13 On the Specificities of the International Legal Personality of the International Criminal Court

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13.1 Introduction

Around the twentieth anniversary of the adoption of the Rome Statute, it is worth revisiting the questions surrounding the international legal personality of the International Criminal Court even if this issue is not at the centre of public attention.

Needless to say, the Court was faced with challenges and difficulties; some of them were resolved but a number of the solutions elaborated generated *nolens-volens* new problems and new challenges. Some of these challenges are partly rooted in changes in the policy of some states and organs, and the classical cost-benefit analysis can always be evoked by those who would like to divert attention from their own responsibilities for the emergence of the current problems. Other challenges arise from the tension between the expectations of 1998 and the difficulties met on the spot by the staff of the Prosecutor, as well as the peculiarities of the lawsuits launched before the different chambers.

Nevertheless, it is worth conducting an analysis of these challenges and the responses given to them. I will focus only on the character of the international legal personality of the ICC, since this issue underlies several challenges, political debates and states' actions whether they admit it or not.

13.2 The Classical Starting Point: The Legacy of the Bernadotte Dictum

When it comes to the international legal personality of international organizations the question is often evoked whether the jurisprudence on the criteria of the objective legal personality of the International Court of Justice is transposable or is not. It is widely known, however that in the doctrine, the majority position seems to back that up till now only the United Nations can be considered to enjoy this status, owing to the will of the states as proclaimed solemnly by the International Court of Justice.

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At this point, I refer to the famous formulation of the ICJ in the advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations* (the "*Bernadotte* case"):

> "Accordingly the question is whether the Organization has capacity to bring a claim against the defendant State to recover reparation in respect of that damage or whether, on the contrary, the defendant State, not being a member, is justified in raising the objection that the Organization lacks the capacity to bring an international claim. On this point, *the Court's opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone*, together with capacity to bring international claims."[1]

The expression "fifty States, representing the vast majority of the members of the international community" should be read in light of the 1945 *ratio,* which was 50: cca. 72.[2]

Three main doctrinal approaches have been developed since then on the possible applicability of the criteria set out by the ICJ with regard to international organizations (or entities) other than the United Nations (the "UN") and, in particular, the ICC. There is an affirmative approach (either *expressis verbis* or *per analogiem* to the scholar's affirmative standpoint regarding the alleged objective legal personality of international orga-

1 ICJ, *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, [1949] ICJ Rep. 174, p. 185 (emphasis added).

2 These States are: Argentina, Australia, Belgium, Bolivia, Brazil, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippine Republic, Poland, Saudi Arabia, Syria, Turkey, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics, United Kingdom, United States, Uruguay, Venezuela and Yugoslavia. The defeated European axis countries – Germany, Hungary, Romania, Bulgaria and Finland – as well as Japan were of course absent. Some neutral countries were also missing: *e.g.* Switzerland, Sweden, Spain, Portugal, Ireland, Iceland and Afghanistan. Some countries were under reconstruction from Axis yoke: Austria, Albania, etc.

nizations in general),[3] a denial[4] and a hesitance (i.e. the question can only be decided on the basis of the practice of the ICC and the States, in particular, the actual practice in the relationship between the ICC and non-States Parties),[5] but it is worth pointing out that they both find their origins in the wording of the ICJ *dictum*.

3 For this approach, *see e.g.*: A. Pellet, 'Le droit international à l'aube du XXIème siècle (La société internationale contemporaine – Permanences et tendances nouvelles)', Cours fondamental in Cours Euro-méditerranéens, Bancaja de droit international, Vol. I, 1997, Aranzadi, Pampelune, 1998 (http://pellet.actu.com/wp-content/uploads/2015/11/PELLET-1997-Cours-Bancaja.pdf), p. 78; A. Pellet, 'Entry into Force and Amendment', in A. Cassese, P. Gaeta & J. Jones (eds.), *The Rome Statute of the International Criminal Court* (Oxford University Press: 2002), Vol. I, p. 147; A. Pellet, 'Le projet de Statut de Cour Criminelle Internationale Permanente – Vers la fin de l'impunité?', in: Héctor Gros Espiell, *Amicorum liber: Persona humana y derecho internacional / Personne humaine et droit international / Human Person and International Law*, Vol. II, Bruylant Bruxelles, l997 (http://pellet.actu.com/wp-content/uploads/2016/02/PELLET-1997-Le-projet-de-statut-de-cour-criminelle-internationale-permanente-vers-la-fin-de-limpunité.pdf), pp. 1080-1081 and 1082-1083; J. Crawford, *Change, Order, Change: The Course of International Law*, General Course on Public International Law, Pocketbooks of the Hague Academy of International Law, Brill Nijhoff, 2014, § 247-248, pp. 201-202; G. M. Danilenko, 'The ICC Statute and Third States', in: A. Cassese, P. Gaeta, J. Jones (eds.), *The Rome Statute of the International Criminal Court*, Oxford University Press, 2002, Vol. II, p. 1873; G. M. Danilenko, 'The Statute of the International Criminal Court and Third States', *Michigan Journal of International Law*, Vol. 21, No. 3, 2000 (https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1390&context=mjil), pp. 450-451; K. S. Gallant, "The International Criminal Court in the System of States and International Organizations", *Leiden Journal of International Law*, Vol. 16, 2003, p. 557; R. Cryer, 'The International Criminal Court and its Relationship to Non-States Parties', in: C. Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 261; D. F. Orentlicher, 'Politics by Other Means: The Law of the International Criminal Court', in: *Cornell International Law Journal*, Vol. 32, 1999, p. 490; S. Rolf Lüder, 'The legal nature of the International Criminal Court and the emergence of supranational elements in international criminal justice', *Revue Internationale de la Croix Rouge*, Vol. 84, No. 845, March 2002 (https://www.icrc.org/eng/assets/files/other/079-092_luder.pdf), pp. 82 and 91; W. M. Reisman, *The Quest for World Order and Human Dignity in the Twenty-first Century, Constitutive Process and Individual Commitment*, The Pocket Books of The Hague Academy of International Law / Les livres de poche de l'Académie de droit international de La Haye, Vol. 16 (2012), p. 226: "[…] the Statute of the International Criminal Court represented a *collective decision by the member States of the United Nations against* a universal jurisdiction for national courts, reposing contingent criminal jurisdiction in an international jurisdiction." (emphasis added); Anneliese Quast Mertsch, *Provisionally Applied Treaties: Their Binding Force and Legal Nature*, Martinus Nijhoff 2012 Leiden, p. 155; Alan Boyle & Christine Chinkin, *The Making of International law*, Oxford University Press 2007 Oxford, pp. 240-241;

4 For the second approach, *see e.g.*: W. Rückert, 'Article 4', in: O. Triffterer & K. Ambos (eds.), *The Rome Statute of the International Criminal Court*, C.H. Beck, Hart, Nomos: 2016, p. 105; G. Cahin, 'Article 4', in: J. Fernandez & X. Pacreau (eds.), *Statut de Rome de la Cour pénale internationale*, Pédone: 2012, pp. 356 and 358-359; O. Svaček, 'Review of the International Criminal Court's Case-Law 2013', *International and Comparative Law Review*, Vol. 13, No. 2, 2013 (https://www.degruyter.com/downloadpdf/j/iclr.2013.13.issue-2/iclr-2016-0068/iclr-2016-0068.pdf), p. 10.

5 For the third approach, *see e.g.*: V. Engström, 'Article 4(2)', Case Matrix; F. Martines, 'Legal Status and Powers of the Court', in A. Cassese, P. Gaeta & J. Jones (eds.), *The Rome Statute of the International Criminal Court*, Oxford University Press: 2002, Vol. I, pp. 207, 210-211 and 216; E. David, 'La Cour pénale internationale', *RCADI*, Vol. 313, 2005, pp. 359, 364 and 368.

Let us not forget that the main legacy of the abovementioned ICJ *dictum* is – besides the recognition of a *locus standi* of the UN for reparations of harms caused to its officials and agents – the judicial confirmation of the competence of the UN (Security Council) in case of a threat to peace and security, a competence which extends also to non-Member States of the UN.

It is also important to see the similarities as well as the differences between the creation and vocation of the UN and those of the Court as reflected in the UN Charter and the Statute of the Court, respectively. It is worth noting that the Statute was adopted on 17 July 1998 by a vote of 120 to 7, with 21 countries abstaining. At the time, the number of UN Member States was 185 (as of 2018, there are 193 UN Member States).

I think that it would be easy to paraphrase the Bernadotte-formula for the case of the International Criminal Court as such:

> *On this point, the Chamber's opinion is that more than one hundred and twenty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity called the International Criminal Court, possessing objective international personality, and not merely personality recognized by them alone, together with the capacity to act against impunity for the most serious crimes of concern to the international community as a whole and which is complementary to national criminal jurisdictions.*

13.3 States' Positions in and around 1998 Concerning the Necessity of an (or the) International Criminal Court

It is equally clear however that the borrowing of the formula and its transposition are in themselves insufficient, in case the thesis cannot be substantiated by adequate reasoning based on the states' attitude and standpoints on and around the famous date of 17 July 1998, and also later. For this purpose, I will now focus on the statements of those who voted against (or voted for, but nevertheless for some reason) to date have not become a state party to the Rome Statute. (It is however known that formally, the vote was a secret (not nominative) vote and states were not obliged to reveal the reasons underlying their vote. There is however an unofficial scholarly consensus on the list of states having abstained from the vote and states having voted against. Let us point out first and foremost that abstaining or voting against are equally legitimate, based on the state's sovereignty and as we shall see *infra,* even a negative position could support the idea while criticizing some elements of the chosen mechanism. It is useful to study the declared or circulated official declarations in order to remember and understand the reasoning and the conse-

quences. Hereby, I beg for the reader's forgiveness for citing some of these declarations in length (or *in extenso*) in the footnotes without using the traditional technique of cutting the less relevant parts. What is less important for some, could be very important for another, and in this way, the accusation of manipulation or simplification can also be avoided.

Even States which cast a negative vote on the adoption of the Statute acted during the Rome Diplomatic Conference – as well as prior or after the Prep.Com – as fervent promoters of establishing the ICC. Among the reasons for their subsequent negative votes were alleged flaws, missing crimes or certain formulations which, to them, seemed inappropriate or insufficiently precise. Two of these States, namely the United States[6] and

6 President William J. Clinton's Statement on the Rome Treaty on the International Criminal Court, 31 December 2000: "The United States is today signing the 1998 Rome Treaty on the International Criminal Court. In taking this action, we join more than 130 other countries that have signed by the December 31, 2000, deadline established in the treaty. We do so to reaffirm our strong support for international accountability and for bringing to justice perpetrators of genocide, war crimes, and crimes against humanity. We do so as well because we wish to remain engaged in making the ICC an instrument of impartial and effective justice in the years to come. The United States has a long history of commitment to the principle of accountability, from our involvement in the Nuremberg tribunals that brought Nazi war criminals to justice, to our leadership in the effort to establish the International Criminal Tribunals for the former Yugoslavia and Rwanda. Our action today sustains that tradition of moral leadership. Under the Rome Treaty, the International Criminal Court (ICC) will come into being with the ratification of 60 governments and will have jurisdiction over the most heinous abuses that result from international conflict, such as war crimes, crimes against humanity, and genocide. The treaty requires that the ICC not supersede or interfere with functioning national judicial systems; that is, the ICC prosecutor is authorized to take action against a suspect only if the country of nationality is unwilling or unable to investigate allegations of egregious crimes by their national. The U.S. delegation to the Rome Conference worked hard to achieve these limitations, which we believe are essential to the international credibility and success of the ICC. In signing, however, we are not abandoning our concerns about significant flaws in the treaty. In particular, we are concerned that when the court comes into existence, it will not only exercise authority over personnel of states that have ratified the treaty but also claim jurisdiction over personnel of states that have not. With signature, however, we will be in a position to influence the evolution of the court. Without signature, we will not. Signature will enhance our ability to further protect U.S. officials from unfounded charges and to achieve the human rights and accountability objectives of the ICC. In fact, in negotiations following the Rome Conference, we have worked effectively to develop procedures that limit the likelihood of politicized prosecutions. For example, U.S. civilian and military negotiators helped to ensure greater precision in the definitions of crimes within the court's jurisdiction. But more must be done. Court jurisdiction over U.S. personnel should come only with U.S. ratification of the treaty. The United States should have the chance to observe and assess the functioning of the court, over time, before choosing to become subject to its jurisdiction. Given these concerns, I will not, and do not recommend that my successor submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied. Nonetheless, signature is the right action to take at this point. I believe that a properly constituted and structured International Criminal Court would make a profound contribution in deterring egregious human rights abuses worldwide and that signature increases the chances for productive discussions with other governments to advance these goals in the months and years ahead." (emphasis added) (http://www.presidency.ucsb.edu/ws/?pid=64170). On the US policy vis-à-vis the ICC see especially: D. J. Scheffer, "Staying the Course with the International Criminal Court", Cornell International Law Journal, Vol. 35, No. 1 (November 2001-February 2002) (https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1497&context=cilj).

Israel,[7] later became signatory States, although the US withdrew its signature shortly thereafter[8] and Israel also expressed her decision[9] not to ratify the Statute.

7 See Israel's Declaration upon signature, United Nations Treaty Collection, Status of Treaties, the Rome Statute of the International Criminal Court, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&lang=en: "*Being an active consistent supporter of the concept of an International Criminal Court, and its realization in the form of the Rome Statute, the Government of the State of Israel is proud to thus express its acknowledgment of the importance, and indeed indispensability, of an effective court for the enforcement of the rule of law and the prevention of impunity.* As one of the originators of the concept of an International Criminal Court, Israel, through its prominent lawyers and statesmen, has, since the early 1950's, actively participated in all stages of the formation of such a court. Its representatives, carrying in both heart and mind collective, and sometimes personal, memories of the holocaust – the greatest and most heinous crime to have been committed in the history of mankind – enthusiastically, with a sense of acute sincerity and seriousness, contributed to all stages of the preparation of the Statute. Responsibly, possessing the same sense of mission, they currently support the work of the ICC Preparatory Commission. At the 1998 Rome Conference, Israel expressed its deep disappointment and regret at the insertion into the Statute of formulations tailored to meet the political agenda of certain states. Israel warned that such an unfortunate practice might reflect on the intent to abuse the Statute as a political tool. Today, in the same spirit, the Government of the State of Israel signs the Statute while rejecting any attempt to interpret provisions thereof in a politically motivated manner against Israel and its citizens. The Government of Israel hopes that Israel's expressions of concern of any such attempt would be recorded in history as a warning against the risk of politicization, that might undermine the objectives of what is intended to become a central impartial body, benefiting mankind as a whole. Nevertheless, as a democratic society, Israel has been conducting ongoing political, and academic debates concerning the ICC and its significance in the context of international law and the international community. The Court's essentiality – as a vital means of ensuring that criminals who commit genuinely heinous crimes will be duly brought to justice, while other potential offenders of the fundamental principles of humanity and the dictates of public conscience will be properly deterred – has never seized to guide us. Israel's signature of the Rome Statute will, therefore, enable it to morally identify with this basic idea, underlying the establishment of the Court. Today, [the Government of Israel is] honoured to express [its] sincere hopes that the Court, guided by the cardinal judicial principles of objectivity and universality, will indeed serve its noble and meritorious objectives." (emphasis in the original).

8 *See further,* United Nations Treaty Collection, Status of Treaties, the Rome Statute of the International Criminal Court, at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&lang=en: "In a communication received on 6 May 2002, the Government of the United States of America informed the Secretary-General of the following: 'This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty."

9 "In a communication received on 28 August 2002, the Government of Israel informed the Secretary-General of the following: "(…) in connection with the Rome Statute of the International Criminal Court adopted on 17 July 1998, […] Israel does not intend to become a party to the treaty. Accordingly, Israel has no legal obligations arising from its signature on 31 December 2000. Israel requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty." https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=xviii-10&chapter=18&lang=en#4.

Russia also signed the Statute, but withdrew its signature in 2016.[10] China did not sign the Statute[11] and India expressed great concerns at the opening of the Rome Diplomatic Conference *vis-à-vis* the planned procedures and mechanisms, but not towards the idea

10 Statement by the Russian Foreign Ministry, 16 November 2016: "On November 16, the President of the Russian Federation signed the Decree «On the intention not to become a party to the Rome Statute of the International Criminal Court." The notification will be delivered to the Depository shortly. Russia has been consistently advocating prosecuting those responsible for the most serious international crimes. Our country was at the origins of the Nuremberg and Tokyo tribunals, participated in the development of the basic documents on the fight against genocide, crimes against humanity and war crimes. These were the reasons why Russia voted for the adoption of the Rome Statute and signed it on September 13, 2000. The ICC as the first permanent body of international criminal justice inspired high hopes of the international community in the fight against impunity in the context of common efforts to maintain international peace and security, to settle ongoing conflicts and to prevent new tensions. Unfortunately the Court failed to meet the expectations to become a truly independent, authoritative international tribunal. The work of the Court is characterized in a principled way as ineffective and one-sided in different fora, including the United Nations General Assembly and the Security Council. It is worth noting that during the 14 years of the Court's work it passed only four sentences having spent over a billion dollars. […]" (http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2523566). *See further,* United Nations Treaty Collection, Status of Treaties, the Rome Statute of the International Criminal Court, at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&lang=en: "In a communication received on 30 November 2016, the Government of the Russian Federation informed the Secretary-General of the following: I have the honour to inform you about the intention of the Russian Federation not to become a party to the Rome Statute of the International Criminal Court, which was adopted in Rome on 17 July 1998 and signed on behalf of the Russian Federation on 13 September 2000. I would kindly ask you, Mr. Secretary-General, to consider this instrument as an official notification of the Russian Federation in accordance with paragraph (a) of Article 18 of the Vienna Convention on the Law of Treaties of 1969."

11 Ministry of Foreign Affairs of the People's Republic of China, China and the International Criminal Court, 28 October 2003: "[…] The Chinese Government consistently understands and supports the establishment of an independent, impartial, effective and universal international criminal Court. If the operation of the court can really make the individuals who perpetrate the gravest crimes receive due punishment, this will not only help people to establish confidence in the international community, but also will be conducive to international peace and security at long last. It was precisely based on this stand and understanding that the Chinese Government took an active part in the process of negotiations on the Rome Statute. What was regrettable was that because some articles of the text of the statute agreed by Rome Conference could not satisfy some reasonable concern of the Chinese Government, the participating Chinese Delegation had to vote against the statute when it was adopted. This was also the reason why China could not sign the Rome Statute." (http://www.fmprc.gov.cn/mfa_eng/wjb_663304/zzjg_663340/tyfls_665260/tyfl_665264/2626_665266/2627_665268/t15473.shtml).

of establishing the ICC as such.[12] At the opening of the Conference, Iran's position was also in favour of establishing the ICC,[13] notwithstanding the fact that the Iranian representative enumerated a number of items in relation to which his Government wished to see substantive changes.[14] (Iran's signature has not yet been followed by ratification.)

I am certainly not in a position to judge the decisions or motivations of these States; I would rather highlight that while these States criticized certain formulations, compe-

12 The representative of India first enumerated India's points of criticism, for example, with regard to the referral mechanism of the Security Council, the Prosecutor's *proprio motu* power to initiate investigations, the fact that some crimes were missing and others were formulated not on the basis of customary law, but progressive development, or according to the text of multilateral treaties which did not enjoy universal acceptance, and the concern that the practice of the *ad hoc* tribunals would be transposed to the ICC, where it was not appropriate. The representative then concluded: "Mr. President, the Conference must address all these matters of substance which are critical to the establishment of the International Criminal Court. A purist approach reflecting a particular group position alone would not be adequate. The international community does not have to repeat the past mistakes as seen in the attempts to pursue narrow national agendas on human rights matters in various UN human rights fora. Instead, the best way to find solutions to these problems lies in recognising genuine diversity, and striving for a broad based Statute capable of wide acceptance and participation by States. Despite the odds, this is a course worth pursuing for all those committed to the basic objectives of establishing an universal international criminal court. My delegation assures you of our support in such an endeavour." (emphasis added); Statement by Mr. Dilip Lahiri, Additional Secretary (UU) Ministry of External Affairs, Head of the Indian Delegation at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (https://www.legal-tools.org/uploads/tx_ltpdb/doc27815.pdf). *See also* an article by Mr. Lahiri, written in 2010 already in a personal capacity and examining the pros and cons of an eventual change in India's policy towards the ICC where he is advocating for a signature; D. Lahiri, 'Should India continue to stay out of ICC?' (https://www.orfonline.org/research/should-india-continue-to-stay-out-of-icc/).

13 Statement by H.E.M. Javad Zarif, Deputy Foreign Minister of the Islamic Republic of Iran, 17 June 1998: "For nearly half a century, and almost since the inception of the United Nations, the international community, through the General Assembly, has recognized the need to establish an international criminal court to prosecute and punish perpetrators of the most heinous international crimes, namely war crimes, crimes against humanity, genocide and aggression […] The international community and the victims of these very horrifying crimes have suffered enough from the abuse of existing international mechanisms through politically motivated negligence or application of double standards. Thus, we need to put this momentum to the best use and truly seize this propitious moment through understanding and tolerance for diversity, to establish an international court that must be an independent, universal effective and impartial judicial body. […] An independent and effective international criminal court requires collective preparation and active participation of all States. To this end, flexibility and consensus building constitute the best means for achieving results now and facilitating the work of the ICC in the future. […] *We all want to see the establishment of an independent judicial body* free from the influence and interference of political organs. […] In conclusion, *my delegation hopes that we will all witness, in the near future, the establishment of an independent and impartial international criminal court*, which could exercise justice in international community and help realize the aspirations of the human society; a Court that contributes to eliminate and deter acts of cruelty and inhumanity throughout the globe, and thus paves the way for a more humane world order in which peace and justice compliment each other." (https://www.legal-tools.org/doc/036269/pdf/).

14 These items concerned mostly the envisaged role of the Security Council and the independence and objectivity of the Prosecutor in the selection of cases; Statement by H.E.M. Javad Zarif, Deputy Foreign Minister of the Islamic Republic of Iran, 17 June 1998 (https://www.legal-tools.org/doc/036269/pdf/). For an analysis of this statement, as well as the prior and subsequent events and experts' discussions on the question of the compatibility of the Rome Statute with the Iranian legal system, *see* H. Abtahi, 'The Islamic Republic of Iran and the ICC', *Journal of International Criminal Justice*, Vol. 3, 2005, pp. 635-648 (https://academic.oup.com/jicj/article-pdf/3/3/635/9615321/mqi050.pdf).

tences or practices, in the period between 1998-2002, they fully recognized the necessity of an international criminal court and supported its establishment. Moreover, at the Assembly of States Parties, States acting as observers – for example, the US[15] and China[16] – while reiterating their concerns, also emphasized the importance of the ICC on the international plane.

15 Statement on Behalf of the United States of America, 16th Session of the Assembly of States Parties, 8 December 2017: "The United States strongly supports justice and accountability for war crimes, crimes against humanity, and genocide, including through support of domestic accountability efforts. We appreciate the efforts of the ICC and the Parties to the Rome Statute to pursue these objectives. At the same time, recent developments in connection with a request by the Office of the Prosecutor to open an investigation into the situation in Afghanistan raise serious and fundamental concerns that we wish to register today. […] By intervening at this meeting, we are expressing our long standing, continuing, and principled objections. We registered these objections throughout the course of the negotiations in the 1990s. We registered these objections following the entry into force of the Rome Statute. And we repeat these objections today. Further, we have long believed and stated that justice is most effective when it is delivered at the local level. In this regard, we don't believe that moving to open an investigation by the ICC would serve the interests of either peace or justice in Afghanistan. The United States stands as a strong ally in the fight to end impunity. Earlier this week, we joined many of you in commemorating the accomplishments of the International Criminal Tribunal for the Former Yugoslavia, an institution we have supported since day one as an important way to help ensure justice for the victims of atrocities committed during the Balkans conflict. Our support for such efforts dates back to Nuremberg and Tokyo. We were one of the most vocal supporters for the creation of tribunals to try those most responsible for atrocities committed in Rwanda and Sierra Leone. And we continue to support a number of hybrid, regional, and domestic efforts to ensure accountability for atrocity crimes, from Guatemala to Syria to Kosovo to South Sudan. The International Criminal Court can play an important role alongside these efforts by exercising its power judiciously within the limits of international law." (available at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ASP-16-USA.pdf).

16 Statement of the Chinese Observer Delegation at the General Debate in the 16th Session of the States Parties to the Rome Statue of the ICC, Mr. Ma Xinmin, Deputy Director-General of the Department of Treaty and Law of the Ministry of Foreign Affairs of China (New York, 7 December 2017): "[…] China has always supported law-based efforts to fight against and punish grave crimes that threaten international peace and security and we expect that the International Criminal Court plays a constructive role in this regard. […]" (https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ASP-16-CHI.pdf).

13.4 Importance of Similarities in the Wording of Statutory Texts and Other Norms

Without forgetting the special nature of preambles in the law of international treaties, it is worth remembering that both the UN Charter[17] and the Statute[18] contain such purposes and considerations which are not *inter partes*, but *erga omnes* in character.

In the context of the similarities of the aims contained in the two preambles, let us focus on Article 2 of the Statute,[19] as well as the special relationship between the UN and the ICC and the applicable agreements.[20]

17 Preamble of the UN Charter: "WE THE PEOPLES OF THE UNITED NATIONS DETERMINED *to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind*, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the *equal rights* of men and women and *of nations large and small*, and to *establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained*, and to promote social progress and better standards of life in larger freedom, AND FOR THESE ENDS to practice tolerance and *live together in peace* with one another as good neighbours, and *to unite our strength to maintain international peace and security*, and *to ensure*, by the acceptance of principles and the institution of methods, *that armed force shall not be used, save in the common interest*, and *to employ international machinery for the promotion of the economic and social advancement of all peoples* […] (emphasis added).

18 Preamble of the Statute: "The States Parties to this Statute, Conscious that *all peoples are united by common bonds, their cultures pieced together in a shared heritage*, and concerned that this delicate mosaic may be shattered at any time, Mindful that *during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity, Recognizing that such grave crimes threaten the peace, security and well-being of the world*, Affirming that *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*, Determined *to put an end to impunity for the perpetrators of these crimes* and thus to contribute to the prevention of such crimes, *Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes, Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations*, Emphasizing in this connection that *nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State*, Determined to these ends and for the sake of present and future generations, *to establish an independent permanent International Criminal Court in relationship with the United Nations system*, with jurisdiction over the most serious crimes of concern to the international community as a whole, Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions, Resolved to guarantee lasting respect for and the enforcement of international justice, Have agreed as follows:" (emphasis added).

19 Art. 2 of the Statute: Relationship of the Court with the United Nations: "The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf."

20 *See especially* Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 22 July 2004, ICC-ASP/3/Res.1.

Some other articles of the Rome Statute are equally relevant from my point of view, such as Articles 4[21] and 87(6)[22] of the Statute. Moreover, I refer to the first three considerations of the preamble[23] on the Negotiated Relationship Agreement between the Court and the UN, as well as its Articles 7,[24] 15(1)[25] and – in particular – Article 17, which covers Security

21 Art. 4 of the Statute: Legal status and powers of the Court:
1. "The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.
2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, *by special agreement, on the territory of any other State*." (emphasis added).

22 Art. 87(6) of the Statute: "The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask *for other forms of cooperation and assistance* which may be agreed upon with such an organization and which are in accordance with its competence or mandate." (emphasis added).

23 Preamble of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 22 July 2004, ICC-ASP/3/Res.1: "*The International Criminal Court and the United Nations, Bearing in mind* the Purposes and Principles of the Charter of the United Nations, *Recalling* that the Rome Statute of the International Criminal Court reaffirms the Purposes and Principles of the Charter of the United Nations, *Noting* the important role assigned to the International Criminal Court in dealing with the most serious crimes of concern to the international community as a whole, as referred to in the Rome Statute, and which threaten the peace, security and well-being of the world […]" (emphasis in the original).

24 Art. 7 of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 22 July 2004, ICC-ASP/3/Res.1: Agenda items: "The Court may propose items for consideration by the United Nations. In such cases, the Court shall notify the Secretary-General of its proposal and provide any relevant information. The Secretary-General shall, in accordance with his/her authority, bring such item or items to the attention of the General Assembly or the Security Council, and also to any other United Nations organ concerned, including organs of United Nations programmes and funds."

25 Art. 15(1) of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 22 July 2004, ICC-ASP/3/Res.1: General provisions regarding cooperation between the United Nations and the Court: "With due regard to its responsibilities and competence under the Charter and subject to its rules as defined under the applicable international law, the United Nations undertakes to cooperate with the Court and to provide to the Court such information or documents as the Court may request pursuant to article 87, paragraph 6, of the Statute."

Council referrals,[26] and Articles 18(1) and (2).[27] (See also the formulation "in particular" in Article 18(1).) It is worth recalling Article 12 (entitled "Preconditions to the exercise of jurisdiction") and Article 13 (entitled "Exercise of jurisdiction") of the Statute. It is to be highlighted that any activity (if any!) of the Chambers of the Court which cannot be qualified as an "exercise of jurisdiction" shall be beyond the scope of these articles. Similarly, while the Prosecutor's main functions are investigation and prosecution, those duties which are of a different nature do not fall under the scope of Article 15 of the Statute (for example, diplomatic, communication and outreach activities).

The reader will certainly remember the promise made by States under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide – today an instru-

26 Art. 17 of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 22 July 2004, ICC-ASP/3/Res.1: Cooperation between the Security Council of the United Nations and the Court:

1. "When the Security Council, acting under Chapter VII of the Charter of the United Nations, decides to refer to the Prosecutor pursuant to article 13, paragraph (b), of the Statute, a situation in which one or more of the crimes referred to in article 5 of the Statute appears to have been committed, the Secretary-General shall immediately transmit the written decision of the Security Council to the Prosecutor together with documents and other materials that may be pertinent to the decision of the Council. The Court undertakes to keep the Security Council informed in this regard in accordance with the Statute and the Rules of Procedure and Evidence. Such information shall be transmitted through the Secretary-General.
2. When the Security Council adopts under Chapter VII of the Charter a resolution requesting the Court, pursuant to article 16 of the Statute, not to commence or proceed with an investigation or prosecution, this request shall immediately be transmitted by the Secretary-General to the President of the Court and the Prosecutor. The Court shall inform the Security Council through the Secretary-General of its receipt of the above request and, as appropriate, inform the Security Council through the Secretary-General of actions, if any, taken by the Court in this regard.
3. Where a matter has been referred to the Court by the Security Council and the Court makes a finding, pursuant to article 87, paragraph 5 (b) or paragraph 7, of the Statute, of a failure by a State to cooperate with the Court, the Court shall inform the Security Council or refer the matter to it, as the case may be, and the Registrar shall convey to the Security Council through the Secretary-General the decision of the Court, together with relevant information in the case. The Security Council, through the Secretary-General, shall inform the Court through the Registrar of action, if any, taken by it under the circumstances."

27 Art. 18(1) and (2) of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 22 July 2004, ICC-ASP/3/Res.1: Cooperation between the United Nations and the Prosecutor:

1. "With due regard to its responsibilities and competence under the Charter of the United Nations and subject to its rules, the United Nations undertakes to cooperate with the Prosecutor and to enter with the Prosecutor into such arrangements or, as appropriate, agreements as may be necessary to facilitate such cooperation, in particular when the Prosecutor exercises, under article 54 of the Statute, his or her duties and powers with respect to investigation and seeks the cooperation of the United Nations in accordance with that article.
2. Subject to the rules of the organ concerned, the United Nations undertakes to cooperate in relation to requests from the Prosecutor in providing such additional information as he or she may seek, in accordance with article 15, paragraph 2, of the Statute, from organs of the United Nations in connection with investigations initiated *proprio motu* by the Prosecutor pursuant to that article. The Prosecutor shall address a request for such information to the Secretary-General, who shall convey it to the presiding officer or other appropriate officer of the organ concerned."

ment of quasi-universal participation – where States committed themselves to establishing an "international penal tribunal"[28] with similar competences and working principles as this Court, which was finally established fifty years later.[29]

13.5 Subsequent Practice and Explanation of Votes in the Security Council

It should be duly noted that non-States Parties (including permanent members of the Security Council) have cooperated or agreed to cooperate with the Court,[30] for instance, in the arrest and surrender of suspects,[31] they expressed their explicit approval of Security

28 Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention"), 9 December 1948, 78 UNTS 277, Art. VI: "Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

29 On the living relationship between the Statute and the Genocide Convention, as well as between the Court and the "international penal tribunal" envisaged by the Genocide Convention, *see further* (albeit in the context of eventual exceptions from head of state immunity), Minority Opinion of Judge Marc Perrin de Brichambaut to Pre-Trial Chamber II, "Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir", 6 July 2017, ICC-02/05-01/09-302-Anx, paras. 10-18, and in particular paras. 11-13.

30 "We Should at All Costs Prevent the ICC from Being Politicized", Interview with Fatou Bensouda, Chief Prosecutor of the International Criminal Court (ICC): "- How is your cooperation with non-states parties? We have received assistance from non-States Parties in many instances. I can give you the example of Bosco Ntaganda. He was indicted by the Court in 2006 for, amongst other things, recruiting child soldiers. In March 2013, he decided to walk into the American Embassy in Kigali (Rwanda) and requested to be transferred to the ICC. Neither Rwanda nor the US is a State Party to the Court. One would have expected this to create difficulties getting hold of Ntaganda, but it happened. We were able to work with both States, and the transfer took place in the most efficient way. Another example is Russia. We have a preliminary examination on-going in Georgia, in the wake of the August 2008 armed conflict in South Ossetia. Georgia, which is a State Party, has given us documents; we have also visited the country on several occasions. But Russia, a non-State Party, has also sent more than 3000 documents to the Office. This shows that being a non-State Party does not necessarily preclude you from working with the Court.", VEREINTE NATIONEN – German Review on the United Nations, Vol. 62, No. 1, 2014, https://www.dgvn.de/fileadmin/user_upload/DOKUMENTE/English_Documents/Interview_Fatou_Bensouda.pdf, pp. 6-7. Ms. Fatou Bensouda, Speech at the African Leadership Centre's Simulation Seminar: "A Season of Changes in Africa: Is Africa's Voice Getting Louder?": "In our Libya situation, we have received very good cooperation from the Libyan authorities, and we visited Tripoli at the end of last year.", African Leadership Centre Keynote, 22 February 2012, http://www.africanleadershipcentre.org/attachments/article/174/ALC%20Keynote%201%20-%20Ms%20Fatou%20Bensuda.pdf, p. 7.

31 Fatou Bensouda (then Deputy Prosecutor), "Africa and the International Criminal Court", 31 May 2007, Pretoria, South Africa: "One of the militia commanders – Raska Lukwiya – was killed in a confrontation with the Ugandan army. At the request of the Government of Uganda, forensic experts from the Office of the Prosecutor helped to identify his body. While the four remaining LRA commanders are still at large, the Court has made a significant impact on the ground. This case shows how arrest warrants issued by the Court can contribute to the prevention of atrocious crimes. The Court's intervention has galvanized the activities of the states concerned. Uganda and the DRC, parties to the Rome Statute and legally bound to execute the arrest warrants, have expressed their willingness to do so. *The Sudan, a non-State Party, has voluntarily agreed to enforce the warrants.*" (emphasis added), http://www.africalegalaid.com/download/afla_lecture_series/Africa_and_the_International_Criminal_Court_ICC.pdf, p. 5.

Council resolutions referring situations to the ICC,[32] have refrained from exercising their veto power, abstaining under certain conditions, participated as observers in the works of the Assembly of States Parties,[33] or have consented to outreach activities.[34]

13.6 Impact of ICC Judgments in Light of the 'ne bis in idem re' Principle

It should be born in mind that when the Security Council refers a situation on the territory of a non-State Party to the ICC, this State – if it is a UN Member State – is duty bound to cooperate with the Court. This duty stems from its membership in the UN. If

32 UN Press Release, "In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters", 26 February 2011, New York: "VITALY CHURKIN (Russian Federation) said he supported the resolution because of his country's deep concern over the situation, its sorrow over the lives lost and its condemnation of the Libyan Government's actions. He opposed counterproductive interventions, but he said that the purpose of the resolution was to end the violence and to preserve the united sovereign State of Libya with its territorial integrity. Security for foreign citizens, including Russian citizens, must be ensured. LI BAODONG (China) said that China was very much concerned about the situation in Libya. The greatest urgency was to cease the violence, to end the bloodshed and civilian casualties, and to resolve the crisis through peaceful means, such as dialogue. The safety and interest of the foreign nationals in Libya must be assured. Taking into account the special circumstances in Libya, the Chinese delegation had voted in favour of the resolution […]. Noting that five Council members were not parties to the Rome Statute that set up the International Criminal Court, including India, that country's representative said he would have preferred a 'calibrated approach' to the issue. However, he was convinced that the referral would help to bring about the end of violence and he heeded the call of the Secretary-General on the issue, while stressing the importance of the provisions in the resolution regarding non-States parties to the Statute.", https://www.un.org/press/en/2011/sc10187.doc.htm.

33 The delegation of United States actively participated as an observer State at the Kampala Review Conference in 2010; *see* Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May – 11 June 2010, Official Records, RC/11, pp. 3-4, para. 4 and p. 126, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP9/OR/RC-11-ENG.pdf.

34 Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, ahead of the Office's visit to Israel and Palestine from 5 to 10 October 2016, 5 October 2016: "As part of its commitment to promote a better understanding of the work of the Office of the Prosecutor (the 'Office') of the International Criminal Court ('ICC'), a delegation from the Office will visit Israel and Palestine from 5 to 10 October 2016. The purpose of this visit will be to undertake outreach and education activities with a view to raising awareness about the ICC and in particular, about the work of the Office; to address any misperceptions about the ICC and to explain the preliminary examination process. *Such visits are standard practice, even in countries that are not State Parties to the Rome Statute*. In accordance with its usual practice at this stage of its work, the delegation will not engage in evidence collection in relation to any alleged crimes; neither will the delegation undertake site visits, or assess the adequacy of the respective legal systems to deal with crimes that fall within ICC jurisdiction. The delegation is scheduled to travel to Tel Aviv, Jerusalem and Ramallah and will hold meetings with Israeli and Palestinian officials at the working levels. The delegation will also participate in two events at academic institutions and engage in television and newspaper interviews in both Israel and Palestine. In addition, the delegation will hold a courtesy meeting with United Nations agencies under the auspices of the United Nations Special Coordinator for the Middle East Peace Process ('UNSCO'). Given the limited duration of the visit, the delegation will not engage in unscheduled events or meetings. The Office is grateful to both the Israeli and Palestinian authorities for facilitating the visit and to UNSCO for providing logistical support. […]" (emphasis added), https://www.legal-tools.org/doc/449145/pdf/.

this country is not a UN Member State – a phenomenon is highly improbable today – the competences enjoyed by the Security Council according to Chapter VII of the UN Charter are sufficient for the Security Council to act and to force the cooperation of the State in case of threats to peace and security. In such a situation, the objective legal personality of the UN enables the ICC to act accordingly.

It is to be emphasized that if a perpetrator is charged and found guilty before this Court – subject to the Court's jurisdictional parameters being met in accordance with Articles 11, 12, 13, 14 and 15 of the Statute – for any crime provided for in Articles 6, 7, 8 and 8*bis* of the Statute, his/her conviction – pronounced according to the rule of law guarantees, enumerated in different articles of the Statute and, in particular, in Articles 22, 23, 24, 25, 31, 66 and 67 – should be duly taken into account before any national jurisdiction in order to avoid double jeopardy (*ne bis in idem re*), a legal principle belonging to the core elements of the rule of law. Given the universally recognized customary law character of the *ne bis in idem re* principle (or according to certain doctrinal schools, its character as a general principle of law recognized by nations), the fact that a State is or is not a State Party to the Statute has no practical relevance as long as the same person/same conduct test is met.

If the Court pronounces a sentence and this sentence is executed in a State Party to the Statute, it should be taken into account also in non-States Parties, especially considering a subsequent bilateral agreement between the Court and the State on the enforcement of sentences if the person in question falls within the scope of application of the agreement.

13.7 Hybrid Nature of the Rome Statute

I would like to also point out the hybrid nature of the Statute which often contains, besides the precise institutional or procedural provisions agreed upon at the Rome Diplomatic Conference, *verbatim* formulations of existing, quasi-universal treaties (such as, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1899, 1907, 1954 Hague Conventions, the 1949 Geneva Conventions and their Additional Protocols of 1977 and 2005 and the 1989 Convention on the Rights of the Child).

Moreover, substantial parts of Articles 7 and 8 of the Statute are generally considered to be customary law (*i.e.* "pure codification" elements) while other parts represent a "progressive evolution" of custom.[35] Other formulations reflect well-established judicial interpretations of the laws of war, for example, according to the Nuremberg and Tokyo tribunals, the ICTY, the International Criminal Tribunal for Rwanda (the "ICTR") and other international or hybrid tribunals.

35 On the importance of the distinction, *see e.g.* ICJ, *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Germany/The Netherlands)*, Judgment of 20 February 1969, [1969] ICJ Rep. 3.

While recognizing the paramount importance of Article 34 of the Vienna Convention on the Law of Treaties[36] (*pacta tertiis nec nocent nec pro sunt*), I refer also to Article 38 of the said Convention,[37] as well as other exceptions[38] generally recognized by scholars and international jurisprudence.

All this should be understood in light of Article 21(2) of the Statute on the role of earlier decisions of the Court on the interpretation of the Statute.

In concluding this part, a special emphasis should be put on the existence of the ICC as an objective fact, *i.e.* a legal-judicial-institutional entity which has engaged and cooperated not only with States Parties, but with a great number of non-States Parties as well, whether signatories or not.

Having said that, it is be underlined that the objective legal personality of the Court does not however imply either automatic or unconditional *erga omnes* jurisdiction. The conditions for the exercise of the Court's jurisdiction are set out, first and foremost, in Articles 11, 12, 13, 14 and 15 of the Statute.

13.8 Analytical Activity of the Prosecutor and the OTP?

The importance of properly distinguishing between States Parties and Non-States Parties should not be forgotten. This distinction is reflected in, *inter alia*, Articles 4(2), 12(3), 15*bis*(5), 87(5), 90(4) and (6), and 93(10)(c) of the Statute.

Jurisdiction is an aspect of the historic mission States Parties conferred upon the ICC but it is certainly not the only one.

In this regard, it should be noted that the ICC has both judicial and non-judicial competences. The following are examples of its non-judicial competences: (i) relief (through the mandate of the Trust Fund for Victims); (ii) analysis; (iii) publication; (iv) scientific synthesis; (v) professional formation; (vi) outreach; (vii) contacts with States, intergovernmental organizations and bodies such as the different international tribunals and human rights courts; (viii) competences as an employer over its staff; and (ix) domestic legal competences for entering into civil law contracts with different service providers in the Netherlands and elsewhere.

36 Vienna Convention on the Law of Treaties, adopted on 23 May 1969, UNTS Vol. 1155, p. 331, Section 4: Treaties and third states, Art. 34: General rule regarding third States: "A treaty does not create either obligations or rights for a third State without its consent."

37 Vienna Convention on the Law of Treaties, adopted on 23 May 1969, UNTS Vol. 1155, p. 331, Article 38: Rules in a treaty becoming binding on third States through international custom: "Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such."

38 *See e.g.* peremptory norms of international law (*jus cogens*), "objective regimes", collateral treaties, repetition of well-established custom (if the State was not a persistent objector when the custom in legal terms was still in *statu nascendi*), reappearance/repetition of the State's commitments contracted elsewhere.

The exercise of jurisdiction, which falls within the Court's judicial competences, is subject to a number of stipulations contained in the Statute. More specifically, these stipulations are contained in Articles 11, 12, 13, 14, and 15 of the Statute and concern: (i) the distinction as to the actors that are entitled to submit a referral and those that are not; (ii) the differentiation between States Parties and Non-States Parties; and (iii) the conditions for *proprio motu* action by the Prosecutor.

In this regard, it should be noted that any activity by the Prosecutor on the territory of a Non-State Party is subject to the consent of that State. Even so, if the exercise of the Court's jurisdiction is not *prima facie* excluded in relation to crimes within the jurisdiction of the Court taking place on the territories of a State Party and a Non-State Party, the Prosecutor may initiate activities on the territory of the State Party. It remains for the Prosecutor to determine whether such activities suffice.

Other activities are regulated elsewhere in the Statute. These are, in particular, set forth in Articles 4(1), 42(9), 43(1), and 112(2)(a) and (2)(g) of the Statute, in conjunction with the Regulations of the Office of the Prosecutor[39] or specific documents adopted by the Assembly of States Parties, such as the Regulations of the Trust Fund for Victims.[40]

In this context, I feel the study and analysis of relevant materials are not identical with the exercise of jurisdiction by the Court. Such study and analysis certainly can form part of the exercise of jurisdiction by the Court.[41] However, the study and analysis of commonly accessible material and pieces of information and communications directly received by the Prosecutor form an integral part of the Prosecutor's activities – as well as that of the Presidency of the Court. This is especially the case regarding contacts, briefings, and exchanges of views with, as well as proposals to, the UN Secretary General, the UN Security Council, or other organs and institutions of the UN. This is also required when contacts are initiated or developed with States Parties and Non-States Parties. (See as an example of these types of contacts the Prosecutor's visit to Qatar[42] or the already

39 *See for example* regulations 15, 23, 24, 25(1), 26, 27, and 28 of Regulations of the Office of the Prosecutor.

40 ICC-ASP/4/Res.3. *See in particular* regulations 50(a)(i) and 53 of the Regulations of the Trust Fund for Victims.

41 Art. 15(2) of the Statute: "The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or nongovernmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court."

42 "ICC prosecutor voices regret over anti-Qatar blockade: Fatou Bensouda visits Doha to discuss violations of international accords committed by the blockading states. On Sunday, ICC's Fatou Bensouda met Qatar's Emir Sheikh Tamim bin Hamad Al Thani in Doha and discussed the violations of international accords as well as human rights abuses committed by the four blockading countries. QNA, Qatar's state news agency, reported that Bensouda praised Doha's mature handling of the crisis. The meeting also dealt with fields of cooperation between Qatar and the ICC, QNA reported. https://www.aljazeera.com/news/2017/07/icc-prosecutor-expresses-regret-anti-qatar-siege-170709192916957.html.

mentioned visit of the OTP experts for "outreach and education" in Israel and Palestine.[43])

Articles 4(2)[44] and 87(5)(a)[45] of the Statute refer to the necessity of preparing agreements of cooperation with Non-States Parties for the purpose of exercising the Court's functions and powers on their territory. For other activities, such as receiving information from intergovernmental organizations, no prior agreement is necessarily required.[46] However, in relation to the Court's relationship with the United Nations,[47] the Rome Statute calls for the conclusion of an agreement.[48] Agreements with other organizations have been entered into as well.[49]

The analysis of communications, documents, and reliable open source materials can contribute to, *inter alia*, verifying whether nationals of States Parties can be identified amongst alleged perpetrators *vis-à-vis* whom the Court could exercise jurisdiction based on Article 12(2)(b) of the Statute.

Furthermore, when the Prosecutor is entitled to investigate according to Article 53 of the Statute, she may benefit from the findings of her previous investigative activities. In addition, when, on the basis of the information acquired during her diplomatic outreach activity, the Prosecutor feels that the conditions laid down in Articles 11, 12, 13, 14, and 15 of the Statute are close to being realized, she may accelerate and shape appropriately the rhythm and directions of her investigative activity in order to be prepared to act as soon as possible when the preconditions for the exercise of the Court's jurisdiction are fulfilled in accordance with the aforementioned provisions.

43 Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, ahead of the Office's visit to Israel and Palestine from 5 to 10 October 2016: https://www.icc-cpi.int//Pages/item.aspx?name=161005-OTP-stat-Palestine.

44 Art. 4(2) of the Statute: "The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State."

45 Art. 87(5) of the Statute: "The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis."

46 Art. 87(6) of the Statute: "The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate."

47 Art. 2 of the Statute: "The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf."

48 *See* Negotiated Relationship Agreement between the International Criminal Court and the United Nations (2004).

49 *See for example* Agreement between the International Criminal Court and the European Union on Cooperation and Assistance (2006); Letter of Understanding on Co-operation between the Office of the Prosecutor of the International Criminal Court with Eurojust (2007).

13.9 Conclusions

In my view, all the above substantiate that the International Criminal Court was set up by the States with the ambition of creating an international judicial body, enjoying an *erga omnes,* objective character even if due attention was paid to the distinction between States Parties and non-States parties.

The States-Parties' obligations on cooperation are precisely defined in the Rome Statute while the cooperation with non-States Parties depend on particular agreements to be concluded. In practice we have witnessed how several non-States Parties were ready to cooperate or to interact with a pro-ICC because in a given case, since this coincided with their own national interests or because they assumed their responsibilities in the global fight against some particular international crimes.

The preponderant role afforded to the Security Council in the triggering mechanism of jurisdiction concerning situations in non-States Parties illustrates well that at the Rome Diplomatic Conference, the governments not only paid great attention to the distinction between States parties and non-States Parties, but also to the maintenance of the decisive role of the permanent members of the Security Council in the affairs of the world, with all the widely known opportunities and failures since 1945. The differences between States Parties and non-States Parties do not have a direct influence on the character of the legal personality of the Court: in my view it is an objective personality – or if not, it should be.

Let us hope that the International Criminal Court will have such a situation on its agenda, giving it the possibility and the ambition to act in the same way as the International Court of Justice did in the Bernadotte advisory opinion.

Addendum

This manuscript was accomplished some weeks before the adoption of the decision of the ICC in the matter.[50] The author is happy to state that most parts and the main lines of the argumentation – including also the adaptation of the "Bernadotte formula"[51] were later reflected – either *verbatim* or *mutatis mutandis* – also in the decision adopted by the Pre-Trial Chamber on 6 of September 2018 in the context of the Prosecutor's request for a ruling on jurisdiction over the situation of the Rohingyas.

50 Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute"; ICC-RoC46(3)-01/18-37, 06-09-2018, https://www.icc-cpi.int/CourtRecords/CR2018_04203.PDF; https://www.icc-cpi.int/Pages/item.aspx?name=pr1403.

51 See § 48 of the decision.