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LEGITIMACY AND ICC JURISDICTION FOLLOWING SECURITY
COUNCIL REFERRALS: CONDUCT ON THE TERRITORY OF NON-
PARTY STATES AND THE LEGALITY PRINCIPLE

Rogier Bartels

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Legitimacy and ICC Jurisdiction following Security Council Referrals: Conduct on the Territory of Non-Party States and the Legality Principle

Rogier Bartels*

Preliminary remark

In a 2009 speech, Antonio Cassese remarked, albeit talking about a wider concept of legality and not just the criminal law safeguard, that legitimacy is broader than legality.¹ When discussing the legitimacy of international criminal courts and tribunals, he stated that one way for an international criminal institution to achieve legitimacy is through its performance. The International Military Tribunal ('IMT') at Nuremberg, in his view, enjoyed such "performance legitimacy" because "the judges at Nuremberg acted at the procedural level in consonance with the principles of due process".² This chapter discusses the criminal law principle of legality, more specifically *nullum crime sine lege*, as an essential component of the performance legitimacy³ of the International Criminal Court ('ICC' or 'Court').⁴ For this

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¹ Antonio Cassese, 'The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice', *Leiden Journal of international Law*, 46 (2012), 492.

² *ibid.*, at 495.

³ In his contribution to this volume, Sergei Vasiliev notes that international criminal tribunals in their self-legitimation efforts "should be enjoined to focus on their proper functioning as (liberal) criminal justice institutions, as a matter of performance legitimacy", because the performance aspect lies within their direct sphere of responsibilities and influence (see Sergei Vasiliev in this volume, p ...).

⁴ David Baragwanath, who took over from Cassese as the president of the Special Tribunal for Lebanon, recently wrote that "[t]he credibility of each tribunal requires a wise blend of two elements – applying the law and doing justice". He emphasises the importance of the principle of legality and the need for the international judges from common law traditions, as well as those from civil law traditions, to go beyond their comfort zone to guarantee such credibility. David Baragwanath, 'The interpretative challenges of international adjudication across the common law/civil law divide', *Cambridge Journal of International and Comparative Law*, 3 (2014), 458.

feature of legality is crucial to generate legal legitimacy and to create a sense of commitment – or “fidelity”, according to the famed legal philosopher Lon Fuller⁵ – to the law.

1. Introduction

The International Criminal Tribunals for the former Yugoslavia and Rwanda (‘ICTY’ and ‘ICTR’, respectively) derive their legal or constitutional legitimacy from Chapter VII resolutions of the United Nations (‘UN’) Security Council and were mandated to address acts that constituted crimes under customary international law,⁶ whilst for the mixed tribunals, such as the Special Court for Sierra Leone, this form of legitimacy finds additional grounding in the agreement and national laws of the States concerned.⁷ The ICC, on the other hand, is vested upon a multilateral treaty: the Rome Statute of the International Criminal Court (‘Rome Statute’).⁸ However, whereas the State Parties to the Rome Statute have consented to ICC jurisdiction,⁹ nationals of States that have not ratified this treaty can also be subjected to the Court’s jurisdiction in the event of a UN Security Council referral.

When the Security Council refers a situation in a State that has not ratified the Rome Statute, thereby granting the Court *ad hoc* jurisdiction over that specific situation, the ICC basically acts as an “*ad hoc* tribunal”, based on Chapter VII of the UN Charter. It acts, then, in much the same way as the ICTY and ICTR were, and are still, acting:¹⁰ as a judicial body specifically instituted for one situation.¹¹ It is submitted here that the ICC, when prosecuting

⁵ Jutta Brunnee and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, 2010), p. 6, referring to Lon L. Fuller, *Morality of Law* (Rev. Ed., New Haven: Yale University Press, 1969).

⁶ See, respectively, UN SC Resolutions 827 (S/RES/827 (25 May 1993)) and 955 (S/RES/955 (8 November 1994)).

⁷ See, e.g., Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, signed on 17 January 2002.

⁸ Claus Kress observes that “[w]ith the entry into force of the Rome Statute [...] the international criminal law tradition of directly applying customary law by resting it on pertinent case law and relevant State practice was replaced with an essentially code-based approach to criminal law that comes quite close to the legality principle in its broadest form” (Claus Kress, ‘Nullum Crimen Nulla Poena Sine Lege’, in Ruediger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2013), para. 18).

⁹ In addition, as discussed below, States can accept the ICC jurisdiction over specific situations or crimes.

¹⁰ It is the Appeals Chamber of the ICTY itself that – in a decision that has not since been disputed by the international community – concluded that “the establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41”. ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995 (‘*Tadić* Jurisdiction Decision’), para. 33.

¹¹ A situation similar to when the ICC’s jurisdiction is extended to the territory of a non-party State will occur if a national of a new State Party were to find him- or herself on trial before the ICC as a result of a declaration

alleged war crimes that occurred on the territory of non-party States and are allegedly committed by nationals of non-party States,¹² will have to consider whether the said acts are actually punishable by the ICC. In this chapter, it is argued that the ICC should, in a similar fashion as the ICTY has done, apply the so-called “*Tadić* conditions”, or create an ICC version thereof, to establish its jurisdiction.¹³

One case before the ICC that results from a Security Council referral makes for a particularly interesting case study with regard to jurisdiction. The *Prosecutor v. Abdallah Banda Abakaer Nourain*¹⁴ case raises intriguing questions about the legitimacy of Security Council referrals and the principle of legality before the ICC – dealing, as it does, with nationals of States that are not parties to the Rome Statute generally, and with the Court’s jurisdiction over such nationals with respect to the war crime of attacking peacekeepers more specifically. Sudan is not a party to the Rome Statute *or* to any other international treaty explicitly prohibiting attacks on peacekeepers.¹⁵ Absent any relevant Sudanese national criminal law prohibiting or criminalising the impugned conduct at the time of its occurrence, it may be argued that the Court’s jurisdiction would have to be established on the basis of the relevant acts being prohibited, and violations of this prohibition being criminalised, by customary international law.

lodged by this State with the Registrar (based on Article 12(3) of the Rome Statute) that gives the ICC jurisdiction of a period before the said State ratified the Rome Statute.

¹² It could be argued that this should also be done in when a member state has not incorporated the Rome Statute into national law. In the *Lubanga* case, the defence called upon the principle of legality when it submitted that it had not been “brought to the knowledge of the inhabitants of Ituri [...] that the Rome Statute had been ratified and that conscripting and enlisting child soldiers entailed individual criminal responsibility”. It argued that Mr Lubanga could not have foreseen that this conduct was criminal. However, Pre-Trial Chamber I considered that the *Lubanga* defence was relying on the defence of mistake of law, rather than the principle of legality, and analysed the defence’s argument as such. After a factual assessment, the Pre-Trial Chamber concluded that Mr Lubanga had, in fact, been aware of the existence of the crime and the consequences of the ratification of the Rome Statute by the Democratic Republic of Congo. See ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, Pre-Trial Chamber I, 29 January 2007, paras 294-6 and 301-316.

¹³ The *Tadić* conditions were first applied by the ICTY Appeals Chamber in *Prosecutor v. Dusko Tadić*. (see *Tadić* Jurisdiction Decision, para. 94). The conditions are discussed in detail below.

¹⁴ The case against Mr Banda was scheduled to start in November 2014 (ICC, *Prosecutor v. Abdallah Banda Abakaer Nourain*, Case No. ICC-02/05-03/09, Decision as to the Further Steps for the Trial Proceedings, 14 July 2014, para. 37). However, after Trial Chamber IV received indication that Mr Banda would not appear for trial, it issued, by majority, an arrest warrant and vacated the trial date until such time as Mr Banda’s arrest or voluntary appearance before the Court (ICC, *Prosecutor v. Abdallah Banda Abakaer Nourain*, Case No. ICC-02/05-03/09, Warrant of arrest for Abdallah Banda Abakaer Nourain, 11 September 2014).

¹⁵ As to the relevance of being a party to such a treaty, the following observation by Dapo Akande may be noted: “The transformation of the rule establishing violations of international humanitarian law by *states* into one which imposes individual criminal responsibility on *individuals* takes place under customary international law. Thus, although reference is made to treaties creating rules of international criminal law, those provisions are not applied *qua* treaty but rather as the context for a rule of customary law which has developed on top of the treaty rule and which criminalizes the same conduct.” (emphasis in original). Dapo Akande, ‘Sources of International Criminal Law’, in Antonio Cassese *et al.* (eds.), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009), p. 48.

Indeed, many of the crimes listed under Article 8 of the Rome Statute are violations of international humanitarian law ('IHL') for which individual criminal responsibility exists in customary international law beyond any doubt.¹⁶ Nevertheless, certain (war) crimes are not reflective of customary law,¹⁷ or at least were not considered as such in 1998.¹⁸ The relationship between the Rome Statute and customary rules could constitute a critical issue in cases such as *Banda*, as it determines the obligations that may be invoked against citizens of States that are not parties to the Rome Statute.¹⁹

This chapter examines the relationship between the ICC and the Security Council, and more specifically discusses the legality of subjecting nationals of non-member States to trials for acts allegedly committed on the territory of such a non-member State. It argues that ICC judges, when seised of alleged violations that can be considered treaty crimes or of crimes with debatable customary status and are allegedly committed in the aforementioned situation, should consider whether such crimes are actually punishable by the Court.²⁰ In doing so, the author first briefly discusses the *Banda* case to show that the current topic is not merely academic, but can relate to actual cases before the Court. Discussed next is the relationship between the ICC and the Security Council, with respect to the Court's jurisdiction. After dealing with the principle of legality generally, and its place in international criminal law, the focus turns to the *Tadić* conditions. These conditions are briefly set out and subsequently applied to the *Banda* case, after which this chapter ends with concluding remarks and recommendations.

¹⁶ Such as the grave breaches of the Geneva Conventions of 1949, listed in Article 8(2) of the Rome Statute. See, e.g., Jean-Marie Henckaerts, 'The Grave Breaches Regime as Customary International Law', *Journal of International Criminal Justice*, 7 (2009), 683-701.

¹⁷ See the discussion below in footnotes 104-108 and accompanying text.

¹⁸ Besides Article 8(2)(b)(iii) and (e)(iii), examples include the crime of recruiting child soldiers (Article 8(2)(b)(xxvi) and (e)(vii)) (see Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, S/2000/915 (4 October 2000), paras 17-18); the crime of enforced pregnancy (Article 8(2)(b)(xii) and (e)(vi)): see discussion below at section 4.2 (*Application of the Tadić conditions by the ICC*); and the crime of transferring, "directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies" (Article 8(2)(b)(viii)): Antonio Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', *European Journal of International Law*, 10 (1999), 151.

¹⁹ Interestingly, although Article 34 of the 1969 Vienna Convention on the Law of Treaties recalls that "[a] treaty does not create either obligations or rights for a third State without its consent", Article 38 provides an exception to that rule, by stating that a treaty rule can, in fact, become binding upon a third State as a customary rule of international law.

²⁰ The ICC's practice to date dealing with the Darfur situation shows that this is not being done.

2. Relevance in practice: the Banda case

On 29 September 2007, the *African Union Mission in Sudan* (AMIS), based at the Haskanita Military Group Site (‘Haskanita base’) in North Darfur, was overrun by an armed group, leaving twelve AMIS members dead and several wounded. After a failed attempt to prosecute Mr Abu Garda for the attack,²¹ Pre-Trial Chamber I of the ICC confirmed the charges brought by the Office of the Prosecutor (‘Prosecution’) against Mr Abdallah Banda and Mr Saleh Jerbo.²² The two men were subject to a summons to appear and therefore were not detained and, before the case commenced at the trial level, Mr Jerbo’s alleged death in battle led to the termination of the case against him by Trial Chamber IV.²³ The remaining accused, Mr Banda, is charged, *inter alia*, with having intentionally directed an attack against personnel, installations, materials, units and vehicles involved in a peacekeeping mission pursuant to Article 8(2)(e)(iii) of the Rome Statute.²⁴

In addition to the interesting question regarding the status of military members of peacekeeping operations,²⁵ which is one of the contested issues in the case, and certain

²¹ See ICC, *The Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 8 December 2010.

²² ICC, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Corrigendum of the “Decision on the Confirmation of Charges”, Pre-Trial Chamber I, 7 March 2011.

²³ On 4 October 2013, Trial Chamber IV issued the “Decision terminating the proceedings against Mr Jerbo”, in which it terminated the case against Mr. Jerbo without prejudice to resuming such proceedings should information become available that he is alive. ICC, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Decision terminating the proceedings against Mr Jerbo, Trial Chamber IV, 4 October 2013.

²⁴ *Banda and Jerbo* Decision on the Confirmation of Charges, pp. 4-5 and para. 163.

²⁵ Marco Sassòli, for example, questions the appropriateness of protected status as civilians for peacekeepers (Marco Sassòli, ‘International Humanitarian Law and Peace Operations, Scope of Application Ratione Materiae’ in Gian Luca Beruto (ed.), *International Humanitarian Law, Human Rights and Peace Operations: Proceedings of the 31st Round Table on Current Problems of International Humanitarian Law* (San Remo: Institute of International Humanitarian Law, 2009). See also Luigi Condorelli, ‘Conclusions générales’, in Luigi Condorelli *et al.* (eds.), *The United Nations and International Humanitarian Law* (Paris: Editions Pedone, 1996), pp. 445, 456-7. The defence team for Mr Banda (and at the time, Mr Jerbo) filed a motion requesting termination of the case against its client, which was – in part – based on the defence’s submission that the AU forces had lost their neutrality by harbouring a government intelligence officer (ICC, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Public Redacted Version of Defence Request for Termination of Proceedings, 5 September 2013, and the Defence Reply to the Prosecution Response To the Defence Request for Termination of Proceedings, 11 October 2013, para. 18). As explained by Judge Eboe-Osuji, in his separate opinion to the decision denying the defence’s request for termination of the case, any possible presence of government representatives on the Haskanita base does not necessarily render the AU forces legitimate military targets (see ICC, *Prosecutor v. Abdallah Banda Abakaer Nourain*, Case No. ICC-02/05-03/09, Separate Opinion of Judge Eboe-Osuji to the ‘Decision on the “Defence Request for Termination of Proceedings”’, 3 February 2014. The protection of peacekeepers as civilians, for the purposes of Article 8(2)(b)(iii) and (e)(iii) is premised on their peacekeeping mission being “in accordance with the Charter of the United Nations”. On this issue, see Barbara Sonczyk, ‘The protection of the Intervention Brigade under Article 8 (2)(e)(iii) of the Rome Statute of the International Criminal Court’ (2014) 1 *Questions of International Law*, 1 (2014).

aspects of the charges confirmed,²⁶ the *Banda* case raises thought-provoking questions about the jurisdiction of the ICC: jurisdiction over nationals of States that are not parties to the Rome Statute generally, and more specifically, jurisdiction over such nationals with respect to the war crime of attacking peacekeepers. As Sudan has not ratified the Rome Statute, and because it appears unwilling to accept the Court's jurisdiction by way of an Article 12(3) declaration, the only way for the situation in Darfur to have come before the Court was through a referral by the United Nations Security Council.²⁷ In such a situation, there was neither prior consent of the relevant State to be bound by the Rome Statute,²⁸ nor to the ICC exercising jurisdiction over its nationals or other individuals perpetrating crimes on its territory. The Rome Statute would thus be applied to nationals (or individuals on the territory) of non-party States in a similar manner as "retroactive" application of the statute.²⁹ It is difficult to reconcile such "retroactive" jurisdiction with the concerns that delegates to the Rome Conference had about legality when drafting the Rome Statute.³⁰ Notably, Sudan has not ratified the 1994 Convention on the Safety of United Nations and Associated Personnel ('UN Safety Convention'), which lists attacking peacekeepers as a crime.³¹ Absent

²⁶ The Pre-Trial Chamber confirmed charges for, *inter alia*, pillage of "vehicles, refrigerators, computers, cellular phones, military boots, and uniforms, fuel, ammunition and money", as it concluded that there was reason to believe that these items were appropriated for private or personal use. However, the taking of some of these items could also be justified by military necessity, in which case their taking – according to the ICC's Elements of Crimes for Articles 8(2)(b)(xvi) and 8(2)(e)(iv) – would not constitute pillage. The available evidence as to the intended use will therefore be of importance. On this topic, see Nobuo Hayashi, 'Requirements of Military Necessity in International Humanitarian Law and International Criminal Law', *Boston University International Law Journal*, 28 (2010), 130-4.

²⁷ UN Security Council Resolution S/RES/1593 (2005), 31 March 2005.

²⁸ Unless such consent would follow from the delegation of powers of States to the UN Security Council. See the discussion below in section 3.1 *UN Security Council referrals*.

²⁹ See Leena Grover, 'A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court', *European Journal of International Law*, 21 (2010), 567. Article 24 of the Rome Statute states that the jurisdiction *ratione personae* for conduct prior to the entry into force of the Statute. This non-retroactivity clause is to be read in conjunction with Article 11, which sets out in its second paragraph that if a State becomes a party to the Rome Statute "after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under Article 12, paragraph 3". Uganda provided such retroactive jurisdiction to the Court (see ICC, *Prosecutor v. Joseph Kony*, Warrant of Arrest for Joseph Kony issued on 8th July 2005 as amended on 27th September 2015, Pre-Trial Chamber II, 13 October 2005, paras 32-34). In the Darfur situation, the UN Security Council, in 2005, provided retroactive jurisdiction all the way back to the entry into force of the Rome Statute, when it referred "the situation in Darfur since 1 July 2002" (UN Security Council Resolution S/RES/1593 (2005))

³⁰ *ibid.*

³¹ Article 9 ("Crimes against United Nations and associated personnel") of the UN Safety Convention reads in relevant part:

1. The intentional commission of:

- (a) A murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel;

relevant national law criminalising the impugned conduct at the time of its occurrence, it appears that the Court's jurisdiction would have to be established on the basis of the relevant acts being prohibited, and violations of this prohibition being criminalised, by customary international law.

3. ICC jurisdiction

The Rome Statute lists various forms of jurisdiction of the ICC. Article 5 of the Rome Statute deals with the Court's subject-matter jurisdiction (*ratione materiae*), and mandates that such jurisdiction "shall be limited to the most serious crimes of concern to the international community as a whole", before listing the specific international crimes within the jurisdiction of the Court. Article 11 limits the Court's temporal jurisdiction (*ratione temporis*) to crimes committed after the Rome Statute's entry into force, namely 1 July 2002, or, in the case of a State becoming a party after that date, to crimes committed after the Rome Statute entered into force for that State. However, a State that accedes to the Rome Statute may accept the Court's jurisdiction, pursuant to an Article 12(3) declaration, for crimes committed before the Statute's entry into force for that State,³² as was, for example, done by Palestine. Also if a State does not intend to ratify the Rome Statute, it can accept the Court's jurisdiction, including for acts that took place prior to such acceptance. Article 12 further sets out the territorial jurisdiction (*ratione loci*) over conduct that occurred on the territory of a State party (or a State that has accepted the Court's jurisdiction), or on a vessel or aircraft registered in such a State. It also describes when the Court may act on the basis of personal jurisdiction (*ratione personae*); namely, if the person accused of an ICC crime is a national of

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- (b) A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty;
 - (c) A threat to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act;
 - (d) An attempt to commit any such attack; and
 - (e) An act constituting participation as an accomplice in any such attack, or in an attempt to commit such attack, or in organizing or ordering others to commit such attack, shall be made by each State Party a crime under its national law.

2. Each State Party shall make the crimes set out in paragraph 1 punishable by appropriate penalties which shall take into account their grave nature.

³² Such a declaration is to be lodged with the Registrar (see Article 12(3) of the Rome Statute). See also Rule 44 of the ICC's Rules of Procedure and Evidence.

a State party or a State that has accepted the Court's jurisdiction.³³ The following provision of Part II of the Rome Statute deals with situations that trigger the Court's jurisdiction. Article 13 lists the three options:

- (a) 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;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

As shown above, an alleged perpetrator of a crime included in the Rome Statute, such as an attack against members of a peacekeeping operation, that has been committed on the territory of a non-party State can be brought before the Court in the following situations: i) the alleged perpetrator is a national of a State party; ii) the non-party State lodges a declaration pursuant to Article 12(3) accepting the Court's jurisdiction over the alleged crime; and iii) the UN Security Council has referred to the Prosecution the situation in which the alleged crime occurred. Although the first two situations are also relevant for the principle of legality, specifically *nullum crimen sine lege*, and therefore the arguments made in this chapter apply to these situations in the same fashion, the author will focus here on the latter situation, given that the *Banda* case resulted from a UN Security Council referral.

3.1 UN Security Council referrals

As discussed above, the drafters of the Rome Statute invested the UN Security Council, acting under Chapter VII of the UN Charter, with the power to refer to the Court situations in which international crimes appear to have been committed. To date, the Security Council has only used the "gift" provided to it to maintain international peace and security³⁴ twice: by referring the situations in Darfur and Libya.³⁵

³³ For the purposes of the crime of attacking members of peacekeeping operations, it is important to note that the drafters of the Rome Statute chose not to include passive personality jurisdiction (see William Schabas, *An Introduction to the International Criminal Court* (3rd ed, Cambridge University Press, 2007), p. 71). Since, by definition, a member of a peacekeeping operation will be operating outside his own territory, jurisdiction on the basis of the nationality of the victim would have significantly broadened the jurisdictional scope for this crime.

³⁴ Luigi Condorelli and Santiago Villalpando, 'Can the Security Council Extend the ICC's Jurisdiction?' in Antonio Cassese *et al.* (eds), *The Rome Statute of the International Criminal Court: A Commentary*, 2 vols.

Some, including the United States ('US'), describe the exercise of jurisdiction by the Court over nationals of a non-party State without the latter's consent as contrary to international law.³⁶ The US was, however, in favour of granting the UN Security Council the power to refer situations. Indeed, during the Rome Conference, the head of the US delegation stated that the "only way" to bring non-party States within the scope of the Court's regime would be "through the mandatory powers of the Security Council under the Charter of the United Nations".³⁷ It has been convincingly argued that States are entitled to delegate their criminal jurisdiction over non-nationals to a treaty-based court, such as the ICC.³⁸ Similarly, there can be indirect delegation when the UN Security Council, in exercising its Chapter VII powers permanently delegated to it by the UN member States collectively,³⁹ delegates jurisdiction to an international tribunal or court.⁴⁰

The "consent problem"⁴¹ primarily concerns non-party States. Indeed, as argued by Akande,⁴² and recently found by Pre-Trial Chamber II,⁴³ the effect of a referral of a situation by the UN Security Council may be that the State concerned becomes bound by the Rome Statute.⁴⁴ Pre-Trial Chamber II held that "[g]iven that the [Rome] Statute is a multilateral

(Cambridge University Press, 2002), vol. 1, p. 572, describing the power to refer situations as "a 'gift' to the Security Council for the accomplishment of its duties under the Charter".

³⁵ UN Security Council Resolutions S/RES/1593 (31 March 2005) and S/RES/1970 (26 February 2011), respectively. The proposed referral of the situation in Syria

³⁶ See David Scheffer, 'The United States and the International Criminal Court', *American Journal of International Law*, 93 (1999), 18; see further Madeline Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States', *Law & Contemporary Problems*, 64 (2001), 27.

³⁷ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June – 17 July 1998), 9th plenary meeting, UN Doc. A/CONF.183/SR.9, para 28. The lack of opposition by the United States to the inclusion of UN Security Council referrals in the Rome Statute is, of course, understandable given the United States' opportunity to use its veto power in the Council.

³⁸ See mainly Dapo Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits', *Journal of International Criminal Justice*, 1 (2003) 621-34; compare also 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', *Law and Contemporary Problems*, 64 (2001), 110-7.

³⁹ See Danesh Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (Oxford University Press, 2000), pp. 25-32.

⁴⁰ Akande, 'Jurisdiction of the ICC', 628-31; and Shlomit Wallerstein, 'Delegation of Powers and Authority in International Criminal Law', *Criminal Law and Philosophy*, (2013), 19-25.

⁴¹ Dapo Akande, 'Prosecuting Aggression: The Consent Problem and the Role of the Security Council', *Oxford Institute for Ethic, Law, and Armed Conflict Working Paper* (May 2010).

⁴² Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities', *Journal of International Criminal Justice*, 7 (2009), 333-52; and Dapo Akande, 'ICC Issues Detailed Decision on Bashir's Immunity (... At long Last ...) But Gets the Law Wrong', *EJIL:Talk!*, 15 December 2011, available at < <http://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir%E2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/>>.

⁴³ ICC, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, Pre-Trial Chamber II, 9 April 2014 ('Al Bashir Cooperation Decision'), paras. 26-9.

⁴⁴ See for a critique of this position: André de Hoogh and Abel S. Knottnerus, 'ICC Issues New Decision on Al-Bashir's Immunities – But Gets the Law Wrong ... Again', *EJIL:Talk!*, 18 April 2014, available at

treaty governed by the rules set out in the Vienna Convention on the Law of Treaties”, it “cannot impose obligations on third States without their consent”, but that the UN Security Council requires the third State to cooperate with the Court in order for it to achieve the mandate entrusted to it by the Council.⁴⁵ As such, the State may be obliged to cooperate with the Court, for example, by arresting a person sought by the Court. However, the *nullum crimen sine legem* principle does not speak to the sovereignty of a State, but instead belongs to the (international) criminal justice paradigm and serves to ensure fair trial rights.⁴⁶ It thus does not address the non-party State. Rather, it focusses on the individual prosecuted before the Court and his/her rights flowing from the need for a criminal process to accord with the legality principle. In other words, it is not a matter of sovereignty but one of human rights.

Although the UN Charter permits the Security Council to impose legal obligations on UN Member States, the Charter creates certain “constitutional limitations” for the Council.⁴⁷ In addition, when triggering the Court’s jurisdiction, the Security Council is confined by the parameters of the Rome Statute, for example, with respect to jurisdiction.⁴⁸ It has been noted by one commentator that, with respect to the “limitations to the Court’s jurisdiction that are determined by essential principles of criminal and international law, the Security Council

<<http://www.ejiltalk.org/icc-issues-new-decision-on-al-bashirs-immunities-%E2%80%92-but-gets-the-law-wrong-again/>>; and Paolo Gaeta, ‘The ICC Changes Its Mind on the Immunity from Arrest of President Al Bashir, But It Is Wrong Again’, *Opinio Juris*, 23 April 2014, available at <<http://opiniojuris.org/2014/04/23/guest-post-icc-changes-mind-immunity-arrest-president-al-bashir-wrong/>>.

⁴⁵ *Al Bashir* Cooperation Decision, paras. 26 and 33.

⁴⁶ See IMT at Nuremberg, *Göring and Others*, 13 Ann. Dig. 203 (‘Nuremberg Judgment’), p. 208; see also Antonio Cassese, ‘*Nullum Crimen Sine Lege*’, in Antonio Cassese et al. (eds), *The Oxford Companion on International Criminal Justice* (Oxford University Press 2009), p. 439, who writes that in international criminal law “the *nullum crimen sine lege* principle must be respected as a fundamental part of a set of basic human rights of individuals”. He adds that the principle is approached from “the viewpoint of the human rights of the accused, and no longer as essentially encapsulating policy guidelines dictating the penal strategy of states at the international level”.

⁴⁷ The ICTY Appeals Chamber explained that “[t]he Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).” *Tadić* Jurisdiction Decision, para. 28.

⁴⁸ See William Schabas, *The International Criminal Court: A Commentary to the Rome Statute* (Oxford University Press, 2010), p. 301; and Paul de Hert and Mathias Holvoet, “Art. 13. Exercise of jurisdiction”, in Paul de Hert et al. (eds), *Code of International Criminal Law and Procedure, Annotated* (Ghent: Larcier 2013), p. 83; see also ICC, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’, Pre-Trial Chamber I, 4 March 2009, para. 45, in which it held that “by referring the Darfur situation to the Court, pursuant to article 13(b) of the Statute, the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole”.

should not be allowed to extend the Court's jurisdiction in such a manner as to contradict those principles", including the principle of *nullum crimen sine lege*.⁴⁹

3.2 Consequences of a referral for the principle of legality

Having addressed the concept of Security Council referral, the discussion now turns to the potential consequences of such a referral. A referral by the Security Council creates a situation where certain acts and one or more persons are brought within the scope of the Rome Statute, whilst the scope did not extend to those acts and persons prior to the referral.⁵⁰ Such a situation obviously creates tension with the principle of legality, the essence of which constitutes the prohibition of retroactive criminal law-making (*nullum crimen sine lege*). This principle, which is included in all major human rights treaties, was described by the European Court of Human Rights as "an essential element of the rule of law" that is to be construed and applied "in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment".⁵¹

The origins of the principle

The legality principle originated as a reaction to the absolute rule and arbitrary exercise of sovereign power prior to the Enlightenment. Following Montesquieu's promotion of a separation of powers in order to prevent the abuse of power by the State that would protect the individual freedom of its citizens,⁵² and the application by Italian legal philosopher Cesare Beccaria of that doctrine to criminal law, the principle became interconnected with the theory of the separation of powers.⁵³ The principle of legality, as it developed in post-Enlightenment continental Europe, envisages that only someone who violates the liberty guaranteed by social contract and safeguarded by penal law commits a crime. Prior (written) legislation, enacted and promulgated by the legislature, is therefore required. Such legislation

⁴⁹ Condorelli and Villalpando, 'Security Council', pp. 579-80. Condorelli and Villalpando submit that the Security Council therefore could not request the Court to look into acts that did not constitute crimes under international law at the time of their alleged commission, because doing so would entail a violation of the *nullum crimen sine lege* principle.

⁵⁰ It is not inconceivable that the Security Council would refer a situation that includes partial treaty-based jurisdiction, for example, if it were to refer a situation that encompasses several States, of which some are non-party States but others have ratified the Rome Statutes.

⁵¹ ECtHR, *Kafkaris v Cyprus*, Judgment, 12 February 2008, para. 137.

⁵² See, generally, Montesquieu, *De l'esprit des lois* (Genève, 1748), Book XI.

⁵³ 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), p. 83.

must be clear to the individuals who have agreed to be subject to it, and may not be applied retroactively by the judiciary.⁵⁴

The principle of legality may have originated in continental Europe, but it transcends the civil law system. Although it probably derives from a different origin,⁵⁵ it also forms part of American criminal law jurisprudence, for example, in which it is considered the key principle that overrides all other criminal law doctrines.⁵⁶ It is said to enjoy “nearly complete priority over the public interest in punishing wrongdoers”,⁵⁷ and as such, applies “even though its exercise may result in dangerous and morally culpable persons escaping punishment”.⁵⁸

It is suggested that, by now, the principle of legality is recognised “in some form or another in all the world’s legal systems”.⁵⁹ In addition to the prohibition of retroactive criminal legislation, its original formulation has been expanded to include: i) the requirement of specificity, ii) the ban on analogy, and iii) the *favor rei* principle, meaning that criminal rules have to be interpreted in favour of the accused.⁶⁰

On the national level, the principle aims to ensure, on the one hand, foreseeability for the individual what behaviour would qualify as criminal⁶¹ and, on the other hand, protection of the individual against the government through a separation of powers in relation to the criminal process. On the international level (before the Court, for example), the latter protection does not play a role. For the purposes of the present discussion, the prohibition of retroactive criminal legislation, or *nullum crimen sine lege*, is of particular relevance.

In addition to its inclusion in national criminal law, it is part of all major human rights treaties that deal with fair trial rights. For example, the International Covenant on Civil and Political Rights (‘ICCPR’) provides that “no one shall be held guilty of any criminal offence

⁵⁴ *ibid.*, p. 85.

⁵⁵ John C. Jeffries, ‘Legality, Vagueness, and the Construction of Penal Statutes’, *Virginia Law Review*, 71 (1985), 195; and Stanislaw Pomorski, *American Common Law and the Principle Nullum Crimen Sine Lege* (2nd ed., The Hague: Mouton, 1975), pp. 9-29.

⁵⁶ Joshua Dressler, *Understanding Criminal Law* (3rd ed., New York: Lexis Publishing, 2001), p. 39. See for a critique of the principle of legality in German and American criminal law: Markus C. Dubber, ‘The Legality Principle in American and German Criminal Law: An Essay in Comparative Legal History’, in Georges Martyn *et al.* (eds), *From the Judge’s Arbitrium to the Legality Principle: Legislation as a Source of Law in Criminal Trials* (Berlin: Duncker & Humblot, 2013), pp. 365-85.

⁵⁷ Donald A. Dripps, ‘The Constitutional Status of the Reasonable Doubt Rule’, *California Law Review*, 75 (1987), p. 1685. However, earlier in the twentieth century, it was still held that “[t]he legislature [...] can, in the absence of any Constitutional prohibition, even make the new statute retroactive” (John C. Gray, *The Nature and Sources* (2nd Ed., New York: Columbia University Press, 1921), p. 187).

⁵⁸ Dressler, *Understanding Criminal Law*, p. 39.

⁵⁹ M. Cherif Bassiouni, *Crimes against humanity: Historical evolution and contemporary application* (Cambridge University Press, 2011), p. 296

⁶⁰ Ilias Bantekas, *International Criminal Law* (Oxford: Hart Publishing, 2010), p. 21.

⁶¹ See, for example, the ECHR’s *Sunday Times* case law.

on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed”.⁶² The European Convention on Human Rights and Fundamental Freedoms,⁶³ the American Convention on Human Rights,⁶⁴ and the African Charter on Human and Peoples’ Rights⁶⁵ all include a version of the *nullum crimen sine lege* principle.⁶⁶

Although the current contribution focusses on the *nullum crimen sine lege* principle, it is worth mentioning here that the ban on analogy, which is included in the Rome Statute in Article 22(2),⁶⁷ could also be relevant to the *Banda* case because only a limited set of charges was formulated and subsequently confirmed. In addition to the charge of attacking members of a peacekeeping mission, the Prosecution in *Banda* did also charged the crime of murdering civilians under Article 8(2)(c)(i) of the Rome Statute. In doing so, however, it explicitly linked the latter with the former.⁶⁸ When confirming the charges against Mr Banda (and, at the time, Mr Jerbo), the Pre-Trial Chamber made a similar connection between the two charges.⁶⁹ Therefore, should it be found that the accused could not be convicted of attacking peacekeepers, this may have consequences for the other counts. In addition, the execution style killing of peacekeepers would, as with summary executions of any person, qualify as the crime of murdering civilians. However, as this crime relates to those persons already in the hands of the accused, it does not cover the loss of life as a result of violations of the rules

⁶² Article 15 of the International Covenant on Civil and Political Rights.

⁶³ Article 7 of the European Convention on Human Rights and Fundamental Freedoms.

⁶⁴ Article 9 of the American Convention on Human Rights.

⁶⁵ Article 7(2) of the African Charter on Human and Peoples’ Rights.

⁶⁶ The principle of *nullum crimen sine lege* is also included in IHL, the body of law dealing with behaviour of the warring parties in times of armed conflict. The International Committee of the Red Cross (‘ICRC’) concludes in its Study on Customary International Humanitarian Law that “no one may be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed” (Rule 101 of the ICRC Customary IHL Study).

⁶⁷ Article 22(2) of the Rome Statute reads, in relevant part: “The definition of a crime [...] shall not be extended by analogy”.

⁶⁸ The Prosecution submitted that Mr Banda “attacked the MGS Haskanita and killed twelve (12) AMIS peacekeeping personnel and attempted to kill eight (8) AMIS peacekeeping personnel, with the knowledge that they were (1) personnel involved in a peacekeeping mission established in accordance with the UN Charter; and (2) taking no active part in hostilities and thus entitled to the protection given to civilians under the international law of armed conflict, thereby committing a crime in violation of Articles 8(2)(c)(i) and 25(3)(a) and 25(3)(f) of the Rome Statute”.

⁶⁹ It held that “the offences listed under Counts 1 [murder under Article 8(2)(c)(i)] and 3 [pillage under Article 8(2)(e)(v)] [...] were allegedly committed during and in the context of the attack on the MGS Haskanita. The Chamber’s findings in relation to the offence charged under Count 2 will thus have legal consequences for its findings in relation to the alleged murders, both committed and attempted (Count 1) and to the alleged pillaging (Count 3). [...] Only in the event that it establishes that there are substantial grounds to believe that both the objective and subjective elements of the crime listed under Count 2 are fulfilled will the Chamber proceed with the analysis of the elements of the crimes with which Abdallah Banda and Saleh Jerbo are charged by the Prosecutor under Counts 1 and 3 of the DCC [Document Containing the Charges].” (ICC, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Corrigendum of the “Decision on the Confirmation of Charges”, Pre-Trial Chamber, 8 March 2011, para. 58).

governing the conduct of hostilities,⁷⁰ and would therefore not encompass the deaths of peacekeepers resulting from, for example, artillery shells fired at the camp. Intentionally firing from a distance at civilians is, of course, conduct punishable before the Court, but is to be qualified as “intentionally directing attacks against the civilian population as such or against individual civilians”, pursuant to Article 8(2)(e)(i) of the Rome Statute. Arguably, similar firing at persons “entitled to the protection given to civilians”, i.e. not constituting legitimate targets, could also qualify as the crime of attacking civilians.⁷¹ However, any conviction under the said article would require re-characterisation pursuant to Regulation 55 of the Regulations of the Court, and would need to comport with the prohibition of analogy.⁷²

Above the existence of the principle of legality in national law was discussed, but more important for the purposes of the present chapter is the question as to what status the principle has on the international level. This will be addressed next.

Nullum crimen sine lege in *international criminal law*

Although *nullum crimen sine lege* plays a very significant role indeed in national criminal law, it has been treated with a “degree of relativism” in international criminal law.⁷³ The

⁷⁰ Similar to the comparable grave breach of wilful killing, committed against protected persons (included in Article 8(2)(a)(i) of the Rome Statute). Compare ICC, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, Pre-Trial Chamber I, 30 September 2008 (*Katanga and Mathieu Ngudjolo Confirmation Decision*), para. 267. See also Rogier Bartels, ‘Denying Humanitarian Access as an International Crime in Times of Non-International Armed Conflict: The Challenges to Prosecute and Some Proposals for the Future’, *Israel Law Review* (forthcoming); Frits Kalshoven, ‘Reprisals and the Protection of Civilians: Two Recent Decisions of the Yugoslavia Tribunal’, in Lal Chand Vohrah et al. (eds), *Man’s Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (The Hague: Kluwer Law International, 2003), pp. 487-90; Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Leiden: Martinus Nijhoff, 1987), para. 4776.

⁷¹ The UN Secretary-General, in his “Report [...] on the Establishment of the Special Court for Sierra Leone” considered that “[b]ased on the distinction between peacekeepers as civilians and peacekeepers turned combatants, the crime defined in article 4 of the Statute of the Special Court is a specification of a targeted group within the generally protected group of civilians which because of its humanitarian or peacekeeping mission deserves special protection”. (Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN.Doc S/2000/915, 4 October 2000, para. 4). The Trial Chamber in the RUF case at the Special Court for Sierra Leone (SCSL) similarly held that “this offence can be seen as a particularisation of the general and fundamental prohibition in international humanitarian law against attacks on civilians and civilian objects”. SCSL, *Prosecutor v. Issa Hassan Sesay et al.*, Case No. SCSL-04-15-T, Judgment, Trial Chamber, 2 March 2009, para. 215.

⁷² Due to “the perceived willingness of the ICTY to engage in liberal reasoning-by-analogy that contributed, in part, to the adoption of article 22 para. 2” (Bruce Broomhall, ‘Article 22’, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd ed., Munich/Oxford/Baden-Baden: CH Beck/Hart/Nomos 2008), p. 725). In *Lubanga*, the Trial Chamber held that where conduct mentioned in an ICC crime is not defined in the Court’s core instruments (i.e. the Rome Statute, the Rules of Procedure and Evidence, or the Elements of Crimes), it “must be determined in accordance with Articles 21 and 22(2) of the Statute” (See ICC, *Prosecutor v Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute (Trial Chamber I), 14 March 2012, para. 600).

⁷³ Bassiouni, *Crimes against humanity*, p. 297.

manner in which international criminal law incorporated the principle has been criticised in the literature.⁷⁴ At the outset of international criminal law, it was held by the judges of the IMT at Nuremberg that “the maxim *nullum crimen sine lege* [...] is a general principle of justice”, which allowed for punishments of certain acts not prohibited by law at the time of their commission if it would be “unjust” for these acts “to go unpunished”.⁷⁵ At its twin tribunal in Tokyo, Judge Röling went one step further when he suggested that “the principle of ‘*nullum crimen sine praevia lege*’ [...] is not a principle of justice but a rule of policy, valid only if expressly adopted, so as to protect citizens against arbitrariness of courts [...] as well as the arbitrariness of legislators”.⁷⁶ This view was vehemently opposed by Judge Pal, who argued that “the so-called trial held according to the definition of crime *now* given by the victors obliterates the centuries of civilization which stretch between us and the summary slaying of the defeated in a war. A trial with law thus proscribed will only be a sham employment of legal process for the satisfaction of a thirst for revenge. It does not correspond to any idea of justice.”⁷⁷

Later, at the ICTY, the principle was generally dealt with by way of resort to the so-called “*Tadić* conditions”, discussed further below. It is mainly in customary international law that the judges looked for, and found, the legal grounding for individual criminal responsibility for violations not explicitly included in the Tribunal’s Statute.⁷⁸ One commentator suggested that the principle should rather be referred to as *nullum crimen sine jure*.⁷⁹ In 1998, the Trial Chamber in its *Delalić et al.* judgment found the extent to which the *nullum crimen sine lege* principle had become part of international criminal law uncertain.⁸⁰ Some years later, the ICTR’s *Karemera et al.* Trial Chamber similarly held that “given the

⁷⁴ See, for example, Beth Van Schaack, ‘*Crimen Sine Lege*: Judicial Lawmaking at the Intersection of Law and Morals’, *The Georgetown Law Journal*, 97 (2008), 119-92.

⁷⁵ Nuremberg Judgment, paras 219-223. The Tribunal’s view, thus, was that *nullum crimen sine lege* was only a general principle, thereby downplaying its relevance and impact on the case before the Tribunal. On the IMT’s approach to the principle of *nullum crimen sine lege*, see Kevin J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press, 2011), pp. 125-6.

⁷⁶ IMT for the Far East, *United States et al. v. Araki et al.*, Judgment, 4-12 November 1948, Separate Opinion of Judge Röling, paras 44-6. He continued: “[T]he prohibition of ex post facto law is an expression of political wisdom, not necessarily applicable in present international relations. This maxim of liberty may, if circumstances necessitate it, be disregarded even by powers victorious in a war fought for freedom.”

⁷⁷ IMT for the Far East, *United States et al. v. Araki et al.*, Judgment, 4-12 November 1948, Dissenting Opinion of Justice Pal, p. 37.

⁷⁸ The challenges to resort to customary international law have been noted by, *inter alia*, Beth Van Schaack. See Schaack, ‘*Crimen Sine Lege*’, p. 138. For a useful overview of the *ad hoc* Tribunal’s approach to *nullum crimen sine lege*, see *ibid.* and Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press, 2009), chapters 6 and 7.

⁷⁹ M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd ed., The Hague: Kluwer Law International, 1999), p. 144.

⁸⁰ ICTY, *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Judgment, Trial Chamber, 16 November 1998, para. 403.

specificity of international criminal law, the principle of legality does not apply to international criminal law to the same extent as it applies in certain national legal systems.”⁸¹

Notwithstanding the aforementioned two judicial findings, the *nullum crimen sine lege* principle is now considered to be “one clearly and firmly entrenched in international law”, and the necessity to include it in the Rome Statute appeared to have been viewed “self-evident” by most delegates to the Rome Conference.⁸² It has been suggested that drafters adopted such a strict form of the legality principle out of self-interest rather than concern for the rights of the accused.⁸³ Given the nature of international crimes and the impact that the International Criminal Court could have on the conduct of their own state agents, this approach by the drafting States is not surprising.⁸⁴ Be that as it may, the drafting process resulted in the adoption of an article explicitly prescribing the principle of legality. This is a major step forward from the Court’s predecessors, which can only be considered a positive development for the rights of the accused.⁸⁵ Recently, appeals judges of the Special Tribunal for Lebanon even held that the principle is *jus cogens* and that, as such, a peremptory norm demands observance on both the national and international level.⁸⁶

⁸¹ ICTR, *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defense’s Preliminary Motions Challenging Jurisdiction: Joint Criminal Enterprise, 11 May 2004, para. 43.

⁸² Susan Lamb, ‘*Nullum Crimen, Nulla Poena Sine Lege* in International Criminal Law’, in Antonio Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2 vols. (Oxford University Press, 2002), vol. 1, pp. 734-5. Per Saland, the chairman of the working group in charge of the section of the Rome Statute that Article 22 is part of (Working Group on the General Principles of Criminal Law), writes that “[t]he material content of the principle of legality (that a person is not criminally responsible unless the act constitutes a crime under the Statute) was never a contentious issue”. Per Saland, ‘International Criminal Law Principles’, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999), pp. 194-5.

⁸³ Schabas, *Commentary to the Rome Statute*, pp. 407-408; Alain Pellet, ‘Applicable Law’, in Cassese, *The Rome Statute*, vol. 2, p. 1051 and 1057; Boot, *Nullum Crimen Sine Lege*, pp. 362-363.

⁸⁴ See also Broomhall, ‘Article 22’, p. 717. Grover, ‘A Call to Arms’, 552.

⁸⁵ Compare J. Verhoeven, ‘Article 21 of the Rome Statute and the ambiguities of applicable law’ (2002) 33 *Netherlands Yearbook of International Law*, 33 (2002), 22.

⁸⁶ Special Tribunal for Lebanon, *Prosecutor v. Salim Jamil Ayyash et al.*, Case No. STL-11-01 Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Appeals Chamber, 16 February 2011, para. 87. In support of the *jus cogens* status, see Ilias Bantekas, ‘Reflections on Some Sources and Methods of International Criminal and Humanitarian Law’, *International Criminal Law Review*, 6 (2006), 125.

4. Addressing the principle of legality at the ICC

As mentioned above, when the Security Council refers a situation in a State that has not ratified the Rome Statute, the ICC basically acts as a sort of “*ad hoc* tribunal”⁸⁷ based on Chapter VII of the UN Charter that, much like the ICTY and the ICTR, has been granted *ad hoc* jurisdiction over the situation concerned – namely, as a judicial body specifically instituted for one situation (or armed conflict).⁸⁸ The principle of legality is enshrined in the Rome Statute, which states in Article 22, entitled “*Nullum crimen sine lege*”, 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.”⁸⁹ The text of Article 22 shows that this safeguard only provides protection to those persons who already found themselves within the framework of the Court, that is to say, those who lived or acted in States that were a party to the Rome Statute at the time of the alleged crime. Obviously, in order for the Court to exercise jurisdiction after a Security Council (or self-)referral, the alleged conduct has to be included as a crime in the Rome Statute; otherwise, the Court would have no crime to prosecute. This, however, does not answer the question as to whether the alleged conduct was also a crime at the time and place where the conduct took place – i.e., on the territory of a State that, at the time, did not fall under the ICC framework.

In addition to the inclusion of the principle under Article 22, the Rome Statute provides that the Court is to apply and interpret the law in a manner consistent with internationally recognised human rights standards. Therefore, even if Article 22 does not provide the required protection, the Court would still be held to apply the broader *nullum crimen sine lege* principle as included in international human rights law, including, for example, the ICCPR.⁹⁰

It is submitted here that, when prosecuting alleged (war) crimes that occurred on the territory of non-State parties and committed by nationals of non-party States that have not

⁸⁷ Schabas refers to the Court as a “‘stand-by’ *ad hoc* tribunal” in this regard (Schabas, *Commentary to the Rome Statute*, p. 294). Fletcher and Ohlin call the ICC “two courts in one”: “an independent criminal court enacted by the parties of the Rome Statute [and], in the case of referrals by the Security Council under Article 13(b) of the Statute, an organ for restoring collective peace and security”. George P. Fletcher and Jens David Ohlin, ‘The ICC – Two Courts in One?’, *Journal of International Criminal Justice*, 4 (2006), 433 and 428.

⁸⁸ A similar situation will occur if a national of a non-party State were to find him- or herself on trial before the ICC as a result of a declaration lodged by a non-party State with the Registrar (based on Article 12(3) of the Rome Statute).

⁸⁹ The second paragraph of Article 22 of the Rome Statute continues: “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”.

⁹⁰ See in support, Akande, ‘Sources’, pp. 46-7.

ratified the treaty prohibiting a certain act or means or method of warfare,⁹¹ chambers of the Court should consider whether the said act is actually punishable by the ICC. The author therefore proposes that, as has been the case with the ICTY, the ICC should apply some form of the *Tadić* conditions to establish its jurisdiction.

The current contribution focusses on war crimes, included in Article 8 of the Rome Statute. The following three issues that have been mentioned as potential challenges to the principle of legality will therefore only be mentioned very briefly here and not discussed in detail. First, the ‘catch all’ crime against humanity included in Article 7(1)(k) of the Rome Statute (“Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”) has been identified as potentially problematic. It has, for example, been suggested that this norm does not fulfill the specificity requirement of the principle of legality as included in national legal systems.⁹² Although Pre-Trial Chamber I did not detect a problem when it analysed the legality of Article 7(1)(k), as it considered the other acts to consist of “serious violations of international customary law and the basic rights pertaining to human beings, drawn from the norms of international human rights law, which are of a similar nature and gravity to the acts referred to in article 7(1) of the Statute”,⁹³ the comments made in this chapter do appear relevant to the determination of such violations. Second, the manner in which the provision for the crime of aggression (Article 8*bis* of the Rome Statute) is framed has also been described as “difficult to reconcile with a strict reading of the *lex certa* element of the legality principle”.⁹⁴ Third, it has been observed that “[t]he acts under article 70 (Offences against the administration of the justice) are distinguished as ‘offences’ rather than ‘crimes’”. Arguably, “Article 22 is therefore applicable by its own terms only to the crimes listed under article 5”.⁹⁵ For their part, the ICTY judges considered possible punishment for contempt of court to be implied in the Tribunal’s powers. As mentioned above, this contribution will not address this issue in detail, but it may be observed here that the obligation to respect international human rights law (as mandated by Article 21(3) of the Rome Statute) does require the ICC judges to consider the principle of legality when seised of Article 70 cases.

⁹¹ Arguably, this should also be done when a State Party has not incorporated the Rome Statute into national law and has not ratified the treaty concerned.

⁹² See Robert Heinsch, ‘The Crime of Aggression After Kampala: Success or Burden for the Future?’, *Goettingen Journal of International Law*, 2 (2012), p. 725.

⁹³ *Katanga and Mathieu Ngudjolo* Confirmation Decision, para. 448.

⁹⁴ Kai Ambos, *Treatise on International Criminal Law*, 2 vols. (Oxford University Press, 2014), vol. 2, p. 203.

⁹⁵ Broomhall, ‘Article 22’, p. 723.

It was argued above that the judges at the ICC should apply some form of the *Tadić* conditions to establish its jurisdiction. What these conditions entail, is set out next.

4.1 The *Tadić* conditions

As the designation suggests, the *Tadić* conditions were first applied in the *Prosecutor v. Tadić* case.⁹⁶ In his report to the UN Security Council on the proposed Statute of the ICTY, the UN Secretary-General had stated that “the application of the principle *nullem crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise”.⁹⁷ When faced with challenges to the Tribunal’s jurisdiction in its first case, the Appeals Chamber held that four conditions must be met in order for criminal conduct to fall within the scope of Article 3 of the ICTY Statute.⁹⁸ These conditions, often referred to as the “*Tadić* conditions”,⁹⁹ are as follows:

- (i) the violation must constitute an infringement of a rule of international humanitarian law;
- (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met [...].¹⁰⁰

⁹⁶ By the Appeals Chamber, in the *Tadić* Jurisdiction Decision.

⁹⁷ *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), U.N. Doc. S/25704, 34 (1993).

⁹⁸ Article 3 of the ICTY Statute provides that the Tribunal “shall have the power to prosecute persons violating the laws or customs of war” and lists five types of violations, but specifies that such violations are not limited to this list.

⁹⁹ See, besides the ICTY and ICTR case law, for example, M. Cherif Bassiouni, *International Criminal Law: International Enforcement*, 3 vols. (Leiden: Martinus Nijhoff Publishers, 2008), vol. 1, p. 81; Roberto Bellelli, *International Criminal Justice: Law and Practice from the Rome Statute to Its Review* (Farnham: Ashgate, 2010), p. 305; Human Rights Watch, *Genocide, War Crimes, and Crimes Against Humanity: A Topical Digest of the Case Law of the International Criminal Tribunal for the Former Yugoslavia* (Human Rights Watch, 2010), pp. 55-62.

¹⁰⁰ Here, the Appeals Chamber refers to a later paragraph in the same decision, which states that “the International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law.” (*Tadić* Jurisdiction Decision, para. 143). In *Kordić and Čerkez*, the Trial Chamber took a short-cut and merely held that, as Additional Protocol I had been applicable to the territory of the two States concerned, “whether it reflected customary law at the relevant time in this case is beside the point” (ICTY, *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgment, Trial Chamber, 26 February 2001, para. 167). The Appeals Chamber approved this approach and ruled that “[t]he maxim of *nullem crimen sine lege* is also satisfied where a State is already treaty-bound by a specific convention, and the International Tribunal applies a provision of that convention irrespective of whether it is part of customary international law” (ICTY, *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgment, Appeals Chamber,

- (iii) the violation must be ‘serious’, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim [...];
- (iv) the violation must entail, under customary or conventional law,¹⁰¹ the individual criminal responsibility of the person breaching the rule.¹⁰²

The four conditions have been confirmed and applied by almost all subsequent trial chambers of the *ad hoc* tribunals dealing with violations of IHL not specifically listed in Article 3 of the ICTY Statute or Article 4 of the ICTR Statute.¹⁰³ Furthermore, the Appeals Chamber of the Special Court for Sierra Leone also used the conditions.¹⁰⁴

The first three conditions and the tribunals’ related findings have not been subject to criticism. In assessing whether the fourth condition is satisfied, the Tribunal has analysed whether a certain violation of international humanitarian law was criminalised in a significant number of States,¹⁰⁵ which was not always an easy task.¹⁰⁶ Indeed, the fourth condition has been subject to criticism. It is, however, not the condition itself but rather the conclusions by

17 December 2004, para. 44). In *Galić*, the Appeals Chamber stated that both treaty law and customary law could be relied on. Whilst binding conventional law could prohibit conduct and provide for individual criminal responsibility, “in practice the International Tribunal always ascertains that the treaty provision in question is also declaratory of custom” (ICTY, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgment, Appeals Chamber, 30 November 2006, para. 82).

¹⁰¹ In *Hadžihasanović et al.*, the accused argued before the Appeals Chamber that “the principle of legality requires the existence of a conventional as well as a customary basis for an incrimination”. The Appeals Chamber held that, when customary international law is relied on, there is no need to also find grounding in a conventional law provision because “there is nothing in the Secretary-General’s Report, to which the Statute of the Tribunal was attached in draft, which requires both a customary basis and a conventional one for an incrimination” (ICTY, *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Appeals Chamber, 16 July 2003).

¹⁰² *Tadić* Jurisdiction Decision, para. 94.

¹⁰³ See, e.g., ICTY, *Prosecutor v. Dragoljub Kunarac et al.*, Judgment, Appeals Chamber, para. 66; ICTY, *Prosecutor v. Zlatko Aleksovski*, Judgment, Appeals Chamber, para. 20; ICTR, *Prosecutor v. Jean Paul Akayesu*, Judgment, Trial Chamber, 2 September 1998, para. 611; ICTR, *Prosecutor v. George Rutaganda*, Judgment, Trial Chamber, 6 December 1999, para. 88; ICTR, *Prosecutor v. Alfred Musema*, Judgment, Trial Chamber, 27 January 2000, para. 242.

¹⁰⁴ The Appeals Chamber of the Special Court was seised of a preliminary motion on jurisdiction, in which the defence for Mr Norman argued that child recruitment had not been a crime under customary international law at the time it was allegedly committed. Referring to *nullum crimen sine lege* as a “fundamental element” essential to all legal systems, the Appeals Chamber used the *Tadić* conditions “to ensure that the principle of non-retroactivity is not breached” (SCSL, *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, para. 25 and further. It may be noted, however, that according to Marko Milanovic, rather understatedly, the Special Court’s Appeals Chamber on this point “did not produce one of the most persuasive pieces of judicial reasoning ever”. Milanovic further identifies the challenges the Appeals Chamber was faced with in applying the conditions (Marko Milanovic, ‘Is the Rome Statute Binding on Individuals? (And Why We Should Care)’, *Journal of International Criminal Justice*, 9 (2011), 36).

¹⁰⁵ See, e.g., ICTY, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgment, Appeals Chamber, 30 November 2006, paras. 94-5.

¹⁰⁶ See *ibid.*, Separate and Partially Dissenting Opinion of Judge Schomburg, paras. 8-22.

trial chambers that have been criticised as being “quite prompt in deducing the criminal character of a prohibition”.¹⁰⁷

The *Tadić* conditions were developed to assess the scope of the ICTY’s jurisdiction, but can also be used to show that prosecution for certain crimes does not violate the legality principle. It is not suggested here that these conditions provide the ideal solution to tackle the legality problem in international criminal law. Applying the conditions is nevertheless a form of analysing the legality of prosecution for the alleged crimes concerned. Moreover, the reaction by States and academia to the use of the conditions by the ICTY makes clear that “showing” legality through the application of the conditions is indeed acceptable.

4.2. Application of the Tadić conditions by the ICC

Although the Rome Statute includes a set of war crimes that are customary to a large extent, it also includes crimes that can be considered treaty crimes or whose customary status is debatable in case of a non-international armed conflict. The foregoing is irrelevant when it concerns crimes allegedly committed in the territory a State party, also when committed by citizens of a non-party State,¹⁰⁸ but the customary status of crimes becomes very relevant in the abovementioned situations where crimes are allegedly committed in a non-member State. It would thus make sense for the trial chamber seised of a case involving such a situation first to establish the ICC’s jurisdiction over the alleged crime.

Many authors,¹⁰⁹ and indeed quite possibly also (Pre-Trial) Chambers of the ICC, might pass over this jurisdictional question relatively easily, insofar as they consider the crimes section of the Rome Statute to reflect customary international law. However, whilst many of the crimes listed under Article 8 of the Rome Statute are violations of IHL for which

¹⁰⁷ Guénaél Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford University Press, 2005), pp. 51-2.

¹⁰⁸ See also the International Law Commission consideration in 1994, when presenting its annotated Draft Statute for the ICC, that “if a person commits a crime on the territory of State X, a party on whose territory the treaty is in force, the fact that the State of the accused’s nationality is not a party to the treaty would be irrelevant”. International Law Commission, *Draft Statute for an International Criminal Court with commentaries* (1994), p. 56.

¹⁰⁹ Amongst those who consider the crimes in the Rome Statute to be reflective of customary law is Philippe Kirsch, former chairman of the Rome Conference and the first president of the ICC. See Philippe Kirsch, ‘Customary International Humanitarian Law, its Enforcement, and the Role of the International Criminal Court’, in Larry Maybee and Benarji Chakka (eds), *Custom as a Source of International Humanitarian Law: Proceedings of the Conference to mark the Publication of the ICRC Study ‘Customary International Humanitarian Law’* (New Delhi: ICRC, 2006), p. 80. Others include Gerhard Werle, *Principles of International Criminal Law* (2nd ed., The Hague: T.M.C. Asser Press, 2009), preface; and Herman von Hebel and Darryl Robinson, ‘Crimes within the Jurisdiction of the Court’, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (The Hague: Kluwer Law International, 1999), p. 126.

individual criminal responsibility exists beyond doubt in customary international law,¹¹⁰ there are certain crimes that are not reflective of customary law¹¹¹ – or, at least, not in 1998. Indeed, there has been hesitation, as well as criticism, surrounding the inclusion of particular violations in the list of war crimes of the Rome Statute in the first place.¹¹² Examples include not only the war crime of attacking personnel, installations, material, units or vehicles involved in a peacekeeping mission (Article 8(2)(b)(iii) and (e)(iii)),¹¹³ but also the crime of recruiting child soldiers (Article 8(2)(b)(xxvi) and (e)(vii));¹¹⁴ the crime of enforced pregnancy (Article 8(2)(b)(xii) and (e)(vi));¹¹⁵ and the crime of transferring, “directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies” (Article 8(2)(b)(viii)).¹¹⁶ With respect to the crime of launching an attack that is expected to cause disproportionate collateral damage (Article 8(2)(b)(iv)), it has been argued that the language of the Rome Statute, which in part tracks Additional Protocol I, is not fully

¹¹⁰ The grave breaches of the Geneva Conventions of 1949 listed in Article 8(2) of the Rome Statute are the most obvious example. See, e.g., Natalie Wagner, ‘The development of the grave breaches regime and of individual criminal responsibility by the International Criminal Tribunal for the Former Yugoslavia’, *International Review of the Red Cross*, 85 (2003), 353-81; Jean-Marie Henckaerts, ‘The Grave Breaches Regime as Customary International Law’, *Journal of International Criminal Justice*, 7 (2009), 683-701; and Ken Roberts, ‘The Contribution of the ICTY to the Grave Breaches Regime’, *Journal of International Criminal Justice*, 7 (2009), 743-61.

¹¹¹ Leila Sadat observes that the “delegates were not prepared to accept wholesale that each and every definition adopted was perfectly reflective of custom.” (Leila Sadat, ‘Custom, Codification and Some Thoughts about the Relationship between the Two: Article 10 of the ICC Statute’, *De Paul Law Review*, 49 (2000), 916). William Schabas considers that “while the correspondence with customary international law is close, it is far from perfect”. (William Schabas, *An Introduction to the International Criminal Court*, (4th ed., Cambridge University Press, 2004), p. 28). Similarly, Leena Grover submits that “Articles 6, 7, and 8 of the Rome Statute [...] are not completely exhaustive of custom and may depart from custom in places”. (Leena Grover, ‘A Call to Arms’, 568). The Appeals Chamber of the ICTY shared this view on the customary nature of the Rome Statute, see *Prosecutor v. Anto Furundzija*, Case no. IT-95-17/1-T, Judgment, 10 December 1998, para. 227.

¹¹² See Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press, 2012), p. 60, referring to Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press, 2005), p. 283; Cassese, ‘Preliminary Reflections’, p. 144; and Claus Kress, ‘War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice’, *International Yearbook of Human Rights*, 30 (2000), 107.

¹¹³ Members of a peacekeeping mission are not explicitly protected under any rule of IHL. No such provision is included in major IHL conventions (e.g., the 1949 Geneva Conventions and the 1977 Additional Protocols). Only the 1994 Convention on the Safety of UN and Associated Personnel includes a prohibition to attack such persons. As such, the crime of attacking against peacekeepers was included as “treaty crime” in the Draft Statute that formed the basis for negotiations in Rome (Draft Statute prepared by the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc A/CONF.183/2/Add.1 (1998)). For a discussion about the problematic formulation and questionable protection on IHL, see Ola Engdahl, ‘The Status of Military Personnel in United Nations Peace Operations: Interplay Between the Laws of Peace and War’, in Diana Amnéus and Katinka Svanberg-Torpman (eds), *Peace and Security: Current Challenges in International Law* (Stockholm: Studentlitteratur, 2004), pp. 53-83.

¹¹⁴ See Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, S/2000/915 (Oct. 4, 2000), paras. 17-18.

¹¹⁵ Some states, such as Greece, have chosen not to implement this crime in their national legal system. Although the existence of a persistent objector does not prevent the formation of custom, this shows that at the very least it can be debated whether such conduct would constitute a war crime entailing individual criminal responsibility).

¹¹⁶ See Cassese, ‘Preliminary Reflections’, p. 151.

reflective of customary IHL.¹¹⁷

It is therefore submitted that, where jurisdiction is based on a retroactive application of the Rome Statute,¹¹⁸ the (Pre-)Trial Chamber seised of the case should pronounce on this issue and apply the *Tadić* conditions, or its own ICC version, in order to establish its jurisdiction before dealing with the substance of the case.¹¹⁹ It is submitted that the Court should do so, even in cases where this issue is not raised by the Defence. The appropriate moment for such a pronouncement would appear to be when a Pre-Trial Chamber decides whether to confirm the Prosecution's charges against one or more individuals. The ICC's practice to date shows, however, that this is not being done at that particular stage of the proceedings.¹²⁰ It remains to be seen whether, at a later stage, the Trial Chambers or the Appeals Chamber of the Court will pronounce on this matter.¹²¹

Interestingly, in its confirmation of charges decision in *Katanga and Ngudjolo* dealing with crimes committed on the territory of a State party (i.e. the Democratic Republic of the Congo), Pre-Trial Chamber I recognised the need to assess the status of the vague crime against humanity of other inhumane acts¹²² under customary international law. It held that, in accordance with “the principle of *nullum crimen sine lege* pursuant to article 22 of the Statute, inhumane acts are to be considered as serious violations of international customary

¹¹⁷ For an overview of the various (academic) views on Article 8(2)(b)(iv) of the Rome Statute, see Rogier Bartels, ‘Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials’, *Israel Law Review*, 46 (2013), 292-310.

¹¹⁸ “Retroactive” because, prior to any UN Security Council referral, the Rome Statute was not applicable to the (territory of the) State concerned.

¹¹⁹ Elsewhere, this author made a (less detailed) proposal advocating application of the *Tadić* conditions by the ICC. See Bartels, ‘Proportionality’, 311-314; and Natalie Wagner and Rogier Bartels, ‘Art. 9 Elements of Crimes’, in Paul De Hert *et al.* (eds), *Code of International Criminal Law and Procedure, Annotated* (Ghent: Larcier 2013), pp. 65-6).

¹²⁰ Those Pre-Trial Chambers dealing with cases related to an alleged attack on African Union peacekeepers in Darfur did not pronounce on this issue in their confirmation of charges decisions. It must be said that the Defence in these cases did not raise the issue. See ICC, *Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 8 December 2010; and ICC, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Corrigendum of the “Decision on the Confirmation of Charges”, Pre-Trial Chamber I, 8 March 2011. However, compare ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, Pre-Trial Chamber I, 29 January 2007, paras. 294 – 316, in which Pre-Trial Chamber I did go into the issue of jurisdiction over the alleged conduct – albeit committed on the territory of a State party that had ratified Additional Protocol I.

¹²¹ The issue is not likely to come up in *Banda*, if the trial goes ahead, as the trial is proceeding only on the basis of three contested issues (namely, “i) Whether the attack on the MGS Haskanita on 29 September 2007 was unlawful; ii) If the attack is deemed unlawful, whether the Accused persons were aware of the factual circumstances that established the unlawful nature of the attack; and iii) Whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations.” See ICC, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Decision on the Joint Submission regarding the contested issues and the agreed facts, Trial Chamber IV, 28 September 2011.

¹²² Article 7(1)(k) of the Rome Statute.

law and the basic rights pertaining to human beings, drawn from the norms of international human rights law”.¹²³

Further support for the need to establish at the outset that legality is not at issue can be found in the scholarship of Cassese, who presided over the Appeals Chamber that delivered the 1995 *Tadić* Jurisdiction Decision. Cassese apparently argued for ‘his’ *Tadić* conditions to be used by the ICC when he wrote that, certain war crimes, the Court “would first have to establish (i) whether under general international law such [conduct] [...] is considered a breach of international humanitarian law of armed conflict, and in addition, (ii) whether under customary international law such a breach would amount to a war crime”.¹²⁴ Marko Milanovic holds a similar view. He correctly submits that the substantive part of the Rome Statute “applies only on the basis of territoriality and nationality”, whilst in other cases where the Court has been given jurisdiction – namely, through a referral by the UN Security Council, a declaration by non-party State, or a retroactive acceptance by a State Party – the Rome Statute should be considered “purely jurisdictional”.¹²⁵ As the relevant individuals would have been bound by customary law, but not the Rome Statute, “the Court would need to establish whether the charges indeed conform to custom”. If, like the statutes of other international criminal courts and tribunals, the Rome Statute is viewed as being “purely jurisdictional in nature”, prosecution before the Court would be for violations of customary law only, and the accused should be allowed to challenge the customary nature of the crimes in the Statute.¹²⁶

¹²³ *Katanga and Mathieu Ngudjolo* Confirmation Decision, para. 448.

¹²⁴ Cassese, ‘Preliminary Reflections’, p. 151. It should be noted that Cassese did not limit his observation to situations that involve non-party States. He was also known for his endeavours to humanise IHL by putting forward *lege ferenda* as *lex lata* (see, e.g., Tamás Hoffmann, ‘The Gentle Humanizer of Humanitarian Law: Antonio Cassese and the Creation of the Customary Law of Non-International Armed Conflicts’, in Carsten Stahn and Larissa van den Herik (eds), *Future Perspectives on International Criminal Justice* (The Hague: T.M.C. Asser Press, 2010), pp. 58-80; and Cassese himself in ‘Soliloquy; My Early Years: Hesitating Between Law and Humanities’, in Antonio Cassese (ed.), *The Human Dimension of International Law: Selected Papers of Antonio Cassese* (Oxford University Press, 2008), p. 147). Cassese may therefore well consider this assessment unnecessary in light of (his interpretation of) the current status of customary international law.

¹²⁵ Milanovic, ‘Rome Statute and Individuals’, 51.

¹²⁶ *Ibid.* Marko Milanovic suggests two further possible approaches of relevance to the present discussion that can be taken by the ICC. First, the Court could see the Rome Statute as “both substantive in nature and universal in application”. However, “[a]lthough this option might be attractive because of its simplicity, the claim that a group of states can bind national of other states absent a territorial or any other connection even in respect of crimes which are *not* customary in legally problematic”. As to the other possible approach, namely to see the Rome Statute as “substantive when it comes to nationals of states parties and other persons present in their territories, but as jurisdictional in all other circumstances”, Milanovic’s view is similar to that of the present author, who therefore wholly supports Milanovic’s argument that “to avoid *ex post facto* issues, the Court should in these cases apply customary law, and allow meaningful challenges to the customary nature of the provisions of the [Rome] Statute on which the charges are based”. *ibid.*, at 52.

Michael Scharf, for his part, argues that the *nullum crimen sine lege* principle is not violated when someone is prosecuted for conduct that did not constitute a recognised offence in his or her State of nationality, or even in the State where that person allegedly committed it.¹²⁷ Scharf observes that, irrespective of whether the defendant is a national of a State party to the UN Safety Convention, “the perpetrator cannot seriously argue that he did not know that [...] [attacking] U.N. peacekeepers was a crime”.¹²⁸ The current author acknowledges that the alleged perpetrator’s nationality is indeed irrelevant, as one has to behave in accordance with the laws in force on the territory where one finds him- or herself. For the criminalisation of an act in the State where the act occurred, however, the legality principle is certainly relevant. It is true, as mentioned above and referred to by Scharf, that the judges of the Nuremberg Tribunal stressed that the *nullum crimen sine legem* principle “is not a limitation of sovereignty, but is in general a principle of justice”.¹²⁹ But it is precisely for that reason that the *Tadić* conditions matter: not, e.g., because of Sudan’s sovereignty, but for an accused’s right, as the principle dictates, not to “be held guilty of any criminal offense, under national or international law, at the time when it was committed”.¹³⁰

5. Application of the *Tadić* conditions to the Banda case

5.1 The first two *Tadić* conditions: an infringement of a customary rule of international humanitarian law?

The first two *Tadić* conditions can be analysed together. As a preliminary remark, should be noted that Sudan has not ratified either the Rome Statute or the UN Safety Convention, the two international instruments specifically prohibiting attacking peacekeepers. Therefore, the

¹²⁷ Michael Scharf discusses this issue in the context of treaty-based universal jurisdiction over nationals of non-party States. However, he makes his argument, in part, in (critical) response to the US position (at the time) that the ICC should not be able to prosecute US nationals so long as the US has not ratified the Rome Statute. See Michael P. Scharf, ‘Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States’, *New England Law Review*, 35 (2001), 375. In *Milutinović et al.*, the ICTY Appeals Chamber held that “[d]ue to the lack of any written norms or standards, war crimes courts have often relied upon the atrocious nature of the crimes charged to conclude that the perpetrator of such an act must have known that he was committing a crime. [...] Although the immorality or appalling character of an act is not a sufficient factor to warrant its criminalisation under customary international law, it may in fact play a role in that respect, insofar as it may refute any claim by the Defence that it did not know of the criminal nature of the acts”. ICTY, *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, Appeals Chamber, 21 May 2003, para. 42.

¹²⁸ Scharf, ‘Treaty-Based Universal Jurisdiction’, 375-376.

¹²⁹ Nuremberg Judgment, p. 208, as quoted by Scharf in *ibid.*, 375.

¹³⁰ Article 15 of the International Covenant on Civil and Political Rights.

possibility mentioned in the second *Tadić* condition for a rule to “belong to treaty law”, is not applicable. It has been said that the crimes mentioned in Article 8(2)(b)(iii) and (e)(iii) of the Rome Statute are “rather broad”¹³¹ and that their inclusion “constitutes progress”.¹³² It is further interesting that the crime of attacking civilian objects, as included for international armed conflicts in Article 8(2)(b)(i), was not repeated in the list of war crimes for non-international armed conflicts; presumably due to a perceived lack of customary status at the time.¹³³ Yet, objects involved in a peacekeeping mission were included for both international and non-international armed conflicts. As to the customary status at the time of adoption, Robert Cryer acknowledges that, at first glance, the crime appears “to extend beyond existing customary law”.¹³⁴ In his view, however, this is alleviated by the qualifier that only those entitled to civilian protection are covered by it, which makes it “evident that it is simply a specific illustration of the undisputed prohibition on attacking civilians”.¹³⁵

To the *Banda* case, however, the customary status of the crime in 1998 is less relevant than whether attacks on personnel involved in a peacekeeping mission were prohibited by customary IHL at the time relevant to the charges in 2007; it is the latter issue that needs to be analysed for the purposes of the legality principle. The ICRC carried out an elaborate study to establish what can be seen as customary IHL applicable both in times of international and non-international armed conflict. Its findings were first published in 2005, two years before the attack on Haskanita base, and can thus serve as a useful basis for the present enquiry.

The ICRC Customary IHL Study does conclude that the prohibition to attack peacekeepers had attained the status of customary IHL by the time of its publication.¹³⁶ However, the practice relied on at the time was extremely limited,¹³⁷ and partially incapable of showing customary status. Besides the very crimes included in the Rome Statute discussed in the present chapter, the ICRC refers, for example, to the ICTY’s 1995 initial indictment in

¹³¹ With respect to attacks on objects, the UN Safety Convention requires that such attacks endanger the “person or liberty” of UN or associated personnel (Article 9(1)(b) of the UN Safety Convention). No such requirement is included for the corresponding war crime included in the Rome Statute.

¹³² M-Christiane Bourloyannis-Vrailas, ‘Crimes Against United Nations and Associated Personnel’, in Gabrielle Kirk McDonald and Olivia Swaak-Goldman, *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, 2 vols. (The Hague: Kluwer Law International, 2000), vol. 1, p. 363..

¹³³ Instead, only specific types of objects that were provided protection in Additional Protocol II, were listed.

¹³⁴ Cryer, *Prosecuting International Crimes*, p. 248.

¹³⁵ Cryer, *Prosecuting International Crimes*, p. 248.

¹³⁶ Rule 33 states that “[d]irecting an attack against personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law, is prohibited”.

¹³⁷ It should be noted that the ICRC Customary IHL Study’s original version provides far more limited practice for Rule 33 than it does for most of the other rules.

the *Karadžić and Mladić* case (which was later split into two separate indictments). However, the crimes alleged in that case are not attacks on UN personnel *per se*. Rather, hostage taking and use of human shields constitute war crimes when committed against any protected person, both civilians and persons *hors de combat*.¹³⁸ Here, no special status for peacekeepers is shown. Moreover, by referring to the said indictment, the ICRC Customary IHL Study appears to overlook the fact that, though reviewed, the indictment still merely contains the view of the prosecution, one of the parties to criminal proceedings, and that a chamber at trial has yet to pronounce thereon.

Furthermore, the crime of attacking peacekeepers was one of three treaty crimes included in the Draft Statute.¹³⁹ The International Law Commission had recognised that “in the case of treaty crimes the [legality] principle has an additional and crucial role to play, since it is necessary that the treaty in question should have been applicable in respect of the conduct of the accused which is the subject of the charge”.¹⁴⁰ During the negotiations, there was great reluctance to give the Court jurisdiction over treaty crimes. Some delegations argued that the inclusion of treaty crimes would necessitate a different system for the exercise of jurisdiction, and that, rather than automatically accepting the Court’s jurisdiction over treaty crimes upon becoming parties to the Rome Statute, States should be given the opportunity to make an express declaration to that effect.¹⁴¹

Be that as it may, it is submitted by various authors that an IHL prohibition to attack peacekeepers is merely a specification of the general prohibition to attack civilians, and the duty to make a distinction between those who can be targeted (namely, combatants, fighters and civilians taking a direct part in hostilities) and those who cannot (namely, *persons hors de combat* and civilians not taking a direct part in hostilities).¹⁴² Moreover, the UN Security Council referred to violence against UN peacekeepers as violations of IHL.¹⁴³ In relation to the protection of humanitarian assistance in armed conflicts, for example, the Council expressed “its grave concern at all attacks or use of force against United Nations and other personnel associated with United Nations operations as well as personnel of humanitarian

¹³⁸ See Common Article 3 of the 1949 Geneva Conventions.

¹³⁹ It should be noted that it was a different kind of treaty crime than, for example, drug-trafficking related treaty crimes.

¹⁴⁰ International Law Commission, *Draft Statute*, p. 55.

¹⁴¹ Bourloyannis-Vrailas, ‘Crimes Against UN Personnel’, p. 364. See also Bruce Broomhall’s discussion of the application of the *nullum crimen sine lege* principle to treaty crimes: Broomhall, ‘Article 22’, p. 727-8.

¹⁴² See, e.g., Cryer, *Prosecuting International Crimes*, p. 248; Eric David, *Principes des droit des conflits armés* (4th ed.; Brussels: Bruylant, 2005), p. 182.

¹⁴³ E.g., Statement by the President of the Security Council (19 June 1997), UN Doc S/PRST/1997/34; and Statement by the President of the Security Council (13 September 1994), UN Doc. S/PRST/1994/53.

organizations, in violation of the relevant rules of international law, including those of international humanitarian law”.¹⁴⁴ In addition, one could point to the criminalisation of attacks against peacekeepers by a number of States, as discussed below.¹⁴⁵ These States apparently considered that an IHL prohibition underlies the crime. Note can also be taken of the fact that, by 1998 when the Rome Statute was adopted, only nineteen States had ratified the UN Safety Convention. Yet, in 2007, this number had grown significantly, to 81.¹⁴⁶

Although further research on this topic is warranted, for the purposes of the current contribution, the following conclusion can be made: The inclusion of the crime of attacking peacekeeping personnel and objects in the UN Safety Convention and the Rome Statute, in 1994 and 1998, respectively, may not have declaratory of a mandatory rule of customary international law specifically prohibiting such attacks.¹⁴⁷ However, the subsequent effect of these inclusions on the relevant *opinio juris* and State practice, indicates that by the time of the attack on AMIS base in Haskanita (in 2007), such a rule existed.¹⁴⁸

5.2 The third Tadić condition: Is the alleged violation of the customary rule “serious”?

Not all violations of the laws or customs of war are not sufficiently serious to amount to a war crime. Some rules are “better considered as ‘instruction norms’”,¹⁴⁹ and violating them would attract a disciplinary rather than penal response.¹⁵⁰ Moreover, the material jurisdiction for war crimes of international criminal courts and tribunals has always been over grave breaches of the 1949 Geneva Conventions, if applicable, and “serious violations” of IHL.¹⁵¹ In its *Tadić* Jurisdiction Decision, the ICTY Appeals Chamber held that, in order for an act to qualify as a “serious” violation, “it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance,

¹⁴⁴ Statement by the President of the Security Council (19 June 1997), UN Doc S/PRST/1997/34.

¹⁴⁵ See 5.3 *The fourth Tadić condition: Does customary international law establish individual criminal responsibility for the violation?*

¹⁴⁶ See the overview of ratifications provided by the UN in its United Nations Treaty Collection Database, <<https://treaties.un.org/>>.

¹⁴⁷ As noted above, it has been argued by various authors that the prohibition to attack peacekeeping personnel and objects forms part of the general protection afforded by IHL to civilians. The present conclusion relates to whether a specific rule with regard to peacekeepers existed.

¹⁴⁸ Compare International Court of Justice, *North Sea Continental Shelf Cases*, Judgment, 20 February 1969, para. 81.

¹⁴⁹ Rogier Bartels, ‘Discrepancies Between International Humanitarian Law on the Battlefield and in the Courtroom: The Challenges of Applying International Humanitarian Law During International Criminal Trials’, in Mariëlle Matthee *et al.* (eds.), *Armed Conflict and International Law: In Search of the Human Face* (The Hague: T.M.C. Asser Press, 2013), p. 341.

¹⁵⁰ Mettraux, *International Crimes*, p. 50.

¹⁵¹ In addition to Article 8 of the Rome Statute, see the statutes of the ICTY, ICTR and SCSL.

the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a ‘serious violation of international humanitarian law’¹⁵². If the protected value is of lesser importance, the infringement of that value has to be more serious.¹⁵³ Indeed, trial chambers of the ICTY have dismissed certain acts on the ground that they are not serious enough with respect to protected property.¹⁵⁴

The protected value, namely the life and physical integrity of members of a peacekeeping mission, and the consequences for the victims,¹⁵⁵ is sufficiently serious to fulfil the third *Tadić* condition.¹⁵⁶ However, because the chapeaux of Article 8(2)(b), (c) and (e) of the Rome Statute already include the requirement that the violations of the laws and customs of war and Common Article 3 of the 1949 Geneva Conventions be “serious”,¹⁵⁷ it could even be argued that there is no need for a separate assessment of the third *Tadić* condition.¹⁵⁸ Following this reasoning, any war crime that would be charged pursuant to Article 8 of the Rome Statute already has fulfilled this very requirement.

This leaves the question whether in certain cases a particular conduct that would qualify as behaviour criminalised in the Rome Statute, could in particular circumstances be considered to be *de minimis* and as such not reaching the seriousness required for it to fall under the Court’s material jurisdiction over war crimes. Furthermore, Article 8(1) of the Rome Statute sets another threshold, as it grants the Court jurisdiction over war crimes “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crime”. This phrase found its way into the Rome Statute as a compromise between the United States, which wanted to set the threshold very high for the Court’s jurisdiction

¹⁵² *Tadić* Jurisdiction Decision, para. 94.

¹⁵³ Mettraux, *International Crimes*, p. 50.

¹⁵⁴ See ICTY, *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, Decision on motion for acquittal, Trial Chamber, 3 July 2000, paras 15-16, in which the Trial Chamber acquitted the accused of the crime of plunder, as the taking of property of only some persons was not sufficiently serious; and ICTY, *Prosecutor v. Mladen Naletilic and Vinko Martinovic*, Case No. IT-98-34-T, Judgment, Trial Chamber, 31 March 2003, paras 613 and 617, supporting the *Kunarac* Trial Chamber’s approach; see, however, also ICTY, *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgment, Appeals Chamber, 24 March 2000, paras 29-38, in which the Appeals Chamber dismissed the accused’s ground of appeal that the violence employed against detainees did not qualify as outrages upon personal dignity. See, however, ICC, *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Jugement rendu en application de l’article 74 du Statut, 7 March 2014, paras. 908-10.

¹⁵⁵ *Banda*, for example, concerns the death of twelve persons and severe eight were severely injured.

¹⁵⁶ Compare, e.g., ICTR, *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, Trial Chamber, para. 616; and ICTR, *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgment, Trial Chamber, paras. 370-1. Whether, for example, the alleged pillage of mobile phones would also pass the threshold is debatable, but this contribution only deals with the attacking of peacekeepers and/or their matériel.

¹⁵⁷ Respectively, “[o]ther serious violations of the laws and customs applicable in international armed conflict”, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949”, and “[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character”.

¹⁵⁸ In this regard, it can be noted that Article 4 of the Statute of the Special Court for Sierra Leone refers to intentionally directing attacks against peacekeepers and their material as a “serious violations” of IHL.

over war crimes, and most of the other delegates at the Rome conference, who wanted no such limitation.¹⁵⁹ The wording “in particular” appears to serve as guidance for prosecutorial policy and is not an absolute requirement.¹⁶⁰ Although the manner and scale in which a violation was carried out, as well as its repeated nature, if applicable, have been mentioned as factors relevant to the assessment of the third *Tadić* condition,¹⁶¹ the guidance included in Article 8(1) is part of a different assessment than the one that has to be made under the third condition. It is submitted here that the “gravity” assessment as part of the *Tadić* conditions is a different one aforementioned gravity assessment at the Court. Under the former the impact of certain conduct should be analysed in an objective, non-case specific way, in order to examine whether that conduct as such would impact on important values and have grave consequences for victims, not just in that specific case, but for all similar occurrences of that conduct.

5.3 The fourth Tadić condition: Does customary international law establish individual criminal responsibility for the violation?

As described above, the findings on the fourth *Tadić* condition have been subject to criticism at the *ad hoc* tribunals.¹⁶² However, those violations scrutinised by ICTY and ICTR chambers dealt with acts committed mainly between 1991 and 1995, at a time when most States had only just started to ratify the 1977 Additional Protocols. Moreover, the Rome Statute had not yet been adopted. National legislation incorporating the Rome Statute (and the crimes contained therein) had therefore not yet been passed. At the time of the attack on Haskanita base, the situation was very different.

By 2007, no less than sixteen States had included attacking members of a peacekeeping operation as a specific offence in their national criminal legislation.¹⁶³ An additional three States passed such legislation a year later and can thus reasonably be expected to have been in the process of enacting such a provision into their criminal laws in

¹⁵⁹ Schabas, *Commentary on the Rome Statute*, pp. 259-61.

¹⁶⁰ Compare Cryer, *Prosecuting International Crimes*, p. 268; see also Prosecutor of the ICC, *Article 53(1) Report on the Situation on Registered Vessels of Comoros, Greece and Cambodia* (6 November 2014), paras 23 and 137.

¹⁶¹ Mettraux, *International Crimes*, p. 51.

¹⁶² See 4.1 *The Tadić conditions* (above).

¹⁶³ Australia, Azerbaijan, Belgium, Burundi, Croatia, Georgia, Germany, Iraq, Mali, The Netherlands, New Zealand, Serbia, South Africa, Trinidad and Tobago, United Kingdom, and Uruguay (as listed in the national legislation section of the ICRC Customary IHL Study’s “Practice Relating to Rule 33”).

2007.¹⁶⁴ Various other States had passed implementing legislation that incorporated the war crimes mentioned in the Rome Statute by reference.¹⁶⁵ Interestingly, Sudan itself included in its Armed Forces Act, which entered into force on 5 December 2007, a few months after the attack on the Haskanita base, that “there shall be punished [*sic*], with imprisonment, for a term, not exceeding ten years, whoever intentionally launches attacks, against officials, employees, facilities, materials, units or vehicles used in the missions of [...] keeping international peace, as long as they are entitled to protection, provided for civilians and civilian posts [...]”.¹⁶⁶

The *Galić* Appeals Chamber of the ICTY was criticised for relying, by majority, on an “extraordinarily limited number” of States to find that “numerous” States had criminalised the relevant violation of IHL. As dissenting Judge Schomburg observed at the time, it may indeed be “doubtful” whether four States having explicitly penalised the relevant behaviour qualified as “‘extensive and virtually uniform’ state practice on this matter”.¹⁶⁷ By contrast, for the crime of attacking members of a peacekeeping operation, the number of States that explicitly penalise it is significantly higher than that accepted by the majority of the *Galić* Appeals Chamber.

In assessing the fourth condition, one may further take into account, *inter alia*, a clear intent of the international community to criminalise the relevant conduct.¹⁶⁸ It appears that a substantial part of the States making up the international community expressed an intent to criminalise attacks against peacekeepers by drafting, and subsequently ratifying, the UN Safety Convention, and by including Article 8(2)(b)(iii) and (e)(iii) in the Rome Statute. As regards attempts to punish attacks on peacekeepers, the SCSL dealt with such attacks as a separate crime in the *RUF* case.¹⁶⁹ Moreover, by 1997 – that is, before the entry into force of the UN Safety Convention – the Security Council not only demanded generally that States

¹⁶⁴ Finland, France and Norway (see the national legislation section of the ICRC Customary IHL Study’s “Practice Relating to Rule 33”). Sudan criminalised attacking members of a UN established peace operation on 5 December 2007.

¹⁶⁵ E.g., Canada and the Democratic Republic of Congo.

¹⁶⁶ Translation of Section 156 of the Sudan Armed Forces Act 2007, available on the UNHCR’s database at <<http://www.refworld.org/docid/4c037f1d2.html>>. This change in Sudanese law may have been triggered by a Status of Forces Agreement or Memorandum of Understanding between the African Union and Sudan about the conditions to be put in place for the AMIS peacekeeping mission.

¹⁶⁷ ICTY, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgment, Separate and Partially Dissenting Opinion of Judge Schomburg, 30 November 2006, para. 10. Judge Schomburg pointed out that another two States referred to in the *Galić* Appeals Judgment (i.e. Norway and Switzerland) had not incorporated the relevant behaviour as a separate crime in their national legislation, but “only generally” referred to breaches of the 1977 Additional Protocols.

¹⁶⁸ Mettraux, *International Crimes*, p. 51, referring to Hersch Lauterpacht, ‘The Law of Nations and the Punishment of War Crimes’, *British Yearbook of International Law*, 21 (1944), 74-5.

¹⁶⁹ The *RUF* case, or *Prosecutor v. Issa Hassan Sesay et al.* (SCSL-04-15-T).

“act promptly and effectively” to “prosecute and punish all those responsible for attacks and other acts of violence” against UN personnel,¹⁷⁰ but also directly addressed individual States to do so.¹⁷¹

One can therefore conclude that, in 2007, the violation in question entailed, under customary international law as applied by the *ad hoc* tribunals, the individual criminal responsibility of the person breaching the rule.¹⁷² All four *Tadić* conditions are thus met for the crime of attacking members of a peacekeeping operation at the time of the attack on Haskanita base on 29 September 2007.

6. Concluding remarks

This chapter has shown that UN Security Council referrals may cause tension with the principle of legality, specifically the *nullum crimen sine lege* maxim, as the *Banda* case illustrates. The analysis of the *Tadić* conditions demonstrates that it is reasonable to consider that the alleged (international) criminal conduct by the accused was, at the time of its commission, a serious violation of international humanitarian law for which individual criminal responsibility arose. In so far as one is willing to accept that the application of the *Tadić* conditions forms an acceptable method with which to verify the legality of prosecution before the Court (or under international criminal law in general), the *Banda* case contains no apparent violation of *nullum crimen sine lege*. Of the various treaty crimes included in the Rome Statute, the crime of attacking members of a peacekeeping operation perhaps has the most questionable customary status. The above discussion has nevertheless shown that this crime had attained customary status in 2007 (at the time of its alleged commission in *Banda*). One may wonder then, whether there is any real problem left – especially given the fact that

¹⁷⁰ See Note by the President of the Security Council (31 March 1993), UN Doc S/25493 (1993); Statement by the President of the Security Council (19 June 1997), UN Doc S/PRST/1997/34. According to M-Christiane Bourloyannis-Vrailas considers that the Security Council with the latter statement that characterised attacks on UN personnel as violations of IHL and reminded States of the need to bring to justice those who violate IHL. In her view the Security Council “made clear that, even when the [UN Safety Convention] was not yet in force, there already existed rules of international law under which persons may be liable to punishment for acts of violence against United Nations and associated personnel”. Bourloyannis-Vrailas, ‘Crimes Against UN Personnel’, pp. 356-7.

¹⁷¹ For example, in 1995, when attacks by Croatian armed forces resulted in the death of three UN peacekeepers, the Security Council demanded that “the Government of the Republic of Croatia fully respect the status of United Nations personnel, refrain from any attacks against them, bring to justice those responsible for any such attacks [...]” S/RES/1009 (10 August 1995), para. 6.

¹⁷² Fulfilling the fourth *Tadić* condition to the ‘standard’ applied by the *ad hoc* tribunals does not necessarily mean that indeed individual criminal responsibility for the violation concerned existed under customary international law. It is, however, a way to assess whether this was the case.

there are no further Security Council referrals that appear to relate to parts of Rome Statute that are of doubtful customary status.

The main reason for conducting the proposed enquiry involving the application of the *Tadić* conditions in cases before the Court is not because there is a tangible risk of breaching the principle of legality. Rather, an institution established to bring justice, and bound by “internationally recognized human rights”,¹⁷³ should not simply presume that its process is in compliance with the principle of legality; it should, in fact, assess whether this is indeed the case and, if so, make an explicit finding to that extent. Only then – where there is no doubt as to the legality of convictions – will the Court be able to perform in such a manner as to achieve the legitimacy¹⁷⁴ it strives for.

¹⁷³ Article 21 of the Rome Statute.

¹⁷⁴ See *Preliminary remark* (above).