Steven Kay QC and Joshua Kern submit Article 15 Communication to OTP on jurisdiction over nationals of non-States Parties at the ICC

20 August 2019

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<https://www.9bedfordrow.co.uk/our-news-views/latest-news/steven-kay-qc-and-joshua-kern-submit-article-15-communication-to-otp-on-jurisdiction-over-nationals-of-non-states-parties-at-the-icc/>

The ICC is yet to unseal an arrest warrant or transmit a request for the surrender of a non-State Party national absent a resolution of the UN Security Council referring the situation to the Court.  Nevertheless, the Court’s organs have provided indications that they consider that the jurisdictional regime prescribed by the Rome Statute permits the Court to do so.  The issue has arisen in the *Situation in the Republic of Korea*(with respect to North Korean nationals), the *Situation in Georgia*(with respect to Russian nationals), the *Situation in Ukraine*(with respect to Russian nationals), the *Situation in Afghanistan*(with respect to US nationals), the *Situation in Bangladesh* (with respect to Myanmar nationals), as well as in the so-called *Situation* *in*Palestine, and the *Comoros*situation (with respect to Israeli nationals).

On the one hand, the OTP has proceeded on the basis that the Court’s permission to exercise jurisdiction over nationals of non-consenting States absent a Security Council referral derives from the delegated criminal jurisdiction of States Parties (see *[Afghanistan](https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF)*[Request](https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF), para. 45).  Alternatively, it has been suggested that the ICC derives its authority from the authority of the Rome Statute itself, the Rome Statute’s universalist orientation, and the ICC’s right to exercise the *ius puniendi* of the international community as a whole (see [Kreß](http://www.toaep.org/ops-pdf/8-kress), [Ambos](https://academic.oup.com/ojls/article-abstract/33/2/293/1547139), and [Stahn](https://www.vanderbilt.edu/jotl/wp-content/uploads/sites/78/5.-Stahn.pdf)).   These issues are part of the ongoing debate concerning the “*true nature of the Court’s jurisdiction*”, which is material to the legality of any given act by which the ICC exercises its jurisdiction.

Our [Communication](https://www.9bedfordrow.co.uk/media/1303/190819_art-15-communication_icc_nsp_9br.pdf) argues that it is the binding norms of customary international law which regulate the relationship between the ICC and non-States Parties. The “*true nature*” of the ICC’s jurisdiction derives from its authority as an international court to exercise a criminal jurisdiction which customarily is vested solely in States. The ICC exercises an enforcement jurisdiction which cannot prejudice non-consenting States’ enjoyment of their own rights, including those rights they claim on behalf of nationals abroad.

**The “*true nature*” of international criminal jurisdiction**

Hans Kelsen identified the “*basic norm*” of international law as the rule that identifies custom as the source of law or stipulates that “*the states ought to behave as they customarily behaved*”. His basic norm contemplates custom as a norm-creating fact (*General Theory of Law and State* (Cambridge, Mass. 1945), pp.369-370). We recall Kelsen in our Communication to argue, with respect to sources of law, that the Rome Statute prescribes *treaty* norms which derive from general norms as reflected by customary international law.  The “*true nature*” of the ICC’s jurisdiction – when opposed by a non-State Party – stems both from customary norms and the rules prescribed by the Rome Statute, not the Court’s status as an international organisation with legal personality or its universalist orientation.

The Appeals Chamber’s Joint Concurring Opinion in *Bashir*defines jurisdiction as “*the prerogative of control over things, places and persons (and their conducts). For functional purposes, such prerogative of control may be expressed in the manner of legislative, judicial or executive power*” ([*Bashir*Joint Concurring Opinion](https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-397-Anx1), para. 41). There are, however, certain crucial distinctions between jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce. The *existence* of prescriptive jurisdiction is not to be confused with its *exercise* through adjudicative and enforcement measures. This is particularly relevant with respect to the exercise of jurisdiction by international criminal courts, which customarily has been preconditioned.

The Appeals Chamber has expressly recognised that the ICC exercises an enforcement jurisdiction and that this is engaged during the arrest and surrender process (*Bashir*Joint Concurring Opinion, para. 41). The scope of the ICC’s enforcement jurisdiction is however contested. Although the view of cooperating States Parties as “*jurisdictional surrogates*” of the ICC may be shared in some parts of the World, elsewhere such a formulation is likely to be disputed (see, e.g. Galand, [here](https://www.ejiltalk.org/a-hidden-reading-of-the-icc-appeals-chambers-judgment-in-the-jordan-referral-re-al-bashir/)). States Parties and their domestic courts will foreseeably assert they are permitted to exercise a residual power to regulate their own enforcement jurisdiction (for example, in the UK, through preservation of common law writs of *habeas corpus*and the Court’s abuse of process jurisdiction). These remedies cannot be displaced through operation of by the Rome Statute, especially considering that implementing legislation will vary with respect to the residual discretion the Rome Statute reserves to States when the Statute is implemented into municipal legal orders.

Synthesising the literature (and with thanks to Gabriel Lentner and Alexandre Skander Galand for their excellent work on this, see [here](https://www.e-elgar.com/shop/the-un-security-council-and-the-international-criminal-court)and [here](https://brill.com/view/title/34598?lang=en)), the *dicta*of the Appeals Chamber in *Bashir,*and PTC I in the *Situation in Bangladesh*, we propose a typology of the characteristics of an international criminal court.  According to this typology, objectively under customary international law, an international criminal court:

1. formally depends for its existence and competence on international law;
2. possesses a capacity of organisational “*independence*” from States; and
3. exercises a criminal adjudicative and enforcement jurisdiction (*ius puniendi*) on behalf of the international community.

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

Pre-Trial Chamber I stated in [*Bashir*](https://www.icc-cpi.int/CourtRecords/CR2011_21750.PDF) that it considered that the exercise of the “*jus puniendi* *of the international community […] has been entrusted to this Court.*” Although the Appeals Chamber judges agreed that international courts exercise jurisdiction on behalf of the “*international community*”, the Joint Concurring Opinion appears to draw a distinction between the ICC’s exercise of jurisdiction pursuant to Article 13(a), 13(c) or 70 of the Rome Statute (when the ICC exercises jurisdiction “*on behalf of the international community represented in the membership of the Rome Statute*”) and Article 13(b) of the Rome Statute (when the Court exercises powers “*as the jurisdictional delegate of the Security Council*, *by virtue of the Council’s power to maintain* *international peace and security under Chapter VII of the UN Charter*”) (para. 54).

The Joint Concurring Opinion’s reference to delegation is telling. It reflects that the Court’s authority derives from conferred, as well as inherent, rights. The concept of preconditions operating as a bar to the exercise of jurisdiction reflects this and consent to the exercise of jurisdiction by an international court cannot be dismissed as mere formalism. Article 12 of the Rome Statute is, after all, a substantive provision. There is no inconsistency between viewing the ICC as an international criminal court with a right to exercise the *ius puniendi*of the international community and viewing its authority to exercise jurisdiction through the prism of preconditions which derive from the delegation model.

State consent through delegation is the mechanism through which international law preconditions the exercise of an international criminal court’s jurisdiction. This flows from the position that the exercise of an international criminal court’s jurisdiction is, effectively, the exercise of a *sovereign* power (namely the power residing in the sovereign to adjudicate criminal law and to punish its violations). For this reason, the Rome Statute contains in Article 12 the preconditions by which a State accepts the jurisdiction of the ICC, including the mechanism in Article 12(3) for a non-State Party to be so bound by a declaratory act.

**Lotus*, sovereignty, and the requirement of a permissive rule***

The Rome Statute does not govern the ICC’s relations with non-State Parties. Instead, customary international law governs them (see [Villiger](https://searchworks.stanford.edu/view/3743578), paras. 244-245). They are informed by the horizontal (not vertical) relationship described in *Lotus* operating between States with respect to the exercise of criminal jurisdiction. The suggestion that an international criminal court is authorised under customary law to ground the exercise of its jurisdiction simply on capacity as a fiduciary of the *ius puniendi*of the international community cannot be sustained.

Given that the exercise of jurisdiction by an international criminal court (i.e. the exercise of adjudicative and enforcement jurisdiction) may properly be viewed as extraterritorial (i.e. separate and distinguishable from the exercise of jurisdiction of the territorial State), any exercise of jurisdiction must be *permitted* by customary international law when it is opposed by a non-State Party. The relevant question is therefore whether the exercise of international criminal jurisdiction over nationals of non-consenting States is permitted by customary international law and, if so, in what circumstances.

**Affected States’ consent, or a Security Council decision, precondition the exercise of jurisdiction by an international criminal court under customary international law**

No international criminal court has exercised jurisdiction over a national of a non-consenting State absent a Security Council resolution enabling the exercise of jurisdiction. The US has been the most vocal opponent of the ICC’s exercise of jurisdiction over its nationals but the US does not stand alone. The issue of whether the ICC is permitted to exercise jurisdiction over nationals of non-party States without State consent has also been one of the official reasons for the Chinese government’s opposition to the ICC.

Prior to establishment of the the ICC, the establishment of the ICTY, ICTR, SCSL and STL had represented State practice’s high watermark through which jurisdiction was exercised on behalf of the international community by an international criminal court over nationals of non-consenting States.  In each case, the tribunal was constituted - or its establishment enabled - by a resolution of the Security Council.  What is required is an examination of State practice and *opinio juris* to determine whether this practice evidences a customary rule. Given that *Lotus* suggests the exercise of extraterritorial enforcement jurisdiction must be supported by a permissive rule, it is open to question whether the  Rome Conference’s acceptance of Article 12 of the Rome Statute reflects, constitutes, or is declaratory of a rule of international law, or whether it represents like-minded States seeking to progress the development of a more permissive norm over the objections of non-consenting States.

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

**Responsibility for illegally or irregularly obtained custody**

The exercise of jurisdiction over a national of a non-consenting State absent a Security Council referral would be exorbitant, and potentially an internationally wrongful act, engaging the responsibility of the ICC as well as, arguably, a custodial State towards the State of nationality. The international responsibility of the custodial State may entail an obligation to make reparation. The breach of the principle of consent would be continuing upon each appearance of an affected suspect.

An international organisation which aids or assists a State or another international organisation in the commission of an internationally wrongful act will itself bear international responsibility where the organisation knew the circumstances of the wrongful act and the act would be internationally wrongful if committed by that organisation (see e.g. [Shaw](https://www.cambridge.org/core/books/international-law/23403D7B22E800C677D5955FD9110AA8), p.1002). It may be open to a court to decline to exercise the jurisdiction it enjoys in the exercise of its inherent jurisdiction to remedy abuse of its process.  The ICC has to date disclaimed an express abuse of process jurisdiction but it is not required to do so by customary international law. Indeed, Article 21(3) of the Rome Statute may be interpreted to permit a stay of proceedings tainted by an abuse which prejudices an Accused’s fundamental rights. Restitution would seem to imply, in relevant cases, the nullification of any unlawful arrest and safe return to the State of nationality.

**Conclusion**

The Appeals Chamber’s Decision on Jordan’s appeal in *Bashir*, as well as Pre-Trial Chamber I’s Decision in the *Situation in Bangladesh*, have more clearly defined the ICC’s capacities as an international court and its jurisdiction under customary international law. These decisions contribute to our understanding of whether, customarily, the consent of the State of nationality has operated as a precondition to the exercise of international criminal courts’ jurisdiction. The answer to that question is affirmative. Irrespective of whether the offence being prosecuted is a Rome Statute crime or is a crime under customary international law, the scope of the Court’s permission to exercise jurisdiction over nationals of non-States Parties derives from a process of discerning rules of customary international law which govern the jurisdiction of international criminal courts in their relations with third States. As a matter of customary international law, State practice and *opinio juris*show that the ICC is not permitted to exercise its jurisdiction absent the consent of the State of nationality in a situation not referred to the Court by the Security Council. Such consent is a precondition to the exercise of an international criminal court’s jurisdiction. A continuing breach renders any subsequent prosecution and trial unlawful and engages the law of international responsibility for unlawful acts, creating exposure to acts of retorsion and countermeasures.