provided for in the Rome Statute should therefore be seen as merely recommendatory. The implementation of such recommendations would come within the application of the prosecutor's inherently vague administrative discretion which arises in the day to day operation of an investigation".

108 Situation in Dem. Rep. Congo, Case No. ICC-01/04, Decision on the Application for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5 and VPRS-6, ¶ 85 (Jan. 17, 2006), "Thus, it has been stated by Pre-Trial Chamber I that "[t]o fall within the Court's jurisdiction, a crime must meet the following conditions: it must be one of the crimes mentioned in article 5 of the Statute, that is to say, the crime of genocide, crimes against humanity and war crimes; the crime must have been committed within the time period laid down in article 11 of the Statute; and the crime must meet one of the two alternative conditions described in article 12 of the Statute".

109 Al-Bashir Arrest Warrant, *supra* note 5, at ¶ 36.

110 Kenya Authorization Decision, *supra* note 22, at ¶ 178.

111 Bassiouni, *supra* note 99, at 503, "Before the Court can exercise jurisdiction, the alleged crime must have been committed on the territory of a state-party or by one of its nationals [article 12 (2)]".

Finally, as regards the principle *ne bis in idem*, the Statute does draw a distinction in its consideration of the *idem* between 'conduct' and 'crimes', as "[i]t became evident in the negotiations that no single, mechanical test could cope with the variety of situations that might arise"[112] under article 20 between the national and international legal orders. However, it is also true that the notion of 'conduct' in the provision does not indicate a conduct *per se*, in juxtaposition to consequences or circumstances, but rather seems to denote the entire set of facts concerning a certain crime, for which an accused was tried and convicted or acquitted by the Court or a national court. This view is supported by article 20(1) that makes reference to 'conduct, which formed the basis of crimes', as well as article 20(3), which applies with regard to 'conduct also proscribed under article 6, 7 or 8". These provisions seem to adhere to the 'broad interpretation' of the *idem*, *i.e*. they cover "the previous conduct, both in law and in fact",[113] or in other words "the historical facts relevant for subsumption under the legal qualification",[114] without excluding any of the factual parameters of the crime or distinguishing between them. This approach is also supported by general principles of law, at least insofar as a criminal disposition by any court presupposes the examination of all attendant factual and mental elements of a crime.[115]

Should one, however, decide to venture beyond Part II of the Statute, it would be further possible to strengthen this argument by recourse to article 22 of the Statute, which provides that "[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court." Viewed in this context, it would appear indeed somewhat arbitrary to separate from the 'conduct in question' an act or omission from its consequences and the circumstances, in which it took place. Otherwise, it would seem impossible, under the principle of legality, to classify a certain course of action – or "attributed conduct" as its was put in the Katanga Confirmation Decision[116] – as a crime within the jurisdiction of the Court, particularly as regards the so-called result crimes.[117] Thus, for example, it would be indeed very difficult to establish whether or not the Court has jurisdiction over the war crime of wilful killing, if the consequence of the conduct, *i.e.* the death of a person, the essence of the crime, fell beyond the Court's examination under the principle of legality, as it would if one would accept the position that the Court should only consider the conduct in question (the shooting, hitting, launching of projectiles etc) and not the crime as a whole.

As such, it is suggested that an acceptable interpretation of article 22 paragraph 1 would be that 'conduct in question' does not refer simply, implicitly or otherwise only to conduct as 'acts or omissions', excluding consequences,[118] but to the totality of the objective and subjective elements of the case at hand, since any other explanation would lead to manifestly unreasonable results.[119] Accordingly, the same expression in article 12 (2) (a) could be construed in a similar manner as in article 22 (1), in order to

112 Tallgren & Coracini, *supra* note 81, at 683.

113 *Id.* at 692 on art. 20(3); Wyngaert & Ongena, *supra* note 81, at 714, 722, 726;

114 Tallgren & Coracini, *supra* note 81, at 692, n. 131, who comment on the selected wording of "conduct also proscribed in article 6, 7 or 8" in article 20(3); "The reason for this change [in the Rome Conference] has never been made clear. One explanation could be that since upwards *idem* is defined by "conduct constituting a crime" meaning the historical facts relevant for subsumption under the legal qualification, the reference to those articles precisely defining the conduct elements which constitute criminal behaviour might have seemed more appropriate than referring to the article merely listing the groups of crimes".

115 Prosecutor v. Delalić et al (Celebici), Case No. IT-96-21-T, Judgment, Trial Chamber, ¶ 424-5 (Nov. 16, 1998), " . . . . it is a general principle of law that the establishment of criminal culpability requires an analysis of two aspects. The first of these may be termed the *actus reus* – the physical act necessary for the offence. . . . . The second aspect . . . . relates to the necessary mental element, or *mens rea*. Often this debate centres around the question of "intent" . . . . "

116 Katanga Confirmation Decision, *supra* note 49, at ¶ 487, "a person may not be criminally responsible under the Statute unless the attributed conduct constitutes a crime under the jurisdiction of the Court (article 22(1) of the Statute)".

117 For the distinction between conduct and result crimes, in general, A. Cassese, International Criminal Law 55 (2nd ed. 2008); Katanga Confirmation Decision, *supra* note 49, at ¶ 270, 274, n. 374, for an example of a conduct and a result crime distinction from the jurisrprudence; the Pre-trial Chamber drew a distinction between the crime of targeting a military objective, with knowledge that it will or may cause a certain consequence, *i.e.* incidental civilian casualties, under article 8(2)(b)(iv) of the Statute, and the crime of intentionally directing an attack against a civilian population under article 8(2)(b)(i) of the Statute, which is described as "a crime of mere action", where the targeting itself is a crime, irrespective of whether death or injury actually occurs; Further examples in the literature, Piragoff & Robinson, *supra* note 61, at 859.

118 The preparatory works would seem to indicate such an approach; According to Saland, *supra* note 66, at 195, in the context of article 22 (1), "the term "conduct" was generally accepted to denote a criminal act or omission in order to avoid the problem which some delegations had with the idea of omissions being criminal on a par with acts"; See also Prosecutor v. Hadzihasanovic et al, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, ¶ 62 (Nov. 12, 2002).

119 In this spirit, Bruce Broomhall, *Article 22,* in Triffterer (Commentary), *supra* note 18, at 722, ""Conduct" may include both acts and omissions where appropriate. . . . . Conduct will "constitute" a crime when it comprises all the necessary elements of the crime, including the mental element under article 30."

achieve consistency and uniformity in the interpretation of the Statute and allay similar concerns over the jurisdictional reach of the Statute as regards the territorial aspects of its jurisdiction.

5.4. / INTERIM CONCLUSION

The entire discussion over the terms 'the conduct in question' may seem to a certain extent without too much practical significance. After all, the Court does not seem to have had any difficulty so far in construing the terminology applied as meaning in fact 'crimes in question', although it is true that these rulings do not deal with the matter of the wording used in any depth; they rather seem to instinctively refer to 'crimes', instead of 'conduct' in question, particularly since the Court's territorial jurisdiction is not disputed in these first cases before it.[120]

On the other hand, however, the issue has received particular attention in the context of the work of the Special Working Group on Aggression, although in the end again no decision was reached.[121]

By way of conclusion, the above arguments may be summarized as follows. When approaching the term 'conduct' in the context of article 12 (2) (a), certain options seem available; either to consider that the term is used consistently and systematically throughout the Statute as having a single meaning, here as denoting an act or omission, or, otherwise to argue that the same term can have different meanings in different Parts of the Statute, depending on the context of each provision and its position in the system and the purposes of the Court.

In this line of thinking, if one accepts that for the sake of the integrity of the treaty text, the same terms are to be at least presumed[122] to have the same meaning throughout the Statute, then the use of the particular terminology in this provision may be attributed to less than perfect drafting.

Within these parameters, therefore, the argument of the previous pages may be explained along the following lines.

The use of the term 'conduct' in the Rome Statute is not employed consistently throughout the Statute. It should not be explained as having the same meaning in each Part of the Statute. On the contrary, its interpretation would appear to be subject to alternative explanations, premised on the context, the purposes and the objectives of each provision. Hence, while 'conduct' in articles 30 and 31 of the Statute for example may be seen as denoting an act or omission distinct from consequences and circumstances, such a reading cannot be accepted for 'conduct' in the context of other provisions, such as article 12(2)(a) ICC Statute. This approach would attach more gravity to the specific subject-matter of each provision, as well as a contextual, and teleological interpretation of the system of the Rome Statute, rather than a more rigid literal interpretation and would consider article 12 (2) mostly in the light of articles 13 and 15.

In the alternative, even if one were to accede to the proposition of the uniform application throughout the Statute of the same terms, it is submitted that in the framework of article 12(2)(a) the use of the terms 'conduct in question' should be considered an unfortunate selection, resulting from the drafting conditions in Rome, rather than as a conscious choice on the part of the negotiators.

As regards the first point of this part of the argument, the problems that could potentially arise from the wording finally employed revolve around the possibility of the use of subjective territoriality to the exclusion of other acceptable forms of territorial jurisdiction under international law, and the application of excessive, it is submitted, contextual interpretation through the use of other articles of the Statute.

As regards this issue, the Appeals Chamber's determination on the Statute's authoritative guide, mandating, it seems,[123] a Part-by-Part analysis, as well as the Katanga's Confirmation Ruling approach, proposing the exclusion from consideration of unrelated norms that would 'engender an asystematic opinio juris', would indicate that the Statute constitutes a unified whole of otherwise divisible interpretative units, the application and interpretation of which is to be deduced by recourse primarily (if not exclusively) to other

120 Situation in Darfur, Sudan, in Prosecutor v. Ahmud Harun and Ali-Kushayb, Case No. ICC-02/05-01/07, Decision of the Prosecution Application under Article 58(7) of the Statute, ¶ 16, (Apr. 27, 2007); Al-Bashir Arrest Warrant, supra note 5, at ¶ 36; Situation in Dem. Rep. Congo, Decision on the Application for Participation in the Proceedings, *supra* note 108, at ¶ 85.

121 See *supra* Part. 5.1.1.

122 Without prejudice to Vienna Convention, *supra* note, 53 at art. 31(4).

123 The reservation is to be reiterated here as the 'authentic guide', in the Extraordinary Review Appeal, *supra* note 27, at ¶ 33, refers to 'sections and subsections', which do not exist in the Statute, instead of Parts.

provisions of the same 'section' or 'sub-section', in tune with the overall purposes of the Court. This approach, it is submitted, is not entirely without merit, as it would seem to comply with the multi-dimensional system (criminal law, criminal procedure, constitutional provisions) of the Statute, provided that it is not adhered to with excessive rigidity to the detriment of the Statute's integrity as a whole. More to the point, this approach would seem particularly useful, at least to the extent that it would allow the Court to 'draw the line', so to speak, between the interpretation of terms used, at first glance interchangeably, throughout the Statute, which were however negotiated in the isolation of each individual Working Group, with possibly different connotations attached to them depending on the use and the specific context of the term employed.[124]

If one is unable to accept this proposition, however, in order to either avoid potential threats to the integrity of the Statute as a unified, uniform and coherent system, on the basis of a different reading of the case-law or even on the basis perhaps of the argument that, in the same international treaty, the exact same terms should be at least presumed to have the same meaning, unless otherwise clearly indicated by the Parties, then, there seems to be only one other alternative; that this constitutes (simply) an example of inadvertent drafting.

Turning hence to the second issue, the key question would be, from a more positivist approach, what the drafters actually intended through this formulation.[125] The *travaux* do not shed any light on the matter; as it has been explained, the creation and adoption of article 12 was the result of a veritable diplomatic battle, which was ultimately decided not in the most transparent way when the P5 decided to 'close ranks'[126] the last days of the Conference. It could be that the delegates chose this formulation on purpose, with the specific intent of distinguishing it from the other possibilities prescribed in article 12 (2) and (3). After all, article 30 of the Statute was one of the provisions on which agreement had been reached earlier in the Conference; the formulation of article 30 and the distinction prescribed therein were available to the delegates. It is not inconceivable that article 12 (2) (a) was created bearing in mind article 30 and its distinction.

On the other hand, one cannot altogether exclude the possibility that there is a simpler explanation to the use of this formulation in article 12 (2) (a). It could be the result of inopportune drafting, similarly to article 12 (3). As Professor Bassiouni mentioned with regard to article 12 (3), the troublesome drafting of that provision was partly owed to the fact that the "Part 2 package", as developed by the "small group of delegates", who "worked with the Chairman of the Committee of the Whole to develop the text" the last few hours prior to the conclusion of the Conference, "was sent directly to the Committee of the Whole and not to the Drafting Committee."[127] In his view, it is clear that the problematic formulation of article 12 (3) on the 'crimes in question' was simply "a material error", "…not intended to deviate from other methods of referrals. Thus, Article 12 (3) must be read *in pari materia* with article 13."[128]

The Pre-Trial Chamber in the recent *Kenya Authorization Decision*, while explaining the redundancy in the duplication of certain requirements under articles 53 and 15 of the Statute for the authorization of an investigation, attributed this situation to the different working groups operating in parallel at Rome, to the lack of time after the conclusion of the Rome Conference to reconcile the texts and submit them for consideration to the drafting committee, as well as to the fact that "many fundamental questions remained unresolved until the very end of the Rome Conference,[…], as well as fundamental questions relating to jurisdiction, such as the preconditions for the Court to exercise jurisdiction…"[129] Similar concerns could be

124 Kenya Authorization Decision, *supra* note 22, at 29-30, ¶ 67; further, R. Cryer et al., An Introduction to International Criminal Law and Procedure 148-149 (2nd ed., 2010).

125 Compare, Prosecutor v. Delalic et al. (Celebici), Case No. IT-96-21-T, Judgment, Trial Chamber, ¶ 412 (Nov. 16, 1998), "It has always been the practice of courts not to fill omissions in legislation when this can be said to have been deliberate. It would seem, however, that where the omission was accidental, it is usual to supply the missing words to give the legislation the meaning intended. The paramount object in the construction of a criminal provision, or any other statute, is to ascertain the legislative intent. The rule of strict construction is not violated by giving the expression its full meaning or the alternative meaning which is more consonant with the legislative intent and best effectuates such intent."

126 H.P. Kaul, *The International Criminal Court: Jurisdiction, Trigger Mechanism and Relationship to National Jurisdictions,* in Mauro Politi & Giuseppe Nesi, The Rome Statute of the International Criminal Court, A Challenge to Impunity 62 (2001) .

127 Mahmoud C. Bassiouni, Introduction to International Criminal Law 516, n. 84 (2003); Bassiouni, *supra* note 61, at 457-8. As that author, then Chairman of the Drafting Committee, mentions, "On the afternoon of July 16, the Drafting Committee received Part 2 of the Draft Statute (Articles 5-21) from the Bureau with the instructions that the text could be read but not altered. The Drafting Committee unanimously refused to accept this restraint. Most members felt that the Bureau's instructions violated the spirit, if not the letter of the Conference's rules. If the Drafting Committee had been able to review Part 2, it could have resolved certain problem that surfaced later."

128 *Id*. at 503-504, n. 30; In the same spirit, Cryer, *supra* note 124, at 148-149; Shabtai Rosenne, *Poor Drafting and Imperfect Organization: flaws to overcome in the Rome Statute*, 41 Virginia J. Int'l L. 164, 185 (2000).

129 Kenya Authorization Decision, *supra* note 22, at 29-30, ¶ 67.

raised perhaps with regard to the provision and the wording of article 12 (2) (a) – and similar solutions could be advanced.[130]

In light of these observations, and absent a clear determination by the Court, the matter is open to some speculation. It is submitted, however, that particularly in light of the Court's practice and the Statute's purpose and object, it would indeed seem an exaggeration inconsistent with the position of article 12 to the jurisdictional system of the Court to interpret this part of the provision as meaning in reality anything other than "crimes in question", or at the very least as the entire 'conduct', including acts, consequences and circumstances of a certain criminal activity in its entirety.

5.5. / LOCALIZATION OF CRIMINAL ACTIVITY

As developed in some detail in Chapter 2, traditionally, reference to the rule of state territorial jurisdiction involves its methodological, mostly, division in subjective and objective territoriality, on the basis of the location, where different parts of a certain criminal activity are said to have manifested and their impact on national law and order. As the Court is vested with jurisdiction, in the event that a crime occurs within the territory of a state party, a significant issue concerns the extent of the Court's jurisdictional reach on the basis of territory in accordance with its Statute and general international law. In this framework, an effort will be made to address the legal questions that may arise in the case of partial commission of a crime within state party territory under international law (including the constituent elements approach).

5.5.1. / DELIMITING THE COURT'S TERRITORIAL JURISDICTION ON THE BASIS OF CONSEQUENCES OR UBIQUITY AND THE APPLICATION OF RULES AND PRINCIPLES OF INTERNATIONAL LAW

It has been affirmed unequivocally ever since the *Lotus* case that states may exercise criminal jurisdiction "if one of the constituent elements of the offence, and more especially its effects, have taken place there."[131]

From that point onwards, it seems that no specific international rules can be clearly discerned in customary international law, explaining with sufficient uniformity and precision the exact parameters for lawful state assertions of territorial criminal jurisdiction, constructive or otherwise, and their relationship to other rules of criminal law relating for example to attempts, commission by proxy and participation. The best position seems to be that ever since *Lotus,* "the magnitude of the consequences which different States require is felt in their territory as a prerequisite to exercising objective territorial jurisdiction are issues that

130 Arguably, however, it would seem that this oversight would not be amenable to corrective attempts through the Rules of Procedure and Evidence, as it seems to have happened with article 12(3) and the adoption of Rule 44, Sub-rule 2. Notwithstanding the cardinal importance of article 12(2) to the Court's system, such attempts would also need to be seen in light of the hierarchy established under article 21 of the Statute, giving priority to the Statute over the Rules, and article 51(5) of the Statute which provides that in case of conflict between the Statute and the Rules, the Statute shall prevail; Freeland, *supra* note 77; Goldsmith, *supra* note 77; Goldsmith, *supra* note 77.

131 S.S. *Lotus* (Fr. v. Turk.), 1927 PCIJ (Ser. A), No. 10, 23.

have evolved through municipal case law and legislation."[132] This seems to be implicitly the position adopted by most of the authorities in the field, to the (generally limited) extent that they deal with it.[133]

The reasons that led to this situation are many, including the *Lotus* perspective that unless certain state action is prohibited, it is permitted,[134] as well as the absence of a general treaty regulating state criminal jurisdiction on the basis of territoriality.[135] This state of affairs seems to have in effect allowed states to constantly test – and perhaps ever re-calibrate – the limits of lawful jurisdictional assertions under customary international law[136] by further stretching their jurisdictional reach, requiring increasingly lesser or fewer consequences or constituent elements to take place in their territory for the exercise of criminal jurisdiction, up to the point where the occurrence of 'effects', other than the consequences of the activity *per se* suffice for asserting jurisdiction. This situation in the law of jurisdiction has been criticized in the literature, on the grounds that, first, it fosters lack of uniformity and wide divergencies in the regulatory selections of different national legal systems, and secondly that it would not be reasonable to subject to territorial law all the situations and all the facts which have a certain territorial connection with a state, as such connections would be multiple and in any event they would not be equally significant.[137]

Be that as it may, states enjoy a significant measure of discretion under international law in the interpretation of constituent elements of a crime under territorial jurisdiction, so as to include preparatory acts, attempt or even acts of assistance to the commission of a crime.[138] In fact, they seem to have consciously preserved this situation, by ensuring that national perspectives on territoriality persist even when substantive criminal law harmonization is achieved through the adoption of international conventions criminalizing certain activity. International treaties bear testimony to the consistent concern of states to endorse the exercise of territorial jurisdiction in terms that would ensure that national approaches to jurisdiction, including territoriality, remained unaffected. This is witnessed mostly in the common prescriptions that "[t]his Convention does not exclude any criminal jurisdiction exercised in accordance with

132 Bantekas & Nash, *supra* note 31, at 75.

133 After a brief discussion of *Lotus*, most authors generally tend to refer to specific national case-law or *ad hoc* jurisdictional arrangements entirely. Indicatively, 1 Lassa Oppenheim, Oppenheim's International Law 460-1, n. 13 (Robert Jennings & Arthur Watts eds. 9th ed. 1992); Ian Brownlie, Principles of Public International Law 300-2 (7th ed. 2008), expressing scepticism even as a matter of general principle, " . . . . the appearance of clear principles has been retarded by the prominence in the sources of the subject of municipal decisions, which exhibit empiricism and adherence to national policies . . . . "; Malcolm N. Shaw, International Law 655-8 (6th ed. 2008); John Dugard, International Law: A South African Perspective 149-154 (2003); Jean Combacau & Serge Sur, Droit International Public 347-9 (1993), in French-speaking literature the emphasis is mainly on questions of extra-territorial jurisdiction; Joe Verhoeven, Droit International Public 132-6 (2000); Patrick Daillier et al., Droit International Public 505-7 (7th ed. 2002).

134 For the very limited instances of state objections to jurisdiction, Michael Akehurst, *Jurisdiction in International Law*, 46 Brit. Y.B. Int'l. L. 167-9 (1972-1973).

135 Adriaan Bos, *The Extraterritorial Jurisdiction of States: Preliminary Report*, 65-I Annuaire de l' Institut de Droit International 14, 39 (1993); Luc Reydams, Universal Jurisdiction, International and Municipal Legal Perspectives 16-17 (2003).

136 For cases where treaty drafters attempt to exclude the contribution of a treaty to the formation of customary law, note International Convention for the Suppression of Counterfeiting, art. 17, Apr. 20, 1929, 112 LNTS 371 and article 16(2)(a) of the 1999 Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 17 May 1999, 2253 UNTS 212.

137 This is where the main criticism is focused. Combacau & Sur, *supra* note 133, at 349 referrring to these as some of the most important 'ambiguities' of the law.

138 *See* in detail from national criminal systems on the point in Chapter 2.

internal [or national] law"[139] or "[t]he provisions of this article shall be subject to the provisions of the domestic law of the Party concerned on questions of jurisdiction."[140] Accordingly, international treaty law does not seem to have encouraged the crystallisation of specific interpretations of territorial jurisdiction under international law on for example attempt or participation.[141]

The absence of uniform treaty practice is further accentuated by the absence of authoritative international statements on the law. This is evident particularly as regards international crimes, where due to the advent and growing endorsement of universal jurisdiction, national courts seem to have been more inclined to extend state jurisdiction over such crimes by virtue of other rules of criminal jurisdiction, rather than through the development of territoriality.[142] This seems to be true for example as regards the crime of

139 Entirely indicatively, International Convention Against the Taking of Hostages, art. 5(3), Dec. 17, 1979, 1316 U.N.T.S. 205; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, art. 3(3), Dec. 14, 1973, 1035 U.N.T.S. 167; Convention Against Tortur and Other Cruel, Inhuman or Degrading Treatment or Punishment, art 5(3), Dec. 10, 1984, 1465 U.N.T.S. 85; Convention on the Safety of United Nations and Associate Personnel, art. 10(5), G.A. Res. 49/59, 49 U.N. GAOR Supp. (No. 49) 299, U.N. Doc. A/49/49 (1994) 2051 U.N.T.S. 363; Convention on the Physical Protection of Nuclear Material, art. 8(1)(a), Mar. 3, 1980, 1987 U.N.T.S. 125; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, art. 6(4), Mar. 10, 1988, 1678 U.N.T.S. 221; Convention for the Suppression of Terrorist Bombing, art. 6(5), Dec. 15, 1997, 2149 U.N.T.S. 284; International Convention for the Suppression of the Financing of Terrorism, art. 7(6), Dec. 9, 1999, 860 U.N.T.S. 105; United Nations Convention against Transnational Organised Crime, art. 15(6), Nov. 15, 2000, 2225 UNTS 209; Single Convention on Narcotic Drugs, art. 36(3), Mar. 30, 1961, 520 U.N.T.S. 151; Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 4(3), Dec. 20, 1988, UN Doc. E/CONF.82/15, Corr.1 and 2; Council of Europe Civil Law Convention on Corruption, art. 17(1)(a), Nov. 4, 1999, CETS 174; United Nations Convention Against Corruption, art. 42(6), Dec. 9-11, 1999 Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 17 May 1999, 2253 UNTS 212; Council of Europe Convention on the Protection of the Environment through Criminal Law, art. 5(3), Nov. 4, 1988, CETS 172; From the literature, Harmen van der Wilt, *Equal Standards? On the dialectics between National Jurisdictions and the International Criminal Court*, 8 J. Int'l Crim. Just. 229, 255 (2008). He discards the use of an *argumentum a contrario*, according to which if a treaty is silent on the possibility that states parties expand their jurisdiction beyond the rules explicitly provided for therein (territoriality, nationality etc.), they should be precluded from so extending their jurisdiction. In his view, this argument would not be convincing, as it would not "meet the rigid test that states parties are violating the specific terms of the treaty", *i.e.*, if it is not explicitly precluded from the treaty, it is implicitly permitted.

140 Convention on Psychotropic Substances, art. 22 (4), Feb. 21, 1971, 1019 U.N.T.S. 175.

141 Specific rules are indeed extremely rare in international instruments. For such an exceptional example, see EU Council Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography, 2004/68/JHA, art. 8(5), OJ (L.13) 44, which provides that "[e]ach Member State shall ensure that its jurisdiction includes situations where an offence under Article 3 and insofar as it is relevant Article 4, is committed by means of a computer system accessed from its territory, whether or not the computer system is on its territory"; *cf.* also International Convention for the Protection of All Persons from Enforced Disappearance, art. IV, June 9, 1994, UN Doc A/RES/47/133, which provides for state party territorial jurisdiction, also when "any act constituting such offence was committed within its jurisdiction"; finally, specific interpretative approaches have been endorsed in official Commentaries. For example, according to the Commentaries on OECD Convention on Combating Bribery of Foreign Public Officials in International Business Relations, Nov. 21, 1997, 37 I.L.M. 1 (1998), reprinted in Mark Pieth, The OECD Convention on Bribery; A Commentary xxxii (2007); a high degree of specificity in identification of constituent elements for the exercise of territorial jurisdiction is further exemplified by the Convention on the Protection of the European Communities' Financial Interests, OJ C 316, 27.11.1995, Article 4, which provides in part that "1. Each Member State shall take the necessary measures to establish its jurisdiction over the offences it has established in accordance with Article 1 and 2 (1) when:
- fraud, participation in fraud or attempted fraud affecting the European Communities' financial interests is committed in whole or in part within its territory, including fraud for which the benefit was obtained in that territory,
- a person within its territory knowingly assists or induces the commission of such fraud within the territory of any other State,[…]"

142 Arrest Warrant of 11 April 2000 (Belgium v. Dem. Rep. Congo), 2002 I.C.J. Rep. 77-78, ¶ 47, Joint Separate Opinion of Judges Kooijmans, Higgins and Buergenthal, who noted, as far as criminal jurisdiction is concerned, "[t]he contemporary trends, reflecting international relations as they stand at the beginning of the new century, are striking. The movement is towards bases of jurisdiction other than territoriality."

genocide. Even though the Genocide Convention itself referred only to territoriality in Article VI,[143] today it is authoritatively said to be "the classic case for application of universal jurisdiction."[144]

In light of these developments, it becomes evident that territorial jurisdiction is increasingly set aside in favour of other rules particularly as regards the prosecution and punishment of massive human rights violations. Evidently, this development does not signify a rejection of territorial jurisdiction as a rule of criminal jurisdiction for the prosecution of 'core crimes'. It is best attributed to the state policy element inherent in these crimes and the clear political issues that are at stake in such prosecutions. In this context, it is easy to understand the reluctance of the territorial state – or its neighbours, where such crimes tend to 'spill over' – to pursue criminal charges and implicate possibly even their own officials.[145] There is therefore considerable difficulty in uncovering recent national case-law dealing with a more extensive approach to state territorial criminal jurisdiction over charges of genocide, war crimes and crimes against humanity.

To sum up, all these observations present a situation where international law is limited to an 'umbrella' ruling from 1927, under which states have enjoyed discretion in the interpretation of territorial jurisdiction in criminal law. Every state criminal law system has been basically left to fend for itself, with international law retaining a residual role that came into effect only in the extraordinary instance of state objections under the principle of non-intervention. Particularly as far as international crimes are concerned, there is also a marked absence of court decisions pursuant to the recent advent and growing acceptance of other forms of jurisdiction.

What, then, is the position reserved for international law in this situation?

This situation has been discussed extensively in Chapter 2. It is submitted that two are the basic points that are important for the operation of the International Criminal Court in the present examination.

The first relates to the scope of jurisdiction and the limits imposed by the principle of non-intervention. The clearest contemporary position available is probably the one adopted by the Canadian and German Supreme Courts, in line with Mann's approach to jurisdiction. These courts appear to adhere to the view that the limits imposed by the principle of non-intervention are satisfied, if a national court exercising jurisdiction is capable of demonstrating that the criminal activity in question has "a reasonable nexus"[146] – a "real and substantial link"[147] with its respective state, depending on the circumstances of the crime and the nature of the offence. Failure to demonstrate that jurisdiction is justified due to the existence of these links would entail a violation of the prohibition of non-intervention.

In the absence of any historical precedent from a standing permanent international criminal court, it is here suggested that the Court should assert jurisdiction in much the same way as states do and decide the matter in the event of jurisdictional objections by recourse to the principle of non-intervention. In these circumstances, even if an objection is raised on account of the Court's nature as an international organization rather than a sovereign state, the Court could reply that its *kompetenz kompetenz* is an inherent power stemming from general principles of law and not subject to state consent limitations.[148] In the alternative, nothing would prevent the Court from invoking as a second line of defense the basic doctrine of delegation of authority as the foundation of its jurisdiction and the well-known Nuremberg approach – that states parties can act do jointly through the Court what each of them can do individually through their national courts.

143 Under Article VI of the Genocide Convention, "[p]ersons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction"; see further Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. Montenegro), Judgment, Merits, 2007 I.C.J. Rep. ¶ 442, "Article VI only obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction; while it certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so." Further on the same approach that the inclusion of territoriality in Article VI does not exclude the right of states to extend their jurisdiction by reference to other rules of jurisdiction, In re Augusto Pinochet, Audiencia Nacional, 119 I.L.R. 331, 335-6.

144 In re Jorgic, BVerfGE (Federal Constitutional Court) (Ger.) 135 I.L.R. at 152, 166.

145 Cassese, *supra* note 117, at 336-337, n. 1.

146 *Jorgic*, *supra* note 144, at 165, "With regard to the prohibition on interference with State sovereignty that is enshrined in both customary and treaty law (Article 2(1) of the UN Charter), the Federal Constitutional Court has required some reasonable nexus with Germany when subjecting to German law all acts performed in a foreign territory and therefore outside German territory. What constitutes a reasonable nexus is dependent on the particular nature of the subject of regulation . . . ."

147 Libman v. The Queen [1985] 2 S.C.R. 178, 200 (Can.), for an extensive discussion concerning this link, *supra* Chapter 2. Libman was largely endorsed by New Zealand courts in Solicitor-General v. Reid [1997] 3 NZLR 617, 631-632 (1997) (C.A.) (NN).

148 *See supra* Part 5.1.2.3.

In this context, it should be recalled that the Court's jurisdiction under article 12(2)(a) embodies a legal requirement that should not be confused with admissibility. This is significant in cases where states parties and not parties share concurrent jurisdiction over a crime committed in part within the territory of both. In these circumstances, a case may be inadmissible for the Court under article 17 if a state not party decides to investigate the crime committed in part in its territory. However, the fact that concurrent territorial jurisdiction may exist over the same activity committed in part also in the territory of states parties is not in itself sufficient to prevent the Court's jurisdiction. To hold otherwise would signal the acceptance under international law of a hierarchy between the different jurisdictional claims of states in the territory of which a crime was partly committed, such that would automatically exclude one state's jurisdictional claim in favour of another's. This is clearly not the case under international law today.[149] As Cameron accurately explained, "[t]here is certainly no support in State practice for requiring all the 'territorial' States to consent before a prosecution can be brought over a crime which can be localised to any one of them."[150]

The second, related point concerns the classification of the 'part' of the crime, which suffices for the exercise of territorial jurisdiction. As shown above, states are free under international law to make the exercise of their criminal jurisdiction dependent on the constructive localisation of any 'constituent element' of a crime within their territory, where both the method of construction and the classification of criminal elements as 'constituent' are decided by national law and national courts. The limitations to such assertions are prescribed loosely by the principle of non-intervention. This approach seems to be in line with the basic concern of the Permanent Court in *Lotus*, where over-regulation – with the risk of conflicts due to concurrency of claims – was preferred to under-regulation and impunity.[151]

The Court may find that for its purposes the *Lotus* 'constituent element' approach suffices. In this context, however, national classifications as such would not be of assistance to the Court, since national jurisdictions may use different definitions of crimes and different theories to regulate attempt, participation and preparatory acts. The Court on the other hand is required to operate on the basis of its own legal instruments and its own definitions.

The usefulness of state practice for the Court would therefore be mostly in the criteria used for classification by national jurisdictions. In this context, it is submitted that as regards the problem of identification and classification of the critical 'constituent elements', the best approach for the Court would be to follow in the footsteps of the doctrine developed in French and English criminal law, where as a constituent element of a crime is considered any part of the offence, without which the offence/the criminal charge cannot be legally upheld.[152] In this regard, it is submitted that the Court's determination would benefit significantly from the Elements of Crimes document, which exhaustively analyzes the constituent elements of each crime codified in articles 6-8 of the Statute, coupled with the modes of liability in articles 25 and 28.

From the point of view of the Rome Statute, therefore, it could be argued that the diversification of the legal characterisation under different national laws of the part of a crime's *actus* or *animus* as a 'constituent element' or 'part' of a crime are probably not very influential to the Court's jurisdictional system. Indeed, insofar as the Court's system is concerned, the exhaustive definitions of crimes in articles 6-8, coupled with the adoption of the Court's Elements of Crimes, could provide significant guidance as to the specific constituent elements of each crime, and therefore the reach of the Court's jurisdiction based on territory. The Elements document in any event occupies a special place in the Court's decision-making process, due to the hierarchy prescribed by article 21 ICC Statute.

That does not mean, however, that national approaches are to be discarded out of hand. Although the above observation is convincing as a matter of hierarchy of sources, one should not lose sight of the fact that the Court's jurisdiction, under article 12(2)(a) depends upon the localization, real or constructive, of the crime within the territory of a state party.[153] After all, the Court cannot exercise territorial jurisdiction properly so called. Article 12(2)(a) does not endow the Court with territorial sovereignty; it merely provides a

149 In the literature different tests have been suggested to prioritize jurisdictional claims of constituent elements and commission in part, none of which seem to have been endorsed by states. The best-known example is Akehurst, *supra* note 133, at 154, promoting the jurisdictional claim of the state where the "primary effect" is felt.

150 Iain Cameron, *Jurisdiction and Admissibility Issues under the ICC Statute*, in Dominic McGoldrick et al., The Permanent International Criminal Court 74 (2004).

151 *See supra* Part 2.4.3.2. in detail and the basic choice made by the Permanent Court in *Lotus* between 'no jurisdiction' and 'concurrent jurisdiction' in Chapter 2.

152 *See* in detail Chapter 2. From international practice, Enforced Disappearances Convention, *supra* note 140, at art. IV.

153 Issues of complementarity appear to properly fall under admissibility, the examination of which is to take place only after the Court has satisfied itself of its jurisdiction, according to Rule 58(4).

functional title which delimits the geographical application of its competence, similarly with other international organizations[154] - as the Appeals Chamber put it, the territorial *parameter* of the Court's jurisdiction.[155] Therefore, the approach assumed by national law and national authorities in the interpretation of these constituent elements may still have a role to play; if not for the Court's decision making-process *per se*,[156] then at least in the state parties' overall attitude towards the exercise of the Court's authority over a situation or a case, particularly as far as their decision to (self-)refer or to raise objections to the jurisdiction of the Court are concerned.

The main issue is perhaps better understood, if one views the subject-matter and territorial parameters of the Court's jurisdiction as being inextricably intertwined, to the effect that departures from the definitions of crimes, for example, may also influence the scope of the Court's territorial reach. As a matter of law, it is clear that, if the definition of a crime changes, so will in all likelihood the ambit of a judicial system's territorial jurisdiction.[157] The possibility that the law and practice of states parties may depart from the substantive prescriptions of the Rome Statute in the identification and classification of constituent elements of crimes falling within the latter's jurisdiction is not as remote as it would seem perhaps at first sight.[158] In fact, Schabas and Sluiter have referred to a number of instances of state implementing legislation, where "under-inclusion, in the sense that penalisation of conduct is restricted in comparison to the Rome Statute, is more frequent."[159]

This position can be further reinforced by reference to the fact that there is no guarantee that the Elements' approach in the classification and enumeration of the crimes in the Statute will be followed by state parties' authorities in the delimitation of their subject-matter – and correspondingly their territorial – jurisdiction and the localisation of crimes. One needs to recall that states parties are not required to ratify or otherwise transpose in their national legal orders the Elements document; the latter exists formally only for the Court's use within the context of article 9 of the Statute.[160] Secondly, when ratifying the Rome Statute, states parties may select – to the extent that they are not obliged under their constitutional laws – to apply national definitions of certain criminal elements, such as mental elements and modes of

154 In general as regards international organisations, Daillier, *supra* note 133, at 609.

155 For the Court's *ratione loci* jurisdiction, *supra* Part 2.1.2.

156 Although *cf.* Judge Pikis' approach to the Court's coincidental and coextensive jurisdiction to that of states parties, *supra* note 37, as well as the application of article 21(1)(c), *infra*.

157 As regards universal jurisdiction and genocide, K. Ambos & Steffen Wirth, *Genocide and War Crimes in the Former Yugoslavia Before German Criminal Courts*, *in* International and National Prosecution of Crimes under International Law: Current Developments 786 (Horst Fischer *et al*. eds. 2001), "In other words: if universal jurisdiction is attached to a certain crime as defined by international law, a change in the definition could also change the scope of jurisdiction attached to this crime."

158 Generally, van der Wilt, *supra* note 139, at 252, in whose view, national courts are not only "allowed to plug the loopholes which are left open at the international level on which the international community has still not reached consensus, but they are supposed to contribute more actively to the formation of international criminal law", although "neither they [national courts] nor the legislator are allowed to alter the content of those crimes substantially; *id*. at 271-2, the decisive benchmark is that the underlying rationale of those crimes should not be changed unilaterally."

159 Göran Sluiter & William Schabas, *Third Report: International Criminal Court,* ILA, Rio de Janeiro Conference (2008) at 6, with examples of under-inclusion.

160 Id. at 7, although some states parties (*e.g.* Malta) make use of the Elements as a requirement for their national courts; Leanne McKay, *Characterising the System of the International Criminal Court: An Exploration of the Role of the Court through the Elements of Crimes and the Crime of Genocide*, 6 Int'l Crim. L. Rev. 257, 272 (2006). That author reviews how the Elements have been incorporated in three States (Austl, N.Z. and Fiji) and concludes as follows, "[C]learly the approach States take to the Elements, and in this case particularly the elements of the crime of genocide, continues to differ both within domestic legislations and at times with what was negotiated and agreed to within the Rome Statute and the Elements"; *see* also the discussion in van der Wilt, *supra* note 139, at 233-241.

liability,[161] thus departing from the stipulations of the Rome Statute.[162] Thirdly, it is not inconceivable that national courts may identify customary law developments subsequent to those in the Rome Statute and adopt different definitions of crimes reflecting these developments in their jurisprudence or practice, thus further complicating the situation over the substantive content of the Statute's prohibitions.[163] Last, but not least, while the Statute and the Elements seem to distinguish between objective and subjective elements of the crime, they do not explain whether only objective elements may qualify as constituent for the purposes of asserting jurisdiction, or even how to approach crimes of omission.

Admittedly, even though this discussion should be generally speaking of little, if any, concern for the Court's territorial reach in the ordinary course of events, it could raise complications in certain rare occasions.[164] That would be the case in the – unlikely at the moment – scenario of 'transfer of proceedings'[165] from a national court to the ICC, where a state party initiates proceedings against an individual for the commission of a crime within the jurisdiction of the Court, as defined in its national implementing legislation, by asserting that an element of the crime interpreted differently or introduced by national law in the definition of the crime has occurred in its national territory, only to later decide to refer the case to the Court. In this situation, it is highly debatable whether the Court could lawfully assume jurisdiction either *ratione materiae* or *ratione loci* as its judicial power is delimited by the definitions of crimes in articles 6-8 and 12(2)(a) of the Statute respectively and a state party may not unilaterally affect amendments to a multilateral treaty.[166]

It remains therefore a possibility, however remote, that the Court's Elements may prove to be of less value than anticipated in delimiting the precise scope of its territorial reach. That said, it is submitted that, notwithstanding these very rare instances, the Court's path under international law seems clear. The Court

161 For the proposition that different modes of liability entail the 'commission' of a 'different crime', note the ruling of Prosecutor v. Bemba Gombo, *supra* note 5, at ¶ 26-27; Al-Bashir Arrest Warrant Decision, *supra* note 5, at 10, ¶ 27, where the notion of commission is further developed.

162 The subject is accurately summarized in the observations of Håkan Friman and Claus Kress in the transcripts on the discussion *Modifying Elements of Crimes when Importing Core International Crimes*, in Importing Core International Crimes into National Criminal Law 27-29 (M. Bergsmo et al. eds. 2007). As examples, perhaps, one could refer to the 2000 Canadian Crimes Against Humanity and War Crimes Act, where command responsibility is classified "as a specific offence rather than a mode of liability", as well as to the definition of genocide included therein, where reference is made to an "identifiable group of persons", rather than one of the groups mentioned in Article 6 of the Statute; *Id*. J. Rikhof, *The Canadian Model*, at 19-20, and Addendum, at 50-54. For the German model, Kress, although acknowledging, for example, that Germany viewed article 7(1)(k) as an invitation "to apply criminal prohibitions by analogy", *id.,* at 24, he has characterised the interventions made in national transposing legislation more technical than substantial, *id.,* at 28, whereas S. Wirth, *Germany's new International Crimes Code: Bringing a case to Court*, 1 J. Int'l Crim. Just. 151, 154-7 (2003), seems to view Germany's approach more substantial.

163 Rome Statute, *supra* note 21, at art. 22(3) ICC Statute seems to have been promulgated bearing in mind exactly this possibility; *cf.* however here article 10(2) and its effect, practically 'insulating' Part 2 of the Statute from subsequent developments in customary law, *supra* note 67 and accompanying text; For national perspectives from the Canadian 2000 Act, and the German Code of Crimes Law, see Rikhof, *supra* note 162, at 21-22 and Cress, *supra* note 162, at 28.

164 "The Rome Statute, however, addresses only the jurisdiction of the International Criminal Court. The national courts only come into consideration in so far as the relationship between the national court with presumptive jurisdiction and the International Criminal Court is at issue", and hence it does not generally affect the exercise of jurisdiction by national courts; Jorgic, *supra* note 144, at 165-167. That national court accepted the exercise of jurisdiction over genocide on the basis of universal jurisdiction, dismissing arguments that such jurisdiction, after the adoption of the Rome Statute was unlawful, on the grounds that the German proposal, advocating universality, was rejected in Rome "on the basis of the *pacta tertiis* argument, ... and not because the applicability of universal jurisdiction to the crimes identified in Article 6 of the German Criminal Code might be called into question . . . . "; *id*. at 167. Significantly, at the time when the judgment was rendered, the Statute had yet to enter into force and Germany had not ratified it. For useful insights, Christina Hoss & Russell A. Miller, *German Federal Constitutional Court and Bosnian War Crimes: Liberalizing Germany's Genocide Jurisprudence*, 44 German Y.B. Int'l L. 576, 588-590 (2001); Ruth Rissing-Van Saan, *The German Federal Supreme Court and the Prosecution of International Crimes Committed in former Yugoslavia*, 3 J. Int'l Crim. Just. 381, 383 (2005).

165 *See* indicatively 2 The Rome Statute and Domestic Legal Orders 133 (C. Kress et al. eds. 2005), on the possibility of transfer of proceedings under the German implementing legislation. The positions for and against the possibility of 'voluntary relinquishment of jurisdiction and uncontested admissibility' by states parties to the Court are summarised by Cryer et al., *supra* note 124, at 157-158. It would seem that in this context, barring national law problems (e.g. Sweden), pertinent questions would arise here as regards admissibility of a case, rather than jurisdiction. The proposition that 'self-referrals' are admissible, because 'unwillingness' may stem also from reasons other than those mentioned in Article 17 (shield the accused) has recently received the Court's approval on a teleological reading of Article 17; Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ¶ 77-81 (June 16, 2009).

166 The same applies with regard to the adoption of universal jurisdiction on the part of certain States Parties in their implementing legislation (Germ., S. Afr. etc), a case asserted on the national level under universal jurisdiction cannot, in case of subsequent unwillingness, be later referred to the Court. *See infra,* at 6.2.

retains the liberty to interpret article 12(2)(a) in the exercise of its *compétence de la compétence* so as to endorse the constituent elements approach of the *Lotus* case. It is submitted that this course of action is available to the Court for all aspects of 'commission in part', including participation, attempt and preparatory acts, since it is available for all states parties to the Statute under international law. Correspondingly, any jurisdictional objections raised against the Court's authority in these conditions would need to demonstrate a violation of the prohibition of non-intervention, in the sense that the Court's jurisdiction is lacking a 'substantial connecting link' to the crime in question, taking into account the nature of the crime and the circumstances surrounding its commission. As such a connecting link may be understood the commission on state party territory of any part of the offence, without which a charge could not be upheld. Ultimately, it is up to the Court to finally decide the issue by interpreting article 12(2)(a) in the light of contemporary international law.

5.5.2. / DELIMITING THE COURT'S TERRITORIAL JURISDICTION ON THE BASIS OF CONSEQUENCES OR UBIQUITY AND THE APPLICATION OF GENERAL PRINCIPLES OF LAW

The above analysis of the status of the law leads to a situation, where states – including states parties and hence the International Criminal Court – are entitled under customary law to exercise jurisdiction on the basis of the consequences of a certain criminal activity or the occurrence of other 'constituent elements of the crime' in their territory, whereas the limits of such jurisdictional assertions, in the absence of a specific rule in customary law and in 'applicable treaties', are to be deduced by recourse to the principle of non-intervention under international law, as explained by Francis Mann and interpreted in recent jurisprudence of national courts. This is proposed as the best-suited analytical course for the Court to follow in future discussions relating to such issues.

In the alternative, however, if it is considered that the general application of the principle of non-intervention, viewed through the lens of Mann's doctrine, is not legally sufficient, then a solution could be gleaned mainly from nationally inspired approaches, according to article 21(1)(c) of the Statute.

While under general international law employing national law analogies to address gaps or ambiguities resulting from the application of international rules hardly qualifies as an innovation,[167] the wording of article 21(1)(c) of the Statute makes this a legally perilous exercise. This is due to the fact that under that provision, if no clear solution is deduced by the application of rules of customary law, 'applicable treaties' and general principles of international law, the Court's judges should seek one in the "general principles of law derived by the Court from national law of legal systems of the world including, as appropriate, the national laws of States that would *normally* exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards (emphasis added)."

This provision is fraught with difficulties, as plainly evidenced from its wording. As regards the application of article 12(2)(a) and the rules of objective territoriality under the lens of article 21(1)(c), two are the most important clusters of issues; in the first place, how should the 'normality/normalcy' of the exercise of territorial jurisdiction be measured, by reference to what criteria and in what way and in the second what is the threshold or the method for the determination that a certain norm qualifies as a general principle?

As regards the states which 'normally' exercise jurisdiction, authorities seem to converge in their analysis of article 21(1)(c) that the Statute provides no guidance as to how exactly one should approach this requirement, a victim of compromise in Rome between those who advocated the use of analogical

167 Generally, Oppenheim, *supra* note 123, at 36-40; Hersch Lauterpacht, *The Function of Law in the International Community*, (1933) at 115-118; Extraordinary Review Appeal, *supra* note 27, at ¶ 39, where the Appeals Chamber has defined 'lacuna' or 'gap' in the Rome Statute along the following terms: "No gap is noticeable in the Statute with regard to the power claimed [the power to file appeals against decisions of the Pre-Trial Chamber refusing leave to appeal], *in the sense of an objective not being given effect to by its provisions. The lacuna postulated by the Prosecutor is inexistent* (emphasis added)." Accordingly, the Appeals Chamber did not resort to the use of national law analogies in that case.

application of national law principles and those who wished a specific state (territorial, nationality etc) to be mentioned.[168] They uniformly criticize the wording, as well as the essence of the provision.[169] Per Saland has underlined that the drafters did not avoid "certain contradiction between the idea of deriving general principles, which indicates that this process could take place before a certain case is adjudicated, and that of looking also to particular national laws of relevance to a certain case; but that price had to be paid in order to reach a compromise."[170] The general consensus is that such states include the territorial and nationality states under article 12(2), while reference is also made to the custodial state[171] and the state of nationality of the victims.[172] As far as universality is concerned, Professor Verhoeven would be 'inclined' to exclude it, "at least as long as such jurisdiction is exercised by a (very) few states only."[173] The Appeals Chamber, for its part, entirely side-stepped the issue in its first jurisprudence on the matter by emphasizing the need to produce general principles of national law, rather than uncovering which national law may be 'appropriate' to apply – although its approach to the Prosecutor's very extensive research is anything but encouraging that this process might eventually bear fruit.[174]

In this framework, it seems that an interpretation of article 12(2)(a) on the basis of article 21(1)(c) may be understood in one of two ways. On the one hand, as a state that 'normally exercises jurisdiction' can be understood the state that 'lawfully' exercises jurisdiction under international law, which means, for the purposes of the present discussion, that the judges and the Prosecutor will need to assess if a certain national approach to the constructive localization of a crime within national territory is not prohibited by international law. This is a fairly self-explanatory doctrinal approach, since, from a literal perspective, international law, as a system of law, is concerned with the limits of legality, or, in other words, what is 'legal' in a certain set of circumstances. The problem with this approach seems to be that in certain limited circumstances, the main legal question (i.e. whether the Court may lawfully exercise jurisdiction under objective territoriality when only acts of assistance have taken place on state party territory) may coincide with the preliminary legal question under article 21(1)(c) (i.e. whether a state party may 'normally' exercise jurisdiction in the same circumstances under international law). Accordingly, and in the second place, if this expression is to be taken literally, it would seem to imply that the Court may have to venture for answers by recourse to national laws on the basis of considerations of judicial policy.

This explanation is mainly derived from the approach followed by the Pre-Trial Chamber I in the *Lubanga Witness Proofing Decision*.[175] The main question in that instance was whether the Prosecutor had the right to engage in 'witness proofing' of the only witness – at that point – scheduled to testify at the Lubanga Confirmation Hearing.[176] In order to address the matter and decide whether this practice – as opposed to witness 'familiarization' – is admissible under the Statute, the Pre-Trial Chamber examined the Prosecutor's argument that this practice is accepted as a general principle under article 21(1)(c) ICC Statute.[177]

The Chamber first noted that the Prosecutor did not submit that such practice was consistent with the DRC's laws. It then proceeded to examine whether this contention was supported by state practice and found that different states assume widely different approaches.[178]

168 Margaret McAuliffe DeGuzman, *Article 21-Applicable Law*, in Triffterer, *supra* note 18, at 710; J. Verhoeven, *Article 21 of the Rome Statute and the Ambiguities of Applicable Law*, 33 Neth. Y.B. Int'l L. 3, 10 (2002); A. Pellet, *Applicable Law*, in Cassese, *supra* note 14, at 1075 highlighted the debate: "One might well question the appropriateness of such a reference"; for the proposition that including a direct reference to a certain state would be considered as a direct referral to state sovereignty considerations, jeopardizing the Court's autonomy, William Bourdon, La Cour Pénale Internationale 110-1 (2000); Sadat, *supra* note 31, at 178, n. 15, "this would have injected an element of state sovereignty back into the ICC Statute."

169 McAuliffe DeGuzman, *supra* note 168 at 708, "rather awkward compromise"; Pellet, *supra* note 168.

170 Saland, *supra* note 66, at 215.

171 Pellet, *supra* note 168, at 1075, asserts that the custodial, territorial and nationality of the accused states "are the object of the expression finally retained".

172 Verhoeven, *supra* note 168, at 10, includes it parenthetically, when mentioning that "the intent probably is to refer to the state or states which would be competent according to the connecting criteria traditionally sued by states to determine criminal jurisdiction"; I. Caracciolo, *Applicable Law,* in Lattanzi & Schabas, Essays, *supra* note 29, at 225.

173 *Id.*

174 Extraordinary Review Appeal, *supra* note 27, at ¶ 24

175 Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Practices of Witness Familiarization and Witness Proofing, ¶ 35-40 (Nov. 8, 2006).

176 *Id.* at ¶ 40, this would involve for example reading to the witness his earlier statement, refreshing his/her memory on the evidence s/he is to provide, putting to the witness the very same questions in the very same order s/he will be asked during the hearing.

177 *Id.* ¶ 35.

178 *Id.* ¶ 36-37.

At this point, one would expect the discussion to be completed and the Prosecutor's argument rejected. This would seem to be the ordinary cause of events under article 21(1)(c). However, the Pre-Trial Chamber continued its examination of the topic specifically under the law of England and Wales, taking into account that "the Prosecution has expressly undertaken to comply with the principles provided for in article 705 of the Code of Conduct of the Bar Council of England and Wales."[179] The Chamber, following a cursory examination of English law, decided that witness proofing, as proposed by the Prosecutor, is not in compliance with English law, the same law serving as model for the Prosecutor's operation in this field. Accordingly, the Chamber rejected the Prosecutor's contention under article 21(1)(c).[180] Surprisingly, however, it went further and concluded as follows; "On the contrary, if any general principle of law were to be derived from the national laws of the legal systems of the world on this particular matter, it would be the duty of the Prosecution to refrain from undertaking the practice of witness proofing as defined in paragraphs 16 (vii), (viii) and (ix) and 17 (ii), (iii)and (iv) of the Prosecution Information."[181]

The most intriguing feature of this decision lies in the Chamber's discussion of English law in the context of article 21(1)(c), at least to the extent that this provision does not designate as a source of law any national law other than the law of the state that would 'normally exercise jurisdiction' – the obvious example here being Congolese law.[182] It would appear, therefore, that there is an element of judicial policy in the approach of the Chamber, as it is indeed difficult to envisage English jurisdiction over the Lubanga charges in any 'normal' course of events (at least under territoriality or nationality), the UK being a state with no connection to the crimes charged. In this context, perhaps it would not be an exaggeration to treat the Chamber's approach as a form of *coup de grâce* to the failing argument of the Prosecutor. Be that as it may, one cannot help but wonder what the influence of this national law would be to the decision of the Chamber, if the Prosecutor's practice was found to be in compliance with article 705 of the English Code of Conduct (or even whether the Chamber would have referred to it at all).

What is the situation, however, if the Court decides that the state 'normally' exercising jurisdiction is in fact a state not party and that accordingly the general principles of a state not party are the decisive applicable law for the territorial parameter of the Court's jurisdiction? This could be the situation for example, if a chemical weapon is launched by one state not party and it detonates in a city of a state not party, after it already traversed territorial waters or air space of one or more states parties (e.g. exchange of missiles from Iran to Israel and vice-versa via Jordanian air-space).

In these circumstances, could it be seriously contemplated that the Statute would make the exercise of its jurisdiction dependent upon the position assumed by the criminal laws of states not parties, where the activity commenced and where it was completed, being the legal systems that would 'normally' exercise jurisdiction? This situation would seem somewhat peculiar under international law. It would make the reach of the Court's territorial jurisdiction dependent upon the legal approach adopted by states not parties. It would therefore 'tie' the performance of the Court's function to laws and organs of a state, which has not delegated any of its authority to the Court and has little or no connection under international law with it. Again, however, 'peculiar' does not mean necessarily unlawful. The situation would be arguably similar to private international law, where an 'applicable law' clause agreed upon by parties to an international agreement may conceivably refer to the laws of a third party, providing further guarantees of impartiality and reflecting practical considerations. Perhaps in the same spirit in the case of the Statute, the drafters could even refer to a specific state not party's laws, if they so wished, whose legal norms would be best suited in their view for resolving such issues. The Court will need again to provide a conclusive answer to this question.

In the alternative, however, even if the Court is to employ the general legal principles of a state, the solution advanced would still raise two significant issues, that are equally applicable irrespective of the participation of that state to the Statute.

179 *Id.* ¶ 38.

180 *Id.* ¶ 40-41.

181 *Id.* ¶ 42.

182 Since the Dem. Rep. Congo was the territorial state and the state of nationality of the accused and probably of most if not all of the victims. This understanding is shared by the ICTY, Prosecutor v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević and Lukić, Case No. IT-05-87-T, Decision on Ojdanić Motion to Prohibit Witness Proofing, ¶ 11-12 (Dec. 12, 2006). However, as Vasiliev accurately noted, the Trial Chamber made a mistake when it referred to the ICC's duty to look into national *laws* under article 21(1)(c), as that provision mentions only general principles of law. Sergey Vasiliev, *General Rules and Principles of International Criminal Procedure, in* International Criminal Procedure: Towards a Coherent Body of the Law 85 (Göran Sluiter and Sergey Vasiliev eds., 2009), with further analysis on the rejection of the Lubanga decision on witness proofing just one month later by the ICTY and the ICTR, mostly on grounds of the 'different circumstances' and the 'specificity of the proceedings' before the *ad hoc* tribunals compared to the ICC.

The first concerns uniformity. Resolving jurisdictional questions by recourse to a specific national law approach to general principles would not serve the Court's efficiency, as it would indicate that the Court assumes a case-by-case approach – if not an 'I know it when I see it' approach – with minimum usefulness for the development of clear standards generally applicable over relevant cases. The inherent danger in these circumstances would be to open up the possibility of different treatment of individuals accused of the same conduct, depending on whether or not the state party in question adheres to a broader or stricter approach to objective territorial jurisdiction.[183] As a result, while one alleged perpetrator could be tried before the Court if his crimes were constructively said to be 'committed' in the territory of some states parties adhering to an expansive approach to territorial jurisdiction, on the contrary another suspect would escape the Court's jurisdiction if his actions were considered from the point of view of stricter approaches adopted by other states.

From this perspective, it seems that the Court's territorial jurisdiction would not constitute the manifestation of the Court's own authority in a single, uniform and generally applicable manner, but rather as an amalgamation of the accumulative whole of 113 (at the moment) state (party) approaches to territoriality. This outcome would constitute an unsatisfactory approach to the interpretation of the Rome Statute, as it would jeopardise its integrity by effectively undermining one of the basic principles underlying its operation, namely that "the law of the Statute and the Court and its operations are generally autonomous from national legal systems and their laws, except, […], with regard to State cooperation."[184]

From a more *étatique* point of view, however, are there implications of delegation of authority to take into account, when some states parties adhere to a more limited interpretation of territorial jurisdiction than others? In these conditions, if a certain national law does not accept e.g. that territorial jurisdiction exists over the main crime abroad when only an act of assistance takes place in its territory, does that mean that the Court is prevented from adhering to a broader perspective, considering that, according to the main doctrinal position, the basis of the Court's jurisdiction is state consent and delegation of authority?[185]

From this perspective, the Court is perceived as a treaty-based mechanism to collectively exercise existing state rights, where the scope of delegation is correspondingly affected by any limitations self-imposed by states parties upon their own authority. In other words, states parties may only delegate to the Court powers that they actually have and only to the extent that they recognise them.[186] Therefore, in light of the fact that certain states parties may have decided to impose upon themselves limitations in their exercise of territorial jurisdiction, can it be said that the Court, which operates on delegation of authority from those same states, may adopt legal solutions which these states themselves do not have or do not recognise due to such self-limitation?[187]

The best answer to this question is probably that a restrictive national law approach to territorial jurisdiction is not in itself decisive for the Court due to the doctrine of delegation. It is not doubted here that the doctrine of delegation does underlie the Court's function to a large extent. However, what is contended is that the power in question is the Court's capacity as a judicial institution to decide finally any question concerning its own jurisdiction in the interpretation of the Statute. This is a power that is vested in the Court inherently, due to its nature as a judicial institution, rather than due to the delegation of authority by states. Accordingly, issues of delegation are not relevant, because the Court's *compétence de la compétence* stems from the Court's judicial character. This is well-established at least ever since the *Tadić* ruling.[188]

183 McAuliffe DeGuzman, *supra* note 168, at 710; Schabas, *supra* note 61, at 197. While uniformity would arguably be the optimum goal to be attained, it seems that it is accurate to state that, "[u]nder the current international system, consisting of sovereign states, differential legal treatment is the norm, conveying the patchwork of cultural and moral values." Van der Wilt, *supra* note 139, at 256, 257 tracing the quest for harmonization of international criminal law to the philosophical ideal of a *civitas maxima*.

184 Sadat, *supra* note 31, at 178, refers to it as "the principle of *délocalisation*", influenced probably by French private international law jurisprudence in this regard. In the reverse, note Professor Sarooshi's following remark in a different context, cautioning against the wholesale application by analogy of domestic public law notions to international organizations; "[W]hen States establish an international organization they are agreeing to be bound by certain common obligations which flow from the treaty: as such, there cannot be a presumption that the treaty is to be applied in a different way to member States depending on their domestic public or administrative law systems and the way in which the conferred governmental power or an analogous power is treated under these various systems". Dan Sarooshi, *The Role of Domestic Public Law Analogies in the Law of International Organizations,* 5 Int'l Org. L. Rev. 237, 238 (2008).

185 *See supra* Part 5.1.2.2.

186 *See* in detail *infra* Chapter 7.

187 A key question that arises here concerns also the precise time, at which the Court should estimate whether the preconditions to the exercise of its jurisdiction under article 12 are met, under Article 11 of the Statute.

188 *See supra* Part 5.1.2.2.

Accordingly, it is submitted that this is not an issue of delegation of authority. The Court's authority to decide on a different interpretation has remained intact and was explicitly recognised in article 19(1) ICC Statute. The issue is best formulated as a question on the proper weight to award to a certain regulatory choice made by national law and case-law. As such, the answer would clearly depend on a case-by-case analysis of the legal nature of the overall criminal activity in question. In these circumstances, some tension may be said to exist between the Court's margin of interpretation, on the one hand, and the precise scope of the jurisdictional authority of the states parties involved on the other. In such a borderline situation the Court would need to demonstrate that once created, it does acquire a 'life' of its own, and, although not a 'super-state', it still retains and puts to good use the prerogative of being the sole arbiter of its jurisdictional authority.

Additionally, another critical issue is that national laws generally tend to leave a margin for interpretation to national courts and opt for general formulations in their criminal statutes.[189] National courts for their part tend to consider issues of territoriality mostly from the point of view of statutory construction or constitutional limitations, rather than by invoking the application or violation of a certain rule of international law.[190] In fact, it is even possible that a national decision, which would otherwise appear useful for deciding a relevant question before the Court, may be the outcome of an intertwined approach, combining national statutory interpretation and the application of customary rules, or may even cause confusion by presenting a national presumption as a rule of international law or vice versa.[191] The usefulness of national law would therefore be diminished, as by merely transplanting national solutions of objective territoriality on the international plane, without clinically examining the reasoning behind them, the Court might inadvertently adopt by implication a certain, national law presumption/statutory interpretation to territoriality that is not consistent either with its function as an international court, or its objects and purposes.[192]

This complex situation seems to be mitigated by the stipulation of article 21(1)(c) that the laws of the States that would 'normally' exercise jurisdiction is a source, whose application is left entirely up to the judges, when they consider 'appropriate' to do so. The flexible formulation employed – a rare example of judicial discretion in the Rome Statute – could be read by implication as an indication to the judges that recourse to national legal norms, in order to assess the legality of the Court's territorial reach, is to be deduced mostly from *principles* of legal *systems*, to the extent possible.[193] This seems to be reflected in the opinion of the Appeals Chamber that "Sub-paragraph (c) of paragraph 1 of Article 21 of the Statute is a multipolar provision of the law involving in the same spell an amplitude of factors definitive of its subject-matter. Be that as it may, there is little doubt about its basic intent that lies in the incorporation of general principles of law derived from national laws of legal systems of the world as a source of law."[194]

The problem then arises, as to how are these general principles of law derived from national laws of legal systems of the world to be detected? Obviously, an elaborate exercise in comparative criminal law

189 See *supra* Part 5.1.

190 Akehurst, *supra* note 133, at 182-184; For presumptions and constructions, see *supra* Chapter 4.1.

191 See for example as regards the U.S. Alien Tort Claims Statute, Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 Eur. J. Int'l L. 331, 350-1 (2009), "In other words, the jurisprudence of the U.S. courts applying the ATS is not merely internationally agreed substantive law plus some U.S. civil litigation concepts to make the claim out in US tort terms such as enterprise liability. It is, instead, an interpretation of 'international law' filtered through an ancient U.S. statute, with U.S. canons of constitutional interpretation applied to the meaning of the statute and only by extension to the 'international law' underlying it."

192 This argument is drawn from Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶ 540-2, 676-7 (Jan. 14, 2000); It needs hardly be said in this context that the organs of the International Criminal Court, in this capacity, are to refrain, when applying article 21(1)(c), from what is known in private international law as a "homeward trend", *i.e.* a tendency of domestic courts to arrive, if possible, at the application of their native domestic law. Arthur Nussbaum, Principles of Private Law 37 (1943); Akehurst, *supra* note 133, at 185; current practice of the Court does offer examples of attachment to certain States' criminal doctrine. *See* comments by Jessberger, *supra* note 65, at 778 (2008).

193 McAuliffe DeGuzman, *supra* note 168, at 709; Verhoeven, *supra* note 168; Pellet, *supra* note 168; In favour of this approach, one could recall the example of the sentencing practice of the ICTY, where, notwithstanding what would seem at first sight to constitute a clear mandate of the Statute that the Tribunal should follow the FRY's sentencing regime for those condemned before it for crimes within its jurisdiction, nevertheless the Tribunal did not hesitate to conclude that the FRY's penalties regime was to be used only indicatively. [Sentencing literature – Broomhall, *supra* note 119; Nancy A. Combs, Guilty Pleas in International Criminal Justice, Constructing a Restorative Justice Approach 3-4 (2007)]

194 Extraordinary Review Appeal, *supra* note 27, at ¶ 24. It would have been very interesting to see in the Appeals Chamber's ruling a certain indication as to 'factors' included in the provision.

followed by a process of "construction, generalization and logical inference"[195] seems inescapable;[196] but would it be useful, and more importantly, when would it be enough?

The Appeals Chamber has been confronted with the application of this provision in the *Extraordinary Review Appeal* – and has apparently demonstrated that reference to an article 21(1)(c) interpretation is to be a very exceptional occurrence. In a nutshell, the Prosecutor filed an appeal against a decision of the Pre-Trial Chamber denying him leave to appeal a critical ruling, recognizing the circumscribed right of victims to participate in the situation stage of proceedings.[197] This appeal was labeled 'extraordinary', in that article 82 of the Statute does not provide for such appeals. The Prosecutor argued that there was a *lacuna* in the Statute, which should be properly filled by analogy from general principles of national law, and mainly through the principle that higher courts may hear appeals and overrule decisions of lower courts denying them leave to appeal.[198] In support of his contention, the Prosecutor produced extensive research from common law, civil and Islamic law jurisdictions as evidence.

The Appeals Chamber was less than enthusiastic with this argument. In a rather short ruling of 16 pages, adopted unanimously, the Court dismissed the Prosecutor's application, on the grounds that first, no such general principle could be deduced from the evidence produced, and secondly, that even if such evidence did exist, there was no *lacuna* in the Statute, as the drafters considered and consciously dismissed the possibility of such appeals, hence exhaustively circumscribing the relevant right under article 82.[199] At the outset, one may only speculate as to why the Appeals Chamber selected to address the subject in this order – after all, if no *lacuna* actually existed, what is the point of engaging in the difficult comparative exercise of addressing and dismissing at some length the evidence adduced as to the existence of general principles of national law, rather than simply declaring the issue moot? It cannot be excluded, in this context, that the Appeals Chamber wished through this ruling to 'set the tone' for the Court's approach to article 21(1)(c)[200] and discourage similar claims by the parties (Prosecutor, Defence, Victims).[201]

Moreover, the Court's approach to the Prosecution's evidence was anything but constructive. In its consideration of the national laws of the 14 states of the "Romano-Germanic system of justice", 5 common law jurisdictions and 3 Islamic law states invoked by the Prosecutor, the Court proceeded as follows; 2 civil law states were found not to support his contention (importantly, France and Germany), while for the rest it was said that "the modalities for the exercise of this right differ and in large measure vary from country to country."[202] As far as the common law countries were concerned, the Court seemed to maneuver in familiar waters when it delved into the distinction between 'complaint motions', writs of certiorari and mandamus and drew attention to their exceptional usage in those jurisdictions, before it ultimately dismissed the cited practice, asserting that "the Pre-Trial and the Trial Chambers of the International Criminal Court are in no way inferior courts, in the sense that they are classified in England and Wales. Hence, any comparison between them and inferior courts under English law is misleading."[203] The Court was willing to acknowledge however that "what they [the common law jurisdictions referred to] share in common is the corrective character of the jurisdiction."[204] Last, but not least, as regards the Islamic law countries, the Chamber summarily dismissed the practice, stating that they "have no uniform rules with regard to review of lower court's decisions not permitting an appeal by a higher court."[205] The Court subsequently concluded; "[I]t

195 Prosecutor v. Kupreškić, *supra* note 192, at ¶ 677; Vasiliev, *supra* note 182, at 82-83, for a recent methodological approach to deduce general principles.

196 Very clear on the methods employed mostly by the ad hoc tribunals to determine general principles are Fabiàn Raimondo, *General Principles of Law as Applied by International Criminal Courts and Tribunals*, *6 The Law and Practice of International Courts and Tribunals* 393, 396, 402 (2007), who seems to recognize a certain lack of methodology in the identification of general principles in international criminal judgments; Lorenzo Gradoni, *L'exploitation des principes généraux de droit dans la jurisprudence des Tribunaux internationaux pénaux ad hoc*, *in* La justice pénale internationale dans les décisions des tribunaux ad hoc 10,40 (E. Fronza & S. Menacorda eds. 2003).

197 Extraordinary Review Appeal, *supra* note 27, at ¶ 1-4.

198 *Id.* at ¶ 3, 21-22.

199 *Id.* at ¶ 32.

200 *Id.* at ¶ 5, "Hereinafter, the Appeals Chamber shall deal first with the parameters of the application of article 82(1)(d) of the Statute, *an exercise that has the additional advantage of providing guidelines on the interpretation of an important aspect of the Statute*…(emphasis added)".

201 *Id.* at ¶ 38, the right to such appeals is not enjoyed by the defense either, as the relevant right codified in article 14(5) ICCPR and regional treaties applies only to final decisions of a criminal court, "determinative of its verdict or decisions pertaining to the punishment meted out to the convict", not interlocutory decisions.

202 *Id.* at ¶ 27.

203 *Id.* at ¶ 29.

204 *Id.* at ¶ 28.

205 *Id,* at ¶ 31.

emerges from the above that nothing in the nature of a general principle of law exists or is *universally adopted* entailing the review of decision of hierarchically subordinate courts disallowing or not permitting an appeal. The Appeals Chamber concludes that the Prosecutor's submission in this respect is ill-founded (emphasis added)."[206]

If this ruling is to serve as any indication of the threshold for the application of article 21(1)(c), one could predict that this provision will be of marginal relevance for the Court's future operation. The reasons for this conclusion are manifold, but most important is that the Appeals Chamber has raised the stakes to such a degree, by requiring *universally adopted* national principles of law, that it will be very difficult for the litigants or the Court itself to have recourse to it.

The Appeals Chamber seems in this regard to have followed the approach of the ICTY, where, in the absence of a relevant provision in the Statute, the judges required practically a 'universal authentication' standard before admitting the existence of such a principle.[207] As such, the Tribunals seem to have accepted the application of general principles in their jurisprudence less often than they probably could.[208]

From the point of view of the ICC Statute, however, it is submitted that the Appeals Chamber went too far in this ruling. From a literal point of view, article 21(1)(c) refers to "national *laws*", "legal *systems* of the world". The Statute does not expect the production of proof verifying the existence of a single, universal general principle of national law. That said, the purpose of this provision – it is submitted – is neither to create/harmonize criminal laws through judicial interpretation, nor to identify rules of universal application in a binding manner for states parties.[209] It rather seems that it is destined to give the Court – similarly to the corresponding provisions of other Statutes[210] – the option of selecting the general principles best suited for its purpose among the general principles developed over the years in the criminal systems of the world and hence open for it more possibilities of interpretation, in order to avoid findings of *non liquet* due to *lacunae* in the law.[211] In that context, it is submitted that proof of existence of such general principles in any one system would suffice for the purposes of interpretation under article 21(1)(c). One need not look further than the *Erdemović* case, where the mainly common law practice of guilty pleas and plea bargaining[212] was transposed virtually overnight in the emerging system of international criminal law, only to become a few years later a standard feature of most international criminal courts,[213] notwithstanding the serious issues its application raises as regards the purposes of international criminal justice.[214]

Arguably, the Court need not attempt to rival the ICTY's innovative approach in *Erdemović.* It could be even justified to err on the side of caution, considering that its effectiveness largely depends upon the good will and cooperation of states. The best approach, however, would be to strive to find a balance between the approach to national law adopted in *Erdemović* and that in the *Extraordinary Review Appeal*. After all, even if the existence of a general principle is proven to exist in a certain family/system of laws,[215] whether or not the Court would revert to it, in the discharge of its function, is an entirely different matter, subject to the Court's discretion in the process of interpretation. Therefore, considering the international diversification of criminal law based on each state's tradition, culture and social values, it is submitted that a better approach would be for the Court to seek solutions under article 21(1)(c) on a family-by-family/system-by-system of law basis, rather than by inquiring whether a certain principle is universally accepted. The Statute,

206 *Id*. at ¶ 32.

207 Famously, Prosecutor v. Furundžija, Case No. IT-95-17/1-T, ¶ 178 (Dec. 10, 1998); further, Cassese, supra note 117, at 22-25.

208 *Id*. at 25, "Far numerous are, however, the cases where the ICTY has ruled out the existence of general principles of law recognised by all nations." ICTY Statute and ICTR Statute art. 28 and 27 respectively provided for pardon or commutation of sentences also on the "basis of general principles of law", rather than, as under article 21(1)(c) of the ICC Statute to "national laws of legal systems of the world", operating as a source of law in all the fields of operation of the Court.

209 Van den Wilt, *supra* note 139, at 256, "[w]hile the Court is indeed entitled to apply international conventional and customary law beyond its Statute, nothing in Article 21 of the Rome Statute suggests that its interpretation should be binding on the states parties."

210 *Cf.* Statute of the ICJ, art. 38(1)(c).

211 Sadat, *supra* note 31, at 178-179; Caracciolo, *supra* note 172, at 228.

212 Generally, Nancy A. Combs, Guilty Pleas in International Criminal Justice, Constructing a Restorative Justice Approach 3-4 (2007); for one of the best comparative studies on the matter, 1-2 Ulrich Sieber, The Punishment of Serious Crimes (2004) with individual state study reports.

213 Combs, *supra* note 212, with thorough review at 57.

214 One of the clearest pronouncements on the matter see Prosecutor v. Deronjic, Case No. IT-02-61, Judgment, ¶ 1-10 (Mar. 30, 2004) (Dissenting Opinion of Judge Schomburg); further, J.N. Clark, *Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation*, 20 Eur. J. Int'l L. 415, 424-8 (2009)

215 Raimondo, *supra* note 196, at 401, valid criticism on the largely antiquated distinction between civil and common law approaches, in light of the convergence and cross-fertilization of these criminal law systems.

by referring to the possibility of employing even a single state's national system ("normally exercises jurisdiction") certainly seems to point to that direction.

As an afterthought, it could be mentioned that the Court, under article 21(1)(c), is directed to look for general principles of law, derived from the main legal systems of the world, rather than to distinguish – and dismiss – the usefulness of one or another legal system, on the basis of "the modalities for the exercise of a right".[216] Through this process of interpretation of article 21(1)(c), it is submitted that one would indeed meet insurmountable difficulties in locating even two national systems capable of supporting the existence of a general principle of law.[217]

These thoughts are particularly relevant in assessing the limits of objective territoriality jurisdiction under the Statute and the use of territorial fictions. Barring the production of a specific rule of customary law delimiting with precision the permissible limits of territoriality – a proposition highly unlikely in and of itself – the Court might be required to look for general principles of national laws and even to the application of the national law of the territorial state in question. However, if this ruling of the Appeals Chamber is to be taken at face value, rather than as a slightly over-animated dismissal of a manifestly inadmissible prosecutorial motion, it would mean that there is little chance of ascertaining with any degree of uniformity the limits of the Court's territorial reach. This is because it would seem highly unlikely that the Court would find the requisite evidence in state practice to prove the existence of a universally accepted principle of criminal jurisdiction on the constructive localization of crime with regard to, for example, attempts, preparatory acts, modes of liability, use of instruments, the commission of another connected crime etc.[218] It would rather seem that the evidential burden imposed by article 21(1)(c) should be considered discharged, if it is proven that either the territorial/nationality state(s) party (Parties) in question, or one of the main legal systems of the world adheres to such a principle. This solution seems to hold the middle ground between exporting a single state's legal principles on the international plane or demanding their universal approval. In this way, general principles of national law, including the law of the territorial state party, could possibly maintain a significant role in the ultimate disposition of such issues.

5.5.3. / DELIMITING THE COURT'S TERRITORIAL JURISDICTION ON THE BASIS OF CONSEQUENCES OR UBIQUITY AND THE APPLICATION OF HUMAN RIGHTS RULES

In the context of ICC jurisdiction, human rights law has a dual role to play. From the point of view of the rights of the accused, it raises concerns of fair treatment and reasonable expectations, usually aimed to limit jurisdiction taking into account considerations of foreseeability judicial interpretation for the accused. From the perspective of the victims, a human rights interpretation would involve an expansive interpretation of the Statute, to ensure that no impunity follows the commission of such crimes against them and their families. This part approaches territorial jurisdiction from the perspective of the rights of the accused. The rights of the victims are addressed mostly in the chapter concerning occupation.

At the outset it should be noted that article 21(3) mandates that internationally recognised human rights have an important role to play, particularly as an instrument of interpretation. As the Appeals Chamber recognised early on in its jurisprudence, "[a]rticle 21 (3) makes the interpretation as well as the application of the law applicable under the Statute subject to internationally recognised human rights. It requires the

216 Extraordinary Review Appeal*, supra* note 27, at ¶ 27.

217 In this spirit, Prosecutor v. Kunarac et al., Case No. IT-96-23-T, Judgment, ¶ 439 (Feb. 22, 2001), referring to "general concepts and legal institutions". It may be interesting to juxtapose here the position of the Pre-Trial Chamber in the Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Practices of Witness Familiarization and Witness Proofing, ¶ 42 (Nov. 8, 2006), which deduced indirectly an 'general principle' from an *a contrario* reading of the Prosecutor's argument.

218 Note in this context the divergences in the approach followed by national criminal law systems identified by Ryngaert, *supra* note 57, at 202-9, particularly as regards cross-frontier attempts.

exercise of the jurisdiction of the Court in accordance with internationally recognised human rights norms."[219]

In this context, it must be underlined that, particularly as regards human rights treaties, "an individual defendant lacks standing to challenge the jurisdiction of the forum State on the international plane. None of the human rights treaties that allow individuals to lodge a complaint against a State party before an international body provide the right of a defendant to be tried in the territorial State or the State of his nationality. There is thus no way for an individual to raise the jurisdiction issue *as such* at the international level."[220] Therefore, any consideration of issues of jurisdiction before international human rights courts seems to be more incidental than at the forefront of relevant complaints.

At the outset, it is submitted that, as far as the interpretation and application of article 12 (2) (a) is concerned, there are two main issues concerning criminal jurisdiction and human rights that should be addressed. The first relates to the existence of criminal jurisdiction and concerns the question of the prescription of jurisdiction "in law". Under this heading, the issue is whether the Court's territorial jurisdiction is prescribed by law in sufficient detail. The second and more important issue concerns the rights of the accused as a barrier to extensive judicial interpretation of a court's jurisdiction. In short, if it is accepted that the general territorial prescription found in article 12(2)(a) of the Statute suffices for the purposes of asserting criminal jurisdiction in accordance with the rights of the accused (the question of existence), do these same rights impose any legal standards against which the latitude for judicial interpretation of such jurisdictional provisions should be measured and possibly even restrained (the question of exercise)? These issues will be examined in turn.

5.5.3.1. / THE EXISTENCE OF JURISDICTION

The jurisprudence of human rights institutions in the interpretation of the corresponding human rights treaties demonstrates that the allegations of violation of human rights due to trial by a court lacking territorial jurisdiction have hardly been discussed, although general pronouncements are available concerning other aspects of jurisdiction. This may be attributed to the general reluctance of international monitoring organs to pass judgment on an issue that is probably felt to be at the margins of their overseeing competence, taking into account the subsidiary role that these institutions reserve for themselves.[221]

In general, it may be said that as regards the question of existence of jurisdiction, monitoring organs have addressed it through the lens of trial by a 'competent' court or tribunal in the analysis of the right to a fair trial or arrest/detention by a competent court.

In the context of article 6 (1) ECHR, the European Court of Human Rights has explained that "[i]f a tribunal does not have jurisdiction to try a defendant, in accordance with the provisions applicable under domestic law, it is not "established by law" within the meaning of Article 6 §1."[222] The main reason for this conclusion is that an inappropriate assertion of jurisdiction on the part of national courts would signify a corresponding violation of national laws relating to the establishment and operation of a judicial system, thereby negating the principle of the 'rule of law' underlying the right of the accused under article 6 (1) to

219 Prosecutor v. Lubanga, *supra* note 28, at ¶ 36; It is in the light of this clear requirement of the Statute that one would need to assess – and arguably dismiss – the *Tadic Interlocutory Appeal* Decision's aphorisms concerning the application of the human rights requirement that a tribunal be 'established by law' as inapplicable for international courts, due to the absence of a separation of powers on the international plane; Prosecutor v. Dusko Tadić, Case No. IT-94-1,¶ 41-48, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Judgment (Oct. 2 1995).

220 Reydams, *supra* note 135, at 17.

221 Z. et al. v. U.K., App. No. 29392/95, Eur. Ct. H.R. ¶ 103 (May 10, 2001), NThe Court emphasises that the object and purpose underlying the Convention, as set out in Article 1, is that the rights and freedoms should be secured by the Contracting State within its jurisdiction. It is fundamental to the machinery of protection established by the Convention that the national systems themselves provide redress for breaches of its provisions, the Court exerting its supervisory role subject to the principle of subsidiarity.NFurther, Claire Ovey & Robin C.A. White, Jacob's, White And Ovey, The European Convention on Human Rights 84 (5th ed. 2010); Rick Lawson, *Interaction between National Judiciary and the European Court of Human Rights: Subsidiarity, Co-operation and Supervision*, in Report of the Seminar: Implementation of Human Rights: the Efficiency of Justice in the Council of Europe and its Member States, 61-67 (2004); Mark E. Villiger, *The Principle of Subsidiarity in the European Convention on Human Rights*, in Promoting Justice, Human Rights and Conflict Resolution through International Law, Liber Amicorum Lucius Caflisch 625 (Marcelo Kohen ed., 2007).

222 Jorgic v. Germany, App. No. 74613/01, Eur. Ct. H.R. ¶ 64 (July 12, 2007).

be tried 'by a tribunal established by law'.[223] Similarly, the Inter-American Court of Human Rights has explained, in its interpretation of the requirement of trial by a "competent tribunal" under Article 8 (1) of the Pact of San Jose, that the failure of national courts to respect the allocation of jurisdictional competence according to national rules constitutes a violation of 8 (1) of the American Convention.[224]

As regards arrest and detention, international human rights law provides generally that the deprivation of liberty of a person must be reviewed by a 'competent' judicial authority.[225] Under Article 5 ECHR and Article 7 ACHR, a court is considered 'competent', if it has jurisdiction to review the defendant's detention under national law.[226] One cannot help noticing in this context a certain hesitation of regional monitoring bodies to find a violation in such cases, unless it is manifest. It is, in fact, evident that in their examination of this provision, the supervisory organs of the European Convention for example have been reluctant to examine the interpretation of jurisdictional provisions of national courts,[227] although they seem to have taken a firmer stand when such authority was entirely and manifestly absent.[228]

223 *Id*. It appears that a similar argument could be made from the point of view of the accused before the ICC by virtue of Article 21(3) of the Statute. For the argument that, in those circumstances, the only body capable of deciding such matter would be the Court itself, because as a 'self-contained' system, it cannot be subjected to the supervision of organs belonging to a different system, such as for example the Eur. Ct. H.R.; S. Zappalà, *supra* note 17, at 12-14; further, note the question of a 'tribunal established by law' as famously discussed in Tadić Interlocutory Appeal, *supra* note 19, at ¶ 41, in the framework of the appellant's contention that the S.C. did not have the power to establish the Tribunals.

224 Loayza-Tamayo v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No 33, ¶ 61 (Sept. 17, 1997), (acquittal of the applicant by military courts on charges of treason – in the acquittal decision, the military court "orders the case file to be remitted to the civil courts and the defendant to be placed in the custody of the competent authority" – case remitted to civil courts on suspicion of terrorism – by ordering the continued detention after the acquittal, the military court "acted ultra vires, usurped jurisdiction, and arrogated to itself the powers of the regular judicial organs", contrary to the provisions of national law – violation of the requirement of trial by a competent court under Article 8 (1) ACHR); Ivcher-Bronstein v. Peru, Judgment, Inter-Am. Ct. H.R. (ser. C) No 74, ¶ 109 (Feb. 6, 2001), (annulment of nationality acquired by naturalization through a subsequent administrative decision adopted contrary to national provisions allocating administrative jurisdiction – violation of Article 8 (1) ACHR).

225 Article 9 International Covenant on Civil and Political Rights, 999 *UNTS* 171 and General Comment No. 8, Right to Liberty and Security of Persons (Article 9), 30/06/1982, para. 1 ("the right to control by a court of the legality of the detention"); Eur. Conv. H.R art. 5. 11 Nov. 1950, CETS No. 5, Am. Conv. On H. R., art. 7, Nov. 22, 1969, 1144 *U.N.T.S.* 123.

226 D. Harris et al., Law of the European Convention on Human Rights 139 (2nd ed. 2009)with references; Yutaka Arai et. al., Theory and Practice of the European Convention on Human Rights 466 (Petrus van Dijk et al. eds. 4th ed. 2006); Héléne Tigroudja & Ioannis K. Panoussis, La Cour Interaméricaine des Droits de l'Homme 204-6 (2003); as regards article 5(3) Eur. Convention Human Rights in particular, the same notion exists in the word 'judge or officer authorized by law to exercise judicial power' for the purposes of reviewing pre-trial detention. From the case-law, indicatively, Aquilina v. Malta, App. No. 25642/94, Eur. Ct. H.R. (Apr. 29, 1999), violation of article 5(3) Eur. Conv. H.R. as the pre-trial judge did not have the power under national law to order the applicant's release).

227 Stefan Trechsel, Human Rights in Criminal Proceedings 440 (2005), "[t]he Court will not examine in detail whether the domestic law was correctly applied and will interfere only in cases of an obvious lack of competence"; from case-law, R v. Federal Republic of Germany, App. No. 11506/85, Eur. Ct. H.R. (Oct. 10, 1986), complaint rejected as inadmissible; the Commission decided that the interpretation of the German Criminal Code by the German Courts, so as to exercise jurisdiction on the basis of active personality over the warden of the Majdanek concentration camp, did not violate article 5(1) ECHR and the requirement of 'competent' judicial authority; " . . . . the Commission notes that altogether four different courts, including the Federal Constitutional Court, held, after careful examination, that the relevant provisions of German penal law were applicable in the applicant's case in particular under S. 7 para. 2 (1) of the Penal Code. The Commission does not find it unreasonable or arbitrary that the respective courts applied S. 7 para. 2(1) of the Penal Code with reference to the German nationality laws in force at the time of the crimes at issue and that they held that the applicant had become a German national after the annexation of Austria in 1938." Further, X. v. Austria, App. No. 4161/69, 1970 Y.B.Eur. Conv. On H.R. 798, 804 (complaint of detention following conviction by an 'incompetent court', inasmuch as in the applicant's view the matter posed issues that should be resolved only by an extended Chamber of the Supreme Court, rather than a 'simple' Chamber - "the Supreme Court dealt in detail with that question and found that an ordinary chamber was competent to give judgment in the applicant's case; . . . . the Commission finds that the Supreme Court's interpretation does not give rise to any appearance of such violation . . . . "). The Swiss cases ought to be probably differentiated on that point, as it would seem that, although the Commission found a violation of art. 5(1)(a) Eur. Conv. H.R. due to the detention of servicemen ordered by an 'incompetent court', the emphasis was on the issue of whether the "the Chief Military Prosecutor may, ... , be regarded as a court within the meaning of art. 5(1)(a)", rather than on the competence of the Prosecutor. Eggs v. Switzerland, App. No. 7341/76, Eur. Ct. H.R., Commission Report of Mar. 4, 1978, 15 DR 35, 64-62, ¶ 66-69 (1979); Santschi et al v. Switzerland, App. No. 8018/77, Eur. Ct. H.R., Commission Report of Oct. 13, 1981, 31 DR 5, 42-44, ¶ 81-85 (1983).

228 Ireland v. United Kingdom, App. No. 5310/71, 25 Eur. Ct. H.R. (ser.A) at ¶ 199 (Jan. 18, 1978), where the European Court decided that the Advisory Committee established to review the detention of IRA suspects, without having however the authority to order their release, was not a competent legal authority for the purposes of Article 5(3) Eur. Conv. H.R., although in the end the Court (¶ 215-221 and *dispositif*) found that Article 15 was applicable as regards these measures and therefore found no violation, since they were considered measures necessary in a state of emergency.

It is from these general statements that one may deduce as a tentative conclusion that questions relating to the existence of territorial jurisdiction are treated under the notion of 'competent court or tribunal' in articles 5 and 6 ECHR.

That does not mean, however, that jurisdictional provisions, as rules of criminal procedure, do not need to be laid down by law. The European Court has recently affirmed that "the principle that the rules of criminal procedure must be laid down by law is a general principle of law", as exemplified by the maxim "*nullum judicium sine lege.*"[229] This is particularly important for any accused, as "the primary purpose of procedural rules is to protect the defendant against any abuse of authority and it is therefore the defence which is the most likely to suffer from omissions and lack of clarity in such rules."[230]

Rules of jurisdiction, therefore, as rules of procedure also need to be provided by law. Taking this as a starting point, the obvious question is how detailed should the 'law' be – what is the degree of judicial notice that should be afforded to the accused under the right to a fair trial. Is a general prescription, such as the one contained in article 12(2)(a) acceptable from the standpoint of the rights of the accused to sustain expansive interpretations of territoriality or is more detailed legislation on territorial jurisdiction required? Where does the right to fair trial require the line to be drawn as regards excessive interpretations of jurisdictional rules?

Unfortunately, so far no case-law specifically addressing this point can be located. The organs of the European Convention of Human Rights have addressed similar questions only incidentally in the context of complaints concerning other procedural violations, such as whether the promulgation of jurisdictional rules by the executive[231] or procedural rules by the judiciary[232] was acceptable under Article 6 (1)ECHR, as well as in cases alleging unlawful joining of separate criminal proceedings on grounds of 'connexity'.[233] The conclusion that can be drawn from the relevant *dicta* and the literature[234] is that "the term "a tribunal established by law" in Art. 6 (1) envisages the whole organisational set-up of the courts, including not only the matters coming within the jurisdiction of a certain category of courts, but also the establishment of the individual courts and the determination of their local jurisdiction."[235]

In this framework, the European Court has explained that, while judicial organisation in a democratic society should be regulated by the legislative authority, rather than by the executive or the judiciary, "[a]rt. 6 (1) does not require the Legislature to regulate each and every detail in this field by formal Act of Parliament, if the legislature establishes at least the organisational framework for the judicial organization."[236]

229 Coëme et al. v. Belgium, App. No. 32492/96, 32547/96, 32548/96, 33209/96, 33210/96, Judgment of 22 June 2000, para. 102.

230 *Id.*

231 Zand v. Austria, App. No. 7360/76, Eur. Ct. H. R., Report of the Commission, (Oct. 12, 1978), determination of local/territorial jurisdiction of Labour Courts by executive act issued by delegation of authority – inadmissible under Article 6(1) ECHR.

232 Coëme et al v. Belgium, (32492/96, 32547/96, 32548/96, 33209/96, 33210/96), 2000-VII Eur. Ct. H.R. 75. In the Coëme case, the Court examined under Article 6 (1) of the Convention two key issues; first, whether the trial of a former Minister by the Belgian Cour de Cassation on a number of charges respected his right to a fair trial, in light of the fact that at that time, the national Parliament had yet to adopt a law determining the procedure for his trial Na *vacuum* that was filled by analogy by the application of other national rules by decision of the Cour de Cassation; secondly, whether it was permissible to join the cases of the former Minister, which was subject to a special procedure, with those of other individuals by application of judge-made rule for joining cases which had certain connecting elements. As regards the former Minister and the promulgation in effect of procedural rules for his trial by the Belgian Cour de Cassation, the Court reiterated the requirement of 'procedure established by law' from the Zand case, and concluded that the organization of the judicial system is a matter that should be regulated by the Legislature, not the judges. Secondly, in its examination of the issue of the joined cases for the rest of the accused persons, the Court reiterated that Norganisation of the judicial system and jurisdiction in criminal cases cannot be left to the discretion of the judicial authoritiesN, Coëme et al v. Belgium, ¶ 107 and found a violation for both situations of article 6 (1).

233 Thus, in the case of Crociani, Palmiotti, Tanassi and Lefebvre d'Ovidio v. Italy, App. No. 8603/79, Eur. Ct. H.R., Commission Decision of Dec. 18, 1980, (Admissibility), 22 DR 147, 219 joining the cases was not considered problematic in the light of Article 6 (1), as Italian law expressly provided for this possibility, in the discretion of the Constitutional Court, whereas in Coëme et als v. Belgium, *supra* note 232, at ¶ 107-8 the decision of the Belgian Cour de Cassation to join the cases on grounds of connection was found to be in violation of Article 6 (1), as this possibility was not provided by legislation but constituted a rule promulgated by that court; Further, Harris et al., *supra* note 226, at 297; in certain cases, however, the European Court has not considered it necessary to examine whether the national procedural framework concerning competence was clear enough, having already reached a finding of violation of a right to a fair trial on grounds of e.g. of lack of impartiality or independence of the judiciary. This was the situation in Findlay v. U.K., 1997-I Eur. Ct. H.R. 30, ¶ 80; Piersack v. Belgium, App. No. 8692/79, Eur. Ct. H.R. ¶ 33 (Oct. 1, 1982), an investigating officer of the prosecutor's office in a murder case later heard it as judge – lack of impartiality – violation of article 6 (1) ECHR.

234 Harris et al., *supra* note 226, at 297; Trechsel, *supra* note 227, at 51-52; Jacques Velu & Rusen Ergec, La Convention Européenne des Droits de l'Homme 453-4 (1990).

235 Zand v. Austria, *supra* note 231, at 26, ¶ 68.

236 *Id.* at ¶ 69; Recently affirmed in Sokurenko & Strygun v. Ukraine, App. No. 29458/04, 29465/04, Eur. Ct. H.R. ¶ 23-25 (July 20, 2006).

Once this 'organisational framework' is provided, it can be developed through interpretation.[237] This seems to be in line with the development of an entire legal corpus of localization devices in the criminal law of member states of the Council of Europe on account of a single provision of territorial jurisdiction similar to article 12(2)(a) ICC Statute.[238]

In the same vein, therefore, it may be argued by analogy that, since article 12(2)(a) ICC Statute as promulgated by the Rome Conference provides for the jurisdiction of the Court if "the conduct in question" is allegedly committed in the territory of states parties, the condition of the provision by the 'legislature'[239] of the basic 'organisational framework' seems to be satisfied. Therefore, under existing human rights law, article 12(2)(a) suffices for the Court's territorial jurisdiction.

5.5.3.2. / THE EXERCISE/INTERPRETATION OF JURISDICTION

The significant question that necessarily follows is whether human rights law in general, and the right to a fair trial in particular, provides for a legal standard, against which the margin of judicial interpretation available to a court under the principle of *kompetenz kompetenz* should be measured. When can it be said that a certain interpretation of the Court's rule of territorial jurisdiction would contravene the human rights of the accused, particularly when such interpretation takes place for the first time?

An answer to this question, influenced particularly by the jurisprudence of the European Court of Human Rights, may be formulated along the following lines.

First, this issue is not regulated by the principle of legality, as mirrored in article 7 ECHR. This is implicit in the reasoning of the ECtHR in earlier case-law[240] and became explicit in an *obiter dictum* of the Court in *Ould Dah v. France*.[241] In that case, the European Court was called upon to pronounce on the exercise of universal jurisdiction by France over a national of Mauritania for torture, when under Mauritanian law the relevant acts were covered by an amnesty law. The Court observed that, while the applicant did not contest the exercise of universal jurisdiction by the French authorities, this was a question which did not raise issues under article 7 ECHR.[242]

Secondly, such issues have been dealt under article 6 ECHR – albeit only peripherally and indirectly. In the context of this examination, the European Court has stressed particularly the need to ensure that a certain assertion of jurisdiction by national courts satisfies a legal standard of 'reasonableness' as a check against interpretations that may be considered 'arbitrary'. This means that the issue will be decided by assessing whether it may be said that, taking all the relevant circumstances into account, the interpretation of a court's jurisdictional provision by national judges in a certain case may be said to be 'reasonable' (the standard of 'reasonableness'), on the basis of certain 'reasonable grounds'.

237 Coëme et al. v. Belgium, *supra* note 232, at ¶ 98; Sokurenko and Strugun, *supra* note 236, at ¶ 23, "Nor, in countries where the law is codified, can organisation of the judicial system be left to the discretion of the judicial authorities, although this does not mean that the courts do not have some latitude to interpret the relevant national legislation."

238 *See supra* Chapter 2.

239 For the role of the ASP as 'legislature', Donat – Cattin, *supra* note 29, at 74*;* But note that in the Tadic Interlocutory Appeal*, supra* note 19, at ¶ 43, the ICTY Appeals Chamber considered that this aspect of the right to a fair trial is inapplicable in an international legal setting, as there is no separation of powers on the international plane between legislative, executive and judiciary. It therefore concluded that this principle applies only to states and national courts. On the other hand, the Appeals Chamber considered that an international tribunal is 'established by law' if (a) a court is established by a body with the "limited power to take binding decisions", such as the Security Council (at ¶ 44), or (b) a court is established in accordance with the rule of law (at ¶ 45), *i.e.* by providing all the necessary guarantees of fairness, justice and internationally recognised human rights. Although the Rome Statute undoubtedly meets the Tadic criteria, it is submitted that in the present context the Tadic analysis is perhaps not applicable, as its primary focus was to justify the trial of accused by an *ad hoc* tribunal that did not exist at the time of the commission of the relevant crimes. In the context of the ICC, such concerns obviously do not arise.

240 Jorgic v. Germany, *supra* note 222.

241 Ould Dah v. France, App. No. 13113/03, 2009 Eur. Ct. H.R. 264.

242 *Id.,* "La Cour note également que le requérant ne conteste pas la competence des juridictions françaises, question qui ne relève au demeurant pas de l'article 7 de la Convention . . . . ."

This is conclusion deduced largely from earlier decisions of the European Commission[243] and more recently the reasoning of the European Court of Human Rights in the *Jorgic v. Germany* case, where the applicant complained that his right to a fair trial had been violated, because the German Courts accepted that the exercise of universal jurisdiction on their behalf for charges of genocide was permissible under the Genocide Convention as implemented in German law.[244] As regards the question of whether the German courts properly exercised universal jurisdiction over the accused, the ECtHR ultimately found in favour of Germany. In assessing the 'reasonableness' of German universal jurisdiction over the case, the Court stressed particularly that jurisdiction was exercised in accordance with national law and public international law on the matter.[245] In the end, the Court concluded that "the German courts' interpretation of the applicable provisions and rules of public international law, in the light of which the provisions of the Criminal Code had to be construed, was not arbitrary. They therefore had reasonable grounds for establishing their jurisdiction to try the applicant on charges of genocide."[246]

The third point is that the right to a fair trial should not be used to allow forum shopping in criminal cases. The ECtHR has clearly stated that "article 6[ECHR] does not grant the defendant a right to choose the jurisdiction of a Court."[247]

It is submitted that these concerns may also prove important for the ICC, in view of article 21(3). However, when assessing the usefulness of these rulings, certain caveats should be articulated.

The more recent cases (*Jorgic, Ould Dah)* concern the permissible exercise of universal criminal jurisdiction, rather than territorial jurisdiction. Accordingly, the value attached to these ruling lies for present purposes primarily in the exclusion of the principle of legality and the legal standard of 'reasonableness' used by the ECtHR, rather than its substantive findings of law as such.

Additionally, in none of these cases were issues of jurisdiction explicitly and clearly raised by the applicants. The European Court's position is thus explained through *obiter dicta* and parts of its reasoning which may be easily reversed in the future.

Furthermore, the reasoning of the European Court is to a large extent circumscribed by its own perception on the proper exercise of its judicial function in a regional context and the limits of its own *kompetenz kompetenz* in the examination of the lawful application of national law by national courts. This is clear when the ECtHR refers to its 'subsidiary' role in the assessment of national judgments applying national law, rendering its intervention possible only when the Convention requires respect of national law and when there is a 'flagrant violation' of that law.[248] This perception may not necessarily be shared by the judges of the ICC in the context of the interpretation of the Court's jurisdiction. While there may exist parallels between the principle of 'subsidiary' monitoring system of the European Convention and

243 In the first case where this expression 'reasonable grounds' was used, G. v. Switzerland, App. No. 16875/90, Eur. Ct. H.R., Commission Decision of October 10, 1990, the applicant was charged with different offences before two separate courts situated in two different cantons. He asked that all proceedings be conducted by one authority in one location, but his request was rejected, as the competent national authority ruled that the offences were not connected materially or locally and that the proceedings could continue before the different courts. Before the European organs, he alleged that the margin of appreciation allowed by Swiss Criminal Procedure Law to the Indictment Chamber of the Federal Court to determine the court with criminal jurisdiction to hear a case was too broad. It is in these circumstances that the European Commission first ruled that "Article 6 (Art. 6) of the Convention does not grant an accused the right to choose the jurisdiction of a court. Rather, in such circumstances the Commission's task is limited to examining whether reasonable grounds existed for the authorities to establish one of the various jurisdictions and whether their decision was lawful." The Commission rejected the complaint as manifestly ill-founded; *See* also Kübli v. Switzerland*,* App. No. 17495/90, Eur. Ct. H.R., Commission Decision of Dec. 2 1992.

244 Jorgic v. Germany, *supra* note 222.

245 *Id*. at ¶ 65-68.

246 *Id*. at ¶ 70.

247 *Id*. at ¶ 65.

248 *Id*. at ¶ 65.

'complementary' system of the ICC,[249] these may be relevant concerns in addressing admissibility, rather than territorial jurisdiction.[250]

Moreover, in reading the above human rights jurisprudence, one cannot help but notice that the applicable legal standard is vague and case-specific. The test for the examination of whether criminal jurisdiction has been lawfully asserted seems to depend largely upon the existence of "reasonable grounds" between the state party that exercises criminal jurisdiction and the criminal activity in question, or their "reasonable interpretation" by domestic courts. In this regard, 'reasonableness' in *Jorgic* consisted mainly of an examination of the appropriateness of the process of interpretation followed by German courts, *i.e.*, the priority to instruments of interpretation under article 31 VCLT rather than to the preparatory works, as well as the consideration of the legal nature of the crime in question and the legal development of universal jurisdiction over genocide charges in national and international case-law. The 'reasonable grounds' relied on by earlier case-law seem to be even more case-specific.[251]

Accordingly, the importance of these rulings seems to be more on the rules that are not applicable, as opposed to the rules that are. In particular, since article 7 ECHR is not applicable, the test of 'foreseeability' and 'accessibility' under the principle of legality does not apply to questions of jurisdiction. This is a well-known test of judicial notice, developed in the framework of substantive criminal law, according to which a rule of law should be 'foreseeable and accessible' to the accused,[252] subject to a certain margin for judicial interpretation.[253] The European Court has indicated in this respect that article 7 ECHR does not apply. It has further suggested that, while article 6 ECHR remains applicable, the right to a fair trial does not give the right to an accused to select his court, *i.e.* engage in 'forum shopping' in criminal cases, on the premise that a certain jurisdictional rule – or its interpretation – was not 'foreseeable' or 'accessible' to him. This is evidenced from the generally unsympathetic stance of courts in both sides of the Atlantic on objections of the accused premised on linguistic objections of foreseeability (how is the accused supposed to 'know' of a rule of jurisdiction in a language he does not understand?),[254] as well as further difficulties that the

249 For the similarities between the two approaches, Schabas, *supra* note 61, at 175 (analogous to the rule of exhaustion of local remedies in human rights bodies); Villiger, *supra* note 221, at 623-4, "Recently, the International Criminal Court has also embodied subsidiarity in its Statute"; *Cf.* Ronald J. Rychlak & John M. Czarnetsky, *The International Criminal Court and the Question of Complementarity*, Third World Legal Studies 115, 130 (2000-2003), "The complementarity doctrine is based strictly on political will; it does not rest upon a moral basis. Thus, when it seems appropriate and political will shifts, there will be no principled basis on which to oppose expansion of the ICC's jurisdiction. If, however, the ICC's structure were based upon a principle grounded in moral or philosophical reasoning rather than political compromise, that principle (properly applied) might prove a more successful prudential protection of national sovereignty in appropriate cases. That is the reason we believe that the principle of subsidiarity is superior to the doctrine of complementarity."

250 On the distinction between jurisdiction and admissibility, Schabas, *supra* note 61, at 58-59, 171-173; Blakesley, *supra* note 40, at 436, " . . . . "admissibility" relates to situations in which the Court has jurisdiction, but should not assert it"; Note that under Rule 58 (4) of the Court's Rules of Procedure, the ICC must first satisfy itself as to its jurisdiction and only subsequently examine admissibility objections.

251 In *G. v. Switzerland, supra* note 243, in the examination of the pertinent 'reasonable grounds', it was stated that "the Commission does not consider it unreasonable if the Indictment Chamber, when interpreting these [national law] provisions and determining the jurisdiction of the various courts, noted that the offence of false accusation was of recent date, and that in the interests of procedural economy and in view of the applicant's previous indictment in the Canton of Aargau, the proceedings should be conducted by two different authorities." In a similar ruling, Kübli v. Switzerland, *supra* note 243, it was held that such 'reasonable grounds' existed in determining jurisdiction *ratione materiae* on the basis of the principle *perpetuatio fori,* originally employed under national law in determining *ratione loci* jurisdiction. As it was stated, "[t]he Commission does not find it unreasonable that the Swiss courts considered that the principle of perpetuatio fori also applied with regard to jurisdiction ratione materiae, in particular in that, after an action had been filed and such jurisdiction had been established, it did not cease to exist where the defendant was no longer listed in the Commercial Register." Note from article 5 jurisprudence that complaints of detention and lack of jurisdiction, R v. Federal Republic of Germany, App. No. (11506/85), Eur. Ct. H.R., Commission Decision of October 10, 1986, where the Commission rejected such complaints on the grounds that 4 different national courts had dealt with the issue.

252 Indicatively, Sunday Times v. United Kingdom, App. No. 65387/74, Eur. Ct. H.R. (Apr. 26, 1979), (Plenary), 2 E.H.R.R. 245 ¶ 49; Most recently, the relevant principles of the Eur. Ct. H.R. case-law are provided in the Chamber's ruling in Kononov v. Latvia, (36376/04), paras. 113-115 – the case has been referred to the Grand Chamber (conviction for commission of war crimes during the Second World War – retroactive application of Additional Protocol I and prosecution 50 years after the expiry of the statute of limitations – lack of 'foreseeability' in national law – violation of Article 7 (1) ECHR by a 4-3 majority).

253 *C.R. v. United Kingdom,* 2 November 1995, 21 E.H.R.R. 363,¶ 34.

254 In *Ould Dah, supra* note 241, the applicant referred explicitly the point, although the Court did not address it as such. It rather emphasized the international nature of the offence in question (torture).

defense may encounter as a result of his trial before foreign – not the territorial state's – courts, in terms of summoning and presenting witnesses from another country, familiarity with the applicable law.[255]

Accordingly, the position seems to be that, where issues of jurisdiction are raised, the question is solely one of 'reasonableness'/lack of arbitrariness of the interpretation of a certain jurisdictional clause by a court of law.

5.5.3.3. / CONCLUDING OBSERVATIONS

From this relatively limited case law, the tentative conclusion that can be drawn is that, notwithstanding their overall unwillingness to assess the application of national jurisdictional rules, regional monitoring organs and particularly the European Court of Human Rights have demonstrated a willingness to intervene, mostly in the context of the right to a fair trial as opposed to the principle of legality, if an assertion of criminal jurisdiction by way of judicial interpretation is considered to be 'arbitrary'/not 'reasonable'.

The criterion is obviously a flexible one, heavily influenced by the facts of each case.[256] Be that as it may, it would seem that this is the legal standard, which the judges of the ICC could bear in mind in the framework of the interpretation of article 12(2)(a) ICC Statute, in order to satisfy the exigencies of procedural legality and the right of the accused to a fair trial. In this spirit, the authorities of the International Criminal Court would be perhaps entitled to consider that the duty to protect the rights of the accused to a fair trial and to lawful arrest are discharged, if the Court is satisfied that the grounds of its jurisdiction as regards territory and the fictions of commission in whole or in part, constituent element, consequences and effects, are 'reasonable' under international law. Whether the accused knew of this possibility is irrelevant, since the principle of legality is not applicable and an expansive interpretation of jurisdiction does not seem to affect the requirement of his right to a fair trial.[257] Human rights bodies seem to have been particularly concerned in this context that human rights norms are not construed as a normative window for forum shopping in criminal cases.

Lastly, it should be noted that the picture emerging from the European approach is one of distinction between the public international law state-to-state 'reasonableness', where the emphasis is on the principle of non-intervention and the connecting links of the crime to a state, as opposed to the human rights 'reasonableness', in the sense of reasonable interpretation of a jurisdictional provision in the trial of an individual.

This approach however is not rigid. From the point of view of US courts, for example, particularly in drug trafficking and extradition cases, the argument has been raised that the exercise of extra-territorial jurisdiction violated the 'due process' rights of the accused. However, in those cases, the critical test appears to have been one of 'sufficient nexus' with the US; "[I]n order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the

255 This argument has been raised in national courts, although without success; indicatively, see U.S. v. Yousef, 327 F.3d 56, 112 (2nd Cir. 2003), where it was that practical considerations, such as unavailability of witnesses, evidence, increasing defense costs and other defense difficulties would have a role to play in that court's assessment of whether the exercise of jurisdiction complied with the human rights of the accused , if specifically invoked and substantiated in the defendant's objection – which the court found not to be in the concrete case. Compare here the European Court of Human Rights similar approach in the Sawoniuk v. United Kingdom, App. No. 63716/00, 2001-III Eur. Ct. H.R. (2001), concerning the applicant's complaints under article 6 stemming from an alleged violation of his procedural rights due to the UK's exercise of extraterritorial (universal) jurisdiction over crimes committed by a Belarus national in Poland against Jews during World War II.

256 For criticism on the notion of 'reasonableness' and analysis, Velu & Ergec, *supra* note 234, at 441, n. 519 - "s'il est un concept à contenu variable, réfractaire à toute approche dogmatique, c'est bien celui de 'raisonnable'" ; further, Neil MacCormick, *On Reasonableness*, in Chaim Perelman & Raymond Vander Elst, Les notions a contenu variable en droit 131-56 (1984) ; Jean Salmon, *Le concept de raisonnable en droit international public*, in Daniel Bardonnet et al., Mélanges offertes à Paul Reuter: le droit international: unité et diversité 448-478 (1981).

257 For this conclusion from a different perspective, Wolswijk, *supra* note 1, at 381, "From the perspective of the offender, the principle that a jurisdictional claim should be predictable does not present a substantial limitation to these wide claims".

defendant and the United States, so that such application would not be arbitrary or fundamentally unfair."[258] The test has been applied extensively in subsequent case-law on drug smuggling and extradition, with fluctuations however as to its precise scope and meaning.[259] Additionally, it should be noted that Germany's argument before the European Court of Human Rights in *Jorgic* also relied at least in part on the applicant's connection to that state, stressing the applicant's long term residence in Germany and his arrest on German territory.[260]

Ultimately, it is a matter to be decided by the Court if, in its interpretation of article 12(2)(a) under article 21(3) ICC Statute, the assessment of 'reasonableness' of a certain jurisdictional assertion made by the Prosecutor would mean an examination of the existence or absence of 'connecting links', as the jurisprudence of national supreme courts would indicate (including the location of the activity, the character of the activity, presence of the accused, residence etc.), an examination similar to that performed by the ECtHR (referring to other national laws and interpretations, judicial decisions and international treaties), or a holistic combination thereof.

5.6. / CONCLUSION

The application of article 12(2)(a) ICC Statute brings to the fore important questions, such as whether the prescription of article 12 suffices for the territorial extension of the scope of the Court's jurisdiction through judicial interpretation and if so, what are the limits to such interpretation.

On the one hand, faithfully to a strict adherence to the spirit of the principle of legality as articulated in substantive criminal law, it can be argued that the International Criminal Court's jurisdiction is limited only to cases, where the 'conduct in question' occurs within the territory of a state party. This strict approach would be consistent with the proposition that the substantive principle of legality applies (or should apply) to questions of jurisdiction, as criminal jurisdiction involves the exercise of power which may restrict individual freedom and the liberty of a person. In favour of this suggestion could be additionally invoked the need to interpret the same expressions in different parts of the Statute in a uniform manner, as well as the position assumed by some delegations in the Aggression Working Group that article 30 ICC Statute should be kept in mind when discussing article 12(2)(a). Finally, this position would be favoured also by an *argumentum a contrario*, according to which the drafters at the Rome Conference had at their disposal the formulations endorsed in a number of other international treaties, whereby reference was made to the exercise of jurisdiction when a crime is committed 'in whole or in part' within state territory. By opting for the

258 U.S. v. Davis, 905 F.2d 245, 248 (9th Cir. 1990); The relevant excerpt reads as follows; "In the instant case, a sufficient nexus exists so that the application of the Maritime Drug Law Enforcement Act to Davis' extraterritorial conduct does not violate the due process clause"; where an attempted transaction is aimed at causing criminal acts within the United States, there is a sufficient basis for the United States to exercise its jurisdiction," United States v. Peterson, 812 F.2d 486, 493 (9th Cir.1987); the facts found by the district court in denying Davis' motion to dismiss for lack of jurisdiction support the reasonable conclusion that Davis intended to smuggle contraband into United States territory. At the time of its first detection, the Myth was 35 miles away from, and headed for, San Francisco. As the Coast Guard approached, the Myth changed its course for the Caribbean by way of Mexico, although the Myth was many miles from the Great Circle route from Hong Kong to Acapulco. The Myth is on a list of boats suspected of drug smuggling. It is unusual for a 58 foot sailing vessel to have sailed from the Myth 's asserted point of departure, Hong Kong. The foregoing evidence is sufficient to establish a nexus between the Myth and the United States. We therefore find that the Constitution does not prohibit the application of the Marijuana Drug Law Enforcement Act to Davis."

259 U.S. v. Caicedo, 47 F.3d 370, 372 (9th Circ. 1995); U.S. v. Kahn, 35 F.3d 426, 429 (9th Circ. 1994); U.S. v. Klimavicius-Viloria, 144 F.3d 1249, 1257 (9th Circ. 1998); an interesting case was U.S. v. Yousef, *supra* note 255, concerning the trial in the U.S. of individuals convicted of involvement in the 1993 World Trade Center attack and conspiracy to crash U.S. commercial aircrafts: "The defendants conspired to attack a dozen United States-flag aircraft in an effort to inflict injury on this country and its people and influence American foreign policy, and their attack on the Philippines Airlines flight was a "test-run" in furtherance of this conspiracy. Given the substantial intended effect of their attack on the United States and its citizens, it cannot be argued seriously that the defendant's conduct was so unrelated to American interests as to render their prosecution in the United States arbitrary or fundamentally unfair"; *id.* Charles Norchi & Lea Brilmayer, *Extraterritoriality and Fifth Amendment Due Process*, 105 Harvard L. Rev. 1217, 1233, 1260 (1991-1992); Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 Harvard Int'l L. J. 121, 158, 163 (2007), who notes particular the discrepancies in the approach of different Circuits to this test, ranging from different interpretations to its outright rejection.

260 Jorgic v. Germany, *supra* note 222, at ¶ 60.

existing formulation, however, the wording of article 12 could be seen as a silent rejection of the 'in whole or in part' approach, as well as other interpretative approaches to territorial jurisdiction. This would indicate that the Court's territorial reach was intended to be strictly circumscribed to cases where the entire criminal conduct took place within a state party.

Last, this argument would perhaps find further support in a more 'state-sovereignty' approach to the question of the limits imposed to the Court's power to determine its own jurisdiction by the delegation of authority given to it by states parties. The main argument would stem here from the premise that the Court, in the exercise of its *compétence de la compétence*, cannot exceed the limits of the power explicitly delegated to it by states parties in this case in article 12(2)(a) ICC Statute. From this perspective, while the *Lotus* dictum is applicable for state criminal jurisdiction, a distinction should be made between states, which enjoy full powers on the international plane, and the International Criminal Court – an international legal person of limited, specified competence, strictly delineated by the states parties' acceptance of its jurisdiction under the Statute. While state competence may therefore be said to be properly regulated by the *Lotus* approach, the Court's operation should be properly limited according to the principle of "speciality". In this context, in the light also of article 10 ICC Statute, which is said to insulate Part II from further developments in customary law, it could be asserted that the limits to the Court's geographical reach are to be deduced strictly from the texts agreed upon and included in article 21(1) ICC Statute, delimiting the Court's discretion to decide the matter.

In this scenario, an extensive approach to the Court's jurisdiction under article 12(2)(a) would be possible only if customary law, 'applicable' treaties or the national law of the state 'normally' exercising jurisdiction would explicitly permit it. It would fall therefore upon the Prosecutor to prove to the Court's Chambers that a certain extensive approach to territorial jurisdiction is permissible, because it has attained the status of a rule of customary law, it is provided by 'applicable treaties' or accepted under general principles of law, including the national law of the state 'normally' exercising jurisdiction.

On the other hand, a persuasive argument could be made in favour of the position that an expansive approach to the Court's territorial jurisdiction is not contingent either upon its explicit inclusion in the Statute or upon a prior finding that objective territoriality and other fictions have become norms of at least customary law quality. From this perspective, 'reading' territorial constructions in the Rome Statute remains a matter falling within the Court's power of interpretation of the limits of its own authority under the rules of interpretation expounded in the Statute and its jurisprudence.

If this approach is followed, the Court would not need to engage immediately in the meticulous, tedious and possibly inconclusive comparative analysis suggested above, save perhaps by way of confirmation of findings already made through interpretation. In this case, the Court, starting from article 12(2)(a) ICC Statute, would simply assert that its power is regulated from this provision and that the limits to the exercise of its authority are to be deduced by interpreting this provision taking into account the 'authoritative guide', the preparatory works and article 21(3) ICC Statute, in the light of the principle of non-intervention and the human rights of the accused. In this process of interpretation, rules of international law may still have a role to play, consistently with article 31(3)(c) VCLT.

This approach would seem to be more consistent with the Court's character as a permanent, independent, international judicial institution, possessing the power to determine the limits of its own jurisdiction and set up to serve an identifiable set of objects and purposes. It would also not pose any threats to the rights of the accused and the requirements of a fair trial. In fact, taking into account the jurisprudence and the reasoning employed by regional human rights bodies on the question of trial by a competent court and the flexible 'procedural' aspect of legality, the requirements of fair trial appear to be satisfied by general jurisdictional prescriptions not unlike article 12(2)(a), laying down the general 'operational framework' of the Court. From that point onwards, it is simply a question of whether the interpretation adhered to is 'reasonable' in the circumstances – ambiguous though this standard may be. Taking into account article 21(3) ICC Statute, it would seem that this is the appropriate course of legal analysis to be applied.

In support of this position could also be cited the corresponding position of states in the Aggression Working Group, advocating for the Court's freedom of interpretation, as well as the difficult negotiating circumstances in the last days of the Rome Conference. Notwithstanding the merits of 'unified' approach to the interpretation of all parts of the Statute, the fact that they were negotiated in different committees operating simultaneously and in the absence of centralized drafting co-ordination through the Drafting Committee in the last days of the Conference militates against such approach at least for the purposes of article 12(2)(a). It is the prevailing negotiating situation at that time that makes it equally difficult to compare

the Rome Statute's formulation in article 12(2)(a) with that of other treaties, as well as to deduce the intentions of the negotiators through arguments to the contrary.

Furthermore, on the question of delegation, it would seem that, while the Court is a creature of state consent, the power to determine its own jurisdiction does not flow from that consent. It is not an attributed power, which the Court would not have if the Statute did not explicitly provide for it, but an inherent power of every court operating on the national and international level. As article 12(1) provides, the Court has its own jurisdiction, originally universal in nature, which is limited in certain cases of specific trigger mechanisms by the requirements of territoriality or nationality. This appears to be the meaning of the phrase that, upon becoming party to the Statute, a state "thereby accepts the jurisdiction of the Court." Once the Court was created and the Rome Statute entered into force, the Court acquired a power incidental to its existence as a judicial institution and independent of the will of states parties. Article 19(1) is simply declaratory. It does not create a power that the Court would otherwise not possess. As such, it does not seem that it would be appropriate to subject this process of interpretation to any limitations other than those perhaps that relate to the Court's own judicial function, such as the principle of non-intervention and human rights law. It remains at the Court's discretion how to best use that power, in light of Mann's doctrine of connecting links.

Finally, in this context, it would seem that the Court's position does not differ substantially from that of national courts, which, on the basis of a similarly general prescription in a national criminal code or legislation adopted a wider approach as to the geographical scope of their respective states' competence. It could be said, in closing, that the Court should be entitled on a par with national courts to consider the matter of the geographical scope of its authority as a matter of interpretation.

Bearing in mind this position, the next part of this study will be devoted to the examination of whether the Court, in the context of its power to interpret article 12(2)(a) ICC Statute, may use the 'effects' doctrine of primarily anti-trust law origin, in order to extend through judicial interpretation the geographical scope of its jurisdiction.

CHAPTER 6 /
THE EFFECTS DOCTRINE

6.1. / THE PROBLEM AND THE STRUCTURE OF THE ARGUMENT

The application of objective territorial jurisdiction under article 12(2)(a) ICC Statute does not seem to be an extremely controversial issue. It is possible to find some support for it in the literature,[1] while the Special Working Group on the Crime of Aggression of the ICC Assembly of States Parties seems to have considered its application as 'ordinary'.[2] In this part, the issue to be explored is whether there is some room for the argument that the Court can have recourse to the "effects doctrine" on jurisdiction as an aspect of objective territorial jurisdiction, in the context of a teleological interpretation of article 12 (2) (a) ICC Statute.

The problem properly stated can be seen as an extension of objective territoriality. The main difference is that the effects are not elements of the description of the crime in question, but other social, economic etc consequences that are less remote and broader. This would be the case, when due to the massacres committed against a civilian population in a state not party in the context of a state-run campaign to exterminate a certain tribe, there is a massive exodus of refugees to neighbouring states parties. This in turn would cause direct, substantial and immediately foreseeable effects within state party territory, including setting up and maintaining refugee camps, keeping people in refugee-camp living conditions, as well as suffering cross-border attacks to these camps. Another similar example could be seen when, in the context of a campaign of extermination, an international watercourse is poisoned on purpose to such an extent that the livelihood of not only the targeted population, but also of the population of lower riparian states is endangered due to the deprivation of access to water and the destruction of cultivation and livestock dependant on that watercourse. Similar issues would arise when the campaign of extermination in a state not party would result to the disruption of the flow to neighbouring states parties of necessities for the survival of the latter's population (such as the supply of natural gas or oil in the winter). The same outcome could be easily envisaged due to the destruction of international pipelines in the context of an internal armed conflict. In these situations, do these effects on the population of a state party originating from crimes against humanity in a state not party suffice for the Court's jurisdiction under article 12(2)(a)?

Evidently, the easy path to follow would be to refuse any such thought, at least in the absence of a Security Council referral. The more difficult proposition would be to consider the possibility that the Court might actually have jurisdiction in such cases, at the initiative of a state party or the Prosecutor. It is this possibility that will be considered here.

In this context, the argument will be structured in two levels. In the beginning, a few pages will be dedicated to the question of whether adopting the effects doctrine would be desirable for the Court. In the second part, the legal approach will be more fully developed. In the context of its jurisdiction to decide on the scope of its jurisdiction, it will be examined whether the Court can teleologically interpret article 12(2) (a) to that direction, taking into account a number of relevant legal and policy considerations.

1 Stéphane Bourgon, *Jurisdiction Ratione Loci*, in The Rome Statute of the International Criminal Court: A Commentary, 559, 567 (Antonio Cassese et al. eds. 2002), who contemplates the possibility of commission of a crime in part within state territory for the purposes of criminal jurisdiction and "sees no reason to believe that the ICC could not exercise its jurisdiction even if only one of the two States" was a Party to the Statute. Markus Wagner, *The ICC and its Jurisdiction – Myths, Misperceptions and Realities*, 7 Max Planck U.N. Y.B. 409, 477-8 (2004); Ilias Bantekas, *Head of State Immunity in the Light of Multiple Legal Regimes and Non-Self-contained System Theories*, 10 J. Conflict and Security L. 21, 39-40 (2005); William Schabas, An Introduction to the International Criminal Court 76 (2007), considers the application of objective territorial or 'effects jurisdiction' as he calls it, but rejects it, "Nevertheless, given the silence of the Statute, about effects jurisdiction, there are compelling arguments in favour of a strict construction of Article 12 and the exclusion of such a concept", without however explaining these arguments. Bing Bing Jia, *The International Criminal Court and Third States*, in The Oxford Companion to International Criminal Justice 160, 161 (A. Cassese et al eds. 2009), who notes that "Art. 12(1) [*sic*] envisages that a person may be subject to the jurisdiction of the Court regardless of his or her nationality, provided that the offence alleged of this person has occurred in the territory or constructive territory of a state party"; Kenneth S. Gallant, The Principle of Legality in International and Comparative Criminal Law 342 (2009), "The ICC Statute can apply to a national of a non-ICC state who commits a criminal act in, or with effect in, an ICC state, as an instance of territorial jurisdiction."

2 Assembly of States Parties, *Report of the Special Working Group on the Crime of Aggression*, 7th Session of the Assembly of States Parties, (Second Resumption), ICC-ASP/7/SWGCA/2, ¶ 38-39 (Feb. 20, 2009).

6.2. / SHOULD THE COURT ADOPT THE EFFECTS DOCTRINE OF JURISDICTION?

From the perspective of positive international law, as Robert Jennings said, "if the law is working reasonably well, there will be many, many cases where the law is clear and its application is not really open to question. Therefore no question of policy or a policy decision can arise."[3] The law of state territorial jurisdiction is to a large extent settled; therefore, a policy discussion on state territoriality in general appears pedantic. However, the same cannot be said for the proposition that an international institution could use this admittedly controversion doctrine of territorial jurisdiction to prosecute offenders falling within the other parameters of its jurisdiction. It is accordingly appropriate to dedicate a few lines to the policy aspect of the argument.

Generally speaking, the main thrust behind this argument is to attempt to interpret broadly the Court's jurisdiction, within the framework of the Statute's existing negotiated limitations, in order to address as far as possible certain jurisdictional loopholes, which the Rome negotiations left open. It is important to realise that in the absence of universal jurisdiction, the Court, without a Security Council referral, is both factually and normatively unable to address what may be labelled as the 'domestic conflict' scenario; namely, the future Pol Pots, who refuse to participate to the Statute of the Court and to recognise its existence, while committing within their territory and against their own nationals 'core' crimes, away from the reach of the ICC. This problematic situation has been recognised in literature early on by the proponents of the proposal of universal jurisdiction.[4] In such situations, where the state policy dimension in the commission of mass crimes is particularly evident, prosecution by states or institutions other than the territorial one may be said to constitute "a practical necessity"[5], notwithstanding any difficulties attached to ensuring state co-operation. The application of the effects doctrine may be perhaps one of the ways available to the Court to overcome this difficulty.

In answering therefore the 'policy' question of whether it is desirable or even necessary to go this 'extra mile', it is submitted here that this approach is supported by three distinct – yet to a certain extent intertwined – arguments. The first relates to deterrence. It could be argued that there is a need to allow the Court to exercise its jurisdiction on the basis of effects, even if only on a 'theoretical' level (at least initially), over an existing humanitarian tragedy in a state not party, in the hope of threatening leaders with criminal sanctions and possibly staying their hand. This approach would arguably have the additional benefit of potentially contributing towards the achievement of 'univeralist' aspirations of equality before the law for all individuals as regards the basic question of individual responsibility for violations of human dignity, life and limb and the promotion of the acceptance of a minimum of moral values shared by all mankind.[6] As such, there is some merit in the argument that deterrence resembles more a goal to be achieved than a fact to be taken for granted, as far as international criminal justice is concerned.[7] However, one cannot turn a blind eye to

3 Robert Jennings, *The Proper Reach of Territorial Jurisdiction: A Case Study of Divergent Attitudes*, 2 Ga. J. Int'l & Comp. L. 35, 39 (1972).

4 Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction,* in Cassese, *supra* note 1, at 612; Leila Sadat, The ICC and the Transformation of Transnational Law 118 (2002), eloquently referring to the problem of 'traveling tyrants'; William Schabas, Genocide in International Law: The Crime of Crimes 410 (2nd ed. 2009), on the argument in the context of genocide.

5 R. v. Finta, [1994] 104 I.L.R. 284, 299 Judgment (S.C.C.) (Can. Ont.) *per* LaForest J.

6 On the ideal of *civitas maxima* and its impact on international criminal law, Edward M. Wise, *Extradition: The Hypothesis of a Civitas Maxima and the Maxim Aut Dedere Aut Judicare*, 62 Revue Internationale de Droit Penal 109-134 (1991); Mahmoud Ch. Bassiouni & Edward M. Wise, Aut Dedere Aut Judicare, The Duty to Extradite or Prosecute in International Law 26-42 (1995); M. Ch. Bassiouni, Introduction to International Criminal Law 31-41 (2003); Harmen van der Wilt, *Equal Standards? On the dialectics between National Jurisdictions and the International Criminal Court*, 8 J. Int'l Crim. Just. 229, 256-267 (2008); for a human rights perspective and the tension between the "voluntarist positivism" prevalent in contemporary international law and the universalism advocated by human rights law, founded on notions of *civitas maxima,* Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 4-12 (Sept. 17, 2003), concurring opinion of Judge A.A. Cançado Trindade.

7 Frédéric Megré, *Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project*, 12 Finnish Y.B. Int'l L. 193, 202-3 (2001).

the criticism that it is arguable whether this approach would lead to any tangible solutions; after all, deterrence can hardly be measured in terms of lives saved and acts of rape or torture averted.[8] Furthermore, it is not inconceivable that the threat of ICC prosecution would alert possible suspects as to the existence of witnesses or other evidence and 'force' them to take measures for their elimination, thus committing further crimes to cover existing ones. The controversy over the ICC and deterrence is one that does not lend itself to unequivocal affirmations; both sides seem to have certain points. That said, however, the fact remains that the Court itself lists deterrence among the crucial purposes underlying its operation.[9] In this spirit, the effects doctrine could be seen as a mechanism used in that direction.

The second argument relates to the purposes of the application of the effects doctrine and in particular the purpose underlying the application of the rule. The effects doctrine, in the context of antitrust law, seems to exist in order to serve ostensibly[10] the goals of promoting consumer and social welfare as well as economic efficiency by ensuring that national borders are not used as a shield against anti-trust prosecutions by perpetrators of price fixing and other similar practices that distort competition.[11] In that direction, competition law and international criminal law may be said to be on the same page. They both seem to endeavour to 'end impunity' and make sure there are no 'safe havens' for perpetrators of antitrust violations

8 Some of the best articulated criticism to the perceived deterrent effects of international criminal justice is Megré's, *id*. at 202-207. Equally true, as Megré clearly notes, is the more generic concern of (ab)using international criminal justice mechanisms, as pretext to avoid dealing with the real, underlying structural issues generating conflicts, at 204-7; the argument for deterrence has been expressed mostly by Payam Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia?*, 20 Human Rts. Q. 737, 741 (1998), who views deterrence as "the ability of the legal system to discourage or prevent certain conduct through threats of punishment or other expression of disapproval"; the same author, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?,* 95 Am. J. Int'l L. 7, 12 (2001), (deterrence measured as a change in behaviour); further well-known studies include David Wippman, *Atrocities, Deterrence and the Limits of International Justice*, 23 Fordham Int'l L.J. 473 (2000); Julian Ku and Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities,* 84 Wash. U. L. Rev. 777 (2006).

9 Situation in Dem. Rep. Congo, Case No. ICC-04-01-169, Judgment on the Prosecutor's Appeal against the decision of the Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", ¶ 75 (July 13, 2006) (hereinafter the Lubanga Arrest Warrant Appeal), referring to the Court's preventive or deterrent role as a cornerstone of its creation.

10 'Ostensibly,' in the sense that the effects doctrine has been seen in the past as nothing more than a pretext for the promotion of certain states economic policies. As R. Jennings, in an often-quoted passage put it, ". . . these cases still offend against the ultimate limit because they are an attempt to export into other countries and to make operate there what are after all peculiarly American political notions." R. Jennings, *Extraterritorial Jurisdiction in the United States Antitrust Laws*, 33 Brit. Y.B. Int'l L. 146, 175 (1957); by the same author, *The Proper Reach of Territorial Jurisdiction, supra* note 3, at 36, "the export of antitrust laws is a weapon of economic policy"; at that time the accusation was humorously framed by Rock Grundman, *The New Imperialism: The Extraterritorial Application of United States Law*, 14 Int'l Law. 257 (1980), who noted that "[I]n the past twenty-five years, the United States has had three main exports: rock music, blue jeans, and United States law"; one still encounters terms such as "judicial imperialism" and "global hegemony" in relevant commentary. Jens Adolphsen, *The Conflict of Laws in Cartel Matters in a Globalised World: Alternatives to the Effects Doctrine*, 1 J. Private Int'l L. 151, 157 (2005).

11 U.S. v. Nippon Paper Industries Co. Ltd., 109 F.3d 1, 8 (1997), for the international criminal law perspective that national borders should be used as a shield to protect offenders, see the *Tadic* ruling *supra* Chapter 5; in the words of the Nippon Court, "a ruling in NPI's favour would create perverse incentives for those who would use nefarious means to influence markets in the United States, rewarding them for erecting as many territorial firewalls as possible between cause and effect." Rosalyn Higgins, Problems and Process: International Law and How we Use it 77-8 (1994), who, while referring to the effects doctrine as a form of extraterritorial jurisdiction, nevertheless argues in favour of its application by stating that "[t]he fight against restrictive practices, which harm the consumer and keep practices high, in my view deserves international solidarity", similarly to that exemplified by extraterritorial jurisdiction over generally accepted criminal conduct; these objectives are intertwined naturally with greater objectives sought by competition law, which, in themselves, denote a certain ideological preference for a free market economy structure. The terms often used in this context are 'consumer welfare' and 'protection of the free market economy'. Although this seems to correspond to the general view, it has been accurately noted that these goals are liable to change, both in themselves, as well as in the means used to achieve them (efficiency, dynamic productivity growth, etc.). Brenda Sufrin, *Competition Law in a Globalised Marketplace: Beyond Jurisdiction*, in Asserting Jurisdiction, International and European Perspectives 105-6 (Patrick Capps et al., eds., 2003).

and core crimes respectively, the difference being that in international criminal law there has been significant substantive harmonization between states on the prohibited conduct for a long time.[12]

From an internationally-oriented policy approach, in juxtaposition with the "international solidarity between states in the fight against crime"[13] or "the fight against restrictive practices, which harm the consumer and keep prices high,"[14] the need to protect fundamental common values of humanity appears significantly greater as regards the punishment of large-scale human rights violations.[15]

In these circumstances, if the 'long arm' of state regulation can reach and control foreign companies from engaging in anti-competitive practices abroad that may (or may not) influence domestic prices through the effects doctrine, one fails to see why the same approach should not be applicable in a situation concerning the lives of foreign peoples placed at mortal peril due to large scale atrocities.

On a scale of values, no one – not even the strictest of positivists – would contest the view that human lives in such situations (usually in the developing world) are not less worthy of protection than the spending capacity of a consumer and the smooth operation of a certain market (usually in the developed world). To put it bluntly, if effects jurisdiction can be used on the national level to catch the perpetrators of price-fixing conspiracies in e.g. the thermal fax paper market (as it happened in the *Nippon* case), why should it not be used for the prosecution of individuals, for whom there is reliable evidence of committing large scale atrocities in states not parties territory, in the absence of a Security Council referral? Therefore, it could be argued that, considering the interests involved, the rule of effects jurisdiction could be applicable *a fortiori* in the case of the most serious crimes of concern to the international community as a whole.

The third argument relates to the complementary operation of the Court. It has been argued by prominent scholars that the rejection of universal jurisdiction at the Rome negotiations may be seen realistically as a positive development, since it encouraged states to ratify the Statute and make the Court

12 Competition law objectives, on the other hand, have been inherently national. As a result, effects jurisdiction has been also perceived as an instrument aimed as exporting the standards of fair competition of the state exercising jurisdiction to the state, on whose nationals or markets the regulatory authority extends. In this context, contrary to the universal acceptance of International Criminal Law values of human life and human dignity, competition law and effects jurisdiction has been largely perceived through the lens of national aspirations of 'us' against 'them'; protection of 'our' national consumers against 'their' national traders and vice versa; the emergence and protection of national 'economic champions'; and ultimately, national versus global economic welfare. This underlying distinction in values – also called a lack of international harmonization of competition laws – has been identified as being in the core of the problems that arise as regards the application of the effects doctrine in competition law. Harold H. Koh, *International Business Transactions in United States Courts*, 261 Recueil des Cours de l' Academie de Droit International 9, 38 (1996), "[t]he recurring theme is the conflict and accommodation of the competing *regulatory philosophies* of the nations with concurrent jurisdiction to regulate the business arrangement." For the issue of objectives indicatively, Albert A. Foer, *The goals of antitrust: thoughts on consumer welfare in the U.S., in* Handbook of Research in Trans-Atlantic Antitrust 566-586 (Philip Marsden ed. 2006); on the national v. global aspects, Angus Johnston & Edward Powles, *The Kings of the Worlds and their Dukes' Dilemma: Globalisation, Jurisdiction and the Rule of Law,* in Globalisation and Jurisdiction 45-6 (Piet-Jan Slot & Mielle Bulterman eds., 2004) ("quasi-criminal matters"); Michael J. Trebilock & Edward M. Iacobucci, *National Treatment and Extraterritoriality: Defining the Domains of Trade and Antitrust Policy*, *in* Competition Laws in Conflict, Antitrust Jurisdiction in Global Economy 152, 152-4 (Richard A. Epstein ed., 2004). As will be demonstrated *infra*, it is indicative that, once the U.K. Government, one of the notorious opponents of effects jurisdiction, aligned its competition policies with those of the US, the bilateral treaty on extradition was soon thereafter amended to include antitrust criminal violations as extraditable offences.

13 European Committee on Crime Problems, Extraterritorial Criminal Jurisdiction 27 (1990), considering that the exercise of extra-territorial jurisdiction in the case of murder and drug-trafficing is a justified exemption. In its view, "The *exercise* of that jurisdiction should be based upon whether the international solidarity would be helped or harmed"; *cf.* the interesting position of D.H.W. Henry, *The United States Antitrust Laws: A Canadian Viewpoint,* [1970] Canadian Y.B. Int'l L. 249, 282, who took the position that, as regards antitrust regulation, "The situation is, therefore, quite different from those involving crimes well recognised among nations as not to be tolerated, such as murder and piracy, so that internationally they may be dealt with on an understood, if not harmonized, basis by the assumption of jurisdiction over the offender on or over the high seas, or by extradition arrangements made to aid enforcement in other jurisdictions. How different the anti-trust case is, can be measured by the abortive attempts at reaching international accord in this field." The main reason for the lack of harmonization lies, in that author's view, in the fact that what is a restrictive practice for one state is a protected or encouraged one for another, as "States quite naturally wish to develop and apply their anti-trust laws according to their own philosophies."

14 Higgins, *supra* note 11, at 77.

15 International solidarity has been defined in this context as ". . . a set of values and interest, common to each and every state, which are perceived as shared concerns by the international community as a whole." *See* the comments of Andrea Bianchi in Harold G. Maier, *Jurisdictional Rules in Customary International Law*, *in* Extraterritorial Jurisdiction in Theory and Practice 85 (Karl M. Meessen ed., 1996).

operational soon after its signature. In any event, so the argument goes, any remaining jurisdictional loopholes may be addressed by national courts operating on the basis of universal jurisdiction.[16]

Although this position does express some 'hard truths' about contemporary politics, from the point of view of the Court it could be contested on at least three specific aspects.

The first relates to complementarity, which, formally speaking, seems to concern only admissibility, not jurisdiction. In assessing the preconditions of the Court's jurisdiction, in the absence of a Security Council referral, the Court's jurisdiction does not depend on considerations of willingness or ability, but rather on the application of the rules of territoriality and nationality.[17] The Court is directed to delve into the examination of the admissibility requirements after it has satisfied itself that it has jurisdiction, according to article 19(1) of the Statute and rule 58(4) of the Rules of Procedure.

The second point refers to the existence of universal jurisdiction as a norm and its resemblance to the effects doctrine.[18] In this context, one could argue that both the effects doctrine and universal jurisdiction, if applicable in the same set of circumstances, would demonstrate a close resemblance. In this line of thinking, the application of the effects doctrine might be seen as an attempt to rename universal jurisdiction and apply it 'through the window' so to speak in the ICC, i.e. endorse it by means of judicial interpretation of article 12 (2) (a) instead of through the proper conduit of amendment of that provision, in spite of its rejection in Rome. Such a course of action would run manifestly contrary to the intentions of the negotiators in light of universality's clear rejection in Rome.[19]

In reply to this argument one would need to stress that, while universal jurisdiction exists simply because of the gravity of a certain criminal activity and its impact on the universal *ordre public*,[20] the effects doctrine would still require a tangible connection between the crime and the state party's territory, certain effects.[21] In the case of a massive refugee exodus to a neighbouring state party of the oppressed people of the state not party where the crimes are committed, proof of the existence of the refugee exodus to the territory of a state party and the production of existing or estimated economic or other effects in that territory would arguably qualify as such.[22] The same could be said perhaps in cases where due to crimes committed in the territory of a state not party, states parties face the real risk that their population will suffer irreparable harm due to the disruption in the provision of energy (gas, oil) or natural resources (water flow from international rivers).[23] Additionally, the effects doctrine is also limited by conditions. Reference to qualifications such as direct, intended, substantial and foreseeable effects are routinely seen in antitrust

16 Olympia Bekou & R. Cryer, *The International Criminal Court and Universal Jurisdiction: A Close Encounter?,* 56 Int'l Comp. L.Q. 49, 67-68 (2007); on the hopes that the compromise would encourage ratification, R. Cryer et al., An Introduction to International Criminal Law and Procedure 167 (2nd ed., 2010); similarly, Sharon A. Williams & William A. Schabas, *Article 12*, in Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article 561 (Otto Triffterer ed. 2nd ed. 2008); *contra*, H.P. Kaul, *supra* note 4, at 607, "Article 12(2) stipulates the quite conservative jurisdictional precondition" of territoriality. In his view, "this is a regression from the universal jurisdiction approach which is generally recognized in customary international law. At the same time, it has long been clear that the principles of territoriality and nationality are internationally undisputed as legitimate bases for criminal jurisdiction."

17 Situation in the Republic of Kenya, Case No. ICC-01/09-19, Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 18, ¶ 40 (Mar. 31, 2010) (hereinafter Kenya Authorization Decision), "The Chamber notes that the second requirement [of article 53] it must consider on the basis of the available information is whether "the case is or would be admissible under article 17". Such an examination must be distinguished from that of jurisdiction. The question of admissibility mainly concerns the scenarios or conditions on the basis of which the Court shall refrain from exercising its recognized jurisdiction over a given situation or case."

18 Michael Akehurst, *Jurisdiction in International Law*, 46 Brit. Y.B. Int'l. L. 145, 154 (1972-1973).

19 *Supra* Chapter 2.

20 Robert Kolb, *The Exercise of Criminal Jurisdiction over International Terrorists*, *in* Enforcing International Law Norms Against Terrorism 249-250, n. 80-81 (Andrea Bianchi ed., 2004) with very extensive references; Luc Reydams, Universal Jurisdiction, International and Municipal Legal Perspectives 38-42 (2003).

21 Bernard H. Oxman, *Jurisdiction of States*, in 3 Encyclopedia Pub. Int'l. L. 55, 58 (Rudolf Bernhardt ed. 1997), from the point of view of the Law of the Sea Convention, it has been suggested that such effects jurisdiction may exist when the effects of maritime pollution or illicit broadcasting are felt by states.

22 Perhaps it would be interesting to juxtapose here some examples from French criminal jurisprudence on 'simple' crimes; see *supra* the case-law referred to on attempt and *condition préalables*, where the French Cour de Cassation has affirmed that it had jurisdiction in cases of e.g. the offence of imitation, where the imitation occurred abroad, if the imitated work is French or belongs to a French resident. Further, *supra* Part 2.4.3.2.; Cedric Ryngaert, *Territorial Jurisdiction over Cross-Frontier Offences: Revisiting a Classic Problem of International Criminal Law*, 9 Int'l. Crim. L. Rev. 187, 198-9 (2009).

23 This is inspired by Shany's argument concerning the application of human rights treaties and the interpretation of jurisdiction in the light of the effects doctrine. Yuval Shany, *The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. Prime Minister of Israel,* 42 Isr. L. Rev. 101, 111-2 (2009).

criminal laws.[24] As such, it is not a case of 're-inventing universality'; the effects doctrine has its own existence on the normative plane of national and international law as an interpretation of territorial jurisdiction. It is not a question of inventing a new norm, but rather one of applying an existing territorial interpretation for the localisation of criminal activity.

Lastly, the position could be assumed that the Court does not need effects jurisdiction, as there are national jurisdictions, which use universal jurisdiction and are consequently both able and willing to pursue such a course of action under national law.

This may very well be the case. However, it does not negate the need to have cases heard by an independent international institution, somewhat distanced from inter-state politics, as a national prosecution premised on universality or other forms of extra-territorial criminal jurisdiction may be construed as an indication of ulterior motivation (political, legal, economic etc) by the state(s) involved.[25] The example of Rwanda could be perhaps indicative, where the exercise of extraterritorial jurisdiction by third states over certain incidents, including the destruction of President Habyarimana's aircraft, on the basis of rules of extraterritorial jurisdiction (passive personality and universal) seems to have inspired Rwandan allegations of foreign attempts to interfere in its internal affairs as well as other protests.[26]

Additionally, difficulties may also arise, should a state party arrest a third state national under universal jurisdiction, only to subsequently decide to refer the case to the Court, in order to avoid e.g. political friction

24 Generally, Int'l Law Association, *Resolution on Extra-Territorial Application of Anti-Trust Legislation,* art. 5, I.L.A. Report, 55th Conference, New York (1972); in detail, particularly as regards the two sides on the Atlantic, C. Ryngaert, Jurisdiction over Antitrust Violations in International Law, 57-73 (2008); however, there is also state practice in antitrust law in support for the view that any form of effects would suffice, without distinction as to the benefit or detriment they cause to a national economy. *See* for the case of South Africa, American Soda Ash Corp. & CHC Global (Pty) Ltd. v. Competition Commission of South African et al., Case 12/CAC/DEC01, Appeal to Competition Appeal Court (October 25, 2002), reported in Oxford Reports on International Law in Domestic Courts, Int'l L. Domestic Cts. 493 (ZA 2002). In that case of predatory price-fixing, the South African Court was called to interpret Section 3 (1) of the South African Competition Act 1998, which provided that "This Act applies to all economic activity within, or having an effect within, the Republic except . . . ." In this regard, the Court of Appeals ruled first that "International law thus permits states to exercise their jurisdiction to promulgate rules, whether it be legislation or administrative decrees, prohibiting conduct elsewhere having an "effect" within the state." *Id.* at ¶ 17. As regards the qualification of such effects, the Court stated that "The question is not whether the consequences of the conduct is [*sic*] criminal or, for that matter, anti-competitive, but whether the conduct complained of has "direct and foreseeable" substantial consequences within the regulating country. In other words, the "effects" in the present case must be such that they fall within the regulatory framework of the Act, whether they are anti-competitive or not." *Id.* at ¶ 18. Thus the Competition Appeals Court ruled that effects need not be negative or 'deleterious' under national law to trigger South African jurisdiction. *Id.* at ¶ 18-21.

25 Instead of others, see the comments from the 2005 discussion in the Institut de Droit International on universal jurisdiction and particularly on the (ultimately rejected) 7th Preambular Paragraph of the October 2004 Draft Resolution, which provided that the Institute was "*Conscious* of the risk that universal jurisdiction may be abused for political or other reasons". Although that paragraph was rejected because, as the Special Rapporteur C. Tomuschat said, "it seemed inappropriate to strike such a blatant note of distrust", 71-II Annuaire de l' Institut de Droit International 200, 207 (2005), there were other members who took the view that the inclusion of this paragraph was necessary, in order to warn against possible abuses. For this latter approach, see particularly *id.,* at 210 (*per* Georges Abi-Saab), at 218 (*per* Hisashi Owada), at 227-228 (*per* Martii Koskenniemi, arguing for inclusion of the word 'hegemonic'); *contra,* at 234 (*per* Krzysztof Skubiszewski, favouring deletion, arguing that inclusion of this general statement would be meaningless and would require further elaboration); further, Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, 80 Foreign Affairs 86, 86-96 (2001).

26 Maziar Jamnejad & Michael Wood, *The Principle of Non-Intervention,* 22 Leiden J. Int'l L. 345, 372-3, n. 117 (2009), report as follows: "In April 2007 Rwanda lodged an application with the I.C.J. alleging inter alia that France, following an investigation into the 1994 downing of the aircraft in which President Juvenal Habyarimana was travelling, breached the principle of non-intervention by issuing arrest warrants for Rwandan President Paul Kagame on the basis of the French nationality of the pilots, and by requesting the U.N. Secretary-General to begin prosecution through the International Criminal Tribunal for Rwanda (ICJ press release, 18 April 2007). The only basis for jurisdiction would have been forum prorogatum. The application was not registered since France did not accept jurisdiction." The situation was further exacerbated by a national Report from Rwanda alleging French complicity in the genocide and the issuance of arrest warrants by the French judiciary against a number of Rwandese nationals, including President Kagame on charges of premeditated murder and terrorism. Vanessa Thalmann, *French Justice's Endeavours to Substitute for the ICTR*, 6 J. Int'l Crim. Just. 995, 996 (2008); similar indictments issued by Spanish Judges under universal jurisdiction were met with the strong disapproval of African leaders. In the Decision on the Report of the Commission on the Abuse of Universal Jurisdiction, adopted by the African Union in the Sharm-el-Sheikh 2008 Session, the leaders of the African Union stated that "the political nature and abuse of the principle of universal jurisdiction by judges from some non-African States against African leaders, particularly Rwanda, is a clear violation of the sovereignty and territorial integrity of these States", and resolved that "those warrants shall not be executed in African Union Member States." In detail with references, Commentator, *The Spanish Indictment of High-Ranking Rwandan Officials*, 6 J. Int'l Crim. Just. 1003, 1010-11 (2008).

with its state of nationality (unwillingness/inability subsequent to the arrest).[27] Could the Court try the suspect? In such circumstances, the Prosecutor would arguably not be able to even open an investigation into the situation, let alone prosecute an individual case, for want of jurisdiction, as universality is not included in the Statute and the preconditions of article 12(2) are not met. Therefore, in these circumstances, the Court would still remain unable to exercise its authority over 'domestic scenarios' and the perpetrators could escape justice.

Finally, even if national courts decided to exercise universal jurisdiction, there is always the possibility that national laws may impose obstacles on national prosecutions, which have been largely removed on the ICC level, or even follow different definitions of crimes.[28] The typical example concerns the immunity of Heads of States and other officials and the disputed argument of whether article 27 of the Statute, national laws and customary law on the matter coincide.[29] While article 27 demonstrates the normative irrelevance of a suspect's official capacity for the Court, it is not unlikely that, pursuant to national constitutional law, existing rules of customary law enforceable in national law, or even under article 98 (1) of the Statute, a national judge would consider that the prosecution for such crimes or surrender of suspects to the ICC are barred due to the application of such rules.[30] Therefore, it is not inconceivable that the national application of universal jurisdiction does not significantly weaken the argument in favour of the application of the effects doctrine by the ICC.

6.3. / THE ARGUMENT

The purpose however of this thesis is not simply to engage in a brave attempt at wishful thinking, no matter how lofty the ideals behind it, but rather to examine critically whether it is possible for the Court to apply this jurisdictional device for the prosecution and punishment of the perpetrators of 'core crimes' under article 12(2)(a) ICC Statute through teleological interpretation.

In doing so, taking into account the extensive discussion in the previous Chapters on the law of jurisdiction, the following pages will treat the effects doctrine as the most recent interpretation of territorial jurisdiction. As such, taking into account that the use of state criminal jurisdiction over offences committed in whole or in part in state territory is well established in international law, the discussion will focus in particular on certain important issues, such as the use of this doctrine in a criminal context, the nature of the effects and *pacta tertiis* objections. These appear to be significant legal and/or policy parameters for the

27 For the transfer of proceedings scenario, see *supra* Part 5.5.1. *Cf.* in this respect the India-Pakistan debacle over the planned extradition of Pakistani PoWs to Bangladesh after the 1970's Bangladesh secession, in order to stand trial for charges of genocide. Pakistan took action before the I.C.J. in order to prevent India from extraditing the prisoners of war, on the basis of the provisions of the Gevena Convention III. In the end the case was settled through repatriation to Pakistan, and no prosecutions took place. Trial of Pakistani Prisoners of War (Pak. v. India), Request for Indication of Provisional Measures 1973 I.C.J. Rep. 328, 329 (May 11) with Pakistan's demands and Pakistan's *Request for the Indication of Provisional Measures*; in more detail, Schabas, Genocide, *supra* note 4, at 417, with references; the possibility that the state of nationality would seek to initiate proceedings before the I.C.J. against the state party of the ICC which surrendered its national(s) to the Court cannot be excluded, depending on the jurisdictional provisions involved.

28 W.A. Schabas, *The Right to a Fair Trial*, *in* 2 Essays on the Rome Statute of the International Criminal Court 528 (Flavia Lattanzi & William Schabas eds. 2004), "[A]rticle 10 makes it quite clear that there is no absolute correspondence between the crimes defined in the Statute and existing, or future customary law. Art. 22(3) seems also to reinforce this assertion".

29 In favor of coincidence, Paola Gaeta, *Official Capacity and Immunities*, in Cassese, *supra* note 1, at 975, 990-1001; Andrea Bianchi, *Immunity versus Human Rights: The Pinochet Case*, 10 Eur. J. Int'l L. 237 (1999); Against, Ademola Abass, *The Competence of the Security Council to Terminate the Jurisdiction of the International Criminal Court*, 40 Texas Int'l L.J. 263, 278-281 (2004-2005); O. Triffterer, *Article 27*, in Triffterer, *supra* note 1, at 791, concurs in his analysis of article 27(2) that this provision confirms in principle that "the Court has jurisdiction in all these cases and can exercise it without for instance waiting for a waiver of immunity, which may in *national* jurisdictions be a condition precedent to activities within the criminal justice system".

30 Arrest Warrant of 11 April 2000 (Belg. v. Dem. Rep. Congo), 2002 I.C.J. Rep. 3, 25, ¶ 58, where the I.C.J. affirmed that customary law does not contain an exception to the rule that incumbent Minister of Foreign Affairs enjoy immunity from national courts' jurisdiction for charges of crimes against humanity and war crimes; John Dugard, International Law: A South African Perspective 207-9 (2005); Ilias Bantekas, *supra* note 1, at 25-27 (2005); also, Abass, *supra* note 29, at 281, "By referring to obligations under international law with respect to state or diplomatic immunity, the Statute recognizes that Article 27 cannot be applied to parties and nonparties equally and that the article does not necessarily coincide with international law."

determination of the possible application of the effects doctrine as an aspect of the territorial jurisdiction of the ICC. Ultimately, in concluding this part, certain considerations relating to the collection of evidence will be addressed.

6.3.1. / CRIMINAL JURISDICTION – THE FORM OF LIABILITY

The idea of reading the effects doctrine in article 12(2)(a) largely hinges on whether one accepts it as a valid legal basis of state criminal jurisdiction under international law. In discussing its application in the field of criminal law, this part will show that the effects doctrine has in fact been used for many years for the implementation of criminal law and particularly criminal antitrust law.

From that point of view, the issue concerns the form of liabilities imposed and civil/administrative liability as opposed to criminal responsibility. In this framework, state practice on anti-trust matters is frequently described as civil, administrative, regulatory or even 'quasi-criminal',[31] or simply as 'not criminal'.[32] To that extent, it would seem that one should distinguish between criminal liability and its consequences (imprisonment and financial penalties) from liability under anti-trust laws (normally involving heavy fines). This distinction needs to be addressed as a matter of substance of the moral apprehension of the substantive activity involved in the respective fields.

This situation has seriously troubled state practice, which seems ambivalent towards the clear characterisation of the conduct (restrictive business practice) and the underlying connotation. The German experience in this regard is indicative of an elaborate discussion since approximately 1958 on whether antitrust violations should be considered as crimes or administrative offences, the underlying normative effect of their characterisation and its consequences. The situation is summarised by Vollmer, who, writing on the development of German legal doctrine on the matter in 2006, demonstrated how legal thinking fluctuated on the characterisation of the relevant practices, depending on the use of the legal test applied to distinguish between administrative and criminal violations.[33] Thus, although there is the possibility of opening criminal proceedings today, particularly for the offence of bid-rigging under article 298 of the German Criminal Code introduced on 20 August 1997, for that authority "it seems that the earlier arguments

31 The authorities in this respect vary greatly. For the general discussion, *infra,* Chapter II. From recent literature, for example, Johnston & Powles, *supra* note 12, at 21 ("quasi-criminal matters"); Ryngaert, *supra* note 22, at 189, uses the term 'regulatory law' for antitrust and securities, "which in some jurisdictions is also criminally enforced. In these fields of law, specific problems relating to non-physical economic effects arise. Classic criminal law concepts -. . . . - may need some refinement to deal with such effects . . . ."

32 Council Regulation 1/2003, implementation of the rules of competition laid down by Articles 81 and 82 EC Treaty, art. 23(5), 2003 OJ (L 1), according to which, the sanctions imposed by the EC Commission for violations of Articles 81-82 EC and obstruction of relevant investigations "shall not be of a criminal law nature"; interestingly, Council Regulation 864/2007, on the law applicable to non-contractual obligations, art. 6(3), 2007 OJ (L 199), lays down conflict of laws rules in antitrust cases having a pan-EU dimension, with the ultimate purpose of limiting the impact of forum shopping in such cases. For this aspect of private enforcement in EU Law, Thomas Ackermann, *Antitrust Damages in Actions under the Rome II Regulation*, *in* Views of the European Law from the Mountain, Liber Amicorum Piet Jan Slot 112 (M. Bulterman *et al.* eds. 2009).

33 German theory and practice promulgated three basic criteria to answer this question. The first, known as the 'aliud' approach provided that criminal and administrative offences are seen as denoting offences of a different nature, where administrative offences cover infringements of a mere technical nature, whereas criminal offences entail violations of moral standards. Secondly, the quantitative approach was created, whereby the difference between administrative and criminal offences is only one of degree of seriousness and not of nature. Thus, serious infringements are criminal, whereas less serious ones are administrative offences. Lastly, the German Constitutional Court distinguished between three types of infringements; those of core moral standards (eg. Murder – criminal offences), those of technical standards (administrative offences) and those in-between, which the legislator may classify as either criminal or administrative. Competition law infringements are thus said in the German experience to fall under the second or third class, but not the first one. The topic is developed comprehensively with references by Christof Vollmer, *Experience with criminal law sanctions for competition law infringements in Germany*, in Crimininalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States 260-261 (Katalin J. Cseres et al., eds., 2006).

for the qualification of competition law infringements as administrative offences are outdated today, but that there is still much scepticism about a criminalisation of competition law infringements in Germany."[34]

State practice seems to demonstrate different attitudes on the matter. Thus, while there is also a trend towards de-criminalisation,[35] criminal punishment is a weapon rigorously used for many years now by, prominently, the United States against antitrust violations and has been seen as a progressive step, in terms of deterrence and the fight against restrictive commercial practices, which, typically, other states, mostly the EU, are said to be slow to follow.[36]

US practice in the field has been very extensive.[37] The law and practice indicates that there are serious criminal aspects to the violation of anti-trust laws going far beyond 'treble' damages. Thus, it has been reported in 2004 that "in the past fiscal year, defendants in Division cases were sentenced to more than 10,000 jail days – a record – with an average sentence of more than 18 months. In the last four fiscal years, a total of over 75 years of imprisonment have been imposed on antitrust defendants, with more than 30 defendants receiving prison sentences of one year or longer. It is not just US executives who are facing prison sentences, but foreign executives as well. Business people from Canada, France, Germany, Sweden, and Switzerland have now served time in US prisons for violating US antitrust laws. Extradition of cartel leaders is now frequently sought. The Justice Department is conducting over 40 criminal investigations of international cartel activity."[38] More recent statistics published by the US Department of Justice Antitrust Division demonstrate that criminal prosecution remains a very real possibility for violations of US antitrust laws.[39] The Assistant Attorney General of the US DoJ's Antitrust Division proudly announced that terms of imprisonment in antitrust convictions have increased in average from "from eight months (in 1997) to more than thirty months (in 2007)" and are expected to increase further in the future.[40] Further, the Antitrust Criminal Penalty Enhancement and Reform Act has increased maximum fines from $10 million to $100 million and the maximum sentence for individual violators from 3 to 10 years.[41] Finally, the US is reported

34 *Id.* at 262; OECD, *Reviews of Regulatory Reform, Regulatory Reform in Germany*, *The Role of Competition Policy in Regulatory Reform*, 15 (2004) at 15, available at http://www.oecd.org/dataoecd/46/23/32407554.pdf (last visited June 30, 2010), where it is stated that under this provision "The public prosecutor has brought a number of cases and even obtained some jail sentences", without however further official information.

35 *Cf.* also other state practice in that direction. For Chile, it is reported that Law 19.911 of Nov. 14, 2003 has elimininated imprisonment but increased fines. The approach in that country was said to be greatly influenced among others by the perception even among competition commissioners of economic crimes to the expense of the public at large as not a serious form of criminality, and a prosecutorial policy of exchanging "trading unused criminal sanctions for much more significant fines"; OECD, *Country Studies, Chile-Peer Review of Competition Law and Policy, Competition Law and Policy in Chile* 7-8, 40,67 (2004) available at http://www.oecd.org/dataoecd/43/60/34823239.pdf (last visited June 30, 2010).

36 Wils P.J. Wouter, *Is Criminalisation of EU Competition Law the Answer?, in* Enforcement of Prohibition of Cartels, Eur. Competition L Ann. 287-8 (Claus D. Ehlerman & I. Atanasiu eds., 2007), identifying criminalisation as the fourth step in the progressive development of deterrent-seeking antitrust law development. Naturally, European scholarship has interpreted U.S. assertions of progress and the EU's slowness to follow – or success to play 'catch up' as the case may be – as an unwillingness on the part of the US to re-negotiate its antitrust policies, on the premise that they are considered to be the 'correct' ones. In that sense, it has been noted that "the 'transatlantic dialogue' is not expected to result in shifts in U.S. policy"; Sufrin *supra* note 11, at 123.

37 Older practice and procedure of U.S. law is provided in the very useful – and interestingly worded – volume of Ved P. Nanda & M.C. Bassiouni, International Criminal Law, A Guide to U.S. Practice and Procedure – Antitrust, Securities, Extradition, Tax and Terrorism (1987) and T.L. Banks' contribution in that volume on *International Activities and Criminal Consideration under United States Antitrust Laws*, at 51-78. As Banks notes, violations of the Sherman Act have been punishable as felonies since 1974. *Id.,* at 51, n. 3.

38 Joel Davidow, *Recent US Antitrust Developments of International Relevance*, 27 World Competition 407, 409 (2004).

39 See Department of Justice, Antitrust Division, *Antitrust Division Workload Statistics FY 1999-2008*, available at http://www.usdoj.gov/atr/public/workstats.pdf (last visited June 30, 2010). As the statistics demonstrate, *id.* at 13, for the year 2008 alone 19 individuals were sentenced to prison terms. The total number of days of imprisonment was 14.331 or approximately 2 years imprisonment per individual.

40 Thomas O. Barnett, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *Global Antitrust Enforcement*, (Address before the Georgetown Law Global Antitrust Enforcement Symposium, Sept. 26, 2007), available at http://www.usdoj.gov/atr/public/speeches/226334.htm (last visited June 30, 2010).

41 Davidow, *supra* note 38, at 412; Antitrust Criminal Penalty Enforcement and Reform Act of 2004, Pub. Law 108-237, §§ 215(b), 201 (June 22, 2004); for a view of the total sums of fines imposed between 1999-2008 in criminal and civil proceedings, see "Antitrust Division Workload Statistics", at 12; from a criminological – sociological perspective, antitrust criminality – 'business crime' – is said to be a distinguished form of white collar crime "in that white collar activity encompasses a broader category of criminality". Ellen S. Podgor, *"Defensive Territoriality": A New Paradigm for the Prosecution of Extraterritorial Business Crimes*, 31 Ga. J. Int'l & Comp. L. 1, 3 (2002); for further criminological/ sociological analysis on antitrust criminality in the U.S. context, Sally S. Simpson, *Cycles of Illegality: Antitrust Violations in Corporate American*, 65 Soc. Forces 943, 943-963 (1985-1986), concluding among others that antitrust criminality increases during periods of financial recession.

to have even placed individuals accused of antitrust criminal law violations in Interpol's "Red Notice" list, in the enforcement of its antitrust criminal statutes.[42]

The US is not alone however in this practice. There is now a more vibrant discussion than ever in the EU on the criminalization of competition law.[43] A significant number of EU Member States have clearly moved to that direction, providing for criminal prosecutions over antitrust violations, while in the case of other states that moved towards de-criminalisation, certain criminal offences are maintained.[44]

In the UK, for example, the 2002 Enterprise Act makes it a criminal offence to engage in cartel engagements,[45] threatening sentences up to 5 years and/or an unlimited fine,[46] while prosecution is undertaken by the Serious Fraud Office, with the Office of Fair Trading as a reserve prosecuting authority. In 2001, through an exchange of notes, the UK amended its 1994 Mutual Legal Assistance Treaty with the United States, effectively repealing the exception of criminal anti-trust or competition law cases from the treaty on legal assistance.[47] The first extradition case followed soon thereafter; the famous *Norris* Case[48], notwithstanding its final outcome due to the application of the rule of double criminality,[49] demonstrates that

42 John S. Magney & Reyn C. Anderson, *Recent developments in Criminal Enforcement of U.S. antitrust laws*, 27 World Competition 101, 105-6 (2004). This is pursued since 2001 as a matter of official policy. The following paragraph from Mr. Barnett's Address is perhaps indicative of the approach of the U.S. Department of Justice. "The Antitrust Division's practice is to put foreign witnesses and subjects of investigation on border watches to detect their entry into the United States. In 2001, the Antitrust Division raised the stakes for fugitive defendants even further by adopting a policy of placing fugitives on a Red Notice list maintained by the International Criminal Police Organization (Interpol). A Red Notice is essentially an international wanted notice that many of Interpol's member countries recognize as the basis for a provisional arrest, with a view toward extradition. The Antitrust Division will seek to extradite any fugitive defendant apprehended through the Interpol Red Notice Watch. Thus, even if a fugitive resides in a country that would not extradite the defendant to the United States for an antitrust offense, the fugitive still runs the risk of being extradited if he or she travels outside of that home country to a third country that participates in the Red Notice list. These restrictions on a foreign national's travel to the United States are often a significant and unacceptable burden on his or her business and personal life, and have contributed to the decision of many individuals to accept responsibility for their cartel offenses, plead guilty, and negotiate plea agreements with the Antitrust Division that include prison sentences."

43 The issue is dealt extensively in the literature. Indicatively, Cseres et al., *supra note 33*; Ehlerman & Atanasiu, *Cartels*, *supra* note 36, at 223-665; Mark Furse, *Issues relating to the enforcement and application of criminal laws in respect of competition, in* Handbook of Research in Transatlantic Antitrust 466-492 (Philip Marsden ed. 2006).

44 Among the States said to move more forcefully towards de-criminalisation are France, the Netherlands, Austria and Luxembourg. Wills, *supra* note 36, at 286-288. Nonetheless, French law does retain some criminal provisions, *infra* note 52.

45 Enterprise Act, 2002, § 188(1) (Eng.)

46 *Id*. § 190(1); in more detail on the U.K. criminal antitrust law, Diana Guy, *The UK's experience with criminal law sanctions*, in Cseres et al., *supra* note 33, at 249-251; for the first activity of the OFT's Criminal Investigation Branch and the Serious Fraud Office investigations, *id*. at 254-255.

47 Agreement Concerning the Application of the Treaty on Mutual Legal Assistance in Criminal Matters of Jan. 6 1994, Note No. 34/01, effected by exchange of notes at Washington Apr. 30 and May 1, 2001, entered into force 1 May 2001, State Dept. No. 01-65, available at Westlaw, 2001 WL 715884. As the pertinent part of the British note, as accepted by its U.S. counterparts provide, "Her Britannic Majesty's Embassy have the honour to inform the Department of State that the Government of the United Kingdom of Great Britain and Northern Ireland no longer sees any reason for refusing to entertain requests for information in criminal anti-trust or competition law cases. Therefore, in the future, the United Kingdom of Great Britain and Northern Ireland will be prepared to offer assistance in respect of requests from the United States of America made pursuant to the Treaty for assistance in anti-trust and competition law investigations, subject to the normal scrutiny process applied to all other such requests.
Accordingly, Her Britannic Majesty's Embassy have the honour to propose that Paragraph (d) of the diplomatic note of 6 January 1994 shall no longer apply." [paragraph (d) concerned the anti-trust and competition law exception]. While this development might seem remarkable, considering previous UK reactions to U.S. antitrust jurisdictional assertions, note that in the U.S. – Canada Treaty on Mutual Legal Assistance in Criminal Matters, (U.S.-Can.), Mar. 18, 1985, 24 I.L.M. 1092, 'consumer protection laws', including antitrust laws, were among the specified laws for which mutual legal assistance was agreed upon between the two parties; *id.,* at 1099, Annex. As such, "antitrust crimes fall within the scope of the treaty"; Spencer W. Waller, *The Internationalization of Antitrust Enforcement*, 77 B. U. L. Rev. 343, 366 (1997).

48 Norris v. Government of the United States and Others, [2008] UKHL 16 (Eng.), House of Lords sitting as an Appellate Committee (Criminal Appeal on Extradition from the High Court). This is reported as being the first case, where extradition is requested specifically on the basis of antitrust offences. Naturally, jurisdiction and thus extradition may be established irrespective of whether the 'label' of the activity is the same or differs between the requesting and the requested country, for example antitrust violations and (a form of) fraud. In this sense, it is the substantive similarity of the conduct that matters.

49 While initially extradition was permitted by assimilating the Sherman Act charges to the common law offense of conspiracy to defraud, the House of Lords refused to allow Mr. Norris' extradition on charges of price-fixing, on the grounds that at the time the alleged criminal conduct took place, it was not yet a crime in the UK – as it clearly became with the Enterprise Act – and therefore the double criminality requirement was not satisfied. *Id*. at ¶ 63. The House of Lords did allow however that the charges of obstruction of justice, although the question of whether extradition was proportional for these charges was sent for a decision to the district judge. In July 2008, Distict Judge Evans allowed extradition for these charges; the appeal is currently pending.

the extradition of UK nationals to the US to stand trial for violations of US antitrust law,[50] is not as unthinkable a proposition as it would have been 30 years earlier, when Lord Diplock in *Rio Tinto Zinc Corpn v. Westinghouse* famously approved the UK government's perception "as an unacceptable invasion of its own sovereignty the use of the United States courts by the United States Government as a means by which it can investigate activities outside the United States of British companies and individuals which it claims infringe the antitrust laws of the United States."[51]

In France, on the other hand, while there was significant de-criminalisation in 1986-1987, Article L 420-6 of the French Commercial Code as currently in force still provides for a term of imprisonment of 4 years and a fine of 500.000 francs for "any natural person fraudulently takes a personal and decisive part in the conception, organisation or implementation of the practices referred to in Articles L.420-1 and L.420-2."[52] In fact, it is interesting to note that "the French Constitutional Court admitted very early the enactment of civil sanctions of punitive nature, even if the legislator decided that such sanctions would be pronounced by authorities whose nature would not be jurisdictional, at the exclusion of imprisonment and provided that fundamental guarantees applicable to criminal sanctions would be granted to defendants."[53] In the criminal front, although perhaps less active than their US counterparts in this field, the French authorities were reported in 2004 to have concluded after the 1986 reform fifteen criminal decisions, whereas the Competition Council was said to have dealt with 100 proceedings per year over the same period leading to an average of 37 decisions on sanctions per year. The amount of criminal fines in the same period (1986-2004) ranged between 1.524 to 12.195 euros.[54]

50 Julian M. Joshua, *The Brave New World of Extradition: A North Atlantic Treaty Alliance against Cartels?, in* Handbook of Research, *supra* note 12, at 493.

51 Rio Tinto Zinc Corpn v. Westinghouse [1978] A.C. 547, 639 (Eng.).

52 Code de commerce [C. com.] art. L 420-6 (Fr.), available at http://www.legifrance.gouv.fr/html/codes_traduits/commercetextA.htm

53 Jacqueline Riffault-Silk, *Jurisdictional Control over the Acts of Antitrust Authorities under French Experience*, *in* Antitrust between EC Law and National Law, 173 Proceedings of the VI Conference, 13-14 May, Casa dei Caravessi, Treviso, (Enrico A. Raffaelli ed., 2005). The author, then President of a Chamber of Cour d'Appel de Paris, makes extensive references to national case-law, concerning the application of procedural guarantees in relevant proceedings (presumption of innocence, principle of contradiction, impartiality and independence of the judiciary, public character of the proceedings), *id.* at 173-7; Note that the European Court of Justice has expressly applied Article 7 of the Eur. Conv. on H.R. and the principle of legality in cases concerning fines and the fining discretion of the European Commission in Antitrust cases; Case T-279/02, Degussa v. Commission, 2006 E.C.R. II-897; Case C-266/06, Evonik Degussa v. Commission, 2008 E.C.R. I-00081 (affirmed, European Court of Justice); for a useful discussion, Arjen Meij, *Scope of Judicial Review and Sanctions in Competition Cases*, *in* Views of European Law, *supra* note 32, at 179-185; however, for certain authors, this does not mean that competition law and criminal law are equated; John A.E. Vervaele, *The transnational ne bis in idem principle in the EU – Mutual Recognition and Equivalent Protection of Human Rights*, 1 Utrecht L. Rev. 100, 106 (2005), who states that "It is now fixed case law of the Eur. Ct. Just. to confirm the ne bis in idem principle as a general principle of Community law, which means that it is not limited to criminal sanctions, but that it also applies in competition matters."

54 J. Riffault-Silk, *supra* note 53, at 160.

A preliminary research demonstrates that criminal anti-trust enforcement is provided for in a number of states,[55] including Japan,[56] Canada,[57] Ireland,[58] Norway,[59] Brazil[60] and the Russian Federation.[61]

These developments aside, however, the question remains whether it is permissible, in pursuing a criminal charge, to apply the effects doctrine. This issue was explicitly answered in the affirmative for the first time in the US in the *Nippon* Case,[62] where an agreement to fix prices for sales of thermal fax paper to North America, concluded by Japanese businessmen in Japan, resulted in criminal charges against them under the Sherman Act before US courts. In deciding the matter, the Court of Appeals, using mostly 'common sense' and national rules of construction, explained that criminal prosecutions through the effects doctrine are permissible, since "courts should interpret the same language in the same section of the same statute uniformly, regardless of whether the impetus for interpretation is criminal or civil."[63] The Court of Appeals, in rejecting the observations of the defendants and the Government of Japan appearing as *amicus* on five basic arguments, made certain interesting pronouncements, which could be perhaps of interest also for the application of the effects doctrine by the International Criminal Court, particularly as regards the issues of analogy and 'lenity'.

First, in discussing the lack of precedent, the Court of Appeals said plainly that "there is a first time for everything" and after referring to *Strassheim v. Daily* and the finding of objective territorial jurisdiction in that case,[64] it underlined that "[I]t is not much of a stretch to apply this same principle internationally, especially in a shrinking world."[65]

Secondly, after dismissing objections premised on national presumptions on territorial application of the law and the Third Restatement, the Court of Appeals also dismissed objections on the grounds that in case of ambiguity, a criminal statute should be interpreted in favour of the defendant. In that Court's view, this rule was 'inapposite', since the provision was not 'ambiguous', as the meaning of the Sherman Act, "even if not readily apparent, is, upon inquiry, reasonably clear."[66]

Lastly, one of the judges in a separate opinion explained why this approach is permissible under international law. Taking into account the purpose of the agreement and that its effects were felt in the US

55 OECD, *Report, Fighting Hard-Core Cartels: Harm, Effective Sanctions and Leniency Programmes*, 2002, at 82 names the following states that provide for imprisonment for cartel activity; Canada (5 years per count), Germany (5 years per count of collusive tendering), Ireland (2 years), Japan (3 years), Korea (3 years), Norway (6 years), Slovak Republic (5 years), United States (3 years). A fuller list of the available sanctions is provided in Annex B of the Report. The report is available at http://www.oecd.org/dataoecd/49/16/2474442.pdf (last visited June 30, 2010).

56 Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade, (Act No. 54 of 14 April 1947), Chapter XI, Articles 89-100, as amended, reproduced in Akira Inoue, Japanese Antitrust Law Manual – Law, Cases and Interpretation of Japanese Antimonopoly Act 120-122, 159 (2007); Also, Rules of Compulsory Investigation of Criminal Cases by the Fair Trade Commission, Fair Trade Commission Rule No. 6, 2005, *id.,* at 283-284. The texts are also available online at http://jftc.jo.jp/e-page/legislation/index.html (last visited June 30, 2010).

57 Competition Act, R.S.C. Ch. C-34, §45, 1985 (Can.), Part VI, Offences in Relation to Competition, available at http://laws.justice.gc.ca/en/showdoc/cs/C-34/bo-ga:l_VI/20090630/en#anchorbo-ga:l_VI

58 Competition Act 2002, § 8 (Ir.), (Penalties and Proceedings in Relation to Offences under Section 6 and 7) available at http://www.irishstatutebook.ie/2002/en/act/pub/0014/sec0008.html#partii-sec8 (fines or/and imprisonment not exceeding 5 years at maximum).

59 Competition Act, 2004, § 30 (fines or imprisonment up to 3 years) (Nor.) available at http://www.konkurransetilsynet.no/en/legislation/The-Competition-Act-of-2004/

60 Federal Economic Crimes Law, No. 8137/90, article 4, which provides for imprisonment from 2 to 5 years and fines for criminal conduct such as price-fixing, market division, predatory pricing and others. OECD, Competition Committee, Directorate for Financial and Entreprise Affairs, *Brazil, Country Review of Competition Law and Policy 2005,* 69-70, available at http://www.oecd.org/document/43/0,3343,en_2649_40381607_2489707_1_1_1_1,00.html

61 Ugolovnyi Kodeks Rossiiskoi Federatsii [UK RF] (Criminal Code) art. 178 (Russ.) provides for monopolistic actions and conduct restricting competition as criminal offences, punished by terms of imprisonment ranging from no more than 2 to 5 years and different levels of fines; however, in the OECD, *Report on Competition Law and Policy in the Russian Federation 2004*, 26, it is mentioned that up to that date, this provision was never used in practice.

62 U.S. v. Nippon*, supra* note 11. Defendants' petition for writ of *certiorari* to the Supreme Court was denied on 12 January 1998 – thereby the appeals ruling was left intact; Richard M. Reynolds et al. *The Extraterritorial Application of the U.S. Antitrust Laws to Criminal Conspiracies,* 19 Eur. Comp. L. Rev. 151, 155 (1998).

63 *Id.,*

64 Strassheim v. Daily, 221 U.S. 280, 285 (1911) (per Holmes J.). That case concerned objective territorial criminal jurisdiction, as the acts of part of the crimes of bribery and fraud (obtaining public money under false pretenses) in that case had occurred in both states involved (Michigan and Illinois).

65 U.S. v. Nippon*, supra* note 1, at 6.

66 *Id*. at 7-8.

market, the conclusion was reached that the exercise of criminal jurisdiction by the US court was 'reasonable' and thus lawful under international law.[67]

It becomes therefore evident that there is support for the argument of the criminal law application of the effects doctrine on jurisdiction. This becomes clearer when one looks behind the titles (civil, administrative) in order to ascertain the precise nature of the sanctions and laws involved.[68] The need to classify becomes redundant, if one adheres to the position that international law on jurisdiction is uniform, irrespective of the nature of manifestation of public power,[69] a position somewhat controversial in international literature.[70] Be that as it may, it would seem that state practice has accepted such an assertion, particularly because "many of the underlying issues are the same in each case", irrespective of the civil or criminal nature of the proceedings.[71] In any event, it is to be noted, the emphasis of diplomatic protests has been mostly on treble damages rather than against such assertions of criminal jurisdiction, on the basis of state sovereignty, as one would expect perhaps on the same path as the 'blocking statutes' of the 1980's.[72]

Finally, it would be useful to adduce as further evidence criminal decisions on 'classic' crimes, where this doctrine was employed. This seems to have been the solution opted for by the Supreme Court of Zimbabwe in the *Mharapara* Case,[73] where the effects, other than the constituent elements of the crime of theft, were the critical factor for the exercise of jurisdiction by Zimbabwe over theft that took place in its Embassy in Belgium by one of its nationals. There seems to exist some support in literature for the

67 *Id*. Concurring Opinion of Judge Lynch, at 12-13. The judge conducted her analysis mostly from the perspective of the rule of reason as laid down in the famous Sections 402-3 of the Third Restatement, American Law Institute, Restatement of the Law Third, Restatement of the Foreign Relations Law of the United States § 402-3 (1986).

68 The particular difficulty in the distinction has been duly discussed in the early literature on the matter by George Van Hecke, *Le Droit Antitrust – aspects comparatifs et internationaux*, 106 Recueil des Cours de l' Academie de Droit International 253, 302 (1962-II); Erik Nerep, Extraterritorial Control of Competition in International Law with Special Regard to U.S. Antitrust Law 465 (1983); J.G. Castel, *The effects of antitrust laws*, 179 Recueil des Cours de l' Academie de Droit International 9, 13, 25 (1983-I); Evelyne Friedel-Souchu, Extraterritorialité de droit de la concurrence aux Etats-Unis et dans la Communauté Européenne, 7 (1994).

69 Francis A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 Recueil des Cours de l' Academie de Droit Internationale 1, 44-46, 73-76 (1964-I). In support of this view, Mann has argued that in reality there is little, if any, difference in the competence of a State to regulate civil and criminal matters under international law, since it is international law that will prescribe the limits, within which a state's rules on private international law will operate. in his view, foreign judgments should be recognised due to the fact that it is a judgment based on a jurisdiction conceded to the courts of a state by rules of international law. For Mann, all jurisdiction under international law should be exercised on the basis of a genuine link of a subject with a national legal order; see also *supra* Chapter 2. Mann's approach was refined by Derek W. Bowett, *Jurisdiction: Changing Patterns of Authority over Activities and Resources*, 53 Brit. Y.B. Int'l. L 1, 1-4 (1982), who advocates for a distinction on the basis of whether the exercise of jurisdiction constitutes an attempt by a state to regulate control or activities over resources for the interests of that state or for the vindication of private interests.

70 Prominently, Akehurst, *supra* note 18, at 170, 176-177, for the proposition that customary international law imposes no limits on the jurisdiction of municipal courts in civil trials. Further, note that in the *Al-Adsani* case, the European Court of Human Rights seemed to accept that a plea of immunity for violations arising from breaches of jus cogens norms (prohibition on torture) is admissible in civil, but not in criminal proceedings. Al-Adsani v. United Kingdom, App. No. 35763/97 Judgment, 34 Eur. Ct. H.R. 273, ¶ 60-66 and Joint Dissenting Opinion of Judges Rozakis and Caflisch, Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic, at ¶ 4.

71 Kruman et al v. Christie's International et al., 284 F.3d 384, 390 (2nd Circ. 2002). From earlier literature, Van Hecke, *supra* note 68, at 302; *See* also, Castel, *supra* note 68, at 13, 25 ; Friedel-Souchu, *supra* note 68, at 7-8 ; Nerep, *supra* note 68, at 465 ; Ian Brownlie, Principles of Public International Law 300 (7th ed. 2008), noted that "in any case, anti-trust legislation often involves a process which, though formally 'civil', is in substance coercive and penal."

72 In fact, even in that time, it was said that "[T]he recent concerns of foreign governments related to United States antitrust actions are due more to massive treble-damage actions than to actual criminal proceedings". Banks, in Nanda & Bassiouni, *supra* note 37, at 75. It may be interesting in this regard to note that blocking statutes did not dispute the criminal basis of the prescriptive jurisdiction, but rather the enforcement aspect thereof (production of documents in the Uranium grand jury investigation, also the London Shipping Cartel case). In detail, Chapter II, and further Joseph P. Griffin, *Foreign Governmental Reactions to U.S. assertions of extraterritorial jurisdiction*, 19 Eur Comp. L. Rev. 64 (1998).

73 S. v. Mharapara, 84 I.L.R. 1, 17 Supreme Court of Zimbabwe, Judgment of 17 October 1985, ". . . . [a]lthough all the constituent elements of the theft occurred in Belgium, in particular the obtaining of the money there, the State is nonetheless entitled to proceed upon the present indictment and adduce evidence at the trial, ... to establish the fact that the harmful effect of the appellant's crime was felt by the Zimbabwean Government within this country"; *id*. at 17. In detail, *supra* Chapter II.

application of this doctrine in cases of terrorism,[74] as well as pollution and pirate broadcasting under the law of the sea.[75]

As a matter of substance, however, there is significant difference between the moral condemnation attached to the respective offences. While international criminal law and the ICC relate to conduct which shocks the conscience of mankind and meets with universal condemnation, even leading to arguments of norms of *jus cogens*, antitrust jurisdiction relates to the regulation of specific forms of conduct whose moral condemnation is ambiguous at best.[76] Therefore, to put it bluntly, it would seem inappropriate to compare the effects of the murder or torture of thousands of individuals with the moral disapproval of a price-fixing cartel or market-sharing agreements. In this context, both the lack of agreement on the policy aspect of antitrust regulation and the very serious activities falling within the scope of international criminal law render any such propositions unconvincing. Hence, it would appear at least controversial to compare the moral opprobrium attached to the acts of a *genocidaire* and those of an executive head of an international price-fixing cartel.

It is difficult to dispute this observation. However, it could be said that precisely because of this differentiation in the underlying legal interests involved that the application of the effects doctrine could win ground. This is because the need for international solidarity in the fight against genocide, war crimes and crimes against humanity is generally accepted to a greater extent than that concerning perpetrators of anti-trust offences. Therefore, it would seem at least peculiar that states, divided as they are in the pursuit of different state policies over competition in the international arena, would be prepared to exercise their 'long arm' effects jurisdiction over arguably criminal anti-competitive practices, whereas they would deny such a possibility to an International Criminal Court, created to prosecute and punish perpetrators of the most heinous crimes imaginable, which violate core values shared by all states in the world. Under this light, the differentiation in the protected interest would arguably encourage, rather than reject, the application of the effects doctrine.[77]

6.3.2. / TERRITORIAL JURISDICTION

Even if the application of the effects doctrine in criminal law is accepted, another disputed point could be whether the effects doctrine is affiliated to the rule of territorial jurisdiction or if it is doctrinally speaking a form of extra-territorial jurisdiction.

One could argue that, while its origin does indicate emphasis on intra-territorial effects,[78] its subsequent application gives credence to claims of 'extra-territorial' application of national law, (be it criminal or civil or both), especially in the light of case law indicating that states, through the excuse of potential future adverse effects in their markets, have in fact employed this device as a siege ram, in order to open up foreign

74 Kolb, *supra* note 20, at 244-245. But it would also appear that his argument seems to draw heavily on the concept of 'abstract endangerment offenses', where emphasis is placed also on the 'effects doctrine' as constructive effects or effect through risk. In detail, *supra* Chapter II. For attempts and conspiracy to commit drug trafficking and aircraft terrorism, see *supra* Chapter 2, Somchai Liangsiripraesert v. U.S. [1990] 29 I.L.M. 1390, 1396 (P.C.) (Eng.), and U.S. v. Davis, 905 F.2d 245, 248 (9th Cir. 1990).

75 Oxman, *supra* note 21, at 58.

76 Thus, to offer only two examples, it is reported that in the reasoning for the adoption of the German 1958 Act against Restriction of Competition it was mentioned that "there has not yet been neither in the German public nor in the relevant business circles . . . . the vivid feeling that restrictive agreements and restrictive business practices violate moral standards". Vollmer, *supra* note 33, at 261, referring to Bundestag Publication (BT-Drucksache), 2/1158, part B II, at 28; similarly, and much more recently, Chile, OECD Report 2004, *supra* note 35, at 67, "An often-cited 1995 analysis of competition enforcement in Chile found that Commission members were indeed very reluctant to apply sanctions, and attributed this to a combination of factors, including (a) a strong belief in Chilean society that economic crimes are not serious, especially when the harm is to the public . . . .".

77 *Cf.* Jennings, *The Proper Reach*, *supra* note 3, at 37, "It is because there is an *opposition* of interests, or a possible opposition of interests, that this doubt about legal controls arises at all. In other areas of jurisdiction (for example, common crimes), the doubts do not arise. Nobody is troubled if courts do exercise wide extraterritorial jurisdiction in common crime . . . ."; also the European Committee on Crime Problems, *supra* note 13, at 27, "Public International Law does not impose any limitations on the freedom of states to establish forms of extraterritorial criminal jurisdiction where they are based on international solidarity between states in the fight against crime"; Higgins, *supra* note 11, at 77, commented on that excerpt that "The *exercise* of that jurisdiction should be based upon whether the international solidarity would be helped or harmed".

78 Ryngaert, *Antitrust Violations, supra* note 24, at 11-13, 15-16.

markets for their exporters.[79] However, even in cases where the effects are said to occur intra-territorially, still the main 'conduct in question' under article 12 (2)(a) is almost entirely performed abroad.[80] Accordingly, the effects doctrine should be considered as an 'extraterritorial' basis of jurisdiction, best explained possibly through other jurisdictional rules (protective rule), and as such it should be treated as doctrinally inappropriate for the Court under article 12(2)(a).[81]

Notwithstanding the overall terminological confusion,[82] in addressing this argument recent studies have explained that the terms 'extraterritoriality', 'extraterritorial jurisdiction' have generally suffered significant abuse, as they have been used extensively in the literature not (only) to explain the exercise of (state) jurisdiction over cases with no link with the territorial state, but also to cover cases of jurisdictional assertions on the basis of some territorial link, usually concurrently with other states.[83] As it has been accurately noted, "the term 'extraterritorial jurisdiction' is only accurate if it refers to assertions of jurisdiction over persons, property, or activities which have no territorial nexus whatsoever with the regulating State, i.e. assertions based on the personality, protective, or universality principles of jurisdiction."[84]

In fact, an important part of the application of this doctrine concerns a less debated aspect concerning imports to a state and their impact *within* a State.[85] The *ALCOA* ruling started from that point, underlying the meaning of intended effects *within* territory.[86] Even Robert Jennings – one of the most vociferous critics of this doctrine – admitted that the problem with some of the most contentious cases of effects jurisdiction was not whether there were territorial effects justifying the exercise of jurisdiction, but rather whether the

79 Sufrin, *supra* note 11, at 106, 109 ("true extraterritoriality"); W. Todd Miller & Donald I. Baker, *Globalisation and antitrust litigation: as the U.S. jurisdictional boundaries sensible, mercantilist or just random?, in* Slot & Bulterman, *supra* note 12*,* at 134-8, distinguishing in recent case-law between the 'import' and 'export' cases and their respective legal standards in the U.S. law; *Contra*, Ryngaert, *Antitrust Violations, supra* note 24, at 143-6 who seems to downplay the importance of this aspect; by invoking the 2000 International Competition Policy Advisory Committee's (US-DOJ) findings, he explains that ultimately this contention may relate only to a handful of cases (up to the year 2000) – if even to them as well, as most of these cases did have some internal connection with the US in his view. Ryngaert identifies the year 1993 as the important landmark, when the United States, through the amendment of the Antitrust Enforcement Guidelines, decided to include in their antitrust goals not only (domestic) consumer welfare, but also the protection of U.S. export trade.

80 This is particularly evident in merger cases; see indicatively *supra* Chapter 2, Case T-102/96, Gencor Ltd. v. Commission of the European Communities, 1999 E.C.R. II-753.

81 This approach, which seems to be adopted implicitly to a certain extent by § 402(c), (f) and comments thereto of the Restatement (Third) of the Foreign Relations Law of the United States, *op.cit.,* at 239-240, is being critically reviewed and effectively rebutted by Ryngaert, *Antitrust Violations, supra* note 24, at 21-22; Iain Cameron, The Protective Principle of International Criminal Jurisdiction 62-67 (1994).

82 As the Special Rapporteur of the Institut de Droit International noted, "compétence, territorialité, extraterritorialité sont des examples-types de concepts flous." In his view, inter-state jurisdictional conflicts take place in "des zones grises où les concepts classificateurs se recouvrent." François Rigaux, *Exposé Préliminaire,* Feb. 15, 1994, 68-I Annuaire de l' Institut de Droit International 372-3 (1999).

83 Ryngaert, *supra* note 22, at 7.

84 *Id*. As that author however noted, at 8 "And even such jurisdiction [nationality, protective, universal] is not wholly 'extra-territorial', as it is asserted by a State and its courts, within a given territory."

85 This distinction is accentuated also in literature; Sufrin, *supra* note 11, at 106, 109, referring to 'true' extraterritoriality to denote the case of exporter protectionism; Trebilock & Iacobucci, *supra* note 12, at 158-9 take the view that while effects jurisdiction over 'inbound commerce' is legitimate, in the case of 'outbound commerce' it is not. They consider the latter case to be best regulated by trade law and possibly the use of the 'national treatment' doctrine. For the first cases, they use the term "limited principle of extraterritoriality", *id*. at 160; Hein D. Wolswijk, *Locus Delicti and Criminal Jurisdiction,* 66 Neth. Int'l. L. Rev. 361, 366 (1999), noted usefully in this context: "It is generally assumed in European doctrine that the effects principle is separate from the territoriality principle. As we have seen, application of the territoriality principle presumes that the intraterritorial element – in this case the intraterritorial effect – is a constituent element of the offence (result theory). But this presumption is not made in the case of the effects principle: it is sufficient that the effect occurs within the country in question, while there is no suggestion that a part of the conduct constituting the offence occurred within the territory. The jurisdictional requirement is a territorial link – an intraterritorial effect –, but not an intraterritorial *locus delicti* because the effect itself need not be a constituent element of the offence. American doctrine, however, does not worry so much about this conceptual difference and, consequently, no sharp distinction is made between the territoriality and the effects principle. They rather see the first as a form of the latter." In that author's view, *id*. at n. 8, from the viewpoint of international law, "American doctrine has its advantage", since "whether an element is a constituent element of an offence is a matter of national law."

86 U.S. v. Aluminium Corp. of America, 148 F.2d 416, 443 (2nd Circ., 1945), "There may be agreements made beyond our borders not intended to affect imports, which do affect them, or which affect exports. Almost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade between the two. Yet when one considers the international complications likely to arise from an effort in the country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intent the Act to cover them"; Ryngaert, *Antitrust Violations, supra* note 24, at 14, considered this as an expression of jurisdictional restraint on the part of that court. *Id.,* at 15; "In *Alcoa,* Judge Learned Hand premised jurisdiction on the *territorial consequences* of foreign anticompetitive conduct" [emphasis in the original].

reach of the remedies ordered by US courts at the time and their enforcement were appropriate.[87] Throughout the application of this doctrine by mostly US courts, the territorial element is constantly present, to the extent that the exercise of jurisdiction depends on the presence of effects in state territory, usually in the form of economic repercussions. The position was probably best articulated in the *Laker Airways* case, where the Court of Appeals emphasized that "[t]he territorial effects doctrine is *not* an *extraterritorial* assertion of jurisdiction. Jurisdiction exists only when significant effects were intended within the prescribing territory" and then went on to explain the reasons underlying such assertions.[88]

Similarly, in a classical criminal law context, in the *Mharapara* Case, the Supreme Court of Zimbabwe applied this doctrine as an aspect of objective territorial jurisdiction, due to the impossibility of asserting nationality jurisdiction under national law.[89] As regards terrorism and effects jurisdiction, the emphasis has again been placed on the effects that a single terrorist attack may have in other states, entitled to exercise jurisdiction on this basis.[90]

In conclusion, as Cameron has explained, "the effects principle is either a principle of extraterritorial jurisdiction, or, like the doctrine of ubiquity, it is simply a means of localising crime. If it is the former, then it is probable that, insofar as it goes beyond the localisation of attempts to commit offences in the territory of the state, then there is little support for it in the criminal law of other States. If it is the latter, then it is simply a form of the territorial principle."[91] It is through the latter alternative perspective – the impact within a state party territory – that the possibility of extending the Court's jurisdiction under article 12(2)(a) is examined.

6.3.3. / EFFECTS – CRIMINAL AND ANTITRUST – CLASSIFICATIONS

Last, but not least, it could be argued that the application of the effects doctrine in this context would be excessive, in the sense that criminal law – normally state criminal law – allows jurisdiction for the commission of crimes in part, but only where a criminal consequence duly prescribed as part of a prohibited criminal activity in a criminal provision has taken place within its territory. This has been the strongest of the arguments advanced against the application of the effects doctrine, that by 'watering down' the constituent elements approach to nebulous financial and other effects,[92] "we embark on a slippery slope which leads away from the territorial principle and towards universal jurisdiction."[93] Objective territoriality, in this sense, is to be seen as applicable only with regard to criminal, rather than economic, social or other effects, which in any event may be difficult to ascertain objectively with any degree of specificity.

In this context, the issue is not so much whether effects jurisdiction is permitted, but rather what effects should qualify for the Court's assertion of jurisdiction. At the outset, it should be stressed that state practice has demonstrated that, once the effects doctrine is accepted, the definition of 'effect' and its qualification falls within the prescriptive power of each national jurisdiction. It is therefore quite conceivable that what qualifies as an 'effect' for one jurisdiction, might not be acceptable for another, or that while one jurisdiction might require 'intended' and 'foreseeable' 'adverse' effects, for another proof of just an effect would suffice. To give just one example, while for South African courts the existence of effects that are not necessarily 'deleterious' or 'adverse' suffices to apply South African anti-trust rules,[94] the ECJ and US

87 Jennings, *The Proper Reach*, *supra* note 3, at 40, "Let us be clear that in most antitrust cases the court does indeed on any view of the law have substantive jurisdiction. In the *Swiss Watch* Case, for example, U.S. v. the Watchmakers of Switzerland Information Center, [1963] Trade Cases (CCH) §70, 600 (S.D.N.Y. 1962) there can be really no doubt that the Court (a) had jurisdiction and (b) that there had been territorial conduct contrary to the local law. But the question then arises: what are the limits to which the remedies ordered by the Court can be taken?[references omitted]".

88 Laker Airways Ltd. v. Sabena, 731 F.2d 909, 923 (D.C. Circuit 1984).

89 S. v. Mharapara*, supra* note 73, at 17. *Supra* Chapter II.

90 Kolb, *supra* note 20.

91 Cameron, *supra* note 81, at 64.

92 The classic discussion by Mann, *supra* note 69*,* at 86-7, 100-4, and later in his follow-up piece F.A. Mann, *The Doctrine of Jurisdiction Revisited After 20 Years*, in Further Studies in International Law, 5, 26 (1990), as well as by Jennings, *Extraterritorial Jurisdiction*, *supra* note 10, at 159, remains unsurpassed; further, Cameron, *supra* note 81*,* at 58. For a clear exposition of the problem at present, Ryngaert, *Antitrust Violations, supra* note 24, at 17-18, with further references.

93 Akehurst, *supra* note 18, at 154.

94 Indicatively, American Soda Ash Corp. v. Competition Commission of South Africa*, supra* note 24.

courts would probably require proof of some detriment to the relevant national markets/interests before assuming jurisdiction.[95] Taking into account this situation, it would seem that it falls upon the Court, considering existing state practice, to consider what, in its view, would qualify as an 'effect' necessary and sufficient for asserting jurisdiction under the Statute. As such, it is evident that an application of the effects doctrine by the ICC would not take place in the form of a 'mechanical transplant' that Professor Cassese warned of in *Erdemovic*, but rather armed with its full panoply, including built-in limitations and means of control.

Such limitations would arguably include the need to prove the current or estimated existence of effects, the nature of the effects, and probably the qualification of the effects as direct, substantial and reasonably foreseeable. Again however, one is faced with an important question; what exactly should the Prosecutor have to prove, by way of 'effects', for the Court to have jurisdiction, before there is even a suspect?

National case-law on drug trafficking and terrorism offers examples, where very little by way of effects is deemed sufficient for asserting jurisdiction over attempts to commit crimes and agreements to commit crimes in state territory, notwithstanding the fact that such jurisdiction is somewhat complicated by national criminal law notions (e.g. conspiracy). In this context, state criminal jurisdiction has been affirmed even by common law countries – arguably the strictest adherents to territorial jurisdiction – when an agreement to import narcotic drugs in state territory has been concluded abroad, although evidence of the materialization of the acts in pursuance of the conspiracy were not forthcoming.[96] A similar approach is witnessed in cases of attempted or planned terrorist attacks against aircrafts, where it is said that the existence of a 'substantial intended effect' to commit a crime within state territory suffices for the latter state to assert jurisdiction, even if, again, such effect did not materialize.[97] The usefulness of this case-law, however, may be moderated, as in those cases the 'effect' implied by those judgments was apparently part of the criminal description of the offence – as opposed to more general effects alluded to by the effects doctrine as such, as well as the fact that jurisdiction in some of those cases was not based on territoriality.[98]

In antitrust law cases, the classification of effects seems to be one particularly intriguing point. In fact, the present research has been unable to locate a case reviewed by a national court, where a jurisdictional ruling provided clearly and unambiguously for example that 'A and B engaged in predatory pricing, with the effect that prices were X instead of Y' and thus that the illegal profit they procured constitutes the required 'effect' allowing the national court to assume jurisdiction. There are no jurisdictional rulings specifying for example that defendants acquired illegal profits of the scale of, for example, 1.000.000 US dollars at the expense of the consumers, which the courts considered as a sufficient effect. Indeed, the rulings on jurisdiction are satisfied by very little general evidence of the harm inflicted, allowing further evidence of financial detriment etc. to be examined in the merits stage of each case. This seems to be the general approach adopted by national courts in this context; a very low probative threshold for asserting jurisdiction and a delegation of the examination of the effects in the merits phase. This difficulty becomes perhaps more pronounced in merger cases, where the effect does not exist yet, but is only estimated to potentially arise in the future.[99]

95 *Id.* This was basically defendant's argument in American Soda Ash, which was rejected by the Appeals Competition Court. Further Chapter II. For another example, see Article 6(3)(a) of the Rome II Regulation (Regulation 864/2007 on the law applicable to non-contractual obligations), according to which "the law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected." On the basis of the this provision, Ackermann mentions that while the Regulation uses the market effect as a connecting factor, "most legal systems do not apply the effects test without further qualifications", with further examples. Ackermann, *Antitrust Damages*, *supra* note 32, at 114; on the Eur. Ct. Just. approach to effects and the Gencor case, *supra* note 80, see *supra* Chapter 2.4.4.

96 For the cases of Somchai Liangsiripraesert and Davis, *supra* note 74, confirming U.S. v. Peterson 812 F.2d 486, at 493 (9th Cir.1987) that "[w]here an attempted transaction is aimed at causing criminal acts within the United States, there is a sufficient basis for the United States to exercise its jurisdiction." Further on attempt and territorial jurisdiction in Chapter 2.4.3.2.

97 U.S. v. Yousef, 327 F.3d 56, at 112 (2nd Circ., 2003) concerning the trial in the U.S. of individuals convicted of involvement in the 1993 World Trade Center attack and conspiracy to crash U.S. commercial aircrafts; "The defendants conspired to attack a dozen United States-flag aircraft in an effort to inflict injury on this country and its people and influence American foreign policy, and their attack on the Philippines Airlines flight was a "test-run" in furtherance of this conspiracy. Given the substantial intended effect of their attack on the United States and its citizens, it cannot be argued seriously that the defendant's conduct was so unrelated to American interests as to render their prosecution in the United States arbitrary or fundamentally unfair." See also *supra* in Chapter 5 (conduct, human rights).

98 Yousef, *supra* note 95, at 110-1, for example, the Court finally accepted prosecution on the basis of the 1971 Montreal Convention and the protective principle.

99 Typically in the Gencor case, *supra* note 80, concerning the potential adverse effects for the EU market of the merger of foreign companies in the platinum market in South Africa. *Supra* Chapter 2 in detail.

The important element in this approach is the differentiation between the required proof of effects in the jurisdiction and merits phase of a case. This approach is believed to be consistent with the tendency to relax previously strict jurisdictional requirements, in order to combat impunity and ensure respect for consumers and fair play in the markets – a veritable 'victim-oriented' approach to jurisdiction. Antitrust and international criminal judges could therefore be entitled to follow the same line of reasoning. This would mean that the organs of the Court could accept general evidence of adverse effects over a situation in order to assert jurisdiction (e.g. expected socio-economic disturbances caused by massive refugee influx, destruction of crops and livestock by poisoned international watercourses and projected pollution and famine estimates, possible financial collapse of national economies etc), and require more specific evidence, in line with the relevant standards of proof established in the Rome Statute for issuing arrest warrants, confirming charges and declaring guilt or innocence, in the merits phase, when a specific accused has been connected to certain crimes.

6.3.4. / OVER-REGULATION AND JURISDICTIONAL CONFLICTS

Another important consequence that the endorsement of the effects doctrine could have concerns the argument of 'over-regulation'. From this perspective, it might be said that the Court is not only extending its jurisdictional reach beyond the letter of its mandate, but it is further sowing the seeds of jurisdictional discord between itself and states, parties and not parties alike. In this context, it can be argued that, contrary to private international law, where rules for jurisdictional conflicts constitute to a certain extent the *raison d'être* of this body of law, international criminal law –and the system of the Rome Statute in particular – does not have sufficient rules in place to resolve jurisdictional conflicts due to multiple jurisdictional assertions.[100] Notwithstanding certain interesting suggestions made in the literature on state jurisdictional conflicts, such as Ryngaert's doctrine of qualified subsidiarity,[101] Akehurst's approach to 'primary effects' in the context of objective territorial jurisdiction,[102] or even bilateral 'guidance' agreements on the appropriate way of handling criminal cases of concurrent jurisdiction,[103] it could be said that the conundrum of the Lockerbie Case is indicative of the situation as it stands at present under general international law.[104] Viewed from this angle, and conscious of the impact that its rulings will have on national criminal laws, it

100 Franklin Berman, *Jurisdiction: The State*, 3 in Capps et al., *supra* note 11, at 13, "One of the paradoxes of current international practice is that, in its drive to deal effectively . . . . with stigmatised abuses, it has deliberately encouraged the greatest multiplicity of national jurisdictions having parallel importance, without creating rules for regulating priorities between them"; as for the ICC, although complementarity might amount to the same outcome, it is strictly speaking not a rule of jurisdiction, but of admissibility. Further, Florian Jessberger, *International v. National Prosecution of International Crimes*, in The Oxford Companion to International Criminal Justice 211-3 (A. Cassese ed. 2009), where with regard to horizontal conflicts of jurisdiction (national court-national court) the author notes that "neither general international law nor specific rules of international law provide an answer. In particular, international law does not provide a hierarchy among national courts that would determine the venue for prosecution for each case. As a consequence, practical factors, such as the whereabouts of the suspect and the availability of evidence, determine where a crime is prosecuted", with further references; further, Wolswijk, *supra* note 85, at 381-2. For a socio-legal over-regulation analysis from the perspective of competition law, M. Taylor, International Competition Law – A New Dimension for the WTO? 46-56 (2006).

101 Ryngaert, *supra* note 22, at 211 *et seq.* That author's very interesting theoretical proposal was summarised at at 237 as follows; "the State with the strongest nexus to a situation is entitled to exercise its jurisdiction, yet if it fails to adequately do so, another State with a weaker nexus (and in the case of violations of *jus cogens* without a nexus) may step in, provided that its exercise of jurisdiction serves the global interest".

102 Akehurst, *supra* note 18, at 155-156.

103 *Guidance for Handling Criminal Cases with Concurrent Jurisdiction between the United Kingdom and the United States of America (Jan. 25, 2007)*, 68 Brit. Y.B. Int'l L. 789, 789-792 (2008). This document signed by Lord Goldsmith as Attorney General and Alberto Gonzalez as US Attorney General establishes mechanisms for co-operation and co-ordination, in order to assist prosecutors of both states to develop a case strategy and resolve issues arising from concurrent jurisdiction.

104 Where the jurisdictional overlap between Scots law (territorial), English and US law (passive personality), and Libyan law (active personality) resulted to the adjudication of the case by an *ad hoc* Scottish Court in the Netherlands. In detail, Anthony Aust, *Lockerbie, the other case*, 49 Int'l Comp. L.Q. 278, 279 (2000); It would be unfair however not to admit that national criminal justice systems are not immune to jurisdictional loopholes. As Edward M. Morgan, *Retributory Theatre*, 3 Am. U.J. Int'l L. & Pol'y 1, 29 (1988), explained with regard to the U.S. system, "The statutory and case law governing the delineation of domestic criminal law jurisdiction in general appears so confused and internally contradictory that the rule might properly be formulated as one in which anything is permitted."

could be argued that the Court should avoid setting an example that would only exacerbate the jurisdictional question as it stands at present. On the contrary, it should strive to endorse solutions more oriented towards the avoidance of jurisdictional conflicts, heeding Judge Fitzmaurice's admonition towards state courts that, although they will be the final arbiters of the extent of their jurisdiction in each case, international law does "involve for every state an obligation to exercise moderation and restraint as to the extent of the jurisdiction by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State."[105] This would arguably be also sound policy advice, considering that the Court is a creature of state consent.

In addressing these concerns, it should be noted that application of the effects doctrine does not – or should not – signify its 'mechanical transplantation' from the national to the international level, without the qualifications and safeguards attached to it. That said, the issue of over-regulation and jurisdictional conflicts has been at the forefront of the discussion for almost 40 years now, albeit, it is admitted, with mixed results.[106] There is a substantial amount of literature and case-law referring to enlightened self-restrictions, comity and 'reasonableness' as the values underpinning the requirements of 'direct, substantial and foreseeable' effects. It is submitted that the effects doctrine in the Court's practice would naturally have to be considered also in the light of such factors as elements of reasonableness in both its inter-state and its human rights perspective – be it of the victims or of the accused. In any event, the possibility that an assertion of such jurisdiction by the Court will draw the world's spotlight on the situation in a state not party and stimulate the Security Council into action cannot be excluded.

That said, however, the rationale underlying the advocacy in favour of the effects doctrine would be to mend the jurisdictional loopholes, in order to ensure that the Statute will be as effective as possible in terms of both deterrence and punishment. In this context, it might be preferable to have as extensive jurisdiction as possible, and risk jurisdictional conflicts between the Court and states or between states, which will in any event bring such crimes to the surface, rather than delimit strictly the Court's jurisdiction and allow impunity to reign. Perhaps it could be hoped that, if the Court takes the initiative by using effects jurisdiction, this will motivate national courts to seriously examine the situation, without requiring any further action on its part. As such, effects jurisdiction could be a useful instrument for the mobilization of national judiciaries.[107] Ultimately, however, it falls upon the Court to decide whether the possibility of jurisdictional conflicts through the application of this doctrine is a worthy price for the fulfilment of its mandate to ensure an end to impunity around the world, "without an adverse distinction founded on grounds such as race,[…], national, ethnic or social origin, wealth, birth or other status."[108] In doing so, the Court will need to address issues of legitimacy – usually masked as state sovereignty objections – and problems of state co-operation.

6.3.5. / PACTA TERTIIS – VIOLATION OF SOVEREIGNTY OF STATES NOT PARTIES

Taking into account this position, it could similarly be suggested that states do not recognize the application of the effects doctrine for their own criminal laws and correspondingly do not recognize the existence of such a rule in customary law. Thus, any potential reference by the Court to this doctrine under article 12(2)(a) would be seen as unsupported by state practice and accordingly give rise to claims of violations of state sovereignty by the states involved (arguably states not parties), not least on the basis of the *pacta tertiis* rule. This development would not contribute to the smooth operation of the Court, as it would force it to

105 Separate Opinion, Barcelona Traction Case (Belgium v. Spain), Judgment, ICJ Rep. 1970, p. 3, at 105, para. 70.

106 The situation has been succintly summarised by Koh, *supra* note 12, at 38.

107 This argument is inspired by Ryngaert, *Antitrust Violations, supra* note 24, at 19-23 on competition law. Also, Wagner, *supra* note 1, at 485.

108 Article 21(3) of the Statute.

enter into the discussion – and defend its position – against allegations of violations of state sovereignty.[109] In this context, third states would be entitled to argue that as the International Court of Justice said in the *Right of Passage* Case, "[i]t is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it."[110]

The state practice accepting the use of effects jurisdiction has been explored in detail above and does not need to be repeated here.[111] It is true that some states may not subscribe to this approach to territorial jurisdiction. However, it is also true that this fact *per se* does not entail that the Court is prevented from using the effects doctrine as an interpretation to localize criminal activity within state party territory. In this perspective, effects jurisdiction is simply one interpretation of article 12(2)(a), "simply a form of the territorial principle."[112] As far as the *pacta tertiis* rule is concerned, this argument has been made and extensively refuted in the literature with regard to ICC territorial jurisdiction over third state nationals.[113] Summarizing the different views, it could be said that, specific classes of individuals notwithstanding (e.g. diplomats, military forces under SOFAs), to the extent that a state does not need the permission of a foreigner's state of nationality to prosecute him for crimes he committed on its territory, issues of *pacta tertiis* do not arise simply because of the international character of the Court.

6.3.6. / PRACTICAL ASPECTS: COLLECTION OF EVIDENCE

Finally, another argument against the application of the effects doctrine would be that it is highly doubtful, in terms of practical application of the Court's operation, whether a state not party would be willing to co-operate with the Court's authorities in the investigation of crimes, the collection of evidence and the arrest of the suspect within its territory, in a case prosecuted on the basis of the effects doctrine. This distinction between prescriptive and enforcement jurisdiction brings to the forefront the acute problem of effectiveness. Even if the Court were to exercise such jurisdiction, it may in the end have to abandon the case for lack of evidence or an accused in custody in the absence of state cooperation.[114] In these circumstances, it is very doubtful whether the Prosecutor would be willing to sacrifice the limited resources allocated to him under the watchful eye of the ASP[115] for such a difficult and doubtful investigation. After all, he has made no secret that his limited resources oblige his Office to prioritise, taking into account also "the feasibility of conducting an effective investigation in a particular territory."[116]

Obviously these concerns are real and cannot be disregarded. From a legal perspective, however, it needs to be pointed out that the Court's jurisdiction, on the one hand, and the state's duty to co-operate

109 The discussion on the *pacta tertiis* rule, i.e the rule that a treaty cannot create rights and obligations for third states without their consent, in the context of the ICC and the rule of territorial jurisdiction and delegation of authority, has been expressed in detail in the literature; Madeleine Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 Law Contemp. Probs. 13, 26 (2001); Michael P. Scharf, *The United States and the International Criminal Court: The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. position*, 64, 70-71 L. Contemp. Probs. (2001); F. Megré, *Epilogue to an Endless Debate: The International Criminal Court's Third Party Jurisdiction and the Looming Revolution of International Law*, 12 Eur. J. Int'l L. 247 (2001); Dapo Akande, *The Jurisdiction of the International Criminal Court over national of Non-Parties: Legal Basis and Limits*, 1 J. Int'l Crim. Just. 618 (2003); the argument is generally dismissed summarily in recent literature, Cryer *et al*, *supra* note 16, at 172-173; further Bantekas, *supra* note 1, at 36, addressing the matter from the point of view of non-self contained system theories, dismissing the arguments on the basis that the ICC belongs to those "particular legal regimes", which "generate legitimate and binding effects for third parties, on the basis of their global character and transnational nature . . . "; similarly, Gennady D. Danilenko, *ICC Statute and Third States*, *in* Cassese, *supra* note 1, at 1871.

110 Right of Passage over Indian Territory (Port. v. India), Preliminary Objections, Judgment, 1957 I.C.J. Rep. 125, 142.

111 See *supra* Chapter II and 3.1.

112 Cameron, *supra* note 81, at 64.

113 See *supra* note 899.

114 Particularly since the Statute does not allow for trial *in absentia*. Håkan Friman, *Rights of Persons Suspected or Accused of a Crime, in* The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results 255-261 (Roy S. Lee ed. 1999).

115 As Bekou & Cryer have astutely noted, "the extraordinary specificity which has characterized the early Budgets of the ICC ought to be sufficient to calm the most tremulous critic of the Rome regime of prosecutorial discretion". Bekou & Cryer, *supra* note 16, at 57, n. 51.

116 Paper on Some Policy Issues Before the Office of the Prosecutor: Referrals and Communications, Annex, at 1, available at http://www.icc-cpi.int/NR/rdonlyres/278614ED-A8CA-4835-B91D-DB7FA7639E02/143706/policy_annex_final_210404.pdf (last visited June 30, 2010).

under the Statute on the other are two entirely different sets of obligations and legal regimes, the first regulated by article 12 and the second by Part IX of the Statute. This was underlined in the ILC discussions of the ILC Draft Statute, where it was duly noted that "[i]n current practice, a State did not have to seek the consent of other States in exercising its criminal jurisdiction. Why should it be otherwise for an international criminal court which took over that jurisdiction from a State? It would, of course, be necessary to obtain the cooperation of the State in whose territory the suspect was present, the State of which he was a national or the State where the alleged offence had been committed, but that was a matter of judicial assistance rather than of the court's jurisdiction."[117]

It is not suggested here that by opening up an investigation the Court would create any sort of legal obligations for states not parties. On the contrary, the Court would only have the capacity to ask and receive evidence from states parties, in accordance with the Statute. Such evidence could be the retrieval of testimonies and forensic evidence from residents of refugee camps, or the performance of environmental impact assessments on the polluted international watercourses. This course of action might provide the necessary groundwork and impetus that will encourage national courts to pursue further investigations, or at the very least deter the commission of such crimes.

In any event, it is to be noted that such practical difficulties emerge in any case, where jurisdiction is exercised on any basis of jurisdiction other than territoriality. Such difficulties would be similarly expected in the case of the exercise of nationality jurisdiction, where a national of a state party commits a crime in the territory of a state not party. Equally, in this contingency, absent the willingness of the territorial state to co-operate, the Court may have custody of the accused, but nothing – or little – else, by way of, for example, on-site forensic evidence. Is it to be presumed that in such situations as well the Court's organs would shy away from their responsibilities under the Statute? There is an obvious question of principle in these situations, one that only the Court can authoritatively answer. The position in this work is that a jurisdictional decision should be made taking into account present and future victims of large scale violence. This position is believed to be consistent with article 21(3) ICC Statute and the right of victims of human rights abuses to an effective investigation and judicial remedy of their grievances. In such conditions, the low threshold of jurisdictional assertions ('reasonable grounds to believe') should not be equated with the evidentiary threshold required for conviction ('proof beyond reasonable doubt');[118] or, as Cameron explained, "[a]lthough it all comes down to evidence in the end, jurisdictional claims should be made on the basis of rational choices as to the crimes which we want to prosecute, not on the predictions – guesswork – on how often sufficient evidence will be forthcoming to obtain convictions"; in these circumstances, "the argument for not letting the evidential tail wag the jurisdictional dog is compelling."[119]

6.4. / CONCLUSION

It is understandable that legal scholars around the world would view the possibility of reading in article 12(2)(a) ICC Statute the effects doctrine as a controversial proposition. The arguments against it could be many, stimulated equally by legal and policy considerations. It is not disputed here that at least some of these objections make the application of the effects doctrine by the Court seem difficult. The present work has tried to explore how these concerns may be addressed through state practice and judicial decisions.

At the outset, this chapter sought to address the following question: why should the Court have recourse to this doctrine? In reply, it has been suggested that, since the criminal activity falling within the Court's jurisdiction is significantly more important and horrifying than the commission of price-fixing offences and cartel agreements, the International Criminal Court should feel morally justified – if not compelled – to use the same approach to territoriality for the repression of offences equally abhorrent to all states in the world, which is already used for the repression of activity on the verge of criminalization by certain states. Even if the Court does not actually proceed with the cases, this course of action might stimulate the Security Council or other states to look into such situations more seriously and deter the commission of future crimes.

117 *Summary Records of the 2333rd Meeting*, [1994] 1 Y.B. Int'l L. Comm'n 36, ¶ 46 (per Chusei Yamada).

118 On the meaning of the relevant thresholds, recently, Kenya Authorization Decision, *supra* note 17, at 13-17, ¶ 27-35.

119 Iain Cameron, *Jurisdiction and Admissibility Issues under the ICC Statute, in* The Permanent International Criminal Court 65, 81 (Dominic McGoldrick et al., eds., 2004).

Having explained in broad strokes why this course of action is seen as morally justified, the next part seeks to address certain considerations of 'reasonableness' for the exercise of such jurisdiction.

At the outset, this is perceived as a question of interpretation of article 12(2)(a) ICC Statute. Accordingly, the effects doctrine is treated as another form of objective territorial jurisdiction, the difference being on the type of effects required for the Court's jurisdiction under article 12(2)(a). In this context, as Cameron explained, the effects doctrine is simply one more way for the juridical localisation of criminal activity,[120] to which the Court may have recourse through its *kompetenz kompetenz*. Therefore, as the *Nippon* Court, through interpretation of its national jurisdiction, decided that it is "not much of a stretch" to read the effects doctrine in national criminal law,[121] similarly it could be argued that it would not be a 'stretch' to have this rule 'read' by the permanent International Criminal Court through interpretation of the Rome Statute. In this context, it is irrelevant that the Court is an international court, as opposed to a national court. Its power to dynamically interpret its Statute stems from general principles of law, rather than directly from state consent.[122] State decisions accepting criminal jurisdiction under territoriality for agreements to commit crimes concluded abroad, when the intended location of the main crime is within that state's territory (irrespective of whether the agreed crime ever manifested or not) serve as an additional source of inspiration to this end.[123]

Finally, this argument is believed to be consistent with the use of teleological interpretation in order to "enable the system to (…) attain its appropriate effects, while preventing any *restrictions* of interpretation that would render the provisions of the treaty inoperative (emphasis in the original)."[124] This interpretation could assist in bridging at least partly the gap between the universalist principles underlying the Court's operation (prevent and punish crimes of international concern) and the sovereignty-oriented rules (territoriality, nationality) it was equipped with.[125]

The limit to this jurisdictional assertion on the part of the Court is outlined by the principle of non-intervention. In this context, an objecting party under article 19(2) ICC Statute would need to prove that the effects, on which the Court is basing its jurisdiction, do not qualify as a 'substantial connecting link' between the territory of a state party and the criminal activity in question, in light of the overall circumstances.

In this context, a number of objections may be made. Among others, it has been noted that states have reserved for themselves the prerogative of classification under their national law of the 'effects' that need to manifest in their territory for the exercise of criminal jurisdiction. This is consistent with the prevailing state attitude of flexibility in criminal jurisdiction, so as to avoid impunity.

The main problem in this regard is that the Court would have to break new ground, at least insofar as such proposition is entirely novel in legal history – much as the Court's existence itself. It is this absence of a body of law in support of this proposition that makes this an interesting perspective *de lege ferenda*.

As such, it seems that whether one accepts or rejects the effects doctrine and its application by the ICC depends correspondingly on the point where each lawyer draws the line between the use and abuse of the Court's *kompetenz kompetenz*. Evidently, this case of teleological interpretation is no different than others; the tension between the morally appropriate option and the 'realistically possible' one is clear. That said, there is an argument to be made in favour of the use of the effects doctrine by the Court. Although it is a contentious one, it is believed that it merits closer attention, in light of the criminal conduct involved. Ultimately, it is up to the Court's organs to decide whether and, if so, when the circumstances are ripe for reading the effects doctrine in article 12(2)(a) ICC Statute.

120 Cameron, *supra* note 81, at 64.

121 U.S. v. Nippon, *supra* note 11, at 6.

122 Prosecutor v. Gombo*,* Case No. ICC-01/05-01/08, Decision Pursuant to Article 61 (7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 10, ¶ 23 (June 15, 2009).

123 See *supra* for Somchai Liangsiripraesert and Davis*, supra* note 74. Further on attempt and territorial jurisdiction, *supra* Chapter 2.

124 Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Adjourning the Hearing pursuant to Article 67(7)(c)(ii) of the Rome Statute, ¶ 36 (Mar. 3, 2009).

125 *See* Introduction, Chapter I.

CHAPTER 7 / BELLIGERENT OCCUPATION AND ICC TERRITORIAL JURISDICTION

7.1. / INTRODUCTION

In the previous chapters some of the main doctrinal issues surrounding the interpretation of article 12(2)(a) ICC Statute and the possibilities under international law for the localization of criminal acts were considered. In this chapter attention will be given to issues relating to the concept of territory in that provision ("the territory of which") and the territorial scope of application of the Rome Statute.

At the outset, it can be stated that there is no shortage of 'grey areas'. Typical examples would be the commission of crimes falling within the jurisdiction of the ICC committed in territory, the title to which is disputed between two or more states parties and states not parties to the ICC Statute. Further such examples would be the commission of crimes in a maritime zone or an island, the extent or territorial status of which is disputed between a state party and a state not party to the ICC Statute. This list, of course, does not include the more extreme instances of crimes committed in air space at an altitude exceeding 100 kilometres, crimes committed in new, disputed areas around the Poles, or crimes committed over – or through – the internet (primarily incitement to genocide).[1]

Especially as regards crimes committed on disputed territory, it has been accurately observed in the literature that the Court might find itself in a difficult position, somewhat at odds with its prescribed mandate. This is due to the fact that the Court would be asked in effect to make, as a preliminary jurisdictional matter, a finding concerning the question of sovereignty over territory, in order to satisfy itself that it 'appears' to have, or later on that it finally has jurisdiction over a situation or a case. In so acting, however, the Court would seemingly distance itself from its proper role as a criminal Court, only to assume a judicial function similar to that of the ICJ in inter-state territorial, maritime or boundary disputes.[2]

One cannot but agree with this introductory observation on a general level. However, it seems that such situations have troubled other courts in the past. These jurisdictions tried to find solutions, albeit – admittedly – not always successful or convincing ones as a matter of international law.[3] That said, it seems that the simple fact of the existence of such occurrences has not stood in the way of the exercise of their judicial function. In this sense, the Court might draw inspiration from their example. It could clarify that its decision on criminal responsibility of an individual is without prejudice to the legal status of the territory. Naturally, this option might not be always available to the Court; in certain circumstances, its decision under article 12 to exercise jurisdiction may have a direct impact on the legal status of territory. The Palestine referral is the obvious example.

1 That is notwithstanding the jurisdiction of the Court on the basis of the 'State of registration' of the ship or aircraft, on board of which the crime was committed, under the second prong of article 12(2)(a) which falls beyond the scope of the present dissertation. Under existing international law, this connecting link is best viewed under nationality rather than territorial jurisdiction. See *infra,* Chapter I.

2 William Schabas, An Introduction to the International Criminal Court 76-77 (2007).

3 Ian Brownlie, Principles of Public International Law 112-3 (7th ed. 2008), on national law. As Brownlie noted, national courts, in an attempt to find a pragmatic solution to the application of treaties over disputed territory and questions of e.g. extradition, have interpreted 'territory' as meaning 'jurisdiction' or 'effective control', to avoid the creation of a legal vacuum. It would seem however that in such cases, national courts have attempted to cautiously tiptoe around the question of sovereignty by adding an – artificial and, with respect, ultimately unconvincing – caveat that the treaties in question did not deal with sovereignty but only with territory and jurisdiction. Schtraks v. Government of Israel, 33 I.L.R. 319, A.C. 556 [1964] (Isr.); *cf.* further In Re LoDolce, 19 I.L.R. 318, to be discussed below, relating mostly to the impact of an armed conflict on the application of a bilateral extradition treaty. As Brownlie himself seems to concede, *id*. at 113, divorcing territory from jurisdiction and territorial sovereignty does not appear appropriate in light of the intricate inter-connection of these legal concepts. The Eur. Ct. H.R. for example has dealt with human rights violations on territory, the legal status of which is unclear. In the case of Ilascu v. Moldova and Russia, App. No. 48787/99, 2004-VII Eur. Ct. H.R. ¶ 333, the Court had to decide the issue of the impact of loss of control and 'residual sovereignty' of Moldova over the Transdniestrian area. The Court explained that in cases of loss of control, such as military occupation or separatist regimes, states parties retain 'jurisdiction' for the purposes of article 1 Eur. Conv. H.R. at least insofar as their positive obligations are concerned. For interesting commentary on this approach, Kjetil M. Larsen, *'Territorial non-Application' of the European Convention on Human Rights*, 78 Nordic J. Int'l L. 73 (2009), addresses the issue of 'residual sovereignty' (at 85-87) and states (at 88) that "the territorial State will always have positive obligations to guarantee the human rights of individuals within its territory, even if the factual circumstances are such that the State exercises no authority in parts of its territory"; Christos L. Rozakis, *Jurisdiction of States and its Limits in the Strasbourg Case-law*, in L'Etat Actuel des Droits de l'Homme dans le Monde, Defis et Perspectives 167, 183-4 (Alice Yotopoulos-Marangopoulos dir. 2006), who considered that the wisdom behind the combination of positive obligations with jurisdiction (whereas normally 'jurisdiction' must exist to have any obligations) attempted in this case is 'disputable'.

In the more limited confines of the present dissertation, it is necessary to choose one of these issues for an in-depth examination. Accordingly, a selection has been made to address one of the most important aspects of the Court's jurisdiction as regards territory, in light of the initial situations pending before the Court; the commission of crimes in occupied territories. A finding of occupation has already been made in the *Lubanga* Case,[4] while such issues may be relevant also as regards potential cases arising out of alleged crimes committed in the Occupied Palestinian Territories[5], occupied Cyprus[6] or even South Ossetia and Abkhazia.[7]

In analyzing the legal questions arising from situations of belligerent occupation in particular, following a brief formulation of the question, reference will be made to the initially to general provisions of the law of treaties concerning the territorial scope of application of treaties (paragraphs 7.2, 7.3). The subsequent paragraphs will be dedicated to the analysis of certain aspects of the law of belligerent occupation, such as the prohibition of annexation and the legal status of occupied territories under international law (paragraph 7.4.1). This is followed by an analysis of the conditions, under which the Court would be able to exercise jurisdiction for crimes committed in occupied territories, namely the delegation of jurisdiction by a state to the Court (at 7.4.2), the existence and exercise of jurisdiction in circumstances of occupation (at 7.4.3) and finally the capacity to conclude treaties (at 7.4.4). The main findings of this first stage of analysis are then briefly outlined (at 7.4.5). Subsequently, the question will be addressed from separate points of view; first, the case of occupation of the territory of a state party by another state party or a state not party (paragraphs 7.5-7.6 – e.g. Uganda/DRC over Ituri, Cyprus/Turkey respectively), and later on the case of occupation of the territory of a state not party by a state party (paragraph 7.7, e.g. Iraq by the UK). General conclusions are offered at the end (paragraph 7.8).

A number of issues will not be discussed in this Chapter. The most important is the Palestine referral to the ICC. This topic requires a separate, in-depth examination under article 12(3) ICC Statute. It has been extensively discussed in scholarly writings and expert opinions offered to the Prosecutor.[8] The answer to this question seems to depend largely on whether Palestine is accepted as a 'state' for the purposes of that provision.[9] Accordingly, it falls beyond the more limited confines of this work.

Further, questions of ICC jurisdiction under article 12(2)(a) in territories under UN Interim Administration deserve a much more detailed examination, including also articles 13, 16, the UN-ICC Relationship Agreement and the UN Charter; as such, they will not be dealt with here.

4 Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, 76 ¶ 220 (Jan. 29, 2007).

5 *See* in this regard Palestine's Declaration under Article 12(3) of the Rome Statute of Jan. 21, 2009, according to which "The Government of Palestine hereby recognizes the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the authors and accomplices of crimes committed on the territory of Palestine since July 1, 2002. As a consequence, the Government of Palestine will cooperate with the Court without delay or exceptions in conformity with Chapter IX." Declaration Recognizing the Jurisdiction of the International Criminal Court, available at http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf (last visited Mar. 20, 2010).

6 The Republic of Cyprus ratified the Rome Statute on Mar. 7, 2002 and became the 55th State Party to the Rome Statute. For details, http://www.icc-cpi.int/Menus/ASP/states+parties/Asian+States/Cyprus.htm (last visited June 30, 2010). For Cyprus in more detail, *infra* Part 7.5.

7 Georgia has been a State Party to the ICC Statute since 2002, long before the 2008 conflagration. Naturally, it is not possible to take up here a thorough examination of the situation in post-August 2008 South Ossetia and Abhazia. The pleadings before the I.C.J. in the CERD Case shed some light to the legal arguments developed by both sides – Georgia's accusations that Russia is an Occupying Power and Russia's refutation on the basis of the self-governance of the local population. Application of the International Convention on Elimination of All Forms of Racial Discrimination, (Geor. v. Russ.), Provisional Measures Order, 2008 I.C.J. Rep. 2008, ¶ 24, 32, 33, 39, 43, 55 (on Georgia's allegations that Russia was in fact occupying certain areas), ¶ 74 (on Russia's refutation of Georgia's allegations). The Court apparently reserved judgment on the issue for later stages of the proceedings.

8 Following a call by the Office of the Prosecutor to that effect, a number of experts have already given their expert opinion on the matter. These opinions, currently numbering 12 submissions at the time of writing are annexed to the Executive Summary offered by the OTP. Situation in Palestine, Summary of submissions on whether the declaration lodged by the Palestinian National Authority meets statutory requirements (May 3, 2010) *available at* http://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281989/PALESTINEFINAL2_2_.pdf (last visited Oct. 26, 2010); from the literature, Yaël Ronen, *Article 12(3) of the ICC Statute and Non-State entities*, 8 J. Int'l Crim. Just. 3, 3-27 (2010); Yuval Shany, *In Defence of Functional Interpretation of Article 12(3) of the Rome Statute: A Response to Yaël Ronen,* 8 J. Int'l Crim. Just. 329 (2010); William T. Worster, *The Exercise of Jurisdiction by the International Criminal Court over Palestine,* 26 Am. U. L. Rev. (forthcoming, on file with author).

9 The Rome Statute of the International Criminal Court, July 7, 1998, art. 12(3) 2187 U.N.T.S. 3 (entered into force July 1, 2002).

7.2. / THE PROBLEM AND THE ROLE OF INTERNATIONAL RULES

This chapter will explore the meaning of the words "territory of State Party" and correspondingly the territorial scope of application of the Statute through the lens of article 12(2)(a) in situations of belligerent occupation. This would be the case, for example, when a state party is occupying a state not party. Would, for example, the fact that the United Kingdom exercised effective control over parts of occupied Iraq in 2003-2004 suffice for subjecting crimes committed there to the jurisdiction of the Court under article 12(2)(a)?[10] Or, in the reverse, when a state not party is occupying territory of a state party – such as in the case of Turkish occupation of Northern Cyprus (or arguably even Russia and South Ossetia/Georgia and possibly even Palestine by analogy)?

In this framework, in the context of state responsibility – as opposed to individual criminal responsibility – international courts[11] and human rights monitoring organs[12] have explained that a state is internationally responsible for breaches of its obligations in territories under its control. Can it be said that a similar line of reasoning, made in the context of specific treaty commitments and the discussion of state responsibility, is decisive also as regards individual criminal responsibility under the Rome Statute? Is the rule of effective control mostly encountered in ECtHR jurisprudence concerning state responsibility for human rights violations applicable as regards the individual criminal responsibility of (high ranking) state officials for crimes falling within the jurisdiction of the ICC under article 12(2)(a)? These are some important questions that will be addressed here.

At the outset, it is important to note that, in such cases, jurisdiction might be established less controversially by recourse to article 12(2)(b) (nationality jurisdiction). The Prosecutor, in his February 2006 letter explaining the reasons for his refusal to open an investigation in Iraq and Venezuela, underlined that, as Iraq was not a state party, the Court had only jurisdiction over nationals of state parties.[13] The issue of territorial jurisdiction was addressed in a brief cryptic statement contained in a footnote; "The Office examined arguments submitted subsequently that were based on alleged connections to the territory of States Parties, but in light of the applicable law under Article 21, the peripheral connections indicated by the available information did not appear to satisfy the requirements for territorial jurisdiction."[14] As the Office of the Prosecutor did not clarify the requirements of territorial jurisdiction, 'in the light of the applicable law under Article 21', as well as the requisite corresponding connections to the territory of states parties that

10 A related topic has been considered mainly in the framework of the Eur. Conv. H.R.. According to the UK Manual, "Where the occupying power is a party to the European Convention on Human Rights the standards of that Convention may, depending on the circumstances, be applicable in the occupied territories". UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, 282, ¶ 11.19 (2004). The House of Lords for its part has accepted the application of the Eur. Conv. H.R. in British detention facilities in Basra in Al-Skeini and Al-Jedda, although in the end the violation of Eur. Conv. H.R. rights was considered overridden by security concerns embodied in a Security Council Resolution. R. (Al-Skeini) v. Secretary of State for Defence, [2007] UKHL 26; R (on the application of Al-Jedda) v. Secretary of State for Defence, [2007] UKHL 58; Nigel White, Democracy Goes to War, British Military Deployments under International Law 23-24, 289-90 (2009); note here also Shany's valid criticism of the Al-Skeini decision by the English Court of Appeal [R.(Al-Skeini) v. Secretary of State for Defence, [2005] EWCA (Civ.) 1609, ¶ 124], insofar as it held that, while the UK was an occupying power in Basrah City, it was not in effective control as regards its duty to fulfill its "basic obligations under the law of occupation – to maintain law and order in Basrah." Y. Shany, *Binary Law Meets Complex Reality: The Occupation of Gaza Debate*, 41 Isr. L. Rev. 68, 80-1 (2008).

11 Legal Consequences for States of Continued Presence of South Africa in Namibia (Southwest Africa) notwithstanding Security Council Resolution 276 Advisory Opinion, 1971 I.C.J. Rep. 16 at 53-54 ¶ 118 (hereinafter Namibia Advisory Opinion).

12 In detail *infra* Part 7.6.2.2., 7.7.

13 Letter of the Office of the Prosecutor, 9 February 2006, available at http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf **(last accessed June 30, 2010).**

14 *Id.* at 3, n. 9.

were considered relevant in the analysis, they remain elusive. Be that as it may, the situation was eventually filed for reasons of gravity and admissibility.[15]

However, while the invocation of article 12(2)(b) might suffice for asserting jurisdiction over a situation, questions concerning the nationality of specific suspects (e.g. dual nationality, lack of nationality, different nationality) might create further complications and eventually allow certain suspects to evade the ICC unscathed.[16]

Furthermore, it might be equally preferable for the Prosecutor to simply opt for the use of localization devices, in order to constructively localize the criminal activity in question clearly within a state party's national boundaries. Bantekas, for example, has suggested that crimes committed in Iraq by UK or Spanish military officers could be constructively considered as having occurred in London or Madrid, particularly as regards orders given by Heads of State and high ranking state officials – or their failure to act under command responsibility. In his view, such acts might fall well within the ambit of the jurisdiction of the Court under the localization devices of subjective or objective territoriality or ubiquity ('the place where conduct commenced' or 'commission in whole or in part').[17]

Indeed, this option was reviewed in previous chapters. However, as indicated there, a potential problem lies in the use of article 21 by the Court and the – unlikely, it is submitted – possibility that the Court might consider such rules not to constitute customary law or not to qualify as general principles of law, under article 21(1)(b) and (c) of the Statute respectively.

However, even if the Court does consider such rules to constitute applicable (customary) law, their exact scope may be difficult to ascertain. After all, the Statute does refer, for example, to 'attempts' in article 25(3)(f) – but it offers no guidance as to where an attempt is committed (e.g. in the place where the 'substantial step' took place, or where the crime would be committed, or in both). Furthermore, considering that different national laws may provide for different yardsticks for the determination of the 'constitutive elements' of an alleged crime (or even for different definitions of crimes altogether),[18] when applying ubiquity ('commission in part' – which part exactly is crucial?) the possibility of meritorious jurisdictional objections becomes less remote. Lastly, such possibility cannot be excluded altogether, considering the high threshold of uniformity demanded by the Court for the determination of general principles under article 21(1)(c).

The silence of the Statute on the territorial parameter of the Court's jurisdiction is evident also in the case of occupation. It is true that a footnote in the Elements of Crimes specifies that cases of occupation are also considered as international armed conflicts. However, this observation seems to relate more to the contextual element for the commission of war crimes (jurisdiction *ratione materiae*), rather than to issues

15 *Id*. at 8-9. From the literature on the Iraq and Venezuela communications, Melanie O' Brien, *The impact of the Iraq Communication of the Prosecutor of the International Criminal Court on War Crimes Admissibility and the Interests of Victims*, U.C. Dublin L. Rev. (Symposium Edition) 109, 111, 119-25 (2007), who seems to accept that the Prosecutor reached the right conclusion, although for the wrong reasons, highlighting particularly the complementarity component of the situation and criticizing the Prosecutor's attitude in assessing victim's rights; William Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. Int'l Crim. Just. 731, 739, 748 (2008), criticizing sharply the Prosecutor's approach to gravity in Iraq, in comparison to other situations; Jan Wouters et al., *The International Criminal Court's Office of the Prosecutor: Navigating between Independence and Accountability?,* 8 Int'l Crim. L. Rev. 273, 316 (2008), on the other hand, conclude that the OTP's refusal to look into Iraq and Venezuela demonstrates that "the Prosecutor is not bound for a loose hunt"; further, Robert W. Heinsch, *Possibilities to Prosecute War Crimes Committed in Iraq: The Different Forum Options*, 16 Internationales Völkerrecht 132, 132-4 (2003). Taking into account this practice, it has been asserted in the literature that, when assessing communications under article 15, "the Prosecutor seems to focus mainly on the legal qualification of the facts, rather than the alleged perpetrators"; Dov Jacobs, *A Samson at the International Criminal Court: The Powers of the Prosecutor at the Pre-Trial Phase,* 6 Law Pract. Intl Cts Tribunals 317, 322 (2007).

16 For an overview, Zsuzsanna Deen-Raczmany, *The nationality of the offender and the jurisdiction of the International Criminal Court*, 95 Am. J. Int'l L. 606, 606-623 (2001).

17 Ilias Bantekas, *Head of State Immunity in the Light of Multiple Legal Regimes and Non-Self-contained System Theories*, 10 J. Conflict and Security L. 21, 39-40 (2005). Naturally, Bantekas explained that this possibility may exist "at some hypothetical future time", in light of prevailing political exigencies. William Schabas, *Complicity before the International Criminal Tribunals and Jurisdiction over Iraq*, in Phil Shiner, The Iraq War and International Law 143 (P. Shiner & Andrew Williams eds. 2008), seems also to entertain the idea. More clearly, W. Schabas, The International Criminal Court, A Commentary on the Rome Statute 285 (2010).

18 Int'l L. Ass'n Working Group on the ICC, *Third Report , International Criminal Court,* Rio de Janeiro Conference, 4-7 (by rapporteurs Göran Sluiter & William Schabas); *See supra* Part 5.5.1. in detail.

of territorial jurisdiction.[19] Additionally, the Statute does classify as a war crime within the Court's jurisdiction an offence particular to situations of occupation, the transfer of population and settlers.[20] However, in those situations as well, questions of territorial jurisdiction are left unanswered in the key documents of the Court.

In keeping therefore with the process suggested in the previous Chapter,[21] the present analysis will treat this issue principally as a question of interpretation. It is therefore submitted that the meaning of territory and the intertwined issue of the territorial scope of the Court's jurisdiction are to be deduced through a process of interpretation, on the basis of the Court's rules of interpretation.

In this context, the rules of international law are used to inform the entire discussion primarily as instruments of interpretation, in accordance with article 31(3)(c) VCLT. In the alternative, such rules of international humanitarian law could be used as sources of law in accordance with article 21 of the Statute, if no reasonable results are forthcoming from the interpretation of the article 12(2)(a).[22]

It is therefore necessary, in an effort to address these questions, to make reference to general treaty law and subsequently to some of the basic axioms of the law of belligerent occupation.

7.3. / THE TERRITORIAL APPLICATION OF THE ROME STATUTE AS AN INTERNATIONAL TREATY - ARTICLE 29 VCLT

Under article 29 of the 1969 Vienna Convention on the Law of Treaties, "[U]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."[23] The substance of the provision seems to be that "a treaty is to be presumed to apply with respect to all the territories under the sovereignty of the contracting parties", unless the party in question has clearly stated its intention to the contrary.[24] That said, the 1969 Vienna Convention does not strictly define what the term 'entire territory' involves. The ILC[25] and authors[26] seem to converge to the view that 'entire territory' for the purposes of article 29 VCLT can be considered as "a comprehensive term designed to embrace all the land and appurtenant territorial waters and air space which constitute the territory of the State",[27] unless states parties exclude clearly a certain territory from the scope of application of the treaty.

19 The footnote itself appears as a reference clarifying the content of the contextual element of international armed conflict for the war crime of wilful killing, under article 8(2)(a)(i) of the Statute. Elements of Crimes, **ICC-ASP/1/3 (part II-B)**, Sept. 9, 2002, article 8(2)(a)(i), at 15, n. 34. In detail, see *infra*. This seems to be confirmed by the approach of the Pre-Trial Chamber in the Lubanga Confirmation of Charges Decision, *supra* note 4, *see infra* in detail.

20 Under article 8(2)(b)(viii), "the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory" constitutes a war crime.

21 See generally *supra* Part 5.1.2.4.

22 For the position that this approach corresponds to the 'consistent case law' of the Court, see Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir, ¶ 44 (Mar. 3, 2009).

23 For the view that article 29 reflects customary international law, Mark E. Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties 393 (2009).

24 Third Report on the Law of Treaties, [1964] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/167 and Add. 1-3, 13, ¶ 4 (by Special Rapporteur Humphrey Waldock). As regards overseas territories, the Special Rapporteur took the view that a slight modification of the rule was warranted to the effect that "in the absence of a territorial clause or other indication of a contrary intention, a treaty is presumed to apply to all the territories for which the contracting States are internationally responsible." *Id.* at 14-15, ¶ 7. His opinion on the latter aspect was not endorsed by the Commission in the end. *Id.* at 179-180, ¶ 4. As such, the matter of overseas territories falls under the general clause.

25 Rep. of the Int'l L. Comm'n, [1964] 2 Y.B. Int'l L. Comm'n, U.N. Doc A/CN.4/173, Draft Article 57, Commentary, 179-180, ¶ 3-4.

26 Anthony Aust, Modern Treaty Law and Practice 200-1 (2007); 1 Lassa Oppenheim, Oppenheim's International Law 1250-1 (R. Jennings and A. Watts eds. 9th ed., 1992); Symeon Karagiannis, *Article 29*, in Les Conventions de Vienne sur le droit des traités: commentaire article par article 1189-91 (Olivier Corten & Pierre Klein eds. 2006); Villiger, *supra* note 23, at 392-3.

27 Rep. of the Int'l L. Comm'n, [1964], *supra* note 25, at 179, ¶ 3.

In the case of the Rome Statute, it would seem that such questions do not arise as prominently as they might in the context of other international treaties, since the Statute does not allow reservations,[28] and there have been only few 'territorial declarations'.[29] That said, one cannot but agree that, in the realistically small chance that crimes within the Court's jurisdiction are committed on territories, for which territorial declarations have been submitted, the Court could potentially imitate the practice of the European Court of Human Rights and sever those declarations as reservations impermissible under the Statute.[30]

Finally, as Villiger notes, article 29 VCLT "determines the territory with regard to which the treaty is binding and creates rights and obligations, and thus falls to be distinguished from the territory or area in which the treaty is to be performed, through the two notions may coincide."[31] Thus, while the Rome Statute is applicable within the territory of all states parties, it is also intended to apply beyond those territories for crimes committed there by nationals of states parties.[32]

As such, it is indisputable that the Statute shall apply to all areas, which fall to be considered under applicable international law as 'territory' of a state, in the sense of full sovereignty, rather than simply sovereign rights areas (EEZ and continental shelf).[33] This conclusion is important for the condition of occupation, where it is said that "[t]he effect of occupation on treaty obligations […] turns in large part on

28 Rome Statute, *supra* note 9, at art. 120, no reservations are permitted.

29 Following Denmark's withdrawal of its declaration excluding the Faroe Islands and Greenland, it would seem that the only such declaration applicable at the moment is New Zealand's concerning Tokelau. The text of the only remaining declaration reads as follows: "consistent with the constitutional status of Tokelau and taking into account its commitment to the development of self-government through an act of self-determination under the Charter of the United Nations, this ratification shall not extend to Tokelau unless and until a Declaration to this effect is lodged by the Government of New Zealand with the Depositary on the basis of appropriate consultation with that territory", Schabas, *supra* note 2, at 77-78; the text of all declarations and relevant statements is available at the official U.N. website, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en (last visited June 30, 2010); finally, note the 'reminder' announcement of the King of Jordan, upon the ratification of the Statute by that state, to the effect that Jordan had renounced all sovereign claims over the OPTs. The legal effect of this announcement is unclear. It was probably not intended as a reservation or an interpretative declaration by Jordan. It would appear that its purpose was primarily to clarify Jordan's position on the matter of ICC jurisdiction over the West Bank by reason of Jordan's ratification of the Statute. William Bourdon, *Jurisdiction of the International Criminal Court over Human Rights Violations Committed by the Israeli Forces in the Occupied Territories After July 1, 2002*, 12 Palestine Y.B. Int'l L. 165, 178 (2002-2003); in fact, Jordan has made an interpretative declaration, which is silent on the matter. The text of Jordan's declaration is available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en (last visited June 30, 2010); for Jordan's 'disengagement' from the West Bank, Jordan, *Statement Concerning Disengagement from the West Bank and Palestinian Self-Determination*, 27 I.L.M. 1637, 1640-2 (1988); Article 3(1); Annex I (a), Article 1 of the 1994 Israel-Jordan Treaty of Peace, 34 I.L.M. 43, 47, 54 (1995); while under article 3(2) of the Agreement, *id.* at 47, the frontier delimitation was "without prejudice to the status of any territories that came under Israeli military governmental control in 1967", as Dinstein notes, the effect of this agreement was first that "the international boundary between the two countries was drawn along the Jordan river" and secondly that the Palestinians were given "a free hand to press ahead with bilateral negotiations concerning the final status of the area." Yoram Dinstein, The International Law of Belligerent Occupation 15 (2009).

30 Schabas, *supra* note 2, at 77-8; Sharon Williams & W. Schabas, *Article 12*, in Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article 557 (Otto Triffterer ed. 2nd ed. 2008). For the proposition that the practice of severing incompatible reservations constitutes a development of the law by human rights bodies to questions that the I.C.J. was never asked and could not foresee in the Genocide Advisory Opinion, Armed Activities on Territory of Congo, (Dem. Rep. Congo v. Rwanda) 2006 I.C.J. Rep. 6, ¶ 15-16, Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma.

31 Villiger, *supra* note 23, at 391.

32 A legal proposition that, as Cryer notes, has raised "less ire" than the jurisdiction over third-state nationals for crimes committed on State-Party territory. R. Cryer, *The International Criminal Court and its relationship to Non-Party States,* in The Emerging Practice of the International Criminal Court 117 (Carsten Stahn & Goran Sluiter eds. 2009).

33 Aust, *supra* note 26, at 201; 1 Oppenheim, *supra* note 26, at 1250, n. 2; Villiger, *supra* note 23, at 392. This approach is particularly sensible in the light of the exclusive jurisdiction enjoyed by each state for criminal matters within its territory. Some declarations, however, by states parties upon the ratification of the Statute might prove less innocent than they appear at first sight. Portugal, for example, declared that "The Portuguese Republic declares the intention to exercise its jurisdictional powers over every person found in the Portuguese territory, that is being prosecuted for the crimes set forth in article 5, paragraph 1 of the Rome Statute of the International Criminal Court, *within the respect for the Portuguese criminal legislation* . . . . (emphasis added)." The impact (if any) that national law might have for the exercise of the Court's jurisdiction with regard to territory remains to be seen (possible limitations/special status as regards overseas territories for example). It is noteworthy that a declaration made by Uruguay subjecting in effect the Statute to its constitutional law was eventually withdrawn. The statements are available at
http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en (last visited June 30, 2010).

the definition of territory."[34] In this context, an examination of the international humanitarian law of occupation appears necessary for the disposition of such issues.

7.4. / OCCUPATION AND TERRITORY – THE PROHIBITION OF ANNEXATION

7.4.1. / THE APPLICABLE LEGAL FRAMEWORK

Notwithstanding applicable customary law, the rules regulating belligerent occupation are to be found mostly in articles 42-56 of the 1907 Hague Regulations (hereinafter The Hague Regulations),[35] the 1949 Geneva Convention IV on the protection of civilians – particularly articles 27-34 and Section III, articles 47-78, (hereinafter Geneva Convention IV),[36] as well as in the 1977 Additional Protocol I, especially articles 63, 68, 69 and 71 (hereinafter Additional Protocol I).[37] While it has been authoritatively ruled since Nuremberg that The Hague Regulations are part of customary international law,[38] for Geneva Convention IV there are some doubts[39] – although it is universally ratified.[40] As far as Additional Protocol I is concerned,

34 Naomi Burke, *A Change in Perspective: Looking at Occupation through the Lens of the Law of Treaties*, 41 N.Y.U J. Int'l L. & Pol. 103, 118 (2008-2009).

35 Convention (IV) Respecting the Laws and Customs of War on Land, Annex to the Convention, Regulations Respecting the Laws and Customs of War on Land, *reprinted in* 2 Am. J. Int'l L. 90-117 (1908 Suppl.). The relevant Section III was first composed as an Annex to the Hague Convention II of 1899 and later on in The Hague Convention IV 1907. Further, Dinstein, *supra* note 29, at 4-5; Christopher Greenwood, *The Administration of Occupied Territory in International Law*, in Essays on War in International Law 355 (2006).

36 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287-417 (1950). According to Geneva Convention IV art. 154, the rules of occupation of the Civilians Convention shall be supplementary to the rules of The Hague Regulations.

37 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3, 608 (1979), *reprinted in* 16 I.L.M. 1391-1441 (1977). Generally on the sources, Dinstein, *supra* note 29, at 4-8.

38 Hermann Goering et al., Trial of Major War Criminal, International Military Tribunal, 467 (Nuremberg Tral); Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 171, ¶ 8 (hereinafter Wall Advisory Opinion); Legality of Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. Rep. 78, ¶ 75, 80-81.

39 Dinstein, *supra* note 29, at 7; Tristan Ferraro, *Enforcement of Occupation Law in Domestic Courts: Issues and Opportunities*, 41 Isr. L. Rev. 331, 341-2 (2008); Sander D. Dikker Hupkes, What Constitutes Occupation? Israel as the occupying Power in the Gaza Strip after the Disengagement 26-27 (2008). The I.C.J.'s reference to the great majority of the provisions of the Convention as "intransgressible principles of customary law", Nuclear Weapons Advisory Opinion, *supra* note 38, at ¶ 79, 82, is said to have further stimulated this discussion. For rulings in support of the customary law nature of the Geneva Conventions, Prosecutor v. Tadić, Case No. IT-94-I-T, Judgment, ¶ 577 (May 7, 1997); Partial Award, Central Front, Ethiopia Claim 2, ¶ 15-17, Eritrea Ethiopia Claims Commission, 43 ILM 1275 (Apr. 28, 2004), at 1279; *id.,* Eritrea Claims 2, 4, 6, 7, 8 and 22, 1254-5, ¶ 21-22, with further references; note also the position in the Int'l Committee of the Red Cross study of customary humanitarian law in 1 Jean Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law xxxvi, I-li. (2005); *cf.* Nicholas F. Lancaster, *Occupation Law, Sovereignty, and Political Transformation: Should The Hague Regulations and the Fourth Geneva Convention still be considered customary international law?,* 189 Mil. L. Rev. 51, 90 (2006), who argues that, "[c]urrent occupation practice indicates that provisions of the Hague Regulations and Fourth Geneva Convention restricting the authority of an occupier to legislate in the economic and political arenas, while still valid as conventional international law, should no longer be considered reflective of customary international law". The 'current occupation practice' referred to in detail by that author (at 77-89) includes S.C. Res. 1483/2003 and examples of the legislative overreach of the Iraqi Coalition Authority in violation of applicable humanitarian law rules.

40 At present, there are 194 Parties to the Geneva Convention IV. See for details http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf. For an analysis of the significance of the customary law value of the Conventions, see however, Theodor Meron, *The Geneva Conventions as Customary Law*, 81 Am. J. Int'l L. 348, 349 (1987).

its status as a whole under customary law is disputed.[41] Finally, these rules are applicable in every occupation, irrespective of whether the occupation results from the use of force in self-defence or is due to aggression or the previous condition of the occupied territory.[42]

7.4.1.1. / OCCUPATION: DEFINITION

The definition of occupation is a complex one.[43] Under article 42 of the 1907 Hague Regulations, "[T]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." Courts and authorities alike have struggled with this definition and the questions of how much or what type of control is 'effective'[44] or whether a territory is occupied only when it is 'actually placed' under foreign military authority, or also when the exercise of such authority is possible over that area.[45] Although since the ICJ's ruling in the *Armed Activities Case* the 'actual control' test seems to have gained ground,[46] for the purposes of the present dissertation both approaches will be considered equally valid.[47]

A factual change of authority in control of certain territory may be made with state consent or under conditions of coercion, usually involving the use of force.[48] In the first case reference is made to 'pacific occupation', whereas in the second to 'belligerent occupation'. As the part of pacific occupation seems today to involve mostly considerations of whether a state consented to such a shift in the exercise of authority and if so, the limits of the consent,[49] the emphasis in the present part will be on belligerent occupation (hereinafter: occupation), or more descriptively, on "cases in which a state engaged in an international

41 For a recent discussion, Dikker Hupkes, *supra* note 39, at 39; more extensively, Christopher Greenwood, *The Customary Law Status of the 1977 Additional Protocols*, in Essays on War in International Law 179-201, 222 (2006). Importantly, Israel and the United States have refused to ratify Additional Protocol I; Dinstein, *supra* note 29, at 7-8 underlines that some provisions of the Additional Protocol I have been accepted as reflecting customary law by the Israeli Supreme Court. The Eritrea Ethiopia Claims Commission rulings, *supra* note 39, shed some light in the discussion. While the Commission had little difficulty asserting time and again that the Geneva Conventions formed part of customary law, when the question arose with regard to Additional Protocol I, the Commission took a more nuanced approach. It accepted that "most of the provisions" of AP I constituted customary law.

42 Greenwood, *supra* note 35, at 355-6. Further *infra*.

43 Among the most comprehensive treatments of the topic, Adam Roberts, *What is a military occupation?,* 55 Brit. Y.B. Int'l L. 249-305 (1984).

44 Dinstein, *supra* note 29, at 43 describes this as "an imponderable problem". Further on the question of effective control, Gerhard von Glahn, The Occupation of Enemy Territory – A Commentary on the Law and Practice of Belligerent Occupation 28-29 (1957); 2 Oppenheim's International Law, Disputes, War, and neutrality, (Hersch Lauterpacht ed., 1957) at 435-7; for a more recent analysis, Dikker Hupkes, *supra* note 39, at 20-24.

45 In favour of the position that "the capacity to send troops within a reasonable time to make the authority of the occupying power felt" also qualifies as occupation, *see* Prosecutor v. Naletilić and Martinovic, Case No. IT-98-34-T, Judgment, ¶ 217 (Mar. 31, 2003); further, U.S. v. List (The Hostages Case), 8 L. Rep. Trials Major War Crim. 38, 55-56 (1949), at at 55-56; Armed Activities, Separate Opinion of Judge Kooijmans, *supra* note 30, ¶ 38-49, with references to the literature; *id.* ¶ 32-35, Separate Opinion of Judge Parra-Aranguren, who, for his part, agreed with the Court on the applicable legal test for Article 42 HagReg, but distanced himself from the factual findings of the Court; for the distinction between the degree of control required for the establishment of the effective control over territory and the maintenance of such control, Dikker Hupkes, *supra* note 39, at 21 with references.

46 As the Court explained, its task involved satisfying itself that "the Ugandan armed forces in the Democratic Republic of the Congo were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government." In that case, the Court accepted that Uganda was occupying parts of the DRC, on account of the criterion of "whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question." 2005 I.C.J. Rep. ¶ 173.

47 The UK Manual seems to follow this approach, *supra* note 10, at 275, ¶11.2, 11.3. Some authors accept that occupation may exist when forces are not physically present, but may be physically present within a short period of time, for the purposes of maintaining control. For this perspective, 2 Oppenheim, *supra* note 44, at 435; Eyal Benvenisti, The International Law of Occupation 2 (2004); Dikker Hupkes, *supra* note 39, at 21, 31-35 with even broader suggestions; Y. Shany, *The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. Prime Minister of Israel*, 42 Isr. L. Rev. 101, 104-6 (2009); this seems, importantly, to be also the position of the Israeli Supreme Court; *see id.* Benvenisti and Shany, with extensive references.

48 Dinstein, *supra* note 29, at 31-36.

49 Michael Bothe, *Pacific Occupation*, 3 Encyclopedia Pub. Int'l. L. 767; Yutaka Arai-Takahashi, The Law of Occupation, Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law (2009) at 40-42; 2 Georg Schwarzenberger, International Law as applied by International Courts and Tribunals 184 (1949) for the proposition that the same rules applied to both military and pacific occupation as far as the consequences flowing from the occupant's control are concerned, Anglo-Chzechoslovak and Prague Credit Bank v. Janseen, 12 A.D. 43-47 (1943-1945) (V.S. Ct.) (Austl.) and Arnold McNair & Arthur Watts, The Legal Effects of War 423 (4th ed. 1966) with criticism.

armed conflict gains control of territory which, prior to the conflict, was under the control of one of its adversaries."[50]

Although it is a matter disputed between authorities,[51] as far as the legal nature of occupation is concerned, it seems best to endorse the view that "occupation, like war itself, is a fact recognised and regulated by international law, not an institution created by it"; its foundation rests on military success rather than international law.[52] As a consequence, it seems more appropriate to address the prerogatives of the occupant as responsibilities vested in it by international law due to this factual situation, rather than as an award of positive rights.[53]

The next paragraphs will be dedicated to a brief examination of two important aspects of occupation law for the purposes of the present study; the temporary character of the occupation and the prohibition of annexation.

7.4.1.2. / THE TEMPORARY CHARACTER OF OCCUPATION

One of the cornerstone principles of the law of belligerent occupation is that an occupation is perceived as a temporary factual situation, as the occupant does not acquire sovereignty over occupied territory. As a consequence, the Occupying Power, in performing its quasi-fiduciary role during the occupation, should produce only minimal changes to the existing legal situation in the occupied territory.[54] It is clear that the "international law of belligerent occupation is built upon the assumption that the occupying power does not acquire sovereign rights over the territory, but exercises provisional and temporary control."[55] This seems to be the spirit expressed mainly in articles 42-43 of the 1907 Hague Regulations,[56] as well as in articles 47 and 64 of the 1949 Geneva Convention IV.[57]

7.4.1.3. / THE PROHIBITION OF ANNEXATION

50 Greenwood, *supra* note 35, at 354.

51 Benvenisti, *supra* note 47, at 8, n. 9, provides extensive literature on both sides of the argument.

52 Greenwood, *supra* note 35, at 363-4.

53 *Id.;* more extensively, Conor McCarthy, *The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq,* 10 J. Conflict & Sec. L. 43, 46-47 (2005).

54 2 Oppenheim, *supra* note 44, at 433-4, 436, 437; Benvenisti, *supra* note 47, at 8; Y. Arai-Takahashi, *supra* note 49, at 42-43; Malcom N. Shaw, *Territorial Administration by non-territorial sovereigns*, *in* The Shifting Allocation of Authority in International Law, Essays in Honour of Ruth Lapidoth 379 (Tomer Broude & Yuval Shany eds. 2008), referring to the focus of occupation law on the "minimalist interference with the pre-existing framework"; von Glahn, *supra* note 44, at 31; Hans-Peter Gasser, *Protection of the Civilian Population*, in The Handbook of International Humanitarian Law 277-8 (Dieter Fleck et al. eds. 2nd ed. 2008); Marco Sassòli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, 16 Eur. J. Int'l L. 661, 668 (2005); Robert Kolb & Sylvie Vite, Le Droit de l'occupation militaire, Pespectives historiques et enjeux juridiques actuels 185-6 (2009).

55 Gasser, *supra* note 54, at 273. Compare here the position of the UK Manual of War, *supra* note 10, at 278, ¶ 11.9, "[o]ccupation differs from annexation of territory by being only of a temporary nature. During occupation, the sovereignty of the occupied state does not pass to the occupying power. It is suspended".

56 Article 43 of the 1907 Hague Regulations provides that "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country". Further, Greenwood, *supra* note 35, at 357-8. For the proposition that the purpose of the Hague Regulations at the time of drafting was to protect the interests of the sovereign while another sovereign is in control of his territory, rather than the interests of civilians (as in Geneva Convention IV), Christopher Greenwood, *International Humanitarian Law (Laws of War), in* The Centennial of the First International Peace Conference, Reports and Conclusions 217 (Frits Kalshoven ed. 2000); Jean Pictet, Commentary on Geneva Convention IV 614 (1958); F. Kalshoven & Liesbeth Zegveld, Constraints on the Waging of War, An Introduction to International Humanitarian Law 15 (2001).

57 Geneva Convention IV, art. 47 provides that "Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory". The text of Geneva Convention IV, art. 64 is quoted *infra* in full. Pictet, *supra* note 56, at 273, 275, commenting on Article 64 of Geneva Convention IV, considered that Article 43 of the HagReg "protects the separate existence of the state, its institutions, its laws"; *id.* at 275 on the temporary nature of occupation. Further, McNair & Watts, *supra* note 49, at 369-370.

One of the most important rules concerning belligerent occupation is that the annexation of territory occupied by military conquest is prohibited. In the words of the International Court of Justice, "[a]s the Court stated in its Judgment in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, *(Nicaragua v. United States of America)*, the principles as to the use of force incorporated in the Charter reflect customary international law [...]; the same is true of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force."[58] Under customary international law therefore, the acquisition of sovereignty over territory occupied through the use of force is prohibited;[59] the Court did not distinguish between aggressive or defensive force.[60] In the same spirit, Article 4 of Additional Protocol I specifies that "[n]either the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question."[61]

Pellet has explained the situation lucidly; "there is one point in which writers and judges agree: occupation does not transfer sovereignty. As a consequence of occupation, power changes hands, not sovereignty."[62] In the cases of belligerent occupation therefore, there is an anomalous situation, since the departed sovereign maintains *de jure* territorial sovereignty over the occupied territory, whereas it is the Occupying Power that is exercising actual (*de facto*) effective control, without possessing territorial sovereignty.[63] In such circumstances, it is accurate that "the structure of an occupation under international law is predicated upon the regulation of the actual exercise of power and not its legitimacy, the upholding of public order and the maintenance of the local legal system."[64]

Finally, it should be noted that the prohibition of annexation remains unaffected by the occupation of Iraq 2003-2004. While post-Iraq it has been suggested that certain rules of occupation law have been put under greater pressure, the prohibition of annexation has survived.[65] This is supported by the practice of both of the Security Council and the CPA. The Security Council affirmed time and again the sovereignty of

58 Wall Advisory Opinion, *supra* note 38, at 171, ¶ 87.

59 Arai-Takahashi, *supra* note 49, at 44-45; Dinstein, *supra* note 29, at 49-51; Benvenisti *supra* note 47, at 7-8; Eric David, Principes de Droit des Conflits Armés 562-3 (4th ed. 2008); Enrico Milano, Unlawful Territorial Situations in International Law, Reconciling Effectiveness, Legality and Legitimacy 102-8 (2006); McNair & Watts, *supra* note 49, at 368-369, Indicatively, reference is made to S.C. Res. 662, U.N. Doc. S/RES/0662 (Aug. 9, 1990) declaring null and void and without legal validity Iraq's attempted annexation of Kuwait. Further on the customary nature of the rule and belligerent occupation, Adam Roberts, Transformative Military Occupation: Applying the Laws of War and Human Rights, in International Law and Armed Conflict: Exploring the Faultlines, Essays in honour of Yoram Dinstein 442 (M. N. Schmitt & J. Pejic eds. 2007); but *cf.* Y. Dinstein, War, Aggression and Self-Defence 71 (4th ed. 2005), where Dinstein has argued that in the cases of long-lasting occupations, the Occupying Power may acquire over time certain prescriptive rights; to assume otherwise, in his view, would be to divorce law from reality; Martii Koskenniemi, *Occupation and Sovereignty: Still a Useful Distinction?,* in Law at War: The Law as it was and the Law as it should be, Liber Amicorum Ove Bring 165-9 (Ola Engdahl & Pàl Wrange eds. 2008) has identified at least 5 ways in which the line between sovereignty and military occupation has been put to question, while refuting them (not least) as a matter of principle; finally, under article 47 of Geneva Convention IV, the inhabitants of the occupied territory should not be deprived of their benefits under the Convention in the event of attempted annexation of occupied territory in whole or in part, with or without the consent of the occupied state.

60 It has been argued in the past that Israel for example might acquire sovereignty over territories it seized following its military actions in self-defence in 1967. In this regard, the present author shares the profound misgivings against the validity of this position expressed by authors and summarized recently by Milano, *supra* note 59, at 107-8, arguing that the use of force resulting to acquisition of territory beyond national frontiers would manifestly transgress the limits of proportionality and necessity of self-defence under international law; further, John Dugard, *Report on the Situation of Human Rights in the Palestinian Territories*, UN Doc. E/CN.4/2004/6, ¶ 14 (Sep. 8, 2003).

61 Further, Bruno Zimmerman, *Article 4*, *in* Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 71-73 (Yves Sandoz et al. eds. 1987); in the view of Greenwood, *supra* note 35, at 357, the prohibition of annexation of occupied territory is reflected in the *de facto* nature of the occupant's authority under article 43 HagReg.

62 Alain Pellet, *The Destruction of Troy will not take place*, in International Law and the Administration of Occupied Territories 174 (Emma Playfair ed. 1992).

63 Int'l Committee of the Red Cross Commentary to Geneva Convention IV, art. 47 *supra* note 39, at 274; Dinstein, *supra* note 29, at 49.

64 Shaw, *supra* note 54, at 379.

65 Roberts, *supra* note 59, at 445. The existence and value of the notion of 'transformative occupation' under contemporary law are critically discussed by Nehal Bhuta, *The Antinomies of Transformative Occupation*, 18 Eur. J. Int'l L. 721, 740 (2005), ('[t] he profound difficulties encountered by the United States in realizing its vision of 'transformative occupation' has put into question whether legal recognition of such a notion is either desirable or useful"); *see* also Koskenniemi, *supra* note 59, at 163, 173-174. Koskenniemi offers an eloquent critique of the theoretical attempts to blur the distinction between sovereignty and occupation through what he identifies as 'reduction to purpose' techniques; i.e. techniques that place the 'security and welfare' of population on a par with self-formation through collective decision-making and highlight the social benefits offered by the Occupying Power.

Iraq[66] and stressed the speedy conclusion of the occupation and return to Iraqi self-government.[67] The Occupying Powers themselves underlined their "goal to transfer responsibility for administration to representative Iraqi authorities as early as possible"[68] and the CPA negotiated a timetable for its own dissolution.[69] It has thus been accurately suggested in literature that in Iraq, the situation is best described as one of transfer of authority, rather than sovereignty.[70]

7.4.2. / THE IMPACT OF THE FACT OF OCCUPATION TO THE DELEGATION OF TERRITORIAL JURISDICTION BY THE OCCUPIED STATE TO THE ICC

In the previous chapters it has been clarified that questions of delegation of authority are irrelevant for the use of localization devices of territorial jurisdiction, as the capacity of the Court to interpret and decide on its own jurisdiction is an inherent, rather than a delegated power. In this sense, the Court cannot be seen to be acting outside of its attributed powers when interpreting article 12(2)(a) ICC Statute, since the power to do so is inherently vested in it by operation of general principles of law.[71]

However, contrary to the case of localization approaches, the examination of 'territory' in article 12(2)(a) raises issues of the geographical scope of the Court's operation. These issues may be properly classified as 'constitutional', since they touch upon the Court's establishment under general treaty law and its connection to states parties. This analytical approach is therefore also mandated by the fundamental axiom endorsed here that the notions of state party territory and the geographical scope of ICC jurisdiction in article 12(2)(a) are intertwined; in that respect state and ICC jurisdiction may be characterized as 'co-extensive'.

In this context, the Court does not forsake its power to decide upon its jurisdiction, simply because of the constitutional character of the issues at stake. Although the Appeals Chamber has so far only outlined the limited approach to the Court's *kompetenz kompetenz* (jurisdiction *ratione temporis, loci, materiae and personae*),[72] it is well-established since *Tadić* that international judicial institutions are empowered to deal with such issues by taking a broader approach to that power. [73]

66 S.C. Res. 1483/2003, U.N. Doc. S/RES/1483 preambular ¶ 3 (May 22 2003); S.C. Res. 1511/2003, UN Doc. S/RES/1551 preambular ¶ 2, operative ¶ 1 (Oct. 8, 2003). Note however the ambiguity in S.C. Res. 1546/2004, U.N. Doc. S/RES/1546 (June 8, 2004), where the S.C. on the one hand in the Preamble is "[R]*eaffirming* the independence, sovereignty, unity and territorial integrity of Iraq," and on the other, in operative ¶ 2, it "[W]*elcomes* the fact that, also by 30 June 2004, ... , Iraq will reassert its full sovereignty."

67 S.C. Res. 1483/2003, *supra* note 66, preambular ¶ 4, "*expressing resolve* that the day when Iraqis govern themselves must come quickly"; S.C. Res. 1511/2003, *supra* note 66, operative ¶ 6, "*Calls upon* the Authority, in this context, to return governing responsibilities and authorities to the people of Iraq as soon as practicable". Further on Resolution 1511 and the interim 'sovereign' character of the Iraqi Governing Council, Al-Saadoon and Mufdhi v. UK, Admissibility Decision, ¶ 8, App. No. 61498/08 (Eur. Ct. H.R.) (June 30, 2009).

68 Letter from the Permanent Representatives of the UK and the U.S. addressed to the President of the Security Council, UN Doc. S/2003/538 of May 8, 2003. Further, on the temporary nature of the occupation, Rüdiger Wolfrum, *The Adequacy of International Humanitarian Law Rules on Belligerent Occupation: To What Extent May Security Council Resolution 1483 Be Considered a Model For Adjustment?,* in International Law and Armed Conflict, Exploring the Faultlines, Essays in Honour of Y. Dinstein 507 (M.N. Schmitt & E. Pejic eds. 2007); A. Roberts, *The End of Occupation: Iraq 2004,* 54 Int'l Comp. L.Q. 27, 31-32 (2005).

69 The so-called "November 15 Agreement". Gregory H. Fox, *The Occupation of Iraq*, 36 Geo. J. Int'l L. 195, 236 (2004-2005).

70 Roberts, *The End of Occupation*, *supra* note 68, at 41; Eric de Brabandere, Post-conflict administrations in international law : international territorial administration, transitional authority and foreign occupation in theory and practice 85 (2009).

71 See *supra* Part 5.1.2.3.

72 Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 OA4, Judgment on the appeal of Lubanga against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, 12, ¶ 21 (Dec. 14, 2006).

73 Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 10-11 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

However, the constitutional nature of the issue raised demands a further examination of questions of delegation of authority in this part, in order to identify the rules of international law – if any – that may further restrain the Court's hand in the matter. This additional precaution is taken, because it is believed that the interpretation of 'territory' in article 12(2)(a) will influence the territorial scope of application of the Statute in its entirety in conditions of military occupation. Accordingly, it will touch directly on the territorial scope of application of the Rome Statute in conditions of military occupation, where issues of state consent are important.

In keeping therefore with what is believed to be the dominant – although not the only theoretically defensible[74] – paradigm concerning the jurisdiction of the International Criminal Court, namely the delegation of jurisdiction from a state to an international court/organization through an international treaty,[75] this part will examine the rules of humanitarian law concerning the legal division of authority on criminal jurisdiction matters between the occupied sovereign and the Occupying Power. This course of action is followed, in order to test the merit of arguments challenging the jurisdiction of the Court, on the basis of the principle that an authority may only grant to another the powers that it possesses.[76] Such arguments would suggest that the Court does not have jurisdiction to address crimes committed in the occupied territory of a state party, because the state party has 'lost' its territorial jurisdiction under international law in that territory by reason of the fact of occupation.

In this context, the exercise of criminal jurisdiction by delegation of authority via a permanent international criminal court is a new phenomenon on the international plane – practically unprecedented.

74 Another interesting approach could be that the jurisdiction is that of the Court ('inherent jurisdiction') and the States Parties are only "accepting" the jurisdiction of the Court, as it is provided in Article 12(1) ICC Statute. Mitsue Inazumi, *The Meaning of the State Consent Precondition in Article 12(2) of the Rome Statute of the International Criminal Court: A Theoretical Analysis of the Source of International Criminal Jurisdiction*, 49 Neth. Int'l L. Rev. 159, 166-7 (2002) with extensive references on what that author labels as the "inherent-jurisdiction theory". If one adheres to this approach, the question arguably becomes whether the fact of occupation has any legal impact – and if so, what exactly – on the capacity of the occupied power to 'accept' the inherent jurisdiction of an international court which represents the world community. It is submitted that the answer to this question would largely depend on whether the occupied power would maintain the capacity to conclude treaties, a practice usual to recognised Governments in Exile during World War II. Stefan Talmon, Recognition of Governments in International Law: with Particular Reference to Governments in Exile 129-131 (1998) with detailed research.

75 Inazumi, *supra* note 74, at 165-6; Madeleine Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 Law Contemp. Probs. 13, 47-52 (2001), questioning "the validity of the delegation" of territorial jurisdiction as a "legal innovation" and explaining by analogical use of the non-prejudice rule from US assignments law why such delegation is not permissible under international law. The position that a state may delegate its territorial jurisdiction to an international court is amply supported by precedent. From the relevant literature see indicatively Jordan J. Paust, *The Reach of ICC Jurisdiction over Non-Signatory Nationals*, 33 Vanderbilt J. Transnat'l L. 1, 3-4 (2000); Dapo Akande, *The Jurisdiction of the International Criminal Court over national of Non-Parties: Legal Basis and Limits*, 1 J. Int'l Crim. Just. 618, 621-2, 625 (2003); Michael P. Scharf, *The United States and the International Criminal Court: The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. position*, 64, 98-108 L. Contemp. Probs. (2001); Markus Wagner, *The ICC and its Jurisdiction – Myths, Misperceptions and Realities*, 7 Max Planck U.N. Y.B. 409, 479-481 (2004); Olympia Bekou & R. Cryer, *The International Criminal Court and Universal Jurisdiction: A Close Encounter?,* 56 Int'l Comp. L.Q. 49, 50-51 (2007).

76 Danesh Sarooshi, The United Nations and the Development of Collective Security 20 (1999). This principle has been applied mainly in the context of acquisition of territory through cession, when the title of the ceding state proved problematic. In the *Island of Palmas,* Arbitrator Huber apparently used this principle to declare that the original Spanish title over the island was not decisive for the dispute, since "Spain could not transfer more rights than she herself possessed", 4 A.D. 114 (1927-1928), "nemo plus juris transferre potest quam ipse habet". In 1 Oppenheim*, supra* note 26, at 682, this principle is used to explain why in cases of cession of state territory, "the ceded territory is transferred to the new sovereign with all the international obligations locally connected with the territory." This principle might be seen also in relation with another general principle, namely that one cannot give more than one has (*nemo dat quod non habet*). Brownlie, *supra* note 3, at 121, n. 97 considers these two principles identical, but notes at 161 that acquisition by conquest is barred by reason of "the force of a powerful prohibition, the stamp of illegality, ... rather than the principle *nemo dat quod non habet*." Relevant arguments were raised by Nigeria but dismissed by the Court in Land and Maritime Boundary (Cameroon v. Nigeria), Merits, 2002 I.C.J. Rep. ¶ 204-9. Clark has used this principle to demonstrate that the conclusion of the 1990 East Timor Gap Treaty between Indonesia and Australia was null and void, arguing that, since Australia conclude the agreement in knowledge of the circumstances of the illegality, "Australia cannot get a good title through the bad Indonesian one". Roger S. Clark, *Timor Gap: The Legality of the Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia*, 4 Pace Y.B.Int'l L. 69, 93-94 (1992).

The practice of Allied Courts operating by delegation of authority on the territory of the United Kingdom during the Second World War may be of some, although limited, assistance on this matter.[77]

In light of the above, the main question to be addressed here is the following; in cases of occupation, does the fact of military occupation deprive the occupied power of its authority under international law to properly delegate territorial criminal jurisdiction to an international court? In the event that it does not, can the occupied state delegate such jurisdiction to the Court through ratification?

This entails a two-tier explanation of whether the fact of occupation divests the occupied Power of its right to territorial jurisdiction ('having the power', under 7.3.3.); and secondly whether the fact of occupation affects that State's treaty-making capacity ('giving the power' 7.3.4.).

7.4.3. / THE EXISTENCE OF JURISDICTION

7.4.3.1. CRIMINAL JURISDICTION AS AN ATTRIBUTE OF STATE SOVEREIGNTY

The starting point of the present analysis is the relationship of state criminal jurisdiction with state sovereignty. As has been explained in detail in chapter II of the present dissertation, state jurisdiction is an attribute of state sovereignty. This was affirmed by the Permanent Court in *Lotus*, when it stated that the entitlement of a state to exercise jurisdiction "rests in its sovereignty."[78]

It would seem, therefore, that the fundamental question becomes ultimately whether a state loses its sovereignty due to foreign belligerent occupation of its territory in whole or in part. As explained above, under contemporary international law, belligerent occupation does not formally affect the sovereignty of the occupied state. Accordingly, as the occupied state maintains its sovereignty, "the occupied state remains invested with its territorial jurisdiction notwithstanding belligerent occupation of its territory by foreign troops."[79]

However, while that would be the situation in theory, international law cannot ignore the fact that the occupied state has lost control over part of its territory. From a legal point of view, this has even led to claims that the sovereignty of the occupied state over the occupied territory is "suspended" for the period of the occupation.[80] The factual situation of belligerent occupation implies that, while formally the occupied state's jurisdictional prerogatives remain unaffected, in reality that authority is physically unable to enforce the law within the occupied territory for the duration of the occupation; the enforcement of territorial jurisdiction within that territory therefore is impaired for that period of time.[81]

In the light of this abnormal situation, international humanitarian law contains a number of rules, attempting to reconcile formal rights with the reality on the ground.

77 During the Second World War, the Allied Governments in Exile in London were authorized by the United Kingdom's Government, under Section 1 of the *Allied Forces Act*, 1940, to establish military courts on British Territory for the trial of members of their armed forces according to their own law. *See* for the interesting interplay of this delegation of jurisdiction and the implementation of British law by a Czechoslovak court in the Allied Forces (Czechoslovakia) Case, 10 Annual Digest 123-8 (1941-1942), which underlined that, since that court was operating in British territory, it should respect British law and the limits of the authorization, viewed from the standpoint of British national law. Thus, the court quashed the appellant's conviction for extortion, accepting that the Allied Forces Act did not have retroactive effect, notwithstanding the fact that under Czechoslovakian statute no such issue could be validly raised. As that Court concluded, ". . . British law, as expressed in the Allied Forces Act, does not authorize the Czechoslovak military courts to proceed on British territory against a member of the Czechoslovak Army for crimes committed before this Act came into force, that is before August 22nd, 1940." *Id.* at 126.

78 S.S. *Lotus* (Fr. v. Turk.), 1927 PCIJ (Ser. A), No. 10, 19; *see* also the Dissenting Opinion of Judge Seferiades in the Lighthouses on Crete and Samos (Fr. v. Greece), 1937 PCIJ (Ser. A/B), No. 71, 136, enumerating certain attributes, "without which no sovereignty can be described as such", including the "right of jurisdiction" and "the right to conclude treaties".

79 Alexander M. Stuyt, The General Principles of Law as Applied by International Tribunals to Disputes of Attribution and Exercise of State Jurisdiction 253 (1946).

80 UK Manual of War, *supra* note 10, at 278, ¶ 11.9, "[o]ccupation differs from annexation of territory by being only of a temporary nature. During occupation, the sovereignty of the occupied state does not pass to the occupying power. It is suspended". Further, De Brabandere, *supra* note 70, at 120 ('The sovereignty of the occupied state is merely 'suspended', although, […], issues of sovereignty and competence are often misconceived"). One also finds in literature notions such as "residual sovereignty". Burke, *supra* note 34, at 115 ('The principles of the law of occupation demand that the automatic termination of the obligations of the occupied state cannot be an effect of occupation. The termination of the obligations of the occupied state would be a denial of its residual sovereignty inherent in the concept of occupation.")

81 Stuyt, *supra* note 79, at 254.

7.4.3.2. / PRESCRIPTIVE CRIMINAL JURISDICTION

7.4.3.2.1. Occupying Power

On the matter of prescriptive criminal jurisdiction during occupation, it would appear that the position under positive humanitarian law at present is regulated by article 43 HagReg and article 64 Geneva Convention IV.

Article 43 of the 1907 Hague Regulations stipulates that "[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respective, unless absolutely prevented, the laws in force in the country".

On the other hand, article 64 of Geneva Convention IV provides that "[t]he penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws. The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying

Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them."[82]

Finally, it should be recalled that under article 42 HagReg, "[t]he occupation extends only to the territory where such authority has been established and can be exercised." This seems to be the critical provision regulating the scope of the territorial authority of the Occupying Power.[83]

As regards the substance of these provisions, they lay down certain fundamental rules as regards criminal jurisdiction and in particular the capacity to prescribe criminal rules.[84]

First, the law pre-dating the occupation continues to apply in the occupied territories, and should be respected by the Occupying power, 'unless absolutely prevented'.[85] In an attempt to balance and ultimately reconcile the two conflicting interests – legal stability and continuity in the occupied territory versus legislative change introduced by the Occupying Power – article 43 lays down a general provision and an exception ('unless absolutely prevented');[86] the exception is further elaborated upon by article 64 of Convention IV, explaining "in a more precise and detailed form" the circumstances under which the Occupying Power is 'absolutely prevented'.[87]

The corollary of this rule is that under international humanitarian law, the Occupying Power enjoys a certain circumscribed discretion[88] to repeal or amend existing legislation, or enact new laws, whether of penal, administrative or civil nature,[89] on the basis of certain exceptions delimited in article 43 HagReg and specified in article 64 GC IV.[90] These exceptions concern notably new laws aimed to ensure orderly government, address threats to the security of the Occupying Power's forces or to remove any obstacles to the application of the Geneva Convention itself.[91] It becomes evident therefore that the prescriptive competence of the Occupying Power is not amenable to clear-cut predeterminations, but rather seems to

82 It is interesting to note that for some authorities, this provision, being among those enumerated in Article 6 ¶ 3 Geneva Convention IV, should be concluded in a list of 'fundamental humanitarian norms' or 'normes d'ordre public humanitaire' closely resembling jus cogens rules. Kolb & Vité, *supra* note 53, at 246-7, 252-5.

83 Sharon Weill, *The Judicial Arm of the Occupation: The Israeli Military Courts in the Occupied Territories*, 89 *International Review of the Red Cross* 395, 404 (2007). As Weill demonstrates, the problem of clear delimitation of territorial jurisdiction in Palestine is particularly acute.

84 There has been extensive discussion in the literature over the question of whether the field of application of the second paragraph of article 64 relates to the general capacity of the Occupying Power to legislate, or only to criminal law. Both positions have been extensively debated in theory; among those in favour of the criminal law scope of the provision, Dinstein, *supra* note 29, at 114 with references; in favour of a general scope, Kolb & Vité, *supra* note 53, at 193-4, with references.

85 In more detail on this rule, David, *supra* note 59, at 562. For one among many clear examples on this rule, Chin Chi-Huo (alias Ken Honda) v. Japan, Judgment, 26 ILR 704 (1958-II) (June 1, 1955).

86 R Kolb & Vité, *supra* note 53, at 188-190.

87 Pictet, *supra* note 56, at 335. Further, Sassòli, *supra* note 54, at 669-670, "Article 64 certainly provides a *lex specialis* regarding the situations in which an occupying power is absolutely prevented from respective penal law".

88 As Arai-Takahashi, *supra* note 49, at 121, puts it, certain "parameters of discretion".

89 Convincing arguments on this point – *i.e.* the interpretation of 'law vie publics' as civil life, rather than safety – are offered among others by Sassòli, *supra* note 54 at 663-664; Kolb & Vité, *supra* note 53, at 189-191 usefully summarise the discussion.

90 Benvenisti, *supra* note 47, at 11, has noted that the ambiguity in the wording of Article 43 has allowed Occupying Powers either to invoke its 'imprecision' so as to expand their legislative prerogatives, or to invoke the 'unless absolutely prevented' limitation so as to limit their responsibilities to the population in the occupied territory. According to the Int'l Committee of the Red Cross Study, *supra* note 39, at 360, the two conditions enumerated in Article 64(1) GC IV are exhaustive.

91 The UK Manual of War, *supra* note 10, at 283-4, ¶ 11.25, refers by way of example to the power of the occupying power to suspend any laws that affect its own security, for example laws concerning "conscription, electoral enfranchisement, rights of public assembly, the bearing of arms and the freedom of the press". Otherwise, the UK Manual emphasizes the very limited right of the Occupying Power to enact legislation in the occupied territories in paragraph 11.25.1, at 284, "The occupying power should make no more changes to the law than are absolutely necessary, particularly where the occupied territory already has an adequate legal system". Compare this strict approach with the more expansive position taken in the same Manual, *id.* at 279, ¶ 11.11, where it is stated that "the occupying power may repeal or amend laws that are contrary to international law and is also entitled to make changes mandated or encouraged by the U.N. Security Council". The Manual refers here to UN SC Res. 1483/2003, *supra* note 66, which among others encouraged the international efforts to promote legal and judicial reform by the occupying powers and others in Iraq. While changes mandated – presumably under Chapter VII U.N. Charter – might be easier to accept, one might have difficulties reconciling the somewhat strict frame of article 34 HagReg and the admittedly broader wording of article 64 GC IV with the legislative capacity of the occupying power on the basis of Security Council 'encouragements'. Further, Sassòli, *supra* note 54, at 681 ('too vague'). From the literature, more recently, Arai-Takahashi, *supra* note 49, at 120-3; Greenwood, *supra* note 35, at 358; Shaw, *supra* note 54, at 381. As regards the occupation of Iraq (2003-2004), Kaikobad lists a number of fields of legislative activity of the Coalition Authority, including laws ranging from intellectual property rights to money laundering and traffic codes. Kaiyan H. Kaikobad, *Problems of Belligerent Occupation: The Scope of Powers exercised by the Coalition Provisional Authority in Iraq, April/May 2003 – June 2004*, 54 Int'l Comp. L.Q. 253, 255 (2005).

depend largely on the evaluation *in concreto* of a number of different factors, such as the security of the Occupying Power, the laws in force in the occupied territory and the development of humanitarian law.[92]

Irrespective, however, of the flexibility of these provisions, this discretion does not entitle the occupying authorities to change national law "merely to make it accord with their own legal conceptions."[93] The purpose of these provisions seems to be the establishment of order in the occupied territory, "but order... for its own sake, not for the purpose of introducing new political institutions."[94] The basic guideline of positive humanitarian law in these situations seems to be accurately described as follows; "because the occupation does not transfer any title to sovereignty, every legislative change made by the occupying power should be commensurate with the transitional and temporary nature of the occupation."[95]

Further, under article 65 of the Civilians Convention "[t]he penal provisions enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of these penal provisions shall not be retroactive." This provision is considered to be "an important safeguard against persecution" of the inhabitants of the occupied territories.[96]

The main contentious issue in this context is whether local courts have the power of judicial review of the compatibility of the new laws introduced by the Occupying Power with the criteria of article 43 HR or 64 GC IV – for example, whether any amendments of criminal law enacted by the occupying power are indeed 'necessary for its security' – and if not, strike them down. This remains an unresolved question, for which both sides of the argument can be amply supported with case-law.[97]

Finally, according to some authorities, strict adherence to these provisions is said to be further qualified in cases of prolonged belligerent occupation. In such instances, it has been argued that "the military government must be given more leeway in the application of its lawmaking power, if the occupation endures for many years."[98] This position has been amply refuted by Greenwood, who explained that "there is no indication that international law permits an occupying power to disregard provisions of the Regulations or of the Convention merely because it has been in occupation for a long period, not least because there is no body of law which might plausibly take their place and no indication that the international community is

92 Int'l Committee of the Red Cross Study, *supra* note 39, at 337 characterizes such power as "very extensive and complex." Dinstein, *supra* note 29, at 46 refutes the position of Charles Rousseau, Le Droit Des Conflits Armés 139 (1983), that an Occupying Power has no jurisdiction in the occupied territory. In his view, the Occupying Power has prescriptive, adjudicative and enforcement jurisdiction. As regards prescriptive jurisdiction, Dinstein criticizes the Naletilić Trial Chamber's approach, *supra* note 45, at ¶ 217), in that he disagrees with the impression given in that judgment that legislation by the Occupying Power is a requirement/obligation. In Dinstein's view, prescriptive and adjudicative jurisdiction of the Occupying Power is a prerogative; if the Occupying Power elects not to exercise it, "nobody can deprecate the act of omission," *id.* at 46. Finally, note the opinion of Ferraro, *supra* note 39, at 353, according to whom "the wording used in Article 66 of the Fourth Geneva Convention of 1949 underlies a presumption of the legality of the occupant's penal measures, since only their breaches are subject to scrutiny of the military tribunal, while their lawfulness is not."

93 Pictet, *supra* note 56, at 336.

94 Fox, *supra* note 69, at 238 with references.

95 Sassòli, *supra* note 54, at 673.

96 Pictet, *supra* note 56, at 339. For example, NGOs and commentators have criticized the U.S.-led Coalition Provisional Authority in Iraq for its failure to comply with this provision. Thus, while CPA orders were routinely entered into force at the date of the signature of the order in English, their translation in Arabic or Kurdish and publication (in the CPA website) took place with substantial delay, at times reaching months. Such orders included among others Order No. 9 on the Penal Code, signed on June 10, 2003 and published on the website on June 19, 2003, CPA Order No. 13 on the Central Criminal Court of Iraq, signed on June 18, 2003 and published on the website on September 2, 2003, CPA Order No. 15 Establishment of the Judicial Review Committee, signed on June 23, 2003 and published on the website on October 29, 2003. In detail, Amnesty Int'l, *Iraq: Memorandum on Concerns related to Legislation introduced by the Coalition Provisional Authority*, MDE 14/176/2003, 14-15 and Annex (Dec. 4, 2003), available at http://www.amnesty.org/en/library/asset/MDE14/176/2003/en/0afded19-d664-11dd-ab95-a13b602c0642/mde141762003en.pdf (last visited on June 30, 2010). Further, Lancaster, *supra* note 39, at 81-83 ("clearly the inhabitants of Iraq were seldom on notice with regard to CPA legislation in a timely fashion.")

97 The issue is highly controversial and a clear answer seems unreachable. It is treated more recently by Dinstein, *supra* note 29, at 132-133 and at length by Arai-Takahashi, *supra* note 49, at 147-157 and Ferraro, *supra* note 39, at 345-352.

98 Dinstein, *supra* note 29, at 120 with references. Other theories used at times to justify an extension of the legislative authority of the occupant particularly in Palestine, such as the so-called 'missing reversioner' theory or the 'trustee-occupant' theory, are critically discussed by Arai-Takahashi, *supra* note 49, at 47-52 and Dikker Hupkes, *supra* note 39, at 58-59. For the position that there is a powerful argument to be made in favour of new and long-term measures to meet the needs of the population in occupied territories under long-lasting military occupation, A. Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories since 1967*, 84 Am. J. Int'l L. 44, 94 (1990). For an interesting discussion, Sassòli, *supra* note 54, at 679-680.

willing to trust the occupant with *carte blanche*."[99] Or, as Jennings generally asserted, "the law will always lean towards the principle that a wrongful act must be ineffective to change or create legal rights."[100]

7.4.3.2.2. Occupied State

As regards the prescriptive power of authorities of the occupied state, that remains in principle unaffected by the fact of occupation, since the occupied state maintains sovereignty over the occupied territories. This seems to be a direct consequence of the position that a duly recognized Government in Exile operates to a large extent as the "depository" of the sovereignty of the occupied State.[101] As McNair and Watts put it, "[t]he mere fact that a foreign Government has been deprived of the control of a part or the whole of its territory by an enemy in no way invalidates legislation passed, or other acts of sovereignty done, by it outside its normal territory, provided that its constitutional law contains no insuperable obstacle to the validity of such legislation or other sovereign acts" and that the Government is recognized as the *de jure* sovereign authority.[102] The same would seem to apply *a fortiori* in cases of partial occupation, where only part of a State's territory is under occupation.

The critical question in this context is at what time such legislation will take effect in the occupied territories; during the occupation or only following liberation/return?[103]

On the matter of the *immediate* effect of laws enacted by the Government in Exile in territories under belligerent occupation, opinions differ significantly. Greenwood denies this possibility.[104] McNair and Watts on the other hand, following an extensive discussion of the relevant case-law, accept it, under two conditions; first, if the new legislation in question is intended to extend within the occupied territory and secondly "if the new law falls within the category of that large portion of national law which persists during the occupation and which the enemy occupant cannot lawfully change or annul. Such a conclusion would seem to be a natural consequence of the retention by the dispossessed State of its sovereignty over the occupied area, and the limitations imposed upon the occupant's power to introduce new legislation."[105] Talmon, in one of the most recent comprehensive studies on the matter, has concluded that "there seems to be no settled rule of international law. State practice is far from being uniform."[106] For that authority, as a matter of principle, the best approach would be to avoid a 'war of laws' between the Government in Exile and the Occupying Power over the occupied territory, by using as a yardstick the Occupying Power's lawful capacity to legislate under international (humanitarian) law. Consequently, in his view, the best solution would be to accept that "the State's government in exile is competent to exercise legislative authority in the occupied territory in so far as this does not conflict with the *lawful* exercise of authority by the occupant", the emphasis being on the "occupant's right to exercise to authority" rather than whether authority has been

99 Greenwood, *supra* note 35, at 377. Greenwood's position was espoused and defended also by Judge Elaraby in his Separate Opinion in the Wall Advisory Opinion, *supra* note 38, at 255. Further, Kypros Chrysostomides, The Republic of Cyprus – A study in International Law 154 (2000).

100 R. Jennings, *Nullity and Effectiveness in International Law*, in Cambridge Essays in International Law¸ Essays in honour of Lord McNair 72 (1965).

101 Dinstein, *supra* note 29, at 1.

102 McNair & Watts, *supra* note 49, at 426, with extensive references to case-law. As these authorities put it, "there is no principle of international law which says that a Government cannot act validly upon foreign territory with the consent of the local sovereign." *Id.* at 427. Further, Fox, *supra* note 69, at 237 ('General legislative competence remains with the displaced regime as the continuing de jure authority over the territory').

103 For Governments in Exile, Talmon, *supra* note 74, at 219. In Fatto v. Ministero Finanze, 19 I.L.R. 1952, 611-613, the Italian Council of State affirmed that "it is an undisputed principle of law that a legitimate Government is competent to annul administrative acts done under the authority of the commander of an enemy force in occupation of the whole or part of the territory of the State when the occupation is brought to an end." The reason for this conclusion was that "belligerent occupation is an essentially temporary state of affairs which does not extinguish the sovereignty over the occupied territory of the State to which that sovereignty belongs", *id*. at 612; but *cf.* Benvenisti, *supra* note 47, at 183, who argues that under recent practice, "the Hague and Geneva conception of an "ousted sovereign" does not exist any longer: since sovereignty inheres in the people that lives in the territory, the modern occupant needs to heed the political interests of the people, the sovereign, and not the historical claims of the ousted government."

104 Greenwood, *supra* note 35, at 361-2, "The duty of respect for the law already in force in the occupied territory does not extend to laws enacted by the displaced power after the occupation has begun. Thus, if a state which has been displaced from part of its territory during an armed conflict adopts changes in its legal system, those changes are not applicable in the occupied territory. Although the displaced sovereign retains sovereignty over the occupied territory, he cannot exercise that sovereignty within the occupied territory for the duration of the occupation". However, the Occupying power may choose to apply changes enacted by the displaced sovereign.

105 McNair & Watts, *supra* note 49, at 446. The conclusion is "notwithstanding the absence of any power to make it [the new law] effective during the occupation."

106 Talmon, *supra* note 74, at 219-220.

exercised as such.[107] The final conclusion of that author is that the Government in Exile, "as the organ through which the occupied State exercises its sovereignty, is in principle competent to legislate with immediate effect for the occupied territory. However, in so far as that legislation conflicts with the legitimate rule of the occupant, it takes effect in the occupied territory only upon its liberation."[108]

It would seem therefore that the delimitation of the prescriptive jurisdictional spheres between the Occupying Power and the occupied sovereign – should such a sovereign persist[109] – is a matter to be decided on the basis of the parameters of discretion recognized as belonging to the Occupying Power under humanitarian law, rather than the rights and duties of the occupied state, and in the light of each separate case of occupation.

By way of interim conclusion, it may be stated that the fact of occupation does not deprive the occupied sovereign authority of its right, under international law, to promulgate criminal laws. This position seems to find support not only in the Hague Regulations and the Civilians Convention, but also in the axiomatic admission of the Permanent Court in *Lotus* that the entitlement of a State to exercise jurisdiction "rests on its sovereignty."[110] Therefore, a law may be passed for example by the Government in Exile – or the legitimate Government in the case of partial occupation – in accordance with national law as valid law for the entire territory of the state, including the occupied territories; such laws could include for example collaboration with the enemy.[111] Particularly as regards the ICC Statute, the Court has immediately applied the Rome Statute as regards crimes allegedly committed in occupied Ituri on the basis of the ratification and implementation of the Statute by the DRC. This seems to indicate that the ratification of the Statute by the Government of the occupied state validly takes immediate effect under international law in occupied territories and does not constitute national law in conflict with the occupant's 'legitimate rule'.[112]

The enforcement jurisdiction within occupied territory, however, is a different matter.

7.4.3.3. / ENFORCEMENT CRIMINAL JURISDICTION

As far as the corresponding enforcement – adjudicative aspect of the jurisdictional prerogatives is concerned, certain preliminary points should be made.

The first concerns the legal nature of the power of the occupant to 'enforce the law' in occupied territories. Article 43 HagReg in this regard is clear; there is a duty incumbent upon the occupying power to maintain law and order in the occupied territories. This renders necessary the exercise of enforcement jurisdiction by the occupying power within the occupied territories, to the extent required to achieve the objectives set out in that provision.[113]

107 *Id*. at 222. Therefore, in Talmon's view, "the question to what extent a government in exile is competent to exercise legislative authority over the occupied territory thus depends on the scope of the occupant's 'legitimate rule'. This must be determined for each individual case by reference to the relevant provisions of the international humanitarian law instruments." *Id.*, at 223, with extensive references to case-law and literature. *Contra,* McNair & Watts, *supra* note 49, at 446, n. 3, "It may even be that even in respect of those matters for which the occupant may lawfully legislate, the dispossessed Government may still legislate for the occupied territory, unless and until the occupant actually does legislate in respect of them." This seems to reflect Feilchenfeld's earlier position expressed in his 1942 work, Ernst H. Feilchenfeld, The International Economic Law of Belligerent Occupation 161 (1942). For a more recent discussion, Ferraro, *supra* note 39, at 344-5, n. 39.

108 Talmon, *supra* note 74, at 226-227.

109 The sovereign would arguably not persist for example in cases of *debellatio* (post-WW II Germany). For a concise description of that situation, Carsten Stahn, The Law and Practice of Territorial Administration: Versailles to Iraq and Beyond (2008), at 126-138.

110 Lotus case, *supra* note 78, at 19.

111 See for example on such matters Article 8 of the Presidential Decree of Nov. 30, 1939 promulgated by the Polish Government in Exile during World War II, in Manfred Lachs, *Polish Legislation in Exile*, 24 *Journal of Comparative Legislation* 57, 58 (1942). There is extensive documentation on the legislative activity of Governments in Exile during World War II; Talmon, *supra* note 74, at 219, n. 68 provides an indicative list.

112 The Dem. Rep. Congo ratified the Statute on Apr. 11 2002 and the Statute entered into force for the Dem. Rep. Congo on July 1, 2002. The occupation of Ituri lasted from June 1999 to June 2003, according to the findings of the I.C.J. in the Armed Activities case and the Lubanga Confirmation decision. Lubanga was prosecuted in part for criminal activities in Ituri from July 2002 until June 2003, during the occupation. See in detail *infra*.

113 U.S. v. List, *supra* note 45, at 1244-5, "the status of an occupant of the territory of the enemy having been achieved, international law places the responsibility upon the commanding general of preserving order, punishing crimes and protecting lives and property within the occupied territory." Dinstein, *supra* note 29, at 46, where Dinstein underlines that contrary to prescriptive jurisdiction, which is only a prerogative of the occupant, enforcement jurisdiction may be seen as an obligation of the occupant, within the context of the Occupying Power's duty to maintain order in the Occupied Territory under Article 43 Hag.Reg. Note however that for that authority, adjudicative jurisdiction is considered separately from enforcement jurisdiction and together with prescriptive jurisdiction as a matter of right, not of obligation.

Secondly, it is safe to assert that the existence of a state of belligerent occupation does not entail that local courts pre-dating the occupation become defunct by reason of the military occupation.

Indeed, it appears that in occupied territories, two systems of courts may operate at the same time; on the one hand, the pre-existing local courts may continue their operation and administer the local civil and criminal law, whereas on the other hand the Occupying Power may establish such military courts[114] as it deems fit for the trial of violations of the security legislation it enacts within the occupied territory.[115] In this 'dualistic' system, under article 23(h) of the Hague Regulations, as further codified in article 8(2)(b)(xiv) of the Rome Statute, it is forbidden to "declare abolished, suspended, or inadmissible in a court of law the rights and action of the nationals of the hostile party". As Dinstein notes, "the centre of gravity of the provision is that the imprint of the occupation on acquired rights should be minimal, subject to supervening security considerations."[116]

The establishment of military courts by the Occupying Power is provided specifically on article 66 GC IV, which stipulates that "[i]n case of a breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64, the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied territory. Courts of appeal shall preferably sit in the occupied territory."[117]

In this system, "the general rule is that the local courts have no jurisdiction, civil or criminal, over members of the occupying power's armed forces and administration, as well as other nationals of the occupying power who accompany their armed forces."[118] As to the theoretical underpinnings of this rule, different positions have been assumed in the literature[119] and case-law.[120] The immunity of the occupant's military and occupation personnel[121] from local legal process has been explicitly asserted in certain cases

114 The name as such of the Courts may differ; see in this regard the U.S. Army Field Manual No. 27-10, the Law of Land Warfare, 1956, as amended, Chapter I, ¶ 13, identifying as military tribunals courts-martial, military commissions, provost courts and other military tribunals and delimits their respective competences.

115 Dinstein, *supra* note 29, at 132-141.

116 I*d.* at 135.

117 In greater detail, Arai-Takahashi, *supra* note 49, at 157-164 on occupation courts.

118 *Id.* at 146 with references. Dinstein, *supra* note 29, at 136; von Glahn, *supra* note 44, at 108.

119 Dinstein has noted in 1978 that the members of the occupying force are subject to the military law of the Occupying Power on the basis of the "allegiance (or active personality) principle". Y. Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 Israel Y.B.H.R. 104, 115 (1978). Stuyt took the view, following the Coleman v. Tennessee precedent that the exclusive jurisdiction of the occupying state over its own troops is an *a fortiori* expression of its power in situations of pacific occupation. Stuyt, *supra* note 79, at 250-1. Schwarzenberger rejected Stuyt's position. In his view, this situation is best explained "on grounds of the equality of status of sovereign States or on functional grounds. Whichever is preferred, as compared with peacetime occupation, wartime occupation rests on completely different rules. Any analogy, therefore, from occupation by consent to occupation against the will of the territorial sovereign appears inappropriate". 2 Schwarzenberger, *supra* note 49, at 184.

120 The Italian Court of Cassation in 1951 took the following position; "According to a rule of international law laid down by the Hague Conventions on 1899 and 1907 . . . . , an Occupying Power may, through its own military tribunals and in accordance with its own substantive law and procedure, assume jurisdiction in occupied territory with respect to both military and other crimes committed by inhabitants against the occupying forces or persons belonging to or associated with those forces. This rule, *which provides an instance of the independence of the law of war crimes of any principle of territoriality*, involves as a corollary the right of the Occupant upon the termination of the occupation to remove convicted persons to serve out their sentences in his own prisons (emphasis added)." *In re Scarpato*, 18 *ILR* 625, 626-627 (1951) (Court of Cassation, It.). It is not clear from the Court's decision to which rule of the Hague Regulations exactly it made reference. From earlier case-law, see the Casablanca Arbitration (Fr. v. Germ.) (May 22, 1909), *reported in* James B. Scott, The Hague Court Reports 110, 114 (1916), "corps of occupation as a rule also exercises exclusive jurisdiction over all persons belonging to it".

121 Greenwood, *supra* note 35, at 361, notes that, while this immunity applies normally for criminal cases involving the occupant's armed forces and occupation administration, together with other nationals of the occupant who accompany the occupying forces, "[o]rdinary civilian nationals of the occupying power, not connected with the armed forces or the occupation administration, who visit the occupied territory, ... , are subject to the local law as lawfully modified by the occupying power".

by unilateral acts of the occupant, as for example in the occupations of post-WWII Japan[122] and Iraq 2003-2004.[123]

The immunity of the occupant's forces from local legal process, however, is only a procedural bar to local prosecution; it does not affect the legal force of the national criminal laws.[124] Furthermore, this rule seems to regulate only the relationship between the occupant's military personnel and the territorial jurisdiction of the occupied state; it does not prohibit the courts of other states from asserting jurisdiction over the offending official, particularly if one of their nationals has been injured.[125]

On the other hand, local courts deal with offences against the local law committed by inhabitants against other inhabitants or their property in occupied territory.[126] Their continued existence is provided for in article 64 of GV IV, whereby, "the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws [the penal law of the occupied territory]". Two fundamental concepts appear to underlie this rule; first, the duty of the occupying state to maintain the fundamental institutions of the occupied state unless exceptional circumstances apply[127] and secondly the principle that "protected persons will be judged by their own regular judges and legal system, without being subjected to alien

122 Memorandum concerning the Exercise of Criminal Jurisdiction, directed to the Japanese Government by the Supreme Commander, Feb. 19, 1945, AGO 15, LS.SCAPIN 756, *reprinted in part* in 26 I.L.R. 706, n. 1; *id.,* Memorandum Concerning the Exercise of Civil and Criminal Jurisdiction over United Nations Nationals, Oct. 18, 1950; *id.,* Ordinance Concerning Special Measures for Criminal Cases etc., against Allied Personnel, Nov. 1, 1950, (Cabinet Order 324).

123 Note, for example, that under CPA Order No. 17, § 2-4, June 27, 2003, the following classes of personnel enjoyed immunity from "Iraqi legal process", Multinational Forces, Coalition Provisional Authority, Foreign Liaison Mission Personnel, International Consultants and, last but not least, Contractors (Section 4(3)). This immunity, in the opinion of Clapham, should be read together with the obligation of contractors in Iraq to submit a minimum refundable bond of 25.000 USD to the Iraqi Ministry of Interior, which would be forfeited in cases of violation "of Iraq or other applicable law", according to § 2 and 3(3) of CPA Memorandum No. 17, Registration Requirements for Private Security Companies (PSC), CPA/MEM/26 June 2004/17, available at http://www.iraqcoalition.org/regulations/20040626_CPAMEMO_17_Registration_Requirements_for_Private_Security_Companies_with_Annexes.pdf (last visited June 30, 2010). Andrew Clapham, *Human rights obligations of non-state actors in conflict situations*, 88 Int'l Rev. Red Cross 491, 519-20 (Sept. 2006), noted in this respect that "Although there is obviously a risk that a $25,000 bond could be written off as an operating cost, this sum represents a minimum and one could imagine larger sums, proportionate to the actual contract, which could be used to compensate the victims of any human rights abuses committed by the company." The matter of criminal accountability of private military contractors has been particularly troublesome in the Iraq context. The issue is treated extensively by Cedric Ryngaert, *Litigating Abuses Committed by Private Military Companies*, 19 Eur. J. Int'l L. 1035 (2008). Peter W. Singer, *War, Profits and the Vacuum of Law: Privatized Military Firms and International Law*, 42 Colum. J. Transnat'l L. 521, 537-8 (2004), on the criminal law enforcement aspect.

124 As the Supreme Court of Japan explained in Chin Chi-Huo, *supra* note 85, at 706-7 (1958-II), "[d]uring the occupation period, Japan did not lose her sovereignty and the Criminal Code of Japan was in force against any person who committed crimes within the territory of Japan, regardless of whether he was Japanese or an alien. However, against the United Nations nationals, Japan was denied temporarily the right to exercise civil and criminal jurisdiction by the Memorandum of the Supreme Commander. This does not mean that the legal force of the Japanese Criminal Code was impaired as against United Nations nationals, but simply that the exercise of civil or criminal jurisdiction by Japan, which was potentially retained by Japan, was temporarily suspended." As a result, the Court held that "where a crime was committed by a United Nations national during this period, as in the instant case, Japan may prosecute and exercise jurisdiction over the offender after completely recovering her jurisdiction", without violating 'double jeopardy' under the Japanese Constitution. *Id*. at 707.

125 Most recently, Lozano v. Italy, Case no. 33171/2008, Appeal Judgment, *reported in* Oxford Reports in International Law, ILDC 1085 (IT 2008) (Court of Cassation, It.) (Rapporteur: P. Palcetti). This case concerned the shooting of three Italian nationals by a US sentry (Mr. Lozano) outside the airport of Baghdad. Ultimately, one Italian intelligence officer died but the other two passengers survived. Italian prosecutors charged Lozano with voluntary homicide and attempted homicide. The accused argued immunity *ratione materiae*. While the Rome Court of Assize held that it did not have jurisdiction to hear the case, as the sending state had exclusive jurisdiction, the Court of Cassation, on appeal by the Prosecutor, reversed. In the opinion of the Court of Cassation, the exclusivity of the jurisdiction over U.S. soldiers in Iraq applies only with regard to the jurisdiction of Iraqi courts, according to S.C. Res. 1546, UN Doc. S/RES/1546 (June 8, 2004) and the Exchange of Letters attached thereto between the U.S. Secretary of State and the Prime Minister of Iraq. It does not however preclude the exercise of criminal jurisdiction by other States on the basis of passive personality. In the end the Court of Cassation however accepted the plea of *ratione materiae* immunity and dismissed the claim. As the Court of Cassation explained, no rules of a 'horizontal partition' of jurisdiction seem to exist between different troop contributing states in the same coalition under customary law. *Id.* at ¶ 4. In support of the proposition that the domestic courts of third states have the obligation, under Common Article 1 of the Geneva Conventions, to deny recognition and enforcement of the occupant's measures that are incompatible with occupation law, Ferraro, *supra* note 39, at 354-5.

126 Arai-Takahashi, *supra* note 49, at 159; Dinstein, *supra* note 29, at 132-136.

127 Art. 43 HagReg, Art. 64 Geneva Convention IV; further, Pictet, *supra* note 56, at 303-8. For an interesting perspective on the current application of the so-called Fauchille doctrine, Sassòli, *supra* note 54, at 671-3.

doctrines of law."[128] As such, the role of local courts is generally limited to offences committed by inhabitants against other inhabitants of the occupied territory or their property.[129]

In the event that the Occupying Power replaces the pre-existing local courts with its own courts of general jurisdiction – or even with its own military courts[130] – in the absence of very exceptional circumstances justified by articles 43 HagReg or 64 of Geneva Convention IV, the new Courts will be established in violation of international humanitarian law and their decisions may be treated as null and void.[131] Naturally, the issue of recognition (or not) of the validity of such decisions may vary depending on the court hearing a case[132] or even the subject of the decision of the occupied authorities.[133]

128 Weill, *supra* note 83, at 399. There is also WW II precedent for the use of the criminal law of the occupied state by the Occupation Courts of the Occupying Power pursuant to an express decision of the authorities of the Occupying Power. Although the *debellatio* might qualify post-WW II Germany as a special case, see the U.S. Control Zone Courts in Germany Eisenhower's *Proclamation No. 2,* Military Government for Germany, United States Zone, 12 *Federal Register* 212, 6997 (Oct. 29, 1947), whereby under Article II, "Except as heretofore abrogated, suspended or modified by Military Government or the Control Council for Germany, the German Law in force at the time of the occupation shall be applicable in each area of the United States Zone of Occupation, until repealed by, or superseded by a new law enacted by the Control Council for Germany, or by Military Government or by the state hereby constituted or by other competent authority." This choice of law on behalf of the U.S. Government has been explained for the following legal and policy reasons; as a matter of law, the U.S. are said to have followed "the long-established principle of private international law that the law of the place governs"; as a matter of policy, "it is wise to apply to the Germans their own law, and there seems to be no reason for making an exception in favor of non-Germans from the principle of the conflict of laws just referred to. William Clark & Thomas H. Goodman, *American Justice in Occupied Germany: United States Military Government Courts*, 36 Am. Bar Ass'n J. 443, 444 (1950). For an interesting example of a murder trial of a U.S. national by his wife, also U.S. national, in accordance with German criminal law, Madsen v. Kinsella, 343 U.S. 341 (Apr. 28, 1952) and John M. Raymond, *Madsen v. Kinsella – Landmark and Guidepost in Law of Military Occupation,* 47 Am. J. Int'l L. 300, 307 (1953), noting that this approach – one law for Americans and Germans – was "an essential if we were to practice the democracy, which we were attempting to persuade the Germans to accept."

129 Arai-Takahashi, *supra* note 49; von Glahn, *supra* note 44, at 114.

130 For example, Israel has been criticized in the literature for bringing simple OPT cases of little or no relevance (e.g. tax evasion, unauthorised building and other minor offences) to its security within the jurisdiction of its military courts. K. Cavanaugh, *The Israeli Military Court System in the West Bank and Gaza*, 12 J. Conflict Sec. L. 197, 206 (2007). On this issue, the legal fictions of territoriality employed by Israel to subject Palestinians to the jurisdiction of the military courts (transition from territory falling within the jurisdiction of the Military Courts equals commission of the crime in part therein) are critically analysed by Weill, *supra* note 83, at 403-6. For the conclusion that "Palestinian territorial jurisdiction is dependent on Israeli military considerations and is not a result of any independent conception of rights – linked, for example, to the doctrine of self-determination", J. Strawson, *Conjuring Palestine: The Jurisdiction of Dispossession*, in Shawn McVeigh, Jurisprudence of Jurisdiction 90 (2007).

131 McNair & Watts, *supra* note 49, at 389, n. 4, 410-1 with extensive references to WW II case-law. For example In Re Condarelli, 19 ILR 1952, 609-11 (July 5, 1952) (Court of Cassation, It.); following the occupation of Ethiopia by UK forces during World War II, the UK authorities maintained the pre-existing local (colonial) system of justice at the first instance, but replaced the Court of Appeals of Addis Ababa with another Court of Appeals sitting in Asmara. The UK Court of Appeals had jurisdiction over all 'ordinary' crimes and was composed of a UK President and two Italian citizens. An appeal on cassation against the decision of the Asmara Court of Appeals affirming a criminal conviction for an 'ordinary crime' was lodged with the Italian Court of Cassation. The latter court ruled that the impugned decision rendered by the Asmara Court was null and void, because the Court of Asmara was established in violation of customary law and Article 43 HagReg. The Italian Court of Cassation explained that "the Occupying Power cannot legitimately set up its own courts of general jurisdiction in the occupied territory, even if these are directed to apply the *lex loci*, nor modify the pre-existing system of judicature, unless in an exceptional case justified by valid considerations of military necessity." For that Court, "any assumption by the Occupant through its own court of jurisdiction over crimes not even remotely prejudicial to the security of itself and its forces and having no relation to the state of war, involves a violation of the principles of customary law restated in Article 43 of the Hague Regulations." *Id.* at 610.

132 McNair & Watts, *supra* note 49, at 422-3 refer by way of example to historical examples in this respect; one of the clearest stems from a disputed case of military occupation, the French occupation of Ruhr after the end of WW I. A conviction of a German national by a French court established in Ruhr was treated as invalid by German courts, on account of the argument that French courts were without jurisdiction; on the other hand, the French Cour de Cassation held that the French courts in Ruhr had jurisdiction to try offences affecting the interests and security of the occupying army. Invasion of the Ruhr District Case, 5 A.D. 79-80 (1929-1930). In re Krupp, In re Thyssen, 2 A.D. 327-8 (1922-1923). For the deduction of a general duty of the courts of third states under Common Article 1 not to recognise and enforce decisions of the occupant going beyond occupation law, Ferraro, *supra* note 39, at 354-355.

133 Particularly for personal status cases (marriage, birth, death, divorce) of even illegally constituted occupation courts. McNair & Watts, *supra* note 49, at 410-1 (e.g. divorce and nullity of marriage). Further, Namibia Advisory Opinion, *supra* note 11, at 56, ¶ 125.

These situations should be distinguished from the exercise of jurisdiction of entirely new courts created by so-called 'Puppet' Governments[134] or by Governments installed pursuant to an unlawful annexation of territory by the Occupying Power. Such historical examples would be the imposition of German Courts in certain territories purportedly annexed by Germany during the war.[135] The establishment of such governments or attempted annexations is contrary to international law. Accordingly, the courts created by such a deficient authority under international law are lacking the proper authority themselves. Therefore, the rulings of such courts are null and void, unless subsequently endorsed by a proper authority (new government after liberation for example).[136]

It is possible that local courts and military courts might have concurrent jurisdiction over the same crime, particularly when the same act of an inhabitant of the occupied territory violates simultaneously local and (the occupant's) security law. This situation may raise problems of *ne bis in idem*. Under post-1949 Geneva Law,[137] it has been argued that the invocation of this principle does not preclude double prosecution, as the two legal orders (the local courts and the military courts) are distinct; two separate legal systems, operating on the basis of different laws, absent any 'combining' legislation enacted by the Occupying Power.[138]

Finally, it appears that there is historical precedent for the proposition that, even after the end of an occupation, military tribunals of the former occupant can retain jurisdiction to try offences committed against members of the occupant's armed forces. Such retention of jurisdiction would seem to require an explicit expression of consent in the form of an international agreement.[139]

7.4.4. / THE CAPACITY TO CONCLUDE TREATIES

134 Raphael Lemkin, Axis Rule in Occupied Europe 11 (1944), provided examples of German 'Puppet' Governments established in Occupied Europe (Fr., Nor., Serb., Greece etc.) and explained that "the creation of puppet states or of puppet governments does not give them any special status under international law in the occupied territory. These organizations derive their existence from the will of the occupant and thus ought to be regarded as organs of the occupant. Therefore the puppet governments and puppet states have no greater rights in the occupied territory than the occupant himself." Further, Loizidou v. Turkey, App. No. 15318/89, Preliminary Objections, Eur. Ct. H.R. (Mar. 23, 1995).

135 Ernst E. Wolff, *Municipal Courts of Justice in Enemy Occupied Territory*, 29 Grotius Society Transactions 99, 102-3 (1944). *See* further, UK Manual of War, *supra* note 10, at 282, ¶ 11.19, "The occupying power cannot circumvent its responsibilities by installing a puppet government or by issuing orders that are implemented through local government officials still operating in the territory." In this regard, it is interesting to note that Turkey's attempts to shield itself from responsibility for human rights violations in the occupied Northern Cyprus by invoking the separate personality of the 'TRNC' have failed. The Grand Chamber of the Eur. Ct. H.R. in fact, took Loizidou one step further in the Cyprus v. Turkey Case, App. No. 25781/94, ¶ 77 (May 10, 2001). In that judgment, the Grand Chamber ruled that Turkey was responsible not only for the acts of its military forces (as in Loizidou it was the Turkish military that prevented the applicant's access to her property in the occupied North Cyprus), but also for all the acts of the local administration, "which survives by virtue of Turkish military and other support." In Arestis-Xenides v. Turkey, App. No. 46347/99, Eur. Ct. H.R. the Court, following findings of violations of the applicant's right to family and private life and right to property in North Cyprus by the respondent State, further instructed Turkey to "introduce a remedy which secures genuinely effective redress for the Convention violations identified in the instant judgment in relation to the present applicant as well as in respect of all similar applications pending before it." Turkey was recently found to have satisfied this condition by the establishment of the Immovable Property Commission in the TRNC. As a result, a number of Greek-Cypriot complaints have been considered inadmissible. Demopoulos et al. v. Turkey, App. No. 46113-99, ¶ 127-9, Grand Chamber, Admissibility Decision, Eur. Ct. H.R. (Mar. 1, 2010).

136 Wolff, *supra* note 135, at 104, "such court is illegal because instituted by an unlawful government." Further, McNair & Watts, *supra* note 49, at 410-411.

137 And more clearly after the adoption of Article 75(4)(h) Additional Protocol I, which provides that "no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgment acquitting or convicting that person has been previously pronounced under the same law and the same procedure." For another perspective, von Glahn, *supra* note 44, at 114, who considered that, in the event of the conflict between the two jurisdictions, the jurisdiction of the occupation courts should prevail, due to the maxim *inter arma leges silent*. Further, Arai-Takahashi, *supra* note 49, at 159.

138 Dinstein, *supra* note 29, ¶ 140-141.

139 Such agreements were concluded between Italy and the Allies after the end of Italy's occupation. Their application was tested in the case of In Re Scarpato, *supra* note 120.According to the relevant agreements and royal decrees then in force, Allied Military Tribunals retained jurisdiction over, *inter alia*, crimes committed against members of Allied Armed Forces. The substantive law would be Italian law, whereas the procedural law would be the law of the tribunals. Finally, the sentences imposed would be carried out by the Italian authorities. For the proposition that the operation of courts of the occupant may continue also by virtue of a Security Council resolution adopted under Chapter VII, Michael J. Kelly, *Iraq and the Law of Occupation: New Tests for an Old Law*, 6 Y.B. Int'l Humanitarian L. 127, 143, n. 46 (2003).

The capacity to conclude treaties during military occupation is a matter that requires a separate thorough study in its own right. For the purposes of the present dissertation, it suffices to underline that in principle, the existence of an armed conflict or a belligerent occupation, total or partial, does not deprive the lawful government of the occupied territories of its sovereignty.[140] Therefore, considering that under international law "the right of entering into international engagements is as attribute of State sovereignty,"[141] the lawful government maintains its capacity to conclude treaties under international law, applicable formally within its entire territory.[142] World War II practice attests to the fact that Governments in Exile, for example, concluded legally binding international agreements with other states on a variety of issues.[143] In the same spirit, the risk of the conclusion of an international agreement between the Occupied and the Occupying Power, to the detriment of the civilian population in the occupied territories, was a particular concern of the drafters of the Geneva Conventions, as evidenced from article 47 GC IV,[144] and would raise serious issues under article 52 of the Vienna Convention on the Law of Treaties.[145]

The International Law Commission, in its recent Draft Articles on the Effect of War on Treaties adopted on first reading, has underlined in this context that "[1]. The outbreak of an armed conflict does not affect the capacity of a State party to that conflict to conclude treaties in accordance with the Vienna Convention on the Law of Treaties. [2]. States may conclude lawful agreements involving termination or suspension of a treaty that is operative between them during situations of armed conflict."[146] The principle was characterized as uncontroversial by the Special Rapporteur and was not the object of any objections, save for one primarily linguistic suggestion.[147] The relevant Working Group established by the Commission considered that situations of occupation "should not be excluded from the definition of 'armed conflict'" for the purposes of these articles.[148]

It is an entirely separate question whether the occupant may conclude agreements with other states on behalf of and specifically for the occupied territories during an occupation, as a sovereign authority would. While there seems to exist some conditional support for this proposition in the literature,[149] state practice does not seem to support such contention. The practice of the Coalition Provisional Authority in Iraq as regards the legal basis for the presence of 'other states' i.e. states not classified as Occupying Powers under SC Resolution 1483, in Iraq during the occupation is one such example. As it has been

140 See *infra*.

141 S.S. Wimbledon, 1923 PCIJ (ser. A), No. 1, at 25; VCLT art. 6. Of course, this statement needs to be qualified today particularly as regards international organizations.

142 *See supra* the discussion on VCLT art. 29. The fact of occupation would influence the on-site enforcement of the treaty within the occupied territory. Further, as treaty law would become national law, its application would rest again on the state's sovereignty. McNair & Watts, *supra* note 49, at 426-427, 446 on the dispossessed sovereign's capacity to make new laws applicable in the occupied territory.

143 Talmon, *supra* note 74, at 117-119. Talmon demonstrates in fact that treaty ratification may take place by Governments in Exile even without following proper national law procedures; *id.* at 129-131. Note further VCLT art. 7(2)(a) and 46 on the capacity of certain officials to conclude treaties without presenting full powers and violation of internal law as a ground for invalidating a treaty.

144 Article 47 Geneva Convention IV reads: "Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory." As the Int'l Committee of the Red Cross Commentary, *supra* note 39, at 275, underlines, this clause applies "both to cases where the lawful authorities in the occupied territory have concluded a derogatory agreement with the Occupying Power and to cases where that Power has installed and maintained a government in power."

145 According to this provision, "[a] treaty is void it its conclusion has been procured by the threat or use of force in violation of the principles of international law embodies in the Charter of the United Nations."

146 *Articles on the Effects of Armed Conflicts on Treaties*, *Draft Article 6*, [2008] Int'l L. Comm'n Rep. 124-5 with commentary.

147 *Draft Article 5*, [2005] Int'l L. Comm'n Rep. 60-61, ¶ 158-161; the citation is from para. 161. On the creation of this provision, *First Report on the effects of armed conflicts on treaties,* U.N. Doc. A/CN.4/552, 17-18 (Apr. 21, 2005) (Special Rapporteur: I. Brownlie), submitted at the ILC at its 57th session (2005). The provision as originally suggested read as follows; "[2]. The outbreak of an armed conflict does not affect the competence of the parties to the armed conflict to conclude treaties in accordance with the Vienna Convention on the Law of Treaties." Following suggestions to that effect, the word 'competence' was changed with 'capacity.'

148 [2007] Rep. Int'l L. Comm'n ¶ 324(b)(ii). This position of the ILC has been criticized in literature, on the basis that "occupation may have different effects on the treaty obligations of the occupying and occupied states than armed conflict . . . ." Burke, *supra* note 34, at 103-104.

149 E. Benvenisti, *Water Conflicts during the Occupation of Iraq*, 97 Am. J. Int'l L. 860, 866-7, 870-1 (2003), addresses the problem from the perspective of whether the occupant may conclude agreements with neighbouring states on the equitable utilization of an international watercourse. Although not very clear, it seems that his argument relates to treaty-making by the occupant on behalf of the people of the occupied territory.

noted, "it was highly unlikely that the CPA – under whose authority the 'other States' would be working in Iraq – would have treaty-making power on behalf of Iraq", since Iraq maintained its sovereignty; it thus remained "doubtful whether the Occupying Powers could sign away Iraq's jurisdiction with respect to foreign troops on its territory."[150] The alternatives included the conclusion of Memoranda of Understanding between CPA and the 'other states', "a practical solution to remedy the lack of treaty-making power of the Coalition",[151] or the regulation of the immunities of such forces by means of a CPA Order. The latter seems to have been the solution finally adopted.[152]

On the other hand, during the occupation of East Timor by Indonesia,[153] the 1990 East Timor Gap Treaty between Australia and Indonesia[154] was concluded. The legality of this treaty was challenged on many grounds, including the prohibition of acquisition of territory by force under general international law[155] and the violation of applicable humanitarian law,[156] insofar as it allowed Indonesia to explore and exploit mineral deposits in East Timorese waters and seabed in a manner inconsistent with article 55 HagReg.[157]

150 Liesbeth Lijnzaad, *How not to be an Occupying Power: Some Reflections on UN Security Council Resolution 1483 and the Contemporary Law of Occupation*, in L. Lijnzaad et al., Making the Voice of Humanity Heard 301 (2004).

151 *Id*. Of course, whether these MoUs are treaties or not is an entirely different question, involving the definition of treaty, under articles 1 and 3 VCLT. Benvenisti, *supra* note 149, at 871, seems to entertain the possibility. Klabbers notes in this regard that the I.C.J. had "no problem treating an instrument concluded prior to Nauru's independence between the Nauru Local Government Council on the one hand and Australia, New Zealand and the United Kingdom on the other, as legally binding". Certain Phosphate Lands, (Nauru v. Austl.), Preliminary Objections, 1992 I.C.J. Rep. 240. Further, Jan Klabbers, The Concept of Treaty in International Law 47-48 (1996). Gautier, on the other hand, recalls that the 1982 UNCLOS allowed under Article 305 participation by states, certain international organizations, as well as Namibia (not yet independent at that time) and certain associated autonomous states or completely internally autonomous territories. In his view, the applicable legal regime to such convention would be regulated on the one hand by customary law, and on the other by "une fragmentation des relations conventionnelles qui repose sur la qualité des parties contractantes concernées". Philippe Gautier, *Article Premier*, *in* Corten & Klein, *supra* note 26, at 42.

152 Under § 2 of CPA Order 17 of 26 June 2003, a far-reaching immunity from Iraqi legal process was awarded to 'Coalition Forces' in Iraq, including contractors. Ian Wexler, A Comfortable SOFA: The Need for an Equitable Foreign Criminal Jurisdiction Agreement with Iraq, 56 Naval L. Rev. 43, 71 (2008) ("the CPA asserted its jurisdictional immunity for U.S. forces by imposing CPA Order No. 17 unilaterally on Iraq. In both nations [Iraq and the Philippines] these perceived imbalances have led to periodic but powerful political protests that have negatively affected the strategic nature of the relationship that the U.S. has with each country"). Ali Allawi, The Occupation of Iraq: Winning the War, Losing the Peace 160 (2007), "In a June 2003 public notice, the CPA exempted itself, the military and foreign contractors from coming under the jurisdiction of Iraqi laws. Most Iraqis could not miss the irony that the CPA had replaced Saddam's rule by decree with yet another form of arbitrary authority, albeit apparently sanctioned by international law and mostly benign in its intent". The immunity of Private Military Contractors in Iraq and the real legal difficulties involved in their prosecution before national courts are demonstrated by Ryngaert, *supra* note 123, at 1035 (2008). Examples of successful prosecutions of PMC are provided at 1045 *et seq*.

153 On the history of East Timor by Indonesia generally, Peter Carey, *East Timor under Indonesian Occupation, 1975-1999*, in A Handbook of Terrorism and Insurgency in Southeast Asia 374-395 (Andrew T.H. Tan ed. 2007). On the question of whether East Timor was occupied in accordance with applicable humanitarian law, Daniel Machover, International Humanitarian Law and the Indonesian Occupation of East Timor, in Catholic Institute for International Relations, International Law and the Question of East Timor 205-222 (1995), especially at 207-208. Although Indonesia refused to be acknowledged as an occupant and provided numerous arguments to justify the occupation of East Timor (P. Lawrence, *East Timor*, 2 Encyclopedia Pub. Int'l L., at 3-4), it seems to be generally accepted today that Indonesia was the belligerent occupant of East Timor. M.N. Shaw, International Law 424-7 (6th ed. 2008); Benvenisti, *supra* note 47, at 153-9; Prosecutor v. Armando Dos Santos, Court of Appeal, Special Panels for Serious Crimes of the Distict Court of Dili, Judgment, 4 (July 15, 2003), available at www.jsmp.minihub.org/.../Ct_of_App-dos_Santos_English22703.pdf (last visited June 30, 2010).

154 Treaty on the Zone of Co-operation in an Area between the Indonesian Province of East Timor and Northern Australia, Indonesia-Australia, 29 I.L.M. 469 (1990).

155 Clark, *Timor Gap*, *supra* note 76, at 76, 90-91.

156 Art. 55 HagReg provides that "the occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct". The I.C.J. in the Armed Activities, *supra* note 30, at ¶ 244, affirmed that the permanent sovereignty of a state over its natural resources forms part of customary international law.

157 Machover, *supra* note 153, at 213-4. The Portuguese Government in its argument before the International Court of Justice elected to emphasize this perspective through the lens of the right of the Timorese people to self-determination, rather than through Article 55 HagReg. East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. Rep. ¶ 19. The Court avoided dealing with the key underlying issues. Further, David M. Ong, *The Legal Status of the 1989 Australia-Indonesia Timor Gap Treaty Following the End of Indonesian Rule in East Timor*, 31 Neth. Y.B. Int'l L. 67, 89-90 (2000). Similar arguments have been made in the past as regards the expropriation of natural resourses of the occupied territory by the occupant in other situations. *See* indicatively, Brice M. Clagett & O. Thomas Johnson Jr., *May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez?,* 72 Am. J. Int'l L. 558, 584-5 (1978); R. Dobie Langenkamp & Rex D. Zedalis, *What Happens to the Iraqi Oil?: Thoughts on Some Significant, Unexamined International Legal Questions Regarding Occupation of Oil Fields*, 14 Eur. J. Int'l L. 417, 430-4 (2003), on the matter of occupant's enrichment.

Eventually, the new Timorese government challenged the treaty concluded by Indonesia and on the day of Timor's independence a new interim international regime agreed with Australia became applicable,[158] while negotiations for the conclusion of new agreements ensued.[159]

It would seem therefore that the capacity to conclude treaties during occupation remains vested in the occupied state under international law. In any event, even if one were to accept that the occupant's rights of usufruct might allow such agreements,[160] they would be valid only for the duration of the occupation.[161] In any event, nothing prevents the validity of such treaties being declared null and void as agreements brought about due to the unlawful use of force.[162]

158 Timor Sea Treaty, 20 May 2002, (Austl. - East Timor), available at www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/AUS-TLS2002TST.PDF (last visited June 30, 2010).

159 In detail on the regime agreed upon after the independence of East Timor, Clive Schofield, *Minding the Gap: the Australia – East Timor Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS),* 22 Int'l J. Marine & Coastal L. 189, 195, 197-8 (2007). On UNTAET's non-recognition of the Gap Treaty as binding, see Exchange of Notes constituting an Agreement between the Government of Australia and the United Nations Transitional Administration in East Timor (UNTAET) concerning the continued operation of the Treaty between Australia and the Republic of Indonesia on the Zone of Co-operation in an area between the Indonesian Province of East Timor and Northern Australia of 11 December 1989, 10 February 2000, available in J.I. Charney & R.W. Smith (eds.), 4 International Maritime Boundaries 2763-4 (2002).

160 Dinstein, *supra* note 29, at 213-218. As Dinstein accurately notes, Article 55 HagReg issues are further complicated as regards the central question of "whether permanent sovereignty over natural resources is vested in States (governments) or in peoples". Further, on popular sovereignty in general, Benvenisti, *supra* note 47, at 183.

161 Benvenisti, Water Conflicts, *supra* note 149, at 871.

162 VCLT art. 52. Further, Stephen C. Neff, War and the Law of Nations, A General History 321 (2005) with references.

7.4.5. / CONCLUSION: BASIC PRINCIPLES AND RULES

In light of all the above, it would seem that the basic rules of international (customary and treaty) law on belligerent occupation, on the premise of which this chapter will be founded, are the following:

First, that the purpose of occupation is to preserve as much as possible the existing legal status-quo in an occupied territory;

Secondly, that the Occupying Power does not acquire sovereignty over occupied territories by reason of annexation and the use of force;

Thirdly, that the 'departed sovereign' (including a recognised Government in Exile) retains *de jure* jurisdiction over occupied territories and the capacity to conclude treaties formally applicable therein. These are consequences of its retention of sovereignty over that area; however,

Fourthly, the *de facto* exercise of prescriptive and enforcement jurisdiction within occupied territories is a prerogative of the Occupying Power(s), albeit one strictly circumscribed by the applicable rules of international law and the aforementioned 'conservationist' principle;

Fifthly, the Occupying Power may be under an obligation to exercise jurisdiction (particularly enforcement jurisdiction), in accordance with established rules of international law, insofar as it is duty-bound under article 43 HR to maintain law and order in the occupied territories; and

finally, the criminal law of the occupied state continues to apply in the occupied territory, unless amended or repealed by the Occupying Power in accordance with applicable humanitarian law.

It is submitted that insofar as the present analysis of article 12(2)(a) in accordance with article 21(1)(a) and (b) ICC Statute is concerned, these rules of international humanitarian law are likely to play a role in the future determination of relevant legal questions. In this context, as the following pages will also explain, the basic position is that an occupied state has *de jure* the capacity to become a party to the ICC Statute with regard to its entire territory – free or occupied. This could arguably apply by analogy also in the case of article 12(3) declarations, insofar as territorial jurisdiction is concerned. The *de facto* implementation of the Statute, however, within the occupied territory during the occupation will largely depend on the position of the Occupying Power.

7.5. /

THE APPLICATION OF ARTICLE 12(2)(A) IN STATE PARTY TERRITORIES OCCUPIED BY ANOTHER STATE PARTY

The Rome Statute does not define the concept of occupation. It does however provide in footnote 34 of the Elements of Crimes that "the term 'international armed conflict' includes military occupation." This footnote applies to the corresponding element in each crime under article 8 (2) (a) [ICC Statute].[163]

The Statute therefore anticipates the commission of crimes within the jurisdiction of the Court in conditions of occupation. Such war crimes are considered as war crimes committed in an international armed conflict.[164] Neither the Statute, nor the Elements of Crimes, however, appear to provide any insights as to the territorial aspect of such cases and their inter-relationship to issues of sovereignty over territory. Therefore, such questions are left to be determined through interpretation and by recourse to applicable international law.

In the practice of the Court at the time of writing, there has been only one situation where the question of occupation arose, without any immediate connection to questions of jurisdiction and territoriality; the occupation of the DRC region of Ituri by Uganda.[165] The matter was discussed in particular in the *Confirmation of Charges Decision* in the Lubanga Case, where Pre-Trial Chamber I was called upon to classify the conflict in the Ituri region of Eastern DRC during 2003-2004 for the purpose of confirming the charges against the accused.[166]

The Prosecutor submitted in the Charges Document that the entire conflict was in fact an internal one (non-international armed conflict) ranging from July 2002 to December 2003. He thus charged Lubanga with the war crime of conscripting and enlisting children below the age of 15 into an armed group and using them to participate actively in hostilities as a co-perpetrator, according to articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute.[167] The 'armed group' in question was the FPLC (*Forces Patriotiques pour la Libération du Congo*), the military wing of UPC/RP (*Union des Patriotes Congolais/Réconciliation et Paix)*. Lubanga was the President of UPC/RP and Commander-in-Chief of FPLC since September 2002.[168]

The Defense and the Victims' Representatives asserted on the other hand that the involvement of other States in the military activities in Ituri was such that it could 'internationalise' the conflict.[169]

163 Elements of Crimes, *supra* note 19, at 15. For analysis, Knut Dormann et al., *The Context of War Crimes, in* The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results 115 (Roy S. Lee ed. 1999). For these authors, "this footnote is not intended to be a definition, but a clarification". They trace its origin to Common Article 2 of the Geneva Conventions 1949 and further add that although reference is made to Article 8(2)(a), "it must be assumed that it [this footnote] applies also to "other serious violations of the laws and customs applicable in international armed conflict" referred to in Article 8(2)(b)". Further, Lubanga Confirmation of Charges, *supra* note 4, at 72, ¶ 205.

164 Lubanga Confirmation of Charges Decision, *supra* note 4, ¶ 220.

165 All other situations (Centr. Afr. Rep., Uganda and Sudan) contain charges relating to non-international armed conflicts. The Kenya situation has not been opened yet, although it is believed that this too will be a situation of a non-international character. For the situation in Iraq, see *supra* 7.2.

166 Lubanga Confirmation of Charges*, supra* note 4; For the Katanga and Ngundjolo case, *infra*.

167 Lubanga Confirmation of Charges*, supra* note 4, at 6-7, 71, 78, paras. 9-12, 200, 227. In the same case, Document Containing the Charges pursuant to Article 61(3)(a) and of the List of Evidence pursuant to Rule 121(3), Case No ICC-01/04-01/06-356, ¶ 12(i) (Aug. 28, 2006), on the Prosecutor's submission that there is not enough evidence to prove an international armed conflict, and Annex 2 thereof, ¶ 7 on the charges. Happold offers the following suggestion for the Prosecutor's insistence on the internal character of the conflict, "Indeed, the uncharitable might conclude that the Prosecutor's decision was influenced by a desire to maintain good relations with the Ugandan Government, given the ongoing investigation into the situation in northern Uganda which have resulted in the issuing of arrest warrants for five leaders of the LRA, all as yet unapprehended. Realists, on the other hand, might argue that it was a legitimate exercise of prosecutorial discretion." M. Happold, "*Prosecutor v.Thomas Lubanga*, Decision of Pre-Trial Chamber I of the International Criminal Court, 27 January 2007", 56 Int'l Comp. L.Q. 713, 718 (2007); Juan C. Ochoa S., *The ICC's Pre-Trial Chamber I Confirmation of Charges Decision in the Case of Prosecutor v.Thomas Lubanga Dyilo: Between Application and Development of International Criminal Law*, 16 Eur. J. Crime Crim. L. & Crim. Just. 39, 42 (2008), makes similar suggestions.

168 Lubanga Confirmation of Charges*, supra* note 4, at 6, ¶ 8-9.

169 *Id.* at 71, ¶ 200.

The Chamber for its part, decided to interpret the applicable provisions (articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Statute) through the lens of articles 21(1)(b) and 21(3) of the Statute.[170] The Chamber therefore took the following steps in its reasoning; starting from common article 2 of the Geneva Conventions, it explained that in its view an armed conflict is international in character, "if it takes place between two or more states; this extends to the partial or total occupation of the territory of another state, whether or not the said occupation meets with armed resistance. In addition, an internal armed conflict that breaks out on the territory of a State may become international – or, depending upon the circumstances, be international in character alongside an internal armed conflict – if (i) another State intervenes in that conflict through its troops (direct intervention), or if (ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention)."[171]

The Chamber then reiterated the celebrated overall control test of the *Tadić Appeals Decision* for the determination of the occurrence of an 'indirect intervention'.[172]

At that point, however, the Chamber avoided the application of the 'overall control test'. Instead, it admitted that the conflict was at the outset international in character (rather than an internal one that was later internationalized by indirect intervention), due to the occupation of Ituri by Uganda; this approach rendered apparently unnecessary the application of the overall control test.[173] In the rest of this part of the decision, the Chamber practically copied the relevant excerpts of the judgment of the World Court in the *Armed Activities Case*;[174] it adopted the ICJ's explanation of the definition of occupation in article 42 HagReg, the classification of a State as an 'occupying state'[175] and further dedicated a page of its decision to the relevant factual findings of that Court, including relevant MONUC reports used in that decision.[176] Finally, the Chamber provided in two heavily redacted paragraphs certain witness statements confirming the ICJ's conclusion that Uganda had been exercising control over Ituri for a certain period of time.[177]

On the basis of this information, the Chamber finally decided that a single characterization of the conflict was not feasible due to Uganda's occupation of Ituri and, accordingly, that the charges should be divided, taking into account foreign state involvement in the conflict.

Thus, the Chamber accepted that "there is sufficient evidence to establish substantial grounds to believe that, as a result of the presence of the Republic of Uganda as an occupying Power, the armed conflict which occurred in Ituri can be characterized as an armed conflict of an international character from July 2002 to 2 June 2003, the date of the effective withdrawal of the Ugandan army."[178] The Chamber also examined the alleged Rwandan involvement, but decided, by reason of "the paucity of evidence before it",[179] that it could not reach a conclusion as to Rwanda's possible occupation of Ituri during the critical time.

The Chamber finally concluded that "there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(b)(xxvi) and 25(3)(a) of the Statute from early September 2002 to 2 June 2003."[180] Secondly, the Chamber confirmed that "there is sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for the

170 *Id*. at 72, ¶ 205.

171 *Id*. at 73, ¶ 209. The Court referred to ¶ 84 of the Prosecutor v. Tadic, Case No. IT-94-1-A, Appeal Judgment (July 15, 1999).

172 *Id*. at 73-74, ¶ 210-1.

173 The Court apparently chose the easy way out; by accepting that the conflict was international due to the occupation, it bypassed the need to prove that FPLC and UPC were in fact organs of Uganda using the 'overall control test'. As Bekou accurately noted, "Had the Chamber followed the [overall control] test, it would have had to show that the UPC was, in fact, an agent of Uganda and consequently considered a non-state armed group such as the UPC as an actor in an international armed conflict. This would have been very interesting, given that international humanitarian law does not consider non-state actors as subjects of the law regulating this type of hostilities." O. Bekou, *Prosecutor v. Thomas Lubanga Dyilo-Decision on the Confirmation of Charges,* 8 Human Rights Law Review 343, 347-8 (2008).

174 Armed Activities in Territory of Congo, (Dem. Rep. Congo v. Uganda), Judgment, Merits, 2005 I.C.J. Rep. 168, 229-230, ¶ 172-5.

175 Lubanga Confirmation of Charges*, supra* note 4, at 74, ¶ 212-213. The Chamber did not discuss the Naletilić decision at all.

176 *Id*. at 75, ¶ 214-7. The 'copy-paste' approach of the Chamber has been criticized in the literature; O. Bekou, *supra* note 173, at 348.

177 Lubanga Confirmation of Charges*, supra* note 4, at 75, ¶ 214-5.

178 *Id*. at 76, ¶ 220.

179 *Id*. at 78, ¶ 226. Prosecutor v. Germain Katanga and Matthieu Ngundjolo Chui, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶ 241 (Sept. 30, 2008), followed the same course as the Lubanga Confirmation Decision, insofar as Rwanda is concerned, invoking "limited evidence".

180 Lubanga Confirmation of Charges*, supra* note 4, at 156. On September 2002 Lubanga became the Commander-in-Chief of the FPLC, the military wing of UPC/RP, of which he was also the President. *Id*. at 6, ¶ 8-9.

charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(e)(vii) and 25(3)(a) of the Statute from 2 June to 13 August 2003."[181]

The confirmation decision attracted a significant amount of commentary in the literature.[182] For the purposes of the present dissertation, two points merit special attention.

First, the Chamber affirmed that it 'appears to have' jurisdiction to hear the case, as "in its Document Containing the Charges the Prosecution did not alter the temporal, geographic, material and personal jurisdictional criteria articulated in the warrant of arrest issued against Thomas Lubanga Dyilo. In addition, nothing new has been submitted to the Chamber in respect of jurisdiction and admissibility in the instant case."[183] This apparently exhausted the Court's duty to satisfy itself of its jurisdiction under article 19(1) of the Statute. However, it should be noted that in its earlier decision on the issuance of arrest warrant for the accused, the Pre-Trial Chamber had decided that article 12(2)(a) was satisfied, because the alleged crimes were said to be committed "in the region of Ituri on the territory of the DRC, […]".[184] It also affirmed that the alleged crimes fell within the Court's temporal jurisdiction, considering the dates of ratification and entry into force of the Statute specifically for the DRC.[185]

Secondly, the Chamber did not deal at all with the question of the source of its jurisdiction.[186] Fundamentally, it did not explicitly answer the question of whether it had jurisdiction by reason of the fact that the Democratic Republic of the Congo (the occupied power), retained at least prescriptive jurisdiction over Ituri during its occupation by Uganda, which in turn allowed it to delegate territorial (or nationality) jurisdiction to the ICC. It similarly did not explain clearly whether the Court's jurisdiction stemmed in fact from Uganda's ratification of the Statute and its effective control over the territory in question for a certain

181 *Id*. at 156-7.

182 On this decision, Bekou, *supra* note 173, at 343; Mark A. Drumbl, *Prosecutor v. Thomas Lubanga Dyilo. Décision sur le confirmation des charges*, 101 Am. J. Int'l L. 841 (2007); Ochoa, *supra* note 167, at 39; Gauthier De Beco, *The Confirmation of Charges before the International Criminal Court: Evaluation and First Application,* 7 Int'l Crim. L. Rev. 469 (2007); Happold, *supra* note 167; Thomas Weigend, *Intent, Mistake of Law and Co-perpetration in the Lubanga Decision on Confirmation of Charges,* 6 J. Int'l Crim. Just. 471 (2008); Michela Miraglia, *Admissibility of Evidence, Standard of Proof and Nature of the Decision in the ICC Confirmation of Charges in Lubanga*, 6 J. Int'l Crim. Just. 489 (2008).

183 Lubanga Confirmation of Charges*, supra* note 4, at 56, ¶166. It is noteworthy that in the Arrest Warrant Decision (Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-37, Decision on the Prosecutor's Application for a Warrant of Arrest, article 58 (Feb. 10, 2006)), the Pre-Trial Chamber did not elaborate much on Article 12(2)(a). It simply noted that the crimes were allegedly committed in the region of Ituri in the territory of the DRC and that therefore the condition of territoriality was met. *Id*. at ¶ 27.

184 *Id.* Lubanga Arrest Warrant Decision. This decision is available as Annex I to the Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06—8-US-Corr (Feb. 24, 2006).

185 *Id.* Lubanga Arrest Warrant Decision at 18, ¶ 26.

186 Ochoa, *supra* note 167, at 41-42 and 49. For that author, the Court should have examined "the specific source of the applicability of the ICC Statute" under articles 64 and 65 of the Geneva Conventions, in light of the acceptance of Ituri's occupation by Uganda from September 2002 till June 2003.

period of time,[187] or whether the application of the Rome Statute as an international treaty was suspended by reason of the armed conflict and the occupation.[188]

In all fairness, it must be admitted that the Defence did not make an argument attacking the Court's jurisdiction. It did however raise an objection based on the principle of legality (article 22 ICC Statute). The Defence invoked articles 64 and 65 of Geneva Convention IV and argued that "only legislation in force at the start of the occupation remains in force and any laws passed subsequently do not apply."[189] The substance of the Defence argument was that Lubanga was not aware of the criminal prohibition which he allegedly violated, because the Statute entered into force as regards Uganda only on 1 September 2002, and additionally because under article 65 GC IV, new penal provisions introduced by the Occupying Power shall not come into force until they have been brought to the knowledge of the population.[190] On the basis of the argument that the ratification of the Rome Statute was not made known to the inhabitants of Ituri by either the DRC or Uganda and that therefore the prohibition of enlisting and conscripting child soldiers did not apply, the Defence concluded that the charge in question would violate the principle of legality. In addition, finally, the Defence argued that as the provisions of enlisting and conscripting child soldiers in the Rome Statute and their counterparts in Additional Protocols I and II and the Optional Protocol to the Convention on the Rights of the Child differed, Lubanga could not foresee that his conduct would entail his criminal responsibility.[191]

The Chamber interpreted the objection as one of mistake of law.[192] It did however mention that, as regards the principle of legality, the crimes in question were sufficiently defined in the Statute and the Elements, and that the Statute entered into force on 1 July 2002. Therefore, the commission of such offences entailed criminal responsibility.[193] The Chamber thus concluded that all the aspects of legality were satisfied and that the objection failed.[194] The Chamber similarly dismissed the Defence argument that the accused was not aware of the prohibition and could not foresee it[195].

The Chamber made many interesting pronouncements on the mistake of law argument.[196] What remains important for the purposes of the present discussion is that the Chamber emphasized the Statute's ratification by the DRC on 11 April 2002, i.e. a few months before the period covered by the Prosecution charging document.[197] On the other hand, it never referred to Uganda's ratification. This is in contrast with the substantive law, where the Court underlined that both the DRC and Uganda were Parties to the 1949

187 *Id*. National extradition law contains very few examples, where objections on the basis of loss of control over occupied territory resulted to a refusal to extradite, on account of the fact that such situations affected the application of bilateral extradition agreements. In the LoDolce Case, supra note 3, the US District Court of the Western District of New York refused the extradition of LoDolce to Italy in 1952 on charges of murder and robbery committed in the occupied part of Northern Italy by Germany in 1944. The Court considered that "It may be true that the Italian Government had not lost to Germany and the United States its sovereignty over the boundaries which it occupied prior to the war, yet while any of the enemy armies were within such boundaries, with or without the consent or permission of Italy's government, such presence may justly be considered as committing an act of hostility and certain of its rights were given up, ceded, severed or abandoned by that sovereign for the time." The Court then underlined that "the alleged crimes upon which this proceeding is based were committed Dec. 6, 1944, at a place in northern Italy then occupied by the German armies, the common enemy of the United States and of Italy; note that the demanding government was not then, with its armies or otherwise, physically in control of the place of the crime. The Court feels constrained to follow the established precedents. In doing so it is necessary to determine that the treaty between the United States and the Republic of Italy is not applicable to the present matter;[...]" *Id*. at 323-4. Note here the interesting reading of the case by Geoff Gilbert, Responding to International Crime 51 (2006), "The court in LoDolce held that while enemy forces are occupying part of a State, it lost its jurisdiction over offences committed at that time. Thus, while murder and robbery were crimes for which extradition could be granted under the U.S.-Italian treaty, the United States refused to surrender the fugitive because the crimes occurred in 1944 when Italy exercised no effective control over its own territory."

188 The issue of suspension or termination of the Rome Statute by reason of an armed conflict or occupation is far from clear and deserves a more lengthy analysis. The topic is currently pending before the Int'l L. Comm'n. At present, the Commission has produced a set of draft articles approved at first reading, [2008] Int'l L. Comm'n Rep., U.N. Doc. A/63/10, at 83-87, art. 1-18 and Annex, with commentaries.

189 *Id*. at 102, ¶ 295.

190 *Id*. at 103, ¶ 296.

191 *Id*.

192 *Id*. at 104, ¶ 301.

193 *Id*. at 104, ¶ 302.

194 *Id*. at 104, ¶ 303.

195 *Id*. at 105-107, ¶ 305-316.

196 A useful discussion is offered by Drumbl, *supra* note 182, at 845-7; Weigend, *supra* note 182, at 474-6.

197 Lubanga Confirmation of Charges, *supra* note 4, at 105, ¶ 307.

Geneva Conventions and Additional Protocol I, when discussing the crimes in question under treaty and customary law.[198]

Accordingly, it seems that for the purposes of this case, the Chamber relied solely on the DRC ratification as the foundation of its jurisdiction. This understanding stems mainly from two facts.

First, in its answer to the Defence objection that the accused could not foresee and know of the criminal prohibition in question, the Chamber stressed only the DRC's ratification of 11 April 2002; no mention is made of Uganda's ratification at any point – or articles 64 and 65 of GC IV for that matter.

Secondly, the Chamber noted in its reply to the argument of the principle of legality that the crimes in question are sufficiently defined in the relevant provisions of the Statute "which entered into force on 1 July 2002."[199] Notwithstanding the general truth of this comment, as far as the respective states in question are concerned, this is true only in part. The Statute entered into force for the DRC on 1 July 2002, according to article 126 of the ICC Statute. As far as Uganda is concerned, its ratification took place on 14 June 2002 and therefore the Statute entered into force on 1 September 2002.[200] This was the reason that rendered necessary Uganda's Declaration of Temporal Jurisdiction under Article 12(3) ICC Statute of 27 February 2004 extending the jurisdiction of the Court to 1 July 2002. This is perhaps in stark contrast with the Chamber's attitude of the substantive crimes, where the Court made reference to both DRC's and Uganda's ratification of the Geneva Conventions and Additional Protocol I .[201] This confirmed the Chamber's earlier conclusion that the crimes fell within the scope of temporal jurisdiction in its decision to issue an arrest warrant for Lubanga on the basis of the critical dates of ratification of the Statute and its entry into force as regards only the DRC.[202]

Thirdly, Uganda never objected to the jurisdiction of the Court.[203]

It would appear therefore that the foundation of the Court's jurisdiction up until and including the confirmation of charges proceedings was the ratification of the Statute by the occupied state party, the DRC, rather than the Occupying Power, Uganda.

In any event, even if jurisdiction was disputed, the result for the accused would probably not differ, at least as far as the Court's jurisdiction under article 12(2)(a) is concerned,[204] since both states were parties to the Statute at the critical time of the commission of the crimes charged (1 September 2002 onwards) and the accused was always a DRC national. It is perhaps for this reason that the Defence did not insist on the applicability of articles 64 and 65 GC IV and elected not to reiterate the corresponding arguments in its application for leave to appeal the confirmation decision.[205]

The findings of the *Lubanga Confirmation Decision* on the nature of the conflict were largely endorsed in the subsequent *Katanga and Ngundjolo Confirmation Decision*.[206] In that case, the Prosecution selected to stress the international character of the conflict and argued for a non-international conflict in the alternative, since the substantive charges were codified in the Statute identically, irrespective of the nature of the conflict.[207] The Chamber ruled that the conflict was international in character,[208] without any clarification as to the foundation of its jurisdiction. The issue was not raised by any of the parties, particularly in light of the fact that the critical date for those cases was well after ratification and entry into force of the Statute for either State (February 2003).

In conclusion, it appears that the Court's early jurisprudence in the *Lubanga* case contains sufficient indicia to conclude that the critical legal test in situations of occupation concerns the ratification of the

198 *Id.* at 106, ¶ 309.

199 *Id.* at 104, ¶ 302.

200 Ochoa, *supra* note 167, n. 50.

201 Lubanga Confirmation of Charges, *supra* note 4, at 106, ¶ 309.

202 *Lubanga Arrest Warrant Decision*, at 18, ¶ 26, "Considering the "[t]he Statute entered into force for the RDC on 1 July 2002, in conformity with article 126(1) of the Statute, the Dem. Rep. Congo having ratified the Statute on 11 April 2002, the second condition would be met pursuant to article 11 of the Statute if the crimes underlying the case against Mr. Thomas Lubanga Dyilo were committed after July 1, 2002. As the case against Mr. Thomas Lubanga Dyilo referred to crimes committed between July 2002 and December 2003, the Chamber considers that the second condition has also been met".

203 Uganda's tacit approval could potentially be considered as 'subsequent agreement between the Parties' (here: Dem. Rep. Congo and Uganda) for the purposes of the interpretation of Rome Statute, art. 12(2)(a), under VCLT art. 31(3)(b).

204 It should be mentioned that Lubanga is a Dem. Rep. Congo national. Article 12(2)(b) thus could also apply. The same is true for a number of other accused persons before the Court; Katanga, Ngundjolo, Bemba (Dem. Rep. Congo nationals).

205 Le Procureur c. Thomas Lubanga Dyilo, Version publique expurgée de la requête de la Défense en autorisation d'interjeter appel de la Décision de la Chamber Préliminaire I du 29 janvier 2007 sur la confirmation des charges en conformité avec les décisions de la Chamber Préliminaire du 7 et 16 février 2007, Case No. ICC-01/04-01/06-836 (Feb. 22, 2007).

206 Katanga and Ngundjolo Confirmation of Charges, *supra* note 179.

207 *Id.* at 71, ¶ 234-5.

208 *Id.* at 73, ¶ 240.

Statute and the jurisdiction of the occupied state (the DRC), rather than that of the occupant (Uganda). This conclusion however should be moderated in light of the fact that the Court did not discuss the issue in the context of a challenge to its jurisdiction. Admittedly, even if its jurisdiction was challenged, the outcome would probably not be different, since both states were and remain parties to the Statute. It is in light of this conclusion that the following questions will be addressed next; first, whether the Court has and can exercise jurisdiction on the basis of the competence vested in a state party, in the event that crimes occur over part of its territory that is occupied by a state not party; and secondly, whether the Court has and can exercise jurisdiction in cases of occupation, where the Occupying Power is a state party and the occupied power a state not party, notwithstanding questions of nationality (article 12(2)(b) Rome Statute).

7.6. / THE APPLICATION OF ARTICLE 12(2)(A) IN STATE PARTY TERRITORIES OCCUPIED BY A STATE NOT PARTY

An interesting question closely connected to the application of article 12(2)(a) in cases of belligerent occupation arises in cases of occupation of the territory of a state party by a state not party. In this situation, does the Court have jurisdiction under article 12(2)(a) when nationals of the state not party commit crimes on the occupied territory?

It would seem that, in conformity with the Chamber's approach in *Lubanga* and the international rule that occupation does not entail loss of sovereignty,[209] the prescriptive territorial jurisdiction of the occupied state remains formally unaffected.[210] The practice of the Court so far in the cases of the DRC situation, where the occupation of Ituri would likely raise relevant jurisdictional issues, does not indicate that the fact of occupation before, during and after the ratification of the Statute by the DRC has had any legal effect to the Court's jurisdiction.[211] The defendants dic not raise the issue and the Court did not consider it *proprio motu* in the context of its duty to satisfy itself of its jurisdiction. Therefore, it does not seem to be a matter of controversy that the ratification of the Statute by the occupied state's authorities would validly give rise to the territorial jurisdiction of the International Criminal Court. Therefore, it would seem undisputed that the Court has territorial jurisdiction for crimes committed in Northern Cyprus, which is under Turkish occupation

209 *Supra* Part 3.2.

210 Stuyt, *supra* note 79, at 253, "the occupied state remains invested with its territorial jurisdiction notwithstanding belligerent occupation of its territory by foreign troops".

211 The Dem. Rep. Congo ratified the Rome Statute on Apr. 11, 2002. The occupation of Ituri, according to the I.C.J. in the *Armed Activities Case*, *supra* note 30, at 230-231, ¶ 175-9, commenced approximately on June 1999. The end of the occupation was assessed to be on June 2, 2003 in the Lubanga Confirmation of Charges, *supra* note 4, ¶ 220. Therefore the area in question was under foreign occupation before, during and after the Dem. Rep. Congo ratification.

since 1974, as the Republic of Cyprus maintains sovereignty over the entire island.[212] The main jurisdictional objections on this situation, it is submitted, arise primarily from other considerations rather than the existence of territorial jurisdiction, for example jurisdiction *ratione temporis, ratione materiae* or even admissibility.[213] Additionally, the factual implementation of such jurisdictional assertions might prove very difficult in practice, since without the co-operation by the occupant, the Prosecutor would be practically unable to collect and process important evidence for meeting the Statute's probative thresholds, e.g. for the issuance of an arrest warrant ('reasonable grounds to believe'). Even if such arrest warrants are ultimately

212 Schabas, *supra* note 17 at 285. Further, S.C. Res. 353, U.N. Doc. S/RES/353 (July 20, 1974); S.C. Res. 541, U.N. Doc. S/RES/541 (Nov. 18, 1983); S.C. Res. 550, U.N. Doc. S/RES/550 (May 11, 1984). Extensive references to the relevant SC and GA resolutions from 1974 onwards is made by Chrysostomides, *supra* note 99, at 148-153; further on the matter of continued sovereignty *id.* at at 155-7. In detail, Cyprus v. Turkey, App. No. 25781/94, Merits, Eur. Ct. H.R.¶ 13-14, Grand Chamber (May 10, 2001); J. Dugard, Recognition and the United Nations 110 (1987); Autocephalous Greek-Orthodox Church of Cyprus and Republic of Cyprus v. Goldberg et al., 917 F.2d 278, 293 (7th Circ. Oct. 24, 1990). Note that in the recent case of Demopoulos et al. v. Turkey, *supra* note 135, at ¶ 96 the Grand Chamber explicitly mentioned that, while the Greek Cypriots who alleged infringement of their right to property in the North should first seek redress in the Immovable Property Commission established in the North in the context of the rule of exhaustion of local remedies, nonetheless " . . . . this conclusion does not in any way put in doubt the view adopted by the international community regarding the establishment of the "TRNC" or the fact that the government of the Republic of Cyprus remains the sole legitimate government of Cyprus . . . . The Court maintains its opinion that allowing the respondent State to correct wrongs imputable to it does not amount to an indirect legitimization of a regime unlawful under international law". For exercise of jurisdiction by the Republic of Cyprus over activities in the occupied territories, see indicatively Tomko v. Republic of Cyprus per the Department of Population Register and Immigration of the Ministry of Interior, Case No 709/2006, Judgment, June 20, 2007 (Supreme Court of Cyprus), *reported in* Oxford Reports on International Law, ILDC 834 (CY 2007) (Rapporteur: A. Constantinides). In that case, the applicant resided in North Cyprus and, following the lifting of the restrictions in the movement between North and South, she filed an application with the authorities of the Republic of Cyprus for renewal of her residence permit. The administrative authorities rejected her application due to her residence in the North. The Supreme Court accepted the appeal against the refusal to renew; in doing so, the Supreme Court affirmed that the Republic of Cyprus not only maintains sovereignty over the occupied North (at 3, "Given that the occupation does not restrict the sovereignty of the Republic in all its territories, including the occupied ones..."- author's translation) but also implied that the Republic of Cyprus is not precluded by the fact of occupation from regulating activities in the Northern part – such as residence, as in this case. See comments of the Rapporteur, ¶ A3. However, it is true, as the Rapporteur notes, that this judgment is quite short and that its laconic reasoning might not be the best for drawing generalized conclusions.

213 Although in the case of Georgia ratification of the Statute took place much earlier than 2008, in the case of Cyprus the temporal dimension poses a real problem, considering the decision of the drafters on the prospective character of the crime of forced disappearances. Elements of Crimes, *supra* note 19, art. 7(1)(i), at 11, n. 24 provides that "This crime falls under the jurisdiction of the Court only if the attack referred to in elements 7 and 8 occurs after the entry into force of the Statute". Further on the negotiations of the provision, Leila N. Sadat, The International Criminal Court and the Transformation of International Law – Justice for the New Millennium 186 (2002). In more detail, from the angle of article 12(3), Héctor Olàsolo et al., *The International Criminal Court's Ad Hoc Jurisdiction Revisited*, 99 Am. J. Int'l L. 421, 431 (2005). These authors suggest that an acceptance of jurisdiction under article 12(3) does not preclude an examination by the Court of events predating that acceptance as regards questions of proof of the contextual elements of the crimes, the execution of common plans and the existence of continuous crimes. Naturally, the crime of settlers under article 8(2)(b)(viii) of the Rome Statute remains a possibility. For reports according to which due to the settlement of mainland Turks in Northern Cyprus, they made up more than 10% of the population in the occupied territories in 1975-1977 (a number which increased considerably later on), *see* Report of the Committee on Migration, Refugees and Demography, Rapporteur: A. Cuco (the 'Cuco Report') ¶ 35 (Apr. 27,1992). In detail, Y. Ronen, *Status of Settlers Implanted by Illegal Territorial Regimes*, 79 Brit. Y.B. Int'l L. 194, 219 (2008). As Ronen mentions, the latest figures on Turkish settlers vary in the studies commissioned by international organizations between 31.000 and 160.000. Similar figures are offered by Chrysostomides, *supra* note 99, at 198-201; on the argument that "the arrival of settlers in Cyprus was aimed solely at bringing about demographic change", *id.* at 197-8. The Eur. Ct. H.R. recognised the situation without reference to specific numbers, when it stated recently that "Turkish settlers from Turkey have arrived in large numbers and established their homes" in the occupied North. Demopoulos et al. v. Turkey, *supra* note 135, at ¶ 84. Further, Van Koufoudakis, *European Human Rights Law and Turkey's Violations in the Occupied Areas of Cyprus*, in The Diversity of International Law: Essays in Honour of Kalliopi K. Koufa 316-7 (Aristotle Konstantinides & Nikos Zaikos eds. 2009).

issued, however, it may be that their function will resemble more that of a travel ban beyond certain frontiers, in the absence of active Security Council support.[214]

Finally, beyond the clear-cut case of Cyprus, in other situations additional complications arise from recognition. This is particularly evident as regards the recognition of South Ossetia and Abkhazia by four states.[215]

To conclude, from the Court's scant practice so far, it appears that the Court has jurisdiction, under article 12(2)(a) ICC Statute for crimes committed on the occupied territory of states parties, irrespective of the time that the state became a party to the Statute. In practice, however, the difficulties that this factual situation may pose to the investigation and ultimately successful application of the Rome Statute might discourage the Prosecutor from actively pursuing an investigation into such situations until after liberation. Finally, it is important to bear in mind that, as a matter of law, the possibility remains open that the Prosecutor would open an investigation during the occupation, albeit it may ultimately prove to be a possibility more significant in terms of deterrence, rather than of actual application, in the absence of Security Council endorsement.

7.7. / THE APPLICATION OF ARTICLE 12(2)(A) IN THE TERRITORY OF A STATE NOT PARTY OCCUPIED BY A STATE PARTY

This section will address issues similar to those concerning the spatial dimension of the application of human rights treaties.[216] Bearing in mind the wording, context and purpose of article 12(2)(a) ("in the territory of which the conduct in question occurred"), the next pages attempt to provide the legal arguments concerning the application of the ICC Statute under this specific provision, when a state party, due to belligerent occupation, exercises effective control over the territory of another state, not party to the Rome Statute, for a certain period of time. Fundamentally, the question is whether the ICC may use the expansive

214 It is noteworthy however that even the existence of a Security Council referral was not enough to convince states not parties to the Rome Statute (e.g. Saudi Arabia, Egypt, Qatar) or even states parties (Chad, Kenya) to arrest the Sudanese President Al-Bashir following the issuance of the arrest warrant against him. More recently, BBC News, *Sudan Leader on Mecca Pilgrimage*, Apr. 1, 2009, available at http://news.bbc.co.uk/2/hi/africa/7976390.stm (last visited on Mar. 20 2010); *Darfur: Genocide Charges to be Reconsidered*, Feb. 3, 2010, available at http://news.bbc.co.uk/2/hi/africa/8494759.stm (last visited on Mar. 20, 2009). For Bashir's recent visit to Chad, BBC New, *Sudan's President Bashir defies arrest warrant in Chad*, July 21, 2010, available at http://www.bbc.co.uk/news/world-africa-10718399 (last visited July 22, 2010), IHT/Reuters, *Chad: A Visitor from Sudan*, July 22, 2010, available at http://www.nytimes.com/2010/07/22/world/africa/22briefs-Chad.html?_r=1&scp=1&sq=Chad%20+%20Bashir&st=cse (last visited July 21, 2010). For his recent visit to Kenya and State Party reactions, BBC News, *Kenyan Ambassadors Summoned over Omar Al-Bashir's visit,* 1 September 2010, available at http://www.bbc.co.uk/news/world-africa-11156184 (last visited Oct. 30, 2010).

215 On Georgia's argument that Russia is an Occupying Power in parts of the conflict area and Russia's denial, see *supra* note 7. For a discussion on whether the occupation affects under the law of treaties the international obligations of the occupied state (here; termination/suspension of Georgia's ICC membership due to occupation), *see* Burke, *supra* note 34, at 114-116. The situation is complicated in light of South Ossetia's and Abkhazia's recognition as states by Russia, Nicaragua, Venezuela and Nauru. Luke Harding, *Tiny Nauru struts world stage by recognising breakaway republics,* The Guardian*,* Dec. 14, 2009, available at http://www.guardian.co.uk/world/2009/dec/14/nauro-recognises-abkhazia-south-ossetia (last visited Oct. 30, 2010).

216 The question of the extraterritorial application of international human rights treaties has been extensively treated in literature and case-law. For a more recent affirmation, CERD Case, *supra* note 7, at ¶ 216; Wall Advisory Opinion, *supra* note 38, at ¶ 108-9, for the ICCPR, ¶ 112 for the ICESCR (the Covenant "applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction". From the literature, *see* indicatively, Rozakis, *supra* note 3, at 167-186; Michail Gondek, *Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?,* 52 Neth. Int'l L. Rev. 347, 349-387 (2005); Fons Coomans & Menno Kamminga, Extraterritorial Application of Human Rights Treaties (2004); T. Meron, *Applicability of Multilateral Conventions to Occupied Territories,* 72 Am. J. Int'l L. 542, 544-550 (1978), as regards Israel and the application of ILO conventions in occupied territories.

interpretation of 'control' familiar from human rights law, in order to expand the notion of 'territory' of state parties in article 12(2)(a), so as to include not only sovereign, but also any type of territories 'controlled' by them. This would expand correspondingly the territorial scope of application of its jurisdiction even to crimes committed by nationals of third states in such circumstances.

In this context, it is to be recalled that, when the Prosecutor discussed the situation in Iraq, he did not offer any indication as to the legal parameters his Office employed to decide the question.[217] In the context of the present examination this part will address the possibility of interpreting "the territory" in article 12(2)(a) Rome Statute as 'effective control'. This is manifestly important in situations of military occupation, where a state party may exercise effective control over the territory of a state not party in whole or in part. Why is it however that such an examination is useful?

7.7.1. / "WITHIN THE TERRITORY" MEANING "UNDER THEIR CONTROL" IN ARTICLE 12(2)(A) ROME STATUTE? – THE EFFECT OF ARTICLE 21(3) ROME STATUTE - THE POLICY ARGUMENT

In order to disperse any suspicions that this examination is merely of academic value, it is perhaps useful to visualise two scenarios relating to the 2004 occupation of Iraq. The first is the situation where UK armed forces would commit war crimes against Iraqi nationals interned in UK administered prisons. The second is where Iraqi nationals would commit war crimes against against UK nationals in Iraq during the occupation. Evidently, ICC jurisdiction under nationality (article 12(2)(b) ICC Statute) would be manifestly available for addressing the criminal conduct of the UK officer.[218] However, the criminal conduct of a state not party national would escape the Court's reach, since the Statute does not endorse passive personality jurisdiction (jurisdiction on the basis of the nationality of the victim).

It becomes apparent, therefore, that accepting a broad interpretation of article 12(2)(a) including territories under state party control would allow the exercise of the Court's jurisdiction over states not party nationals. It would therefore serve as in effect adding an international court in the list of *fora* competent to try such violations of the laws of war.[219] Therefore, in the Iraq example, if one accepted that article 12(2)(a) applies also in territories under the states party's control, over which it has no sovereignty, third party nationals could be charged and brought before the ICC for trial if they committed crimes in territories under UK (or Spanish, Polish etc) control.[220]

Whether this solution would be advisable or legally acceptable is naturally open to question and not amenable to categorical answers. It depends on a number of legal and political parameters that may differ in each situation.

For the purposes of the present dissertation, it is suggested that there is an argument to be made in favour of a 'human rights' interpretation of article 12(2)(a) in that direction, in spite of the evident political risks and the significant financial and operational burdens involved for the Court. These policy arguments would rely heavily on the general advocacy of the ICC movement, as well as the need to ensure a fair trial in secure circumstances for the accused. In this sense, it could be argued that the International Criminal Court, being an independent international judicial mechanism, would provide much greater guarantees of transparency and impartiality than either the local courts or the occupation military courts, which might be

217 *Infra* notes 13-14 and text.

218 Indeed, this was the hypothetical jurisdictional basis contemplated by the Prosecutor in the Iraq letter. Letter of the Office of the Prosecutor, *supra* note 13 at 3.

219 This list would include the military courts of the occupant, as well as third States Parties to the Geneva Conventions, under Article 146(2) (aut dedere aut judicare). Further, Ferraro, *supra* note 39, at 336, 354-5.

220 On the issue of UK effective control in Iraq and the complaints within the jurisdiction of the European Court of Human Rights, *see* Saddam Hussein v. Albania et al., App. No. 23276/04, Admissibility Decision, Eur. Ct. H.R. (Mar. 14, 2006) (dismissed due to lack of establishment of jurisdictional link); Al-Saadoon and Mufdhi v. UK, *supra* note 67, at ¶ 84-89 (jurisdiction of UK over prison it operated in Iraq).

heavily influenced by the armed conflict in their decision-making process.[221] Furthermore, a standing judicial criminal institution would also offer greater guarantees of a fair trial than a 'Special' or 'Exceptional' Tribunal established specifically for the trial (and conviction) of certain individuals.[222] Finally, as ICC decisions would be perceived as free from the taint of victor's justice or retribution, their potential to contribute to the maintenance of order in the occupied area and the protection of the rights of individuals charged with war crimes should not be underestimated.[223]

This suggestion finds support from the actual practice in judicial reconstruction during the occupation of Iraq. Instead of referring cases to the ICC or creating a hybrid tribunal, as advocated by NGOs and academics,[224] the CPA created a Special Tribunal for the trial of important crimes committed prior to and including 1 May 2003 (the Iraqi Special Tribunal – IST),[225] as well as a Central Criminal Court of Iraq in Baghdad (CCCI).[226] The Central Criminal Court of Iraq was created by the CPA as a local Iraqi court, rather than a military court, in order to "try Iraqis accused of serious offences against Coalition forces and the provisional government."[227] The CCCI intended "to serve as an example a model court in Iraq;"[228] and as "a supplement to the Iraqi court system" in order to assist in managing specific aspects of the security

221 Ferraro, *supra* note 39, at 343 explains clearly the situation. For example, Allawi, *supra* note 152, at 160 mentions as regards the attitude of the Iraqi judiciary during the occupation, "The 'legality' of Bremer's Orders was always a contentious issue. The Iraqi judiciary was loath to implement the more controversial aspects of Bremer's decrees, and a number of them were left to gather dust. A frequent ploy was to insist that the Orders were reproduced in the official gazette before they could have the force of law. When the CPA announced a definite end date to its occupation mandate, Iraqi lawyers and judges began to procrastinate in implementing or interpreting the law, preferring the established Iraqi version, even if it contravened Bremer's Orders. Enforcement of the Orders, except where they impinged on security or other vital matters, was an ongoing problem." For a U.S. perspective on the same issue, Wexler, *supra* note 152, at 76, ("CCCI [Central Criminal Court of Iraq] judges are notorious for their sympathetic leanings toward the Sunni-dominated insurgency. Since its inception, CCCI judges have been accused of basing individual verdicts on various outside influences, to include: bribery; pro-Islamic religious affiliation; pro-Sunni religious affiliation; political interference; fear of reprisal from the insurgency and a general opposition to the presence of U.S. forces in Iraq"). When discussing the possibility of U.S. service members by Iraqi Courts, that author concludes as follows *Id*. at 77, "the Iraqi court system does not appear to possess *any* court that is substantially free from corruption or inappropriate outside influences that would allow for an impartial trial."

222 M. C. Bassiouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal*, 38 Cornell Int'l L.J. 327, 363-6 (2005), considers the creation of the Iraq Special Tribunal an 'exceptional' tribunal and therefore in violation of article 14 ICCPR. As Prof. Bassiouni highlights, human rights norms remain applicable in times of war and affect the responsibilities of the occupant. *Id*. with references. For the proposition under humanitarian law that "Special Courts set up on an *ad hoc* basis are therefore not permitted" under article 66 Geneva Convention IV (interpreting 'non-political' and 'properly constituted' courts), Gasser, *supra* note 54, at 305, ¶ 569.

223 This argument was made also for the trial of Saddam Hussein by the ICC, Heidi M. Spalholz, *Saddam Hussein and the IST on trial: the case for the ICC*, 13 Buff. Hum. Rts. L. Rev. 255 (2007).

224 Bassiouni, *supra* note 222, at 340-5 details the discussions. The three options were for an *ad hoc* international tribunal under SC authority as *per* ICTY/ICTR, a mixed international/national tribunal as *per* SCSL, and finally a national Iraqi tribunal with some international support. The Bush Administration favoured the last option, while NGOs favoured the first two. *Id*. at 342. The policy criteria that tilted the balance in favour of the creation of the IST are listed at 344. The ICC apparently was not an option, "Much of the antipathy towards international participation in Iraq's transitional justice process was due in large measure to the Bust Administration's opposition to the ICC and any involvement by the United Nations in Iraq's internal affairs". Eric Stover et al., *Bremer's "Gordian Knot"; Transitional Justice and the US Occupation of Iraq*, in Transitional Justice in the Twenty-First Century, Beyond Truth versus Justice 229, 236 (Naomi Roht-Arriaza and Javier Mariezcurrena eds. 2006). Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform,* 23 Arizona J. Int'l & Comp. L. 347, 399 -400 (2006), " For whatever reason, in crafting a position on trials in Iraq, the Bush administration staunchly opposed involvement by the U.N. or any other international body as such". Further, Richard Goldstone, *The Trial of Saddam Hussein: What kind of Court Should Prosecute Saddam Hussein and Others for Human Rights Abuses?,* 27 Fordham Int'l L. J. 1490 (2004).

225 CPA Order No. 48, Delegation of Authority Regarding an Iraqi Special Tribunal, CPA/ORD/9 Dec 2003/48, 10 December 2003, and Annex I, The Statute of the Iraqi Special Tribunal, Article 1(b). The IST was subsequently abrogated by the Iraqi parliament on Aug. 10, 2005 and replaced by a similar structure with a different name, the Supreme Iraqi Criminal Court. Higonnet, *supra* note 225, at 404.

226 Coalition Provisional Authority Order Number 13 (Revised) (Amended), The Central Criminal Court of Iraq, CPA/ORD/X 2004/13, available at http://www.iraqcoalition.org/regulations/20040422_CPAORD_13_Revised_Amended.pdf (last visited June 30, 2010).

227 Lancaster, *supra* note 39, at 87.

228 Wexler, *supra* note 152, at 74-75; De Brabandere, supra note 70, at 215. See further, Michael J. Frank, *Trying Times: The Prosecution of Terrorists in the Central Criminal Court of Iraq,* 18 Florida J. Int'l L. 1, 7-8 (2006), "Not only would this demonstrate the level of trust the United States placed in these judges, it would also save the U.S. government the time and expense of creating an alternative forum to adjudicate these cases. Similarly, U.S. troops were and are in short supply in Iraq, so why not use Iraqi judges, rather than American officers, to try the insurgents? American officials reasoned that this approach would conserve valuable human resources for other important missions".

situation.[229] For the IST, it seems unclear whether it is an international, hybrid or national court;[230] the best position seems to be that it was a national court with international elements.[231]

The Authority apparently relied for the creation of such tribunals in necessity under humanitarian law and SC authorization.[232]

The criticisms found in the literature against these options of the U.S. Bush Administration are numerous and from all quarters.

US commentators have criticized the Central Criminal Court of Iraq for, among others, treating "dangerous insurgents as petty criminals" and harboring "enmity for U.S. soldiers-to deny U.S. soldiers the justice they deserve."[233] The situation is said to have been aggravated to such an extent, that "the United States eventually ignored CCCI orders to free acquitted insurgents."[234]

From the other side of the spectrum, NGOs and international commentators were equally vociferous. As regards the establishment of the IST,[235] the US was accused of disregarding existing national judicial structures and occupation courts contrary to applicable humanitarian law,[236] for permitting the trial of such cases by national judges and court officers who lacked "the capacity, experience, and independence to provide fair trials for the abuses of the past",[237] for violating the principle of legality through the retroactive application of new criminal law,[238] to name but a few of the criticisms.[239] Other authors acknowledged that "it is possible that the Bush Administration ruled out significant international intervention in the trials of

229 Kelly, *supra* note 139, at 142. According to that author, the CPA also preferred this solution to others (e.g. military commissions, internationally staffed civil tribunal, special Iraqi tribunal) as the preference was to use an existing Iraqi court, but there was "no confidence in any Iraqi court to perform the desired functions to the required standard at that early stage of recovery". *Id*. at 143.

230 Rüdiger Wolfrum, *Iraq: From Belligerent Occupation to Iraqi Exercise of Sovereignty: Foreign Power versus International Community Interference*, 9 *Max Planck U.N.Y.B.* 1, 29 (2005).

231 *Id*. at 31.

232 CPA Order No. 13, preambular ¶ 1; CPA Order No. 48, preambular ¶ 1, 2; Kelly, *supra* note 139, at 143, 152. 'Apparently' in the sense that, as Stahn observes, the CPA failed to "articulate a clear legal basis" for the creation of both these Tribunals (CCCI and IST) under humanitarian law. Carsten Stahn, *Justice under Transitional Administration: Contours and Critique of a Paradigm*, 27 Hous. J. Int'l L. 311 (2004-2005), at 340-341. For commentators who support the view that the creation of the CCCI is based on security and public order considerations under humanitarian law, Michael N. Schmitt & Charles H.B. Garraway, *Occupation Policy in Iraq and International Law*, 9 Int'l Peacekeeping 27, 34 (2005); Ben Clarke, *Military Occupation and the Rule of Law: The Legal Obligations of Occupying Forces in Iraq*, 10 Int'l Trade & Bus. L. Rev. 133, 165-6 (2006).

233 Frank, *supra* note 228, at 8-9. Further, Wexler, *supra* note 152, at 76.

234 Frank, *supra* note 228. Perhaps it is relevant to note here that Amnesty International reported concerns of Iraqi justice officials that the Coalition forces failed to respect the jurisdiction of the Iraqi courts in criminal matters. "Amnesty International understands that in Baghdad, it is the policy of the CPA and the Coalition Forces not to implement court decisions to release detainees on bail; court orders for the unconditional release of detainees are only implemented after approval from a senior military official. Such a policy contravenes Article 9(3) of the ICCPR [...]." Amnesty Int'l, *Iraq: Memorandum on Concerns Relating to Law and Order,* 8, July 2003, available at http://www.amnesty.org/en/library/asset/MDE14/157/2003/en/968002d6-d6b1-11dd-ab95-a13b602c0642/mde141572003en.pdf (last visited June 30, 2010). Further, Stahn, "Justice...", *op.cit. supra note 232,* at 340.

235 See the critical comments by David Gersh, *Poor Judgment: Why the Iraqi Special Tribunal is the wrong mechanism for trying Saddam Hussein on charges of genocide, human rights abuses and other violation of international law*, 33 Ga. J. Int'l & Comp. L. 273, 274 (2004).

236 Sassòli, *supra* note 54, at 675. That authority is very clear on the matter; the CPA "chose neither of those two options [local courts or occupation courts], but preferred to create a new Iraqi court for that purpose, an option which is not offered by Convention IV and is certainly not necessary in order to respect IHL, as the other two kinds of tribunals could have done the job". On further criticism on the establishment of the IST, Bassiouni, *supra* note 222, at 361-4 and further, at 343, n. 73, where that authority underlines that the U.S. Administration argued for the creation of the IST on the basis of S.C. Res. 1483 para. 8(i) ('encouraging international efforts to promote legal and judicial reforms'), and concluded that "[T]hus, the U.S. Administration employed a great deal of latitude in relying on this paragraph to justify the establishment of a entirely new judicial institution".

237 Human Rights Watch, *Memorandum to the Iraqi Governing Council on The Statute of the Iraqi Special Tribunal* 1-15 (Dec. 2003). Further, Stover et al., *supra* note 224, at 235-6.

238 Bassiouni, *supra* note 222, at 372-8; Wolfrum, *supra* note 230, at 30-31.

239 José Alvarez, *Trying Hussein: Between Hubris and Hegemony*, 2 J. Int'l Crim. Just. 319 (2004), for a watershed criticism of most aspects of the IST. Bassiouni on the other hand identified at least 11 aspects of the Iraqi Special Tribunal that could be considered in violation in international criminal, humanitarian and human rights law. Bassiouni, *supra* note 222, at 364-365. *See* also Stahn, "Justice...", *op.cit., supra note 232* at 340-342. Further problems concerning the impartiality and independence of the IST, such as for example political interference, Wexler, *supra* note 152, at 80. Higonnet, *supra* note 225, at 401 notes that although some 'windows' for international assistance were envisaged in the creation of the CCCI, international participation was seriously curtailed by the permissible imposition of the death penalty as a sentence. Further, Stover et al., *supra* note 224, at 237.

Saddam Hussein and other Iraqi leaders for political reasons, out of a desire to control the justice process, in order to avoid embarrassing reminders of past American support for Saddam's government, or as a response to local desires for Iraqi trials."[240]

Similarly, regarding the CCCI, it was said that its creation violated article 64 of the Civilians Convention, "since the predicates for displacing indigenous courts and law did not exist";[241] that Order No. 13 (which created the CCCI) violated the independence and impartiality of the CCCI judiciary, insofar as it provided for the appointment of judges through "one year contracts approved by the CPA" and allowed for the referral of cases by the CPA;[242] finally, important sociological issues were also highlighted, such as representation on the bench of at least the main interested groups/factions in Iraq and the vetting process of judges, in light of the de-Baathification process.[243]

Allocation of some of the high profile cases at least to the ICC might assist in overcoming most of these objections. ICC jurisdiction in such situations[244] could possibly defuse tensions on the ground and avert attempts to resort to court-making initiatives of doubtful effectiveness.[245] Naturally, such an option would also have its own significant problems to overcome, such as the distance from the affected population[246] and the vast difference in the sentencing standards for an accused before the ICC and national courts. The maximum penalty under article 77 ICC Statute would be life imprisonment, whereas the capital punishment was reinstated for certain important crimes in August 2004 in the Iraqi Criminal Code.[247] In those circumstances, it cannot be excluded that individuals would actively wish to be tried by the ICC in order to avoid the capital punishment. Finally, in the front of the ICC-state relationship, Cryer has already warned that "[s]tates are watching closely, and over-expansive readings, as have been suggested at times, have to be very carefully avoided when interpreting the Statute. The Court scares third parties, as well as States parties, at its peril. Especially if it needs anything from them, be it co-operation or possible ratification."[248] These are just some of the evident hurdles in the Court's path.

Be that as it may, the Court could still play a viable alternative as an independent third party, particularly when the national judicial system of the occupied state is in disarray, considering some of the alternatives, such as trials through ostensibly national courts[249] established by the occupant.[250] From the point of view of the accused – state not party national – trial by the ICC would entail access to a high-level international judicial mechanism on an equal footing with nationals of states parties and trial in a safe

240 Higonnet, *supra* note 225, at 399; Alvarez, *supra* note 239.

241 Lancaster, *supra* note 39, at 88; Similarly, Stahn, *Justice*..., *supra* note 232 at 340. See also the *Condarelli* ruling of the Italian Court of Cassation cited *supra.*

242 Stahn, *Justice*..., *supra* note 232, at 341.

243 Stanley A. Roberts, *Socio-religious obstacles to Judicial Reconstruction in Post-Saddam Iraq*, 33 Hofstra L. Rev. 367, 387-390 (2004-2005).

244 The possibility of ICC jurisdiction over Iraq under territoriality is contemplated by I. Bantekas and W. Schabas, *supra* note 17. Naturally, the greatest difficult with ICC jurisdiction in Iraq in general and the trial of Saddam Hussein in particular was the temporal limitation of the Court's jurisdiction.

245 Wexler, *supra* note 152, at 77, "Whatever the cause for its ineffectiveness, the CCCI bears little resemblance to CPA's "flagship Iraqi court" and is currently an unreliable and ineffectual tool for prosecuting insurgents, much less American service members".

246 Higonnet, *supra* note 225, at 348-349 explains that the ICC could only provide a "partial solution to impunity", for a number of reasons; for example, that international courts, such as the ICC, were neither meant to nor capable of prosecuting post-atrocity cases on a large-scale but only a "handful of senior figures", while moreover, due to their 'binary' international or local approach, "international courts have proven disconnected with local realities and may even be considered imperialistic". The disconnection argument is reiterated by Rosanna Lipscomb, *Restructuring the ICC framework to advance transitional justice: A search for a permanent solution in Sudan*, 106 Colum. L. Rev. 182, 195-6 (2006) (for Sudan); John Dermody, *Beyond Good Intentions: Can Hybrid Tribunals Work After Unilateral Intervention?,* 30 Hastings Int'l & Comp. L. Rev. 77 (2006-2007), at 81.

247 Al-Saadoon and Mufdhi v. UK, *supra* note 67, at ¶ 5-15. For a recent example, BBC News, *Tariq Aziz, Iraqi ex-minister, sentenced to death*, Oct. 26, 2010, available at http://www.bbc.co.uk/news/world-middle-east-11625501 (last visited Oct. 30, 2010).

248 Cryer, *The International Criminal Court*, *supra* note 32, at 121.

249 For example, CPA Order No. 13 § 19(1) on the creation of CCCI, provided for the possibility that the CPA would refer cases to the CCCI. Frank, *supra* note 228, mentioned that "[i]nitially, the CCCI was obliged to hear cases initiated by U.S. prosecutors through the auspices of the CPA Administrator, but after July 1, 2004, the CCCI was free to decline even these cases". Wexler, *supra* note 152, at 75, n. 226, "[A]ssigned U.S. military lawyers are instructed to operate as military liaisons to the CCCI rather than prosecutors. Though they frequently provide each of the witnesses and all of the evidence for each case, they have no official role during the trial process and do not, in theory, have the capacity to refer cases to the court. In practice, however, the military liaisons are of indispensable assistance to the court and operate as de facto prosecutors. The U.S. prepares and forwards to the CCCI the majority of the cases involving insurgents accused of attacking Coalition Forces".

250 As Dermody mentions, *supra* note 246, at 88-89, a popular criticism at the time of the Iraq occupation was that "[a]ny tribunal established on behalf of the Coalition Provisional Authority will not be able to rid itself of the perception and fact that it is an instrument of American power"; the IST itself is said to have been the target of many attacks, resulting to casualties.

environment. In this sense, the accused would enjoy a benefit, i.e. a reliable criminal trial with full human rights protection under constant international scrutiny, which in light of the alternatives and the security challenges in question, might be preferable for all involved (the occupant, the suspect and the occupied state).[251]

7.7.2. / "WITHIN THE TERRITORY" MEANING "UNDER THEIR CONTROL" IN ARTICLE 12(2)(A) ROME STATUTE? – THE EFFECT OF ARTICLE 21(3) ROME STATUTE - THE LEGAL ARGUMENT

7.7.2.1. / AN EXAMPLE

From the point of view of international law, extending ICC territorial jurisdiction under article 12(2)(a) to territories under state party control – rather than sovereignty – is not as easy a proposition as it might seem at first sight. The complications are many, particularly in the light of the relatively fluid division of authority between the occupant and the occupied state in conditions of occupation under humanitarian and general international law, as discussed above.

To visualize the predicament, in the recent occupation of Iraq the question was raised in the chambers of the Coalition Provisional Authority whether it was possible to detain, prosecute and try Iraqi nationals outside Iraq. This discussion was said to be stimulated by "concerns over the protection or security of a detainee", in light of the killing of two CPA civilians in March 2004 and the plans to capture Saddam Hussein.[252]

The question needed to be addressed from a number of perspectives.

First, article 49 GC IV does not allow transfer of protected persons from the occupied territory to the territory of the Occupying Power. In fact, article 147 thereof qualifies unlawful deportation, transfer or unlawful confinement of protected persons as a grave breach.[253] Secondly, article 64 GC IV provides for maintaining in force local criminal law, as well as for the continuing operation of local courts in conditions of occupation. Thirdly, article 66 GC IV, which allows for the creation of military courts by the occupant in the occupied territory explicitly states "on condition that said courts sit in the occupied territory". The Pictet Commentary on this provision adds that "[A] last condition, already referred to above, is that the courts in question should "sit in occupied territory". If they are sitting, for any special reason, outside the occupied territory, they must move into it in order to try the cases mentioned here. This obligation is in accordance with the principle of the territoriality of penal jurisdiction. It prevents protected persons who are accused of an offence from being brought before a court in a country other than that in which the offence was committed and thus provides them with a safeguard of the utmost value. In the same way, the Convention lays down that protected persons against whom proceedings are taken are to be "detained within the occupied country" and, where necessary, "serve their sentence there"."[254] Last, but not least, the CPA had to consider the strict prohibition of extradition of Iraqi nationals contained in the Iraqi Criminal Procedure Code, a prohibition which remained in effect under CPA Memorandum No. 3.[255]

251 Although not a case arising from military occupation, it appears that security concerns were predominant in the transfer of the trial of Charles Taylor trial to The Hague.

252 Kelly, *supra* note 139, at 147.

253 On the customary law nature of this prohibition, Wolfrum, *supra* note 230, at 502. Further, David Scheffer, *Beyond Occupation Law*, 97 Am. J. Intl' L. 842, 857 (2003).

254 Int'l Committee of the Red Cross Commentary, *supra* note 39, at 340-1.

255 The discussion is analysed by Kelly, *supra* note 139, at 148. Note in this context from the preparatory works to the ICC Statute, Observations of Governments on the report of the Working Group on a draft statute for an International Criminal Court, UN Doc. A/CN.4/458 and Add. 1-8, [1994] 2 Y.B. Int'l L. Comm'n 68, ¶ 9, where the delegation of Slovenia expressed a reservation "against the territorial scope of the jurisdiction of the court in relation to its own nationals, who by our Constitution cannot be surrendered for trial outside the country."

While the CPA in the end opted for a localised solution (the referral of cases to the Central Criminal Court of Iraq and the IST),[256] these are concerns that would arguably play a significant role in the interpretation of article 12(2)(a) ICC Statute, in the light of article 21(1)(b) and (c).

These arguments can be rebutted however. It could be argued, for example, that article 49 GC IV does not apply in the criminal context, particularly in light of the fact that article 66 of the Convention does envisage the possibility that appellate courts might sit outside the occupied territory.[257] In any event, in order to overcome allegations of potential violations of the GC IV or national law from the transfer of a person to The Hague, the Court could avail itself of the possibility to 'sit' in the occupied territory, under article 3(3) ICC Statute, with the consent of the states involved.[258]

7.7.2.2. / THE MAIN ISSUE

The above example is illustrative of the legal difficulties that may arise under humanitarian law.

From this point of view, if a state party wishes in a future situation of occupation to surrender to the ICC for trial third party nationals for crimes against its personnel under article 12(2)(a), it would need to overcome a number of legal obstacles, similar to the ones faced by the CPA in Iraq.

Potential solutions would involve perhaps a justification for this course of action under articles 43 HagReg and 64 GC IV ('necessity', 'application of the Conventions') for amending national laws in force in the occupied territory, so as to allow extradition of nationals accused of war crimes and criminalizing the commission of grave breaches, if such legislation does not exist in the occupied territory.[259] An additional argument that could be made in this regard is that, since under article 66 GC IV, military courts can be established to try security violations and war crimes against the occupants' forces, the state party – Occupying Power – has jurisdiction to try such offenders under the Convention. Since the Occupying Power has jurisdiction is such cases, relinquishing jurisdiction in favour of the ICC is its own sovereign decision. This seems to be the rationale behind the 'delegation of authority' by the CPA to the Iraqi Governing Council, in order to establish the IST, under Order no. 48.[260]

From the point of view of international law, it is submitted that the key issue under article 12(2)(a) would be whether the ICC could be considered as an alternative to the trial of such crimes by local courts, occupation courts, or new 'special' courts established by the occupants. For this to happen, under general law of the treaties and specifically Article 29 VCLT, the following formula is proposed;

The Court shall have jurisdiction over territories of States not Parties occupied by a State Party under article 12(2)(a) ICC Statute, if

(a) the concept 'territory' in that provision is interpreted so as to include both sovereign territory and territory under a state's control, or

(b) if such intention of the Parties can be deduced from the Statute's preparatory works. Otherwise, the general presumption in favour of territoriality would apply under article 29 VCLT and the Court's jurisdiction would be excluded.[261]

In this context, it should be affirmed that jurisdictional objections can be raised by the accused under article 19(2)(a) and may include also arguments stemming from violations of state sovereignty, pursuant to the *Tadić* jurisprudence.[262]

The main documents of the Court do not seem to provide for clear answers to these questions. It is true, for example, that the Court has jurisdiction over the crime of settlement of the occupying state's nationals within the occupied territory.[263] However, it is also true that the inclusion of such crime is of minimum, if any, assistance to the determination of the question of jurisdiction under this provision, since it

256 Kelly, *id.*

257 Kelly, *id.* at 147, as regards the CCCI establishment, underlined that "[o]ther provisions of the Convention that set forth a detailed scheme covering criminal actions in an occupied territory may effectively govern this aspect".

258 Article 3(3) ICC Statute provides that "The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute". Such a solution however would still not solve legal issues arising from e.g. constitutional prohibitions of extradition of nationals or allegations of unlawful arrest or detention and claims of *male captus*.

259 Sassòli, *supra* note 54, at 675 explains that this constitutes a duty of the occupying power (legislation for trial of grave breaches).

260 CPA Order No. 48, Delegation of Authority Regarding an Iraqi Special Tribunal, 10 Dec. 2003, CPA/ORD/9 Dec. 2003/48.

261 For the presumption, see *supra* under Part 2.1.; further, Burke, note 34, at 121-122.

262 Prosecutor v. Tadic, Interlocutory Appeal, supra note 73, ¶ 55.

263 Under Article 8(2)(b)(viii) of the Rome Statute.

refers only to the charges at hand, rather than the territorial jurisdictional foundation for such charges to be brought before the ICC.

At the outset, it must be mentioned that as far as the preparatory works of the Statute are concerned, as demonstrated in Chapter 3, the compromise of article 12 was cloaked by a shroud of secrecy at the very end of the negotiations. While there is some evidence to suggest that it was discussed in the ILC and the pre-Rome Committees, no specific solutions are recorded.[264] While there are a number of very credible individual accounts by participants of the general atmosphere, official preparatory works are not available to shed some light as regards the birth of the wording of this provision – for example, whether the term 'jurisdiction' instead of territory was proposed and rejected. It would seem therefore that the absence of preparatory works does not allow any room for decisive affirmations in this respect.

As regards the interpretation of the terms "territory of which", it would seem appropriate to use the sources available under article 21 of the ICC Statute, as well as the 'authoritative guide' of interpretation used by the Court, including article 21(3) ICC Statute. For the purposes of the present dissertation, the position is assumed that this is ultimately a question of interpretation. The answer therefore will depend much on the wording, the context, the purpose and spirit of the Statute, as well as article 21(3).

It should be reiterated here that the Court has not had occasion to date to interpret this provision.

The wording of article 12(2)(a) refers to the states parties, in the "territory of which" the 'conduct in question' is alleged to have occurred. The Rome Statute employs neither the word 'jurisdiction', as human rights treaties usually do,[265] nor "in all circumstances" as *per* article 1 of the Geneva Conventions[266] or to "any territory under its jurisdiction" as does the Torture Convention.[267] Furthermore, the Rome Statute itself does not provide for a definition of the term 'territory', as other international treaties do.[268] While jurisdiction

264 See in detail *supra* Parts 3.2. and 3.3.

265 In detail, *infra.* Eur. Conv. H.R art. 1. reads as follows: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." Am. Conv. H.R. art. 1(1) reads as follows: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition." ICCPR art. 2 ¶ 1 of the stipulates that "[E]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

266 Geneva Convention IV, *supra* note 36, at art. 1. Further, Bankovic et al. v. Belgium et al, 2001-XII Eur. Ct. H.R. 335 ¶ 75.

267 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2(1), Dec. 10, 1984, 1465 U.N.T.S. 85, provides that "[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

268 For example Chicago Convention on International Civil Aviation, art. 2, Dec. 7, 1944, 15 U.N.T.S. 295, "[f]or the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State." It is interesting to note that the ICAO Assembly insisted that flight arrangements concerning the Jerusalem Airport should have the consent of Jordan, since the airport was noted as being on an occupied territory. For criticism against this decision, Meron, *Multilateral Conventions*, *supra* note 216, at 555-7.

is a more flexible concept, amenable to broader[269] or stricter[270] interpretations, the concept of territory is a parameter more objectively ascertained. Taking into account also that the present research in the Statute's preparatory works has not revealed any suggestion or discussion aimed to replace 'territory' with 'jurisdiction', a departure from the wording of article 12 would appear very difficult.

Secondly, a contextual approach would seem to lead to the same conclusion. Article 4(2) ICC Statute provides that, while the Court may exercise the totality of its functions and powers in the territory of a state party, it can do so "on the territory of any other State" only following a special agreement between the Court and that state. In the absence of such a special agreement, the Court appears to be precluded from exercising its functions and powers beyond state party territories; doing so would arguably entail a violation of the prohibition of non-intervention.

Additionally, under article 13(b), the Court's jurisdiction shall not be limited by the condition of territoriality in article 12(2)(a) only in the case of a Security Council referral. An extensive interpretation of article 12(2)(a) following the footsteps of the human rights bodies might conflict with the system of the Court and the allocation of roles through the referral system, since it would in effect attach to a state referral a result very similar to – if not outright equivalent – to a Security Council referral. A state referral cannot have under the Statute a legal effect identical to that of a Security Council Resolution under Chapter VII, at least to the extent that it dispenses with the requirement of ratification of the Statute and state consent.

Furthermore, under article 18(1), the Prosecutor's decision to investigate should be notified to all states parties and "those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned."[271] Similarly, the cooperation of third states with the Court under Part 9 is based upon the agreement of that state.[272] Indeed, as Cryer notes, "[o]wing to the structure of the court, and the fact that non-parties have no duties to co-operate with the Court, the limitation of the

269 The Eur. Ct. H.R. has in this context accepted that the following types of situations fall within its 'jurisdiction', although they concern territories outside the European "espace juridique". *See* indicatively the following cases; Turkey's cross-border incursions in northern Iraq (Issa et al. v. Turkey, App. No. 31821/96, Eur. Ct. H.R., Nov. 16, 2004); Turkey's famous effective control over Northern Cyprus (*Loizidou, supra* note 134), the surrender of Abdullah Öcalan to Turkey in Kenya (Öcalan v. Turkey, App. No. 46221/99, Merits, ¶ 91, Eur. Ct. H.R., May 12, 2005); in the arrest of Carlos 'the Jackal' in Sudan (Ramirez Sanchez v. France, App. No. 28780/95, Eur. Ct. H.R., June 24, 1996), Decisions and Reports vol. 86-B, at 155); arrest in Iran by Turkish forces of Iranian and an Iraqi national (Pad and Others v. Turkey, App. No. 60167/00, Eur. Ct. H.R., June 28, 2007); in the murder of the Greek-Cypriot Isaak by a Turkish mob in the Cyprus 'Green Zone' (Isaak v. Turkey, App. No. 44587/98, Eur. Ct. H.R., June 24, 2008); in international waters in a case concerning the maritime interdiction of the Dutch vessel which was approaching Portugal for the purpose of conducting a campaign on reproductive rights and abortion (Women on Waves et al. v. Portugal, App. No. 31276/05, Eur. Ct. H.R., Feb. 3, 2009); in a British prison operated in Iraq and the transfer of prisoners to Iraqi authorities under threat of the death penalty (Al-Saadoon and Mufdhi v. UK, *supra* note 67, at ¶ 84-89); in the region of Transdniestria for Russia's "effective authority, or at the very least...decisive influnce" over the separatists, in Ilascu v. Moldova, *supra* note 3, at §§ 320-321. On the ICCPR art. 2(1), *see* indicatively General Comment No. 31, "Nature of the General Legal Obligation Imposed on States Parties to the Covenant", 26/05/2004, CCPR/C/21/Rev.1/Add.13, ¶ 10 and further Sergio Euden Lopez Burgos v. Uruguay, Communication No. R.12/52 (June 6, 1979), Views of July 29, 1981, 68 I.L.R. 29, at 38-39, ¶ 11.4. *See* further, Coard et als. v. United States, Inter-Am. Comm'n on H.R. Case No. 10.951, Report No. 109/99, ¶ 37 (Sep. 29, 1999). *See* further, Shany, *supra* note 47, at 111-2, who argues that § 403(2) of the Third Restatement of Foreign Relations provides a test arguably governing the applicability of international human rights to State acts and omissions with cross-border impact. Under § 403(2) of the Restatement, a state has jurisdiction to regulate certain activity that has "substantial, direct and foreseeable effect upon or in the territory". On the effects doctrine on jurisdiction, see Chapter IV. Judge Rozakis has noted that following Ilascu, 'jurisdiction' under the Eur. Conv. H.R. includes also the "decisive influence" and the "survival through control" tests. Rozakis, *supra* note 3, at 182.

270 The Eur. Ct. H.R. has not accepted the application of the Eur. Conv. H.R. in e.g. Bankovic et al. v. Belgium et al, *supra* note 266, at ¶ 74-82 concerning alleged human rights violations during the NATO Kosovo bombing campaign, and in Behrami and Behrami v. France and Saramati v. France, Germany and Norway, App. No. 71412/01, 78166/01, ¶ 149-152 Eur. Ct. H.R., Admissibility, May 2, 2007, on alleged human rights violations committed in areas of Kosovo under KFOR control – although in the latter case the Court seems to have relied more on the *ratione personae* objection (i.e who was exercising control – NATO or States), rather than the existence of control as such.

271 See further the Prosecutor's policy approach to multiple state jurisdictions over the same crime. Paper on some policy issues before the Office of the Prosecutor, available at www.icccpi.int/library/organs/otp/030905_Policy_Paper.pdf (last visited June 30, 2010), at 5. Be that as it may, it should be underlined that, as Cameron has noted, ICC jurisdiction requires authorization by only one of the territorial states involved (state of conduct, state of consequence etc Iain Cameron, *Jurisdiction and Admissibility Issues under the ICC Statute*, in Dominic McGoldrick et al., The Permanent International Criminal Court 65, 74 (2004).

272 Rome Statute, *supra* note 9, at art. 87(5)(a). *See* also Article 54(2)(a) for the Prosecutor's power to investigate "on the territory of a State".

jurisdiction in this manner is quite sensible"; otherwise, vesting jurisdiction in the Court without the corresponding obligation of the respective states to co-operate would likely hinder the Court's operation.[273]

Thirdly, from a teleological point of view, several remarks need to be made. Initially, the differences between the human rights treaties and the Rome Statute are far more numerous; they include, among others, the regional versus the universal character of the mechanisms at hand,[274] the type of responsibility involved[275] and the consequences of the respective findings.[276] It would therefore appear that the systems compared are too different to allow for an unqualified transposition of such interpretation.

Moreover, it would seem that the rationale of human rights bodies for the extension of their authority is mostly the need to address thinly-veiled state attempts to avoid their international obligations, by means of simply transferring individuals out of national territory, as "the contemporary sovereign finds scope for absolutism more easily *outside* his territorial realm than within it."[277] Thus, as far as human rights mechanisms are concerned, "[i]n principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control."[278] It would seem therefore that it is one thing to extend an existing, legally binding treaty, in order to protect the human rights afforded to individuals by that treaty, who find themselves under state party authority beyond its national frontiers; it is quite another to extend the rights and corresponding obligations of individuals through an unratified treaty, in order to subject individuals to a court procedure with which they have little (if any) connection – even if, *arguendo*, such extension might be beneficial to their (eventual) legal treatment (fair trial rights) and would not subject them to the death penalty.

Last, but not least, article 21(3) ICC Statute provides that "[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights [...]." Notwithstanding a certain reluctance evidenced in the Court's practice to have recourse to this provision, the emphasis in the jurisprudence seems to lie primarily on ensuring consistency of the interpretation of the Statute and certain human rights, such as the right to a fair trial,[279] rather than to expound upon the scope of inter-state territorial application of the Statute.

273 Cryer, *The International Criminal Court*, *supra* note 32, at 118. Cryer compares here the ICC with the Lebanon tribunal. In his view, the Lebanon tribunal is "likely to suffer", because its jurisdiction and the duty to co-operate of some of the most important states do not seem to coincide. *Id*. at n. 21.

274 At least as regards the Eur. Conv. H.R., the European Court of Human Rights in particular has underlined that although it endeavors to move within general international law when interpreting Article 1 Eur. Conv. H.R. under art. 31(3)(c) of the Vienna Convention on the Law of Treaties, it never loses sight of the special character of the Convention as a regional instrument for the protection of human rights. See Bankovic, *supra* note 266, at ¶ 80 (the Convention as "a constitutional instrument of the *European* public order", having "an essentially regional vocation"); Loizidou v. Turkey, *supra* note 134, at ¶ 43 on the 'special character' of the Eur. Conv. H.R. as a human rights treaty. Rozakis, *supra* note 3, at 176 "the notion of 'regionality', as expounded by *Banković*, is not predominantly determined by geographical considerations . . . . , but by geopolitical considerations, in the sense that "Europe" and "European" were here defined on the ground of their participation in or belonging to the political family of the Council of Europe (and the legal order of the Convention)." Commentators have taken the view, however, that in light of subsequent case-law, the 'regionality' argument has not been followed through by the Eur. Ct. H.R.; Gondek, *supra* note 216, at 377, "The Court's readiness to apply the ECHR to Turkish activities in Northern Iraq . . . . does confirm that the reference to the legal space in the Convention in *Banković* was used *in casu* to deal with the particular argument of the applicants rather than as a condition *sine qua non* for extraterritorial application of the Convention".

275 Human rights bodies are typically concerned with the performance of state obligations under their constituent instrument. The ICC on the other hand deals with individual criminal responsibility. See Articles 2 ICCPR, Eur. Conv. H.R. art. 1, and Rome Statute, *supra* note 9, at art. 25 (1) and (2).

276 Finding of a breach of obligations under the Eur. Conv. H.R. may lead to monetary compensation as "just satisfaction" under Article 41 Eur. Conv. H.R. or very rarely to "restitutio in integrum", mostly in property disputes (e.g. Vondas and others v. Greece, App. No. 43588/06, Judgment, ¶ 49-50, Eur. Ct. H.R., Feb. 5, 2009). The Human Rights Committee under the ICCPR may make findings of violations and recommend remedies, as far as individual complaints are concerned, under articles 2(3) of the Covenant and article 5(4) of Additional Protocol I to the Covenant. It is controversial whether the "views" of the Committee are legally binding or not. Henry Steiner et al., International Human Rights in Context: Law, Politics and Morals: Text and Materials 915-8 (3rd ed. 2007); Michael J. Dennis, *Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Armed Conflict*, 40 Isr. L. Rev. 453, 458 (2007), "the international human rights treaty bodies lack authority to issue binding legal interpretations". The penalties envisaged in the ICC Statute on the other hand may entail even the life-long imprisonment of the accused, under Rome Statute, supra note 9, at art. 77(1)(b).

277 Joan J. Fitzpatrick, *Sovereignty, Territoriality and the Rule of Law*, 25 Hastings Int'l Comp. L. Rev. 303, 304 (2001-2002).

278 Coard et al. v. U.S., *supra* note 269, ¶ 37. In that case, the Commission was concerned over the unlawful arrest and detention of 17 Grenadan citizens for a number of days during the US intervention in Grenada in 1983.

279 On article 21(3) see in detail *supra* Chapter 4.

On the other hand, it would seem that the argument for the application of article 12(2)(a) in territories under the control of a state party is premised mostly on an interpretation of the term "territory" under article 21(3) and the Statute's purposes.

First of all, as regards article 21(3), this provision mandates an interpretation and application of the Court's 'applicable law' consistently with internationally recognised human rights. This provision has been frequently used by the Court as a window for the introduction of human rights jurisprudence – if applicable/adequate – in order to assist in the interpretation of the Statute.[280] In this spirit, it could be argued perhaps that through this provision, the Court could have recourse to the jurisprudence of human rights bodies on territorial jurisdiction. The Court therefore should bear this jurisprudence in mind when addressing article 12(2) of the Rome Statute. After all, the Appeals Chamber has already indicated that "[H]uman rights underpin the Statute; every aspect of it, including the exercise of jurisdiction by the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognised human rights*;* first and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied embracing the judicial process in its entirety."[281]

Additionally, the interpretation of article 12(2)(a) ICC Statute might resemble to a certain extent the situation before the International Court of Justice in the *CERD (Georgia v. Russia) Case*.[282] In that dispute, one key factor was that articles 2 and 5 of the CERD did not contain any indication on the territorial scope of application, and the preparatory works did not provide clear guidance on the issue. The Convention's silence was interpreted differently by each party to the dispute. Georgia suggested that, since there is no spatial limitation in articles 2 and 5 of that Convention, they apply beyond national frontiers,[283] whereas Russia took the view that the wording of the obligations in articles 2 and 5 CERD indicates a strictly territorial field of application of the Convention and that these two provisions do not bind Russia out of its territory.[284] The Court concluded as follows; "[...] the Court observes that there is no restriction of a general nature in CERD relating to its territorial application; [...] it further notes that, in particular, neither Article 2 nor Article 5 of CERD, alleged violations of which are invoked by Georgia, contain a specific territorial limitation; and [...] the Court consequently finds that these provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory."[285] In light of this ruling, therefore, it has been accurately noted that the critical factor that tilted the scales in favour of the extraterritorial application of the CERD and defeated the presumption of article 29 VCLT was "the nature" of the instrument.[286] Although the Rome Statute does contain a territorial indication in article 12(2)(a) – which the CERD did not – this ruling might be used at least as an indication that the legal nature of the Rome Statute should be also considered, when deciding this issue.

Furthermore, one should look at the effect of such interpretation, i.e. placing state not party nationals subject to the jurisdiction of the Court and its service to the Court's objective of putting "an end to impunity".[287] This might be important not only for the nationals of the occupied state, in terms of offering to them the possibility to be tried by an independent Court held to the highest human rights standards. It might also serve as a forum for the trial of third party nationals, who serve in the same coalition/alliance as the occupier.[288] This proposition is founded on the opinion of the Italian Court of Cassation in *Lozano*,[289] according to which the forces of one state are not precluded from the criminal jurisdiction of another, when they are acting jointly in a military coalition. Having an independent third party decide the most high-profile – and thus politically charged – cases might contribute considerably to the attainment of these goals.

Moreover, the phrase "in the territory of which" could be read so as to include not only territories under a state's sovereignty, but also territories under a state's control. This is an argument that seems to have been made on the basis of the Court's *Wall Advisory Opinion*, where the Court ruled that both the ICCPR

280 See *supra* Chapter 4 in detail.
281 *Prosecutor v. Lubanga, supra* note 72, at ¶ 37.
282 CERD Case, *supra* note 7.
283 *Id*. ¶ 92.
284 *Id*. ¶ 100.
285 *Id*. ¶ 109.
286 Burke, note 34, at 125.
287 Rome Statute, *supra* note 9, at preamble. For this aim as one of the cornerstones of the Rome Statute, see more recently the Appeals Chamber ruling in Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May Be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court", ¶ 77 (Dec. 8, 2009).
288 Of course, in such cases, ICC Statute art. 98 might effectively bar prosecution.
289 Lozano v. Italy, *supra* note 125, at ¶ 4.

and the ICESCR apply in the West Bank and Gaza.[290] On the basis of the Court's ruling, it has been suggested that "arguably, the best reading of the Court's opinion is that it was based only on the view that the West Bank and Gaza were part of the 'territory' of Israel, for the purposes of the application of the Covenant [on Civil and Political Rights]."[291] From that perspective, the factual control of foreign territory may be considered sufficient to render such territory a "territory" of the state party for the purposes of the application of article 12(2)(a) ICC Statute. This argument, however, does not seem particularly convincing in light of the Court's emphasis in that case on jurisdiction of a state "outside its own territory."[292]

In light of all the above, it seems highly doubtful to the present author that an argument on the expansive application of article 12(2)(a), so as to include territories occupied by states parties, would be successful at the present stage of operation of the Court,[293] for the following reasons.

First, the preparatory works of the Conference do not shed light on the choice of the wording of article 12(2)(a) and the intention behind it. However, as the numerous failsafe mechanisms in the Statute for the protection of third states indicate, the drafters seemed to give particular emphasis to state consent and jurisdiction on the basis of the least controversial principles available under international law.

Additionally, it is also true that, under article 21(3) ICC Statute, an interpretation and application of the Statute "must" be in accordance with international human rights. However, it seems excessive to suggest that the interpretation endorsed by human rights monitoring mechanisms over provisions of their respective human rights treaties that have different wording than the Statute would qualify as an appropriate means for the interpretation of article 12(2)(a). This becomes evident, considering the significant differences between the ICC system and those of international or regional human rights bodies. Moreover, the *CERD* test as such is inapposite to the case of the ICC, as the Statute contains clear territorial indications, under articles 4(2) and 12(2)(a), for example. However, even under the *CERD* test, it is highly doubtful whether the ICC Statute can be said to be an international instrument of the same "nature" as that Convention,[294] so as to overcome the territorial presumption of article 29 VCLT.

Last, but not least, an exercise of criminal jurisdiction by the ICC without the consent of the territorial state would risk violating the prohibition of non-intervention under general international law and the ICC Statute.

Ultimately, even if an extensive ICC territorial jurisdiction might be said to be beneficial to the local population of the occupied territory, this is a complicated question which needs to be addressed from a number of points of view, under both humanitarian and general international law.[295] The answer may therefore depend extensively on the facts of each case.

In the end, it is the Court's task to decide whether in the specific circumstances of an occupation, its mission is served by an expansive interpretation. The bottom line seems to be that the Court will have to decide whether to give priority to the human right to a fair trial of state not party nationals, accused of

290 Wall Advisory Opinion, *supra* note 38, ¶ 110-3.

291 Dennis, *supra* note 276, at 123. The argument is explained in detail by Burke, note 34, at 119-120 and rejected at 121 as unfounded under current treaty law.

292 Wall Advisory Opinion, supra note 38, ¶ 110-113; the Court affirmed the application of the ICCPR "in respect of acts done by a State in the exercise of its jurisdiction outside its own territory." In the Armed Activities, *supra* note 30, at ¶ 216, the Court, commenting on the Wall ruling, explained that N[t]he Court further concluded that international human rights instruments are applicable Nn respect of acts done by a State in the exercise of its jurisdiction outside its own territoryN, particularly in occupied territoriesN

293 Naturally, this perspective may change following a 'subsequent agreement' of the Parties, explicit or implicit, under VCLT art. 31(3)(b).

294 Whatever the term 'nature' might mean. See also the Fragmentation of International Law, Int'l L. Comm'n Rep., U.N. Doc. A/CN.4/L.682, ¶ 15 (by M. Koskennemi) (Apr. 13, 2006), "Human rights law" aims to protect the interests of individuals and "international criminal law" gives legal expression to the "fight against impunity." Each rule-complex or "regime" comes with its own principles, its own form of expertise and its own "ethos", not necessarily identical to the ethos of neighbouring specialization." This part is reproduced verbatim in the *Study Group Report on Fragmentation*, U.N. Doc. A/CN.4/L.702 (July 18, 2006), ¶ 10.

295 Meron, *Multilateral Conventions*, *supra* note 216, at 551: as regards labour law treaties in particular, Meron identified a number of parameters to be considered; "[w]hen the occupant but not the territorial sovereign has ratified an international labour convention prior to the commencement of the occupation, there is a presumption against the applicability of that convention to the occupied territory, but account must be taken of the positions taken by the latter government with regard to that convention in the relevant international bodies. The answer must, however, be given in each case in light of the specific convention, the social and economic conditions of the occupied territory, the needs of the population, and the character of the changes in the local laws and institutions that would be required."

committing war crimes in an occupied territory, or the sovereignty of the occupied state and its decision not to ratify or otherwise accept the Court's jurisdiction and not to become party to a multilateral treaty.[1]

7.8. / CONCLUSIONS

The purpose of this Chapter has been to examine the territorial parameters of the jurisdiction of the Court under article 12(2)(a) ICC Statute in cases of military occupation. Before recapitulating briefly the main points, it is necessary to reiterate a basic caveat; at the moment that this Chapter was produced, there was no decision of the Court interpreting article 12(2)(a) of the Rome Statute. This seems to have been the result of the Prosecutor's policy to ensure – through the self-referral mechanism mostly – that the first cases before the Court will not raise questions of jurisdiction. Any conclusions drawn therefore from the present examination are founded on general international law and scant traces – or even pregnant silences – in the Court's case-law.

This Chapter was built on the understanding that the Rome Statute is an international treaty that does not contain a definition of the term territory. The meaning of the term therefore should be ascertained through interpretation, by recourse to the Court's instruments of interpretation, including articles 21(1)(b), 21(1)(c) and 21(3) ICC Statute. These three provisions operate here again in a dual capacity; on the one hand, as rules of interpretation in accordance with article 31(3)(c) of the Vienna Convention on the Law of Treaties and 21(3) of the Statute, whereas on the other – and in the alternative – as sources of law, provided that a solution cannot be achieved by interpretation.[2]

Starting from article 29 VCLT, three situations have been identified for further examination in this Chapter. First, the occupation of the territory of a state party by another state party, secondly the occupation of the territory of state party by a state not party, and thirdly the occupation of the territory of a state not party by a state party.

The following tentative conclusions may be iterated, in light also of these caveats.

Under general international law, a state that suffers belligerent occupation of a part of its territory maintains sovereignty over it. As a consequence, it formally retains on the international plane the capacity to conclude treaties and to exercise jurisdiction as manifestations of that sovereignty.

Consequently, in the event that the territory of a state party is occupied either by a state party or a by a state not party to the Statute, the Court has jurisdiction under article 12(2)(a). This is corroborated by the first decisions in the *Lubanga* case. The Court's treatment of the DRC's ratification indicates that the application of the Statute as an international treaty is not precluded, even when the territory where the crimes were committed was under foreign occupation before, during and after ratification. This conclusion further indicates that the occupation can be presumed not to terminate or suspend the Rome Statute – an issue that is not amenable to clear-cut answers and which is not addressed in the present dissertation.

In the event that a state party occupies the territory of a state not party, article 12(2)(a) can be seen to preclude the application of the Rome Statute, in the absence of a Security Council referral, unless it is proven that (a) the parties intended the Statute to apply in such circumstances, or (b) that the terms "territory of which" in article 12(2)(a) are construed as referring not only to territory under state party sovereignty, but also to territory under state party control.

As far as the intentions of the parties are concerned, the negotiating process that led to the wording of this provision does not allow for any clear conclusions to be drawn. Finally, the interpretation of 'territory' in 12(2)(a) requires an assessment of a number of factors, including the wording of the provision, its

1 Generally, on this approach, Burke, *supra* note 34, at 127; Meron, *Multilateral Conventions*, *supra* note 216, at 549-550. From relevant practice cited by these authorities, compare the position of the ILO concerning complaints lodged under Article 24 of the ILO Constitution against Israel originating from the OPTs. These complaints alleged non-observance in the OPTs of Israel's obligations under labour conventions to which that state is a Party. The ILO deemed these complaints as inadmissible, on the grounds that such territories are not within Israel's "jurisdiction" for the purposes of that Convention. "[T]he occupation by Israel of Arab territories in 1967 cannot be considered as having extended to the occupied territories Israel's obligations under Conventions it has ratified." ILO Doc. GB.233/16/30, 233d Sess., para. 7 (1986). Further, Dennis, *supra* note 276, at 131-132.

2 In detail, *supra* Part 5.1.2.4.

context, as well as the object and purpose of the Statute and applicable humanitarian and human rights law.

Without overlooking the plethora of social, legal and political considerations only outlined in the analysis above, in the end it is submitted that the main question for the Court would be to find the appropriate balance between, on the one side, the decision of the occupied state not to ratify the Rome Statute, and on the other the human rights of a national of a state not party accused of the most serious crimes in occupied territories.

In light of this analysis, it is the author's position that the best option in such circumstances would be to either ensure a Security Council referral, or to elicit the consent of the authorities of the occupied state – even on an *ad hoc* basis under article 12(3) Rome Statute – in order to proceed with the relevant prosecutions. These conclusions are of course without prejudice to an interpretation on the basis of subsequent developments, according to articles 31(3)(a) and 31(3)(b) of the Vienna Convention on the Law of Treaties.[3]

3 According to these provisions, in treaty interpretation "There shall be taken into account, together with the context: (*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation . . . "

CHAPTER 8 / CONCLUSIONS

8.1. / INTRODUCTION

The purpose of the present dissertation was to make a contribution to the interpretation and application of the territorial parameters of the Court's jurisdiction, as provided in article 12(2)(a) ICC Statute.

The examination of this provision is motivated by a number of legal considerations, which may be said to refer broadly to the three main classes of actors that the Court has to cater for; states, the victims and the accused.

First, as regards the ICC-state dimension, the main starting point is that territorial jurisdiction has been traditionally addressed from the point of view of states and the limits of state criminal jurisdiction under international law. However, as the International Criminal Court is an international organization, rather than a state, a number of novel legal issues arise closely intertwined with the Court's nature as an permanent international legal institution. Otherwise well-settled issues in the context of inter-state law are thus deemed worthy of new analysis from the point of view of the Rome Statute.

The distinction between state authority and the authority of an international institution informs the entire analysis. It lies in the background of the explanation of the scope of the territorial parameters of the Court's jurisdiction, including both the perception of the limits to the Court's jurisdiction imposed by the principle of non-intervention and the use of legal devices for the localization of criminal activity. In this context, one of the main questions is whether states would be willing to accept from the International Criminal Court what they routinely accept without reservation from even the lowest national criminal court of misdemeanors insofar as the interpretation of territorial jurisdiction is concerned. As the pre- and post-Rome negotiations demonstrate, this is a difficult question to answer, although, admittedly, while states seem reluctant to fully accept universal jurisdiction, they have generally been generous with claims of territorial jurisdiction in their own practice. In this framework, to what extent can an interpretation of a provision of the Statute address some of the situations left uncovered by the last minute package agreement in Rome?

Moving away from the ICC-state dimension, however, the analysis of the Court's territorial jurisdiction becomes more complicated on the ICC-individual level. In this context, two interest groups voice diametrically opposite concerns. On the one hand, the victims would presumably seek an effective investigation into allegations of commission of core crimes. Their claims to effective justice would thus motivate as expansive a reading of article 12(2)(a) ICC Statute as possible. On the other hand, established principles of criminal law aimed to protect the accused would arguably seek to strictly delimit the Court's territorial reach, in line with the requirements laid down by human rights law. The tension between the two approaches reaches critical mass in the assessment of whether or not, and if so, to what extent, the principle of legality affects the interpretation of territoriality in the Rome Statute.

It is the tension between these basic poles and the legal rules developed for their respective interests that shapes the analysis.

From the point of view of localization devices, both public law and human rights rules seem to point in the same direction, with only vague and largely indeterminate restraints imposed by the principle of non-intervention.

On the other hand, the clash manifests clearly in conditions of military occupation. In those circumstances, while classic international law takes a clear stand, human rights norms pose difficult and intriguing questions. This should not come as a surprise. Belligerent occupation poses difficult questions as to the level of development of international law at large; it could not be any different in the case of the ICC Statute. The treatment by the Court's organs of the occupation of Iraq and the occupation of Ituri – the one never opened, the other not seriously problematic – are evident examples of judicial policy. It remains to be seen how the Court will engage with similar situations in the future. It was this dissertation's ambition to provide insights into some of the plausible outcomes of the interpretation of article 12(2)(a) in these situations.

8.2. / FOUNDATIONS

Before providing the main conclusions of the present study, it is necessary to outline some of the main doctrinal foundations, upon which these conclusions have been constructed.

First, one of the basic premises of this work is that article 12(2)(a) suffices as it stands at the moment, so as to address through judicial interpretation most trans-border criminal activities within the Court's jurisdiction. The main research aim was therefore to examine alternative interpretations of the provision under international law, as opposed to calling for its amendment. The present author does not share the position expressed by some delegations calling for an amendment of the provision during the debates in the Aggression Working Group.[4] While the wording of this provision ('conduct'), viewed in the light of article 30 of the Statute might give rise to some concern, such a restrictive approach would seem to run contrary to the entire scheme of the Court's jurisdiction, taking into account the context of this provision and the Statute's purposes. The early jurisprudence of the Court as well seems to explain "the conduct in question" as "the crimes in question", although the case-law is scant and does not address the issue fully. From this point of view, it is suggested that the Court's organs have given no reason to states to justify the 'unfortunate mistrust in international judges'[5] evident in the Statute. Both the judges and the Prosecutor have been particularly sensitive – if not outright deferential – to state concerns of jurisdictional overreach. The practice of soliciting Security Council and state party self-referrals bears testimony to that effect. It also explains why article 12 has not troubled the Court in the formative years of its operation.

Therefore, the main perspective of this work is that the exact meaning and application of article 12(2)(a) should be ascertained through interpretation.

The second foundational question that naturally arises is how to interpret this provision. The present dissertation proceeds to identify the means of interpretation of the Statute, as enshrined in the Court's key documents and articulated by the Court's jurisprudence. It is suggested that, considering the complexity of the legal nature of jurisdictional provisions, the selection of the appropriate means to interpret article 12(2)(a) and the weight to be attributed to each are matters that will demand serious consideration by the Court. Rules of international law are also influential here, in accordance with article 31(3)(c) VCLT.

This process of interpretation needs to be considered in the light of two main limitations, one stemming from general (inter-state) international law, and the second from human rights law; the principles of non-intervention and legality respectively.

From the point of view of general international law, the principle of non-intervention is considered through the lens of Mann's doctrine of connecting links. Accordingly, it is here suggested that the existence of the Court's jurisdiction depends on a holistic view of the connection between a certain criminal activity and state party territory. It is only in the absence of such 'substantial nexus' that the Court will be barred from exercising jurisdiction under territoriality by operation of this rule.

Another topic that merits particular attention is the application of the principle of legality in the interpretation of article 12(2)(a). Following extensive research in national case-law, as well as in the jurisprudence of international human rights bodies, it is the position of the present author that the principle of legality – in the sense of *nullum crimen sine lege* – is not applicable to the interpretation of article 12(2)(a) of the Rome Statute. This view is formed particularly under the influence of the wording of article 22 Rome Statute and the 'flexible' approach adopted by the ECtHR when addressing such issues. In this context, it is suggested here that since the basic 'organizational framework' exists in the Statute for such assertions of jurisdiction, the only limitation to the interpretation of this provision is a vague standard of 'reasonableness', in the sense of absence of arbitrariness. The decision of national courts to subject jurisdictional laws as *lex* to the principle of legality seems best attributable to their reluctance to accept universal jurisdiction, rather than to a firm belief that all criminal statutes on jurisdiction should be subject to the principle of legality. In fact, many years of state expansions of territoriality in criminal law and the absence of state objections seem to suggest the opposite. As a consequence, the present author does not accept that an accused may validly challenge the Court's jurisdiction on the argument that an interpretation

4 See *supra* Chapter 5.1.1.

5 David Hunt, *The International Criminal Court : high hopes,"creative ambiguity" and an unfortunate mistrust in international judges,* 2 J. Int'l Crim. Just. 56 (2004).

of territorial jurisdiction on the basis that a certain interpretation of article 12(2)(a) was not foreseeable to him/her at the time of the commission of the crime.

It is on these foundations that the following approaches to the territorial parameters of the Court's jurisdiction have been based.

8.3. / ARTICLE 12(2)(A) AND TERRITORIAL APPROACHES; FROM STRICT TERRITORIALITY TO THE EFFECTS DOCTRINE AND BEYOND?

Under article 12(2)(a) ICC Statute, the Court has jurisdiction only if "the conduct in question" occurred in the territory of a state party. Taking into account the division of article 30 ICC Statute, the present analysis first attempted to identify the entire spectrum of plausible interpretations of this provision, insofar as the key element of localization ('conduct in question') is concerned. Thus, different answers were offered, starting from the strictest grammatical approach ('conduct in question' as 'conduct' alone) and moving on to more flexible interpretations ('conduct' including 'consequences' and/or 'circumstance' and/or 'effects').

This study takes the view that the Court is not only able, through its *compétence de la compétence*, but also legally justified to employ other elements besides 'conduct' for the localization of criminal activity falling within its jurisdiction, such as the consequences of the crimes in question. It is submitted that this conclusion maintains its validity, irrespective of whether the Court selects to address this issue as one of silence on the part of the Statute and the sources of 21(1)(a) thereof, which necessitates recourse to other rules and principles of international and national law, or simply as a question of interpretation. Especially in the latter case, it has been argued that the wording of article 12(2)(a) should not be the decisive element in its interpretation, considering the use of the word 'conduct' in other provisions of the Statute and the difficult drafting circumstances prevailing in the last day of the Rome Conference.

While few would arguably dispute that the Court can exercise jurisdiction on the basis of objective territoriality or ubiquity, the argument that the Court can use the effects doctrine, as the outer teleological limit of article 12(2)(a) of the Rome Statute, is likely to raise more objections.

The present dissertation attempted an impartial analysis of both points of view. On the one hand, refusing to accept an interpretation of article 12(2)(a) so as to include the effects doctrine seems the legally well-trodden path. It does not take a vivid imagination to visualize the passionate pleas of state not party lawyers before the Court on grounds of state sovereignty and non-intervention. There would also be no shortage of legal bases, on which to rely for these objections, such as the differences that exist between anti-trust law and international criminal law, the application of the principle of legality, the limits of analogy as instrument of interpretation and the hierarchy sources of article 21 ICC Statute. And all this, without even considering some of the perennial problems of the effects doctrine itself, particularly the classification of an 'effect' – other than a criminal consequence per se – that gives rise to criminal jurisdiction, a riddle subject to a variety of answers even from national courts.

Understandably, in light of the above, articulating an argument in favour of 'reading' the effects doctrine through teleological interpretation of article 12(2)(a) has been by far the greatest challenge. This is clearly the road least traveled, one that has not been examined so far in international literature or case law. As possible examples have been envisaged the socio-economic effects occurring in the territory of a state party by the inflow of population from a neighbouring state not party where an internal conflict takes place, or the large scale destruction of crops and livestock in a state party caused by transboundary pollution of a poisoned international river during an campaign of extermination in a state not party. Another relevant example could be the disruption of provision of natural gas or oil to a state party due to an internal conflict

within a state not party affecting the operation of an international pipeline, causing devastating effects to the economy and well-being of the population of the state party.

The policy argument for the application of this doctrine is particularly forceful. The implementation of the effects doctrine would potentially assist in addressing partly one of the key blind spots of the Statute following the rejection of universal jurisdiction, namely the inability of the Court to address internal conflicts in states not parties in the absence of a Security Council referral. In this framework, any lawyer raising an objection to the application of the effects doctrine by the Court would need to convincingly answer a simple question; namely, why the effects doctrine can be used – and has been used – as an acceptable interpretation of territorial jurisdiction by financially powerful states to address through criminal sanctions what qualifies in their view as foreign anti-competitive behaviour that allegedly affects the smooth functioning of their markets, whereas it cannot be used to address mass crimes committed in Africa or other less developed areas in the world by an international court. After all, the effects doctrine is but a means to an end, the protection of consumer welfare from anticompetitive practices. There is therefore an underlying question of principle at stake; is the protection of the Western consumer's spending capacity more important than combatting impunity for international crimes? If the implementation of this doctrine in "not much of a stretch"[6] in cases concerning e.g. price collusion concerning thermal fax paper exports, why should it qualify as such in the case of mass murders and rapes?

No doubt, realists would come up with many arguments on this point premised on political realism, the political difference of ICC against state criminal jurisdiction, allegations of sacrifice of clear and prevalent state interests and international stability on the altar of 'ill-defined' international community values, to name a few. However, insofar as these objections would perpetuate a form of discrimination in the access of individuals – victims of horrendous crimes – to international justice on the basis of nationality or territoriality traits, they do not seem to be very convincing. It is difficult to accept that all human beings have equal entitlements to life and dignity, but only a privileged few are worthy of international protection. These objections, in essence, would seek to replay a well-known theme of sovereignty versus community values/ universality of human rights, this time in the context of ICC territorial jurisdiction.

Interesting though this policy debate may be, it is submitted that the answer to this question depends on the limits to the interpretation of the Court's jurisdiction under article 12(2)(a). Starting from the position that the Court has the power to definitively decide on its own jurisdiction, it is believed that the Court could have access to this doctrine by recourse to teleological interpretation. Accordingly, the Court can use the effects doctrine as a means for the juridical localization of criminal activity in state party territory in the exercise of its *kompetenz kompetenz.* Any objections to the Court's jurisdiction in this respect will need to prove the absence of a substantial nexus between the territory of a state party and the criminal activity in question, according to the principle of non-intervention.

On the other hand, it could be argued that in such circumstances, there is an absence of a substantial connecting link between the state party and the crimes in question. Although this is a question, which depends on the facts of each case, it is an objection that is likely to be raised. From the same point of view, it could be even argued that such interpretation remains precarious, since the body of law supporting the application of this rule in 'classic' criminal cases is still limited and a number of important aspects would need to be worked out in practice. From this perspective, therefore, its application would be precluded as one that remains somewhat premature legally – as an 'unreasonable' or even 'abusive' one. Even in those circumstances, however, the door is not hermetically sealed. It is not denied that the Court has the power to boldly interpret article 12(2)(a) in that direction, particularly if subsequent developments so permit it, in accordance with article 31(3)(a) and 31(3)(b) VCLT. The opportune time for such an interpretation is the critical issue, one that depends largely on the future development of international law in general and the Court's applicable law in particular.

Finally, the practical application of this doctrine is not free from difficulties, since any investigation launched on that basis would very likely stumble on the lack of co-operation by the territorial state not party in the collection of evidence or the arrest of suspects, two crucial aspects of the proper functioning of the Court. It is true that endorsing this doctrine might enable the Court to investigate situations and even identify cases in states not parties, something that it would otherwise not be able to do in the absence of Security Council referral. However, without co-operation in the collection of evidence (on-site forensic evidence, access to witnesses) and the arrest of suspects by the territorial state, this course of action would risk resembling a publicity campaign with minimum 'naming and shaming' effect, or – at best – a de facto travel ban for certain individuals to certain states, rather than a fully-fledged international investigation. The

6 U.S. v. Nippon Paper Industries Co. Ltd., 109 F.3d 1, 8 (1997), at 6.

Darfur referral and Sudan's unwillingness to co-operate with the Court serve as useful illustrations;[7] the situation may be even worse in the case of state party referral or *proprio motu* action by the Prosecutor.

The present research attempted to shed some light onto these complicated issues Ultimately, it falls upon the Prosecutor and the judges to decide during a preliminary examination of jurisdiction whether such a course of action would benefit the interests of international justice in a specific situation.

8.4. / ARTICLE 12(2)(A) IN SITUATIONS OF MILITARY OCCUPATION

In every research endeavour of this type, a certain degree of selectivity on the basis of objective and subjective parameters is expected. For the reasons outlined above, the present research attempted to clarify the Court's approach to questions of territorial criminal jurisdiction in cases of military occupation, one of the key contemporary problems troubling the Court.

At the outset, it should be stressed that the complexity of this issue revolves largely around the distribution of authority between the occupied and the occupying states, in circumstances where the latter has succeeded in taking control of territory of the former through the use of force. In this situation, the lawful exercise of criminal jurisdiction on the basis of the rule of territoriality is influenced by considerations of *de facto* and *de jure* authority and control. In the context of the present dissertation, the relevant issues are addressed through rules of international humanitarian law as instruments of interpretation under article 31(3)(c) VCLT, or in the alternative as sources of law in accordance with article 21(1)(b) of the Statute, assuming the absence of authoritative guidance by the sources indicated in article 21(1)(a).

The main doctrinal foundation of the analysis is that the occupied state retains sovereignty over the occupied territory. This is a basic axiom of occupation law, stemming from the general principle *ex injuria jus non oritur*. As a result, the occupied state retains two important prerogatives associated with the concept of sovereignty on the international plane; criminal jurisdiction over its territory and the capacity to conclude treaties.

As regards the first aspect, since criminal jurisdiction is an aspect of state sovereignty, the occupied state retains territorial criminal jurisdiction over crimes committed on occupied territory during the occupation. However, for the duration of the occupation, the authorities of the occupied state are unable to enforce this jurisdiction within the occupied territory due to the lack of control. Such enforcement becomes feasible when the rightful sovereign is restored in the occupied territory, or a suspect is found in the territory within its control.

The second, and equally important aspect concerns the delegation of authority by the occupied state to the International Criminal Court. Plainly explained, it is one thing to have the prerogative of jurisdiction, and quite another to transfer it to an international organization. This problem has been analyzed in terms of delegation of authority, treaty-making powers and the requirement that the government of the occupied state persists. If this condition is met, it is suggested that on the basis of World War II practice and classic treaty law doctrine, the government of the occupied state – be it government in exile or a government in control of the remaining state territory – has the capacity to conclude treaties and delegate territorial jurisdiction to the Court.

The authority of the international organization, however, will be subject to the same limitations as the authority of the state delegating jurisdiction, according to the basic principle of law that one may delegate only authority that one possesses. In cases of belligerent occupation, this means that the enforcement of territorial jurisdiction will be constrained in equal measure by the *de facto* loss of control over the occupied territory, irrespective of whether the entity seeking to exercise jurisdiction is a national prosecutor of the occupied state or the Prosecutor of the ICC – an international organization – acting with its consent. Thus, the Court will be able to enforce its jurisdiction only after the termination of the occupation or following the arrest of a suspect in the territory of a state party.

7 Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Adb-al-Rahman ("Ali Kushayb"), Case No ICC-02/05-01/07, Decision Informing the United Nations Security Council about the lack of cooperation by the Republic of Sudan, 4-8 (May 25, 2010) (Pre-Trial Chamber I).

It is submitted, therefore, that the occupied state maintains formally under international law both the right to exercise territorial criminal jurisdiction over crimes committed in occupied territories and the right to delegate such jurisdiction to the Court, although subject to enforcement limitations stemming from the fact of occupation. This conclusion finds some support in the Court's early practice, although in the absence of clear authoritative guidance, it seems too early to offer a categorical reply. The Court has so far barely touched the surface of these issues, for reasons that involve the Prosecutor's strategy, as well as the absence of challenges by the Defense. For the purposes of methodological cohesion, the Court's approach has been analyzed from the standpoint of three different scenarios.

First, the situation of the territory of a state party occupied by another state party is discussed. This is the only situation so far encountered by the Court in the situation of the Democratic Republic of the Congo, concerning the occupation of Ituri, an area of that state, by Uganda. In the first case to ever reach the trial phase, *Prosecutor v. Lubanga*, the Court asserted its jurisdiction on the basis that the crime(s) in question allegedly occurred on DRC territory, taking into account only DRC's ratification of the Statute. Uganda's ratification is not considered in the Court's cursory examination of article 12(2)(a) in the context of a case involving conduct localized in Ituri during its occupation by Uganda. It made no difference to the Court, insofar as its jurisdiction under article 12(2)(a) was concerned, that the crime(s) allegedly occurred during an international armed conflict (the period of the occupation) and a non-international armed conflict (the period after the occupation). This stands in stark contrast with the Court's attitude towards its subject-matter jurisdiction under article 8 of the Statute. The motives underlying the Court's cursory examination of the matter are not difficult to imagine; the existence of nationality jurisdiction, the fact that both states were parties, or the self-referral of the case by the DRC all point to the same, obvious result. Be that as it may, this ruling on the part of the Court seems to lend weight to the conclusion that the critical consent for the Court's jurisdiction under article 12(2)(a) is that of the occupied state party.

In light of this practice, it is submitted that the same conclusion would be reached, when the occupying state is not party to the Statute. Notwithstanding the obvious difficulties in the enforcement of such jurisdiction, the doctrinal foundation implied in *Lubanga* remains the same, namely that the occupied state retains sovereignty and territorial jurisdiction over the occupied territory during the occupation. For the present author, therefore, it would not make any difference under article 12(2)(a)[8] if Ituri was occupied by a state not party, instead of Uganda. It goes without saying that the Court should consider each situation on its own merits in terms of the other jurisdictional parameters.

The last scenario is by far the more intriguing one legally and concerns the occupation of states not parties territory by states parties, as it happened for example by the United Kingdom in Iraq. The OTP's refusal to open an investigation on allegations of war crimes committed in Iraq during the occupation is well-documented. While the question of jurisdiction was cursorily treated by reference to article 12(2)(b) (nationality), the OTP also offered a statement in a footnote on the matter of the possibility to exercise jurisdiction under territoriality. The Prosecutor took the view that "the peripheral connections indicated by the available information did not appear to satisfy the requirements for territorial jurisdiction."[9] This statement seems to indicate that in those circumstances, ICC territorial jurisdiction remains an alternative. The identification of the 'requirements for territorial jurisdiction' mentioned by the Prosecutor in that footnote remains elusive.

The present research sought to uncover these requirements, going beyond the more obvious solutions (i.e. when part of the crime may be said to have been committed in state party territory). In this perspective the well-known decisions of international and regional human rights bodies on the interpretation of their territorial jurisdiction were discussed. Furthermore, the position of the ICJ in the *CERD* case that treaties of a certain 'nature', which are silent on the issue, may be interpreted to extent beyond a state party's territory, has been also taken into account.

In addressing the question of interpretation, it is submitted that there are real difficulties to overcome, should the organs of the Court wish to follow the footsteps of human rights monitoring organs. The wording of the provision and the form of responsibility and two of the most important issues. Moreover, even if one takes the *CERD* case as a definitive ruling on the matter – which is debatable – the Court would still need to explain, first, why this ruling would apply here, even through the Statute contains a provision on territorial jurisdiction, which the CERD did not, and secondly whether the Statute is legally of the same 'nature' as other human rights treaties, thus leading to an expansive interpretation of article 12(2)(a). Additionally,

8 Although, naturally, a variety of issues would likely rise under other provisions of the Statute, concerning complementarity and subject-matter jurisdiction.

9 Letter of the Office of the Prosecutor, Feb. 9, 2006, 3, n. 9 available at http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf **(last visited June 30, 2010).**

article 29 of the Vienna Convention on the Law of Treaties would seem to indicate that this interpretation would be possible only if an 'intention' of the drafters to that end appears, a proposition which is difficult to ascertain due to the lack of records of the negotiations on the topic during the last day of the conference.

Finally, and perhaps more to the point, such an interpretation would risk violating the rule of article 34 VCLT, insofar as it would in effect lead to the creation of rights and obligations for a third party to a treaty, without its consent. As such, the question relates to the respect due under international law to the decision of a sovereign government *not* to accede to the ICC Statute. It is highly questionable whether the fact of occupation would suffice to subvert the sovereign decision of the occupied state not to ratify, without at the same time subverting the legal position of that state under international law as an existing sovereign entity and raising concerns under the rule of non-intervention.

Beyond the realm of positive international law, however, this research would be amiss if it did not pose the question of the beneficiaries of such extensive interpretation. Taking into account that the Court has already jurisdiction under article 12(2)(b) for crimes committed by state party nationals, it is suggested that the purpose of this discussion would be solely to make the Court available for cases of 'core' crimes allegedly committed by state not party nationals against state party nationals or other state not party nationals. The question therefore is whether the ICC is the appropriate forum to investigate war crimes committed for example by Iraqis against United Kingdom nationals or other Iraqis. It is this mainly policy question that lies at the heart of the argument, one that hints at considerations of *forum non conveniens* – to borrow a well-known concept from litigation in the field of private international law.[1]

At the outset, it is submitted that this question is not amenable to black-and-white generalizations. It should be best addressed *in concreto*, taking into account the situation on the ground in each specific case. Notwithstanding this general observation, it is submitted that the Court will need to balance two main groups of interests, when deciding the issue. The first relates to the humane treatment of the third party national and his/her entitlement to a fair trial. The comparative advantage of the ICC over any national or occupation court is clear in this respect. Moreover, particularly in trials of high-level officials, there is perhaps an added value to this suggestion; the establishment of the historical truth. On the other hand, there is however the need to ensure respect for the law and sovereignty of the occupied state, as well as to consider the interests of the affected victim communities to an accessible criminal process on the ground, in accordance with local law and penalties. The issue of penalties is particularly thorny, when the national law of the occupied state provides for capital punishment. Notwithstanding the multiplicity of issues that a trial in The Hague may raise, arguably minimizing the 'cathartic' effect of the entire criminal process in the local communities, 'exporting' one or more trials to the ICC would entail that for some suspects the risk of the death penalty would not apply. This would clearly be the case, if the trial of Saddam Hussein was conducted by the ICC. This situation would likely create to the local communities a sense of inequality before the law, or even of impunity, where the mildest criminal treatment would be reserved only for the highest echelon of military and political suspects tried in The Hague.

In attempting to find the equilibrium, and drawing heavily from the Iraq experience and the suggestions for ICC jurisdiction in that situation, the present research proposed that the Court, in making this determination, should consider a number of factors. These may range from humanitarian law restraints, to constitutional limitations of the third state on the extradition of nationals from its territory, to the possibility of an unbiased, fair trial for the accused and the practical difficulties of ensuring an efficient administration of justice in The Hague.

Accordingly, it is here contended that trial of state not party nationals before the ICC for crimes committed against state party nationals under article 12(2)(a) ICC Statute is a very controversial proposition, in terms of both legal and policy considerations. The Court might understandably find itself unwilling or genuinely unable to make a determination, particularly when such solution could be perceived by the local population of the occupied territory as taking sides in an on-going international conflict, thus portraying the Court in their eyes as just another form of victor's justice.

There are obvious solutions to these difficulties that are perhaps better suited to the Court's role under the circumstances. Soliciting from the state not party under occupation an *ad hoc* declaration under article 12(3) of the Statute, accepting the jurisdiction of the Court for crimes allegedly committed during the occupation, could be one of them. This would effectively neutralize most legal obstacles and would further assist in consolidating the legal authority of the occupied state as a sovereign entity acting on the international plane. This solution was preferred in recent history by the Palestinian Authority through its

1 Antonio Cassese, International Criminal Law 336, n. 1 (2nd ed. 2008), "The *locus delicti commissi* . . . . is usually the place where it is easiest to collect evidence. It is therefore considered the *forum conveniens*, or the appropriate place of trial…."

well-known declaration, requesting from the Court to open an investigation into the events of Operation 'Cast Lead' in Gaza. The more challenging situation emerges when such government no longer exists, as it apparently happened in Iraq. In those circumstances, the second viable option would be to request a referral by the Security Council, acting under Chapter VII, where issues under article 12(2)(a) would not even arise.

Finally, if these alternatives are not available, the Court would make a determination under article 12(2)(a), pursuant to a state party referral or proprio motu action by the Prosecutor.

In this scenario, the easier course to follow for the Court's organs would be to limit themselves to a literal interpretation of the Statute and reject the possibility of such an investigation due to lack of jurisdiction. This solution would find support in both the Court's Statute and general international law of treaties and could be supported by reference to the Court's 'guide' on interpretation.

On the other side of the argument, however, there is a more difficult path to take, one where the sensitivities for the fair trial of an individual would challenge sovereign concerns. This perspective is not novel as such. There is an abundance of international jurisprudence by human rights courts and bodies, and recently from the ICJ, concerning the interpretation of human rights treaties. In this instance, therefore, the question before the Court does not appear to be one of maturity of the law as such; the legal techniques are well-known. It is rather one of determining whether it is desirable and, if so, when the time is ripe for transposition of this body of law in the ICC Statute, through a teleological interpretation of article 12(2)(a).

8.5. / CONCLUSION

In 1944, Brierly argued in favour of the conceptualization and prosecution of German war criminals under international, as opposed to national law. One key aspect of his argument was that the fact that jurisdiction over war crimes "has no territorial basis, and it may therefore be exercised without any reference to the *locus delicti*;[…]".[2] Accordingly, since jurisdiction over war crimes is created by the laws of war, he suggested that "it ceases to be necessary for the lawyers of the United Nations anxiously to scan their respective systems of municipal criminal law in order to see how far they are adequate to deal with the crimes that our enemies have committed".[3] The adoption of the Rome Statute in 1998 and specifically of article 12(2)(a), laudable though it may be for bringing the Court into life, would therefore seem as a regression to a pre-1944 legal situation, to a time where the emancipation of the prosecution of war crimes from national legal perceptions of law and jurisdiction was still debated. After more than 50 years of development of human rights law and more than 100 years of humanitarian law, the Rome Statute indicates that, in the absence of Security Council referrals, while the substantive standards for the protection of human life and dignity are universal, their enforcement at the international level remains tantalizingly intertwined with traditional state consent doctrine, manifested through territorial and nationality classifications.

That does not mean that there is no room for improvement or optimism, however. Notwithstanding the potential amendment of the Statute to that direction, the more evident solution is to turn to the Court and its organs for guidance. After all, the Court exists and it has the power to determine its own jurisdiction within the limits of the Statute – a prerogative inherent to its existence as an international judicial institution by operation of general principles of law. It is the proper use of this prerogative that may allow the Court to overcome some of the difficulties arising from the unfortunate rejection of universality in Rome.

This is the main theme that informed the entire work; an exploration of the possibilities open to the Court, so as to redress the 'universalist' vacuum created in Rome in the case of state party referrals or prosecutorial initiative, through judicial interpretation. In doing so, two main groups of legal devices that are frequently used to that effect by national judges, have been explored; the first concerns the juridical localization of criminal activity in state territory through legal constructions and the second the expansion of the territorial scope of application of the Court, particularly in conditions of occupation.

An effort has been made to address the key points of all the sides of the spectrum, from the more restrictive interpretation to the more expansive one.

2 James L. Brierly, *The Nature of War Crimes Jurisdiction*, in The Basis of Obligation in International Law and Other Papers 304 (Hersch Lauterpacht ed. 1958).

3 *Id.* at 303.

As regards territorial constructions, this approach involved a corresponding examination of the Court's jurisdiction starting from the occurrence of the criminal conduct alone on state party territory, to the localization of any constituent element of the crime on state party territory and ultimately to situations when any direct, substantial and reasonably foreseeable effects, other than the criminal consequences of the crime, take place in state party territory.

Equally, from the point of view of territorial jurisdiction and article 12(2)(a) in situations of occupation, this approach rendered necessary the examination of occupation of state party territory by another state party or by a state not party, and finally the situations of occupation of state not party territory by states parties.

The discussion evidently moved between the twin pillars of utopia, i.e. the belief that the universality of substantive norms for the protection of human beings should be enforced with the corresponding universal mechanisms, and apology, meaning the negotiated limitations and the *lex lata*, on the basis of which the Court is called to operate.[4] In this discussion, Mann's teachings on the relationship of national law, international law and jurisdiction have been particularly influential.

The outcome has been mixed. Thus, it is believed that the exercise of objective territorial jurisdiction, as well as the exercise of territorial jurisdiction by the Court in cases where state party territory is occupied, will very likely prove to be uncontroversial. These conclusions are founded on well-established rules of international law and are generally supported by (and supportive of) the doctrine of state sovereignty.

On the other hand, the exercise of jurisdiction by the Court on the basis of the effects doctrine, as well as on the notion of state party 'control' over occupied territory are much more controversial. The first suggestion suffers to a large extent from its novelty and the lack of precedents in the field of international criminal law. The second, while supported by human rights jurisprudence, has its own difficulties as regards the sovereign decision of states not parties not to ratify the Statute. These possible interpretations are generally inspired by the human rights of the victims, rather than state sovereignty. As such, a substantial degree of objection may be expected from states and suspects alike.

All things considered, the Court has yet to take a position on either one of the groups of issues discussed, as the Prosecutor's reliance on self-referrals and Security Council initiatives has not yet given rise to any issues under article 12(2)(a) ICC Statute. Such issues, however, are likely to rise in the not too distant future. One can only expect with eagerness the Court's maneuvers in these challenging legal and political waters.

4 Generally, Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (1989).

BIBLIOGRAPHY

1. / BOOKS

E. R. Adair, The Exterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries (New Yok: Longmans, Green & Co., 1929)

Yusuf Aksar, Implementing International Humanitarian Law: From the Ad Hoc Tribunals to a Permanent International Criminal Court (London: Routledge, 2004)

Mahasen M. Aljaghoub, The Advisory Function of the International Court of Justice 1946-2005 (Berlin: Springer 2006)

Ali Allawi, The Occupation of Iraq: Winning the War, Losing the Peace (New Haven, CT: Yale University Press 2007)

Jose E. Alvarez, International Organizations as Law-Makers (Oxford: Oxford University Press 2005)

Chittharanjan F. Amerasinghe, Jurisdiction of International Tribunals (The Hague: Kluwer Law Publ., 2nd ed. 2005)

Chittharanjan F. Amerasinghe, Jurisdiction of Specific International Tribunals (Leiden: Brill 2009)

Chittharanjan F. Amerasinghe, Principles of the institutional law of international organizations (Cambridge: Cambridge University Press 2nd ed. 2005)

American Law Institute, Restatement of the Law Third, Restatement of the Foreign Relations Law of the United States (St. Paul, Minn.: American Law Institute, 1986)

Yutaka Arai-Takahashi, The Law of Occupation, Continuity and Change of International Humanitarian Law and its Interaction with International Human Rights Law (Leiden: Nijhoff 2009)

Anthony Aust, Handbook of International Law (Cambridge: Cambridge University Press 2nd ed. 2010)

Anthony Aust, Modern Treaty Law and Practice (Cambridge: Cambridge University Press 2nd ed. 2007)

Ivo van Bael & Jean François Bellis, Competition Law of the European Community (The Hague: Kluwer Law International, 4th ed. 2004)

Ilias Bantekas & Susan Nash, International Criminal Law (Oxford: Hart 3rd ed. 2007)

Mahmoud C. Bassiouni & P. Manikas, The Law of the International Criminal Tribunal for the Former Yugoslavia (Irvington-on-Hudson: Transnational Publishers 1996)

Mahmoud C. Bassiouni (ed.), The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text, (Ardsley: Transnational 2005)

Mahmoud C. Bassiouni, International Extradition, United States Law and Practice (New York: Oceana Publ., 5th ed. 2007)

Mahmoud C. Bassiouni, Introduction to International Criminal Law (Ardsley:Transnational, 2003)

Eyal Benvenisti, The International Law of Occupation (Princeton NJ: Princeton University Press 2004)

Morten Bergsmo et al. (eds.) Importing Core International Crimes into National Criminal Law (Oslo: International Peace Research Institute 2007)

Machteld Boot, Genocide, Crimes Against Humanity, War Crimes - Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court (Antwerp: Intersentia, 2002)

William Bourdon, La Cour Pénale Internationale (Paris : Editions du Seuil, 2000)

Eric de Brabandere, Post-conflict administrations in international law : international territorial administration, transitional authority and foreign occupation in theory and practice (Leiden: Nijhoff 2009)

Kingman Brewster, Antitrust and American Business Abroad, (New York: McGrill and Sons 1958)

Ian Brownlie, Principles of Public International Law (Oxford: Oxford University Press 7th ed. 2008)

Michael Byers, Custom, Power and the Power of Rules (Cambridge: Cambridge University Press 1999)

Iain Cameron, The Protective Principle of International Criminal Jurisdiction (Aldershot: Dartmouth 1994)

Antonio Cassese, International Criminal Law (Oxford: Oxford University Press 2nd ed. 2008)

Antonio Cassese, International Law (Oxford: Oxford University Press 2nd ed. 2005)

Mahmoud Ch. Bassiouni & Edward M. Wise, Aut Dedere Aut Judicare, The Duty to Extradite or Prosecute in International Law (Dordrecht: Nijhoff 1995)

Kypros Chrysostomides, The Republic of Cyprus – A study in International Law (The Hague: Nijhoff 2000)

Jean Combacau & Serge Sur, Droit International Public (Paris: Montchrestien ed. 1993)

Nancy A. Combs, Guilty Pleas in International Criminal Justice, Constructing a Restorative Justice Approach (Stanford: Stanford University Press, 2007)
European Committee on Crime Problems, Extraterritorial Criminal Jurisdiction (Strasburg: Council of Europe, 1990)
Fons Coomans & Menno Kamminga, Extraterritorial Application of Human Rights Treaties (Antwerp: Intersentia, 2004)
J. Craig Barker, The protection of Diplomatic Personnel (Aldershot: Ashgate 2006)
Robert Cryer et al. An Introduction to International Criminal Law and Procedure (Oxford University Press 2007)
Robert Cryer, Prosecuting International Crimes (Cambridge: Cambridge University Press 2005)
Patrick Daillier et al., Droit International Public (Paris: L.G.D.J. 7th ed. 2002)
Eric David, Principes de Droit des Conflits Armés (Bruxelles: Bruylant 4th ed. 2008)
Frédéric Desportes & Francis Le Gunehec, Droit Pénal Général (Paris : Economica, 14th ed. 2007)
Pieter van Dijk et. al., Theory and Practice of the European Convention on Human Rights (4th ed.) (Antwerpen : Intersentia, 2006)
Sander D. Dikker Hupkes, What Constitutes Occupation? Israel as the occupying Power in the Gaza Strip after the Disengagement (Den Haag: E.M. Meijers Instituut 2008)
Yoram Dinstein, The International Law of Belligerent Occupation (Cambridge: Cambridge University Press 2009)
Yoram Dinstein, War, Aggression and Self-Defence (4th ed. Cambridge: Cambridge University Press 2005)
John Dugard, International Law: A South African Perspective (Lansdowne: Juta and Co. Publ., 2005)
John Dugard, Recognition and the United Nations (Cambridge: Grotius 1987)
Knut Dörmann, Elements of War Crimes under the Rome Statute of the International Criminal Court (Cambridge: Cambridge University Press, 2003)
Einer Elhauge & Damien Geradin, Global Competition Law and Economics (Oxford: Hart 2007)
Adhémar Esmein, History of Continental Criminal Procedure with special reference to France (Boston: Little, Brown and Co. 1913)
Ernst H. Feilchenfeld, The International Economic Law of Belligerent Occupation (Washington: Carnegie Endowment for International Peace, 1942)
Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice (Cambridge: Grotius 1986)
George P. Fletcher, The Grammar of Criminal Law – American, Comparative and International (Oxford: Oxford University Press, 2007)
Evelyne Friedel-Souchu, Extraterritorialité de droit de la concurrence aux Etats-Unis et dans la Communauté Européenne (Paris: L.G.D.J., 1994)
Wilbur F. Fugate, Foreign Commerce and the Antitrust Laws (Boston: Little, Brown and Co. 4th ed., 1991)
Kenneth S. Gallant, The Principle of Legality in International and Comparative Criminal Law (Cambridge: Cambridge University Press 2009)
Geoff Gilbert, Responding to International Crime (Leiden: Nijhoff 2006)
Gerhard von Glahn, The Occupation of Enemy Territory – A Commentary on the Law and Practice of Belligerent Occupation (Minneapolis, MN: The University of Minnesota Press 1957)
Marlies Glasius, The International Criminal Court: A Global Civil Society Achievement (Oxford: Routledge, 2006)
David Harris et al., Law of the European Convention on Human Rights (Oxford: Oxford University Press, 2nd ed. 2009)
David J. Harris, Cases and Materials in International Law (London: Sweet & Maxwell, 7th ed. 2010)
Barry E. Hawk, United States, Common Market and International Antitrust: A Comparative Guide (New York: Aspen Law & Business, 1996)
Louis Henkin et al, International Law, Cases and Materials (St. Paul, Minn.: West, 1993)
Christiane Hennau and Jacques Verhaegen, Droit Pénal Général (Bruxelles: Bruylant, 2003)
Larissa J. van den Herik, The Contribution of the Rwanda Tribunal to the Development of International Law (Leiden: Martinus Nijhoff Publishers 2005)
Grat van den Heuvel et al. (eds.)The Dutch Penal Code (Littleton: Rothman, 1997)
Rosalyn Higgins, Problems and Process; International Law and How we use it (Oxford: Clarendon Press, 1994)
Michael Hirst, Jurisdiction and the Ambit of Criminal Law (Oxford: Oxford University Press 2003)

Herbert Hovencamp, Federal Antitrust Policy, The Law of Competition and Its Practice (St. Paul, Minn.: West, Hornbook Series 2nd ed. 1999)
Philip Hughes, A History of the Church (London: Sheed and Ward 1955)
André Huét and Renée Koering-Joulin, Droit Pénal International (Paris: PUF Themis, 2000)
Akira Inoue, Japanese Antitrust Law Manual – Law, Cases and Interpretation of Japanese Antimonopoly Act (Alphen aan den Rijn: Kluwer Law International 2007)
Amnesty International, The International Criminal Court: Making the Right Choices, AI Index IOR 40/01/1997
Robert Jennings & Arthur Watts (eds.) Oppenheim's International Law (9th ed., 1992), Vol. I
John R.W.D. Jones & Steven Powles, International Criminal Practice (Ardsley: Transnational Publishers, 3rd ed. 2003)
Frits Kalshoven & Liesbeth Zegveld, Constraints on the Waging of War, An Introduction to International Humanitarian Law (Geneva: International Committee of the Red Cross 3rd ed. 2001)
Karim A.A. Khan et al (eds.) Archbold, International Criminal Courts – Practice, Procedure and Evidence (London: Sweet and Maxwell, 2005)
United Kingdom Ministry of Defence, The Manual of the Law of Armed Conflict (Oxford: Oxford University Press, 2004)
Jan Klabbers, An Introduction to International Institutional Law (Cambridge: Cambridge Univ. Press, 2nd ed. 2009)
Jan Klabbers, The Concept of Treaty in International Law (The Hague: Kluwer Law International 1996).
Robert Kolb & Sylvie Vite, Le Droit de l'occupation militaire, Pespectives historiques et enjeux juridiques actuels (Bruxelles : Bruylant 2009)
Robert Kolb, Droit International Pénal (Bâle: Helbing & Lichtenhahn2008),
Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (Helsinki: Lakimiesliiton Kustannus, Finnish Lawyers' Publishing Company 1989)
Claus Kress et al. (eds), The Rome Statute and Domestic Legal Orders (Baden-Baden: Nomos. 2005),
Eve La Haye, War Crimes in Internal Armed Conflicts (Cambridge: Cambridge Univ. Press, 2008)
Dieter Lange & Gary Bord (eds.) The Extraterritorial Application of National Laws (Paris: ICC Publishing, 1987)
Hersch Lauterpacht (ed.), Oppenheim's International Law, Vol. II, Disputes, War and Neutrality, (London: Longmans, Green & Co. 7th ed. 1957)
Hersch Lauterpacht, The Development of International Law by the International Court (London: Stevens and Sons, 2nd ed. 1958)
Hersch Lauterpacht, The Function of Law in the International Community (Oxford: Clarendon Press, 1933)
Raphael Lemkin, Axis Rule in Occupied Europe (Washington: Carnegie Endowment for International Peace, 1944)
Ulf Linderfalk, On the Interpretation of Treaties, The Modern International Law as expressed in the 1969 Vienna Convention on the Law of Treaties (Berlin: Springer 2007)
Vaughan Lowe (ed.), Extraterritorial Jurisdiction, An Annotated Collection of Legal Materials (Cambridge: Grotius ed. 1983)
Henry S. Maine, Ancient Law, (London: Murray,1905)
Peter Malanczuk (ed.), Akehurst's Modern Introduction to International Law (London: Routledge, 7th ed. 1997)
Jean Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law (Cambridge: Cambridge University Press 2005, Vol. I-II)
Arnold McNair & Arthur Watts, The Legal Effects of War (Cambridge: Cambridge University Press 4th ed. 1966)
Arnold McNair, Law of Treaties (Oxford: Clarendon Press 2nd ed. 1961)
Roger Merle & André Vitu, Traité de Droit Criminel (Cujas ed. 7th ed. 1997)
Enrico Milano, Unlawful Territorial Situations in International Law, Reconciling Effectiveness, Legality and Legitimacy (Leiden: Nijhoff 2006)
Theodor Mommsen & Paul Krueger (eds.), The Digest of Justinian (Philadelphia: University of Pennsylvania Press, 1985)
John Moore, US Dept. of State, Report on Extraterritorial Crime and the Cutting Case (Gov't print. off 1887)
Gerhard Mueller (ed.), The Korean Criminal Code (South Hackensack: Rothman 1960)
Ved P. Nanda & M.C. Bassiouni, International Criminal Law, A Guide to U.S. Practice and Procedure – Antitrust, Securities, Extradition, Tax and Terrorism (New York City: Practising Law Institute1987)

United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court: Rome, 15 June-17 July 1998, Official Records, 2002, (Vol. I: Final Documents, Vol. II: Summary Records of the Plenary Meetings of the Committee and of the Meetings of the Committee of the Whole, Vol. III: Reports and Other Documents)
Stephen C. Neff, War and the Law of Nations, A General History (Cambridge: Cambridge University Press 2005)
Erik Nerep, Extraterritorial Control of Competition in International Law with Special Regard to U.S. Antitrust Laws, (Stockholm: Norstedt, 1983)
Arthur Nussbaum, Principles of Private Law (Oxford: Oxford University Press 1943)
Claire Ovey & Robin C.A. White, Jacob's, White and Ovey, The European Convention on Human Rights (Oxford University Press 5th ed. 2010)
Daniel P. O' Connell, Intenational Law (London: Stevens and Sons, 2nd ed. 1970)
Jean Pictet, Commentary on Geneva Convention IV (Geneva: International Committee of the Red Cross 1958)
Mark Pieth et al (eds.), The OECD Convention on Bribery; A Commentary (Cambridge: Cambridge University Press 2007)
Fabiàn O. Raimondo, General Principles of Law in the Decisions of International Criminal Courts and Tribunals (Leyden: Martinus Nijhoff Publishers, 2007)
Luc Reydams, Universal Jurisdiction, International and Municipal Legal Perspectives (Oxford: Oxford University Press 2003)
Charles Rousseau, Droit International Public (Paris: Recueil Sirey, 1980)
Charles Rousseau, Le Droit Des Conflits Armés (Paris: Pedone, 1983)
Cedric Ryngaert, Jurisdiction in International Law (Oxford: Oxford University Press 2008)
Cedric Ryngaert, Jurisdiction over Antitrust Violations in International Law (Antwerp: Intersentia 2008)
Leila N. Sadat, The International Criminal Court and the Transformation of International Law – Justice for the New Millennium (Ardsley, NY: Transnational 2002)
Philippe Sands & Pierre Klein (eds.), Bowett's Law of International Institutions 448 (London: Sweet & Maxwell 6th ed. 2009)
Danesh Sarooshi, The United Nations and the Development of Collective Security (Oxford: Oxford University Press, 1999)
Tetsuo Sato, Evolving Constitutions of International Organisations (The Hague: Kluver Law International 1996)
Georges Scelle, Précis de droit des gens (Paris : Sirey, 1934)
William Schabas, An Introduction to the International Criminal Court (3rd ed. Cambridge: Cambridge University Press 2007)
William Schabas, Genocide in International Law: The Crime of Crimes (2nd ed. Cambridge: Cambridge University Press 2009)
William Schabas, The International Criminal Court, A Commentary on the Rome Statute (Oxford: Oxford University Press, 2010)
William Schabas, The UN International Criminal Tribunals, The Former Yugoslavia, Rwanda and Sierra Leone (Cambridge: Cambridge University Press 2006)
Henry G. Schermers and Niels M. Blokker, International Institutional Law, Unity within Diversity (Leyden: Martinus Nijhoff Publishers, 4th ed. 2003)
Georg Schwarzenberger, International Law as applied by International Courts and Tribunals (London: Stevens & Sons Ltd. 3rd ed. 1957)
Malcolm N. Shaw, International Law (Cambridge: Cambridge University Press 6th ed. 2008)
Ulrich Sieber, The Punishment of Serious Crimes (on file with author, 2004)
Denys Simon, L'interpretation judiciaire des traités d'organisations internationales (Paris: Pedone, 1981)
Elies van Sliedregt, The Criminal Responsibility of Individuals for Violations of International Humanitarian Law (The Hague: T.M.C. Asser Press, 2003)
Young Sok Kim, The International Criminal Court, A Commentary to the Rome Statute (Lim.: Wisdom House Publ., 2003)
Carsten. Stahn, The Law and Practice of Territorial Administration: Versailles to Iraq and Beyond (Cambridge: Cambridge University Press 2008)
Henry Steiner et al., International Human Rights in Context: Law, Politics and Morals: Text and Materials (3rd ed. Oxford: Oxford University Press, 2007)

H. Steven Harris Jr., Calvin S. Goldman et al (eds.), Competition Laws Outside the United States (Chicago: American Bar Association, 2001)
Michael J. Struett, The Politics of Constructing the International Criminal Court (New York: Palgrave Macmillan 2008)
Alexander M. Stuyt, The General Principles of Law as Applied by International Tribunals to Disputes of Attribution and Exercise of State Jurisdiction ('s-Gravenhage: Martinus Nijhoff 1946)
Albertus H. J. Swart & André H. Klip (eds.), International Criminal Law in the Netherlands (Freiburg im Breisgau: Edition Iuscrim, 1997)
Stefan Talmon, Recognition of Governments in International Law: with Particular Reference to Governments in Exile (Oxford: Clarendon Press, 1998)
Martyn Taylor, International Competition Law, A New Dimension for the WTO? (Cambridge: Cambridge University Press, 2006)
Durmus Tezcan, Territorialité et conflits de juridiction en droit Pénal International (Ankara: Faculté des sciences politiques de l'Université d'Ankara, 1983)
Héléne Tigroudja & Ioannis K. Panoussis, La Cour Interaméricaine des Droits de l'Homme (Bruxelles: Bruylant, 2003)
Stefan Trechsel, Human Rights in Criminal Proceedings (Oxford: Oxford University Press 2005)
Jacques Velu & Rusen Ergec, La Convention Européenne des Droits de l'Homme (Bruxelles: Bruylant 1990)
Joe Verhoeven, Droit International Public (Brussels: Larcier, 2000)
Jan H. W. Verzijl, International Law in Historical Perspective (Leiden: Sijthoff and Noordhoff, 1972)
Mark E. Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties (Leiden: Nijhoff 2009)
Paul Viollet, L' Histoire des institutions politiques et administratives de la France (Paris: Larose et Forcel, 1890 reprint 1966)
Carl-Ludwig Von Bar, A History of Continental Criminal Law (Boston: Little, Brown and Co. 1916)
Humphrey Waldock (ed.), James Brierly, The Law of Nations (Oxford: Clarendon Press, 6th ed. 1963)
Gerhard Werle, Principles of International Criminal Law (The Hague: T.M.C. Asser Press, 2nd ed. 2009)
Nigel White, Democracy Goes to War, British Military Deployments under International Law (Oxford: Oxford University Press 2009)
Alexander Zahar & Goran Sluiter, International Criminal Law (Oxford: Oxford University Press 2008)
Salvatore Zappalà, Human Rights in International Criminal Proceedings (2003)
Hendrik Zwarensteyn, Some Aspects of the Extraterritorial Reach of the American Antitrust Laws (Deventer: Kluwer 1970)

2. / ARTICLES AND BOOK CONTRIBUTIONS

Ademola Abass, The Competence of the Security Council to Terminate the Jurisdiction of the International Criminal Court, 40 Texas Int'l L.J. 263 (2004-2005)

Thomas Ackermann, Antitrust Damages in Actions under the Rome II Regulation, in Views of the European Law from the Mountain, Liber Amicorum Piet Jan Slot 109-122 (M. Bulterman et al. eds. 2009)

Jens Adolphsen, The Conflict of Laws in Cartel Matters in a Globalised World: Alternatives to the Effects Doctrine, 1 J. Priv. Int'l L. 151 (2005)

Dapo Akande, The Jurisdiction of the International Criminal Court over national of Non-Parties: Legal Basis and Limits, 1 J. Int'l Crim. Just. 618 (2003)

Dapo Akande, The Jurisdiction of the International Criminal Court over national of Non-Parties: Legal Basis and Limits, 1 J. Int'l Crim. Just. 618 (2003)

Michael Akehurst, Jurisdiction in International Law, 46 Brit. Y.B. Int'l. L. 145 (1972-1973)

Payam Akhavan, Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?, 95 Am. J. Int'l L. 7 (2001)

Payam Akhavan, Justice in the Hague, Peace in the Former Yugoslavia?, 20 Human Rts. Q. 737 (1998)

Aftab Alam, Extradition and Human Rights, 48 Indian J. Int'l L. 87 (2008)

José Alvarez, Trying Hussein: Between Hubris and Hegemony, 2 J. Int'l Crim. Just. 319 (2004)

Kai Ambos & Steffen Wirth, Genocide and War Crimes in the Former Yugoslavia Before German Criminal Courts, in International and National Prosecution of Crimes under International Law: Current Developments 786 (Horst Fischer et al. eds. 2001)

Kai Ambos, Article 25, in Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article (O. Triffterer ed. 2nd ed. Oxford University Press 2008)

Chittharanjan F. Amerasinghe, Interpretation of Texts in Open International Organisations, 65 Brit. Y.B. Int'l L. 175 (1994)

Kenneth Anderson, The Rise of International Criminal Law: Intended and Unintended Consequences, 20 Eur. J. Int'l L. 331 (2009)

Louise Arbour & M. Bergsmo, Conspicuous Absence of Jurisdictional Overreach, in Reflections on the International Criminal Court, Essays in Honour of Adriaan Bos 129-140 (H.A.M. von Hebel et al. eds., 1999)

Mahnoush.H. Arsanjani & William M. Reisman, The Law-in-Action of the International Criminal Court, 99 Am. J. Int'l L. 385 (2005)

Mahnoush H. Arsanjani, Reflections on the Jurisdiction and Trigger Mechanism of the International Criminal Court, in Reflections on the International Criminal Court, Essays in Honour of Adriaan Bos 57-76 (H.A.M. von Hebel et al. eds., 1999)

Mahnoush H. Arsanjani, The Rome Statute of the International Criminal Court, 93 Am. J. Int'l L. 22 (1999)

Anthony Aust, Lockerbie, the other case, 49 Int'l Comp. L.Q. 278 (2000)

Thomas L. Banks, International Activities and Criminal Consideration under United States Antitrust Laws, in International Criminal Law, A Guide to U.S. Practice and Procedure – Antitrust, Securities, Extradition, Tax and Terrorism 51-78 (Ved P. Nanda & M.C. Bassiouni eds., 1987)

Ilias Bantekas, Head of State Immunity in the Light of Multiple Legal Regimes and Non-Self-contained System Theories, 10 J. Conflict and Security L. 21 (2005)

Ilias Bantekas, Head of State Immunity in the Light of Multiple Legal Regimes and Non-Self-contained System Theories, 10 J. Conflict and Security L. 21 (2005),

Julio Barboza, International Criminal Law, 278 Recueil des Cours de l' Academie de Droit International 9 (1999)

Mahmoud C. Bassiouni, The Discipline of International Criminal Law, in International Criminal Law 1-140 (M. Ch. Bassiouni ed. 3rd ed. 2008)

Richard R. Baxter, Extraterritorial Application of Domestic Law, (1960) U. Brit. Colum. L. Rev. 333

William E. Beckett, Criminal Jurisdiction over Foreigners, The Franconia and the Lotus, 8 Brit. Y.B. Int'l. L. 108 (1927)

William E. Beckett, The Exercise of Criminal Jurisdiction over Foreigners, 6 Brit. Y.B. Int'l. L. 44 (1925)

Olympia Bekou & Robert Cryer, The International Criminal Court and Universal Jurisdiction: A Close Encounter?, 56 Int'l and Comp. L. Q. 49 (2007)
Olympia Bekou, Prosecutor v. Thomas Lubanga Dyilo-Decision on the Confirmation of Charges, 8 Hum. R. L. Rev. 343 (2008)
Mohammed Bennouna, The Statute's Rules on Crimes and Existing or Developing International Law, in The Rome Statute of the International Criminal Court: A Commentary 1101-1107 (A. Cassese et al. eds. 2002)
Eyal Benvenisti, Water Conflicts during the Occupation of Iraq, 97 Am. J. Int'l L. 860 (2003
Markus Benzing, The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity, 7 Max Planck U.N. Y.B 591 (2003)
Bradley E. Berg, The 1994 I.L.C. Draft Statute for an International Criminal Court: A Principled Appraisal of Jurisdictional Structure, 28 Case W. Res. J. Int'l L. 221 (1996)
Wendell Berge, Criminal Jurisdiction and the Territorial Principle, 30 Mich. L. Rev. 238 (1931-1932)
Morten Bergsmo & Jelena Pejić, Article 15, in Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article 581-595 (O. Triffterer ed. 2nd ed. 2008)
Morten Bergsmo & Pieter Kruger, Article 53, in Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article 1065-1076 (O. Triffterer ed. 2nd ed. Oxford University Press 2008)
Morten Bergsmo, Occasional Remarks on certain state concerns about the jurisdictional reach of the international criminal court, and their possible implications for the relationship between the Court and the Security Council, 69 Nordic J. Int'l L. 87 (2000)
Morten Bergsmo, The Jurisdictional Régime of the International Criminal Court (Part II, Articles 11-19), 6 Eur. J. Crime Crim. L. & Crim. J. 345 (1998)
Franklin Berman, Jurisdiction: The State, in Asserting Jurisdiction, International and European Perspectives 3-15 (Patrick Capps et al., eds., 2003)
Nehal Bhuta, The Antinomies of Transformative Occupation, 18 Eur. J. Int'l L. 721 (2005)
Andrea Bianchi, Immunity versus Human Rights: The Pinochet Case, 10 Eur. J. Int'l L. 237 (1999)
Bing Bing Jia, The International Criminal Court and Third States, in The Oxford Companion to International Criminal Justice 16-167 (A. Cassese et al eds. 2009)
Roger D. Blair & Christine A. Piette, Antitrust Damages: Theory and Practice, 51 Antitrust Bulletin 449 (2006)
Christopher L. Blakesley, Extraterritorial Jurisdiction, in 2 International Criminal Law 85-152 (M. Ch. Bassiouni ed. 3rd ed., 2008)
Christopher L. Blakesley, Jurisdiction Ratione Personae or the Personal Reach of the Court's Jurisdiction, in The Legal Regime of the ICC: Essays in Honour of Prof. I. P. Blishchenko 423-454 (José Doria, H.-P. Gasser and M. C. Bassiouni eds. 2009)
Cristopher Blakesley, Jurisdictional Issues and Conflicts of Jurisdiction, in Legal Responses to International Terrorism, US Procedural Aspects 131-180 (M.C. Bassiouni ed.1988)
Gary B. Born, A Reappraisal of the Extraterritorial Reach of U.S. Law, 24 L. Pol'y in Int'l Bus. 1 (1992)
Adriaan Bos, From the International Law Commission to the Rome Conference (1994-1998), in The Rome Statute of the International Criminal Court: A Commentary 35-65 (Antonio Cassese et al eds. 2002)
Adriaan Bos, The Extraterritorial Jurisdiction of States: Preliminary Report, 65-I Annuaire de l'Institut de Droit International 14 (1993)
Michael Bothe, Pacific Occupation, 3 Encyclopedia Pub. Int'l. L. 767
William Bourdon, Jurisdiction of the International Criminal Court over Human Rights Violations Committed by the Israeli Forces in the Occupied Territories After July 1, 2002, 12 Palestine Y.B. Int'l L. 165 (2002-2003)
Stéphane Bourgon, Jurisdiction Ratione Loci, in The Rome Statute of the International Criminal Court: A Commentary 559-569 (A. Cassese et al. eds. 2002)
Derek W. Bowett, Jurisdiction: Changing Patterns of Authority over Activities and Resources, 53 Brit. Y.B. Int'l. L 1 (1982)
James L. Brierly, The Nature of War Crimes Jurisdiction, in The Basis of Obligation in International Law and Other Papers 297-305 (Hersch Lauterpacht ed. 1958)
James L. Brierly, The 'Lotus' Case, in The Basis of Obligation in International Law and other papers 142-151 (H. Lauterpacht ed. 1958)
Morten P. Broberg, The European Commission's Extraterritorial Powers in Merger Control; The Court of First Instance's Judgment in Gencor v. Commission, 49 Int'l. Comp. L. Q. 172 (2000)

Bruce Broomhall, Article 22, in Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article 713-730 (O. Triffterer ed. 2nd ed. Oxford University Press 2008)
Chester Brown, The Inherent Powers of International Courts and Tribunals, 76 Brit. Y.B. Int'l L. 195 (2006)
Naomi Burke, A Change in Perspective: Looking at Occupation through the Lens of the Law of Treaties, 41 N.Y.U J. Int'l L. & Pol. 103 (2008-2009).
Iain Cameron, Jurisdiction and Admissibility Issues under the ICC Statute, in Dominic McGoldrick et al., The Permanent International Criminal Court 65-94 (2004)
Cornelis Canenbley & Michael Rosenthal, Co-operation between Antitrust Authorities in – and outside the EU: What does it mean for Multinational Corporations? : Part 2, 26 Eur. Comp. L. Rev. 178 (2005)
Ida Caracciolo, Applicable Law, in 2 Essays on the Rome Statute of the International Criminal Court 211-232 (Flavia Lattanzi & William Schabas eds. 2004)
Peter Carey, East Timor under Indonesian Occupation, 1975-1999, in A Handbook of Terrorism and Insurgency in Southeast Asia 374-404 (Andrew T.H. Tan ed. 2007).
Antonio Cassese, From Nuremberg to Rome: International Military Tribunals to the International Criminal Court, in The Rome Statute of the International Criminal Court: A Commentary 3-19 (A. Cassese et al. eds. Oxford University Press 2002)
Antonio Cassese, The Statute of the International Criminal Court: Some Preliminary Reflections, 10 Eur. J. Int'l L. 144 (1999)
Jean-Gabriel Castel, The extraterritorial effects of antitrust laws, 179 Recueil des Cours de l' Academie de Droit Internationale 9 (1983-I)
Mauro Catenacci, The Principle of Legality, in 2 Essays on the Rome Statute of the International Criminal Court 85-102 (Flavia Lattanzi & William Schabas eds. 2004),
Kathleen Cavanaugh, The Israeli Military Court System in the West Bank and Gaza, 12 J. Conflict Sec. L. 197 (2007)
Mahmoud Ch. Bassiouni, International Criminal Justice in Historical Perspective, in International Criminal Law 29-65 (M. Ch. Bassiouni eds. 3rd ed. 2008)
Mahmoud Ch. Bassiouni, Negotiating the Treaty of Rome on the Establishment of an International Criminal Court, 32 Cornell Int'l L. J. 443 (1999)
Mahmoud Ch. Bassiouni, Observations concerning the 1997-1998 Preparatory Committee's Work, 13 Nouvelles Études Pénales 1 (1997)
Mahnoum Ch. Bassiouni, Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal, 38 Cornell Int'l L.J. 327 (2005)
Mahmoud Ch. Bassiouni, Principles of Legality in International and Comparative Criminal Law, in 1 International Criminal Law 73-105 (3rd ed. 2008)
Adrian Chua & Rohan Hardcastle, Retroactive Application of Treaties Revisited: Bosnia Herzegovina v. Yugoslavia, 44 Neth. Int'l L. Rev. 414 (1997)
Brice M. Clagett & O.Thomas. Johnson Jr., May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez?, 72 Am. J. Int'l L. 558 (1978)
Andrew Clapham, Human rights obligations of non-state actors in conflict situations, 88 Int'l Rev. Red Cross 491 (Sept. 2006)
William Clark & Thomas H. Goodman, American Justice in Occupied Germany: United States Military Government Courts, 36 Am. Bar Ass'n J. 443 (1950).
Roger S. Clark, Drafting a General Part to a Penal Code: Some Thoughts inspired by the Negotiations on the Rome Statute of the International Criminal Court and by the Court's first Substantive Law discussion in the Lubanga Dyilo Confirmation Proceedings, 19 Crim. L. Forum 519 (2008)
Janine N. Clark, Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation, 20 Eur. J. Int'l L. 415 (2009)
Roger Clark, The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Law Court and the Elements of Offences, 12 Crim. L. Forum 291 (2001)
Roger S. Clark, Timor Gap: The Legality of the Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia, 4 Pace Y.B.Int'l L. 69 (1992).
Ben Clarke, Military Occupation and the Rule of Law: The Legal Obligations of Occupying Forces in Iraq, 10 Int'l Trade & Bus. L. Rev. 133 (2006)
Anthony J. Colangelo, Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law, 48 Harvard Int'l L. J. 121 (2007)
Luigi Condorelli & A. Ciampi, Comments on the Security Council Referral of the Situation in Darfur to the ICC, 3 J. Int'l Crim. Just. 590, 594-7 (2005),

Luigi Condorelli, Jurisdictio et (dés)ordre judiciaire en droit international: quelques remarques au sujet de l'arrêt du 2 octobre 1995 de la Chambre d'appel du tribunal pénal international pour l'ex Yugoslavie dans l'affaire Tadić, in Mélanges Valticos, Droit et Justice 281-286 (R.-J. Dupuy, sous la dir., 1999)
Irwin Cotler, R. v. Finta, 90 Am. J. Int'l L. 460 (1996)
James Crawford, The ILC adopts a Statute for an International Criminal Court, 89 Am. J. Int'l L. 404 (1995)
James Crawford, The Work of the International Law Commission, in 1 The Rome Statute of the International Criminal Court: A Commentary 23-34 (A. Cassese et al. eds. Oxford University Press 2002)
Robert Cryer, The International Criminal Court and its relationship to Non-Party States, in The Emerging Practice of the International Criminal Court 115-133 (Carsten Stahn & Goran Sluiter eds. 2009).
Gennady D. Danilenko, ICC Statute and Third States, in The Rome Statute of the International Criminal Court: A Commentary 1871-1897 (Antonio Cassese et al. eds. 2002)
Eric David, La Cour Pénale Internationale, 313 Recueil des Cours de l' Academie de Droit International 325 (2005).
Eric David, The International Criminal Court: What is the Point?, in International Law: Theory and Practice, Essays in Honour of Eric Suy 631-650 (Karel Wellens ed. 1998)
Joel Davidow, Extraterritorial Antitrust and the Concept of Comity, 15 J. World Trade L. 500 (1981)
Joel Davidow, Recent US Antitrust Developments of International Relevance, 27 World Competition 407 (2004)
Gauthier De Beco, The Confirmation of Charges before the International Criminal Court: Evaluation and First Application, 7 Int'l Crim. L. Rev. 469 (2007)
Zsuzsanna Deen-Raczmany, The nationality of the offender and the jurisdiction of the International Criminal Court, 95 Am. J. Int'l L. 606 (2001)
Michael J. Dennis, Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Armed Conflict, 40 Isr. L. Rev. 453 (2007)
John Dermody, Beyond Good Intentions: Can Hybrid Tribunals Work After Unilateral Intervention?, 30 Hastings Int'l & Comp. L. Rev. 77 (2006-2007)
Yoram Dinstein, The International Law of Belligerent Occupation and Human Rights, 8 Israel Y.B.H.R. 104 (1978)
David Donat-Cattin, Decision-Making in the International Criminal Court: Functions of the Assembly of States Parties and Independence of the Judicial Organs, in, 2 Essays on the Rome Statute of the International Criminal Court 69-83 (Flavia Lattanzi & William Schabas eds. 2004)
Frédéric Dopagne, Convention de Vienne de 1969 – Article 28 – Non-rétroactivité des Traités, in 2 Les Conventions de Vienne sur le Droit des Traités, Commentaire Article par Article 1163-1187 (Olivier Corten & Pierre Klein dir. 2006)
Knut Dormann et al., The Context of War Crimes, in The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results 112-123 (Roy S. Lee ed. 1999)
Mark A. Drumbl, Prosecutor v. Thomas Lubanga Dyilo. Décision sur le confirmation des charges, 101 Am. J. Int'l L. 841 (2007)
John Dugard & Christine van den Wyngaert, Reconciling Extradition with Human Rights, 92 Am. J. Int'l L. 187 (1998)
John Dugard, Obstacles in the way of an International Criminal Court, 56 Cambridge L. J. 329 (1997)
Michael Duttwiler, Liability for Omission in International Criminal Law, 6 Int'l Crim. L. Rev. 1 (2006).
Albin Eser, Article 31, in Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article 863-895(O. Triffterer ed. 2nd ed. 2008)
Albin Eser, Mental Elements – Mistake of Fact and Mistake of Law, in The Rome Statute of the International Criminal Court: A Commentary, 889-948 (Antonio Cassese et al. eds. 2002)
J. E. S. Fawcett, The Eichmann Case, 38 Brit. Y.B. Int'l. L. 181 (1962)
Tristan Ferraro, Enforcement of Occupation Law in Domestic Courts: Issues and Opportunities, 41 Isr. L. Rev. 331 (2008)
Andre R. Fiebig, International Law Limits on the Extraterritorial Application of the European Merger Control Regulation and Suggestions of Reform (1998) Eur. Competition L. Rev. 323
Gerald Fitzmaurice, The General Principles of International Law considered from the standpoint of the rule of law, 92 Recuel des Cours de l' Academie de Droit International 1 (1957-II)
Gerald G. Fitzmaurice, The Law and Procedure of the International Court of Justice, 28 Brit. Y.B. Int'l L. 1 (1951)
Malgosia Fitzmaurice, The Practical Working of the Law of Treaties, in International Law 172-199 (Malcolm D. Evans ed. 3rd ed., 2010)

Joan Fitzpatrick, Sovereignty, Territoriality and the Rule of Law, 25 Hastings Int'l Comp. L. Rev. 303 (2001-2002)
P. G. Fitzpatrick, The Location of a Crime, A Comment on Treacy v. Director of Public Prosecutions, 21 Int'l. Comp. L.Q. 60 (1972)
George Fletcher, Against Universal Jurisdiction, 1 J. Int'l Crim. Just. 580 (2003)
Albert A. Foer, The goals of antitrust: thoughts on consumer welfare in the U.S., in Handbook of Research in Trans-Atlantic Antitrust 566-593 (Philip Marsden ed. 2006)
Richard T. Ford, Law's Territory (A History of Jurisdiction), 97 Mich. L. Rev. 843 (1998-1999)
Eleanor M. Fox, The Merger Regulation and its Territorial Reach: Gencor Ltd. v. Commission, (1999) Eur. Competition L. Rev. 334
Hazel Fox, The Objections to Transfer of Criminal Jurisdiction to the UN Tribunal, 46 Int'l Comp L. Q. 434 (1997)
Gregory H. Fox, The Occupation of Iraq, 36 Geo. J. Int'l L. 195 (2004-2005)
Michael J. Frank, Trying Times: The Prosecution of Terrorists in the Central Criminal Court of Iraq, 18 Florida J. Int'l L. 1 (2006)
Steven Freeland, How open should the Door be? – Declarations by non-States Parties under Article 12 (3) of the Rome Statute of the International Criminal Court, 75 Nordic J. Int'l L. 211 (2006)
Håkan Friman, Rights of Persons Suspected or Accused of a Crime, in The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results 247-262 (Roy S. Lee ed. 1999)
Larry Fullerton & Camelia C. Mazard, International Antitrust Co-operation Agreements, 24 World Competition 405 (2001)
Mark Furse, Issues relating to the enforcement and application of criminal laws in respect of competition, in Handbook of Research in Transatlantic Antitrust 466-492 (Philip Marsden ed. 2006)
Paola Gaeta, Inherent Powers of International Tribunals, in Man's Inhumanity to Man: Essays of International Law in Honour of Antonio Cassese 353-372 (Lal C. Vohrah et al. eds. 2003)
Paola Gaeta, Is the Practice of "Self-Referrals" a Sound Start for the ICC?, 2 J. Int'l Crim. Just. 949 (2004)
Paola Gaeta, Official Capacity and Immunities, in The Rome Statute of the International Criminal Court: A Commentary 975-1002 (Antonio Cassese et al. eds. 2002)
Giorgio Gaja, Issues of Admissibility in Cases of Self-Referrals, in The International Criminal Court and National Jurisdictions 49-55 (Mauro Politi & Federica Gioia eds. 2008)
Chris Gallavin, The Security Council and the ICC: Delineating the Scope of Security Council Referrals and Deferrals, 5 N.Z. Armed Forces Rev. 19 (2005)
Hans-Peter Gasser, Protection of the Civilian Population, in The Handbook of International Humanitarian Law 237-324 (Dieter Fleck et al. eds. 2nd ed. 2008)
Philippe Gautier, Article Premier, in 1 Les Conventions de Vienne sur le Droit des Traités, Commentaire Article par Article 27-44 (Olivier Corten & Pierre Klein dir. 2006)
David Gersh, Poor Judgment: Why the Iraqi Special Tribunal is the wrong mechanism for trying Saddam Hussein on charges of genocide, human rights abuses and other violation of international law, 33 Ga. J. Int'l & Comp. L. 273 (2004)
Yves van Gerven & Lorelien Hoet, Gencor: Some Notes on Transnational Competition Law Issues, 28 Legal Issues of European Integration 195 (2001)
Geoff Gilbert, Crimes sans frontières: Jurisdictional Problems in English Law, 63 Brit. Y.B. Int'l. L. 415 (1992)
Jack Goldsmith, The Self-Defeating International Criminal Court, 70 U. Chicago L. Rev. 89 (2003)
Richard Goldstone, The Trial of Saddam Hussein: What kind of Court Should Prosecute Saddam Hussein and Others for Human Rights Abuses?, 27 Fordham Int'l L. J. 1490 (2004)
Michail Gondek, Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?, 52 Neth. Int'l L. Rev. 347 (2005)
Lorenzo Gradoni, L'exploitation des principes généraux de droit dans la jurisprudence des Tribunaux internationaux pénaux ad hoc, in La justice pénale internationale dans les décisions des tribunaux ad hoc 10-40 (E. Fronza & S. Menacorda eds. 2003)
Leslie C. Green, Legal Issues of the Eichmann Trial, 37 Tulane Law Review 641 (1962-1963)
Christopher Greenwood, International Humanitarian Law (Laws of War), in The Centennial of the First International Peace Conference, Reports and Conclusions 161-260 (Frits Kalshoven ed. 2000)
Christopher Greenwood, The Administration of Occupied Territory in International Law, in Essays on War in International Law 353-381 (2006).
Christopher Greenwood, The Customary Law Status of the 1977 Additional Protocols, in Essays on War in International Law 179-199 (2006).

Christopher Greenwood, The United Kingdom War Crimes Act 1991, in Essays on War in International Law 435-455 (C. Greenwood, ed. 2006)
Joseph P. Griffin, Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction, 19 Eur. Competition L. Rev. 64 (1998)
Joseph P. Griffin, Foreign Governmental Reactions to U.S. assertions of extraterritorial jurisdiction, 19 Eur Comp. L. Rev. 64 (1998)
Leo Gross, Treaty Interpretation: The proper rôle of an international tribunal, in 1 Essays on International Law and Organization 411-427 (1984)
Rock Grundman, The New Imperialism: The Extraterritorial Application of United States Law, 14 Int'l Law. 257 (1980)
Diana Guy, The UK's experience with criminal law sanctions, in Crimininalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States 248-256 (Katalin J. Cseres et al., eds., 2006)
Gerhard Hafner & Christina Binder, The Interpretation of Article 21 (3) ICC Statute Opinion Reviewed, 9 Austrian Rev. Int'l and Eur. Law 163 (2004)
Gerhard Hafner, Jonathan Huston, Anne Rübesame, Kristen Boon, A Response to the American View as presented by Ruth Wegdwood, 10 Eur. J. Int'l L. 108 (1999)
Christopher K. Hall, Article 19, in Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article 637-668 (Otto Triffterer ed. 2nd ed. 2008)
Christopher K. Hall, The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court 92 Am. J. Int'l L. 331 (1998)
Christopher K. Hall, The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court, 91 Am. J. Int'l L. 177 (1997)
Christopher K. Hall, The third and fourth sessions of the UN Preparatory Committee on the establishment of an International Criminal Court 92 Am. J. Int'l L. 124 (1998)
Lynden Hall, 'Territorial' Jurisdiction and the Criminal Law, 1972 Crim. L. Rep. 276
Matthew Happold, Prosecutor v. Thomas Lubanga, Decision of Pre-Trial Chamber I of the International Criminal Court, 27 January 2007, 56 Int'l Comp. L.Q. 713 (2007)
Robert W. Heinsch, Possibilities to Prosecute War Crimes Committed in Iraq: The Different Forum Options, 16 Internationales Völkerrecht 132 (2003).
D.H.W. Henry, The United States Antitrust Laws: A Canadian Viewpoint, [1970] Canadian Y.B. Int'l L. 249
Rosalyn Higgins, Time and the Law: International Perspective on an Old Problem, 46 Int'l Comp. L. Q. 501 (1997)
Etelle R. Higonnet, Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform, 23 Arizona J. Int'l & Comp. L. 347 (2006)
Michael Hirst, Jurisdiction over Cross-Frontier Offences, 97 L.Q.Rev. 80 (1981)
John T. Holmes, Jurisdiction and Admissibility, in The International Criminal Court: Elements of crimes and rules of procedure and evidence (Roy S. Lee et al eds., 2001)
Christina Hoss & Russell A. Miller, German Federal Constitutional Court and Bosnian War Crimes: Liberalizing Germany's Genocide Jurisprudence, 44 German Y.B. Int'l L. 576 (2001)
David Hunt, The International Criminal Court, High Hopes, 'Creative Ambiguity' and an Unfortunate Mistrust in International Judges, 2 J. Int'l Crim. Just. 56 (2004)
Ian Hunter, Specific Application to Antitrust Matters of General Principles of International Law Governing the Assumption and Exercise of Jurisdiction, Int'l L. Association, Report of the 54th Conference, 221 (1970)
Mitsue Inazumi, The Meaning of the State Consent Precondition in Article 12(2) of the Rome Statute of the International Criminal Court: A Theoretical Analysis of the Source of International Criminal Jurisdiction, 49 Neth. Int'l L. Rev. 159 (2002)
Dov Jacobs, A Samson at the International Criminal Court: The Powers of the Prosecutor at the Pre-Trial Phase, 6 Law Pract. Intl Cts Tribunals 317 (2007).
Maziar Jamnejad & Michael Wood, The Principle of Non-Intervention, 22 Leiden J. Int'l. L. 345 (2009)
Robert Jennings, Extraterritorial Jurisdiction and the United States Antitrust Laws, 33 Brit. Y.B. Int'l. L. 146 (1957)
Robert Jennings, General Course on Principles of International law, 121 Recueil des Cours de l' Academie de Droit Internationale 323 (1967-II)
Robert Jennings, Nullity and Effectiveness in International Law, in Cambridge Essays in International Law¸ Essays in honour of Lord McNair 64-87 (1965).

Robert Jennings, The Limits of State Jurisdiction, in The Collected Writings of Sir Robert Jennings 885-914 (1998)
Robert Jennings, The Proper Reach of Territorial Jurisdiction: A Case Study of Divergent Attitudes, 2 Ga. J. Int'l & Comp. L. 35 (1972)
Florian Jessberger, A Substantive Criminal Law Perspective, in Discussion, 6 J. Int'l Crim. Just. 763 (2008)
Florian Jessberger, International v. National Prosecution of International Crimes, in The Oxford Companion to International Criminal Justice 208-215 (A. Cassese ed. 2009)
Lu Jiangping & Wang Zhixiang, China's attitude towards the ICC, 3 J. Int'l. Crim. Just. 608 (2005)
Eduardo Jiménez de Arechaga, International Law in the Past Third of the Century, 159 Recueil des Cours de l' Academie de Droit Internationale 1 (1978-I)
Angus Johnston & Edward Powles, The Kings of the Worlds and their Dukes' Dilemma: Globalisation, Jurisdiction and the Rule of Law, in Globalisation and Jurisdiction 13-54 (Piet-Jan Slot & Mielle Bulterman eds., 2004)
Julian M. Joshua, The Brave New World of Extradition: A North Atlantic Treaty Alliance against Cartels?, in Handbook of Research in Transatlantic Antitrust (Philip Marsden ed. 2006)
Kaiyan H. Kaikobad, Problems of Belligerent Occupation: The Scope of Powers exercised by the Coalition Provisional Authority in Iraq, April/May 2003 – June 2004, 54 Int'l Comp. L.Q. 253 (2005)
Symeon Karagiannis, Article 29, in Les Conventions de Vienne sur le droit des traités: commentaire article par article 1189-1237 (Olivier Corten & Pierre Klein eds. 2006);
Hans-Peter Kaul & Claus Kress, Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises, 2 Y.B. of Int'l Humanitarian Law 143 (1999)
Hans-Peter Kaul, Preconditions to the Exercise of Jurisdiction, in 1 The Rome Statute of the International Criminal Court: A Commentary 583-616 (A. Cassese et al. eds. Oxford University Press 2002)
Hans-Peter Kaul, Special Note: The Struggle for the International Criminal Court's Jurisdiction, 6 Eur. J. of Crime, Crim. L. and Crim. Just. 364
Hans-Peter Kaul, The International Criminal Court: Jurisdiction, Trigger Mechanism and Relationship to National Jurisdictions, in Mauro Politi & Giuseppe Nesi, The Rome Statute of the International Criminal Court, A Challenge to Impunity 59-62 (2001)
Michael J. Kelly, Iraq and the Law of Occupation: New Tests for an Old Law, 6 Y.B. Int'l Humanitarian L. 127 (2003)
Maria Kelt & Herman von Hebel, What are Elements of Crimes?, in The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence 13-18 (Roy S. Lee ed. 2001)
Ph. Kirsch & D. Robinson, Initiation of Proceedings by the Prosecutor, in The Rome Statute of the International Criminal Court: A Commentary 657-664 (Antonio Cassese et al. eds. 2002)
Philippe Kirsch & Daniel Robinson, Referral by States Parties, in The Rome Statute of the International Criminal Court: A Commentary 619-625 (Antonio Cassese et al. eds. 2002)
Philip Kirsch & Darryl Robinson, Reaching Agreement at the Rome Conference, in The Rome Statute of the International Criminal Court: A Commentary 67-91 (A. Cassese et al. eds. 2002)
Philippe Kirsch & John T. Holmes, The Rome Conference on an International Criminal Court, The Negotiating Process, 93 Am. J. Int'l L. 2 (1999)
Philip Kirsch, Introduction, Reflections on the International Criminal Court, Essays in Honour of Adriaan Bos 1-9 (H.A.M. von Hebel et al. eds., 1999)
Philip Kirsch, The Role of the International Criminal Court in Enforcing International Criminal Law, in International Law, Classic and Contemporary Readings 237-243 (Charlotte Ku & Paul F. Diehl eds. 2009)
Henry Kissinger, The Pitfalls of Universal Jurisdiction, 80 Foreign Affairs 86 (2001)
Kjetil M. Larsen, 'Territorial non-Application' of the European Convention on Human Rights, 78 Nordic J. Int'l L. 73 (2009)
Jan Klabbers, International Legal Histories: The Declining Importance of Travaux Préparatoires in Treaty Interpretation?, 50 Neth. Int'l L. Rev 267 (2003)
Eric S. Kobrick, Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction over International Crimes, 87 Colum. L. Rev. 1515 (1987)
Harold H. Koh, International Business Transactions in United States Courts, 261 Recueil des Cours de l' Academie de Droit International 9 (1996)
Robert Kolb, The Exercise of Criminal Jurisdiction over International Terrorists, in Andrea Bianchi, Enforcing International Law Norms Against Terrorism 227-281 (A. Bianchi ed. 2004)

Martii Koskenniemi, Occupation and Sovereignty: Still a Useful Distinction?, in Law at War: The Law as it was and the Law as it should be, Liber Amicorum Ove Bring 163-174 (Ola Engdahl & Pàl Wrange eds. 2008)
Van Koufoudakis, European Human Rights Law and Turkey's Violations in the Occupied Areas of Cyprus, in The Diversity of International Law: Essays in Honour of Kalliopi K. Koufa 303-318 (Aristotle Konstantinides & Nikos Zaikos eds. 2009)
Claus Kress,"Self-referrals" and "Waivers of Complementarity": Some Considerations in Law and Policy, 2 J. Int'l Crim. Just. 944 (2004)
Julian Ku and Jide Nzelibe, Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities, 84 Wash. U. L. Rev. 777 (2006)
Eve La Haye, The Elaboration of the Elements of War Crimes, in Essays on the Rome Statute of the International Criminal Court 305-331 (F. Lattanzi & W. Schabas eds. 1999)
Eve La Haye, The Jurisdiction of the International Criminal Court: Controversies over the Preconditions for Exercising its Jurisdiction, 46 Neth. Int'l L. Rev. 1 (1999)
Manfred Lachs, Polish Legislation in Exile, 24 Journal of Comparative Legislation 57 (1942).
Susan Lamb, Nullum crimen, nulla poena sine lege in International Criminal Law, in The Rome Statute of the International Criminal Court: A Commentary 733-766 (A. Cassese et al. eds. 2002)
Nicholas F. Lancaster, Occupation Law, Sovereignty, and Political Transformation: Should The Hague Regulations and the Fourth Geneva Convention still be considered customary international law?, 189 Mil. L. Rev. 51 (2006)
R.Dobie Langenkamp & Rex D. Zedalis, What Happens to the Iraqi Oil?: Thoughts on Some Significant, Unexamined International Legal Questions Regarding Occupation of Oil Fields, 14 Eur. J. Int'l L. 417 (2003)
G. E. Langermeijer, Le principe de territorialité, in Le Droit Pénal International Recueil d' Études en hommage à Jacob Maarten Van Bemmelen 17-37 (Jacob Maarten van Bemmelen ed. 1965)
Flavia Lattanzi, The Rome Statute and State Sovereignty. ICC Competence, Jurisdictional Links, Trigger Mechanism, in 1 Essays on the Rome Statute of the International Criminal Court 51-66 (F. Lattanzi & W. Schabas eds. 1999).
Flavia Lattanzi, "Compétence de la Cour Pénale Internationale et Consentement des États », 103 Revue Générale de Droit Int'l Public 425 (1999)
Hersch Lauterpacht, Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens, 9 Cambridge L. J. 330 (1947)
Peter Lawrence, East Timor, 2 Encyclopedia Pub. Int'l L., 3-4
Rick Lawson, Interaction between National Judiciary and the European Court of Human Rights: Subsidiarity, Co-operation and Supervision, in Report of the Seminar: Implementation of Human Rights: the Efficiency of Justice in the Council of Europe and its Member States 61-67(2004)
Yves Le Bouthillier, Article 32, in 2 Les Conventions de Vienne sur le Droits des Traités, Commentaire Articles par Article 1328-1360 (O. Corten & P. Klein eds. 2006)
L.H. Leigh, Territorial Jurisdiction and Fraud, (1988) Crim. L.Rep. 280
William K. Lietzau, A General Introduction to the General Introduction: Animating Principles behind the Elements of Crimes, in 2 Essays on the Rome Statute of the International Criminal Court 285-303 (Flavia Lattanzi & William Schabas eds. 2004)
Liesbeth Lijnzaad, How not to be an Occupying Power: Some Reflections on UN Security Council Resolution 1483 and the Contemporary Law of Occupation, in L. Lijnzaad et al., Making the Voice of Humanity Heard 291-306 (2004)
Ulf Linderfalk, Is the Hierarchical Structure of Articles 31 and 32 of the Vienna Convention real or not? Interpreting the Rules of Interpretation, 54 Neth. Int'l L. Rev. 133 (2007)
Rosanna Lipscomb, Restructuring the ICC framework to advance transitional justice: A search for a permanent solution in Sudan, 106 Colum. L. Rev. 182 (2006)
Davies D.J. Llewelyn, The Influence of Huber's De Conflictu Legum on English Private International Law, 18 Brit. Y.B. Int'l. L. 49 (1937)
Ernest G. Lorenzen, Huber's De Conflictu Legum, 13 Illinois L. Rev. 375 (1919)
Vaughan Lowe, Blocking Extra-territorial Jurisdiction: The British Protection of Trading Interests Act, 1980, 75 Am. J. Int'l. L. 257 (1981)
Vaughan Lowe, Jurisdiction, in International Law 313-339 (M. D. Evans ed. 3rd ed. 2010)
Andreas Lowenfeld, International Litigation and the Quest for Reasonableness, 245 Recueil des Cours de l' Academie de Droit Internationale 9 (1994-I)

Andreas F. Lowenfeld, Sovereignty, Jurisdiction and Reasonableness: A Reply to A. V. Lowe, 75 Am. J. Int'l. L. 629 (1981)
Neil MacCormick, On Reasonableness, in Chaim Perelman & Raymond Vander Elst, Les notions a contenu variable en droit 132-156 (1984)
Daniel Machover, International Humanitarian Law and the Indonesian Occupation of East Timor, in Catholic Institute for International Relations, International Law and the Question of East Timor 205-222 (1995)
John S. Magney & Reyn C. Anderson, Recent developments in Criminal Enforcement of U.S. antitrust laws, 27 World Competition 101 (2004)
Harold G. Maier Jurisdictional Rules in Customary International Law, in Extraterritorial Jurisdiction in Theory and Practice 64-101 (Karl M. Meessen ed., 1996)
Harold G. Maier, Extraterritorial Jurisdiction at a Crossroad: An intersection between public and private international law, 76 Am. J. Int'l. L. 280 (1982)
Francis A. Mann, Anglo-American Conflict of Jurisdiction, 13 Int'l. Comp. L. Q. 1460 (1964)
Francis A. Mann, Reflections on the Prosecution of Persons Abducted in Breach of International Law, in International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne 407-421 (Yoram Dinstein ed. 1989)
Francis A. Mann, The Doctrine of Jurisdiction Revisited After 20 Years, in Further Studies in International Law 3-83 (F. A. Mann ed. 1990)
Francis A. Mann, The Doctrine of Jurisdiction in International Law, 111 Recueil des Cours de l' Academie de Droit Internationale 1 (1964-I)
Francis A. Mann, The Extremism of American Extraterritorial Jurisdiction, 39 Int'l. Comp. L. Q. 410 (1990)
Ferrando Mantovani, The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer, 1 J. Int'l. Crim. Just. 26 (2003)
Antonio Marchesi, Article 14, in Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article 575-581 (O. Triffterer ed. 2nd ed. Oxford University Press 2008)
Pierre-Marie Martin, La compétence de la compétence (à propos de l'arrêt Tadić, Tribunal pénal international, chambre d' appel, 2 octobre 1995, 19e cahier Recueil Dalloz 157 (1996)
Francesca Martinez, Legal Powers and Status of the Court, in The Rome Statute of the International Criminal Court: A Commentary 203-218 (A. Cassese et al. eds. 2002)
Margaret McAuliffe DeGuzman, Article 21, Applicable Law, in Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article 701-713 (Otto Triffterer ed. 2nd ed. 2008)
Conor McCarthy, The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq, 10 J. Conflict & Sec. L. 43 (2005).
Dominick McGoldrick, Criminal Trials before International Tribunals: Legality and Legitimacy, in The Permanent International Criminal Court, Legal and Policy Issues 9-46 (D. McGoldrick et al. eds. 2004)
Leanne McKay, Characterising the System of the International Criminal Court: An Exploration of the Role of the Court through the Elements of Crimes and the Crime of Genocide, 6 Int'l Crim. L. Rev. 257, 272 (2006)
Karl M. Meessen, Antritrust Jurisdiction under Customary International Law, 78 Am. J. Int'l. L. 783 (1984)
Frédéric Megré, Epilogue to an Endless Debate: The International Criminal Court's Third Party Jurisdiction and the Looming Revolution of International Law, 12 Eur. J. Int'l L. 247 (2001)
Frédéric Megré, Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project, 12 Finnish Y.B. Int'l L. 191 (2001)
Arjen Meij, Scope of Judicial Review and Sanctions in Competition Cases, in Views of the European Law from the Mountain, Liber Amicorum Piet Jan Slot 179-186 (M. Bulterman et al. eds. 2009)
Eduard M. Meijers, L'Histoire des Principes Fondamentaux du Droit International Privé à partir de Moyen Âge, 49 Recueil des Cours de l' Academie de Droit Internationale 547 (1934-III)
Theodor Meron, Applicability of Multilateral Conventions to Occupied Territories, 72 Am. J. Int'l L. 542 (1978)
Theodor Meron, The Geneva Conventions as Customary Law, 81 Am. J. Int'l L. 348 (1987)
Michela Miraglia, Admissibility of Evidence, Standard of Proof and Nature of the Decision in the ICC Confirmation of Charges in Lubanga, 6 J. Int'l Crim. Just. 489 (2008)
Edward M. Morgan, Criminal Process, International Law and Extraterritorial Crime, 38 U. Toronto L. J. 245 (1988)
Edward M. Morgan, Retributory Theatre, 3 Am. U.J. Int'l L. & Pol'y 1 (1988)
Virginia Morris & M. Christiane Bourloyannis-Vrailas, The Work of the Sixth Committee at the Forty-Ninth Session of the UN General Assembly, 89 Am. J. Int'l L. 607 (1995)

Madeleine Morris, High Crimes and Misconceptions: The ICC and Non-Party States, 64 Law Contemp. Probs. 13 (2001)
Charles Norchi & Lea Brilmayer, Extraterritoriality and Fifth Amendment Due Process, 105 Harvard L. Rev. 1217 (1991-1992)
Daniel D. N. Nsereko, The International Criminal Court: Jurisdictional and Related Issues, 10 Crim. L. Forum 87 (1999)
Daniel D.N. Nsereko, Triggering the Jurisdiction of the International Criminal Court, 4 Afr. Hum. Rts. J. 256 (2004).
Juan C. Ochoa S., The ICC's Pre-Trial Chamber I Confirmation of Charges Decision in the Case of Prosecutor v. Thomas Lubanga Dyilo: Between Application and Development of International Criminal Law, 16 Eur. J. Crime Crim. L. & Crim. Just. 39 (2008)
Yoshio Ohara, New US Policy on the Extraterritorial Application of Antitrust Law and Foreign Responses, in Extraterritorial Jurisdiction in Theory and in Practice 166-182 (K. M. Meessen ed., 1996)
Hector Olàsolo, A Note on the Evolution of the Principle of Legality in International Criminal Law, 18 Crim. L. Forum 301 (2007).
Héctor Olàsolo, The Prosecutor of the ICC before the initiation of investigations: a quasi-judicial or a political body?, 3 Int'l Crim. L. Rev. 87 (2003)
David M. Ong, The Legal Status of the 1989 Australia-Indonesia Timor Gap Treaty Following the End of Indonesian Rule in East Timor, 31 Neth. Y.B. Int'l L. 67 (2000)
Bernard H. Oxman, Jurisdiction of States, in 3 Encyclopedia Pub. Int'l. L. 55 (Rudolf Bernhardt ed. 1997)
Melanie O' Brien, The impact of the Iraq Communication of the Prosecutor of the International Criminal Court on War Crimes Admissibility and the Interests of Victims, U.C. Dublin L. Rev. (Symposium Edition) 109-125 (2007)
Raul C. Pangalangan, Article 24, in Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article 735-742 (O. Triffterer ed. 2nd ed. 2008)
Jordan J. Paust, Non-Extraterritoriality of 'Special Territorial Jursdiction' of the United States: Forgotten History and the Errors of Erdos, 24 Yale J. Int'l L. 305 (1999)
Jordan J. Paust, The Reach of ICC Jurisdiction over Non-Signatory Nationals, 33 Vanderbilt J. Transnat'l L. 1 (2000)
Alain Pellet, Applicable Law in The Rome Statute of the International Criminal Court: A Commentary 1051-1084 (Antonio Cassese et al. eds. 2002)
Alain Pellet, The Destruction of Troy will not take place, in International Law and the Administration of Occupied Territories 169-204 (Emma Playfair ed. 1992).
Rollin M. Perkins, The Territorial Principle in Criminal Law, 22 Hastings L. J. 1155 (1970-1971)
Ruth Phillips, The International Criminal Court Statute: Jurisdiction and Admissibility, 10 Crim. L. Forum 61 (1999)
Donald K. Piragoff & Daryll Robinson, Article 30-Mental Element, in Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article 527-535 (O. Triffterer ed. 2nd ed. 2008)
Ellen S. Podgor, "Defensive Territoriality": A New Paradigm for the Prosecution of Extraterritorial Business Crimes, 31 Ga. J. Int'l & Comp. L. 1 (2002)
Lawrence Preuss, American Conception of Jurisdiction with Respect to Conflicts of Laws on Crime, 30 Transactions of the Grotius Society 184 (1944)
Fabàn Raimondo, General Principles of Law as Applied by International Criminal Courts and Tribunals, 6 The Law and Practice of International Courts and Tribunals 393 (2007)
Usha Ramanathan, India and the ICC, 3 J. Int'l. Crim. Just. 627 (2005)
John M. Raymond, Madsen v. Kinsella – Landmark and Guidepost in Law of Military Occupation, 47 Am. J. Int'l L. 300 (1953),
Richard M. Reynolds et al. The Extraterritorial Application of the U.S. Antitrust Laws to Criminal Conspiracies, 19 Eur. Comp. L. Rev. 151 (1998)
A. T. Richardson, War Crimes Act 1991, 55 Modern L. Rev. 73 (1992)
Jacqueline Riffault-Silk, Jurisdictional Control over the Acts of Antitrust Authorities under French Experience, in Antitrust between EC Law and National Law, 159-177 Proceedings of the VI Conference, 13-14 May, Casa dei Caravessi, Treviso (Enrico A. Raffaelli ed., 2005)
François Rigaux, Exposé Préliminaire, Feb. 15, 1994, 68-I Annuaire de l' Institut de Droit International 372 (1999)
Joseph Rikhof, The Canadian Model, in Importing Core International Crimes into National Criminal Law 19-22 (Oslo: PRIO, M. Bergsmo et al. eds. 2007)

Mona Rishmawi, The ICC viewed from the Office of the High Commissioner for Human Rights, 6 J. Int'l Crim. Just. 769 (2008)
Ruth Rissing-Van Saan, The German Federal Supreme Court and the Prosecution of International Crimes Committed in former Yugoslavia, 3 J. Int'l Crim. Just. 381 (2005)
Adam Roberts, Prolonged Military Occupation: The Israeli-Occupied Territories since 1967, 84 Am. J. Int'l L. 44 (1990)
Stanley A. Roberts, Socio-religious obstacles to Judicial Reconstruction in Post-Saddam Iraq, 33 Hofstra L. Rev. 367 (2004-2005)
Adam Roberts, The End of Occupation: Iraq 2004, 54 Int'l Comp. L.Q. 27 (2005)
Adam Roberts, Transformative Military Occupation: Applying the Laws of War and Human Rights, in International Law and Armed Conflict: Exploring the Faultlines, Essays in honour of Yoram Dinstein 439-495 (M. N. Schmitt & J. Pejic eds. 2007)
Adam Roberts, What is a military occupation?, 55 Brit. Y.B. Int'l L. 249 (1984)
Yaël Ronen, Article 12(3) of the ICC Statute and Non-State entities, 8 J. Int'l Crim. Just. 3 (2010)
Yaël Ronen, Status of Settlers Implanted by Illegal Territorial Regimes, 79 Brit. Y.B. Int'l L. 194 (2008)
Shabtai Rosenne, Poor Drafting and Imperfect Organization: flaws to overcome in the Rome Statute, 41 Virginia J. Int'l L. 164 (2000)
Kenneth Roth, Discussion – Court from the Lobby: an NGO View, 6 J. Int'l Crim. Just. 764
Christos L. Rozakis, Jurisdiction of States and its Limits in the Strasbourg Case-law, in L'Etat Actuel des Droits de l'Homme dans le Monde, Defis et Perspectives 167-186 (Alice Yotopoulos-Marangopoulos dir., 2006)
Ronald J. Rychlak & John M. Czarnetsky, The International Criminal Court and the Question of Complementarity, Third World Legal Studies 115 (2000-2003)
Cedric Ryngaert, Litigating Abuses Committed by Private Military Companies, 19 Eur. J. Int'l L. 1035 (2008)
Cedric Ryngaert, Territorial Jurisdiction over Cross-Frontier Offences: Revisiting a Classic Problem of International Criminal Law, 9 Int'l. Crim. L. Rev. 187 (2009)
Wiebke Rückert, Article 4, Legal Status and Powers of the Court, in Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article 121-128 (O. Triffterer ed. 2nd ed. 2008)
Milan Sahović & William W. Bishop, The Authority of the State: Its Range with Respect to Persons and Places, in Manual of Public International Law 311-380 (Max Sørensen ed. 1968)
Per Saland, International Criminal Law Principles, in The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results 189-216 (Roy S. Lee ed. 1999).
Jean Salmon, Le concept de raisonnable en droit international public, in Daniel Bardonnet et al., Mélanges offertes à Paul Reuter: le droit international: unité et diversité 447-478 (1981)
Lotika Sarkar, The Proper Law of Crime in International Law, 11 Int'l. Comp. L. Q. 446 (1962)
Dan Sarooshi, The Role of Domestic Public Law Analogies in the Law of International Organizations, 5 Int'l Org. L. Rev. 237 (2008)
Marco Sassòli, Legislation and Maintenance of Public Order and Civil Life by Occupying Powers, 16 Eur. J. Int'l L. 661 (2005)
William Schabas, Canadian Implementing Legislation for the Rome Statute, 3 Yearbook Int'l Humanitarian L. 337 (2000)
William Schabas, Complicity before the International Criminal Tribunals and Jurisdiction over Iraq, in Phil Shiner, The Iraq War and International Law 145-149 (P. Shiner & Andrew Williams eds. 2008)
William Schabas, Prosecutorial Discretion v. Judicial Activism at the International Criminal Court, 6 J. Int'l Crim. Just. 731 (2008)
William A. Schabas, The Right to a Fair Trial, in 2 Essays on the Rome Statute of the International Criminal Court 242-282 (Flavia Lattanzi & William Schabas eds. 2004)
Michael P. Scharf, The United States and the International Criminal Court: The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. position, 64 L. Contemporary Probs. 67 (2001)
David Scheffer, Beyond Occupation Law, 97 Am. J. Intl' L. 842 (2003)
David Scheffer, The United States and the International Criminal Court, 93 Am. J. Int'l. L. 12 (1999)
Henry Schermers, Interpretation of the constituent instruments, in A Handbook on International Organisations 406-408 (Renè J. Dupuy ed., 2nd ed. 1998)
Michael N. Schmitt & Charles H.B. Garraway, Occupation Policy in Iraq and International Law, 9 Int'l Peacekeeping 27 (2005)
Clive Schofield, Minding the Gap: the Australia – East Timor Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS), 22 Int'l J. Marine & Coastal L. 189 (2007)

Julian J. E. Schutte, Enforcement Measures in International Criminal Law, 52 Revue Int'l de Droit Pénal 441 (1981)
Georg Schwarzenberger, The Problem of an International Criminal Law, 3 Current Legal Problems 263 (1950)
Stephen Schwebel, May preparatory work be used to correct rather than confirm the 'clear' meaning of a treaty provision?, in Theory of International Law at the Threshold of the 21st century, Essays in Honour of of Krysztof Skubiszewski 541-547 (Jerzy Makarczyk ed. 1996)
Mohamed Shahabudeen, Does the Principle of Legality Stand in the Way of Progressive Development of Law, 2 J. Int'l Crim. Just. 1007 (2004)
Yuval Shany, Binary Law Meets Complex Reality: The Occupation of Gaza Debate, 41 Isr. L. Rev. 68 (2008)
Yuval Shany, In Defence of Functional Interpretation of Article 12(3) of the Rome Statute: A Response to Yaël Ronen, 8 J. Int'l Crim. Just. 329 (2010)
Yuval Shany, The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. Prime Minister of Israel, 42 Isr. L. Rev. 101 (2009)
Malcom N. Shaw, Territorial Administration by non-territorial sovereigns, in The Shifting Allocation of Authority in International Law, Essays in Honour of Ruth Lapidoth 369-415 (Tomer Broude & Yuval Shany eds. 2008),
Sally S. Simpson, Cycles of Illegality: Antitrust Violations in Corporate American, 65 Soc. Forces 943 (1985-1986)
Peter W. Singer, War, Profits and the Vacuum of Law: Privatized Military Firms and International Law, 42 Colum. J. Transnat'l L. 521 (2004)
Jean M. Sorel, Article 31 – Convention de 1969, in 2 Les Conventions de Vienne sur le Droits des Traités, Commentaire Articles par Article 1290-1327 (O. Corten & P. Klein eds. 2006)
Heidi Spalholz, Saddam Hussein and the IST on trial: the case for the ICC, 13 Buff. Hum. Rts. L. Rev. 255 (2007)
Carsten Stahn, Justice under Transitional Administration: Contours and Critique of a Paradigm, 27 Hous. J. Int'l L. 311 (2004-2005)
Carsten Stahn, Mohamed El Zeidy, Héctor Olásolo The International Criminal Court's Ad Hoc Jurisdiction revisited, 99 Am. J. Int'l L. 421 (2005)
Carsten Stahn, The Ambiguities of Security Council Resolution 1422 (2002), 14 Eur. J. Int'l L. 85 (2002)
Eric Stover et al., Bremer's "Gordian Knot"; Transitional Justice and the US Occupation of Iraq, in Transitional Justice in the Twenty-First Century, Beyond Truth versus Justice 229-254 (Naomi Roht-Arriaza and Javier Mariezcurrena eds. 2006)
John Strawson, Conjuring Palestine: The Jurisdiction of Dispossession, in Shawn McVeigh, Jurisprudence of Jurisdiction 84-101 (2007).
Gerard A.M. Strijards, Article 3, Seat of the Court, in Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article 71-88 (O. Triffterer ed. 2nd ed. Oxford University Press 2008)
Leo Strisower, L' exterritorialité et ses principales applications, 1 Recueil des Cours de l' Academie de Droit Internationale 233 (1923)
Brenda Sufrin, Competition Law in a Globalised Marketplace: Beyond Jurisdiction, in Asserting Jurisdiction, International and European Perspectives 105-126 (Patrick Capps et al., eds., 2003)
Immi Tallgren & Astrid R. Coracini, Article 20, Ne bis in idem, in Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article 419-434 (O. Triffterer ed. 2nd ed. 2008)
Vanessa Thalmann, French Justice's Endeavours to Substitute for the ICTR, 6 J. Int'l Crim. Just. 995 (2008)
Commentator, The Spanish Indictment of High-Ranking Rwandan Officials, 6 J. Int'l Crim. Just. 1003 (2008)
Hugh Thirlway, The Law and Procedure of the International Court of Justice 1960-1989, 62 Brit. Y.B. Int'l L. 1 (1991)
P. W. Thornely, Extraterritoriality, 7 Brit. Y.B. Int'l. L. 121 (1926)
W. Todd Miller & Donald I. Baker, Globalisation and antitrust litigation: as the U.S. jurisdictional boundaries sensible, mercantilist or just random?, in Views of the European Law from the Mountain, Liber Amicorum Piet Jan Slot 131-156(M. Bulterman et al. eds. 2009)
Santiago Torrez Bernández, Interpretation of Treaties by the International Court of Justice following the adoption of the 1969 Vienna Convention on the Law of Treaties, in Liber Amicorum: Professor Ignaz Seidl-Hohenveldern 721-748 (Gerhard Hafner et al eds. 1998)

Michael J. Trebilock & Edward M. Iacobucci, National Treatment and Extraterritoriality: Defining the Domains of Trade and Antitrust Policy, in Competition Laws in Conflict, Antitrust Jurisdiction in Global Economy 152-176 (Richard A. Epstein ed., 2004)
Otto Triffterer, Article 27, in Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article 779-794 (O. Triffterer ed. 2nd ed. 2008)
Otto Triffterer/Morten bergsmo, Preamble, in Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article 1-14 (O. Triffterer ed. 2nd ed. 2008)
Ole Träskman, Provisions on Jurisdiction in Criminal Law – The Reform of Law caught in the Tension between Tradition and Dynamism, in, Criminal Law Theory in Transition, Finnish and Comparative Perspectives 511-26 (Raimo Lahti & Kimmo Nuotio eds. 1992)
Giuliano Turone, Powers and Duties of the Prosecutor, in 2 The Rome Statute of the International Criminal Court: A Commentary 1137-1180 (Antonio Cassese et al. eds. 2002)
Nsogurua J. Udombana, Pay back time in Sudan? Darfur in the International Criminal Court, 13 Tulsa J. Comp. & Int'l L. 1 (2006)
Walter Ullmann, Roman Public Law and Medieval Monarchy: Norman rulership in Sicily, in Jurisprudence in the Middle Ages 164-182 (Walter Ullmann ed. 1980)
George Van Hecke, Le Droit Antitrust – aspects comparatifs et internationaux, 106 Recueil des Cours de l' Academie de Droit Internationale 253 (1962-II)
Christine Van den Wyngaert & Tom Ongena, Ne bis in idem principle, including the issue of amnesty, in The Rome Statute of the International Criminal Court: A Commentary 705-732 (Antonio Cassese et al. eds. 2002)
Sergey Vasiliev, General Rules and Principles of International Criminal Procedure, in International Criminal Procedure: Towards a Coherent Body of the Law 19-91 (Göran Sluiter and Sergey Vasiliev eds., 2009)
Joe Verhoeven, Article 21 of the Rome Statute and the Ambiguities of Applicable Law, 33 Neth. Y.B. Int'l L. 3 (2002)
John A.E. Vervaele, The transnational ne bis in idem principle in the EU – Mutual Recognition and Equivalent Protection of Human Rights, 1 Utrecht L. Rev. 100 (2005)
Mark E. Villiger, The Principle of Subsidiarity in the European Convention on Human Rights, in Promoting Justice, Human Rights and Conflict Resolution through International Law, Liber Amicorum Lucius Caflisch 623-637 (Marcelo Kohen ed., 2007)
Christof Vollmer, Experience with criminal law sanctions for competition law infringements in Germany, in Crimininalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States 257-269 (Katalin J. Cseres et al., eds., 2006)
Herman A.M. Von Hebel, An International Criminal Court – A Historical Perspective, in Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos 13-38 (H.A.M. Von Hebel et al. eds. 1999)
Markus Wagner, The ICC and its Jurisdiction – Myths, Misperceptions and Realities, 7 Max Planck U.N.Y.B. 409 (2004)
Cyntia D. Wallace, Extraterritorial Discovery: Ongoing Challenges for Antitrust Litigation in an Environment of Global Investment, 5 J. Int'l Econ. L. 353 (2003)
Spencer W. Waller, The Internationalization of Antitrust Enforcement, 77 B. U. L. Rev. 343 (1997)
Colin Warbrick & G. R. Sullivan, Current Developments: Criminal Jurisdiction, 43 Int'l & Comp. L.Q. 460 (1994)
Colin Warbrick, Current Developments: International Criminal Law, 44 Int'l Comp. L. Q. 466 (1995)
Colin Warbrick, The principle of sovereign equality, in The UN and Principles of International Law. Essays in Memory of Michael Akehurst 204-229 (V. Lowe & C. Warbrick eds. 1994)
Ruth Wedgwood, The International Criminal Court: An American View, 10 Eur. J. Int'l L. 93 (1999)
Ruth Wedgwood, The Present State of Research Carried Out By The English-Speaking Section of the Centre for Studies and Research, in The Hague Academy of International Law, Centre for Studies and Research in International Law and International Relations, International Criminal Justice 2002 17-97 (2007)
Thomas Weigend, Intent, Mistake of Law and Co-perpetration in the Lubanga Decision on Confirmation of Charges, 6 J. Int'l Crim. Just. 471 (2008)
Prosper Weil, International Law Limitations on State Jurisdiction, in Extraterritorial Application of Laws and Responses Thereto (Cecil Olmstead ed. 1983)
Sharon Weill, The Judicial Arm of the Occupation: The Israeli Military Courts in the Occupied Territories, 89 Int'l Rev. Red Cross 395 (2007
André Weiss, Compétence ou Incompétence des Tribunaux à l'égard des États Étrangers, 1 Recueil des Cours de l' Academie de Droit Internationale 521 (1923)

Gerhard Werle & Florian Jessberger, 'Unless Otherwise Provided': Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law, 3 J. Int'l Crim. Just. 35 (2005)
Ian Wexler, A Comfortable SOFA: The Need for an Equitable Foreign Criminal Jurisdiction Agreement with Iraq, 56 Naval L. Rev. 43 (2008)
Leila S. Wexler, Commentary on Parts 1 and 2 of the Zutphen Intersessional Draft: Establishment of the Court, Complementarity, Jurisdiction and Admissibility, 13bis Nouvelles Études Pénales 17 (1998)
Luc Willemarck, La Cour pénale internationale partagée entre les exigences de l'indépendance judiciaire, de la souveraineté des États et du maintien de la paix, 83 Revue de Droit Penal et de Criminologie 3 (2003)
Sharon A. Williams & William Schabas, Article 12, in Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article 547-562 (O. Triffterer ed., 2nd ed. 2008)
Glanville Williams, Venue and the Ambit of Criminal Law, 81 L.Q.Rev. 518 (1965)
Elizabeth Wilmshurst, Jurisdiction of the Court, in The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results 127-142 (Roy S. Lee ed. 1999)
Harmen van der Wilt, Equal Standards? On the dialectics between National Jurisdictions and the International Criminal Court, 8 J. Int'l Crim. Just. 229 (2008)
David Wippman, Atrocities, Deterrence and the Limits of International Justice, 23 Fordham Int'l L.J. 473 (2000)
Steffen Wirth, Germany's new International Crimes Code: Bringing a case to Court, 1 J. Int'l Crim. Just. 151 (2003)
Edward M. Wise, Extradition: The Hypothesis of a Civitas Maxima and the Maxim Aut Dedere Aut Judicare, 62 Revue Internationale de Droit Penal 109 (1991)
Ernst Wolff, Municipal Courts of Justice in Enemy Occupied Territory, 29 Grotius Society Transactions 99 (1944).
Rüdiger Wolfrum, Iraq: From Belligerent Occupation to Iraqi Exercise of Sovereignty: Foreign Power versus International Community Interference, 9 Max Planck U.N.Y.B. 1 (2005)
Rüdiger Wolfrum, The Adequacy of International Humanitarian Law Rules on Belligerent Occupation: To What Extent May Security Council Resolution 1483 Be Considered a Model For Adjustment?, in International Law and Armed Conflict, Exploring the Faultlines, Essays in Honour of Y. Dinstein 497-508 (M.N. Schmitt & E. Pejic eds. 2007)
Hein D. Wolswijk, Locus Delicti and Criminal Jurisdiction, 66 Neth. Int'l. L. Rev. 361 (1999)
William T. Worster, The Exercise of Jurisdiction by the International Criminal Court over Palestine, 26 Am. U. L. Rev. (forthcoming)
Wils P.J. Wouter, Is Criminalization of EU Competition Law the Answer?, in Enforcement of Prohibition of Cartels, Eur. Competition L Ann. 60-109 (Claus D. Ehlerman & I. Atanasiu eds., 2007)
Jan Wouters et al., The International Criminal Court's Office of the Prosecutor: Navigating between Independence and Accountability?, 8 Int'l Crim. L. Rev. 273 (2008)
Christine van den Wyngaert & Guy Stessens, The International Non bis in Idem Principle: Resolving some of the Unanswered Questions, 48 Int'l Comp. L. Q. 779 (1999)
Salvatore Zappalá, The Reaction of the US to the entry into force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements, 1 J. Int'l Crim. Just. 114 (2003)
Bruno Zimmerman, Article 4, in Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 71-74 (Yves Sandoz et al. eds. 1987)

3. / TABLE OF CASES

1. / PERMANENT COURT OF INTERNATIONAL JUSTICE

S.S. Wimbledon, 1923 PCIJ (Ser. A), No. 1
S. S. Lotus (Fr. v. Turk.), 1927 PCIJ (Ser. A), No. 10
Legal Status of Eastern Greenland (Den. V. Nor.), 1933 PCIJ (Ser. A/B), No. 53
Lighthouses on Crete and Samos (Fr. v. Greece), 1937 PCIJ (Ser. A/B), No. 71

2. / INTERNATIONAL COURT OF JUSTICE

Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, 1948 I.C.J. Rep. 57
Corfu Channel Case, (U.K. v. Alb.), Judgment, Merits, 1949 I.C.J. Rep. 4
Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. Rep. 4
Rights of Nationals of the United States of America in Morocco, (Fr. v. U.S.), Judgment, 1952 I.C.J. Rep. 212
International Status of South-West Africa, Advisory Opinion, 1950 I.C.J. Rep. 128
Effect of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. Rep. 47
Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the UNESCO, Advisory Opinion of October 23rd, 1956 I.C.J. Rep. 77
Certain Norwegian Loans Case (Fr. v. Nor.), 1957 I.C.J. Rep. 48
Right of Passage over Indian Territory (Port. v. India), Preliminary Objections, Judgment, 1957 I.C.J. Rep. 125
Application of Convention of 1902 Concerning Guardianship of Infants, (Neth. v. Swed.), 1958 I.C.J. Rep. 121
Certain Expenses of the United Nations, (Article 17 paragraph 2 of the Charter), Advisory Opinion, 1962 I.C.J. Rep. 151
Barcelona Traction (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 3
Legal Consequences for States of Continued Presence of South Africa in Namibia (Southwest Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. Rep. 16
Trial of Pakistani Prisoners of War (Pak. v. India), Request for Indication of Provisional Measures, Order, 1973 I.C.J. Rep. 328
Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253
Interpretation of Agreement of 25 March 1951 between World Health Organization and Egypt, Advisory Opinion, 1980 I.C.J. Rep. 73
Military and Paramilitary Activities in and Against Nicaragua, (Nicaragua v. U.S.), Judgment, Merits, 1986 I.C.J. Rep. 14
Frontier Dispute, (Burk. Faso v. Mali), Judgment, 1986 I.C.J. Rep. 554
Maritime Delimitation and Territorial Questions between Qatar and Bahrain, (Qatar v. Bahr.), Judgment, Jurisdiction and Admissibility, 1995 ICJ Rep. 6
Certain Phosphate Lands, (Nauru v. Austl.), Preliminary Objections, 1992 I.C.J. Rep. 240
East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. Rep. 90
Legality of Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. Rep. 66
Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belgium), Judgment, 2002 I.C.J. Rep. 3
Oil Platforms (Iran v. U.S.), Judgment, Merits, 2003 I.C.J. 161
Certain Criminal Proceedings in France, 2003 I.C.J. Pleadings, 4 (April 28)
Land and Maritime Boundary Dispute (Cameroon v. Nigeria), Merits, 2002 I.C.J. Rep. 303

Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136
Armed Activities in Territory of Congo, (Dem. Rep. Congo v. Uganda), Judgment, Merits, 2005 I.C.J. Rep. 168
Armed Activities on Territory of Congo, (Dem. Rep. Congo v. Rwanda), Judgment, Preliminary Objections, 2006 I.C.J. Rep. 6
Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. Montenegro), Judgment, Merits, 2007 I.C.J. Rep.
Certain Questions of Mutual Assistance in Criminal Matters, (Djib. v. Fr.), Judgment, 2008 I.C.J. Rep. 177
Application of the International Convention on Elimination of All Forms of Racial Discrimination, (Geor. v. Russ.), Request for the Indication of Provisional Measures, Order, 2008 I.C.J. Rep. 353

3. / INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995)
Prosecutor v. Tadić, Case No. IT-94-I-T, Trial Chamber, Judgment (May 7, 1997)
Prosecutor v. Tadić, Case No. IT-94-1, Appeals Chamber, Judgment (July 15, 1999)
Prosecutor v. Drazen Erdemović, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese (Oct. 7, 1997)
Prosecutor v. Delalić, Case No. IT-96-21, Trial Chamber, Judgment (Nov. 16, 1998)
Prosecutor v. Delalić et al. (Celebici), Case No. IT-96-21-A, Appeals Chamber, Judgment (Feb. 20, 2001)
Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, Trial Chamber (Dec. 10 1998)
Prosecutor v. Hadzihasanović, Case No. IT-01-47-PT, Trial Chamber, Decision on Joint Challenge to Jurisdiction (Nov. 12, 2002)
Prosecutor v. Kupreškić, Case No. IT-95-16-T, Trial Chamber, Judgment, (Jan. 14, 2000)
Prosecutor v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević and Lukić, Case No. IT-05-87-T, Trial Chamber, Decision on Ojdanić Motion to Prohibit Witness Proofing (Dec. 12, 2006)
Prosecutor v. Deronjic, Case No. IT-02-61, Trial Chamber, Judgment (Mar. 30, 2004)
Prosecutor v. Kunarac et al., Case No. IT-96-23-T, Trial Chamber, Judgment (Feb. 22, 2001)
Prosecutor v. Naletilić and Martinovic, Case No. IT-98-34-T, Trial Chamber, Judgment (Mar. 31, 2003)

4. / INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

Prosecutor v. Kanyabashi, Case No. ICTR-96-15-T, Trial Chamber, Decision on the Defence Motion on Jurisdiction (June 18, 1997)
Prosecutor v. Karemera, Case no. ICTR-98-44-T, Trial Chamber, Decision on the Defence Motion, pursuant to Rule 72 of Rules of Procedure and Evidence (Apr. 25, 2001)

5. / INTERNATIONAL CRIMINAL COURT

Situation in Dem. Rep. Congo, Case no. ICC-01/04, Decision assigning the Situation in the Dem. Rep. Congo to Pre-Trial Chamber I (July 5, 2004)
Situation in Dem. Rep. Congo, Case No. ICC-01/04, Decision on the Application for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5 and VPRS-6 (Jan. 17, 2006)

Situation in Dem. Rep. Congo, Case No. ICC-04-01-169, Judgment on the Prosecutor's Appeal against the decision of the Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58" (July 13, 2006)
Situation in Dem. Rep. Congo, Case No. ICC-01/04, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal (July 13, 2006)
Situation in Dem. Rep. Congo, Case No. ICC-01/04, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal (July 13, 2006)
Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad al Abd-al-Rahman ("Ali Kushayb"), Case No. ICC-02/05-01/07, Decision on the Prosecution Application under Article 58 (7) of the Statute (Apr. 27, 2007)
Prosecutor v. Ahmad Muhammad Harun (Ahmud Harun) and Ali Muhammad Al Abd Al Rahman (Ali-Kushayb), Case No. ICC-02/05-01/07, Warrant of Arrest for Ali Kushayb (Apr. 27, 2007)
Prosecutor v. Ahmad Muhammad Harun & Ali Muhammad Ali Abd-Al Rahman, Case No. ICC-02/51-01/07, Decision Informing the United Nations Security Council about the lack of cooperation by the Republic of Sudan (May 25, 2010)
Prosecutor v. Germain Katanga and Mathieu Ngodjolo Chui, Case No. ICC-01/04-01/07, 3, Warrant of Arrest (July 2, 2007)
Prosecutor v. Germain Katanga and Mathieu Ngodjolo Chui, Case No. ICC-01/04-01/07 OA 3, Judgment on the Appeal of Mr. Germain Katanga Against the Decision of the Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages" (May 27, 2008)
Prosecutor v. Germain Katanga and Mathieu Ngodjolo Chui, Case No. ICC-01/04-01/07, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute) (June 16, 2009)
Prosecutor v. Germain Katanga and Mathieu Ngodjolo Chui, Case No. ICC-01/04-01/07 OA 7, Reasons of the "Decision on the 'Application for extension of time limits pursuant to Regulation 35 of the Court to allow the Defence to submit its observations on the Prosecutor's Appeal regarding the decision on evidentiary scope of the confirmation hearing and preventive relocation'" (June 27, 2008)
Prosecutor v. Germain Katanga and Mathieu Ngodjolo Chui, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges (Sept. 30, 2008)
Prosecutor v. Mathieu Ngudjolo Chui, Case No. ICC-01/04-02/07, 3, Warrant of Arrest (July 6, 2007)
Situation in Centr. Afr. Rep., Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision on the Prosecutor's Application for a Warrant of Arrest (June 10, 2008)
The Prosecutor v. Bemba Combo, Case No. ICC-01/05-01/08, Decision on Application for Interim Release (Aug. 20 2008)
Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Adjourning the Hearing pursuant to Article 67(7)(c)(ii) of the Rome Statute (Mar. 3, 2009).
Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61 (7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 10 (June 15, 2009)
Prosecutor v. Thomas Lubanga Dyilo, Case no. ICC-01/04-01/06-108, Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence (May 19, 2006)
Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Practices of Witness Familiarization and Witness Proofing (Nov. 8, 2006)
Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 OA 4, Judgment on the Appeal of Lubanga against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006 (Dec. 14, 2006).
Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges, (Jan. 29, 2007)
Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-812, Defence Submissions on the scope of the right to appeal within the meaning of article 82 (1) (d) of the Statute (Feb. 7, 2007).
Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-824, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'" (Feb. 13, 2007)

Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-825, Prosecution's Response to the Directions and Decisions of the Appeals Chamber of 1February 2007 (Feb. 13 2007)
Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 OA 8, Reasons for the "Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007" issued on 16 February 2007" (Feb. 21 2007)
Le Procureur c. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-836, Version publique expurgée de la requête de la Défense en autorisation d'interjeter appel de la Décision de la Chamber Préliminaire I du 29 janvier 2007 sur la confirmation des charges en conformité avec les décisions de la Chamber Préliminaire du 7 et 16 février 2007 (Feb. 22, 2007)
Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 OA 8, Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of the Pre-Trial Chamber I entitled "Décision sur la confirmation des charges of 29 January 2007" (June 13, 2007).
Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/07 (OA), Appeals Chamber's Decision on the "Prosecutor's Urgent Application for Extension of Time to File Document in Support of Appeal" (Dec. 18, 2007)
Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 OA9, OA10, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber 'I's Decision on Victim's Participation of 18 January 2008 (July 11, 2008)
Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 OA 12, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the release of Thomas Lubanga Dyilo" (Oct. 21, 2008) (Dissenting Opinion of Judge Pikis')
Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 OA 13, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008" (Oct. 21, 2008)
Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 (OA 15 OA 16), Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court" (Dec. 8, 2009)
Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May Be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court" (Dec. 8, 2009)
Situation in Darfur, Sudan, Case No. ICC-02/05, Decision on the Submissions Challenging Jurisdiction and Admissibility (Nov. 22, 2006)
Situation in Darfur, Sudan, Case No. ICC-02/05-111-Corr., Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07 (Dec. 14, 2007)
Situation in Darfur, Sudan, Case No. ICC-02/05-138 OA, OA2, OA3, Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 6 December 2007 (June 18, 2008)
Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir (Mar. 3, 2009)
Situation in Republic of Kenya, Case No. ICC-01/09-19, Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Mar. 31, 2010)
Situation in Uganda, Case No. ICC-02/04, Decision Assigning the Situation in Uganda to Pre-Trial Chamber II (July 5, 2004)
Situation in Uganda, Case No. ICC-02/04, Warrant of Arrest for Joseph Cony issued on 8 July 2005 as amended on 27 September 2005 (Sept. 27, 2005)
Situation in Uganda, Case No. ICC-02/04-01/05, Decision on the Prosecutor's Application that the Pre-Trial chamber Disregard as Irrelevant the Submission Filed by the Registry on 5 December 2005, 14 (Mar. 9, 2006)
Prosecutor v. Joseph Kony et al., Case No. ICC-02/04-01/05, Decision to terminate the proceedings against Raska Lukwiya, (July 11, 2007)
Case No. ICC-02/04-01/05-54, Warrant of Arrest for Vincent Otti (July 8, 2005)

Case No. ICC-02/04-01/05-55,Warrant of Arrest for Raska Lukwiya (July 8, 2005)
Case No. ICC-02/04-01/05-56, Warrant of Arrest for Okot Odhiambo (July 8, 2005)
Case No. ICC-02/04-01/05-57, Warrant of Arrest for Dominic Ongwen (July 8, 2005)
Document Containing the Charges pursuant to Article 61(3)(a) and of the List of Evidence pursuant to Rule 121(3), Case No ICC-01/04-01/06-356 (Aug. 28, 2006)
Situation in Cent. Afr. Rep., Case No. ICC-01/05, Decision Assigning the situation in the Centr. Afr. Rep. to Pre-Trial Chamber III (Jan. 19, 2005)
Prosecutor v. Bosco Ntaganda, case No. ICC-01/04-02/06, 2, Warrant of Arrest (Aug. 22, 2006)

6. / INTERNATIONAL TRIBUNAL OF THE LAW OF THE SEA

M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Order of Jan. 20, 1998, 2 ITLOS Rep. 4, 5, 38 ILM 1323 (1999)
M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, 120 Int'l. L. Rep. 143 (1999)

7. / EUROPEAN COURT OF JUSTICE

Case 48/69 Imperial Chemical Industries Ltd. v. Commission ('Dyestuffs'), 1972 E.C.R. 619
Cases C-89, 104, 114, 116, 117, 125-129/85, Wood Pulp Cases, A. Alstrom Osakeyhtio et als v. Commission (Joined Cases), 1988 E.C.R. 5193
Case T-102/96, Gencor Ltd. v. Commission of the European Communities, 1999 E.C.R. II-753
Case T-279/02, Degussa v. Commission, 2006 E.C.R. II-897
Case C-266/06, Evonik Degussa v. Commission, 2008 E.C.R. I-00081

8. / EUROPEAN COURT OF HUMAN RIGHTS

Ireland v. United Kingdom, App. No. 5310/71, 25 Eur. Ct. H.R. (ser.A) (Jan. 18, 1978)
Sunday Times v. United Kingdom, App. No. 65387/74, 245 Eur. Ct. H.R. (Apr. 26, 1979)
Crociani, Palmiotti, Tanassi and Lefebvre d'Ovidio v. Italy, App. No. 8603/79, Eur. Ct. H.R., Commission Decision of Dec. 18, 1980, (Admissibility), 22 DR 147
Young, James and Webster v. United Kingdom, 44 Eur. Ct. H.R. (ser. A) (1981)
Piersack v. Belgium, App. No. 8692/79, Eur. Ct. H.R. (Oct. 1, 1982)
Sigurjonsson v. Iceland, 264 Eur. Ct. H.R. (ser. A) (1993)
Loizidou v. Turkey, App. No. 15318/89, Preliminary Objections, Eur. Ct. H.R. (Mar. 23, 1995)
C.R. v. United Kingdom, 21 EHRR 363 (Nov. 2, 1995)
Ramirez Sanchez v. France, App. No. 28780/95, Eur. Ct. H.R., 86-B DR 155 (June 24, 1996)
Findlay v. U.K., 1997-I Eur. Ct. H.R. 30
Aquilina v. Malta, App. No. 25642/94, Eur. Ct. H.R. (Apr. 29, 1999)
Coëme et als v. Belgium, 2000-VII Eur. Ct. H.R. 75
Bankovic et al. v. Belgium et al, 2001-XII Eur. Ct. H.R. 335
Cyprus v. Turkey, App. No. 25781/94, Merits, Eur. Ct. H.R. Grand Chamber (May 10, 2001)
Z. et al. v. U.K., App. No. 29392/95, Eur. Ct. H.R. (May 10, 2001)
Sawoniuk v. United Kingdom, App. No. 63716/00, 2001-III Eur. Ct. H.R. (May 29, 2001)
Al-Adsani v. United Kingdom, App. No. 35763/97 Judgment, 34 Eur. Ct. H.R. 273 (Nov. 21, 2001)
Issa et al. v. Turkey, App. No. 31821/96, Eur. Ct. H.R. (Nov. 16, 2004)
Ilascu v. Moldova and Russia, App. No. 48787/99, 2004-VII Eur. Ct. H.R.
Öcalan v. Turkey, App. No. 46221/99, Merits, Eur. Ct. H.R. (May 12, 2005)
Arestis-Xenides v. Turkey, App. No. 46347/99 Eur. Ct. H.R. (Dec. 22, 2005)

Saddam Hussein v. Albania et al., App. No. 23276/04, Admissibility Decision, Eur. Ct. H.R. (Mar. 14, 2006)
Sokurenko & Strygun v. Ukraine, App. No. 29458/04, 29465/04, Eur. Ct. H.R. (July 20, 2006)
Behrami and Behrami v. France and Saramati v. France, Germany and Norway, App. No. 71412/01, 78166/01, Eur. Ct. H.R., Admissibility (May 2, 2007)
Pad and Others v. Turkey, App. No. 60167/00, Eur. Ct. H.R., June 28, 2007
Jorgic v. Germany, (74613/01), 12 July 2007
Jorgic v. Germany, App. No. 74613/01, Eur. Ct. H.R. (July 12, 2007)
Isaak v. Turkey, App. No. 44587/98, Eur. Ct. H.R., (June 24, 2008)
Women on Waves et al. v. Portugal, App. No. 31276/05, Eur. Ct. H.R. (Feb. 3, 2009)
Vondas and others v. Greece, App. No. 43588/06, Judgment, Eur. Ct. H.R. (Feb. 5, 2009)
Ould Dah v. France, App. No. 13113/03, 2009 Eur. Ct. H.R. 264
Al-Saadoon and Mufdhi v. UK, Admissibility Decision, App. No. 61498/08 (Eur. Ct. H.R.) (June 30, 2009)
Demopoulos et al. v. Turkey, App. No. 46113-99, Grand Chamber, Admissibility Decision, Eur. Ct. H.R. (Mar. 1, 2010)
Kononov v. Latvia, (36376/04), Eur. Ct. H.R. (May 17, 2010)

9. / EUROPEAN COMMISSION OF HUMAN RIGHTS

X. v. Austria, App. No. 4161/69, 1970 Y.B. Eur. Comm'n H.R. 798 (1970)
Zand v. Austria, App. No. 7360/76, Eur. Ct. H. R., Report of the Commission, (Oct. 12, 1978)
Eggs v. Switzerland, App. No. 7341/76, Eur. Ct. H.R., Commission Report of Mar. 4, 1978, 15 DR 35 (1979)
Santschi et al v. Switzerland, App. No. 8018/77, Eur. Ct. H.R., Commission Report of Oct. 13, 1981, 31 DR 5 (1983)
R. v. Federal Republic of Germany, App. No. (11506/85), Eur. Ct. H.R., Commission Decision of October 10, 1986
G. v. Switzerland, App. No. 16875/90, Eur. Ct. H.R., Commission Decision of October 10, 1990, the
Kübli v. Switzerland, App. No. 17495/90, Eur. Ct. H.R., Commission Decision of Dec. 2 1992

10. / INTER-AMERICAN COURT OF HUMAN RIGHTS

Fairen Garbi & Solis Corrales, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser.C) No. 2 (June 26, 1987)
Loayza-Tamayo v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No 33 (Sept. 17, 1997)
Ivcher-Bronstein v. Peru, Judgment, Inter-Am. Ct. H.R. (ser. C) No 74 (Feb. 6, 2001)
Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18 (Sept. 17, 2003)

11. / INTER-AMERICAN COMMISSION OF HUMAN RIGHTS

Sergio Euden Lopez Burgos v. Uruguay, Communication No. R.12/52 (June 6, 1979), Views of July 29, 1981, 68 I.L.R. 29
Coard et als. v. United States, Inter-Am. Comm'n on H.R. Case No. 10.951, Report No. 109/99 (Sep. 29, 1999)

12. /
CENTRAL AMERICAN COURT OF JUSTICE

Central American Court of Justice, The Republic of El Salvador – The Republic of Nicaragua Case, Opinion and Decision of the Court of 9 March 1917, 11 Am.J.Int'l.L. 718 (1917)

13. /
ARBITRATION AWARDS

Casablanca Arbitration (Fr. v. Germ.) (May 22 ,1909), reported in James B. Scott, The Hague Court Reports 110 (1916)
Island of Palmas (US/Netherlands), 4 Annual Digest 114 (1927-1928)
Young Loan Arbitration, (Belg. et al/ Fed. Rep. Ger.) 59 I.L.R. 495 (1980)
Maffezini v. Kingdom of Spain Arbitration, 124 I.L.R. 2, 22-23 (2003)
Partial Award, Central Front, Ethiopia Claim 2, Eritrea Ethiopia Claims Commission, 43 ILM 1275 (Apr. 28, 2004)

14. /
INTERNATIONAL MILITARY TRIBUNALS

Hermann Goering et al., Trial of Major War Criminals, International Military Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946, reprint. in. 41 Am. J. Int'l L. 172 (1947)

15. /
DOMESTIC COURTS

AUSTRALIA

Anglo-Chzechoslovak and Prague Credit Bank v. Janseen, 12 Annual Digest 43-47 (1943-1945) (V.S. Ct.) (Austl.)

BELGIUM

Cour de Cassation [Cass] [Court of Cassation] Bertchmann v. Société Anonyme des Charbonnages d' Argenteau, 22 I.L.R. 207, 208 (1958) (Belg.)
Arbitragehof [Constitutional Court], decision no. 73/2005, Apr. 20, 2005, Oxford Reports on International Law in Domestic Courts, ILDC 9 (BE 2005) (Bel.)

CANADA

Libman v. The Queen [1985] 2 S.C.R. 178, 200 (Can.)
R. v. Deutsch [1986] S.C.R. 2 (Can.)
R. v. Finta, Canada, [1989] 82 I.L.R. 425, Judgment (High Court of Justice)
R. v. Finta, [1992] 98 I.L.R. 520, Judgment (Can. Ont. C.A.)
R. v. Finta, [1994] 104 I.L.R. 284, Judgment (S.C.C.)
US v. Lépine, Judgment [1994] 1 S.C.R. 286 (Can.)
Bouzari and others v. Islamic Republic of Iran, (2002) 124 I.L.R. 428 (Can. Ont. Sup. Ct.)
R. v. Hape, [2007] 2 S.C.R. 292 (Can. Ont. 3563)

COSTA RICA

In Re Quiros, Court of Cassation of Costa Rica, *reported in* 3 Annual Digest 196 (1933)

CYPRUS
Tomko v. Republic of Cyprus per the Department of Population Register and Immigration of the Ministry of Interior, Case No 709/2006, Judgment, June 20, 2007 (Supreme Court of Cyprus), *reported in* Oxford Reports on International Law, ILDC 834 (CY 2007)

CZECHOSLOVAKIA
Allied Forces (Czechoslovakia) Case, 10 *Annual Digest* 123-8 (1941-1942)

EAST TIMOR
Prosecutor v. Armando Dos Santos, Court of Appeal, Special Panels for Serious Crimes of the Distict Court of Dili, Judgment, 4 (July 15, 2003), available at
www.jsmp.minihub.org/.../Ct_of_App-dos_Santos_English22703.pdf (last visited June 30, 2010).

FRANCE
In re Krupp, In re Thyssen**,** 2 A.D. 327-8 (1922-1923) (Cour de Cassation, Fr.)
In Re Feld and Newman, Cour de Cassation [Cass.] [Supreme Court for civil and criminal matters], May 25, 1967, 48 ILR 88 (Fr.)

GERMANY
Invasion of the Ruhr District Case, 5 A.D. 79-80 (1929-1930) (Germany, Reichsgericht in Criminal Matters)
In Re Jorgic, Entscheidungen des Bundesverfassungsgerichts [BVerwGe] [Federal Constitutional Court] Dec. 12, 2000, 135 I.L.R. 152, 165
In re Jorgic, BVerfGE (Federal Constitutional Court) (Ger.) 135 I.L.R. at 152, 166.
'The Auschwitz Lie Case', Bundesverwaltungsgericht [B.Verw.G.] [Federal Administrative Court], Dec. 12, 2000, BVerfGE 90, 241-255 (Germ.)

INDIA
Mobarik Ali Ahmed v. State of Bombay, 24 I.L.R. 156, 159 (S.C.) (India)

IRELAND
The People v. Robert J. Thomas, [1954] 22 I.L.R. 295, 298 (S.C.) (Ir.)

ISRAEL
Eichmann Case*,* Judgment, 36 I.L.R. 5 (District Court of Jerusalem, 1962)
Attorney-General of the State of Israel v. Adolf Eichmann, 36 I.LR. 277 (Supreme Court of Israel, 1962)
Schtraks v. Government of Israel, 33 I.L.R. 319, AC 556 [1964] (Isr.)
Ze'ev Rosenstein v. Israel, Appeal Judgment of 30 November 2005 (Extradition), Crim. A. 4596/05, Int'l. L. Domestic Ct. 159 (IL 2005) (Nov. 30, 2005)

ITALY
In re Scarpato, 18 ILR 625 (1951) (Court of Cassation, It.)
Fatto v. Ministero Finanze, 19 I.L.R. 611 (1952) (Council of State, It.,)
In Re Condarelli, 19 ILR 609 (1952) (Court of Cassation, It.)
Lozano v. Italy, Case no. 33171/2008, Appeal Judgment, *reported in* Oxford Reports in International Law, ILDC 1085 (IT 2008) (Court of Cassation, It.)

JAPAN
Chin Chi-Huo (alias Ken Honda) v. Japan, Judgment, 26 ILR 704 (1958-II) (1955) (Constitutional Court, Japan)

KENYA
Musisi v. Republic, (48 ILR 91 1969) (H.C.K.) (Kenya)

LUXEMBOURG

Avis du Conseil d'Etat, *Projet de loi portant approbation du Statut de Rome de la Cour Pénale Internationale*, fait à Rome, le 17 juillet 1998, Conseil d'Etat de Luxembourg, 4.5.1999, No. 4502 (12.5.1999)

NETHERLANDS

R. Wijngaarde and R.A. Hoost v. Desire Delano Bouterse, Court of Appeal of Amsterdam, (Nov. 20, 2000) 32 Neth. Y.B. Int'l L. 266
R. Wijngaarde and R.A. Hoost v. Desire Delano Bouterse, Appeal in Cassation in the Interests of the Law, Supreme Court of the Netherlands, (Sept. 18, 2001) 32 Neth. Y.B. Int'l L. 282.

NAMIBIA

S. v. Mwinga, High Court of Namibia, 1994/10/27,13-14, available at http://www.saflii.org/na/cases/NAHC/1994/10.html (last visited 30 June 2010)

NEW ZEALAND

Solicitor-General v. Reid [1997] 3 NZLR 617, 631-632 (1997) (C.A.) (N.Z.)

SINGAPORE

Public Prosecutor v. Taw Cheng Kong, [1998] 2 S.L.R. 410, http://www.singaporelaw.sg/rss/judg/8595.html (last visited June 30, 2010) (Singapore Court of Appeals)

SOUTH AFRICA

American Soda Ash Corp. & CHC Global (Pty) Ltd. v. Competition Commission of South African et al., Case 12/CAC/DEC01, Appeal to Competition Appeal Court (October 25, 2002), reported in Oxford Reports on International Law in Domestic Courts, Int'l L. Domestic Cts. 493 (ZA 2002)

SPAIN

In re Augusto Pinochet, Audiencia Nacional, 119 I.L.R. 331

SWITZERLAND

Cour de Cassation [Cass] [Court of Cassation] Novic v. Public Prosecutor of the Canton of Basel-Stadt, 22 I.L.R. 515 (1955) (Switz.)

UNITED KINGDOM

McLeod v. Attorney General for New South Wales, [1891] A.C. 453
County Council of Fermanagh v. Farrendon, 2 I.L.R. 109 (1933) (C.A., Northern Ireland)
Control Commission Court of Appeal in Germany (British Zone), Director of Prosecutions v.
R. v. Page, *per* Lord Goddard, [1953] *QB* 170
In re Hobbs, April 27, 1950, 17 I.L.R. 138 (1956)
Treacy v. Director of Public Prosecutions, [1971] 2 W.L.R. 112 (H.L.)
Rio Tinto Zinc Corpn v. Westinghouse [1978] A.C. 547 (Eng.)
Somchai Liangsiripraesert v. U.S. [1990] 29 I.L.M. 1390 (Privy Council) (Eng.)
R. v. Latif, R. v. Shahzad, [1996] 1 All E.R. 353
R. v. Manning, [1999] QB 980
R. v. Duncan Wallace Smith (No.2), [2004] E.W.C.A. 631. (C.A.)
R.(Al-Skeini) v. Secretary of State for Defence, [2005] EWCA (Civ.) 1609
R(Al-Skeini) v. Secretary of State for Defence, [2007] UKHL 26
R (on the application of Al-Jedda) v. Secretary of State for Defence, [2007] UKHL 58
Norris v. Government of the United States and Others, [2008] UKHL 16 (Eng.)

UNITED STATES

Murray v. the Schooner Charming Betsey, 6 U.S. 2 Cranch 64 (1804)
Schooner Exchange v. McFaddon & Others, 7 Cranch Reports 116 (1812) (U.S. Supreme Court)
State v. Hall, 114 N.C. 909, 19 S.E. 602 (1894)
American Banana Co. v. United Fruit Company, 213 U.S. 347 (1909)
Strassheim v. Daily, 211 U.S. 280 (1911)
McDonald v. Mabee, 243 US 90 (1917)

U.S. v. Aluminum Company of America et al., 148 F.2d 416 (1945)
In re Grand Jury Subpoenas Duces Tecum Addressed to Canadian Int'l Paper Co. 72 F. Supp. 1013 (S. D. N. Y., 1947)
U.S. v. Lothar Eisentrager, 14 L. Rep. of Trials of War Crim. 8 (US Military Commission 1948)
U.S. v. List (The Hostages Case), 8 L. Rep. Trials Major War Crim. 38 (U.S. Military Commission 1949)
In Re LoDolce, 19 I.L.R. 318, 106 F. Supp. 455 (W.D.N.Y. 1952)
U.S. v. Imperial Chemical Industries, 105 F. Supp. 215 (1952)
Madsen v. Kinsella, 343 U.S. 341 (Apr. 28, 1952)
U.S. v. General Electric Co., 115 F. Supp. 835 (D. N. J. 1953)
U.S. v. Rodriguez, 182 F. Supp. 479 (S.D. Cal. 1960)
U.S. v. the Watchmakers of Switzerland Information Center, [1963] Trade Cases (CCH) 600 (S. D. N. Y., 1962)
Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Circ., 1976)
Westinghouse Electric Corp. Uranium Contracts Litigation, Subpoena Duces Tecum, 563 F.2d. 992 (10th Circ., 1977)
Mannington Mills v. Congoleum Corporation, 595 F.2d 1287 (3rd Circ., 1979)
Westinghouse Electric Corporation v. Rio Algom Ltd., 480 F.Supp. 1138 (7th Circ., 1979)
Westinghouse Electric Corporation v. Rio Algom Ltd., 617 F.2d 1248 (7th Circ., 1980)
National Bank of Canada v. Interbank Card Association, 666 F.2d 6 (2nd Circ., 1981)
Laker Airways Ltd. v. Sabena, 731 F.2d 909 (D.C. Cir., 1984)
U.S. v. Peterson, 812 F.2d 486 (9th Cir. 1987)
U.S. v. Davis, 905 F.2d 245 (9th Cir. 1990)
Autocephalous Greek-Orthodox Church of Cyprus and Republic of Cyprus v. Goldberg et al., 917 F.2d 278 (7th Circ. 1990)
Hartford Fire Ins. Co. v. California, 509 U.S. 764, 113 S. Ct. 2891 (1993)
U.S. v. Kahn, 35 F.3d 426 (9th Circ. 1994)
U.S. v. Caicedo, 47 F.3d 370 (9th Circ. 1995)
U.S. v. Nippon Paper Industries Co. Ltd., 109 F.3d 1 (1997)
U.S. v. Klimavicius-Viloria, 144 F.3d 1249 (9th Circ. 1998)
Kruman et al v. Christie's International et al, 284 F.3d 384 (2nd Circ. 2002)
U.S. v. Yousef, 327 F.3d 56 (2nd Cir. 2003)
F. Hoffman – La Roche Ltd. Et al. v. Empargan S.A. et al., 124 U.S. 2359 (2004)

ZIMBABWE

S. v. Mharapara, 84 ILR 1, (1985) (Supreme Court of Zimbabwe)

ANNEX

NEDERLANDSE SAMENVATTING

DE TERRITORIALE RECHTSMACHT VAN HET INTERNATIONALE STRAFHOF – ENKELE BETWISTE KWESTIES

Het onderwerp van deze dissertatie behelst de analyse van het territoriale element van de rechtsmacht van het Internationale Strafhof (hierna: het Hof) onder artikel 12 van het Statuut van Rome (hierna: het Statuut). Op grond van deze bepaling heeft het Hof rechtsmacht als "de desbetreffende gedragingen plaatsvonden" op het "grondgebied" van een lidstaat bij het Statuut. Het onderwerp wordt benaderd op basis van de positivistische traditie die gebruikelijk is in het internationaal publiekrecht.

De centrale onderzoeksvragen zijn als volgt geformuleerd:

a) Hoe dient het Hof om te gaan met vragen aangaande zijn rechtsmacht ten aanzien van misdaden die niet zijn begaan op een aanwijsbaar grondgebied?
b) Hoe dient het Hof om te gaan met vragen aangaande zijn rechtsmacht op grond van artikel 12 lid 2, onder a, ten aanzien van misdaden die hebben plaatsgevonden in bezette gebieden?

De gehanteerde methodologie is bibliografisch onderzoek van relevante literatuur evenals relevante jurisprudentie waarbij gebruik is gemaakt van deductieve en analoge redenering. Het internationaal publiekrecht vormt hierbij het uitgangspunt, in tegenstelling tot bijvoorbeeld het strafrecht, criminologie of sociologie.

In hoofdstuk 2 worden de voor dit onderzoek belangrijke begrippen en termen gedefinieerd, de onderscheiden verschillen in territoriale rechtsmacht uiteengezet (het subjectieve - en objectieve territorialiteitsbeginsel, het beschermingsbeginsel en het effectenbeginsel). Het hoofdstuk wordt afgesloten met de beschrijving van de rechtsmachtleer van Mann als analytisch raamwerk voor het verdere onderzoek.

Hoofdstuk 3 analyseert de *Traveaux Preparatoire* van artikel 12 van het Statuut. Hoofdstuk 4 beschrijft de belangrijkste interpretatiemethoden ten aanzien van dit artikel waarbij de nadruk ligt op de teleologische interpretatie van artikel 12, lid 2, onder a. Daarnaast wordt aandacht besteedt aan het argument dat het legaliteitsbeginsel *('nullum crimen nulla poena sine lege')* zoals neergelegd in artikel 22 van het Statuut niet van toepassing is op de interpretatie van artikel 12, lid 2, onder a.

Hoofdstuk 5 begint met de analyse van artikel 12 door middel van de analyse van de term "desbetreffende gedraging" uit die bepaling. In het eerste deel van het hoofdstuk worden enkele grondbeginselen uiteengezet. Een van deze grondbeginselen – tevens van belang voor de dissertatie als geheel – is dat de interpretatie van deze bepaling valt binnen de *kompetenz-kompetenz* die het Hof inherent toekomt. De logische gevolgtrekking hiervan is dat, omdat de bevoegdheid van het Hof om zelf te bepalen of hij rechtsmacht heeft direct voortvloeit uit het feit dat hij een rechtsprekende organisatie is, de toepassing ervan niet kan worden uitgesloten of beperkt door gebruik te maken van argumenten die hun oorsprong hebben in het leerstuk van de gedelegeerde bevoegdheden. Hieruit volgt voor dit onderzoek dat argumenten dienen te worden verworpen die pogen de reikwijdte van de interpretatie van artikel 12 door het Hof in te perken, bijvoorbeeld de stelling dat, als een bepaalde interpretatie van het territorialiteitsbeginsel niet voorkomt in het rechtssysteem van een lidstaat, het Hof niet de bevoegdheid zou hebben deze toe te passen. Het Hof heeft deze bevoegdheid namelijk ongeacht de instemming van de lidstaten. Dat betekent echter niet dat deze bevoegdheid van het Hof ongelimiteerd is. Het Hof kan artikel 12, lid 2, onder a, niet zo ruim interpreteren dat universele rechtsmacht ontstaat. Dat zou immers neerkomen op een (feitelijke) wijziging van het Statuut. Het betekent daarentegen wel dat het Hof een ruimere interpretatiemarge heeft

dan het op dit moment hanteert, of zelfs bereid is te erkennen. De stelling is dan ook dat het Hof artikel 12, lid 2, onder a, mag interpreteren aan de hand van de in het internationaal publiekrecht gebruikelijke opvatting ten aanzien van het territorialiteitsbeginsel, zelfs als deze interpretatie niet wordt gehanteerd door de rechtsprekende instanties in een of meerdere lidstaten.

Het tweede deel van hoofdstuk 5 neemt deze stelling als uitgangspunt bij de exploratie van twee mogelijke interpretaties van de woorden "desbetreffende gedragingen" zoals deze staan in artikel 12, lid 2, onder a. De eerste interpretatie houdt in dat "gedragingen" moet worde gelezen als criminele *gedragingen*. Dit in tegenstelling tot de in artikel 30 van het Statuut gebruikte termen criminele *gevolgen* of *omstandigheden*. Dat houdt in dat het Hof alleen territoriale rechtsmacht heeft indien de aanklager kan bewijzen dat de gedraging heeft plaatsgevonden op het grondgebied van een lidstaat, in tegenstelling tot het grondgebied van een niet-lidstaat. De tweede mogelijke interpretatie houdt in dat "desbetreffende gedragingen" wordt gelezen als desbetreffend *misdrijf*. Vanuit dit door de auteur gewenste perspectief zou het Hof rechtsmacht hebben indien de criminele activiteiten geheel of gedeeltelijk plaatsvinden op het grondgebied van een lidstaat, ongeacht het onderscheid tussen *gevolgen* en *gedragingen*. Dit standpunt wordt onderschreven door zowel de vroege jurisprudentie van het Hof, evenals gezaghebbende commentaren en hetgeen naar voren is gebracht bij de totstandkoming van artikel 12, lid 2, onder a. De overige delen van hoofdstuk 5 zijn gewijd aan een analyse van de mogelijkheden die het Hof ter beschikking staan met betrekking tot het objectieve territorialiteitsbeginsel en het beschermingsbeginsel, bezien vanuit het perspectief van de rechtsmachtleer van Mann ('de leer van de verbindende schakels').

Hoofdstuk 6 gaat in op de vraag of artikel 12, lid 2, onder a, kan worden geïnterpreteerd in het licht van de effectenleer zoals deze is ontwikkeld in de antitrustwetgeving en het mededingingsrecht. In het hoofdstuk wordt betoogd dat de effectenleer in het verleden is toegepast door nationale rechters bij de toetsing van het territorialiteitsbeginsel in (semi)strafrechtelijke procedures. Het betoog wordt beschouwd vanuit in de eerste plaats een beleidsmatige, en in de tweede plaats een juridische invalshoek. Vanuit beleidsmatig oogpunt bezien is de auteur van mening dat een vergelijking van de relevante argumenten de weegschaal doet doorslaan ten gunste van de toepassing van de effectenleer door het Hof. Het is moeilijk voor te stellen waarom het Hof niet bevoegd zou zijn om zijn territoriale rechtsmacht ruim te interpreteren teneinde straffeloosheid voor genocide en oorlogsmisdaden tegen te gaan, terwijl nationale rechters dit in mededingings- en antitrustzaken consequent en in toenemende mate doen teneinde de portemonnee van consumenten te beschermen. Vanuit juridisch oogpunt is het toepassen van de effectenleer moeilijker te beredeneren. De classificatie van de 'effecten' die de rechtsmacht van het Hof in het leven roepen wordt geanalyseerd. Met andere woorden de vraag of artikel 12, lid 2 onder a, een *lacune* bevat die zo ernstig is dat het een analoge interpretatie op basis van de effectenleer noodzakelijk maakt. Een andere belangrijke kwestie die aan bod komt is het vraagstuk van de internationale samenwerking. Ter afsluiting van het hoofdstuk beargumenteert de auteur dat, ondanks het feit dat de toepassing van de effectenleer door het Hof momenteel nog kan worden gezien als poging tot progressieve rechtsontwikkeling, het idee wel degelijk serieuze aandacht verdient van het Hof indien dit zijn territoriale rechtsmacht in de toekomst wenst uit te breiden.

Hoofdstuk 7 analyseert de vraag of het Hof rechtsmacht heeft op grond van artikel 12, lid 2, onder a, in het geval van belligerente bezetting. Het hoofdstuk gaat niet in op de kwestie Palestina gezien het voortgaande onderzoek naar de kwalificatie van Palestina als 'staat' voor de toepassing van het Statuut. Na een korte uiteenzetting van de onderliggende principes en beginselen van het bezettingsrecht worden in dit hoofdstuk drie scenario's beschreven; de bezetting van het grondgebied van een lidstaat door een andere lidstaat (bijv. Ituri door Uganda), de bezetting van het grondgebied van een lidstaat door een niet-lidstaat (bijv. Cyprus door Turkije) en de bezetting van het grondgebied van een niet-lidstaat door een lidstaat (bijv. Irak door het Verenigd Koninkrijk). De analyse van deze drie scenario's leidt tot de conclusie dat terwijl de eerste twee scenario's geen controverse oproepen dit bij het derde scenario ingewikkelder ligt. Bezetting beïnvloedt immers formeel gezien de soevereine rechtsmacht van de bezette staat niet. De auteur onderzoekt of het in dit laatste scenario mogelijk is, en zo ja in welke mate, het Hof gebruik kan maken van het leerstuk van de effectieve controle zoals dat ontwikkeld is in de jurisprudentie van het VN Mensenrechtencomité en het Europese Hof voor de Rechten van de Mens. De auteur is van mening dat de verschillen in bewoording, context en doelstelling van de vergeleken verdragen weinig ruimte laten voor een voor mensenrechten ontwikkelde interpretatie van artikel 12, lid 2, onder a. Het is gezien de bewoording van artikel 21, lid 3 echter ook niet geheel uit te sluiten.

In de conclusie worden de belangrijkste bevindingen van het onderzoek samengevat en wordt benadrukt dat het Hof, hoewel het onder het geldende internationaal recht vele mogelijkheden ter beschikking heeft voor de beantwoording van de vragen ten aanzien van zijn territoriale rechtsmacht, hiervan totnogtoe geen gebruik heeft gemaakt in zijn uitspraken. De auteur spreekt de hoop uit dat het Hof in de toekomst een teleologische benadering kiest bij de interpretatie van artikel 12, lid 2, onder a, om daarmee daadwerkelijk de doelen te bereiken die het stelt na te streven.

SUMMARY

THE TERRITORIAL JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT – CERTAIN CONTESTED ISSUES

The subject of the present dissertation is the analysis of the territorial parameter of the jurisdiction of the International Criminal Court (hereinafter: the ICC) under article 12 ICC Statute. According to this provision, the Court shall have jurisdiction if "the conduct in question occurs" in the "territory of" a State Party to the Rome Statute. This topic is approached on the basis of the positivist tradition of public international law. The main research questions are formulated as follows:

a) How could jurisdictional questions concerning criminal activity, which cannot be isolated in a specific territory, be addressed by the Court?
b) How could the Court tackle jurisdictional questions under article 12(2)(a) when the crimes allegedly occur in occupied territories?

The methodology used is bibliographical research of the relevant literature and case-law on the topic and its analysis through deductive reasoning and legal analogy. The main perspective is that of public international law, as opposed to a criminal law, criminology or sociology.

Chapter 2 lays down certain important definitions of terms used in the present work, the basic distinctions of criminal jurisdiction on the basis of territory, (subjective territoriality, objective territoriality, ubiquity and the effects doctrine) and finally it establishes as the main framework of analysis Mann's doctrine of jurisdiction.

In Chapter 3, the *travaux preparatoires* of article 12 are analyzed, while Chapter 4 lays down the main instruments for the interpretation of this provision, with emphasis on the teleological interpretation for article 12(2)(a) and the argument that the principle of legality under article 22 ICC Statute (*nullum crimen nulla poena sine lege*) is not applicable for the interpretation of article 12(2)(a).

Chapter 5 of the present work begins the analysis of article 12 by attempting an interpretation of the terms 'conduct in question' in that provision. In the first part thereof, certain basic principles are provided. One of the basic tenets of this chapter – and indeed of the entire work – is that the question of interpretation of this provision is one that falls squarely within the Court's *compétence de la compétence* as an inherent power of the Court. Drawing from the theory of the law of international organizations, this implies by logical necessity that, since the power of the Court to decide on its own jurisdiction stems exclusively from its nature as a judicial institution, its application cannot be precluded or delimited by arguments rooted in the doctrine of delegation of authority. Accordingly, the position in this work is that arguments seeking to restict the scope of interpretation of article 12 claiming that, if a certain interpretation of territoriality is not applicable in the system of a State Party, then the Court does not have the authority to apply it, should be dismissed as this power exists independently of state consent. At the same time, however, this power is not without limits. It does not mean for example that the Court can interpret Article 12(2)(a) in such a way as to include for example universal jurisdiction, effectively amending the Statute. It does indicate however that the Court is entitled to a larger margin for interpretation than the one it currently employs – or is currently willing to acknowledge. It is therefore submitted that the Court may interpret this provision in accordance with permissible interpretations of territoriality under international law, even if such interpretation is not espoused by the courts of one or more States Parties.

Taking this as a starting point, the second part of Chapter 5 envisages two possible interpretations of the terms 'conduct in question' in article 12(2)(a); first, that conduct in question refers to criminal *conduct*, as opposed to criminal *consequences* or *circumstances*, along the lines suggested by Article 30 ICC Statute. This means that the Court would have territorial jurisdiction only if the Prosecutor proved that the criminal

conduct took place on State Party territory, as opposed to the territory of a State not Party. The second possible interpretation – which is favoured by the present author – is that 'conduct in question' means in fact 'crime in question'. From this perspective, the Court would have jurisdiction insofar as the criminal activity takes place in State Party territory in whole or in part – irrespective of the distinction between consequences and conduct. This position finds support not only in the early jurisprudence of the Court on the matter, but also in the writings of publicists and the drafting process of article 12(2)(a) ICC Statute. The next parts of this Chapter are dedicated to an analysis of the possibilities available under the Court insofar as the doctrine of objective territoriality and ubiquity are concerned, from the perspective of the Mann doctrine of jurisdiction ('doctrine of connecting links').

Chapter 6 addresses the question of whether the interpretation of Article 12(2)(a) could go so far as to include the effects doctrine of jurisdiction, mostly known from its application in antitrust/competition law. This Chapter seeks to explain that the effects doctrine has been applied in the past by national courts in their interpretation of territorial jurisdiction in criminal matters or quasi-criminal matters. The argument is addressed first on the policy level and secondly on the legal level. Insofar as the policy dimension of the issue is concerned, the present author takes the view that a comparison of the values involved tilts the scales in favour of the application of the effects doctrine by the International Criminal Court. Indeed, one fails to see why the International Criminal Court should not be entitled to extensively interpret its territorial jurisdiction in order to combat impunity for crimes such as genocide and war crimes, when national courts have consistently and increasingly done so, in order to protect the spending capacity of their consumers from anticompetitive practices. On the other hand, the legal argument seems to be more difficult to make. The classification of the 'effects' that would animate the Court's jurisdiction, the question of whether there is indeed a *lacuna* in article 12(2)(a) such that would justify the use of analogy in interpretation and the issues concerning state co-operation are some of the important matters highlighted and analysed. In closing this chapter, the author explains that, while at present this idea might constitute simply an effort at progressive development of the law, it is nonetheless an idea that merits further attention by the Court, in order to expand the territorial parameter of its reach in the future.

Chapter 7 addresses the territorial jurisdiction of the Court under article 12(2)(a) in situations of belligerent occupation. This Chapter does not deal with Palestine, as the investigation is on hold until it is ascertained whether Palestine qualifies as a 'state' for the purposes of the Rome Statute. Following a brief exposition of certain basic principles and rules of the law of occupation, this Chapter tackles three different scenarios; the occupation of State Party territory by another State Party (e.g. Ituri by Uganda), of State Party territory by a State not Party (e.g. Cyprus by Turkey), and State not Party territory by a State Party (e.g. Iraq by the United Kingdom). This chapter analyzes all three of these situations and concludes that, while the exercise of jurisdiction in the first two situations is largely uncontroversial, since occupation does not formally affect the sovereign right of jurisdiction of the occupied state, the third one is more difficult to apply. In this situation the author examines whether or not, and, if so, to what extent the International Criminal Court could use the interpretation of territorial jurisdiction on the basis of 'effective control', along the lines of the jurisprudence of the Human Rights Committee and the European Court of Human Rights. The author's opinion is that the differences in the wording, the context and the purposes of the instruments compared are such that do not allow much room for the application of the human rights interpretation of jurisdiction to article 12(2)(a) ICC Statute, although this possibility cannot be completely excluded due to the influnce of article 21(3) thereof.

The concluding chapter recapitulates the main findings of the present research and highlights that, while under international law the Court has many options available to it for the interpretation of the territorial parameter of its jurisdiction, its jurisprudence so far has not dealt with any of these issues. The hope is expressed that, should the need arise in the future, the Court will assume a teleological approach to the interpretation of Article 12(2)(a) more conducive to the goals it purports to achieve.

CURRICULUM VITAE

Name	Michail Vagias
Date of Birth	2 August 1980
Place of Birth	Thessaloniki, Greece

Educational

September 2009-present	Lecturer, The Hague University of Applied Sciences, LLB Program of International, European and Comparative Law
September 2009-present	Research Fellow in Public International and International Criminal Law, Bynkershoek Institut, The Hague
January 2008-present	Lecturer in Law, New Business School, Amsterdam
December 2009-April 2010	Guest Lecturer, Adv. LL.M. in Air and Space Law, Leiden University
May 2009	Guest Lecturer, LL.M. in International and Comparative Law, American University of Cairo, Egypt
2003-2004	LL.M. (adv.) in Public International Law, with an International Criminal Law Specialization, Leiden University (cum laude)
1998-2003	Bachelor of Law, Democritus University of Thrace, Greece

Professional

August 2008-present	Legal Counsel, European Court of Human Rights: Stavrousis, Tzanis and Thessaloniki Corps of Selected Translators v. Greece
November 2007-June 2008	Legal Counsel of the Republic of Djibouti, International Court of Justice; Case Concerning Certain Questions of Mutual Legal Assistance, (Djibouti v. France), I.C.J. Rep. 2008
September 2005	Member of the Thessaloniki Bar Association, Greece

Other

September 2007-December 2010	Scholar, State Scholarship Foundation, Hellenic Republic
March 2005-September 2007	Scientific Collaborator, Center of International and European Economic Law, Thessaloniki, Greece