

THE CONFERRED JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

*Leila Nadya Sadat**

After twenty years of operation, we know that the International Criminal Court (ICC) works in practice. But does it work in theory? A debate rages regarding the proper conceptualization of the Court's jurisdiction. Some have argued that the ICC's jurisdiction is little more than a delegation by states of a subset of their own criminal jurisdiction. They contend that when states ratify the Rome Statute, they transfer some of their own prescriptive or adjudicative criminal jurisdiction to the Court, meaning that the Court cannot do more than the state itself could have done. Moreover, they argue that these constraints are imposed by international law itself. This Article disagrees, contending that states "confer upon" or "accept" the jurisdiction of international courts and tribunals like the ICC not to transfer a subset of their own power to those entities, but because they often want and need those courts and tribunals to do things that they cannot do in their national systems. International law not only allows them to do this: it encourages it. This is true for many international courts and tribunals created by treaties and by the United Nations; this Article contends that it is equally true for the ICC. This Article demonstrates that this theory of "collective conferral" supports the ICC's recent caselaw on jurisdiction and immunities, which is consonant with principles of general international law, the Rome Statute itself, and the values and concerns that drove states to establish the Court in 1998.

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* James Carr Professor of International Criminal Law, Washington University in St. Louis; Visiting Fellow, Schell Center for Human Rights, Yale Law School; Special Adviser on Crimes Against Humanity to the ICC Prosecutor (2013–2023). This Article is written solely in my personal capacity and does not represent the views of any organ or personnel of the International Criminal Court. I would like to thank William Aceves, Susan Appleton, Kathleen Claussen, Nancy Combs, M.J. Durkee, Oona Hathaway, Rebecca Hollander-Blumoff, Mark Janis, Patrick Keenan, Claus Kreß, Christopher Lenz, David Luban, Saira Mohamed, Goran Sluiter, Beth Van Schaack, David J. Scheffer, and Carlos Vázquez, as well as workshop participants at the University of Connecticut Law School, Georgetown Law School, the ICC Scholars Forum, Washington University School of Law, William & Mary School of Law, and 9 Bedford Row. I am deeply appreciative of the superb research assistance of students Kelly Adams, Markus Baldermann, Anna Boos, Jordan Michael Terry, and Sam Rouse and Washington University Law Librarians Tove Klovning and Kathie Molyneux.

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INTRODUCTION

After twenty-plus years of operation, there is growing evidence that the International Criminal Court (ICC), despite its challenges, can work in practice. But does it work in theory? A debate rages among states and scholars regarding the proper conceptualization of the Court's jurisdiction. Some have recently argued that the ICC's jurisdiction is little more than a delegation by states of a subset of their own criminal jurisdiction. Some refer to the ICC's jurisdictional regime as one of "delegated" jurisdiction,¹ others refer to "transferred" jurisdiction,² and yet others speak of the "derivative nature"³ of the Court's jurisdiction.⁴ Various iterations of the delegation theory have been advanced, the boldest of which asserts that when states ratify the Rome Statute, they thereby transfer (or delegate) some of their own prescriptive and adjudicative criminal jurisdiction to the Court, meaning that the Court cannot do more than the states themselves could have done. They make this argument not as an interpretation of the Rome Statute itself, but as a limit imposed by international law. Thus, proceeds the argument, Palestine cannot delegate criminal jurisdiction to the Court over alleged ICC crimes committed on its territory by Israeli citizens, because it does not have jurisdiction over those crimes itself under the Oslo Accords.⁵ Another variant asserts that the regime governing head-of-state immunity at the ICC flows from whatever a state might delegate to the Court, depriving the ICC of jurisdiction over heads of state unless the Court has received an explicit waiver of

1 Talita de Souza Dias, *The Nature of the Rome Statute and the Place of International Law Before the International Criminal Court*, 17 J. INT'L CRIM. JUST. 507, 515 (2019) ("[T]he most likely explanation for [the ICC's] adjudicative powers . . . is that these have been delegated or otherwise transferred by states or other subjects of international law." (emphasis omitted)).

2 See, e.g., ADVISORY COMM. ON PUB. INT'L L., ADVISORY REPORT NO. 40, CHALLENGES IN PROSECUTING THE CRIME OF AGGRESSION: JURISDICTION AND IMMUNITIES 8 (2022) (Neth.).

3 See, e.g., Michael A. Newton, *How the International Criminal Court Threatens Treaty Norms*, 49 VAND. J. TRANSNAT'L L. 371, 414 (2016).

4 See, e.g., Beth Van Schaack uses the concept of "pooled" jurisdiction, a concept akin to this Article's assertion that states "collectively confer" jurisdiction on the Court. See, e.g., BETH VAN SCHAACK, *IMAGINING JUSTICE FOR SYRIA* 238 (2020); see also Beth Van Schaack, *Can the Int'l Criminal Court Try US Officials?—The Theory of "Delegated Jurisdiction" and Its Discontents (Part II)*, JUST SEC. (Apr. 9, 2018), <https://www.justsecurity.org/54620/intl-criminal-court-officials-the-theory-delegated-jurisdiction-discontents-part-ii/> [<https://perma.cc/Y83U-89HB>].

5 Press Release, Ministry of Foreign Affs., *The International Criminal Court's Lack of Jurisdiction over the So-Called "Situation in Palestine"* (Dec. 20, 2019) (Isr.); Observations by the Federal Republic of Germany as Amicus Curiae, *Situation in the State of Palestine*, ICC-01/18-103, ¶¶ 24, 27 (Mar. 16, 2020).

immunity from their country of origin (on the theory that they would be immune from prosecution by national systems without such a waiver).⁶ Finally, the official position of the United States for a long time—at least prior to Russia’s invasion of Ukraine—was that the Court had no jurisdiction over the nationals of non–States Parties because States Parties to the Statute may not delegate such jurisdiction to the ICC under the law of treaties.⁷

This Article disagrees. Although the delegation theory of ICC jurisdiction has descriptive appeal, and the word “delegation” or “delegates” is unobjectionable when used in a general sense,⁸ the *legal limitations* imposed by delegation theory misstate the juridical character of the ICC’s power and the power of international courts and tribunals more generally. In fact, except in the case of truly supranational organizations such as the European Coal and Steel Community, the European Atomic Energy Community (EURATOM), and, later, the European Economic Community to which states actually transfer some sovereign powers,⁹ states “confer upon” or “accept” the jurisdiction of

6 See Dapo Akande, *ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals*, EJIL: TALK! (May 6, 2019), <https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/> [https://perma.cc/54ZD-46UN]; Kevin Jon Heller, *Creating a Special Tribunal for Aggression Against Ukraine is a Bad Idea*, OPINIO JURIS (July 3, 2022), <https://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/> [https://perma.cc/5TGC-SC8Q] (arguing that Vladimir Putin would be immune from jurisdiction as a head of state if a specialized tribunal was created by an entity other than the U.N. Security Council). For a summary of the decision, see Angela Mudukuti, *Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal*, 114 AM. J. INT’L L. 103 (2020).

7 Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, LAW & CONTEMP. PROBS., Winter 2001, at 13; see Newton, *supra* note 3, at 384–85; Article 15 Communication from Steven Kay & Joshua Kern, 9 Bedford Row, to the Off. of the Prosecutor, Int’l Crim. Ct., *Preconditions to the Exercise of Jurisdiction Under Article 12 of the Rome Statute* (July 3, 2019).

8 See, e.g., Rod Rastan, *Jurisdiction*, in *THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 141, 164 (Carsten Stahn ed., 2015). Dan Sarooshi discusses “conferral of powers” and distinguishes “delegation” from “agency” and “transfer,” but notes that there is “a considerable lack of clarity and consistent usage in the conceptual labels used to describe different types of conferrals by States of powers on international organizations.” DAN SAROOSHI, *INTERNATIONAL ORGANIZATIONS AND THEIR EXERCISE OF SOVEREIGN POWERS* 28, 29 (2005). ICC delegation theorists do not use the term “delegation” in the same way that Sarooshi does, to describe the kinds of powers conferred on the ICC by states (and its founding treaty). Rather, they typically use the concept as a *prohibition* under general international law that prevents the Court from exercising its jurisdiction in certain cases.

9 See Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140; Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 167; Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3. These treaties were merged and the final iteration, the European Union, has emerged as a supranational entity that can adopt legislation (in areas permitted

international courts and tribunals not because they are thereby transmitting to those institutions some part of their own sovereignty (although ratification and accession are sovereign acts), but precisely because they need and want those courts and tribunals to do things that they cannot do in their national systems. Moreover, international law not only allows them to do this: it encourages it.

Part I of this Article sets out the basis of the Court's jurisdiction as it has evolved historically and doctrinally and suggests why the conferral theory better describes the ICC's jurisdiction than the several iterations of the delegation theory described in more detail in Part II. Part III marries theory and practice, evaluating the current caselaw of the Court and confirming the application of the conferral theory in practice. In evaluating the conferral theory of jurisdiction at the ICC, this Article considers the jurisdictional character of international courts and tribunals more generally, as well as the status of the ICC as an international institution. For example, states established the International Court of Justice (ICJ) precisely because, by and large, they cannot hear disputes between sovereign states in their national courts. Needing an independent and neutral forum, they created an entity to which their disputes may be submitted, and the decisions of which are binding upon them.

Likewise, states establish human rights courts such as the European Court of Human Rights (ECtHR) not to "delegate" some of their national sovereignty or prescriptive jurisdiction over the rights enshrined in their constitutions or national laws to international courts, but to grant their citizens access to additional fora for the protection of human rights enshrined in international law. The rights states are required to respect by the ECtHR are those set forth in the European Convention on Human Rights, rights that may or may not be present in their national law and may or may not be justiciable before their national courts.¹⁰

by the treaty), that member states are required to carry out, and which have direct effect in their national legal systems. *See* Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C191) 1. The Court of Justice of the European Union (CJEU), whose jurisdiction was set forth in the founding treaties of the community, is the primary judicial organ of the Union today, along with the more recently established General Court.

10 The European Court of Human Rights (ECtHR) was established by the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, *as amended* by Protocol No. 15 Amending the Convention on the Protection of Human Rights and Fundamental Freedoms, June 24, 2013, C.E.T.S. No. 213 (entered into force Aug. 1, 2021). The purpose of the Convention, by its terms, was to secure implementation of the Universal Declaration of Human Rights, achieve greater unity between the members of the Council of Europe, and establish the ECtHR, which could exercise "supervisory jurisdiction" over the enforcement of the rights in its member states in accordance with the principle of subsidiarity and according to the States Parties a "margin of appreciation." *Id.*

Similarly, states may invoke Article 287 of the United Nations (U.N.) Convention on the Law of the Sea and bring a dispute before the International Tribunal for the Law of the Sea (ITLOS), the ICJ, or a special arbitral tribunal involving maritime cases that they would likely be unable to adjudicate in their own legal systems because they involve disputes between sovereigns.¹¹ And they created the ICC as a court of last resort to hear cases involving the commission of international crimes (defined and set forth in the Rome Statute and the Elements of Crimes), where no state is able or willing to prosecute them, crimes that are the concern of the international community as a whole and in which “the rights of states to act collectively for the protection of interests of the international community as a whole”¹² are at stake. As Michael Scharf wrote in 2001, responding to the U.S. position asserting that the ICC’s jurisdictional scheme violated international law, under the ICJ’s jurisprudence in the *Lotus* and *Nuclear Weapons Advisory* opinions, “the question is not whether international law or precedent exists permitting an ICC with this type of jurisdictional reach . . . but rather whether any international legal rule exists that would prohibit it.”¹³

Once properly created under international law, international courts and tribunals exist as independent international organizations, operating under the rules of international law, and constrained by their constitutive documents to exercise the jurisdiction conferred upon them by their creators in a manner consistent with their statutes as the International Court of Justice recognized in *The Reparations Case*.¹⁴ To put it another way, these institutions, including the

pmb]. Articles 1 to 18 set out the rights themselves and their conditions of application; Articles 19 to 51 set out provisions for the establishment of the ECtHR, its operation, and its jurisdiction. *Id.* arts. 1–51.

11 United Nations Convention on the Law of the Sea, art. 287, Dec. 10, 1982, S. TREATY DOC. NO. 103-39, 1833 U.N.T.S. 396 [hereinafter UNCLOS]. The current docket of the ITLOS references thirty-two cases, none of which presumably could have been resolved in a national court as they involve interstate disputes or requests for advisory opinions. See *List of Cases*, INT’L TRIBUNAL L. SEA, <https://www.itlos.org/en/main/cases/list-of-cases/> [https://perma.cc/X29U-52A3].

12 Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-parties: Legal Basis and Limits*, 1 J. INT’L CRIM. JUST. 618, 634 (2003).

13 See Michael P. Scharf, *The ICC’s Jurisdiction over the Nationals of Non-party States: A Critique of the U.S. Position*, LAW & CONTEMP. PROBS., Winter 2001, at 67, 73 (discussing S.S. Lotus (Fr./Turk.) (*The Lotus Case*), Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7); and Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8)).

14 Reparation for Injuries Suffered in Service of the United Nations (*The Reparations Case*), Advisory Opinion, 1949 I.C.J. 174, 182 (Apr. 11). Note that the WTO’s Dispute Settlement Body is an exception, not because international law would not permit states to

International Criminal Court, are, as Carsten Stahn has contended, “more than the sum of [their] parts.”¹⁵ They have independent international legal personality, and when their jurisdiction is challenged by a party to a dispute, under the well-established principle of *la compétence de la compétence*¹⁶ these courts and tribunals determine the proper contours of their own jurisdiction.¹⁷ As Dinah Shelton observed some years ago, international courts—unlike nonjudicial bodies created by international law—are created by states to carry out a variety of tasks: dispute settlement, compliance assessment, enforcement, and legal advice.¹⁸ Once states determine whether to create a court, they may “limit [its] jurisdiction, decide the body of substantive law the court may apply, and restrict or deny implied powers.”¹⁹ However, they also “possess certain inherent powers by virtue of their status as judicial bodies,”²⁰ and “the control that states exercise cannot exceed certain limits if they intend to maintain the judicial nature of the institution.”²¹

establish a free-standing and independent trade court, but because states declined to do so in crafting the treaty by which it was established.

15 Carsten Stahn, *Response: The ICC, Pre-existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine—A Reply to Michael Newton*, 49 VAND. J. TRANSNAT'L L. 443, 447 (2016). For an analysis of the *ius puniendi* theory and its critics, see generally Frédéric Mégret, *The International Criminal Court: Between International Ius Puniendi and State Delegation*, 23 MAX PLANCK Y.B. U.N. L. 161 (2019).

16 Prosecutor v. Tadić (*Tadić Interlocutory Appeal*), Case No. IT-94-I-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 18 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (describing the principle and noting that the German equivalent is known as *Kompetenz-Kompetenz*); Laurence Boisson de Chazournes, *The Principle of Compétence de la Compétence in International Adjudication and Its Role in an Era of Multiplication of Courts and Tribunals*, in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 1027, 1028 (Mahmoud H. Arsanjani et al. eds., 2011).

17 Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar (*Bangladesh Myanmar Jurisdiction Decision*), ICC-RoC46(3)-01/18, Decision on the Prosecution's Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute, ¶ 30 n.38 (Sept. 6, 2018) (citing international decisions, including arbitrations, elucidating the principle that international courts and tribunals have the right to determine the extent of their jurisdiction).

18 Dinah Shelton, *Form, Function, and the Powers of International Courts*, 9 CHI. J. INT'L L. 537, 539 (2009); see also Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CALIF. L. REV. 899, 904 (2005) (“Independent tribunals act as trustees to enhance the credibility of international commitments in specific multilateral contexts.”).

19 Dinah Shelton, *Inherent and Implied Powers of Regional Human Rights Tribunals*, in TOWARDS CONVERGENCE IN INTERNATIONAL HUMAN RIGHTS LAW: APPROACHES OF REGIONAL AND INTERNATIONAL SYSTEMS 454, 459 (Carla M. Buckley et al. eds., 2017).

20 Danesh Sarooshi, *The Powers of the United Nations International Criminal Tribunals*, 2 MAX PLANCK Y.B. U.N. L. 141, 144 (1998).

21 Shelton, *supra* note 18, at 543.

Like other international courts and tribunals, the International Criminal Court is a creature of international law, with international legal personality. It is an independent international organization established by—and constrained by—its founding treaty, which must be read in light of the *lex specialis* of international criminal law. The prescriptive, adjudicative, and enforcement jurisdiction of the International Criminal Court are set out in the Rome Statute, following the Nuremberg model, as informed by general international law.²²

The International Criminal Court has faced many challenges to its jurisdiction over its twenty years of operation, but several situations have done so in fundamental ways. These are taken up in Part III of this Article. One category is a large number of situations in which allegations of ICC crimes allegedly committed by the nationals of non–States Parties on the territory of a State Party to the Statute (or on the territory of a non–State Party referred by the Security Council) have been referred to the Court. A second fundamental challenge to the ICC’s jurisdiction has been the extension of the Court’s geographic jurisdiction to situations involving the commission of crimes partly in the territory of a non–State Party that flowed across the border of the state into the territory of a State Party and in which at least one element of the crime was partially committed there as well, such as the Bangladesh/Myanmar situation. This raises not only the question of jurisdiction over the nationals of non–States Parties, but the geographic contours of the Court’s territorial jurisdiction.

Some of the jurisdictional challenges in each of these situations have now been adjudicated by the Court’s Chambers, which have consistently found the Court’s exercise of jurisdiction to be consonant with international law and with the text of the Rome Statute. Some commentators—and states—have vehemently disagreed, particularly as regards the decisions to find jurisdiction in the Afghanistan²³ and

22 See Rome Statute of the International Criminal Court art. 4(1), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute]. See generally LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM* (Int’l & Comp. Crim. L. Ser. No. 31, 2002); Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381 (2000).

23 The United States imposed sanctions on the ICC Prosecutor as well as one of her senior officials, Phakiso Mochochoko, in response to the decision to open an investigation into the Afghanistan situation, which potentially implicated allegations of war crimes involving U.S. persons. Laurel Wamsley, *Trump Administration Sanctions ICC Prosecutor Investigating Alleged U.S. War Crimes*, NPR (Sept. 2, 2020, 6:27 PM), <https://www.npr.org/2020/09/02/908896108/trump-administration-sanctions-icc-prosecutor-investigating-alleged-u-s-war-crim> [<https://perma.cc/N8R4-TAVP>].

Palestine situations.²⁴ Indeed, the ferocity of the U.S. response to the opening of an investigation into the situation in Afghanistan has uncomfortable echoes of U.S. arguments about the jurisdiction of nineteenth-century antislavery courts.²⁵ Some writers have likewise reacted quite strongly to the Appeals Chamber's judgment that former Sudanese President Omar Al-Bashir did not benefit from head-of-state immunity before the ICC and that States Parties were required to effectuate his arrest.²⁶

While the Court's jurisprudence is at an early stage, this Article concludes that the ICC's Chambers have generally gotten it right, even if the terminology employed is occasionally confusing. As they have uniformly held, the proper resolution of each of these jurisdictional questions is not found in theories of "delegated," "transferred," or "derivative" jurisdiction, but in the recognition that the jurisdiction of modern international courts and tribunals—including the International Criminal Court—is located in the international legal order and conscribed by principles of general international law, as informed by the *lex specialis* of international criminal law. The Court, as Claus Kreß has argued, enforces the *ius puniendi* of the international community with respect to the core crimes falling within its jurisdiction.²⁷ This competence is not derived from or transferred by each individual state's national jurisdiction but is, rather, a function of their collective

24 Israel protested the Palestine decision, calling it "undiluted antisemitism" and "morally and legally bankrupt." Peter Beaumont, *ICC Opens Investigation into War Crimes in Palestinian Territories*, THE GUARDIAN (Mar. 3, 2021, 9:51 AM), <https://www.theguardian.com/law/2021/mar/03/icc-open-formal-investigation-war-crimes-palestine> [https://perma.cc/HE34-TPAR] (quoting Israeli Prime Minister Benjamin Netanyahu and Foreign Minister Gabi Ashkenazi, respectively).

25 See Bartram S. Brown, *U.S. Objections to the Statute of the International Criminal Court: A Brief Response*, 31 N.Y.U. J. INT'L L. & POL. 855, 869, 871 (1999) (arguing that U.S. objections to the ICC's jurisdiction over non-States Parties have a "colonialist concept" and are "untenable"); Eugene Kontorovich, *The Constitutionality of International Courts: The Forgotten Precedent of Slave-Trade Tribunals*, 158 U. PA. L. REV. 39, 43 (2009) (noting that the United States refused to participate in international tribunals to punish slave trading in part due to objections about the jurisdiction of those courts over U.S. nationals); Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 YALE L.J. 550, 576, 596, 603, 629 (2008) (noting that the first antislavery courts were established in 1817 and "were most active between 1819 and the mid-1840s," *id.* at 596, and that the United States was the last state to join the international anti-slavery courts, not joining until 1862, some 45 years after the first bilateral treaty had been signed).

26 See Akande, *supra* note 6 (calling the decision "dangerous and unwise").

27 Claus Kreß, *Article 98: Cooperation with Respect to Waiver of Immunity and Consent to Surrender*, in ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: ARTICLE-BY-ARTICLE COMMENTARY 2585, 2649 (Kai Ambos ed., 4th ed. 2022); see also Kai Ambos, *Punishment Without a Sovereign: The Ius Puniendi Issue of International Criminal Law: A First Contribution Towards a Consistent Theory of International Criminal Law*, 33 OXFORD J. LEGAL STUD. 293 (2013).

action at the international level, representing, in other words, a form of “collective conferral.” The ICC has the powers conferred upon it by States Parties to the Rome Statute, as well as those inherent to its function as an international court.²⁸ Like the reasoning adopted by the Chambers themselves, the answer to any jurisdictional challenge is properly resolved by examining: *first*, whether the ICC, consistent with the principles of general international law, may exercise prescriptive, adjudicative and enforcement jurisdiction in a particular case or situation;²⁹ *second*, whether the Rome Statute was intended to apply to the situation or the case in question.

Finally, there are important limits to the ICC’s jurisdiction and some situations present closer questions than others. Some of these are general in character, stemming from important conceptions about the legitimacy and legality of international organizations generally, or emerge from the *lex specialis* of international criminal law.³⁰ Others are specifically imposed by the Rome Statute itself. Others are the product of practical and political constraints. These are taken up in Part IV.

The Article concludes that the legal analysis offered by proponents of the delegation theory misses the mark. States may indeed “pool” their jurisdiction to create international criminal courts and tribunals to address threats on the scale of Darfur, Rwanda, Myanmar, or Russia’s invasion of Ukraine, and collectively confer upon the ICC adjudicative power over those situations. But they do this not because they are delegating some part of their own sovereign authority, but precisely because they are not powerful enough to face such calamities alone.

28 Sarooshi, *supra* note 20, at 151 (describing the “inherent” powers of the ad hoc international criminal tribunals).

29 The ICC’s jurisprudence, and the Rome Statute, distinguish “situations” from “cases.” OFF. OF THE PROSECUTOR, INT’L CRIM. CT., POLICY PAPER ON CASE SELECTION AND PRIORITISATION ¶ 4 (2016) [hereinafter CASE SELECTION & PRIORITISATION]. Situations are referenced in Articles 13 and 14 of the Rome Statute and are “generally defined in terms of temporal, territorial and in some cases personal parameters.” *Id.*; Rome Statute, *supra* note 22, arts. 13–14. Cases, in contrast, “comprise specific incidents within a given ‘situation’ during which one or more crimes within the jurisdiction of the Court may have been committed, and whose scope are defined by the suspect under investigation and the conduct that gives rise to criminal liability under the Statute.” CASE SELECTION & PRIORITISATION, *supra*, ¶ 4 (footnote omitted).

30 See Dan Sarooshi, *The Essentially Contested Nature of the Concept of Sovereignty: Implications for the Exercise by International Organizations of Delegated Powers of Government*, 25 MICH. J. INT’L L. 1107, 1122–23 (2004) (suggesting that conferrals by states of powers on international organizations may undermine the separation of powers within states, a concern that national systems and the organization’s constituent treaty will need to address).

I. GENERAL PRINCIPLES OF ICC JURISDICTION AND THE ROME STATUTE

A. *The Nuremberg Consensus*

The jurisdiction of the International Criminal Court was founded on the principles expressed in the Charter of the International Military Tribunal at Nürnberg (IMT),³¹ and the Statutes of the Yugoslavia (ICTY) and Rwanda (ICTR) Tribunals created by the Security Council.³² For that reason, to understand the jurisdictional quality of the ICC in 2023, and contemplate the Statute's application to new scenarios, examining its precursors and the development of international criminal law over the past century is required.

Like the ICC, the IMT was established by an international agreement³³ and its establishment was a direct response to growing and overwhelming evidence of atrocities. Although the United States is often credited for the Tribunal's establishment, recent scholarship underscores the critical contribution of the Soviet Union.³⁴ Indeed, the

31 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter London Accord]. While established nearly contemporaneously, and presumably on the same jurisdictional basis, the International Military Tribunal for the Far East, is not typically referenced to the same degree as Nuremberg due to the problematic way in which it was established (by military proclamation), and the criticism that the proceedings were fundamentally unfair. Georg Schwarzenberger, *The Problem of an International Criminal Law*, in 3 CURRENT LEGAL PROBLEMS 263, 289–90 (George W. Keeton & Georg Schwarzenberger eds., 1950) (noting that the “legal standards—or their absence—of the Tokyo Trial were such as to make lawyers wish to forget all about it at the earliest possible moment”). The Tokyo Trial has had a revival due to recent scholarship. Viviane E. Dittrich & Jolana Makraiová, *Towards a Fuller Appreciation of the Tokyo Tribunal*, in THE TOKYO TRIBUNAL: PERSPECTIVES ON LAW, HISTORY AND MEMORY 3 (Viviane E. Dittrich et. al eds., Nuremberg Acad. Ser. No. 3, 2020). Gerry Simpson suggests that we should use “the term ‘Tokyoberg’ to refer to a transformative moment . . . in the two great cities of Nuremberg and Tokyo . . . [, understanding] that these two trials can be understood as a single event.” Gerry Simpson, *Opening Reflections: Tokyoberg*, in THE TOKYO TRIBUNAL, *supra*, at 17, 17; *see also* NEIL BOISTER & ROBERT CRYER, THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL (2008).

32 U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25704, annex (May 3, 1993), *adopted by* S.C. Res. 827, ¶ 2 (May 25, 1993) (amended 1998, 2000, 2002, 2005, 2006, 2008, 2009, 2016) [hereinafter ICTY Statute]; S.C. Res. 955, annex (Nov. 8, 1994) (amended 1998, 2002, 2003, 2008, 2009) [hereinafter ICTR Statute].

33 *See* London Accord, *supra* note 31, pmb1.

34 *See* FRANCINE HIRSCH, SOVIET JUDGMENT AT NUREMBERG: A NEW HISTORY OF THE INTERNATIONAL MILITARY TRIBUNAL AFTER WORLD WAR II, at 28–43 (2020). Hirsch notes that “[e]ven as the Soviets were influencing the Allied approach to German war crimes, they were continuing to engage in a massive cover-up of Katyn.” *Id.* at 33.

Moscow Declaration of October 30, 1943,³⁵ was the first clear call for trials, providing that while most individuals would be “sent back to the countries in which their abominable deeds were done in order that they may be judged and punished,” the “major criminals, whose offences have no particular geographical localisation” would “be punished by the joint decision” of the Allied governments.³⁶

After extensive negotiations, the four Allied powers—France, the Soviet Union, the United States, and the United Kingdom—signed the London Agreement and Charter on August 8, 1945, following which an additional nineteen countries acceded to the agreement.³⁷ Over the course of ten months, the tribunal tried twenty-two individuals, nineteen of whom were convicted, for three crimes: crimes against peace, war crimes, and crimes against humanity, each of which were defined in the Charter.³⁸

The idea of holding an international trial for atrocities committed by the “major” leaders did not emerge overnight. The Allies had proposed in the Treaty of Versailles that a special tribunal be established to try William II of Hohenzollern, the German Kaiser, for the “supreme offence against international morality and the sanctity of treaties.”³⁹ The trial of the Kaiser never occurred, however, as the Netherlands refused his extradition.⁴⁰ Yet the failure of Versailles sparked efforts to establish an international criminal tribunal for breaches of international public order, either as a freestanding institution or as a division of the Permanent Court of International Justice. Drafts were penned and debated, but until the Second World War, the prevailing view was that state sovereignty, the absence of an international code of crimes, and a “right” to be judged under one’s domestic law by one’s own countrymen posed insurmountable obstacles to the establishment of an international criminal court.⁴¹ It was the atrocities of World War

35 Secret Protocol, annex 10, Nov. 1, 1943, 3 Bevens 816 [hereinafter Moscow Declaration]. It was preceded by the St. James Declaration in 1942. See Resolution by Allied Governments Condemning German Terror and Demanding Retribution, Jan. 13, 1942, 144 BSP 1072 (1952).

36 Moscow Declaration, *supra* note 35, at 836.

37 See U.N. Secretary-General, *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis*, at 3, U.N. Doc. A/CN.4/5 (1949) [hereinafter *Secretary-General’s Memorandum*].

38 *Judgment of 1 October 1946*, in 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 411, 412, 529 (1948) [hereinafter *IMT Judgment*]; Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT’L L.J. 665, 672–76 (1996); see also *Secretary-General’s Memorandum*, *supra* note 37, at 6–8.

39 Treaty of Peace with Germany (Treaty of Versailles) art. 227, June 28, 1919, 42 Stat. 1939. The Allies envisaged the Tribunal would have five judges, from France, Great Britain, Italy, Japan, and the United States. *Id.*

40 WILLIAM A. SCHABAS, *THE TRIAL OF THE KAISER* 9 (2018).

41 Sadat Wexler, *supra* note 38, at 671–72. Some continued to argue that the establishment of an international penal jurisdiction would not prevent war, and might even make

II that prompted states to turn draft proposals and legal theories into legal precepts.

Despite the taint of “victors’ justice” often levied at it,⁴² it is undeniable that the Nuremberg Tribunal had a powerful practical effect. But what was the theoretical understanding of the tribunal’s power? The Judgment itself stated that states had simply accomplished “together what any one of them might have done singly,”⁴³ that is, exercise criminal jurisdiction. The Moscow Declaration and the text of the instrument offer clues as to the rationale permitting the establishment of an international court to adjudicate newly created international crimes. First, the text mentions the international nature of the crimes as those having “no particular geographic localisation,” and referred to the accused as “major criminals.”⁴⁴ This idea of serious cross-boundary crimes harkens back to notions of piracy and slavery as international crimes that were offenses against the law of nations and whose impact transcended national boundaries. As Mark Chadwick has argued, establishing universal jurisdiction over international crimes represents a communal “response mechanism” designed to uphold “the ‘agreed vital interests’ of the international community.”⁴⁵ The Nuremberg Charter set forth three new crimes under international law (prescriptive jurisdiction) and provided for their adjudication and the modalities of enforcement (adjudicative and enforcement jurisdiction).

Writing in 1946, Egon Schwelb queried whether the IMT was an “organ of the community of nations” representing the “supremacy of international law over municipal law, and the overriding of national sovereignty by this organ of the international community,”⁴⁶ or an occupation court. Although Schwelb found evidence that the IMT’s

it worse, as justice could become an impediment to peace. This argument still resonates today. *Id.* at 672.

42 See, e.g., Christoph Burchard, *The Nuremberg Trial and Its Impact on Germany*, 4 J. INT’L CRIM. JUST. 800, 800 (2006); see also M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 418 (2003) (assessing the impact of Nuremberg).

43 *IMT Judgment*, *supra* note 38, at 444.

44 Moscow Declaration, *supra* note 35.

45 MARK CHADWICK, PIRACY AND THE ORIGINS OF UNIVERSAL JURISDICTION: ON STRANGER TIDES? 238 (Queen Mary Stud. in Int’l L. Vol. 34, 2019) (tracing the history of piracy as an international crime); see also JENNY S. MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW 114–39 (2012) (discussing the use of the terms “crimes against humanity” and *hostis humanis generis* (enemies of all humankind) by nineteenth-century writers on the slave trade); Christopher C. Joyner & Christopher C. Posteraro, *The United States and the International Criminal Court: Rethinking the Struggle Between National Interests and International Justice*, 10 CRIM. L.F. 359 (1999); Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988).

46 Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT’L L. 178, 208 (1946).

authority flowed from Control Council Law No. 10,⁴⁷ he concluded that the tribunal had the character of an international judicial body, exercising jurisdiction “on behalf of the international community, which at the relevant time was, and is now, represented for all practical purposes by the United Nations.”⁴⁸ Vespasian Pella agreed, noting that

by so combining their several jurisdictional powers, the states concerned inevitably set up a superior judicial order . . . [as the IMT] possessed powers over each of the states setting it up; its decisions were taken by majority vote . . . [and a] state whose judge dissented was bound to recognize the validity of its decisions.⁴⁹

He concluded, like Schwelb, that the IMT was a “veritable international institution.”⁵⁰

This was not a new idea,⁵¹ although its effective implementation at Nuremberg was a first. Other European scholars⁵² wrote both before and after Nuremberg about the importance of the international legal order in the establishment of an international penal law with an international criminal court at its center.⁵³ While their ideas found a less positive reception in the United States and the United Kingdom,⁵⁴ the catalyst of the war allowed states with diverging views to come together to establish the IMT.

47 Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, OFFICIAL GAZETTE OF THE CONTROL COUNCIL FOR GERMANY 50 (1945).

48 Schwelb, *supra* note 46, at 210. The Israeli Supreme Court took the same position in the *Eichmann* decision. CrimA 336/61 Attorney General of Israel v. Eichmann, 16 PD 2033 (1962) (Isr.) (finding that the establishment of the IMT was not just “an act of legislation” but “the expression of international law existing at the time of its creation”).

49 Vespasian V. Pella, *Towards an International Criminal Court*, 44 AM. J. INT’L L. 37, 43 (1950).

50 *Id.*

51 The draft statute of the International Law Association for an international criminal court emerged in 1926. *Report of the Permanent International Criminal Court Committee*, 34 INT’L L. ASS’N REP. CONF. 106, 183 (1927); *see also* Vespasian V. Pella, *Rapport sur un Projet de Statut d’une Cour Criminelle Internationale*, 5 REVUE INTERNATIONALE DE DROIT PÉNAL [R.I.D.P.] 265 (1928) (Fr.).

52 *See, e.g.*, Eugène Aronéanu, *Le Crème contre l’Humanité*, 13 NOUVELLE REVUE DE DROIT INTERNATIONAL PRIVÉ [N.R.D.I.P.] 369 (1946) (Fr.); Hugh H.-L. Bellot, *La Cour Permanente Internationale Criminelle*, 3 R.I.D.P. 333 (1926) (Fr.); H. Donnedieu de Vabres, *La Cour Permanente de Justice Internationale et sa Vocation en Matière Criminelle*, 1 R.I.D.P. 175 (1924) (Fr.); Jean Graven, *Les crimes contre l’humanité*, 76 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE [R.C.A.D.I.] 427 (1950) (Fr.).

53 *See* Leila Nadya Sadat, *The Nuremberg Paradox*, 58 AM. J. COMP. L. 151 (2010) (surveying interwar scholarship).

54 *See id.* at 167 (noting that the distinguished U.S. international lawyer, Manley Hudson, referred to the European scholarship as revealing “the spell which the idea of an international criminal court exercised on many minds” (quoting Manley O. Hudson, Editorial Comment, *The Proposed International Criminal Court*, 32 AM. J. INT’L L. 549, 551 (1938))).

Following the creation of the United Nations in 1945, a plan to establish a permanent international criminal court was advanced, and Article VI of the Genocide Convention of 1948 referred to this future international penal tribunal.⁵⁵ This tribunal would presumably have been based upon the Nuremberg principles elaborated by the U.N. International Law Commission in 1950. These principles reaffirmed that the international community had the right to create law as a matter of prescriptive jurisdiction (international crimes, *stricto sensu*), and create and establish a tribunal or court to adjudicate cases and enforce that law against individuals. Defendants, in turn, could not plead their national law in defense, although they were entitled to a fair trial on the facts and the law.⁵⁶ The Nuremberg Principles are understood to represent customary international law.⁵⁷ They informed the ICC Appeals Chamber's unanimous (but contested)⁵⁸ finding in *Al-Bashir* that there is "no rule of customary international law that would have given Mr Al-Bashir immunity from arrest and surrender" before an "international court" like the ICC, even though he was a sitting head of state at the time.⁵⁹ It is also what the late M. Cherif Bassiouni referred to as the "direct" enforcement of international criminal law (over core *ius*

55 Convention on the Prevention and Punishment of the Crime of Genocide art. 6, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

56 See Rep. of the Int'l L. Comm'n Covering Its Second Session, 5 U.N. GAOR Supp. No. 12, princs. II, V, at 11, 12, U.N. Doc. A/1316 (1950) [hereinafter Nuremberg Principles].

57 See, e.g., M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 68 (1996); David Donat Cattin, *Intervention of Humanity or the Use of Force to Halt Mass-Atrocity Crimes, the Peremptory Prohibition of Aggression and the Interplay Between Jus ad Bellum, Jus in Bello and Individual Criminal Responsibility on the Crime of Aggression*, in INTERNATIONAL LAW AND THE PROTECTION OF HUMANITY: ESSAYS IN HONOR OF FLAVIA LATTANZI 353 (Pia Acconci et al. eds., 2017); Marjorie M. Whiteman, *Jus Cogens in International Law, with a Projected List*, 7 GA. J. INT'L & COMP. L. 609 (1977); see also ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW (2d ed., 2008); ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW (Vaughan Lowe ed., 2006); Claus Kreß, *International Criminal Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2009); JORDAN J. PAUST, M. CHERIF BASSIOUNI, MICHAEL SCHARF, LEILA SADAT, JIMMY GURULÉ & BRUCE ZAGARIS, INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 6–22 (4th ed. 2013); GERHARD WERLE & FLORIAN JESSBERGER, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 10 (3rd ed. 2014) ("Today there is no doubt that the Nuremberg Principles are firmly established as customary international law.").

58 William Schabas argued (prior to the *Al-Bashir* decision), that "under no circumstances can a State Party referral or the Prosecutor acting *proprio motu* remove the immunity of a head of State of a non-party State." WILLIAM SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 604 (2d ed. 2016). His view is that the "challenge [immunity] poses for the integrity of the system is sometimes exaggerated." *Id.* at 594.

59 Prosecutor v. Al-Bashir, ICC-02/05-01/09 OA2, Judgment, ¶¶ 116–117 (May 6, 2019).

cogens crimes), as opposed to “indirect” enforcement of international crimes in national systems.⁶⁰

It was impossible to advance the international criminal court project until the end of the Cold War.⁶¹ The International Law Commission continued to work on the Draft Code of Crimes,⁶² but the creation of an international penal body stagnated. It was, once again, conflict accompanied by the commission of atrocities that drove the establishment of ad hoc tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), in 1993 and 1994. At that time, eager to establish the tribunals quickly, the Security Council relied upon its enforcement powers under Chapter VII of the U.N. Charter rather than negotiate a treaty.⁶³ The ICTY’s jurisdiction was challenged almost immediately, and in 1995, the ICTY Appeals Chamber issued an important decision in *Prosecutor v. Tadić* on the question of its own jurisdiction and authority. The Appeals Chamber found that the creation of the Tribunal was not a question of the Security Council delegating some of its own powers to the ICTY.⁶⁴ Rather, it entailed the creation of an autonomous judicial organ⁶⁵ and a new judicial system.⁶⁶ Relying on the idea of “incidental” or “inherent” jurisdiction, the ICTY Appeals Chamber noted:

60 BASSIOUNI, *supra* note 42, at 5, 18–21.

61 Sadat Wexler, *supra* note 38, at 676–83.

62 Many areas of international law expanded at the same time that international criminal law was developing in the post–Cold War era, with the concomitant establishment of many other international courts and tribunals. Indeed, the explosion of international courts and tribunals over the past thirty years has caused worries about the possible fragmentation of international law. See, e.g., Study Grp. of the Int’l L. Comm’n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006), as corrected by U.N. Doc. A/CN.4/L.682/Corr.1 (Aug. 11, 2006) [hereinafter ILC Fragmentation Report]; Suzannah Linton & Firew Kebede Tiba, *The International Judge in an Age of Multiple International Courts and Tribunals*, 9 CHI. J. INT’L L. 407, 410 (2009). It also sparked critiques from scholars fearful of the independence and possible overreach of international courts and their judiciaries. See, e.g., Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89 (2003). But see Rosalyn Higgins, *A Babel of Judicial Voices? Ruminations from the Bench*, 55 INT’L & COMP. L.Q. 791 (2006); Bruno Simma, *Fragmentation in a Positive Light*, 25 MICH. J. INT’L L. 845 (2004).

63 U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶¶ 31–68, U.N. Doc. S/25704 (May 3, 1993); see also M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (1996); 2 VIRGINIA MORRIS & MICHAEL P. SCHARF, *AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS* 326 (1995).

64 *Tadić Interlocutory Appeal*, Case No. IT-94-I-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 38 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

65 *Id.*

66 *Id.* ¶¶ 11, 38.

In international law, every tribunal is a self-contained system (unless otherwise provided). Of course, the constitutive instrument of an international tribunal can limit some of its jurisdictional powers, but only to the extent to which such limitation does not jeopardize its “judicial character” Such limitations cannot, however, be presumed and, in any case, they cannot be deduced from the concept of jurisdiction itself.⁶⁷

Writing for the majority, the late Judge Antonio Cassese took a broad view of the independence and autonomy of international criminal law⁶⁸ and the *Tadić* decision evidences that. While the decision had its critics,⁶⁹ Cassese was not writing on a blank slate, and his conception of the ICTY was consistent with the earlier writings on the inherent jurisdiction of international courts and tribunals referenced above. As Karen Alter has contended, it is also consistent with the conceptualization of international courts and tribunals as trustees of the law as opposed to agents of states, in which they take on the authority to say and define *what the law means*.⁷⁰ This is a task increasingly conferred upon them by states seeking international adjudication of disputes over an increasingly greater number of subject matter areas.⁷¹ In the context of the ICC, under Alter’s theory, judges (or the Prosecutor) would presumably be selected not because of their fidelity to the will of the delegating principal (states), but because of their “personal and/or professional reputation,” and can be expected to make

67 *Id.* ¶ 11.

68 Mary Fan, *Custom, General Principles and the Great Architect Cassese*, 10 J. INT’L CRIM. JUST. 1063, 1070–74 (2012).

69 Judge Li argued that the judgment was examining the competence and appropriateness of the Security Council resolution establishing the Tribunal, a task he thought was outside its purview given that the Appeals Chamber’s judges were “trained only in law and having little or no experience in international political affairs.” *Tadić Interlocutory Appeal*, Case No. IT-94-I-AR72, Separate Opinion of Judge Li, ¶ 3; *see also* Jose E. Alvarez, *Nuremberg Revisited: The Tadic Case*, 7 EUR. J. INT’L L. 245 (1996); Mia Swart, *Tadic Revisited: Some Critical Comments on the Legacy and the Legitimacy of the ICTY*, 3 GOETTINGEN J. INT’L L. 985 (2011).

70 Karen J. Alter, *The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 345, 357–59 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013) [hereinafter Alter, *Multiple Roles*]. The kind of “self-binding” elements underscoring Alter’s trustee concept can be seen in the Prosecutor’s *proprio motu* powers (Arts. 13(c), 15(1)), in the fact that judges are elected, not appointed, and in the ICC review of admissibility determinations which give the Court the last word in a contest over complementarity or admissibility under *ne bis in idem*. *See* Karen J. Alter, *Agents or Trustees? International Courts in Their Political Context*, 14 EUR. J. INT’L RELS. 33 (2008) [hereinafter Alter, *Agents or Trustees*].

71 *See* Alter, *Multiple Roles*, *supra* note 70, at 350–51; Helfer & Slaughter, *supra* note 18; Linton & Tiba, *supra* note 62; Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429 (2003); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT’L L. 1103 (2000).

decisions based on their best judgment as to the correct result in the case (under the law).⁷²

The position taken in the *Tadić* case is also sensible. If international courts and tribunals could exercise only those powers and procedures expressly or implicitly delegated to them by their member states and had no independent rulemaking or competences of their own, those courts and tribunals would be hard-pressed to function adequately, their independence would be severely constrained, and their ability to carry out their mandate jeopardized. As the *Tadić* decision noted, *la compétence de la compétence* is a core principle of international adjudication for courts and tribunals established on an ad hoc basis or as subsidiary organs of international organizations.⁷³ Without it, courts faced with jurisdictional challenges would either “have to accept all applications filed, rejecting any challenges to [their] jurisdiction, or uphold all challenges and dismiss each case in which jurisdiction is questioned.”⁷⁴

The ICTY and the ICTR relied heavily upon the Nuremberg model. They were governed by the principle of primacy, meaning that national courts had to relinquish cases to them if so requested.⁷⁵ Indeed, *Tadić*’s appearance before the ICTY resulted from a request for deferral sent by the ICTY to the government of the Federal Republic of Germany.⁷⁶ Thus, conceptually, the ICTY and the ICTR were similar to the IMT in jurisdictional design. Not only was the prescriptive criminal law embodied in their statutes hierarchically superior to domestic law, as was true for the crimes set out in the Nuremberg Charter, but the tribunals themselves had both adjudicative and enforcement jurisdiction that could displace national courts.

B. *The Rome Consensus*

When the ICC Statute was negotiated, the Nuremberg consensus was in the minds of the negotiators. At the same time, because the Court would operate prospectively, as opposed to retroactively, more thought had to be given regarding the intersection between national jurisdictions and the ICC. The International Law Commission (ILC) had been asked by the General Assembly to prepare a draft statute for

72 Alter, *Agents or Trustees*, *supra* note 70, at 39.

73 *Tadić Interlocutory Appeal*, Case No. IT-94-I-AR72, Decision on the Defense Motion, ¶ 18; Boisson de Chazournes, *supra* note 16, at 1049–50.

74 Shelton, *supra* note 18, at 547.

75 ICTY Statute, *supra* note 32, art. 9(2) (“The International Tribunal shall have primacy over national courts.”).

76 *Tadić Interlocutory Appeal*, Case No. IT-94-I-AR72, Decision on the Defense Motion, ¶ 50.

the court. Its 1994 draft provided that jurisdiction would be “inherent” with respect to the crime of genocide, but that both the territorial state and the custodial state would have to accept the court’s jurisdiction in “complaints” relating to any of the other crimes, including aggression, war crimes, crimes against humanity and so-called “treaty crimes” created by special international criminal law conventions.⁷⁷ This complex “opt-in” system did not accept that jurisdiction over core international crimes other than genocide would be automatic or inherent. Likewise, the ILC draft only permitted States Parties and the Security Council to send complaints to the court and restricted the manner in which states could send complaints to the court considerably.

When the ILC’s draft was sent to an ad hoc committee for discussion and debate, differences of view regarding the appropriate scope of the future court’s jurisdiction emerged. Some states advocated for “inherent” jurisdiction over core crimes, and for the fewest number of preconditions. They argued that the court should be the “guardian of international public order.”⁷⁸ Others advocated for a more restrictive approach, including a requirement that the consent of the accused’s state of nationality would be required.⁷⁹ As the text wound its way through the many sessions of the U.N. Preparatory Committee charged with preparing the text for a diplomatic conference, two trends were apparent, although disagreement remained on details, and early versions of the proposed text regarding jurisdiction and trigger mechanisms that were drafted prior to the opening of the Diplomatic Conference contained multiple options.⁸⁰ *First*, a consensus was reached that “treaty crimes” would be dropped from the statute, at least for the time being. *Second*, most delegations became of the view that the “opt-in” system proposed by the ILC should be dropped in favor of a regime that would make the jurisdiction of the court

77 Rep. of the Int’l L. Comm’n on the Work of Its Forty-Sixth Session, 49 U.N. GAOR Supp. No. 10, at 38–42, U.N. Doc. A/49/10 (Sept. 1, 1994) [hereinafter *ILC 1994 Draft Statute*] (in draft statute, listing crimes within the jurisdiction of the Court (art. 20) and preconditions to the exercise of jurisdiction (art. 21)).

78 Rep. of the Ad Hoc Comm. on the Establishment of an Int’l Crim. Ct., 50 U.N. GAOR Supp. No. 22, at ¶ 93, U.N. Doc. A/50/22 (Sept. 6, 1995).

79 *Id.* ¶¶ 92, 100; see also Elizabeth Wilmshurst, *Jurisdiction of the Court*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 127, 130–31 (Roy S. Lee ed., 1999).

80 For example, the report by the Working Group on Complementarity and Trigger Mechanisms contained a series of complex options on jurisdiction reflecting a variety of views expressed by states. Preparatory Comm. on the Establishment of an Int’l Crim. Ct, Rep. of the Working Grp. on Complementarity & Trigger Mechanism, U.N. Doc. A/AC.249/1997/L.8/Rev.1, annex I (Aug. 14, 1997).

automatic for states ratifying the statute, but still subject to preconditions to be determined.⁸¹

During the negotiations, Germany tabled a proposal that the court should have universal jurisdiction over the “core crimes of genocide, crimes against humanity and war crimes,” and should “have the authority to try anybody found on the territory of a State Party, even if the crime had been committed elsewhere and if the accused was not a national of the State Party.”⁸² Although this proposal received widespread support, some states felt it was too broad.⁸³ The Republic of Korea tabled a proposal two days later proposing for “automatic jurisdiction” of the court (along the lines of Germany’s universal jurisdiction proposal), but requiring at least one of any four possible states to have consented to jurisdiction: the territorial state, the states of the accused or the victim’s nationality, or the custodial state (in which the accused was found).⁸⁴ This proposal responded to the concerns of some states that the German proposal was too broad, but was objected

81 At the outset of the Conference, states by and large supported inherent jurisdiction over genocide, crimes against humanity, and war crimes, with some exceptions. Views were mixed on the crime of aggression. U.N. DIPLOMATIC CONF. OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INT’L CRIM. CT., OFFICIAL RECORDS, 6th plen. mtg., at 97–105, U.N. Doc. A/CONF.183/13 (Vol. II), U.N. Sales No. E.02.I.5 (2002) [hereinafter U.N. DIPLOMATIC CONF.]. The transcript of this early plenary session included comments by several delegations supporting “inherent jurisdiction” (with no opt-in or opt-out) over the crimes of genocide, war crimes, and crimes against humanity including Argentina, Belgium, Ireland, Finland, the Netherlands, New Zealand, and Luxembourg. See, e.g., *id.* ¶ 69 (arguing that the Court must have “universal jurisdiction”). France agreed, although it expressed some concern regarding war crimes, *id.* ¶ 77; Israel supported jurisdiction over the three crimes but expressed concern about political abuse of the process, *id.* ¶ 39; and Gabon objected to the Security Council being used as a filter, *id.* ¶ 96. The United Kingdom proposed that states would automatically accept the jurisdiction of the Court by ratifying the statute, but that the consent of the custodial state and the territorial state would be required as regards non-party state nationals. Preparatory Comm. on the Establishment of an Int’l Crim. Court, Proposal by the United Kingdom of Great Britain and Northern Ireland: Trigger Mechanism, U.N. Doc. A/AC.249/1998/WG.3/DP.1 (Mar. 25, 1998).

82 WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 61, 61–65 (3d ed. 2007); see also Preparatory Comm. on the Establishment of an Int’l Crim. Ct., The Jurisdiction of the International Criminal Court: An Informal Discussion Paper Submitted by Germany, U.N. Doc. A/AC.249/1998/DP.2 (Mar. 23, 1998); Hans-Peter Kaul & Claus Kreß, *Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises*, 2 Y.B. INT’L HUMANITARIAN L. 143, 143–175 (1999); Sharon A. Williams, *The Rome Statute on the International Criminal Court—Universal Jurisdiction or State Consent—To Make or Break the Package Deal*, 75 INT’L L. STUD. 539 (2000).

83 See Williams, *supra* note 82, at 545–46.

84 U.N. DIPLOMATIC CONF., *supra* note 81, Republic of Korea: Proposal Regarding Articles 6 [9], 7 [6], and 8 [7], at 227–29, U.N. Doc. A/CONF.183/13 (Vol. III); see also FANNY BENEDETTI, KARINE BONNEAU & JOHN L. WASHBURN, NEGOTIATING THE INTERNATIONAL CRIMINAL COURT: NEW YORK TO ROME, 1994–1998, at 162 (2014); Williams, *supra* note 82, at 546.

to by other states, which argued that “pure” universal jurisdiction could discourage ratifications. It was particularly criticized by the United States, which considered the idea to be a deal-breaker and maintained its longstanding position that the ICC should have no jurisdiction over the nationals of states that had not become a party to the Statute.⁸⁵

The jurisdictional regime of the ICC was not decided until the final days of the negotiations. On July 10, 1998, the Bureau offered a proposal on jurisdiction which narrowed the choices before the Conference to two options. Option I provided for “automatic” jurisdiction over all three core crimes. Option II provided for “automatic” jurisdiction over genocide but required opting into the Court’s crimes against humanity and war crimes jurisdiction.⁸⁶ Discussions between delegates continued, most of which were not recorded in the official records of the meeting.

A few days prior to the conference’s end, the United States tabled a proposal requiring the consent of both the state of the accused’s nationality and the territorial state’s consent as preconditions to jurisdiction.⁸⁷ In addition, states wishing to restrict the Court’s jurisdiction further proposed that states be permitted to “opt out” of the crimes-against-humanity provisions of the statute for a period of ten years, and the war crimes provisions for three years; and that an exercise of jurisdiction over non-party state nationals accused of war crimes or crimes against humanity that amounted to “official acts” would have required both the acknowledgement of the act as its own, and the consent of the state of the accused’s nationality to jurisdiction.⁸⁸ While the idea of an “opt out” received some positive attention, and the final text provided for a seven-year opt-out over war crimes,⁸⁹ the idea of official

85 See SCHABAS, *supra* note 82, at 62; Olympia Bekou & Robert Cryer, *The International Criminal Court and Universal Jurisdiction: A Close Encounter?*, 56 INT’L & COMPAR. L.Q. 49, 53 (2007); Williams, *supra* note 82, at 547.

86 U.N. DIPLOMATIC CONF., *supra* note 81, Bureau: Proposal Regarding Part 2, at 217, U.N. Doc. A/CONF.183/13 (Vol. III).

87 See U.N. DIPLOMATIC CONF., *supra* note 81, 42nd mtg. of the Comm. of the Whole, ¶¶ 20–23, at 361 (referring to *id.*, United States of America: Proposal Regarding Article 7, at 247, U.N. Doc. A/CONF.183/13 (Vol. III); and *id.*, United States of America: Proposal Regarding Article 7 *ter*, at 249).

88 See Wilmschurst, *supra* note 79, at 137; Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT’L L. 2, 8–9 (1999).

89 See Rome Statute, *supra* note 22, art. 124. Only two states ever availed themselves of this provision when ratifying the Rome Statute, Colombia and France, and both subsequently reversed their positions. Although Article 124 was not deleted in Kampala, the ICC’s Assembly of States Parties voted to delete it in 2015. Andreas Motzfeldt Kravik, *The Assembly of State Parties to the International Criminal Court Decides to Delete Article 124 of the Rome Statute*, EJIL:TALK! (April 12, 2016), <https://www.ejiltalk.org/the-assembly-of-state-parties>

immunity did not. Moreover, while some states (like the United States) were pushing to narrow the Court's jurisdiction, others (like India) were endeavoring to expand the Court's independence by eliminating any role for the Security Council in the Statute.⁹⁰

The proposals of India and the United States were met with "no-action motions" on the final night of the Diplomatic Conference,⁹¹ which went on to adopt the final text in an emotional vote of 120 in favor, 7 opposed (including the United States) and 21 abstentions.⁹² The solution proposed and adopted by the Conference was elegant. In terms of prescriptive jurisdiction (*ratione materiae*), the Court's jurisdiction would be universal, applying to every human being in the world, unbounded by geography or nationality in Security Council referral cases.⁹³ This I have referred to in my earlier writings as *universal*

-to-the-international-criminal-court-decides-to-delete-article-124-of-the-rome-statute-2/ [https://perma.cc/QS3H-GNQR]. As of this date, only nineteen states have ratified this amendment, see *Rome Statute and Other Agreements*, INT'L CRIM. CT.: ASP INFO., https://asp.icc-cpi.int/RomeStatute [https://perma.cc/ZB9M-FBLU], which will enter into force in accordance with Article 121(4) of the Rome Statute after seven-eighths of all States Parties have adopted it. U.N. Secretary-General, Statement on Amendment 124 of the Rome Statute of the International Criminal Court, U.N. Ref. C.N.7.2016.TREATIES-XVIII.10 (Depository Notification) (Jan. 15, 2016).

90 India proposed deleting the provisions of the Statute permitting the Security Council to refer situations to the Court and to defer them. See U.N. DIPLOMATIC CONF., *supra* note 81, 42nd mtg. of the Comm. of the Whole, ¶ 8, at 360 (referring to *id.*, India: Proposed Amendments to the Draft Statute in Document A/CONF.183/C.1/L.76/Add.2 and Corr.1, at 250, U.N. Doc. A/CONF.183/13 (Vol. III)).

91 See BENEDETTI ET AL., *supra* note 84, at 136–39; U.N. DIPLOMATIC CONF., *supra* note 81, 42nd mtg. of the Comm. of the Whole, ¶¶ 9–15, at 360–61 (no-action vote on India's proposals); *id.* ¶¶ 24–31, at 361–62 (no-action vote on the U.S. proposals).

92 BENEDETTI ET AL., *supra* note 84, at 142. The vote was unrecorded. The other dissenting votes are generally attributed to China, Iraq, Israel, Libya, Qatar, and Yemen, *id.*, although recent evidence suggests that Syria may have voted "no," rather than Libya.

93 This means that "Rome law" is customary international law, otherwise it is problematic to have the Security Council apply Rome law to the nationals of non-States Parties, and for immunities to have no application thereto. The text of Articles 6, 7, and 8 of the Rome Statute represent customary international law because they crystallized, codified, or created it at the time of the Statute's negotiation. See WERLE & JESSBERGER, *supra* note 57; Claus Kreß, *supra* note 27, at 2615. This view was recently expressed by the Court. See Prosecutor v. Abd-Al-Rahman ("Ali Kushayb"), ICC-02/05-01/20 OA8, Judgment on the Appeal of Mr. Abd-Al-Rahman against the Pre-Trial Chamber II's "Decision on the Defense 'Exception d'incompétence,'" ¶ 89 (Nov. 1, 2021) ("[G]enerally . . . the statutory crimes are a product of a concerted effort to codify the developing state of international law . . . [and] the crimes under the Statute were intended to be generally representative of the state of customary international law when the Statute was drafted." (footnote omitted)). This customary nature of Rome Statute crimes is what renders ICC's universal prescriptive jurisdiction legitimate. See Sadat & Carden, *supra* note 22, at 405–09; see also Yoram Dinstein, *The Universality Principle and War Crimes*, 71 INT'L L. STUD. 17, 21 (1998). But see William Schabas, *Customary Law or 'Judge-Made' Law: Judicial Creativity at the UN Criminal Tribunals*, in THE LEGAL REGIME

*international jurisdiction*⁹⁴ to distinguish it from universal jurisdiction in interstate cases.⁹⁵

Regarding the Court's adjudicative jurisdiction, however, in referrals by states or by the Prosecutor *proprio motu*, the negotiators superimposed jurisdictional preconditions in Article 12 of the ICC Statute over this prescriptive universality, limiting the Court's adjudicative jurisdiction to crimes committed on the territories of States Parties to the Statute or by their nationals.⁹⁶ They also imposed complementarity as a principle requiring the Court to relinquish its jurisdiction if a state—even a state not party to the Rome Statute—is investigating or prosecuting the potential case in question. Any link to the custodial state was abandoned, however.⁹⁷ To further cabin the exercise of the Court's adjudicative power (and the power of the independent Prosecutor), Article 15 provides that the Prosecutor cannot open an investigation without the permission of a Pre-Trial Chamber.⁹⁸ In other words, the negotiators of the Rome Statute narrowed the Court's adjudicative and enforcement jurisdiction in the ICC treaty beyond what they were required to do under international law, and certainly made

OF THE INTERNATIONAL CRIMINAL COURT: ESSAYS IN HONOUR OF PROFESSOR IGOR BLISHCHENKO 81–82 (J. Doria et al. eds., Int'l Humanitarian L. Ser. Vol. 19, 2009).

94 See SADAT, *supra* note 22, at 107–11; Sadat & Carden, *supra* note 22, at 406–13.

95 This means that the substantive rules of the Rome Statute must be grounded in customary international law, given that the Security Council may refer situations involving non–States Parties and their nationals to the Court. The Council cannot “create” rules of international law; it can only apply them. See Paul C. Szasz, Notes and Comments, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901, 901 (2002) (“It has long been accepted that intergovernmental organizations (IGOs) cannot legislate international law. . . . Exceptionally, a few IGOs are empowered to adopt international legal rules that could become binding on their members, but these states could opt out by raising a timely objection.”); accord SADAT, *supra* note 22, at 7. But see Prosecutor v. Al-Bashir, ICC-02/05-01/09, Minority Opinion of Judge de Brichambaut, ¶ 61 (July 6, 2017) (suggesting that although “scholars disagree on the powers of the UN Security Council to set aside customary international law . . . ‘the prevailing opinion [is] that Article 103 should be read extensively—so as to affirm that charter obligations prevail also over United Nations Member states’ customary law obligations” (emphasis in original) (citing ILC Fragmentation Report, *supra* note 62, ¶ 345)). The ILC Study Group admits that the Security Council cannot contravene a *jus cogens* norm. ILC Fragmentation Report, *supra* note 62, ¶ 346. Moreover, the broad assertion that it can set aside customary international law or create new rules of international law is virtually unfootnoted and seems at odds with current understandings of the limits of the Council's powers. See, e.g., Nigel D White & Ademola Abass, *Countermeasures and Sanctions*, in INTERNATIONAL LAW 537, 550 (Malcolm D. Evans ed., 4th ed. 2014) (“Article 103 gives obligations arising out of the UN Charter pre-eminence over obligations arising under any other international treaty, though it is not clear that this affects member States’ customary duties.”).

96 See Rome Statute, *supra* note 22, art. 12.

97 That is, the custodial state cannot provide a nexus to satisfy jurisdictional preconditions; nor is the consent of the custodial state to the accused's prosecution a requirement.

98 See Rome Statute, *supra* note 22, art. 15.

it less extensive than the jurisdiction exercised by the ad hoc international criminal tribunals. Finally, the Court's enforcement jurisdiction is the weakest of the three components of its power. As I have noted elsewhere, "if the framers were willing to permit the intangible presence of the law to permeate State borders, the reception they were willing to offer those charged with enforcing that law was much chillier."⁹⁹

C. Jurisdictional Principles Applicable to Other International Courts and Tribunals

In considering the meaning of the term "delegation" in international law more generally, outside the *lex specialis* of the ICC and international criminal law, one observes that "delegation theories" regarding the jurisdiction of international courts are not found outside the context of the ICC, at least not to the same degree. Neither the jurisdiction of the International Court of Justice nor the European Court of Human Rights is debated in the same terms as the ICC. The word "delegation" often appears in the literature, not in terms of jurisdiction, but to describe a grant of authority to an international court or tribunal. That is, it is not used in the narrow and confined manner of modern-day ICC delegation theory proponents.

Even U.S. scholars who maintain that international courts exercise a form of delegated power¹⁰⁰ do not focus narrowly on delegation of *jurisdiction*, but on delegation of *authority*. They define delegation as "a grant of authority by two or more states to an international body to make decisions or take actions."¹⁰¹ In this context, they see all international courts as exercising a form of delegated jurisdiction.¹⁰² This is more a function of the breadth of their definition, rather than an assertion about the nature and source of their power. For example, while the European Court of Human Rights has sometimes exercised extraterritorial jurisdiction, this has not generated academic commentary asking if this is outside the court's delegated jurisdiction, although it has raised interpretative questions relating to the scope of the European Convention on Human Rights' application. Extraterritoriality has been allowed in several circumstances—generally when exercising some form of control over a territory outside of the state.¹⁰³ This is the

99 Sadat & Carden, *supra* note 22, at 416.

100 See, e.g., Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, LAW & CONTEMP. PROBS., Winter 2008, at 1.

101 *Id.* at 2.

102 See *id.* at 11–12.

103 See e.g., *Loizidou v. Turkey*, App. No. 15318/89, 23 Eur. H.R. Rep. (1996) (where Turkey had military control over an area in Cyprus, a nonparty, and the Court had jurisdiction to review its activity); *Al-Skeini v. United Kingdom*, App. No. 55721/07, 53 Eur. H.R. Rep. (2011) (applying the convention to U.K. activity in Iraq). On extraterritorial

case even if national courts would not have jurisdiction over the actions themselves as outside of their territory.

What of other international courts and tribunals? The ICJ exercises authority over states themselves, authority that clearly has not been transferred from national jurisdictions as states do not exercise any such authority. The ICJ hears cases presenting questions of international law just as the ICC hears cases involving the commission of international crimes. The International Tribunal for the Law of the Sea (ITLOS) exercises jurisdiction over disputes that concern the interpretation or application of the United Nations Convention on the Law of the Sea, as well as over disputes and applications submitted to it pursuant to the provisions of many other agreements conferring jurisdiction on the Tribunal. Like the ICJ, it hears disputes involving states, and, in the event of a dispute as to whether the Tribunal has jurisdiction, it has jurisdiction to decide that dispute.¹⁰⁴ National courts would have no jurisdiction to hear the cases before the ITLOS because of limitations extant in the horizontal application of international law by coequal sovereigns.

In his essay addressing early versions of the delegation doctrine, Dapo Akande referred to the jurisdiction of the European Court of Justice (ECJ) over criminal matters in preliminary references to the Court as evidence that the ICC was able to exercise jurisdiction over the nationals of non–States Parties.¹⁰⁵ This is indeed an interesting example, because it shows not that the EU member states had delegated any criminal jurisdiction to the ECJ for *adjudication* (because they have not), but because it demonstrates that indeed the ECJ exercises independent jurisdiction *conferred upon it* (as opposed to transferred to it) by the member states to assess the compatibility of their criminal law with European Union law in specific instances.

D. *The ICC as an International Organization*

Article 4(1) of the Rome Statute provides that the Court is endowed with international legal personality, including the capacity “necessary for the exercise of its functions and the fulfilment of its purposes.”¹⁰⁶ Had the Statute been silent on this point, the Court would

jurisdiction in international human rights law, see Lea Raible, *Between Facts and Principles: Jurisdiction in International Human Rights Law*, 13 JURISPRUDENCE 52 (2021).

104 UNCLoS, *supra* note 11, art. 288(4).

105 See Akande, *supra* note 12, at 632–33. As noted earlier, the ECJ is now known as the CJEU. See *supra* note 9.

106 Rome Statute, *supra* note 22, art. 4(1). Article 4(2) provides that “[t]he Court may exercise its functions and powers . . . on the territory of any State Party, and, by . . . agreement, on the territory of” other states. *Id.* art. 4(2).

not have been deprived of its status as an international organization, assuming it met the criteria therefore, to wit: (1) it was created by a treaty; and (2) it has an autonomous will, distinct from that of its members.¹⁰⁷ The inclusion of Article 4(1) is a useful indicator of the intent of the negotiators, however, who evidently conceived of the ICC as a lasting association of states with legal powers exercisable on the international level, established for lawful purposes.¹⁰⁸ As stated in the preamble, the object of the Rome Statute is to establish a permanent international criminal court whose purpose is to “put an end to impunity” for perpetrators of “unimaginable atrocities that deeply shock the conscience of humanity,” and “contribute to the prevention of such crimes” of concern “to the international community as a whole.”¹⁰⁹

As the International Court of Justice held in *The Reparations Case*¹¹⁰ when asked whether the United Nations had international legal personality, the “presence of organs with specific tasks, the obligations on member states to accept certain decisions made by those organs, the granting of privileges and immunities . . . and the conclusion of agreements between the U.N. and member states,” as evidence of the UN’s “legal ‘detachment’” from its member states.¹¹¹ In the words of the ICJ, “[i]t must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.”¹¹²

The constitutive treaty of the International Criminal Court is the Rome Statute, which, with its 128 articles, divided into thirteen separate parts, created a blueprint for the Court’s functioning. The Statute set out, at least in part, the ICC’s relationship with the United Nations and other international organizations,¹¹³ created a mechanism for States Parties to conduct oversight of the institution and propose

107 See Wiebke Rückert, *Article 4: Legal Status and Powers of the Court*, in *ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 103, 103–09 (Otto Triffterer & Kai Ambos eds., 3d ed. 2016); Kirsten Schmalenbach, *International Organizations or Institutions, General Aspects*, ¶ 3, in *MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* (2020).

108 See, e.g., Sascha Rolf Lüder, *The Legal Nature of the International Criminal Court and the Emergence of Supranational Elements in International Criminal Justice*, 84 INT’L REV. RED CROSS 79, 80, 84 (2002).

109 Rome Statute, *supra* note 22, pmb1.

110 *The Reparations Case*, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11).

111 NIGEL D. WHITE, *THE LAW OF INTERNATIONAL ORGANISATIONS* 103 (3d ed. 2017) (quoting *The Reparations Case*, 1949 I.C.J. at 179).

112 *The Reparations Case*, 1949 I.C.J. at 179.

113 See SADAT, *supra* note 22, at 78–81.

review and amendment of the Statute,¹¹⁴ and, at the same time, included criminal “legislation” inside the Statute to be applied by its organs as set forth in the treaty.¹¹⁵

The Rome Statute established the Court as an autonomous international organization¹¹⁶ endowed with “international legal personality.”¹¹⁷ It is an “independent permanent” jurisdiction¹¹⁸ whose judges and prosecutor are required to be independent in the performance of their functions,¹¹⁹ performing their statutory functions “without fear or favour.”¹²⁰ Some have described it as an international organization with supranational elements.¹²¹ Certainly, unlike the paradigmatic supranational organization, the European Union, states have not *transferred* elements of sovereignty to the Court, whose rulings do not, by and large, have “direct effect” in national systems, although they operate directly on specific individuals accused of ICC crimes. The principle of complementarity requires the ICC to defer to national systems if they are investigating an accused sought by the Court; yet it is the Court, not the state in question, that has the final word on whether the ICC will relinquish its jurisdiction.¹²²

States objecting to Al-Bashir’s lack of immunity, or to the ICC’s jurisdiction over the nationals of non–States Parties accused of committing crimes on the territories of States Parties, appear to envisage the ICC—and the regime of international criminal law more generally—as a mere facility for States Parties to the Rome Statute to use (subject to their control) if they are not exercising jurisdiction themselves.¹²³ Yet this was precisely the International Law Commission’s

114 See *id.* at 84, 99.

115 See Rome Statute, *supra* note 22, arts. 5–9.

116 See *id.* art. 19(1) (“The Court shall satisfy itself that it has jurisdiction in any case brought before it.”); Jan Klabbers, *Transforming Institutions: Autonomous International Organizations in Institutional Theory*, 6 CAMBRIDGE INT’L L.J. 105 (2017).

117 Rome Statute, *supra* note 22, art. 4(1).

118 *Id.* pmb1.

119 *Id.* art. 40; see also *id.* art. 42(1).

120 Statement of ICC Prosecutor, *Fatou Bensouda, Respecting an Investigation of the Situation in Palestine*, INT’L CRIM. CT. (Mar. 3, 2021), <https://www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-respecting-investigation-situation-palestine> [https://perma.cc/X8NJ-M8A7].

121 Lüder, *supra* note 108, at 87–89.

122 Rome Statute, *supra* note 22, arts. 17–19.

123 Douglas Guilfoyle recently suggested something along these lines when he reverted to the pre-Rome ILC idea of making the Court’s judiciary temporary and shifting its focus to serving as a “mechanism for assisting the creation of special chambers in national legal systems with international elements . . . with a small standing court attached.” Douglas Guilfoyle, *Reforming the International Criminal Court: Is it Time for the Assembly of State Parties to be the Adults in the Room?*, EJIL:TALK! (May 8, 2019), <https://www.ejiltalk.org/reforming-the>

1994 proposal, which was rejected at Rome.¹²⁴ As Schermers and Blokker write,

In the 20th century, the notion of absolute state sovereignty has become obsolete. There [is] more need for international organizations to operate independently on the international level, separate from the member states. . . .

. . . [P]rovisions [on legal personality] oblige the members to accept the organization as a separate international person, competent to perform acts that under traditional international law could only be performed by states.¹²⁵

The Court's "autonomous will" is evidenced by the explicit grant of legal personality in Article 4;¹²⁶ by the fact that it is the Court, not States Parties, that decides whether or not jurisdiction and admissibility exist in a particular case; and in conferring upon the institution the capacity to create rules for its operation and functioning, in regard to the judiciary,¹²⁷ the Office of the Prosecutor (OTP), and the Staff more generally.

That said, the ICC, like other international organizations, is constrained by its members, the States Parties to the Rome Statute, in myriad ways: through the regular elections of Court personnel that take place; through the budgetary process of the Assembly of States Parties and the annual review to which the Court is subjected; and, of course, by the Statute's limitations on jurisdiction and admissibility as well as political and external constraints. Most critically, as noted above, and set out in Part IV below, the ICC is almost completely dependent upon states for cooperation in its investigations and prosecutions.

In the early years of the Court's history, much attention was paid to the possibility of political or unfounded prosecutions. This fear has not materialized. Acquittal rates have been relatively high compared

-international-criminal-court-is-it-time-for-the-assembly-of-state-parties-to-be-the-adults-in-the-room/ [<https://perma.cc/WHA9-F3WJ>].

124 See *ILC 1994 Draft Statute*, *supra* note 77.

125 HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY* §§ 1563–1564 (5th ed. 2011). Helfer and Slaughter characterize the ICC's jurisdiction as supranational. Helfer & Slaughter, *supra* note 18, at 926.

126 See Schmalenbach, *supra* note 107, ¶ 7.

127 In addition to the Statute's provisions on the judiciary contained in Articles 35–41, the ICC Assembly of States Parties has adopted additional provisions on the procedure for electing the Court's judges. See Assembly of States Parties, Int'l Crim. Ct., *Procedure for the Nomination and Election of Judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court: Consolidated Version*, ICC-ASP/8/Res.1 (Sept. 10, 2004). The judges themselves have adopted a Chambers Practice Manual. See INT'L CRIM. CT., *CHAMBERS PRACTICE MANUAL* (7th ed. 2023).

to other international criminal tribunals,¹²⁸ the doctrine of complementarity appears to be functioning effectively,¹²⁹ and no tangible evidence of politically motivated prosecutions has come to light. While it is true that international organizations may, like Frankenstein's monster, "behave differently from the way they are expected to" and "impact the system in ways that harm, rather than help, the interests of [the] states" that created them,¹³⁰ there is little evidence suggesting that is true for the ICC.

II. EMERGENCE AND EVOLUTION OF THE DELEGATION THEORY AT THE ICC

The various theories regarding the "delegation" or transfer of powers from national jurisdictions to the ICC can usefully be grouped for ease of understanding into three categories: The original theory proffered by the United States during the Rome Conference (Delegation Theory 1.0, which focused mostly upon the law of treaties); a different version of theory 1.0 that rejected the law of treaties argument, but accepted the transfer of powers thesis as regards the Court's adjudicative jurisdiction (Delegation Theory 2.0); and finally, the most extensive iteration of the theory emerging in respect to certain situations referred to the Court, including the Afghanistan and the Palestine situations (Delegation Theory 3.0), which suggest limits not only on the adjudicative but on the prescriptive adjudication of the Court. Having been rebuffed by ICC States Parties, and most academics, Delegation Theory 1.0 is primarily voiced as a policy, as opposed to a legal, argument in most fora. Variants 2.0 and 3.0, however, have been raised by defense counsel, states, and scholars, and continue to inform debate regarding the nature and effect of the Court's jurisdiction.

Delegation Theory 1.0: The U.S. Government took the position during the Rome conference that it violated the law of treaties for the ICC to exercise its jurisdiction over the nationals of non-States Parties

128 In defense of the ICC's acquittals, see Richard Goldstone, *Acquittals by the International Criminal Court*, EJIL:TALK! (Jan. 18, 2019), <https://www.ejiltalk.org/acquittals-by-the-international-criminal-court/> [<https://perma.cc/5XLA-G24N>]. But see ROBERT CRYER, DARRYL ROBINSON & SERGEY VASILIEV, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 169 (4th ed. 2019) (suggesting that the low rate of successful prosecutions at the ICC may reflect "systemic dysfunctions").

129 See, e.g., OFF. OF THE PROSECUTOR, INT'L CRIM. CT., SITUATION IN IRAQ/UK: FINAL REPORT (2020) (determining to close the preliminary examination of alleged UK war crimes in Iraq on the basis of complementarity).

130 Andrew Guzman, *International Organizations and the Frankenstein Problem*, 24 EUR. J. INT'L L. 999, 1000 (2013).

without the consent of the state of the suspect or accused's nationality.¹³¹ That argument was rejected by the Canadian Chair of the Diplomatic Conference, Philippe Kirsch, at the time of the Statute's negotiation, who wrote that "[t]his does not bind states that are not parties to the Statute. It simply confirms the recognized principle that individuals are subject to the substantive and procedural criminal laws applicable in the territories to which they travel, including laws arising from treaty obligations."¹³² It was also rejected by other states involved in the negotiations,¹³³ and by academics.¹³⁴ Those disagreeing with the U.S. view took the position that this argument, which had been advanced by those opposing the trial of the Kaiser following World War I, was no longer tenable under the Nuremberg consensus described above. As Jordan Paust noted, citing the Nuremberg judgment,¹³⁵ given that the crimes in the Rome Statute were crimes over which there existed "[u]niversal competence," a state with personal jurisdiction over the accused could either try the accused itself (regardless of nationality), extradite that individual to another state, or "agree with another state or group of states to set up a tribunal . . . and can render to such a tribunal any person reasonably accused of a crime under customary international law who is found in territory under its control."¹³⁶

American writers supporting the U.S. view included Madeline Morris, who argued that because the Court would exercise jurisdiction over state officials in some cases, for actions taken as state officials, it

131 See David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 18 (1999); Ruth Wedgwood, *The International Criminal Court: An American View*, 10 EUR. J. INT'L L. 93, 99–101 (1999); Theodor Meron, *The Court We Want*, WASH. POST (Oct. 13, 1998), <https://www.washingtonpost.com/archive/opinions/1998/10/13/the-court-we-want/2a542970-aa89-4529-8c42-419bc1f3d27d/> [https://perma.cc/4WWN-RGRD].

132 Philippe Kirsch, *The Rome Conference on the International Criminal Court: A Comment*, ASIL NEWSLETTER (Am. Soc'y of Int'l Law, D.C.), Nov.–Dec. 1998, at 1, 8.

133 See, e.g., Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 26 (1999) ("The overwhelming majority of states . . . could not agree to requiring the consent of the state of the nationality of the accused as a prerequisite for the court's jurisdiction."); Gerhard Hafner, Kristen Boon, Anne Rübeseame & Jonathan Huston, *A Response to the American View as Presented by Ruth Wedgwood*, 10 EUR. J. INT'L L. 108, 116 (1999); Philippe Kirsch, *The International Criminal Court: Current Issues and Perspectives*, LAW & CONTEMP. PROBS., Winter 2001, at 3, 11.

134 See, e.g., Brown, *supra* note 25, at 869; Gennady M. Danilenko, *The Statute of the International Criminal Court and Third States*, 21 MICH. J. INT'L L. 445, 458 (2000); Scharf, *supra* note 13, at 71.

135 In particular, Paust cited the language that "they have done together what any one of them might have done singly." Jordan J. Paust, *The Reach of ICC Jurisdiction Over Non-signatory Nationals*, 33 VAND. J. TRANSNAT'L L. 1, 4 (2000) (quoting *IMT Judgment*, *supra* note 38, at 444).

136 *Id.* at 3.

violated the law of treaties for it to do so without the consent of the state of nationality.¹³⁷ She saw the Court as engaging in interstate dispute settlement, for which the consent of both states would be required, and rejected the ability of states to delegate universal jurisdiction to it.¹³⁸ Michael Newton is the most ardent modern proponent of Morris's argument, contending, as she did, that it violates the law of treaties for the ICC to assert its jurisdiction over U.S. persons accused of crimes in Afghanistan, for example, because the United States has not explicitly consented to the Court's jurisdiction and had negotiated Status of Forces Agreements (SOFAs) allocating jurisdiction over U.S. forces to the United States.¹³⁹ These arguments, while powerfully stated, simply have not convinced scholars and the more than 124 states that have joined the Court.¹⁴⁰ Moreover, Delegation Theory 1.0 has now been repudiated by at least some of the officials who advanced it 1998, including former U.S. Ambassador for War Crimes Issues David Scheffer, who wrote in 2020:

I used to make this theoretical international law argument, grounded in the Vienna Convention on the Law of Treaties, on behalf of the U.S. Government many years ago. Today it holds very little credibility because of the character of the crimes at issue, the evolution of international criminal law, and the longstanding principle of criminal jurisdiction over one's own territory.¹⁴¹

As Dapo Akande noted in 2003, "it would be extraordinary and incoherent if the rule permitting prosecution of crimes against the collective interest by individual states [under universal jurisdiction] . . . simultaneously prevented . . . states from acting collectively in the prosecution of these crimes."¹⁴² As Akande observes, the United States supported the jurisdiction of the ICTY and the Special Court for Sierra Leone (SCSL), both of which exercised jurisdiction over individuals whose state of nationality had not consented to their trial, including two heads of state.¹⁴³ More recently, the United States has supported

137 Morris, *supra* note 7, at 14–15, 66.

138 *Id.* at 15, 52.

139 See Newton, *supra* note 3.

140 *Armenia as the 124th Member to the Rome Statute*, OPINIOJURIS (Sept. 22, 2023), <https://opiniojuris.org/2023/09/22/armenia-as-the-124th-member-to-the-rome-statute/> [<https://perma.cc/KT4M-WATW>].

141 David Scheffer, *The Self-Defeating Executive Order Against the International Criminal Court*, JUST SEC. (June 12, 2020), <https://www.justsecurity.org/70742/the-self-defeating-executive-order-against-the-international-criminal-court/> [<https://perma.cc/R8UH-TL8X>].

142 Akande, *supra* note 12, at 626.

143 *Id.* at 630–32. The SCSL indicted, tried, and convicted Liberian President Charles Taylor and the ICTY indicted and tried Serbian President Slobodan Milošević, who died during the proceedings. Both the SCSL and the ICTY rejected their head-of-state defenses. Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction,

the jurisdiction of the ICC over the situation in Ukraine, involving the potential prosecution of Russian (non-State Party) nationals accused of committing ICC crimes on the territory of Ukraine.¹⁴⁴ Thus, it is reasonable to conclude that the original theory employed by the United States, while still advanced by a limited number of scholars, is widely perceived to be a political or policy objection to the ICC's jurisdiction rather than a legal constraint.

Delegation Theory 2.0: Another strand of the delegation theory has had more adherents and has undoubtedly been generated in part by nontechnical use of the term “delegation,” not in the sense of “pooled” jurisdiction, by which states “do together what they could have done singly” but in a formal and technical sense that suggests there has been an actual *transfer* of adjudicative criminal jurisdiction from the States Parties to the Rome Statute to the ICC. Under this variant, the ICC can only exercise what the States Parties have themselves. Theorists in this vein, like Dapo Akande, argue that the Court *may sometimes* exercise jurisdiction over the nationals of non-States Parties, but impose additional limitations on the Court. In their view, the Court is exercising only those powers “delegated” to it by states and is thus limited in the exercise of its jurisdiction by any concomitant limits found in national law.

For this reason, while Akande rejects the argument of the United States in terms of the law of treaties, he maintains the ability of states to “contract out” of the ICC regime through the negotiation of bilateral immunity agreements.¹⁴⁵ As for heads of state, he relies upon another provision of the Statute, Article 98(1), which he suggests operates as a bar to the application of Article 27(2) in the case of non-States Parties.¹⁴⁶ For Akande, prosecution of individuals entitled to personal immunity before international courts if their state of nationality has not consented to the prosecution “is to allow subversion of the policy underpinning international law immunities.”¹⁴⁷ Under this

¶ 52 (May 31, 2004); Prosecutor v. Milosevic, Case No. IT-99-37-PT, Decision on Preliminary Motions, ¶¶ 27–28 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 8, 2001).

144 See Ryan Goodman, *Top Cover: Congressional Republicans Pave Way for US Policy Shift on Int'l Criminal Court*, JUST SEC. (Apr. 13, 2022), <https://www.justsecurity.org/81093/top-cover-congressional-republicans-pave-wave-for-us-policy-shift-on-intl-criminal-court/> [<https://perma.cc/B3GK-UKAD>].

145 Akande, *supra* note 12, at 639–40.

146 Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT'L L. 407, 420 (2004).

147 *Id.* at 417; see also MONIQUE CORMIER, THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT OVER NATIONALS OF NON-STATES PARTIES 81–93 (2020); Paola Gaeta, *Does President Al Bashir Enjoy Immunity from Arrest?*, 7 J. INT'L CRIM. JUST. 315, 315, 329 (2009) (arguing that although the “ICC arrest warrant is a lawful coercive act against an incumbent head of state,” because Sudan has not waived the immunities of Al-Bashir, “states parties to

view, even if every state in the world joined the ICC other than the Russian Federation, the ICC would have no jurisdiction over Russian leaders so long as Russia remained a non-State Party. That is because Akande sees the “delegation” of criminal authority to the ICC as if there were an actual transfer of jurisdiction from its member states to the Court. We return to the question of immunities below in subsection IV.A.2.

Talita de Souza Dias, writing in 2019, contends that the Rome Statute is a “mere jurisdictional instrument,” (harkening back to the original language of the ILC in describing it as a purely “adjectival instrument”), and embraces the idea of “delegation” in a strict sense to describe the Court’s power.¹⁴⁸ Her thesis dismisses work to the contrary grounding the nature of the Court’s jurisdiction in the Nuremberg and ad hoc tribunal precedents,¹⁴⁹ and ignores the distinction between international and national jurisdictions. She argues, for example, that it is “hard to believe that states parties have agreed to waive the immunities of their officials before the ICC (i.e. vertically), but not before the domestic jurisdiction of other states parties (i.e. horizontally).”¹⁵⁰

Yet, as suggested above, states create *international* adjudicatory bodies precisely to do things they cannot or do not wish to do themselves. The global nature of the Court, with judges and staff from all over the world, including, but not limited to the Court’s 124 members, means that it is not one state’s judges sitting in judgment of another state’s nationals, but a global institution, with worldwide competence. While that may raise other questions, a long line of scholarship—and practice—establishes the ability of states to create institutions upon which they confer authority to adjudicate cases, either criminal or civil. They do this not by transferring some subset of their own authority, but by jointly establishing international institutions whose power and authority are defined by international law and their founding treaties.

Delegation Theory 3.0: Some authors have expanded upon the idea of delegation to argue that states cannot “delegate” power to prosecute high ranking officials from non-States Parties because they could not be prosecuted in national courts. Under this theory, Palestine, for example, regardless of its status as a state or not, could not “delegate” authority to the ICC over allegations of ICC crimes committed by Israeli nationals on its territory because Palestine ceded jurisdiction over Israelis to Israel in the Oslo Accords. This version of the delegation

the Statute are not obliged to execute the ICC request for surrender of President Al Bashir, and can lawfully decide not to comply with it”).

148 de Souza Dias, *supra* note 1.

149 *Id.* at 516.

150 *Id.* at 519–20.

theory means that the jurisdiction of the Court in each case not referred by the Security Council would have to be examined in light of the national legislation of the territorial state, the state of the accused's nationality, and potentially all states with jurisdiction over the offense, in addition to limits imposed by treaties such as SOFAs or the Oslo Accords. Such a result would reduce the ICC to a "mere jurisdictional instrument"—contrary to the intent of those negotiating the text. It would also undermine the principle of complementarity itself, which, paradoxically, limits the Court to exercising its jurisdiction only when states are unwilling or unable to do so.

If taken to its logical conclusion, this theory suggests, for example, that there is no jurisdiction over crimes against humanity committed by Russians in Ukraine, because Ukraine does not have legislation on crimes against humanity. Indeed, there are many Rome Statute states that do not yet have universal-jurisdiction legislation covering Rome Statute crimes, meaning that they cannot exercise jurisdiction over those crimes. Must the ICC consult the national legislation of every territorial state to assess its capacity in each case, as well as the state of the accused's nationality? The Palestine situation is distinguishable if one accepts the view that Palestine is not a state for the purposes of accession to the Rome Statute at all. But if it is a State Party, as Pre-Trial Chamber III found, then surely the ICC's jurisdiction cannot be dependent on the treatment of ICC crimes in national legislation. Consider that in the case of the IMT at Nuremberg, this variant of the delegation theory would have negated that tribunal's jurisdiction over crimes against humanity and crimes against peace because no state had legislation or authority over the same as the crimes had not yet been codified in international law.

III. TWO PRACTICAL CHALLENGES TO THE COURT'S JURISDICTION

A. *Jurisdiction over Non-State Party Nationals*

1. As a General Matter

The situations that have generated the most vocal objections to the ICC's exercise of jurisdiction over the nationals of non-States Parties are the Afghanistan and Palestine situations, which have been the object of particular concern by the U.S. and Israeli governments. Yet there are many other similar situations that either are or have been a matter of preliminary examination or are under investigation that involve the commission of ICC crimes by non-State Party nationals in the territory of States Parties. These include the case of Bosco Ntaganda, a Rwandan (non-ICC State Party) national, convicted of war crimes

and crimes against humanity in the Democratic Republic of Congo;¹⁵¹ attacks on South Korean targets allegedly mounted by North Korean nationals;¹⁵² the commission of ICC crimes in the territory of Georgia by Russian nationals;¹⁵³ the commission of ICC crimes at least in part on the territory of Bangladesh (a State Party) by Myanmar officials, discussed below; the referral by the Union of the Comoros of the attack by Israeli Defense Forces on the MV *Mavi Marmara*, a Comoros registered vessel that was part of a flotilla bound for Gaza;¹⁵⁴ and most recently, the situation in Ukraine, in which war crimes, crimes against humanity, and genocide allegations have been levelled at Russian nationals operating on the territory of Ukraine.¹⁵⁵

151 Prosecutor v. Ntaganda, ICC-01/04-02/06, Judgment, ¶ 1 (July 8, 2019) (noting the accused is a Rwandan national).

152 Such as the 2010 attack on the *Cheonan*, a South Korean warship, that was sunk by a torpedo allegedly fired from a North Korean submarine that killed forty-six persons. OFF. OF THE PROSECUTOR, INT'L CRIM. CT., REPORT ON PRELIMINARY EXAMINATION ACTIVITIES ¶ 47 (2011). South Korea also referred the shelling of Yeonpyeong Island on November 23, 2010, which resulted in several deaths, multiple injuries to civilians and military personnel and significant property destruction. *Id.* The Preliminary Examination was ultimately closed on June 23, 2014, after the Prosecutor concluded that war crimes had not been committed. *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*, INT'L CRIM. CT. (June 23, 2014), <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-conclusion-preliminary> [<https://perma.cc/X5TT-AM74>].

153 *Situation in Georgia: ICC Pre-Trial Chamber Delivers Three Arrest Warrants*, INT'L CRIM. CT. (June 30, 2022), <https://www.icc-cpi.int/news/situation-georgia-icc-pre-trial-chamber-delivers-three-arrest-warrants> [<https://perma.cc/LSB9-VAPU>] (two of the three individuals charged are Russian nationals).

154 Letter from Ramazan Arıtırık & Cihat Gökdemir, Union of the Comoros, to Fatou Bensouda, Prosecutor, Int'l Crim. Ct. (May 14, 2013). Other vessels in the flotilla were also registered to Rome Statute States Parties Greece and Cambodia. The Prosecutor concluded that jurisdiction existed under Article 12(2)(a) of the Statute. OFF. OF THE PROSECUTOR, INT'L CRIM. CT., SITUATION ON REGISTERED VESSELS OF COMOROS, GREECE AND CAMBODIA: ARTICLE 53(1) REPORT ¶ 14 (2014). The Office also concluded that although there was a reasonable basis to believe that war crimes had been committed, *id.* ¶ 19, the attack on the flotilla did not meet the "gravity" threshold of the Statute, given the limited jurisdictional reach of the investigation to vessels registered to ICC States Parties, and declined to open an investigation, *id.* ¶¶ 24–26. The Comoros challenged the Prosecutor's decision, and she was required to reconsider it. *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, ICC-01/13, Decision on the 'Application for Judicial Review by the Government of the Comoros,' ¶ 3 (Sept. 16, 2020). Her view did not change, and no investigation was opened. *Id.* ¶ 4.

155 The position of the Russian Federation towards the ICC has evolved over time. Russia signed the Statute and was an active participant during the Rome Conference and later attended Assembly of States Parties meetings. Assembly of States Parties, Int'l Crim. Ct., Delegations to its Fourth Session, ICC-ASP/4/INF.1/Rev.1, at 37 (Dec. 12, 2005) (noting the presence of a distinguished Russian Federation delegation). In 2016, however, in response to the Ukraine preliminary examination, it repudiated its signature. Nonetheless, prior to the 2022 invasion of Ukraine, and despite the official repudiation of the Court,

The United States did not object to the exercise of the Court's jurisdiction in the *Ntaganda* case. (The United States even transferred the accused from the U.S. embassy in Kigali to the ICC.)¹⁵⁶ Nor did it complain regarding the North Korean or Russian nationals referenced above. Indeed, the United States and Israel have protested only the ICC's jurisdiction over their own nationals,¹⁵⁷ a position the United States has articulated since the Rome Diplomatic Conference.¹⁵⁸

To ensure, as a practical matter, that U.S. persons (and allies) could not be handed over to the Court without U.S. consent, the Bush administration negotiated more than 100 Bilateral Immunity Agreements with ICC States Parties, requiring them not to turn over U.S. persons to the Court.¹⁵⁹ Additionally, in 2002, then Under Secretary for Arms Control and International Security John Bolton sent a letter to the U.N. Secretary-General stating that the United States "does not intend to become a party" to the Rome Statute and that "[a]ccordingly, the United States has no legal obligations arising from its

Russian representatives, judges, academics, and students were aware of the Court and sometimes engaged with its personnel and activities. Bakhtiyar Tuzmukhamedov, *Russia and the International Criminal Court: From Uncertain Engagement to Positive Disengagement, in THE PAST, PRESENT AND FUTURE OF THE INTERNATIONAL CRIMINAL COURT* 733, 733–45 (Alexander Heinze & Viviane E. Dittrich eds., Nuremberg Acad. Ser. No. 5, 2021). Russia has been highly critical of the Court since the Ukraine referral. *Kremlin: ICC Warrants Outrageous and Unacceptable, but Null and Void for Us*, REUTERS (Mar. 17, 2023, 4:45 PM), <https://www.reuters.com/world/europe/russia-warrant-against-putin-meaningless-russia-does-not-belong-icc-2023-03-17> [<https://perma.cc/R7TZ-NDFH>].

¹⁵⁶ See *Congolese Warlord Bosco Ntaganda Now in Custody of International Criminal Court*, UN NEWS (Mar. 22, 2013), <https://news.un.org/en/story/2013/03/435182> [<https://perma.cc/L33Q-LKFU>]. Rwanda did not object to the U.S. handover to the ICC, noting that the decision was "not Rwanda's business" as the embassy was U.S. territory. Jenny Clover, *Update, 1-U.S. Working Out Transfer of Congo War Suspect to ICC*, REUTERS (Mar. 19, 2013, 2:12 PM), <https://www.reuters.com/article/rwanda-warcrimes/update-1-u-s-working-out-transfer-of-congo-war-suspect-to-icc-idUKL6N0CBG0V20130319> [<https://perma.cc/SDD3-8NVC>].

¹⁵⁷ While not the subject of this Article, it is interesting to observe that China supported the U.S. position at Rome, U.N. DIPLOMATIC CONF., *supra* note 81, 42nd mtg. of the Comm. of the Whole, ¶ 28, at 362, and continues to do so. In 2022, China congratulated the Court on its twentieth anniversary but noted with "concern" the Court's jurisdiction in the Bangladesh/Myanmar and Philippines situations, which it suggested might be problematic in light of "sovereignty and the principle of state consent." Assembly of States Parties, Int'l Crim. Ct., Statement of the Chinese Observer Delegation to the Twenty-First Session (Dec. 6, 2022).

¹⁵⁸ On April 1, 2021, President Joe Biden repeated this position. Exec. Order No. 14022, 86 Fed. Reg. 17895 (Apr. 1, 2021).

¹⁵⁹ A list of the agreements can be found on the website of Georgetown Law School. *Countries That Have Signed Article 98 Agreements with the U.S.*, GEO. L. LIB., <https://guides.ll.georgetown.edu/c.php?g=363527&p=2456099> [<https://perma.cc/W6JR-CEAF>].

signature on December 31, 2000.”¹⁶⁰ The Bolton letter notwithstanding, it was not until the Prosecutor requested the opening of an investigation into crimes committed on the territory of Afghanistan, including those possibly perpetrated by members of the United States Armed Forces and CIA in secret detention facilities,¹⁶¹ that the full fury of the United States descended upon the Court.

As noted above, some U.S. officials argued vociferously that the opening of the Afghan investigation violated the “law of treaties,” because a treaty could not bind a state not party thereto, reprising Delegation Theory 1.0. In addition, they relied on Delegation Theory 3.0, arguing that because the United States had entered into a SOFA with Afghanistan, Afghanistan could not delegate its criminal jurisdiction over U.S. persons to the Court since it had transferred it to the United States. This argument was made by Michael Newton, who writes:

Afghanistan and Palestine entered into binding agreements that ceded exclusive jurisdiction over Americans and Israelis, respectively, for crimes committed on the territory of the state. The subsequent transfer of territorial jurisdiction from the state to the ICC via ratification of the Rome Statute therefore could not have included Americans or Israelis.¹⁶²

The ICC Prosecutor rejected this position, noting that the Court was entitled to exercise jurisdiction over all alleged crimes committed on Afghan territory “irrespective of the nationality of the accused.”¹⁶³ Reprising the arguments made in the 1990s and early 2000s regarding the U.S. negotiating position at Rome, the Prosecutor pointed to the “[s]imilar bases for the exercise of criminal jurisdiction” found in multilateral treaties addressing slavery, piracy, genocide, apartheid, counterfeiting of currency, war crimes, drug trafficking, hijacking and sabotage of aircraft, sabotage on the High Seas, attacks on diplomats, the taking of hostages, and torture.¹⁶⁴ Finally, the Prosecutor noted that the “conferral or delegation of jurisdiction by a party to a treaty to an

160 Letter from John R. Bolton, Under Sec’y of State for Arms Control & Int’l Sec., to U.N. Secretary-General Kofi Annan (May 6, 2002) (on file with the U.S. Department of State Archive).

161 See *The Prosecutor of the International Criminal Court, Fatou Bensouda, Requests Judicial Authorisation to Commence an Investigation into the Situation in the Islamic Republic of Afghanistan*, INT’L CRIM. CT. (Nov. 20, 2017), <https://www.icc-cpi.int/news/prosecutor-international-criminal-court-fatou-bensouda-requests-judicial-authorisation> [<https://perma.cc/YP9Y-LEKD>].

162 Newton, *supra* note 3, at 373. Newton appears to be referencing adjudicative jurisdiction.

163 See Situation in the Islamic Republic of Afghanistan, ICC-02/17, Public Redacted Version of “Request for Authorisation of an Investigation Pursuant to Article 15,” ¶ 44 & n.42 (Nov. 20, 2017).

164 See *id.* ¶ 45 & n.43.

international jurisdiction [is not] in itself novel, this . . . having been the basis for the establishment of the Nuremberg Tribunal.”¹⁶⁵ The Prosecutor also dismissed the argument that just because Afghanistan itself might be deprived of jurisdiction to try U.S. citizens under the SOFA concluded between itself and the United States, the ICC was similarly hampered, noting that Article 98 of the Statute, located in Part 9, had no effect upon the ICC’s adjudicative jurisdiction set out in Part 2, but related only to the Court’s enforcement jurisdiction.¹⁶⁶

Although the Prosecutor’s request was initially rejected on the grounds that an investigation would not “serve the interests of justice,”¹⁶⁷ the Chamber agreed with the Prosecutor’s arguments on jurisdiction. It found that neither the nationality of the potential accused nor the presence of the SOFA between the United States and Afghanistan prevented the Court from exercising its jurisdiction.¹⁶⁸ In the Chamber’s view:

The conducts that have allegedly occurred in full or in part on the territory of Afghanistan or of other State Parties fall under the Court’s jurisdiction, irrespective of the nationality of the offender. The Court has jurisdiction if the conduct was either completed in the territory of a State Party or if it was initiated in the territory of a State Party and continued in the territory of a non-State Party or vice versa.¹⁶⁹

The Pre-Trial Chamber’s dismissal of the case was reversed by a unanimous Appeals Chamber,¹⁷⁰ provoking a swift and angry response

165 *Id.* ¶ 45.

166 *See id.* ¶ 47 & n.47.

167 Situation in the Islamic Republic of Afghanistan, ICC-02/17, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ¶ 33 (Apr. 12, 2019). The Pre-Trial Chamber’s decision was controversial as it referenced, among other factors, the continued likely non-cooperation with the ICC as a reason for refusing permission to investigate. *See id.* ¶¶ 44, 90. This was widely understood to be a reference to U.S. noncooperation and threats. *See* Sergey Vasiliev, *Not Just Another ‘Crisis’: Could the Blocking of the Afghanistan Investigation Spell the End of the ICC? (Part I)*, EJIL:TALK! (Apr. 19, 2019), <https://www.ejiltalk.org/not-just-another-crisis-could-the-blocking-of-the-afghanistan-investigation-spell-the-end-of-the-icc-part-i/> [<https://perma.cc/NUM7-CAEY>].

168 *Article 15 Decision*, ICC-02/17, ¶¶ 58–59.

169 *Id.* ¶ 50.

170 Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan (Mar. 5, 2020). Afghanistan requested a deferral of the investigation under Article 18(2) of the Rome Statute, on the basis that it was investigating the allegations itself. This paused the ICC investigation, but on September 27, 2021, ICC Prosecutor Karim A.A. Khan requested authorization to resume the investigation, focusing on Taliban and Islamic State–Khorasan Province crimes, and deprioritizing crimes allegedly committed by others, including U.S. nationals. *Statement of the Prosecutor of the*

from the United States. Less than two weeks later, Secretary of State Mike Pompeo announced that OTP officials and their families would face possible sanctions as a result of the authorization of the Afghanistan investigation,¹⁷¹ which he labeled an “inappropriate and unjust attempt[] to investigate or prosecute Americans.”¹⁷² On June 11, 2020, President Donald Trump issued an executive order declaring that the ICC’s “illegitimate assertions of jurisdiction over personnel of the United States and certain of its allies . . . infringes upon the sovereignty of the United States,” and represents an “overbroad, non-consensual assertion[] of jurisdiction” that is “an unusual and extraordinary threat to the national security and foreign policy of the United States,” and constitutes a “national emergency.”¹⁷³ The Executive Order permitted the imposition of extraordinary sanctions against persons and property, which in September 2020, were applied to two members of the OTP, Chief Prosecutor Fatou Bensouda and one of her deputies, Phakiso Mochochoko.¹⁷⁴ The only individuals sanctioned were two African officials, raising suspicion that the Trump administration’s motivation may even have been racially motivated.¹⁷⁵ The sanctions were lifted and the Executive Order repudiated by the Biden administration, which nonetheless continued to maintain U.S. objections to ICC jurisdiction “over personnel of such non-States Parties as the United

International Criminal Court, Karim A.A. Khan QC, Following the Application for an Expedited Order Under Article 18(2) Seeking Authorisation to Resume Investigations in the Situation in Afghanistan, INT’L CRIM. CT. (Sept. 27, 2021), <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application> [https://perma.cc/V794-Q4ER]. Authorization to resume the investigation was granted on October 31, 2022, over the entire scope of the original investigation. Situation in the Islamic Republic of Afghanistan, ICC-02/17, Decision Pursuant to Article 18(2) of the Statute Authorising the Prosecution to Resume Investigation, ¶ 58 (Oct. 31, 2022).

171 Todd Buchwald, David M. Crane, Benjamin Ferencz, Stephen J. Rapp, David Scheffer & Clint Williamson, *Former Officials Challenge Pompeo’s Threats to the International Criminal Court*, JUST SEC. (Mar. 18, 2020), <https://www.justsecurity.org/69255/former-officials-challenge-pompeos-threats-to-the-international-criminal-court/> [https://perma.cc/H4LZ-357B].

172 Randle DeFalco, *Is Pompeo Unintentionally Helping out the International Criminal Court?*, JUST SEC. (Mar. 25, 2020), <https://www.justsecurity.org/69362/is-pompeo-unintentionally-helping-out-the-international-criminal-court/> [https://perma.cc/M99T-6Q94].

173 Exec. Order No. 13928, 85 Fed. Reg. 36139 (June 11, 2020).

174 Haley S. Anderson, *Why Them? On the U.S. Sanctions Against Int’l Criminal Court Officials*, JUST SEC. (Sept. 2, 2020), <https://www.justsecurity.org/72275/why-them-on-the-us-sanctions-against-intl-criminal-court-officials/> [https://perma.cc/47HW-HVC2].

175 Mark Kersten, *Trump’s Sanctions Against International Criminal Court Staff Aren’t Just ‘Bad’, They’re Racist*, JUST. IN CONFLICT, (Sept. 10, 2020), <https://justiceinconflict.org/2020/09/10/trumps-sanctions-against-international-criminal-court-staff-arent-just-bad-theyre-racist/> [https://perma.cc/95AM-KH8Z].

States and its allies absent their consent or referral by the United Nations Security Council.”¹⁷⁶

The Palestine situation also raised the question of the ICC’s jurisdiction over the nationals of non–States Parties. On January 2, 2015, Palestine acceded to the Rome Statute,¹⁷⁷ and in 2018 made a referral to the Prosecutor requesting her to “investigate, in accordance with the temporal jurisdiction of the Court, past, ongoing and future crimes within the court’s jurisdiction, committed in all parts of the territory of the State of Palestine,”¹⁷⁸ referencing alleged crimes committed by Israeli nationals.¹⁷⁹ On January 22, 2020, the Prosecutor applied to the Court for a preliminary ruling on jurisdiction, seeking confirmation that the “territory” over which the Court may “exercise its jurisdiction under article 12(2) (a) comprises the Occupied Palestinian Territory, that is the West Bank, including East Jerusalem, and Gaza.”¹⁸⁰

The Prosecutor argued that the application was warranted because the scope of the Court’s jurisdiction “appear[ed] to be in dispute between . . . Israel and Palestine[, and] . . . other states have also expressed interest and concerns on relevant issues.”¹⁸¹ Observing that she believed Palestine’s accession to the Rome Statute was valid, she rejected the argument that the Oslo Accords, by according jurisdiction over offenses committed by Israelis on Palestinian territory to Israel, did not permit Palestine to “delegate” its (prescriptive or adjudicative) jurisdiction to the Court.¹⁸² The application is not entirely consistent regarding the terminology used to describe the ICC’s jurisdiction,¹⁸³ but concludes that once a state “has conferred jurisdiction” upon the Court, “the resolution of the State’s potential conflicting obligations is not a question that affects the Court’s jurisdiction[,] . . . [but] may

176 Exec. Order No. 14022, 86 Fed. Reg. 17895 (Apr. 1, 2021).

177 Palestine accepted the ICC’s jurisdiction under Article 12(3) in 2014. See Letter from Mahmoud Abbas, President of the State of Palestine, to the Int’l Crim. Ct. (Dec. 31, 2014) (on file with the Int’l Crim. Ct.). It subsequently acceded to the Rome Statute. *The State of Palestine Accedes to the Rome Statute*, INT’L CRIM. CT. (Jan. 7, 2015), <https://www.icc-cpi.int/news/state-palestine-accedes-rome-statute> [<https://perma.cc/932Q-5VDQ>].

178 Referral by the State of Palestine Pursuant to Articles 13(a) and 14 of the Rome Statute, Situation in the State of Palestine, ICC-01/18, ¶ 9 (May 15, 2018).

179 Situation in the State of Palestine, ICC-01/18, Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine, ¶ 2 (Jan. 22, 2020). See generally Alain Pellet, Debate, *The Palestinian Declaration and the Jurisdiction of the International Criminal Court*, 8 J. INT’L CRIM. JUST. 981 (2010); Yael Ronen, Debate, *Israel, Palestine and the ICC—Territory Uncharted but Not Unknown*, 12 J. INT’L CRIM. JUST. 7 (2014); Yuval Shany, Debate, *In Defence of Functional Interpretation of Article 12(3) of the Rome Statute*, 8 J. INT’L CRIM. JUST. 329 (2010).

180 *Article 19(3) Request*, ICC-01/18, ¶ 5.

181 *Id.* ¶ 35.

182 *Id.* ¶ 183.

183 *Id.* ¶ 184.

become an issue of cooperation or complementarity during the investigation and prosecutions stages.”¹⁸⁴

Forty-three amicus briefs were submitted in the case by NGOs, individuals, states, and organizations.¹⁸⁵ Until that time, only four States Parties to the Rome Statute had objected to Palestine’s accession to the Rome Statute, or to the term “State of Palestine” in the ICC Assembly of States Parties (ASP): Canada,¹⁸⁶ Germany, the Netherlands, and the United Kingdom.¹⁸⁷ During the consideration of the Prosecutor’s Article 19(3) request, seven states—Australia, Austria, Brazil, the Czech Republic, Germany, Hungary, and Uganda—and the Arab League—submitted briefs. Five argued either that Palestine was not a state¹⁸⁸ or that they had not recognized Palestine as such.¹⁸⁹ Brazil recognized Palestine as a state but expressed concern that “initiating an investigation would compromise the search for a just and negotiated political solution.”¹⁹⁰

Germany’s submission was the most substantive, and reprised Delegation Theory 3.0. It noted that because it did not consider Palestine to be a state,¹⁹¹ its view was that Palestine had no “jurisdiction [to] . . . delegate” to the Court.¹⁹² Moreover, even if it were considered a State Party to the Rome Statute (as the depositary’s acceptance of its

184 *Id.* ¶ 185.

185 *See* Situation in the State of Palestine, ICC-01/18, Decision on the ‘Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine,’ ¶ 12 (Feb. 5, 2021).

186 U.N. Secretary-General, Communication by Canada on the Rome Statute of the International Criminal Court, C.N.57.2015.TREATIES-XVIII.10 (Depositary Notification) (Jan. 23, 2015) (stating that Canada believes that “‘Palestine’ does not meet the criteria of a state under international law” and “is not able to accede” to the Rome Statute).

187 Statement by Canada, Germany, the Netherlands, and the United Kingdom of Great Britain and Northern Ireland in Explanation of Their Position Concerning the Use of the Term “State of Palestine,” *in* Bureau of the Assembly of States Parties, Int’l Crim. Ct., 7th mtg., Agenda and Decisions, annex II (Nov. 15, 2016).

188 This was the position of Australia, the Czech Republic, Hungary, and Uganda. *See* Submission of Observations Pursuant to Rule 103 by the Czech Republic, Situation in the State of Palestine, ICC-01/18, ¶ 4 (Mar. 12, 2020); Observations of Australia, Situation in the State of Palestine, ICC-01/18, ¶ 12 (Mar. 16, 2020); Written Observations by Hungary Pursuant to Rule 103, Situation in the State of Palestine, ICC-01/18, ¶ 3 (Mar. 16, 2020); The Observations of the Republic of Uganda Pursuant to Rule 103 of the Rules of Evidence and Procedure, Situation in the State of Palestine, ICC-01/18, ¶¶ 11–12 (Mar. 16, 2020).

189 Austria concluded that Palestine’s accession did not render it a “state” under international law, as it had not recognized Palestine. Amicus Curiae Observations of the Republic of Austria, Situation in the State of Palestine, ICC-01/18, ¶ 4 (Mar. 15, 2020).

190 Brazilian Observations on ICC Territorial Jurisdiction in Palestine, Situation in the State of Palestine, ICC-01/18, ¶ 34 (March 16, 2020).

191 Observations by the Federal Republic of Germany, Situation in the State of Palestine, ICC-01/18, ¶ 16 (Mar. 16, 2020).

192 *Id.* ¶ 27.

accession suggests), it could not “delegate” its (prescriptive or adjudicative) criminal jurisdiction to the ICC because the “Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip of 1995 [the Oslo Accords] explicitly stipulates that the Palestinians have no criminal jurisdiction over Israeli nationals.”¹⁹³ Conversely, the League of Arab states, representing twenty-two countries (but only a handful of ICC States Parties), argued that Palestine was a state, and that the occupation did not deprive it of sovereignty or the capacity to grant jurisdiction to the Court.¹⁹⁴

The Pre-Trial Chamber found, by majority, that it could not “review the outcome of the accession procedure” whereby Palestine acceded to the Rome Statute,¹⁹⁵ and that it was therefore a “State Party” to the Statute, whose territory was thereby referenced by Article 12(2)(a) of the Statute, without prejudice to matters of international law not within the Court’s competence, including the question of Palestine’s present or future borders.¹⁹⁶ It agreed with the Prosecutor that the relevant territory for the purpose of Article 12 is the territories occupied by Israel since 1967, including Gaza and the West Bank, including East Jerusalem.¹⁹⁷ Finally, the majority rejected the view that the Oslo Accords affected the Court’s territorial jurisdiction.¹⁹⁸

Judge Kovács partly dissented. He argued that the Chamber should have undertaken a *de novo* review of the question of Palestinian statehood in interpreting Article 12 of the Statute, rather than relying upon the accession of Palestine to the Statute.¹⁹⁹ His review of state practice led him to the conclusion that Palestine is not a state under

193 *Id.* ¶ 28 (citing Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II), art. XVII(2)(C), U.N. Doc. A/51/889 (1995) (“The territorial and functional jurisdiction of the [Palestinian Authority] will apply to all persons, except for Israelis, unless otherwise provided in this Agreement.” (alteration in original)). Palestine has argued that the Accords no longer apply as it has repudiated them. *See* The State of Palestine’s Response to the Pre-Trial Chamber’s Order Requesting Additional Information, Situation in the State of Palestine, ICC-01/18 (June 4, 2020); *see also* Eyder Peralta, *Palestinian President Abbas Says He’s No Longer Bound by Oslo Accords*, NPR (Sept. 30, 2015, 1:01 PM), <https://www.npr.org/sections/thetwo-way/2015/09/30/444754892/palestinian-president-abbas-says-hes-no-longer-bound-by-oslo-accords> [<https://perma.cc/5RBA-3KCS>].

194 Submission of Observations, League of Arab States, Situation in the State of Palestine, ICC-01/18, ¶ 32 (Mar. 16, 2020).

195 Situation in the State of Palestine, ICC-01/18, Decision on the ‘Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court’s Territorial Jurisdiction in Palestine,’ ¶ 99 (Feb. 5, 2021).

196 *Id.* ¶¶ 104–113.

197 *Id.* ¶ 118.

198 *Id.* ¶ 129.

199 *See* Situation in the State of Palestine, ICC-01/18, Judge Péter Kovács’ Partly Dissenting Opinion, ¶¶ 28–34 (Feb. 5, 2021).

international law.²⁰⁰ Somewhat confusingly, however, he then concluded that it *was* a “State Party” to the Rome Statute.²⁰¹ He concluded Palestine was a *nasciturus* state, without full sovereignty, and that the provisions of the Oslo Accords depriving Palestine of jurisdiction were potentially effective.²⁰² Neither the majority nor the dissent accepted Delegation Theory 3.0 as a clear bar to the exercise of jurisdiction over Israeli nationals in the Palestine situation, although Judge Kovács came closest in suggesting that the jurisdictional limitations on enforcement jurisdiction in Palestine would potentially limit the prescriptive and adjudicative jurisdiction of the ICC.²⁰³

2. Jurisdiction over High-Ranking Government Officials

Because Sudan was not a State Party to the Rome Statute, the question of the Court’s jurisdiction over the national of a non-State Party, and more specifically, Sudan’s President and head of state, Omar Al-Bashir, was raised when he was indicted on charges of genocide, crimes against humanity, and war crimes, and warrants for his arrest were issued while he was still in office.²⁰⁴ The arrest warrants provoked a series of challenges to the Court’s jurisdiction whereby even some ICC States Parties were arguing that principles of international law applicable in national systems applied to their relationship with the Court, meaning that no head of state could be turned over to the ICC without a waiver of their immunity by their state of nationality, because the Court could not be possessed of jurisdiction where the state had no power to delegate it. This position presented a conflict with Article 27(1) of the Rome Statute, which provides:

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.²⁰⁵

200 *See id.* ¶¶ 261–267.

201 *Id.* ¶ 267.

202 *Id.* ¶¶ 323, 357.

203 *Id.* ¶ 365.

204 Arrest warrants were issued in 2009 and 2010. Prosecutor v. Al-Bashir, ICC-2/05-01/09, Case Information Sheet (July 2019).

205 Rome Statute, *supra* note 22, art. 27(1).

Article 27(1) tracks Article IV of the Genocide Convention²⁰⁶ and “codifies the customary international law rule that whatever immunities an official might otherwise have under international law cannot be pled as a bar or a defense to criminal responsibility, *ratione materiae*.”²⁰⁷

Article 27(2) complements Article 27(1), as follows: “[I]mmunities 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.”²⁰⁸

Article 27 was virtually “uncontested” during the negotiation of the Rome Statute and was “relatively easy to agree on.”²⁰⁹ The ICTY and the ICTR²¹⁰ found the provision represented “a rule of customary international law,”²¹¹ as did the SCSL in the *Charles Taylor* case.²¹² These decisions track the judgment of the International Court of Justice in the *Arrest Warrant Case*, finding that “immunities enjoyed under international law . . . do not represent a bar to criminal prosecution in certain circumstances,” including in the case of “criminal proceedings before certain international criminal courts . . . [including] the future International Criminal Court.”²¹³

In 2017, the Jordanian government refused to arrest Sudanese President Omar Al-Bashir when he traveled to Jordan to attend the twenty-eighth Arab League Summit, arguing he was immune based upon his position as the President of a non-State Party.²¹⁴ The Pre-Trial Chamber ruled against Jordan, and the case was appealed.

206 See Genocide Convention, *supra* note 55. Article IV provides: “Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.” *Id.* art. IV.

207 Leila Nadya Sadat, *Heads of State and Other Government Officials Before the International Criminal Court: The Uneasy Revolution Continues*, in THE ELGAR COMPANION TO THE INTERNATIONAL CRIMINAL COURT 96, 97 (Margaret M. deGuzman & Valerie Oosterveld eds., 2020).

208 Rome Statute, *supra* note 22, art. 27(2).

209 Per Saland, *International Criminal Law Principles*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 189, 202 (Roy S. Lee ed. 1999).

210 ICTY Statute, *supra* note 32, art. 7(2); ICTR Statute, *supra* note 32, art. 6(2).

211 See, e.g., Prosecutor v. Milosevic, Case No. IT-99-37-PT, Decision on Preliminary Motions, ¶ 28 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 8, 2001). The Chamber noted that Jean Kambanda, who had pled guilty before the ICTR, had not asserted his immunity as the former Prime Minister of Rwanda in the case brought against him for genocide. *Id.* ¶ 26.

212 Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, ¶ 52 (May 31, 2004).

213 Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) (*Arrest Warrant Case*), Judgment, 2002 I.C.J. 3, ¶ 61 (Feb. 14).

214 Prosecutor v. Al-Bashir, ICC-02/05-01/09, Decision Under Article 87(7) of the Rome Statute on the Non-compliance by Jordan with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir, ¶ 8 (Dec. 11, 2017).

Before the Appeals Chamber, Jordan argued that “fundamental rules and principles of international law” allowed it to refuse to execute an arrest warrant of the Court against him based on his alleged immunity.²¹⁵ Jordan advanced a series of legal arguments, one of which was that the Rome Statute cannot impose obligations on or deny rights to states not parties to the Statute (reprising the long-standing U.S. position),²¹⁶ assimilating the case before the ICC to a case involving “immunity from the criminal jurisdiction of other States,” in other words, arguing that the ICC was a “foreign court.”²¹⁷ The ICC Appeals Chamber, however, found that the ICC is not a foreign court, but an international court,²¹⁸ and that Jordan should have arrested Al-Bashir.²¹⁹ The Appeals Chamber relied upon customary international law,²²⁰ holding not that international law *removed* any immunities Al-Bashir might have, but instead, advancing the bolder position that

[t]here is neither State practice nor *opinio juris* that would support the existence of Head of State immunity under customary international law *vis-à-vis* an international court. To the contrary, such immunity has never been recognised in international law as a bar to the jurisdiction of an international court.²²¹

The Appeals Chamber noted that the absence of a rule of customary international law recognizing head-of-state immunity before an international court is “explained by the different character of international courts when compared with domestic jurisdictions.”²²² It found

215 The Hashemite Kingdom of Jordan’s Appeal Against the “Decision Under Article 87(7) of the Rome Statute on the Non-compliance by Jordan with the Request by the Court for the Arrest and Surrender [of] Omar Al-Bashir,” Prosecutor v. Al-Bashir, ICC-02/05-01/09, ¶ 5 (Mar. 12, 2018).

216 *Id.* ¶¶ 59–64.

217 *Id.* ¶ 64. Dire Tladi argued the same thing to the Appeals Chamber. Transcript of Appeals Hearing, Prosecutor v. Al-Bashir, ICC-02/05-01/09, at 89 (Sep. 10, 2018).

218 Darryl Robinson dismissed the “international court” argument out of hand in his argument to the Appeals Chamber. Prosecutor v. Al-Bashir, ICC-02/05-01/09, Transcript of Appeals Hearing, at 16 (Sep. 11, 2018).

219 Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al-Bashir Appeal, ¶ 119 (May 6, 2019).

220 The Court received many arguments on customary international law during the proceedings. *See, e.g.*, Written [sic] Observations of Professor Claus Kreß as Amicus Curiae, with the Assistance of Ms Erin Pobjie, on the Merits of the Legal Questions Presented in ‘The Hashemite Kingdom of Jordan’s Appeal Against the “Decision Under Article 87(7) of the Rome Statute on the Non-compliance by Jordan with the Request by the Court for the Arrest and Surrender [of] Omar Al-Bashir”’ of 12 March 2018, Prosecutor v. Al-Bashir, ICC-02/05-01/09 OA2, ¶ 20 (June 18, 2018); Transcript of Appeals Hearing, *supra* note 218, at 107.

221 *Judgment in the Jordan Appeal*, ICC-02/05-01/09 OA2, ¶ 1.

222 *Id.* ¶¶ 115, 115–116. *See also The Lotus Case*, Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7).

that although domestic jurisdictions constitute “an expression of a State’s sovereign power, which is necessarily limited by the sovereign power of the other States,” international courts “act on behalf of the international community as a whole.”²²³

Jordan (and Sudan’s) efforts to contest the applicability of Article 27 appear to have been an effort to rewrite the customary international law on immunity of heads of state before international courts on tribunals.²²⁴ While Jordan did not argue its case based on a theory of “delegation,” the sovereigntist approach it took was essentially the same as the approach taken by delegation theorists in conceptualizing the ICC’s jurisdiction, which is that the ICC cannot do more than the state of the accused’s nationality in any particular case. Jordan even asserted that the Security Council referral in the Darfur Situation did not clearly waive interstate immunities, meaning that the ICC could not proceed against Al-Bashir without a waiver from the Sudanese government.²²⁵ The ICC Appeals Chamber rejected this in favor of the more universalist approach expressed in the *Tadić* case, and in agreement with the late M. Cherif Bassiouni that the Nuremberg Trial established “a new rule of customary international law . . . namely that international immunities do not apply to international criminal prosecutions for certain international crimes.”²²⁶

B. *Geographic Extension of the Court’s Jurisdiction: Bangladesh/Myanmar*

The negotiators in Rome agreed that the prescriptive jurisdiction of the Court would be unbounded by principles of geography or nationality. That is, they permitted the Security Council to refer situations involving nationals of states and non–States Parties who may have committed ICC crimes.²²⁷ In cases referred by states or brought by the

223 *Judgment in the Jordan Appeal*, ICC-02/05-01/09 OA2, ¶ 115. The Chamber issued a five-member unanimous decision, accompanied by a four-judge concurrence of nearly 200 pages further elaborating on the head-of-state immunity question. See *Prosecutor v. Al-Bashir*, ICC-02/05-01/09 OA2, Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa (May 6, 2019). The Joint Concurring Opinion, while interesting, added complexity to the case by taking up issues not directly before it, such as the question of the outer limits of the term “international court.” Leila Sadat, *Why the ICC’s Judgment in the Al-Bashir Case Wasn’t So Surprising*, JUST SEC. (July 12, 2019), <https://www.justsecurity.org/64896/why-the-iccs-judgment-in-the-al-bashir-case-wasnt-so-surprising/> [<https://perma.cc/P2XN-NZBA>].

224 Sadat, *supra* note 207, at 97.

225 *Judgment in the Jordan Appeal*, ICC-02/05-01/09 OA2, ¶¶ 64–66.

226 BASSIOUNI, *supra* note 42, at 73. Some authors argued that Jordan should have arrested Al-Bashir, relying upon the Security Council referral as the determining factor. See, e.g., Dapo Akande, *The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir’s Immunities*, 7 J. INT’L CRIM. JUST. 333, 340–42 (2009).

227 See Rome Statute, *supra* note 22, art. 13(b); Sadat, *supra* note 22, at 410.

Prosecutor *proprio motu*, however, that universality is constrained by limits imposed by Article 12 in the form of preconditions to the exercise of jurisdiction, namely, that either the state of the accused's nationality or the state on the territory of which the crimes were committed must be parties to the Statute or accept the jurisdiction thereof.²²⁸

Suppose that a crime originates on the territory of a non-State Party and is completed on the territory of a State Party or has effects thereon. This is a classic scenario in international and transnational criminal law. Under the Permanent Court of International Court of Justice's judgment in *The Lotus Case*, both the state where the crimes originated and the state on which their effects are felt may exercise criminal jurisdiction over persons alleged to have committed such a crime.²²⁹ This, it should be noted, is true regardless of the crime's status as an international or national offense.

As noted earlier, when the ICC Statute was negotiated based upon the Nuremberg consensus, these principles of extraterritorial national criminal jurisdiction were transposed to the international sphere.²³⁰ Not because the Court is exercising jurisdiction transferred to it by states, but because it is exercising jurisdiction over "the most serious crimes of concern to the international community as a whole," that "threaten the peace, security and well-being of the world."²³¹ What to do then about crimes originating in one country that are partially committed on the territory of ICC States Parties? Should the judges read the Statute narrowly? Or does international law—and the Rome Statute—permit the exercise of jurisdiction in cases such as Ukraine/Russian Federation or Bangladesh/Myanmar?

The Court confronted this question in the Bangladesh/Myanmar situation when the ICC Prosecutor sought a ruling whether her office could proceed with an investigation under the Statute's jurisdictional provisions. The application was predicated upon the large number of individuals who had been driven out of Myanmar into Bangladesh as a result of the attacks on the Rohingya in 2017, which had forced more than 750,000 Rohingya across the border into refugee camps, a situation that has been described as a textbook example of ethnic cleansing and possibly genocide.²³²

Pre-Trial Chamber I concluded in 2018 that

228 See Rome Statute, *supra* note 22, arts. 12(2)–(3).

229 *The Lotus Case*, Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 30 (Sept. 7).

230 See *supra* notes 95–99 and accompanying text.

231 Rome Statute, *supra* note 22, pmb1.

232 Zeid Ra'ad Al Hussein, U.N. High Comm'r for Hum. Rts., Opening Statement at the Hum. Rts. Council 36th Session (Sept. 11, 2017) (transcript available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22041&LangID=E> [<https://perma.cc/99PL-KCLM>]).

the preconditions for the exercise of the Court's jurisdiction pursuant to article 12(2)(a) of the Statute are, as a minimum, fulfilled if at least one legal element of a crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party.²³³

It also found that the ICC exercises jurisdiction over crimes in the same circumstances in which States Parties would be allowed to assert jurisdiction over such crimes under their legal systems. *Not* because it transposed principles of interstate criminal jurisdiction to the International Criminal Court, but because the drafters of the Rome Statute interpreted the principle of territoriality embodied in Article 12 to apply to a scenario like the Myanmar/Bangladesh/Rohingya investigation.²³⁴

The Pre-Trial Chamber did not resort to policy analysis in its interpretation of Article 12, even though there is admittedly very little direct evidence in the *travaux* to the Rome Statute that explicitly addresses the effects doctrine or the scope of the territoriality principle. Given, however, that these principles are well established as a matter of general international law in interstate cases, and that Article 21(1)(b) of the ICC Statute requires the Court to apply principles of customary international law when there are ambiguities in its Statute, it seems reasonable for the Chamber to have interpreted Article 12(2)(a) as it did.

Pre-Trial Chamber III confirmed the Court's jurisdiction, finding that in the case of deportation, the "conduct" referenced in Article 12(2)(a) was both the coercive activity causing the victim to flee, and the crossing of a border; thus, "it could be concluded that part of the *actus reus* of the crime of deportation occurred in the territory of Bangladesh," a State Party.²³⁵ Surveying national jurisdictions, the Chamber concluded that customary international law permitted the exercise of jurisdiction in cross-boundary cases,²³⁶ and that there was no evidence that either international law or the Rome Statute required that the ICC's jurisdiction be limited to crimes committed exclusively in the territory of one or more States Parties. The Chamber noted that "when States delegate authority to an international organisation they transfer all the powers necessary to achieve the purposes for which the

233 Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-RoC46(3)-01/18, Decision on the "Prosecution's Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute," ¶ 64 (Sept. 6, 2018).

234 *Id.* ¶ 70.

235 Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ¶ 53 (Nov. 14, 2019).

236 *Id.* ¶ 57.

authority was granted to the organisation.”²³⁷ Thus, given the Court’s jurisdiction over war crimes committed in international armed conflicts in Article 8 of the Statute, for example, the Chamber found that it would be inconsistent with the principle of good faith and effective interpretation to read a limit into the Statute that would prevent the Court from hearing “cases involving war crimes committed in international armed conflicts involving non-States Parties.”²³⁸ Thus, the Chamber concluded, they had “transferred to the Court the same territorial jurisdiction as they have under international law.”²³⁹

The Court’s theoretical grounding of the opinion is slightly confused. On the one hand, it notes that the “transfer” of jurisdiction (the Chamber’s words) to the ICC included within it “all the powers necessary to achieve [its] purposes.”²⁴⁰ At the same time, it limited that conferral, relying upon the concept of delegation. The better view is that States Parties *conferred* authority upon the Court to exercise that criminal jurisdiction accepted under international law under the Nuremberg and Rome consensuses, which is universal jurisdiction over *jus cogens* “core” crimes, regardless of national laws (Nuremberg Principle II), subject, of course, to the limits imposed by the Rome Statute itself. It is to these limits that I now turn.

IV. LIMITS ON THE CONFERRED JURISDICTION OF THE ICC

While the potential jurisdiction of the International Criminal Court under the conferral theory is broader than under any variation of the delegation doctrine, it is not unbounded. Important legal limitations exist, as well as a myriad of practical and political constraints. These include limits imposed by international law, limits imposed by the Rome Statute itself, and practical and political checks on the Court’s power.

A. *Legal Limitations of the Conferral Theory*

The Nuremberg Principles and modern human rights standards articulate a series of limits on the exercise of criminal jurisdiction by international courts and tribunals, as follows:

1. A Crime Under International Law

Nuremberg Principle I notes that the crimes triable before international courts must be crimes “under international law,” created

237 *Id.* ¶ 60.

238 *See id.*

239 *Id.*

240 *Id.*

either by treaty or found in customary international law (Principle I).²⁴¹ Nuremberg Principle VI specifies the three crimes “punishable under international law” at Nuremberg: crimes against peace (now known as the crime of aggression), war crimes, and crimes against humanity,²⁴² the three core crimes now contained in Article 5 of the Rome Statute, to which has been added the crime of genocide, as an extreme and specialized form of crimes against humanity.²⁴³

The International Law Commission’s 1996 Draft Code of Crimes Against the Peace and Security of Mankind adds to this list attacks against United Nations and associated personnel.²⁴⁴ The Draft Code was meant to complement the draft statute of the International Criminal Court adopted by the Commission two years earlier. The crimes listed are “crimes under international law and punishable as such, whether or not they are punishable under national law,”²⁴⁵ meaning that they are not derived from national law but independent of it. Under the Draft Code, states are required to exercise jurisdiction over international crimes (Article 8)²⁴⁶ and to extradite or prosecute those accused of them (Article 9),²⁴⁷ meaning that they are universal jurisdiction crimes.

The *Princeton Principles* listed piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide and torture as “serious crimes under international law” over which a state might rely upon universal jurisdiction.²⁴⁸ They were formulated just prior to the September 11, 2001, attacks in the United States, and it may well be that terrorism should have been included, given that it is the subject of different international treaties, and a consensus on, if not clear definition of, the contours of the crime have been understood for some time.²⁴⁹ There were efforts to include terrorism in the Rome Statute,²⁵⁰ and in

241 Nuremberg Principles, *supra* note 56, princ. I.

242 *Id.* princ. VI.

243 See Rome Statute, *supra* note 22, art. 5.

244 Rep. of the Int’l L. Comm’n on the Work of its Forty-Eighth Session, ¶ 50, Draft Code of Crimes Against the Peace and Security of Mankind, arts. 16–20, 51 U.N. GAOR Supp. 10, U.N. Doc. A/51/10 (1996) [hereinafter Draft Code of Crimes].

245 *Id.* art. 1(2).

246 *Id.* art. 8.

247 *Id.* art. 9.

248 PRINCETON UNIV. PROGRAM IN L. & PUB. AFFS., *THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION* 29 (Stephen Macedo ed., 2001); see also STEVEN R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* 161 (2d ed. 2001) (defining universal jurisdiction crimes).

249 But see Luz E. Nagle, *Terrorism and Universal Jurisdiction: Opening a Pandora’s Box?*, 27 GA. ST. U. L. REV. 339, 340 (2011) (arguing against universal jurisdiction over terrorism).

250 U.N. DIPLOMATIC CONF., *supra* note 81, Final Act, annex I, res. E, at 71–72, U.N. Doc. A/CONF.183/13 (Vol. I). This issue has also come up at the International Law

1937 a treaty for an international terrorism court was even adopted, although it never entered into force.²⁵¹ More recently, a campaign to include ecocide in the jurisdiction of the ICC has been launched.²⁵² States, however, appear wary of creating new universal jurisdiction crimes, especially at the ICC, perhaps due to their concerns about the necessary limits on the ICC's jurisdiction.

2. Immunities for Heads of State Are Only Inapplicable Before “International Courts”

In the *Arrest Warrant Case*, decided by the International Court of Justice in 2002, the ICJ held that Belgium had violated international law by issuing an arrest warrant against a Congolese foreign minister.²⁵³ Aware that the Court's ruling was seen as shielding an individual associated with the commission of notorious crimes, the Court noted that immunity was not tantamount to impunity. It proceeded to lay out, in paragraph 61 of its judgment, four scenarios under which an incumbent or former minister of foreign affairs could be criminally prosecuted: (1) in their own countries; (2) in a third state if their state waives their immunity; (3) if they cease to hold office, they may be tried in a third state for acts committed prior or subsequent to their period in office for acts committed during their tenure in office “in a private capacity”; and, finally (4) “an incumbent or former Minister . . . may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction . . . [including] the future

Commission in its Report on Immunities of State Officials from Foreign Criminal Jurisdiction. Rep of the Int'l L. Comm'n, 77 U.N. GAOR Supp. 10, U.N. Doc. A/77/10, at 240–41 (2022) (excluding terrorism as a “transnational crime[],” *id.* at 241); *see also* Hervé Ascencio & Béatrice I. Bonafé, *L'absence d'immunité des agents de l'Etat en cas de crime international: Pourquoi en débattre encore?*, 4 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC [R.D.G.I.P.] 821, 845 (2018) (Fr.).

251 Two treaties were negotiated; one defining terrorism as an international crime, the other provided for an international court. Neither entered into force. *See* Martin David Dubin, *Great Britain and the Anti-terrorist Conventions of 1937*, 5 TERRORISM & POL. VIOLENCE 1 (1993). The draft Convention for the Creation of an International Criminal Court opened for signature at Geneva, November 16, 1937. *See* Convention for the Creation of an International Criminal Court, *reprinted in* U.N. Secretary-General, *Historical Survey of the Question of International Criminal Jurisdiction*, U.N. DOC. A/CN.4/7/Rev.1, app. 8, U.N. Sales No. 1949.V.8 (1949).

252 Kate Mackintosh & Lisa Oldring, *Watch This Space: Momentum Toward an International Crime of Ecocide*, JUST SECURITY (Dec. 5, 2022), <https://www.justsecurity.org/84367/watch-this-space-momentum-toward-an-international-crime-of-ecocide/> [https://perma.cc/N388-486K].

253 *Arrest Warrant Case*, Judgment, 2002 I.C.J. 3, ¶ 78(2) (Feb. 14).

International Criminal Court,” making specific reference to ICC Statute Article 27(2).²⁵⁴

The implications of the *Arrest Warrant Case* were raised when Omar Al-Bashir, the President of Sudan, was indicted by the ICC in 2010. As noted above, the Appeals Chamber unanimously agreed that Al-Bashir was not immune on the grounds, *inter alia*, that the ICC is an international court. While not necessary to the decision before them, four judges of the ICC Appeals Chamber appended a separate opinion expanding upon their judgment and defining what they meant by the finding that the ICC is an international court.²⁵⁵ They asserted that an international court

is an adjudicatory body that exercises jurisdiction at the behest of two or more states. Its jurisdiction may be conferred in one of a variety of ways: such as by treaty; by instrument of promulgation, referral or adhesion made by an international body or functionary empowered to do so; or, indeed, by adhesion or referral through an arbitral clause in a treaty.²⁵⁶

The opinion added that states “pool” their collective sovereign will in creating such a court, meaning that it “exercises the jurisdiction of no one sovereign . . . [but] the jurisdiction of all the concerned sovereigns *inter se*, for their overall benefit.”²⁵⁷

The separate-opinion judgment is unobjectionable, and, at the same time, unsatisfying. While providing a description of an international court that comports with the objective reality of the same, because that portion of the opinion is unfootnoted, it is difficult to discern the limits of the concept. As a court established under the auspices of the United Nations, open to all U.N. member states, and linked to the Security Council through provisions allowing the Council to refer cases (Article 13(b)) and defer cases (Article 16), the ICC seems clearly to be entitled to exercise jurisdiction over international crimes.²⁵⁸ Moreover, the Court has many important characteristics that render it international. It was negotiated and established in a treaty-making process open to all States. It has 124 States Parties, and additional states under its jurisdiction either by way of declarations or Security Council referrals. The crimes in the Statute are widely recognized as codifications of customary international law. It also adheres to fair trial practices. Thus, the ICC, while not truly universal, seems

254 *Id.* ¶ 61.

255 Prosecutor v. Al-Bashir, ICC-02/05-01/09 OA2, Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa (May 6, 2019).

256 *Id.* ¶ 56.

257 *Id.* ¶ 59.

258 See Rome Statute, *supra* note 22, pmb1.; *id.* arts. 13(b), 16.

to have all the indicators of legitimacy required by the Nuremberg Principles and modern human rights law.

The *Al-Bashir* case does not cite the *Charles Taylor* decision of the SCSL,²⁵⁹ finding that the SCSL, established by a treaty between the United Nations and Sierra Leone, was an international court as the agreement was “an expression of the will of the international community,” by virtue of its negotiation with the United Nations.²⁶⁰ Following the rendering of the *Al-Bashir* judgment, a Q&A was issued by the ICC explaining that this holding of the judgment merely meant that the ICC was a court that has “proper jurisdiction,” meaning that it fell within the “international court” exception of the *Arrest Warrant* case.²⁶¹ Thus, we have a sense that a limit is there, but not of its precise contours. Frédéric Mégret has argued that the claim of the ICC to be “emanating from the international community is much weaker than . . . the UN’s own claim to truly global governance,”²⁶² but has not suggested what universality requires. Would 150 states suffice? How many is enough? The Genocide Convention has been ratified by 153 states²⁶³ (meaning forty U.N. member states have not ratified it), yet a clear consensus exists that the prohibition against genocide is a universal norm.²⁶⁴

In his amicus brief to the ICC in the *Al-Bashir* case, Claus Kreß suggests some additional criteria for a truly “international” court. He argued that it must be established by a treaty that constitutes a “legitimate attempt to provide the international community as a whole with a judicial organ to directly enforce its *ius puniendi*.”²⁶⁵ He adds that the negotiation of such a treaty must have been open to all states and that membership must be open to all states as well.²⁶⁶

259 Prosecutor v. Taylor, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction (May 31, 2004).

260 *Id.* ¶ 38.

261 See Prosecutor v. Al-Bashir, ICC-02/05-01/19, Q&A Regarding Appeals Chamber’s 6 May 2019 Judgment in the Jordan Referral re Al-Bashir Appeal (May 2019).

262 Mégret, *supra* note 15, at 167.

263 See *Ratification of the Genocide Convention*, UNITED NATIONS: OFF. ON GENOCIDE PREVENTION & THE RESPONSIBILITY TO PROTECT, <https://www.un.org/en/genocideprevention/genocide-convention.shtml> [<https://perma.cc/8EUD-YFKB>].

264 Mégret suggests that perhaps it is not a “quantitative universality” that matters but a “qualitative one.” Mégret, *supra* note 15, at 187.

265 Observations of Professor Claus Kreß, *supra* note 220, ¶ 14 (emphasis omitted).

266 *Id.*

3. A Fair Trial on the Facts and the Law

Nuremberg Principle V requires that the accused receive “a fair trial on the facts and law.”²⁶⁷ Under modern international human rights standards, a fair trial requires that the accused be accorded the presumption of innocence, an opportunity to defend him- or herself, and an attorney for his or her defense. The ILC’s Draft Code of Crimes included judicial guarantees in Article 11, double jeopardy protection in Article 12 (*non bis in idem*), and nonretroactivity (Article 13), and set forth defenses and extenuating circumstances (Articles 14 and 15).²⁶⁸

The ICC Statute itself embodies, in Articles 66 and 67, fair trial rights including, *inter alia*, the presumption of innocence;²⁶⁹ a right to be informed of the charges²⁷⁰ and to meet them in a “fair hearing conducted impartially”;²⁷¹ to have adequate time and facilities for the preparation of their defense,²⁷² including the right to choose a lawyer;²⁷³ to be tried without undue delay;²⁷⁴ to examine or have examined the witnesses against him or her;²⁷⁵ to have free of charge a competent interpreter and such translations as are required;²⁷⁶ and to have the proceedings conducted in a language the accused “fully understands.”²⁷⁷ These rights reflect and even expand on the basic minimum guarantees set forth in Article 14 of the International Covenant on Civil and Political Rights, and their inclusion in the Statute was uncontroversial.²⁷⁸ As William Schabas and Yvonne McDermott have noted in their commentary on Article 67, it would be “unthinkable” to have a Court that did not embody fundamental guarantees of fairness to the accused, not only for the credibility and legitimacy of the institution itself, but to serve as a model to domestic justice systems throughout the world.²⁷⁹

The idea that an international court exercising international jurisdiction must be legitimate is an important one. As Thomas Franck

267 Nuremberg Principles, *supra* note 56, princ. V.

268 Draft Code of Crimes, *supra* note 244.

269 Rome Statute, *supra* note 22, art. 66(1).

270 *Id.* art. 67(1)(a).

271 *Id.* art. 67(1).

272 *Id.* art. 67(1)(b).

273 *Id.* And to have legal assistance assigned by the Court if justice requires, and without payment if the accused lacks sufficient means. *Id.* art. 67(1)(d).

274 *Id.* art. 67(1)(c).

275 *Id.* art. 67(1)(e).

276 *Id.* art. 67(1)(f).

277 *Id.* art. 67(1)(a), (f).

278 International Covenant on Civil and Political Rights art. 14, Dec. 19, 1966, 999 U.N.T.S. 171.

279 William A. Schabas & Yvonne McDermott, *Article 67: Rights of the Accused*, in THE ROME STATUTE, *supra* note 107, at 1651, 1651–52.

has written, the “legitimacy of rules and institutions exerts a compliance pull on those addressed.”²⁸⁰ But what makes jurisdiction by the ICC “legitimate?” Franck suggests that determinacy (clarity), is one factor; others are symbolic validation, ritual, and pedigree.²⁸¹ As noted above, the ICC’s establishment and operation are consistent with these indicators of legitimacy. David Luban, similarly, argues that “the legitimacy of international tribunals arises from their fairness rather than their political pedigree (their state authorization).”²⁸²

The argument is sometimes raised that if the ICC can try President Vladimir Putin, then why can’t an ad hoc two-state tribunal created by Russia and Belarus try President Volodymyr Zelensky? The answer is not that two-state or international courts are prohibited by international law, for they are not per se unlawful, although ad hoc tribunals immediately raise questions about selectivity and legitimacy, as many have argued regarding proposals to create an ad hoc aggression tribunal to try Vladimir Putin.²⁸³ Rather, an ad hoc tribunal intended by way of political retaliation would presumably be illegitimate in its establishment, its operation, and its effect.

As Frédéric Mégret suggests (although he appears skeptical of theories based upon the *ius puniendi* and universality of the ICC), if theories about state delegation “cannot justify the creation of international criminal tribunals in violation of international law,” they also “cannot entirely justify those that are not in violation of international law.”²⁸⁴ Unlike the ICC, or the SCSL, the United Nations would not be involved in the establishment of a Russia-Belarus tribunal. Moreover, given the history of trials of political opponents and the status of the rule of law more generally in the Russian Federation, it is probable that the trial would not be fair on the facts or the law; and thus, neither the tribunal nor its indictments would pass muster.²⁸⁵ Just as a state may indict an

280 THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 112 (1990).

281 *See id.*

282 David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 577, 580 (Samantha Beson & John Tasioulas eds., 2010).

283 *See, e.g.*, Jess Peake, *On Why Creating a New Tribunal to Prosecute Russian Aggression is a Bad Idea*, UNIV. OF CAL. INST. ON GLOB. CONFLICT AND COOPERATION: UKRAINE ONE YEAR AFTER THE INVASION (Feb. 21, 2023), <https://ucigcc.org/publication/ukraine-one-year-after-the-invasion/#peake> [<https://perma.cc/5QQD-SF37>]; Heller, *supra* note 6. In support of an aggression tribunal, see Oona A. Hathaway, *The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part I)*, JUST SEC. (Sept. 20, 2022), <https://www.justsecurity.org/83117/the-case-for-creating-an-international-tribunal-to-prosecute-the-crime-of-aggression-against-ukraine/> [<https://perma.cc/2HUL-3F6N>].

284 Mégret, *supra* note 15, at 193.

285 In 2022, Freedom House ranked Russia as “not free” based upon low scores for political rights and civil liberties. *Russia: Freedom in the World 2022 Country Report*, FREEDOM HOUSE, <https://freedomhouse.org/country/russia/freedom-world/2022> [<https://perma>

individual from another state improperly and conduct a trial that is not considered legitimate under international standards, it may collaborate with another state to achieve the same objectives. The response to a bad-faith use of international law is not to remove the tools of international law for law-abiding states, but to condemn the misuse and bad faith and refuse to recognize its effects.

B. *Practical and Political Constraints*

Important policy and political constraints will also ensure that the Court remains bounded by its Statute and the intentions of the Statute's negotiators. These include the power of the ASP to control the Court's budget; to supervise the activities of the Court itself and make recommendations to ensure its efficient and appropriate operations, as it has done with the establishment of the Independent Expert Review;²⁸⁶ and of course, each state has the sovereign right either to join or leave the Statute at any time. Despite concerns about a mass withdrawal of African states due to the *Al-Bashir* case, the only African state that has withdrawn from the Court is Burundi, which did so not in response to Al-Bashir's indictment, but due to an investigation opened by the Prosecutor regarding alleged ICC crimes occurring on its territory.²⁸⁷ Finally, the relatively weak enforcement regime of the Statute, combined with the complementarity principle, means that states, not the Court, can pursue cases first, and the Prosecutor cannot force them into compliance without Security Council backing.

States also have the power to amend the Rome Statute to limit the operation of Article 12 so that "effects jurisdiction" would no longer be possible, to preclude the application of the Statute to the nationals of non-States Parties, or to delete Article 27(2) from the Statute or otherwise ensure the immunity of heads of state before the Court.²⁸⁸ The fact that they have not done so is not conclusive evidence of state approval; however, it is an indicator that the theories of scholars

.cc/Q7QH-GB7N]. It noted that the judiciary "lacks independence," and that "[s]afeguards against arbitrary arrest and other due process guarantees are regularly violated." *Id.* The World Justice Project ranks the Russian Federation as 107 out of 140, with even lower scores for fundamental rights and criminal justice. *Russian Federation*, WORLD JUSTICE PROJECT: WJP R. OF L. INDEX (2022), <https://worldjusticeproject.org/rule-of-law-index/country/2022/Russian%20Federation/> [<https://perma.cc/K9TN-WPJ5>].

²⁸⁶ See Assembly of States Parties, Int'l Crim. Ct., *Resolution Establishing Review of the International Court and the Rome Statute System*, ICC-ASP/18/Res.7 (Dec. 6, 2019) (establishing Independent Expert Review).

²⁸⁷ See, e.g., Christopher Lentz, *State Withdrawals of Jurisdiction from an International Adjudicative Body*, in THE CRISIS OF MULTILATERAL LEGAL ORDER: CAUSES, DYNAMICS AND IMPLICATIONS 118–19 (Lukasz Gruszczynski et al. eds., 2023).

²⁸⁸ See Rome Statute, *supra* note 22, art. 121.

notwithstanding, ICC States Parties largely agree with the jurisprudence of the Court in the controversies described above. Finally, the Prosecutor, the Deputy Prosecutors, and the judges are subject to removal by States Parties under Article 46 of the Statute, if they are found to have committed serious misconduct or a breach of their duties under the Statute.²⁸⁹

CONCLUSION

Lon Fuller posited that the indispensable qualities of any legal rule are that it is applied generally, publicly, prospectively, equally, and with certainty.²⁹⁰ And the most important distinguishing feature of a court is that it is an “independent body that answers legal questions according to principles and rules of law.”²⁹¹ Although the term “delegation” is often used to describe the relationship between national systems and international courts, as this Article has demonstrated, international courts are created to function as independent institutions, constrained by international law and the terms of their founding charters, but not by the national laws of the states creating them (unless the treaty creating them so provides). Examining the landscape of the world’s international courts and tribunals, one does not find the arguments made contesting the ICC’s jurisdiction. It is readily conceded that these courts and tribunals are established to accomplish what national courts cannot, particularly as regards interstate dispute settlement, but also in the case of international human rights.

Likewise, for the International Criminal Court, the rules applicable to its operation and functioning are the rules of international law, and the mandate—and constraints—of the Rome Statute. Although the delegation theory has been advanced as a neutral and objective principle that would limit the Court’s jurisdiction in predictable ways, in fact, as the arguments in the Palestine situation demonstrate, in its most potent iteration, it would potentially subject the Court to 193 different jurisdictional regimes depending upon the rules embedded in the territorial state either referring the case to the Court (such as Ukraine) or providing the jurisdictional nexus for the Prosecutor to proceed *proprio motu* (such as Afghanistan). The result would be chaos. Indeed, it would mean that only in cases of referrals by the Security Council would the Court’s jurisdiction be clear; and even in those cases, at least some scholars believe that heads of state would be immune unless their state waived their immunity. The net result would be a return to the unhappy precedent created by the abortive efforts

289 See *id.* art. 46.

290 See, e.g., LON L. FULLER, *THE MORALITY OF LAW* 46–70 (rev. ed. 1964).

291 Shelton, *supra* note 18, at 540.

to try the Kaiser after World War I—immunity, impunity, and exceptionalism would prevail.

This was in fact the U.S. position at Rome—it was all about the Security Council acting as a filter for cases and situations that could come to the Court,²⁹² a conception that was rejected by the negotiators, in an emotional vote at the end of the Diplomatic Conference. The wisdom of that decision has been amply demonstrated by the current situation in Ukraine, which has caused even the United States to obliquely concede the wisdom of not subjecting the Court to the Security Council given Russia's veto power, and to support the referral of the Ukraine situation to the ICC.²⁹³ This clearly implies that even the United States agrees that the Court has jurisdiction over Russian nationals accused of committing war crimes, crimes against humanity, and even genocide, on the territory of Ukraine.²⁹⁴ As David Scheffer noted, to take the opposite position would be to concede that U.S. (or Russian) forces and intelligence personnel could commit atrocity crimes inside any of the 124 States Parties to the Rome Statute even though those states' national courts could prosecute those crimes.²⁹⁵ That is simply not a plausible reading either of the legal theory supporting the establishment of earlier international criminal courts and tribunals, or of the Rome Statute itself.

It is interesting to consider why contestation about the nature of the ICC's jurisdiction is so much fiercer than discussions surrounding other international courts and tribunals. It may well be due to the complicated U.S. history with early slave courts, American exceptionalism, or the influence of the Pentagon during the discussions at Rome. As this Article shows, "delegation" theories do not surround discussions of the jurisdiction of other international courts and tribunals in the way they have emerged at the ICC. The United States fought hard for its position in Rome, a position that has become entrenched amongst some scholars and states. It is now reversing course

292 William A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 15 EUR. J. INT'L L. 701, 709–14 (2004).

293 A strong bipartisan consensus has emerged in the United States that the ICC *has* jurisdiction over Russian nationals. See Press Release, U.S. Senate Comm. on the Judiciary, Durbin, Graham, Bipartisan Group of Senators Urge President Biden to Support the ICC's Investigation into Atrocities in Ukraine (Mar. 24, 2023) (on file with the U.S. Senate Comm. on the Judiciary); Goodman, *supra* note 144.

294 This Article does not address the question of Russian aggression, given the explicit limitations on jurisdiction over non–States Parties of states not accepting those amendments (or the jurisdiction of the Court itself) incorporated in Article 15 *bis* of the Rome Statute. See U.N. Secretary-General, Amendments to the Rome Statute of the International Criminal Court, art. 15 *bis*, U.N. Ref. C.N.651.2010.TREATIES-8 (Depositary Notification) (June 11, 2020) [hereinafter *Kampala Amendments*].

295 Scheffer, *supra* note 141.

faced with extraordinary atrocities being committed in Ukraine. Yet as the United States now retreats from its original views, the ideas have spread to others. Some have suggested during the debates concerning the establishment of a Special Aggression Tribunal in the Russia/Ukraine situation that high-ranking Russian individuals (such as Vladimir Putin) would be immune before the ICC as non-State Party nationals, even for crimes ordered against Ukraine and committed on the territory of Ukraine.²⁹⁶ A recent draft legal opinion submitted to the European Union makes the same assertion.²⁹⁷ This was not the understanding that informed the negotiation of Article 27 of the Rome Statute.²⁹⁸ Indeed, as noted above, to date, *every* international criminal court or tribunal faced with this issue—without exception—has rejected immunity for sitting heads of state, including the ICC Appeals Chamber.

As this Article has endeavored to show, the legal analysis offered by proponents of the delegation theory misses the mark. Yet it is equally true that the ICC does not operate without limits. It is constrained by its Statute and by its dependence upon states for cooperation. The early caselaw of the Court seems generally to have struck a good balance between independence and constraint, situating its holdings within the canon of international criminal law articulated by other international criminal courts and tribunals. States have not sought to amend the Statute to “correct” the caselaw probably because, by and large, they find the ICC serves not only to label law-breaking behavior, but because they need the credibility of an international court weighing in on the commission of atrocity crimes.²⁹⁹ This leads to what Helfer and Slaughter have termed “constrained independence,” meaning that the judges are independent assessors of their statutory mandate, but within the constraints imposed by the Rome Statute itself, and by general international law.³⁰⁰

If states believe that the Court has overreached, it is perfectly possible to further constrain the jurisdiction of the ICC. This would require amendment of the Statute to, for example, insert immunities into it for the heads of state or non-States Parties, or to place limits on

296 ADVISORY COMM. ON PUB. INT’L L, *supra* note 2, at 13–14. Ironically, the U.S. Congress apparently does not believe he is immune from prosecution at the Court.

297 Options Paper by the European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy on Ensuring Full Accountability of Individuals Responsible for International Crimes in Ukraine (Dec. 2, 2022) (on file with author).

298 See Sadat, *supra* note 207, at 97; see also Alexandre Skander Galand, *The Nature of the Rome Statute of the International Criminal Court (and Its Amended Jurisdictional Scheme)*, 17 J. INT’L CRIM. JUST. 933–56 (2019); Kreß, *supra* note 27, at 2650.

299 Helfer & Slaughter, *supra* note 18.

300 See *id.* at 942.

the Court's territorial jurisdiction. The Kampala Amendments on the crime of aggression explicitly exclude the Court's jurisdiction over the nationals of non-States Parties, showing that states are capable of imposing limits on the Court if they wish to do so.³⁰¹ If they do not, the Court's jurisprudence has, at this point, settled the question of the Court's jurisdiction over non-States Parties, the salience of Delegation Theories 2.0 and 3.0, and immunities before the Court.³⁰² Although the *Al-Bashir* case admittedly involved a head of state charged in a case involving a Security Council referral, the referral mechanism should not change the operation or application of the Statute itself to avoid the double-standards problem evoked above. As Claus Kreß has noted, "the Court was not designed as an institution with two fundamentally different faces depending on whether or not the Security Council triggered the proceedings before it."³⁰³

As an international court exercising international jurisdiction, the ICC represents the hopes of the world that the most serious crimes of concern to the international community as a whole will not go unpunished. As Kai Ambos has noted, this view is consistent with the argument that there is "a normative international order, based on certain values worthy of being defended" by international criminal law, a Kantian order grounded in the importance of human dignity.³⁰⁴ David Luban has made the same point in his *A Theory of Crimes Against Humanity*, arguing that this particular core crime is an example of "politics gone cancerous," destroying the very fabric of society, and giving all humankind a reason to address these crimes which "pose a universal threat."³⁰⁵ States may indeed "pool" their jurisdiction to create international courts and tribunals to address threats on the scale of Darfur, Rwanda, Myanmar, or Russia's invasion of Ukraine and confer authority upon those courts to adjudicate individual cases. They do this not because they are delegating some part of their powers, but precisely because they believe they are not powerful enough to face such calamities alone. In this way, the Nuremberg Tribunal, with its famous aphorism that they are "only doing together what they could do singly" may have had it backwards. In fact, states need each other and the

301 See Kampala Amendments, *supra* note 294, art. 15 bis.

302 See also Adil Ahmad Haque, *Head of State Immunity Is Too Important for the International Court of Justice*, JUST SEC. (Feb. 24, 2020), <https://www.justsecurity.org/68801/head-of-state-immunity-is-too-important-for-the-international-court-of-justice/> [https://perma.cc/F387-NZLY].

303 Kreß, *supra* note 27, at 2650; see also Observations of Professor Claus Kreß, *supra* note 220, ¶ 7.

304 Ambos, *supra* note 27, at 304.

305 David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85, 90-91 (2004).

solidarity of international society—creating a Court that is “more than the sum of its parts,”³⁰⁶ exercising the *ius puniendi* of the international community, to combat the commission of atrocities that “shock the conscience of humanity.”³⁰⁷

306 Stahn, *supra* note 15; *see also* Shany, *supra* note 179, at 331, 337.

307 Rome Statute, *supra* note 22, pmb. cl. 2.

