



ARTICLE 15 COMMUNICATION

Preconditions to the exercise of jurisdiction over nationals of non-States Parties

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19 August 2019



1. The so-called *Situation in Palestine* (the “Situation”) is at Phase 3 of the OTP’s preliminary examination. We understand that no final determinations with respect to jurisdiction, admissibility or the interests of justice have been made. This communication is made further to our communication of 3 July 2019. In that communication we considered jurisdictional issues arising from operation of Article 12 of the Rome Statute given Palestine’s lack of objective Statehood and indeterminate sovereign territorial claim. The communication was limited to consideration of issues arising from application of the internal legal order of the Rome Statute.¹ This communication addresses issues which arise under customary international law from the prosecution of nationals of non-States Parties absent a Security Council referral pursuant to Article 13(b) of the Rome Statute. It is germane to the OTP’s ongoing preliminary examination of the Situation, and the implications which would arise from any decision to authorise an investigation into the alleged conduct of Israeli nationals.
2. At the time of this communication, the ICC is yet to unseal an arrest warrant or transmit a request for the surrender of a non-State Party national absent a resolution of the UN Security Council referring the situation to the Court. Nevertheless, the Court’s organs have provided indications that they consider that the jurisdictional regime prescribed by the Rome Statute permits the Court to do so. The issue has arisen in the *Situation in the Republic of Korea* (with respect to North Korean nationals), the *Situation in Georgia* (with respect to Russian nationals), the *Situation in Ukraine* (with respect to Russian nationals), the *Situation in Afghanistan* (with respect to US nationals), the *Situation in Bangladesh* (with respect to Myanmar nationals), as well as in this Situation and the *Comoros* situation (with respect to Israeli nationals).² To date, the Court has proceeded on the basis that it is entitled to exercise jurisdiction in such potential cases, but the issue has never been litigated in an adversarial context. Moreover, the legal reasoning proffered for the permissibility of the exercise of the Court’s jurisdiction over such potential cases has differed.

¹ S. Kay QC and J. Kern, Corrected Version of Preconditions to the exercise of jurisdiction under Article 12 of the Rome Statute, 3 July 2019, n.35.

² Our understanding of the current OTP position is that as articulated in its Request to open an investigation in the *Situation in Afghanistan*. Request for authorisation of an investigation pursuant to article 15, 20 November 2017, ICC-02/17-7-Conf-Exp, ICC-02/17-7-Red 20-11-2017 (hereinafter the ‘Afghanistan Request’), paras. 44-47. In the *Situation in Comoros*, the OTP similarly concluded that although “*Israel is not a State Party, according to article 12(2)(a) of the Statute, the ICC can exercise its jurisdiction in relation to the conduct of non-Party State nationals alleged to have committed Rome Statute crimes on the territory of, or on vessels and aircraft registered in, an ICC State Party*”: Report on Preliminary Examination Activities 2017, 4 December 2017, para. 321. It does not appear that the issue has to date been specifically addressed (with respect to Russian nationals) in the *Situation in Georgia* or the *Situation in Ukraine*. See also Y. Ronen, ‘The International Criminal Court and Nationals of Non-Party States’ in G. Werle, A. Zimmermann (eds.) *The International Criminal Court in Turbulent Times*, p.83-110 (hereinafter “Ronen”) (for further issues which arise from the prosecution of nationals of non-States Parties absent an Article 13(b) referral).



3. On the one hand, the OTP has proceeded on the basis that the Court's permission to exercise jurisdiction over nationals of non-consenting States absent a Security Council referral derives from the delegated criminal jurisdiction of States Parties.³ Alternatively, it has been suggested that the ICC derives its authority from the authority of the Rome Statute itself, the Rome Statute's universalist orientation, and the right of the ICC to exercise the *ius puniendi* of the international community as a whole.⁴ The issues which arise require consideration of the ongoing scholarly debate concerning the "*true nature of the Court's jurisdiction*", which is material to the scope as well as the legality of any given act through which the ICC exercises jurisdiction.
4. This communication argues that it is the binding norms of customary international law which regulate the relationship between the ICC and non-States Parties. The "*true nature*" of the ICC's jurisdiction derives from its authority as an international court to exercise a criminal jurisdiction which customarily vests in States. The ICC, as an international criminal court with a recognised legal personality, exercises an enforcement jurisdiction which cannot prejudice non-consenting States' enjoyment of their own rights (which includes those rights claimed by a State on behalf of its nationals).⁵ State practice and *opinio juris* demonstrate that international criminal courts have not historically been permitted to exercise jurisdiction over nationals of non-consenting States absent an enabling Security Council decision. This communication argues that under customary international law such consent is a *precondition* to the exercise of an international criminal court's jurisdiction, absent the Security Council's *imprimatur*. A continuing breach renders any subsequent prosecution and trial unlawful and engages the law of international responsibility for unlawful acts, creating exposure to acts of retorsion and countermeasures.
5. The communication is divided into four parts. The first part addresses the "*true nature*" of the ICC's international criminal jurisdiction and the interplay between the Court's sources of authority *vis-à-vis* non-States Parties, namely customary

³ Afghanistan Request, paras. 44-47.

⁴ See C. Kreß, 'Preliminary Observations on the ICC Appeals Chamber's Judgment of 6 May 2019 in the Jordan Referral re Al-Bashir Appeal', Brussels 2019 (hereinafter 'Kreß Observations'), p.20. K. Ambos, 'Punishment without a Sovereign? The Ius Puniendi Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law', OXFORD JOURNAL OF LEGAL STUDIES, Vol. 33, Issue 2, 2013, 293-315 (hereinafter "Punishment without a Sovereign?").

⁵ The doctrine of State responsibility with regard to injuries to a State's nationals rests upon the proposition that it is through the medium of the State that the individual may obtain the full range of benefits available under international law. M. Shaw, *International Law*, 8th ed., Cambridge (2017) (hereinafter 'Shaw'), p.612. See also Article 1 of the ILC Draft Articles on Diplomatic Protection, Report of the ILC on its 58th Session, A/61/10, 2006, p.13; *Mavrommatis Palestine Concessions* PCIJ Series A, No. 2, 1924, p.12; Vattel, *The Law of Nations*, 1916 trans., p.136. Cf. e.g. G. Hafner *et al.*, 'A Response to the American View as Presented by Ruth Wedgwood', EJIL, 10(1) (1999) 108, p.117-118 (arguing that problems of *pacta tertiis* do not arise since the Rome Statute does not impose legal obligations on non-States Parties).



international law and the Rome Statute itself. It examines the relationship between these sources of authority and the ICC's international legal personality and considers the Court's recent jurisprudence on the subject. It proposes a definition of an international criminal court which reconciles (what might otherwise appear to be) opposing concepts of the "true nature" of the Court's jurisdiction (namely the "delegation" and "universalist" models) by arguing that exercise of the *ius puniendi* of the international community as a whole is a feature of international criminal courts' jurisdiction which has customarily been preconditioned on the consent of affected States. It further argues that legal personality is not material to the question of jurisdiction. The second part considers the exercise of jurisdiction by an international criminal court over nationals of non-consenting States. It argues that absent the consent of the State of nationality, customarily the exercise of jurisdiction by international criminal courts has been preconditioned on a decision of the Security Council. Part III addresses the issue of responsibility (and potential liability) for illegally or irregularly obtained custody. Part IV concludes.

I. The "true nature" of international criminal jurisdiction

6. Hans Kelsen identified the "basic norm" of international law as the rule that identifies custom as the source of law or stipulates that "the states ought to behave as they customarily behaved."⁶ A decision of an international court derives its validity from the instrument through which the court was established. If we ask why the Rome Statute is valid, we are led back to a general norm which obligates States to behave in conformity with the treaties they have concluded (*pacta sunt servanda*). This is a norm of general international law.⁷ General international law is in turn created by custom constituted by the acts of States. Kelsen's basic norm of international law therefore contemplates custom as a norm-creating fact.⁸
7. H. L. A. Hart, alternatively, posited that international law has not yet evolved a basic norm, or a "rule of recognition", by reference to which the validity of all other rules might be tested.⁹ Professor Hart acknowledged, however, that although international law lacks a legislature and that there is no centrally organised effective system of sanctions,¹⁰ in "any society, whether composed of individuals or states, what is necessary and sufficient, in order that the words of a promise, agreement, or treaty should give rise to obligations, is that rules providing for this and specifying a procedure for these self-binding

⁶ H. Kelsen, *General Theory of Law and State* (Cambridge, Mass. 1945), pp.369-370.

⁷ See, e.g., R. Crootoof, 'Change Without Consent: How Customary International Law Modifies Treaties', 41 *Yale Journal of International Law* 237 (2016), p.239 (arguing that *pacta sunt servanda* undergirds much of international law and explaining States' willingness to invest energies in concluding treaties).

⁸ H. Kelsen, *General Theory of Law and State* (Cambridge, Mass. 1945), p.369-370.

⁹ H. L. A. Hart, *Concept of Law* 3rd ed (Oxford 2012), p.236.

¹⁰ *Id.*, p.3.



operations should be generally, though they need not be universally, acknowledged.”¹¹ Thus, rules “are binding if they are accepted and function as such.”¹² Consent, in other words, is key. Today, the search for an all-embracing general theory of international law has largely been abandoned in mainstream thought as being founded upon unverifiable propositions.¹³ Policy-oriented approaches, according to Professor Koskenniemi, might too easily be utilised to support a dominant political position, and superior operating principles are difficult to find or justify.¹⁴ Instead, contemporary scholars, practitioners, and Judges undertake a kind of *bricolage*, fusing norms and concepts in order to formulate a position reflecting their values.¹⁵

8. Hans Kelsen’s basic norm nevertheless bears recalling when we consider recent *dicta* of the Appeals Chamber in the case of *Bashir* on the “true nature” of the ICC’s jurisdiction. The Appeals Chamber’s Joint Concurring Opinion in Jordan’s appeal against referral posited that with respect to international criminal courts, the “current reality” is that “the sources of jurisdiction of international criminal tribunals – from the Nuremberg era tribunals to the ICTY and ICTR and the ICC – have uniformly come in written legal instruments.”¹⁶ We recall Kelsen so that we do not fail to acknowledge, with respect to sources of law, that the Rome Statute prescribes *treaty* norms which are secondary (or arguably tertiary) norms deriving from general norms (*pacta sunt servanda* and the principle of consent), as reflected by customary international law constituted by acts of States. The “true nature” of the ICC’s jurisdiction stems both from these customary norms and the rules prescribed by the Rome Statute, not its status as an international organisation with legal personality or its universalist orientation.

- a. *The existence of prescriptive jurisdiction, and the exercise of adjudicative and enforcement jurisdiction*

9. Prescriptive jurisdiction refers to the authority under international law to assert the applicability of law to persons, natural or legal, or to property, whether by legislation, by executive act or order, by administrative rule or regulation, or by court determination.¹⁷ Adjudicative jurisdiction refers to “authority under international law to entertain legal proceedings in respect of given persons or property.” Jurisdiction to

¹¹ *Id.*, p.225.

¹² *Id.*, p.235.

¹³ Shaw, p.46.

¹⁴ Shaw, p.47 citing M. Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge 2004). See also M. Koskenniemi, *The Politics of International Law* (Oxford 2001).

¹⁵ M. Koskenniemi, ‘Imagining the Rule of Law: Rereading the Grotian ‘Tradition’, *EJIL* (2019) Vol 30 No.1, 17-52, 24.

¹⁶ *Prosecutor v Omar Hassan Ahmad Al Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal (Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa), Appeals Chamber, ICC-02/05-01/09-397-Anx1, 6 May 2019 (hereinafter “Joint Concurring Opinion”), para. 447.

¹⁷ R. O’Keefe, *International Criminal Law 2015* (Oxford) (hereinafter “O’Keefe”), para. 1.7.



adjudicate is not to be confused with courts' competence *ratione loci*, *ratione personae*, and *ratione materiae*. Questions of jurisdiction to adjudicate under international law centre in practice on whether a State may, as a matter of international law, permissibly assume judicial competence in relation to acts or things outside its territory.¹⁸

10. Enforcement jurisdiction refers to authority under international law to exercise investigative, coercive or custodial powers in support of law, whether through the courts or by use of executive, administrative, police, or other non-judicial action.¹⁹ In short, jurisdiction to enforce is a State's international legal authority to exercise any or all of the usual range of police, prosecutorial, judicial, and related executive powers in relation to criminal justice, including the investigation of crimes and collection of evidence.²⁰ Questions of jurisdiction to enforce centre in practice on whether a State's police and other relevant executive organs may, as a matter of international law, permissibly operate and its courts permissibly sit outside its territory and whether injunctions and *subpoenas* issued and orders made by those courts may permissibly extend to persons and property outside that territory.²¹ States are always free to establish special jurisdictional rules by way of treaty, applicable to the parties *inter se*, and there are many conventions in the field of criminal law by which states parties do precisely this (including the Rome Statute).²²
11. Reflecting these principles, the Appeals Chamber's Joint Concurring Opinion in *Bashir* defines jurisdiction as "*the prerogative of control over things, places and persons (and their conducts). For functional purposes, such prerogative of control may be expressed in the manner of legislative, judicial or executive power.*"²³ There are, however, certain crucial distinctions between jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce. The *existence* of prescriptive jurisdiction is not to be confused with its *exercise* through adjudicative and enforcement measures.²⁴ This is particularly relevant with respect to the exercise of jurisdiction of international criminal courts,²⁵ which customarily has been permitted only through satisfaction of consensual preconditions.

¹⁸ O'Keefe, para. 1.8.

¹⁹ *Id.*, para. 1.9.

²⁰ *Id.*, paras. 1.12, 1.74.

²¹ *Id.*, para. 1.9.

²² *Id.*, para. 1.14.

²³ Joint Concurring Opinion, para. 41.

²⁴ See also R. O'Keefe, Response: "Quid," Not "Quantum": A Comment on "How the International Criminal Court Threatens Treaty Norms", 49 VAND. J. TRANSNAT'L L. 433 (hereinafter "Quid"), p.4.

²⁵ *Id.*



b. *The ICC's enforcement jurisdiction*

12. The Appeals Chamber has expressly recognised that the ICC exercises an enforcement jurisdiction and that this enforcement jurisdiction is engaged during the arrest and surrender process.²⁶ The ICC's enforcement jurisdiction is exercised through, for example, the issuance of arrest warrants to secure the attendance of suspects. ICC jurisdiction attaches to natural persons, but pre-trial its enforcement jurisdiction is exercised by States and the Court together. The successful operation of the Court's mandate is impossible if it is not permitted to exercise a lawful enforcement jurisdiction. Without an effective enforcement jurisdiction, no ICC arrest could be made or surrender process completed successfully, as States' national courts would be constrained by the illegality underpinning the proceedings.
13. The scope of the ICC's enforcement jurisdiction is contested. Although South African decisions suggest the view of cooperating States Parties as "*jurisdictional surrogates*" of the Court may be shared in some parts of the World, elsewhere such a formulation is likely to be disputed. States Parties and their domestic courts will foreseeably assert they are permitted to exercise a residual power to regulate their own enforcement jurisdiction (for example, in the UK, through preservation of common law writs of *habeas corpus* and the Court's abuse of process jurisdiction).²⁷ These (municipal) remedies cannot be displaced through operation of the Rome Statute, not least when considering that implementing legislation will vary (as well as considering the residual discretion the Rome Statute reserves to States when the Rome Statute is implemented into municipal legal orders, which reflects the diverse nature of States Parties' legal systems).²⁸

c. *Universalist orientation*

14. The ICC is an international criminal court with a universalist orientation and a universalist ambition.²⁹ For Eleni Chaitidou and Hans-Peter Kaul, the Court's creation "*marked a momentous development which has changed the landscape of international law*

²⁶ *Prosecutor v Al-Bashir*, ICC-02/05-01/09-3, Decision on the Prosecutor's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 4 March 2009, paras. 3, 125 (referring to the Court's enforcement jurisdiction' *vis-à-vis* States Parties to the Rome Statute).

²⁷ See, e.g., Articles 59(1), 59(2), 89(1) and 93(3) of the Rome Statute.

²⁸ Joint Concurring Opinion, paras. 441 *et seq.* See also, in South Africa, *Minister of Justice and Constitutional Development & ors. v Southern Africa Litigation Centre* [2016] ZASCA 17 (15 March 2016); *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Forum and Another* [2014] ZACC 30. Cf. e.g. section 5(6) of the International Criminal Court Act 2001 (UK): 'Whether or not it makes a delivery order, the competent court may of its own motion, and shall on the application of the person, determine: (a) whether the person was lawfully arrested in pursuance of the warrant, and (b) whether his rights have been respected.'

²⁹ See, e.g. 'UN chief urges universal ratification of International Criminal Court's founding treaty', UN News, 4 December 2017 (last accessed 22 July 2019).



noticeably... For the first time, an international criminal court has been created by the entire community of States as a result of multilateral negotiations, doing away with the old criticism of victor's justice applying the law retroactively or selectively. At the Rome Conference, where traditional bilateralist mentalities and multilateralist ambitions met, in the end the political will for multilateralism, protecting community values in a collective effort, prevailed."³⁰ These universalist claims, deriving from the ICC's universalist orientation, appear to be the basis upon which PTC I concluded (*obiter*) in September 2018 in the *Situation in Bangladesh* that the Court possesses an objective legal personality which is opposable to non-States Parties.³¹ These findings warrant analysis.

15. Paragraph 57 of the Joint Concurring Opinion in *Bashir* also addresses the issue and states that an "international court may be regional or universal in orientation. In the latter case, the universal character remains undiminished by the mere fact that any of the States entitled to join it elected to stay out in the meantime, or declined to consent to the Court's jurisdiction as the case may be."³² However, paragraphs 447 to 449 of the Joint Concurring Opinion leave open the question whether, in a situation which relies on satisfaction of the precondition contained in Article 12(2)(a) of the Rome Statute for jurisdiction to attach to a non-State Party national, *customary international law* permits the exercise of jurisdiction absent satisfaction of consent-based preconditions. The ICC's universalist orientation is not determinative of the question of the permissible scope of the exercise of jurisdiction under customary international law.³³

d. *International legal personality*

16. In its Article 19(3) Ruling in the *Situation in Bangladesh*, PTC I recalled the ICJ's pronouncement in *Reparation for Injuries Suffered in the Service of the United Nations ("Bernadotte")* that the UN possesses objective legal personality opposable to non-Member States. PTC I recognised the "*paramount importance of the principle pacta tertiis nec nocent nec pro sunt*" and recalled that the "*UN Charter contains purposes and considerations that are not inter partes but erga omnes in character*". However, PTC I also acknowledged the differences between the UN and ICC situations.³⁴

³⁰ E. Chaitidou and H-P. Kaul, "Balancing Individual and Community Interests: Reflections on the International Criminal Court", in Ulrich Fastenrath et al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford 2011) (hereinafter "Balancing Individual and Community Interests"), 1001.

³¹ *Situation in Bangladesh*, Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, ICC-RoC46(3)-01/18, 6 September 2018 (hereinafter "PTC I Decision in the *Situation in Bangladesh*").

³² Joint Concurring Opinion, para. 57.

³³ Nor, it is submitted, is the Court's universalist orientation capable of operating as a shield protecting the ICC from instrumentalisation and hegemonic abuse. Indeed, the Court's universalist orientation, when viewed in conjunction with less than universal acceptance of the Rome Statute, arguably renders the Court more (not less) vulnerable to hegemonic abuse. Cf. Krefß Observations, p.18.

³⁴ PTC I Decision in the *Situation in Bangladesh*, para. 41.



17. The UN has 193 Member States. The ICC has 122 States Parties. There is scarce evidence of State practice and *opinio juris* to support a claim as to the existence of *erga omnes* obligations arising from the Rome Statute which would bind a third State without its consent absent a Security Council resolution. PTC I notes that the Court's suggested objective legal personality "*does not imply either automatic or unconditional erga omnes jurisdiction.*"³⁵ Even if "*objective legal personality is admitted or recognized, this does not mean that the constitution becomes binding upon non-members or the Organization can impose obligations upon non-member States without authorization from these, any more than a State whose objective legal personality is admitted or recognized can impose obligations upon other States without authority from these.*"³⁶
18. It follows that the question of whether the ICC possesses objective legal personality is distinct from the issue of whether it is permitted to exercise jurisdiction in any given case. Legal personality is distinct from preconditions to the exercise of jurisdiction and, (recalling Kelsen and Hart) the permissibility (or otherwise) of a given exercise of jurisdiction is elucidated from an analysis of both the Rome Statute and, when the rights of third States are engaged, of customary international law. In the *Situation in Bangladesh*, however, PTC I's analysis was grounded entirely on Articles 11, 12, 13, 14, and 15 of the Rome Statute.³⁷ This is an analysis of the *internal order* of the Rome Statute. It is problematic because the Court's relations with non-States Parties (who are not bound by the Rome Statute) must be predicated on a more basic set of norms, namely those of customary international law.
19. The Court's legal personality (objective or otherwise),³⁸ whilst relevant to issues of responsibility (in the event of breaches of custom or municipal law) does not alter the

³⁵ PTC I Decision in the *Situation in Bangladesh*, para. 49.

³⁶ F. Seyersted, 'Is the International Personality of Intergovernmental Organizations Valid vis-a-vis Non-Members?' in J. Klabbers (ed.), *International Organizations* (London 2005) (hereinafter "Seyersted"), 253.

³⁷ PTC I Decision in the *Situation in Bangladesh*, para. 49.

³⁸ See, further, G. Lentner, *The UN Security Council and the International Criminal Court: The Referral Mechanism in Theory and Practice* (Elgar 2018) (hereinafter "Lentner"), p.8: "*It is therefore a factual, objective question, and not the provisions of the constitution or the intention of its framers which establishes the international personality of an international organization*" citing F. Seyersted, 'Objective International Personality of Intergovernmental Organizations' (1964) *NORDISK TIDSSKRIFT FOR INTERNATIONAL LAW* RET 1, 39-40; ILC, Report by G.G. Fitzmaurice, Special Rapporteur (14 March 1956) UN Doc A/CN.4/101, 108; Article 2 of ILC Draft articles on the Responsibility of International Organizations (2011) adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as part of the Commission's report covering the work of that session, A/66/10, para 87; S. Bouwhuis, 'The International Law Commission's Definition of International Organizations' (2012) 9(2) *INTERNATIONAL ORGANIZATIONS LAW REVIEW* 451. Cf. Shaw, p.991: "*The question of legal personality will in the first instance depend upon the terms of the instrument establishing the organisation. If states wish the organisation to be endowed specifically with international personality, this will appear in the constituent treaty and will be determinative of the issue.*"



ICC's *horizontal* relationship with non-States Parties on the international plane, which remains governed by customary international law.³⁹ It is not the Rome Statute which establishes the international legal personality of the Court, or even its objective existence as an international criminal court. Instead, it is general international law once objective criteria are met.⁴⁰ Legal personality is not material to the question of whether preconditions to the exercise of international criminal jurisdiction are satisfied.

e. Defining an "international criminal court"

20. The *Bashir* Appeals Chamber stated that international criminal courts are of a "*fundamentally different nature*" to national courts exercising a domestic jurisdiction.⁴¹ Developing this pronouncement, the Joint Concurring Opinion defined an "*international court*" (or an "*international tribunal*" or an "*international commission*") as "*an adjudicatory body that exercises jurisdiction at the behest of two or more states.*"⁴² This, of course, does not identify any special characteristics that international *criminal* courts might possess.

21. The breadth of the Joint Concurring Opinion's definition of "*international court*" is tempered by the Judgment, which distinguishes between national and international *criminal* jurisdictions. According to Professor Kreß, this distinction "*is essential to the Chamber's reasoning.*"⁴³ Whereas national criminal courts "*are essentially an expression of a State's sovereign power, which is necessarily limited by the sovereign power of the other States, [international courts], when adjudicating international crimes, do not act on behalf of a particular State or States. Rather, international courts act on behalf of the international community as a whole.*"⁴⁴ The jurisdiction to adjudicate international crimes,⁴⁵ as well as capacity to act on behalf of the international community as a whole, are suggested as

³⁹ See *infra* para. 33.

⁴⁰ Seyersted, 259.

⁴¹ *Prosecutor v Omar Hassan Ahmad Al Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, Appeals Chamber, ICC-02/05-01/09-397-Corr, 6 May 2019 (hereinafter "*Jordan Appeals Chamber Judgment*"), para 116. Cf. O Keefe, 3.1, 3.5: For "*the purposes of international law, not much hangs on the formal juridical distinction between international and national criminal courts... [and the] basis of the formal legal distinction between international criminal courts and municipal criminal courts is rarely articulated.*"

⁴² Joint Concurring Opinion, para. 56.

⁴³ Kreß Observations, p.13.

⁴⁴ *Jordan Appeals Chamber Judgment*, paras. 115-116. See also Joint Concurring Opinion, paras. 52-174 and paras. 431-445.

⁴⁵ In Professor Kreß's view, and by implication, "*a 'crime under international law', as referred to by the Appeals Chamber, appears to be ultimately rooted in general customary international law.*" Professor Kreß observes that when the "*Joint Concurring Opinion, beginning with paragraph 175, sets out a series of detailed reflections on the basis of certain fundamental concepts, principles and interests recognized in the international legal order, it almost constantly (see already paragraph 176) refers to the exercise of jurisdiction by an international criminal court over 'international crimes' or 'crimes under international law.'*" Kreß Observations, p.14.



criteria capable of distinguishing an *international criminal court* from treaty-based courts which purport to act on behalf of a particular State or States.⁴⁶

22. Professor Kreß is “*not convinced*” by a distinction predicated on authority to prosecute international crimes. He notes that “*national criminal courts, when adjudicating crimes under international law, also act on behalf of the international community. This is most clearly visible where a national criminal court exercises universal jurisdiction over such a crime. In such a case, the national or regional criminal court does not act in the pursuit of a national prosecution interest, but the national criminal court is made available for the decentralized enforcement of the ius puniendi of the international community and accordingly acts as a kind of trustee of that international community.*”⁴⁷ Professor Kreß and the Joint Concurring Opinion agree that a more important consideration remains the greater the perceptions of objectivity which arise, upon the exercise of jurisdiction by an international criminal court.⁴⁸

23. Synthesising the literature,⁴⁹ the *dicta* of the Appeals Chamber in *Bashir*, and PTC I in the *Situation in Bangladesh*, a typology of the characteristics of an international criminal court can be proposed. According to this typology, objectively under customary international law, an international criminal court:

- a. formally depends for its existence and competence on international law;⁵⁰

⁴⁶ For example, the bombing of a Pan-Am flight over Lockerbie, Scotland, resulted in the UK’s and Netherlands’ agreement to establish a Court to prosecute Libyan suspects. Libya was requested to and did in fact consent to the surrender of the suspects (and was obliged to do so through the imposition of cooperation obligations by the Security Council). Libya suggested a trial in the Netherlands, implying consent to the prosecution. The trial was mandated by, and its Agreement was specifically designed to be consistent with, UN Security Council Resolution 883, which required a trial before a US or UK Court. The Agreement reflects an example of State Practice as at July 1998 and acts as a reminder that the consent of the State of nationality or Security Council authorisation were relevant factors taken into account with respect to the jurisdiction of international (or internationalised) tribunals at the time of conclusion of the ICC’s Rome Statute. See Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Netherlands concerning a Scottish Trial in the Netherlands (18 September 1998) 2062 I-35699 UNTS 82.

⁴⁷ Kreß Observations, p.15-16.

⁴⁸ See Joint Concurring Opinion, para. 63. Kreß Observations, p.16.

⁴⁹ See also A. S. Galand, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits* (Leiden 2018) (hereinafter “Galand”), p.169.

⁵⁰ For Professor O’Keefe, this requirement means that the establishment of the court derives “*without formal interposition of municipal law from an international legal instrument or act.*” Alternatively, “*it may mean that the court’s constituent instrument takes the form of or is found in some other document on which an international legal instrument or act has conferred the force of international law by means of express incorporation, adoption, or the like.*” To date, international criminal courts have been established and empowered by way of four types of international legal instruments or acts. The first way is by way of a multilateral treaty among States (e.g. the Nuremberg IMT and the ICC), the second by way of a proclamation of a joint organ of several states (e.g. the Tokyo IMT), the third by way of a bilateral treaty between a State and an international organisation (e.g. the United Nations and the SCSL), and the fourth



- b. possesses a capacity of organisational “*independence*” from States;⁵¹ and
- c. exercises a criminal adjudicative and enforcement jurisdiction (*ius puniendi*) on behalf of the international community.⁵²

f. *The ius puniendi of the international community and the delegation model*

24. Pre-Trial Chamber I stated in *Bashir* that it considered that the exercise of the “*ius puniendi of the international community [...] has been entrusted to this Court.*”⁵³ Professor Kreß argues that enforcement of the international community’s *ius puniendi* is a vital distinction between national and international criminal proceedings.⁵⁴ For Professor Kreß, this is not only the case where an international criminal court has been established or otherwise endorsed by the Security Council. Rather, it is also true, “*perhaps even more so*”, where such a court has been established based on an

by way of a decision of the UN Security Council under Chapter VII of the UN Charter (ICTY, ICTR and STL). O’Keefe, 3.10-3.22. In each case, the authority underpinning the formal constitution of these international criminal courts arises from the consent of the affected States or a decision of the Security Council which acts as a precondition to the exercise of the court’s or tribunal’s jurisdiction.

⁵¹ Professor Sarooshi QC argues that one characteristic by which a transfer of powers by States to international organisations can be assessed is the “*degree to which States retain control over the exercise of powers by the organization. At one level this involves issues relating to control by States over the organization’s exercise of powers. But at another level it involves issues relating to control by States over the implementation of the organization’s decisions within their domestic legal orders. This latter issue forms part of the broader issue of whether the organization possesses the sole right to exercise conferred powers or whether States have retained the right to exercise conferred powers concurrently with the organization.*” International Organizations and their Exercise of Sovereign Powers (Oxford 2005) (hereinafter “Sarooshi”), p.29 *et seq.*

⁵² See *infra* paras. 24-25. But see e.g. O’Keefe, at 3.38, describing as a “*fallacy*” the notion that the international character of a criminal court has consequences, in and of itself, for the international legal authority for the exercise by the court of its powers. It is, however, submitted that the “*international*” character of an international criminal court exercising jurisdiction on behalf of the international community as a whole and claiming *independence* from States establishes a perceptibly higher authority than a municipal court. This perception of higher authority is related to a perception - described by Professor Kreß - that an international criminal court exercising the *ius puniendi* of the international community as a whole is shielded from the risk of hegemonic abuse. See Joint Concurring Opinion, para. 63. Kreß Observations, p.16.

⁵³ *Prosecutor v Al-Bashir*, Case No. ICC-02/05-01/09-139, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, 12 December 2011, para. 46.

⁵⁴ In Professor Kreß’s view, the distinction “*only holds if the jurisdiction of the international criminal court in question transcends the delegation of national criminal jurisdiction by a group of States and can instead be convincingly characterized as the direct embodiment of the international community for the purpose of enforcing its ius puniendi.*” Professor Kreß argues that arguments which rest on the idea that the ICC’s jurisdiction (to the extent that it is exercised pursuant to Article 12(2) of the Statute), has been created through the delegation of national criminal jurisdiction “*and is therefore no more than a bundle of national criminal jurisdiction based on territoriality and passive personality [sic]*”, fails to recognise that the ICC has been established to exercise the *ius puniendi* of the international community with respect to crimes under customary international law. Kreß Observations, p.17-20. Cf. *infra* paras. 26 to 28.



international treaty which constitutes a “legitimate” attempt to provide the international community with a judicial organ to enforce its *ius puniendi* directly. According to Professor Kreß, such a treaty must have resulted from negotiations with a truly “universal” format, the treaty must contain a standing invitation to universal membership,⁵⁵ it must incorporate internationally applicable fair trial standards, and it must be confined to crimes under customary international law.⁵⁶ If all of these conditions are fulfilled, Professor Kreß argues that “there can be no question of (a risk of) ‘hegemonic abuse’.” Given that, according to Professor Kreß, the “Rome Statute fulfils all of these conditions”, the ICC is accredited as a judicial organ entrusted with the direct enforcement of the international *ius puniendi*.⁵⁷

25. Although the Appeals Chamber judges agreed in *Bashir* that international courts exercise jurisdiction on behalf of the “international community”,⁵⁸ the Joint Concurring Opinion appears to draw a distinction between the ICC’s exercise of jurisdiction pursuant to Article 13(a), 13(c) or 70 of the Rome Statute (when the ICC exercises jurisdiction “on behalf of the international community represented in the membership of the Rome Statute”) and Article 13(b) of the Rome Statute (when the Court exercises powers “as the jurisdictional delegate of the Security Council, by virtue of the Council’s power to maintain international peace and security under Chapter VII of the UN Charter”).⁵⁹ In each case, the *ius puniendi* of the international community with respect to crimes under international law “has come into existence through the ordinary process of the formation of a rule of (general) customary international law.”⁶⁰

⁵⁵ ICC, Situation in Darfur, Sudan, *Prosecutor v Al Bashir*, Appeals Chamber, Written observations by Professor Claus Kreß as amicus curiae, with the assistance of Ms Erin Pobje, on the merits of the legal questions presented in ‘The Hashemite Kingdom of Jordan’s appeal against the ‘Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir’” of 12 March 2018 (ICC-02/05-01/09-326), 18 June 2018, ICC-02/05-01/09-359 (“Kreß Amicus Curiae Brief”), para. 14.

⁵⁶ In Professor Kreß’s view, Articles 5 to 8 of the Statute were drafted “with the shared intent to ensure that only crimes under customary international law are included and that the definitions do not exceed existing customary international law.” Kreß Amicus Curiae Brief, para. 14.

⁵⁷ Kreß Amicus Curiae Brief, para. 14 (emphasis in original). See also Kreß Observations, p.22 (Rome Statute crimes “have been listed and circumscribed in Articles 5 to 8 so as not to extend beyond the *ius puniendi* of the international community as a whole”).

⁵⁸ See Joint Concurring Opinion, para 54: “The ICC exercises its jurisdiction in no other circumstance than on behalf of the international community – represented under the Rome Statute or the UN Charter as the case may be – for the purpose of the maintenance of international peace and security according to the rule of international law”.

⁵⁹ Joint Concurring Opinion, para. 54.

⁶⁰ In Professor Kreß’s view, this “process started at the end of the Great War and States not party to the ICC Statute, such as the US, the Russian Federation or India, have played an important part in this development. Those States may choose not to be bound by the ICC Statute as such. But as a matter of customary international law, they cannot completely distance themselves from the fact that the international community, in full conformity of a central guiding principle of the customary process, has been provided, by virtue of the ICC Statute, with a court of universal orientation for the enforcement of this community’s *ius puniendi*.” Kreß Observations, p.19. See also Punishment without a Sovereign?



26. That said, the Joint Concurring Opinion's reference to delegation is telling. It reflects that the Court's authority derives from conferred, as well as inherent, rights. The concept of preconditions operating as a bar to the exercise of jurisdiction reflects this idea, and the notion that an international criminal court might simply be "*competent for nationals of participating states*" is recognised even by proponents of the view that the ICC is a universal institution acting beyond the special interests of States.⁶¹
27. The consent of States to be bound by the legal order of the Rome Statute or the UN Charter is the source, directly or indirectly, of the ICC's authority to exercise its jurisdiction pursuant to Article 13(a) and (c) (together with Article 12) of the Rome Statute, on the one hand, and Article 13(b) of the Rome Statute, on the other. Without States' consent, either to the legal order of the Rome Statute or the UN Charter, the Court would have no legitimate ground to exercise jurisdiction. This explains why Professor Ambos, while supporting the notion of the *ius puniendi* as a unifying theory of international criminal law, also recognises that Article 12(3) is premised on a delegation-based theory of jurisdiction.⁶² There is no inconsistency between conceptualising the ICC as an international criminal court with a right to exercise the *ius puniendi* of the international community as a whole (when the requisite preconditions are satisfied) and viewing its authority to exercise jurisdiction through the prism of preconditions which derive from the delegation model.
28. The delegation model derives from the law of international organisations and the consent principle,⁶³ and it frames our understanding of the normative landscape existing both within and outside the legal order of the Rome Statute.⁶⁴ The delegation model is reflected in Articles 12, 13, and 125 of the Rome Statute and it frames investigation of whether customary international law permits the exercise of jurisdiction over nationals of non-consenting States. Through scrutiny of operation of

⁶¹ See, e.g., Balancing Individual and Community Interests, 978.

⁶² K. Ambos, "Palestine UN Non-Member Observer Status and ICC Jurisdiction", EJIL Talk!, 6 May 2014.

⁶³ See e.g. J. Klabbers, *An Introduction to International Institutional Law* (Cambridge 2009), 184-186. See also 53.

⁶⁴ See D. Akande, "The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits", 1 JICJ (2003) 618 (hereinafter "Akande"), at 621-634. As Antonio Cassese put it, the "*Rome Statute authorizes the ICC to substitute itself for a consenting state, which would thus waive its right to exercise its criminal jurisdiction.*" A. Cassese, "The Statute of the International Criminal Court: Some Preliminary Reflections", 10 EJIL (1999) 144, 160. Lentner, p.47: "*For parties to the Rome Statute, the jurisdiction of the ICC as an international court is explained on the basis of delegation of authority by states parties*" citing, *inter alia*, Akande, n.26; M. Vagias, 'The Territorial Jurisdiction of the International Criminal Court – A Jurisdictional Rule of Reason for the ICC?' (2012) 59(1) Netherlands International Law Review 43, 44; Shlomit Wallerstein, 'Delegation of Powers and Authority in International Criminal Law', *Criminal Law, Philosophy* (2015) 9(1) 123. See also K. Boon, 'Instances of International Criminal Courts' in T. M. Franck (ed.), *Delegating State Powers: The Effect of Treaty Regimes on Democracy and Sovereignty* (Brill 2000) (hereinafter "Boon"), p.179.



the principle of consent in the establishment and exercise of jurisdiction of international criminal courts (as reflected by State practice, *opinio juris*, and the practice of organs of the international community), it is clear that a State's – or the UN Security Council's – consent to the exercise of jurisdiction by an international court cannot be dismissed as mere formalism.⁶⁵ It is through the act of State or Security Council consent - which preconditions an international criminal court's jurisdiction to prosecute and punish - that authority to exercise jurisdiction is delegated to an international criminal court. Article 12 of the Rome Statute is a substantive provision. The question is whether it reflects customary international law.

g. *Limitations to the ICC's universalist orientation*

29. The Rome Conference preconditioned the exercise of “*universal jurisdiction*” by the ICC to situations where the UN Security Council expressly consented to the exercise of jurisdiction.⁶⁶ Major powers have not joined the ICC, including the US, China, Russia, India and regional powers including Turkey, Egypt, Israel, Saudi Arabia, Iran, Pakistan and Indonesia. Together, non-States Parties to the ICC account for almost three-quarters of the world's armed forces. This is not surprising because States have traditionally been reluctant to internationalise processes of accountability for serious violations of humanitarian law,⁶⁷ and no international criminal court has successfully prosecuted a national of a non-consenting State absent a Security Council resolution enabling the exercise of jurisdiction.⁶⁸ The United States has been the most vocal opponent of the ICC's exercise of jurisdiction over its nationals, and the US does not

⁶⁵ Sarooshi, 6: “*The contestation of the concept of sovereignty has always moved to a more transcendent level of human institution: from the tribe to the city-state to the region to the institution of independent and sovereign nation-States and now, finally, to international organizations. It is partly for this reason that the debate about the legitimacy of the exercise by international organizations of governmental powers (the so-called ‘democratic deficit’) is largely framed by reference back to the exercise of these powers within the nation-State... The lower level of government has in history always played a more active and important role as a safeguard against the capacity of the more recently established, higher, level of government to establish and enforce problematic conceptions of sovereignty. This is particularly relevant in the context of global institutions where maintaining the system of national autonomy is so essential if the evils of excessive centralization are to be avoided.*” Cf *Punishment Without a Sovereign?*

⁶⁶ See Galand, p. 30. States accepting the Court's jurisdiction do not assert, through the collective medium of the Court, what would in effect be universal jurisdiction. Rather, they assert collective jurisdiction only on bases of what territoriality and nationality, i.e. heads of prescriptive jurisdiction as permissible in relation to all offences. O'Keefe, 14.33.

⁶⁷ Lentner, p.23. See also A. Cassese, ‘On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law’ (1998) 9(1) EJIL 2, 6. Dilip Lahiri, the Head of the Indian delegation at the Rome Conference, delivered a ruthless criticism of the final draft of the Rome Statute and pointed out that “*it was odd, for instance, that the draft adopted a definition of crimes against humanity with which the representatives of over half of humanity did not agree. And we are now about to adopt a Statute to which the Governments who represented two-thirds of humanity would not be a party.*” Dilip Lahiri, ‘Explanation of the Vote by Mr Dilip Lahiri, Head of Delegation of India, on the Adoption of the Statute of the International Criminal Court’, 17 July 1998.

⁶⁸ See *infra* Part II.



stand alone. The issue of whether the ICC is permitted to exercise jurisdiction over nationals of non-party States without State consent has been one of the official reasons for the Chinese government's opposition to the ICC.⁶⁹

30. The limits and nature of adjudication and enforcement of the crimes over which the ICC has (prescriptive) subject matter jurisdiction must be recognised. Firstly, not all Rome Statute crimes are crimes of universal jurisdiction, or are international crimes under customary international law.⁷⁰ In several instances, the Rome Statute goes beyond customary international law.⁷¹ Even Professor Kreß, elsewhere, recognises these limitations.⁷² Thus, the Rome Statute prescribes crimes that are exclusively conventional in character and form part of a broader concept of international criminal law without encroaching upon the hard core of international criminal law *stricto sensu* (i.e. crimes under customary international law).⁷³ Given that the Rome Statute prescribes subject matter jurisdiction over offences which are not criminal under customary law, on Professor Kreß's own analysis the ICC is rendered systemically liable to hegemonic abuse.⁷⁴ The Court's twenty-one year history (not least reflected by its experience in the *Situation in Kenya*) reflects this vulnerability.⁷⁵
31. Secondly, the suggestion that an international criminal court is authorised to ground the *exercise* of its jurisdiction simply on its capacity as fiduciary of the *ius puniendi* of the international community, absent satisfaction of consensual preconditions, cannot be sustained. At its core, the *ius puniendi* exercised by organs of the international community "gives them wider power than 'a national criminal court, which acts as a mere

⁶⁹ Galand, p.91 citing Zhu, *China and the International Criminal Court* (Edinburgh 2018), 59.

⁷⁰ At the Rome Conference, while "some delegations thought that the Statute was merely codifying existing customary law, and not engaging in progressive development, other delegations thought that a debate on the customary nature of certain instruments could be avoided." M. Milanović, 'Is the Rome Statute Binding on Individuals?', *JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE*, (2011) Vol. 9, Issue 1, 25–52 (hereinafter "Is the Rome Statute Binding?"), p.32 citing Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN GAOR, 51st Sess., Supp. No. 22, Vol. 1, UN Doc. A/51/22 (1996), at 16.

⁷¹ Is the Rome Statute Binding?, p.30. Ronen.

⁷² C. Kreß, "International Criminal Law", in Max Planck Encyclopedia of International Law, paras. 8, 12, 13.

⁷³ *Id.* This may be problematic if, as Professor Kreß has also asserted, the ICC derives legitimacy as an international court exercising the *ius puniendi* of the international community as a whole on the basis of its jurisdiction to prosecute and punish crimes under international law. This would suggest that ICC's authority to enforce the *ius puniendi* of the international community is contingent on the customary status of the crime which is being prosecuted.

⁷⁴ Roger O'Keefe opines that there is no such thing as the *ius puniendi* of the international community, other than the community of UN Member States *inter se* acting through an explicit decision of the UN Security Council under Chapter VII of the UN Charter. Transcript of hearing, 14 September 2018, ICC-02/05-01/09-T-8-ENG, p.56, lines 14-22 cited in Jordan Appeals Chamber Judgment, para. 84.

⁷⁵ See e.g. S. Kay QC, *The Prosecution of Uhuru Kenyatta at the International Criminal Court*, 20 January 2015 available at <http://www.internationallawbureau.com/wp-content/uploads/2015/01/report.pdf> (last accessed 31 July 2019).



fiduciary of the common good".⁷⁶ This has implications with respect to historical narrative, norm generation, and international recognition of emerging States under general international law. Quite plainly, it is States doing together that which they cannot do singly.⁷⁷

h. Lotus, sovereignty, and the requirement of a permissive rule

32. State consent through delegation is the mechanism through which international law preconditions the exercise of an international criminal court's jurisdiction. This flows from the position that an exercise of an international criminal court's jurisdiction is, effectively, the exercise of a *sovereign* power (namely the power residing in the sovereign to adjudicate criminal law and to punish its violations).⁷⁸ This *sovereign* aspect of jurisdiction (which, it must be recognised, permits the use of violence against accused and offenders) is fundamental to a complete understanding of international criminal courts' functional position, and their source of authority in the international legal order.⁷⁹ It serves to explain in part why an interpretation simply grounded in the Rome Statute with respect to the rights of non-consenting States is lacking.
33. The Rome Statute does not govern the ICC's relations with non-State Parties. Instead, customary international law governs them,⁸⁰ and as such they are informed by the horizontal (not vertical) relationship described in the *Lotus* case as operating between States with respect to the exercise of criminal jurisdiction.⁸¹ In *Lotus*, the PCIJ explained that jurisdiction is an aspect of sovereignty. States possess a "*wide measure of discretion*

⁷⁶ C. Kreß, "Immunities under International Law" in M. Bergsmo and Y. Ling (eds.), *State Sovereignty and International Criminal Law* (Beijing 2012), 246.

⁷⁷ The IMT held that: "*The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.*" Judgment, IMT Nuremberg, 30 September 1946, 22 IMT 447.

⁷⁸ As Professor Sarooshi notes, "*the contours of the conceptual framework generated by this core problem clearly allow us to speak of the concept of sovereignty within the context of international organizations exercising conferred powers of government.*" D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford 2005), 5. See also M. Koskeniemi, "Imagining the Rule of Law: Rereading the Grotian 'Tradition', EJIL Vol. 30 No.1, 17-52, 42-43 (Although "*sovereignty and property arose from the same acts, they were not to be confused. What was acquired as 'sovereignty' was 'jurisdiction' either in a territorial or a personal sense*") citing DIBP, bk II, ch. III, s.IV, 456-457.

⁷⁹ See W. Benjamin, 'Critique of Violence' in *Selected Writings: Volume I: 1913 – 1926* (London 1996).

⁸⁰ See M. E. Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (Kluwer 1997) (hereinafter "Villiger"), paras. 244-245 (submitting that a convention cannot directly impair customary law on the same subject matter and noting that parties to a convention are obliged to apply customary rules *vis-à-vis* non-parties for whom the convention remains *res inter alios acta*).

⁸¹ See M. Vagias, *The Territorial Jurisdiction of the International Criminal Court* (Cambridge 2014), 2.3. See also D. Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits', JICJ 1 (2003) 618-650.



which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.”⁸² However, absent the existence of a permissive rule, a State may not exercise jurisdiction in any form in the territory of another State. In this sense, jurisdiction is purely territorial.⁸³

34. The ICC’s authority to exercise jurisdiction, if opposed by a non-State Party, will be informed by the principles established in *Lotus*. Given both that the exercise of jurisdiction by an international criminal court (i.e. the exercise of adjudicative and enforcement jurisdiction) may properly be viewed as extraterritorial (i.e. separate and distinguishable from the exercise of jurisdiction of the territorial State) and that relations between the ICC and a non-State Party operate horizontally, it follows that any such exercise of jurisdiction must be authorised by a permissive rule of customary international law when opposed by a non-State Party. The relevant question, therefore, is whether the exercise of international criminal jurisdiction over nationals of non-consenting States is permitted by customary international law and, if so, in what circumstances. Put another way, it is open to question whether the absence of consent of the State of nationality operates as a precondition to the exercise of an international criminal court’s jurisdiction under customary international law.

II. Exercise of international criminal jurisdiction over nationals of non-consenting States

35. The State and its nationals have been inextricably connected since the birth of international criminal law.⁸⁴ It is no coincidence that State practice has not witnessed the prosecution of a national of a non-consenting State by an international criminal court absent an enabling Security Council resolution. The *Tadić* and *Taylor* cases reflected an evolving practice permitting the exercise of jurisdiction by an

⁸² *The SS Lotus* PCIJ Rep Ser A Non 10 (1927) (hereinafter “*Lotus*”), p.19.

⁸³ *Lotus*, p.18. See also, e.g., *Arrest Warrant of 11 April 2000 (DRC v. Belgium)*, International Court of Justice, 14 February 2002, ICJ Reports (2002) 3 (hereinafter the ‘*Arrest Warrant Case*’) (Dissenting Opinion of Judge Van Den Wyngaert), paras 49, 76 (drawing the distinction between prescriptive and enforcement jurisdiction and finding that the prohibitive rule contained in *Lotus* ‘is about what a State may do on its own territory when investigating and prosecuting crimes committed abroad, not about what a State may do on the territory of other States when prosecuting such crimes. Obviously, a State has no enforcement jurisdiction outside its territory: a State may, failing permission to the contrary, not exercise its power on the territory of another State. This is ‘the first and foremost restriction imposed by international law upon a State’. In other words, the permissive rule only applies to prescriptive jurisdiction, not to enforcement jurisdiction: failing a prohibition, State A may, on its own territory, prosecute offences committed in State B (permissive rule); failing a permission, State A may not act on the territory of State B’. See also paras. 51, 59 et seq. (applying a modified *Lotus* test by examining whether international law permits a universal jurisdiction for war crimes and crimes against humanity); para 76 (acknowledging that international acts in “the realm of enforcement jurisdiction” are, under the *Lotus* test, “in principle prohibited” as the “first and foremost restriction that international law imposes on States”). See also J. Crawford, *Brownlie’s Principles of Public International Law*, 8th ed. (2012), at 458.

⁸⁴ See *supra* n. 5.



international criminal court over nationals of non-consenting States pursuant to a decision of the Security Council.⁸⁵ In 1998, the vote on the Rome Statute purported to broaden the scope of an international criminal court's enforcement jurisdiction through obviating the requirement of the State of nationality's consent (by operation of its Article 12). Given that *Lotus* suggests the exercise of extraterritorial enforcement jurisdiction must be supported by a permissive rule, it is open to question whether the Rome Conference's acceptance of Article 12 reflects, constitutes, or is declaratory of a rule of international law, or whether it represents like-minded States seeking to progress the development of a more permissive norm over the objections of non-consenting States.⁸⁶

36. Prior to establishment of the the ICC, the establishment of the ICTY, ICTR, SCSL and STL had represented State practice's high watermark through which jurisdiction was exercised on behalf of the international community by an international criminal court over nationals of non-consenting States. In each case, the tribunal was constituted, or its establishment enabled, by a resolution of the Security Council. What is required is an examination of State practice and *opinio juris* to determine whether this practice evidences a customary rule.

a. Nuremberg and Tokyo

37. The International Military Tribunal was, like the ICC, a treaty-based international criminal court.⁸⁷ The Nuremberg Military Tribunals' "*power and jurisdiction arose out of the joint sovereignty of the four victorious powers.*"⁸⁸ Their existence does not represent an example of State practice reflecting the permissibility of prosecution and punishment of nationals of non-consenting States. The Allies that established the IMT and NMT were exercising sovereign powers in Germany in 1945. It was Germany's sovereign rulers who signed the London Charter, and who (as sovereign) enacted Control Council Law No.10.⁸⁹

⁸⁵ *Prosecutor v Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995. *Prosecutor v Taylor*, SCSL-2003-01-I, Decision on Immunity from Jurisdiction, Appeals Chamber, 31 May 2004 (hereinafter "*Taylor Jurisdiction Decision*").

⁸⁶ Villiger, para. 244.

⁸⁷ Cf. C. Kreß, "International Criminal Law", in Max Planck Encyclopedia of International Law, para. 23 (noting that it is difficult to portray the Nuremberg and Tokyo Tribunals as "*organs of the international community*").

⁸⁸ See e.g. Boon, p.178.

⁸⁹ The US, the USSR, the UK and France – the four Allied powers in occupation of defeated Germany – expressly assumed in the Berlin Declaration of 5 June 1945 "*supreme authority with respect to Germany, including all the powers possessed by the German Government... and any state, municipal, or local government or authority*": Declaration regarding the Defeat of Germany and the Assumption of Supreme Authority with respect to Germany by the Governments of the United States of America, the Union of Soviet Socialist Republics, the United Kingdom and the Provisional Government of the French Republic,



38. The Nuremberg Tribunal(s) may be contrasted in turn with the jurisdictional basis of the Tokyo Tribunal, established to prosecute Japanese war criminals after World War II. The Tokyo Tribunal was predicated on the consent of the Japanese Government, as reflected by the Instrument of Surrender's incorporation of the Potsdam Declaration.⁹⁰

b. Suppression Conventions

39. The Rome Statute and suppression conventions have different natures. Aside from Article VI of the Genocide Convention and Article V of the Apartheid Convention,⁹¹ suppression conventions operate *inter partes* and do not purport to regulate relations between States and an international criminal tribunal.⁹² Suppression conventions by themselves impose no duties and no responsibility directly on the individual.⁹³ Save with respect to the crimes of genocide, they do not constitute practice capable of evidencing a norm which has attained customary status with respect to the exercise of jurisdiction by *international criminal courts*.⁹⁴

c. Article VI of the Genocide Convention

Berlin, 5 June 1945 ("Berlin Declaration"). The IMT Judgment stated that the "*making of the [Nuremberg] Charter (p.73) was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered*", speaking of the "*right of these countries to legislate for the occupied territories*": Judgment of the International Military Tribunal for the Trial of the German Major War Criminals, Nuremberg, 30 September and 1 October 1946, Misc No 12 (1946), Cmd 6964, reproduced (1947) 41 *AJIL* 172 ("Nuremberg Judgment"), 220. In short, the Allied powers claimed to wield the criminal jurisdiction of the subjugated German State: O'Keefe, para. 2.59.

⁹⁰ See Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo January 19, 1946; charter dated January 19, 1946; Tribunal established January 19, 1946, *Treaties and Other International Acts Series* 1589.

⁹¹ The Apartheid Convention has 31 signatories and 109 States Parties. It is less universal than the Rome Statute. Indeed, the Rome Statute represents the high-water mark in civil society's and States' mission to criminalise apartheid as a crime against humanity and provide a framework for its authors' prosecution and punishment. See International Convention on the Suppression and Punishment of the Crime of Apartheid, Status available at <https://treaties.un.org/>.

⁹² See B. Broomhall, 'Article 22', in O. Triffterer/K. Ambos eds., *The Rome Statute of the International Criminal Court, A Commentary* (C.H. Beck/Hart/Nomos, 3rd ed., 2016) ('Broomhall'), at 964, mn.56 arguing that not all treaties which call for the prohibition of certain conduct also entail the internationally enforceable criminal responsibility of individuals, absent some form of incorporation into national law. However, agreements to prohibit conduct are relatively common between States, with the parties agreeing to penalise certain behaviour in their national legal systems and otherwise to cooperate in its suppression. Such 'suppression conventions' create law of a different sort from prohibitions directly entailing individual responsibility under general international law.

⁹³ B. Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford 2003), at 13.

⁹⁴ See Akande, at 624-5.



40. It may be argued from the number of ratifications of the Rome Statute and the ICC's relationship with the UN, the ICC has been entrusted to act on behalf of the international community when it applies the Rome Statute.⁹⁵ In this context, it bears recalling that the Genocide Convention has been ratified by 151 States Parties, including Russia, China, the US, Saudi Arabia, Iran, Israel, Myanmar, and India. In terms of universality, States' acceptance of the Genocide Convention is of a different order to States' acceptance of the Rome Statute.⁹⁶
41. Rather than granting States universal jurisdiction over genocide, Article VI of the Genocide Convention provides that persons charged with genocide or any of the other acts enumerated in Article III of the Convention 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.⁹⁷ Article VI of the Genocide Convention is a rule which preconditions an international criminal court's exercise of jurisdiction over genocide with respect to Contracting Parties which have accepted its jurisdiction. The near universality of the Genocide Convention reflects this provision's crystallised status as a norm of customary international law. Universal acceptance of Article VI of the Genocide Convention provides a contrast with Article 12 of the Rome Statute, which has not been so widely accepted.

d. Other examples of State practice

42. Professor Akande argues that the Central Commission for Navigation on the Rhine, the Court of Justice of the European Union (CJEU), and the Caribbean Court of Justice (CCJ) constitute examples of "*delegations by states of part of their national criminal jurisdiction over non-nationals to international tribunals.*"⁹⁸ However these courts and commissions are distinguishable from international criminal courts. Neither the Central Commission for Navigation on the Rhine, the CCJ nor the ECJ possessed or possess a criminal jurisdiction which purports to exercise the enforcement jurisdiction of an international criminal court on behalf of the international community. As appellate courts, the ECJ and CCJ have no inherent criminal jurisdiction at all.

e. Security Council practice

43. The ICTY and the ICTR were established as subsidiary organs of the Security Council exercising Chapter VII powers. In the ICTR's case, this was over and above the objection of the Government of Rwanda. The ICTY provides an example of an

⁹⁵ Galand, p.97

⁹⁶ See Genocide Convention available at

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&clang=en.

⁹⁷ Article VI of the Genocide Convention.

⁹⁸ Akande, at 631.



international criminal court exercising jurisdiction over a national of a non-State Party without the State of nationality's consent,⁹⁹ on the basis of the authority vested in it by the Security Council. The ICTY was permitted to exercise jurisdiction over nationals of the Federal Republic of Yugoslavia (FRY) notwithstanding that the FRY was arguably not a UN Member at the material time.¹⁰⁰

44. In Resolutions 1422 (2002) and 1487 (2003), the Security Council deferred investigation of nationals of non-State Parties on UN peacekeeping operations in Libya and Darfur (i.e. situations which had been referred to the ICC by the Security Council), through utilising the mechanism established by Article 16 of the Rome Statute. The Security Council debate accompanying these resolutions demonstrates that the United States' objections to the exercise of jurisdiction over its nationals remained consistent.¹⁰¹ The carve out was necessary as, otherwise (by virtue of the Security Council referral itself), the Court may have had jurisdiction to prosecute all crimes committed on the situation territory.

f. Special Tribunal for Lebanon (STL) and Special Court for Sierra Leone (SCSL)

45. The STL and the SCSL are also creatures of the Security Council.¹⁰² The STL was established by way of a decision of the Security Council under Chapter VII of the UN Charter, without Lebanon's consent in accordance with its constitutional law and procedure.¹⁰³ Nevertheless, the Security Council established the STL by making the provisions of the agreement negotiated with Lebanon an integral part of the resolution adopted under Chapter VII.¹⁰⁴

⁹⁹ *Id.*, at 626.

¹⁰⁰ *Id.*, at 628. *But see Prosecutor v Milutinović et al.*, Case No.IT-99-37-PT, Decision on Motion Challenging Jurisdiction, 6 May 2003. *Application for Revision of the Judgement of 11 July 1996 in the Case concerning Genocide Convention Case (Yugoslavia v Bosnia and Herzegovina)*, International Court of Justice, 3 February 2003, para. 70-71 (where the ICJ stated that "FRY's claim to continue the international legal personality was not 'generally accepted,'" and did not explicitly accept or reject FRY's submission that its admission to the UN as a new member in 2000 showed that it was not a UN member in 1996, but simply noted that the FRY had a *sui generis* position as regards the UN between 1992 and 2000).

¹⁰¹ See UN Press Release, SC/7789, 12 June 2003 (in which James Cunningham articulated the continuing objections of the United States). As to the US position at the Security Council debate on Darfur, see Reports of the Secretary-General on the Sudan, UN Doc S/PV.5158, 31 March 2005, at 3.

¹⁰² See, e.g., *Taylor* Jurisdiction Decision, paras 36-39 (reaffirming the importance of SC Res. 1315 (2000) in constituting the SCSL).

¹⁰³ Lebanon declined to ratify the Agreement to establish the STL.

¹⁰⁴ O'Keefe, 3.24: "By letter to the UN Secretary-General dated 13 December 2005, the prime minister of Lebanon requested the Security Council to establish a 'tribunal of an international character' to try persons suspected of involvement in the assassination of 14 February 2005 of former prime minister of Lebanon Rafiq Hariri... In Security Council resolution 1644(2005) of 15 December 2005, the Council acknowledged the Lebanese government's request, and in turn requested the Secretary-General to help the Lebanese Government identify the nature and scope of the international assistance needed in this regard' and to report back to the Council. The Secretary-General duly reported back, and the Security Council, welcoming his report, requested him 'to negotiate



46. The SCSL's authority to exercise jurisdiction on behalf of the international community derives from the Security Council.¹⁰⁵ The *Fofana* Appeals Chamber held that the establishment of an international criminal tribunal by way of agreement with a State was a measure within the wide discretion granted to the Security Council under Article 24(1) of the UN Charter to maintain international peace and security and that, since the Council was not acting coercively, it was immaterial whether this measure had been taken under Chapter VII or not.¹⁰⁶ It was the Security Council which was the SCSL's source of authority (the "power-bearer") and the Security Council which created the SCSL.¹⁰⁷

47. The *Taylor* Appeals Chamber held that it was "clear that the power of the Security Council to enter into an agreement for the establishment of the court was derived from the Charter of the United Nations both in regard to the general purposes of the United Nations as expressed in Article 1 of the Charter and the specific powers of the Security Council in Articles 39 and 41."¹⁰⁸ The Security Council decision permitted the SCSL to exercise jurisdiction as an international criminal court on behalf of the international community as a whole. Moreover, with respect to the prosecution of Charles Taylor (a Liberian national), Liberia gave its full support to the trial of its former Head of State before the Special Court.¹⁰⁹

g. *Opinio juris: preparatory work leading up to the Rome Conference*

48. Prior to the Rome Conference, no norm of customary international law had developed permitting the exercise of jurisdiction by an international criminal court over a national of a non-consenting State absent an enabling decision of the Security Council. The Special Rapporteur of the Draft Code of Crimes in his 11th Report proposed that,

an agreement with the Government of Lebanon aimed at establishing a tribunal of an international character..., taking into account the recommendations of his report." On 30 May 2007, in paragraph 1 of Resolution 1757 (2007), the Security Council decided, under Chapter VII, that the provisions of the STL Agreement would enter into force on 10 June 2007. Thus, in short, it was by way of Security Council resolution 1757 (2007) that the STL was formally established.

¹⁰⁵ See *Taylor* Jurisdiction Decision, paras. 41 and 42.

¹⁰⁶ O'Keefe, 13.20 citing *Prosecutor v Fofana*, SCSL-2004-14-AR72, Appeals Chamber, Decision on Preliminary Motion on Lack of Jurisdiction Materiae [*sic*]: Illegal Delegation of Powers by the United Nations, 25 May 2004.

¹⁰⁷ *Prosecutor v Fofana*, SCSL-2004-14-AR72, Appeals Chamber, Decision on Preliminary Motion on Lack of Jurisdiction Materiae [*sic*]: Illegal Delegation of Powers by the United Nations, 25 May 2004, paras. 16, 23. *But see* Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, S/2000/915, 4 October 2000, para. 9 (finding the SCSL to be a "treaty-based *sui generis* court of mixed jurisdiction and composition").

¹⁰⁸ *Taylor* Jurisdiction Decision, para. 37.

¹⁰⁹ See O'Keefe, 3.42.



in order to be realistic, the future Court's jurisdiction should be premised on the consent of both the territorial State and the State of nationality of the perpetrator.¹¹⁰

49. The International Law Commission ("ILC") Draft Statute in 1994 proposed that the future court should distinguish, as does the ICJ Statute, between participation and support for the structure and operation of the court, on the one hand, and acceptance of substantive jurisdiction in a particular case on the other. The process of acceptance was proposed to be separate (as under Article 36 of the ICJ Statute)¹¹¹ and was an 'opt-in' system based on State consent.¹¹² Acceptance of jurisdiction would be required by both the territorial State and the custodial State, save in cases of genocide.¹¹³ Reflecting its special status, the future Court would have inherent jurisdiction only over genocide.¹¹⁴ From the US perspective, the Draft constituted 'a good starting point' for more detailed and comprehensive discussions.¹¹⁵
50. At the *Ad Hoc* Committee, in 1995, the US insisted that the proposed Court should only have jurisdiction if interested states had consented to the exercise of such jurisdiction, and was supported by China, Russia, and the Middle Eastern States. Others firmly rejected such an approach.¹¹⁶ In the *Ad Hoc* and Preparatory Committees there was no agreement between States that on the one hand supported the jurisdiction for all core crimes due to their gravity and States on the other, that stressed sovereignty and the consensual nature of the Court.¹¹⁷ This *opinio juris* shows not only that the practice described above is compatible with a customary rule that an international criminal court is not permitted to exercise jurisdiction absent the State of nationality's consent (or an enabling Security Council decision), but also that the practice cannot be explained other than as based on such a restriction.

¹¹⁰ International Law Commission, 'Eleventh Report on the Draft Code of Crimes Against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur: including the Draft Statute for an International Criminal Court,' UN Doc. A/CN.4/449 and Corr. 1, *Yearbook of the International Law Commission*, 2(1)(1993), at 115, para. 32 (Draft Article 5, para. 2), and at 116, para. 36.

¹¹¹ Report of the International Law Commission on the work of its forty-sixth session, Draft Statute for an International Criminal Court with commentaries 1994, at 36.

¹¹² *Id.*, at 43. See also W. Schabas and G. Pecorella, 'Article 12', in O. Triffterer and K. Ambos (eds), *The Rome Statute of the International Criminal Court, A Commentary* (C.H. Beck/Hart/Nomos, 3rd ed., 2016) ('Schabas and Pecorella'), mn.3.

¹¹³ *Id.*, at 42.

¹¹⁴ *Id.*, p.37.

¹¹⁵ D. Scheffer, 'The United States and the International Criminal Court', 93 AJIL (1999) 12, at 13.

¹¹⁶ Fanny Benedetti, Karine Bonneau, and John L. Washburn, *Negotiating the International Criminal Court: New York to Rome, 1994-1998* (Martinus Nijhoff Publishers 2014) 29-31.

¹¹⁷ Schabas and Pecorella, mn.3.



h. Opinio juris as expressed at the Rome Conference

51. Although the United States asserts ‘*long standing, continuing, and principled objections*’ to ‘*any assertion of ICC jurisdiction over nationals of States that are not parties to the Rome Statute, absent a UN Security Council referral or the consent of that State,*’¹¹⁸ it has been suggested that the role of the Security Council ‘*really was epiphenomenal*’ to the Rome negotiations and the ‘*real sticking point [in Rome] was the possibility that the ICC could exercise jurisdiction over US nationals; the role of the Security Council was really raised as a means to an end for ensuring exemption for US nationals.*’¹¹⁹ The question arises whether - at the Rome negotiations - *opinio juris* was expressed in such a way as being indicative of the existence of a customary rule which permitted the exercise of jurisdiction over a national of a non-consenting State, and if so in what circumstances. If Article 12 had been agreed by consensus, it would arguably follow that its text reflected customary international law. However, the Conference records show that these provisions were ‘*among the most complex and most sensitive, and for that reason remained subject to many options as long as possible.*’¹²⁰
52. The Rome Conference rejected proposals suggesting the ICC should exercise a universal jurisdiction.¹²¹ At the other end of the spectrum, States proposed the mandatory consent of all interested states.¹²² The United States required the consent of the State of nationality of the suspect in all cases, unless the jurisdiction of the Court were triggered by the Security Council.¹²³ In the final plenary of the Committee of the Whole, the United States submitted an amendment to make the exercise of jurisdiction conditional on the consent of the State of nationality of the accused person.¹²⁴ However, a no-action motion was adopted by a vote of 113 in favour to 17 against,

¹¹⁸ Statement on Behalf of the United States of America, 16th Session of the Assembly of States Parties, December 8, 2017.

¹¹⁹ R. Cryer, ‘The Relationship between the ICC and the United Nations Security Council’ in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford 2016), at 275. See also G. Danilenko, ‘The Statute of the International Criminal Court and Third States’, 21 MICHIGAN JOURNAL OF INTERNATIONAL LAW 3 (2000) 445, at 454. Cf. W. Schabas, ‘United States hostility to the International Criminal Court: it’s all about the Security Council,’ 15(4) EJIL (2004) 701-720.

¹²⁰ Schabas and Pecorella, mn.1.

¹²¹ The Jurisdiction of the International Criminal Court: an Informal Discussion Paper Submitted by Germany, U.N. Doc. AIAC.249/1998/DP.2 (1998); Republic of Korea: proposal regarding articles 6 [9], 7 [6], UN Doc. A/CONF.183/C.1/L.6, 18 June 1998, para. 1.

¹²² Schabas and Pecorella, mn. 5, 8.

¹²³ Schabas Commentary, at 347. See also R. Rastan, ‘Jurisdictional Scope of Situations’ in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford 2016) at 275 citing Amendments proposed by the United States of America at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 15 June – 17 July 1998, UN Doc A/CONF.183/C.1/L.70.

¹²⁴ Proposal Submitted by the United States of America, UN Doc. A/CONF.183/C.1/L.70; UN A/CONF.183/C.1/SR.42, 16 June 1998, para. 22. See also W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford 2016) (hereinafter ‘Schabas Commentary’), at 349.



with 25 abstentions, and the amendment was never put to a vote.¹²⁵ Professor Newton suggests that this reflects that the ‘*concept of transferred territoriality was sufficiently accepted*’ by the Rome Conference.¹²⁶ Of course, on 17 July 1998 the Rome Statute was adopted by those participating in the treaty negotiations as 120 votes in favour to 7 against with 21 abstentions.¹²⁷

53. We respectfully disagree with Professor Newton’s conclusion here. The United States had expressed a clear and conscious objection to ICC jurisdiction over nationals of States that are not parties to the Rome Statute, absent a UN Security Council referral,¹²⁸ or the consent of that State.¹²⁹ The United States’ narrow position on consent was endorsed by several other states.¹³⁰ China objected to the purported conferral on the ICC of jurisdiction over nationals of non-state parties, absent a UN Security Council referral,¹³¹ or the consent of that State (except in cases of genocide).¹³² Israel noted *inter*

¹²⁵ Schabas Commentary, at 350 *citing* UN Doc. A/CONF.183/C.1/SR.42, para 31.

¹²⁶ M. Newton, ‘How the International Criminal Court Threatens Treaty Norms,’ 49 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 371 (2016), at 386.

¹²⁷ Schabas and Pecorella, mn.5.

¹²⁸ As to the role of the Security Council, for the US position see UN Doc. A/CONF.183/SR.5, paras 59-60. *See also* UN Doc. A/CONF.183/C1/SR.9, para 23; A/CONF.183/C.1/SR.29, para. 42: ‘*The United States had grave difficulties with establishing a court that presumed to have jurisdiction over the citizens of a State that had not ratified the treaty creating it, except in situations where the Security Council had taken enforcement action under Chapter VII of the Charter of the United Nations, which was binding on all Member States*’; UN Doc. A/CONF.183/SR.9, paras. 28, 30.

¹²⁹ As to requiring the consent of the State of nationality, David Scheffer expressed US objections as follows: ‘*[I]f the principle of universal jurisdiction were adopted, many Governments would never sign the treaty and the United States would have to actively oppose the Court. The principle of universal jurisdiction was not accepted in the practice of most Governments and, if adopted for the Statute, would erode the fundamental principles of treaty law. The possibility that the Court might prosecute the officials of a State that was not a party to the treaty or had not submitted to the Court’s jurisdiction in other ways was a form of extraterritorial jurisdiction that would be quite unorthodox.*’ *See also* A/CONF.183/C.1/SR.29, para. 42; A/CONF.183/C.1/SR.42, para. 22.

¹³⁰ *See* UN Doc. A/CONF.183/C.1/SR.30, paras 14 (Jamaica), 30 (Nigeria), 51 (Vietnam), 75 (Algeria), 78 (Indonesia), 87 (Egypt), 92 (Israel); UN Doc A./CONF.183/C.1/SR.31, paras 11 (Sri Lanka), 18 (Pakistan), 27 (Afghanistan), 40 (Iran). *See also* UN Doc A/CONF.183/SR.3, para. 91 (Pakistan); UN Doc A/CONF.183/SR.4, paras 47-49 (India); UN Doc A/CONF.183/SR.6, para. 76 (France); UN Doc A/CONF.183/SR.7, para. 12 (Turkey). *See also* UN Doc. A/CONF.183/C.1/SR.42, para. 27 (Qatar).

¹³¹ *See* UN Doc. A/CONF.183/SR.3, para. 35. *See also* UN Doc. A/CONF.183/C.1/SR.27, para. 80.

¹³² *See* UN Doc. A/CONF.183/SR.3, para. 37. *See also* UN Doc. A/CONF.183/C.1/SR.27, para. 76: ‘*With regard to jurisdiction, ... the effectiveness of the Court would depend entirely on the cooperation of States and that the consent of the interested parties was therefore essential. [The Chinese] delegation considered, with respect to article 7, that the Court might exercise its jurisdiction if the territorial State, the custodial State and the State of which the accused of the crime was a national were parties to the Statute*’; A/CONF. 183/C. 1/SR.33, para. 41: ‘*With regard to the preconditions to the exercise of jurisdiction over genocide in article 7, China could accept the possibility of automatic jurisdiction. However, for non-party States, the consent of the State of nationality and of the territorial State should be required. As for preconditions in the case of crimes against humanity and war crimes, there should be opt-in jurisdiction with consent of the State of nationality and the territorial State.*’ *See also* UN Doc. A/CONF.183/SR.9, para. 37.



alia that a ‘precondition to the exercise of the Court’s jurisdiction should be the adherence to the Statute of specific categories of States. Those States should be the territorial State, the custodial State and the State of nationality of the accused.’¹³³

i. Amendments to the Rome Statute

54. Article 15bis(5) precludes the Court from exercising jurisdiction over the crime of aggression committed on the territory or by nationals of a State not Party to the Rome Statute. The amendment was not strongly objected to¹³⁴ and the text of Article 15bis(4) also permits a State of nationality to issue an opt-out declaration.¹³⁵ The Kampala Review Conference’s approach harmonises the Rome Statute’s preconditions to the exercise of jurisdiction over aggression with customary international law.

55. Similarly, amendments to Article 8 expressly prohibit the Court from exercising jurisdiction over crimes covered by the amendment when committed by a non-ratifying State party’s nationals or on a non-ratifying State Party’s territory, and confirms its understanding that the same exemption applies to non-State Parties.¹³⁶ ICC States Parties appear to have reconsidered the preconditions permitting the Court to exercise jurisdiction over nationals of non-consenting States.¹³⁷ The amendments to Article 8 may be viewed, like the Kampala amendments, as part of contemporary recognition by States Parties (*opinio juris*) reflecting the norm whereby an international criminal court is not permitted to exercise jurisdiction absent the consent of the State of the accused’s nationality or an enabling Security Council decision.

j. Jus cogens norms and erga omnes obligations

56. If there is no customary rule which would permit an international criminal court to exercise jurisdiction over nationals of non-consenting States absent a Security Council trigger, this begs the question whether (in the absence of such a rule) jurisdiction can nevertheless be established on account of the *jus cogens* nature of the prohibition of the conduct in question, or the *erga omnes* nature of the obligation to prosecute the conduct. However, the existence of a rule of *jus cogens* does not by analogy permit an international court (or any other court) to exercise jurisdiction where otherwise it would not be so permitted. The ‘*status of a rule, whether or not a rule erga omnes, is a*

¹³³ UN Doc. A/CONF.183/C.1/SR.30, para. 92. See also UN Doc. A/CONF.183/C.1/SR.7, paras. 64-66; UN Doc. A/CONF.183/C.1/SR.35, para. 27.

¹³⁴ Galand, p.40 citing Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May – 11 June 2010, ICC Doc. RC/11, 21 December 2010, p.72.

¹³⁵ See Article 15bis(4) and (5) of the Rome Statute.

¹³⁶ Resolution ICC-ASP/16/Res.4, op. para.2.

¹³⁷ Galand, p.91 citing Resolution RC/Res.5, preamb, par. 2; Resolution ICC-ASP/16/Res.4, preamb. par. 2.



*separate question from that of consent to the exercise of jurisdiction.*¹³⁸ Where the Rome Statute prescribes norms which have attained the status of *jus cogens*, this status implies prohibition but there are no specific enforcement implications.¹³⁹

k. *Conclusion as to customary international law*

57. In conclusion, although there is evidence of State Practice whereby international criminal courts have exercised treaty-based jurisdiction over nationals of non-consenting States, adjudication and enforcement has customarily been preconditioned on the mechanism of a Security Council decision enabling the establishment of the tribunal. State practice yields no discernible rule which permits an international criminal court to exercise jurisdiction absent such a Security Council decision, or the consent of the State of nationality. Given that the United States and China, among others, have stated clear objections to being bound by a rule that would permit such an exercise of jurisdiction, *opinio juris* is insufficiently uniform to demonstrate the crystallization of a customary rule to this effect.

III. Responsibility for illegally or irregularly obtained custody

58. The foregoing shows that the exercise of international criminal jurisdiction over a national of a non-consenting State absent an enabling Security Council decision is not permitted under customary international law. The exercise of such jurisdiction would be exorbitant, and potentially an internationally wrongful act, engaging the responsibility of the ICC as well as, arguably, a custodial State towards the State of nationality. The international responsibility of the custodial State may entail an obligation to make reparation, in accordance with the rule of customary international law codified in Article 31 of the International Law Commission's (ILC's) Articles on Responsibility of States for International Wrongful Acts.¹⁴⁰

59. Criminal courts are permitted, as a matter of municipal law, to try an accused even where his or her presence before the court has been secured contrary to international law.¹⁴¹ There is, however, a clear distinction between the jurisdiction of international criminal courts over nationals of non-consenting States and application of the principle of *male captus bene detenus* before municipal courts. Before the international court, the breach of the principle of consent would be continuing upon each appearance of an affected suspect. Each exercise of jurisdiction, each remand into custody, and any punishment, would represent the exercise of an exorbitant jurisdiction precluding regularisation of the legal position.

¹³⁸ Shaw, at 95. See also *Jones & ors. v UK*, ECtHR, App. No. 34356/06 and 40528/06.

¹³⁹ See, e.g. H. Aust, *Complicity and the Law of State Responsibility* (Cambridge 2011), 39-40.

¹⁴⁰ O'Keefe, 1.107 - 1.108.

¹⁴¹ O'Keefe, 1.108 citing *Eichmann* (District Court), 59-70, paras 41-49 and *Eichmann* (Supreme Court), 306-307, para 13 and *United States v Alvarez-Machain* 95 ILR 355, 359 (US 1992).



60. Separate legal personality implies liability for wrongful acts of international organisations. The question of liability of States Parties to third parties may arise subsidiarily and poses potential difficulties. The question will be decided by rules of international law (not least since it is consequential upon a determination of legal personality which, in the case of international organisations, is also governed by international law).¹⁴²
61. An international organisation which aids or assists a State or another international organisation in the commission of an internationally wrongful act will itself bear international responsibility where the organisation knew the circumstances of the wrongful act and the act would be internationally wrongful if committed by that organisation.¹⁴³ It may be open to a court to decline to exercise the jurisdiction it enjoys, in the exercise of its inherent jurisdiction to remedy abuse of its process.¹⁴⁴ The ICC has to date disclaimed an express abuse of process jurisdiction, but it is not required to do so by customary international law and Article 21(3) of the Rome Statute may be interpreted so as to permit a stay of proceedings tainted by an abuse which prejudices an Accused's fundamental rights.¹⁴⁵ Restitution would seem to imply, in relevant cases, the nullification of any unlawful arrest and safe return to the State of nationality.¹⁴⁶

IV. Conclusion

62. The Appeals Chamber's Decision on Jordan's appeal in *Bashir*, as well as Pre-Trial Chamber I's Decision in the *Situation in Bangladesh*, have defined the ICC's capacities as an international court and its jurisdiction under customary international law in such a way as to render necessary analysis of whether, customarily, the consent of the State of nationality has operated as a precondition to the exercise of international criminal

¹⁴² Shaw, p.990, 1004: The "International Law Commission in article 2(a) of its Draft Articles on the Responsibility of International Organizations adopted in 2011 defines an international organization as 'an organization established by treaty or other instrument governed by international law and possessing its own legal personality.'" See also Draft articles on the responsibility of international organizations (2011), Article 2(a).

¹⁴³ Shaw, p.1002 citing Article 14 of the ILC draft articles on the responsibility of international organisations. See also *Behrami v France*, ECtHR Judgment 2 May 2007, where the Court dismissed as inadmissible an application against a number of NATO states operating within the framework of KFOR (a force authorised by the UNSC under Chapter VII) on the grounds that the actions complained against "were directly attributable to the UN", whether to KFOR or UNMIK. See also Shaw, p.258.

¹⁴⁴ O'Keefe, 1.108 citing eg. *R v Horseferry Road Magistrates' Court, Ex parte Bennett*, 95 ILR 380 (UK 1993) per Lord Bridge at 395 and 398-9, and Lord Lowry at 408. In South Africa, by contrast, the criminal courts lack jurisdiction to try the accused where his or her presence has been secured in violation of international law: see *S v Ebrahim* 95 ILR 417 (South Africa 1991).

¹⁴⁵ *Prosecutor v Lubanga*, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, Appeals Chamber, ICC-01/04-01/06 (OA4), 14 December 2006.

¹⁴⁶ See O'Keefe, 1.110.



courts' jurisdiction. The foregoing analysis shows that the answer to this question is affirmative. Methodologically, irrespective of whether the offence being prosecuted is a Rome Statute crime or is also a crime under customary international law, the scope of the Court's permission to exercise jurisdiction over nationals of non-States Parties derives from a process of discerning rules of customary international law which govern the jurisdiction of international criminal courts in their relations with third States. As a matter of customary international law, State practice and *opinio juris* show that the ICC is not permitted to exercise its jurisdiction absent the consent of the State of nationality in a situation not referred to the Court by the Security Council. Responsibility under general international law will flow from any breach of this customary rule.

V. Offer of assistance

63. The authors stand ready to assist the OTP and the Court through further dialogue and communications with respect to the legal and factual matters arising from this communication.

VI. Acknowledgments

64. This communication was funded by The Lawfare Project. It is part of a series drawing the OTP's attention to matters of fact and law relevant to its preliminary examination of the Situation. The Lawfare Project is a non-profit organisation based in New York.

65. The authors further gratefully acknowledge the contribution of UK Lawyers for Israel and Dr Dov Jacobs for their kind assistance with review of this communication in draft.

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