
Introduction

The creation of the International Criminal Court (ICC) took place through the adoption of the Rome Statute of the ICC on 17 July 1998.¹ Historically, this marked the end of a legal Odyssey; the journey to Rome was full with well-recorded, failed attempts to create a permanent international criminal institution.² The efforts to create such an institution after the Second World War were effectively halted for almost fifty years due to the Cold War.³ It was only in the late 1980s that there was again sufficient momentum in the international community to seriously contemplate the creation of appropriate international mechanisms to address large-scale atrocities. The events in the former Yugoslavia and Rwanda in the 1990s proved catalytic in this respect. The creation of the International Criminal Tribunals for Yugoslavia (ICTY)⁴ and Rwanda (ICTR)⁵ by the UN Security Council demonstrated that international

¹ The Rome Statute of the International Criminal Court, Rome, 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) (hereinafter, Rome Statute/ICC Statute).

² D. McGoldrick, 'Criminal Trials before International Tribunals: Legality and Legitimacy', in D. McGoldrick *et al.* (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford: Hart, 2004), 40; M.C. Bassiouni, 'International Criminal Justice in Historical Perspective', in M.C. Bassiouni (ed.), *International Criminal Law* (3rd edn, The Hague: Martinus Nijhoff, 2008), 32–39; R. Cryer, *Prosecuting International Crimes* (Cambridge University Press, 2005), 25; B.E. Berg, 'The 1994 ILC Draft Statute for an International Criminal Court: A Principled Appraisal of Jurisdictional Structure', *Case Western Reserve Journal of International Law*, 28 (1996), 221.

³ A. Cassese, 'From Nuremberg to Rome: International Military Tribunals to the International Criminal Court', in A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), 9–10.

⁴ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 25 May 1993, UNSC Res. 827, 48 UN SCOR, UN Doc. S/RES/827 (hereinafter, ICTY Statute).

⁵ Statute of the International Criminal Tribunal for Rwanda, 8 November 1994, UNSC Res. 955, 49 UN SCOR, UN Doc. S/RES/955 (hereinafter, ICTR Statute).

criminal justice was possible. It also strengthened the voices calling for the establishment of a permanent ICC. However, this new-found enthusiasm for international criminal justice did not entirely assuage the concerns of the international community connected to the creation of this Court. In fact, it is a mark of the extensive legal, social and political difficulties attached to the ICC project that, even in this euphoric environment, it took nothing short of almost a decade of protracted, multilateral negotiations fuelled by extensive civil society lobbying for the Court to become a reality.⁶

One of the most important objects of negotiation, the ‘question of questions of the entire project’,⁷ was the jurisdiction of the Court. Although the issue fluctuated significantly throughout the negotiating process, in the end the delegates at Rome opted mainly for territorial and nationality jurisdiction.⁸ Universal jurisdiction was reserved solely for Security Council referrals, in an effort to gain support for the Court from more reluctant states.⁹

As a result, political expediency led to what seems to be, at first sight, a double paradox. On the one hand, the 1998 ICC Statute is one of the most recent international instruments for the repression of ‘core crimes’. Yet it provides for the jurisdiction of the ICC on the basis of rules that have existed approximately since the Peace of Westphalia, if not well before that.¹⁰ The newest and most expansive rules on jurisdiction offered by the science of international law (e.g. universality, passive personality, custodial State jurisdiction) were not preferred. Universal jurisdiction was reserved only for Security Council referrals.

⁶ Officially, at least, the ICC saga kicked off with GA Res. 44/39, para. 1 (4 December 1989) UN Doc. A/RES/44/39. See below, Section 3.2 in detail.

⁷ H.-P. Kaul and C. Kress, ‘Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises’, *Yearbook of International Humanitarian Law*, 2 (1999), 143, 145.

⁸ For the negotiations in Rome, see generally P. Kirsch and J.T. Holmes, ‘The Rome Conference on an International Criminal Court: The Negotiating Process’, *American Journal of International Law*, 93 (1999), 2.

⁹ Arts. 13(b), 12(2) of the Rome Statute, above n. 1. See below Section 3.4 in detail.

¹⁰ Reference is frequently made to the Digest of Justinian and the proposition that ‘one who administers justice beyond the limits of his territory may be disobeyed with impunity’. See T. Mommsen and P. Krueger (eds.), *The Digest of Justinian* (Philadelphia: University of Pennsylvania Press, 1985), 42, further, H.S. Maine, *Ancient Law* (New York: Dorset, reprint 1986), 98; R.T. Ford, ‘Law’s Territory (A History of Jurisdiction)’, *Michigan Law Review*, 97 (1998–1999), 843; C. Rynjaert, *Jurisdiction in International Law* (Oxford University Press, 2008), 44.

On the other hand, the ICC was ostensibly created as the guardian of certain values shared by the international community as a whole.¹¹ However, barring Security Council intervention, the Court will not be able to exercise jurisdiction on the basis of jurisdictional rules premised on principles of ‘international solidarity’¹² and ‘universality’.¹³ On the contrary, its jurisdiction will normally be based on the rule of territorial jurisdiction. This is a rule that played a leading role in the consolidation of the authority of the territorial sovereign during the rise of the Nation State.¹⁴ Thus, it would seem that, while the values are shared by all, the enforcement of such values on the international plane is reserved only for some, along the lines of traditional State consent doctrine.¹⁵

As a result, the Rome negotiations appear to have offered to the world an international mechanism for the protection of universal values through the use of sovereign tools of governance. This situation suggests that

¹¹ O. Triffterer, ‘Preamble’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2nd edn, Munich: Beck Hart-Nomos, 2008), 8–9 for a classification of these as ‘basic, inherent values of the international community as a whole’. The Preamble of the Court is replete with such references, for example, ‘The States Parties to this Statute . . . Recognizing that such grave crimes threaten the peace, security and well-being of the world . . .’; Bassiouni, ‘International Criminal Justice in Historical Perspective’, above n. 2, 29.

¹² European Committee on Crime Problems, *Extraterritorial Criminal Jurisdiction* (Strasbourg: Council of Europe, 1990), 26–27.

¹³ G.E. Langermeijer, ‘Le principe de territorialité’, in J.M. van Bemmelen (ed.), *Le Droit Pénal International Recueil d’Études en hommage à Jacob Maarten Van Bemmelen* (Leiden: Brill, 1965), 21–22; D. Tezcan, *Territorialité et conflits de juridiction en droit Pénal International* (Ankara: Publication de la Faculté des sciences politiques de l’Université d’Ankara, 1983), 21; I. A. Cameron, *The Protective Principle of International Criminal Jurisdiction* (Aldershot: Dartmouth, 1994), 22.

¹⁴ Tezcan, *Territorialité et conflits de juridiction*, above n. 13 77–78; Ford, ‘Law’s Territory’, above n. 10, 866–868, 873–874; W. Ullmann, ‘Roman Public Law and Medieval Monarchy: Norman Rulership in Sicily’, in W. Ullmann (ed.), *Jurisprudence in the Middle Ages* (London: Variorum Reprints, 1980), 170; P. Viollet, *L’Histoire des institutions politiques et administratives de la France*, vol. II (Paris: Armand Colin et cie, 1890, reprint. Aalen: Scientia Verlag 1966), 453; A. Esmein, *History of Continental Criminal Procedure with Special Reference to France* (Boston: Little, Brown, 1913), 47–56; C.-L. von Bar, *A History of Continental Criminal Law* (Boston: Little, Brown, 1916, reprint. The Lawbook Exchange, 1999), 85–86.

¹⁵ Note particularly here International Law Commission, ‘Summary Records of the 2209th Meeting’, UN Doc. A/CN.4/SER.A/1991, *Yearbook of the International Law Commission*, 1 (1991), 15–16, para. 12 (per A. Pellet) and the rationale in the first cases of universal jurisdiction for war crimes; *United States v. Lothar Eisentrager*, 14 *L. Rep. of Trials of War Crim.* (US Military Commission, 1948), 8, 15; D.D.N. Nsereko, ‘The International Criminal Court: Jurisdictional and Related Issues’, *Criminal Law Forum*, 10 (1999), 87, 98–99.

States have succeeded through the adoption of the Statute, in the name of the protection of community values, to assert once again indirectly, yet effectively, the prominence of State sovereignty on the international plane. Within the ‘contrast between consensualism and community interests’ that characterizes the Statute,¹⁶ the adopted rules on jurisdiction are closer to State sovereignty than to community values.

It is clear therefore that the selection of territoriality in the Rome Statute can hardly be called a progressive development of international law. It is best seen as one of many necessary concessions to sovereignty that made possible the last-minute ‘package deal’ in Rome.¹⁷

The solution finally adopted on territoriality is today contained in Article 12(2) of the ICC Statute. Under this provision, in the event of a State referral or action *proprio motu* by the Prosecutor, the Court has jurisdiction only if ‘the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3; (a) The State on the territory of which the conduct in question occurred . . .’¹⁸

This final compromise did not go unnoticed in the literature. Authorities have extensively discussed whether endorsing territoriality at the expense of universal, custodial or other jurisdiction was the right thing to do in Rome. Obviously, in the prevailing political atmosphere of the day, there is some merit to the view that adopting universal jurisdiction would likely jeopardize the Court’s existence.¹⁹ On the other hand, however, it is difficult to disregard the argument that the final compromise left beyond the Court’s reach the typical internal conflict scenario in a State not Party. The Court would be unable to address Darfur, for example, without a Security Council referral. In those circumstances, the Court’s

¹⁶ These were some of the comments of the ICTY judges in plenary on the draft Statute during the *ad hoc* Committee on the Establishment of an International Criminal Court; Report of the Secretary-General, ‘Comments Received pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Criminal Court’, UN Doc. A/AC.244/1/Add.2 (20 March 1995), 26–27.

¹⁷ Kirsch and Holmes, ‘The Rome Conference on an International Criminal Court’, above n. 8, 9–11; P. Kirsch and D. Robinson, ‘Reaching Agreement at the Rome Conference’, in Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court*, above n. 3, 75; M. Bergsmo, ‘The Jurisdictional Régime of the International Criminal Court (Part II, Articles 11–19)’, *European Journal of Crime, Criminal Law and Criminal Justice*, 6(4) (1998), 345, 346–348.

¹⁸ Art. 12(2)(a) of the Rome Statute, above n. 1.

¹⁹ O. Bekou and R. Cryer, ‘The International Criminal Court and Universal Jurisdiction: A Close Encounter?’, *International and Comparative Law Quarterly*, 56 (2007), 49, 68.

reach depends heavily on political action, in the form of a Security Council referral.²⁰

Moreover, it is as yet unclear whether this crucial legal–political concession has succeeded in allaying State concerns of ‘jurisdictional overreach’ on the part of the Court.²¹ The allegations that ICC prosecution of State not Party nationals committing crimes in State Party territory would violate the *pacta tertiis* rule are well documented and amply refuted in the international literature.²² On a more positive note, the conclusion of the UN–ICC relationship agreement²³ and the referral of the Darfur and Libya situations by the Security Council to the ICC²⁴ may be indications of a change of State attitude towards the Court. These positive developments were not, however, without their own compromises. In fact, the exemption of peacekeepers from the Court’s reach by SC Resolution 1593 and the use of Article 16 by the Council in the past²⁵ suggest a lingering suspicion over the Court’s jurisdiction. That said, while the Council seems to retain certain misgivings over the Court, 122 states have become parties

²⁰ H.-P. Kaul, ‘Preconditions to the Exercise of Jurisdiction’, in Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court*, above n. 3, 583, 612–613; L. Willemarck, ‘La Cour pénale internationale partagée entre les exigences de l’indépendance judiciaire, de la souveraineté des États et du maintien de la paix’, *Revue de Droit Pénal et de Criminologie*, 83 (2003), 3, 11–12. For similar argumentation and the issue of the ‘traveling tyrants’, L.N. Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (New York: Transnational, 2002), 118.

²¹ L. Arbour and M. Bergsmo, ‘Conspicuous Absence of Jurisdictional Overreach’, in H.A.M. von Hebel *et al.* (eds.), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (The Hague: T.M.C. Asser Press, 1999), 134–137. The US, Indian and Chinese concerns are particularly well known. The opposition of the United States was expressed mostly through the conclusion of bilateral agreements, providing for the inability of states parties to surrender US citizens to the Court, without US consent, according to Art. 98(2) of the Rome Statute. Among others, D. Scheffer, ‘The United States and the International Criminal Court’, *American Journal of International Law*, 93 (1999), 12. For the position of India and China, L. Jiangping and W. Zhixiang, ‘China’s Attitude Towards the ICC’, *Journal of International Criminal Justice*, 3 (2005) 608; U. Ramanathan, ‘India and the ICC’, *Journal of International Criminal Justice*, 3 (2005), 627.

²² See below Section 6.3.4 for an extensive discussion.

²³ For the UN–ICC Relationship agreement and its adoption, see UNGA. Res. A/58/318 20 September 2004. The Relationship Agreement entered into force on 4 October 2004. The text of the agreement is available at www.icc-cpi.int (last accessed 18 February 2013).

²⁴ N.J. Udombana, ‘Pay Back Time in Sudan? Darfur in the International Criminal Court’, *Tulsa Journal of Comparative and International Law*, 13 (2006), 1, 8. For Libya, SC Res. 1970 (26 February 2011) UN Doc. S/RES/1970.

²⁵ See SC Res. 1422 (12 July 2002) UN Doc. S/RES/1422; C. Stahn, ‘The Ambiguities of SC Resolution 1422 (2002)’, *European Journal of International Law*, 14 (2003), 85.

Cambridge University Press

978-1-107-03427-3 - The Territorial Jurisdiction of the International Criminal Court

Michail Vagias

Excerpt

[More information](#)

to the Rome Statute,²⁶ including two permanent members of the Security Council. The Court became operational on 1 July 2002 and continues to operate to date. A certain degree of optimism for the future of the ICC therefore seems warranted.

Notwithstanding these interesting academic perspectives, the fact remains that Article 12(2)(a) is part of the Statute. This is the world in which the Court has lived so far and apparently will continue to live for some time in the future. This regime has remained largely intact following the 2010 Review Conference, although it took a turn to the conservative as regards the crime of aggression. The new Article 15bis provides that '[i]n respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory'.²⁷ That said, the Kampala amendments did not amend Article 12(2)(a) as regards war crimes, crimes against humanity and genocide and in any event have yet to enter into force.²⁸

In light of the above, the first part of Article 12(2)(a) of the Rome Statute ('in the territory of which the conduct in question occurred') constitutes the main subject of the present work. The Court's territorial jurisdiction has not been analysed in detail in the otherwise vast literature dedicated to the ICC Statute. It is the ambition of the present book to make a contribution to the academic debate on this topic and afford to this provision some of the doctrinal attention it merits.

1.1 Objective

The endorsement of territorial jurisdiction offers to the Court the opportunity to take its first steps on the basis of an established, 'legally unassailable' rule of international law.²⁹ However, notwithstanding the rule's normative maturity, its application is not free of controversy. Each national

²⁶ See www.icc-cpi.int (last accessed 28 June 2013).

²⁷ Resolution RC/Res. 6, The crime of aggression, adopted at the 13th plenary meeting, on 11 June 2010, by consensus, Annex I, Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, available at www.icc-cpi.int/iccdocs/aspdocs/Resolutions/RC-Res.6-ENG.pdf (last accessed 18 February 2013). The amendment has not yet entered into force.

²⁸ R.S. Clark, 'Amendments to the Rome Statute of the International Criminal Court Considered at the First Review Conference on the Court, Kampala, 31 May–11 June 2010', *Göttingen Journal of International Law*, 2 (2010), 702 on the requirements of thirty ratifications and an ASP decision after 1 January 2017.

²⁹ Kirsch and Robinson, 'Reaching Agreement at the Rome Conference', above n. 17, 84.

criminal system has written its own legal history in addressing questions of territoriality.³⁰ It is only natural that the Court will have to do the same.

The phenomena themselves are not new. The world of criminal justice is only too familiar with transboundary criminal activity, be it terrorist bombings or drug trafficking, and the use of legal constructions of territoriality to address them. The juridical localization of crimes or the expansion of the territorial scope of application of criminal laws are well-known examples of such practice.³¹

On the contrary, the principal legal novelty rests here in the way that such jurisdictional issues can be addressed through the lens of the Rome Statute and the entity seeking to address them. This is important, considering that ‘the permissive nature and scope of jurisdiction under international law vary with the international legal person whose jurisdiction is at issue’.³²

The key problem with ICC territoriality appears to be the determination of the precise scope of the territorial parameter of the Court’s jurisdiction. As such, the question is one of interpretation, or more appropriately of identification of the limits to the interpretation of this provision. Accordingly, the primary objective of the present work is an examination of the possible interpretations of Article 12(2)(a) of the Rome Statute concerning the exercise of jurisdiction based on territory under International Law. In keeping with the structure of the key jurisdictional provision under examination, the main topics of this book may be summarized along the following lines.

The first may be presented in the form of a question; namely, how little of an international crime need take place on State Party territory for the Court to have jurisdiction under Article 12(2)(a)? This question raises familiar issues concerning the constructive localization of criminal activity and the application of well-known territorial fictions in the case of the ICC Statute. It also provokes more innovative propositions, such as the use of the effects doctrine by the Court in the exercise of its territorial jurisdiction, as well as the exercise of ICC territorial jurisdiction for crimes committed by means of electronic systems and particularly the internet.

³⁰ I.A. Cameron, ‘Jurisdiction and Admissibility Issues under the ICC Statute’, in McGoldrick *et al.* (eds.), *The Permanent International Criminal Court*, above n. 2, 73.

³¹ H.D. Wolswijk, ‘Locus Delicti and Criminal Jurisdiction’, *Netherlands International Law Review*, 66 (1999), 361, 380–381.

³² L. Henkin, *International Law, Cases and Materials* (St Paul, MN: West, 1993), 1048.

Cambridge University Press

978-1-107-03427-3 - The Territorial Jurisdiction of the International Criminal Court

Michail Vagias

Excerpt

[More information](#)

The second topic concerns the exercise of ICC territorial jurisdiction in cases of belligerent occupation. This subject involves an in-depth examination of situations where a state loses control over its territory and their consequences for the Court's territorial jurisdiction. Beyond the more or less settled rules on the matter, an intriguing proposition here is whether the Court may follow human rights jurisprudence, so as to extend its territorial jurisdiction over territories of States not Parties occupied by a State Party to the Statute. In a nutshell, can 'territory' be understood as 'effective control' for the purposes of Article 12(2)(a)?

The third topic constitutes the underlying theme of the entire work and an overall safeguard to ICC jurisdiction. It relates to the limits of ICC territorial jurisdiction under international law. Considering that the Court is an international legal person subject to international law,³³ what is the relevant yardstick under international law to measure the lawfulness of its jurisdictional assertions? This issue relates to considerations of 'reasonableness', as a concept encompassing aspects of non-intervention and abuse of rights. It refers to the search for a 'sufficiently close connection' between an offence and the territory of a State Party.

Certain issues will therefore not be addressed. For example, crimes occurring on board vessels or aircrafts and the topic of vessel registration and flag State jurisdiction are excluded. This selection is justified primarily on grounds of space and cohesion, since matters relating to the registration of ships and aircrafts and their relationship with the flag State belong more appropriately to the field of nationality jurisdiction.³⁴

Additionally, the present analysis will not examine in any depth the exercise of territorial jurisdiction in certain particular situations, such as conspiracy criminality and crimes committed on disputed territories. Most of these issues have a distinct national law flavour, appear to be worthy of more extensive case-specific analysis, or have yet to be addressed squarely on the interstate level. Therefore, they have not been considered appropriate for full inclusion in this work. Finally, it should be recalled that this is an examination focused on Article 12(2)(a); therefore, the issue of Palestine will not be examined, as it has yet to be determined if Palestine qualifies as a 'State' for the purposes of Article 12(3).

³³ On the Court's legal personality, Art. 4 of the Rome Statute, above n. 1. For international organizations in general and international law, *Interpretation of Agreement of 25 March 1951 between WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep. 73, 89–90.

³⁴ On the nationality of ships, see Art. 91 of the United Nations Convention on the Law of the Sea (UNCLOS), 10 December 1982, 1833 UNTS 397 and *M/V Saiga Case (No. 2) (St Vincent v. Guinea)* (Judgment), *International Law Reports* 120 (1999), 143, 144–145.

1.2 Structure and approach

Chapter 2 explains briefly a topic well rehearsed in international literature, the territorial reach of State criminal jurisdiction. This chapter establishes the basic vocabulary of the terms of art that will be frequently used later on. It further underlines the limits to State territorial jurisdiction imposed by international law. In this context, the notion of a jurisdictional ‘rule of reason’ is presented as the international law measure for the evaluation of the legality of jurisdictional assertions.

Chapter 3 then traces the steps that led to the promulgation of Article 12(2)(a) of the Rome Statute. The preparatory works of the Statute will be analysed here, starting from the 1989 discussions in the International Law Commission (ICC) and leading all the way to the Rome Conference.

Chapter 4 identifies the instruments of interpretation of the Rome Statute. Since the position is assumed that the extent of the Court’s territorial reach is primarily a question of interpretation rather than legislation, it is only natural that some space should be dedicated to an analysis of the tools of interpretation at the disposal of the Court. This chapter identifies the instruments to be employed in the interpretation of Article 12(2)(a), and particularly the rules of interpretation of the Statute and Articles 31–32 of the Vienna Convention on the Law of Treaties (VCLT). In doing so, this part further assesses the impact of human rights law (legality and fair trial) to the interpretation of Article 12(2)(a).

Chapters 5 and 6 then address the possible use of localization constructions by the Court, particularly ‘subjective territoriality’, ‘objective territoriality’, ‘ubiquity’ and finally the ‘effects doctrine’. Taking the wording of the Statute as a starting point, Chapter 5 explores the meaning of ‘conduct in question’ in Article 12(2)(a) and seeks to analyse certain problems attached to the application of objective territoriality likely to arise in the future, including also crimes over the internet.

Chapter 6 attempts to broaden the discussion further, and contemplates the possibility of ‘reading’ in Article 12(2)(a) the effects doctrine of jurisdiction, developed mostly in the context of antitrust law. Policy and legal aspects will be touched upon in this innovative and controversial discussion. A special place is reserved in the chapter for the analysis of certain important aspects of this proposition, such as the form of liability, the territorial nature of jurisdiction and the classification of effects. In this discussion, the ‘sufficiently close connection’ concept under international law, and the use of a similar standard by the Court in the *Mbarushimana* Case will be critically examined.

Concerning the notion of ‘territory’ itself, where a crime is said to take place for the purposes of Article 12(2)(a), Chapter 7 deals with the issue of the territorial parameters of the Court’s jurisdiction in cases of military occupation. The topic is treated as one intertwined with the territorial scope of application of the Rome Statute as an international treaty. Three scenarios are addressed; the occupation of State Party territory by another State Party (the Ituri scenario) or by a State not Party (the North Cyprus situation), as well as the occupation of State not Party territory by a State Party (e.g Iraq and the United Kingdom). The possibility of interpreting ‘territory’ as ‘effective control’ in tandem with human rights jurisprudence will be explored in this chapter.

From a more technical perspective, Chapter 8 addresses certain procedural aspects concerning the Court’s jurisdiction. This chapter examines among other things the power of the Court to review its jurisdiction *proprio motu*, the definition of a challenge to jurisdiction, standing to raise a challenge and the time limits for such challenges.

Ultimately, the above analysis is complemented with certain concluding observations in Chapter 9, the last chapter of this work.

The present approach to the analysis of Article 12(2)(a) involves in essence a selection between the two main ways of thinking on ICC jurisdiction; the international law perspective emphasizing *compétence de la compétence*, and the criminal law approach stressing the principle of legality.³⁵ The author follows the international law approach. There is therefore a strong emphasis on the competence of the Court to interpret its jurisdiction.

This choice is subscribed to, because it is believed that, while subtle, this difference in perspective is significant. It represents the corresponding conceptual difference in selecting to start the analysis from asking what the Court *can* do when interpreting Article 12(2)(a), as opposed to what the Court *cannot* or should not do.

Accordingly, the present international law analysis does not view the Court as a largely circumscribed entity, whose actions are clinically delimited by the principle of legality of substantive criminal law and the drafters’ attention to minute detail. On the contrary, the Court is identified

³⁵ R. Wedgwood, ‘The Present State of Research Carried Out by the English-Speaking Section of the Centre for Studies and Research’, in The Hague Academy of International Law, Centre for Studies and Research in International Law and International Relations, *International Criminal Justice*, 2007(27) (The Hague, 2007).