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Alexandre GUERREIRO
School of Law, University of Lisbon
Alameda da Universidade, Lisbon, Portugal, 1649-014
atguerreiro@campus.ul.pt
ORCID: 0000-0002-7000-7190

THE ATTEMPT TO UNIVERSALISE DOMESTIC JURISDICTIONS: INTERNATIONAL CRIMINAL JUSTICE AND RUSSIA

INTRODUCTION. *Over the past two decades, the Western bloc has intensified pressure on Russian Federation through attempts to expand its area of influence as well as to interfere in the domestic affairs of Eastern Europe countries. Russia's response to what it perceives as a threat to its interests has been met with recourse to all available means, including international criminal justice. This paper proposes the identification of legal proceedings brought in the last decade before the International Criminal Court and critically examines the possibility of triggering domestic jurisdictions against Russian or Ukrainian citizens associated with Russia, in order to assess the legality of the ongoing actions and the solutions that international law presents.*

MATERIALS AND METHODS. *This paper first gives a brief overview of international justice cases started in the last decade against the Russian Federation and persons allegedly associated to Russian interests. It will then go on to focus the analysis exclusively on international criminal justice aspects, which are of interest because of the potential friction they may cause for international peace and security. Highlighting previous international courts decisions as well as the evolution of customary law, the fourth chapter is concerned with the activity of the International Criminal Court worldwide and the attempts made by the Western bloc to expand the jurisdiction of the Hague-based court in order to increase pressure over countries out of Western countries sphere of influence. After an inroad into the particular features and dangers of the principle of universal jurisdiction, the last two sections will explore the peaceful means to settle international disputes as well as the final thoughts on the main focus of this study.*

RESEARCH RESULTS. *Having in mind customary international law, the inherent nature of treaty law and decisions derived from international judicial bodies, campaigns launched against the Russian Federation before criminal courts, regardless of whether they are national courts or they have an international mandate resulting from international treaties, are more able to aggravate the tension between Russia and the Western bloc than to settle any specific dispute between these two sides.*

DISCUSSION AND CONCLUSIONS. *The results in this paper indicate that any unilateral attempt developed by a State or a group of States to pursue a campaign against third States and persons outside the UN environment in order to bring any of them to face justice under a specific group of States' values and principles is deemed unlawful. Therefore, such State or group of States are only able to settle disputes through options that are less likely to increase the level of threat against international peace and security.*

KEYWORDS: *international criminal court, Russia, Ukraine, customary international law, Rome Statute, jus cogens crimes, principle of universal justice*

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МЕЖДУНАРОДНЫЕ ОСНОВЫ БОРЬБЫ С ПРЕСТУПНОСТЬЮ

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Александр ГЕРРЕЙРО
Юридический факультет, Лиссабонский университет
Аламеда да Универсидад, Лиссабон, 1649-014, Португалия
atguerreiro@campus.ul.pt
ORCID: 0000-0002-7000-7190

ПОПЫТКА УНИВЕРСАЛИЗАЦИИ НАЦИОНАЛЬНЫХ ЮРИСДИКЦИЙ: МЕЖДУНАРОДНОЕ УГОЛОВНОЕ ПРАВОСУДИЕ И РОССИЯ

ВВЕДЕНИЕ. *За последние два десятилетия блок западных стран усилил давление на Российскую Федерацию посредством попыток расширить зону своего влияния, равно как и вмешательство во внутренние дела государств Восточной Европы. Ответные шаги России на эти действия, воспринятые в качестве угрозы своим интересам, были встречены использованием всех доступных средств, включая механизмы международного уголовного правосудия. В данной статье предлагается проанализировать судебные разбирательства в Международном уголовном суде, инициированные в течение последнего десятилетия, с критических позиций рассмотреть возможность применения механизма национальных юрисдикций против российских граждан или украинских граждан, связанных с Россией, для целей оценки правомерности таких действий и предложить международно-правовые варианты решения возникающих в этом контексте вопросов.*

МАТЕРИАЛЫ И МЕТОДЫ. *В начале статьи содержится краткий обзор судебных разбирательств, инициированных в последнее десятилетие против Российской Федерации и лиц, предположительно связанных с российскими интересами, в рамках международного правосудия. В дальнейшем фокус исследования будет сосредоточен на аспектах международного уголовного правосудия, которые представляют интерес из-за их потенциального влияния на международный мир и безопасность. На основе рассмотренных ранее решений международных судебных органов и с учетом развития обычного права, четвертый раздел статьи посвящен деятельности Международного уголовного суда и попыткам западного блока расширить его юрисдикцию с целью увеличения давления на государства, на-*

ходящихся вне сферы влияния западных стран. После исследования особенностей и потенциальных рисков применения принципа универсальной юрисдикции в последних двух разделах будут рассмотрены мирные средства разрешения международных споров, а также заключительные выводы по основной теме данного исследования.

РЕЗУЛЬТАТЫ ИССЛЕДОВАНИЯ. *Принимая во внимание нормы международного обычного права, имманентную природу договорного права и решения международных судебных органов, можно сделать вывод, что инициированная кампания против Российской Федерации в судебных органах, независимо от того, являются ли они органами национальной судебной системы или имеют международную природу, основанную на международных договорах, в большей степени может обострить напряженность между Россией и западным блоком, чем урегулировать какой-либо конкретный спор между ними.*

ОБСУЖДЕНИЕ И ВЫВОДЫ. *Результаты, представленные в данной статье, показывают, что любая односторонняя попытка государства или группы государств проводить кампанию против третьих государств и лиц, не входящих в сферу действия ООН, с целью привлечения любого из них к ответственности сообразно ценностям и принципам определенной группы государств является неправомерной. Такое государство или группа государств могут урегулировать споры только с помощью вариантов, которые с меньшей вероятностью повысят степень угрозы международному миру и безопасности.*

КЛЮЧЕВЫЕ СЛОВА: *Международный уголовный суд, Россия, Украина, международное обычное право, Римский статут, преступления, нарушающие нормы jus cogens, принцип универсального правосудия*

ДЛЯ ЦИТИРОВАНИЯ: Геррейро А. 2023. Попытка универсализации национальных юрисдикций: международное уголовное правосудие и Россия. – *Московский журнал международного права.* № 2. С. 77–94. DOI: https://doi.org/10.24833/0869-0049-2023-2-77-94

Автор заявляет об отсутствии конфликта интересов.

1. Recent dynamics between Russia and global justice

Since 2014, Ukraine and some States of the so-called "Western bloc" have launched various initiatives aimed at holding the Russian Federation accountable for non-compliance with international law and criminally holding Russian citizens accountable for actions carried out in Ukraine. Among the steps taken or sponsored by the West against the Russian Federation since 2014 are the two Ukrainian applications instituting proceedings before the International Court of Justice (ICJ): the first, started on 16 January 2017, concerning the application of the *International Convention for the Suppression of the Financing of Terrorism* and the *International Convention on the Elimination of All Forms of Racial Discrimination*[1]; the second, filed on 27 February 2022 with regard to alleged violations of the *Convention on the Prevention and Punishment of the Crime of Genocide*[2].

On the criminal level, it should be noted that, although Ukraine is not a State Party to the Rome Statute, it exercised, on two occasions, the prerogative provided for in article 12(3) of the Statute and transferred its jurisdiction over alleged crimes committed on its territory to the International Criminal Court (ICC). The first declaration was lodged by the Ukrainian Government before the ICC with respect to events that occurred in Ukraine from 21 November 2013 to 22 February 2014[3], whilst the second declaration paved the way to cover alleged crimes committed on Ukrainian territory after 20 February 2014[4].

[1] The procedure can be followed at the web site of ICC. URL: https://www.icj-cij.org/en/case/166 (accessed 10.01.2023).

[2] Available at the web site of ICJ: https://www.icj-cij.org/en/case/182 (accessed 10.01.2023).

[3] ICC: Declaration of Recognition of Jurisdiction. April 9, 2014. URL: https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJuristiction09-04-2014.pdf (accessed 10.01.2023).

[4] ICC: Resolution of the Verkhovna Rada of Ukraine. February 4, 2015. URL: https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine (accessed 10.01.2023).

This last authorisation was used by 43 States of the Western bloc to insist on the opening of a concrete investigation into events that occurred in Ukraine after 24 February 2022[5].

Alongside this case, on 27 January 2016, the ICC Prosecutor was authorised to open an investigation into war crimes and crimes against humanity allegedly committed in and around South Ossetia[6]. Although the Office of the Prosecutor states that this case targets "the three parties involved"[7], including Georgian armed forces, so far, it has issued arrest warrants against two Russian citizens[8] and one Georgian national representing South Ossetian authorities[9].

2. Problems arising from the exercise of jurisdiction by international courts

2.1. Russia and the ICJ

The ICJ's jurisdiction *ratione personae* over Russia and Ukraine is not controversial. In effect, both Russia and Ukraine are Members of the United Nations, and thus if Article 35, paragraph 1, of the Statute states that "the Court shall be open to the States parties to the Statute", and Article 93, paragraph 1, of the Charter of the United Nations provides that "all Members of the United Nations are *ipso facto* parties to the Statute" then both the Russian Federation and Ukraine are parties to the Statute of the ICJ.

What can and should be disputed is whether the necessary elements to grant the ICJ jurisdiction *ratione materiae* over the two cases previously identified and promoted by Ukraine against the Russian Federation are verified, which would not be unprecedented in the ICJ's activity[10].

2.2. *Ad hoc* criminal tribunals

The most sensitive issues in international justice involve the exercise of criminal jurisdiction by international courts. As is generally known, the ICJ has no criminal jurisdiction and all *ad hoc* international tribunals established to date binding the States of nationality of the persons directly affected have resulted exclusively from the unilateral imposition of the UN Security Council acting under Chapter VII of the Charter[11] or on the initiative of States that have requested formal support from the UN in this regard[12].

Nevertheless, *ad hoc* tribunals are limited to the range of competences defined by the Security Council, are perceived as illegitimate and "remote justice" that is not carried out by national judges [Stahn 2019:192-194] and tend to simplify and shorten procedures [Iontcheva Turner 2020:42-44].

3. The rise of the ICC

2022 marked the twentieth anniversary of the entry into operation of the ICC, after the deposit of the 60th instrument of ratification, acceptance, approval or accession to the Rome Statute. The difficulties in the negotiations for the creation of a permanent criminal court with a global scope were evident in the slowness of a process that saw several changes, especially regarding the position of States vis-à-vis the guiding principles of the treaty[13], the typology and elements of the crimes over which the court would have jurisdiction and also the forms of collaboration between States and the ICC [Escarameia 2003:225].

The apparent initial enthusiasm shown by the majority of States for the final result of this new project was, actually revealed three distinct positions.

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5 For a complete timeline and a full list of the 43 States that referred the situation to the ICC, please see the web site of ICC. URL: https://www.icc-cpi.int/ukraine (accessed 10.01.2023).

6 ICC: Decision on the Prosecutor's request for authorization of an investigation. January 27, 2016. URL: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_00608.PDF (accessed 10.01.2023).

7 See full declaration at the web site of ICC. URL: https://www.icc-cpi.int/georgia (accessed 10.01.2023).

8 Namely, Gamlet Guchmazov and Mikhail Mayramovich Mindzaev.

9 Specifically, David Georgiyevich Sanakoev.

10 Like in the cases Anglo-Iranian Oil Co. (United Kingdom v. Iran), Certain Norwegian Loans (France v. Norway), Aerial Incident of 27 July 1955 (Israel v. Bulgaria) or, in part, the case Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France).

11 It must be noted the International Criminal Tribunal for the former Yugoslavia (created under Security Council Resolutions 808 (1993) of 22 February 1993 and 827 (1993) of 25 May 1993) along with the International Criminal Tribunal for Rwanda (created pursuant to Resolution 955 (1994) of 8 November 1994) and the Special Tribunal for Lebanon (through Resolution 1757 (2007) of 30 May 2007).

12 Like the Special Court for Sierra Leone (established after the adoption of Security Council Resolution 1315 (2000) of 14 August 2000) and the Extraordinary Chambers in the Courts of Cambodia (set after the 6 June 2003 agreement was approved by UNGA Resolution A/RES/57/228 of 22 May 2003).

13 In particular, the complementarity, the non-applicability of statute of limitations and the irrelevance of official capacity.

China, Russia and Israel have expressed unwillingness to cede part of their sovereignty to an unpredictable international entity [Zhu 2018:34, Yastrebova 2022:16]. The United States and some African States have not opposed the ICC and have even signed the Rome Statute, but so far they have not dared to ratify it[14]. Finally, a clear majority of States have embraced the Rome Statute for the most diverse reasons: either as a demonstration of total commitment to the evolution of the human rights protection system, or for the international prestige that accession to the Rome Statute gives, or for the possibility of instrumentalization of the ICC in favour of domestic political ambitions [Guerreiro 2012:47].

In this context, the difficulties with which a new international organisation with the nature of the ICC[15] began its mission are more than evident, successively subject to the constraints arising from the fact that it is a "product" of treaty law[16] and circumstantially inserted in the orbit of the UN[17]. At the material level, jurisdiction over crimes of genocide, war, against humanity and aggression still generates controversy today regarding the exercise of jurisdiction by the court, and the principle of complementarity has not contributed to the lightening of criticism [Direitos Humanos...2022:661].

Consequently, the concentration of powers in the Prosecutor[18] and the management of the situations under investigation are unavoidable aspects of any assessment of the ICC's performance. Indeed, there are frequent accusations that the ICC pursues a model of "political, selective and biased"[19] justice and is marked by a set of "deadly sins" [Guerreiro 2012:36-42] that it is unable to fix and that compromise its credibility. At the same time, the Hague-based court is also confronted with the low number of convictions[20], the frustration of expectations[21] and the high costs that a court of this nature entails[22], especially when compared with past experiences, like the United Nations War Crimes Commission (UNCGC)[23].

However, it is still important to point out that, in a review of the last 20 years of the ICC's activity, the court has assumed three sorts of roles in which it has achieved positive results for international law at the global level, although with less public perception and recognition: a *legal role* (by modifying and defining the scope of norms of international law), a *social role* (because it tends to raise awareness regarding the matters and cases it investigates) and a *role of influence* (due to the importance that the application of the legal solutions provided for in the Rome Statute to an increasing number of States has in affirming the rule of Law and in deterring potential perpetrators of serious human rights violations) [Direitos Humanos... 2022:664].

4. ICC's influence on the status of "core crimes"

In the material field, one of the most controversial aspects and which from an early age sparked heated discussion as to the scope of the court's action

[14] Like Guinea-Bissau, Mozambique and Sao Tome and Principe. See: [Guerreiro 2012:46].

[15] About the legal nature of the ICC and the features that make it an international organisation rather than the judicial body of an international organisation, see: [The Rome Statute...2016:103-104].

[16] Therefore, its activity does not go beyond the purposes to which each of the States Parties to the Rome Statute submits itself, nor to which they are already bound by international law. See: [The Legislative History...2016:132].

[17] In particular, with regard to the follow-up by the General Assembly and the possibility that the Security Council can refer or defer investigations, even though three of its five permanent members are not parties to the Rome Statute but can interfere in the ICC's activity. See: [Schmitt 2019:VI].

[18] Evidence that allows the Prosecutor to make decisions about opening or closing cases without having to substantiate them in detail, which casts doubt on "political pressures", as seen in the situation in Palestine. See: [Dugard 2013:563-570].

[19] Ba O. States of Justice Symposium: A Response. – *Opinio Juris.* August 21, 2020. URL: http://opiniojuris.org/2020/08/21/states-of-justice-symposium-a-response/ (accessed 10.01.2023).

[20] As of 1 January 2023, the ICC has recorded five convictions and 11 acquittals or dismissals of cases.

[21] As was the case of Kenya after the cases against former President Uhuru Kenyatta and then Deputy President William Ruto were dropped, which suggests that the decision not to prosecute was politically motivated. See: [Bassiouni 2015:101].

[22] Ensuring the functioning of the ICC in the calendar year 2022 required a budgeted amount of 154,8 million euros. ICC: Resolution of the Assembly of States Parties on the proposed programme budget for 2022, the Working Capital Fund for 2022, the scale of assessment for the apportionment of expenses of the International Criminal Court, financing appropriations for 2022 and the Contingency Fund. December 9, 2021. P. 1. URL: https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP20/ICC-ASP-20-Res1-AV-ENG.pdf (accessed 10.01.2023).

[23] The UNCGC is given as the best example of cost/efficiency that International Criminal Justice has had since the beginning of the twentieth century, since, at the end of its six years of activity (1943-1948), it recorded operational costs slightly higher than 2 million euros (current values) and handled 8,178 cases, which ranged in duration from four days to six weeks. See: [Plesch, Sattler 2014:446-447].

concerns the irrelevance of official capacity for the purposes of exercising the ICC's jurisdiction over a person, under Article 27 of the Rome Statute. Hence, the case *Al Bashir* set out on an ambitious path that not only departs from a customary norm (immunity *ratione personae* of Heads of State and government), but takes advantage of a putative vertical relationship that the Security Council unilaterally produced to impose treaty norms on a State that voluntarily intended not to be a party to the Rome Statute. In fact, as an international organization, the ICC depends on the voluntary accession of States to be able to impose duties on them, to the extent that relations with third States are subject to the norm *pacta tertiis nec nocent nec prosunt,* which is customary in nature [Klabbers 2001:243, Proelss 2018:657].

Although the application of the Rome Statute to a Non-Party State against its express will is worthy of reflection [The Rome Statute...2016:1042], it is important to underline that the States that ratify it expressly waive the immunities of their representatives. This evidence does not mean, however, that Article 27(2) of the Statute declares a norm of customary law, being rather an obligation *erga omnes partes,* which is similar in nature to a "material breach of a multilateral treaty" provided for in article 60(2) of the *Vienna Convention on the Law of Treaties* (VCLT) [Chow 2021:469].

At the same time, the increasing criminalisation in national legal systems of the four most serious international crimes as defined in the Rome Statute favours the conviction that these offences are not limited to highlighting "the most serious crimes with international scope" ("core crimes")[24], but rather favour their affirmation as international *jus cogens* crimes" [Bassiouni 2013:34-35][25]. The demonstration of a common will of a significant majority of States so that the aforementioned offenses never cease to be prosecuted marks the difference between "core crimes" and general international crimes ("treaty based crimes")[Gouveia 2008:269, Cassese 2003:23-25, Bassiouni 2013:144-145], which are established in over 200 conventions – also called *suppression conventions* – covering particular aspects of criminal actions that may manifest itself transnationally, like drug trafficking, terrorism and torture [Ambos 2014:223, 272].

Here, it is imperative to emphasize that *jus cogens* crimes are those that result from violations of *jus cogens* norms and affect the interests of humanity as a whole by constituting a threat to peace and security and by shocking the human conscience by action or omission of the State [Bassiouni 2008:176], thereby generating obligations *erga omnes* [Meron 2006:137, Baptista 1998:177, Guerreiro 2021:39, 129]. An indication that an international crime may have such special characteristics as to enable it to be recognized as an international *jus cogens* crime results from the evolution of the approach of States to such offences, both as part of a community and as individuals [Bassiouni 2008:242-244].

The instruments of treaty law in which a particular conduct is recognized as a crime with special characteristics and the consequent number of accessions by States are important elements that contribute to the elevation of an international crime to jus cogens status. This conviction can additionally be reinforced by the individual involvement of a significant number of states in the process of criminalizing these crimes in their respective legal systems[26].

On the basis of these elements, the contribution of the Rome Statute in the manifestation of a common and solid position of a group of states and the dynamics developed individually by State actors to declare four offences as "core crimes" are decisive evidence of the unique value given to the offences over which the ICC exercises its jurisdiction [de Wet 2013:543].

While definitions of genocide and war crimes tend to be relatively consensual and, as a rule, are accompanied by norms of domestic law that transpose them, a general position regarding the prediction and autonomisation of crimes of aggression and crimes against humanity is still encountering resistance from some States. The crime of aggression, because it is a conduct prohibited by a *jus cogens* norm, is not perceived by a significant number of States as sufficient to generate an obligation to incorporate an incriminating norm in their legal system. Take, for example, the ILC's conclusion that "half or even the

[24] Article 1 of the Rome Statute.

[25] UN General Assembly International Law Commission: Report of the International Law Commission – Sixty-third session (26 April-3 June and 4 July-12 August 2011). New York: United Nations. 2011. P. 273-274.

[26] UN General Assembly International Law Commission: Report of the International Law Commission – Seventy-first session (29 April-7 June and 8 July-9 August 2019). New York: United Nations. 2019. P. 170.

majority of States had no statute on crimes prohibited by *jus cogens*"[27].

The growing autonomous classification of a body of crimes against humanity has been crucial in countering the notion still present in some States that provisions punishing common offences can simultaneously sanction crimes against humanity. As an example, the Criminal Code of Kazakhstan particularizes crimes against peace and security of humanity in a separate chapter that typifies international *jus cogens* crimes. However, almost all conducts that constitute crimes against humanity under international law are dispersed as traditional crimes, and can be excluded from the rule of non-applicability of statute of limitations as well as from the exercise of universal jurisdiction, unlike others [Sayapin 2020:4-5]. This approach runs counter to the tendency of affirming the autonomisation of these crimes that was highlighted in the ILC's *Draft articles on Prevention and Punishment of Crimes Against Humanity* and whose wording defining illicit conduct is almost *verbatim* the text of the Rome Statute[28].

5. Western attempts to enforce values and norms enshrined in domestic criminal law instruments to third States

The emergence of the so-called third-generation civil wars – as those whose primary objective is to persecute, terrorize and conduct hostilities on the part of a community with a view to eliminating an opposing community, thus assuming this reality of civil wars, a purely ethnic component – has triggered in several States the need to act with the non-lethal means at their disposal [Domestici-Met 1999:277-301].

It was in this context that there was an attempt by certain States, primarily European, to extend the exercise of their criminal jurisdiction beyond borders and to go beyond what are the limits established between States regarding the exercise of their criminal action. Indeed, throughout the 1990s, judicial authorities in Spain, Belgium, Denmark, France, Germany, the Netherlands, Switzerland and the United Kingdom issued arrest warrants for crimes over which they had no personal or territorial connection [Benavides 2001:27].

As we shall see, in some of these cases the fulfilment of obligations *erga omnes* has been invoked as an express recognition by the international community that certain norms of international law, identified from customary international law, occupy such a decisive place for the effectiveness and functioning of the entire system that they cannot be contradicted even if an isolated group of States expressly choose to do so. This issue is also seen in the direct applicability and effects of *jus cogens* norms in the domestic law of each State, with the consequent invalidity of norms issued by the States themselves for strictly domestic application when they conflict with *jus cogens* norms [Gaja 1981:283, Christenson 1988:599, Baptista 1998:549-558]. *Jus cogens* norms therefore impose obligations *erga omnes* that bind all States to comply with them in relation to all other States – in the same way that when an obligation *erga omnes* is violated, all States must feel affected by the breach of that obligation [Dupuy 1999:373] – but they prevent the exercise of actions aimed at ensuring unilateral compliance by States based on their own view of each of the circumstances in the territory of a third party [Guerreiro 2021:223-224].

The confrontation between how to comply with obligations *erga omnes* obligations and the internal jurisdictions of each state has occupied a unique space in international law without bringing substantive results that regulate in detail all the specificities arising from this reality. Nevertheless, over the past 100 years, it has been possible to identify the position of international law on some aspects of international responsibility. Already in the twenty-first century, in the framework of the case *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal),* decided in 2012, the ICJ decided that "any State party to the Convention [Against Torture] may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes* [...] and to bring that failure to an end"[29].

[27] UN General Assembly International Law Commission: Report of the International Law Commission – Seventieth session (30 April-1 June and 2 July-10 August 2018). New York: United Nations. 2018. P. 235.

[28] UN General Assembly International Law Commission: Report of the International Law Commission – Seventy-first session (29 April-7 June and 8 July-9 August 2019). New York: United Nations. 2019. P. 11.

[29] International Court of Justice: Case concerning Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal). Judgment of 20 July 2012 (hereinafter Belgium v. Senegal). P. 450. URL: https://www.icj-cij.org/public/files/case-related/144/144-20120720-JUD-01-00-EN.pdf (accessed 10.01.2023).

Although the reference in this case was not to obligations *erga omnes* – those recognised by customary international law – but to obligations *erga omnes partes* – relating to multilateral treaties, the ICJ insisted on the same interpretation given 42 years earlier, being consistent with the position it had already expressed in 1970. It is also worth noting the ILC's reference to obligations to "the international community as a whole" in *Draft articles on Responsibility of States for Internationally Wrongful Acts,* specifically Articles 25(1)(b) and 48(1)(b), which is clearly inspired by the ICJ's reference to obligations *erga omnes* in the case *Barcelona Traction*[30]. In short, the actuality of the expression is a demonstration of international legal and political practice.

In this context, the question arises whether the recognition of an obligation *erga omnes* confers on any State the right to take the necessary measures to put an end to a possible breach of that obligation. The question generates controversy and there are, among the doctrine, those who speak in the affirmative in the answer to this question, not only calling into question the existence of obligations *erga omnes,* as we have seen previously, but also claiming that obligations to the international community that result from general international law confer on States "the capacity to protect victims of violations regardless of their nationality", while obligations *erga omnes partes* no longer confer this right [International Law...2003:99-100].

However, it is important to highlight that obligations owed to the international community as a whole do not *per se* mean the right to ensure their fulfilment and to cease their violation unilaterally without, at the very least, formal recognition by the international community that a particular situation qualifies as an obligation [Guerreiro 2021:229]. After all, the ICJ and the ILC recognised the existence of an obligation, they did not recognise a right of all States to interfere in a third State by adopting unilateral measures against the latter.

In the case *Barcelona Traction,* for example, the ICJ highlighted that "on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such human rights irrespective of their nationality"[31]. This conclusion thus recognizes the importance of States to not take unilateral actions based on apparently noble motivations and compliance with what they consider to be International Humanitarian Law, otherwise they themselves will contribute to international tension and to a *status quo* of unilateralism that is impossible to establish limits and capable of enhancing interference campaigns [The legal nature... 2022:19].

The same conclusion can be drawn from the case *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* in which the United States justified its support for the Nicaraguan armed opposition on the grounds that the Sandinista Government had not fulfilled its commitments to the OAS[32] and violated human rights[33]. Even admitting the hypothesis that the factual allegations presented by the US correspond to reality, the ICJ condemned the use of force against Nicaragua, considering that it "could not be the appropriate method to monitor or ensure such respect" for Human Rights, and that it was not "a legal justification for the conduct of the United States"[34].

Some 26 years after that decision, the ICJ, in the case *Belgium v. Senegal,* ruled in a similar vein again, recognizing, as mentioned above, that the common interest in complying with the obligations provided for in the *Convention Against Torture* grants each State party to this instrument the right to demand the cessation of the violation by another State party[35]. There is therefore a right to demand that the necessary measures be taken to prevent a continuing breach of an obligation *erga omnes* (*partes* or not), but there is no unilateral right to recognise such a breach and to take measures involving the exercise of unilateral interference.

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[30] UN General Assembly International Law Commission: Report of the International Law Commission on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001). – *Yearbook of the International Law Commission – 2001. Vol. II. Part II.* New York: United Nations. 2001. P. 83-84, 127.

[31] International Court of Justice: Case concerning Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain). Judgment of 5 February 1970 (hereinafter Belgium v. Spain). P. 47. URL: https://www.icj-cij.org/public/files/case-related/50/050-19700205-JUD-01-00-EN.pdf (accessed 10.01.2023).

[32] International Court of Justice: Case concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America). Judgment of 27 June 1986. P. 120. URL: https://www.icj-cij.org/public/files/case-related/70/070-19860627-JUD-01-00-EN.pdf (accessed 15.05.2023)

[33] Ibidem. P. 134.

[34] Ibidem. P. 134-135.

[35] Belgium v. Senegal. P. 450.

In the present case, it seems irrelevant to discuss whether we are dealing with obligations *erga omnes* or obligations *erga omnes partes,* since torture, being a violation of Human Rights seriously repudiated by the international community as a whole, is part of customary international law. It should be recalled, however, that the recognition of the legality of third-party countermeasures for infringement of community interests does not merit the approval of a considerable number of States, but is the subject of reservations able to compromise the lawfulness of unilateral actions with a view to ensuring compliance with obligations *erga omnes* [Paulus 2012:101-102].

The same understanding is confirmed, for example, by Articles 40 and 41 of the *Draft articles on Responsibility of States for Internationally Wrongful Acts:* the first, by referring the application of the chapter to international responsibility arising from a grave breach by a State of an obligation arising from a peremptory norm of general international law; the second, by encouraging interstate cooperation through peaceful means for the purpose of resolving the serious breach referred to in Article 40. In short, there is a clear incentive for diplomatic means to be privileged[36] and to avoid conducts capable of promoting hostilities and tension, whether at a merely local or transnational level.

6. The territoriality of criminal law

6.1. The concept of "universal jurisdiction"

Prior to the position taken by the ICJ in the above cases, the Permanent Court of International Justice (PCIJ) made an exception to the principle of the exercise of the territorial sovereignty of States. In the 1927 judgment in the case *S. S. Lotus,* the PCIJ found that "the territoriality of criminal law is not an absolute principle of international law and by no means coincides with territorial sovereignty", since "all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them"[37].

The territoriality of criminal law was a crucial aspect to the decision of the dispute between Türkiye and France and contributed to the confirmation, even presently, of the exercise of criminal jurisdiction by a State, beyond the borders of its territory, without such action being unlawful and infringing the sovereignty of States. In effect, it was agreed, on the one hand, that the sovereign equality, without the prevalence of constraints imposed by global powers outside what is established by international law [Guilfoyle 2017:96].

On the other hand, however, while it may be argued to what extent the case *S. S. Lotus* had a nuclear contribution to the emergence and development of a *principle of universal jurisdiction,* it is imperative to consider whether, even if a State may pursue its criminal proceedings against persons of another nationality, that State will lack the legitimacy to do so without an element of affinity established with the State of nationality of those targeted by the criminal proceedings[38]. The case *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* brought some important topics for appreciation around the subject under consideration.

In this dispute, the DRC lodged a complaint against Belgium on the grounds that the authorities of the latter had issued an international arrest warrant against Abdoulaye Yerodia Ndombasi, the Congolese Minister of Foreign Affairs in office, for alleged crimes constituting violations of international humanitarian law[39], on the basis of Article 7 of the Law of 10 February 1999 (on the punishment of serious violations of International Humanitarian Law), which provides that "the Belgian courts shall have jurisdiction over all crimes provided for in this law, regardless of the place where they may have been committed". This provision reflects a principle apparently similar to the *principle of universality* and

[36] The ILC has even suggested that cooperation be done through the UN without making it impossible to resort to non-institutional solutions. UN General Assembly International Law Commission. Report of the International Law Commission on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001). – *Yearbook of the International Law Commission – 2001. Vol. II. Part II.* New York: United Nations. 2001. P. 114.

[37] Permanent Court of International Justice: The Case of the S.S. "Lotus". Series A. No. 10. Judgment of 7 September 1927 (hereinafter SS Lotus). P. 20. URL: https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_A/A_10/30_Lotus_Arret.pdf (accessed 10.01.2023).

[38] SS Lotus. P. 23.

[39] About the charges brought against Abdoulaye Yerodia Ndombasi in the present case, see: International Court of Justice: Case concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium). Application instituting proceedings of 17 October 2000 (hereinafter Democratic Republic of the Congo v. Belgium). P. 3-7. URL: https://www.icj-cij.org/public/files/case-related/121/7081.pdf (accessed 10.01.2023).

which is called *principle of "vicarious administration of Justice",* a notion limited to the European context and inspired by the German tradition which is based on two criteria: the suspect shall be found in the territory of the State that intends to exercise universal jurisdiction and cannot be extradited [Gouveia 2008:244, Benavides 2001:27].

In this case, it should be noted that President [Judge] Gilbert Guillaume pronounced in his separate opinion recalling that in the fight against maritime piracy the universal jurisdiction of States was recognized through customary international law, although he had reserved the exceptionality of this crime because it is carried out on the high seas, that is, outside the territory of all States[40], so there is no predetermined sovereignty[41]. He also added the exercise of universal jurisdiction in the crimes of counterfeiting foreign currency, trafficking narcotic drugs and terrorism, but stressing that legitimacy in all of them arose from the respective conventions concluded between the participating States and also from a set of conditions, among which, the suspects shall be in the territory that triggers the exercise of jurisdiction[42].

A clear majority of the judges who supported a rationale for their position, either by concurring opinion or by dissenting votes, agreed with Judge Guillaume. However, Judges Rosalyn Higgins, Pieter Kooijmans and Thomas Buergenthal held that the existence of a concrete link between the targeted suspect and the State seeking to exercise universal jurisdiction is not justified because they consider that if that State does not attempt to exercise its action in the State where the suspect is located, or impose on third parties the exercise of the same action, this does not affect the sovereignty of other States. Nevertheless, the *troika* demanded that certain guarantees should be fulfilled, including suggesting to the State where the agent is located to take criminal action against him[43].

We are, however, as these last judges have pointed out, before an obligation of States created exceptionally by treaty or convention – with the aim of punishing crimes committed in the present and repressing a concrete threat against humanity for the future – and not a right arising from an abstract basis with an apparently customary nature[44]. It is essential to define this aspect in such a way as to set limits to more ambitious impulses of States driven by political agendas and cultural values specifically suited to arouse them some kind of *judicial activism* able to compromise international stability and peace. In the end, the case *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium*) marked the pull back from a romanticized position and with reinforced legitimacy from the judgment of Adolf Eichmann in the sense that it was a necessary and justified response to extraordinary circumstances, thus denying the "hegemonic control of the moralistic position" and the possibility of an exceptional situation setting a precedent [O'Sullivan 2017:198].

As we have seen, the *principle of universal jurisdiction* calls into question the exercise of criminal action by States beyond their traditional *locus* of jurisdiction when crimes are so serious that they shock humankind, regardless of where they take place and against whom they are committed, and therefore a reaction from the international community is required. However, it is important to note that, on the basis of ICJ jurisprudence, State practice and *opinio juris,* there is broad acceptance that international law contemplates the exercise of extraterritorial jurisdiction by States, at least when there is a connecting factor with the State that intends to pursue its criminal action.

On the other hand, not only there is no understanding, treaty or custom, but the overall position is admittedly conservative as to the existence of a purported generic duty or obligation of States to prosecute and prosecute such crimes with which they have

[40] Democratic Republic of the Congo v. Belgium. Judgment of 14 February 2002. Separate opinion of President Guillaume (English Original Text). P. 37-38. URL: https://www.icj-cij.org/public/files/case-related/121/121-20020214-JUD-01-01-EN.pdf (accessed 10.01.2023).

[41] Democratic Republic of the Congo v. Belgium. Judgment of 14 February 2002. Declaration of Judge Ranjeva (translation). P. 56. URL: https://www.icj-cij.org/public/files/case-related/121/121-20020214-JUD-01-03-EN.pdf (accessed 10.01.2023).

[42] Democratic Republic of the Congo v. Belgium. Judgment of 14 February 2002: Separate opinion of President Guillaume (English Original Text). P. 38-40.

[43] Democratic Republic of the Congo v. Belgium. Judgment of 14 February 2002. Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal. P. 80-81. URL: https://www.icj-cij.org/public/files/case-related/121/121-20020214-JUD-01-05-EN.pdf (accessed 10.01.2023).

[44] Ibid. P. 75-76.

no direct connection. Even in the face of jus cogens crimes, the uncontested understanding among the international community is to accept the prosecution carried by a State for acts occurring abroad when the suspect is in its territory, the crime is typified in its legal system and it is not possible or there is no willingness to prosecute the suspect by his State of origin, and interstate cooperation is compromised.

In this context, the competence of States is thus subsidiary, since there is an obligation *erga omnes* to prosecute when impunity is to be avoided, and it is in this spirit that the competence of the ICC has been defined. Take, for example, the fifth and sixth paragraphs of the Rome Statute, where this idea is reaffirmed, and also its Article 1, a provision in which the principle of complementarity of the court can be found. In the case *S. S. Lotus,* crimes recognized by the legal systems of practically all sovereign States, such as murder, were at issue. Even if it were a question of murder, there would be no enabling rule justifying Türkiye's prosecution without a territorial or nationality element in the case at hand. In *jus cogens* crimes, this solution is already debatable, since the duty to prosecute these crimes may arise, at least, from a source of conventional international law – initiatives that would be justified in the most serious crimes and not in traditional crime.

No matter how noble it may sound to a group of States, particularly those that compose the Western bloc, to speak of a principle of universal jurisdiction in *jus cogens* crimes must require caution in the approach to be adopted. On the one hand, it is somewhat strange that in the case *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* some of the judges took the view that only the crime of maritime piracy met the necessary requirements for the application of that principle and only when it took place under specific conditions. In fact – it seems a manifestly reductive perspective to support – at least in 2002, the year in which the ICJ delivered its judgment – a thesis that bureaucratizes and almost makes it impossible to prosecute the most serious crimes affecting the international community, by making it dependent on the presence of the suspect in the territory of the State that demonstrates willingness to prosecute such crimes.

In this context, it is important to recall that Judges Abdul Koroma and Christine van den Wyngaert already admitted at the time that other crimes could fall under the concept of *universal jurisdiction,* namely war crimes and crimes against humanity[45]. Twenty years on, to establish the same reservations constitutes a denial of the whole system set out to address impunity in an era when threats are transversal and threats to international peace and security are succeeding each other and with increasing sophistication.

However, we cannot avoid drawing attention to the risks of sponsoring a thesis in favour of a *principle of universal jurisdiction* in its raw state which recognises the lawfulness and *ab initio* legality of unilateral proceedings for the arrest and trial of persons who are not its nationals or who have committed acts against persons of its nationality and are not present nor have even committed acts on its territory[46]. In practice, such States would *de facto* end up assuming a central position in the international order and hierarchical superiority over third parties, which would *per se* violate the principle of sovereign equality.

In the case *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium),* Judge Christine van den Wyngaert advocated that the legality of universal jurisdiction provided that the State wishing to exercise it did not do so by seeking to impose its authority beyond its territory, since "prescriptive jurisdiction" was at issue[47]. Although we agree with this position, we must point out that this rule, however, remains dependent on customary international law or on a specific convention, and cannot be decided by each State from an abstract scenario and if international law does not expressly prohibit it. In the end, *prescriptive jurisdiction* is understood as the power of a State to legislate on a certain matter based on territoriality and nationality, in the exercise of its

[45] Democratic Republic of the Congo v. Belgium. Judgment of 14 February 2002. Separate opinion of Judge Koroma. P. 61-62. URL: https://www.icj-cij.org/public/files/case-related/121/121-20020214-JUD-01-04-EN.pdf (accessed 10.01.2023); Democratic Republic of the Congo v. Belgium. Judgment of 14 February 2002. Dissenting opinion of Judge ad hoc Van den Wyngaert (English original text). P. 169-175. URL: https://www.icj-cij.org/public/files/case-related/121/121-20020214-JUD-01-09-EN.pdf (accessed 10.01. 2023).

[46] Unilateral because its legitimacy does not derive from any authorization or provision of an international organization or instrument.

[47] Democratic Republic of the Congo v. Belgium. Judgment of 14 February 2002. Dissenting opinion of Judge ad hoc Van den Wyngaert (English original text). P. 168.

sovereignty, while *executive jurisdiction* corresponds to the territorial limit of the exercise of executive power by the State [Mills 2014:195-196].

All in all, despite the suggestion of differentiation between *prescriptive jurisdiction* and *executive jurisdiction,* the issue, as we have seen, cannot be reduced to the mere recognition of the legality of the exercise of universal jurisdiction if a State does not attempt to conduct it in the territory of the targeted State, as Judge van den Wyngaert suggested. At issue is not only a mere discussion of prescriptive jurisdiction, but also of deterring States from embarking on campaigns based on an abusive and arbitrary exercise of their sovereign powers, and any campaign sustained in universal jurisdiction must be based on an explicit international permissive rule.

6.2. Universal jurisdiction through the ICC

The previously analysed reality assumes greater proportions and raises more questions if one considers the possibility of carrying out abstract evaluations motivated by political issues. Moreover, in concrete terms, it is relevant to refer to the conflict between Africa (which in recent years extended to countries on other continents) and the ICC, whose activity is guided by a *principle of selective justice,* according to which only some cases, some crimes and some individuals can be investigated by the court, which makes its justice a justice that can be classified as biased and based on avoidable double standards [Guerreiro 2012:36-43].

The situation in Darfur (Sudan), which initially merited a brief and general unanimous position by the Security Council[48], quickly generated criticism and divided this UN body over the possibility of a violation of Sudanese sovereignty[49]. Some criticism was also registered in the process of adopting Resolution 1593 (2005) of 31 March, which referred the situation in Darfur to the ICC and in which dual criteria could be a reality at the same time that some States that are not parties to the Rome Statute – and have strongly and clearly expressed not to be parties to it – voted in favour of an instrument that would most likely be blocked by these States if a proposal on the same terms were ever formalised against each of them.

Indeed, the United States, China and Algeria abstained in the vote on the activity of a court to which they were not parties; the Russian Federation was not and still does not intend to be a party to the Rome Statute, but voted in favour of the Resolution referring Sudan to the ICC, as did the Philippines and Japan, States which were not parties to the Rome Statute at the time; and Brazil took an extremely critical stance on the Resolution, criticizing the admissibility of concluding bilateral non-surrender agreements under Article 98(2) of the Rome Statute and stressing the possibility that the Security Council could interfere in the work of the ICC, which would call into question its impartiality[50].

Just as the same Resolution that revealed the concern and condemnation of States in the face of violations of human rights and International Humanitarian Law was the same that granted immunity from ICC jurisdiction to nationals of other States operating in Sudan[51], it is also unacceptable that Ukraine concludes agreements with the ICC in order to allow the latter to investigate only crimes allegedly committed by persons related with the Russian Federation and both the Donetsk and Lugansk People's Republics and, simultaneously, instruct the "cabinet of ministers of Ukraine and the office of the Prosecutor General of Ukraine [to] gather necessary materials and proper evidence base"[52].

This evidence has already been recognized and lamented by the United Nations Office of the High Commissioner for Human Rights[53] and only attests to the weaknesses of the conventional and condi-

[48] Through the adoption by unanimity of Resolution 1547 (2004) of 11 June, paragraph 6 of which calls upon the parties to the conflict to use their influence and promote a cessation of fighting in the Darfur region. UN Security Council: 4988th meeting. June 11, 2004. P. 2. URL: https://digitallibrary.un.org/record/523203/files/S_PV.4988-EN.pdf?ln=en (accessed 10.01. 2023).

[49] In particular, Algeria and Pakistan stressed the need to respect the independence, sovereignty, unity and territorial integrity of Sudan. UN Security Council: 5040th meeting. September 18, 2004. P. 3, 7. URL: https://digitallibrary.un.org/record/530562/files/S_PV.5040-EN.pdf?ln=en (accessed 10.01.2023).

[50] UN Security Council: 5158th meeting. March 31, 2005. URL: https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/PV.5158&Lang=E (accessed 10.01.2023).

[51] Point 6 of Resolution 1593 (2005), of 31 March.

[52] ICC: Resolution of the Verkhovna Rada of Ukraine. February 4, 2015. URL: https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine (accessed 10.01.2023).

[53] United Nations Human Rights Office of the High Commissioner: Report on the human rights situation in Ukraine, 1 February – 31 July 2022. September 27, 2022. P. 31. URL: https://www.ohchr.org/sites/default/files/documents/countries/ua/2022-09-23/ReportUkraine-1Feb-31Jul2022-en.pdf (accessed 10.01.2023).

tional application of the Rome Statute depending on the willingness of States, as is the case with regard to Ukraine in the controversy that opposes it to the Russian Federation and outside of what is the customary nature inherent to treaties. For these reasons, the US has condemned the ICC exercising its jurisdiction over States that have chosen not to be parties to the Rome Statute, claiming that such actions violate "the essence of the nature of sovereignty" insofar as it is a court whose jurisdiction depends on the accession of States, a position categorically shared by China[54].

6.3. Universal jurisdiction and State sovereignty

The reservations expressed by the most varied State actors about the ICC's activity in third States demonstrate, not only the rejection of the jurisdiction of this judicial body for formal or procedural purposes, but also the possibility that the facts may deserve different interpretation depending on the socio-cultural specificities of each State, as happened in the case involving former Sudanese President Omar Al Bashir[55].

In this way, there is recognition of certain subjectivity in the interpretation of facts, which may ultimately be motivated by traditional aspects and by differences in the analysis of circumstances and the situation on the ground. At the end of the day, the lack of clarity around the powers of a court whose jurisdiction derives from treaty law and is based on the *principle of complementarity* is to be criticized, while interpreting as *unwillingness to judge* (from Sudan) the fact that an investigation has not been formally opened against Omar Al Bashir and ignoring the Sudanese motivations for this decision. There is therefore clear interference from the ICC and States pushing Sudan to cooperate with the court against the Sudanese sovereign powers and to impose on African States and Sudan a specific interpretation of politically and culturally inspired factuality.

Thus, the fact that there is no uniform view on many controversial aspects related to the activity of the ICC, such as the question of the immunity of the Heads of State or Government in office [Pedretti 2015:225-226][56], allows us to conclude that the humankind faces a court with a strong potential to be used as an instrument of interference and violation of the sovereignty of States that do not want to be parties to the Rome Statute. We are therefore in the context of the absence of legitimacy or consent.

Although States such as Ukraine, Russia, China or the United States are UN Member States and are bound to comply with Security Council decisions, it is important to note that the ICC has its origin in the Rome Statute, which means that it is a treaty and not a Security Council Resolution with binding effects on all Member States. In fact, it is not a coincidence that Georgia ratified the Rome Statute on 5 September 2003, hence agreeing to submit to the rules prescribed in this treaty. The principle *pacta tertiis nec nocent nec prosunt,* also codified in Article 34 of the VCLT, must therefore prevail [Skuratova 2016:134][57]. Thus, if a treaty does not create obligations or rights for a third State without its consent, including those provided for in the Rome Statute[58], accepting as a solution that the Security Council can use its powers to impose treaty obligations would be nothing more than consenting to a violation of this important customary principle.

This could lead, firstly, to a situation of indirect hierarchy between the Security Council and the ICC, in which the latter would emerge as a subsidiary or-

[54] UN Security Council: 5158th meeting. P. 3, 5; UN Security Council: 5423rd meeting. April 25, 2006. P. 2-3. URL: https://digitallibrary.un.org/record/573617/files/S_PV.5423-EN.pdf?ln=en (accessed 10.01.2023).

[55] As a result of the various Resolutions of the African Union Assembly, several States have suggested that Omar Al Bashir should be tried by Sudanese courts.

[56] On this sense, see UN General Assembly International Law Commission, Report of the International Law Commission, Official Records: Sixty-fifth session (6 May-7 June and 8 July-9 August 2013) – Supplement No. 10. New York: United Nations. 2013. P. 43-44; UN General Assembly International Law Commission, Report of the International Law Commission, Official Records: Sixty-seventh session (4 May-5 June and 6 July-7 August 2015) – Supplement No. 10. New York: United Nations. 2015. P. 121; Assembly of the African Union: Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC): Thirteenth Ordinary Session, Sirte. 1-3 July 2009. Para. 10. URL: https://au.int/sites/default/files/decisions/9560-assembly_en_1_3_july_2009_auc_thirteenth_ordinary_session_decisions_declarations_message_congratulations_motion_0.pdf (accessed 10.01.2023).

[57] The same principle is also embodied in principle 9 of the *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations.* UN General Assembly International Law Commission, *Yearbook of the International Law Commission – 2006*. Vol. II. Part. 2. New York: United Nations. 2013. P. 161, 165.

[58] As recognized by the ICC itself. International Criminal Court – Pre-Trial Chamber II. Situation in Darfur, Sudan: in the case of The Prosecutor v. Omar Hassan Ahmad al-Bashir. July 6, 2017. P. 30. URL: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_04402.PDF (accessed 10.01.2023).

gan of the former, a risk that the States parties expressly rejected during the negotiating process of the Rome Statute [The Rome Statute...2002:573]. On the other hand, it could allow 15 States to take advantage of their Security Council status to impose, in the abstract, any instrument of treaty law on the 193 UN Member States. Such a possibility would be able to contradict the customary concept of a treaty which implies the voluntary and express accession of States, so that the delimitation of the addressees of the so-called norm *juris cogentis* apparently implicit in the Charter of the United Nations, would always have to be carried out by voluntary criteria of ratification, under penalty of violating its nature of public order and endangering the protection of the underlying interest [Baptista 1997:356-359].

The hypothesis would become even more abusive and bizarre when it is noted that, in the case of the ICC, three of the five permanent members are not even parties to the Rome Statute. Such a solution would be unacceptable and abusive, since, we insist on the idea, the Security Council has no competence to enforce a treaty on a State that has decided not to be a party to it, since an organ of an international organization and constituted by the treaty establishing the constitutional framework of the UN is subject to certain constitutional limitations, regardless of how broad its powers are under that constitution, so that such powers not only cannot go beyond the limits of the jurisdiction of the organization, as they are subject to other specific limitations which in no way allow us to infer from the text or spirit of the Charter that the action of the Security Council can be *legibus solutus*[59].

Furthermore, during the ICC "Preparatory Works", Germany formulated the proposal favouring the incorporation of the *principle of universal jurisdiction* into the treaty when the crimes provided for in Article 5 of the Rome Statute were at stake, with the aim that the ICC would assume the same contracting capacity as the States and replace them, since it would be facing a set of crimes whose combat is in the interest of the humankind. As expected, the German proposal attracted the support of other States and NGOs, since the dependence on ratification could dissuade accession to the Rome Statute, as it turned out [Williams 2000:544]. Nevertheless, the German proposal was ultimately rejected, including by the US, which declared that the legalization of universal jurisdiction through a treaty was illegal as it constituted an attempt to bind non-party States to the terms of a treaty [Scharf 2000:213-230, Morris 2001:350-351].

At the same time, it should be noted that the Rome Statute itself admits the celebration of special agreements with a view to the non-surrender of individuals to the ICC, under Article 98(2) of the Rome Statute, which has been part of a set of combined strategies to prevent the exercise of the court's jurisdiction over nationals of Non-party States [Werner 2007:344-345]. In essence, the Rome Statute contemplates the possibility of nullifying its purposes in view of the individual political interests of the States involved and not of the commission of the most serious crimes against international law.

The US alone has concluded at least 96 Non-Surrender Agreements with as many States[60], in addition to the natural application of the conditions provided for in the 2002 American Service-Members' Protection Act to the other 29 NATO allies as well as to other countries to which the USA is a privileged military ally. Of course, this instrument allows certain States to conclude agreements that are financially, politically and militarily favourable to States Parties to the Rome Statute and thus ensure the legality of their non-cooperation with the court – while the remaining non-party States would continue to benefit from a privileged status that would only make them cooperate with the ICC if and as they see fit[61].

7. The obligation to settle international disputes by peaceful means

Delimited the scope of the exercise of criminal action by States and international jurisdictions and admitting that recourse to actions of a criminal nature based on non-universalized standards are more likely to contribute to the aggravation of tension than to the resolution of the dispute, States have the duty to settle international disputes by peaceful means, un-

[59] International Criminal Tribunal for the former Yugoslavia: Prosecutor v. Dusko Tadic a/k/a "DULE". Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction. October 2, 1995. Para. 28. URL: https://www.icty.org/x/cases/tadic/acdec/en/51002.htm (accessed 10.01.2023).

[60] See: International Criminal Court - Article 98 Agreements. URL: https://guides.ll.georgetown.edu/c.php?g=363527&p=2456099 (accessed 10.01.2023).

[61] Since any act of jurisdiction of the ICC would always be dependent on the application of Article 98(1) of the Rome Statute.

der article 2(3) of the UN Charter, principle that creates a legal obligation [The Charter...2012:189-190] and is supported by the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*[62]. In this context, States are recognized as having the right to invoke the responsibility of another State in breach of an obligation owed to the international community as a whole[63], with a view to demanding cessation of the breach and guarantees of non-recurrence of the wrongful act, as well as the obligation to make reparation for the damage caused[64].

We support, on the one hand, the opinion that international crimes that achieve the quality of *jus cogens* constitute obligations *erga omnes* [Bassiouni 2008:63-74]. However, we do not follow the conclusion that, because there are obligations *erga omnes* arising from the verification of *jus cogens* crimes, interference is not an option of States, but corresponds to a duty that all should pursue under penalty of such norms, especially crimes, losing the imperative character of international law that elevates them to the top of the hierarchy of norms and guarantees their non-derogable nature [Bassiouni 2008:172-174, 176].

In effect, the adoption of unilateral countermeasures and the attempt to impose international treaties in order to sanction citizens of a third State constitute violations of the Charter of the United Nations, in particular of the *principles of non-intervention, sovereign equality and peaceful settlement of international disputes.* In the event of a violation of a legal obligation, the fulfilment of an obligation, whether *erga omnes* or not, and its redress cannot be achieved by means that are likely to, at the very least, affect international peace and security, such as referrals to the ICC, the exercise of the *principle of universal jurisdiction* or the creation of *ad hoc* tribunals outside the UN environment. To accept these solutions would be to go against the goals of guaranteeing international peace and security, on which the entire system is based, through a unilateral and arbitrary duty that would call the international order into question.

8. Final remarks

On the material level, the particular importance that ICC decisions assume should be underlined, inasmuch as they contribute decisively to the standardization of the scope of application of the rules of International Criminal Law. In theory, one of the corollaries of this evidence is the reduction of the chances of each State party to apply the rules in question in a discretionary manner and according to political or ideological agendas [Direitos Humanos...2022:666]. This, however, cannot ignore the need to frame the factuality of each case in a given interpretation of the rules of International Criminal Law, nor can it assuage scepticism about the potential deterrent that international criminal courts have for most States in the commission of international crimes [Bloxham 2006:465-466, Ku, Nzelibe 2006:832].

Symbiosis between the ICC and States parties in the uniform application of the provisions of International Criminal Law is essential to ensure full communion of States with the purposes for which the ICC was established, since failure to implement offences in the domestic legal order would reflect indifference and unwillingness to deter and punish the occurrence of crimes on their territory. Thus, since complementarity is a core element in the implementation of the criminal justice model in the Rome Statute [The Rome Statute...2016:13], the criminalization of international crimes in the domestic legal order[65] – also promoted by the so-called "positive complementarity"[66] – becomes essential to ensure the primacy of the exercise of the jurisdiction of each State in combating the most serious crimes against international law committed in its territory.

Regardless of the shortcomings already identified in the ICC's activity, nevertheless, the adequacy

[62] UNGA Resolution 2625 (XXV).

[63] As is recognized, for example, in Article 48(1) of Draft articles on Responsibility of States for Internationally Wrongful Acts.

[64] Article 48(2).

[65] On the various methods of implementation of the crimes typified in the Rome Statute, see Case Matrix Network. International Criminal Law Guidelines: Implementing the Rome Statute of the International Criminal Court. 2017. P. 21-23. URL: https://www.legal-tools.org/doc/e05157/pdf/ (accessed 10.01.2023).

[66] As Otto Triffterer and Michael Bohlander have pointed out, over the last decade the so-called "positive complementarity" has gained greater relevance, which corresponds to the promotion of strengthening the links between the court and domestic legal orders in order to consolidate the assimilation and the growing commitment of national jurisdictions to the values of International Criminal Law, seeking to adjust the approach of the institutions of each State party to international values and standards. See: [The Rome Statute... 2016:20].

of the exercise of its jurisdiction in accordance with international law is always hostage to the voluntary and unconditional accession of States that freely decide to ratify the Rome Statute. Despite amendments to Ukraine's Constitution in 2016 to make it possible for the ICC to exercise jurisdiction[67], Kiev's motivations raise questions when it is known that the Ukrainian Parliament passed Bill no. 2689, on 20 May 2021, which incorporates into the Criminal Code elements of the Rome Statute, such as the criminal responsibility of hierarchical superiors and the introduction of international crimes, including the crime of aggression, but even today it is awaited promulgation by President Volodymyr Zelenskyy[68].

The motivations of Ukraine, sponsored by the Western bloc, also leave little doubt as to its essentially political nature and not of punishing the perpetrators of core crimes in the country, when it is noted that the governments in office since 1998 have never shown real willingness to ratify the Rome Statute and have only recognized the jurisdiction of the ICC since 2014 on the condition that the court exercises its punitive action only against Russian citizens or Ukrainians who are in any way associated with Moscow.

In this context, three alternatives remain for Ukraine and the Western bloc: to promote, through the Security Council, steps towards the establishment of a special court that sanctions all those responsible for the commission of core crimes in Ukraine, regardless of their nationality; to move forward with domestic investigations targeting all the actors involved, regardless of nationality and offering the guarantees of impartiality deemed necessary; to use the ICJ for the purpose of accountability for non-compliance with international obligations.

Any other solution favouring the application of instruments of treaty law against citizens of third States and against the will of the sovereign bodies of these States is null and void and does not have the same effect as any other Resolution in which the Security Council decides on the basis of the powers conferred upon it by the Charter of Nations. In the end, an international organization acts illegally if it acts for purposes other than those for which it was created in the case of the UN, this organization was not created to impose itself as an international order with the capacity to superimpose its powers and its purposes on any customary norms pre-existing to the Charter of the United Nations [Lusa 2022:283, Schmalenbach 2022:283], so that excess of power generally constitutes a basis for invalidity.

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[67] Amendments concerning the recognition of jurisdiction of the ICC were introduced by Law no. 1401-VIII of 2 June 2016 to Article 124 of the Ukrainian Constitution.

[68] As we can see at the official web site of the Rada. URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=67804 (accessed 10.01.2023).

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About the Author

Alexandre Guerreiro,
Associate Member of the Institute of Political Legal Sciences, School of Law, University of Lisbon

Alameda da Universidade, Lisbon, Portugal, 1649-014

atguerreiro@campus.ul.pt
ORCID: 0000-0002-7000-7190

Информация об авторе

Александр Геррейро,
ассоциированный член Института политико-правовых наук, Юридический факультет, Лиссабонский университета

1649-014, Португалия, Лиссабон, Аламеда да Университдад

atguerreiro@campus.ul.pt
ORCID: 0000-0002-7000-7190