



**RETROACTIVE RECHARACTERISATION OF
CRIMES AND THE PRINCIPLES OF LEGALITY
AND FAIR LABELLING IN INTERNATIONAL
CRIMINAL LAW**

Talita de Souza Dias
Balliol College, University of Oxford

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ABSTRACT

The principle of legality is one of the most fundamental principles of criminal law. It requires crimes and penalties to be established by law at the time of the conduct. In international criminal law, it applies as a rule of custom, treaty and a general principle of law. Nonetheless, the principle sits uneasily with some unique features of the international legal order, particularly its multiple adjudicative and prescriptive authorities. This has led to a frequent but overlooked practice known as ‘retroactive recharacterisation of crimes’. This occurs when, upon charging, convicting or sentencing the accused, an international or domestic tribunal substitutes new rules of criminal law for those applying at the time of the conduct. Retroactive recharacterisation of crimes has been justified on the basis of a cursory reading of the principle of legality in general international law, which, on closer look, does not seem to accommodate some of its problematic outcomes. It is also unclear whether this phenomenon is consistent with the principle of fair labelling, which necessitates criminal labels to be representative of the accused’s blameworthiness. This thesis seeks to answer two principal research questions. First, how are the principles of legality and fair labelling to be applied in international criminal law generally and in the specific context of the International Criminal Court? Second, to what extent is the phenomenon of retroactive recharacterisation of crimes consistent with them, bearing in mind their elements, scope and rationales? Its central claim is that, although not *per se* contrary to both principles, changes in the applicable criminal law which substantively affect the fundamental rights of the accused, including the imposition of more stigmatising labels, may be unlawful. To address this, the substantive criminal law binding on the accused at the crime of the conduct ought to be applied as such.

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TABLE OF ABBREVIATIONS

ACHPR	African Court on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACmHPR	African Commission on Human and Peoples' Rights
AJICJ	African Journal of International Criminal Justice
AJIL	American Journal of International Law
ALJST	Albany Law Journal of Science and Technology
AlbLRev	Albany Law Review
AP	Additional Protocol (I or II) to the Geneva Conventions
ARIEL	Austrian Review of International and European Law
ASEAN	Association of Southeast Asian Nations
ASP	Assembly of States Parties to the Rome Statute
BYIL	British Yearbook of International Law
BYU LRev	Brigham Young University Law Review
CalLRev	California Law Review
Chi-Kent LRev	Chicago-Kent Law Review
CLJ	Cambridge Law Journal
Cornell LRev	Cornell Law Review
CLP	Current Legal Problems
ColumJTransnat'lL	Columbia Journal of Transnational Law
ColumLRev	Columbia Law Review
ConnJ Int'l L	Connecticut Journal of International Law
CRC	Convention on the Rights of the Child
CrimLF	Criminal Law Forum
CrimLR	Criminal Law Review
CUP	Cambridge University Press
DePaul LRev	DePaul Law Review
DPP	Director of Public Prosecutions
DRC	Democratic Republic of Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECmHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
ECOSOC	United Nations Economic and Social Council
ECOWAS	Economic Community of West African States
EJIL	European Journal of International Law
ERPL	European Review of Private Law
EurJCrime CrLCrJ	European Journal of Crime, Criminal Law and Criminal Justice
Fletcher FWldAff	Fletcher Forum of World Affairs
GC	Geneva Convention (I, II III or IV)

GeoLJ	Georgetown Law Journal
GJICL	Georgia Journal of International and Comparative Law
HILJ	Harvard International Law Journal
HRLR	Human Rights Law Review
HumRtsQ	Human Rights Quarterly
IACHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICLQ	International and Comparative Law Quarterly
ICLR	International Criminal Law Review
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHHR	International Human Rights Research
ILC	International Law Commission
IndLJ	Indiana Law Journal
ILQ	International Law Quarterly
IMT	International Military Tribunal
IsLR	Israel Law Review
JCE	Joint Criminal Enterprise
JCL	Journal of Criminal Law
JCLC	Journal of Criminal Law and Criminology
JCLIL	Journal of Comparative Legislation and International Law
JICJ	Journal of International Criminal Justice
LCP	Law and Contemporary Problems
LJIL	Leiden Journal of International Law
L&Phil	Law and Philosophy
MichJInt'l L	Michigan Journal of International Law
MJIL	Michigan Journal of International Law
MLR	Modern Law Review
NCrimLR	New Criminal Law Review
NELR	New England Law Review
NJIL	Nordic Journal of International Law
NJLJ	Nordic Journal of Law and Justice
NYIL	Netherlands Yearbook of International Law
OJLS	Oxford Journal of Legal Studies
OTP	Office of the Prosecutor of the International Criminal Court
OUP	Oxford University Press
RPE	Rules of Procedure and Evidence
SCR	Supreme Court of Canada
SCSL	Special Court of Sierra Leone

StanJInt'l L	Stanford Journal of International Law
TIAS	Treaties and Other International Acts Series
TLR	Tilburg Law Review
TxLR	Texas Law Review
STL	Special Tribunal for Lebanon
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Committee
UNSC	United Nations Security Council
US	United States of America
VCLT	Vienna Convention on the Law of Treaties
VaLRev	Virginia Law Review
VandJTransnat'l L	Vanderbilt Journal of Transnational Law
VillLRev	Villanova Law Review
YILC	Yearbook of the International Law Commission
YIHL	Yearbook of International Humanitarian Law
WHO	World Health Organisation

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INTRODUCTION

The principle of legality or *nullum crimen, nulla poena sine lege* is one of the most fundamental principles of criminal law applying to both international and domestic law. Its core element is the principle of non-retroactivity of crimes and penalties, which requires, for one to be held guilty and sentenced for a crime, that the conduct constitute a punishable offence at the time it took place.¹ In the context of international criminal law, the legal basis of the principle can be found in customary international law, general principles of law and treaties, some of which are universally ratified.² Thus, it is safe to say that it is part of general international law. The *nullum crimen* principle is also a fundamental human right, having a prominent place in most international and regional human rights instruments, such as the Universal Declaration of Human Rights (UDHR),³ the International Covenant on Civil and Political Rights (ICCPR)⁴ and the European Convention on Human Rights (ECHR).⁵ In the ICCPR, ECHR and other treaties, such as the American Convention on Human Rights (ACHR),⁶ the principle is one of the few rights from which no derogation is permitted, not even in times of emergency.⁷

¹ Bruce Broomhall, 'Article 22: Nullum Crimen Sine Lege' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (Beck/Hart 2016) 953; Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (CUP 2010) 352; Damien Scalia, *Du principe de légalité des peines en droit international pénal* (Bruylant 2011) 93–94; M Cherif Bassiouni, *International Criminal Law: Sources, Subjects and Contents* (Brill 2008) 73.

² Gallant (n 1) 3, 8–9; Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia 2002) 365–369; Noora Arajärvi, *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals* (Routledge 2014) 127.

³ Art 11(2), Universal Declaration of Human Rights, UNGA Res 217 A(III) (10 December 1948).

⁴ Art 15, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

⁵ Art 7, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) ETS 5.

⁶ American Convention on Human Rights, 'Pact of San Jose', Costa Rica (adopted 22 November 1969, entered into force 18 July 1978) 1114 UNTS 123).

⁷ See, e.g., Art 4(2), ICCPR; Art 15(2), ECHR; Art 27(2), ACHR.

Its main purpose or rationale is to provide individuals with fair notice of the severe consequences arising from criminal wrongdoing.⁸ By doing so, the principle also safeguards individuals from the exercise of arbitrary power by domestic or international judiciary, legislative and executive bodies.⁹ Ultimately, it protects one of the most fundamental human values, namely, individual freedom.¹⁰ Some have referred to it as ‘the first principle of the criminal law’,¹¹ and as a principle ‘of central importance’.¹² Virtually all states in the world recognise it in their domestic legal systems, with some going beyond non-retroactivity to include the requirements of strict construction, legal certainty (or specificity), *in dubio pro reo*, *lex mitior*, and even *lex scripta*.¹³ In the same vein, this principle is now applicable to the rules of international criminal law, whether these are interpreted and applied by states and their national organs, particularly domestic courts, or by international courts and other subjects of international law.¹⁴

However, some of the traditional features of the principle of legality sit uneasily with the peculiarities of international criminal law. Challenges include the unwritten nature of two sources of international law, namely customary international law and general principles of law, and their often-embryonic content, which have strained the requirements of specificity, written law and strict interpretation. In addition, the international legal order does not have a unified legislature or judiciary, but multiple

⁸ Gallant (n 1) 20; Scalia (n 1) 48, 55; Claus Kreß, ‘Nulla Poena Nullum Crimen Sine Lege’, *Max Planck Encyclopedia of Public International Law* (2010) para 22 <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e854>> accessed 25 August 2019; Broomhall (n 1) 952; M Cherif Bassiouni, *International Criminal Law: Sources, Subjects and Contents* (Brill 2008) 98; John Calvin Jeffries Jr, ‘Legality, Vagueness, and the Construction of Penal Statutes’ (1985) *VaLRev* 189, 205–206; Franz von Liszt, ‘The Rationale for the Nullum Crimen Principle’ (2007) 5 *JICJ* 1009, 1010–1011.

⁹ Gallant (n 1) 20; Andrew Ashworth, *Principles of Criminal Law* (OUP 2009) 20; Scalia (n 1) 48, 57, 59, 93; Kreß (n 8) para 22; Broomhall (n 1) 952; Shahram Dana, ‘Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing’ (2009) 99 *JCLC* 857, 862; Bassiouni, *International Criminal Law: Sources, Subjects and Contents* (n 8) 98; Jeffries Jr (n 8) 205–206.

¹⁰ Kreß (n 8) para 3; Ashworth (n 9) 57–58.

¹¹ Herbert Packer, *The Limits of the Criminal Sanction* (Stanford University Press 1968) 79–80.

¹² Jeffries Jr (n 8) 190.

¹³ Bassiouni, ‘Legality’ (n 1) 73, 75–76; Boot (n 2) 81, 367; Gallant (n 1) 231–302, 353, 355.

¹⁴ Gallant (n 1) 355, 393.

prescriptive and adjudicative authorities which adopt and interpret a variety of rules. This has led to a rather flexible interpretation of the non-retroactivity principle. Prior criminalisation and punishment by *some*, rather than a specified, source of domestic *or* international law, which was binding on the accused at the time of the conduct, has been deemed sufficient to secure a conviction.¹⁵

This flexible reading of the principle of legality has led domestic and international courts to treat the various sources of international and domestic criminal law interchangeably by resorting to what has been termed ‘retroactive recharacterisation’ or ‘reclassification’ of crimes.¹⁶ This occurs whenever the legal basis for criminalisation and/or punishment differs from the substantive law governing the charges, conviction and sentencing. In other words, rules of criminal law not previously binding on the accused are retroactively applied to them in substitution for the applicable law, under the pretext that a similar crime or mode of liability was found therein. In this way, the laws defining the offence, the general principles of liability (modes of liability, general standards of *mens rea* and defences), the penalties, and the other rules determining whether the individual can be punished or prosecuted (e.g. statutes of limitations, pardons or amnesties), which applied at the time of the conduct, are retroactively reclassified or recharacterised into ‘analogous’ laws that did not exist or were not previously binding on the individual.

¹⁵ See Chapter 2.

¹⁶ Gallant (n 1) 40–42, 97, 123, 132–134, 276–278, 320–323, 367–369, 372–373, 381–382; Galand AS, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits* (Brill Nijhoff 2019) 148–149; Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (CUP 2014) 162–165. Note that other authors have referred to the same phenomenon with different terminology. For example, Bassiouni classifies it a form of permissible *ejusdem generis* analogy, but without considering any recent state practice, *opinio juris* and case law (see M Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (Martinus Nijhoff Publishers 1999) 144). Some commentators describe the phenomenon without naming it. See e.g. Beth Van Schaack, ‘Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals’ (2008) 97 *GeoLJ* 119, 168–169, 172, 177–178; Theodor Meron, ‘The Principle of Legality in International Criminal Law’, *The Making of International Criminal Justice* (OUP 2011) 112; *Stakić Case* (Appeal Judgment), Partly Dissenting Opinion of Judge Shahabuddeen, ICTY-97-24 (22 March 2006), §§66–72; Christopher Greenwood, ‘International Humanitarian Law and the Tadić Case’ (1996) 7 *EJIL* 265, 281 (all defending the consistency of recharacterisation with the principle of legality, but on the basis of a limited analysis of the rationales of the principle and recent state and judicial practice).

For instance, conduct that could only have been criminalised and punished as murder under domestic law is later recharacterised as genocide or crimes against humanity under customary international law. This interchangeable application of different sources of law, domestic or international, usually takes place when the perpetrator is tried by a court that did not exist at the time of the conduct (an *ex post facto* trial) or is not competent to apply the law that was binding on them at that time (e.g. in cases of vicarious or representation jurisdiction).¹⁷ In short, the criminal law that applies in the forum does not exactly mirror the one that applied to the accused at the time of the conduct, i.e. the applicable law. Examples can be found in the context of post-World War II trials, the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) and even the International Criminal Court (ICC, the Court). Significantly, this practice has been accepted without much discussion in legal scholarship and practice. It is often argued, rather simplistically, that the application of *formally* retroactive rules of criminal law or the retroactive relabelling of the conduct are not contrary to the principle of legality.¹⁸

However, on closer look, the texts of the various conventional formulations of the *nullum crimen* principle, which are reflective of customary international law, their preparatory works, state practice and *opinio juris*, and, most importantly, the principle's rationale seem to cast some doubt on the lawfulness of retroactive recharacterisation of crimes, at least in some circumstances. This is because they seem to indicate that the principle of non-retroactivity not only precludes the retroactive application of crimes and penalties *per se* but of all rules of criminal law whose change would *substantively* affect the fundamental rights of the accused, regardless of their classification as procedural or substantive. This includes all the material and mental elements of the crime, modes of

¹⁷ See Chapter 2, Section 3(b) and Cristine van den Wyngaert, 'Double Criminality as a Requirement to Jurisdiction' in Nils Jareborg (ed), *Double Criminality: Studies in International Criminal Law* (Iustus Förlag 1989) 49–50; Cedric Ryngaert, *Jurisdiction in International Law* (OUP 2015) 121–123.

¹⁸ See Chapter 1.

liability, defences, penalties, conditions of prosecution and punishment and, in some circumstances, criminal labels. And yet, by replacing one crime or mode of liability by another, retroactive recharacterisation of crimes may have the inadvertent effect of changing, to the detriment of the accused, one or more of those rules. In this way, conduct that was innocent when done may be retroactively criminalised and punished, or a crime may be subsequently punished in a manner that is, in substance, more severe than the applicable law would have allowed. Thus, questions arise as to whether retroactive recharacterisation of crimes is truly consistent with the dictates and rationales of the principle of legality in general international law.

Although much has been written on the principle of legality in international criminal law, most of the literature focuses on the basic features or elements of this principle and on historical accounts of its relevance before and after the Nuremberg trial.¹⁹ In contrast, there is very little academic discussion of how the principle of legality in general international law has been effectively applied by the various international and domestic criminal courts. In particular, retroactive recharacterisation of crimes has been discussed only very briefly by a handful of commentators,²⁰ and its appraisal does not go beyond a general word of caution.²¹

By changing the labels of crimes, modes of liability and defences, recharacterisation also challenges the principle of fair labelling. This principle seeks to ensure that criminal conduct is labelled and described in a way that represents the accused's culpability or moral blameworthiness. Its significance lies in ensuring that the stigma and public opprobrium of a criminal conviction are proportionate to the accused's wrongdoing. Fair labelling is often assumed to be a '(general) principle' applicable to

¹⁹ See, e.g., Gallant (n 1); Kreß (n 8); Bassiouni, 'Legality' (n 1).

²⁰ See *supra* note 16

²¹ Gallant (n 1) 40, 134, 369, 406; Grover (n 16) 164–165; Galand (n 16) 149; Van Schaack (n 16) paras 158–159, 166.

international criminal law, but there is to date very little discussion of its legal basis and content in international law.

With the establishment of the ICC, some thought that most of those questions would become obsolete.²² This is due to the generally prospective jurisdiction of the Court and the recognition of a robust version of the principle of legality in the Court's constitutive treaty, the Rome Statute (the Statute).²³ Nevertheless, the Statute still leaves room for the retroactive recharacterisation of crimes in a few instances. They include situations which are brought to the Court's jurisdiction via Security Council (UNSC) referrals or ad hoc declarations of states, both of which can be retrospective and involve states that had not accepted the application of the Statute to their nationals and territory at the time of the relevant events. In those cases, recharacterisation occurs if the Rome Statute is applied in place of another body of law which applied to the accused at the time of the conduct, such as customary international law or domestic law. Other problematic scenarios arise when states retrospectively withdraw declarations which exempted their nationals from the jurisdiction of the Court over war crimes or the crime of aggression, the so-called 'opt-out' declarations. Lastly, instances of extensive interpretation may give rise to retrospective creation, aggravation or relabelling of crimes and other rules of substantive criminal law. In all of those scenarios, issues of substantive retroactivity and unfair labelling may arise whenever the Rome Statute goes beyond previously applicable sources of law. Notably, these are all specific manifestations of the fundamental problems that the principles of legality and fair labelling have generally encountered in international criminal law.

²² See, e.g., Philippe Kirsch, 'Applying the Principles of Nuremberg in the International Criminal Court' (2007) 6 Washington University Global Studies Law Review 501, 506; Van Schaack (n 16) 177; Boot (n 2) 369–370, 372.

²³ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 01 July 2002) 2187 UNTS 38544

Against this background, the thesis' two principal research questions are: 1) How are the principles of legality and fair labelling *to be* applied in international criminal law generally and in the specific context of the ICC? 2) To what extent is the phenomenon of retroactive recharacterisation of crimes consistent with those principles, bearing in mind their elements, scope and rationales?

To answer those research questions, this thesis will be divided into **three parts**.

Part I focusses on retroactive recharacterisation of crimes and its consistency with the principles of legality and fair labelling in international criminal law *generally*.

It starts in **Chapter 1** whose aim is to explain the origins and effects of retroactive recharacterisation of crimes and to devise a taxonomy of its various problematic outcomes. In particular, it will demonstrate that, by simply replacing one crime or mode of liability by an analogous one, different rules of criminal law attached thereto may also change to the detriment of the accused. Those rules include the material or mental elements of the recharacterised crime or mode of liability, defences, general standards of *mens rea*, penalties, conditions of punishment or prosecution and labels.

Chapter 2 will focus on the principle of legality and to what extent retroactive recharacterisation of crimes is consistent with it. It will identify the legal basis and elements of the principle in general international law, as formulated in treaties, customary international law and general principles of law. It will also interpret its various elements, particularly the principle of non-retroactivity of crimes and penalties, in order to ascertain its scope, i.e. which rules or aspects of the criminal law it is concerned with. My analysis will centre around the relevant texts codifying or crystallising the principle of legality in general international law, other rules of international law which are part of its context, formative and subsequent state practice and *opinio juris*, its object and purpose and supplementary means of interpretation. This chapter's principal claim is that the principle of legality has a 'human rights protective core': its scope includes not only rules of

criminal law defining crimes and penalties, but also any other criminal rule whose retroactive application to the accused would substantively affect their fundamental rights and freedoms. As such, while recharacterisation of crimes is not *per se* contrary to it, some of its outcomes may be.

Chapter 3 will begin by tracing the history and significance of fair labelling in international criminal law. It will then try to identify the legal basis and content of this principle in general international law. Starting from the hypothesis that it is a general principle of international criminal law grounded in customary international law, I will employ the deductive and inductive methods for the identification of international custom to test that assumption. Thus, I will seek to deduce aspects of the principle from other customary rules and principles, and to confirm to what extent they are binding by observing the relevant state practice and *opinio juris*. These various aspects or elements of fair labelling will also be interpreted in light of the phenomenon of retroactive recharacterisation of crimes. This chapter's main argument is that the principle of fair labelling is a general or structural principle underpinning international criminal law, whose elements are spread across other rules of international law and whose content cannot always be ascertained *in abstracto*. However, by piecing those elements together in concrete cases, it is possible to determine whether or not recharacterisation of crimes is consistent with them.

Part II will shift the focus to the ICC and the specific challenges that retroactive recharacterisation of crimes may raise therein.

Chapter 4 will start by explaining how the Rome Statute leaves room for instances of retroactive recharacterisation of crimes in at least five scenarios and why they are problematic for the Court. **Chapter 5** will provide a critical appraisal of the existing views on the subject both in literature and the Court's case law. It will

identify the merits and shortcomings of some of the existing solutions to that problem and use them as building blocks for a more comprehensive approach.

Lastly, **Part III** will propose an alternative method to tackle the inconsistencies that might arise between the Rome Statute and the principles of legality and fair labelling. This approach can be extrapolated to other international criminal tribunals facing similar problems.

Chapter 6 starts by looking at the legal nature of the Rome Statute, i.e. whether, to what extent and under what legal basis the Statute is binding on individuals, or simply lays down the Court's jurisdictional and institutional framework. This is decisive for identifying whether a norm conflict arises, in the first place, between the Statute and the principles of legality and fair labelling. This chapter's main conclusion is that, in situations involving states parties and states making ad hoc declarations, the Statute ought to be seen as binding on the individuals concerned. This means that in retrospective ad hoc declarations actual norm conflicts might arise with the principles of legality and fair labelling. Conversely, the Statute ought to have a purely jurisdictional nature in UNSC referrals, with the applicable law coming from pre-existing international law. Accordingly, in those instances, no genuine norm conflicts should arise with the principles of legality and fair labelling, at least in the abstract.

Chapter 7 is chiefly addressed to the Court and seeks to provide it with the necessary tools to avoid or resolve normative conflicts between the Statute and the principles of legality and fair labelling. In particular, it suggests recourse to Article 21(3) of the Rome Statute and its requirement of consistency with 'internationally recognized human rights' as a norm displacement rule giving primacy to the principle of legality and certain aspects of the fair labelling principle. It then argues that, rather than recharacterising applicable sources of international law, such as customary international law or treaties, into the crimes or modes of liability contained in the Statute, the Court

ought to apply those sources as such, that is, directly. This has the potential to prevent or resolve the retroactive application of the Rome Statute in the various scenarios identified earlier, whilst avoiding the dangers of retroactive recharacterisation of crimes.

PART I: RETROACTIVE RECHARACTERISATION OF CRIMES IN INTERNATIONAL LAW

CHAPTER 1: EXPLAINING THE PHENOMENON

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1. Introduction

There is no question that the principle of legality is now part of general international law and applies to international crimes and other rules of international criminal law. It is both a general principle of criminal law and a fundamental human right, protecting important liberal values such as individual freedom. But despite its significance and universal recognition, it has encountered some major challenges in its application to international criminal law.

One such challenge is that of ‘retroactive recharacterisation’ or ‘reclassification’ of crimes, which has received minimal attention in the literature and case law to date.¹ This phenomenon occurs when the rules of criminal law binding on the accused at the time of the conduct are retroactively replaced by a similar set of rules that were not previously applicable to them and are found in a different source or system of law. This process is often justified on the basis that the application of *formally* retroactive criminal crimes and penalties which are not *substantively* more severe than the applicable law is

¹ See Introduction.

consistent with the principle of legality in general international law. However, as I will demonstrate in the course of this chapter, retroactive recharacterisation of crimes may inadvertently alter essential aspects of the applicable criminal law, leading to an expansion of the scope of criminal liability or a substantive aggravation of the situation of the accused. Those aspects include: 1) the material or mental elements of the crime; 2) general principles of liability, including modes of liability, general standards of *mens rea* and defences; 3) penalties; 4) conditions of prosecution and punishment (i.e. the ‘prosecutability’ and ‘punishability’ of the individual);² and 5) criminal labels. Thus, the question arises as to whether changes in any of those rules are consistent with the rationales and the core component of the principle of legality, i.e. the principle of non-retroactivity, prohibiting the retroactive application of substantive criminal law.

In this light, the purpose of this chapter is to explain the phenomenon of retroactive recharacterisation of crimes before assessing, in Chapter 2, to what extent it is consistent with the principle of legality in general international law. **Section 2** will start by discussing the origins of that phenomenon, that is, how it arises in international law. Then, **Section 3** will look at how different domestic and international courts or tribunals have embraced this practice when applying crimes and other rules of international criminal law. This will be followed, in **Section 4**, by an attempt to construe a taxonomy of retroactive recharacterisation of crimes, based on the various problematic outcomes that it may lead to. **Section 5** will briefly discuss the sources of domestic and international law which can be recharacterised. Lastly, **Section 6** will distinguish what is termed ‘retroactive recharacterisation’ or ‘reclassification’ *of crimes* from the process known as ‘legal recharacterisation *of facts*’.

² For a more detailed definition of these terms, see Michal Plachta, ‘The Role of Double Criminality in International Cooperation Matters’ in Nils Jareborg (ed), *Double Criminality: Studies in International Criminal Law* (Iustus Förlag 1989) 105, 109.

2. Origins

One of the key features of international criminal law is the absence of a centralised legislature.³ Its various sources are adopted by a plethora of states and international organisations, with differing scopes of application. The result of this decentralised legislative setting is that different rules may apply to the same states or individuals.⁴ By the same token, a single rule of international criminal law may be implemented by different legislative authorities in different ways.⁵ In the absence of a single legislator, states have also delegated or transferred their prescriptive powers in criminal matters to other states or international entities.⁶ For example, faced with the impossibility of extraditing foreigners who commit ordinary crimes extraterritorially, states have applied their own criminal laws in substitution for the laws of states with an original jurisdictional claim over the individual. This is known as vicarious or representation jurisdiction.⁷

International criminal law also lacks a centralised judiciary.⁸ It is interpreted and applied not only by international tribunals but also the domestic courts of various states.⁹ This means that its rules are inevitably subject to different and often conflicting

³ James Crawford, *Brownlie's Principles of Public International Law* (OUP 2012) 16; *Čelebići Case* (Judgment) ICTY-96-21-T (16 November 1998) §405.

⁴ Ward N Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (TMC Asser Press 2006) 238–241; Beth Van Schaack, 'Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals' (2008) 97 *GeoLJ* 119, 158–159, 172.

⁵ Ferdinandusse (n 4) 6–9, 18–87, 239–240; M Cherif Bassiouni, *International Criminal Law: Sources, Subjects and Contents* (Brill 2008) 18–19, 22–23, 37.

⁶ Galand AS, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits* (Brill Nijhoff 2019) 16–17; Dapo Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 *JICJ* 618, 621–622, 625–626.

⁷ Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (CUP 2010) 41–44, 282–287, 371–372; Cedric Ryngaert, *Jurisdiction in International Law* (OUP 2015) 121–123.

⁸ Leena Grover, 'A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court' (2010) 21 *EJIL* 543, 554; Ferdinandusse (n 4) 239–240.

⁹ Ferdinandusse (n 4) 1–5.

interpretations.¹⁰ Furthermore, states have transferred or delegated their judicial powers to each other or to different international institutions, in particular, international courts.¹¹ Often, this delegation of adjudicative powers is not followed by a delegation of prescriptive ones, so that each power is exercised by a different authority.¹² For example, international courts usually possess adjudicative powers, but cannot prescribe substantive criminal law, a function that remains within the domain of states. This means that, at the international level, prescriptive and adjudicative powers must be distinguished at times. As a consequence, domestic and international courts may be called upon to apply not the *lex fori*, but a law with which they may be unfamiliar.

For the purposes of interpreting and applying the principle of legality, this all means that the requirement of a prior law criminalising and punishing the conduct cannot be bound up with a single prescriptive and adjudicative authority, as in some domestic systems.¹³ In other words, at the international level, one cannot always expect that the authority who prescribed the criminal law at the time of the events is the same that subsequently convicts and punishes the individual. Rather, it should be sufficient that at least one source of applicable criminal law criminalises and punishes the individual's behaviour at the time it took place, regardless of the specific piece of legislation or the court that applies it subsequently.¹⁴ As will be discussed in Chapter 2, this reading of the *nullum crimen* principle finds support in the texts of the most prominent human rights instruments, state practice and *opinio juris*. It has also found overwhelming support in

¹⁰ Antonio Cassese, *International Criminal Law* (OUP 2008) 42–43; Harmen van der Wilt, 'Nullum Crimen and International Criminal Law: The Relevance of the Foreseeability Test' (2015) 84 NJIL 515, 527.

¹¹ Yuval Shany, *Questions of Jurisdiction and Admissibility before International Courts* (CUP 2016) 22, 26–33; Galand (n 6) 16–17, 25–27, 47–48.

¹² Simon Chesterman, *Private Security, Public Order: The Outsourcing of Public Services and Its Limits* (OUP 2009) 36–37; Gallant (n 7) 149–150, 394.

¹³ Gallant (n 7) 48–49, 277–278, 369.

¹⁴ Van Schaack (n 4) 158–159; Gallant (n 7) 41, 284–286, 371–372.

mainstream literature and case law.¹⁵ In particular, courts and commentators alike have stressed that formally or temporally retroactive laws do not violate the principle of legality in general international law.¹⁶ Rather, it is argued that all this principle requires is that the accused had notice of the ‘essence’ of the crime in the sense ‘generally’ or ‘ordinarily’ understood by lay individuals, i.e. knowledge that the conduct in question was, by its own nature, criminal, without reference to any particular provision.¹⁷

A few commentators have noticed that this reading of the principle of legality allows courts to retroactively recharacterise or reclassify crimes and other rules of criminal law. As explained earlier, this practice consists of charging, convicting and sentencing the individual on the basis of rules of criminal law that did not apply to them at the time of the conduct, provided that analogous or similar rules criminalising and punishing the conduct were previously applicable. In short, the applicable law is retroactively replaced by a subsequent source of law.¹⁸ For example, an individual could

¹⁵ See, e.g., Gallant (n 7) 20, 352, 357–358, 364–365; Theodor Meron, ‘The Principle of Legality in International Criminal Law’, *The Making of International Criminal Justice* (OUP 2011) 112; Allain Pellet, ‘Applicable Law’ in Antonio Cassese and others (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 1057–1058; Mohamed Shahabuddeen, ‘Does the Principle of Legality Stand in the Way of Progressive Development of Law?’ (2004) 2 JICJ 1007; Van Schaack (n 4) 158–172, 177–178; *Trial of Wilhelm List and Others* (*The Hostages Case*), United States Military Tribunal at Nuremberg, Law Reports of Trials of War Criminals, UN War Crimes Commission, Volume VIII, 8 July 1947 to 19 February 1948 at 36, 53; *Baumgarten v Germany* (2003) Human Rights Committee Communication no 960/2000 §9.3; *Streletz, Kessler and Krenz v Germany* App nos 34044/96, 35532/97 & 44801/98 (ECtHR, 22 March 2001) §§89, 105–106; *Čelebići Case* (Appeal Judgment) ICTY-96-21-T (20 February 2001) §§179–180; *Ayyash et al Case* (Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging) STL-11-01/I/AC/R176bis (16 February 2011) §§136; *Norman Case* (Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)) SCSL-2004-14-AR72(E) (31 May 2004) §25; *Case 002/01* (Appeal Judgment) 002/19-09-2007-ECCC/SC (23 November 2016) §§762–763, 765; *Franca da Silva Case* (Judgment), Special Panels for Serious Crimes, District Court of Dili, Timor Leste, Case No 04a/2001 (5 December 2002) §§59–80. See also Introduction.

¹⁶ V Spiga, ‘Non-Retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga’ (2011) 9 JICJ 5, 15–16; Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel 2005) 362.

¹⁷ *Hadzihasanović, Alagic & Kubura Case* (Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility) ICTY-01-47-AR72 (16 July 2003) §34; *Norman* (n 15) §25; *Ayyash et al* (n 15) §136; *Case 002/01* (n 15) §762; Meron (n 15) 112; Van Schaack (n 4) 156–157, 168, 173; Christopher Greenwood, ‘International Humanitarian Law and the Tadić Case’ (1996) 7 EJIL 265, 281.

¹⁸ See *supra* note 1.

be convicted of torture as a crime against humanity under the Rome Statute of the ICC even if the Statute *per se* was not binding on them at the time of the events, as long as an analogous crime existed under an applicable source of law, such as another treaty, international custom or domestic law. Whether or not the crime has the same name or is enacted by the same prescriptive authority is often thought to be of no consequence.¹⁹

3. Application

Retroactive recharacterisation of crimes is a process that has been employed by several domestic and international courts in various ways. For instance, in domestic prosecutions of ordinary crimes committed extraterritorially in accordance with the principle of vicarious jurisdiction, states have applied their own domestic laws to conduct that could only have been criminalised by the law of other states.²⁰ Similarly, when exercising universal jurisdiction, many states convict individuals by reference to their own domestic ordinary crimes and principles of liability, even when the only laws that applied to the perpetrator at the time of the conduct were treaty law, customary international law, or foreign domestic law.²¹

This is not a new phenomenon but permeates the entire history of international criminal law. Most notably, at the International Military Tribunals (IMT) sitting at Nuremberg²² and Tokyo,²³ and in some domestic post-World War II trials,²⁴ certain acts

¹⁹ Gallant (n 7) 40–42, 367; *Stakić Case* (Appeal Judgment) ICTY-97-24 (22 March 2006), Partly Dissenting Opinion of Judge Shahabuddeen §§66–69; Van Schaack (n 4) 169, 172, 177–178; Theodor Meron, *War Crimes Law Comes of Age: Essays* (OUP 1999) 246.

²⁰ Gallant (n 7) 40–44, 282–287, 371–372; Cristine van den Wyngaert, ‘Double Criminality as a Requirement to Jurisdiction’ in Nils Jareborg (ed), *Double Criminality: Studies in International Criminal Law* (Iustus Förlag 1989) 49–50.

²¹ Ferdinandusse (n 4) 33; Eric S Kobrick, ‘The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction over International Crimes’ (1987) 87 *Columbia Law Review* 1515, 1519; Amnesty International, ‘Universal Jurisdiction: A Preliminary Survey of Legislation Around the World - 2012 Update’ (2012) 1–2 <<https://www.amnesty.org/en/documents/ior53/019/2012/en/>> accessed 25 August 2019.

²² *Judgment of the Nuremberg International Military Tribunal 1946* (1947) 41 *AJIL* 172 at 44.

that could *only* have been characterised as war crimes or ordinary crimes under domestic law were later reclassified as crimes against humanity under customary international law. For example, the Nuremberg IMT justified the characterisation of certain ‘acts committed on a vast scale’ as crimes against humanity by holding that these also constituted or were connected to war crimes.²⁵ It also reassured that ‘insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute War Crimes’,²⁶ but only crimes against humanity, these were, in any event, ‘violations of internal penal laws, of the general principles of criminal law as derived from the criminal law of all civilized nations’.²⁷

More recently, the ICTY has applied international crimes and modes of liability which were not undoubtedly part of customary international law, but which could find analogues in domestic law. In particular, it was far from clear that joint criminal enterprise, especially in its third modality (requiring only advertent recklessness), existed in international custom in 1992 when the facts of the *Tadić* case took place.²⁸ Likewise, it was questionable whether the war crime of terrorising civilians had a separate legal basis in customary international law before the *Galić* case was decided in 2006.²⁹ However, for

²³ *United States et al v Araki Sadao et al, Judgment, Part A* (International Military Tribunal for the Far East) at 33.

²⁴ *United States of America vs Otto Ohlendorf et al (Case No 9) ('The Einsatzgruppen Case')*, United States Military Tribunal II, *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No 10*, Volume IV 496, 497; *Hostages* (n 15) 36, 53–54; *Trial of Hans Albin Rauter*, Netherlands Special Court of Cassation, *Law Reports of Trials of War Criminals*, UN War Crimes Commission, Volume XIV, 12 January 1949 at 119. See also Gallant (n 7) 131–134.

²⁵ *Nuremberg IMT Judgment* (n 22) 254–255, 302–304.

²⁶ *ibid* 254.

²⁷ *ibid* 65.

²⁸ See *Tadić Case* (Appeal Judgment) ICTY-94-1-A (15 July 1999) §§204–220; *Šešelj Case* (Concurring Opinion of Presiding Judge Jean-Claude Antonetti attached to the Judgement) ICTY-03-67-T (31 March 2016) §§151–176; *Case 002* (Decision on the Applicability of Joint Criminal Enterprise) 002/19-09-2007/ECCCITC (12 September 2011).

²⁹ *Galić Case* (Appeal Judgment) ICTY-98-29-A (30 November 2006), Separate and partially dissenting opinion of Judge Schomburg §§7, 8, 17, 21–22.

the ICTY, it was enough that the relevant conduct was criminalised under domestic law.³⁰ For its part, the ICC has been automatically applying its Statute to situations that were brought to its jurisdiction *ex post facto*, and for which the Statute was not an applicable source of law. These include the situations in Libya, Darfur, Côte d'Ivoire, Uganda, Palestine and Ukraine.³¹

4. A Taxonomy of Retroactive Recharacterisation of Crimes: Problematic Outcomes

Despite the frequent recourse to retroactive recharacterisation of crimes by various domestic and international tribunals, this practice may lead to several outcomes which I believe may be problematic in light of the principle of legality. Let me now turn to those outcomes whilst attempting to draw a taxonomy of the phenomenon.

a. Recharacterisation of Elements Essential for Criminal Liability

First, retroactive recharacterisation of crimes may alter elements which are essential for individual criminal liability to arise. This includes the material (*actus reus*) and mental (*mens rea*) elements of the crime, and other substantive elements without which the conduct cannot be held criminal, such as modes of liability and defences, including excuses and justifications. To be sure, if the change in question results in *narrowing down* the scope of the applicable law, that is, reducing the array of acts and/or omissions which are subject to criminalisation, then it will *not* likely lead to retroactive criminalisation or another detrimental effect on the accused. This type of scenario occurs if the subsequent law contains more elements and is thus more demanding than the applicable law. For instance, if the subsequent law requires crimes against humanity to be

³⁰ See also *Čelebići Appeal Judgment* (n 3) §§312–313; *Galić* (n 29) §617.

³¹ See Talita de Souza Dias, 'The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad Hoc Declarations: An Appraisal of the Existing Solutions to an Under-Discussed Problem' (2018) 16 JICJ 65, 68.

committed pursuant to a state or organisational policy,³² an element which has not been held to exist under customary international law, then the addition of this element will lead to the exclusion of conduct that was previously within the realm of crimes against humanity.

Nonetheless, if the recharacterisation in question results in an *expanded* scope of application, i.e. the subsequent law criminalises *more* acts and/or omissions than the applicable law, then it will likely lead to the retroactive criminalisation of conduct that was innocent when done. This will occur if the subsequent law: a) excludes or expands any of the essential elements of the crime or the mode of liability, b) adds new underlying acts to the definition of a crime, c) removes previously available defences, or d) simply contains new crimes or modes of liability that are not found in the applicable law. Three examples might help illustrate how these changes may violate the principle of legality.

First, in a hypothetical scenario, assume that an individual perpetrated an armed attack against a lawful military target, which nonetheless caused severe and disproportionate environmental damage during a non-international armed conflict. Let us also assume that, at the time of the events, the conduct was not criminalised by the domestic law of the state where the events took place and from which the perpetrator is a national. Although disproportionate attacks on the natural environment are a war crime in international armed conflict, they have not yet been criminalised in non-international armed conflict under customary international law or under the ICC Statute.³³ Consider that, after the events, the state in question enacts legislation criminalising disproportionate attacks on the environment, along with other acts, regardless of the

³² See Art 7(2)(a), Rome Statute.

³³ See Art 8(2)(b)(iv) and (e), Rome Statute; ICRC, 'Customary IHL - Rule 156. Definition of War Crimes' (2019) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule156> accessed 25 August 2019; Matthew Gillet, 'Using International Criminal Law to Protect the Environment During and After Non-International Armed Conflict' in Carsten Stahn, Jennifer S Easterday and Jens Iverson (eds), *Environmental Protection and Transitions from Conflict to Peace* (OUP 2017) 228.

nature of the armed conflict.³⁴ Imagine that the individual in question is later tried and convicted for their acts on the basis of this new legislation, and under the pretext that, under customary international law, a ‘similar’ war crime of attacking civilian objects in non-international armed conflict existed at the material time.³⁵ However, as indicated earlier, this crime does not include, as of yet, incidental environmental damage. Thus, in this example, a customary crime was recharacterised into a domestic one containing additional underlying acts. As a result, the accused would have been convicted for conduct that was not criminal when done.

Second, in another hypothetical scenario, imagine that a military commander failed to prevent the commission of intentional attacks against cultural property by their subordinates in a non-international armed conflict. The superior had acted negligently by failing to actively seek out relevant information and therefore should have known that those crimes were about to be committed. Let us also assume that the perpetrator was a national of a state not party to the Rome Statute, and acted on the territory of that state, i.e. they were not subject to the Statute at the time of the events. Consider that, at that time, only customary international law and the domestic laws of the said state applied to the perpetrator. Consider further that the applicable domestic laws did not criminalise crimes against propriety committed by negligence. The superior is later brought to the jurisdiction of the ICC, granted retrospectively via a Security Council referral.³⁶ The Court convicts them for the war crime of intentional attacks against cultural buildings in non-international armed conflict, under Article 8 (2)(e)(iv) of the Rome Statute, and on the basis of superior responsibility, pursuant to Article 28(a)(i) of the Statute. However,

³⁴ This approach to domestic implementation of war crimes has been followed in various states. For examples, see Case Matrix Network, ‘International Criminal Law Guidelines: Implementing the Rome Statute of the International Criminal Court’ (2017) <<http://www.legal-tools.org/doc/e05157/>> accessed 25 August 2019 43–44.

³⁵ See ICRC (n 33) and Art 8(2)(e)(iv), Rome Statute.

³⁶ See Art 13(b), Rome Statute.

although this conduct is also a war crime in customary international law, the customary version of superior responsibility requires a higher mental element, i.e. that the superior at least had reason to know and was thus in possession of information putting them on notice of the subordinates' crimes.³⁷ This means that, in the example at hand, a mode of liability under customary international law was recharacterised into a broader mode of liability under the Rome Statute. As a consequence, the individual would have been convicted for conduct that was innocent when done.

Third, the *Tadić* case provides another good example of recharacterisation of a mode of liability which has led to an inadvertent expansion of the applicable law. The Appeals Chamber of the ICTY found the accused guilty of murder as a war crime and a crime against humanity for having participated in the killings of five men from the village of Jaskići.³⁸ In reaching that conclusion, the Appeals Chamber relied on the mode of liability known as joint criminal enterprise (JCE) III, whose prior legal basis in customary international law had been identified for the very first time in that case.³⁹ This mode of liability applies when one or more members of the group commit an additional crime which was not part of the common purpose. While the accused need not intend this additional crime, they must at least foresee this crime and accept the risk of it occurring, i.e. the mental element required is *dolus eventualis* or advertent recklessness.⁴⁰ In *Tadić*, the accused shared the common purpose of 'rid[ding] the Prijedor region of the non-Serb population, by committing inhumane acts', and had accepted the risk that the killings could happen, as he was aware that these frequently occurred as a result of the

³⁷ *Karadžić Case* (Judgment) ICTY-95-5/18-T (24 March 2016) §§584–586; *Bemba Case* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-424 (15 June 2009) §§432–434.

³⁸ *Tadić Appeal Judgment* (n 28) §§231–233.

³⁹ *ibid* 220, 224.

⁴⁰ *ibid* 220, 228.

implementation of the common purpose.⁴¹ However, as it became clearer in subsequent cases, JCE III did not clearly exist in customary international law at the time of the events (1992).⁴² More importantly, pursuant to the domestic criminal laws in force in the Former Yugoslavia, the default *mens rea* for all modes of participation was intent, and those participating in a criminal association could only be held responsible for acts that were part of the common design, not incidental acts that were merely foreseeable.⁴³ The Appeals Chamber justified the accused's 20-year imprisonment sentence by simply relying on the maximum penalty that he could have received in the Former Yugoslavia for 'similar offences'.⁴⁴ However, it overlooked the fact that the mode of liability and the mental element on the basis of which *Tadić* was convicted were broader, and thus substantively more severe than the ones found in domestic law. As a consequence, the accused was convicted for acts that may not have been covered by any applicable mode of liability.

b. Recharacterisation of Penalties

Retroactive recharacterisation of crimes may also change the nature or extent of the penalties which were previously attached to the crime under the applicable law. If such a change results in punishment more severe than the maximum available under the applicable law, it may be inconsistent with the principle of *nulla poena sine lege*. As will be discussed in Chapter 2, this principle requires that the penalties applied upon conviction be no greater than the ones applicable to the crime committed perpetrator at the time it took place. Because the application of more severe penalties is often easily detectable, their retroactive recharacterisation has been less subject to abuse. Indeed,

⁴¹ *ibid* 231–232.

⁴² See *supra* note 28.

⁴³ Arts 11 and 26, Criminal Code of the Socialist Federal Republic of Yugoslavia 1977.

⁴⁴ *Tadić Case* (Judgment in Sentencing Appeals) ICTY-94-1-A & ICTY-94-1-A bis (26 January 2000) §21.

when faced with instances of retroactive recharacterisation of crimes, domestic and international courts have stressed the need to rely on the penalties which applied to the crime at the time and place it occurred.⁴⁵

However, instances of retroactive recharacterisation of penalties remain possible and have occurred in the past. To be sure, the core international crimes do not have specific scales or tariffs of penalties, but only one maximum penalty applicable across all crimes, which under customary international law is life imprisonment or even the death penalty for the most serious underlying acts.⁴⁶ Nevertheless, the principle of proportionate sentencing would still require the punishment to be proportionate to the conduct and circumstances of the accused.⁴⁷ Thus, if the applicable international crime was less severe and as a consequence subject to a lower penalty upon sentencing, the retroactive application of a more serious offence and penalty would violate the principle of legality. Moreover, if a domestic offence is retroactively recharacterised into a core international crime, the maximum available penalties may also be retroactively increased.

To illustrate this, consider the facts of the *Kononov v Latvia* case before the European Court of Human Rights (ECtHR). In this case, the applicant had summarily executed ‘Red Partisans’, i.e. unarmed villagers suspected of previously collaborating with the enemy, *in casu*, the Nazi.⁴⁸ As the Chamber found in the first instance judgment, at the time of the events (1944), it was by no means clear whether such ‘collaborators’

⁴⁵ *Prosecutor v Bundalo Ratko and Others*, Second Instance Verdict, Court of Bosnia and Herzegovina, Section I for War Crimes, the Appellate Division Panel, Case No X-KRŽ-07/419, 28 January 2011, §228; *Furundžija Case* (Judgment) ICTY-95-17/1-T (10 December 1998) §184; Van Schaack (n 4) 164–165, 186.

⁴⁶ See Gallant (n 7) 385–387; William A Schabas, ‘Article 23: Nulla Poena Sine Lege’ in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (Beck/Hart 2016) paras 2–3.

⁴⁷ See Silvia D’Ascoli, *Sentencing in International Criminal Law: The UN Ad Hoc Tribunals and Future Perspectives for the ICC* (Hart 2011) 25–26. and Chapter 3, Section 4(a)(v).

⁴⁸ *Kononov v Latvia* App no 36376/04 (ECtHR, 17 May 2010) §§188–199; *Kononov v Latvia* App no 36376/04 (ECtHR, 24 July 2008) §§116–125.

were lawful military targets or civilians entitled to be taken prisoners instead.⁴⁹ Arguably, this question only began to be grappled with after the 1949 Geneva Conventions specified who qualifies as combatant and civilian during armed conflict.⁵⁰ And it was only reasonably settled after the 1977 Additional Protocols to the Conventions laid down the general rule according to which civilians are protected against attack, unless and for such time as they take a direct part in hostilities.⁵¹ Accordingly, at the time they took place, Kononov's acts could not have been qualified as war crimes, but, at most, murder or another ordinary crime applicable under domestic law.⁵² This means that by convicting him of murder as a war crime, a crime still subject to capital punishment under customary international law, the Latvian courts have increased the maximum penalty applicable to him under domestic law at the time of the events.⁵³

c. Recharacterisation of Other Decisive Rules of Criminal Law

Aside from penalties and elements essential for criminal liability, recharacterisation may change rules of criminal law which do not directly make up an offence and are often classified as procedural, but which may be decisive for the prosecution or punishment of an individual. This broad category of rules includes conditions of prosecution, such as pardons, amnesties, immunities and statutes of limitations. It also covers rules that

⁴⁹ *Kononov v Latvia* App no 36376/04 (ECtHR, 24 July 2008) §§137–140, 148.

⁵⁰ See, e.g. Arts 3(1) and 4, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention); Art 4, Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 1950 75 UNTS 135 (Third Geneva Convention).

⁵¹ Art 51(3), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I); Art 13(3), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II); ICRC, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (2009); 'Customary IHL - Rule 6. Civilians' Loss of Protection from Attack' <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule6> accessed 25 August 2019.

⁵² See *Kononov v Latvia* App no 36376/04 (ECtHR, 17 May 2010), Dissenting opinion of Judge Costa joined by Judges Kalaydjieva and Poalelungi §§16–19.

⁵³ *Kononov v Latvia* App no 36376/04 (ECtHR, 17 May 2010) §§38, 42.

effectively alter the scope or the nature of a penalty, including measures of execution which in fact extend preventive detention or curtail parole or other early release rights, such as remission for work or studies done in prison. If procedural bars are retroactively removed, conduct that could not have been prosecuted or punished might so become. Similarly, the removal of certain rights of the convicted person in relation to the execution of a penalty might lead to a substantive worsening of their punishment.

To illustrate, let us assume that one individual enlisted children under the age of 15 into the national army of a state during a non-international armed conflict in the 1970s, that is, before the war crime of using, conscripting or enlisting child soldiers became part of customary international law in the mid-1980s.⁵⁴ Assume that, at the time of the events, the perpetrator could only have been convicted of a domestic crime subject to the default limitation period: 10 years after the date on which the crime has been committed or became known, the state could no longer prosecute it. Imagine that this individual was tried in 2000 by an international or hybrid tribunal applying customary international law and that this tribunal convicts them of said war crime on the basis that the conduct in question constituted an analogous crime under domestic law. In this instance, domestic law was recharacterised into customary international law with the ensuing effect that more severe conditions of prosecution subsequently applied to the accused. This would have led to the prosecution and punishment of conduct that was neither prosecutable nor punishable at the time of the events.

⁵⁴ *Norman* (n 15) §50.

d. Recharacterisation of Labels

Lastly, retroactive recharacterisation of crimes may take the form of a detrimental change in the label or classification of the crime or the mode of liability.⁵⁵ Although changes in criminal labels have more readily been associated with the principle of fair labelling,⁵⁶ I believe that the principle of legality is not indifferent to them either.⁵⁷ This is because, as will be discussed in detail in Chapter 2, different criminal labels may carry with them distinct elements or legal effects, such as penalties and conditions of prosecution or punishment.⁵⁸ Thus, by replacing one label for another, the result might be the removal of elements which were essential for criminal liability, or the lifting of pre-existing bars to prosecution or punishment. At the same time, even if the subsequent crime or mode of liability has more elements and is thus more demanding than the previous one, it might contain aggravating circumstances which make it a more severe crime or mode of liability. Significantly, aggravated labels may lead to greater social stigmatisation, thereby substantively affecting the rights or the situation of the accused.⁵⁹

Detrimental changes in labels often take place when ordinary crimes, such as murder, grievous bodily harm or rape, are recharacterised into one of the core international crimes, such as crimes against humanity or genocide. This is precisely what happened in the case of *Vasiliauskas v Lithuania*, where the Lithuanian definition of

⁵⁵ Gallant (n 7) 41–42, 97, 130, 132, 321, 367; Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (CUP 2014) 164; Galand (n 6) 148; *Galić* (n 29) §§7–22; *Stakić* Appeal Judgment, Partly Dissenting Opinion of Judge Shahabuddeen (n 19) §§66–72; *Furundžija* (n 45) §184.

⁵⁶ See Grover (n 55) 164–165; Darryl Robinson, ‘The Identity Crisis of International Criminal Law’ (2008) 21 LJIL 925, 927; Andrew Ashworth, *Principles of Criminal Law* (OUP 2009) 78. See also Chapter 3.

⁵⁷ See de Souza Dias (n 31) 81–82; Talita de Souza Dias, ‘Recharacterisation of Crimes and the Principle of Fair Labelling in International Criminal Law’ (2018) 18 ICLR 788, 11–12, 24–25; Grover (n 55) 163–165.

⁵⁸ de Souza Dias (n 57) 25; Priya Urs, ‘The Role of the Security Council in the Use of Force against the “Islamic State”’ (2015) 19 Max Planck Yearbook of United Nations Law 65, 95; *Castillo Petruzzi et al v Peru* (IACHR, 30 May 1999) §119.

⁵⁹ See Supreme Court of Norway, *The Public Prosecuting Authority v Mirsad Repak*, Case No. HR-2010-2057-P, Judgment of 3 December 2010 at 106; *Krstić Case* (Appeal Judgment) ICTY-98-33-A (19 April 2004) §§36–37; *R v Finta*, [1994] 1 SCR 701 at 851; de Souza Dias (n 57) 13, 25.

genocide, enacted *ex post facto*, expanded its international counterpart to include the protection of political groups.⁶⁰ As a result, the applicant, who could only have been convicted of ordinary crimes (for having killed members of the Lithuanian armed resistance against the Soviet occupation), was retroactively convicted of genocide by the Lithuanian courts.⁶¹ Likewise, statutes of limitations, which would have ordinarily excluded his punishability, were retroactively removed.⁶² Furthermore, a conviction for genocide undoubtedly invites greater public opprobrium than a conviction for murder or another ordinary crime.

Similarly, in the *Korbely v Hungary* case, the ECtHR held that the applicant's conviction for crimes against humanity committed against armed insurgents violated the *nullum crimen* principle because, at the time of the events (1956), it was unclear whether those individuals could be victims of that crime, even if the conduct would, in any event, qualify as homicide under domestic law.⁶³ Notably, the ECtHR stressed that, as a result of his conviction for crimes against humanity, the applicant received a greater penalty than he could have had for homicide.⁶⁴ In the same vein, Korbely was deprived of the right to claim that his prosecution was statute-barred, as, unlike homicide, crimes against humanity are not subject to statutory limitations.⁶⁵ Lastly, there is no question that a conviction for crimes against humanity carries greater social stigma than one for homicide.

⁶⁰ *Vasiliauskas v Lithuania* App no 35343/05 (ECtHR, 20 October 2015) §§29–41, 50–74.

⁶¹ *ibid* §§60, 165–191. See also Kai Ambos, 'The Crime of Genocide and the Principle of Legality under Article 7 of the European Convention on Human Rights' (2016) 17 HRLR 175, 176–177.

⁶² *Vasiliauskas v Lithuania* (n 60) §60.

⁶³ *Korbely v Hungary* App no 9174/02 (ECtHR, 19 September 2008) §§78–95.

⁶⁴ *ibid* 45.

⁶⁵ *Vasiliauskas v Lithuania* (n 60) §§23–24, 31, 76.

These examples demonstrate that the retroactive relabelling of a crime or a mode of liability is not as harmless as is often assumed. Rather, it may lead to a series of substantively detrimental effects on the accused.

5. The Recharacterised Rules: Domestic and International Law

The problematic outcomes listed above often ensue when the recharacterisation takes place between international law and domestic law. On the one hand, if domestic law is retroactively applied as a substitute for international law,⁶⁶ the danger is that broader domestic offences⁶⁷ may cover acts that were originally non-criminal.⁶⁸ Ordinary crimes, such as murder or rape, lack certain specific elements which are unique to the core international crimes, for instance, the nexus with an armed conflict (in war crimes) and the existence of a widespread or systematic attack against a civilian population (in crimes against humanity).⁶⁹ Although these elements have been characterised as ‘jurisdictional’, the fact that they must be known to the individual indicates that they are substantive in nature, and their removal expands the scope of the crime.⁷⁰ They are the very essence of international crimes, indicating their special seriousness.⁷¹ On the other hand, if domestic law is later recharacterised into more specific international law, not only might the individual be accused of a more severe crime, but new modes of liability which are exclusive to international law may be added, and defences and other bars to prosecution (e.g. statutes of limitations) that were originally available under the applicable law may

⁶⁶ See Ferdinandusse (n 4) 15, 19–21, 40; Amnesty International (n 21) 2, 13–15.

⁶⁷ See Van Schaack (n 4) 168. Domestic law could be a useful basis of criminalisation when there is no other source of law (e.g. treaties, international custom) criminalising the conduct at the time of the events.

⁶⁸ See, e.g., *Vasiliauskas v Lithuania* (n 60) §§60, 166, 181–184.

⁶⁹ Grover (n 55) 164; Gallant (n 7) 322–324, 340; *Bagaragaza Case* (Decision on the Prosecution Motion for Referral to the Kingdom of Norway – Rule 11 bis of the Rules of Procedure and Evidence) ICTR-2005-86-11 bis (19 May 2006) §16.

⁷⁰ Grover (n 55) 164; Leila Nadya Sadat and S Richard Carden, ‘The New International Criminal Court: An Uneasy Revolution’ (1999) 88 *GeoLJ* 381, 431. *Contra* Van Schaack (n 4) 168–169.

⁷¹ Leila Sadat Wexler, ‘The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again’ (1994) 32 *ColumJTransnat’lL* 289, 358; *Bagaragaza Rule 11 bis Decision* (n 69) §16; *R v Finta* (n 59) 814, 817–818.

be removed.⁷² Thus, here too there is a risk of criminalising conduct that was innocent when done or otherwise substantively aggravating the situation of the accused.

But retroactive recharacterisation of crimes can also take place between different sources of international law, such as treaty law, general principles of law and customary international law. This happens whenever the subsequent law is broader (or narrower, in the case of defences) than the applicable law. And it is rarely the case that all the sources of international criminal law are identical in their substantive content. For instance, while crimes were set out in great detail in the Rome Statute and the ICC Elements of Crimes, customary offences are inevitably more elusive given their unwritten nature.⁷³ In the same vein, apart from some rare examples such as the Genocide Convention,⁷⁴ treaties recognising international crimes do not usually contain as detailed descriptions of offences, modes of liability and defences as those found in the Rome Statute.⁷⁵

An example of an offence that has different elements in treaty and customary international law is the crime against humanity of torture: whilst the Rome Statute does away with the requirement of a specific purpose,⁷⁶ this element still exists under customary international law⁷⁷ and in the 1984 Convention against Torture.⁷⁸ Similarly, it

⁷² See, e.g. *Kononov v Latvia*, Dissenting opinion of Judge Costa joined by Judges Kalaydjieva and Poalelungi (n 52) paras 16–19. See also Ben Juratowitch, ‘Retroactive Criminal Liability and International Human Rights Law’ (2005) 75 BYIL 337, 345–346.

⁷³ See William A Schabas, ‘An Introduction to the International Criminal Court’ (CUP, 2012) 126; Grover (n 55) 355.

⁷⁴ See Arts II and III, Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

⁷⁵ Bassiouni (n 5) 95–98, 100; Grover (n 55) 135; Antonio Cassese and others, *Cassese’s International Criminal Law* (OUP 2013) 28.

⁷⁶ ICC Elements of Crimes (2001), p 7, Art 7(1)(f), fn 14. Note that for torture as a war crime the Elements of Crimes still require a specific purpose: *ibid* p 14 Art 8 (2) (a) (ii)-1, Element 2. See also *Bemba Confirmation of Charges Decision* (n 37) §195; Christopher K Hall and Carsten Stahn, ‘Article 7: Crimes against Humanity - 5. Torture’ in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (Beck/Hart 2016) 272–273.

⁷⁷ See, e.g., *Kunarac et al Case* (Appeal Judgment) ICTY-96-23 & ICTY-96-23/1-A (12 June 2002) §155; *Krnjelac Case* (Judgment) ICTY-97-25-T (15 March 2002) §180.

is unclear whether forced pregnancy and other crimes of a sexual nature existed as separate categories of war crimes or crimes against humanity under customary international law, especially considering the debates over their inclusion in the ICC Statute.⁷⁹

6. Retroactive Recharacterisation of Crimes vs Legal Recharacterisation of Facts

It is important to distinguish what I refer to as ‘retroactive recharacterisation’ or ‘reclassification’ of crimes from what is known as ‘legal recharacterisation of facts’.⁸⁰ The latter process occurs when the accused is initially charged with a certain crime or mode of liability and is later convicted for a different one, with both legal qualifications being part of the *same applicable law*.⁸¹ For example, charges for modes of liability such as co-perpetration through an organisation or aiding and abetting can be later recharacterised as command responsibility.⁸²

Accordingly, legal recharacterisation of facts does not entail a change in the applicable law and is therefore normally consistent with the principle of legality. Despite those differences, the two processes are very similar in that they both involve a change in the labels of crimes or modes of liability. For this reason, Chapter 3 will explain how the

⁷⁸ Art 1, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (Torture Convention).

⁷⁹ Robert Cryer, *An Introduction to International Criminal Law and Procedure* (CUP 2014) 254–255. See, more generally, on the inclusion of new categories of sexual crimes in the Rome Statute, *Ntaganda Case* (Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9) ICC-01/04-02/06-1707 (04 January 2017) §35, fn 74; Michael Cottier and Sabine Mzee, ‘Article 8: War Crimes - 22. Paragraph 2(b)(Xxii): Rape and Other Forms of Sexual Violence’ in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (Beck/Hart 2016) 482. For more examples of instances where the Rome Statute goes beyond customary international law, see Chapter 5, Section 2(a)(ii).

⁸⁰ See, generally, Elinor Fry, ‘Legal Recharacterization and the Materiality of Facts at the International Criminal Court: Which Changes Are Permissible?’ (2016) 29 LJIL 577.

⁸¹ See, e.g. *Block v Hungary* App no 56282/09 (ECtHR, 25 January 2011) §22; *Penev v Bulgaria* App no 20494/04 (ECtHR, 7 January 2010) §§37–44; *Fermin Ramírez v Guatemala* (IACHR, 20 June 2005) §§65, 67, 70–76.

⁸² *Gbagbo and Blé Goudé Case* (Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court) ICC-02/11-01/15-185 (19 August 2015) §§9–14.

rules governing legal recharacterisation of facts are relevant for interpreting the principle of fair labelling in international law.

7. Conclusion

This chapter has demonstrated how retroactive recharacterisation of crimes is a longstanding phenomenon which has nonetheless received marginal attention in the literature and case law to date. It has been taken for granted given its *prima facie* consistency with the principle of legality in general international law. Due to the decentralised character of the international legal order, this principle does not require that the exact criminal law binding on the accused at the time of the conduct be applied upon conviction and sentencing. For one to be held guilty of a crime, it suffices their conduct was criminalised by *some* applicable law. However, closer scrutiny of the various scenarios in which criminal rules can be retroactively recharacterised reveals a series of outcomes which may not be entirely consistent with that principle. They include inadvertent changes in the material or mental elements of the crime, modes of liability, defences, penalties, other rules which are decisive for criminal prosecution or punishment, and criminal labels. These changes might clash with the principle of non-retroactivity to the extent that they lead to a retroactive expansion of criminal liability or a substantive aggravation of the situation of the accused.

Not surprisingly, the few authors who have identified this phenomenon have sensed some intuitive discomfort with it and noted the paucity of discussion thereof.⁸³ In particular, they have stressed that retroactive recharacterisation of crimes is ‘too easily subject to abuse’.⁸⁴ Some commentators have also suggested that, even if permitted, its

⁸³ Gallant (n 7) 40.

⁸⁴ *ibid* 369.

use should be exceptional and might be close to an end, due to the progressive development of the principle of legality in international law.⁸⁵

All those considerations are cause for concern and beg a careful examination of whether retroactive recharacterisation of crimes is indeed consistent with the principle of legality in general international law. Thus, in the following chapter, I propose to take a closer look at the various elements of this principle, its scope as well as its interpretation.

⁸⁵ *ibid* 369, 406; Galand (n 6) 149; Grover (n 55) 165.

CHAPTER 2: RETROACTIVE RECHARACTERISATION OF CRIMES AND THE PRINCIPLE OF LEGALITY IN INTERNATIONAL LAW

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1. Introduction

Chapter 1 explained in detail what retroactive recharacterisation of crimes is, why it arises in international law and the various problematic outcomes that it may lead to. However, to confirm whether my misgivings about this phenomenon are warranted, it is necessary to identify and interpret the various elements and the scope of the principle of legality as it presently exists in general international law, i.e. under customary international law and as a general principle of law.

As mentioned in the previous chapter, there seems to be a general assumption in the literature and case law that retroactive recharacterisation of crimes is perfectly consistent with the principle of legality. Nevertheless, as I will demonstrate in this chapter, the various formulations of the *nullum crimen* principle found in international instruments, their preparatory works, relevant state practice and *opinio juris*, and, most importantly, the principle’s rationale, seem to cast some doubt on this assumption, at least

in some circumstances. For one thing, the texts and the drafting history of the ICCPR, the ECHR and the UDHR indicate that a certain level of substantive equivalence between previous and subsequent criminal laws was implied in the formulation of the legality principle. Furthermore, whenever confronted with different legal bases for criminalisation and conviction, states have strived to ensure that at least all the essential elements of the crime, modes of liability, defences, penalties and other rules of substantive criminal law are the same as between prior and subsequent laws. This is perhaps an indication that all of these rules come within the scope of the principle of legality. If this is indeed true, it would challenge the assumption that a simple substitution of one crime or mode of liability for another, similar one, without more, is in line with the dictates of the principle of legality.

In this light, the main purpose of this Chapter is to discuss to what extent the practice of retroactive recharacterisation of crimes is consistent with the principle of legality in general international law. Three main reasons justify this narrower focus. First, there is not enough space in this thesis for an exhaustive and comprehensive enquiry into the various rationales, elements and sources of the principle of legality in general international law, or into the various challenges that it has encountered therein. Second, studies of this kind have already been conducted elsewhere.¹ Third, and most importantly, very little has been written on retroactive recharacterisation of crimes, despite its recurrence in the law and practice of various states and international tribunals.

Therefore, in this Chapter, I will seek to identify and interpret the principle of legality in general international law to the extent necessary to determine whether

¹ See, e.g., Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (CUP 2010); M Cherif Bassiouni, *International Criminal Law: Sources, Subjects and Contents* (Brill 2008), Chapter 2.1, Principles of Legality in International and Comparative Criminal Law; Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia 2002); Héctor Olásolo, 'A Note on the Evolution of the Principle of Legality in International Criminal Law' (2007) 18 CrimLF 301.

retroactive recharacterisation of crimes is consistent with it. In particular, I will be looking at the various elements of this principle and its scope, that is, which rules of criminal law are subject to it.

To this end, I will follow the general rule of treaty interpretation reflected in Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT).² I believe that this rule is applicable, with some adaptations, to the identification and interpretation of unwritten sources of law, such as customary international law and general principles of law.³ Adaptations to the VCLT are necessary to account for the fact that the interpretation of unwritten sources of law often overlaps with their identification or ascertainment.⁴ To elaborate, even if the two processes can be distinguished at times,⁵ the identification of unwritten rules necessarily involves a degree of interpretation of the relevant evidentiary materials.⁶ In the same vein, while interpreting a previously identified rule, one may reaffirm it, expose new elements which had not been considered before or even exclude previously established ones.⁷ Thus, in this chapter, I will try to identify the elements and the scope of the principle of legality in general international law whilst interpreting the relevant materials from which to draw them. In any event, since the principle of legality

² Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331. On the customary nature of the VCLT, see *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)* (Preliminary Objections) [2016] ICJ Rep 3 §35.

³ Robert Kolb, *Interprétation et création du droit international: esquisses d'une herméneutique juridique moderne pour le droit international public* (Bruylant 2006) 219–222; Panos Merkouris, 'Interpreting the Customary Rules on Interpretation' (2016) University of Groningen Faculty of Law Research Paper 2016-12 <<https://papers.ssrn.com/abstract=2749066>> accessed 25 August 2019; Duncan B Hollis, 'Sources and Interpretation Theories: An Interdependent Relationship' (2016) Temple University Legal Studies Research Paper No 2016-46 <<https://papers.ssrn.com/abstract=2836691>> accessed 25 August 2019.

⁴ Hollis (n 3) 2, 4–6, 8, 18; Kolb (n 3) 220–221.

⁵ Merkouris (n 3) 2, 7–8, 10–11.

⁶ Hollis (n 3) 2, 4–6, 8; Duncan B Hollis, 'The Existential Function of Interpretation in International Law' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 80; Jean D'Aspremont, 'The Multidimensional Process of Interpretation' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 117–118.

⁷ Hollis (n 3) 6; Hollis (n 6) 80, 85–87; D'Aspremont (n 6) 114–115, 117–118.

under both customary international law and as a general principle of law is now reflected in some of the most prominent human rights treaties,⁸ it is sensible to use the VCLT as a starting point.

With those aims and methodology in mind, **Section 2** will start by looking at the text of the principle of legality in various treaties and other international instruments. **Section 3** will then turn to the analysis of other instances of state practice and *opinio juris* which have shaped the customary version of the *nullum crimen* principle (i.e. ‘formative’ state practice and *opinio juris*).⁹ These will be considered together with the principle’s context, including subsequent practice and other applicable rules of international law, within the meaning of Article 31(3)(b)-(c) of the VCLT.¹⁰ The materials consulted comprise, *inter alia*, official government statements, decisions of domestic and international courts and national legislation.¹¹ Although it is beyond the scope of this thesis to conduct a comprehensive study of the various domestic versions of the principle

⁸ See *infra* Section 2(a).

⁹ *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (Merits) [1969] ICJ Rep 3 §77. Although these two constitutive elements must always be distinguished, they can often be ascertained by reference to the same materials or instances of practice, such as national legislation, domestic case law and international treaties. Many such materials can be, at once, evidence of state practice and *opinio juris*, if they adopted by states with an explicit or implicit claim to be binding under customary international law (as opposed to domestic or treaty law). See ILC, ‘Fourth Report on Identification of Customary International Law by Michael Wood, Special Rapporteur’ (08 March 2016) UN Doc A/CN.4/695 para 18; ILC, ‘Third Report on Identification of Customary International Law by Michael Wood, Special Rapporteur’ (27 March 2015) UN Doc A/CN.4/682 paras 13–15 and footnotes 18–19, 41, 43; Richard R Baxter, ‘Treaties and Customs’ ‘Treaties and Customs’ (1970) 129 *Recueil des Cours de l’Académie de Droit International* 25, 64; Richard R Baxter, ‘Multilateral Treaties as Evidence of Customary International Law’ (1965) 41 *BYIL* 275, 277–278, 287.

¹⁰ Note that subsequent practice that does not qualify as ‘practice in the application of the [rule] which establishes the agreement of [states] regarding its interpretation’ can be considered as a supplementary means of interpretation. See Arts 31(3)(b) and 32, VCLT; ILC, ‘Report on the Work of the Sixty-Eighth Session (2016), Chapter VI: Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties’ (2 May–10 June and 4 July–12 August 2016) UN Doc A/71/10, Draft Conclusion 2[1], para 4, Draft Conclusion 4, para 3 and commentaries thereto.

¹¹ ILC, ‘First Report on Formation and Evidence of Customary International Law by Michael Wood, Special Rapporteur’ (17 May 2013) UN Doc A/CN.4/663 paras 46–85; ILC, ‘Second Report on Identification of Customary International Law by Michael Wood, Special Rapporteur’ (22 May 2014) UN Doc A/CN.4/672 paras 37–41; ILC, ‘Third Report on Identification of Customary International Law’ (n 9) paras 58–61.

of legality which have given rise to the corresponding general principle of law,¹² I will refer to the relevant conclusions of other commentators.¹³ Lastly, **Section 4** will examine the object and purpose of the principle and how it informs the issue of retroactive recharacterisation of crimes.

While evaluating each interpretative tool, I will have recourse to supplementary means of interpretation, including, in particular, the preparatory works of relevant instruments and case law.¹⁴ I am nonetheless mindful that such recourse can only be made to confirm or clarify the meaning yielded by the primary tools of interpretation and in accordance with the principle of *in dubio pro reo*.¹⁵ Also known as *favor rei*, this principle is a specific rule of interpretation in both domestic and international criminal law requiring ambiguous rules to be interpreted more favourably to the accused.¹⁶ It is not only a component of the principle of legality itself,¹⁷ but also the presumption of

¹² On the constitutive elements and the method for ascertaining general principles, see Art 38(1)(c), Statute of the International Court of Justice (adopted 24 October 1945, entered into force 18 April 1946) (ICJ Statute) and Catherine Redgwell, 'General Principles of International Law' in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Bloomsbury Publishing 2017); Fabián Raimondo, 'General Principles of Law as Applied by International Criminal Courts and Tribunals' (2007) 6 *The Law & Practice of International Courts and Tribunals* 393, 396–406; Dapo Akande, 'Sources of International Criminal Law' in Cassese A, *The Oxford Companion to International Criminal Justice* (OUP 2009) 51–52.

¹³ See ICRC, 'Customary IHL - Practice Relating to Rule 101. The Principle of Legality' <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule101> accessed 25 August 2019; Gallant (n 1), Chapter 5; Jerome Hall, *General Principles of Criminal Law* (The Lawbook Exchange 2010); Bassiouni (n 1) 76–84; Stefan Glaser, 'Nullum Crimen Sine Lege' (1942) 24 *JCLIL* 29; Giuliano Vassalli, *Nullum Crimen Sine Lege* (Digesto delle discipline penali 1939).

¹⁴ See Art 32, VCLT and Art 38(1)(d), ICJ Statute.

¹⁵ Akande (n 12) 45; Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (CUP 2014) 208.

¹⁶ *Akayesu Case* (Judgment) ICTR-96-4-A (2 September 1998) §§319, 501; *Limaj et al Case* (Appeal Judgment) ICTY-03-66-A (27 September 2007) §21 and Judge Shahabuddeen's Declaration §6; *Čelebići Case* (Judgment) ICTY-96-21-T (16 November 1998) §413.

¹⁷ Antonio Cassese and others, *Cassese's International Criminal Law* (OUP 2013) 35; Susana Sanz-Caballero, 'The Principle of Nulla Poena Sine Lege Revisited: The Retrospective Application of Criminal Law in the Eyes of the European Court of Human Rights' (2017) 28 *EJIL* 787, 788; Grover (n 15) 205; *Hadzihasanović, et al Case* (Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility) ICTY-01-47-AR72 (16 July 2003) §51; *Akayesu Judgment* (n 16) §319.

innocence,¹⁸ thereby applying to all stages of criminal proceedings and to all rules of criminal law, procedural or substantive.¹⁹ Thus, recourse to this interpretative canon is warranted throughout this thesis.

The order I will follow when identifying and interpreting the principle of legality under general international law is flexible,²⁰ and, for the sake of simplicity, I will often consider more than one interpretative tool at once. In the final analysis, my observations will be based on the totality of materials assessed together in a single and combined operation, following the crucible approach.²¹

As I will demonstrate by the end of this chapter, the main conclusion to be drawn from those materials is that the principle of legality in general international law comprises the principles of non-retroactivity of crimes and penalties, specificity and *in dubio pro reo*. Most importantly, its scope includes not only crimes and penalties, but any rule of criminal law whose retroactive application to the facts would be *substantively* detrimental to the accused, that is, which encroaches upon their substantive human rights, regardless of its *prima facie* classification as substantive or procedural. This means that the retroactive recharacterisation of a crime may be inconsistent with this principle to the extent that it leads to a substantive aggravation of the situation of the accused.

¹⁸ See ICRC, 'Customary IHL - Practice Relating to Rule 100. Fair Trial Guarantees, Section C. Presumption of Innocence' <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule100_sectionc> accessed 25 August 2019.

¹⁹ *Bemba Case* (Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/08-3343 (21 March 2016) §218; *Renzaho Case* (Appeal Judgment) ICTR-97-31-A (1 April 2011) §474; *Limaj et al* (Appeal Judgment) (n 16) §21.

²⁰ See Richard K Gardiner, *Treaty Interpretation* (OUP 2015) 10; Mark Eugen Villiger, 'The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The "Crucible" Intended by the International Law Commission' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 113–114.

²¹ ILC, 'Reports of the International Law Commission on the Second Part of its Seventeenth Session and Eighteenth Session' (1966) UN Doc A/CN.4/SER.A/1966/Add.II 219–220; Gardiner (n 20) 8, 10, 31, 32, 161; Villiger (n 20) 114.

2. Identifying and Interpreting the Principle of Legality in General International Law: Relevant Texts

As mentioned earlier, it is uncontroversial that the principle of legality exists in general international law, that is, both as a rule of customary international law and a general principle of law. It has been recognised in numerous human rights and humanitarian instruments that together enjoy universal acceptance, as well as in virtually all domestic legal systems.²² There is also general agreement that the contemporary version of the principle in general international law is reflected in the three most prominent human rights instruments, i.e. the ICCPR, the UDHR, and the ECHR.²³ Indeed, their quasi-universal ratification or acceptance,²⁴ the extent to which they have been mirrored in domestic systems, together with other instances of state practice and *opinio juris*, especially of states that did not ratify them,²⁵ provide overwhelming support to the view that their version of the principle of legality is part of general international law. In the ICCPR, ECHR and in other human rights treaties, it is non-derogable human right.²⁶ Although this could be evidence that the principle has acquired the status of *jus cogens*, this assertion has not yet been met with universal support.²⁷

²² Gallant (n 1) 156–230, 241–242, 297–298, 302; Bassiouni (n 1) 73, 76–83, 91–92, 95; ICRC (n 13).

²³ See, e.g., Hurst Hannum, ‘The Status of the Universal Declaration of Human Rights in National and International Law’ (1995) 25 GJICL 287, 345–346; Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel 2005) 359; ILC, ‘Report of the International Law Commission on the Work of Its Forty-Sixth Session’ (2 May–22 July 1994) UN Doc A/49/10 113; *Blaškić Case* (Appeal Judgment) ICTY-95-14-A (29 July 2004) §141.

²⁴ UNGA ‘3rd Session, 3rd Committee, 183rd Plenary Meeting’ (10 December 1948) UN Doc A/PV.183 933; ‘Ratification Status for CCPR - International Covenant on Civil and Political Rights’ <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx> accessed 25 August 2019; ‘Full List - European Convention for the Protection of Human Rights and Fundamental Freedoms’ (*Treaty Office*) <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures>> accessed 25 August 2019.

²⁵ On the need to look beyond widely ratified treaties to establish the constitutive elements of the corresponding custom, i.e. state practice and *opinio juris*, known as the ‘Baxter paradox’, see ILC, ‘Third Report on Identification of Customary International Law’ (n 9) paras 41, 43; Baxter, ‘Treaties and Customs’ (n 9) 64.

²⁶ Art 4(2), ICCPR; Art 15(2), ECHR; Art 27(2), ACHR.

²⁷ See Gallant (n 1) 343, 399–402; Theodor Meron, *War Crimes Law Comes of Age: Essays* (OUP 1999) 244; *Ayyash et al Case* (Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide,

The formulations of the principle in all three instruments are almost identical.²⁸ Their drafting histories are also intertwined, with the UDHR setting the framework for the ICCPR and the ECHR, and the latter two inspiring one another (although the ECHR came first).²⁹ Notably, the drafters of both the ICCPR and the UDHR (the members of the UN Commission on Human Rights) were elected as representatives of states, as opposed to individuals acting in their personal capacity. This means that their actions and statements during the drafting of those instruments are not simply preparatory works, but can also count as state practice and/or *opinio juris*.³⁰

Significantly, the fact that the UDHR was adopted by a UN General Assembly Resolution,³¹ and that the specific provision containing the *nullum crimen* principle (Article 11(2)) was adopted by unanimous vote, with no abstentions,³² is strong evidence that UN member states considered themselves to be bound by it under customary international law.³³ Significantly, at the 1968 UN International Conference on Human Rights, the General Assembly declared that the UDHR ‘states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all

Perpetration, Cumulative Charging) STL-11-01/I/AC/R176bis (16 February 2011) §76; *Hadzihasanović* Interlocutory Appeal on Command Responsibility (n 17) §55.

²⁸ Christoph Grabenwarter, *The European Convention on Human Rights: A Commentary* (Beck/Hart 2014) 172; Nowak (n 23) 359.

²⁹ See, e.g., Gallant (n 1) 159, 161, 187–188, 203; David S Weissbrodt and Matthias Hallendorff, ‘Travaux Préparatoires of the Fair Trial Provisions—Articles 8 to 11—of the Universal Declaration of Human Rights’ (1999) 21 HumRtsQ 1061, 1077.

³⁰ ECOSOC, ‘Commission on Human Rights’ E/RES/9(II) (21 June 1946) para 9(2)(a); Gallant (n 1) 161. But see *supra* note 9. On how *travaux préparatoires* can constitute evidence of *opinio juris* in relation to the entire treaty or separate treaty provisions, see ILC, ‘Second Report on Identification of Customary International Law’ (n 11) para 76 (f); Baxter, ‘Multilateral Treaties as Evidence of Customary International Law’ (n 9) 287.

³¹ On resolutions of international organisations as evidence of the *opinio juris* of member states, see ILC, ‘Third Report on Identification of Customary International Law’ (n 9) paras 45–53; ILC, ‘Second Report on Identification of Customary International Law’ (n 11) para 76 (g).

³² UNGA, A/PV.183 (n 24) 933.

³³ On the relevance of voting patterns within the UN General Assembly, especially unanimous votes, for assessing *opinio juris*, see ILC, ‘Third Report on Identification of Customary International Law’ (n 9) para 49; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 1996 226 §71.

members of the human family and constitutes an *obligation* for members of the international community'.³⁴

Other multilateral and regional human rights treaties that recognise the principle of legality include the Convention on the Rights of the Child (CRC),³⁵ the ACHR, the African Charter of Human and Peoples' Rights (the 'African Charter')³⁶ and the Revised Arab Charter on Human Rights (the 'Arab Charter').³⁷ While their formulations of the *nullum crimen* principle either go beyond or fall short of those found in the UDHR, ICCPR and ECHR, there are significant overlaps between them.³⁸ Moreover, these are undoubtedly instances of state practice which have contributed to the formation, consolidation and/or development of the legality principle in general international law. Accordingly, they should be taken into account when identifying and interpreting this principle.

Despite the paucity of human rights treaties in Asia, the Association of Southeast Asian Nations (ASEAN) has issued a Human Rights Declaration recognising the principle of legality in almost identical terms as the UDHR.³⁹ Although the ASEAN Declaration is a non-binding document, one of its stated goals is to reaffirm certain pre-existing human rights obligations of ASEAN member states under international custom, treaties and domestic law, including the principle of legality.⁴⁰ Thus, the declaration can

³⁴ UNGA, 'Proclamation of Tehran, Final Act of the International Conference on Human Rights' (22 April to 13 May 1968) UN Doc A/CONF.32/41 para 2 (emphasis added).

³⁵ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 02 September 1990) 1577 UNTS 3

³⁶ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58.

³⁷ Revised Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) 12 IHRR 893 (2005).

³⁸ Gallant (n 1) 201–203.

³⁹ ASEAN, 'Human Rights Declaration' (2012) <https://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf> accessed 25 August 2019

⁴⁰ Preamble, paras 2-3 *ibid*.

help establish the *opinio juris* of its signatories to be bound by this principle under customary international law. At the very least, it can be used as evidence of their pre-existing customary obligation to uphold the *nullum crimen* principle.

Other texts amounting to instances of state practice are the provisions of humanitarian conventions recognising the principle of legality during armed conflict. These include Article 99 of the Third Geneva Convention (GC III), Article 67 of the Fourth Geneva Convention (GC IV), Article 75(4)(c) of Additional Protocol I to the 1949 Geneva Conventions (AP I), and Article 6(2)(c) of Additional Protocol II to the same conventions (AP II).

Similarly, the Rome Statute of the ICC also contains several provisions recognising different aspects of the principle of legality, in particular, Article 22 (on non-retroactivity of crimes, strict construction and in *dubio pro reo*), Article 23 (on *nulla poena*), and Article 24 (on non-retroactivity of crimes and *lex mitior*). However, because the Statute has been opposed by several states,⁴¹ its version of the legality principle cannot presently be seen as reflective of general international law.⁴² Nevertheless, the Rome Statute does count as practice of its states parties.⁴³ In fact, given its high number of ratifications and its growing influence on non-states parties and other international

⁴¹ See, e.g., John Bolton, 'Bolton's Remarks on the International Criminal Court' (*Just Security*, 10 September 2018) <<https://www.justsecurity.org/60674/national-security-adviser-john-bolton-remarks-international-criminal-court/>> accessed 16 August 2018; Brendon J Cannon, Dominic R Pkalya and Bosire Maragia, 'The International Criminal Court and Africa: Contextualizing the Anti-ICC Narrative' (2016) 2 AJICJ; David J Scheffer, 'The United States and the International Criminal Court' (1999) 93 AJIL 12.

⁴² Ward N Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (TMC Asser Press 2006) 231–232; Grover (n 15) 188–189; Gallant (n 1) 355–356.

⁴³ *Kupreškić et al Case* (Judgment) ICTY-95-16-T (14 January 2000) §580; *Tadić Case* (Appeal Judgment) ICTY-94-1-A (15 July 1999) §223; *Furundžija Case* (Judgment) ICTY-95-17/1-T (10 December 1998) §227.

institutions, the Statute will likely shape the evolution of the principle of legality in general international law.⁴⁴

Furthermore, some of the Statute's *travaux préparatoires*, particularly statements issued by government representatives acting in an official capacity, can be evidence of the *opinio juris* of states parties and non-parties.⁴⁵ Importantly, they express, either implicitly or explicitly, an intention of those states to be bound by the formulation of the principle of legality contained in Article 15 ICCPR, which was considered to be the blueprint of the principle.⁴⁶ It is telling that they did so at a time when the substantive provisions of the Statute were thought to reflect general international law.⁴⁷

Lastly, the Report by the UN Secretary-General containing the Statute of the ICTY,⁴⁸ which was adopted by the UNSC unanimously,⁴⁹ states that 'the principle of *nullum crimen sine lege require[s]* the tribunal to apply rules of international humanitarian law which [were] beyond any doubt part of customary law'.⁵⁰ This is a good indication that the members of the Council considered the principle of legality to be part of general international law.

⁴⁴ Similarly, Ferdinandusse (n 42) 232; Leena Grover, 'A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court' (2010) 21 EJIL 543, 557, 571; *Furundžija* (n 43) §227.

⁴⁵ See *supra* note 30, *in fine*.

⁴⁶ See, e.g., ILC, 'Report of the International Law Commission on the Work of Its Forty-Sixth Session' (n 23) 113, Commentary (1) to Art 39; ILC, 'Report of The International Law Commission on Its Forty-Fifth Session, Draft Statute for an International Criminal Court' (3 May-23 July 1993) UN Doc A/48/10 119, Commentary (1) to Art 41.

⁴⁷ See, e.g., UNGA, 'Report of the Preparatory Committee on the Establishment of an International Criminal Court - Volume I (Proceedings of the Preparatory Committee during March-April and August 1996)' (14 September 1996) UN Doc A/51/22[VOL-I](SUPP) paras 54-55; ILC, 'Report of The International Law Commission on the Work of Its Forty-Sixth Session (1994), Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly during Its Forty-Ninth Session Prepared by the Secretariat, Addendum' (22 February 1995) UN Doc A/CN.4/464/Add.1 paras 22, 29, 78, 80-81, 86, 90, 101, 138, 153.

⁴⁸ 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)' (1993) UN Doc S/25704.

⁴⁹ UNSC Res 827 (25 May 1993) UN Doc S/RES/827 para 1.

⁵⁰ UN Doc S/25704 (n 48) para 34 (emphasis added).

Thus, there is overwhelming evidence that the principle of legality is recognised in general international law and is reflected in the texts of the UDHR, ICCPR and ECHR. However, its specific elements and, most importantly, its scope are still open to question. In particular, beyond crimes and penalties, it remains unclear what exact rules of criminal law come within the purview of the principle of legality and are the subject to the prohibition of retroactive application.

In this regard, it has been suggested in the literature and case law that the principle of legality in general international law comprises the following elements: 1) the core rule of non-retroactivity of crimes, which includes the prohibition of analogy; 2) a limited version of the prohibition of retroactive penalties (*nulla poena sine lege*); 3) *in dubio pro reo*; and 4) and a requirement of *sufficient* specificity or legal certainty (*lex certa*).⁵¹ Other elements which are found in more robust formulations of the principle and are said *not* to apply under general international law include: 1) the principle of strict construction or strict interpretation (*lex stricta*); 2) the requirement of written law (*lex scripta*); and 3) the principle of *lex mitior*, requiring the retroactive application of criminal laws that are more beneficial to the accused.⁵² It has also been suggested that the principle of non-retroactivity does not specify which exact source of law must have previously criminalised the conduct and laid down its punishment. Rather, it is enough that some source of law, be it domestic or international, previously defined the crime and stipulated the applicable penalty.

⁵¹ See Gallant (n 1) 275, 352–363, 378–389; Cassese and others (n 17) 27–36; Claus Kreß, ‘Nulla Poena Nullum Crimen Sine Lege’, *Max Planck Encyclopedia of Public International Law* (2010) paras 16–34 <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e854>> accessed 25 August 2019; *Vasiljević Case* (Judgment) ICTY-98-32-T (29 November 2002) §§193, 196, 198, 201; *Kokkinakis v Greece* App no 3/1992/348/421 (ECtHR, 19 April 1993) §52.

⁵² Gallant (n 1) 355–356; Kreß (n 51) paras 21, 31.

To determine whether retroactive recharacterisation of crimes is consistent with the principle of legality, I tested the above suggestions by first looking at the texts mentioned earlier. This has led me to three main conclusions.

First, it is true that the principle of legality, as it stands today in general international law, has fewer elements and is thus more flexible than some of its domestic and treaty-based counterparts. Second, it is also true that this version of the principle does not require the exact same criminal law to apply to the accused at the time of the conduct and at the time of conviction. Third, the principle nevertheless requires that the *substance* of the subsequent law be equivalent to or not more expansive than the applicable law. This substantive content, which makes up the scope of the principle of legality, includes not only criminal offences and their penalties, but also modes of liability, defences, conditions of punishment or prosecution, and, in some circumstances, criminal labels. This means that, although not intrinsically contrary to the principle of legality, recourse to retroactive recharacterisation of crimes cannot lead to a substantive expansion of the criminal law. Specifically, the conduct must constitute a crime under both laws, which means that the material and mental elements of the crime and the applicable modes of liability cannot be retroactively expanded. Likewise, available defences cannot be made retroactively more demanding. Subsequent penalties must be the same or less severe than the previously applicable ones. Conditions of punishment or prosecution which are substantively more severe cannot be retroactively imposed. Lastly, subsequent labels must not be more stigmatising than previous ones.

Let me now turn to each of those conclusions and how I have reached them.

a. The Elements of the Principle of Legality in General International Law

Articles 15 ICCPR, 11(2) UDHR and 7 ECHR read as follows:

Article 15 ICCPR:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not *constitute a criminal offence, under national or international law*, at the time when it was committed. Nor shall a heavier penalty be imposed than *the one that was applicable* at the time when *the criminal offence* was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal *according to the general principles of law recognized by the community of nations*.⁵³

Article 11(2) UDHR:

2. No one shall be held guilty of any penal offence on account of any act or omission which did not *constitute a penal offence, under national or international law*, at the time when it was committed. Nor shall a heavier penalty be imposed than *the one that was applicable at the time the penal offence was committed*.⁵⁴

Article 7 ECHR:

No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not *constitute a criminal offence under national or international law* at the time when it was committed. Nor shall a heavier penalty be imposed than *the one that was applicable at the time the criminal offence was committed*.

⁵³ Emphasis added.

⁵⁴ Emphasis added.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was *criminal according to the general principles of law recognised by civilised nations*.⁵⁵

i. Nullum crimen, nulla poena sine lege

The texts of those provisions clearly indicate that the principle of legality comprises the prohibition of retroactive crimes, or non-retroactivity of crimes (*nullum crimen sine lege*), as well as the prohibition of retroactive penalties, also known as non-retroactivity of penalties (*nulla poena sine lege*). These elements have also been recognised in the other international instruments mentioned above, including, in particular, Article 40(2)(a) of the CRC, Article 9 of the ACHR, Article 7(2) of the African Charter, Article 15 of the Arab Charter, Article 99 of GC III, Article 67 of GC IV, Article 75(4)(c) of AP I, Article 6(2)(c) of AP II, Articles 22 to 24 of the Rome Statute and Article 20(2) of the ASEAN Declaration. Likewise, they feature in virtually all domestic systems,⁵⁶ and have been identified by the ICRC in its study on customary international humanitarian law (IHL).⁵⁷

Non-retroactivity of crimes is recognised in the first sentence of Articles 15 ICCPR, 11(2) UDHR and 7 ECHR. It requires that offences and other rules of substantive criminal law which give rise to criminal responsibility, i.e. those rules that are essential for any conduct to ‘constitute’ a crime, must have applied to the accused, under domestic

⁵⁵ Emphasis added.

⁵⁶ Gallant (n 1) 241–242, 297–298, 302; M Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (Martinus Nijhoff Publishers 1999) 137; ICRC (n 13).

⁵⁷ ICRC, ‘Customary IHL - Rule 101: The Principle of Legality’ <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule101> accessed 25 August 2019.

or international law, at the time of the events.⁵⁸ This requirement is thought to be the core or the minimum guarantee of the *nullum crimen* principle.⁵⁹

The prohibition of retroactive criminal laws does not seem to cover a requirement of pre-established courts, i.e. a rule prohibiting the *ex post facto* creation or expansion of jurisdiction, at least not presently.⁶⁰ This requirement would be impractical in the current state of international law, given its decentralised judicial and legislative setting. Similarly, *strictly* procedural rules do not in themselves violate the principle of non-retroactivity.⁶¹ This includes, in particular, rules of evidence, provided that their effect is limited to questions of proof and admissibility thereof, as opposed to the legality or illegality of conduct.⁶²

Although this conclusion is sound and justified, some concerns have rightly been raised about the impact of retroactive rules of procedure on the accused's rights and defence strategy.⁶³ Retroactive court creation can also lead to the targeting of specific individuals or groups, as ad hoc tribunals are generally brought into existence after the crimes and least some suspects have been identified.⁶⁴ Thus, the gradual inclusion of

⁵⁸ Gallant (n 1) 357; Bassiouni (n 1) 99; Triestino Mariniello, 'The "Nuremberg Clause" and Beyond: Legality Principle and Sources of International Criminal Law in the European Court's Jurisprudence' (2013) 82 NJIL 221, 246; Ben Juratowitch, 'Retroactive Criminal Liability and International Human Rights Law' (2005) 75 BYIL 337, 344–345.

⁵⁹ Bassiouni (n 1) 89; Gallant (n 1) 352; Galand AS, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits* (Brill Nijhoff 2019) 111; Ferdinandusse (n 42) 225, 229.

⁶⁰ Gallant (n 1) 318–320, 394; Grover (n 15) 137; Raul C Pangalangan, 'Article 24: Non-Retroactivity Ratione Personae' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (Beck/Hart 2016) 968, 970; *Čelebići* Judgment (n 16) para 313.

⁶¹ E.g., *Bosti v Italy* App no 43952/09 (ECtHR, 13 November 2014) §§54–55; *Liakat Ali Alibux v Suriname* (IACHR, 30 January 2014) §§68–70.

⁶² *David Michael Nicholas v Australia* (2004) UNHRC Communication no 1080/2002, UN Doc CCPR/C/80/D/1080/2002 §7.7.

⁶³ See María Luisa Piqué, 'Artículo 9. Principio de Legalidad y de Retroactividad' in Enrique M Alonso Regueira (ed), *La Convención Americana de Derechos Humanos y su Proyección en el Derecho Argentino* (La Leye 2013) 178–181; Michiel Luchtman, 'Principles of European Criminal Law: Jurisdiction, Choice of Forum, and the Legality Principle in the Area of Freedom, Security, and Justice' (2012) 2 ERPL 347, 354–356, 370–371, 379.

⁶⁴ Gallant (n 1) 320.

strictly procedural rules within the scope of the principle of legality in domestic and international systems is a welcome development.⁶⁵

The second component of the principle of legality, *nulla poena sine lege*, is recognised in the second sentence of Articles 15 ICCPR, 11(2) UDHR and 7 ECHR. As the texts of those provisions indicate, *nulla poena* requires that the punishment applied to an individual upon conviction be no heavier than the one that was applicable under domestic or international law at the time of the conduct. There is no requirement of specific scales or tariffs of penalties, but only that the maximum available punishment is set out in advance.⁶⁶

ii. *In dubio pro reo*

The principle of *in dubio pro reo* is not explicitly mentioned in the texts of Articles 15 ICCPR, 11(2) UDHR and 7 ECHR. Yet it has been rightly held to apply as a necessary corollary of the principles of legality and the presumption of innocence.⁶⁷ *In dubio* is not the same as strict construction, as it does not require textual primacy. Rather, in international law, it logically operates when the analysis of the text, context and object and purpose leaves room for ambiguities.⁶⁸

⁶⁵ See, e.g., Art 8(1), ACHR; *Katanga and Chui Case* (Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled ‘Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings) ICC-01/04-01/07-2297 (29 July 2010), Dissenting Opinion of Judge Erkki Kourula and Judge Ekaterina Trendafilova §§33–34.

⁶⁶ Gallant (n 1) 378–387; Kreß (n 51) para 32. But see *Tadić Case* (Judgment in Sentencing Appeals) ICTY-94-1-A & ICTY-94-1-A bis (26 January 2000), Separate Opinion of Judge Cassese §§4–5 (arguing that *nulla poena*, as it exists in domestic systems, is still inapplicable in international law); and Damien Scalia, *Du principe de légalité des peines en droit international pénal* (Bruylant 2011) 11, 183–184, 223–224 (arguing that the way penalties have been laid down and applied in international criminal law is not in line with the *nulla poena* principle and its requirements of certainty, accessibility and foreseeability).

⁶⁷ See *supra* notes 16, 17, 18 and 19.

⁶⁸ Grover (n 15) 206, 208; Akande (n 12) 44–45; *Katanga Case* (Judgment pursuant to article 74 of the Statute) ICC-01/04-01/07-3436-tENG (7 March 2014) §§53.

iii. Specificity

Although there is no explicit reference to the principle of specificity in Articles 15 ICCPR, 11(2) UDHR or 7 ECHR, it has been generally recognised as an intrinsic component of the principle of legality.⁶⁹ This is because, without a *minimum* level of certainty, crimes would be so loosely defined that it would be easy to apply them retroactively. However, the level of specificity or detail required in international criminal law is not as high as in certain civil law systems.⁷⁰ Customary international law and general principles of law are inherently less specific than written sources of law. Even certain treaty provisions are notoriously broad, such as the crime against humanity of ‘other inhumane acts’, codified in Article 7(1)(k) of the ICC Statute. With an increasingly large and diverse community of states, compromises often necessitate open-ended formulations. Thus, in general international law, specificity is only required to the extent necessary to provide reasonable notice of crimes, penalties and other substantive rules of criminal law.⁷¹

iv. Accessibility and foreseeability?

It is often said that the principle of legality requires the criminal law to be accessible and foreseeable. These are not separate elements of the principle. Instead, they have been devised as qualities or criteria with which the prohibition of retroactive crimes and penalties, as well as the requirement of sufficient specificity, can be tested in concrete cases.⁷² Accessibility refers to the applicability of the rule to the individual concerned and

⁶⁹ Gallant (n 1) 275, 362–363; Cassese and others (n 17) 27–28; Kreß (n 51) para 29.

⁷⁰ Cassese and others (n 17) 28–29; Bassiouni (n 1) 95, 99–100, 180.

⁷¹ *Vasiljević* (n 51) §§193, 201–203; UNHRC, ‘CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency’ (31 August 2001) UN Doc CCPR/C/21/Rev.1/Add.11 para 7; *Kokkinakis v Greece* (n 51) §52; *X Ltd and Y v United Kingdom* App no 8710/79 (ECmHR, 07 May 1982) §9.

⁷² Sanz-Caballero (n 17) 790, 811 (characterising these as qualitative requirements of criminal laws); Scalia (n 66) 4, 8, 60–61, 69 (framing these as ‘material criteria’ for defining criminal law in accordance with the principle of legality).

its availability to the public, i.e. the possibility of knowing the law.⁷³ In contrast, foreseeability has been defined as the ability of the average person to predict, to a degree that is reasonable in the circumstances, the consequences which a given conduct might entail.⁷⁴ This includes developments of the criminal law by the courts, whether through the interpretation of statutory offences or the identification of customary crimes. Courts can gradually interpret or develop the contents of the criminal law in light of new societal developments, provided that the resulting interpretation was consistent with the essence of the offence and reasonably foreseeable with legal advice if necessary.⁷⁵ Beyond those boundaries, expansive interpretation amounts to retroactive criminalisation by analogy and is therefore banned.⁷⁶

In practice, the test of accessibility and foreseeability has been applied rather flexibly by the ECtHR and some international criminal tribunals. For instance, the analysis of the two requirements has been conflated⁷⁷ or entirely sidestepped, especially when the legal basis of the crime is a general principle of law.⁷⁸ In addition, foreseeability

⁷³ Gallant (n 1) 20–21, 363–364; Council of Europe, ‘Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law’ (2017) <https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf> accessed 25 August 2019 para 23; *Vasiliauskas v Lithuania* App no 35343/05 (ECtHR, 20 October 2015) §§167–168; *Milutinović et al* (Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction — Joint Criminal Enterprise) ICTY-99-37-AR72 (6 May 2003) §41.

⁷⁴ Mariniello (n 58) 244; Council of Europe (n 73) paras 24, 27; *Kononov v Latvia* App no 36376/04 (ECtHR, 17 May 2010) §§187, 235, 238; *Hadzihasanović* Interlocutory Appeal on Command Responsibility (n 17) §34.

⁷⁵ See, e.g., *Sunday Times v The United Kingdom* App no 6538/74 (ECtHR, 26 April 1979) §59; *SW v United Kingdom* App No 20166/92 (ECtHR, 22 November 1995) §36; *Vasiliauskas v Lithuania* (n 73) §§141, 152, 155–157; Council of Europe (n 73) para 29; *Stakić Case* (Appeal Judgment) ICTY-97-24 (22 March 2006) §39.

⁷⁶ Cassese and others (n 17) 33; *Hadzihasanović et al Case* (Interlocutory Appeal on Decision on Joint Challenge to Jurisdiction) ICTY-01-47-PT (27 November 2002) §15; *Vasiliauskas v Lithuania* (n 73) §§154, 183.

⁷⁷ See, e.g., Ferdinandusse (n 42) 238; Gallant (n 1) 364; Harmen van der Wilt, ‘Nullum Crimen and International Criminal Law: The Relevance of the Foreseeability Test’ (2015) 84 NJIL 515, 524–525; *Kononov v Latvia* (n 74) §§235–238; *Kononov v Latvia* App no 36376/04 (ECtHR, 24 July 2008) §122; *Gbao et al Case* (Appeal Judgment) SCSL-04-15-A (26 October 2009) §891.

⁷⁸ See, e.g. *X v Belgium* App no 268/57 (ECmHR, 20 July 1957) §§239–241; *Touvier v France* App no 29420/95 (ECmHR, 13 January 1997) §7; *Papon v France (No 2)* App no 54210/00 (ECtHR, 15 November 2001) §5; Cass Crim, 26 January 1984, Klaus Barbie Case (No 2) (83-94425) 92. For other cases, see

has been equated to the outcome of some hypothetical (and often unavailable) legal advice,⁷⁹ as opposed to what would be expected from an average individual.⁸⁰ This is a rather unrealistic standard, particularly in international law, where certain rules are not readily available or identifiable even for legal experts, such as more technical or unwritten ones.⁸¹ Moreover, it fails to account for the fact that not all individuals have access to justice or to an attorney, especially in societies decimated by armed conflict.⁸² But what is more troublesome is that the requirements of accessibility and foreseeability do not always capture the full range of elements and rules that give rise to criminal liability, punishment and prosecution. Instead, the test focusses on whether the individual had notice of the ‘essence’ of the conduct, and whether the penalties are not heavier than

Penart v Estonia App no 14685/04 (ECtHR, 24 January 2006) §9; *Baumgarten v Germany* (2003) UNHRC Communication no 960/2000, UN Doc CCPR/C/78/D/960/2000 §9.4; *Čelebići Case* (Appeal Judgment) ICTY-96-21-T (20 February 2001) §173. See also A Cassese, ‘Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law: The Kolk and Kislyiy v. Estonia Case before the ECHR’ (2006) 4 JICJ 410, 416–417; Mariniello (n 58) 225, 229–233.

⁷⁹ *Sunday Times v The United Kingdom* (n 75) §49; *Pessino v France* App no 40403/02 (ECtHR, 10 October 2006) §36; Council of Europe (n 73) paras 24, 26–27; Juratowitch (n 58) 347–348, 350; Ben Emmerson, Andrew Ashworth and Alison Macdonald, *Human Rights and Criminal Justice* (Sweet & Maxwell 2007) para 397.

⁸⁰ For a critical analysis of the hypothetical lawyer test, see John Calvin Jeffries Jr, ‘Legality, Vagueness, and the Construction of Penal Statutes’ [1985] VaLRev 189, 207–212, 229–230. See also Sergio García Ramírez and Julieta Morales Sánchez, ‘Consideraciones Sobre El Principio de Legalidad Penal En La Jurisprudencia de La Corte Interamericana de Derechos Humanos’ (2011) 24 Revista Mexicana de Derecho Constitucional 195, 216 (stressing that criminal laws are addressed to all citizens and as such must be formulated in precise terms so as to be understood by all of them).

⁸¹ See also Kai Ambos, ‘The Crime of Genocide and the Principle of Legality under Article 7 of the European Convention on Human Rights’ (2016) 17 HRLR 175, 181–182 (arguing that this turns foreseeability ‘into a rather low standard which is easy to meet, and thus of little help with regard to the preservation of legality’); Scalia (n 66) 74 (criticising this approach and arguing that it would be more adequate if knowledge was measured without reference to expert advice).

⁸² See, e.g., the position of the defendant in *K-HW v Germany* App no 37201/97 (ECtHR, 22 March 2001) §§68–72.

the ones applicable to the crime.⁸³ This, in my view, is far too simplistic, especially when retroactive recharacterisation of crimes is involved.⁸⁴

This might explain why the requirements of accessibility and foreseeability have not been universally accepted. As will be discussed in Section 2(a)(iii), various human rights bodies, international criminal tribunals and domestic courts have resorted to more stringent tests to evaluate compliance with the principle of non-retroactivity under general international law.

v. *Lex mitior, stricta et scripta?*

In addition to non-retroactivity of crimes and penalties, Article 15 ICCPR explicitly recognises the principle of *lex mitior*. The same principle has been implicitly recognised in the context of Article 7 ECHR.⁸⁵ However, its scope has been restricted to changes in the criminal law of one and the same domestic legal system,⁸⁶ not as between different systems or different sources of international law.⁸⁷ This makes sense, as the requirement to apply the most beneficial criminal law to the accused cannot be easily reconciled with international criminal law's multitude of sources, which often apply to the same individual at one point in time. Were *lex mitior* to apply internationally, perpetrators

⁸³ *Streletz, Kessler and Krenz v Germany* App nos 34044/96, 35532/97 & 44801/98 (ECtHR, 22 March 2001) §50; *Coëme and others v Belgium* App nos 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96 (ECtHR, 22 June 2000) §§145, 150; *Hadzihasanović* Interlocutory Appeal on Command Responsibility (n 17) §34; *Ayyash et al* (n 27) §136.

⁸⁴ For a full argument, see de Souza Dias T, 'Accessibility and Foreseeability in the Application of the Principle of Legality under General International Law: A Time for Revision?' (2019) HRLR (forthcoming). See also *supra* notes 80 and 81.

⁸⁵ Council of Europe (n 73) paras 50, 52; *Gouarré Patte v Andorra* App no 33427/10 (ECtHR, 12 January 2016) §§31–36; *Öcalan v Turkey (No 2)* App nos 24069/03, 197/04, 6201/06 and 10464/07 (ECtHR, 18 March 2014) §§175; *Scoppola v Italy (No 2)* App no 10249/03 (ECtHR, 7 September 2009) §§105–106, 109.

⁸⁶ *ibid.*

⁸⁷ See *Nikolić Case* (Judgment on Sentencing Appeals) ICTY-94-2-A (4 February 2005) §§77–85; *Nikolić Case* (Sentencing Judgment) ICTY-94-2-S (18 December 2003) §§160–165; Harmen van der Wilt, 'Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court' (2008) 8 ICLR 229, 260, citing *Tadić* Judgment in Sentencing Appeals (n 66) §21; *Scoppola v Italy (No. 2)* (n 85) §§108–109.

could always evade criminal rules that were perfectly applicable at the time of the conduct by simply pointing to a more beneficial one.

By the same token, given the decentralised nature of international law and the embryonic state of most rules of international criminal law, the principle of legality, as applied to this body of law, cannot fully require strict interpretation (*lex stricta*).⁸⁸ Furthermore, the presence of unwritten sources of law and their significance for the development of international criminal law means that the requirement of *lex scripta* does not presently apply in general international law.⁸⁹ Accordingly, strict construction and written law have not been recognised, implicitly or explicitly, by the texts of Articles 15 ICCPR, 11(2) UDHR, and 7 ECHR. Existing comparative studies also indicate that those requirements have not been consistently recognised in domestic legal systems, which means that it is hard to derive a rule of customary international law or a general principle of law therefrom.⁹⁰

vi. Exceptions?

Some have argued that the second paragraph of Articles 15 ICCPR and 7 ECHR contains an exception to the principle of legality. This provision states that the principle is without prejudice to the trial and punishment of individuals in accordance with ‘general principles of law recognised by civilised nations’.⁹¹ However, the better view, supported by the consistent case law of ECtHR and the *travaux préparatoires* of both the ICCPR and

⁸⁸ Grover (n 44) 554–555; Bassiouni (n 1) 96–98; Noora Arajärvi, ‘Between Lex Lata and Lex Ferenda-Customary International (Criminal) Law and the Principle of Legality’ (2010) 15 TLR 163, 174.

⁸⁹ See Art 38(1)(b)-(c), ICJ Statute. See also Susan Lamb, ‘Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law’ in Antonio Cassese and others (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 743; Gallant (n 1) 356, 358; Boot (n 1) 216; Bassiouni (n 1) 86–87, 99.

⁹⁰ Gallant (n 1) 237–298, 355; Antonio Cassese, *International Criminal Law* (OUP 2008) 38–41; Bassiouni (n 1) 86, 88–89, 95–96.

⁹¹ Juratowitch (n 58) 340–342, 361–362; Hans Kelsen, ‘Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?’ (1947) 1 ILQ 153, 165.

ECHR, is that the purpose of this clause, known as the ‘Nuremberg clause’, is to simply clarify that there is no doubt as to the validity of the various post-WWII prosecutions for international crimes.⁹² Thus, these crimes, and *all* sources of criminal law, including general principles, remain subject to the elements of the principle of legality under general international law. Nonetheless, it is worth emphasising that general principles of law are fall-back sources, that is, they can only be invoked to fill gaps in treaties or customary international law.⁹³

In sum, a survey of relevant texts confirms that the principle of legality under general international law presently comprises the following elements: a) non-retroactivity of crimes, including the prohibition of analogy; b) non-retroactivity of penalties; c) *in dubio pro reo*; and d) the requirement of sufficient specificity.

b. The Requirement of ‘Some Source of Law’ and the Interchangeable Application of Domestic and International Criminal Law

As seen earlier, the first sentences of Articles 15 ICCPR, 11(2) UDHR and 7 ECHR indicate that *either* domestic *or* international law can be sources of criminal law for the purposes of satisfying the principle of non-retroactivity of crimes. Similarly, the second sentences of those provisions only require that the penalty applied upon conviction be no heavier than the previously applicable one, without specifying what the applicable law is.

This could mean at least two different things. On the one hand, it could mean that either domestic or international law could criminalise and punish conduct, but only *separately*, that is, within their own particular ‘spheres’ or ‘systems’. On this

⁹² Marc J Bossuyt, *Guide to the ‘Travaux Préparatoires’ of the International Covenant on Civil and Political Rights* (Martinus Nijhoff Publishers 1987) 330–331; *X v Belgium* (n 78) §241; *Vasiliauskas v Lithuania* (n 73) §§188–190.

⁹³ Fabian O Raimondo, ‘General Principles of Law as Applied by International Criminal Courts and Tribunals’ (2008) 393 LPITC 394–396; Akande (n 12) 51–52; *Kupreškić* (n 43) §§591, 677.

interpretation, rules of domestic and international law could not be treated interchangeably, meaning that the prior application of either one would not suffice to justify the subsequent application of the other. Each separate legal system would have to provide for its own prior basis of criminalisation and punishment.⁹⁴

A different interpretation would be that, for an individual to be convicted of an offence, and to receive the relevant penalty, it suffices that their conduct was criminal and punishable under *any* source of applicable law, which could be *either* domestic or international law. This view is reinforced by the fact that Articles 15(1) ICCPR, 11(2) UDHR and 7(1) ECHR only require that the conduct constitute ‘a criminal (or penal) offence’ under ‘national or international law’, as opposed to a *specified* crime within a *specified* legal system. In the same vein, those provisions do not require the penalty imposed to be exactly the same as the one that was applicable at the time of the conduct, but only that it be no more severe than the latter.⁹⁵

Further support to this interpretation comes from the fact that the English and Russian⁹⁶ versions of Article 15(1) ICCPR, together with the English version of Article 11(2) UDHR, use commas when referring to ‘under national and international law’ as an appositive (i.e. an explanatory clause) to ‘a criminal offence’.⁹⁷ The use of commas around an appositive is warranted when the preceding clause provides sufficient

⁹⁴ See Gallant (n 1) 48–49, 369, 406; Devin O Pendas, ‘Retroactive Law and Proactive Justice: Debating Crimes against Humanity in Germany, 1945–1950’ (2010) 43 *Central European History* 428, 47; Cass Crim, 28 February 2014, Arrêt n° 808 (13-86631); *Hissein Habré v Senegal* (Judgment) ECOWAS Court of Justice ECW/CCJ/JUD/06/10 (18 October 2010) §§42, 45, 55–58; *Streletz, Kessler and Krenz v Germany* App nos 34044/96, 35532/97 & 44801/98 (ECtHR, 22 March 2001), Concurring Opinion of Judge Loucaides §40; *Armando dos Santos Case* (Appeal Judgment) Special Panel for Serious Crimes, District Court of Dili, Timor Leste, Case No 16/PID.C.G./2001/PD.DIL (15 July 2003) 18–19.

⁹⁵ Gallant (n 1) 379–380, 386, 392.

⁹⁶ UN, ‘Декларации, конвенции, соглашения и другие правовые материалы’ <http://www.un.org/ru/documents/decl_conv/conventions/pactpol.shtml> accessed 25 August 2019.

⁹⁷ On the equal interpretative value of all authentic versions of a treaty text, see Art 33, VCLT.

identification on its own.⁹⁸ In the context of Article 15(1) ICCPR and 11(2) UDHR, this reinforces the idea that what is relevant for the *nullum crimen* principle is that the conduct constitutes a criminal offence prior to the events, regardless of the exact law where it is found. Note that the lack of commas in Article 7(1) ECHR and in the other authentic versions of Articles 15(1) ICCPR and 11(2) UDHR does not necessarily support the first interpretation (i.e. that international and domestic law must be treated separately). Rather, having no commas around the appositive ‘national and international law’ merely implies that the meaning of ‘a criminal offence’ is not complete without the appositive.⁹⁹ In this sense, ‘a criminal offence’ must be defined in *some* prior source of applicable law, which could be either domestic or international law.¹⁰⁰

Therefore, either way, the emphasis has been placed on the existence of an applicable crime and applicable penalties, rather than specific sources of law. As seen earlier, this interpretation has found overwhelming support in legal scholarship and the case law of domestic and international courts.¹⁰¹ It is also supported by the texts of the other international instruments mentioned earlier.

In particular, Article 40(2)(a) CRC refers to ‘national or international law at the time [the relevant acts] were committed’ as possible sources of juvenile infractions. Similarly, Article 9 ACHR, Article 7(2) of the African Charter and Article 15 of the Arab Charter do not specify which source of law must have applied to the individual for them to be held guilty of a crime and punished for it. Rather, they all seem to stress that the

⁹⁸ ‘Commas with Appositives - Grammar & Punctuation | The Blue Book of Grammar and Punctuation’ <<http://data.grammarbook.com/blog/commas/commas-with-appositives/>> accessed 25 August 2019; ‘Purdue OWL: Appositives’ <<https://owl.english.purdue.edu/owl/resource/596/01/>> accessed 25 August 2019.

⁹⁹ *ibid.*

¹⁰⁰ For a similar conclusion, see UNGA ‘Draft International Covenants on Human Rights: Report of the Third Committee’ (8 December 1960) UN Doc A/4625 para 13.

¹⁰¹ See Chapter 1, Section 2.

offence and its punishment must have been applicable to the individual before the events. Specifically, Article 9 ACHR provides that the conduct must constitute ‘*a criminal offence, under the applicable law, at the time it was committed*’. Article 7(2) of the African Charter requires ‘*a legally punishable offence*’ at the time of the relevant events, and Article 15 of the Arab Charter speaks of ‘*a prior provision of the law*’.

The ASEAN Declaration also does not specify which source of domestic or international law must have provided the basis of criminalisation and punishment prior to the conduct. In almost identical terms as the UDHR, it simply stipulates that ‘[n]o person shall be held guilty of any criminal offence on account of any act or omission which did not constitute *a criminal offence, under national or international law*, at the time when it was committed and no person shall suffer greater punishment for *an* offence than was prescribed *by law* at the time it was committed’.¹⁰²

Humanitarian treaties recognising the application of the principle of the legality during armed conflict have adopted similar language. Article 99 GC III permits the trial and sentencing of prisoners of war for acts which are ‘*forbidden by the law of the Detaining Power or by international law, in force* at the time the said act was committed’.¹⁰³ Likewise, Article 67 GC IV emphasises the prior applicability of the criminal law, as opposed to its origin, by stating that ‘[t]he courts shall apply only *those provisions of law* which were *applicable* prior to the offence’.¹⁰⁴ Further support to this interpretation comes from the fact that Article 67 GC IV directs the courts of member states to ‘take into consideration the fact that the accused is not a national of the Occupying Power’.

¹⁰² Art 20(2), ASEAN (n 36) (emphasis added).

¹⁰³ See Gallant (n 1) 208–209.

¹⁰⁴ Emphasis added.

The formulations of the *nullum crimen* principle found in Additional Protocols I (AP I) and II (AP II) to the Geneva Conventions come even closer to the ones contained in the ICCPR, UDHR and ECHR. Article 75(4)(c) AP I requires that the conduct ‘constitute a criminal offence *under the national or international law to which he was subject* at the time when it was committed’.¹⁰⁵ Article 6(2)(c) AP II also refers generally to the (criminal) law, rather any particular source thereof. It states that ‘no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, *under the law*, at the time when it was committed’.¹⁰⁶

Lastly, Rule 101 of the ICRC’s study on customary IHL confirms that the version of the principle of legality found in Articles 15 ICCPR, 11(2) UDHR and 7 ECHR has now become part of customary international law applicable to both international and non-international armed conflict.¹⁰⁷

In sum, there is ample evidence that, in general international law, criminalisation and punishment by *one* source of domestic or international law suffice to satisfy the demands of the principle of non-retroactivity. This means that domestic and international sources of criminal law can be applied interchangeably and their recharacterisation is not in principle prohibited.

c. The Scope of the Principle of Legality

The texts of Articles 15 ICCPR, 11(2) UDHR and 7 ECHR not only authorise domestic or international law to criminalise and punish conduct. They also require that the ‘act or omission (...) *constitute* a criminal [or penal] offence’ at the time it took place. But what I believe is critical here is that a certain conduct can only subsume into a criminal offence

¹⁰⁵ Emphasis added.

¹⁰⁶ Emphasis added.

¹⁰⁷ Emphasis added.

if *all* the constituent or essential elements of the offence are previously binding on the accused and are made out in their case.¹⁰⁸ The same logical inference has been drawn by the Human Rights Committee (HRC), which has stated that Article 15 ICCPR requires that ‘all of the elements of the crime in question [be applicable] at the time the offence took place’.¹⁰⁹

Likewise, the second sentences of Articles 15(1) ICCPR, 11(2) UDHR, 7(1) ECHR and 9 ACHR on non-retroactivity of penalties, despite allowing the interchangeable application of domestic and international law, suggest that the content of the subsequent law must be the same or less severe than the applicable law. Indeed, those provisions all require that the penalty imposed upon conviction be no heavier than ‘*the one* that was applicable at the time when *the* criminal offence was committed’.¹¹⁰ Similarly, the formulations found in both AP I and AP II require that the penalty be ‘no greater than *that which* was applicable at the time when *the* criminal offence was committed’.¹¹¹

The preparatory works of Articles 15 ICCPR, 11(2) UDHR and 7 ECHR also seem to support the view that a certain level of substantive identity or equivalence must exist between prior and subsequent laws. Indeed, before receiving its final wording, previous versions of Article 15 ICCPR read that ‘[n]o one shall be held guilty of any offence on account of any act or omission which did not constitute *such an offence* at the time when it was committed’.¹¹² While this formulation does not require that the law of

¹⁰⁸ *David Michael Nicholas v Australia* (n 62) §7.3.

¹⁰⁹ *ibid* §§7.5, 7.7.

¹¹⁰ Emphasis added.

¹¹¹ Emphasis added.

¹¹² Emphasis added. See ECOSOC ‘1st Session: Report of the Drafting Committee to the Commission on Human Rights’ E/CN.4/21 (1 July 1947) Annex 1, International Bill of Human Rights page 34, Draft Art 12 and pp 83-84, Annex G, Draft Articles on Human Rights and Fundamental Freedoms to be Considered for Inclusion in a Convention, Draft Art 6; UNCHR, ‘2nd Session: Report of the Working Party on an

conviction be strictly the same as the law of criminalisation, it does signal that the offence itself must be the same or at least equivalent as between both laws.

In the context of the UDHR, several earlier versions of what became Article 11(2) required, for a person to be convicted of a crime, that they must have violated ‘*some law*’¹¹³, ‘*a law*’¹¹⁴ or simply ‘*law*’¹¹⁵ ‘in effect (or in force) at the time of the act charged’. Nevertheless, the formulation stating that ‘no person shall be held guilty of any offence on account of any act or omission that did not constitute *such an offence* at the time it was committed’ was also retained for some time during the drafting of Article 11(2).¹¹⁶ This suggests that, regardless of the specific source(s) of law that applied prior to or after the events, the offence for which the individual was convicted must have been the same as or equivalent to the one that was previously applicable to them.

The idea that the *content* of subsequent criminal laws must not go beyond the applicable law has been confirmed by the Inter-American Court of Human Rights (IACHR) in several cases. In particular, it has held that criminal laws must be rigorously defined and applied so as to ensure that the conduct subsumes into *all* the previously applicable elements of the crime and that the applicable penalties are respected.¹¹⁷ The

International Convention on Human Rights’ UN Doc E/CN.4/56 (11 December 1947) pp 8-9 Draft Art 13; ECOSOC, ‘Report of the 3rd Session of the Commission on Human Rights’ E/800 (28 June 1948) Annex B, p 27, Draft ICCPR Draft Art 14.

¹¹³ UNCHR, ‘Draft Outline of International Bill of Rights (Prepared by the Division of Human Rights)’ UN Doc E/CN.4/AC.1/3 (4 June 1947) p 10, Draft Art 26; ECOSOC ‘E/CN.4/21’ (n 112) p 17, Draft Art 26, page 75, Draft Art 10.

¹¹⁴ ECOSOC ‘E/CN.4/21’ (n 112) Annex D, p 53, Suggestions Submitted by the Representative of France for Articles of the International Declaration of Human Rights, Draft Art 12.

¹¹⁵ UNCHR, ‘2nd Session, Working Group on the Declaration on Human Rights: Summary Record of the 4th Meeting’ UN Doc E/CN.4/AC.2/SR.4 (8 December 1947) Examination of Article 10, pp 7-8.

¹¹⁶ ECOSOC, ‘2nd Session: Report of the Drafting Committee [on an International Bill of Rights] to the Commission on Human Rights’ E/CN.4/95 (21 May 1948) Annex A, p 6, Draft International Declaration on Human Rights, Draft Art 8; UNCHR, ‘3rd Session: Proposed Amendments to the Draft Declaration on Human Rights / India and the United Kingdom’ (24 May 1948) UN Doc E/CN.4/99, p 3, Art 8. See also Weissbrodt and Hallendorff (n 29) 1078–1079.

¹¹⁷ *Ricardo Canese v Paraguay* (IACHR, 31 August 2004) §§174–175; *De La Cruz Flores v Peru* (IACHR, 18 November 2004) §82; *García Asto y Ramírez Rojas v Peru* (IACHR, 25 November 2005) §191; *J v*

IACHR has also interpreted Article 9 ACHR to require that certain procedural rules which severely impact on the fundamental rights of the accused, such as conditions of punishment or prosecution (e.g. statutes of limitations), as well as prior criminal labels must be observed by subsequent laws.¹¹⁸

Similarly, the African Commission on Human and Peoples' Rights (ACHPR), although relying on the jurisprudence of the ECtHR for a series of *nullum crimen* questions, has not applied the test of accessibility and foreseeability. Instead, it has stressed that the legality principle requires offences to be in force and known before the relevant conduct,¹¹⁹ and that citizens be 'fully aware of the state of the law under which they are living'.¹²⁰ More recently, the ACHPR has interpreted the principle of legality to include not only the prohibition of plainly retroactive criminal laws but also the requirement that these laws be accessible to the public and defined in a clear and precise manner.¹²¹

International(ised) criminal tribunals have also applied and interpreted the principle of legality in general international law. As mentioned earlier, some of them have relied on the loose notions of accessibility and foreseeability,¹²² and effectively

Peru (IACHR, 27 November 2013) §279; *Liakat Ali Alibux v Suriname* (n 61) §§ 59–61; *Pollo Rivera and Others v Peru* (IACHR, 21 October 2016) §§218–221; *Kimel v Argentina, Judgment* (IACHR, 2 May 2008) §63.

¹¹⁸ *Castillo Petruzzi et al v Peru* (IACHR) [119]; *Ricardo Canese v Paraguay* (n 117) para 175; *García Asto y Ramírez Rojas v Peru* (n 117) para 191; *J v Peru* (n 117) paras 278–279; *Liakat Ali Alibux v Suriname* (n 61) paras 59–61, 64–70; *Mohamed v Argentina* (IACHR) [131–132]. For commentary, see Piqué (n 63) 168–170; García Ramírez and Morales Sánchez (n 80) 216–128.

¹¹⁹ *Tsatsu Tsikata v Republic of Ghana*, Comm No 322/2006, ACmHRP, 14 October 2014 §§128, 135, 137].

¹²⁰ *Sir Dawda K Jawara v Gambia*, Comm No 147/95, ACmHPR, 11 May 2000 §§62–63.

¹²¹ ACmHPR, 'Principles and Guidelines on Human and Peoples' Rights While Countering Terrorism in Africa' (2016) 15, 27. At the time of writing, I was unable to find any relevant decisions of the African Court of Human and Peoples' Rights on its database ('Cases - African Court on Human and People's Rights' <<http://www.african-court.org/en/index.php/cases>> accessed 25 August 2019).

¹²² *Hadzihasanović Interlocutory Appeal on Command Responsibility* (n 17) §34; *Norman Case* (Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)) SCSL-2004-14-AR72(E) (31

recharacterised crimes and modes of liability.¹²³ However, some of their most recent decisions have held that *all* the ‘ingredients’ of an offence, along with conditions of punishment and prosecution, as well as labels (often referred to as ‘(sub-)headings’ or criminal offences ‘as such’, ‘as charged’ or ‘as pleaded’), come within the scope of the principle of legality.¹²⁴ For this reason, the ICTY has held that prior criminalisation by domestic law alone was insufficient to satisfy the principle of non-retroactivity if international law was to be relied on upon conviction.¹²⁵ Those tribunals have also stressed the importance of specificity and strict legality.¹²⁶

Even the ECtHR, despite having consistently relied on the notions of accessibility and foreseeability, has moved away from the notoriously flexible construction of the principle of legality which permeated its earlier case law. In more recent cases, it has rejected the retroactive application of domestic criminal laws containing elements or labels that are more severe than the applicable international ones. In *Korbely v Hungary*, the Grand Chamber found that crimes against humanity could not be retroactively applied to the murder of an insurgent whose protected status was not foreseeable under international law at the time of the events.¹²⁷ Similarly, in *Vasiliauskas v Lithuania*, the Grand Chamber held that the applicant could not have been convicted of genocide of a political group under retroactive domestic laws, given that, in accordance with

May 2004) §25; *Ayyash et al* (n 27) §137; *Case 002/01* (Appeal Judgment) 002/19-09-2007-ECCC/SC (23 November 2016) §758.

¹²³ See Chapter 1, Section 4(a).

¹²⁴ *Stakić* Appeal Judgment (n 75) §§300–302; *Armando dos Santos Case* (n 94) §§14, 18–19; *Prosecutor v Hadzihasanović* Interlocutory Appeal on Decision on Joint Challenge to Jurisdiction (n 76) §18(c); *Milutinović* JCE Decision (n 73) §§37–38; *Vasiljević* (n 51) §§193, 195, 198, 201; *Čelebići* Appeal Judgment (n 78) §§408, 411.

¹²⁵ *Milutinović* JCE Decision (n 73) §§40–41; *Vasiljević* (n 51) §199.

¹²⁶ *Vasiljević* (n 51) §§193, 201–202; *Čelebići* Judgment (n 16) §§408, 411; *Hadzihasanović* Interlocutory Appeal on Decision on Joint Challenge to Jurisdiction (n 76) §§20–25; *Ayyash et al* (n 27) §135.

¹²⁷ *Korbely v Hungary* App no 9174/02 (ECtHR, 19 September 2008) §§15, 38, 44–45, 57–60, 88.

international law, this class of individuals was excluded from the scope of that crime.¹²⁸ In both cases, the ECtHR did not simply hold that the conduct was unquestionably criminal under domestic law. Instead, it went on to check whether the relevant acts constituted crimes against humanity or genocide *as such, under international law*, at the time of the events, so as to warrant those distinct labels and their ensuing consequences.¹²⁹

More generally, the ECtHR's predecessor, the European Committee of Human Rights, had already found in 1982 that the 'constituent elements of an offence such as e.g. the particular form of culpability required for its completion may not be essentially changed, at least not to the detriment of the accused, by the case-law of the courts'.¹³⁰ In the context of the *nulla poena* principle, the ECtHR's case law has gradually embraced a more flexible understanding of a penalty. Rather than simply relying on its classification or imposition following a sentence, the ECtHR now considers whether the measure effectively amounts to a change in the nature or scope of the penalty.¹³¹

I believe the texts, preparatory works and case law examined above support the view that, to comply with the principle of legality in general international law, the *substance* of the applicable law must be observed. This means that, although rules of criminal law can be retroactively recharacterised, this must not: 1) exclude or widen essential elements of the applicable crime; or 2) expand the applicable mode(s) of

¹²⁸ *Vasiliauskas v Lithuania* (n 73) §§30–33, 38–40, 121–123, 170, 175, 178. But note that, more recently, in *Drélingas v Lithuania* App no 28859/16 (ECtHR, 12 March 2019) §§103–105, an ECtHR Chamber held that individuals could be retroactively convicted of genocide of a political group if such group was a substantial part of one of the protected groups, i.e. national, ethnic, religious or racial. Although it is questionable that this interpretation of a 'substantive part of the group' was foreseeable at the material time (1956), it is significant that the Chamber did not depart from the finding in *Vasiliauskas* that genocide could not retroactively cover political groups *as such* (see *ibid* §§106–109).

¹²⁹ *Korbely v Hungary* (n 127) §§74–80, 94–95; *Vasiliauskas v Lithuania* (n 73) §§162, 165–166, 169, 178.

¹³⁰ *X Ltd and Y v United Kingdom* (n 71) §9.

¹³¹ *Del Río Prada v Spain* App no 42750/09 (ECtHR, 21 October 2013) §§81–90; *M v Germany* App no 19359/04 (ECtHR, 17 December 2009) §§120–121, 135–137. See also Sanz-Caballero (n 17).

liability; 3) limit the availability of applicable defences; 4) impose heavier penalties than the ones applicable to the crime, either in nature or duration; 5) impose retroactive conditions of punishment or prosecution that impact upon the accused' criminal liability or punishment; and 6) apply more severe criminal labels.

3. Other Instances of Formative State Practice, *Opinio Juris* and Article 31(3)(b)-(c) VCLT

To confirm the conclusions made so far, it is necessary to look at other instances of state practice and *opinio juris* which helped form and develop the customary version of the principle of legality and are particularly relevant to the question of retroactive recharacterisation of crimes. These are, essentially, i) how states have applied the principle of legality in general international law while asserting or exercising universal jurisdiction domestically, i.e. through their domestic legislation and case law, and ii) how states have applied the double criminality rule to assess compliance with that principle when asserting or exercising vicarious jurisdiction domestically.¹³²

As I will explain below, the rules of customary international law governing universal and vicarious jurisdiction are also relevant for interpreting the principle of legality in accordance with Article 31(3)(c) VCLT, i.e. the principle of systemic integration.¹³³ Therefore, the practice of states in applying those rules can be, at once, formative state practice and/or *opinio juris* and part of the broader interpretative context of the *nullum crimen* principle.

Furthermore, when it comes to the assertion and exercise of universal and vicarious jurisdiction, it is often difficult to separate instances of *formative* state practice

¹³² On the ascertainment of *opinio juris* in national law and case law, see *supra* note 9.

¹³³ See ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi' (13 April 2006) UN Doc A/CN.4/L.682 paras 37–45.

from instances of *subsequent* practice in the application of the treaties which reflect the *nullum crimen* principle in general international law. In fact, when exercising universal and vicarious jurisdiction, the practice of states in the application of the *treaty* versions of the legality principle has contributed to the development of this principle *under customary international law*. As will become clearer in the following sections, this is because such practice is widespread and extends beyond the parties to the relevant treaties.¹³⁴ At the same time, pursuant to Articles 31(3)(b) and 32 VCLT,¹³⁵ those instances of state practice must also be considered when interpreting the conventional formulations of that principle. Because those treaty texts are reflective of general international law, the subsequent practice of states in their application is also relevant for identifying and/or interpreting the principle of legality in general international law.

For those reasons, and for the sake of simplicity, I will now examine the international rules and the domestic practice of states relating to universal and vicarious jurisdiction *as both* 1) formative state practice and/or *opinio juris* establishing the customary version of the principle of legality, and 2) as interpretative tools within the meaning of Article 31(3)(b)-(c) VCLT. Also in this section, I will briefly discuss how the principle of legality must be interpreted consistently with the cognate principle of fair labelling, in accordance with Article 31(3)(c) VCLT.

a. Universal Jurisdiction

Before anything, it is important to clarify the meaning of ‘universal jurisdiction’. On the one hand, I understand universal jurisdiction as the authority of any state to prescribe and adjudicate, within its domestic system, crimes that are universally recognised under

¹³⁴ See *supra* note 25.

¹³⁵ See *supra* note 10.

customary international law or general principles of law,¹³⁶ regardless of any pre-existing nexus with the perpetrator (this is also known as ‘universal jurisdiction proper’ or *qua* customary international law).¹³⁷ On the other hand, I also include within the meaning of universal jurisdiction the competence of states to prescribe and adjudicate certain treaty crimes (also referred to as ‘treaty-based universal jurisdiction’). This competence arises from a multilateral treaty and applies only between its parties, in particular by virtue of clauses which require the state on whose territory a perpetrator is found to either prosecute or extradite them (the so-called *aut dedere aut judicare* clauses).¹³⁸

By looking at the practice of states when asserting or exercising these two types of universal jurisdiction, it is possible to identify how they have interpreted and applied the principle of legality under general international law in respect of international crimes found in treaties, customary international law and general principles of law. This is because, when applying crimes under international law (or universal jurisdiction crimes), states are bound by *at least* the general international law version of the principle of legality.¹³⁹ Granted, they are free to rely on a stronger formulation of the principle when implementing or prosecuting those crimes in their own domestic systems or before international courts, such as the ICC.¹⁴⁰ Still, states are *not necessarily required*, under general international law, to apply those stronger versions of the *nullum crimen* principle

¹³⁶ This includes genocide, crimes against humanity, war crimes and piracy, but possibly not the crime of aggression. See Roger O’Keefe, *International Criminal Law* (OUP 2015) 17, 22–25; Institute of International Law, ‘Seventeenth Commission, Resolution on Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes against Humanity and War Crimes’ (2005) para 3(a); Princeton Project on Universal Jurisdiction, ‘The Princeton Principles on Universal Jurisdiction’ (2001) Principle 2. On the crime of aggression, see Beth Van Schaack, ‘Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression’ (2012) 10 JICJ 133, 143–144.

¹³⁷ Roger O’Keefe, ‘Universal Jurisdiction Clarifying the Basic Concept’ (2004) 2 JICJ 735, 737, 745–746, 757; Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (OUP 2004) 38–42; Kenneth C Randall, ‘Universal Jurisdiction under International Law’ (1987) 66 TxLR 785, 788.

¹³⁸ O’Keefe (n 137) 746–747; Reydam (n 137) 35–38; Michael P Scharf, ‘Application of Treaty-Based Universal Jurisdiction on Nationals of Non-Party States’ (2000) 35 NELR 363, 363–365, 368–373.

¹³⁹ Ferdinandusse (n 42) 224–226, 229–230.

¹⁴⁰ *ibid* 231.

for universal jurisdiction crimes. Thus, it is safer (although not foolproof!) to rely on the application of such crimes, rather than on that of purely domestic crimes, for the purposes of identifying and interpreting the principle of legality in general international law. The analysis of said instances of state practice and *opinio juris* is also significant because, when exercising or asserting universal jurisdiction, states frequently recharacterise international crimes into domestic ones and vice-versa, as will become clearer in the remainder of this section.¹⁴¹

As mentioned earlier, universal jurisdiction is relevant in two ways for the interpretation of the principle of legality in the context of recharacterisation of crimes. First, the various instances in which universal jurisdiction has been asserted and exercised by states (including decisions of national courts, domestic legislation and executive acts) constitute state practice and/or *opinio juris* which has contributed to the formation and the development of the principle of legality under customary international law,¹⁴² as well as subsequent practice relevant to its interpretation.

Secondly, certain international rules which govern the limits and exercise of universal jurisdiction shall be considered together with the context of the principle of

¹⁴¹ For problematic instances of recharacterisation of international or domestic law into the Rome Statute of the ICC, see Chapter 4. Note that the reverse type of recharacterisation, i.e. from the Rome Statute into domestic law, may take place when a state *retrospectively* applies *more expansive* domestic laws in respect of conduct that could *only* have been criminalised by Rome Statute at the time it took place (rather than other sources of domestic or international law). For examples of domestic laws implementing the Rome Statute's substantive provisions but going beyond them as well as customary international law, see Case Matrix Network, 'International Criminal Law Guidelines: Implementing the Rome Statute of the International Criminal Court' (2017) 26–28, 30–32, 35–36, 43, 45–46, 55, 57–58 <<http://www.legal-tools.org/doc/e05157/>> accessed 25 August 2019; Julio Bacio Terracino, 'National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC' (2007) 5 JICJ 421, 421, 424–426. Also note that, while Art 12(2) of the Statute only enables its states parties to prescribe its substantive provisions on the basis of territoriality and active nationality, many states use the definitions of crimes under customary international law and other treaties as a means to implement the Rome Statute as well as to assert universal jurisdiction domestically. For e.g., see ss 1, 6–12, Act to Introduce the Code of Crimes under International Law of 26 June 2002, Germany; ss 4(4), 6(4)(5), Crimes Against Humanity and War Crimes Act, Canada (SC 2000, c 24); ss 50–51, 58, 65A, 68, UK International Criminal Court Act 2001. See also Case Matrix Network 51–53. For an analysis of the domestic implementation of the Rome Statute from the perspective of the labels adopted, see Chapter 3, Section 4(b)(ii).

¹⁴² See *supra* note 132.

legality, in accordance with Article 31(3)(c) VCLT. To be sure, the existing rules on the principle of universality are not directly concerned with the content of the *nullum crimen* principle. Instead, they have developed over time to circumscribe the once unlimited freedom of states to prescribe and adjudicate crimes committed extraterritorially. Thus, the rules in question exist under customary international law and set out the bases under which states are permitted to exercise extraterritorial jurisdiction in criminal matters, including universal jurisdiction. They also regulate how those bases must be exercised so as not to encroach upon the sovereignty of other states.¹⁴³ Nonetheless, by limiting the power of states to prescribe and adjudicate crimes extraterritorially, the customary rules on universal jurisdiction have the effect of narrowing down the scope of those crimes and other rules of substantive criminal law which states can apply. This in turn necessarily affects the operation of the principle of legality in general international law.

In respect of universal jurisdiction as formative state practice and *opinio juris*, it is telling that many states have applied or purported to apply their own national criminal laws, in particular, ordinary crimes, to conduct that was solely criminalised by international law, and perhaps foreign domestic law, at the time it took place.¹⁴⁴

¹⁴³ See, generally, O’Keefe (n 136) 6–28; Alex Mills, ‘Rethinking Jurisdiction in International Law’ (2014) 84 BYIL 187, 190, 193–200; Michael Akehurst, ‘Jurisdiction in International Law’ (1972) 46 BYIL 145.

¹⁴⁴ See e.g., Art 4, Netherlands International Crimes Act 2003; Art 4-2, Penal Code of Japan 1907; ss 2(3), 3(2)(a)(ac), Criminal Code of Hungary 2012; Art 7(2)(b), Penal Code of Switzerland 1937; s 3(2), Penal Code of Norway 1902; *Prosecutor v Pinčić*, Court of Bosnia and Herzegovina, First Instance Verdict, Court of Bosnia and Herzegovina, Section I for War Crimes, X-KRŽ-08/502, 28 November 2008 §§17–21; Dusko C case, Austrian Supreme Court of Justice, Case No 99/94-6, 13 July 1994, cited in Axel Marschik, ‘European National Approaches to War Crimes’ in Timothy LH MacCormack and Gerry J Simpson (eds), *The Law of War Crimes: National and International Approaches* (Martinus Nijhoff Publishers 1997) 79–80; *Federal Republic of Germany v Rauca* 30 CR3d 97, 101 (Ont High Ct 1982) 9, 13; UNGA ‘The Scope and Application of the Principle of Universal Jurisdiction, Report of the Secretary-General Prepared on the Basis of Comments and Observations of Governments’ (2010) UN Doc A/65/181 paras 17, 83; UNGA, ‘The Scope and Application of the Principle of Universal Jurisdiction, Report of the Secretary-General’ (2011) UN Doc A/66/93 paras 44, 63, 130; UNGA, ‘The Scope and Application of the Principle of Universal Jurisdiction, Report of the Secretary-General’ (2012) UN Doc A/67/116 paras 16, 26; UNGA, ‘The Scope and Application of the Principle of Universal Jurisdiction, Report of the Secretary-General’ (2014) UN Doc A/69/174 paras 10, 14, 19, 22, 25; UNGA, ‘The Scope and Application of the Principle of Universal Jurisdiction, Report by the Secretary-General’ (2018) UN Doc A/73/123 para 18; Amnesty International, ‘Universal Jurisdiction: A Preliminary Survey of Legislation Around the World - 2012 Update’ (2012) 1–2, 10, 13–15 <<https://www.amnesty.org/en/documents/ior53/019/2012/en/>> accessed 25

Conversely, there are also some instances (although fewer) where domestic law alone was applicable but states still charged, convicted and sentenced individuals on the basis of international law, in particular by applying the label and definition of an international crime.¹⁴⁵ Both types of scenario amount to instances of retroactive recharacterisation of crimes, as discussed in Chapter 1. To be sure, they do not constitute the general rule as to how universal jurisdiction has been applied or asserted. In the vast majority of cases, states have applied international crimes *as such*,¹⁴⁶ either by adopting domestic implementing legislation which mirrors international law or by directly incorporating international law within their domestic legal systems.¹⁴⁷ Nonetheless, the fact that many states have openly recharacterised international law into domestic law and vice-versa, without protests by other states, may be an indication that recharacterisation is *prima facie* consistent with the principle of legality in general international law.

At the same time, this practice also shows that even when recharacterising crimes states have consistently sought to ensure that at least 1) all the material and mental

August 2019. See also Ferdinandusse (n 42) 19–21, 33; Richard R Baxter, ‘The Municipal and International Law Basis of Jurisdiction over War Crimes’ (1951) 28 BYIL 382, 382–385.

¹⁴⁵ See, e.g., Cass Crim, 23 October 2002, Ould Dah Ely Case (02-85.379); *Attorney General of the Government of Israel v Adolf Eichmann*, Judgment, District Court of Jerusalem, Israel, Criminal Case No. 40/61 (11 December 1961) §§26–27; *Trial of Hans Albin Rauter*, Netherlands Special Court of Cassation, Law Reports of Trials of War Criminals, UN War Crimes Commission, Volume XIV, 12 January 1949 119; *Trial of Wilhelm List and Others (‘The Hostages Case’)*, United States Military Tribunal at Nuremberg, Law Reports of Trials of War Criminals, UN War Crimes Commission, Volume VIII, 8 July 1947 to 19 February 1948 53; *United States of America vs Otto Ohlendorf et al (Case No 9) (‘The Einsatzgruppen Case’)*, United States Military Tribunal II, Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No 10, Volume IV 497. See also the domestic laws and decisions assessed in *Jorgić v Germany* App no 74613/01 (ECtHR, 12 July 2007) §§9–27, 36, 89, 96–98; *Vasiliauskas v Lithuania* (n 73) §§29–41, 121–146, 165–190 (where genocide was applied to conduct that could only have amounted to an ordinary crime, but on the basis of an extensive interpretation of the definition of genocide in international law)

¹⁴⁶ See e.g. Evidentiary Challenges in Universal Jurisdiction Cases - Universal Jurisdiction Annual Review 2019’ (2019) <<https://trialinternational.org/latest-post/universal-jurisdiction-annual-review-2019-overcoming-evidentiary-challenges-though-collaboration/>> accessed 25 August 2019; TRIAL International and others, ‘Make Way for Justice #4: Closing the Net on Impunity - Universal Jurisdiction Annual Review 2018’ (2018) <<https://trialinternational.org/latest-post/make-way-for-justice-4-momentum-towards-accountability/>> accessed 25 August 2019; Amnesty International (n 144) 1–2, 12.

¹⁴⁷ UNGA, ‘Scope and Application of Universal Jurisdiction (2010)’ (n 144) paras 30–33, 37, 41, 45, 47, 49, 51–52, 54; Ferdinandusse (n 42) 21–23, 29–30, 33–36.

elements of the crime, 2) modes of liability, 3) penalties, 4) defences and 5) other bars to prosecution or punishment,¹⁴⁸ and, in some circumstances, 6) criminal labels,¹⁴⁹ are not more severe than those provided for in the applicable law, in order to satisfy the principle of legality.

It was mentioned earlier that certain customary rules governing the exercise of universal jurisdiction may affect how the principle of legality operates in general international law. These rules are derived from the nature of universal jurisdiction as a limited power. As with any extraterritorial basis of jurisdiction, the power of states to assert and exercise universal jurisdiction is limited by the sovereign powers of other states over their internal affairs.¹⁵⁰ Accordingly, states can only prescribe law and prosecute individuals on the basis of universal jurisdiction proper to the extent that customary international law permits them to do so. Similarly, treaty-based universal jurisdiction is limited by the terms of the relevant treaty. Of particular relevance are the limits to the substantive scope of both types of universal jurisdiction, i.e. the crimes and other rules of substantive criminal law which can be prescribed under either base.

¹⁴⁸ See, e.g., *Prosecutor v Pinčić* (n 144) 18; Oslo District Court, Norway, *The Public Prosecuting Authority v Mirsad Repak*, Judgment of 2 December 2008, Case No 08-018985MED-OTIR/08 §§10–11, 68, 83–84; *Scilingo Case*, Appeal Judgment, Supreme Court of Spain, Penal Section, Sentence No 798/2007, 01 October 2007, Reason Sixth, §§8–10; Office of the Public Prosecutor v Julio Simón, Appeal judgment, S 1767 XXXVIII, ILDC 579 (AR 2005), 14 June 2005, Supreme Court of Argentina 49–51, 322–323; Arancibia Clavel Case, N° 1516/93-B, Judgment, A 38 XXXVII, 24 August 2004, Supreme Court of Argentina 10–11, 28–29, 47–48, 122–127, 145–148; *R v Finta*, [1994] 1 SCR 701 706–707, 712–716, 731, 733–735, 738, 751, 776–777, 812–815, 824–826; *Polyukhovich v The Commonwealth of Australia and Another* (1991) 172 CLR 501 §§29–30 (Mason C J); §§64–65, 69, 75 (Brennan J). Some states condition the application of universal jurisdiction crimes to the requirement of double criminality: *Re Pinochet Ugarte* (Order of 6 November 1998) Investigating Judge, Court of First Instance of Brussels, Belgium §3.2.2.; Office of the Prosecutor v Erich Priebeke, Ordinary appeal judgment, request of extradition, Case N° 16.063/94, 02 November 1995, Supreme Court of Argentina, Summary §§7–8, 17, §§19–38 (Judges Nazareno and Moliné O’Connor), §§19–40 (Judge Bossert); Art 689–11, French Code of Criminal Procedure 1959; s 3(2)(a)(aa), Criminal Code of Hungary 2012; ch 2, s 2, Penal Code of Sweden (*Brottsbalken*)1965; ss 3(2) and 12(4)b, Penal Code of Norway; Arts 6(1)(a) and 7(1)(a), (2)(b) and (3), Penal Code of Switzerland. See also Anthony J Colangelo, ‘Universal Jurisdiction as an International “False Conflict” of Laws’ (2009) 30 MJIL 881, 884–885, 909–910, 914–916.

¹⁴⁹ Supreme Court of Norway, *The Public Prosecuting Authority v Mirsad Repak*, Case No HR-2010-2057-P, Judgment of 3 December 2010 §§106, 118; *R v Finta* (n 148) 812–813, 815.

¹⁵⁰ O’Keefe (n 136) 7–9; Colangelo (n 148) 882–884, 887, 901–903; Reydams (n 137) 21, 23.

The rationale of universal jurisdiction proper is the repression of crimes that concern the international community as a whole.¹⁵¹ Thus, its scope is limited to offences that are universally recognised as such, which mostly coincide with crimes under customary international law or general principles of law.¹⁵² Conversely, the crimes which are subject to treaty-based universal jurisdiction are not limited to those of a universal nature. Instead, they can be of any type which the states parties to the treaty choose to suppress, such as purely domestic or transnational crimes.¹⁵³

For present purposes, the existence of those substantive limits means that, when asserting or exercising universal jurisdiction, states are circumscribed by the substantive criminal law applicable under customary international law, general principles of law or treaty law. This is the case even if they need to adopt domestic implementing legislation, which must then mirror the applicable international law.¹⁵⁴ In other words, states cannot go beyond the definitions of crimes, including the material and mental elements, the modes of liability, and the penalties provided for in international custom, general principles or treaty law. Similarly, they must apply any defences and other bars to prosecution or punishment contained therein. Failure to respect those limits may result in exorbitant exercises of universal jurisdiction, in violation of international law.¹⁵⁵ This statement of principle finds support in the practice and *opinio juris* of states.¹⁵⁶

¹⁵¹ Colangelo (n 148) 888–890; Reydams (n 137) 38; Randall (n 137) 788.

¹⁵² See *supra* note 136.

¹⁵³ Eric S Kobrick, ‘The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction over International Crimes’ (1987) 87 ColumLRev 1515, 1523.

¹⁵⁴ Colangelo (n 148) 882–884, 890–892, 903–907.

¹⁵⁵ *ibid* 884, 901–903; Bacio Terracino (n 141) 425–426.

¹⁵⁶ See, e.g., *Polyukhovich* (n 148) Judgment of Brennan J §§64-65, 67-71, Judgment of Toohey J §§26, 72-73, 80-81, 83, 90; *United States v Roy M Belfast Jr, aka Chuckie Taylor*, 09-10461 (11th Cir 2010) (Court of Appeals for the Eleventh Circuit) §§20, 30–40; UNGA, ‘Scope and Application of Universal Jurisdiction (2010)’ (n 144) paras 66, 68 (comments by Finland, Norway and Italy); UNGA, ‘Scope and Application of Universal Jurisdiction (2011)’ (n 144) para 15 (comments by Colombia); UNGA, ‘Scope and Application of Universal Jurisdiction (2012)’ (n 144) para 10 (comments by El Salvador); UNGA, ‘The Scope and Application of Universal Jurisdiction (2014)’ (n 144) para 71 (comments by Paraguay).

In sum, if the principle of legality is to be interpreted in accordance with the law and practice relating to universal jurisdiction, it must be read as requiring states to observe all the elements or rules which, under the applicable international law, are decisive for the criminalisation and punishment of the crime concerned, including, in some circumstances, its label.

b. Vicarious Jurisdiction and Double Criminality

Vicarious or representation jurisdiction, also called subsidiary universal jurisdiction or co-operative general universal jurisdiction, is sometimes listed as one of the accepted bases of prescriptive and adjudicative jurisdiction in criminal matters under customary international law. On this basis, states have jurisdiction over serious ordinary offences, such as murder and rape, committed abroad by non-nationals against non-nationals, provided that the perpetrator is present on their territory and extradition to the territorial state (or another state with prior jurisdiction over them) is not possible.¹⁵⁷ Importantly, the state exercising vicarious jurisdiction applies its own domestic criminal law in substitution to the law of a state with a prior jurisdictional claim over the individual.¹⁵⁸ Thus, it effectively recharacterises the domestic criminal law that applied to the individual at the time of the conduct into its own domestic criminal law.

Although actual exercises of vicarious jurisdiction are rare and difficult to track,¹⁵⁹ many states have asserted this power either in their domestic laws¹⁶⁰ or in extradition

¹⁵⁷ Reydams (n 137) 28–29, 31; Cristine van den Wyngaert, ‘Double Criminality as a Requirement to Jurisdiction’ in Nils Jareborg (ed), *Double Criminality: Studies in International Criminal Law* (Iustus Förlag 1989) 49–50; Karin Cornils, ‘The Use of Foreign Law in Domestic Adjudication’ in Nils Jareborg (ed), *Double Criminality: Studies in International Criminal Law* (Iustus Förlag 1989) 79; Jurgen Meyer, ‘Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction, The’ (1990) 31 HILJ 108, 115–116.

¹⁵⁸ Cedric Ryngaert, *Jurisdiction in International Law* (OUP 2015); Gallant (n 1) 284; van den Wyngaert (n 157) 44.

¹⁵⁹ Ryngaert (n 158) 121, 123; O’Keefe (n 136) 25; Gallant (n 1) 286–287.

¹⁶⁰ See, e.g., Art 7(1)–(2), Penal Code of Switzerland; Art 7(2), Criminal Code of Germany (*Strafgesetzbuch*) 1998; § 65(1), (4), Criminal Code of Austria 1974; Art 10, Penal Code of Italy 1930

treaties¹⁶¹ Vicarious jurisdiction has also been recognised in inter-governmental documents and academic studies which helped shape the current customary rules on jurisdiction in criminal matters.¹⁶² Moreover, it has not been objected by states, which provides further support to its permissibility under customary international law.¹⁶³ For present purposes, the fact that states have asserted their power to retroactively recharacterise foreign domestic criminal laws under certain circumstances might mean that recharacterisation of crime is *prima facie* consistent with the principle of legality in general international law.

At the same time, virtually all states that assert vicarious jurisdiction condition it to the rule of double or dual criminality, also called double incrimination.¹⁶⁴ This is the requirement that the relevant conduct be criminal and/or punishable both in the *judex loci delicti*, i.e. the territorial state (or another state with a prior jurisdictional claim over the individual), and the *judex deprehensionis*, i.e. the state that has custody of the accused

(Royal Decree n 1398); s 2, Penal Code of Sweden; s 12(4)(a)-(b), Penal Code of Norway; s 7(1), no 6, Criminal Code of Denmark 2012; s 17(a), Penal Law of Israel (Law No 626/1996); Arts 113-6 and 113-8-1, Penal Code of France 1992; Art 7, Code of Criminal Procedure of Belgium 1878; Art 5(1)(c), (d) and (f), Penal Code of Portugal 1982 (Legislative Decree n° 48/95); Art 11(1)-(2), Criminal Code of Romania 2009; Arts 110 §2 and 111 §1, Criminal Code of Poland 1997; s 8(1), Criminal Code of Czech Republic 2009; s 7(1) 2), Criminal Code of Estonia 2002; Art 12(4)(5), Criminal Code of Bosnia and Herzegovina 2003; Art 9, §1, Penal Code of Paraguay 1997 (Law No 1160/97); 18 USC § 3184 (1948) (United States Code); ss 72(2), (3), (5), UK Criminal Justice and Immigration Act 2008; Art 305, second paragraph, Tunisian Code of Criminal Procedure 1968 (Law No 68-23); s 10(1), Penal Code of Cameroon 2016 (Law N° 2016/007).

¹⁶¹ Ryngaert (n 158) 123. See, e.g., Art 6(1), European Convention on the Suppression of Terrorism (adopted 27 January 1977, entered into force 4 August 1978) ETS 90; Art 6, European Convention on the Transfer of Proceedings in Criminal Matters (adopted 15 May 1972, entered into force 3 March 1978) ETS 73.

¹⁶² Art 10, Institute of International Law, ‘Resolution on the Rules Regarding Conflicts of Criminal Law on the Subject of Competence (Règles Relatives Aux Conflits Des Lois Pénales En Matière de Compétence)’ (23 September 1883); Art 10(a), Draft Convention on Jurisdiction with respect to Crime, annexed to ‘Harvard Research in International Law (1935), Part II: Jurisdiction in Respect to Crime’ 29, Supplement AJIL 439, 440–441; Art 7, Resolution of Conference for Unification of Penal Law, Warsaw, 1927, reprinted in *ibid* 641–642.

¹⁶³ Ryngaert (n 158) 123.

¹⁶⁴ *ibid* 121–122; Gallant (n 1) 284–286. See, e.g., *supra* note 160

and is prosecuting them.¹⁶⁵ To satisfy the double criminality rule in the context of vicarious jurisdiction, most states require that all the material and mental elements of the crime (1), defences (2), and modes of liability (3) exist in the criminal laws of both the *judex loci delicti* and the *judex deprehensionis*.¹⁶⁶ In addition, they also require that the conduct be punishable in those states, meaning that any bars to prosecution (4), such as statutes of limitations and pardons, existing under the applicable law must be observed by the *judex deprehensionis*.¹⁶⁷ Consideration of all of those factors makes up what has been referred to as the *in concreto* approach to double criminality, which enquires whether prosecution is possible in the concrete circumstances of each case.¹⁶⁸ This contrasts with double criminality *in abstracto*, which disregards subjective elements of the crime and exonerating factors,¹⁶⁹ but applies only in the context of extradition, not criminal prosecution.¹⁷⁰ When asserting vicarious jurisdiction, some states also explicitly require that the punishment (5) applied upon conviction pursuant to the *lex fori* be no greater than the one that was applicable in the territorial state or another state with jurisdiction over the individual at the time of the conduct.¹⁷¹

¹⁶⁵ van den Wyngaert (n 157) 43, 50; Michal Plachta, 'The Role of Double Criminality in International Cooperation Matters' in Nils Jareborg (ed), *Double Criminality: Studies in International Criminal Law* (Iustus Förlag 1989) 108–109; Sharon A Williams, 'The Double Criminality Rule Revisited' (1993) 27 *IsLR* 297, 298; Lech Gardocki, 'Double Criminality in Extradition Law' (1993) 27 *IsLR* 288, 288.

¹⁶⁶ See *supra* note 164.

¹⁶⁷ *ibid.*

¹⁶⁸ van den Wyngaert (n 157) 51; Jonathan O Hafen, 'International Extradition: Issues Arising Under the Dual Criminality Requirement' (1992) 1992 *BYU LRev* 191, 199.

¹⁶⁹ van den Wyngaert (n 157) 51; Gardocki (n 165) 289–290; SZ Feller, 'The Significance of the Requirement of Double Criminality in the Law of Extradition' (1975) 10 *IsLR* 51, 56.

¹⁷⁰ See van den Wyngaert (n 157) 44; Cornils (n 157) 81–83.

¹⁷¹ Gallant (n 1) 285–286; van den Wyngaert (n 157) 44; Cornils (n 157) 81–83; Meyer (n 157) 116. See, e.g.: Art 7(3), Penal Code of Switzerland; s 17(b), Penal Law of Israel; s 2, final sentence, Penal Code of Sweden; s 13, second paragraph, Penal Code of Norway; § 65(2), Criminal Code of Austria; Art 13(2), Criminal Code of Slovenia (KZ-1) 2008 (Št 003-02-4/2008-22); s 8(3), Criminal Code of Czech Republic; Art 111§2, Criminal Code of Poland; Art 9, §2, Penal Code of Paraguay; s 10(1), last sentence, Penal Code of Cameroon.

As has been noted elsewhere, the adoption of double criminality *in concreto* is in line with the nature and limits of vicarious jurisdiction.¹⁷² This is because this jurisdictional basis is derived from the prescriptive and adjudicative powers of the state with a prior jurisdictional claim over of the individual.¹⁷³ Thus, states cannot go beyond the punitive powers of the state which they ‘represent’ or ‘substitute’.¹⁷⁴ More importantly for present purposes, double criminality *in concreto* also seeks to ensure compliance with the principle of legality in the context of criminal proceedings.¹⁷⁵

The fact that assertions of vicarious jurisdiction have been accompanied by double criminality *in concreto* suggests that the latter has been deemed an appropriate tool for securing compliance with the principle of legality and existing jurisdictional limits in cases of recharacterisation of crimes. In particular, it demonstrates that, in order to uphold the *nullum crimen* principle, recharacterisation can only be resorted to when 1) all the material and mental elements of the crime, 2) modes of liability, 3) defences, 4) bars to prosecution or punishment and 5) penalties that existed under applicable law are observed.

c. Fair Labelling

The principle of fair labelling and the extent to which it applies to the phenomenon of retroactive recharacterisation of crimes will be examined in detail in Chapter 3. However, it is important to briefly discuss how this principle affects the interpretation of the principle of legality, to which it is closely connected. The principle of fair labelling

¹⁷² Per Ole Träskman, ‘Should We Take the Condition of Double Criminality Seriously?’ in Nils Jareborg (ed), *Double Criminality: Studies in International Criminal Law* (Iustus Förlag 1989) 138.

¹⁷³ Cornils (n 157) 79–80; van den Wyngaert (n 157) 49.

¹⁷⁴ Cornils (n 157) 80; van den Wyngaert (n 157) 52; Träskman (n 172) 147–148, 150–151.

¹⁷⁵ van den Wyngaert (n 157) 53; Träskman (n 172) 146, 148–149, 152–153; Gallant (n 1) 286; Williams (n 165) 298; Plachta (n 165) 107; Gardocki (n 165) 289.

requires that criminal labels accurately reflect the accused's moral blameworthiness.¹⁷⁶ It overlaps with the principle of legality to the extent that both are concerned with providing notice of the consequences of criminal wrongdoing, as well as ensuring that such consequences are fair and proportionate to the degree of culpability.¹⁷⁷ But fair labelling is especially concerned with how criminal labels fulfil those aims, particularly by determining which penalties ought to apply, and signalling how much public opprobrium is deserved.¹⁷⁸ Thus, interpreting the principle of legality in accordance with fair labelling means that the impact of labels on the accused and their rights should not escape scrutiny.

4. The Object and Purpose of the Principle of Legality

In this section, I do not intend to delve into the various rationales or purposes associated with the principle of legality or the criminal law in general. My focus is on how those purposes inform the question of whether retroactive recharacterisation of crimes is consistent with that principle. Having identified the elements of the principle of legality in general international law, it is its scope that requires further inquiry. In this light, the key question that I shall endeavour to respond in this section is: What do the object and purpose of the principle of legality have to say about its scope? In particular, to uphold the various rationales of the principle, which rules or aspects of the criminal law ought to be subject to non-retroactivity?

To begin with, two principal rationales have been attributed to the principle of legality, namely, protection of individual freedom against state arbitrariness and fair

¹⁷⁶ Andrew Ashworth, 'The Elasticity of Mens Rea' in Colin Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworths 1981) 54.

¹⁷⁷ Andrew Ashworth, *Principles of Criminal Law* (OUP 2009) 65; Hilmi M Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals* (OUP 2014) 37, 43–44, 53.

¹⁷⁸ Talita de Souza Dias, 'Recharacterisation of Crimes and the Principle of Fair Labelling in International Criminal Law' (2018) 18 ICLR 788, 16, 24; James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71 MLR 217, 220, 222, 230–231.

notice of the consequences of engaging in criminal conduct.¹⁷⁹ In addition, this principle fulfils some of the purposes of the criminal law in general, in particular deterrence and fair retribution or just deserts.¹⁸⁰ Underlying all of those rationales is the notion of individual autonomy: the idea that individuals ought to know the criminal law in advance so as to freely decide whether to avoid its sanctions and their effects on their liberty.¹⁸¹ But which elements or aspects of the criminal law must be given fair notice in order to protect individuals from state arbitrariness, to deter crime and to duly punish those that deserve to be punished? I would say some, but not all of them.

It is uncontroversial that the law must provide fair notice of what conduct is criminal, as well as the most prominent consequences of engaging in such conduct, namely, criminal prosecution, conviction and punishment.¹⁸² Notice of these elements is necessary because of their severity, that is, the significant way in which they impact upon the fundamental rights and freedoms of the individual.¹⁸³ This is the foundation of any liberal state: to be free, individuals must be able to know, in advance, at least those rules which have the most significant implications for their rights, so they can avoid them.¹⁸⁴ At the same time, prospectivity has not always been required, even among liberal states, in respect of procedural matters. Although many states do consider it essential to subject

¹⁷⁹ See Introduction.

¹⁸⁰ Gallant (n 1) 26–30; Beth Van Schaack, ‘Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals’ (2008) 97 *GeoLJ* 119, 121, 145–146; *Erdemović Case* (Sentencing Judgment) ICTY-96-22-T (29 November 1996) §§64–65; Ashworth (n 177) 63, 65.

¹⁸¹ Ashworth (n 177) 58.

¹⁸² *Kokkinakis v Greece* (n 51) para 52; Sanz-Caballero (n 17) 789 (noting that the principle of legality offers ‘essential safeguards against arbitrary prosecution, conviction and punishment’).

¹⁸³ Bruce Broomhall, ‘Article 22: Nullum Crimen Sine Lege’ in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (Beck/Hart 2016) 953; Lamb (n 89) 734; Piqué (n 63) 169; Luchtman (n 63) 350–351; *Ricardo Canese v Paraguay* (n 117) para 174; *Castillo Petruzzi et al v Peru* (n 118) para 121; *J v Peru* (n 117) para 287; *Miller v Florida*, 482 US 423 (1987) 430; *Dobbert v Florida*, 432 US 282 (1977) 293 (all stressing that what justifies the *nullum crimen* principle is the importance of the individual rights affected by criminal sanctions)

¹⁸⁴ *Ricardo Canese v Paraguay* (n 117) para 174; *J v Peru* (n 117) paras 278, 287; *Castillo Petruzzi et al v Peru* (n 118) paras 120–121; *Miller v Florida* (n 183) para 429; *Weaver v Graham*, 450 US 24 (1981) 29; *Dobbert v Florida* (n 183) 293.

those issues to advance notice, in the majority of domestic systems and human rights protective systems, procedural fairness has been achieved by other means.¹⁸⁵ These include fair trial guarantees such as impartiality, presence at trial, and effective defence.

Drawing on those rationales and basic ideas about the principle of legality, I would argue that the decisive criterion for determining its scope is whether a certain criminal rule or its consequences affect or impair the fundamental human rights of the accused. This is what has been considered to amount to a *substantive* or *material* change in the criminal law.¹⁸⁶ In other words, the principle of legality has a deeper ‘human rights protective core’. This is due to the principle’s underlying function as a safeguard of individual freedom and is perhaps reflected in the principle’s own status as a fundamental human right.

It is true that, at present, the core human rights protected by the *nullum crimen* principle are limited to *substantive* rights, particularly fundamental freedoms such as liberty, property and privacy. As a result, the retroactive application of procedural or administrative measures that do not affect such rights will not violate the principle.¹⁸⁷ Nevertheless, its scope has progressively expanded to include, in some regional and domestic systems, the protection of certain procedural human rights, such as the right to

¹⁸⁵ Gallant (n 1) 15–16.

¹⁸⁶ *Ricardo Canese v Paraguay* (n 117) paras 174–175; *Baena Ricardo et al v Panama* (IACHR, 02 February 2001) §§106–107; *Castillo Petruzzi et al v Peru* (n 118) para 121; Arancibia Clavel Case (n 148) 10, 29, 123, 146; *Maxwell v Murphy* (1957) 96 CLR 261 277–283, 286–288; *Collins v Youngblood*, 497 US 37 (1990) 45–46; *Miller v Florida* (n 183) 430–433; *Weaver v Graham* (n 184) 29, including footnote 12; Luchtman (n 63) 350–353. See also Talita de Souza Dias, ‘The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad Hoc Declarations: An Appraisal of the Existing Solutions to an Under-Discussed Problem’ (2018) 16 JICJ 65, 87.

¹⁸⁷ The scope of fundamental human rights covered by the principle of legality seems to be coterminous with the various human rights whose limitation must be ‘prescribed/provided by law’ or ‘in accordance with law’. The ECtHR has considered that the requirements of ‘quality of law’ which apply to administrative measures limiting those rights (i.e. accessibility and foreseeability) are virtually identical to the ones applying to criminal measures (see *Sunday Times v The United Kingdom* (n 75) §§48–49). See also Steven Greer, *The Exceptions to Articles 8 to 11 of the European Convention on Human Rights* (Council of Europe Publishing 1997) 9–10. Similar reasoning has been employed by the UNHRC when interpreting the ICCPR (see UNCHR, ‘The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights’ (28 September 1984) E/CN.4/1984/4 paras 15–17).

pre-established courts¹⁸⁸ and the right of appeal in criminal matters.¹⁸⁹ This trend is especially visible within the ACHR¹⁹⁰ and the case law of the IACHR, which has considered that the type of court, the criminal proceedings, and administrative measures must be subject to the principle of legality.¹⁹¹ Granted, this approach is not yet widespread and would be difficult to follow in a decentralised international legal order. However, as international law and international criminal law develop, it becomes less and less justifiable to apply procedural and administrative rules retrospectively.

With that key criterion in mind, it can be safely argued that all the rules which are decisive for criminal liability are part of the scope of the principle of legality. These include first and foremost the substantive elements or ingredients of a crime, i.e. its underlying acts, the causal nexus, the mental element, the contextual elements and any aggravating circumstances which are essential for making out the offence, as well as modes of liability.¹⁹² Defences, including both excuses and justifications, should also be included in this category, to the extent that they may exclude criminal liability.¹⁹³ It is the presence or absence of all those elements which triggers the severe consequences of committing a crime. If any of them is missing (or present, in the case of defences), the conduct cannot *constitute* an offence, and none of the serious consequences attaching thereto will arise. It is also safe to conclude that penalties must be subject to the principle

¹⁸⁸ See, e.g. Art 8, ACHR.

¹⁸⁹ Art 7, European Convention for the Protection of Human Rights and Fundamental Freedoms Protocol No 7 (adopted 22 November 1984, entered into force 01 November 1988) ETS 117 (Protocol 7 ECHR).

¹⁹⁰ Art 8, ACHR.

¹⁹¹ *Kimel v Argentina* (n 117) §63; *Baena Ricardo et al v Panama* (n 186) §106–107; *Castillo Petruzzi et al v Peru* (n 118) §119.

¹⁹² *J v Peru* (n 117) §279; *García Asto y Ramírez Rojas v Peru* (n 117) §191; *David Michael Nicholas v Australia* (n 62) §7.3; *Ricardo Canese v Paraguay* (n 117) §175; *Polyukhovich* (n 148) Judgment of Mason C J §30; Judgment of Deane J §38; Judgment of Toohey J §109; *Calder v Bull*, 3 US (3 Dall) 386 (1798) 390. See also *supra* notes 148, 164 and 168.

¹⁹³ *Gallant* (n 1) 39; *Mariniello* (n 58) 246; *Juratowitch* (n 58) 344–345; *R v Finta* (n 148) 707, 712–713, 715–716, 731, 738, 751, 776–777, 824–848; *Polyukhovich* (n 148) §§55–59 (Brennan J), §§81–90 (Toohey J).

of legality.¹⁹⁴ After all, by definition, they impact upon some of the most fundamental rights of the individual, particularly the rights to liberty and property.

What about other rules of criminal law which leave untouched the criminal liability of the individual, but which affect the application or the execution of a penalty to the detriment of the accused? This category includes bars to prosecution, such as pardons, amnesties, statutes of limitations, and rules that alter the execution of a penalty in a way that changes its very nature or scope (e.g. an extension of preventive detention, an exclusion or limitation of parole or other early release rights, such as remission for work or studies done in prison). To be fair, the issue of whether those rules are or should be included within the scope of the principle of legality has not received a great deal of attention in the literature or case law. However, if one accepts that it is the impact of a rule on the accused's substantive human rights which determines its inclusion within the scope of the principle of legality, then its mere classification as a procedural rule cannot be decisive. Procedural bars and rules pertaining to the execution of penalties may well substantively affect the rights and freedoms of the accused.¹⁹⁵ Accordingly, their consequences should be examined in each case, regardless of whether they are classified as procedural or substantive. If can be said, *in concreto*, that they encroach upon the accused's substantive human rights, then there is no reason why they should not comply with the principle of legality.¹⁹⁶ There is a point at which rules that are in principle

¹⁹⁴ See *supra* note 192.

¹⁹⁵ See García Ramírez and Morales Sánchez (n 80) 198, 200.

¹⁹⁶ For a similar conclusion see, e.g.: *Liakat Ali Alibux v Suriname* (n 61) §60; *Mohamed v Argentina* (n 118) §131; *Ricardo Canese v Paraguay* (n 117) §§175–176; *Kononov v Latvia* (n 74), Dissenting opinion of Judge Costa joined by Judges Kalaydjieva and Poalelungi, §§16–19; *Arancibia Clavel Case* (n 148) 10–11, 28–29, 122–127, 145–148; *Vasiljević* (n 51) §§196, 202 (in relation conditions of punishment and/or prosecution); *Robert John Fardon v Australia* (2010) UNHRC Communication no 1629/2007, UN Doc CCPR/C/98/D/1629/2007 §7.4; *Van Duzen v Canada* (1982) UNHRC Communication no 50/1979, UN Doc CCPR/C/15/D/50/1979 §§10.2–10.3; *Del Rio Prada v Spain* (n 131) §§81–90, 103; *Scoppola v Italy (No 2)* (n 85) §§110–113; *Kafkaris v Cyprus* App no 21906/04 (ECtHR, 12 February 2008) §142; *M v Germany* (n 131) §§120–121, 135–137; *Vélez Loor v Panamá* (IACHR, 23 November 2010) §187; *Baena Ricardo et al v Panama* (n 186) §§106–107; *Amnesty International v Zambia*, Comm No 212/98,

thought to be procedural affect questions of substantive criminal law so that their formal classification becomes insignificant or artificial.¹⁹⁷

The last aspect of the criminal law which is left to consider are criminal labels, i.e. the denomination or legal classification given to a crime, a mode of liability or a defence. As mentioned earlier, labelling issues have more readily been associated with the principle of fair labelling.¹⁹⁸ It is often asserted that criminal labels are immaterial for satisfying the principle of non-retroactivity,¹⁹⁹ and may only be relevant for sentencing.²⁰⁰ Paradoxically, it is generally accepted that labels may have a severe impact on the accused.²⁰¹ This is because they are a powerful tool for conveying the gravity and the

ACmHPR, 5 May 1999 §§35–38 (in relation to sanctions/penalties); *Liakat Ali Alibux v Suriname* (n 61) §§64–70; *Lori Berenson-Mejía v Peru* (IACHR, 25 November 2004) §§117–121; *Cantoral-Benavides v Peru* (IACHR, 18 August 2000) §§156–157; *Ruto and Sang Case* (Decision on Prosecution Request for Admission of Prior Recorded Testimony) ICC-01/09-01/11-1938-Red-Corr (19 August 2015) §22; *Katanga and Chui* (n 65) §§33–34 (for other procedural rules substantively affecting the rights of the accused).

¹⁹⁷ Piqué (n 63) 180; *Tolofson v Jensen*, [1994] 3 SCR 1022, 22980 1066–1074; *Maxwell v Murphy* (n 186) 277–283, 286–288; Luchtman (n 63) 352–356.

¹⁹⁸ See generally Ashworth (n 177) 78–80; David Nersessian, ‘Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes against Humanity’ (2007) 43 *StanJInt’l L* 255–263.

¹⁹⁹ See, e.g., Meron (n 27) 246 (simply stating that the legal classification of crime is a matter of procedure falling outside the scope of the principle, but without assessing its actual consequences); Gallant (n 1) 367 (arguing that a change in the designation of a crime is not prohibited by the core rule of non-retroactivity, but acknowledging its anomaly and cautioning against its use); Van Schaack (n 181) 187–188 (suggesting that ‘[t]he particular crime classification employed may thus assert fewer tangible impacts on a defendant where the tribunal calibrates the sentence based on the gravity of the conduct in question’, but failing to acknowledge other effects arising from a criminal conviction); *Naletilić and Martinović Case* (Appeal Judgment) ICTY -98-34-A (03 May 2006), Separate and Partly Dissenting Opinion of Judge Schomburg §§17–18 (stating that labelling ‘has no impact on criminal liability’); *Stakić* Appeal Judgment (n 75), Partly Dissenting Opinion of Judge Shahabuddeen §§66–72 (noting that international law generally does not ‘put a premium on labels’); *Krnjelac Case* (Judgment) ICTY-97-25-T (15 March 2002) §§217–223; *Furundžija* (n 43) §184; *Erdemović Case* (Appeal Judgment) ICTY-96-22 (7 October 1997), Separate and Dissenting Opinion of Judge Li §19.

²⁰⁰ See, e.g., Silvia D’Ascoli, *Sentencing in International Criminal Law: The UN Ad Hoc Tribunals and Future Perspectives for the ICC* (Hart 2011) 303–306; Allison Marston Danner, ‘Constructing a Hierarchy of Crimes in International Criminal Law Sentencing’ (2001) 87 *VaLRev* 415; *Furundžija* (n 43) §§184, 186.

²⁰¹ See, e.g., *Furundžija* (n 43) §184; *Krstić Case* (Appeal Judgment) ICTY-98-33-A (19 April 2004) §§36–37.

moral blameworthiness of criminal wrongdoing and may thus lead to severe social stigmatisation.²⁰²

Granted, for some crimes, it may be difficult if not impossible to appraise the difference in gravity and the impact of their labels on the accused.²⁰³ Therefore, in those cases, it is understandable that the retroactive relabelling of the conduct should not significantly affect the rights of the accused. This is especially the case between two international crimes of equivalent seriousness, such as torture and rape as sub-categories of crimes against humanity or genocide. Nevertheless, for other crimes, the different levels of gravity and, thus, the different impact of their labels on the accused is evident.²⁰⁴ This difference becomes clear when comparing certain ordinary crimes, such as murder and rape, to their international counterparts, such as genocide and crimes against humanity.²⁰⁵ For those two sets of crimes, even if the underlying acts are the same, the different labels will certainly lead to different levels of stigmatisation, and thus different levels of deterrence and retribution.²⁰⁶

Indeed, the mere conviction for an international crime is, in itself, severe punishment, regardless of the penalty imposed and the sentence served.²⁰⁷ The stigma of being an international criminal or an ‘enemy of mankind’ may lead to social and political

²⁰² See Chalmers and Leverick (n 178) 226–227, 238; Ashworth (n 177) 80; Nersessian (n 199) 256; Zawati (n 177) 32–33, 35, 53, 55.

²⁰³ Theodor Meron, ‘The Principle of Legality in International Criminal Law’, *The Making of International Criminal Justice* (OUP 2011) 112; *Erdemović* Appeal Judgment (n 199), Separate and Dissenting Opinion of Judge Li §20.

²⁰⁴ See Van Schaack (n 181) 158, 187; Ferdinandusse (n 42) 241–243; *Musema Case* (Judgment and Sentence) ICTR-96-13-A (27 January 2000) §§981–982; *Erdemović* Appeal Judgment (n 199), Joint Separate Opinion of Judge McDonald and Judge Vohrah §§26–27.

²⁰⁵ Grover (n 15) 164; *Tadić* Appeal Judgment (n 43) §271; Leila Sadat Wexler, ‘The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again’ (1994) 32 *ColumJTransnat’IL* 289, 358; *R v Finta* (n 148) 705, 752, 812–813, 815; Amnesty International (n 144) 14.

²⁰⁶ de Souza Dias (n 178) 17, 19; *Krstić* Appeal Judgment (n 201) §§36–37; Ashworth (n 177) 78.

²⁰⁷ Frederic Mégret, ‘Practices of Stigmatization’ (2013) 76 *LCP* 287, 301; *Čelebići* Appeal Judgment (n 78), Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna §23; *R v Finta* (n 148) 815.

exclusion and may render rehabilitation or reintegration extremely difficult,²⁰⁸ as demonstrated by empirical studies of individuals convicted by various international criminal tribunals to date.²⁰⁹ Individual rights affected by such a conviction range from civil and political ones, such as freedom of movement, family life, and participation in elections, to social and economic rights, such as education and employment.²¹⁰ A simple charge or an arrest warrant for an international crime, even if followed by an acquittal, may already have serious and irreversible consequences for the rights of the individual accused.²¹¹ Moreover, as some have already noted, the opprobrium and shame of a conviction for an international crime by an international court, such as the ICC, is of a different – and arguably more severe – nature than a conviction entered by a national court.²¹² Labels may also play an important role in the determination of appropriate penalties, especially in the absence of specific tariffs.²¹³ Lastly, it may well be that

²⁰⁸ Mirsad Repak Supreme Court Judgment (n 149) ss 106, 118; Payam Akhavan, ‘Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?’ (2001) 95 AJIL 7, 7, 12, 23; Chalmers and Leverick (n 178) 223, 227.

²⁰⁹ Barbora Holá and Joris van Wijk, ‘Life after Conviction at International Criminal Tribunals: An Empirical Overview’ (2014) 12 JICJ 109, 114, 116, 119–121, 130–131; Barbora Holá, Jessica M Kelder and Joris van Wijk, ‘Rehabilitation and Early Release of Perpetrators of International Crimes: A Case Study of the ICTY and ICTR’ (2014) 14 ICLR 1177, 1178–1179, 1189–1190.

²¹⁰ *Bemba et al Case* (Decision Re-sentencing Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo) ICC-01/05-01/13-2312 (17 September 2018), §138; Marie O’Leary, ‘Until Proved Guilty before the Court: The Aftermath of International Criminal Law Cases on the Human Rights of Those Tried’ in Joanna Nicholson and Juan Pablo Pérez-Léon Acevedo (eds), *Ensuring and Balancing the Rights of Defendants and Victims at International and Hybrid Criminal Courts* (Rutledge 2019) (forthcoming); Holá and van Wijk (n 210) 116, 120, 130; Mark Kersten, ‘Should War Crime Perpetrators Pursue Doctorates?’ (*Justice Hub*, 26 August 2015) <<https://justicehub.org/article/should-war-crime-perpetrators-pursue-doctorates/>> accessed 25 August 2019. See also Chapter 3, Section 2.

²¹¹ Joris Van Wijk and Barbora Holá, ‘Acquittals in International Criminal Justice: Pyrrhic Victories?’ (2017) 30 LJIL 241, 242, 246–253, 261–262; Kevin Jon Heller, ‘What Happens to the Acquitted?’ (2008) 21 LJIL 664–665, 668–671, 675–677, 680; Wieteke Theeuwes, ‘Ngudjolo’s Asylum Proceedings: The Saga Continues’ (*International Justice Monitor*, 30 April 2015) <<https://www.ijmonitor.org/2015/04/ngudjolos-asylum-proceedings-the-saga-continues/>> accessed 25 August 2019.

²¹² Steven Kay and Joshua Kern, ‘Method to the Madness? John Bolton and US Objections to ICC Jurisdiction’ (*Opinio Juris*, 12 September 2018) 2 <<http://opiniojuris.org/2018/09/12/method-to-the-madness-john-bolton-and-us-objections-to-icc-jurisdiction/>> accessed 25 August 2019; Madeline Morris, ‘High Crimes and Misconceptions: The ICC and Non-Party States’ (2001) 64 LCP 13, 30.

²¹³ de Souza Dias (n 178) 25; *Semanza Case* (Appeal Judgment) ICTR-97-20 (20 May 2005) §§386, 388; *Kvočka et al Case* (Appeal Judgment) ICTY-98-30/1-A (28 February 2005) §92.

distinct labels carry with them different conditions of prosecution or punishment, such as statutes of limitations.²¹⁴ For instance, while most domestic ordinary crimes are subject to statutes of limitations, international ones are usually not.²¹⁵

Thus, retroactive changes in labels may have a substantive impact on the rights of the accused, sometimes even greater than the penalty itself. Labels are not a mere formality but may have significant legal and social consequences on accused persons. If one takes the rationale and the scope of the principle of legality seriously, their assessment cannot be left out.²¹⁶ Significantly, it appears that the fundamental question one should be asking in this regard is to what extent the relabelling of the conduct amounts to the creation of a different and more severe crime, mode of liability or defence. Pursuant to a robust version of the principle of legality, requiring precise categories and strict interpretation, the answer is clear: such types of reclassification go beyond the original contours of the applicable law. However, even if we accept a more flexible version of the principle, such as the one found in general international law, there seems to be a tipping point at which the relabelling of a crime, mode of participation or defence has such a detrimental impact on the accused that it must be covered by the principle of non-retroactivity.

Three examples drawn from the jurisprudence of the ICTY are illustrative of this type of scenario. First, in the *Stakić* case, a Trial Chamber of the ICTY convicted the accused for ‘deportation’ as a crime against humanity,²¹⁷ which, under pre-existing customary international law, required the displacement of individuals across a *de jure* or

²¹⁴ *Lori Berenson-Mejía v Peru* (n 196) §§117–121; *Cantoral-Benavides v Peru* (n 196) §§156–158; *Castillo Petrucci et al v Peru* (n 118) §§119; de Souza Dias (n 178) 25.

²¹⁵ See Art I, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, UNGA Res 2391(XXIII) (26 November 1968).

²¹⁶ See *ibid* and *Vasiljauskas v Lithuania* (n 73) §§165–191, esp. 178, 181–186; *Vasiljević* (n 51) §§193, 195, 198, 201; *Stakić* Appeal Judgment (n 75) paras 300–302. See also *Ambos* (n 81) 182, 184.

²¹⁷ *Stakić Case* (Judgment) ICTY-97-24-T (31 July 2003) §712.

de facto international border.²¹⁸ However, the conduct in question consisted of displacement across constantly changing frontlines *within a state*,²¹⁹ which, at the time it took place, amounted to the customary crime of ‘forcible transfer or (internal) displacement’.²²⁰ Thus, the ICTY Appeals Chamber noted that, even if the conduct in question was previously criminalised as forcible transfer, its subsequent reclassification as deportation would amount to an impermissible expansion of the applicable crime, in violation of the *nullum crimen* principle.²²¹ The Chamber based its decision on the fact that the crimes had different elements and different labels under pre-existing customary international law,²²² and emphasised the reasons behind such distinct treatment: forcible transfer was traditionally considered to be an internal affair, rather than a matter of international concern.²²³ The label ‘deportation’ was much more severe than ‘forcible transfer’ or ‘displacement’, which justifiably required proof an additional element, i.e. the existence of an international armed conflict and the crossing of an international border.²²⁴ While dissenting from such findings, Judge Shahabuddeen argued that the principle of legality in international law was concerned with the substance of a criminal prohibition, rather than its labelling.²²⁵ And yet his argument that internal displacement warranted the label ‘deportation’ revolved precisely around the impact and importance of such legal classification.²²⁶

²¹⁸ *Stakić* Appeal Judgment (n 75) §§289–303.

²¹⁹ *Stakić* Judgment (n 217) §§688–712.

²²⁰ *Stakić* Appeal Judgment (n 75) §§295–296, 299, 302; *Brđanin Case* (Judgment) ICTY-99-36-T (1 September 2004) §§540, 542; *Krstić Case* (Judgment) ICTY-98-33-T (02 August 2001) §521.

²²¹ *Stakić* Appeal Judgment (n 75) §302.

²²² *ibid* §§292–299. Similarly, *Brđanin* (n 220) §§540–542; *Krstić* Judgment (n 220) §521.

²²³ *Stakić* Appeal Judgment (n 75) §291.

²²⁴ *ibid* §§292–301; *Brđanin* (n 220) §§540, 542; *Krstić* Judgment (n 220) §521.

²²⁵ *Stakić* Appeal Judgment (n 75), Partly Dissenting Opinion of Judge Shahabuddeen, §§66–69.

²²⁶ *ibid* §70.

Similarly, in *Vasiljević*, another Trial Chamber of the ICTY held that the war crime of ‘violence to life and person’ did not exist as such under customary international law applicable at the time of the events.²²⁷ For that Chamber, the principle of legality required specificity or legal certainty in relation to each criminal label or ‘heading’ with which the accused is charged.²²⁸ Thus, Vasiljević’s conviction for the new crime and label was vacated.²²⁹

Lastly, in the *Galić* case, the Appeals Chamber of the ICTY upheld the accused’s conviction for the war crime of terror against a civilian population (‘acts or threats of violence the primary purpose of which is to spread terror among the civilian population’), although this was the first time in which this offence was identified as a separate war crime. Granted, the conduct in question was unquestionably a crime under treaty law, international custom and domestic law at the time it took place.²³⁰ However, it could only have been classified as the broader war crime of ‘attacks on the civilian population’.²³¹ As Judge Schomburg stressed in his dissent, the problem with this type of relabelling is that the crime of terrorising civilians was so distinct from other pre-existing war crimes that it could not apply to the defendant without violating the *nullum crimen* principle.²³²

In sum, the object and purpose of the principle of legality suggest that all criminal rules which are decisive for criminal liability, together with those relating to penalties, conditions of prosecution and punishment ought to be subject to the principle of legality. It is only by giving sufficient notice of those rules that the criminal law can protect individual freedom and achieve deterrence and fair retribution. Reassurance that those

²²⁷ *Vasiljević* (n 51) §§198, 201, 203.

²²⁸ *ibid* §§193, 195, 198, 201.

²²⁹ *ibid* §204.

²³⁰ *Galić Case* (Appeal Judgment) ICTY-98-29-A (30 November 2006) §§86–98.

²³¹ *ibid* §§87, 102–103.

²³² *Galić* (n 230) Separate and partially dissenting opinion of Judge Schomburg §§7, 17, 21–22.

rules are subject to *nullum crimen* comes from the principle of *in dubio pro reo*, which would resolve any remaining ambiguities to the advantage of the accused. Thus, when recharacterising crimes, one must verify whether the subsequent law does not go beyond the previously applicable one in all those respects. As I showed in the course of this Chapter, this statement of principle finds overwhelming support in the practice and *opinio juris* of states, although it has been misapplied by certain domestic and international courts in a few cases.²³³

As to labels, my view is that they must also be taken into account when considering the retroactive character of a certain criminal rule. Ultimately, they should be assessed by reference to the criterion which has defined the scope of the principle of the legality in general international law: whether, *in concreto*, the rule in question affects the substantive rights of the accused. Thus, what matters is not whether the subsequent label is exactly the same as the applicable one, but whether the relabelling is, in each case, substantively detrimental to the individual.

5. Conclusion

As I have demonstrated throughout this chapter, the principle of legality in general international law has evolved since its earlier formulation as a ‘principle of justice’ by the Nuremberg IMT.²³⁴ The principle now comprises four elements, namely, the core rule of non-retroactivity of crimes, a modest version of non-retroactivity of penalties, *in dubio pro reo* and (sufficient) specificity. More importantly, there has been a gradual expansion of its scope as well as greater flexibility in assessing whether a certain measure falls

²³³ On the fact that instances of inconsistent practice do not undermine a rule of international custom, see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 §186.

²³⁴ *Judgment of the Nuremberg International Military Tribunal 1946* (1947) 41 AJIL 172 219.

within it.²³⁵ As it stands today, the principle of legality, particularly its non-retroactivity component, comprises any rule or aspect of the criminal law that impairs the substantive human rights of the accused. Thus, while domestic and international sources of law can be applied interchangeably when it comes to criminalising, convicting and sentencing individuals, all the decisive aspects of criminal liability, as they existed in the applicable law, must be observed. Those aspects include: 1) the material and mental elements of the crime, 2) modes of liability, 3) defences, 4) penalties, 5) conditions of punishment and prosecution and 6) any other rule which may have a substantive impact on the rights of the individual, including, in some cases, criminal labels. This version of the principle of legality lies in between the laxer version applied at Nuremberg, Tokyo and in the early days of the ad hoc tribunals, and the more stringent formulation of the principle found in the Rome Statute of the ICC and some domestic legal systems. Significantly, it continues to expand by gradually encompassing criminal measures that affect not just substantive human rights, but also procedural ones. This is a welcome expansion that ought to naturally follow the development of international criminal law.

I have shown how this conclusion finds support in the texts and *travaux préparatoires* of the most prominent human rights and humanitarian law instruments, the case law of relevant human rights monitoring bodies and international criminal tribunals, the practice and *opinio juris* of states, the rules forming part of the context of the principle of legality, and the principle's rationales.

Yet in practice, by relying on the requirements of accessibility and foreseeability, certain international courts and tribunals have failed to verify whether recharacterised criminal laws are not substantively detrimental to the accused. To remedy this, a more stringent and comprehensive test to verify compliance with the principle of legality ought

²³⁵ See Sanz-Caballero (n 17) 788, 798–799, 817 (noticing this trend in the context of ECtHR).

to be adopted. By focusing on whether the accused had a general understanding of the crime, and could have sought some hypothetical legal advice, the notions of accessibility and foreseeability fail to capture the full range of rules that fall within the scope of the principle of legality. Perhaps as a sign of its weakness, this test has been gradually replaced by more robust approaches. In particular, tests which focus on the actual severity of the consequences of a certain law seem more in line with the scope and rationales of that principle.²³⁶ In cases of retroactive recharacterisation of crimes, inspiration could be drawn from the requirement of double criminality.²³⁷ Alternatively, domestic and international courts could rely on the applicable criminal law *as such*, without any sort of recharacterisation. Although this would require domestic courts to apply foreign criminal law and break the so-called ‘public law taboo’,²³⁸ it has proved to be a viable way of ensuring compliance with the principle of legality in the context of the ad hoc tribunals.²³⁹ I will explore those options further in Chapter 7, but the basic idea is that none of the elements that substantively affect the rights of the accused should escape the protective mantle of the principle of legality, especially when the criminal law is retroactively recharacterised.

²³⁶ *Baena Ricardo et al v Panama* (n 186) §106; *Cantoral-Benavides v Peru* (n 196) §§156–158; *Del Río Prada v Spain* (n 131) §§81–90; *Collins v Youngblood* (n 186) 45–46.

²³⁷ *Bacio Terracino* (n 141) 426.

²³⁸ William S Dodge, ‘Breaking the Public Law Taboo’ (2002) 43 HILJ 161.

²³⁹ ‘Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)’ (n 48) para 34; *Čelebići Judgment* (n 16) §§310, 417.

CHAPTER 3: RETROACTIVE RECHARACTERISATION OF CRIMES AND THE PRINCIPLE OF FAIR LABELLING IN INTERNATIONAL LAW

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1. Introduction

Chapter 1 explained what the phenomenon of retroactive recharacterisation of crimes is and how it results from certain peculiar features of the international legal order and international criminal law (ICL), particularly the multiplicity of prescriptive and adjudicative authorities. Chapter 2 then tried to establish to what extent that phenomenon is consistent with the principle of legality in general international law. For that purpose, it set out to identify and interpret the relevant aspects of that principle in accordance with the general rule of treaty interpretation reflected in the VCLT, as adapted to unwritten sources of international law. In the course of that enquiry, it was noted that the principle of fair labelling is not only part of the context of the legality principle but is also relevant on its own to the question of whether retroactive recharacterisation of crimes is lawful in international law. This is because, when the criminal law is retroactively recharacterised,

not only may the elements of crimes, modes of liability or defences be changed, but also their labels. As was mentioned in Chapter 2, the principle of fair labelling has its origins in English criminal law doctrine and requires criminal labels to be a fair representation of the perpetrator's moral guilt or blameworthiness.¹

In that light, this Chapter will turn its attention to the principle of fair labelling. It seeks to answer two principal questions. First, to what extent is fair labelling a principle of international law applicable to ICL? In particular, what are its legal status and content in ICL? Second, to what extent is retroactive recharacterisation of crimes consistent with that principle? To answer those questions, I propose to take five different steps.

In **Section 2**, I will provide a brief account of the history of fair labelling in England and Wales, in other legal systems and in ICL, where some scholars have applied it to crimes and modes of liability under international law. In **Section 3**, I will look at how this principle has been defined in the literature to date, and what justifications have been attributed to it. In **Section 4**, I will verify whether fair labelling has a legal basis in three proposed sources of international law: general principles of law recognised in domestic legal systems (**Sub-section a**), general principles of ICL (**Sub-section b**), and customary international law (**Sub-section c**). To do that, I will evaluate some of the assertions or assumptions made by other commentators in light of the elements, methods and/or evidence required to prove each of those sources. After concluding that fair labelling is likely to be a general or structural principle of ICL, in **Section 5**, I will test this hypothesis by trying to identify and interpret the content of the principle with a particular emphasis on the issue of retroactive recharacterisation of crimes. This approach is justified by the unwritten nature of the principle, which makes it difficult, if not

¹ See Andrew Ashworth, 'The Elasticity of Mens Rea' in Colin Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworths 1981) 54; David Nersessian, 'Whoops, I Committed Genocide - The Anomaly of Constructive Liability for Serious International Crimes' (2006) 30 *Fletcher FWildAff* 81, 96–97.

impossible, to separate its identification from its interpretation.² A two-tiered method will be followed to identify and interpret the principle of fair labelling in ICL. Specifically, in **Sub-section a**, I will employ the deductive method to infer its elements or aspects from the purposes of ICL, as well as existing rules or principles of international law. These include the principles of culpability, *mens rea*, correspondence, *ne bis in idem*, proportionality of punishment and legality. In **Sub-section b**, I will have recourse to the inductive method, i.e. I will analyse relevant instances of state practice and *opinio juris* to confirm the legal status and content of the principle, deduced earlier. Lastly, **Section 6** will weigh up the various aspects of the principle of fair labelling, as well as the relevant practice and *opinio juris*, to determine whether recharacterisation of crimes is consistent with them. To illustrate how my conclusions play out in practice, I will apply them to a few examples drawn from the jurisprudence of the ICTY and ICTR.

Before taking those steps, it is important to recall that the phenomenon of retroactive recharacterisation of crimes, which is the object of this thesis, is distinct from what is known as ‘legal recharacterisation of facts’.³ As explained in Chapter 1, the latter process does not entail a retroactive change in the criminal laws that applied to the accused at the time of the conduct and is normally consistent with the principle of legality. However, because the phenomenon of legal recharacterisation of facts is, like retroactive recharacterisation of crimes, a form of relabelling of the conduct, its consistency with the principle of fair labelling requires closer scrutiny. A clash with the principle of fair labelling might ensue to the extent that the final label chosen, although perfectly applicable to the accused and their conduct, may not accurately represent their culpability, especially in comparison to other available labels. Therefore, while legal

² See Chapter 2, Section 1.

³ See, generally, Elinor Fry, ‘Legal Recharacterization and the Materiality of Facts at the International Criminal Court: Which Changes Are Permissible?’ (2016) 29 LJIL 577.

recharacterisation of facts is not my focus, some of the conclusions reached on the principle of fair labelling might apply to it.

2. Brief History

The history of fair labelling is not easy to trace in most domestic legal systems. This is because the first explicit articulation of the principle, at least in the English language, was made in 1981 by Andrew Ashworth, when writing about the ‘elasticity’ of *mens rea* in cases of transferred intent.⁴ Ashworth had referred to the principle as ‘representative labelling’, and had argued that it was a prerequisite to the doctrine of subjective intent and the principle of correspondence in English criminal law. According to him, the requirement that there was *mens rea* for every crime and every objective element of the conduct (*actus reus*) only made sense in relation to agreed categories of crimes.⁵

In English law, the principle was further elaborated by Glanville Williams, who coined the term ‘fair labelling’ in 1983.⁶ But despite being frequently used to justify law reform proposals in England, Wales and Scotland,⁷ very little has been written on its specific elements, purposes or justifications in those countries. Since its inception, only a few academic articles have tangentially dealt with fair labelling in the context of other topics of English criminal law, such as multiple wrongdoing crimes,⁸ and proposed reforms in the law of theft,⁹ homicide¹⁰ and non-fatal offences against the person.¹¹ The

⁴ Ashworth, ‘Elasticity’ (n 1) 53–56. See also James Chalmers and Fiona Leverick, ‘Fair Labelling in Criminal Law’ (2008) 71 MLR 217, 218–219.

⁵ Ashworth, ‘Elasticity’ (n 1) 53–54.

⁶ Glanville Williams, ‘Convictions and Fair Labelling’ (1983) 42 CLJ 85, 85.

⁷ E.g., Law Commission, ‘Offences against the Person’ <<https://www.lawcom.gov.uk/project/offences-against-the-person/>> accessed 25 August 2019; Law Commission, *Reform of Offences against the Person* (Law Com No 361, 2015) para 1.10; Law Commission, *Legislating the Criminal Code, Fraud and Deception* (Consultation Paper No 155, 1999) paras 7.15, 7.39.

⁸ Barry Mitchell, ‘Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling’ (2001) 64 MLR 393.

⁹ CMV Clarkson, ‘Theft and Fair Labelling’ (1993) 56 MLR 554.

most comprehensive account of the principle is found in a 2008 article by James Chalmers and Fiona Leverick, focussing on the Scottish legal system.¹² Notably, fair labelling does not have an explicit legal basis in statutory law and has not been directly referred to in the case law of any of those legal systems.

In other legal systems, particularly those following civil law tradition, explicit articulations of fair labelling are rare if not inexistent.¹³ In some states, this is due to the recognition of a robust version of the principle of legality. By requiring written (*lex scripta*) and specific criminal laws (*lex certa*), as well as the classification of crimes into different ‘penal types’ (*tipicidad(e)*, *Tatbestand*), some domestic versions of the principle of legality seem to address most concerns regarding inaccurate or overly-broad criminal labels.¹⁴ This means that, in those states, fair labelling is largely subsumed into the principle of legality. Yet its essence remains virtually unchanged: crimes and other rules of substantive criminal law must be defined and distinguished with sufficient precision so

¹⁰ Barry Mitchell, ‘Public Perceptions of Homicide and Criminal Justice’ (1998) 38 *BritJCrinol* 453, 454, 468.

¹¹ Jeremy Horder, ‘Rethinking Non-Fatal Offences against the Person’ (1994) 14 *OJLS* 335, 339–343, 347–348, 351.

¹² Chalmers and Leverick (n 4).

¹³ Kevin Heller and Markus Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press 2010) (see sections on Argentina, China, Egypt, France, Germany, Iran, Japan, Russia and Spain, none referring explicitly to a separate principle of fair or representative labelling); Markus D Dubber, *Comparative Criminal Law* (OUP 2006) 1320–1321 (commenting on the general principles of liability, but not mentioning a specific principle on labelling).

¹⁴ See Francisco Javier Bedecarratz Scholz, ‘La indeterminación del criminal compliance y el principio de legalidad’ (2018) 13 *Política criminal: Revista Electrónica Semestral de Políticas Públicas en Materias Penales* 208, 211–212 (referring to the principle of specificity and its requirement that ‘penal types’ be defined as precisely as possible, in the context of Chilean and German criminal law); Michael Faure, Morag Goodwin and Franziska Weber, ‘The Regulator’s Dilemma: Caught between the Need for Flexibility and the Demands of Foreseeability. Reassessing the Lex Certa Principle’ 24 *ALJST* 283, 316–323 (noticing the importance of the principle of specificity in continental Europe); Ernst von Beling, *Die Lehre vom Tatbestand* (Mohr 1930); Heller and Dubber (n 13) (discussing the concept of *Tatbestand* in German criminal law); Cláudio Brandão, ‘Suitability to the Type of Crime and Criminal Law Interpretation’ (2015) 68 *Sequência (Florianópolis)* 59 (discussing how *Tatbestand* translates into ‘*tipicidad(e)*’ in some Latin American legal systems, and how this is a corollary of the principle of legality). See also *Liakat Ali Alibux v Suriname* (IACHR, 30 January 2014) §§59–61; *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago* (IACHR, 21 June 2002) §102 (all showcasing the connection between the principle of legality, particularly legal certainty, and the need to define crimes exhaustively as well as to distinguish them into ‘penal types’).

that different types of offences can fully capture different levels of culpability or wrongdoing. This ensures that individuals who commit a less severe offence do not suffer the consequences attached to a more severe crime and label.¹⁵

Fair labelling is also said to be a more general ‘principle of justice’ or a ‘fundamental principle of criminal justice’ in that it promotes fairness to defendants, victims and the public at large.¹⁶ To the extent that those concerns are found in a certain system of criminal law, the principle of fair labelling has been said to apply, at the very least as a policy consideration.¹⁷

In ICL, explicit articulations of the principle are infrequent and recent, but the principle seems to lie implicit in the very creation of separate international crimes. Since its modern inception, one of the principal aims of ICL has been to single out and appropriately label conduct which has been deemed to affect the interests of the international community as a whole.¹⁸ In fact, most acts or omissions that are now criminalised under international law were already criminal as ordinary crimes under domestic law.¹⁹ However, the definitions of ordinary crimes and, in particular, their labels did not fully capture the international dimension, the special gravity and the degree of condemnation that were associated with those acts.²⁰ More accurate labels were also

¹⁵ *Lori Berenson-Mejía v Peru* (IACHR, 25 November 2004) §§117–121; *Cantoral-Benavides v Peru* (IACHR, 18 August 2000) §§156–158.

¹⁶ Williams (n 6) 85–86; David Nersessian, ‘Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes against Humanity’ (2007) 43 *StanJInt’l L* 255.

¹⁷ Hilmi M Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals* (OUP 2014) 34–35.

¹⁸ Antonio Cassese and others, *Cassese’s International Criminal Law* (OUP 2013) 79, footnote 33; Terje Einarsen, *The Concept of Universal Crimes in International Law* (Torkel Opsahl Academic EPublisher 2012) 149; Nersessian (n 16) 221, 262.

¹⁹ See, e.g. *United States of America vs Otto Ohlendorf et al (Case No 9) (‘The Einsatzgruppen Case’)*, United States Military Tribunal II, Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No 10, Volume IV 496–497; *Akayesu Case* (Judgment) ICTR-96-4-A (2 September 1998) §617.

²⁰ Nersessian (n 16) 255, 262.

thought to contribute to proportionate sentencing and would send a message to future perpetrators that the commission of international crimes carries with it severe consequences.²¹ Thus, fair labelling concerns permeate the history and purposes of ICL.

Furthermore, fair labelling has also informed the development and appraisal of various modes of liability specifically conceived and branded for international crimes.²² For instance, the second modality of joint criminal enterprise has been specially conceived for ‘concentration camp’ types of scenario.²³ Likewise, indirect co-perpetration through an organisation has been adapted from German criminal law to capture certain hierarchical and highly organised structures behind the commission of international crimes.²⁴ More evidently, superior responsibility was drawn from the disciplinary rules of international humanitarian law to hold commanders liable for the crimes of their subordinates.²⁵ Although many of those involved in the commission of international crimes could already be held liable at the very least as aiders or abettors, there was a separate value in holding them accountable as principals or superiors.²⁶

For those reasons, discussion of the principle of fair labelling in ICL has gained traction in the last decade or so. Drawing on the scholarship of Ashworth and other English criminal lawyers, David Nersessian was the first to apply the principle to

²¹ *ibid* 261–262.

²² See *Lubanga Case* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (01 December 2014) §462; *Kvočka et al Case* (Appeal Judgment) ICTY-98-30/1-A (28 February 2005) §92. See also Douglas Guilfoyle, ‘Responsibility for Collective Atrocities: Fair Labelling and Approaches to Commission in International Criminal Law’ (2011) CLP 1; James G Stewart, ‘The End of “Modes of Liability” for International Crimes’ (2012) 25 LJIL 165, 176–177; Elis van Sliedregt, ‘The Curious Case of International Criminal Liability’ (2012) 10 JICJ 1171, 1182–1185; Miles Jackson, ‘The Attribution of Responsibility and Modes of Liability in International Criminal Law’ (2016) 29 LJIL 879, 888–891; Nersessian (n 1) 96–98; Darryl Robinson, ‘A Justification of Command Responsibility’ (2017) 28 CrimLF 633, 662.

²³ See *Tadić Case* (Appeal Judgment) ICTY-94-1-A (15 July 1999) §§202–203, 220.

²⁴ See *Katanga Case* (Judgment pursuant to article 74 of the Statute) ICC-01/04-01/07-3436-tENG (7 March 2014) §§1381–1416; *Ruto et al Case* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-01/11-373 (23 January 2012) §§301, 305–306, 313, 333.

²⁵ Nersessian (n 1) 97–98; Stewart (n 22) 178.

²⁶ Guilfoyle (n 22) 7–9, 12–13.

international crimes and modes of liability in 2006.²⁷ The principle was then referred to by Daryl Robinson in a seminal article on the ideological assumptions and methods of reasoning underpinning ICL.²⁸ Fair labelling also features as a key concern of Robinson and other commentators when discussing modes of liability in ICL.²⁹ Most notably, the principle was the focus of Hilmi M. Zawati's analysis of the prosecution of gender-based crimes in international criminal tribunals.³⁰ It has also been implicitly discussed by the ICTY³¹ and explicitly referenced in some ICC cases.³² Importantly, some have already voiced concerns that the principle may be violated in the process of retroactively recharacterising crimes.³³

Despite this growing interest in the principle, existing authorities fall short of discussing the legal basis, content and implications of fair labelling in ICL. This is what motivates the present enquiry into its definition, justifications and sources, as well as its interpretation in the context of retroactive recharacterisation of crimes.

²⁷ Nersessian (n 1) 96–98; Nersessian (n 16) 225, 247, 255–258.

²⁸ Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 LJIL 925, 927–929, 938–939, 941–943, 947, 949–950, 952, 961.

²⁹ See *supra* note 22.

³⁰ Zawati (n 17). See also Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (CUP 2014) 164; Einarsen (n 18) 34–35.

³¹ *Furundžija Case* (Judgment) ICTY-95-17/1-T (10 December 1998) §§184, 186; *Stakić Case* (Appeal Judgment) ICTY-97-24 (22 March 2006), Partly Dissenting Opinion of Judge Shahabuddeen §§66, 69.

³² *Bemba Case* (Appeal Judgment) ICC-01/05-01/08-3636-Anx3 (14 June 2018), Concurring Separate Opinion of Judge Eboe-Osuji §200; *Ruto and Sang Case* (Decision on Defence Applications for Judgments of Acquittal) ICC-01/09-01/11-2027-Red (05 April 2016), Reasons of Judge Eboe-Osuji §328; *Al Mahdi Case* (Judgment and Sentence) ICC-01/12-01/15-171 (27 September 2016) §60; *Lubanga Appeal Judgment* (n 22) §462; *Katanga Case* (Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons) ICC-01/04-01/07-3319-tENG (21 November 2012), Dissenting Opinion of Judge Van den Wyngaert §5; *Chui Case* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-02/12-4 (18 December 2012), Concurring Opinion of Judge Christine Van den Wyngaert §§28–29.

³³ Grover (n 30) 164; Galand AS, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits* (Brill Nijhoff 2019) 149.

3. Definition and Justifications

The most widely accepted definition of the principle of fair labelling is the one carved by Andrew Ashworth and further developed by other commentators in the context of English and Scottish criminal law. According to this definition, the principal aim of fair labelling is to ensure that the designation of an offence accurately represents the offender's criminality, wrongdoing or harm, i.e. the nature and magnitude of the law-breaking.³⁴ Thus, the thrust of the principle is the proportionality or correspondence between the facts and the criminal labels into which they subsume. However, as the qualifier 'fair' indicates, this balancing exercise is not a simple, exact formula. Instead, the principle is necessarily imbued with moral (pre-)conceptions about the individual conduct, the abstract label and how the two relate to each other.³⁵ Most authors consider that the scope of the principle includes the correspondence between the offence's label and *all* the subjective and objective elements of the conduct, i.e. *mens rea* and *actus reus*, including the conduct, the means of perpetration, the result and the mode of liability.³⁶ Some have also held that defences, including both excuses and justifications, should be subject to fair labelling, as their labels may also entail serious consequences for the accused, the victims and the public at large.³⁷

Two dimensions have been attributed to the principle, namely to describe and distinguish criminal conduct on the basis of the gravity of each of their elements.³⁸ Thus, on the one hand, fair labelling tells the story of the offender's criminality and gives us a

³⁴ Ashworth, 'Elasticity' (n 1) 56; Williams (n 6) 85, 91; Horder, 'Rethinking' (n 11) 339; Nersessian (n 16) 255.

³⁵ Nersessian (n 1) 97.

³⁶ Andrew Ashworth, *Principles of Criminal Law* (OUP 2009) 79; Chalmers and Leverick (n 4) 242.

³⁷ Ashworth, *Principles* (n 36) 80; Chalmers and Leverick (n 4) 244–246.

³⁸ Chalmers and Leverick (n 4) 220–222, 238–239, 246.

complete moral grasp of its nature and seriousness.³⁹ On the other hand, it categorises crimes based on their gravity, by arranging them in the same or different classes or ‘families’ of offences.⁴⁰ For this classification, the basic guideline seems to be that the greater the interest protected by the crime, the more deserving it is of a separate label or category.⁴¹

Yet there is no pre-established level of generality or specificity required to satisfy the principle. Instead, fair labelling is meant to reflect ‘widely felt distinctions’ in a given legal system, i.e. distinctions which are considered to be acceptable or fair in a certain social context.⁴² Therefore, the exact result yielded by the principle will largely depend on predominant moral conceptions and inevitably subjective choices.⁴³ For instance, law reformers in England and Wales considered that rape should remain a narrow and separate category of crime,⁴⁴ whereas in Canada it was decided to merge rape and indecent assault into a single and less stigmatising label (sexual assault).⁴⁵ Similarly, under customary international law, the label ‘rape’ (as a war crime and as a crime against humanity) encapsulates acts that have been qualified as both rape and sexual assault in domestic legal systems, in response to the particularly coercive context in which international crimes take place.⁴⁶

It is important to note that fair labelling applies not only to the legislative process but to all stages of criminal proceedings, including the charging, conviction and

³⁹ *ibid* 222, 238; Mitchell, ‘Multiple’ (n 8) 405; Nersessian (n 16) 255.

⁴⁰ Chalmers and Leverick (n 4) 221–222; Nersessian (n 16) 261.

⁴¹ Horder, ‘Rethinking’ (n 11) 342–343; Chalmers and Leverick (n 4) 242–243; Zawati (n 17) 28.

⁴² Ashworth, ‘Elasticity’ (n 1) 55; Ashworth, *Principles* (n 36) 78–79; Chalmers and Leverick (n 4) 240–241; Nersessian (n 16) 255, 257.

⁴³ Nersessian (n 1) 97; Nersessian (n 16) 257.

⁴⁴ Chalmers and Leverick (n 4) 227; Clarkson (n 9) 555.

⁴⁵ Art 271, Criminal Code of Canada 1985 (RSC, 1985, c C-46). See also Zawati (n 17) 38; Chalmers and Leverick (n 4) 235.

⁴⁶ Zawati (n 17) 39, 50–52.

sentencing of an individual.⁴⁷ Thus, an inconsistency with this principle may not only arise from what the abstract label of a crime, but also from the concrete labelling of individual conduct during a criminal investigation or trial. This means that the process of retroactive recharacterisation of crimes, which may occur at the stages of charging, convicting and/or sentencing the accused, falls well within the scope of that principle.

The primary set of justifications attributed to fair labelling are fairness to the accused⁴⁸ and the protection of their reputation.⁴⁹ In particular, the principle has been motivated by the need to provide accused persons with fair notice of their charges as well as the applicable penalties.⁵⁰ To this extent, fair labelling overlaps with the principle of legality, which also requires offences and penalties to be described with sufficient precision so as to fully inform accused persons and the general public about the consequences of committing a crime.⁵¹ More importantly, criminal labels have a powerful stigmatising effect, with important consequences for convicted persons.⁵² These include social isolation,⁵³ loss of political and/or economic power,⁵⁴ low employability,⁵⁵ difficult access to education,⁵⁶ and a negative impact on future prosecutions.⁵⁷ Accordingly, fair

⁴⁷ *ibid* 29; Williams (n 6) 85, 90–91.

⁴⁸ Ashworth, *Principles* (n 36) 78–79; Chalmers and Leverick (n 4) 225–226.

⁴⁹ Chalmers and Leverick (n 4) 227, 237; Zawati (n 17) 32–33.

⁵⁰ Chalmers and Leverick (n 4) 220, 222, 230; Zawati (n 17) 28, 38.

⁵¹ Ashworth, *Principles* (n 36) 65; Zawati (n 17) 37, 43–44, 53.

⁵² Chalmers and Leverick (n 4) 226–227; Ashworth, *Principles* (n 36) 80; Nersessian (n 16) 256; Zawati (n 17) 32–33, 35, 55.

⁵³ Victor Tadros, ‘Fair Labelling and Social Solidarity’ in Lucia Zedner and Julian V Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (OUP 2012) 70; Payam Akhavan, ‘Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?’ (2001) 95 AJIL 7, 7, 12.

⁵⁴ Akhavan (n 53) 7, 12, 23.

⁵⁵ Chalmers and Leverick (n 4) 223; Tadros (n 53) 70.

⁵⁶ *Bemba et al Case* (Decision Re-sentencing Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo) ICC-01/05-01/13-2312 (17 September 2018) §138; Barbora Holá and Joris van Wijk, ‘Life after Conviction at International Criminal Tribunals: An Empirical Overview’ (2014) 12 JICJ 109, 116, 120, 130; Niklas Jakobsson, ‘Thomas Lubanga: From Prison to PhD?’ (*Justice Hub*, 30 August 2015) <<https://justicehub.org/article/thomas-lubanga-from-prison-to-phd/>>

labelling seeks to ensure that the stigma resulting from a conviction corresponds to the perpetrator's culpability.⁵⁸ In doing so, fair labelling also seeks to counter or minimise sentencing discretion⁵⁹ and to ensure equality between offenders.⁶⁰

The second set of justifications of fair labelling revolves around the symbolic, communicative or expressive function of labels. Labels can convey key information on criminal conduct in a simple and concise manner, thereby signalling how an offence has been committed and how it should be regarded.⁶¹ The most obvious addressees of such information are offenders, who are thereby able to understand what they are being punished for.⁶² But communication to the general public is another important rationale of the principle.⁶³ Other addressees of the principle include victims of crimes,⁶⁴ criminal justice professionals,⁶⁵ and potential employers,⁶⁶ who all have some interest in accurate labels. Significantly, by ensuring that criminal labels send the appropriate message to these various audiences, fair labelling contributes to the fulfilment of the criminal law's educative,⁶⁷ deterrent⁶⁸ and condemnatory functions.⁶⁹

accessed 25 August 2019; Mark Kersten, 'Should War Crime Perpetrators Pursue Doctorates?' (*Justice Hub*, 26 August 2015) <<https://justicehub.org/article/should-war-crime-perpetrators-pursue-doctorates/>> accessed 25 August 2019.

⁵⁷ Ashworth, 'Elasticity' (n 1) 56; Williams (n 6) 85, 95; Chalmers and Leverick (n 4) 231.

⁵⁸ Ashworth, *Principles* (n 36) 20, 78; Zawati (n 17) 30–31, 52.

⁵⁹ Chalmers and Leverick (n 4) 224–225; Ashworth, *Principles* (n 36) 78; Tadros (n 53) 71; Clarkson (n 9) 555.

⁶⁰ Chalmers and Leverick (n 4) 220.

⁶¹ See *ibid* 226, 238; Nersessian (n 16) 256; Mitchell, 'Multiple' (n 8) 405.

⁶² Chalmers and Leverick (n 4) 229; Nersessian (n 16) 256; Tadros (n 53) 68.

⁶³ Chalmers and Leverick (n 4) 222, 226–229, 238, 246; Ashworth, *Principles* (n 36) 78; Nersessian (n 16) 256; Mitchell, 'Multiple' (n 8) 398.

⁶⁴ Chalmers and Leverick (n 4) 235–237; Tadros (n 53) 68–69.

⁶⁵ Chalmers and Leverick (n 4) 229–234, 237–238, 246; Ashworth, *Principles* (n 36) 78–80; Zawati (n 17) 33, 53.

⁶⁶ Chalmers and Leverick (n 4) 234–235, 237–238; Ashworth, *Principles* (n 36) 79.

⁶⁷ Ashworth, *Principles* (n 36) 78; Mitchell, 'Multiple' (n 8) 398; Tadros (n 53) 71–72.

⁶⁸ Chalmers and Leverick (n 4) 230; Mitchell, 'Multiple' (n 8) 398; Tadros (n 53) 72.

⁶⁹ Tadros (n 53) 72.

Thirdly, fair labelling plays an important formal role in criminal proceedings. It brings accuracy to the penal system, especially in relation to criminal records.⁷⁰ As a consequence, it strengthens the role of precedent⁷¹ and the consistency of prosecutions and judgments.⁷² This is because, with more accurate labels, it is easier to recognise when similar facts warrant the same legal outcome. Furthermore, fair labels are also justified by the need to register criminal convictions,⁷³ including for the purposes of sentencing future crimes. It is often the case that the details of previous convictions are lost in time, whereas labels remain a concise and reliable account of the past.⁷⁴

Lastly, fair labelling gives effect to the principle of *mens rea* and one of its corollaries, known as the principle of correspondence.⁷⁵ As will be discussed in more detail later on, this principle requires the mental element to cover all the material elements of the crime and necessitates labels that reflect or uphold such correspondence.⁷⁶

In sum, the principle of fair labelling is satisfied when the moral blameworthiness associated with the criminal conduct matches the moral condemnation expressed through the criminal label. It covers not only the subjective and objective elements of crimes, but also modes of liability and defences, and is fully applicable to the legislative and judicial process. Its rationales include fairness to the accused as well as the fulfilment of some the fundamental purposes of the criminal law, such as deterrence, retribution and education.

⁷⁰ Ashworth, 'Elasticity' (n 1) 56; Mitchell, 'Multiple' (n 8) 398; Chalmers and Leverick (n 4) 231–233.

⁷¹ Zawati (n 17) 38.

⁷² *ibid* 30, 33, 40.

⁷³ Chalmers and Leverick (n 4) 222, 232; Ashworth, *Principles* (n 36) 78; Mitchell, 'Multiple' (n 8) 398; Nersessian (n 16) 256–257.

⁷⁴ Ashworth, 'Elasticity' (n 1) 56; Chalmers and Leverick (n 4) 231–232, 237–238; Ashworth, *Principles* (n 36) 78.

⁷⁵ Ashworth, 'Elasticity' (n 1) 53–54; Williams (n 6) 85.

⁷⁶ Ashworth, 'Elasticity' (n 1) 49–50, 52.

4. Legal Status and Sources in International Law

As mentioned earlier, the articulation of the principle of fair labelling in both domestic and international criminal law is the product of a few recent academic works. In English criminal law, it was originally identified as a policy consideration addressed to legislators and prosecutors, as well as an evaluative principle with which one could assess the appropriateness of the criminal labels found in a given legal system.⁷⁷ This remains an important function of the principle in both domestic and international criminal law, regardless of its legal status.

Nevertheless, some commentators have suggested or assumed that fair labelling is part of positive international law, and to this extent applicable to ICL. There are at least three legal bases where it could potentially be found: a) a general principle of law derived from domestic criminal law,⁷⁸ b) a general principle of ICL; and/or c) a rule of customary international law. While most authors have framed fair labelling as a self-standing ‘principle of fairness’, along with the principles of legality and culpability,⁷⁹ others have treated it as a component of the latter.⁸⁰

In this section, I will test whether those assumptions can be substantiated with the elements, methods and/or evidence one must turn to in order to ascertain or prove each of those sources of law. For the reasons that I will set out in detail throughout this Chapter, I conclude that, although it is *possible* that fair labelling is a self-standing general principle of law recognised in most domestic systems in the world, it is safer to conceive it as a general or structural principle underpinning ICL. I consider a ‘general principle of ICL’

⁷⁷ *ibid* 54–55; Williams (n 6) 85–86.

⁷⁸ Zawati (n 17) 34. See also Nersessian (n 16) 255; Tadros (n 53) 68; Ashworth, *Principles* (n 36) 78 (all qualifying fair labelling as a fundamental principle of criminal law).

⁷⁹ Jackson (n 22) 888; Alexander KA Greenawalt, ‘The Pluralism of International Criminal Law’ (2011) 86 *IndLJ* 1063, 1111; Nersessian (n 16) 255.

⁸⁰ Stewart (n 22) 176; A Cassese, ‘The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise’ (2005) 5 *JICJ* 109, 117, 120–122.

to be a principle grounded in customary international law and/or other sources of international law, such as treaty law or general principles of law. Under customary international, it can be derived, by deduction, from existing rules of international law, and confirmed by observation or induction from state practice and *opinio juris*.

However, as I will argue in the following sections, fair labelling does not always impose a specific legal outcome. Although likely binding under customary international law, it is a rather modest and inherently broad ‘principle of fairness’.⁸¹ In this sense, it gives legal effect to certain normative concerns that have informed and ought to inform the creation and application of crimes, modes of liability and defences under international law.⁸² As it stands today, the principle does not disclose one single, pre-established legal requirement, or even a general preference towards certain types of labels as opposed to others (e.g. more specific vs more general, international vs domestic). In a way, it has more grey areas than black and white ones. But despite not necessarily yielding an exact result in the abstract, fair labelling does provide some outer limits or parameters which must be followed during the criminalisation, charging and conviction of individuals.⁸³ While some of those parameters or aspects do place specific limits on labelling, others only disclose a preference for certain types of labels. Let me now turn to each assertion and a brief discussion thereof.

a. Fair labelling as a General Principle of Criminal Law

Fair labelling is often qualified as a fundamental principle of criminal law or criminal justice and, on that basis, it has been applied to ICL.⁸⁴ Going one step further, Zawati has argued that it is also a general principle of law within the meaning of Article 38(1)(c) of

⁸¹ Similarly, Greenawalt (n 79) 111; Jackson (n 22) 888.

⁸² See Jens David Ohlin, ‘LJIL Symposium: Names, Labels, and Roses’ (*Opinio Juris*, 23 March 2012) <<http://opiniojuris.org/2012/03/23/ljil-names-labels-and-roses/>> accessed 25 August 2019.

⁸³ Similarly, Nersessian (n 16) 257.

⁸⁴ Nersessian (n 1) 96; Nersessian (n 16) 255; Jackson (n 22) 891.

the ICJ Statute.⁸⁵ However, no evidence is provided in support of those assertions. It is true that fair labelling has been explicitly recognised in some common law systems. Similar concerns have been addressed by the principle of legality in some civil law systems. Yet it is difficult to find clear expressions of the principle in other legal systems, especially in Asia, Eastern Europe and the Middle East.⁸⁶ More generally, comprehensive surveys of the world's domestic legal systems have been met with inherent difficulties, such as lack of accessibility and inaccurate translations.⁸⁷ For those reasons, although I do not rule out that fair labelling may be a general principle of law, I prefer to rely on other, less uncertain legal bases.

b. Fair labelling as a General Principle of ICL

Certain fair labelling concerns, especially those relating to the expressive and truth-telling functions of criminal labels, have been said to underpin or inform the discipline of ICL, particularly how its crimes and modes of liability have been formulated.⁸⁸ As discussed earlier, one of the key purposes of conceiving crimes under international law, as distinct from ordinary crimes under domestic law, was to better convey their particular gravity and international dimension.⁸⁹ Thus, it could be that fair labelling is a general principle of ICL, i.e. a principle which can be *inferred* from intrinsic features of this discipline,⁹⁰ regardless of the extent to which it has been recognised in domestic legal systems.⁹¹

⁸⁵ Zawati (n 17) 34.

⁸⁶ See *supra* note 13.

⁸⁷ Neha Jain, 'Judicial Lawmaking and General Principles of Law in International Criminal Law' (2016) 57 HILJ 111, 133–138.

⁸⁸ Nersessian (n 16) 262; Guilfoyle (n 22) 6; van Sliedregt (n 22) 1182; Jackson (n 22) 891.

⁸⁹ See *supra* note 18.

⁹⁰ On this approach to identifying general principles of law, see Oscar Schachter, *International Law in Theory and Practice* (M Nijhoff Publishers 1991) 53; Jain (n 87) 117–118, 120–129.

⁹¹ On the definition of general principles of ICL, see Antonio Cassese, *International Criminal Law* (OUP 2008) 21; *Kupreškić et al Case* (Judgment) ICTY-95-16-T (14 January 2000) §677.

Although references to general principles of ICL are found in the literature⁹² and case law,⁹³ their exact legal status remains unclear. Some commentators have suggested that general principles of international law (or some of its sub-areas) are one of the categories of general principles of law recognised in Article 38(1)(c) of the ICJ Statute, along with general principles derived from domestic law.⁹⁴ While recognition by all or a representative sample of domestic legal systems would suffice as a basis of formal validity for this category of general principles,⁹⁵ it has been argued that general principles of international law or of ICL need not be transposed from domestic law.⁹⁶ Rather, they could derive their legal imprimatur from other existing rules or principles of international law, from which they can be deduced.⁹⁷ To this extent, they are indistinguishable from the other formal sources of international law from which they are inferred, such as treaty law or customary international law.⁹⁸

As I will demonstrate in detail in the following section, the various elements, aims and rationales of fair labelling discussed earlier can be inferred not only from the purposes of ICL but from a series of rules and principles of international law. These are the principles of culpability, *mens rea*, correspondence, *ne bis in idem*, proportionality of penalties, legality and the more specific rules governing legal recharacterisation of facts.

⁹² Cassese (n 91) 21; Jain (n 87) 124–126, 128–129, 131, 135; Dapo Akande, ‘Sources of International Criminal Law’ in Cassese A, *The Oxford Companion to International Criminal Justice* (OUP 2009) 51–52.

⁹³ *Kupreškić* (n 91) §§591, 669, 677, 728; *Furundžija* (n 31) §177.

⁹⁴ Jain (n 87) 116–117, 119–120; Oscar Schachter, ‘International law in theory and practice: general course in public international law’ (1982) 178 *Recueil des Cours de l’Académie de Droit International* 9, 79–80.

⁹⁵ Jain (n 87) 119; Akande (n 92) 52.

⁹⁶ Cassese (n 91) 21.

⁹⁷ *ibid*; *Kupreškić* (n 91) para 677; Peter Malanczuk and Michael Barton Akehurst, *Akehurst’s Modern Introduction to International Law* (Routledge 1997) 48–49.

⁹⁸ Cassese (n 91) 21.

In this way, fair labelling can be pieced together as a general or ‘structural’ principle underpinning ICL.⁹⁹

c. Fair labelling as a Rule of Customary International Law

To the extent that fair labelling can be framed as a general principle of ICL derived from certain rules of international custom, it is also a rule of customary international law. Significantly, one of the well-established methods for identifying or ascertaining rules or principles of customary international law is deduction from other rules or principles of international law.¹⁰⁰ This method exists alongside induction, namely the empirical observation of state practice and *opinio juris* from which one can extract or extrapolate more general assumption.¹⁰¹ Both methods have been resorted to by different international courts and tribunals, and have often been combined.¹⁰² In particular, in cases where state practice and/or *opinio juris* are scarce or unclear, it is possible to first attempt to deduce a ‘logical’ rule of international custom from other existing rules of international law, and then test or confirm this deduction with a lower threshold of state practice and *opinio juris*.¹⁰³

⁹⁹ See James Crawford, ‘International Law and Foreign Sovereigns: Distinguishing Immune Transactions’ (1984) 54 BYIL 75, 85–86 (discussing how ‘structural’ or ‘systemic’ rules can be inferred from clearly established ones); Dapo Akande, ‘The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits’ (2003) 1 JICJ 618, 626 (using similar terminology and methodology to deduce a ‘structural’ rule of customary international law permitting the delegation of universal jurisdiction by states to international institutions).

¹⁰⁰ Stefan Talmon, ‘Determining Customary International Law: The ICJ’s Methodology between Induction, Deduction and Assertion’ (2015) 26 EJIL 417, 420, 423–427, 431; Anthea Elizabeth Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’ (2001) 95 AJIL 757, 758–759; Akande (n 99) 626. For examples of cases where deduction was employed, see *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Merits) [2002] ICJ Rep 3 §§52–54; *Furundžija* (n 31) §183.

¹⁰¹ Talmon (n 100) 421–422; Roberts (n 100) 758.

¹⁰² Talmon (n 100) 423; Akande (n 99) 626–627. For examples of recourse to a combined deductive-inductive method, see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 §§202, 206–207 (deducing the principle of non-intervention in internal affairs from the principle of territorial sovereignty); *Kupreškić* (n 91) §§669–692 (deducing the principle of reciprocal speciality, allowing the cumulative charges for different international crimes, from the nature of international crimes).

¹⁰³ Talmon (n 100) 422–423, 427.

I believe that a combination of those two methods is appropriate for the identification and interpretation of the principle of fair labelling in customary international law. As mentioned earlier, several aspects of the principle are in-built in pre-existing rules of international law, including customary ones. Moreover, the existence of this principle, as well as its content, can be tested and confirmed by observation of the following instances of state practice and *opinio juris*: a) domestic assertions or exercises of universal jurisdiction, b) domestic implementation or adjudication of international crimes in accordance with other jurisdictional bases; c) domestic assertions of vicarious jurisdiction.

5. Identifying and Interpreting the Principle of Fair labelling in ICL

In this section, I will explain why the principle of fair labelling can be considered a structural or general principle underpinning ICL. In **Sub-section a**, I will demonstrate how it can be ascertained by deduction from the general purposes of ICL, and from established rules and principles of international law. In **Sub-section b**, I will confirm that fair labelling exists as a general principle of ICL grounded in customary international law by induction from certain instances of state practice and *opinio juris*. As indicated earlier in the Introduction, the identification of the principle will be necessarily accompanied by its interpretation, with an emphasis on the issue of retroactive recharacterisation of crimes and its lawfulness in international law. This means that, after identifying what aspect or element of fair labelling is reflected in each purpose, rule or practice, I will seek to interpret what this particular aspect of the principle has to say about retroactive recharacterisation of crimes. In particular, I will try to determine whether the principle of fair labelling, as it exists in ICL today, discloses a preference for typically international labels as opposed to domestic, ordinary ones.

a. Deduction

Three types of deduction lead to the principle of fair labelling in ICL. The first operates on a normative level: the principle can be deduced from the purposes of the discipline, as well as evaluative or guiding principles contained therein. These are the principles of correspondence and *mens rea* which, although not binding in international law, have informed the making of international crimes and modes of liability. This type of deduction explains *why* it is important to uphold the principle of fair labelling in ICL and discloses a mere *preference* for certain types of labels. The second type of deduction is made from legal principles of ICL: personal culpability, *ne bis in idem*, proportionality of punishment and legality. These principles are binding under customary international law, treaty or general principles of law, and often *require* fair labels to be upheld. The third type of deduction is made from the specific rule governing legal recharacterisation of facts, whose very purpose is to give effect to the principle of fair labelling.

i. The purposes of ICL

As discussed earlier, certain fair labelling concerns are behind the creation of ICL as a distinct legal field and continue to inform how crimes, principles of liability and defences are defined and classified therein. Most importantly, certain specific purposes of ICL may only be achieved through fair labels. In fact, some of the justifications that have been attributed to fair labelling domestically and reflect the various purposes of criminal justice also find expression in ICL, such as deterrence and retribution. To this extent, the principle is reflected in the various purposes or functions of ICL, including those pertaining to the conviction and punishment of international crimes and to the process of conducting international criminal trials.

To begin with, fair labels play a key role in ensuring that ICL fulfils its retributive or condemnatory function.¹⁰⁴ In ICL, retribution has been understood not as a mere desire for revenge, but as an expression of the international community's condemnation of international crimes.¹⁰⁵ This function is partly achieved by the expressive or communicative role of labels and the stigmatisation which they lead to. As explained earlier, labels can convey, in simple and accessible terms, how a certain criminal conduct ought to be perceived by the members of a certain social group. By the same token, the message conveyed by the label will lead to a certain degree of social condemnation of the individual perpetrator. Therefore, by accurately portraying the seriousness of international crimes, fair labels lead to greater public opprobrium for these crimes, thus providing just retribution to their perpetrators.¹⁰⁶

Relatedly, ICL is often said to pursue an expressive or symbolic function for victims of international crimes.¹⁰⁷ The greatest satisfaction that international criminal justice can offer victims comes not so much from the punishment of individual perpetrators or monetary compensation, but from what an international conviction represents or symbolises to them:¹⁰⁸ an official and public recognition of their loss and sufferings. One of the functions of fair labelling in criminal law generally is precisely to communicate the particulars of the crime to its victims. Thus, arguably, the symbolic

¹⁰⁴ Beth Van Schaack, 'Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals' (2008) 97 *GeoLJ* 119, 146–147; *Krstić Case* (Appeal Judgment) ICTY-98-33-A (19 April 2004) §§36–37.

¹⁰⁵ *Al Mahdi* (n 32) §67; *Krajinšnik Case* (Appeal Judgment) ICTY-00-39-A (17 March 2009) §§ 775; *Erdemović Case* (Sentencing Judgment) ICTY-96-22-T (29 November 1996) §65; Van Schaack (n 104) 146.

¹⁰⁶ *Krstić* Appeal Judgment (n 104) §§36–37; *R v Finta*, [1994] 1 SCR 701 815.

¹⁰⁷ Conor McCarthy, 'Victim Redress and International Criminal Justice: Competing Paradigms, or Compatible Forms of Justice?' (2012) 10 *JICJ* 351, 365–367; Bill Wringer, 'Why Punish War Crimes? Victor's Justice and Expressive Justifications of Punishment' (2006) 25 *L&Phil* 159, 185.

¹⁰⁸ Sofia Stolk, 'The Victim, the International Criminal Court and the Search for Truth: On the Interdependence and Incompatibility of Truths about Mass Atrocity' (2015) 13 *JICJ* 973, 991 (quoting Paola Massidda, Principal Counsel of the Office of Public Counsel for Victims in the Lubanga case, ICC); McCarthy (n 107) 366–367.

function of ICL can only be achieved if its criminal labels are representative of the seriousness of those crimes and, in particular, of the harm and consequences which they have caused to the victims.¹⁰⁹

Additional functions of ICL are crime deterrence and prevention, which should ultimately contribute to international peace and security.¹¹⁰ The role of fair labelling in this regard has to do with the stigmatising effect of labels and their importance for signalling appropriate penalties.¹¹¹ As mentioned earlier, the stigma generated by a certain criminal label may have a wide array of detrimental effects on perpetrators, such as reduced employability, difficult access to education and social ostracism, which often constitute punishment in themselves.¹¹² Accurate labels are also important for providing notice of the penalties applicable to different crimes.¹¹³ It is the severity of those effects, i.e. both the stigma and the punishment attached to the label, which contributes to individual and general deterrence and crime prevention in ICL. By appropriately labelling international crimes, a message is sent to past and future perpetrators that serious consequences arise from their commission.¹¹⁴ This, in turn, helps to prevent future international crimes from being committed, thereby fostering international peace and security.

¹⁰⁹ See van Sliedregt (n 22) 1182–1183; Andrea Raab and Siobhan Hobbs, ‘Forced Relationships: Prosecutorial Discretion as a Pathway to Survivor-Centric Justice’ (*Opinio Juris*, 13 September 2018) <<http://opiniojuris.org/2018/09/13/forced-relationships-prosecutorial-discretion-as-a-pathway-to-survivor-centric-justice/>> accessed 25 August 2019.

¹¹⁰ Linda M Keller, ‘Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms’ (2007) 23 *ConnJ Int'l L* 209, 270; Akhavan (n 53) 12; *Erdemović*, Sentencing Judgment (n 105) §§58, 64; *Bemba Case* (Decision on Sentence pursuant to Article 76 of the Statute) ICC-01/05-01/08 (21 June 2016) §11.

¹¹¹ See *supra* note 50.

¹¹² *Bemba* Decision Re-sentencing (n 56) §138.

¹¹³ See *supra* note 50 and Section 4(v) *infra*.

¹¹⁴ Nersessian (n 16) 255, 262; *Krstić* Appeal Judgment (n 104) §37; Akhavan (n 53) 7, 12.

International criminal justice has also been associated with fostering truth and reconciliation. Although truth-telling is not a primary function of ICL, it is a desirable effect of international criminal trials.¹¹⁵ The role of fair labels in this regard is to provide an accurate recollection or record of the events and to communicate them to the general public.¹¹⁶ Fair labelling may also play an important role in relation to peace and reconciliation,¹¹⁷ by allowing different interests to be balanced and reflected in criminal labels, such as those of the accused, victims and the public at large.¹¹⁸ Thus, the more representative of those interests the label is, the more conducive to peace and reconciliation it may be.

On balance, the various purposes of ICL show a profound reliance if not dependence on fair labels. It appears that the more specific and tailored the label is to the international context, the more effective it may be in achieving the various functions of ICL. International labels normally convey information which is essential for achieving the retributive, deterrent, preventive, expressive, truth-telling and reconciliatory functions of ICL. This information is often missing in domestic criminal labels and includes the particular seriousness of international crimes, their specific context, the higher degree of responsibility of some of their perpetrators and their more blameworthy mental state.¹¹⁹

ii. Mens rea and correspondence

The principles of correspondence and *mens rea* (also known as the ‘subjective principle’) revolve around ideas of choice and belief. They seek to give effect to the principle of

¹¹⁵ Stolk (n 108) 975; Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2003) 174–176; Mirjan Damaska, ‘What Is the Point of International Criminal Justice’ (2008) 83 Chi-Kent LRev 329, 332–333, 335.

¹¹⁶ Guilfoyle (n 22) 6, 14; Nersessian (n 16) 255.

¹¹⁷ On reconciliation as a goal of ICL, see Drumbl (n 115) 12, 62, 69, 150; *Kambanda* (Judgment) ICTR 97-23-S (4 September 1998) §26; *Erdemović* Sentencing Judgment (n 105) §58; *Al Mahdi* (n 32) §67.

¹¹⁸ See Raab and Hobbs (n 109).

¹¹⁹ Similarly, Zawati (n 17) 39 (in relation gender-based international crimes); Nersessian (n 16) 262.

individual autonomy, by holding that individuals should only suffer criminal censure if they have chosen to engage in the prohibited behaviour (intention) or, at the very least, if they have personally foreseen the risk of causing a prohibited harm (advertent recklessness).¹²⁰

The principle of *mens rea* precludes criminal liability in respect of a given harm unless the perpetrator intended to cause or knowingly risked causing that harm,¹²¹ and believed in the factual circumstances which led to it.¹²² At the same time, because intention, recklessness or belief are necessarily attached to particular fact(s) or consequence(s), correspondence or equivalence between such mental and objective elements is necessary to uphold the principle of *mens rea*. Accordingly, the principle of correspondence dictates that each element of the *actus reus* must be covered by the same or an equivalent mental state required for the offence.¹²³ The implication is that there should be no objective or strict liability in relation to any element of the crime. Likewise, constructive liability, whereby fault as to a lesser degree of harm can ground liability for a more serious harm, ought to be rejected.¹²⁴ For instance, if the material element of a crime is to cause injury, there should be intention or recklessness to cause injury, not any lesser degree of harm.

The subjective and correspondence principles are closely related to the principle of fair labelling in two principal ways. First, the *mens rea* of a crime can only be

¹²⁰ Ashworth, *Principles* (n 36) 75–77; Adam Jackson and Tony Storey, ‘Reforming Offences Against the Person: In Defence of “Moderate” Constructivism’ (2015) 79 JCL 437, 439, 441; Barry Mitchell, ‘In Defence of a Principle of Correspondence’ (1999) CrimLR 195, 195–197, 205.

¹²¹ Ashworth, *Principles* (n 36) 75; Andrew Ashworth, ‘A Change of Normative Position: Determining the Contours of Culpability in Criminal Law’ (2008) 11 NCrimLR 232, 235; *R v Martineau*, [1990] 2 SCR 633 634, 645; *R v Vaillancourt*, [1987] 2 SCR 636 637.

¹²² Ashworth, ‘Change’ (n 121) 235–236; Ashworth, *Principles* (n 36) 75.

¹²³ Ashworth, ‘Elasticity’ (n 1) 45–46, 50, 52; Jeremy Horder, ‘Questioning the Correspondence Principle - A Reply’ (1999) CrimLR 206, 208.

¹²⁴ Ashworth, *Principles* (n 36) 76–77; Ashworth, ‘Elasticity’ (n 1) 52; Ashworth, ‘Change’ (n 121) 236, 240; Mitchell, ‘Correspondence’ (n 120) 195.

coterminous with the *actus reus* if both elements are accurately reflected in the offence's label. For instance, the label 'murder' generally expresses an intent to kill. Therefore, some have argued that its use to cover death caused by intentional grievous bodily harm would be inconsistent with the principles of fair labelling and correspondence.¹²⁵ In short, correspondence cannot be achieved without fair labels.¹²⁶

Secondly, breaches of fair labelling may lead to breaches of the subjective and correspondence principles. This is because overly broad criminal labels or labels that do not accurately capture the individual conduct come close to constructive liability, i.e. instances where the individual is labelled for harm that they did not intend or knowingly risk. Consider the example of a broad offence of 'causing personal harm to another' with a correspondingly broad intention to cause harm, which would be satisfied if the victim died or suffered a mere scratch. This would not only be contrary to the principle of fair labelling but also lead to a conviction for harm more severe than the one intended or personally foreseen.¹²⁷

Therefore, although each principle addresses a separate concern, it appears that correspondence and *mens rea* presuppose compliance with fair labelling.¹²⁸

Despite their intuitive appeal, the principles of *mens rea* and correspondence are neither binding nor absolute and have been countered by some opposing trends. Notably, many subjectivists concede that, given certain policy considerations, negligence, objective recklessness and even strict liability are acceptable mental states for certain crimes in some limited circumstances, particularly where the activity in question involves

¹²⁵ Tadros (n 53) 69; Jackson and Storey (n 120) 440.

¹²⁶ Ashworth, 'Elasticity' (n 1) 53–54; Ashworth, 'Change' (n 121) 240.

¹²⁷ Ashworth, 'Elasticity' (n 1) 46, 48–49, 53.

¹²⁸ Zawati (n 17) 49, 52; Mitchell, 'Correspondence' (n 120) 199.

a high risk of serious harm.¹²⁹ Moreover, certain instances of constructive liability have been accepted in the criminal law of states adopting a predominantly subjectivist approach. Examples have included the crimes of murder and unlawful act manslaughter and some offences against the person.¹³⁰

Nevertheless, even those opposing trends seem to place fair labelling at the centre of their concerns.¹³¹ It appears that one of their main criticisms of the principles of *mens rea* and correspondence is that these do not necessarily lead to fair labels.¹³² For instance, by focussing too much on the mental element, the principles of *mens rea* and correspondence may lead to labels that may not fully capture the perpetrator's conduct.¹³³ Likewise, constructive liability has been defended because of its alleged consistency with the principle of fair labelling, i.e. its ability to provide a full picture of the perpetrator's conduct, including any inadvertent consequences thereof.¹³⁴

Therefore, it seems that both the subjectivist and constructivist paradigms have a common interest in upholding the principle of fair labelling. Importantly, a compromise between the two approaches seems to require labels which are reflective not only of the perpetrator's *mens rea* and the corresponding elements of the *actus reus*, but of the full range of consequences of the conduct, including any distinctions between more and less

¹²⁹ Ashworth, 'Change' (n 121) 75–76; *ibid* 236–238; Mitchell, 'Correspondence' (n 120) 195–197.

¹³⁰ See Ashworth, 'Elasticity' (n 1) 48–49, 52; Jackson and Storey (n 120) 439–441; *DPP v Smith* [1960] 3 All ER 161 (HL) (in English Criminal Law); Section 2.03, American Law Institute, *Model Penal Code: Official Draft and Explanatory Notes* (1985); Ashworth, 'Change' (n 121) 255 (in the United States); Section 229, Criminal Code of Canada 1985 (RSC, 1985, c C-46) (in Canada).

¹³¹ Jackson and Storey (n 120) 443–445, 447; Jeremy Horder, 'A Critique of the Correspondence Principle' (1995) *CrimLR* 759, 761, 763, 770; Ashworth, 'Change' (n 121) 252.

¹³² Jackson and Storey (n 120) 444; Horder, 'Questioning' (n 123) 209–210; Horder, 'Critique' (n 131) 761–763, 765–767.

¹³³ Jackson and Storey (n 120) 444; Horder, 'Questioning' (n 123) 209; Horder, 'Critique' (n 131) 765–767.

¹³⁴ Jackson and Storey (n 120) 444, 446; Horder, 'Questioning' (n 123) 210, 212; Horder, 'Critique' (n 131) 765–766; Horder, 'Rethinking' (n 11) 339–343, 351.

serious harms and different levels of fault.¹³⁵ Thus, ideally, to address the demands of the principles of fair labelling, *mens rea* and correspondence, as well as the concerns which have given rise to constructive liability, labels should be as detailed as possible, capturing the key mental and objective elements of the crime and how they relate to one another.¹³⁶ However, as both subjectivists and constructivists concede, a complete labelling of criminal conduct is often unachievable and undesirable. After all, labels can and should only depict the essence of one's wrongdoing, rather than each and every one of its features.¹³⁷

Similar trends can be observed in ICL. In particular, although it largely follows the subjective and correspondence principles, mental states that come close to negligence or objective recklessness have been exceptionally accepted. An example is the *mens rea* of superior responsibility, which is satisfied by constructive knowledge (a 'should have known' standard).¹³⁸ There are also limited instances of constructive liability since crimes such as murder or extermination (as war crimes or crimes against humanity) are satisfied by an intention to cause death or serious bodily harm.¹³⁹

The presence of both the subjectivist and constructive paradigms in ICL is a sign that the principle of fair labelling ought to be upheld in respect of crimes, modes of liability and defences under international law. Specifically, compliance with both

¹³⁵ Jackson and Storey (n 120) 444; Horder, 'Critique' (n 131) 765.

¹³⁶ Jackson and Storey (n 120) 446–447.

¹³⁷ Mitchell, 'Correspondence' (n 120) 202–203; Horder, 'Critique' (n 131) 759.

¹³⁸ Cassese and others (n 18) 51, 53–54, 184–186; *Blaškić Case* (Appeal Judgment) ICTY-95-14-A (29 July 2004) §§61–62; *Bagilishema Case* (Appeal Judgment) ICTR-95-1A (3 July 2002) §§33–37. See also Art 28(a)(i) and (b)(i), Rome Statute.

¹³⁹ See, e.g., *Stanišić & Župljanin Case* (Appeal Judgment) ICTY -08-91-A (30 June 2016) §1036; *Setako Case* (Appeal Judgment) ICTR-04-81-A (28 September 2011) §257; *Stakić Case* (Appeal Judgment) ICTY-97-24 (22 March 2006) §§584–587, 624. But note that, for murder as an *actus reus* of genocide, the ICJ has held that death must have been intended. See *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Merits) [2015] ICJ Rep 3 §§156, 474.

paradigms seems to demand criminal labels that are reflective of the perpetrator's conduct and mental state, as far as possible.¹⁴⁰ This, in turn, evinces a preference for more specific labels as opposed to generic ones.

iii. Personal culpability

The principle of personal culpability or individual criminal responsibility is a well-established principle of ICL.¹⁴¹ It has not only been transposed from domestic legal systems,¹⁴² but is now part of customary international law, at the very least since it was recognised in the Charter and Judgments of the Nuremberg and Tokyo IMTs,¹⁴³ and confirmed in subsequent manifestations of state practice and *opinio juris*.¹⁴⁴ According to this principle, individuals can only be held criminally responsible for their own individual participation in a crime.¹⁴⁵ This has two main implications. First, collective responsibility is precluded.¹⁴⁶ Second, the degree of criminal responsibility attributed to each perpetrator must accord with their own individual contribution to the crime, including their mental state.¹⁴⁷ Significantly, to the extent that the label of the crime and, in particular, that of the mode of liability, is essential for conveying said degree of criminal responsibility, the principle of culpability necessitates fair labels.¹⁴⁸ As the Appeals

¹⁴⁰ *R v Martineau* (n 121) 637.

¹⁴¹ See Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law* (OUP 2014) 41.

¹⁴² *Tadić* Appeal Judgment (n 23) §186.

¹⁴³ Art 7(1), Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ('London Agreement') (adopted 8 August 1945); Art 1, Charter of the International Military Tribunal for the Far East, Special proclamation by the Supreme Commander for the Allied Powers at Tokyo (adopted 19 January 1946) TIAS 1589.

¹⁴⁴ Principle I, UNGA, 'Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal' (1950) YILC vol II para 97; Art IV, Genocide Convention.

¹⁴⁵ Cassese (n 91) 33; van Sliedregt (n 22) 1171–1172.

¹⁴⁶ Cassese (n 91) 33.

¹⁴⁷ *ibid* 33–34; Stewart (n 22) 173; van Sliedregt (n 22) 1173; Jackson (n 22) 884; Jennifer Martinez and Allison Marston Danner, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2004) 93 CalLRev 75, 79.

¹⁴⁸ Stewart (n 22) 176–177; Guilfoyle (n 22) 14, 24; van Sliedregt (n 22) 1184–1185; Jackson (n 22) 890–891.

Chamber of the ICC has held, the distinction between different modes of liability is ‘not merely terminological’, but ‘contributes to a proper labelling of the accused person’s criminal responsibility’.¹⁴⁹

Two examples can help illustrate the point. First, the mode of liability known as JCE III has been the object of severe criticism for expressing a higher level of culpability than the one required by its specific elements. This is because members of a common enterprise are held responsible and so stigmatised as principal perpetrators for an incidental crime which they did not intend to commit but merely foresaw as a risk arising from the implementation of the common plan.¹⁵⁰ A similar mismatch between the label’s stigmatising effect and the accused’s actual degree of blameworthiness has been observed as regards superior responsibility. Specifically, the message that this label conveys is that the commander is personally responsible, as an accessory, for the crimes committed by their subordinates, even if their own personal fault was simply a failure to prevent or to punish such crimes.¹⁵¹ This is particularly worrying for crimes of special intent, such as genocide, since the superior need only have actual or constructive knowledge of the subordinate’s intent, without any intent to assist the crime.¹⁵² In that light, some have argued that JCE III must not be applied to specific intent crimes,¹⁵³ and that superior responsibility should re-labelled as a *sui generis* ‘dereliction of duty’ crime.¹⁵⁴

These are, without a doubt, fair labelling concerns expressed through or together with the principle of culpability. This is a natural result of the overlap between the two

¹⁴⁹ See also *Lubanga* Appeal Judgment (n 22) §462.

¹⁵⁰ Guilfoyle (n 22) 18–19; Stewart (n 22) 171–178; van Sliedregt (n 22) 1179–1180.

¹⁵¹ *Bemba* Appeal Judgment, Concurring Separate Opinion of Judge Eboe-Osuji (n 32) §§194–202; Nersessian (n 1) 89–98; Stewart (n 22) 178–182; Martinez and Danner (n 147) 12–13; van Sliedregt (n 22) 1181–1182.

¹⁵² Nersessian (n 1) 92–93.

¹⁵³ Cassese (n 80) 121–123.

¹⁵⁴ Nersessian (n 16) 82.

principles: both seek to achieve proportionality between moral guilt and criminal responsibility. But it is also a reflection of how personal culpability is dependent on fair labelling, to the extent that criminal accountability can only be effectively expressed through criminal labels. Simply put, labels are a necessary component of individual criminal responsibility. For present purposes, this means that the principle of fair labelling, or aspects thereof can be inferred from the principle of personal culpability as it exists in ICL.

However, as demonstrated earlier, to fulfil the demands of both principles, it is not enough to have typically international labels as opposed to domestic ones. Aside from capturing the international dimension and the gravity of international crimes, criminal labels must also accurately reflect the specific degree of participation of the individual perpetrator.¹⁵⁵ This can be achieved, in part, by further refining or specifying the existing labels of modes of liability such as JCE and superior responsibility.¹⁵⁶ At the same time, certain modes of liability which are ordinarily found in domestic law have proven to be as appropriate, if not better suited to reflect the level of blameworthiness of certain perpetrators. This is the case of modes of liability such as aiding and abetting, ordering or instigating.¹⁵⁷ Thus, when it comes to modes of liability, it is not necessarily the case that existing international labels are more appropriate than domestic ones. Domestic law may actually provide for a wider and more varied catalogue of modes of liability. Yet it seems that the greater the spectrum and the level of detail of the modes of liability in a given

¹⁵⁵ See *Al Mahdi* (n 32) §60; *Chui* Judgment, Concurring Opinion of Judge Christine Van den Wyngaert (n 32) §§28–19.

¹⁵⁶ *Bemba* Appeal Judgment, Concurring Separate Opinion of Judge Eboe-Osuji (n 32) §§199–200.

¹⁵⁷ *Guilfoyle* (n 22) 15, 24, 28; *Cassese* (n 80) 120.

system, the more in line they will be with the demands of the principles of individual culpability and fair labelling.¹⁵⁸

iv. *Ne bis in idem* and cumulative convictions

The principle of *ne bis in idem*, also known as the prohibition of double jeopardy, has been recognised in human rights treaties¹⁵⁹ and in the statutes of various international criminal tribunals, including the ICC, ICTY and ICTR.¹⁶⁰ It precludes the trial and conviction of an individual who has finally been convicted or acquitted for the same offence.¹⁶¹

There is one particular aspect of this principle that is closely connected with fair labelling, namely, the regulation of cumulative charges and convictions.¹⁶² In this regard, different international criminal tribunals have warned that:

multiple convictions create a very real risk of prejudice to an accused, including the *stigma* inherent in being convicted of additional crimes and practical consequences, such as a potential impact on sentencing in the same and subsequent proceedings (...) and eligibility for early release.¹⁶³

This risk of prejudice exists precisely because of criminal labels and their fundamental role in stigmatising and sentencing individuals as well as recording previous

¹⁵⁸ *Lubanga* Appeal Judgment (n 22) §462.

¹⁵⁹ Art 14(7), ICCPR; Art 4, ECHR; Art 8(4), ACHR.

¹⁶⁰ Art 20, Rome Statute; Art 10, UNSC, Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted 25 May 1993 by Res 827) (ICTY Statute); Art 9, UNSC, Statute of the International Criminal Tribunal for Rwanda (adopted 8 November 1994 by Res 955) (ICTR Statute).

¹⁶¹ Immi Tallgren and Astrid Reisinger Coracini, 'Article 20: Ne Bis in Idem' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (Beck/Hart 2016) 901; *Renzaho Case* (Appeal Judgment) ICTR-97-31-A (1 April 2011) §16.

¹⁶² On the relevance of labels for the principle of *ne bis in idem*, see *Bagaragaza Case* (Decision on Rule 11 bis Appeal) ICTR-2005-86-11 bis (30 August 2006) §17.

¹⁶³ *Bemba Case* (Judgement pursuant to Article 74 of the Statute) ICC-01/05-01/08-3343 (21 March 2016) §745 (emphasis added). See also *Kunarac et al Case* (Appeal Judgment) ICTY-96-23 & ICTY-96-23/1-A (12 June 2002) §169; *Case 001* (Appeal Judgment) 001/18-07-2007-ECCC/SC (03 February 2012) §§295–296.

convictions. To this extent, they cannot escape the regulation of cumulative charges or convictions.

In the context of international criminal tribunals, cumulative charges or convictions have been permitted even if the crimes in question apply to the *same conduct*, provided that *each* crime requires proof of an element not contained in the other.¹⁶⁴ This relationship has been described as ‘reciprocal speciality’, i.e. where each crime is more specific than another in at least one respect.¹⁶⁵ If instead one offence is simply more specific than the other (i.e. it has elements in addition to the other), the principle of *lex specialis* applies, giving preference to the more specific crime.¹⁶⁶ Similarly, if one crime is lesser included than the other (i.e. all its legal requirements are met by the commission of another, more serious offence), then the more serious crime consumes or subsumes the less serious one in what is known as the ‘principle of consumption’.¹⁶⁷

Crucially, the relationship between different categories of crimes under international law, or between domestic and international crimes is more often than not one of reciprocal speciality.¹⁶⁸ This is because, although there might be overlaps, it is usually the case that each crime contains a distinct element, mental or material.¹⁶⁹ More generally, each international crime protects a distinct set of interests, which are also very

¹⁶⁴ *Bemba* Trial Judgment (n 163) §§744–747; *Tolimir Case* (Appeal Judgment) ICTY-05-88/2-A (08 April 2015) §§616–617; *Case 001*(n 163) §§287–288, 298–299; *Nahimana et al Case* (Appeal Judgment) ICTR-99-52 (28 November 2007) §§1019–1020, 1026; Guénaél Mettraux, *International Crimes and the Ad Hoc Tribunals* (OUP 2005) 317–318.

¹⁶⁵ *Kupreškić* (n 91) §685.

¹⁶⁶ *Čelebići Case* (Appeal Judgment) ICTY-96-21-T (20 February 2001) §413; *Kupreškić* (n 91) §§683–684; *Case 001* (n 163) §298.

¹⁶⁷ *Kupreškić* (n 91) §686–688; *Kunarac* (n 163) §170.

¹⁶⁸ On the difference between ordinary and international crimes, see Art 10(2)(a), ICTY Statute; Art 9(2)(a), ICTR Statute; Grover (n 30) 165; Jordan J Paust, ‘It’s No Defense: Nullum Crimen, International Crime, and the Gingerbread Man’ (1997) 60 *AlbLRev* 657, 663.

¹⁶⁹ *Bagaragaza* Rule 11 bis Appeal (n 162) §§15–17; *Bagaragaza Case* (Decision on the Prosecution Motion for Referral to the Kingdom of Norway – Rule 11 bis of the Rules of Procedure and Evidence) ICTR-2005-86-11 bis (19 May 2006) §16.

different in nature and scale from the values protected by domestic crimes.¹⁷⁰ To the extent that those various elements and interests are communicated to the public through labels, these do matter for the purposes of cumulative charges and convictions.¹⁷¹ Specifically, labels can indicate whether certain crimes are sufficiently different. By the same token, it is this difference that justifies the cumulation of labels and their ensuing stigma so as to reflect the totality of the accused's culpability.¹⁷² Thus, in essence, the principle of *ne bis in idem* suggests that it is not fair to label and stigmatise someone twice for the same crime.

This aspect of fair labelling which lies implicit in the principle of *ne bis in idem* has three important consequences in the context of retroactive recharacterisation of crimes. First, ordinary criminal labels, found in domestic law, are not necessarily less important, less accurate or less fair than international ones. Rather, each label may reflect different interests and aspects of the individual conduct which deserve to be reflected upon charging and conviction. Second, if the domestic offence is simply broader than the international one, the latter ought to prevail. Third, although ideally both the international and the domestic label should be applied (if sufficiently distinct), this might not happen in practice, especially in states where the implementation of substantive rules of ICL is deficient or inexistent. In those instances, other aspects of fair labelling need to be resorted to in order to decide which label would be more appropriate in a given case.

¹⁷⁰ *Bagaragaza* Rule 11 bis Appeal (n 162) §§15–17; *Bagaragaza* Rule 11 bis Decision (n 169) §16; *Kupreškić* (n 91) §§693–694.

¹⁷¹ *Bagaragaza* Rule 11 bis Appeal (n 162) §17.

¹⁷² *Mettraux* (n 164) 356; *Bemba* Trial Judgment (n 163) §745; *Čelebići* Appeal Judgment (n 166) §§429–430; *Case 001* (n 163) §299.

v. Proportionality of punishment

The principle of proportionality of punishment (or proportionate sentencing) requires that the penalty applied to the accused be proportionate to the seriousness of the offence and the perpetrator's culpability, both considered in themselves and in comparison to other wrongful acts.¹⁷³ Proportionate sentencing finds its rationale in the retributive function of punishment, according to which the penalty is a deserved response to criminal wrongdoing.¹⁷⁴ In the context of ICL, the principle has also been linked to broader, collective goals of international criminal justice, such as peace and reconciliation.¹⁷⁵ It has been qualified as a general principle of criminal law¹⁷⁶ and there is sufficient evidence to support its customary status in international law. In particular, it has been recognised implicitly in human rights instruments¹⁷⁷ and explicitly in the Fourth Geneva Convention¹⁷⁸ as well as in the statutes of various international criminal tribunals.¹⁷⁹ One of its most common expressions is the legal requirement to base the sentence on the gravity of the crime, the degree of responsibility of the offender and their individual circumstances.¹⁸⁰

¹⁷³ Kai Ambos, *Treatise on International Criminal Law: Volume II: The Crimes and Sentencing* (OUP 2013) 288–289; Silvia D'Ascoli, *Sentencing in International Criminal Law: The UN Ad Hoc Tribunals and Future Perspectives for the ICC* (Hart 2011) 25–26.

¹⁷⁴ Ambos (n 173) 288; Allison Marston Danner, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing' (2001) 87 *VaLRev* 415, 437; *Al Mahdi* (n 32) §67; *Erdemović Sentencing Judgment* (n 105) §§58, 65.

¹⁷⁵ *Bemba Decision on Sentence* (n 110) §11; Ambos (n 173) 288; D'Ascoli (n 173) 36; *Tadić Case* (Sentencing Judgment) ICTY-94-1 (11 November 1999) §7; *Furundžija* (n 31) §288; *Erdemović Sentencing Judgment* (n 105) §58.

¹⁷⁶ Ambos (n 173) 287; D'Ascoli (n 173) 22–25.

¹⁷⁷ See, e.g., Art 5, UDHR; Art 3, Protocol 7 ECHR; Art 5.2, ACHR; Art 5, African Charter; Art 49(3), Charter of Fundamental Rights of the European Union (adopted 26 October 2012) 2012/C 326/02.

¹⁷⁸ See Art 67.

¹⁷⁹ See, e.g., Arts 76(1) and 81(2)(a), Rome Statute; Art 24(2), ICTY Statute; Art 23(2), ICTR Statute; Art 19(2), SCSL Statute.

¹⁸⁰ *Prlić et al Case* (Appeal Judgment) ICTY-04-74 (29 November 2017) §3130; *Al Mahdi* (n 32) §§67, 71–72.

As discussed earlier, given their stigmatising effects, labels are instrumental in the achievement of the retributive function of punishment.¹⁸¹ Likewise, to the extent that they play a decisive role in the determination of penalties, they ought to be considered at the sentencing stage.¹⁸² There are two principal ways in which fair labelling concerns intersect with proportionate sentencing.

First, if the penalties attached to the various crimes and modes of liability are different, then the choice of criminal labels upon conviction will affect the penalty imposed at the sentencing state.¹⁸³ For example, if a certain conduct can be subsumed into both the crime of murder under domestic law and crimes against humanity under customary international law, the penalty resulting from a conviction for the latter may be greater than the one applied to the former.¹⁸⁴ Importantly, the more accurate the labels and their classification, the more proportionate the penalties tend to be *in abstracto* and *in concreto*.

Second, if there is no distinction between the penalties attached to the various crimes, that is, the same penalties are applicable across all crimes in question (which is the case for the crimes under customary international law, all subject to a maximum penalty of life imprisonment or death),¹⁸⁵ then greater reliance will be placed on criminal labels and the information they convey to calibrate the punishment.¹⁸⁶ Particularly significant circumstances include the gravity of the crime, the mental element, the means of perpetration, the consequences of the conduct, especially for victims, defences and the

¹⁸¹ *Erdemović* Sentencing Judgment (n 105) §§64–66.

¹⁸² See, e.g., *D'Ascoli* (n 173) 303–306; *Van Schaack* (n 104) 187; *Danner* (n 174); *Furundžija* (n 31) §§184, 186; *Erdemović* Sentencing Judgment (n 105) §65.

¹⁸³ *Castillo Petruzzi et al v Peru* (IACHR, 30 May 1999) §119; *R v Martineau* (n 121) 634–635, 645; *Ashworth, Principles* (n 36) 78.

¹⁸⁴ *R v Finta* (n 106) 815.

¹⁸⁵ Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (CUP 2010) 385–387.

¹⁸⁶ See *Nersessian* (n 16) 256; *Chalmers and Leverick* (n 4) 225.

degree of participation.¹⁸⁷ In the absence of specific tariffs of penalties, the label may be one of the few parameters on which a sentencing decision will be based. Thus, in this scenario too, more accurate labels are more conducive to proportionate sentences.

Admittedly, proportionate sentences are not always dependent on fair labels. The greater the discretion afforded to sentencing judges, the greater their ability to adjust the punishment according to the perpetrator's blameworthiness, regardless of the label.¹⁸⁸ For example, if the offence's label is excessive in relation to the accused's culpability, sentencing discretion allows the judge to adopt a less severe penalty to counterbalance the label's stigmatising effect.¹⁸⁹ In the same vein, a wide margin of sentencing discretion allows judges to correct or compensate, through fair and proportionate punishment, the effect of labels that understate the gravity of the conduct.¹⁹⁰ However, the price of wide sentencing discretion and inaccurate labels are inconsistent sentencing decisions.¹⁹¹ Moreover, the greater the significance and the impact of labels within a certain criminal system, particularly on the general public, the lesser control the sentencing judge will have over the proportionality of punishment.¹⁹² As discussed earlier, the label applied upon conviction is in itself a form of punishment, whose effect on the accused remains independently of the penalties imposed.¹⁹³

¹⁸⁷ See, e.g., *Bemba Decision on Sentence* (n 110) §§15–17; *Krajinšnik* (n 105) §§778–781; *Akayesu Case* (Appeal Judgment) ICTR-96-4-A (1 June 2001) §§414–417; *Nikolić Case* (Sentencing Judgment) ICTY-94-2-S (18 December 2003) §§144–146. See also *Ambos* (n 173) 291–302; *D'Ascoli* (n 173) 31–32, 208–210.

¹⁸⁸ Ashworth, 'Elasticity' (n 1) 50–51; Van Schaack (n 104) 187; *Erdemović Case* (Appeal Judgment) ICTY-96-22 (7 October 1997), Separate and Dissenting Opinion of Judge Li §19.

¹⁸⁹ See *Furundžija* (n 31) §290; Ashworth, 'Elasticity' (n 1) 51.

¹⁹⁰ Ashworth, 'Elasticity' (n 1) 51.

¹⁹¹ *Zawati* (n 17) 30; *Ohlin* (n 82).

¹⁹² Ashworth, 'Elasticity' (n 1) 51.

¹⁹³ *Nersessian* (n 16) 224, 262; *Mettraux* (n 164) 319; *Krstić Appeal Judgment* (n 104) §§37–38; *R v Finta* (n 106) 815; *Čelebići Appeal Judgment* (n 166) Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna §23; *Case 001* (n 163) §295.

On balance, given the importance of labels for the determination of sentences, it is safe to say fair labelling concerns inform the principle of proportionate sentencing.¹⁹⁴ In the context of sentencing, a ‘fair’ label seems to be one that provides the most complete picture of the accused’s culpability, including the gravity of the crime, the mental state, the means of commission, the mode of participation and any significant consequences of the crime. Labels that lack one or more of those elements may lead to disproportionate sentences, but not necessarily so.

vi. The principle of legality

The principle of legality in general international law was extensively discussed in Chapter 2.¹⁹⁵ Of particular significance was the finding that this principle is not entirely indifferent to labels.¹⁹⁶ To this extent, the principles of legality and fair labelling overlap in three important ways.

First, as with the principle of legality, fair labelling seeks to provide, through labels, fair notice of crimes, penalties as well as other consequences of criminal conduct.¹⁹⁷ This means that both principles lean towards clarity and specificity.¹⁹⁸

Secondly and most importantly, Chapter 2 concluded that criminal labels are subject to the principle of legality if their retroactive recharacterisation is, in itself, substantively detrimental to the accused. This may happen if the label applied upon conviction leads to greater social stigmatisation than the previously applicable one, with potential consequences for some of the accused’s most fundamental rights, such as liberty and family life. This is perhaps an indication that certain chiefly labelling concerns are

¹⁹⁴ Similarly, Nersessian (n 16) 256; *Kvočka* (n 22) §92.

¹⁹⁵ See Chapter 2, especially Sections 2 and 4.

¹⁹⁶ See, in particular, Chapter 2, Sections 2 (c) and 4.

¹⁹⁷ Ashworth, *Principles* (n 36) 65; Zawati (n 17) 37, 43–44, 53.

¹⁹⁸ Ashworth, *Principles* (n 36) 65; Zawati (n 17) 41–42; Ohlin (n 82).

subsumed within the *nullum crimen* principle. In fact, what comes across at the intersection of both principles is the need to ensure that the individual is not excessively stigmatised for conduct that was not considered to be (as) blameworthy at the time of the events. This means that the retroactive application of a more stigmatising label, even if more accurate, would arguably run contrary to both principles of legality and fair labelling. This could happen if, for example, an individual is convicted of genocide when the conduct could only have been classified as rape at the time it took place.

Thirdly, it was also shown in Chapter 2 that different criminal labels often carry with them different material and mental elements, defences, penalties and conditions of punishment or prosecution. For instance, while most domestic ordinary crimes are subject to statutes of limitations, international ones are usually not. Retroactive changes in any of those elements or rules might substantively affect the rights of the accused, which means that they too are subject to the principle of legality.¹⁹⁹ If one is to interpret the principle of fair labelling in line with the principle of legality, the application of a label that leads to such retroactive changes should be deemed unfair. This might be so even if the subsequent label itself is more lenient or accurate than the applicable one, but the other substantive consequences are more detrimental to the accused.

In sum, three aspects of the principle of fair labelling can be deduced from the principle of legality: a) a general preference for more specific labels, b) a legal requirement to refrain from recharacterising labels that are in themselves more stigmatising than previously applicable ones, c) or that lead to retroactive changes in elements or rules of criminal law that are substantively detrimental to the accused.

¹⁹⁹ See Chapter 1, Section 4(d), and Chapter 2, Section 4.

vii. Legal recharacterisation of facts

As explained earlier, legal recharacterisation of facts is the process by which a criminal tribunal changes the legal characterisation of the facts contained in the charges, i.e. the crimes and/or mode(s) of liability with which the accused was initially charged are replaced for other ones found in the same applicable law.²⁰⁰ This process has been deemed lawful by human rights bodies and international criminal tribunals, provided that the accused's fair trial rights are complied with.²⁰¹ Three different aspects of legal recharacterisation of facts are associated with the principle of fair labelling.

First, as has been noted in the context of the ICC, legal recharacterisation of facts is a tool with which tribunals can 'adjust the legal characterisation *to better accord with* the facts and circumstances described in the charges'.²⁰² In this way, one of its purposes is precisely to give effect to the principle of fair labelling.²⁰³

Second and relatedly, in all international criminal tribunals which have recognised this device, procedural safeguards have been put in place to counter the detrimental effects of the recharacterised labels on the accused.²⁰⁴ This is in recognition of the fact that labels play a significant story-telling role. As has been noted elsewhere, each label carries with it a different narrative, and to this extent moulds the evidence and the way it

²⁰⁰ See, generally, Fry (n 3).

²⁰¹ *Block v Hungary* App no 56282/09 (ECtHR, 25 January 2011) §§22–25; *Fermin Ramírez v Guatemala* (IACHR, 20 June 2005) §§67–80; *Prlić* (n 180) §55; *Gbagbo and Blé Goudé Case* (Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled 'Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court) ICC-02/11-01/15-369 (18 December 2015) §§31–32; *Case 002* (Decision on the Applicability of Joint Criminal Enterprise) 002/19-09-2007/ECCCITC (12 September 2011) §§24–25.

²⁰² Emphasis added. *Katanga* Regulation 55 Decision, Dissenting Opinion of Judge Van den Wyngaert (n 32) §5. See also Regulation 55(1) Regulations of the Court 2004 (ICC-BD/01-01-04).

²⁰³ *Katanga* Regulation 55 Decision, Dissenting Opinion of Judge Van den Wyngaert (n 32) §§27–28.

²⁰⁴ See *supra* note 201.

is presented, interpreted and weighted during trial.²⁰⁵ Simply put, labels have a significant impact on both the procedure and substance of a trial. Accordingly, fair trial rights, including, in particular, the rights to a detailed notification of the charges and to an effective defence are necessary procedural safeguards in the substantive determination of the charges against an accused.²⁰⁶

Third, although legal recharacterisation of facts is subject to prior notification and must be consistent with other fair trial rights, it does not dictate the types of labels that ought to prevail. In particular, there is no pre-established preference for international labels as opposed to domestic ones, for more specific over more general ones, or for more severe over more lenient ones.²⁰⁷ Instead, the aim of legal recharacterisation of facts, as underpinned by the principle of fair labelling, is to apply the label which most accurately describes the accused's culpability.²⁰⁸

Thus, although fair labelling is the very purpose of legal recharacterisation of facts, the only limit that its regulation presently seems to impose on the selection of labels is compliance with the accused's fair trial rights. Given the similarities between this process and the phenomenon of retroactive recharacterisation of crimes, the same procedural safeguards that apply to the former ought to apply to the latter.

²⁰⁵ Kevin Jon Heller, "A Stick to Hit the Accused With": The Legal Recharacterization of Facts under Regulation 55', *The Law and Practice of the International Criminal Court* (OUP 2015) 986, 988, 996–1003; Stewart (n 22) 210.

²⁰⁶ See *Katanga* Regulation 55 Decision, Dissenting Opinion of Judge Van den Wyngaert (n 32) §8. See also *Ruto and Sang* Decision on Defence Applications for Judgments of Acquittal, Reasons of Judge Eboc-Osuji (n 32) §328 (recognising the connection between fair trial rights and the principles of legality, fair labelling and culpability).

²⁰⁷ *Al Mahdi* (n 32) §60; *Chui* Judgment, Concurring Opinion of Judge Christine Van den Wyngaert (n 32) §§28–29.

²⁰⁸ *Al Mahdi* (n 32) §60; *Chui*, Concurring Opinion of Judge Christine Van den Wyngaert (n 32) §§28–29; *Katanga* Regulation 55 Decision, Dissenting Opinion of Judge Van den Wyngaert (n 32) §5.

b. Induction from State Practice and Opinio Juris

As explained earlier, the various aspects or parameters of the principle of fair labelling which can be deduced from the purposes of ICL and different rules of international law can be confirmed by observation of relevant instances of state practice and *opinio juris*. This method for identifying and interpreting principles or rules of customary international law (i.e. deduction followed by induction) is justified where state practice and/or *opinio juris* is limited or difficult to trace.²⁰⁹ This is precisely the case of fair labelling, given that explicit references to this principle cannot be found in international instruments, domestic legislation or decisions of national courts. Yet the substance of the principle is not only intertwined with a series of rules of international law, as I demonstrated in the previous section but can also be inferred from certain instances of state practice and/or *opinio juris*. Irrespective of the legal status of fair labelling in international law, observation of said practice can shed some light on how states have interpreted and applied it. Three sets of practices are particularly relevant in the context of retroactive recharacterisation of crimes, namely a) domestic assertions or exercises of universal jurisdiction; b) domestic implementation of international crimes under other bases of jurisdiction; c) domestic assertions or exercises of vicarious jurisdiction. In these three contexts, states have retroactively recharacterised crimes and other rules of ICL.

i. Universal jurisdiction

The bulk of state practice and *opinio juris* relating to universal jurisdiction has already been examined in Chapter 2, in the context of the principle of legality.²¹⁰ Nonetheless, there are two aspects of this practice which are especially relevant to the identification and interpretation of the principle of fair labelling and are worth reiterating.

²⁰⁹ Talmon (n 100) 421–422, 427.

²¹⁰ See Chapter 2, Section 3(a).

First, many states retroactively recharacterise crimes under international law into domestic offences when asserting or exercising universal jurisdiction domestically. Yet the majority states apply those crimes as such, that is, with their original and more specific international labels.²¹¹ This behaviour often seems to arise out of an obligation or at least a concern to fairly and accurately label the accused's conduct and to ensure that they receive the appropriate punishment, bearing in mind the requirements of the principle of legality.²¹² By the same token, domestic labels have been applied in some states to the extent that the application of international crimes enacted retroactively would breach the principle of legality.²¹³

²¹¹ See Amnesty International, 'Universal Jurisdiction: A Preliminary Survey of Legislation Around the World - 2012 Update' (2012) 1–2, 12 <<https://www.amnesty.org/en/documents/ior53/019/2012/en/>> accessed 25 August 2019 (noting that 166, i.e. approximately 86%, of the 193 UN member states have defined one or more of four crimes under international law - war crimes, crimes against humanity, genocide and torture – as crimes in their national law); UNGA 'The Scope and Application of the Principle of Universal Jurisdiction, Report of the Secretary-General Prepared on the Basis of Comments and Observations of Governments' (2010) UN Doc A/65/181 paras 30–33, 37, 41, 45, 47, 49, 51–52, 54. For a comprehensive and up-to-date survey of the investigation and prosecution of universal jurisdiction crimes domestically, see TRIAL International and others, 'Evidentiary Challenges in Universal Jurisdiction Cases - Universal Jurisdiction Annual Review 2019' (2019) <<https://trialinternational.org/latest-post/universal-jurisdiction-annual-review-2019-overcoming-evidentiary-challenges-though-collaboration/>> accessed 25 August 2019; TRIAL International and others, 'Make Way for Justice #4: Closing the Net on Impunity - Universal Jurisdiction Annual Review 2018' (2018) <<https://trialinternational.org/latest-post/make-way-for-justice-4-momentum-towards-accountability/>> accessed 25 August 2019; TRIAL International and others, 'Make Way for Justice #3: Closing the Net on Impunity - Universal Jurisdiction Annual Review 2017' (2017) <<https://trialinternational.org/latest-post/make-way-for-justice-3-closing-the-net-on-impunity/>> accessed 25 August 2019 (all showing that, in the majority of cases, charges for international crimes have been entered under international labels alone or alongside domestic ones).

²¹² See, e.g., *Scilingo Case*, Appeal Judgment, Supreme Court of Spain, Penal Section, Sentence No 798/2007, 01 October 2007 §§6, 8–9; Office of the Public Prosecutor v Julio Simón, Appeal judgment, S 1767 XXXVIII, ILDC 579 (AR 2005), 14 June 2005, Supreme Court of Argentina 1, 42–43, 50, 89, 213–214, 270–271; *Re Pinochet Ugarte* (Order of 6 November 1998) Investigating Judge, Court of First Instance of Brussels, Belgium §§3.2.2., 3.3.1.–3.3.2.; *R v Finta* (n 106) 705, 752, 812–813; *Prosecutor v Pinčić*, Court of Bosnia and Herzegovina, First Instance Verdict, Court of Bosnia and Herzegovina, Section I for War Crimes, X-KRŽ-08/502, 28 November 2008 1–2, 17–18; Fischer Case, Supreme Court of the German Democratic Republic (*Oberster Gerichtshof*), Judgment of 25 March 1966, cited in Ward N Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (TMC Asser Press 2006) 39–40. See also *Radilla-Pacheco v Mexico* (IACHR, 23 November 2009) §§238–241; *Heliodoro Portugal v Panama* (IACHR, 12 August 2008) §§181–183; UNGA 'The Scope and Application of the Principle of Universal Jurisdiction, Report of the Secretary-General' (2012) UN Doc A/67/116 para 10; Amnesty International (n 211) 13–15.

²¹³ See, e.g., *R v Sawoniuk* [2000] EWCA Crim 9 (CACD) (applying the domestic crime of murder to conduct constituting war crimes, in accordance with Section 1 of the UK War Crimes Act 1991, no longer in effect); Supreme Court of Norway, The Public Prosecuting Authority v Mirsad Repak, Case No HR-2010-2057-P, Judgment of 3 December 2010 106, 118 (applying the domestic crime of deprivation of liberty to conduct constituting war crimes and crimes against humanity); *Prosecutor v Mouhannad Droubi*,

Second, even when states have recharacterised universal jurisdiction crimes, they have sought to preserve their essential elements, as well as the applicable modes of liability and defences.²¹⁴ They do so in order to comply with the substantive limits to the principle of universality (i.e. prescription and adjudication of crimes affecting the international community as a whole) and to avoid exorbitant exercises of jurisdiction.²¹⁵

Thus, what state practice and *opinio juris* in the context of universal jurisdiction seem to reveal is that, although retroactive recharacterisation of crimes is generally lawful under international law, there is a preference and often an obligation to apply pre-existing labels as opposed to subsequent ones.

ii. Domestic implementation of international crimes under other jurisdictional bases

Aside from universal jurisdiction, states have applied definitions of crimes, modes of liability and defences under international law in accordance with other bases of jurisdiction recognised in customary international law. These include, in particular, territoriality and active nationality, i.e. where international crimes are committed on their territory or by their nationals.²¹⁶ A prominent example of reliance on these jurisdictional bases for the criminalisation and punishment of international offences is the domestic implementation of the ICC Statute by some of its states parties.²¹⁷ As explained in Chapter 2, although the behaviour of those states is *in principle* limited to the Statute's own ambit, it does count at least as state practice for the purposes of customary

Svea Court of Appeal, Sweden, Case No B 4770-16, Judgment of 5 August 2016 (applying the domestic crime of extremely gross assault to conduct constituting crimes against humanity).

²¹⁴ See Chapter 2, Section 3(a).

²¹⁵ Anthony J Colangelo, 'Universal Jurisdiction as an International "False Conflict" of Laws' (2009) 30 *MichJInt'l L* 881, 882–884, 890–892, 903–907.

²¹⁶ Case Matrix Network, 'International Criminal Law Guidelines: Implementing the Rome Statute of the International Criminal Court' (2017) 51 <<http://www.legal-tools.org/doc/e05157/>> accessed 25 August 2019; Ferdinandusse (n 212) 19–20.

²¹⁷ See Arts 1 and 12(1)-(2), Rome Statute. See also Case Matrix Network (n 216) 40–50.

international law.²¹⁸ Tellingly, some states have relied on the same legislation to implement the Rome Statute and universal jurisdiction crimes domestically.²¹⁹

As others have noted, four principal trends can be observed in the domestic implementation of those crimes: i) identical definitions;²²⁰ ii) under-inclusive definitions;²²¹ iii) over-inclusive definitions;²²² and iv) no implementing legislation at all, in which case states rely on their own domestic definitions and labels to criminalise and/or prosecute those crimes domestically.²²³ When it comes to modes of liability and defences, many states have relied on their own national laws when applying the Rome Statute domestically.²²⁴

This disparity can be explained by two singular features of the Statute. First, states parties do not have an obligation to implement it domestically, but only the right to do so.²²⁵ Second, the principle of complementarity and the ensuing rules of admissibility²²⁶ not only give states parties primacy in the prosecution of ICC crimes but also great

²¹⁸ See Chapter 2, Section 2(a).

²¹⁹ Case Matrix Network (n 216) 51–53.

²²⁰ See, e.g., UK International Criminal Court Act 2001; Crimes Against Humanity and War Crimes Act, Canada (SC 2000, c 24). See also Julio Bacio Terracino, ‘National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC’ (2007) 5 JICJ 421, 423–424; Case Matrix Network (n 216) 22–23.

²²¹ See, e.g. Art 408, Criminal Code of Georgia 1999 (excluding a number of acts from the definition of crimes against humanity, such as apartheid, enforced disappearance, rape and other forms of sexual assault); Art 361, Penal Code of El Salvador 1997 (omitting ethnical groups from the definition of genocide).

²²² See, e.g., Art 417, Criminal Code of the Republic of Montenegro 2003 (expanding the definition of crimes against humanity beyond Art 7, Rome Statute and customary international law, in particular by criminalising persecution on ‘on political, religious, racial, national, ethnic, cultural, *sexual* or *any other grounds*’, emphasis added); Art 211-1, Penal Code of France 1992 (broadening the definition of genocide, which protects any ‘group determined on the basis of any other arbitrary criteria’). Note that the retrospective application of those laws might amount to a breach of the principle of legality. See also Bacio Terracino (n 220) 424–425; Case Matrix Network (n 216) 23, 34, 43.

²²³ Examples include Mexico and Colombia, with respect to crimes against humanity, as well as Venezuela, with respect to genocide. See Bacio Terracino (n 220) 428; Werle and Jeßberger (n 141) 147–148.

²²⁴ Case Matrix Network (n 216) 55–58, 60–61, 63–67. A similar opinion has been expressed in the context of the Draft Convention for Crimes Against Humanity: ILC, ‘Fourth Report on Crimes against Humanity by Sean D Murphy, Special Rapporteur’ (18 February 2019) UN Doc A/CN.4/725 paras 136–137.

²²⁵ Gerhard Werle, ‘Individual Criminal Responsibility in Article 25 ICC Statute’ (2007) 5 JICJ 953, 145–146; Case Matrix Network (n 216) 21–22.

²²⁶ See Art 17, Rome Statute.

flexibility in the legal definitions that they can apply.²²⁷ In particular, for a case to be considered inadmissible before the ICC, it suffices that the state is investigating, prosecuting, or has investigated or prosecuted substantially the same *conduct*, irrespective of the crime(s) or mode(s) of liability with which the conduct has been qualified.²²⁸ Thus, the ICC Statute does not require states to adopt the exact same definitions or labels of crimes, modes of liability or defences domestically. Yet, despite variations in the said *definitions*, the majority of its states parties have retained their international *labels*, or applied these alongside domestic ones.²²⁹

The same goes for other treaties which, unlike the Statute, *require* states to criminalise, prosecute and punish certain crimes domestically, including under the principles of territoriality or active nationality. Examples include certain anti-terrorism conventions,²³⁰ the grave breaches provisions of the Geneva Conventions and their Protocols,²³¹ and the Torture Convention,²³² which only seem to require the

²²⁷ See Arts 17(1) and 20(2), Rome Statute. See also Werle and Jeßberger (n 141) 145–146.

²²⁸ *Gaddafi and Al-Senussi Case* (Decision on the admissibility of the case against Saif Al-Islam Gaddafi) ICC-01/11-01/11-344-Red (31 May 2013) §§84–86, 88.

²²⁹ Case Matrix Network (n 216) 20–47 (on the various ways in which states have implemented international crimes into domestic legislation). On the actual investigation and adjudication of international crimes before domestic courts under universal and other bases of jurisdiction see the reports by TRIAL International cited in *supra* note 211.

²³⁰ See, e.g., Art 2, Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 105; Art 3, Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (adopted 23 September 1971, entered into force 26 January 1973) 974 UNTS 177 (both of which only require states parties to make the offences punishable by severe penalties). See also Ben Saul, ‘The Implementation of the Genocide Convention at the National Level’ in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) 62.

²³¹ See, e.g., Art 146, Fourth Geneva Convention (only requiring states parties to adopt domestic legislation ‘to provide effective penal sanctions’ for individuals perpetrating acts amounting to grave breaches).

²³² See Art 2(1), Torture Convention (requiring its states parties ‘to take effective legislative, administrative, judicial or other measures to prevent *acts* of torture’, emphasis added). See also ILC (n 224) para 135.

criminalisation of the prohibited *conduct*, as opposed to the domestic implementation of the exact definitions and labels provided therein.²³³

In contrast, the Genocide Convention does seem to impose upon its states parties an obligation to enact domestic legislation not only criminalising acts that constitute genocide, but also using this particular label.²³⁴ Similarly, the IACHR has held that the Inter-American Convention on Forced Disappearance of Persons²³⁵ requires states to implement domestically the exact definition and label of the crime of enforced disappearance.²³⁶ In both cases, the justification is germane to the principle of fair labelling: the specific labels of ‘genocide’ and ‘enforced disappearance’ are more appropriate to convey the gravity of the conduct, the culpability of the offender, as well as the specific punitive consequences that those crimes entail.²³⁷

A more comprehensive survey of state practice and *opinio juris* in the domestic implementation of international crimes is beyond the scope of this thesis. However, for present purposes, it suffices to note that states have openly and without protests retroactively recharacterised international crimes into domestic ones. This seems to indicate that, at present, there is no sense of a general obligation, at least under customary international law, to use specific labels in the domestic implementation of international crimes. Similarly, the use of modes of liability and defences under international law is not yet prevalent. However, states have, in the vast majority of cases, retained international

²³³ But see ILC (n 224) paras 133–134, noting, in the context of the Draft Convention for Crimes Against Humanity, the disagreement between states as to whether the exact label and definition of the crime must be replicated domestically.

²³⁴ See Arts I and V, Genocide Convention. See also Saul (n 230) 60–64, 66. But note that there are many variations in the domestic definitions of genocide, some over-inclusive and others under-inclusive (see Case Matrix Network (n 216) 25–33; Ferdinandusse (n 212) 22–29).

²³⁵ Inter-American Convention on Forced Disappearance of Persons (adopted 9 June 1994, entered into force 28 March 1996).

²³⁶ *Heliodoro Portugal v Panama* (n 212) §§181–183; *Radilla-Pacheco v Mexico* (n 212) §§238–241.

²³⁷ Saul (n 230) 62, 66; *Heliodoro Portugal v Panama* (n 212) §181; *Radilla-Pacheco v Mexico* (n 212) §238.

labels of crimes, even when tweaking their definitions. Notably, the choice to apply a domestic or an international label has been often justified by the need to ensure compliance with the principles of legality, personal culpability and proportionate sentencing.²³⁸

iii. Vicarious jurisdiction

The practice and *opinio juris* of states in the context of vicarious jurisdiction was examined in detail in Chapter 2. In particular, it was noted that, when asserting or exercising vicarious jurisdiction in respect of ordinary crimes committed extraterritorially, states have consistently applied the principle of double criminality to avoid violations of the principle of legality and instances of exorbitant jurisdiction.²³⁹ However, they have not specifically considered labels when applying the double criminality principle. This seems to be justified by an assumption that the mere relabelling of a crime or mode of liability will not necessarily entail an expansion of the substantive scope of the applicable law or a violation of the principle of legality.²⁴⁰

Although it is hard to derive any firm conclusions from those trends, they seem to confirm that retroactive recharacterisation is not per se unlawful, provided that it is line with the principle of legality and any jurisdictional limits imposed on the substantive criminal law.

6. Interpretative Outcome and Practical Implications

Different aspects of the principle of fair labelling find expression or are in-built in the purposes of ICL, as well as in some well-established rules or principles of international

²³⁸ See *supra* notes 234, 235, 236 and *Scilingo Case* (n 212), Reason Sixth, §6; *Re Bouterse (Desire)*, Judgment on Appeal, Supreme Court of the Netherlands, Decision No LJN: AB1471, Case No HR 00749/01 CW 2323 (18 September 2001) §§4.5-4.6.

²³⁹ Cedric Ryngaert, *Jurisdiction in International Law* (OUP 2015) 121–122; Gallant (n 185) 284–286. See also Chapter 2, Section 3(b).

²⁴⁰ Sharon A Williams, ‘The Double Criminality Rule Revisited’ (1993) 27 *IsLR* 297, 300–301, 305–306.

law. These aspects of the principle also come across in the practice and *opinio juris* of states when exercising or asserting universal, vicarious or other bases of jurisdiction permitted under customary international law. On balance, after bringing together those scattered aspects of the principle, I have reached the following conclusions.

On the one hand, fair labelling, as a general principle of ICL, does not establish a general hierarchy or preference for international labels over domestic ones, or for specific labels over more generic ones. This can be inferred from the treatment of labels under the principle of personal culpability, the regulation of cumulative convictions, as well as from state practice and *opinio juris* in the context of universal jurisdiction, domestic implementation of international crimes and vicarious jurisdiction. Crucially, this means that retroactive recharacterisation of crimes and similar forms of relabelling are not per se inconsistent with that principle, even when an international crime is reclassified as a domestic one.

On the other hand, there are some circumstances in which the principle of fair labelling necessitates either more specific or more generic labels. This will depend on a series of factors, such as the stage of criminal proceedings and the operation of other binding rules or principles of international law. Accordingly, compliance with the principle of fair labelling in international law, including in the context of recharacterisation of crimes, can only be assessed on a case-by-case basis.

But while the principle does not provide one single, easy answer in the abstract, its various aspects, derived from the purposes, rules and practices examined above, do provide the parameters with which compliance with this principle can be measured in each particular case. In this way, they act as corners or outer limits within which labelling choices ought to be made. While some of those parameters may impose a legal requirement to adopt certain labels (e.g. the principles of culpability, proportionality of

penalties, legality and *ne bis in idem*), others normally disclose a mere preference for certain types of labels (e.g. the purposes of ICL and the principles of *mens rea* and correspondence).

In particular, to accord with the principle of personal culpability, labels must accurately reflect the degree of participation of the accused. To be in line with the principles of *mens rea* and correspondence, they should be indicative of the perpetrator's actual mental state in relation to the conduct and consequences thereof. Similarly, more specific labels, particularly those containing details of relevant sentencing factors such as the gravity of the crime and the means of commission, are usually more conducive to upholding the principle of proportionality of penalties. Conversely, excessively broad labels may lead to violations of this principle. To comply with the principle of legality, as well as the substantive limits placed on the various basis of jurisdiction recognised under customary international law, it is often the case that original labels must be preserved, be those domestic or international. This will be the case if a label applied retrospectively is more stigmatising on the accused, or if it expands the substantive scope of criminal liability under the applicable law. By the same token, where crimes or facts are recharacterised, fair labelling concerns cannot override fair trial rights. Lastly, some of the purposes of ICL, such as retribution, deterrence, expressive justice and reconciliation may only be effectively achieved if international labels are applied. It is the consideration of all those factors that defines what is a 'fair' label in each particular case.

The fact that these parameters can only be applied and appraised in concrete cases does not mean that the principle of fair labelling has no content or cannot be binding in international law. It simply means that some of its legal outcomes have not been pre-established, at least not presently. In this way, the operation of fair labelling is not dissimilar to that of other binding but inherently open-textured principles of international

law, such as proportionality, equity and good faith.²⁴¹ Nevertheless, the principle continues to develop through state practice, *opinio juris*, and the adoption of new rules of international law. There is a noticeable trend in the practice of states to adopt and often require international labels as opposed to domestic ones. And perhaps this is what fair labelling will dictate as a general rule in the future, when the substantive rules of ICL, especially those under customary international law, achieve the necessary level of sophistication and domestic implementation.²⁴²

Three examples drawn from the case law of the ad hoc tribunals can illustrate how the above conclusions would operate in cases where crimes, modes of liability or defences are retroactively recharacterised.²⁴³

As discussed in Chapter 1, in the *Tadić* case, the Appeals Chamber of the ICTY relabelled the ordinary mode of liability applicable to the accused in the Former Yugoslavia, known as ‘criminal association’,²⁴⁴ as JCE III under customary international law.²⁴⁵ However, JCE III did not apply to *Tadić* at the time of the events,²⁴⁶ and was made out by a lower mental element (advertent recklessness)²⁴⁷ than criminal association (intent).²⁴⁸ As the accused lacked intent, he may have been convicted for conduct that was not criminal nor culpable at the time it occurred. Likewise, he may have been stigmatised

²⁴¹ Christina Voigt, ‘The Role of General Principles in International Law and Their Relationship to Treaty Law’ (2008) 31 NJLJ 23, 9–10; Cassese (n 91) 21.

²⁴² See Werle and Jeßberger (n 141) 148.

²⁴³ For more examples of retroactive recharacterisation of labels, see Chapter 1, Section 4(d).

²⁴⁴ See Art 26, Criminal Code of the Socialist Federal Republic of Yugoslavia 1977; *Milutinović et al* (Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction — Joint Criminal Enterprise) ICTY-99-37-AR72 (6 May 2003) §40.

²⁴⁵ *Tadić* Appeal Judgment (n 23) §§195–220, 221–228.

²⁴⁶ See *Šešelj Case* (Concurring Opinion of Presiding Judge Jean-Claude Antonetti attached to the Judgement) ICTY-03-67-T (31 March 2016) §§151–176; *Case 002* (n 201); JD Ohlin, ‘Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise’ (2005) 5 JICJ 69.

²⁴⁷ *Tadić* Appeal Judgment (n 23) §§220, 227–228; *Milutinović* (n 244) §§29–33; Robert Cryer, *An Introduction to International Criminal Law and Procedure* (CUP 2014) 357–362; Cassese and others (n 18) 168–172; Ohlin (n 246) 75–76, 81–85.

²⁴⁸ See Arts 11 and 26, Criminal Code of the Socialist Federal Republic of Yugoslavia 1977.

as a principal perpetrator for a non-intentional and peripheral contribution to the crimes concerned. Thus, arguably, the retroactive recharacterisation of the applicable mode of liability was unfair because it led to the application of a label that neither at the time of the events nor at the time of conviction accurately depicted the accused's culpability.

A second example of impermissible recharacterisation occurred in the *Furundžija* case. In this case, the Trial Chamber of the ICTY acknowledged that, at the time of the events, there was no international consensus as to whether forcible oral sex constituted *rape*, either as an underlying act of crimes against humanity, a war crime or as an ordinary offence in domestic legal systems.²⁴⁹ Nonetheless, the Chamber held that, because forcible oral sex could in any event be classified as *sexual assault* (as a domestic crime in the Former Yugoslavia, as a war crime or as a crime against humanity), the accused's conviction for rape would not be unfair nor violate the *nullum crimen* principle.²⁵⁰ The Trial Chamber did recognise that a conviction for rape would carry greater stigma than one for sexual assault or outrages upon personal dignity.²⁵¹ Yet this was thought to be outweighed by the principle of 'human dignity'.²⁵² It is interesting to note how 'human dignity' was a device through which the Chamber considered what was a 'fair label' for victims, but not for the accused.²⁵³

This line of reasoning is problematic for at least two reasons. On the one hand, it is debatable whether 'rape' is more accurate than 'sexual assault' to describe acts of forcible oral sex, from both the perspective of the victim and the perpetrator.²⁵⁴ As the Trial Chamber remarked itself, states seem to disagree as to whether those acts should be

²⁴⁹ *Furundžija* (n 31) §§179–182.

²⁵⁰ *ibid* §184.

²⁵¹ *ibid*.

²⁵² *ibid* §183–184.

²⁵³ *ibid* §183.

²⁵⁴ See *supra* notes 44 and 45 and Chalmers and Leverick (n 4) 220, 227, 235–236, 240–241, 243.

called rape.²⁵⁵ On the other hand, the Chamber itself recognised that rape is more stigmatising than sexual assault, the previously applicable label.²⁵⁶ As I argued earlier, this retroactive relabelling would, in and of itself, be substantively detrimental to the accused, contrary to the principles of legality and fair labelling.

The third example is drawn from the *Bagaragaza* case before the ICTR, where an instance of impermissible recharacterisation of crimes was averted. Here, the Prosecutor had requested a referral of the case so that it could be tried in Norway.²⁵⁷ However, because Norway had not implemented the applicable international crimes in its domestic legislation (genocide, conspiracy to commit genocide and complicity in genocide), the accused could only be convicted of ordinary crimes, such as homicide or bodily harm.²⁵⁸ Both the Trial and the Appeals Chamber concluded that the domestic crimes were significantly different from the international ones, in terms of their elements, gravity and protected values.²⁵⁹ Most importantly, they considered that the domestic labels would not appropriately describe the accused's conduct, particularly its gravity.²⁶⁰ Therefore, chiefly fair labelling considerations have, at least implicitly, precluded the referral of the case to Norway.²⁶¹

7. Conclusion

This Chapter has tried to demonstrate that fair labelling is a general principle of ICL whose legal basis can be found in customary international law. Although explicit articulations of this principle are rare, its content can be inferred from the purposes of

²⁵⁵ *Furundžija* (n 31) §182.

²⁵⁶ *ibid* 184.

²⁵⁷ *Bagaragaza* Rule 11 bis Decision (n 169) §§2–3.

²⁵⁸ *Bagaragaza* Rule 11 bis Appeal (n 162) §§12–16; *Bagaragaza* Rule 11 bis Decision (n 169) §§9, 16.

²⁵⁹ *Bagaragaza* Rule 11 bis Appeal (n 162) §§17–18; *Bagaragaza* Rule 11 bis Decision (n 169) §16.

²⁶⁰ *Bagaragaza* Rule 11 bis Appeal (n 162) §17; *Bagaragaza* Rule 11 bis Decision (n 169) §16.

²⁶¹ *Bagaragaza* Rule 11 bis Appeal (n 162) §18–19; *Bagaragaza* Rule 11 bis Decision (n 169) §17.

ICL, other rules and principles of international law, as well as certain instances of state practice and *opinio juris*. Each of these elements reflects essential aspects or parameters of fair labelling in international law. Pursuant to some of those parameters, labels should fulfil the deterrent, retributive and expressive functions of international criminal justice, as well as indicate the correspondence between the material and mental elements of the crime as far as possible. Other parameters require labels to be in line with the principles of culpability, proportionate sentencing, *ne bis in idem*, legality and fair trial rights. Although the principle of fair labelling does not always yield pre-established labelling choices and is largely case-dependent, at least its binding elements must always be observed. It is only by piecing them together in each and every case that one can determine what is a fair label, including when recourse is had to retroactive recharacterisation of crimes. In this sense, fair labelling is akin to other principles of fairness in international law, such as proportionality, good faith and equity. Irrespective of its legal status in international law, fair labelling remains an important policy consideration for legislators and prosecutors alike, as well as a powerful evaluative tool in the hands of academics, judges and the public at large.

PART II: RETROACTIVE RECHARACTERISATION OF CRIMES IN THE ROME STATUTE

CHAPTER 4: THE RETROACTIVE APPLICATION OF THE ROME STATUTE EXPLAINED

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1. Introduction

Part I of this thesis focussed on the phenomenon of retroactive recharacterisation of crimes and its interplay with the principles of legality and fair labelling in general international law. Chapter 1 has sought to conceptualise and classify this phenomenon, by looking at its origins and some of the problematic outcomes that it may lead to. Chapter 2 tried to determine the extent to which retroactive recharacterisation of crimes is consistent with the principle of legality in general international law. It concluded that, while recharacterisation is not *per se* contrary to the *nullum crimen* principle, it may be so to the extent that it impinges upon the substantive human rights of the accused. This might happen not only if the recharacterised criminal law contains more serious crimes or penalties, but also if other rules of criminal law are substantively detrimental to the accused, regardless of their classification as procedural or substantive. Thus, changes in the mode of liability, the removal of defences, the displacement of bars to prosecution or

punishment, or the application of more severe labels all fall within the scope of the principle of legality and might be inconsistent with it.

Chapter 3, in turn, looked at whether retroactive recharacterisation of crimes is consistent with the principle of fair labelling. It concluded that fair labelling is a general principle of international criminal law, whose legal basis can be found in customary international law, but whose content does not always yield pre-established legal outcomes. Chapter 3 also found that, although retroactive recharacterisation of crimes is not necessarily inconsistent with fair labelling, it might be so to the extent that one or more aspects of this principle are not observed in each case. These aspects can be derived by deduction from other rules of international law, such as the principles of legality and personal culpability, and by induction from state practice and *opinio juris*.

The present Chapter opens Part II of this thesis, which is centred around retroactive recharacterisation of crimes and the principles of legality and fair labelling in the context of the ICC. It aims to explore how the Rome Statute (the Statute) can be applied retroactively and in substitution for other sources of law that were binding on the accused at the time of the conduct. In other words, it seeks to demonstrate how the application of the Statute in certain scenarios can amount to retroactive recharacterisation of crimes, potentially violating the principles of legality and fair labelling in general international law and under the Rome Statute itself.

To this end, **Section 2** will first explain how Article 11 of the Statute, while making the ICC's temporal jurisdiction generally prospective, still leaves room for some instances of *ex post facto* or retrospective jurisdiction. It will demonstrate that it is the possibility of exercising jurisdiction retrospectively that opens the door to the retroactive application of the substantive provisions of the Statute.

Next, **Section 3** will analyse five principal retrospective scenarios in which the Rome Statute might apply retroactively. These are: a) situations originating from ad hoc or unilateral declarations made by non-states parties or states parties that joined the Statute after its general entry into force (Article 12(3)); b) situations referred to the Court by the Security Council (UNSC) involving non-states parties to the Statute (Article 13(b)); c) retroactive withdrawals of opt-out declarations for war crimes (Article 124); d) certain situations involving the crime of aggression (Articles 15 *bis* and 15 *ter*); and e) instances of extensive interpretation. In each case, I will interpret the relevant provisions of the Statute and explain how their operation might lead to instances of retroactive recharacterisation of crimes. As the Rome Statute is a treaty, the VCLT will be followed throughout, always bearing in mind the principle of *in dubio pro reo*, as well as strict interpretation for any provisions of substantive criminal law.¹

After having identified the various ways in which the Statute risks applying retroactively, **Section 4** shows how Article 21(1) of the Statute and its treatment of the substantive law applicable materialises such risk.

Lastly, **Section 5** will explain why those retroactive scenarios are problematic for the ICC. This will involve an analysis of how the principles of legality and fair labelling apply to the Court. Specifically, I will first establish whether and to what extent those principles are recognised in the Rome Statute itself. Secondly, I will show how their formulations under general international law are binding on the ICC.

It is important to reiterate that, in light of the conclusions reached in Chapters 2 and 3, the retroactive application of the Rome Statute and any resulting recharacterisation

¹ *Bemba et al Case* (Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala and Mr Narcisse Arido against the Decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/13-2275-Red (8 March 2018) §§11, 675; *Bemba Case* (Judgement pursuant to Article 74 of the Statute) ICC-01/05-01/08-3343 (21 March 2016) §218.

of crimes are not *per se* inconsistent with the principles of legality and fair labelling. Rather, it is only to the extent that the criminal provisions of the Statute go beyond previously applicable sources of law, such as customary international law, treaties and domestic law, that a violation of the principle of legality might ensue. As mentioned earlier, this applies not only to the crimes and penalties but to all rules of criminal law that substantively affect the rights of the accused. Similarly, a violation of fair labelling will only arise if the retroactive application of the Statute results in criminal labels that do not accurately represent the accused's culpability at the time of the conduct or conviction.

2. Article 11 and Retrospective Jurisdiction

As mentioned earlier, Article 11 of the Rome Statute deals with the ICC's temporal (*ratione temporis*) jurisdiction, i.e. the time limits to the Court's adjudicative authority. It reads as follows:

Jurisdiction *ratione temporis*

1. The Court has jurisdiction *only* with respect to crimes committed *after the entry into force of this Statute*.
2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, *unless that State has made a declaration under article 12, paragraph 3*.²

The text of this provision seeks to give effect to the requirement of pre-established courts and to safeguard the principle of non-retroactivity.³ By limiting the Court's

² Emphasis added.

³ UNGA, 'Summary of the Proceedings of the Preparatory Committee during the Period 25 March-12 April 1996' (7 May 1996) UN Doc A/AC-249/1, para 86; UNGA, 'Report of the Preparatory Committee on the Establishment of an International Criminal Court - Volume II Compilation of Proposals' (13 September 1996) UN Doc A/51/22[VOL-II](SUPP) p 79, Art A; UNGA, 'Report of the Preparatory Committee on the Establishment of an International Criminal Court - Volume I (Proceedings of the Preparatory Committee during March-April and August 1996)' (14 September 1996) UN Doc A/51/22[VOL-I](SUPP) p 44, para189. See also Rod Rastan and Mohamed Elewa Badar, 'Article 11: Jurisdiction Ratione Temporis' in

jurisdiction to events that occurred after the Statute's entry into force, Article 11 seeks to avoid the retroactive application of the Statute's substantive provisions, i.e. their application to individuals that were not bound by them at the time of the relevant events.⁴

Paragraph 1 establishes a general ban⁵ to the exercise of the Court's jurisdiction over facts taking place before the Statute's general entry into force on 1 July 2002.⁶ By doing so, it successfully prevents any exercise of retrospective jurisdiction and the retroactive application of the Statute in relation to its 'original' states parties, i.e. those first 60 states whose ratifications triggered the entry into force of the Statute on 1 July 2002 and for whom the Statute became an applicable source of law on that date.

Paragraph 2 seeks to create a similar ban in respect of states parties joining the Statute after 1 July 2002, as it excludes from the Court's jurisdiction events occurring before the date of entry into force of the Statute for those states. However, that provision also contains an exception to this general rule. It allows those states to accept the Court's jurisdiction for retrospective situations, i.e. events taking place before the date of entry into force of the Statute for the state in question. They can do so by making a so-called 'ad hoc declaration', in accordance with Article 12(3). Ad hoc declarations made by states parties must necessarily be made in respect of events occurring before the entry into force of the Statute for those states, as after this date the Statute itself becomes the

Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (Beck/Hart 2016) 658–662.

⁴ William A Schabas, 'An Introduction to the International Criminal Court' (CUP, 2012) 69, 70; Alexandre Skander Galand, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits* (Brill Nijhoff 2019) 107–109.

⁵ See, for instance, UNGA, "United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998. Official Records. Volume II, Summary Records of the Plenary Meetings and of the Meetings of the Committee of Whole' (15 June - 17 July 1998) UN Doc A/CONF-183/13(VOL-II)198 para 71. See also Schabas (n 4) 69.

⁶ Art 126 (1), Rome Statute provides that 'This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations'. This condition was fulfilled on 1 July 2002. See Rastan and Badar (n 3) 657.

basis for the Court's jurisdiction. In this way, the ad hoc declaration can cover events that took place both before and after the date of the declaration, up to the entry into force of the Statute for the state concerned. Crucially, to the extent that the ad hoc declaration is the legal basis of the Court's jurisdiction, any exercise of this jurisdiction over events occurring before the date of the declaration will be *ex post facto*.

By the same token, Article 11 fails to prevent the exercise of retrospective jurisdiction and the retroactive application of the Rome Statute in situations involving non-states parties, i.e. where the crimes are committed on the territory *and* by nationals of those states. As will be discussed in more detail later on, these situations can be brought to the Court's jurisdiction via an UNSC Referral, in accordance with Article 13(b) of the Statute, or via an ad hoc declaration, pursuant to Article 12(3). By setting as the starting point for the Court's jurisdiction the Statute's entry into force *for its states parties*, Article 11 enables the ICC to assume jurisdiction over situations that, although taking place after 1 July 2002, occur before the date of the relevant UNSC referral or ad hoc declaration. To the extent that the referral or the declaration is the legal basis of the Court's jurisdiction,⁷ the Court's jurisdiction will be retrospective in those instances.

As will be discussed in Section 2, Article 11 also fails to prevent the exercise of retrospective jurisdiction when states parties withdraw a declaration whereby they had previously excluded from the Court's jurisdiction war crimes or the crime of aggression (a so-called 'opt-out declaration').

Although the prohibition of retrospective jurisdiction is an effective safeguard against the retroactive application of substantive criminal law, it does not follow that the exercise of retrospective jurisdiction necessarily leads to a violation of the principle of

⁷ On the legal basis of the ICC's jurisdiction and the applicable law in cases of UNSC referrals, see Chapter 6, Section 4.

non-retroactivity. As will be discussed in this chapter, despite being related, jurisdiction and substantive law remain separate questions. Accordingly, a criminal court may adjudicate upon facts that take place before its creation but apply substantive criminal law that was binding on the accused at the time of the conduct. This is precisely what the ad hoc tribunals and the IMTs set out to do.⁸ And this is the very reason why retrospective jurisdiction is not *per se* prohibited under customary international law, as was mentioned in Chapter 2.

Nevertheless, just as prospective jurisdiction is the gatekeeper of non-retroactivity, the exercise of retrospective jurisdiction opens the door to the retroactive application of criminal law. As demonstrated in Chapter 2, this risk is materialised if, aside from exercising *ex post facto* jurisdiction, a court or tribunal applies rules of criminal law that were not binding on the accused at the time of the events and are substantively more severe than the applicable law. Therefore, it is only after ascertaining which rules of criminal law apply in those retrospective scenarios that one should be able to tell whether such laws are applied retroactively, in violation of the principles of legality and fair labelling. This will be discussed in Section 4 *infra*.

3. Five Retrospective Scenarios

I have identified at least five different scenarios in which the Rome Statute enables the ICC to exercise retrospective jurisdiction. Let me now turn to each scenario and how it arises from the interpretation of certain key provisions of the Statute.

a. Ad hoc Declarations

⁸ *Judgment of the Nuremberg International Military Tribunal 1946* (1947) 41 AJIL 172, 218; UNSC 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808' (1993) UN Doc S/25704, para 34; UNSC 'Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994)' (1995) UN Doc S/1995/134 paras 12,14.

Article 12 of the Statute, entitled ‘Preconditions to the exercise of jurisdiction’, reads as follows:

1. A State which becomes a Party to this Statute thereby *accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.*
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if *one or more* of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
 - (a) The State *on the territory* of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
 - (b) The State of which the person accused of the crime is a *national*.
3. If the acceptance of a State which *is not a Party* to this Statute is required under paragraph 2, that State may, by *declaration* lodged with the Registrar, *accept the exercise of jurisdiction* by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.⁹

As the title and wording of this provision indicate, its function is to lay down the types of state consent which are necessary for the ICC to exercise its jurisdiction over ‘the crimes referred to in Article 5’.

According to paragraphs 1 and 3, a state can accept the Court’s jurisdiction either by becoming a party to Statute or by making an ad hoc declaration. Furthermore, paragraph 2 tells us which states must consent before the Court can exercise its jurisdiction over a situation. It lists, disjunctively, the state on whose territory the conduct took place, or the state of nationality of the perpetrator. As will be discussed in Chapter 6, these types of consent seem to reflect the two principal bases of prescriptive and

⁹ Emphasis added.

adjudicative jurisdiction of states in criminal matters under customary international law, i.e. territoriality and active nationality.¹⁰ Because those bases are listed disjunctively in Article 12(2), either suffices for the Court to have jurisdiction over a situation. Thus, the Court can hear cases where crimes have been committed by nationals of non-states parties on the territory of a state party or a state that has made an ad hoc declaration ('accepting state'). Conversely, it also can hear cases where crimes have been committed on the territory of non-states parties by nationals of states parties or accepting states.

As mentioned earlier, Article 12(3) regulates ad hoc declarations. It enables non-states parties to accept the jurisdiction of the ICC for a certain situation which could not be brought before the Court without their consent. In other words, if neither the state of nationality of the perpetrator nor the state where the crime took place is a party to the Statute, either state can give their ad hoc consent to the Court's jurisdiction. A non-state party can give its ad hoc consent to the Court's jurisdiction in respect of either its nationals *or* its territory, or *both*. Article 11(2) extends this possibility to states parties that joined the Rome Statute after its general entry into force. Although Article 12(3) refers to the acceptance of jurisdiction 'with respect to the crimes referred to in article 5', Rule 44 of the Rules of Procedure and Evidence (RPE) clarifies that an ad hoc declaration cannot single out specific categories of crimes or events. Rather, it must cover all Article 5 crimes arising from a broader factual situation.¹¹

¹⁰ Sharon A Williams and William A Schabas, 'Article 12: Preconditions to the Exercise of Jurisdiction' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (Beck/Hart 2016) 680; Roger O'Keefe, *International Criminal Law* (OUP 2015) 541; Kenneth S Gallant, 'Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts' (2003) 48 *VillLRev* 763, 788–789.

¹¹ ICC Rules of Procedure and Evidence (2002) ICC-ASP/1/3 and Corr1. The purpose of this clarification was to avoid one-sided declarations, i.e. declarations targeting specific individuals or events. See, in this regard, William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2016) 358.

For present purposes, it suffices to note that Article 12(3) does not limit ad hoc declarations to any specific timeframe. This means that Article 11's temporal limitations to the Court's jurisdiction are fully applicable. As a consequence, if an ad hoc declaration issued by a non-state party complies with Article 11(1), and only covers events taking place after 1 July 2002, it can still include situations occurring before the date of the declaration.¹² In the same vein, if a state party joining the Statute after 1 July 2002 makes an ad hoc declaration in accordance with Article 11(1) and (2), it can still accept the Court's jurisdiction over situations that occur before the date of the declaration and before the Statute comes into force for that state.¹³ As the text of Article 12(3) makes it clear, the ad hoc declaration is the basis for the accepting state's consent to the Court's jurisdiction. Thus, if the situation pre-dates the ad hoc declaration, the ICC will be exercising retrospective jurisdiction over it.

Again, although the exercise of retrospective jurisdiction does not in itself lead to the retroactive application of criminal law, it certainly opens the door to this possibility. Ultimately, it is the substantive criminal law that the Court applies in cases of ad hoc declarations that will determine whether this law is applied retroactively. As discussed in Chapter 2, what matters is a) whether the law was applicable to the individual at the time of the conduct, and b) even if it was not, whether it is substantively more severe than the applicable law.

The ascertainment of the applicable substantive law in cases of ad hoc declarations depends on two different questions. First, whether such declarations can prescribe or make the Statute directly binding on the individuals concerned (i.e. nationals of the

¹² For a contrary interpretation, see A Zimmermann, 'Palestine and the International Criminal Court Quo Vadis?: Reach and Limits of Declarations under Article 12(3)' (2013) 11 JICJ 303, 311–312 (arguing that that Article 12(3) should not be read with retroactive effect).

¹³ See *contra* *ibid* 313–317.

accepting state and/or persons on their territory), in accordance with Article 12(3) of the Statute and international law generally. I refer to this as the ‘prescriptive effect’ or ‘nature’ of ad hoc declarations. Second, whether, independently of such prescriptive effect, the Rome Statute directs the Court to apply its criminal provisions in cases of ad hoc declarations. This question is dealt with in Article 21(1) of the Statute and will be discussed in Section 4 below.

Turning to the first question, on the prescriptive effect of ad hoc declarations, two views can be discerned in the literature.¹⁴ On the one hand, some argue that ad hoc declarations cannot apply substantive criminal law to the individuals who are subject to the prescriptive jurisdiction of the accepting state.¹⁵ In this regard, it has been pointed out that, unlike the ratification or accession to the Statute, ad hoc declarations are not in principle subject to the approval of the accepting state’s legislative bodies, nor widely publicised.¹⁶ Indeed, all that Article 12(3) seems to require is that the state, through the recognised governmental channels, lodges a declaration at the Court’s Registry. On the other hand, other commentators accept, either implicitly or explicitly, that ad hoc declarations can prescribe the Statute as a whole to the individuals concerned.¹⁷

The text of Article 12(3) is silent on this matter. The context of this provision, particularly Articles 125 and 126 of the Statute, does seem to indicate that some of the effects of ad hoc declarations are different from those arising from the ratification, acceptance or approval of the Rome Statute. In particular, by means of ratification, acceptance or approval, a state becomes a party to the Statute, thereby conferring upon

¹⁴ Only two commentators seem to have explicitly addressed the question of the prescriptive effect of ad hoc declarations. See Marko Milanović, ‘Is the Rome Statute Binding on Individuals? (And Why We Should Care)’ (2011) 9 JICJ 25, 37; Marko Milanović, ‘Aggression and Legality: Custom in Kampala’ (2012) 10 JICJ 165, 173–174) and Gallant, ‘Jurisdiction’ (n 10) 819–820.

¹⁵ See, e.g., Milanović, ‘Rome Statute’ (n 14) 37; O’Keefe (n 10) 553.

¹⁶ See, e.g., Gallant, ‘Jurisdiction’ (n 10) 819–820; Milanović, ‘Aggression’ (n 14) 174, fn 35, 177, fn 48.

¹⁷ Gallant, ‘Jurisdiction’ (n 10) 819, 820; Galand (n 4) 129–130, 135–140.

the ICC jurisdiction over any situation where a crime listed in Article 5 is committed on its territory or by its nationals after the date of entry into force of the Statute.¹⁸ In contrast, an ad hoc declaration can only cover one factual situation at a time.¹⁹ Furthermore, from a domestic perspective, ratifications are usually (although not necessarily) backed by parliamentary approval, and can, in some cases, lead to the incorporation of the Statute into national law.²⁰ Conversely, an ad hoc declaration can be simply adopted by the executive branch of the accepting state.

Yet none of those differences matters. For one thing, the more limited factual reach of an ad hoc declaration is no impediment to its prescriptive effect. For another, how a state accepts to be bound by international law is irrelevant. It is now generally accepted that international norms, regardless of how they are adopted, can directly apply to individuals, giving rise to individual criminal responsibility.²¹ It is a separate and subsequent question whether or not a specific rule of international criminal law complies with the requirements of the principle of legality in a given legal system.²²

That ad hoc declarations may have a prescriptive effect is further supported by their inclusion in Article 12, together with the provisions on the consent of states parties. As mentioned earlier, the jurisdictional bases referred to in Article 12(2), i.e. territoriality and active nationality, could be and have been interpreted not only as pre-conditions to the Court's adjudicative jurisdiction, but also as the bases of prescriptive jurisdiction

¹⁸ See Arts 11 and 12(2), Rome Statute.

¹⁹ See Art 12(3), Rome Statute and *supra* note 11.

²⁰ Eileen Denza, 'The Relationship Between International and National Law' in Malcolm Evans (ed), *International Law* (OUP 2010) 418–425.

²¹ See, e.g., O'Keefe (n 10) 47, 67; Robert Cryer, 'The Doctrinal Foundations of International Criminalization' in M Cherif Bassiouni (ed), *International Criminal Law: Sources, Subjects and Contents* (Brill 2008) 108; ILC, 'Report of the Working Group on the Question of an International Criminal Jurisdiction, Annex' (1992) UN Doc A/47/70 71 para 101. For a contrary, but minority view, see Kevin Jon Heller, 'What Is an International Crime? (A Revisionist History)' (2017) 58 HILJ 353.

²² See Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia 2002) 345.

pursuant to which states parties have accepted to apply the provisions of the Statute to their nationals and on their territory.²³ If this is true, then ad hoc declarations could have the same effect: not only would they grant the Court jurisdiction over a situation, but also apply the criminal provisions of the Rome Statute on the basis of territoriality and/or active nationality.²⁴

At this point, it is important to note that, if one accepts that ad hoc declarations can have prescriptive effects, the risk of retroactive application of the Statute only arises in cases of retrospective declarations. This is because, if such declarations can prescribe the Rome Statute to the individuals concerned, then, at least from the date of the declaration onwards, the Statute would have been binding on them prior to the commission of any crime. In contrast, if one takes the view that ad hoc declarations do not have the effect of applying the substantive provisions of the Statute to individuals, then the risk of retroactive application of the Statute would arise for both retrospective and prospective declarations. After all, the Statute would never be an applicable source of substantive law for individuals, not even prospectively.²⁵

To date, four ad hoc declarations have given rise to investigations or prosecutions before the ICC. These have been made by Côte d'Ivoire,²⁶ Uganda,²⁷ Ukraine,²⁸ and Palestine.²⁹ All of them cover partly retrospective situations.

²³ See *supra* note 10 and Chapter 6, Section 2.

²⁴ See Chapter 6, Section 3.

²⁵ Milanović, 'Aggression' (n 14) 173–174; Milanović, 'Rome Statute' (n 14) 36, 37.

²⁶ Alassane Ouattara, The President of Côte d'Ivoire, 'Confirmation de La Déclaration de Reconnaissance' <<https://www.icc-cpi.int/NR/rdonlyres/498E8FEB-7A72-4005-A209-C14BA374804F/0/ReconCPI.pdf>> accessed 25 August 2019.

²⁷ *Situation in Uganda* (Decision Assigning the Situation in Uganda to Pre-Trial Chamber II) ICC-02/04-1 (5 July 2004), Annexed Letter from the OTP.

²⁸ Pavlo Klimkin, Minister for Foreign Affairs of Ukraine, 'Declaration by Ukraine Lodged under Article 12(3) of the Rome Statute' <https://www.icc-cpi.int/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine> accessed 17 April 2019; The Embassy of Ukraine to the Kingdom of the Netherlands, 'Declaration by Ukraine Lodged under Article 12(3) of the Rome Statute'

b. UNSC Referrals

Article 13 of the Rome Statute reads as follows:

Exercise of jurisdiction

The Court may *exercise its jurisdiction* with respect to a *crime* referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor *by the Security Council acting under Chapter VII of the Charter of the United Nations*; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.³⁰

As the title of Article 13 indicates, the aim of this provision is to list the various ways in which a situation can be brought before the ICC, the so-called ‘trigger mechanisms’.³¹ These are: a) the referral of a situation by a state party, b) the referral of a situation by the UNSC, and c) the initiation of an investigation by the Prosecutor acting on their own initiative (*‘proprio motu’*), after having been granted authorisation by the Pre-Trial Chamber.³² These mechanisms ‘activate’ or ‘trigger’ the jurisdiction of the

<<https://www.icc-cpi.int/itemsDocuments/997/declarationRecognitionJurisdiction09-04-2014.pdf>> accessed 25 August 2019.

²⁹ Mahmoud Abbas, President of the State of Palestine, ‘Declaration Accepting the Jurisdiction of the International Criminal Court’ <https://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf> accessed 25 August 2019.

³⁰ Emphasis added

³¹ Sharon A Williams and William A Schabas, ‘Article 13: Exercise of Jurisdiction’ in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (Beck/Hart 2016) 690; Elizabeth Wilmschurst, ‘Jurisdiction of the Court’ in Roy SK Lee (ed), *The International Criminal Court: the making of the Rome Statute-issues, negotiations, results* (Kluwer Law International 1999) 127.

³² See Art15(3)-(4), Rome Statute.

Court once it has been granted pursuant to one of the pre-conditions listed in Article 12(2).³³

It was mentioned earlier that the Rome Statute may be applied retroactively in situations triggered by an UNSC referral. What is critical for understanding how this might happen is that, while the pre-conditions listed in Article 12(2) must be met before the Court's jurisdiction can be activated by a state party referral or the Prosecutor's *proprio motu* investigation, they are *not* required for an UNSC referral.³⁴ This is clear from the text of Article 12(2), which only applies '[i]n the case of article 13, paragraph (a) or (c)'. Two important consequences ensue.

First, the Council can refer to the ICC situations that involve non-states parties to the Statute.³⁵ The fact that Article 12(2) does not apply to UNSC referrals means that, when referring a situation to the Court, the Council is not limited by the existence of a nexus of territoriality or active nationality between the individual and a state party or an accepting state. Second, and relatedly, in contrast with ad hoc declarations,³⁶ UNSC referrals have the dual effect of granting jurisdiction to the ICC *and* triggering it in respect of a certain situation when non-states parties are concerned.³⁷ In this way, an UNSC referral functions as a jurisdictional pre-condition or basis, just as the ratification or the ad hoc acceptance of the Statute by either the state of nationality of the perpetrator or the territorial state. Although it is open to the Council to refer situations involving

³³ See Schabas (n 11) 367; Antonio Coco, 'Article 13' in Mark Klamberg and Jonas Nilsson (eds), *Commentary on the Law of the International Criminal Court – The Rome Statute* (2017) <<https://cilrap-lexsis.org/clicc/13>> accessed 25 August 2019.

³⁴ But the UNSC can still refer a situation where those pre-conditions have already been met, in which case it functions solely as a trigger mechanism. See also Chapter 6, Section 4.

³⁵ See Williams and Schabas (n 31) 696; Luigi Condorelli and Santiago Villalpando, 'Referral and Deferral by the Security Council' in Antonio Cassese and others (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 634; O'Keefe (n 10) 541.

³⁶ Thus, for the Court to exercise its jurisdiction over a situation following an ad hoc declaration, its jurisdiction still needs to be activated by one of the triggering mechanisms. See Schabas (n 11) 358, 359.

³⁷ *ibid* 375.

states parties, including those joining the Statute after its general entry into force, and states making ad hoc declarations, in those instances, the referral will function solely as a trigger mechanism, given that the Court's jurisdiction would already be grounded in the consent of the state(s) concerned, in accordance with Article 12(2) or (3).

But the Council must still fulfil certain conditions when making a referral to the Court. The first of them is set by Article 13(b) itself, which states that the Council must be 'acting under Chapter VII of the Charter of the United Nations'. This means that, if the UNSC wants to make use of its referral powers granted by the Rome Statute, it must invoke and observe its pre-existing decision-making powers under Chapter VII of the UN Charter.³⁸ Of particular relevance is Article 41 of the Charter, which authorises the UNSC to adopt a wide range of measures short of armed force to maintain or restore international peace and security. The Council relied on this very same provision when it decided to establish the two ad hoc tribunals.³⁹ Furthermore, pursuant to Article 25 of the UN Charter, the UNSC's powers under Chapter VII are only binding on UN member states and states which have otherwise accepted to be bound by the UN Charter. Thus, to the extent that UNSC referrals find their legal basis in the UN Charter (as opposed to universal jurisdiction), they can only cover situations that fall under the jurisdiction of those states.⁴⁰

The Council must also comply with the Rome Statute as a whole when making a referral to the ICC.⁴¹ This comes from the chapeau of Article 13, which requires, for all

³⁸ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter).

³⁹ See *Tadić Case* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1 (2 October 1995) §§33–36.

⁴⁰ For a discussion of the bases of prescriptive and adjudicative jurisdiction underlying an UNSC referral, see Chapter 6, Section 4.

⁴¹ Williams and Schabas (n 31) 697; Rod Rastan, 'Jurisdiction' in Carsten Stahn (ed), *Law and Practice of the International Criminal Court* (OUP 2015) 170.

trigger mechanisms, that the Court exercise its jurisdiction ‘in accordance with the provisions of this Statute’.⁴² In any event, because the ICC is an international organisation, vested with own international legal personality, it is not bound by the Council’s decision-making powers.⁴³ Thus, an UNSC referral that does not comply with the provisions of the Statute could be rejected by the Court.⁴⁴

Another significant feature of Article 13(b) is that, as with Article 12(3), it does not impose a specific timeframe for UNSC referrals. This means that Article 11’s general limitations to the Court’s temporal jurisdiction also apply to UNSC referrals.⁴⁵ Crucially, it is the absence of specific temporal limitations for UNSC referrals, coupled with the fact that these can involve non-states parties that may give rise to the retroactive application of the Rome Statute.

In more detail, even if the Council sticks to the temporal limits imposed by Article 11(1), i.e. no exercise of jurisdiction over events prior to 1 July 2002, it might still refer to the Court *ex post facto* situations in respect of non-states parties (situations taking place after 1 July 2002 but before the referral). Likewise, for states acceding to the Statute after 1 July 2002, Article 11(2) is without prejudice to the Council’s power to refer situations that occurred when such states were not parties to the Statute or had not

⁴² This is confirmed by Article 1 of the Rome Statute, which states that ‘[t]he jurisdiction and functioning of the Court shall be governed by the provisions of this Statute’. See also Condorelli and Villalpando (n 35) 634, particularly fn 26.

⁴³ See also Kenneth S Gallant, ‘The International Criminal Court in the System of States and International Organizations’ (2003) 16 LJIL 553, 573; Luigi Condorelli and Santiago Villalpando, ‘Can the SC Extend the ICC’s Jurisdiction?’ in Antonio Cassese and others (eds), *The Rome Statute for an International Criminal Court: A Commentary* (OUP 2002) 578, 580.

⁴⁴ Although the ICC does not have a general power to review UNSC resolutions, it has an inherent power to examine its own jurisdiction over situations and cases brought before it. To this extent, it can pronounce itself on the conformity of UNSC referrals with the Statute. See Art 19, Rome Statute and Condorelli and Villalpando (n 35) 640–642; *Tadić* Interlocutory Appeal on Jurisdiction (n 39) §§14–22.

⁴⁵ But see *contra* Condorelli and Villalpando (n 35) 636, 637 (interpreting Art 11 as allowing the UNSC to extend the temporal jurisdiction of the Court to situations occurring before 1 July 2002).

made an ad hoc declaration.⁴⁶ In those instances, it is the referral itself which grants jurisdiction to the ICC, rather than the ratification or ad hoc acceptance of the Statute. Thus, the Court's jurisdiction will be retrospective for any situation that occurs before the date of the referral, even if it takes place after 1 July 2002. Again, Article 11's limited focus on the entry into force of the Statute for its states parties fails to avoid the exercise of retrospective jurisdiction in cases of UNSC referrals that involve non-states parties.⁴⁷

Yet the retroactive application of the Statute depends on two further questions. First, whether UNSC referrals have prescriptive effects, i.e. the effect of making the Rome Statute directly binding on the individuals concerned. Second, whether the Court is required to apply the criminal provisions of the Rome Statute in situations arising from UNSC referrals. I will now turn to the first question while leaving the second to Section 4 below.

Two principal views can be distinguished on the prescriptive effect of UNSC referrals. According to the first, although the Council can make decisions which are binding on UN member states and states having accepted to be bound by the UN Charter, it is not within its powers to create law binding on individuals, let alone criminal law. For one proponent of this view, a distinction should be made between rules that 'focus' on the individual being prosecuted and which 'belong to the (international) criminal justice paradigm', and those that 'speak to the sovereignty of a State'. The Council could prescribe the latter, but not the former.⁴⁸ This would mean that, on the one hand, an UNSC referral could apply the Rome Statute to the non-state(s) party concerned, including the Statute's obligations of cooperation and its provisions on immunities. On

⁴⁶ Rastan and Badar (n 3) 671.

⁴⁷ Similarly, Zimmermann (n 12) 317–318.

⁴⁸ Rogier Bartels, 'Legitimacy and ICC Jurisdiction Following Security Council Referrals: Conduct on the Territory of Non-Party States and the Legality Principle' in Nobuo Hayashi and Cecilia M Bailliet (eds), *The Legitimacy of International Criminal Tribunals* (CUP 2017) 151–152.

the other hand, none of the Statute's provisions on criminal matters would bind the individuals that are subject to the prescriptive jurisdiction of the said state(s).⁴⁹ The view that the UNSC cannot create criminal offences has also been explicitly endorsed by at least one Trial Chamber of the ICTY.⁵⁰

In contrast, a second view holds that the UN Charter does confer upon the Council the power to create and apply law to individuals, including criminal law.⁵¹ Thus, by referring a situation to the ICC, the Council would not only be applying the Statute to the non-state party but also directly prescribing its criminal provisions to the individuals concerned. This view is grounded in the fact that the UNSC's powers under Article 41 of the UN Charter are broad and non-exhaustive.⁵²

This question remains, to date, a highly contentious one, as it relates to the broader issue of the extent of the Council's powers under Chapter VII of the UN Charter. Nonetheless, for the limited purposes of this thesis, a short answer can be offered. In my view, the ability of the UNSC to directly bind individuals is inseparable from its power to bind states. Two main reasons support this conclusion.

First, conceiving the UNSC as capable of prescribing international law to states but not to individuals would lead to an artificial distinction between rules that 'speak to the state's sovereignty' and those that focus on individuals. For instance, many rules of criminal procedure which have been adopted by the Council in the context of other international and hybrid tribunals simultaneously relate to questions of state sovereignty and the status and interests of individuals. This is notably the case of rules relating to the

⁴⁹ *ibid* 150–151.

⁵⁰ *Čelebići Case* (Trial Judgment) ICTY-96-21-T (16 November 1998) §417.

⁵¹ See Gallant, 'Jurisdiction' (n 10) 827–828; Galand (n 4) 76–78, 129–130; Alexandre Skander Galand, 'Security Council Referrals to the International Criminal Court as Quasi-Legislative Acts' (2016) 19 *Max Planck Yearbook of United Nations Law Online* 142, 153.

⁵² See *Tadić* Interlocutory Appeal on Jurisdiction (n 39) §§32–36.

issuance of warrants of arrest or summons to appear, which not only address questions of state cooperation but also individual rights and obligations.⁵³ In other rules, the situation of the individual is intrinsically connected to the prerogative of a state, as is the case of personal immunities. Therefore, it is often a fruitless exercise to try to separate such rules into strict categories.

The second and most significant reason why the Council ought to have the ability to directly bind individuals arises from an interpretation of its Chapter VII powers taking into account the relevant texts, context, object and purpose and supplementary means of interpretation.

For one thing, the text of Chapter VII, particularly Article 41, is remarkably broad when referring to the measures that can be adopted by the Council to give effect to its decisions. Significantly, the fact that this provision lists measures that are ‘included’ within the realm of the UNSC’s powers is a strong indication that the Council has powers other than those explicitly indicated.⁵⁴ More generally, pursuant to the doctrine of implied powers, the Council has been held to have all those powers that can be implied from its functions and which are either necessary⁵⁵ or over even just appropriate to fulfil such aims.⁵⁶ Thus, the Council must have the power to bind individuals to the extent that this is necessary or appropriate for the discharge its primary responsibility to maintain international peace and security.

⁵³ See, e.g. Arts 17 and 29, ICTY Statute; Rules 54-61, ICTY Rules of Procedure and Evidence (adopted 11 February 1994, amended 10 July 2015) IT/32/Rev.50.

⁵⁴ *Tadić* Interlocutory Appeal on Jurisdiction (n 39) §§32–36.

⁵⁵ *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 182-183; Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing 2004) 193.

⁵⁶ *Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151, 168.

The same conclusion is justified by the object and purpose of Chapter VII and the principle of effective interpretation. The aim of Chapter VII is to grant the UNSC powers that it can effectively employ to fulfil its primary responsibility to maintain international peace and security.⁵⁷ Therefore, the Council's powers under Chapter VII should include the power to bind individuals to the extent that this is conducive to the effective implementation of its mandate.⁵⁸ Examples include situations of non-international armed conflict and other peace-threatening situations, such as terrorism, where it may be necessary or useful to directly regulate the conduct of non-state groups or private individuals.⁵⁹ Even outside of these scenarios, it may be that, to successfully maintain or restore peace, the UNSC must be able to criminalise individual conduct beyond pre-existing rules of international or domestic law.⁶⁰ This is precisely what may be at stake in a referral to the ICC: the Council may find that not just the exercise of jurisdiction by the Court, but also the application of the criminal provisions of the Statute are necessary or appropriate to achieve peace and security in a certain situation. Thus, to deprive the Council of the ability to directly apply criminal law to individuals would be to deprive Chapter VII of its purpose and effectiveness.

This view finds further support in the jurisprudence of the ICJ, ICTY and ICC. In particular, the ICJ acknowledged that it was the common practice of the Council to 'make demands on actors other than United Nations Member States and inter-governmental

⁵⁷ See Arts 24(1) and 39, UN Charter.

⁵⁸ Anne Peters, 'Security Council Resolution 2178 (2014): The "Foreign Terrorist Fighter" as an International Legal Person, Part I' (*EJIL: Talk!*, 20 November 2014) 2 <<https://www.ejiltalk.org/security-council-resolution-2178-2014-the-foreign-terrorist-fighter-as-an-international-legal-person-part-i/>> accessed 25 August 2019.

⁵⁹ See, e.g., UNSC Res 1333 (19 December 2000) UN Doc S/RES/1333, paras 9 and 16(b); UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178 para 1; UNSC Res 1203 (24 October 1998) UN Doc S/RES/1203 para 4.

⁶⁰ Gallant, 'Jurisdiction' (n 10) 828.

organizations'.⁶¹ It also held that the addressees of any binding resolution would depend on a case-by-case interpretation of the resolution.⁶² Likewise, the ICC has held that an UNSC referral has the effect of making the 'entire statutory framework of the Statute' applicable to the relevant situation, without distinguishing between rules addressed to states and individuals.⁶³ The Court has also been automatically applying the criminal provisions of Rome Statute to all cases and situations arising from UNSC referrals.⁶⁴ Along similar lines, the Appeals Chamber of the ICTY has previously held that 'it is open to the Security Council - subject to respect for peremptory norms of international law (*jus cogens*) - to adopt definitions of crimes in the Statute which deviate from customary international law'.⁶⁵

Moreover, the UNSC has already adopted a series of resolutions creating direct obligations vis-à-vis individuals. The most significant examples include resolutions which specifically require a certain conduct by non-states actors,⁶⁶ and those delegating to the Al-Qaeda Sanctions Committee the power to list or delist individuals in the Al-Qaeda Sanctions list.⁶⁷ Importantly, these resolutions have not been contested by states.⁶⁸

⁶¹ *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403 §116.

⁶² *ibid* §117.

⁶³ See, e.g., *Al-Bashir Case* (Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or (sic) Omar Al-Bashir) ICC-02/05-01/09-309 (11 December 2017) §§37–38; *Al-Bashir Case* (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) ICC-02/05-01/09-302 (6 July 2017) §§85–86; *Al-Bashir Case* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09-3 (4 March 2009) §45. But see *Al-Bashir Case* (Judgment in the Jordan Referral re Al-Bashir Appeal) ICC-02/05-01/09-397 (6 May 2019) §§135–145, 149 (holding that the Statute – at least when it comes to the cooperation regime for states parties – does not automatically apply to non-states parties following an UNSC referral, but only to the extent that the Council clearly imposes upon them an obligation to fully cooperate with the Court).

⁶⁴ See, e.g., *Al-Bashir Arrest Warrant Decision* (n 63) §45; *Gaddafi and Al-Senussi Case* (Decision on the admissibility of the case against Saif Al-Islam Gaddafi) ICC-01/11-01/11-344-Red (31 May 2013) §§1-2.

⁶⁵ *Tadić Case* (Appeal Judgment) ICTY-94-1-A (15 July 1999) §296. See also §287.

⁶⁶ See *supra* note 59 and, e.g., UNSC, 'Res 1203' (n 59) paras 4, 5, 6, 10, 11; UNSC Res 1306 (5 July 2000) UN Doc S/RES/1306 para 10; UNSC Res 814 (26 March 1993) UN Doc S/RES/814 para 8.

⁶⁷ UNSC, 'Res 1333' (n 59) para 16(b).

This subsequent practice must either be taken as part of the context of Chapter VII, under Article 31(3)(b) of the VCLT,⁶⁹ or can be used, at the very least, as a supplementary means of interpretation, within the meaning of Article 32 of the VCLT.⁷⁰

Therefore, the better view seems to be that the Council's power to bind states necessarily includes the ability to directly apply law to individuals, including criminal law and, in particular, the provisions of the Rome Statute.⁷¹

It is important to note that the view one takes on the prescriptive effect of UNSC referrals leads to a different conclusion as regards the retroactive application of the Rome Statute. If one accepts that UNSC referrals have prescriptive effects, it is only in retrospective referrals involving non-states parties that the Statute risks being applied retroactively. Such retroactivity would arise because, even if the Council could in theory apply criminal law directly to individuals, the fact remains that, before the referral, the Rome Statute was not *per se* binding on individuals who were exclusively subject to the legislative authority of non-states parties.⁷² At the same time, from the date of the referral onwards, the Statute could be applied to such individuals, at least theoretically (although it may be that the Statute requires otherwise, as we shall in Chapter 6).

⁶⁸ Peters (n 58) 2; Anne Peters, 'Security Council Resolution 2178 (2014): The "Foreign Terrorist Fighter" as an International Legal Person, Part II' (*EJIL: Talk!*, 21 November 2014) <<https://www.ejiltalk.org/security-council-resolution-2178-2014-the-foreign-terrorist-fighter-as-an-international-legal-person-part-ii/>> accessed 25 August 2019.

⁶⁹ See ILC, 'Report on the Work of the Sixty-Eighth Session (2016), Chapter VI: Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' (2 May-10 June and 4 July-12 August 2016) UN Doc A/71/10 p 142, paras 16-17, p 149, para 2, p 193, Conclusion 10[9](2), p 197, paras 13-25 (on the effect of omissions and silence in generating subsequent practice or agreement).

⁷⁰ See ILC, 'Report on the Work of the Sixty-Fifth Session (2013), Chapter IV, Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' (6 May-7 June and 8 July-9 August 2013) UN Doc A/68/10 pp 31-41, Draft Conclusion 4(3) and Commentary, particularly (36).

⁷¹ Similarly, see Galand (n 51) 149-154; Peters (n 58) 2.

⁷² For a discussion of the UNSC's powers to derogate from international human rights law, including the principle of legality, see Chapter 6, Section 4.

Thus, in prospective referrals, the application of the Statute would not, in principle, be retroactive or contrary to the principle of legality.

Conversely, if one takes the view that UNSC referrals cannot bind individuals, the risk of retroactive application of the Statute arises for both retrospective and prospective referrals involving non-states parties. This is because the Council could not apply the Rome Statute to individuals, neither before nor after the referral. Accordingly, any application of the criminal provisions of the Statute to individuals that had been exclusively subject to the legislative authority of non-states parties would be retroactive, at least in a formal sense.

Again, even if the application of the Rome Statute to said individuals would be formally retroactive, a violation of the principle of legality will only materialise to the extent that the criminal provisions of the Statute are substantively detrimental to them, as discussed in Chapter 2. Moreover, regardless of whether or not the UNSC can bind individuals and apply the Rome Statute to them, it is a separate question whether the Statute itself requires the ICC to apply its own criminal provisions to situations that have been referred by the UNSC. This question, which is also decisive for the retroactive application of the Statute in cases of UNSC referrals, will be addressed in Section 4 below, and further in Chapter 6.

At the time of writing, there have been two UNSC referrals involving non-states parties to the Statute, namely Sudan,⁷³ and Libya.⁷⁴ Both referrals cover partly retrospective events.

⁷³ UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593.

⁷⁴ UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970.

c. Retroactive Withdrawal of Opt-out Declarations for War crimes

As mentioned earlier, the Rome Statute may also apply retroactively where a state withdraws an opt-out declaration whereby it had previously decided to exclude from the Court's jurisdiction events amounting to war crimes committed by its nationals or on its territory. Those declarations are provided for in Article 124 of the Statute. Their retroactive effect arises from the fact that, while their operation is limited to seven years after the entry into force of the Statute, there are no temporal limitations to their withdrawal. Thus, such declarations could be withdrawn, at any time, including in respect of retrospective events, i.e. events that occurred when the opt-out declaration was in force.⁷⁵

Nevertheless, opt-out declarations for war crimes have had minimal practical effect.⁷⁶ Only France and Colombia have made use of it, with the French declaration being withdrawn with prospective effect in 2008⁷⁷ and the Colombian declaration having expired in 2009.⁷⁸ Moreover, on 26 November 2015, during the Review Conference of the Rome Statute, the Assembly of States Parties decided to delete Article 124 by adopting an amendment to that effect.⁷⁹ Although the amendment still needs to be ratified or accepted by seven-eighths of states parties to the Statute in order to enter into force⁸⁰

⁷⁵ Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (CUP 2010) 338, fn 172.

⁷⁶ Roberto Bellelli, *International Criminal Justice: Law and Practice from the Rome Statute to Its Review* (Routledge 2016) 405.

⁷⁷ 'France: Withdrawal of Declaration, C.N.592.2008.TREATIES-5' <<https://treaties.un.org/doc/Publication/CN/2008/CN.592.2008-Eng.pdf>> accessed 25 August 2019.

⁷⁸ Jan Schneider and Francisco Taborda Ocampo, 'Alcance de La Declaración Colombiana Según El Artículo 124 Del Estatuto de Roma' (2011) *Revista de Derecho* 297.

⁷⁹ ASP, Resolution on article 124 (26 November 2015) Res ICC-ASP/14/Res2.

⁸⁰ See Art 121(4), Rome Statute.

(with only twelve states parties having ratified it so far),⁸¹ it is unlikely that Article 124 will be invoked after a decision to delete it has been made.

d. The Retroactive Application of the Crime of Aggression

Although the crime of aggression was included within the subject-matter jurisdiction of the ICC since the entry into force of the Rome Statute, it lacked a definition and the conditions pursuant to which the Court could exercise jurisdiction over it.⁸² Thus, the crime was dormant until: a) amendments were adopted to fill those gaps in 2010 (the ‘Kampala Amendments’),⁸³ b) the requisite number of ratifications was reached in 2016,⁸⁴ and c) the Assembly of States Parties to the Statute finally decided to activate it on 14 December 2017.⁸⁵ The crime of aggression became active on 17 July 2018. However, for state party referrals and *proprio motu* investigations, the pre-conditions to the Court’s jurisdiction are more demanding than those listed in Article 12(2). This is because *both* the state of nationality of the perpetrator (i.e. the aggressor state) *and* the state on whose territory the crime took place (i.e. the victim state) must have accepted the Kampala Amendments.⁸⁶ Thus, the assumption is that the Court does not have jurisdiction over an alleged crime of aggression that was committed by or against a non-

⁸¹ ‘United Nations Treaty Collection, Amendment to Article 124 of the Rome Statute of the International Criminal Court’ 124 <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-c&chapter=18&clang=_en> accessed 25 August 2019.

⁸² See Art 5(2), Rome Statute.

⁸³ ASP, ‘The crime of aggression’ (11 June 2010) Res RC/Res. 6.

⁸⁴ ‘United Nations Treaty Collection, Chapter XVIII, 10. b Amendments on the Crime of Aggression to the Rome Statute of the International Criminal Court, Kampala, 11 June 2010’ <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&lang=en> accessed 25 August 2019.

⁸⁵ ASP, ‘Activation of the Jurisdiction of the Court over the Crime of Aggression’ (14 December 2017) Res ICC-ASP/16/Res.5.

⁸⁶ *ibid* 2. See also Claus Kreß, ‘On the Activation of ICC Jurisdiction over the Crime of Aggression’ (2018) 16 JICJ 1, 13–16; Dapo Akande, ‘The International Criminal Court Gets Jurisdiction Over the Crime of Aggression’ (*EJIL: Talk!*, 15 December 2017) <<https://www.ejiltalk.org/the-international-criminal-court-gets-jurisdiction-over-the-crime-of-aggression/>> accessed 25 August 2019.

ratifying state party or a non-state party, unless the UNSC refers the situation to the ICC.⁸⁷

For present purposes, three brief remarks on the crime of aggression and its jurisdictional framework are warranted.

First, what has been said earlier about the retroactive application of the Statute in cases of UNSC referrals is valid for the crime of aggression. In particular, a violation of the principle of legality might arise to the extent that the definition of this crime in Article 8 *bis* of the amended Statute departs from its customary counterpart.⁸⁸ While the Statute's version of the crime of aggression is narrower than custom when it comes to the gravity threshold (a manifest violation of the UN Charter is required), some of the underlying acts criminalised under the Statute go beyond the customary definition of this crime, such as the sending of armed groups⁸⁹

Second, it is unclear whether non-states parties can make ad hoc declarations in respect of the crime of aggression. They are not explicitly mentioned in Article 15 *bis*, which regulates the exercise of the Court's jurisdiction for the crime of aggression in cases of state party referrals or *proprio motu* investigations. Other parts of the resolution containing the Kampala Amendments,⁹⁰ as well as the more recent Activation Decision are also silent on this matter.⁹¹ Although this question remains subject to some controversy⁹² and is beyond the scope of this thesis, my view is that ad hoc declarations

⁸⁷ See Art 15*ter*(1), RC/Res. 6 (n 83).

⁸⁸ See RC/Res. 6 (n 83), Annex III, Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression, paras 4, 6-7.

⁸⁹ See Art 8*bis*, RC/Res. 6 (n 83) and Milanović, 'Aggression' (n 14) 183–186; Kreß (n 86) 4.

⁹⁰ See, in particular, RC/Res. 6 (n 83), Annex III.

⁹¹ ASP (n 85).

⁹² Dapo Akande and Antonios Tzanakopoulos, 'Treaty Law and ICC Jurisdiction over the Crime of Aggression' (2018) 29 EJIL 939, 954–955; Stefan Barriga and Niels Blokker, 'Conditions for the Exercise

can cover the crime of aggression.⁹³ To begin with, in the absence of explicit derogation, the pre-conditions listed in Article 12 continue to apply.⁹⁴ For the crime of aggression, all that has been altered in those pre-conditions is that territoriality and active nationality are now cumulative, and both the aggressor and the victim state must have accepted the amendments on this crime. Provided that those conditions are met, nothing stops a non-state party or a non-ratifying state party from accepting those amendments through an ad hoc declaration. Admittedly, Article 15 *bis*(4) categorically excludes from the Court's jurisdiction crimes of aggression committed on the territory or by nationals of non-states parties in cases of *proprio motu* investigations and state party referrals. However, the chief aim of this provision is to preclude the Court from adjudicating over acts of aggression committed by or against a state that has not consented to the Court's jurisdiction.⁹⁵ Thus, it would not contradict Article 15 *bis*(4) or the principle of state consent if both the aggressor and the victim state accepted the Court's jurisdiction on an ad hoc basis.⁹⁶ Furthermore, when making ad hoc declarations in respect of a given situation, states cannot cherry-pick or carve out the crimes that will arise therefrom. They accept the application of the Statute as a whole to the entire situation.⁹⁷ If it is accepted that ad hoc declarations can be made for the crime of aggression, the same observations made earlier on their retroactive effect are valid for this crime.

of Jurisdiction Based on State Referrals and Proprio Motu Investigations' in Claus Kreß and Stefan Barriga (eds), *The Crime of Aggression: A Commentary* (CUP 2016) 656; Milanović, 'Aggression' (n 14) 177–178.

⁹³ For the full argument, see Talita de Souza Dias, 'The Activation of the Crime of Aggression before the International Criminal Court: Some Overlooked Implications Arising for States Parties and Non-States Parties to the Rome Statute' (2019) JCSL, Sections 2 and 3.

⁹⁴ Rastan (n 41) 146, fn 26.

⁹⁵ Kreß (n 86) 7.

⁹⁶ See Dapo Akande, 'Prosecuting Aggression: The Consent Problem and the Role of the Security Council' (2011) Oxford Legal Studies Research Paper No 10/2011 17, 26–27, 30, 33 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762806> accessed 25 August 2019; *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964).

⁹⁷ *Gbagbo Case* (Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings) ICC-02/11-01/11-321 (12 December 2012) §80.

Third, according to Article 15 *bis*(4) of the Kampala Amendments, states parties that have accepted those amendments can still ‘opt out’, i.e. exclude from the Court’s jurisdiction, crimes of aggression committed by their nationals.⁹⁸ Significantly, that provision allows and even invites states parties to withdraw such declarations at any time. Without any limitations being imposed on the temporal scope of a withdrawal, it could be made *ex post facto*, i.e. in respect of events that took place before the date of the opt-out declaration. Therefore, in those instances, the application of the Rome Statute and the Kampala Amendments to individuals that were not previously bound by them would be retroactive.

e. Extensive Interpretation

Extensive or expansive interpretation refers to the interpretation of the criminal law in a way that expands the text of the relevant provision to events that were not previously covered by it.⁹⁹ This is the most frequent and yet the least evident way in which the Rome Statute might apply retroactively. It may occur in situations coming within the Court’s jurisdiction under any jurisdictional pre-condition or triggering mechanism. And it happens whenever the Court disregards the principles of strict construction and *in dubio pro reo* to apply the criminal provisions of the Statute in ways that are substantively more severe than their text could have envisaged. There are countless ways in which this can happen, such as by expanding the underlying acts of crimes, their mental or contextual elements, modes of liability, or by limiting the scope of available defences. Thus, a comprehensive examination of this instance of retroactive application of the Statute falls outside the scope of this thesis. However, it is worth mentioning that, if an extensive

⁹⁸ See Dapo Akande, ‘The ICC Assembly of States Parties Prepares to Activate the ICC’s Jurisdiction over the Crime of Aggression: But Who Will Be Covered by That Jurisdiction?’ (*EJIL: Talk!*, 26 June 2017) <<https://www.ejiltalk.org/the-icc-assembly-of-states-parties-prepares-to-activate-the-iccs-jurisdiction-over-the-crime-of-aggression-but-who-will-be-covered-by-that-jurisdiction/>> accessed 25 August 2019.

⁹⁹ Antonio Cassese, *International Criminal Law* (OUP 2008) 45–46.

interpretation of the Statute is simply justified on the basis that the accused's conduct amounted to a crime in accordance with the applicable law, this could amount to a retroactive recharacterisation of crimes.

4. Article 21(1): Applicable Law and Retroactivity

Article 21(1) of the Rome Statute reads as follows:

Article 21

Applicable law

1. The Court *shall* apply:

(a) *In the first place*, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) *In the second place, where appropriate*, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) *Failing that*, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.¹⁰⁰

(...)

As the title and *chapeau* of this provision indicate, its function is to list the applicable sources of law that the Court can apply to the cases and situations coming within its jurisdiction. It is the determination of these sources of law that will be decisive as to whether or not the Rome Statute will be applied retroactively in the scenarios discussed above. Three aspects of Article 21(1) must be noted in this regard.

¹⁰⁰ Emphasis added.

First, subject to the supra-legality of ‘internationally recognized human rights’, discussed below,¹⁰¹ Article 21(1) gives primacy to the application of the Rome Statute, the ICC Elements of Crimes and its RPE, over ‘external’ sources of law that may also be applicable before the Court.¹⁰² Pursuant to paragraphs b and c quoted above, these sources are: i) treaties that are both relevant and applicable to the individual(s) concerned, ii) customary international law, and, failing those, iii) ‘general principles of law derived by the Court from national laws of legal systems of the world’.¹⁰³ Furthermore, according to the ICC’s consistent case law, the application of external sources is only warranted where there is a lacuna or gap within the Rome Statute.¹⁰⁴ This occurs when the Statute has an objective which cannot be fulfilled by its very own provisions, the Elements of Crimes or the RPE, even with recourse to the applicable rules of interpretation.¹⁰⁵

Second, Article 21(1) does not distinguish between rules of procedure and substance, or between rules that are addressed to states and individuals. As highlighted in this chapter, as well as in previous chapters, those distinctions are often artificial and

¹⁰¹ See also Chapter 7, Section 2.

¹⁰² See Allain Pellet, ‘Applicable Law’ in Antonio Cassese and others (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 1077–1079; Schabas (n 11) 515; Margaret MacAuliffe deGuzman, ‘Article 21: Applicable Law’ in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (Beck/Hart 2016) 935–937.

¹⁰³ *Ruto et al Case* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-01/11-373 (23 January 2012) §289; *Situation in the Democratic Republic of Congo* (Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal) ICC-01/04-168 (13 July 2006) §§24–32. See also MacAuliffe deGuzman (n 102) 938–945; J Verhoeven, ‘Article 21 of the Rome Statute and the Ambiguities of Applicable Law’ (2002) 33 NYIL 2, 8–13.

¹⁰⁴ See *Ruto and Sang Case* (Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled ‘Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation’) ICC-01/09-01/11-1598 (09 October 2014) §105; *Katanga Case* (Judgment pursuant to article 74 of the Statute) ICC-01/04-01/07-3436-tENG (7 March 2014) §1395; *Al-Bashir Arrest Warrant Decision* (n 63) §44.

¹⁰⁵ *Situation in the Democratic Republic of Congo* (n 103) §39; Gilbert Bitti, ‘Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC’ in Carsten Stahn and Göran Sluiter (eds), *The Law and Practice of the International Criminal Court* (OUP 2015) 294–296.

difficult to draw. Accordingly, the text of Article 21(1) suggests that all provisions contained in the Rome Statute must be given primacy.¹⁰⁶

Third, most significantly, Article 21(1) seems to require, at least on its face, that primacy be given to the provisions of Rome Statute across all situations that come within the Court's jurisdiction, regardless of the jurisdictional pre-condition or trigger mechanism. Thus, at first glance, Article 21 directs the Court to apply the criminal provisions of the Rome Statute to individuals in situations i) involving states parties, ii) brought to the Court via an ad hoc declaration, or iv) arising from an UNSC referral, including for the crime of aggression and where there has been a withdrawal of an opt-out declaration for war crimes or the crime of aggression. This proposition finds some support in the jurisprudence of the ICC, which has been automatically applying the substantive provisions of the Statute even in cases arising from ad hoc declarations and UNSC referrals involving non-states parties.¹⁰⁷ Although I will put this assumption to the test in Chapter 6, by looking at the nature of the Rome Statute and the powers of the ICC, for now it suffices to note that the apparent import of Article 21(1) is that the Statute as a whole is binding on individuals across all those situations.

It is the application of the Rome Statute as a primary source of criminal law in the five retrospective situations identified earlier that will ultimately lead to its retroactivity, i.e. its application to individuals that were not bound by its provisions at the time of the conduct. In a way, Article 21(1) materialises a risk foreshadowed by the retrospective

¹⁰⁶ This view also finds support in the drafting history of Article 21(1). See, e.g. UNGA, 'Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I (Proceedings of the Preparatory Committee during March-April and August 1996)' (13 September 1996) UN Doc A/51/22 p 43, para188; UNGA, 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, General Assembly, Fiftieth Session' (6 September 1995) UN Doc A/50/22 para 52.

¹⁰⁷ See *supra* note 64 and *Gbagbo Case* (Decision on the confirmation of charges against Laurent Gbagbo) ICC-02/11-01/11-656-Red (12 June 2014) §278; *Blé Goudé Case* (Decision on the confirmation of charges against Charles Blé Goudé) ICC-02/11-02/11-186 (11 December 2014) §§114–194 (where the ICC has applied the Statute to partly retrospective cases arising from Côte d'Ivoire's ad hoc declaration).

exercise of jurisdiction. Crucially, to the extent that the formally retroactive application of the Statute is justified by the existence of a similar offence or mode of liability under customary international law, applicable treaties, general principles or domestic law, recourse will be had to retroactive recharacterisation of crimes. If this results in the application of rules of criminal law that are substantively detrimental to the accused, regardless of their classification as procedural or substantive, the principle of legality in general international law might be violated. By the same token, if the labels of crimes, modes of liability or defences contained in the Rome Statute fail to capture the accused's moral blameworthiness at the time of the conduct or upon conviction, their application might be inconsistent with the principle of fair labelling in general international law.

5. The Retroactive Application of the Rome Statute and the Principles of Legality and Fair Labelling: A Problem for the ICC?

The previous sections have shown how the interplay between certain provisions of the Statute, in particular Articles 11, 12(3), 13(b), 15*bis*(4), 21(1) and 124, may lead to the retroactive application of the Rome Statute in at least five scenarios. It was also mentioned that, in those scenarios, rules of criminal law may be recharacterised and a breach of the principles of legality and fair labelling in general international law might ensue. What remains to be addressed in this Chapter is whether this breach would be an issue for the ICC. Two questions are of particular relevance. First, from an external perspective, to what extent is the Court bound by the principles of legality and fair labelling in general international law so that a breach of those principles would engage its international responsibility? Second, from an internal perspective, to what extent does the Rome Statute require the Court to comply with those principles?

To start from the second question, the Rome Statute has often been praised for recognising a robust version of the principle of legality.¹⁰⁸ It explicitly recognises the principles of non-retroactivity of crimes (Articles 22(1) and 24(1)) and penalties (Article 23), strict interpretation (Article 22(2)), *in dubio pro reo* (Article 22(2)), *lex mitior* (Article 24(2)) and, implicitly, the principles of legal certainty and *lex scripta*. However, this formulation of the principle of legality is self-contained, that is, limited to the application of the Statute's own criminal provisions.¹⁰⁹ In particular, Article 22(1) only requires, for a person to be held responsible under the Statute, that the conduct constituted, at the time it took place, 'a crime within the [subject-matter] jurisdiction of the Court'. Thus, Article 22(1) would not be violated if the criminal provisions of the Statute are applied to someone who was not bound by them at the material time, provided that their conduct amounts to a crime listed in Article 5 of the Statute. Similarly, all that Article 23 requires is that the person be punished 'in accordance with [the] Statute', regardless of whether the Statute's penalties were previously applicable. Thus, the Rome Statute's own provisions on the principle of legality are not in line with how this principle has been defined in general international law and fail to prevent the retroactive application of the Statute in the five scenarios identified earlier.

Nevertheless, Article 21(3) of the Statute requires the Court to apply and interpret its applicable law consistently with 'internationally recognized human rights'. Although the exact scope and effect of this provision will be analysed in detail in Chapter 7, for now it suffices to note that there is general agreement that the principle of legality, as it

¹⁰⁸ Kai Ambos, *Treatise on International Criminal Law: Volume I: Foundations and General Part* (OUP 2013) 90–91; Birgit Schlütter, *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International Ad Hoc Criminal Tribunals for Rwanda and Yugoslavia* (Brill 2010) 319.

¹⁰⁹ O'Keefe (n 10) 552, fn 108; Milanović, 'Rome Statute' (n 14) 52; Bartels (n 48) 161; Galand (n 4) 121–122. For a contrary, but minority view, see Gallant, 'Legality' (n 75) 341.

exists in general international law, is an ‘internationally recognized human right’ within the meaning of Article 21(3).¹¹⁰

In contrast, the principle of fair labelling has not been explicitly recognised in the Statute, nor is its status as an ‘internationally recognized human right’ clear. However, as indicated in Chapter 3, fair labelling underpins different provisions and principles recognised in the Statute, such as the principle of legality itself, the principle of personal culpability (Article 25) and the rules governing legal recharacterisation of facts.¹¹¹ This conclusion finds support in the case law of the ICC, which on various occasions has invoked the principle of fair labelling, particularly in the context of modes of liability.¹¹²

Turning to the first question above, it suffices to note that the ICC is a subject of international law. Accordingly, it is in principle bound by the rules of general international law.¹¹³ As will be discussed in Chapter 6, although it is open to its states parties to derogate from other rules of international law, they cannot do so in respect of *erga omnes* rules, or rules that create rights and obligations for other interested parties, such as individuals.¹¹⁴ Thus, to the extent that the principles of legality and fair labelling

¹¹⁰ See, e.g., Boot (n 22) 18; Leena Grover, ‘A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court’ (2010) 21 EJIL 543, 559; Gallant, ‘Legality’ (n 75) 331–332; Milanović, ‘Rome Statute’ (n 14) 52; Galand (n 4) 140–143; UNGA, ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court - Addendum’ (19 April 1998) UN Doc A/CONF.183/2/Add.1 p 47, fn 63.

¹¹¹ See, e.g., Reg 55, Regulations of the Court (2004) ICC-BD/01-01-04.

¹¹² See, e.g., *Bemba Case* (Appeal Judgment) ICC-01/05-01/08-3636-Anx3 (14 June 2018), Concurring Separate Opinion of Judge Eboe-Osuji §200; *Al Mahdi Case* (Judgment and Sentence) ICC-01/12-01/15-171 (27 September 2016) §60; *Lubanga Case* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (01 December 2014) §462.

¹¹³ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, International Court of Justice* (Advisory Opinion) [1980] ICJ Rep 73 §37; Gallant, ‘Legality’ (n 75) 357–358.

¹¹⁴ ILC, ‘Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (2006) YILC, vol II, Part Two para 10.

recognise individual rights, their violation would engage the Court's international responsibility.¹¹⁵

In sum, if the Rome Statute is applied retroactively and in substitution for more beneficial rules of criminal law binding on the accused at the time of the conduct, the ICC might be in breach of the principles of legality and fair labelling. Significantly, the Court is bound by both principles under the Statute itself and general international law. As we shall see in the next chapter, this means that a series of apparent and actual norm conflicts might arise between the Statute and those two principles.

6. Conclusion

This Chapter has shown that the Court may not only exercise retrospective jurisdiction but also apply the criminal provisions of the Rome Statute retroactively in at least five different scenarios. These are: i) situations which have been brought to the Court's jurisdiction via an ad hoc declaration; ii) situations referred by UNSC and involving non-states parties; iii) situations where there has been a retrospective withdrawal of an opt-out declaration for war crimes; iv) instances where an opt-out declaration for the crime of aggression has been retrospectively withdrawn; and v) certain types of extensive interpretation. In all those scenarios, the Statute appears to direct the Court to apply its own criminal provisions to individuals who were not bound by them at the time of the conduct. This may amount to the retroactive recharacterisation of the applicable criminal law into the Rome Statute. The recharacterisation in question may take the form of one or more of the types described in Chapter 1. In particular, the jurisdictional provisions in Articles 12(3) (on ad hoc declarations) and 13(b) (on UNSC referrals) might prescribe criminal conduct that was not previously criminal, punishable or culpable. By the same

¹¹⁵ ILC, 'Draft Articles on the Responsibility of International Organizations, with Comments' (2011) YILC, vol II, Part Two, Arts 3 and 10 (including commentaries [2]-[3]).

token, the application of the Statute in substitution for other applicable sources of criminal law in these and other circumstances could most typically result in the removal of essential elements of crimes or available defences and the imposition of more serious labels. Although such recharacterisation does not seem to clash with Articles 22 to 24 of the Statute itself, recognising a self-contained version of the principle of legality, it does appear to breach the principles of legality and fair labelling in general international law. The Court is bound by both principles not only as a subject of international law but also through the provisions of its Statute.

CHAPTER 5: THE EXISTING VIEWS ON THE RETROACTIVE APPLICATION OF THE ROME STATUTE: A CRITICAL APPRAISAL

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1. Introduction

Chapter 4 has shown how the ICC can exercise retrospective jurisdiction and apply the Rome Statute retroactively in at least five scenarios: i) ad hoc declarations lodged by non-states parties or states joining the Statute after 1 July 2002; ii) UNSC referrals involving non-states parties; iii) retrospective withdrawals of opt-out declarations for war crimes; iv) retrospective withdrawals of opt-out declarations for the crime of aggression by states having ratified the Kampala Amendments; and v) certain instances of extensive interpretation of the criminal provisions of the Statute. That chapter has also explained how, in those scenarios, the application of the Rome Statute in substitution for an applicable source of criminal law might clash with the principles of legality and fair labelling.

Nevertheless, not enough attention has been devoted to this issue in the literature or case law. Some commentators and the ICC itself have so far overlooked or disregarded the problem. Only a handful of scholars have taken issue with the Statute's retroactive application and proposed some solutions to it. But these do not seem to fully address the problem.

Against this backdrop, the purpose of this Chapter is to identify and critically appraise the principal views on the retroactive application of the Rome Statute. **Section 2** will start by discussing why some have rejected the problem. **Section 3** then identifies the solutions that have been proposed so far, followed by an evaluation of their merits and shortcomings. My main argument is that, while some of those proposals rightly frame the retroactive application of the Statute as a norm conflict between the Statute and the principle of legality, this only scratches the surface. A series of fundamental questions have been left unanswered, such as the problematic outcomes arising from the recharacterisation of the applicable law into the Rome Statute. **Section 4** will conclude by identifying the key steps needed to fill those gaps and build a more comprehensive approach to tackle the retroactive application of the Statute.

2. Identifying the Existing Views

a. Retroactivity Issues Overlooked or Rejected

For some commentators, the exercise retrospective jurisdiction by the ICC or the retroactive application of the Statute has gone completely unnoticed.¹ Others recognise that the Court can exercise retrospective jurisdiction in at least some situations,

¹ See, e.g., Philippe Kirsch, 'Applying the Principles of Nuremberg in the International Criminal Court' (2007) 6 Washington University Global Studies Law Review 501, 506; Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia 2002) 369–370, 372; Stéphane Bourgon, 'Jurisdiction Ratione Temporis' Antonio Cassese and others (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 543, 549; Shabtai Rosenne, 'The Jurisdiction of the International Criminal Court' (1999) 2 YIHL 119, 125, 127, 140; Beth Van Schaack, 'Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals' (2008) 97 GeoLJ 119, 176–177.

particularly those arising from ad hoc declarations and UNSC referrals. Nevertheless, they still reject the idea that the Statute applies retroactively or violates the principle of legality.

i. ‘The Court is bound by the Statute’

Some commentators rely on the hierarchy of sources set by Article 21(1) of the Statute to shield the Court from potential violations of the principle of legality. In particular, it is argued that the ICC is bound to apply the Rome Statute in the first place, and has no authority to depart from it, even if it goes against the *nullum crimen* principle in general international law. On this view, the Statute would constitute a self-contained regime and ICC judges must follow it, regardless of the Court’s responsibility for breaches of general international law.² This view finds some support in the text of Articles 22 and 23, which suggest that the criminalisation and punishment of a certain conduct by the Rome Statute suffice to comply with the principle of legality. A similar argument was advanced by the Nuremberg IMT, which concluded that the London Charter (containing the Statute of the Tribunal) was authoritative and conclusive as to the existence of the crimes that it defined and their applicability to the defendants.³

In earlier decisions, the ICC seems to have followed this view by holding that the principle of legality would be satisfied if a certain conduct is found to be a crime ‘within

² Dov Jacobs, ‘Positivism and International Criminal Law: The Principle of Legality as a Rule of Conflict of Theories’ in Jean D’Aspremont and Jörg Kammerhofer (eds), *International Legal Positivism World* (CUP Forthcoming) 23–24 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2046311> accessed 25 August 2019; Emmanuel Heugas-Darraspen, ‘Article 22’ in Julian Fernandez and Xavier Pacreau (eds), *Statut de Rome de la Cour Pénale Internationale : Commentaire Article par Article* (Pedone 2012) 786. See also William A Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press 2006) 66, 67 (making a similar argument in relation to ad hoc tribunals and the Special Court of Sierra Leone).

³ *Judgment of the Nuremberg International Military Tribunal 1946* (1947) 41 AJIL 172, 173-174, 218, 228, 232, 243, 253.

the jurisdiction of the Court’, irrespective of its customary nature.⁴ In particular, in a case arising from the UNSC referral of the situation in Darfur, Sudan, the *Abu Garda* case, Pre-Trial Chamber I held that:

[T]he Defence must understand that the *nullum crimen poena sine lege* principle which it has tirelessly cited during its legal arguments is inappropriate in the present case for the simple reason that *the provisions of the Rome Statute are what serve as the legal foundations to the charges brought against Abu Garda*.⁵

Likewise, in other partly retrospective cases currently before it, i.e. those arising from the situations in Darfur, Côte d’Ivoire and Libya, the Court has been automatically applying the criminal provisions of the Statute.⁶ In particular, it has applied rules of substantive criminal law that it has found to go beyond pre-existing customary international law, such as the mode of liability known as ‘indirect co-perpetration through an organisation’.⁷ In none of those cases has the Court enquired whether the Statute was binding on the accused at the material time, and, in the negative, whether it goes beyond customary international law or another source of applicable law.

⁴ *Lubanga Case* (Decision on the Confirmation of Charges) ICC-01/04-01/06-803-tEN (29 January 2007) §§302–303; *Katanga Case* (Judgment pursuant to article 74 of the Statute) ICC-01/04-01/07-3436-tENG (7 March 2014) §1395.

⁵ Emphasis added. *Abu Garda Case* (Confirmation of Charges Hearing Transcript) ICC-02/05-02/09-T-21-Red-ENG (30 October 2009) §§30–31, 38. The Abu Garda case is now closed unless new evidence is presented, as the charges were not confirmed due to lack of sufficient evidence. See *Abu Garda* (Decision on the Confirmation of Charges, Public Redacted Version) ICC-02/05-02/09-243-Red (08 February 2010).

⁶ See, e.g., *Al-Bashir Case* (Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir ICC-02/05-01/09-3 (4 March 2009) §45; *Gaddafi and Al-Senussi Case* (Decision on the admissibility of the case against Saif Al-Islam Gaddafi) ICC-01/11-01/11-344-Red (31 May 2013) §§1–2; *Gbagbo Case* (Decision on the confirmation of charges against Laurent Gbagbo) ICC-02/11-01/11-656-Red (12 June 2014) §§193–278. See also Alexandre Skander Galand, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits* (Brill Nijhoff 2019) 77–78.

⁷ *Situation in the Libyan Arab Jamahiriya* (Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi’) ICC-01/11-12 (27 June 2011) §71; *Al-Bashir Arrest Warrant Decision* (n 6) §223. On the non-customary nature of indirect co-perpetration see *Katanga and Chui Case* (Decision on the confirmation of charges) ICC-01/04-01/07-717 (01 October 2008) §508.

There are several issues with this view. First, the Statute is not and cannot be a self-contained regime.⁸ For one thing, several of its provisions implicitly or explicitly incorporate other rules of international law, such as Articles 13(b) and 21(3). For another, Article 31(3)(c) of the VCLT, which applies to the Rome Statute, requires ICC judges to consider other applicable and relevant rules of international law.⁹ Furthermore, as discussed earlier, both the principles of legality and fair labelling are also binding on the Court under the Statute itself.

ii. The ‘universal conception’ of the Rome Statute

For some scholars, even if the ICC can exercise retrospective jurisdiction and apply the Statute retroactively, no violation of the principle of legality in general international law would ensue. On one view, the Rome Statute, although primarily grounded in the territorial and active nationality jurisdiction of its states parties, was ultimately based on the principle of universal *prescriptive* jurisdiction.¹⁰ This means that the Statute was either reflective of international custom,¹¹ or instantly gave rise to rules that were binding worldwide, given its ‘quasi-constitutional’ nature.¹² While this view might have some

⁸ See, *mutatis mutandis*, WTO, *United States - Standards for Reformulated and Conventional Gasoline – Report of the Appellate Body* (29 April 1996) WT/DS2/AB/R 17.

⁹ ILC, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi’ (13 April 2006) UN Doc A/CN.4/L.682 paras 37–45.

¹⁰ See, e.g., Leila Nadya Sadat and S Richard Carden, ‘The New International Criminal Court: An Uneasy Revolution’ (1999) 88 *GeoLJ* 381, 407, 408, 412–414; Michael P Scharf, ‘The ICC’s Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position’ (2001) 64 *LCP* 67, 76–79; Jordan J Paust, ‘The Reach of ICC Jurisdiction over Non-Signatory Nationals’ (2000) 33 *VandJTransnat’l L* 7, 8.

¹¹ Sadat and Carden (n 10) 390, 409–410; Scharf (n 10) 79, 80.

¹² Leila Nadya Sadat, ‘Custom, Codification and Some Thoughts About the Relationship Between the Two: Article 10 of the ICC Statute’ (1999) 49 *DePaul LRev* 909, 918, 919, 923; Sadat and Carden (n 10) 407, 410 fn 167 (relying on Bardo Fassbender’s view that the UN Charter is a ‘Constitution’ of the international community, binding on all states irrespective of their individual will; see Bardo Fassbender, ‘The United Nations Charter As Constitution of the International Community’ (1998) 36 *ColumJTransnat’l L* 529, 568–584).

cogency when it comes to UNSC referrals,¹³ it has a few fundamental problems. As will be discussed in more detail in Chapter 6, universal jurisdiction was eventually rejected by the drafters of the Statute, at least as a default basis for the Court's jurisdiction and applicable law.¹⁴ In addition, the Statute cannot, in and of itself, bind all individuals worldwide,¹⁵ or instantly become part of customary international law,¹⁶ not least because it has been opposed by several states. In the current state of international law, rules criminalising and punishing conduct must first and foremost be accepted by states, before they can bind individuals.¹⁷ Moreover, even if the drafters had originally intended the Statute to reflect pre-existing international law,¹⁸ the fact remains that it has departed from the latter in various respects.¹⁹

¹³ See Héctor Olásolo, 'Reflections on the International Criminal Court's Jurisdictional Reach' (2005) 16 *CrimLF* 279, 292; Scharf (n 10) 76; Sadat and Carden (n 10) 412–413.

¹⁴ Scharf (n 10) 76–79; Hans Peter Kaul, 'Preconditions to the Exercise of Jurisdiction' in Antonio Cassese and others (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 599; William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2016) 346–350.

¹⁵ See Art 34, VCLT.

¹⁶ Widespread and consistent state practice and *opinio juris* would be required to that effect. See Art 38(1)(b), ICJ Statute; *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (Merits) [1969] ICJ Rep 3 §§73, 77.

¹⁷ See Roger O'Keefe, *International Criminal Law* (OUP 2015) 6, 9, 50–58; Cedric Ryngaert, *Jurisdiction in International Law* (OUP 2015) 30.

¹⁸ See, e.g., UNGA, 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, General Assembly, Fiftieth Session' (6 September 1995) UN Doc A/50/22 p 12, para 58; UNGA, 'Report of the Preparatory Committee on the Establishment of an International Criminal Court - Volume I (Proceedings of the Preparatory Committee during March-April and August 1996)' (14 September 1996) UN Doc A/51/22[VOL-I](SUPP) p16, para 54; Philippe Kirsch, 'Foreword' in Knut Dörmann (ed), *Elements of War Crimes Under the Rome Statute of the International Criminal Court: Sources and Commentary* (CUP 2003) xiii. See also Chapter 6, Section 2.

¹⁹ See Antonio Cassese, *International Criminal Law* (OUP 2008) 43; Rogier Bartels, 'Legitimacy and ICC Jurisdiction Following Security Council Referrals: Conduct on the Territory of Non-Party States and the Legality Principle' in Nobuo Hayashi and Cecilia M Bailliet (eds), *The Legitimacy of International Criminal Tribunals* (CUP 2017) 164–165; Leena Grover, 'A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court' (2010) 21 *EJIL* 543, 568–569; Kenneth S Gallant, 'Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts' (2003) 48 *VillLRev* 763, 838; Madeline Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States' (2001) 64 *LCP* 13, 28; Mahnoush H Arsanjani, 'The Rome Statute of the International Criminal Court' (1999) 93 *AJIL* 22, 25.

While it is not the purpose of this Chapter to exhaust the instances where such departure might occur, especially given the ever-changing content of customary international law, a few examples are warranted.

First, certain sub-headings or underlying acts of crimes under the Statute, even if already criminal under custom or treaties, did not previously exist *as such*, i.e. as separate crimes. This is the case of the war crime of attacking personnel, installations, material, units or vehicles involved in a peacekeeping mission (Article 8(2)(b)(iii) and (e)(iii)), which was covered by the broader war crimes of attacks on civilians and on civilians objects under customary international law.²⁰ Similarly, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilisation (Articles 7(1)(g) and 8(2)(b)(xxii), (e)(vi)), as underlying acts of crimes against humanity and war crimes, even if subsumed into more general categories such as ‘other inhumane acts’ or ‘outrages upon personal dignity’, did not find specific analogues in pre-existing international law.²¹ The problem with these ‘new’, separate crimes is that they introduce more severe labels than the ones applicable under customary international law. To this extent, their application in substitution for the applicable law might be inconsistent with the principles of legality and fair labelling in general international law, as discussed in Chapters 2 and 3.

Second, some sub-headings of ICC crimes have fewer elements in comparison to customary international law or treaty law. For example, torture as a crime against humanity in the Rome Statute is more expansive than its analogue under customary

²⁰ Dapo Akande, ‘Customary International Law and the Addition of New War Crimes to the Statute of the ICC’ (*EJIL: Talk!*, 2 January 2018) <<https://www.ejiltalk.org/customary-international-law-and-the-addition-of-new-war-crimes-to-the-statute-of-the-icc/>> accessed 25 August 2019; Bartels (n 19) 165; UNGA, UN Doc A/51/22[VOL-I](SUPP) (n 18) p 27, para113.

²¹ *Ntaganda Case* (Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9) ICC-01/04-02/06-1707 (04 January 2017) fn 74; Robert Cryer, *An Introduction to International Criminal Law and Procedure* (CUP 2014) 251–256.

international law²² and the Convention against Torture,²³ as it does away with the requirement of a specific purpose.²⁴ Thus, even if the conduct of inflicting severe pain or suffering without a specific purpose could have amounted, in some circumstances, to ‘other inhumane acts’, the labels and perhaps the penalties are not quite the same.

Third, in other instances, the Statute may criminalise conduct that was not previously criminal under custom or pre-existing treaties. For example, the Statute’s list of discriminatory grounds of persecution as a crime against humanity is likely to be broader than its customary counterpart. While there is no question that persecution on political, racial, ethnic or religious grounds is a crime against humanity under customary international law,²⁵ it is unclear whether the same can be said of additional grounds listed in the Statute, namely national, cultural, gender, or ‘other grounds that are universally recognised as impermissible under international law’.²⁶

Lastly, some of the Statute’s modes of liability and their respective mental elements are also more expansive than the ones found in custom or treaties.²⁷ These include: i) indirect co-perpetration through an organisation,²⁸ which finds no parallel in

²² *Kunarac et al Case* (Judgment) ICTY-96-23-T & ICTY-96-23/1-T (22 February 2001) §162.

²³ Art 1, Torture Convention.

²⁴ ICC Elements of Crimes, p 7, fn 14.

²⁵ Art 2(h), Statute of the Special Court for Sierra Leone (adopted 16 January 2002, established by Agreement between the UN and the Government of Sierra Leone pursuant to UNSC Res 1315 (2000) of 14 August 2000) (SCSL Statute); Art 5, Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006); Art 5(h), ICTY Statute; Art 3(h), ICTR Statute.

²⁶ Art 7(1)(h), Rome Statute. Note that a convention on crimes against humanity is in the process of being drafted by the ILC, and its current definition of persecution includes all the grounds listed in the Rome Statute. However, several aspects of the draft convention are not intended to codify customary international law, but to progressively develop it. In particular, there is presently some support for the inclusion of additional grounds of persecution beyond the ones listed in the Rome Statute. See ILC, ‘Fourth Report on Crimes against Humanity by Sean D Murphy, Special Rapporteur’ (18 February 2019) UN Doc A/CN.4/725 pp 22 and 128, and paras 60, 65, 80.

²⁷ See, e.g. O’Keefe (n 17) 552, note 107; Cryer (n 21) 353–397.

²⁸ Included in Art 25(3(a)), Rome Statute

customary international law or treaties, but only in some domestic legal systems;²⁹ ii) the Statute's residual accessory liability;³⁰ iii) and superior responsibility of military commanders, whose mental element comes close to negligence and is lower than its customary counterpart.³¹

In sum, the view that the Statute's criminal provisions have a universal scope of application does not find support in the Statute's drafting history or the rules of pre-existing international law that it purportedly mirrors.

iii. The Rome Statute was accessible and foreseeable worldwide

For some, even if the Rome Statute is not grounded in the principle of universality, its retroactive application would not violate the *nullum crimen* principle. This is because individuals worldwide, including nationals of non-states parties, would have received sufficient notice or warning that they could be prosecuted by the ICC, especially when a situation is referred by the UNSC.³² This would be in line with the requirements of 'accessibility and foreseeability' of the criminal law, discussed in Chapter 2. But the problem with this view is that even those requirements assume that some law, domestic or international, must have applied to the individual at the time of the conduct.³³ Thus, to the extent that the criminal provisions of the Statute go beyond an applicable source of

²⁹ *Katanga and Chui* Confirmation of Charges Decision (n 7) §508; *Stakić Case* (Appeal Judgment) ICTY-97-24 (22 March 2006) §62; Marko Milanović, 'Is the Rome Statute Binding on Individuals? (And Why We Should Care)' (2011) 9 JICJ 25, 38; Cryer (n 21) 363.

³⁰ See Art 25(3)(d), Rome Statute and *Katanga* Judgment (n 4) §1625.

³¹ See Art 28(a), Rome Statute and *Bemba Case* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-424 (15 June 2009) §§429, 432–433; *Blaškić Case* (Appeal Judgment) ICTY-95-14-A (29 July 2004) §§61–62.

³² William A Schabas, *An Introduction to the International Criminal Court* (CUP 2017) 57; Michael P Scharf, 'Application of Treaty-Based Universal Jurisdiction on Nationals of Non-Party States' (2000) 35 NELR 363, 375, 376.

³³ See Chapter 2, Section 2(a)(iv). See also Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (CUP 2010) 20; V Spiga, 'Non-Retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga' (2011) 9 JICJ 5, 16; *Hadzihasanović et al Case* (Interlocutory Appeal on Decision on Joint Challenge to Jurisdiction) ICTY-01-47-PT (27 November 2002) §§20–25.

criminal law, a violation of the principle of legality in general international law would still ensue.³⁴

b. The Existing Solutions to the Retroactive Application of the Rome Statute

As mentioned earlier, some authors have proposed different ways of tackling the issue of the retroactive application of the Statute in two of the scenarios discussed earlier, namely UNSC referrals involving non-states parties and ad hoc declarations. While their proposals do not entirely overlap and their level of detail varies, it is possible to roughly classify them into three main categories: i) ‘compatibility check’, ii) ‘interpretative’ and iii) ‘displacement’ solutions.

i. Compatibility check solutions

First, many authors have proposed what I refer to as ‘compatibility check’ solutions.³⁵ They suggest a simple verification of consistency between the Statute and pre-existing customary international law or domestic law in cases of UNSC referrals and ad hoc declarations.³⁶

According to the proponents of this solution, if said verification shows that the relevant statutory crime or mode of liability did not exist in customary international law or domestic law, then the application of the criminal provisions of the Statute would be

³⁴ Similarly, Gallant (n 33) 342–343.

³⁵ See, e.g. Luigi Condorelli and Santiago Villalpando, ‘Referral and Deferral by the Security Council’ in Antonio Cassese and others (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 636–637; Bruce Broomhall, ‘Article 22: Nullum Crimen Sine Lege’ in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (Beck/Hart 2016) 956; Theodor Meron, ‘Revival of Customary Humanitarian Law’ (2005) 99 AJIL 817, 832; O’Keefe (n 17) 553, 554; Susan Lamb, ‘Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law’ in Antonio Cassese and others (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 750; Gallant (n 19) 819, 820, 828, 835, 837, 838–840, 842; Gallant (n 33) 339–343.

³⁶ See, e.g. O’Keefe (n 17) 554; Meron (n 35) 832; Broomhall (n 35) 956; Gallant (n 33) 339–340; Gallant (n 19) 828, 839; A Wills, ‘Old Crimes, New States and the Temporal Jurisdiction of the International Criminal Court’ (2014) 12 JICJ 407, 418–420; Gennady M Danilenko, ‘ICC Statute and Third States’ in Antonio Cassese and others (eds), *The Rome Statute of The International Criminal Court: A Commentary* (OUP 2002) 1884–1885.

inconsistent with the principle of legality.³⁷ Conversely, if customary international law or domestic law does recognise a crime or a mode of liability that is ‘equivalent’ to the one laid down in the Rome Statute, then no problem of substantive retroactivity would arise.³⁸ Since international custom is directly applicable to virtually all individuals in the world,³⁹ the fact that the Rome Statute did not formally apply to the perpetrator at the time of the conduct would be immaterial for satisfying the principle of legality.

While this reasoning is, in essence, correct, it fails to address two fundamental questions.

First, how should the ICC proceed when the Rome Statute goes beyond customary international law or domestic law, and risks clashing with the principle of legality? Although the Statute has largely codified or contributed to the development of customary international law, there are still several instances in which the former is more expansive than the latter, as seen earlier. The same goes for the comparison between the Statute and applicable domestic law. For instance, many states have not yet implemented the definitions of core international crimes into their national legal systems, often relying on under-inclusive or less stigmatising domestic offences to criminalise the same conduct.⁴⁰ Where the Statute is more severe than the applicable law, a simple compatibility check does not tell us how the Court can avoid or resolve a violation of the principle of legality. In particular, it is unclear whether the Court should refuse to exercise jurisdiction, or whether it could interpret or even displace the provisions of the Statute to accord them with custom or domestic law.

³⁷ O’Keefe (n 17) 553; Gallant (n 33) 338–342; Broomhall (n 35) 956; Meron (n 35) 832.

³⁸ O’Keefe (n 17) 554; Gallant (n 33) 339; Gallant (n 19) 820, 828, 835, 838–839; Meron (n 35) 832; Broomhall (n 35) 956.

³⁹ Gallant (n 19) 818, 835. Similarly, UNSC ‘Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808’ (1993) UN Doc S/25704 para 34.

⁴⁰ See Chapter 3, Section 4(b)(ii).

Second, compatibility check solutions fail to indicate on what legal grounds the Court could proceed to a comparison between the Rome Statute and customary international law or domestic law. The answer to this question is by no means evident from the Statute's text. This is because, as explained in Chapter 4, Article 21(1)(a) appears to give primacy to the Statute's own criminal provisions across all situations that come within the Court's jurisdiction.⁴¹ Moreover, the Statute's version of the principle of legality, found in Articles 22(1), 23 and 24(1), does not seem to require consistency between the Statute and customary international law or another source of law that was binding on the accused at the time of the conduct. According to those provisions, the conduct need only i) come within one of the definitions of crimes provided in the Statute, ii) have occurred after the Statute's entry into force, and iii) be punished in accordance with the Statute.⁴²

Therefore, it appears that compatibility check solutions are insufficient to address the retroactive application of the Statute in the various scenarios identified earlier.

ii. Interpretative solutions

The second set of solutions which have been proposed to tackle the issue at hand are what I call 'interpretative solutions'. They take the compatibility check further by suggesting that, in cases where the Rome Statute is broader than customary international law or domestic law, there is an apparent conflict or inconsistency with the principle of legality which can be interpreted away.⁴³

In more detail, interpretative solutions start from the same compatibility check to verify whether the Rome Statute is consistent with custom or another previously

⁴¹ See Chapter 4, Section 4.

⁴² See Chapter 4, Section 5.

⁴³ See, e.g. Marko Milanović, 'Aggression and Legality: Custom in Kampala' (2012) 10 JICJ 165, 174–175; Milanović (n 29) 37–38, 48–52; Bartels (n 19) 159–168; Galand (n 6) 143, 147–149.

applicable source of criminal law, such as treaty law, general principles of law or domestic law.⁴⁴ If the Statute does correspond with the applicable law, then no problem of retroactivity arises because the conduct was made criminal and punishable by some source of law.⁴⁵ But if the Statute goes beyond the applicable law, the Court is directed to a series of steps.

First, an apparent norm conflict should be identified between the principle of legality and the criminal provisions of the Statute which are more expansive than the applicable law.⁴⁶ The conflict is said to arise because, irrespective the Statute's self-contained provisions on the principle of legality, Article 21(3) incorporates the principle as it exists in general international law. This provision requires the Court to *interpret* and apply its law consistently with 'internationally recognized human rights', including the principle of legality as found in human rights instruments.⁴⁷ Thus, the Court would be bound to satisfy the requirements of this principle, namely, that some source of law was previously applicable to the accused and sufficiently clear to a reasonable person in their shoes.⁴⁸

Next, interpretative solutions rely on Article 21(3) to interpret away the apparent norm conflict, as this provision requires the Court to interpret the Statute in accordance with the principle of legality.⁴⁹ This interpretation comprises two further steps. First, the Statute is read as a 'merely jurisdictional' instrument whenever its criminal provisions go beyond the applicable law. This would mean that, although the Statute is, as a general

⁴⁴ Milanović (n 43) 174, footnote 37; Galand (n 6) 148–149.

⁴⁵ Milanović (n 29) 37, 48, 51–52; Milanović (n 43) 174–175, including fn 37; Bartels (n 19) 144, 147, 157, 161–162; Galand (n 6) 147–149.

⁴⁶ Milanović (n 29) 27, 36; Galand (n 6) 105, 107, 130–131, 135, 149.

⁴⁷ See Chapter 4, Section 5.

⁴⁸ See Chapter 2, Section 2.

⁴⁹ Milanović (n 29) 52; Milanović (n 43) 175; Bartels (n 19) 160, 177; Galand (n 6) 140–143.

rule, the ‘substantive law’ that directly applies to individuals, in cases of UNSC referrals involving non-states parties and ad hoc declarations it should exceptionally be read as solely laying down the rules governing the Court’s jurisdiction and functioning.⁵⁰ Second, this jurisdictional conception of the Statute would be followed by a reading down of any statutory provisions that exceed customary international or another source of applicable law. Accordingly, the individual could be charged and convicted on the basis of crimes and modes of liability found in the Statute, but only to the extent that these conform to the applicable law.⁵¹ This would avoid any potential violation of the principle of legality.⁵²

iii. Displacement solution

A third type of solution to the retroactive application of the Rome Statute is what I refer to as the ‘displacement solution’.⁵³ Three basic steps are discernible.

First, as with compatibility check and interpretative solutions, the displacement solution proposes to verify whether the Statute is consistent with customary international law.⁵⁴ If so, then the conduct would be criminalised and punished in accordance with some source of law, and no inconsistency with the principle of legality would arise. Nonetheless, where the Statute goes beyond custom, there would be a genuine, rather than an apparent, norm conflict between the principle of legality and the more expansive

⁵⁰ Milanović (n 29) 30–32, 48, 51–52; Milanović (n 43) 174–175, 177; Galand (n 6) 63–64, 141, 147–148; Bartels (n 19) 167.

⁵¹ Milanović (n 29) 34, 52; Milanović (n 43) 175; Bartels (n 19) 147–148; Galand (n 6) 147–149.

⁵² Milanović (n 29) 52; Milanović (n 43) 175; Bartels (n 19) 161, 163, 176–177; Galand (n 6) 147, 149, 151.

⁵³ Dapo Akande, ‘Sources of International Criminal Law’ in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009) 45–47.

⁵⁴ *ibid* 46.

statutory provisions.⁵⁵ Again, this genuine norm conflict would arise because Article 21(3) of the Statute incorporates the principle of legality in general international law.⁵⁶

Second, whenever faced with this genuine norm conflict, the Court would have to resort to a norm displacement technique, i.e. it would have to ascertain which rule prevails over the other.⁵⁷ Crucially, this answer is also to be found in Article 21(3), as this provision creates a hierarchy or ‘super legality’ in favour of ‘internationally recognized human rights’, including the principle of legality. This is because Article 21(3) requires the Court not only to interpret but also apply law in accordance with those rights.⁵⁸

The third step is to implement the norm displacement rule contained in Article 21(3). This would require the Court to displace or override any criminal provisions of the Statute that are, in substance, more expansive than pre-existing custom in cases of UNSC referrals and ad hoc declarations. In practical terms, the individual would be charged and convicted on the basis of statutory crimes and modes of liability, but only to the extent that these are reflected in customary international law.⁵⁹ This would resolve the norm conflict between the Rome Statute and the principle of legality in general international law.

⁵⁵ *ibid* 45–47.

⁵⁶ *ibid* 46–47.

⁵⁷ See Marko Milanović, ‘A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law’ (2009) 14 JCSL 459, 465; Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (CUP 2003) 178, 327.

⁵⁸ Akande (n 53) 47. See also Allain Pellet, ‘Applicable Law’ in Antonio Cassese and others (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 1079–1082; Gilbert Bitti, ‘Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC’ in Carsten Stahn and Göran Sluiter (eds), *The Law and Practice of the International Criminal Court* (OUP 2015) 303–304.

⁵⁹ Akande (n 53) 46–47 (drawing a parallel with *Norman Case* (Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)) SCSL-2004-14-AR72(E) 7413 (31 May 2004), Dissenting Opinion of Justice Robertson §47)

Note that, unlike the interpretative solutions, the displacement solution does not propose an interpretation of the Statute as purely jurisdictional whenever a problem of retroactivity arises. In fact, by suggesting that the Statute should be *applied* in accordance with the principle of legality and that some of its provisions should be *displaced* to conform with custom,⁶⁰ the displacement solution appears to assume that the Rome Statute is ‘substantive’ in nature, i.e. directly binding on individuals.

3. Evaluating Interpretative and Displacement Solutions

a. Merits

This brief incursion into the existing solutions to the retroactive application of the Rome Statute shows that some of the questions left answered by a simple compatibility check have been resolved by interpretative and displacement solutions. In particular, I believe three aspects of these solutions are useful, if not essential for tackling the problem under scrutiny.

First, both solutions seem to frame the retroactive application of the Statute as a norm conflict between the Statute and the principle of legality in general international law. This framing is accurate and gives us the necessary tools with which to resolve the issue at hand. For present purposes, I will adopt a broad definition of a norm conflict, not only comprising mutually exclusive obligations (i.e. commands versus prohibitions), but any instance where the adoption or implementation of one norm would breach another (including norms providing for rights or exemptions).⁶¹ Norm conflicts can be either apparent, if they can be avoided through interpretation, or genuine, in which case resort to a norm displacement or conflict-resolution technique will be required.⁶² As discussed

⁶⁰ Akande (n 53) 46–47.

⁶¹ Pauwelyn (n 57) 169–171, 175–177. See also ILC, ‘Fragmentation Report’ (n 9) para 25.

⁶² Pauwelyn (n 57) 178, 237, 275, 327.

earlier, while interpretative solutions conceive the conflict between the Statute and the principle of legality as an apparent one, the displacement solution perceives it as a genuine one. Admittedly, the classification as one or another type of norm conflict depends on how one interprets the conflicting norms in the first place, particularly their scope of application.⁶³ As we shall see in the next chapter, the norm conflict between the Rome Statute and the principle of legality in the five scenarios identified above depends on the interpretation of the Statute's 'nature', that is, whether or not it is directly binding on individuals.

Secondly, the retroactive application of the Rome Statute would indeed be inconsistent with Article 21(3) of the Statute, as I had already indicated in Chapter 4. The only way to argue that the Statute's retroactive application complies with Article 21(3) is to conceive the principle of legality not as a rule of international law, but as a non-binding 'principle of justice'.⁶⁴ However, as was shown in Chapter 2, this view no longer reflects the current status of that principle in international law.

Lastly, resort to Article 21(3) seems to be one of the few avenues to avoid or resolve the problem of the retroactive application of the Statute. This is because, as mentioned earlier, the Statute's own provisions on the principle of legality (Articles 22(1), 23 and 24(1)) are self-contained and thus not very helpful. They are not concerned with whether the conduct was criminal and punishable under some previously applicable source of law, but only with whether it could have been characterised as a crime under the Statute when it took place.⁶⁵ Furthermore, although there is no question that the Court is bound by the principle of legality in general international law, and that a breach of this

⁶³ ILC, 'Fragmentation Report' (n 9) para 412.

⁶⁴ Similarly, Galand (n 6) 131–135.

⁶⁵ *Supra* n 42.

principle might entail its international responsibility,⁶⁶ it is disputed whether ICC judges could, without the intermediary of Article 21(3), rely on that version of the principle internally, i.e. in particular cases.⁶⁷ As explained earlier, Article 21(1) requires the Court to give primacy to the Statute over other sources of international law. Even if the Court is competent to apply customary international law and general principles of law in accordance with Article 21(b)-(c), these can only be resorted to when there is a gap in the Statute, the Elements of Crimes, and the RPE.⁶⁸ No such gap appears to exist when it comes to the principle of legality, as the Statute provides its own version thereof. Thus, a rule of interpretation or displacement such as the one contained in Article 21(3) might be necessary to enable judges to read down or disapply the Statute whenever its application would be retroactive.

b. Shortcomings

Despite their merits, both interpretative and displacement solutions, along with compatibility check solutions, fail to address a series of questions that seem to be fundamental to tackle the retroactive application of the Statute.

i. An incomplete picture of the Statute's retroactive application

The first problem with the existing solutions is that they do not offer a complete picture of the Statute's retroactive application, i.e. the various scenarios where this might occur.

It was mentioned earlier that their proponents, to a greater or lesser extent, have successfully identified a potential violation of the principle of legality in situations arising

⁶⁶ See ILC, 'Fragmentation Report' (n 9) paras 108–109, 154, 172, 174–179, 391, 394; ILC, 'Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (2006) YILC, vol II, Part Two para 10; Pauwelyn (n 57) 298–299, 325–326, 328, 436–437; ILC, 'Draft Articles on the Responsibility of International Organizations, with Comments' (2011) YILC, vol II, Part Two, Arts 3 and 10 (including commentaries [2]-[3]). See also Chapter 4, Section 5.

⁶⁷ See *supra* note 2.

⁶⁸ See Chapter 4, Section 4.

from UNSC referrals involving non-states parties and ad hoc declarations, including in respect of the crime of aggression.⁶⁹ Kenneth Gallant has also identified the same problem in cases of retrospective withdrawals of opt-out declarations for war crimes.⁷⁰ However, there is no record in the literature or case law of any discussion about the retroactive application of the Statute in cases of retrospective withdrawals of opt-out declarations for the crime of aggression. Likewise, although some commentators have discussed the issue of expansive interpretation generally and in the context of the Rome Statute,⁷¹ this has not been presented as an instance of retroactivity. Rather, expansive interpretation in the context of the ICC has been framed as a possible violation of the principle of strict interpretation, recognised in Article 22(2) of the Statute,⁷² but not yet part of general international law.⁷³

ii. An incomplete enquiry into the nature of the Rome Statute

Another fundamental issue with the existing solutions is their failure to undertake a complete enquiry into the ‘nature’ of the Rome Statute, that is, the sources of law that are meant to apply before the ICC.⁷⁴ In particular, at least in cases of ad hoc declarations and UNSC referrals, the question remains as to whether the Statute was really conceived as a source of criminal law directly binding on individuals, or as a mere jurisdictional

⁶⁹ For a discussion of the retroactive application of the crime of aggression, see Milanović (n 43) 171–175.

⁷⁰ Gallant (n 33) 338, fn 172.

⁷¹ See, e.g., Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (CUP 2014) 165–174; Antonio Cassese and others, *Cassese’s International Criminal Law* (OUP 2013) 30–35; Darryl Robinson, ‘Legality and Our Contradictory Commitments: Some Thoughts About How We Think’ (2009) 103 Proceedings of the Annual Meeting (American Society of International Law) 104.

⁷² See, e.g., Broomhall (n 35) 960–962; Joseph Powderly, ‘The Rome Statute and the Attempted Corseting of the Interpretative Judicial Function: Reflections on Sources of Law and Interpretative Technique’ in Carsten Stahn (ed), *The law and practice of the International Criminal Court* (First edition, OUP 2015) 447, 489–497; Grover (n 71) 106–107; Grover (n 19) 553–554; Lamb (n 35) 752–753.

⁷³ See Chapter 2, Section 2(a)(iv).

⁷⁴ Milanović (n 57) 26–27.

instrument addressed to its states parties and the Court itself, in which case the substantive criminal law would have to be sought elsewhere.

As mentioned earlier, interpretative solutions conceive the Rome Statute as being, as a general rule, ‘substantive’, that is, binding on individuals, especially in situations involving states parties. It is only if and when this conception of the Statute would give rise to a problem of substantive retroactivity, i.e. in cases of ad hoc declarations and UNSC referrals involving non-states parties, and whenever the Statute goes beyond custom, that it should be interpreted as merely jurisdictional.⁷⁵

Conversely, the displacement solution does not dwell on the Statute’s nature. It simply assumes that its criminal provisions are always binding on individuals and does not discuss the possibility of them being purely jurisdictional.⁷⁶

But what if the Rome Statute was originally conceived as being jurisdictional in certain circumstances, regardless of any potential inconsistency with the *nullum crimen* principle? In other words, are the substantive provisions of the Statute really meant to apply across all the situations over which the Court has jurisdiction, including ad hoc declarations and UNSC referrals? Alternatively, could it be that, in certain circumstances, the Statute itself requires the application of a different source of law?

The answer to this question can only be provided after a thorough investigation of the Rome Statute’s nature, to be conducted as a preliminary question, that is before one tries to work out any solution to the Statute’s retroactive application. This is because, if the Statute requires the Court to apply an external source of law which was binding on the accused at the time of the conduct in at least some of the five scenarios identified earlier, a conflict with the principle of legality under general international law might not

⁷⁵ *Supra* n 50.

⁷⁶ Akande (n 53) 46–47.

even arise in the first place. Thus, one cannot assume a problem of retroactivity without first verifying what is the nature of the Statute in those situations.

Crucially, this analysis should not only involve an interpretation of the relevant provisions of Statute, by looking at their text, context, object and purpose and preparatory works, as proposed by Marko Milanović.⁷⁷ It should also include an enquiry into the bases of prescriptive and adjudicative jurisdiction which underpin the Statute and the ICC, i.e. the powers which lie at the origin of the Court's jurisdiction and applicable law. In particular, the nature of the Statute depends on the extent to which the adjudicative powers that have been transferred to the Court were accompanied by a prescription of the Rome Statute. A mapping of those powers may also reveal that the retroactive application of the Statute is *ultra vires*.⁷⁸ Nevertheless, an enquiry of this sort is yet to be found in the literature to date.

In sum, to try to avoid or resolve the retroactive application of the Statute before ascertaining its nature is to put the cart before the horse and to neglect some of the more fundamental questions that lie beneath the surface.

iii. Retroactive recharacterisation of crimes and its potential clash with the principles of legality and fair labelling

The main problem with both interpretative and displacement solutions is that, inadvertently or not, they may lead to instances of retroactive recharacterisation of crimes. Specifically, by proposing that the Statute be read down or displaced to conform with the applicable law, the suggestion is made to recharacterise the latter into the

⁷⁷ Milanović (n 29) 30–32, 48–49; Milanović (n 43) 175 and footnote 40.

⁷⁸ See Chapter 6, Section 5 and Claus Kreß, 'Nulla Poena Nullum Crimen Sine Lege', *Max Planck Encyclopedia of Public International Law* (2010) para 25 <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e854>> accessed 25 August 2019 (simply warning that 'retroactive re-characterization of a national crime as a crime under international law would usually pose serious jurisdictional questions').

former.⁷⁹ To be sure, although it is acknowledged that the basis of criminalisation and punishment lies in an external source of law, the charges, conviction and sentence would still be grounded in the Rome Statute.⁸⁰ For example, one could be charged with and convicted of the war crime of sexual slavery, in accordance with Article 8(2)(b)(xxii) or (e)(vi) of the Statute, even if, at the time it took place, the conduct could only have been characterised as the war crime of outrages upon personal dignity under treaty, customary international law or domestic law. The Court need only make sure that the individual is convicted on the basis of crimes or modes of liability that do not go beyond the ones found in the applicable law. If the Statute's crimes or modes of liability are more expansive, their more expansive parts would simply be read down or disapplied. But, ultimately, it is the Statute that provides the crimes, modes of liability, penalties and other rules of criminal law that will apply to the accused.

As I argued in Chapter 2, retroactive recharacterisation of crimes is not per se inconsistent with the principle of legality in general international law.⁸¹ This principle does not require the exact same law to apply at the time of the conduct and upon conviction, provided that the subsequent law is not substantively more severe than the applicable law.⁸² However, by focussing solely on whether the Statute's crimes and modes of liability are not more expansive than the ones found in the applicable law, one may let other essential aspects of criminal liability go unchecked. These include whether, under the applicable law, the individual could have benefited from additional or more expansive defences, bars to prosecution or punishment, more lenient penalties or less severe labels. Even when the retroactive recharacterisation of the applicable law into the

⁷⁹ See Gallant (n 33) 340. and *supra* notes 51 and 59.

⁸⁰ *ibid.*

⁸¹ See Chapter 2, Sections 4 and 5.

⁸² See Chapter 5, Section 2(b).

Statute has been foreseen, there is no discussion of the various problematic outcomes that it may lead to.⁸³

Furthermore, as argued in Chapter 3, changes in the labels of crimes, modes of liability or defences may also be contrary to the principle of fair labelling.⁸⁴ Although this requires a case-by-case analysis, it would likely be unfair to retroactively reclassify the accused's conduct with a label that is either more stigmatising or carries with it more severe criminal consequences, even if it is a more accurate one. Yet only Leena Grover appears to have remarked, *en passant*, that the reclassification of crimes in those circumstances might not be in line with the principle of fair labelling.⁸⁵

Therefore, even if the Rome Statute could, in principle, be applied in substitution for the applicable law in the retroactive scenarios identified earlier, the result might be inconsistent with the principles of legality and fair labelling in general international law. As mentioned earlier in this chapter, there are several instances where the criminal provisions of the Statute are more expansive or otherwise more severe than customary international law, treaties or domestic law.

To give one further example, consider the definition of rape as a war crime and a crime against humanity in the Rome Statute when compared to its customary counterpart. Under customary international law, rape requires sexual penetration of a) the vagina or anus of the victim by the penis of the perpetrator or any other object, or of b) the mouth of the victim by the penis of the perpetrator.⁸⁶ In contrast, the ICC Elements of Crimes define rape as an invasion of the victim's body 'by conduct resulting in penetration,

⁸³ Gallant (n 33) 337–343; Galand (n 6) 148–149.

⁸⁴ See Chapter 3, Section 5.

⁸⁵ Grover (n 71) 164.

⁸⁶ Emphasis added. *Kvočka et al Case* (Appeal Judgment) ICTY-98-30/1-A (28 February 2005) §395; *Kunarac et al Case* (Appeal Judgment) ICTY-96-23 & ICTY-96-23/1-A (12 June 2002) §§127–128; *Furundžija Judgment* (n 22) §185.

however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body'.⁸⁷ This means that the Statute criminalises, as rape, additional types of penetration, including, in particular, where the perpetrator is female. Accordingly, if the Statute's definition of rape is retroactively applied to an accused who committed such additional acts, they will likely be labelled a 'rapist' when all they could have been convicted of, at the material time, are the war crime of 'outrages upon personal dignity', the crime against humanity of 'other inhumane acts' or perhaps sexual assault under domestic law. These labels are not just less stigmatising than rape, but might also carry with them less severe penalties, and justifiably so, as not all sexual offences are of the same gravity.

In sum, to retroactively recharacterise an applicable source of domestic or international law into the Rome Statute may lead to results that are hardly consistent with the principles of legality and fair labelling. This means that, in the five retroactive scenarios identified in Chapter 4, aside from a norm conflict between the Rome Statute and the principle of legality, *in abstracto*, recourse to retroactive recharacterisation of crimes may, *in concreto*, clash with both the principles of legality and fair labelling. None of the existing solutions conceives of ways to avoid or resolve such concrete norm conflicts.

iv. *Nulla poena sine lege*

Despite being an essential component of the principle of legality in general international law,⁸⁸ the principle of *nulla poena sine lege* has been overlooked by most commentators

⁸⁷ Emphasis added. Art 7(1)(g)-1, Art 8 (2) (b) (xxii)-1 and (e) (vi)-1, Element 1, ICC Elements of Crimes.

⁸⁸ See Chapter 2, Section 2(a)(i).

who have dealt with the retroactive application of the Statute.⁸⁹ This is perhaps explained by the fact that, under customary international law, severe penalties are still applicable to the core international crimes, namely, the death penalty and life imprisonment.⁹⁰ In contrast, under the Rome Statute, the maximum available penalties are thirty years' imprisonment or life sentence, the latter being reserved to cases of extreme gravity.⁹¹ Thus, if the accused's conduct was criminalised under customary international law, it is assumed that more severe penalties would have been applicable anyway.

Nonetheless, retroactive recharacterisation of crimes in the context of the Rome Statute might still be inconsistent with the *nulla poena* principle in at least two circumstances. First, as seen earlier, even if the maximum available penalties in customary international law or in the Statute are the same across all core international crimes, the fact remains that different categories and sub-categories of crimes and different modes of liability must be sentenced differently depending on their gravity. This is because not all international crimes and modes of participation are equally severe and the principle of proportionate sentencing requires them to be punished accordingly.⁹² For instance, it was mentioned that torture is more severe than cruel treatment or other inhumane acts, and rape is usually more severe than outrages upon personal dignity or other inhumane acts. In the same vein, an accessory is usually considered to be less blameworthy than a principal. Thus, to the extent that the accused could only have been convicted of a less severe crime, or in accordance with a less culpable mode of liability under the applicable law, the retroactive application of the Statute would breach the *nulla poena* principle.

⁸⁹ Only Gallant and Galand appear to have discussed this issue, and only very briefly. See Gallant (n 33) 341; Galand (n 6) 149.

⁹⁰ Gallant (n 33) 385–387; *Čelebići Case* (Appeal Judgment) ICTY-96-21-T (20 February 2001) §817.

⁹¹ See Art 77, Rome Statute.

⁹² See Chapter 1, Section 4(b) and Chapter 3, Section 4(a)(v).

Second, *nulla poena* might also be breached if, at the time it took place, the conduct was *not* criminalised under customary international law, but only treaty or domestic law. In those instances, the applicable penalties may be more lenient than those provided for in the Rome Statute. Therefore, to comply with the principle of non-retroactivity of penalties, the Court must ensure that its sentences are not more severe than those which could have been passed under the applicable law.

v. Domestic law

The last fundamental question that remains unaddressed is the applicability of domestic law before the ICC. Proponents of interpretative and compatibility check solutions suggest looking at domestic law as a basis of criminalisation and punishment when customary international law and applicable treaties are of no resort.⁹³ Nevertheless, aside from the specific problems arising from the retroactive recharacterisation of domestic offences into international crimes, the very application of domestic law before the ICC may not be permitted at all. This is because Article 21(1)(c) of the Statute only authorises the application of ‘general principles of law *derived* by the Court from national laws of legal systems of the world’.⁹⁴ Thus, this provision seems to preclude the direct reliance on domestic law as a source of criminal law.⁹⁵

One may argue that Article 21(3) could provide an alternative legal basis under which domestic law can be applied.⁹⁶ In this sense, the principle of legality, as recognised in Article 21(3), would justify displacing or reading down Article 21(1)(c) to allow

⁹³ Milanović (n 43) 174, fn 37; Galand (n 6) 148–149; Gallant (n 33) 339, 368.

⁹⁴ Emphasis added.

⁹⁵ See Margaret MacAuliffe deGuzman, ‘Article 21: Applicable Law’ in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (Beck/Hart 2016) 942–943; Pellet (n 58) 1074–1076; UNGA, UN Doc A/51/22[VOL-I](SUPP) (n 18) 43; Per Saland, ‘International Criminal Law Principles’ in Roy SK Lee (ed), *The International Criminal Court: the making of the Rome Statute - issues, negotiations, results* (Kluwer Law International 1999) 214.

⁹⁶ Galand (n 6) 148–149.

domestic law to be directly applied in cases where it is the only applicable source of law criminalising the conduct at the time it took place. However, this argument cannot be easily reconciled with the text of Article 21(3), which seems to condition the ‘supra legality’ of human rights to the application of the law pursuant to Article 21, including paragraph 1(c).

4. Conclusion

Upon evaluation of the existing views on the retroactive application of the Rome Statute, this chapter has shown that many still overlook or dismiss this problem. It has also discussed the extent to which others have identified and tackled the issue in different ways. Three principal methods for resolving the retroactive application of the Statute were discerned, namely: i) conducting a compatibility check between the criminal provisions of the Statute and those under the applicable law, ii) interpreting the Statute as jurisdictional in exceptional circumstances; and iii) displacing the provisions of the Statute which go beyond custom or another source of applicable law. However, I have demonstrated that a series of fundamental questions remain to be answered. In particular, the existing proposals do not seem to take issue with the retroactive recharacterisation of crimes that might result from the application of the Statute in substitution for the applicable law. After evaluating some of their merits and shortcomings, I can now outline the key steps which I believe need to be taken to fully address the retroactive application of the Rome Statute.

First, it is necessary to conduct a comprehensive enquiry into the nature of the Rome Statute, i.e. the extent to which the Statute is binding on individuals or simply delineates the Court’s jurisdiction and functioning. This analysis should not only cover UNSC referrals and ad hoc declarations, but also situations involving states parties, where the retroactive application of the Statute might arise from retrospective

withdrawals of opt-out declarations for war crimes or the crime of aggression and instances of extensive interpretation. A complete enquiry into the Statute's nature requires not only an interpretation of its relevant provisions but also an analysis of the adjudicative and prescriptive powers upon which the Court and the Statute are based. It is this assessment that will reveal what sources of criminal law are meant to apply in all five retrospective scenarios identified earlier. These scenarios can be grouped into three types of situation, each having a different jurisdictional pre-condition and possibly a different applicable law. These are i) situations involving a least a state party; ii) situations arising from ad hoc declarations; and iii) UNSC referrals involving non-states parties. It is the applicable law in each of those situations that will determine whether the Court has the power to apply the criminal provisions of the Statute and whether an apparent or genuine norm conflict arises with the principles of legality and fair labelling.

Next, having identified what sources of criminal law the Court is required to apply in those situations, and in which instances there is a genuine norm conflict with the principles of legality and fair labelling, any such conflicts need to be resolved by resorting to Article 21(3) of the Statute. However, before doing so, one must still discuss whether this provision really shifts the hierarchy of sources in favour of human rights. Likewise, it is necessary to ascertain the extent to which the principles of legality and fair labelling are 'internationally recognized human rights' and what legal implications might arise from their 'supra legality'.

The last step is to propose a different approach to the application of any external source of law before the ICC. This approach should be followed not only in cases where the Statute itself might require the application of external sources of law but also to resolve genuine conflicts with the principles of legality and fair labelling. Rather than recharacterising the applicable law into the Rome Statute, the Statute's criminal

provisions should be set aside, so that the criminal laws that were binding on the accused at the time of the conduct can be applied as such.

I shall now turn to the first step in Chapter 6, while leaving the two last steps for Chapter 7.

PART III. ADDRESSING THE RETROACTIVE
APPLICATION OF THE ROME STATUTE:
ALTERNATIVE APPROACHES TO RETROACTIVE
RECHARACTERISATION OF CRIMES

CHAPTER 6: THE NATURE OF THE ROME STATUTE

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1. Introduction

The ‘nature’ of the Rome Statute is understood here as its legal effect on individuals.¹ In this sense, the Statute is said to be substantive to the extent that its provisions are directly binding on them. Conversely, it is jurisdictional if it regulates the ICC’s jurisdiction over questions of law and fact, as well as its functioning. As I have argued in Chapter 5, ascertaining the nature of the Statute is a prerequisite for any attempt at resolving or avoiding its retroactive application. The Statute may have a different nature depending on the legal basis of the Court’s jurisdiction and applicable law. The Court’s jurisdiction may be grounded in one of the following bases or pre-conditions: i) the ratification of the Statute by the territorial state or the state of nationality of the accused; ii) ad hoc declarations made by non-states parties or states joining the Statute after 1 July 2002 in respect of their nationals or territory; and iii) UNSC referrals involving non-states parties. Significantly, in each of those situations, the Court’s jurisdiction may or may not be

¹ For an analysis of the nature of the Statute in respect of *both* individuals and states, see Talita de Souza Dias, ‘The Nature of the Rome Statute and the Place of International Law before the International Criminal Court’ (2019) 17 JICJ 507.

accompanied by the prescription of the Rome Statute to the individuals concerned. It is this prescription that gives the Statute a substantive nature, making it an applicable source of law before the Court.

To determine the nature of the Rome Statute for each of those jurisdictional pre-conditions, I will interpret some of its key provisions. Of particular relevance are Articles 12, 13(b) and 21(1). While these have been briefly analysed in Chapter 4, this chapter will take a closer look at their text, context, object and purpose and preparatory works, in accordance with Articles 31-32 of the VCLT. The aim is to challenge some common assumptions made about them. In particular, it is often taken as a given that Article 21(1) requires the Court to apply the criminal provisions of the Statute across all situations coming within its jurisdiction, regardless of whether the Statute was binding on the accused at the time of the conduct.

To complement this analysis, I will also look at the adjudicative powers that states have accepted to delegate, directly or indirectly, to the ICC. Most importantly, I will try to determine if the delegation of such adjudicative powers has been accompanied by the prescription of the Rome Statute to the individuals concerned. To this end, it will be helpful to analyse the Statute and the ICC through the theory of delegated powers. This theory holds that the Court, as an international organisation of a judicial character, can only exercise powers that its states parties, accepting states and perhaps non-states parties have transferred to it in a delegation of adjudicative jurisdiction.² Although this is not the

² See Michael A Newton, 'How the International Criminal Court Threatens Treaty Norms' (2016) 49 *VandJTransnat'l L* 371; Dapo Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 *JICJ* 618, 621–627; Rod Rastan, 'Jurisdiction' in Carsten Stahn (ed), *Law and Practice of the International Criminal Court* (OUP 2015) 155–156. See generally Viljam Engström, 'Reasoning on Powers of Organizations' in Jan Klabbers and Asa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar Publishing 2011) 56–57.

only explanation for the Court's adjudicative powers,³ it is arguably the most likely, given the current state of international law and its longstanding dependence on state consent. In the same vein, the authorities that have granted the Court jurisdiction over certain situations may have decided to apply the criminal provisions of the Statute to the individuals concerned, according to their prescriptive powers in criminal matters. Thus, jurisdiction in this context refers to the power of states to subject persons, objects or events to their municipal laws (prescriptive jurisdiction) or courts (adjudicative jurisdiction).⁴ Each of those powers may be exercised by states themselves or delegated to other states or international institutions.⁵

The theory of delegated powers is not just a helpful analytical tool with which one can better understand the Court's jurisdictional setting. To the extent that it is grounded in the principles of state sovereignty and consent,⁶ it must be considered together with the context of the Statute, in accordance with Article 31(3)(c) of the VCLT and the principle of systemic integration. At the very least, it should be considered as a supplementary means of interpretation as per Article 32 of the VCLT.

With those aims in mind, **Section 2** will start by looking at the nature of the Rome Statute in situations involving at least one state party, i.e. where alleged crimes are

³ For a contrary view, see Leila Nadya Sadat and S Richard Carden, 'The New International Criminal Court: An Uneasy Revolution' (1999) 88 *GeoLJ* 381, 407–410 (arguing that the states parties to the Rome Statute have, in a 'quasi-constitutional' way, prescribed its provisions to all individuals worldwide) and Kai Ambos, *Treatise on International Criminal Law: Volume I: Foundations and General Part* (OUP 2013) 297; *Al Bashir Case* (Written (sic) observations of Professor Claus Kreß as amicus curiae, with the assistance of Ms Erin Pobjie, on the merits of the legal questions presented in 'The Hashemite Kingdom of Jordan's appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir"' of 12 March 2018) ICC-02/05-01/09-326 (18 June 2018) §§11–14 (suggesting that the ICC exercises the *jus puniendi* of the 'international community as a whole', without the intermediary of states).

⁴ Michael Akehurst, 'Jurisdiction in International Law' (1972) 46 *BYIL* 145, 145; Roger O'Keefe, *International Criminal Law* (OUP 2015) 3–6.

⁵ See Jan Klabbbers, *An Introduction to International Institutional Law* (CUP 2002) 185–186. and Chapter 1, Section 2.

⁶ *ibid.*

committed on the territory or by nationals of those states, under Article 12(1)-(2). **Section 3** will then try to ascertain the nature of the Statute in situations arising from ad hoc declarations in respect of crimes perpetrated on the territory or by nationals of accepting states, pursuant to Article 12(3). **Section 4** will then turn its attention to the nature of the Statute in situations referred by the UNSC where crimes are committed on the territory *and* by nationals of non-states parties, in accordance with Article 13(b). In each of those sections, I will look at the text, context, object and purpose and *travaux préparatoires* of the relevant provisions. As usual, *in dubio pro reo* will always be borne in mind. In light of the conclusions reached on the nature of the Rome Statute, **Section 5** will identify the extent to which normative conflicts arise between the Statute and the principles of legality and fair labelling in the five scenarios identified in Chapter 4. It will also try to determine whether such conflicts are apparent or genuine.

This chapter's main claim is that, while the criminal provisions of the Rome Statute should be binding on individuals in situations involving states parties and accepting states, the Statute ought to be conceived as merely jurisdictional when it comes to UNSC referrals involving non-states parties. In that light, it also argues that genuine norm conflicts might arise between the Statute and the principles of legality and fair labelling in cases of retrospective ad hoc declarations. In contrast, such conflicts are only apparent in cases of UNSC referrals involving non-states parties, retrospective withdrawals of opt-out declarations for war crimes or the crime of aggression, and instances of extensive interpretation.

2. Situations Involving a State Party: The Rome Statute as 'An International Code of Crimes

The nature of the Rome Statute in situations involving at least one state party has not been the subject of much debate in the literature or the ICC's case law. Rather, it is

generally accepted that the Statute is both jurisdictional and substantive in those instances.⁷

To elaborate, by referring disjunctively to the territory or the nationals of states parties, Article 12(2)(a)-(b) appears to reflect two of the most traditional bases of jurisdiction in criminal matters under customary international law, namely, territoriality and active nationality.⁸ Thus, this provision suggests that states parties to the Rome Statute have delegated to the Court their powers to adjudicate cases and situations where alleged crimes appear to have been committed on their territory or by their nationals.⁹ Granted, some have objected to the power of states to transfer their territorial jurisdiction over foreign nationals to international institutions without the consent of their state of nationality.¹⁰ However, as has been discussed elsewhere, this view does not find support in state practice and *opinio juris*.¹¹

The text of Article 12(1) and (2) also seems to assume a prior exercise of prescriptive jurisdiction by states parties in accordance with the same bases or principles of jurisdiction, i.e. over their territory *and* their nationals. Indeed, Article 12(1) provides that, by becoming a party to the Statute, states ‘thereby accept the jurisdiction of the

⁷ See e.g. Sadat and Carden (n 3) 406–407; Antonio Cassese, ‘The Statute of the International Criminal Court: Some Preliminary Reflections’ (1999) 10 EJIL 144, 146, 149, 152; Kenneth S Gallant, ‘Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts’ (2003) 48 VillLR 763, 817–820; Héctor Olásolo, ‘Reflections on the International Criminal Court’s Jurisdictional Reach’ (2005) 16 CrimLF 279, 291–292. For more recent commentary, see O’Keefe (n 4) 552–553; Marko Milanović, ‘Is the Rome Statute Binding on Individuals? (And Why We Should Care)’ (2011) 9 JICJ 25, 30–31. See also *Lubanga Case* (Decision on the Confirmation of Charges) ICC-01/04-01/06-803-tEN (29 January 2007) §§302–307, 321]; *Katanga and Chui Case* (Decision on the confirmation of charges) ICC-01/04-01/07-717 (01 October 2008) §§480–486, 508.

⁸ Sharon A Williams and William A Schabas, ‘Article 12: Preconditions to the Exercise of Jurisdiction’ in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (Beck/Hart 2016) 680; O’Keefe (n 4) 541; Gallant (n 7) 789.

⁹ *Situation in Afghanistan* (Public redacted version of “Request for authorisation of an investigation pursuant to article 15”) ICC-02/17-7-Red (20 November 2017) §45; Yuval Shany, *Questions of Jurisdiction and Admissibility before International Courts* (CUP 2016) 32–33; Rastan (n 2) 155–156; Gallant (n 7) 783–786, 789.

¹⁰ Madeline Morris, ‘High Crimes and Misconceptions: The ICC and Non-Party States’ (2001) 64 LCP 13; David J Scheffer, ‘US Policy and the International Criminal Court’ (1999) 32 Cornell Int’l LJ 529.

¹¹ Akande (n 2) 627–634.

Court with respect to the crimes referred to in article 5'.¹² Before jurisdiction can be exercised over any crime, there has to be a prescription of criminal law. In the same vein, Article 12(2) is phrased in the past tense and refers to the prior occurrence of a crime, committed by a national or on the territory of a state party. As discussed in the course of this thesis, although the *ex post facto* exercise of adjudicative jurisdiction is permitted in general international law, the same is not true for the exercise of prescriptive jurisdiction, i.e. the application of substantive criminal law. Thus, prior to delegating to the ICC their adjudicative jurisdiction on the basis of territoriality or active nationality, states parties ought to have prescribed the criminal provisions of the Rome Statute under both bases.¹³

There is no question that, under customary international law, states are permitted to exercise those bases of prescriptive jurisdiction domestically.¹⁴ Although questions have been raised as to whether international law can directly bind individuals,¹⁵ there is now little doubt that prescriptive jurisdiction can be exercised by states either individually or collectively, through treaty, custom or any source of law.¹⁶ Accordingly, by adopting and accepting to be bound by the Rome Statute, states have prescribed it to their nationals *and* on their territory.

This view finds overwhelming support in other provisions of the Statute. In particular, although the list of crimes contained in Article 5 of the Statute has the primary function of defining the Court's subject-matter jurisdiction, the fact that they have been

¹² Emphasis added.

¹³ Gallant (n 7) 788–789; Marko Milanović, 'Aggression and Legality: Custom in Kampala' (2012) 10 JICJ 165, 172, 174; Alexandre Skander Galand, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits* (Brill Nijhoff 2019) 47–48, 118; Milanović (n 7) 31–32, 41, 47–48, 51–52; Cassese (n 7) 152.

¹⁴ O'Keefe (n 4) 9–11; 'Draft Convention on Jurisdiction with Respect to Crime' (1935) 29 AJIL 439, Arts 3-6; Cedric Ryngaert, *Jurisdiction in International Law* (OUP 2015) 101, 104–105.

¹⁵ Milanović (n 7) 38; Kevin Jon Heller, 'What Is an International Crime? (A Revisionist History)' (2017) 58 HILJ 353.

¹⁶ See O'Keefe (n 4) 47, 67; Milanović (n 7) 39–47; M Cherif Bassiouni, *International Criminal Law: Sources, Subjects and Contents* (Brill 2008) 46–49.

thoroughly defined in Articles 6 to 8 *bis* suggests that they also embody rules of substantive criminal law binding on individuals. Likewise, the Rome Statute defines in detail the general standard of *mens rea* (Article 30), together with the various modes of liability (Articles 25 and 28) and defences (Articles 31 to 33) that might apply to those crimes. As these general principles of liability have no bearing on the definition of the Court's jurisdiction, their function seems to be chiefly substantive. Accordingly, it appears that the 'crimes referred to in Article 5' have a dual jurisdictional and substantive function, i.e. they not only lay down the extent of the Court's adjudicative competence, but are also meant to directly apply to the individuals who are brought before the Court pursuant to Article 12(2). Moreover, both Articles 22(1) and 24 explicitly refer to 'criminal responsibility *under [the] Statute*',¹⁷ which suggests that the basis of criminalisation and punishment comes directly from the Statute, at least for nationals of states parties and persons subject to their territorial jurisdiction.

In sum, by accepting the jurisdiction of the ICC with respect to the crimes listed in Article 5, states parties have also accepted to apply such crimes and other criminal provisions of the Statute to their nationals and territory. As in some domestic systems, the Court's adjudicative jurisdiction is a prolongation or a 'mere actualisation' of the substantive provisions contained in the Statute.¹⁸ Notably, the ICC seems to have reached the same conclusion by holding that the Rome Statute is an 'international code of crimes' and, to this extent, 'an expression of states parties' desire to criminalise conduct'.¹⁹ The Court has also confirmed that those crimes 'generally will, but need not necessarily, have

¹⁷ Emphasis added.

¹⁸ Galand (n 13) 47–48. See also O'Keefe (n 4) 6; Akehurst (n 4) 179; C Kreß, 'Universal Jurisdiction over International Crimes and the Institut de Droit International' (2006) 4 JICJ 561, 564.

¹⁹ *Ntaganda Case* (Judgment on the appeal of Mr Bosco Ntaganda against the "Decision on Defence request for leave to file a 'no case to answer' motion") ICC-01/04-02/06-2026 (05 September 2017) §35.

been subject to prior criminalisation pursuant to a treaty or customary rule of international law'.²⁰

It is true that the original purpose of the Rome Statute was to merely define the jurisdiction of an international tribunal that would be charged with applying crimes and other rules of international criminal law found in pre-existing treaties, customary international law and general principles of law.²¹ Specifically, the Statute was meant to be 'adjectival' to a 'Code of Crimes Against the Peace and Security of Mankind', whose Drafts were elaborated by the International Law Commission (ILC) in 1951, 1991 and 1996.²² However, given the significant divide over the definition of various crimes, the project of a codification of international crimes was eventually abandoned by the ILC.²³ The abandonment of this project, together with a concern with upholding the principle of legality, meant that it was the Rome Statute itself that would have to define the rules of criminal law that the Court would apply.²⁴ This is what explains the primacy of the Statute over other sources of law under Article 21(1).²⁵ More importantly, despite the original agreement that those rules were to be simply imported from pre-existing treaties,

²⁰ *ibid* §35, including fn 74.

²¹ See, e.g. ILC, 'ILC, 'Draft Statute for an International Criminal Court with Commentaries (1994) YILC vol II, Part Two p 36, Commentary to Part Three, para 2; UNGA, 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, General Assembly, Fiftieth Session' (6 September 1995) UN Doc A/50/22 para 57.

²² ILC, 'Report of The International Law Commission on the Work of Its Forty-Sixth Session (1994), Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly during Its Forty-Ninth Session Prepared by the Secretariat, Addendum' (22 February 1995) UN Doc A/CN.4/464/Add.1 paras 17, 19.

²³ Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia 2002) 328.

²⁴ ILC, 'Report of the Working Group on the Question of an International Criminal Jurisdiction, Annex' (1992) UN Doc A/47/70 pp 71–72; UNGA, UN Doc A/50/22 (n 21) paras 52–57. See also Allain Pellet, 'Applicable Law' in Antonio Cassese and others (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 1057; Rastan (n 2) 659.

²⁵ UNGA, 'Report of the Preparatory Committee on the Establishment of an International Criminal Court - Volume II Compilation of Proposals' (13 September 1996) UN Doc A/51/22[VOL-II](SUPP) pp 104–107.

customs and general principles, the Statute eventually departed from these sources in various respects, as has been noted in Chapter 5.²⁶

The same observations are valid, *mutatis mutandis*, for the crime of aggression, when the Court's jurisdiction is exercised on the basis of the ratification of the Kampala Amendments by both the aggressor and the victim state, according to Article 15 *bis*(4)-(5). To be sure, the Amendments have not resolved the textual ambiguities surrounding the nature of the Statute.²⁷ However, there is significant support for the view that, in respect of states parties that have ratified the Amendments, the amended Statute is meant to directly apply to individuals, including when an opt-out declaration is made. In particular, Article 8 *bis* sets out the detailed definition of the crime of aggression, whereas Article 25 (3 *bis*) lays down the applicable modes of liability. Tellingly, those provisions seem to depart from customary international law in at least some respects.²⁸

Therefore, in my view, at least in respect of states parties (or ratifying states parties, for the crime of aggression), the Statute not only defines the jurisdiction of the Court but also codifies rules of criminal law that these states have agreed to apply to their nationals and on their territory.²⁹

3. Ad hoc Declarations: Ad hoc Accessions to Rome Statute?

The nature of the Rome Statute in situations arising from ad hoc declarations is less evident. The text of the relevant provisions does not clearly indicate what jurisdictional powers (prescriptive and/or adjudicative) or bases (territoriality, active nationality, etc.) lie at the origin of an ad hoc declaration. Article 12(3) simply states that a non-state party may lodge a declaration accepting the Court's jurisdiction with respect to a crime listed in

²⁶ O'Keefe (n 4) 552–553; Milanović (n 7) 30–31.

²⁷ Milanović (n 13) 168, 176.

²⁸ See Chapter 5, Section 2(a)(ii).

²⁹ Galand (n 13) 47, 129–130.

Article 5 if the acceptance of that state is required under Article 12(2). Article 11(2) then extends this possibility to states parties that have joined the Rome Statute after its general entry into force on 1 July 2002, without saying more. But the mere consent to the Court's jurisdiction does not necessarily imply that the accepting state has agreed to give the Statute's criminal provisions a substantive effect, i.e. the effect of directly binding individuals.³⁰

Indeed, Rule 44 of the RPE clarifies that, unlike the ratification or accession to the Statute, an ad hoc declaration can only be made in respect of specific factual situations, defined by temporal and geographical parameters.³¹ Furthermore, some have argued that accepting states cannot bind individuals by simply lodging an ad hoc declaration, given its lack of parliamentary approval or accessibility.³² Thus, it may well be that the sole effect of an ad hoc declaration is to grant the Court jurisdiction over that specific factual situation.

However, as discussed in Chapter 4, the more limited factual scope and the domestic approach to the adoption of an ad hoc declaration are immaterial to its potential prescriptive effect.³³ As a treaty-based document, grounded in the consent of the accepting state, nothing stops it from being used as a source of criminal law. Most importantly, accepting states have the power to prescribe the criminal provisions of the Rome Statute to their nationals, on their territory or in accordance with other accepted bases of jurisdiction under customary international law.

³⁰ Similarly, Milanović (n 13) 173; Milanović (n 7) 48.

³¹ See Williams and Schabas (n 8) 682–684; William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2016) 358; Hans Peter Kaul, 'Preconditions to the Exercise of Jurisdiction' in Antonio Cassese and others (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 610.

³² See Gallant (n 7) 819–820; Milanović (n 13) 174, fn 35, 177, fn 48, and Chapter 4, Section 3(a).

³³ See Chapter 4, Section 3(a).

A closer look at the text of Article 12(3) confirms this view. This provision seems to treat the consent of an accepting state as a substitute for the consent of states parties. This comes across when it states that an ad hoc declaration is warranted ‘[i]f the acceptance of a State which is not a Party to this Statute is required under paragraph 2’. Moreover, the fact that ad hoc declarations are regulated in the same provision dealing with the consent of states parties is telling. It suggests that, as with states parties, accepting states may not only delegate to the Court their adjudicative jurisdiction based on the principles of territoriality or active nationality but also consent to the application of the Statute’s criminal provisions to their nationals and on their territory.³⁴

This conclusion is buttressed by the identical terminology used in Article 12(1), (2) and (3), i.e. the ‘acceptance’ of the Court’s ‘jurisdiction’.³⁵ In particular, as with Article 12(1) and (2), Article 12(3) refers to the acceptance of ‘the exercise of jurisdiction by the Court *with respect to the crime in question*’.³⁶ Although this cannot be read as enabling accepting states to pick and choose which crimes to include in their declaration,³⁷ it does signal that Article 12(3) was meant to have a prescriptive import, as in the case of Article 12(1) and (2). This interpretation also finds support in the jurisprudence of the ICC: its Appeals Chamber held that Article 12(3)’s reference to ‘the crime in question’, coupled with Rule 44(2) RPE’s mention of ‘crimes referred to in article 5’, implies acceptance that any of those crimes might apply in a given situation.³⁸

³⁴ See Schabas (n 31) 363.

³⁵ A Zimmermann, ‘Palestine and the International Criminal Court Quo Vadis?: Reach and Limits of Declarations under Article 12(3)’ (2013) 11 JICJ 303, 311.

³⁶ Emphasis added.

³⁷ See Schabas (n 31) 358; Kaul (n 31) 610.

³⁸ *Gbagbo Case* (Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings) ICC-02/11-01/11-321 (12 December 2012) §80.

For the Court, a declaration lodged in accordance with Article 12(3) has the effect of applying the Statute as a whole to the relevant situation.³⁹

The *travaux préparatoires* of Article 12(3) further confirm this view. They tell us that this provision is what is left of a mechanism recognised in earlier drafts of the Statute whereby states parties and non-states parties alike could give their consent to the Court's jurisdiction on a case-by-case basis.⁴⁰ At that time, the jurisdiction of the Court, even for states parties, was not automatic, i.e. it was not granted by the mere ratification of the Rome Statute, as is the case today. Instead, an opt-in regime was in place, requiring states to lodge a separate 'declaration of acceptance' before the Court was able to exercise its jurisdiction in relation to a certain situation.⁴¹ Although the jurisdiction of the Court for states parties eventually became automatic, the provision regulating declarations of acceptance by non-states parties remained virtually unchanged throughout the drafting of the Statute.⁴² This signals that declarations of acceptance by non-states parties were treated on an equal footing with the consent of states parties.⁴³ Their only difference pertained to scope: while ad hoc declarations could only cover one situation at a time, the consent of states parties, expressed by means of ratification, accession or acceptance, was as broad as the Court's jurisdiction.⁴⁴

In sum, I believe there is sufficient evidence that the Rome Statute not only delineates the Court's jurisdiction but is also directly binding on individuals in situations arising from ad hoc declarations. Like states parties, accepting states can delegate to the

³⁹ *ibid* §§80–84.

⁴⁰ Schabas (n 31) 357; Kaul (n 31) 610; ILC, 'Report of The International Law Commission on Its Forty-Fifth Session, Draft Statute for an International Criminal Court' (3 May–23 July 1993) UN Doc A/48/10 43, Art 22(4) and Commentary (6).

⁴¹ ILC, 'Report of the International Law Commission on the Work of Its Forty-Sixth Session' (2 May–22 July 1994) UN Doc A/49/10 p 83, paras 3–4; Schabas (n 31) 357.

⁴² See *supra* n 40.

⁴³ UNGA, UN Doc A/50/22 (n 21) para 110; ILC, UN Doc A/49/10 (n 41) pp 83–84, para 6.

⁴⁴ *ibid* and Rule 44(2), ICC RPE.

Court their adjudicative jurisdiction over their nationals or on their territory. And before doing so, they will have prescribed the criminal provisions of the Statute to their nationals and on their territory. As discussed in Chapter 4, it is also my view that ad hoc declarations can be made in respect of conduct amounting to the crime of aggression, for which the same observations apply.⁴⁵

4. UNSC Referrals Involving Non-State Parties: The ICC as an ‘Ad hoc Permanent Tribunal’?

Nothing in the text of Article 13(b) points to the nature of the Rome Statute in situations referred to the Court by the SC. All it says is that UNSC referrals must cover a situation in which Article 5 crimes appear to have been committed and that the Council must be ‘acting under Chapter VII of the Charter of the United Nations’. The *chapeau* of Article 13 does make it clear that the Council’s referrals can only grant the Court jurisdiction over a crime listed in Article 5, and that such jurisdiction must be exercised ‘in accordance with the provisions of [the] Statute’. This is reinforced by Article 1 of the Statute, which states that ‘[t]he jurisdiction and functioning of the Court shall be governed by the provisions of this Statute’.

However, a simple grant of jurisdiction, without more, does not necessarily mean that the criminal provisions of the Statute have a substantive effect in the referred situation. This ambiguity is compounded by the fact that, for UNSC referrals, Article 12 does not require the fulfilment of any of the ordinary jurisdictional pre-conditions listed in paragraphs 2 and 3, i.e. the commission of a crime on the territory or a by a national of a state party or an accepting state. This means that such referrals can cover alleged crimes committed on the territory *and* by a national of a non-state party, which were not otherwise subject to the Court’s jurisdiction, provided that the relevant state is a UN

⁴⁵ See Chapter 4, Section 3(d).

member or has accepted to be bound by the UN Charter.⁴⁶ It is the fact that the UNSC can refer situations involving non-states parties that casts doubt on the applicability of the Statute to those states and the individuals subject to their prescriptive jurisdiction.

Despite those textual ambiguities, the object and purpose of Article 13(b) and, most importantly, its *travaux*, do shed some light on the nature of the Statute in cases of UNSC referrals. As some have already noted, the purpose of allowing the UNSC to refer situations to the ICC is to avoid the creation of new ad hoc tribunals by the Council in the future.⁴⁷ This is why the Court has been referred to as an ‘ad hoc permanent international criminal tribunal’ whenever its jurisdiction is granted and activated pursuant to an UNSC referral.⁴⁸ Those statements find ample support in the drafting history of Article 13(b). It is particularly telling that drafters not only conceived UNSC referrals as substitutes for future ad hoc tribunals,⁴⁹ but also considered that their ‘modus operandi’⁵⁰ and ‘powers’⁵¹ should be analogous to that of those tribunals. Admittedly, it is quite possible that those comparisons with the ad hocs were not to be given much weight. And it may well be that, even in situations arising from UNSC referrals, the ICC was meant to operate differently from them. However, the fact that their jurisdictional bases and applicable law directly inspired the institutional design of UNSC referrals is a good indication that, at least in

⁴⁶ See Art 25 of the UN Charter and Chapter 4, Section 3(b).

⁴⁷ Gallant (n 7) 826; Luigi Condorelli and Santiago Villalpando, ‘Referral and Deferral by the Security Council’ in Antonio Cassese and others (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 628.

⁴⁸ Condorelli and Villalpando (n 47) 628; Rogier Bartels, ‘Legitimacy and ICC Jurisdiction Following Security Council Referrals: Conduct on the Territory of Non-Party States and the Legality Principle’ in Nobuo Hayashi and Cecilia M Bailliet (eds), *The Legitimacy of International Criminal Tribunals* (CUP 2017) 142.

⁴⁹ See, e.g., ILC, UN Doc A/49/10 (n 41) p 85; UNGA, ‘United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998. Official Records. Volume II, Summary Records of the Plenary Meetings and of the Meetings of the Committee of Whole’ (15 June -17 July 1998) UN Doc A/CONF-183/13(VOL-II) p 68, para 55, p 208, paras 66, 75, p 209, para 85, p 210, para 92.

⁵⁰ UNGA, UN Doc A/50/22 (n 21) p 27, para 120.

⁵¹ UNGA, ‘Summary of the Proceedings of the Preparatory Committee during the Period 25 March-12 April 1996’ (7 May 1996) UN Doc A/AC-249/1 p 40, para 150.

those situations, the ICC's own jurisdiction and applicable law should mirror those of the ICTY and ICTR. As is well known, although the Council limited the adjudicative jurisdiction of those tribunals to the territory and nationals of the states concerned, their applicable law came directly from customary international law, applicable treaties and general principles of law.⁵²

The *travaux* are also instructive in respect of another, related point: they seem to indicate that a form of 'quasi-universal' jurisdiction is the basis of the Court's adjudicative jurisdiction in cases of UNSC referrals, similarly to the ad hoc tribunals. To be sure, universal jurisdiction *proper* (i.e. *qua* customary international law) was ultimately rejected as the default basis for the Court's jurisdiction and applicable law.⁵³ Nevertheless, even drafters who firmly opposed this idea, including representatives of the US, conceded that, in cases of UNSC referrals, the Court would indeed be exercising a *type* of universal jurisdiction, which would be grounded in the Council's powers under Chapter VII of the UN Charter and would entail the application of pre-existing rules of international law, as opposed to the Statute.⁵⁴

Indeed, it seems unlikely that, in those instances, the basis of the Court's *adjudicative* jurisdiction would be universal jurisdiction proper. If that was the case, an UNSC referral would have been unnecessary, at least as a matter of law, since states already have the power to exercise this type of jurisdiction individually or collectively

⁵² 'UNSC 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808' (1993) UN Doc S/25704 para 34; 'UNSC 'Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994)' (1995) UN Doc S/1995/134 para 12; *Tadić Case* (Appeal Judgment) ICTY-94-1-A (15 July 1999) §§287, 296; *Galić Case* (Appeal Judgment) ICTY-98-29-A (30 November 2006) §§81–85; Gallant (n 7) 783–785.

⁵³ UNGA, UN Doc A/CONF-183/13(VOL-II) (n 49) pp 122, 185, 187, 189, 191, 297, 298, 299, 300, 302; Schabas (n 31) 350.

⁵⁴ UNGA, UN Doc A/CONF-183/13(VOL-II) (n 49) p 123, para 28, p 187, para 10, p 297, para 42; Scheffer (n 10) 533–534; Ademola Abass, 'The International Criminal Court and Universal Jurisdiction' (2006) 6 ICLR 349, 374.

over crimes against humanity, war crimes and genocide.⁵⁵ Furthermore, the crime of aggression, although customary in nature, is not yet subject to universal jurisdiction.⁵⁶ This means that UNSC referrals, at least in respect of this crime, would have to be explained by a different jurisdictional basis.⁵⁷ Moreover, many states had principled objections to the concept or the exercise of universal jurisdiction proper.⁵⁸ It is also significant that, at that time, the Statute's criminal provisions were thought to be reflective of customary international law, pre-existing treaties and general principles of law.⁵⁹ As mentioned earlier, it was not until the Rome Conference that the idea to include treaty crimes was dropped,⁶⁰ and it had become apparent, but by no means clear, that the Statute's criminal provisions had gone beyond customary international law and general principles of law.⁶¹

From the perspective of the doctrine of delegated powers, this jurisdictional setting does make sense. Given its broad enforcement powers under Chapter VII, the Council, despite lacking itself any adjudicative powers, does have the ability to create a

⁵⁵ Milanović (n 7) 49; Akande (n 2) 618, 621–622, 625.

⁵⁶ Beth Van Schaack, 'Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression' (2012) 10 JICJ 133, 134, 137–145; Roger S Clark, 'Complementarity and the Crime of Aggression' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice, Volume II* (CUP 2011) 731.

⁵⁷ Unless one subscribes to the view that the jurisdiction of the ICC is grounded in the *jus puniendi* of the international community as a whole over all crimes under international law, including the crime of aggression. See, e.g., *Al-Bashir Case*, Kreß and Pobjie's Amicus Brief (n 3) §14.

⁵⁸ See UNGA, UN Doc A/CONF-183/13(VOL-II) (n 49) p 123, para 28, p 185, paras 60, 66, p 187, para 19, p 191, para 23, p 196, para 23, p 196, paras 44, p 297, para 42, p 310, para 87, p 361, para 21 (objections were raised at least by India, US, Israel, Mexico, Turkey and Egypt).

⁵⁹ See *supra* note 24 and 25 and 'UNGA, 'Report of the Preparatory Committee on the Establishment of an International Criminal Court - Addendum' (19 April 1998) UN Doc A/CONF.183/2/Add.1 p 27, fn 18, p 36, Art 11, Option 2, para 2, p 48, Art 21(1)(b) (on treaty crimes).

⁶⁰ UNGA, UN Doc A/CONF-183/13(VOL-II) (n 49) p 109, para 48, pp 172–173, para 37, p 175, para 70, p 176, para 94, p 178, paras 132, 136, p 179, para 142, p 271, paras 45, 55.

⁶¹ *ibid* p 67, para 44, p 74, para 21, p 86, para 52, p 159, paras 49, 51–52, 55, p 163, para 24, p 164, para 30, p 167, para 77, p 168, para 89, p 194, para 20, p 194, para 20, p 270, para 36, p 280, para 93, p 285, para 45, p 287, para 60, p 288, para 80, p 299, para 74, p 335, para 24, p 337, para 25. For some scholars, doubts about whether the Statute was meant to reflect custom remained until after the adoption of the Statute. See, e.g., Milanović (n 7) 30, 32; Michael P Scharf, 'The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position' (2001) 64 LCP 67, 79–80, 116–117; Darryl Robinson and Herman von Hebel, 'War Crimes in Internal Conflicts: Article 8 of the ICC Statute' (1999) 2 YIHL 193, 194.

judicial body exercising such powers over states having accepted to be bound by the UN Charter.⁶² This is what has been referred to as the ‘Chapter VII conception’ of the ICC’s adjudicative jurisdiction in cases of UNSC referrals: a *potentially* worldwide or quasi-universal reach of jurisdiction rooted in the Council’s powers under Chapter VII.⁶³ Ultimately, those jurisdictional powers remain grounded in the consent of the relevant state(s), manifested through their ratification or acceptance of the UN Charter. What happens is what some have characterised as an ‘indirect delegation’ (or ‘re-delegation’) of powers *through* the UNSC: states have transferred to the Council ample enforcement powers, even greater than the ones which they possess individually, including the power to exercise adjudicative criminal jurisdiction under any of the existing customary bases or a brand new one.⁶⁴ The Council has in turn ‘(re)delegated’ or passed on those adjudicative powers which it cannot exercise itself to another body which is competent to do so.⁶⁵ In the case of UNSC referrals, this body is an existing one – the ICC. In the case of the ad hoc tribunals, two new, subsidiary UN bodies were created for that purpose.

But while the ICC’s adjudicative jurisdiction in cases of UNSC referrals seems to be grounded in the Council’s Chapter VII powers, the basis of the Court’s applicable criminal law, i.e. the criminal prescriptions that it is meant to apply, appears to be different. Rather than being prescribed by the UNSC itself, the ICC’s applicable law for individuals should come, at least as a general rule, from pre-existing international law, including customary international law, general principles and applicable treaties. This would mean that the applicable rules of criminal law would have been prescribed or

⁶² *Tadić Case* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1 (2 October 1995) §§32–36.

⁶³ Galand (n 13) 35–36; *Al-Bashir Case* (Hearing before the Appeals Chamber in the Jordan Referral re Al-Bashir Appeal) ICC-02/05-01/09-T-5-ENG (11 September 2018) 129–130.

⁶⁴ Galand (n 13) 36–37. See also Danesh Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of Its Chapter VII Powers* (OUP 2000) 28–29; *Al-Bashir Appeal Hearing* (n 63) 51–52.

⁶⁵ Bartels (n 48) 149; Rastan (n 2) 171.

accepted by all states or at the very least the non-state party(ies) implicated in the referral. Four principal reasons support this view.

First, as explained earlier, states parties do not need the UNSC to be able to apply the definitions of genocide, crimes against humanity and war crimes to the nationals and on the territory of non-states parties, to the extent that those crimes are subject to universal prescriptive jurisdiction under customary international law.⁶⁶ It is true that those definitions cannot depart from international custom, but recall that, for most of its drafting, the Statute's substantive provisions were thought to reflect pre-existing international law. Although the crime of aggression is not subject to universal jurisdiction, states parties do not need the Council to be able to apply its customary definition, provided that the aggressor state has consented to the Court's adjudicative jurisdiction. Similarly, states parties would not need an UNSC referral to apply treaties which the non-states parties concerned had accepted if the Court were to have jurisdiction over treaty crimes. Thus, it seems that the point of having UNSC referrals is not to allow states parties or the Council to prescribe new rules of international criminal law to all individuals in the world. Instead, their purpose seems to be limited to granting the Court adjudicative jurisdiction over situations which could not be subject to it under Article 12, i.e. the principles of territoriality or active nationality.

Second, the Council's ability to prescribe criminal law to individuals was not only disputed between the drafters of the Statute,⁶⁷ but remains contested.⁶⁸

Third, as noted earlier, the ICC's jurisdictional setting in cases of UNSC referrals appears to have been modelled on that of the ad hoc tribunals, whose default applicable

⁶⁶ Milanović (n 7) 49; Akande (n 2) 618, 621–622, 625.

⁶⁷ ILC, 'Draft Statute for an International Criminal Court with Commentaries' (n 21) 44, Commentaries (1) and (6) to A 23; UNGA, UN Doc A/50/22 (n 21) para 120.

⁶⁸ See Chapter 4, Section 3(b).

law was customary international law, general principles, and applicable treaties.⁶⁹ This means that, in a way, the original idea of a Statute reflecting pre-existing sources of international law has survived in cases of UNSC referrals.

Fourth, as has been noted in the context of the ad hoc tribunals, even assuming that the Council has prescriptive powers, which I believe is true, a departure from general rules of international law should not be taken lightly, and requires clear and unambiguous language, even if implicit.⁷⁰ Most importantly, given the paramount place of human rights in the UN Charter and the strong presumption that the Council does not intend to derogate from them, any deviation from the principle of legality would require explicit wording from the Council.⁷¹ In any event, even if the UNSC can, in theory, derogate from international human rights law, including the principle of legality, when referring a case to the ICC, it is questionable whether the Court could give effect to such a referral. This is because, as mentioned earlier, the ICC is not bound by UNSC resolutions and has an obligation to apply and interpret its law in accordance with ‘internationally recognized human rights’, pursuant to Article 21(3) of the Statute. This means that, when referring a situation to the Court, although it is open to the Council to depart from pre-existing international law by applying the criminal provisions of the Rome Statute prospectively, the same could not be done retrospectively.⁷²

For all those reasons, even if the UNSC has the power to prescribe criminal law to individuals, the better view is that the *default* applicable law for both prospective and

⁶⁹ See *supra* note 52.

⁷⁰ Galand (n 13) 76–77; *Tadić* Appeal Judgment (n 52) §§287, 296; *Čelebići Case* (Trial Judgment) ICTY-96-21-T (16 November 1998) §310.

⁷¹ *Al-Jedda v United Kingdom* App no 27021/08 (ECtHR, 7 July 2011) §102; *Al-Dulimi and Montana Management Inc v Switzerland* App no 5809/08 (ECtHR, 21 June 2016) §§139–140, 146; Michael Wood, ‘The Interpretation of Security Council Resolutions, Revisited’ (2017) 20 Max Planck Yearbook of United Nations Law Online 1, 19, 23–24.

⁷² See Gallant (n 7) 839–840; Galand (n 13) 76–77, 135–140.

retrospective UNSC referrals involving non-states parties ought to be pre-existing international law, namely customary international law, general principles of law and applicable treaties. Put differently, in cases of UNSC referrals involving non-states parties, the Rome Statute ought to have a purely jurisdictional nature, and the Court should only rely on those criminal provisions that mirror the applicable law. Nevertheless, in prospective referrals, the Council may choose to depart from this general rule by deciding, clearly and unambiguously, to apply the Statute as a whole to a certain situation, including those provisions that go beyond pre-existing international law. This could be done upon referral of the situation or in a separate Chapter VII resolution.

As a consequence, the primacy that Article 21(1) affords to the Rome Statute and the Elements of Crimes should not apply in cases of UNSC referrals involving non-states parties, at least when it comes to rules of substantive criminal law going beyond pre-existing international law. Put differently, the substantive provisions of the Statute that depart from pre-existing international law should not prevail. As will be discussed in more detail in Chapter 7, in those cases, Articles 5 to 8 *bis* of the Statute, listing and defining the four core international crimes coming within the Court's subject-matter jurisdiction, ought to have a purely jurisdictional function, limited to setting out the events and legal matters upon which the Court is competent to adjudicate. They should not be given substantive effect to the extent that they are more expansive than the applicable law.

5. Norm Conflicts in Situations Involving States Parties, Ad hoc Declarations and UNSC Referrals: Apparent or Genuine?

I have argued that, in situations involving states parties, as well as in those implicating states parties having ratified the Kampala Amendments for the crime of aggression, the Rome Statute has a substantive nature, i.e. it defines not only the Court's jurisdiction but

also the substantive criminal law that is binding on individuals. This means that, if states parties retrospectively withdraw opt-out declarations for war crimes committed by their nationals or on their territory, thereby subjecting to the Court's jurisdiction situations for which the Statute was not previously applicable, a norm conflict seems to arise between the Statute and the principle of legality. The same conflict appears to ensue if states parties having ratified the Kampala agreements retrospectively withdraw their opt-out declarations for a crime of aggression committed by their nationals.

However, I believe that this conflict is only apparent.⁷³ This is because it can and should be avoided through an interpretation of the relevant provisions of the Rome Statute, namely Articles 124 and 15 *bis* (4). As mentioned in Chapter 4, although the Statute does not explicitly preclude states parties (and ratifying states parties for the crime of aggression) from retrospectively withdrawing opt-out declarations, it does not clearly authorise them to do that either.⁷⁴ Thus, to prevent inadvertent clashes with the principle of legality, the Court could simply interpret the Statute as not allowing withdrawals of opt-out declarations with retrospective effect.

I have also concluded earlier that the Rome Statute has a substantive nature in situations arising from ad hoc declarations. If that is true, the application of the criminal provisions of the Statute in retrospective ad hoc declarations would conflict with the principle of legality to the extent that those provisions are substantively more severe than the criminal laws that were binding on the accused at the time of the events. These norm conflicts between the Statute and the principle of legality arise not only in the abstract but

⁷³ For the distinction between apparent and genuine norm conflicts, see Chapter 5, Section 3(a).

⁷⁴ See Chapter 4, Sections 3(c) and (d).

also in concrete cases before the ICC.⁷⁵ Likewise, the retroactive recharacterisation of the applicable law into the Statute would lead to concrete norm conflicts between the Statute and the principles of legality and fair labelling (remember: breaches of fair labelling can only be determined on a case-by-case basis).⁷⁶ Those conflicts are, in my view, genuine, given that the text, context, object and purpose and preparatory works of Article 12(3) do not seem to make room for a jurisdictional reading of Statute in cases of ad hoc declarations, prospective or retrospective. Notably, although this normative conflict seems to have resulted from a drafting oversight, at least one state delegate had spotted it during the Rome Conference.⁷⁷

Conversely, in cases of UNSC referrals involving non-states parties, the Statute ought to be conceived as having a purely jurisdictional nature, with the substantive criminal law coming from pre-existing sources of international law, i.e. customary international law, general principles of law and applicable treaties. But it is open to the Council to deviate from pre-existing international law and to apply the Statute's more expansive provisions in prospective referrals involving non-states parties. As seen earlier, this interpretation is not only justified by the principle of legality, as others have suggested, but also by the broader international law context, object and purpose and the *travaux* of Article 13(b) of the Statute. The implication is that no norm conflict exists in the abstract between the Rome Statute and the principle of legality, in both retrospective and prospective referrals. After all, the applicable rules of criminal law would have been binding on the accused at the time of the events.

⁷⁵ For a discussion of how norm conflicts can arise 'on the normative' plan or in specific circumstances, see Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (CUP 2003) 177.

⁷⁶ See Chapter 3, Sections 5 and 6.

⁷⁷ UNGA, UN Doc A/CONF-183/13(VOL-II) (n 49) p 333, para 97.

Nevertheless, whether or not a norm conflict is genuine or apparent depends on how one interprets the rules in conflict.⁷⁸ Thus, if the Court decides to apply criminal provisions of the Statute that are more expansive than the applicable law in cases of UNSC referrals involving non-states parties (as it has been doing so far), an actual norm conflict may arise *in concreto* between the Statute and the principles of legality and fair labelling. As discussed in Chapter 5, this would amount to the retroactive recharacterisation of the applicable law into the Statute, with potentially detrimental effects on the accused.

The final scenario which might lead to the retroactive application of the Statute is where the Court extensively interprets its criminal provisions of the Statute in ways that are substantively detrimental to the accused. This might happen across all situations described above, i.e. those involving states parties, ad hoc declarations and UNSC referrals implicating non-states parties. Yet, in those instances, any conflict with the principles of legality and fair labelling is only apparent, as it would arise from a certain reading of the Statute's criminal provisions. Thus, such conflicts can and should be avoided through interpretation, in particular, by interpreting the criminal provisions of the Statute in accordance with the principles of *in dubio pro reo* and strict interpretation, both recognised in Article 22(2) of the Statute itself.

As discussed in Chapter 2, the principle of legality is a universally recognised human right under treaty law, customary international law and a general principle of law,⁷⁹ and, to this extent, it is opposable *erga omnes*.⁸⁰ In the same vein, both the principles of legality and fair labelling protect the interests of third parties (i.e.

⁷⁸ See Chapter 5, Section 3(a).

⁷⁹ See Chapter 2, Section 2.

⁸⁰ ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi' (13 April 2006) UN Doc A/CN.4/L.682 paras 108–109, 154, 380, 391–398.

individuals). This means that states parties to the Rome Statute cannot simply contract out from those principles by adopting the Statute or establishing the ICC.⁸¹ Although the principle of legality is often phrased as precluding a conviction or sentence based on retroactive criminal law or punishment,⁸² the mere enactment of a retroactive rule of substantive criminal law would, *in and of itself*, breach the principle.⁸³ Furthermore, the Rome Statute itself requires the Court to comply with the principle of legality and at least certain aspects of the principle of fair labelling. Thus, breaches of those principles violate the Court's constitutive instrument and are thereby *ultra vires*.⁸⁴

Therefore, the genuine norm conflicts between the Rome Statute and the principles of legality and fair labelling, in the circumstances described above, may lead to the partial illegality of the Statute and the respective ICC decisions. As any breach of *erga omnes* obligations under international law, the consequence of such illegality is the international responsibility of the ICC and its states parties, as well as the ineffectiveness of the relevant provisions of the Statute in the relations between its parties, as well as these and third states.⁸⁵

6. Conclusion

This Chapter has interpreted certain key provisions of the Rome Statute with the aim of ascertaining its nature in situations involving states parties, as well as those arising from

⁸¹ *ibid* 108–109, 154, 172, 174–179, 309, 324–326, 391, 394; ILC, ‘Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (2006) YILC, vol II, Part Two para 10; Pauwelyn (n 75) 298–299, 325–326, 328, 436–437; ILC, ‘Draft Articles on the Responsibility of International Organizations, with Comments’ (2011) YILC, vol II, Part Two, Arts 3 and 10 (including commentaries [2]–[3]).

⁸² See, e.g., Art. 15(1) ICCPR, Art. 7 ECHR, Art. 11(2) UDHR.

⁸³ See, e.g., *Vasiliauskas v Lithuania* App no 35343/05 (ECtHR, 20 October 2015) §154; Council of Europe, Council of Europe, ‘Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law’ (2017) <https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf> accessed 25 August 2019 para 2; *Sunday Times v The United Kingdom* App no 6538/74 (ECtHR, 26 April 1979) §49; *Ricardo Canese v Paraguay* (IACHR, 31 August 2004) §§175–175.

⁸⁴ Pauwelyn (n 75) 285–289, 324–326.

⁸⁵ *ibid* 177, 276–277, 310–315.

ad hoc declarations and UNSC referrals implicating non-states parties. It has looked at their text, context, object and purpose and preparatory works. It has also looked at other relevant and applicable rules of international law, in accordance with Article 31(3)(c) of the VCLT and the principle of systemic integration. Of particular relevance was the analysis of the adjudicative powers that have been delegated to the Court by different states, including through the SC, and the prescriptive powers belonging to states parties, non-states parties and the Council. These reflect broader rules of international law which continue to apply to the ICC in the background, such as the principles of sovereignty and state consent, as well as the customary bases of jurisdiction in criminal matters.

This enquiry has led me to conclude that there is overwhelming support for the view that the Rome Statute is both jurisdictional and substantive where crimes are committed by nationals or on the territory of a state party, and where the perpetrator and the victim of a crime of aggression are ratifying states parties. Similarly, in situations arising from ad hoc declarations lodged by a non-state party or state party joining the Statute after its general entry into force, there is sufficient indication that the Statute is both jurisdictional and substantive. In contrast, for UNSC referrals involving non-states parties, there are good reasons of law and policy justifying a purely jurisdictional conception of the Statute, with the substantive criminal law coming from pre-existing customary international law, applicable treaties and general principles of law.

In light of this compartmentalised nature, both genuine and apparent norm conflicts might arise, in different circumstances, in the abstract or in concrete cases, between the Statute and the principles of legality and fair labelling. Genuine conflicts exist in situations arising from retrospective ad hoc declarations. In contrast, apparent ones seem to arise when the UNSC refers situations involving non-states parties, when states parties retrospectively withdraw opt-out declarations for war crimes or the crime of

aggression, and in instances of extensive interpretation. Yet, in specific cases, these conflicts might materialise to the extent that the Court applies the Statute in substitution for an applicable source of law, in a manner that is substantively detrimental to the accused. Whenever a genuine norm conflict arises, only a norm displacement technique can resolve it. This is where Article 21(3) comes in, as will be discussed in the next chapter.

In sum, the Rome Statute has a different nature depending on its jurisdictional basis or pre-condition. Although this will lead to different sources of law applying in different scenarios, this is arguably the price to pay for compliance with the Statute's text, object and purpose and, most importantly, its broader international law context. Granted, as with any interpretation, a certain degree of uncertainty remains and policy choices are inescapable. Thus, my conclusions can only be tentative. However, they are grounded in a cautious application of the VCLT and other rules of international law.

In Chapter 7, the final chapter of this thesis, I will demonstrate how the ICC can apply external sources of international law in order to uphold the Statute's jurisdictional nature in cases of UNSC referrals involving non-states parties and to resolve the remaining norm conflicts in the other retroactive scenarios.

CHAPTER 7: ARTICLE 21(3) OF THE ROME STATUTE AND THE APPLICATION OF CRIMINAL LAW IN ACCORDANCE WITH ‘INTERNATIONALLY RECOGNIZED HUMAN RIGHTS’

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1. Introduction

Chapter 6 has shown that, in cases of retrospective ad hoc declarations, a genuine norm conflict might arise, in the abstract, between the Rome Statute and the principle of legality in general international law. This conflict arises to the extent that the criminal provisions of the Statute are substantively more severe than the criminal law binding on the accused at the time of the conduct. It was mentioned that, to resolve those norm conflicts, one must resort to a norm displacement technique, i.e. a rule that tells us which of the norms in conflict shall prevail.

The previous chapter has also demonstrated that, in cases of retrospective withdrawals of opt-out declarations for war crimes or the crime of aggression, any conflict with the principle of legality can, in principle, be interpreted away. This could be done by simply reading Articles 124 and 15 *bis*(4) of the Statute as not permitting such retrospective withdrawals. Otherwise, genuine norm conflicts between the Rome Statute and the principle of legality in general international law might arise in those instances too.

In contrast, clashes with the principle of legality arising from an extensive interpretation of the Statute can be avoided by the adoption of a strict interpretation and, in case of doubt, one that is more favourable to the accused, in accordance with Article 22(2) of the Rome Statute. Since there is no need to resort to a norm displacement rule, this chapter will leave those instances aside.

I have also concluded that, in cases of prospective and retrospective UNSC referrals involving non-states parties, the norm conflict between the Rome Statute and the principle of legality is only apparent, at least *in abstracto*. This is because, in those instances, the Statute ought to have a purely jurisdictional nature, with the applicable law coming from pre-existing international law. However, if the Court continues to apply the criminal provisions of the Statute in those situations, genuine norm conflicts with the principle of legality might arise *in concreto*.

To avoid or resolve the various normative conflicts at hand, the Court needs to resort to external sources of law. In more detail, whenever genuine norm conflicts arise because the Statute would apply retroactively, a simple recharacterisation of the applicable law into the Statute might be inconsistent with both the principles of legality and fair labelling. Thus, an applicable source of criminal law must be applied as such, whenever such conflict arises. According to Article 21(1)(b)-(c) of the Statute, the Court is competent to apply customary international law, applicable treaties and, failing those, general principles of law. Similarly, if the Statute is conceived as purely jurisdictional in cases of UNSC referrals involving non-states parties, the applicable law must be sought in pre-existing international law. Again, external sources of law should not be retroactively recharacterised into the Rome Statute but applied as such.

Crucially, I believe that it is Article 21(3) of the Statute that enables and requires the Court to apply external sources of law to avoid or resolve the said normative

conflicts. This is because it states that the ‘application and interpretation’ of the Court’s applicable law ‘shall be consistent with internationally recognized human rights’. But to confirm this hypothesis, three sets of questions must be answered. First, to what extent does Article 21(3) incorporate the principles of legality and fair labelling in general international law? Second, does Article 21(3) really afford primacy or ‘supra-legality’ to those principles? If so, does ‘application’ consistently with those rights include the displacement of the Statute, followed by the application of external sources of law? Or does it only concern the mere ‘implementation’ of the Statute? Third, how can the Court do this in particular cases? Specifically, at which stage of the criminal proceedings this displacement ought to be implemented? Is this a question of jurisdiction, which requires the Court to dismiss the case or situation at the outset? Or is it a question of substance, which ought to be resolved at the confirmation of charges or during trial?

This chapter will only briefly address the first question, focussing instead on the second and third questions. Given the lack of controversy that the principle of legality is an ‘internationally recognized human rights’ within the meaning of Article 21(3), there is no need to dwell on this. However, it is important to clarify why other, more robust formulations of the principle, found in certain regional treaties, fall outside of the scope of that provision. By the same token, it is necessary to ascertain the extent to which the principle of fair labelling is covered by that provision. This will be done in **Section 2**. In **Section 3**, I will turn to the legal effect of Article 21(3), enquiring, in particular, whether and to what extent the Court can or must displace the criminal provisions of the Statute in the various instances of normative conflict mentioned above, to comply with the principles of legality and fair labelling. **Section 4** will demonstrate how the legal effect of Article 21(3) will play out in practice, i.e. in actual proceedings before the Court. It will explain whether clashes with the principle of legality and fair labelling are issues of

jurisdiction or substance, and at which stages of the proceedings the Court will be called upon to resolve them. It will also show how external sources of criminal law can and should be applied as such. Relatedly, it will discuss which substantive and jurisdictional provisions of the Statute should be relied on in each case. This is especially challenging considering how some questions of subject-matter jurisdiction are intermingled with those of substance.

This chapter will make three principal claims. First, it will argue that, while there is no question that the principle of legality in general international law is recognised in Article 21(3), the principle of fair labelling *per se* is not. However, fair labelling is covered to the extent that it overlaps with legality. Second, it will be shown that Article 21(3) does contain a supra-legality clause in favour of internationally recognized human rights. This primacy not only requires the Court to set aside the substantive provisions of the Statute when there is a genuine clash with the principle of legality but also to directly apply external sources of substantive criminal law. Third, the primacy of the principle of legality is not only a question of substance but also of subject-matter jurisdiction, as those issues inevitably overlap in criminal trials. Thus, it commands either the refusal to exercise jurisdiction or the application of external sources of law as such, depending on the stage of proceedings.

As usual, to interpret Article 21(3) and other relevant provisions of the Statute, I will follow Articles 31-32 of the VCLT, always bearing in mind the principle *in dubio pro reo*.

2. To What Extent Are the Principles of Legality and Fair Labelling ‘Internationally Recognized Human Rights’?

As explained in Chapter 5, reliance on Article 21(3) is one of the few avenues with which to avoid or resolve clashes with the principle of legality arising from the retroactive

application of the Statute. This is because, even if the ICC is bound by general international law, it is unclear whether judges are competent to apply external sources of law without the Statute's authorisation. It was also mentioned that it is uncontroversial that the principle of legality, as found in general international law, falls within the scope of Article 21(3).¹ The question then becomes whether other, more stringent versions of this principle, such as the one recognised in the ACHR, have been incorporated into Article 21(3). After all, this provision does not speak of 'universally binding' or 'protected' human rights, but only 'internationally recognized' ones. The question also arises as to whether fair labelling is an internationally recognized 'human right'.

As to the first question, the wording of Article 21(3) indeed suggests that not only human rights binding under customary international law, general principles of law and universally ratified treaties are included within the scope of that provision.² For some, to be 'internationally recognized', a human right need only be accepted by two or more states, i.e. a source of international law.³ This would mean that regional human rights treaties and even non-binding instruments could, and for some *must*, be used by ICC when giving effect to Article 21(3).⁴ Notably, the Court itself has frequently had recourse to the provisions of regional human rights treaties, such as the ECHR and the ACHR, and

¹ See Chapter 4, Section 5.

² Volker Nerlich, 'Article 21 (3) of the ICC Statute: Identifying and Applying "Internationally Recognized Human Rights"' in Paolo Lobba and Triestino Mariniello (eds), *Judicial Dialogue on Human Rights: The Practice of International Criminal Tribunals* (Brill 2017) 87; Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (CUP 2014) 117; Rebecca Young, "'Internationally Recognized Human Rights' before the International Criminal Court' (2011) 60 ICLQ 189, 199; Gerhard Hafner and Christina Binder, 'The Interpretation of Article 21 (3) ICC Statute: Opinion Reviewed' (2004) 9 ARIEL 163, 184–185.

³ See Nerlich (n 2) 80–83; Daniel Sheppard, 'The International Criminal Court and "Internationally Recognized Human Rights": Understanding Article 21(3) of the Rome Statute' (2010) 10 ICLR 43, 63–65; Stephen Bailey, 'Article 21(3) of the Rome Statute: A Plea for Clarity' (2014) 14 ICLR 513, 532–533.

⁴ Christoph Deprez, 'Article 21(3) of the ICC Statute and "Internationally Recognized Human Rights" as a Source of Mandatory Judicial Dialogue' in Paolo Lobba and Triestino Mariniello (eds), *Judicial Dialogue on Human Rights: The Practice of International Criminal Tribunals* (Brill 2017) 92–95, 101; Sheppard (n 3) 67–70.

even the case-law of their respective supervisory bodies, particularly when examining the rights of the accused.⁵

However, the *direct* application of regional and non-binding instruments, on their own, would subvert the Court's applicable law, comprising only the Statute, the Elements of Crimes, the RPE, international custom, applicable treaties and general principles of law, in accordance with Article 21(1). Although Article 21(3) requires consistency with 'internationally recognized human rights', this cannot be achieved at all costs but, according to its text, must be made 'pursuant' to Article 21(1) and its listed applicable sources of law. The application of regional and 'soft law' instruments would also have the effect of binding the Court to what it is not bound to or applying to accused persons instruments that are not applicable to them.⁶ Thus, it appears that regional and non-binding instruments can only be applied to the extent that they are reflective of the Statute or another applicable source of law.⁷ However, that is not to say that they cannot be used as interpretative aids or supplementary means of interpretation, in accordance with Article 32 of the VCLT.⁸ Indeed, in the various instances where the Court has looked at them, it has done so for the purposes of clarifying or confirming the meaning of the Statute's provisions.⁹

⁵ See, e.g., *Ongwen Case* (Decision on Request for Disclosure and Related Orders Concerning Mr Ongwen's Family) ICC-02/04-01/15-1444 (12 February 2019) §9, fn 28 and 31; *Ntaganda Case* (Second Decision on Bosco Ntaganda's Interim Release) ICC-01/04-02/06-284 (17 March 2014) §24; *Situation in the Republic of Kenya, Situation in Kenya* (Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya) ICC-01/09-24 (3 November 2010) §§4–5, including fn 2. See also Nerlich (n 2) 82–83, 86–87; Bailey (n 3) 532–533.

⁶ Young (n 2) 206; Nerlich (n 2) 85–86, 88–89.

⁷ Bailey (n 3) 526–527; Grover (n 2) 120; Young (n 2) 203–205.

⁸ Nerlich (n 2) 85–86, 88–89; Young (n 2) 206.

⁹ See, e.g., *Ntaganda Case* (Judgment on the appeal of Mr Bosco Ntaganda against the "Decision on Defence request for leave to file a 'no case to answer' motion") ICC-01/04-02/06-2026 (05 September 2017) §§48–49 (referring to the Appeals Chamber not being 'persuaded' that an ECtHR judgment establishes a no case to answer procedure); *Situation in Kenya* Decision on Victim Participation (n 5) §5 ('taking note' of non-binding instruments); *Ntaganda* Second Decision on Interim Release (n 5) §24

As to the second question, it is unlikely that the principle of fair labelling is, on its own, an ‘internationally recognized human right’ within the meaning of Article 21(3) of the Statute. As argued in Chapter 3, although this principle is likely part of general international law, scattered as it is in different rules and principles of international law, it has not been considered a human right. Granted, there are suggestions that fair labelling could be a fair trial right,¹⁰ and this would certainly be desirable in terms of strengthening the legal basis of the principle. However, this view has not been generally followed, at the very least due to the paucity of academic commentary on the principle.

Nevertheless, it was argued in Chapter 3 that different aspects or elements of fair labelling are reflected in various rules or principles of international law, some of which are or may be internationally recognized human rights. In particular, the principles of legality and fair labelling overlap to a great extent, as both seek to protect the accused against the retroactive application of labels that would lead to greater stigma or substantively more severe criminal consequences. As this is the aspect of fair labelling that matters the most in the context of the retroactive application of the Rome Statute, there is no need to go any further in proving that the principle is part of Article 21(3). To the extent that it overlaps with the principle of legality in general international law, it has also been incorporated by that provision.

In any event, it was mentioned in Chapter 4 that other aspects of fair labelling have been recognised in the Rome Statute itself. For instance, it is reflected in the principle of personal culpability and the spectrum of modes of liability listed in Articles 25 and 28. Similarly, fair labelling is the very purpose of the Court’s power to

(stating that the Chamber’s interpretation is consistent with “‘internationally recognized human rights” [...] and finds support in the jurisprudence of the [ECtHR]”). For a contrary view, see Deprez (n 4) 101–102.

¹⁰ *Ruto and Sang Case* (Decision on Defence Applications for Judgments of Acquittal) ICC-01/09-01/11-2027-Red (05 April 2016), Reasons of Judge Eboe-Osuji §328; Talita de Souza Dias, ‘Recharacterisation of Crimes and the Principle of Fair Labelling in International Criminal Law’ (2018) 18 ICLR 788.

recharacterise facts, pursuant to Regulation 55 of the Regulations of the Court. To be sure, these are *not* human rights, at least not *per se*. Accordingly, recourse to them would not resolve the norm conflict between the Rome Statute and fair labelling whenever the applicable criminal law is retroactively recharacterised into the criminal provisions of the Statute. However, as a matter of policy, the Court should consider whether the retroactive application of the Statute is, in each case, consistent with the aspects of fair labelling going beyond the principle of legality. After all, fair labelling seeks to give effect to important interests which also find expression in the Rome Statute, such as fairness to the accused, the victims and the public at large, as well as deterrence, retribution and truth-telling.¹¹

In sum, the principle of legality in general international law is an ‘internationally recognized human right’ in the sense of Article 21(3). So is the principle of fair labelling, but only to the extent that it overlaps with the former.

3. The Legal Effect of Article 21(3) of the Rome Statute: ‘Supra-Legality’ of Human Rights and Application of External Sources of Law?

Article 21(3) of the Rome Statute not only recognises the principle of legality in general international law, giving rise to an internal norm conflict between this principle and those provisions leading to the retroactive application of the Statute. It also appears to contain a norm displacement rule giving primacy to that principle as well as other ‘internationally recognized human rights’. This is what some have referred to as the ‘supra-legality’ or ‘super legality’ of human rights.¹² However, this question is far from settled. In particular, some have suggested that the effect of Article 21(3) is limited to requiring the

¹¹ See Chapter 3, Section 4(a)(i).

¹² Grover (n 2) 113; Dapo Akande, ‘Sources of International Criminal Law’ in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009) 47; Allain Pellet, ‘Applicable Law’ in Antonio Cassese and others (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 1081.

Court to simply interpret¹³ and maybe ‘implement’¹⁴ the Statute as well as the other sources of applicable law consistently with human rights. They argue that in no circumstance would that provision allow the Court to override the Statute in favour of those rights.

In that light, it is necessary to spend some time on the interpretation of Article 21(3) to determine its legal effect. In particular, does it shuffle the hierarchy of sources in favour of ‘internationally recognized human rights’, including the principle of legality? Beyond the displacement of the Statute, to what extent does it authorise or even require the Court to apply external sources of law so as to ensure consistency with that principle?

The text of Article 21(3) states, in relevant part, that ‘[t]he *application* and *interpretation* of law pursuant to [Article 21] *must be* consistent with internationally recognized human rights’.¹⁵ If effective meaning is given each of those words,¹⁶ application and interpretation ought to mean different things. In fact, interpretation ordinarily refers to the process through which one ascertains the meaning of a certain provision, or tries to reconcile it with another provision, to the extent that their text, context and object and purpose permit.¹⁷ In contrast, the meaning of application, as employed in other parts of the Statute¹⁸ and in international law generally, goes beyond the mere concrete implementation of a rule. It includes the recognition of a legal effect or

¹³ Young (n 2) 193, 200–202, 207; Hafner and Binder (n 2) 171–172; J Verhoeven, ‘Article 21 of the Rome Statute and the Ambiguities of Applicable Law’ (2002) 33 NYIL 2, 14–15.

¹⁴ Hafner and Binder (n 2) 172, 174, 177, 190; Young (n 2) 193.

¹⁵ Emphasis added.

¹⁶ On the principle of effective interpretation, see *Bemba Case* (Judgement pursuant to Article 74 of the Statute) ICC-01/05-01/08-3343 (21 March 2016) §77; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16 §66.

¹⁷ Hafner and Binder (n 2) 172; ILC, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi’ (13 April 2006) UN Doc A/CN.4/L.682 paras 37–43, 411–412.

¹⁸ See, e.g., Art 21(1), which refers to the ‘application’ of various sources of law.

objective.¹⁹ Thus, to *apply* the Rome Statute in accordance with ‘internationally recognized human rights’ means to import or to give effect to the content or objective of the relevant human right, whatever that is.²⁰ This means that, rather than a simple rule of interpretation, Article 21(3) is a gateway to the application or incorporation of autonomous sources of law before the ICC.²¹

Yet Article 21(3) also speaks of application ‘pursuant to’ Article 21, as noted earlier. This suggests that the sources of law that the ICC is competent to apply in accordance with Article 21(1) cannot be changed. Therefore, although the Court must give effect to internationally recognized human rights, these have to be grounded in an applicable source of law, i.e. customary international law, applicable treaties, or, failing those, general principles of law.²² Again, domestic law, as well as non-binding instruments *per se* are ruled out.²³ This view finds support in the ICC’s case law.²⁴ In particular, the Court has stated that ‘prior to undertaking the analysis required by article 21 (3) of the Statute, [it] must find a provision, rule or principle that, under article 21 (1) (a) to (c) of the Statute, could be applicable to the issue at hand.’²⁵

¹⁹ See Gilbert Bitti, ‘Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC’ in Göran Sluiter and Carsten Stahn (eds), *The Law and Practice of the International Criminal Court* (OUP 2015) 303; Nerlich (n 2) 75; ILC (n 17) para 45.

²⁰ Nerlich (n 2) 75, 78, 88.

²¹ See, in particular, Bitti (n 19) 304; Nerlich (n 2) 88; William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2016) 530, 532.

²² Volker Nerlich, ‘The Status of ICTY and ICTR Precedent in Proceedings before the ICC’ in Göran Sluiter and Carsten Stahn (eds), *Emerging Practice of the International Criminal Court* (Brill 2009) 88–89; Schabas (n 21) 530, 532; Grover (n 2) 119–123; Young (n 2) 198.

²³ Nerlich (n 2) 88–89; Schabas (n 21) 532.

²⁴ *Situation in Kenya* (Decision on the “Victims’ request for review of Prosecution’s decision to cease active investigation”) ICC-01/09-159 (5 November 2015) §§16–21; *Lubanga Case* (Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008) ICC-01/04-01/06-1401 (13 June 2008) §§57–58; *Situation in the Democratic Republic of Congo* (Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal) ICC-01/04-168 (13 July 2006) §§11, 38.

²⁵ *Lubanga Case* (Decision on the Practices of Witness Familiarisation and Witness Proofing) ICC-01/04-01/06-679 (8 November 2006) §§10. See also §28.

At the same time, the duty to interpret and apply law pursuant to Article 21 does not seem to require the Court to follow the exact order of sources listed in paragraph 1 of this provision.²⁶ Otherwise, a separate provision, requiring the Court to *apply* law consistently with ‘internationally recognized human rights’ would have been unnecessary. After all, under Article 21(1), the Court already has the power to apply, as secondary sources of law, human rights that are found in international custom, applicable treaties and, failing those, general principles of law. Accordingly, if Article 21(3) is to be given effective meaning, it ought to be interpreted as requiring the Court to displace the Statute, as well as the Elements of Crimes and the RPE, in order to ensure consistency with ‘internationally recognized human rights’. The same view has been followed by the ICC,²⁷ which has recognised, in particular, that it has the obligation to disapply the Statute and to exercise its jurisdiction so as to give effect to those rights.²⁸

Nevertheless, the mere displacement of the applicable law may be insufficient to give effect to a certain human right and ensure consistency with it.²⁹ If the text and object and purpose of Article 21(3) are to be given meaningful effect, this provision ought to be interpreted as *requiring* the Court to import or transpose the content of external human rights provisions into its own criminal proceedings, to the extent necessary and provided

²⁶ See Young (n 2) 201 (describing but rejecting this view).

²⁷ *Lubanga Case* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06-2842 (14 March 2012) §602; *Katanga Case* (Decision on the application for the interim release of detained Witnesses DRC- D02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350) ICC-01/04-01/07-3405-tENG (1 October 2013) §§29–30; *Gbagbo Case* (Decision on the ‘Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of Articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11- 01/11-129)’) ICC-02/11-01/11-212 (15 August 2012) §89; *Lubanga Case* (Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006) ICC-01/04-01/06-772 (14 December 2006) §§36–37.

²⁸ *Lubanga Decision on Witness Familiarisation and Proofing* (n 25) §10, 28.

²⁹ See *Katanga and Chui Case* (Decision on “Mr Mathieu Ngujolo’s Complaint Under Regulation 221(1) of the Regulations of the Registry Against the Registrar’s Decision of 18 November 2008”) ICC-RoR-217–02/08 (10 March 2009) §§31, 37, 53–55.

that those rights are based on an applicable source of law.³⁰ This is so even if the application of the human right in question necessitates the adaptation of the Statute's rules of substance or procedure, or the creation of new procedural remedies, such as jurisdictional challenges or requests for redress or compensation.³¹ Notably, the Court has already relied on Article 21(3) to generate a series of procedural remedies, including *sui generis* motions for the stay of proceedings,³² the power to delay the return of witnesses,³³ the power to require the Registry to fund family visits to detainees,³⁴ and the power to decide that the accused has a 'no case to answer'.³⁵

In sum, the text of Article 21(3), read in context and in light of the principle of effectiveness, seems to suggest that the ICC has the power and the duty to give effect to internationally recognized human rights found in any of the sources listed in Article 21(1). To this end, Court may have to displace the Rome Statute, the Elements of Crimes, and the RPE, in favour of those rights, as well as to import their content into specific cases, even if this requires the creation of new remedies.³⁶

Shifting the discussion back to the retroactive application of the Rome Statute, this means that, as suggested earlier, Article 21(3) requires the ICC to give primacy to the principle of legality in general international law whenever it may genuinely clash, *in*

³⁰ Nerlich (n 22) 75, 88; Deprez (n 4) 97; Alexandre Skander Galand, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits* (Brill Nijhoff 2019) 140–141; Bitti (n 19) 304; Bailey (n 3) 514, 536, 542–544; Sheppard (n 3) 57, 60, 62–63.

³¹ Nerlich (n 22) 75, 78–79, 88; Galand (n 30) 142–143; Bailey (n 3) 542–546, 549–550; Sheppard (n 3) 60–63.

³² *Lubanga* Judgment on Jurisdiction Appeal (n 27) §§24–39.

³³ *Katanga Case* (Decision on an Amicus Curiae application and on the “Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d’asile” (articles 68 and 93(7) of the Statute)) ICC-01/04-01/07-3003-tENG (9 June 2011) §§67–73.

³⁴ *Katanga and Chui* Decision on Regulation 221(1) Complaint (n 29) §§31, 37, 53–55.

³⁵ *Ntaganda* Judgment on no case to answer Appeal (n 9) §46.

³⁶ Similarly, Nerlich (n 2) 75, 78–79, 88; Deprez (n 4) 97; Galand (n 30) 140–143; Bitti (n 19) 303–304; Bailey (n 3) 523; Sheppard (n 3) 62; Akande (n 12) 46–47; Pellet (n 12) 1080.

abstracto or *in concreto*, with other provisions of the Statute. To this end, the Court must displace or disapply the criminal provisions of the Rome Statute going beyond pre-existing international law, and, at the same time, directly apply the latter. As explained earlier, this may happen in cases of retrospective ad hoc declarations, where genuine norm conflicts exist with the principle of legality. On the other hand, in cases of UNSC referrals involving non-states parties, the jurisdictional nature of the Statute would require the Court to set aside the provisions of substantive criminal law that do not reflect pre-existing international law. To the extent that the Statute differs from custom, applicable treaties and general principles, the Court must apply these as such, in accordance with Article 21(1). However, the question remains as to how, in practical terms, those external sources of law can be ‘applied’ in those various scenarios.

4. How Should the ICC Apply External Sources of Law to Ensure Consistency with the Principles of Legality and Fair Labelling?

Chapters 1 and 2 have demonstrated how recourse to retroactive recharacterisation of crimes may inadvertently lead to a series of outcomes that are inconsistent with the principle of legality in general international law. These include an expansion or exclusion of essential elements of the crime, the application of more culpable modes of liability, the removal of defences, the lifting the of bars to prosecution or punishment, an increase in the penalties applicable to the crime and the imposition of more stigmatising labels. Chapter 3 then looked at the extent to which retroactive recharacterisation of crimes is consistent with the principle of fair labelling. Of particular relevance was the finding that previously applicable labels must often be preserved to be in line with the principles of legality and fair labelling. This may be required to the extent that subsequent labels carry with them more severe rules of substantive criminal law or are, in themselves, more stigmatising. In Chapter 5, it was noted that the suggestion to simply read down or

displace the Statute's crimes or modes of liability to conform with international custom or another applicable source of law would be a form of retroactive recharacterisation of crimes, with all the ensuing dangers.

Therefore, to resolve or avoid the conflicts arising from the retroactive application of the Rome Statute in accordance with Article 21(3), it is not enough to apply the Statute in a manner that 'conforms' to the applicable law. To ensure consistency with the principles of legality and fair labelling, the Court must not retroactively recharacterise crimes in a manner that will result in substantively detrimental consequences for the accused. But if this approach to applying external sources of law does not work, what are the alternatives for the ICC? How, in practical terms, can these be implemented?

a. Double Criminality

One option is for the Court to apply a version of the double criminality test, similarly to domestic courts in the context of vicarious jurisdiction.³⁷ Under this jurisdictional basis, states have the power to retroactively apply their own domestic criminal laws when prosecuting foreigners for ordinary crimes committed extraterritorially, following a decision not to extradite them. In this context, double criminality may be an effective means of avoiding exorbitant jurisdiction and violations of the principle of legality. It does so by ensuring that the criminal law of the forum state, although not previously binding on the accused, is not more severe than the applicable law in respect of i) the material and mental elements of the crime; ii) defences; iii) modes of liability; iv) penalties and v) bars to prosecution and punishment.³⁸ However, there are a few problems with transposing the double criminality test, as it is, to the ICC.

³⁷ See Julio Bacio Terracino, 'National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC' (2007) 5 JICJ 421, 426; *Hadzihasanović et al Case* (Decision on Joint Challenge to Jurisdiction) ICTY-01-47-PT (12 November 2002) §62. See also Chapter 2, Sections 3(b) and 5.

³⁸ See Chapter 2, Section 3(b).

First, as explained in Chapter 2, double criminality is not concerned with criminal labels. To elaborate, domestic legal systems have historically been reluctant to apply foreign criminal law, as part of the so-called ‘public law taboo’.³⁹ Double criminality was devised precisely to allow states to apply their own formally retroactive criminal laws in substitution for the applicable law, whilst ensuring consistency with the principle of legality.⁴⁰ In this way, it enables states to apply their own domestic laws as far as possible. But perhaps due to the significance of criminal labels for national legal systems, those have been left out of the double criminality test. For instance, although the courts of England and Wales would be happy to conform the substance of their criminal laws with those of France, it is unlikely that they would apply the French label of ‘voluntary violence leading to death’⁴¹ to the act of killing with intent to cause grievous bodily harm, which they would normally label, more severely, as ‘murder’.⁴² Yet this very importance militates in favour of a careful consideration of labels where the criminal law is applied retroactively. As explained in Chapters 1 to 3, aside from carrying with them different rules of criminal law, labels can lead to insurmountable stigma. By allowing retroactive labels to apply to the accused, reliance on the double criminality test, as it has been understood, may still lead to breaches of both the principles of legality and fair labelling.

Second, the application of the double criminality test may be an unnecessarily cumbersome task in cases of UNSC referrals involving non-states parties. To be sure, in cases of retrospective ad hoc declarations, the criminal provisions of the Statute apply as

³⁹ Matthieu JL Decroos, ‘Criminal Jurisdiction over Transnational Speech Offenses’ (2005) 13 *EurJCrime CrLCrJ* 365, 373–374, 391–396; William S Dodge, ‘Breaking the Public Law Taboo’ (2002) 43 *HILJ* 161, 161–162; Michiel Luchtman, ‘Principles of European Criminal Law: Jurisdiction, Choice of Forum, and the Legality Principle in the Area of Freedom, Security, and Justice’ (2012) 2 *ERPL* 347, 349.

⁴⁰ Cristine van den Wyngaert, ‘Double Criminality as a Requirement to Jurisdiction’ in Nils Jareborg (ed), *Double Criminality: Studies in International Criminal Law* (Iustus Förlag 1989) 49, 53–54; Michal Plachta, ‘The Role of Double Criminality in International Cooperation Matters’ in Nils Jareborg (ed), *Double Criminality: Studies in International Criminal Law* (Iustus Förlag 1989) 107–108.

⁴¹ Art 222-7, Penal Code of France 1992.

⁴² *R v Cunningham* [1982] AC 566 (HL).

a general rule, and external sources of law need only be relied on to the extent that they are substantively more beneficial to the accused. To verify whether this is the case, i.e. the extent of the clash between the Statute and the principle of legality, one needs to check whether each and every rule of criminal law applied to the individual accused is not substantively more severe than pre-existing international law, including in respect of labels. This means that, in a way, the double criminality test or a version thereof must be applied to check whether the Rome Statute needs to be displaced and what must be set aside. However, in cases of UNSC referrals, if the Statute is conceived as purely jurisdictional, as I have argued, then, in any event, the substantive criminal law as a whole will have to be sought elsewhere. In other words, there is no genuine norm conflict with the principle of legality to begin with, because the applicable law is, in my view, pre-existing international law. Thus, relying on the double criminality rule in those scenarios, just for the sake of applying the Rome Statute as far as possible, would not only be fiddly but pointless.

Third and relatedly, the double criminality test appears to be overly simplistic when it comes to the interplay between questions of jurisdiction and substance. As it has been applied in the context of vicarious jurisdiction, the verification of the concrete punishability of the accused serves not only to ensure compliance with the principle of legality but also as a precondition for the exercise of adjudicative and prescriptive jurisdiction by the forum state.⁴³ Simply put, if the conduct was, for some reason, not punishable in a state with a prior jurisdictional claim over the individual, the forum state cannot exercise vicarious jurisdiction in the first place. Granted, this approach (of refusing to exercise jurisdiction) may work well in cases of genuine norm between the Rome Statute and the principle of legality, i.e. for retrospective ad hoc declarations.

⁴³ van den Wyngaert (n 40) 50; Karin Cornils, 'The Use of Foreign Law in Domestic Adjudication' in Nils Jareborg (ed), *Double Criminality: Studies in International Criminal Law* (Iustus Förlag 1989) 79–80.

However, for UNSC referrals involving non-states parties, where the substantive criminal law as a whole comes from elsewhere, double criminality does not tell us how to define the Court's subject-matter jurisdiction. This is a fundamental question, given that, as will be discussed further, jurisdiction comes before applicable law, and yet the latter necessarily shapes the former. Moreover, double criminality alone cannot tell us whether and when to treat a possible violation of the principle of legality as a question of jurisdiction, warranting the dismissal of a case or situation, or a question of substance, requiring the acquittal of the individual on the merits.

Overall, although double criminality may be useful, if not necessary, in cases of retrospective ad hoc declarations, it is not a complete answer to the problem of the retroactive application of the Statute. It would have to be adapted to take account of criminal labels and their effects on the accused, and the interplay between issues of jurisdiction and substance still needs to be worked out. For UNSC referrals involving non-states parties, it is unhelpful and so not a recommended course of action.

b. The Application of Pre-Existing International Law 'As Such'

As hinted at earlier, another option to avoid or resolve the normative conflicts between the Rome Statute and the principles of legality and fair labelling is for the Court to apply pre-existing sources of international law 'as such'. This simply means that those external sources of law would not be retroactively recharacterised into the Statute, but applied as they existed in their original form, with their labels, to the extent necessary in each case. This approach has the potential to tackle the retroactive application of the Statute, whilst avoiding the dangers of retroactive recharacterisation of crimes and other forms of relabelling that double criminality and other approaches fail to address. Simply put, to ensure that the application of external sources of law is made in full compliance with the

principles of legality and fair labelling, there can be no detour through the Rome Statute when it comes to issues of substantive criminal law.

But before the Court can apply pre-existing international law as such, some preliminary questions need to be addressed. These revolve around the overlap between questions of subject-matter jurisdiction and substantive criminal law. I will first discuss the difficulty of separating those questions in criminal matters (sub-section i) and the implications arising therefrom (sub-section ii). This partly explains why questions relating to the retroactive application of criminal law are at once jurisdictional and substantive. In sub-section ii, I will also explain how application of pre-existing sources of international law ‘as such’ should be implemented in practice, both in cases of retrospective ad hoc declarations and UNSC referrals involving non-states parties. Particular attention will be given to the different provisions of the Statute which ought to apply in each case.

i. The overlap of subject-matter jurisdiction and substantive criminal law

As indicated earlier, the Court cannot apply external sources of law to avoid or resolve norm conflicts without knowing what its subject-matter jurisdiction looks like, i.e. the crimes which it is competent to interpret and apply and the corresponding events which it can adjudicate. After all, if the Court lacks jurisdiction over a certain crime, this crime cannot be applied to the relevant conduct. Thus, questions of jurisdiction are preliminary to those of substance. Yet the choice of applicable law necessarily impacts upon the Court’s subject-matter jurisdiction. In other words, depending on which rules of substantive criminal law the Court is competent to apply, it will have a different subject-matter jurisdiction.

This happens because a criminal court ought not to exercise adjudicative jurisdiction over facts for which there is no prior criminal prescription. Doing otherwise would amount to unnecessary prosecutions of innocent conduct, which could constitute violations of the principle of legality. At the same time, it is desirable that all conduct that is made criminal and punishable is also prosecutable. Hence, it is said that, in criminal matters, adjudicative jurisdiction is the mere actualisation of prescriptive jurisdiction.⁴⁴ Equally, there is normally a complete overlap between the crimes making up a tribunal's subject-matter jurisdiction and those that are part of its substantive criminal law. For instance, in many domestic systems, the subject-matter jurisdiction of criminal tribunals is defined on the basis of the same provisions defining crimes in substance.⁴⁵ The same goes for international criminal tribunals, such as the ICTY and ICTR, whose Statutes listed, at once, the crimes which defined their subject-matter jurisdiction and were also applicable to accused persons under customary international law, applicable treaties or general principles of law.⁴⁶ Similarly, the Rome Statute lists in Articles 6 to 8 *bis* the crimes which its states parties or accepting states have prescribed to their nationals and/or their territory, and which the ICC is competent to adjudicate. Thus, in situations involving states parties and accepting states, those provisions have a dual jurisdiction and substantive function.⁴⁷

In sum, in the context of criminal tribunals, subject-matter jurisdiction is overlaid onto the substantive criminal law. This is what I refer to as the overlap between subject-matter jurisdiction and substantive criminal law. Although it is in theory possible to separate the two, this is not only impractical but also dangerous, for the reasons just

⁴⁴ Galand (n 30) 47–48; Roger O'Keefe, *International Criminal Law* (OUP 2015) 6; Michael Akehurst, 'Jurisdiction in International Law' (1972) 46 BYIL 145, 179. See also Chapter 6, Section 2.

⁴⁵ See Chapter 6, Section 2.

⁴⁶ Arts 2-5, ICTY Statute; Arts 2-4, ICTR Statute.

⁴⁷ See *Lubanga* Judgment on Jurisdiction Appeal (n 27) §22.

mentioned. The same issues would arise in the context of the Rome Statute, where having different rules defining the crimes coming within the Court's subject-matter jurisdiction and those applicable to accused persons could lead to two especially problematic outcomes.

First, the Court's subject-matter jurisdiction could be broader or otherwise more severe than the applicable law. This would lead to the prosecution of conduct that was not criminal under the applicable law or the application of more severe offences or labels. For example, it was mentioned that, in the Rome Statute, the crime against humanity of persecution includes more discriminatory grounds (cultural, national, gender, or 'other grounds that are universally recognized as impermissible under international law')⁴⁸ than its customary counterpart (political, racial, ethnical or religious).⁴⁹ Thus, if the subject-matter jurisdiction is based on the former and yet the applicable law is provided by the latter, acts of persecution that may not have been criminal under the applicable law, i.e. those committed on the basis of the Statute's additional grounds, will be prosecuted and may end up being punished by the ICC.

Second, in other instances, the subject-matter jurisdiction could be narrower than the applicable law. In this case, conduct that was perfectly criminal under the applicable law would fall outside of the Court's subject-matter jurisdiction. In addition, it may also be that conduct that was criminalised as a more serious offence will have to be punished with a label that understates the degree of wrongdoing. For instance, under customary international law, the use of chemical weapons *per se* constitutes the war crime of using prohibited weapons.⁵⁰ In contrast, under the Rome Statute, this may only be criminal if

⁴⁸ See Art 7(1)(h), Rome Statute.

⁴⁹ See Chapter 5, Section 2(a)(ii).

⁵⁰ ICRC, 'Customary IHL - Rule 156. Definition of War Crimes' <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule156> accessed 25 August 2019.

employed in a way that amounts to other crimes, such as the war crimes of intentional attacks on civilians, indiscriminate or disproportionate attacks.⁵¹ Thus, if custom is the applicable law and the subject-matter jurisdiction is defined by the Statute, then the conduct in question, though criminal, will not be prosecuted by the ICC.

To avoid those difficulties associated with an over or under-inclusive jurisdiction, *ideally*, the applicable law *as a whole* should define the subject-matter jurisdiction. This means that, in instances of retrospective ad hoc declarations, both the subject-matter jurisdiction and the substantive criminal law should be defined by the Rome Statute, i.e. Articles 5 to 8 *bis*. In contrast, as I argued in Chapter 6, in cases of UNSC referrals involving non-states parties, the Statute ought to be conceived as purely jurisdictional, with the applicable law coming from pre-existing international law, i.e. customary international law, applicable treaties and, failing those, general principles of law. In those instances, the crimes falling within the Court's subject-matter jurisdiction, i.e. those listed in Article 5, should *ideally* be defined entirely on the basis of the applicable law, namely pre-existing international law, rather the definitions found in Articles 6 to 8 *bis* of the Statute. But the problem with this approach is that it is difficult to read Article 5 of the Statute, listing the crimes coming within the Court's subject-matter jurisdiction, separately from Articles 6 to 8 *bis*, defining those crimes.⁵² After all, these provisions have a dual jurisdictional and substantive function. As is evident from their text, the definitions of crimes are being spelled out '[f]or the purpose of [the] Statute', without any distinction between subject-matter jurisdiction and substantive criminal law. Thus, the definitions of crimes set out in Articles 6 to 8 *bis* of the Statute limit the scope of facts and legal issues that the Court is competent to adjudicate under Article 5. This means

⁵¹ See Art 8(2)(b)(ii), (iv) and (e)(i) of the Rome Statute and Dapo Akande, 'Can the ICC Prosecute for Use of Chemical Weapons in Syria?' (*EJIL: Talk!*, 23 August 2013) <<https://www.ejiltalk.org/can-the-icc-prosecute-for-use-of-chemical-weapons-in-syria/>> accessed 25 August 2019.

⁵² *Lubanga* Judgment on Jurisdiction Appeal (n 27) §22.

that, although the Court's subject-matter jurisdiction could, in some situations, be narrower than the scope of Articles 6 to 8 *bis*, it could not go beyond them. Otherwise, the Court would be exercising jurisdiction *ultra vires*.

The key practical implication is that, in cases of UNSC referrals implicating non-states parties, the Court's subject-matter jurisdiction would be a superposition of both the applicable law, i.e. pre-existing international law, and Articles 5 to 8 *bis* of the Rome Statute. In other words, in those instances, the subject-matter jurisdiction of the ICC is shaped by the definitions of genocide, crimes against humanity, war crimes and the crime of aggression existing under customary international law, applicable treaties and/or general principles of law, but only to the extent that these are not more expansive than the definitions found in the Rome Statute. Granted, this solution would leave unpunished certain acts that are criminal under the applicable law but fall outside of the Statute's substantive scope. The Court would lack jurisdiction to hear such cases. However, this is arguably a fair compromise between the need to avoid breaches of the principle of legality arising from an over-inclusive jurisdiction and exorbitant exercises of jurisdiction beyond the confines of the Statute. Moreover, a narrower interpretation of the Court's jurisdiction, by reference to both the applicable law and the Statute, is consistent with the principle of *in dubio pro reo*. At the same time, this approach still allows the Court to apply more representative labels existing under the applicable law, provided that the facts fall within Articles 6 to 8 *bis*.

The overlap between subject-matter jurisdiction and substantive criminal law explains why issues relating to the retroactive application of criminal law are and have been treated by the ICC and other international criminal tribunals as both jurisdictional

and substantive.⁵³ As mentioned earlier, to proceed with a criminal trial where the accused cannot be convicted or sentenced is not only an unnecessary waste of time and resources but may also breach the principle of legality. Thus, treating a potential violation of the principle of legality as a jurisdictional question has the advantage of preventing violations of this principle and avoiding useless trials to proceed before they reach the merits stage. Moreover, to the extent that breaches of the principle of legality amount to *ultra vires* acts, i.e. illegal acts which the Court is not empowered to perform, they should also be treated as matters of jurisdiction or competence.

Granted, as mentioned in various parts of this thesis, the mere exercise of jurisdiction cannot *per se* breach the principle of legality. Violations of this principle only happen if the individual is convicted and/or sentenced on the basis of a new rule of criminal law that is, in substance, more severe than the applicable law. These are chiefly substantive questions. However, as explained in Chapter 4, jurisdiction is the gatekeeper of the principle of legality, which is why it makes sense to adjust the former to accord with the latter and to deal with both questions, at once, at the jurisdictional stage. Accordingly, in situations involving states parties and accepting states, if the ICC finds that the crimes listed in the Rome Statute were not binding on the accused at the time of the conduct, in breach of the *nullum crimen* principle, it may not only dismiss the charges or acquit the accused on the merits, but also refuse to exercise jurisdiction at the first opportunity. Similarly, in cases of UNSC referrals involving non-states parties, if the Court finds that the conduct was not criminalised under customary international law, an

⁵³ See, e.g., Art 22(1), Rome Statute and *Ntaganda Case* (Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9) ICC-01/04-02/06-1707 (04 January 2017) §35, including fn 74. See also Alexandre Skander Galand, 'Conflicts of Norms in Situations Referred to the International Criminal Court by the United Nations Security Council' (PhD Thesis, European University Institute 2015) 137; Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (CUP 2010) 343–344; Bruce Broomhall, 'Article 22: Nullum Crimen Sine Lege' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (Beck/Hart 2016) 959.

applicable treaty or a general principle of law, then it must find that it lacks jurisdiction over the case, dismiss the charges or acquit the accused, depending on the stage of the proceedings and the evidence available.

But if a violation of the principle of legality is both an issue of jurisdiction and substance, the question then becomes at which stage of the proceedings it should be treated as one or the other. This is significant because a finding of lack of jurisdiction has different legal and practical implications from a finding of a breach of the principle of legality on the merits. In particular, while the former may lead to a refusal to grant authorisation into an investigation⁵⁴ or to issue an arrest warrant,⁵⁵ the latter may lead to the dismissal of the charges against the accused,⁵⁶ or their acquittal,⁵⁷ depending on the stage of the proceedings.

The problem is that, at the ICC, as in other international criminal tribunals, the assessment of questions of jurisdiction is not confined to the preliminary stages of the proceedings. Rather, the Court is competent to assess its own jurisdiction *proprio motu*, at any time, from the start of an investigation to the trial.⁵⁸ Moreover, while, as a general rule, challenges to the ICC's jurisdiction are accepted prior to or at the commencement of the trial at the latest, the Court can allow these to be made during trial in exceptional cases.⁵⁹ In addition, the Prosecutor may request a ruling on jurisdiction even at the

⁵⁴ Art 15(4), Rome Statute.

⁵⁵ Art 58(1)(a), Rome Statute.

⁵⁶ Art 61(7)(b), Rome Statute.

⁵⁷ Art 74(2), Rome Statute.

⁵⁸ See Art 19(1), Rome Statute. See also Christopher K Hall, Daniel D Ntanda Nsereko and Manuel J Ventura, 'Article 19: Challenges to the Jurisdiction of the Court or the Admissibility of a Case' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (Beck/Hart 2016) 852–854; Schabas (n 21) 485, 488.

⁵⁹ Art 19(4)-(6), Rome Statute. See also Hall, Ntanda Nsereko and Ventura (n 58) 887–882.

preliminary examinations stage.⁶⁰ In the same vein, both the Prosecutor and the Pre-Trial Chamber must assess whether the Court has jurisdiction before the initiation of an investigation and the issuance of a summons to appear or an arrest warrant, which formally starts a case or prosecution against an accused.⁶¹ In sum, the analysis of the ICC's jurisdiction may be spread across various stages of the proceedings, from the preliminary examination to the confirmation of charges or even the trial. Therefore, when the case moves on to the merits stage, the challenge is to know when the retroactive application of the Statute is an issue of jurisdiction or substance. In the context of the ICC, the 'merits stage' starts when issues of substantive criminal law are considered by the Court, including, in particular, the applicable modes of liability, the mental element and possible defences.⁶² The assessment of those issues begins when the Prosecutor requests the issuance of an arrest warrant or summons to appear.⁶³

Some domestic legal systems have tried to separate those two issues by applying lower evidentiary standards to the jurisdictional stage. For instance, in the US, various types of *prima facie* standards of proof have been used to prove jurisdictional facts and jurisdictional questions of law. These have included: slightest possibility, reasonable

⁶⁰ Art 19(3), Rome Statute and Reg 46, Regulations of the Court. See, e.g., *Request under Article 46(3) of the Regulations of the Court* (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 September 2018).

⁶¹ Arts 15(3)-(4), 53(1)(a) and 2(a), 58(1)(a), Rome Statute. See also OTP, 'Policy Paper on Preliminary Examinations' (2013) paras 34, 36–41, 72–84 <<http://www.legal-tools.org/doc/acb906/>> accessed 25 August 2019; OTP, 'Policy Paper on Case Selection and Prioritisation' (2016) paras 26–28 <https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf> accessed 25 August 2019; Morten Bergsmo, Jelena Pejic and Dan Zhu, 'Article 15: Prosecutor' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (Beck/Hart 2016) 733–734; Hall, Ntanda Nsereko and Ventura (n 58) 852–855; Cedric Ryngaert and Christopher K Hall, 'Article 58: Issuance of a Warrant of Arrest or a Summons to Appear' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (Beck/Hart 2016) 1440–1442.

⁶² See *Abu Garda* (Decision on the Confirmation of Charges, Public Redacted Version) ICC-02/05-02/09-243-Red (08 February 2010), Separate opinion of Judge Cuno Tarfusser §3. For a definition of merits in international law generally, see Yuval Shany, *Questions of Jurisdiction and Admissibility before International Courts* (CUP 2016) 84.

⁶³ See Art 58(2)(d), Rome Statute and *Yekatom Case* (Public Redacted Version of 'Warrant of Arrest for Alfred Yekatom') ICC-01/14-01/18-1-Red (17 November 2018) §§16, 19–21; *Al-Bashir Case* (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir ICC-02/05-01/09-3 (4 March 2009) §§28, 209–223.

possibility or substantial possibility.⁶⁴ Similarly, the ICJ has applied a lower evidentiary standard to questions of jurisdiction in its rulings on preliminary measures: the claimant need only establish a *prima facie* case that the Court has jurisdiction.⁶⁵

But there is no need to look beyond the Rome Statute to find the appropriate standards of proof for questions of jurisdiction and merits, including potential violations of the principle of legality. The Statute recognises at least four different evidentiary standards which have been used either for findings of jurisdiction or substance, or both. Two of these are lower standards of proof which have been used for questions of subject-matter jurisdiction, namely ‘reasonable basis to believe’⁶⁶ and ‘reasonable grounds to believe’.⁶⁷ These are almost identical, with the difference lying in the amount of information or evidence available. ‘Reasonable basis’ applies when the Prosecutor decides to initiate a formal investigation into a situation, and is in possession of information obtained from third party communications, state party referrals, ad hoc declarations and/or their own preliminary examinations.⁶⁸ In contrast, ‘reasonable grounds’ applies when the Prosecutor has concluded an investigation and decides, based on the evidence collected, to move forward with a case, thereby requesting an arrest warrant or a summons to appear.⁶⁹ Notably, while ‘reasonable basis’ only applies to questions of subject-matter jurisdiction (i.e. whether crimes have been committed which

⁶⁴ Kevin M Clermont, ‘Jurisdictional Fact’ (2006) 91 Cornell LRev 973, 975, 978–979, 983, 998–1000, 1020.

⁶⁵ *Immunities and Criminal Proceedings (Equatorial Guinea v France)* (Provisional Measures) [2016] ICJ Rep 1148 §31; *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russian Federation)* (Provisional Measures [2008] ICJ Rep 353 §§84–85.

⁶⁶ Arts 15(3), 53(1)(a) and 2(a), Rome Statute and Rule 48, ICC RPE. See also OTP, ‘Policy Paper on Preliminary Examinations’ (n 61) paras 34–36; Bergsmo, Pejic and Zhu (n 61) 733–734.

⁶⁷ Art 58(1)(a), Rome Statute. See also OTP, ‘Policy Paper on Case Selection and Prioritisation’ (n 61) para 26; Ryngaert and Hall (n 61) 1445–1447; Bergsmo, Pejic and Zhu (n 61) 734; *Yekatom and Ngaïssona Case* (Public Redacted Version of ‘Warrant of Arrest for Patrice-Edouard Ngaïssona’) ICC-01/14-01/18-89-Red (13 December 2018).

⁶⁸ See OTP, ‘Policy Paper on Preliminary Examinations’ (n 61) paras 34–35.

⁶⁹ See *supra* note 67.

fall under the Court's jurisdiction), 'reasonable grounds' also applies to questions of substance (i.e. the mode of liability and the mental element), although for the purposes of an initial assessment.⁷⁰

The third standard of proof is used for the confirmation of charges, namely, 'sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged'.⁷¹ This stage serves as a filter against unfounded charges and will result in either their dismissal or confirmation to proceed to trial.⁷² Significantly, this stage focusses on questions of substantive criminal law, such as the possible crimes committed by the accused, their mode(s) of participation, their mental state and potential defences.⁷³ The fourth standard of proof is that of 'beyond reasonable doubt', which applies at the trial stage for the purpose of convicting or acquitting the accused on the merits.⁷⁴

In a nutshell, although the ICC does not have airtight phases for assessing questions of jurisdiction and substance, there seems to be a tendency to assess the former from the initiation of a preliminary examination up to the commencement of the trial, and the latter from the issuance of an arrest warrant to the trial, and subsequent appeals on questions of substance. Most importantly, whether or not a violation of the principle of legality should be treated as a question of jurisdiction or substantive criminal law will not necessarily be determined by reference to the stage where it comes up and is resolved. Rather, it is only by looking at the evidentiary standard applied, regardless of the time

⁷⁰ See *supra* note 63.

⁷¹ Art 61(5), Rome Statute.

⁷² Mohamed M El Zeidy, William A Schabas and Eleni Chaitidou, 'Article 61: Confirmation of the Charges before Trial' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (Beck/Hart 2016) 1487–1488.

⁷³ *ibid* 1522.

⁷⁴ Art 66(3) Rome Statute. See also Yvonne McDermott and William A Schabas, 'Article 66: Presumption of Innocence' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (Beck/Hart 2016) 1643–1645.

and stage at which it is assessed, that the Court will know whether to find that a) it lacks jurisdiction, b) the charges must be dismissed, or c) an acquittal is warranted. This is yet another reason why it would be extremely complicated to have different rules defining the Court's subject-matter jurisdiction and its substantive criminal law in cases of UNSC referrals involving non-states parties.

In practical terms, this all means that, if the Court finds that there is no reasonable basis or grounds to believe that the conduct could have amounted to a crime under an applicable source of law, the case or situation should be dismissed for lack of jurisdiction, at any stage of the proceedings. Conversely, if, upon receiving a request for an arrest warrant or summons to appear, the Court concludes that there are no reasonable grounds that the accused committed the crimes on the basis of an applicable offence, mode of liability or mental element, the Court must refuse to grant the request. If it finds, during the confirmation of charges stage, that there is not sufficient evidence to establish substantial grounds to believe that the accused's conduct was criminal at the time it took place, the charges must be dismissed.⁷⁵ Lastly, if the Court cannot find, beyond reasonable doubt, that the accused could have been convicted or punished for their conduct, under domestic or international law, they must be acquitted.

However, it may be that a violation of the principle of legality arises from the fact that the crimes and other rules of substantive criminal law applicable under pre-existing international law are less severe than those under the Rome Statute. As explained in Chapter 6, this may happen in cases of retrospective ad hoc declarations. If that is the case, to resolve the normative conflicts with the principle of legality, the Court should not simply refuse to exercise jurisdiction, dismiss charges or acquit the accused. After all, the

⁷⁵ See *Lubanga Case* (Decision on the Confirmation of Charges) ICC-01/04-01/06-803-tEN (29 January 2007) §§302–303.

conduct was duly criminal and punishable under an applicable source of law that the Court is competent to apply under Article 21(1)(b)-(c). Rather, if the Court finds that this is the case, at any stage of the proceedings, under any of those evidentiary standards, it should proceed with the case or situation, and apply pre-existing international law as such, following the approach that I propose in the next section.

In cases of UNSC referrals involving non-parties, the Court might find that the conduct is criminal under pre-existing international law but falls outside of the scope of Articles 6 to 8 *bis*. As mentioned earlier, although this would not amount to a breach of the principle of legality, the Court probably lacks jurisdiction to hear the case or situation. This means that, depending on the stage of the proceedings, the investigation or prosecution cannot proceed, any charges must be vacated or dismissed, or the individual must be acquitted, without prejudice to a trial for the same conduct before another international or domestic court with jurisdiction over the events.

In sum, the subject-matter jurisdiction of the ICC should be defined by the same provisions defining the crimes that are part of its substantive criminal law. This means that, in cases involving states parties and accepting states, both issues are dealt with by Articles 5 to 8 *bis* of the Statute. Conversely, for UNSC referrals involving non-states parties, the Court's subject-matter jurisdiction is primarily defined by the applicable law, i.e. pre-existing international law, but its outer limits are also set by Articles 5 to 8 *bis* of the Statute, which function as a sort of 'jurisdictional filter'. Moreover, across all these scenarios, a potential violation of the principle of legality can either be treated as a question of jurisdiction or substance, depending on the stage of proceedings and, more importantly, the evidentiary threshold applied.

ii. What does application ‘as such’ mean in practical terms?

As argued in Chapter 6, in cases of retrospective ad hoc declarations, the substantive criminal law should come from the Statute itself. However, if the criminal provisions of the Statute are substantively more severe than the criminal laws that applied to the accused at the time of the conduct, a genuine norm conflict will arise with the principle of legality. To identify the extent of those normative conflicts, a double criminality test of sorts, as complemented by an analysis of labels, should be applied. But, unlike the double criminality test, which would either result in the application of the *lex fori* or a finding of lack of jurisdiction, my proposed approach suggests that, whenever such a conflict arises, a pre-existing rule of international law should be applied, as such, to the accused.

To be sure, this does not mean that the entire corpus of pre-existing international law should automatically displace the criminal provisions of the Statute and apply to the accused in cases of retrospective ad hoc declarations. Instead, the applicable source of international law need only be relied on to the extent necessary to resolve a normative conflict, that is, whenever it is substantively more beneficial to the accused. On the other hand, to the extent that the Rome Statute is more beneficial to the accused, its substantive criminal provisions should continue to apply. After all, the Statute is the applicable law in those situations, albeit a retroactive one at times. And any change in the applicable law can only benefit the accused, as per Article 24(2) of the Statute. It is also open to the Court to conceive ad hoc declarations as purely jurisdictional. However, as discussed in Chapter 6, this interpretation is not easily reconcilable with the text, context, object and purpose and *travaux* of Article 12(3). But if the Court chooses this avenue, it should apply pre-existing international law as such, as opposed to recharacterising it into the Statute.

To illustrate the point, take the example of torture as a crime against humanity. As mentioned earlier, the Rome Statute has removed one element⁷⁶ that is still essential for making out this crime under customary international law⁷⁷ and the Torture Convention,⁷⁸ namely, a specific purpose. This means that, if an individual inflicts severe physical or psychological pain without a purpose, their conduct could *not*, under customary international law, amount to torture as a crime against humanity, but only ‘other inhumane acts’. Assume that this individual is subject to the jurisdiction of the ICC via a retrospective ad hoc declaration. In this instance, the specific events amounting to torture as a crime against humanity under the Rome Statute could not be qualified as such, because this label would be more severe than the previously applicable label of ‘other inhumane acts’.⁷⁹ At the same time, the maximum penalties available under the Rome Statute (30-years imprisonment),⁸⁰ which are less severe than those applicable under customary international law (life imprisonment)⁸¹ must continue to apply. But it must be borne in mind that ‘other inhumane acts’ would normally warrant a less severe penalty than torture, in light of the principle of proportionate sentencing. Similarly, the Statute’s catalogue of the defences, which is more expansive than the one existing under customary international law, ought to be made available to the accused.⁸² The Statute’s modes of liability also continue to apply, but only to the extent that they are equally or less severe than those under pre-existing international law.

⁷⁶ See ICC Elements of Crimes 7, fn 14.

⁷⁷ See, e.g., ILC, ‘Fourth Report on Crimes against Humanity by Sean D Murphy, Special Rapporteur’ (18 February 2019) UN Doc A/CN.4/725 para 73; *Kunarac et al Case* (Judgment) ICTY-96-23-T & ICTY-96-23/1-T (22 February 2001) §497; *Furundžija Case* (Judgment) ICTY-95-17/1-T (10 December 1998) §162.

⁷⁸ Art 1, Torture Convention.

⁷⁹ See Art 7(1)(k), Rome Statute and *Lukić & Lukić Case* (Appeal Judgment) ICTY-98-32/1-A (12 April 2012) §634.

⁸⁰ See Art 77(1)(a), Rome Statute.

⁸¹ Gallant (n 53) 385–387; *Čelebići Case* (Appeal Judgment) ICTY-96-21-T (20 February 2001) §817.

⁸² Antonio Cassese and others, *Cassese’s International Criminal Law* (OUP 2013) 212, 216, 222, 227.

In sum, in retrospective ad hoc declarations, the pre-existing source of international law does not become the applicable law but is utilised for the limited purpose of resolving a norm conflict with the principle of legality. As a consequence, the Statute's substantive criminal provisions contained in Parts 2, 3 (on general principles of criminal law) and 7 (on penalties) continue to apply *as a general rule*. The provisions setting out the jurisdiction of the ICC which are also contained in Part 2, as well as the procedural and institutional provisions which regulate the functioning of the Court, and are set out in Parts 1, 4-6 and 8, apply in full in those instances.

In contrast, in cases of UNSC referrals involving non-states parties, it was argued that no norm conflict arises in principle between the Statute and the principles of legality or fair labelling. In those instances, the Statute ought to be conceived as purely jurisdictional, with the *entire* substantive criminal law coming from pre-existing international law. This includes not only crimes and their specific sub-headings, but also modes of liability, general standards of *mens rea*, defences, penalties, conditions of prosecution or punishment and criminal labels. As discussed in Chapter 6, this jurisdictional setting would be similar to that of the ad hoc tribunals.

However, while the Statutes of those tribunals were meant to reflect customary international law and applicable treaties, at least in respect of their subject-matter jurisdiction and substantive criminal law, the same is not true of the Rome Statute. Even if its original aim was to reflect pre-existing international law, the Rome Statute eventually departed from the latter in some respects.⁸³ Therefore, in cases of UNSC referrals involving non-states parties, the substantive provisions of the Statute, including, in particular, Articles 6 to 8 *bis*, and Articles 25, 28 and 30, can only be applied to the extent that they mirror the applicable law. If the substantive provisions of criminal law

⁸³ See Chapter 5, Section 2(a)(ii), and Chapter 6, Section 2.

found in pre-existing international are narrower or otherwise less severe than those found in the Statute, the former should apply as such. On the other hand, if the accused has committed a crime under pre-existing international law that does not fall under Articles 6 to 8 *bis*, the Court must refuse to exercise jurisdiction. But modes of liability and defences do not limit the Court's jurisdiction. Therefore, the Court could apply defences and modes of liability under pre-existing international law even if those are more severe than those found in the Statute. When it comes to penalties, the Court is only competent to apply those listed in Article 77 of the Statute, which are, in any event, lower than the ones applying to the core crimes under customary international law. Nevertheless, the sentence must be proportionate to the gravity of the conduct, as reflected in the applicable crimes, modes of liability, and defences, as well as their labels.

It is important to stress that, in contrast to situations involving states parties and accepting states, the principle of *lex mitior*, recognised in Article 24(2) of the Statute, should not, in principle, operate for UNSC referrals. This is because, as mentioned earlier, the substantive criminal law applying in such referrals comes not from the Statute, but pre-existing international law. As explained in Chapter 2, *lex mitior* is not yet part of the principle of legality in general international law. Moreover, in treaties where it has been recognised, including the Rome Statute, it only applies to changes in the applicable law.⁸⁴ In cases of UNSC referrals involving non-states parties, no change in the applicable law occurs in principle: pre-existing international law was applicable at the time of the conduct and should continue to apply subsequently. However, in prospective referrals, the UNSC may decide to depart from these by applying the Statute or another source of law listed in Article 21(1) in a way that is more detrimental to the accused. In those instances, there will be a change in the applicable law. Thus, to the extent that the

⁸⁴ See Art 24(2), Rome Statute and Arti 15(1) *in fine*, ICCPR; *Gouarré Patte v Andorra* App no 33427/10 (ECtHR, 12 January 2016) §§31–36. See also Chapter 2, Section 2(a)(iv).

principle of *lex mitior*, as recognised in Article 15(1) of the ICCPR or Article 7(1) of the ECHR, is an internationally recognized human right within the meaning of Article 21(3), i.e. if it is applicable to the state and individual concerned, the Court ought to apply the more beneficial rule.

Lastly, a genuine norm conflict between the Statute and the principle of legality under Article 21(3) may also arise if a certain conduct over which the Court has been granted *ex post facto* jurisdiction was *only* criminal and punishable under domestic law, as opposed to the Statute or pre-existing international law. Such a conflict might arise to the extent that the application of the criminal provisions of the Statute or other subsequent rules of international law would be substantively detrimental to the accused, in comparison to the applicable domestic law. However, because the Court is not competent to apply domestic law under Article 21(1), it could not resolve such conflicts by applying domestic law as such. Thus, if the ICC finds that the accused could *only* have been convicted and punished in accordance with domestic law at the time of the conduct, then it must either find that it lacks jurisdiction over the case, dismiss the charges, or acquit the individual upon trial, without prejudice to a domestic prosecution for an ordinary crime on the basis of the same facts.⁸⁵ Again, whichever of these remedies is warranted depends on the stage of proceedings, as well as the evidentiary standard applied.

5. Conclusion

This chapter has shown that the principle of legality in general international law is uncontroversially an ‘internationally recognized human right’ within the meaning of Article 21(3) of the Statute. It has also argued that, even if not *per se* a human right, the principle of fair labelling is included within the scope of that provision to the extent that

⁸⁵ See Art 20(2), Rome Statute.

it overlaps with the principle of legality. More importantly, the text, context and object and purpose of that provision, as well as case law of the ICC, support the view that Article 21(3) contains a rule of displacement, requiring that primacy be given to any ‘internationally recognized human right’ under customary international law, an applicable treaty or general principles of law. This rule of displacement requires the Court to not only set aside the Statute if it fails to comply with the principle of legality but also to import the content of the external source of international law in question. If necessary to give effect to the principle of legality, the Court must also generate *sui generis* procedural remedies so as to allow the accused to challenge a violation of this principle at any stage of the proceedings, including, for instance, a no case to answer.

I have also shown that double criminality is, at best, an incomplete tool in the hands of the Court for the purpose of resolving genuine normative conflicts between the Statute and the principle of legality in cases of retrospective ad hoc declarations. For UNSC referrals involving non-states parties, it is neither helpful nor practical. Instead, and to avoid the dangerous outcomes of retroactive recharacterisation of crimes, I have argued that the Court ought to apply pre-existing international law as such. In cases of retrospective ad hoc declarations, this approach should be used to the extent that the Rome Statute is substantively more severe than pre-existing international law. Conversely, in situations grounded in an UNSC referral and implicating non-parties, pre-existing international law as such ought to be the applicable law. In light of the necessary overlap between questions of jurisdiction and substantive criminal law, the legal remedy that will be required to avoid or resolve the retroactive application of the Statute will depend on the stage of the proceedings as well as the evidentiary standard applied. This might be a finding of lack of jurisdiction at any point during the proceedings, a refusal to issue an arrest warrant or summons to appear, the dismissal or vacation of the charges,

the acquittal of the accused following the trial, or the application of pre-existing international law as such.

CONCLUSION

This thesis has looked at the phenomenon known as retroactive recharacterisation or reclassification of crimes, whose origins are intertwined with those of international criminal law itself. From the Nuremberg and Tokyo Trials to the recent prosecution of Omar Al-Bashir before the ICC, different international and domestic tribunals have justified the application of retroactive criminal laws by simply pointing to analogous crimes or modes of liability in the applicable law. To do that, they have overconfidently relied on the flexible version of the principle of legality in general international law, which requires, for one to be convicted and punished for a crime, that the conduct be criminal and punishable according to at least one applicable source of international or domestic law.

But something did not feel right about this process. And the general word of caution coming from other commentators seemed hardly enough. In that light, this thesis sought to look deeper into the origins, outcomes and, most importantly, the lawfulness of retroactive recharacterisation of crimes in international law. It was driven by the perception that some of its side-effects could not be easily reconciled with the principle of legality, even in its laxer formulation under general international law. Along the way, it became evident that the principle of fair labelling also had something to say about the phenomenon. Two main research questions came to mind: 1) How are the principles of legality and fair labelling to be applied in international criminal law generally and in the specific context of the ICC? 2) To what extent is the phenomenon of retroactive recharacterisation of crimes consistent with them, bearing in mind their elements, scope and rationales?

In my doctorate, I set out to answer those questions in three parts.

The first part was dedicated to the interplay between retroactive recharacterisation of crimes and the principles of legality and fair labelling in general international law. **Chapter 1** kicked off by trying to make sense of the different ways in which international and domestic tribunals have retroactively recharacterised crimes throughout the history of international criminal law. I have noted that the interchangeable application of different sources of international and domestic law is an intrinsic feature of that discipline. It finds an explanation in the embryonic content of certain rules of international criminal law as well as the multiplicity of prescriptive and adjudicative authorities in international law generally. However, I have also demonstrated how a simple comparison between crimes or modes of liability, without more, can lead to a series of problematic outcomes. I have classified those different outcomes into various categories, in what I have described as a ‘taxonomy’ of retroactive recharacterisation of crimes. I have concluded that this practice may lead to i) the removal or expansion of essential elements of criminal liability, such as the material or mental elements of the crime, modes of liability and defences; ii) an increase in the applicable penalties; iii) a detrimental change in other decisive rules of criminal law, such as conditions of punishment or prosecution; and finally iv) the retroactive relabelling of the conduct. In a nutshell, I have shown that there is an intricate arrangement of criminal rules applying to an individual perpetrator whenever an offence is committed. By changing one or more of these rules, that entire arrangement might shift to the detriment of the accused. The imminence and seriousness of this risk justified delving deeper into the principles of legality and fair labelling in international law.

Chapter 2 aimed at filling some of the gaps in the extensive literature and case law on the principle of legality. This was necessary to assess the extent to which retroactive recharacterisation of crimes is consistent with that principle. In particular, I have traced its evolution from Nuremberg and Tokyo to the Rome Statute, whilst looking

carefully at the various materials which have shaped its current formulation in general international law. After concluding that, in general international law, the principle of legality only comprises non-retroactivity of crimes and penalties, sufficient specificity and *in dubio pro reo*, my enquiry focussed on the extent to which different sources of international and domestic law can be treated interchangeably.

Notably, there has been a gradual and visible expansion of the principle's scope. It now comprises what I have described as a 'human rights protective core'. This means that the *nullum crimen* principle is now applicable to any rule of criminal law whose retroactive change has, in effect, a substantive impact on the fundamental human rights of the accused, regardless of its classification as procedural or substantive. Those human rights remain limited to fundamental freedoms, such as liberty, property and privacy. But the principle is developing to include procedural rights too. As a result, included within the scope of the principle of legality are all material and mental elements of crimes, modes of liability, defences, penalties, conditions of punishment and prosecution and, in some circumstances, labels. When applying those findings to the phenomenon of retroactive recharacterisation of crimes, I have found that, although not *per se* inconsistent with the principle of legality, it may be so to the extent that it substantively aggravates the rights of the accused in any of those respects.

Chapter 3 was concerned with the principle of fair labelling in international law. In light of unsubstantiated assumptions that this principle, with humble beginnings in the scholarship of Andrew Ashworth, applies to international criminal law, the challenge was twofold. First, to determine its legal basis, if any at all, in international law. Second, to flesh out its content, with a particular emphasis on the phenomenon of retroactive recharacterisation of crimes. I have tested the assertions of other commentators and concluded that it is difficult to determine whether fair labelling is a general principle of

law derived from domestic legal systems. Nevertheless, there are sufficient indications that it is a general principle underpinning international criminal law, to be found at least in customary international law. By applying the deductive and inductive methods to identify international custom, I have inferred different elements or aspects of this principle from other international rules and principles, confirmed by observation of available state practice and *opinio juris*. My main conclusion was that, while fair labelling is scattered across different rules and principles and its content is evasive in the abstract, it is possible to piece together its various aspects to assess the consistency of retroactive recharacterisation of crimes on a case-by-case basis. In particular, I have found that, although it is often the case that international labels are preferred over domestic ones, the retroactive application of a more stigmatising label would be unlawful, no matter how accurate the new label is. In any event, fair labelling is undoubtedly an evaluative principle that ought to be followed as a matter of fairness, regardless of its legal status in international law.

In its second part, the thesis turned its attention to the specific context of the ICC. It started with **Chapter 4**, which demonstrated how the combined effect of various provisions of the Rome Statute is to allow its retroactive application in at least five scenarios. These are: i) retrospective ad hoc declarations made in accordance with Article 12(3); ii) prospective and retrospective UNSC referrals involving non-states parties, pursuant to Article 13(b); iii) retrospective withdrawals of opt-out declarations for war crimes, under Article 124; iv) retrospective withdrawals of opt-out declarations for the crime of aggression, seemingly authorised under Article 15 *bis*(4); and v) certain instances of extensive interpretation. That chapter has also shown that an inconsistency with the principles of legality and fair labelling might ultimately arise to the extent that the Statute appears to require the Court to apply its own criminal provisions to

individuals who were not bound by it at the time of the conduct. This inconsistency arises to the extent that the Statute's criminal provisions are substantively more severe than applicable sources of law, such as customary international law, applicable treaties, general principles of law or domestic law. None of this seems to have been intentional and remained unnoticed during most of the Statute's drafting. Yet it arose from the mismatch between an original and overambitious plan to turn the Statute into an international code of crimes, and the more modest outcome arrived at during the Rome Conference, which failed to gather universal support.

Chapter 5 then provided a critical evaluation of the existing views on the subject. It set out to understand how other commentators have overlooked or rejected that the Statute might apply retroactively and in violation of the principle of legality. It also tried to dissect the various solutions that have been proposed so far to address this problem. While praising their merits, I have highlighted their gaps and shortcomings. In particular, I have shown that, by proposing to read down or apply the Rome Statute to accord with the applicable law, other commentators have effectively endorsed the retroactive recharacterisation of the latter into the former, with all the ensuing dangers. To avoid these dangers, I have suggested a different, more comprehensive approach. Using what has been proposed so far as a starting point, I have arrived at a different endpoint: the application of pre-existing sources of international law as such.

The third and final part of this thesis fleshed out this alternative approach. **Chapter 6** started by ascertaining the nature of the Rome Statute. It did so by looking at the text, context and object and purpose of some of its key provisions, against the background of the adjudicative and prescriptive powers at play. It concluded that, in situations involving states parties and accepting states, the Statute is meant to function as a codification of crimes, providing the substantive criminal law applicable to individuals.

In contrast, in UNSC referrals involving non-states parties, the Statute ought to be conceived as purely jurisdictional, with the substantive criminal law coming from pre-existing international law, analogously to the ad hoc tribunals. The implication is that, while there is a genuine norm conflict between the principle of legality and the Statute in cases of retrospective ad hoc declarations, this conflict is only apparent in cases of UNSC referrals involving non-states parties, as well as in the other scenarios identified earlier.

Lastly, **Chapter 7** sought to provide the ICC with the necessary tools to avoid or resolve such normative conflicts, without recourse to retroactive recharacterisation of crimes and in line with the principles of legality and fair labelling. It argued that the key lies in Article 21(3) of the Statute and the application of pre-existing international law as such, in accordance with Article 21(1)(b)-(c). Specifically, I argued that Article 21(3) contains a displacement rule in favour of ‘internationally recognized human rights’. These include the principle of legality and at least certain aspects of the principle of fair labelling. Furthermore, that provision requires the Court to give full effect to these principles by directly importing the content of pre-existing international law both in cases of retrospective ad hoc declarations and UNSC referrals involving non-states parties. This means that the Court should charge, convict and sentence individuals on the basis of applicable sources of international law to the extent that the Rome Statute is substantively detrimental to the accused. In cases of UNSC referrals, the Court can apply modes of liability, defences, conditions of punishment and prosecution and criminal labels applying to the accused under pre-existing international law, even if those go beyond the Statute. However, if the conduct was not criminal or punishable under pre-existing international law, the Court should find that it lacks jurisdiction, dismiss the charges or acquit the accused, depending on the stage of proceedings and the evidence available.

While this roadmap for addressing the retroactive application of the Statute is more comprehensive than what has been proposed so far, it does not and cannot exhaust the discussion of this issue. Further research still needs to be conducted on the exact content of the crimes and other rules of criminal law under customary international law, treaties and general principles of law. Perhaps it would be useful to revisit the ILC's project of a Code of Crimes Against the Peace and Security of Mankind. Likewise, considering the growing importance of domestic courts in the application of international criminal law, the challenges of transposing my approach to national legal systems still need to be addressed. This is particularly important given the consistent reluctance of states to apply foreign criminal law and the lack of uniformity in the domestic implementation of international criminal law.

It is also unclear whether the ICC will follow this approach. Not least because, in the past, it has addressed issues of retroactivity by looking at the Statute's self-contained provisions. It has also automatically applied the Statute as a whole across all cases and situations before it. Nonetheless, there are signs that the Court is more willing to step out of its bubble and to navigate through the waters of general international law.¹ While clumsy and unsuccessful at times,² this new mindset has transformative potential. It leads

¹ See e.g., *Ntaganda Case* (Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9) ICC-01/04-02/06-1707 (4 January 2017) §35 (holding that the Statute is 'a multilateral treaty which acts as an international criminal code *for the parties to it*', emphasis added); *Al-Bashir Case* (Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court) ICC-02/05-01/09-195 (9 April 2014) §26 (finding that the Statute 'cannot impose obligations on third states without their consent'). See also *ibid* §§29–33; *Al-Bashir Case* (Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or (sic) Omar Al-Bashir) ICC-02/05-01/09-309 (11 December 2017) §§68–94; *Al-Bashir Case* (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) ICC-02/05-01/09-302 (6 July 2017) §§74–97.

² See, e.g. *Situation in Afghanistan* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan) ICC-02/17-33 (12 April 2019) §§92–96 (overriding the Prosecutor's discretion to decide that the investigation into the situation of Afghanistan was in the 'interests of justice'); *Al-Bashir Case* (Judgment in the Jordan Referral re Al-Bashir Appeal) ICC-02/05-01/09-397 (6 May 2019) §§102–117 (holding that Head of State

me to believe that, if faced with questions of legality and fair labelling today, the Court would move in a very different direction than it has before.

In what has been a journey of deep reflection, discovery and constant re-discovery, it is now clear to me that the principle of legality is not the only justification for the longstanding practice of retroactive recharacterisation of crimes. Rather, it is deeply rooted in moral considerations of fairness and justice arising in response to events that have shocked the conscience of mankind. The Holocaust, the Rwandan genocide, the Srebrenica massacre and the civil wars in Sierra Leone, Libya, Sudan, Côte d'Ivoire and many other places come to mind. Yet, for reasons of both law and policy, recourse to retroactive recharacterisation of crimes ought to be abandoned. Granted, international criminal law is not yet as mature as most domestic criminal law systems. Nevertheless, it has developed to a point where it is no longer necessary to mix and match different sources of law in a desperate attempt to hold individuals to account.

However, to fight the abuses that an overly passionate pursuit for justice may lead to, it is also important to recognise the limits of the law. In particular, while a doctrinal approach remains a fundamental tool in fighting injustice, uncertainties will always remain, and policy choices will have to be made. In this journey to discover those legal and normative tools, I have found that, ultimately, one needs to take a step back and go back to basics, to see what kinds of values the law encapsulates. As discussed throughout this thesis, the principles of legality and fair labelling find their rationale in the values of individual freedom and fairness. In the context of the Rome Statute, the fight against impunity, fair trials and respect for state sovereignty take centre stage. With those values in mind, and at the very core of the legal analysis, this thesis has tried to offer a practical

immunities do not apply before international criminal tribunals, including the ICC, regardless of state consent).

and legally sound response to some of the pressing challenges surrounding the phenomenon of retroactive recharacterisation of crimes. It is my hope that it has succeeded in doing so.

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