

Testing the boundaries of the ICC's territorial jurisdiction in the Afghanistan situation

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1. Introduction

There are three situations currently under investigation by the International Criminal Court (ICC) in which the alleged criminal conduct does not fall squarely within the territorial borders of one State. The situation in Bangladesh/Myanmar, for example, involves allegations of cross-border crimes against humanity including the deportation of members of the Rohingya ethnic minority from Myanmar to Bangladesh.¹ The ICC Prosecutor is also investigating crimes alleged to have been committed in the Palestinian territories occupied by Israel, including Gaza and the West Bank.² The third such investigation, and the focus of this article, is the situation in Afghanistan. The Prosecutor is investigating evidence of war crimes committed in connection with the armed conflict in Afghanistan, which includes crimes that allegedly took place on the territories of Romania, Lithuania and Poland.³

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¹ The Appeals Chamber authorised the Prosecutor to investigate crimes 'committed at least in part on the territory of Bangladesh' *Situation in Bangladesh/Myanmar (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of Myanmar)* ICC, Pre-Trial Chamber III, Case No ICC-01/19 (14 November 2019) para 124.

² Office of the Prosecutor, 'Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine ('Statement', 3 March 2021). For detailed analysis of the status of the territories in relation to the ICC, see, S McKenzie, *Disputed Territories and International Criminal Law: Israeli Settlements and the International Criminal Court* (Routledge 2019).

³ *Situation in the Islamic Republic of Afghanistan (Request for authorisation of an investigation pursuant to Article 15)* Office of the Prosecutor, Case No ICC-02/17-7-RED (20 November 2017) ('Prosecutor Request for Authorisation of an Investigation').



An additional complicating factor in each of these situations is that they involve, in one way or another, States not party to the Rome Statute.⁴ For instance, Myanmar is not a State Party, nor is Israel, but both Bangladesh and Palestine have acceded to the Rome Statute. In the situation in Afghanistan, the Prosecutor is investigating crimes alleged to have been committed by both Afghan and US nationals; Afghanistan has been a party to the Rome Statute since 2003, but the US remains one of the ICC's most high profile opponents.

Invariably, ICC investigations that involve criminal allegations against nationals of non-States Parties attract accusations against the Court of judicial overreach and disrespect of State sovereignty.⁵ At the Rome Conference, negotiating the Court's jurisdiction was a particularly fraught process, and the final compromise on jurisdiction preconditions was controversial.⁶ Article 12 of the Rome Statute enables the ICC to prosecute individuals who are accused of committing Statute crimes in situations where either the territorial State⁷ or the State of nationality⁸ have consented to the jurisdiction of the Court. This means that if nationals from a State not party to the Statute commit crimes on the territory of a State Party, the ICC may exercise jurisdiction over them without requiring the consent of the State of nationality. It was not anticipated at Rome that the first decades of the Court's operation would see situations involving such contentious and multi-faceted applications of the Statute's territorial jurisdiction provision. The complexity of the territorial jurisdiction in situations such as Bangladesh/Myanmar, Palestine and Afghanistan has raised concerns that the ICC is becoming overly confident in the territorial basis of its jurisdiction, leading to accusations that it is ignoring the importance of state consent and unjustifiably expanding its

⁴ Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 ('Rome Statute').

⁵ See, eg, Ambassador Anne W Patterson, Acting US Representative to the United Nations, Explanation of Vote on the Sudan Accountability Resolution, in the Security Council (31 March 2005); US Department of State, Daily Briefing (15 November 2016) (Elizabeth Trudeau).

⁶ H-P Kaul, 'Preconditions to the Exercise of Jurisdiction' in A Cassese, P Gaeta, JRWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 584.

⁷ Rome Statute (n 4) art 12(2)(a).

⁸ Rome Statute (n 4) art 12(2)(b).



jurisdictional reach.⁹ The question that this comment seeks to address is ‘whether this expanded jurisdiction is consistent with the Statute’¹⁰ and I use the situation in Afghanistan as the principal example.

On 20 November 2017, the ICC Prosecutor requested authorisation to open an investigation into crimes committed on the territory of Afghanistan since 1 May 2003.¹¹ The request confirmed that the Prosecutor intended to investigate Afghan government forces, Taliban affiliates and members of the US armed forces and CIA for war crimes and crimes against humanity in connection with the situation in Afghanistan. While Pre-Trial Chamber II controversially declined to authorise the investigation in 2019,¹² the Appeals Chamber overturned this decision in 2020 and the Prosecutor was authorised to proceed with an investigation.¹³ The situation in Afghanistan provides an interesting example of competing jurisdictional arrangements, multiple territories, and a mix of nationalities; including from a powerful non-State Party that at one point described ICC jurisdiction over its nationals as ‘unacceptably [threatening] to American sovereignty and US national security interests’.¹⁴

⁹ Israeli Attorney-General, for example, claimed that ‘nothing could be more harmful to the credibility and legitimacy of a court of law than compromising its judicial character and appearing to over-reach. This would especially be the case where consent to jurisdiction has not been given (such as where the conduct of a State not Party to the Rome Statute is concerned)’: State of Israel Office of the Attorney General, ‘The International Criminal Court’s lack of jurisdiction over the so-called “situation in Palestine”’ (20 December 2019) 34.

¹⁰ BI Bonafé, A Bufalini, ‘The Judicial Function of the ICC and Its Territorial Basis’ (2021) 78 QIL-Questions Intl L 1, 2.

¹¹ Prosecutor Request for Authorisation of an Investigation (n 3). Afghanistan ratified the Rome Statute in February 2003.

¹² *Situation in the Islamic Republic of Afghanistan (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan)* ICC, Pre-Trial Chamber II, Case No ICC-02/17 (12 April 2019). The Pre-Trial Chamber found that an investigation would not serve the interests of justice as required by art 53(1)(c) of the Statute. For an example of the reaction to this decision, see G Rona, ‘More on What’s Wrong with the ICC’s Decision on Afghanistan’ *Opinio Juris* (15 April 2019) <<http://opiniojuris.org/2019/04/15/more-on-whats-wrong-with-the-iccs-decision-on-afghanistan/>>.

¹³ *Situation in the Islamic Republic of Afghanistan (Judgment on the Appeal against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan)* ICC, Appeals Chamber, Case No ICC-02/17 OA4 (5 March 2020).

¹⁴ ‘Full Text of John Bolton’s Speech to the Federalist Society’ *Al Jazeera* (11 September 2018) <www.aljazeera.com/news/2018/9/10/full-text-of-john-boltons-speech-to-the-federalist-society>.

This article proceeds in three parts. It first provides a brief overview of the two main theories that purport to explain how and why, under international law, the ICC can exercise its relatively expansive jurisdiction. Conceptualising the legal basis for the Court's jurisdiction as either reliant on delegated jurisdiction from States Parties or as sustained by an international *ius puniendi* has ramifications for the perceived legitimacy of the Court's authority. The second part of this article turns to examine the territorial parameters of the Afghanistan situation, which extend to Romania, Lithuania and Poland. Taking issue with Pre-Trial Chamber II's characterisation of the situation beyond Afghan borders as 'undue expansion', I endorse the Appeal Chamber's view of the armed conflict 'nexus' requirement, which does not exclude ICC jurisdiction over crimes allegedly committed in Europe in connection with the armed conflict in Afghanistan. Third, and finally, this article examines the principal objection to the ICC's jurisdiction over US nationals in the Afghanistan situation: that the Afghanistan-US status of forces agreement (SOFA) gives the US exclusive jurisdiction over its nationals for criminal conduct committed on the territory of Afghanistan. I argue that while there may be a jurisdictional conflict between the Rome Statute on the one hand, and the SOFA on the other, the onus to resolve it is not on the ICC.

I offer some brief concluding remarks on the scope of the ICC's jurisdiction and the significant autonomy the Court enjoys to investigate and prosecute crimes under to the Rome Statute. In relation to the Afghanistan situation, while the ICC might appear to be testing the outer boundaries of its jurisdiction, it nevertheless remains *intra vires* the Statute.

2. *The legal basis for the ICC's jurisdiction: Derived from the international community or grounded in State Party consent?*

Before delving into specific issues relating to the boundaries of the ICC's jurisdiction in the Afghanistan situation, it is worth providing a brief overview of the debate surrounding the legal basis for the Court's jurisdiction. While the Rome Statute provides the legal framework within which the Court must operate, there also needs to be an underlying legal basis that aligns with broader principles of international law to justify the



Statute's authorisation of jurisdiction. This legal basis has particular relevance for circumstances in which the Court is accused of unjustifiably expanding or exceeding its jurisdictional authority.

While the ICC has not, as of yet, decisively articulated the legal basis for its jurisdiction, there is a clear preference in scholarship and State practice for this legal basis to be conceived of in terms of delegation of jurisdiction from States Parties.¹⁵ Upon ratification of the Rome Statute, States Parties are said to have delegated to the ICC certain powers of prescription, adjudication and enforcement that each State possesses by virtue of its sovereignty. The jurisdiction provisions in the Rome Statute then give the ICC the right to exercise these powers for the purposes of criminal justice in accordance with the customary principles of territoriality and nationality.¹⁶ To say that the legal basis for the ICC's jurisdiction is predicated on delegation from States Parties is not to claim that the ICC is a mere instrument of States Parties.¹⁷ The ICC is an independent international court with the authority and discretion to exercise its jurisdiction to the extent that it remains *intra vires* the Rome Statute.

An alternative theory that purports to provide a legal basis for the ICC's jurisdiction is rooted in universalism. In recent years, the idea has gained traction that there exists a *ius puniendi* belonging to the international community as a whole, exercisable by the ICC. Such a theory posits that there is a universal jurisdiction that exists independently of States, and that international courts such as the ICC can exercise this jurisdiction over certain international crimes as an agent of the international community.¹⁸ Under this theory, the legal basis for the ICC's jurisdiction

¹⁵ See eg, D Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 J Intl Criminal Justice 618; MP Scharf, 'The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position' (2001) 64 L and Contemporary Problems 67; Y Shany, 'In Defence of Functional Interpretation of Article 12(3) of the Rome Statute A Response to Yaël Ronen' (2010) 8 J Intl Criminal Justice 329, 330; E Kontorovich, 'Israel/Palestine — The ICC's Uncharted Territory' (2013) 11 J Intl Criminal Justice 979, 989; KJ Heller, 'What Is an International Crime? (A Revisionist History)' (2017) 28 Harvard Intl L J 353, 375.

¹⁶ M Cormier, *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties* (CUP 2020) 36-70.

¹⁷ For a discussion of what delegation entails in the context of conferral of powers, see D Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (OUP 2005) 38-32, 54.

¹⁸ K Ambos, 'Punishment without a Sovereign? The Ius Puniendi Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International



is therefore not dependent upon delegation from States Parties, although the exercise of its jurisdiction is still limited by the parameters of the Rome Statute. In a 2019 decision in the Omar Al Bashir case, the Appeals Chamber fuelled speculation that the ICC perceives its jurisdictional basis as *ius puniendi* when it asserted that the Court exercises its jurisdiction ‘in no other circumstance than on behalf of the international community’.¹⁹ Such a description is arguably also applicable to an international court exercising jurisdiction based on delegation,²⁰ but the Appeals Chamber did make other remarks in this judgment and joint concurring opinion that suggested it took a more expansive view of its own jurisdictional basis.²¹ None of these pronouncements are, however, conclusive evidence that the ICC considers its jurisdictional basis as universal in the sense that it is disconnected from the consent of States Parties. I have argued elsewhere that characterising the legal basis for the ICC’s jurisdiction as a *ius puniendi* would not make a significant difference to the scope of the Court’s allowable jurisdiction given the fact that any exercise of jurisdiction must be *intra vires* the Rome Statute.²² Furthermore, it is politically preferable for the Court to characterise its jurisdiction in a way that emphasises the importance of State Party consent. For the purposes of this article, therefore, I proceed on the assumption that the legal basis for the ICC’s jurisdiction is delegation of territorial and nationality jurisdiction from States Parties. This is the basis upon which the US frames

Criminal Law’ (2013) 33 Oxford J Legal Studies 293; F Mégret, ‘The International Criminal Court: Between International *Ius Puniendi* and State Delegation’ (2020) 23 Max Planck YB United Nations L Online 161.

¹⁹ *Prosecutor v Al Bashir (Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa)* ICC, Appeals Chamber, Case No ICC/02/05-01/09 (6 May 2019) para 54. See also C Kreß, ‘Preliminary Observations on the ICC Appeals Chamber’s Judgment of 6 May 2019 in the Jordan Referral re Al-Bashir Appeal’ (Occasional Paper Series No 8, Torkel Opsahl Academic Epublisher, May 2019).

²⁰ Such a phrase might be mere rhetoric given that the Rome Statute specifically provides that the jurisdiction of the Court is over ‘the most serious crimes of concern to the international community as a whole’.

²¹ For example, the Appeals Chamber held that States Parties executing a request under art 59 ‘should not be seen as exercising their own criminal jurisdiction’ because in doing so they are ‘merely acting as jurisdictional surrogates of the ICC’: *Prosecutor v Al Bashir (Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa)* ICC, Appeals Chamber, Case No ICC/02/05-01/09 (6 May 2019) para 445.

²² Cormier (n 16) 193-194.



its objections to the Court's jurisdiction over its nationals in the Afghanistan situation, which will be discussed in Part 4. The next part examines the expansion of the Afghanistan situation to Europe.

3. *'Undue expansion' of the Afghanistan situation to Europe? Nexus, jurisdiction and territory*

As mentioned above, the preliminary examination into the situation in Afghanistan found evidence of war crimes allegedly committed by, among others, members of the US armed forces and the CIA on the territories of Afghanistan, Romania, Lithuania and Poland. In connection with the armed conflict in Afghanistan, the CIA ran 'black site' detention facilities in all four States during the mid-2000s.²³ The Prosecutor alleged that, in these detention facilities, US nationals committed acts amounting to war crimes of torture, outrages upon personal dignity and sexual violence against suspected members of the Taliban and Al Qaeda who had been captured both in Afghanistan and abroad.²⁴ Like Afghanistan, Romania, Lithuania and Poland are all States Parties to the Rome Statute, meaning that the ICC may, assuming admissibility criteria are met, exercise jurisdiction over Statute crimes committed on any of their territories.

One of the questions that was considered by Pre-Trial Chamber II in its decision on the Prosecutor's request to authorise an investigation into the situation in Afghanistan, was whether that 'situation' could extend to crimes that allegedly took place in the European detention facilities. The Prosecutor sought authorisation to investigate war crimes committed in Europe on the grounds that they 'have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties'.²⁵ This 'nexus' is described in the ICC's Elements of Crimes document as requiring that the conduct in question 'took place in the context of and was associated with' an armed conflict.²⁶ The Chamber focused on the fact that the situation in Afghanistan was a non-international armed conflict and held that this meant that

²³ Prosecutor Request for Authorisation of an Investigation (n 3) paras 202-3.

²⁴ *ibid* paras 191-203.

²⁵ *ibid* para 1.

²⁶ ICC, *Elements of Crimes*, Doc No ICC-ASP/1/3 (Pt II-B) (September 2002) 13.



any victims of the alleged crimes that took place in the US-run detention facilities had to have been captured in Afghanistan in order for there to be a sufficient nexus with the armed conflict. Any detainees who had been captured outside Afghanistan and transferred to a black-site facility in either Romania, Lithuania or Poland would fall outside of the ICC's jurisdiction 'due to the lack of the nexus with an internal armed conflict'.²⁷ To otherwise allow the territorial parameters of the situation to extend beyond the Afghanistan borders would, according to the Pre-Trial Chamber, constitute 'undue expansion of the reach of the law of war crimes'.²⁸

On appeal, the Appeals Chamber found that the Pre-Trial Chamber had erroneously interpreted the nexus requirement, observing that:

'[I]t is incorrect to assume that, merely because the alleged capture of the victim did not take place in Afghanistan and the alleged criminal act also occurred outside Afghanistan, the conduct cannot possibly have taken place in the context of, and have been associated with, the armed conflict in that State'.²⁹

Instead, an analysis would need to be made on a case-by-case basis to determine whether there was a sufficient nexus to the armed conflict for the conduct to be considered a war crime within the jurisdiction of the ICC. The Appeals Chamber further recognised that such a granular analysis of whether specific incidents fall within the Court's jurisdiction *ratione materiae* is unnecessary at the authorisation stage.³⁰ Consideration of whether to authorise an investigation only requires the Pre-Trial Chamber to be satisfied that there is a reasonable basis to proceed with

²⁷ *Situation in the Islamic Republic of Afghanistan (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan)* ICC, Pre-Trial Chamber II, Case No ICC-02/17 (12 April 2019) para 55.

²⁸ *ibid* para 53. The Pre-Trial Chamber was quoting the Appeals Chamber in *Prosecutor v Ntaganda (Judgment on the appeal of Mr Ntaganda against the 'Second decision on the Defence's challenge to jurisdiction of the Court in respect of Courts 6 and 9)* ICC, Appeals Chamber, Case No ICC-01/04-02/06-1962 (15 June 2017) at para 68.

²⁹ *Situation in the Islamic Republic of Afghanistan (Judgment on the Appeal against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan)* ICC, Appeals Chamber, Case No ICC-02/17 OA4 (5 March 2020) para 76.

³⁰ *ibid* para 78.



an investigation and that alleged conduct appears to fall within the jurisdiction of the Court.³¹

The Afghanistan situation therefore appears to be appropriately defined for the purposes of the ICC's jurisdiction. It encompasses temporal parameters for conduct committed since May 2003, personal parameters that include Afghan and US nationals; territorial parameters for conduct that occurred on the territory of States Parties Afghanistan, Romania, Poland and Lithuania; and material parameters for acts that amount to war crimes and crimes against humanity. Each of these 'situational parameters'³² finds its authority in the Rome Statute. The ICC may exercise jurisdiction *ratione temporis* over crimes committed after the entry into force of the Statute;³³ it has jurisdiction *ratione personae* where the accused person either committed a crime on the territory of a State Party,³⁴ or is a national of a State Party;³⁵ jurisdiction *ratione materiae* if the conduct falls within one of the categories of crimes specified in the Rome Statute;³⁶ and jurisdiction *ratione loci* if the conduct took place on the territory of a State Party.³⁷

As the Appeals Chamber held, a sufficient nexus between the non-international armed conflict on the territory of Afghanistan and the conduct alleged to have taken place in the detention facilities in Europe is not automatically precluded due to the territorial boundaries of the armed conflict. This means that, despite potentially expanding the territory of the situation in Afghanistan to include Romania, Lithuania and Poland, at this early stage of the investigation the actions of the Prosecutor remain *intra vires* the Statute. The US, however, has taken issue with the Court's potential assertion of personal jurisdiction over its nationals in this situation, which is discussed in the next part.

³¹ Rome Statute (n 4) art 15(4).

³² R Rastan, 'Situation and Case: Defining the Parameters' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity - From Theory to Practice*, vol 1 (CUP 2011).

³³ Rome Statute (n 4) art 11.

³⁴ Rome Statute (n 4) art 12(2)(a).

³⁵ Rome Statute (n 4) art 12(2)(b).

³⁶ Rome Statute (n 4) art 5.

³⁷ Rome Statute (n 4) art 12(2)(a).



4. *'Unwarranted expansion' of the ICC's jurisdiction over US nationals? Exclusive jurisdiction, SOFAs and political decision*

Given the Appeals Chamber's decision to overturn the earlier ruling of Pre-Trial Chamber II which declined authorisation of an investigation into the situation in Afghanistan, the ICC Prosecutor is now duly authorised to investigate war crimes and crimes against humanity committed in connection with the situation in Afghanistan.³⁸ Then-US Secretary of State Mike Pompeo called the decision a 'truly breathtaking action by an unaccountable political institution masquerading as a legal body'.³⁹ The US has long had a fractured relationship with the ICC, beginning at Rome when it was decided that consent of the State of nationality was not a necessary precondition to the Court's jurisdiction.⁴⁰ It is not surprising then, that the ICC's potential exercise of jurisdiction over US nationals has raised the political stakes of the situation in Afghanistan and led to accusations of the 'unwarranted expansion' of the ICC's jurisdiction.⁴¹

The foundation of the US's legal objection to the ICC's jurisdiction over its nationals is the existence of international agreements regulating the status of US forces in Afghanistan. Such agreements give exclusive criminal and disciplinary jurisdiction to the US over its nationals for conduct that takes place on Afghan territory.⁴² The US argument that the ICC cannot exercise jurisdiction over US nationals in the Afghanistan situation relies on the notion that the exclusive jurisdiction clauses of the

³⁸ *Situation in the Islamic Republic of Afghanistan (Judgment on the Appeal against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan)* ICC, Appeals Chamber, Case No ICC-02/17 OA4 (5 March 2020) para 79.

³⁹ E Peltier, F Faizi, 'I.C.C. Allows Afghanistan War Crimes Inquiry to Proceed, Angering U.S' *NY Times* (5 March 2020) <www.nytimes.com/2020/03/05/world/europe/afghanistan-war-crimes-icc.html>.

⁴⁰ D Scheffer, Ambassador-At-Large for War Crimes Issues, Remarks before the 6th Committee of the 53rd General Assembly (21 October 1998).

⁴¹ MA Newton, 'How the International Criminal Court Threatens Treaty Norms' (2016) 49 *Vanderbilt J Transnational L* 371, 373.

⁴² See, eg, Exchange of notes between the Embassy of the United States of America and the Transitional Islamic State of Afghanistan (26 September 2002, 12 December 2002, 28 May 2003). This was eventually superseded by Security and Defense Cooperation Agreement between the Islamic Republic of Afghanistan and the United States of America (30 September 2014).



US-Afghanistan SOFA prevent Afghanistan from delegating jurisdiction to the ICC.⁴³ This argument is predicated on the conceptualisation of territorial jurisdiction as a finite quantum; something that can be traded away or relinquished.

A more nuanced conceptualisation of jurisdiction is that states have the right to exercise their sovereign powers by prescribing, adjudicating and enforcing laws on the basis of certain permissive principles of international law, including territoriality and nationality. In agreeing to give the US exclusive jurisdiction over its nationals, Afghanistan has promised not to exercise its powers of adjudication and enforcement over US nationals. Afghanistan nevertheless retains its sovereign rights under international law to exercise such powers over foreign nationals on the basis of the territorial principle of jurisdiction. It has simply agreed, via the SOFA, not to exercise those rights in limited circumstances over US nationals.⁴⁴ Afghanistan has also agreed, by ratifying the Rome Statute, to delegate its powers of prescription, adjudication and enforcement to the ICC, which itself has the right to exercise these powers in accordance with the territoriality and nationality principles embedded in Articles 12 and 13 of the Rome Statute.

Article 98(2) of the Rome Statute recognises that States Parties have obligations under SOFAs that might conflict with the general requirement to cooperate with the ICC in its investigations and prosecutions.⁴⁵ Article 98(2) therefore would prevent the Court from requesting that Afghanistan facilitate the arrest and surrender of any US national to the ICC without the consent of the US. Article 98(2) does not, however, have any bearing on the ICC's jurisdiction, and if the ICC were able to secure the custody of an accused US national without the cooperation of Afghanistan, then exercise of its jurisdiction would not be precluded.

The key issue as far as the US is concerned is that Afghanistan has promised, via the SOFA, to grant exclusive jurisdiction to the US over its nationals, and at the same time Afghanistan has consented, by ratification

⁴³ Mr J Sekulow, Transcript of proceedings, *Situation in the Islamic Republic of Afghanistan (Appeal against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan)* ICC, Appeals Chamber, Case No ICC-02/17 OA4 (5 December 2019) 101.

⁴⁴ R O'Keefe, 'Quid Not Quantum: A Comment on How the International Criminal Court Threatens Treaty Norms' (2016) 49 *Vanderbilt J Transnational L* 433, 436.

⁴⁵ Rome Statute (n 4) arts 86 and 87.



of the Rome Statute, to the ICC's exercise of jurisdiction over international crimes committed on its territory. The US appears to place the onus for resolving this conflict on the ICC, by arguing that the Court must refrain from exercising jurisdiction over US nationals due to the existence of the US-Afghanistan SOFA. Michael Newton, for example, has asserted that the ICC has a duty to ensure that it considers the compatibility of the Statute's jurisdiction provisions with existing jurisdiction agreements between or among states.⁴⁶ The Court, he argues, ought to 'seek interpretations that harmonize' the SOFA and the Rome Statute.⁴⁷

While the ICC was intended to be complementary to the jurisdiction of States, this does not mean that it must accommodate every alternative international jurisdictional arrangement that may be inconsistent with the Statute. To require the ICC to refrain from exercising jurisdiction whenever it conflicts with a State's prior claim to exclusive jurisdiction would essentially amount to the importation of an additional admissibility criterion into the Statute. As it is, the Statute's admissibility regime already provides an avenue for any State with jurisdiction to challenge the jurisdiction of the Court or the admissibility of a case.⁴⁸

Ultimately, it seems that Afghanistan has entered into two conflicting agreements. It agreed, via the SOFA, to allow the US to exercise exclusive jurisdiction over American service members for any crimes committed on Afghan territory. Afghanistan also agreed, by ratifying the Rome Statute, to allow the ICC to exercise jurisdiction over certain crimes committed by any national on Afghan territory. There is no allowance in the Statute for States Parties to make reservations to the Court's jurisdiction over their territory.⁴⁹ Given the ICC is now investigating whether US nationals have committed Statute crimes on the territory of Afghanistan, there is no way that Afghanistan can honour both agreements. I have argued elsewhere that Afghanistan appears to be facing in a classic treaty conflict and therefore might be considered to have made a 'political decision' in preferencing its obligations under the Rome Statute over its SOFA agreement with the US. Jan Klabbers views 'the principle of political decision

⁴⁶ Newton (n 41) 422.

⁴⁷ *ibid.*

⁴⁸ The US would be considered a State with jurisdiction on the basis of nationality: Rome Statute (n 4) arts 17, 18 and 19.

⁴⁹ Rome Statute (n 4) art 120.



[as allowing] for flexible and responsible politics' even if it is at the expense of legal certainty.⁵⁰ But the consequences of entering into conflicting agreements is a matter for Afghanistan, not the ICC. In deciding to investigate allegations of crimes committed by US nationals in Afghanistan, the ICC Prosecutor remains within the territorial and personal parameters allowed by the Rome Statute.

5. Concluding remarks

The notion of a 'political decision' in relation to a treaty conflict is also a fitting descriptor for so many of the considerations and determinations that are made with respect to the ICC's jurisdiction. The Rome Statute itself is the product of political compromise; reflecting the political choices of negotiators at Rome to include or exclude certain crimes, and to allow the Court to have extensive scope in relation to personal and territorial jurisdiction. The ICC Chambers make political choices in how they interpret and apply the law, and the ICC Prosecutor makes political evaluations in relation to its selection of examinations, investigations and cases. This is not to say that the Court is allowing naked politics to consciously influence its decision-making,⁵¹ but that international criminal justice is an inherently political project.⁵² In this article I have argued that the ICC's expanded jurisdiction in the Afghanistan situation is *intra vires* the Rome Statute. That argument is sustainable because the parameters of the ICC's jurisdictional framework were purposely designed to be broad, to grant considerable scope to the Prosecutor and the Chambers to investigate and prosecute 'the most serious crimes of concern to the international community as a whole'.⁵³ The ICC has recently chosen to open investigations into jurisdictionally complex situations in which

⁵⁰ J Klabbers, *Treaty Conflict and the European Union* (CUP 2009) 90. For further discussion on the principle of political decision, see S Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law* (CUP 2014) 56-61.

⁵¹ Although see, 'Afghanistan: ICC refuses to authorize investigation, caving to USA threats' Amnesty International /12 April 2019) <www.amnesty.org/en/latest/news/2019/04/afghanistan-icc-refuses-to-authorize-investigation-caving-into-usa-threats/>.

⁵² H Cullen, Philipp Kastner and Sean Richmond, 'Introduction: The Politics of International Criminal Law' (2018) 18 Intl Criminal L Rev 907.

⁵³ Rome Statute (n 4) Preamble.



crimes are not neatly confined to one State's territory or to a consenting State Party's nationals. The Court cannot be surprised that such decisions have attracted accusations of overreach. But while the Court may be exploring the outer boundaries of its jurisdiction in such matters, it remains, for now at least, within the lawful confines of the Statute.

