

CONOR DONOHUE

**THE UNANSWERED “QUESTION OF QUESTIONS”:
THE JURISDICTIONAL COMPETENCE OF THE
INTERNATIONAL CRIMINAL COURT**

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The Unanswered “Question of Questions”: The Jurisdictional Competence of the International Criminal Court

The negotiation of the International Criminal Court’s jurisdiction proved to be highly controversial during the Diplomatic Conference at Rome in 1998. Despite this, the jurisdiction of the Court has not yet been a major issue in practice. Present situations before the Court, such as the situation in Palestine, however, mean that a re-examination of the Court’s jurisdictional scope is timely. In this vein, it is argued that territorial disputes between a State Party and a non-Party should not act as a bar to the exercise of the Court’s jurisdiction, and that the Court’s territorial jurisdiction may be properly understood as encompassing ‘objective territoriality’. The Court’s territorial jurisdiction, however, cannot be understood as permitting an application of the ‘effects doctrine’. Finally, the issue of nationality jurisdiction is explored, and it is concluded that this jurisdictional basis will be of limited practicality in the Court’s goal of ending impunity. If such a goal is to be achieved, States must be willing to try serious international criminals municipally.

Keywords: International Criminal Court; International Criminal Law; Jurisdiction; Territorial Jurisdiction; Nationality Jurisdiction

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I Introduction

Upon the entry into force of the Rome Statute of the International Criminal Court (Rome Statute), an unprecedented entity was established – the International Criminal Court (ICC), the world’s first permanent international criminal tribunal. The Court was established for the noble purpose of ending impunity and ensuring accountability for the most serious of international crimes.¹ Given this significant aim, it is unsurprising that, during the drafting negotiations, the issue of the Court’s jurisdictional scope became the most contentious issues² – the “‘question of questions’ of the entire project.”³ Many conceptually different approaches as to jurisdiction were proposed. At one extreme stood the proponents of universality,⁴ at the other, defenders of State consent and sovereignty.⁵ Such was the difficulty in reconciling these two polar opposites that it was not until the final day of the Rome Conference that a solution was reached⁶ – the Court would have jurisdiction over crimes which occurred on the territory of, or committed by a national of, a State Party.⁷ Before the ink on the final conference document so much as had a chance to dry, condemnation was directed at these jurisdictional bases by some States, particularly the United States, on the grounds that they opened up the Court’s jurisdiction too far.⁸

In contrast to the controversy surrounding jurisdiction at Rome, there has been little jurisprudence as to the Court’s jurisdiction in practice. This means that several key parameters of the “question of questions”⁹ remain unanswered. Although there has been academic debate on what the Court’s territorial and nationality jurisdiction properly entails,

¹ Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002) [Rome Statute], preamble.

² William A Schabas *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, Oxford, 2010) at 277.

³ Hans-Peter Kaul and Claus Kreß “Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises” (1999) 2 YIHL 143 at 145.

⁴ See *The jurisdiction of the International Criminal Court: An informal discussion paper submitted by Germany* A/AC.249/1998/DP.2 (1998).

⁵ *Proposal Submitted by the United States of America* A/CONF.183/C.1/L.70 (1998).

⁶ Schabas, above n 2, at 282.

⁷ Rome Statute, art 12(2).

⁸ Schabas, above n 2, at 283.

⁹ Kaul and Kreß, above n 3, at 145.

the matter is now becoming more significant – situations such as Palestine and the Islamic State of Iraq and the Levant (ISIL) bring these issues to the fore. It is timely, therefore, to return to that unanswered “question of questions”¹⁰ – what is the scope of the Court’s jurisdiction?

The search for an answer requires consideration of several issues. An examination of what is known of the ICC’s jurisdictional scheme is undoubtedly essential, as is a consideration of the laws of State municipal jurisdiction. In terms of the Court’s territorial jurisdiction, issues such as the competence of the Court to prosecute crimes committed in disputed territories,¹¹ and to adopt objective territoriality¹² and the effects doctrine¹³ shall be explored. Finally, the prospects of nationality jurisdiction, in light of the practice of the Office of the Prosecutor (OTP) in relation to ISIL¹⁴ and the conduct of the United Kingdom (UK) in Iraq,¹⁵ shall be considered. An examination of these issues leads to the conclusion that the Court’s jurisdiction is narrow. States, in the exercise of their municipal competence, must be willing to prosecute individuals for grave international crimes if the dream of ending impunity is to become reality.

¹⁰ At 145.

¹¹ Eugene Kontorovich “Israel/Palestine — The ICC’s Uncharted Territory” (2013) 11 JICJ 979; Yaël Ronen “Israel, Palestine and the ICC — Territory Uncharted but not Unknown” (2014) 12 JICJ 7.

¹² Jean-Baptiste Maillart “Article 12(2)(a) Rome Statute: The Missing Piece of the Jurisdictional Puzzle” (8 July 2014) EJIL: Talk! <www.ejiltalk.org>.

¹³ Michail Vagias *The Territorial Jurisdiction of the International Criminal Court* (Cambridge University Press, Cambridge, 2014) at ch 6.

¹⁴ Office of the Prosecutor “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS” (8 April 2015) International Criminal Court <www.icc-cpi.int> [“ISIS Statement”].

¹⁵ Office of the Prosecutor “Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq” (13 May 2014) International Criminal Court <www.icc-cpi.int> [“Iraq Statement”].

II The Court’s Jurisdictional Scheme

A Negotiating Jurisdiction at Rome

During the Rome negotiations, the problem of jurisdiction became the most difficult issue¹⁶ – the “‘question of questions’ of the entire project.”¹⁷ The difficulty arose from competing conceptions as to what values should prevail in the Court’s jurisdictional scheme.¹⁸ At one extreme, Germany proposed a scheme whereby the Court would have universal jurisdiction.¹⁹ It was argued that States could lawfully exercise universal jurisdiction over the crimes in question,²⁰ and that they could delegate this jurisdiction to the ICC.²¹ Proponents of universality believed that the Court’s potential and capacity to achieve its aims would be limited by requiring the consent of the State of territoriality or nationality.²² The German proposal had support from many non-governmental organisations,²³ but drew criticism from some States. Opponents of universality opined that universal jurisdiction was not fully recognised as a lawful jurisdictional basis, and expressed concerns as to the implications of universality for non-Parties.²⁴

At the other extreme to the universality proposal was that of the United States. The United States proposal required prior consent of both the State upon whose territory the conduct occurred, and the State of nationality of the accused, before a prosecution could proceed.²⁵

¹⁶ Schabas, above n 2, at 277.

¹⁷ Kaul and Kreß, above n 3, at 145.

¹⁸ See generally Schabas, above n 2, at 278–283; Kaul and Kreß, above n 3, at 145–156.

¹⁹ See *The jurisdiction of the International Criminal Court: An informal discussion paper submitted by Germany*, above n 4.

²⁰ At 2.

²¹ At 2–3.

²² Schabas, above n 2, at 279.

²³ See for example International Committee of the Red Cross *Concerns on Jurisdiction of the International Criminal Court Relating to the Bureau Proposal (Information Conveyed by New Zealand)* A/CONF.183/INF/9 (1998).

²⁴ Kaul and Kreß, above n 3, at 146.

²⁵ *Proposal Submitted by the United States of America*, above n 5.

This proposal was largely motivated by a desire to retain control over when the Court could prosecute United States nationals.²⁶

Although some proposals were tabled to reconcile these approaches, the jurisdiction issue was so divisive that it was not until the final day of the Conference that the preconditions to jurisdiction were agreed upon.²⁷ The Court would have jurisdiction if the State upon whose territory the conduct occurred,²⁸ or the State of nationality of the accused,²⁹ were Party to the Statute. Even this compromise was controversial, with some nations, including the United States, arguing that jurisdiction remained too far-reaching in respect of non-Parties.³⁰

B Defining the Court’s Jurisdiction

The ICC’s jurisdiction is its “competence to deal with a criminal case or matter under the Statute.”³¹ The term ‘jurisdiction’ has four different meanings in the Statute: referring to the Court’s subject-matter jurisdiction;³² jurisdiction over persons;³³ territorial and nationality jurisdiction;³⁴ and temporal jurisdiction.³⁵ Although the present piece is concerned with territorial and nationality jurisdiction, an understanding of the other senses of the Court’s jurisdiction is essential.

²⁶ See generally Monroe Leigh “The United States and the Statute of Rome” (2001) 95 AJIL 124; Dapo Akande “The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits” (2003) 1 JICJ 618.

²⁷ Schabas, above n 2, at 282.

²⁸ Rome Statute, art 12(2)(a).

²⁹ Article 12(2)(b).

³⁰ Schabas, above n 2, at 283.

³¹ *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)* ICC Appeals Chamber ICC–01/04–01/06 (OA4), 14 December 2006 [*Lubanga (Jurisdiction)*] at [24].

³² At [21]; Rome Statute, art 5.

³³ *Lubanga (Jurisdiction)*, above n 31, at [21]; Rome Statute, art 12(2).

³⁴ *Lubanga (Jurisdiction)*, above n 31, at [21]; Rome Statute, art 12(2).

³⁵ *Lubanga (Jurisdiction)*, above n 31, at [21]; Rome Statute, art 11.

The Court’s subject-matter jurisdiction is outlined in art 5 of the Statute as being genocide;³⁶ crimes against humanity;³⁷ war crimes;³⁸ and, from 1 January 2017,³⁹ aggression.⁴⁰ This subject-matter jurisdiction may only be exercised over natural persons, not legal persons, such as corporations or States.⁴¹ Furthermore, the Court has no jurisdiction over offences committed by persons when they were younger than 18.⁴²

Regarding territorial and nationality jurisdiction, the ICC has jurisdiction over crimes where the conduct occurred on a State Party’s territory,⁴³ or where it was committed by a Party’s national.⁴⁴ Collectively, these are called “preconditions to jurisdiction”.⁴⁵ Temporally, the Court may only exercise jurisdiction over crimes committed after the date of the Statute’s entry into force.⁴⁶

Additional to these jurisdictional pillars, there are three mechanisms by which jurisdiction may be triggered. First, it may be triggered by a referral to the OTP by a State Party;⁴⁷ second, the Security Council, acting pursuant to Chapter VII of the Charter of the United Nations, may refer a situation to the OTP;⁴⁸ and third, the OTP may initiate an investigation independently.⁴⁹ Significantly, where a matter is referred by the Security Council, the preconditions to jurisdiction need not be fulfilled.⁵⁰ This reflects the power of the Security

³⁶ Rome Statute, art 5(a).

³⁷ Article 5(b).

³⁸ Article 5(c).

³⁹ Article 15 bis(3); *Resolution RC/Res6: The Crime of Aggression (2010)* (annex I Amendments to the Rome Statute of the International Criminal Court on the crime of aggression) [*Resolution RC/Res.6*].

⁴⁰ Rome Statute, art 5(d).

⁴¹ See *Kiobel v Royal Dutch Petroleum Co* 621 F 3d 111 (2d Cir 2010) [*Kiobel* (2d Cir)] at 136–137 for a discussion of this.

⁴² Rome Statute, art 26.

⁴³ Article 12(2)(a).

⁴⁴ Article 12(2)(b).

⁴⁵ Article 12.

⁴⁶ Article 11.

⁴⁷ Article 13(a).

⁴⁸ Article 13(b).

⁴⁹ Article 13(c).

⁵⁰ Article 12(2).

Council to create ad hoc criminal tribunals,⁵¹ as it did in relation to the Former Yugoslavia⁵² and Rwanda.⁵³

C Territorial Jurisdiction

The Court may exercise jurisdiction where the “State on the territory of which the conduct in question occurred” is a Party to the Statute.⁵⁴ To date, all prosecutions, aside from situations referred by the Security Council, have relied upon territoriality.⁵⁵ Despite this, little jurisprudence on the ICC’s territorial jurisdiction exists. The Court’s analysis of territorial jurisdiction is typically limited to noting its satisfaction on the facts before it. Indicatively, in the *Bemba Gombo (Arrest Warrant)* decision, the Court simply stated that “the crimes alleged against Mr Jean-Pierre Bemba are stated to have been committed on [Central African Republic] territory”.⁵⁶ The Court also noted that Bemba Gombo was believed to be a national of the Democratic Republic of the Congo (DRC), also a Party,⁵⁷ meaning nationality jurisdiction also existed.⁵⁸

There has been only one challenge to the territorial jurisdiction of the Court. Callixte Mbarushimana, who was charged with having committed war crimes and crimes against humanity in the DRC,⁵⁹ lodged a challenge to the Court’s temporal and territorial jurisdiction.⁶⁰ The challenge to territorial jurisdiction was unusual. It was not alleged that the offences took place outside the DRC’s territory, but that the DRC’s referral to the OTP

⁵¹ See *Prosecutor v Tadić (Jurisdiction)* (1995) 105 ILR 453 (ICTY Appeals Chamber) at [37].

⁵² SC Res 827, S/RES/827 (1993).

⁵³ SC Res 955, S/RES/955 (1994).

⁵⁴ Rome Statute, art 12(2)(a).

⁵⁵ Schabas, above n 2, at 286; Michail Vagias “The Territorial Jurisdiction of the International Criminal Court – A Jurisdictional Rule of Reason for the ICC?” (2012) 59 NILR 43 at 54.

⁵⁶ *Prosecutor v Bemba Gombo (Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo)* ICC Pre-Trial Chamber III ICC–01/05–01/08–14-tENG, 10 June 2008 [*Bemba Gombo (Arrest Warrant)*] at [15].

⁵⁷ At [15].

⁵⁸ Rome Statute, art 12(2)(b).

⁵⁹ *Procureur c Mbarushimana (Mandat d’arrêt à l’encontre Callixte Mbarushimana)* ICC Pre-Trial Chamber I ICC–01/04–01/10, 28 September 2010 at [10].

⁶⁰ See generally *Prosecutor v Mbarushimana (Defence Challenge to the Jurisdiction of the Court)* Defence Counsel for Mbarushimana ICC–01/04–01/10–290, 19 July 2011.

did not intend to encompass crimes committed in the region wherein Mbarushimana’s alleged offending occurred.⁶¹ The DRC did not support this objection,⁶² and the Court concluded that it had territorial jurisdiction.⁶³ Subsequently, however, the Court refused to confirm the charges against Mbarushimana.⁶⁴

The decision offers little insight into the scope of the Court’s territorial jurisdiction. The most significant point of law in the decision is the notion that, in referring a situation to the OTP, a State cannot limit the OTP to investigate only certain crimes – the Court will have jurisdiction “as long as the crimes are committed within the context of the situation of crisis that triggered the jurisdiction of the Court”.⁶⁵ Although the *Mbarushimana* decision concerned a State referral, it is likely that a referral made by the Security Council would be similarly interpreted, such that it could not limit the scope of crimes or persons to be investigated.⁶⁶

D Nationality Jurisdiction

As all prosecutions before the ICC have been based upon territoriality,⁶⁷ there is even less jurisprudence on the Court’s nationality jurisdiction. In cases where nationality jurisdiction has been referenced, it is largely as an aside. For example, in the *Bemba Gombo (Arrest Warrant)* decision, the Court noted that the accused was a national of a Party after having found territorial jurisdiction.⁶⁸

The Court’s jurisdiction over nationals of non-Parties, however, has been controversial. If the conduct in question occurs on the territory of a Party, the Court has jurisdiction

⁶¹ At [23].

⁶² See *Prosecutor v Mbarushimana (Decision on the “Defence Challenge to the Jurisdiction of the Court”)* ICC Pre-Trial Chamber I ICC–01/04–01/10, 26 October 2011 [*Mbarushimana (Jurisdiction)*] at [15].

⁶³ At [39].

⁶⁴ See *Prosecutor v Mbarushimana (Decision on the confirmation of charges)* ICC Pre-Trial Chamber I ICC–01/04–01/10–465-Red, 16 December 2011.

⁶⁵ *Mbarushimana (Jurisdiction)*, above n 62, at [27].

⁶⁶ *Prosecutor v Al Bashir (Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir)* ICC Pre-Trial Chamber I ICC–02/05–01/09–3, 4 March 2009 [*Al Bashir (Arrest Warrant Decision)*] at [45]; *Mbarushimana (Jurisdiction)*, above n 62, at [27], n 41.

⁶⁷ Schabas, above n 2, at 286; Vagias, above n 55, at 54.

⁶⁸ *Bemba Gombo (Arrest Warrant)*, above n 56, at [15].

regardless of the accused’s nationality.⁶⁹ The United States maintains the position that for the Court to exercise jurisdiction over the nationals of non-Parties would be unlawful.⁷⁰ Such arguments, however, have been agreed to be untenable, particularly as there is no such restriction applicable in the laws of State jurisdiction.⁷¹

E La Compétence de la Compétence

An international tribunal has “jurisdiction to determine its own jurisdiction”.⁷² This doctrine is known as *la compétence de la compétence*. It is an inherent power,⁷³ which has been applied consistently and without controversy by many tribunals.⁷⁴ In both the *Nottebohm (Preliminary Objection)* and *Arbitral Award* cases, the International Court of Justice (ICJ) observed that, absent agreement to the contrary, “an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction.”⁷⁵ The *compétence* doctrine “assumes particular force” when the tribunal is pre-established and treaty-based,⁷⁶ and “can only be taken away by a provision framed for that express purpose” in the tribunal’s constitutive instrument.⁷⁷

The *compétence* doctrine undoubtedly applies in international criminal tribunals. In the *Tadić (Jurisdiction)* decision, the Tribunal held that it had the competence to determine the legality of its own creation,⁷⁸ and it is “beyond argument” that the doctrine applies in the

⁶⁹ Rome Statute, art 12(2).

⁷⁰ See for example *Proposal Submitted by the United States of America*, above n 5.

⁷¹ See generally Leigh, above n 26; Akande, above n 26.

⁷² *Tadić (Jurisdiction)*, above n 51, at [18]; *La Constancia, Good Return and Medea (United States of America v Colombia)* (1866) 29 RIAA 121 at 124; *Affaire du Guano (Chile v France)* (1900) 15 RIAA 99 at 100.

⁷³ Chittharanjan F Amerasinghe *International Arbitral Jurisdiction* (Leiden, Koninklijke Brill NV, 2011) vol 2 at 28.

⁷⁴ At 30–31.

⁷⁵ *Nottebohm (Liechtenstein v Guatemala) (Preliminary Objection)* [1953] ICJ Rep 111 at 119; *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal) (Judgment)* [1991] ICJ Rep 53 at [46].

⁷⁶ *Nottebohm (Preliminary Objection)*, above n 75, at 119.

⁷⁷ *Rio Grande Irrigation and Land Company Ltd (Great Britain v United States of America) (Judgment)* (1923) 6 RIAA 131 at 136.

⁷⁸ *Tadić (Jurisdiction)*, above n 51, at [22].

Special Court for Sierra Leone.⁷⁹ International criminal tribunals apply the doctrine where there is a “gap or lacuna” in the rules.⁸⁰ It serves to fill an “unforeseen gap in the legal regulations”, the resolution of which is incidental to the exercise of primary jurisdiction.⁸¹ The ICC has such *compétence*. The *Kony (Admissibility)* decision stated the doctrine is “enshrined” in art 19(1) of the Rome Statute,⁸² which requires the Court to satisfy itself that it has jurisdiction in all cases before it.⁸³ As such, it is “for the judicial body whose jurisdiction is being debated to have the last say as to the way in which its statutory instruments should be construed.”⁸⁴

The *compétence* doctrine is crucial in determining the Court’s jurisdictional scope. Contrary to the view expressed by some scholars,⁸⁵ the Statute’s silence on an issue does not imply that the Court is incompetent to act. Rather, the Court itself is to resolve these issues,⁸⁶ in accordance with well-established international practice.⁸⁷ In keeping with the sources of law applicable under the Rome Statute,⁸⁸ and more generally in the interpretation of treaties,⁸⁹

⁷⁹ *Prosecutor v Kallon (Constitutionality and Lack of Jurisdiction)* (2004) 16 BHRC 227 (SCSL Appeals Chamber) at [34].

⁸⁰ *Prosecutor v Ayyash (Reasons for Decision on Applications Filed by Counsel for Witness PRH012 and Order on Confidentiality)* STL Appeals Chamber STL-11-01/T/AC, 28 July 2015 at [11].

⁸¹ *Prosecutor v El Sayed (Decision Appeal of Pre-Trial Judge’s Order Regarding Jurisdiction and Standing)* STL Appeals Chamber CH/AC/2010/02, 10 November 2010 at [53].

⁸² *Prosecutor v Kony (Decision on the admissibility of the case under article 19(1) of the Statute)* ICC Pre-Trial Chamber II ICC-02/04-01/05-377, 10 March 2009 at [45].

⁸³ Rome Statute, art 19(1).

⁸⁴ *Kony (Admissibility)*, above n 82, at [46].

⁸⁵ See for example Kontorovich, above n 11, at 984.

⁸⁶ *Kony (Admissibility)*, above n 82, at [46].

⁸⁷ *Nottebohm (Preliminary Objection)*, above n 75, at 119; *Arbitral Award of 31 July 1989*, above n 75, at [46]; *Rio Grande Irrigation and Land Company*, above n 77, at 136; *La Constancia*, above n 72, at 124; *Affaire du Guano*, above n 72, at 100; *Kallon (Jurisdiction)*, above n 79, at [34]; *Tadić (Jurisdiction)*, above n 51, at [22]; *Ayyash (Witness PRH012 Application)*, above n 80, at [11]; *El Sayed (Jurisdiction)*, above n 81, at [53]; *Kony (Admissibility)*, above n 82, at [45]–[46].

⁸⁸ Rome Statute, art 21(1)(b).

⁸⁹ Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 31(3)(c); *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia (Decision on the admissibility of the Prosecutor’s appeal against the “Decision on the Request of the Union of the Comoros to review the Prosecutor’s decision not to*

the Court may make recourse to the customary international law rules of jurisdiction to determine the scope of its own jurisdiction.

III State Jurisdiction

A Introduction

State jurisdiction refers to the power to lawfully make and enforce rules.⁹⁰ There is uncertainty as to whether a State may exercise jurisdiction unless such an exercise is *prohibited* by international law, or if it must rely on some positive *permissive* rule before the exercise of jurisdiction will be lawful.⁹¹

As to the first possibility, the *Lotus* case held that a State may exercise jurisdiction unless there is prohibition on such an exercise.⁹² On this basis, the *Eichmann* case concluded that, as international law did not prohibit the exercise of universal jurisdiction, its exercise was lawful.⁹³ Further support for the *Lotus* approach arguably comes from *Kosovo*, wherein the ICJ held that international law does not *prohibit* unilateral declarations of independence, without considering whether there was *permissive* rule as to such declarations.⁹⁴

That said, no great reliance on the *Lotus* proposition is justified.⁹⁵ Most practice and academic opinion supports the proposition that a State may only take jurisdiction where it can rely on a permissive rule.⁹⁶ So widespread was the condemnation of the *Lotus* case that

initiate an investigation”) ICC Appeals Chamber ICC–01/13 OA, 6 November 2015 at [61], n 135; *Prosecutor v Lubanga (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction)* ICC Appeals Chamber ICC–01/04–01/06 A 5, 1 December 2014 at [277].

⁹⁰ Bernard Oxman “Jurisdiction of States” in R Wolfrum (ed) *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, Oxford, 2012) vol 6 546 at [1].

⁹¹ At [10].

⁹² *SS Lotus (France v Turkey) (Judgment)* (1927) PCIJ (series A) No 10 at 19.

⁹³ *Attorney-General of the Government of Israel v Eichmann* (1962) 36 ILR 5 (Israel DC) at 26.

⁹⁴ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403 at [84]; Gillian D Triggs *International Law: Contemporary Principles and Practices* (2nd ed, LexisNexis, New South Wales, 2010) at 434.

⁹⁵ Triggs, above n 94, at 434; Rosalyn Higgins *Problems and Processes: International Law and How We Use It* (Oxford University Press, Oxford, 1994) at 77.

⁹⁶ See indicatively FA Mann “The Concept of Jurisdiction in International Law” (1964) 111 *Recueil des Cours* 1 at 35; Harvard Research in International Law “Draft Convention on Jurisdiction with Respect to Crime”

FA Mann, in his authoritative work on jurisdiction, concluded that “nothing was decided” by it.⁹⁷

If it is accepted that a State’s jurisdiction depends on permissive rules, those rules can guide an understanding of the ICC’s jurisdictional limitations. Two questions arise for consideration: first, on what grounds can a State exercise jurisdiction; second, how can this inform an understanding of the ICC’s jurisdiction? The latter of these issues shall be addressed in detail in Parts V–VII of the present piece, while the former falls for immediate consideration.

The grounds of State jurisdiction can be divided into three categories: first, those bases which are undisputed; second, other generally accepted jurisdictional grounds; and third, those which are contested – the effects doctrine for present purposes.

B Undisputed Grounds of Jurisdiction

There are two undisputable grounds upon which a State may lawfully exercise jurisdiction. First, a State may exercise jurisdiction over any conduct within its territory.⁹⁸ Second, a State may exercise jurisdiction over its own nationals abroad.⁹⁹ The possession of both territory and nationals are key constitutive elements of Statehood.¹⁰⁰ Thus, the undisputable nature of these grounds of jurisdiction largely stems from the fact that they are key elements

(1935) 29 AJIL Supp 439, art 2; *Compagnie Européenne des Pétroles SA v Sensor Nederland BV* (1982) 87 ILR 98 (Netherlands DC) at [7.3.1]–[7.3.4]; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3 at [51] per Judges Higgins, Kooijmans and Buergenthal (joint separate opinion).

⁹⁷ Mann, above n 96, at 93.

⁹⁸ See for example *R v Keyn* (1876) 2 Ex D 63 (Crim App) at 160 per Marshall CJ; *The Schooner Exchange v McFaddon* 11 US (7 Cranch) 116 (1813) at 136 per Marshall CJ; *Compania Naviera Vascongado v SS Cristina* [1938] AC 485 (HL) at 496–497 per Lord Macmillan; *Amsterdam v Minister of Finance* (1952) 19 ILR 229 (Israel SC) at 231.

⁹⁹ See for example *Public Prosecutor v Günther B and Manfred E* (1970) 71 ILR 247 (Austria SC) at 250–251; *Passport Seizure Case* 73 ILR 372 (Germany Sup Admin Ct) at 373; *Weiss v Inspector General of the Police* (1958) 26 ILR 210 (Israel SC); *Ekanayake v Attorney-General* (1986) 87 ILR 296 (Sri Lanka CA) at 300–301; *Re Gutierrez* (1957) 24 ILR 265 (Mexico SC) at 266; *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29, [2011] 1 AC 65 at [238] per Lord Collins.

¹⁰⁰ Convention on the Rights and Duties of States 165 LNTS 19 (opened for signature 26 December 1933, entered into force 26 December 1934), art 1.

of sovereignty.¹⁰¹ Territoriality and nationality also correspond with the preconditions to jurisdiction in the Rome Statute.¹⁰² The Statute, therefore, not only takes a relatively safe approach to jurisdiction, but has provisions which may be informed by State practice, given the dearth of jurisprudence generated by the Court’s organs.

1 Territorial Jurisdiction

So indisputable is territorial jurisdiction that, as early as 1812, it was stated that “[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself.”¹⁰³ Whilst this proposition that jurisdiction is unlimited within a State’s territory is now qualified by other rules, particularly those concerning human rights,¹⁰⁴ territoriality remains the most preferred basis of jurisdiction.¹⁰⁵

That said, there are moves away from territoriality. Particularly in human rights law, States are said to have jurisdiction where they have effective control over an area, despite a lack of legal title.¹⁰⁶ Thus, the European Court of Human Rights, in *Issa*, recognised that “a State’s jurisdictional competence is primarily territorial”,¹⁰⁷ but held that persons are within a State’s jurisdiction where the State exercises control of an area outside its territory.¹⁰⁸

¹⁰¹ *The Schooner Exchange*, above n 98, at 136 per Marshall CJ; *Island of Palmas (Netherlands v United States)* (1928) 2 RIAA 829 at 838.

¹⁰² Rome Statute, art 12(2).

¹⁰³ *The Schooner Exchange*, above n 98, at 136 per Marshall CJ; see similarly *Island of Palmas*, above n 101, at 838.

¹⁰⁴ See indicatively International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976), art 2; Triggs, above n 94, at 431.

¹⁰⁵ See for example Case C-366/10 *Air Transport Association of America v Secretary of State for Energy and Climate Change* [2012] 2 CMLR 4 (CJEU) at [107]; *Issa v Turkey* (2004) 156 ILR 1 (Section II, ECHR) at [67]; *Bankovic v Belgium* (2001) 11 BHRC 435 (Grand Chamber, ECHR) at [59]; *Smith*, above n 99, at [91]–[92] per Lord Hope, at [247] per Lord Collins; *Amnesty International Canada v Chief of Defence Staff for the Canadian Forces* (2008) 156 ILR 312 (Can FC) at [182]–[183]; *Amnesty International Canada v Chief of Defence Staff for the Canadian Forces* (2008) 156 ILR 363 (Can FCA) at [36]; *Kiobel v Royal Dutch Petroleum Co* 13 S Ct 1659 (2013) [*Kiobel* (SC)].

¹⁰⁶ See for example *Al-Jedda v United Kingdom* (2011) 53 EHRR 23 (Grand Chamber, ECHR) at [85]–[86].

¹⁰⁷ *Issa*, above n 105, at [67].

¹⁰⁸ At [69].

Similarly, persons effectively under a State’s authority are said to be within their jurisdiction, even if they are not within their territory.¹⁰⁹ Perhaps Mann, renowned for his works on jurisdiction, would welcome these developments. He advocated for a more holistic approach to jurisdiction, whereby jurisdiction exists where legally relevant facts “belong” to the State.¹¹⁰ However, one should be cautious before concluding that these developments sound the passing knell of territoriality. Jurisdiction remains inherently territorial, particularly in the field of criminal law, if not so much in the field of State responsibility.¹¹¹

Whilst a State “should possess jurisdiction over all persons and things within its territorial limits”,¹¹² issues arise in cases of cross-border criminal conduct. The point is illustrated by the *Farrendon* case. An Irish Republican, situated in County Donegal, Irish Free State, shot and wounded Farrendon, a British soldier, who was within the boundaries of County Fermanagh, Northern Ireland – a part of the UK.¹¹³ Under applicable UK law, victims of crime could seek compensation “from the council of the county in which the murder, maiming, or injury occurred”.¹¹⁴ The issue arose as to where the crime occurred – in Donegal, located in the Irish Free State, or in Fermanagh, Northern Ireland. It was held that, where a person shoots at someone with the intent to wound, that intent is present until the victim is struck by the bullet.¹¹⁵ In other words, the crime could be said to have been committed in Fermanagh, despite the shot originating from another country, as the intent also transcended the border.

Were this situation to arise today, particularly in the context of a prosecution, both States could properly exercise territorial jurisdiction. A State’s territorial jurisdiction encompasses crimes committed partially in their territory in two circumstances. First, under the principle of subjective territoriality, a State has territorial jurisdiction over all crimes commenced in

¹⁰⁹ *Öcalan v Turkey* (2005) 156 ILR 30 (Grand Chamber, ECHR) at [91].

¹¹⁰ Mann, above n 96, at 45; see also Vagias, above n 55, at 47–50.

¹¹¹ James Crawford *Brownlie’s Principles of Public International Law* (Oxford University Press, Oxford, 2012) at 457.

¹¹² *SS Cristina*, above n 98, at 496–497 per Lord Macmillan.

¹¹³ *County Council of Fermanagh v Farrendon* [1923] 2 IR 180 (NI CA) at 182–183.

¹¹⁴ Criminal Injuries (Ireland) Act 1919 9 Geo 5 ch 14, s 1(2).

¹¹⁵ *Farrendon*, above n 113, at 184.

its territory, even when completed abroad.¹¹⁶ Thus, on the facts of *Farrendon*, the Irish Free State could have prosecuted the shooter, provided the shooting violated her laws.

Furthermore, Northern Ireland could also have taken territorial jurisdiction, on the basis of objective territoriality. By this principle, a State has jurisdiction where “any essential constituent element” is committed within their territory.¹¹⁷ The notion of objective territoriality is endorsed in the *Lotus* case,¹¹⁸ and is applied without controversy globally.¹¹⁹ In determining what amounts to a constituent element of a crime, Courts look for a “real and substantial link” with the territory concerned.¹²⁰

2 Nationality Jurisdiction

Nationality jurisdiction refers to the right of States to exercise jurisdiction over nationals abroad. Like territoriality, it is uncontroversial.¹²¹ The rationale of nationality jurisdiction is that a State should not be “transformed into a safe refuge for its own nationals who have committed crimes outside its frontiers”.¹²² It is further based on nationality being a “legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.”¹²³

¹¹⁶ See for example Crawford, above n 111, at 458; *Public Prosecutor v DS* (1958) 26 ILR 209 (Netherlands SC) at 209.

¹¹⁷ Crawford, above n 111, at 458.

¹¹⁸ *SS Lotus*, above n 92, at 23.

¹¹⁹ *Liangsiriprasert v Government of the United States of America* [1991] 1 AC 225 (Hong Kong PC) at 246–247; *Director of Public Prosecutions v Doot* [1973] 807 AC (HL) at 817 per Lord Wilberforce; *Attorney General v Yeung Sun-shun* [1987] HKLR 987 (CA) at 997–998; Cedric Ryngaert “Territorial Jurisdiction Over Cross-frontier Offences: Revisiting a Classic Problem of International Criminal Law” (2009) 9 Int’l Crim L Rev 187 at 198–202; *Strassheim v Daily* 221 US 280 (1991) at 285; *Libman v The Queen* [1985] 2 SCR 178 at 213.

¹²⁰ *Libman*, above n 119, at 213; see further *Solicitor-General v Reid* [1997] 3 NZLR 617 (HC) at 632; *Rosenstein v Israel* ILDC 159 (Israel SC 2005) at [46].

¹²¹ *Günther*, above n 99, at 250–251; *Passport Seizure Case*, above n 99, at 373; *Weiss*, above n 99; *Ekanayke*, above n 99, at 300–301; *Re Gutierrez*, above n 99, at 266.

¹²² *Re Gutierrez*, above n 99, at 266.

¹²³ *Nottebohm Case (Liechtenstein v Guatemala) (Second Phase Judgment)* [1955] ICJ Rep 4 at 23; see also Oliver Dörr “Nationality” in R Wolfrum (ed) *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, Oxford, 2012) vol 7 496 at [1]–[3].

Although international law permits the exercise of nationality jurisdiction, it does not generally compel it.¹²⁴

There is uncertainty as to whether an accused need be a national of the State asserting jurisdiction at the time they offended, or if a later acquirement of nationality is sufficient for the exercise of this jurisdictional basis. Although it has been argued that the assertion of nationality jurisdiction over someone who becomes a national subsequent to offending violates the accused’s right not to be subject to retrospective criminalisation,¹²⁵ State practice indicates that this does not bar prosecution.¹²⁶ Support for the first approach is also found in the field of diplomatic protection, wherein a State cannot make claims on behalf of persons who were not nationals at the time of injury.¹²⁷

International law does generally restrict a State’s ability to grant nationality,¹²⁸ as the grant of nationality is seen as being within the domestic competence of States.¹²⁹ That said, most States grant nationality to those who are born in their territory, or to their nationals.¹³⁰ However, there are some limits on the right to grant nationality. For example, States may not grant nationality to nationals of others States with no connection to the naturalising State, or upon any discriminatory basis.¹³¹

There is also no bar to holding multiple nationalities.¹³² In such circumstances, there is generally a dominant nationality, that being the State to which the person has “stronger

¹²⁴ *S v Mharapara* [1986] 1 SA 556 (Zimbabwe SC) at 559.

¹²⁵ Roger O’Keefe “Universal Jurisdiction: Clarifying the Basic Concept” (2004) 2 JICJ 735 at 742–743.

¹²⁶ *In re SS Member Ahlbrecht* (1947) 14 Ann Dig 196 (Netherlands Spec Ct Cass) at 200; Crawford, above n 111, at 460; Brottsbalken SFS 1962:700 [Criminal Code (Sweden)], ch 2, s 2.

¹²⁷ *Kren Claim* (1955) 20 ILR 233 (US Int Claims Comm) at 234.

¹²⁸ Triggs, above n 94, at 439.

¹²⁹ *Nationality Decrees Issued in Tunis and Morocco (Advisory Opinion)* (1923) PCIJ (series B) No 4 at 24; Dörr, above n 123, at [4].

¹³⁰ Dörr, above n 123, at [12].

¹³¹ At [17].

¹³² At [22].

factual ties”.¹³³ For the purposes of other areas of law, such as diplomatic protection, the dominant personality takes preference in competing claims.¹³⁴

C Other Accepted Grounds of Jurisdiction

Although States cannot generally exercise jurisdiction over foreigners for conduct committed abroad,¹³⁵ there are some grounds upon which extraterritorial jurisdiction over foreigners is accepted, such as protection, passive personality and universality.

1 The Protective Principle

The protective principle permits States to exercise jurisdiction over extraterritorial actions which threaten their security.¹³⁶ Most States exercise such jurisdiction,¹³⁷ as it enables protection from threats which would otherwise be non-justiciable.¹³⁸ Notably, the Courts of Israel held that it was a basis upon which jurisdiction could be exercised over Eichmann, despite Israel not having been a State during the Holocaust.¹³⁹

2 Passive Personality

Passive personality permits States to act where a victim of a crime committed abroad is their national.¹⁴⁰ Although there is support for its application to international crimes,¹⁴¹ it is inherently controversial. Judge Moore, dissenting in *Lotus*, noted that passive personality would allow a citizen to take with them for “protection” their own nation’s laws, and other

¹³³ *Nottebohm (Second Phase)*, above n 123, at 22.

¹³⁴ *Mergé Case - Decision 55 (United States of America v Italy)* (1955) 14 RIAA 236 (Italian-United States Conciliation Commission) at 247–248; *Case Number A/18 (Iran v United States)* 5 Iran–US CTR 251 at 265–266.

¹³⁵ *Brandão & Company v Francisco Canales* (1921) 1 Ann Dig 108 (Brazil Sup Fed Trib) at 108–109.

¹³⁶ *Smith*, above n 99, at [263] per Lord Collins.

¹³⁷ Crawford, above n 111, at 462; *Joyce v Director of Public Prosecutions* [1946] AC 347 (HL) at 372.

¹³⁸ *Giles v Tumminello* [1963] SASR 96 (SC) at 102.

¹³⁹ *Eichmann (DC)*, above n 93, at 54; 304 *Attorney-General of the Government of Israel v Eichmann* (1962) 36 ILR 277 (Israel SC) at 304.

¹⁴⁰ *Smith*, above n 99, at [263] per Lord Collins.

¹⁴¹ *Eichmann (SC)*, above n 139, at 304; *United States of America v Yunis* 924 F 2d 1086 (DC Cir 1991); *Gaddafi* (2000) 125 ILR 490 (France CA) at 496.

persons would be subject to those laws by merely coming into contact with the individual.¹⁴² The principle was heavily criticised by the United States in *Cutting’s Case*, as it “would create dual responsibility in the citizen, and lead to inextricable confusion, destructive of that certainty in the law which is an essential of liberty.”¹⁴³

3 *Universal Jurisdiction*

Universal jurisdiction, originally applicable to piracy,¹⁴⁴ is now frequently invoked in relation to war crimes.¹⁴⁵ Although the legality of exercising universal jurisdiction outside of piracy is “probably still not entirely resolved”¹⁴⁶ there is growing support for its application in relation to crimes within the Rome Statute’s subject matter jurisdiction.¹⁴⁷ Notably, it has been implicitly endorsed by the ad hoc Tribunals through their transfer of prosecutions to States who had enacted universal jurisdiction laws.¹⁴⁸ The exercise of universal jurisdiction is only appropriate where the territorial State is unwilling or unable to prosecute.¹⁴⁹ As such, universality acts as a final barrier to prevent impunity.

D *The Effects Doctrine*

Finally, the so-called ‘effects doctrine’ has been argued to be a basis of jurisdiction, particularly by the United States. Michail Vagias describes the effects doctrine as “the latest

¹⁴² *SS Lotus*, above n 92, at 92 per Judge Moore dissenting.

¹⁴³ *Cutting’s Case* II Moore 228 (1886) at 232.

¹⁴⁴ *In re Piracy Jure Gentium* [1934] AC 586 (PC) at 589.

¹⁴⁵ *Smith*, above n 99, at [263] per Lord Collins; *The jurisdiction of the International Criminal Court: An informal discussion paper submitted by Germany*, above n 4, at 2–3; *R v Finta* [1994] 1 SCR 701 at 732–733 per La Forest J dissenting.

¹⁴⁶ Schabas, above n 2, at 279.

¹⁴⁷ *Doot*, above n 119, at 817; Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law: Rules* (Cambridge University Press & International Committee of the Red Cross, Cambridge, 2005) vol 1, rule 157; Malcolm N Shaw *International Law* (7th ed, Cambridge University Press, Cambridge, 2014) at 485–486; *Eichmann* (DC), above n 93, at 26.

¹⁴⁸ See for example *Prosecutor v Bagaragaza (Decision on Prosecutor’s Request for Referral of the Indictment to the Kingdom of the Netherlands)* ICTR Trial Chamber III ICTR-2005–86–11bis, 13 April 2007 at [13]–[15]; *Procureur c Bucyibaruta (Décision relative à la requête du procureur aux fins de renvoi de l’acte d’accusation contre Laurent Bucyibaruta aux autorités française)* ICTR Trial Chamber ICTR-2005–85–I, 20 November 2007 at [5].

¹⁴⁹ *Peruvian Genocide Case* (2003) 24 ILM 1200 (Spain SC) at 1205.

variant of territorial jurisdiction, according to which a State has jurisdiction over conduct that takes place abroad that produces effects within its territory.”¹⁵⁰

This controversial doctrine originates from the *Alcoa* case of 1945, which held that “[i]t is settled law... that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends”.¹⁵¹ Since then, it has been a part of United States law, particularly in competition law. For example, under the Foreign Trade Antitrust Improvements Act, jurisdiction may be assumed over foreign commerce involving conduct that “has a direct, substantial and reasonably foreseeable effect” on the United States,¹⁵² and, at common law, the Courts have jurisdiction where the effects are intended and substantial.¹⁵³ Such effects include “injuries to United States commerce”¹⁵⁴ and price-fixing.¹⁵⁵

Outside of the United States, the effects doctrine has been heavily criticised.¹⁵⁶ Many States passed legislation to limit the impact of United States jurisdictional claims,¹⁵⁷ and made active protests about them.¹⁵⁸ The Courts of the European Union (EU) also resisted adopting

¹⁵⁰ Vagias, above n 13, at 24.

¹⁵¹ *United States v Aluminum Co of America* 148 F 2d 416 (2d Cir 1945) [*Alcoa*] at 443.

¹⁵² Foreign Trade Antitrust Improvements Act 15 USC § 6a.

¹⁵³ *Alcoa*, above n 151, at 444; *Hartford Fire Insurance Co v California* 509 US 764 (1993) at 796.

¹⁵⁴ *National Bank of Canada v Interbank Card Association* 666 F 2d 6 (2d Cir 1981) at 8.

¹⁵⁵ *Kruman v Christie’s International* 284 F 3d 384 (2d Cir 2002) at 390.

¹⁵⁶ Cedric Ryngaert *Jurisdiction in International Law* (2nd ed, Oxford University Press, Oxford, 2015) at 83.

¹⁵⁷ See for example Protection of Trading Interests Act 1980 (UK); Foreign Proceedings (Prohibition of Certain Evidence) Act 1976 (Cth).

¹⁵⁸ Note No 117 from the British Embassy in Washington to the United States Department of State regarding economic laws and regulations (18 October 1982) in Geoffrey Marston (ed) “United Kingdom Materials on International Law 1982” (1982) 53 BYIL 377 [Note No 117] at 454–455; Protection of Trading Interests (US Cuban Assets Control Regulations) Order 1992 (UK), explanatory note; Letter from the United Nations Delegation of the European Community Commission to the United States Congress regarding Bill S 2444 (27 April 1990) in Geoffrey Marston (ed) “United Kingdom Materials on International Law 1992” (1992) 63 BYIL 615 [Letter from European Community Commission] at 725; United Kingdom Government *Comments on the Draft ‘Antitrust Enforcements Guidelines for International Operations (United States Department of Justice and Federal Trade Commission, 1994)’* (13 October 1994) in Geoffrey Marston (ed) “United Kingdom Materials on International Law 1995” (1995) 66 BYIL 583 [United Kingdom *Comments*] at 668; *United Nations General Assembly: Official Records of 53rd Session, 37th Plenary Meeting A/53/PV.37* (1998) at 17 per Mr Manz (Austria; on behalf of the European Union); *United Nations General Assembly: Official Records*

the doctrine for many years.¹⁵⁹ That said, in *Gencor*, which concerned an antitrust merger, the European Court of First Instance appears to have applied the doctrine, stating that applying a regulation “is justified under public international law when it is foreseeable that a proposed concentration will have an *immediate and substantial effect* in the Community.”¹⁶⁰ The European judiciary’s jurisdiction, however, has traditionally been limited to cases of conduct being implemented from within the EU, more resembling traditional territoriality.¹⁶¹

There is some, albeit limited, application of the doctrine to ‘classic’ crimes. In *Mharapara*, the defendant, employed by the Zimbabwe Mission in Belgium, stole money from the Mission.¹⁶² The elements of the offence occurred exclusively in Belgium,¹⁶³ and Zimbabwean law did not permit nationality jurisdiction to be exercised.¹⁶⁴ It was held that the accused could be tried on the basis of territoriality. The Court stated that the traditional territoriality principle was “becoming decreasingly appropriate to the facts of international life”, due to increased globalisation.¹⁶⁵ Thus, it was held that, although the offence occurred exclusively in Belgium, Zimbabwe could take jurisdiction over the accused, as the harmful effects of the crime were felt in Zimbabwe.¹⁶⁶

of 54th Session, 50th Plenary Meeting A/54/PV.50 (1999) at 18 per Ms Korpi (Finland; on behalf of the European Union).

¹⁵⁹ Case C-89/85 *Ahlström Osakeyhtiö v Commission of the European Communities* [1988] ECR 5233 [*Wood Pulp*] at [12]–[14]; Case 48/69 *Imperial Chemical Industries Ltd v Commission of the European Communities* [1972] ECR 619 [*Dyestuffs*] at [131]–[132].

¹⁶⁰ Case T-102/96 *Gencor Ltd v Commission* [1999] ECR II-753 at [90]; Ryngaert, above n 156, at 83.

¹⁶¹ United Kingdom *Comments*, above n 158, at 669.

¹⁶² *Mharapara*, above n 124, at 557.

¹⁶³ At 558.

¹⁶⁴ At 559.

¹⁶⁵ At 563.

¹⁶⁶ At 564.

The effects doctrine remains controversial.¹⁶⁷ Although more countries now accept the doctrine,¹⁶⁸ or note its advantages,¹⁶⁹ many States still oppose it.¹⁷⁰ Such is the continued opposition to the doctrine that, as recently as 2014, the Federal Court of Australia rejected the proposition that the effects doctrine could constitute international custom.¹⁷¹ Scholars, too, oppose the doctrine as moving too far from the traditionally territorial nature of jurisdiction.¹⁷² The position of the doctrine as a principle of international law remains, at best, uncertain.¹⁷³

IV The Court’s Competence in Disputed Territory

A Introduction

To date, the issue of the jurisdictional competence of an international criminal tribunal in situations where territorial title is disputed has been subject only to limited jurisprudence. However, following the recognition of Palestinian Statehood by the General Assembly (GA),¹⁷⁴ the possibility of an investigation into the situation in Palestine became of increased international interest. One of the more difficult questions posed by the Palestinian situation is whether, and to what extent, the ICC can exercise jurisdiction. As Israel is not a Party to the Rome Statute, the Court may only exercise jurisdiction over Israeli nationals for crimes committed in Palestinian territory. There is, however, uncertainty as to Palestine’s territorial scope. The question of the competence of the Court in situations of disputed territories has, therefore, been called into question. As the OTP has opened a preliminary examination into

¹⁶⁷ *Smith*, above n 99, at [263] per Lord Collins.

¹⁶⁸ Ryngaert, above n 156, at 84; *Vodafone International Holdings BV v Union of India* (2008) 11 ITLR 491 (India HC) at [166]; *GVK Industries Ltd v Income Tax Officer* [2011] INSC 203, [2011] 3 LRC 68 at [40].

¹⁶⁹ *Public Prosecutor v Taw Cheng Kong* [2000] 2 LRC 17 (Singapore CA) at [88].

¹⁷⁰ Nico Krisch “The Decay of Consent: International Law in an Age of Global Public Goods” (2014) 108 *AJIL* 1 at 12; *Poynter v Commerce Commission* [2010] NZSC 38, [2010] 3 NZLR 300 at [44]; *Australian Competition and Consumer Commission v Air New Zealand Ltd* [2014] FCA 1157, 319 ALR 388 at [384]; *Philip Morris Inc v Bundeskartellamt* [1984] ECC 393 (Germany CA) at 413.

¹⁷¹ *Air New Zealand*, above n 170, at [384].

¹⁷² Krisch, above n 170, at 12.

¹⁷³ At 13.

¹⁷⁴ *Status of Palestine in the United Nations* GA Res 67/19, A/RES/67/19 (2012) at [2].

Palestine,¹⁷⁵ this question is not of mere academic interest. At some point, the competence of the Court in situations of jurisdictional conflict needs to be determined.

The Palestinian situation has caused a divide in opinion, between those opining that the Court may determine the scope of Palestine’s territory for the purposes of establishing territorial jurisdiction,¹⁷⁶ and those who believe it cannot.¹⁷⁷ Much of the debate has concerned the actual uncertainty of Palestine’s territory, although there has been some more general discussion of the competences of the Court in relation to disputed territory. The present piece will, therefore, step away from Palestine specifically, and examine the wider arguments surrounding the competence of the Court in disputed territory. Such an examination leads to the conclusion that there is nothing truly objectionable about the ICC determining, for the limited purposes of its own Statute, whether disputed territory belongs to a Party.

B Disputed Territory: Three Possible Scenarios

Not all cases of disputed territory will cause jurisdictional difficulties. Assume, for example, that States A and B are neighbours, and both States exercise a reasonable claim to Region X, such that it is uncertain whose territory it is. A and B engage in an international armed conflict for control of X, and war crimes are committed within the region. Were there to be prosecutions for these crimes, there are three possible scenarios which may arise, each having a different impact on the Court’s territorial jurisdiction.

First, if both A and B are Parties to the Statute, it does not matter which of these States exercises better title to X. Regardless of which does so, the crimes in question occurred within a State Party’s territory, although it is unclear which one. The Court, therefore, has territorial jurisdiction.

¹⁷⁵ Office of the Prosecutor “The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine” (16 January 2015) International Criminal Court <www.icc-cpi.int> [“Palestine Statement”].

¹⁷⁶ See for example Kontorovich, above n 11.

¹⁷⁷ See for example Ronen, above n 11.

Second, if neither A nor B are Parties to the Statute, the status of X is equally irrelevant. Regardless of which State exercises better title, it is not a State Party’s territory. Absent a Security Council referral,¹⁷⁸ the Court cannot exercise jurisdiction.

Third, if A is a Party to the Statute, but B is not, the status of X is crucial. If X is part of A’s territory, the Court will have territorial jurisdiction. If, however, X is part of B’s territory, then territorial jurisdiction will not exist. It is this situation with which the ability of the Court to make territorial determinations is concerned.

C The Question before the Court

In a piece arguing that the ICC does not have the competence to act over crimes in disputed territories, Eugene Kontorovich states that “the ICC has not been understood as a border-determination body, nor has defining the territory of nations ever been part of the work of past international criminal tribunals.”¹⁷⁹ By way of rebuttal, Yaël Ronen argued that the issue which would have to be determined is not the definition of borders, nor the extent of a State’s territory, but rather “whether the location where a specific allegedly criminal conduct was carried out” is within the State’s territory.¹⁸⁰

Ronen is correct that the issue is not the delineation of borders. It would be an absurd barrier to jurisdiction if the Court could not act without delineating an entire contested territory if the crimes in question occurred only within a small region of it. However, Ronen’s conception of the issue also misses a key point. Rather than the question being whether “a specific allegedly criminal conduct” occurred on the territory of a Party,¹⁸¹ the issue is whether a *constitutive element* of a specific allegedly criminal act occurred on a Party’s territory. In the adoption of such a test, the jurisdiction issue is not whether the entire border of the territory is clear,¹⁸² or whether the entire criminal act in question occurred within the State Party’s territory.¹⁸³ It is rather whether one element of the crime occurred within the Party’s territory.

¹⁷⁸ Rome Statute, art 13(b).

¹⁷⁹ Kontorovich, above n 11, at 984.

¹⁸⁰ Ronen, above n 11, at 10.

¹⁸¹ At 10.

¹⁸² Contrast Kontorovich, above n 11, at 984.

¹⁸³ But see Ronen, above n 11, at 10.

Such an approach is supported by recourse to the laws of State jurisdiction, particularly the doctrine of objective territoriality.¹⁸⁴ It is relatively uncontroversial that the ICC is competent to adopt this approach to its territorial jurisdiction,¹⁸⁵ as outlined in detail in Part V of the present piece. Assuming, *arguendo*, that objective territoriality is applicable in the Court’s jurisdictional scheme, the determination to be made in cases of disputed territory narrows significantly. The Court would not be required to determine borders, or that the whole of the criminal offence occurred on a Party’s territory. All that needs to be established is that an essential element occurred on the Party’s territory, a distinctively narrower inquiry than that identified by Kontorovich¹⁸⁶ or Ronen.¹⁸⁷ Such a narrow determination would not significantly prejudice the interests on any non-Parties.

D The Competence of the Court to Make Territorial Determinations

Kontorovich’s statement that “the ICC has not been understood as a border-determination body, nor has defining the territory of nations ever been part of the work of past international criminal tribunals”¹⁸⁸ also suggests that because the ad hoc tribunals have not been called upon to consider their jurisdiction over disputed territory, the Court is incapable of doing so.

This proposition makes several crucial errors. First, defining State territory has obviously never been the “work” of international criminal tribunals. Their “work” is enabling the prosecution of international criminals. The real issue is whether the Court *can* make incidental determinations as to upon whose territory the conduct occurred, rather than whether it is their task to define international borders, in the same manner as would the ICJ or an arbitrator.

The second error stems from the fact that, unlike the implication in Kontorovich’s argument, that an action is unprecedented does not mean it is unlawful. The point is perfectly illustrated

¹⁸⁴ See indicatively *SS Lotus*, above n 92, at 23; *Doot*, above n 119, at 817 per Lord Wilberforce; *Liangsiriprasert*, above n 119, at 246–247; *Strassheim*, above n 119, at 285; *Yeung Sun-shun*, above n 119, at 997–998; *Libman*, above n 119, at 213; *Ryngaert*, above n 119, at 198–202.

¹⁸⁵ See for example *Report of the Special Working Group on the Crime of Aggression ICC-ASP/7/SWGCA/2* (2009) at [38]–[39].

¹⁸⁶ Kontorovich, above n 11, at 984.

¹⁸⁷ Ronen, above n 11, at 10.

¹⁸⁸ Kontorovich, above n 11, at 984.

in that, although the Security Council had never created a criminal tribunal before the establishment of the International Criminal Tribunal for the Former Yugoslavia, it was implicitly entitled to do so by the Charter of the United Nations, despite the absence of any provision granting this specific right.¹⁸⁹

These two errors are reached by ignoring the *compétence* doctrine. International tribunals, including the ICC,¹⁹⁰ have the inherent power to determine their own jurisdiction.¹⁹¹ In light of this, the issue for determination is not whether the Court has made territorial determinations before, but whether so doing is an appropriate use of the *compétence* doctrine.

After Kontorovich noted that no international criminal tribunal had made a determination as to disputed territory,¹⁹² the OTP made such a determination. In 2015, the OTP requested authorisation to open a preliminary investigation into allegations of war crimes and crimes against humanity committed in Georgia in 2008.¹⁹³ The crimes in question were committed in South Ossetia, which issued a declaration of independence in 1992.¹⁹⁴ However, the international community has not recognised South Ossetia as an independent State,¹⁹⁵ there having been numerous GA resolutions classifying South Ossetia as Georgian.¹⁹⁶ In reliance

¹⁸⁹ *Tadić (Jurisdiction)*, above n 51, at [40].

¹⁹⁰ *Kony (Admissibility)*, above n 82, at [45]–[46].

¹⁹¹ *Nottebohm (Preliminary Objection)*, above n 75, at 119; *Arbitral Award of 31 July 1989*, above n 75, at [46]; *Rio Grande Irrigation and Land Company*, above n 77, at 136; *La Constancia*, above n 72, at 124; *Affaire du Guano*, above n 72, at 100; *Kallon (Jurisdiction)*, above n 79, at [34]; *Tadić (Jurisdiction)*, above n 51, at [18]; *Ayyash (Witness PRH012 Application)*, above n 80, at [11]; *El Sayed (Jurisdiction)*, above n 81, at [53].

¹⁹² Kontorovich, above n 11, at 984.

¹⁹³ *Situation in Georgia (Corrected Version of "Request for an authorisation of an investigation pursuant to article 15", 16 October 2015, ICC-01/15-4-Corr)* ICC Office of the Prosecutor ICC-01/15-4-Corr-2, 17 November 2015 at [1].

¹⁹⁴ At [54].

¹⁹⁵ But see for example *Presidential Decree of the Russian Federation About Recognition of the Republic of South Ossetia* Decree No 1261, 26 August 2008.

¹⁹⁶ See for example *Status of internally displaced persons and refugees from Abkhazia, Georgia, and the Tskhinvali region/South Ossetia, Georgia* GA Res 63/307, A/RES/63/307 (2009) at [1]; *Status of internally displaced persons and refugees from Abkhazia, Georgia, and the Tskhinvali region/South Ossetia, Georgia* GA Res 64/296, A/RES/64/296 (2010) at [1]; *Status of internally displaced persons and refugees from Abkhazia, Georgia, and the Tskhinvali region/South Ossetia, Georgia* GA Res 65/287, A/RES/65/287 (2011)

upon these resolutions, the OTP request for an authorisation concluded that South Ossetia was part of Georgian territory, and that territorial jurisdiction could be exercised.¹⁹⁷ Granted, the request by the OTP is not a Court decision, and it will not be until the Pre-Trial Chamber issues its decision on the request that there will be a Court decision on the competence of the ICC in relation to disputed territory. However, it is evident that the OTP does not consider that territorial disputes act as a barrier to the exercise of jurisdiction.

A simple application of the *compétence* doctrine also leads to the conclusion that the Court may make incidental territorial determinations. The doctrine serves to fill an “unforeseen gap in the legal regulations”.¹⁹⁸ As the ICC was a novel creation, being the first *permanent* international criminal tribunal, it is to be expected that not all matters essential to its functioning would be included in its Statute. Oversights are inevitable, particularly given the well-documented difficulties in negotiating the jurisdictional provisions of the Statute.¹⁹⁹ Given this, the exclusion of an article in the Statute as to the Court’s competence in relation to disputed territory cannot be seen to be determinative of a lack of such power, just as the absence of a provision in the Charter of the United Nations as to the creation of international tribunals did not make such an act unlawful.²⁰⁰ Rather, it is a matter which is appropriately addressed through the *compétence* doctrine.

at [1]; *Status of internally displaced persons and refugees from Abkhazia, Georgia, and the Tskhinvali region/South Ossetia, Georgia* GA Res 66/283, A/RES/66/283 (2012) at [1]; *Status of internally displaced persons and refugees from Abkhazia, Georgia, and the Tskhinvali region/South Ossetia, Georgia* GA Res 67/268, A/RES/67/268 (2013) at [1]; *Status of internally displaced persons and refugees from Abkhazia, Georgia, and the Tskhinvali region/South Ossetia, Georgia* GA Res 68/274, A/RES/68/274 (2014) at [1]; *Status of internally displaced persons and refugees from Abkhazia, Georgia, and the Tskhinvali region/South Ossetia, Georgia* GA Res 69/286, A/RES/69/286 (2015) at [1].

¹⁹⁷ *Situation in Georgia (Request for Authorisation of an Investigation)*, above n 193, at [54].

¹⁹⁸ *El Sayed (Jurisdiction)*, above n 81, at [53]; see similarly *Ayyash (Witness PRH012 Application)*, above n 80, at [11].

¹⁹⁹ See generally Schabas, above n 2, at 278–283; Kaul and Kreß, above n 3, at 145–156.

²⁰⁰ *Tadić (Jurisdiction)*, above n 51, at [40].

E Municipal Practice

Much like the OTP,²⁰¹ States do not regard territorial disputes as a bar to the exercise of jurisdiction.²⁰² As States undoubtedly seek to protect their own claims and political interests, this is unsurprising. Such practice is, therefore, less persuasive than would be practice of an international criminal tribunal. However, it highlights that there is no general principle of comity prohibiting jurisdiction over disputed territory, and lends support to the proposition that the Court can determine whether the territory in question is that of a State Party.

F The ICC as Forum non Conveniens

Also implicit in Kontorovich’s argument is that the ICC is *forum non conveniens* for the determination of territorial title. He argues that neither the GA nor ICJ have delineated Palestine’s territory, and that it would be inappropriate for the ICC to act before such a determination is made.²⁰³ Some limited support for this approach may be found in the practice of the OTP. In 2012, the OTP refused to accept that Palestine was a State for the purposes of the Rome Statute, as Palestinian Statehood was unclear.²⁰⁴ The OTP stated that it was more appropriate to wait until the “competent organs of the United Nations or eventually the Assembly of States Parties resolve the legal issue”.²⁰⁵ It was not until the recognition of Statehood by the GA²⁰⁶ that the OTP opened a preliminary examination into Palestine.²⁰⁷

However, for the Court to wait for such a determination in relation to disputed territory would be unsatisfactory. The word “disputed”, when used in relation to territory, is a simple “factual description of a political situation.”²⁰⁸ The determination of whether conduct occurs on a Party’s territory is, therefore, a determination of fact, not of law.²⁰⁹ Just as the elements

²⁰¹ *Situation in Georgia (Request for Authorisation of an Investigation)*, above n 193, at [54].

²⁰² See for example *Cordova v Grant* 248 US 413 (1919) at 419; *In re Pojasi Alejandro* (1921) 1 Ann Dig 106 (Bolivia SC) at 106.

²⁰³ Kontorovich, above n 11, at 984.

²⁰⁴ *Situation in Palestine* ICC Office of the Prosecutor, 3 April 2012 at [6]–[7].

²⁰⁵ At [8].

²⁰⁶ GA Res 67/19, above n 174, at [1].

²⁰⁷ “Palestine Statement”, above n 175.

²⁰⁸ Ronen, above n 11, at 16.

²⁰⁹ At 17.

of an offence are proved or disproved by evaluating submissions, evidence and oral arguments, so too can the factual status of territory be determined by the ICC. At the most basic level, territorial status is a simple factual inquiry, the addressing of which the Court is capable. Furthermore, were the Court obliged to wait until territorial title was determined by external processes, this could lead to the situation where a State could indefinitely bar the Court’s jurisdiction by simply refusing to agree to resolution processes as to the underlying territorial dispute.

A crucial point, perhaps overlooked by Kontorovich, is that any such determination by the Court would be of little value for any purposes other than criminal prosecution. Notably, the OTP’s Georgia authorisation request specifically states that the determination of Georgia’s territorial scope is “[f]or the purposes of this Application”,²¹⁰ indicating that it is not intended to have any wider effect. Furthermore, the Rome Statute envisages the practice of the Court having limited impact on wider international law – nothing in the Statute “shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than [the] Statute”.²¹¹ Furthermore, the Statute is not intended to affect the characterisation of criminal conduct in general international law.²¹² Although these provisions relate to principles of law, and the determination of territorial title is a factual issue,²¹³ these provisions imply is that a restrictive approach will be taken to any incidental territorial determinations made by the Court.

Furthermore, territorial determinations of the ICC will not bind the Parties to the underlying dispute. Even when made by tribunals with the competence to delineate borders, territorial determinations only bind disputing States with their prior consent.²¹⁴ Thus, were the ICC to determine that a crime occurred on Palestinian territory, this determination would not bind Israel or Palestine. In proceedings before the ICC, the parties are the prosecutor and the defendant. Although there is scope for States to intervene, they are not, in the same sense, parties. Again, the ICC has no jurisdiction over States, only over natural persons.²¹⁵ The

²¹⁰ *Situation in Georgia (Request for Authorisation of an Investigation)*, above n 193, at [54].

²¹¹ Rome Statute, art 10.

²¹² Article 22(3).

²¹³ Ronen, above n 11, at 17.

²¹⁴ Shaw, above n 147, at 359.

²¹⁵ *Kiobel* (2d Cir), above n 41, at 136–137.

States disputing the territory’s status would not, therefore, be bound by an ICC determination in their wider dealings.

History also suggests that the determinations of the ICC would be of limited value in other dispute resolution processes. Decisions of other criminal tribunals have had little influence on wider international law.²¹⁶ For example, *Tadić (Appeal against Conviction)* held that responsibility could attach to a defendant for conduct committed by those under their overall control.²¹⁷ However, in the *Genocide* case, the ICJ rejected this test in the context of State responsibility²¹⁸ – not because it was invalid, but because it was only suited to criminal responsibility.²¹⁹ The same result would likely be reached in the context of disputed territory. All a determination of the ICC would address is whether a constitutive element of a crime was committed in a Party’s territory. Resolving the territorial dispute in the ICJ or by arbitration would concern the demarcation of borders and boundaries. The two inquiries are distinct, and there is ample evidence that an ICC determination would be of little wider impact.

G The Monetary Gold Principle

Finally, Kontorovich argues that any territorial determinations by the Court, where a non-Party to the Statute was a Party to the underlying territorial dispute, would violate the *Monetary Gold* principle.²²⁰ In *Monetary Gold*, the ICJ held that it could not determine a dispute concerning interests of a State absent from the proceedings, as this would violate the principle of State consent.²²¹ Kontorovich argues that, were the ICC to act in relation to disputed territory, this would be “as clear a violation of the *Monetary Gold* principle as one could imagine.”²²²

²¹⁶ Ronen, above n 11, at 21.

²¹⁷ *Prosecutor v Tadić (Appeal against Conviction)* (1999) 124 ILR 61 (ICTY Appeals Chamber) at [145].

²¹⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43 at [404]–[405].

²¹⁹ At [405].

²²⁰ Kontorovich, above n 11, at 988–989.

²²¹ *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom and United States of America) (Preliminary Question)* [1954] ICJ Rep 19 at 32.

²²² Kontorovich, above n 11, at 989.

The *Monetary Gold* principle is of limited application under the Rome Statute. Prosecutions for the crime of aggression may not be commenced when committed by a national, or on the territory of, a non-Party.²²³ However, outside of this specific statutory incorporation, the *Monetary Gold* principle should be applied restrictively. This is consistent with the jurisprudence of the ICJ,²²⁴ wherein the *Monetary Gold* principle only applies where the other State’s interests constitute the “very subject-matter of the decision.”²²⁵ In ICC prosecutions, the “very subject-matter of the decision” is the criminal responsibility of a defendant for grave crimes. Any determination as to upon whose territory the conduct occurred is incidental, and permissible under the *compétence* doctrine.²²⁶ Given this, and the fact that the determination will not be binding but for the purposes of the Rome Statute, the *Monetary Gold* principle is not a barrier to the ICC making incidental territorial determinations for the limited purposes of establishing jurisdiction to prosecute.

H The Limits of the Argument

There are at least two further arguments which could be made that, although appearing to be of assistance in rebutting Kontorovich’s concerns, are unhelpful. The first comes from Ronen’s response to Kontorovich, which states that “[c]ircumventing the jurisdictional constraints of the ICC to *preclude* its jurisdiction is even more problematic than circumventing them to *grant* it jurisdiction.”²²⁷

This proposition is misguided. The determination of territory is not circumventing the Statute. Rather, it is consistent with established international law, particularly the *competence* doctrine. Furthermore, circumventing jurisdiction to enable prosecution is arguably as problematic as precluding jurisdiction, particularly for the Court’s reputation. If the Court were to circumvent its jurisdiction, issues as to the accused’s rights and the Court’s legitimacy would be raised. As the determination of territory is not circumventing jurisdiction, but rather an inherent part of the Court’s incidental *compétence*, moral

²²³ Rome Statute, art 15 *bis*(5); *Resolution RC/Res6*, above n 39.

²²⁴ Ronen, above n 11, at 19.

²²⁵ *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras) (Application by Nicaragua for Permission to Intervene)* [1990] ICJ Rep 92 at [56].

²²⁶ *Kallon (Jurisdiction)*, above n 79, at [34]; *Tadić (Jurisdiction)*, above n 51, at [18]; *Ayyash (Witness PRH012 Application)*, above n 80, at [11]; *El Sayed (Jurisdiction)*, above n 81, at [53].

²²⁷ Ronen, above n 11, at 18 (emphasis in original).

comparisons between circumventing jurisdiction in favour of or against prosecution are unhelpful, and potentially dangerous.

Second, nothing suggests that the accused cannot make challenges to territorial jurisdiction in cases of dispute if the non-Party State itself does not make a protest before the Court. One of the controversies following the *Eichmann* trial was the holding that Eichmann could not raise the violation of Argentina’s sovereignty arising from his capture by Israeli forces as a challenge to jurisdiction. The District Court held that this right of challenge belonged exclusively to Argentina, and that the accused “has no right to take over the rights of that State”.²²⁸ Although there is authority in support of the *Eichmann* proposition,²²⁹ this approach is inconsistent with the rights of the accused to offer a full defence, and is inappropriate in an international criminal tribunal.²³⁰ There can be no doubt, therefore, that the accused may challenge the factual status of territory, even absent support from the non-Party State.

I Conclusion: The Prospects for Palestine

Although this argument has taken a more general approach to territorial disputes in the ICC, it would be remiss not to offer at least passing comment on Palestine. As Palestine is a State,²³¹ it must be presumed that it has some territory.²³² Kontorovich is correct when he notes that neither the ICJ²³³ nor the GA²³⁴ have determined where these territorial boundaries lie. However, there is arguably State practice to which the Court may turn in this regard.²³⁵ Thus, the Court has the theoretical competence to determine whether conduct in relation to Palestine occurs on its territory. This, of course, does not presuppose any particular result.

²²⁸ *Eichmann* (DC), above n 93, at 62.

²²⁹ See indicatively *United States v Noriega* 746 F Supp 1506 (SD Fla 1990) at 1533.

²³⁰ *Tadić (Jurisdiction)*, above n 51, at [55].

²³¹ GA Res 67/19, above n 174, at [1].

²³² Convention on the Rights and Duties of States, art 1.

²³³ Kontorovich, above n 11, at 988; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136.

²³⁴ Kontorovich, above n 11, at 988; see also GA Res 67/19, above n 174.

²³⁵ Ronen, above n 11, at 13–16.

Although the Court has the legal capacity to make such a determination, this is a different question from whether it has the political will to do so. The situation in Georgia, wherein a territorial determination was made by the OTP,²³⁶ was significantly more clear-cut, due to the widespread non-recognition of South Ossetia.²³⁷ Palestine, however, is more politically charged. The approach of the OTP regarding Palestine to date has been subject to much criticism for being overtly political.²³⁸ As the OTP has recently defended allegations of political bias and institutional racism,²³⁹ taking action in relation to Palestine would be a strong indicator of sincerity behind this defensive rhetoric.

V *Objective Territoriality and the Rome Statute*

Although the ICC has not yet examined whether it is capable of applying objective territoriality, it appears to be relatively beyond dispute that it is so competent.²⁴⁰ It has, for example, been argued by scholars that objective territoriality is consistent with the Court’s territorial jurisdiction,²⁴¹ and the Assembly of States Parties also sees no major controversy in the doctrine’s adoption.²⁴²

That said, at least one commentator has recently argued that the plain wording of art 12(2)(a) bars the adoption of objective territoriality. Article 12(2)(a) permits jurisdiction where the “conduct in question occurred” on the territory of a State Party.²⁴³ Jean-Baptiste Maillart argues that the term “conduct” is traditionally understood as being distinct from the result

²³⁶ *Situation in Georgia (Request for Authorisation of an Investigation)*, above n 193, at [54].

²³⁷ See for example GA Res 63/307, above n 196, at [1]; GA Res 64/296, above n 196, at [1]; GA Res 65/287, above n 196, at [1]; GA Res 66/283, above n 196, at [1]; GA Res 67/268, above n 196, at [1]; GA Res 68/274, above n 196, at [1]; GA Res 69/286, above n 196, at [1].

²³⁸ See for example William A Schabas “The Prosecutor and Palestine: Deference to the Security Council” (8 April 2012) PhD studies in human rights <humanrightsdoctorate.blogspot.com>; John Dugard “Palestine and the International Criminal Court: Institutional Failure or Bias?” (2013) 11 JICJ 563 at 568–570.

²³⁹ Fatou Bensouda “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda: ‘The ICC is an independent court that must be supported’” (24 November 2015) International Criminal Court <www.icc-cpi.int>.

²⁴⁰ Vagias, above n 13, at 162.

²⁴¹ Rod Rastan “The Jurisdictional Scope of Situations before the International Criminal Court” (2012) 23 Crim L Forum 1 at 18–20; Vagias, above n 55, at 162.

²⁴² *Report of the Special Working Group on the Crime of Aggression*, above n 185, at [38]–[39].

²⁴³ Rome Statute, art 12(2)(a).

of the crime itself.²⁴⁴ Thus, he states, were a person in Syria, a non-Party, to fire a rocket into Jordan and kill civilians, this would amount to a war crime. However, it is the *result* which occurs in Jordan, the State Party, whereas the *conduct* which is unlawful occurred in Syria, thus precluding territorial jurisdiction on the basis of objectivity.

Maillart, therefore, seeks out alternative means by which this loophole can be closed, and proposes a ‘constructive conduct theory’. By this approach, the criminal conduct is seen as “not static”, as the “conduct does not only take place where it started to take place but also everywhere the missile goes before causing the result of the crime.”²⁴⁵ Thus, the same result is essentially reached as were objective territoriality adopted. This reasoning is similar to the *Farrendon* case, wherein the Northern Ireland Court of Appeal held that the intent to wound travelled with the bullet.²⁴⁶ Maillart also notes similar practice in early United States case law.²⁴⁷

However, Maillart’s argument that the adoption of objective territoriality is not possible based on the wording of the Statute overlooks key points. Most significantly, States themselves have endorsed the application of objective territoriality under art 12(2)(a).²⁴⁸ Maillart’s observations are, therefore, unsupported by State practice.

Furthermore, the mere firing of a rocket is not a criminal act alone. It is not until the civilians are killed that there is a war crime, and thus something which falls within the Court’s jurisdiction. The firing of a rocket itself, therefore, does not amount to ‘conduct’ being questioned by the Court, as stated by Maillart, unless an unlawful consequence occurs. Put another way, there is no “conduct” which the Court can “question” until the civilians are killed, or the “harm” occurs to borrow Maillart’s language. Thus, the adoption of a reading excluding the application of objective territoriality is problematic.

The *Mbarushimana* decision also suggests that the Court would be open to the adoption of objective territoriality. In the context of a challenge to temporal jurisdiction, the Court looked to whether the crimes alleged to have been committed by the accused were

²⁴⁴ Maillart, above n 12.

²⁴⁵ Maillart, above n 12.

²⁴⁶ *Farrendon*, above n 113, at 184.

²⁴⁷ Maillart, above n 12.

²⁴⁸ *Report of the Special Working Group on the Crime of Aggression*, above n 185, at [38]–[39].

“sufficiently linked” to the referral made by the DRC.²⁴⁹ This language is similar to the sufficient link test, applicable in cases of objective territoriality, to determine if jurisdiction can be said to exist.²⁵⁰ This indicates, therefore, that the Court is willing to look at jurisdiction in terms of sufficiency and proximity. It should, therefore, be no great stretch to adopt objective territoriality, by which municipal Courts do the same.

VI The Effects Doctrine and the Rome Statute

A Introduction

Although the Court may adopt objective territoriality, what is significantly more controversial is the argument made by Vagias that the ICC can, and should, apply the effects doctrine.²⁵¹ Vagias offers the example of a campaign to exterminate a group on the territory of a non-Party, which causes mass exodus to neighbouring States Parties. This, it is argued, would cause “direct, substantial and immediately foreseeable socio-economic effects within State Party territory”.²⁵² Vagias argues that this should serve as a sufficient jurisdictional basis for the Court.

Vagias supports his argument in favour of the adoption of the effects doctrine by first examining policy, and then looking at the legal mechanisms by which the doctrine could be adopted. Such an approach, however, is unhelpful and misleading. The policy arguments for the expansion of the Court’s jurisdiction will always sound persuasive, as they are inevitably based on morality and the ending of impunity. Indeed, Vagias adopts this approach, stating that applying the effects doctrine is justified, as:²⁵³

...not even the strictest of positivists would contest the view that the human lives in situations of genocide (usually in the developing world) are not less worthy of protection than the spending of a customer and the smooth operation of a certain market (usually in the developed world).

²⁴⁹ *Mbarushimana (Jurisdiction)*, above n 62, at [21].

²⁵⁰ *Libman*, above n 119, at 213; *Reid*, above n 120, at 632; *Rosenstein*, above n 120, at [46].

²⁵¹ See generally Vagias, above n 13, at ch 6.

²⁵² At 163.

²⁵³ At 167.

Such a proposition is misleading, and misunderstands the role of morality in a positivist analysis. The approach to law and morality in positivism is aptly summed up by John Austin, who, writing in 1832, stated:²⁵⁴

The *existence* of a law is one thing: its *merits* or *demerits* are another. Whether a law *be*, is one inquiry: whether it *ought* to be, or whether it agree with a given or assumed test, is another and a distinct inquiry.

Thus, were a positivist to discuss the adoption of the effects doctrine under the Rome Statute, they would look to what the law *is*, or, in other words, whether the Court could actually adopt the doctrine in light of 12(2)(a) and effect doctrine's nature. In discussing policy arguments before his discussion of the legality of the adoption of the effects doctrine, Vagias' discussion of the law becomes coloured by, perhaps meritorious, policy concerns.

Contrary to this approach, looking first to the legality of the adoption of the doctrine, then to policy, leads to the opposite conclusion as that reached by Vagias – the ICC cannot adopt the effects doctrine as a sub-ground of its territorial jurisdiction. Such a conclusion is reached upon examining the plain wording of the Statute, and the contested nature of the doctrine in international law. Furthermore, many of Vagias' policy arguments made in relation to the adoption of the doctrine, although well-intentioned, do not support his conclusions to the degree he suggests.

B The Legality of Adopting the Effects Doctrine

Vagias states that whether the Court may *legally* adopt the effects doctrine hinges on two issues: first, whether anti-competitive practices are considered crimes; and second, whether the effects doctrine is a valid basis of State criminal jurisdiction.²⁵⁵

Whilst these issues are of some importance, there are other more crucial issues which must be resolved. Most obviously, the key issue is whether the wording in art 12(2)(a) permits the adoption of the effects doctrine.

²⁵⁴ John Austin *The Province of Jurisprudence Determined* (John Murray, London, 1832) at 278 (emphasis in original).

²⁵⁵ Vagias, above n 13, at 172.

I The Conduct in Question

Article 12(2)(a) states that the Court will have jurisdiction if the following State is a Party:²⁵⁶

The State on the territory of which *the conduct in question* occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft[.]

The crucial segment of art 12(2)(a) is the phrase “the conduct in question”. In any case before the ICC, the conduct which is in question is a violation of the subject-matter jurisdiction of the Court.²⁵⁷ The jurisdiction of the Court is “limited to the most serious crimes of concern to the international community”, specifically genocide, crimes against humanity, war crimes, and aggression.²⁵⁸ Thus, the conduct in question before the Court can only be these matters. Helpfully, the later articles of the Statute²⁵⁹ and the *Elements of Crimes*²⁶⁰ outline specifically what is meant by this conduct. Conspicuously absent from these elements is reference to any effect other than the immediate outcome of the crime. Thus, on a plain reading of the Statute and the *Elements*, the adoption of the effects doctrine appears to be excluded, as wider economic effects are not the conduct which is being questioned before the Court.

The conclusion that the “conduct in question” does not include effects in other States is also supported by the practice of the OTP in relation to ISIL. In April 2015, after the publication of Vagias’ book, the OTP issued a statement on the crimes allegedly committed by ISIL. The statement noted allegations of war crimes and genocide. However, the OTP stated that the Court did not have jurisdiction to try ISIL members. In terms of territoriality, the OTP simply noted that crimes committed by ISIL were committed in Iraq and Syria, neither of which are Parties to the Rome Statute.²⁶¹

²⁵⁶ Rome Statute, art 12(2)(a) (emphasis added).

²⁵⁷ See further Part V of the present piece.

²⁵⁸ Rome Statute, art 5(1).

²⁵⁹ Articles 6-8*bis*.

²⁶⁰ *Elements of Crimes* E.03.V.2 (2002).

²⁶¹ “ISIL Statement”, above n 14.

However, before the release of the OTP’s statement, mass exodus of refugees, particularly from Syria, occurred in unprecedented levels, directly due to the conflict.²⁶² The ISIL example, therefore, is directly analogous to that given by Vagias as to when the effects doctrine should be applicable.²⁶³ Syrian refugees arrived en masse in European nations, the majority of which are Parties to the Statute. This caused substantial economic and social effects within the territory of States Parties. However, the OTP did not in any way assert territorial jurisdiction over ISIL’s crimes on the basis that they caused an effect in Europe.²⁶⁴

Although the statement of the OTP generated much debate, the majority of this was centred on *nationality* jurisdiction.²⁶⁵ No one doubted the OTP’s statements on *territorial* jurisdiction. The lack of objection to the findings of the OTP in terms of territoriality indicates that the OTP, the international community, and academics collectively do not believe that the effects doctrine is applicable under art 12(2)(a).

Such a conclusion is also supported by the *Registered Vessels* report, wherein the OTP noted that, if it were to assert jurisdiction over an attack on a flotilla by Israeli forces, it could only take jurisdiction over actions which occurred on the vessels. Nothing was seen to justify taking jurisdiction over conduct occurring off the vessels, despite any effects that may have been felt by States Parties.²⁶⁶

Even if the words “the conduct in question” do not *explicitly* exclude the adoption of the effects doctrine, there is, at the very least, ambiguity as to whether they permit its adoption. This point is noted by Schabas, who concluded that there are “compelling arguments in

²⁶² Office of the United Nations High Commissioner for Refugees “Mediterranean Crisis 2015 at six months: refugee and migrant numbers highest on record” (1 July 2015) United Nations High Commissioner for Refugees <www.unhcr.org>.

²⁶³ Vagias, above n 13, at 162–163.

²⁶⁴ “ISIS Statement”, above n 14.

²⁶⁵ Mohammad Hadi Zakerhossein “ICC Prosecutor is Wrong about ISIS” (19 June 2015) Justice Hub <justicehub.org>; Letter from Global Justice Centre to Fatou Bensouda (Prosecutor, International Criminal Court) regarding filing OTP-CR-397/15 (17 December 2015); “Is ISIS out of the ICC’s reach?” (23 April 2015) Global Justice <cicglobaljustice.wordpress.com>; Anna Marie Brennan “Prosecuting ISIL before the International Criminal Court: Challenges and Obstacles” (17 September 2015) American Society of International Law <www.asil.org>.

²⁶⁶ *Situation on Registered Vessels of Comoros, Greece and Cambodia (Article 53(1) Report)* ICC Office of the Prosecutor, 6 November 2014 at [17], n 21.

favour of a strict construction” of art 12(2)(a) to the exclusion of effects doctrine.²⁶⁷ Whilst these policy arguments were not substantially elaborated, one such argument is the rights of the accused. It is a fundamental principle of law that penal provisions should be interpreted strictly.²⁶⁸ This rule is reflected in the Rome Statute, which states that the “definition of a crime shall be strictly construed and shall not be extended by analogy.”²⁶⁹ Whilst, on its plain wording, this provision applies only to the definition of crimes, and not provisions governing jurisdiction, there is strong support for a wider reading of it, so as to cover other provisions of the Statute.²⁷⁰ The Court has applied this provision on strict interpretation to the definition of the mens rea provisions of the Statute, not merely the definitions of crimes per se,²⁷¹ and the ad hoc tribunals have interpreted jurisdictional ambiguities in favour of the accused in light of similar principles.²⁷² Thus, as there is at least ambiguity as to whether the doctrine may be adopted, the narrower reading in favour of the accused should be adopted, in line with both the Statute²⁷³ and general criminal law principles.²⁷⁴

2 *The Effects Doctrine and Custom*

After a review of State practice in relation to the effects doctrine, Vagias concludes that “for ‘the most egregious violations of competition law’, there is certain acceptance of the effects doctrine as an interpretation of territorial criminal jurisdiction.”²⁷⁵

²⁶⁷ William A Schabas *An Introduction to the International Criminal Court* (4th ed, Cambridge University Press, Cambridge, 2011) at 82.

²⁶⁸ See for example *Sweet v Parsley* [1970] AC 132 (HL) at 149 per Lord Reid; *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA) at 668.

²⁶⁹ Rome Statute, art 22(2).

²⁷⁰ Schabas, above n 2, at 410.

²⁷¹ *Prosecutor v Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* ICC Pre-Trial Chamber II ICC–01/05–01/08–424, 15 June 2009 [*Bemba Gombo (Confirmation of Charges)*] at [369].

²⁷² *Prosecutor v Nahimana (Judgment)* ICTR Appeals Chamber ICTR-99–52-A, 28 November 2007 at [575].

²⁷³ Rome Statute, art 12(2)(a); *Bemba Gombo (Confirmation of Charges)*, above n 271, at [369]; Schabas, above n 2, at 410.

²⁷⁴ *Sweet*, above n 268, at 149 per Lord Reid; *Millar*, above n 268, at 668.

²⁷⁵ Vagias, above n 13, at 182 (citations omitted).

As has been argued, the effects doctrine cannot be said to be custom, in light of extensive State opinion to the contrary.²⁷⁶ Notably, Mann was of the view that was an “excess of international jurisdiction which, on account of its manifold repercussions, is of unsurpassed gravity”,²⁷⁷ and that United States had “gone astray” in utilising the doctrine.²⁷⁸ The wide protests of States also mean that it cannot be considered a general principle of law. This is significant, as these are the statutory bases upon which the ICC could apply the effects doctrine.²⁷⁹ An adoption of practice not consistent with these grounds of law is of questionable legality.²⁸⁰ The Court, therefore, is not competent to have recourse to the effects doctrine as a means of interpretation.

Essentially, if the Court were to adopt the effects doctrine, it would be adopting the practice of primarily one State, the United States. The Court has, on at least one occasion, adopted a sole State’s practice, without recourse to the sources of law applicable under the Statute. In defining modes of liability in the *Lubanga (Confirmation of Charges)* case, the Court largely adopted German jurisprudence, without significant consideration of the law of other nations.²⁸¹ Whilst this approach is questionable, in that it largely ignores the sources of law applicable in the Court,²⁸² even if the adoption of one State’s jurisprudence is permissible, the adoption of the effects doctrine remains inappropriate.

Unlike Germany, the United States has not ratified the Rome Statute. It would be inappropriate to adopt the practice of a non-Party to the Statute, especially when so many

²⁷⁶ *Smith*, above n 99, at [263] per Lord Collins; *Krisch*, above n 170, at 12; *Poynter*, above n 170, at [44]; *Air New Zealand*, above n 170, at [384]; *Philip Morris*, above n 170, at 413; Note No 117, above n 158, at 454–455; Letter from European Community Commission, above n 158, at 725; United Kingdom *Comments*, above n 158, at 668; *United Nations General Assembly: Official Records of 53rd Session, 37th Plenary Meeting*, above n 158, at 17 per Mr Manz (Austria; on behalf of the European Union); *United Nations General Assembly: Official Records of 54th Session, 50th Plenary Meeting*, above n 158, at 18 per Ms Korpi (Finland; on behalf of the European Union).

²⁷⁷ Mann, above n 96, at 106.

²⁷⁸ FA Mann “The Doctrine of International Jurisdiction Revisited After Twenty Years” (1984) 186 *Recueil des Cours* 9 at 95.

²⁷⁹ Rome Statute, art 22(1).

²⁸⁰ Florian Jessberger “A Substantial Criminal Law Perspective” in “Discussion” (2008) 6 *JICJ* 763 at 778.

²⁸¹ See generally *Prosecutor v Lubanga (Decision on the confirmation of the charges)* ICC Pre-Trial Chamber I ICC-01/04-01/06-803-tEN, 29 January 2007 at [317]–[367].

²⁸² Jessberger, above n 280, at 778.

States Parties do not recognise the legality of such practice. Furthermore, the adoption of United States practice to widen the jurisdiction of the Court would be highly ironic, given that the United States itself would likely be an opponent of the Court employing the doctrine, as it strongly campaigned to limit the Court’s jurisdictional reach.²⁸³ Finally, a perhaps greater irony comes from the fact that the adoption of the jurisprudence of a limited amount of States would be inconsistent with earlier arguments posed by Vagias himself. Vagias has previously stated:²⁸⁴

...when it comes to territorial jurisdiction, one should be particularly mindful of a ‘national law orientation’ of the Court. The reasons are many, ranging from the imposition of one national law to an international institution composed of many States Parties, to arguments similar to those made by Judge Cassese in *Erdemović*.²⁸⁵ In his Opinion, Judge Cassese clearly outlined the dangers inherent in any mechanical transposition of national law solutions, developed within a specific legal system to address national problems, to the international plane. It is submitted that this line of thinking retains its validity in the present situation as well.

Vagias’ earlier remarks are the perfect rebuttal to his argument in favour of the applicability of the effects doctrine. In essence, such an adoption would be transposing the jurisprudence of a sole State, which *has not ratified* the Statute, into the Court’s jurisdictional regime. Furthermore, this practice was designed to deal with national problems – detriment to internal commerce. The adoption of such an approach is highly problematic and of questionable merit.

3 *The Effects Doctrine and Criminal Jurisdiction*

Vagias argues that there is “significant State practice in support of the proposition that antitrust violations constitute criminal law violations”,²⁸⁶ and that “criminal punishment is increasingly being used in national law for antitrust violations.”²⁸⁷ Thus, as the effects

²⁸³ Schabas, above n 2, at 279; *Proposal Submitted by the United States of America*, above n 5.

²⁸⁴ Vagias, above n 55, at 56.

²⁸⁵ *Prosecutor v Erdemović (Judgment)* ICTY Appeals Chamber IT-96-22-A, 7 October 1997 at [2]–[6] per Judge Cassese dissenting.

²⁸⁶ Vagias, above n 13, at 172.

²⁸⁷ At 177.

doctrine applies to antitrust violations, which are criminal violations, “there is certain support for the argument of the criminal law application of the effects doctrine on jurisdiction.”²⁸⁸

One of the great controversies relating to the exercise of the doctrine was the fact that the anticompetitive behaviour it sought to regulate, whilst criminal in the United States, was often not criminal in the countries wherein the conduct occurred.²⁸⁹ This led to many States adopting legislation seeking to block United States attempts to gain evidence which could otherwise be used in a prosecution.²⁹⁰ The EU, too, although having adopted the effects doctrine in part, resists classifying antitrust violations as criminal conduct.²⁹¹ There is, therefore, still doubt as to whether the effects doctrine applies to criminal conduct, and its appropriateness to address such matters.

Even if anticompetitive behaviour is accepted to be criminal in nature, the adoption of the effects doctrine remains problematic. These prosecutions are for a specific type of criminal violation, relating largely to commercial matters. Even within this sphere, Vagias concedes that there is “no list available of uniformly agreed classifications across the world” or indeed within the United States itself, as to what constitutes an effect.²⁹² It is also crucial to note that, outside of the anticompetitive cases, the United States still generally adheres to the traditional territoriality doctrine.²⁹³ This means that, even drawing from United States jurisprudence, there is little which can assist in determining what amounts to an effect of conduct aside from that of an economic nature. Thus, an effect includes injury to

²⁸⁸ At 181.

²⁸⁹ Higgins, above n 95, at 75–76.

²⁹⁰ See for example Protection of Trading Interests Act 1980 (UK); Foreign Proceedings (Prohibition of Certain Evidence) Act 1976 (Cth).

²⁹¹ Case C-628/10 P *Alliance One International Inc v European Commission (Opinion of Advocate General Kokott)* [2012] 5 CMLR 14 at [2] and [111], n 66; Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1, art 23(5).

²⁹² Vagias, above n 13, at 190.

²⁹³ See generally *Kiobel* (SC), above n 105.

commerce,²⁹⁴ or price-fixing,²⁹⁵ but the effects which can be said to flow from other crimes remain largely undefined.

Even if it is accepted that there is an international consensus that anticompetitive behaviour is a criminal offence, there is very little practice outside of commercial proceedings in which the doctrine has been applied. The only case of the use of the effects doctrine in a ‘classic’ criminal case to which Vagias explicitly points is *Mharapara*, a case of theft by a Zimbabwean national abroad.²⁹⁶ However, whereas international law allows prosecution on the basis of nationality,²⁹⁷ the law of Zimbabwe did not allow prosecution on this basis.²⁹⁸ Most other States would not have needed to have recourse to the effects doctrine had *Mharapara* been one of their nationals.

The fact that other nations would have prosecuted *Mharapara*, and indeed any of their nationals offending abroad, on the basis of nationality means there is no solid jurisprudential basis as to what amounts to an effect of an ‘ordinary’ crime, let alone a crime within the Rome Statute’s jurisdiction. The lack of established jurisprudence on what amounts to an effect of a crime presents conceptual difficulties. For jurisdiction to be adopted under the effects doctrine, the effects in question must be direct, intended, foreseeable and substantial.²⁹⁹ While damage to commerce might be a direct, intended and foreseeable effect of anticompetitive behaviour,³⁰⁰ it is more difficult to see how it can be such an effect of, for example, a genocide. Whilst, as Vagias states, an influx of persons fleeing from genocide might cause economic effects in a neighbouring State,³⁰¹ this certainly cannot be said to be intended. In fact, if the unlikely scenario arose that a person was committing an act of genocide with the *intention to cause economic effects* on a neighbouring State, there would be an issue as to whether the accused person had the requisite genocidal intent to be held

²⁹⁴ *National Bank of Canada*, above n 154, at 8.

²⁹⁵ *Kruman*, above n 155, at 390.

²⁹⁶ *Mharapara*, above n 124, at 564.

²⁹⁷ *Günther*, above n 99, at 250–251; *Passport Seizure Case*, above n 99, at 373; *Weiss*, above n 99; *Ekanayke*, above n 99, at 300–301; *Re Gutierrez*, above n 99, at 266.

²⁹⁸ *Mharapara*, above n 124, at 559.

²⁹⁹ *Alcoa*, above n 151, at 444; *Hartford Fire Insurance*, above n 153, at 796; Foreign Trade Antitrust Improvements Act 15 USC § 6a.

³⁰⁰ *National Bank of Canada*, above n 154, at 8.

³⁰¹ Vagias, above n 13, at 163.

liable. To be convicted of genocide, an accused must have the *specific* genocidal intent to destroy the group in question,³⁰² which must be the only reasonable conclusion open to the Court.³⁰³ Thus, if the effects doctrine requires *intended* effects, it cannot logically be applicable in cases of genocide, as its use would be self-defeating.

Even if one takes the more liberal definition of intent as meaning “reasonably foreseeable” effects,³⁰⁴ the issue still arises as to what amounts to a reasonably foreseeable effect of any particular crime within the Statute. The test adopted by the United States Courts, and proposed by Vagias, is that of whether the effect is foreseeable to an objective reasonable person.³⁰⁵ Of course, a reasonable person would expect a crime, genocide, for example, to have an effect on other nations. This is because States are under an obligation to provide assistance to those fleeing otherwise certain death. Further, if so ordered by the Security Council, States are obliged to contribute resources to assist in combating these crimes.³⁰⁶ It is, therefore, reasonably foreseeable that war crimes and genocide will affect many States.

The risk, therefore, is that the jurisdictional scheme of the Court would be opened far beyond what was envisaged in Rome if the effects doctrine were to be adopted, as it is reasonably foreseeable, and indeed inevitable, that crimes within the Court’s subject-matter jurisdiction will have effects on many nations other than the territorial State. The adoption of a wide definition of effect, stemming from a lack of guidance in established jurisprudence, would open up the jurisdictional scheme of the Court too far. It will be recalled that the States Parties explicitly rejected wide-ranging jurisdiction of the Court,³⁰⁷ and economic, political and social detriment are largely regarded as too remote to permit the exercise of jurisdiction.³⁰⁸ The adoption of such wide definitions of effect would mean that the Court’s

³⁰² *Al Bashir (Arrest Warrant Decision)*, above n 66, at [158].

³⁰³ At [159].

³⁰⁴ Vagias, above n 13, at 192–193.

³⁰⁵ *Animal Science Products In v China Minmetals Corp* 654 F 3d 462 (3d Cir 2011) at 471; Vagias, above n 13, at 193.

³⁰⁶ Charter of the United Nations, art 25.

³⁰⁷ Schabas, above n 2, at 283.

³⁰⁸ Mann, above n 278, at 28.

territorial jurisdiction would closely resemble universal jurisdiction, which was expressly rejected at Rome.³⁰⁹

Even a narrower definition of effect is problematic, as those effects which are reasonably foreseeable and directly linked to the crimes under the Court’s jurisdiction would ordinarily be prosecuted under other jurisdictional grounds. If, for example, the death of a national of a State contributing troops to a peacekeeping force were an effect, this would essentially be passive personality jurisdiction³¹⁰ dressed up as territoriality. Likewise, if the detriment to the security of a neighbouring State were an effect, this would be an application of the protective principle³¹¹ disguised as territorial jurisdiction. Both these consequences, however, are more direct and foreseeable than economic detriment. Thus, the mere adoption of the traditional test for the applicability of the effects doctrine gives rise to definitional difficulties as to what amounts to an effect, particularly given the constrained bases of jurisdiction contained in art 12 of the Statute.

The crucial difficulty which cannot be adequately overcome is the fact that almost all definitions of an effect concern some form of economic detriment. Whilst the adoption of such definitions of an effect may, *arguendo*, be possible in an international *commercial* court, it is more difficult to see how economic detriment can be adopted as a basis of effects jurisdiction in an international *criminal* court. The nexus between a war crime and economic detriment to a neighbouring State is less “direct”, to borrow the test applied in United States antitrust cases,³¹² than it is in cases of anticompetitive behaviour and such loss.

³⁰⁹ Schabas, above n 2, at 278–283.

³¹⁰ *Eichmann* (SC), above n 139, at 304; *Yunis*, above n 141; *Gaddafi*, above n 141, at 496; per Lord Collins *Smith*, above n 99, at [263].

³¹¹ *Eichmann* (DC), above n 93, at 54; 304 *Eichmann* (SC), above n 139, at 304; *Smith*, above n 99, at [263] per Lord Collins; *Joyce*, above n 137, at 371; *Giles*, above n 138, at 102; Crawford, above n 111, at 462.

³¹² Foreign Trade Antitrust Improvements Act 15 USC § 6a.

4 *The Effects Doctrine and Territorial Jurisdiction*

Vagias’ argument presumes that the effects doctrine is “one of the most recent interpretations of territorial jurisdiction.”³¹³ He further notes that, in many cases applying the effects doctrine, “the territorial element is constantly present”.³¹⁴

There is authority in support of the proposition that the effects doctrine is an extension of territoriality. The *Laker Airways* case, for example, states that “[t]he territorial effects doctrine is *not* an *extraterritorial* assertion of jurisdiction. Jurisdiction exists only when significant effects were intended within the prescribing territory”,³¹⁵ and the *Alcoa* case concerned intended effects within United States’ territory.³¹⁶ Support for this proposition is arguably found as far back as the *Lotus* case, wherein the Permanent Court of International Justice stated that an offence is “to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, *and more especially its effects*, have taken place there.”³¹⁷ A plain reading of this passage in *Lotus* seemingly equates effects to a constituent element of the offence, reminiscent of objective territoriality.

However, the effects doctrine is not an extension of territorial jurisdiction. Although some scholars have classified it as objective territoriality,³¹⁸ others continue to classify it as extraterritorial jurisdiction.³¹⁹ As Shaw correctly notes, the main controversy around the use of the effects doctrine was the view that it was an exercise of extraterritorial jurisdiction beyond traditionally accepted grounds.³²⁰ Likewise, Mann was also of the view that the doctrine amounted to extraterritorial jurisdiction, as the effect was not a constituent element of the offence being tried in most cases.³²¹

³¹³ Vagias, above n 13, at 171.

³¹⁴ At 184.

³¹⁵ *Laker Airways v Sabena, Belgian World Airways* 731 F 2d 909 (DC Cir 1984) at 923 (citations omitted; emphasis in original).

³¹⁶ *Alcoa*, above n 151, at 443; Vagias, above n 13, at 184.

³¹⁷ *SS Lotus*, above n 92, at 23 (emphasis added).

³¹⁸ Oxman, above n 90, at [23].

³¹⁹ Krisch, above n 170, at 12–13; Higgins, above n 95, at 73–74; Crawford, above n 111, at 463.

³²⁰ Shaw, above n 147, at 499.

³²¹ Mann, above n 96, at 104–105.

State practice, too, indicates the effects doctrine is extraterritorial. It has been noted by the United Kingdom Supreme Court that the “controversial” effects doctrine is only “sometimes” said to be an extension of territoriality.³²² Furthermore, the practice of the Netherlands indicates a clear view that the effects doctrine is an invalid extraterritorial jurisdictional ground.³²³ Similarly, the practice of many other States, including New Zealand,³²⁴ and nations of the EU,³²⁵ expresses a clear view that the effects doctrine is properly understood as being extraterritorial in nature.³²⁶ This is true even of some States which employ the doctrine.³²⁷

The United States jurisprudence relied upon by Vagias to establish that the effects doctrine is territorial³²⁸ does not provide a sufficient basis to support his argument. As the doctrine was widely protested by other States, the United States would obviously attempt to justify their practice upon accepted bases of jurisdiction. However, as Mann so aptly noted:³²⁹

...where the large majority of nations co-exists harmoniously but there is tension and disagreement between them and a single other State, the presumption is that the latter is wrong in law. This is the position in the field of international jurisdiction.

Although support for the United States position is gained from *Mharapara* and *Lotus*, these are also of little relevance. *Mharapara*, which applied the effects doctrine as an extension of territoriality,³³⁰ is unhelpful. Most other States would have brought such a prosecution on the basis of nationality. The Court in *Mharapara* was unwilling to let jurisdictional gap lead

³²² *Smith*, above n 99, at [263] per Lord Collins.

³²³ *Sensor Nederland BV*, above n 96, at [7.3].

³²⁴ *Poynter*, above n 170, at [44]–[45].

³²⁵ Note No 117, above n 158, at 454–455; Protection of Trading Interests (US Cuban Assets Control Regulations) Order 1992 (UK), explanatory note; Letter from European Community Commission, above n 158, at 725; United Kingdom *Comments*, above n 158, at 668; *United Nations General Assembly: Official Records of 53rd Session, 37th Plenary Meeting*, above n 158, at 17 per Mr Manz (Austria; on behalf of the European Union).

³²⁶ *Air New Zealand*, above n 170, at [384]–[386]; *Taw Cheng Kong*, above n 169, at [88].

³²⁷ *GVK Industries*, above n 168, at [40].

³²⁸ *Laker Airways*, above n 315, at 923; *Alcoa*, above n 151, at 444; *Vagias*, above n 55, at 184.

³²⁹ Mann, above n 278, at 95.

³³⁰ *Mharapara*, above n 124, at 562–563.

to the accused escaping punishment, particularly as State interests were at stake. As such, the decision is of limited probative value. As to the *Lotus* dictum,³³¹ given the widespread criticism of the *Lotus* case in general, caution should be taken before placing too much weight on this as authority for the legality of the effects doctrine.³³²

In summary, the effects doctrine, if it is a principle of jurisdiction, is an *extraterritorial*, not *territorial*, one. As the ICC can prosecute on the basis of territoriality,³³³ reading an extraterritorial jurisdictional doctrine into art 12(2)(a) is impossible. Thus, even if the doctrine is custom, and there is sufficient guidance as to what amounts to an effect, the simple fact is that the Court is not empowered to apply extraterritorial bases of jurisdiction, aside from nationality,³³⁴ absent a Security Council referral.

C Matters of Policy

1 A Broad Interpretation of the Statute

As a matter of policy, it is argued by Vagias that a wide interpretation of art 12(2)(a) is needed to close "jurisdictional loopholes" within the Statute.³³⁵ Reference is made to the *Finta* judgment,³³⁶ for the proposition that the prosecution of war crimes by States other than the territorial one is one of practical necessity. This, it is argued, justifies a wide reading of art 12(2)(a).³³⁷

Two important points must be made in relation to *Finta*. First, it was a domestic decision, deciding on domestic jurisdiction, before the Rome Statute was drafted. Thus, its policy considerations are not of automatic relevance. Second, *Finta* does not support the application of the effects doctrine. The decision of La Forest J, relied upon by Vagias, states "[e]xtraterritorial prosecution is thus a practical necessity in the case of war crimes and crimes against humanity."³³⁸ However, in the preceding text, La Forest J cites authorities

³³¹ *SS Lotus*, above n 92, at 23.

³³² Higgins, above n 95, at 77.

³³³ Rome Statute, art 12(2)(a).

³³⁴ Article 12(2)(b).

³³⁵ Vagias, above n 13, at 164.

³³⁶ *Finta*, above n 145, at 733 per La Forest J dissenting.

³³⁷ Vagias, above n 13, at 164.

³³⁸ *Finta*, above n 145, at 733 per La Forest J dissenting.

commonly understood as permitting *universal* jurisdiction, not the adoption of the effects doctrine.³³⁹ Notably, the judgment explicitly states that “the international community has encouraged member states to prosecute war crimes and crimes against humanity *wherever they have been committed*.”³⁴⁰ Thus, *Finta*, so far as policy is concerned, stands for the proposition that serious international crimes should be justiciable on the basis of *universal* jurisdiction. Contrary to the implication in Vagias’ work,³⁴¹ *Finta* is not authority for the proposition that territorial jurisdiction should be read widely in the case of war crimes. It is, therefore, of little assistance in the context of a statutory scheme which cannot, even on the most liberal construction, permit universal jurisdiction.

Equally crucial is the fact that, as previously mentioned, jurisdictional ambiguities should be read in favour of the accused.³⁴² Contrary to Vagias’ suggestion,³⁴³ it is not the role of the Court to close “jurisdictional loopholes”. Any concerns about the closing of jurisdictional loopholes left open by the plain wording of the Statute, if one accepts they are loopholes at all, are matter of law reform, not interpretation. As unsavoury as it may be, gaps in the jurisdiction of any international tribunal are inevitable. In accordance with basic criminal law principles, such ambiguities should be interpreted in a way which favours the accused.³⁴⁴

³³⁹ At 732 per La Forest J dissenting; those authorities relied upon include *Eichmann* (DC), above n 93; *Eichmann* (SC), above n 139; Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 UNTS 31 (opened for signature 12 August 1949, entered into force 21 October 1950); Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea 75 UNTS 85 (opened for signature 12 August 1949, entered into force 21 October 1950); Convention Relative to the Treatment of Prisoners of War 75 UNTS 135 (opened for signature 12 August 1949, entered into force 21 October 1950); Convention Relative to the Protection of Civilian Persons in Time of War 75 UNTS 287 (opened for signature 12 August 1949, entered into force 21 October 1950).

³⁴⁰ *Finta*, above n 145, at 732 per La Forest J dissenting (emphasis added).

³⁴¹ Vagias, above n 13, at 164.

³⁴² Rome Statute, art 12(2)(a); *Bemba Gombo (Confirmation of Charges)*, above n 271, at [369]; Schabas, above n 2, at 410; *Nahimana (Judgment)*, above n 272, at [575]; *Sweet*, above n 268, at 149 per Lord Reid; *Millar*, above n 268, at 668.

³⁴³ Vagias, above n 13, at 164.

³⁴⁴ See for example *Sweet*, above n 268, at 149 per Lord Reid; *Millar*, above n 268, at 668; *Nahimana (Judgment)*, above n 272, at [575]; Schabas, above n 2, at 410.

That is not to say that the accused should escape liability. Prosecution may be brought municipally, on any State ground of jurisdiction. What it simply means is that the conduct of the accused, however reprehensible it may be, does not fall within the jurisdiction of one particular international court.

2 *Deterrence*

Vagias places reliance on the potential deterrent value of the Court, and how this may be widened by the adoption of the effects doctrine.³⁴⁵ Although deterrence is an aim of the ICC,³⁴⁶ this cannot be a basis for the expansion of jurisdiction by interpretation. Such an approach opens up another matter of concern. Were the Court to adopt the doctrine, and justify this on the basis of increasing its deterrent effect, the legitimacy of the Court would be called into question were there to be no evident increase in deterrent value. The ad hoc tribunals had little, if any, deterrent value,³⁴⁷ and it is not difficult to see why – the suggestion that “the average crazed nationalist purifier or abused child soldier” will be deterred by the remote prospect of prosecution is untenable.³⁴⁸ It is worth recalling that perpetrators outside the Court’s jurisdiction can still be prosecuted on the basis of universal jurisdiction. If deterrence had any practical effect, one might expect deterrence to have occurred on the basis of universality.

Deterrence will not be increased by widening the Court’s jurisdictional scope. The number of prosecutions the Court can handle is not determined by the scope of its jurisdiction, but by the availability of finances and resources. Two general propositions, therefore, emerge. Firstly, the deterrent effect of the Court is uncertain at best, and placing justification on deterrence for an expansion of the Court’s jurisdiction may be damaging to the Court’s reputation if deterrence is not obviously seen. Second, even if the ICC does deter offending,

³⁴⁵ Vagias, above n 13, at 164–165.

³⁴⁶ *Prosecutor v Gbagbo (Judgment on the appeal of Mr Laurent Koudo Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings)* ICC Appeals Chamber ICC–02/11–01/11 OA 2, 12 December 2012 at [83]; *Situation in the Democratic Republic of the Congo (Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”)* ICC Appeals Chamber ICC–01/04–169, 13 July 2006 at [75].

³⁴⁷ Frédéric Mégret “Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project” (2001) 12 FYBIL 193 at 202.

³⁴⁸ At 203.

the increase of its territorial scope will not have a major deterrent effect while the number of prosecutions which may be brought remain limited by resources. Although deterrence is a key goal of the Court,³⁴⁹ discourse suggesting an expansion of its scope of jurisdiction will increase deterrence is premature so long as the Court’s *practical* jurisdiction, that is to say the caseload which the Court may actually take, is limited by resourcing. The adoption of the effects doctrine, therefore, will not have a significant deterrent impact, and deterrence cannot serve as a satisfactory basis for its adoption.

3 *The Seriousness of International Crimes*

Vagias states that the adoption of the effects doctrine, in relation to commercial conduct, ensures that “geographical distance as such does not entail immunity from antitrust prosecution.”³⁵⁰ He states that competition law and international criminal law “are therefore on the same page. They both aim to ‘end impunity’ and ensure that there are no ‘safe havens’”.³⁵¹ He concludes that the adoption of the doctrine is justified, on the basis that international crimes should be treated as being equally serious to violations of commercial laws.³⁵²

The argument that international crimes are more serious than antitrust violations is obviously correct. The community of nations, too, believes this. The seriousness of international crimes, or more specifically the ending of impunity relating to them, is the very *raison d’être* of the ICC.³⁵³ It also goes some way to explaining why there is an international *criminal* court empowered to try such crimes, and not an international *commercial* court with criminal jurisdiction over anticompetitive behaviour. However, it does not follow that the ICC should adopt the effects doctrine. Certainly, it would have been open to the Rome negotiators to have granted the Court jurisdiction on the basis of effects. The negotiators instead chose to grant the power to expand the Court’s jurisdiction in any particular situation to the Security

³⁴⁹ *Gbagbo (Jurisdiction and Stay of Proceedings)*, above n 346, at [83]; *Democratic Republic of the Congo (Warrants of Arrest Appeal)*, above n 346, at [75].

³⁵⁰ Vagias, above n 13, at 165–166.

³⁵¹ At 166.

³⁵² At 167.

³⁵³ Rome Statute, preamble.

Council.³⁵⁴ The simple fact is that the effects doctrine was not a basis upon which the international community saw fit to grant the Court jurisdiction.

Further evidence of the fact that international crimes are treated more seriously than anticompetitive conduct comes the differential treatment of the two classes of offence municipally. Assuming, *arguendo*, that prosecutions on the basis of the effects doctrine are valid under international law,³⁵⁵ there do not appear to have been any domestic prosecutions for serious international crimes on this basis. Rather, States exercise *universal* jurisdiction over crimes within the Rome Statute's subject-matter jurisdiction,³⁵⁶ a ground of jurisdiction not available for antitrust violations. Thus, Vagias is correct that international crimes should be treated more seriously than antitrust matters.³⁵⁷ What is overlooked, however, is that they *are* treated more seriously. The route the international community has chosen to permit municipal prosecutions of serious crimes include universal jurisdiction, which offers a far wider jurisdictional base than the effects doctrine; and a standing court, there being no such equivalent for commercial offences. Although universality is not applicable in the ICC, it does not follow that the effects doctrine should be. It should be noted, as Vagias himself notes,³⁵⁸ that the ICC is based on the principle of complementarity. Primary responsibility for the prosecution of international crimes rests with States, and a case is deemed inadmissible if investigated by another State with jurisdiction.³⁵⁹ Although the inquiry into admissibility depends on the Court having jurisdiction, and is distinguishable from the jurisdictional inquiry,³⁶⁰ the point is that universality, rather than effects, is the basis of jurisdiction which States have chosen as the most appropriate for international crimes municipally. A simple review of State practice reveals that international crimes are already

³⁵⁴ Article 13(b).

³⁵⁵ *Alcoa*, above n 151, at 443; *National Bank of Canada*, above n 154, at 8; *Kruman*, above n 155, at 390; *Hartford Fire Insurance*, above n 153, at 796; *Gencor*, above n 160, at [90].

³⁵⁶ *Henckaerts and Doswald-Beck*, above n 147, rule 157; *Bucyibaruta*, above n 148, at [5]; *Bagaragaza*, above n 148, at [13]–[15]; *Eichmann* (DC), above n 93, at 26.

³⁵⁷ Vagias, above n 13, at 167.

³⁵⁸ At 167.

³⁵⁹ Rome Statute, art 17(1).

³⁶⁰ *Situation in the Republic of Kenya (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya)* ICC Pre-Trial Chamber II ICC–01/09–19–Corr, 31 March 2010 at [40].

treated more severely than antitrust violations, and any imagined lesser treatment of international crimes cannot justify reading the effects doctrine into art 12(2)(a).

D Conclusion

To conclude, there is simply no basis in law upon which the effects doctrine can be adopted by the Court. Its application is plainly excluded by the wording of art 12(2)(a). Furthermore, issues as to the status of the doctrine, and its classification as territoriality, create ambiguities that should be interpreted in favour of the defendant. Nor are there particularly compelling policy arguments in favour of its adoption.

Although the present argument proposes a narrower reading of the Court's jurisdiction than that proposed by Vagias, it shares his view that international crimes are serious, and every effort should be made to bring perpetrators to justice. This task, however, is the responsibility of States in the exercise of their municipal jurisdiction, the Security Council in referring situations to the OTP, or perhaps the Assembly of States Parties through amendments to the Statute. Strained readings of the Statute, in violation of fundamental presumptions of criminal law, cannot be used to widen the Court's jurisdictional scope.

VII The Nationality Jurisdiction of the Court

A Introduction

Although the bulk of the present piece has addressed controversies surrounding the Court's territorial jurisdiction, nationality jurisdiction also raises several issues. This is in spite of there having been no prosecutions on the basis of nationality to date.

Nationality jurisdiction has a wide scope. Depending on the interpretation adopted by the Court, this basis of jurisdiction could be significantly wider than the Court's territorial jurisdiction. The accused need be only a national of a State Party³⁶¹ – no further guidance is given. This gives rise to significant unresolved questions as to the scope of the Court's jurisdiction, the brief exploration of which shall take place below.

³⁶¹ Rome Statute, art 12(2)(b).

B Multiple Nationality

Cases of multiple nationality are becoming increasingly common in the globalised world. This raises the issue as to how the Court is to address persons with multiple nationalities. For example, could the Court exercise jurisdiction over X, a soldier of non-Party State A, on the basis that the soldier is also a national of State Party B? Or is it more appropriate for the Court to borrow practice from the law of diplomatic protection, whereby the ‘dominant’ nationality takes precedence?³⁶²

The plain wording of art 12(2)(b) suggests that, in cases of multiple nationalities, the Court need not adopt a dominant nationality test – all art 12(2)(b) requires is that the State of nationality is a Party. Given that the Court’s purposes include the ending of impunity,³⁶³ this approach is also supported by policy. Although much reliance was placed on the rights of the accused in resolving ambiguities earlier in the present piece, there is no such ambiguity in the wording of art 12(2)(b). Such a result is also consistent with State practice, which does not prohibit non-dominant States of nationality from exercising nationality jurisdiction.³⁶⁴

That said, nationality must still be validly and legitimately granted for the ICC to exercise jurisdiction. Although international law does not generally restrict grants of nationality,³⁶⁵ there are exceptions to this. Consider the following hypothetical: as Palestine is recognised as a State,³⁶⁶ it, in theory, has a right to grant nationality.³⁶⁷ There is uncertainty as to whether the Court would have territorial jurisdiction over the situation in Palestine. Setting aside any international agreements reached with Israel, could Palestine enact a law by which all Israeli nationals also had Palestinian nationality, thereby granting the Court nationality jurisdiction over the Israeli Defence Forces?

This hypothetical grant of nationality could not be sufficient for the Court to have nationality jurisdiction. Although considering the merits of a grant of nationality may violate principles

³⁶² *Nottebohm (Second Phase)*, above n 123, at 22; *Mergé*, above n 134, at 246–248; *Case Number A/18*, above n 134, at 265–266.

³⁶³ Rome Statute, preamble.

³⁶⁴ Oxman, above n 90, at [20].

³⁶⁵ Dörr, above n 123, at [4]; *Nationality Decrees (Advisory Opinion)*, above n 129, at 24.

³⁶⁶ GA Res 67/19, above n 174, at [1].

³⁶⁷ Convention on the Rights and Duties of States, art 1.

of international comity,³⁶⁸ nationality grants need not be recognised if they are made to persons unconnected with the State.³⁶⁹ There must, therefore, be some connection for the nationality to be recognised as valid, particularly a connection to the territory of the State or other nationals.³⁷⁰ Furthermore, there is nothing objectionable about the Court looking to the legality of a grant of nationality in order to satisfy itself as to its jurisdiction. Thus, in any cases of multiple nationalities within the Court, so long as both nationalities are validly granted, either should be sufficient for the Court to have jurisdiction, but an unlawful grant of nationality cannot act as a sufficient basis.

C Acquisition and Renunciation of Nationality

Many States exercise nationality jurisdiction over persons who committed crimes before acquiring their nationality.³⁷¹ Such an approach, however, cannot be adopted by the ICC. This amounts to retrospective criminalisation,³⁷² the exercise of which is prohibited under the Rome Statute.³⁷³

Similarly, were an accused to lose their nationality, and then subsequently commit a crime within the Statute’s subject-matter jurisdiction, a prosecution could not be brought on the basis of nationality. Such a result is explicitly excluded by the plain wording of the Statute, which states that there is jurisdiction if the State “of which the person accused of the crime *is* a national” is Party.³⁷⁴ Had the word “was” been used, however, nationality jurisdiction on the basis of a former nationality could have been exercised.

D The Prospects of Nationality Jurisdiction

In light of the preceding discussion, an exploration of the practice of the OTP in relation to nationality jurisdiction is timely, particularly in determining whether nationality offers a

³⁶⁸ *In re Maury* (1967) 41 ILR 379 (France Tribunal de Grande Instance) at 479–480.

³⁶⁹ Alfred M Boll *Multiple Nationality and International Law* (Martinus Nijhoff Publishers, Leiden, 2007) at 109.

³⁷⁰ At 109.

³⁷¹ *In re SS Member Ahlbrecht*, above n 126, at 200; Crawford, above n 111, at 460; Criminal Code (Sweden), ch 2, s 2.

³⁷² O’Keefe, above n 125, at 742–843.

³⁷³ Rome Statute, art 22(1).

³⁷⁴ Article 12(2)(b) (emphasis added).

practical basis of jurisdiction. Two situations are of note: first, the conduct of ISIL militants; second, the conduct of United Kingdom (UK) soldiers in Iraq.

In relation to ISIL, the OTP recently released a statement on the prospects of prosecution. It was noted that there were crimes committed within the Court’s subject-matter jurisdiction. The Court could not exercise territorial jurisdiction, as neither Iraq nor Syria are Parties to the Statute. Although the Court could have theoretically exercised nationality jurisdiction over so-called ‘foreign fighters’ – nationals of other States who travel to Iraq and Syria to join ISIL – the OTP concluded that “the jurisdictional basis for opening a preliminary examination into this situation is too narrow at this stage.”³⁷⁵ In comparison, there appears to be no difficulty in bringing prosecutions on the basis of nationality against British nationals for crimes committed in Iraq.³⁷⁶

The refusal of the OTP to open an investigation into ISIL sparked backlash. In particular, it was noted that the concept of ‘narrowness’ of jurisdiction has no basis within the Rome Statute.³⁷⁷ However, if one accepts the term ‘narrow’ to be a mere descriptor, rather than being a legal term of art, an understanding into the difficulties of nationality jurisdiction may be reached.

As the OTP report stated, most of the high-ranking leaders of ISIL are not nationals of States Parties, and the purpose of the Court is to punish the most serious perpetrators.³⁷⁸ Although this matter might be better seen as being addressed at the admissibility phase of proceedings,³⁷⁹ the OTP and the Court have limited resources. The foreign fighters who have joined ISIL are, realistically, never going to return to their home States, as they would likely face prosecution there. They will likely remain in areas under the effective control of ISIL. This makes the bringing of prosecutions against them almost impossible until ISIL is defeated, or the foreign fighters in question are otherwise captured.

Compare this situation with that of the UK forces in Iraq. Those accused of war crimes are still in the UK, and the UK is cooperating with the investigation. Logistically, this means

³⁷⁵ “ISIS Statement”, above n 14.

³⁷⁶ “Iraq Statement, above n 15.

³⁷⁷ Zakerhossein, above n 265.

³⁷⁸ “ISIS Statement”, above n 14.

³⁷⁹ Zakerhossein, above n 265.

that matters such as the gathering of evidence, interviewing witnesses, and arresting of any suspects should that become appropriate, are all comparatively straightforward. By comparison, the opening of an investigation into the conduct of ISIL, and the eventual issuing of arrest warrants for foreign fighters, would be a largely symbolic gesture. Whilst it has been suggested that this move would increase public support for the ICC,³⁸⁰ it would be largely unjustifiable given the slim prospects of any prosecutions and the Court’s limited resources.

Contrasting these two situations indicates that, unless the accused is within the territory of the State of nationality, or perhaps another Party, and unless that State is willing and able to cooperate with the Court, nationality jurisdiction will be an impractical basis of jurisdiction upon which to base prosecutions.

There is, however, another sense in which nationality jurisdiction over ISIL foreign fighters can be said to be becoming jurisdictionally narrow, and arguably impossible. Many States are revoking the nationality of those who join ISIL.³⁸¹ If revocation occurs *before* the foreign fighter commits any crimes within the Statute’s subject-matter jurisdiction, the Court cannot rely on nationality jurisdiction.³⁸² Whilst many of the fighters concerned will have committed domestic crimes before their citizenship was revoked, there has been discourse towards removal of citizenship before convictions are made.³⁸³ Although joining ISIL may violate domestic law and international anti-terror laws, it is not a crime with the ICC’s jurisdiction. If a person, having had their nationality revoked, then commits a crime within the Statute’s subject-matter jurisdiction, they are no longer a national of the State Party, and the Court cannot rely on nationality jurisdiction. A strict reading of art 12(2)(b) in this regard is not without precedent. *Nahimana* held that the accused’s liability could not be based on conduct committed prior to the dates within the Court’s temporal jurisdiction, even if it was inherently connected to the later conduct. At best, it could have some probative evidential

³⁸⁰ Zakerhossein, above n 265.

³⁸¹ Ailsa McKeon “Revoking Citizenship of Foreign Fighters: Implications for the Jurisdiction of the International Criminal Court” (15 June 2015) *Opinio Juris* <opiniojuris.org>; see for example Citizenship Act RSC 1985 c C-29, s 10(2)(b); *Décision n° 2014-439 QPC (M Ahmed S)* (25 January 2015) 21 JORF 1150.

³⁸² McKeon, above n 381.

³⁸³ McKeon, above n 381.

value.³⁸⁴ It is likely that the nationality jurisdiction provision in the Statute will be similarly interpreted, such that the accused must have been a national *at the time* of the offence.³⁸⁵ As such, the actions of the States Parties to the Statute may contribute significantly to increased difficulties of successful nationality prosecutions. It seems likely, therefore, that, as is the position in terms of State jurisdiction,³⁸⁶ territoriality will remain the preferred and most practical basis of jurisdiction for the ICC to exercise.

VIII Conclusion

The present analysis paints what is perhaps an unfortunate picture of the ICC's jurisdictional scheme. While the Court has the competence to exercise jurisdiction over disputed territories and on the basis of objective territoriality, it cannot aptly adopt the effects doctrine. Likewise, the nationality jurisdiction of the Court is unlikely to prove to be a practical basis of jurisdiction for the Court to commence prosecutions in many serious instances of offending. Despite the gravity of the crimes which fall to be tried by the Court, no considerations of morality justify strained readings of the Statute in a manner contrary to fundamental criminal law principles.³⁸⁷

This rather unhappy result, in terms of the Court's goal to end impunity, may be addressed in three ways. First, the States Parties may amend the Statute's jurisdictional scheme.³⁸⁸ Such an outcome is unlikely, as any amendment of the Statute requires a two-thirds majority vote of Parties before it can be undertaken,³⁸⁹ and jurisdiction of the Court is a highly controversial topic.³⁹⁰ Second, the Security Council could use its Chapter VII powers to

³⁸⁴ *Nahimana (Judgment)*, above n 272, at [575].

³⁸⁵ McKeon, above n 381.

³⁸⁶ See for example *Air Transport Association of America*, above n 105, at [107]; *Issa*, above n 105, at [67]; *Bankovic*, above n 105, at [59]; *Smith*, above n 99, at [91]–[92] per Lord Hope, at [247] per Lord Collins; *Amnesty International Canada (FC)*, above n 105, at [182]–[183]; *Amnesty International Canada (FCA)*, above n 105, at [36]; *Kiobel (SC)*, above n 105.

³⁸⁷ Schabas, above n 2, at 410; *Nahimana (Judgment)*, above n 272, at [575].

³⁸⁸ Rome Statute, art 121.

³⁸⁹ Article 121(3).

³⁹⁰ See generally Schabas, above n 2, at 278–283; Kaul and Kreß, above n 3, at 145–156.

refer situations to the Court,³⁹¹ bypassing the ordinary jurisdictional requirements.³⁹² Unfortunately, the Security Council has a lack of political will to act in many of the most serious situations, given that the interests and actions of permanent members would be called into account.³⁹³ This will be particularly so if it is correct that the Council members cannot exclude the conduct of their own nationals in referred situations from investigation.³⁹⁴

This leaves the third, and most plausible, option – an increased role of States in ending impunity. If it is accepted that States may exercise universal jurisdiction,³⁹⁵ then although the crimes within the Court's subject-matter jurisdiction may not be justiciable within the ICC, they remain so within individual States. As the Court is intended to be complementary to national criminal jurisdictions,³⁹⁶ there is nothing untoward with States continuing, and increasing, their efforts to combat impunity through universal jurisdiction. Such a result is a more preferable way of addressing impunity than adopting strained readings of the Statute. Simply put, the inherent and intended narrowness of the Court's jurisdictional scheme means it cannot be an entity to end impunity without strong national efforts in the same vein.

³⁹¹ Rome Statute, art 13(b).

³⁹² Article 12(2).

³⁹³ Schabas, above n 238.

³⁹⁴ *Mbarushimana (Jurisdiction)*, above n 62, at [27], n 41; *Al Bashir (Arrest Warrant Decision)*, above n 66, at [45].

³⁹⁵ *Smith*, above n 99, at [263] per Lord Collins; *Doot*, above n 119, at 817; Henckaerts and Doswald-Beck, above n 147, rule 157; Shaw, above n 147, at 485–486; *Eichmann (SC)*, above n 139, at 26; *Bagaragaza*, above n 148, at [13]–[15]; *Bucyibaruta*, above n 148, at [5]; *Peruvian Genocide Case*, above n 149, at 1205; Shaw, above n 147.

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