

**EXERCISING JURISDICTION AT THE EDGE—WHAT
HAPPENS NEXT? AN ANALYSIS OF INTERNATIONAL
CRIMINAL COURT SUBSTANTIVE LAW AS APPLIED
TO NON-PARTY STATE NATIONALS**

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The Charter by which this Tribunal has its being, embodies certain legal concepts which are inseparable from its jurisdiction and which must govern its decision. . . . International law is not capable of development by the normal processes of legislation, for there is no continuing international legislative authority.¹

I. Introduction

On 10 December 2002, an Afghan man “known only as Dilawar, was hauled from his cell at the detention center in Bagram, Afghanistan” where he died after being repeatedly struck during his final interrogation by U.S. Army Soldiers.² From January to May 2010, 2d Infantry Division Soldiers murdered Afghan civilians on three separate occasions, covering their

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¹ Robert H. Jackson, Chief of Couns. for the U.S., Opening Statement Before the International Military Tribunal (Nov. 21, 1945), <https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal>.

² Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates’ Deaths*, N.Y. TIMES (May 20, 2005), <https://www.nytimes.com/2005/05/20/world/asia/in-us-report-brutal-details-of-2-afghan-inmates-deaths.html>.

crimes by planting weapons and manufacturing allied false narratives.³ Two years later, while deployed to Kandahar, Afghanistan, Staff Sergeant (SSG) Robert Bales left Camp Belambay and murdered sixteen Afghan civilians in the early morning hours.⁴ As the United States exercised jurisdiction over these Soldiers, there was little question as to what substantive law applied to prosecuting the above war crimes.⁵ However, the issue of what substantive law would apply if the International Criminal Court (ICC) exercised jurisdiction is less clear, as the above individuals are nationals of a state not party to the Rome Statute of the ICC (Rome Statute).

For instance, on 5 March 2020, the Appeals Chamber of the ICC approved a 2017 request from the Prosecutor of the ICC to initiate an investigation

in relation to alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties [to the Rome Statute] in the period since 1 July 2002.⁶

While the Prosecutor of the ICC reports a reasonable basis to believe crimes were committed by the Taliban, members of the Haqqani Network, and Afghan forces, the report also finds such a basis for crimes alleged to

³ Mark Boal, *The Kill Team: How U.S. Soldiers in Afghanistan Murdered Innocent Civilians*, ROLLING STONE (Mar. 28, 2011, 2:00 AM), <https://www.rollingstone.com/politics/politics-news/the-kill-team-how-u-s-soldiers-in-afghanistan-murdered-innocent-civilians-169793>.

⁴ Peter Finn, *Staff Sgt. Robert Bales Admits to Killing 16 Afghans*, WASH. POST (June 5, 2013), https://www.washingtonpost.com/world/national-security/staff-sgt-robert-bales-admits-to-killing-16-afghans/2013/06/05/31ea3406-ce29-11e2-8845-d970ccb04497_story.html.

⁵ *Id.* See Daniel Schorn, *The Court-Martial of Willie Brand*, CBS NEWS (Mar. 2, 2006), <https://www.cbsnews.com/news/the-court-martial-of-willie-brand>; see also Boal, *supra* note 3.

⁶ Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17-138, Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ¶ 79 (Mar. 5, 2020), https://www.icc-cpi.int/CourtRecords/CR2020_00828.pdf.

have been committed by “members of the US armed forces . . . and members of the [Central Intelligence Agency (CIA)].”⁷

Though there has been much debate regarding whether the ICC could subject non-party state nationals to its jurisdiction, and the allied implications of such action, the question of what substantive law would apply in such a scenario remains.⁸ This question is apt as, while the Rome Statute⁹ generally mirrors customary international law (CIL), it fails to do so completely. Instead, the Rome Statute overreaches the bounds of CIL and unlawfully purports to impose new obligations on non-party states by applying those overreaching portions of the Rome Statute to those non-party states.

Additionally, the mechanisms by which the ICC purports to assert jurisdiction over non-party state nationals infringe upon fundamental fairness concerns—specifically, notice of the applicable substantive law. Furthermore, party states possess the ability to increase the Rome Statute’s overreach of CIL by amending and defining additional substantive crimes within the ICC’s core crimes¹⁰ of genocide, crimes against humanity, war crimes, and the crime of aggression. This article argues that if the ICC asserts jurisdiction over non-party state nationals, it must limit the substantive law to those portions of the Rome Statute that constitute CIL or are consistent with applicable non-party state treaty obligations.

Part II of this article provides background on the United States’ relationship with the ICC and details the mechanisms by which the ICC purports to exercise jurisdiction over non-party state nationals. Part III

⁷ THE OFF. OF THE PROSECUTOR OF THE INT’L CRIM. CT., REPORT ON PRELIMINARY EXAMINATION ACTIVITIES ¶ 241 (2017), https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf.

⁸ Compare Michael A. Newton, *How the International Criminal Court Threatens Treaty Norms*, 49 VAND. J. TRANSNAT’L L. 371 (2016) (defining the limitations of the ICC’s jurisdiction and dangers associated with its expansion) with 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 (2016) (arguing in response that robust ICC jurisdiction fosters a system of accountability). See also Jay Alan Sekulow & Robert Weston Ash, *An Unlawful Overreach: Trying Nationals of Non-Consenting, Non-Party States Before the International Criminal Court*, 26 FLA. J. INT’L L. 1 (2014) (asserting that the ICC’s jurisdictional reach is unlawful under the Rome Statute).

⁹ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

¹⁰ *Id.* art. 5(1). Article 121 of the Rome Statute sets forth amendment procedures. *Id.* art. 121.

identifies portions of the Rome Statute that overreach the limits of CIL and details party states' ability to increase such overreach via legislation. Part IV details the implications of applying the entire body of crimes available under the Rome Statute when trying non-party state nationals. Specifically, this part addresses how such overreaches constitute an unlawful attempt to impose new obligations on non-party states and result in non-party states' inability to acquire notice of the applicable law at the time of alleged violations. Ultimately, the article will detail why, when prosecuting non-party state nationals, international law requires the ICC to apply only those portions of the Rome State that also constitute CIL.

II. Introducing Uncertainty: ICC Mechanisms of Jurisdiction Over Non-Party State Nationals

Despite the United States' antagonistic relationship with the ICC,¹¹ as ultimately detailed by the United States' decision not to become party to the Rome Statute,¹² the ICC asserts the ability to exercise jurisdiction over U.S. citizens and nationals of other non-party states. While the question of whether the ICC can exercise jurisdiction over a non-party state is not the focus of this paper, an abbreviated understanding of the proposition is required for the ensuing analysis and argument; these arguments stem from the mechanisms the ICC purports to possess in exercising jurisdiction over non-party state nationals. The ICC asserts the ability to exercise jurisdiction over non-party state nationals via three mechanisms: territorial jurisdiction, referral by the United Nations Security Council (UNSC), and ad hoc consent.

A. Mechanism One: Territorial Jurisdiction

First, the Rome Statute maintains the ICC can assert jurisdiction over non-party state nationals when non-party state nationals within the territory of a party state commit a crime enumerated in article 5 of the Rome Statute.¹³ As an example, the Prosecutor of the ICC has concluded that pursuant to Afghanistan having "deposited its instrument of ratification to the Rome

¹¹ E.g., Owen Bowcott et al., *John Bolton Threatens War Crimes Court with Sanctions in Virulent Attack*, THE GUARDIAN (Sept. 10, 2018, 2:49 PM), <https://www.theguardian.com/us-news/2018/sep/10/john-bolton-castigate-icc-washington-speech>.

¹² Rome Statute of the International Criminal Court 3 & 15 n.12 (July 17, 1998), <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-10.en.pdf> (showing the that the United States has only signed the Rome Statute and explaining its "intention not to become a party").

¹³ Rome Statute, *supra* note 9, art. 12(2)(a).

Statute on 10 February 2003[, t]he ICC . . . has jurisdiction over Rome Statute crimes committed on the territory of Afghanistan or by its nationals from 1 May 2003 onwards.”¹⁴ Consequently, and as an example, the Prosecutor of the ICC purports to possess the ability to exercise jurisdiction over U.S. Armed Forces if such crimes were committed in Afghanistan during the pertinent time frame.¹⁵ The ICC maintains such jurisdiction despite both the unsettled nature of the claim¹⁶ and presence of U.S.-Afghan bilateral agreements prohibiting the transfer of “members of the force and of the civilian component”¹⁷ to the ICC. As such, in the event the ICC exercises jurisdiction over members of the U.S. Armed Forces, CIA, or other non-party state nationals alleged to have committed crimes in violation of the Rome Statute while “on the territory of Afghanistan” pursuant to this mechanism,¹⁸ this article argues the substantive law applied should be limited to those portions of the Rome Statute that also constitute CIL.

B. Mechanism Two: UNSC Referral

Alternatively, the ICC can exercise jurisdiction over non-party state nationals pursuant to article 13(b) of the Rome Statute in “[a] situation in which one or more [crimes referred to in article 5] appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations[.]”¹⁹ The ICC first exercised jurisdiction pursuant to this mechanism when the UNSC referred President Omar Al Bashir’s involvement in the Sudan crisis to the ICC.²⁰ As the United States is a permanent member of the UNSC,²¹ and thus able to exercise an unconditional veto of any substantive resolution before it, a U.S. citizen cannot be subjected to ICC jurisdiction without the United States’ consent, though the United States could abstain from voting on such

¹⁴ THE OFF. OF THE PROSECUTOR OF THE INT’L CRIM. CT., REPORT ON PRELIMINARY EXAMINATION ACTIVITIES ¶ 76 (2014), <https://www.icc-cpi.int/iccdocs/otp/otp-pre-exam-2014.pdf> [hereinafter 2014 REPORT ON PRELIMINARY EXAMINATION ACTIVITIES].

¹⁵ THE OFF. OF THE PROSECUTOR OF THE INT’L CRIM. CT., *supra* note 7.

¹⁶ *See, e.g.*, sources cited *supra* note 8.

¹⁷ Security and Defense Cooperation Agreement Between the United States of America and the Islamic Republic of Afghanistan, Afg.-U.S., art. 13, Sept. 20, 2014, T.I.A.S. No 15-101, <https://www.state.gov/wp-content/uploads/2019/02/15-101-Afghanistan-Defense-Cooperation.pdf>.

¹⁸ 2014 REPORT ON PRELIMINARY EXAMINATION ACTIVITIES, *supra* note 14.

¹⁹ Rome Statute, *supra* note 9, art. 13(b).

²⁰ Sascha Dominik Dov Bachmann & Eda Luke Nwibo, *Pull and Push—Implementing the Complementarity Principle of the Rome Statute of the ICC Within the African Union: Opportunities and Challenges*, 43 BROOK. J. INT’L L. 457, 474 n.84 (2018).

²¹ *Current Members*, UNITED NATIONS SEC. COUNCIL, <https://www.un.org/securitycouncil/content/current-members> (last visited Aug. 21, 2020).

a measure.²² However, this is not the case for states lacking UNSC veto power. As such, this mechanism creates the potential for an inequitable exercise of jurisdiction, and allied application of substantive law, between states possessing UNSC veto power and those states without such power. More importantly, this mechanism poses the risk of implicating issues of fundamental fairness—specifically, notice of the applicable substantive law. As a result, and among further reasons detailed in Part IV, this article argues that in such a circumstance the ICC should apply only those portions of the Rome Statute that also constitute CIL.

C. Mechanism Three: Ad Hoc Consent

Finally, the ICC purports to possess the ability to exercise jurisdiction over non-party state nationals when non-party states consent to such jurisdiction.²³ Considering the United States' controversial relationship with the ICC,²⁴ it is unlikely the ICC could exercise jurisdiction over a U.S. national pursuant to U.S. consent.²⁵ But what about subjecting non-party state nationals to ICC jurisdiction pursuant to the consent of another non-party state? While Rome Statute parties are limited to states, as detailed by the Office of the Prosecutor of the ICC's rejection of Palestine's 2009 attempted ad hoc submission to ICC jurisdiction,²⁶ the ICC maintains the ability to exercise jurisdiction over non-party state nationals pursuant to another non-party state's consent.

This occurs through article 11 of the Rome Statute. Though article 11 limits ICC jurisdiction to crimes committed after the Rome Statute goes into effect for a state, it allows non-party states to accept ICC jurisdiction “with respect to the crime in question” via an ad hoc declaration.²⁷ Despite seeming contrary to the intent of the Rome Statute, this “appears to permit the territorial state and state of nationality to consent to the ICC's jurisdiction with respect to ‘the crime in question’ on an ad hoc basis without subjecting themselves to the ICC's jurisdiction over their own

²² U.N. Charter art. 27, ¶ 3.

²³ Rome Statute, *supra* note 9, art. 12(3).

²⁴ *E.g.*, Steve Holland et al., *Trump Authorizes Sanctions over ICC Afghanistan War Crimes Case*, REUTERS (June 11, 2020, 9:34 AM), <https://www.reuters.com/article/us-warcrimes-afghanistan-trump/trump-authorizes-sanctions-over-icc-afghanistan-war-crimes-case-idUSKBN23I23A>.

²⁵ *E.g.*, Bowcott et al., *supra* note 11.

²⁶ THE OFF. OF THE PROSECUTOR OF THE INT'L CRIM. CT., SITUATION IN PALESTINE ¶ 7 (Apr. 3, 2012), <https://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>.

²⁷ Rome Statute, *supra* note 9, arts. 11(2), 12(3).

citizens' actions within the situation giving rise to the crime."²⁸ As such, this mechanism does not merely contemplate a non-party state's ability to subject other non-party state nationals to ICC jurisdiction on an ad hoc basis for crimes alleged to have occurred in its territory, but also the ability to do so without subjecting one's own nationals to ICC jurisdiction. Even more pertinent to this discussion are the potential implications concerning notice of the applicable substantive law as applied to non-party state nationals.²⁹

III. Overreaching the Edge of CIL: Applying the Rome Statute to Non-Party State Nationals

Having addressed the mechanisms by which the ICC purports to assert jurisdiction over non-party state nationals, this part details those portions of the Rome Statute that overreach the bounds of CIL and ICC party states' ability to expand the degree by which the Rome Statute overreaches.

Even though the ICC represents a continuation of the recent lineage of international tribunals in its effort to hold responsible those that commit atrocities,³⁰ it also represents a remarkable and nuanced departure from such lineage. By largely contemplating prospective prosecutions (i.e., prosecuting those crimes occurring after a state becomes party to the Rome Statute), the ICC breaks from the precedent of international tribunals that were generally established "in reaction to atrocities that had already occurred."³¹ As these tribunals were established following the commission

²⁸ Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 L. & CONTEMP. PROBS. 67, 78 n.56 (2001).

²⁹ See discussion *infra* Part IV.

³⁰ Rome Statute, *supra* note 9, pmb1.

³¹ Song Sang-Hyun, *Preventive Potential of the International Criminal Court*, 3 ASIAN J. INT'L L. 203, 206 (2013). *E.g.*, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, art. 6, Aug. 8, 1945, 82 U.N.T.S. 279 (establishing the International Military Tribunal to prosecute "crimes against peace", "war crimes", and "crimes against humanity" previously committed during World War II); S.C. Res. 827 (May 25, 1993) (establishing the International Criminal Tribunal for the Former Yugoslavia following the Bosnian genocide); S.C. Res. 955, (Nov. 8, 1994) (establishing the International Criminal Tribunal for Rwanda following the Rwandan genocide). Article 11 of the Rome Statute details the statute's *ratione temporis*, stating, "[t]he Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute" and "[i]f a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3." Rome Statute, *supra* note 9, art. 11.

of crimes, they necessarily relied on CIL to prosecute the respective parties.³²

Conversely, unlike previous tribunals, when Rome Statute party states envisioned prospective prosecution of party states at the ICC, they rightly regarded themselves as unconstrained by CIL.³³ Unfortunately, when applied to non-party states, this application proves problematic.

A. Identifying Overreach: The Rome Statute and CIL

While the Rome Statute closely resembles CIL, it does not perfectly reflect CIL. Instead, those parties responsible for drafting the Rome Statute elected to exercise jurisdiction over specifically defined crimes, extensively defined those substantive crimes, and ratified a Rome Statute in which portions of the substantive law exceed the bounds of CIL.³⁴

As an example, article 8(2)(b)(viii) of the Rome Statute overreaches CIL by defining a war crime as including, among other things, “[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory.”³⁵ While article 8(2)(b)(viii) of the Rome Statute is largely similar to articles within the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (Geneva Convention IV) and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), it differs via the addition of

³² Hortensia D. T. Gutierrez Posse, *The Relationship Between International Humanitarian Law and the International Criminal Tribunals*, 88 INT’L REV. RED CROSS 65, 67 (2006) (“These are international bodies that do not make law or legislate in respect of the law; their role is to apply existing law.”).

³³ *Report of the International Law Commission to the General Assembly*, 49 U.N. GAOR Supp. No. 10, at 1, U.N. Doc. A/49/10 (1994), reprinted in [1994] 2 Y.B. Int’l L. Comm’n 187, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (Part 2). The draft statute shows when defining the principle of *nullum crimen sine lege*, or principle of legality, drafting parties originally considered prosecuting only that which “constituted a crime under international law.” *Id.* at 36. However, per article 22 of the Rome Statute, this was subsequently amended as parties settled on a principle of *nullum crimen sine lege* restricted to those “crime[s] within the jurisdiction of the Court.” Rome Statute, *supra* note 9, art. 22.

³⁴ See Rome Statute, *supra* note 9, art. 5 (detailing ICC jurisdiction over genocide; crimes against humanity; war crimes, and the crime of aggression). *Id.* arts. 6–8 *bis*. See generally INT’L CRIM. CT., ELEMENTS OF CRIMES (2011) <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>.

³⁵ Rome Statute, *supra* note 9, art. 8(2)(b)(viii).

“language referring to the transfer of civilian population to occupied territory ‘directly or indirectly.’”³⁶

Some may argue the Rome Statute’s inclusion of “directly or indirectly,” as it pertains to the transfer of nationals of an occupying power, fits within CIL. However, such a skewed interpretation equivocates, for example, forcibly displacing one’s population via cattle cars into an occupied area with an occupying power’s inaction concerning a national’s freely exercised decision to rent a house within occupied territory. Characterizing the use of “directly or indirectly” as a clarification of CIL, instead of an addition to CIL, belies the fact that the change criminalizes conduct that previously failed to constitute a war crime under CIL.³⁷ Neither Geneva Convention IV nor Additional Protocol I contemplate that an “occupying power[’s]” indirect transfer of their civilian population into occupied territory could constitute a war crime.³⁸ Furthermore, Jean Pictet’s commentary to Geneva Convention IV, article 49, makes clear the “indirect” transfer of an occupying power’s nationals was not intended to constitute a war crime as “transfer” is used in conjunction with deportation and described as “compulsory movement.”³⁹ As such, article 8(2)(b)(viii) of the Rome Statute exceeds CIL, and the discrepancy should not receive dismissive treatment.

Illustrating this point, and emphasizing the relevance of the “directly or indirectly” discrepancy, is a recent Human Rights Watch report about Airbnb’s and Booking.com’s business practices in Israeli West Bank settlements.⁴⁰ This report highlights the importance of the “directly or indirectly” discrepancy by detailing the Israeli government’s role, via inaction, in facilitating Israeli settlement of the occupied area.⁴¹ Specifically, the Human Rights Watch report details that Israeli “authorities ultimately refrained from interfering when settlers built homes

³⁶ 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, 865–66 (1999).

³⁷ Rome Statute, *supra* note 9, art. 8.

³⁸ Brown, *supra* note 36.

³⁹ JEAN S. PICTET, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR: A COMMENTARY 283 (1958).

⁴⁰ KEREM NAVOT & HUMAN RIGHTS WATCH, BED AND BREAKFAST ON STOLEN LAND: TOURIST RENTAL LISTINGS IN WEST BANK SETTLEMENTS (2018), https://www.hrw.org/sites/default/files/report_pdf/israel1118_web_0.pdf.

⁴¹ *Id.* at 21. See also S.C. Res. 2334, ¶ 1 (Dec. 23, 2016) (reaffirming Israel as an “occupying Power” and that “the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a flagrant violation under international law . . .”).

and community buildings” in occupied territory.⁴² When taken in conjunction with the ICC’s ongoing preliminary examination into, among other things, “Israeli authorities hav[ing] allegedly been involved in the settlement of civilians onto the territory of the West Bank, including East Jerusalem,”⁴³ the need to clarify the substantive law against which nationals of non-party states will be measured is necessary—especially when the pertinent portion of the Rome Statute exceeds CIL. In this case, even if the ICC finds that Israeli officials “indirectly” transferred Israeli citizens into occupied Palestine, there is no way these officials could have known such inaction constituted a crime at the time it occurred. As such, it would violate international law to hold those Israeli officials to such a standard.

However, not all instances of the Rome Statute’s overreach of CIL appear in such a forthright fashion. For example, the Rome Statute and CIL appear nearly identical in addressing the mental element required to hold commanders accountable for war crimes committed by their subordinates. Commanders may be held responsible under the Rome Statute when they “knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes”⁴⁴ Similarly, Additional Protocol I states superiors may be held accountable when “they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or going to commit” war crimes.⁴⁵ “By contrast, under the Rome Statute, to prove a violation, it is enough to show that commander

⁴² NAVOT & HUMAN RIGHTS WATCH, *supra* note 40, at 21.

⁴³ THE OFF. OF THE PROSECUTOR OF THE INT’L CRIM. CT., REPORT ON PRELIMINARY EXAMINATION ACTIVITIES ¶ 269 (2018), <https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf> [hereinafter 2018 REPORT ON PRELIMINARY EXAMINATION ACTIVITIES].

⁴⁴ See Rome Statute, *supra* note 9, art. 28(a)(i).

⁴⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 86(2), June 8, 1977, 1125 U.N.T.S. 3. See *Prosecutor v. Delalić*, Case No. IT-96-21-A, Judgment, ¶ 239 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) (“A superior may only be held liable for the acts of his subordinates if it is shown that he ‘knew or had reason to know’ about them.”); see also *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, Judgment, ¶ 35 (July 3, 2002) (“References to ‘negligence’ in the context of superior responsibility are likely to lead to confusion of thought The law imposes upon a superior a duty to prevent crimes which he knows or has reason to know were about to be committed A military commander, or a civilian superior, may therefore be held responsible if he fails to discharge his duties as a superior either by deliberately failing to perform them or by culpably or wil[l]fully disregarding them.”).

‘ha[d] merely been negligent in failing to acquire knowledge of his subordinates illegal conduct.’⁴⁶

While the above examples do not encompass all the substantive discrepancies between the Rome Statute and CIL, they show the relevance of such discrepancies given ongoing investigations into situations concerning non-party state nationals, including the United States and Israel, and the breadth of the types of discrepancies possible. However, non-party state nationals’ concerns are not limited to discrepancies between the substantive law contained in the Rome Statute and CIL. Instead, ICC party states’ legislative activities have shown non-party state nationals may rightfully feel uneasy regarding the Rome Statute’s potential to further overreach the bounds of CIL.

B. Reaching Further: Legislating Beyond the Bounds of CIL at the ICC

This part details how ICC party states can legislatively expand the Rome Statute’s overreach of CIL. This amendment process, via article 121 of the Rome Statute, has the potential to create fragmented and unequal substantive law both among party states and between party states and non-party states. Of specific concern are party states’ ability to grow the body of substantive law available to the ICC, via amendment to the Rome Statute, and subsequently subject nationals of non-party states to that body of law while potentially not being subjected themselves.

Consistent with the Rome Statute’s break from past international tribunals’ reliance on CIL, the Rome Statute details party states’ ability to amend the statute by consensus or, in the event consensus cannot be reached, approval by a two-thirds majority.⁴⁷ However, article 121 contains an exception that, though not swallowing the rule, authorizes individual party states to create a fragmented body of substantive law. Article 121(5) states:

⁴⁶ James T. Hill, *The Korean Situation and the Law of War* 29 (2018) (unpublished manuscript) (on file with author) (citing Prosecutor v. Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 432 (June 15, 2009), https://www.icc-cpi.int/CourtRecords/CR2009_04528.PDF). Under the United States’ command responsibility standards, a “commander can only be held liable if his violation was manifest—if ‘every reasonable official would have understood that what he is doing violates the law.’” *Id.* (citing U.S. DEP’T OF ARMY, OFF. OF THE JUDGE ADVOC. GEN., *TARGETING AND THE LAW OF WAR: ADMINISTRATIVE INVESTIGATIONS & CRIMINAL LAW SUPPLEMENT* ¶ 6.C.(1)–(2)).

⁴⁷ Rome Statute, *supra* note 9, art. 121(3).

Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.⁴⁸

By constructing a system in which the ICC exercises jurisdiction over different bodies of crimes for those states that either accept and ratify Rome Statute criminal amendments or decline to do so, the ICC creates distinct bodies of law among party states.

More important, given the ICC's purported ability to assert jurisdiction over the nationals of non-party states, are the implications for non-party state nationals. Of note, the provision of article 121 quoted above is silent regarding how amendments to Rome Statute crimes will impact non-party states. Party states have attempted to neutralize such criticism by noting in a Rome Statute resolution on amendments their "understanding that . . . the same principle that applies in respect of a State Party which has not accepted this amendment applies also in respect of States that are not parties to the Statute. . . ."⁴⁹ However, these "understanding[s]" lack any binding effect, which could be accomplished by an amendment to the Rome Statute, and open the door for a "[mis]understanding" tomorrow despite today's "understanding."⁵⁰

If party states intend to treat non-party states on the same footing as party states who decline to adopt an amendment and satisfy international jurisprudential norms, party states could amend the Rome Statute to state as much. Instead, by paying lip service to equal treatment while failing to guarantee such treatment via an amendment to the Rome Statute, ICC party states leverage non-party states to become party to the Rome Statute because, once a party, states are able to limit their criminal liability by

⁴⁸ *Id.* art.121(5).

⁴⁹ Assembly of the States Parties, *Resolution ICC-ASP/16/Res.4: Resolution on Amendments to Article 8 of the Rome Statute of the International Criminal Court*, INT'L CRIM. CT. (Dec. 14, 2017), https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res4-ENG.pdf. See also Review Conference, *Resolution RC/Res.5: Amendments to Article 8 of the Rome Statute*, INT'L CRIM. CT. (June 10, 2010), <https://treaties.un.org/doc/source/docs/RC-Res.5-ENG.pdf>.

⁵⁰ See Assembly of the States Parties, *supra* note 49; Review Conference, *supra* note 49.

declining amendments to the Rome Statute. By not enacting such an amendment, party states can continue to expand the scope of substantive law beyond the bounds of CIL in an effort to illegally subject non-party state nationals to substantive law that is prohibited by international jurisprudence and to which they are not themselves bound. While such an amendment is not the core of this article, ICC party states' failure to ratify such an amendment speaks to its heart—that ICC party states are working to subject ICC non-party states to new obligations in violation of international law.

IV. Consequences of Overreach: ICC Violations of International Law

This part explains why applying those portions of the Rome Statute that exceed CIL to non-party state nationals violates international law. Specifically, it details how those portions of the Rome Statute that exceed CIL impermissibly purport to constitute new obligations for non-party state nationals in violation of international law and subsequently violate international law and judicial norms of fundamental fairness by skirting notice requirements.

A. Illicitly Creating Obligations at the ICC

As members of a treaty-based organization, ICC party states are free to hold themselves to a standard more restrictive than CIL. However, absent a requirement by CIL or other international agreements, international jurisprudence prohibits the practice in which bilateral treaties purport to create binding obligations on third parties.⁵¹ As such, when an exercise of jurisdiction over non-party state nationals implicates actions that constitute crimes under the Rome Statute but not under CIL, such an exercise of jurisdiction purports to create new obligations for non-party state nationals. Such actions are impermissible as these purported new obligations for non-party state nationals violate international law.

The tenet that treaties cannot create obligations for non-party states is well settled international law dating over 2,000 years.⁵² Concisely stated, “[s]ince international organizations are constituted by the common will of states through the act of transferring powers to them, the resulting legal

⁵¹ Vienna Convention on the Law of Treaties, art. 34, May 23, 1969, 1155 U.N.T.S. 331.

⁵² Newton, *supra* note 8, at 373–74, 374 n.4.

creatures cannot acquire more powers than their creators”⁵³ Consequently, as a treaty-based organization, the ICC possesses only those powers conferred to it by party states. Likewise, the ICC’s ability to impose obligations is limited by the powers granted it by party states. As such, if the ICC were to impose a portion of the Rome Statute that exceeds CIL on a non-party state, such action would constitute a violation of international law. Article 34 of the Vienna Convention supports this conclusion, stating a “treaty does not create either obligations or rights for a third State without its consent.”⁵⁴

Even critics of the U.S. position on ICC jurisdiction agree that “[a]s a non-party to the Treaty of Rome, the U.S. would not be obligated to provide evidence or surrender accused persons within its territory to the ICC”⁵⁵ Nonetheless, the ICC has maintained an aggressive posture regarding non-party state nationals by continuing to assert the ability to exercise jurisdiction over non-party state nationals and investigating alleged violations of the Rome Statute that exceed CIL.⁵⁶ In response, the United States enacted legislation acknowledging the “fundamental principle of international law that a treaty is binding upon its parties only and that it does not create obligations for nonparties without their consent to be bound.”⁵⁷ In codifying this principle, U.S. domestic law reflects international legal jurisprudence by reaffirming a treaty’s inability to create new obligations for non-parties,⁵⁸ while the ICC ironically moves away from the international jurisprudential norm.

However, ICC party states’ inability to create obligations binding on third parties without their consent is not the only limitation on ICC prosecution of non-party state nationals. Indeed, bilateral agreements between party states and non-party states represent existing obligations “between sovereign states” despite the Rome Statute’s requirement that

⁵³ August Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, 95 AM. J. INT’L L. 851, 858 (2001).

⁵⁴ Vienna Convention on the Law of Treaties, art. 34, May 23, 1969, 1155 U.N.T.S. 331.

⁵⁵ Scharf, *supra* note 28, at 69.

⁵⁶ *E.g.*, 2014 REPORT ON PRELIMINARY EXAMINATION ACTIVITIES, *supra* note 14. *See also* 2018 REPORT ON PRELIMINARY EXAMINATION ACTIVITIES, *supra* note 43, ¶ 271 (discussing alleged Israeli involvement in indirectly transferring portions of its civilian population into occupied Palestinian territory).

⁵⁷ 22 U.S.C. § 7421 (2012).

⁵⁸ *Id.*

party states cooperate with the ICC.⁵⁹ These bilateral agreements generally prohibit the transfer of “members of the force and of the civilian component” to the ICC.⁶⁰ As such, party states’ compliance with the Rome Statute may come at the cost of violating treaty obligations to non-party states. As the Rome Statute lacks a supremacy clause,⁶¹ such as that contained within the U.N. Charter,⁶² party states and non-party states ought to “seek interpretations that harmonize the two sets of treaties.”⁶³ Such an interpretation is vital given the Rome Statute’s requirement that party states “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”⁶⁴

As this requirement fails to except those portions of the Rome Statute that exceed the bounds of CIL, it has the effect of requiring party states to facilitate the prosecution of non-party state nationals even when the applicable law exceeds the bounds of CIL. Given the aforementioned, non-party states are justifiably cautious of the ICC’s attempt to enforce Rome Statute obligations and discard separate treaty obligations. However, the adverse effects of imposing those overreaching portions of the Rome Statute on non-party state nationals is not limited to violating international law by imposing new obligations but extends to ensuring non-party state nationals are unaware of the applicable law at the time of an alleged offense.

B. Notice Violations: When Non-Party States Do Not Know the Rome Statute Applies

This part addresses those portions of the Rome Statute that stand to violate another tenet of international jurisprudence: that accused have notice of the applicable law at the time of an alleged crime. Specifically, it addresses the unsettled state of ICC jurisdiction over non-party state nationals and the ICC’s purported ability to retroactively apply the Rome Statute’s substantive law to non-party state nationals via the mechanisms

⁵⁹ See generally Newton, *supra* note 8 (dissecting the ICC’s overly ambitious strides to expand its jurisdictional reaches).

⁶⁰ E.g., Security and Defense Cooperation Agreement Between the United States of America and the Islamic Republic of Afghanistan, Afg.-U.S., art. 13, Sept. 20, 2014, T.I.A.S. No 15-101, <https://www.state.gov/wp-content/uploads/2019/02/15-101-Afghanistan-Defense-Cooperation.pdf>.

⁶¹ Mike Newton, *Treaty Based Limitations on the Article 12 Jurisdiction of the Int’l Criminal Court*, JUST SEC. (Apr. 23, 2018), <https://www.justsecurity.org/55318/treaty-based-limitations-article-12-jurisdiction-icc>.

⁶² U.N. Charter art. 103.

⁶³ Newton, *supra* note 8, at 422.

⁶⁴ Rome Statute, *supra* note 9, art. 86.

of ad hoc jurisdiction and jurisdiction via the United Nations Security Council Resolution (UNSCR) referral in contravention of CIL. Given the above, the unsettled nature of ICC jurisdiction over non-party state nationals wholly permeates the issue of whether such concerned nationals have proper notice of whether they are subject to the ICC's jurisdiction and allied substantive law.

While Part II detailed how the ICC purports the ability to assert jurisdiction over non-party state nationals via the mechanisms of ad hoc consent and UNSCR, this part details how such an aggressive exercise of jurisdiction would allow party states to abuse the Rome Statute in violation of international law. Article 22 of the Rome Statute purports to establish the principle of non-retroactivity, stating “[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.”⁶⁵ However, by implicating jurisdictional issues, article 22 requires analysis of articles 11, 12, and 13. These articles⁶⁶ fail to clarify whether, when pursuant to the mechanisms of ad hoc consent and UNSCR referral, ICC jurisdiction over the nationals of non-party states is limited to those crimes committed after the provision of such consent or UNSCR referral. While such a constrained application is consistent with international jurisprudential norms and certain provisions of the Rome Statute, other provisions of the Rome Statute and ICC practice suggest otherwise.

A reading in which the ICC possesses jurisdiction over crimes alleged to have occurred prior to the provision of such ad hoc consent or UNSCR referral is consistent with the intent of the Rome Statute to ensure “the most serious crimes. . . [do] not go unpunished”⁶⁷ and precedent set by

⁶⁵ *Id.* art. 22(1).

⁶⁶ *Id.* art. 11(1) (“This Court has jurisdiction only with respect to crimes committed after the entry into force of [the Rome] Statute.”); *id.* art. 12(2) (“[A non-party] State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question.”); *id.* art. 13(b) (“The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if . . . [a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations . . .”).

⁶⁷ *Id.* pmb1.

international tribunals, despite the ICC's treaty-based departure from such precedent that largely contemplates prospective prosecution.⁶⁸

However, ICC practice provides the most telling insight regarding how the ICC may treat non-party state nationals pursuant to an exercise of jurisdiction via ad hoc consent or UNSCR referral. Palestine's first attempted ad hoc submission to ICC jurisdiction was rejected on grounds pertaining to Palestine's statehood status.⁶⁹ However, after gaining UN non-member observer state status,⁷⁰ the ICC accepted Palestine's 31 December 2014 grant of ad hoc ICC jurisdiction which purports to extend to crimes "committed in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014."⁷¹

Here, Palestine purports to grant the ICC jurisdiction over crimes occurring six months before Palestine's grant of jurisdiction. In such an instance, non-party state nationals in Palestine lack notice of the Rome Statute's purported application during those six months. The implications of disregarding such international jurisprudential norms are not constrained to the theoretical, as the ICC is investigating alleged Rome Statute violations, which exceed the bounds of CIL, occurring during this period in Palestine.⁷²

Palestine was not the first state to have the ICC accept temporal jurisdiction beginning on a date that preceded the date of submission of ad hoc consent. On 18 April 2003, the Ivory Coast declared, via ad hoc consent, their submission to ICC jurisdiction dating to 19 September 2002.⁷³

⁶⁸ *E.g.*, Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defence Motion on Jurisdiction, ¶ 65 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 10, 1995) ("The Trial Chamber finds that it has subject-matter jurisdiction under Article 3 because violations of laws or customs of war are a part of customary international law over which it has competence regardless of whether the conflict is international or national Imposing criminal responsibility upon individuals for these violations does not violate the principle of *nullum crimen sine lege*.").

⁶⁹ THE OFF. OF THE PROSECUTOR OF THE INT'L CRIM. CT., *supra* note 26.

⁷⁰ G.A. Res. 67/19, ¶ 2 (Nov. 29, 2012).

⁷¹ Mahmoud Abbas, *Declaration Accepting the Jurisdiction of the International Criminal Court*, INT'L CRIM. CT. (Dec. 31, 2014), https://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf. See also Herman von Hebel, *Ref: 2015/10R/3496/HvH*, INT'L CRIM. CT. (Jan. 7, 2015), <https://www.icc-cpi.int/iccdocs/PIDS/press/150107-Registrar-Letter-to-HE-President-Abbas-regarding-Palestine-Art-12-3--Declaration.pdf> (accepting President Abbas's declaration).

⁷² 2018 REPORT ON PRELIMINARY EXAMINATION ACTIVITIES, *supra* note 43.

⁷³ *Situation in Côte d'Ivoire*, INT'L CRIM. CT., <https://www.icc-cpi.int/cdi> (last visited Aug. 20, 2020).

To be clear, the ICC registrar's acceptance of states' ad hoc submissions to ICC jurisdiction, in which states retroactively submit to ICC jurisdiction, amounts to an administrative measure and does not constitute a judicial determination. However, the ICC accepted the Ivory Coast's ad hoc submission, conducted a preliminary examination, and initiated an investigation.⁷⁴ Furthermore, after receiving authorization from the pre-trial chamber pursuant to article 15 of the Rome Statute, ICC Pre-Trial Chamber III "expand[ed] its authorisation for the investigation in Côte d'Ivoire to include crimes within the jurisdiction of the Court allegedly committed between 19 September 2002 and 28 November 2010."⁷⁵

The Court never made a formal judicial determination as to whether the ICC possessed jurisdiction over conduct occurring prior to the Ivory Coast's ad hoc consent submission, likely due to the subsequent cases' failure to implicate the pertinent time period. However, the Pre-Trial Chamber's expanded authorization remains significant, as article 15(4) of the Rome Statute states, "[i]f the Pre-Trial Chamber [finds] . . . that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case."⁷⁶ As such, despite not having made a formal determination regarding jurisdiction over conduct occurring prior to the Ivory Coast's ad hoc consent submission—and in expanding the temporal scope of the investigation—the ICC Pre-Trial Chamber presumably determined such action to be proper because the "case appears to fall within the jurisdiction of the court."⁷⁷

The above detailed uncertainty pertaining to retroactive exercise of jurisdiction, and allied notice implications, extends beyond the mechanism of ad hoc consent. For example, on 31 March 2005 the UNSC referred "the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court."⁷⁸ Subsequently, in deciding to issue an arrest warrant for President Omar Al Bashir, ICC Pre-Trial Chamber I noted the case fell "within the jurisdiction of the Court," stating "the 31

⁷⁴ *Id.*

⁷⁵ Situation in the Republic of Côte d'Ivoire, ICC-02/11, Decision on the "Prosecution's Provision of Further Information Regarding Potentially Relevant Crimes Committed Between 2002 and 2010", ¶ 37 (Feb. 22, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_03483.PDF.

⁷⁶ Rome Statute, *supra* note 9, art. 15(4).

⁷⁷ *Id.*

⁷⁸ S.C. Res 1593, ¶ 1 (Mar. 31, 2005).

March 2005 referral by the Security Council . . . and the 1 June 2005 Prosecution's decision to open an investigation . . . define the territorial and temporal parameters of the Darfur situation . . . since 1 July 2002."⁷⁹ Similar to article 15 concerning the authorization of an investigation, article 58(1)(a) of the Rome Statute requires the Pre-Trial Chamber to "issue a warrant of arrest of a person if . . . [t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court."⁸⁰ Despite the ICC not having formally taken up the matter, as President Al Bashir remains at large⁸¹ and the ICC does not conduct trials in absentia, the Pre-Trial Chamber's action indicates the ICC is willing to prosecute President Al Bashir for actions prior to the UNSCR referral. In such a case, the ICC is required by international law to limit the substantive law of such prosecutions to that of CIL to ensure the accused possessed notice of the applicable law.

While Pre-Trial Chambers' findings are not final, ICC treatment of the situations in Afghanistan, Palestine, the Ivory Coast, and Sudan display the ICC's inclination to retroactively exercise temporal jurisdiction over the nationals of non-party states despite such parties not having notice of the applicable law at the time of the alleged crimes.

V. Conclusion: Addressing Overreach at the ICC

As a treaty-based organization, concerns about how the ICC conducts its affairs should be limited when its affairs are constrained to Rome Statute party states. However, the ICC's purported exercise of jurisdiction over non-party state nationals opens a Pandora's box of legal concerns due to the Rome Statute's use of substantive law that overreaches CIL, and party states' expansion of this overreach via legislative amendment only magnifies such legal concerns. What results are violations of international jurisprudence via the Rome Statute's purported imposition of new obligations on non-party states and an international tribunal whose structure fails to ensure all those under its purported jurisdiction have notice of the applicable law. As such, international law requires that the ICC use only those portions of the Rome Statute that constitute CIL when

⁷⁹ Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, ¶ 37 (Mar. 4, 2009), https://www.icc-cpi.int/CourtRecords/CR2009_01517.PDF.

⁸⁰ Rome Statute, *supra* note 9, art. 58(1)(a).

⁸¹ *Al Bashir Case*, INT'L CRIM. CT., <https://www.icc-cpi.int/darfur/albashir> (last visited Aug. 22, 2020).

prosecuting non-party state nationals in order to avoid the “[u]nfairness [that] clearly results when an individual is held liable under a new rule that could never have been anticipated.”⁸²

United States Supreme Court Chief Justice Harlan Fiske Stone once criticized Supreme Court Justice Robert Jackson’s prosecution of the Nuremberg trials, stating, “I don’t mind what he does to the Nazis, but I hate to see the pretense that he is running a court and proceeding according to common law. This is a little too sanctimonious a fraud to meet my old-fashioned ideas.”⁸³ Given the ICC’s willingness to try non-party state nationals via retroactive prosecution using overreaching law, the international community would be wise to relook Chief Justice Stone’s comments regarding international military tribunals, as it remains as relevant today as it was seventy years ago. By heeding such critiques, the ICC can avoid similar criticisms and ensure proceedings at The Hague comply with international legal standards.

⁸² Beth Van Schaack, Associate Professor, Santa Clara Law School, *The Principle of Legality in International Criminal Law* (Mar. 26, 2011) in 103 AM. SOC’Y OF INT’L L. PROCEEDINGS 101, 103.

⁸³ Noah Feldman, *Opinion, Nuremberg’s Complicated Legacy*, BLOOMBERG (Nov. 22, 2015, 11:00 AM), <https://www.bloomberg.com/opinion/articles/2015-11-22/nuremberg-s-complicated-legacy>.