

## Chapter 2

# State Sovereignty, Cosmopolitanism and the International Criminal Court

**Abstract** The overarching argument of this book is that a definition of international terrorism in an international criminal law context will not be functional nor serve the purposes of international criminal justice unless it balances properly State sovereignty considerations and cosmopolitan ideals. The State-centric theory of international law on the one hand, and cosmopolitanism on the other, treat the concept of State sovereignty from different perspectives, with the former emphasising sovereign interests, sometimes at the expense of international criminal justice purposes, and the latter prioritising cosmopolitan aspirations over the respect for State sovereignty. The crime of aggression and international terrorism present aspects that can be addressed in either a pro-State sovereignty or a pro-cosmopolitan context. This chapter will focus at this differentiation of the treatment of State sovereignty in the context of the UN Charter and the Rome Statute frameworks, focusing on the regime of complementarity enshrined in the latter and contributing thus to our understanding of the differentiated approaches that the Security Council and the ICC follow on issues that touch upon State sovereignty. The effectiveness of the definitions of international crimes as provided into the Rome Statute, and for the purposes of this book, the definition of the crime of aggression and possibly terrorism, will ultimately be determined by whether they will be successful in promoting the cosmopolitan ethos that the ICC represents in an international system of sovereign States which might feel threatened by that ethos.

**Keywords** Cosmopolitanism • Cosmopolitan theory • State sovereignty • State-centric theory • UN Charter • Rome Statute • Complementarity

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## 2.1 Introduction

This chapter will first discuss the relationship between State sovereignty and international law in light of the State-centric and cosmopolitan theories. It will analyse the position that sovereignty holds in these theories, highlighting the role they have played in the development of the concept of sovereignty in international law. The analysis of these theories will be complemented by an examination of how the UN Charter,<sup>1</sup> as the most fundamental international law instrument, treats State sovereignty and balances it with the international rule of law. While the UN Charter enshrines cosmopolitan aspirations, such as the respect for human rights, the promotion of peace and the prohibition of the use of force, the function of the UN up to date has shown a particular sensitivity to State sovereign interests, mainly those of the Members of the Security Council and consequently their allies. In the subsequent chapters, it will be shown that situations pertaining to aggression/use of force and international terrorism, have been addressed by the Security Council in a way that prioritised national security interests (at least those of the most powerful States) often at the expense of cosmopolitan purposes, the promotion of international criminal justice included. For the purposes of this chapter, it will suffice to highlight this contradistinction between the preference the Security Council has shown to the State-centric theory, with the pro-cosmopolitan basis on which the ICC<sup>2</sup> is meant to function. The establishment of a permanent international criminal court can be viewed as an offset to the sovereignty-based concessions the Security Council has made in this respect and can constitute a genuine cosmopolitan effort in the fight against impunity, even despite State sovereign concerns. However, and since the overarching argument of the book focuses on the need for balance, the final part of this chapter will examine to what extent the complementarity regime of the ICC can achieve a desired balance between its cosmopolitan ethos and the sovereign priorities of its States Parties. While there is no explicit obligation for the States Parties to adopt the Rome Statute<sup>3</sup> definitions verbatim in their national law, the current

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<sup>1</sup> Charter of the United Nations, opened for signature 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945) (UN Charter).

<sup>2</sup> UNGA 1998.

<sup>3</sup> Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) UN Doc. A/CONF. 183/9 (Rome Statute).

practice of the ICC has shown that possible differentiation between the range of offences as charged against an individual accused by national courts and the ICC Prosecutor might result in a case being admissible before the ICC, something that is not strictly envisioned by the Rome Statute. Thus, the chapter will finally conclude with an analysis of the complementarity regime of the ICC, looking at different but interrelated aspects of it: (i) how complementarity interacts with State sovereignty under Article 17 of the Rome Statute<sup>4</sup> which provides for the criteria of inadmissibility of a case before the ICC, and notably with the concept of State inability to prosecute, (ii) what the current practice of the ICC has shown with respect to whether States have the implicit obligation to adopt the Rome Statute definitions in order to avoid being considered unable to conduct national proceedings and finally (iii) to what extent complementarity will allow the ICC to achieve the required balance, when it confronts cases of aggression and, perhaps, terrorism.

## 2.2 The Two Theories

### 2.2.1 *The Traditional State-Centric Theory About the Relationship Between Sovereignty and International Law*

The traditional State-centric theory rests upon the original and etymological meaning of the word sovereignty, that of supremacy.<sup>5</sup> A State being sovereign means it is supreme and, legally speaking, that its legal authority (or national order) is superior to any other.<sup>6</sup> In this sense, if a State recognises international law as binding for its organs, then international law becomes part of its national legal order.<sup>7</sup> Thus, one can regard sovereignty as a system of norms that does not derive its validity from any other supreme order,<sup>8</sup> whereas international law is a system of norms which gains validity only when recognized by the sovereign State. Complementing this idea, Brus views sovereign States as the backbone of world

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<sup>4</sup> The conditions of inadmissibility of a case as provided by Article 17(1) of the Rome Statute are: ‘(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; ...’.

<sup>5</sup> Kelsen 1959–1960, p. 627.

<sup>6</sup> For an elaboration on the concept of sovereignty and its historical development see Henley 2011, pp. 1025–1027.

<sup>7</sup> This is also in accord with Kelsen’s monistic theory, where he argues that ‘international law and national law form a unity’ which can be achieved with the primacy of the one over the other (Kelsen 1959–1960, p. 629). See also text to n. 78.

<sup>8</sup> Ibid., 630.

order, as ‘creators and enforcers’ of international law.<sup>9</sup> This view is also to be found in the Grotian tradition of international law which holds that international order should be regulated through States; either by creating State responsibility mechanisms or by rendering States the enforcement arm of international law.<sup>10</sup> Finally, according to Bodin, the essential manifestation of sovereignty is the law-making power, suggesting that those who make laws (the sovereign States) cannot be bound by the laws they create and consequently, they are above the (international) law.<sup>11</sup> This theory, or rather this attitude towards sovereignty views the surrender of sovereignty as a necessary precondition for the development of international law.

As a result, it becomes obvious that the State-centric theory views sovereignty as a system of norms incompatible with the idea of subjection to another superior normative order.<sup>12</sup> Being sovereign means to have no other supreme order to account to, and thus, Cassese contends that ‘either one supports the international rule of law or one supports State sovereignty’.<sup>13</sup> However, the gradual developments of the post-World War II (WWII) period, the emergence of new, decolonised States and the end of the Cold War era changed the centre of gravity of the concept of sovereignty. Instead of the State, sovereignty moved towards the people; it took the new dimension of self-determination of peoples and became a synonym of sovereign independence from the colonial State who exercised territorial sovereignty.<sup>14</sup> This notion is also manifest in the UN Charter, which starts with the phrase ‘We the Peoples of the United Nations determined...’.<sup>15</sup> Sovereignty as self-determination means that the people are the ultimate source of sovereignty, who authorise the State, as their organ, to exercise sovereign powers.<sup>16</sup> Thus, the newly-developed idea was that State sovereignty has to include authority derived from the people of that State, in the absence of which this new ‘people’s sovereignty’ remains incomplete or even violated.<sup>17</sup> In this sense, the modern, post-WWII manifestations of sovereignty come in tension with the traditional State-centric ideas,<sup>18</sup> and this tension could not but be reflected in the relationship between State sovereignty and international law that was to be formed with the

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<sup>9</sup> Brus 2002, p. 3.

<sup>10</sup> Mégret 2001, p. 257.

<sup>11</sup> Jennings 2002, p. 27.

<sup>12</sup> Kelsen 1959–1960, p. 627.

<sup>13</sup> Broomhall 2003, p. 56 commenting on Cassese 1998, pp. 11–17.

<sup>14</sup> Jennings 2002, p. 29.

<sup>15</sup> UN Charter, above n. 1, Preamble. See also Articles 1(2) and 55.

<sup>16</sup> Nagan and Hammer 2004, p. 171. While the principle of national self-determination as a manifestation of the sovereignty of the people was asserted from the French revolution, it lost ground during the Cold War era but regained its validity after the demise of the bi-polar model of balance of power (in Pavković and Radan 2003, p. 4).

<sup>17</sup> That a State exercises public powers within a territory does not necessarily mean that these powers are sovereign if this happens contrary to the will of the people. In this case, one can talk about violation of the sovereignty of the people. See also Sarooshi 2005, pp. 9–10.

<sup>18</sup> Broomhall 2003, p. 52.

establishment of the UN and the emergence of decolonised States gradually leading to the further development of the international legal order.

### 2.2.2 *Cosmopolitan Theory and International Law*

While it can be argued that cosmopolitan thinking was born together with the idea of democracy, the cosmopolitan tradition in international law can be traced back into the Enlightenment era and in particular into the ideas of Kant,<sup>19</sup> whose theory will be briefly analysed as an example of traditional cosmopolitanism; by the same token, the views of some modern cosmopolitan theorists will be examined and compared with the views of Kant, in an attempt to demonstrate the development of cosmopolitan thought in international law. Taking Kant's cosmopolitanism as the point of departure, Kant's vision of a cosmopolitan society moves into a middle passage between 'a world State' model and the traditional, sovereignty-based Westphalian model.<sup>20</sup> Kant was critical of both the absolute State sovereignty supremacy on the international plane and the creation of a world republic, in which States would have lost all their sovereign prerogatives and would have to surrender their sovereignty to coercive international institutions.<sup>21</sup> Instead, he envisaged a model that would mostly resemble a federation of States which would be bound by 'a commonly accepted international right.'<sup>22</sup> While he supported the establishment of international institutions, he was against their interference in States' constitution and government<sup>23</sup> and viewed the domestic administration of justice as the first necessary step for the creation of a cosmopolitan order.<sup>24</sup>

Kant's approach of the interrelationship between States and international law can be summarised in the following statement: States have a central role to play in international institutions, there are systems of checks and balances developed in order to limit State sovereignty according to the conditions prescribed by international law instruments, while, at the same time, there is no international sovereign to enforce any duties on States or to oblige them to participate in international organisations and sign international treaties.<sup>25</sup> The Kantian approach of the structure of international law bears significant resemblances with the structure that general international law took after the establishment of the UN and that of international criminal law after the establishment of the ICC. Therefore, one could argue that the ICC seems to bring Kantian cosmopolitanism in its modernity:

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<sup>19</sup> Cabrera 2011, p. 209.

<sup>20</sup> Brown 2005, pp. 497–98.

<sup>21</sup> Ibid., p. 501.

<sup>22</sup> Kant 1793 in Reiss 1970, pp. 61–92.

<sup>23</sup> Gregor 1996, p. 96.

<sup>24</sup> Brown 2005, p. 501.

<sup>25</sup> Teson 1992, pp. 86–7.

cosmopolitanism is no more an 'intellectual ethos' but 'a vision of global political consciousness...generated and sustained by international institutions',<sup>26</sup> the ICC included.

While Kant's vision of cosmopolitanism seems reconcilable with the current ICC system, the same cannot be said for the modern version of cosmopolitanism, at least as envisaged by some cosmopolitan theorists. For example, Jürgen Habermas and Hans Kelsen radicalise the Kantian vision of cosmopolitanism in a manner incompatible with the current structure and function of the ICC. While in the Kantian system States do not lose their place in the international plane, both Habermas and Kelsen envisage an international system where a 'world State' would have absorbed all State sovereign prerogatives and separate national legal systems and where the centralisation of power would be the only means to secure a peaceful international order.<sup>27</sup> Similarly, according to Pogge's idea of what he calls 'institutional cosmopolitanism', State sovereignty should not be concentrated at a single level (the State) but should be dispersed in a vertical manner among several units—at least domestically—which will be 'sovereign' on their own right and manifest the traditional characteristics of State.<sup>28</sup> That does not mean that Pogge is in favour of the establishment of a world State, which he sees as a repetition of the 'State sovereignty model' only at a global level.<sup>29</sup> However, he is in favour of this vertical distribution of sovereignty in some fields of international law, such as international peace and security, for which he proposes a central decision-making mechanism, whose function would not depend on State voluntary cooperation and which would have the ability to enforce its decisions to States and thus, to violate their sovereignty.<sup>30</sup>

Despite the differences between the Kantian theory of cosmopolitanism and the modern ones, a concept of relevance to international law that is strongly attached to all, is the concept of morality. For Kant, morality becomes of relevance for international law because he views it as a means to promote moral behaviour through legal institutions which would impose penalties for conduct falling outside the scope of that morality.<sup>31</sup> More recent theorists like Archibugi held that cosmopolitan law is not based on coercion but rather on moral authority,<sup>32</sup> something that is also underpinned by Finch's assertion that, before WWII, the weaknesses of international law were not based on the lack of enforcement mechanisms but on the absence of 'an international moral sense'.<sup>33</sup> Concerning international law developments in general and the ICC in particular, Koller has argued that international

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<sup>26</sup> Cheah 2006, p. 486.

<sup>27</sup> Zolo 1999, p. 437; Zolo 1998, p. 310.

<sup>28</sup> Pogge 1992, p. 58.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid., pp. 61–62.

<sup>31</sup> Wacks 2005 in Fouladvand 2012, p. 30.

<sup>32</sup> Archibugi 1995, p. 443.

<sup>33</sup> Finch 1979, p. 37.

lawyers believe that any development of international law will bring us closer to the establishment of ‘first an international community and then a cosmopolitan community’ in which ‘all individuals are accorded equal moral status’.<sup>34</sup>

Therefore, the concept of morality is not far from the essence of law, and in particular from international law. The recognition of diversity between States constitutes a legal innovation which allows States to apply their own understanding to judge international events, promoting thus the ultimate goal of Kantian cosmopolitanism, the perpetual peace.<sup>35</sup> Thus, States have a place in the moral discourse, firstly as central actors in international relations and secondly through their domestic legal systems<sup>36</sup> which regulate the lives of their citizens through coercive mechanisms requiring a moral justification.<sup>37</sup>

Therefore, for a coercive legal system, be it national or international, to be legitimate, there has to be a moral justification as a basis for its establishment. In the case of the ICC, its moral justification is already declared in the Preamble of the Rome Statute, when it affirms that ‘the most serious crimes of concern to the international community as a whole must not go unpunished’ and when it makes reference to the millions of victims of ‘unimaginable atrocities that deeply shock the conscience of humanity’.<sup>38</sup> This moral basis of the ICC’s establishment is actually the door that, it can be argued, potentially opens the transition from international law to cosmopolitan law, in the sense that the rights of an individual are now protected irrespective of his or her nationality or the territory they happened to be in, an idea equivalent to Kant’s cosmopolitan right. By the same token, the ICC’s moral basis also justifies the applicability of coercive international criminal law to persons that violate that cosmopolitan right irrespective of their nationality or the place where the conduct happens to occur. This cosmopolitan model—called by Feldman minimalist legal cosmopolitanism—aims at eliminating any ‘law-free’ zones, any chance where an individual could evade prosecution either because no jurisdiction could reach him or her or because the applied jurisdiction would fall short of the basic moral standards that the ICC is meant to promote.<sup>39</sup>

However, the model of minimal legal cosmopolitanism is not to be performed solely by an international institution—the ICC in this case—but instead, it holds a central place for States. It is not meant to erode the concept of State sovereignty; to the contrary, it is meant to give primacy to domestic legal systems to protect the cosmopolitan right not just of their own nationals but of everyone whose cosmopolitan right is violated. The essence of that model is not that universal jurisdiction should apply everywhere but that some jurisdiction should be applicable

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<sup>34</sup> Koller 2008, p. 1050.

<sup>35</sup> Archibugi 1995, p. 443.

<sup>36</sup> Fouladvand 2012, p. 40.

<sup>37</sup> Feldman 2007, p. 1045.

<sup>38</sup> Rome Statute, above n. 3, Preamble paras 2 and 4.

<sup>39</sup> Feldman 2007, pp. 1065–1069.

everywhere to avoid the creation of legal vacuums.<sup>40</sup> This concept matches perfectly the complementarity regime of the ICC, which attempts to reconcile cosmopolitan morality, legitimate coercive international criminal law mechanisms and respect for State sovereignty.

Before moving on to examine the interplay between the concept of State sovereignty and the Rome Statute, it will be important to examine first to what extent the UN Charter, as the most fundamental international legal instrument, has laid the legal basis on which State sovereignty and international law can co-exist. As it will be argued in Chap. 5, the Security Council has taken a rather pro-sovereignty approach in addressing issues that relate to the use of force/aggression and international terrorism. This pro-sovereignty response to conducts whose definitions are the main focus of this study, is founded on UN Charter provisions which clearly favour sovereign prerogatives—at least of the five permanent members of the Security Council and their allies—over cosmopolitan purposes. Instead, the definition of aggression for the purposes of the ICC and the formulation of a definition for international terrorism for international criminal law purposes focus, or will focus, primarily on the cosmopolitan aspirations enshrined by international criminal law. Therefore, it is important to show this antithesis of the treatment of State sovereignty in the context of firstly, the UN Charter and subsequently, the Rome Statute frameworks. This differentiation of approaches towards State sovereignty will help understand the Security Council's pro-sovereignty practice in addressing use of force/aggression and international terrorism issues and the ICC's pro-cosmopolitan mandate in responding to the commission of the crime of aggression, and hopefully international terrorism.

## 2.3 Sovereignty and International Law: The UN Charter Provisions

According to Kelsen's theory<sup>41</sup> concerning the primacy of international law over national legal orders, there is a distinction between the concept of sovereignty that is excluded under international law and the concept of sovereignty that can be limited or controlled by international law. The type of sovereignty that is excluded by international law is the one advocated by the traditional State-centric theory, i.e. the absolute supremacy of national law over the international. On the other hand, the type of sovereignty that can be regulated by international law is that of sovereignty as freedom of action by the State, namely unlimited competence of its legal order. The latter is not automatically rejected by international law but can be subject to regulations and norms, prescribed by an international organisation. Whether one views international law as superior to national legal orders or as a

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<sup>40</sup> Ibid., p. 1067.

<sup>41</sup> Kelsen 1959–1960, p. 636.



body of law that is part of that order and thus, inferior to it, sovereignty can still be subject to international normative regulations.<sup>42</sup>

In this respect, when a State recognises international law when adhering to an international organisation or becoming a party to an international treaty, it becomes bound to international legal regulations, irrespective of which legal order it regards as superior, the national or the international. International law is valid in both cases, either as supreme to a national legal order or as a part of that legal order which binds the sovereign State. In both cases, State sovereignty can be restricted and regulated and thus, an international organisation which will have the competence of regulating a State's sovereignty is always possible. The extent to which a State's sovereignty can be restricted and regulated by international law, according to Kelsen, has always to do with the content of international law and not with the concept of sovereignty itself.<sup>43</sup>

It can be said that State sovereignty is the fundamental principle upon which the UN system is based; the UN is composed of sovereign States. Whether it can function only as a sum of sovereign States or it can have a broader capacity that surpasses the boundary of the accumulation of several State sovereignties is a question of politics. However, the provisions of the UN Charter can provide some insight of how the principle of State sovereignty is understood and tackled at an international level and how its concept has been formed by the State-centric and the cosmopolitan theory.

In the first place, being a sovereign State is the *sine qua non* condition of membership to the UN.<sup>44</sup> This precondition alone is indicative of the fact that a State's capacity of sovereignty pre-exists or exists independently of its membership to an international organisation. In this sense, a State does not need the recognition of its sovereignty to be conferred by a supreme authority but this State quality exists *a priori*. Furthermore, Article 2(7) of the UN Charter provides for the non-interference in the internal affairs of a Member State,<sup>45</sup> a provision that can be said to formulate a statement very close to a definition of State sovereignty.<sup>46</sup> Ultimately, one of the core articles of the UN Charter, Article 2(4), protects in an unequivocal way the territorial integrity and the political independence of its Member States.<sup>47</sup> In this respect, the UN Charter appears to respect at least the core

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<sup>42</sup> Ibid. However, it is obvious that these two types of sovereignty, the absolute supremacy of national order and the unlimited competence of a State to act (inside or outside its territory) are two sides of the same coin. What Kelsen is trying to argue with this distinction is that, although the absolutist view about sovereignty is in any respect antithetical to international law, a State's freedom of action is not, if conditioned upon certain rules.

<sup>43</sup> Ibid., p. 637.

<sup>44</sup> UN Charter, above n. 1, Article 3.

<sup>45</sup> Ibid., Article 2(7): 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.'

<sup>46</sup> Nagan and Hammer 2004, p. 25.

<sup>47</sup> UN Charter, above n. 1, Article 2(4).

aspects of State sovereignty and to recognise and protect a State's ruling and behavioural autonomy within its own territory.

However, this conclusion, which is in harmony with the traditional State-centric theory of the concept of sovereignty, is not fully supported by other provisions of the UN Charter which refer to the obligations of its Member States and to the authority of the UN organs over them. Article 1 of the UN Charter states that the Members of the UN should honour their Charter obligations and should always seek pacific means for the settlement of their disputes.<sup>48</sup> Article 4 continues by adding another precondition for acquiring a UN membership status, namely that a State should be 'peace-loving' and willing and able to accept all Charter obligations.<sup>49</sup> Regarding the scope of authority of the UN organs over their Member States, the decision-making mechanisms of the UN Charter give the General Assembly the competence to give rise to any issue that falls within the scope of the Charter and make it a matter of international discussion.<sup>50</sup>

Despite these cosmopolitan elements in the function of the UN and the formulation of some UN Charter provisions, the UN cannot in any case be characterised as a pro-cosmopolitan institution. The competences and prerogatives that its primary organ, the Security Council, enjoys, go far beyond the individual State sovereign prerogatives of the other Member States of the UN and have been characterised by some as super sovereign powers.<sup>51</sup> The power of veto of the five permanent members of the Security Council,<sup>52</sup> the competence of the Security Council to enforce its decisions even by the use of force under Chapter VII of the UN Charter,<sup>53</sup> its primary responsibility for the protection of international peace and security<sup>54</sup> and its power to determine the existence of threats to the peace, breaches of the peace or acts of aggression<sup>55</sup> constitute powers that severely favour the most powerful States (and their allies) sometimes at the expense of other, smaller States' sovereign interests or at the expense of cosmopolitan purposes. Moreover, the Security Council, when acting under Chapter VII, is not bound by any international legal obligations, apart from respecting the UN Charter.<sup>56</sup> Consequently, the Members of the Security Council enjoy a latitude that can

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<sup>48</sup> Ibid., Article 1.

<sup>49</sup> Ibid., Article 4.

<sup>50</sup> Ibid., Article 10.

<sup>51</sup> Nagan and Hammer 2004, p. 26; Goodrich and ors 1969, pp. 290–309.

<sup>52</sup> UN Charter, above n. 1, Article 27(3). The power of veto is not explicitly mentioned in the UN Charter, however Article 27(3) requires the concurring votes of the five permanent members of the Security Council for the adoption of resolutions that concern non-procedural matters (regulated by Article 27(2)), permitting thus any permanent Member to block the proceedings.

<sup>53</sup> Ibid., Article 42.

<sup>54</sup> Ibid., Article 24.

<sup>55</sup> Ibid., Article 39.

<sup>56</sup> UN Charter, above n. 1, Article 24(2): 'In discharging these duties [concerning its responsibility for the maintenance of international peace and security] the Security Council shall act in accordance with the Purposes and Principles of the United Nations...'. See also Kelsen 1950, pp. 294–95.

possibly be used to serve political exigencies without due regard to cosmopolitan considerations enshrined in the UN Charter, such as protection and respect for human rights, promotion of peace or the prohibition of the use of force. In the subsequent chapters, it will be shown that more often than not, at least with respect to the use of force/aggression and international terrorism, the Security Council has mostly prioritised State-centric concerns pertaining to these issues rather than cosmopolitan aspirations.

Turning now to the relationship between sovereignty and the UN Charter, it seems that, under the UN Charter provisions, the concept of sovereignty is transformed into meaning independence in the sense of non-interference.<sup>57</sup> Sovereignty has retained its external characteristics under Article 2(7) referring to the domestic jurisdiction of Member States but has been subject to restrictions and control by the UN Charter and its organs. The international legal order established by the UN requires a transfer of aspects of sovereignty in areas such as international security and the use of force to the UN organs as well as a convergence of the individual interests of the Member States.<sup>58</sup> By the same token, the development of international criminal law, as reflected in the establishment of the ICC, requires from States the relinquishment to it, even if only on a subsidiary basis, of legal-judicial aspects of sovereignty in the area of prosecution of international crimes. However, it has to be noted that compliance with the international legal order is often mostly determined by factors that are little related to the cosmopolitan principles promoted by the UN or international criminal justice, but related to political pressure or national interests.<sup>59</sup> If one looks at the examples of the ad hoc military tribunals of the Former Yugoslavia and Rwanda (ICTY and ICTR respectively), one will draw the conclusion that the political context in each of these examples played a significant role in whether the affected States would cooperate with the tribunals.<sup>60</sup> In

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<sup>57</sup> Brus 2002, p. 8.

<sup>58</sup> Broomhall 2003, p. 58.

<sup>59</sup> Ibid., p. 61.

<sup>60</sup> Broomhall 2003, pp. 152–54. In the case of the ICTR, two incidents are worth noticing: in the first one, while the newly-formed Rwandan government invited the Security Council to establish the tribunal and engaged to cooperate, it then voted against the resolution adopting its Statute, on the basis of the temporal jurisdiction of the tribunal (post-genocide revenge killings by the Tutsis would fall into its jurisdiction) and of its failure to apply the death penalty. The second one involves an order of the ICTR Appeals Chamber to release a suspect whose rights of fair trial had been violated. In response, the Rwandan government promised to suspend its cooperation with the tribunal. The Prosecutor applied for a review of the decision for release and finally the Chamber reversed its initial decision. In the case of the ICTY, Croatia was mostly unwilling to extradite its nationals to the tribunal or to provide evidence. It finally agreed to surrender to the tribunal Tihomir Blaskić and Zlatko Aleksovski, after the US's threats to block international loans. In the Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (1999), the ICTY stated that there was 'a pattern of non-compliance, including the failure to defer to the competence of the Tribunal, failure to execute warrants, failure to provide evidence and information and the refusal to permit the Prosecutor and her investigators into Kosovo', paras 91–99.

principle, there is no reason to believe that this will not be the case as far as the ICC is concerned. Despite the existence of a sufficient framework of obligations for cooperation in the Rome Statute,<sup>61</sup> the ICC will not be able to function effectively without the goodwill and favourable legislative frameworks of its States Parties. The extent to which States will respond (if at all) to violations of international criminal law or decide to cooperate with the ICC depends highly on politics and any enhanced normative infrastructure promoted by the ICC in terms of State obligations will only temper, but not replace, the role international politics play in the enforcement of international law.<sup>62</sup> Therefore, adhering to a treaty regime and to the definitions of crimes contained therein will have consequences that pertain to sovereignty.

What follows next is an assessment of how the ICC deals with the concept of State sovereignty. The ICC has given flesh and blood to some extent to the principle of universal jurisdiction<sup>63</sup> for international crimes and the Rome Statute constitutes a body of international law the violation of which bears severe consequences for its States Parties. The introduction of a permanent international criminal law enforcement mechanism into the international legal order constitutes a novelty for the community of sovereign States, which might feel threatened by it due to its more direct effect on—at least the judicial—aspects of their sovereignty. As was noted above, in contrast to the Security Council, whose function and approach towards international security matters relies heavily on State-centric considerations (at least of its Member States and its allies), the ICC is meant to function on a more pro-cosmopolitan basis, prioritising cosmopolitan concerns despite State considerations in the adjudication of international crimes, including those that pertain to international security matters, such as aggression. Eventually, the success of the Rome Statute definitions will highly rely on their ability to promote and defend cosmopolitan ideals in a system of States which might be very distrustful or even hostile towards those ideas. As such, the complementarity regime of the ICC is meant to work towards this direction.<sup>64</sup>

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<sup>61</sup> Rome Statute, above n. 3, Articles 86–102.

<sup>62</sup> Broomhall 2003, p. 61.

<sup>63</sup> It is more accurate to speak of a qualified or quasi-universal jurisdiction. Article 12(2) of the Rome Statute provides that the ICC may exercise its jurisdiction when the territorial State or the State of nationality of the accused (or both) are Parties to the Statute or have accepted its jurisdiction ad hoc. However, this jurisdictional link with the territorial or nationality State is not required in case of a Security Council referral of a situation to the ICC Prosecutor under Chapter VII of the UN Charter (Rome Statute, above n. 3, Articles 12 and 13). Besides, some of the crimes of the Rome Statute, such as the grave breaches of the Geneva Conventions (Rome Statute, above n. 3, Article 8(2a)), are subject to universal jurisdiction anyway. On the other hand, some national legislations relating to the implementation of the Rome Statute provisions either adopt the jurisdictional bases explicitly referred to in the Rome Statute or clearly establish universal jurisdiction. On national implementation of the Rome Statute substantive law see Kleffner 2003, p. 86.

<sup>64</sup> Philippe 2006, p. 375, where he argues that the principle of complementarity is the means through which to enforce universal jurisdiction for international crimes.

## 2.4 Sovereignty and International Law: The Rome Statute and the Principle of Complementarity

If, for the reasons analysed above, one views the Security Council as a mostly State-centric organ driven by political exigencies and State sovereignty concerns, the ICC can be seen as an offset, an international criminal justice mechanism whose principal purposes rely on cosmopolitanism, the respect for the rule of law and the fight against impunity. While a definition for aggression, and aggression as an international crime in its own right, have ultimately found their place among the other crimes of Article 5 of the Rome Statute,<sup>65</sup> the same cannot be said with respect to international terrorism and it may take a long time before international criminal justice is allowed to play a role in such cases. However, the paradigm of the ICC as a permanent international court that could potentially exercise jurisdiction, cannot go without examination as to the extent to which it can achieve the desired balance between State sovereignty and cosmopolitanism in the adjudication of international crimes. Therefore, this section has as its focus the ICC's complementary mandate and will examine (i) whether the criterion of State inability as a ground of admissibility of cases before the ICC can be seen as an implied obligation for States to adopt the Rome Statute definitions in national legislations, (ii) whether the current practice of the ICC manifests that States are compelled to follow the Rome Statute definitions even if there is no explicit obligation under the Rome Statute to do so and (iii) how the complementarity regime in general might work when the ICC confronts a case of aggression and possibly, terrorism. While in principle, complementarity strikes a certain degree of balance between the respect for State sovereignty and the cosmopolitan goal of fighting impunity in the adjudication of international crimes, complementarity in practice has revealed an ICC which sometimes appear to be pro-cosmopolitan, in the sense of stepping in circumstances not clearly envisioned by the Rome Statute. Since the author's view is that the balance between State sovereignty concerns and cosmopolitan ideals should not be limited to the definition of international crimes but should extend to their criminalisation and modalities of prosecution, it has to be noted early on that an ICC with an overly pro-cosmopolitan orientation might constitute a disincentive for States to eventually extend its jurisdiction over a crime of international terrorism or define it for that purpose.

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<sup>65</sup> As was also noted in Chap. 1, the international crimes under the ICC's jurisdiction (genocide, war crimes, crimes against humanity and the crime of aggression) will be hereinafter referred to as Article 5 crimes.

### 2.4.1 Complementarity in Principle

#### 2.4.1.1 Conditions of Inadmissibility: Article 17

According to Article 17(1), there are four conditions that have to be met for a case to be declared inadmissible before the ICC<sup>66</sup>: (i) the case is being investigated or prosecuted by a State which has jurisdiction over it, (ii) the case has been investigated by a State with jurisdiction but that State decided not to prosecute the individual concerned, (iii) the individual concerned has already been tried for the same conduct by a State<sup>67</sup> and (iv) the case is not of sufficient gravity in order to fall within the ICC's jurisdiction. In this respect, it has to be noted that the fourth condition is a condition of admissibility as well as one of jurisdiction, according to the Article 1 formulation of 'the most serious crimes of concern'. If a case is not of sufficient gravity, it will not fall into the ICC's jurisdiction anyway, even if the State of jurisdiction is not investigating or has not investigated the case or prosecuted the concerned individual(s). On the other hand, if a case is of sufficient gravity, it still needs to be checked whether any of the other three conditions is not met, before a case is declared admissible. In other words, for a case to be admissible before the ICC the condition of sufficient gravity does not suffice on its own but it has to be coupled with the absence of any of the other conditions mentioned in the provision.

However, even if one of the first three conditions is met, a case may still be deemed admissible before the ICC. Article 17 provides some exceptions regarding the first three conditions of inadmissibility. For conditions (i) and (ii), a case can still be declared admissible if the State of jurisdiction is 'unwilling' or 'unable' to 'genuinely' carry out proceedings against a concerned individual.<sup>68</sup> For the third condition, a similar exception also applies and it is formulated in Article 20(3), where it states that the proceedings conducted by the State of jurisdiction should not have had as their purpose to 'shield' the accused from justice and that they should have been carried out independently and impartially 'in accordance with the norms of due process recognised by international law'.<sup>69</sup> Article 17(2) gives some further guidelines regarding the context of the terms 'unwillingness' and 'inability' as used in the provision: namely, for a State to be deemed unwilling to 'genuinely' carry out proceedings it has to be shown that the national proceedings were carried out with

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<sup>66</sup> Rome Statute, above n. 3, Article 17.

<sup>67</sup> This third condition complements Article 20(3) of the Rome Statute, concerning the *ne bis in idem* principle.

<sup>68</sup> Rome Statute, above n. 3, Article 17(1): '(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;...'

<sup>69</sup> Rome Statute, above n. 3, Article 20(3).

the purpose of shielding the accused from justice or carried out with unjustified delay ‘inconsistent with an intent to bring the person concerned to justice’ or that they are not or have not been carried out independently or impartially, again ‘inconsistent with an intent to bring the person concerned to justice’.<sup>70</sup> Concerning the term ‘inability’, a State is unable to carry out proceedings when its national judicial system is partly or totally collapsed or unavailable and thus, the State cannot ‘obtain the accused or the necessary evidence and testimony or [is] otherwise unable to carry out its proceedings.’<sup>71</sup>

### 2.4.1.2 ‘Inability’ as Lack of Compatible Domestic Legislation

The language of the above-mentioned provisions is meant to cover two possible situations that the ICC wishes to avoid with respect to the administration of international justice: firstly, to avoid the possibility that a State conducts sham trials, a problem foreseen when the ICTY was established and secondly, to avoid the possibility that a State will not conduct any proceedings at all due to the unavailability of its national judicial system, as was the case with the ICTR’s creation.<sup>72</sup> The criterion of ‘unwillingness’, contrary to that of ‘inability’, raised a number of objections from States during the negotiations<sup>73</sup> due to its subjectivity. In particular, it was feared that the ICC gains too much discretion in deciding in which cases a State is unwilling to try an alleged offender, with the risk of functioning as a court of appeal and potentially overruling judgments of national judicial systems.<sup>74</sup> Moreover, since a State’s unwillingness shall be measured by ‘the principles of due process recognised by international law’,<sup>75</sup> this can be said to give an extra discretion to the ICC to also determine what these principles of due process are and if they are complied with by the concerned State. However, most States at the negotiation conference seemed willing enough to give priority to the promotion of international criminal justice over their need to protect their judicial sovereignty, at least in this respect, and the criterion of ‘unwillingness’ was finally introduced.

As an objective criterion, inability presumably applies to States which suffer from a breakdown of their national institutions or are plagued by chaos due to civil war or any other public disorder.<sup>76</sup> All the three deficiencies mentioned in Article

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<sup>70</sup> Ibid., Article 17(2).

<sup>71</sup> Ibid., Article 17(3).

<sup>72</sup> Trahan 2012, pp. 581–82.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid. See also Gurulé 2001–2002, p. 30.

<sup>75</sup> Rome Statute, above n. 3, Article 17(2): ‘In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable...’.

<sup>76</sup> Benzing 2003, p. 613. According to Article 17(3) of the Rome Statute, inability is determined by three factors: whether, due to a total or substantial collapse or unavailability of its national judicial system the State is (i) unable to obtain the accused, (ii) unable to obtain the necessary

17(3), the inability to obtain the accused, necessary evidence and testimony and the inability to otherwise carry out the proceedings, have to be a result of collapse or unavailability of the national judicial system.<sup>77</sup> In this respect, it is unclear whether a State can be deemed unable to carry out national proceedings in cases where the national legislation either does not include the crimes under the jurisdiction of the ICC or does not penalise them to the same extent as the Rome Statute. As is the case with the rest of the Article 5 crimes, it is always questionable whether an eventual inclusion, and for this reason, formulation of a definition for international terrorism for the purposes of the Rome Statute, will equal to a subsequent obligation for States to enshrine this same definition into their national legal frameworks.

It has to be noted at first that the Rome Statute creates criminal liability for the crimes under the jurisdiction of the ICC only at an international and not at a national level. Thus, an act committed by an individual that can be categorised as an international crime under Article 5 of the Rome Statute does not automatically fall into the same category for the national criminal justice system concerned, unless the State has introduced in its domestic penal legislation the definitions of the Article 5 crimes of the Rome Statute.<sup>78</sup> In the opposite case, it is possible that such an act might be prosecuted and punished as an 'ordinary crime'.<sup>79</sup> To the extent that the scope of 'unavailability of the national judicial system' includes the absence of compatible penal legislation from domestic judicial systems, a State can be seen as

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(Footnote 76 continued)

evidence and testimony or (iii) otherwise unable to carry out its proceedings. In the ICC, *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the admissibility of a case against Saif Al-Islam Gaddafi, 31 May 2013, Case No. ICC-01/11-01/11-344-Conf (*Gaddafi Admissibility Decision*) para 200, the Pre-Trial Chamber held that the ability of a State to genuinely carry out proceedings 'must be assessed in the context of the relevant national system and procedures... [and] in accordance with the substantive and procedural criminal law applicable in Libya'.

<sup>77</sup> Rome Statute, above n. 3, Article 17(3).

<sup>78</sup> The relationship between national and international legal orders has been divided into three, principal theories: (i) the monistic view which advocates the supremacy of national law over the international, (ii) the dualistic view which advocate that international law and national law are 'independent of each other in their validity' (Kelsen 1959–1960, p. 629) and therefore can be valid simultaneously and (iii) the monistic view which places international law above the various national legal systems. The dualistic theory started to lose ground after the second half of the 20th century and in its place, the monistic theory of international law supremacy over national legal systems started to emerge. The Vienna Convention on the Law of Treaties, (opened for signature 23 May 1969, 1155 UNTS 331, entered into force 27 January 1980) under Article 27, provides that a State party to a treaty cannot invoke national legislation as justification for non-compliance with its treaty obligations. Also, Article 88 of the Rome Statute provides that the national legal systems of its States Parties shall have in place procedures which allow all forms of cooperation, as envisaged by Part 9 of the Rome Statute, for the purposes of the ICC. The incorporation in domestic legislations of international rules as such is also another manifestation of the monistic theory of the primacy of international law over national legal orders. For a thorough analysis of these theories see Cassese 2005, pp. 213–237.

<sup>79</sup> Benzing 2003, p. 614.



‘otherwise unable to carry out its proceedings’ if it has not incorporated the definitions of the Article 5 crimes.<sup>80</sup>

However, even when such legislation exists, a State can be still deemed ‘unable’ if the national legislation is assessed as inadequate by the ICC Prosecutor.<sup>81</sup> In the context of definitions of crimes, inadequacy might entail the recategorisation of a conduct being an international offence under the Rome Statute, to an ordinary offence under a State’s national legislation.<sup>82</sup> Thus, provided that international terrorism becomes an offence under the Rome Statute, a State Party with absent or incompatible national legislation concerning terrorist offences might not satisfy the complementarity requirements of Article 17, increasing the number of cases related to terrorism that can be found admissible before the ICC. This interpretation of unavailability might provide an additional reason for States to be wary of any extension of the ICC’s jurisdiction over a crime of international terrorism and consequently, of the formulation of an international criminal law definition. While Article 17 of the Rome Statute clearly shows a preference for domestic prosecutions of international crimes, State sovereignty has been rendered conditional,<sup>83</sup> in that (and as it will also be shown in the next section) the ICC is provided with the pro-cosmopolitan competence of exercising external oversight over the national proceedings for the commission of international crimes of its States Parties.

While there are views which support that in this case State sovereignty is undermined under the Rome Statute,<sup>84</sup> it should be pointed out that one of the aims of complementarity is to urge States to exercise their criminal jurisdiction for the commission of international crimes and remind them that it is first and foremost their duty to enforce international law.<sup>85</sup> If an obligation to introduce compatible penal legislation to domestic laws would undermine aspects of State sovereignty, then the absence of this obligation would clearly undermine the overall purpose of the complementarity principle, as the ICC would not be able to rely on national prosecutions for international crimes.<sup>86</sup> While not explicitly required by the Rome Statute, the harmonisation of national legislation concerning international crimes

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<sup>80</sup> Doherty and McCormack 1999, p. 152; Kleffner 2003, p. 89. However, Colombia opposed to this interpretation. See also Declaration of Colombia upon ratification of the Rome Statute (1998) that ‘the word “otherwise” [...] refers to the obvious absence of objective conditions necessary to the conduct of trial’ and that ‘none of the provisions of the Rome Statute alters the domestic law applied by the Colombian judicial authorities in exercise of their domestic jurisdiction within the territory of the Republic of Colombia’.

<sup>81</sup> Ibid.

<sup>82</sup> Kleffner 2003, p. 95. In the *Gaddafi* Admissibility Decision, above n. 76, para 88, the Pre-Trial Chamber held that domestic prosecutions under the category of ordinary crimes can be considered sufficient provided though that the case covers the same conduct as the one to be charged by the ICC Prosecutor. A discussion on the ‘same person, same conduct’ test as has been applied by the ICC will follow in the next section.

<sup>83</sup> McAuliffe 2014, p. 273; Robinson 2010, p. 96.

<sup>84</sup> Benzing 2003, p. 616.

<sup>85</sup> Rome Statute, above n. 3, Preamble paras 4, 6.

<sup>86</sup> Kleffner 2003, p. 93.

with the Rome Statute definitions seems to be the only way that allows the ICC to really function on a complementary basis and not as a replacement of national judicial systems.<sup>87</sup> An opposite interpretation of complementarity would mean that States Parties would be free to define international offences according to their own understanding, categorising them as ordinary offences or define them more narrowly than the Rome Statute. The legislative gaps resulting from differentiated international and national definitions would most probably increase the number of cases before the ICC, as States Parties would fail to establish their jurisdiction over an Article 5 crime for the purpose of conducting national prosecutions.<sup>88</sup>

As Newton suggests, the reasons why States should criminalise Article 5 crimes and thus, harmonise their national criminal justice systems with ICC standards, are: (i) to ensure the primacy of national jurisdictions over the ICC, (ii) to ensure that the ICC is not overburdened with cases, (iii) to eliminate the creation of safe havens for international criminals trying to flee prosecution and (iv) to strengthen the international criminal justice system by rendering States the 'enforcement arms' of international law, ensuring that there will be no impunity for the commission of international crimes.<sup>89</sup> However, there are several scenarios that can take place in the effort of States to harmonise their domestic penal legislation with the ICC provisions. The first one, which was already mentioned in the previous paragraph, involves the national prosecution of an Article 5 crime under a different criminal formulation, categorised as the 'ordinary crime' of murder for example, a scenario that will most probably result in finding the State of jurisdiction 'unable' to carry out the proceedings. A second scenario would be the verbatim adoption of Article 5 definitions, such as is the case of the UK, with the adoption of the UK International Criminal Court Act 2001.<sup>90</sup> In this case, the mirroring of the ICC provisions into domestic legislation would preclude the finding that a State is unable to carry out national proceedings. However, if the national Prosecutor decides to charge the alleged offenders for different crimes than the ones the ICC Prosecutor would charge, should the trial be conducted before the ICC, then there is the risk that the jurisdictional State be found 'unwilling' to prosecute the perpetrators<sup>91</sup> or that it conducts proceedings for a different range of crimes than the one envisaged by the ICC Prosecutor.<sup>92</sup>

Other practices followed by States in their effort of harmonisation are the adoption of narrower definitions of international crimes or of definitions taken by other international law instruments than the Rome Statute. The example of the Swiss Penal Code is indicative of the first practice. Whereas the reformed Swiss

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<sup>87</sup> Ibid.

<sup>88</sup> Ibid., p. 94.

<sup>89</sup> Newton 2011, p. 320.

<sup>90</sup> International Criminal Court Act 2001 c 17.

<sup>91</sup> Newton 2011, p. 321.

<sup>92</sup> As was the case with ICC, *Prosecutor v Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-8, which will be commented below.

Penal Code includes more precise definitions for war crimes, so far sanctioned only by general reference to international humanitarian law,<sup>93</sup> provisions concerning the crime of genocide and the responsibility of senior officials are less broad than in the Rome Statute.<sup>94</sup> On the other hand, the Extraordinary Chambers of Cambodia, a hybrid international court, which was established however ‘within’ the Cambodian courts,<sup>95</sup> operates under the 2001 Law on establishment of the Extraordinary Chambers<sup>96</sup> which reproduces in part the provisions of the Rome Statute. In particular, some formulations for crimes against humanity have been taken from the Statute of the International Criminal Tribunal for Rwanda,<sup>97</sup> other acts of crimes against humanity are omitted<sup>98</sup> whereas some others are only mentioned by reference and without definitions.<sup>99</sup>

This selectivity of approaches concerning the harmonisation of definitions under international criminal law with domestic legislation can be paradoxically interpreted to be either in conformity or in conflict with the complementarity regime. On the one hand, a vision of complementarity, based on identical criminal definitions between the Rome Statute and domestic legislations of States Parties, suggests that the main concern of the ICC is not simply whether international criminal justice can be administered by States, but also whether it is administered according to the ICC’s own standards of what best constitutes international criminal justice.<sup>100</sup> This universalist approach of complementarity, namely that national prosecutions should be conducted following the definitions provided in the Rome Statute, does not leave much room for tolerance to the pluralism of the national judicial systems of States Parties and suggests that the means of administering international criminal justice

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<sup>93</sup> Hirondele News Agency 2008.

<sup>94</sup> Article 259(1bis) of the Swiss Criminal Code, 21 December 1937 (status as of 1 May 2013) provides that public provocation to commit genocide is prosecutable only when genocide has taken place in whole or in part in Switzerland without criminalising incitement to commit genocide abroad. Also Article 264k(1) provides that a superior could be held responsible only for crimes he was aware that a subordinate has committed or will commit and failed to act. The Rome Statute establishes liability for superiors also in cases where a superior ‘should have known’ that the forces under his or her command have committed or will commit Article 5 crimes (Article 28(a)(i)).

<sup>95</sup> Report of International Federation of Human Rights 2006.

<sup>96</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea, 10 August 2001, amended 27 October 2004 (2001 Law).

<sup>97</sup> The chapeau of the definition of crimes against humanity (Article 5 of 2001 Law) is taken from the UNSC 1994, Article 3.

<sup>98</sup> Report of International Federation of Human Rights 2006, p. 21. Article 5 of the 2001 Law, above n. 96, omits some material acts included in Article 7 of the Rome Statute, above n. 3: enforced disappearances, sexual violence other than rape and the crime of apartheid.

<sup>99</sup> Ibid. Article 5(2) of 2001 Law, above n. 96, includes extermination, enslavement, deportation, persecutions and other inhumane acts as constitutive elements of crimes against humanity without any definition of these terms. The crime of torture is defined, not according to Article 7 of the Rome Statute, above n. 3, but according to Article 500 of the 1955 Cambodian Criminal Code (Article 3 of the 2001 Law, above n. 96).

<sup>100</sup> Mégret 2011, p. 363.

matter as much as the end. In fact, it is argued that this approach runs counter to the very essence of the complementarity regime,<sup>101</sup> which dictates primacy of national jurisdictions and the respective national definitions they entail.

On the other hand, it can be argued that States Parties have an implied obligation, arising from the Rome Statute, to include Article 5 crimes into domestic legislation. This obligation can be derived from both a contextual and a teleological interpretation of the Preamble of the Rome Statute. According to the preambular para 6,<sup>102</sup> States Parties have a duty to prosecute international crimes, meaning that they cannot impede the administration of international justice for any reason, including the lack of appropriate legislation or non-criminalisation of a particular conduct which is criminalised under the Rome Statute. A teleological interpretation would support that conclusion, in that the ultimate purpose of the ICC, the fight against impunity, will not be achieved if States Parties have not fully criminalised the conduct which is punishable under the Rome Statute, weakening thus the deterrent effect of national prosecutions.<sup>103</sup> Since (i) the object and purpose behind the establishment of the ICC is the fight against impunity, (ii) preambular para 4 provides that effective prosecutions 'must be ensured by taking measures at the national level'<sup>104</sup> and (iii) practically, not all cases concerning international crimes can be prosecuted by the ICC, the harmonisation of domestic definitions for international crimes with the international ones is necessary, in order to both prevent States from being exposed to the ICC and, at the same time, promote a common understanding regarding the content and scope of international crimes recognised by, at least, the States Parties to the Rome Statute.

All in all, the applicability of the test of a State's unwillingness and inability is characterised as a judicial tightrope,<sup>105</sup> since the balance between a too narrow and a too broad interpretation of the terms is quite tenuous. On the one hand, too broad an interpretation may lead to criticisms that the ICC exceeds its powers in being too intrusive into national judicial systems. On the other hand, if the ICC follows too narrow an approach for the concepts of 'unwillingness' and 'inability', it may attract criticism for being too lenient towards State sovereign prerogatives. The term 'genuinely' tries to strike that balance by adding a standard, that of genuine State action to investigate or prosecute, in order to assess its unwillingness or inability. However, the practice of the ICC has not offered any further elaboration of these terms in its current case law; on the contrary, it seems that it has taken a different, broader approach with respect to the admissibility of cases. This broader approach, while in line with a pro-cosmopolitan model of international criminal justice, might have an adverse effect on the degree of States willingness towards an eventual definition and criminalisation of international terrorism for the purposes of the

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<sup>101</sup> Ibid.

<sup>102</sup> Rome Statute, above n. 3, Preamble.

<sup>103</sup> Kleffner 2003, p. 93.

<sup>104</sup> Rome Statute, above n. 3, Preamble para 4.

<sup>105</sup> Benzing 2003, p. 603.

Rome Statute. The following section will show to what extent the ICC, as it has been revealed by its practice to date, has walked away from a strict application of the complementarity regime, risking the delicate balance achieved by the Rome Statute provisions between the respect for State sovereignty and the ICC's cosmopolitan aspirations.

### 2.4.2 *Complementarity in Practice*

Turning now to the current practice of the ICC relating to the complementarity regime, there is not so far much development in case-law concerning further elaboration of the terms of unwillingness or inability on the part of a concerned State; from the ten situations that have reached the ICC at the time of writing, five of them have reached it through self-referrals, two through Security Council referrals and three situations have been brought before the ICC through investigations conducted *proprio motu*.<sup>106</sup> So far, the role of the ICC seems to go beyond the one prescribed in the Rome Statute at least for the five self-referred situations, in that the vision of a complementarity regime which would strengthen and encourage States to conduct national prosecutions is far from reality.<sup>107</sup> Instead, the concepts of unwillingness and inability seem to have been replaced in practice by unavailability or inactivity.<sup>108</sup> So far, it has been shown that, in most cases, the ICC has intervened where the concerned State showed no intention to prosecute.<sup>109</sup> This lack of intention for national prosecutions does not indicate that there is genuine unwillingness on the part of the State (if the situation is referred to the ICC by the concerned State itself) or genuine inability (because the national judicial system might be perfectly in place) but it shows State unavailability or inaction. However, according to the Preamble of the Rome Statute, it is the duty of States Parties primarily to prosecute international crimes and only in cases of unwillingness and inability, can jurisdiction be relinquished. Having the ICC conducting trials for international crimes in cases where the jurisdictional States are both willing (in the sense that they wish that justice be done) and able to do so, does not equal to a proper use of complementarity but rather to a waiver of it. This pro-cosmopolitan interventionist policy, which circumvents aspects of the concerned State's judicial sovereignty, seems to prioritise the goal of ending impunity in The Hague over the goal of encouraging States to conduct national prosecutions, a function that goes beyond the initial vision of complementarity as envisaged by the States Parties.<sup>110</sup> The ICC's judicial dynamism, though in conformity with a cosmopolitan model of

<sup>106</sup> ICC, Situations under investigation 2017.

<sup>107</sup> McAuliffe 2013, p. 215.

<sup>108</sup> Mégret 2011, p. 376.

<sup>109</sup> Ibid.

<sup>110</sup> McAuliffe 2013, p. 215.

international criminal justice, might have adverse effects with respect to States' willingness to potentially expand the ICC's jurisdiction over an international crime of terrorism (and define it for that purpose), should the ICC continue to follow this broader approach with respect to the admissibility of cases.

#### 2.4.2.1 The *Lubanga* and *Katanga* Precedents: An Intrusive ICC?

Examples from the current practice of the ICC have demonstrated that the ICC avails itself of a more interventionist approach to initiate proceedings even in circumstances not necessarily envisioned by the drafters of the Rome Statute. The *Prosecutor v Lubanga Dyilo* was the first case that was made admissible through self-referral by the Democratic Republic of Congo (DRC). Although the Pre-Trial Chamber recognised that the Congolese judicial system 'had undergone certain changes' and was 'able' to prosecute the case under Article 17, admissibility was granted on grounds that the accused was not being prosecuted by the national authorities for the same offences as were to be charged with by the ICC Prosecutor.<sup>111</sup> When the ICC Prosecutor sought an arrest warrant against Lubanga in January 2006, the accused was already in the custody of the DRC since March 2005, being charged with, among other things, genocide and crimes against humanity.<sup>112</sup> The Prosecutor based his application for arrest on allegations that the accused committed the war crimes of recruiting, conscripting, and enlisting child soldiers<sup>113</sup> and argued that the case should be declared admissible, because the DRC government had stated that it was not able to prosecute crimes under the jurisdiction of the ICC, and thus, it was deemed 'unable' under Article 17.<sup>114</sup> The Pre-Trial Chamber I rejected inability as a ground of admissibility but declared the case admissible, because 'for a case arising from the investigation of a situation to be inadmissible, national proceedings must encompass both the person and the conduct which is the subject of the case before the Court'.<sup>115</sup> The Congolese authorities were conducting proceedings against Lubanga for a different range of offences than those presented by the ICC Prosecutor, thus the case, according to a strict interpretation of Article 17(1a), which should involve both the same person and the same criminal conduct, was not being prosecuted at all.

The Pre-Trial Chamber I introduced a third ground of admissibility of a case before the ICC: apart from a genuine State 'unwillingness' or inability', State inactivity can constitute a ground of admissibility. The Pre-Trial Chamber found

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<sup>111</sup> ICC, *Prosecutor v Thomas Lubanga Dyilo*, Under Seal Decision of the Prosecutor's Application for a Warrant of Arrest, Article 58, 10 February 2006, Case No. ICC-01/04-01/06-8 (*Lubanga* decision) paras 35–37.

<sup>112</sup> *Ibid.*, para 33.

<sup>113</sup> *Ibid.*, para 38.

<sup>114</sup> *Ibid.*, para 34.

<sup>115</sup> *Ibid.*, para 37.

that ‘the DRC cannot be said to be acting in relation to the specific case before the Court’<sup>116</sup> and held that the ‘case would be admissible only if those States with jurisdiction over it have remained inactive in relation to that case or are unwilling or unable’ under Article 17.<sup>117</sup> While this holding went unchallenged by the defence,<sup>118</sup> this irregular application of Article 17 gave rise to criticism that the ICC sidestepped the complementarity spirit of the Rome Statute. Instead of supporting the national primacy of the DRC to conduct proceedings against the accused and encouraged confidence in the Congolese criminal justice system to enforce implementation of the Rome Statute provisions,<sup>119</sup> it preferred to supersede a national trial and rushed to assume as much responsibility as possible.<sup>120</sup> This type of judicial activism walks away from the initial vision of complementarity which was destined to protect the judicial aspects of State sovereignty from a court which would intervene on grounds other than unwillingness and inability.<sup>121</sup> In this particular case, it also had the awkward effect of the ICC’s conducting its first trial for offences less serious than the ones pursued by the authorities of the DRC.<sup>122</sup>

Similarly, in *Prosecutor v Katanga*,<sup>123</sup> the ICC took a broader approach with respect to the admissibility of cases than the one provided in the Rome Statute. In June 2005, the Prosecutor sought an arrest warrant against Germain Katanga on grounds that he was allegedly responsible for a number of war crimes and crimes against humanity committed in February 2003 in a village in the DRC.<sup>124</sup> The arrest warrant was granted by the Pre-Trial Chamber, even though the accused had already been arrested and detained since March 2005 by the authorities of the DRC.<sup>125</sup> However, the Pre-Trial Chamber found the case admissible because, as in the *Lubanga* case, the domestic proceedings against Katanga did not ‘encompass the same conduct’ as the Prosecutor’s application for arrest. The defence challenged the validity of the so-called ‘same conduct’ test, arguing that it was a flawed precedent and that it departed from a proper interpretation of Article 17.<sup>126</sup> The Trial Chamber rejected the defence motion without however providing any elaboration on the proper applicability of the ‘same conduct’ test; rather, it held that the

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<sup>116</sup> Ibid., para 39.

<sup>117</sup> Ibid., para 29.

<sup>118</sup> Schabas 2008a, p. 757.

<sup>119</sup> Jurdi 2011, p. 264.

<sup>120</sup> Schabas 2008b, pp. 32–33.

<sup>121</sup> McAuliffe 2013, pp. 220–21.

<sup>122</sup> Schabas 2008a, p. 743.

<sup>123</sup> ICC, *Prosecutor v Germain Katanga*, Case No. ICC-01/04-01/07-4.

<sup>124</sup> ICC, *Prosecutor v Germain Katanga*, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Germain Katanga, 6 July 2006, Case No. ICC-01/04-01/07-4, paras 3, 10.

<sup>125</sup> Ibid., para 18.

<sup>126</sup> ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a) of the Statute, 11 March 2009, Case No. ICC-01/04-01/07-949 paras 31–37.

case was admissible before the ICC because the DRC was deemed ‘unwilling’ to prosecute the accused under Article 17. According to the Trial Chamber’s decision, an ‘unwilling’ State can be also a State

which may not want to protect an individual, but, for a variety of reasons, may not wish to exercise its jurisdiction over him or her...[t]he Chamber considers that a State which chooses not to investigate or prosecute a person before its own courts, but has nevertheless every intention of seeing that justice is done, must be considered as lacking the will referred to in Article 17.<sup>127</sup>

This pro-cosmopolitan attitude of the ICC in the implementation of the ‘same conduct’ test might send the message to its States Parties that it interprets its mandate in a way that it is much more than a complementary international court. In the context of defining and making international terrorism an offence under the Rome Statute, a potential differentiation between the range or content of the offence as charged by a State against an individual accused and the ICC Prosecutor might equal to a sufficient ground on which a case can be made admissible before the ICC. While a textual approach of the complementarity regime seems to privilege State sovereignty<sup>128</sup> in that the jurisdiction of the ICC is only subsidiary and is exercised only when a State’s unwillingness or inability becomes manifest, in practice it seems that the ICC has applied the ‘same conduct’ test in a self-serving way.<sup>129</sup> It remains to be seen whether this self-serving use of complementarity is explained by the urgency that the ICC might have felt in the early days of its establishment to pursue cases<sup>130</sup> and thus justify its existence or is meant to be its standard practice in the future. What remains true however, is that the more sovereignty-conscious States, which have already opposed to the idea of international terrorism’s inclusion into the Rome Statute based on sovereignty-based concerns as was shown in Chap. 1, will have an additional reason to remain opposed, should this pro-cosmopolitan understanding of the complementarity regime predominates over the pro-sovereignty one.

So far, it has been shown that, while on paper the complementarity regime seems to be able to do justice to both State sovereignty concerns relating to their judicial primacy and to cosmopolitan purposes relating to the fight against impunity, in practice the ICC has departed—at least in part—from this vision of complementarity which regards States and international law as mutually constituted.<sup>131</sup> As such, it becomes obvious that the required balance between sovereignty and law is not only to be searched for in the definitions of international crimes but also in the

<sup>127</sup> ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case, 16 June 2009, Case No. ICC-01/04-01/07, para 77.

<sup>128</sup> On how international institutions practically function in a privileging way towards State sovereignty see Kahn 2000, p. 10.

<sup>129</sup> Nouwen 2011, pp. 212–214.

<sup>130</sup> Schabas 2011, p. 156. However, he notes further that this over-intrusiveness was rather welcome by the DRC since prosecutions were targeted against enemies of the official government. In this respect see also Schabas 2010; Tiemessen 2014, p. 444.

<sup>131</sup> Mégret 2006, pp. 49–51.



modalities of their prosecution. Regardless of whether a criminal definition is construed in a way that rightly weighs the respect for State sovereignty and the need for justice, if the administration of this justice is imbalanced, then the overall effectiveness of an international crime definition will be undermined and ICC's credibility severely compromised.

In this respect and since this study focuses on the crime of aggression and international terrorism, the analysis of complementarity should be concluded with an examination of the challenges that the ICC will face when it confronts an aggression case. Since the ICC has not as yet acquired jurisdiction over aggression cases, an analysis of how the complementarity regime will work is only speculative; however, the conclusions drawn will shed some light on several sovereignty-pertaining issues that might be raised which can also be of relevance when and if terrorism finds its place among the international crimes with its own international definition. For this reason, the next section will attempt to give an insight on how the complementarity regime will work for cases of aggression and how the adjudication of aggression cases by an international court may implicate with issues of State sovereignty. This examination will bring us closer to understand why State sovereignty often functions as an obstacle to the further development of international criminal justice and how this obstacle can be overcome if sovereign interests are to be properly weighed against the purposes of international criminal justice.

### 2.4.3 *The Applicability of the Complementarity Regime on Cases of Aggression*

Before examining the development and finalisation of the definition of aggression for the purposes of the Rome Statute in Chaps. 3 and 4, it is worth making some remarks on how it raises, among other issues, some jurisdictional questions under the existing framework of the complementarity regime. Using Article 17 as a starting point for the following analysis, a case is inadmissible before the ICC when a State, *which has jurisdiction over it*, is investigating or prosecuting or has investigated or prosecuted the case concerned.<sup>132</sup> The question that arises from this provision is obviously which State has, or better *can* have jurisdiction over a case of aggression. Since a case of aggression will involve at least two States, one aggressor and one victim State, the bases of jurisdiction that can unequivocally be invoked are the territoriality and the nationality principles.<sup>133</sup> However, the provision does not make clear whether a third State, exercising universal jurisdiction,

<sup>132</sup> Rome Statute, above n. 3, Article 17.

<sup>133</sup> Rome Statute, above n. 3, Article 12(2): '[...] (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.'

can prosecute a case of aggression if either the aggressor or the victim State, or both, are unwilling or unable to do so. Under the 'Princeton Principles on Universal Jurisdiction', a State can exercise universal jurisdiction over an individual for serious crimes under international law, such as, among others, crimes against peace,<sup>134</sup> the post-WWII equivalent for aggression. Some authors also argue that national courts of third States can try cases of aggression under the principle of universality.<sup>135</sup> Nevertheless, setting aside the precedents of the Nuremberg and Tokyo trials, the principle of universal jurisdiction has not been invoked since for the crime of aggression, showing that State practice in this respect casts doubts on the existence of universal jurisdiction for this crime. Besides, the 1996 Draft Code of Crimes against the Peace and Security of Mankind of the International Law Commission, in its Article 8 provides that jurisdiction on aggression can rest only with an international court or a State whose national is the alleged offender.<sup>136</sup> From this formulation, two conclusions can be drawn with respect to how the crime of aggression was viewed, at least before the establishment of the ICC: firstly, that aggression was different from the rest of the international crimes of the Draft Code, in that universal jurisdiction was not supported for it and secondly, that the only State that could exercise jurisdiction was the State of nationality of the accused, a view not shared by the Rome Statute and inconsistent with the regime of complementarity enshrined in it.<sup>137</sup> On the other hand, domestic prosecutions for the crime of aggression are nowhere to be exempted in the Kampala Resolution, and therefore the principle of the Rome Statute Preamble that it is the duty of national courts to try those responsible for the commission of international crimes applies also to the crime of aggression once the Kampala Resolution enters into force.<sup>138</sup> Moreover, the jurisprudence of the famous *Lotus* case,<sup>139</sup> where France questioned the jurisdiction of Turkey to prosecute a French sailor for criminal manslaughter when a French vessel ran into a Turkish one on the high seas, causing a number of deaths of Turkish citizens, advocates that the exercise of extraterritorial jurisdiction is valid and that it was on France to prove that Turkey's exercising jurisdiction violated a prohibitive rule of international law.<sup>140</sup> In light of this principle, it has been argued that the exercise of domestic universal jurisdiction is valid, unless the party questioning this jurisdiction can demonstrate that there is a generally accepted rule in international law which would prohibit the exercise of such jurisdiction.<sup>141</sup>

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<sup>134</sup> Princeton Project on Universal Jurisdiction 2001, Principle 2(1).

<sup>135</sup> Dinstein 2005, p. 145; Brotons 2005, p. 16 quoted in Wrangé 2010, p. 600.

<sup>136</sup> International Law Commission 1996, Article 8: '...Jurisdiction over the crime set out in Article 16 shall rest with an international court. However, a State referred to in Article 16 is not precluded from trying its nationals for the crime set out in that article.'

<sup>137</sup> Clark 2011, p. 726.

<sup>138</sup> Scharf 2012, p. 364.

<sup>139</sup> PCIJ, *SS Lotus (France v Turkey)*, Judgment, 1927, PCIJ Series A No. 10.

<sup>140</sup> *Ibid.*, para 46.

<sup>141</sup> Scharf 2012, p. 380.

Since, under the complementarity regime of the Rome Statute, cases of aggression will most probably be adjudicated by either the aggressor or the victim State (and only if they should fail, will the ICC step in) it remains to be seen to what extent the national courts of either the victim or the aggressor State are competent to adjudicate such cases. While the Special Working Group on the Crime of Aggression, during the negotiations held in Kampala for the incorporation of aggression in Article 5 of the Rome Statute, decided to treat aggression similarly to the other Article 5 crimes, it seems that there are distinguishing features that make aggression not well-suited for the complementarity regime.<sup>142</sup> Firstly, and generally speaking, there is the question of whether national judiciaries could function independently and impartially with respect to so politically-charged crimes such as aggression. Of course, this argument can be equally valid for the conduct of trials concerning the other core crimes under the ICC jurisdiction, which can also have political aspects. However, as was pointed out above, the crime of aggression would involve at minimum two States, whereas so far, the ICC practice has shown that the crimes that have been or are being prosecuted by the ICC, have been committed in the territory of one State. Without excluding a scenario where crimes against humanity or war crimes are committed in a context where more than one State is involved, the involvement of at least two States in a national trial concerning aggression will exacerbate the already disturbed relations of the States concerned with the risk of further aggravating an already intense situation. Corollary to this is also the high risk of having States conducting trials which lack independence and impartiality and have the intention to shield the accused from justice, in which case of course, the ICC can intervene and invoke the provisions of Article 17(2c) that the State appears 'unwilling' to try the accused due to such lack. At the same time, even in cases where the victim State and not the State of nationality of the accused is to conduct a highly politicised trial, it is possible that the national courts will appear 'all too willing' to prosecute, and thus, issues of fair trial and due process might be raised.<sup>143</sup> While due process considerations do not constitute *per se* a ground of admissibility, there might be instances where overzealous national authorities might indefinitely detain the accused for purposes different from conducting a trial (such as extracting information). The ICC's primary role is to function as an anti-impunity mechanism<sup>144</sup> and ensure that judicial proceedings take place, be it national or international. In this respect, it is likely that where judicial proceedings do not occur, a case might be deemed admissible before the ICC (given also the so far interventionist practice it has adopted regarding the conditions of admissibility), not due to the commission of human rights violations against the accused but due to the lack of intention of the national authorities to

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<sup>142</sup> Trahan 2012, p. 587.

<sup>143</sup> For a discussion concerning over-zealous national prosecutions see Trahan 2012, pp. 594–601.

<sup>144</sup> Mégret and Samson 2013, p. 573.

conduct a trial.<sup>145</sup> As such, it is highly likely that States which have been directly involved in an aggression case would be deemed by the ICC as either unwilling or unable to genuinely carry out the investigation or prosecution, resulting in the subsequent ICC's intervention.

Secondly, the attribution of individual liability for the crime of aggression goes beyond the individual himself and implicates directly the State on behalf of which he acted.<sup>146</sup> There is a direct implication of a State's action with the commission of the individual crime of aggression, which is absent from the other Article 5 crimes. This implication is also reflected into the definition for aggression as formulated in the Kampala negotiations, where the act of aggression, committed by a State, forms an express element of the offence.<sup>147</sup> Thus, a national judiciary that will sit in judgment for a case concerning the crime of aggression will have to assess the legality of another State's decision to use force,<sup>148</sup> a competence which is primarily reserved to the Security Council under its Chapter VII powers.<sup>149</sup>

With these implications in mind, it is still questionable whether national courts can be seen as appropriate fora to conduct aggression trials.<sup>150</sup> But even if the jurisdiction-related considerations are set aside, there is still a number of theoretical and procedural issues that have to be addressed when a State acquires jurisdiction over a case of aggression. Firstly, it comes as a logical conclusion that, if a case of aggression falls under a State's jurisdiction, then the jurisdictional filters that are in place for the ICC to exercise the same jurisdiction, will not be in place for the national court, unless specifically provided by the domestic legislation.<sup>151</sup> In other words, when a case of aggression is referred to the ICC by a State or in case of a *proprio motu* initiation of proceedings, the Prosecutor shall seek the Security Council's determination of the existence of an act of aggression or, in the absence of it, he or she shall turn to the Pre-trial Division.<sup>152</sup> These mechanisms will be absent if a national court adjudicates over a case of aggression, meaning that the concerned State will have to make a determination on the existence of an act of

<sup>145</sup> Ibid., p. 586. About Rome Statute's safeguards concerning due process protection see Fry 2012.

<sup>146</sup> Morris 2001, pp. 14–15.

<sup>147</sup> Resolution RC/Res. 6, Annex I, Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, 11 June 2010 (Kampala Resolution) Article 8bis: 'For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.'

<sup>148</sup> Van Schaack 2012, p. 149.

<sup>149</sup> UN Charter, above n. 1, Article 39: 'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression...'

<sup>150</sup> Among the authors that are sceptical about the application of the complementarity regime to cases of aggression are: Trahan 2012; Wrangle 2010; Van Schaack 2012.

<sup>151</sup> Van Schaack 2012, p. 151.

<sup>152</sup> Kampala Resolution, above n. 147, Article 15bis (6) and (8).

aggression allegedly committed by itself or another State, something that is contrary to Article 39 of the UN Charter, which confers this power primarily to the Security Council, and also contrary to the principle of the sovereign equality of States.

Apart from these issues that will probably arise when aggression cases are to be adjudicated nationally, there are also some sovereignty-related questions that may come into play in the adjudication of both aggression and terrorism cases. In the first place, the issue of immunities, which will most certainly arise in cases of aggression since the crime of aggression is established as a 'leadership crime', might also arise in cases of terrorist crimes which involve a State's high political or military officials. The framework provided by the Rome Statute does not recognise immunity statuses<sup>153</sup>; however, this renunciation of immunities will likely not be applied before national jurisdictions.<sup>154</sup> Domestic immunities are often in place in a State Party's national legislation and protect its officials from being tried before their own courts. Amending immunity-related domestic legislation to accommodate the ICC's requirements for national prosecutions pursuant to the complementarity principle or for surrender to the ICC might be seen as an infringement into a State's sovereignty.<sup>155</sup> But even if States Parties amend their relevant domestic legislation to allow the surrender or national prosecution of their own nationals, the situation is different with respect to requests for surrender of non-nationals. In this latter case, the ICC will have to decide whether States Parties, in agreeing to limit immunity before the ICC (Article 27), are deemed to have done so with respect to one another or that States Parties cannot arrest or surrender officials of another State Party, without a waiver of their immunity, according to Article 98(1).<sup>156</sup>

Another challenge that is to be faced when States adjudicate on cases of aggression and even more so on cases of international terrorism, is the fragmentation and differentiation of their domestic penal codes in the very definition of the crimes. The ICC, as with the rest of the crimes under its jurisdiction, applies a uniform legal framework for all the States Parties, which contain thoroughly negotiated elements; in contrast, a State which is going to incorporate or has already incorporated domestic provisions related to aggression, might pick and choose among the definitional elements of the crime, something that will give way to incoherence in the applicability of the legal framework for international crimes as

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<sup>153</sup> Rome Statute, above n. 3, Article 27.

<sup>154</sup> Wrange 2010, p. 594; Mégret 2011, p. 383 where he argues that immunity laws might be a legitimate reason for non-prosecution on a horizontal plane and between States but not before an independent international institution. See also Rome Statute, above n. 3, Article 98(1) where it states that without a waiver of immunity by the State whose national is being accused, the Court cannot proceed with a request for surrender or assistance.

<sup>155</sup> Broomhall 2003, p. 140. France and Germany have dealt with this issue by making amendments which either allow the surrender to the ICC but not the domestic prosecution of a person entitled to immunities (France) or allow both the surrender and prosecution after authorisation of the parliament (Germany).

<sup>156</sup> *Ibid.*, pp. 141–45.

accepted by the Assembly of States Parties (ASP).<sup>157</sup> As it was already shown by the ‘same conduct’ test that the ICC applied in *Lubanga* and considered in *Katanga*, it is highly likely that differentiation between the range of offences (and possibly their definitions) against an accused that are brought before national courts and before the ICC, will favour heavily the ICC’s intervention. Besides, the incorporation of domestic provisions related to aggression is somewhat discouraged by the Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression.<sup>158</sup> Understanding 5 provides that the Kampala Resolution does not create any right or obligation for States to exercise jurisdiction over an act of aggression committed by another State, implying (i) that the incorporation of related legislation should not be seen as mandatory and probably is not even seen as desirable by the negotiators<sup>159</sup> and (ii) that the reference ‘by another State’ means that the exercise of jurisdiction by a State whose nationals are being accused was considered as less problematic.<sup>160</sup> This Understanding was adopted due to US concerns that States Parties to the Rome Statute will finally incorporate a definition of aggression into their domestic laws (‘particularly one we believe is flawed’)<sup>161</sup> expanding principles of jurisdiction and resulting in officials’ being prosecuted for aggression in foreign courts. The US opposition against such a development is based on the view that international customary law does not recognise an existing right for States to exercise universal jurisdiction over aggression.<sup>162</sup> As a result, the effect of Understanding 5 will be to discourage,<sup>163</sup> but not to preclude States from harmonising their national criminal laws with the Kampala provisions. However, it has been argued that this Understanding could at least ensure that States Parties could not invoke the Kampala Resolution to support the exercise of jurisdiction over the crime of aggression committed by non-nationals.<sup>164</sup> With respect to terrorism, the problem of differentiation of national legislations is even more acute; the divergence of views regarding core elements of the definition of international terrorism are such<sup>165</sup> that they have not allowed so far the formulation of a universally accepted definition and, as was also mentioned in Chap. 1, the sovereignty-related

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<sup>157</sup> As emphasised by Van Schaack, a national definition for aggression might for example reject the ‘leadership requirement’ of the crime or the threshold of ‘manifest violation’ or even permit the prosecution of ‘attempted aggression’, issues that have been decided upon after careful and rigorous negotiations by the ASP. Van Schaack 2012, p. 152.

<sup>158</sup> Kampala Resolution, above n. 147, Annex III ‘Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression’.

<sup>159</sup> Van Schaack 2012, p. 155.

<sup>160</sup> Ibid., p. 160.

<sup>161</sup> Koh 2010.

<sup>162</sup> Scharf 2012, p. 365.

<sup>163</sup> Kress and von Holtzendorff 2010, p. 1216.

<sup>164</sup> Van Schaack 2012, p. 161.

<sup>165</sup> A thorough examination of the major points of contention on the core elements of an international definition for terrorism will follow in Chaps. 5 and 6.

implications of agreeing on an international definition of terrorism have heavily obstructed its inclusion into the ICC.

All in all, it seems that the complementarity model prescribed for the rest of the international crimes under the ICC's jurisdiction is not appropriate for cases of aggression and might not be for cases of international terrorism as well. The very thin practice of States exercising universal jurisdiction on cases of aggression, the high risk of politicisation of national courts that will adjudicate over such cases and the absence of jurisdictional filters that are in place for the ICC but not for national courts make it clear that complementarity might not be applied in the same way to aggression as it is with the other Article 5 crimes. Finally, the controversial nature of aggression as an international crime touches upon challenges which may also come into play should terrorism become an international crime (under the jurisdiction of the ICC or any other international tribunal), such as the immunity statuses of high-ranking officials and the risk of fragmentation of the definition of the crime in domestic penal codes. All these challenges, however, reveal a common denominator which will inevitably determine the effectiveness of international crimes definitions to contribute to the fight against impunity: State sovereignty. The crucial question to be asked is what place and content State sovereignty should hold in the modern international criminal justice system in order to comply with the current exigencies of international law.

## 2.5 Conclusion

This chapter has demonstrated how the concept of State sovereignty in light of the State-centric and the cosmopolitan theories has been influencing international law in general and international criminal law in particular, as embodied in the Rome Statute of the ICC. State sovereignty considerations are reflected into the function of the ICC and specifically into its provisions regarding the complementarity regime under which it operates. The establishment of the complementary role of the ICC is the means through which the Rome Statute attempts to strike the balance between the respect for State sovereignty on the one hand and the promotion of cosmopolitan purposes, in the form of international criminal justice, on the other. To this end, the chapter has analysed the details of this complementary function, and specifically how a State's failure to harmonise its national law definitions of crimes with the Rome Statute ones can be understood as State inability to genuinely carry out proceedings, how complementarity has worked in practice as to whether the application of the 'same conduct' test means that States Parties are compelled to follow the ICC's definitions (or the ICC prosecutorial agenda) in order not to be characterised as unable and how the adjudication of aggression and perhaps, terrorism cases raise jurisdictional issues that other Article 5 crimes do not. It was shown that to date, the ICC has to some extent failed to implement complementarity as it was envisioned by the drafters of the Rome Statute, by overstretching its

jurisdictional mandate to the maximum allowed for the purpose of declaring cases admissible even in circumstances not clearly envisioned by the Rome Statute.

The last part of this chapter analysed the reasons why the crime of aggression should not be treated in the same way under the complementarity regime of the Rome Statute as the rest of the Article 5 crimes. The implications on State sovereignty in cases of aggression render States a less appropriate forum for the prosecution of this crime by national courts whereas an international forum appears more suitable for this purpose. The strong political dimension of the crime of aggression was what had hampered its definition and criminalisation for so long, leaving room for States to prioritise their national interests over the need to push forward the development of international law to this direction. Therefore, the next chapter will attempt to show in a historical perspective the dynamics that shaped the concept of aggression and finally led to its definition and criminalisation under the Rome Statute. The analysis of these dynamics will contribute in our comprehension of the role that State sovereignty considerations and cosmopolitan ideals have played in this process, underlying the position they hold in the formation of international criminal law as it stands today.

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