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## **How the International Criminal Court Threatens Treaty Norms**

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# How the International Criminal Court Threatens Treaty Norms

Michael A. Newton\*

## ABSTRACT

*This Article demonstrates the disadvantages of permitting a supranational institution like the International Criminal Court (ICC) to aggrandize its authority by overriding agreements between sovereign states. The Court's constitutive power derives from a multilateral treaty designed to augment sovereign enforcement efforts rather than annul them. Treaty negotiators expressly rejected efforts to confer jurisdiction to the ICC based on its aspiration to advance universal values or a self-justifying teleological impulse to bring perpetrators to justice. Rather, its jurisdiction derives solely from the delegation by States Parties of their own sovereign prerogatives. In accordance with the ancient maxim *nemo plus iuris transferre potest quam ipse habet*, states cannot transfer jurisdictional authority to the supranational court that they themselves do not possess at the time of the alleged offenses. Upon ratification of the Rome Statute, both Afghanistan and Palestine conveyed jurisdiction to the Court, but the scope of that delegation is limited by their preexisting treaty-based constraints. American forces and Israelis remain subject to the exclusive criminal jurisdiction of their own states for criminal offenses committed on the territory covered by those binding bilateral agreements so long as those treaties remain applicable. Hence, the Rome Statute by its own terms does not automatically extend territorial jurisdiction over American forces in Afghanistan or over Israeli citizens suspected of offenses in the Occupied Territory of the West Bank or in the Gaza Strip. Yet, the Office of the Prosecutor uncritically accepts the premise that ratification of the multilateral treaty conveyed indivisible territorial jurisdiction. The ICC is not empowered to sweep aside binding bilateral agreements between sovereign states. By*

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*asserting that it has power to abrogate underlying bilateral treaties, the Court undermines ancient precepts of international law and harms the principles of treaty law. The ICC is not constructed as an omnipotent super-court with self-proclaimed universal jurisdiction based upon the presumption that the Rome Statute operates in isolation from other treaty-based constraints on sovereign prerogatives. This Article examines the conflicts between current Court assumptions and the tenets of the Rome Statute. Its final Parts dissect the foreseeable damage caused by the present policy. The conclusion asserts that the Court cannot unilaterally override the validity of existing jurisdictional treaties. The assertion of such powers would violate the Vienna Convention on the Law of Treaties and muddy the existing debates related to resolving conflicts between equally binding treaty norms.*

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## I. INTRODUCTION

The International Criminal Court (ICC) straddles a jurisdictional fault line that threatens to corrode first principles of international treaty law. The premise of this Article is that the current approach of the ICC Office of the Prosecutor (OTP) in two of its most sensitive jurisdictional dilemmas undermines international law even as it obfuscates the specific tenets found in the Rome Statute of the International Criminal Court (the Rome Statute or the Statute).<sup>1</sup> Upon entry into the ICC Assembly of States Parties (ASP), both Afghanistan and Palestine conveyed territorial jurisdiction to the Court within the meaning of Article 12 of the Rome Statute. But the quantum of that delegated jurisdiction is constrained by their preexisting treaty-based constraints. In both instances, 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.

This Article highlights the harm caused by unwarranted expansion of the Court's jurisdiction over American forces in Afghanistan and Israeli citizens suspected of offenses in the Occupied Territory<sup>2</sup> of the West Bank and on the Gaza Strip. The current OTP approach would reshape established international treaty norms in fundamental ways. To be precise, the Office of the Prosecutor presumes jurisdiction over American or Israeli nationals in these two controversial situations<sup>3</sup> based on assumptions that undermine the

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1. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, 2187 U.N.T.S. 90 (July 17, 1998), *entered into force* July 1, 2002, *reprinted in* 37 I.L.M. 999 [hereinafter Rome Statute].

2. For the purposes of this Article, the phrase "Occupied Territory" refers to all the territory of the Occupied West Bank and the Gaza Strip as those areas are designated a single entity in the Oslo Accords. Land subject to the law of "belligerent occupation" as that term is understood in the laws and customs of war are called different names, such as "Yesha," "Yosh," and "Ahza"—Hebrew acronyms accepted in the Israeli Defense Force—or the "Occupied Territories," the "Administered Territories," the "Territories," and "Judea and Samaria"—names commonly used by the general public. Some scholars prefer to use the term "The Region" as reflected in early Israeli legislation. *See, e.g.*, Entry into Israel Law, 5712-1952, SH No. 111, § 12A. The original law was passed by the Knesset on the 5th Elul, 5712 (Aug. 26, 1952).

3. The term "situation" is a *sui generis* treaty term found in the Rome Statute to designate the overall context within which the Court is empowered to investigate cases and bring specific perpetrators to trial. The Final Report of the Preparatory Committee on the Establishment of the International Criminal Court postulated the parallel terms "matter" as well as "situation" in bracketed text. U.N. Diplomatic Conference on Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. Doc. A/CONF.183/2 (Apr. 14, 1998), *reprinted in United Nations*

basic tenets of established treaty law. The maxim *nemo plus iuris transferre potest quam ipse habet* can be traced back more than two millennia.<sup>4</sup> Literally translated as “No one can transfer to another more rights (*plus iuris*) than he has himself,”<sup>5</sup> the concept is one of the bedrock principles of international law, just as it governs kindergarten playgrounds the world over. Surprisingly, there has been almost no recognition of the complex interrelationship between the rights and duties of states arising from entry into the Rome Statute, when such entry squarely conflicts with equally binding bilateral instruments. This Article seeks to fill that void.

Chief Justice John Marshall echoed perhaps the most foundational aspect of international law in *Schooner Exchange v. McFadden* by noting that “[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute.”<sup>6</sup> Territorial jurisdiction to make and enforce criminal law is indisputably one of the quintessential aspects of state sovereignty.<sup>7</sup> Any sovereign state retains “exclusive jurisdiction to punish offenses against its laws committed within its border, unless it expressly or impliedly consents to surrender its jurisdiction.”<sup>8</sup> The Rome Statute revolutionized the landscape of international law by establishing a complex framework for a permanent supranational prosecutorial authority. Nevertheless, the Court’s authority is not independent or omnipotent. Treaty-based ICC jurisdiction flows exclusively from the

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*Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June–17 July 1998, Official Records, U.N. Doc. A/CONF.183/13 (Vol. III), at 22, [http://legal.un.org/diplomaticconferences/icc-1998/vol/english/vol\\_III\\_e.pdf](http://legal.un.org/diplomaticconferences/icc-1998/vol/english/vol_III_e.pdf) [perma.cc/7YKY-937N] (archived Jan. 22, 2016).*

4. DIG. 50.17.54 (Ulpian, Ad Edictum 46). When Justinian became ruler of the Byzantine Empire, he ordered compilation of a comprehensive collection of Roman law that together formed the Corpus Juris Civilis. This resulted in the Code, which collected the legal pronouncements of the Roman emperors, the Institutes, an elementary student’s textbook, and the Digest, by far the largest and most highly prized of the three compilations. The Digest was assembled by a team of sixteen academic lawyers commissioned by Justinian in 533 to cull everything of value from earlier Roman law. The citation reflects the fact that the maxim is attributed to the period 211 to 222 AD, during which the Roman jurist Ulpian (Domitius Ulpianus) wrote a well-respected 80+ book/scroll treatise LIBRI AD EDICTUM.

5. 1 ADOLF BERGER, ENCYCLOPEDIA OF ROMAN LAW 740 (1953).

6. *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812); see also *Munaf v. Geren*, 553 U.S. 674, 705 (2008) (declining unanimously to shield U.S. citizens who committed “hostile and warlike acts within the sovereign territory of Iraq” during ongoing military operations from prosecution before Iraqi courts because habeas corpus “does not require the United States to shelter such fugitives from the criminal justice system of the sovereign with authority to prosecute them”).

7. See *Islands of Palmas Case* (Netherlands v. U.S.), Permanent Court of Arbitration, 2 U.N. Rep. International Arbitral Awards 829, 838–842 (1928) (“Spain could not transfer more rights than she herself possessed . . . Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.”).

8. *Wilson v. Girard*, 354 U.S. 524, 529 (1957).

delegation of a State Party's sovereign jurisdictional power. Except for the overarching authority of the United Nations Security Council to convey jurisdiction to the Court through binding resolutions under Chapter VII of the UN Charter, the jurisdiction of the ICC, as embodied in Article 12 of the Rome Statute, is based only on derivative jurisdiction granted by states at the time they ratify the multilateral treaty. To be more precise, affirmative Security Council referrals in the form of a Resolution passed under its Chapter VII authority are the only mechanism by which the ICC can exercise universal jurisdiction over offenses.

Properly understood and implemented, the jurisdictional relationship between the ICC and sovereign states represents a tiered allocation of authority to adjudicate because states retain the primacy of jurisdiction under the treaty. The principle that sovereignty can be subordinated when necessary to achieve accountability for crimes that most directly challenge the commonality of values and order shared among nations is the cornerstone of the ICC. Upon ratification of the Rome Statute, both Afghanistan and Palestine accepted the premise of Article 12 that empowers the ICC to exercise jurisdiction over any case where either (a) the *actus reus* for the alleged crime occurred on the territory of a State Party to the Rome Statute, or (b) the perpetrator is a national of a State Party. Article 12(3) also permits, but does not require, any state that is not party to the ICC to consensually transfer criminal jurisdiction to the ICC. Preceding Palestinian Authority (PA) ratification of the Rome Statute, Mahmoud Abbas purported to create ICC jurisdiction over Israeli citizens based on just such a declaration signed on December 31, 2014.<sup>9</sup> The incompatibility between the jurisdictional provisions of the Rome Statute and the preexisting bilateral treaties described in Part II that simultaneously bind Afghanistan and Palestine represents an important example of normative fragmentation. To date, neither State Party has offered any explanation for why the purported jurisdictional conveyance to the ICC is valid despite the parallel treaty-based constraints on territorial jurisdiction over Americans and Israeli nationals that remain in force.

Members of the ICC Assembly of States Parties<sup>10</sup> have conflicting duties to other sovereign states *vis-à-vis* those due the

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9. See Declaration from President of the State of Palestine to ICC (Dec. 31, 2014), [http://www.icc-cpi.int/iccdocs/PIDS/press/Palestine\\_A\\_12-3.pdf](http://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf) [perma.cc/2KEQ-HRVK] (archived Jan. 22, 2016); see also Andreas Zimmerman, *Palestine and the International Criminal Court Quo Vadis? Reach and Limits of Declarations under Article 12(3)*, 11 J. INT'L CRIM. J. 304, 313 (2013).

10. See Rome Statute, *supra* note 1, art. 112. The ASP is the management oversight and legislative body of the International Criminal Court. It is composed of representatives of states that have ratified or acceded to the Rome Statute. Assembly of States Parties, ICC, [http://www.icc-cpi.int/en\\_menus/asp/sessions/documentation/](http://www.icc-cpi.int/en_menus/asp/sessions/documentation/)

Court. The fragmentation of duties is a side effect of the otherwise laudable growth of authoritative lawmakers within international law. The number of states represented in the United Nations, for example, has grown by more than 378 percent since its inception.<sup>11</sup> Further complicating prospects for linear development of norms through treaty provisions designed to resolve conflicts with other state obligations, international organizations are increasingly empowered to negotiate new instruments applicable to sovereign states.<sup>12</sup> In many instances, states consciously use multilateral conferences convened by international organizations as venues for “reaffirming, modifying, or elaborating codified custom.”<sup>13</sup> International treaties became the dominant form of international lawmaking in a multipolar world order.<sup>14</sup> Robust academic efforts arose to analyze potential treaty conflicts and postulate solutions for preserving epistemic integrity and intellectual consistency.<sup>15</sup>

The complexity of interrelated legal obligations spawned by the dramatic growth in the number and reach of, *inter alia* human rights

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13th-session-resumption/Pages/default.aspx [perma.cc/8KBM-BMDN] (archived Jan. 22, 2016).

11. See Member States, <http://www.un.org/en/members/growth.shtml> [perma.cc/FNY4-2V8V] (archived Jan. 22, 2016) (documenting the growth from 51 states represented in the General Assembly to 193 with the formation of South Sudan in 2011).

12. See generally, JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS (2005) (discussing how international organizations, like the United Nations and the WTO, have changed the methods by which international law is created, implemented, and enforced).

13. *Id.* at 390. Examination of the many conflicts that originate from overlapping institutional authority is beyond the scope of this Article. The integrity and consistency of international law is increasingly eroded when states, international organizations, and the growing number of specialized courts and tribunals differ over the substantive meaning of a particular norm of international law. See, e.g., YUVAL SHANY, THE COMPETING JURISDICTION OF INTERNATIONAL COURTS AND TRIBUNALS (2003); SHANE DARCY, JUDGES, LAW AND WAR: THE JUDICIAL DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW (2014); PHILIPPA WEBB, INTERNATIONAL JUDICIAL INTEGRATION AND FRAGMENTATION (2013).

14. Joel P. Trachtman, *The Growing Obsolescence of Customary International Law*, in CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD (Curtis A. Bradley ed., forthcoming 2016); Julie M. Grimes, *Conflicts Between EC Law and International Treaty Obligations: A Case Study of the German Telecommunications Dispute*, 35 HARV. INT'L L. J. 535 (1994).

15. See, e.g., JOOST PAUWELYN CONFLICT OF NORMS IN INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (2003); Christopher Borgen, *Resolving Treaty Conflicts*, 37 GEO. WASH. INT'L L. REV. 573 (2005); Benedetto Conforti, *Consistency among Treaty Obligations*, in THE LAW OF TREATIES: BEYOND THE VIENNA CONVENTION 187 (Enzo Cannazaro ed., 2011); Jan Klabbers, *Beyond the Vienna Convention: Conflicting Treaty Provisions*, in THE LAW OF TREATIES: BEYOND THE VIENNA CONVENTION, 192 (Enzo Cannazaro ed., 2011). For the minority view that fragmentation poses no serious challenge to the consistency of the overall fabric of international law, see Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553 (2002).

treaties, environmental treaties,<sup>16</sup> and overlapping trade regimes is sometimes shorthanded as the “Trade and . . .” phenomenon.<sup>17</sup> The International Law Commission (ILC) sought to provide comprehensive guidance to practitioners facing this “emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice.”<sup>18</sup> The resulting Study on Fragmentation in International Law premised its conclusions on the finding that “[i]nternational law is a legal system. Its rules and principles (*i.e.* its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them.”<sup>19</sup> The Study Group was nevertheless unable to propose comprehensive guidance to international organizations, practitioners, and state officials for resolving conflicts when multiple treaty-based norms are equally binding in a given situation. At the time of this writing, there is no definitive approach for addressing systematic tensions caused by the proliferation of treaty provisions that present actual or apparent conflicts with preexisting treaty provisions.

Without even acknowledging this legal ferment or the persisting debates in capitals over the most advisable resolution treaty conflicts, the OTP presumes jurisdiction over crimes committed by Americans in Afghanistan<sup>20</sup> and is rapidly moving towards making similar findings with respect to offenses alleged against Israeli citizens for

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16. For an example of this strand of this robust body of scholarship, see Annick Emmenegger Brunner, *Conflicts Between International Trade and Multilateral Environmental Agreements*, 4 ANN. SURV. INT'L & COMP. L. 74 (1997).

17. Christopher J. Borgen, *Treaty Conflicts and Normative Fragmentation*, in THE OXFORD GUIDE TO TREATIES 448, 449 (Duncan Hollis ed., 2012); *see, e.g.*, Adarsh Ramanujan, *Conflicts over "Conflict" Preventing Fragmentation of International Law*, 1(1) TRADE L. & DEV. 171 (2009).

18. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Rep. of the Study Group of the Int'l Law Comm'n, U.N. Doc. A/CN.4/L.682, 10–11 (April 13, 2006) [hereinafter ILC Fragmentation Study], [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf) [perma.cc/NM7D-GZWM] (archived Jan. 23, 2016). The ILC Study Group justified the need for comprehensive assessment and concrete guidance to the field because “What once appeared to be governed by ‘general international law’ has become the field of operation for such specialist systems as ‘trade law,’ ‘human rights law,’ ‘environmental law,’ ‘law of the sea,’ ‘European law,’ and even such highly specialized forms of knowledge as ‘investment law’ or ‘international refugee law,’ etc.—each possessing their own principles and institutions.” *Id.* at 404.

19. *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, ¶ 1 (2006), reprinted in Rep. of the Int'l Law Comm'n on Its Fifty-Eighth Session, U.N. Doc. A/61/10, 407, at 477–78 (Aug. 11, 2006), <http://legal.un.org/docs/?path=../ilc/reports/2006/english/chp12.pdf&lang=EFSSRAC> [perma.cc/D82F-8UFD] (archived Jan. 23, 2016).

20. *See infra* notes 134–59 and accompanying text.



acts committed in the Occupied Territories or in the Gaza Strip.<sup>21</sup> In both situations, asserting ICC authority over cases alleged against American or Israeli nationals would effectively abrogate the preexisting treaty-based jurisdictional allocations made between the sovereign states. Some observers might describe such efforts to eliminate any potential hindrance to ICC authority as a healthy “expression of political pluralism.”<sup>22</sup> In the best possible light, such decisions could represent “new institutions” using international law to “further new interests.”<sup>23</sup> Indeed, the dominant narrative is that ICC is imbued from its creation with an inherently supreme legitimacy. For its most ardent supporters, the ICC is a necessary augmentation of the *erga omnes* duty that all states owe to all other states to prosecute the crimes “of most serious concern to the international community as a whole.” As a logical extension, the Court might well be expected to discard binding treaties between sovereign states that hinder its powers in any way. The OTP appears at present to operate on the presumption that the overall object and purpose of the Rome Statute warrants a self-justifying teleological impulse to expand ICC jurisdiction as needed to bring potential perpetrators to justice.

From this perspective, the OTP extension of its authority over non-State Party nationals reflects the prioritization of its own institutional power at the expense of sovereign states’ prosecutorial rights and interests. However, the foreseeable result of current OTP policy would discredit the role of the Court as only one of many authoritative actors in the international domain. It is neither designed nor intended by its framers to function as an omnipotent supranational institution; it must adhere to the textual limitations imposed by sovereign states woven into the text of the Rome Statute. The very treaty that energizes the ICC does not contain any provision that hints at preclusive effects over all other treaties. Hence, an ICC policy that discards bilateral treaties negotiated by states to protect their citizens from foreign jurisdictions would necessarily subvert the treaty-based due process rights of potential perpetrators.

No analysis has yet situated this assertion of jurisdiction within the larger context of the Rome Statute and its relation to overarching principles of international treaty law. Seeking to extend the Court’s unqualified jurisdiction into those two situations, the OTP disregards underlying bilateral treaties that preclude personal jurisdiction on the territory of both Afghanistan and the territory claimed by a fully sovereign future state of Palestine. This Article argues that the Court cannot assert jurisdiction over Americans or Israelis in light of the Rome Statute’s provisions on jurisdiction. The reasons are complex

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21. See *infra* notes 158–91 and accompanying text.

22. Koskeniemi & Leino, *supra* note 15, at 553.

23. *Id.*

but strike at the heart of our system of international justice and the commitments of the Rome Treaty, which provides a defined and limited constitutive power to the ICC. By extending its jurisdictional authority in a manner that simply discounts the authority of bilateral treaties, the ICC would be rewriting the Rome Statute to convey a universal scope of jurisdiction that is contrary to both the text of the treaty and the clear negotiating history. This Article demonstrates the disadvantages of permitting a supranational institution like the ICC to unilaterally expand its own power by overriding preexisting agreements between sovereign states.

Furthermore, the Court undermines international law to the extent that its jurisdictional determinations degrade the sovereign efforts of states to use treaties as a basis for making formal and binding commitments to other nations. At a minimum, if it became the accepted norm of transnational practice, the ICC assertion of jurisdiction undermines important aspects of the Vienna Convention on the Law of Treaties (VCLT).<sup>24</sup> All treaties embody extensive transactional costs due to the time, diplomatic effort, and policy exertion needed to bring them to successful fruition. States undertake negotiations in the hopes of achieving concrete rights and receiving reciprocal obligations from other states; current Court policy would introduce unwarranted uncertainty into those efforts.<sup>25</sup>

The remainder of this Article proceeds as follows. Part II illustrates the parameters within which OTP policy decisions have been made. The Rome Statute operates as a carefully constructed jurisdictional scheme that rejected a sweeping assertion of universal jurisdiction. The interactions between the bilateral treaties entered into by Afghanistan and the Palestinian Liberation Organization (which entered into the Oslo Accords inherited by the PA) and their subsequent entry into the ASP remain complex. Neither state invoked accession to the Statute as justifiable grounds for terminating the preexisting treaty-based jurisdictional limitations.<sup>26</sup> The OTP presumes an overarching scope of jurisdiction that disregards any preclusive effects of the earlier treaties described in Part II.

Part III analyzes the distinctive features of the Rome Statute. Close examination demonstrates that expanded ICC jurisdiction contravenes the object and purpose of the Rome Statute in significant ways. The Court is designed to augment domestic enforcement efforts

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24. Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 1969, 8 I.L.M. (entered into force Jan. 27, 1980) [hereinafter VCLT].

25. See generally JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2006).

26. Both the United States and Israel would presumably have proceeded under the law applicable to questions of treaty termination or suspension as well as the Law of State Responsibility. See VCLT, *supra* note 24, arts. 30(5), 41, 60.

rather than annul them. The current jurisdictional posture purports to supplant sovereign enforcement rather than operating on a cooperative model. In doing so, the Court paradoxically threatens to deprive perpetrators of their treaty-based due process rights. Indeed, the text implicitly contemplates the establishment of the ICC as a permanent supranational institution with a respected role based on an explicitly defined relationship with sovereign states. To reiterate, the ICC is not a court of sweeping universal jurisdiction. In fact, after the Rome Statute entered into force, the larger body of treaty norms that contrast with its defined scope of jurisdiction to convey some form of universal jurisdiction, such as the Torture Convention or the grave breach provisions of the Geneva Conventions, remain fully binding on sovereign states.

Part IV considers the effects of the OTP policy within the larger field of treaty conflicts. By usurping domestic jurisdiction, the Court's example could bring turmoil to the already murky waters of international treaty law. The OTP undermines important aspects of international treaty law because the Court cannot unilaterally abrogate other treaties in order to eliminate actual or apparent normative conflicts. Neither Afghanistan nor the PA can lawfully transfer jurisdiction to the ICC that they do not already exercise in their sovereign capacity. The Article concludes that the ICC should not rely on episodic and intuitive decision making that willfully disregards the other obligations incumbent on States Parties. Accepting the fact that the Court has no criminal jurisdiction over American forces in Afghanistan or over Israelis in the Occupied Territories and the Gaza Strip would represent good faith implementation of international norms as the hallmark of a maturing supranational institution.

## II. HARMONIZING THE MULTILATERAL AND BILATERAL VISIONS

The Rome Statute combines a complex blend of civil law, common law, customary international law, and *sui generis* principles held together by the notion that the sovereign nations of the world are interdependent components of a larger global society in which the principles of justice are a common good.<sup>27</sup> This makes the Court the conceptual pinnacle of an interlocking system designed to achieve justice within which the core element is a set of shared, but

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27. See Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L. J. 381, 386 (2000). For an excellent summary of the negotiating dynamic in Rome that resulted in the current Statute, see Ruth Wedgwood, *Fiddling in Rome: America and the International Criminal Court*, FOREIGN AFF. 20 (Nov.–Dec. 1998). See generally M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11 (1997).

delineated, rights and responsibilities.<sup>28</sup> The object and purpose of the Court nicely accords with the philosophical construct of the ancient Greeks for whom the pursuit of justice symbolized a quest for order and harmony.<sup>29</sup> Plato conceived of justice as “that highest class of good things” on both the personal and societal level.<sup>30</sup>

This deeply ingrained aspiration for justice propelled the development of the ICC for more than fifty years until the adoption of the Rome Statute in 1998. For Court proponents, it embodies a blend of appropriately balanced power, wisdom, and temperance, which in turn has great potential to generate societal stability at the international level. Thus, while it operates within the milieu of international politics, the very *raison d'être* of the Court is to seek justice for the most consequential crimes known to man in an apolitical and impartial manner. This effort to eradicate impunity for the most egregious categories of international criminality operates against the backdrop of interconnected and often interdependent relationships with domestic criminal systems. By extension, the Court should not function in ways that undermine the utility of treaties as vehicles for shaping and clarifying the prosecutorial reach of sovereign states over Rome Statute crimes. Neither should the Rome Statute be understood and implemented in ways that destabilize the desirable relationship between domestic jurisdictions and the permanent supranational Court.

The following section describes in greater detail the specific mechanisms designed to operate in conjunction with domestic jurisdictional arrangements. Those treaty-based limitations must be implemented against the backdrop of the bilateral treaties that restrict the ability of both Afghanistan and the PA to lawfully confer jurisdiction over some potential perpetrators to the Court upon their entry into the ASP. This Part ends by summarizing those agreements, which in turn necessitates consideration in Parts III and IV of the normative arguments that mitigate towards recognizing their residual authority.

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28. See Carsten Stahn, *Taking Complementarity Seriously: On the Sense and Sensibility of 'Classical,' 'Positive,' and 'Negative Complementarity*, in I THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE 233, 237 n.16 (Carsten Stahn & Mohammed M. El Zeidy eds., 2011) (noting the lengthy articulation of this well-established concept in early ICC jurisprudence).

29. See BRIAN R. NELSON, WESTERN POLITICAL THOUGHT FROM SOCRATES TO THE AGE OF IDEOLOGY 31 (1982).

30. THE REPUBLIC OF PLATO 52 (F. MacDonald Cornford trans. & ed., 1945).

### A. *The Jurisdictional Design of the Rome Statute*

#### 1. Limitations on the Court's Jurisdiction

The ICC was not created to impede viable domestic processes or impose dominance over the prosecutorial practices and priorities of states with developed systems and demonstrated adherence to the rule of law.<sup>31</sup> Hence, the ICC does not have authority to take a case to trial until the issues associated with domestic jurisdiction have been analyzed and resolved in accordance with the framework of the Rome Statute. From the prosecutor's point of view, jurisdiction under the provisions of Article 12 and admissibility under Article 17<sup>32</sup> are mandatory prerequisites for ICC authority. The creation of a vertical level of prosecutorial authority operating as a permanent backdrop to the horizontal relations between sovereign states in large part depended on clear delineation of the mechanism for prioritizing the domestic jurisdiction of responsible domestic states and preserving sovereign rights while simultaneously serving the ends of justice.

The Rome Statute scheme of limited and defined supranational jurisdiction embodied the rejection of earlier proposals that would have allowed an "inherent" ICC jurisdiction over some crimes.<sup>33</sup> The United States, for example, historically supported such an inherent jurisdictional scheme for the genocide offenses.<sup>34</sup> The 1994 ILC Draft

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31. The irony is that the actual prosecution of Saddam and other leading Ba'athists took place in an internationalized domestic forum precisely because, *inter alia*, Iraqis saw grave injustice arising from prosecuting only the subset of crimes within ICC jurisdiction. MICHAEL A. NEWTON & MICHAEL P. SCHARF, ENEMY OF THE STATE: THE TRIAL AND EXECUTION OF SADDAM HUSSEIN 76–80 (2008).

32. See *infra* notes 54–78 and accompanying text.

33. WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 278–83 (2010) (discussing the variety of proposals formally introduced and the expressions of support from, *inter alia*, Poland, Australia, Canada, Mexico, Khazakistan, Senegal, and Afghanistan and concluding that a "clear majority of States preferred an option based upon universal jurisdiction"); see also Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Tribunals*, 23 YALE J. INT'L L. 383, 417–28 (1998) [hereinafter Brown, *Primacy or Complementarity*] (describing the advantages and disadvantages of such an inherent supranational scheme).

34. See David J. Scheffer, *International Operations of the Senate Foreign Relations Committee*, S. Hrg. 105–724, at 13 (July 23, 1998) (testimony of Ambassador-at-Large for War Crimes Issues and Head of the U.S. Delegation for the UN Diplomatic Conference on the Establishment of a Permanent International Criminal Court, U.S. Department of State) (reproducing the statement of Ambassador Scheffer in which he referred to a regime of "automatic jurisdiction over the crime of genocide" in describing the inherent regime of the ILC Draft); see also Convention on the Prevention and Punishment of the Crime of Genocide, art. VI, Dec. 9, 1948, 78 U.N.T.S. 277, entered into force Jan 12, 1951 [hereinafter Genocide Convention] (providing that persons charged with genocide "shall be tried by a competent tribunal of the State in the territory in which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have

included a provision that allowed the ICC to have automatic jurisdiction over the crime of genocide, which would have created a truly concurrent jurisdiction, at least over those offenses.<sup>35</sup> Unlike the *ad hoc* tribunals that are grounded in the Chapter VII authority of the United Nations Security Council,<sup>36</sup> a system built on straightforward assertions of supranational primacy was not a “politically viable alternative for a permanent ICC.”<sup>37</sup> Similarly, proposals by Germany and Korea for an extended supranational jurisdiction based on the universality principle were emphatically rejected by delegations in Rome.<sup>38</sup> Some scholars lament the fact that the “underlying disparity of wealth, power, and influence” resulted in a multilateral treaty that “was heavily influenced by the prevailing notions of state sovereignty and the views of the most powerful states.”<sup>39</sup> Such is the nature of any multilateral negotiating dynamic, which inevitably produces what some states or treaty supporters see as suboptimal outcomes. The key issue for the purposes of pinpointing the precise basis of ICC jurisdiction on the territory of a State Party is that the Statute as adopted is founded on the bedrock of state consent.

Rather than a flawed system of concurrent jurisdiction, the existing jurisdictional scheme requires progressive judicial findings

accepted its jurisdiction”). In the 1948 debates over the Genocide Convention, the United States actually made a proposal that sounded remarkably close to the modern formulation of complementarity in the ICC context. The proposal would have added an additional paragraph to Article VII of the Genocide Convention to read as follows: “Assumption of jurisdiction by the international tribunal shall be subject to a finding that the State in which the crime was committed has failed to take adequate measures to punish the crime.” Rep. of the Ad Hoc Committee on Genocide, U.N. Doc. E/794 (1948), *reprinted in* U.N. Secretary General, *Historical Survey of the Question of International Criminal Jurisdiction* 142, U.N. Doc. A/CN.4/7Rev.1 (1949). The proposal was rejected by a vote of five votes to one with one abstention (the USSR) on the basis that such a paragraph would prejudice the question of the court’s jurisdiction. *Id.*

35. Rep. of the Int’l Law Comm’n on the Work of its Forty-Sixth Session, U.N. GAOR, 49th Sess., Supp. No. 10, art 21(1)(a), 25(1), U.N. Doc A/49/10 (1994) [hereinafter *ILC Draft Statute*].

36. The innovative use of the Security Council Chapter VII authority to establish the Yugoslavia and Rwanda tribunals was so widely accepted by 1998 that the correlative provision in the Rome Statute that permits precisely the same extension of ICC jurisdiction even over the nationals and territory of non-States Parties was uncontroversial. See Rome Statute, *supra* note 1, art. 13(b); *infra* notes 113–30.

37. Brown, *Primacy or Complementarity*, *supra* note 33, at 431.

38. See Sharon A. Williams & William A. Schabas, *Article 12*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES ARTICLE BY ARTICLE 547, 550–56 (Otto Triffterer ed., 2d. ed. 2008) (describing the content and consequential politics of the German, Korean, British, and American proposals); see also Andreas Zimmermann, *The Creation of a Permanent International Criminal Court*, in 2 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 169, at 205ff (1998) (detailing the legal underpinnings of the then German proposal for such a universal jurisdiction-based Court).

39. Richard Dicker, *The International Criminal Court (ICC) and Double Standards of Justice*, in THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 3, 6 (Carsten Stahn ed., 2015).

that implement an appropriate balance of authority between the supranational court and domestic states. Supranational jurisdiction based on a straightforward scheme of concurrent jurisdiction would almost certainly have resulted in ever-present jurisdictional clashes between the ICC and one or more states with valid claims based on established principles such as nationality, territoriality, or passive personality.<sup>40</sup> In order to ensure the preservation of individual state sovereignty and fulfill the promises of complementarity, the Rome Statute contains specific restraints on the exercise of the Court's power.

Article 12 sets out the preconditions for exercise of the Court's jurisdiction. This is important because the OTP cannot initiate an investigation without first certifying that the "information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed."<sup>41</sup> Similarly, the Pre-Trial Chamber cannot issue a Warrant of Arrest without deciding on the jurisdictional sufficiency of the charges over the alleged perpetrator at the time of the charged offenses.<sup>42</sup> Article 19 of the Statute mandates that the Court satisfy itself that it has jurisdictional competency "in any case brought before it" and sets forth the range of parties that may contest jurisdiction.<sup>43</sup> The textual distinction between an overall "situation" and a specific "case" brought against a particular perpetrator is important because the scope of Court jurisdiction over particular perpetrators within a given situation is never monolithic and all encompassing.

The practical effects of Article 12 are significant as they embody the theory that the Court should not have jurisdiction where States involved have not so consented. On its face, Article 12 preserves the principle that ICC jurisdiction is grounded in the sovereign consent of states.<sup>44</sup> The preconditions under Article 12 serve as a limitation on the Court's power; at a minimum, one State that would normally be able to exercise jurisdiction over the case will have manifested consent to the jurisdiction of the Court. Should all States involved in a conflict refuse to consent to the power of the Court, then the conditions of Article 12 have not been met, and the ICC is powerless to hear the case in the absence of a Security Council referral of the

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40. See M. Cherif Bassiouni & Christopher L. Blakesly, *The Need for an International Criminal Court in the New International World Order*, 25 VAND. J. TRANSNAT'L L. 151, 170 (1992) ("The problem with concurrent jurisdiction, however, is that it inherently includes the potential for jurisdictional conflict between two or more states and the international criminal court.").

41. Rome Statute, *supra* note 1, art. 53(1).

42. *Id.* art. 58(1).

43. *Id.* art. 19.

44. Article 12 works in conjunction with the admissibility criteria of Article 17 to preserve state jurisdictional primacy. See *infra* notes 54–78 and accompanying text.

overall situation using its Chapter VII authority derived from the UN Charter.

The jurisdictional provisions of Article 12 were a make-or-break gamble that represented the most controversial aspect of the Rome Statute.<sup>45</sup> Its final form emerged as a take-it-or-leave-it “package” that had been cobbled together behind closed doors by the conference Bureau and completed at 2:00 am of the last day of the conference, Friday, July 17, 1998. The Rome Statute as adopted postulated solutions to some drafting questions that delegates had been unable to resolve and included a number of provisions that the Bureau selected and presented to the floor without open debate on either the text itself or its substantive merits.<sup>46</sup> Article 12 requires only that “one or more” States have accepted the jurisdiction of the Court. This distinction is important because treaties do not “create either obligations or rights for a third State without its consent.”<sup>47</sup> Rather than violating the framework of international law, as some scholars argued at the time,<sup>48</sup> Article 12 reflects the reality that states possess an inherent right of territorial jurisdiction that they may dispose of in accordance with their sovereign prerogatives. In effect, if nationals of a state that is not a party to the treaty commit crimes on the territory of a State Party, then that state has agreed a priori that the ICC can exercise its jurisdiction as an extension of the uncontroverted right of the territorial state to punish all persons who have committed crimes on its soil, regardless of their nationality.

The vital point, particularly regarding the putative transfers from Afghanistan and Palestine to the ICC discussed below, is that the State Party must itself possess jurisdictional authority at the time of the alleged offense. Otherwise, there is no tangible right that can result in jurisdiction under Article 12. This concept, that I term “transferred territoriality,” was a distinctive innovation. In effect,

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45. See David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 17–21 (1999).

46. See Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 21 (2001) (discussing the Rome Statute as a quietly put together take-it-or-leave-it package).

47. VCLT, *supra* note 24, art. 34.

48. See Madeleine Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 LAW & CONTEMP. PROBS. 13, 27 (2001). The U.S. Department of Defense Law of War Manual echoes this inaccurate legal conclusion conception by restating that “the United States has a longstanding and continuing objection to any assertion of jurisdiction by the ICC with respect to nationals of States not Party to the Rome Statute in the absence of consent from such States or a referral by the Security Council.” OFFICE OF GENERAL COUNSEL, UNITED STATES DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL 1110, ¶18.20.3.1 (2015) [hereinafter DOD LAW OF WAR MANUAL]. *But see* Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Party States: Legal Basis and Limits*, 1 J. INT'L CRIM. JUST. 618 (2003).



transferred territoriality created a legal superstructure over the aspirational seeds sown in Article 6 of the 1949 Genocide Convention.<sup>49</sup> The concept of transferred territoriality was sufficiently accepted that a U.S. proposal that would have required an affirmative manifestation of consent before the ICC could exercise any personal jurisdiction over nationals of a non-Party State was defeated by a no-action motion adopted 113 in favor, 17 opposed, with 25 abstentions.<sup>50</sup> States sought to assuage American fears by observing that the concept of complementarity described in the next subsection “best describes the nature of the International Criminal Court.”<sup>51</sup> Delegates noted that deference to domestic jurisdictions of non-States Parties would be required by the conjunction of Articles 17 (the complementarity framework) and 98 (which sought to preserve the legal validity of jurisdictional Status of Forces Agreements between the United States and more than one hundred other nations). Such bland assurances were unwarranted, as present events have demonstrated.

## 2. The Admissibility Framework

The Rome Statute of the International Criminal Court was designed to address the “most serious crimes of international concern.”<sup>52</sup> This mandate operates against the *gründnorm* that the Court at all times and in all cases “shall be complementary to national criminal jurisdictions.”<sup>53</sup> The paradigmatic language of Article 17(1) sets out what is technically termed “issues of admissibility.”<sup>54</sup> The article declares in full that:

Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the

49. See Genocide Convention, *supra* note 34, art. VI (“Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”).

50. Williams & Schabas, *supra* note 38, at 555.

51. Silvia A. Fernandez, *Foreword* to I THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE, at xviii (Carsten Stahn & Mohammed M. El Zeidy eds., 2011).

52. See Rome Statute, *supra* note 1, art. 1.

53. *Id.*

54. *Id.* art. 17.

decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.<sup>55</sup>

The operative language in Article 17 mandates that “the Court shall determine that a case is inadmissible” where the criteria warranting exclusive domestic authority are met as specified in the Statute itself.<sup>56</sup> The formulation that a case is “inadmissible” unless the domestic state is “unwilling or unable genuinely” to carry out the investigation or prosecution is technically termed the admissibility criterion, but is almost universally referred to using the legal term of art “complementarity.”<sup>57</sup> The admissibility requirements are important in part because they were so carefully negotiated by states in order to preserve the primacy of domestic jurisdictions, but they also represent some of the Court’s most important pragmatic constraints by focusing its scarce resources on the cases where its role is most beneficial.

Though it is the fulcrum that prioritizes the authority of domestic forums, the precept of complementarity embedded in the Rome Statute does not of itself logically lead to a homogenized system of national and supranational concurrent jurisdiction despite its simple formulation. Complementarity is designed to serve as a pragmatic and limiting principle rather than an affirmative means for an aggressive prosecutor to target the nationals of states that are hesitant to embrace ICC jurisdiction and authority. The provisions of the Rome Statute preserve a careful balance between maintaining the integrity of domestic adjudications and authorizing a supranational court to exercise power where domestic systems are inadequate. Complementarity preserves this delicate balance by serving as a restrictive principle rather than an empowering one; while the ICC has affirmative powers as a supranational court, the textual predicates necessary to make a case admissible are designed to constrain the power of the Court.

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55. *Id.* art. 17(1).

56. *Id.*

57. See, e.g., Michael A. Newton, *The Quest for Constructive Complementarity*, in *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE* 304, 314 (Carsten Stahn & Mohammed El Zeidy eds., 2011); William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 *HARVARD INT. L.J.* 53, 53 (2008).

Complementarity has been repeatedly reaffirmed as the most suitable formulation for interactions of an international adjudicatory institution with fully empowered domestic systems. John Holmes, a Canadian diplomat who was deeply involved in the negotiations that preceded the Rome Statute, noted that

Throughout the negotiating process, States made clear that the most effective and viable system to bring perpetrators of serious crimes to justice was one which must be based on national procedures complemented by an international court . . . The success in Rome is due in no small measure to the delicate balance developed for the complementarity regime . . . [i]t remains clear to those most active throughout the negotiations that any shift in the balance struck in Rome would likely have unravelled [sic] support for the principle of complementarity and, by extension, the Statute itself.<sup>58</sup>

The complementarity principle was the motivating force behind a court built around a limited and defined scope of jurisdiction that operates only when needed to supplement domestic court systems. The initial limiting function of complementarity derives from the treaty basis of the ICC. As a fundamental premise of treaty law, States should be bound to a treaty only by voluntarily relinquishing part of their sovereign rights manifested through the signing and implementation of the treaty into domestic systems.<sup>59</sup> As a logical extension, States Parties delegate decision-making authority over proposed amendments to the Rome Statute to the ASP.<sup>60</sup> In other words, States Parties ceded some degree of future sovereign prerogative to the Court in the confidence that the constraints of the text were dispositive. States that elected not to ratify the Rome Statute have ceded none of their sovereign rights to the Court or its constituent organs.

Complementarity generated much debate over the best method for constraining the power of a potentially overreaching prosecutor. This was particularly important because the inherently subjective framework of Article 17 applies equally to all states. To that end, paragraphs 2 and 3 of Article 17 attempt to provide specific factors the Court shall consider in evaluating the effort of the domestic jurisdiction with respect to its unwillingness or inability to investigate or prosecute.<sup>61</sup> The factors enumerated for determining if a State is *unwilling* to prosecute include whether the proceedings

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58. John T. Holmes, *The Principle of Complementarity*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS* 41, 73–74 (Roy S. Lee ed., 1999).

59. Vienna Convention on the Law of Treaties art. 12, 14, May 23, 1969, 1155 U.N.T.S. 980, *reprinted in* 8 I.L.M. 679. This foundational truth is echoed in the provisions that a treaty does not create obligations for a third state without its consent. *Id.* art 34.

60. *See* Rome Statute, *supra* note 1, arts. 121–22.

61. *Id.* art. 17(2)–(3).

were undertaken for the purpose of shielding the person concerned from criminal responsibility,<sup>62</sup> whether there was an unjustified delay in the proceedings,<sup>63</sup> or whether the proceedings were not being conducted independently or impartially.<sup>64</sup> The determination of the *inability* of a domestic court to adjudicate the case is “whether due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”<sup>65</sup>

In sharp contrast, the requirement “genuinely” in the formulation of Article 17, paragraph 1 is left for the Court to ascertain. This gap caused one of the most distinguished international scholars in the field to observe that this aspect of Article 17 is “enigmatic.”<sup>66</sup> Accepting the reality that some external standard of review was needed to prevent illusory efforts by states, delegates rejected a series of proposed phrases such as “ineffective,” “diligently,” “apparently well founded,” “good faith,” “sufficient grounds,” and “effectively” on the basis that such formulations remained overly subjective.<sup>67</sup> In the final analysis, the formulation “genuinely” was accepted by delegations as being the least subjective concept considered, while at the same time eliminating external considerations of domestic efficiency in the investigation or prosecution.<sup>68</sup> For the purposes of this Article, the essential conclusion is that the Rome Statute’s very design contemplates the need for systematic cooperation between jurisdictions rather than capture by the supranational court.

The admissibility requirements, unlike the jurisdictional predicates, do not speak to the Court’s power to hear a case. They serve as a mechanism to give State jurisdictions primacy because the supranational authority is the exception rather than the *de fault* norm. The prohibition on ICC authority in Article 17 results in a terminological shift by which the concept of complementarity is embedded into treaty provisions that articulate the considerations and criteria for the admissibility of a particular case. Domestic states have valid claims to jurisdiction without the possibility of ICC

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62. *Id.* art. 17(2)(a).

63. *Id.* art. 17(2)(b).

64. *Id.* art. 17(2)(c).

65. *Id.* art. 17(3).

66. WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 67 (2001).

67. Rod Jensen, *Complementarity, “Genuinely” and Article 17: Assessing the Boundaries of an Effective ICC*, in COMPLEMENTARY VIEWS ON COMPLEMENTARITY 147, 155 (Jann K. Kleffner & Gerben Kor eds., 2006).

68. John Holmes, *Complementarity: National Courts Versus the ICC*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY (A. Cassese et. al eds., 1st ed. 2001).

interference, whether or not they are members of the ASP. The carefully constructed textual balance between domestic and international power masks the complexity of the underlying debates over the appropriate resolution between the multilateral treaty and the underlying web of preexisting agreements. In fact, the former President of the Court, Judge Phillipe Kirsch, publicly acknowledged that the ICC “will really have to invent, create, and define the meaning of a state that is unable or unwilling to conduct genuine proceedings.”<sup>69</sup>

ICC Judgements promulgating an automatic presumption of universal jurisdiction that overrides other applicable treaty-based jurisdiction would change the central character of the Rome Statute. A permanent shift to a judicially approved policy of automatic supranational jurisdiction at the expense of treaty-based domestic jurisdiction over the same types of offenses would represent an abandonment of the shared responsibility of states and the Court to seek justice.

### 3. The Intent of Article 98

As shown in the preceding subsections, the ICC was designed from the ground up to be additive to sovereign jurisdictions. Seeking to preserve sovereign prosecutorial prerogatives, U.S. negotiators decided as early as 1994 that the new Court could not eviscerate bilateral and multilateral<sup>70</sup> Status of Forces agreements (SOFAs)<sup>71</sup>

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69. Phillipe Kirsch, President, Int'l Criminal Court, The International Criminal Court, remarks John Tait Memorial Lecture in Law and Policy (Oct. 7, 2003), cited in Gregory S. McNeal, *ICC Inability Determinations in Light of the Dujail Case*, 39 CASE W. RES. J. INT'L L. 325, 325 (2007).

70. The text as adopted leaves *lacuna* with respect to the jurisdictional immunities that attach to personnel deployed pursuant to multinational agreements negotiated by international organizations such as the Military Technical Annex concluded in 2002 between the British military commander and Afghanistan to cover NATO forces inside the country. GEERT-JAN ALEXANDER KNOOPS, *THE PROSECUTION AND DEFENSE OF PEACEKEEPERS UNDER INTERNATIONAL CRIMINAL LAW* 245–247 (2004); see also U.N. Secretary-General, *Model Agreement Between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peacekeeping Operations*, art. IV, U.N. Doc. A/46/185 (May 23, 1991); U.N. Secretary-General, *Model Status of Forces Agreement for Peace-Keeping Operations*, ¶ 47(b), U.N. Doc. A/45/594 (Oct. 9, 1990) (providing in ¶ 47(b) that members of the military component “shall be subject to the exclusive jurisdiction of their respective sending states in respect of any criminal offenses that may be committed by them” on the territory of the host nation).

71. U.S. Department of Defense doctrine defines this term as follows: “status-of-forces agreement—a bilateral or multilateral agreement that defines the legal position of a visiting military force deployed in the territory of a friendly state.” DEP'T OF DEFENSE, JOINT PUBLICATION 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 229 (8 November 2010, as Amended Through 15 June 2015), [http://www.dtic.mil/doctrine/new\\_pubs/jp1\\_02.pdf](http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf) [<https://perma.cc/P82R-FXXE>] (archived Feb. 18, 2016). Other academics have adopted a more legalistic

by which the authority of American military and federal courts are safeguarded from interference by domestic courts in more than one hundred nations.<sup>72</sup> This became a “rock bottom” negotiating stance that was embraced by all of the delegations in Rome and incorporated into Article 98 of the Statute.<sup>73</sup> Thus, if nothing else, the Rome Statute stands for the proposition that accountability for the array of crimes detailed in Articles 6, 7, 8, and *8bis* of the treaty must impinge upon sovereignty to some degree, but not at the expense of erasing the traditional jurisdictional arrangements between states.

Reflecting the early and strong consensus on its substance, the final text of Article 98 of the Rome Statute is identical to the proposed Draft Article submitted to the Committee of the Whole.<sup>74</sup> This example of a completely unmodified text in the wake of lengthy and contentious negotiations will strike any experienced treaty negotiator as very rare indeed. Article 98(2)<sup>75</sup> of the Statute provides that the ICC

may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to

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approach focusing on the binding nature of SOFAs as treaties—“A SOFA is an arrangement, no matter in what form, delineating the legal status of servicemen from a sending State who stay with the consent of the host State on its territory, and that at the least includes rules on the exercise of criminal jurisdiction over the sending State’s servicemen.” JOOP VOETELINK, STATUS OF FORCES: CRIMINAL JURISDICTION OVER MILITARY PERSONNEL ABROAD 1.4.6, 17 (Marielle Matthee trans., 2015).

72. See DAVID J. SCHEFFER, ALL THE MISSING SOULS 171 (2012).

73. See *id.* at 175.

74. Draft Statute for an International Criminal Court, Report of the Drafting Committee, 15 June–17 July 1998, U.N. Doc. A/CONF.183/13, 177–78, reprinted in III United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome (Vol. III) (1998), [http://legal.un.org/diplomaticconferences/icc-1998/vol/english/vol\\_III\\_e.pdf](http://legal.un.org/diplomaticconferences/icc-1998/vol/english/vol_III_e.pdf) [<https://perma.cc/G2C6-5LE5>] (archived Feb. 5, 2016); see also M. CHERIF BASSIOUNI, II THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: AN ARTICLE-BY-ARTICLE EVOLUTION OF THE STATUTE 703–04 (2005).

75. At the time of this writing, the application of Article 98(1) addressing the residual diplomatic immunities owed to non-States Parties remains a hotly contested jurisprudential issue because it has surfaced in the context of the transfer of Omar Bashir to the authority of the Court. See Paola Gaeta, *Does President Al Bashir Enjoy Immunity From Arrest?*, 7 J. INT. CRIM. J. 315, 316 (2009); Prosecutor v. Bashir, ICC-02/05-01/09, Decision Following the Prosecutor’s Request for an Order Further Clarifying that the Republic of South Africa Is Under the Obligation to Immediately Arrest and Surrender Omar Al Bashir, ¶ 6 (June 13, 2015), <http://www.icc-cpi.int/iccdocs/doc/doc1995566.pdf> [<https://perma.cc/X7HF-HFQC>] (archived Feb. 18, 2016); Prosecutor v. Bashir, ICC-02/05-01/09-195, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, ¶¶ 28–31 (Apr. 9, 2014), <http://www.legal-tools.org/en/doc/89d30d> [<https://perma.cc/AT8Q-YH3Q>] (archived Feb. 18, 2016); The South Africa Litigation Centre v. the Minister of Justice, et. al., Case No. 27740/2015, ¶ 21 (High Court of South Africa) (Gauteng Division, Pretorial) (June 23, 2015), <http://constitutionallyspeaking.co.za/complete-high-court-al-bashir-judgment/> [<https://perma.cc/T47U-UFYD>] (archived Feb. 18, 2016).

surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.<sup>76</sup>

The text itself is rather straightforward. It absorbed little negotiation time in Rome because it “was not considered to be of utmost political sensitivity by most participants in the negotiations.”<sup>77</sup> One of the most eminent experts assessing the Rome Statute noted that the *travaux préparatoires* for Article 98 are “summary and uninformative.”<sup>78</sup> On its face, Article 98(2) addresses only agreements between states, whether they are bilateral or multilateral. Neither does the text provide any express or implied limitation on the timing of such an agreement when measured against the accession of any state into the ASP. The universal understanding is that the use of the term “sending state” in contrast to the receiving state reflects the clear sense of negotiators that its principal area of application is to Status of Forces Agreements.<sup>79</sup> The United States made that connection clear from the beginning of the negotiations in 1995.<sup>80</sup>

The head of the U.S. delegation addressed the Ad Hoc Committee in 1995 with the admonition that “[i]t is also critical that the rights and responsibilities of states parties to applicable Status of Forces Agreements be fully preserved under the statute of the ICC . . . . Most SOFAs contain provisions governing the exercise of criminal jurisdiction over the armed forces stationed or posted abroad.”<sup>81</sup> Most delegations understood the U.S. argument and “accepted without difficulty that status of forces agreements created a kind of immunity over nationals of a sending state who were on the territory of another nation analogous to diplomats which would be entitled to some recognition in the Statute.”<sup>82</sup> In any event, the text is devoid of practical consequences for States Parties because Article 98(1), dealing with diplomatic or other immunities, is waived by

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76. Rome Statute, *supra* note 1, art. 98(2).

77. Claus Kreß & Kimberly Prost, *Article 98*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES ARTICLE BY ARTICLE 1601, 1604 (Otto Triffterer ed., 2d. ed. 2008) (describing the content and consequential politics that surrounded Article 98 after its uncontroversial adoption).

78. SCHABAS, *supra* note 33, at 1042.

79. BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 148, 167, 180 (2003).

80. See David J. Scheffer, *Article 98(2) of the Rome Statute: America's Original Intent*, 3 J. INT'L CRIM. JUST. 333, 339 (2005) (“The use of the term ‘sending State’ derives from the original American effort, very early in the ICC negotiations, to preserve the rights accorded to its official personnel covered by status of forces agreements (SOFAs) between the United States and scores of foreign governments.”).

81. SCHABAS, *supra* note 33, at 1042.

82. *Id.* at 1043.

virtue of Article 27(2).<sup>83</sup> Requests from the Court to States Parties would bypass Article 98(2) due to the generalized duty to cooperate in the Statute<sup>84</sup> and the particularized duty to “comply with requests for arrest and surrender” of alleged perpetrators subject to the procedures under their national law.<sup>85</sup>

In sum, Article 98, when taken at face value, merely recognizes a limited right of non-surrender for citizens of non-States Parties. Its provisions nevertheless generated a storm of controversy as the George W. Bush administration began a worldwide campaign on May 6, 2002, to negotiate a web of bilateral agreements to insulate U.S. service members from transfer to the Court.<sup>86</sup> Commentators referred to these as “bilateral immunity agreements” or “bilateral impunity agreements” but overlooked the fact that the U.S. agreements purport only to create a reciprocal duty between nations not to transfer each other’s citizens pursuant to a request from the Court (which in most agreements includes the obligation to refrain from transfer to another state for the purpose of eventual transfer to the Court “for any purpose”). Absent the pejorative presumption from ICC proponents that the Article 98 agreements are undesirable as a feature of ICC practice, there is nothing on the face of the bilateral agreements that hints at presumed or promised immunity from prosecution for substantive offenses found in the Rome Statute.

Beginning the campaign that would eventually negotiate more than one hundred such agreements,<sup>87</sup> the Undersecretary of State for

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83. Rome Statute, *supra* note 1, art. 27(2) (“Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”).

84. *Id.* art. 86 (**General Obligation to Cooperate**: “States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”).

85. *Id.* art. 89.

86. On that day, the State Department notified the Secretary General that despite President Clinton’s signature the United States did not intend to ratify the treaty. Secretary of State Colin Powell simultaneously sent a demarche to every U.S. Ambassador to raise the issue with the host nation as follows, “We are interested in your view regarding bilateral agreements recognized under Article 98 of the Rome Statute that could be used to provide protection for nationals from both of our countries from the reach of the ICC. If a host government offers directly to undertake such an agreement, post can use the following point: We would be interested in discussing your offer further at the moment we are considering our next steps and should have a decision very soon. I will report our conversation to Washington and I expect we will have a response for you shortly.” Colin Powell, Sec’y of State, Demarche on the U.S. Policy on the International Criminal Court from Secretary to Ambassadors 5 (May 2, 2006), [http://www.amicc.org/docs/Demarche\\_US.pdf](http://www.amicc.org/docs/Demarche_US.pdf) [perma.cc/ZPG4-4JKW] (archived Feb. 7, 2016).

87. For an updated listing and the text of the existing unclassified bilateral agreements, see Georgetown, *International Criminal Court—Article 98 Research Guide*, GEORGETOWN LAW LIBRARY, [https://www.law.georgetown.edu/library/research/guides/article\\_98.cfm](https://www.law.georgetown.edu/library/research/guides/article_98.cfm) [perma.cc/75X8-YNZS] (archived Feb. 7, 2016).



Policy reassured the world that “the United States respects the decision of those nations who have chosen to join the ICC; but they in turn must respect our decision not to join the ICC or place our citizens under the jurisdiction of the Court.”<sup>88</sup> U.S. policy continued to emphasize mutual efforts to “promote real justice.” In particular, the United States promised, *inter alia*, to “continue our longstanding role as an advocate for the principle that there must be accountability for war crimes and other serious violations of international humanitarian law” and to “discipline our own when appropriate.”<sup>89</sup> Implicitly referencing the concerns of ICC supporters regarding this campaign, Professor William Schabas concluded that the “legal consequences” of Article 98(2) agreements “were much misunderstood” as they in no way sought to achieve immunity from investigation and prosecution where appropriate. His definitive Commentary noted that Article 98 agreements “do not affect the jurisdiction of the Court at all.”<sup>90</sup>

The actual substance of the worldwide web of bilateral agreements in place at the time of this writing has little to do with jurisdictional conflicts caused by equally binding treaty obligations, as even a cursory reading of Article 98 and the agreements makes plain. However, the practice following the Rome Conference illustrates two powerful, but subtle, linkages between the debates over Article 98 and the present jurisdictional dilemmas faced by the Court. Firstly, the text itself sets up a powerful duality in that it preserves the ability of States Parties to transfer jurisdiction to the Court as an aspect of sovereign prerogative. The concept of transferred territoriality is buttressed by the duty of any State Party to cooperate with the Court, but only within the limits of lawful capacity as governed by “obligations under international agreements.”<sup>91</sup> At the same time, the validity of the underlying bilateral obligations is implicitly preserved. In fact, Article 98(2) represents a definitive rejection of the argument by some ICC advocates that the object and purpose of the Rome Statute is to establish the authority of the supranational court as the transcendent institution empowered to bypass any hindrance to its punitive discretion. Of particular note, there is nothing in the Statute or in subsequent state practice that distinguishes between a SOFA presumed valid only for the purposes of transfers under Article 98 and one that addresses transfers as well as the allocation of

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88. Marc Grossman, Under Secretary for Political Affairs, Remarks to the Center for Strategic and International Studies Washington DC, *American Foreign Policy and the International Criminal Court* 5, May 6, 2002, [http://www.amicc.org/docs/Grossman\\_5\\_6\\_02.pdf](http://www.amicc.org/docs/Grossman_5_6_02.pdf) [<https://perma.cc/ZZB7-QNV8>] (archived Feb. 7, 2016).

89. *Id.*

90. SCHABAS, *supra* note 33, at 1045.

91. Rome Statute, *supra* note 1, art. 98(2).

jurisdiction between sovereigns. In fact, as the next section will demonstrate, most SOFAs combine jurisdictional allocation between States on the horizontal level along with a wide range of other issues. The broad phrase “international agreements” in Article 98 encompasses a wide array of SOFA arrangements to include those that allot jurisdictional authority even when one of the parties to the bilateral instrument subsequently accedes to the Rome Statute.

Secondly, to buttress this conclusion, the American campaign to achieve Article 98 Agreements generated intensive debate within the European Union, which in turn reinforced the binding nature of SOFA Agreements even as States Parties assumed new treaty-based duties under the Rome Statute. On September 30, 2002, the Council of the European Union issued its Conclusions and Guiding Principles concerning arrangements between the United States and States Parties regarding the surrender of persons to ICC authority. The European Union supported the concept of such agreements subject to three conditions: (1) that EU states take “existing international agreements” into account (presumably referring to the NATO Status of Forces Agreement that creates concurrent jurisdiction for most offenses),<sup>92</sup> (2) they should cover only persons sent in their official capacity to another territory by a non-State Party, and (3) “any solution should include appropriate operative provisions ensuring that persons who have committed crimes falling within the jurisdiction of the Court do not enjoy impunity.”<sup>93</sup>

The EU policy guidance implicitly accepted the legality of an allocation of jurisdiction and investigative authority from a State Party to a non-State Party when the relevant international agreements “ensure appropriate investigation and—where there is sufficient evidence—prosecution by national jurisdictions concerning persons requested by the ICC.”<sup>94</sup> Thus, subsequent state practice within the European Union is clear that international agreements that allocate jurisdiction between sovereigns remain legally binding even after entry into force of the Rome Statute. Notwithstanding the text of Articles 12 and 98, jurisdictional allocations between states are subject only to the limitation that the “object and purpose of the

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92. Agreement between the Parties to the North Atlantic Treaty Organization Regarding the Status of their Forces art VII.3, 4 U.S.T. 1792, T.I.A.S. No. 2846, (June 19, 1951) [hereinafter NATO Agreement], [http://www.nato.int/cps/en/natohq/official\\_texts\\_17265.htm](http://www.nato.int/cps/en/natohq/official_texts_17265.htm) [perma.cc/9WVR-PC67] (archived Feb. 7, 2016).

93. Council Conclusions on the International Criminal Court ICC34EN (Sept. 30, 2002), <http://www.consilium.europa.eu/uedocs/cmsUpload/ICC34EN.pdf> [perma.cc/3K9A-Q8UC] (archived Feb. 7, 2016).

94. *Id.*; see also James Crawford, Phillippe Sands & Ralph Wild, Joint Opinion, *In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States Under Article 98(2) of the Statute*, ¶¶ 47–52 (June 5, 2003), <http://www.amicc.org/docs/Art98-14une03FINAL.pdf> [perma.cc/H2TB-ZNPW] (archived Feb. 7, 2016).

ICC Statute precludes a State party from entering into an agreement the purpose or effect of which may lead to impunity.<sup>95</sup> The following section will examine the binding agreements entered into by Afghanistan and the PA that now present the Court with highly controversial and superficially conflicting treaty obligations *vis-à-vis* the ICC.

### B. The Pattern of Preexisting Jurisdictional Allocations

The Rome Statute is expressly designed to be juxtaposed against an array of other treaty obligations incumbent on States Parties. The jurisdictional provisions of the Geneva Conventions,<sup>96</sup> for example, remain fully applicable. SOFAs remain a ubiquitous feature of modern military operations for both ICC States Parties and non-States Parties. They continue to be indispensable to United Nations peacekeeping efforts.<sup>97</sup> Most such agreements address ancillary matters such as customs constraints, wearing of uniforms, and the right of sending state nationals to carry weapons.

But the key provisions of any SOFA are those that address the legal protection from domestic prosecution that will be afforded to the nationals of the negotiating state present in a foreign country.<sup>98</sup> Department of Defense Directive 5525.1, for example, specifies that U.S. policy is “to protect, to the maximum extent possible, the rights of U.S. personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons.”<sup>99</sup> Typical SOFA

95. Crawford, Sands & Wild, *supra* note 94, ¶ 52.

96. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 1–11, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 1, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (replacing Hague Convention No. X of 18 October 1907, 36 Stat. 2371); Geneva Convention Relative to the Treatment of Prisoners of War art. 1, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (replacing the Geneva Convention Relative to the Protection of Prisoners of War of 27 July 1929, 47 Stat. 2021); Geneva Convention Relative to the Protection of Civilians in Time of War art. 1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims Of International Armed Conflicts art. 1.1, June 8, 1977, 125 U.N.T.S. 3.

97. *See, e.g.*, The Status of Forces Agreement Between the United Nations and the Government of the Republic of South Sudan Concerning the United Nations Mission in South Sudan, August 8, 2011, [http://www.un.org/en/peacekeeping/missions/unmiss/documents/unmiss\\_sofa\\_08082011.pdf](http://www.un.org/en/peacekeeping/missions/unmiss/documents/unmiss_sofa_08082011.pdf) [perma.cc/5QZX-CQGF] (archived Feb. 7, 2016).

98. *See, e.g.*, CHUCK MASON, CONG. RESEARCH SERV., RL34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? 5 (2012).

99. Department of Defense, DoDD 5525.1, Status of Forces Policy and Information, ¶ 3 (Aug. 7, 1979), <http://www.dtic.mil/whs/directives/corres/pdf/552501p.pdf> [perma.cc/GK5V-3KT8] (archived Feb. 7, 2016). The NATO SOFA guarantees arrested members of the Armed Forces and their civilian dependents, *inter alia*, an attorney, an interpreter, and a prompt and speedy trial, as well as the right to

provisions establish which party to the agreement is able to assert criminal and/or civil jurisdiction and specify procedures for the exercise of civil and criminal jurisdiction by the host nation over personnel of the sending state if at all. Military prosecutors would vehemently object to unsupported assumptions that treaty provisions related to jurisdictional immunity from foreign prosecution serve as the functional equivalent of grants of impunity for war crimes; they merely preserve the full panoply of prosecutorial prerogatives to the sending state. Both States Parties<sup>100</sup> and non-States Parties<sup>101</sup> have convened many war crimes prosecutions in recent years based on jurisdictional authorities of domestic law and SOFA provisions that

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confront witnesses, obtain favorable witnesses, and communicate with a representative of the United States. NATO Agreement, *supra* note 92, art. VII, ¶ 9.

100. See generally *R.v. Sec'y of State for Def.*, (2007) 3 W.L.R. 33 (H.L.) (documenting a situation in which British soldiers were accused of committing war crimes and the case was brought to the attention of the ICC prosecutor; the UK stepped in and prosecuted the soldiers, which they were able to do since they had the proper domestic legislation; subsequently, the ICC prosecutor found the prosecution sufficient and did not try the soldiers under the ICC); MICHAEL A. NEWTON & LARRY MAY, *PROPORTIONALITY IN INTERNATIONAL LAW* 194–99 (2014) (discussing the investigation and ultimate acquittal of Polish forces for crimes alleged near a village called Nangar Khel, located in the Paktika province of Afghanistan; the case represents the danger of conflating the principles of distinction and proportionality and the common understanding on this issue of ICC States Parties such as Poland, Germany, Canada, the United Kingdom, and the Netherlands, among others).

101. See, e.g., *U.S. v. Bram*, No. ARMY 20111032, 2014 WL 7236126 (Army Ct. Crim. App. Nov. 20, 2014) (convicting appellant of solicitation to commit murder in Afghanistan, sentencing appellant to a dishonorable discharge, confinement for five years, and reduction from the grade of E-5 to the grade of E-1, and subsequently denying appeal because there was no doubt that “this was anything but a criminal venture well outside the bounds of the rules of engagement or law of armed conflict”); *U.S. v. Morlock*, No. ARMY 20110230, 2014 WL 7227382 (Army Ct. Crim. App. Apr. 30, 2014) (upholding conviction of attempted murder for an agreement between appellant and other soldiers from his unit, while deployed to Afghanistan, to murder non-hostile Afghan males through the use of grenades and automatic weapons and then claim their victims had either committed a hostile act or exhibited hostile intent); *United States v. Behenna*, 71 M.J. 228, 229 (C.A.A.F. 2012) (resulting in a sentence of Dismissal from the service, twenty-five years confinement, forfeiture of all pay and allowances on charges of unpremeditated murder and assault); *United States v. Girouard*, 70 M.J. 5, 7 (C.A.A.F. 2011); *United States v. Maynulet*, 68 M.J. 374, 377 (C.A.A.F. 2011); *United States v. Clagett*, No. ARMY20070082, 2009 WL 6843560, at \*1 (Army Ct. Crim. App. 2009); *United States v. Green*, 654 F.3d 637, 646–47 (6th Cir. 2011), *cert. denied* 132 S. Ct. 1056 (2012) (Green was convicted and sentenced to life in prison for participating in a sexual assault and multiple murders while stationed in Iraq as an infantryman in the United States Army. Green was discharged due to a personality disorder before senior Army officials became aware that he and three fellow soldiers were involved in these crimes. He was convicted in federal court and the three coconspirators were tried by courts-martial and each sentenced to between 90 and 110 years imprisonment); Kevin Vaughan, *Soldier Pleads Guilty to Killing Jailed Taliban Commander*, DENVER POST (May 26, 2011), [http://www.denverpost.com/ci\\_18142186](http://www.denverpost.com/ci_18142186) [<https://perma.cc/EA2A-79GZ>] (archived Mar. 1, 2016) (chronicling the story of a soldier sentenced to life in prison, which was limited to a term of no more than twelve and a half years through an agreement between the Army and the soldier’s lawyers, and who was dishonorably discharged, and had rank reduced to E-1 after soldier pleaded guilty to premeditated murder of a detainee committed during deployment in Afghanistan).

preserve in personam jurisdiction that might otherwise have been exercised by the territorial state. Such domestic prosecutions are fully consistent with the object and purpose of the Rome Statute as well as its plain text.

The sovereign act of a State Party in transferring its own territorial jurisdiction over the nationals of another state to the Court is perfectly consistent with the VCLT if the territorial state has a colorable claim to jurisdiction at the time of the alleged offense. *Nemo plus iuris transferre potest quam ipse habet* is millennia old and inarguably an accepted rule of international law.<sup>102</sup> The Court must respect its normative impact as part of “the principles and rules of international law.”<sup>103</sup> ICC jurisdiction is merely derivative of sovereign domestic jurisdiction, and was intentionally designed to be so in the absence of a Chapter VII Resolution conferring jurisdiction. For much the same reason, an Occupying Power does not lawfully acquire title to personal or state property within the zone of occupation and thus cannot sell or otherwise dispose of such properties.<sup>104</sup> Jurisdictional allocations prescribed in the Rome Statute do not present intractable difficulties for States Parties with the caveat that no state can transfer more jurisdictional authority to the ICC than it possesses under “applicable treaties”<sup>105</sup> at the time of the alleged offense.

To date, the Court’s disregard of underlying treaty-based jurisdictional allocations undermines its intellectual consistency. Under the tenets of Article 12, personal jurisdiction over a particular perpetrator attaches only on the basis of territoriality or nationality rather than as a necessary byproduct of functionalist treaty interpretation. The Court has no treaty basis under the Rome Statute for claiming a universal scope of punitive authority over **all** potential perpetrators in **all** circumstances. Even if the *actus reus* of a particular offense might have been committed, the OTP must make a legally defensible, objective, and apolitical assessment that “there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.”<sup>106</sup> Of course, the nationals of States Parties and non-States Parties are dissimilar in that the Rome Statute permits nationality-based jurisdiction in the Court over the citizens of 123 states,<sup>107</sup> even when the receiving state otherwise has no basis for asserting territorial jurisdiction.

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102. MAARTEN BOS, A METHODOLOGY OF INTERNATIONAL LAW 5 (1984).

103. Rome Statute, *supra* note 1, art. 21(1)(b).

104. RAPHAEL LEMKIN, 1 AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS 43 (1944).

105. Rome Statute, *supra* note 1, art. 21(1)(b).

106. *Id.* art. 58(1)(a).

107. See International Criminal Court, The State Parties to the Rome Statute, [http://www.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) [perma.cc/9WEN-LPGW] (archived Feb. 7, 2016).

To reiterate, the act of transferring territorial jurisdiction over a state that is not party to the Rome Statute can be done perfectly consistent with the VCLT **if the territorial state has a colorable claim to jurisdiction at the time of the alleged offense.**<sup>108</sup> In this sense, the territorial state transfers its own authority in the same manner that the co-owner of a house could choose to sell or to transfer his/her property right without the consent of the other co-owner. On the other hand, if the territorial state has no legally cognizable claim (i.e., possessory interest) to criminal jurisdiction over a particular class of perpetrators at the time of the alleged offense/s then it has nothing to transfer to the supranational court irrespective of ostensible obligations under the Rome Statute. The underlying web of binding jurisdictional treaties inevitably affects the Court in three important circumstances, which will be summarized in *seriatim* below: (1) when States Parties have established treaty-based concurrent jurisdiction with other states, (2) when the UN Security Council curtails ICC jurisdiction, and (3) when a State Party has voluntarily surrendered its prosecutorial prerogatives.

As Chief Justice Marshall explained in *Schooner Exchange*, allocations of jurisdiction between sovereigns remain “rather questions of policy than of law” and “are for diplomatic, rather than legal discussion.”<sup>109</sup> There are no a priori rules under international criminal law nor drawn from customary international law that give preference to one jurisdictional basis when two or more states possess concurrent jurisdiction.<sup>110</sup> More than 40 percent of the States Parties to the ICC share concurrent jurisdiction with non-States Parties. The concurrent jurisdiction embodied in the NATO SOFA, for example, governs more than fifty States Parties as it binds all NATO members as well as the nations that participate in NATO Partnership for Peace (PfP) program.<sup>111</sup> In addition, Japan,<sup>112</sup> the Republic of Korea, and

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108. *But see* 22 U.S.C. § 7421(11) (2002) (reflecting the political posture of the United States Congress, notably without any legal analysis, that “[i]t is a 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. The United States is not a party to the Rome Statute and will not be bound by any of its terms. The United States will not recognize the jurisdiction of the International Criminal Court over United States nationals”).

109. *Schooner Exchange*, 7 Cranch at 143, 146.

110. ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 348 (2d ed. 2003).

111. *See* Signatures of Partnership for Peace Framework, NORTH ATLANTIC TREATY ORGANIZATION, [http://www.nato.int/cps/en/natolive/topics\\_82584.htm](http://www.nato.int/cps/en/natolive/topics_82584.htm) [<https://perma.cc/7BCA-BYZJ>] (archived Jan. 22, 2016).

112. *See, e.g.*, Agreement Under Article VI of the Treaty of Mutual Cooperation and Security: Facilities and Areas and the Status of United States Armed Forces in Japan, U.S.–Japan, Jan. 19, 1960, 11 U.S.T. 1652 (SOFA in the form of an executive agreement pursuant to a treaty).

the Philippines<sup>113</sup> are all ICC States Parties that share concurrent jurisdiction with the United States pursuant to binding SOFA provisions. As a normal operating principle, where two states exercise concurrent jurisdiction, transfer of authority from the State Party to the Court does not vitiate the jurisdiction of the non-State Party insofar as jurisdiction technically remains intact but is effectively displaced by the sovereign act of the State Party.

Arguments of some academics that the VCLT prohibits transferred territoriality are misplaced because the Rome Statute does not impose obligations on non-States Parties beyond those exercised by any sovereign state through its exercise of treaty-based concurrent criminal jurisdiction.<sup>114</sup> The possibility that a State Party can be subject to seemingly inconsistent duties *vis-à-vis* another state based on one treaty obligation and a different duty to the ICC based on the Rome Statute could well present States Parties with excruciatingly delicate political decisions. Article 90 of the Rome Statute<sup>115</sup> appears to anticipate precisely this dilemma. It specifically addresses the process to be followed when a State Party receives competing requests for extradition of a particular perpetrator.<sup>116</sup> By its very terms, Article 90(4) requires States Parties to comply with their underlying “international obligation to extradite” a perpetrator back to a state that is not a member of the ICC (such as the United States or Israel) even when transfer of that same person has been requested by the ICC.<sup>117</sup> Instances of truly concurrent jurisdiction thus create the appearance of conflicting legal obligation rather than an intractable inconsistency with the Rome Statute.

The second common situation leads to the converse result yet is also in complete conformity with the Rome Statute.<sup>118</sup> Under Article 13 of the Statute, the Security Council may refer situations to the ICC based upon the finding that impunity threatens international

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113. Agreement regarding the treatment of the United States armed forces visiting the Philippines, U.S.–Phil., April 2, June 11 and 21, 1993, *Bilateral Treaties in Force as of Jan. 1, 2013*.

114. The debate over the constitutionality of U.S. accession to the Rome Statute on the basis of its different due process standards mirrored earlier debates regarding the jurisdictional provisions of the Genocide Convention. Both arguments are inaccurate. Myres S. McDougal & Richard Arens, *The Genocide Convention and the Constitution*, 3 VAND. L. REV. 683 (1950).

115. Rome Statute, *supra* note 1, art. 90.

116. *Id.* Article 90 implicitly concedes the point of this Article in that there is no embedded presumption that ICC jurisdiction automatically preempts competing domestic jurisdictional authority.

117. *Id.* art. 90(4).

118. *But see* Deborah Ruiz Verduzzo, *The Relationship Between the ICC and the United Nations Security Council*, in *THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 30, 36 (Carsten Stahn ed., 2015) (positing with no evidence or analysis that the position of the Security Council with respect to Resolutions 1593 and 1970 “goes against the Rome Statute”).

peace and security.<sup>119</sup> Such referrals are not limited by the nationality or territoriality constraints derived from state consent under the normal provisions of Article 12.<sup>120</sup> The 2005 referral of ICC jurisdiction over Darfur was the first such constitutive act in the history of the Court.<sup>121</sup> As a more recent marquee example, UN Security Council Resolution 1973<sup>122</sup> empowered states to “use all necessary means” to protect civilians inside Libya and to enforce the no-fly zone over Libyan territory. This Chapter VII decision was implemented in the shadow of the previous referral of jurisdiction to the Court over the situation in Libya by virtue of Resolution 1970.<sup>123</sup> Resolution 1970 mirrored the language of the earlier Darfur Resolution by expressly providing that

nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State.<sup>124</sup>

Thus, every time it has created ICC jurisdictional authority, the Security Council has simultaneously constrained the reach of that authority over the nationals of non-States Parties to the Rome Statute. This is indistinguishable from the Security Council Resolutions creating the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, which gave each *ad hoc* tribunal legal authority, but

119. Rome Statute, *supra* note 1, art. 13(b).

120. See *The Prosecutor v. Al Bashir*, ICC-02/05-01/09-3, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, ¶¶ 36–42 (Mar. 4, 2009), <https://www.icc-epi.int/iccdocs/doc/doc1759849.pdf> [<https://perma.cc/C68T-ZNB4>] (archived Feb. 18, 2016).

121. See S.C. Res. 1593, ¶ 1 (Mar. 15, 2005), <http://www.icc-epi.int/nr/rdonlyres/85febd1a-29f8-4ec4-9566-48edf55cc587/283244/n0529273.pdf> [[perma.cc/85SA-GG6G](https://perma.cc/85SA-GG6G)] (archived Jan. 22, 2016) (stating simply that the Security Council Acting under Chapter VII “[d]ecides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court”).

122. S.C. Res. 1973 (Mar. 17, 2011), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/268/39/PDF/N1126839.pdf?OpenElement> [[perma.cc/D2YA-6MMA](https://perma.cc/D2YA-6MMA)] (archived Feb. 7, 2016).

123. S.C. Res. 1970, ¶ 4 (Feb. 26, 2011), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/245/58/PDF/N1124558.pdf?OpenElement> [[perma.cc/K8NG-MS7A](https://perma.cc/K8NG-MS7A)] (archived Feb. 7, 2016).

124. *Id.* ¶ 6; see S.C. Res. 1593, ¶ 6 (providing that “nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State.”).



simultaneously constrained jurisdictional scope based on articulated geographic and temporal limits.<sup>125</sup>

Jurisdictional limitations prescribed by Security Council Resolutions do not represent amendments to the Rome Statute because they conform to the intent of Article 13(b) and well-established international practice.<sup>126</sup> To be clear, Resolution 1970 was unanimously adopted by the Security Council and received the affirmative votes of ten ICC States Parties, to include Germany, France, South Africa, the United Kingdom, and Portugal. The Secretary-General spoke in favor of the Resolution. The President of the Council voiced the only note of caution regarding the jurisdictional carve-out, speaking in his capacity as the representative of Brazil.<sup>127</sup>

States have therefore consented to the premise of the UN Charter that the Security Council may override otherwise binding treaty obligations within the scope of its Chapter VII powers.<sup>128</sup> It is

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125. See *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 45 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), <http://www.un.org/icty/tadic/appeal/decision/51002.htm> [<https://perma.cc/W2LP-X4BF>] (archived Feb. 18, 2016).

126. Though the Security Council failed to pass a Chapter VII resolution with respect to the situation in Syria because both China and Russia exercised their veto power based on other concerns, the draft Resolution S/2014/348 also contained the same jurisdictional limitation in paragraph 7. This language caused Argentina to voice its concerns as follows:

The Security Council does not have the power to declare an amendment to the Statute in order to grant immunity to nationals of States non-Parties who commit crimes under the Statute in a situation referred to the Court. That is to say, nothing in the text of paragraph 7 would have given the power to amend the standard of the Statute with regard to the Court's jurisdiction in a given situation or the fact that if a decision is needed, the Court is ultimately the judge of its own jurisdiction.

The Situation in the Middle East (Syria), Record of Debates on draft Resolution, S/2014/348, ¶ 11 (May 22, 2014).

127. See *Peace and Security in Africa*, U.N. Doc. S/PV.6491 (February 26, 2011), [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/PV.6491](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.6491) [<https://perma.cc/5HP6-M7GE>] (archived Feb. 7, 2016) ("Brazil is a long-standing supporter of the integrity and universality of the Rome Statute. We oppose the exemption from jurisdiction of nationals of those countries not parties to the Rome Statute. In the face of the gravity of the situation in Libya and the urgent need for the Council to send a strong, unified message, my delegation supported this resolution. However, we express our strong reservation concerning paragraph 6. We reiterate our conviction that initiatives aimed at establishing exemptions of certain categories of individuals from the jurisdiction of the International Criminal Court are not helpful to advancing the cause of justice and accountability and will not contribute to strengthening the role of the Court.")

128. See U.N. CHARTER art. 103 (providing that Charter obligations "shall prevail" over inconsistent treaty obligations); Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libya v. U.S.*), 1992 I.C.J. Rep. 114, 126–27 (Provisional Measures Order of

of course true that the ICC exercises a *sui generis* scope of authority within its mandate as a supranational organization with an independent “international legal personality.”<sup>129</sup> Some academics infer that Council-imposed jurisdictional limitations over non-States Parties “have no place”<sup>130</sup> in Article 13(b) referrals because the ICC is not similarly situated to a sovereign state obligated by the UN Charter to “accept and carry out the decisions of the Security Council.”<sup>131</sup> This line of logic misapprehends the true nature of ICC jurisdiction. Jurisdiction under Article 13(b) actually *originates* by virtue of Security Council action, which itself manifests the intention of its members acting in their sovereign capacity.

The Court is a secondary subject of international law constituted by the common will of states through the act of transferring their powers. Both the jurisdictional scope of the Court and the range of substantive offenses it is empowered to investigate are limited by the authority conveyed from states. Thus, it cannot exercise more power than it has been granted by its creators.<sup>132</sup> With respect to the creation of ICC jurisdiction under Article 13(b), the limited scope of allocation is absolutely binding because the Court cannot simply create its own jurisdictional authority over non-States Parties.<sup>133</sup> The ICC, of course, exercises the full scope of its delegated jurisdiction with institutional independence and (theoretical) apolitical autonomy. As the International Court of Justice opined in *Congo v. Belgium*, “immunity from jurisdiction . . . does not mean that [alleged perpetrators] enjoy impunity.”<sup>134</sup> There is accordingly no basis for sustaining a presumption that circumscribed ICC jurisdiction over citizens of non-States Parties violates international law in general or obviates the core object and purpose of the Rome Statute.

The situations in Afghanistan and Palestine illustrate the third strand of confluence, and for our purposes the most salient. At the same time, purported conflicts between the obligations of the Rome Statute and underlying but equally authoritative treaty norms can be resolved in an intellectually consistent manner. The ICC is not an all-

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Apr. 14) (holding that a Security Council resolution superseded whatever rights Libya may have enjoyed under a pre-existing treaty).

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

130. Rod Rastan, *Jurisdiction*, in *THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 141, 162–63 (Carsten Stahn ed., 2015).

131. U.N. Charter, art. 25.

132. See 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).

133. It must also be clearly understood that the limitation of Court jurisdiction in the Libya situation has no bearing whatever on other existing grounds for national jurisdiction derived from other sources, such as universal jurisdiction based on violations of the grave breach provisions of the Geneva Conventions or the Torture Convention or any other domestic statutory authority.

134. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 ICJ Rep. 1, ¶ 60 (Feb. 14).

encompassing judicial authority. Upon entry into the ASP, both Afghanistan and Palestine conveyed jurisdiction within the meaning of Article 12, but the quantum of that delegated jurisdiction is limited by their preexisting treaty-based constraints.<sup>135</sup>

Neither Afghanistan nor Palestine can convey juridical authority to the Court over all alleged offenses perpetrated by all persons on their territory because they do not enjoy exhaustive jurisdictional power. To be precise, no scholar or politician can authoritatively describe the territorial boundaries of a Palestinian state at the time of this writing. The ICC website implicitly concedes that the scope of territorial jurisdiction purportedly conveyed by the PA is legally indeterminate. On the top of the entry page to the ICC website, users can scroll over the listing of situations under investigation and those under preliminary examination; when a mouse cursor touches the name of each state its geographic contours pop up along with its name, except for Palestine.<sup>136</sup> As a necessary predicate to proceeding with any investigation based on territoriality, the Court must create its own template for the scope of legal authority conveyed by the Palestinian Authority under the Rome Statute.

In any event, there is nothing in the Rome Statute or in state practice that compels the conclusion that the States Parties have an unyielding obligation to confer all traces of sovereign prosecutorial authority to the Court. Nor can it acquire more authority than that bestowed by its creators in the text of the multilateral treaty. The Court is a “derivative” or “secondary” subject of international law in the sense that it does not possess any original powers or sovereign authority in its own right.<sup>137</sup> *Nemo plus iuris transferre potest quam ipse habet*. In the situations of Afghanistan and Palestine, the quantum of territorial jurisdiction is received by the Court “subject to all burdens resting upon it.”<sup>138</sup> This section concludes by detailing the treaty-based limitations on the otherwise unfettered jurisdictional delegations of Afghanistan and Palestine at the time of their accession to the Rome Statute.

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135. Roman law distinguished between original ownership (in which the thing owned is created by a person that had no predecessor in title) and derivative (by which ownership is transferred). CARL SADOWSKI, *INSTITUTES AND HISTORY OF ROMAN PRIVATE LAW WITH CATENA OF TEXTS* 88 (E.E. Whitfield trans. & ed., 1886).

136. INTERNATIONAL CRIMINAL COURT (Jan. 24, 2016), [https://www.icc-cpi.int/EN\\_Menus/icc/Pages/default.aspx](https://www.icc-cpi.int/EN_Menus/icc/Pages/default.aspx) [perma.cc/XK5Y-9X9F] (archived Jan. 24, 2016).

137. 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).

138. CHARLES PHINEAS SHERMAN, *II ROMAN LAW IN THE MODERN WORLD* 202 (2d. ed. 1924).

## 1. Afghanistan

As a non-State Party, even if one or more Americans<sup>139</sup> committed a prohibited *actus reus* within the temporal jurisdiction of the Court, there is no basis of territoriality nor of nationality to support an assertion of ICC prosecutorial prerogative for acts alleged in Afghanistan. Afghanistan deposited its instrument of ratification to the Rome Statute on February 10, 2003, which meant that the treaty entered into force for Afghanistan on May 1, 2003.<sup>140</sup> In its December 2014 Report on Preliminary Examination Activities, the OTP concluded that “[t]he ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Afghanistan or by its nationals from 1 May 2003 onwards.”<sup>141</sup> The OTP publicly disclosed its investigation into possible detainee mistreatment and abuse committed by “international forces within the temporal jurisdiction of the Court” and singled out American armed forces for further examination based on allegations of misconduct against unnamed individuals from May 2003 to June 2004.<sup>142</sup> Article 12 conveys jurisdiction over crimes committed on the territory of Afghanistan, so

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139. On 31 December 2000, which was the last day permitted by the treaty, the United States signed the Rome Statute at the direction of President Clinton. *See* Rome Statute, *supra* note 1, art. 125(1). The White House statement clarified that President Clinton ordered the signature because the United States seeks to “remain engaged in making the ICC an instrument of impartial and effective justice in the years to come.” *Statement on the Rome Treaty on the International Criminal Court* (Dec. 31, 2000), 37 WEEKLY COMP. PRES. DOC. 4 (2001), reprinted in DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2000, 272 (Sally J. Cummins & David P. Stewart eds.), <http://www.state.gov/documents/organization/139599.pdf> [perma.cc/7ULW-6TEC] (archived Jan. 24, 2016). President Clinton made clear that he would “not recommend that my successor submit the Treaty to the Senate for [ratification] until our fundamental concerns are satisfied.” In its operative paragraph, President Clinton, wrote that

In signing, however, we are not abandoning our concerns about significant flaws in the Treaty. In particular, we are concerned that when the Court comes in existence, it will not only exercise authority over personnel of States that have ratified the treaty, but also claim jurisdiction over personnel of States that have not . . . . Signature will enhance our ability to further protect U.S. officials from unfounded charges and to achieve the human rights and accountability objectives of the ICC. In fact, in negotiations following the Rome Conference, we have worked effectively to develop procedures that limit the likelihood of politicized prosecutions. For example, U.S. civilian and military negotiators helped to ensure greater precision in the definitions of crimes within the Court’s jurisdiction.

*Id.* at 273.

140. Rome Statute, *supra* note 1, art. 126(2).

141. The Office of the Prosecutor, International Criminal Court, *Report on Preliminary Examination Activities*, ¶ 76 (Dec. 2, 2014), <http://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf> [perma.cc/K2R8-UZWK] (archived Jan. 24, 2016).

142. *Id.* ¶¶ 94–96.

the OTP assumption appears to reflect a straightforward, if superficial, assessment of the Statute.

However, this view overlooks a series of jurisdictional agreements that curtailed the permissible scope of Afghani territorial jurisdiction. The Security Council authorized deployment of an Interim Security Force to Afghanistan in Resolution 1386, adopted in December 2001.<sup>143</sup> As early as January 4, 2002, the British force commander of the Interim Security Assistance Force (ISAF) negotiated and signed a comprehensive agreement with the interim government in Afghanistan.<sup>144</sup> The ISAF Agreement included an Annex entitled “Arrangements Regarding the Status of the International Security Assistance Force.”<sup>145</sup> The Annex provided, *inter alia*, that “ISAF and supporting personnel, including associated liaison personnel, will under all circumstances and at all times be subject to the exclusive jurisdiction of their respective national elements in respect of any criminal or disciplinary offences which may be committed by them on the territory of Afghanistan.”<sup>146</sup> The Annex implicitly relied on Article 98 as well by providing that all ISAF personnel are immune from arrest or detention by Afghan authorities and may not be turned over to any international tribunal or any other entity or State without the express consent of the contributing nation.<sup>147</sup> Notice the intent of the parties to make the preclusive jurisdictional effects as broad as possible by covering “all circumstances and at all times.”

This early agreement comports with the intent of Article 98 insofar as it specifically prevents non-consensual transfer.<sup>148</sup> However, given that the agreement retained its legal force and effect following Afghan accession to the Rome Statute, it represents an indivisible whole with respect to territorial jurisdiction over the nationals of non-States Parties. In other words, the scope of Afghani

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143. S.C. Res. 1386 (Dec. 20, 2001), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/708/55/PDF/N0170855.pdf?OpenElement> [perma.cc/A6CP-BX9E] (archived Feb. 7, 2016).

144. *Letter dated 14 January 2002 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council*, U.N. Doc. S/2002/117 (Jan. 25, 2002), <http://reliefweb.int/sites/reliefweb.int/files/resources/9B11C79DE13BB700C1256B5300381E4F-unsc-afg-25jan.pdf> [perma.cc/7HND-5T3K] (archived Jan. 24, 2016).

145. *Id.*

146. *Id.* ¶ 3.

147. *Id.* ¶ 4.

148. American officials later negotiated a stand-alone supplemental Article 98 agreement with Afghanistan that was signed in Washington on September 20, 2002. Agreement between the Government of the Transitional Islamic State of Afghanistan and the Government of the United States of America regarding the surrender of persons to the International Criminal Court, Transitional Islamic State-U.S., Sept. 20, 2002, <https://www.law.georgetown.edu/library/research/guides/upload/Afghanistan03-119.pdf> [perma.cc/YAP9-Q3QN] (archived Jan. 24, 2016).

territorial jurisdiction was voluntarily constrained effective January 4, 2002, and thus correspondingly curtailed when transferred to the ICC beginning in May 2003. As noted above, there is no basis in the Rome Statute for the ICC to assert that its authority over crimes committed by nationals of non-States Parties on the territory of a State Party derives from some independent or transcendent purpose that obviates the need to obtain the consent of the territorial state.

It is important to note in this context that the permanent agreement reached between Afghanistan and NATO on September 20, 2014, included nearly identical language revalidating exclusive jurisdiction to all NATO nations.<sup>149</sup> It also included explicit language noting that the permanent agreement does not “limit or prejudice the implementation” of any “bilateral Agreement or Arrangement” then in force for Afghanistan.<sup>150</sup> Many Americans deployed to Afghanistan did so under the auspices of ISAF, but many more deployed in distinctive operational lines of command and control as part of Operation Enduring Freedom (OEF).<sup>151</sup> The treaty<sup>152</sup> that applied to American personnel during OEF took the form of an exchange of diplomatic notes (thus conforming to the description above).

Afghanistan relinquished any claim to criminal jurisdiction over the nationals of the United States by accepting that they are accorded status equivalent to that accorded to the administrative and technical staff of the Embassy of the United States of America under the Vienna Convention on Diplomatic Relations of April 18, 1961.<sup>153</sup> By conveying full immunity from the criminal jurisdiction of the host nation for offenses alleged on its territory, such status (termed A&T P&I by military practitioners) is just one notch below full diplomatic

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149. Agreement between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status of NATO Forces and NATO personnel conducting mutually agreed NATO-led activities in Afghanistan, U.S.-Afg., art. 11(1), Sept. 30, 2014, [http://www.nato.int/cps/en/natohq/official\\_texts\\_116072.htm](http://www.nato.int/cps/en/natohq/official_texts_116072.htm) [perma.cc/B98K-MA2E] (archived Jan. 24, 2016) (“Afghanistan, while retaining its sovereignty, recognizes the particular importance of disciplinary control, including judicial and non-judicial measures, by NATO Forces Authorities over Members of the Force and Members of the Civilian Component and NATO Personnel. Afghanistan therefore agrees that the State to which the Member of the Force or Members of the Civilian Component concerned belongs, or the State of which the person is a national, as appropriate, shall have the exclusive right to exercise jurisdiction over such persons in respect of any criminal or civil offenses committed in the territory of Afghanistan.”).

150. *Id.* art. 24.

151. ISAF began its operations as a result of the Security Council decision, while the legal authority for coalition forces participating in Enduring Freedom originated with the sovereign right of individual and collective self-defense.

152. VCLT, *supra* note 24, art. 2(1) (defining a treaty as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”).

153. Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes art. 37(2), April 18, 1961, 23 U.S.T. 3227, T.I.A.S. 7502.

immunity enjoyed by the Ambassador upon delivery of his full powers instrument<sup>154</sup> to the sovereign government. The Vienna Convention is absolutely clear that persons enjoying A&T P&I status are fully immune from host nation criminal law for all purposes at all times and subject to limited civil immunity only for acts undertaken in their official capacity. In its reply dated December 12, 2002, the Afghan Foreign Ministry declared “its concurrence” with the curtailed scope of sovereign criminal jurisdiction.<sup>155</sup> In a second demarche dated May 28, 2003, Afghanistan reiterated its concurrence and noted that the agreement entered into force on that date pursuant to the Foreign Minister’s signature.<sup>156</sup>

The United States arguably had exclusive jurisdiction over any U.S. national alleged to have committed any cognizable criminal offense within Afghanistan as early as the December 12 “concurrence.”<sup>157</sup> There is simply no credible argument that Afghanistan had any lawful authority to prosecute American forces for any acts committed on or after May 28, 2003. Acts that were literally committed “on the territory” of Afghanistan could therefore not lawfully be delegated to the ICC based on the principle of transferred territoriality that is the bedrock of Article 12 authority over the nationals of non-States Parties. Any other reading of Article 12 would warp its entire meaning within the larger context of the Rome Statute. The consequences for the larger body of treaty norms occasioned by the OTP assumption of such power will be considered in Part IV below.

## 2. The West Bank and Gaza

The legal situation in the Occupied Territories is more controversial and, it must be said, more straightforward based on the relevant treaty texts. Officials of the PA attempted to leverage the

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154. VCLT, *supra* note 24, art. 7(1) (providing the framework for assessing the legally binding authority of persons who purport to speak on behalf of states as either producing “appropriate full powers” or when the practice of the state or from other circumstances that the “intention was to consider that person as representing the State for such purposes”).

155. Agreement regarding the Status of United States Military and Civilian Personnel of the U.S. Department of Defense Present in Afghanistan in connection with Cooperative Efforts in Response to Terrorism, Humanitarian and Civic Assistance, Military Training and Exercises, and Other Activities, U.S.-Afg., Exchange of notes September 26 and December 12, 2002 and May 28, 2003, T.I.A.S., State Dep’t No. 03-67, 2003 WL 21754316, 6192 KAV i (entered into force May 28, 2003).

156. *Id.*

157. Arié E. David, *Faits Accomplis in Treaty Conflicts*, 6 INT’L L. 88, 98 n.13 (1972) (citing the example of the Soviet government that renounced the Treaty of Brest-Litovsk in 1918 through a radio proclamation “addressed to everybody” which was in due course regarded in 1925 by a German court as “sufficient expression” that the Soviet government regarded the treaty as abrogated and invalid).

threat of ICC accession to achieve diplomatic progress towards formalized international recognition as a state. The PA delegate participated in the thirteenth meeting of the ASP as an “invited observer state” for the first time in December 2014. He challenged the Court to use its power to prosecute Israelis for “war crimes and crimes against humanity” being perpetrated in the Occupied Territories.<sup>158</sup> On December 30, 2014, Jordan introduced a draft Security Council Resolution that would have mandated a “just, lasting, and comprehensive”<sup>159</sup> negotiated settlement between Israel and Palestine that recognized mutually agreed borders of both states and mandated an end to the Israeli occupation by the end of 2017.<sup>160</sup> The Resolution failed to achieve the requisite affirmative votes, thereby avoiding the necessity for any veto by a member of the P-5.<sup>161</sup>

In response to that diplomatic defeat, the PA submitted its third declaration under Article 12(3) of the Statute for “crimes . . . committed in the occupied . . . territory, including East Jerusalem, since June 13, 2014,” on the following day.<sup>162</sup> The date chosen as the temporal beginning of ICC authority coincided with the beginning of the controversial military campaign known as Tzuk Eitan by which Israeli forces entered the Gaza Strip to root out the tunnel complexes from which Hamas continued to fire indiscriminate missiles against Israeli homes.<sup>163</sup> The PA later deposited its full instrument of ratification to the Rome Statute on January 2, 2015, which had the legal effect of transferring territorial and nationality-derived

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158. Dr. Riyad Mansour, Ambassador, Statement by the Permanent Observer Mission of the State of Palestine to the United Nations before the Assembly of State Parties to the Rome Statute of the International Criminal Court (thirteenth session) (Dec. 15, 2014), [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP13/GenDeba/ICC-ASP13-GenDeba-Palestine-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/GenDeba/ICC-ASP13-GenDeba-Palestine-ENG.pdf) [perma.cc/RT3S-DULQ] (archived Jan. 24, 2016).

159. S.C. draft Res. 916, ¶ 11 (Dec. 30, 2014), [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2014/916](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2014/916) [perma.cc/J964-9FHL] (archived Jan. 24, 2016).

160. See U.N. SCOR, 69th Sess., 7354th mtg., U.N. Doc. S/PV.7354, The Situation in the Middle East including the Palestinian question (Dec. 30, 2014), [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/PV.7354](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.7354) [perma.cc/NMF3-LQXB] (archived Jan. 24, 2016).

161. *Id.*

162. Declaration Accepting the Jurisdiction of the International Criminal Court, President Abbas of Palestine, (Dec. 31, 2014), [http://www.icc-cpi.int/iccdocs/PIDS/press/Palestine\\_A\\_12-3.pdf](http://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf) [perma.cc/QW2S-7LGL] (archived Jan. 24, 2016).

163. See, e.g., SPECIAL REPORT: OPERATION PROTECTIVE EDGE, <https://www.idfblog.com/operationgaza2014/#Home> [perma.cc/7YBS-JULH] (archived Jan. 24, 2016); Rep. of the Detailed Findings of the Independent Comm’n of Inquiry Established Pursuant to H.R.C. res. S-21/1, U.N. Doc. A/HRC/29/52 (Jun. 24, 2015), <http://www.ohchr.org/EN/HRBodies/HRC/CoIGazaConflict/Pages/ReportCoIGaza.aspx> [perma.cc/D7G9-CM8N] (archived Jan. 24, 2016).



jurisdiction in accordance with Article 12 of the Statute, effective on the date the treaty entered into force for Palestine.<sup>164</sup>

There has been a tremendous amount of academic literature dedicated to considering the validity of previous PA attempts to convey jurisdiction to the Court under Article 12(3)<sup>165</sup> and the corollary question whether it qualifies as a “state” within the meaning of that Article for the purposes of ICC accession.<sup>166</sup> It is widely known that the first ICC Prosecutor declined to accept the previous PA proffers,<sup>167</sup> but did so on a dubious legal basis. Depending upon the Court’s ultimate decision regarding the previous efforts to instantiate Court jurisdiction, ICC authority may be limited to acts committed on or after April 1, 2015,<sup>168</sup> which is the date that the Statute entered into force for Palestine.<sup>169</sup>

In any event, there are at least three evident conclusions at the time of this writing. Firstly, the General Assembly Resolution granting Palestine “non-member observer status”<sup>170</sup> paired with the acceptance of Palestine into the ASP is dispositive in interpreting the breadth of Article 12 for the purposes of its *sui generis* meaning within the Rome Statute.<sup>171</sup> Secondly, Professor Schabas is correct that there is no requirement that the territorial jurisdiction conferred

164. State of Palestine: Accession, C.N.13.2015.Treaties-XVIII.10 (Depositary Notification, Jan. 6, 2015), <https://treaties.un.org/doc/Publication/CN/2015/CN.13.2015-Eng.pdf> [perma.cc/V64R-WW7C] (archived Jan. 24, 2016).

165. See, e.g., Eugene Kontorovich, *Israel/Palestine: The ICC’s Uncharted Territory*, 11 J. INT’L CRIM. JUST. 979 (2013) (discussing the challenge of the legality of Israeli settlement on the West Bank under ICC jurisdiction); Malcolm N. Shaw, *The Article 12(3) Declaration of the Palestinian Authority, the International Criminal Court, and International Law*, 9 J. INT. CRIM. JUST. 301, 321 (2011); William Thomas Worster, *The Exercise of Jurisdiction by the International Criminal Court over Palestine*, 26 AM. U. INT’L L. REV. 1153 (2012).

166. JOHN QUIGLEY, *THE STATEHOOD OF PALESTINE: INTERNATIONAL LAW IN THE MIDDLE EAST CONFLICT* (2010); Yael Ronen, *ICC Jurisdiction over Acts Committed in the Gaza Strip*, 8 J. INT’L CRIM. JUST. 3, 6 (2010); Yuval Shany, *In Defense of Functional Interpretation of Article 12(3) of the Rome Statute*, 8 J. INT’L CRIM. JUST. 329, 338 (2010) (noting that “the Palestinian territories (with the exception of East Jerusalem) are not the object of a competing sovereignty claim by Israel or any other state, means that by accepting the PNA declaration and relying on it to investigate the situation in Gaza, the Prosecutor or the Court would not be required to decide a contentious sovereignty claim.”).

167. Situation in Palestine, ICC (April 3, 2012), <http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf> [perma.cc/FWL4-HQLY] (archived Jan. 24, 2016).

168. See Mohamed M. El Zeidy, *Ad Hoc Declarations of Acceptance of Jurisdiction: The Palestinian Situation under Scrutiny*, in *THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 179, 1999 (Carsten Stahn ed., 2015).

169. Rome Statute, *supra* note 1, art. 126(2).

170. G.A. Res. 52/164 (Nov. 29, 2012).

171. VCLT, *supra* note 24, art. 31(3)(b) (stating that the text of the treaty can be interpreted in light of “[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”).

upon the Court by ratification or accession is limited to territory over which a State exercises effective control at the time of accession.<sup>172</sup> The key issue is sovereignty along with its correlative power to enforce criminal law or to delegate that enforcement to another state or entity. The precise boundaries of Palestine are indeterminate at the time of this writing. It follows that even if the PA possessed the authority to transfer territorial jurisdiction to the ICC the scope of that authority is opaque. Indeed, in the wake of the Oslo Accords, both parties involved and the International Court of Justice have avoided resolution of “permanent status issues such as borders.”<sup>173</sup> The OTP cannot possibly ascertain the precise geographic boundaries of authoritative territorial jurisdiction transferred to the Court under Article 12. Finally, and most importantly, the transferred territorial jurisdiction of the ICC cannot be extended over Israeli citizens because the PA has neither *de facto* nor *de jure* authority to claim such criminal jurisdiction in its own right.

The law of occupation under the Fourth Geneva Convention and the plain text of the Oslo Accords provide incontrovertible grounds for denying Palestinian sovereignty over Israeli nationals in the Occupied Territories of the West Bank and the Gaza Strip. Israel has treated the Occupied Territory within the mandates of the laws and customs of occupation since 1967. The 1949 Geneva Conventions marked a definitive rejection of the concept of *debellatio*, under which the occupier assumed full sovereignty over the civilians in the occupied territory.<sup>174</sup> A state of occupation does not “affect the legal status of the territory in question,”<sup>175</sup> hence its cornerstone is the broad obligation that the foreign power must “take *all* the measures in his power to restore, and ensure, as far as possible, public order

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172. SCHABAS, *supra* note 33, at 285 (noting the theoretical possibility that Syrian accession to the Rome Statute could convey territorial jurisdiction over the Golan Heights because overall sovereignty is merely displaced by Israeli occupation).

173. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 177–81 (July 9), *reprinted in* 43 I.L.M. 1009, 1038–39 (2004), [http://www.icj-cij.org/docket/index.php?p1=3&\[perma.cc/8X2S-WJRJ\]](http://www.icj-cij.org/docket/index.php?p1=3&[perma.cc/8X2S-WJRJ]) (archived on Jan. 24, 2016).

174. MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 600–01 (1959). *Debellatio* “refers to a situation in which a party to a conflict has been totally defeated in war, its national institutions have disintegrated, and none of its allies continue militarily to challenge the enemy on its behalf.” EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 59 (1993).

175. Protocol I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144 Annex I, art. 4, (entered into force Dec. 7, 1978), *reprinted in* 16 I.L.M. 1391 (1977). U.S. policy in this regard is clear that “the fact of occupation gives the Occupying Power the right to govern enemy territory temporarily, but does not transfer sovereignty of occupied territory to the Occupying Power.” DOD LAW OF WAR MANUAL, *supra* note 48, 752, ¶11.4.

and safety.”<sup>176</sup> While the Supreme Court of the Netherlands has noted that Israel does not have sovereign authority over the Occupied Territory, it has upheld Israeli criminal jurisdiction over offenses committed therein.<sup>177</sup> In the authoritative French text, the occupier must preserve “*l’ordre et la vie publique*” (i.e., public order and life).<sup>178</sup> The corresponding duty found in Article 43 of the 1907 Hague Regulations to respect local laws unless “absolutely prevented” (“*empêchement absolu*”) imposes a seemingly categorical imperative. However, rather than being literal, “*empêchement absolu*” has been widely interpreted as the equivalent of “*nécessité*.”<sup>179</sup> Israeli law applies to Israeli public servants, both civilian and military, for acts committed within the Occupied Territories.<sup>180</sup>

From the outset of the occupation, Israeli military authorities exercised full authority over the criminal system in the Occupied Territories<sup>181</sup> and have updated guidance to local commanders as needed.<sup>182</sup> The Oslo Accords recognize the full “legislative, executive, and judicial” authority of the Israeli military government “in accordance with international law.”<sup>183</sup> The Israeli Supreme Court sitting as the High Court of Justice held that “[a]s is well known, Article 43 has been acknowledged in our rulings as a quasi-constitutional framework maxim of the belligerent occupation laws, which sets a general framework for the manner by which the military commander exercises its duties and powers in the occupied territory.”<sup>184</sup> The law of occupation “sets out the duty and power of the military commander to maintain order and security in the territory under his control. There is no doubt that one of the main

176. Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex, art. 43, Oct. 18, 1907 (emphasis added).

177. HR 9 juni 2015, ECLI: NL: PHR: 2015: 967 (Neth.), <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:2015:967> [perma.cc/2S2W-7T9Q] (archived Feb. 7, 2016).

178. The authoritative French text reads: “L’autorité du pouvoir legal ayant passé de fait entre les mains de l’occupant, celui-ci prendra toutes les mesures qui dependent de lui en vue de rétablir et d’assurer, autant qu’il est possible, l’order et la vie publique end respectant, sauf empechement absolu les lois en virueur dans le pays.”

179. Yoram Dinstein, Legislation under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding, No. 1, *Program on Humanitarian Policy and Conflict Research*, Harvard University Occasional Paper Series 4 (Fall 2004).

180. DAVID KRETZMER, THE OCCUPATION OF JUSTICE 20–29 (2002).

181. Order Concerning Security Provisions (Judea and Samaria) 5727–1967.

182. Order regarding Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651), 5770–2009, May 2, 2010, <http://nolegalfrontiers.org/en/military-orders/mil01> [perma.cc/TP8H-KCAH] (archived Jan. 24, 2016).

183. Interim Agreement on the West Bank and the Gaza Strip, Isr.-Palestine, art. XVII 4(b), Sept. 28, 1995, 36 I.L.M. 551 (1997) [hereinafter Oslo II], <http://www.refworld.org/docid/3de5ebbc0.html> [perma.cc/3P7F-D28F] (archived Jan. 24, 2016).

184. HCJ 2164/09, Yesh Din v. Commander of IDF Forces in Judaea and Samaria, et. al (Dec. 26, 2011) (Isr.).

duties for which the military commander is responsible within this framework is the duty to ensure that the law is upheld in the territories.”<sup>185</sup> Palestinian criminal jurisdiction thus does not include Israeli citizens in the Occupied Territories under the laws and customs of warfare.<sup>186</sup>

While the Geneva Conventions preempt Palestinian jurisdiction over Israelis as a general matter, the plain text of the Oslo Accords does so with unmistakable precision. Under the 1995 Accords, “Israel has sole criminal jurisdiction over . . . offenses committed in the Territory by Israelis.”<sup>187</sup> The Accords specify that the West Bank and Gaza Strip constitute a “single territorial unit.”<sup>188</sup> Israeli citizens cannot be arrested or detained by Palestinian authorities.<sup>189</sup> Neither Israel nor the PA has abrogated the Accords, and Palestinian judges that have attempted to exercise criminal authority over Israelis following the General Assembly’s acceptance of Palestine as a “non-member observer state” have been removed from office by PA orders. Security cooperation also continues in accordance with the terms of Oslo II. The language of Article XVII, para. 2(a) is particularly relevant in the context of a purported transfer of territorial jurisdiction to the ICC: “The territorial jurisdiction of the Council shall encompass Gaza Strip territory, except for the Settlements and the Military Installation Area shown on map No. 2, and West Bank territory, except for Area C which, except for the issues that will be negotiated in the permanent status negotiations will be gradually transferred to Palestinian jurisdiction in three phases . . . .”<sup>190</sup> Annex IV of the Accords reiterates this division of jurisdiction on the West

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185. H CJ 9593/04, Rashed Morar, Head of Yanun Village Council v. IDF Commander in Judaea and Samaria, 2 Isr. L. Rep. 56, ¶ 30 (June, 26 2006); *see also* H CJ 9132/07, Jaber Al-Bassiouni Ahmed et. al. v. Prime Minister et.al. ¶ 12 (Jan. 27, 2008) (Isr.) (holding that Israeli officials must comply with human rights imperatives).

186. UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT 275, ¶ 11.3 (2004).

187. Oslo II, *supra* note 183, Annex IV, Art. 1(2)(b), <http://www.mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/THE%20ISRAELI-PALESTINIAN%20INTERIM%20AGREEMENT%20-%20Annex%20IV.aspx#article1> [perma.cc/8RCH-6TFF] (archived Jan. 24, 2016) (Article 7b of the Annex also specifies that Israel has jurisdiction in the Occupied Territory over crimes committed against Israel or against Israeli citizens); GEOFFREY R. WATSON, THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS (2000).

188. Oslo II, *supra* note 183, Article XVII, ¶ 1.

189. This provision alone arguably makes the textual mandate of Article 98 binding upon the Court, as no Palestinian official has authority to hold or detain any Israeli, much less authority to transfer non-existent criminal jurisdiction to any other state or entity. As noted above, however, jurisdiction under Article 12 is a distinctive issue from the limitation on the right of a State Party to transfer a particular perpetrator envisioned under Article 98.

190. West Bank: Area C Map, UN OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, [https://www.ochaopt.org/documents/ocha\\_opt\\_area\\_c\\_map\\_2011\\_02\\_22.pdf](https://www.ochaopt.org/documents/ocha_opt_area_c_map_2011_02_22.pdf) [perma.cc/9CW6-RN4X] (archived Jan. 24, 2016).

Bank as follows: Areas A (full Palestinian control), B (Palestinian civil control and joint Palestinian-Israeli security control), and C (full Israeli civil and security control, except over Palestinians). Area C includes the settlements, their environs, and roadways.

Crimes committed by Israelis in Occupied West Bank or the Gaza Strip are, under Oslo, solely Israel's to investigate and try. Every treaty imposes binding obligations only upon the "parties to it," and accordingly it imposes obligations and bestows rights that "must be performed by them in good faith."<sup>191</sup> Notwithstanding the import of the *pacta sunt servanda* principle noted above, no Palestinian official has proffered a public explanation justifying the authority of the PA to delegate territorial authority over Israeli citizens in the Occupied Territory to the ICC.

### III. THE PROSECUTOR'S APPROACH UNDERMINES THE ROME STATUTE ITSELF

This Article has thus far demonstrated the intellectual dissonance between the derivative nature of ICC jurisdiction and the assumption that it can disregard treaties by which both Afghanistan and Palestine limited the quantum of their territorial jurisdiction. The balance of the adjudicative authority between the supranational Court and states is the bridge that bears the entire weight of the enterprise. The Court's long-term viability, and its fidelity to the object and purpose of the Statute, depends upon sustaining a cooperative synergy with domestic jurisdictions, whether or not they are States Parties.

The Court has no articulable basis for asserting an independent claim to jurisdiction outside the scope of the Rome Statute. If the Court is properly seized with jurisdiction, the intentions of states are irrelevant to the disposition of any particular case.<sup>192</sup> Conversely, States Parties cannot unilaterally empower the Court to disregard grants of exclusive jurisdiction to another state absent a waiver of jurisdiction by that state. Neither Afghanistan nor Palestine had any right to assert jurisdiction over Americans or Israelis respectively; neither had an ability to transfer territorial jurisdiction over all perpetrators on their territory.

States Parties cannot modify their jurisdictional treaties through a multilateral treaty that operates to disadvantage other states that

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191. VCLT, *supra* note 24, art. 26.

192. See *Right of Passage over Indian Territory* (Port. v. India), Preliminary Objection, 1957 I.C.J. Rep. 125 (Nov. 26); *Fisheries Jurisdiction Case* (U.K. v. Ice.), 1973 I.C.J. Rep. 3 (Feb. 2).

are not direct parties to that treaty.<sup>193</sup> International law embeds a long-standing premise that violations by one party do not ipso facto invalidate the underlying treaties.<sup>194</sup> Afghanistan and Palestine subverted the sovereign right to exercise exclusive personal jurisdiction by purportedly transferring territoriality to the Court. The United States or Israel could theoretically cite the act of accession as the basis for exiting the earlier treaties based on the breach by the other party. However, Afghanistan did not treat its ratification of the Rome Statute as a repudiation of its SOFA agreements, nor has Palestine in any way indicated its withdrawal from the Oslo Accords. All of the relevant entities continue to regard the jurisdictional allocations as binding.

The preceding raises the obvious question: Why should transferred territoriality operate to defeat the diplomatic desires of all the parties to the earlier agreements? The language of Article 12 is not literal because the territorial jurisdiction asserted by the Court is constrained by the actual legal authority transferred from States Parties rather than all-encompassing. As noted above, the transfer of territorial jurisdiction does not necessarily imply an indivisible scope of authority for the supranational court. The ICC does have territorial jurisdiction over perpetrators on the soil of Afghanistan and Palestine (assuming there is concrete agreement on the borders subject to such jurisdiction). However, the purported conveyance of territorial jurisdiction over nationals of those non-States Parties covered by the relevant treaties was *ultra vires* and therefore without legal effect. It follows that, for the purposes of military deployments, when receiving states routinely allocate exclusive jurisdiction over nationals of sending states, the Court cannot unilaterally assert that “there are reasonable grounds to believe that a person has committed a crime within the jurisdiction of the Court” over the nationals of non-States Parties covered by those SOFAs.

The situations in Afghanistan and Palestine will transform the Court’s institutional arc. The paradox is that the very claims of authority and prosecutorial power in principle may well lead to decreased Court authority and prosecutorial effectiveness in practice. It is appropriate to speak of the “Court” because jurisdictional decisions by the OTP will be reviewed by the Pre-Trial<sup>195</sup> and Appeals Chambers.<sup>196</sup> The appropriate power of the OTP will be

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193. Quincy Wright, *Conflicts Between International Law and Treaties*, 11 AM. J. INT’L L. 566, 568 (1917).

194. LASSA FRANCIS LAWRENCE OPPENHEIM, I OPPENHEIM’S INTERNATIONAL LAW § 165, at 547 (H. Lauterpacht ed., 6th ed. 1947).

195. Rome Statute, *supra* note 1, art. 19(1) (“The Court shall satisfy itself that it has jurisdiction in any case brought before it.”); Prosecutor v. Kony et. al., ICC-02/04-01/05-377, Decision on the admissibility of the case under article 19(1) of the Statute (Mar. 9, 2009) (asserting that the Court will have the “last say” over its jurisdiction).

196. Rome Statute, *supra* note 1, art. 82.

sustainable only with relationships grounded in authentic partnership with sovereign authorities. When a supranational Court attempts to unilaterally repudiate the agreements of sovereign states, it may well generate noncooperation by many states. Former UN Secretary General Dag Hammarskjöld wrote, “There is a point at which everything becomes simple and there is no longer any question of choice, because all you have staked will be lost if you look back. Life’s point of no return.”<sup>197</sup> The controversies sure to arise over the situations in Palestine and Afghanistan will be emblematic data points for all other cases and controversies.

It would also be ironic if the quintessential function of a Court (in this instance, interpreting and applying the scope of its lawful jurisdiction) reignites the undercurrent of contention over this supranational Court’s legitimacy. The Court does not have a “completely free hand” in interpreting its jurisdictional scope because it cannot “acquire a law-making capacity through its *compétence de la compétence*.”<sup>198</sup> The Court will no doubt be under intense political pressures to assert jurisdiction over Americans in Afghanistan and over Israelis. The tension is between the politicized exploitation of the jurisdictional boundaries enunciated in Article 12 and the need to disprove the lingering undercurrent of distrust amongst the political classes of non-States Parties. The residual ambiguity in Article 12 epitomizes what President Clinton termed “significant flaws in the Treaty.”<sup>199</sup> At the same time, Court supporters vehemently fought for an independent *proprio motu* power in a Prosecutor designed to operate above the fray of international politics.<sup>200</sup> Limiting the likelihood of politicized prosecutions was a core American negotiating objective. The desire to prevent “unfounded charges” and “achieve the human rights and accountability objectives of the ICC” while limiting the “likelihood of politicized prosecutions” ought to be shared by every nation.<sup>201</sup> Apart from the very design of the treaty discussed in detail above, this Part closes with two additional considerations that should prevent supranational re-invention of territorial jurisdiction where none actually exists.

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197. DAG HAMMARSKJÖLD, MARKINGS 66 (Leif Sjöberg & W.H. Auden trans., 1965).

198. MICHAEL VAGIAS, THE TERRITORIAL JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT 88 (2014).

199. Statement on the Rome Treaty on the International Criminal Court (Dec. 31, 2000), 37 WEEKLY COMP. PRES. DOC. 4 (Jan. 8, 2001), reprinted in DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2000, *supra* note 139, at 272.

200. SCHABAS, *supra* note 33, AT 315–20; Morten Bergsmo & Jelena Pejić, Article 15, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES ARTICLE BY ARTICLE 581–85 (Otto Triffterer ed., 2d. 2008).

201. Statement on the Rome Treaty on the International Criminal Court, *supra* note 199, at 273.

### A. Protecting a Perpetrator's Human Rights

The Court is designed from the ground up to respect the human rights of potential perpetrators. The due process rights of perpetrators are protected throughout the Statute in ways that often tilt the interpretive balance away from the Chambers and the Prosecutor. In the event of a change in the law applicable to a given case prior to a final judgment, the law “more favourable to the person being investigated, prosecuted or convicted shall apply.”<sup>202</sup> Moreover, the precept *nullem crimen sine lege* prevents jurisdiction absent judicial determinations that “the conduct in question constitutes, **at the time it takes place**, a crime within the jurisdiction of the Court” (emphasis added).<sup>203</sup> The corollary to this foundational human rights tenet requires the presumption that conflicting interpretations of any rule arising in the context of trial must be resolved *favor rei*.<sup>204</sup> In the *Bashir* case, Pre-Trial Chamber I recognized that the substantive scope of the Rome Statute “fully embraces the general principle of interpretation *in dubio pro reo*.”<sup>205</sup> Phrased another way, if the evidence at trial must be evaluated in the light most favorable to the defendant, as must the specific substantive content of the charges,<sup>206</sup> why would jurisdiction be any different from a human rights perspective? The idea that a perpetrator can be charged for acts that are subject to prosecution in a forum that deprives the rightful sovereign entity of jurisdiction and substitutes differing legal standards and procedures than at the time of commission should be anathema from a human rights perspective.

In this light, it is worth recalling that the centrality of treaty agreements to deprive a host state of territorial jurisdiction springs from the desire to protect the due process rights of accused persons.<sup>207</sup> This principle is ubiquitous in military operations, to

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202. Rome Statute, *supra* note 1, art. 24(2).

203. *Id.* art. 22(1) (emphasis added).

204. *Nullum Crimen Sine Lege*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 438, 440 (Antonio Cassese ed., 2009).

205. See The Prosecutor v. Al Bashir, ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, ¶ 156 (Mar. 4, 2009), <https://www.icc-cpi.int/iccdocs/doc/doc1759849.pdf> [<https://perma.cc/C68T-ZNB4>] (archived Feb. 18, 2016).

206. Rome Statute, *supra* note 1, art. 22(2) (“The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.”).

207. John D. Negroponte, Remarks at Stakeout Following UN Security Council Vote on Resolution 1422 (July 12, 2002), <http://2001-2009.state.gov/p/io/rls/rm/2002/11846.htm> [[perma.cc/KZA2-J9D7](https://perma.cc/KZA2-J9D7)] (archived Feb. 7, 2016) (“The American system of justice can be trusted to punish crimes, including war crimes or crimes against humanity, committed by an American—and we pledge to do so. But we do not believe the International Criminal Court contains sufficient safeguards to protect our



include UN peacekeeping and peace enforcement operations. Deployed forces should enjoy the liberty to focus on their mission rather than fear politicized prosecution in the domestic forums of other nations using unfamiliar procedures and foreign tongues. Treaty provisions that confer exclusive jurisdiction on a sending state also prevent the receiving state from transferring jurisdictional authority to a third state, which in turn necessarily precludes transfer to a supranational jurisdiction. Such proceedings in other forums that go beyond the lawful authority of the receiving state could well represent judicial extension of hostilities, akin to asymmetric warfare.

For much the same reason, all ICC personnel are accorded “immunity from legal process of every kind” from the territorial jurisdiction of States Parties “in respect of words spoken or written and acts performed by them in their official capacity.”<sup>208</sup> Imagine the protestations that would arise from the Court if a State Party entered into a subsequent agreement to transfer jurisdiction over Court personnel despite the textual preclusion in the Rome Statute. Similarly, the principle of *ne bis in idem* included in Article 20 does not permit the Court to try a person “who has been tried by another court for conduct also proscribed” unless it was not a genuine trial.<sup>209</sup> In sum, these provisions mean that when the due process rights of perpetrators are preserved by treaty arrangements specifically accepted by two states to preserve the domestic jurisdiction of one state over crimes committed by its nationals on the territory of another state, the Court interposes its limited authority only at the expense of the due process protections negotiated by the sending states.

#### B. *Intentional Integration in lieu of Creating a Special (Self-Contained) Regime*

The object and purpose of the Statute models shared rights and responsibilities by which the Court synergizes with domestic prosecutors. Decisions by the OTP that invalidate jurisdictional arrangements between sovereign states and operate to deprive states of their criminal jurisdiction undermine the very *raison d'être* of the institution. The field of international criminal law is emphatically not the exclusive province of supranational tribunals like the ICC because domestic courts are “formally distinct, but substantively intertwined mechanisms that pursue a common goal: the

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nationals, and therefore we can never in good conscience permit Americans to become subject to its authority.”)

208. Rome Statute, *supra* note 1, art. 48(2).

209. *Id.* art. 20.

enforcement” of crimes defined under international law.<sup>210</sup> The Statute Preamble notes that “the most serious crimes of concern to the international community must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level.”<sup>211</sup> It amplifies the argument with the admonition in Preambular paragraph 6 that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”<sup>212</sup>

Roger Clark once observed that this paragraph operates as a “sort of Martens clause,”<sup>213</sup> which “insists that just because” some crimes are not dealt with by the ICC “does not mean that there is now impunity for them.”<sup>214</sup> The Statute recognizes and respects healthy interfaces between the Court and sovereign jurisdictions that are obligated to prosecute offenses when those crimes fall outside the jurisdiction of the Court. The entire fabric of the Statute compels the conclusion the Court was not intended to subsume all other forms of jurisdiction by virtue of its exclusivity as a regime within international law. Hence, a jurisdictional finding under Article 12(2)(a) that relies upon the premise that the ICC has inherent authority to negate domestic jurisdiction would undermine the actual object and purpose of the Rome Statute.

To conclude this Part, the Rome Statute does not create such an isolated (or self-contained) regime based on its text or its relationship to the general principles of international law. The ILC Study on Fragmentation highlighted the reality that “whole fields of functional specialization . . . are described as self-contained . . . in the sense that special rules and techniques of interpretation are thought to apply.”<sup>215</sup> Quite apart from the complementarity framework as

210. Florian Jessberger, *International v. National Prosecution of International Crimes*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 208 (Antonio Cassese ed., 2009).

211. Rome Statute, *supra* note 1, Preamble ¶ 4.

212. *Id.* Preamble ¶ 6.

213. See, e.g., Preamble to The Hague Regulations Concerning the Laws and Customs of War on Land, July 29, 1899 [hereinafter Martens Clause]. The so-called Martens Clause appeared in the Preamble to the 1899 Hague Regulations and is substantially replicated in the Preamble to the 1907 Hague Regulations, the 1949 Geneva Conventions, the Preamble of Additional Protocol II, and Article 1(2) of Additional Protocol I. It states: “[u]ntil a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.”

214. OTTO TRIFFTERER, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES ARTICLE BY ARTICLE 13 (2008).

215 ILC Fragmentation Study, *supra* note 18, ¶ 129 (including examples in investment law, the law of the sea, human rights law, WTO law, EU law, humanitarian law, space law, energy law, etc.).

augmented by Article 98, the Statute incorporates the notion of distributed domestic enforcement with a textual “Rule of specialty.”<sup>216</sup> Article 101 provides that anyone “surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.”<sup>217</sup> This is one reason why the Prosecutor must “notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned” before proceeding with an investigation based on her/his own authority.<sup>218</sup>

States have the opportunity both to challenge the Court’s jurisdiction<sup>219</sup> and to validate their own right to extradition<sup>220</sup> in particular cases. The predominate role of consent-based jurisdiction, combined with the power of complementarity, mean that the Court does not have discretion to invent its own *sui generis* jurisdictional principles. The object and purpose of the Rome Statute is to create and sustain a supranational institution that operates in conjunction with the domestic judicial systems of states around the world to minimize or (ideally) eliminate the ability of perpetrators to commit acts of genocide, war crimes, and crimes against humanity with no fear of criminal sanction. Framed another way, nothing in the text of the Statute or the negotiating history compels the conclusion that the Court operates as a specialized judicial mechanism whose institutional interests trump any competing domestic domain.

Secondly, as a natural extension of the foregoing, when any expert thinks of the field of “international criminal law,” the Court is a necessary component, but not the exhaustive exemplar. The ILC noted that “no self-contained regime is a ‘closed legal circuit.’”<sup>221</sup> “While a special/treaty regime has (as *lex specialis*) priority in its sphere of application, that sphere should normally be interpreted in the way exceptions are, that is, in a limited way.”<sup>222</sup> The ILC specifically noted that general rules of international law supplement any treaty-based regime “to the extent that no special derogation is provided or can be inferred from the instrument(s) constituting the regime.”<sup>223</sup> Article 21 of the Rome Statute mirrors this tenet by specifically requiring the Court to apply “where appropriate, applicable treaties and the principles and rules of international law”

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216. Rome Statute, *supra* note 1, art. 101.

217. *Id.* art. 101(1).

218. *Id.* art. 18(1).

219. *Id.* art. 19(2).

220. *Id.* art. 90.

221. ILC Fragmentation Study, *supra* note 18, ¶ 142.

222. *Id.* ¶ 152(3).

223. *Id.* ¶ 152(2).

as well as “general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute.”<sup>224</sup>

Nothing in the Rome Statute provides for derogation from the principle *nemo plus iuris transferre potest quam ipse habet*. Neither is there a textual basis for requiring ICC prosecution of perpetrators that fall within domestic jurisdictions. Multinational corporations cannot improve their actual jurisdictional position by leveraging corporate subsidiaries based abroad to capitalize upon otherwise non-applicable conventions.<sup>225</sup> In like manner, no State Party can transfer territorial jurisdiction to the Court that it has already surrendered by other agreements. Absent a finding that the exclusive jurisdiction of a sending state guarantees impunity in violation of *jus cogens* norms, the Court must respect the underlying treaty-based jurisdictional allocation.

#### IV. ADVERSE IMPLICATIONS FOR THE LARGER LAW OF TREATIES

Normative shifts in the legal structures for regulating interstate conduct never develop as a *tabula rasa*, nor do they march with the linear certainty of mathematical extrapolation or algebraic formulae. Law does not appear in a vacuum. The attempt by the OTP to disregard treaty-based jurisdictional arrangements between states will provide an important barometer for the developing law of treaty conflicts. If international law functions as an integrated system in accordance with the ILC view, treaty norms adapt to shifting contexts and emerging challenges. Nevertheless, states do not construct treaty obligations in isolation because treaty norms establish state expectations and shape correlative rights. Parties to treaties therefore normally express their intentions regarding actual or perceived conflicts between treaty provisions precisely because of shifting valuations and the inevitable tide of technological innovation and political interaction. The Rome Statute expressly acknowledges the duty of the Court to interpret the Statute in conformity with the larger body of treaty norms.

Expansion of ICC authority under Article 12 would strike a discordant chord in the larger dance of international treaty design.

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224. Rome Statute, *supra* note 1, art. 21(1).

225. *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, Award, 41 I.L.M. 867 ¶ 24 (2002) (“[I]f Mihaly (Canada) had a claim which was procedurally defective against Sri Lanka before ICSID because of Mihaly (Canada)’s inability to invoke the ICSID Convention, Canada not being a Party thereto, this defect could not be perfected *vis-a-vis* ICSID by its assignment to Mihaly (USA).”).

The relationship between the Rome Statute and other treaties needs to be clarified because the Rome Statute is silent on any preclusive effect. Unlike the Terrorist Bombing Convention, for example, the Rome Statute contains no express clause that modifies the substantive content or legal effect of bilateral extradition treaties.<sup>226</sup> Neither does it contain any presumption of automatic superiority akin to Article 103 of the UN Charter by which the obligations of states under the UN Charter “prevail” over “any other international agreement” that conflicts with the Charter.<sup>227</sup> Nor have States Parties concluded any agreements to modify the effects of earlier jurisdictional allocations either between themselves or *vis-à-vis* non-States Parties.<sup>228</sup> Absent any hint that Afghanistan or Palestine intended to abrogate earlier jurisdictional treaties or suspend their operation, the *default* approach across divergent fields of international law is to seek interpretations that harmonize the two sets of treaties.<sup>229</sup> An imposed abrogation of the underlying treaties by the OTP or the Pre-Trial Chambers would represent a definitive rejection of the precept that the Rome Statute should “be interpreted as producing, and intended to produce effects in accordance with existing law and not in violation of it.”<sup>230</sup> This is, after all, precisely what Article 21 of the Rome Statute purports to require. As a matter of transnational treaty practice, it would be extraordinary for a supranational court to simply infer the intent of parties to abrogate earlier agreements by virtue of accession to the subsequent multilateral treaty.

At a minimum, if it became the accepted norm of transnational practice, the OTP policy would contravene key provisions of the VCLT.<sup>231</sup> The Court has been clear to date that the “interpretation of treaties, and the Rome Statute is no exception, is governed by the VCLT, specifically the provisions of Articles 31 and 32.”<sup>232</sup> The VCLT

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226. International Convention for the Suppression of Terrorist Bombings, art. 9, 2149 U.N.T.S. 256, G.A. Res. 52/164, U.N. Doc. A/RES/52/164 (Dec. 15, 1997) (noting that the provisions of all extradition treaties and arrangements between States Parties with regard to offenses set forth in article 2 shall be deemed to be modified as between State Parties to the extent that they are incompatible with this Convention).

227. U.N. Charter, art. 103.

228. VCLT, *supra* note 24, art. 41.

229. See *P. Kadi and Al Barakaat International Foundation v. Council and Commission*, Case C-402/05 P & C-415/05 ECR I-6351 (2008); *SD Myers Inc. v. Canada (US-Canada)*, 40 I.L.M. 1408 (2000) (NAFTA/UNCITRAL tribunal); *SPP (ME) v. Egypt*, Case No. ARB/84/3, 19 Y’Book Commercial Arbitration 51 (1994).

230. *Case Concerning the Right of Passage over Indian Territories (Portugal v. India)*, Preliminary Objection, ICJ Rep. 52 (1952).

231. VCLT, *supra* note 24.

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

contains few genuine treaty innovations and largely refines extant customary international law.<sup>233</sup> The vast majority of its precepts are grounded in widely accepted international practice.<sup>234</sup> In submitting the VCLT to the U.S. Senate for its advice and consent, President Nixon noted the treaty's benefits in providing "clear, well defined, and readily accessible rules of international law applicable to treaties."<sup>235</sup> The general rules of treaty interpretation prescribed by VCLT Article 31 mean that the phrase "on the territory of which the conduct occurred" found in Article 12(2)(a) of the Rome Statute must be interpreted by the Court in light of the "object and purpose" of the Rome Statute. ICC case law indicates that the "purpose" should be gleaned from "the wider aims of the law as may be gathered from its preamble and the general tenor of the treaty."<sup>236</sup> Similarly, the Appeals Chamber has made plain that "supplementary means of interpretation," to include the *travaux préparatoires* may well provide the dispositive meaning to guide ICC practice under the Rome Statute in accordance with VCLT Article 32.<sup>237</sup>

There are no indications in either the text or negotiating history of the Rome Statute that its provisions should be interpreted in a manner that would impede accountability of perpetrators under domestic law when merited (as exemplified in the Admissibility regime); predictably undermine international peace and security (by dissuading states from entering into Peacekeeping Operations

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2006), <https://www.icc-cpi.int/iccdocs/doc/doc183558.pdf> [<https://perma.cc/L5AZ-WDQ4>] (archived Feb. 27, 2016).

233. In particular Article 66, by which certain disputes may be transferred to the authority of the International Court of Justice was the subject of many state reservations and is not declaratory of established customary international law.

234. See, e.g., RICHARD K. GARDINER, *TREATY INTERPRETATION* 5–50 (2008) (describing the acceptance of the Vienna Convention Rules on treaty interpretation as "virtually axiomatic" and detailing the wide range of courts and tribunals that have applied them as reflective of the customary international law norm); Jeremy Telman, *Medellin and Originalism*, 68 MD. L. REV. 377, 417–18 (2009) (describing the Vienna Convention on the Law of Treaties and the degree to which it has been recognized as embodying principles of customary international law, both internationally and in U.S. courts). But see Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. IN'L L. 431, 474–75 (2004) (raising independent concerns about the ability of the Vienna Convention to bind American judges).

235. Letter of Transmittal of the Vienna Convention on the Law of Treaties from the White House to the United States Senate (Nov. 22, 1971) 11 I.L.M. 234 (1972). The State Department specifically noted that the Vienna Convention would contribute significantly to the "stability of treaty relationships" because it was (and largely remains) "the authoritative guide to current treaty law and practice." *Id.*

236. See *Situation in the Democratic Republic of the Congo*, ICC-01/04, at ¶33.

237. See *Prosecutor v. Katanga*, ICC-01/04-01/07-522, Judgment on the appeal of Mr. Germain Katanga Against the Decision of Pre-Trial Chamber I Entitled "Decision on the Defense Request Concerning Languages", ¶¶ 37, 50, 51–55 (May 27, 2008) (holding that the Pre-Trial Chamber erred as it "did not comprehensively consider the importance of the fact that the word "fully" is included in the text, and the article's full legislative history" and "The fact that this standard is high is confirmed and further clarified by the preparatory work of the Statute, to which the Appeals Chamber turns under article 32 of the Vienna Convention on the Law of Treaties").

because the UN Standard Agreement is invalid in the ICC); or undermine the due process rights of perpetrators (by preventing states from negotiating SOFA provisions designed to protect those rights). Thus, the text of Article 12(2)(a), when read in light of the tenets of VCLT Articles 31 and 32, should lead the Court to preserve the binding nature of SOFA provisions because the intent of the parties, subsequent state practice, and the relevant rules of international law are all aligned.

Because States have the “primary responsibility for investigating and prosecuting” ICC crimes, Pre-Trial Chamber I held that the “Statute cannot be interpreted as permitting a State to permanently abdicate its responsibilities by referring a wholesale of present and future criminal activities comprising the whole of its territory, without any limitation whether in context or duration. Such an interpretation would be inconsistent with the proper functioning of the principle of complementarity.”<sup>238</sup> In other words, ICC precedent already indicates that the best interpretation of Article 12(2)(a) is one that best preserves a healthy synergy between domestic jurisdictions and the territorial scope of ICC power.

Furthermore, there is nothing whatsoever in the negotiating history of the Rome Statute or its accepted text that indicates any intention to upend the established precepts of the VCLT. Of particular relevance to the OTP action, Article 30(4)(b) expressly provides the default rule for situations such as the attempt to impose multilateral treaty obligations to non-States Parties.<sup>239</sup> The Convention specifies that “When the parties to the later treaty do not include all the parties to the earlier one . . . as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.”<sup>240</sup> In other words, the Court cannot unilaterally extend the Rome Statute to cover nationals of the United States or Israel in violation of prior bilateral treaties because they are not States Parties to the Rome Statute. In both instances, the default rule of Article 30 requires that the legal duties owed by the states to each other flow from their binding bilateral treaties that specifically allocate personal jurisdiction. Framed slightly differently, under the Vienna Convention framework, the *lex specialis* of the bilateral jurisdictional arrangements takes precedence over the broader

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238. See Prosecutor v. Mbarushimana, ICC-01/04-01/10-451, Decision on the “Defense Challenge to the Jurisdiction of the Court”, ¶ 21 (Oct. 26, 2011), <https://www.icc-cpi.int/iccdocs/doc/doc1252321.pdf> [<https://perma.cc/KH6Q-XXRS>] (archived Feb. 27, 2016).

239. VCLT, *supra* note 24, art. 30(4)(b).

240. *Id.* art. 30(4). As one commentator has noted, Article 30 only applies to specifically delineated circumstances, which makes it “a necessary, but incomplete, response to treaty conflicts.” Borgen, *supra* note 17, at 450.

obligation of only one state arising from the more general multilateral treaty that also allots criminal jurisdiction.<sup>241</sup>

Similarly, Article 54(b) of the Convention requires that states cannot simply release themselves at will from binding legal obligations.<sup>242</sup> As Emer de Vattel noted in 1758, it is a

settled point of natural law, that he who has made a promise to any one, has conferred upon him a real right to require the thing promised, -- and consequently, that the breach of a perfect promise is a violation of another's rights, and as evidently an act of injustice, as it would be to rob a man of his property. The tranquility, the happiness, the security of the human race, wholly depend on justice – on the obligation of paying a regard to the rights of others.<sup>243</sup>

Article 54 was adopted by a vote of 105 votes to none and reflects a commonsense extension of the *pacta sunt servanda* principle that preserves the “principle of the sovereignty of States which remain masters of their treaties.”<sup>244</sup> The ICC ought not lightly cast aside such well-established tenets of treaty law. The current OTP policy reflects institutional tunnel vision that damages the larger debates over treaty-based rights and duties.

This Part concludes with two pragmatic warnings if the Court invalidates the underlying jurisdictional treaties on its own authority by superimposing the Rome Statute as the pinnacle of a newly created treaty hierarchy.

#### *A. Disadvantages of a Purely Formalist Approach*

Experts have noted that “no set of black letter rules can fully respond to the multitude of potential treaty conflicts.”<sup>245</sup> The formulae for describing precise interrelationships between multilateral treaties and the plethora of other agreements is complex because there is no definitive hierarchy that governs in the absence of clear expressions of intent by the parties. As the ILC noted, the

241. *Id.* art. 30(1) (noting that Article 30 applies by its very terms to “successive treaties relating to the same subject matter”).

242. *Id.* art. 54.

243. EMER DE VATTEL, *LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉ À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS* (THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS), Bk. II. Ch. XXXI § 163 (1758) (Charles G. Fenwick trans., 1916).

244. MARK E. VILLIGER, *COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES* 689 (Martinus Nijhof ed., 2009) (noting that the termination of treaties as provided by the parties is a “self-evident proposition rather than a rule,” while Article 54(b) “appears codificatory”).

245. Borgen, *supra* note 17, at 463.



concurrent pragmatic validity of both the *lex posterior* and the *lex prior* maxims may follow from the way the two derive from different domestic analogies. Where *lex posterior* projects international rules as analogous to domestic legislation (later laws regularly overruling earlier ones), the *lex prior* suggests an analogy to domestic contracts.<sup>246</sup>

There is no definitive state practice establishing authoritative sequencing of treaty conflicts, and the Rome Statute does not fit neatly into either a legislative or contractual straitjacket.

The ICC is caught on the horns of a dilemma because either of the traditional formalist approaches deprives it of authoritative jurisdiction over Americans or Israelis. The *lex prior* principle, by which the earlier treaty remains binding, is most commonly applicable where there is divergence between the parties to the respective treaties.<sup>247</sup> By definition, any Court interaction with non-States Parties would be governed by this principle insofar as existing agreements establishing the exclusive jurisdiction of sending states would preclude jurisdiction under the Rome Statute.

On the other hand, imposing a flat *lex posterior* rule would undermine the basic concept of *pacta sunt servanda*, by which the consent of all the parties to the bilateral treaties would be required for their termination.<sup>248</sup> The Court cannot impose the Rome Statute in toto onto non-States Parties because it would require alternative findings that plainly undermine assertion of ICC jurisdiction. Either “all the parties” to the earlier jurisdictional treaties must manifest an intention that the Rome Statute supersedes the bilateral jurisdictional arrangements, or the Court must decide that Article 12 by its nature is “so far incompatible with the [earlier jurisdictional arrangements] that the two treaties are not capable of being applied at the same time.”<sup>249</sup> As shown above, the provisions of the Rome Statute itself leave little room for a Court finding that it is always “incompatible” with other treaties.

No lawyer, politician, or prosecutor can demonstrate definitive positive authority that either Palestine or Afghanistan can lawfully convey unqualified territorial jurisdiction to the Court in violation of earlier agreements. Similarly, there is no express or implied agreement by any of the four states (Afghanistan/United States and Israel/Palestine) by which the earlier treaties can be authoritatively deemed irrelevant. Circumstances on the ground indicate that all four states would strongly oppose the presumption of the Court that they assent to invalidating the earlier treaties.

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246. ILC Fragmentation Study, *supra* note 18, ¶ 296.

247. W. Karl, *Conflicts Between Treaties*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 468 (R. Bernhardt ed., Oxford Public International Law 1984).

248. VILLIGER, *supra* note 244, at 686.

249. VCLT, *supra* note 24, art. 59.

At the same time, imposition of a *lex posterior* principle would impose a seemingly intractable practical problem for the Court. The Palestinian acceptance of the Rome Statute in January 2015 might be deemed by the Court as suitable *lex posterior* to override the conflicting jurisdictional provisions of the Oslo Accords. However, the entry into force of the U.S./ Afghanistan agreement that provides for exclusive jurisdiction by American authorities effective May 28, 2003, came subsequent to Rome Statute accession by Afghanistan on May 1, 2003. In other words, applying a *lex posterior* principle cannot lead to ICC jurisdiction over both situations in an intellectually consistent manner. The Court would quickly find itself amidst a bog of contradictory explanations of its treaty-based authority under the Rome Statute. This would inevitably produce the prospect of widespread backlash over its perceived reformation of treaty practices.

### B. *The Danger of Subjective Functionalism*

On the other hand, despite the danger of strengthening perceptions that its decisions are driven by raw politics and narrow institutional interests, the Court might well be willing to impose jurisdiction over Americans and Israelis based upon its faith in the larger purpose of the Rome Statute. After all, both Israel and the United States have been staunch supporters of universal jurisdiction in contexts where domestic fora are demonstrably inadequate to address the grievous crimes within the subject matter jurisdiction of the ICC. For some scholars, the absence of an official negotiating history of the ICC could be framed as a blessing in disguise. From this perspective, the Court is arguably free to innovate international law by stressing that its constitutive document is unshackled from expectations rooted from the historic record. Court proponents hope that the interpretation of the Statute will shift over time akin to a national constitution that is flexible enough to meet changing needs of States Parties and the ceaseless flow of world events. It is true that there is nothing in the Statute that expressly addresses the relationship between the treaty text and previous SOFA agreements that limit the jurisdictional authority of the territorial state. However, the aspiration that the overarching imperative of strengthening the supranational Court warrants evisceration of every treaty barrier seems to represent a facile functionalism. Neither is there any evidence that States Parties themselves intended to empower the Court to override bilateral SOFA provisions.

In the first place, accepting the premise that the tenet *nemo plus iuris transferre potest quam ipse habet* has become a rule of desuetude would defeat the object and purpose of an entire class of binding agreements that remain vital to community efforts to build international peace and security. Roman jurists maintained that

*pactum* (as in *pacta sunt servanda*) emanated from the same etymological roots as *pax*.<sup>250</sup> ICC efforts to invalidate SOFA provisions could paradoxically threaten to undermine international peace and security because they would without doubt disincentivize UN peacekeeping and peace-enforcement operations. Even when states have an overwhelming right to exercise collective self-defense, institutionalized doubt over the utility of SOFAs could prevent formation of coalitions. Thus, the ICC could undermine one of its most aspirational objectives—to benefit international order and buttress the role of law as a bulwark against unlawful aggression. The challenge is to formulate principles for treaty interrelationships that support the “community interest in both stability and change” in order to “identify destructive practices for future regulation, so that international agreements can be relied on as effective factors in international behavior and, in the longer run, precipitate fundamental constitutive changes.”<sup>251</sup> By invalidating SOFAs and other jurisdictional allocations, the ICC would undermine the sanctity of binding agreements between states by elevating multilateral agreements not intended to create rights and obligations for non-Parties.<sup>252</sup>

Secondly, a newly promulgated doctrine of multilateral treaty superiority that automatically invalidates earlier bilateral treaties would fly in the face of strong precedents. Article 54 of the VCLT accepts the premise that the termination of a treaty “necessarily [deprives] all the parties of all their rights and, in consequence, the consent of all of them [was] necessary.”<sup>253</sup> Given its unanimous adoption, Article 54 represents *l’expression du droit coutumier*. This echoes the premise of the International Court of Justice in the *Case of the Monetary Gold Removed from Rome in 1943*, whereby whenever a third party State’s interests “form the very subject matter of the decision” the Court “cannot . . . give a decision on that issue.”<sup>254</sup> Other tribunals have reinforced the notion that “it is only in the most compelling circumstances that a tribunal charged with the application of international law and governed by that law should depart from a principle laid down [by] the International Court of Justice.”<sup>255</sup> Fidelity to these established treaty norms denies the supranational forum of power to impose its treaty-based jurisdiction

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250. Kirsten Schmalenback, *Article 26, Pacta sunt Servanda*, in VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 427, 429 (Oliver Dörr & Kirsten Schmalenback eds., 2012).

251. Arié E. David, *Faits Accomplis in Treaty Controversies*, 6 INT’L LAWYER 88, 98 (1972).

252. *Id.*

253. ILC Report 1966, YBILC 1966 II 249, ¶ 3, and 252, ¶ 1.

254. I.C.J. Rep. 19 (1954).

255. *Larsen v. Hawaiian Kingdom*, 119 I.L.R. 556 (2001) (Permanent Court of Arbitration).

as a matter of supranational prerogative when such assertion abrogates a clear manifestation of prior state consent to surrender exclusive jurisdiction over the nationals of another state.<sup>256</sup>

The Court would be hard pressed to persuade states that its jurisdictional decisions do not address the “very subject” addressed by specific treaty provisions that preserve the affirmative right to exercise criminal jurisdiction over their citizens. The SOFA provisions and the jurisdictional aspects of the Oslo Accords are *lex specialis* with respect to the permissible scope of territorial jurisdiction. Thus, the territorial states (Afghanistan and Palestine) face the reality of clearly contradictory treaties. There is no principle of international law to permit subordination of explicit treaty rights of non-States Parties through ratification of a multilateral treaty by another State. Similarly, processes for resolving treaty conflicts disputes on the intra-state level remain inadequate to resolving the precise conflict. They provide scant guidance for practitioners or judges even though they represent “the highest measure of common ground that could be found among governments as well as in the Commission on this question.”<sup>257</sup> It is true that the ICC is not a sovereign state, so there might be some basis to assert that it is free to experiment in its relations with sovereign states. Imbuing the ICC with a robust entrepreneurial independence might be portrayed as a manifestation of its importance as a symbol of global interdependence in confronting the enduring problem of criminal impunity.

However, the ICC is inescapably a creature of its constitutive treaty. The default principle that States should resolve treaty conflicts by mutual consent remains paramount, so why should the same premise evaporate in the context of a supranational court created via a multilateral treaty? States that surrender their sovereign authority to exercise territorial jurisdiction over a defined class of person or under certain conditions may act to reclaim that sovereign authority. Even if it is seen as an organ created by states to implement their duty to prosecute egregious violations of international norms, the fact remains that the ICC has no adjudicative power that does not originate from the consent of sovereign states.

Because the entire authority of the Court derives from the consent of states as manifested in adoption or accession to the Rome Statute, there is no definitive basis for presuming that the Court is at liberty to expand its own jurisdictional authority. As noted above, states expressly rejected the formulation of the ICC as an embodiment of universal jurisdiction. It logically follows that the ICC

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256. East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. Rep. 1995 (June 30, 1995).

257. Int'l L. Comm'n., Draft Rep. on the Work of Its Eighteenth Session, U.N. Doc. A/CN.4/L.116/Add.6, at 4(4) (1966).

has no independent authority apart from that delegated by sovereign states. Inventing a rule that multilateral treaties, even one of great import such as the Rome Statute, take precedence over binding bilateral mechanisms would transform international treaty law, despite the reality that there is “no significant practice on the matter.”<sup>258</sup> Such fundamental reforms ought to be the province of states rather than a supranational tribunal that seeks to impose its vision over non-consenting states. The ICC is the object of the Rome Statute and not its signatory; thus, sovereign states are properly positioned to determine its place within the larger constellation of international treaties.

## V. CONCLUSIONS

Some discerning readers will have been troubled throughout their reading by the use of the word “aggrandize” in the abstract of this Article. That word implies an intentional exploitation of legal authorities and might be perceived to impute ill will and excess politicization into every act of the ICC. Rather than disparaging the Court or its aspirations, this Article is intended to represent a dispassionate explication of the linkage between the highly controversial situations that the Court faces and the larger first-principles of treaty law and international practice. While an invalid assertion of jurisdiction by the ICC is important in its own right, these assertions have a greater significance for the international law of treaties, and the project of international criminal law in particular. The maturation of the ICC as the culmination of supranational institution building need not necessarily mark the end of the line for the field of international criminal law. On the contrary, rather than facing the unending prospect of politicized justice at the whims of a permanent Court,<sup>259</sup> processes within the ICC should serve to strengthen the Court’s legitimacy.

Squarely addressing the reality that the Rome Statute presents states with a specific form of treaty conflict in the areas that are most central to their national security interests might mark a whole new phase of qualitative growth for the Court that deepens its institutional breadth and justifies the faith of States Parties. The danger is that the Court will pursue its narrow vision of jurisdiction in “disregard of founding principles of international law as well as general principles of law that are common to the main legal systems

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258. Benedetto Conforti, *Consistency among Treaty Obligations*, in *THE LAW OF TREATIES: BEYOND THE VIENNA CONVENTION* 187, 189 (Enzo Cannazaro ed., 2011).

259. William A. Shabas, *The Banality of International Justice*, 11 *J. INT’L CRIM. JUST.* 545 (2013).

of the world.”<sup>260</sup> In the words of Pre-Trial Chamber I “Such an interpretation would be inconsistent with the proper functioning of the principle of complementarity.”<sup>261</sup> Readers will be hard-pressed to discover any legal system in the world that would ignore the basic precept of law and morality that is preserved by the ancient Roman tenet *nemo plus iuris transferre potest quam ipse habet*. Overlooking that foundational principle would represent a radical reshaping of the Court’s intended jurisdictional competence.

This conclusion has been heretofore unacknowledged by the Court. It will doubtless be unpleasant for Court proponents to confront; it is nonetheless unavoidable given a good faith reading of the Statute in light of the larger precepts of international treaty law. In perhaps his most famous observation, Justice Oliver Wendell Holmes noted that the

life of the law has never been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do with the syllogism in determining the rules by which men should be governed.<sup>262</sup>

Amidst a world of legal and political uncertainty, the ICC should not settle for long-term reliance on intuitive fine-tuning that pretends that the Rome Statute operates in isolation from other treaty-based constraints on sovereign prerogatives.<sup>263</sup> Rather than being a hallmark of its demise, then, the role of the Court as one component of a healthy transnational system would be enhanced by good faith judgments that the Court has no lawful basis of jurisdiction over crimes committed by Americans in Afghanistan, or over offenses alleged against Israeli citizens for acts committed in the Occupied Territories or in the Gaza Strip.

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260. Flavia Lattanzi, *Introduction*, in *THE DIVERSIFICATION AND FRAGMENTATION OF INTERNATIONAL CRIMINAL LAW* 3 (Larissa van den Herik & Carsten Stahn eds., 2012).

261. See Prosecutor v. Mbarushimana, ICC-01/04-01/10-451, Decision on the “Defense Challenge to the Jurisdiction of the Court”, ¶ 21 (Oct. 26, 2011), <https://www.icc-cpi.int/iccdocs/doc/doc1252321.pdf> [<https://perma.cc/KH6Q-XXRS>] (archived Feb. 27, 2016).

262. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

263. Elies van Sliedregt & Sergey Vasiliev, *Pluralism: A New Framework for International Criminal Justice*, in *PLURALISM IN INTERNATIONAL CRIMINAL LAW* 4, 5 (Elies van Sliedregt and Sergey Vasiliev eds., 2014).