Enforcement of the Cooperation Obligation with the ICC for the Accountability under International Criminal Law

by Dikran M. Zenginkuzucu[*]

ABSTRACT: International criminal law is a forceful response of the international community to the commission of grave violations of humanitarian law. On the other hand, the effectiveness and accountability mechanism of the ICC may be put in jeopardy because of the unwillingness of non-member states to cooperate with the warrant of arrest decisions issued by the Court. The extent of *ratione personae* immunity of the higher officials and representatives of non-member states is also a potential ban of the ICC jurisdiction. This article argues that the obligation of cooperation, including the surrender and the transfer of the accused persons, is binding upon all states in case of a referral by the UNSC and this obligation covers the non-states parties to the ICC even if the accused possesses *ratione personae* immunity. The conclusion relies on an analysis of the requirements on the effects of a referral by the UNSC and the character of the crimes under the jurisdiction of the ICC.

KEYWORDS: ICC; *Jus Cogens*; Obligation *Erga Omnes*; State Cooperation; UNSC Referral.

I. Introduction

On 31 March 2005, the United Nations Security Council (UNSC) referred alleged genocide, war crimes, and crimes against humanity committed in Darfur, Sudan since 1 July 2002 to the International Criminal Court (ICC)[1]. Accordingly, the office of the prosecutor opened an investigation in June 2005 and issued two warrants of arrest against Sudan's former President Omar Al Bashir on 4 March 2009[2] and 12 July 2010.[3] However, neither of the two warrants of arrest has been enforced until today, which means the suspension of the proceedings, till he is in the court custody. In the meanwhile, Al Bashir visited several states parties to the ICC including Chad, the Democratic Republic of the Congo, Djibouti, Malawi, and Uganda. The ICC requested the Republic of South Africa to arrest Al Bashir and surrender him to the ICC while he was on its territories from 13 – 15 June 2015 to attend 25th African Union Summit. However, South Africa did not comply with the Court's request. Despite the Pre-Trial Chamber of the ICC concluded that South Africa acted against its duties under Rome Statute, it refrained from referring South Africa to the Assembly of States Parties (ASP) and to the UNSC as South Africa had invoked the Court and engaged in consultation on its international obligations, and subsequently it had accepted its duty to cooperate with the Court.[4] Furthermore, Al Bashir visited in April 2016 to attend a Summit of Organization of the Islamic Cooperation held in Istanbul. The prosecutor of the ICC requested this time Turkey to arrest and surrender the

[*] Assistant Professor Dr., Istanbul Esenyurt University, Department of Political Sciences and International Relations (Turkey).

[1] UNSC, Res 1593, (Mar. 31, 2005).

[2] ICC, Situation in Darfur, Sudan, ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir of Pre-Trial Chamber I (Mar. 4, 2009).

[3] ICC, Situation in Darfur, Sudan, ICC-02/05-01/09-95, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir of Pre-Trial Chamber I (July 12, 2010).

[4] ICC, Twenty-sixth report of the prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1593 (2005), (Dec. 12, 2012), para. 9, pp. 2-3.

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accused President, however, Turkey's President declared that Turkey rejected to cooperate with the ICC, and he found this request "ridiculous".[5] The prosecutor of the ICC, on the other hand, has not taken any step against Turkey as she is not a member state to the ICC. Finally, the Former Sudan President attended to the Summit of the League of Arab States in Amman, Jordan in March 2017, however, Jordan authorities refrained again from the enforcement of the warrants of arrest. The Pre-Trial Chamber decided to refer Jordan to the ASP and to the UNSC, however, the Appeals Chamber reversed this decision concluding that the Pre-Trial Chamber's exercise of discretion was erroneous.[6]

International criminal law (ICL) refers to grave crimes that are internationalized by the international community. These are basically the crime of genocide, systemic and widespread crimes against humanity, grave violations of humanitarian law including war crimes, as well as the crime of aggression. International crimes are the crimes committed against the international community as a whole and its fundamental values. The ICC is indisputably a milestone in the attempts on the accountableness of the gravest international crimes. The consent of states parties constitutes a standing point of the jurisdiction of international judicial organs; however, lack of consent or unwillingness to cooperate with the Court of a concerned state could have a paralysing effect as it may be deduced from the example of *Al Bashir case*. Furthermore, solely the states parties to the Rome Statute establishing the ICC are bound with the cooperation obligation with the Court. In that respect, this article evaluates the question on the responsibility of the international community (here the community of sovereign states and their agents) on the international criminal jurisdiction of the ICC, especially in the cases referred by the UNSC. This discussion neglects the indisputable moral responsibility of the international community, focusing on the substantive aspect of the ICL. In this context, the next part will summarize the principles and development of ICL and outline the roots of ICC. Thereafter, the basis of jurisdiction of the ICC and the obligation of cooperation with the Court will be taken into consideration. Therein, the competence of the UNSC to refer a case to the ICC and associatively the obligation of cooperation of the states with the Court will be discussed in different aspects.

II. A Brief Overview on the Fundamentals and History of International Criminal Law

It is obvious that unexceptional and powerful cooperation of the international community is a vital element for the non-negligible effectiveness of the Court and accountableness before ICL. Especially when the respondent of a criminal case is a higher state representative, the states have a strong fond of protecting *ratione personae* immunities (personal immunities) and abstain from fulfilling the requirements of warrants of arrest. In international law, "personal immunity" provides its beneficiary with an absolute inviolability and exemption of prosecution, arrestation, detention, or expulsion regardless of the nature of the charges. Personnel immunity of the state's representatives is hypothetically based on the principle of sovereignty and equality of sovereignty equality of states and is granted to a limited list of state representatives such as heads of states or governments as well as ministers of foreign affairs. As a matter of fact,

[5] Hilal Kaplan, *Erdoğan: Bizden Ömer El Beşir'i tutuklamamızı istediler*, Sabah, (Dec. 28, 2017), www.sabah.com.tr/gundem/2017/12/28/erdogan-tutuklayin-dediler-gulduk-gectik> accessed Oct.16, 2020.
[6] ICC, Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09 OA2, Appeal Chamber (May 6, 2019), para. 216.

international customary law[7] as well as 1961 VDRC[8] are evidently not recognizing "personal immunities" for the purposes of personal benefits but in order to safeguard international goods and values by facilitating international relations, and only to the persons who represent the sovereignty and equality of their states in order to maintain channels of communication between nations.[9]In this context, the international community is challenged by a need of balancing between "competing" international goods, concretely preserving "personal immunities" on one hand and fighting against the impunity of international crimes on the other.[10] In this regard, while defending robustly the personal immunities of the foreign state's high representatives, the international community shall not neglect the accountableness of the commission of international crimes against itself. Then, the personal immunity recognized by the international community shall extend as far as it is serving against the values and fundamentals of the international community as the judges of Nuremberg International Military Tribunal observed:

> The principle of International Law, which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by International Law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.[11]

The subject matter of ICL is the accountability of the gravest international crimes. In the trials of Nuremberg Tribunals, every person is considered accountable for his/her criminal acts against such grave crimes against the international community as Showcross argued:

> as we submit that each of these men is guilty of countless war crimes… those who are behind the state, are entitled to rely on the metaphysical entity which they create and control when by their directions that state sets out to destroy that very comity on which the rules of international law depend.[12]

However, those persons who claim personal and absolute immunity are not liable to be prosecuted by national courts. Then, for the purpose of criminal prosecution of an incumbent state representative sheltered behind the personal immunity, the International Court of Justice (ICJ) suggested the international criminal courts.[13]

The international humanitarian law and human rights law require each state to criminalize and prosecute such international crimes against the "international community as a whole" is more appropriate in their domestic law. However, once domestic criminal jurisdiction is deficient in the prosecution of such grave crimes, national authorities must enter cooperation

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[7] ICJ, Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Rep. 3, Judgement (Feb. 14, 1982), para. 51–3, available at <www.icj-cij.org/public/files/case-related/121/121-20020214-JUD-01-00-EN.pdf> accessed Nov. 1, 2020.

[8] UN, Vienna Convention on Diplomatic Relations (adopted on Apr. 18, 1961, entered into force on Apr. 24, 1963), vol. 500, UNTS 95, Preamble paras 2-4.

[9] Steffen Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case'European Journal of International Law, Vol.13, Issue 4, Sep. 2002, at 877-879.

[10] ROBERT CRYER ET AL., INTERNATIONAL CRIMINAL LAW (CUP 2007) at 422.

[11] *Judgement of the Nuremberg International Military Tribunal* (Oct. 1, 1946) in THE TRIAL OF GERMAN MAJOR WAR CRIMINALS. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22, (Aug. 22, 1946 to Oct. 1946), at 56, availabre at <crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf> accessed Sep. 14, 2020.

[12] UNGA, Doc. A/CN. 4/5, The Charter and judgment of the Nuremberg Tribunal – History and analysis: memorandum submitted by the Secretary-General (March 3, 1949) at 41 available at <www.cininas.lt/wp-content/uploads/2015/06/1949_UN_ILC_N_statuto_koment.pdf> accessed Sep. 22, 2020.

[13] ICJ, Case Concerning Arrest Warrant, *supra* note 7, para 61, at 26.

with the international criminal courts.[14] In this jurisdictional cycle, isolated attempts in domestic sphere on the enforcement of the ICL has generally failed due to several reasons; first of all, ICL has in essence a transboundary character, secondly domestic regulations are generally insufficient to identify and prosecute such crimes, and finally many states are reluctant to prosecute their nationals for committing such crimes. In that respect, Bridge underlined that dissuasiveness and enforcement of ICL depend on the establishment of an international mechanism; "trying international criminals before municipal courts is haphazard, unjust and militates against the development of universal criminal law. The administration of ICL will only become systematic, just and universal when the organ of its administration is a permanent international criminal court".[15]

For a long time, the historical attempts to internationally prosecute and punish gross and grave human rights abuses and systematic violations during or related to an armed conflict and threatening international community have failed –or rather have not aimed to- establish a permanent international penal law and judicial mechanism.[16]Nuremberg International Military Tribunals was established following the end of WWII by the victorious Allied States with an agreement signed on 8 August 1945 in London.[17] for the trial and punishment of the major war criminals of the European Axis countries whether as individuals or as members of organisations, committed any of the crimes listed in Article 6 of the Charter, namely crimes against peace, war crimes and crimes against humanity. Furthermore, an International Military Tribunal for the Far East known as Tokyo Tribunal was established for the trial and punishment of war crimes and crimes against humanity committed by Japanese forces during WWII.[18]It is quite obvious that Nuremberg and Tokyo trials had a significant contribution to the development of ICL, especially in the sense of subject matter[19] and on the establishment of the principle of personal responsibility on their conduct of war.[20]The deadlock of inter-state communication and cooperation during the Cold War devoiced ICL[21], on the other hand, new activities and mobilization in international relations after the Cold War lead the international community in its struggle against the impunity of grave humanitarian crimes. In this context, a new breakthrough came in 1993 and 1994 with the establishment of the two *ad hoc* criminal tribunals respectively for the former Yugoslavia and Rwanda.[22] The main difference of the new *ad hoc* tribunals was their basis of establishment. Both International Criminal Tribunal for the

[14] Antônio Augusto Cançado-Trinidade, *Complementarity between State Responsibility and Individual Responsibility for Grave Violations of Human Rights: The Crime of State Revisited* in MAURIZIO RAGAZZI (ed.), INTERNATIONAL RESPONSIBILITY TODAY. ESSAYS IN MEMORY OF OSCAR SCHACHTER (Martinus Nijhoff ed., 2005) at 258 – 260.

[15] John W. Bridge, *The Case for an International Court of Criminal Justice and the Formulation of International Criminal Law,* 13(4) ICLQ (1964), at 1255, 1281

[16] For a detailed review, Georg Schwarzenberger, *International Law: As Applied by International Courts and Tribunals,* vol 1 (Stevens & Sons 1968), at 462-466; Kevin John Heller and Gerry Simpson, *The Hidden Histories of War Crimes Trials* (OUP 2013).

[17] UN, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, (Aug. 8, 1945), available at <www.refworld.org/docid/3ae6b39614.html> accessed Sep. 22, 2020.

[18] ILIAS BANTEKAS & SUSAN NASH, INTERNATIONAL CRIMINAL LAW, (Cavendish, 2nd edn 2003), at 334-335.

[19] Heller, *supra* note 16, at 179-250.

[20] GIDEON BOAS, JAMES L. BISCOFF & NATALIE L. REID, ELEMENT OF CRIMES UNDER INTERNATIONAL LAW (CUP 2009) 2007.

[21] Frédéric Mégret, *The Politics of International Criminal Justice*, 13(2), EJIL 1261 (2002), at 1261-2.

[22] Jelena Pejic, *Accountability for International Crimes: From Conjecture to Reality*, 84(845) IRRC (2002), at 13-15.

Former Yugoslavia (ICTY)[23] and International Criminal Tribunal for Rwanda (ICTR)[24] were established by a resolution of the UNSC relying on its competence set forth in Article 41 of the UN Charter which grant a power to take necessary peaceful measures at its discretion in order to maintain and restore international order.[25]As the establishment of the ICTY and ICTR were based on UNSC resolutions, the Statutes and procedures of the *ad hoc* criminal tribunals had binding effects upon all UN member states. This responsibility of the UN member states and even non-member states encompassed cooperation obligation with the Tribunals.[26]The cooperation with the Tribunal shall be prompt and shall cover the identification and location of criminals, victims as well as witnesses, the taking of testimony and the production of evidence, the service of documents, the arrest or detention of accused persons and the surrender or the transfer them to the Tribunal.[27] In this regard, when an arrest warrant was issued by the Tribunals or a transfer order for a witness was transmitted, all UN member states are under responsibility to act promptly to ensure proper execution thereof.[28]As judge Antonio Cassese underlined in an interim decision dated 3 April 1996 given in the *Blaškić case*, all states were under a peremptory obligation of complying with the Tribunal's orders and requests, including the execution of arrest warrants.[29] This specific obligation derives in general from the binding force of the UNSC decisions under Chapter VII of the UN Charter and specifically from SC Resolution 827 (1993) under which UNSC "decides that all states shall cooperate fully with the International Tribunal and its organs... and that consequently all states shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute including the obligations of states to comply with requests for assistance or orders issued by a Trial Chamber".[30]

Despite several critics and discussions on the establishment and basis of jurisdiction, Nuremberg and Tokyo Tribunals, as well as the ICTY and ICTR have undoubtedly ***contributed*** significantly on the development of ICL, especially in terms of personal accountableness of

[23] UNSC Res. 827 (May 25, 1993) UN Doc S/RES/827. ICTY is established for the investigation and prosecution of persons for serious violations of international humanitarian law including grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide and crimes against humanity committed in the territory of the former Yugoslavia since 1991, arts. 2-5 ICTYSt..

[24] UNSC Res. 955 (Aug. 8, 1994), UN Doc S/RES/955. ICTR is established to prosecute persons responsible for serious violations of international humanitarian law including genocide, crimes against humanity, violations of art.3 common to the Geneva Conventions and of Additional Protocol II, ICTRSt. arts. 1-4.

[25] Danesh Sarooshi, *The Powers of the United Nations Criminal Tribunals* 7(1), UNYB 141 (2002), 143-147.

[26] ICTY St., art. 29(1), art. 28(1), provide that "states shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law".

[27] RACHEL KERR, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: AN EXERCISE IN LAW, POLITICS, AND DIPLOMACY (OUP 2004), at 128-129.

[28] Rule 56 ICTY RPE; Rule 56 ICTR RPE. Under Security Council, SC Res. 827 (1993) para 4, UNSC "decides that all states shall cooperate fully with the International Tribunal and its organs... and that consequently all states shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute including the obligations of states to comply with requests for assistance or orders issued by a Trial Chamber". See also Security Council, SC Res. 955 (1995) establishing ICTR also contains almost the same phrase envisaging a full co-operation of all states with the Tribunal (see para 2). See Decision on the motion of the defence filed pursuant to Rule 64 of the Rules of Procedures and Evidences, Blaškić case (Decision) IT-95-14/00-T (3 April 1996), para 8; "attention should be drawn to the inherent nature and content of the for states to comply with the Tribunal's orders and requests… obligation all states have been unquestionable obligation to enact any implementing legislation necessary to permit them to execute warrants and requests of the Tribunal".

[29] Blaškić case, *supra* note 28, para 8.

[30] UNSC, Res. 827, (1993) para 4; UNSC, Res. 955, (1995) para 2.

grave violation of international humanitarian law, and finally opened the door for a permanent international criminal court.

III. Establishment and Jurisdiction of the ICC

A. Establishment of the ICC

The experiences of *ad hoc* criminal tribunals led to the idea of the establishment of a permanent world criminal court and the attempts of the UN International Law Commission (ILC) resulted with the creation of the ICC in a UN Diplomatic Conference held in Rome between 15 June – 17 July 1998 with the attendance of 160 states and a number of international organizations. The Rome Statute establishing the first permanent international criminal tribunal, namely the ICC, was adopted on 17 July 1998 by the vote of 120 states to 7 with 21 abstentions and entered into force on 1 July 2002.[31] As affirmed in the Preamble of the Rome Statute "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing *international cooperation*".[32] The Preamble of the Statute underlines the ICC's complementary role, emphasizing the primary role of national criminal jurisdiction.[33] However, the ICC has jurisdiction over the most serious crimes against international community as a whole and is "[r]esolved to guarantee lasting respect for and the enforcement of international justice".[34] The complementary role of the ICC on national criminal jurisdictions assuring the most horrific atrocities does not remain unpunished has two grounds. First, the ICC has jurisdiction over grave international crimes if the concerned state is unwilling or incapable of investigating, prosecuting, and trying suspected criminals. Secondly, ICC's jurisdiction over most serious crimes against international community has a corrective effect as involving in case of improper prosecution or unduly delays of national jurisdictions intending to shield those who are perpetrators and responsible for grave international crimes. Finally, the principle of complementarity reaffirms that the national juridical systems hold the principal responsibility for trying the perpetrators of international crimes within their jurisdiction. However, the possibility of an ICC's substitution of a failure in national level for the prosecution and punishment of such grave crimes against all humanity has a vital concern to the maintenance of international order and survival of international community.

B. Cooperation of States Parties

The ICC, not being a supra-national body with its military or police force, relies primarily on members of international community[35]. Article 86 Rome Statute provides that "states parties

[31] Rome Statute of ICC, UN Doc A/CONF.183/10, Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, (June 17, 1998) available at <legal.un.org/icc/statute/finalfra.htm> accessed Oct. 20, 2020.
[32] emphasis added.
[33] CARSTEN STAHN, A CRITICAL INTRODUCTION TO INTERNATIONAL CRIMINAL LAW (CUP 2019), at 225-30; Gerry Simpson, *Politics, Sovereignty, Remembrance*, in THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES (D. McGoldrick, P. Rowe & E. Donnelly eds., 2004), at 55-56.
[34]Rome Statute of the ICC, Relations (adopted July 17, 1998, entered into force July 1, 2002) 2187 UNTS 3 (here in after "RomeSt."), Preamble.
[35] Adele E. Erasmus, *Revisiting Schwarzenberger Today: The Problem of an International Criminal Law* 16(3) SACJ 393 (2003), at 409-410.

shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court". This general requirement includes, among others, arrestation of accused persons and surrendering them to the Court, as well as collecting and sharing evidence and serving supporting documents. In that respect, one may easily argue that the success of the Court is determined by the level of cooperation it receives from international community[36] but mainly from states.[37] As an international court established by a treaty, the provisions on the cooperation are binding over solely states parties as it is mentioned in Article 88 Rome Statute, which provides that all states parties shall ensure available procedures under their national law for all of the forms of cooperation envisaged in the Statute. Correspondingly, all states parties shall comply with a request for the arrest and surrender transmitted by the Court together with supporting materials.[38] This general requirement is supplemented by the ICC's Rules of Procedures and Evidence.[39] Furthermore, states parties shall cooperate with the Court upon a request for the identification and whereabouts of the persons and locations of items, the takings and production of evidences and testimonies including expert opinions and reports, the questioning of any person, the service of any documents including judicial decisions, exhuming and examining places or sites, executing searches and seizures and others as appeared as a long list in Article 93(1) Rome Statute within their jurisdiction.[40] The most important form of cooperation is arrestation and surrendering of accused persons. If a member state does not comply with a cooperation request by the Court, the Court has the authority to address this situation to the ASP, or where the case is referred by the UNSC, to the UNSC.[41] However, non-member states have no responsibility for cooperation with the Court under Rome Statute unless they enter into voluntary cooperation within the limits determined by themselves. Where a non-member state enters voluntarily into a special arrangement of cooperation with the Court, any non-compliance

[36] In addition to states, the ICC may cooperate also with IGO's and INGO's (arts. 2, 15(2), 44(4), 54(3)(c), 87(1)(b) RomeSt.). See Best Practices Manual for United Nations – International Criminal Court Cooperation pursuant to The Relationship Agreement between the United Nations and the International Criminal Court and General Assembly resolution 58/318, UNGA Res. 58/318 (Sep. 13, 2004) at 4 available at <archive.iccnow.org/documents/GA Resolution UN-ICC. 13Sept04.pdf> accessed Nov. 6, 2020.

[37] Valerie Oosterveld, Mike Perry & John McManus, *The Cooperation of States with the International Criminal Court*, 25(3), FORDHAM INTERNATIONAL LAW JOURNAL 767 (2001), at 767-768.

[38] Art. 89(1) RomeSt.

[39] Official Records of the Assembly of States Parties to the Rome Statute of the ICC, first session, New York, 3-10 Sep. 3-10, 2002, ICC-ASP/1/3 and Corr.1 as amended, available at <www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf> accessed Aug. 20, 2020.

[40] art. 93/1 RomeSt. sets out some additional forms of cooperation as follows:
(a) The identification and whereabouts of persons or the location of items;
(b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;
(c) The questioning of any person being investigated or prosecuted;
(d) The service of documents, including judicial documents;
(e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;
(f) The temporary transfer of persons as provided in paragraph 7;
(g) The examination of places or sites, including the exhumation and examination of grave sites;
(h) The execution of searches and seizures;
(i) The provision of records and documents, including official records and documents;
(j) The protection of victims and witnesses and the preservation of evidence;
(k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and
(l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation.

[41] Art. 87(7) RomeSt.

with the cooperation request of the Court may be reported to the ASP or, where the case is referred by the UNSC, to the UNSC.[42]

C. Referral of a Situation to the Court

A situation which may fall into the jurisdiction of the ICC can be referred to the Court in three ways; (a) a referral by a member state[43], (b) commencement of an investigation by the Prosecutor by his/her initiative relying on information received from states, UN organs, IGO's, INGO's or other appropriate sources[44], and (c) referral of a situation by the UNSC acting under Chapter VII of the UN Charter[45]. The Rome Statute describes a four-stage procedure for the exercise of jurisdiction when a situation is referred to the Court by a member state or the investigation is initiated by the Prosecutor him/herself. In this phase, the Prosecutor will need close and effective cooperation and collaboration in various forms of states as well as other actors of the international community. In the first stage, the Prosecutor shall investigate if the situation falls into the jurisdiction of the ICC and shall declare inadmissible if a situation is expressly outside the scope of the Court. In this stage, the Prosecutor shall primarily review if the situation may fall into the jurisdiction of the Court regarding its nature and gravity. In other words, this is a preliminary investigation on the Courts' jurisdiction *ratione personae et materiae*, *ratione loci* and *ratione temporis.* When a recourse received from the Government of Palestine on 22 January 2009[46], the Office of Prosecutor (OTP) have discussed the admissibility *ratione personae* of the referral in terms of whether Palestine qualified as a state for the purpose of making *ad hoc* declaration accepting the Courts' jurisdiction[47] and concluded that the Office could consider allegations of crimes committed in Palestine, provided that competent organs of the UN or eventually the ASP resolve the legal issue relevant to an assessment of statehood[48] or should the UNSC, in accordance with Article 13(b) Rome Statute, makes a referral providing jurisdiction. Furthermore, on 14 May 2013, the OTP received a referral on behalf of the Union of the Comoros, a member state of the Rome Statute since 2006, with respect to the alleged war crimes committed on board the Comorian registered vessel during the Israeli interception of Gaza Flotta on 31 May 2010. The OTP underlined that the ICC can exercise its jurisdiction in relation to the conduct of non-member state nationals alleged to have committed the crimes under Rome Statute on the territory of, or on vessels and aircraft registered in a state party to the ICC, the Court thus has jurisdiction *ratione loci* and *personae* under Article 12(2)(a) Rome

[42] RomeSt.,art. 87 (5)(b)
[43] RomeSt., art. 14.
[44] RomeSt., art. 15
[45] RomeSt., art. 13(b).
[46] ICC Press Release, *The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine*, (ICC-OTP-20150116-PR1083), Jan. 16, 2015, available at <www.icc-cpi.int/pages/item.aspx?name=pr1083> accessed Nov. 6, 2020.
[47] RomeSt., art. 12(3)
[48] ICC Press Release, *Situation in Palestine, Office of the Prosecutor*, Apr. 3, 2012, available at <www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf> accessed Nov. 6, 2020. For a discussion on the statehood of the Palestine and the admissibility of the Palestine's referral to the ICC see Yaël Ronen, 'ICC Jurisdiction over Acts Committed in the Gaza Strip: Article 12(3) of the ICC Statute and Non-state Entities' 8(1) JICJ (2010) at 3; Yuval Shany, *In Defence of Functional Interpretation of Article 12(3) of the Rome Statute: A Response to Yaël Ronen*, 8(2), JICJ (2010) at 329; Daniel Boneliel & Ronen Perry, *Israel, Palestine and the ICC*, 32(1) MichJ.Int'l L (2010) at 73.

Statute.[49] The Prosecutor may declare an investigation unnecessary also if there is a genuine national proceeding on the same matter. Additionally, the Prosecutor shall consider whether opening an investigation would serve the interests of justice and of the victims. In the above-mentioned *Gaza Flotta case*, the OTP, when examining the admissibility *ratione materiae* of the referral, concluded that the gravity of the alleged war crimes did not constitute sufficient gravity to justify further action by the Court.[50] In this stage, the OTP shall proactively monitor and analyse information on alleged crimes. In doing so, the OTP may request cooperation and collaboration of states parties as well as concerned international organizations, NGO's and others.[51]The OTP initiated a preliminary preliminary examination on the situation in Afghanistan in 2007 over multiple communications that had been received since 2006. In this preliminary investigation, the OTP maintained contact with experts, civil society organisations, Afghan Government officials, UN officials, and contributing states to ISAF in Afghanistan.[52]

When the UNSC refers a case to the Court in accordance with Article 13(b) Rome Statute, on the other hand, the Prosecutor shall not consider the admissibility *ratione personae* and *loci* and shall investigate the substance of the situation. In case of a referral by the UNSC, the Court will also have jurisdiction over the crimes committed in the territories or by the nationals of a non-member state. However, in any case, the jurisdiction of the ICC may not be applied retrospectively in line with the principle of non-applicability of treaties before its entry into force as embodied in Article 28 Vienna Convention on the Law of Treaties (VCLT).[53] When the UNSC deems it necessary, it is possible to create a new *ad hoc* Tribunal with a resolution for the crimes committed before the date of entry into force on 1 July 2002 or even for specific cases after 1 July 2002.[54]

If the Prosecutor concludes that the situation may fall into the jurisdiction of the Court or a case is referred by the UNSC, the Prosecutor shall inform all states parties, especially and necessarily the states which may have jurisdiction over the situation or concerned persons of the initiated investigation. In one month, a state may inform the Court that it exercises its criminal jurisdiction in the case and for concerned persons. Upon such notification, the Prosecutor shall defer the case but may review periodically if the national jurisdiction is exercised appropriately. While the preliminary examination of the situation in Guinea of 2009, the OTP has continued to assess the Guinean authorities' efforts to complete the national investigation into for 28 September 2009 events. Additionally, the OTP met with Guinean civil society and victims' representatives during the 15th session of the ASP in December 2016 in the Hague, to listen to their views and concerns on the prospect of genuine prosecution of all the alleged perpetrators.[55]

Once the Prosecutor has been convinced that there is satisfactory evidence of crimes falling within the ICC's jurisdiction and has gathered sufficient evidence on the events and the

[49] ICC, Situation on Registered Vessels of Comoros, Greece and Cambodia, Office of the Prosecutor, ICC Office of the Prosecutor (Nov.6, 2014), para 13, available at <www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf> (accessed Nov. 6, 2020).
[50] Ibid. 3, para 3.
[51] RomeSt., art. 15(2)
[52] ICC, *Report on Preliminary Examination activities*, ICC OFFICE OF THE PROSECUTOR (December 13, 2011), para. 30 <www.icc-cpi.int/nr/rdonlyres/63682f4e-49C8-445d-8C13-f310a4f3aeC2/284116/otpreportonpreliminaryexaminations13december2011.pdf>.
[53] Vienna Convention on the Law of Treaties (adopted May 23, 1969, entered into force Jan. 27, 1980) 1155 UNTS 331 (hereinafter "VCLT") Preamble paras 2-4.
[54]YUSUF AKSAR, IMPLEMENTING INTERNATIONAL HUMANITARIAN LAW FROM THE *AD HOC* TRIBUNALS TO A PERMANENT INTERNATIONAL CRIMINAL COURT (2004), at 58-59.
[55] ICC, *Report on Preliminary Examination Activities 2017*, ICC OFFICE OF THE PROSECUTOR (Dec. 4, 2017) paras 167,169 , <www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf>.

suspect(s), the Prosecutor shall submit the case before the ICC judges requesting them to issue a summons to appear or an arrest warrant. In this stage, if the ICC judges accept the request and issue an arrest warrant, the cooperation of states for the arrest and surrender of the suspect(s) to the ICC plays a vital role in the efficiency of the Court and the execution of the ICL. Once a suspect initially appears before the Court, three pre-trial judges confirm suspect's identity and ensure that suspect understands the charges. The suspect is tried before three-judge Trial Chamber, and the trial judges shall issue a verdict considering the evidence. The Trial Chamber's decision is subject to the appeal by both the Prosecutor and the Defence. The Appeals Chamber, in its turn, consists of five judges and may uphold the appealed decision, amend it, or reverse it. The judgement of the Appeals Chamber is final and binding. The Court relies on the community of states for their support on the enforcement of its judgements including freezing and seizing suspects' assets and enforcing sentences. In the *Kenyatta case*, the Trial Chamber requested the Kenyan government's cooperation under Article 93(1)(k) Rome Statute to identifying, tracing and/or freezing assets or property of accused person.[56] In a decision issued in *Bemba et al case.*, the single judge determined that the properties and assets of the accused subjected to freeze shall not be connected to the crime and reversed the freezing decision. The Appeals Chamber upholds the decision of Trial Chamber.[57]

D. Diplomatic Law and Duty of Cooperation

Today, it is a well-established principle of international law that ICTs have jurisdiction over persons even though they enjoy personal immunities. Article 27 Rome Statute provides "official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute" and then specifies that "[i]mmunities or special personal rules which may attach to the official capacity of a person […] shall not bar the Court from exercising its jurisdiction […]". This article stresses the immunities that the officials of member states possess under international law shall not block their prosecution and trial before the ICC.[58] In other words, states parties to the Rome Statute waived automatically the personal immunities of their representatives and officials under Article 27 for the purpose of the jurisdiction of the ICC. However, Article 98(1) provides that the ICC will not proceed with requests for surrender "which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity". In that respect, if the Court's request of surrender and cooperation from a member state or another cooperative state, relates to a person who enjoys immunities bestowed by another state, ICC is still respecting the sensitivities of the former on the duties driven from diplomatic law. On the other hand, it is generally accepted that it would not be necessary for the requested State first to obtain the waiver of the other State Party.[59] Although some writers

[56] ICC, The Prosecutor v. Uhuru Muigai Kenyatta (Decision on the implementation of the request to freeze assets) ICC-01/09-02/11-931, Trial Chamber V, Judgement (July 8, 2014) para 20 available at <www.icc-cpi.int/CourtRecords/CR2014_06208.PDF> (accessed Sep. 20, 2020).

[57] ICC, Bemba *et al*. case, (Judgment on the appeal of the Prosecutor against the decision) ICC-ACRed-01/16, Appeal Chambre, Judgement (Feb. 15, 2016), para 63, available at <www.icc-cpi.int/CourtRecords/CR2016_01145.PDF> accessed 23 September 2020.

[58] Otto Triffterer & Kai Amboss, *The Rome Statute of the International Criminal Court: A Commentary,* (3rd ed., Back/Hart 2016), 1051; Dapo Akande, *International Law Immunities and the International Criminal Court*, 98(3) AJIL 407 (2004), at 420.

[59] Cryer, *supra* note 10, at 440-441.

claimed that the term "third state" shall be understood as all states -member or not- other than the state of nationality[60], the Rome Statute already requested the member states a waiver of personal immunities of all officials for criminal prosecution before ICC in Art 27. Accordingly, many scholars convincingly argued that the requirement of Article 98(1) is oriented only towards non-states parties, otherwise the content of Art 27 would be significantly reduced.[61] In its decision, the Pre-Trial Chamber I concluded that "an international customary law exception from the international law immunity of States *ratione personae* with respect to their Heads exists with a view to proceedings before an international court, including the ICC" and underlined the duty of states parties to cooperate fully with the Court includes the surrender of those persons enjoying personal immunities when necessary:

> Furthermore, the Chamber is of the view that the unavailability of immunities with respect to prosecutions by international courts applies to any act of cooperation by States which forms an integral part of those prosecutions.[62]

On the other hand, a cooperation of a non-member state of the Rome Statute concerning surrender of a person who enjoys personal immunities under international law will be subject to the waiver of the state of the accused person in terms of Article 98(1) Rome Statute. As a matter of fact, the Assembly of African Union decided to the thirteenth Ordinary Session hold on 1–3 July 2009 that:

> [I]n view of the fact that the request by the African Union has never been acted upon, the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan.[63]

As a result, many states parties and non-parties to the Rome Statute abstained from arresting and surrendering Al Bashir hiding behind the general international obligation on the basis of personal immunities.

IV. Character of International Crimes and Duty of Cooperation

A. Jus Cogens Character of International Crimes

In modern international law, the supremacy of *jus cogens* is first emphasized by the writings of leading international jurists as L. Oppenheim[64] and W. Hall[65] along with citations in a couple

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[60] BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN STATE SOVEREIGNTY AND INTERNATIONAL JUSTICE (OUP 2003), at 144-1455; Steffen Wirth, *Immunities, Related Problems, and Article 98 of the Rome Statute*, 12(4) CLF 429 (2001), at 456-457.

[61] Paola Gaeta, *Official Capacity and Immunities*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY (Antonio Cassese, Paola Gaeta & J.R.W.D. Jones eds. 2002), 975, at 991-1000; Dapo Akande, *The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities*, 17(2), JICJ 333 (2009), at 337-338; Akande, *supra* note 58, 424; Triffterer, *supra* note 58, 2125.

[62] ICC, Prosecutor v. Al Bashir, Decision ICC-02/05-01/09, (Dec. 12, 2011) paras 44–6.

[63] Assembly/AU/Dec. 245(XIII) Rev.1 (July 3, 2009), para 10 <au.int/sites/default/files/decisions/9560-assembly_en_1_3_july_2009_auc_thirteenth_ordinary_session_decisions_declarations_message_congratulations_motion_0.pdf> accessed Nov. 6, 2020.

[64] LASSA FRANCIS OPPENHEIM, INTERNATIONAL LAW, VOL. 1, PEACE (2ND EDN., LONGMANS, GREEN AND CO.1912) 550, note 506.

[65] WILLIAM EDWARD HALL, A TREATIES OF INTERNATIONAL LAW (8TH EDN., CLARENDON PRESS 1924), at 382. See also Rafael Nieto-Navia, *International Peremptory Norms (Jus Cogens) and International Humanitarian Law*,

of judgments [66] at the beginning of the previous century. Furthermore, the concept of the *jus cogens* found its legal basis in two separate articles of the 1969 VCLT. Article 53 VCLT which introduces peremptory norms (*jus cogens*) of general international law reads as follows:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Another clause of the VCLT supporting the establishment of the supremacy of a potentially emerging peremptory norm is Article 64: "If a new peremptory norm of general international law emerges, any existing treaty which conflicts with that norm becomes void and terminates.".[67]

The discussions on the character of *jus cogens* ineluctably attracted the attention of the ILC, which appointed a special rapporteur on the subject and established a Draft Committee to prepare draft conclusions on the subject of the peremptory rules of general international law.[68] In the draft conclusions, a peremptory norm of general international law is defined as a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[69]

Any international law norm including customs, any treaty rules as well as reservation to a treaty rule in contradiction with a *jus cogens* shall be void and null. The supremacy and binding nature of a *jus cogens* also has a retroactive effect. Accordingly, a customary rule of international law shall be null if it is in contradiction with a newly emerging peremptory norm and once a *jus cogens* is emerged, thereafter any new customary rule in contradiction with it shall appear.

ILC draft states that "[p]eremptory norms of general international law (*jus cogens)* reflect and protect *fundamental values of the international community*, are hierarchically *superior to other rules of international law* and are universally applicable".[70] Therefore, the *jus cogens* character of an obligation give rise to obligations owed to the international community as a whole

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in, MAN'S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE, (Lal Chand Vohrahet et al. eds. 2003), (Kluwer Law Intl. 2003) 595, at 603; Michael Byers, *Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules* 66, Nord J Int Law 211 (1997), at 213 note 7.

[66] Pablo Nájera (France) v. United Mexican States (Decision No 30-A of 19 October 1928) 5 RIAA 466, 470; the Arbitration Tribunal described *jus cogens* as the character of a legal rule that states, members of the League of Nations, are not allowed to derogate at any particular situation; Oscar Chinn (U.K. v. Belg.), 1934 P.C.I.J. (ser. A/B) No. 63 (Dec. 12, 1943), available at <www.worldcourts.com/pcij/eng/decisions/1934.12.12_oscar_chinn.htm> accessed Sep. 18, 2020, Separate Opinion of M. Schücking, para 341. Judge Schücking assumed that the Covenant of the League of Nations would have created a jus cogens through Art. 20 which is as follows: "The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings inter se which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof".

[67] A natural consequence of this regulation has been the inclusion of the supremacy of jus cogens in 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986, not yet in force) UN Doc. A/CONF.129/15, art. 53 and 64.

[68] ILC Res. A/74/10, Report of the International Law Commission (Aug.7, 2019), available at <legal.un.org/ilc/reports/2019/english/a_74_10_advance.pdf> (accessed Nov. 6, 2020), (hereinafter "ILC Conclusions").

[69] ILC Conclusions 2, *supra* note 68, at 142.

[70] ILC Conclusions 3, *supra* note 68, at 142, emphases added.

(obligation *erga omnes*), and any state is entitled to invoke the responsibility of another state for a breach of a peremptory norm of general international law.[71]

The international crimes falling into jurisdiction of the ICC, namely the crime of genocide, crimes against humanity war crimes and the crime of aggression, are in a general manner constituting a violation of *jus cogens*.[72] The Federal Court of Australia accepted that "the prohibition of genocide is a peremptory norm of customary international law giving rise to non-derogable obligations *erga omnes* that is, enforcement obligations owed by each nation state to the international community as a whole". [73]International society has produced universal revulsion of the crime of torture, and the torturer has been recognized *hostis humani generis,* an enemy of all mankind.[74]In *Barcelona Traction case*, the ICJ states that:

[s]uch obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of

[71] ILC Conclusions 17, *supra* note 68, at 145. See Christian Tomuschat, *Reconceptualizing the Debate on Jus Cogens and obligations Erga Omnes: Concluding Observations*, in THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: JUS COGENS AND OBLIGATIONS ERGA OMNES, (Christian Tomuschat & J.-M. Thouvenin eds. 2006), at 426-430; Ulf Linderfalk, *Understanding the Jus Cogens Debate: The Pervasive Influence of Legal Positivism and Legal Idealism*, in NETHERLANDS YEARBOOK OF INTERNATIONAL LAW HEIJER, (M. der Heijen & H. van der Wilt eds 2015) Ibid., 52; Erika de Wet, *Jus Cogens and Obligations Erga Omnes*, in THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW, (Dinah Shelton ed.) (OUP 2013) 543; M. CHERIF BASSOUINI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW VOL 1, (2nd edn., Martinus Nijhoff 2014) at 244–6; Bridge, *supra* note 15, 1261; BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT (OUP 2014), at 19.

[72] IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW (3rd edn, OUP 2002), at 488 – 9; Dan Dubois, *The Authority of Peremptory Norms in International Law: State Consent or Natural Law?* 78(2), Nord J Int Law 33 (2009), at 160; LUKE MOFFETT, JUSTICE FOR VICTIMS BEFORE THE INTERNATIONAL CRIMINAL COURT (2014), at 9, 148-9, 192. Draft ILC Conclusions also set forth a non-exhaustive list of jus cogens norms as follows; (a) The prohibition of aggression; (b) The prohibition of genocide; (c) The prohibition of crimes against humanity; (d) The basic rules of international humanitarian law; (e) The prohibition of racial discrimination and apartheid; (f) The prohibition of slavery; (g) The prohibition of torture; (h) The right of self-determination (ILC Conclusions 23, supra note 68, 146-7).

[73] ICJ, Case Concerning Barcelona Traction, Light, and Power Company, Ltd (Belgium v. Spain) (Merits, Second Phase) [1970] ICJ Rep 3, para 33, available at <www.icj-cij.org/files/case-related/50/050-19700205-JUD-01-00-EN.pdf> accessed 23 March 2020; Nulyarimma and Others v. Thompson (Appeal Decision) Federal Court of Australia (Sep. 1, 1999), FCA 1192, para 81. S. Peters *The Genocide Case: Nulyarimma v. Thompson* 15(1), AUILJL 233 (1999), at 235-237. For the recognition of jus cogens status to genocide, slavery, racial discrimination, and apartheid see J. R. Dugard, Recognition and the United Nations (Grotius1987) 156–8; Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)(Merits) [2006] General List No 126 31-2, paras 64-7, available at <www.icj-cij.org/files/case-related/126/126-20060203-JUD-01-00-EN.pdf> accessed 23 March 2020; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Preliminary Objections) [1996] ICJ Rep. 595 para 31 <www.icj-cij.org/files/case-related/91/8618.pdf> accessed 23 March 2020; Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) [1951] ICJ Rep. 15, 23 <www.icj-cij.org/files/case-related/12/012-19510528-ADV-01-00-EN.pdf> accessed 23 March 2020.

[74] US Court of Appeals, Filartiga v. Pena-Irala, 630 F.2d 876, (June 30, 1980), at 14; UN, Prosecutor v. Furundžija IT-95-17/1-T, Judgement (Dec. 10, 1998) para 147 <https://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf> (accessed Sep. 22, 2020). For many scholars, the jus cogens nature of the right to life and the prohibition of torture may be deduced from non-derogability of these rights in the core international human rights instruments. See Rosalyn Higgins, *Derogations under Human Rights Treaties*, 48(1), B.Y.I.L. 281 (1976), at 281-282; Martin Scheinin, 'Core Rights and Obligations' in Shelton (ed), supra note 71, 529–32; Lauri Antero Hannikainen, Peremptory Norms (Jus Cogens) in International Law (Lakimiesliiton Kustannus 1998) 499–513; Alfred Mwenedata and Joseph Sehorana, 'The Determination and Enforcement of Jus Cogens Norms For Effective Human Rights Protection' [2016] 21(8) IOSR-JHSS 66, 77–9.

the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law.[75]

A similar peremptory status has been granted to the prohibition of aggression, the acquisition of territory by force and the forcible suppression of the right of peoples to self-determination. It is agreed that these crimes devastate the very foundations of international society.[76]

These crimes against the whole international community, having risen to the level of *jus cogens*, creates obligations *erga omnes* and responsibilities for each state towards the whole international community. An obligation *erga omnes* of a state is not reduced to the prosecution of such crimes within its jurisdiction, but additionally and above all shall contain, in broad terms, the requirement of cooperation and collaboration to all attempts to prosecute and punish such crimes. Consequently, it may be logically assumed that, for the effectiveness of *erga omnes*, states are required not only to prosecute an allegedly guilty person within their jurisdiction but also to make all available cooperation and collaboration to other members of the international community for the prosecution and trial of such criminals. An obstructive and neglecting attitude of a state towards the execution of *erga omnes* by other members of the international community cannot be considered a bona fide act.[77]

B. Role and Competences of the UNSC

In the cadre of Article 13(b) Rome Statute, beside others, one of the most crucial roles of the UNSC is the referral of a situation to the ICC.[78]As mentioned above, the jurisdiction of the Court covers the member states of the Rome Statute.[79] On the other hand, the UNSC is entitled

[75] Case Concerning Barcelona Traction, supra note 73, 32, paras 33-34; Genocide case, supra note 73, 23.

[76] For the jus cogens character of the prohibition of genocide, the right to life, the prohibition of torture, humanitarian law, the prohibition against the use of force and the right to self-determination see Karen Parker, 'Jus Cogens: Compelling the Law of Human Rights' [1989] 12 Hastings I. & Comp. L.R. 411, 430-9; M. Cherif Bassouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' [2001] 42(1) VJIL 82, 104-8; Drew Kostic, 'Whose Crime Is It Anyway? The International Criminal Court and the Crime of Aggression' [2011] 22 DJIL 109, 130–8. Sergey Sayapin, The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State (Asser 2014) 91-7. See also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep. 136, paras 155-7 <https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf> accessed Nov. 6, 2020; East Timor case (Portugal v. Australia) (Judgment) [1995] ICJ Rep. 90, para 29 <www.icj-cij.org/files/case-related/84/084-19950630-JUD-01-00-EN.pdf> accessed Nov. 6, 2020.

[77] Christian J. Tams and Alessandra Asteriti, 'Erga Omnes, Jus Cogens and Their Impact on the Law of State Responsibility' in Malcolm Evans and Panos Koutrakos (eds), The International Responsibility of the European Union: European and International Perspectives (Hart 2013) 166-8; Diajeng Wulan Christianti, *Why We Need Erga Omnes Character for Obligations to Combat Impunity for International Crimes* 4(2), PJIH 362 (2017), at 370-374. In Genocide case, *supra* note 73, the Court affirmed that the erga omnes character of the crime of genocide requires each state "to prevent and to punish the crime of genocide" and this jurisdiction is not "not territorially limited".

[78] Another crucial role attributed to UNSC under RomeSt. is the competence to deferral of investigation or prosecution for a renewable 12 months. (Art. 16 RomeSt.). M. Wagner, *The ICC and Its Jurisdiction: Myths, Misperceptions and Realities* 7, UNYB 409 (2003), at 497–504.

[79] The Monetary Gold principle prevents an international tribunal from deciding a case where the legal interests of a third state is concerned. Thus, an international tribunal apparently is unable to have jurisdiction without the consent of a third party whose rights and responsibilities are in question; Case of Monetary Gold Removed from Rome in 1943, Judgement June 15, 1954), ICJ Rep. 19, 30 available at <https://www.icj-cij.org/public/files/case-related/19/019-19540615-JUD-01-00-EN.pdf> accessed Nov.6, 2020. Antonio F. Perez, *The Passive Virtues and the World Court: Pro-Dialogic Abstention by the International Court of Justice*' 18(3) Mich. J. Int'l L. 399 (1997), at 416–423.

to refer a situation falling into the jurisdiction *ratione materiae* occurred after 1 July 2002 to the ICC. The referral of a situation by the resolution under Chapter VII UN Charter is substituting the non-existence of consent of a concerned state in cases where the ICC cannot exercise its jurisdiction, albeit gravity.

The UNSC's power to refer a case to the ICC is based on Articles 39-51 UN Charter concerning the actions to be taken "with respect to threats to the peace, breaches of the peace and act of aggression". The actions taken by the UNSC in the frame of Chapter VII is doubtlessly binding over all member states.[80] In that respect, even if there is not a well-established jurisprudence or customary rule, it can be assumed that the effects of a referral of a resolution to the ICC by the UNSC shall extend to all UN members. Accordingly, the effects of a UNSC referral shall include the responsibility of cooperation to provide all necessary and supporting documents and evidences as well as execution of arrest warrants issued by the Prosecutor and the Court and surrender an individual to the Court. In this regard, the responsibility of all UN member states to cooperate with the ICC in the cases referred to the Court by the UNSC arises, axiomatically, from their mandatory responsibility under Article 49 UN Charter to cooperate each other for the implementation of the measures for the maintenance of the peace and international order decided by the UNSC. Furthermore, this responsibility extends to non-member states also to the extent to be necessary for the maintenance of international peace and security.[81]

When an investigation had been initiated by the Prosecutor, in case a member state does not comply with a cooperation request by the Court, the Prosecutor shall submit such non-compliance to the UNSC.[82] As a referral by the UNSC of a grave international crime before the ICC serves the purpose to re-establish international peace and order, a non-cooperation of any UN member state with such a request by the Court will constitute a breach in the meaning of Article 39 UN Charter and the UNSC shall take provisional measures as it deems necessary, make recommendations to the concerned state or states, or decide necessary measures.[83]

C. UNSC Referrals to ICC and Duty of Cooperation

Until today, the UNSC has referred two cases to the ICC. The first referral was the situation in Darfur, Sudan since 1 July 2002[84] and the second case was the situation in the Libyan Arab Jamahiriya since 15 February 2011.[85]As Sudan and Libya are not a party to the Rome Statute and consequently the ICC had no *ratione personae* and *ratione loci* jurisdiction over neither its nationals nor the crimes committed therein, the international community risked the impunity of the horrifying and unpardonable atrocities committed there. In its decision to take all necessary actions for the cessation and prevention of gross and systematic violations of human rights committed by the governments of Sudan and Libya against the civilians, the UNSC grounded in international human rights commission's reports[86] and acted on behalf of the whole international community. Reminding "its primary responsibility for the maintenance of international peace and security", the UNSC affirmed that it was acting under Chapter VII of

[80] UN Charter , art. 25.
[81] UN Charter art. 2(6).
[82] Rome St., art. 87(5)(b).
[83] UN Charter, arts. 39-42.
[84] UNSC, Res. 1593 (March 31, 2005) UN Doc S/RES/1593.
[85] UNSC Res. 1970 (Feb. 26, 2011) UN Doc S/RES/1970.
[86] International Commission of Inquiry on Darfur, 'Report of the International Commission of Inquiry on Darfur to the Secretary-General'(Feb. 1, 2005) UN Doc S/2005/60; UNCHR 'Human Rights Council Report' (Feb. 25, 2011) UN Doc A/HRC/RES/S-15/1.

the UN Charter and its referral to the ICC was consisting of its power to take non-armed measures under Article 41 UN Charter for the restoration of international order.

In both referrals, the UNSC emphasized and highlighted the need and responsibility of global cooperation with a common phrase included into the respecting resolutions.[87] In that respect, the UNSC urged, at the first stage, Libyan authorities and also the Government of Sudan and all other parties to the conflict in Darfur to cooperate fully with and provide any necessary assistance to the Court and the Prosecutor of ICC. Furthermore, the UNSC requested all states regardless of its membership to the Rome Statute as well as all concerned international and regional organizations to cooperate fully with the ICC and its Prosecutor. The UNSC's request from all states -parties and non-parties states to the Rome Statute- to "cooperate fully" include literally to comply with the warrants of arrest and surrender the accused persons -even if they enjoy personal immunity- to the ICC so that the Court may have the possibility to prosecute and punish the alleged international crimes. In this view, the obligations to respect personal immunities of the accused person remain in force for non-state parties to the Rome Statute. The arrest and surrender of a person enjoying personal immunities shall require a waiver by the state of nationality. It is right that UNSC resolutions refer a case to the ICC, triggering the jurisdiction of the Court and prosecution of alleged international crimes. It may be furthermore speculated that there was no explicit order for a waiver from the State in the referral resolutions. However, the referral resolutions contain much more than one single paragraph of referral and set out a list of requirements which are equally binding for all states, including providing all necessary assistance to the Prosecutor and the Court, facilitating their work and especially cooperating fully. A lack of cooperation with the Court will result with the failure of the UNSC decision to prosecute and avoid the impunity of international crimes. In this context, the discourse and the content of the referrals by the UNSC impress their power on the basis of the Chapter VII UN Charter, and to this respect especially emphasize the bindingness of the cooperation responsibility of all states with the Court in the cadre of, but even not limited to the Rome Statute.

V. Conclusion

Throughout human history, ICL provides a response of international community to most serious international crimes against the humanity as a whole. In the struggle against the extremely wicked and cruel atrocities that the humanity suffers from and in the fight against impunity of the betrayers of humankind, the establishment of a permanent ICT, namely the ICC, has constituted a crucial further step. The scope of jurisdiction of the ICC extends to the crime of genocide, war crimes, crimes against humanity and crime of aggression. The international society granted *jus cogens* status to such crimes which give rise to a non-derogable obligation *erga omnes* to the members of the international community to prosecute and try the responsible as well as those who cooperate and collaborate such attempts. The ICC has a complementary role to the national criminal jurisdictions in case of the inability or unwillingness of the concerned states to prosecute and try the responsible for such grave crimes against the international community and order. In our days, international cooperation has become more than an issue considering the severity and transboundary character of the international crimes. This cooperation including but not limited to arrest of accused persons and surrendering them

[87] Both SC Res 1593 (2005) para 2 and SC Res. 1970 (2011) para 5 contain the common requirement of 'while recognizing that states not party to the Rome Statute have no obligation under the Statute, urges all states and concerned regional and other international organizations to cooperate fully' with the Court and the Prosecutor.

to the Court, as well as collecting and sharing evidence and serving documents, is vital for the enforcement of ICL and avoid impunity of criminals. On the other hand, the ICC is based on the Rome Statute which is binding on states parties and consequently the jurisdiction of the Court covers the nationals of states parties or the individuals who have committed such crimes within the boundaries of a member state. The competence of the UNSC to refer a case to the ICC expands the *ratione personae* and *loci* jurisdiction of the Court and the accountableness of the grave international crimes. The competence of the UNSC in the cadre of the Rome Statute is based on its role of maintaining international order and peace and it is the application of its binding power under Chapter VII UN Charter. Correspondingly, the obligation of cooperation with the Court under the Rome Statute covers the UN states parties. In this respect, a referral resolution of the UNSC shall have the effect for all states parties and non-parties to the UN to comply with the obligations of the ICC and the Rome Statute, it means a waiver of personal immunities of its nationals under jurisdiction of the ICC and comply with warrants of arrest for them. However, some examples as observed in the *Al Bashir case*, demonstrate that the cooperation requirement under the Rome Statute risks the impunity of gravest criminals. In that respect, even non-member states shall have an obligation to cooperate with the Court in the cases referred by the UNSC to ensure the accountableness of international criminals and maintenance of international order and peace. This obligation arises mainly from three requisites of states towards the UNSC and international community. Firstly, all states are compelled to observe the measures taken by the UNSC pursuing its power to maintain international order. Secondly, the cooperation of all states is imperatively required in the resolutions adopted by the UNSC for the referral of the cases such as Sudan and Libya. Finally, obligation *erga omnes* requires all states not only to prosecute and try, but also cooperate and collaborate all struggles by other states and organizations such as the ICC to punish such criminals. In this regard, non-compliance with this requirement of a state may be subject to further measures of the UNSC.