



FACULTY OF SOCIAL SCIENCES

SCHOOL OF LAW

Department of Public Law

Bartholomew Hayden

When is a Treaty not a Treaty?
The Doctrinal Nature of the Rome Statute and the Limits of the
Vienna Convention on the Law of Treaties

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Supervisor

Andres Parmas

Lecturer

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Introduction

The International Criminal Court (ICC) has repeatedly held that the method of interpretation that must be employed when interpreting the Rome Statute is that which is codified in the Vienna Convention on the Law of Treaties (Vienna Convention), specifically articles 31 and 32. At first blush, this approach is rooted in common sense. After all, the Rome Statute is a treaty and the applicable rules of interpretation enshrined within the Vienna Convention apply to all treaties between States,¹ insofar as those treaties are concluded after the entry into force of the Vienna Convention itself.²

In the same guise, the Rome Statute appears to be imbued with recognition of the role that the Vienna Convention plays in treaties constructed, signed, and entered into agreement between states. Article 21, listing the law applicable to the Statute, mandates that the Court shall apply “where appropriate, applicable treaties and the principles and rules of international law”. Whilst the implications of ‘where appropriate’ may cause a conscientious reader to pause, the Rome Statute is a creature of international law, and international lawyers (when confronted with ambiguity or uncertainty concerning the meaning of a provision) are well-versed and justified in preliminary recourse to the principal document governing the art of treaty interpretation.

The Rome Statute, however, operates in a uniquely complex space within international law. It is a treaty, but it is also significantly more than a treaty. In fact, the Rome Statute, as it is interpreted, when it is interpreted, is always being interpreted simultaneously as more than one instrument, save for a select few instances. A tripartite nature is identifiable: the Rome Statute is (1) a multilateral treaty between States; (2) the constituent treaty of an international organisation, constructed for a specific purpose; and (3) a substantive document of criminal code and procedure.³ This multifaceted nature calls into question whether the teleological prescriptions of the interpretative method codified by the Vienna Convention is always appropriate in an analysis of the Statute. As an international treaty, the Statute falls within the interpretative framework of Articles 31, 32, and 33 of the Vienna Convention under ‘the Interpretation of Treaties’ which accords weight to object and purpose considerations; as a

¹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 1.

² Vienna Convention, art 4.

³ Alain Pellet, ‘Chapter 25: Applicable Law’ in Antonio Cassese, Paola Gaeta, John RWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary (Volume I)* (Oxford University Press 2002) 1051, 1054-1055.

criminal code the Statute gives effect to the principle of legality, insisting on strict interpretation and ambiguous provisions being construed to the benefit of the accused; as the constituent treaty of an international organisation, the Statute takes on a constitutional nature containing internal law that is distinct from the framework of general international law. The Rome Statute sits at the intersection of three interpretative traditions that are not always doctrinally aligned. Frequently, when the judges of the ICC interpret the Rome Statute, this gives rise to a plethora of academic discussion over whether the Court has stretched the wording of the treaty too far so as to offend norms in one category in service of another.⁴

The problem that this thesis seeks to examine, then, is whether the Rome Statute is amenable to interpretation using the Vienna Convention. More explicitly, whether the tension generated by this three-limbed nature can be resolved in favour of one of the three normative traditions. In answering this question, the thesis aims to clarify the interpretative hierarchy envisaged by Article 21 in light of the principle of legality espoused in Article 22; to assess the extent to which the Vienna Convention's object and purpose analysis can be harmonised with the principle of legality; and to evaluate whether the implications that follow from the Court's *sui generis* institutional character can assist in clarifying the method of interpretation.

Alternatively, this thesis can be conceived of as a set of logical conclusions built on the foundations of doctrinal traditions:

1. If the Rome Statute is a criminal code, what are the implications of this on its interpretation?
2. If the Rome Statute is a treaty, what are the implications of this on its interpretation?
3. If the Rome Statute is the constituent treaty of an international organisation, what are the implications of this on its interpretation?

The primary methodology employed is doctrinal analysis – with a focus on identifying the corresponding means of interpretation as derived from the normative tradition, and applying this to the Rome Statute. The research proceeds through a close reading of the Statute's text, with particular emphasis on Articles 21 and 22, together with the relevant provisions of the Vienna Convention. Primary sources include the respective treaty texts, travaux préparatoires, ICC jurisprudence, and the decisions of other international courts when relevant to accepted

⁴ Among others, see Jens David Ohlin, Elies van Sliedregt and Thomas Weigend, 'Assessing the Control Theory' (2013) 26 *Leiden Journal of International Law* 725, 726-727; Caleb H Wheeler, 'Human Rights Enforcement at the Borders: International Criminal Court Jurisdiction over the Rohingya Situation' (2019) 17(3) *Journal of International Criminal Justice* 609, 631.

practice. These are supplemented by scholarly commentary on treaty interpretation, international criminal law, and the standards of interpretation applicable to international organisations.

A subordinate methodology employed is normative interpretation. The disparate doctrinal ideas discussed have not necessarily been deployed as a method of interpretation for the Rome Statute, however, contextually within and between other bodies or organisations they are relevant. For example, it is axiomatic that the constituent treaty establishing the European Union has been conceptualised as a constitution for the peoples of Europe and, while acknowledging that the EU and the ICC are different creatures entirely, in an attempt to graft the current knowledge of applicable methods of interpretation of constituent treaties onto the Rome Statute to explore internal coherence and assessments as to what constitutes the ‘rules of the organisation’, comparative insights have been deployed. Importantly, this is not to import foreign doctrine but to illuminate the legal consequences of approaching the Statute as a constituent treaty. By way of a second example, in Chapter 2, the International Court of Justice’s jurisprudence concerning ascertaining the object and purpose of a treaty is explored; this is not done with the intention of making any grandiose statement about whether the ICJ is correct or incorrect, but rather to assess the implications of this same reasoning on a treaty of a different nature.

This raises an intentional omission in the research conducted in furtherance of this thesis. The analysis of doctrinal approaches is both conceptual and normative: conceptual in clarifying the interpretive structure mandated by the Statute and the Vienna Convention, and normative in evaluating how legality constrains permissible interpretative latitude in criminal adjudication. The thesis goes to great lengths to omit, to the degree that it is possible, any allusion to empirical analysis or claims resting on empirical analysis; there is no attempt to catalogue or evaluate instances of interpretative practice before the Court, nor to undertake an empirical assessment of outcomes in specific cases. Where jurisprudence is referenced, it is done so for the sole purpose of illustrating or clarifying doctrinal positions or judicial self-understanding, the focus remains on the normative structure of interpretation rather than judicial behaviour.

Put bluntly, I am not interested in the jurisprudential position on treaty interpretation as considered by the judges of the ICC and statements made are not intended to conclude whether, in the opinion of the author, those decisions or statements were correct or incorrect. The discrete purpose is to assess, when viewing the Rome Statute as written, what the implications of the

nature of this treaty are with regard to its interpretation. Although this may appear short-sighted, this is done for a pertinent reason – throughout the history of the Court’s case law, whenever the ICC has pronounced a judgement, supporters and detractors of the same have discussed individual cases at the granular level that may inform on the veracity of the specific decision in question but get us no closer to a holistic understanding of how the treaty ought to be approached going forward. In addition, there are already a number of works written that engage in an empirical study on the usage of the Vienna Convention methodology to the Rome Statute, there is no value, in my mind, in extending this literature.⁵

As a final note on the methodology employed and the limitations therein, the doctrinal approaches analysed are immense, and separate papers could be (and have been) written on each independent doctrinal approach outside the constraints of their relevance to the Rome Statute. Further, for a number of these approaches, there is no unified agreement within the literature that can be said to dominate discourse or constitute, consistently and holistically, an irrefutable understanding of the doctrine; by way of an example, it is by no means the case that critical opinion is harmonised on the nature of international organisations being constitutional – there are a number of theories such as realism, liberalism, constructivism, functionalism etc. that may, arguably, be more correct. Insofar as is possible, this thesis has engaged the status quo of critical opinion; that is the contemporary, majority position as it stands at the moment.

The thesis proceeds in three chapters. Chapter 1 establishes the pre-eminence of the principle of legality to the Rome Statute, charting the course of the progression of international criminal tribunals from Paris to Rome to demonstrate that, for the purposes of the Rome Statute particularly, judicial flexibility is constrained to an extent not seen in the predecessor institutions. In doing so, the Rome Statute integrates legal positivism into its core by way of establishing a hierarchy of sources and codifying judicial limits. Chapter 2 turns to the Vienna Convention, identifying the primary source of tension being the notion of the ‘object and purpose’ of a treaty and how this teleological turn sits in uneasy tension with proscribed law; focus is particularly directed at the lack of understanding as to what the object and purpose of the Rome Statute is, or at least a perceived lack of understanding when applied. Chapter 3 engages with Article 5 of the Vienna Convention, denoting a functional reservation clause for international organisations, providing that the ‘rules of the organisation’ take precedence when

⁵ See, for example, Stewart Manley, Pardis Tehrani and Raja Rasiah, ‘Mapping Interpretation by the International Criminal Court’ (2023) 36 *Leiden Journal of International Law* 771.

the two norms conflict and what this means for interpretation when considering the Rome Statute.

In doing so, the thesis seeks to illuminate a roadmap for interpretation of this novel Statute, elucidating and de-escalating the innate tensions that arise between an international criminal law treaty and teleological interpretation. By situating the Rome Statute within the conceptual pivot point of criminal codes and constitutive treaties, this thesis contributes to a more coherent understanding of interpretative legitimacy in international criminal law.

1. If the Rome Statute is a Criminal Code

International Criminal Law features prominently in the classical, and contemporary, debate surrounding legal positivism and its limits.⁶ There is no greater prism through which this can be observed than the gradual progression, and delimitation, of positivist ideals through the institution of the major tribunals leading up to the creation of the ICC, namely; the International Military Tribunal (IMT) at Nuremberg, the International Tribunal for the Former Yugoslavia (ICTY) and the International Tribunal for Rwanda (ICTR).

Unlike its predecessors, where legality was acknowledged but not systematically codified, the Rome Statute embeds the tenet *nullum crimen sine lege*⁷ explicitly within the general principles of criminal law, maintaining a formal guarantee of some degree of certainty, foreseeability and specificity in the adjudication of international trials.⁸ So important was the principle of legality to the drafters of the Rome Statute that it found common agreement within the preparatory committee as early as 1996 which provided that “the crimes within the jurisdiction of the Court should be defined with the clarity, precision and specificity required for criminal law in accordance with the principle of legality”.⁹ Taken together, the relevant provisions of the Rome Statute give assurances that the definition of crimes “shall be strictly construed” and that “[i]n the case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted”;¹⁰ that “a person convicted by the Court may be punished only in accordance with this Statute”;¹¹ and that there is an articulated prohibition on retroactivity.¹² These provisions mark a deliberate attempt by the drafters to address criticism levelled at the IMT and the *ad hoc* tribunals for over reliance on customary international law and expansive judicial interpretation.¹³

⁶ Dov Jacobs, ‘International Criminal Law’ in Jörg Kammerhofer and Jean D’Aspremont (eds), *International Legal Positivism in a Post-Modern World* (Cambridge University Press 2014) 451.

⁷ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art 22.

⁸ Dov Jacobs, ‘International Criminal Law’ in Jörg Kammerhofer and Jean D’Aspremont (eds), *International Legal Positivism in a Post-Modern World* (Cambridge University Press 2014) 452-453.

⁹ Preparatory Committee on the Establishment of an International Criminal Court, ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume 1’ (13 September 1996) UN Doc A/51/22, para. 52.

¹⁰ Rome Statute, art 22(2).

¹¹ Rome Statute, art 23.

¹² Rome Statute, art 24.

¹³ HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71(4) Harvard Law Review 593; Lon L. Fuller, ‘Positivism and Fidelity to Law – A Reply to Professor Hart’ (1958) 71(4) Harvard Law Review 630; Gustav Radbruch, ‘Statutory Lawlessness and Supra-Statutory Law’ (1946) 26(1) Oxford Journal of Legal Studies 1; Mia Swart, ‘Judicial Lawmaking at the *ad hoc* Tribunals: The Creative Use of the Sources of International Law and “Adventurous Interpretation”’ (2010) 3 Heidelberg Journal of International Law 459.

This is not to condemn the fundamental and essential work of the *ad hoc* tribunals in pioneering the progressive development of international criminal law, indeed, this was seemingly an aspect of their mandate; however, there is a tacit importance in recognising the distinction between the permissive lawmaking capabilities intentionally and explicitly provided for in the ICTY and the ICTR in comparison to the stringent provisions of the ICC resulting from their constitution and the latter's crystallisation of the principle of legality.

The principle of legality in Article 22 is not merely an expression of criminal justice orthodoxy, but an embodiment of legal positivism within the architecture of the Rome Statute; it seeks to limit the space for judicial discretion by tethering interpretation strictly to the content of the text. This positivist orientation stands in uneasy relation to the interpretive framework of general international law whose imposition in the jurisprudence of international criminal tribunals has been to “apply supra-positive law without admitting it openly... ‘presented’ as if it were positivised in a custom or a general principle of law”.¹⁴

The broad aim of this first chapter is to evidence that the ICL regime recruited and emphasised in the teleological exogenesis of the *ad hoc* tribunals is wholly detached from the circumscribed limits put forward in the Rome Statute. Whilst the ICTY and ICTR were conceived necessarily from a dearth of literature and experience in the administration of justice via an international criminal tribunal, the conception of the Rome Statute was the product of reasoned and considered drafting over a longer period of time, whose foundations as a treaty indicate positivist formations prescribing ‘what the law is’ rather than ‘what the law ought to be’.¹⁵

Whilst it is not the intention of this thesis to engage in a holistic analysis of the contentious debate between positivism and natural law, or either's usefulness in the context of ICL, the notion that the invocation of legality imbues the Rome Statute with a theoretical regime that is at least more positivist than not, is essential to the broader question that the thesis intends to serve in an analysis of the treaty's amenability to interpretation by the Vienna Convention.

To these ends, this chapter will lay the conceptual groundwork for analysing the unique ICL regime implemented by the Rome Statute. It proceeds in three stages. The first section will give a brief overview of classical legal positivist thought, situated through the integration of the principle of legality in Article 22. The second section makes the case that the entry into force

¹⁴ Nuria Pastor Muñoz, ‘Why International Criminal Law Can and Should be Conceived with Supra-Positive Law: The Non-Positivist Nature of International Criminal Legality’ (2023) 17 Criminal Law and Philosophy 381, 389.

¹⁵ HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71(4) Harvard Law Review 593.

of the Rome Statute on 1 July 2002 heralded a ‘regime shift’ in ICL, departing from the framework of its predecessors’ invitation to judges to develop this substantive area of law and, instead, curtailing the interpretive powers in favour of strict legality. The third section examines what the principle of legality means when incorporated into the treaty and highlighting how this structural feature shapes the interpretative tension that animates the remainder of the thesis.

1.1 Legal Positivism – a Utilitarian Doctrine of Interpretation

At its core legal positivism presents the thesis that law, apposite to its prior deontological dogmatic conscriptions, is manifested as a social contract between the hegemonic state, capable of asserting limitless and tyrannical authority, and the otherwise powerless individual engaged in this adversarial relationship. Perhaps more simply, legal positivism can be framed as the notion that what is law and what is not is a matter of social fact, as opposed to its pre-eminent ‘moral thesis’ that emphasises the moral value of law, or the validity of the same predicated on social conscience.¹⁶ Positivism, then, is conceptualised in practical terms as ‘legal formalism’ maintaining that “if law is to govern, it must by virtue of logic guarantee certain outcomes in legal cases”.¹⁷

The earliest conception of the doctrine emerged in John Austin’s *The Province of Jurisprudence Determined*, refining the work of Jeremy Bentham, proposing the accurately termed ‘command theory of law’, that a rule is legally valid in a society only when that rule is commanded by the sovereign in that society and is backed with the threat of sanction.¹⁸ The highly influential Hart-Fuller¹⁹ debate developed a clearer conception of legal positivism as being the relatively simple suggestion of the ‘separability thesis’ which emphasised the utilitarian insistence on the “distinction between law as it is and law as morally it ought to be”.²⁰

This notion of the separation of codified law from utopian conceptions of what law ought to be, imbued with moral discretion, creates a useful starting point, although consigned to being primarily a thesis about legal validity; the supposition from this perspective is that a legally valid rule does not lose its legal standing if it fails to conform to some moral requirement.²¹

¹⁶ Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) 37.

¹⁷ Boštjan M. Zupančič, ‘On Legal Formalism: The Principle of Legality in Criminal Law’ (1981) 27 *Loyola Law Review* 369, 370.

¹⁸ John Austin, *The Province of Jurisprudence Determined* (Cambridge University Press 1995) 166.

¹⁹ HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71(4) *Harvard Law Review* 593; Lon L. Fuller, ‘Positivism and Fidelity to Law – A Reply to Professor Hart’ (1958) 71(4) *Harvard Law Review* 630.

²⁰ HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71(4) *Harvard Law Review* 593, 614.

²¹ Giorgio Pino, ‘Positivism, Legal Validity, and the Separation of Law and Morals’ (2014) 27(2) *Ratio Juris* 190, 194.

Although characterised as a primarily theoretical enterprise, what can be derived from ‘Hartian positivism’ is the invocation, or at least the possibility of, a legal system whose bases are entirely separate from notions of natural justice, creating a system of absolute legal certainty; that “the positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as ‘flawed law’, must yield to justice”.²² Of import, the ‘classical’ positivist position has often been criticised as foolish on account of the necessity of some degree of moral reasoning when interpreting law (statute, treaty or otherwise), but as above, it is relevant that for Hart, and to some extent those before him, this was a theoretical debate about the concept of law.

More importantly for the purposes of this paper, the fundamental tenets of classical legal positivism are relevant: that law is a social enterprise; that in the domestic sphere norms are a determinative source that manifest a power relation (statutes); and that *valid* law is that which stems from a determinative source guaranteeing some degree of foreseeability or certainty.²³ What is meant by legal positivism for our purposes is more akin to what might be termed ‘normative’ or ‘prescriptive’ positivism:²⁴ that “the individuation, interpretation and application of the law should be as much as possible free from moral considerations”.²⁵

The Rome Statute is more concerned with so-called ‘normative’ positivism (hereinafter ‘positivism’) that has significant methodological implications for the interpretation of its provisions emphasising the importance of a codified crime, encapsulated in the verbiage *nullum crimen sine lege*²⁶ and *nulla poena sine lege*.²⁷ The subtext to this recourse to a primary position of strict legality is the claim that, for ICL to be considered a legitimate system of ending impunity and attaining justice for those involved, both victims and the accused, the decisions of those who are charged with interpreting and applying the law must do so without unjustifiable recourse to moral considerations. As Jacobs puts it, “with the recognition of the

²² Gustav Radbruch, ‘Statutory Lawlessness and Supra-Statutory Law’ (2006) 26(1) Oxford Journal of Legal Studies 1, 7.

²³ Stanley L. Paulson, ‘Classical Legal Positivism at Nuremberg’ (1975) 4(2) Philosophy and Public Affairs 132, 133.

²⁴ See generally Bruno Celano, ‘Normative Legal Positivism, Neutrality, and the Rule of Law’ in Jordi Ferrer Beltrán, José Juan Moreso and Diego M. Papayannis (eds), *Neutrality and Theory of Law* (Springer 2013); Neil MacCormick, ‘A Moralistic Case of A-moralistic Law?’ (1985) 20 Valparaíso Law Review 1; Jeremy Waldron, ‘Normative (or Ethical) Positivism’ in Jules Coleman (ed), *Hart’s Postscript* (Oxford University Press 2001).

²⁵ Giorgio Pino, ‘Positivism, Legal Validity, and the Separation of Law and Morals’ (2014) 27(2) Ratio Juris 190, 197.

²⁶ Rome Statute, art 22.

²⁷ Rome Statute, art 23.

principle of legality, criminal law has acquired a thoroughly positivist touch” wherein “[international] criminal law is one field of law where the classic debate between positivists and natural lawyers has in fact been resolved in favour of positivism”.²⁸ Notionally, the Rome Statute’s preoccupation with positivist principles enshrines the treaty with an unparalleled ambition towards legal certainty and the requirements of justice in equal measure, with the particular end being the resolution of disputes by the provision of a directive sufficiently definite and specific to conclusively label one party as right and the other wrong, without the imposition of *ex post facto* lawmaking.²⁹ In comparison to its predecessor tribunals, one might even suggest that the Rome Statute marks a regime shift for the entire enterprise of ICL.

1.2 From Paris to Rome – a Regime Shift

Following the conclusion of the First World War, the Preliminary Peace Conference at the plenary session on 25 January 1919, decided to create a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties.³⁰ The Commission was charged to inquire into and report upon a number of points, including “the constitution and procedure of a tribunal appropriate for the trial of these offences”, relating to the responsibility of the authors of the war.³¹ The Commission suggested establishing an international tribunal to prosecute war criminals, including the Kaiser, resulting in the creation of a “special” tribunal under Article 227 of the Treaty of Versailles.³² Although the prosecution of the Kaiser did not take place, of note was the basis of the offence, not being for offending an international norm, but rather “for a supreme offence against international morality and the sanctity of treaties”.³³

Later, under the auspices of the League of Nations, the Convention for the Prevention and Punishment of Terrorism was adopted in 1937, including the provision for a permanent

²⁸ Dov Jacobs, ‘International Criminal Law’ in Jörg Kammerhofer and Jean D’Aspremont (eds), *International Legal Positivism in a Post-Modern World* (Cambridge University Press 2014) 451, 454.

²⁹ John M. Finnis, ‘Natural Law and Legal Reasoning’ (1990) 38 *Cleveland State Law Review* 1, 6.

³⁰ Preliminary Peace Conference, *Protocol No 2, Plenary Session, January 25, 1919*, in *Papers Relating to the Foreign Relations of the United States: The Paris Peace Conference, 1919, Vol III*, Document 4 (Office of the Historian, U.S. Department of State) <https://history.state.gov/historicaldocuments/frus1919Parisv03/d4>

³¹ Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference* (29 March 1919) 14(1/2) *The American Journal of International Law* 95, 95.

³² Treaty of Peace between the Allied and Associated Powers and Germany (signed 28 June 1919, entered into force 10 January 1920) 225 CTS 188.

³³ *ibid*

international court.³⁴ The Convention was signed by 13 states, but none ratified it, leading to it not entering into force.

The first successful international criminal tribunal was established as a result of the 1945 London Conference, with the Agreement for the prosecution and punishment of the major war criminals of the European Axis, affixing the Charter of the International Military Tribunal.³⁵ Being the first operational tribunal, it was “the lack of a systematic definition of international criminal law [that] ensured that it fell to the Tribunals themselves to articulate many of the elements of the crimes”, as a consequence the Nuremberg trials were frequently criticised as being *ex post facto* applications of law in relation to acts which had not been codified, outlined, or were not adequately accessible at the time of their commission.³⁶ The same criticism was levied against the idea of crimes against peace and humanity on the basis that they did not exist in international law prior to 1945.³⁷ The Nuremberg Charter, then, established criminal responsibility for the acts of ‘crimes against peace’, ‘war crimes’ and ‘crimes against humanity’ with the overarching rationale by the IMT, confronted with the criticism of applying *ex post facto* law being that the “Charter was declaratory of international law and was neither new nor *ex post facto* law”.³⁸

Also worthy of consideration is that the principle of *nullum crimen sine lege* was not codified in any international legal document until 1948, after the establishment of the IMT. Indeed, the Universal Declaration of Human Rights was the first document to codify the principle on the international strata,³⁹ and later included in the Third Geneva Convention,⁴⁰ the ICCPR,⁴¹ and a number of other human rights treaties, prominently the regional treaties. The purpose of this

³⁴ Convention for the Prevention and Punishment of Terrorism (adopted 16 November 1937, not in force) 19 UNTS 23.

³⁵ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement) (signed 8 August 1945, entered into force 8 August 1945) 82 UNTS 279; see also Charter of the International Military Tribunal (annexed to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed 8 August 1945, entered into force 8 August 1945) 82 UNTS 279.

³⁶ Susan Lamb, ‘Chapter 19: *Nullum crimen, nulla poena sine lege* in International Criminal Law’ in Antonio Cassese, Paola Gaeta, John RWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary (Volume 1)* (Oxford University Press 2002) 733, 735.

³⁷ Antonio Cassese, *The Tokyo Trial and Beyond: Reflections of a Peacemaker* (Polity 1994) 2 – 5.

³⁸ Susan Lamb, ‘Chapter 19: *Nullum crimen, nulla poena sine lege* in International Criminal Law’ in Antonio Cassese, Paola Gaeta, John RWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary (Volume 1)* (Oxford University Press 2002) 733, 740.

³⁹ Universal Declaration of Human Rights, UNGA Res 217 A (III), UN Doc A/810 (10 December 1948), art 11.

⁴⁰ Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, art 99.

⁴¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 15.

exposition is to highlight that, although the IMT may have been guided by norms that were in existence prior to the commission of the crimes of the Nazi officials, they were not ‘positivised’, so to speak, identifiable only in customary international law and lacking expressed prohibitions predicated on the value of legal certainty. This is somewhat unsurprising given that, as the first international tribunal, international criminal law was relatively young and underdeveloped resultingly the dearth of jurisprudence inevitably entailed an aspect of judicial lawmaking.

The constitution of the ICTY and the ICTR diverged slightly from the approach taken by the IMT. Rather than being products of a multilateral treaty making process, both the ICTY and ICTR were established by resolutions of the United Nations Security Council (UNSC), with the UNSC calling upon the then Secretary-General to establish an impartial Commission of Experts to examine and analyse evidence of grave breaches of the 1949 Geneva Conventions and other violations of international humanitarian law.⁴²

Later, following UNSC Res 808 in which the Security Council stated that it was satisfied that the establishment of an international criminal tribunal would bring about the achievement of the aim of putting an end to the crimes taking place in the former Yugoslavia, the report of the Secretary-General provided quite articulately that, in assigning to the international tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not “be creating or purporting to ‘legislate’ that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law”.⁴³ In other words, in an effort to unequivocally avoid the criticisms that were levied against the IMT, the ICTY’s applicable law was to be firmly rooted in accessible, certain, customary international law, notwithstanding the underlying oxymoronic nature of the task. The ICTY was then established, with the report of the Secretary-General espousing the goals of the tribunal being accepted by the UNSC.⁴⁴ In turn, the constitution of the ICTY was even more forthcoming with the applicable law but reduced the presence of legal certainty in an attempt to achieve the desired aim of the tribunal. The UNSC elected to take a more expansive approach including in the subject-matter jurisdiction “international instruments regardless of

⁴² UNSC Res 780 (6 October 1992) UN Doc S/RES/780.

⁴³ UNSC, ‘Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)’ (3 May 1993) UN Doc S/25704, para. 29.

⁴⁴ UNSC Res 827 (25 May 1993) UN Doc S/RES/827.

whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime”.⁴⁵

With all this being said, the *nullum crimen* principle “sits uneasily with the very nature of customary international law, which is unwritten and frequently difficult to define with precision”.⁴⁶ The previously prescribed due diligence of the UNSG and the UNSC, having learnt the lessons from the constitution of the IMT, was still heavily criticised both by defence counsel⁴⁷ and critical opinion, scrutinising the justification of the application of “supra-positive law without admitting it openly”.⁴⁸

On what basis, then, does the subtitle of this chapter come into play? By way of a preliminary acknowledgement, the Rome Statute features as a part of the larger corpus of international criminal law, being the only international written instrument codifying international rules on the ‘general principles of international criminal law’ and definitions of the substantive crimes.⁴⁹ That is to say that the contents of the Rome Statute do not amount to a prescriptive doctrine of methodological interpretation for the broad regime of international criminal law, but instead comprise a set of rules only applicable by the ICC to the statute, without intruding on any previous or subsequent international criminal tribunals that have been established or may be constituted.

That being said, there is significant value in a comparison between the ICC and its predecessors (the IMT, the ICTY and the ICTR) insofar as concerns the perceived development of international criminal law from ‘law-making’ to prescribed rules of interpreting strictly positive law. The use of ‘positive’ here is not intended to be antagonistic or to introduce inclinations that the predecessor tribunals were engaging in *ex post facto* law-making, but rather to highlight the central fact that the international criminal law practice has shifted from requiring the identification of uncodified norms (whether through customary international law or otherwise) to a delimitation, as much as is feasible, of any possible exercise of judicial discretion through

⁴⁵ UNSC, ‘Report of the Secretary-General pursuant to paragraph 5 of Security Council Resolution 955 (1994) UN Doc S/1995/134, para. 12.

⁴⁶ Susan Lamb, ‘Chapter 19: *Nullum crimen, nulla poena sine lege* in International Criminal Law’ in Antonio Cassese, Paola Gaeta, John RWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary (Volume 1)* (Oxford University Press 2002) 733, 743.

⁴⁷ *Prosecutor v Tadić* (Decision on the Defence Motion on Jurisdiction) ICTY-94-1 (10 August 1995) para. 72; see also *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (2 October 1995) paras. 92 and 128.

⁴⁸ Nuria Pastor Munoz, ‘Why International Criminal Law Can and Should be Conceived with Supra-Positive Law: The Non-Positivist Nature of International Criminal Legality’ (2023) 17 Criminal Law and Philosophy 381, 388.

⁴⁹ Antonio Cassese, *International Criminal Law* (Oxford University Press 2008) 14.

the extensively articulated, readily accessible treaty.⁵⁰ Further, that the establishment of the ICC is indicative of the culmination of a process that began with the IMT, and was developed by the ICTY and ICTR, is a truism.

The term ‘regime shift’ is used as an intentional allusion to Koskenniemi’s work with the Study Group of the International Law Commission (ILC) such that international criminal law, which prior to the 21st century was articulated to be firmly within the remit of general public international law, importing the interpretive principles therein, experienced a shift in its own ‘self-contained regime’ from expansive, indeterminate interpretation to positivist underpinnings framed by the articulation and codification of the previously mentioned articles of the Rome Statute.

Indeed, the analysis presented by the ILC is almost pedagogical to this reading of the Rome Statute, in exemplifying the emergence and preponderance of the ‘self-contained regime’ of human rights law and the notion that “teleological interpretation is much more deeply embedded in human rights law than in general international law”,⁵¹ the ILC has, in fact, enunciated a parallel claim to the one presented here – that textual interpretation is much more deeply embedded in international criminal law than in general international law. Further, while the view of the European Court of Human Rights is, when applying a ‘normative treaty’, to “look for its object and purpose, not to the interpretation that would provide the most limited understanding of the obligations of States parties”,⁵² the view of the Rome Statute is threefold:

- (1) The Court shall apply: (a) in the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;⁵³
- (2) The definition of a crime shall be strictly construed and shall not be extended by analogy;⁵⁴ and
- (3) In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.⁵⁵

⁵⁰ Antonio Cassese, *An Introduction to the International Criminal Court* (Cambridge University Press 2007) 194.

⁵¹ International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalised by Martti Koskenniemi* (13 April 2006) UN Doc A/CN.4/L.682 Add.1, 130.

⁵² *ibid*; see also *Wemhoff v Germany* App no 2122/64 (ECtHR, 27 June 1968) 19, para. 8.

⁵³ Rome Statute, art 21(1); further analysis on why Article 21(1) invokes notions of textual supremacy is contained in the forthcoming section of this chapter.

⁵⁴ Rome Statute, art 22(2).

⁵⁵ Rome Statute, art 22(2).

In this vein, the establishment of the Rome Statute and its pre-eminent focus on the applicable law and absolute commitment to the principle of legality can be considered a regime shift, ushering in a “‘new legal order of international law’, it is called on to apply both its ‘proper law’ of which Statute is the ‘supreme norm’, and the rules referred to therein, whether they form part of its proper law (A) or are external to it (B)’”.⁵⁶ In relation to its predecessor tribunals, where the IMT, ICTY and ICTY were called upon to apply norms that were without doubt identifiable in customary international law, the ICC is to apply, in the first place, the Statute. In this sense, the commitment to legal certainty through Article 22(2), although frequently called into question by the application of general interpretive principles by the judges of the ICC,⁵⁷ is “‘precise enough to leave open the question of whether or not strict construction applies to provisions of the Statute other than those that define the offences themselves’”.⁵⁸

1.3 Integrated Positivism

When considering the extent of the application of the Vienna Convention on the Law of Treaties to the Rome Statute, the drafters provided two discrete provisions that, I believe, evidence the normative stance that they intended the future of international criminal law to take:

- Article 21 mirrors, builds and develops on the framework of applicable law espoused in the Statute of the International Court of Justice;⁵⁹ this article builds towards a framework of integrated positivism that is derived from the explicit drafting intentions of hierarchical norms that leads to an interpretive structure that is as close as possible to what might be considered a positivist text, or at least *more* positive than not.
- Article 22 incorporates a vision of a Court “‘whose subject-matter jurisdiction is exhaustively defined in its constituent instrument’”,⁶⁰ the principle of legality is indefatigably drafted into the Rome Statute, evincing a clear divergence between this

⁵⁶ Alain Pellet, ‘Chapter 25: Applicable Law’ in Antonio Cassese, Paola Gaeta, John RWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary (Volume I)* (Oxford University Press 2002) 1051, 1053.

⁵⁷ See *Situation in the Democratic Republic of Congo* (Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal) ICC-01/04 (13 July 2006) para 5; see also *Prosecutor v Lubanga* (Decision on the Prosecutor’s Application for a Warrant of Arrest) ICC-01/04-01/06-8 (10 February 2006) para 42; *Prosecutor v Lubanga* (Decision on the Practices of Witness Familiarisation and Witness Proofing) ICC-01/04-01/06 (8 November 2006) para 8.

⁵⁸ William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press 2007) 202.

⁵⁹ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993, art 38.

⁶⁰ Susan Lamb, ‘Chapter 19: *Nullum crimen, nulla poena sine lege* in International Criminal Law’ in Antonio Cassese, Paola Gaeta, John RWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary (Volume I)* (Oxford University Press 2002) 733, 751.

permanent international court and the *ad hoc* tribunals, in an attempt to “enhance the certainty of the law, provide justice and fairness for the accused, achieve the effective fulfilment of the deterrent function of the criminal sanction, prevent abuse of power and strengthen the application of the Rule of law”.⁶¹

What follows is an exposition and analysis of these two pivotal articles that fundamentally enshrine positivist interpretive guidance into the Rome Statute and call into question the rigorous and expansive application of the Vienna Convention to the treaty, having taken its application to the Rome Statute for granted for the past 20 years of the Court’s existence.

1.3.1 A Hierarchy of Sources

The Court has held that “the interpretation of treaties, and the Rome Statute is no exception, is governed by the Vienna Convention on the Law of Treaties, specifically the provisions of articles 31 and 32”⁶² and this, in and of itself, is not necessarily problematic. Indeed, it is not the claim of this paper that there ought to be a holistic disapplication of all interpretive principles of general international law to this new regime of international criminal law; it is however the claim that any purposive interpretation taken must be utilised with the upmost caution as the Rome Statute is inherently concerned with the protection of the accused from judicial overreach. Equally, whilst there are a number of provisions within the Rome Statute that may be treated as purely treaty-functional articles, for example those contained within ‘Part 13: Final Clauses’ in which it would be a nonsense to question the application of general interpretive principles of international law, there are significantly more that are based in an unknown origin.⁶³ The issue with a departure from strict construction arises when the judges of the Court presume that an expansive interpretive reading in the name of putting “an end to impunity”⁶⁴ is allowed to “prevail so decisively over text, context, and other purposes”.⁶⁵

The Rome Statute is very clear in this regard, drawing on Article 38 of the Statute of the International Court of Justice, a list is provided of the applicable law, being:

⁶¹ Mahmoud Sherif Bassiouni, *Introduction to International Criminal Law* (Transnational Publishers, Inc 2003) 180.

⁶² *Situation in the Democratic Republic of the Congo* (Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal) ICC-01/04 (13 July 2006) para 33.

⁶³ With specific reference to ordinary treaty provisions such as Article 125 ‘Signature, ratification, acceptance, approval or accession’ or Article 127 ‘Withdrawal’.

⁶⁴ Rome Statute, Preamble

⁶⁵ Darryl Robinson, ‘The Identity Crisis of International Criminal Law’ (2008) 21 *Leiden Journal of International Law* 925, 935

In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence.⁶⁶

In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.⁶⁷

Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.⁶⁸

However, the Rome Statute includes the notable addition of establishing a hierarchy to these sources.⁶⁹ Noted in the commentary by deGuzman, the intention of establishing a hierarchy was to provide a compromise between two schools of thought; one that argued the principle of legality requires judicial discretion to be strictly limited in the criminal law context, and the other that, due to the unique nature of international criminal law, judges ought to be granted discretion in applying general principles of international law.⁷⁰ Reinforcing this notion of Article 21(1)(a) RS behaving as a supremacy clause, the drafters reiterated that ‘in the event of a conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail’⁷¹ exemplifying the primacy of the Statute amongst those at the top of the hierarchy. Indeed, the Court itself has determined previously that the only instances in which judges may defer to those sources of law under articles 21(1)(b) and (c) are in situations where there is a lacuna in the written law contained in the Statute, the Elements of Crimes and the Rules of Procedure and when such a lacuna cannot be filled by the application of the criteria provided in Articles 31 and 32 of the Vienna Convention.⁷²

⁶⁶ Rome Statute, art 21(1)(a)

⁶⁷ Rome Statute, art 21(1)(b)

⁶⁸ Rome Statute, art 21(1)(c)

⁶⁹ Mikaela Heikkilä, ‘Article 21: Applicable Law’ in Mark Klamberg (ed), *Commentary on the Law of the International Criminal Court* (Torkel Opsahl Academic Epublisher 2017) 241, 242-243; see also Margaret M deGuzman, ‘Article 21: Applicable Law’ in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C H Beck/Hart/Nomos 2016) 932, 933

⁷⁰ Margaret M deGuzman, ‘Article 21: Applicable Law’ in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C H Beck/Hart/Nomos 2016) 932, 933

⁷¹ Article 51(5), Rome Statute

⁷² Robert Cryer, ‘Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources’ (2009) 12(3) *New Criminal Law Review* 390, 397-398; see also *Prosecutor v Al Bashir* (Decision on the Prosecution’s

Heikkilä notes that Article 21 focuses on enumerating and ranking the applicable legal sources rather than how they should be identified or interpreted.⁷³ However, deGuzman grants the Court further interpretive powers in stating that “the hierarchy is less rigid than it appears because the rules of treaty interpretation enable the Court to refer to general principles and customary law in interpreting provisions of the Statute”.⁷⁴ It is difficult to reconcile this perspective with explicit wording of the Statute that ‘the definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted’.⁷⁵

There is also the additional issue of what to make of Article 21(3) which purports to curtail the “application and interpretation of law” insofar as it is inconsistent with internationally recognised human rights. Given that Article 21(3) has not received significant exposition in the jurisprudence of the Court, although it has been raised on a number of occasions to varying degree, although it has been relied upon to give consideration to such matters as the protection of fair-trial rights;⁷⁶ balancing victims’ participation against accused’s rights amounting to procedural fairness;⁷⁷ and aspects of proportionality in relation to sentencing and reparations.⁷⁸ Notwithstanding the aforementioned references to Article 21(3), little has been documented on its relationship to its foregoing provisions under the hierarchy of sources.

One perspective is that Article 21(3) imparts a ‘super-legality’ on the provision of human rights norms that goes further than protecting fundamental human rights, but all internationally recognised human rights⁷⁹ and, as such, is a manifestation of the primacy of supra-positive law in the “denial of validity to that positive law which enters into an intolerable conflict with

Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir ICC-02/05-01/09 (4 March 2009) para 126.

⁷³ Mikaela Heikkilä, ‘Article 21: Applicable Law’ in Mark Klamberg (ed), *Commentary on the Law of the International Criminal Court* (Torkel Opsahl Academic Epubisher 2017) 241, 242.

⁷⁴ Margaret M deGuzman, ‘Article 21: Applicable Law’ in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C H Beck/Hart/Nomos 2016) 932, 936.

⁷⁵ Rome Statute, art 22(2).

⁷⁶ *Prosecutor v Lubanga* (Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I of 10 June 2008) ICC-01/04-01/06-1486 (OA13) (21 October 2008) paras 64, 76–78.

⁷⁷ *Prosecutor v Lubanga* (Decision on Victims’ Participation) ICC-01/04-01/06-1119 (18 January 2008) para 97 (and surrounding); see also *Prosecutor v Katanga and Ngudjolo* (Decision on an Amicus Curiae Application and on the Request for Presentation of Witnesses DRC-D02-P-0350, DRC-D02-P-0236 and DRC-D02-P-0228 to Dutch Authorities for Asylum) ICC-01/04-01/07-3003 (9 June 2011).

⁷⁸ *Prosecutor v Lubanga* (Public Redacted Judgment on the Appeal of Mr Thomas Lubanga Dyilo against his Conviction) ICC-01/04-01/06-3121-Red (1 December 2014) para 148.

⁷⁹ Alain Pellet, ‘Chapter 25: Applicable Law’ in Antonio Cassese, Paola Gaeta, John RWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary (Volume I)* (Oxford University Press 2002) 1051, 1079-1082).

justice”.⁸⁰ A separate perspective, and one that is more indicative of general academic opinion, is that, in spite of the sparse legislative history of the provision, consistency with internationally recognised human rights was “intended to require consistency with the principle of legality and to maximise other fair trial protections for the alleged perpetrator which originate from international human rights law”.⁸¹ Further, this interpretation is rallied by the *travaux préparatoires* wherein the view was that consistency with internationally recognised human rights would require that interpretation by the Court be in line with the principle of *nullum crimen sine lege* and indicated the connection between the framework of positivism established under Article 22.⁸²

1.3.2 Nullum Crimen Sine Lege

Notionally, when taken in tandem, Article 22 imports a guarantee of strict adherence to the norms of criminal law. That criminal law, as previously espoused, is predicated on a delicate balance of a social contract between the hegemonic state and the powerless individual such that, the adjudicatory process works only to the extent that decisions are based on a known norm. This social contract is then elevated in the context of international criminal law, as the individual is pitted against more than the whims of a particular state, but instead is opposite an institution whose mandate is to prosecute the most offensive crimes against the international community.⁸³ Absent this guarantee, “submission to adjudication becomes the mere substitution of one arbitrary force by another” and the distinction between the legitimate application of the law and teleological, *ex post facto* interpretation becomes significantly more important.⁸⁴

The ICTY gave a useful overview of what comprises the fundamental requirements for *nullum crimen*, *nullum poena sine lege*: those of specificity, that the provision providing for the criminalisation of certain conduct must be sufficiently specific for individuals to understand; foreseeability, that the norm criminalising conduct must be accessible to the accused and

⁸⁰ Nuria Pastor Munoz, ‘Why International Criminal Law Can and Should be Conceived with Supra-Positive Law: The Non-Positivist Nature of International Criminal Legality’ (2023) 17 Criminal Law and Philosophy 381, 394.

⁸¹ Leena Grover, ‘A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court’ (2010) 21(3) The European Journal of International Law 543, 559.

⁸² ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court’ (14 April 1998) UN Doc A/CONF.183/2/Add.1, 47.

⁸³ Jessica Lynn Corsi, ‘An Argument for Strict Legality in International Criminal Law’ (2018) 49(4) Georgetown Journal of International Law 1321, 1344.

⁸⁴ Boštjan M. Zupančič, ‘On Legal Formalism: The Principle of Legality in Criminal Law’ (1981) 27 Loyola Law Review 369, 373.

therefore prosecution of the same would be foreseeable; accessibility, that the norm relied upon must be reasonably accessible to allow the individual to be acquainted with and to understand that such conduct amounts to an offence; and certainty, that the definition of a crime ought to be strictly construed, without extension by analogy, and that the conduct constituted a crime at the time that it took place.⁸⁵ Further clarity can be gleaned from the European Court of Human Rights' interpretation of Article 7 of the European Convention on Human Rights, the provision enshrining the *nullum crimen* principle as an applicable human right, that "Article 7 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty and the principle that the criminal law must not be extensively construed to an accused's detriment".⁸⁶

This conception on legality has been consistently promulgated through a robust history of academic literature.⁸⁷ Pertinently, this concept of integrated legality lays down requirements for the interpretation of criminal provisions, it forms a *lex specialis* that is synonymous with the self-contained regime of international criminal law and, indeed, with the majority of domestic systems of criminal law although not always so starkly articulated. It is here then, that the discussions on classical legal positivism, normative positivism and the incorporation of *nullum crimen sine lege* come into play. The literal translation is clear and unequivocal, 'no crime without law', and Article 22 prescribes more specifically that a person shall not be criminally responsible under the Statute unless the conduct in question constitutes a crime within the jurisdiction of the court.⁸⁸ Further, the definition of a crime shall be strictly construed and the principle of *in dubio pro reo*, that when in doubt, rule for the accused, dissolves a significant proportion of the rationale for delegating interpretive rules to the Vienna Convention when there are problems of indeterminacy in international criminal provisions.⁸⁹

The position that the aspirations of strict adherence to the principle of legality can be attained only by a rigid formalistic approach inspired by legal positivism is a contested view, however,

⁸⁵ *Prosecutor v Mitar Vasiljević* (Trial Judgement) ICTY-98-32-T (29 November 2002) para 193.

⁸⁶ *Veeber v Estonia* App no. 45771/99 (ECtHR, 21 January 2003) para 31.

⁸⁷ Susan Lamb, 'Chapter 19: *Nullum crimen, nulla poena sine lege* in International Criminal Law' in Antonio Cassese, Paola Gaeta, John RWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary (Volume 1)* (Oxford University Press 2002) 733, 734; see also John Finnis, *Natural Law and Natural Rights* (Clarendon Press 1979) 270; Dov Jacobs, 'International Criminal Law' in Jörg Kammerhofer and Jean D'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (Cambridge University Press 2014) 451, 452-453.

⁸⁸ Rome Statute, art 22(1).

⁸⁹ Rome Statute, art 22(2).

the clearest explication of this principle comes from one of its chief critics; Bassiouni writes that “the most appropriate articulation of international criminal law’s counterpart to *nullum crimen sine lege* is *nullum crimen sine iure*”, to clarify this, the idea is that it isn’t necessarily the written law that matters when enunciating criminal responsibility, at least not in the practice derived from the predecessor tribunals, it is instead that there is an identifiable law, whether codified or uncoded, that can be isolated in time.⁹⁰ This reinforces the primary argument of this chapter, notwithstanding the veracity of this view, the drafters of the Rome Statute elected to include a formulation of the Latin maxim that is aligned with the rigid formalistic approach, prohibiting attribution to a crime that has not been codified. Whilst one might argue that, historically, there is a moral facet imbued in the consideration of international crimes, that does not affect the position as it is now, that the international criminal law regime imported into the ICC’s statute is one of integrated positivism, that does not leave room for a doctrine of natural law to flourish.

1.4 Summary

The centrality of legal positivism, and legal formalism, to the Rome Statute’s regime of international criminal law cannot be overstated. The principle of legality grounds the authority of the international tribunal in a codified source of international criminal law with the intention of the protection of the accused. In this regard, positivism function as a legitimising device: it ensures that the implication of criminal responsibility is grounded in sufficiently certain, foreseeable, accessible doctrine that demands rigid formalistic interpretation, curtailing interpretive whims of the international community, providing the accused with sufficient protections to ensure that the adjudicatory process does not devolve into the arbitrary use of authority precipitated by an inherent imbalance of power.

This chapter has demonstrated that; first, where international criminal law has historically been preoccupied with the interplay between natural law, guided by moral considerations, and positivist law, guided by strict adherence to the text, the Rome Statute establishes a regime wherein this debate is settled, a rule of conflict of theories.⁹¹ Second, that the narrative and progression of international criminal tribunals has shifted significantly, from initial notions of prosecuting individuals for a ‘supreme offence against international morality’, phraseology that

⁹⁰ Mahmoud Sherif Bassiouni, *Introduction to International Criminal Law* (Transnational Publishers, Inc 2003) 202.

⁹¹ Dov Jacobs, ‘International Criminal Law’ in Jörg Kammerhofer and Jean D’Aspremont (eds), *International Legal Positivism in a Post-Modern World* (Cambridge University Press 2014) 451.

is explicit in its syllogism with natural law, to prosecuting individuals for identified and codified norms that are within the jurisdiction of the court. And third, that it is a matter of fact that the Rome Statute is an instrument of positive law and deplores the application of interpretive reasoning that stretches beyond the strict construction of the text such that there is less room for importing discussions on the indeterminacy of language, the intentions of the drafters, or the object and purpose of the treaty.

This paper now turns to considerations of the implications of ignoring this normative stance on interpretation through the utilisation of the Vienna Convention, which sits uneasily with the preponderant notion of strict legality. What will be assessed is to what extent, bearing in mind the contents of this chapter, the Vienna Convention is an appropriate tool to aid in the interpretation of a positivist international criminal law document, and whether such interpretive guise is reconcilable with this new regime of international criminal law.

2. If the Rome Statute is a Multilateral Treaty

Imagine this: the Prosecutor opens an investigation into alleged environmental destruction committed during an international armed conflict in State A. The accused, a senior military commander, is charged under Article 8(2)(b)(iv) of the Rome Statute.⁹²

Defence counsel argues that under a strict interpretation of Article 8(2)(b)(iv), the crime requires proof of actual environmental destruction that is widespread, long-term, and severe – that all three elements must be met cumulatively; they rely on the principle of legality arguing that expanding the meaning of ‘damage’ to include potential or indirect harm would violate notions of foreseeability and legal certainty.

In contrast, the Prosecution refers to Article 31(1) of the Vienna Convention, arguing that the Chamber ought to interpret the provision in light of the object and purpose of the treaty, to protect civilians from unnecessary suffering and the environment from excessive destruction during a conflict. The Prosecution further invokes Article 31(3)(c) of the Vienna Convention, referring to relevant rules of international environmental law such as the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification (ENMOD), arguing that the concept of ‘damage’ ought to encompass serious risk of long-term environmental harm, not only actual destruction.⁹³

The Chamber, in accordance with Article 21(1)(a), turns first to the wording of the Statute, the Elements of Crimes and its Rules of Procedure and Evidence and notes that no definitions have been provided for the meaning of ‘widespread’, ‘long-term’, or ‘severe’ within the primary sources of applicable law, but more importantly, the wording ‘long-term’ in particular is ambiguous. They note that the wording of Article 8(2)(b)(iv) appears to call for a strict interpretation primarily through the clause “will cause... widespread, long-term, or severe damage”. However, in an attempt to clarify the substantive law, the Chamber turns to Article 21(1)(b), namely the applicable treaties, and invokes Article 31(1) adopting a teleological interpretation to further the object and purpose of the Statute and holds that ‘damage’ may be

⁹² “Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”.

⁹³ Adopted 10 December 1979, entered into force 5 October 1978, 1108 UNTS 151.

understood as encompassing acts that create a substantial and foreseeable risk of environmental devastation.⁹⁴

The interpretive rules codified in the Vienna Convention are assumed to apply to all treaties (between States),⁹⁵ and this assumption is not ill-founded, indeed the Vienna Convention states as much.⁹⁶ This notwithstanding, the extent to which the International Law Commission initially intended for their study on the law of treaties to encompass such an expansive scope, for example its applicability to constituent treaties of international organisations, is well documented in the Report made by the Commission to the General Assembly in 1966 in excluding “treaties between states and other subjects in international law”⁹⁷ amongst others.⁹⁸ The question of the extent of application of the Vienna Convention to the Rome Statute specifically is further complicated due to its unique three-part nature being, at the same time, an international treaty agreed upon between states, the constituent treaty of an international organisation, and a criminal statute. In this regard, using the Vienna Convention to interpret the Rome Statute is quintessentially different from using the Vienna Convention to interpret non-criminal treaties, “making the application of the Vienna Convention’s method at times awkward”.⁹⁹

This ‘awkwardness’ is not insignificant; it is the central conflict of interpretive methodology for the ICC. Demonstrated in the hypothetical scenario above, whereas Article 31 of the Vienna Convention is considered to reflect the generally accepted principles on the elements and means of treaty interpretation, designed in its draft as a compromise between the three distinctive schools of thought being (a) the ‘textual’ approach, (b) the ‘intentions of the State parties’ approach, and (c) the ‘teleological’ approach,¹⁰⁰ the Rome Statute admonishes this

⁹⁴ For a comprehensive overview of the shortcomings of Article 8(2)(b)(iv) see Jessica Lawrence and Kevin Heller, ‘The First Ecocentric Environmental War Crime: The Limits of Article 8(2)(b)(iv) of the Rome Statute’ (2007) 20 *Georgetown International Environmental Law Review* 61.

⁹⁵ Vienna Convention, arts 31 – 33.

⁹⁶ Vienna Convention, art 1.

⁹⁷ *Yearbook of the International Law Commission* 1966, vol II, UN Doc A/CN.4/SER.A/1966/Add.1, 187.

⁹⁸ The ILC also excluded: (1) treaties not in written form; (2) the effect of the outbreak of hostilities upon treaties; (3) the succession of States in respect of treaties; (4) the effect upon treaties of the extinction of the international personality of a State; (5) the international responsibility of a State with respect to failure to perform a treaty obligation; (6) the most-favoured nation clause; (7) the application of treaties providing for obligations or rights to be performed or enjoyed by individuals; and (8) the relationship between treaty law and customary law. For further explication, see Ian Sinclair, ‘The Vienna Convention on the law of Treaties, 1984’ in Jill Barret and Jean-Pierre Gauci, *British Contributions to International Law, 1915-2015: An Anthology Set* (Brill 2020) 657, 659 – 661.

⁹⁹ Stewart Manley, Pardis Tehrani and Raja Rasiah, ‘Mapping Interpretation by the International Criminal Court’ (2023) 36 *Leiden Journal of International Law* 771, 774.

¹⁰⁰ Francis Jacobs, ‘Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the law of Treaties before the Vienna Diplomatic Conference’ (1969) 18 *The International and*

compromise, giving explicit priority and effect to principles of “lenity, strict construction, and the prohibition of defining crimes by analogy” as a balance in favour of the accused against this “illiberal teleological approach to criminal law”.¹⁰¹

The conflict of interpretation is therefore rooted in the conceptual ideas espoused in Chapter 1. It is a tug-of-war, so to speak, between textual adherence, placing particular emphasis on the text of the treaty as incorporating the authentic expressions of the parties, and the teleological approach that “maintains that the task of the decision-maker is to ascertain the object and purpose of the treaty and then to interpret the treaty so as to give effect to that object and purpose”.¹⁰²

This teleological approach, while effective in navigating state-to-state contexts, risks dissolving the certainty, foreseeability, and strict construction inherent in the principle of legality. Hunt notes that “the Statute evinces a deep suspicion of the Court’s judges” through the extensive codification of the elements of crimes and the circumspect hierarchy of sources.¹⁰³ Despite the apparent aims to imbue the Rome Statute with sufficient forewarnings to perpetrators of international crimes and instructing those interpreting the same to do so with caution, examinations of the application of the Vienna Convention demonstrate that the results of its invocation are “markedly inconsistent” and, in some instances, “opaque and arguably unjustified”.¹⁰⁴

In light of these claims, this chapter aims to engage in an analysis of the application of Article 31 of the Vienna Convention to the Rome Statute of the International Criminal Court and identifies that there is an inherent contradiction of methodological approaches to interpretation that is difficult, potentially impossible, to resolve. Noting the unique nature and constraints of strict construction under Article 22 of the Rome Statute, appeals to the object and purpose, and interpretation in purview of the same, have resulted in expansive interpretation at the expense of the accused. Ironically, in a search for greater certainty, the object and purpose of the statute

Comparative Law Quarterly 318, 319 – 325; Ian Sinclair, ‘Vienna Conference on the Law of Treaties’ (1970) 19(1) The International and Comparative Law Quarterly 47, 61; David Jonas and Thomas Saunders, ‘The Object and Purpose of a Treaty: Three Interpretive Methods’ (2010) 43 Vanderbilt Journal of Transnational Law 565, 577.

¹⁰¹ Caroline Davidson, ‘How to Read International Criminal Law: Strict Construction and the Rome Statute of the International Criminal Court’ (2017) 91 St. John’s Law Review 37, 41.

¹⁰² Ian Sinclair, ‘Vienna Conference on the Law of Treaties’ (1970) 19(1) The International and Comparative Law Quarterly 47, 61.

¹⁰³ David Hunt, ‘High Hopes, ‘Creative Ambiguity’ and an Unfortunate Mistrust in International Judges’ (2004) 2 Journal of International Criminal Justice 56, 61.

¹⁰⁴ Stewart Manley, Pardis Tehrani and Raja Rasiah, ‘Mapping Interpretation by the International Criminal Court’ (2023) 36 Leiden Journal of International Law 771, 773.

and the looseness and flexibility of the Vienna Convention methodology has caused increased confusion over the scope of liability.

The chapter will proceed in two sections. The first section will consider some of the difficulties regarding the interpretation of the term(s) ‘object and purpose’ in and of themselves as presented in the Vienna Convention. The second section will, in an attempt to graft the current understanding of the applicable methodology of Article 31 Vienna Convention onto interpretation of the Rome Statute, demonstrate that this malleable concept when analysed across the court’s jurisprudence, has tended towards imposing more culpability on the defendant, expanding liability to those further from the crime, and the provision of greater lenity towards the goal of prosecution rather than administering a fair trial. I address three principal issues: whether a treaty can have more than one object and purpose; the inherent subjectivity in identifying what the object and purpose of a treaty is; and how to interpret a treaty “in light of its object and purpose” when more than one appears to be present.

2.1 Vienna Convention – The Object(s) and Purpose(s) of a Treaty

Much ink has been spilled in an effort to elucidate what exactly the ILC intended when they drafted “in light of its [the treaty’s] object and purpose”.¹⁰⁵ Despite this, there are still several unsettled questions: How does one identify the object and purpose of a treaty? Can a treaty have more than one object and purpose? If so, what weight is to be given to each identifiable object and purpose? Should the object and purpose supersede the wording of the text? What is required, at least if the ICC intends to cling to the ideas espoused in the treaty and the general perception of the fundamental tenets of criminal law, is certainty in interpretation. While ICL’s origins are borne from “human rights and humanitarian law on one hand and criminal law on the other hand”, the two are incongruent in their aims with the former seeking justice for breaches of fundamental rights, and the latter advocating for a check against the arbitrary use of a state’s coercive power.¹⁰⁶

Speaking plainly, ICL cannot adhere to both doctrines, it must choose one: to adopt the illiberal principles of human rights and humanitarian law, acknowledging then (as seems the state now) that the Rome Statute is more concerned with the prosecution of the accused and justice for victims at all costs, regardless on the method used to reach such a conclusion; or to strictly

¹⁰⁵ Vienna Convention, art 31.

¹⁰⁶ Darryl Robinson, ‘The Identity Crisis of International Criminal Law’ (2008) 21 *Leiden Journal of International Law* 925, 932; Patrick Keenan, ‘The Slippery Concept of “Object and Purpose” in International Criminal Law’ (2023) 37(4) *American University International Law Review* 799, 802.

adhere to the nuances that seem to pervade the Rome Statute, those of fair trial rights, strict construction, and legality, bringing itself into conformity with these fundamental liberal principles of criminal law. The Vienna Convention seems only to aid the former.

2.1.1 Singular or Plural?

The International Court of Justice (ICJ) has directly tussled with the practical effect that the object and purpose of a treaty has on its interpretation. Prior to the drafting of the Vienna Convention, acknowledging first that the Vienna Convention is properly viewed as the codification of customary international law on its approach to interpretation, the ICJ famously considered the question of whether a state that makes a reservation to the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention),¹⁰⁷ to which some but not all other states object, can still be considered a party to the convention.¹⁰⁸

The Court concluded that a State may be considered a party to the Convention if the reservation is compatible with the object and purpose of the treaty, even if some States object to it.¹⁰⁹ This conclusion, was not reached without significant inquiry into how to identify what the object and purpose of a treaty is; the question of the object and purpose, however, was not adequately ventilated so as to dissuade the plethora of academic and judicial controversy surrounding the concept. Notably, within its reasoning, the Court recognised that the Genocide Convention contained two objects: (1) to safeguard the existence of certain human groups and (2) to confirm and endorse the most elementary principles of morality.¹¹⁰ Without further elucidation as to the possibility or utility of severing the concepts, the Court also maintained that there was a solitary purpose to the Genocide Convention, to establish a convention in which as many States as possible should participate,¹¹¹ and that there was a separate intention to condemn and punish genocide as a crime.¹¹²

This brief glimpse into the analysis of the object and purpose raises a number of salient issues, the most pertinent of which were eloquently put forward in the joint dissenting opinions of Judge Guerrero, Judge McNair, and Judge Hsu Mo stating, “[w]hat is the ‘object and purpose’ of the Genocide Convention? To repress Genocide? Of course; but is it more than that? Does

¹⁰⁷ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

¹⁰⁸ *Reservations to the Genocide Convention* (Advisory Opinion) [1951] ICJ Rep 15, 17.

¹⁰⁹ *ibid* 29.

¹¹⁰ *ibid* 23.

¹¹¹ *ibid* 24.

¹¹² *ibid* 23.

it comprise any or all of the enforcement articles of the Convention? That is the heart of the matter. One has only to look at them to realise the importance of this question”.¹¹³ Indeed, identifying what the object(s) and purpose(s) of a treaty is the crux of treaty interpretation for the Vienna Convention; the problem arises because notwithstanding the significant critical appraisal, “we are none the wiser as to what the object and purpose... might in fact be”.¹¹⁴

The ICJ has, since the drafting of the Vienna Convention, engaged in further analysis of the potential plurality of the object and purpose of a treaty. In the *Whaling in the Antarctic* case, the Court concluded that, with regard to the International Convention for the Regulation of Whaling (ICRW),¹¹⁵ “the Preamble of this Agreement expressed the desire of States parties ‘to secure the prosperity of the whaling industry and, for that purpose, to maintain the stock of whales’”,¹¹⁶ this also was met with disagreement as to what the object and purpose was, although there was a degree of consensus on what the object and purpose was intended to achieve despite the lack of common agreement on what the object and purpose was. Judge Owada stated that the object and purpose of the ICRW was to “pursue the goal of achieving the twin purposes of the sustainability of the maximum sustainable yield of the stocks in question and the viability of the whaling industry”¹¹⁷ and Judge Cancado Trindade disagreed entirely arguing that “to try to reduce the object and purpose of the ICRW to the protection or development of the whaling industry would be at odds with the rationale and structure of the ICRW as a whole”, suggesting instead that “the primary object and purpose of the ICRW can be found in the conservation and recovery of whale populations”.¹¹⁸

It seems clear, at this juncture, from the jurisprudence of the ICJ, that it is possible, or even likely, that a treaty will have more than one object and purpose. However, the implications of the openness of the term are that the judges within tribunals cannot agree on what the objects and purposes of a treaty might be. Perhaps the objects identified diverge, but the underlying intentions of the parties is apparent notwithstanding the inconsistency, and this may not be a

¹¹³ *Reservations to the Genocide Convention* (Advisory Opinion) [1951] ICJ Rep 15, Joint Dissenting Opinion of Judges Guerrero, McNair and Hsu Mo 31, 44.

¹¹⁴ Dino Kritsiotis, ‘The Object and Purpose of a Treaty’s Object and Purpose’ in Michael Bowman and Dino Kritsiotis (eds) *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018) 237, 247.

¹¹⁵ International Convention for the Regulation of Whaling (adopted 2 December 1946, entered into force 10 November 1948) 161 UNTS 72.

¹¹⁶ *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Judgement) [2014] ICJ Rep 226, 247.

¹¹⁷ *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Judgement) [2014] ICJ Rep 226, Dissenting Opinion of Judge Owada, 303.

¹¹⁸ *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Judgement) [2014] ICJ Rep 226, Separate Opinion of Judge Cancado Trindade, 349-350.

conceptual problem for bilateral or multilateral treaty-making and interpretation between States, whose very purpose for entering into these agreements is more often than not political, but for ICL, whose normative nature sits at the intersection of human rights law, international humanitarian law, and criminal law, such indeterminacy within interpretation renders international criminal statutes without the predictability and certainty characterising a just system of criminal justice.¹¹⁹

2.1.2 Inherent Subjectivity

Suffice to say that the ILC gave an indication that it might be more proper, or at least less contentious, if a singular object and purpose (or a ‘chief’ object and purpose) could be identified as a guide in the fundamental intentions of the States parties to a treaty in amending the language of their initial draft, which noted “objects and purposes”, to “object and purpose” in the final draft.¹²⁰ Klabbbers notes that it is likely no accident that the various Vienna Conventions speak of ‘object and purpose’ in the singular “for, if various objects and purposes could be distinguished, it could follow that a proposed reservation could be compatible with some of those objects and purposes, but incompatible with others”.¹²¹ The concern here is rather blatant, if various objects and purposes could be identified, this would result in different yardsticks under the same treaty.

However, this is not what practice has evidenced, as shown above. Instead, the majority of academic opinion is firmly on the side of any number of objects and purposes to a treaty, although it is important to note, for the purposes of indeterminacy, that even this is not the subject of consensus. What is more important is the inherent subjectivity integrated within the interpretation of treaties when deferring to their object and purpose. Linderfalk writes that under Article 31(1), the object and purpose of a treaty means “those reasons for which a treaty exists... as with all things, the object and purpose is in essence subjective”.¹²²

Indeed, the task of treaty interpretation through the lens of the object and purpose from this perspective cannot be anything but the subjective opinion of the one deciding. What the decider is trying to decipher is, when confronted to distinct conclusions deriving from the same

¹¹⁹ Patrick Keenan, ‘The Slippery Concept of “Object and Purpose” in International Criminal Law’ (2023) 37(4) American University International Law Review 799, 812 and 818.

¹²⁰ *Yearbook of the International Law Commission* 1964, vol II, UN Doc A/CN.4/SER.A/1964/Add.1, 52.

¹²¹ Jan Klabbbers, ‘Treaties, Object and Purpose’ (December 2006) *Max Planck Encyclopaedia of Public International Law* (OUP Online Edition) 6.

¹²² Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007) 204.

provision, in view of conventional language, that one conclusion can be correct from the point of view of the object and purpose of the treaty. But this approach raises a significant issue that cannot be ignored in the context of criminal law – “when judges are free to determine that a treaty has a particular object and purpose in one case and a different object and purpose in a different case”, or even that an individual provision has a specific object and purpose that ought to supersede the ‘chief’ object and purpose in a particular circumstance, we are no longer bound by the rigours of legality and strict construction, but by a methodology that is predicated on the subjective interpretation of what a particular decision-maker has concluded the parties intended, where another decision-maker may have concluded otherwise.¹²³

To evidence this further, Linderfalk produces an illustration:

[I]t seems that in the European Convention for the Protection of Human Rights and Fundamental Freedoms, the telos of article 6 paragraph 3(d) is to ensure the accused criminal of a full equality of arms throughout the criminal process, while the combined telos of article 6 paragraphs 1, 2 and 3 is to ensure that the accused is given a fair trial and the telos conferred on the convention as a whole is to promote and defend the ideal of a democratic society.¹²⁴

This is a dangerous road to tread in interpreting an ICL statute as it is conceivable that a textually plausible interpretation may be confronted with an alternative construction based on the object and purpose of a treaty. The concern is that, with legitimised subjectivity, the interpretation achieved by the object and purpose may overcome the perceived drawbacks of a strict textual interpretation.¹²⁵

2.1.3 Applying Multiple Objects and Purposes

Consistently throughout the ICJ’s case history, the Court has advocated for a holistic approach to treaty interpretation. When it becomes apparent that there may be multiple objects and purposes in play, the Court is minded to ensure that all of these aims are fulfilled together, rather than privileging one over another; treaty interpretation is an art and the aims of treaty interpretation are to give effect to all parts of the treaty – consequentially any interpretation

¹²³ Patrick Keenan, ‘The Slippery Concept of “Object and Purpose” in International Criminal Law’ (2023) 37(4) American University International Law Review 799, 818.

¹²⁴ Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007) 212.

¹²⁵ Jan Klabbbers, ‘Treaties, Object and Purpose’ (December 2006) *Max Planck Encyclopaedia of Public International Law* (OUP Online Edition) 17; Darryl Robinson, ‘The Identity Crisis of International Criminal Law’ (2008) 21 Leiden Journal of International Law 925, 934.

which renders any part of the text meaningless or redundant is to be avoided – or even more bluntly, the aim of interpretation is to give effect to every relevant clause.¹²⁶

This is given even greater importance where multiple objects might conflict or pull in different directions, the ICJ then has attempted to balance these contradictory objects and purposes in light of the treaty's overall framework, or as Klabbers identifies it, the treaty's "chief object".¹²⁷ Consider the *Gabčíkovo-Nagymaros Project* in which the Court was requested to decide a dispute regarding the legality and continuance of a bilateral treaty concerning a system of dams and locks on the Danube River for the production of hydroelectricity, navigation and flood control. The Court concluded that "the 1977 Treaty has as its object the construction and joint operation of these works. These objectives can be attained while taking account of the norms of environmental law now in force".¹²⁸ The implications for the parties being that the original economic aims of the parties still stood, but had to take into account the obligations imposed by the environmental aims. There were two objects and purposes, both economic and environmental, that conflicted but needed to be harmonised.

2.2 Rome Statute – Its Object(s) and Purpose(s)

The normative problem that characterises this discussion of what happens when the interpretive methodology of the Vienna Convention is grafted onto the Rome Statute has been conceptualised as a tripartite construction: "(1) to adopt a purposive interpretive approach; (2) to assume that the exclusive object and purpose of an ICL instrument is to maximise victim protection; (3) and to allow this presumed object and purpose to dominate over other considerations, including if necessary the text itself."¹²⁹

The *Katanga* Trial Chamber asserted that the Vienna Convention provides "a method of interpretation which is both circumscribed and rigorous and which leaves little scope for any risk of misinterpretation of the Statute".¹³⁰ How circumscribed? When reading the past

¹²⁶ *Aegean Sea Continental Shelf (Greece v Turkey)* (Judgment) [1978] ICJ Rep 3, 77; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (Judgment) [1994] ICJ Rep 6, 41; *Kasikili/Sedudu Island (Botswana/Namibia)* (Judgment) [1999] ICJ Rep 1045, 18; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (Judgment) [2002] ICJ Rep 625, 37; *Maritime Delimitation in the Black Sea (Romania v Ukraine)* (Judgment) [2009] ICJ Rep 61, 41.

¹²⁷ Jan Klabbers, 'Treaties and Their Preambles' in Michael Bowman and Dino Kriticos (eds) *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018) 172, 184.

¹²⁸ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7, 140-141.

¹²⁹ Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 *Leiden Journal of International Law* 925, 934

¹³⁰ *Prosecutor v Katanga* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/07-3436 (7 March 2014) para 56.

jurisprudence of the ICC, one finds a similar uncertainty as was identified in the joint dissenting opinions of Judge Guerrero, Judge McNair, and Judge Hsu Mo when considering the Genocide Convention, and to mirror their language – what is the object and purpose of the Rome Statute? To submit to trial and prosecute those responsible for the most serious crimes of concern to the international community? Or perhaps more anecdotally, the goal of “ending impunity”? Of course; but is it more than that? Does it comprise any or all of the enforcement articles of the Convention? That is the heart of the matter.

Much has been made of the value of recourse to the preamble of a treaty to identify what the object and purpose, the intentions of the parties and the goal aimed at when agreeing to the terms of the treaty, might be. Hulme writes that “while the Vienna Convention has not substantially clarified preambles’ role in treaty interpretation, it leaves ample room for preambles to exert legal power”;¹³¹ and Klabbers identifies a set of broad functions that preambles can serve, amongst which is to “help to identify what the treaty concerned aims to accomplish: its object and purpose”.¹³²

Although not intended to provide legislative power to the remainder of the text, and certainly not considered to comprise imparting additional obligations imposed by the treaty on the States parties or otherwise willing (or unwilling, in the case of ICL) parties, the preamble does fall among the primary interpretive applicable text for the purposes of deriving the context of the treaty; as much is stated under Article 31(2) of the Vienna Convention which provides that “the context for the purpose of the interpretation of the treaty shall comprise, in addition to the text, including its preamble and annexes”,¹³³ bearing in mind that the “context” is formulated as one of the three key approaches to the general rule of interpretation between the “ordinary meaning of the text” and “in light of its object and purpose”.¹³⁴

In this regard, recourse to the preamble of the Rome Statute has been heavily utilised by the judges of the ICC in clarifying the interpretation of substantive articles of the treaty text in light of their object and purpose. There is, at present, a relatively significant body of academic literature devoted to discussions and criticism of how the ICC has allowed the concept of “ending impunity”, applied through the object and purpose of the treaty, to give way to

¹³¹ Max Hulme, ‘Preambles in Treaty Interpretation’ (2016) 164(5) *University of Pennsylvania Law Review* 1281, 1296.

¹³² Jan Klabbers, ‘Treaties and Their Preambles’ in Michael Bowman and Dino Kritsiotis (eds) *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018) 172, 182-183.

¹³³ Vienna Convention, art 31(2).

¹³⁴ Vienna Convention, art 31(1).

excessive purposive interpretation of specific treaty provisions.¹³⁵ In this sense, the preamble of the Rome Statute can be viewed as an aid to the identification of what the object and purpose of the Rome Statute is, but at the same time, seems to have evolved into imparting a quasi-legislative input to the interpretation of crimes, procedural matters, and general treaty provisions within the statute.

By way of example, in the *Katanga* judgement on his appeal against the admissibility of the case, the Appeals Chamber noted that, amongst other issues with the conformity of the Defence' argument regarding Article 17(1), that an interpretation according that the criteria of "unwillingness" and "inability" needed to be considered in the event of a state's inaction, not just its action, was considered to be "in conflict with a purposive interpretation of the Statute", going on to provide that "the aim of the Rome Statute is 'to put an end to impunity' and to ensure that 'the most serious crimes of concern to the international community as a whole must not go unpunished'".¹³⁶ In doing so the Appeals Chamber referred to the fifth and fourth paragraphs of the Preamble of the Statute, accordingly, within the body of their decision. The Appeals Chamber painted this object and purpose of the Statute as unitary, that there was a singular object and purpose that was aimed at "ending impunity" and ensuring that those responsible "must not go unpunished". But this cannot be the object and purpose of the Rome Statute in isolation, a reading such as this would be indicative of an aim at prosecution rather than an aim at justice, and "ending impunity" accounts not only for the prosecution of a specific act, but also deterrence and prosecution at all costs, notwithstanding the rights of the accused.

Separately, in *Lubanga*, Trial Chamber I, when considering the principles and procedures to be applied to reparations, noted two additional objects and purposes of the Statute; those of "oblig[ing] those responsible for serious crimes to repair the harm they caused to the victims" and to enable the Chamber "to ensure that offenders account for their acts".¹³⁷ By extension, it must be a corollary of the object and purpose of the Statute to provide justice, or vindication for victims.

¹³⁵ Göran Sluiter, 'Atrocity Crimes Litigation: Some Human Rights Concerns Occasioned by Selected 2009 Case Law' (2010) 8(3) Northwestern Journal of International Human Rights 248, 257-260; Benjamin Perrin, 'Searching for Law While Seeking Justice: The Difficulties of Enforcing International Humanitarian Law in International Criminal Trials' (2008) 39(2) Ottawa Law Review 367, 385.

¹³⁶ *Prosecutor v Katanga and Ngudjolo* (Decision on the Admissibility of the Case) ICC-01/04-01/07-984 (25 September 2009) paras 68-87.

¹³⁷ *Prosecutor v Lubanga* (Judgment on the Appeals against the "Decision Establishing the Principles and Procedures to Be Applied to Reparations" of 7 August 2012, with Amended Order for Reparations (Annex A)) ICC-01/04-01/06-3129 (3 March 2015) para 2.

The Trial Chamber in *Bemba* found differently again, that the Preamble of the Statute declares that “the most serious crimes of concern to the international community as a whole must not go unpunished”¹³⁸ and that the States Parties were “[d]etermined to put an end to the impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”.¹³⁹ By extension then, the Chamber considered that “the Preamble establishes retribution and deterrence as the primary objectives of punishment at the ICC”.¹⁴⁰ In interpreting the same Preamble provisions as the Appeals Chamber in *Katanga* in a separate context, the Trial Chamber distilled different interpretations of the object and purpose of the Statute that were more focused on retribution (which the Chamber clarified not to be understood as fulfilling a desire for revenge but rather an expression of the international community’s condemnation of the crimes), but also a mechanism to acknowledge the harm to the victims in order to promote peace and restoration.¹⁴¹

A more insidious example is presented by Sluiter, among other academics, in relation to the notion of “fighting impunity” as the prevailing interpretive tool at the ICC when considering the object and purpose of the treaty. On 8 December 2009, the Appeals Chamber gave its judgement on the changes to the legal characterisation of the facts pursuant to Regulation 55(2).¹⁴² Within which, the Appeals Chamber noted that:

Mr Lubanga Dyilo’s interpretation article 61(9) of the Statute bears the risk of acquittals that are merely the result of legal qualifications confirmed in the pre-trial phase that turn out to be incorrect... This would be contrary to the aim of the Statute to “put an end to impunity”. The Appeals Chamber is of the view that a principal purpose of Regulation 55 is to close accountability gaps, a purpose that is fully consistent with the Statute.¹⁴³

The Appeals Chamber, in essence, asserted that the “risk of acquittal” and that the Statute’s object and purpose being to “put an end to impunity” guided the interpretation of a provision permitting the alteration of the legal characterisation of the facts after the charges have been

¹³⁸ Preamble, para. 4 of the Statute.

¹³⁹ Preamble, para. 5 of the Statute.

¹⁴⁰ *Prosecutor v Bemba* (Decision on Sentence pursuant to Article 76 of the Statute) ICC-01/05-01/08 (21 June 2016) para 9.

¹⁴¹ *ibid*, para 11.

¹⁴² *Prosecutor v Lubanga* (Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May Be Subject to Change in accordance with Regulation 55(2) of the Regulations of the Court) ICC-01/04-01/07 (OA8) (14 July 2009).

¹⁴³ *ibid*, para 77.

confirmed and the trial has begun, to which the Defence counsel objected that this would breach the principle of legality on the basis that the defence case had been constructed with regard to co-perpetration, and notions of foreknowledge and foreseeability would be offended. So then, is the object and purpose of the Rome Statute to rectify “risks of acquittal” in favour of the Prosecution?

Not wanting to fall into an empirical rabbit-hole, suffice to say that across a relatively narrow range of case analysis, the object and purpose is no clearer now than it was when the treaty was at the head of this section, and this is the fundamental premise of the complaint of its usage. If the Rome Statute is to be conceived of as an international criminal tribunal that bears resemblance to the relatively uncontested standards of legality espoused in the previous chapter of this paper, then it must adhere to those principles of foreseeability, certainty and strict construction. The use of the Vienna Convention method of interpretation is very far removed from these notions due, primarily, to its legitimisation of the object and purpose as a narrative interpretive tool to the provisions of a treaty.

With regard to academic opinion, the consensus seems relatively clear on what the object and purpose of the treaty ought to be – in their joint opinion provoked by the Lawyers’ Committee on Human Rights and the Medical Foundation for the Care of Victims of Torture, James Crawford, Philippe Sands and Ralph Wilde write that “the object and purpose of the ICC Statute is to put in place effective arrangements to prevent impunity for the crimes over which the ICC will have jurisdiction” and in no uncertain terms noted that the ICC is established to “ensure that persons subject to the jurisdiction of a State party to the Statute who are suspected of committing one of these crimes are subjected to proper investigation, if a sufficient case exists are prosecuted, and if found guilty, are duly punished for their crimes”.¹⁴⁴ Separately, Davidson notes that the object and purpose of the Statute goes further than “ending impunity” and is rather “to condemn and punish people who have been found guilty of committing gross violations of ICL through fair trials conducted in accordance with international human rights and the rule of law”.¹⁴⁵

Both of these suggestions sound more applicable than simply “ending impunity” but are still hampered by notions of legality with regard to the interpretation of the treaty on the basis that,

¹⁴⁴ James Crawford, Philippe Sands and Ralph Wilde, ‘In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States under Article 98(2) of the Statute’ (Joint Opinion, 5 June 2003) <https://www.legal-tools.org/doc/7f2edf/pdf/%3E> accessed 3 November 2025, 12.

¹⁴⁵ Caroline Davidson, ‘How to Read International Criminal Law: Strict Construction and the Rome Statute of the International Criminal Court’ (2017) 91 St. John’s Law Review 37, 92.

if the substantive substructure of interpretation is predicated on indeterminacy, the resulting application of the object and purpose leaves us unstuck due to the normative constraints of the Rome Statute.

This is a methodological issue that results in a fundamental dilemma for the ICC when interpreting the Rome Statute, how does one balance adherence to legality with the distinct flexibility of the Vienna Convention? The central thrust of this concern then is as follows; if it is the case that legality functions as a normative constraint that demands determinacy, there are necessarily subsequent methodological limits on the grounds of subjectivity that cannot be overcome by the perceived “circumscribed and rigorous” method of interpretation provided for by the Vienna Convention – the two are simply, inherently, at odds with one another.

Accordingly, the Vienna Convention’s teleological structure – intended to codify agreed upon norms of treaty interpretation for those treaties belonging to the broad sphere of general public international law – conflicts with the Rome Statute’s positivist integration. When imported into ICL without adaptation, it converts interpretive discretion into a method that risks the fundamental principle of legality.

2.3 Summary

The preceding analysis has shown that the interpretative framework of the Vienna Convention, while purporting to offer a neutral methodology grounded in textualism and good faith, inevitably accommodates a degree of subjectivity that undermines the precision demanded by the legality principle. The malleability of terms such as “object and purpose” and “context” allows interpretative discretion that, in the setting of international criminal adjudication, risks converting judicial interpretation into judicial lawmaking. This difficulty raises a further and more fundamental question: whether the Vienna Convention can be presumed to govern the interpretative practice of the International Criminal Court at all.

This tension between a textual approach and a teleological approach is compounded by Article 21(2) of the Rome Statute, envisaging a system of the optional applicability of precedent in subsequent decisions made by the Court.¹⁴⁶ There is a dual problem here, first that there can be no reliance, by the accused, that the object and purpose derived from the Rome Statute will be consistently applied across decisions; the second that the Court lacks a stabilising interpretative hierarchy found within criminal codes. Consequently, in applying the object and purpose

¹⁴⁶ The provision provides that “[t]he Court may apply principles and rules of law as interpreted in its previous decisions”.

methodology, the judges of the ICC are faced with a choice between textual fidelity and teleological lawmaking aimed at achieving the proposed intentions of the drafters potentially stretching treaty interpretation beyond the consent of States Parties.

The Rome Statute is not merely a treaty among States; it constitutes the founding instrument of an international organisation endowed with its own organs, procedures, and sources of law. If the Statute operates, at least in part, as the internal law of that organisation, then the applicability of the Vienna Convention may be structurally limited by Article 5 of the Convention itself. The following chapter therefore turns to this institutional dimension, examining the distinction between the Rome Statute's external, treaty-based obligations and its internal, organisational law, and assessing how that distinction bears upon the scope and legitimacy of interpretation under the Vienna Convention.

3. If the Rome Statute is the Constituent Treaty of an International Organisation

The Rome Statute occupies a paradoxical position within the architecture of the contemporary international law position on treaty interpretation. In form it is a multilateral treaty, concluded through the reciprocal, quasi-contractual (to draw a corollary with private law), consent of States; in substance it is the constituent treaty of a permanent criminal tribunal, necessitating certain essential characteristics such as legal personality, autonomous organs, and a distinct normative will. That there is something unique concerning the interpretation of treaties constituting international organisations – or indeed, that they are “treaties of a particular type” – is neither a novel nor a controversial claim.¹⁴⁷ What the implications on the interaction between general international law and the internal law of an international organisation are, is, by contrast, subject to considerable disagreement and debate.

By way of exposition, Article 5 of the Vienna Convention provides that “the present Convention applies to any treaty which is the constituent instrument of an international organisation and to any treaty adopted within an international organisation without prejudice to any relevant rules of the organisation”.¹⁴⁸ Integrated within the convention, the Vienna Convention proscribes a nuanced regime for the application of the treaty to these instruments of a particular kind and, although the ILC provided no exposition as to what the “relevant rules of the organisation” might be, or how they might be ascertained, in principle it is agreed that the function of Article 5 is primarily that of a general reservation clause. More plainly, “even if the convention (*lex generalis*) is in principle applicable to constituent instruments of international organisations and treaties adopted within international organisations, it is the subsidiary legal regime”.¹⁴⁹ What can be granted, however, is that the ILC’s draft of the 1986 Vienna Convention on the Law of Treaties defines the “rules of the organisation” as being “in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organisation”.¹⁵⁰

But it is not that simple. The above characterised Janus-faced character of constituent instruments, being simultaneously conventional and constitutional (institutional), is the “starting point of the controversy between the so-called ‘traditionalists’ and

¹⁴⁷ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, [19]

¹⁴⁸ Vienna Convention, art 5.

¹⁴⁹ Kirsten Schmalenbach, ‘Article 5: Treaties Constituting International Organisations and Treaties Adopted within an International Organisation’ in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 99.

¹⁵⁰ Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (adopted 21 March 1986, not yet in force) UN Doc A/CONF.129/15, art 2.

‘constitutionalists’”.¹⁵¹ The former makes the claim that treaties by their very nature are contractual instruments that function as social agreements whereby sovereign States consent to the limitation of their unfettered whims in furtherance of a common goal – the institution owes “not only its existence but its ability to act to the instrument which founds it”;¹⁵² the latter that constituent instruments are different from other bilateral and multilateral treaties,¹⁵³ such that following the contractual process of the creation of any international organisation, “the creature created by that contract takes on something of a life of its own, acting independently of the States” that created it.¹⁵⁴

It is this dual quality that renders the Rome Statute a particularly instructive case study with regard to the interpretation of constituent instruments. The question at stake is not merely whether the Court’s constituent treaty can be interpreted using the Vienna Convention, but whether the Statute, by constituting the Court as an autonomous institution, generates an internal legal order whose interpretive logic diverges from that of ordinary treaty law. The argument advanced here is that the Statute, much like other constituent treaties, establishes an internal order that renders it at least in part distinct from the ordinary application of the general principles of treaty interpretation, yet the Statute does not benefit from the extensive, expansive teleology observed in cases such as the European Union or the United Nations Charter as it is necessarily restricted by the principle of legality that pervades criminal law. The ICC’s interpretive autonomy, then, is both real and bounded; the effect of constitutionalism both informs the interpretive logic of the institution and curtails it with the manifestation of this in the Rome Statute being a vertical interpretation.¹⁵⁵ This, in turn, leads to a simple yet eloquent conclusion – it is the nature of a treaty that matters, not its form.

This Chapter proceeds in four parts. Part 1 clarifies the problem of the dual character of constituent instruments and elucidates the distinction between treaty and constitution; notionally, through the prescription of internal and external law. Parts 2 and 3 engage in a comparative analysis with considerations of the EC Treaty and the UN Charter that demonstrate that the constituent nature of a treaty modifies interpretive practice. Part 4 applies this to the ICC’s internal legal order, making the case that the Statute establishes an internal normative

¹⁵¹ *ibid.*, 102.

¹⁵² Elihu Lauterpacht, ‘The Development of the Law of International Organisations by the Decisions of International Tribunals’ (1976) 152 *Recueil des Cours* 377, 414.

¹⁵³ Christopher Peters, ‘Subsequent Practice and Established Practice of International Organisations: Two Sides of the Same Coin?’ (2011) 3(2) *Goettingen Journal of International Law* 617, 621.

¹⁵⁴ Nigel D. White, *The Law of International Organisations* (2nd edn, Manchester University Press 2005) 18.

¹⁵⁵ Jan Klabbbers, ‘Constitutionalism Lite’ (2004) 1 *International Organisations Law Review* 31, 49.

framework that is rooted in the *telos* of the organisation – recognising that the Rome Statute is, at the same time, a treaty and a legislative code (the nature of the organisation) that informs the interpretation of the same. extracting the interpretive consequences that follow.

3.1 Distinction between Internal and External Law

The tension between contract and constitution has long been identified as the central ambiguity that pervades the doctrinal controversy surrounding international institutions. Ahlborn writes that “on the one hand, it is widely accepted that international organisations are founded by their constituent instruments as closed entities with separate legal personality that interact with other subjects of international law horizontally. On the other hand, international organisations... operate according to rules enacted by the organs of the organisation on the basis of the same constituent instruments in a vertical dimension”.¹⁵⁶ This distinction between horizontal and vertical interaction with other subjects of international law is a distinction that has consistently been recognised in the jurisprudence and doctrine of international institutional law. It reflects two complementary yet distinct orders of law: external law, which manifests as the inter-state, consensual, classical structure of the international legal order,¹⁵⁷ and an internal law, insofar as the agreements establishing them are intended to constitute a new internal legal order, “which is both empowered and circumscribed by the purposes it is designed to achieve”.¹⁵⁸ The internal law, in effect, regulates the conduct and functioning of the international organisation within that framework; importantly, a framework that appears to escape the reach of the general rules of international law.

As early as 1930, British jurist Arnold McNair classified “treaties constituting constitutional international law” as an exclusive category of law-making treaties concluding the necessity to “free ourselves from the traditional notion that the instrument known as the treaty is governed by a single set of rules”.¹⁵⁹ This perspective is not isolated, in recognition of the unique nature of constituent treaties, White writes that “although the [Vienna Convention] seems to apply all three approaches (textual, purposive and practical) equally to all treaties, it is submitted here

¹⁵⁶ Christiane Ahlborn, ‘The Rules of International Organisations and the Law of International Responsibility’ (28 April 2011) Amsterdam Centre for International Law Research Paper No 2011-03 (SHARES Series) <https://ssrn.com/abstract=1825182>.

¹⁵⁷ Catherine Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart Publishing 2007) 27.

¹⁵⁸ Tim Clark, ‘The Teleological Turn in the Law of International Organisations’ (2021) 70(3) *International and Comparative Law Quarterly* 533, 538.

¹⁵⁹ Arnold McNair, ‘The Function and the Differing Legal Character of Treaties’ (1930) 11 *British Yearbook of International Law* 100, 118, reprinted in A McNair, *The Law of Treaties* (Clarendon Press 1961).

that the weight given to each does vary with the type of treaty”;¹⁶⁰ Schermers and Blokker’s authoritative text notes of this internal law that “the resulting law is an exclusive part of a separate legal order, which is dependent on the organisation’s own constitution, but independent of any other legal orders”;¹⁶¹ Brölmann asserts that it seems “undisputed in legal writing and in positive international law” that this internal legal order “stands apart from general international law”,¹⁶² providing perhaps the most permissive endorsement of this argument that “even when the constituent treaty is subjected to the law of treaties, it is not accessible to the law of treaties as a regular treaty would be”;¹⁶³ Zoller goes as far to state that the Vienna Convention “which has bearing solely on states, cannot regulate the relations between the organisation and its members in the same manner that it regulates the relations among member states”;¹⁶⁴ even Klabbers, who has consistently approached the notion of the unique nature of constituent treaties and the question concerning alternative interpretation with extraordinary scepticism,¹⁶⁵ acknowledges that “such constituent documents are not ordinary treaties”, although the conclusion to this statement is less ambitious than his contemporaries.¹⁶⁶

Why is this important? There are two primary reasons: first, in a deluge of disagreement as to the exact nature of constituent instruments, the resulting affect that this might have on State consent, and the applicability of the general rules of interpretation to bodies which appear to sit outside of the realm of the rules of international law but owe their very genesis to those self-same rules, there appears to be a glimmer of agreement that, at the very least, these instruments are abnormal. Consequently, any interpretation must recognise this and probably should be, by extension, not based on a norm. Second, the emergence of this internal law marks a transformation from contractual to institutional normativity, where interpretive focus shifts from the intentions of the contracting States to the functional needs and objectives of the organisation; if interpretation is not governed by the Vienna Convention but by the internal legal order of the organisation, this has profound implications on the method of interpretation

¹⁶⁰ Nigel D. White, *The Law of International Organisations* (2nd edn, Manchester University Press 2005) 20.

¹⁶¹ Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity within Diversity* (5th edn, Martinus Nijhoff 2011) 741.

¹⁶² Catherine Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart Publishing 2007) 28.

¹⁶³ *ibid*, 113.

¹⁶⁴ Elisabeth Zoller, ‘The “Corporate Will” of the United Nations and the Rights of the Minority’ (1987) 81(3) *American Journal of International Law* 610, 625.

¹⁶⁵ For justification of this assertion, see Jan Klabbers, ‘Constitutionalism Lite’ (2004) 1 *International Organisations Law Review* 31 and Jan Klabbers, ‘The Transformation of International Organizations Law’ (2015) 26(1) *European Journal of International Law* 9.

¹⁶⁶ Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press 2002) 82.

of these instruments which appears to lean towards a teleological interpretation predicated on the function and purpose of the institutions' creation operating on the basis of a *Kompetenz-Kompetenz* of sorts.¹⁶⁷

The consequence of this doctrinal divide is that the interpretive question cannot be answered by reference to form alone. A treaty that constitutes an international organisation possesses, by its very function, an internal legal dimension that conditions how its provisions must be read and applied. The most progressive examples of this statement derive from the jurisprudence of the European Community (EC) Treaty and the UN Charter, whose constituent treaties have been regarded primarily as constitutions – the nature of the instrument has decided its interpretation and application.

3.2 The Nature of the European Union

Perhaps the principal example of a multilateral treaty constituting an international organisation that has subsequently acquired a life of its own, such that it is now beyond the capability of States to control, is the European Union (EU). Apposite to the idea of a consent-based formal legal agreement, the EU epitomises the disparity between ordinary multilateral treaties, entirely subject to a State's continued willingness to limit its own sovereignty, and constituent treaties, that are evolutionary in nature and possess an "organic-constitutive element which distinguishes them from other multilateral treaties and influences their working".¹⁶⁸

Two infamous cases will be considered: *Van Gend en Loos* and *Costa v ENEL*, both asserting that the international law contained in the European Economic Community (EEC) is to be considered as establishing a "new legal order" whose supranational law, the European Court of Justice (ECJ) concluded, was (and is) directly effective within, and superior to, the domestic legislation of member-states. Both decisions are notorious and there is little value in an explanation of the circumstances, what is pertinent for the purposes of the development of the law of international institutions is the reasoning that the Court employed.

The question in *Van Gend en Loos* was whether Article 12 of the EEC Treaty had direct application in national law such that nationals of Member States could rely on the basis of the treaty article to claim rights domestically. The ECJ held in the affirmative that "the Community constitutes a new legal order of international law for the benefit of which the states have limited

¹⁶⁷ Catherine Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart Publishing 2007) 113.

¹⁶⁸ *ibid*, 115; Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press 2002) 97.

their sovereign rights... and the subjects of which comprise not only Member States but also their nationals”.¹⁶⁹ The decision, in and of itself, was a relatively extensive interpretation of the EEC Treaty, but what is more interesting is the broad teleological reasoning that the Court used to reach this conclusion. Citing first that the objective of the EEC Treaty was to establish a common market, whose function was “of direct concern to interested parties in the Community” was sufficient to imply not only that the Treaty was “more than an agreement which merely creates mutual obligations” (the substance of which has been discussed above regarding the constitutional interpretation of constituent agreements), but further that this view was reinforced with reference to the preamble of the Treaty which refers “not only to governments but to peoples”.¹⁷⁰ In tandem with the establishment of subsidiary organs to the treaty, such as the European Parliament and the Economic and Social Committee, the ECJ constructed the initial framework for its conversion to a constitutional instrument.

The ECJ did not stop there. In *Costa v ENEL* the Court widened the division between state consent and community constitution, asserting that the EEC Treaty established an “independent source of law” with a “special and original nature”.¹⁷¹ In *Les Verts*, the Court asserted that the EEC Treaty constituted a “basic constitutional charter”.¹⁷² And more recently, and purposeful for our analysis, the ECJ has gone so far as to assert that the Vienna Convention is not applicable when interpreting the constituent instruments of the European Union.¹⁷³

In tracking a successive series of judgements, it becomes apparent that the considerations of the ECJ in *Van Gend en Loos* marked a decisive break from traditional horizontal international law. What once was simply a multilateral treaty concluded by States in furtherance of communal aims, quickly morphed, due to the nature of the institution, into a constituent instrument establishing permanent institutions and subsidiary organs capable of directly interfering with the domestic legal order of Member States. More severely, this led to the disapplication of the Vienna Convention to the EU organs due to the *lex specialis* nature of international institutional law.

¹⁶⁹ *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* (Case 26/62) [1963] ECR I [12].

¹⁷⁰ *ibid.*

¹⁷¹ *Flaminio Costa v ENEL* (Case 6/64) [1964] ECR 585, 594

¹⁷² *Parti écologiste “Les Verts” v European Parliament* (Case 294/83) [1986] ECR 1339 [23].

¹⁷³ *SP v Commission* (Joined Cases T-27/03, T-46/03, T-58/03, T-79/03, T-94/03, T-102/03, T-150/03 and T-252/03) [2007] ECR II-4329, [58].

The ECJ's constitutional methodology confirmed this transformation as the Court “did not consider itself bound by the formal rules of interpretation of international law. It derived its reasoning from the system and the spirit of the Treaty itself, and from the objectives pursued by the Community”.¹⁷⁴ This is the crux of what seems to be the consistent method of interpretation of constituent treaties – to look to the nature rather than the form – and although it might be said that the EU is unique in this regard, indeed there is no other international institution that functions in the same way, this is exactly the point. It is the unique nature of each constituent instrument that affects disparate modes of interpretation. This notwithstanding, the EU is not the only organisation that has gone this far in separation from the ordinary rules in furtherance of an alternative method of interpretation to the Vienna Convention.

3.3 The Nature of the United Nations

A similar evolution can be observed to the UN Charter. In fact, to such an extent that, where in *Van Gend en Loos* the EC treaty was considered to constitute a legal order that was demonstrative of the will of the peoples of Europe, the UN Charter has been argued to amount to a constitution of the international community in its entirety.¹⁷⁵

In the *Reparations* advisory opinion, the Court wrestled with the question of whether the UN could bring an international claim for injuries suffered by its agents, raising subsequent essential considerations as to whether the organisation could be considered to be imbued with a legal personality given the Charter did not expressly provide for this. In doing so, the Court noted that “the rights and duties of an entity such as the Organisation must depend upon its purposes and functions as specified or implied in its constituent instruments and developed in practice”.¹⁷⁶ This marked a resounding step towards the recognition that a constituent instrument constructs an internal legal order whose interpretation is governed by functional necessity, or a “functional interpretive framework”, that heavily implied the emergence of a distinct method of interpretation towards constituent instruments as opposed to ordinary multilateral treaties.¹⁷⁷ Indeed, this is considered to be the “highpoint of purpose-based

¹⁷⁴ Pierre Pescatore, ‘The Doctrine of “Direct Effect”: An Infant Disease of Community Law’ (2015) 40(2) *European Law Review* 135, 137

¹⁷⁵ Bardo Fassbender, ‘The United Nations Charter as Constitution of the International Community’ (1998) 36 *Columbia Journal of Transnational Law* 529, 531-532.

¹⁷⁶ *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 180.

¹⁷⁷ Catherine Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart Publishing 2007) 119.

interpretation” whereby the recognition of an incontrovertible attribute of a State was imparted onto an international organisation, not due to a strict interpretation of the words amounting to consent of the State parties, but rather resulting from a teleological approach to the nature of the organisation.¹⁷⁸

Subsequent decisions reinforced this framework. The most important of these for the purposes of constituent treaty interpretation was the *Nuclear Weapons* advisory opinion, in which the Court was asked first by the World Health Organisation and, following its dismissal, by the UN General Assembly, whether the threat or use of nuclear weapons is permissible under international law under any circumstances.¹⁷⁹ Notably, although the Court reinforced the notion that “constituent instruments of international organisations are multilateral treaties, to which the well-established rules of treaty interpretation apply”¹⁸⁰ (with particular with reference to the *Certain Expenses* advisory opinion wherein it was held that this was the established framework or the interpretation of constituent instruments “albeit [treaties] having certain special characteristics”),¹⁸¹ acknowledgement was also given to the fact that the constituent instruments of international organisations are “treaties of a particular type”, that “such treaties can raise specific problems of interpretation” owing to their character, their nature, the objectives of the organisation, the imperatives associated with the performance of its functions, and its established practice, which all deserve “special attention when the time comes to interpret these constituent instruments”.¹⁸²

The guidance to take from this is that, when encountering interpretation of constituent treaties of international organisations, the ICJ considers the role of the very nature of the organisation created by a constituent instrument “to distinguish the interpretation process of a constituent instrument from other treaties”.¹⁸³ Further, all indications seem to point towards the general rules of interpretation of international law both existing concomitantly with the *lex specialis* of the international organisation, but also being subordinate to the same when interpreting the instrument itself. In this regard, “the element of treaty appears merely as the presupposition of

¹⁷⁸ Peter Quayle, ‘Treaties of a Particular Type: The ICJ’s Interpretative Approach to the Constituent Instruments of International Organisations’ (2016) 29 Leiden Journal of International Law 853, 871-872.

¹⁷⁹ UNGA Res 49/75 K (15 December 1994) UN Doc A/RES/49/75.

¹⁸⁰ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, 74.

¹⁸¹ *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151, 177.

¹⁸² *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, 75.

¹⁸³ Peter Quayle, ‘Treaties of a Particular Type: The ICJ’s Interpretative Approach to the Constituent Instruments of International Organisations’ (2016) 29 Leiden Journal of International Law 853, 862.

the organisation, the foundation upon which the superstructure, the constitution of the organisation” is based, but for all intents and purposes, inapplicable to the organic growth nature of an organisation post-establishment when assessing its own internal law.¹⁸⁴

3.4 The Nature of the International Criminal Court

If the nature of the constituent treaty of the EU is that of a community constitution, and the nature of the UN Charter is that of a constitution of the entire international community, what is the nature of the Rome Statute establishing the ICC? Clark suggests that such teleological exploration is a two-part endeavour: (1) the identification of an organisation’s purpose; and (2) a determination as to how it might be attained.¹⁸⁵ The question is whether the interpretative method applicable to the Rome Statute aligns with the external rules of the Vienna Convention or the internal principles grounded in criminal legality and institutional coherence.

As a starting point, the ICC is a treaty-based international organisation with independent legal personality, operating as a permanent international criminal court of last resort, whose Statute is both a constituent treaty and a criminal code, producing a *sui generis*, hybrid interpretative regime. To take this further, the ICC transcends classical bilateralism and creates, as Ahlborn noted much like other international organisations, an open political community in which sovereign States must act according to the rules enacted by the organisation in a vertical dimension (in accordance with its internal law).¹⁸⁶ Kaul and Chaitidou go as far as to equate the ICC to the EU legal system, claiming “the emergence of an ‘ICC Community’ with distinct roles for its various actors” whose community interest (or purpose) is to “prosecute ‘the most serious crimes of concern to the international community as a whole’ and hold perpetrators of such crimes accountable”.¹⁸⁷ If the nature of the Rome Statute is a community constitution taking form as a quasi-legislative body of criminal law, this necessitates certain interpretative consequences. The judges of the ICC, then, when interpreting the Rome Statute, are not interpreting a standard multilateral treaty between states; the form, being a treaty, is secondary to the nature, being a criminal code. When a judge applies the ICC Statute, he is applying the

¹⁸⁴ Shabtai Rosenne, *Developments in the Law of Treaties, 1945-1986* (Cambridge University Press 1989) 191.

¹⁸⁵ Tim Clark, ‘The Teleological Turn in the Law of International Organisations’ (2021) 70(3) *International and Comparative Law Quarterly* 533, 557.

¹⁸⁶ Christiane Ahlborn, ‘The Rules of International Organisations and the Law of International Responsibility’ (28 April 2011) Amsterdam Centre for International Law Research Paper No 2011-03 (SHARES Series) <https://ssrn.com/abstract=1825182>, 2-3.

¹⁸⁷ Hans-Peter Kaul and Eleni Chaitidou, ‘Balancing Individual and Community Interests: Reflections on the International Criminal Court’ in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press 2011) 975, 987.

internal law of the constitution of an international organisation, in this instance, the constitution of a permanent criminal tribunal, which brings to the forefront the concerns that animated Chapters 1 and 2 of this paper, the principle of legality as opposed to legitimised judicial flexibility permitted by the Vienna Convention.

Aligning with the internal – external law paradigm noted previously, where the Statute functions as a criminal code, interpretative discretion must be constrained to safeguard legality. In other words, when the Statute speaks as criminal law, it must be read as criminal law. What makes the Rome Statute particularly unique, however, is that it is only part criminal law; implying that not all articles contained within require such formalist rigour. For example, whilst the substantive crimes within the jurisdiction of the Court would be considered to constitute a vertical, internal law application, the same cannot be said of those ordinary articles often found in treaties and concerned with the interaction between the State parties and the Court. Provisions relating to, for example, cooperation or jurisdiction, operate on this horizontal plane of State-ICC relations and, in contexts such as these, the Vienna Convention approach to interpretation is legitimate. In this vein, Article 21 of the Rome Statute is better read from the perspective of a layered interpretative structure that anticipates the convergence of internal and external law, in a way not dissimilar to the EU and UN contexts – constitutional instruments and the law contained within, “is not a distinct source of the law of international law but a distinct source of law in the internal legal order of the organisation”, the two exist simultaneously;¹⁸⁸ what is captured by Article 5 of the Vienna Convention is that constitutional instruments require interpretative rules that respect both their constitutive function and their international genesis.

In this regard, considering the constitutional nature of the Rome Statute when assessing the correct method of interpretation provides a degree of illumination; indeed, it offers a conceptual solution to the interpretative tensions between the treaty as a treaty, and the treaty as a criminal code. There need be no convoluted exercise undertaken to understand what rules are applicable to each individual article of the Rome Statute, only an understanding of what the article is intended to achieve. In doing so, the dual nature of the Statute ceases to be a source of instability and instead becomes a prescriptive guide: the Vienna Convention’s methodology continues to apply, but its scope is calibrated to reflect vertical analysis.

¹⁸⁸ Christiane Ahlborn, ‘The Rules of International Organisations and the Law of International Responsibility’ (28 April 2011) Amsterdam Centre for International Law Research Paper No 2011-03 (SHARES Series) <https://ssrn.com/abstract=1825182>, 15.

For example, when viewing the substantive crimes, one must recognise that, as the fundamental basis on which the individual responsibility of the accused will be engaged, dependent upon the actions taken, there is simply no room for expansive interpretation if one aims at upholding the promises of *nullum crimen sine lege*. Cognisant of the role that the ICC is intended to play, that it is a “permanent institution” with the “power to exercise its jurisdiction over persons for the most serious crimes of international concern”, its primary mandate is judicial: to investigate and prosecute individuals where national courts are unwilling or unable to do so.¹⁸⁹ It is not an institution like the International Law Commission whose remit is explicitly enunciated as “the promotion and progressive development of international law and its codification”.¹⁹⁰

However, the same level of analysis does not hold true in provisions such as those contained under Part 9 of the Rome Statute with regard to international cooperation and judicial assistance. These are, by their very nature, beholden to the application of the general rules of interpretation as they engage the relationship between States Parties and the ICC. In this vein, the dual nature of the Rome Statute can be viewed as a safeguard reconciling the two perspectives.

¹⁸⁹ Rome Statute, art 1.

¹⁹⁰ UNGA Res 174 (II) (21 November 1947) *Establishment of an International Law Commission* GAOR 2nd Session Supp No 16, 105

Conclusion

To the question, then, of to what extent the Rome Statute is amenable to interpretation using the methodology put forward by the Vienna Convention, the answer is mercurial. The extent to which the Vienna Convention is applicable is entirely dependent on the context in which the Rome Statute is being interpreted. This thesis has acknowledged that while the Vienna Convention supplies a universal interpretative framework for treaties, its application is conditioned by the nature of the treaty. The Rome Statute's hybrid nature engages distinct interpretative imperatives, but the overarching discipline required by Articles 21 and 22 of the Statute, integrating the principle of legality through the maxim *nullum crimen sine lege* / *nulla poena sine lege*, in combination with a hierarchy of sources, necessitates a degree of formalism and foreseeability that is not always compatible with the teleological flexibility legitimised by the Vienna Convention's object and purpose approach.

Accordingly, this thesis has presented a bifurcated approach to interpretation, one that mirrors the ontological implications of its institutional nature: the Rome Statute must be interpreted vertically (as the code of an international criminal tribunal) where individual criminal liability arises, and horizontally (as a multilateral treaty) where the Court operates as a mediating entity constructed by the common agreement of the State Parties. Within this framework, the Vienna Convention retains relevance but is not the determinative source of interpretation – it is qualified by the regime in which it is operating.

Chapter 1 framed legality as the primary interpretative anchor, demonstrating that the Rome Statute entrenches legality as a structural interpretative norm. Article 22(2) requires that definitions of crimes “shall be strictly construed and shall not be extended by analogy”, further, that any ambiguity must be resolved in favour of the accused. By centralising this position, interpretation within the criminal provisions of the Statute must emulate the specificity and predictability associated with domestic criminal codes rather than the purposive guise of general public international law. Importantly, this is a guideline specifically for the Rome Statute rather than the entire regime of ICL, but being a criminal tribunal, notwithstanding its international nature, the ICC's interpretative fidelity must first be directed towards the legality principle, ensuring fair notice. Teleological or evolutive (using the language of human rights law) readings of crimes risk violating the legality that legitimises the institutions authority to prosecute.

Thus, the Rome Statute's criminal dimension demands that the Vienna Convention be filtered through legality – and whilst Article 31 of the Vienna Convention proscribes a balance between the ordinary meaning of words and conformity with the principle of good faith, reference to object and purpose must yield to textual certainty where individual rights are at stake.

Chapter 2 was concerned with the risks of inherent indeterminacy when applying the rules of interpretation under the Vienna Convention. Jurisprudence from the ICJ was employed to demonstrate that the notion of object and purpose is one that eludes definition to a degree, rather than constituting a fixed criterion, its usage is more akin to a balancing tool enabling interpreters to reconcile competing textual and purposive considerations. Importantly, within the ICC's practice, purposive reasoning has been argued to lean towards teleological expansion, importing justifications from human rights law whereby the object and purpose of the Statute is considered to be a mechanism to achieve justice for victims without acknowledging its central purpose – the framework for a criminal justice system.

The doctrinal conclusion is therefore one of qualified compatibility. The Vienna Convention methodology is not entirely rejected, rather, it cannot be used liberally and must, whenever the two come into conflict, be subsidiary to notions of legality. The interpretative process must begin and end with the strict wording of the text, purposive considerations may clarify, but not expand, the meaning of defined offences.

Chapter 3 considered interpretation of the Rome Statute through the lens of its nature as the constituent instrument of an international organisation. In this capacity, the distinction between the internal law of the organisation and the external law of general public international law are paramount; of note, the Vienna Convention takes this into account under Article 5 that makes provision for an effectual reservation clause to the rules of interpretation for international organisations through recognition of the 'rules of the organisation'.

Constituent treaties, as the jurisprudence of the ICJ and the practice of the EU indicate, are living instruments whose provisions must be interpreted in light of their object, purpose, and institutional context. The Statute, in its regulation of institutional relationships between the organs of the Court, the Court and its States Parties, the Court and the UN, and the Court and the accused, engenders separate recourse to interpretation.

Accordingly, when the ICC interprets provisions concerning cooperation obligations, jurisdictional limits, rules of withdrawal, or the powers of the Presidency, Registry and the

Court, the interpretative toolkit of the Vienna Convention applies legitimately. There are no questions of individual criminal responsibility at play and, therefore, there is no restriction imposed by legality.

Doctrinally, this thesis intends to contribute to a more precise understanding of the interaction between general international law and the ICC, it clarifies that whilst the Court derives its authority from a treaty, it is not merely a treaty-based organ. As the Statute contains substantive provisions of criminal law – codifying the most serious international crimes, putting in place procedures for trials, establishing penalties and reparations – its interpretation cannot be solely beholden to general treaty-law interpretative methodologies. The nature of what the Rome Statute is matters and, in turn, this determines the interpretative approach taken.

Institutionally, acknowledging the “Janus-faced” nature of the Statute situates the ICC within the grouping of international organisations without eroding its distinctiveness as a criminal court. International Criminal Law, like every other body of international law, is a developing, evolutionary practice, but there are evolutions that are inapplicable to this regime in order to preserve the fundamental agreement undertaken when prosecuting crimes – that in order for a criminal system to avoid devolving into a tyrannical relationship between the individual and the State (or the individual and the institution in this circumstance) there are important principles that must take precedence.

The foregoing analysis leads to a clear conclusion. The Rome Statute is amenable to interpretation using the Vienna Convention, but its operation is functionally differentiated. By articulating the set of distinctions, the thesis seeks to advance the understanding of ICL’s interpretative foundations, suggesting that ICL, while finding its origins in treaty law, constitutes a specialised regime requiring interpretative caution proportionate to the gravity of its consequences.

Résumé

Introduction

Cette thèse examine la relation interprétative entre le Statut de Rome de la Cour pénale internationale (CPI) et la Convention de Vienne sur le droit des traités (Convention de Vienne). Elle vise à tester et à remettre en question l'opinion dogmatique selon laquelle la Convention de Vienne s'applique, de manière égale ou totale, à tous les traités dans le contexte du droit pénal international (DPI).

La réponse à la question de l'étendue de l'application de la Convention de Vienne réside dans la manière dont on conçoit la nature juridique du Statut de Rome. Il faut reconnaître que le Statut de Rome est un instrument à double visage : un traité multilatéral conclu entre des États souverains, l'instrument constitutif d'une organisation internationale et un code pénal. Chacune de ces conceptions conduit à une approche interprétative distincte.

En tant que code pénal, le Statut de Rome établit des définitions suffisamment claires et précises des crimes visés aux articles 5 à 8, codifiant et cristallisant les crimes relevant de la compétence de la Cour, accompagnées des éléments constitutifs des crimes distincts du traité mais convenus par l'Assemblée des États parties. Sa nature pénale est en outre établie par l'acte novateur consistant à intégrer le principe de légalité dans le traité lui-même : l'article 22 intègre la maxime *nullum crimen sine lege* (pas de crime sans loi), et l'article 23 la maxime *nulla poena sine lege* (pas de peine sans loi). Dans son ensemble et accompagnée d'une hiérarchie des sources, la thèse soutient que le Statut de Rome est un traité qui vise à garantir que l'interprétation judiciaire se limite à ce que la loi est plutôt qu'à ce qu'elle devrait être.

En tant que traité multilatéral entre États souverains, les règles générales d'interprétation des traités en vertu du droit international sont applicables, à savoir celles énoncées aux articles 31 à 33 de la Convention de Vienne : un traité doit être interprété de bonne foi, conformément au sens ordinaire à donner aux termes du traité dans leur contexte et à la lumière de son objet et de son but ; le recours à des moyens d'interprétation supplémentaires est autorisé et la déférence peut être accordée aux intentions des rédacteurs.

En tant qu'instrument constitutif d'une organisation internationale, la CPI, en tant qu'institution, acquiert une existence propre, établissant un droit interne distinct des normes externes du droit international public général. La CPI est donc évolutive, et l'interprétation du Statut de Rome, lorsqu'elle est interprétée par la CPI, suit cette évolution. La thèse soutient que c'est le droit

interne de l'institution qui importe pour l'interprétation du traité, et que celle-ci n'est pas supplantée par son mode de création (sa forme).

Sur la base de cette analyse, la thèse soutient que le cadre interprétatif de la CPI ne peut être pleinement compris en se référant à l'une de ces méthodologies interprétatives isolément. Si le Statut de Rome peut constituer un code pénal, il n'est pas totalement dissocié du cadre du droit international général, car il doit après tout son existence à un instrument juridiquement contraignant du droit international qui établit des obligations et des droits entre les sujets de ce dernier. Néanmoins, bien qu'il découle d'un traité, le Statut de Rome ne peut être considéré comme permettant un recours étendu à la Convention de Vienne, car il se préoccupe d'une relation distincte entre une entité supranationale et l'individu sans pouvoir. Cette nature tripartite doit être équilibrée.

La thèse se déroule en trois chapitres, chacun correspondant à l'un de ces fondements conceptuels, et aboutit à une description intégrée de la manière dont ils interagissent et des conséquences que cela a sur la pratique interprétative de la Cour.

Méthodologie

Cette thèse adopte principalement une méthodologie doctrinale, analysant le Statut de Rome à travers des principes d'interprétation dérivés de son texte, de sa structure et de son statut en droit international. L'approche analytique repose sur un examen des dispositions du Statut relatives à l'interprétation et s'appuie sur un raisonnement juridique fondé sur les règles générales d'interprétation des traités.

Une méthodologie secondaire est utilisée, à savoir la catégorisation conceptuelle, qui évalue le Statut de Rome selon trois dimensions, comme indiqué ci-dessus : un traité multilatéral, un instrument constitutif et un code pénal, en tirant des conclusions doctrinales de ces catégories et en évaluant chacune d'entre elles selon ses propres termes. Celles-ci sont ensuite mises en contraste les unes avec les autres afin d'identifier les points de tension à réconcilier.

L'analyse menée est résolument normative. Elle ne fait guère référence à l'analyse empirique et la thèse n'a pas pour objectif d'évaluer la manière dont la CPI a interprété le Statut dans la pratique. Elle s'interroge sur la conclusion logique à tirer de la nature et de la conception juridique du Statut si l'on suit son raisonnement jusqu'au bout.

Chapitre 1 – Si le Statut de Rome est un code pénal

Le premier chapitre se concentre sur la nature du Statut de Rome en tant que code pénal intégrant le principe de légalité. S'articulant autour du débat doctrinal opposant le positivisme juridique au droit naturel, il démontre qu'une évolution progressive de l'interprétation peut être identifiée à travers une analyse sommaire des tribunaux pénaux internationaux.

Tout commence par la proposition de créer un tribunal « spécial » en vertu de l'article 227 du traité de Versailles (après la Première Guerre mondiale) afin de poursuivre le Kaiser pour crime suprême contre la moralité internationale et le caractère sacré des traités, ce qui témoigne d'une emphase particulière sur le droit naturel. Elle a été suivie par la création du Tribunal militaire international de Nuremberg, qui a été vivement critiqué pour avoir appliqué une loi rétroactive (ayant un effet ou une force rétroactive) en raison de l'absence de codification des crimes avant la mise en place du tribunal. Puis, le Conseil de sécurité des Nations unies (CSNU) a créé des tribunaux ad hoc pour les crimes commis respectivement en ex-Yougoslavie et au Rwanda, dans lesquels on observe un virage positiviste nuancé, malgré le fait que ces tribunaux s'appuient sur le droit international coutumier.

La proclamation par le secrétaire général des Nations unies de l'application du droit qui faisait sans aucun doute partie du droit international coutumier a mis en œuvre une tentative de prévisibilité qui n'existait pas avant 1992. Enfin, le Statut de Rome, qui pousse plus loin ce virage positiviste, codifie les dispositions relatives à la non-rétroactivité et à la légalité, et met en œuvre une hiérarchie des lois applicables.

À cet égard, le chapitre 1 soutient, peut-être de manière optimiste, qu'un changement de régime a eu lieu en 1998, la nature du droit pénal international mis en œuvre en vertu du Statut de Rome (qui se limite aux crimes contre l'humanité, aux crimes de guerre, au génocide et au crime d'agression) s'éloignant de plus en plus du fonctionnement général du droit international public et établissant un régime fondé sur des principes plus applicables au droit pénal général.

Enfin, en ce qui concerne les principes qui guident l'interprétation si le Statut de Rome doit être conçu comme un code pénal, l'article 21 établit une hiérarchie des sources qui interdit, premièrement, que l'interprétation stricte des crimes relevant de la compétence de la Cour soit primordiale ; deuxièmement, les seules circonstances dans lesquelles il est possible de se référer aux sources visées à l'article 21(1)(b) et (c) sont celles où il existe une lacune dans le droit écrit contenu dans le Statut ; et troisièmement, que l'application de l'article 21(3), à savoir

le respect des normes applicables en matière de droits de l'homme à la lumière des travaux préparatoires, vise à garantir l'égalité des armes entre la Cour et l'accusé.

En termes d'interprétation, cela signifie que le respect de la formulation de la loi dans le Statut doit primer sur toute forme de créativité judiciaire ; si le Statut de Rome est un code pénal, il se distingue des règles ordinaires d'interprétation des traités et est soumis aux normes de prévisibilité, de spécificité, d'accessibilité et de certitude, notions qui sont extrêmement difficiles à concilier avec la méthode d'interprétation prévue par la Convention de Vienne.

Chapitre 2 – Si le Statut de Rome est un traité multilatéral

Le deuxième chapitre aborde les implications de la considération du Statut de Rome comme étant régi par son statut de traité multilatéral et, ce faisant, examine le cadre de la Convention de Vienne tel qu'il s'applique à un instrument de droit pénal international. Reconnaisant que l'article 31 de la Convention de Vienne visait à établir un compromis entre trois écoles de pensée distinctes concernant l'interprétation des traités : (a) l'approche textuelle, (b) l'approche fondée sur les intentions des États parties et (c) l'approche téléologique, les préoccupations relatives à l'applicabilité découlent de la difficulté perçue à se laisser guider par « l'objet et le but » du traité.

Un bras de fer est identifié entre l'adhésion au texte et une approche téléologique qui offre au décideur la flexibilité de déterminer à la fois l'objet et le but d'un traité et la meilleure façon d'interpréter ce traité pour donner effet à cet objet et à ce but.

Tout d'abord, un certain nombre de problèmes sont isolés en ce qui concerne l'objet et le but, par exemple : comment identifier l'objet et le but d'un traité ? Un traité peut-il avoir plusieurs objets et buts ? Si oui, quel poids faut-il accorder à chaque objet et but identifiable ? Ces questions sont examinées en référence à la jurisprudence de la Cour internationale de justice (CIJ).

Le problème qui découle de l'analyse de ces deux éléments est que toute évaluation de l'objet et du but d'un traité est nécessairement (ou intrinsèquement) subjective. La question est obscure : si l'approche interprétative de la Convention de Vienne permet d'identifier des objets et des buts alternatifs, il serait possible que différentes interprétations découlent d'un même traité. Cette interaction potentielle avec le Statut de Rome met en évidence un problème évident : s'il

est exact que le Statut de Rome se préoccupe du principe de légalité, une entreprise d'interprétation intrinsèquement subjective est inappropriée.

Le chapitre fournit quelques exemples concrets à ce sujet. Dans l'affaire *Le Procureur c. Germain Katanga*, la CPI a déterminé que l'objet et le but du Statut de Rome étaient « de mettre fin à l'impunité ». Dans l'affaire *Le Procureur c. Thomas Lubanga Dyilo*, la CPI a décidé qu'il existait deux objets et buts supplémentaires : l'un permettant le recours à des réparations et l'autre garantissant que les auteurs de crimes répondent de leurs actes. De plus, dans l'affaire *Le Procureur c. Jean-Pierre Bemba*, la CPI a estimé que le préambule établissait le caractère punitif et dissuasif du Statut de Rome. La conclusion qui en est tirée est que, même dans un éventail relativement restreint d'affaires, l'objet et le but du Statut de Rome ne sont pas plus clairs qu'avant l'exercice et, parfois, donnent l'impression de changer les règles du jeu pour obtenir le résultat souhaité.

Le chapitre se termine par une interprétation de ce que devraient être l'objet et le but du Statut de Rome. Cependant, ces suggestions se heurtent à un problème fondamental, à savoir que la sous-structure de cette approche interprétative repose sur l'indétermination.

Chapitre 3 – Si le Statut de Rome est le traité constitutif d'une organisation internationale

Le dernier chapitre reformule la question et présente une solution au problème en considérant le Statut de Rome comme l'instrument constitutif d'une organisation internationale, à savoir la Cour pénale internationale. À l'instar de la Charte des Nations unies ou du traité de l'Union européenne, le Statut de Rome crée une institution permanente dotée de la personnalité juridique internationale, d'organes distincts et de son propre droit interne.

Considérer le Statut comme une constitution institutionnelle met en évidence une dimension verticale de l'interprétation : si la CPI est née d'un traité multilatéral, formé par un pacte interétatique, elle constitue également une communauté évolutive dotée de règles qui s'appliquent en interne entre les organes eux-mêmes. En d'autres termes, le Statut a une double nature, et son interprétation dépend de la fonction de la disposition interprétée.

Par exemple, les dispositions pénales substantielles, lorsqu'elles sont interprétées par les juges de la Cour, constituent une forme de droit interne de la Cour et exigent donc une interprétation cohérente avec les normes applicables à un tribunal pénal, à savoir celles de la stricte légalité et de la précision textuelle. À l'inverse, les dispositions ordinaires des traités (telles que celles

contenues dans la partie 13 du Statut) invitent à une approche horizontale, telle qu'elle est appliquée entre les institutions et leurs membres au sein du forum international.

Le chapitre soutient que le Statut de Rome doit être compris comme un instrument vivant. L'approche interprétative correcte est celle qui distingue ces deux niveaux d'interprétation – l'interprétation verticale et l'interprétation horizontale – en comblant le fossé entre le textualisme strict du droit pénal et la téléologie flexible de la Convention de Vienne.

Conclusion

La thèse conclut que le Statut de Rome ne peut être compris de manière adéquate par une conception unilatérale d'un code pénal ou d'un traité multilatéral. Il revêt plutôt une identité normative hybride qui exige une approche interprétative nuancée en conséquence. En cartographiant l'interaction entre la légalité, la téléologie et l'autonomie institutionnelle, la thèse clarifie les fondements conceptuels du cadre interprétatif de la CPI et démontre que la jurisprudence de la Cour dépend de la prise en compte du niveau (vertical ou horizontal) qui est interprété.

La réponse obtenue est donc à la fois doctrinale et constitutionnelle. La primauté du principe de légalité est renforcée dans l'interprétation des crimes substantiels, annulant l'imposition de pratiques interprétatives larges tirées du droit international public général. Sur le plan constitutionnel, la CPI, à l'instar de toute autre organisation internationale, possède un ordre juridique interne en évolution qui nécessite une interprétation téléologique pour fonctionner, mais pas au détriment de sa nature fondamentale.

On espère que ces conclusions contribueront à une compréhension plus précise de la logique interprétative du Statut de Rome. Elles suggèrent que la légitimité de la Cour réside dans sa capacité à trouver un équilibre entre la fidélité à la légalité et la reconnaissance de son objectif institutionnel. À ces fins, l'application de la Convention de Vienne au Statut de Rome ne doit pas être considérée comme acquise, son application dépendant de ce qui est examiné, en reconnaissant sa double identité et en adhérant à l'état de droit.

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