THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT OVER NATIONALS OF NON-PARTY STATES

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ABSTRACT

The Rome Statute for the International Criminal Court (‘ICC’) provides that nationals from states not party to the Statute may, in certain circumstances, be prosecuted by the ICC. Some non-party states vehemently object to the fact that the ICC, a treaty body, can exercise jurisdiction in situations where the state of nationality has not consented to the terms of the treaty. While the source of the ICC’s jurisdiction is the Rome Statute, the Statute on its own does not provide a legal justification for the scope of the Court’s jurisdiction. This thesis addresses the overarching question: On what legal basis is the ICC authorised to exercise jurisdiction over nationals of non-party states?

A general consensus has emerged among international criminal law scholars that in situations referred to the Court by states parties or in investigations initiated by the prosecutor, the legal basis for the ICC’s jurisdiction over nationals of non-party states is predicated on states parties delegating jurisdiction to the Court. But there are multiple situations in which the question of whether there is a legal basis for prosecution of nationals of non-party states is not as straightforward as simply proclaiming that the territorial state has delegated its jurisdiction to the Court.

This thesis provides a systematic and comprehensive analysis of the ICC’s jurisdiction over nationals of non-party states in order to determine whether there is a legal basis for the ICC to prosecute such nationals in all scenarios allowed by the Rome Statute. In situations that come before the Court via a state party referral or through a Prosecutor-initiated investigation, I argue that delegation of jurisdiction provides a legal basis for the ICC’s prosecution in all scenarios with the exception of incumbent senior state officials from non-party states, who remain immune from the Court’s jurisdiction. In situations that are referred to the Court by the UN Security Council, the legal basis for the ICC’s jurisdiction over nationals of a non-party state is predicated on the indirect consent of the relevant non-party state by virtue of that state’s membership of the UN. There remain, however, some questions about whether certain Council actions in relation to the ICC are *intra vires* the UN Charter.

Ultimately, I demonstrate that the ICC has missed a number of opportunities to clarify the legal basis for its jurisdiction over nationals of non-party states. Going forward it will be essential for the Court to respond to challenges to its authority over non-party nationals by
providing a sound—and comprehensive—explanation as to how and why its jurisdiction is grounded in international law.
DECLARATION

This is to certify that

(i) the thesis comprises only my original work towards the PhD,

(ii) due acknowledgment has been made in the text to other material used,

(iii) the thesis is fewer than 100,000 words in length, exclusive of tables, bibliographies and appendices.

Monique Cormier
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I am fortunate to have had a team of three supervisors—Professor Tim McCormack, Professor Alison Duxbury and Dr Rain Liivoja—whose guidance, encouragement and good humour have sustained me throughout my candidature.

I would like to thank Tim for his enthusiastic support of my research and for his insights and expertise on the situations currently before the ICC. I am especially grateful to Tim for his support during the five months I spent as a Visiting Researcher at Harvard Law School which coincided with his tenure as the Charles H Stockton Distinguished Scholar-in-Residence at the US Naval War College.

Thank you to Alison for being a dedicated supervisor, a supportive mentor and a wonderful colleague. I particularly appreciated her expertise on international institutional law, and for reminding me of the importance of the overarching argument of my thesis. Thank you to Rain whose willingness to engage with the technicalities of international criminal jurisdiction assisted me greatly. I am also grateful to Rain for being endlessly available as a sounding board for my ideas and my frustrations.

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Workshop; the Stockton Center for the Study of International Law at the US Naval War College, and the Harvard Law School Visiting Researchers Colloquium. I wish to thank Melbourne Law School and the Asia Pacific Centre for Military Law for their generous funding which enabled me to attend such events where I had the opportunity to receive valuable feedback on my ideas and arguments.

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I dedicate this thesis to my grandfather, Bruce Rosewarne, who passed away peacefully on 6 March 2017.
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<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>DRC</td>
<td>Democratic Republic of the Congo</td>
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<tr>
<td>FRY</td>
<td>Federal Republic of Yugoslavia</td>
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<tr>
<td>ICC</td>
<td>International Criminal Court</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
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<tr>
<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<tr>
<td>ICTY</td>
<td>International Criminal Tribunal for Yugoslavia</td>
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<tr>
<td>ILC</td>
<td>International Law Commission</td>
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<tr>
<td>ISAF</td>
<td>International Security Assistance Force</td>
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<tr>
<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<tr>
<td>NGO</td>
<td>Non-Governmental Organisation</td>
</tr>
<tr>
<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
</tr>
<tr>
<td>PLO</td>
<td>Palestinian Liberation Organization</td>
</tr>
<tr>
<td>SCSL</td>
<td>Special Court for Sierra Leone</td>
</tr>
<tr>
<td>SFRY</td>
<td>Socialist Federal Republic of Yugoslavia</td>
</tr>
<tr>
<td>SOFA</td>
<td>Status of Forces Agreement</td>
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<tr>
<td>SOMA</td>
<td>Status of Mission Agreement</td>
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<tr>
<td>UK</td>
<td>United Kingdom</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNMIL</td>
<td>United Nations Mission in Liberia</td>
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<tr>
<td>US</td>
<td>United States</td>
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<tr>
<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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CHAPTER I
INTRODUCTION

I. THE INTERNATIONAL CRIMINAL COURT AND NON-PARTY STATES

A. Continuing Resistance to the ICC’s Jurisdiction

In March 2005, the Acting United States (‘US’) Representative to the United Nations (‘UN’) issued a statement on the historic vote by the UN Security Council to refer the humanitarian situation in Darfur, Sudan, to the International Criminal Court (‘ICC’ or ‘the Court’). Ambassador Anne W Patterson explained that the US abstained from the vote because:

[...] the United States continues to fundamentally object to the view that the ICC should be able to exercise jurisdiction over the nationals, including government officials, of states not party to the Rome Statute. This strikes at the essence of the nature of sovereignty.¹

This statement effectively encapsulates the attitude to the ICC exhibited by many states that are not party to its constitutive treaty, the Rome Statute.² There are certain circumstances in which the ICC can prosecute nationals of states that have not consented to the Court’s jurisdiction, and as Ambassador Patterson acknowledges, this jurisdiction extends to government officials who would otherwise enjoy immunity from prosecution by foreign courts. An enduring belief exists among some states that there is no basis in international law for the ICC’s jurisdiction where the state of nationality does not directly consent. While the US is perhaps the most high-profile non-party state to object to the jurisdiction of the ICC over nationals of non-party states,³ it is by no means the only state to take this position. Since the adoption of the Rome Statute in 1998, the US has been joined in its objection to the jurisdiction of the ICC by a small but vocal chorus of non-party states, including India, China, Sudan, Libya, Israel and Russia.⁴ A growing number of states—parties and non-parties—are also unhappy with the fact that the ICC does not

³ Throughout this thesis I distinguish between a ‘state party’ and a ‘non-party state’. The reason I do not refer to the latter as a ‘non-state party’ is to avoid any possible conflation with non-state actors.
⁴ See Chapter II for a detailed exploration of why non-party states object to the jurisdiction of the ICC.
recognise immunity for sitting heads of state, arguing that the Statute conflicts with customary obligations on states to respect the immunity of incumbent foreign leaders. It has been almost 20 years since the Rome Statute was adopted, and to say that the Court’s jurisdiction over nationals of non-party states remains legally and politically contentious might be an understatement.

B. The Jurisdiction Provisions

The story of the Rome Diplomatic Conference negotiations over the ICC’s jurisdiction provisions has been mythologised in countless retellings by those who were there. The issue of the Court’s personal jurisdiction has been described as ‘the most important, politically the most difficult and therefore the most controversial question of the negotiations as a whole, in short: “the question of questions” of the entire project’. The compromise on jurisdiction that was reached in the ‘proverbial eleventh hour’ of the Conference enables the Court to prosecute individuals who are accused of committing Statute crimes in situations where either the territorial state or the state of nationality have consented to the jurisdiction of the Court. These ‘preconditions to the exercise of

5 See, eg Assembly of the African Union, Decision on Africa’s Relationship with the International Criminal Court, Extraordinary Session, Ext/Assembly/AU/Dec.1 (12 October 2013); Republic of South Africa Department of Justice and Constitutional Development, ‘Briefing to the media by Minister Michael Masutha on the matter of International Criminal Court and Sudanese President Omar Al Bashir’ (21 October 2016).


9 Sharon A Williams, ‘The Rome Statute on the International Criminal Court—Universal Jurisdiction or State Consent—To Make or Break the Package Deal’ (2000) 75 International Law Studies 539, 540. The Statute was adopted with 120 states voting in favour, seven voting against and 21 abstentions.

10 Statute crimes refer to those crimes within the jurisdiction of ICC: the crime of genocide; crimes against humanity; war crimes and the crime of aggression. Rome Statute, Article 5.

jurisdiction’—codified in Article 12 of the Rome Statute—represented a deal breaker for states such as the US, which had lobbied for cumulative consent of both the territorial state and the state of nationality before the ICC could exercise jurisdiction.

The Article 12 preconditions mean that the ICC can potentially exercise jurisdiction over nationals of non-party states who are accused of committing a Statute crime on the territory of a state party or on the territory of a state that has otherwise accepted the jurisdiction of the Court on an ad hoc basis. Upon satisfaction of one of the preconditions, Article 13(a) and (c) of the Rome Statute then activate the Court’s jurisdiction when a situation is referred to the Court by a state party, or when the ICC Prosecutor has received Pre-Trial Chamber approval to initiate an investigation proprio motu. Article 13(b) provides that the ICC may also exercise its jurisdiction when a situation is referred to the Court by the UN Security Council acting under Chapter VII of the UN Charter. The Article 12 preconditions do not apply to a Security Council referral, which means that the ICC can potentially exercise jurisdiction over crimes committed on the territory of any state, irrespective of the nationality of the accused.

Furthermore, the Rome Statute prevents accused individuals from relying on any immunities or amnesties. This blanket ban on individual exemptions to the ICC’s personal jurisdiction was not contentious at the Rome Conference, but has proven to be exceedingly divisive in the years since the Court began operations.


12 See the Appendix for the full text of Article 12 and all other relevant Rome Statute provisions referred to throughout this thesis.


14 Rome Statute, Article 12(2).

15 Rome Statute, Article 12(3).

16 Rome Statute, Article 13(a).

17 Rome Statute, Article 13(c).

18 Rome Statute, Article 27.
Since the ICC’s establishment in 2003, there have been eight situations subject to either a preliminary examination or an investigation\(^{19}\) that involve nationals of non-party states, seven of which remain before the ICC.\(^{20}\) The ICC has yet to provide serious judicial consideration of its jurisdiction over nationals of non-party states, and tension is rising over the Court’s involvement in certain situations.\(^{21}\) It is within the context of the developments at the Court over the past decade that this thesis addresses the overarching question: On what legal basis is the ICC authorised to exercise jurisdiction over nationals of non-party states?

II. SIGNIFICANCE OF THIS RESEARCH

The ICC’s expanding catalogue of examinations and investigations combined with the slow pace of judicial proceedings have created the opportunity for a contemporary scholarly intervention into the issue of the ICC’s jurisdiction over nationals of non-party states. This thesis builds on existing scholarship by focusing on current situations and emerging legal issues to formulate a coherent legal basis for the Court’s jurisdiction over nationals of non-party states.

\(^{19}\) Under Article 15 of the Rome Statute, the ICC Prosecutor may conduct a preliminary examination to determine whether there is sufficient evidence relating to the admissibility of crimes within the jurisdiction of the Court. If the conclusion is reached that there is a reasonable basis to open an investigation, the Prosecutor must then seek approval from the Pre-Trial Chamber to go ahead with the investigation.

\(^{20}\) The situations are Afghanistan, Ukraine, Palestine, Darfur, Libya, Georgia and the situation concerning registered vessels of Comoros, Greece and Cambodia. See Part II(B) below for more detail.

The eighth situation was a preliminary examination initiated in 2010 of the situation in the Republic of Korea (‘South Korea’). South Korea is a state party, and the examination involved allegations of war crimes involving North Koreans. North Korea is not a party to the Rome Statute. The preliminary examination was closed in June 2014 after the Prosecutor concluded that there were insufficient grounds on which to seek an investigation: Office of the Prosecutor, ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in the Republic of Korea’ (Press Release, 23 June 2014).

The situation in the Democratic Republic of the Congo (‘DRC’) also involves nationals of non-party states; several Rwandan nationals have been indicted for crimes committed on the territory of the DRC. The DRC is a state party to the Rome Statute, and Rwanda is not. While Rwanda has been highly critical of the ICC’s jurisdiction more generally, it has not objected to the Court’s exercise of jurisdiction over these particular nationals in this situation. This is likely because the indicted individuals (Sylvestre Mudacumura and Bosco Ntaganda (a dual citizen)) are members of rebel groups. See, Stephen Lamony, ‘Rwanda and the ICC: Playing Politics with Justice’, *African Arguments* (21 October 2013). While some of the arguments in my thesis apply to this situation, given the fact that Rwanda appears to have at least tacitly consented to the prosecution of certain of its nationals, I do not use the situation in the DRC as an example of ICC prosecution of nationals of non-party states.

\(^{21}\) The information in this thesis is current as at March 2017.
A. Building on Past Scholarship

In 2001, Frédéric Mégret published an article in the *European Journal of International Law* on ICC jurisdiction over nationals of non-party states entitled ‘Epilogue to an Endless Debate’.\(^{22}\) Considering that, at the time of the article’s publication, the Rome Statute had not even entered into force, the concept of an ‘epilogue’ to this ongoing debate appeared somewhat premature. It is true that since the adoption of the Rome Statute in 1998, the jurisdiction provisions have attracted a considerable amount of scholarly attention. Between 1999 and 2003 in particular, there was a flurry of scholarship dedicated to the Article 12 preconditions with a focus on whether the ICC could lawfully prosecute nationals from states that do not consent to the jurisdiction of the Court.\(^{23}\) Given the Court’s activities over the past decade, however, the scholarship produced in the years immediately following the adoption of the Rome Statute is arguably only the prologue to a much more complex discussion. Indeed, as Robert Cryer acknowledged in a recent book chapter on the ICC’s relationship with non-party states: ‘to cover everything would take at least a book-length treatment’.\(^{24}\) Although I do not intend to ‘cover everything’ in this thesis; as at March 2017, a comprehensive, book-length treatment of the jurisdiction of the ICC over nationals of non-party states has yet to be published. This thesis seeks to make a contribution to this ‘endless debate’ by examining the myriad legal issues that stem from ICC jurisdiction over nationals of non-party states, and in particular, legal issues that have arisen in the context of current situations before the Court.


B. Current Situations and Emerging Concerns

1. Situations under Preliminary Examination

Of the situations currently under preliminary examination by the Office of the Prosecutor, four potentially involve nationals of non-party states. The most high profile of these is the situation in Afghanistan, which has been the subject of a preliminary investigation since at least 2007.\footnote{Office of the Prosecutor, Report on Preliminary Examination Activities (2016) (International Criminal Court, 14 November 2016) 43.} In November 2016, the Prosecutor reported that there was evidence that, since 2003, crimes within the jurisdiction of the ICC have been committed on the territory of Afghanistan, a state party to the Rome Statute.\footnote{Ibid, 47.} The Prosecutor’s report implicates the Taliban and Afghan government forces, as well as the US armed forces and Central Intelligence Agency. Should the Prosecutor decide to seek Pre-Trial Chamber approval to open an official investigation into this situation pursuant to Articles 13(c) and 15 of the Statute, there is a very real likelihood that US nationals will be indicted by the Court. Given US hostility to the very idea that its nationals could be prosecuted without its consent, it is hardly an overstatement to say that actual indictments will have serious ramifications for the ICC, especially in light of the nascent Trump administration.\footnote{See Part II(B) of Chapter II, and Part IV(A) of Chapter IV for further discussion of potential ICC jurisdiction over US nationals.}

The Prosecutor is also examining two situations involving nationals of Israel, another non-party state. The first is in relation to crimes allegedly committed during the 2010 Israeli blockade of a flotilla on its way to Gaza. The Comoros, a state party, referred the situation to the Prosecutor in 2013 alleging crimes committed by the Israel Defence Forces on board a ship registered to the Comoros.\footnote{Office of the Prosecutor, ‘ICC Prosecutor receives referral by the authorities of the Union of the Comoros in relation to the events of May 2010 on the vessel ‘MAVI MARMARA’ (Statement, 14 May 2013).} The Prosecutor received additional referrals from Greece and Cambodia whose registered ships were also part of the flotilla.\footnote{Office of the Prosecutor, Report on Preliminary Examination Activities (2016) (International Criminal Court, 14 November 2016) 69-73.} The second situation under preliminary examination is the situation in Palestine, where the Prosecutor is considering whether there is sufficient evidence of war crimes committed in occupied Palestinian territory since 13 June 2013.\footnote{Ibid, 25-32.} Palestine has been a state party to the Rome
Statute since January 2015. Israel has strenuously objected to the ICC’s jurisdiction over Palestine.\textsuperscript{31}

The final preliminary examination potentially involving nationals of a non-party state is the situation in Ukraine. Ukraine is not a party to the Rome Statute, but in April 2014 lodged a declaration under Article 12(3) accepting the jurisdiction of the ICC over crimes committed on its territory from 20 February 2014.\textsuperscript{32} The Prosecutor is considering evidence of crimes committed by both Ukrainian and Russian nationals during this time period.\textsuperscript{33} Russia is not a party to the Rome Statute.

2. \textit{Situations under Investigation}

In addition to the four preliminary examinations, there are also three situations currently under official investigation at the ICC involving nationals of non-party states.\textsuperscript{34} In January 2016, the ICC Prosecutor received authorisation to open an investigation into crimes committed on the territory of Georgia, a state party, between 1 July and 10 October 2008.\textsuperscript{35} No charges have been laid, but the investigation into whether crimes were committed by Georgian, South Ossetian and Russian armed forces is ongoing.\textsuperscript{36} In response, Russia, which had signed but never ratified the Rome Statute, issued a statement in November

\textsuperscript{31} Israel Ministry of Foreign Affairs, ‘Palestinian Authority joins the ICC – Israel’s response’ (Statement, 1 April 2015). See Part IV(B) of Chapter IV for further discussion of the ICC’s jurisdiction over the situation in Palestine.

\textsuperscript{32} Declaration by Ukraine lodged under Article 12(3) of the Rome Statute (8 September 2015).


\textsuperscript{34} The situation in the Democratic Republic of the Congo (‘DRC’) also involves nationals of non-party states; several Rwandan nationals have been indicted for crimes committed on the territory of the DRC. The DRC is a state party to the Rome Statute, and Rwanda is not. While Rwanda has been highly critical of the ICC’s jurisdiction more generally, it has not objected to the Court’s exercise of jurisdiction over its nationals in this situation. This is likely because the indicted individuals (Sylvestre Mudacumura and Bosco Ntaganda) are members of rebel groups. See, Stephen Lamony, ‘Rwanda and the ICC: Playing Politics with Justice’, \textit{African Arguments} (21 October 2013).

\textsuperscript{35} Situation in Georgia (Decision on the Prosecutor’s request for authorization of an investigation) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/15, 27 January 2016).

\textsuperscript{36} Ibid.
2016 to declare that it was withdrawing its signature to the Statute. Such a decree has limited legal impact, but is nevertheless a potentially detrimental symbolic act.

The final two situations under investigation by the ICC that involve nationals of non-party states were both referred to the Court by the UN Security Council. The ICC has jurisdiction over crimes committed on the territory of Darfur, Sudan, since 1 July 2002 and jurisdiction over crimes committed on the territory of Libya since 15 February 2011. Indictments and warrants of arrest have been issued in both situations, but the ICC does not yet have custody of the various accused, which include the incumbent president of Sudan. Neither Libya nor Sudan are states parties to the Rome Statute, and Sudan in particular has been openly defiant of the ICC’s orders.

The fact that there are seven situations under either preliminary examination or investigation that involve nationals of non-party states—including from several powerful states—reflects the ongoing significance of the issue of the ICC’s jurisdiction over such individuals. These situations give rise to numerous questions about state sovereignty and consent; delegation of powers; state party obligations; customary immunities; treaty conflicts; Security Council powers; and the nature of international criminal jurisdiction. Moreover, the ICC is yet to properly consider the legal basis for its jurisdiction over nationals of non-party states, which means this area of enquiry is of particular contemporary relevance.

C. Lack of Relevant ICC Jurisprudence

Throughout the thesis I argue that the ICC itself needs to identify and explain the assumptions that underpin its reasoning in cases involving nationals of non-party states in far more detail than it has to date. While the Court has not yet faced a significant legal challenge to its jurisdiction over nationals of non-party states, it has had to deal with the

38 Article 18 of the Vienna Convention on the Law of Treaties provides that states that have signed but not ratified a treaty are nevertheless obliged to ‘refrain from acts that would defeat the object and purpose of [said] treaty’. In withdrawing its signature from the Rome Statute, Russia would no longer be under this obligation. Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).
40 See Chapter V for discussion of the ICC’s jurisdiction in situations referred by the UN Security Council.
issue of its authority over an incumbent head of state from a non-party state in a situation referred by the Security Council. The fact that the Sudanese president, Omar Al Bashir, is wanted by the ICC for war crimes, crimes against humanity and genocide in connection with the situation in Darfur has set off a political firestorm and raised some genuine legal questions about the Court’s jurisdiction. President Al Bashir remains at large and the ICC has yet to properly articulate the legal basis for its jurisdiction over him, and the legal basis for the obligations on states parties to arrest and transfer President Al Bashir to the ICC. The ICC Chambers’ failure to provide comprehensive and convincing legal reasons for why sitting heads of state are not immune from the jurisdiction of the ICC, has undoubtedly contributed to the growing acrimony of the African Union towards the ICC. There are currently 34 African states parties to the Rome Statute, and court-watchers now fear an ‘African exodus’ after states parties Burundi, the Gambia and South Africa recently announced their intention to withdraw from the Statute.

Given the number of situations currently being examined or investigated by the ICC involving nationals of non-party states, it will be imperative for the Court to articulate the legal basis for its jurisdiction and, I argue, ensure that this basis is grounded in state consent.

41 See, eg, Prosecutor v Al Bashir (Decision pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir) (International Criminal Court, Pre-Trial Chamber I, Case No ICC/02/05-01/09, 12 December 2011); Prosecutor v Al Bashir (Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court) (International Criminal Court, Pre-Trial Chamber II, Case No ICC/02/05-01/09, 9 April 2014).

42 See Part III of Chapter IV for a detailed discussion of the ICC’s jurisdiction over sitting heads of non-party states.


44 Patrick Wintour, ‘African exodus from ICC must be stopped, says Kofi Annan’ The Guardian (18 November 2016), Since the Gambia signalled its intention to withdraw from the Statute in October 2016, there has been a change of government, and newly sworn-in President Barrow indicated in February 2017 that the Gambia would remain a party to the Rome Statute: Merrit Kennedy, ‘Under New Leader, Gambia Cancels Withdrawal from International Criminal Court’ NPR (14 February 2017). South Africa has also revoked its withdrawal notification in the wake of a recent declaration by the South African High Court that the government’s decision to withdraw from the Statute was unconstitutional: Democratic Alliance v Minister of International Relations and Cooperation (83145/16) [2017] (High Court). See Chapter VII for some further discussion and reflections on the African withdrawal attempts.
III. AIMS AND ARGUMENT

‘[A]ll jurisdictional claims need a basis in international law.’45

The central purpose of this thesis is to ascertain whether the ICC can lawfully exercise its jurisdiction over nationals of non-party states in the circumstances provided for by the Rome Statute. Non-party states, by their very definition, have not agreed to the Rome Statute and are not bound by its provisions. To simply assert that the ICC can exercise jurisdiction over nationals of non-party states because the Rome Statute provides for such, is therefore an unsatisfactory explanation for states that have not consented to the Statute’s terms. There must instead be an underlying basis for the ICC’s jurisdiction that complies with the broader principles of international law.

A. What is the Legal Basis in Situations Referred by a State Party or Initiated by the Prosecutor?

A general consensus has emerged among international criminal law scholars (with a few notable exceptions) that in situations referred by states parties or investigations initiated by the prosecutor, the legal basis for the ICC’s jurisdiction over nationals of non-party states is framed as ‘delegation of jurisdiction’.46 Prima facie, delegation of jurisdiction is a straightforward concept whereby a state with the right to prosecute foreign nationals for crimes committed on its territory, delegates this right to the ICC by ratifying the Rome Statute. The theory that the ICC’s authority over nationals of non-party states is predicated on delegation of jurisdiction from states parties has prevailed in the literature, and I take it as the starting point for my inquiry. I conduct a systematic conceptual analysis of what it means to say that states parties are delegating jurisdiction to the ICC, before considering how this legal basis would work in practice. In particular, I focus on questions that arise in situations complicated by customary or treaty-based immunities. For example, how can the Rome Statute’s rejection of immunities be reconciled with the absolute personal immunity enjoyed by incumbent senior state officials under customary international law? Can a state party delegate jurisdiction to the ICC where the state’s own jurisdiction is limited by a bilateral agreement?


46 See Part II of Chapter III for a review of the relevant scholarship.
Ultimately I argue that in situations referred to the Court by states parties or investigations initiated by the Prosecutor, the delegation theory provides a comprehensive legal basis for the ICC’s jurisdiction, with one exception. I maintain that delegation of jurisdiction does not provide a legal basis for the ICC to prosecute an incumbent senior state official from a non-party state for crimes committed on the territory of a state party.

B. What is the Legal Basis in Situations Referred by the UN Security Council?

With respect to situations referred to the ICC by the UN Security Council, there does not seem to be as much concern among either scholars or states about the legal basis for the Court’s jurisdiction over nationals of non-party states. Often the Article 13(b) referral mechanism is glossed over in discussions about the Court’s jurisdiction, with only a brief reference to the Security Council’s powers under Chapter VII of the UN Charter as an explanation for the Council’s role in the Statute. But the fact that the Council has a mandate to maintain international peace and security under the Charter does not, on its own, explain why the ICC—an independent international court established by treaty—can exercise criminal jurisdiction over nationals of states that have not consented to the terms of the Rome Statute.

I undertake a holistic examination of the Security Council’s relationship with the ICC to detangle the complex web of state obligations that are created when the two institutions interact. For instance, does a non-party state referred to the ICC become a de facto state party to the Rome Statute as a consequence of the UN Security Council resolution? Is the ICC itself legally bound by Security Council resolutions? I argue that the ICC’s jurisdiction over situations referred by the Security Council is not unlimited, because the Council’s powers under the UN Charter are not unlimited. In any referral to the ICC, the Security Council resolution must be intra vires the Charter and consistent with the Rome Statute before there is a legal basis for the ICC’s jurisdiction. Where referrals meet these conditions, the ICC’s jurisdiction over nationals of non-party states is indirectly grounded in state consent by virtue of the referred state’s membership of the UN.

47 Charter of the United Nations, opened for signature 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945) (‘UN Charter’).

48 See Chapter V.
IV. METHODOLOGY

A. Theoretical Framework

This thesis uses doctrinal analysis with a theoretical framework that draws on the tenets of positivism. The positivist tradition in international legal scholarship views states as the primary subjects of international law and state consent as foundational. States continue to use rhetoric espousing the fundamental importance of Westphalian sovereignty, which explains why the principle of state consent underpins many of the legal arguments against ICC jurisdiction over nationals of non-party states. Recognising the primacy of this worldview among states allows for greater scope to challenge such arguments. By framing my analysis of the legal basis for the ICC’s jurisdiction in a way that prioritises state consent, certain objections to the Court’s prosecution of nationals of non-party states can be minimised. This is not to say that I adopt the state-centrism of international law uncritically. In Chapter II I recognise that the concept of sovereignty is evolving to accommodate cosmopolitan ideals and I discuss how the primacy of sovereignty and state consent can be reconciled with the aims and values of international criminal justice.

B. Sources

M Cherif Bassiouni describes international criminal law as ‘a complex legal discipline that consists of several components bound by their functional relationship in the pursuit of its value-oriented goals’. It has roots in public international law and domestic criminal law, and draws on the intellectual traditions of comparative criminal law and international human rights law. The focus of my project is international criminal jurisdiction, the law of which is derived mainly from sources of public international law. Article 38(1) of the


50 See, eg, ‘Trial of Sayf-al-Islam in Libya is question of sovereignty – NTC official’ BBC Monitoring Middle East (9 April 2012); Statement of Vestine Nahimana Ambassador of Burundi, Fifteenth Session of the Assembly of States Parties to the Rome Statute (16–24 November 2016) in which the ICC preliminary examination is described as ‘a betrayal of the sovereignty of Burundi’.

51 Indeed, modern positivism in international law has evolved from its association with absolute state voluntarism: Simma and Paulus, above n 49, 304.

Statute of the International Court of Justice (‘ICJ’), provides what is generally considered to be an authoritative statement of the sources of international law. It lists international conventions, international custom and general principles of law as primary sources, alongside judicial decisions and ‘teachings of the most highly qualified publicists’ as subsidiary sources of international law. I use these sources throughout my thesis, with a particular reliance on treaties, custom and judicial decisions.

The Rome Statute is a multilateral constitutive treaty which provides a focal point for much of my analysis, and I also use various other multilateral and bilateral agreements to assess complementary or competing state obligations. Where there is uncertainty about the meaning of treaty provisions, either in the Statute or other relevant treaties, I take a broadly teleological approach to their interpretation in line with Article 31 of the Vienna Convention on the Law of Treaties (‘VCLT’).

Customary international law is a particularly important source of law for matters of jurisdiction. For example, I use evidence of state practice and opinio juris to clarify the legal parameters of the extraterritorial exercise of criminal jurisdiction. The doctrine of head of state immunity is also derived from customary international law; whether and how this doctrine conflicts with the Rome Statute is discussed in Chapter IV.

I also rely on judicial decisions to support my argument and analysis. The ICC’s own jurisprudence on matters of legal substance is quite limited, and the Court has yet to consider a serious challenge to its jurisdiction over nationals of non-party states. But what little consideration the Court has given to matters relevant to its personal jurisdiction are discussed and critiqued throughout my thesis. More useful is the established jurisprudence of the ICJ and other international criminal courts and tribunals. While international courts do not adhere to a system of precedent, where relevant, judges frequently consider and

53 Statute of the International Court of Justice, appended to the Charter of the United Nations, opened for signature 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945).

54 Article 31(1), VCLT. The ICJ has taken a teleological approach to interpretation of constituent treaties in Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) [1949] ICJ Rep 174, 179; Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion) [1996] ICJ Rep 66, 79-80. The ICC has also favoured a teleological approach to interpretation of the Rome Statute in a number of decisions. See, eg, Prosecutor v Katanga and Chui (Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)) (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 16 June 2009) [36]-[47]; Prosecutor v Lubanga (Decision on the Confirmation of Charges) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/06-803-tEN, 29 January 2007) [281], [284]-[285].
apply legal principles and reasoning developed by other international courts.\textsuperscript{55} This has led to a well-developed body of jurisprudence on issues relating to international criminal jurisdiction that I use as an aid to interpretation and analysis throughout the thesis. Furthermore, I occasionally use judicial decisions of national courts as evidence of state practice. Additional sources of state and institutional practice include UN Security Council resolutions; UN records and memoranda; reports and statements from the ICC Office of the Prosecutor; and the Rome Statute \textit{travaux préparatoires}.

\textbf{C. Method of Analysis}

The process of doctrinal methodology involves ‘synthesis, analysis, restatement and critique’.\textsuperscript{56} To this end, I use the above sources of law and information to develop an argument that the ICC can lawfully exercise jurisdiction over nationals of non-party states in most circumstances provided for by the Rome Statute. I also engage with and build upon arguments and theories developed in recent academic scholarship. My process of analysis involves a combination of deductive and inductive reasoning that is characteristic of doctrinal method.\textsuperscript{57} For example, as mentioned in Part II above, I take the theory of delegated jurisdiction as the starting point for my investigation of whether there is a legal basis for the ICC to exercise jurisdiction in accordance with the Article 12 Preconditions. I then use a series of fact scenarios—both hypothetical and actual—to deduce whether delegation of jurisdiction would be an appropriate legal basis for ICC jurisdiction over nationals of non-party states in those situations. Conversely, in Chapter V I begin with a series of legal issues that arise in relation to Security Council referrals of non-party states, and, using inductive reasoning, explore whether it is possible to identify a coherent legal basis for the ICC’s exercise of jurisdiction in such cases.

\textbf{V. Thesis Structure}

This thesis is divided into five substantive chapters, and I begin in Chapter II by providing a contextual discussion of why non-party states object to the jurisdiction of the ICC. In this


\textsuperscript{57} Terry Hutchinson and Nigel Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012) 17 \textit{Deakin Law Review} 83, 111.
chapter I engage with the allegation that the Rome Statute infringes on the sovereignty of non-party states by allowing the ICC to prosecute their nationals in certain circumstances. This involves an analysis of how the Statute affects non-party states and an evaluation of whether such effects amount to an infringement of state sovereignty. How sovereignty interacts with international law is largely a matter of perspective, and how states perceive sovereignty shapes their view of whether there is a legal basis for the Rome Statute’s jurisdiction provisions. I argue that the ICC will need to recognise such concerns and formulate the legal basis for its jurisdiction in a way that maximises the role of state consent.

Chapter III then turns to analyse the prevailing theory that the ICC’s jurisdiction is based on delegation from states parties. I undertake a review of scholarship published in the years following the adoption of the Rome Statute and adopt one of the principal conclusions from this early debate: that states may lawfully delegate jurisdiction to an international court. This chapter then proceeds to undertake a conceptual analysis of what delegation of jurisdiction actually entails in the context of the ICC. I explore how the concept of delegation is understood in international institutional law which provides a framework for understanding how international institutions receive and exercise their powers. This is directly relevant for the ICC as an international organisation. The second part of this chapter demonstrates the utility of describing jurisdiction as ‘the legal right to exercise powers’. I also provide an overview of the principles of international law under which a state may exercise jurisdiction extraterritorially and explain how these apply to the Rome Statute jurisdiction regime. I argue that delegation of jurisdiction is, in theory, a sound legal basis for the ICC’s jurisdiction when either the territorial state or the state of nationality has consented to the Statute.

In Chapter IV, I test this delegation of jurisdiction theory by applying it to a number of hypothetical case studies involving actual situations that are in either the preliminary examination or investigation stage at the ICC. Specifically, I use scenarios that potentially involve legal immunities to explore whether delegation of jurisdiction provides a legal basis for the ICC’s jurisdiction in all situations that come before the Court via a state referral or Prosecutor-initiated investigation. The first case study is a hypothetical scenario in which a sitting head of state from a non-party state is indicted by the ICC for the commission of crimes on the territory of a state party. Incumbent senior officials are immune from prosecution in foreign domestic courts, which raises the question of how states parties can
be said to delegate jurisdiction to the ICC, when such jurisdiction does not exist domestically. The second and third case studies use the two existing preliminary examinations in Palestine and Afghanistan. Each of these situations raises unique legal obstacles relating to domestic jurisdiction that could affect whether the ICC is able to lawfully prosecute nationals of non-party states. For example, in the Afghanistan situation, I examine how status of forces agreements and bilateral non-surrender agreements might affect the ICC’s jurisdiction over US nationals for crimes committed on the territory of Afghanistan. In the situation in Palestine I explore how the Oslo Accords\(^{58}\) and questions of statehood might impact on the ICC’s potential jurisdiction over Israeli nationals. I conclude that delegation of jurisdiction provides a legal basis for the ICC’s jurisdiction over nationals of non-party states in most situations except for sitting heads of state accused of committing crimes on the territory of a state party.

Chapter V then focuses on the ICC’s relationship with the UN Security Council. Under the Rome Statute, the Council has two important roles: Article 13(b) provides that the Security Council may trigger the jurisdiction of the Court (the ‘referral power’), and under Article 16 the Council may halt any ICC investigation for 12 months at a time (the ‘deferral power’). In the 2010 Kampala Amendments, the Security Council was also given a third role to play with respect to the Court’s jurisdiction over the crime of aggression.\(^{59}\) In the first part of Chapter V I critically examine the ways in which the Council has used Article 16 in an attempt to limit the jurisdiction of the Court. In particular, I analyse Resolutions 1422 and 1487 in which the Security Council purported to exempt certain non-party nationals from the jurisdiction of the ICC,\(^{60}\) concluding that it is unlikely that Resolution 1422 is consistent with the Rome Statute. I then discuss the Article 13(b) referral power by using the Darfur and Libya situations as case studies for my analysis. I argue that the legal basis for the ICC’s authority in those situations is grounded in the implied consent of Sudan and Libya to the jurisdiction of the Court by virtue of their membership of the UN. The final part of Chapter V considers the role of the Security Council with respect to the crime of aggression and the consequences of this for states not party to the Rome Statute.

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\(^{59}\) Amendments on the crime of aggression to the Rome Statute of the International Criminal Court, Resolution RC/Res.6, adopted at the 13th plenary mtg (11 June 2010).

\(^{60}\) SC Res 1422, UN SCOR, 4572nd mtg, UN Doc S/RES/1422 (12 July 2002); SC Res 1487, UN SCOR, 4772nd mtg, UN Doc S/RES/1487 (12 June 2003).
Chapter VI addresses an alternative theory to delegation of jurisdiction and implied consent. I explore whether the concept of universal jurisdiction can provide a coherent legal basis for the ICC’s jurisdiction in any and all situations allowed by the Rome Statute. I take two different approaches to the possibility that universal jurisdiction provides a foundation for the ICC’s authority over nationals of non-party states. First is the idea that states are delegating universal jurisdiction to the ICC, along with jurisdiction based on territoriality and nationality. I undertake a survey of international crimes justiciable under universal jurisdiction in customary international law and conclude that most, but not all, of the Statute crimes may be prosecuted by states under universal jurisdiction. This means that in theory, states could delegate such jurisdiction to the ICC. I also discuss a second approach to universality as a legal basis for ICC jurisdiction; one that envisages universal jurisdiction as inherent to the international community and exercisable by the ICC as an agent of this community. Ultimately I argue that the flaws in both the delegated and inherent universal jurisdiction approaches mean that there is no advantage to conceiving of the legal basis for the ICC’s jurisdiction as predicated on universal jurisdiction.

I conclude in Chapter VII by using South Africa’s recent attempt to withdraw from the Rome Statute as an example to draw together the analysis and arguments developed throughout the thesis. South Africa claims that its obligations under the Rome Statute to arrest Sudanese President Al Bashir are inconsistent with its obligations under customary international law to respect Al Bashir’s immunity. I argue that there is no inconsistency in this situation and conclude that the Court’s failure to explain the legal basis for its jurisdiction over nationals of non-party states made it much easier for South Africa to use the Al Bashir situation as a pretext for its withdrawal attempt. Until the ICC clearly articulates a sound legal basis for its jurisdiction over situations involving nationals of non-party states, any attempt by the Court to prosecute such individuals will likely be used by the Court’s opponents to question the ICC’s integrity and undermine its legitimacy.
CHAPTER II

REFUSING TO RATIFY: QUESTIONS OF STATE CONSENT AND SOVEREIGNTY

I. INTRODUCTION

The classic conception of sovereignty provides that a state has exclusive rights within its territory and remains free from external interference. States that are not party to the Rome Statute claim that the ICC does not sufficiently respect their freedom from external interference. An understanding of why non-party states object to the jurisdiction provisions of the Rome Statute is an essential first step in the process of identifying a legal basis for the Court’s jurisdiction over nationals of non-party states. By taking the main concerns of non-party states into account, the legal basis can be formulated in a way that acknowledges such concerns and reduces the strength of the arguments against the Court’s jurisdiction. This chapter focuses on one of the most common accusations levelled against the Court: in allowing the prosecution of nationals of non-party states, the Statute infringes on the sovereignty of the state of nationality. The purpose of this chapter is not to provide a comprehensive account of how the ICC affects sovereignty for non-party states, nor is it to remedy the relative under-theorisation of the relationship between sovereignty and international criminal justice.\(^1\) Instead, it provides necessary context and lays some of the conceptual groundwork required for the analysis in later chapters.

The chapter begins in Part II with an overview of the major claims that many non-party states make in objection to the jurisdiction provisions of the Rome Statute. In particular, I examine attitudes of high profile non-party states such as China, India and the US, as well as the grounds for opposing jurisdiction raised by Sudan and Libya in the wake of the UN Security Council referrals of situations in those non-party states.\(^2\) I outline the four main contentions that have been directed against the ICC’s exercise of jurisdiction over non-party nationals. First, that the Rome Statute contravenes Article 34 of the VCLT; second, that it ignores the importance of state consent in international law; third, that the principle of complementarity infringes on sovereignty by allowing the Court to evaluate the

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competence of a non-party state’s judicial system; and fourth, that the Security Council referral mechanism in Article 13(b) of the Statute provides another challenge to a non-party state’s sovereignty. Given the significance of the US’s evolving relationship with the Court, and its importance for later chapters, I will also briefly canvass the progression of US engagement with the Court in order to evaluate the implications of this in terms of the ICC and state sovereignty.

Part III then analyses whether there is any merit to the allegations listed above, with a focus on whether the Rome Statute does affect non-party states in the manner claimed. In particular, this part explores whether a state has the right to object to the prosecution of its nationals abroad, and how the principle of complementarity affects non-party states. Part IV examines to what extent such effects amount to an infringement on the sovereignty of non-party states, and whether any such infringement is, nevertheless, justifiable. The strength of the arguments in this part very much depends on the preferred underlying characterisation of sovereignty. For example, is a state’s sovereignty absolute in nature and inherent to the existence of the state? Or is it flexible, conditional and subject to international law? There has been a significant shift in the conception of sovereignty since the end of World War II, away from the Bodin-inspired absolutist sovereignty of the Westphalian era, towards a definition that allows for the evolution of a ‘cosmopolitan social contract’. But even as the latter characterisation has gained in popularity, the former has not entirely disappeared. States and commentators remain free to conceptualise sovereignty in different ways. Such theorisation is relevant for later chapters where I focus on jurisdiction. For the purposes of this chapter I argue that the question of whether non-party states are prepared to accept that there is a legal basis for the ICC’s prosecution of their nationals is influenced by their interpretation of the concept of sovereignty.

Throughout this chapter I use the term ‘infringe on’ where there is an element of unwanted intrusiveness into a state’s sovereign sphere of liberty and the Rome Statute can be said to have an impact on a state’s sovereign rights and obligations. Whether the Statute ‘affects’

5 Separating the analysis of ‘sovereignty’ and ‘jurisdiction’ in different chapters is not intended to imply that the concepts are entirely distinct from one another. Clearly, sovereignty and jurisdiction are inextricably linked. This chapter discusses sovereignty in broad terms, which is reflective of how non-party states frame their objections to the Rome Statute. Subsequent chapters delve into a specific aspect of a state’s sovereignty: criminal jurisdiction.
or ‘has an effect on’ sovereignty refers to any consequences for a state’s broader legal and political interests. The question of whether such an infringement or effect is ‘acceptable’ asks whether there is an underlying rationale that makes theoretical sense for such an infringement/effect. It does not mean that the argument or proposition must be accepted by all states or commentators.

II. THE ROME STATUTE AND NON-PARTY STATES: THE ALLEGATIONS

A. ICC Jurisdiction Infringes on the Sovereignty of Non-Party States

Despite an overwhelming majority of states voting to adopt the Rome Statute in July 1998, there has been a continuing undercurrent of objection to the jurisdiction of the ICC among a vocal minority of states that remain opposed to acceding to the Statute. These states have identified various reasons for rejecting the Rome Statute, but this part will focus on those grounds that relate directly to the jurisdiction of the Court over nationals from non-party states. As mentioned in Chapter I, the question of the Court’s jurisdiction was the most contentious aspect of the negotiations, and has remained controversial since the adoption of the ICC’s jurisdiction regime in Articles 12 and 13 of the Statute. This part will set out the principal objections raised by non-party states to the potential for ICC jurisdiction over their nationals. For clarity of analysis I am separating the objections into four categories, although in reality there is significant overlap among them. All four fall under the umbrella criticism of ‘ICC jurisdiction infringes on the sovereignty of non-party states’. Note that the following sections simply summarise the principal allegations; Part III will analyse whether the objections have any legal merit.

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6 I have adopted the language used by the ICJ which distinguishes between a state’s rights and obligations, and its interests. See, eg East Timor (Portugal v Australia) (Judgment) [1995] ICJ Rep 90; Monetary Gold Removed from Rome in 1943 (Italy v France) (Judgment) [1954] ICJ Rep 19.

7 Other grounds for opposing the Statute include: the fact that the Court has jurisdiction over war crimes committed in non-international armed conflict; the expansion of the list of acts considered to be crimes against humanity; the inclusion of the crime of aggression; the exclusion of the use of nuclear weapons as a crime; the exclusion of the crime of terrorism; and the fact that the Prosecutor has proprio motu powers. See, generally, Summary Record of the 9th Meeting, UN GAOR, 6th Comm, 53rd sess, 9th mtg, Agenda Item 153, UN Doc A/C.6/53/SR.9 (4 November 1998); Summary Record of the 10th Meeting, UN GAOR, 6th Comm, 53rd sess, 10th mtg, Agenda Item 153, UN Doc A/C.6/53/SR.10 (11 December 1998); Summary Record of the 11th Meeting, UN GAOR, 6th Comm, 53rd sess, 11th mtg, Agenda Item 153, UN Doc A/C.6/53/SR.11 (3 November 1998); Summary Record of the 12th Meeting, UN GAOR, 6th Comm, 53rd sess, 12th mtg, Agenda Item 153, UN Doc A/C.6/53/SR.12 (19 December 1998).

8 No one state makes all four objections.
1. The Rome Statute Violates the Pacta Tertiis Principle

One of the earliest objections raised by states unhappy with the final version of the Rome Statute is also one of the easiest to dismiss. In the aftermath of the Statute’s adoption, some states were quick to claim that the provisions giving the ICC jurisdiction over nationals of non-party states were in contravention of the customary pacta tertiis nec nocent nec prosunt principle embodied in Article 34 of the VCLT. Article 34 provides that ‘a treaty does not create either obligations or rights for a third State without its consent’. In India’s explanation of its negative vote on the adoption of the Statute, the Head of the Delegation declared that:

[The Statute] makes a mockery of the distinction between States Parties and those who choose not to be bound by a treaty. It is truly unfortunate that a Statute drafted for an institution to defend the law should start out straying so sharply from established international law. Before it tries its first criminal, the ICC would have claimed a victim of its own – the Vienna Convention on the Law of Treaties.9

The former US Ambassador-at-Large for War Crimes Issues, David Scheffer, summarised his country’s objections to the Statute in similar terms:

[T]he treaty purports to establish an arrangement whereby US armed forces operating overseas could be conceivably prosecuted by the international court even if the United States has not agreed to be bound by the treaty. … [T]his is contrary to the most fundamental principles of treaty law.10

The overwhelming majority of commentators who write on questions relating to the relationship between the ICC and non-party states agree that such claims are without merit.11 In cases where the ICC has jurisdiction over a national of a non-party state on the basis of Article 13(a) or (c), the state of the accused’s nationality incurs neither rights nor obligations under the Rome Statute. The state of nationality is under no legal obligation to cooperate with the Court, which means, for example, that it does not have to surrender the accused to the ICC if the indicted individual is in the custody of the state of nationality.

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9 Explanation of vote by Mr Dilip Lahiri, Head of Delegation of India, on the adoption of the Statute of the International Criminal Court (17 July 1998).


Statements such as those by India and the US above represent a conflation of *pacta tertiis* with the issue of whether the ICC can prosecute non-party nationals without the consent of the state of nationality, which is addressed in the next section. I raise the *pacta tertiis* objection here because it is a feature of some of the initial statements of objection from non-party states and addressed by the early scholarship surrounding jurisdiction over non-party nationals. But given the fact that a violation of *pacta tertiis* is not an accurate characterisation of the Rome Statute jurisdiction regime, I will not be discussing the question of *pacta tertiis* any further in this chapter.\(^\text{12}\) It will, however, be raised again in Chapter V when I examine the implications of Security Council referrals for states not party to the Rome Statute.

2. The Rome Statute Ignores the Importance of State Consent

Although the Rome Statute does not explicitly create positive obligations or rights for non-party states, one of the primary objections to the Court’s jurisdiction is that prosecution of non-party nationals without the consent of the state of nationality takes something away from that state’s sovereign domain. For example, in a statement following the adoption of the Rome Statute in 1998, India listed the ‘[failure] to respect the principle of consent of states’ as one of the main reasons why it would not be ratifying the Statute.\(^\text{13}\) China asserted that states ‘would no longer be able to invoke their non-acceptance of the Court’s jurisdiction in order to prevent the Court’s interference with their judicial sovereignty’.\(^\text{14}\) Both states have remained non-parties and, despite some warming of attitudes towards the Court, maintain their objection to the Statute on the basis that it allows the ICC to prosecute non-party nationals without first obtaining consent from the state of the accused’s nationality.\(^\text{15}\)

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In a similar vein, non-party states Sudan and Libya are also using the absence of their consent to the Statute as the primary reason for refusing to recognise ICC authority over their nationals. Upon announcement of arrest warrants for two senior Sudanese government officials, one of the indicted—Minister Ahmad Harun—declared that there was ‘no jurisdiction to take action on this issue for the simple reason that the government of Sudan did not approve the ICC basic law’. Similarly, Libya also invoked lack of consent as the grounds for its refusal to hand over former officials Saif Al-Islam Gaddafi and Abdullah Al-Senussi to the ICC: ‘Libya is not a signatory to the Rome Statute that establishes the ICC’s authority […] We insist on trying Sayf-al-Islam in accordance with provisions that are well established in the Libyan law and cannot be overlooked. It is a matter of sovereignty’. Whether state consent in the context of ICC prosecution of non-party nationals is as important in international law as some states allege will be discussed in Part III below.

3. **Complementarity as an Infringement on State Sovereignty**

In addition to the underlying complaint that the Rome Statute’s jurisdiction provisions ignore the importance of state consent in international law, some non-party states have claimed that the principle of complementarity embedded in the Rome Statute only serves as a further infringement on their sovereignty. Ironically, complementarity was included in the Statute to respect the sovereign right of states to criminally prosecute crimes within their jurisdiction, with Article 1 of the Statute emphasising that the Court is intended to be ‘complementary to national criminal jurisdictions’. Article 17 provides that the Court may decide admissibility of a particular case by determining whether a state with jurisdiction over it is ‘unwilling or unable genuinely to carry out an investigation or prosecution’. At Rome, India was concerned that complementarity would mean that:

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16 Prosecutor v Harun and Abd-Al-Rahman (Warrant of Arrest for Ahmad Harun and Ali Muhammad Ali Abd-Al-Rahman) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/07, 27 April 2007).

17 ‘Sudan rejects ICC ruling on Darfur’ *Al Jazeera* (28 Feb 2007). The Sudanese government has further claimed that its stance against the ICC is ‘in line with international law because Sudan is not a member of the treaty that founded this jurisdiction’: ‘Sudan rejects ICC arrest warrants’ *Sudan Tribune* (2 May 2007).


19 Art 17(1)(a).
All nations must constantly prove the viability of their judicial structures or find these overridden by the ICC. Certainly, it is inconceivable to India, as it is to many other countries, that States with well established and functioning judicial and investigative systems should be subjected to a Star Chamber procedure.20

China has also expressed concern that giving the ICC the power to judge whether a state is willing or able to properly prosecute its own nationals means that the Court has become a ‘supra-national organ’.21

As alluded to above, in 2011 the ICC issued arrest warrants for Saif Al-Islam Gaddafi and Abdullah Al-Senussi for crimes committed in Libya.22 In May 2013 Pre-Trial Chamber I decided that the case against Gaddafi was admissible before the ICC because Libya was ‘unable genuinely to carry out the investigation or prosecution against Mr Gaddafi’.23 In a lengthy appeal submission, representatives for the Libyan government invoked Libya’s sovereignty on numerous occasions and declared the Pre-Trial Chamber’s decision ‘an unwarranted intrusion upon the right of a sovereign state to determine its own domestic procedures’.24 The Appeal Chamber rejected the appeal and despite Libya’s apparent willingness to prosecute, the judgment that Libya is unable to prosecute this case still stands.25


21 Jianping and Zhixiang, above n 15, 611.

22 Situation in the Libyan Arab Jamahiriya (Warrant of Arrest for Saif Al-Islam Gaddafi) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/11, 27 June 2011); Situation in the Libyan Arab Jamahiriya (Warrant of Arrest for Abdullah Al Senussi) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/11, 27 June 2011).

23 The Pre-Trial Chamber recognised the procedural fairness safeguards of Libya’s Code of Criminal Procedure, but concluded that the national judicial system remained ‘unavailable’: Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi (Decision on the admissibility of the case against Saif Al-Islam Gaddafi) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/11-01/11, 31 May 2013) [199]-[205]. In October 2013 Pre-Trial Chamber I held that the case against Al-Senussi was inadmissible before the ICC under Article 17(1)(a): Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi (Decision on the admissibility of the case against Abdullah Al-Senussi) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/11-01/11, 11 October 2013). Some of the reasons why Pre-Trial Chamber I held this case to be inadmissible are outlined in Part 3(B) below.

24 Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi (Document in support of the Government of Libya’s Appeal against the “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”) (International Criminal Court, Appeals Chamber, Case No ICC-01/11-01/11, 24 June 2013) [165].

25 Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi (Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013) (International Criminal Court, Appeals Chamber, Case No ICC-01/11-01/11, 21 May 2014).

The fourth main objection to the jurisdiction of the ICC over nationals of non-party states is the fact that Article 13(b) of the Statute provides the UN Security Council with the power to trigger the Court’s jurisdiction over situations in non-party states. Both Pakistan and India protested the role given to the Security Council on the basis that it would subordinate the Court to the discretion of the five permanent Council members and further undermine the sovereignty of states that have chosen not to ratify the Rome Statute.\(^{26}\) India went so far as to question the legality of giving the Security Council the power to refer a non-party state to the ICC, both under customary international law and the UN Charter.\(^{27}\)

Sudan and Libya’s non-cooperation with the Court in the years since the situations were referred by the Security Council, and their continued objections to the ICC’s jurisdiction over their nationals on the basis that it interferes with their sovereign rights demonstrates further hostility towards the Security Council referral power. Chapter V of this thesis will deal with the legal issues raised by the referral power under both the Rome Statute and the UN Charter in more detail. For the purposes of this chapter, it is sufficient to acknowledge that such objections exist.

Parts III and IV below address in more detail some of the questions surrounding the ICC, non-party states and sovereignty raised in this part, but I want to turn briefly to the issue of US opposition to the ICC, as it will become particularly relevant in later chapters. The US is the most high profile non-party state and in the years since the Rome Statute’s adoption, official US policy towards the ICC has evolved from active hostility to cautious engagement. This period witnessed a number of political and legal moves against the ICC on the part of the US government that continue to affect relations between the US, the ICC, states parties and non-parties alike.\(^{28}\)

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\(^{27}\) Explanation of vote by Mr Dilip Lahiri, Head of Delegation of India, on the adoption of the Statute of the International Criminal Court (17 July 1998).

The US was one of only seven states to vote against the adoption of the Rome Statute in 1998. There was significant resistance to the very notion of an international criminal court in the US Senate, with a few particularly vocal senators fearful of what this institution could mean for US sovereignty:

The United States can never lessen its commitment to ensuring that this Court does not pose a threat to the constitutional rights of American citizens. We must never trade away American sovereignty and the Bill of Rights so that international bureaucrats can sit in judgment of the United States military and our criminal justice system.29

Senator Rod Grams declared ‘should this court come into existence, we must have a firm policy of total non-cooperation, no funding, no acceptance of its jurisdiction, no acknowledgement of its rulings and absolutely no referral of cases by the Security Council’.30 This attitude towards the Court essentially became US government policy as the election of George W Bush in 2000 ushered in an era of non-cooperation with, and active campaigning against, the Court.

Although outgoing President Bill Clinton signed the Rome Statute at the end of 2000, he did not recommend it for ratification. In 2002 President Bush’s administration sent a letter to the UN Secretary General signalling the US’s intention not to ratify the Statute and disavowing that the US had any obligations or responsibilities that President Clinton’s signature may have imposed.31 Soon after, the American Servicemembers’ Protection Act of 2002 was enacted.32 This federal statute prohibits US governments and agencies from assisting the ICC and authorises the president ‘to use all means necessary and appropriate’ to secure


30 Statement of Senator Rod Grams, ibid.

31 Letter from John R Bolton, US Under Secretary of State for Arms Control and International Security to Kofi Annan, UN Secretary General (6 May 2002).

the release of any American citizen detained by the Court.\textsuperscript{33} It further requires the president to withdraw military support from any state that ratifies the Rome Statute unless it signs a bilateral agreement promising not to transfer American personnel to the Court.\textsuperscript{34}

Following the enactment of the \textit{American Servicemembers’ Protection Act}, the US began a ‘systematic campaign’ of concluding what became known as Article 98 agreements.\textsuperscript{35} Article 98(2) of the Rome Statute provides that:

\begin{quote}
The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.
\end{quote}

Between 2002 and 2006, the US signed approximately 100 bilateral Article 98 agreements, all of which required the partner state to undertake not to surrender any US government officials, military personnel, employees, and in some cases, nationals, to the ICC without the ‘express consent’ of the US.\textsuperscript{36}

During this period the US also began actively working in the UN Security Council to undermine the Court’s ability to prosecute nationals of non-party states in accordance with Article 12(2)(a) of the Rome Statute. In 2002, the US sponsored Security Council Resolution 1422 which essentially exempts non-party state peacekeeping personnel who are operating in the territory of states parties from the jurisdiction of the ICC.\textsuperscript{37} During negotiations, the US threatened to withdraw from all UN peacekeeping operations if the

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\textsuperscript{33} Ibid §7427. This broad authority led to the provision being dubbed the ‘Hague Invasion’ clause.

\textsuperscript{34} Ibid §7423.

\textsuperscript{35} Bogdan, above n 28, 25.

\textsuperscript{36} Those Article 98 Agreements that are publicly available can be found at Georgetown Law Library website: <http://www.law.georgetown.edu/library/research/guides/article_98.cfm>. The strategy of concluding Article 98 agreements was used somewhat selectively after some US allies refused to enter into such arrangements. See, \textit{European Union Guiding Principles concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court} [2002] 12488/1/02 COJUR 10 USA 37 PESC 374. See Chapter IV for further discussion of Article 98 agreements.

\textsuperscript{37} Specifically, Operative Paragraph 1 provides that:

[The Security Council] requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.

SC Res 1422, UN SCOR, 4572\textsuperscript{nd} mtg, UN Doc S/RES/1422 (12 July 2002).
resolution was not adopted. The terms of Resolution 1422 were renewed in 2003 for another 12 months, but the Security Council refused to authorise further renewals after news of the Abu Ghraib abuses in Iraq came to light. However, the US has still managed to insist on clauses exempting non-party nationals from ICC jurisdiction in subsequent Security Council resolutions, namely the two resolutions referring situations in Darfur and Libya to the Court. The effect of such clauses on the ICC will be discussed in Chapter V of this thesis.

The 2005 Security Council referral of the situation in Darfur marked the start of a turning point in US-ICC relations. Rather than voting against Resolution 1593, the US abstained, ensuring that the referral would go ahead. Given the outward hostility the Bush administration had displayed toward the Court, the decision to abstain during the vote for Darfur’s referral was surprising. In addition, after 2006, only two more Article 98 agreements were concluded.

Under President Barack Obama, there was significant improvement in relations between the US and the ICC. For example, in 2010, the US participated in the Kampala Review Conference as an observer state; in 2011 the US voted in favour of Security Council Resolution 1970 referring the situation in Libya to the ICC; and in 2013 the US facilitated the transfer of Bosco Ntaganda to the ICC, after he surrendered himself to the US embassy in Rwanda. While not perhaps reaching the heights of the ‘lovefest’ that one observer claims, the relationship between the US and the ICC has come a long way since 1998.

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38 Bogdan, above n 28, 26.
44 David Bosco, Rough Justice: The International Criminal Court in a World of Power Politics (Oxford University Press, 2014) 175.
In recent months, however, events have transpired that signal a potential regression in US-ICC relations. As mentioned in Chapter I, the ICC Prosecutor has been conducting a preliminary examination of Statute crimes committed in Afghanistan since 2003. The examination has now concluded and in November 2016 the Office of the Prosecutor reported that there is ‘a reasonable basis to believe’ that crimes within the Court’s jurisdiction were committed by both US and Afghan nationals.\footnote{Office of the Prosecutor, Report on Preliminary Examination Activities (2016) (International Criminal Court, 14 November 2016) 47.} The Office indicated that it would be making its final decision ‘imminently’ about whether to request authorisation from the Pre-Trial Chamber to open an official investigation into the situation in Afghanistan.\footnote{Ibid, 51.} The Obama administration responded by reiterating denial of the Court’s jurisdiction:

\begin{quote}
We do not believe that an ICC examination or investigation with respect to the actions of US personnel in relation to the situation in Afghanistan is warranted or appropriate. As we previously noted, the United States is not a party to the Rome Statute and has not consented to ICC jurisdiction.\footnote{US Department of State, Daily Briefing, 15 November 2016 (Elizabeth Trudeau).}
\end{quote}

In January 2017, Donald Trump was inaugurated as the new US president. While there has not yet been any official statement from the Trump administration with respect to future US policy on the ICC, given his isolationist and nationalist rhetoric,\footnote{Baker, Peter, ‘Donald Trump’s Victory Promises to Upend the International Order’ The New York Times (9 November 2016).} relations between the US and the ICC are likely to regress, especially if an official investigation into the situation in Afghanistan goes ahead.\footnote{The Afghanistan situation and the potential for ICC prosecution of US nationals is discussed in more detail in Part IV(A) of Chapter IV.}

Part III takes a closer look at some of the objections outlined in this part with a view to analysing whether non-party states are being affected by the Rome Statute jurisdiction provisions to the extent that they claim.

\section{III. The Rome Statute and Non-Party States: The Reality}

As described above, one of the early assertions of non-party states was that the Rome Statute violated the \textit{pacta tertiis} principle, which is now largely acknowledged to be an
inaccurate interpretation of the Statute. However, non-party states maintain the overarching objection that the Court’s prosecution of their nationals without consent is an unacceptable infringement on their sovereignty. Before I turn, in Part IV, to look at broader issues of sovereignty and the ICC, this part examines whether the objections raised above are an accurate characterisation of the Rome Statute’s jurisdiction provisions.

A. The (Un)importance of State Consent to Prosecution

Scholars and state officials alike have claimed that the ICC’s prosecution of nationals from non-party states represents a flagrant disrespect for the ‘fundamentally important’ principle of state consent in international law. But how important is it for the state of nationality to consent before its nationals can be prosecuted for crimes committed on foreign territory? Under customary international law, states do not have unfettered authority over their citizens at all times. Individuals travelling abroad are bound by the laws of the territorial state, subject to certain basic human rights standards guaranteed by customary international law. Under the principle of territorial jurisdiction, the territorial state may prosecute a foreigner for a crime committed on its territory and in this situation consent of the accused’s state of nationality is not required. The state of nationality may intervene diplomatically and the accused is entitled to consular assistance, but consent of the state of nationality is not required for the foreign domestic prosecution to go ahead. Only where there is an international agreement in place between states to specifically exempt nationals from prosecution by foreign courts does a state have the exclusive right to jurisdiction over its nationals.

Given that consent of the state of nationality is not required for foreign prosecutions in domestic courts, it would seem that such objections of non-party states to ICC prosecution

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51 Casey and Rivkin, above n 50, 84.

52 This, and other principles of jurisdiction will be discussed in detail in Chapter III.

53 See, eg, Article 5(i) Vienna Convention on Consular Relations, which provides that consular functions include ‘subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State’. Vienna Convention on Consular Relations 1963, opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967).

54 How international agreements affect the jurisdiction of the ICC is analysed in Chapter IV.
of their nationals are largely unfounded. However, as argued by Madeline Morris in her often-cited article critiquing the relationship between the ICC and non-party states, prosecution by an international court may have greater political and legal consequences for the state of the accused than prosecution by a foreign domestic court.\textsuperscript{55} This would particularly be the case for situations before the ICC which involve heads of state or senior state officials.

Under customary international law sitting heads of state and senior state officials are immune from prosecution in foreign domestic courts.\textsuperscript{56} Any attempt to prosecute would be a violation of international law. Under Article 27(1) of the Rome Statute, however, sitting heads of state are not immune from prosecution by the ICC.\textsuperscript{57} Morris argues that the prosecution of senior officials amounts to prosecution of the state by proxy, as crimes committed by such individuals in their official capacity generally occur pursuant to state policy.\textsuperscript{58} Even the perception that the ICC is prosecuting states—particularly states that have not ratified the Rome Statute—will likely have significant political consequences.\textsuperscript{59}

There is also a concern that the ICC could become a de facto adjudicator in interstate disputes involving a non-party state,\textsuperscript{60} which is a distinct possibility in any future litigation involving Palestine and Israel. Palestine acceded to the Rome Statute in January 2015 and Israel remains a non-party state. Although the preliminary examination currently underway in the situation in Palestine is limited to crimes committed ‘in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014,’\textsuperscript{61} any subsequent prosecutions could very well involve an examination of the legality of Israel’s occupation policies. As Morris points out, ‘[t]he political repercussions of [the ICC] determining that a state’s acts

\begin{itemize}
  \item \textsuperscript{55} Morris, above n 11, 30.
  \item \textsuperscript{56} \textit{Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) (Judgment)} [2002] ICJ Rep 3, 20-21 [51]-[54].
  \item \textsuperscript{57} The question of whether there is a legal basis for ICC prosecution of heads of state and senior officials from non-party states will be discussed in detail in Chapter IV.
  \item \textsuperscript{58} Morris, above n 11, 25.
  \item \textsuperscript{59} The ICC’s prosecution of Kenya’s president Uhuru Kenyatta, for example, drew significant ire from the African Union which claimed the prosecution of a head of state ‘could undermine the sovereignty’ of Kenya and other African Union member states: \textit{Decision on Africa’s Relationship with the International Criminal Court, Extraordinary Session of the Assembly of the African Union, Ext/Assembly/AU/Dec.1 (12 October 2013)}, 1.
  \item \textsuperscript{60} Ibid 16–18.
  \item \textsuperscript{61} ‘The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine’ (Press Release, ICC-OTP-20150116-PR1083, 16 January 2015).
\end{itemize}
or policies were unlawful would be substantial indeed, and categorically different from the repercussions of the same verdict rendered by a national court.\textsuperscript{62}

Under the consent principle of international adjudication, an international tribunal only has jurisdiction when both parties to the dispute have agreed to be bound by the tribunal’s decision.\textsuperscript{63} In the \textit{Monetary Gold} case, the ICJ further held that it was precluded from exercising jurisdiction where the legal interests of a third state formed ‘the very subject matter of the decision’.\textsuperscript{64} There is some suggestion that the \textit{Monetary Gold} principle is a broader principle of international law, applicable beyond the ICJ.\textsuperscript{65} It is conceivable that an ICC case involving an interstate dispute or the prosecution of a senior state official could mean that the interests of a non-party state form the very subject matter of the decision. There is not, however, any precedent for applying the \textit{Monetary Gold} principle to international criminal tribunals exercising jurisdiction over individuals.\textsuperscript{66} Furthermore, Article 25(4) of the Rome Statute confirms that ‘no provision in the Statute relating to individual criminal responsibility shall affect the responsibility of States under international law’. Undoubtedly there may well be ICC cases in which the \textit{political} interests of a third state form the very subject matter of the decision, but any consequences for that state’s legal interests would be indirect.

B. \textit{The Effects of Complementarity for Non-Party States}

As discussed above, the principle of complementarity was embedded in the Rome Statute as a way of ensuring respect for state sovereignty by giving primacy of prosecution to states with jurisdiction.\textsuperscript{67} To date, there have not been any situations outside of a Security Council

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\item \textsuperscript{62} Morris, above n 11, 30.
\item \textsuperscript{64} \textit{Monetary Gold Removed from Rome in 1943 (Italy v France) (Judgment)} [1954] ICJ Rep 1954, 32.
\item \textsuperscript{67} ‘The most apparent underlying interest that the complementarity regime of the Court is designed to protect and serve is the \textit{sovereignty} both of State parties and third states’: Markus Benzing, ‘The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity’ (2003) \textit{7 Max Planck Yearbook of United Nations Law} 591, 595 (emphasis original).
\end{itemize}
\end{footnotesize}
referral where a non-party state has challenged the admissibility of an ICC case under Article 19. But there are two scenarios in which this could occur.

The first is in a situation where a national of a non-party state commits a Statute crime on the territory of a state party. For example, the ICC is currently investigating crimes committed on the territory of Georgia. Nationals from both Georgia and Russia have been accused of committing Statute crimes. Georgia is a party to the Statute, Russia is not. In accordance with the principle of complementarity, the ICC respects that Russia may assert jurisdiction over any accused Russian nationals based on the nationality principle of jurisdiction. Under Article 19(2)(b) of the Rome Statute, Russia would be able to challenge the admissibility of any future ICC case against a Russian national.

The second scenario is where a national of a state party commits a Statute crime on the territory of a non-party state. The re-opened preliminary examination into crimes committed in Iraq represents an example of this. Nationals from the United Kingdom (‘UK’) which is a state party, are accused of committing Statute crimes in Iraq, which is not a party. Should this examination proceed to the investigation stage, Iraq could exercise jurisdiction over the accused UK nationals based on the territoriality principle, and would be able to challenge the admissibility of any cases that come before the ICC.

In either the Georgia or the Iraq/UK situations, the non-party state would likely experience ‘extraordinary pressure to carry out its own investigation’ if the ICC decides to proceed with an official investigation. If Russia and Iraq challenged admissibility, both states would then be subject to a review by the ICC under Article 17 to determine whether they are in fact willing and able genuinely to prosecute.

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69 Situation in Georgia (Decision on the Prosecutor’s request for authorization of an investigation) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/15, 27 January 2016).

70 See Chapter III for a discussion of the customary principles of jurisdiction.

71 Office of the Prosecutor, ‘Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq’ (Statement 13 May 2014).

72 Ruth Wedgwood, ‘The Irresolution of Rome’ (2001) 64 Law and Contemporary Problems 193, 199. It should be noted that the states parties involved in such situations (eg Georgia and the UK) also face pressure to investigate and prosecute.
In an admissibility challenge, the ICC has held that the burden is on the applicant state to prove that the case is inadmissible before the Court. Libya’s admissibility challenge in the case of Saif Al-Islam Gaddafi provides a good example of what this involves for a challenging state. In brief, Pre-Trial Chamber I had to ‘assess whether the Libyan authorities are capable of investigating or prosecuting Mr Gaddafi in accordance with the substantive and procedural law applicable in Libya’. To make this assessment, the Court undertook a detailed examination of Libya’s relevant legislation and reviewed evidence of Libya’s ongoing investigation into crimes allegedly committed by Gaddafi. It considered whether the Libyan government could ensure adequate protection for witnesses and provide a lawyer for the defendant, and whether the government had sufficient control over the detention facilities in which Gaddafi was being held. Ultimately, Pre-Trial Chamber I held that there was not ‘evidence of a sufficient degree of specificity and probative value’ to find that Libya was able genuinely to prosecute Gaddafi. Despite Libya’s request to submit further evidence, it was denied by the Pre-Trial Chamber, whose decision was upheld on appeal.

Although Libya is obliged to cooperate with the Court by virtue of Security Council Resolution 1970, there is nothing in the Rome Statute itself to compel a non-party state to respect an ICC decision on admissibility. Nevertheless, the very fact that the ICC is empowered to review a non-party state’s investigative and judicial processes in such detail and then make a final decision as to admissibility is a clear-cut example of how the ICC can have a significant effect on non-party states. Whether this amounts to an unacceptable infringement of sovereignty will be discussed in Part IV.

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73 Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’) (International Criminal Court, Appeals Chamber, Case No ICC-01/09-02/11 OA, 30 August 2011) [61].

74 Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi (Decision on the admissibility of the case against Saif Al-Islam Gaddafi) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/11-01/11, 31 May 2013) [200].

75 Ibid [107]-[137].

76 Ibid [185]-[189], [209]-[210].

77 Ibid [135].

78 Ibid [136]-[137]; Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi (Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013) (International Criminal Court, Appeals Chamber, Case No ICC-01/11-01/11, 21 May 2014).

79 See Chapter V for discussion about whether the Rome Statute applies to non-party states referred to the Court by the Security Council.
C. Other Indirect Effects for Non-Party States

There are several other ways in which the Rome Statute might affect the interests of non-party states. In September 2014, for example, Israel announced that it would be investigating and prosecuting allegations of misconduct by Israeli soldiers during the 2014 Gaza conflict. The announcement came only two weeks after the end of the conflict and was viewed as ‘a swift effort to pre-empt an investigation’ by the ICC. The Office of the Prosecutor opened a preliminary examination of the situation in Palestine only four months later, but prior to that, the mere possibility of the ICC getting involved was likely a motivating factor in Israel’s expedited investigations. Similarly, the fact of the Court’s existence prompted the US to conclude numerous bilateral agreements and led to the enactment of the American Servicemembers’ Protection Act. Despite its rejection of the Rome Statute, the US was sufficiently concerned about the Statute’s possible effects for it to take such measures.

Furthermore, the Statute’s wide ratification is likely to have some broader influence on the development of international criminal law, and any normative consequences of the Rome Statute will not be limited to states parties. Just as international criminal law affects all states by ‘prohibiting behaviour perhaps previously outside of the purview of international law’, the definitional standardisation of genocide, war crimes and crimes against humanity will likely have far-reaching effects. Most states parties have implemented the substantive definitions of the Statute crimes into their domestic legislation, and Article 88 of the Statute requires states parties to enact procedures in their national law to facilitate cooperation with the Court. The fact that 124 states have so far ratified the Rome Statute means that it has the potential to generate new customary law, particularly with respect to the elements of the crimes elaborated in the Statute. This will affect domestic enforcement of international criminal law and interstate cooperation in international criminal matters.

Although the Rome Statute does not create obligations or rights for non-party states, in this part I have argued that the Statute can and does have an effect on the interests of...

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82 Cryer, above n 1, 985.
83 Danilenko, above n 11, 448–449.
states that remain outside the Statute’s legal regime. Whether the effect amounts to an infringement on state sovereignty and whether this is morally and legally justifiable very much depends on how modern sovereignty is characterised. The next section will examine how different interpretations of sovereignty can significantly alter the validity of non-party state objections to the Statute.

IV. THE ROME STATUTE, NON-PARTY STATES AND SOVEREIGNTY

Non-party states maintain their objection to the Rome Statute on the grounds that any effect on their interests constitutes an unacceptable infringement on their sovereign rights. The basis for this objection ultimately arises out of the fact that the ICC exercises criminal jurisdiction, long considered ‘one of the most sacred areas of state sovereignty’. But there is no singular understanding of the concept of sovereignty, which in turn means that there is no universal agreement about what might be considered a ‘sacred’ aspect of it. In this part, I examine the various ways that international criminal law scholars have interpreted the relationship between the ICC and state sovereignty, demonstrating divergence of opinions even among academic advocates of the Court. In the section that follows, I analyse whether such diverse views on the issue of the Rome Statute’s relationship with state sovereignty can be reconciled, which involves a brief examination of the theoretical foundations of sovereignty. The analysis in this part is a necessary simplification of what is an immensely complex issue. For the purposes of this thesis, however, understanding and accepting the contradictions inherent in the concept of sovereignty goes some way to explaining the diversity of answers to the question ‘does the Rome Statute infringe on state sovereignty?’ and allows for the recognition of conflicting arguments as mutually valid.


A. Does the Rome Statute Infringe on State Sovereignty? Yes, No and Somewhat.

Scholars have responded to the claim that the Rome Statute represents an unacceptable infringement on state sovereignty with a diverse range of views. At one end of the broad spectrum of opinions is the argument that the ICC does not represent any significant challenge to the concept of sovereignty. For example, M Cherif Bassiouni concludes that ‘the ICC neither infringes upon national sovereignty nor overrides national legal systems capable of and willing to carry out their international legal obligations’. Bassiouni sees the jurisdiction of the Court as representative of the collective will of states, and the existence of the complementarity regime as a sufficient safeguard for the sovereignty of non-party states. Bruce Broomhall is similarly convinced that ‘the institution of sovereignty, at least in the areas relevant to international criminal law, is in no danger of being replaced or of its importance being radically diminished in the foreseeable future’.

At the other end of the spectrum is the claim that the establishment of the ICC embodies a transformation of global politics and a new era in international law. Antonio Cassese declared the ICC to be ‘a revolutionary institution that intrudes into state sovereignty by subjecting states’ nationals to an international criminal jurisdiction’. Leila Sadat takes the idea of the ICC as a revolutionary institution further, to argue that the Rome Statute is having a transformative effect on international law by challenging the Westphalian model of state sovereignty:

The process by which the Statute was adopted, the Court’s ultimate institutional structure, and the fact that it [has] jurisdiction over individuals, not traditionally considered subjects of international law, all suggest an important shift in the substructure of international law upon which the Court’s establishment is premised.

Situated somewhere in between these contrasting positions are scholars who remain sceptical about the alleged transformative impact of the ICC on state sovereignty, and yet do not necessarily agree that the institution of sovereignty will remain completely unscathed by the activities of the ICC. Robert Cryer, for example, does not see the ICC as

a threat to sovereignty’s existence or integrity, but argues that the Court does inevitably have some effect on the sovereignty of all states, party and non-party.\textsuperscript{91} He emphasises the importance of acknowledging the role that sovereignty played in the creation of the Court, and the role that it continues to play when states exercise their sovereign prerogative to ratify the Rome Statute and respect decisions of the Court.\textsuperscript{92} Cryer claims that ‘[n]on-party states have not had their sovereignty limited in any additional way by this concession made by states parties’.\textsuperscript{93}

This brief cross section of opinions indicates that there does not appear to be a consensus among international criminal law scholars on the question of whether the Rome Statute infringes on state sovereignty. There is, however, general agreement among them that any effect, infringement, or transformation would be entirely acceptable, even if this involves non-party states.\textsuperscript{94} Although it may be an oversimplification to say that ‘international criminal law scholars see sovereignty as the enemy … thwarting international criminal justice at every turn’,\textsuperscript{95} they do tend to prioritise the goals of international criminal justice over the preservation of state sovereignty. The notion that any limitation of sovereignty by the ICC is legally and morally justifiable is the main point of divergence from the position of non-party states and their supporters who argue that any infringement on sovereignty is unacceptable.

So why do some scholars consider ICC infringement on state sovereignty to be an acceptable, even desirable, development? The argument is predicated on the notion that international crimes represent ‘a formal limit to a State’s legitimate exercise of its sovereignty, and so in principle justify a range of international responses’\textsuperscript{96} including prosecution by an international court.\textsuperscript{97} This is part of a broader evolution of the understanding of the concept of ‘sovereignty as control’ to ‘sovereignty as responsibility’. This reconceptualisation of sovereignty manifests most palpably in the Responsibility to Protect doctrine and the idea that the international community has a responsibility to act

\textsuperscript{91} Cryer, above n 1, 983–985. See also the discussion in Part III above.

\textsuperscript{92} Ibid 985.

\textsuperscript{93} Ibid 985–986.

\textsuperscript{94} See, eg Cassese, above n 89, 171; Cassese, above n 84, 16.

\textsuperscript{95} Cryer, above n 1, 980.

\textsuperscript{96} Broomhall, above n 88, 43.

\textsuperscript{97} Andrew Altman and Christopher Heath Wellman, \textit{A Liberal Theory of International Justice} (Oxford University Press, 2009) 73, 78, 95.
when a state is unwilling or unable to protect its citizens from ‘avoidable catastrophe’.

Any breach of this responsibility may be grounds for international prosecution of those most responsible for the harm, on the basis that sovereignty cannot be used to shield perpetrators of international crimes.

Yet, as Bassiouni observes, ‘state sovereignty remains an obstacle to international criminal justice … because it is interpreted and used as a means of achieving goals that contradict those of international justice’. On the one hand we have states not party to the Rome Statute using sovereignty as the main legal, political and moral rationale for their objection to the jurisdiction of the ICC. On the other are advocates for international criminal justice who argue that it is legally, politically and morally justifiable to disregard sovereignty in circumstances where a state fails in its responsibility. To better appreciate why this dichotomy exists, and how it might affect the legal basis for the ICC’s jurisdiction over nationals of non-party states, the next section provides a brief analysis of the theoretical foundations of modern sovereignty.

B. The Sovereignty Paradox

As mentioned in the introduction to this chapter, there has been a shift away from characterising sovereignty in absolutist Westphalian terms towards an understanding that better reflects the evolving role of states in a global community. Traditionally, sovereignty gives states unfettered and exclusive authority over their territory. International law exists because states are free to consent to be bound in relation to each other. Martti Koskenniemi identifies this as the ‘ascending’ perspective on statehood, because rights and responsibilities of international law ascend from the inherent freedom of states. Koskenniemi associates this understanding with Carl Schmitt who viewed sovereignty as ‘external to international law, a normative fact with which the law must accommodate itself’. Counter to this construction is the ‘descending’ perspective, which Koskenniemi

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100 M Cherif Bassiouni, ‘Foreword’ in Maogoto, above n 86, x.

101 Koskenniemi, above n 85, 225.

attributes to Hans Kelsen and HLA Hart.\textsuperscript{103} The concept of descending sovereignty explains the recent conception of sovereignty as responsibility. Under this approach, sovereignty is a product of—or descends from—international law which allocates liberties and competencies to the states.\textsuperscript{104}

International criminal lawyers tend to employ the descending approach to sovereignty as justification for the existence of international criminal law and its intrusive nature. Georg Schwarzenberger, for example, argued that sovereignty ‘only exists within the limits drawn at any time by international law’.\textsuperscript{105} By characterising sovereignty in this manner, any limits that international criminal law places on a state’s liberty have an acceptable theoretical basis, and ‘interference with sovereignty’ does not hold up as a legitimate objection. In contrast, those states that maintain their objection to the ICC’s jurisdiction over nationals of non-party states do so on an understanding of sovereignty as ascending. The US in particular remains ‘one of the most tenacious advocates of Westphalian notions of state sovereignty’\textsuperscript{106} and its continuing opposition to the Rome Statute’s Article 12 jurisdiction preconditions is framed in terms of sovereignty and state consent. Similarly, as discussed above, Libya and Sudan predicate their objections on the basis of the sanctity of sovereignty and the illegitimacy of the ICC prosecuting their nationals without explicit state consent. This is a justifiable position in light of the ascending view of sovereignty.

The fact that these perspectives on sovereignty give rise to conflicting claims is a result of the ‘constant oscillation’ of the doctrine of modern sovereignty between competing viewpoints.\textsuperscript{107} Neither the ascending nor the descending approach is unimpeachable, and so the uneasy co-existence of both means that ‘in the end, the debate turns on what one chooses to understand by the term sovereignty’.\textsuperscript{108} Not all arguments based on differing conceptual foundations of sovereignty will have equal merit. But the fact that there is not necessarily a common response to the question of whether the Rome Statute represents an unacceptable infringement on the sovereignty of non-party states provides the ICC with

\textsuperscript{103} Koskenniemi, above n 85, 229.

\textsuperscript{104} Ibid 229–230.


\textsuperscript{106} Ralph, above n 28, 2.

\textsuperscript{107} Koskenniemi, above n 85, 225.

\textsuperscript{108} Andrew Clapham, ‘National Action Challenged: Sovereignty, Immunity and Universal Jurisdiction before the International Court of Justice’ in Mark Lattimer and Philippe Sands (eds), Justice for Crimes against Humanity (Hart Publishing, 2003) 303, 312. See also, Mégrét, above n 4, 265.
the flexibility it needs to navigate the myriad political, diplomatic and legal concerns that come before it. As Koskenniemi emphasises, ‘indeterminacy is an absolutely central aspect of international law’s acceptability’.  

C. What This Means for the ICC and Non-Party States

Of the two main objections to the Rome Statute analysed in Part III, the issue of whether the Statute’s complementarity mechanism represents an unacceptable infringement on the sovereignty of non-party states is the one most likely to turn on the chosen conceptualisation of sovereignty. For example, the ICC’s review of Libya’s investigative and judicial processes and subsequent decision rejecting the Gaddafi admissibility challenge could undoubtedly be construed as an infringement on Libya’s sovereignty. For an international court to appraise a state’s judicial system, particularly when the state in question has not consented to this action, is arguably an intrusion into the state’s sovereign domain.  

Adopting an ascending perspective on sovereignty, the outcome of the Court’s admissibility consideration matters less than the fact that the ICC had authority to conduct the review of Libya’s judicial system in the first place. Conversely, the existence of the review mechanism in Article 19 of the Statute and the ICC’s application of this in the Gaddafi case amounts to an entirely acceptable infringement on state sovereignty when viewed through the lens of a descending interpretation of sovereignty. International law places limits on sovereignty to prevent impunity for international crimes. The principle of complementarity respects the sovereign right of states to exercise criminal jurisdiction, but as the Rome Statute makes clear, if a state is unable or unwilling to prosecute, then the ICC will step in. This also means that Libya’s objections to the ICC’s admissibility decision on the grounds of sovereignty are not justifiable under the descending paradigm of sovereignty.

Ultimately, the conceptual indeterminacy of sovereignty means that the ICC will make its decisions in light of the Court’s purpose and the aims of international criminal justice more generally.  

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109 Koskenniemi, above n 85, 591.

110 Whether the Security Council referral operates as an acceptable substitute for state consent will be discussed in Chapter V.

111 See, eg Prosecutor v Gbagbo (Judgment on the Appeal of Mr Laurent Koudou Gbagbo against the Decision of Pre-Trial Chamber I on Jurisdiction and Stay of Proceedings) (International Criminal Court, Appeals Chamber, Case No ICC-02/11-01/11, 12 December 2012) [83].
that allows for a state’s sovereign liberty to be limited in particular circumstances, the Court will also need to demonstrate due respect to the genuine concerns that states have about the potentially extensive reach of the Rome Statute.

V. CONCLUSION

Non-party states continue to object to the potential for ICC jurisdiction over their nationals on the grounds that it represents an unacceptable infringement on their sovereignty. Of the various objections raised by non-party states, there are two that identify some genuine issues with respect to the Statute’s impact on sovereignty. First is the possibility that heads of state or other senior state officials from non-party states may be prosecuted by the ICC while still in office.\(^{112}\) This could very well be perceived as a prosecution of the state by proxy and would likely have significant political and legal ramifications for the states involved. The second issue arises when a non-party state has primary jurisdiction over a case before the ICC, and challenges admissibility under Article 19(2)(b) of the Statute. The Court is then authorised to review the state’s investigative processes and judicial structures and make a final determination as to whether the case is admissible.

Whether such an infringement on the sovereignty of a non-party state is considered acceptable or not ultimately comes down to how one chooses to conceptualise sovereignty. The dichotomy of the ascending/descending theory of sovereignty allows for competing, yet mutually valid, claims about the ICC’s relationship with non-party states. The availability of interpretive choices and the continual oscillation between them goes some way toward explaining why the Rome Statute, as a product of compromise, is viewed with disappointment both by those who feel that it goes too far in its constraint of state sovereignty,\(^ {113}\) and those who believe it does not go far enough.\(^ {114}\) It also demonstrates the importance of grounding the legal basis for ICC jurisdiction in state consent and accepted international legal principles. The following chapters explore how the ICC can accomplish this.

\(^ {112}\) Whether there is a legal basis for the ICC to prosecute incumbent heads of states from non-party states will be the focus of Part III of Chapter IV.

\(^ {113}\) See, eg, Kaul, above n 84, 613–615; Cassese, above n 89, 161.

CHAPTER III

DELEGATION OF JURISDICTION: THE CONCEPTS

I. INTRODUCTION

In current scholarship focusing on the ICC, a general consensus appears to have developed with respect to the legal basis for the Court’s jurisdiction. The prevailing theory is that the ICC is lawfully able to exercise criminal jurisdiction because such jurisdiction is delegated to the Court by states parties.\(^1\) Delegation of jurisdiction, it is argued, explains how and why the ICC can lawfully exercise jurisdiction over nationals of non-party states in certain circumstances. If a foreign national commits a Statute crime on the territory of State X, State X has the right to prosecute the foreign national without the consent of his or her state of nationality. If State X has agreed to the jurisdiction of the ICC, and the case is otherwise admissible under the Rome Statute, State X is said to have delegated its own right to prosecute such a foreign accused to the ICC. It is a seemingly coherent explanation designed to address accusations that the ICC’s jurisdiction over nationals of non-party states is unlawful without the consent of the state of nationality.\(^2\)

Delegation of jurisdiction was not always the presumed legal basis for ICC jurisdiction. As I mentioned in Chapter I, a significant amount of scholarship was produced in the years after the adoption of the Rome Statute that debated whether or not a legal basis for ICC jurisdiction over nationals of non-party states even existed.\(^3\) A sizable portion of this

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\(^2\) See Part II of Chapter II for further discussion of the accusations levelled at the Court by non-party states.

commentary was devoted to the question of whether delegation of jurisdiction from states parties was an acceptable explanation for how and why the ICC could lawfully prosecute nationals of non-party states in the circumstances prescribed by the Rome Statute. Arguably the capstone to this debate was Dapo Akande’s influential article of 2003 which seemed to tip the scales in favour of delegation as the prevailing theory for ICC jurisdiction over nationals of non-party states.4

Missing from this early scholarship, and from much of the growing body of literature that deals with questions surrounding ICC jurisdiction and non-party states,5 is a clear conceptual analysis of ‘jurisdiction’ and ‘delegation’.6 In this chapter I address this lacuna by undertaking an exploration of what is meant by jurisdiction and what it means to say that this jurisdiction is being delegated to the ICC. The aim of this chapter, therefore, is to provide a detailed conceptual analysis of delegation of jurisdiction with a view to determining whether it works as an appropriate legal basis for the ICC’s jurisdiction. While the delegation theory was developed in response to the issue of ICC jurisdiction over


6 This is not to imply that there has not been significant theoretical analysis of either ‘jurisdiction’ or ‘delegation’ in international law (and international criminal law) more broadly, but that in the doctrinal literature that deals specifically with ICC jurisdiction over nationals of non-party states, ‘delegation of jurisdiction’ is often presented as a legal basis with limited consideration of what this actually entails. For comprehensive analyses of jurisdiction and delegation in different contexts see, eg Alejandro Chehtman, The Philosophical Foundations of Extraterritorial Punishment (Oxford University Press, 2010); Cedric Ryngaert, Jurisdiction in International Law (Oxford University Press, 2nd ed, 2015); Chithrarajan Felix Amerasinghe, Jurisdiction of International Tribunals (Kluwer Law International, 2003); Michael Akehurst, ‘Jurisdiction in International Law’ (1972) 46 British Yearbook of International Law 145; Danesh Saroooshi, International Organizations and Their Exercise of Sovereign Powers (Oxford University Press, 2005); Curtis A Bradley and Judith G Kelley (eds), ‘Special Issue: The Law and Politics of International Delegation’ (2008) 71 Law and Contemporary Problems 1; Darren G Hawkins, Delegation and Agency in International Organizations (Cambridge University Press, 2006).
nationals of non-party states, I argue that delegation of jurisdiction provides an overarching foundation to explain how a treaty-based international court can exercise powers of criminal jurisdiction traditionally reserved to states. To this end, international institutional law provides a useful framework for exploring how the ICC, as an international organisation, acquires its powers from states parties.

Part II of this chapter begins by summarising the arguments and issues raised in the early scholarship, which focused on the question of whether states can lawfully delegate their powers of criminal jurisdiction over foreign nationals to an international court without the consent of the accused’s state of nationality. I outline the existing arguments about whether, prior to the ICC, there was any precedent for states delegating their criminal jurisdiction over foreign nationals to an international court, and whether delegation might nevertheless be lawful as an innovation. A review of this literature demonstrates how international criminal law scholars arrived at the broadly-accepted conclusion that the legal basis for the ICC’s authority is delegated jurisdiction.

In Part III I take a step back from the arguments presented in the narrow context of the legal basis for the ICC’s jurisdiction to discuss some of the basic tenets of international institutional law. In particular, I explore how and why states confer their sovereign powers on international organisations. This involves an analysis of the doctrine of attributed powers and a discussion of the unique features of multilateral treaties as constituent documents.

Part IV of this chapter breaks down the concept of jurisdiction in international law and attempts to make sense of the tapestry of terminology and principles that exist with respect to criminal jurisdiction in international law. I provide an overview of the principles under which a state may exercise jurisdiction in customary international law and explain how these apply in the context of the ICC. I distinguish between powers of criminal jurisdiction and the right to exercise them, and argue why this distinction is especially relevant for any discussion of the ICC’s jurisdiction.

Clarifying the foundational concepts of ‘delegation’ and ‘jurisdiction’ requires a certain amount of descriptive exposition that is essential for understanding what it means to say that delegation of jurisdiction is the legal basis that allows the ICC to prosecute nationals of non-party states. The purpose of this chapter is to test the coherence of the delegation of jurisdiction theory before applying it in the following chapters to situations involving
nationals of non-party states. I argue that delegation provides a defensible legal basis for the ICC’s jurisdiction, but that ‘delegation of jurisdiction’ is a more complex theory than usually acknowledged by scholars who write about the ICC. An understanding of the foundational concepts of ‘delegation’ and ‘jurisdiction’ is necessary to explain how, why, or even whether, the ICC may lawfully exercise criminal jurisdiction in the various circumstances envisaged by the Statute.

II. DELEGATION DEBATES IN THE EARLY SCHOLARSHIP

Delegation of jurisdiction was raised soon after the Rome Statute’s adoption as a theory that purported to explain how the ICC can lawfully prosecute nationals of non-party states within the parameters of Article 12(2). In the early years of the Statute’s existence, scholars and other commentators who were interested in issues of ICC jurisdiction focused their discussions on whether delegation of criminal jurisdiction to an international court is lawful. In particular, the emphasis was on whether states could lawfully delegate criminal jurisdiction exercisable over foreign nationals without consent of the state of nationality. The existing scholarship has covered this issue quite comprehensively, and here I provide a concise review of the main issues and arguments that were debated in the literature to demonstrate the possible legal foundations for the delegation of jurisdiction theory in the ICC context. The majority of the analysis on this question was produced between 1999 and 2003; collectively I refer to it as the ‘early scholarship’.

A. Is it Lawful to Delegate Criminal Jurisdiction without the Consent of the State of Nationality?

Two main issues were commonly addressed in the early scholarship with respect to the ‘lawfulness of delegation’ question. The first was whether states are generally entitled to delegate their criminal jurisdiction to each other without the consent of the state of the accused’s nationality. The second issue dealt with the argument that even if states can lawfully delegate their criminal jurisdiction to other states without agreement from the state

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of the accused’s nationality, it remains unlawful to delegate such jurisdiction to an international court. I will outline the essence of each of these debates.

1. **Delegation of Jurisdiction among States**

It was, by and large, accepted in the early scholarship that states have the right to prosecute non-nationals on the basis of criminal jurisdiction delegated from other states.\(^8\) States can and do prosecute foreign nationals via delegated criminal jurisdiction without the consent of the state of the suspect’s nationality. There are numerous examples of multilateral treaties that provide for delegation among states parties. Typically such treaties involve agreement that the state of custody will either extradite the offender to the state with primary jurisdiction, or prosecute on the basis of delegated jurisdiction.

One such example of state-to-state delegation of criminal jurisdiction that was frequently mentioned in the early scholarship is the European Convention on the Transfer of Proceedings in Criminal Matters.\(^9\) This Convention allows any state party to prosecute a crime on behalf of another state party that would otherwise have jurisdiction.\(^10\) The Convention provides the prosecuting state with jurisdiction by creating ‘a legal fiction allowing the [prosecuting] state to treat the offense as if it had been committed in its own territory’.\(^11\) Madeline Morris, a vocal critic of the delegation of jurisdiction theory in the ICC context, conceded that the European Convention does represent an example of state-to-state delegation of jurisdiction. But she argued that the Convention does not represent an example of delegation of jurisdiction exercisable without consent from the state of the accused’s nationality.\(^12\) Michael Scharf challenged Morris’s contention, claiming that ‘the Convention does in fact permit transfer of proceedings in the absence of consent of the

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\(^8\) ‘The fact that the overwhelming majority of states have been prepared to delegate and to accept delegations of jurisdiction, even in cases where the state of nationality of the offender has not given its consent, is evidence that states generally take the view that such delegations of jurisdiction are lawful.’ Akande, above n 4, 624. Contra Casey and Rivkin, above n 3, 88.


\(^10\) This is also known as ‘vicarious’ jurisdiction. Article 2(1) of the European Convention provides: ‘For the purposes of applying this Convention, any Contracting State shall have competence to prosecute under its own criminal law any offence to which the law of another Contracting State is applicable’. There are 25 states parties to this Convention (at February 2017).


\(^12\) Morris, ‘High Crimes and Misconceptions: The ICC and Non-Party States’, above n 3, 44.
state of nationality.\(^{13}\) Based on an examination of the Convention’s legislative history and an interview conducted with one of the drafters of the Council of Europe’s 1985 Explanatory Report on the European Convention, Scharf demonstrated that consent from the state of the accused’s nationality is not required when transferring criminal proceedings.\(^{14}\) Indeed, there does not seem to be anything in either the Convention or the Explanatory Report\(^{15}\) to suggest that a national from a non-party state could not be prosecuted by a state party with custody of the accused for a crime committed on the territory of another state party.

The agreements collectively known as the anti-terrorism treaties\(^{16}\) were widely cited in the early scholarship as further examples of state-to-state delegation of criminal jurisdiction.\(^{17}\) Such treaties specify a list of states with primary jurisdiction over the proscribed acts and an ‘extradite or prosecute’ clause for the custodial state.\(^{18}\) None of these treaties require the state of the offender’s nationality to consent to prosecution, and there have been cases where nationals of states not party to the particular anti-terrorism treaty have been prosecuted in the custodial or territorial state without the state of nationality’s consent. The US has on multiple occasions prosecuted foreign nationals for crimes committed outside

\(^{13}\) Scharf, above n 3, 113.

\(^{14}\) Michael P Scharf, Interview with Andre Klip, Associate Professor at the University of Utrecht, (Siracusa Sicily, 15 September 1999) in ibid 114.


\(^{17}\) See, eg, Scharf, above n 3, 99–103; Morris, ‘High Crimes and Misconceptions: The ICC and Non-Party States’, above n 3, 61–66; Akande, above n 4, 622–633. These treaties are also often cited as providing states with universal jurisdiction over such crimes (see Chapter VI(2)(A) for a discussion of treaty-based universal jurisdiction).

\(^{18}\) States with primary jurisdiction usually include the territorial state, the state of the accused’s nationality and the state of the victim’s nationality. For a detailed analysis of these treaties and the aut dedere aut judicare principle, see Luc Reydams, Universal Jurisdiction: International and Municipal Legal Perspectives (Oxford University Press, 2003) 43–80.
US territory, using jurisdiction granted by anti-terrorism treaties.\textsuperscript{19} This has occurred even where such crimes did not affect US nationals or interests.

For example, in 2013, the US Court of Appeals for the DC Circuit addressed the question of prosecuting a non-US national for crimes committed extra-territorially in the case of \textit{US v Ali}.\textsuperscript{20} Ali Mohamed Ali, a Somali national, was arrested in the US and charged with offences relating to piracy and hostage taking. Ali was accused of aiding and abetting the capture of a Danish-owned merchant ship that was flying a Bahamian flag with a crew consisting of 11 Russians, one Georgian and one Lithuanian. In conformity with the Convention against the Taking of Hostages (‘Hostage Convention’), the American implementing legislation provides for jurisdiction over non-nationals found in the US who have committed the crime of taking hostages outside of the US, even where there is no other nexus to the US aside from custody.\textsuperscript{21} In accordance with Article 5(1)(a) of the Hostage Convention, the Bahamas, as a party to the Convention and as the flag state of the ship on board which the hostages were taken, would have had primary jurisdiction over Ali. So too would Russia, Lithuania and Georgia, as the hostages’ states of nationality, under Article 5(1)(d). As the custodial state, the US can be said to have been exercising jurisdiction delegated from those states of primary jurisdiction.\textsuperscript{22} The fact that Somalia was not a party to the Hostage Convention and, as argued by Ali, had therefore not consented to US jurisdiction over a Somali national, was not considered to be relevant.\textsuperscript{23}

In summary, state-to-state delegation of criminal jurisdiction is generally uncontroversial, and consent of the state of the accused’s nationality is not usually required. This was the conclusion reached in the early scholarship which also grappled with the more contentious question of whether such jurisdiction could be delegated to an international court.

\textsuperscript{19} \textit{US v Yunis} 924 F 2d 1086 (DC Cir, 1991); \textit{US v Rezaq} 134 F 3d 1121 (DC Cir, 1998); \textit{US v Yousef} 327 F 2d 56 (2nd Cir, 2003); \textit{US v Shi} 525 F 3d 709 (9th Cir, 2008); \textit{US v Ali} 718 F 3d 929 (DC Cir, 2013). See also the discussion in Scharf, above n 3, 101–103; Akande, above n 4, 623–624.

\textsuperscript{20} 718 F 3d 929 (DC Cir, 2013).

\textsuperscript{21} 18 USC §1203 (1985).

\textsuperscript{22} Alternatively, the court could have been exercising universal jurisdiction, given that hostage taking is considered a ‘crime under national law of international concern’ and subject to universal jurisdiction in customary international law: Amnesty International, \textit{Universal Jurisdiction – Strengthening This Essential Tool of International Justice} (2012) 7. Universal jurisdiction will be addressed below and explored in detail in Chapter VI.

\textsuperscript{23} \textit{US v Ali} 718 F 3d 929, 944 (DC Cir, 2013). The Court held that the existence of the Hostage Convention provides non-nationals with sufficient notice that hostage-taking is prosecutable by any state party.
Delegation of Jurisdiction to an International Court

Regardless of how jurisdiction may be delegated among states, critics of the Rome Statute maintained in the early scholarship that conferral of criminal jurisdiction on an international court is unlawful, particularly when it is to be exercised without consent from the state of the accused’s nationality.\(^\text{24}\) As discussed in Chapter II, those who object to the ICC’s jurisdiction over nationals of non-party states argue that although it may be acceptable for a state to prosecute a non-national without consent in certain circumstances, the political ramifications of such a prosecution by an international court would be far greater.\(^\text{25}\) This is of particular concern in cases where the crimes arise from official state policy. However, potentially adverse political consequences of ICC prosecution do not mean that the Court’s jurisdiction is unlawful.

The early scholarship on this issue debated whether any precedents exist among historical and contemporary international criminal tribunals for the notion that states can delegate criminal jurisdiction to an international court without the consent of the state of nationality. The International Military Tribunal established at Nuremberg after World War II (‘Nuremberg Tribunal’) was a case study frequently used in the early scholarship to argue both for and against delegation of criminal jurisdiction to an international court without the consent of the accused’s state of nationality. Scharf and Gennady Danilenko, for example, argued that in establishing the Tribunal via the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis,\(^\text{26}\) the victorious Allied nations could be said to have delegated their individual rights to prosecute the Nazi leadership to the Nuremberg Tribunal.\(^\text{27}\) Morris, on the other hand, argued that after the war the Allies were acting as the German sovereign, and that consent from the accused’s state of nationality was therefore unnecessary in establishing the Nuremberg Tribunal, as essentially a national court.\(^\text{28}\)


\(^{26}\) Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal, 82 UNTS 279 (signed and entered into force 8 August 1945).

\(^{27}\) The right of the Allied nations to prosecute the German major war criminals was based on the permissive jurisdiction principles of territoriality, passive personality and possibly the protective principle. These will be discussed in Part IV(B) below. Scharf, above n 3, 103–106; Danilenko, above n 3, 465.

\(^{28}\) Morris, ‘High Crimes and Misconceptions: The ICC and Non-Party States’, above n 3, 38–42. In support of her argument Morris relied on post-war scholarship by Frederick A Mann and Georg Schwarzenberger: F
The Nuremberg judgment itself does not shed any light on which of these theories—delegated jurisdiction or Allies as sovereign—provides the basis for the Tribunal’s authority to prosecute German nationals. The most relevant passage in the judgment was cited somewhat selectively in the early scholarship, but I set it out here in full:

The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.

The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.29

The second paragraph of this passage was quoted by those who viewed the Nuremberg Tribunal as a precedent for delegation of jurisdiction to an international court, exercisable over nationals of a state that has not consented to such prosecution.30 Conversely, the first sentence of the first paragraph was cited by those who claim that jurisdiction of the Tribunal was based on the fact that the Allied nations were acting as the sovereign (effective or actual) of Germany at the time.31 Support for this interpretation is based on the German Instrument of Surrender and the Berlin Declaration through which the Allied governments ‘[assumed] supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority’.32 Critics of the delegation theory argued that the sovereign theory overcomes the perceived problem of consent, particularly if the

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30 Danilenko, above n 3, 465; Paust, above n 3, 4; Scharf, above n 3, 104.

31 Morris, ‘High Crimes and Misconceptions: The ICC and Non-Party States’, above n 3, 40. See also Scheffer, above n 7, 71.

32 Instrument of Surrender, Germany, signed 4 May 1945; Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany by the Governments of the United States of America, the Union of Soviet Socialist Republics, the United Kingdom and the Provisional Government of the French Republic (‘Berlin Declaration’), signed 5 June 1945.
prosecutions could be considered an exercise of national jurisdiction by the Allies in their capacity as German sovereign.\footnote{Morris, ‘High Crimes and Misconceptions: The ICC and Non-Party States’, above n 3, 40. Kevin Jon Heller views this argument as ‘particularly unseemly: the idea that the Allies using their defeat of Germany to consent on Germany’s behalf to the prosecution of German war criminals is more than a little redolent of victor’s justice’: Heller, above n 28, 133.}

The UN Secretary General’s 1949 Memorandum on the Nuremberg Tribunal discusses both the possibility that the Tribunal was based on collective exercise of delegated jurisdiction and the prospect that the Tribunal was validly established and imbued with jurisdiction by the Allied nations acting as the German sovereign.\footnote{Memorandum submitted by the Secretary-General, \textit{The Charter and Judgment of the Nürnberg Tribunal History and Analysis}, UN Doc A/CN.4/5 (1949) 79-80.} In the early scholarship, proponents of both the delegation and sovereign theories cited the Memorandum as authority for each interpretation.\footnote{Danilenko, above n 3, 465; Morris, ‘High Crimes and Misconceptions: The ICC and Non-Party States’, above n 3, 40–41; Scharf, above n 3, 104.} The Memorandum, however, acknowledges that ‘[t]he Court seems to have perceived two different grounds of jurisdiction’ and does not come to a definitive conclusion as to which is more persuasive.\footnote{Memorandum submitted by the Secretary-General, \textit{The Charter and Judgment of the Nürnberg Tribunal History and Analysis}, UN Doc A/CN.4/5 (1949) 79.} Indeed, it appears that the legal basis for the establishment of the Nuremberg Tribunal and its authority over the Nazi leadership remains somewhat indeterminate. As such, the most useful conclusion that can be drawn from Nuremberg may be that articulated by Akande: ‘one cannot rely with any certainty on the Nuremberg Tribunal as a precedent for delegation without the consent of the state of nationality’.\footnote{Akande, above n 4, 627.}

There is less uncertainty surrounding the jurisdictional basis of the International Military Tribunal for the Far East (‘Tokyo Tribunal’).\footnote{Morris, ‘High Crimes and Misconceptions: The ICC and Non-Party States’, above n 3, 37; Scharf, above n 3, 106.} Unlike Germany, Japan retained a functioning government at the conclusion of World War II, and under the terms of the Potsdam Proclamation and the Japanese Instrument of Surrender, acceded to the jurisdiction of the Tokyo Tribunal over its nationals.\footnote{Proclamation Defining the Terms for the Japanese Surrender, US-China-UK, signed July 1945, 3 \textit{Treaties and Other International Agreements of the United States of America 1776-1949} 1204 (‘Potsdam Proclamation’); Instrument of Surrender, Japan, signed 2 September 1945.} The Tokyo Tribunal is therefore
generally not considered to be a precedent for the exercise of delegated jurisdiction by an international court over nationals of a state that does not consent to prosecution.\textsuperscript{40}

Some of the early scholarship also examined whether the International Criminal Tribunal for the former Yugoslavia (‘ICTY’); the International Criminal Tribunal for Rwanda (‘ICTR’) and the Special Court for Sierra Leone (‘SCSL’) could be held up as precedents for the delegation of jurisdiction to an international court without the consent of the state of nationality.\textsuperscript{41} Akande argued that the ICTY, the ICTR and the SCSL provided ‘evidence of extensive practice of states delegating part of their criminal jurisdiction over non-nationals’ to international tribunals.\textsuperscript{42} Given the involvement of the UN Security Council in the establishment of the ICTY and ICTR,\textsuperscript{43} their precedential value for the ICC is arguably limited to cases where the Security Council refers nationals of non-party states to the Court.\textsuperscript{44} Neither can the SCSL be conclusively held up as an example of an international court exercising delegated criminal jurisdiction.\textsuperscript{45} The SCSL is a ‘sui generis court’ having been established by a treaty between the UN and Sierra Leone.\textsuperscript{46} Despite academic arguments to the contrary,\textsuperscript{47} the SCSL Appeals Chamber held that the Special Court ‘does not operate on the basis of transferred jurisdiction but is a new jurisdiction operating in the sphere of international law’.\textsuperscript{48}

\textsuperscript{40} Given the coerced nature of Japan’s consent, however, it may be possible to draw some parallels between this and the ICC’s exercise of jurisdiction in situations referred by the Security Council, which is discussed in Chapter V.

\textsuperscript{41} Scharf, above n 3, 108; Akande, above n 4, 628–631.

\textsuperscript{42} Akande, above n 4, 633. Akande also uses lesser-known examples including the preliminary reference procedure of the European Court of Justice and the Caribbean Court of Justice, 632–633.

\textsuperscript{43} SC Res 827, UN SCOR, 3217\textsuperscript{th} mtg, UN Doc S/RES/827 (25 May 1993); SC Res 955, UN SCOR, 3453\textsuperscript{rd} mtg, UN Doc S/RES/955 (8 November 1994).

\textsuperscript{44} See Chapter V.

\textsuperscript{45} Even if it was evident that the SCSL is an example of an international court exercising delegated jurisdiction over a foreign national (President Charles Taylor of Liberia), the SCSL was established in 2002, three and a half years after the adoption of the Rome Statute. It would not, strictly speaking, be considered a precedent to the ICC.


\textsuperscript{47} Sarah Williams argues that the Sierra Leone has delegated territorial jurisdiction to the SCSL: Williams, above n 1, 303–305.

\textsuperscript{48} Prosecutor v Gbao (Decision on the Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court) (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-15-AR72(E), 25 May 2004) [6]. The idea of ‘a new jurisdiction operating in the sphere of international law’ will be discussed in detail in Chapter VI.
Notwithstanding the confidence in some of the early scholarship that precedent exists for delegation of jurisdiction over foreign nationals to an international court, there is enough uncertainty about the jurisdictional basis of previous international tribunals to render them unpersuasive as precedents. More persuasive is the alternative argument put forward by Scharf and Frédéric Mégret which contends that a permissive rule of international law (ie customary precedent) is not needed to validate delegation of jurisdiction to an international court. As long as delegation does not violate an existing rule of international law, it is a perfectly lawful jurisdictional arrangement. The principle that international law gives states ‘a wide measure of discretion’ to exercise their jurisdiction unless there is a prohibitive rule against such exercise was recognised by the Permanent Court of International Justice (‘PCIJ’) in the 1927 Lotus case. Applying this to the ICC, Scharf argued that states are free to collectively establish an international court that will exercise criminal jurisdiction over nationals of non-party states because there is no rule in customary international law that prevents them from doing so. In his view, ‘[t]he continued growth and evolution of international criminal law requires a permissive legal culture, which encourages state experimentation with new forms of collective international jurisdictional arrangements’. Given that the Lotus principle has attracted significant criticism since it was first pronounced, caution should be exercised with respect to its application.

Mégret suggested that even if there is some question about the applicability of the Lotus principle in the ICC context, the fact that a state can, under customary international law, exercise criminal jurisdiction over foreign nationals for crimes committed on their territory is a sufficient permissible rule. He argued that ‘customary international law deals only with the existence and establishment of territorial jurisdiction, not the technical modalities of its use’. In other words, the delegation of jurisdiction to an international court comes within

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49 For a detailed analysis of the legal bases and jurisdictional complexities of the various international tribunals, see Williams, above n 1, 253–320. Williams sees the ICC as an original precedent for the delegation of jurisdiction to an international court, at 306.
50 Mégret, above n 3, 252–254; Scharf, above n 3, 72–74.
51 SS Lotus (France v Turkey) (Judgment) [1927] PCIJ (Series A) No 10, 19.
52 Scharf, above n 3, 73.
53 Ibid 74.
54 The Lotus case and its controversies will be discussed in more detail in Part IV(B)(2) below.
56 Ibid 253.
the purview of the permissible rule that allows states to exercise jurisdiction under the principle of territoriality.

The *Lotus* case and the permissible principles of jurisdiction (including territoriality) will be discussed in detail in Part III below. For now, it is worth noting that despite the numerous and complex arguments in the early scholarship on the question of whether states can lawfully delegate their criminal jurisdiction to an international court, there does not appear to be any convincing legal reason for why this is not a valid action. As discussed in Chapter II, an international court exercising delegated criminal jurisdiction over nationals of non-party states may very well have negative political consequences, but this does not necessarily preclude the legality of delegation.57

**B. Delegation of Jurisdiction to an International Court is Lawful**

It is significant that in the current ICC scholarship, delegated jurisdiction has largely become the presumed legal basis for the Court’s jurisdiction.58 By examining state practice in which criminal jurisdiction appears to have been delegated, the early scholarship made the case that such action is lawful. Missing from this analysis, however, is a proper conceptualisation of what delegation of jurisdiction actually entails. Understanding what is being delegated by states to the ICC and the processes through which delegation occurs is essential for determining whether delegation of jurisdiction works as a legal basis for ICC jurisdiction over nationals of non-party states in all circumstances envisaged by the Statute. The rest of this chapter therefore addresses two conceptual questions: What is delegation? And what is jurisdiction?

**III. Delegation in International Law**

So far, my consideration of delegation has been limited by the parameters of the discussion in the early scholarship. This literature—written predominantly by international criminal law specialists—consistently acknowledges the *sui generis* nature of the ICC as a permanent,  

57 Ibid 254.

58 See, eg, Shany, above n 1, 330; Williams, above n 1, 305–308; Wallerstein, above n 1; Eugene Kontorovich, ‘Israel/Palestine — The ICC’s Uncharted Territory’ (2013) 11(5) *Journal of International Criminal Justice* 979, 989. Even the ICC Prosecutor has asserted that ‘Under article 12 of the Statute, States *can confer jurisdiction* to the Court by becoming a Party to the Statute (article 12(1)) or by lodging an ad hoc declaration accepting the Court’s jurisdiction (article 12(3))’ (emphasis added). Whether this amounts to an acknowledgment of the ICC’s legal basis is unclear. Office of the Prosecutor, ‘The determination of the Office of the Prosecutor on the communication received in relation to Egypt’ (Press Release, ICC-OTP-20140508-PR1003, 8 May 2014).
independent, international criminal court established by a multilateral treaty. What it does not sufficiently recognise, however, is the fact that the theory of delegation has its origins in international institutional law, and that the elements that make the ICC unique among international criminal tribunals are classic characteristics of international organisations. In this section I explore the theory of delegation in its international institutional law context and argue that viewing the ICC as an international organisation can provide a useful framework for understanding the source and scope of the Court’s authority.  

A. The ICC as an International Organisation

Henry Schermers and Niels Blokker identify three defining features of an international organisation.  

1. The first is that an international organisation is founded by an international agreement, commonly a multilateral treaty.  

2. The second feature is that it should have ‘at least one organ with a will of its own’, meaning that the organisation is not simply a forum for member states, but can make decisions and take action independently of its members.  

3. The third defining feature of an international organisation is that it must be established under international law. Schermers and Blokker clarify that this third criterion can be assumed where the organisation is founded by an international agreement, unless the agreement specifies that the organisation should be established under a domestic legal system.

Under this definition, the ICC is a clear example of an international organisation. The ICC’s establishment by multilateral treaty distinguishes it from other international criminal tribunals, and fulfils the first and third criteria for its characterisation as an international

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60 See also, Viljam Engström, *Constructing the Powers of International Institutions* (Brill, 2012) 11.

61 Schermers and Blokker, above n 59, 37–44.


63 Ibid 46–47.

organisation. Importantly, international law recognises that constituent treaties are in a special category of treaty owing to their nature as ‘conventional and at the same time institutional’. Article 5 of the VCLT acknowledges that ‘[t]he present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization’. Practice suggests that constituent treaties are often interpreted by favouring a teleological approach over the traditional textual interpretation.

With respect to the second feature—an organ with a will of its own—the Rome Statute specifically provides that the ICC has international legal personality, and the Statute further recognises the independence of the Office of the Prosecutor as a separate organ from the rest of the Court. Given the ICC’s status as an international organisation, therefore, the question of how the Court acquires its jurisdiction can be explored through the principles of international institutional law.

B. How do International Organisations Acquire Their Powers?

The notion that international organisations are established on a functional basis is the leading theory to explain why an organisation is able to exercise certain powers traditionally reserved to states: organisations need to have the ability to fulfil their functions. In this context, the term ‘powers’ is used to describe any number of wide-ranging actions that that an organisation might legally take, and how an organisation acquires its powers is widely

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67 Rome Statute, Article 4(1). See also, Sands and Klein, above n 64, 386; Klabbers, above n 59, 38–39.

68 The independence of the Office of the Prosecutor is enshrined in Article 42(1) of the Rome Statute, which specifically provides that ‘a member of the office shall not seek or act on instructions from any external source’.


considered to be by attribution from states.\textsuperscript{71} In its \textit{Legality of the Use of Nuclear Weapons Advisory Opinion}, the ICJ described the attributed competence of international organisations in the following terms:

\textit{[I]nternational organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the ‘principle of specialty’, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.}\textsuperscript{72}

The rationale behind the doctrine of attributed, or conferred, powers is ‘the manifest will of the founders’, which ensures that an organisation’s powers are limited to what is required to fulfil its functions.\textsuperscript{73} Founding states confer express powers on an international organisation through the establishing treaty, which also becomes the organisation’s constituent instrument. It is generally accepted that international organisations are also granted certain implied powers, limited to those that are necessary for the exercise of express powers and incidental to the fulfilment of the organisations’ functions.\textsuperscript{74} The following section briefly sets out the conceptual parameters of conferred powers (particularly delegation) as understood in international institutional law, and as applicable to the ICC.

1. \textit{Typology of Conferral}

Dan Sarooshi laments that the ‘[f]ailure to distinguish between different types of conferrals of power confuses analysis of the differing legal consequences of these conferrals and obfuscates the domestic policy debates that surround their conferral’.\textsuperscript{75} Indeed, in much of the literature dealing with the legal basis for ICC jurisdiction, terms such as ‘delegation’ and

\begin{itemize}
\item\textsuperscript{71} Schermers and Blokker, above n 59, 157.
\item\textsuperscript{72} \textit{Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)} [1996] ICJ Rep 66, 78.
\item\textsuperscript{73} Klabbers, above n 59, 64.
\item\textsuperscript{74} Ibid 58–59; Schermers and Blokker, above n 59, 180–189. See also, \textit{Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)} [1949] ICJ Rep 174, 196 (Judge Hackworth). The ICC has held that it has certain implied powers necessary ‘for the exercise of its primary jurisdiction or the performance of its essential duties and functions’ such as the power to subpoena witnesses: \textit{Prosecutor v Ruto and Sang (Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation)} (International Criminal Court, Trial Chamber V(A), Case No ICC-01/09-01/11, 17 April 2014) [61]-[87], [81]. The implied powers of an international organisation should not be confused with the \textit{inherent} power of an international judicial body to determine its own jurisdiction. This will be discussed in more detail in Chapters IV and V. See, Paola Gaeta, ‘Inherent Powers of International Courts and Tribunals’ in Lal Chand Vohrah et al (eds), \textit{Man’s Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese} (Kluwer Law International, 2003) 353.
\item\textsuperscript{75} Dan Sarooshi, ‘Conferrals by States of Powers on International Organizations: The Case of Agency’ (2004) 74(1) \textit{British Yearbook of International Law} 291, 294.
\end{itemize}
‘transfer’ are used interchangeably. In an attempt to clarify this state of affairs, Sarooshi has undertaken one of the more comprehensive examinations of how attributed powers are acquired by international organisations. For the purposes of this thesis, it is therefore appropriate to adopt Sarooshi’s typology of conferral that categorises and explains the variables involved in the attribution of powers from states to international organisations. Sarooshi envisions a spectrum on which there are three main ways that a state can confer powers on an international organisation: agency, delegation and transfer. In the case of agency, the powers conferred on the international organisation are revocable, and the conferring state retains control over how the powers are exercised by the organisation. The state further retains the right to exercise the conferred powers concurrently with the organisation. At the opposite end of Sarooshi’s spectrum is transfer, whereby a state irrevocably cedes powers to an international organisation and relinquishes all claims to further use of such powers. Somewhere between agency and transfer is delegation. Powers conferred by delegation are revocable, and the conferring state retains the right to exercise such powers concurrently. It differs from agency in that the state does not have any control over how delegated powers are used by the organisation.

This is a simplified overview of Sarooshi’s typology, but it is sufficient to see that his characterisation of delegation is broadly applicable to the ICC. Through a constituent treaty (the Rome Statute) states parties confer powers on an international organisation (the ICC). Under Article 127 of the Statute, states can withdraw from the Statute, meaning that the power is revocable, and the principle of complementarity embedded in the Statute ensures that states parties not only retain their powers to prosecute international crimes, but are given primacy to do so. Finally, states parties do not preserve authority to control how the

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78 Sarooshi, above n 6, 28–32.


80 Sarooshi, above n 6, 31–32.

81 Ibid 54.

82 Although Article 127(2) provides that a withdrawing state is still obliged to cooperate with the Court with respect to continuing matters that were underway while the state was a party. In October 2016, Burundi, Gambia and South Africa indicated their intention to withdraw from the Rome Statute; the first states parties to do so. See Chapter VII for more details on the African withdrawals.
ICC uses its powers once conferred via the Rome Statute. It would therefore appear that the ICC represents a relatively archetypal example of an international organisation exercising delegated powers.

2. **Collective Conferral or Individual Delegation?**

Sarooshi also underscores the importance of distinguishing between the notion of individual and collective conferral. Individual delegation occurs when states delegate powers that they possess in their individual capacity to an international organisation. Collective conferral occurs when a group of states collectively confer a power or powers that they do not possess individually. For example, individually, states are unable to provide an authoritative interpretation of a multilateral treaty, but collectively they may confer on an international tribunal the power to do so. The rationale behind collective conferral is that ‘the powers which can be exercised—and hence conferred—by the collective totality of sovereign States is greater than the sum of the individual powers of these States.’ In the *Reparations for Injuries Suffered in the Service of the United Nations* case, the ICJ essentially confirmed that the establishment of the UN was an exercise of collective conferral of powers:

*The Court’s opinion is that fifty States, representing the vast majority of the Members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognised by them alone….*

The idea that ‘the vast majority’ of the international community may collectively confer powers on an international organisation is an imprecise metric. It would presumably be sufficient to prevent two or three states from attempting to establish an external entity with independent legal personality, but there is no way to definitively identify an acceptable minimum number of states that would possess this collective conferral power. With respect to the ICC, this is arguably not such an issue given that 120 states voted in favour of adopting the Rome Statute in 1998 and the 60 ratifications required for its entry into force

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84 Ibid; Engström, above n 60, 103.
was a stipulation that states agreed upon at Rome. Characterising the ICC’s establishment as a collective conferral of powers by the vast majority of the international community is unlikely to be seriously contested. Beyond the conferral of objective legal personality, the rest of the ICC’s powers are more likely to be a matter of individual delegation because of the fact that they reflect the powers that states possess in their individual capacity. Whether states parties can be said to have collectively conferred additional powers on the ICC will be revisited in Chapter IV.

C. The ICC as an Atypical International Organisation

Viewing the ICC as an international organisation exercising conferred powers provides a useful way to understand how delegation operates as a legal basis for the ICC’s jurisdiction. As an independent international court, however, the ICC is an atypical international organisation in that it exercises criminal jurisdiction. The remainder of this chapter deals with the second half of the conceptual ‘delegation of jurisdiction’ question by exploring what jurisdiction means in this context.

IV. JURISDICTION IN INTERNATIONAL LAW

While the early scholarship described above produced convincing arguments as to why states can lawfully delegate their criminal jurisdiction, what ‘delegated jurisdiction’ actually is remains under-conceptualised. By necessity, an analysis of delegated jurisdiction must begin with some basic consideration of the concept of jurisdiction itself, which, unsurprisingly, is difficult to define with any precision. In international law scholarship and jurisprudence there is a veritable labyrinth of sub-concepts and terminology that needs to be navigated in order to reach an understanding of what is meant by jurisdiction. Until now, I have been deliberately general in my use of the word ‘jurisdiction’ in this thesis, but

88 Rome Statute, Article 126. For a related discussion on what constitutes ‘the international community’ see Part IV(B) of Chapter VI.

89 For a discussion of the theory that collective conferrals can create an ‘objective regime’ in which legal obligations may be imposed on states not party to the establishing treaty, see David J Bederman, ‘Third Party Rights and Obligations in Treaties’ in Duncan B Hollis (ed), The Oxford Guide to Treaties (Oxford University Press, 2012) 328, 341–345. It is beyond the scope of this thesis to discuss objective regimes in more detail.

the rest of this chapter will demonstrate why the term needs to be clarified and why its interpretation matters when talking about delegation of jurisdiction to the ICC.

At the outset it is necessary to differentiate between two distinct applications of the term ‘jurisdiction’, both of which are relevant to the ICC. The first relates to a state’s general legal competence to exercise authority over territory and persons by virtue of its sovereignty.\textsuperscript{91} One of the most helpful explanations of this type of jurisdiction comes from Frederick A Mann’s 1964 Hague lectures on ‘The Doctrine of Jurisdiction in International Law’:

Jurisdiction involves a state’s right to exercise certain of its powers. It is a problem, accordingly, that is entirely distinct from that of internal power or constitutional capacity or, indeed, sovereignty. There is, of course, no doubt that, as a matter of internal law, a State is free to legislate in whatever manner and for whatever purpose it chooses. But like all other attributes of sovereignty this liberty is subject to the overriding question of entitlement. The existence in fact or in municipal law of the State’s power to do a particular act does not by any means imply its international right to do so.\textsuperscript{92}

In other words, jurisdiction in this context concerns the question of whether a state has the right under international law to exercise certain powers. ‘Powers’ refers broadly to those ‘public powers of government or administration [that] derive from the sovereignty of a State’, including powers relating to criminal justice.\textsuperscript{93} This distinction between ‘powers’ and the legal right to exercise those powers is essential, and for the purposes of this thesis, I will refer broadly to a state’s international legal right to exercise certain powers as its ‘sovereign jurisdiction’.

The second use of ‘jurisdiction’ is much narrower, and largely concerns the exercise of judicial powers by courts and associated entities of the domestic judicial system.\textsuperscript{94} Courts represent a mechanism through which a state exercises certain of its sovereign powers over persons and territory.\textsuperscript{95} Courts are given particular judicial competences by a state’s domestic legal framework. To say that a court has jurisdiction over someone or over a particular geographical area means that it has the legal right to exercise certain judicial

\textsuperscript{92} Mann, above n 90, 9. Emphasis original.
\textsuperscript{93} Sarooshi, ‘Conferrals by States of Powers on International Organizations’, above n 75, 291.
\textsuperscript{95} Liivoja, above n 90, 35.
powers over that person or that territory. The question of whether a court has such ‘judicial jurisdiction’ is a matter of procedure.⁹⁶

Distinguishing between sovereign jurisdiction and judicial jurisdiction is useful for discussing jurisdiction in the context of the ICC. When reference is made to ‘the jurisdiction of the ICC’ this describes its judicial jurisdiction. Determining what is meant by delegation of jurisdiction, however, involves an analysis of both the judicial and sovereign jurisdiction of states parties. The relevance of this distinction will become further apparent in Chapter IV. The rest of this part explores aspects of a state’s jurisdiction over criminal matters, and where applicable, it also explains how particular terms apply to the ICC.

A. Jurisdiction to Prescribe (Adjudicate) and Enforce

When discussing jurisdiction in international law, the majority of scholars appear to have followed the influential 1987 Restatement (Third) of the Foreign Relations Law of the United States which identified three subcategories of sovereign jurisdiction that concern the power of a state to prescribe, to adjudicate and to enforce laws.⁹⁷ According to the Restatement, jurisdiction to prescribe relates to the authority to make laws ‘applicable to the activities, relations, or status of persons, or the interests of persons’;⁹⁸ jurisdiction to adjudicate describes the power of a state ‘to subject persons or things to the process of its courts or administrative tribunals’;⁹⁹ and jurisdiction to enforce refers to powers ‘to induce or compel compliance or to punish noncompliance with its laws or regulations’.¹⁰⁰ Not all writers subscribe to the tripartite division of jurisdiction, with some preferring a twofold distinction between legislative and prerogative jurisdiction,¹⁰¹ or between the jurisdiction to prescribe and to apply.¹⁰² The totality of the jurisdictional powers remains the same no

⁹⁹ Ibid.
¹⁰⁰ Ibid.
¹⁰¹ Mann, above n 90, 13.
matter whether they are divided among two or three categories, but scholars who promote a twofold distinction are not always in agreement about how these powers should be divided.\(^{103}\) For the purposes of this thesis, it is useful to apply a two-part division between prescriptive and enforcement jurisdiction and to adopt Roger O’Keefe’s interpretation of such.\(^ {104}\) O’Keefe is not the first to advocate for this particular split; his argument builds on the conceptualisation of twofold jurisdiction adopted by others.\(^ {105}\) But O’Keefe’s scholarship provides one of the more comprehensive explanations of the distinct aspects of jurisdiction, particularly as they relate to criminal matters.

According to O’Keefe’s description, jurisdiction to prescribe in the criminal context encompasses a state’s right to enact laws proscribing particular conduct as criminal, and to apply those laws to certain persons and territory.\(^ {106}\) This includes the application of criminal law by a state’s criminal courts.\(^ {107}\) Jurisdiction to enforce comprises a state’s powers to investigate and collect evidence; to issue subpoenas; to arrest and retain custody over defendants; to convene a criminal trial; to incarcerate; etc.\(^ {108}\) “[I]n short, to exercise any or all of the usual range of police, prosecutorial, judicial and related executive powers in relation to criminal justice.”\(^ {109}\) This division is also suitable for describing the jurisdiction of the ICC. Ascribing aspects of prescriptive and enforcement jurisdiction to the ICC does not mean that I am implying that the Court has the power to make laws or to enforce them in the sense that it can compel compliance. But the Court does have elements of prescriptive jurisdiction to the extent that it has the right to apply law to certain persons and territory. It has limited enforcement jurisdiction in that it is empowered to, *inter alia*, investigate crimes, issue arrest warrants and keep suspects in custody.

\(^{103}\) Adjudicative jurisdiction is sometimes included as part of prescriptive jurisdiction and other times as part of enforcement jurisdiction. Liivoja, above n 90, 31.


\(^{105}\) See, eg Mann, above n 90, 13; Brownlie, above n 91, 299; Higgins, above n 102, 4; Malcolm N Shaw, *International Law* (Cambridge University Press, 7th ed, 2014) 469.


\(^{107}\) O’Keefe, above n 104, 737.

\(^{108}\) O’Keefe, above n 106, 29.

\(^{109}\) Ibid.
Under customary international law there are five accepted principles under which a state has the right to exercise its powers over criminal matters: territoriality, nationality, passive personality, protection and universality. A recitation of these principles of jurisdiction is almost mandatory in any discussion of criminal jurisdiction in international law. It is indeed necessary to set them out here to explain where they fit within the broader context of jurisdiction as a concept, and to clarify how they are applicable to the delegation theory for ICC jurisdiction. I deal first with territorial jurisdiction before examining the grounds on which a state may exercise jurisdiction extraterritorially.

1. Territoriality principle

At its essence, territorial jurisdiction is a manifestation of state sovereignty and is considered to be of fundamental importance in the international legal system. In criminal matters, jurisdiction exercisable under the territoriality principle allows a state to prescribe and enforce with respect to crimes committed on its territory. The locus delicti commissi is generally the forum conveniens due to the ease and expediency of gathering evidence and locating witnesses. Prosecuting international crimes where they were committed can also have a significant psychological impact on the affected community, providing some sense of resolution and justice.

The assertion of territorial jurisdiction over criminal matters is not without its challenges. There may be questions as to what constitutes territory within a state’s sovereign authority. For example, an aircraft in international airspace or a ship on the high seas may be considered analogous to the territory of the flag state for the purposes of jurisdiction, but foreign vessels in territorial waters will be subject to criminal jurisdiction of the coastal state in most circumstances.

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110 Ibid 9.

111 SS Lotus (France v Turkey) [1927] PCIJ (Series A) No 10, 20.


113 See, for example, the ICC preliminary examination into the situation on the vessel Mavi Marmara, which was registered to the Union of the Comoros, a state party to the Rome Statute. Under Article 12(2)(a) of the Statute, the Mavi Marmara is considered territory of the Comoros: Office of the Prosecutor, Situation on Registered Vessels of Comoros, Greece and Cambodia Article 53(1) Report (6 November 2014) 13.

committed in another, giving rise to a potential conflict of territorial jurisdictions.\footnote{For a detailed analysis of the complexities of territorial jurisdiction, see generally Michail Vagias, \textit{The Territorial Jurisdiction of the International Criminal Court} (Cambridge University Press, 2014); Ryngaert, above n 6, 49–100.} There is no uniform practice among states as to which jurisdiction has priority in such a scenario.\footnote{Cassese and Gaeta, above n 112, 276.} Despite such uncertainties, territorial jurisdiction maintains a particular significance in matters of international criminal law due to the high value that states place on the principles of sovereign equality and non-intervention. There are, however, limited circumstances in which a state can extend its prescriptive jurisdiction extraterritorially.

2. \textit{Extraterritorial Jurisdiction}

Cedric Ryngaert advises that the word extraterritorial ‘might best be avoided’ in relation to jurisdiction because it is often inaccurately deployed as a shorthand for ‘not \textit{exclusively} territorial’.\footnote{Ryngaert, above n 6, 8. Emphasis original.} Ryngaert further reasons that even where a state is asserting jurisdiction over a crime with no territorial link to the prosecuting state, such jurisdiction is still exercised territorially in the courts of the prosecuting state.\footnote{Ibid.} This is technically true, but given the pervasiveness of the term extraterritorial jurisdiction and the absence of any appropriate alternative, I will continue to apply it in this thesis to situations where the crime being prosecuted was committed entirely outside the territory of the prosecuting state.

\textbf{(a) \textit{Lotus case}}

The 1927 PCIJ \textit{Lotus} case is the ‘inescapable starting point’\footnote{Cassese and Gaeta, above n 112, 272.} for any discussion of the legality of extraterritorial criminal jurisdiction.\footnote{\textit{SS Lotus (France v Turkey) (Judgment)} [1927] PCIJ (Series A) No 10.} The case originated from a collision that occurred on the high seas between the French steamer \textit{SS Lotus} and a Turkish collier. The Turkish vessel sank causing the deaths of eight crewmembers and passengers. When the \textit{SS Lotus} docked in Turkey, its officer of the watch was charged and convicted of involuntary manslaughter under Turkish law. France objected to Turkey exercising criminal jurisdiction over a French national, for a crime that did not occur on Turkish territory.\footnote{Ibid, 7.} The majority
of the PCIJ found in favour of Turkey, reasoning that international law does not prohibit a state from exercising jurisdiction in its own territory, over acts that occurred outside its territory. Contrary to what was argued by France, the PCIJ held that Turkey did not need to identify a permissive rule of international law in order for it to be allowed to prosecute the French officer for the Lotus collision. Instead, the majority found that when it comes to the extraterritorial application of jurisdiction, international law gives states a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable. … In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.122

In Judge Loder’s dissenting opinion, His Excellency summarised the majority’s reasoning in a pithy one line: ‘under international law, every door is open unless it is closed by treaty or by established custom’.123 Described decades later in an ICJ joint separate opinion as the ‘high water mark of laissez-faire in international relations’,124 the Lotus case has received significant criticism in international law scholarship, with many commentators concluding that it no longer represents good law.125 Instead, the prevailing opinion among scholars is that a state can only exercise prescriptive jurisdiction over crimes committed outside of its territory where one of four recognised principles of extraterritorial jurisdiction applies: nationality; passive personality; the protective principle; and universality. In section 2(c) below, I will come back to the Lotus decision and discuss its continuing relevance for the exercise of extraterritorial jurisdiction in modern international law. First, however, I will provide a brief overview of each of the permissive principles of extraterritorial jurisdiction.

122 SS Lotus (France v Turkey) (Judgment) [1927] PCIJ (Series A) No 10, 19.
123 SS Lotus (France v Turkey) (Judgment) [1927] PCIJ (Series A) No 10, 34 (Judge Loder).
125 See, eg Crawford and Brownlie, above n 102, 478; Gillian D Triggs, International Law: Contemporary Principles and Practices (LexisNexis Butterworths, 2006) 349. In 1964 Mann wrote ‘[i]t can be confidently asserted that [the Lotus reasoning has] been condemned by the majority of the immense number of writers who have discussed [it]’. Mann, above n 90, 35. Although see O’Keefe, above n 106, 7.
(b) **Permissive Principles of Extraterritorial Jurisdiction**

(i) **Nationality principle**

The nationality principle, sometimes referred to as the active personality principle, is one of two principles of personal jurisdiction (the other being passive personality, discussed below). The nationality principle allows a state to exercise prescriptive jurisdiction over its own nationals for conduct occurring outside the state of nationality’s territory.\(^{126}\) While many states have limited their exercise of jurisdiction on the basis of nationality to serious crimes only, international law does not limit the nationality principle in this way.\(^{127}\) Furthermore, it is not necessary for the conduct being prosecuted to be criminalised by the *lex loci delicti commissi*. It is sufficient for the conduct to constitute a crime under the *lex fori*.\(^{128}\) Problems with respect to the assertion of jurisdiction based on the nationality principle may arise where an accused is a dual national, or where there has been a change of nationality in the period between the commission of the crime and its prosecution.\(^{129}\)

(ii) **Passive personality principle**

Passive personality allows a state to assert prescriptive jurisdiction over criminal acts that take place outside its territory where one or more of its nationals is a victim of the crime. Unlike the nationality principle which is a non-controversial basis for extraterritorial jurisdiction, passive personality (or passive nationality) has been criticised as ‘an excess of jurisdiction’.\(^{130}\) In particular it raises issues with respect to defendants’ rights, particularly when defendants subject to a claim of passive personality jurisdiction may be ignorant of the foreign law, and unaware of its applicability to their actions.\(^{131}\)

Under the various anti-terrorism treaties, states parties are given jurisdiction over acts of terrorism committed extraterritorially where ‘the offence has been committed by or against

\(^{126}\) Under Division 272 of Australia’s *Criminal Code Act 1995* (Cth), for example, it is a criminal offence for Australian citizens to participate in child sex tourism overseas.

\(^{127}\) ‘Harvard Research in International Law, Jurisdiction with Respect to Crime’ (1935) 29 *Supplement to the American Journal of International Law* 435, 531.

\(^{128}\) Cassese and Gaeta, above n 112, 276.


\(^{130}\) Mann, above n 90, 92.

\(^{131}\) Ryngaert, above n 6, 110–111.
a national or permanent resident of such state’. In customary international law, however, there is some question as to whether a permissive rule allowing for jurisdiction based on passive personality does actually exist. Ryngaert posits that passive personality jurisdiction may instead fall under the legal umbrella of the Lotus case, enabling such jurisdiction in the absence of a prohibitive rule to the contrary.

(iii) Protective principle

Under the protective principle of jurisdiction, a state may assert prescriptive jurisdiction over the extraterritorial acts of non-nationals if they threaten the national security or key interests of the prosecuting state. Despite the potentially broad nature of this jurisdictional basis, the invocation of the protective principle has not been particularly controversial. It has been used for offences such as drug smuggling and illegal immigration, for example. More questionable was the District Court of Jerusalem’s application of the protective principle in Israel v Eichmann, given the fact that the state of Israel did not exist at the time the offences were committed.

(iv) Universality principle

The final principle of extraterritorial jurisdiction is universality, which gives rise to universal jurisdiction. This allows for a state to prosecute any individual, of any nationality, for certain crimes committed anywhere in the world. According to some commentators, ‘true’ or ‘pure’ universal jurisdiction is only exercised where the prosecuting state does not have

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133 Ryngaert, above n 6, 112.


136 Attorney-General of the Government of Israel v Adolf Eichmann (1962) 36 ILR 5, 54-7. The application of the protective principle was accepted by the Supreme Court, at 304. I return to this case in Chapter VI.

137 Crawford and Brownlie, above n 102, 462.
any nexus whatsoever to the crime, including custody of the accused.138 Due to the significant procedural problems and human rights concerns of conducting a trial in absentia, it is generally not acceptable for a state to prosecute without first acquiring custody of the accused.139 As such, universal jurisdiction only gives states the right to prescribe laws that extend universally; states cannot enforce these laws unless they also have custody of the defendant.140 How universal jurisdiction may or may not be applicable to the ICC will be the focus of Chapter VI.

(c) Prohibitive vs Permissive Rules

I return now to examine the current status of extraterritorial jurisdiction in international law as there is still some question about how the prohibitive rule of the Lotus case can be reconciled with the existence of permissive principles. Are states only allowed to exercise extraterritorial jurisdiction when they can demonstrate a permissive rule based on the nationality, protective, passive personality or universality principles? Or, in accordance with the Lotus case, are states allowed to exercise jurisdiction extraterritorially in whatever manner they choose as long as there is no prohibitive rule to the contrary?

Despite the controversy over the Lotus decision, it remains central to the analysis of extraterritorial jurisdiction. As James Crawford and Ian Brownlie point out, it is the only decision by an international court that directly deals with this aspect of jurisdiction.141 Rather than insisting on either the Lotus approach or the permissive rules approach as the only correct interpretation of extraterritorial jurisdiction in international law, a more nuanced view acknowledges the legitimacy of both.142 Cassese, for example, recognises that the divergence between the two approaches is the result of ‘one’s own understanding of sovereignty and of the role and function of international law in a society whose primary

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139 Arrest Warrant of 11 April 2000 (Congo v Belgium) [2002] ICJ Rep 2001 (declaration of Judge Ranjeva) 55-7; (separate opinion of Judge ad hoc Bula-Bula) 121-6.

140 Crawford and Brownlie, above n 102, 478.

141 Ibid 477. See also Ryngaert, above n 6, 30–32.

subjects are sovereign states.’ \textsuperscript{143} Directly applicable here, is Martti Koskenniemi’s acknowledgment of sovereignty as ‘ascending’ and/or ‘descending’, discussed in the previous chapter. \textsuperscript{144} It is unsurprising that most scholars of international law and jurisdiction should be so insistent on the permissive rules approach to extraterritorial jurisdiction, given their natural preference for the descending perspective on sovereignty. As articulated by Prosper Weil,

\begin{quote}
[t]he prevailing view—from Bourgin and Basdevant to Brierly, from Sir Gerald Fitzmaurice to Rousseau—is that state jurisdiction is not limited, but rather conferred, by international law. International law, in their view, is the source of state jurisdiction; states exercise their jurisdiction by delegation, as it were, of international law. \textsuperscript{145}
\end{quote}

Conversely, supporters of the \textit{Lotus} approach view sovereignty as inherent to states, and state jurisdiction as only limited by international law where necessary to prevent interference with a foreign state’s sovereignty. \textsuperscript{146} This corresponds to the ascending perspective on sovereignty. Although there is a preference for the permissive rules approach among scholars and the judiciary, the majority reasoning in the \textit{Lotus} case continues to survive. \textsuperscript{147} Ryngaert observes that a state’s preference for either the \textit{Lotus} approach or the permissive rules approach may depend on whether a state is asserting extraterritorial jurisdiction or opposing another state’s claim to jurisdiction. \textsuperscript{148} For example, the asserting state might claim the \textit{Lotus} approach in order to shift the burden of proof to the opposing state to demonstrate that there is a rule of international law prohibiting such jurisdiction. The opposing state might prefer the permissive rules approach to require the asserting state to show that its behaviour is in compliance with one of the four principles of extraterritorial jurisdiction. \textsuperscript{149}

For the purposes of this chapter, it is unnecessary to discuss the divergence between the \textit{Lotus} approach and the permissive rules approach any further. The delegation of

\begin{footnotesize}
\begin{itemize}
\item[143] Cassese and Gaeta, above n 112, 272–273.
\item[145] Weil, above n 142, 32. See also, Mann who asserts that ‘[t]he existence of the state’s right to exercise jurisdiction is exclusively determined by \textit{public international law}’ (emphasis original): Mann, above n 90, 10–11.
\item[146] Mégret, above n 3, 252; Weil, above n 142, 33.
\item[147] The ICJ did little to clarify the status of \textit{Lotus} in \textit{Arrest Warrant of 11 April 2000 (Congo v Belgium)} [2002] ICJ Rep 2001 [Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal [50]–[51]; Separate Opinion of Judge Guillaume [14])
\item[148] Ryngaert, above n 6, 29.
\item[149] Ibid 21.
\end{itemize}
\end{footnotesize}
jurisdiction theory is compatible with either approach, although delegation does tend to be associated with the permissive rules approach given the explicit reference to territoriality and nationality in the Rome Statute.

C. Content and Ambit of Laws

A final conceptual point to make with respect to jurisdiction is to clarify how it relates to the content and ambit of laws.\(^{150}\) This distinction is a useful one to make when discussing the jurisdiction of the ICC. The content of a law is a relatively straightforward concept and encompasses the law’s regulation of particular acts and behaviour. For example, Articles 6 to 8 of the Rome Statute give the ICC jurisdiction over the acts that constitute genocide, war crimes and crimes against humanity, as detailed in the Statute.\(^{151}\)

Once the content of a particular law has been established, its ambit deals with the question of when, to whom and where these laws can be applied. The ambit of a particular law, therefore, reflects the principles of temporality, personality and territoriality. The temporal ambit, or 
ratione temporis,
refers to any time-related restrictions on a rule. The temporal ambit of the Rome Statute, for example, is limited to crimes committed after its entry into force on 1 July 2002. Personal ambit, or 
ratione personae,
identifies the persons to which the law applies. The personal ambit of the Rome Statute is effectively limited by Article 12 to nationals of states parties, and in certain circumstances, nationals of non-party states.\(^{152}\) Finally, a law’s territorial ambit, or 
ratione loci,
describes its application to a particular geographical area. Again, Article 12 effectively limits the Rome Statute’s territorial ambit to territory of states parties unless a non-party accepts the Court’s jurisdiction on an \textit{ad hoc} basis. Under Article 13(b), the Security Council can extend the personal and territorial ambit of the Statute to both the nationals and the territory of non-party states.

D. A Visual Representation of the Elements of Jurisdiction

A visual representation of how the various elements of jurisdiction interact with each other is a useful way of summarising the above discussion. It will also be a helpful aid for the

\(^{150}\) Hirst, above n 96; Liivoja, above n 90.

\(^{151}\) For the most part this thesis does not deal with the content of international criminal jurisdiction, although there will be some discussion of the crimes in relation to universal jurisdiction in Chapter VI.

\(^{152}\) The ICC’s personal ambit is further limited to natural persons aged 18 years and over: Rome Statute, Articles 25(1) and 26.
analysis in the next chapter. Diagram 1 sets out the relationship between sovereign jurisdiction and judicial jurisdiction in states. To summarise, under international law states have the right to exercise their sovereign powers by prescribing and enforcing laws on the basis of certain permissive principles. These laws form the domestic legal framework that regulates how the state’s powers are exercised internally. The content and ambit of the laws dictate proscribed conduct, and where, when and to whom the laws apply. Under the domestic legal framework a state’s courts are empowered with particular judicial competences which allow them to exercise judicial jurisdiction.

Diagram 2 explains how the various jurisdictional elements apply to the ICC. Under the Rome Statute, the ICC has the power to, *inter alia*, conduct investigations; issue orders and warrants for arrest; confirm charges; convene criminal trials; pronounce on guilt or innocence; and apply penalties.153 The Statute also sets out the circumstances in which the ICC may use these powers; analogous to how a state’s domestic legal framework regulates the internal exercise of the state’s sovereign powers.154 The provisions of the Statute that deal with content and ambit are what give the Court the right to exercise its powers with respect to particular conduct; over specified territory; in relation to certain individuals and within a limited timeframe.155 The content and ambit of the Statute mean that the ICC is strictly limited in its authority; it cannot go beyond what the Rome Statute provides.

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153 See, eg, Rome Statute, Articles 53-58; 61-64; 66(3); 76-78.


155 See, eg, Rome Statute, Articles 5-8; 11-13.
**Diagram 1: State Jurisdiction**

**SOVEREIGN JURISDICTION**

A state’s right under international law to exercise certain of its powers

- To prescribe laws
  - On the basis of territoriality, nationality, passive personality, the protective principle and universality
- To enforce laws
  - On the basis of territoriality

**DOMESTIC LEGAL FRAMEWORK** (lex loci) regulates the internal exercise of its sovereign powers

- Content of laws
- Ambit of laws
  - Territorial
  - Personal
  - Temporal

**DOMESTIC JUDICIAL JURISDICTION**

Courts have judicial competence over certain conduct, territory and persons
V. CONCLUSION

The purpose of this chapter was to examine the notion that the jurisdiction of the ICC is predicated on delegation from states parties. The debates in the early scholarship show that there is nothing to legally prevent states from delegating their powers of criminal justice to an international court. What has been missing from the literature so far is a conceptual analysis of what ‘delega
tion of jurisdiction’ actually means in the context of the ICC. Such an analysis, I argued, is a necessary precursor to determining whether and how this theory provides a legal basis for the Court’s jurisdiction in all circumstances allowed by the Rome Statute.

As discussed above, jurisdiction is essentially the legal right to exercise power, whether it is the state’s right to exercise sovereign power or a court’s right to exercise judicial powers. In
international institutional law, when the term ‘delegation’ is used, it is in the context of
delegation of powers. In adopting the Rome Statute, states at Rome agreed to establish an
international organisation and delegate to it certain powers of prescription and
enforcement that each state possesses by virtue of its sovereignty. The ICC’s right to
exercise these powers under the Rome Statute reflects the right of states themselves to
exercise their powers of criminal justice in accordance with the customary principles of
territoriality and nationality.\textsuperscript{156}

Conceiving of the legal basis for such jurisdiction as delegation from states parties
addresses the perceived problem of state consent when nationals from non-party states
come within the jurisdiction of the Court. States may prosecute foreign nationals for crimes
committed on their territory, and the consent of the state of nationality is not required
under international law. In the abstract, therefore, delegation of jurisdiction is a sound
theory to explain how and why the ICC is lawfully empowered to exercise jurisdiction over
nationals of non-party states. As I demonstrate in the next chapters, however, whether the
delegation theory provides a legal basis for ICC authority in all situations involving non-
party nationals requires further analysis.

\textsuperscript{156} Although this does not include situations involving a UN Security Council referral, in which case some
commentators talk about the ICC as exercising ‘universal jurisdiction’. This notion will be discussed in
Chapters V and VI.
CHAPTER IV

DELEGATION OF JURISDICTION: APPLICATION AND LIMITATIONS

I. INTRODUCTION

This chapter explores whether delegation of jurisdiction provides a legal basis for the ICC to prosecute nationals of non-party states in situations that have been referred to the ICC by a state party, or where investigations have been initiated proprio motu by the ICC Prosecutor. Specifically I analyse whether restrictions on the territorial state’s own jurisdiction can affect the legal basis for the ICC’s jurisdiction in certain circumstances. For example, are states parties delegating only such jurisdiction as is exercisable in their domestic legal systems, or are they delegating territorial and nationality jurisdiction unaffected by limitations on domestic judicial jurisdiction? This question is important because there are situations and cases in which the ICC’s jurisdiction is potentially complicated by immunities and other limitations that affect a state party’s domestic jurisdiction. If such limitations affect a state’s delegable jurisdiction, this would in turn affect the legal basis for the ICC’s jurisdiction. The analysis in this chapter is limited to the legal basis for ICC jurisdiction in situations that do not involve the UN Security Council. Chapter V will explore the Security Council’s relationship with the ICC.

Part II of this chapter begins by addressing whether a state’s domestic legal framework has any effect on what a state party can delegate to the ICC. I argue that the parameters of a state’s delegable jurisdiction are defined by international, not domestic, law. On the basis of this conclusion the rest of the chapter then focuses on whether there are any restrictions on delegable jurisdiction under international law.

In Part III I investigate whether personal immunities under customary international law have any bearing on delegation of jurisdiction to the ICC. I use a hypothetical scenario in which a sitting head of state from a non-party state is indicted by the ICC. This part begins with some necessary background discussion on the status of head of state immunity before the ICC. Here, I examine the limited—albeit controversial—judicial consideration of this issue by the ICC itself, which has left a number of questions unsettled. Uncertainty

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1 This chapter is only addressing situations that come before the Court via the Article 13(a) or 13(c) avenues. It does not deal with situations referred by the UN Security Council in accordance with Article 13(b), unless otherwise stated.
remains, for example, over whether the Court can lawfully issue a request for the arrest and transfer of a foreign head of a non-party state in circumstances that do not involve a Security Council referral. Ultimately I argue that delegation of jurisdiction would not provide a legal basis for the ICC to prosecute such an individual considering that states parties are precluded under customary international law from exercising jurisdiction over foreign incumbent heads of state.

Part IV uses the two existing preliminary examinations in Afghanistan and Palestine to further explore possible limitations on delegable jurisdiction under international law. Each of these situations raise unique legal obstacles that could affect whether the ICC is able to exercise jurisdiction over certain nationals of non-party states on the basis of delegated jurisdiction. In Afghanistan, for example, I examine whether the bilateral immunities contained in the status of forces agreements (‘SOFAs’) in place between the US and Afghanistan affect the jurisdiction of the ICC. Similarly, in Palestine, I discuss how the ongoing question of Palestinian statehood and the existence of the Oslo Accords may affect Palestine’s ability to delegate jurisdiction.

I argue that even where a state’s own jurisdiction is restricted, its delegable jurisdiction will only be affected by limitations contained in customary international law. A state’s delegable jurisdiction will not be affected by the *lex loci* nor will it be limited by any immunities contained in a bilateral or multilateral agreement. Conceptualising delegation of jurisdiction in this way will allow the ICC to lawfully exercise its powers over nationals of non-party states in almost all circumstances provided for by the Rome Statute.

II. **Is Delegation of Jurisdiction Affected by National Laws?**

Recalling the discussion in Chapter III, a state’s judicial jurisdiction refers to the actual jurisdiction exercisable by courts and associated entities in a state’s domestic justice system. The parameters of this judicial jurisdiction are defined by the content and ambit of the domestic legal framework. In this part I briefly address the question of whether a state party’s legal framework—the *lex loci*—affects state delegation of jurisdiction to the ICC.
A. The Lex Loci of State Party X

Consider the following hypothetical example: The Pre-Trial Chamber approves the Prosecutor’s request to open an investigation into the situation in State Party X. Charges are laid under Article 8(2)(b)(xxvi) of the Rome Statute against a national of State X for the war crime of conscripting or enlisting children under the age of 15 into the armed forces. State X has not criminalised the conscription of child soldiers in its domestic law, meaning that State X’s own courts do not have domestic judicial jurisdiction over such conduct. How, then, can State X be said to have delegated its jurisdiction to the ICC when such jurisdiction does not exist in the lex loci? Conceptualising a state’s delegable jurisdiction more broadly than its domestic judicial jurisdiction would overcome this hurdle.

Under customary international law, a sovereign state has the right to exercise wide-ranging powers of criminal justice over its territory and its nationals, and may choose for itself the specific parameters that its jurisdiction will take within that territory. In the Arrest Warrant case, the ICJ recognised that national legislation reflects the circumstances in which a State provides in its own law the ability to exercise jurisdiction. But a state is not required to legislate up to the full scope of jurisdiction allowed by international law.

Returning to the example in the previous paragraph, just because State X has not criminalised the conscription of child soldiers does not mean that it does not possess the right to do so under international law. It is State X’s right to empower its legal system with jurisdiction over such acts (on the basis of territoriality, nationality etc) that comprises its delegable jurisdiction. The argument for rejecting a narrow characterisation of delegable jurisdiction is further strengthened by considering the sheer diversity of the criminal laws and criminal justice systems among states parties. It would be entirely unworkable if the

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2 There was some question during the drafting of the Rome Statute about whether conscription and enlistment of child soldiers was a war crime or a human rights issue, meaning that it was not widely criminalised as a war crime in domestic legislation: Herman von Hebel and Darryl Robinson, ‘Crimes within the Jurisdiction of the Court’ in Roy S Lee (ed), The International Criminal Court - The Making of the Rome Statute (Kluwer Law International, 1999) 79, 117; Madeline Morris, ‘High Crimes and Misconceptions; The ICC and Non-Party States’ (2001) 64 Law and Contemporary Problems 13, 28. See further discussion of this issue in Chapter VI.

3 FA Mann, ‘The Doctrine of Jurisdiction in International Law’ (1964) 111 Recueil des Cours de l’Academie de Droit Internationale 1, 9.


5 See generally, Kevin Heller and Markus Dubber (eds), Handbook of Comparative Criminal Law (Stanford University Press, 2010). This book contains a comparative analysis of the criminal laws in 16 countries, nine of which are states parties to the Rome Statute.
jurisdiction of the ICC were subject to the vagaries of the *lex loci* of delegating states parties.\(^6\) Furthermore, the ICC’s status as an independent entity with legal personality means that the Court is exercising its own jurisdiction, not that of states parties. The legal basis for such jurisdiction may be delegation from states parties, but the ICC is not merely their agent.\(^7\)

### B. The Constitutionality of Delegation: Ukraine

An interesting case study on the *lex loci* issue involves the question of Ukraine’s ratification of the Rome Statute. In 2001 Ukraine’s Constitutional Court held that ratification of the Rome Statute would be unconstitutional.\(^8\) Article 124 of Ukraine’s Constitution provides that administration of justice in Ukraine is to be undertaken only by its courts, and specifically prohibits delegation of any judicial functions to other entities.\(^9\) This has led the government of Ukraine to claim that it is unable to ratify the Rome Statute without an amendment to the Constitution, because the delegation of any judicial powers is prohibited.\(^10\) This constitutional prohibition notwithstanding, Ukraine has since lodged declarations under Article 12(3) of the Rome Statute accepting ICC jurisdiction over its territory on an *ad hoc* basis.\(^11\) Assuming delegation as the underlying basis on which the ICC

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\(^6\) See also, Robert K Woetzel, *The Nuremberg Trials in International Law with a Postlude on the Eichmann Case* (Steven & Sons Ltd, 1962) 60–61. Note that Article 21(1)(c) of the Rome Statute does recognise, as a source of applicable law, ‘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’. Such principles are subsidiary to the Rome Statute, Elements of Crimes, Rules of Procedure, applicable treaties and principles of international law. Furthermore, Pre-Trial Chamber I has held that recourse to principles of law derived from national laws can only be had where there is a lacuna in the Rome Statute and Elements of Crimes: *Prosecutor v Al Bashir (Warrant of Arrest)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 4 March 2009) [126]. See also, ‘Article 21’, William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010) 515; Gilbert Bitti, ‘Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC’ in Göran Sluiter and Carsten Stahn (eds), *The Emerging Practice of the International Criminal Court* (Brill, 2008) 281; Michail Vagias, ‘The Territorial Jurisdiction of the International Criminal Court – A Jurisdictional Rule of Reason for the ICC?’ (2012) 59(1) *Netherlands International Law Review* 43, 101–130.

\(^7\) On the difference between delegation and agency, see the discussion in Part III(B) of Chapter III.


\(^9\) Ibid.


exercises its powers, any state acceptance of ICC jurisdiction—even acceptance on an ad hoc basis under Article 12(3)—would involve an act of delegation.\textsuperscript{12} It is entirely within a state’s sovereign prerogative to restrict delegation of its powers under domestic law, but this does not affect the state’s right to delegate under international law. It is therefore likely that Ukraine’s Article 12(3) declarations are invalid under Ukraine’s unamended Constitution, but perfectly valid under customary international law and the Rome Statute.\textsuperscript{13} It is another example of how the lex loci of a state does not affect the jurisdiction of the ICC.\textsuperscript{14}

C. Delegation is Unaffected by the Lex Loci

Ultimately, the jurisdiction of the ICC may not reflect the domestic judicial jurisdiction of a state’s courts. As long as the state has the right, under international law, to empower its judicial system, then that jurisdiction is delegable to the ICC. To say that the ICC is exercising jurisdiction based on delegation from states parties is without regard to the actual judicial jurisdiction of individual states’ domestic courts.

While the lex loci does not influence delegation of jurisdiction, there may nevertheless be restrictions on delegable jurisdiction imposed by international law. The following examples explore how delegation of jurisdiction might be restricted by the application of international legal immunities, and whether that in turn would affect the legality of the ICC’s jurisdiction over nationals of non-party states in certain circumstances.

III. Is Delegation of Jurisdiction Affected by Customary Immunities?

Under customary international law, incumbent senior state officials and diplomats accredited to a foreign state are immune from prosecution in foreign domestic courts. The Rome Statute, however, provides that immunities ‘under national or international law’ do

\textsuperscript{12} Kevin Jon Heller, ‘Thoughts on the Ukraine Ad Hoc Self-Referral’ Opinio Juris (18 April 2014).

\textsuperscript{13} See also Article 46 of the VCLT which specifies that ‘A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance’.

\textsuperscript{14} For a discussion of how entering into treaties can affect domestic constitutions, see generally, Thomas M Franck (ed), Delegating State Powers: The Effect of Treaty Regimes on Democracy and Sovereignty (Transnational Publishers, 2000).
not apply before the ICC. This part examines whether delegation of jurisdiction provides a legal basis for ICC prosecution of incumbent presidents from non-party states in situations where crimes have been committed on the territory of a state party.

A. ICC Jurisdiction over Sitting Heads of Non-Party States

At present, outside of the two Security Council referrals, there are a number of situations at the ICC which involve crimes allegedly committed by nationals of non-party states on the territory of states parties. As discussed in Chapter I, the Prosecutor has received authorisation to commence an investigation *proprio motu* into the situation in Georgia, and there are ongoing preliminary examinations in Afghanistan, Ukraine, and Palestine. In the Georgian and Ukraine situations, it is alleged that Russian armed forces have been involved in committing Statute crimes; in Afghanistan, there are accusations of crimes committed by US soldiers; and the situation in Palestine involves crimes allegedly committed by Israeli soldiers in the occupied Palestinian territories. I emphasise that nationals of Russia, the US and Israel are not the only ones accused of committing crimes in these situations, but given that Russia, the US and Israel are not party to the Rome Statute, the legal issues surrounding any potential prosecution of such non-party nationals are the focus of this part. In particular, I mention these examples to raise the hypothetical—albeit remote—possibility that Russian President Vladimir Putin and Israeli Prime Minister Benjamin Netanyahu could theoretically be indicted by the ICC, even while they remain in office.

The likelihood of either of these individuals being indicted by the ICC is dependent on myriad legal and political issues, not least of which is evidence of individual criminal responsibility. Nevertheless, such indictments remain hypothetically possible under the Statute, which is why it is useful to examine whether the ICC could lawfully prosecute a sitting head of state from a non-party state in situations not involving a Security Council referral. Before analysing whether delegation of jurisdiction provides a legal basis for

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15 Rome Statute, Article 27(2).
16 *Situation in Georgia (Decision on the Prosecutor’s request for authorization of an investigation)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/15, 27 January 2016).
17 As mentioned above, Ukraine is not a state party, but has accepted the jurisdiction of the ICC under Article 12(3).
18 In theory, the incumbent US president could also be indicted by the ICC, but given the fact that President Trump has only recently taken office, he would not be responsible for crimes committed in Afghanistan by US soldiers prior to his inauguration.
19 Some of the unique issues that arise in the situations in Palestine and Afghanistan for example, will be addressed in Part IV below.
prosecution in such a case, it is necessary to briefly discuss the doctrine of head of state immunity and its exceptions.

B. Prosecuting Sitting Heads of State: Background

There is an almost overwhelming amount of scholarship\(^\text{20}\) and judicial consideration\(^\text{21}\) on the topic of individual and state immunities in international law, indicative of the complexity of the issue. The discussion contained in this section can only scratch the surface of the legal issues surrounding head of state immunity, but it is sufficient for the purposes of this thesis. I begin by providing an overview of head of state immunity in foreign domestic courts before turning to discuss the prosecution of incumbent heads of state by the ICC.\(^\text{22}\)


\(^{21}\) See, eg, *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) (Judgment)* [2002] ICJ Rep 3; *R v Bow Street Stipendiary Magistrate; Ex parte Pinochet Ugarte [1998]* All ER 897; *R v Bow Street Stipendiary Magistrate; Ex parte Pinochet Ugarte [No 2] [1999]* 1 All ER 577; *R v Bow Street Stipendiary Magistrate; Ex parte Pinochet Ugarte [No 3] [2000]* 1 AC 147; *Prosecutor v Blaškić (Judgement on the Request for the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997)* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-95-14-AR108, 29 October 1997).

\(^{22}\) The discussion in this Part is limited to heads of state and other senior officials, but it should be noted that diplomats also enjoy immunity from certain foreign domestic jurisdictions. This is a rule of customary international law that has been codified in the *Vienna Convention on Diplomatic Relations*, opened for signature 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964) Article 31(1). See, generally, Ivor Roberts, ‘Privileges and Immunities of Diplomatic Agents’ in Ivor Roberts (ed), *Satow’s Diplomatic Practice* (Oxford University Press, 6th ed, 2009) 121. See also, fn 31 below.
1. Head of State Immunity in Customary International Law

The rationale behind conferring certain state officials with immunity from the jurisdiction of foreign domestic courts is to facilitate stable international relations. Senior state officials who travel to foreign countries have unique diplomatic responsibilities, the performance of which is necessarily protected by the principle of immunity. In customary international law, the doctrine of immunity comprises two distinct applications: immunity *ratione materiae* (functional immunity) and immunity *ratione personae* (personal or private immunity). Only the latter is relevant for my hypothetical case study, but I will first provide a brief summary of functional immunity in order to contextualise the relevance of personal immunity for the ICC.

Functional immunity attaches to all official acts attributable to the state and it is the state that bears responsibility for them rather than the individual who performed the acts in his or her official capacity. This type of immunity is based on the nature of the conduct rather than the status of the individual who carried out the act. As such, it may be relied on by former officials (including heads of state) for acts undertaken during their tenure in office as well as by individuals who perform acts on behalf of the state even if they are not state officials. It has been argued that this type of immunity provides a substantive defence to any criminal charges, in the sense that functional immunity prevents legal responsibility from attaching to the individual, and instead shifts it to the state itself. There is, however, a growing consensus that customary international law provides an

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24 See *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) (Judgment)* [2002] IC Rep 3, 85 [75] (Judges Higgins, Kooijmans, and Buergenthal) (‘*Arrest Warrant*’): ‘immunities are granted to high State officials to guarantee proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system’.


26 For a detailed discussion of what constitutes ‘acts performed in an official capacity’ see Foakes, above n 20, 142–175.


28 See *Prosecutor v Blaškić (Objection to the Issue of Subpoena Duces Tecum)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14-AR-108, 18 July 1997) [38]. Contra, Foakes, above n 20, 10.
exception to functional immunity for individuals accused of international crimes in both foreign domestic and international courts.29

Irrespective of whether functional immunity applies, sitting heads of state also enjoy personal immunity as an absolute bar against being subjected to foreign criminal jurisdiction while they remain in office. Personal immunity can be invoked by a limited group of state officials, whose freedom of action is essential to the functioning of their state. There is some contention over precisely which senior officials attract personal immunity, but there is no doubt that incumbent heads of state, heads of government and foreign ministers are protected.30 It should be noted that personal immunity is procedural in nature and does not exempt a person from criminal responsibility. It provides a temporary bar from prosecution in a foreign court for the duration of the individual’s official status.31 Despite some suggestion that there might be an erosion of personal immunity in order to allow for the prosecution of sitting heads of state accused of

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29 Akande and Shah, above n 20, 828–851; Cassese, above n 20, 865; Steffen Wirth, ‘Immunity for Core Crimes? The ICJ’s Judgment in the Congo v. Belgium Case’ (2002) 13(4) European Journal of International Law 877; Foakes, above n 20, 149–160; Pedretti, above n 20, 307–308. Since 2007 the International Law Commission has included the topic of ‘Immunity of State Officials From Foreign Criminal Jurisdiction’ in its program of work. In the fifth report on the issue, the ILC Special Rapporteur examined state practice on the question of whether there is an exception to functional immunity for international crimes and concluded ‘prima facie that contemporary international law recognizes a limitation or exception to the immunity of State officials from foreign criminal jurisdiction in situations where the State official is suspected of committing an international crime’: Concepción Escobar Hernández, Special Rapporteur, Fifth report on the immunity of State officials from foreign criminal jurisdiction, UN Doc A/CN.4/701 (14 June 2016) [180]. But see Roman Anatolevich Kolodkin, Special Rapporteur, Second report on the immunity of State officials from foreign criminal jurisdiction, UN Doc A/CN.4/631 (10 June 2010) in which the former Special Rapporteur concludes that ‘it is difficult to talk of exceptions to immunity as having developed into a norm of customary international law’, at 57. See also, Roger O’Keefe, ‘An “International Crime” Exception to the Immunity of State Officials from Foreign Criminal Jurisdiction: Not Currently, Not Likely’ (2015) 109 AJIL Unbound 167.


For the purposes of this thesis, any reference to ‘head of state immunity’ is taken to include other senior state officials who enjoy customary immunity ratione personae. Although diplomats are also immune from foreign criminal jurisdiction, unlike immunity for senior state officials, diplomats only enjoy immunity ratione personae while on the territory of the receiving state, with some limited exceptions. Diplomats are not automatically immune from arrest while travelling outside the receiving state. For example, in 2014, the Italian ambassador to Turkmenistan was arrested while on holiday in Manila on suspicion of child abuse. The ambassador’s diplomatic immunity did not apply in the Philippines: ‘Italian diplomat faces child abuse charges in Philippines’ Agence France Presse (26 May 2014); See also, Vienna Convention on Diplomatic Relations, opened for signature 18 April 1961, 500 UNTS 95, (entered into force 24 April 1964), Articles 39–40.

31 Cassese, above n 20, 863. In addition to the personal immunity afforded to senior state officials under customary international law, Article 31 of the Vienna Convention on Diplomatic Relations also provides diplomatic agents with personal immunity from criminal jurisdiction of foreign domestic courts.
committing international crimes, state practice does not yet support such an exception in foreign domestic courts. Whether there is a customary exception to personal immunity applicable in international courts is a more difficult question, and one that has direct relevance to the jurisdiction of the ICC over incumbent heads of state. This will be addressed in the next section.

2. Head of State Immunity and the ICC

(a) Articles 27 and 98 of the Rome Statute

Article 27(2) of the Rome Statute provides that

[ ]immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

This provision was adopted at Rome without controversy and amounts to a clear rejection of all immunities, including functional immunity and personal immunity for sitting heads of state. It is not the only provision that must be considered when discussing jurisdiction of the ICC over non-party heads of state. Article 98(1) provides that

[ ]the Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

Article 98(1) is ambiguous with respect to a number of questions that relate to sitting heads of state: What is the relationship between this provision and Article 27? Does the reference

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33 For a comprehensive review of state practice on this question, see Pedretti, above n 20, 138-155-191. See also, Concepción Escobar Hernández, Special Rapporteur, Fifth report on the immunity of State officials from foreign criminal jurisdiction, UN Doc A/CN.4/701 (14 June 2016) 24-54. In 2016, the South African Supreme Court of Appeal affirmed that customary international law does not provide an exception to personal immunities for senior officials, but held that South Africa’s domestic implementing legislation for the Rome Statute nevertheless allows for foreign incumbent heads of state to be prosecuted in South African courts for Statute crimes: Minister of Justice and Constitutional Development v The Southern African Litigation Centre (867/15) [2016] ZASCA 17 [122]-[123]. For a critique of this decision and its implications for the development of custom in this area, see, Dapo Akande, ‘The Bashir Case: Has the South African Supreme Court Abolished Immunity for all Heads of States?’ EJIL: Talk! (29 March 2016). See also, Chapter VII of this thesis.


to a ‘third state’ apply only to non-party states or to states parties as well? Is the ICC precluded from even issuing an arrest warrant over a non-party head of state? How does a Security Council referral affect this provision? Such questions have been debated extensively in academic commentary, and the ICC’s limited consideration of Articles 27(2) and 98(1) (discussed below) has so far proven to be somewhat inconclusive.

To date, the ICC has dealt with situations involving four different heads of state: Sudanese President Omar Al Bashir; Laurent Gbagbo, the former President of the Côte d’Ivoire; Kenyan President Uhuru Kenyatta; and Colonel Muammar Gaddafi of Libya. Of the four of these, only the cases against Al Bashir and Gbagbo remain before the Court. As a former head of state, Gbagbo no longer enjoys the protection of personal immunity. Even if he had still been in power when indicted, the Côte d’Ivoire had previously accepted the jurisdiction of the ICC on an ad hoc basis and in doing so, accepted the ambit of the Rome Statute including the Article 27(2) exclusion. Similarly, before the charges against President


37 The situation in Darfur, Sudan was referred to the ICC by the Security Council in 2005: SC Res 1593, UN SCOR, 5158th mtg, UN Doc SC/Res/1593 (31 March 2005). In 2009, Pre-Trial Chamber I issued a warrant of arrest for Omar Al Bashir Prosecutor v Omar Hassan Ahmad Al Bashir (Warrant of Arrest) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 4 March 2009).


39 Uhuru Kenyatta was summoned to appear before the ICC in March 2011: Prosecutor v Kenyatta (Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali) (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/09-02/11, 8 March 2011). Kenyatta became President of Kenya in March 2013 while the ICC case against him was still in progress.

Kenyatta were withdrawn, there was no question about whether the ICC could exercise jurisdiction over him, as Kenya is a state party to the Rome Statute. The Gaddafi case was terminated in November 2011 following his death. The case against Omar Al Bashir is therefore the only one in which there has been any judicial consideration of ICC jurisdiction and head of state immunities. Despite the fact that the situation in Darfur was referred to the ICC by the UN Security Council, Sudan is not a party to the Rome Statute, and the judicial analysis of the Pre-Trial Chambers in Al Bashir’s case has direct relevance for potential ICC prosecutions of non-party heads of state in situations that do not involve the Security Council.

(b) Consideration of Articles 27 and 98 by Pre-Trial Chambers I and II in the Case of Al Bashir

In March 2009, Pre-Trial Chamber I approved the Prosecutor’s application for an arrest warrant against Al Bashir, holding that ‘the current position of Omar Al Bashir as Head of a state which is not party to the Statute, has no effect on the Court’s jurisdiction over the present case’. The Chamber gave the following four reasons for its pronouncement, which I summarise as follows:

1) the Preamble to the Rome Statute provides that one of the ICC’s core goals is to end impunity for international crimes;
2) the provisions of Article 27 of the Statute clearly provide that neither official capacity nor immunities shall prevent the Court from exercising its jurisdiction;
3) under Article 21, resort to other sources of law (such as customary international law) can only be had where there is a lacuna in the Statute, Elements of Crimes and Rules;

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41 All charges against Kenyatta were withdrawn on 13 March 2015: Prosecutor v Kenyatta (Decision on the withdrawal of charges against Mr Kenyatta) (International Criminal Court, Trial Chamber V(B), Case No ICC-01/09-02/11, 13 March 2015).

42 There were numerous other controversies surrounding the prosecution of Kenyatta, but none of these related to head of state immunity. See, eg Felix Olick, ‘Three more ICC witnesses refuse to testify against Uhuru’, Standard Digital (5 April 2013); David Smith, ‘Kenyan MPs vote to quit International Criminal Court’, The Guardian (5 September 2013); Solomon Ayele Dersso, ‘The AU’s Extraordinary Summit decisions on Africa-ICC Relationship’, EJIL: Talk! (28 October 2013); Mark Kersten, ‘Kenya and the ICC: Coming to a Head’, Justice in Conflict (19 November 2013).

43 Prosecutor v Muammar Gaddafi (Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01-11-01/11, 22 November 2011).

44 Prosecutor v Al Bashir (Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 4 March 2009) [41].
4) by referring the situation in Darfur to the ICC under Article 13(b), the Security Council accepted that any prosecution arising from the referral would ‘take place in accordance with the statutory framework provided for in the Statute’.  

This fragmented reasoning attracted criticism for being vague and legally unconvincing. It was, however, only the beginning of the Court’s attempts to justify its authority over President Al Bashir. Two and a half years later, Al Bashir remained at large, and the question of whether a sitting head of state from a non-party state enjoys immunity from arrest by states parties under Article 98(1) came before Pre-Trial Chamber I. The Republic of Malawi and the Republic of Chad, both states parties to the Rome Statute, and both accused of failing to comply with cooperation requests by the ICC to arrest Al Bashir, argued that such action would conflict with their legal obligations under customary international law to respect the personal immunity of a foreign incumbent head of state. In its rejection of Malawi and Chad’s arguments, Pre-Trial Chamber I reconsidered the position of head of state immunity vis-à-vis the ICC, and after examining the practice of previous international courts, concluded that the principle in international law is that immunity of either former or sitting Heads of State can not be invoked to oppose a prosecution by an international court. This is equally applicable to former or sitting Heads of States not Parties to the Statute whenever the Court may exercise jurisdiction. [...] The Chamber finds that customary international law creates an exception to Head of State immunity when international courts seek a Head of State’s arrest for the commission of international crimes.  

46 See, eg Gaeta, ‘Does President Al Bashir Enjoy Immunity from Arrest?’, above n 36, 323–324.  
47 Prosecutor v Al Bashir (Decision pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir) (International Criminal Court, Pre-Trial Chamber I, Case No ICC/02/05-01/09, 12 December 2011); Prosecutor v Al Bashir (Decision pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir) (International Criminal Court, Pre-Trial Chamber I, Case No ICC/02/05-01/09, 13 December 2011).  
48 Notably, the Pre-Trial Chamber relied on the SCSL Appeals Chamber decision in Prosecutor v Taylor (Decision on Immunity from Jurisdiction) (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2003-01-I, 31 May 2004).  
49 Prosecutor v Al Bashir (Decision pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir) (International Criminal Court, Pre-Trial Chamber I, Case No ICC/02/05-01/09, 12 December 2011) [36] and [43]; Prosecutor v Al Bashir (Decision pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir) (International Criminal Court, Pre-Trial Chamber I, Case No ICC/02/05-01/09, 13 December 2011) [13].
In essence, the Pre-Trial Chamber found there to be two customary exceptions to personal immunity. The first prevents a sitting head of state from relying on immunities before international courts, and the second allows national authorities to arrest and transfer a foreign head of state to an international court. Although the Chad and Malawi decisions were directed to states parties, the Chamber’s reasoning has potential ramifications for non-party states as well. If a customary exception to personal immunities exists in cases where an international court seeks arrest and transfer of a sitting head of state, the ICC is not precluded under Article 98(1) from issuing a request for cooperation to a non-party state. The non-party state would not be obliged to cooperate with such a request, but neither would there be any competing obligations under international law to prevent this state from arresting and transferring a visiting foreign head of state to the ICC if the state chose to do so. This would theoretically be the case even in situations that do not involve a Security Council referral.

Despite Pre-Trial Chamber I’s proclamation, Al Bashir remained unarrested and continued to travel outside Sudan with seeming impunity. In 2012, the ICC Presidency reassigned the situation in Darfur to Pre-Trial Chamber II. From February 2013 to April 2014, this differently constituted chamber was provided with numerous notifications of Al Bashir’s travel plans. It responded to all of these by simply holding that states parties are obliged under the Rome Statute to arrest and surrender Al Bashir to the Court. Conversely, Pre-Trial Chamber II acknowledged that non-party states are not under such an obligation, although Security Council Resolution 1593 urges the cooperation of all states. The Chamber did not at any time consider the question of Al Bashir’s immunity.

In February 2014 the Prosecutor notified the Court of Al Bashir’s intent to travel to the DRC. In response to the DRC’s non-cooperation with the arrest warrant, Pre-Trial Chamber II finally gave some substantive consideration to the question of whether Al Bashir’s customary immunity as a head of state conflicts with the Rome Statute obligations

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50 (Decision on the constitution of Pre-Trial Chambers and on the assignment of the Democratic Republic of the Congo, Darfur, Sudan and Côte d’Ivoire situations) (International Criminal Court, The Presidency, Case No ICC-Pres-01-12, 15 March 2012).

51 Al Bashir’s travel during this period—actual and intended—included to Chad, Libya, Nigeria, USA, Ethiopia, Saudi Arabia and Kuwait.

52 Prosecutor v Al Bashir (Order Regarding Omar Al-Bashir’s Potential Visit to the Republic of Chad and to the State of Libya) (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/05-01/09, 15 February 2013) [10]-[13]. See Chapter V for further discussion.
on states parties to effect his arrest and surrender. The Chamber did not acknowledge the reasoning of Pre-Trial Chamber I in the Chad and Malawi decisions, and did not even address the possibility of a customary international law exception to head of state immunity for the arrest and transfer or prosecution by an international court. Instead, it simply held that Al Bashir does not enjoy immunity from arrest in a foreign state because the Security Council referral ‘implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State’.

The ICC is not bound by its previous decisions, but the fact that Pre-Trial Chamber II did not acknowledge (let alone criticise) the reasoning of Pre-Trial Chamber I leaves it somewhat uncertain as to what the legal basis is for the removal of head of state immunity from arrest and transfer in national jurisdictions. Can such immunity only be removed by a Security Council resolution? Or is there a customary exception for when an international court seeks arrest and transfer? If the latter, this would mean that any incumbent head of state wanted by the ICC (not just those involved in a Security Council referred situation) would be unable to rely on immunity from arrest and transfer in states parties and non-party states alike. But the existence of such a customary exception would essentially render Article 98(1) meaningless.

All attempts so far by the ICC to clarify the head of state immunity issue have been widely criticised in scholarly commentary, with almost all aspects of the Chambers’ legal reasoning coming under fire. Causing particular uncertainty was Pre-Trial Chamber I’s declaration of the existence of a customary exception to personal immunity and then Pre-Trial Chamber II’s omission of any mention of such an exception. By and large, commentators

53 Prosecutor v Al Bashir (Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court) (International Criminal Court, Pre-Trial Chamber II, Case No ICC/02/05-01/09, 9 April 2014).

54 Ibid [29]. This concept will be discussed in more detail in Chapter V of this thesis.

55 Rome Statute, Article 21(2).

agree that there is not yet sufficient state practice to support a customary exception for the prosecution of sitting heads of state by international courts. A lack of state practice also precludes extending such an exception to domestic jurisdictions to allow the arrest and transfer of a foreign head of state to an international court. The existence of such customary exceptions to immunity would raise numerous issues, not least of which would be the question of what constitutes an international court. The next section builds on the analysis of the ICC’s jurisprudence in the Al Bashir case to determine whether the ICC could lawfully exercise jurisdiction over a sitting head of a non-party state in a situation that does not involve a Security Council referral.

C. A Hypothetical Case Study: Can the ICC Exercise Jurisdiction over an Incumbent Head of State from a Non-Party State in a Situation Not Involving the Security Council?

The following discussion uses a hypothetical case involving the ICC prosecution of a sitting head of state from Non-Party State Y (President Y) for crimes committed on the territory of State Party X. This hypothetical case is based on five important assumptions:

1. That crimes have been committed on the territory of State Party X that reach the gravity threshold required by the Rome Statute;
2. That these crimes were committed by nationals of Non-Party State Y;
3. That there is evidence that President Y is criminally responsible;

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58 States parties to the Rome Statute would be obliged to arrest and transfer a visiting foreign head of state to the ICC in two circumstances: 1) where the wanted head of state is also from a state party to the Statute and 2) where the head of state is from a state that has been referred to the Court by a Security Council resolution. In the first scenario, the foreign state is considered to have waived head of state immunity by virtue of its ratification of the Rome Statute. In the second scenario, the Security Council has implicitly waived head of state immunity on behalf of the non-party state by referring the situation to the ICC: Prosecutor v Al Bashir (Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court) (International Criminal Court, Pre-Trial Chamber II, Case No ICC/02/05-01/09, 9 April 2014). See Chapter V, Part IV(C)(1).

59 Jacobs, above n 57, 288. But see Gaeta’s argument with respect to what constitutes an international court: Gaeta, ‘Does President Al Bashir Enjoy Immunity from Arrest?’, above n 36, 322.
4. That the Court’s jurisdiction is triggered by a state party referral or *proprio motu* investigation by the Prosecutor;

5. That the ICC is able to gain custody of President Y.

1. *Is President Y Immune from Arrest and Transfer?*

For the sake of argument, assuming that a customary exception to head of state immunity of the type envisioned by Pre-Trial Chamber I does exist, President Y would no longer be able to invoke personal immunity where a foreign state seeks his or her arrest and transfer to the ICC. Nor would President Y be able to claim immunity from prosecution by the ICC. A customary exception would make it easier, legally speaking, for the ICC to gain custody of an accused incumbent head of a non-party state by removing the procedural barrier of personal immunity in foreign domestic jurisdictions. Without a customary exception, and in the absence of a Security Council referral, Article 98(1) would preclude the ICC from requesting even states parties to arrest and surrender President Y to the Court. Hypothetically speaking, if the ICC were to somehow gain custody of such an accused head of state, this would clear only the immunity hurdle at the domestic level. There would still be a question of whether the ICC could exercise jurisdiction over President Y. That will depend on whether ‘delegation of jurisdiction’ constitutes an appropriate legal basis in this instance.

2. *Does Delegation of Jurisdiction Provide a Legal Basis for ICC Jurisdiction over President Y?*

The nature of personal immunity as an absolute procedural bar to prosecution of sitting heads of state in all foreign domestic jurisdictions means that no state party to the ICC has the right to exercise its powers of criminal justice over President Y. The absence of this jurisdiction at the domestic level would appear to preclude its delegation to the ICC, as

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60 Conceivably, an accused could turn him or herself into the ICC, or a foreign state could arrest and transfer the accused president to the ICC in violation of its customary international law obligations to respect personal immunities. In *Israel v Eichmann*, the Supreme Court held the fact that Eichmann was abducted from Argentina was not a bar to the jurisdiction of the Israeli Court: *Attorney-General of the Government of Israel v Adolf Eichmann* (1962) 36 ILR 5, 308. It is possible, however, that the ICC would hold that an unlawful transfer of an accused to the ICC constituted an abuse of process, notwithstanding the fact that the Court would have jurisdiction to prosecute. This scenario occurred in the Australian High Court case of *Moti v The Queen*, in which the Australian defendant was charged with the offence of engaging in sexual intercourse with a person under the age of 16 years whilst outside Australia (s 50BA of the *Crimes Act 1914* (Cth)). The High Court held that it would be an abuse of process to prosecute Mr Moti in Australia because an Australian official facilitated his deportation from the Solomon Islands which was unlawful under Solomon Islands law: *Moti v The Queen* (2011) 245 CLR 456.
states parties do not possess such jurisdiction in their individual capacity. It might be possible, however, to conceive of ICC jurisdiction over President Y as based on collective conferral. Recalling the discussion in Chapter III, the idea of collective conferral is that where the ‘vast majority’ of states act together, they can confer certain powers on an international organisation that, individually, they do not have. But this characterisation of the legal basis for ICC jurisdiction over heads of state from non-party states is only sustainable if a customary exception to head of state immunity exists before international courts. If, for example, future ICC cases follow the Pre-Trial Chamber I reasoning in the Chad and Malawi decisions and hold that the customary international law of personal immunity for incumbent heads of state does not apply to international courts, then it would follow that the ICC can exercise jurisdiction over President Y on the basis of collectively conferred jurisdiction. As mentioned above, however, a customary exception to head of state personal immunity before international courts is far from settled.

In 2016, in its Fifth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, the International Law Commission (‘ILC’) came to the conclusion that state practice did not yet provide evidence of a customary exemption to the personal immunity of state officials.62 With regards to personal immunity before an international court, the ILC suggested that ‘nothing prevents States from establishing, by means of international treaties, circumstances in which immunity from foreign criminal jurisdiction is not applicable. This has already occurred in practice and is fully consistent with treaty law’.63 The ILC clarified this statement in a proposed draft article which provides that an exemption to personal immunity may exist where there is a ‘provision of a treaty that is binding on both the forum State and the State of the official, under which immunity would not be applicable’.64 In other words, both the territorial state and the state of nationality must have agreed to be bound by the relevant treaty that removes personal immunities.


62 Concepción Escobar Hernández, Special Rapporteur, Fifth report on the immunity of State officials from foreign criminal jurisdiction, UN Doc A/CN.4/701 (14 June 2016) [240].

63 Ibid [246]. This reflects the reasoning of the ICJ in the Arrest Warrant case, where it held that sitting heads of state ‘may be subject to criminal proceedings before certain international courts, where they have jurisdiction’. Arrest Warrant of 11 April 2000 (Congo v Belgium) [2002] ICJ Rep 2001 [26] (emphasis added). Paola Gaeta argues that personal immunities should not apply at all before international courts: ‘the very rationale of the rules on personal immunities is lacking when criminal jurisdiction is instead exercised by an international criminal court’ (emphasis original): Gaeta, ‘Does President Al Bashir Enjoy Immunity from Arrest?’, above n 36, 320.

Applying this proposal to my hypothetical scenario, because the Rome Statute is not binding on Non-Party State Y, President Y would be able to continue relying on his or her immunity before the ICC.

D. No Legal Basis for ICC Jurisdiction over Some Heads of Non-Party States

At present, how Article 27, Article 98(1) and the doctrine of head of state immunity in customary international law interact with each other has not been satisfactorily clarified by the ICC. The Court has not yet had the opportunity to consider how these legal issues would play out in a case against a sitting head of a non-party state in a situation not involving a Security Council referral. Beyond the issue of whether states are precluded from arresting and transferring a foreign head of a non-party state to the ICC, the Court must still be able to provide a legal basis for jurisdiction if it intends to prosecute. As the above analysis has demonstrated, there does not yet appear to be a customary exception to personal immunities before international courts. Without such, neither individual delegation nor collective conferral would provide a legal basis for ICC jurisdiction over an incumbent president from a state not party to the Rome Statute.

IV. IS DELEGATION OF JURISDICTION AFFECTED BY INTERNATIONAL AGREEMENTS?

This part explores whether bilateral agreements that provide procedural immunities for foreign nationals affect a state party’s delegable jurisdiction, and whether this in turn affects the legal basis for the ICC’s jurisdiction. Here, I use as examples two situations that are currently in the preliminary examination phase at the ICC: Afghanistan and Palestine. Both situations potentially involve nationals of non-party states, and both have unique legal issues that could have an impact upon delegation of jurisdiction as a legal basis for ICC prosecution.

65 For a discussion on whether there is a legal basis for ICC prosecution of sitting heads of state from non-party states in situations referred by the Security Council, see Chapter V.
A. The Situation in Afghanistan

Afghanistan ratified the Rome Statute in 2003, meaning that the ICC could exercise jurisdiction over crimes committed on Afghan territory any time after 1 May 2003. In the years since the 2001 US-led military intervention in Afghanistan, the country has been in a perpetual state of armed conflict. The Office of the Prosecutor considers the situation in Afghanistan to be ‘an armed conflict of a non-international character between the Afghan Government, supported by the ISAF and US forces on the one hand… and non-state armed groups, particularly the Taliban, on the other’. The ISAF is the International Security Assistance Force which has been under the control of the North Atlantic Treaty Organization (‘NATO’) since 2003. US forces have made up a significant proportion of foreigners operating in Afghanistan since the 2001 intervention, under both ISAF and US command.

In 2007 the ICC Prosecutor made public the fact that a preliminary examination was being conducted into the situation in Afghanistan. In November 2016 the Office of the Prosecutor reported that there is ‘a reasonable basis to believe’ that crimes within the jurisdiction of the Court had been committed on the territory of Afghanistan by Afghan government forces and members of the Taliban and associated networks. The Office also reported evidence that US military forces have committed ‘war crimes of torture and related ill-treatment’ on the territory of Afghanistan. If the Prosecutor seeks and receives Pre-Trial Chamber approval to open an investigation into this situation, US nationals would be subject to the Court’s jurisdiction, despite the fact that the US is not a state party to the Rome Statute. The main issue that affects whether or not there is a legal basis for ICC prosecution of US nationals is the existence of the SOFAs between the US and Afghanistan that give the US exclusive jurisdiction over its personnel. First, however, it is necessary to briefly discuss the relevance (or irrelevance) of Article 98(2) of the Rome Statute as it pertains to US nationals.

67 Ibid 44.
69 Ibid. The report also cited evidence of crimes associated with the situation in Afghanistan that were committed in secret detention facilities run by the US Central Intelligence Agency (‘CIA’) in Poland, Lithuania and Romania, which are all states parties to the Rome Statute. This part focuses on those crimes that were allegedly committed in Afghanistan by US nationals.
1. **Article 98 Agreements**

As discussed in Chapter II, during the Rome Statute negotiations the US was adamantly against the idea of an international criminal court exercising jurisdiction without the consent of the accused’s state of nationality.\(^{70}\) Fearing that more than a hundred thousand American troops stationed all over the world would be vulnerable to politically motivated prosecutions, the US insisted on the insertion of Article 98(2) in the Rome Statute. Article 98(2) provides that:

> The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

The term ‘sending state’ was intentionally included by American negotiators to specifically apply to official personnel covered by SOFAs and Status of Mission Agreements (‘SOMAs’).\(^{71}\) ‘Sending state’ is often used in SOFAs and refers to the state that has sent its forces on foreign missions.\(^{72}\)

During President George W Bush’s first term in office, US Congress passed the *American Servicemembers’ Protection Act*, designed to minimise, if not outright prevent, the possibility that the ICC could gain jurisdiction over members of the US Armed Forces. Section 2005 of that Act provides that:

> Members of the Armed Forces of the United States are able to participate in the peacekeeping or peace enforcement operation without risk of criminal prosecution or other assertion of jurisdiction by the International Criminal Court because each country in which members of the Armed Forces of the United States participating in the operation will be present … has entered into an agreement in accordance with Article 98 of the Rome Statute preventing the International Criminal Court from proceeding against members of the Armed Forces of the United States present in that country….

Between 2002 and 2006, the US concluded 100 bilateral agreements with foreign governments for the express purpose of ensuring that members of the US Armed Forces

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\(^{72}\) Ibid 339.

would not be surrendered to the ICC without US consent. These agreements invariably became known as ‘Article 98 agreements’ or ‘bilateral non-surrender agreements’ and, somewhat erroneously, ‘bilateral immunity agreements’. Reading the excerpt cited above from the American Servicemembers’ Protection Act, it appears that the US legislature intended that Article 98 agreements would prevent the ICC from asserting jurisdiction or ‘proceeding against’ members of the US Armed Forces. In actual fact, Article 98(2) has the same legal effect as Article 98(1) discussed above in Part III with respect to ICC jurisdiction over heads of state. Article 98(2) merely prevents the ICC from proceeding with a request for a surrender, and does not mean that persons subject to an Article 98 agreement are immune from the jurisdiction of the ICC. The US concluded an Article 98 agreement with Afghanistan in 2002, essentially stipulating that Afghanistan would not surrender US nationals to the ICC without the consent of the US government. The effect of this agreement, in conjunction with Article 98(2), means that the ICC cannot request Afghanistan’s cooperation in any future cases against US nationals for crimes they are accused of committing on Afghan territory. This state of affairs does not have any bearing on whether the ICC has jurisdiction, and if the ICC were able to somehow gain custody of

74 In many of these agreements, the US purported to include government officials, employees and contractors, military personnel and even nationals as a blanket category of people subject to the agreement’s provisions. David Scheffer argues that this goes beyond what Article 98(2) was intended to cover, namely personnel subject to a SOFA or SOMA: Scheffer, above n 71, 339. Those Article 98 Agreements that are publically available can be found at Georgetown Law Library website: Georgetown Law Library, International Criminal Court – Article 98 Agreements Research Guide (31 January 2017) <http://guides.ll.georgetown.edu/article_98>.


76 Agreement between the Government of the Transitional Islamic State of Afghanistan and the Government of the United States of America regarding the surrender of persons to the International Criminal Court (20 September 2002).

77 Arguably, Article 98 would also prevent the ICC from requesting that another state party arrest and surrender a US national to the Court if the custodial state is also party to an Article 98 agreement with the US. For example, if a US national who is wanted by the ICC in conjunction with crimes committed in Afghanistan were to travel to Bangladesh, another state party to the Rome Statute, the fact that Bangladesh has an Article 98 agreement with the US would likely preclude the ICC from requesting that Bangladesh arrest and surrender the US suspect. Given that standard Article 98 agreements cover a wide range of persons and not just those on a country-specific mission, it would seem that a US suspect who was travelling in Bangladesh on vacation would nevertheless be covered by the US-Bangladesh Article 98 Agreement, and the ICC would be unable to request his or her surrender.
accused US nationals, jurisdiction over them is not necessarily precluded. While Article 98 agreements do not affect the ICC’s jurisdiction, the situation may be different where SOFAs are in effect.

2. Can Afghanistan Delegate Jurisdiction in Light of the US-Afghanistan SOFAs?

Since 2002, there have been a number of SOFAs in place to regulate the status of US forces in Afghanistan. Each agreement specifically provides that the US retains the exclusive right to exercise jurisdiction over members of the US armed forces and associated civilian personnel for any criminal or civil offences committed on the territory of Afghanistan. In light of these SOFA provisions, it raises the question: if a case against US soldiers for crimes committed in Afghanistan came before the ICC, would there be a legal basis for the Court to exercise jurisdiction? To simplify this analysis I will refer to the bilateral security agreement between Afghanistan and the US as ‘the SOFA’.

(a) The Incompatibility of the Rome Statute and the SOFA

In agreeing to be bound by the SOFA, Afghanistan has relinquished its right to prosecute US soldiers for crimes committed on its territory. The practical effect of this is that Afghanistan does not have domestic judicial jurisdiction over US soldiers, and Afghanistan’s ratification of the Rome Statute does not change this. First, in accordance with Article 98(2) of the Rome Statute, the ICC cannot oblige Afghanistan to arrest and surrender an indicted US soldier to the Court. The existence of the SOFA and an Article 98 agreement prevents the ICC from making such a request, because to arrest and surrender a

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80 See, eg Article 13(1) of the bilateral security agreement and Article 11(1) of the NATO SOFA. As a matter of customary international law, members of the armed forces stationed in foreign countries enjoy functional immunity from prosecution in foreign jurisdictions. They do not enjoy personal immunity as a matter of custom, but SOFAs and other bilateral arrangements often provide for such. See generally, Aurel Sari, ‘The Status of Armed Forces in Public International Law: Jurisdiction and Immunity’ in Alexander Orakhelashvili (ed), Research Handbook on Jurisdiction and Immunities in International Law (Edward Elgar Publishing, 2015) 319.
US soldier would require Afghanistan to act ‘inconsistently with its obligations under international agreements’.\(^81\)

Second, under the principle of complementarity, Afghanistan would usually have priority over the ICC to prosecute US nationals for crimes committed on its territory. Article 17(1) provides that a case would be inadmissible before the ICC if it ‘is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution’. Courtesy of the SOFA, Afghanistan no longer has jurisdiction over such a case against US soldiers, therefore it cannot lawfully prosecute in this situation. Alternatively, the ICC may view Afghanistan’s SOFA obligations as an issue of unwillingness or inability to investigate and prosecute and the case would remain admissible before the ICC.\(^82\) However the Court interprets the admissibility threshold, neither Article 17(1) nor Article 98(2) would require Afghanistan to exercise jurisdiction over US soldiers in contravention of the SOFA. But the fact that US soldiers remain procedurally immune from Afghanistan’s jurisdiction is not necessarily sufficient to ensure Afghanistan’s compliance with the SOFA.

As mentioned above, Afghanistan has agreed that the US retains exclusive jurisdiction over US soldiers for crimes committed on Afghan territory. This is broader than simply promising that Afghanistan will not exercise its jurisdiction, and arguably exclusive jurisdiction is not something that can be decided in a bilateral treaty. For example, this agreement would have no effect on a third state purporting to exercise jurisdiction over US nationals for crimes committed in Afghanistan under the principles of universality or passive personality.\(^83\) Nevertheless, by ratifying the Rome Statute, Afghanistan has agreed

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81 This would stand even if there was not a separate Article 98 non-surrender agreement in place between the US and Afghanistan. Arguably, such an agreement was superfluous given the existing arrangement under the SOFAs which denies Afghanistan any jurisdiction over US nationals, which would include jurisdiction to arrest and surrender to the ICC.

82 Under Article 17(1) the US would also be considered a state with primacy of jurisdiction. The US claims to have conducted thousands of investigations into allegations of detainee abuse by American military personnel since 2001, and asserts that more than 70 investigations of detainee abuse in Afghanistan resulted in courts martial: US Department of State, One-Year Follow-Up Response of the United States of America to Recommendations of the Committee Against Torture on its Combined Third to Fifth Periodic Reports (27 November 2015) [31]. However, the ICC Office of the Prosecutor has disputed this figure, contending that only seven of the courts martial proceedings were actually for conduct in Afghanistan, the majority were for abuse that occurred in Iraq: Office of the Prosecutor, Report on Preliminary Examination Activities (2016) (International Criminal Court, 14 November 2016) 49-50.

83 This argument was raised when the US attempted to ensure that UN peacekeepers were subject to the state of nationality’s exclusive jurisdiction in Security Council Resolution 1497: Statement of the Representative of Germany, UN SCOR, 58th year, 4803rd mtg, UN Doc S/PV.4803 (1 August 2003) 4. See Chapter V(III)(B). See also, Mario Luiz Logano v Italy [Italian Supreme Court of Cassation] Judgment No 31171/2008, 24 July 2008, discussed in Aurel Sari, ‘The Status of Foreign Armed Forces Deployed in Post-Conflict Environments:
that the ICC may have jurisdiction over crimes committed on Afghan territory. Nothing in the Statute allows for an exception to ICC jurisdiction in circumstances where the territorial state has restricted its own jurisdiction through a bilateral treaty. Article 120 of the Statute specifically prohibits states parties from making reservations to the treaty, meaning that when Afghanistan ratified the Statute, there was no option for carving out an exception for ICC jurisdiction over US soldiers because of the SOFA. By agreeing to be bound by the Rome Statute, Afghanistan has, for all intents and purposes, provided the ICC with jurisdiction over US soldiers for crimes committed on its territory. This appears to conflict with Afghanistan’s promise under the SOFA that the US shall retain exclusive jurisdiction over its nationals. But does the existence of this conflict mean that there is no legal basis for the ICC’s jurisdiction over US soldiers in Afghanistan?

(b) Does Delegation of Jurisdiction Provide a Legal Basis for ICC Jurisdiction over US Soldiers?

Under the SOFA, Afghanistan does not have jurisdiction over US soldiers, and it is technically an accurate assessment to conclude that there is no legal basis for ICC jurisdiction over US nationals in this situation because Afghanistan cannot delegate what it does not have. The problem with viewing a state’s delegable jurisdiction as modifiable by bilateral or multilateral treaties is that the ICC would be in the untenable position of having to ensure that the relevant territorial state or state of nationality has lawfully delegated its jurisdiction, not just in accordance with the Statute, but in relation to any other jurisdictional agreements that the state has concluded.

Article 19(1) of the Statute provides that ‘[t]he Court shall satisfy itself that it has jurisdiction in any case brought before it’. This is a statutory recognition of the principle of compétence de la compétence which gives international courts the inherent power to determine the extent of their own jurisdiction. In theory, this means that the Court could consider whether the US-Afghanistan SOFA has limited Afghanistan’s delegation of jurisdiction to

A Search for Basic Principles’ in Carsten Stahn, Jennifer S Easterday and Jens Iverson (eds), Jus Post Bellum: Mapping the Normative Foundations (Oxford University Press, 2014) 467, 492–495. In this case, the Italian Court of Cassation held that it had jurisdiction under the principle of passive personality to prosecute a US soldier (in absentia) for killing an Italian military intelligence officer in Iraq, notwithstanding the fact that the NATO SOFA gives sending states exclusive jurisdiction over their nationals. The Court held that the provision of such immunity only applies vertically between the sending and receiving states, not horizontally between two sending states.

the ICC in deciding whether the Court has jurisdiction over US soldiers accused of committing crimes in Afghanistan. While reviewing the SOFA for the purposes of determining its own jurisdiction would most likely be within the Court’s *compétence de la compétence*, it is unlikely, however, that such action would be necessary. As Sarooshi argues:

> [T]here cannot be a presumption that [a] treaty is to be applied in a different way to member States depending on their domestic public or administrative law systems and the way in which the conferred governmental power or an analogous power is treated under these various systems.\(^8\)

In the same way that it would be unsustainable for the *lex loci* to affect the delegable jurisdiction of states parties, it would be incongruous for the ICC to have to consider treaty limitations on the delegable jurisdiction of states parties. To require the ICC to do so would mean that the Court would be obliged to apply the Rome Statute very differently in each territorial situation in deference to the various ways that states parties have limited the jurisdiction of their own courts vis-à-vis nationals of non-party states.\(^6\) As such, the existence of the SOFA between Afghanistan and the US should not affect the legal basis for the ICC’s jurisdiction.

Afghanistan is free to enter into bilateral agreements that restrict its domestic jurisdiction, but it is also free to unilaterally withdraw from such agreements, and this fact distinguishes the SOFA immunity issue from the head of state immunity issue discussed in Part III. Immunity for incumbent foreign heads of state is a universally recognised doctrine of customary international law and it is not possible for states to delegate jurisdiction over foreign heads of state to the ICC because they do not possess such jurisdiction in their individual capacity. Conversely, states do possess the individual capacity to exercise jurisdiction over other foreign nationals for crimes committed on their territory. This may be limited on an *ad hoc* basis through international agreements, but as argued above, it would be unsustainable for the ICC to take every variance of every state party’s jurisdiction into account when considering the legal basis for its own jurisdiction. The doctrine of head


\(^6\) For example, Poland has a SOFA with the US which recognises Poland’s ‘primary right’ to exercise criminal jurisdiction in its territory. The US may request a waiver of Poland’s jurisdiction over its nationals, but unlike Afghanistan, Poland has not agreed to give the US ‘exclusive jurisdiction’ over its soldiers: *Agreement between the United States of America and Poland* (signed 11 December 2009, entered into force 31 March 2010) Article 13. For the ICC to take such bilateral jurisdictional arrangements into account would result in a state of affairs where the Court would not have jurisdiction over US nationals accused of Statute crimes in Afghanistan, but it would have jurisdiction over US nationals accused of Statute crimes in Poland. Considering that the ICC Prosecutor has evidence of crimes committed by the CIA in Poland as part of the situation in Afghanistan (see fn 69), taking the SOFAs into account would lead to an absurd jurisdictional outcome for the ICC.
of state immunity, on the other hand, applies to every state and there is at present no customary exception to this before international courts. As a result, it would be straightforward for the ICC to read down the Article 27(2) rejection of immunities ‘under national or international law’, as restricted to immunities under national law or international agreements. 87

Afghanistan’s decision to enter into the SOFA and to voluntarily restrict its own jurisdiction by bestowing procedural immunity on US soldiers was a quintessential sovereign act. Ratifying the Rome Statute and agreeing to the jurisdiction of the ICC over Afghan territory was also a sovereign act. The consequences of entering into conflicting agreements are therefore a matter for Afghanistan, not the ICC.

(c) Resolving the Conflict Between the Statute and the SOFA

By virtue of its ratification of the Rome Statute, Afghanistan is obliged to delegate, without reservation, its territorial (and nationality) jurisdiction to the ICC. Under the SOFAs, Afghanistan is obliged to respect the exclusive jurisdiction of the US over its nationals. These two obligations appear irreconcilable, which mean Afghanistan is facing a classic treaty conflict. 88 It is far beyond the scope of this thesis to explore how the complex doctrine of treaty conflict might apply to the Afghanistan situation. 89 In cases like this one where there is no commonality of parties, 90 it is sufficient to acknowledge that ‘neither the VCLT nor the customary canons of treaty construction offer a ready solution to such conflicts’. 91 It may be that Afghanistan has essentially resorted to the principle of political decision, having chosen to honour its obligation under the Rome Statute over its promise to the US under the SOFAs. 92 The irreconcilable conflict is ultimately Afghanistan’s issue to resolve, not the ICC’s. As long as Afghanistan remains a party to the Rome Statute, the

87 See above, Part III(B)(2).
89 For a comprehensive treatment on the law of treaty conflict, see generally Jan Klabbers, Treaty Conflict and the European Union (Cambridge University Press, 2009); See also, Anthony Aust, Modern Treaty Law and Practice (Cambridge University Press, 2007) 192–204.
90 This is the case for the Rome Statute and the US-Afghanistan bilateral security agreement (above n 79). Afghanistan is the only party to both treaties.
91 Borgen, above n 88, 456. This difficulty is likely compounded by the special nature of the Rome Statute as the constituent treaty of an international organisation.
92 Klabbers describes the principle of political decision as applying where ‘the state concerned simply has to make a political decision which commitment to prefer’. See Klabbers, above n 89, 88–100.
ICC can exercise jurisdiction over acts committed by US soldiers on the territory of Afghanistan on the basis of delegated jurisdiction.

B. The Situation in Palestine

The ICC’s consideration of the Palestine situation began in January 2009 when the Palestinian National Authority lodged an Article 12(3) declaration accepting the jurisdiction of the ICC over ‘acts committed on the territory of Palestine since 1 July 2002’. The Prosecutor opened a preliminary examination but eventually decided that Palestine could not be considered a state for the purposes of Article 12(3), and therefore was unable to accept the jurisdiction of the ICC. The Prosecutor reasoned that the ‘competence for determining the term “State” within the meaning of article 12 rests, in the first instance with the United Nations Secretary General who, in case of doubt, will defer to the guidance of [the] General Assembly’.

In November 2012, the UN General Assembly elevated Palestine from observer to ‘non-member observer State status at the United Nations’ in a resolution that was adopted by 138 votes in favour, with 9 against and 41 abstentions. In 2014, the Office of the Prosecutor released a statement acknowledging the General Assembly resolution as sufficient recognition of Palestinian statehood for the purposes of the ICC. The Prosecutor declared that Palestine could accede to the Statute or lodge another Article 12(3) declaration and the Court would potentially be able to exercise jurisdiction over crimes committed on Palestinian territory after 29 November 2012. On 1 January 2015, Palestine lodged a declaration under Article 12(3) accepting the jurisdiction of the ICC over crimes allegedly committed ‘in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014’. The following day Palestine acceded to the Rome Statute, and two weeks later the Office of the Prosecutor announced that it would be opening a preliminary

93 Palestinian National Authority, Declaration recognizing the Jurisdiction of the International Criminal Court (21 January 2009).
94 Office of the Prosecutor, ‘Situation in Palestine’ (Statement, 3 April 2012) [5].
97 Ibid.
examination into crimes committed in the territory during the time period specified by Palestine in its declaration. Crimes are alleged to have been committed by both Palestinian and Israeli nationals. Israel is not a state party to the Rome Statute.

Should the Prosecutor receive authorisation to open an investigation into this situation and to pursue active cases against Israeli nationals, two potential issues may arise with respect to delegation of jurisdiction as the legal basis for such action. The first relates to the question of Palestine’s statehood and the extent of its delegable jurisdiction. The second issue concerns the ability of Palestine to delegate jurisdiction in light of certain immunities provided under the Oslo Accords.

1. The Question of Statehood and Delegable Jurisdiction

Despite the General Assembly resolution and Palestine’s subsequent accession to the Rome Statute, there are still some who doubt whether Palestine is really a state in the traditional sense, with the full gamut of sovereign powers. As it stands, 137 states recognise the state of Palestine, and the Palestinian government has joined numerous international organisations either as a member or an observer. Palestine has not, however, been able to secure a recommendation from the Security Council which is required for admission to the UN as a member state. And as David Luban has observed, ‘the Palestinian effort to bootstrap itself into statehood by joining international organisations backhandedly concedes that its statehood claim needs buttressing’.

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101 The Palestine/Israel situation is extraordinarily complex and while I recognise that there are myriad political and legal issues that would undoubtedly arise in the course of any ICC investigation, this part is necessarily limited to a broad brush strokes account of the situation.


104 For example, Palestine is a member of the Arab League, the Group of 77 and the United Nations Educational, Cultural and Scientific Organisation.

105 Palestine has observer status at the World Health Organisation, the Universal Postal Union and the International Telecommunications Union, among others.

or is not a state does not fall within the scope of this thesis.\textsuperscript{107} It is, however, necessary to acknowledge that some ambiguity remains with respect to Palestinian statehood.\textsuperscript{108} By becoming a non-member observer state at the UN, Palestine met the statehood threshold criterion set by the ICC Prosecutor for the purposes of acceding to the Rome Statute, but its uncertain status beyond the ICC may nevertheless have implications for Palestine’s ability to delegate jurisdiction.\textsuperscript{109}

Given that sovereign jurisdiction is the right under international law of a state to exercise certain of its sovereign powers,\textsuperscript{110} the question arises as to whether Palestine possesses sufficient sovereign powers to delegate. In particular, can Palestine empower the ICC to prosecute Israeli nationals on the basis of delegated jurisdiction? As James Crawford points out:

\begin{quote}
[O]nce a state is generally recognised—evidenced most obviously by admission to the United Nations—then a new situation arises, a category divide is established, marked by the legal category of statehood. The new state is ‘sovereign’, has ‘sovereignty’; and this is true, no matter how fragile its condition, how diminutive its resources.\textsuperscript{111}
\end{quote}

If Palestine is considered a state, then it is sovereign and possesses sovereign powers of criminal justice exercisable under international law over foreign nationals for crimes committed on Palestinian territory.\textsuperscript{112} Such jurisdiction would be delegable to the ICC, and would provide the basis for the Court to lawfully prosecute Israeli nationals for crimes committed on the territory of Palestine. Even assuming Palestinian statehood, however,


\textsuperscript{110} See Part IV of Chapter III.


there is another legal issue that could potentially affect Palestine’s ability to delegate jurisdiction to the ICC: the existence of the Oslo Accords.

2. **Restriction of Palestine’s Judicial Jurisdiction**

(a) **The Oslo Accords**

The Oslo Accords comprise two agreements between the government of Israel and the Palestine Liberation Organisation (‘PLO’), concluded in 1993 and 1995 respectively.\(^{113}\) The Accords are considered the ‘cornerstone’ of the peace process.\(^{114}\) They created the Palestinian Authority and Oslo II divided the West Bank into three areas: Area A, over which Palestinians were to be given full control; Area B, which would give Palestinians control over civilian matters and Palestine and Israel joint control over security matters; and Area C, over which Israel has full control. Of particular relevance for the question of Palestine’s ability to delegate jurisdiction to the ICC is the Protocol Concerning Legal Affairs. This is contained in Annex IV to Oslo II and provides that Israel has sole criminal jurisdiction over offences committed by Israelis in all Areas of the West Bank and in the Gaza Strip.\(^{115}\)

Politically, the Oslo Accords are essentially defunct, but their provisions continue to regulate daily life in the Palestinian territories despite some recent attempts to disregard them.\(^{116}\) For example, shortly after Palestine’s accession to the Rome Statute, a judge in the criminal department of the Jenin Magistrates Court in the West Bank declared that the Oslo Accords were no longer in effect, meaning that Israeli nationals were no longer exempt from prosecution in Palestinian courts.\(^{117}\) Less than a week after this decision, the judge was transferred out of the criminal division of the Jenin court, with the Palestinian

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\(^{113}\) Declaration of Principles on Interim Self-Government Arrangements, Palestine Liberation Organisation—Israel (13 September 1993); Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Palestinian Liberation Organisation—Israel (28 September 1995) (‘Oslo I’ and ‘Oslo II’).


\(^{115}\) Art I(2)(b).


\(^{117}\) Nasouh Nazzal, ‘Jenin judge reassigned over unilateral move’ *Gulf News* (19 January 2015); ‘In the Name of the Palestinian People: Court Abrogates Oslo Accords’ *The Legal Agenda* (24 February 2015).
High Judicial Council releasing a statement affirming that the continuing validity of the Oslo Accords ‘is a political matter to be decided by the Palestinian leadership, not a judicial body of any form’.\footnote{118}{In the Name of the Palestinian People: Court Abrogates Oslo Accords’ The Legal Agenda (24 February 2015), citing Jenin Magistrates Court, case 855, 11 January 2015 [trans].}

Nine months later, ‘the Palestinian leadership’ set out the political position on the issue. In his speech to the UN General Assembly in September 2015, Palestinian President Mahmoud Abbas declared that Palestinians were no longer bound by the terms of the Oslo Accords.\footnote{119}{Permanent Observer Mission of the State of Palestine to the United Nations, ‘Statement by HE Mr Mahmoud Abbas President of the State of Palestine at the General Debate of the United Nations General Assembly at its 70th Session’ (30 September 2015).} But his declaration has not been followed by any implementing measures, and observers remain sceptical that Abbas will implement the ‘concrete action’ needed to truly dismantle the systems put in place by the Oslo Accords.\footnote{120}{Rick Gladstone and Jodi Rudoren, ‘Mahmoud Abbas, at UN, Says Palestinians Are No Longer Bound by Oslo Accords’ The New York Times (30 September 2015).} As such, the Protocol Concerning Legal Affairs remains applicable and Israeli nationals continue to be immune from prosecution in Palestinian courts, even for crimes committed on Palestinian territory.

(b) Does Delegation of Jurisdiction Provide a Legal Basis for ICC Jurisdiction over Israeli Nationals?

The circumstances of Palestine and Oslo II are similar to the situation with Afghanistan and the SOFA discussed above. Both Palestine and Afghanistan have entered into agreements that provide procedural immunity to certain foreign nationals. But unlike the SOFA, the Oslo Accords are arguably not treaties in the traditional sense because they were not concluded between states.\footnote{121}{Aust, above n 89, 58–59; Watson, above n 114, 57–74.} At best, the PLO could be considered a non-state subject of international law, meaning that the Oslo Accords still have binding force between the two parties.\footnote{122}{Watson, above n 114, 91–102. See Article 3 VCLT.} Complicating the status of the Accords further is the fact that they were concluded by the PLO, which has essentially been succeeded by the Palestinian Authority as the main governing body of the state of Palestine.\footnote{123}{Yaël Ronen, ‘Israel, Palestine and the ICC — Territory Uncharted but Not Unknown’ (2014) 12(1) Journal of International Criminal Justice 7, 23.}
Assuming, for the purposes of this analysis, that Oslo II remains in effect between Palestine and Israel, it does not affect the sovereign ability of Palestine to delegate its jurisdiction to the ICC. By ratifying the Rome Statute, however, Palestine has created a conflict between its obligations to delegate territorial jurisdiction to the ICC without reservation and its obligations to provide procedural immunity to Israeli nationals. As with the Afghanistan-US situation, Palestine’s choice to restrict its own judicial jurisdiction should not affect the ICC’s jurisdiction. The ICC operates on the assumption that states parties are validly delegating jurisdiction in accordance with the Rome Statute. To assume otherwise would create an untenable onus on the Court to review a state party’s international agreements to ensure there are no restrictions on its delegable jurisdiction. More importantly it would significantly impair the uniform application of the ICC’s jurisdiction provisions to states parties.

Ultimately, Palestine has made a political decision to delegate jurisdiction to the ICC. Whether this is in contravention of Oslo II depends on whether Palestine still considers itself bound by the Accords. In any event, any irreconcilable conflict between Palestine and Israel about delegation of territorial jurisdiction is Palestine’s issue to resolve, not the ICC’s. As long as Palestine can be considered a state under international law, it can delegate jurisdiction to the ICC, and the ICC’s jurisdiction is not affected by the Oslo Accords.

V. CONCLUSION

Under the Rome Statute, the ICC may exercise its jurisdiction over nationals of non-party states for crimes committed on the territory of states parties. There are no allowances in the Statute for variations to this by way of immunities or other jurisdictional limitations. In ratifying the Rome Statute, a state is delegating jurisdiction to the ICC on the understanding that the Court will act in accordance with the preconditions and jurisdictional provisions contained in the Statute. It would be somewhat antithetical if the existence of a treaty limiting the exercise of domestic judicial jurisdiction over particular

124 For alternative arguments as to why the Oslo Accords do not affect Palestine’s ability to delegate jurisdiction to the ICC, see ibid 21–24.

persons could then also further limit the jurisdiction of the ICC. The ICC is not an agent of any individual state party, and it therefore would be incongruous for a state’s decision to enter into international agreements to impede the ICC’s jurisdiction.

Delegation of jurisdiction does not, however, provide the Court with a legal basis for jurisdiction over incumbent heads of state and other senior officials from non-party states. Such individuals are likely to be able to continue to rely on their personal immunity as a procedural bar to ICC jurisdiction, despite the existence of Article 27(2). Given that head of state immunity is a rule of customary international law, it is likewise a matter for custom to provide exceptions to such immunity (unless a state has agreed to the waiver of its own head of state immunity by virtue of its ratification of the Statute).

In summary, where a situation is referred to the ICC by states parties or an investigation is initiated by the Prosecutor, delegation of jurisdiction provides the Court with a legal basis to prosecute nationals of non-party states for crimes committed on the territory of a state party. The only exception to this is where the accused non-party national is an incumbent head of state. In the next chapter I explore the legal basis for ICC jurisdiction over nationals of non-party states in situations referred to the Court by the Security Council.
CHAPTER V

THE UN SECURITY COUNCIL, THE ICC AND NATIONALS OF NON-PARTY STATES

I. INTRODUCTION

The previous chapter focused almost exclusively on situations in which the ICC’s jurisdiction is triggered by a state party referral or by the initiation of an investigation by the Prosecutor. This chapter turns to examine the role of the UN Security Council in both activating and limiting the jurisdiction of the Court, particularly as it relates to nationals of non-party states.

The Preamble of the Rome Statute recognises that the crimes within the jurisdiction of the ICC ‘threaten the peace, security and well-being of the world’. The maintenance of international peace and security is the raison d’être of the UN, and the primary responsibility of the Security Council. The drafters of the Rome Statute recognised this potential overlap between the ICC’s mandate and the UN’s, and worked to ensure it would result in collaboration rather than conflict. There are references throughout the Rome Statute to the UN and in 2004 the two institutions concluded the Negotiated Relationship Agreement between the International Criminal Court and the United Nations (‘ICC-UN Relationship Agreement’) in which the UN and the ICC agreed to ‘respect each other’s status and mandate’ and to cooperate on matters of mutual concern. There are no circumstances in which this need for respect and cooperation is more important than the relationship between the ICC and the UN Security Council.

As mentioned above, and in previous chapters, the Rome Statute provides the Security Council with two significant avenues of intervention into the Court’s processes. The first is in Article 13(b) which gives the Council the power to trigger the Court’s jurisdiction over a particular situation, and the second is in Article 16 which allows the Council to defer an investigation or prosecution for 12 months at a time. Both provisions stipulate that the Security Council must be acting under Chapter VII of the UN Charter when taking such

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1 UN Charter, Articles 1 and 24.
2 See, eg, Rome Statute, Articles 2; 8(b)(ii); 115(b); 121; 125.
actions as recognised by the Rome Statute. Chapter VII of the Charter sets out the measures that the Council may authorise ‘with respect to threats of the peace, breaches of the peace and acts of aggression’.\(^4\) Under Article 25 of the Charter, the Council’s decisions are binding on UN member states. Decisions are made by an affirmative vote of at least nine of the 15 Council members, as long as none of the permanent five members have used their veto.\(^5\)

Of particular relevance to this thesis are the issues that arise when, in exercising its referral powers under the Rome Statute, the Security Council affects the jurisdiction of the ICC over nationals of non-party states. Article 13(b) of the Statute is not subject to the territorial limit that applies to the other two Article 13 trigger mechanisms, meaning that the Council can extend the jurisdiction of the ICC to crimes committed on the territory of non-party states. Conversely, the Council has attempted to exempt nationals of non-party states from the jurisdiction of the Court using both the referral and deferral powers. This chapter explores the parameters of the Security Council’s powers in Article 13(b) and Article 16 of the Statute and examines how the Council has utilised these powers in practice. Despite the existence of the ICC-UN Relationship Agreement, the ‘partly overlapping mandates’ of the Court and the Security Council have caused some tensions between the two.\(^6\) The aim of this chapter is to examine the validity of some of the actions the Security Council has taken since the Statute entered into force, as well as to analyse the legal basis for ICC jurisdiction over Council-referred situations in non-party states. While delegation of jurisdiction provides a legal basis for the ICC’s authority in situations where either the territorial state or the state of nationality are parties to the Rome Statute, it is not sufficient for situations involving non-party states that are referred to the Court by the Security Council. I argue that the legal basis for the ICC’s jurisdiction in such Council-referred situations nevertheless remains anchored in the consent of the territorial state, implied by virtue of that state’s membership of the UN and its obligations under the UN Charter.

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\(^4\) UN Charter, Article 39.

\(^5\) UN Charter, Article 27. Of the permanent members, France and the UK are also states parties to the Rome Statute. China, Russia and the US remain staunchly opposed to ratifying the Rome Statute.

Part II of this chapter provides a brief overview of the negotiations for a permanent international criminal court in which delegates waxed and waned on the powers to be granted to the Security Council under the draft Statute. The rest of this chapter then focuses on each of the different roles given to the Council; beginning in Part III with the Article 16 power of deferral which was invoked by the Council almost immediately after the Statute’s entry into force. In this part I canvass the Council’s early attempts to shield nationals of non-party states from the jurisdiction of the Court, arguing that such action is a misuse of the Council’s power under the Statute.

In Part IV, I focus on the Security Council’s role in referring situations to the ICC under Article 13(b) of the Rome Statute. Using the situations in Sudan and Libya, I argue that these states have implicitly consented to the jurisdiction of the Court over their nationals by virtue of their membership of the UN. In this part, I also touch upon whether the Council’s power to refer situations to the ICC is intra or ultra vires the UN Charter and the effect that this would have on the legal basis for the ICC’s jurisdiction.

In the final substantive part of this chapter, I turn to discuss the role to be played by the Security Council in the Court’s future jurisdiction over the crime of aggression. The 2010 Kampala Amendments provide the Council with an additional (albeit limited) role in determining the existence of an act of aggression, and the amendments also raise some further questions about the Court’s jurisdiction over non-party states and non-consenting states parties.

II. THE ROLE OF THE SECURITY COUNCIL IN THE ROME STATUTE

What role the Security Council should play with respect to the ICC was a question that plagued the various preparatory committees tasked with drafting a statute for a permanent international criminal court. Early on, the ILC envisioned a relatively minor role for the Security Council. The only power allocated to the Council under the 1991 Draft Code of Crimes against the Peace and Security of Mankind was the ability to override any prima facie determination by the court that an act of aggression had been committed. Such a limited

7 Amendments on the crime of aggression to the Rome Statute of the International Criminal Court, Resolution RC/Res.6, adopted at the 13th plenary mtg (11 June 2010) (‘Kampala Amendments’).

role for the Security Council reflected the prevailing view at the time that the maintenance of international peace and security was incompatible with judicial criminal proceedings.\textsuperscript{9} This attitude changed markedly after the Council’s establishment of the \textit{ad hoc} criminal tribunals in 1993 and 1994, with the ILC’s 1994 Draft Statute for an International Criminal Court incorporating a much greater role for the Security Council. Importantly, the 1994 Draft Statute provided that the Council may, acting under Chapter VII of the UN Charter, refer a matter involving any state to the court (as opposed to matters involving only states parties to the proposed statute).\textsuperscript{10} The rationale behind giving the Security Council broad referral power was to provide an alternative to establishing any more \textit{ad hoc} tribunals.\textsuperscript{11} In addition to the referral power, the Draft Statute stipulated that the Council would have sole authority to determine the existence of an act of aggression. Furthermore, the court would be precluded from initiating a prosecution if the situation under investigation was simultaneously ‘being dealt with’ by the Security Council under Chapter VII.\textsuperscript{12} This last provision was particularly contentious considering it essentially would have given the Security Council the power to prevent the commencement of court proceedings.\textsuperscript{13}

In 1995 the UN General Assembly set up the \textit{Ad Hoc Committee} on the Establishment of an International Criminal Court which continued to deliberate on the role of the Security Council. Several delegations expressed ‘serious reservations’ about the powers granted to the Council under the Draft Statute.\textsuperscript{14} They argued that giving the Security Council total authority over the crime of aggression and the power to block commencement of proceedings would undermine the credibility, independence and impartiality of the court.\textsuperscript{15} From 1996 until the Rome Conference in 1998, the discussions continued in the Preparatory Committee, and questions surrounding the role of the Security Council


\textsuperscript{12} 1994 Draft Statute, Articles 23(2) and (3).


\textsuperscript{14} Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN GAOR, 50\textsuperscript{th} Sess, Supp No 22, UN Doc A/50/22 (1995) 27.

\textsuperscript{15} Ibid, 27-28.
remained highly contentious. At Rome, there was resolute opposition from a small group of delegates who objected to any involvement of the Security Council whatsoever, but the compromise reached in the final hours of the conference cemented the relationship between the Council and the new court.

The final text of the Rome Statute provides two avenues for Security Council involvement with the Court. Article 13(b) gives the Council the ability to refer situations to the ICC, regardless of whether the situation involves states not party to the Rome Statute. Because of the nature of the referral power as potentially extending the jurisdiction of the Court, it has become known as the ‘positive pillar’ of the Council’s relationship with the Court. Under Article 16 of the Statute, the Security Council has the power to defer an ICC investigation or prosecution for 12 months at a time. The deferral power is, conversely, known as the ‘negative pillar’ because it provides the Security Council with an ostensibly broad power that could significantly curtail the activities of the Court.

Given the outwardly hostile position taken by the US towards the ICC in the early years of the Court’s establishment, there was little expectation that the Security Council would be cooperating with the ICC any time soon after its establishment. Yet in the first decade of the Court’s operation, the Security Council invoked both its referral and deferral powers in ways that were not anticipated by the Statute’s drafters. In particular, Court watchers and commentators did not foresee the Security Council’s attempts to restrict the Court’s jurisdiction over nationals of non-party states by invoking Article 16. The following parts explore the legal parameters of the Security Council’s role under Articles 16 and 13(b) with a focus on how it affects the legal basis for the ICC’s jurisdiction over nationals of non-party states.

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17 Triffterer, above n 11, 695.


19 Berman, above n 18; Ruiz Verduzco, above n 9, 30.

20 See Part II(B) of Chapter II.

21 White and Cryer, above n 6, 466.

22 Ibid.
III. THE NEGATIVE PILLAR: EXCLUDING JURISDICTION

In this part I examine the power of the Security Council to defer ICC prosecutions under Article 16 as well as the creative ways in which the Council has actually deployed Article 16 in an attempt to limit the jurisdiction of the Court. I also explore whether the Security Council can lawfully exempt certain non-party nationals from the jurisdiction of the ICC simply by invoking Chapter VII of the UN Charter.

A. Article 16: The Deferral Power

Article 16 provides that

[n]o investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Article 16 came about as an alternative proposal to the suggestion in the 1994 ILC Draft Statute that the Security Council should have the ability to prevent the Court from proceeding with a prosecution if the Council was already dealing with the matter.23 Article 16 differs from the proposal first made in the Draft Statute in two important aspects. The first is that Article 16 puts the onus on the Security Council to make a request under Chapter VII of the Charter if the Council wants to prevent or halt ICC proceedings for the sake of international peace and security. This means that it must adopt a resolution with the affirmative vote of nine Council members and there must be no veto from any of the permanent five. This mechanism is designed to stop any one of the permanent members from being able to disingenuously interfere with ICC proceedings.24 The second difference between Article 16 and the proposed provision in the ILC Draft Statute is that Article 16 provides a time limit on the deferral request. Again, the onus is on the Security Council to reassess the situation every 12 months and adopt another Chapter VII resolution to keep the matter out of the ICC’s jurisdiction.

23 UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Court, Draft Statute for the International Criminal Court, UN Doc A/CONF.183/2/Add.1 (14 April 1998) Article 5. The original proposal was in Article 23(3) of the 1994 ILC Draft Statute.

Critics have suggested that without a limit on the number of times a deferral resolution can be adopted under Article 16, the Council could prevent an ICC investigation or prosecution from proceeding indefinitely.\(^2^5\) This is theoretically true but the fact that the Council must reconsider the deferral every 12 months, and adopt a new resolution if it wants the stay to continue, means that the odds of an indefinite deferral are significantly decreased. The Council is a political body subject to the ever-changing dynamics of international relations, meaning that the political will for ongoing deferrals will fluctuate. Furthermore, of the permanent five members, France and the UK are also states parties to the Rome Statute and arguably have a vested interest in ensuring that the Security Council deferral power is not abused.

Article 16 does not, \textit{prima facie}, raise any questions with respect to the ICC’s jurisdiction over nationals of non-party states. But early on, the Security Council controversially attempted to use Article 16 to exempt nationals from non-party states from the jurisdiction of the Court.

1. \textit{Resolutions 1422 (2002) and 1487 (2003)}

The Rome Statute entered into force on 1 July 2002. Just 12 days later the Security Council adopted Resolution 1422 in which it made a blanket request in the following terms:

\textit{Acting} under Chapter VII of the Charter of the United Nations [the Security Council],

1. \textit{Requests}, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.\(^2^6\)

In operative paragraph 2, the resolution expressed the Council’s intention to renew this request every 12 months ‘for as long as may be necessary’. The resolution did not refer to any specific countries or issues on the Council’s agenda, but nevertheless purported to exclude from the jurisdiction of the ICC any UN peacekeepers from states not party to the Rome Statute. Driven by the US threat to block future UN peacekeeping missions if its


\(^2^6\) SC Res 1422, UN SCOR, 4572\textsuperscript{nd} mtg, UN Doc S/RES/1422 (12 July 2002).
concerns were not addressed, 27 the resolution was a clear attempt to circumvent Article 12(2)(a) of the Rome Statute. If a situation were to arise in which UN peacekeepers were accused of committing Statute crimes on the territory of a state party to the Rome Statute, Resolution 1422 intended to give those accused peacekeepers who are nationals of non-party states immunity from ICC jurisdiction. This is at odds with the jurisdiction granted to the ICC by Article 12(2)(a).

Of particular concern with Resolution 1422 was the fact that both Chapter VII of the Charter and Article 16 of the Statute were invoked for unspecified, future situations in which potential ICC cases would be deferred indefinitely based solely on the involvement of nationals of non-party states. The implied rationale for such a sweeping resolution was that those states not party to the Statute would be reluctant to contribute troops to UN peacekeeping operations if there was any risk that such forces might be prosecuted by the ICC. 28 Facilitating UN member states’ ability to contribute to such operations was therefore claimed to be ‘in the interests of international peace and security’. 29

Twelve months later, the provisions of Resolution 1422 were renewed by the adoption of Resolution 1487. 30 The renewal did not go ahead without issue, however, as the UN Secretary-General took the unusual step of addressing the Security Council in its chamber with a plea against making the resolution renewal ‘an annual routine’. 31 The Secretary-General warned that ongoing renewals would create a permanent immunity that ‘would undermine not only the authority of the ICC but also the authority of the Council and the legitimacy of United Nations peacekeeping’. 32

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27 Record of UN Security Council 4568th meeting, UN SCOR, 57th year, 4568th mtg, UN Doc S/PV.4568 (10 July 2002).

28 SC Res 1422, UN SCOR, 4572nd mtg, UN Doc S/RES/1422 (12 July 2002), Preambular paragraphs 7 and 8 of Resolution 1422:

Determining that operations established or authorized by the United Nations Security Council are deployed to maintain or restore international peace and security,

Determining further that it is in the interests of international peace and security to facilitate Member States' ability to contribute to operations established or authorized by the United Nations Security Council...

29 Ibid.


31 UN Secretary-General address to the UN Security Council in UN SCOR, 58th year, 4772nd mtg, UN Doc S/PV.4772 (12 June 2003), 3.

32 Ibid.
Resolution 1422 was not renewed for a third time, as the US lost support for its cause after evidence of prisoner abuse by American soldiers at Abu Ghraib prison in Iraq came to light in the first half of 2004.\footnote{White and Cryer, above n 6, 471.} Despite the fact that the resolution was only in operation for two years and did not apply to any specific situation during that time period, it created a potential precedent for the notion that the Security Council has the ability to exempt nationals of non-party states from the jurisdiction of the ICC.\footnote{This issue will be discussed further in Part IV.}


2. The Validity of Resolution 1422

The issue of Resolution 1422’s validity may be split into two separate questions. The first is whether the resolution was \textit{intra vires} with respect to the UN Charter, and the second is whether the resolution was a properly constituted deferral within the terms of Article 16 of the Rome Statute.
(a) *Was Resolution 1422 intra vires the UN Charter?*

The chief complaint directed towards Resolution 1422 was that the Security Council did not draw a link to any threat to the peace or breach of the peace which is required by Article 39 of the Charter before the Council can take measures under Chapter VII. At most, the preamble of Resolution 1422 implies that the mere possibility of ICC prosecution is enough to discourage some UN member states from contributing to UN peacekeeping operations, and that this could prevent the UN from addressing future conflicts. The Council seemed to be drawing a very tenuous inference that the potential for ICC prosecution of peacekeepers from non-party states could exacerbate a threat to, or breach of, the peace. This reading of Resolution 1422 was considered entirely insufficient by many UN member states and commentators to bring it *intra vires* the UN Charter. Ultimately, however, the issue of whether Resolution 1422 is valid under the UN Charter is less relevant for the ICC than the question of whether the resolution conforms to the requirements of the Rome Statute.

(b) *The Consistency of Resolution 1422 with the Rome Statute*

In operative paragraph 1 of Resolution 1422, the request for a deferral is prefaced by a declaration that the terms of the request are ‘consistent with the provisions of Article 16 of the Rome Statute’. Yet by attempting to defer future cases on uncertain grounds, critics argue that the Security Council’s interpretation of Article 16 was inappropriately broad and incompatible with the purpose of the provision. A number of states took to the floor of the Security Council to protest that the Council’s interpretation of Article 16 did not reflect what was agreed upon by states parties to the Rome Statute. They called attention to the negotiating history of the provision, which ‘makes clear that recourse to article 16 is on a case-by-case basis only, where a particular situation—for example the dynamic of a peace

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37 Stahn, above n 36, 87.


39 For further discussion of the limits of Security Council power under the UN Charter, see Part IV(C)(2) below. For a more comprehensive analysis of this issue as it relates to Resolution 1422, see Mokhtar, above n 35, 317–326; Lavalle, above n 36, 200–206.

40 Berman, above n 18, 177–178; Stahn, above n 36, 88–91; Cryer and White, above n 38, 149.
negotiation—warrants a 12-month deferral.’ This fact that there is no specific case or situation mentioned in the resolution lends credence to the argument that Resolution 1422 is not consistent with the provisions of Article 16. In order for a resolution to be compatible with Article 16, the Security Council would need to make a determination that a threat to the peace exists in relation to a particular situation before the ICC, and that a deferral of investigation or prosecution is therefore required in those circumstances.

In light of Resolution 1422’s apparent incompatibility with Article 16, some observers concluded that the Security Council was not merely trying to interpret Article 16 to suit its agenda, but was in fact attempting to ‘amend the negotiated terms’ of the Rome Statute. Irrespective of what the Security Council actually intended, the perception that the Council was attempting to amend the terms of a treaty was roundly criticised:

The Council cannot alter international agreements that have been duly negotiated and freely entered into by States parties. The Council is not vested with treaty-making and treaty-reviewing powers. It cannot create new obligations for the States parties to the Rome Statute, which is an international treaty that can be amended only through the procedures provided in articles 121 and 122 of the Statute.

Even if there was some allowance for the Security Council to modify the terms of a treaty via a resolution, such action would only be binding on UN member states and not on the ICC as an institution. As discussed in Chapter III, Article 4(1) of the Rome Statute establishes the ICC’s international legal personality, and the ICC-UN Relationship Agreement further recognises the Court’s independence from the UN system. As an independent body, the ICC is only bound by the Rome Statute, not by Security Council resolutions. Therefore, unless a Security Council resolution complies with the Statute, the

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41 Statement of the Representative of Canada, UN SCOR, 57th year, 4568th mtg, UN Doc S/PV.4568 (10 July 2002). See also, statements of the Representatives of New Zealand, Liechtenstein, Brazil, Switzerland and Mexico. Under Article 32 of the VCLT, recourse may be had to travaux préparatoires as supplementary means of treaty interpretation.

42 Cryer and White, above n 38, 150.

43 Mokhtar, above n 35, 328.

44 Statement of the Representative of Brazil, UN SCOR, 57th year, 4568th mtg, UN Doc S/PV.4568 (10 July 2002), 22. See also, statements of the Representatives of Canada, New Zealand, France, the Islamic Republic of Iran, Mongolia, Liechtenstein and Switzerland, UN SCOR, 57th year, 4568th mtg, UN Doc S/PV.4568 (10 July 2002).

45 White and Cryer, above n 6, 458.

46 Article 2(1) ICC-UN Relationship Agreement.

47 Those states parties that are also members of the UN (all except Palestine) are bound in their individual capacities by Security Council resolutions. But the ICC as an institution is not: Article 1 of the Rome Statute provides that ‘[t]he jurisdiction and functioning of the Court shall be governed by the provisions of this Statute’. 121
ICC is not obliged to follow the terms of the resolution. The only conceivable way that the ICC would be bound by the Security Council’s interpretation of Article 16, is if Resolution 1422 was read as obliging those UN member states who also make up the Assembly of States Parties to the Rome Statute to amend Article 16 to bring it in line with Resolution 1422. This would be an extraordinary use (and arguably an abuse) of the Security Council’s Chapter VII powers.

Perhaps as a consequence of the controversy surrounding the invocation of Article 16 in Resolution 1422, the Council’s next attempt at limiting the jurisdiction of the ICC appeared to circumvent the Rome Statute entirely.

B. Excluding Jurisdiction without Reference to the Rome Statute

In August 2003, two months after the adoption of Resolution 1487 to extend the mandate of Resolution 1422, the Security Council adopted Resolution 1497 which authorised the establishment of a multinational force in Liberia. Operative paragraph 7 of that resolution was included at the insistence of the US and decides the following:

[T]hat current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of the contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State.

Resolution 1497 is directed at a specific situation in which there has been a clear determination of a threat to international peace and security, which immediately distinguishes it from Resolution 1422. What also sets Resolution 1497 apart from 1422 is the fact that there is no mention of Article 16. Instead, the resolution purports to exempt nationals of non-party states from any foreign criminal jurisdiction: domestic or international. There was a legitimate concern, raised by Germany, that Resolution 1497 would prevent states from asserting universal or passive personality jurisdiction over certain foreign nationals accused of committing jus cogens crimes in Liberia. But the clear intention behind operative paragraph 7 was to prevent the ICC from exercising jurisdiction over nationals of non-party states without the constraints of Article 16. The result is that

48 SC Res 1497, UN SCOR, 4803rd mtg, UN Doc S/RES/1497 (1 August 2003).
49 White and Cryer, above n 6, 471.
50 Statement of the Representative of Germany, UN SCOR, 58th year, 4803rd mtg, UN Doc S/PV.4803 (1 August 2003) 4.
Resolution 1497 appears to provide permanent immunity from ICC jurisdiction to peacekeepers from non-party states in Liberia despite the fact that there is no basis for such in the Rome Statute.

Unlike Resolution 1422, Resolution 1497’s validity under the UN Charter was not in issue. Aside from its clear link to a threat to the peace, giving troop-contributing states exclusive jurisdiction over their personnel is not a novel arrangement for UN-sanctioned missions.\(^{51}\) The chief controversy over Resolution 1497 was whether operative paragraph 7 would actually prevent the ICC from exercising jurisdiction over nationals from non-party states for Statute crimes allegedly committed while part of the Liberian peacekeeping force.

Importantly, Liberia did not ratify the Rome Statute until September 2004. Consequently, when Resolution 1497 was adopted in August 2003, the only way the ICC could have exercised jurisdiction over nationals of non-party states for crimes committed on the territory of Liberia would have been if the Security Council had referred the situation under Article 13(b). It would thus appear that the inclusion of operative paragraph 7 at the insistence of the US was, at the time, entirely unnecessary. For the sake of analysis, however, the remainder of this part makes the hypothetical assumption that Liberia was a state party to the Rome Statute when Resolution 1497 was adopted, meaning that under Article 12(2)(a), the ICC could have gained jurisdiction over accused nationals of non-party states.\(^{52}\)

\(^{51}\) See, eg, Model status-of-forces agreement for peace-keeping operations, UN GAOR, 45th sess, UN Doc A/45/594 (9 October 1990), clause 47(b), Jain, above n 36, 245. The issue of foreign immunity for members of national armed forces and UN peacekeepers is particularly complex and far beyond the scope of this thesis. To give a greatly simplified overview, members of armed forces have functional immunity from foreign domestic jurisdictions under customary international law and also usually enjoy personal immunity under bilateral and multilateral international agreements. As a starting point for further research on this issue, see generally Róisín Burke, ‘Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity’ (2011) 16(1) Journal of Conflict and Security Law 63; Aurel Sari, ‘The Status of Armed Forces in Public International Law: Jurisdiction and Immunity’ in Alexander Orakhelashvili (ed), Research Handbook on Jurisdiction and Immunities in International Law (Edward Elgar Publishing, 2015) 319; Roger S Clark, ‘Peacekeeping Forces, Jurisdiction and Immunity: A Tribute to George Barton’ (2012) 43 Victoria University of Wellington Law Review 77.

\(^{52}\) The following hypothetical analysis assumes that crimes within the jurisdiction of the ICC have been committed on the territory of Liberia by UN peacekeepers from states not party to the Rome Statute. The jurisdiction of the ICC has been triggered under Article 13(a) or (c) and admissibility criteria have been satisfied.
1. **Resolution 1497 and Article 98(2) of the Rome Statute**

As discussed previously, the ICC is an independent international institution not bound by Security Council resolutions. For Resolution 1497 to have an effect on the jurisdiction of the ICC, the source of any obligation on the Court would have to be found in the Rome Statute. Neha Jain posits that Article 98(2) could be used to require the ICC’s compliance with operative paragraph 7 of Resolution 1497. Recalling the analysis in Chapter IV, Article 98(2) prevents the Court from proceeding with a request for surrender when that surrender would be at odds with the requested state’s obligations under international agreements. Jain argues that because the Security Council acts on behalf of UN member states when it carries out its duties related to the maintenance of international peace and security, any Chapter VII resolution is essentially an international agreement among all UN member states. More likely, the UN Charter itself is the relevant international agreement among UN member states, who are obliged by Article 25 of the Charter ‘to accept and carry out the decisions of the Security Council’. Either way, UN member states are bound by the terms of Resolution 1497, meaning that operative paragraph 7 would arguably have the effect of preventing any UN member state (and therefore any states party to the Rome Statute) from surrendering to the ICC a peacekeeper from a non-party state accused of crimes committed in Liberia. But Article 98(2) of the Rome Statute would only prevent the ICC from proceeding with a request for surrender, and would not oblige the Court to respect the Security Council’s decision to subject the non-party national peacekeepers to the exclusive jurisdiction of the contributing state. As I argued in Chapter IV, Article 98(2) would not prevent the ICC from exercising jurisdiction in accordance with Article 12(2)(a) if the Court somehow gained custody of an accused non-party national. The question of whether there is a legal basis for such jurisdiction requires further analysis.

2. **Can Liberia Delegate Jurisdiction in Light of Resolution 1497?**

Pursuant to Resolution 1497, the Security Council established the United Nations Mission in Liberia (‘UNMIL’) in September 2003. The effect of operative paragraph 7 of

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53 Jain, above n 36, 248.

54 At the time of Resolution 1497's operation, all members of the Assembly of States Parties were also UN members. Since January 2015 Palestine represents an exception to this, as a state party to the Rome Statute that is not a member of the UN. The effect of Palestine’s unique status will be discussed in more detail in Part IV(C)(2)(a) below. For the purposes of the hypothetical discussion relating to Resolution 1497, the assumption is that all ICC states parties are also UN members.

Resolution 1497 is to give procedural immunity from foreign domestic jurisdictions to all members of the UNMIL peacekeeping force who are from states not party to the Rome Statute.\textsuperscript{56} As described above, UN members are bound by the decisions of the Security Council under Article 25 of the UN Charter.\textsuperscript{57} This means that if a non-party national commits a Statute crime while he or she is part of UNMIL, no state aside from the state of nationality would have jurisdiction over that individual.\textsuperscript{58} As mentioned above, this is similar to the typical jurisdictional arrangement found in SOFAs regulating UN peacekeeping missions. Such an agreement was concluded between the UN and the government of Liberia in November 2003, Article 51(b) of which provides that ‘[m]ilitary members of the military component of UNMIL shall be subject to the exclusive jurisdiction of their respective participating States in respect of any criminal offences which may be committed by them in Liberia’.\textsuperscript{59} The effect of both Resolution 1497 and the UNMIL SOFA means that Liberia cannot lawfully exercise jurisdiction over UNMIL peacekeepers. At the same time, however, by ratifying the Rome Statute, Liberia has agreed that the ICC may have jurisdiction over crimes committed on Liberian territory, with no exceptions as to the nationality of the perpetrator.

(a) Does Delegation of Territorial Jurisdiction Provide a Legal Basis for ICC Jurisdiction over UN Peacekeepers?

Recalling the analysis in Chapter IV with respect to the situation in Afghanistan, Liberia appears to be in a position similar to that of Afghanistan. Both states are obliged under their respective SOFAs to recognise the exclusive jurisdiction of troop-sending states, and yet Afghanistan and Liberia have both ratified the Rome Statute and agreed to ICC jurisdiction over their territory. In Chapter IV I argued that it would be problematic if the ICC were to hold that its jurisdiction could be limited on an \textit{ad hoc} basis by agreements to which the Court is not party.\textsuperscript{60} Assuming that the Court would not limit its own jurisdiction

\textsuperscript{56} The resolution also purports to give such individuals immunity from prosecution before international courts, but as discussed above in Part III(A)(2), the ICC itself is not directly bound by Security Council resolutions.

\textsuperscript{57} For general discussion on the binding nature of Security Council resolutions, see Marko Divac Öberg, ‘The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ’ (2005) 16(5) \textit{European Journal of International Law} 879, 891.

\textsuperscript{58} See discussion in Chapter IV, Part IV(A)(2), and above in Part III(B) for criticism of ‘exclusive jurisdiction’.

\textsuperscript{59} \textit{Agreement Between Liberia and the United Nations Concerning the Status of the United Nations Mission in Liberia} (6 November 2003) (‘UNMIL SOFA’).

\textsuperscript{60} See generally, Chapter IV Part (IV)(A).
to nationals of states parties for crimes committed on Liberian territory, the ICC would have two remaining options. The first would be to decide that the Court cannot exercise territorial jurisdiction at all over the situation in Liberia, on the grounds that Liberia's own jurisdiction is limited by the UNMIL SOFA and by the Security Council resolution and therefore it cannot delegate what is required to the ICC. The second option is that the ICC would treat Liberia’s ratification of the Rome Statute as a valid delegation of jurisdiction and any conflict of Liberia’s international obligations as a matter for Liberia. In Chapter IV I concluded that Afghanistan would need to make a political decision as to which of its conflicting agreements it would uphold. The Liberian situation is slightly different given that the UNMIL SOFA is not a traditional bilateral or multilateral agreement between states.

(b) Resolving the Conflict Between the Rome Statute and the SOFA/Resolution 1497

The UN Security Council established the Liberian peacekeeping mission as a measure under Chapter VII of the UN Charter, and the UNMIL SOFA is an international agreement between Liberia and the UN.\(^6\) The UN Charter is therefore the ultimate source of Liberia’s obligations in both Resolution 1497 and the SOFA. Article 103 of the UN Charter provides that ‘[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail’.\(^6\) The only way that Liberia could prevent the ICC from potentially exercising jurisdiction over a situation on its territory involving UN peacekeepers from states not party to the Rome Statute would be to withdraw from the Statute itself. Theoretically, the combination of Resolution 1497, the UNMIL SOFA and the UN Charter would legally oblige Liberia to take such action. It is far more likely, however, that the ICC—not Liberia—would bear the brunt of any recriminations for going ahead with the prosecution of UN peacekeepers from non-party states, even if the Court has held that such prosecutions are *intra vires* the Rome Statute.

\(^6\) Although UNMIL was established by a Security Council resolution, one of the three basic principles of UN peacekeeping is that such operations are deployed with the consent of the parties, meaning that Liberia directly consented to the terms of the UNMIL SOFA. For an critique of the role of consent in UN peacekeeping operations, see Hitoshi Nasu, *International Law on Peacekeeping: A Study of Article 40 of the UN Charter* (Martinus Nijhoff Publishers, 2009) 17–23.

C. Unorthodox and Unintended

To date, the Security Council has yet to invoke Article 16 as it was intended to be used by the drafters of the Rome Statute.63 With respect to the Council’s unorthodox attempts in Resolutions 1422 and 1497 to limit the jurisdiction of the ICC in future cases, the Court has not had the opportunity to test whether these resolutions would actually prevent it from exercising jurisdiction over peacekeepers from states not party to the Rome Statute. But as I argue above, it is unlikely that Resolution 1422 would have been a valid invocation of Article 16 under the Rome Statute. It is also unlikely that Resolution 1497 would prevent the ICC from exercising delegated jurisdiction over nationals from non-party states. The ICC is not bound by Security Council resolutions or SOFAs, and where states parties have limited their own jurisdiction under an international agreement it should not affect the jurisdiction of the ICC. The next part continues exploring questions of ICC jurisdiction and non-party states in context of the positive pillar of the Security Council’s relationship with the ICC.

IV. THE POSITIVE PILLAR: ENABLING JURISDICTION

In the following analysis I focus on the Security Council’s role in referring situations to the ICC under Article 13(b) of the Rome Statute. I canvass the two existing Council referrals in Sudan and Libya to review the legal relationship between non-party states and the ICC where the Security Council has triggered the Court’s jurisdiction. This part argues that the legal basis for the ICC’s jurisdiction over nationals of non-party states is grounded in implied state consent when the situation is referred by the Security Council. I conclude by briefly examining the source of the Security Council’s referral power in the UN Charter to demonstrate how this could affect the legal basis for the ICC’s jurisdiction in particular cases.

A. Article 13(b): The Referral Power

Article 13(b) of the Rome Statute provides that the Court may exercise its jurisdiction with respect to crimes listed in Article 5 if ‘[a] situation in which one or more of such crimes

63 In 2013 there was a significant push by the African Union to defer the ICC cases against Kenyan President Uhuru Kenyatta and Deputy President William Rutu. But there was little appetite in the Security Council for such a deferral, with only seven Council members voting in favour of the draft resolution. UN SCOR, 7060th mtg, UN Doc S/PV.7060 (15 November 2013).
appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations’. As mentioned in Introduction to this chapter, the decision of the Security Council to refer a situation to the ICC must be made by ‘an affirmative vote of nine members including the concurring votes of the permanent members’ in order to comply with Article 27 of the UN Charter. The Article 13(b) referral power is essentially the same as what was envisioned in Draft Article 23(1) of the 1994 ILC Draft Statute.

Unlike the other two trigger mechanisms—referral by a state party and proprio motu initiation of an investigation by the Prosecutor—referral by the Security Council is not limited to situations involving states parties to the Rome Statute. In general, the notion that the Security Council can trigger the Court’s jurisdiction over situations involving nationals of non-party states has been viewed as more palatable than the alternative avenues for such jurisdiction. Reasons for this vary, but a general theme that emerges among the views is that the near-universal membership of the UN means that the international community of states has granted the Security Council broad powers to fulfil its mandate to maintain international peace and security. I examine this concept in more detail below, but first turn to look at the two situations that have been referred to the Court by the Security Council.

1. Resolution 1593: The Situation in Darfur

The Security Council confounded all expectations in 2005 when it invoked Article 13(b) of the Rome Statute to refer the situation in Darfur to the ICC prosecutor. Both China and the US abstained from the final vote, and in return for allowing the referral to go ahead without a veto, the US demanded a number of important concessions. The first was an acknowledgment of the controversial bilateral agreements concluded by the US under

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64 Rome Statute, Article 12(2).
65 Although there was some concern during the Preparatory Committee phase that giving the Security Council the power to refer situations to the Court would undermine judicial independence: Report of the Preparatory Committee on the Establishment of an International Criminal Court (Volume I), UN GAOR, 51\(^{\text{st}}\) Sess, Supp No 22, UN Doc A/51/22 (1996) [130]. By the time of the Rome Conference, however, there was ‘strong support for referral by the Security Council’: Preparatory Committee on the Establishment of an International Criminal Court, ‘Proposal by the United Kingdom of Great Britain and Northern Ireland: Trigger mechanism’ UN Doc A/AC.249/1998/WG.3/DP.1 (25 March 1998) [2]. See also, Schabas, above n 16, 369–370.
Article 98(2); the second recalls the wording of Resolution 1497 by exempting nationals of non-party states (other than Sudan) from the jurisdiction of the ICC; and the third placed the financial burden for any costs associated with the referral solely on the Assembly of States Parties.68

Since the 2005 referral, the Court has opened five cases against six suspects in the Darfur situation. Pre-Trial Chamber I declined to confirm the charges in one of the cases, but warrants of arrest have been issued for the remaining five accused, all of whom are still at large.69 This is despite the inclusion of operative paragraph 2 of Resolution 1593:

Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully.

As discussed in Chapter IV, not only is Sudan refusing to cooperate with the ICC, but President Omar Al Bashir continues to travel outside Sudan with seeming impunity.70 The Security Council has adopted numerous follow-up resolutions repeatedly affirming the continuing threat to peace created by the situation in Darfur,71 but the Council has fallen short when it comes to enforcing the outstanding arrest warrants. The ICC Prosecutor has made repeated appeals to the Council for assistance with the arrest and transfer of the accused to no avail,72 leaving the impression that ‘the Council uses the ICC whenever it is

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68 I will briefly deal with the first two concessions at the end of this part, but it is beyond the scope of this thesis to address the third concession. For more information on the Security Council’s literal passing of the buck to the Assembly of States Parties, see W Michael Reisman, ‘Editorial Comment: On Paying the Piper: Financial Responsibility for Security Council Referrals to the International Criminal Court’ (2005) 99 American Journal of International Law 615.

69 Prosecutor v Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman (Warrant of Arrest for Ahmad Harun and Ali Muhammad Ali Abd-Al-Rahman) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/07, 27 April 2007); Prosecutor v Omar Hassan Ahmad Al Bashir (Warrant of Arrest for Omar Al Bashir) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 4 March 2009); Prosecutor v Abdallah Banda Abakaer Nourain (Warrant of Arrest for Abdallah Banda Abakaer Nourain) (International Criminal Court, Trial Chamber IV, Case No ICC-02/05-03/09, 11 September 2014); Prosecutor v Abdel Raheem Muhammad Hussein (Warrant of Arrest for Abdel Raheem Muhammad Hussein) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/12, 1 March 2012).

70 See, eg Prosecutor v Al Bashir (Order Regarding Omar Al-Bashir’s Potential Visit to the Republic of Chad and to the State of Libya) (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/05-01/09, 15 February 2013).

71 A recent example is SC Res 2256, UN SCOR, 7619th mtg, UN Doc S/RES/2256 (10 February 2016) renewing the mandate of the UN Panel of Experts on the Sudan.

convenient for Council members, while turning a blind eye on the Court when its mandate needs to be operationalized’.73

As mentioned above, the Security Council included a number of concessions in Resolution 1593 which were made in exchange for the US agreeing to abstain from, rather than veto, the referral.74 For example, the resolution’s preamble ‘takes note’ of the existence of Article 98(2) agreements, which was undoubtedly a reference to the Bush administration’s systematic campaign of concluding bilateral non-surrender agreements with states parties.75

In the Security Council, Brazil abstained from the vote on Resolution 1593, expressing disappointment that Article 98(2) was even mentioned in a referral resolution.76 Denmark tried to assuage concerns by describing the acknowledgment of Article 98(2) as ‘purely factual … the reference in no way impinges on the integrity of the ICC’.77 While the inclusion of a reference to Article 98 raised eyebrows, more concerning was the inclusion of operative paragraph 6 in which the Security Council:

Decides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State.

This stipulation recalls the Council’s efforts in Resolutions 1422 and 1497 to exclude non-party state nationals from the jurisdiction of the ICC. This time, however, the Council was attempting to shape the Court’s jurisdiction through a referral resolution, leading to accusations that the Council was interfering with the ICC’s judicial independence.78

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73 Ruiz Verduzco, above n 9, 50. In December 2014 the Prosecutor told the Security Council that she was suspending the investigation into the Darfur situation, citing lack of enforcement assistance from the Council and a pressing need to shift investigative resources to other cases: Prosecutor of the International Criminal Court, Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005) (12 December 2014) 2.

74 Reports of the Secretary-General on the Sudan, UN SCOR, 5158th mtg, UN Doc S/PV.5158 (31 March 2005): Statement of the US, 4.

75 See Part II(B) of Chapter II for more information.

76 Reports of the Secretary-General on the Sudan, UN SCOR, 5158th mtg, UN Doc S/PV.5158 (31 March 2005): Statement of Brazil, 11.

77 Ibid, Statement of Denmark, 6.

78 Ibid, Statement of Brazil, 11; Statement of the Philippines, 6.
The drafters of the Statute purposely chose the term ‘situation’ in Article 13 to avoid the possibility that a referral might be ‘improperly [targeted]’. The Security Council’s attempts to narrow the ICC’s personal jurisdiction in the referred situations is at odds with the fact that the Prosecutor has continually maintained that referral of a ‘situation’ must be construed broadly. In 2003, for example, the government of Uganda became the first state to trigger the Court’s jurisdiction through Article 13(a), and attempted to limit the referral to the ‘situation concerning the Lord’s Resistance Army’. The Prosecutor decided that the referral had to be interpreted in conformity with the principles of the Rome Statute and that to do so meant broadening its scope to include crimes committed by anyone in the situation in Northern Uganda.

Operative paragraph 6 of Resolution 1593 has not had any effect in practice, so it is unknown whether the Prosecutor would excise or otherwise ignore it for not according with the provisions of the Rome Statute. However, the Security Council’s continuing attempts to exclude nationals from non-party states from the jurisdiction of the ICC is at best ‘bad practice, devoid of any precedential value’ and at worst a ‘dangerous erosion of the principle of equality before the law and the judicial independence of the Court’.

2. Resolution 1970: The Situation in Libya

The second time the Security Council invoked its Article 13(b) power was in 2011 when it adopted Resolution 1970 referring the situation in Libya. This resolution was adopted unanimously, and included affirmative votes from five states not party to the Rome Statute,
including the US. Despite this positive—and seemingly cooperative—new attitude towards the ICC, Resolution 1970 contained two of the same caveats as the Council’s previous referral. Namely, the exemption of nationals of non-party states (other than Libya) from the jurisdiction of the ICC, and the refusal to fund any ICC investigations or prosecutions that arise out of the referral.

Almost immediately, the ICC opened three cases against three high-ranking Libyan officials, with arrest warrants issued for President Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi. The case against Muammar Gaddafi was terminated in November 2011 following his death, and both Saif Gaddafi and Abdullah Al-Senussi have since been arrested and are in custody in Libya. As discussed in Chapter II, Libya challenged the admissibility of both cases under Article 17 of the Rome Statute. Pre-Trial Chamber I held that the case against Gaddafi was admissible before the ICC, but that the case against Al-Senussi was inadmissible. Despite the ruling of admissibility in the Gaddafi case, Saif Gaddafi remains in Libya where the government is either unwilling or unable to transfer him to the ICC. In December 2014 Pre-Trial Chamber I officially referred Libya’s non-cooperation to the Security Council in accordance with Article 87(7) of the Rome Statute, but the Council has not taken action to enforce Libya’s obligation to cooperate with the ICC.

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87 Along with affirmative votes by permanent Council members China, Russia and the US, non-permanent members India and Lebanon also voted to refer Libya to the ICC.


89 Situation in the Libyan Arab Jamahiriya (Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/11, 27 June 2011); Situation in the Libyan Arab Jamahiriya (Warrant of Arrest for Saif Al-Islam Gaddafi) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/11, 27 June 2011); Situation in the Libyan Arab Jamahiriya (Warrant of Arrest for Abdullah Al Senussi) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/11, 27 June 2011).

90 Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi (Decision on the admissibility of the case against Saif Al-Islam Gaddafi) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/11-01/11, 31 May 2013); Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi (Decision on the admissibility of the case against Abdullah Al-Senussi) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/11-01/11, 11 October 2013).

91 In 2011 Gaddafi was captured by rebel forces in Zintan, and then tried in absentia and sentenced to death by a court in Tripoli in July 2015; ‘Gaddafi’s son Saif al-Islam sentenced to death’ Al Jazeera (28 July 2015). There were reports in mid-2016 that he had been freed and granted amnesty by the Libyan government, but the government has since denied those reports and the ICC Prosecutor is operating on the assumption that Gaddafi remains in Zintan detention. Office of the Prosecutor, Twelfth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1970 (2011) (9 November 2016) 1-2.

92 Prosecutor v Saif Al-Islam Gaddafi (Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/11-01/11, 10 December 2014). The Office of the Prosecutor has since praised the cooperation it has received from the Libyan Prosecutor-General’s Office: Office of the Prosecutor, Twelfth Report of the
Given the fact that Sudan and Libya have yet to surrender any of the accused to the ICC for trial, there has been minimal judicial consideration of pertinent jurisdictional issues in these situations. The Court has not yet had the opportunity for a considered examination of its own jurisdiction over nationals of non-party states in situations referred by the Security Council. Important legal questions remain about the authority of both the ICC and the Security Council in such matters.

B. Do Sudan and Libya have Rights and Obligations under the Rome Statute?

One of the questions that captivated scholars soon after the adoption of Resolution 1593 was whether Sudan could be considered to be in a position analogous to that of states parties to the Rome Statute. Both Sudan and Libya are obliged by the terms of their respective Security Council resolutions to cooperate with the ICC. What is less certain is the extent to which the Rome Statute applies to Sudan and Libya as non-party states, and how any legal obligations can be reconciled with the principle of *pacta tertii nec nocent nec prosunt*. While ordinarily the Rome Statute does not create any rights or obligations for non-party states, Resolutions 1593 and 1970 each provide that Sudan and Libya 'shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution'. The resolutions do not specify that the provisions of the Rome Statute are binding on Sudan and Libya, but it is arguably implied by the very fact of the referrals to the ICC that the Rome Statute will be the primary source of law for any investigation or prosecution. Pre-Trial Chamber I confirmed as much in its decision to issue an arrest warrant for Omar Al Bashir:

[B]y referring the Darfur situation to the Court, pursuant to article 13(b) of the Statute, the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole.


94 See Chapter II for further discussion of the *pacta tertii* principle.

95 Prosecutor v Omar Hassan Ahmad Al Bashir (Warrant of Arrest for Omar Al Bashir) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 4 March 2009) [45].
The main difference, therefore, between states parties to the Rome Statute and Sudan and Libya, is the source of the states’ legal obligations. Under Article 25 of the UN Charter, UN member states are bound by decisions of the Security Council, meaning that Sudan and Libya are obliged to cooperate with the ICC because the Security Council resolutions create a legal obligation for them to do so.96

Beyond the explicit obligation for Sudan and Libya to cooperate with the ICC, the implicit notion that any investigation and prosecution will take place within the ICC's statutory framework also means that these two non-party states have certain legal rights under the Statute. For example, they have the right under Article 17 to challenge the admissibility of a case before the ICC which would otherwise fall within domestic jurisdiction. As mentioned above, Libya was successful in challenging the admissibility of the case against Al Senussi, in which Pre-Trial Chamber I held that ‘Libya is not unwilling or unable genuinely to carry out its proceedings in relation to the case against Mr Al-Senussi’.97 Again, the Rome Statute avoids falling foul of the pacta tertiis principle because Libya’s membership of the UN and Resolution 1970 essentially place Libya in a position analogous to that of states parties.98

To summarise, the provisions of the Rome Statute apply to any ICC investigation and prosecution of cases in the Darfur and Libya situations. This means that Sudan and Libya have the same legal obligations and rights under the Statute as states parties (with respect to the specific situations in Darfur and Libya). Unlike states parties, Sudan and Libya are bound by the Rome Statute not because they consented to it directly, but because they agreed upon ratification of the UN Charter to be bound by decisions of the UN Security Council. The Security Council decided to refer the situations to the ICC in compliance with Article 13(b) of the Rome Statute, and in doing so, implicitly bound Sudan and Libya to comply with the Rome Statute, to the extent that it is relevant.99 This explains how and why Sudan and Libya, as non-party states, are legally obliged to cooperate with the Court. But

96 States parties are legally obliged to arrest and transfer suspects in the Darfur and Libya situations, by virtue of both the Rome Statute and the Security Council resolutions. See also, Chapter VII.

97 Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi (Decision on the admissibility of the case against Abdullah Al-Senussi) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/11-01/11, 11 October 2013) [311].


99 While Sudan and Libya may be implicitly bound by the jurisdiction, investigation and cooperation regimes established by the Rome Statute, it would be incorrect to say that the Statute applies to them in its entirety. There are clearly parts of the Statute that would not be relevant, such as ‘Part XI: Assembly of States Parties’ and ‘Part XII: Financing’.
the implied application of the Rome Statute by virtue of a Security Council resolution does not, on its own, provide a legal basis for the ICC’s jurisdiction over Sudanese and Libyan nationals in this situation.

C. What is the Legal Basis for ICC Jurisdiction over Situations Referred by the Security Council?

Recalling the discussion in Chapter II, one of the key objections to the ICC’s jurisdiction over nationals of non-party states is that it ignores the importance of state consent in international law. The consent of the state of nationality is not traditionally required for prosecution in foreign domestic courts, so the fact that Article 12(2) of the Rome Statute requires either the territorial state or the state of nationality to accept ICC jurisdiction is generally considered to be sufficient preservation of state consent.100 But Article 12(2) does not apply to situations triggered by a Security Council referral, which has given rise to a perception that no state consent is involved.101 Indeed, Sudan has repeatedly rejected the jurisdiction of the ICC over Darfur on the grounds that Sudan has not consented to it.102 In the following sections, I explore how the problem of state consent may be addressed by re-examining the delegation theory as the legal basis for ICC jurisdiction over situations in non-party states referred to the Court by the Security Council. I use the situation in Sudan as the primary example in my analysis.

1. The Security Council Empowers the Court

In February 2014, Pre-Trial Chamber II addressed the DRC’s failure to arrest Omar Al Bashir, and held that his position as head of state does not preclude him from the jurisdiction of the ICC.103 The rationale for this conclusion was that ‘the SC implicitly waived the immunities granted to Omar Al Bashir under international law and attached to

100 See Part III(A) of Chapter II for further analysis of state consent issues.
102 ‘Sudan rejects ICC ruling on Darfur’ Al Jazeera (28 Feb 2007); ‘Sudan rejects ICC arrest warrants’ Sudan Tribune (2 May 2007).
103 See Part III(A)(2) of Chapter IV for more discussion of this issue.
his position as a Head of State’. 104 This is further evidence for the notion that a Security Council referral implicitly activates the application of the Rome Statute to referred situations. In the Al Bashir case, Article 27 of the Statute applies to prevent the Sudanese president from claiming head of state immunity before the ICC. For states parties to the Statute, Article 27 represents a waiver of all immunities by direct consent. For the situation in Darfur, the Security Council is said to have waived Al Bashir’s immunities on Sudan’s behalf, which allows the ICC to exercise jurisdiction in that case. But how does the Security Council empower the Court to exercise jurisdiction over situations in non-party states in the first place?

Dapo Akande writes that ‘[a]t a minimum, the referral of a situation to the ICC is a decision to confer jurisdiction on the Court (in circumstances where such jurisdiction may otherwise not exist)’. 105 This is not to say that the Security Council possesses criminal jurisdiction which it bestows upon the Court. Recalling the discussion in Chapter III, the source of the ICC’s powers of criminal justice is the Rome Statute, and the legal basis for these powers is delegation from states parties. The source of the ICC’s right to exercise its powers is a matter of which trigger mechanism is used. For example, the ICC has the right to exercise its powers when a state party refers a situation to the Prosecutor under Article 13(a) or when the Prosecutor initiates an investigation proprio motu under Article 13(c). The legal basis for the right to exercise its powers in either situation may be conceived of as delegation of jurisdiction from states parties. Where the Security Council refers a situation in a non-party state to the ICC under Article 13(b), it gives the Court the right to exercise its powers over that situation. But to say that the Security Council has empowered the ICC to exercise jurisdiction over the situation in Darfur is not enough to explain how the Court can lawfully investigate and prosecute crimes committed in non-party states by non-party nationals. A Security Council referral may trigger the ICC’s jurisdiction, but it does not, on its own, provide a legal basis for that jurisdiction.

104 Prosecutor v Al Bashir (Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court) (International Criminal Court, Pre-Trial Chamber II, Case No ICC/02/05-01/09, 9 April 2014) 29.

105 Akande, above n 93, 341. Other scholars have used similar language to describe the mechanics of a Security Council referral. See, eg Joanne Foakes, The Position of Heads of State and Senior Officials in International Law (Oxford University Press, 2014) 201.
2. What Empowers the Security Council?

To ascertain the legal basis for the ICC’s jurisdiction over situations in non-party states referred by the Security Council, it is necessary to determine what (beyond the Rome Statute) gives the Council the authority to trigger the ICC’s jurisdiction. How is it that the Council can authorise a treaty-based court to exercise jurisdiction over a situation in a state that has not consented to the terms of that treaty? Answering this question involves an examination of the basis for the Security Council’s powers under the UN Charter. It is beyond the scope of this thesis to discuss the actions and authority of the Council in any great depth; the following provides a cursory analysis of the UN Charter and the powers of the Security Council as they relate to an ICC referral.106

(a) The Powers of the Security Council under the UN Charter

The organs of the UN, including the Security Council, derive their powers from the UN Charter. The UN Charter empowers the Security Council to refer situations to the ICC through a combination of Article 24(1) and Article 41 of the UN Charter. Article 24(1) provides that:

In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

Article 41 gives the Council the authority to decide ‘what measures not involving the use of armed force are to be employed to give effect to its decisions’. As Article 24(1) suggests, the original source of the Security Council’s powers is UN member states, who have collectively conferred powers on the UN through ratification of the Charter.107 In the ICJ’s Certain Expenses case, Judge Bustamante affirmed that the Charter’s provisions ‘imply on the part of Member States certain partial and contractual renunciations in respect of the exercise of their own sovereignty—which indeed is fully recognized by Article 2 (paras 1


and 7)—in the interests of international co-operation and peace’.\textsuperscript{108} In other words, by conferring powers on the UN, UN member states have tacitly consented to action taken by the Security Council as long as it is \textit{intra vires} the Charter.

Since the Security Council’s establishment of the \textit{ad hoc} international criminal tribunals in the 1990s,\textsuperscript{109} it has been widely accepted that the Council’s powers under Article 41 of the Charter extend to implementing measures involving criminal justice.\textsuperscript{110} In the \textit{Tadić} decision, the Appeals Chamber of the ICTY held that the Security Council had significant discretion to determine what measures to take under Chapter VII of the Charter, and that the establishment of an international tribunal was ‘squarely within the powers of the Security Council under Article 41’.\textsuperscript{111} Specifically, the Appeals Chamber found that the Council had ‘resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security’.\textsuperscript{112}

Similarly, the ICTR Trial Chamber responded to allegations that the Security Council’s establishment of the tribunal violated the sovereignty of Rwanda by noting that membership of the United Nations entail [sic] certain limitations upon the sovereignty of the member States. This is true in particular by virtue of the fact that all member States, pursuant to Article 25 of the UN Charter, have agreed to accept and carry out the decisions of the Security Council in accordance with the Charter.\textsuperscript{113}

One of the rationales for giving the Security Council a role in triggering the jurisdiction of the ICC was to provide the Council with an alternative to establishing \textit{ad hoc} tribunals.\textsuperscript{114} It stands to reason that if the Security Council can lawfully establish a criminal tribunal as a

\begin{footnotesize}
\begin{enumerate}
\item Certain Expenses of the United Nations (Advisory Opinion) [1962] ICJ Rep 151, 295 (Judge Bustamante).
\item The ICTY was established by SC Res 827, UN SCOR, 321\textsuperscript{7th} mtq, UN Doc S/RES/827 (25 May 1993); the ICTR was established by SC Res 955, UN SCOR, 3453\textsuperscript{4th} mtq, UN Doc S/RES/955 (8 November 1994).
\item See, eg, Sarah Williams, \textit{Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues} (Hart Publishing, 2012) 258; White and Cryer, above n 6, 460; Schabas, above n 16, 368.
\item Prosecutor \textit{v} Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber II, Case No ICTY-94-1-AR72, 2 October 1995) [31]-[36], at [36].
\item Ibid, [38].
\item Prosecutor \textit{v} Kanyabashi (Decision on the Defence Motion on Jurisdiction) (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-96-15T, 18 June 1997) [13].
\item Report of the International Law Commission, UN GAOR, 49\textsuperscript{th} Sess, Supp No 10, UN Doc A/49/10 (1994) 44.
\end{enumerate}
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measure to maintain international peace and security under Chapter VII of the Charter, then it can also activate the jurisdiction of an existing international criminal court.\footnote{But see Dov Jacobs, ‘Libya and the ICC: On the Legality of any Security Council Referral to the ICC’ on Spreading the Jam (28 February 2011).}

Applying the above reasoning to the situation in Darfur, the legal basis for the ICC’s jurisdiction is grounded in the implied consent of Sudan to the powers given to the Security Council by the UN Charter. In ratifying the UN Charter, Sudan consented to the fact that the Security Council may take measures under Chapter VII to maintain international peace and security and agreed that such enforcement measures may include intervention in the sovereign domestic sphere.\footnote{Article 2(7) of the UN Charter provides: 
Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII. (Emphasis added)} In adopting Resolution 1593, the Security Council implemented a Chapter VII measure not involving the use of armed force by referring the situation in Darfur to the ICC. By virtue of its UN membership, Sudan has tacitly consented to the jurisdiction of the ICC over Darfur.

(b) Is the Security Council’s Power to Refer Situations Universal?

A common description of the Article 13(b) Security Council trigger is that it gives the ICC universal jurisdiction.\footnote{See, eg, Danilenko, above n 101, 452; Jordan J Paust, ‘The Reach of ICC Jurisdiction over Non-Signatory Nationals’ (2000) 33 Vanderbilt Journal of Transnational Law 1, 7–8; Williams, above n 110, 250; Heyder, above n 101, 653.} This is not to say that the ICC has jurisdiction based on the principle of universality,\footnote{See Chapter VI for further discussion on the ICC and universal jurisdiction.} but the Security Council could theoretically refer situations in any one of the 193 UN member states to the ICC as there is no territorial limit on Security Council referrals in the Rome Statute. For those UN member states that are not also states parties to the Rome Statute, the legal basis for ICC jurisdiction is grounded in consent to the UN Charter and the powers of the Security Council. But what about states that are not UN members? Are there any territorial limitations to the Security Council’s referral power?\footnote{Politically, it would be exceedingly unlikely for the Council to refer a situation in any of the five permanent members of the Security Council, for the simple fact that any one of them could veto the referring resolution. This essentially means that the ICC could not have jurisdiction over situations in China, Russia or the US without their express consent.} There are very few situations in which such a scenario might even be possible, but it is worth undertaking a brief hypothetical analysis to better understand the parameters.
of the Security Council’s referral power and the legal basis for the ICC’s jurisdiction. The following sections assume circumstances in which Statute crimes have been committed on the territories of Palestine, Vatican City and Kosovo.

(i) **Palestine**

Palestine is a state party to the Rome Statute, which means that ICC jurisdiction over a situation in Palestine could be triggered by a state party referral or the initiation of a *proprio motu* investigation by the Prosecutor.\(^\text{120}\) Palestine is not, however, a member of the UN, which would seem to preclude the Security Council from adopting a resolution under Chapter VII involving any kind of interference with Palestinian sovereignty. Palestine has not acceded to the UN Charter, meaning that it has not consented to the Security Council’s activation of the ICC’s jurisdiction as a measure to maintain international peace and security. As a matter of *pacta tertiis*, there would not be a legal basis for the Security Council to impose rights and obligations on Palestine via a referral resolution. If the Council were to nevertheless go ahead with a referral of a situation in Palestine to the ICC, the question of whether the ICC can exercise jurisdiction would depend on whether the Security Council referral is valid under Article 13(b).

Article 13(b) simply states that the ICC may exercise its jurisdiction if a situation is referred ‘by the Security Council acting under Chapter VII of the Charter of the United Nations’. *Prima facie*, a Security Council referral of Palestine would fulfil this provision, even where the resolution is *ultra vires* the Charter. In determining the validity of the triggering referral, the ICC would need to decide if it has the power to review the legitimacy of the Security Council’s resolution under the Charter. While such a ‘judicial review’ of the Security Council’s actions would undoubtedly be controversial, it would not be exceptional. The ICTY Appeals Chamber decision in *Tadić* represents an important precedent for the ICC not only in regard to the Council’s power to use measures involving criminal justice, but also as a model for judicial scrutiny of the limits of the Council’s powers under the UN Charter. The Appeals Chamber affirmed that ‘neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law)’.\(^\text{121}\) The Chamber then engaged in a detailed analysis of the Security Council’s powers under the Charter to

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120 See Part IV(A) of Chapter IV for a more detailed discussion of Palestine’s relationship with the ICC and acknowledgment of issues surrounding its statehood.

121 *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber II, Case No ICTY-94-1-AR72, 2 October 1995) [28].
ascertain whether the Council had acted lawfully in establishing the ICTY. The Chamber held that it had inherent jurisdiction under the principle of compétence de la compétence to ‘examine the legality of its establishment by the Security Council, solely for the purpose of ascertaining its own “primary” jurisdiction over the case before it’. Given the status of the ICC as an independent legal entity and the undertaking in the ICC-UN Relationship Agreement to ‘respect each other’s status and mandate’, the Court may be more reluctant than the ICTY Appeals Chamber to examine the legality of Security Council action. Paradoxically, if a Security Council referral of Palestine was accepted as valid under Article 13(b) (despite its invalidity under the Charter), there would still be a legal basis for ICC jurisdiction, but it would not be based on the consent of Palestine to the UN Charter. Instead it would be based on Palestine’s status as a state party to the Rome Statute and its delegation of jurisdiction to the Court.

(ii) Vatican City

Vatican City is the world’s smallest state in terms of both territory and population and it is neither a member of the UN nor a state party to the Rome Statute. Given the Vatican’s small size, it is highly unlikely that a situation involving the commission of Statute crimes would ever arise solely on the territory of Vatican City. If such an improbable situation did

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122 Ibid, [28]-[40].

123 Ibid, [20]. The Special Court for Sierra Leone also examined the powers of the Security Council to establish a special court by treaty: Prosecutor v Fofana (Decision on Preliminary Motion on Lack of Jurisdiction Materiа: Illegal Delegation of Powers by the United Nations) Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-14-AR72(F), 25 May 2004) [18]-[29]. The ICJ has not ruled out the possibility that it could review the merits of a Security Council resolution. See, eg, Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America) (Preliminary Objections) [1998] IC Rep 115 [49]-[50].

124 Article 2(3) ICC-UN Relationship Agreement.

125 In 2012, the Appeals Chamber of the Special Tribunal for Lebanon came to the opposite conclusion to the one reached by the ICTY about its own competence to review Security Council action in establishing the Special Tribunal. The majority held that the Security Council’s decision to establish the Special Tribunal for Lebanon ‘is essentially political in nature, and as such not amenable to judicial review’. Prosecutor v Ayyash (Decision on the Defence Appeals Against the Trial Chamber’s “Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal” (Special Tribunal for Lebanon, Appeals Chamber, Case No STL-11-01/PT/AC/AR90.1, 24 October 2012) [52]. Judge Baragwanath provided a partially dissenting opinion in which he stressed that the Security Council’s ‘power is limited in law by the Charter of the United Nations which conferred it’ [2] and held that ‘while there can be no claim to any general power of judicial review of Security Council resolutions, their legality may require judicial determination within a specific context against competing norms’ [79]. For a detailed critique of the Ayyash decision, see José E Alvarez, ‘Tadić Revisited: The Ayyash Decisions of the Special Tribunal for Lebanon’ (2013) 11(2) Journal of International Criminal Justice 291.

126 While there is little doubt that the Vatican City has separate international personality, there remains some uncertainty about the Vatican’s statehood in international law. See, generally John R Morss, ‘The International Legal Status of the Vatican/Holy See Complex’ (2015) 26 European Journal of International Law 927.
occur, it would be difficult to see how the Security Council could claim the authority to refer this situation to the ICC. Even if the Council adopted a referral resolution *ultra vires* the Charter, the ICC would technically have jurisdiction in accordance with the Statute. There would not, however, be any legal basis for this jurisdiction because of the fact that Vatican City has not consented to either the UN Charter or the Rome Statute.

Related to the above scenario are interesting jurisdictional questions that would arise if the Security Council decided to refer to the ICC a non-territorially specific situation involving the sexual abuse of children committed all over the world by members of the Catholic Church. The Council could oblige all UN member states—including states not party to the Rome Statute—to cooperate with the Court. The Court would have jurisdiction over nationals of non-party states by virtue of the fact that as UN members those states have implicitly conferred authority on the Security Council to impose international criminal justice measures for the maintenance of international peace and security. But the Council would not have any authority under the Charter to oblige the Holy See to cooperate with the Court which would leave a significant impunity gap in any ICC prosecution attempts.

(iii) Kosovo

Kosovo is neither a member state of the UN, nor a state party to the Rome Statute. Whether or not the Security Council could trigger the jurisdiction of the ICC over a situation in Kosovo would likely depend on whether Kosovo is an independent state or an autonomous province of Serbia. In 1999 the ICTY dealt with a somewhat comparable situation when it indicted Slobodan Milosevic and four other senior officials from the Federal Republic of Yugoslavia (‘FRY’) for crimes committed in Kosovo, which was part

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127 An argument can be made that such crimes might constitute crimes against humanity under Article 7: Geoffrey Robertson, *The Case of the Pope: Vatican Accountability for Human Rights Abuse* (Penguin Books, 2010). Whether that would be sufficient to bring the situation into the Security Council’s mandate to maintain international peace and security is less predictable.


of the FRY’s territory at the time. The FRY considered itself the successor state to the Socialist Federal Republic of Yugoslavia (‘SFRY’) upon its break up in the early 1990s. But the Security Council and General Assembly made it clear that the FRY did not automatically take over the UN membership of its predecessor, and would need to apply to become a UN member in its own right. In the case of Milutinović, the defence challenged the jurisdiction of the tribunal over the FRY officials on the basis that the FRY was not a UN member state at the time the crimes were committed and therefore could not be subject to the jurisdiction of a court whose legal basis was grounded in the UN Charter. The Trial Chamber held that ‘the FRY retained sufficient indicia of United Nations membership to make it amenable to the regime of Chapter VII Security Council resolutions adopted for the maintenance of international peace and security’. The Chamber ultimately based its conclusion on the fact that the Council had, in 1991, made a Chapter VII determination that the situation in the SFRY was a threat to international peace and security, and that it would be institutionally ineffective if the Council was estopped from taking further measures in that situation because one country involved ceased to be a UN member.

In a hypothetical Kosovo situation, the validity of any Security Council referral would depend on whether Kosovo is a state under international law. If it is not, then Serbia’s consent—to both the UN Charter and the Rome Statute—would provide a legal basis for ICC jurisdiction. If Kosovo is an independent state, then as a non-UN member and a non-party state to the Rome Statute, there would be no basis for either a Security Council

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130 The accused were indicted for crimes committed from January 1999 onwards. Prosecutor v Milosević (Indictment) (Office of the Prosecutor, International Criminal Tribunal for the Former Yugoslavia, Case No IT-99-37, 22 May 1999).


132 The other newly independent states that emerged from the Socialist Federal Republic of Yugoslavia (Bosnia-Herzegovina, Croatia, Macedonia and Slovenia) all became members of the UN soon after they declared independence. FRY was eventually admitted to the UN in November 2000: GA Res 55/12, UN GAOR, 55th sess, 48th plen mtg, UN Doc A/RES/55/12 (1 November 2000).

133 Prosecutor v Milutinović (Decision on Motion Challenging Jurisdiction) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-99-37-PT, 6 May 2003).

134 Ibid [38]. For a critique of this, see Akande, above n 93, 629–631.

135 Prosecutor v Milutinović (Decision on Motion Challenging Jurisdiction) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-99-37-PT, 6 May 2003) [45]-[48].

136 In 2010, the ICJ held that Kosovo’s unilateral declaration of independence ‘did not violate international law’ but declined to give an opinion on whether or not Kosovo was a state. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion) [2010] ICJ Rep 403, [51] and [122].
referral or ICC jurisdiction over any crimes committed in Kosovo after it became independent in February 2008.

The conclusions drawn above are predicated on the assumption that UN member states are, collectively, the ultimate source of the Security Council’s powers to maintain international peace and security.137 These powers are subject to the usual limitations of treaty law which would prevent the Council from imposing any obligations on non-UN member states.138 An alternative (and unorthodox) view of the Security Council is that its decisions are actually binding on non-UN member states. Hans Kelsen is sometimes cited as a proponent of this idea, finding support for it in the text of Article 2(6) of the Charter which provides that ‘[t]he Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security’.139 A more accepted rationale for arguing that Council resolutions are binding on non-UN member states is the idea that the Security Council is exercising a historical international police power that gives states the right under customary international law to act collectively to take ‘international police action’.140 Depending on the scope of this customary right, it would theoretically allow the Security Council to lawfully exercise its powers on a truly universal scale, including referral to the ICC of situations on any territory, even where the status of UN membership or statehood is in doubt. Given the near universal membership of the UN, the question of whether the Security Council can bind non-UN member states is unlikely to arise in the ICC context. Acknowledging the uncertainties, however minor they seem, serves to demonstrate the complexity of the legal arrangement between the ICC and the Security Council when it comes to the legal basis for the ICC’s jurisdiction.

D. Implied Consent as a Legal Basis

The idea that non-party states Sudan and Libya are obliged to cooperate with the ICC by virtue of their ratification of the UN Charter is largely uncontroversial. As UN member

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states, they have agreed ‘to accept and carry out the decisions of the Security Council’ under Article 25 of the Charter. It is also accepted that the source of the ICC’s right to prosecute in these situations is the Security Council’s Chapter VII powers, which trigger the Court’s jurisdiction under Article 13(b). What is less clear, however, is the legal basis for the Court’s jurisdiction over non-party situations when the jurisdiction is triggered by the Security Council. A strong argument can be made that as UN member states, Libya and Sudan have consented to the Security Council’s role under the Charter to maintain international peace and security, and that this implicitly includes the triggering of ICC jurisdiction. Assuming that such action is within the Council’s power, then the legal basis for such jurisdiction is indirectly grounded in the consent of Libya and Sudan.

The final part of this chapter examines what role the Security Council will play with respect to the ICC’s jurisdiction over the crime of aggression.

V. THE HIDDEN PILLAR REVEALED: THE CRIME OF AGGRESSION

At Rome, states were so deeply divided on the issue of the crime of aggression that it was nearly omitted from the Statute entirely. In the end, the crime was included in Article 5(1)(d) of the Statute, but the elements of the crime and conditions of ICC jurisdiction over it were deferred, leading Sir Franklin Berman to term this the ‘hidden pillar’ of the Council’s relationship to the Court. In 2010, the Assembly of States Parties convened for a review conference in Kampala, Uganda, with the objective of finalising the crime of aggression in the Rome Statute. In the adopted Kampala Amendments, Article 8 bis(1) defines the crime as:

[T]he planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

The definition necessarily recognises that the UN Charter prohibits states from threatening or using force against other states (unless in self-defence). Article 39 of the Charter gives

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141 See, eg, *Prosecutor v Omar Hassan Ahmad Al Bashir (Warrant of Arrest for Omar Al Bashir)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 4 March 2009) [40].


143 Berman, above n 18, 178.

144 UN Charter, Articles 2(4) and 51.
the Security Council the power to determine the existence of an act of aggression; what role the Council would play with respect to the ICC’s jurisdiction over the crime of aggression was therefore a key question at the Kampala negotiations.\footnote{145}

The following discussion outlines the Security Council’s role as set out in the Kampala Amendments and the consequences of this for states not party to the Rome Statute. I also take the opportunity to highlight some of the unique (non-Security Council related) jurisdictional issues in the Kampala Amendments that affect non-party states and non-consenting states parties.\footnote{146} I argue that the Council has a key role to play in triggering the ICC’s jurisdiction over the crime of aggression in situations involving both non-party states and non-consenting states parties. It should be noted that the Kampala Amendments have not yet entered into force and the jurisdiction of the ICC over the crime of aggression is therefore entirely untested.\footnote{147} All analysis below is subject to the caveat that the ICC will only have jurisdiction over aggression once the Kampala Amendments have entered into force.


\footnote{147} It was decided at Kampala that the ICC would not be able to exercise jurisdiction over the crime of aggression until 30 states parties have ratified the amendments and taken a decision after 1 January 2017 to formally incorporate the crime of aggression into the Rome Statute: Articles 15bis and ter (2) and (3). Palestine became the thirtieth state to ratify the Kampala Amendments on 26 June 2016: International Criminal Court, ‘State of Palestine becomes the thirtieth state to ratify the Kampala amendments on the crime of aggression’ (Press release, 29 June 2016). Now that 30 states have ratified the amendments, it is possible that the amendments could enter into force in 2017.
A. The Kampala Amendments

The jurisdiction of the ICC over the crime of aggression involves a complex interaction between the Kampala Amendments and the Rome Statute. Specifically, regard must be had to the Article 15bis and 15ter amendments; the existing jurisdiction provisions and preconditions in Articles 12 and 13 of the Statute; and Article 121 of the Statute which sets out the rules for implementing amendments. The primary role for the Security Council is set out in Article 15ter(1) which provides that the ICC may exercise jurisdiction over the crime of aggression in accordance with the provisions of Article 13(b) of the Statute. In other words, the ICC may prosecute a crime of aggression when a situation has been referred to the Court by the Security Council. Annex III to the Kampala Amendments confirms that the ICC may exercise jurisdiction in such a situation ‘irrespective of whether the State concerned has accepted the Court’s jurisdiction in this regard’.\(^\text{148}\)

This reflects the scope of the Council’s referral power already established in Article 13(b).

As well as the power to trigger the ICC’s jurisdiction over the crime of aggression, the Kampala Amendments give the Security Council an additional role. Article 15bis governs the jurisdiction of the ICC over the crime of aggression in situations referred by states parties or investigations initiated \textit{proprio motu} by the Prosecutor. The amendment stipulates that where the Prosecutor intends to proceed with an investigation potentially involving a crime of aggression, he or she must first ascertain whether the Security Council has made a determination about the existence of an act of aggression in that situation.\(^\text{149}\)

Where the Council has made such a determination, the Prosecutor may go ahead with the investigation into the crime of aggression.\(^\text{150}\) If the Council has not made such a determination within six months from when the Prosecutor notifies the UN of the intention to investigate, then the Prosecutor may nevertheless proceed with the investigation upon authorisation by the Pre-Trial Chamber.\(^\text{151}\) Giving the Security Council the opportunity to make a pronouncement under Article 39 of the Charter on the existence of an act of aggression was a concession to the permanent five who argued during the

\(^\text{148}\) Kampala Amendments, Annex III [2].

\(^\text{149}\) Kampala Amendments, Article 15bis(6).

\(^\text{150}\) Kampala Amendments, Article 15bis(7).

\(^\text{151}\) Kampala Amendments, Article 15bis(8).
negotiations that a Security Council determination should be a prerequisite for ICC jurisdiction over a crime of aggression.152

How these Article 15bis requirements will work in practice remains to be seen. They appear to offer the Security Council a somewhat superfluous role given that the Prosecutor can go ahead with an investigation into a crime of aggression, even where the Council has not declared the existence of an act of aggression.153 The Office of the Prosecutor need only notify the UN of its intention to investigate and, in doing so, give the Security Council the opportunity to make an Article 39 determination within six months. Furthermore, it can be inferred from Article 15bis that the role envisioned for the Security Council is limited to the opportunity to make positive pronouncements on the existence of an act of aggression. There is nothing in the Kampala Amendments to suggest that the Prosecutor would be prevented from investigating a crime of aggression if the Council were to take the unlikely step of specifically declaring that an act of aggression has not occurred. The only way the Security Council could stop the ICC from going ahead with such an investigation would be via an Article 16 deferral.154

Interestingly, the requirement that the Prosecutor must first ascertain whether the Security Council has made a determination on the existence of an act of aggression is limited to situations referred to the Court by states parties or investigations initiated by the Prosecutor. There are no equivalent requirements in Article 15ter which is the provision dealing with Security Council referrals. This is perhaps due to an assumption that an Article 13(b) referral giving rise to an ICC investigation into a crime of aggression would presumably contain a Council determination that an act of aggression exists in that situation. But as discussed above, the Prosecutor’s discretion to decide what acts and persons to investigate in any given situation cannot be limited by the Security Council. If an Article 13(b) referral resolution does not contain a determination about the existence of an act of aggression, this does not preclude the ICC prosecutor from pursuing an investigation based on other evidence that a crime of aggression has taken place.155 Conversely, if the


153 As long as the Pre-Trial Chamber approves the opening of such an investigation.

154 McDougall, above n 142, 270.

155 ‘A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s own findings under this Statute’: Kampala Amendments, Article 15bis(9).
Council’s Article 13(b) referral does specifically declare the existence of an act of aggression, this does not create an obligation for the Prosecutor to investigate a crime of aggression.156

B. Jurisdiction over the Crime of Aggression in Situations Not Referred by the Security Council

1. No Jurisdiction over Nationals from Non-Party States

One of the unique features of the jurisdictional regime for the crime of aggression is Article 15bis(5) which provides that ‘[i]n respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory’. This limits the application of Article 12(2) of the Rome Statute which otherwise allows for nationals from non-party states to be prosecuted for crimes committed on the territory of states parties. It also means that even where a non-party state has accepted the jurisdiction of the ICC on an ad hoc basis, the Court cannot exercise jurisdiction over a crime of aggression in that situation. The rationale for this departure from the Article 12(2) and (3) preconditions is that the crime of aggression is inescapably a ‘crime of state’157 which by its nature involves an aggressor state and a victim state. Any investigation and prosecution of a crime of aggression would inherently involve adjudication of an interstate dispute, and as discussed in Chapter II, this would likely present an unacceptable infringement on state sovereignty where one of the states has not consented to the jurisdiction of the ICC. China, Russia and the US were particularly influential in securing this outcome for non-party states.158 Ultimately the Kampala Amendments ensure that the only avenue through which the ICC can exercise jurisdiction over a crime of aggression involving non-party state nationals or territory is a Security Council referral.

156 For discussion on the distinction between the Security Council’s political right to determine an act of aggression and the ICC’s judicial prerogatives relating to the crime of aggression, see, generally McDougall, above n 142, 209–234; Mark S Stein, ‘The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive Is the Security Council’s Power to Determine Aggression’ (2005) 16 Indiana International and Comparative Law Review 1, 8–11; Schaeffer, above n 146.


2. *Jurisdiction over Non-Consenting States Parties*

There is one final distinctive jurisdictional feature of the Kampala Amendments, which is that states parties have the chance to opt out of the ICC’s jurisdiction over the crime of aggression.¹⁵⁹ This opt-out clause in Article 15bis(4) does not concern non-party states but it is worth briefly raising some of the interpretation issues that may nevertheless arise under this complex jurisdictional regime. In particular, the question of how Article 15bis(4) interacts with the Article 121 provisions on ratification of amendments is an important one in this respect.

Article 15bis(4) provides that the ICC is precluded from exercising jurisdiction over a crime of aggression committed by a state party if that state has ‘previously declared that it does not accept such jurisdiction’. This clause respects state consent by giving parties a choice as to whether they intend to subject their nationals and sovereign decisions to the jurisdiction of the ICC. Complicating this, however, is the Rome Statute procedure for implementing amendments to the Statute. Specifically there appears to be a choice as to which of the relevant amending procedures in Article 121 should apply to the Kampala Amendments:

(4) Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.

(5) Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party’s nationals or on its territory.

The combined effect of the above provisions with Article 15bis(4) leaves uncertain the status of a state party that does not ratify the Kampala Amendments. The second sentence of Article 121(5) would appear to preclude ICC jurisdiction over nationals or territory of a state party with respect to the crime of aggression if that state has not ratified the amendments. This is at odds with Article 121(4) which provides that the amendment will apply to all states parties a year after the requisite number of ratifications. It is not immediately clear whether the Kampala jurisdiction arrangements in Article 15bis and ter fall under Article 121(4) or (5). Scholars are split between those who favour an interpretation that would ensure all states parties are subject to the Kampala regime once it

¹⁵⁹ The opt-out clause does not apply to situations referred to the ICC by the Security Council.
enters into force (unless they specifically opt out), and those who advocate for a narrow interpretation which would require states parties to specifically ratify the amendments before they would be subject to the Court’s jurisdiction over aggression. Others refrain from making an argument one way or the other.

If the ICC interprets the amendments in accordance with Article 121(5), it would significantly limit the scope of the Court’s jurisdiction. The Court would only be able to exercise jurisdiction over a crime of aggression in situations where both the aggressor state and the victim state have ratified the amendments, assuming that the aggressor state has not opted out under Article 15bis(4). If, on the other hand, the Court interprets the amendments in accordance with Article 121(4), this could give rise to ICC jurisdiction over a crime of aggression committed by a state party that has not ratified the amendments, against a state party that has also not ratified the amendments (again assuming that the aggressor state has not opted out). In this scenario neither the aggressor state nor the victim state has consented to the Kampala Amendments, raising the question of what the legal basis would be for the Court’s jurisdiction over such a situation. The only way that delegation of jurisdiction might work as a legal basis in this case is by construing the initial ratification of the Statute by those states parties as sufficient consent to the Court’s jurisdiction. In ratifying the Statute, states parties have agreed to the ICC’s jurisdiction over the crime of aggression in Article 5(1)(d), when the conditions for exercising this have been agreed upon and implemented under the Statute. If the ICC chooses to implement the Kampala Amendments under Article 121(4), then it will be exercising jurisdiction within the parameters of the Rome Statute, to which all states parties have consented. Furthermore, states parties have the choice to opt out of the Kampala Amendments—a significant concession to the principle of consent—which would prevent the ICC from exercising jurisdiction where the aggressor state has opted out (unless the situation is referred by the Security Council).

160 Clark, ‘The Crime of Aggression’, above n 158, 791; McDougall, above n 142, 259; Reisinger Coracini, above n 146, 775.
162 Kreß and Holtzendorff, above n 146, 1195–1199; Milanović, above n 146, 178–182.
163 Milanović, above n 146, 179; Akande, above n 146, 32–35.
164 The above is a simplified analysis of the legal intricacies involved with implementing the Kampala Amendments. For more thorough and nuanced discussions of this issue, see generally, Akande, above n 146;
C. A Mixed Role for the Security Council

It is likely that the Assembly of States Parties will vote to activate the Kampala Amendments some time in 2017. The Security Council has an important role to play in that it is the only avenue through which states not party to the Statute can be subject to the ICC’s jurisdiction for a crime of aggression. Similarly, given the uncertainties surrounding state party acceptance of the amendments, a Council referral is, at this stage, the only guaranteed way that the ICC will be able to prosecute a crime of aggression in all situations involving states parties. Beyond extending the Council’s Article 13(b) referral power to the crime of aggression, however, the Council otherwise has a relatively inconsequential role in determining whether an act of aggression has taken place. The ICC Prosecutor is obliged to check whether the Council has made such a determination, before proceeding with an investigation, but the Amendments and the Statute give the Prosecutor significant discretion to go ahead with an investigation into a suspected crime of aggression regardless of what the Council decides.

VI. CONCLUSION

In the years since the Rome Statute entered into force, the Security Council has been relatively active in interacting with the ICC. The Court’s supporters were surprised, and pleased, that the Council used its Article 13(b) power to refer situations in both Sudan and Libya to the ICC, although the Council has not followed its referral decisions with the assistance that the Court desperately needs. Sudan and Libya maintain their objections to the jurisdiction of the ICC over their nationals, with Sudan in flagrant defiance of Court orders and Council remonstrations. Sudan continues to frame its objections in terms of sovereignty and illegality, which is why the ICC will need to clarify the legal basis for its jurisdiction in situations referred by the Security Council. Consent from Sudan and Libya can be implied by virtue of their UN membership and adherence to the UN Charter, but questions of whether referrals are intra vires the UN Charter may be beyond the competence of the ICC. Likewise, the Court will need to make a pronouncement on whether the Council’s ongoing attempts to curtail the jurisdiction of the ICC by exempting UN

Kreß and Holtzendorff, above n 146, 1195–1199; McDougall, above n 142, 238–268; Milanović, above n 146, 178–182; Reisinger Coracini, above n 146.

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peacekeepers from non-party states has any legal bearing on the Court. As argued above, the Council’s action does not conform to the parameters of Article 16 or any other provision in the Rome Statute, meaning that it is unlikely to have any legal impact on the ICC’s jurisdiction. If the Council continues to include such exemption clauses in its resolutions without response from the ICC, it runs the risk of setting an unfortunate precedent.
CHAPTER VI

UNIVERSALITY AS A LEGAL BASIS FOR ICC JURISDICTION

I. INTRODUCTION

Chapters III and IV focused on the legal basis for the ICC’s jurisdiction in situations referred to the Court by a state party or investigations initiated by the ICC Prosecutor. I explored the theory that states parties are delegating territorial and nationality jurisdiction to the ICC and concluded that this provides a sound legal basis for the ICC’s exercise of jurisdiction over nationals of non-party states, with the exception of incumbent heads of state. Chapter V then analysed the legal basis for the ICC’s jurisdiction over nationals of non-party states in situations referred to the Court by the UN Security Council. I argued that the ICC’s jurisdiction in such situations is predicated on implied consent of the territorial state by virtue of that state’s obligations under the UN Charter. In this chapter I examine an alternative theory that the legal basis for the ICC’s jurisdiction over nationals of non-party states is founded upon the principle of universality.

The idea that the principle of universality provides a legal basis for the ICC’s jurisdiction has its origins in the Article 13(b) Security Council referral mechanism. The potentially global reach of the ICC’s jurisdiction in situations referred to the Court by the Security Council has led a number of commentators to claim that this gives the ICC universal jurisdiction. This is an accurate assessment to the extent that the Court could, in limited circumstances, prosecute crimes committed in any state, by any national, irrespective of whether states involved are party to the Statute. But a Court with the potential to exercise its jurisdiction universally must be distinguished from jurisdiction based on the principle of universality. In previous chapters, I have largely assumed that only the principles of territoriality and nationality have any direct relevance to the legal basis for the ICC’s jurisdiction, as those two principles reflect the limitations contained in the Article 12


2 Although see the discussion in Part IV(C)(2) of Chapter V for an analysis of whether the Security Council can in fact refer any situation to the ICC.
preconditions. Yet the nature of the Rome Statute’s subject matter jurisdiction and the preambular declaration that the Court will prosecute ‘the most serious crimes of concern to the international community as a whole’ evokes the rhetoric and rationale more often associated with universal jurisdiction. It is perhaps not surprising that some scholars argue that the principle of universality is relevant for the ICC’s jurisdiction, especially in situations involving nationals of non-party states.

This chapter examines the issue of whether the principle of universality has any bearing on the legal basis for the ICC’s jurisdiction. I begin in Part II by providing an overview of how the term ‘universal jurisdiction’ is commonly used in international criminal law, by canvassing three different conceptualisations of universal jurisdiction. I conclude that the most relevant characterisation provides that a state has the right to prescribe laws concerning crimes defined in customary international law where such offences are committed extraterritorially with no link to the prosecuting state.

Part III then turns to deal with the fact that Article 12 appears to preclude universality as a legal basis for the ICC’s jurisdiction. I argue that the preconditions requiring either the territorial state or the state of nationality to have accepted the jurisdiction of the Court are not necessarily indicative of the legal basis for the Court’s jurisdiction. Instead, it is necessary to determine whether the offences in the Rome Statute are crimes that attract universal jurisdiction under customary international law. I demonstrate that, by and large, the Statute crimes are customarily justiciable under universal jurisdiction.

The final substantive part of this chapter explores two theories that would allow for the ICC’s jurisdiction to be based on the principle of universality. The first is that states are delegating universal jurisdiction to the Court, alongside territorial and nationality

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3 Unless stated otherwise, throughout this chapter I use ‘universal jurisdiction’ as a term of art to mean jurisdiction exercised on the basis of universality.


5 It is beyond the scope of this chapter to discuss how the existence and operation of the ICC affects the exercise of universal jurisdiction by states. Similarly, I do not address whether states asserting universal jurisdiction is sufficient to render a particular case inadmissible under Article 17. For an analysis of these issues, see generally Louise Arbour, ‘Will the ICC Have an Impact on Universal Jurisdiction?’ (2003) 1(3) Journal of International Criminal Justice 585; Gabriel Bottini, ‘Universal Jurisdiction after the Creation of the International Criminal Court’ (2003) 36 New York University Journal of International Law and Politics 503; Maximo Langer, ‘The Archipelago and the Wheel: The Universal Jurisdiction and the International Criminal Court Regimes’ in Cora C True-Frost, Martha Minow and Alex Whiting (eds), The First Global Prosecutor (University of Michigan Press, 2015) 204.
jurisdiction. The result is that the ICC’s jurisdiction in any given situation would be based on a combination of the principles of territoriality, nationality and universality, and would remain anchored in delegation from states. The second theory reconceptualises universal jurisdiction as inherent to the international community and exercisable by the ICC as an agent of this community. I argue that either theory would, at least in principle, provide a legal basis for the ICC’s jurisdiction over nationals of non-party states in most circumstances prescribed by the Statute. But there are also some significant limitations to both universal jurisdiction theories, and I conclude that there is no advantage to characterising the legal basis for ICC jurisdiction over nationals of non-party states in terms of universality.

II. WHAT IS UNIVERSAL JURISDICTION?

As mentioned in Chapter III, universality is one of the four principles of international law under which states may exercise jurisdiction extraterritorially. There is an inordinate amount of scholarship devoted to the conceptualisation of universal jurisdiction and the dissection of relevant state practice.6 In this section I canvass the main definitional and conceptual issues that frequently arise in analyses of universal jurisdiction with a view to ascertaining how the principle of universality might apply in the ICC context. A survey of the relevant literature reveals that ‘confusion and uncertainty reigns’7 over what universal jurisdiction actually is, with three relatively distinct versions of the concept emerging in the doctrine.

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A. Three Types of Universal Jurisdiction

1. Representative or Vicarious Jurisdiction

The first version of universal jurisdiction is what Luc Reydams terms ‘cooperative general universality’ which has its origins in the practice of states prior to World War II. Under this construction, a custodial state may prosecute a foreign national for a crime committed extraterritorially, with no other nexus between the prosecuting state and the crime. The crime itself does not have to be an international crime; it may be a serious crime common among domestic criminal jurisdictions. The rationale for such jurisdiction is that the custodial state may prosecute where it is not possible to extradite the offender to a state with jurisdiction based on territoriality, nationality, passive personality or the protective principle. To the extent that there is no link between the prosecuting state and the offence (other than custody), the description of this type of situation as universal jurisdiction makes sense. But since the post-war evolution of international criminal law, such jurisdiction has become better known as representative jurisdiction or the vicarious exercise of jurisdiction. It is essentially an example of the custodial state exercising jurisdiction delegated from a state that would otherwise have jurisdiction on the basis of territoriality or nationality.

2. Treaty-Based Universal Jurisdiction

There are a growing number of multilateral treaties that give states parties criminal jurisdiction over certain crimes without regard to the nationality of the offender or the territory of the offence. For example, the anti-terrorism treaties discussed in Chapter III are often described as providing universal jurisdiction over certain acts of terrorism, hijacking and torture. These treaties prescribe a list of states with primary jurisdiction over the

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8 Reydams, above n 6, 28–35.
9 Reydams, above n 6.
relevant crimes but also oblige custodial states to extradite or prosecute the suspected offender.12

Commentators are divided as to whether such treaties can accurately be described as providing for universal jurisdiction. There are those who contend that treaties cannot be a source of universal jurisdiction for the simple fact that only states parties to the treaty regime are entitled to exercise jurisdiction under it.13 In accordance with the principle of *pacta tertii nec nocent nec prosunt*, a custodial state not party to the treaty does not have the right to prosecute a foreign national for a treaty crime with no other nexus to the custodial state. In contrast, other scholars argue that the *pacta tertii* limitation does not affect the universal nature of the jurisdiction provided for in certain treaties.14 Roger O’Keefe, for example, argues that universal jurisdiction is simply ‘prescriptive jurisdiction in the absence of any other recognized jurisdictional nexus’.15 Insofar as treaties allow (or oblige) states parties to prescribe jurisdiction in this way, such jurisdiction may be characterised as universal.16

3. **Universal Jurisdiction in Customary International Law**

The third version of universality is the idea that under customary international law, any state can exercise criminal jurisdiction over a limited category of international crimes with absolutely no link to the offence. Piracy *jure gentium* has long assumed the mantle as the classic customary crime of universal jurisdiction, subject to prosecution by any state because of the *terra nullius* nature of the high seas.17 Since World War II, war crimes, crimes

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12 See the discussion in Part II(A)(1) of Chapter III. See also, *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v Senegal) (Judgment) [2012] ICJ Rep 422, in which the ICJ held that Senegal, as the custodial state, was obliged by the Convention against Torture to either prosecute the accused former president of Chad under universal jurisdiction, or extradite him to Belgium where he would be prosecuted on the basis of passive personality.


15 O’Keefe, above n 6, 747.

16 It is unnecessary to evaluate the merits of the various arguments for and against treaty-based universal jurisdiction in this thesis. It is sufficient to acknowledge the divergence of opinion among scholars.

against humanity and genocide have widely been considered as subject to universal jurisdiction under customary international law. The rationale for universality in this instance is that such crimes are offences against the international community as a whole. In *Israel v Eichmann*, for example, the District Court of Jerusalem tried Eichmann for crimes against humanity and war crimes, holding that:

> These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself (*delicta juris gentium*). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is universal.

Where scholars and jurists are divided on customary universal jurisdiction is over the issue of whether the accused must be in the custody of the prosecuting state, or whether states may exercise universal jurisdiction *in absentia*.

In the 2002 ICJ *Arrest Warrant* case, Belgium issued an arrest warrant for the foreign minister of the DRC for war crimes and crimes against humanity committed on Congolese territory, against Congolese nationals. At the time the arrest warrant was issued, the accused foreign minister was not in Belgium’s custody. The primary issue before the ICJ was whether Belgium had violated the minister’s immunity, but a number of judges took the opportunity to pronounce on Belgium’s assertion of universal jurisdiction. In a separate opinion, President Guillaume found that Belgium did not have jurisdiction to try the Congolese foreign minister on the grounds that ‘universal jurisdiction *in absentia* as applied in the present case is unknown to international law’. Similarly, Judges Rezek and Ranjeva

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18 Ibid 22–23; Yee, above n 13, 519.


20 Eichmann was also charged with crimes against the Jewish people as defined in the *Nazi and Nazi Collaborators (Punishment)* Law, 5710/1950.


22 *Arrest Warrant of 11 April 2000 (Congo v Belgium) (Judgment)* (2002) ICJ Rep 2001 (Separate Opinion of President Guillaume) [14].
rejected the notion that a state with no connection to the crime may seek to extradite or arrest a foreign national on the basis of universal jurisdiction.\textsuperscript{23}

In contrast, Judges Higgins, Kooijmans and Buergenthal found that although there is no established practice of states exercising universal jurisdiction \textit{in absentia}, neither is there any practice to suggest that custody is a precondition to such jurisdiction.\textsuperscript{24} Their Excellencies noted that if a state’s domestic law allows for a trial to take place \textit{in absentia}, such proceedings would likely contravene the accused’s right to a fair trial, but this ‘has little to do with bases of jurisdiction recognized under international law’.\textsuperscript{25}

It seems most scholars accept that universal jurisdiction may, at least in theory, be asserted without the need for custody of the accused.\textsuperscript{26} Antonio Cassese agrees with Judges Higgins, Kooijmans and Buergenthal that universal jurisdiction \textit{in absentia} is permitted in international law, but argues that it would nevertheless be ‘inadvisable’ on policy grounds for states to assert jurisdiction in this manner.\textsuperscript{27} O’Keefe clarifies that technically there is no such thing as universal jurisdiction \textit{in absentia} because universality is solely a principle of prescriptive jurisdiction:

The fact is that prescription is logically independent of enforcement. On the one hand, there is universal jurisdiction, a head of prescriptive jurisdiction alongside territoriality, nationality, passive personality and so on. On the other hand, there is enforcement \textit{in absentia}, just as there is enforcement \textit{in personam}.\textsuperscript{28}

As discussed in Chapter III, a state may assert prescriptive jurisdiction extraterritorially on the basis of the permissive principles, but its jurisdiction to enforce is strictly territorial.\textsuperscript{29}

\begin{itemize}
\item \textsuperscript{23} \textit{Arrest Warrant of 11 April 2000 (Congo v Belgium) (Judgment)} [2002] ICJ Rep 2001 (Separate Opinion of Judge Rezek) [6]; (Declaration of Judge Ranjeva) [5]-[6].
\item \textsuperscript{24} \textit{Arrest Warrant of 11 April 2000 (Congo v Belgium) (Judgment)} [2002] ICJ Rep 2001 (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal) [54]-[56].
\item \textsuperscript{25} Ibid, [56].
\item \textsuperscript{26} Reydams, above n 6, 38; Yee, above n 13, 508; Inazumi, above n 10, 101–103; Kreß, above n 13, 576.
\item \textsuperscript{28} O’Keefe, above n 6, 750. See also, O’Keefe, above n 17, 17.
\item \textsuperscript{29} A state may only enforce its jurisdiction extraterritorially if the territorial state consents. For example, the Scottish court established in the Netherlands to try Libyan suspects under Scots law for the 1988 bombing of Pan Am Flight 103: \textit{Al Megrahi v Her Majesty’s Advocate (Scotland)} [1999] HCJT 1475. See generally, Michael Plachta, ‘The Lockerbie Case: The Role of the Security Council in Enforcing the Principle \textit{Aut Dedere Aut Judicare}’ (2001) 12 \textit{European Journal of International Law} 125; Michael P Scharf, ‘The Lockerbie Model of
\end{itemize}
B. ‘Universal Jurisdiction’ in this Thesis

While universal jurisdiction remains a complex—and at times, convoluted—concept, for the purposes of the analysis in this chapter, I will use the term to mean a state’s right to prescribe laws in relation to customary international crimes that are committed extraterritorially with no other nexus to the prosecuting state. The rest of the chapter examines whether the principle of universality may have any bearing on the legal basis for the ICC’s jurisdiction.

III. UNIVERSALITY AND THE ROME STATUTE

A. Is the Principle of Universality Precluded by the Statute?

At the Rome Conference, states had the opportunity to consider establishing a court with universal jurisdiction under a proposal put forward by the German delegation. Under the German proposal, the future court would have jurisdiction over genocide, crimes against humanity and war crimes irrespective of where and by whom they were committed.30 Representing Germany at the 7th meeting of the Committee of the Whole, Hans-Peter Kaul clarified the objective of the proposal:

Since the contracting parties to the Statute could individually exercise universal jurisdiction for the core crimes they could also, by ratifying the Statute, vest the Court with a similar power to exercise such universal jurisdiction on their behalf, though only of course with regard to the core crimes.31

Advocates for this proposal believed that any state consent requirements would hinder the effectiveness of the court and potentially undermine its very raison d’être.32 Despite strong

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support from many delegations, the resistance of some states to giving the court universal jurisdiction was intense, and the German proposal was removed from consideration.\textsuperscript{33}

The compromise reached on the final text of the Rome Statute’s jurisdiction provisions makes it clear that the ICC does not have universal jurisdiction. Article 12 of the Rome Statute plainly requires either the territorial state or the state of nationality to consent to the authority of the ICC before the Court can exercise jurisdiction. The only circumstance in which state consent to the Statute is not a precondition to jurisdiction occurs when the Security Council refers a situation to the ICC in accordance with Article 13(b). While the Statute’s complex ‘consent regime’ restricts the Court’s jurisdiction to certain persons and territory, it does not necessarily mean that the principle of universality is precluded as a basis for the Court’s limited jurisdiction.

Leila Nadya Sadat and S Richard Carden argue that the uncertainty surrounding the applicability of the principle of universality to the ICC ‘has been generated by a failure to separate the principles of jurisdiction upon which the Statute is premised from the regime governing the exercise of jurisdiction by the Court in particular cases’.\textsuperscript{34} The idea that the ICC’s jurisdiction is predicated on delegated territorial and nationality jurisdiction from states parties assumes that the Article 12 preconditions are indicative of the legal basis for the Court’s jurisdiction. An alternative interpretation of the consent regime in Articles 12 and 13 is that it is a procedural limitation on the Court’s jurisdiction that was included in the Statute as a political compromise to gain the consensus needed for the adoption of the Statute. Michael Scharf argues that

the drafters did not view the consent of the state of territoriality or nationality as necessary as a matter of international law to confer jurisdiction on the court. Rather, they adopted the consent regime as a limit to the exercise of the court’s inherent jurisdiction as a politically expedient concession to the sovereignty of states in order to garner broad support for the statute.\textsuperscript{35}

These procedural preconditions would not necessarily disqualify the principle of universality from being a relevant component of the legal basis for the ICC’s jurisdiction. Advocates of the theory that universality plays a role in the ICC’s jurisdiction view the


\textsuperscript{34} Sadat and Carden, above n 4, 412.

\textsuperscript{35} Michael P Scharf, ‘The ICC’s Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position’ (2001) 64 Law and Contemporary Problems 67, 77; See also, Sadat and Carden, above n 35, 413.
Statute as providing ‘an explicit clue’\textsuperscript{36} that the drafters did not intend to preclude universality entirely. In particular, proponents of this view cite the declaration in the Preamble that the ICC has ‘jurisdiction over the most serious crimes of concern to the international community as a whole’\textsuperscript{37}. Such language reflects the rationale for universal jurisdiction over international crimes discussed above.

Accepting that the Statute preconditions are not necessarily determinative of the legal basis for the Court’s authority, the question of whether the principle of universality is relevant for ICC jurisdiction cannot be answered by simply looking to Articles 12 and 13. Ascertaining the relevance of universality instead requires an analysis of whether the offences listed in the Statute are crimes justiciable under universal jurisdiction.

\textbf{B. Justiciability of Statute Crimes under Universal Jurisdiction}

When the Rome Statute was being drafted, there was an understanding that the intent ‘was not to create new substantive law, but only to include crimes already prohibited under international law’.\textsuperscript{38} The drafting and negotiation process eventually reduced the list of crimes to those that give rise to individual criminal responsibility under customary international law.\textsuperscript{39} By and large it is recognised that where customary international law is the ultimate source of crimes, such crimes are automatically justiciable by universal jurisdiction.\textsuperscript{40} As O’Keefe explains, ‘a crime under customary international law is a crime under customary international law regardless of where, by whom, and against whom it is committed and regardless of whether it threatens the fundamental interests of or has

\textsuperscript{36} Sadat and Carden, above n 4, 408. See also, Paust, above n 1, 8.

\textsuperscript{37} Sadat and Carden, above n 4, 408.


\textsuperscript{39} With the possible exception of the crime of aggression – see discussion below. For an overview of the negotiation process on the crimes within the jurisdiction of the Court, see William Schabas, The International Criminal Court: A Commentary on the Rome Statute (Oxford University Press, 2nd ed, 2016) 111–122.

\textsuperscript{40} There is some disagreement as to which offences fall into this category. For example, the crime of piracy may be distinguished from war crimes, crimes against humanity and genocide in that piracy is not actually prohibited by customary international law. Instead customary international law gives states the right to criminalise acts of piracy under domestic law and prosecute on the basis of universality: O’Keefe, above n 17, 50–57. Similarly, a distinction must be made between crimes of customary international law which give rise to individual responsibility and crimes that give rise to state responsibility only. Only customary crimes that give rise to individual criminal responsibility are automatically justiciable under universal jurisdiction, and identifying such crimes is not a straightforward task. See, Reydams, above n 6, 38–39; Rosalyn Higgins, Problems and Process: International Law and How We Use It (Clarendon, 2000) 62–63; Bottini, above n 5, 517–519.
deleterious effects in any state’. Commentators who reject universality as a legal basis for the ICC argue that not all of the specific offences listed in the Statute are crimes of customary international law which means they are not justiciable under universal jurisdiction. Indeed, the viability of the theory that universality is applicable as a legal basis for ICC jurisdiction depends on whether the crimes in the Statute are crimes of universal jurisdiction. This section provides a brief overview of the customary status of each of the four categories of Statute crimes.

1. Genocide

The inclusion of genocide as a crime in the Rome Statute was the least controversial addition to the Court’s subject matter jurisdiction at the Rome Conference. The definition of genocide contained in Article 6 of the Statute replicates verbatim that which is set out in Article II of the Genocide Convention, a definition considered to accurately reflect customary international law. Despite the early acknowledgment of genocide as a customary crime, doubts remained about whether states could lawfully prosecute genocide under universal jurisdiction because such a right is not recognised explicitly in the Genocide Convention.

Article VI of the Convention provides that individuals suspected of committing genocide shall be tried by either the territorial state or ‘such international penal tribunal as may have jurisdiction’. In 1948, states parties were not prepared to accept universal jurisdiction over genocide, as demonstrated by the Ad Hoc Committee on Genocide’s rejection of a provision that would have provided for universal jurisdiction under the Genocide Convention. But in the decades since the Convention was adopted, Article VI has come

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41 O’Keefe, above n 17, 25.
44 ‘[T]he principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any Conventiona]l obligation,’ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) [1951] ICJ Rep 15, 23.
to be interpreted as establishing only the ‘minimum jurisdictional obligation’ on territorial states.\textsuperscript{47} The jurisprudence\textsuperscript{48} and \textit{travaux préparatoires}\textsuperscript{49} of international courts, academic writing\textsuperscript{50} and state legislative practice\textsuperscript{51} all point towards a general acceptance of genocide as a crime of universal jurisdiction.

2. \textit{Crimes Against Humanity}

Since ‘crimes against humanity’ first appeared in the Nuremberg Charter,\textsuperscript{52} the customary status of the category of crimes as justiciable under universal jurisdiction has rarely been questioned.\textsuperscript{53} Article 7 of the Rome Statute lists 11 specific acts that constitute crimes against humanity when ‘committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’. The provision also contains a

\begin{itemize}
\item \textsuperscript{47} Scharf, ‘ICC’s Jurisdiction over the Nationals of Non-Party States’, above n 4, 76. See also, \textit{Arrest Warrant of 11 April 2000 (Congo v Belgium)} [2002] IC Rep 2001 (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal) [27].
\item \textsuperscript{48} See, eg \textit{Attorney-General of the Government of Israel v Adolf Eichmann} (1962) 36 ILR 5 [25]; \textit{Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)} (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber II, Case No ICTY-94-1-AR72, 2 October 1995) [62]; \textit{Prosecutor v Furundzija, (Judgement)} (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No IT-95-17/I-T, 10 December 1998) [156]; \textit{Prosecutor v Nyabgogo, (Decision on the Prosecutor’s Motion to Withdraw the Indictment)} (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-90-40-T, 18 March 1999); \textit{Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)) (Preliminary Objections)} [1996] IC Rep 595, 616: The IC adopted the view that territorial limitations do not apply to rights and obligations which are \textit{erga omnes}; it held that the rights and obligations of the Genocide Convention fall into this category.


\item \textsuperscript{51} Much of this state legislative practice has occurred since the Rome Statute came into existence. Currently, at least 94 states have provided for universal jurisdiction over genocide in their national law. See, Amnesty International, \textit{Universal Jurisdiction – A Preliminary Survey of Legislation Around the World} 2012 Update (London, UK) 13 available at <http://www.amnesty.org/en/library/asset/IOS53/019/2012/en/2790cAmnee03-16b7-4dd7-8ea3-95f4c64a522a/ior530192012en.pdf>.

\item \textsuperscript{52} Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal, 82 UNTS 279 (signed and entered into force 8 August 1945) Article 6(c).


\end{itemize}
residual category for ‘other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental and physical health’. At the Rome Conference there was general consensus with respect to the propriety of including crimes against humanity as a category in the Statute, although delegates disagreed over which acts should be included in the list of specific offences.

The Rome Statute expanded the list of offences previously categorised as crimes against humanity in the ICTY and ICTR Statutes. Specifically it includes apartheid and enforced disappearance of persons; and expands the offences of torture, deportation, imprisonment and rape. There has been some speculation about whether these additional and extended offences attract universal jurisdiction under customary international law. With respect to the crime of apartheid, for example, the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid (‘Apartheid Convention’) provides that states parties are obliged to prosecute and punish those responsible for acts of apartheid regardless of whether there is any jurisdictional nexus to the prosecuting state. This is a classic example of treaty-based universal jurisdiction, but as discussed above, a treaty obligation is not necessarily indicative of broader customary universal jurisdiction over the crime. Nor does the existence of the Apartheid Convention mean that apartheid is recognised in and of itself as a crime against humanity under customary international law. But the list of acts in the Rome Statute that may constitute crimes against humanity is not finite, as indicated by the inclusion of ‘other inhuman acts’ in Article 7(d). As long as the customary elements of a crime against humanity are satisfied there is no prescribed limit to

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54 Rome Statute, Article 7(1)(k).


56 Morris, above n 42, 42 fn 114.


58 Morris, above n 42, 42 fn 114.

what acts might be considered crimes against humanity.60 Given that ‘crimes against humanity’ is a category of offences justiciable under universal jurisdiction in customary international law, it stands to reason that an act of apartheid that meets the customary requirements for a crime against humanity is most likely justiciable under universal jurisdiction. This reasoning can also be applied to enforced disappearances of persons and the other extended offences of crimes against humanity in the Rome Statute.

3. **War Crimes**

The 2005 International Committee of the Red Cross Study on Customary International Humanitarian Law (‘the ICRC Customary IHL Study’) concluded that ‘States have the right to vest universal jurisdiction in their national courts over war crimes’ 61 It is now widely accepted that this is the case; states may exercise universal jurisdiction over the category of war crimes under customary international law.62 There is less certainty, however, about the customary definition of ‘war crimes’. The ICRC Customary IHL study confirms that ‘serious violations of international humanitarian law’ constitute war crimes in both international and non-international armed conflict, but this leaves open the question of what conduct amounts to a ‘serious violation’ of international humanitarian law.63

The definition of war crimes and the list of offences in Article 8 of the Rome Statute were drawn from the Hague Regulations,64 the Geneva Conventions,65 and the Protocols

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60 See, Bantekas and Nash, above n 53, 121–122; Cassese, ‘Crimes against Humanity’, above n 59, 373–376. For a discussion of the category of ‘other inhumane acts’ see Prosecutor v Krnojelac (Judgment) (International Criminal Tribunal for Yugoslavia, Trial Chamber, Case No IT-97-25, 15 March 2002) [130]; Prosecutor v Vasićević (Judgment) (International Criminal Tribunal for Yugoslavia, Trial Chamber, Case No IT-98-32-T, [234].


63 Henckaerts and Doswald-Beck, above n 61, 568–603; Garraway, above n 62, 384–390.


65 *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (‘Geneva Convention I’); *Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*,
additional to the Geneva Conventions. There is little doubt that serious violations of the Hague Regulations and grave breaches of the Geneva Conventions give rise to individual criminal responsibility under customary international law. The customary basis of Article 8 of the Rome Statute has, however, been challenged on two main grounds. The first is that Additional Protocol I in its entirety does not constitute customary international law, and the second is that war crimes committed during non-international armed conflict are not universally recognised as part of custom.

With respect to the customary status of Additional Protocol I, there was extensive debate at the Rome Conference about the inclusion of Article 8(2)(b)(viii) on deportation and transfer of population. Based on Article 49 of Geneva Convention IV, the act of an occupied power transferring part of its civilian population into the territory it occupies is recognised as a grave breach in Article 85(4)(a) of Additional Protocol I. Israel is not a party to Additional Protocol I, and insisted that this aspect of the provision was not part of customary international law.

66 Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (‘Additional Protocol II’). See also, Schabas, above n 39, 228–231.

67 von Hebel and Robinson, above n 55, 112–113; Byron, above n 59, 107.
state practice to suggest that the act described in Article 8(2)(b)(viii) does in fact amount to a war crime in customary international law.\textsuperscript{72}

In the same vein, the US objected to the inclusion of Article 8(2)(b)(xxvi) which provides that it is a war crime to conscript or enlist children under the age of fifteen years into the national armed forces.\textsuperscript{73} Specifically, the US held that this provision did not reflect customary international law and that conscription and enlistment of child soldiers is a human rights concern rather than a war crime.\textsuperscript{74} The ICRC Customary IHL study notes, however, that the inclusion of the child soldiers provision in the Rome Statute was ‘uncontroversial’ given the extensive state practice prohibiting the conscription and use of children in armed forces.\textsuperscript{75} Furthermore, the SCSL undertook an extensive analysis of this issue in *Prosecutor v Norman* and concluded that conscription and enlistment of children under the age of fifteen as a war crime has crystallised into customary international law.\textsuperscript{76}

When the Security Council established the ICTR, it ensured that the ICTR Statute included war crimes committed in non-international armed conflict within the tribunal’s subject matter jurisdiction. This was seen as ‘a more expansive approach’ which incorporated serious violations of Common Article 3 and of Additional Protocol II ‘regardless of whether they were considered part of customary international law’.\textsuperscript{77} In *Prosecutor v Tadić* the ICTY Appeals Chamber undertook a thorough examination of state practice and concluded that there is extensive support for the notion that serious violations of international humanitarian law committed during non-international armed conflicts amount to war crimes under customary international law.\textsuperscript{78} In addition, there have been several

\textsuperscript{72} Such conduct is prohibited in numerous military manuals, state legislation and other practice. For a comprehensive list see Henckaerts and Doswald-Beck, above n 61, 578–579.

\textsuperscript{73} *UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Court, 4th mtg, UN Doc A/CONF.183/C.1/SR.4 (17 June 1998) Statement of the US* [54].

\textsuperscript{74} *Ibid*; von Hebel and Robinson, above n 55, 117; Morris, above n 42, 28.

\textsuperscript{75} Henckaerts and Doswald-Beck, above n 61, 584.

\textsuperscript{76} *Prosecutor v Norman (Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment))* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL 2004-14-AR72(E), 31 May 2004) [33]-[51]; see also, *Prosecutor v Lubanga (Judgment pursuant to Article 74 of the Statute)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04/01/06, 14 March 2012) (Separate and Dissenting Opinion of Judge Odio Benito) [6], [8]; *Prosecutor v Lubanga (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04/01/06, 29 January 2007) [242]-[248].


\textsuperscript{78} *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for Yugoslavia, Appeals Chamber, Case No IT-94-1, 2 October 1995) [96]-[137]. See also, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14, [218].
domestic criminal cases in which suspected war criminals were tried under universal jurisdiction for crimes committed in non-international armed conflicts.  

In summary, it would appear that the war crimes listed in the Rome Statute were for the most part intended to reflect customary international law. Where doubt existed at the time of the Statute’s drafting with respect to the customary status of a particular offence, it was understood that the Statute would take a progressive approach by codifying offences that would, in the future, crystallise into customary international law. As with crimes against humanity discussed above, if an offence meets the customary requirements for a war crime it will be justiciable on the basis of universal jurisdiction.

4. **Aggression**

As discussed in Chapter V, the crime of aggression is, in several ways, unique among the Rome Statute’s core crimes. Unlike the other crimes in the Statute, the crime of aggression was not defined until 2010 when the Assembly of States Parties adopted the Kampala Amendments. Article 8bis(1) defines the crime of aggression as:

> [T]he planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

Article 8bis(2) then specifies what is meant by ‘an act of aggression’ providing a list of seven acts that could constitute the *actus reus* in a crime of aggression. Although the Kampala Amendments specifically prevent the ICC from exercising jurisdiction over a crime of aggression committed by a national of a non-party state or on the territory of a non-party state, it is nevertheless instructive to examine whether the crime of aggression exists in customary international law and is justiciable under universal jurisdiction.

Any analysis of the customary crime of aggression by necessity begins with the Nuremberg and Tokyo judgments. Article 6 of the Nuremberg Charter provides:

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80 von Hebel and Robinson, above n 55, 122–126.

81 Henckaerts and Doswald-Beck, above n 61, 604–607.

82 Except in a situation referred by the Security Council. See Part V(B) of Chapter V for further discussion.
The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes Against Peace: namely, planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing […]

The term ‘war of aggression’ is not defined in the Charter and it was left up to the judges to interpret the term’s meaning. A reading of both the Nuremberg and Tokyo judgments reveals three scenarios that would each constitute a ‘war of aggression’:

(i) War with the object of the occupation or conquest of the territory of another State or part thereof;
(ii) War declared in support of a third party’s war of aggression; and
(iii) War with the object of disabling another State’s capacity to provide assistance to (a) third State(s) victim of a war of aggression initiated by the aggressor.

In December 1946 the UN General Assembly affirmed the principles of international law enumerated in the Nuremberg Charter and the Tribunal’s judgment, which was followed by a resolution in 1947 entrusting formulation of the Nuremberg Principles to the ILC. The 1951 Draft Code of Offences against the Peace and Security of Mankind and the positive views of states received in relation to the Draft Code further affirmed the existence of the crime against peace in international law. In the decades since, additional evidence of state practice and opinio juris with respect to the recognition of crimes against peace can be found in the significant number of states that have adopted legislation that criminalises the waging of wars of aggression.

83 Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis and the Charter of the International Military Tribunal, 8 August 1945, 82 UNTS 279, Article 6.


85 Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal, GA Res 95, UN GAOR, 2nd sess, UN Doc A/Res 95 (1946); Resolution on the Formation of the Principles Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, UN Doc A/Res/177 (1947).


87 For an overview of such legislation, see McDougall, above n 84, 142–148.
In its 2006 decision of *R v Jones*, the UK House of Lords had occasion to consider whether the crime of aggression exists in customary international law. Lord Bingham of Cornhill held that

'[it] may, I think be doubtful whether [aggressive] wars were recognised in customary international law as a crime when the 20th century began. But whether that be so or not, it seems to me clear that such a crime was recognised by the time the century ended' .

Lord Hoffman also found that ‘there is no doubt that this is a recognised crime in international law’. Such statements by a high profile domestic court add weight to the argument that a customary crime of aggression exists in international law.

It appears, therefore, that the crime of aggression is widely recognised as existing in customary international law, but as Carrie McDougall observes, ‘[r]eferences to wars of aggression dominate’. In other words, the customary definition of the crime is narrow and reflects the ‘crimes against peace’ World War II jurisprudence rather than the ‘crime of aggression’ contained in the Kampala Amendments. While wars of aggression are criminalised in customary international law, state practice and *opinio juris* do not support the notion that all acts of aggression attract individual criminal responsibility under customary law.

There is some state practice to suggest that the narrow customary version of the crime of aggression may be prosecutable under universal jurisdiction. For example, a number of states have enacted legislation to give domestic courts universal jurisdiction over crimes against peace, and in the UK House of Lords *Pinochet* decision, Lord Millet affirmed that crimes against peace were in the category of international crimes that attract universal jurisdiction.

88 [2006] UKHL 16 [12].
89 Ibid, [44].
90 McDougall, above n 84, 150.
91 Ibid 146.
jurisdiction. Scholarly commentary on this issue is more cautious, with some authors expressing doubt as to whether it is possible to state with any certainty that crimes against peace are justiciable under customary international law. Although Principle 2(1) of the Princeton Principles on Universal Jurisdiction provides for universal jurisdiction over crimes against peace, it is notable that crimes against peace or the crime of aggression are often not mentioned in lists of universal jurisdiction crimes.

Ultimately, it is difficult to conclude that there is sufficient state practice or opinio juris to establish universal jurisdiction for the crime of aggression in customary international law. McDougall notes that even if there is enough evidence to suggest that the narrow customary definition of crimes against peace attracts universal jurisdiction, the additional acts of aggression set out in the Kampala Amendments would not be justiciable under universal jurisdiction at present.

C. Genocide, Crimes against Humanity and War Crimes as Crimes of Universal Jurisdiction

Genocide, crimes against humanity and war crimes are, for the most part, recognised as crimes of universal jurisdiction under customary international law. It may be that some of the acts enumerated in the Rome Statute do not yet have customary equivalents, but there is little doubt that acts of genocide and the categories of crimes against humanity and war crimes do attract universal jurisdiction in customary international law. It is less certain whether the crime of aggression, even in its narrow post-World War II ‘crimes against peace’ definition, attracts universal jurisdiction.

94 R v Bartle & the Commissioner of Police for the Metropolis & Ors, Ex parte Pinochet; R v Evans & Anor and the Commissioner of Police for the Metropolis & Ors, ex parte Pinochet [1999] UKHL 17 (24 March 1999) [34].


97 McDougall, above n 84, 320.
IV. UNIVERSALITY AS THE BASIS FOR ICC JURISDICTION

The analysis in this part is predicated on the above arguments that universality is not precluded by the Statute consent regime and that most Statute crimes attract universal jurisdiction. The remainder of this chapter examines how the principle of universality could operate as a legal basis for ICC jurisdiction in any and all situations authorised by the Rome Statute. First I discuss whether states can be said to have delegated universal jurisdiction to the Court, which is similar to the prevailing theory that states have delegated territorial and nationality jurisdiction. Second I examine an alternative theory based on the idea that universal jurisdiction belongs to the international community and that the ICC acts as an agent of this community. Ultimately I conclude that neither of these theories is sufficiently persuasive as a legal basis for ICC jurisdiction.

A. Universal Jurisdiction as Belonging to States

1. Delegation of Universal Jurisdiction

The notion that the ICC’s authority over nationals of non-party states has its legal basis in delegated universal jurisdiction is conceptually similar to delegation of territorial jurisdiction discussed in Chapters III and IV. Recall that states have the right, under international law, to exercise their prescriptive powers of criminal justice on the basis of the territoriality, nationality, passive personality, protective and universality principles. In addition, states have the right to exercise powers of enforcement on the basis of territoriality. A common argument is that if states may lawfully delegate territorial and nationality jurisdiction to an international court, then they can also delegate universal jurisdiction. Delegated universal jurisdiction would not supplant delegated territorial jurisdiction as a legal basis, but instead would complement it in situations where delegation of territorial jurisdiction is uncertain.

98 See Part IV(B) of Chapter III.
99 Dapo Akande, ‘The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits’ (2003) 1 Journal of International Criminal Justice 618, 626; Einarsen, above n 6, 64; Olympia Bekou and Robert Cryer, ‘The International Criminal Court and Universal Jurisdiction: A Close Encounter’ (2007) 56 International and Comparative Law Quarterly 49, 51; Paust, above n 1, 5; Scharf, ‘ICC’s Jurisdiction over the Nationals of Non-Party States’, above n 4, 77; Kaul, above n 33, 587. But Morris argues that states may not delegate universal jurisdiction because the consequences of an international court exercising universal jurisdiction would be far greater than the consequences of a state exercising such jurisdiction. Morris, above n 42, 29–30. This is the same as her argument as to why states cannot delegate territorial jurisdiction (see Part III(A) of Chapter II).
A number of scholars contend that delegated universal jurisdiction is the legal basis for the ICC’s authority over situations in non-party states referred by the Security Council.\(^{100}\) Under this theory, states parties have each delegated to the ICC their right to exercise universal jurisdiction, and the ICC is then able to exercise its jurisdiction based on universality in the same way that states can do so individually.\(^{101}\) For example, any state has the right to exercise universal jurisdiction over acts of genocide and crimes against humanity committed in Darfur, and states parties to the Rome Statute can be said to have delegated this right to the ICC. Delegation of universal jurisdiction would have the effect of simplifying the legal basis for the ICC’s authority over situations in non-party states referred by the Security Council. There would be no need to rely on a theory that Sudan and Libya have implicitly consented to the jurisdiction of the ICC by virtue of their UN membership.\(^{102}\)

Accepting the premise of delegated universal jurisdiction, there does not seem to be any reason why it should not be applicable as a legal basis for ICC jurisdiction over situations in non-party states referred by the Security Council. As demonstrated in Chapter IV, there are some rare examples of situations referred by a state party or the prosecutor in which delegation of territorial jurisdiction may be hampered by immunities. For instance, the bilateral security agreement between Afghanistan and the US means that technically Afghanistan cannot delegate territorial jurisdiction over US soldiers to the ICC because Afghanistan does not have such jurisdiction itself.\(^{103}\) In Chapter IV I argued that this should not prevent the ICC from prosecuting US nationals accused of committing Statute crimes in Afghanistan based on delegated territorial jurisdiction. To do so would mean that the ICC would have to apply the Rome Statute differently in each situation depending on how the states parties involved have limited their own delegable jurisdiction through international agreements. But delegated universal jurisdiction as a complementary legal basis for ICC jurisdiction would potentially overcome the immunities hurdle in such cases. The ICC’s jurisdiction over US soldiers in Afghanistan would not be reliant on delegation

\(^{100}\) See, eg, Scharf, ‘ICC’s Jurisdiction over the Nationals of Non-Party States’, above n 4, 76; Sadat and Carden, above n 4, 412.

\(^{101}\) Some commentators conceive of the ICC’s jurisdiction in such cases as representing a ‘collective assertion of universal jurisdiction’: O’Keefe, above n 17, 541. But as I discuss in Chapter III, collective conferral occurs when states possess powers collectively that they do not have in their individual capacities. States have the individual right to prosecute on the basis of universality, therefore any delegation of such a right is better characterised as an individual conferral. See Part III(B)(2) of Chapter III.

\(^{102}\) See Part IV of Chapter V.

\(^{103}\) See Part IV(A) of Chapter IV.
of jurisdiction from Afghanistan, but would instead be based on delegated universal jurisdiction from all states parties.

2. **The Limits of Delegated Universal Jurisdiction**

Commentators opposed to the idea of delegated universal jurisdiction argue that there is no precedent for states to establish an international court on the basis of universal jurisdiction, and that to accept the ICC as having jurisdiction based on universality would set a dangerous precedent itself.\(^{104}\) As I argued in Chapter III, the historical and contemporary international criminal tribunals have limited precedential value for the ICC when it comes to the legal basis for its jurisdiction. But to accept that universal jurisdiction can be delegated *sui generis* to an international court does raise questions about the potential for states’ misuse of this power. What, for example, would prevent two states from setting up an international criminal tribunal on the basis of delegated universal jurisdiction?\(^2\)

Hypothetically, Australia and New Zealand could adopt a treaty to establish a trans-Tasman criminal tribunal with authority to prosecute individuals of any nationality for crimes of universal jurisdiction committed anywhere in the world. Establishing an international court imbued with authority to exercise criminal jurisdiction on the basis of universality would be a clear case of states doing ‘together what any one of them might have done singly’.\(^{105}\) Undoubtedly such a tribunal would be accused of illegitimacy for its excessive reach, but if states can delegate universal jurisdiction to the ICC, it stands to reason that they can delegate universal jurisdiction to other treaty-based international tribunals as well.

However, a trans-Tasman criminal tribunal exercising jurisdiction on the basis of delegated universal jurisdiction would be significantly restricted in what it could lawfully accomplish compared to the ICC, because of the fact that universality is a principle of prescriptive jurisdiction only. A trans-Tasman criminal tribunal would have no power to investigate, collect evidence, arrest suspects, compel testimony or enforce its jurisdiction in any way outside of Australian or New Zealand territory. It could theoretically issue subpoenas or arrest warrants *in absentia*, but even if lawful, such action would be entirely symbolic and

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\(^{105}\) International Military Tribunal (Nuremberg), Judgment and Sentences, reproduced in ‘Judicial Decisions’ (1947) 41 American Journal of International Law 172, 216. See Part II of Chapter III for a discussion of the Nuremberg Tribunal’s judgment.
unenforceable. The ICC, on the other hand, is able to rely on delegated territorial jurisdiction as a legal basis for its limited enforcement jurisdiction. Delegated universal jurisdiction on its own would not provide a legal basis for the ICC’s enforcement jurisdiction, even in situations referred by the Security Council. It is only because the Security Council has adopted resolutions under Chapter VII of the UN Charter to oblige Sudan and Libya to cooperate with the ICC that the Court can lawfully investigate, issue arrest warrants and otherwise enforce its jurisdiction over these situations.\(^{106}\)

B. Universal Jurisdiction as Inherent to the International Community

There is a different conceptualisation of universal jurisdiction which purports to provide an alternative basis upon which the Court can prosecute nationals of non-party states without relying on delegation of jurisdiction from states. As discussed above, one of the main rationales for universal jurisdiction over international crimes is that certain conduct amounts to an offence against the international community. Explanations for why this is the case almost always involve rhetoric about how such crimes ‘threaten the peace and security of mankind’ or ‘shock the conscience of humanity’ and that their perpetrators are ‘enemies of all mankind’.\(^{107}\) The notion that these crimes have an intangible global effect has given rise to the argument that the right to prosecute such crimes belongs to the international community as a whole. States exercising universal jurisdiction are not acting merely on behalf of the international community, but as agents of the international community.\(^{108}\) Under this conceptualisation of universal jurisdiction, international courts are also agents of the international community and their jurisdiction is not dependent upon delegation from states.

\(^{106}\) Even in a situation where the ICC has prescriptive jurisdiction on the basis of delegated nationality, the Court’s ability to exercise its enforcement jurisdiction is restricted to territory of states parties. In the ongoing preliminary examination into the Iraq/UK situation, for example, the Prosecutor is assessing evidence of war crimes committed on Iraqi territory by UK nationals. The ICC has personal prescriptive jurisdiction over accused UK soldiers because the UK is a state party to the Rome Statute, but it does not have territorial jurisdiction over Iraq, because Iraq is not a party. This means that the ICC does not have the power to, *inter alia*, collect evidence in Iraq or to request Iraq’s cooperation in any investigation. The Court’s enforcement jurisdiction in this situation is instead limited to the territory of the UK and other states parties where relevant, exercisable on the basis of delegated territorial jurisdiction. For more information on the preliminary examination in the situation in Iraq, see Office of the Prosecutor, *Report on Preliminary Examination Activities (2016)* (International Criminal Court, 14 November 2016) 18-24.


\(^{108}\) Ibid, 15: ‘The State prosecuting [international crimes] acts as agent of the international community, administering international law’.
To recognise the above theory as a legal basis for the ICC’s jurisdiction requires a conceptual shift away from the Westphalian view of jurisdiction and sovereignty. The idea that universal jurisdiction is inherent to the international community—exercisable by states and international courts as agents of this international community—assumes what Martti Koskenniemi terms the ‘descending approach’ to sovereignty.\(^{109}\) As I discussed in Chapter II, Koskenniemi identifies oscillating ‘ascending’ and ‘descending’ views on statehood and sovereignty to explain the existence of conflicting perspectives on international law. The argument that the ICC is exercising jurisdiction as an agent of the international community rests on the assumption that states must defer to certain global community norms surrounding criminal jurisdiction.

While the ICC’s very existence and its relatively broad personal jurisdiction reflects changes to the state-centric system of international relations, the delegation theory of jurisdiction ensures that state consent retains a central role in the legal basis for ICC jurisdiction. To accept that the legal basis for ICC jurisdiction is universal jurisdiction belonging to the international community significantly reduces the role of the state in the authority of the Court.

1. **The ICC as an Agent of the International Community**

A number of scholars subscribe to the notion that universal jurisdiction exists independently of states and that the ICC is a mechanism through which the international community can exercise such jurisdiction.\(^{110}\) Sadat and Carden, for example, posit

a theory of universal international jurisdiction which would permit the international community as a whole, in certain limited circumstances, to supplement, or even displace, ordinary national laws of territorial application with international laws that are universal in their thrust and unbounded in their geographic scope.\(^{111}\)

Such ‘universal international jurisdiction’ is exercisable by international courts, and provides the basis for the ICC’s authority and its ‘political legitimacy’.\(^{112}\) Sadat contends

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\(^{110}\) See, e.g., Rüdiger Wolfrum who argues that when states prosecute on the basis of universal jurisdiction they are ‘acting instead of international organs… as instruments of the decentralized enforcement of international law’: Rüdiger Wolfrum, ‘The Decentralized Prosecution of International Offences through National Courts’ in Yoram Dinstein and Mala Tabory (eds), *War Crimes in International Law* (Martinus Nijhoff Publishers, 1996) 233, 236.

\(^{111}\) Sadat and Carden, above n 4, 407.

\(^{112}\) Sadat, above n 96, 246.
that despite the shared goals and rationales between universal jurisdiction exercised by states and jurisdiction exercised by international courts, the practical differences in application and effect are significant enough to warrant a conceptual division between the two.\textsuperscript{113}

This view is shared by Mitsue Inazumi who argues that universal jurisdiction exercised by states should be distinguished from what she calls the ‘inherent-jurisdiction’ of international courts.\textsuperscript{114} She writes that

\begin{quote}
[the crimes subject to the ICC are those whose prosecution and punishment relate to the interests of the international community as a whole, therefore it is this community that has to deal with these kinds of crimes in the first place. Under this inherent-jurisdiction theory, ICC jurisdiction exists irrespective of the consent or absence thereof, of the states.\textsuperscript{115}
\end{quote}

The SCSL has characterised its own jurisdiction in similar terms. In 2004 the Appeals Chamber found that the international crimes listed in the Special Court’s Statute are crimes subject to universal jurisdiction and held that the Special Court ‘does not operate on the basis of transferred jurisdiction but is a new jurisdiction operating in the sphere of international law’.\textsuperscript{116} The Chamber went on to describe this new jurisdiction as ‘reflecting the interests of the international community’.\textsuperscript{117}

The next section revisits some of the case studies from previous chapters to ascertain whether this alternative conceptualisation of the Court’s legal basis can overcome some of the challenges faced by the delegation of jurisdiction theory. As a shorthand, I refer to this legal basis as ‘inherent universal jurisdiction’, in reference to the notion that universal jurisdiction is inherent to the international community.\textsuperscript{118}

\textsuperscript{113} Ibid 263.


\textsuperscript{115} Inazumi, above n 114, 166.

\textsuperscript{116} Prosecutor v Gbao (Decision on the Preliminary Motion on the Invalidity of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court) (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-15-AR72(E), 25 May 2004) [6]; Prosecutor v Kallon and Kamara (Decision on Challenge to Jurisdiction: Lomé Accord Amnesty) (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-15-AR72(E), 13 March 2004) [68]-[70].

\textsuperscript{117} Prosecutor v Gbao (Decision on the Preliminary Motion on the Invalidity of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court) (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-15-AR72(E), 25 May 2004) [6].

\textsuperscript{118} This should not be confused with the ICC’s inherent jurisdiction of compétence de la compétence (discussed in Part IV of Chapter IV).
2. **Inherent Universal Jurisdiction as a Legal Basis for ICC Jurisdiction over Nationals of Non-Party States**

(a) **Situations Involving Immunities**

Recalling the analysis in Chapter IV, senior state officials retain absolute personal immunity from prosecution in foreign and international courts for the duration of their tenure in office, unless waived by the official’s state of nationality. Although Article 98(1) of the Rome Statute precludes the ICC from requesting states to arrest and transfer an accused non-party head of state to the Court, this is a separate issue from the legal basis for the ICC’s jurisdiction. As I concluded in Chapter IV, there is not yet a customary exemption to head of state immunity before international courts.\(^{119}\) This means that even if the basis for the ICC’s authority is inherent universal jurisdiction, without a Security Council referral to implicitly waive immunity, accused heads of state from non-party states can continue to rely on their personal immunity and are exempt from the Court’s jurisdiction as a matter of procedure.

The situation is different in the case of immunities granted by international agreements. Returning to the example of the US-Afghanistan SOFA, conceptualising the basis for ICC jurisdiction as inherent universal jurisdiction would remove the need to even consider whether international agreements affect the Court’s jurisdiction. It would no longer be necessary to determine whether the SOFA affects Afghanistan’s ability to delegate jurisdiction to the ICC, because the legal basis for the Court’s jurisdiction does not depend on delegation. The only effect that such an agreement would have is under Article 98(2) of the Statute which prevents the ICC from requesting states to arrest and transfer a suspect to the ICC if to do so would violate an existing international agreement. In the Afghanistan case, the existence of the SOFA would mean that the ICC could not request Afghanistan to arrest and transfer any US suspects, but this has no bearing on the legal basis for the ICC’s jurisdiction should the Court somehow otherwise gain custody.

Inherent universal jurisdiction as a legal basis would also remove any potential obstacles to the ICC’s jurisdiction over Israeli nationals accused of committing Statute crimes on Palestinian territory. Any uncertainties surrounding Palestine’s statehood or the status of

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\(^{119}\) See generally, Part III of Chapter IV.
the Oslo Accords would have no impact on the ICC’s jurisdiction if the Court’s legal basis is not dependent on delegation.\(^\text{120}\)

\((b)\) **Situations Involving a Security Council Referral**

Inherent universal jurisdiction would arguably also provide a more straightforward basis for the ICC’s jurisdiction over situations in non-party states referred to the Court by the Security Council. Once the Court’s jurisdiction is properly triggered under Article 13(b) of the Statute, inherent universal jurisdiction would provide a legal basis for the ICC to exercise its powers over situations in non-party states such as Sudan and Libya. There would still be a question about the Security Council’s power to trigger the jurisdiction of a treaty-based Court over states that have not agreed to be bound by the terms of the Statute. But as discussed in Chapter V, this is a matter of UN membership and states’ agreement to be bound by the terms of the UN Charter, which includes an obligation to accept decisions of the Security Council.\(^\text{121}\) As a UN member, Sudan, for example, has consented to the Security Council’s power to take measures under Chapter VII of the Charter for the maintenance of international peace and security. There is established precedent that such measures include the implementation of criminal justice mechanisms. The jurisdiction of the ICC, once triggered, would then be based on inherent universal jurisdiction rather than the non-party state’s implied consent by virtue of its UN membership and the Security Council resolution.\(^\text{122}\)

3. **The Limits of Inherent Universal Jurisdiction**

\((a)\) **Jurisdiction is Inherent to States**

Critics of the inherent universal jurisdiction theory argue that such jurisdiction does not and cannot exist. Sarah Williams, for example, denounces the very idea of universal jurisdiction without delegation:

This conjures the image of a ‘floating’ universal jurisdiction, once a tribunal is created to try crimes giving rise to universal jurisdiction under customary international law, that jurisdiction simply exists and is vested in the tribunal with no need for a delegation of jurisdiction from states. This simply cannot be the case: universal

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120 See Part IV(B) of Chapter IV for background and analysis of the situation in Palestine.

121 See Part IV of Chapter V.

122 And perhaps implied consent by virtue of Sudan’s membership of the international community. See below for a critique of the concept of ‘the international community’.
jurisdiction is exercised by states. States may delegate their own competencies for crimes subject to universal jurisdiction to an international or internationalised tribunal. 123

Williams uses an interesting hypothetical example to demonstrate her argument against inherent universal jurisdiction: what if two non-governmental organisations (‘NGOs’) established an international court to try individuals accused of crimes of universal jurisdiction? Williams contends that it is ‘highly unlikely’ that such a court would be accepted in the absence of any state approval. 124 But if inherent universal jurisdiction exists, an NGO court could, at least in theory, exercise jurisdiction over certain crimes without individual state consent as an agent of the international community. David Luban writes that the legitimacy of international courts derives ‘not from the shaky political authority that creates them, but from manifested fairness of their procedures and punishments’. 125 If Amnesty International or Human Rights Watch decided to establish a special court for international crimes vested with sound rules of procedure, humane punishments and experienced judges of the highest quality, such a court could theoretically operate on the basis of inherent universal jurisdiction. 126

As discussed above, acceptance of inherent universal jurisdiction as a conceivable basis for the ICC’s jurisdiction is predicated on a descending perspective of jurisdiction and sovereignty. Outright rejections of inherent universal jurisdiction are firmly anchored in an ascending perspective. Rather than framing criticisms of inherent universal jurisdiction in terms of blanket assertions that jurisdiction unequivocally belongs to states, a more useful critique raises the question of what it means to say that universal jurisdiction can be inherent to the international community and exercised by an international court.

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123 Williams, above n 1, 315. Similarly Frédéric Mégret rejects the notion that jurisdiction, even universal jurisdiction, can be separated from states: Frédéric Mégret, ‘Epilogue to an Endless Debate: The International Criminal Court’s Third Party Jurisdiction and the Looming Revolution of International Law’ (2001) 12(2) European Journal of International Law 247, 251 n 16.

124 Williams, above n 1, 316.

125 David Luban, ‘Fairness to Rightness: Jurisdiction, Legality and the Legitimacy of International Criminal Law’ in Samantha Besson and John Tasioulas (eds), The Philosophy of International Law (Oxford University Press, 2010) 584, 579.

126 At least insofar as prescriptive jurisdiction is concerned. Without acceptance by states, such a court would lack any type of enforcement jurisdiction.
Is the ICC an Agent of the International Community?

The term ‘international community’ is ubiquitous (it appears twice in the Rome Statute Preamble alone), but its meaning remains elusive. As Dino Kritsiotis observes, ‘it is almost as if there exists a subliminal and pervasive appreciation of the meaning of this term—of what forms and frames this community—that eliminates the need for further detail or consideration’. A conservative view would be that the international community refers simply to the community of states. But does this mean that acts or principles attributed to the international community reflect the acquiescence of every member of this community? Or is it sufficient that the ‘vast majority’ of states are in agreement? As discussed in Chapter III, the ambiguity of what constitutes a majority of states risks contravening the principle of res inter alios acta.

Proponents of the inherent jurisdiction theory might argue that the will of the international community can be ascertained by looking to customary international law, which develops through uniform, consistent and general state practice. To the extent that certain universal jurisdiction crimes are offences against customary international law, it reflects a consensus by the international community. But in this instance, customary international law is only an indicator of a) the existence and scope of certain crimes and b) the right of states to prosecute criminal conduct on the basis of universal jurisdiction. At present, there is not sufficient state practice and opinio juris to suggest that customary international law gives international courts the right to exercise jurisdiction on the basis of universality.

If the ICC’s membership was universal, or near-universal, this would likely overcome any objections to the idea that the Court is acting as an agent of the international community.

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128 Kritsiotis, above n 127, 964.


The near-universal membership of the UN, for example, gives the UN and its organs a defensible claim that they act on behalf of the international community. Perhaps if the ICC had been established by the Security Council the idea that the Court is exercising jurisdiction as an agent of the international community could be sustained. As a treaty-body without universal membership, however, it is a bridge too far to accept that the legal basis for the ICC’s jurisdiction is universal jurisdiction inherent to the international community.

C. Two Flaws

No matter which theory is preferred—delegated or inherent universal jurisdiction—universality as a legal basis for the ICC’s jurisdiction suffers from two basic flaws. The first is that there is still some uncertainty surrounding which acts can be prosecuted as crimes of universal jurisdiction. While there is a sound argument to be made that acts meeting the customary requirements of a crime against humanity or a war crime should attract universal jurisdiction, there remains some contention over whether certain offences are universally justiciable. Furthermore, the crime of aggression as defined in the Kampala Amendments is not yet a customary crime of universal jurisdiction, which would automatically preclude inherent universal jurisdiction as a basis for ICC prosecution in such cases.

The second flaw with the universal jurisdiction theory has to do with the fact that universality is a principle of prescriptive jurisdiction only. Even conceding the possibility that universal jurisdiction exercisable by an international court is something that can be distinguished from universal jurisdiction exercisable by states, this cannot overcome the fact that jurisdiction to enforce is exclusively territorial. Without the cooperation of states to gather evidence, arrest and incarcerate offenders, an international court would be significantly limited in what it can actually achieve.

132 United Nations Secretary-General, ‘Secretary-General examines ‘meaning of international community’ in address to DPI/NGO conference’ (Press Release, SG/SM/7133, 15 September 1999).

133 Given that the Kampala Amendments prevent the ICC from exercising jurisdiction over acts of aggression involving non-party states in all circumstances other than a Security Council referral, it may not matter that delegated universal jurisdiction would not provide a legal basis for the Court’s jurisdiction over the crime of aggression. The legal basis would remain delegated territorial or nationality jurisdiction.
Some scholars have suggested that the principle of universality remains applicable to ICC jurisdiction even in a situation involving only a state party. Sadat and Carden maintain that in such a case, ‘the universality principle does not disappear, layered upon it is a State consent regime based on two additional principles (which are disjunctive) of jurisdiction: the territorial principle and the nationality principle’.\textsuperscript{134} As I have argued above, however, there is no substantial advantage to characterising the legal basis for the ICC’s jurisdiction as either delegated or inherent universal jurisdiction. In situations involving treaty-based immunities or a Security Council referral, for example, universality potentially simplifies the basis for ICC jurisdiction over nationals of non-party states. But in these situations, the Court would still need to rely on delegated territorial jurisdiction for its powers to enforce, and universal jurisdiction cannot overcome the personal immunities of incumbent senior officials from states not party to the Rome Statute. On balance, given the flaws in both the delegated and inherent universal jurisdiction theories, the principle of universality as a legal basis for ICC jurisdiction does not work as well as delegated territorial jurisdiction and implied consent, which provide an adequate basis for ICC authority in the same situations.

This does not mean that the principle of universality is immaterial for the ICC. The Court has a legitimate interest in casting its jurisdictional net as wide as possible if it is to fulfil its promise that ‘the most serious crimes of concern to the international community as a whole must not go unpunished’.\textsuperscript{135} To the extent that the aims and objectives of the ICC align with the rationale for universal jurisdiction, the Court does represent certain universal norms and values of the international community.

\textsuperscript{134} Sadat and Carden, above n 4, 413.

\textsuperscript{135} Rome Statute, Preamble.
CHAPTER VII

CONCLUSION

AN AFRICAN EXODUS?

In October 2016, Burundi, South Africa and the Gambia declared, within days of each other, their intention to withdraw from the Rome Statute. Four months later, the African Union adopted a resolution urging other African states parties to follow suit.¹ This confluence of events may be a decisive moment for the ICC’s relationship with Africa, and it may also be the catalyst that leads to some clarification of the legal basis for the ICC’s jurisdiction over nationals of non-party states. As such, the withdrawal efforts—South Africa’s in particular—provide a useful concluding example to draw together the analysis and arguments raised throughout this thesis.

Of the three states that announced their intention to withdraw from the Statute, South Africa’s effort to leave the ICC caused the most consternation among court watchers and commentators.² South Africa was an early and vocal supporter of the Court. It was the first African state to enact domestic legislation implementing the Rome Statute,³ and it remained stalwart in its refusal to conclude an Article 98 agreement with the US.⁴ South Africa also wields significant political and economic influence in the African region, and the government’s attempt to withdraw from the Statute raised concerns about the impact that this will have on the ICC.⁵

¹ ‘African leaders plan mass withdrawal from international criminal court’ The Guardian (31 January 2017). At the time of writing, the text of the resolution is not publicly available.

² See, eg, Dov Jacobs, ‘South Africa (and Burundi) to withdraw from the ICC? Spreading the Jam (21 October 2016); Amnesty International, ‘South Africa: Decision to leave International Criminal Court a “deep betrayal of millions of victims worldwide”’ (Statement, 21 October 2016); Magnus Killander, ‘Withdrawal from the ICC: A sad day for South Africa and Africa’ The Conversation (22 October 2016); Hannah Woolaver, ‘International and Domestic Implications of South Africa’s Withdrawal from the ICC’ EJIL: Talk! (24 October 2016).


⁵ Kate Cronin-Furman and Stephanie Schwartz, ‘Is this the end of the International Criminal Court?’ The Washington Post (21 October 2016).
Conversely, the announcements by Burundi and the Gambia that they would be withdrawing from the Statute have been ‘[easier] to dismiss’ as little more than reactionary stunts by governments seeking to avoid scrutiny for allegations of domestic atrocities. Indeed, Burundi’s decision to withdraw from the Rome Statute came less than six months after the Office of the Prosecutor made public its preliminary examination into crimes committed in Burundi since April 2015. But Burundi’s rhetoric following its decision to withdraw is indicative of the enduring contention that the Rome Statute represents an unacceptable infringement on state sovereignty. The withdrawal by Burundi also raises new questions about the legal basis for the Court’s jurisdiction over nationals of a former state party.

The Gambia’s withdrawal is undoubtedly the least consequential of the three, as it was arguably a desperate attempt by former president Yahyeh Jammeh to shore up support right before a presidential election. A change of government in January heralded a swift reversal of the decision to withdraw which means the Gambia will remain a party to the Rome Statute. For now, at least. With rumours of the African Union’s adoption of a resolution calling on Union members to withdraw from the Rome Statute, the future of the ICC’s relationship with African states parties is uncertain.

Reflecting on the arguments and analysis of the preceding chapters, I use South Africa’s withdrawal attempt to review some of the key legal questions that have yet to be adequately addressed by the ICC. In doing so, I offer some observations on how the ICC could mitigate the ongoing objections to its jurisdiction over nationals of non-party states.

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7 Office of the Prosecutor, ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a Preliminary Examination into the situation in Burundi’ (Statement, 25 April 2016).

8 At the November 2016 Assembly of States Parties, Burundi’s representative declared that submitting to the ICC’s preliminary examination ‘would be tantamount to a betrayal of the sovereignty of Burundi, its people and National Institutions’: Statement of Vestine Nahimana Ambassador of Burundi, Fifteenth Session of the Assembly of States Parties to the Rome Statute (16-24 November 2016).

9 Jammeh lost the election to Adama Barrow in December 2016, but refused to concede power until January 2017: ‘President Adama Barrow arrives in The Gambia, at last’ Al Jazeera (27 January 2016).


11 The resolution is not binding on African Union members, but it may nevertheless have a destabilising effect on Africa’s relationship with the ICC. ‘African leaders plan mass withdrawal from international criminal court’ The Guardian (31 January 2017). The reasons for the ICC’s deteriorating relationship with Africa are numerous and complex, for an overview, see ‘Africa and the International Criminal Court’ (2017) 22(10) Strategic Comments vi.
In June 2015, President Omar Al Bashir travelled to South Africa to attend an African Union summit, despite the ICC having held on numerous occasions that states parties to the Statute have an obligation to arrest and transfer the indicted Al Bashir to the Court when he enters their territory.\(^\text{12}\) The High Court in Pretoria heard an urgent application brought by the Southern African Litigation Centre seeking orders compelling the South African government to arrest and transfer President Al Bashir to the ICC. The High Court declared that the failure to arrest Al Bashir was unconstitutional and ordered the government to ‘take all reasonable steps’ to arrest and detain the Sudanese president.\(^\text{13}\) By the time the order was handed down, however, Al Bashir had been allowed to leave the country, despite an interim injunction in place to prevent him from doing so.\(^\text{14}\)

On appeal, the South African Supreme Court of Appeal delivered a scathing judgment against the government for allowing Al Bashir to leave South Africa unarrested.\(^\text{15}\) It held that South Africa had violated its obligation under the Rome Statute and the domestic Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 by failing to arrest Al Bashir.\(^\text{16}\) The government appealed this decision to the Constitutional Court soon after, but withdrew South Africa from the ICC a little over a month before the nation’s highest court was scheduled to hear the matter.\(^\text{17}\) At the Fifteenth Session of the Assembly of States Parties to the Rome Statute, the South African Minister of Justice explained his government’s decision to withdraw from the Statute as follows:

South Africa found itself in the unenviable position where it was faced with conflicting obligations: obligations contained in the Rome Statute which are in

\(^{12}\) See Part III(B)(2) of Chapter IV. See also, *Prosecutor v Al Bashir (Decision following the Prosecutor’s request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/05-01/09, 13 June 2015).

\(^{13}\) *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & ors* (2015) 5 SA 1 (High Court).

\(^{14}\) Ibid.

\(^{15}\) *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (Supreme Court of Appeal).

\(^{16}\) Ibid [103]. For a discussion of the domestic legal implications of this decision, see Dapo Akande, ‘The Bashir Case: Has the South African Supreme Court Abolished Immunity for all Heads of States?’ *EJIL: Talk!* (29 March 2016).

\(^{17}\) Candice Nolan, ‘Concourt to hear President al-Bashir appeal case’ *SABC* (6 August 2016).
conflict with customary international law pertaining to immunity for sitting heads of state and government.\textsuperscript{18}

The claim that South Africa’s obligations under the Rome Statute are ‘in conflict and inconsistent with’ its customary obligations to respect head of state immunity has been the government’s primary justification for the decision to withdraw.\textsuperscript{19} But this explanation highlights the persistent confusion about the interaction between the customary obligation to respect head of state immunity and the Rome Statute’s removal of personal immunities before the ICC. Moreover, the statement reflects a fundamental misunderstanding of the source of South Africa’s international legal obligation to arrest President Al Bashir, and the legal basis for the ICC’s jurisdiction in the Darfur situation.

In Chapter IV, I conceded that there is no customary exception to the personal immunity of incumbent heads of state, and this includes for prosecution for international crimes by an international court.\textsuperscript{20} This means that the ICC has no legal basis to exercise jurisdiction over a sitting head of a non-party state for crimes committed on the territory of a state party.\textsuperscript{21} The territorial state cannot, in these circumstances, delegate jurisdiction to the ICC because there is no customary exception to the immunity, and the non-party state in question has not consented to the Article 27 waiver of immunity.

The situation is different, however, where the UN Security Council has referred a non-party state to the ICC. As I argued in Chapter V, the legal basis for the ICC’s jurisdiction over Darfur rests on the implied consent of Sudan by virtue of Sudan’s membership of the UN. In 2014, Pre-Trial Chamber II provided some much needed clarification of the legal position of President Al Bashir, declaring that he could not rely on any immunities under international law because the Security Council referral resolution had ‘implicitly waived’

\textsuperscript{18} Opening Statement by Mr TM Masutha, Minister of Justice and Correctional Services, Republic of South Africa, \textit{Fifteenth Meeting of the Assembly of States Parties of the International Criminal Court} (16-24 November 2016).

\textsuperscript{19} Department of Justice and Constitutional Development Republic of South Africa, ‘Briefing to the media by Minister Michael Masutha on the matter of International Criminal Court and Sudanese President Omar Al Bashir’ (Press release, 21 October 2016). The African Union commended South Africa for refusing to arrest Al Bashir and held that this action was ‘consistent with international law’: \textit{Assembly of the African Union, Decision on the International Criminal Court, Twenty-Sixth Ordinary Session, Assembly/AU/Dec.590 (XXVI)} (30-31 January 2016) 1.

\textsuperscript{20} See Part III of Chapter IV.

\textsuperscript{21} In situations referred to the Court by a state party or via an investigation initiated by the ICC Prosecutor: \textit{Rome Statute, Article 13(a) and (c)}. 

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them.\(^\text{22}\) This is consistent with the theory that the legal basis for the ICC’s jurisdiction over Darfur is grounded in Sudan’s obligations under the UN Charter. Unfortunately, the Pre-Trial Chamber's decision, while a welcome (albeit overdue) explanation of Al Bashir’s legal status vis-à-vis the ICC, did not sufficiently clarify the legal parameters of the obligations on states parties to cooperate with the Court in this situation.\(^\text{23}\) This is evident from the plea by the Pretoria High Court at the end of its judgment:

We … find it prudent to invite the ICC to take cognisance of the issues that arise in this matter. As we demonstrate in this judgement, South Africa is not the only Rome Statute signatory that has failed to carry out its duties in terms of that Statute when it could have done so, based on a conflict between its regional affiliation on the one hand and its broader international obligations on the other.\(^\text{24}\)

Based on my analysis in this thesis, I offer a brief response to South Africa’s claim that its obligations under the Rome Statute conflict with its obligations under customary international law. First and foremost, there is no conflict or inconsistency between the Statute obligation to cooperate with the ICC and the customary obligation to respect Al Bashir’s personal immunity. In referring the situation in Darfur to the ICC, the Security Council implicitly waived any immunities enjoyed by Al Bashir; this waiver extends to the ICC and to states parties to the Rome Statute. The only residual customary immunity that Al Bashir enjoys is immunity from the domestic jurisdiction of non-party states which are specifically exempted from the obligation to cooperate with the ICC by the terms of Resolution 1593.\(^\text{25}\) This means that when Al Bashir travelled to South Africa in 2015, he did not have immunity from arrest in South Africa because it had been removed by the Security Council resolution. Therefore, there was no legal impediment to South Africa’s obligation to arrest Al Bashir – an obligation to which South Africa was bound under both the Rome Statute and the UN Charter.

As per the terms of Article 127 of the Rome Statute, in October 2016, South Africa submitted written notification to the UN Secretary-General of its intention to withdraw

\(^{22}\) Prosecutor v Al Bashir (Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court) (International Criminal Court, Pre-Trial Chamber II, Case No ICC/02/05-01/09, 9 April 2014) [29]. See Part IV(C) of Chapter V.

\(^{23}\) The Pre-Trial Chamber did briefly discuss the Security Council resolution and the UN Charter, but only in relation to the question of Al Bashir’s immunity under an African Union resolution, not customary international law, ibid [29]-[32]. See also, Assembly of the African Union, Decision on Africa’s Relationship with the International Criminal Court, Extraordinary Session, Ext/Assembly/AU/Dec.1 (12 October 2013) 2.

\(^{24}\) Southern Africa Litigation Centre v Minister of Justice and Constitutional Development (2015) 5 SA 1 (GP) [34].

\(^{25}\) SC Res 1593, UN SCOR, 5158th mtg, UN Doc SC/Res/1593 (31 March 2005), operative paragraph 2.
from the Statute.²⁶ Had the withdrawal gone ahead as planned, it would have taken effect one year later, after which time South Africa would be a non-party state. From then, South Africa would legitimately have been obliged under customary international law to respect the personal immunity of President Omar Al Bashir, for as long as he remains in office. South Africa would no longer have been bound by the Rome Statute, and Resolution 1593 would have exempted South Africa from cooperating with the ICC as a non-party state. In March 2017, however, the High Court of South Africa held that the government’s notice of withdrawal from the Rome Statute is ‘unconstitutional and invalid’ on the grounds that parliamentary approval is required before the executive can take such action.²⁷ The government has notified the UN Secretary-General of this decision and revoked its instrument of withdrawal.²⁸ South Africa now faces an impending hearing before the ICC where Pre-Trial Chamber II will determine whether South Africa’s failure to arrest Al Bashir warrants a finding of non-compliance under Article 87(7) of the Statute and a referral to the Assembly of States Parties and the UN Security Council.²⁹

The circumstances surrounding South Africa’s attempt to withdraw from the Statute illustrate the inadequacies of the ICC’s existing jurisprudence on jurisdiction. As I discussed in Chapter IV, the Pre-Trial Chambers’ decisions on Al Bashir’s immunity, for example, ‘have either been roundly criticized or not been sufficiently reasoned’.³⁰ At the most recent session of the Assembly of States Parties, Namibia expressed genuine uncertainty as to ‘whether it is correct to apply the Rome Statute system wholly’ to non-party states and questioned the role of the Security Council in making referrals to the Court.³¹ It has

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²⁶ Department of Justice and Constitutional Development Republic of South Africa, ‘Briefing to the media by Minister Michael Masutha on the matter of International Criminal Court and Sudanese President Omar Al Bashir’ (Press release, 21 October 2016).

²⁷ Democratic Alliance v Minister of International Relations and Cooperation (83145/16) [2017] (High Court) [84].

²⁸ United Nations Secretary-General, ‘South Africa: Withdrawal of notification of withdrawal’ (Statement, UN Treaties Website, 8 March 2017).

²⁹ Back in September 2015 the Pre-Trial Chamber held that South Africa’s failure to cooperate warranted opening Article 87(7) proceedings, but granted South Africa an extension of time to submit its views while the domestic proceedings were ongoing. Prosecutor v Al Bashir (Prosecution’s Submission in advance of the public hearing for the purposes of determination under article 87(7) of the Statute with respect to the Republic of South Africa in the case of the Prosecutor v Omar Al Bashir) (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/05-01/09, 17 March 2017) [40]-[42].


³¹ Statement by Mr Issaskar Ndjoze, Permanent Secretary, Republic of Namibia Ministry of Justice, Fifteenth Meeting of the Assembly of States Parties to the International Criminal Court (16-24 November 2016).
become too easy for states parties to use legal confusion as an excuse for non-cooperation, and in South Africa’s case, as a pretext for withdrawal.

The African Union has called for the ICJ to be asked to render an advisory opinion on the question of immunities for heads of non-party states indicted by the ICC. There would be certain advantages in taking this question to the ICJ, not least of which is the perception of the ICJ as a neutral arbiter for a politically-charged issue. As I have demonstrated throughout this thesis, however, the legal uncertainties surrounding the ICC’s jurisdiction over nationals of non-party states go beyond the issue of head of state immunity. What the ICC needs is a foundational, Tadić-style decision in which it sets out the legal basis for its jurisdiction and explains how this allows the Court to exercise jurisdiction over nationals of non-party states in the circumstances provided for by the Rome Statute. As argued in Chapter II, such a basis needs to be grounded in the principle of state consent to mitigate concerns that the ICC represents an unacceptable infringement on state sovereignty. By conceptualising the legal basis for the Court’s jurisdiction as delegated territorial and nationality jurisdiction from states parties, the ICC will be able to lawfully exercise jurisdiction over nationals of non-party states in most situations allowed by the Rome Statute. A thorough conceptual discussion of what ‘delegation of jurisdiction’ actually entails will be required to ensure the credibility of this theory as a legal basis. Furthermore, as discussed above, the ICC should articulate the basis for its jurisdiction in situations referred to the Court by the Security Council in more detail than it has to date. As I argued in Chapters IV and V, this would be within the Court’s compétence de la compétence and would clarify the parameters of the obligations on both states parties and non-party states in such situations.

The ICC will have another opportunity to clarify the legal basis for its jurisdiction over President Al Bashir when Pre-Trial Chamber II convenes for the Article 87(7) hearing.

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34 *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber II, Case No ICTY-94-1-AR72, 2 October 1995). See the discussion in Part IV(C)(2) of Chapter V.

35 Except over incumbent heads of state (and other senior state officials) from non-party states in situations where jurisdiction is triggered by Article 13(a) or (c). See Part III of Chapter IV.

36 See Chapter III.
against South Africa. In its submissions to the Court, South Africa maintains the position that the ICC’s request for states parties to arrest Al Bashir conflicted with South Africa’s customary and treaty obligations to respect his immunity.\(^{37}\) The submissions provide a lengthy critique of the ICC’s previous attempts to explain why Al Bashir does not enjoy immunity before the Court, and conclude that Al Bashir nevertheless retains his immunity in foreign domestic jurisdictions.\(^{38}\) The Pre-Trial Chamber should respond to these arguments and use the occasion to clarify the legal basis for its jurisdiction over sitting heads of non-party states referred to the Court by the Security Council, and to explain why states parties are obliged to arrest and transfer Al Bashir to the ICC. If the Pre-Trial Chamber instead agrees with the Prosecutor’s submissions that the Article 87(7) hearing is ‘primarily procedural’ in nature and therefore ‘should not focus on the substantive law relating to the alleged immunity of Mr Al Bashir’,\(^{39}\) it would constitute another lost opportunity for the ICC to strengthen the legal basis for its jurisdiction.

Going forward, concern about the jurisdiction of the ICC over nationals of non-party states is only going to intensify. The situations in Afghanistan and Palestine in particular raise complex jurisdictional issues that the Court will need to address before it can justify any prosecution of US or Israeli nationals.\(^{40}\) Burundi’s withdrawal raises a new set of questions about the legal basis for the Court’s jurisdiction in a situation where the state has withdrawn its consent.\(^{41}\) I anticipate that it is only a matter of time before another significant test of the Court’s jurisdiction over nationals of non-party states takes place. While the ICC may be facing multiple and multifaceted challenges to its credibility and legitimacy, as I have argued throughout this thesis, the legal basis for its jurisdiction over nationals of non-party states does not have to be one of them.

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37 *Prosecutor v Al Bashir (Submission from the Government of South Africa for the purposes of proceedings under Article 87(7) of the Rome Statute)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/05-01/09, 17 March 2017).

38 Ibid, [51]-[99].

39 *Prosecutor v Al Bashir (Prosecutor’s Submission in advance of the public hearing for the purposes of determination under article 87(7) of the Statute with respect to the Republic of South Africa in the case of the Prosecutor v Omar Al Bashir)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/05-01/09, 17 March 2017) [52].

40 See Part IV of Chapter IV.

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APPENDIX A

ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

Select Provisions

Article 1

The Court

An International Criminal Court (‘the Court’) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Article 4

Legal status and powers of the Court

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

Article 5

Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
   a. The crime of genocide;
   b. Crimes against humanity;
   c. War crimes;
   d. The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.
Article 6

Genocide

For the purpose of this Statute, ‘genocide’ means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

Article 7

Crimes against humanity

1. For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

a. Murder;
b. Extermination;
c. Enslavement;
d. Deportation or forcible transfer of population;
e. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
f. Torture;
g. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
h. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
i. Enforced disappearance of persons;
j. The crime of apartheid;
k. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
2. For the purpose of this Statute, ‘war crimes’ means:
   a. Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention
      …
   b. Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
      …
      viii. The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
      …
      xxvi. Conscription or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

Article 11
Jurisdiction ratione temporis

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

Article 12
Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
   a. The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
b. The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

**Article 13**

**Exercise of jurisdiction**

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

**Article 15**

**Prosecutor**

1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.

2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.
6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 16
Deferral of investigation or prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Article 17
Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
   a. The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
   b. The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
   c. The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
   d. The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
   a. The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
   b. There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
   c. The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Article 19

Challenges to the jurisdiction of the Court or the admissibility of a case

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.

2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:
   a. An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;
   b. A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
   c. A State from which acceptance of jurisdiction is required under article 12.

Article 21

Applicable law

1. The Court shall apply:
   a. In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
   b. In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
   c. Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards;
   d. The Court may apply principles and rules of law as interpreted in its previous decisions.

2. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.
Article 26
Exclusion of jurisdiction over persons under eighteen
The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Article 27
Irrelevance of official capacity
1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 34
Organs of the Court
The Court shall be composed of the following organs:
(a) The Presidency;
(b) An Appeals Division, a Trial Division and a Pre-Trial Division;
(c) The Office of the Prosecutor;
(d) The Registry.

Article 42
The Office of the Prosecutor
1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.

…

Article 86
General obligation to cooperate
States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.
Article 87

Requests for cooperation: general provisions

…

7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

Article 98

Cooperation with respect to waiver of immunity and consent to surrender

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Article 121

Amendments

1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.

2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.

3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.

4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.

5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which
has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.

7. The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.

Article 127
Withdrawal

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.
APPENDIX B

KAMPALA AMENDMENTS TO THE ROME STATUTE

Select Provisions

**Article 8 bis**

Crime of aggression

1. For the purpose of this Statute, ‘crime of aggression’ means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

**Article 15 bis**

Exercise of jurisdiction over the crime of aggression

(State referral, *proprio motu*)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.

5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory.

6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a
crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.

9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s own findings under this Statute.

10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

Article 15 ter

Exercise of jurisdiction over the crime of aggression

(Security Council referral)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s own findings under this Statute.

5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.
Appendix C

Charter of the United Nations

Select Provisions

Chapter I: Purposes and Principles

Article 2

1. The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles. The Organization is based on the principle of the sovereign equality of all its Members.

2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Chapter V: The Security Council

Article 24

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.
Article 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Chapter XVI: Miscellaneous Provisions

Article 103

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.
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