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Temporal Dynamics and the Jurisdiction of the International Criminal Court

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DECLARATION

Hereby, I declare that this master's thesis is my original work and that I have written it independently. All sources and literature that I have used during the elaboration of the thesis are fully cited and listed. I further declare that this thesis has not been used to obtain any other or the same degree.

I further declare that the text of this thesis has 188 144 characters including spaces and footnotes.

David Závada
In Prague on 25 March 2024

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Table of contents

Introduction

Over the recent years, the issue of how the passage of time impacts the International Criminal Court's (the "**Court**" or "**ICC**") jurisdictional scheme has been gaining momentum. In the Court's recent practice, there are two issues where the dynamic of time played a crucial role in assessing whether the Court had jurisdiction and whether it could exercise it.

The first issue relates to States accepting the Court's jurisdiction through *ad hoc* declarations. In relation to the situation in *Palestine,*[1] there was a discussion about whether a State can accept the Court's jurisdiction over conduct that occurred before that State became a State, particularly in the context of *ad hoc* declarations under Article 12(3) of the Rome Statute[2] (the "**Statute**").[3] On 2 January 2015, Palestine became a State Party to the Statute,[4] after being admitted into the United Nations ("**UN**") as a non-member observer State on 29 November 2012.[5] In January 2009, prior to its accession to the Statute and its admission into the UN, it lodged an *ad hoc* declaration with the Court's Registrar, seeking to accept the jurisdiction of the Court pursuant to Article 12(3) of the Statute,[6] probably in response to Israel's military operation carried out in Gaza in 2008.[7] The declaration was rejected by the Prosecutor.[8] The issue is whether Palestine could now lodge an *ad hoc* declaration with the same scope as in 2009. However, Article 12(3) of the Statute speaks of a "State" accepting the Court's jurisdiction.[9] The Court's practice appears to be settled on allowing retrospective *ad hoc* declarations,[10] but how far into the past can such

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[1] ICC, Pre-Trial Chamber, Situation in the State of Palestine, *Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine'*, ICC-01/18-143, 5 February 2021 (the "**Palestine 19(3) Decision**"), p. 1.

[2] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, ISBN No. 92-9227-227-6, UN General Assembly, 17 July 1998.

[3] ZIMMERMANN, A. Palestine and the International Criminal Court Quo Vadis?: Reach and Limits of Declarations under Article 12(3). *Journal of International Criminal Justice*. 2013, vol. 11, no. 2. DOI: 10.1093/jicj/mqt014; WILLS, A. Old Crimes, New States and the Temporal Jurisdiction of the International Criminal Court. *Journal of International Criminal Justice*. 2014, vol. 12, no. 3. DOI: 10.1093/jicj/mqu033; ZEIDY, Mohamed M. El. Ad Hoc Declarations of Acceptance of Jurisdiction: The Palestinian Situation under Scrutiny. In: STAHN, Carsten, ed. *The law and practice of the International Criminal Court*. Oxford, United Kingdom: Oxford University Press, 2015.

[4] The State of Palestine accedes to the Rome Statute | International Criminal Court. In: *International Criminal Court* [online]. 7. 1. 2015 [accessed 19.03.2024]. Available at: https://www.icc-cpi.int/news/state-palestine-accedes-rome-statute

[5] UN General Assembly, Resolution 67/19: Status of Palestine in the United Nations. In: *Resolutions and Decisions adopted by the General Assembly during its 67th session, Volume III*, 4 December 2012. A/RES/67/19.

[6] ICC, Office of the Prosecutor, *Situation in Palestine*, 3 April 2012, para. 1.

[7] ZEIDY, Mohamed M. El. *Ad Hoc Declarations of Acceptance of Jurisdiction: The Palestinian Situation under Scrutiny*, p. 179.

[8] ICC, Office of the Prosecutor, *Situation in Palestine*, 3 April 2012.

[9] Rome Statute, Article 12(3).

[10] SCHABAS, William and Giulia PECORELLA. Article 12 Preconditions to the exercise of jurisdiction. In: AMBOS, Kai, ed. *Rome Statute of the International Criminal Court: article-by-article commentary*. München, Germany: Oxford, United Kingdom; New York, NY, USA: Baden-Baden, Germany: Beck; Hart; Nomos, 2022, p. 829.

declarations reach? Abstracting a bit, Palestine was not a "State" in 2009, but it might be in 2024. Therefore, depending on the point in time when the conditions for an *ad hoc* declaration found in Article 12(3) of the Statute will be assessed, this would lead to two situations – in one, Palestine could accept the Court's jurisdiction, and in the other, it could not.

The second issue has come to the forefront since States have begun withdrawing from the Statute; first Burundi in 2017,[11] then the Philippines in 2019.[12] The problem before the Court is whether it is still able to exercise jurisdiction in a situation where alleged crimes are committed prior to a State's withdrawal from the Statute. The issue is to what point in time should the Court assess preconditions to the exercise of jurisdiction found in Article 12(2) of the Statute. Again, the point in time for assessing the Statute's jurisdictional provisions becomes crucial – if the Court was to assess the preconditions to the exercise of jurisdiction at a time after the withdrawal becomes effective, it would not be able to exercise jurisdiction over those crimes.

There is little academic discussion related to how the flow of time can influence the Court's jurisdiction and the ability to exercise it. The reasons for this void might be the fact that Palestine has not attempted to re-lodge its original 2009 declaration and the fact that the withdrawal issue is still relatively recent, with the arguably most important decision in the saga was rendered in July 2023.[13] The aim of this thesis is to fill the academic void and spark a scholarly discussion related to the date on which the Statute's jurisdictional provisions should be assessed. As a result, the research question in this thesis is as follows:

> Can a State that is not a party to the Statute retrospectively accept the jurisdiction of the Court for crimes committed in what is now its territory (but was not at the time of commission) and can the Court exercise that jurisdiction?

The research question combines both the temporal aspects of accepting the Court's jurisdiction (best illustrated on the issue of retrospective *ad hoc* declarations under Article 12(3) of the Statute) and the assessment of the relevant point in time for assessing the jurisdictional conditions found in the Statute.

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[11] Situation in the Republic of Burundi | International Criminal Court. In: *International Criminal Court* [online] [accessed 20.03.2024]. Available at: https://www.icc-cpi.int/victims/situation-republic-burundi

[12] Republic of the Philippines | International Criminal Court. In: *International Criminal Court* [online] [accessed 20.03.2024]. Available at: https://www.icc-cpi.int/philippines

[13] ICC, Appeals Chamber, Situation in the Republic of the Philippines, *Judgment on the appeal of the Republic of the Philippines against Pre-Trial Chamber I's "Authorisation pursuant to article 18(2) of the Statute to resume the investigation"*, ICC-01/21-77, 18 July 2023 (the "**Philippines Appeal Judgment**").

Structure and methodology

This thesis is divided into three chapters. Below, I provide a description of the contents of each chapter and the methodology used.

Chapter 1 will seek to clarify the concept of "jurisdiction" within the context of the Statute and the "relevant date" for assessing the acceptance and exercise of the Court's jurisdiction. This chapter uses the descriptive, analytical and, in part, the comparative method of research to achieve two goals. *First*, I will rely on the split between sovereign jurisdiction, which allows a sovereign State to accept the Court's jurisdiction, and judicial jurisdiction, which refers to the Court's ability to deal with criminal matters, in order to explain the Court's jurisdictional scheme. *Second*, I will argue that the date for assessing jurisdictional matters should be referred to as a "relevant date", relying on the jurisprudence of the International Court of Justice (the "**ICJ**") dealing with a similar but slightly distinct concept.

Chapter 2 will focus on the acceptance of jurisdiction, trying to determine the possibility of retrospective acceptance of the Court's jurisdiction through *ad hoc* declarations. This chapter will discuss an issue that is not entirely new, going back all the way to the first Palestine *ad hoc* declaration in 2009.[14] Nevertheless, I will argue that it still has relevance today, for example, as the battle for determining the Court's jurisdictional bases still rages on, or the possibility of remedying a lack of jurisdiction later on in the proceedings, such as the Appeals Chamber (the "**AP**") has argued in the situation in the *Philippines*.[15] The chapter will address the relevant date of acceptance of jurisdiction, focusing on the retrospective nature of *ad hoc* declarations, trying to test the limits of accepting the Court's jurisdiction over crimes occurring in the past. This chapter uses descriptive and synthetic methods when presenting the differing doctrinal views related to the Court's jurisdictional basis. Additionally, it uses the analytical method to analyse the standing of *ad hoc* declarations within the Statute. The comparative method is used only in section 2.4.2 when assessing the possibility of remedying a lack of jurisdiction on the relevant date.

Chapter 3 will focus on the Court's exercise of jurisdiction, mostly on the relevant date. It will briefly introduce the Court's jurisdictional scheme, the preconditions to the exercise of jurisdiction, and the trigger mechanisms that come with it. Using descriptive methods, it will address the developments in the Court's case law related to the relevant date. Then, it will critically assess the arguments raised in the relevant case law, mostly focusing on the situation in the

[14] ICC, Office of the Prosecutor, *Position paper regarding the situation in Palestine*, 3 April 2012.
[15] Philippines Appeal Judgment, para. 56.

Philippines. The method of research used is descriptive when describing the up-to-date jurisprudence of the Court and the relevant scholarly opinions and analytical when interpreting the jurisdictional provisions of the Statute and analysing the academic literature.

The conclusion concludes the analysis and summarizes the findings from the preceding chapters, arguing that a State that is not a party to the Statute can retrospectively accept the jurisdiction of the Court for crimes committed in what its territory is now (but was not at the time of commission), and the Court can exercise that jurisdiction. The method of research used in this chapter is the synthesis of the findings from chapters 1 to 3.

1. Terminology – jurisdiction and the relevant date

In order to properly assess the possibility of retrospective acceptance and exercise of the Court's jurisdiction, a clarification in terminology is necessary. In international law, identical terms often have different meanings and are generally understood differently.[16] Therefore, to properly set the stage for the analysis in later chapters, this chapter introduces the terms central to this thesis. The posed research question relates to the retrospective[17] acceptance and exercise of the Court's *jurisdiction*; two key terms will therefore be analysed: jurisdiction and relevant date.

1.1. The meaning of jurisdiction – sovereign and judicial jurisdiction

The first obstacle lies in defining the term jurisdiction. Jurisdiction is a complex topic that has received a lot of scholarly attention,[18] including literature solely focused on the context of the Court.[19] A complete examination of jurisdiction exceeds the scope of this thesis, and a comprehensive review of the term concerning the jurisdiction of the Court has already been undertaken by others, particularly Cormier.[20] Her analysis of the Court's jurisdictional regime will serve as a foundational reference in this section, albeit with certain caveats.

In examining the Court's jurisdiction over nationals of non-State Parties, Cormier differentiates between two kinds of jurisdictions in international law: sovereign and judicial.[21] Sovereign jurisdiction relates to the "State's international legal right to exercise certain powers," whereas judicial jurisdiction reflects "the exercise of judicial powers by courts and associated

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[16] HERIK, L. J. van den and Carsten STAHN, eds. *The diversification and fragmentation of international criminal law*. Leiden; Boston: Martinus Nijhoff Publishers, 2012, p. 23.
[17] WILLS, A. *Old Crimes, New States and the Temporal Jurisdiction of the International Criminal Court*, p. 408.
[18] See in particular RYNGAERT, Cedric. *Jurisdiction in International Law* [online]. Oxford University Press, 2008 [accessed 09.03.2024]. Available at: https://academic.oup.com/book/5415
[19] For a recent overview, see in particular CORMIER, Monique. *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties* [online]. Cambridge University Press, 2020 [accessed 18.11.2022]. Available at: https://www.cambridge.org/core/product/identifier/9781108588706/type/book; SCHABAS, William. *An introduction to the International Criminal Court*. Cambridge, United Kingdom ; New York, NY: Cambridge University Press, 2020, pp. 51–150.; BRACKA, Jeremie. A False Messiah? The ICC in Israel/Palestine and the Limits of International Criminal Justice. *Vanderbilt Journal of Transnational Law*. 2021, vol. 54, no. 2.; MCINTYRE, Gabrielle. The ICC, Self-created Challenges and Missed Opportunities to Legitimize Authority over Non-states Parties. *Journal of International Criminal Justice*. 2021, vol. 19, no. 3. DOI: 10.1093/jicj/mqab053; H. STEINBERG, Richard, ed. *The International Criminal Court: Contemporary Challenges and Reform Proposals* [online]. Brill | Nijhoff, 2020 [accessed 04.05.2023]. Available at: https://brill.com/view/title/39286; SADAT, Leila N. *The Conferred Jurisdiction of the International Criminal Court* [online]. Rochester, NY, 2023 [accessed 19.11.2023]. Available at: https://papers.ssrn.com/abstract=4376240.
[20] CORMIER, Monique. *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties*, pp. 36–112.
[21] Ibid., p. 58.

entities of the domestic judicial system."[22] Sovereign jurisdiction would be the cornerstone of the Court, its foundation.

Whereas judicial jurisdiction would be the avenue through which States exercise some of their powers. In relation to the Court, Cormier argues that judicial jurisdiction reflects what is referred to as "the jurisdiction of the Court", and a mix of sovereign and judicial jurisdiction refers to the concept of delegation of jurisdiction.[23] I agree partially. In my view, only sovereign jurisdiction reflects what will be addressed as delegation of jurisdiction – this is because, as will be discussed in section 2.2.1.1, domestic limitations of jurisdiction do not affect a State's ability to delegate, *i.e.* sovereign jurisdiction.

Illustrating judicial jurisdiction in the Court's practice – for example, in *Lubanga*, when referring to the Court's jurisdiction as the "competence to deal with a criminal cause or matter under the Statute,"[24] the AP would be referencing the Court's judicial jurisdiction. Judicial jurisdiction can then be differentiated in the classic four-faceted way into jurisdiction *ratione materiae*, *loci*, *personae* and *temporis*."[25] This subset of jurisdiction can be viewed as a parameter to the exercise of the delegated sovereign jurisdiction.[26] These facets relate to the preconditions to the exercise of jurisdiction in the Statute.[27]

I suggest that by going with this split approach to jurisdiction, sovereign jurisdiction should be addressed in relation to the Court's jurisdictional basis. In contrast, judicial jurisdiction should be discussed in relation to the preconditions to the exercise of jurisdiction found in Article 12(2) of the Statute, which are a matter of procedure.[28] This division makes sense as it distinguishes between the source of the Court's authority, *i.e.* sovereign jurisdiction, and the specific conditions under which this authority is exercised, *i.e.* judicial jurisdiction.

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[22] Ibid., p. 59.
[23] Ibid.
[24] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, *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-01/04-01/06-772, 14 December 2006, para. 24.
[25] VAGIAS, Michail. *The Territorial Jurisdiction of the International Criminal Court* [online]. Cambridge University Press, 2014, p. 12 [accessed 17.10.2022]. Available at: https://www.cambridge.org/core/product/identifier/9781139525374/type/book; SVAČEK, Ondřej. *Mezinárodní trestní soud (2005-2017)*. Praha: C.H. Beck, 2017, p. 38.; *Prosecutor v. Thomas Lubanga Dyilo (Judgment on Appeal against Decision on Defence Challenge to Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006) ICC-01/04–01/06–772 (14 December 2006)*. 2006, para. 24.
[26] VAGIAS, Michail. *The Territorial Jurisdiction of the International Criminal Court*, p. 12.
[27] RASTAN, Rod. Jurisdiction. In: STAHN, Carsten, ed. *The law and practice of the International Criminal Court*. Oxford, United Kingdom: Oxford University Press, 2015, p. 146.
[28] CORMIER, Monique. *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties*, p. 59.

The split also works particularly well for distinguishing between the acceptance of the Court's jurisdiction and the ability of the Court to exercise it, which will be a central topic in the following chapters. It is essential to distinguish between sovereign and judicial jurisdiction, and by that token, acceptance and exercise of the Court's jurisdiction, since these may refer to different points in time in the proceedings before the Court. Some scholars conflate the two,[29] but I suggest that there is a difference between them that should be taken into consideration.

Given the dual nature of jurisdiction – sovereign and judicial – as the foundation for the analysis of the Court's jurisdictional framework, the research question posed in this thesis is split into two parts, better reflecting the dual understanding of jurisdiction in the context of the Court, that is the differentiation between the *acceptance* of the Court's jurisdiction and the Court's ability to *exercise* its jurisdiction.

1.2. The point in time for assessing jurisdiction – the relevant date

The second obstacle introduces a wholly different problem; the research question posed in this thesis deals with situations where the jurisdictional assessment (either related to the acceptance or the exercise of jurisdiction) hinges on the date of the assessment. As a result, the flow of time becomes important to the assessment of jurisdiction and its exercise.

Under Article 1 of the Statute, the Court's jurisdiction is governed by the Statute, and it is the Statute that the Court will apply in the first place as a source of law under Article 21(1)(a) of the Statute.[30] The question then arises as to *what point in time* the Statute's jurisdictional provisions should be assessed.

Take the situation in the *Philippines* as an example; the Philippines withdrew from the Statute effective 17 March 2019.[31] The Prosecutor sought the PTC I's authorisation to open an investigation on 24 May 2021, more than two years later.[32] The alleged crimes were committed

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[29] CAMERON, Ian. Jurisdiction and Admissibility Issues under the ICC Statute. In: MCGOLDRICK, Dominic, P. J. ROWE and Eric DONNELLY, eds. *The permanent International Criminal Court: legal and policy issues*. Oxford; Portland: Hart Publishing, 2004, p. 65.

[30] DE SOUZA DIAS, Talita. The Nature of the Rome Statute and the Place of International Law before the International Criminal Court. *Journal of International Criminal Justice*. 2019, vol. 17, no. 3, p. 71. DOI: 10.1093/jicj/mqz034

[31] Situation in the Republic of the Philippines: ICC Appeals Chamber confirms the authorisation to resume investigations | International Criminal Court. In: *International Criminal Court* [online] [accessed 19.03.2024]. Available at: https://www.icc-cpi.int/news/situation-republic-philippines-icc-appeals-chamber-confirms-authorisation-resume

[32] ICC, Appeals Chamber, Situation in the Republic of the Philippines, *Dissenting Opinion of Judge Perrin De Brichambaut and Judge Lordkipanidze*, ICC-01/21-77-OPI, 18 July 2023 (the "**Philippines Appeal Dissent**"), para. 30.

while the Philippines were still a Party to the Statute.[33] Leaving the procedural developments aside for now, the Court could have assessed the questions of jurisdiction at two points in time; either at the time the alleged crimes in question were committed or at the time of the jurisdictional trigger.[34] Each of these approaches would have led to different results – one in which the Court could exercise its jurisdiction since the Philippines *were* a Party to the Statute at the time and one in which it could not. These situations show just how important the relevant point in time is.

Yet, this has never been the subject of the Court's attention, even in cases where it arguably should have been, such as the mentioned *Philippines* situation, before the Pre-Trial Chamber (the "**PTC**") I, at least.[35] As more States debate on leaving the Court,[36] this issue might become more and more relevant to the Court's practice. A similar situation has been addressed by the ICJ in its case law, although in a slightly different context. "[I]n the context of a dispute related to sovereignty over land",[37] the ICJ stresses the significance of "the date upon which the dispute crystallised", referring to this concept as the "critical date".[38] Since this thesis deals with jurisdiction in the context of individual criminal liability and not sovereignty claims to land, to avoid possible confusion, I will refer to the present situation as the "relevant date".

[33] Ibid.
[34] Or at a different point entirely but these the example show the difference in the approach the Court could take, and these two cases illustrate the contrast between the two approaches.
[35] See section 3.3.2.
[36] PLESSIS, Carien du. South Africa to try to withdraw from ICC again - Ramaphosa. *Reuters* [online]. 2023 [accessed 01.03.2024]. Available at: https://www.reuters.com/world/africa/south-africa-try-withdraw-icc-again-ramaphosa-2023-04-25/
[37] ICJ, Territorial and Maritime Dispute (Nicaragua v. Colombia), *Judgment*, I.C.J. Reports 2012, p. 624, para. 71.
[38] Ibid.

2. Acceptance of jurisdiction

This chapter deals with the first part of the research question in this thesis: whether a State that is not a party to the Statute can retrospectively accept the jurisdiction of the Court for crimes committed in what is *now* its territory.

The Statute provides two ways for a State to accept the Court's jurisdiction.[39] Either by becoming a State Party to the Statute or by submitting an *ad hoc* declaration accepting the Court's jurisdiction with respect to a particular crime.[40] Article 12 of the Statute refers in several places and several different forms to "acceptance of jurisdiction"[41] but provides little help in ascertaining the meaning of these words. Moreover, the Statute does not provide the relevant date on which the ability of a State to accept the Court's jurisdiction should be assessed. There is also disagreement among scholars as to precisely what the Court's jurisdictional basis is,[42] which I find important for the purposes of accepting jurisdiction because how can the ability to accept the Court's jurisdiction be assessed if there is no consensus over what precisely that entails?

Therefore, the aim of this chapter is to explain the Court's jurisdictional basis, especially concerning States' acceptance of the Court's jurisdiction. Additionally, it seeks to ascertain the relevant date for acceptance of jurisdiction as the first part of the research question in this thesis.

This chapter is structured as follows: In section 2.1, I will first attempt to determine what the Court's jurisdictional basis is. I will explain the ongoing debate between scholars regarding the delegation and *ius puniendi* approaches as bases for the Court's jurisdiction. I will argue that the delegation theory is an acceptable solution for the purposes of the present analysis. In sections 2.2 and 2.3, I will explain the different ways in which a State can accept the Court's jurisdiction, and I will discuss their requirements. Finally, in section 2.4, I will discuss the relevant date for the acceptance of jurisdiction and whether a possible lack of valid acceptance of jurisdiction can be remedied later on in the proceedings before the Court.

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[39] Also relevant is the mechanism of a United Nations Security Council referral under Article 13(b) of the Statute. It is not included here because, although it can result in the *exercise* of jurisdiction, it is not a form of *acceptance* of jurisdiction, but rather jurisdictional trigger,) see URBANOVÁ, Kristýna. *Princip komplementarity v Římském statutu*. 2018, Disertační práce, Univerzita Karlova, p. 15.; ZEIDY, Mohamed M. El. *Ad Hoc Declarations of Acceptance of Jurisdiction: The Palestinian Situation under Scrutiny*, p. 180.; O'KEEFE, Roger. Response: "Quid," Not "Quantum": A Comment on "How the International Criminal Court Threatens Treaty Norms." *Vanderbilt Journal of Transnational Law*. 2016, vol. 49, no. 2, p. 437.

[40] SCHABAS, William. *An introduction to the International Criminal Court*, p. 59.

[41] Five times in total, see Rome Statute, Article 12.

[42] RICARDI, Alice. The Palestine Decision and the Territorial Jurisdiction of the ICC: Is the Court Finding its Inner Voice? *Questions of International Law* [online]. 2021, vol. 2021, no. 78, p. 40 [accessed 26.11.2023]. Available at: http://www.qil-qdi.org/the-palestine-decision-and-territorial-jurisdiction-of-the-icc-is-the-court-finding-its-inner-voice/

2.1. What is the basis for the Court's jurisdiction? The theory of delegation as an acceptable solution

A simple question on the surface, but one that has sparked considerable scholarly interest.[43] In the years following the adoption of the Statute, there has been significant debate over the basis for the Court's jurisdiction, particularly concerning its jurisdiction over nationals of non-State Parties.[44] In scholarly literature, two views in particular have emerged for explaining the Court's jurisdictional basis; one arguing for the theory of delegation, *i.e.* that the Court's jurisdiction is limited by what State delegate to it, and the second arguing the Court's jurisdiction is based on a broader *ius puniendi* and that the Court is acting on behalf of the international community as a whole.[45] This debate spans the entire existence of the Court and has created a split between scholars. As Ricardi puts it, "the divide between those who believe that States exercise jurisdiction over core crimes which is granted to them by international law and those who maintain that such jurisdiction is inherent to States may never be reconciled."[46] Some authors argue that the issue

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[43] SADAT, Leila N. *The Conferred Jurisdiction of the International Criminal Court*.; LIPOVSKÝ, Milan. Universal Jurisdiction and the Crime of Genocide. In: LIPOVSKÝ, Milan and Pavel ŠTURMA, eds. *The Crime of Genocide: Then and Now* [online]. Brill Nijhoff, 2022 [accessed 18.03.2024]. Available at: https://brill.com/edcollchap/book/9789004519329/BP000019.xml; NIETO MARTÍN, Adán. The Ius Puniendi of International Organizations. In: NIETO MARTÍN, Adán, ed. *Global Criminal Law: Postnational Criminal Justice in the Twenty-First Century*. Cham: Springer International Publishing, 2022. DOI: 10.1007/978-3-030-84831-6_2; KRESS, Claus. Article 98 Cooperation with respect to waiver of immunity and consent to surrender. In: AMBOS, Kai, ed. *Rome Statute of the International Criminal Court: article-by-article commentary*. München, Germany: Oxford, United Kingdom; New York, NY, USA: Baden-Baden, Germany: Beck; Hart; Nomos, 2022.; MCINTYRE, Gabrielle. *The ICC, Self-created Challenges and Missed Opportunities to Legitimize Authority over Non-states Parties*.; HELD, Florian. The ICC's Al Bashir jurisprudence over the last decade: enforcer of the will of States Parties or of a global jus puniendi? *Cambridge International Law Journal*. 2021, vol. 10, no. 1. DOI: 10.4337/cilj.2021.01.03; RICARDI, Alice. *The Palestine Decision and the Territorial Jurisdiction of the ICC*.; CORMIER, Monique. *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties*.; MEGRET, Frederic. *The International Criminal Court: Between State Delegation and International Jus Puniendi* [online]. Rochester, NY, 2020 [accessed 20.11.2023]. Available at: https://papers.ssrn.com/abstract=3691935; GALAND, Alexandre Skander. *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits* [online]. Brill | Nijhoff, 2019 [accessed 27.11.2023]. Available at: https://brill.com/view/title/34598; DE SOUZA DIAS, Talita. *The Nature of the Rome Statute and the Place of International Law before the International Criminal Court*.; STAHN, Carsten. Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine--A Reply to Michael Newton. *Vanderbilt Journal of Transnational Law*. 2016, no. 49.; AMBOS, Kai. Punishment without a Sovereign? The Ius Puniendi Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law. *Oxford Journal of Legal Studies* [online]. 2013, vol. 33, no. 2 [accessed 19.03.2024]. Available at: https://doi.org/10.1093/ojls/gqt005; UŠACKA, Judge Anita. Promises Fulfilled? Some Reflections on the International Criminal Court in Its First Decade. *Criminal Law Forum*. 2011, vol. 22, no. 4. DOI: 10.1007/s10609-011-9155-z; AKANDE, Dapo. The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits. *Journal of International Criminal Justice*. 2003, vol. 1, no. 3. DOI: 10.1093/jicj/1.3.618

[44] For an overview of opposing views, see CORMIER, Monique. *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties*, p. 37.; SADAT, Leila N. *The Conferred Jurisdiction of the International Criminal Court*.

[45] MEGRET, Frederic. *The International Criminal Court*, pp. 4–5.; CORMIER, Monique. *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties*, p. 187.

[46] RICARDI, Alice. *The Palestine Decision and the Territorial Jurisdiction of the ICC*, p. 40.

"will remain purely theoretical".[47] Somewhat strangely, there hasn't been exactly an agreement of this nature in the Court's practice either.[48]

In this section, I argue that the delegation theory is an acceptable explanation of the Court's jurisdictional basis. However, it is outside the scope of this thesis to exhaustively describe and defend the two approaches. Instead, the objective is to lay down the foundation for the assessment in later sections.

As mentioned above, two main theories surround the Court's jurisdictional basis: the *ius puniendi* theory and the delegation theory. I will introduce them and compare their appropriateness for explaining the Court's jurisdiction.

First, the *ius puniendi* theory presents a universalist foundation for the Court's jurisdiction.[49] It is also sometimes referred to as the inherent jurisdiction theory,[50] but according to some, this rather refers to the procedure of accepting the Court's jurisdiction as automatic.[51] The argument is that the power of the Court over "the most serious crimes of concern to the international community as a whole"[52] is grounded in customary international law,[53] and the act of becoming a State Party to the Statute merely activates it.[54] Following this approach, some authors refer to the Court as being "more than just the sum of its parts,"[55] embodying a broader, international legal personality and authority.

Under this approach, accepting the Court's jurisdiction seems simple; if the conditions of the relevant jurisdictional provisions in the Statute are met, nothing can bar the acceptance of jurisdiction by a particular State, not domestic law nor international treaties.[56]

Megret sees the *ius puniendi* basis as a logical fallacy, arguing that if the Court is acting on behalf of the international community as a whole, there should be no need for State acceptance of

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[47] LIPOVSKÝ, Milan. *Universal Jurisdiction and the Crime of Genocide*, p. 293.
[48] CORMIER, Monique. *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties*, pp. 37 and 57.
[49] STAHN, Carsten. *Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine--A Reply to Michael Newton*, p. 446.
[50] RICARDI, Alice. *The Palestine Decision and the Territorial Jurisdiction of the ICC*, p. 35.
[51] ZEIDY, Mohamed M. El. *Ad Hoc Declarations of Acceptance of Jurisdiction: The Palestinian Situation under Scrutiny*, p. 80.
[52] Rome Statute, Article 5(1).
[53] KRESS, Claus. *Article 98 Cooperation with respect to waiver of immunity and consent to surrender*, p. 2650.
[54] STAHN, Carsten. *Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine--A Reply to Michael Newton*, p. 448.
[55] Ibid., p. 447.; STAHN, Carsten, ed. *The International Criminal Court in Its Third Decade: Reflecting on Law and Practices* [online]. Brill Nijhoff, 2023, p. 47 [accessed 19.11.2023]. Available at: https://brill.com/edcollbook/title/63722
[56] STAHN, Carsten. *Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine--A Reply to Michael Newton*, p. 450.

the Court's jurisdiction.[57] However, the *ius puniendi* approach still has merit; the Court has an international legal personality, and limits to its jurisdiction are set by the Statute,[58] which is the primary source of law for the Court.[59] According to Kreß,[60] this approach has been accepted by the PTC I in its Malawi decision in the *Al-Bashir* saga, where the Chamber held that "when cooperating with this Court and therefore acting on its behalf, States Parties are instruments for the enforcement of the [i]us puniendi of the international community whose exercise has been entrusted to this Court when States have failed to prosecute those responsible for the crimes within its jurisdiction."[61] However, this quote in the decision relates more to the issue of *enforcement* than the Court's prescriptive jurisdiction *per se*. [62]

The Appeals Chamber in *Al-Bashir* seems to have also confirmed the *ius puniendi* basis for the Court's jurisdiction,[63] where it held that the Court is acting as an international tribunal "on behalf of the international community as a whole."[64] However, it is difficult to ascertain precisely what the Court had in mind since the AP's reasoning is rather scant.[65] Moreover, the AP relies on UN Security Council Resolution 1593[66] as a basis for concluding that there was "no Head of State immunity that Sudan could invoke in relation to Jordan."[67] In my view, the reliance on the UN Security Council Resolution 1593 somewhat relativizes the AP's conclusion about *ius puniendi* as a basis for the Court's jurisdiction.

Another approach also seemingly supporting the *ius puniendi* theory seems to have been undertaken with respect to the situation in *Ukraine*, particularly with the issuance of the arrest warrant against Vladimir Putin, the sitting head of the Russian Federation.[68] This is because if the

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[57] MEGRET, Frederic. *The International Criminal Court*, p. 30.
[58] SADAT, Leila N. *The Conferred Jurisdiction of the International Criminal Court*, p. 8.
[59] Rome Statute, Article 21(1)(a).
[60] KRESS, Claus. *Article 98 Cooperation with respect to waiver of immunity and consent to surrender*, p. 2649.
[61] ICC, Pre-Trial Chamber, Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad Al Bashir, *Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-139-Corr, 13 December 2011, para. 46.
[62] Ibid.
[63] ICC, Appeals Chamber, Situation in Darfur, Sudan, Prosecutor v. Al Bashir, *Judgment in the Jordan Referral re Al-Bashir Appeal*, ICC-02/05-01/09-397-Corr, 6 May 2019 (the "**Al-Bashir Appeal Judgment**"), para. 115.
[64] Ibid.
[65] Ibid.
[66] UN Security Council, Security Council resolution 1593 (2005) [on Violations of International Humanitarian Law and Human Rights Law in Darfur, Sudan], S/RES/1593 (2005), 31 March 2005.
[67] Al-Bashir Appeal Judgment, para. 149
[68] Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova | International Criminal Court. In: *International Criminal Court* [online]. 17. 3. 2023 [accessed 25.11.2023]. Available at: https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and

Court did not consider its jurisdictional basis as grounded in the *ius puniendi*, it would not be able to issue the arrest warrants at all. However, the argument remains in the realm of speculation since the actual text of the arrest warrants is not public.[69]

The PTC I's decision in the situation of *Palestine* could arguably also be seen as confirming the universalist basis for the Court's jurisdiction. Broadly, one of the arguments in the situation in *Palestine* was that the Oslo Accords, which were peace agreements between Israel and the Palestine Liberation Organization, split criminal jurisdiction over contested territories in Israel between Israel and Palestine. The argument was that the Oslo Accords should have been considered when assessing Palestine's ability to accept the Court's jurisdiction. The Chamber found that the Oslo Accords were "not pertinent to the resolution of [...] the scope of the Court's territorial jurisdiction in Palestine."[70] If the Court were to consider the theory of delegation as its jurisdictional basis, it should have at least entered into a discussion regarding the Oslo Accords and their effects, which the Chamber did not.[71] But again, it is unclear precisely what legal value the Oslo Accords held for the Chamber. Therefore, the decision should not be taken as definitively ruling out the theory of delegation.

Second, according to the theory of delegation, the jurisdiction of the Court was delegated to it by "[S]tates that had an internationally recognised right to prosecute the crimes in question before their domestic courts."[72] This is the general idea, although the delegation theory has undergone certain evolution over time, though mostly regarding the possibility of limiting the ability of a State to delegate.[73] Therefore, according to the delegation theory, the Court possesses and can exercise only the power delegated to it by States, and in turn, States cannot "transfer to the Court a power that they do not possess."[74]

This approach is often criticised as not reflecting the nature of the Court as a supranational authority, which is inherently more than "just the sum of its parts."[75] Criticising the delegation theory, Sadat argues that States create international adjudicatory bodies such as the Court *precisely*

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[69] Ibid.
[70] Palestine 19(3) Decision, para. 129.
[71] Ibid, para. 124-129.
[72] SHANY, Y. In Defence of Functional Interpretation of Article 12(3) of the Rome Statute: A Response to Yael Ronen. *Journal of International Criminal Justice* [online]. 2010, vol. 8, no. 2, p. 331 [accessed 16.10.2022]. Available at: https://academic.oup.com/jicj/article-lookup/doi/10.1093/jicj/mqq023
[73] SADAT, Leila N. *The Conferred Jurisdiction of the International Criminal Court*, pp. 30–35.; CORMIER, Monique. *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties*, pp. 37–39.
[74] O'KEEFE, Roger. *Response: "Quid," Not "Quantum": A Comment on "How the International Criminal Court Threatens Treaty Norms"*, p. 434.
[75] STAHN, Carsten. *Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine--A Reply to Michael Newton*, p. 447.

because they cannot do certain things themselves.[76] She puts forward the case of the ICJ as an example; an international court that can hear disputes between States – something, she argues, national courts cannot do.[77] I disagree. *First*, even the ICJ still needs the consent of the parties to a dispute;[78] therefore, the fact that the Court may constitute something more than the States themselves does not absolve it of the necessity of State acceptance. *Second*, regarding the fact that States cannot do certain things themselves – under the delegation theory within the context of the Court, it is not the State's domestic ability that allows it to delegate. Still, rather, it "is reflective of an internationally recognised legal authority."[79] The fact that a State may not be able to domestically prosecute an individual because its national laws do not allow it does not mean that it does not have the international authority to delegate jurisdiction to do so to the Court.[80]

Somewhat puzzlingly, the delegation approach also seems to have been accepted by the Court, although by a different Chamber in a different composition than in *Al-Bashir*.[81] The PTC III held in the situation in *Bangladesh* that "[w]hen States delegated authority to an international organisation, they transfer all the powers necessary to achieve the purposes for which the authority was granted to the organisation."[82] As a note, the term transfer is not most fitting since it implies an irrevocable cession of powers and relinquishment of "all claims to further use of such powers."[83] In my view, Rastan provides the best description, referring to the Court's jurisdictional basis as substitution through delegation,[84] whereby the extent of delegated jurisdiction is the same as the delegating State possesses. This reflects the fact that the acceptance of the Court's jurisdiction is not irrevocable since the Statute accounts for a withdrawal procedure.[85]

I will take the delegation theory as the starting point for examining the Court's jurisdictional framework for two reasons.

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[76] SADAT, Leila N. *The Conferred Jurisdiction of the International Criminal Court*, pp. 5, 25.
[77] Ibid., p. 5.
[78] UN, Statute of the International Court of Justice, 18 April 1946, Arts. 35 and 36.
[79] SHANY, Y. *In Defence of Functional Interpretation of Article 12(3) of the Rome Statute*, p. 339.
[80] See section 2.2.1.1.
[81] Al-Bashir Appeal Judgment, p. 1; ICC, Pre-Trial Chamber, Situation in Bangladesh/Myanmar, *Request under Regulation 46(3) of the Regulations of the Court, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute"*, ICC-RoC46(3)-01/18-37, 6 September 2018 (the "**Bangladesh 19(3) Decision**"), p. 1.
[82] Ibid., paras. 15 and 60.
[83] SAROOSHI, Dan. Conferrals by States of Powers on International Organizations: The Case of Agency. *British Yearbook of International Law*. 2004, vol. 74, no. 1, pp. 31–32. DOI: 10.1093/bybil/74.1.291
[84] RASTAN, Rod. *Jurisdiction*, p. 164.
[85] Rome Statute, Article 127.

First, it appropriately reflects the Court's nature as an international organisation of a judicial character.[86] By adopting the Rome Statute, States collectively agreed to form an international organisation to which they delegated certain powers inherent in their sovereignty.[87] In my view, the first approach better reflects this State consent as the root of the Court. Whatever the modalities (which I discuss in the following sections) may be, it is not controversial that the Statute is an international treaty signed and ratified by States.

Second, there is also a pragmatic consideration for the purposes of this thesis; both approaches require the acceptance of the Court's jurisdiction, the difference being that according to the inherent jurisdiction approach, since the Court is acting on behalf of the international community as a whole, the domestic and international limitations placed on delegation are no obstacle.[88] Put simply, under the *ius puniendi* theory, the Court possesses its jurisdiction inherently, and the act of acceptance of the Court's jurisdiction serves the sole purpose of fulfilling the preconditions to the exercise of jurisdiction found in Article 12 of the Statute.[89] However, under delegation theory, some of these limitations might apply.[90] Therefore, for the purposes of this thesis, I suggest erring on the side of caution and addressing the practical limitations exhaustively.

The delegation principle is theoretically straightforward; if the State has criminal jurisdiction to delegate, it can delegate it to the Court. And on the contrary, what a State does not have, it cannot delegate.[91] However, there is still a lack of consensus over the precise extent of this ability and its limitations, particularly with regard to different kinds of rules or situations and their effect on the ability of a State to accept the jurisdiction of the Court.

The following sections examine the delegation theory in more detail, focusing on its content and limits within the Court's jurisdictional regime. As a starting point, I take the two-step approach to examining State delegation proposed by Shany: *first*, whether a State has the internationally recognised right to exercise jurisdiction on its own, and *second*, whether there is a

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[86] DE SOUZA DIAS, Talita. *The Nature of the Rome Statute and the Place of International Law before the International Criminal Court*, pp. 514–515.
[87] CORMIER, Monique. *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties*, p. 70.
[88] STAHN, Carsten. *Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine--A Reply to Michael Newton*, p. 451.
[89] GALAND, Alexandre Skander. *UN Security Council Referrals to the International Criminal Court*, p. 35.
[90] See section 2.2.1.
[91] MCINTYRE, Gabrielle. *The ICC, Self-created Challenges and Missed Opportunities to Legitimize Authority over Non-states Parties*, p. 517.

valid act of acceptance of jurisdiction, *i.e.* an act of delegation.[92] I will also refer to these elements as the material and the formal requirement respectively.

2.2. The material requirement of delegation – the ability to delegate

State jurisdiction can be categorised into two distinct forms: prescriptive jurisdiction and enforcement jurisdiction.[93] Prescriptive jurisdiction refers to a State's ability to apply its laws to various circumstances, such as individuals' behaviour.[94] In the context of international criminal law, it refers "to a [S]tate's international legal authority to treat given conduct as criminal."[95] On the other hand, enforcement jurisdiction refers to a State's ability to enforce compliance or punish non-compliance with its laws.[96] Some scholars recognise a tripartite division of jurisdiction, including adjudicative jurisdiction,[97] following the 1987 United States Third Restatement of the Foreign Relations Law.[98] Either way, it does not really matter for our analysis since adjudicative and prescriptive jurisdiction go "hand in hand."[99]

What, then, is the role of enforcement jurisdiction, and do limits on a State's enforcement jurisdiction affect its ability to accept the Court's jurisdiction? Vagias argues, building on the *Lotus* decision,[100] that the relationship between prescriptive and enforcement jurisdiction is clear; there can be no enforcement without prescriptive jurisdiction, yet there can be prescriptive jurisdiction without the possibility of enforcement.[101] Therefore, even if a State cannot enforce its rules and therefore has no enforcement jurisdiction with respect to a particular crime, this is not a hurdle in its ability to prescribe rules that would prohibit such conduct or, more importantly, delegate its jurisdiction to the Court. As Shany puts it: „[t]he right to delegate jurisdiction is reflective of an internationally recognised legal authority, and not of the material ability of *actually exercising*

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[92] SHANY, Y. *In Defence of Functional Interpretation of Article 12(3) of the Rome Statute*, pp. 331–332.
[93] DE SOUZA DIAS, Talita. *The Nature of the Rome Statute and the Place of International Law before the International Criminal Court*, p. 514.
[94] STAHN, Carsten. *Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine--A Reply to Michael Newton*, p. 450.; O'KEEFE, Roger. *Response: "Quid," Not "Quantum": A Comment on "How the International Criminal Court Threatens Treaty Norms"*, p. 7.
[95] O'KEEFE, Roger. *International criminal law*. Oxford: Oxford university press, 2015, p. 6.
[96] STAHN, Carsten. *Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine--A Reply to Michael Newton*, p. 450.
[97] O'KEEFE, Roger. *Response: "Quid," Not "Quantum": A Comment on "How the International Criminal Court Threatens Treaty Norms"*, p. 436.; GALAND, Alexandre Skander. *UN Security Council Referrals to the International Criminal Court*, p. 14.; LIPOVSKÝ, Milan. *Universal Jurisdiction and the Crime of Genocide*, p. 271.
[98] AMERICAN LAW INSTITUTE. *Restatement of the Law, Third, Foreign Relations Law of the United States*, 1987, p. 1.
[99] O'KEEFE, Roger. *Response: "Quid," Not "Quantum": A Comment on "How the International Criminal Court Threatens Treaty Norms"*, p. 436.
[100] Permanent Court of International Justice, *Lotus*, PCIJ Series A. No 10, Judgment, 7 September 1927.
[101] VAGIAS, Michail. *The Territorial Jurisdiction of the International Criminal Court*, p. 13.

jurisdiction over either the territory in question or over certain individuals within or outside that territory."[102]

These considerations are not entirely theoretical. The situations in *Afghanistan*[103] and *Palestine*[104] show that the relationship between prescriptive and enforcement jurisdiction and their exercise might be important.[105] In both situations, there was an ongoing discussion about the possibility of the Court having and exercising jurisdiction since both Afghanistan and Palestine concluded treaties that limited their criminal jurisdiction in some way; both situations will be analysed in more detail in section 2.2.1.2.

2.2.1. Can a State's ability to delegate be limited?

The previous section concluded that the acceptable basis for the Court's jurisdiction is delegation of criminal jurisdiction by States. This subsection will explore the limits of a State's ability to delegate and whether that can influence that State's acceptance of the Court's jurisdiction. Two general areas will be analysed: limitations placed on the ability to delegate by domestic law and those placed by international treaties.

2.2.1.1. Limitations imposed by domestic law

The first question is whether a State can limit its ability to delegate jurisdiction to the Court under its domestic laws. Does the capacity to delegate jurisdiction mirror a particular State's domestic law? Specifically, is the relevant scope of prescriptive jurisdiction based on what is permissible under international law or on what is permissible under domestic law? Or maybe neither? One could argue that since "domestic law, not the Statute, regulates matters of prescriptive jurisdiction," the Court can extend its jurisdiction only in a way that a national court can.[106]

The answer to this question is no; domestic law cannot limit a State's ability to delegate.[107] The conclusion is based on the difference between the domestic and international ability of States.

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[102] SHANY, Y. *In Defence of Functional Interpretation of Article 12(3) of the Rome Statute*, p. 339. in STAHN, Carsten. *Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine--A Reply to Michael Newton*, p. 450.

[103] Afghanistan | International Criminal Court. [accessed 20.03.2024]. Available at: https://www.icc-cpi.int/afghanistan

[104] State of Palestine | International Criminal Court. [accessed 20.03.2024]. Available at: https://www.icc-cpi.int/palestine

[105] See for example the OTP's submission in the situation in Palestine, arguing that Oslo accords do not preclude the Court's exercise of jurisdiction – ICC, Office of the Prosecutor, Situation in the State of Palestine, *Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine*, ICC-01/18-12, 22 January 2020 (the "**Palestine 19(3) Request**"), paras. 183-185.

[106] RASTAN, Rod. *Jurisdiction*, p. 156.

[107] Ibid.

Although it is within a State's sovereign power to limit the delegation of its prescriptive jurisdiction under domestic law, this would have no bearing on the State's ability to delegate under international law.[108] As the ICJ noted in the *Arrest Warrant* case, "a State is not required to legislate up to the full scope of jurisdiction allowed by international law."[109]

This can be illustrated in two instances in the situation in *Ukraine*, which show that domestic law cannot limit a State's ability to accept the Court's jurisdiction. *First,* in 2001, the Constitutional Court of Ukraine held that ratifying the Rome Statute would be unconstitutional.[110] Yet, this did not preclude Ukraine from lodging an *ad hoc* declaration under Article 12(3) of the Statute, accepting the Court's jurisdiction (but see the conclusion in section 2.3.2 regarding the review of *ad hoc* declarations).[111] Although the *ad hoc* avenue of accepting the Court's jurisdiction differs from becoming a State Party to the Statute, Cormier suggests that the delegation theory would apply just the same.[112] *Second*, another example lies in the difference between the parliament's underlying resolution and the text of the declaration itself. On 4 February 2015, Ukraine's parliament, the Verkhovna Rada, adopted a resolution endorsing its declaration on recognising the Court's jurisdiction over war crimes and crimes against humanity committed by certain individuals.[113] However, while the resolution itself limits the acceptance of the Court's jurisdiction to war crimes and crimes against humanity committed by certain individuals, the declaration itself does not. Again, this shows that a State's domestic law does not limit its ability to delegate jurisdiction to the Court.

A valid criticism of these arguments is that the precise reasoning regarding the Court's jurisdiction over *Ukraine* is unknown. But given the recent issuing of arrest warrants in the situation,[114] it would appear that Ukraine has accepted the Court's jurisdiction.

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[108] CORMIER, Monique. *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties*, p. 75.; RASTAN, Rod. *Jurisdiction*, pp. 155–156.
[109] ICJ, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), *Joint separate opinion of Judge Higgins, Kooijmans and Buergenthal*, I.C.J. Reports 2002, p. 76, para. 45.
[110] Constitutional Court of Ukraine, *Opinion of the Constitutional Court on the conformity of the Rome Statute with the Constitution of Ukraine*, N 1-35/2001, 11 July 2001 in CORMIER, Monique. *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties*, p. 74.
[111] Ukraine accepts ICC jurisdiction over alleged crimes committed since 20 February 2014 | International Criminal Court. In: *International Criminal Court* [online]. 8. 9. 2015 [accessed 25.11.2023]. Available at: https://www.icc-cpi.int/news/ukraine-accepts-icc-jurisdiction-over-alleged-crimes-committed-20-february-2014
[112] CORMIER, Monique. *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties*, p. 75.
[113] Declaration by Ukraine lodged under Article 12(3) of the Rome Statute, 8 September 2015, p. 4.
[114] Russia/Ukraine: ICC issues arrest warrants for top Russian commanders for alleged war crimes and crimes against humanity. In: *Amnesty International* [online]. 5. 3. 2024 [accessed 20.03.2024]. Available at: https://www.amnesty.org/en/latest/news/2024/03/russia-ukraine-icc-issues-arrest-warrants-for-top-russian-commanders-for-alleged-war-crimes-and-crimes-against-humanity/

2.2.1.2. Limitations imposed by international treaties

A State's domestic legislation cannot preclude it from accepting the Court's jurisdiction since there may be a difference between the extent of a State's domestic exercise of its jurisdiction and its internationally recognised ability to do so. But what about situations where a State limits its own jurisdiction by virtue of an international treaty? There are two situations before the Court where these considerations are relevant: the situation in *Afghanistan* and the situation in *Palestine*.

In the situation in *Afghanistan*, Afghanistan and the United States concluded agreements which limited Afghanistan's jurisdiction over certain US nationals on the territory of Afghanistan, essentially stating that the US "retains exclusive jurisdiction over US soldiers for crimes committed on Afghan territory."[115] It is generally accepted that the agreements limit Afghanistan's enforcement jurisdiction.[116] But even this has been subject to debate; for example, Cormier argues that "in ratifying the [Status of Forces Agreements], Afghanistan has simply promised not to exercise its powers of enforcement over US service members."[117] Contrary to this, Newton argues that as a result of these agreements, Afghanistan "relinquished any claim to criminal jurisdiction over the nationals of the United States."[118] For the purposes of this discussion, let's assume (as the Appeals Chamber in *Afghanistan* later did[119]) that these agreements limited Afghanistan's enforcement jurisdiction.

When the Prosecutor requested the PTC to authorise the opening of an investigation, the existence of the limiting agreements was not subject to great focus. The PTC II declined the authorization, although not due to lack of jurisdiction.[120] However, it did not address the issue of the limiting agreements whatsoever.[121] The Prosecutor appealed the decision of the PCT II.[122] On

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[115] CORMIER, Monique. *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties*, p. 96.
[116] O'KEEFE, Roger. *Response: "Quid," Not "Quantum": A Comment on "How the International Criminal Court Threatens Treaty Norms"*, p. 438.
[117] CORMIER, Monique. *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties*, p. 97.
[118] NEWTON, Michael A. How the International Criminal Court Threatens Treaty Norms. *Vanderbilt Journal of Transnational Law*. 2016, vol. 49, no. 2, p. 407.
[119] ICC, Appeals Chamber, *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-02/17-138, 5 March 2020 (the "**Afghanistan Appeal Judgment**"), para. 44.
[120] But rather on the grounds that the investigation would not serve the interests of justice. See LUBAN, David. The "Interests of Justice" at the ICC: A Continuing Mystery. In: *Just Security* [online]. 17. 3. 2020 [accessed 15.03.2024]. Available at: https://www.justsecurity.org/69188/the-interests-of-justice-at-the-icc-a-continuing-mystery/
[121] ICC, Pre-Trial Chamber, 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-02/17-33, 12 April 2019, paras. 49-50.
[122] ICC, Office of the Prosecutor, Situation in the Islamic Republic of Afghanistan, Prosecution Appeal Brief, ICC-02/17-74, 30 September 2019.

appeal, the Appeals Chamber took note of the issue and held that: „[it] is of the view that the effect of these agreements is not a matter for consideration in relation to the authorisation of an investigation under the statutory scheme. [...] [A]rticle 19 [of the Statute] allows States to raise challenges to the jurisdiction of the Court, while [A]rticles 97 and 98 include safeguards with respect to pre-existing treaty obligations and other international obligations that may affect the execution of requests under Part 9 of the Statute."[123]

According to the AP, the argument was this: a limitation of enforcement jurisdiction does not affect neither the sovereign jurisdiction of the accepting State nor the judicial jurisdiction of the Court. The Statute accounts for this in Articles 97 and 98, which deal with the execution of requests in situations of conflicting obligations of States. And on the surface, the argument is sound – no enforcement jurisdiction, no problem. This is what Stahn argued: Article 98 deals with situations related to State cooperation and not the issues of whether the Court has or can exercise jurisdiction. [124]

It is interesting to note that this is what the United States argued, stating that some of the agreements were related to Article 98 but also that some of the other agreements were related to Afghanistan's relinquishment of criminal jurisdiction over certain US nationals.[125] The Court did not deal with these arguments in the slightest; instead, it grouped all of the agreements under Articles 97 and 98 into possible issues of *enforcement*, not *jurisdiction*.[126] Therefore, the problem with the Afghanistan Appeal Judgment was that the Court did not touch upon the nature of these agreements very much - the whole issue was dealt with in one paragraph.[127] In my view, the AP in the Afghanistan Appeal Judgment came to a logical conclusion, although with very little reasoning. The AP's decision later served as a basis for the PTC I's reasoning in the Palestine 19(3) Decision.[128]

In the situation in *Palestine*, the issue was also related to a lack of delegable jurisdiction but this time, the jurisdiction to prescribe. On 1 January 2015, Palestine lodged an *ad hoc* declaration with the Registrar, accepting the Court's jurisdiction with respect to crimes committed

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[123] Afghanistan Appeal Judgment, para. 44.
[124] STAHN, Carsten. *Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine--A Reply to Michael Newton*, p. 451.
[125] ICC, Appeals Chamber, Situation in the Islamic Republic of Afghanistan, *Transcript of the Appeals Hearing*, ICC-02/17-T-002-ENG, 5 December 2019, pp. 102-102.
[126] Afghanistan Appeal Judgment, para. 44
[127] Ibid.
[128] Palestine 19(3) Decision, para. 128.

in the occupied Palestinian territory since 13 June 2014.[129] Additionally, the next day, Palestine acceded to the Statute.[130] Annex IV to the Oslo II provided "that Israel has sole criminal jurisdiction over offences committed by Israelis in all areas."[131] One of the questions before the Court was whether Palestine could even accept the Court's jurisdiction as a result of the Oslo Accords. The PTC I found that the Oslo Accords were "not pertinent to the resolution of [...] the scope of the Court's territorial jurisdiction in Palestine."[132]

Does this leave us with the conclusion that limitations of prescriptive jurisdiction should not be an obstacle to accepting the Court's jurisdiction? If a State can limit its prescriptive ability by concluding a treaty while still being able to delegate jurisdiction to the Court, what then is this limitation worth? Or is the State limiting the *exercise* of its prescriptive jurisdiction? Going back to the example of the *Palestine* situation, the Oslo Accords "deal with the transfer and repartition of competences between a sovereign State and Palestine, a special entity (originally the Palestine Liberation Organization, as a signatory party)."[133] In my view, the only logical argument that comes from this is that both the Statute and the Oslo Accords are international treaties, and any conflict related to Palestine's acceptance should be treated as such, as a conflict of treaties.

Where we end up with this argument is that it is not so much a matter of the limitations of (exercise of) jurisdiction but rather a *State's* ability to adhere to such treaties. Since that ability comes from the entity being a State, from my point of view, the relevant test would be the Statehood of the delegating entity.

In relation to the situation in *Palestine*, Ricardi argues that "its status as a State under general international law is irrelevant, in so far as it was able to ratify the [...] Statute and become a State Party to it."[134] She bases her argument on the international *ius puniendi* and a State's ability to adhere to treaties.[135] I understand her argument as follows – the Court's jurisdiction is grounded in the State's ability to adhere to treaties. Palestine successfully became a State Party to the Statute. The Court cannot review whether the accession was valid. Therefore, the *actual ability* of Palestine to adhere to treaties is not important. The fact that it *happened* is important because it is not the

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[129] *The State of Palestine accedes to the Rome Statute | International Criminal Court*.
[130] *Ibid.*
[131] Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Annex IV - Protocol Concerning Legal Affairs, September 28, 1995, Art. 1(2).
[132] Palestine 19(3) Decision, para. 129.
[133] ICC, Pre-Trial Chamber, Situation in the State of Palestine, *Judge Péter Kovács' Partly Dissenting Opinion*, ICC-01/18-143-Anx1, 5 February 2021 (the "**Palestine Appeal Dissent**"), para 360.
[134] RICARDI, Alice. *The Palestine Decision and the Territorial Jurisdiction of the ICC*, p. 36.
[135] Ibid.

Court's job to review the accession to the Statute. I disagree – what if a mistake happens during the accession procedure? Just because an entity deposits its instruments of accession with the UN Secretary-General, do the doubts about its ability to do so *validly* disappear?

2.2.1.3. Conclusions on limitations of delegation

To conclude this section, neither domestic law nor international treaties can limit a State's ability to delegate jurisdiction. In my view, what matters is the ability of a State to adhere to treaties. The Statute and all of the other limiting treaties mentioned in this section are, after all, treaties. In the context of the Statute, the relevant test for the ability to delegate then is that the delegating State is a State.

However, I concur with Stahn that prescriptive jurisdiction cannot be "contracted out",[136] and although such situations will result in conflicting obligations, they do not mean that the acceptance of the Court's jurisdiction is invalid. I argue that the situations in *Afghanistan* and *Palestine* highlight just that; a conflict of obligations, which should not be the Court's job to resolve. According to Cormier, this would impose an unnecessary burden on the Court to review a State Party's international agreements to ensure there are no restrictions on its delegable jurisdiction.[137] In relation to *Afghanistan*, she also argues that the existence of confidential agreements limiting Afghanistan's (exercise of) jurisdiction would be problematic since this would result in a situation where only the agreements that are publicly known could influence the Court's jurisdiction.[138] On the other hand, one may argue that this is accounted for by the option of a State which has jurisdiction over a case to challenge jurisdiction in Article 19(2)(b) of the Statute.

Although this approach may be criticised since it allows creating a situation where a State might violate preceding obligations, this is ultimately the State's problem to solve, not the Court's. Both an agreement to limit a State's jurisdiction and becoming a State Party to the Statute are sovereign acts. The takeaway for the purposes of the present thesis is that the ability to accept the Court's jurisdiction is reflected in the entity being a State. This is also supported by analysing the content of delegation or acceptance of the Court's jurisdiction, which will be analysed in the following section 2.2.2.

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[136] STAHN, Carsten. *Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine--A Reply to Michael Newton*, p. 451.
[137] CORMIER, Monique. *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties*, p. 112.
[138] Ibid., p. 104.

2.2.2. What is being delegated by States? The scope of delegated jurisdiction

The previous sections introduced the concepts of the ability of States to delegate jurisdiction to the Court and the extent of its limitations. I concluded that it is the general prescriptive ability that allows a State to delegate its jurisdiction to the Court – the material test for accepting the Court's jurisdiction is whether the accepting entity is a State for the purposes of the Statute.

But what about the scope of acceptance? Since the ability to delegate relates to the State's general prescriptive ability, is the acceptance of jurisdiction also general? There remains a question about the scope of this delegated jurisdiction. The result of delegation does not precisely reflect the Court's ability to later exercise jurisdiction, at least not at the moment of delegation - Olásolo aptly describes this situation as "dormant jurisdiction".[139]

At the time a State accepts the Court's jurisdiction, either by becoming a State Party or through an *ad hoc* declaration, the precise scope of subsequent investigations and the identities of perpetrators is unknown. There may be a *general idea* of the conduct and perpetrators that could later come under the purview of the Court. However, in my view, a general idea has no legal bearing until the Court's jurisdiction is triggered and the contours of proceedings become clear. When States accept the Court's jurisdiction, that jurisdiction will not be activated until one of the jurisdictional triggers under Article 13 of the Statute comes into play.[140] It is worth noting that the preconditions are only required in the case of a State referral or the Prosecutor initiating the investigation *proprio motu*. In the case of a UN Security Council referral, also referred to by one author as a "titanium legal spear",[141] the preconditions found in Article 12 are not required.

The delegated jurisdiction does not yet have a clearly defined shape; when States accept the jurisdiction of the Court, what is being delegated is the reflection of their prescriptive jurisdiction, taking a State's prescriptive ability in bulk and delegating it to the Court. Since the acceptance of the Court's jurisdiction is automatic for State Parties,[142] the assessment at this stage should be limited to whether a particular State has *any p*rescriptive jurisdiction to delegate whether it can delegate jurisdiction to the Court. This is precisely because of the abstract nature of the

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[139] OLÁSOLO, Héctor. *The Triggering Procedure of the International Criminal Court* [online]. Brill Nijhoff, 2005, p. 131 [accessed 05.11.2023]. Available at: https://brill.com/display/title/12251

[140] See section 3.1.

[141] TSILONIS, Victor. *The Jurisdiction of the International Criminal Court* [online]. Cham: Springer International Publishing, 2019, p. 37 [accessed 04.05.2023]. Available at: https://link.springer.com/10.1007/978-3-030-21526-2

[142] RASTAN, Rod. *Jurisdiction*, p. 145.; ZEIDY, Mohamed M. El. *Ad Hoc Declarations of Acceptance of Jurisdiction: The Palestinian Situation under Scrutiny*, p. 181.

prescriptive jurisdiction at this stage. The territorial scope of a subsequent investigation and the identities of potential perpetrators are not yet known.[143] Therefore, a more detailed assessment of the extent of delegated jurisdiction should be saved for when the preconditions to the exercise of jurisdiction found in Article 12 of the Statute should be assessed.

This reasoning appears to have been accepted by the Court. In *Gbagbo*, the Appeals Chamber was tasked with answering whether a State may accept the Court's jurisdiction through an *ad hoc* declaration limited to "past crimes or specific situations".[144] The AP held that the acceptance of jurisdiction upon becoming a State Party or lodging an *ad hoc* declaration is "general and not limited to specific situations."[145] This would support the reasoning that at the stage of *acceptance* of jurisdiction, the jurisdiction is dormant and therefore, the assessment of the ability to delegate should be made in rather abstract terms.

Of note is an interesting discussion about the exact nature of the delegated jurisdiction regarding Article 12(2) of the Statute and whether this package of jurisdiction also encompasses universal jurisdiction, or rather, the ability of States to exercise jurisdiction based on the universality principle.[146] The principle of universality is understood as allowing a State to apply its laws universally to any individual for certain crimes, regardless of nationality or where the crime was committed.[147] Cormier argues that when States delegate jurisdiction to the Court, they could arguably do this not only based on the personality and territoriality principles but also universality, arguing that such an approach would be useful in situations concerning nationals of non State Parties, particularly in situations referred by the UN Security Council.[148]

I agree partially; the universalist argument might find practical application in situations referred by the UN Security Council since preconditions to the exercise of the Court's jurisdiction found in Article 12(2) of the Statute will not come under purview in such a case. However, I disagree that the delegation theory based on universality is useful anywhere else. While theoretically possible, this delegation will inevitably run into a wall when it comes to the *exercise* of jurisdiction, *i.e.* the conditions of Article 12(2) of the Statute. The preconditions require either

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[143] OLÁSOLO, Héctor. *The Triggering Procedure of the International Criminal Court*, p. 39.
[144] ICC, Appeals Chamber, Situation in Côte d'Ivoire, Case of Prosecutor v. Laurent Gbagbo, *Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings*, ICC-02/11-01/11-321, 12 December 2012 (the "**Gbagbo Appeal Judgment**"), para. 77.
[145] Ibid., para. 82.
[146] CORMIER, Monique. *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties*, p. 182.
[147] Ibid., p. 67.
[148] Ibid., pp. 183–185.

the personality or territoriality principle to be met. Therefore, in the case of the universalist argument for the basis for the Court's jurisdiction, the preconditions to the exercise of jurisdiction will not be met, and the Court will not be able to exercise jurisdiction.

The logical conclusion to this seems to be that, *at the time of delegation*, the State is delegating whatever prescriptive sovereign jurisdiction it possesses, and it is immaterial if, *at that time*, the State exercises its jurisdiction over a territory or individual that might later come under the purview of the Court. The conclusion would be practically the same; whether the delegating State has *anything* to delegate.

Therefore, determining general prescriptive ability for the purposes of accepting jurisdiction is relatively straightforward in situations of accession to the Statute since no reservations are permitted under Article 120 of the Statute – the scope of delegation is not specified, and the State's general prescriptive ability is delegated to the Court. However, the situation might become more complicated when the extent of delegation *is* specified. The Court could then rule that such a limitation constitutes an illegal reservation and, therefore, lacks any effect.[149]

Moreover, there are two ways to accept the Court's jurisdiction, and the Court itself recognises that *ad hoc* declarations could be subject to certain limits, although this has not been the case for any of the declarations lodged so far.[150] Additionally, the precise extent of such limitations is also doubtful.[151] I suggest that the assessment at the acceptance stage should be just the same, limited to the *general* prescriptive ability of a given State.

However, one could argue that this is a wrong approach entirely. If we look at the wording of Article 12(3) of the Statute, it reads that "if the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court [...]." So maybe situations where *ad hoc* declarations come into play skip the delegation phase altogether. The wording says, "accept the *exercise* of jurisdiction by the Court". This would conform to the idea of the Court as an international organisation with a separate legal personality, and since State Parties established the Court to *have* jurisdiction over crimes of most serious concern to the international community as

[149] SCHABAS, William and Giulia PECORELLA. *Article 12 Preconditions to the exercise of jurisdiction*, p. 818.
[150] Ibid., p. 828.
[151] Ibid.

a whole,[152] only its *exercise* depends on State approval, which would only come into play at the exercise of jurisdiction stage.

However, this could potentially create application problems. If this argument applied in practice, non-State entities could validly accept the jurisdiction of the Court, but the Court would not be able to exercise its jurisdiction. Some scholars argue that Article 12(3) of the Statute is worded in a way that suggests that by lodging a declaration, a State accepts the "exercise of jurisdiction"[153] and that the State necessarily accepts the Court's *jurisdiction* as well.[154] I agree, in my view, a necessary precondition to the exercise of jurisdiction must be the acceptance (or rather delegation) of jurisdiction. If the Court does not have jurisdiction, then it surely cannot exercise it, even if the preconditions to its exercise are met.

2.2.3. Conclusion on the basis of the Court's jurisdiction

To conclude this section, the assessment of a State's ability to delegate at this stage seems somewhat limited. I draw the following conclusions. The delegation theory is an acceptable basis for explaining the Court's jurisdictional basis. Prescriptive jurisdiction is what allows a State to accept and delegate criminal jurisdiction to the Court. This ability might be limited by that State but without effect on its ability to delegate jurisdiction to the Court. The State might find itself in a conflict of obligations, but that is not a problem for the Court to solve.

One can argue that the result of the delegation theory as I propose it is just the same as the *ius puniendi* one. And, to an extent, it is. The practical result is the same, but the road that led there is different. I concur with the proponents of the *ius puniendi* theory that the delegation theory in its original form (*i.e.* that basically anything can limit a State's ability to delegate),[155] is far too restrictive and that whatever limits a State imposes upon itself cannot be an obstacle to it then accepting the jurisdiction of the Court. However, I do not agree with the basis for the *ius puniendi* theory that the Court is acting as an international tribunal "on behalf of the international community as a whole."[156] In delegation, there is no activation of the Court's jurisdiction that had already existed regardless of the State Parties. By the same token, the position proposed by Newton

[152] Rome Statue, Preamble.
[153] Rome Statute, Article 12(3).
[154] SCHABAS, William. *The International Criminal Court: a commentary on the Rome Statute*. Oxford: Oxford University Press, 2016, p. 357.; RASTAN, Rod. *Jurisdiction*, p. 71.; ZIMMERMANN, A. *Palestine and the International Criminal Court Quo Vadis?*, p. 318.
[155] AKANDE, Dapo. *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties*.
[156] Al-Bashir Appeal Judgment, para. 115

that once a State has an obligation, it cannot infringe upon it by assuming a secondary obligation,[157] is also untenable.

States can be bound by conflicting obligations; this does not preclude them from doing so nor from undertaking different obligations.[158] The logical conclusion must be that if a sovereign State finds itself bound by conflicting obligations, this does not mean that one obligation automatically blocks the other.

Then, since the only limitation to the ability to delegate appears to be whether a State enjoys *any* prescriptive jurisdiction over something or someone, the relevant test I propose is whether the entity delegating jurisdiction to the Court is a State. I find this the most elegant solution, although it opens up a can of worms in and of itself – what constitutes a State, particularly a State for the purposes of the Statute? Should the term be interpreted the same in relation to the acceptance and the exercise of the Court's jurisdiction? Can the Court even assess Statehood in either meaning? There has been considerable debate about the exact interpretation of this term within the context of the Statute.[159] These questions, though interesting, are not the focus of research in this thesis. What is important is that the delegating entity has something to delegate. The relevant question discussed in section 2.4 is *at what time* the entity delegating jurisdiction must be a State.

[157] NEWTON, Michael A. *How the International Criminal Court Threatens Treaty Norms*, p. 431.
[158] DE SOUZA DIAS, Talita. *The Nature of the Rome Statute and the Place of International Law before the International Criminal Court*, p. 514.
[159] ZEIDY, Mohamed M. El. *Ad Hoc Declarations of Acceptance of Jurisdiction: The Palestinian Situation under Scrutiny*, pp. 181–182.

2.3. The formal requirement of delegation – an act of delegation

When a State has the ability to exercise criminal jurisdiction, it can delegate it – by an act of delegation. In literature, this act of delegation is described as "acceptance of jurisdiction".[160] The Statute provides two ways for a State to accept the Court's jurisdiction,[161] either by becoming a State Party to the Statute or by submitting an *ad hoc* declaration accepting the Court's jurisdiction with respect to a particular crime.[162] The preceding section introduced situations in which a State possesses the ability to accept the Court's jurisdiction. It needs to do so through an act of delegation, which must fulfil certain requirements set by the Statute regarding its form, content, and procedure; the objective of this section is to describe them.

2.3.1. Becoming a State Party to the Statute

A State that becomes a Party to the Statute automatically accepts the Court's jurisdiction,[163] without the need for any other acts accepting the exercise of the Court's jurisdiction.[164] In this respect, Article 12(1) of the Statute states that "[a] State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in [A]rticle 5." Following Article 125(1) of the Statute, up until 31 December 2000, the Statute was open for signature. After, States could only become State Parties by accession to the Statute.[165] Article 125(3) of the Statute provides that the "Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations."[166]

Therefore, the procedure from the point of view of international law is straightforward; to become a State Party to the Statute, a State fulfilling the "all States" formula must deposit the instrument of accession with the UN Secretary-General.

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[160] SCHABAS, William. *An introduction to the International Criminal Court*, p. 79.
[161] Also relevant is the mechanism of a United Nations Security Council referral under Article 13(b) of the Statute. It is not included here because, although it can result in the *exercise* of jurisdiction, it is not a form of *acceptance* of jurisdiction, but rather jurisdictional trigger,) see URBANOVÁ, Kristýna. *Princip komplementarity v Římském statutu*, p. 15.; ZEIDY, Mohamed M. El. *Ad Hoc Declarations of Acceptance of Jurisdiction: The Palestinian Situation under Scrutiny*, p. 180.
[162] SCHABAS, William. *An introduction to the International Criminal Court*, p. 59.
[163] SCHABAS, William. *The International Criminal Court*, p. 351.
[164] INAZUMI, Mitsue. The Meaning of the State Consent Precondition in Article 12(2) of the Rome Statute of the International Criminal Court: A Theoretical Analysis of the Source of International Criminal Jurisdiction. *Netherlands International Law Review*. 2002, vol. 49, no. 2, p. 162. DOI: 10.1017/S0165070X00000437
[165] CLARK, Roger S. and Simon M. MEISENBERG. Article 125 Signature, ratification, acceptance, approval or accession. In: AMBOS, Kai, ed. *Rome Statute of the International Criminal Court: article-by-article commentary*. München, Germany: Oxford, United Kingdom; New York, NY, USA: Baden-Baden, Germany: Beck; Hart; Nomos, 2022, p. 2915.
[166] Rome Statute, Article 125(3).

2.3.2. *Ad hoc* declarations under Article 12(3) of the Statute

Becoming a State Party is not the only avenue for a State to accept the Court's jurisdiction. Article 12(3) of the Rome Statute provides an option for a State to accept the jurisdiction of the Court on an *ad hoc* basis.[167] It enables a State that is not a Party to the Statute to "consent to the Court's exercise on an *ad hoc* basis and subject to the same conditions provided for in Article 12(2) concerning such crimes arising from a particular situation."[168] The difference between becoming a State Party and an *ad hoc* declaration lies in the status of the delegating State. When a State accepts the Court's jurisdiction by lodging an *ad hoc* declaration, it does not "have all the rights or obligations of a State Party."[169]

Complemented by Article 11(2) of the Statute, the declarations serve two purposes: *first*, to provide a "State which is not a Party to [the] Statute"[170] with the option to accept the Court's jurisdiction in a limited way and *second*, to allow a State that is a Party to the Statute to extend the Court's temporal jurisdiction over a period prior to that State's accession to the Statute.[171] Article 12(3) of the Statute provides that "If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question [...]." From the text of the provision, it follows that three formal requirements must be fulfilled for a State to validly accept the Court's jurisdiction on an *ad hoc* basis. *First*, the text of the declaration itself accepting the Court's jurisdiction. *Second*, the declaration must be lodged with the Registrar. *Third*, by a person competent to represent the accepting State.

There are other interesting questions connected to the acceptance of jurisdiction which deserve a mention, but their exhaustive assessment is outside of the scope of this thesis. For example, who reviews the act of acceptance of jurisdiction? The PTC I in *Palestine* stated that it "cannot review the outcome of the accession procedure" and that it should rather be the Assembly of State Parties under Article 119(2) of the Statute who can challenge it. Under Article 125(3) of the Statute, the instrument of accession is deposited with the UN Secretary-General.[172] However, in the case of *ad hoc* declarations, Article 12(3) of the Statute provides that a State must lodge a

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[167] ŠTURMA, Pavel. *Mezinárodní trestní soud a stíhání zločinů podle mezinárodního práva*. Praha: Nakladatelství Karolinum, 2002, p. 143.
[168] ZEIDY, Mohamed M. El. *Ad Hoc Declarations of Acceptance of Jurisdiction: The Palestinian Situation under Scrutiny*, p. 180.
[169] Gbagbo Appeal Judgment, para. 74.
[170] Rome Statute, Article 12(3).
[171] Ibid., Article 11(2).
[172] Ibid., Article 125(3).

declaration with the Registrar. However, the Statute is unclear both as to the procedure following the receipt of an *ad hoc* declaration and who should carry it out.[173]

In *Gbagbo*, the question before the Appeals Chamber was whether the 2003 Declaration lodged by Cote d'Ivoire was prospective, in addition to being retrospective. At the beginning of its reasoning, the Chamber states the "general validity of the [...] Declaration is not disputed."[174] This would suggest that the reasoning of the PTC I in the *Palestine* decision regarding the lack of ability to review the accession is consistent with the decision of the Appeals Chamber. The Appeals Chamber is not reviewing the validity of the declaration itself but rather ruling on a question of law interpreting Article 12(3) of the Statute. Nevertheless, the AP then continues with the assessment of whether the 2003 Declaration of Cote d'Ivoire implicitly limits the jurisdiction to temporally delineated crimes.[175] This assessment would suggest that it is the Court who can review the *ad hoc* declarations.

But take the case of the *ad hoc* declaration lodged on behalf of Egypt in 2013 as an example.[176] What is important from that declaration is that it was the Registrar who dismissed it.[177] Puzzlingly enough, the Prosecutor later asserted that the dismissal was their conclusion, not the Registrar's.[178] Therefore, while the issue of formal requirements necessary for the acceptance of the Court's jurisdiction is relatively straightforward, the issue of review of acceptance of jurisdiction is rather inconclusive.

To conclude this section, the Statute provides for two ways for a State to accept the Court's jurisdiction: by becoming a State Party or by lodging an *ad hoc* declaration under Article 12(3) of the Statute. This section introduced the formal conditions that an acceptance of the Court's jurisdiction must fulfil. This will serve as a basis for the following sections, where I will analyse at what point in time these conditions must be fulfilled.

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[173] JAMES, Chan. Judicial Oversight over Article 12(3) of the ICC Statute. *FICHL Policy Brief Series* [online]. 2013, no. 11, p. 1. Available at: https://www.toaep.org/pbs-pdf/11-chan

[174] Gbagbo Appeal Judgment, para. 75.

[175] Ibid., paras. 77-90.

[176] The determination of the Office of the Prosecutor on the communication received in relation to Egypt. In: *International Criminal Court* [online]. 8. 5. 2014 [accessed 05.11.2023]. Available at: https://www.icc-cpi.int/news/determination-office-prosecutor-communication-received-relation-egypt

[177] Communication seeking to accept the ICC's jurisdiction over Egypt is dismissed | International Criminal Court. In: *International Criminal Court* [online]. 1. 5. 2014 [accessed 01.12.2023]. Available at: https://www.icc-cpi.int/news/communication-seeking-accept-iccs-jurisdiction-over-egypt-dismissed

[178] *The determination of the Office of the Prosecutor on the communication received in relation to Egypt*.

2.4. The relevant date for assessing the acceptance of jurisdiction

The previous sections introduced the statutory scheme for accepting the Court's jurisdiction and its possible use and limitations. However, when addressing a State's ability to accept the Court's jurisdiction, a wholly different question arises. The question now is to what point in time should the acceptance of the Court's jurisdiction be assessed, *i.e.* what is the relevant point in time for such an assessment? This issue is what I introduced as the concept of relevant date.

As noted in the introductory section 1.2, the research question in this thesis deals with jurisdictional changes and the flow of time. This means that depending on whether the Court would address the acceptance of jurisdiction by a State at the time of acceptance of jurisdiction, or at the time the Court's jurisdiction is triggered,[179] this would lead to different results.[180] As a result, in some cases, the State would have validly accepted the Court's jurisdiction. In others, it would not. The flow of time is important to the assessment of jurisdiction. The Court applies, in the first place, the Statute as a source of law under Article 21(1)(a) of the Statute.[181] But the question is to *what point in time* should it apply the Statute's jurisdictional provisions.

Looking at the practice of other international criminal bodies, their practice is unhelpful, as the relevant time for acceptance of jurisdiction has never been the leading issue before them. The International Criminal Tribunal for the former Yugoslavia[182] and the International Criminal Tribunal for Rwanda[183] are based on UN Security Council resolutions; therefore, the issue of the relevant date did not come up. As for the others that have their foundations in an international treaty, these were either concluded between a State and the UN (*i.e.* Special Court for Sierra Leone,[184] Extraordinary Chambers in the Courts of Cambodia,[185] Special Tribunal for Lebanon[186])

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[179] Or at a different point entirely.
[180] But see the question of who reviews the acceptance of jurisdiction in section 2.3.2.
[181] DE SOUZA DIAS, Talita. *The Nature of the Rome Statute and the Place of International Law before the International Criminal Court*, p. 71.
[182] UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia* (as amended on 17 May 2002), 25 May 1993.
[183] UN Security Council, *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006)*, 8 November 1994.
[184] UN, *Statute of the Special Court for Sierra Leone*, 16 January 2002.
[185] UN, *Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic kampuchea*, 6 June 2003.
[186] UN Security Council, *Security Council resolution 1757 (2007) [on the establishment of a Special Tribunal for Lebanon] Annex*, S/RES/1757 (2007), 30 May 2007.

or between a State and the EU (*i.e.* the Kosovo Specialist Chambers[187]) – in neither of these situations has the relevant date come into the spotlight.

The practice of the ICJ might provide a helpful starting point. In its case law, the ICJ "usually starts by [...] recalling that the jurisdiction of the Court must normally be assessed on the date of the filing of the act instituting proceedings."[188] However, as I will address in section 2.4.2, the ICJ has been rather flexible in choosing its relevant date, choosing different dates on different occasions.[189]

A plain reading of Article 12(2)(a) and 12(3) of the Statute provides that the accepting entity must be a State at the moment it either becomes a State Party or when it makes the *ad hoc* declaration.[190] I suggest that the only possibility is to assess the validity of acceptance of jurisdiction at the time a State accept the Court's jurisdiction.

As noted above, the ability to accept the Court's jurisdiction is exercised through a particular State's *ability* to adhere to international treaties, regardless of who reviews its validity.[191] The issue can be illustrated well on the example of a situation where a State is seeking to accept the Court's jurisdiction over crimes that occurred on what is now its territory but was not at the time of commission. This is the issue of retrospective *ad hoc* declarations under Article 12(3) of the Statute, which I will address in the following section.

2.4.1. The relevant date in the context of retrospective *ad hoc* declarations

The issue of the relevant point in time for assessing the acceptance of the Court's jurisdiction – the relevant date – can be illustrated on *ad hoc* declarations under Article 12(3) of the Statute, particularly if these declarations refer to the past. The Court's practice appears to be settled on allowing retrospective *ad hoc* declarations,[192] but how far into the past can such declarations reach?

I concluded in the previous sections that the assessment at the stage of acceptance is limited to whether the delegating entity is a State. Then, if the validity of accepting the Court's jurisdiction

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[187] European Union and Kosovo, *Agreement on the Establishment of the Specialist Chambers and the Specialist Prosecutor's Office*, 14 August 2015.
[188] PALESTINI, Lorenzo. The Relevant Time for Assessing Jurisdiction and the Ratione Temporis Objection in the Genocide (Croatia v. Serbia) Case. In: VAN DER PLOEG, Klara Polackova, Luca PASQUET and León CASTELLANOS-JANKIEWICZ, eds. *International Law and Time: Narratives and Techniques* [online]. 101. Cham: Springer International Publishing, 2022, p. 241 [accessed 04.05.2023]. Available at: https://link.springer.com/10.1007/978-3-031-09465-1
[189] Ibid., pp. 248–251.
[190] WILLS, A. *Old Crimes, New States and the Temporal Jurisdiction of the International Criminal Court*, p. 430.
[191] See chapter 2.3.2.
[192] SCHABAS, William and Giulia PECORELLA. *Article 12 Preconditions to the exercise of jurisdiction*, p. 829.

should be assessed to the moment of acceptance, newly formed States could conceivably accept the Court's jurisdiction with respect to crimes that occurred on what is *now* their territory but was not so at the time of commission.

What if a State lodges an *ad hoc* declaration with respect to conduct that took place *before* that State even came into existence but on what is *now* its territory? Moreover, what if the new State formed through seceding from another and the former territory sovereign still exists – who can accept the Court's jurisdiction? The question that I will attempt to answer in this section is whether a State's *ad hoc* declaration can reference a time period preceding that State's existence, which illustrates the importance of the relevant date for the acceptance of jurisdiction.

The question is pertinent to the relevant date since whether a State can lodge a declaration covering a period when it was not yet a State depends on the date of the assessment; if the relevant date is at the moment of commission of the alleged commission, such a new State could not accept the Court's jurisdiction with respect to those crimes, since that State did not yet exist.

And this is not an entirely theoretical scenario. In January 2009, the Palestinian Minister of Justice lodged an *ad hoc* declaration with the Registrar, accepting the jurisdiction of the Court pursuant to Article 12(3) of the Statute,[193] probably in response to Israel's military operation carried out in Gaza in 2008.[194] The declaration was rejected by the Prosecutor because Palestine was not a State for the purposes of the Statute.[195]

In the recent Palestine 19(3) Decision, the PTC I concluded that Palestine was, at the time of the decision, a State for the purposes of the Statute.[196] If we were to take the PTC I's recent ruling in the situation in *Palestine* at face value, can it be conceivably argued that Palestine could lodge the same *ad hoc* declaration *now*, even if the very same declaration was rejected in 2009?[197] Could the declaration lodged now precede Palestine's admission into the UN as a non-member observer State on 29 November 2012?[198]

Although the issue may seem more territorial than temporal, this is not the case. The question is not where the crimes were committed but rather the relevant date for acceptance of jurisdiction – to what point in time to assess where the alleged crimes occurred.

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[193] ICC, Office of the Prosecutor, *Position paper regarding the situation in Palestine*, 3 April 2012, para. 1.
[194] ZEIDY, Mohamed M. El. *Ad Hoc Declarations of Acceptance of Jurisdiction: The Palestinian Situation under Scrutiny*, p. 179.
[195] ICC, Office of the Prosecutor, *Position paper regarding the situation in Palestine*, 3 April 2012, para. 5-7.
[196] Palestine 19(3) Decision, para. 112.
[197] SCHABAS, William and Giulia PECORELLA. *Article 12 Preconditions to the exercise of jurisdiction*, p. 830.
[198] UN General Assembly, *Resolution 67/19: Status of Palestine in the United Nations*. In: *Resolutions and Decisions adopted by the General Assembly during its 67th session, Volume III*, 4 December 2012. A/RES/67/19.

According to the former Prosecutor, the answer would be a simple no, because "she did not think that any retroactivity could extend back to [before Palestine attained the status of a non-member observer State in the UN]."[199] This means that the relevant date for *ad hoc* declarations would be when the conduct in question takes place since if the assessment was carried out after Palestine's admission to the UN, Palestine would not have any problems accepting the Court's jurisdiction.

Zimmerman agrees with the Prosecutor, arguing that "the [alleged] crimes must have been committed on the territory of the [S]tate making the declaration or by nationals of that very state."[200] He argues that if that were not the case, Article 12(2) would become an empty provision since "any subsequent change in title to a given territory [...] would immediately ex post facto provide for the [Court's] jurisdiction."[201] He refers to this situation as double retroactivity, arguing that it undermines the very jurisdictional foundation of the Court.[202]

According to Zimmerman, the Court is not a court of universal jurisdiction, and the drafters intended the Court's jurisdiction to be strictly limited to the provisions of the Statute.[203] He illustrates his point on secession, arguing that if the seceding State could accept the Court's jurisdiction with respect to crimes over which the former State has jurisdiction, this would infringe the original State's sovereignty.[204] Additionally, he puts forward that if the double retroactivity (referring to the possibility of *ad hoc* declarations preceding the Statehood of the State lodging the declaration) was allowed, the Court would be forced to "render internally inconsistent and self-contradictory decisions."[205]

He argues that, on the one hand, Palestine would be a State for the purposes of Article 12 of the Statute only from 29 November 2012 onwards, since only after attaining the non-member observer status in the UN was it able to become a State Party to the Statute.[206] But on the other hand, if Palestine was able to retrospectively accept the Court's jurisdiction, it would also be "when it comes to the effects *ratio temporis* of that very same declaration, a [S]tate well before that date [...]"[207] because it would now be allowed to accept the Court's jurisdiction over the exact same

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[199] WHITBECK, John V. Palestine and the ICC. In: *Al Jazeera* [online]. 16. 4. 2013 [accessed 09.03.2024]. Available at: https://www.aljazeera.com/opinions/2013/4/16/palestine-and-the-icc
[200] ZIMMERMANN, A. *Palestine and the International Criminal Court Quo Vadis?*, p. 318.
[201] Ibid.
[202] Ibid., p. 319.
[203] Ibid.
[204] Ibid., p. 320.
[205] Ibid.
[206] Ibid.
[207] Ibid.

crimes occurring on exactly the same territory. This would create a paradoxical situation where Palestine would be regarded as a State (for the purposes of the Statute) before becoming one.

Contrary to Zimmerman, Wills argues that the double retroactivity was indeed permitted under the Statute. He argues that the Statute does not require "the accepting entity to have been a [S]tate at the time a crime was committed."[208] According to Wills, all that is required is that the conditions under Article 12(2) of the Statute are met, either that the conduct in question occurred on that State's territory or that it was committed by its national.[209] In support, he raises two arguments. *First*, he argues this approach does not infringe on the sovereignty of the previous territory sovereign since concurrent jurisdiction is allowed, building upon the PCIJ's decision in the *Lotus* case.[210] Building on this, he argues that concurrent jurisdiction is widely recognised and unproblematic within the context of the Court.[211] *Second*, he argues that this would better serve the Court's object and purpose of ending impunity.[212] As an example, he gives the issue of the dissolution of the Soviet Union, with the Russian Federation as the successor State – he argues that if double retroactivity was not permitted, in order to prosecute former crimes of people that are now Lithuanians and the crimes happened on Lithuanian territory, Russia's consent would be needed, or no State would be able to accept the Court's jurisdiction at all.[213]

I agree with Wills, although not with some of the arguments. The problematic aspect of both Zimmerman's and Will's arguments is that they conflate the *acceptance* and the *exercise* of the Court's jurisdiction.[214] The only Zimmerman's unaddressed argument is the inner inconsistency that would result in the practice of the Court if double retroactivity was allowed. In my view, these concerns are not applicable here; acceptance of jurisdiction should be able to precede Statehood (even in its meaning for the purposes of the Statute). Territorial jurisdiction is the manifestation of State sovereignty,[215] it is exercised by the current sovereign. In this regard, I disagree with Zimmerman; if the relevant date for the acceptance of jurisdiction was at the time of delegation, the new State would be seen as a State well before it came into existence from the point

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[208] WILLS, A. *Old Crimes, New States and the Temporal Jurisdiction of the International Criminal Court*, p. 429.
[209] Ibid., p. 430.
[210] Permanent Court of International Justice, *Lotus*, PCIJ Series A. No 10, Judgment, 7 September 1927 in
[211] Ibid.
[212] Ibid., p. 433.
[213] Ibid., pp. 431–2.
[214] See ZIMMERMANN, A. Palestine and the International Criminal Court Quo Vadis?, p. 318: "The legal effect of such [a] declaration is that the Court would then *be in a position to exercise* its jurisdiction with regard to crimes taking place in the territory of that state, or being committed by its nationals."; WILLS, A. Old Crimes, New States and the Temporal Jurisdiction of the International Criminal Court, p. 432: "[...] the Court can *exercise* its jurisdiction retroactively pursuant to an Article 12(3) declaration."
[215] SCHABAS, William and Giulia PECORELLA. *Article 12 Preconditions to the exercise of jurisdiction*, p. 817.

of *ratione temporis*.[216] Zimmerman's argument is essentially that since that State did not exist at the time it is referencing, it cannot accept the Court's jurisdiction in regard to that time frame.[217]

However, the question is not whether the entity is seen as a State at different points in time but rather *who* is accepting the Court's jurisdiction. Then, when the organs of the Court would reject an *ad hoc* declaration by a not-yet State entity for lack of ability to delegate at one point in time and accept it when that entity has become a State, this would not lead to any inconsistencies.

To conclude, I argue that in cases of new States coming into existence, those new States can accept the Court's jurisdiction retrospectively, even for crimes preceding their own Statehood. This is relevant to the issue of relevant date since it supports the argument that the relevant date for acceptance of jurisdiction is at the time of acceptance.

2.4.2. Can you remedy a lack of jurisdiction on the relevant date?

Another question in the context of the relevant date for the acceptance of jurisdiction is whether a lack of jurisdiction can be remedied later on. What if, by some mistake, the acceptance of the Court's jurisdiction was invalid, but the proceedings went on? Going back to the example of Palestine, what if Palestine was not really a State for the purposes of the Statute at the moment it became a State Party or lodged the *ad hoc* declaration but later *became* one – can the lack of ability to accept the Court's jurisdiction at the moment of acceptance of jurisdiction be later remedied?

Looking at other international judicial bodies, ICJ jurisprudence suggests that a lack of jurisdiction can be remedied later on during proceedings.[218] For example, in the *Bosnian Genocide* case, the ICJ held that "[...] it is of no importance which condition was unmet at the date the proceedings were instituted, and thereby prevented the Court at that time from exercising its jurisdiction, once it has been fulfilled subsequently."[219] The significant difference, however, is that all cases before the ICJ concern disputes between States, not matters of individual criminal responsibility. In the *Bosnian Genocide* case, the ICJ based the above conclusion on the fact that "[i]t would not be in the interests of justice to oblige the Applicant [...] to initiate fresh proceedings."[220] In that case, Serbia asserted a lack of jurisdiction by the Court since Croatia, the

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[216] ZIMMERMANN, A. *Palestine and the International Criminal Court Quo Vadis?*, p. 320.
[217] Ibid.
[218] VAN DER PLOEG, Klara Polackova, Luca PASQUET and León CASTELLANOS-JANKIEWICZ, eds. *International Law and Time Narratives and Techniques* [online]. Cham: Springer International Publishing, 2022, p. 242 [accessed 04.05.2023]. Available at: https://link.springer.com/10.1007/978-3-031-09465-1
[219] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), *Preliminary Objections, Judgment*, I.C.J. Reports 1996, p. 595 ("**Bosnian Genocide case**"), para. 87.
[220] Bosnian Genocide case, para. 87.

applicant, had not yet had access to the ICJ at the time the proceedings were instituted.[221] I find it difficult to transplant these arguments into the realm of international criminal law – there is no dispute between two sovereign entities, and there is no applicant nor respondent. Nevertheless, I agree with the reasoning proposed by the ICJ; it would not make sense to restart the proceedings (regardless of its stage) for something that has been remedied.

The ICC's recent practice would suggest that a lack of jurisdiction can, in fact, be remedied later. In the situation in the *Philippines*, the Appeals Chamber held as an *obiter dictum* that a lack of jurisdiction in the past can be remedied later.[222] In this situation, the Philippines withdrew from the Statute effective 17 March 2019.[223] The OTP sought the PTC I's authorisation to open an investigation on 24 May 2021, more than two years later.[224] The alleged crimes were committed while the Philippines remained a Party to the Statute.[225] The question before the Court was whether the Court could exercise jurisdiction over the alleged crimes since the Philippines was no longer a State Party to the Statute. In deciding on the effects of the Philippines' withdrawal from the Statute, the AP held that even though the Court might or might not have lost jurisdiction over the Philippines, this does not matter since the Philippines made submissions in the proceedings, accepting the Court's jurisdiction implicitly.[226] The AP did not provide any further reasoning. While the AP came to the conclusion in the context of States withdrawing from the Statute and not solely focused on the relevant date, I find it relevant to mention here since it relates to the same problem – whether a lack of acceptance of jurisdiction on the relevant date can be remedied later.

I disagree with this approach of implicit acceptance as proposed by the AP. There is absolutely no basis in the Statute for implicitly accepting the Court's jurisdiction.[227] The argument for implicit acceptance of the Court's jurisdiction might have merit (perhaps in relation to procedural economy, where it would not make sense to restart the triggering procedure a subsequent proceedings just as a formality) but not in cases where the State concerned is actively making submissions that the Court cannot exercise its jurisdiction, such as in the *Philippines* situation; the AP states that "by requesting deferral and by making submissions in the context of

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[221] Bosnian Genocide case, paras. 83-85.
[222] Philippines Appeal Judgment, para. 56.
[223] ICC, Office of the Prosecutor, Situation in the Republic of the Philippines, *Public redacted version of "Request for authorisation of an investigation pursuant to article 15(3)*", ICC-01/21-7-Red, 14 June 2021 ("**Philippines 15(3) Request**").
[224] Ibid., p. 1.
[225] Ibid., para. 80.
[226] Philippines Appeal Judgment, para. 56.
[227] See section 2.3.

[A]rticle 18 proceedings, the Philippines implicitly accepted the Court's jurisdiction."[228] However, in the context of Article 18 proceedings, the Philippines argued that the "Court has no jurisdiction over the situation in the *Philippines*".[229] Moreover, the Philippines appealed the Article 18(2) decision.[230] The Philippines were actively fighting the Court's exercise of jurisdiction.

I therefore disagree with the AP's reasoning that the Philippines accepted the Court's jurisdiction by making submissions on how the Court *lacked* jurisdiction and the capacity to exercise it. If one were to accept the AP's conclusion, then any State submissions challenging the Court's jurisdiction would be seen as accepting the Court's jurisdiction. Coupled with the fact that there is no basis for the implicit acceptance of jurisdiction in the Statute and the AP's scant reasoning, I do not agree that the Court's jurisdiction can be accepted implicitly by making submissions actively disputing the court's jurisdiction.

To conclude this section, I think that it would make sense to allow remedies for a possible lack of valid acceptance of jurisdiction, as was the case before the ICJ, but the approach of the Appeals Chamber in the *Philippines* is an entirely wrong way to go about it. Therefore, a lack of acceptance of jurisdiction on the relevant date can be remedied later on in the proceedings.

2.5. Conclusion on acceptance of jurisdiction

This chapter sought to introduce the Court's jurisdictional basis as a starting point for analysing the relevant date for the acceptance of the Court's jurisdiction. In this chapter, I came to the conclusion that the theory of delegation is an acceptable answer for explaining the Court's jurisdiction. The test for the acceptance of the Court's jurisdiction is composed of two parts: first, the ability to delegate (the material element) and second, an act of delegation (the formal element). *First*, The ability to delegate is reflected in a State's jurisdiction to prescribe; however, at the point of acceptance, only general prescriptive ability is required. This ability might be limited by that State but without effect on its ability to delegate jurisdiction to the Court. The State might find itself in a conflict of obligations, but that is not a problem for the Court to solve. The relevant test at the stage of acceptance is whether the delegating entity constitutes a State for the purposes of the Statute. *Second*, the act of delegation encompasses formal requirements that the act of delegation must fulfil.

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[228] Philippines Appeal Judgment, para. 56.
[229] ICC, The Republic of the Philippines, Situation in the Republic of the Philippines, *Philippine Government's Observation on the Office of the Prosecutor's Request*, ICC-01/21-51, 8 September 2022, p. 8.
[230] ICC, The Republic of the Philippines, Situation in the Republic of the Philippines, *Philippine Government's Appeal Brief against "Authorisation pursuant to article 18(2) of the Statute to resume the investigation"*, ICC-01/21-65, 13 March 2023 ("**Philippines Appeal Brief**"), paras. 36-62.

Finally, I argued that the relevant date for assessing the acceptance of the Court's jurisdiction is at the time of delegation and that a lack of valid acceptance can be remedied later, although not in the way the Court has most recently put forward. I analysed the relevant date for the acceptance of jurisdiction, particularly in relation to *ad hoc* declarations under Article 12(3) of the Statute and concluded that the relevant date for the acceptance of jurisdiction is at the time of acceptance. To conclude this chapter, my answer to the first part of the research question is that a State that is not a party to the Statute can retrospectively accept the jurisdiction of the Court for crimes committed in what is *now* its territory.

3. Exercise of jurisdiction

This chapter deals with the second part of the research question in this thesis – whether the Court can exercise jurisdiction over crimes that occurred on what is *now* the territory of a State that has accepted the Court's jurisdiction (but which was not its territory at the time of the commission of those crimes).

The exercise of the Court's jurisdiction is governed primarily by Articles 12 and 13 of the Statute. Article 12 of the Statute deals with preconditions to the exercise of the Court's jurisdiction, *i.e.* conditions that must be met for the Court to be able to exercise its jurisdiction.[231] Article 13 of the Statute deals with jurisdictional triggers, situations that wake up the Court's jurisdiction that would otherwise remain dormant.[232] The object of analysis in this chapter will be the relevant date for assessing the preconditions to the exercise of jurisdiction since, without them, there would be no possibility of triggering the Court's jurisdiction.[233] Again, as with the acceptance of jurisdiction, the Statute does not provide the relevant date.

Therefore, the aim of this chapter is to briefly introduce the Court's jurisdictional regime applicable to the exercise of jurisdiction. Additionally, it seeks to ascertain the relevant date for assessing the preconditions to the Court's exercise of jurisdiction, with a focus on the territorial precondition in Article 12(2)(a) of the Statute since the research question deals with territoriality.

This chapter is structured as follows. In sections 3.1 and 3.2, I explain the Statute's jurisdictional framework related to the exercise of jurisdiction, starting with the jurisdictional triggers under Article 13 of the Statute and proceeding to the preconditions that must be met for the Court's jurisdiction to be able to exercise its jurisdiction found in Article 12 of the Statute. Finally, in section 3.3, I discuss the relevant date for the exercise of jurisdiction by the Court.

3.1. Jurisdictional triggers under Article 13 of the Statute

In order for the Court to exercise its jurisdiction, that jurisdiction must be triggered. Article 13 of the Statute provides for three different ways to trigger the Court's jurisdiction: first, a referral by a State that is a Party to the Statute, second, an investigation initiated *proprio motu* by the Prosecutor, and third, a referral by the UN Security Council. Again, there are its own issues connected to this provision,[234] however, for the purposes of the present analysis, the only relevant

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[231] SCHABAS, William A., ed. Jurisdiction. In: SCHABAS, William A., ed. *An Introduction to the International Criminal Court*. Cambridge: Cambridge University Press, 2020, p. 51. DOI: 10.1017/9781108616157.004
[232] OLÁSOLO, Héctor. *The Triggering Procedure of the International Criminal Court*, p. 39.
[233] Save for a UN Security Council referral, see Rome Statute, Article 12.
[234] See OLÁSOLO, Héctor. *The Triggering Procedure of the International Criminal Court*.

consideration is that in the case of UN Security Council referrals, it is not necessary to examine the preconditions to the exercise of jurisdiction, as is stated in Article 12(2) of the Statute.[235]

3.2. Preconditions to the exercise of jurisdiction under Article 12(2) of the Statute

The Court's jurisdiction may only be triggered if the preconditions to the exercise of jurisdiction found in Article 12(2) of the Statute are met. Article 12(2) of the Statute, being called one of the "cornerstone provisions of the Statute," [236] provides that the Court can exercise its jurisdiction if one of the following alternative conditions is met: either the State of nationality of the accused or the territorial State where the conduct occurred is a Party to the Statute or has accepted the Court's jurisdiction by lodging an *ad hoc* declaration.[237]

Although Article 12 refers to jurisdiction in reference to Article 5 of the Statute, *i.e.* the subject matter jurisdiction, it reflects a State's delegation on the basis of territoriality and active personality principles.[238] Article 12 of the Statute represents perhaps one of the most controversial provisions finalised behind closed doors and adopted "five minutes past midnight".[239]

Therefore, the Court can only exercise its jurisdiction if its jurisdiction was triggered in accordance with Article 13 of the Statute and, at the same time, one of the alternative preconditions found in Article 12(2) of the Statute is fulfilled. These sections set the stage for the following analysis of to what point in time should the preconditions to the exercise of jurisdiction be assessed – the relevant date.

3.3. The relevant date for assessing the preconditions to the exercise of jurisdiction

The previous sections introduced the relevant framework for the Court's exercise of jurisdiction. The question now is at what point in time should the preconditions to the exercise of jurisdiction under Article 12(2) of the Statute be assessed – the relevant date.[240] The research question in this thesis relates to the territorial precondition to the exercise of jurisdiction found in Article 12(2)(a) of the Statute. As the issue is still relatively new, there is a paucity of academic

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[235] Rome Statute, Article 12.
[236] KLAMBERG, Mark, ed. *Commentary on the Law of the International Criminal Court*. Brussels: Torkel Opsahl Academic EPublisher, 2017, p. 169.
[237] ZEIDY, Mohamed M. El. *Ad Hoc Declarations of Acceptance of Jurisdiction: The Palestinian Situation under Scrutiny*, p. 180.
[238] SCHABAS, William. *The International Criminal Court*, p. 283.
[239] NEWTON, Michael A. *How the International Criminal Court Threatens Treaty Norms*, p. 385.
[240] See section 1.2.

discussion on the topic,[241] although there is some literature related to the relevant date related to the precondition based on the personality principle found in Article 12(2)(b) of the Statute. This literature will be analysed in the discussion section 3.3.4.

This chapter is structured as follows. In section 3.3.1, I describe arguably the Court's first encounter with the relevant date for the exercise of jurisdiction in the situation in *Bangladesh/Myanmar*, specifically the *Bangladesh 19(3) Decision.* I analyse the PTC I's ruling and conclude that although the decision is inconclusive regarding the relevant date, it shows that the relevant date for the jurisdictional preconditions is sometime prior to or at the time the Court decides on jurisdiction, arguably showing a preference for setting the relevant date at an earlier time. In section 3.3.2, I analyse the continuation of the Court's case law in the situations in the *Philippines* and *Burundi*, where the relevant date played a pertinent role, although the spotlight was on State withdrawal from the Statute and its effects.[242] I conclude that according to the PTCs, the relevant date for the exercise of jurisdiction relates to a point in time preceding a jurisdictional trigger, which would be in line with its previous findings. In section 3.3.3, I analyse the recent procedural developments in the *Philippines* situation, particularly the *Philippines Appeal Judgment* and the *Philippines Appeal Dissent* attached to it.

Finally, in section 3.3.4, I discuss the Court's developments in case law related to the relevant date for the exercise of jurisdiction. I address the arguments raised by the PTCs in the *Bangladesh* and *Burundi* situations and the arguments raised in the proceedings related to the *Philippines* situation, including the submission of the Philippines, the Prosecutor and the Public Counsel for Victims. I analyse Article 12(2)(a) of the Statute according to the Court's "authentic guide to the interpretation of the Statute"[243] and conclude that the relevant date for the exercise of jurisdiction should be at the point of the jurisdictional trigger found in Article 13 of the Statute.

3.3.1. The first steps – the situation in *Bangladesh/Myanmar*

The first opportunity that the Court had to address its relevant date for the exercise of jurisdiction arose in the *Bangladesh/Myanmar* situation. On 9 April 2018, the Prosecutor filed a

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[241] The Philippines Appeal Judgment was delivered on 18 July 2023.
[242] ICC, Pre-Trial Chamber III, Situation in Burundi, *Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi"*, ICC-01/17-9-Red, 9 November 2017 ("**Burundi 15 Decision**"), paras. 22-26.; ICC, Pre-Trial Chamber, Situation in the Philippines, *Decision on the Prosecutor's request for authorisation of an investigation pursuant to Article 15(3) of the Statute*, ICC-01/21-12, 15 September 2021 ("**Philippines 15(3) Decision**"), paras. 109-111.
[243] ICC, Appeals Chamber, Situation Prosecutor v. Lubanga Dyilo, *Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la confirmation des charges" of 29 January 2007*, ICC-01/04-01/06-926, 13 June 2007, para. 8.

request seeking a ruling by the PTC on jurisdiction under Article 19(3) of the Statute, asking the Court whether it enjoyed territorial jurisdiction over the deportation of Rohingya from Myanmar to Bangladesh.[244] This was the first ever[245] request by the Prosecutor under Article 19(3) of the Statute.[246]

The request by the Prosecutor came before "even a preliminary examination of a situation has been initiated."[247] For context, an investigation is the first procedural step in triggering the Court's jurisdiction as noted under Articles 13, 15 and 53(1) of the Statute – the request preceded even that. Vagias criticised the Prosecutor's request, arguing that the critical moment (not to be mixed with the relevant date to which the jurisdictional conditions must be assessed) when the Court should satisfy itself that it has jurisdiction is connected to the trigger mechanisms found in Article 13 of the Statute – in the case of *Bangladesh/Myanmar*, this would be "the [PTC's] assessment of the Prosecutor's request to open an investigation under Article 15 [of the Statute]."[248] Vagias argued that it would make little sense to allow the Prosecutor to seek a ruling on jurisdiction prior to "an Article 15 [of the Statute] procedure designed to resolve precisely the same issues."[249] In the decisions itself, judge De Brichambaut added in his dissenting opinion that allowing this request would "hazard an inconsistent result with subsequent determinations at a later (and more appropriate) phase of proceedings."[250] He argues that Article 19(1) of the Statute provides that "[t]he Court shall satisfy itself that it has jurisdiction in any *case* brought before it."[251] Therefore, he does not see the time before even a preliminary examination by the Prosecutor as appropriate for a ruling on jurisdiction.[252]

Therefore, the timing of the request should have arguably been one of the central issues in the ruling since the request preceded any formal procedural steps connected to triggering the

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[244] ICC, Office of the Prosecutor, Situation in Bangladesh/Myanmar, *Prosecution's Request for a Ruling on Jurisdiction*, ICC-RoC46(3)-01/18-1, 9 April 2018 ("**Bangladesh 19(3) Request**"), para. 4.
[245] Two years later, a second request under Article 19(3) of the Statute followed in the situation in *Palestine*. However, that situation is not as helpful as the request in *Palestine* already came after the jurisdictional trigger under Article 13 of the Statute, so it will not be addressed here - see Palestine 19(3) Request, para. 1.
[246] Ibid., para. 55.
[247] ICC, Pre-Trial Chamber I, Situation in Bangladesh/Myanmar, *Partially Dissenting Opinion of Judge Marc Perrin de Brichambaut*, ICC-RoC46(3)-01/18-37-Anx, 6 September 2018 ("**Bangladesh Dissent**"), para. 1.
[248] VAGIAS, Michail. The Prosecutor's Request Concerning the Rohingya Deportation to Bangladesh: Certain Procedural Questions. *Leiden Journal of International Law*. 2018, vol. 31, no. 4, p. 993. DOI: 10.1017/S0922156518000481
[249] Ibid., p. 994.
[250] Bangladesh Dissent, para. 32.
[251] Rome Statute, Article 19(1).
[252] Bangladesh Dissent, para. 32.

Court's jurisdiction, a "pre-preliminary examination", as the PTC I referred to it.[253] The PTC I concluded that the Court had jurisdiction over the alleged crimes of deportation of Rohingya from Myanmar to Bangladesh,[254] although relying on Article 119(1) of the Statute rather than Article 19(3).[255]

Although the Chamber side-stepped the issue of applicability of Article 19(3) of the Statute,[256] the decision still sheds some light on the issue of the relevant date. Again, for context, neither the timing of the request nor the decision that followed addresses the relevant date *per se* – it is the timing of the decision that has implications for the relevant date. Therefore, these issues are related, but they are not the same. With that in mind, let us proceed to the interpretation of the PTC I's decision.

According to the fact that the PTC I's decision came prior to the opening of an investigation,[257] the relevant date for assessing the Court's jurisdiction under its statutory scheme cannot be later than when the matter is *sub judice* (as the PTC I put it).[258] If the Chamber was able to rule on jurisdiction *prior* to the jurisdictional triggers found in Article 13, the relevant date must logically precede those triggers. If that were not the case, the Court would have nothing on which to base its decision. I do not think that this finding is undermined by the fact that the Chamber relied on Article 119(1) of the Statute rather than Article 19(3) since the jurisdictional assessment took place nevertheless. Article 19(3) allows the Prosecutor to "seek a ruling from the Court regarding a question of jurisdiction",[259] while Article 119(1) provides that a "dispute concerning the judicial functions of the Court shall be settled by the decision of the Court."[260] The Court concluded that "the preconditions for the exercise of the Court's jurisdiction [...] might be fulfilled [...]."[261] For our purposes, it is immaterial whether the avenue it took was by means of Article 19(3) or 119(1) of the Statute.

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[253] Bangladesh 19(3) Decision, para. 81.
[254] Ibid., p. 50.
[255] Ibid., para. 28.
[256] NTANDA NSEREKO, Daniel D. and Manuel J. VENTURA. Article 19 Challenges to the jurisdiction of the Court or the admissibility of a case. In: AMBOS, Kai, ed. *Rome Statute of the International Criminal Court: article-by-article commentary*. München, Germany: Oxford, United Kingdom; New York, NY, USA: Baden-Baden, Germany: Beck; Hart; Nomos, 2022, p. 1063.
[257] Bangladesh 19(3) Decision, para. 81.
[258] Ibid., para. 33.
[259] Rome Statute, Article 19(3).
[260] Ibid., Article 119(1).
[261] Bangladesh 19(3) Decision, para. 78.

Therefore, summarizing the discussion above, according to the PTC I (the deciding majority composed of judges Kovács and Alapini-Gansou), [262] the relevant date for the preconditions to the exercise of jurisdiction is sometime prior to or at the time the Court decides on jurisdiction. While this conclusion seems unhelpful at best, it shows a preference for earlier assessments of the ability to exercise jurisdiction and, by that token, a preference for an earlier relevant date for assessing the ability to exercise jurisdiction.

3.3.2. Before the jurisdictional trigger – the *Burundi* and *Philippines* approach

The second opportunity to address the relevant date for the exercise of jurisdiction presented itself in the *Burundi* and *Philippines* situations. Both illustrate the effects of States withdrawing from the Statute but with slightly different circumstances. Even though the spotlight is on the effects of State withdrawal from the Statute,[263] these situations are still helpful for addressing the relevant date for the exercise of jurisdiction.

I will proceed chronologically, starting with the situation in *Burundi* since the *Philippines* saga builds upon the *Burundi* situation.[264]

Starting with the situation in *Burundi*. On 27 October 2017, Burundi's withdrawal from the Statute would come into effect.[265] On 5 September 2017, not two months before that date, the Prosecutor requested the Court to authorise an investigation under Article 15 of the Statute. The PTC II authorised the Prosecutor's request on 25 October 2017.[266] Relying on Article 127 of the Statute, it concluded that the Court had jurisdiction. Article 127(1) of the Statute provides that a withdrawal takes "effect one year after the date of receipt of the notification" of withdrawal.[267] The PTC III concluded that "by ratifying the Statute, a State Party accepts [...] the jurisdiction of the Court [...] for a period starting at the moment of the entry into force of the Statute for that State and running up to at least one year after a possible withdrawal, in accordance with article 127(1) of the Statute."[268]

From this conclusion, the PTC III continued on the effects of withdrawal from the Statute on the Court's jurisdiction.[269] I find it appropriate to reproduce this finding in full:

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[262] Ibid., p. 1.
[263] Burundi 15 Decision, paras. 22-26.; Philippines 15(3) Decision, paras. 109-111.
[264] Philippines 15(3) Decision, para. 111.
[265] Burundi 15 Decision, para. 22.
[266] Ibid., p. 1.
[267] Rome Statute, Article 127(1).
[268] Burundi 15 Decision, para. 24.
[269] Ibid.

> "This acceptance of the *jurisdiction* of the Court remains unaffected by a withdrawal of the State Party from the Statute. Therefore, the Court retains jurisdiction over any crimes falling within its jurisdiction that may have been committed in Burundi or by nationals of Burundi up to and including 26 October 2017. As a consequence, the *exercise* of the Court's jurisdiction, *i.e.* the investigation and prosecution of crimes committed up to and including 26 October 2017, is, as such, not subject to any time limit."[270]

The conclusion of the PTC III is as follows. *First*, the Court retains *jurisdiction* as a result of a State being a State Party before withdrawing, relying on an ordinary reading of Article 127(1) of the Statute. *Second*, more importantly, since the *existence* of jurisdiction over the period referenced in the Prosecutors' request is undisputed,[271] the Court's jurisdiction can be triggered any time *after* the withdrawal becomes effective.[272] This conclusion tells us that according to the PTC III, the relevant date for assessing the exercise of jurisdiction must be some time prior to the Court's exercise of jurisdiction, prior to the jurisdictional triggers in Article 13 of the Statute. The conclusion is based on the PTC III's statement that "[t]he Court's *exercise* of [...] jurisdiction is not subject to any time limit".[273] If that is the case, the relevant date for the preconditions to the exercise of jurisdiction must be prior to the jurisdictional triggers.

Although this sentence was what the PTC III held in general, it was not the context of the *Burundi* situation since the Prosecutor requested the authorisation of the investigation *prior* to the effective date of Burundi's withdrawal, so this temporal conclusion did receive much attention.[274] Even the PTC's decision authorising the investigation was rendered prior to Burundi's withdrawal.[275] The PTC III dealt with the temporal argument rather swiftly in five paragraphs.[276] Still, the conclusion is an important stepping stone for the later situation in the *Philippines*. The decision has attracted some criticism,[277] but it will be addressed later in the discussion section

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[270] Ibid.
[271] Ibid.
[272] Ibid.
[273] Ibid.
[274] Ibid., paras. 22-26.
[275] Burundi 15 Decision, para. 22 and p. 1.
[276] Ibid.
[277] VASILIEV, Sergey. *Piecing the Withdrawal Puzzle: May the ICC still open an investigation in Burundi? (Part 2)* [online]. 2017 [accessed 01.11.2023]. Available at: http://opiniojuris.org/2017/11/06/piecing-the-withdrawal-puzzle-may-the-icc-still-open-an-investigation-in-burundi-part-1/

since some of the critics' arguments found their way into the dissenting opinion in the *Philippines Appeal Judgment*.[278]

Moving to the situation in the *Philippines*, the situation differed from the *Burundi* situation in one important aspect; at the time the Prosecutor sought to open an investigation, requesting authorisation from the PTC I, the Philippines were no longer a Party to the Statute, whereas Burundi's withdrawal came into effect only after the investigation was initiated.[279] The Philippines withdrew from the Statute effective 17 March 2019.[280] The Prosecutor sought the PTC I's authorisation to open an investigation on 24 May 2021, more than two years later.[281] The alleged crimes were committed while the Philippines were still a Party to the Statute.[282] Swiftly dealing with the issue, the PTC I followed the approach set by the PTC III in *Burundi*.[283]

Interestingly, building on the *Burundi* jurisprudence, the Chamber added that "[t]he Court's exercise of such jurisdiction is not subject to any time limit, *particularly since the preliminary examination here commenced prior to the Philippines' withdrawal*."[284] This could indicate that, following *Burundi,*[285] since the *existence* of jurisdiction over the period in the crosshairs of the Prosecutor where a State was still a State Party is undisputed,[286] the Court's jurisdiction can be triggered at any time *after* the withdrawal. If the Court's exercise of jurisdiction is not subject to any time limit, the preconditions to the exercise of jurisdiction must crystallise prior to the jurisdictional trigger.

The reference to the preliminary examination in the decision can be read as confirming this conclusion since a preliminary investigation by the Prosecutor does not amount to a jurisdictional trigger found in Article 13 of the Statute.[287] On the other hand, the inclusion of the preliminary examination can also be read as a reference point for the relevant date itself, meaning that the relevant date for the exercise of jurisdiction would be the first procedural step leading up to the jurisdictional trigger. However, it is difficult to convincingly extract the precise reasoning for a

[278] Philippines Appeal Dissent, para. 24.
[279] Philippines Appeal Brief, para. 48.
[280] Philippines 15(3) Decision, para. 111.
[281] Philippines 15(3) Request, p. 1.
[282] Ibid., para. 1.
[283] Philippines 15(3) Decision, para. 111.
[284] Philippines 15(3) Decision, para. 111.
[285] Burundi 15 Decision, para 24.
[286] Philippines 15(3) Decision, para. 111.
[287] Rome Statute, Article 13(a)-(c).

complex jurisdictional issue within the Court's jurisdictional system when it was dealt with in five sentences.[288]

What we can extract from both the PTC I and III's decisions is that the relevant date for the exercise of jurisdiction relates to a point in time preceding a jurisdictional trigger within the meaning of Article 13 of the Statute. The decisions were an essential step in bringing the issue of relevant date to light, but they are unhelpful for their vagueness and general lack of argumentation.

3.3.3. Relevant date coming to the forefront – the Philippines 15(3) Decision on appeal

After the authorisation by the PTC I, the *Philippines* saga continued. On 18 November 2021, the Prosecutor notified the PTC I that the Philippines had requested a deferral of the investigation.[289] On 24 June 2022, the Prosecutor requested the authorisation to resume its investigation. [290] In its written observations, the Philippines disagreed, although not yet for the temporal relevant date argument, arguing instead that the Court having jurisdiction over the situation would violate the principle of non-intervention.[291] The Chamber did not entertain the Philippines' challenge, concluding that this was not the right procedural moment, that "[A]rticle 18 proceedings are not an avenue to re-litigate what has already been ruled on as part of [A]rticle 15 proceedings."[292] In its submission lodged on 13 March 2023, the Philippines appealed the decision.[293]

And so, for the first time ever, the issue of the relevant date for assessing the preconditions to the exercise of jurisdiction came to the forefront.[294] In the following paragraphs, I will outline the arguments put forward by the parties as they warrant a closer inspection.

The Philippines argued that the preconditions to the exercise of jurisdiction must be considered at the point at which the exercise of the Court's jurisdiction is triggered. It argued that the Court's jurisdiction is not perpetual and that it must respect a State's decision to withdraw from the Statute.[295] The Philippines relied on the textual interpretation of Article 12(2) of the Statute,

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[288] Philippines 15(3) Decision, para. 111.
[289] ICC, Office of the Prosecutor, Situation in the Republic of the Philippines, *Prosecution's request to resume the investigation into the situation in the Philippines pursuant to article 18(2)*, ICC-01/21-46, 24 June 2022 ("**Philippines 18(2) Request**"), para. 2.
[290] Ibid., para. 3.
[291] ICC, The Republic of the Philippines, Situation in the Republic of the Philippines, *Philippine Government's Observation on the Office of the Prosecutor's Request*, ICC-01/21-51, 8 September 2022, paras. 7-10.
[292] ICC, Pre-Trial Chamber, Situation in the Philippines, *Public Redacted Version of "Authorisation pursuant to article 18(2) of the Statute to resume the investigation",* ICC-01/21-56-Red, 26 January 2023, para. 25.
[293] Philippines Appeal Brief.
[294] Ibid., para. 36.
[295] Ibid., para. 37.

which uses the present tense in "if one or more of the following States *are* Parties to [the] Statute."[296] It further argued that the cornerstone of the Court is State cooperation, arguing that „[...] the exercise of the Court's jurisdiction is premised on its ability to secure cooperation and the two matters are inextricably linked."[297] It relied on the fact that the obligatory cooperation scheme kicks in only after the PTC had authorised the investigation.[298]

Moreover, the Philippines based their argument on the Court's previous jurisprudence.[299] They argued that the preconditions to the exercise of jurisdiction must come after the Court's jurisdiction is triggered. As support, they cited the Palestine 19(3) Decision, "whereby the Prosecution sought an article 19(3) ruling on the Court's territorial jurisdiction in Palestine for the purposes of Article 12(2) following Palestine's referral pursuant to articles 13(a) and 14."[300] This is not very convincing since the prior *Bangladesh/Myanmar* decision included precisely the opposite situation, with the precondition assessment *preceding* any sort of jurisdictional triggers,[301] and in the very same composition as in the Palestine 19(3) Decision (judges Brichambaut, Kovács and Alapini-Gansou).[302]

The Prosecutor argued that the relevant date for assessing the preconditions to the exercise of jurisdiction was at the time of the commission of the alleged crimes.[303] He argued that the "the Court's proceedings may otherwise materialise after the relevant events,"[304] noting that allowing the relevant date at the time of the jurisdictional trigger would enable States to "avoid investigation and potentially prosecution of the alleged perpetrators by subsequently withdrawing [from the Statute]."[305] He submits that the purpose of Article 127(2) of the Statute does not regulate the Court's jurisdiction, but rather it "seeks to ensure that ongoing proceedings (and related treaty obligations) are not undermined by a State's withdrawal."[306] He relies, as the PTC I did in its authorisation decision,[307] on the Burundi 15 Decision.[308] His additional argument is that "a State's

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[296] Rome Statute, Article 12(2).
[297] Philippines Appeal Brief, para. 44.
[298] Ibid., para. 45.
[299] Ibid., para. 38, fn. 27.
[300] Ibid.
[301] Bangladesh 19(3) Decision, para. 81.
[302] Ibid., p. 1.
[303] ICC, Office of the Prosecutor, Situation in the Republic of the Philippines, *Prosecution's response to the Philippine Government's Appeal Brief against "Authorisation pursuant to article 18(2) of the Statute to resume the investigation" (ICC-01/21-65 OA)*, ICC-01/21-68, 4 April 2023 ("**Philippines Prosecution Response to Appeal**"), para. 14.
[304] Ibid., para. 18.
[305] Ibid., para. 18.
[306] Ibid., para. 20.
[307] Philippines 15(3) Decision, para. 111.
[308] Philippines Prosecution Response to Appeal, para. 21.

decision to withdraw from an international agreement does not have retroactive effect,"[309] noting that a State's acceptance of the Court's jurisdiction creates a "legal situation"[310] within the meaning of Article 70(1)(b) of the VCLT.[311]

The submission of the Public Counsel for Victims reiterates the same points and does not add new arguments.[312] The Philippines submitted a reply to the Prosecutor's submission, but it is focused more on the obligations of the withdrawing State rather than the relevant date.[313]

These were the submission, respect for State sovereignty by the Philippines against a cautionary approach preventing the way to escape accountability by the Prosecutor. The ground was set. Disappointingly, in its judgment on the appeal on 18 July 2023, the AP summarily dismissed the relevant date ground of appeal, finding that the Philippines challenge came at an inappropriate point in the proceedings.[314] Therefore, the AP did not discuss the issue of the relevant date at all. Attaching their joint dissenting opinion, judges De Brimchambaut[315] and Lordkipanidze considered "the Philippines' challenge regarding the Court's jurisdiction [...] properly raised" and addressed the issue.[316]

The dissenting judges argued that the relevant date for assessing preconditions to the exercise of jurisdiction is when the Court's jurisdiction is triggered. As a starting point, for the first time in the Court's history, they stress the difference between the *existence* of jurisdiction and its *exercise*.[317]

De Brimchambaut and Lordkipanidze averred that the textual interpretation of Article 12(2) indicates that the relevant date is the moment of the jurisdictional trigger, noting the present tense used in "the Court may exercise its jurisdiction if one or more of the [States concerned] *are* Parties to this Statute."[318] Furthermore, they argue, "[j]ust as a State that is [...] no longer Party to

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[309] Ibid., para. 23.
[310] Ibid., para. 23.
[311] UN, Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol. 1155, p. 331, 23 May 1969 ("**VCLT**").
[312] ICC, Public Counsel for Victims, Situation in the Republic of the Philippines, *Observations on behalf of victims on the Philippines Government Appeal against the Decision authorising the resumption of the investigation*, ICC-01/21-71, 18 April 2023, paras. 21-34.
[313] ICC, The Republic of the Philippines, Situation in the Republic of the Philippines, *Philippine Government's Reply to "Prosecution's response to the Philippine Government's Appeal Brief against 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation'"*, ICC-01/21-73, 16 May 2023.
[314] Philippines Appeal Judgment, para. 55.
[315] It is worth noting that it was also judge De Brichambaut who criticised the PTC I's approach in the *Bangladesh/Myanmar* decision, so the dissenting opinion can be seen as a sort of continuation of his critique, see the Bangladesh Dissent, paras. 31-39.
[316] Philippines Appeal Dissent, paras. 15-37.
[317] Ibid., para. 23.
[318] Ibid., para. 25.

the Statute cannot refer a situation to the Court under article 13(a) of the Statute [...], the Prosecutor cannot commence the process of triggering the jurisdiction of the Court once a withdrawal has become effective and the State in question is no longer Party to the Statute."[319] Regarding the competing arguments of the Philippines and the OTP, they take a more balanced approach, considering both the right of a State to decide whether it wants to be bound by a treaty and the objective of ending impunity.[320] They argue that the Statute strikes a fair balance between these considerations since Article 127(1) provides a one-year period for the use of one of the trigger mechanisms, which is „sufficient for the Prosecutor to conduct his preliminary examination and request a [PTC]'s authorization the commencement of the investigation, and for the PTC to rule upon such a request.[321]

The appeal proceedings in the *Philippines* situation are arguably the most important milestone for the issue of relevant date for the exercise of jurisdiction. In this section, I introduced the appeal proceedings and outlined the arguments raised by the parties. Although the AP ultimately did not address the issue of the relevant date, the dissenting opinion shows that the issue is gaining traction. My goal was to provide an overview of the arguments raised throughout the proceedings so that they may serve as a basis for the following discussion.

3.3.4. Discussion on the relevant date for the exercise of jurisdiction

From the case law mentioned above (particularly in the situation in the *Philippines*), one can identify two possible relevant moments for assessing the preconditions to the exercise of jurisdiction: the moment of commission of the alleged crimes and the moment of the jurisdictional trigger. In this section, I will address all of the arguments mentioned above and conclude with what I see as the most appropriate solution. Although the framing of the discussion is focused on territorial jurisdiction and Article 12(2)(a) of the Statute and the Court's territorial jurisdiction since the research question deals with territoriality,[322] I will argue that a parallel to personal jurisdiction and Article 12(2)(b) of the Statute might be helpful.

In this section, I will follow the approach the Court has taken in interpreting the Statute, following primarily Article 31 of the VCLT,[323] which has been implemented into the Court's

[319] Ibid., para. 23.
[320] Ibid., para. 28.
[321] Ibid., para. 29
[322] Since the research question relates to conduct that occurred on the hypothetical State's territory, rather than being committed by its national(s).
[323] UN, Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol. 1155, p. 331, 23 May 1969.

authentic guide on the interpretation of the Statute.[324] The Court provides that: "[t]he rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and the general tenor of the treaty."[325] The methods of interpretation cannot be isolated; rather, they must be considered together.[326] However, for the sake of clarity, I introduce the arguments in this chapter based on the method of interpretation, and I attach headings to each method.

Ordinary reading of article 12(2)(a) of the Statute

Article 12(2)(a) of the Statute provides that "the Court may exercise its jurisdiction if one or more of [the relevant States] *are* Parties to [the] Statute or have accepted the jurisdiction of the Court in accordance [with Article 12(3), being] [t]he State on the territory of which the conduct in question *occurred*".[327] In the *Philippines* situation, the Philippines and the dissenting judges on appeal placed emphasis on the "are" and its present tense, interpreting the tense as indicating the relevant date.[328] I find this rather inconclusive for our purposes since the text of the provision only indicates that *on* the relevant date, the relevant State must be a Party to the Statute, not the relevant date *itself*. Put simply, this means that Article 12(2) provides conditions that must be met in order for the Court to exercise jurisdiction but does not provide when these conditions must be fulfilled. A similarly unpersuasive argument could be made for the relevant date at the time of commission, relying on the that the past tense in "occurred" relates to the past and, therefore, the relevant date is at the time of the commission of the alleged crimes.

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[324] I do not address Article 32 VCLT (*i.e.* [...] supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion [...]" because the Statute's preparatory works are of little use here. Article 12 was prepared „by a small group of states, behind closed doors, and presented on the final day of the conference, limiting the time available for states to consider them." see MCINTYRE, Gabrielle. *The ICC, Self-created Challenges and Missed Opportunities to Legitimize Authority over Non-states Parties*, p. 525.

[325] ICC, Appeals Chamber, Situation in the Democratic Republic of the Congo, *Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal*, ICC-01/04, 13 July 2006 in VAGIAS, Michail. *The Territorial Jurisdiction of the International Criminal Court*, p. 62.

[326] SVAČEK, Ondřej. *Mezinárodní trestní soud (2005-2017)*, p. 150.

[327] Rome Statute, Article 12(2)(a).

[328] Philippines Appeal Dissent, para. 25; Philippines Appeal Brief, para. 37.

The context of Article 12(2)(a) of the Statute

Regarding the context of Article 12(2)(a) within the Statute, three arguments will be addressed in this sub-section. First, whether there is any interplay between a State's obligation to cooperate with the Court and the possibility of the Court's exercise of jurisdiction. Second, approaching Article 12(2)(a) from the lens of the Statute's provisions governing the rights of State Parties. Third and finally, whether the territoriality precondition in Article 12(2)(a) should be addressed with reference to the active personality precondition found in Article 12(2)(b) of the Statute.[329]

First, Article 12(2)(a) in the context of the Court's cooperation scheme, *i*s a lack of obligation to cooperate determinative of the Court's ability to exercise jurisdiction? The Philippines argued that "[...] the exercise of the Court's jurisdiction is premised on its ability to secure cooperation, and the two matters are inextricably linked."[330] Article 86 of the Statute governs the general obligation of cooperation with the Court; it applies only to State Parties. In the case of *proprio motu* proceedings, Kreß argues that this obligation kicks in only after the investigation has been authorised.[331] If that is the case, the Philippines would not be obliged to cooperate after the withdrawal. The question is, would this have implications on the preconditions to the exercise of jurisdiction? The Prosecutor seems to think that it would not.[332] I agree. Lack of cooperation cannot have effects on the ability of the Court to exercise jurisdiction. In the Court's practice, situations may arise where a State might not cooperate with the Court, yet the Court is able to exercise jurisdiction – take the *Bangladesh/Myanmar* situation, for example, with Myanmar vocally refusing to cooperate with the Court.[333] Moreover, as the Prosecutor rightly notes, Article 12(2) contains two *alternative* preconditions based on territorial and personal principles, respectively. Therefore, I do not find this argument persuasive.

Second, the context within the regime governing the rights of State Parties; if a State that is not a Party to the Statute cannot refer a situation under Article 13(a) of the Statute and trigger the Court's jurisdiction, does this mean that "the Prosecutor cannot commence the process of triggering the jurisdiction of the Court once a withdrawal has become effective"[334]? The example

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[329] SCHABAS, William. *The International Criminal Court*, p. 283.
[330] Philippines Appeal Brief, para. 44.
[331] KRESS, Claus. *Article 98 Cooperation with respect to waiver of immunity and consent to surrender*, p. 2456.
[332] Philippines Prosecution Response to Appeal, para. 28.
[333] Myanmar 'resolutely rejects' ICC ruling on Rakhine; voices 'serious concerns' over UN human rights report | UN News. In: *United Nations* [online]. 28. 9. 2018 [accessed 15.03.2024]. Available at: https://news.un.org/en/story/2018/09/1021562
[334] Philippines Appeal Dissent, para. 27.

of the Prosecutor comes from the situation in *the Philippines,* but the question remains the same for all possible jurisdictional triggers under Article 13 of the Statute.[335]

The argument, as I understand it, is that if the withdrawn State does not enjoy the rights of a State Party, why should it have the obligations of a State Party? This argument might be difficult to reconcile with, as the exercise of the Court's jurisdiction does not impose any obligations upon the State within the meaning of Article 12.[336] Moreover, taking *ad hoc* declarations into account, where the lodging State does not incur any rights stemming from being a State Party to the Statute, save for an obligation to cooperate with the Court under Part 9 of the Statute.[337] But I think the original argument still stands its ground since *ad hoc* declarations complement the Court's jurisdictional scheme.[338] Although it is true that the issue of cooperation does not play a role in the assessment of Article 12(2)(a) of the Statute, I find the link between the State Parties rights to trigger the Court's exercise of jurisdiction and the relevant date fitting because it shows the issue from the position of the State Party – when its withdrawal becomes effective, it loses its rights under the Statute as a Party but it would still continue to be bound with respect to all possible future investigations, so long as the referenced time was when that State was still a Party.

Third, Article 12(2)(a) read in the context of Article 12(2)(b) of the Statute. Both Articles provide preconditions to the exercise of the Court's jurisdiction – Article 12(2)(a) is based on the principle of territoriality, while Article 12(2)(b) is based on the principle of active personality. [339] Although the research question focuses mainly on territorial jurisdiction, could a parallel drawn to personal jurisdiction in Article 12(2)(b) of the Statute be helpful?

Article 12(2)(b) of the Statute provides that the Court may exercise its jurisdiction if the State of which the person accused of the crime is a national [has accepted the Court's jurisdiction].[340] As a preliminary note, even more than in addressing territorial jurisdiction, this question remains only in the realm of academic discussion since there is yet to be a prosecution based on the nationality principle.[341]

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[335] Rome Statute, Article 13.
[336] CORMIER, Monique. *The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties*, p. 16.
[337] STAHN, Carsten, Mohamed M. EL ZEIDY and Héctor OLÁSOLO. The International Criminal Court's Ad Hoc Jurisdiction Revisited. *The American Journal of International Law*. 2005, vol. 99, no. 2, p. 422. DOI: 10.2307/1562506
[338] ZEIDY, Mohamed M. El. *Ad Hoc Declarations of Acceptance of Jurisdiction: The Palestinian Situation under Scrutiny*, p. 181.
[339] SCHABAS, William. *The International Criminal Court*, p. 283.
[340] Rome Statute, Article 12(2)(b).
[341] SCHABAS, William and Giulia PECORELLA. *Article 12 Preconditions to the exercise of jurisdiction*, p. 824.

Deen-Racsmány has suggested that the relevant point in time could be either at the time of commission or at the time of prosecution of the perpetrator, basing her argument mostly on the fact that any other interpretation would lead to impunity.[342] Contrary to Deen-Racsmány, Rastan argues that the relevant date should be when the conduct occurs.[343] He bases his argument on Article 22 of the Statute, arguing that "criminal responsibility under the Statute arises where the conduct constitutes, at the time it takes place, a crime within the jurisdiction of the Court."[344] He uses this argument to put forward that a loss of nationality of the relevant State *following* the commission of a crime within the jurisdiction of the Court should not bar the Court from exercising jurisdiction, and *vice versa*, obtaining nationality after committing a crime should not allow the Court to now exercise jurisdiction. This argument is somewhat supported by Newton.[345]

I do not agree with either – first, Deen-Racsmány's argument is overly expansive, relying too much on the objective of ending impunity as an end-all-be-all solution, which is precisely what the Court has been criticized for.[346] In my view, there should be *one* relevant date. This might arguably lead to situations where the Court would lack the ability to exercise jurisdiction. But all-encompassing jurisdiction was never the intention - in fact, pointing back to territorial jurisdiction, there are places in the world over which the Court can never exercise jurisdiction based on the territoriality principle, such as "the high seas and Antarctica, not to mention outer space."[347] And if there is one relevant date, I do not agree with Rastan that it is at the time of commission. I find it difficult to apply Article 22 of the Statute to the issue of the relevant date since I see it as conflating criminality (which principle of *nullum crimen sine lege* in Article 22 of the Statute deals with) with preconditions to the exercise of jurisdiction. I find that they relate to different moments; criminality must necessarily arise at the time of commission, and Article 22 of the Statute explicitly says so.[348] However, the nationality of the accused is a procedural precondition, and it might change depending on what happens after the commission of crimes. It would not make sense if the Court were precluded from exercising jurisdiction in a situation where a perpetrator was to change

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[342] DEEN-RACSMÁNY, Zsuzsanna. The Nationality of the Offender and the Jurisdiction of the International Criminal Court. *American Journal of International Law*. 2001, vol. 95, no. 3, p. 615. DOI: 10.2307/2668495
[343] RASTAN, Rod. *Jurisdiction*, p. 157.
[344] Ibid.
[345] NEWTON, Michael A. *How the International Criminal Court Threatens Treaty Norms*, p. 398.
[346] STAHN, Carsten and Göran SLUITER, eds. The Emerging Practice of the International Criminal Court. In: STAHN, Carsten and Göran SLUITER, eds. *The Emerging Practice of the International Criminal Court* [online]. Brill Nijhoff, 2008, p. 121 [accessed 04.05.2023]. Available at: https://brill.com/edcollbook/title/14966
[347] SCHABAS, William. Part 2 Jurisdiction. In: *The International Criminal Court: a commentary on the Rome Statute* [online]. 1. Oxford University Press, 2016, p. 361 [accessed 29.10.2023]. Available at: http://opil.ouplaw.com/view/10.1093/law/9780198739777.001.0001/law-9780198739777-chapter-15
[348] Rome Statute, Article 22(1).

his nationality subsequent to his commission of crimes. Therefore, I think that basing the argument on Article 22 of the Statute and the Court's subject matter jurisdiction conflates criminality with the preconditions to the exercise of jurisdiction found in Article 12. For these reasons, I find the analyses related to Article 12(2)(b) of the Statute are of little use for our purposes.

The object and purpose of the Statute

The object and purpose of the Statute is to "end impunity for the perpetrators of the most serious crimes".[349] It must "[...] always be borne in mind and fully considered during the interpretation of its provisions as they are one of the components which make it possible to establish its definitive meaning."[350] Therefore, it is necessary to analyse the relevant date from this perspective, as well. This sub-section addresses two arguments. First, whether interpreting the relevant date for the exercise of jurisdiction at the time of the jurisdictional trigger violates the Court's objective of ending impunity. Second, whether a balance can be struck between competing principles in the Court's practice, such as the objective of ending impunity and the right of States to withdraw from treaties.

First, would setting the relevant date at the time of the jurisdictional trigger impinge upon the objective of ending impunity? This may be so. Imagine a scenario, where a State loses a part of its territory in a natural disaster, an island nation losing as a result a part of its territory due to sea level rise, for example.[351] If the relevant date fell on the date of the jurisdictional trigger, a situation where the Court would not be able to exercise jurisdiction would be possible, which would certainly be against the Court's object and purpose. This is Wills' argument flipped on its head;[352] instead of changes to the territory sovereign (through cession, secession or dissolution),[353] the focus is on the territory – a change of focus from the subject to the object.

But there are difficulties with this argument. *One*, does the fact that a part of the territory might end up under the sea equal the loss of that territory? *Two*, how likely is this to happen? As an answer, I propose the analogy of vessels. "According to Article 12(2)(a), the Court may also

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[349] Rome Statue, Preamble; ICC, Trial Chamber II, Situation in the Prosecutor v. Katanga, *Judgment pursuant to article 74 of the Statute*, ICC-01/04-01/07-3436-tENG, 7 March 2014, para. 55.
[350] ICC, Trial Chamber II, Situation in the Prosecutor v. Katanga, *Judgment pursuant to article 74 of the Statute*, ICC-01/04-01/07-3436-tENG, 7 March 2014, para. 55.
[351] Countries at risk of disappearing due to climate change. In: *Active Sustainability* [online] [accessed 18.03.2024]. Available at: https://www.activesustainability.com/climate-change/countries-risk-disappearing-climate-change/
[352] see section 3.5.1.
[353] CRAWFORD, James R. *The Creation of States in International Law* [online]. Oxford University Press, 2007 [accessed 18.03.2024]. Available at: https://academic.oup.com/book/3288

exercise its jurisdiction with respect to crimes committed on board of a vessel or aircraft, if the State of registration is a State Party to the Statute."[354] Take the example of the *Mavi Marmara* before the Court.[355] On 31 May 2010, the Mavi Marmara vessel, part of a humanitarian aid flotilla bound for Gaza, was attacked by the Israel Defence Forces in international waters, leading to nine deaths and dozens seriously injured.[356]

What if the ship sank? Would the Court not be able to exercise its jurisdiction? One may argue, as Vagias does,[357] that the jurisdiction of the flag State is more akin to the personality principle. As support, Vagias quotes Article 91 of the UN Convention on the Law of the Sea, which is titled "nationality of ships".[358] However, I do not think this is a persuasive argument because the convention regulates what the ships *themselves do*,[359] unlike the Statute, which regards ships as State *territory*.[360] Assessing relevant date at the point of the jurisdictional trigger could, therefore, run contrary to the objective of ending impunity.[361] In my view, the argument related to the destruction of territory is too far-fetched, relying on presumptions (such as what the effects of destruction of territory might be and whether the jurisdiction over vessels truly reflects the principle of territoriality) to apply to a situation that has no precedent. Therefore, I do not see the argument for the relevant date at the time of commission as particularly strong.

A contrary argument related to the objective of ending impunity would be, as proposed by Wills,[362] that assessing the relevant date with respect to the exercise of jurisdiction on the date of the commission would result in a situation where, in cases of dissolution of the original State, the Court would be barred from exercising jurisdiction, since the original State would cease to exist and the preconditions to the exercise of jurisdiction would never be fulfilled.[363] This would also result in an interpretation contrary to the Court's objective of ending impunity.[364] I view the

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[354] SCHABAS, William and Giulia PECORELLA. *Article 12 Preconditions to the exercise of jurisdiction*, p. 823.
[355] ICC Prosecutor receives referral by the authorities of the Union of the Comoros in relation to the events of May 2010 on the vessel 'MAVI MARMARA' | International Criminal Court. In: *International Criminal Court* [online]. 14. 5. 2013 [accessed 19.03.2024]. Available at: https://www.icc-cpi.int/news/icc-prosecutor-receives-referral-authorities-union-comoros-relation-events-may-2010-vessel
[356] BUCHAN, Russell. The Mavi Marmara Incident and the International Criminal Court. *Criminal Law Forum*. 2014, vol. 25, no. 3, p. 467. DOI: 10.1007/s10609-014-9243-y
[357] VAGIAS, Michail. *The Territorial Jurisdiction of the International Criminal Court*, p. 8.
[358] UN General Assembly, Convention on the Law of the Sea, 10 December 1982 ("**UNCLOS**"), Article 91, heading.
[359] See*, e.g.*, Article 92(1) UNCLOS: „Ships shall sail under the flag of one State only [...]."
[360] BUCHAN, Russell. *The Mavi Marmara Incident and the International Criminal Court*, p. 471.
[361] Rome Statute, Preamble.
[362] WILLS, A. *Old Crimes, New States and the Temporal Jurisdiction of the International Criminal Court*, p. 431.
[363] Though I do not dispute that the assessment could be differentiated based on whether the former territory sovereign still exists, but I do not think i tis practical for such a granular legal test, as specify invites oversight.
[364] Rome Statute, Preamble.

dissolution argument as stronger than the previous one related to the destruction of territory since sovereignty changes have actually occurred in the past, compared to the destruction of territory.[365] Therefore, the approach by the Court should reflect the possibilities of sovereignty changes.

Second, it is important to highlight the balance between the objective of ending impunity and other principles, such as the right of a State to withdraw from a treaty. In their dissenting opinion in the *Philippines* situation, judges De Brichambaut and Lordkipanze recognize two competing principles at play in this argument:[366] the right of a State to withdraw from a treaty and the objective of the Statute, which is to "put an end to impunity".[367] In their view, the one-year buffer for the withdrawal to take effect found in Article 127(1) of the Statute is sufficient to balance these competing considerations.[368] They argue that the Prosecutor has ample time to "make all efforts to trigger the Court's jurisdiction in a manner that would not infringe the right of a State to withdraw from the Statute."[369] Contrary to this position, the Prosecutor raised concerns about potential accountability gaps, arguing that addressing the relevant date at the point of a jurisdictional trigger would "allow States to commit or accept the commission of [the] Statute crimes while the Court had jurisdiction, but then avoid investigation and potentially prosecution of the alleged perpetrators by subsequently withdrawing."[370]

I think the Prosecutor is partially correct. One might argue that this approach would put the Prosecutor under unwarranted pressure since it would force him to decide whether to pursue the authorisation of an investigation just one year after a State withdraws from the Statute (potentially including the time it would take the PTC to decide on the request, depending on the interpretation). On the other hand, in the *one* situation that can be of assistance, the *Philippines* situation, the examination by the Prosecutor had already been underway for more than three years prior to the request.[371] But again, this is *precisely why* the Philippines withdrew from the Statute in the first place, [372] so the situation might not be as clear-cut as the dissenting judges in the Philippines argue. Nevertheless, in my view, a year seems like a sufficient amount of time for the Prosecutor to gather

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[365] CRAWFORD, James R. *The Creation of States in International Law*, pp. 707–714.
[366] Philippines Appeal Dissent, paras. 28-29.
[367] Rome Statute, Preamble.
[368] Philippines Appeal Dissent, paras. 28-29.
[369] Philippines Appeal Dissent, paras. 28-29.
[370] Philippines Prosecution Response to Appeal, para. 18.
[371] ICC, Office of the Prosecutor, *Report on Preliminary Examination Activities (2019)*, ICC-OTP-20191205-PR1504, 5 December 2019, para. 233.
[372] DONAT CATTIN, David. Article 68 Protection of victims and witnesses. In: AMBOS, Kai, ed. *Rome Statute of the International Criminal Court: article-by-article commentary*. München, Germany: Oxford, United Kingdom; New York, NY, USA: Baden-Baden, Germany: Beck; Hart; Nomos, 2022, p. 2015.

(or complete gathering, rather) enough evidence to fulfil the "lowest evidentiary standard provided for in the Statute".[373] I think this is a persuasive argument for the relevant date at the time of the jurisdictional trigger.

It is difficult to pre-empt which way the Court will lean. From the Court's practice so far (dissenting judges in the *Philippines* aside),[374] it would seem that the Court and the Prosecutor would rather err on the side of caution and interpret the Statute's jurisdictional provisions in favour of being able to exercise jurisdiction.

In this chapter, I discussed the issue of the relevant date for assessing the preconditions to the exercise of jurisdiction, particularly the territorial precondition found in Article 12(2)(a) of the Statute. I started by outlining the approach that the Pre-Trial Chambers have taken in tackling the issue, particularly in the context of State withdrawal. Then, I addressed the appeal proceedings in the situation in *the Philippines*, where the relevant date came into the spotlight. Finally, in this section, I addressed the arguments for assessing the relevant date at either the time of commission of the alleged crimes or at the point of a jurisdictional trigger. I proceeded with the analysis based on the Court's authentic guide to the interpretation of the Statute,[375] dividing the analysis based on the textual interpretation of the provision, then assessing the provision in the context of the Statute and finally, in light of the Statute's object and purpose. My aim was to illustrate the contentious points and outline possible arguments for both sides of the barricade. As a result, I came to the conclusion that assessing the preconditions to the exercise of jurisdiction at the point of the jurisdictional trigger is a more persuasive approach since it approaches the Court's objectives in a balanced way rather than relying on the object of ending impunity. Although the objective of ending impunity is important, it should not be seen as an end-all-be-all solution to any problems of interpretation that might arise.

To conclude this chapter, my answer to the second part of the research question is the Court can exercise jurisdiction over crimes that occurred on what is *now* the territory of a State that has accepted the Court's jurisdiction (but which was not its territory at the time of the commission of those crimes).

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[373] Philippines 15(4), para 12.
[374] Philippines Appeal Dissent.
[375] ICC, Appeals Chamber, Situation Prosecutor v. Lubanga Dyilo, *Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la confirmation des charges" of 29 January 2007*, ICC-01/04-01/06-926, 13 June 2007, para. 8.

Conclusion

This thesis dealt with the passage of time and its impacts on the jurisdiction of the Court and the ability of the Court to exercise it, particularly in the context of territorial jurisdiction under Article 12(2)(a) of the Statute. The thesis aimed to answer the research question of whether a State that is not a party to the Statute can retrospectively accept the jurisdiction of the Court for crimes committed in what is now its territory (but was not at the time of commission) and whether the Court can exercise that jurisdiction. I decided to focus on territorial jurisdiction because of its use in practice since there is yet to be a prosecution based on the nationality principle.[376]

Although the research question might appear very narrow at first glance, it combines the problematic aspects and issues that have come into play in the Court's recent practice. The research question focused on both the temporal aspects of accepting the Court's jurisdiction (best illustrated on the issue of retrospective *ad hoc* declarations under Article 12(3) of the Statute) and the assessment of the relevant point in time for assessing the jurisdictional preconditions found in the Statute (which are relevant in the context of State withdrawal from the Statute and its effects). Because of this combination, the research question was split into two parts that were addressed in their own separate chapters, better reflecting the division between acceptance of jurisdiction and its exercise.

In order to even proceed to the analysis and discussion of the research question, it was necessary to first lay down a terminological groundwork. Therefore, in chapter 1, I analysed two central preliminary problems. First, how to even address the concept of jurisdiction in this thesis and within the context of the Court. Addressing the concept proved a much greater challenge than anticipated. I relied on previous scholarly research and divided the concept of jurisdiction into sovereign jurisdiction, *i.e.* a State's ability to accept the Court's jurisdiction and judicial jurisdiction, *i.e.* what is referred to as the jurisdiction of the Court. This division also worked particularly well for the analysis that followed since the research question dealt with *acceptance* and *exercise* of jurisdiction, which the split between sovereign and judicial jurisdiction mirrors. Second, it was necessary to lay down the groundwork for addressing the passage of time and what to even call the concept since it was previously unknown in the Court's practice and in literature related to the Court. I settled on the concept of the "relevant date", borrowing from the concept of "critical date" as espoused by the ICJ in its decisions related to competing sovereignty claims, where the date of assessment played a crucial role.

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[376] SCHABAS, William and Giulia PECORELLA. *Article 12 Preconditions to the exercise of jurisdiction*, p. 824.

Next, in chapter 2, I sought to determine whether a State that is not a party to the Statute can retrospectively accept the jurisdiction of the Court for crimes committed in what is *now* its territory. In order to proceed to the analysis of the Court's jurisdictional framework related to the acceptance of the Court's jurisdiction, it was first necessary to address the Court's jurisdictional basis. Broadly speaking, the Court's jurisdiction either rests on what States delegate to it, the delegation theory, or the power of the Court over "the most serious crimes of concern to the international community as a whole"[377] is grounded in customary international law,[378] and the act of becoming a State Party merely activates it.[379] I analysed scholarly literature as well as the Court's case law and concluded that the delegation theory (for the purposes of this thesis) was an acceptable solution since it better reflected the Court's nature as an international organization with a basis in international treaty law. The determination was relevant since, under the delegation theory (or some of its different modalities), limitations of a State's ability to delegate could result in a lack of ability to accept the Court's jurisdiction.

I addressed these considerations next and concluded that limitations in neither domestic law nor limitations imposed by international treaties can limit a State's ability to delegate. The first conclusion was based on the fact that domestic law does not reflect a State's ability to act internationally. I illustrated this conclusion on how Ukraine accepted the Court's jurisdiction through an *ad hoc* declaration and how the text adopted by the national parliament differed from the text of the *ad hoc* declaration itself. The second conclusion was based on the fact that the Statute is an international treaty, and the ability of States to delegate jurisdiction to the Court is grounded in a State's ability to adhere to treaties. If there is another treaty limiting a State's ability to do precisely that, that would result in a conflict of obligations but could not be seen as a limit to accepting the Court's jurisdiction. In other words, the conflict would be the State's problem to solve, not the Court's. Additionally, I briefly introduced the two ways in which a State might accept the jurisdiction of the Court – through becoming a State Party to the Statute or by means of an *ad hoc* declaration. I concluded that the relevant test for determining the acceptance of jurisdiction was a State's general prescriptive ability, which should be assessed by whether the delegating entity is a State (for the purposes of the Statute, although this question was not subject to research).

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[377] Rome Statute, Article 5(1).
[378] KRESS, Claus. *Article 98 Cooperation with respect to waiver of immunity and consent to surrender*, p. 2650.
[379] STAHN, Carsten. *Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine--A Reply to Michael Newton*, p. 448.

Next, I focused on the relevant date for assessing the acceptance of jurisdiction, particularly in the context of *ad hoc* declarations under Article 12(3) of the Statute. I analysed the relevant academic literature and came to the conclusion that the relevant date for assessing the acceptance of jurisdiction is at the time of the acceptance, in this case, the lodging of the declaration. I found that this approach better reflected the Court's basis grounded in treaty law and that it was additionally supported by the Court's objective of ending impunity. I proceeded with the analysis of whether a lack of ability to accept the Court's jurisdiction on the relevant date could be remedied later. There is a lack of academic discussion related to the topic in the context of the Court, but I addressed a similar concept as it was developed in the practice of the ICJ, which has been rather flexible in choosing the relevant date and allowed for remedies in cases, where restarting the proceedings for solely formal reasons would not make sense. I contrasted the findings with the recent Appeals Chamber's judgment in the situation in the Philippines, where the Chamber also concluded that remedying a lack of acceptance of jurisdiction later on was possible. I concluded that allowing remedies made sense in certain situations where it would be justified by procedural economy.

Based on the abovementioned analysis, I concluded chapter 2 by answering the first part of the research question that a State that is not a party to the Statute can retrospectively accept the jurisdiction of the Court for crimes committed in what is *now* its territory.

Finally, in chapter 3, I aimed to determine whether the Court can exercise jurisdiction over crimes that occurred on what is *now* the territory of a State that has accepted the Court's jurisdiction (but which was not its territory at the time of the commission of those crimes). In this chapter, I relied primarily on the Court's case law and methods of interpretation of the Statute since there is a paucity of academic discussion related to the topic, probably because of the novelty of the topic. [380]

In addressing the issue, I first introduced the statutory regime related to the exercise of the Court's jurisdiction, particularly the jurisdictional triggers found in Article 13 of the Statute and the preconditions to the exercise of jurisdiction found in Article 12(2) of the Statute. Next, I proceeded with the analysis of the relevant date for the exercise of jurisdiction. I began by introducing the relevant case law of the Court related to the problem, relying on descriptive methods to set the ground for further analysis. I introduced the situation in *Myanmar/Bangladesh*,

[380] Arguably most important decision in the saga was rendered in July 2023, see the Philippines Appeal Judgment, p. 1.

where the Court addressed its ability to exercise jurisdiction prior to the start of an investigation or any jurisdictional trigger. Next, I described the *Burundi* and *Philippines* situation, where the focus was on the effects of State withdrawal from the Statute on the Court's jurisdiction, but which were nevertheless an important stepping stone. Finally, I addressed the appeal proceedings in the situation in the *Philippines*, where the relevant date gained the spotlight. Additionally, I addressed the proceedings in detail and presented the differing opinions presented by the Prosecutor, the Philippines, as well as the Appeals Chamber.

Next, I proceeded with the analysis of the relevant date for the exercise of jurisdiction, focusing on territorial jurisdiction. The question of the relevant date for the exercise of jurisdiction lies in the interpretation of Article 12(2)(a) of the Statute. I followed the Court's authentic guide to the interpretation of the Statute,[381] dividing the analysis based on the ordinary reading of Article 12(2)(a) of the Statute, the context of the provision within the Statute and finally, assessing it in light of the Court's object and purpose. The ordinary reading of Article 12(2)(a) of the Statute did not prove to be of much assistance since it is rather ambiguous as to the relevant date.

In the contextual interpretation of the Statute, I addressed three principal arguments. First, I analysed Article 12(2)(a) of the Statute in the context of the Court's cooperation scheme, focusing on the relationship between the Court's ability to exercise jurisdiction and the possibility of obtaining cooperation from States, ultimately concluding that a lack of cooperation could not stop the Court from exercising jurisdiction. I illustrated this conclusion on Myanmar, which has vocally refused to cooperate with the Court.[382] Next, I proceeded to the context within the statutory regime governing the rights of State Parties. I analysed whether, just as a State that is no longer Party to the Statute cannot refer a situation to the Prosecutor under Articles 13(a) and 14 of the Statute, it is possible that the Court should not be able to exercise jurisdiction, since that would impose obligations on the withdrawing State. I concluded that the argument is unpersuasive since the Court's exercise of jurisdiction does not impose any obligations on that State. Finally, I referred to the analysis of the relevant date related to the active personality principle found in Article 12(2)(b) of the Statute since the issue has seen some academic discussion, one author arguing that the relevant date should be both at the time of commission or at the time of exercise, another author arguing for just the moment of commission. I did not agree with either. In my view, the first

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[381] ICC, Appeals Chamber, Situation Prosecutor v. Lubanga Dyilo, *Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la confirmation des charges" of 29 January 2007*, ICC-01/04-01/06-926, 13 June 2007, para. 8.
[382] *Myanmar 'resolutely rejects' ICC ruling on Rakhine; voices 'serious concerns' over UN human rights report | UN News*.

author's arguments were too reliant on the Court's objective of ending impunity, and the second one conflated criminality with the exercise of jurisdiction. I concluded that criminality and the active personality precondition that they relate to different moments; criminality must necessarily arise at the time of commission.[383] However, the nationality of the accused is a procedural precondition, and it might change depending on what occurs after the commission of crimes. It would not make sense if the Court were precluded from exercising jurisdiction in a situation where a perpetrator was to change his nationality subsequent to his commission of crimes.

Finally, in analysing Article 12(2)(a) of the Statute in light of its object and purpose, I focused on the objective of ending impunity and how potential solutions to the issue of the relevant date might impact it. Next, in the context of the issue of State withdrawal from the Statute, I addressed the competing principles between the objectives of ending impunity and a State's right to withdraw from a treaty. As a result of the analysis, I concluded that assessing the preconditions to the exercise of jurisdiction at the point of the jurisdictional trigger is a more persuasive approach since it approaches the Court's objectives in a balanced way rather than relying on the object of ending impunity. Although the objective of ending impunity is important, it should not be seen as an end-all-be-all solution to any problems of interpretation that might arise.

Therefore, I concluded chapter 3 by answering the second part of the research question, that the Court can exercise jurisdiction over crimes that occurred on what is *now* the territory of a State that has accepted the Court's jurisdiction (but which was not its territory at the time of the commission of those crimes).

There is a difficult road ahead for the Court. The *Philippines* situation highlighted how problematic and controversial a simple question of what time to assess the Court's jurisdictional provisions might be. Even though the AP side-stepped the answer, the issue will come up again eventually, possibly in relation to other State Parties, as more States debate withdrawing from the Court.[384] In the end, there are arguments for both sides of the barricade. It will be up to the Court to find the balance in interpreting the Statute and its provisions. Whatever way the Court will lean, it will be criticised one way or another.[385] I hope that my analysis will help spark the academic discussion that has been lacking on the topic.

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[383] Rome Statute, Article 22(1).
[384] PLESSIS, Carien du. *South Africa to try to withdraw from ICC again - Ramaphosa*.
[385] STAHN, Carsten. *Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine--A Reply to Michael Newton*, p. 445.

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Časová dynamika a jurisdikce Mezinárodního trestního soudu

Abstrakt

Tato práce se zabývá vlivem plynutí času na jurisdikci Mezinárodního trestního soudu (MTS) a jeho schopnost ji vykonávat, přičemž zvláštní pozornost je věnována územní jurisdikci podle čl. 12 odst. 2 písm. a) Římského statutu. Práce si klade za cíl zodpovědět otázku, zda stát, který není smluvní stranou Římského statutu, může zpětně přiznat jurisdikci MTS nad zločiny spáchanými na území, které je nyní územím daného státu (ale v době jejich spáchání jím nebylo), a zda MTS může takto přijatou jurisdikci vykonávat.

Aby bylo možné tyto otázky řešit, práce se nejprve zabývá vnímáním pojmu jurisdikce v rámci kontextu Římského statutu a rozlišuje mezi schopností státu jurisdikci MTS přijmout a pravomocí MTS ji vykonávat. Tento pojmový základ je klíčový pro orientaci ve vzájemném působení mezi plynutím času a jurisdikčním dosahem MTS. Klíčovým aspektem pro zodpovězení výzkumné otázky je pak relevantní časový okamžik pro posouzení jurisdikčních ustanovení Římského statutu, v práci je tento jev označován jako relevantní datum.

Práce dochází k závěru, že stát, který není smluvní stranou Římského statutu, může zpětně přijmout jurisdikci Soudu nad zločiny spáchané na území, které je nyní územím daného státu, ale v době spáchání jím nebylo. V důsledku toho je tak relevantním datem pro uznání jurisdikce MTS okamžik přijetí jurisdikce, přičemž tento postoj je podpořen analýzou *ad hoc* prohlášení podle čl. 12 odst. 3 Římského statutu. Dále je tento závěr podpořen základy MTS jako mezinárodní organizace, a také jeho cílem skoncovat s beztrestností pachatelů.

Tato práce dále dochází k závěru, že MTS může vykonávat jurisdikci nad takovými zločiny, a že relevantním datem pro zkoumání předpokladů pro výkon jurisdikce, zejména v čl. 12 odst. 2 písm. a) Římského statutu, je okamžik, kdy MTS začne jurisdikci vykonávat v souladu s čl. 13 Římského statutu. Tento přístup vyvažuje cíl MTS skoncovat s beztrestností s cílem respektovat suverenitu států.

Klíčová slova: Mezinárodní trestní soud, jurisdikce, relevantní datum

Temporal Dynamics and the Jurisdiction of the International Criminal Court

Abstract

This thesis examines how the passage of time affects the jurisdiction of the International Criminal Court (ICC) and its ability to exercise it, with special focus being placed on territorial jurisdiction under Article 12(2)(a) of the Rome Statute. The research aims to answer whether a State that is not a party to the Statute retrospectively accepts the jurisdiction of the ICC for crimes committed in what is now its territory (but was not at the time of commission) and can the ICC exercise that jurisdiction.

To address these questions, the thesis first establishes an understanding of jurisdiction within the ICC's statutory scheme, distinguishing between a State's capacity to accept the ICC's jurisdiction and the ICC's authority to exercise it. This conceptual groundwork is crucial for navigating the complex interplay between the passage of time and the ICC's jurisdictional reach. A crucial aspect for answering the research question is the relevant point in time for assessing the Rome Statute's jurisdictional provisions – this thesis refers to the phenomenon as the relevant date.

The thesis argues that a State that is not a party to the Statute retrospectively accepts the jurisdiction of the ICC for crimes committed in what is now its territory (but was not at the time of commission). As a result, it argues that the relevant date for accepting the ICC's jurisdiction is the time of acceptance of the ICC's jurisdiction, supporting this stance by examining *ad hoc* declarations under Article 12(3) of the Rome Statute. This conclusion is upheld by the ICC's treaty foundations and its goal of ending impunity, allowing new States to accept its jurisdiction over past crimes within their current territories.

Furthermore, this thesis argues that the ICC can exercise jurisdiction over these crimes, advocating for the assessment of preconditions to the exercise of jurisdiction, particularly in Article 12(2)(a) of the Rome Statute, at the time the ICC's jurisdiction is triggered. This approach balances the ICC's objective of ending impunity with respecting individual States' sovereignty.

Key Words: International Criminal Court, jurisdiction, relevant date