How Much Is Enough? The ICC’s Territorial Reach over Cross-Border Crimes

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I. Introduction

The International Criminal Court (“ICC” or “Court”)’s jurisdiction is composed of four elements: (i) temporal jurisdiction (\textit{ratione temporis}),\(^1\) (ii) territorial jurisdiction (\textit{ratione loci}),\(^2\) (iii) subject-matter jurisdiction (\textit{ratione materiae}),\(^3\) and (iv) personal jurisdiction (\textit{ratione personae}).\(^4\) Article 12(2) of the Court’s charter, the Rome Statute of the International Criminal Court (“\textit{Rome Statute}”), states that, “the Court may exercise its [territorial] jurisdiction if one or more of the following States are Parties to this Statute . . . (a) The State on the territory of which the conduct in

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\(^{2}\) \textit{Id.} art. 12.
\(^{3}\) \textit{Id.} art. 5.
\(^{4}\) \textit{Id.} art. 12(2)(b).
question occurred.”5 While the application of this requirement is clear enough in the context of many cases, including the relatively few cases that have come before the Court to date, difficult issues of interpretation will undoubtedly arise for cases involving cross-border crimes—ones in which the conduct occurs in one state and the harm occurs in another—or in which the elements of the crime are otherwise split between or among states.6 This is particularly true for cases in which the crime occurs, only in part, on State Party territory.7 The classic example of the complexity at play is commonly presented in European casebooks: The “[d]efendant shoots a gun in Italy, wounding a person in France, who travels to Switzerland where he succumbs to his wounds.”8 Despite the potential for confusion, “Article 12(2)(a)9 does not offer any concrete answers to the question of how little of an international crime needs to take place within State Party territory for the Court to have jurisdiction.”10

States have developed numerous theories over time by which to substantiate their exercise of territorial jurisdiction. This paper explores four of them. Namely, it looks at (i) the theory of subjective territoriality, (ii) the theory of objective territoriality, (iii) the constituent elements-based approach, and (iv) the continuing crime-based approach. Each of these theories were well-known during the Rome Conference, which resulted in the creation of the Rome Statute.11 While they reflect firm grounds upon which states can exercise territorial jurisdiction, the grounds upon which the Court can do so reflected “the question of questions of the entire [Court-creation] project.”12 Article 12 became “[t]he single most problematic issue” with respect to reaching consensus among the delegates.13 Nevertheless, for better or for worse, “the Court has

5 Id. art. 12(2) (emphasis added).
6 See infra notes 46–47 and accompanying text.
8 Id. at 101.
9 Rome Statute, supra note 1, art. 12(2).
11 See infra notes 66, 76, 85, 92.
12 Vagias, supra note 10, at 44.
13 David Scheffer, The International Criminal Court: The Challenge of Jurisdiction,
never had the opportunity, to date, to engage in an interpretation of its territorial jurisdiction,”14 which “left certain important questions untouched, and particularly the issue of jurisdiction in cases of the partial commission of a crime on State Party territory.”15 No doubt defining the reach of the Court would be a difficult and delicate task, one that would require not only accounting for the theories of territorial jurisdiction used by states, but also, more importantly, reconciling those theories with Article 12(2)(a), as well as the Court’s other unique imperatives.

This paper begins by noting the need to afford primacy to the operative text of the Rome Statute.16 In Part II, the paper first turns to an analysis of Article 12(2)(a)’s “conduct in question.”17 Part II illustrates the repercussions of reading Article 12 narrowly and, to the extent possible, identifies areas of ambiguity to pave the way for the discussion of extratextual sources. In Part III, the paper turns to the four theories of territorial jurisdiction noted above.18 Part III serves to introduce each theory and its status under general principles of law. More importantly, it serves to gauge whether, or to what extent, each theory further informs the options available to the Court.19 Part IV adds important considerations with respect to generally defining what committing a crime within the jurisdiction of the Court means. Whereas Parts II and III show how the Court’s reach could be more limited than observers expect or hope in certain

93 AM. SOC’Y INT’L L. 68, 69 (1999) (“The single most problematic part of the Rome Treaty is Article 12.”); see also Vagias, supra note 10, at 43 (“The territorial scope of the jurisdiction of the International Criminal Court was an issue which was hotly debated prior to the adoption of the Rome Statute.”).

14 Vagias, supra note 10, at 54, 63 (“This is largely the result of the Prosecutor’s policy of avoiding jurisdictional conflicts in the situations and cases he has selected to investigate.”).

15 Id. at 43.

16 The International Criminal Court is a treaty-body instrument guided, foremost, by its charter. See Rome Statute, supra note 1, art. 21 (setting forth the applicable law for the Court and establishing a hierarchy among the potential sources); id. art. 21(1)(a) (“In the first place, [the Court shall apply the] Statute, Elements of Crimes and its Rules of Procedure and Evidence.”); id. art. 21(1)(c) (“[Only f]ailing that, [the Court shall apply] general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime.”); infra Part II.

17 Rome Statute, supra note 1, art. 12(2)(a).

18 See supra notes 1–4.

19 See infra Part III.
cases, Part IV shows how the opposite could prove true in others. Part V recapitulates three potential limits to the Court’s territorial jurisdiction.

Pausing to note those topics that do not appear in this paper is helpful. First, this paper excludes any direct focus on universal jurisdiction. Much has been written on the topic. Many scholars rightly maintain that universal jurisdiction ended with respect to the jurisdiction of the Court on the floor of the Rome Conference. Instead of summarizing or otherwise dealing with that debate—which unfortunately functions to subsume discussion of territorial jurisdiction more generally—this paper focuses on the four theories noted above, which prove to be relatively viable bases of territorial jurisdiction for the Court insofar as they were not so explicitly rejected during the drafting process.

Second, this paper largely omits any focus on jurisdiction based on the nationality of the perpetrator. That issue has given rise to a rich and ongoing debate about whether nationals of non-State Parties can be tried before the Court. Though interesting, those discussions fall outside this paper’s core focus. Third, this paper largely excludes discussion of the particularly nebulous and oft-discussed area of individual criminal responsibility and avoids in-depth discussions of concepts like co-perpetration and joint criminal enterprise. Instead, for the sake of simplicity, unless otherwise noted, this paper assumes the applicability of Article 25(2), whereby individual criminal responsibility is based on the perpetrator’s direct commission of the crime. Finally, this paper refers to State Party territory and non-State Party territory without acknowledging that states can accept the territorial jurisdiction of the Court on an ad hoc basis.

20 See William Schabas, The International Criminal Court: A Commentary on the Rome Statute 277–88 (2010) [hereinafter Schabas Commentary] (“Had the Rome Conference opted for universal jurisdiction, the Court would thereby have had jurisdiction over crimes committed anywhere in the world, by whomever, regardless of ratification or accession.”); William A. Schabas, An Introduction to the International Criminal Court 73–77 (2d. ed. 2004) [hereinafter Schabas Introduction]. Note that the Court might effectively have universal jurisdiction for cases initiated by U.N. Security Council referral. See Schabas Commentary, supra, at 283–84. This paper, as will be noted below, focuses on cases otherwise raised.


22 Rome Statute, supra note 1, art. 25(2) (“A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.”).
basis, or that territorial jurisdiction is possible, irrespective of state consent, following United Nations Security Council referral.

II. The Operative Text

Before turning to theories of territorial jurisdiction, this paper pauses to look at the operative text of the *Rome Statute*, namely Article 12(2)(a) and its grant of territorial jurisdiction based upon where “the conduct in question” occurred.

The International Criminal Court is a treaty-body instrument guided foremost by the *Rome Statute*, which is the agreement that led to its creation. Article 21, which sets forth the law applicable to the Court, establishes a clear hierarchy among the potential legal sources. According to Article 21(1):

The Court shall apply:

(a) *In the first place*, this Statute, Elements of Crimes and its Rules of Procedure and Evidence.

(b) . . . .

(c) *Failing that*, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

The *Rome Statute* appears in subparagraph (a), along with two of its complementary documents. Article 21(1) affords them primacy by noting that they apply “in the first place.” By contrast, “general principles of law,” which appear in subparagraph (c), apply only “[f]ailing [the application of the sources in subparagraphs (a) and (b), and] provided those principles are not inconsistent with

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23 See id. art. 12(2)–(3). “[T]he Court may exercise its [territorial] jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3.” Id. art. 12(2) (emphasis added).

24 Schabas Introduction, supra note 20, at 81; see also Rome Statute, supra note 1, art. 13(b) (“It also has jurisdiction on an *ad hoc* basis, in accordance with Article 12(2), as well as where jurisdiction is conferred by the Security Council, pursuant to Article 13(b) but also acting in accordance with Chapter VII of the Charter of the United Nations.”).

25 Rome Statute, supra note 1, art. 12(2)(a).

26 Id. art. 21(1) (emphasis added).

27 Id. art. 21(1)(a).
The Rome Statute, like any treaty, can prescribe rules for its State Parties and for the Court that differ from the rules of customary international law. Based on the clear dictates of Article 21(1), if the Rome Statute resolved the question at hand, then placing weight on “general principles of law” is methodologically and legally incorrect. Because many scholars fail to appreciate this, existing scholarship on the Court’s territorial jurisdiction pertains almost exclusively to one or two unlikely theories of territorial jurisdiction and, even then, almost exclusively to their bases in less authoritative sources. By contrast, this paper looks first to the Rome Statute (in Part II) and lays the proper foundation for the consideration (in Part III) of four well-founded theories by which the Court, the Rome Statute withstanding, might be able to further interpret its reach.

Article 12(2)(a) specifies the places of occurrence, loci, of “the conduct in question” as the basis for the Court’s territorial jurisdiction. Where the Court must rely on Article 12(2)(a), the repercussions of reading Article 12(2)(a) narrowly could be two-fold: (i) perhaps the occurrence of conduct on State Party territory is both necessary and sufficient (and thus the occurrence of harm on State Party territory is neither); and (ii) perhaps all of “the conduct in question,” as defined by the crime at issue, must occur on State Party territory for jurisdiction to be well-founded. The Rome Statute does not otherwise explicitly establish a relationship between the occurrence of harm and the finding of territorial jurisdiction. The sections below focus on (i) and (ii), respectively. They elaborate on the implications of reading the Rome Statute narrowly and search for ambiguity within the text, namely to add legitimacy to the subsequent discussion of several well-founded

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28 Id. art. 21(1)(c) (emphasis added).
29 This concept is well-recognized with regard to treaty creation and customary law in general. See Curtis A. Bradley & Mitu Gulati, Withdrawing from International Custom, 120 Yale L.J. 202, 208–15 (2010); Rome Statute, supra note 1, art. 21 (recognizing this idea explicitly through its structure).
30 Rome Statute, supra note 1, art. 21(1).
31 See infra Part III.
32 Rome Statute, supra note 1, art. 12(2)(a) (emphasis added).
33 For instance, where the Court does not have jurisdiction under Article 12(2)(b) based on the nationality of the perpetrator. See infra text accompanying note 43.
34 See infra Part II.A.
35 See infra Part II.A.
No scholar to date has offered convincing arguments as to why the words “conduct in question” appear in Article 12(2)(a), instead of “crime in question,” and at least some scholars reduce the difference to “imprecise wording,” the result of “drafting oversight[s].”\(^{36}\) However, as this section helps demonstrate, the use of “conduct in question” does not create any unavoidable anomalies within the text.\(^{37}\) This paper frequently returns to the word “conduct” and, in doing so, provides some basis for why its use makes sense within the broader framework of the Rome Statute. Perhaps what bothers scholars most is not the imprecision of Article 12(2)(a), but the potential for Article 12(2)(a)’s wording to exclude jurisdiction in at least some cases where jurisdiction otherwise seems appropriate.\(^{38}\)

### A. Conduct or Crime?

While Article 12(2)(a) clearly refers to “the conduct in question,”\(^{39}\) judges and legal advocates might be tempted to equate “the conduct in question” with “the crime in question” insofar as the latter includes the materialization of harm. That temptation would be particularly strong where the only territorial hook resided in the loci of the harms (and not the loci of the conduct), or where the Defense, for instance, seeks to preclude jurisdiction on the basis that both the underlying conduct and the underlying harms must occur on State Party territory.

After all, the Court’s language has yet to distinguish between “the conduct” and “the crime” in this respect. For instance, regarding the situation in the Democratic Republic of the Congo (“DRC”), the Court “[took] note of the locations in which the crimes described by the Applicants were allegedly committed,” finding that, “the crimes were committed on the territory of the DRC.”\(^{40}\)

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\(^{36}\) See Vagias, supra note 10, at 53 (“The use of the word ‘conduct’ in Art. 12(2)(a) is best attributed to a drafting oversight in Rome, as opposed to a conscious effort on the part of the drafters to limit the Court’s jurisdiction by excluding jurisdiction based on the territory where the consequences of the crime took place.”).

\(^{37}\) See infra Part I.A.

\(^{38}\) See infra text accompanying notes 123–29.

\(^{39}\) See Rome Statute, supra note 1, art. 12(2)(a) (emphasis added).

\(^{40}\) Prosecutor v. Applicants VPRS 1–6, Case No. ICC-01/04, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, ¶¶ 92–93 (Jan. 17, 2006) (emphasis added), http://www.icc-
Subsequent cases reference that early ruling, noting, for instance, how the Court “previously stated that . . . under article 12(2) of the Statute one of the following two alternative criteria must be met: (a) the relevant crime was committed in the territory . . . or (b) the relevant crime was committed by a national of a State Party.”41 This language is misleading to the extent that “the relevant crime” includes all of its subject-matter elements and perhaps its harms. The imprecision here likely results from the fact that the Court has yet to address a cross-border crime. When the Court must do so, as inevitably is often the case, it is likely to parse its words far more carefully.

The operative wording within Article 12(2)(a) departs from other portions of the text. For instance, the full subsection states that jurisdiction obtains with respect to: “[t]he State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft.”42 Likewise, the subsequent subparagraph, Article 12(2)(b), states that jurisdiction obtains with respect to “[t]he State of which the person accused of the crime is a national.”43 It is unclear whether this difference leans in favor of equating “conduct” with “crime” or whether, to the contrary, it leans in favor of ensuring that “conduct” maintains a unique meaning.

The temptation to equate “the conduct in question” with “the crime in question” could result from looking to other provisions within the Rome Statute. For instance, one reference to “a crime within the jurisdiction of the Court” appears in Article 25(2), which sets forth the main basis for individual criminal responsibility.44 At first, focusing on conduct alone for the purpose of territorial jurisdiction seems odd when, in order to have an accused, “a crime” must have been committed. Despite this first impression, the questions of territorial jurisdiction and individual criminal

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41 Prosecutor v. Chui, Case No. ICC-01-04-01-07-262, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Mathieu Ngudjolo Chui, ¶ 14 (July 6, 2007) (citations omitted) (emphasis added), http://www.icc-cpi.int/iccdocs/doc/doc455752.pdf [http://perma.cc/9MCC-VPYD]. “The Chamber notes that the crimes underlying the case against Mathieu Ngudjolo were allegedly committed in the district of Ituri on the territory of the DRC.” Id. ¶ 15.
42 Rome Statute, supra note 1, art. 12(2)(a) (emphasis added).
43 Id. art. 12(2)(b) (emphasis added).
44 Id. art. 25(2).
responsibility can be separate. Jurisdiction over a cross-border crime could be well-founded under Article 12(2)(a) where the conduct occurred on State Party territory, 45 provided, consistent with Article 25(2), the harm materialized elsewhere. 46 Likewise, Article 22(1) could engender a similar misunderstanding. It states that, “[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.” 47 Despite its reference to the same words that appear in Article 12(2)(a), “the conduct in question,” Article 22(1) does not exist to clarify the meaning of those words. 48 Instead, Article 22(1) pertains to the principle of nullum crimen sine lege, which requires the crime to be well-established in law before the conduct in question took place. 49 It is based on the idea that the accused should know acts are criminal before he or she engages in them. 50 Therefore, it makes sense why Article 22(1) refers only to “the time [the conduct] takes place.” 51

Considering the crime against humanity of sexual slavery, 52 to which this paper often returns, is illustrative here. Elements of Crimes defines sexual slavery in terms of two unique subject-matter elements. 53 First, sexual slavery occurs if the accused “exercised

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45 Thereby fulfilling Article 12(2)(a) of the Rome Statute.
46 Thereby fulfilling the subject-matter requirements in full and addressing the aforementioned concern illustrated through Article 22(1).
47 Rome Statute, supra note 1, art. 22(1) (emphasis added).
48 See Schabas Introduction, supra note 20, at 71.
49 Id.; see also Beth Van Schaack, Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals, 97 Geo. L.J. 119, 119 (2008) (providing the definition “no crime without law, no punishment without law”).
50 See Schabas Introduction, supra note 20, at 72.
51 Rome Statute, supra note 1, art. 22(1) (emphasis added).
52 Id. art. 7(1)(g).
53 Rep. of the Preparatory Comm’n for the Int’l Criminal Court, Finalized Draft Text of the Elements of Crimes, 5th Sess., Mar. 13–31, June 12–30, 2000, U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000) [hereinafter Elements of Crimes]. Elements of Crimes includes two additional elements that correspond to the general chapeau requirements for all crimes against humanity under Article 7(1) of the Rome Statute. Compare id. art. 7(1)(g)(3)–(4) (“The conduct was committed as part of a widespread or systematic attack directed against a civilian population [and] []the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.”), with Rome Statute, supra note 1, art. 7(1) (defining “crime[s] against humanity” as . . . acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack . . . .”). See Elements of Crimes, supra, art. 7, para. 2 (“The last two elements for
any or all of the powers attaching to the right of ownership over one or more persons"; second, sexual slavery occurs if the accused "caused such person or persons to engage in one or more acts of a sexual nature."

Consider a case in which the accused carried out all of his or her acts within the territory of “State A.” Those acts “caused [the victims] to engage in [sexual acts],” but solely within the territory of “State B.” The loci of the first element is clear: The first element obtains wherever the accused “exercised [ownership],” i.e., State A. By contrast, the loci of the second element could raise an issue of interpretation: Does the second element obtain where the conduct occurred, in the state from which the accused “caused [sexual violence],” i.e., State A, or where the harm occurred, in the state in which the accused “caused [sexual violence],” i.e., State B?

An answer in favor of the former seems likely given Article 12(2)(a)’s focus on conduct alone, as well as, given Elements of Crimes’ emphasis on the cause of the harm and not the harm itself, the effect. Based on the word “caused,” the loci of the second element seems to obtain wherever the accused engaged in conduct that “caused [harm],” even if that harm materialized elsewhere. Many other crimes are based upon the same “caused [harm]” language. For instance, the crime against humanity of murder applies where the accused “killed,” or “caused death.” Through this “caused [harm]” construction, Elements of Crimes seems to put forth conduct-based definitions that align well with Article

54 Elements of Crimes, supra note 53, art. 7(1)(g)–2(1).
55 Id. art. 7(1)(g)–2(2).
56 Id. art. 7(1)(g).
57 Suppose, for instance, that because the accused sold the victims at the border (before entering State B) to perpetrators of sexual violence, the Court found that he or she effectively “caused” the victims to engage in sexual acts (even though those acts ultimately took place solely within State B).
58 Elements of Crimes, supra note 53, art. 7(1)(g)–2(1).
59 Id. art. 7(1)(g)–2(2).
60 Id.
61 Id.
62 Rome Statute, supra note 1, art. 7(1)(a)(1); Elements of Crimes, supra note 53, art. 7(1)(a)(1).
12(2)(a). Under this interpretation, the Court could have jurisdiction over crimes entailing harms that occurred exclusively on non-State Party territory.

Despite the lack of textual backing, the temptation will remain to answer the question above in favor of the latter, thereby placing emphasis on where the harm occurred, or to answer both questions affirmatively, suggesting that both the conduct and the harms must occur within State Party territory. Requiring both the conduct and the harm to occur in State Party territory could effectively eliminate the prosecution of cross-border crimes where some portion of those crimes occur on non-State Party territory (provided the perpetrators are non-State Party nationals).

In sum, the text of Article 12(2)(a) seems clear insofar as its focus is criminal “conduct.” Nevertheless, the Court has yet to differentiate between conduct and crime for the purposes of establishing its territorial jurisdiction. When the Court must do so, it is likely to embrace a conduct-based approach in keeping with the text. To the extent the text is clear in this regard, providing the loci of the harms with greater significance will prove difficult.

B. How Much Conduct?

Another preliminary question resides in the scope of the conduct required by Article 12(2)(a). Namely, is it possible for the “conduct in question” to be anything less than conduct underlying the crime in full, and by definition, anything less than conduct meeting all of the crime’s material elements? Of course the Court tries individuals, not for their conduct, but for their crimes. This question reflects the possibility that the conduct of the accused could occur in multiple states. Seeing the “conduct in question” as anything less, such as the conduct on State Party territory, would pave the way for the greater inclusion of cross-border crimes within the Court’s purview.

The example in the preceding section led to the likely conclusion that the accused committed the crime of sexual slavery in full on the territory of State A (despite the fact that the primary

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63 See Elements of Crimes, supra note 53, art. 7(1).
64 See Rome Statute, supra note 1, art. 12(2)(a).
65 See Vagias, supra note 10, at 63.
66 See Rome Statute, supra note 1, art. 12(2)(a).
67 Id.
harm, i.e., of sexual violence, occurred on the territory of State B). What if the accused “exercised [ownership]” within State A, but “caused [sexual violence]” within State B? If State A is a State Party, then this scenario reflects the partial commission of the crime on State Party territory.

The implications of reading the Rome Statute narrowly seem quite clear: “[T]he conduct in question” is likely the conduct underlying the crime of sexual slavery in full, which, as noted above, includes conduct whereby the accused “exercised [ownership]” and conduct whereby the accused “caused [sexual violence].” Reading the Rome Statute narrowly, the occurrence of both on State Party territory seems required. Thus, whereas acts of “exercising [ownership]” could be sufficient for jurisdiction over another crime, that of enslavement, acts of “exercising [ownership]” alone seem insufficient for jurisdiction over sexual slavery.

On the other hand, the question here seems slightly harder to answer through textual analysis. After all, beyond the word “the” (in “the conduct”), Article 12(2)(a) does not qualify the scope of the conduct that must take place on State Party territory, and perhaps conduct falling short of all of “the conduct in question” could be sufficient. Such an approach seems slightly less persuasive, but, then again, an exceedingly narrow reading of the Statute could be even less plausible. To the extent ambiguity exists, the Court is more likely to move beyond the text on this issue.

On the issue of territorial jurisdiction, one must reconcile his or her views with the text of Article 12(2)(a). In many cases, Article 12(2)(a) will stand on its own footing without creating consternation among the opposing parties. However, the above shows that, in cases of cross-border crimes, one or more parties will likely seek to move beyond the text’s constraints in order to narrow or broaden the Court’s reach and doing so requires identifying ambiguity within the text. Only then is turning general principles of law,

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68 This time suppose, for instance, that instead of stopping at the border between State A and State B, the accused traveled into State B and sold the victims to perpetrators of sexual violence (such that the selling “caused [sexual violence]”).

69 See Rome Statute, supra note 1, arts. 7(1), 12(2)(a).

70 See id. art. 7(1)(c). The crime of enslavement corresponds to the crime of sexual slavery, minus the element of “causing [sexual violence].” Compare Elements of Crimes, supra note 53, art. 13, with Rome Statute, supra note 1, art. 7(1)(g)-2, and id. art. 7(1)(c).

71 Rome Statute, supra note 1, art. 12(2)(a).
including the theories in the following section, methodologically sound.

III. Theories of Territorial Jurisdiction

Part III discusses several theories of territorial jurisdiction that are well-founded with respect to the exercise of territorial jurisdiction by states. They are: (i) the subjective theory of territoriality, (ii) the objective theory of territoriality, (iii) the constituent elements approach, and (iv) the continuing crime-based approach. Each receives separate analysis below. In addition to noting the stature of each theory with respect to the jurisdiction of states, which is relevant to its status under “general principles of law,” Part III serves primarily to ask whether, or to what extent, each theory finds basis in the Rome Statute’s text.

It is imperative to be precise when talking about states delegating their jurisdictional claims to the Court. All too often scholars imply that states may delegate any valid claim they possess. Logically, this cannot be the case. Alone, the attempt to define the Court’s territorial jurisdiction in Article 12 means that the Court’s territorial jurisdiction is not determined, in whole, by the validity of State Party claims. The drafting history of the Statute, like the analysis of the text, makes clear that the Court’s reach is limited. Moreover, uniformity requires that the Court take an approach independent of various state policies. Thus, while a valid State Party claim is likely a necessary condition, it is clearly not a sufficient one. An alternate view renders the provisions of Article 12(2)(a) without meaning.

72 See id. art. 21(1)(c); supra Part II.A.
73 See, e.g., Scheffer, supra note 13, at 71 (“Another major argument advanced to support Article 12’s purported reach over the nationals of non-party states is that the state of territory where the crime was committed has delegated its own jurisdiction to the ICC.”).
74 See, e.g., SCHABAS COMMENTARY, supra note 20, at 277–93 (discussing the difficulty in compromising over the Rome Statute); SCHABAS INTRODUCTION, supra note 20 (discussing the differing arguments about jurisdiction of the International Criminal Court).
75 See SCHABAS INTRODUCTION, supra note 20, at 76.
76 See Vagias, supra note 10 (explaining that a valid state claim is a necessary condition because “jurisdiction is considered a manifestation of state sovereignty” and “[t]he Court is not a sovereign in its own right”). Logically, one can also say that a valid state claim is a necessary condition because no understanding of state territorial jurisdiction can be more narrow than our understanding of jurisdiction pursuant to Article 12(2)(a) based on its terms.
A. The Theory of Subjective Territoriality

The conceptual difficulties attendant to territorial jurisdiction and cross-border crimes are easily illustrated by the analogy of a lethal gunshot across an international border. The state in which the gunman stood may properly claim jurisdiction through the so-called theory of subjective territoriality, i.e., on the basis of his or her conduct alone (the shooting of the gun) and not its harmful effects.77

The theory of subjective territoriality has been well-established in international law.78 For instance, it appears in § 402 the Restatement 3d of the Foreign Relations Law of the U.S. (“Restatement”), which states that, subject to an exception that appears in § 403, “a state has jurisdiction to prescribe law with respect to: (1)(a) conduct that, wholly or in substantial part, takes place within its territory.”79 This subsection explicitly contemplates conduct alone (like the mere shooting of a gun) being sufficient, given that, as discussed below, a separate subsection, § 402(1)(c), deals with harmful effects.80 If states could not regulate conduct within their own borders, then some harmful conduct could occur with impunity. Therefore, it is not surprising that the subjective theory of territoriality reflects an independent basis for jurisdiction in many penal systems.81 After evaluating whether, or to what extent, the subjective theory finds basis in the Rome Statute, this section briefly returns to questions about the type, or magnitude, of the conduct that must occur on State Party territory.

The subjective theory finds strong merit in the Rome Statute.


78 See, e.g., Harvard Research in International Law, Draft Convention on Jurisdiction with Respect to Crime, 29 AM. J. INT’L L. 435, 480 (Supp. 1935); Christopher L. Blakesley, A Conceptual Framework for Extradition and Jurisdiction over Extraterritorial Crimes, 1984 UTAH L. REV. 685, 691–95; Blakesley, supra note 7, at 96–104; see also Cedric Ryngaert, Territorial Jurisdiction over Cross-Frontier Offences: Revisiting a Classic Problem of International Criminal Law, 9 INT’L CRIM. L. REV. 187, 200 (2009) (“The ‘theory of a physical act’ is probably the oldest one. As a modality of the subjective territoriality principle, it confers jurisdiction on the place where the initial physical act occurred.”).


80 Id.

81 See Boczek, supra note 78.
Part II’s textual analysis supports this. Recall that, under Article 12(2)(a), the Court has territorial jurisdiction if “the conduct in question” occurred on State Party territory. By referring merely to “the conduct,” Article 12(2)(a) departs from other portions of the text, which often reference “the crime.” It therefore seems possible to argue that “the crime” (including its harms) need not occur, in full, on State Party territory.

At the same time, the subjective theory potentially adds depth to Article 12(2)(a). First, recall that one preliminary question in Part II was whether the “conduct in question” could be anything less than the conduct underlying the crime in full, i.e., anything less than conduct meeting all of the crime’s material elements. With respect to the theory of subjective territoriality in particular, § 402(1)(a) of the Restatement specifies “conduct that, wholly or in substantial part, takes place [within state] territory.” Likewise, Cherif Bassiouni notes that “[t]he subjective territorial theory obtains when at least one material or constituent element of an [offense] occurs within [the] state.” This characterization of the theory leans in favor of the conclusion that “the conduct in question” can, in fact, fall short of the conduct underlying the crime in full. Thus, if the theory applies, then not all of the conduct underlying the crime must occur on State Party territory for the Court’s jurisdiction to be well-founded. Of course, the subjective theory can only qualify Article 12(2)(a) to the extent Article 12(2)(a)’s wording allows for that possibility. Part II casts some doubt on this, perhaps inconclusively.

Second, although Article 12(2)(a) does not contain any explicit qualifiers, the above lends credit to the idea that use of the subjective theory depends on the occurrence of “substantial” conduct in State Party territory, i.e., conduct that reflects, in the words of Cherif Bassiouni, one “material or constituent” element of the crime. Although defining what these qualifiers mean in practice could be challenging, the natural starting point for the Court would be Elements of Crimes, which lists the subject-matter elements of

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82 Rome Statute, supra note 1, art. 12(2)(a).
83 Id.
85 Blakesley, supra note 7, at 101 (emphasis added).
86 Id.
crimes within the Court’s jurisdiction. However, some elements within *Elements of Crimes* are easier than others to reconcile with a purely conduct-based approach. For instance, Part II noted that an issue of interpretation arises with respect to the potential loci of crimes based on causing harm, such as causing sexual violence. Going further to differentiate between substantial and unsubstantial conduct could prove challenging. This is particularly true for charges based on aiding or abetting, or otherwise contributing to crimes within the Court’s jurisdiction, for which, by definition, the conduct in question is necessarily limited with respect to the elements of the crime in full.

In sum, the subjective theory not only finds strong basis in general principles of law, but also finds strong basis in the texts of the *Rome Statute* and, perhaps, *Elements of Crimes*. Its use as an alternative to the theory whereby the full crime must materialize within State Party territory that seems both particularly likely and well-founded. Article 12(2)(a) does not explicitly qualify the magnitude of the conduct that must occur in State Party territory. Here, the subjective theory might offer some assistance, namely by providing some basis for the conclusion that only some conduct need occur in State Party territory, provided that conduct is relatively substantial.

### B. The Theory of Objective Territoriality

Once again, recall the scenario of a lethal shot across an
international border. The state in which the harm occurred may claim jurisdiction on the basis of the harm alone under the theory of objective territoriality.95

The objective theory, also known as effects-based jurisdiction (or the “Effects Doctrine”),96 is the conceptual counterpart of subjective theory.97 It too is well-established in international law.98 Again, § 402 of the U.S. Restatement provides a clear invocation: it notes that, “a state has jurisdiction to prescribe law with respect to . . . (1)(c) conduct outside its territory that has or is intended to have substantial effect within its territory.”99 Scholar William Schabas notes that,

[m]any national jurisdictions extend the concept of territorial jurisdiction to include crimes that create effects upon the territory of a State. For example, it could be argued that, in the case of a conspiracy to commit genocide, the Court might have jurisdiction even if the conspirators actually hatched their plan outside the territory where the crime was to take place.100

Of course the theory could have many other potential

95 See Blakesley, supra note 7, at 104.
96 See, e.g., Schabas INTRODUCTION, supra note 20, at 78–79 (explaining that a crime “could be committed outside the territory of a State but might be deemed to fall within the jurisdiction of the Court if its effects were felt on the territory”).
97 The theories were “first used in 1887 by J.B. Moore in his ‘Report on Extraterritorial Crime and the Cutting Case’” and they entered into “conventional international law [via] Article 9 of the Convention for the Suppression of Counterfeited Currency . . . and Articles 2 and 3 of the Convention for the Suppression of the Illicit Traffic in Dangerous Drugs.” Ryngaert, supra note 78, at 189 n.6. “Akehurst observed that at the beginning of the 20th century, the arguments in [favor] of subjective and objective territoriality were ‘so evenly matched that it was eventually realized that there was no logical reason for preferring the claims of one State over the claims of the other.’” Id. at 189 n.8 (citing Michael Akehurst, Jurisdiction in International Law, 1972–73 Brit. Y.B. INT’L L. 145, 152).
98 “The principle that a man who outside of a country willfully puts in motion a force to take effect in it is answerable at the place where the evil is done, is recognized in the criminal jurisprudence of all countries.” Ryngaert, supra note 78, at 189 n.7; see also Blakesley, supra note 78, at 695–70 (providing examples from French and American law); Blakesley, supra note 7, at 96–108.
100 Schabas INTRODUCTION, supra note 20, at 78 (continuing by stating “[s]imilarly, an order to take no prisoners [or a denial of quarter], which is a crime in and of itself even if nobody acts upon the order, could be committed outside the territory of a State but might be deemed to fall within the jurisdiction of the Court if its effects fell on the territory”).
applications. For instance, with respect to the crime of sexual slavery, discussed in depth above,\textsuperscript{101} theoretically the objective theory could provide jurisdiction to the Court even when the conduct of the accused, which caused the sexual violence, took place exclusively on non-State Party territory.\textsuperscript{102} Because the occurrence of harm is sufficient, irrespective of where the conduct in question occurs, the objective theory might considerably increase the bases for jurisdiction.\textsuperscript{103} Whereas, generally speaking, the physical acts of the accused will occur in one or two states, the repercussions of those acts could, at least more easily, materialize in many.\textsuperscript{104}

Hoping to justify use of the objective theory, one might say that the Rome Statute is silent on its applicability. The merits of that perspective seem hard to maintain given what the Rome Statute has to say about the Court’s territorial jurisdiction more generally. Many scholars quickly move past the text in favor of consulting general principles of law. Part II identifies the flaws of doing so given the Court’s treaty-body nature.\textsuperscript{105} Moreover, Part II notes that, by focusing on “the conduct in question,” Article 12(2)(a) seems to make the occurrence of conduct on State Party territory both necessary and sufficient—thereby making the occurrence of harm on State Party territory neither.\textsuperscript{106} Unfortunately, because the Rome Statute does not otherwise establish a relationship between the occurrence of harm and the finding of territorial jurisdiction, a plain reading of Article 12(2)(a) seems not just “compelling,”\textsuperscript{107} but more likely conclusive.

It remains worth noting that the prominence of the objective theory might weigh against its potential applicability. States were certainly aware of the objective theory, and its ability to confer jurisdiction over a larger number of crimes, during the drafting

\textsuperscript{101} See Rome Statute, supra note 1, arts. 7(1)(g), 8(2)(a)(xxii), 8(2)(e)(vi).

\textsuperscript{102} Elements of Crimes, supra note 53, art. 7(1)(g)-1 to -2.

\textsuperscript{103} See generally Rome Statute, supra note 1 (setting forth the basis for jurisdiction).

\textsuperscript{104} See Scheffer, supra note 13, at 68–69 (noting the concern of Madeleine Albright over the definition of the Court’s jurisdiction in multiple states).

\textsuperscript{105} Rome Statute, supra note 1, pt. I.

\textsuperscript{106} See id. art. 12(2)(a).

\textsuperscript{107} See SCHABAS INTRODUCTION, supra note 20, at 79 (“[G]iven the silence of the Statute about effects jurisdiction, there are compelling arguments in favor of a strict construction of Article 12 and the exclusion of such a concept.”).
In fact, the theory’s ability to extend the scope of the Court’s territorial jurisdiction might very well have been the reason why the drafters of the Rome Statute failed to include (or succeeded in omitting) any indication of it. After all, the drafters could have easily included wording in Article 12(2)(a) that provides for effects-based jurisdiction.

The theory of objective territoriality is well-established in international law with respect to the state exercise of jurisdiction. Scholars, taking note of this, often cite the theory as one of potential basis of jurisdiction for the Court. However, through its “silence,” the ultimate authority on the issue, the Rome Statute’s Article 12(2)(a), seems to speak quite clearly to the contrary. Thus, unfortunately, finding an authoritative basis for the theory’s use seems rather unlikely.

C. The Constituent Elements Approach

Given the extent to which the subjective and objective theories have gained favor in international law, it is not surprising that yet another theory, the constituent elements approach, provides jurisdiction to any state in which any constituent element of the crime occurred. There is little to say about how this theory in particular relates to the Court given that it derives both its strengths and weaknesses from the prior two. However, it is worth mentioning separately because it exists as an independent basis for the exercise of state jurisdiction, and provides additional support for

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108 Many states have incorporated the theory of objective territoriality into their domestic law. See, e.g., Blakesley, supra note 7, at 105 (noting that some U.S. courts have begun applying the objective theory).

109 See generally Rome Statute, supra note 1 (lacking an indication of the objective theory).

110 Article 12(2)(a) of the Rome Statute, supra note 1, could read: “The State on the territory of which the conduct or harms in question occurred . . .” (addition in italics).

111 See, e.g., Ryngaert, supra note 78, at 208 (discussing States’ exercising of jurisdiction).

112 Recall, however, that at least some experts see the formulation of Article 12 as “imprecise,” and erroneous, given the intentions of the drafters. See supra text accompanying notes 39–42.

113 Ryngaert, supra note 78, at 188 (“In international criminal law, it is commonly accepted that, for a State to exercise jurisdiction, it is necessary, but also sufficient, that one constituent element of the act or situation has been consummated in the territory of the State that claims jurisdiction.”).

114 See id. (discussing the problems of the constituent elements approach).
the idea that only one constituent element of the underlying crime must occur within State Party territory. To the extent the constituent-elements approach incorporates the objective theory of territoriality, the Rome Statute likely prohibits the approach from taking its traditional meaning.

D. The Continuing Crime-Based Approach

Another potential basis for territorial jurisdiction pertains to so-called continuing crimes. The International Criminal Tribunal for Rwanda (“ICTR”) adopted Black’s Law Dictionary’s definition of a “continuous crime” as one that “continues after an initial illegal act[,] . . . involves ongoing elements[,] and[,] . . . continues over an extended period.” Additionally, continuing crimes are often described as crimes that “are repeated over time and are linked by a common intent or purpose.”

In the domestic context, the continuing crime-based approach often, though not always, arises with respect to criminal conspiracy. The concept is clearly stated, for example, in 18 U.S.C. § 3237(a). It says: “any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such [offense] was begun, continued, or completed.” This provision, which falls under Chapter 211, Jurisdiction and Venue, allows for the prosecution of crimes that occur, in part, outside the United States. For instance, in United States v. Levy Auto Parts of Canada, the U.S. Fourth Circuit Court

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115 The Court could have territorial jurisdiction over a crime with multiple conduct-based elements; for instance, even if only one conduct-based element occurred in State Party territory. See Rome Statute, supra note 1, pts. I, II.


117 Id. ¶ 2, at 348 (Pocar, J., dissenting in part) (“Insofar as [offenses] are repeated over time and are linked by a common intent or purpose, they must be considered as a continuing [offense], that is a single crime.”).


119 Id.

120 Id.

121 See id.
of Appeals noted the applicability of § 3237(a) when the defendant had conspired to violate the Arms Export Control Act where twenty-four of the alleged twenty-six overt acts occurred abroad. However, as noted, the same concept applies with respect to the ongoing acts of one individual (i.e., outside the framework of large-scale criminal conspiracy involving multiple actors). The continuing crime-based approach appears in the law and jurisprudence of many other jurisdictions.

The concept of a continuing crime is neither entirely foreign to international criminal law nor entirely foreign to the International Criminal Court. However, while the concept has served multiple purposes in international criminal law, no international tribunal or court has recognized its potential relevance to territorial jurisdiction to date. Instead, the purposes of its use have been limited, in one way or another, to questions about the timing of certain issues. International tribunals and courts most often invoke the continuing crime-based approach for the purpose of establishing their temporal jurisdiction (ratione temporis) over specific crimes. Such was the

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123 See, e.g., United States v. Gilboe, 684 F.2d 235, 239 (2d Cir. 1982). One must not confuse the idea here, which pertains to territorial jurisdiction, with the idea of using conspiracy to establish individual criminal responsibility. Conspiracy could help fulfill two independent requirements (ratione loci and ratione personae).

124 See, e.g., LAW COMM’N, THE EFFECTIVE PROSECUTION OF MULTIPLE OFFENDING 10–11 (2002), http://www.lawcom.gov.uk/wp-content/uploads/2015/04/lc277.pdf [https://perma.cc/2PEQ-Y99N] (noting that, in Barton, “[t]he appellant had stolen a total of £1,338.23 on 94 occasions from the till at which she worked over the period of a year” and that “[t]he high degree of repetition involved in the offending persuaded the court to regard it as a continuous single [offense]”).


126 See Ryngaert, supra note 78, at 208 (“[T]he territoriality principle is interpreted in a fairly expansive manner in most jurisdictions. This is because other principles of jurisdiction, which are not based on territoriality and are thus extraterritorial . . . are perceived to be in need of special justification under international law, while the uncontroversial territoriality principle is not.” (emphasis added)).

127 See Alan Nissel, Continuing Crimes Under the Rome Statute, 25 MICH. J. INT’L L. 653, 660 (2004) (“The ICC has no retroactive jurisdiction to criminalize conduct that was not criminal before the critical date.”).

128 See Stéphane Bourgon, Jurisdiction Ratione Temporis, in THE ROME STATUTE OF
purpose of its use, for instance, by the ICTR.\textsuperscript{129} Tribunals and courts also invoke the approach with respect to the issue of consent.\textsuperscript{130} For instance, in \textit{Lubanga}, the International Criminal Court noted that the offenses of conscripting and enlisting child soldiers are “continuous in nature,”\textsuperscript{131} and therefore they endure despite any subsequent “voluntary” participation.\textsuperscript{132} The Court has not yet addressed continuing crimes elsewhere. Scholars, quite remarkably in my view, have also yet to remark on the potential relevance of continuing crimes to the issue of territorial jurisdiction.\textsuperscript{133} This is surprising given the lack of conceptual moves needed for the underlying concepts to apply.\textsuperscript{134} One case before the Special Court of Sierra Leone illustrates just how closely an international court has come to setting precedent on the issue.\textsuperscript{135}


\textsuperscript{130} See, e.g., \textit{Lubanga Dyilo}, Case No. ICC-01/04-01/06-2842 (discussing consent).


\textsuperscript{132} \textit{See} \textit{id.} \textsuperscript{¶} 663–79 (providing an analysis of continuing crimes under the \textit{Rome Statute}). In this comprehensive piece, Nissel notes that “issues [beyond \textit{ratione personae}, \textit{ratione materiae}, and \textit{ratione temporis}], \textit{i.e.}, \textit{ratione loci}, do not directly concern us here.” \textit{Id.} at 659 n.30.

\textsuperscript{133} \textit{See generally id.} at 658–60 (discussing the necessary steps to establish jurisdiction).

\textsuperscript{134} There too territorial jurisdiction was not at issue. Nevertheless, the Special Court noted that, “[b]ecause forced marriage is a continuing crime, it follows that the acts of
It remains important to ask what basis the continuing crime-based approach might have in the Rome Statute. Two observations are particularly important here. First, insofar as the continuing crime-based approach is conduct-based, it seems to possess the merits of the subjective theory. The crime against humanity of sexual slavery is once again illustrative here (in part because sexual slavery has been characterized as a continuing crime already). Recall that, under Article 12(2)(a), the Court has territorial jurisdiction whenever the “conduct in question” occurs on the State Party territory. The crime of sexual slavery includes, in part, the continuous and incremental acts associated with confinement. Perhaps territorial jurisdiction is well-founded under Article 12(2)(a) where those acts, the “conduct in question,” occurred on State Party territory. Thus, merely forcing victims to travel through State Party territory (while depriving them of their liberty) would be sufficient irrespective of where their capture and the sexual violence occurred.

Second, though it shares the merits of the subjective theory through its focus on conduct, the continuing crime-based approach goes further by suggesting that the occurrence of relatively incremental acts on State Party territory is a sufficient basis for jurisdiction under Article 12(2)(a). Two observations weigh against the continuing crime-based approach in this respect.

terrorism continued from the place of abduction to Kailahun District.” Sesay, Case No. SCSL-04-15-A, ¶ 990.

136 See Nissel, supra note 127, at 654 (“A ‘continuing crime’ describes a state of affairs where a crime has been committed and then maintained.”).

137 See Ryangaert, supra note 78, at 189 (defining the subjective territoriality principle as the ability of a State to “exercise jurisdiction if the act has been initiated in the territory, but completed abroad”).

138 In Sesay, the Special Court often deals with forced marriage and sexual slavery jointly. See, e.g., Sesay, Case No. SCSL-04-15-A, ¶¶ 972, 983. The Court notes, in two places, that “forced marriage is a continuing crime.” Id. ¶ 739 n.1915, ¶ 990.

139 Rome Statute, supra note 1, art. 12(2)(a).

140 See, e.g., Elements of Crimes, supra note 53, art. 7(1)(g)-2(1) (stating that deprivation of liberty is an element of crime against humanity of sexual slavery).

141 Rome Statute, supra note 1, art. 12(2)(a).

142 Article 4 of the Rome Statute states that “the Court may exercise its functions and powers . . . on the territory of any State Party” but does not address jurisdiction when the victims travel through State Party territory. Id. art. 4.

143 Ryangaert, supra note 78, at 189.

144 Nissel, supra note 127, at 664.
Part II.B notes that Article 12(2)(a)’s grant of territorial jurisdiction, based on “the conduct in question,” might require that all of the conduct underlying the crime occur on State Party territory. Even then, to the extent some ambiguity exists, the subjective theory and others seem to require that at least one material or constituent element of the crime occur on State Party territory. To the extent this qualification applies, the subjective theory might subsume the continuing crime-based approach, such that the latter carries little independent significance.

In sum, the continuing crime-based approach reflects yet another potentially valid theory of territorial jurisdiction. However, its practical utility might be cabined by the requirement that relatively substantial conduct occurs on State Party territory. To the extent some utility remains, the continuing crime-based approach might be more persuasive, based on the wording of Article 12(2)(a), than the theory of objective territoriality and the constituent elements approach (insofar as the latter incorporates the former).

IV. Territorial Jurisdiction in Context

The above illustrates that, insofar as the text of Article 12(2)(a) governs, the territorial jurisdiction of the Court could be considerably more narrow than the territorial jurisdiction of its State Parties, and considerably more narrow than many observers likely expect or hope. This section serves to provide greater context and, in doing so, illustrate ways in which, despite the above, the territorial reach of the Court might nevertheless be surprising to many observers. Namely, it highlights two general observations that focus on what committing a crime within the jurisdiction of the Court means at the level of individual perpetrators. For instance, whereas observers often envision a crime against humanity in terms

145 See Rome Statute, supra note 1, pt. I.B.
146 Id. pt. II.A.
147 See Ryngaert, supra note 78, at 187–88 (describing territorial jurisdiction and its application in international criminal law).
148 Rome Statute, supra note 1, art. 12(2)(a).
149 See Ryngaert, supra note 78, at 188 (noting the weakness is the constituent elements approach under international law).
150 See Rome Statute, supra note 1, art. 12(2)(a).
151 See id. art. 25 (describing the jurisdiction the Court has over individuals).
of the overall attack and harm to the victims, “the conduct in question” for the purposes of an individual prosecution could amount to much less.\footnote{Article 12(2)(b) of the \textit{Rome Statute} provides the Court with jurisdiction where the accused is a State Party national. \textit{Rome Statute}, \textit{supra} note 1, art. 12(2)(b). Thus the analysis here pertains more closely to non-State Party nationals. For them, Article 12(2)(a) is the relevant basis. \textit{See Prosecutor v. Chui}, Case No. ICC-01/04-01/07-262, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Mathieu Ngudjolo Chui (July 6, 2007), http://www.icc-cpi.int/iccdocs/doc/doc455752.pdf \cite{perma.cc/9MCC-VPYD} (noting that two alternate bases for jurisdiction exist in Article 12(2)(a) and (b)).}

First, for this purpose, Part IV looks briefly at crimes against humanity and war crimes.\footnote{\textit{Rome Statute}, \textit{supra} note 1, arts. 7, 8.} In order to commit a crime against humanity, such as the crime against humanity of murder,\footnote{\textit{Id. art. 7}(1)(a).} the perpetrator must have carried out his or her criminal acts “as part of a widespread or systematic attack.”\footnote{\textit{Id. art. 7}(1). The attack must also be “directed against any civilian population, with knowledge of the attack.” \textit{Id.}} The crucial point is that this requirement (\textit{i.e.}, the commission of the acts “as part of a widespread or systematic attack”) is an independent one. To be clear, the acts of the accused (\textit{e.g.}, acts of murder) need not account for the broader attack in full (\textit{e.g.}, widespread or systematic murder) in order for the accused to be guilty of crimes against humanity under Article 7(1).\footnote{\textit{Elements of Crimes} makes this clear; it includes three subject-matter elements for the crime against humanity of murder, stipulating that the crime might be well-founded where: (1) “[t]he perpetrator killed one or more persons”; (2) “[t]he conduct was committed as part of a widespread or systematic attack directed against a civilian population”; and (3) “[t]he perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.” \textit{Elements of Crimes}, \textit{supra} note 53, art. 7(1)(a). The last two elements reflect the general \textit{chapeau} requirements for crimes against humanity under Article 7(1). \textit{Compare id. art. 7}(1)(g)-2(3)–(4) (describing sexual acts of violence as crimes against humanity), \textit{with Rome Statute}, \textit{supra} note 1, art. 7(1) (defining a crime against humanity). They pertain, not to the conduct of the accused, but the \textit{context} in which the acts of the accused took place. \textit{Elements of Crimes}, \textit{supra} note 53, art. 7 (“The last two elements for each crime against humanity describe the context in which the conduct must take place.” (emphasis added)). In practice, the Court should only try those individuals who contributed most to the crimes at issue. Nevertheless, the point here still stands.} While the accused could be responsible for the broader attack, for instance, having ordered its commission,\footnote{\textit{Id. art. 7}(1)(g). Compare \textit{id. art. 7}(1)(g)-2(3)–(4) (describing sexual acts of violence as crimes against humanity), \textit{with Rome Statute}, \textit{supra} note 1, art. 7(1) (defining a crime against humanity). They pertain, not to the conduct of the accused, but the \textit{context} in which the acts of the accused took place. \textit{Elements of Crimes}, \textit{supra} note 53, art. 7 (“The last two elements for each crime against humanity describe the context in which the conduct must take place.” (emphasis added)). In practice, the Court should only try those individuals who contributed most to the crimes at issue. Nevertheless, the point here still stands.}
 Crimes other than those of the accused in furtherance of the overall attack are relevant to the analysis insofar as they help substantiate whether or not the acts of the accused where indeed “part [thereof].” They are circumstantial evidence.\textsuperscript{160} \textit{Elements of Crimes} defines murder in terms of “kill[ing] one or more persons.”\textsuperscript{161} Thus, in theory, the murder of one individual might warrant charges of crimes against humanity,\textsuperscript{162} provided other criteria is met.\textsuperscript{163}

This observation is important within the context of this paper because it clarifies the meaning of “conduct in question” under Article 12(2)(a).\textsuperscript{164} Namely, it adds to Part II.B by clarifying what conduct must take place on State Party territory. “[T]he conduct in question,” that which must occur on State Party territory, almost certainly refers to the conduct of the accused.\textsuperscript{165} If this is true, as it

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\item[158] The jurisprudence of other tribunals helps make this clear. The ICTR, for instance, tried a greater breadth of perpetrators.
\item[159] Rome Statute, \textit{supra} note 1, art. 7.
\item[160] An example seems helpful here. In \textit{Katanga}, the Court found that the massacre in Bogoro village, which resulted in nearly 200 deaths, was a crime against humanity. \textit{See} Prosecutor v. Katanga, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges (Sep. 30, 2008), \textit{http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf} [\textit{http://perma.cc/UU3Q-MGEW}]. In doing so, the Court noted that the massacre fit the trend of at least three others, some even more deadly. \textit{Id.} ¶¶ 408–10. What is important to note is that Katanga was not tied for his involvement in the related atrocities; instead, the Court took notice of them only to establish that the massacre in Bogoro village, as well as the other crimes that took place there, was, in fact, “part of” a broader widespread or systematic attack. \textit{Id.} In other words, the additional massacres (those outside of Bogoro) were not part of the specific acts for which Katanga was changed. \textit{Id.} However, due to the ways in which they were committed, they served as important, if not vital, contextual (\textit{i.e.}, circumstantial) evidence. \textit{Id.} ¶ 415.
\item[161] \textit{Elements of Crimes}, \textit{supra} note 53, art. 7(1)(a)(1).
\item[162] An independent requirement, the so-called “gravity threshold,” might preclude prosecution under such circumstances. \textit{See}, e.g., Rome Statute, \textit{supra} note 1, art. 17(1)(d). Then again, it too could apply to the circumstances writ large, \textit{i.e.}, the common plan in the aggregate, and thereby perhaps pose no barrier. \textit{See generally} Margaret M. Deguzman, \textit{How Serious Are International Crimes?: The Gravity Problem in International Criminal Law}, 51 \textit{COLUM. J. TRANSNAT’L L.} 18 (2012) (discussing the gravity threshold).
\item[163] The idea that the ICC Prosecutor would pursue cases involving relatively few killings might not be as far-fetched as it seems. \textit{See} Deguzman, \textit{supra} note 162, at 22 (noting that, at the time of publication, “[t]he ICC prosecutor [was] considering whether to act with regard to situations involving as few as six deaths and violence that occurred on a single day”).
\item[164] Rome Statute, \textit{supra} note 1, art. 12(2)(a).
\item[165] It seems far less feasible for “conduct in question” to apply to the “attack” writ
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seems to be, then the *Rome Statute*’s sole provision on territorial jurisdiction has little or nothing to say about the *loci* of the broader attack. Thus, provided the conduct of the accused occurred on State Party territory, the conduct underlying the broader attack need not have.166 This observation is important given that, when thinking about crimes against humanity, observers almost certainly envision the overall attack and could be prone to perceive its *loci* as dispositive. In theory, just one murder on State Party territory could satisfy the dictates of Article 12(2)(a), and thereby provide the Court with territorial jurisdiction irrespective of where the broader attack occurred. The reach of the Court would be even broader if the Court utilized one or more of the theories noted above.

The same general idea applies to war crimes. Article 8(2)(a)(i) specifies the war crime of willful killing.167 The *chapeau* requirements of Article 8(1) mirror those of Article 7(1).168 The only additional criterion is that the crime must have a sufficient nexus to an armed conflict.169 What is interesting to note here is that, while the crime (e.g., the willful killing) must occur within State Party territory, the related armed conflict likely need not.170

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166 Relatedly, Article 12(2)(b) provides jurisdiction to the Court where the accused is a State Party national, again irrespective of where the attack writ large occurs. *See* *Rome Statute*, *supra* note 1, art. 12(2)(b); *supra* Part II.A (noting that two alternate bases for jurisdiction exist in Article 12(2)(a) and (b)).

167 *Rome Statute*, *supra* note 1, art. 8(2)(a)(i).

168 Article 8(1) states that, “[t]he Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.” *Rome Statute*, *supra* note 1 (emphasis added).

169 *See, e.g., Elements of Crimes*, *supra* note 53, art. 8(2)(a)(i)(4) (“The conduct took place in the context of and was associated with an international armed conflict.”); id. art. 8(2)(i)(i)-1(4) (“The conduct took place in the context of and was associated with an armed conflict not of an international character.”).

170 In *Tadić*, the International Criminal Tribunal for the Former Yugoslavia (ICTY) expounded upon the nexus requirement, noting that the law of armed conflict can continue to apply outside the immediate area of the hostilities. *See, e.g.,* Marko Milanovic & Vidan Hadzi-Vidanovic, *A Taxonomy of Armed Conflict*, in *Research Handbook of International Conflict and Security Law* 14 (Nigel White & Christian Henderson eds., 2012) (“[Based on the decision of] the ICTY Appeal Chamber in *Tadić* . . . if there is a sufficient nexus between an ongoing [non-international armed conflict] and military operations that are occurring outside the areas in which the conflict and ‘protracted armed violence’ normally take place, these military operations will nevertheless be understood as part of the overall armed conflict. This reasoning can be extended by analogy to military operations outside the state.” (emphasis in original) (citations omitted)).
Therefore, in terms of war crimes under Article 8, one killing could again suffice for the purpose of establishing the Court’s jurisdiction (over that killing), provided, of course, the other criteria are met.

Second, for the purpose of placing the aforementioned theories of territorial jurisdiction more precisely in the context of what it means to commit a crime within the jurisdiction of the Court, here this paper briefly looks at the topic of individual criminal responsibility. Under Article 25, the crime of the accused could be limited to aiding or abetting or otherwise contributing to crimes listed in the Rome Statute and Elements of Crimes. Here too, “the conduct in question,” which must occur on State Party territory, almost certainly refers to the conduct of the accused (i.e., the conduct underlying his or her crime alone). That conduct, by definition, necessarily falls short of the conduct needed to bring about a listed crime in full. This observation, further evidences the disparity between what observers likely perceive as individual crimes against humanity, and what could come before the Court in theory. Seemingly, to the extent “the conduct in question” is the conduct of the accused, conduct that aided or abetted or otherwise contributed to a crime, even just one murder, on State Party territory could be sufficient for territorial jurisdiction under Article 12(2)(a).

Relatedly, it is important to note that theories of individual criminal responsibility have evolved dramatically in international criminal law over time, largely to ensure that convicting those most responsible for particularly heinous international crimes is possible. Many states have yet to ratify the Rome Statute.

171 Here too the aforementioned caveat would apply. See supra note 160.
172 Doing so requires that we dispense temporarily with the understanding noted in the introduction of this paper.
173 See Rome Statute, supra note 1, art. 25(3)(c)–(d); Elements of Crimes, supra note 53.
174 See Rome Statute, supra note 1, art. 12(2)(a).
175 See supra text accompanying notes 154–62.
177 See Rome Statute of the International Criminal Court, UNITED NATIONS TREATY
Guided by the same imperative of ending impunity, the Court might very well find validity in arguments that take equally expansive approaches to territorial jurisdiction. Evolution of the law in that direction would certainly be met by great applause in certain corridors and steep criticism in others.

V. Potential Limiting Principles

While many observers might like the Court to possess expansive territorial jurisdiction, there are many others who would fear development of the law in that direction. Understanding where the limiting principle or principles lie is critically important.

One clear option is reading the Rome Statute narrowly. Part II.A discusses why this is the most appropriate limit. In some respects, the implications of reading Article 12(2)(a) narrowly seem relatively clear. A narrow reading would exclude the theory of objective territoriality, and to the extent the constituent elements approach includes the theory of objective territoriality, would falter. By contrast, a narrow reading of Article 12(2)(a) would not fully exclude use of the theory of subjective territoriality or the continuing crime-based approach. As noted above, the text itself might place limits on the extent of the conduct that must occur on State Party territory, and render these two theories with little practical significance as well.

A second option is requiring a material or constituent element to have occurred on State Party territory. As noted above, the challenge would be defining what those terms mean in practice and a natural starting point for the Court would be Elements of Crimes. The Court could significantly limit the expanse of its territorial jurisdiction by requiring that one or more elements listed


178 See, e.g., Rome Statute, supra note 1, pmbl., paras. 4–6.
179 See supra Part II.
180 See supra Parts II.A, III.B.
181 See supra Part III.C.
182 See supra Part II.B.
183 See, e.g., supra Part III.B (addressing objective territoriality).
184 See Elements of Crimes, supra note 53.
therein occur on State Party territory. This limit might exclude the use of the continuing crime-based approach. It might also limit jurisdiction over some crimes where the perpetrator merely aided or abetted or otherwise contributed to a crime that, in all material respects, occurred on non-State Party territory.\footnote{This approach could raise some unique concerns. In fact, the approach could alter prosecutions based on aiding and abetting, or otherwise contributing to a crime, by narrowing the types of cases that can come before the Court. The law of individual criminal responsibility does not necessary require that the actions of the accused, alone, amount to a material or substantial element of the crime at issue. Thus, by adopting this limitation for the purpose of territorial jurisdiction, the Court will be unable to address cases that might otherwise fall within its jurisdiction (i.e., if territorial jurisdiction were not an issue). If one considers the “conduct in question” to be conduct other than that of the accused, such as that of the overall crime, the analysis here would differ, as well as result in larger issues of interpretation.}

A third option is imposing a flexible case-by-case standard. There is basis for this approach in the state exercise of territorial jurisdiction. For instance, it is well-recognized that the exercise of jurisdiction must be “reasonable.”\footnote{This standard relates to a caveat noted above. \textit{See supra} Part III.A.} Recall that § 402 of the \textit{Restatement 3d of the Foreign Relations Law of the U.S.} provides basis for the subjective and objective theories. The next section, § 403, qualifies § 402.\footnote{\textit{Restatement (Third) of the Law of Foreign Relations of the United States} § 403 (AM. LAW INST. 1986).} In particular, § 403(1) sets forth the reasonableness limitation.\footnote{\textit{Id.} § 403(1).} The next subsection, § 403(2) states that, “[w]hether exercise of jurisdiction . . . is unreasonable is determined by evaluating all relevant factors.”\footnote{\textit{Id.} § 403(2) (emphasis added).} One such factor is “the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory.”\footnote{\textit{Id.} § 403(2)(a).} Other factors include “the character of the activity to be regulated,”\footnote{\textit{Id.} § 403(2)(c).} “the importance of regulation to the international political, legal, or economic system,”\footnote{\textit{Id.} § 403(2)(e).} and “the extent to which another state may have an interest in regulating the activity.”\footnote{\textit{Id.} § 403(2)(g).}
At least one scholar has proposed this type of approach. That scholar, Michail Vagias, states that, “the crime in question... should be considered as having ‘occurred’ in the territory of a State Party, when there is a reasonable connecting link between the crime and the territory of the State Party.” Vagias believes that “it would then fall upon the Court to specify exactly what constitutes a ‘reasonable connection’ in each case or situation.” Neither Vagias, nor any other scholar to my knowledge, calls attention to the gravity threshold, which reflects one way in which the Rome Statute embodies a somewhat analogous case-by-case standard. Moreover, because the gravity threshold allows for the consideration of many qualitative factors, it could be the natural home for a case-by-case standard to narrow the Court’s reach. In other words, the Court might invoke the gravity threshold to rule that a merely tenuous or fortuitous connection with State Party territory is insufficient.

This overall approach would provide the Court with a great degree of flexibility, which would certainly alarm some observers. Vagias describes the process of interpreting the Rome Statute as an exercise in “fusion cooking,” one in which “[t]he taste of the final result depends on the combination of spices and the imagination of the chef.”

194 See Vagias, supra note 10, at 44 (“[I]t is suggested that the Court would have jurisdiction over any case or situation that would have a sufficiently strong connection with the territory of a State Party. The meaning of a ‘sufficiently strong connection’—an essential ‘reasonableness’ approach, showing the absence of an abuse of rights or arbitrariness—would then need to be specified on a case-by-case basis.”).

195 Id. at 53–54. As noted above, Vagias wrongly characterizes the language of Article 12(2)(a) as “imprecise.” See id. at 44 n.46 (“The use of the word ‘conduct’ in Art. 12(2)(a) is best attributed to a drafting oversight in Rome, as opposed to a conscious effort on the part of the drafters to limit the Court’s jurisdiction by excluding jurisdiction based on the territory where the consequences of the crime took place.”). The focus of this paper has not been justifying why the phrase, “the conduct in question,” is, in fact, an apt choice. Nevertheless, the paper sheds light on several potential reasons. It also sheds light on why the phrase, “the crime in question,” could be far more problematic (particularly if one favors maintaining flexibility for the sake of ending impunity, as Vagias does).

196 Id. at 54.

197 See supra note 162 (discussing the “gravity threshold”).

198 In fact, Vagias’ description of the process as an exercise in “fusion cooking” might give rise to some alarm: “The interpretation of the Rome Statute in general and the clauses of jurisdiction in particular resembles largely an exercise in fusion cooking... [T]he judges have available all sorts of spices and ingredients available for interpretation... The taste of the final result depends on the combination of spices and the imagination of
cabinet,\textsuperscript{199} seems to look upon this dynamic favorably, this approach could easily run afoul of the Court’s imperatives. For instance, two concerns, which are common to all of the legal systems from which those “ingredients” are drawn, are maintaining the consistency and integrity of the legal process and safeguarding the rights of the accused.\textsuperscript{200} On this basis, and others, many states and observers are certainly unlikely to share his taste for conferring great latitude to individual judges.

\textbf{VI. Conclusion}

It is unsurprising that the territorial jurisdiction of the International Criminal Court was the most hotly debated issue during the Rome Conference. However, what is surprising is the amount of attention the issue has received since the \textit{Rome Statute} entered into force. In short, many fundamental questions remain unresolved, ones that will inevitably come before the Court in due time. This paper serves to show that the Court will face a range of options when this occurs and that the results could be surprising, irrespective of where one stands with regard to their views on the Court’s reach. Ensuring that the Court retains its legitimacy and honors the rights of the accused requires renewed efforts to resolve those questions now. This paper provides numerous insights in this regard, including suggestions with respect to limiting the territorial jurisdiction of the Court. The Prosecutor has some role to play in warding off political crises, but the good judgment of the individual prosecutor, like that of individual judges, will certainly be insufficient to provide the type of assurances that many stakeholders will find sufficient.

\textsuperscript{199} Id.

\textsuperscript{200} The \textit{Rome Statute} makes multiple references to protecting the rights of the accused, thereby acknowledging that doing so is among the Court’s core imperatives. \textit{See, e.g.}, \textit{Rome Statute}, supra note 1, arts. 67, 68, 69(2).