

IMPUNITY RISES FROM THE ASHES?: THE EXTENT OF THE ROME STATUTE'S JURISDICTION IN THE EVENT OF STATE SUCCESSION

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I. INTRODUCTION

The International Criminal Court's (ICC) deterrence effect in situations of armed conflict extends only to the reach of its jurisdiction.¹ State succession, which often involves massive human rights violations,² casts doubt on the jurisdiction of the Court and the protection it offers because of questions regarding the continuity of treaty obligations, including those under the Rome Statute, formerly binding upon the predecessor State. This Note argues that customary international law supports the continued application of the Rome Statute in instances of State succession because the treaty articulates the necessary human rights and humanitarian law principles to fall under the customary international law rule for the continuation of human rights and humanitarian law treaties.

Two basic types of international law exist: treaties and customary international law.³ Treaties arise out of express negotiations between State parties, resulting in certain rights and obligations to which the parties agree.⁴ Human rights and humanitarian treaties obligate State parties to protect individuals living under those treaties.⁵ Customary international law, on the other hand, arises not from express negotiations between sovereign States,⁶ but rather from the practice of nations followed out of a sense of legal obligation.⁷ However, customary international law—as with the law of treaties—imposes human rights and humanitarian obligations

¹ See generally G.A. Res. 36/106, U.N. Doc. A/RES/36/106 (Dec. 10, 1981), available at <http://perma.cc/SF9N-ABHS> (stating the importance of an international criminal court as it relates to international peace and security); see also Rome Statute of the International Criminal Court art. 12, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute], available at <http://perma.cc/MC7P-KFPN>.

² Menno T. Kamminga, *State Succession in Respect of Human Rights Treaties*, 7 EUR. J. INT'L L. 469, 470 (1996).

³ Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 204 (2010).

⁴ *Id.*

⁵ See generally MALCOLM N. SHAW, INTERNATIONAL LAW 265-344 (6th ed. 2008) (outlining the evolution of human rights protection in international law).

⁶ Bradley & Gulati, *supra* note 3.

⁷ See, e.g., Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031; Statute of the Int'l Ct. of Justice, art. 38, ¶ 1 [hereinafter ICJ Statute]. The ICJ Statute is widely considered the definitive statement on the sources of international law; SHAW, *supra* note 5, at 70.

upon States.⁸

The beginning of the twentieth century ushered in human rights and humanitarian treaties and the recognition of such customary international law norms.⁹ State succession started in waves in the nineteenth century, and crescendoed with the breakup of the Soviet Union and the former Yugoslavia in the late-twentieth century.¹⁰ The international law of human rights and humanitarian treaties in relation to State succession became paramount in establishing accountability and responsibility for crimes committed during the breakup of the former Yugoslavia.¹¹ The Rome Statute formed against this backdrop,¹² its object and purpose to prevent impunity and prosecute individuals for international crimes.¹³

Armed conflict and crimes against humanity continue to plague the international community, well after the Rome Statute entered into force.¹⁴ State succession lingers in the background of these challenges and the questions they pose for the ICC and international law. New States born from the rubble of armed conflict, like the seven nascent States of the Former Yugoslavia, straddle the edge of impunity for crimes committed during the conflict because their status as State parties to the Rome Statute is questionable.¹⁵ Charges filed by the ICC's Office of the Prosecutor against

⁸ See Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28) (establishing that the protections of the Geneva Conventions rise to the level of customary international law and bind all States).

⁹ STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 5 (3rd ed. 2009).

¹⁰ See Detlev F. Vagts, *State Succession: The Codifiers' View*, 33 VA. J. INT'L L. 275, 277-80 (1992-93) (listing the different occurrences of State succession throughout the nineteenth and twentieth centuries).

¹¹ See generally Kamminga, *supra* note 2.

¹² WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 62 (4th ed. 2011).

¹³ See Rome Statute, *supra* note 1, at pmbl.

¹⁴ See, e.g., Ian Traynor & Shaun Walker, *Ukraine Violence: Dozens Killed as Protestors Clash with Armed Police*, THE GUARDIAN (Feb. 20, 2014, 11:00 AM), <http://perma.cc/M8FG-P584>; and NORWEGIAN HELSINKI COMM., WAITING FOR RUSSIAN JUSTICE: THE INEFFECTIVE RUSSIAN INVESTIGATION OF CRIMES COMMITTED DURING THE AUGUST 2008 ARMED CONFLICT BETWEEN RUSSIA AND GEORGIA (Mar. 2012), available at <http://perma.cc/P4YY-3BWN>.

¹⁵ See Rome Statute, *supra* note 1, at art. 12, which outlines preconditions for the exercise of the Court's jurisdiction:

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of Article 13, paragraph (a) or (c), the Court may exercise its 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:
 - (a) The 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;
 - (b) The State of which the person accused of the crime is a national.

the leaders of a new State, its citizens, or military, likely face an immediate motion to dismiss based on a lack of jurisdiction.¹⁶ The Appeals Chamber will ultimately determine the questions presented by such a jurisdictional challenge.¹⁷ A U.N. Security Council referral to the ICC of certain crimes associated with State succession would help solve this jurisdictional question,¹⁸ but it would also throw into question the legitimacy and independence of the ICC.¹⁹ The potential liability of a successor State party to the Rome Statute under international criminal law warrants a thorough analysis of the issue in light of the object and purpose of the treaty.

This Note is divided into five parts. Part II reviews the bases of jurisdiction upon which the Rome Statute rests. It describes the different types of jurisdiction vested in the Court and presents potential scenarios of State succession over which the Court may exercise its jurisdiction. Part III appraises the international law surrounding the continuity of human rights and humanitarian treaties in the event of State succession. This section reviews the method by which the Court applies and determines the law. To support the contention that a rule of customary international law exists for the continuity of human rights and humanitarian treaties, this section updates the literature of State succession with recent judicial decisions and pronouncements. Part IV, in turn, considers the intersection of international human rights, humanitarian, and criminal law. The purpose here is to illustrate the Rome Statute's fundamental characteristics of human rights and humanitarian treaties, which continue to apply to a successor State. Finally, Part V utilizes the situation between Russia, the Republic of Georgia, and South Ossetia to show the practical aspects of the international legal issues surrounding State succession and the Rome Statute. In reviewing the conflict between the parties, this section presents a scenario in which the Court might face the question of jurisdiction in the event of

3. If the acceptance of the State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Article 12 indicates the Court only possesses jurisdiction over crimes committed on the territory of a State party, or by a national of a State party. A gap exists for new States to argue that the territorial, or personal, jurisdiction of the Court ceases by virtue of the State's embryonic existence.

¹⁶See generally Rome Statute, *supra* note 1, at art. 19(2) (indicating that an accused or a State with jurisdiction over a case may challenge the jurisdiction of the Court).

¹⁷See Rome Statute, *supra* note 1, at art. 82(1)(a); see also Rules of Procedure and Evidence Rule 154 (2d ed. 2013) (granting automatic right of appeal for questions of jurisdiction), available at <http://perma.cc/SVT9-DFHQ>.

¹⁸Rome Statute, *supra* note 1, at art. 13(b); see, e.g., S.C. Res. 1593, ¶. 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005) (referring the situation in Darfur to the ICC).

¹⁹See generally U.N. SCOR, 67th Sess., 6849th mtg. at 24-25, U.N. Doc. S/PV.6849 (Oct. 17, 2012), in which the President of the ICC, in addressing the U.N. Security Council, repeatedly asserts that the ICC acts as an independent judiciary and discusses the issue of referrals and cooperation with the Court.

State succession and argues for the Court to assume the continuity of the Rome Statute in such an event.

II. JURISDICTION AND JURISDICTIONAL CHALLENGES AT THE ICC

The Rome Statute requires the Court to “satisfy itself that it has jurisdiction in any case brought before it.”²⁰ The Rome Statute’s jurisdictional prerequisites include: crimes within the Court’s jurisdiction; temporal jurisdiction; territorial and personal jurisdiction; and admissibility.²¹ Article 12 of the Rome Statute enumerates specific preconditions for the Court to exercise its jurisdiction; these include a State’s acceptance of jurisdiction with respect to subject matter; the scope of the Court’s jurisdiction based upon which States must accept the Court’s jurisdiction before the Court can act; and how a State can accept the Court’s jurisdiction on an *ad hoc* basis.²²

Domestic and international courts generally permit decisions involving jurisdictional questions to be reviewed immediately on appeal, because without jurisdiction, a court possesses no authority to conduct a trial.²³ The Rome Statute permits the prosecution and defense to appeal as of right decisions concerning jurisdiction.²⁴ Interlocutory appeals provide the added benefit of offering authoritative rulings on unsettled issues of law and assist in maintaining a consistent application of the law across cases before the same court.²⁵ An interlocutory appeal presents the most likely vehicle by which the Rome Statute’s jurisdiction will be reviewed in the event of State succession because of its immediacy and grant as of right.²⁶ This necessitates a review of the history and basis of the ICC’s jurisdiction, the interlocutory appeals process, and the potential scenarios for a challenge to the Court’s jurisdiction.

²⁰ Rome Statute, *supra* note 1, at art. 19.

²¹ See generally SCHABAS, *supra* note 12, at 62 (referencing Articles 5, 11, 12, 17, 18 & 19 of the Rome Statute and explaining each Article’s impact on the ICC’s jurisdiction to hear cases).

²² Rome Statute, *supra* note 1, at art. 12; see also Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 583-84 (Antonio Cassese et al. eds., 2002).

²³ WAR CRIMES RESEARCH OFFICE, INTERLOCUTORY APPELLATE REVIEW OF EARLY DECISIONS BY THE INTERNATIONAL CRIMINAL COURT 3 (2008), available at <http://perma.cc/LQA4-98T9>.

²⁴ *Id.* at 1; see also Rome Statute, *supra* note 1, at art. 82(1)(a).

²⁵ WAR CRIMES RESEARCH OFFICE, *supra* note 23, at 3.

²⁶ The Rome Statute allows both the Prosecutor and the Defendant to utilize an interlocutory appeal to determine the grounds of jurisdiction. Rome Statute, *supra* note 1, at art. 82(1)(a). It is reasonable to assume that one party, or the other, will appeal the decision of the Pre-Trial Chamber on jurisdiction in the event of State succession to either prevent the case from going to trial, or to ensure that the case goes to trial.

A. *Automatic Jurisdiction in the Rome Statute*

States utilize five bases of jurisdiction in criminal law: territory, personal, passive personality, protective, and universal.²⁷ International law tends to favor territory-based jurisdiction.²⁸ International tribunals constituted over the last half of the twentieth century based their jurisdiction in territorial, personal, and temporal.²⁹ The ICC's jurisdiction rests on the consent of those who agreed to be bound by the Rome Statute.³⁰ State parties agree to allow the Court to prosecute crimes committed on their territory or by their nationals.³¹ This differs from previous international criminal tribunals, which possessed jurisdiction from U.N. Security Council Resolutions or as a result of victory in war.³²

The Rome Statute's adheres to the principle of State sovereignty, which contrasts with the initial draft presented by the International Law Commission (ILC) and others at the Rome Conference.³³ The ILC draft favored an "opt-in" system designed to ensure the Court hears cases brought before it. By "opting-in," according to the ILC's rationale, the State signaled *ipso facto* acceptance of jurisdiction over particular cases.³⁴ France proposed a "state consent regime," which required State approval in every proceeding against every individual suspect for the Court to possess jurisdiction.³⁵ Germany supported the system of "automatic jurisdiction," which vested the Court's jurisdiction upon ratification by a State.³⁶

The ILC draft's conservative approach, modeled after the International Court of Justice's (ICJ) submission requirements, provided States considerable freedom to pick and choose which cases went before the

²⁷ SCHABAS, *supra* note 12.

²⁸ *Id.* at 62-63 (listing examples of territory-based jurisdiction and statements in support of territory as the main basis for jurisdiction).

²⁹ *Id.* at 63 (reviewing the bases of jurisdiction for the Nuremberg Tribunal, the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda).

³⁰ *Id.*

³¹ *Id.* at 63-64 (calling territoriality and nationality the fundamentals of the Court's jurisdiction).

³² *See id.* at 62-64 (explaining the bases of previous international criminal tribunals' jurisdiction and how the ICC differs from them).

³³ Compare Rep. of the Int'l L. Comm'n, 46th Sess., May 2-July 22, 1994, 42-43, U.N. Doc. A/49/10; GAOR, 49th Sess., Supp. No. 10 (1994) (explaining mechanisms for acceptance of jurisdiction similar to the ICJ Statute), with Rome Statute, *supra* note 1, at art. 12 (constructing territory and nationality of State party as bases of jurisdiction). *See generally* Hans-Peter Kaul, *Special Note: The Struggle for the International Criminal Court's Jurisdiction*, 6 EUR. J. CRIME CRIM. L. & CRIM. JUST. 364, 366 (1998).

³⁴ Rep. of the Int'l L. Comm'n, *supra* note 33, at 43.

³⁵ Kaul, *supra* note 33.

³⁶ *Id.*

Court.³⁷ The ILC commentary on the draft indicated a fear that an “opting-out” system would incentivize States to deny jurisdiction to the Court for cases brought before it.³⁸ Twenty-seven States supported the ILC’s “opt-in” system.³⁹ France’s proposal required consent from the State on whose territory the acts were committed, whose nationals were the victims of the acts, and whose nationals were the suspected perpetrators.⁴⁰ Jurisdiction under the French proposal rested entirely with States.⁴¹ The ILC and French proposals crafted a weak Court prone to paralysis and chaos due in part to the jurisdictional restrictions placed upon it.⁴²

Germany’s proposal for automatic jurisdiction provided the foundation for a stronger Court.⁴³ Support for automatic jurisdiction increased in the course of the Preparatory Committee’s deliberations.⁴⁴ Article 12(1) of the Rome Statute adopted the wording of the German proposal almost identically.⁴⁵ The consensus for automatic jurisdiction acted as a building block to determining the nuanced and procedural aspects of the exercise of jurisdiction.⁴⁶ Proposals to operationalize the jurisdiction varied from universal jurisdiction for specific crimes to strictly territorial for all crimes.⁴⁷ South Korea presented a hybrid proposal, which gave the Court competence over crimes that occurred on the territory of a State party; if a crime was committed by a national of a State party; or, if a State party detained an individual accused of crimes within the Court’s jurisdiction.⁴⁸ This compromise prevailed with the removal of the custodial State provision.⁴⁹

Article 12 incorporates automatic jurisdiction over all core crimes into the Rome Statute.⁵⁰ Article 12(1) contains the central rule that State parties accept the jurisdiction of the ICC by becoming a party to the Rome Statute.⁵¹ Article 12(2) focuses on the general jurisdiction of the Court.⁵²

³⁷ *Id.* at 367; *see also* ICJ Statute, *supra* note 7, at art. 36(2)-(5) (allowing for the submission of cases to the Court by States).

³⁸ Rep. of the Int’l Law Comm’n, *supra* note 33, at 43.

³⁹ Kaul, *supra* note 33, at 367.

⁴⁰ Preparatory Comm. on the Establishment of an Int’l Crim. Ct., Aug. 12-30, 1996, U.N. Doc. A/AC.249/L.3, 35 (Aug. 6, 1996).

⁴¹ Kaul, *supra* note 33, at 367.

⁴² *Id.* at 366, 367.

⁴³ *See id.* at 368.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *See* Kaul, *supra* note 33, at 368-69.

⁴⁷ *See id.* at 366-67.

⁴⁸ *Id.* at 369.

⁴⁹ *See id.* at 373; *see also* SCHABAS, *supra* note 12, at 69.

⁵⁰ Kaul, *supra* note 22, at 606.

⁵¹ *Id.* at 605. Article 124 contains a limited exception to Article 12(1). It allows States to opt-out of the Court’s jurisdiction for war crimes committed by a State’s national or on that State’s territory for seven years after the entry into force of the treaty for that State. Rome

Article 12(2) concerns cases referred to the Prosecutor by a State party, or where the Prosecutor initiated an investigation *proprio motu*.⁵³ It combines two elements to determine the scope of the Court's jurisdiction:⁵⁴ (1) State acceptance of the Court's jurisdiction⁵⁵ and (2) State acceptance of jurisdiction of the territorial State on which the crime in question occurred, or State acceptance by the State of the accused national.⁵⁶ The territoriality and nationality requirements of Article 12(2)(a) anchor the ICC in line with international law and the domestic law of most States.⁵⁷

Article 12(3), acceptance of jurisdiction by a non-State party, forms part of the overall scheme of the Statute for the preconditions to the exercise of jurisdiction.⁵⁸ This subsection expands the jurisdiction of the Court by providing for non-State parties to grant jurisdiction to the Court on an *ad hoc* basis.⁵⁹ It represents the "opt-in" provision of the ILC Draft⁶⁰ and received long-standing support by the delegations negotiating the Rome Statute.⁶¹ The Statute contains no details concerning the commencement of an Article 12(3) declaration beyond lodging the declaration with the Registrar.⁶² The State making an Article 12(3) declaration does not have all the rights and obligations of a State party.⁶³ States opting into the Court's jurisdiction must act within the system of the Statute and Rules of Procedure and Evidence.⁶⁴ The Statute also requires the State to cooperate with the subsequent investigations and proceedings.⁶⁵

Statute, *supra* note 1, at art. 124; *see also* Prosecutor v. Laurent Koudou Gbagbo, Case No. ICC-02/11-01/11, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo Against the Decision of Pre-Trial Chamber I on Jurisdiction and Stay of the Proceedings, ¶ 72 (Dec. 12, 2012) ("By becoming a Party to the Rome Statute (subject to any declaration pursuant to article 124 of the Statute), a State accepts the jurisdiction of the Court within the parameters set, in particular, by articles 11 and 12(1) and (2) of the Statute.").

⁵² Kaul, *supra* note 22, at 606.

⁵³ *See* Rome Statute, *supra* note 1, at art. 12(2) (referencing art. 13(a) & 13(c)).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at art. 12(2)(a) & 12(2)(b).

⁵⁷ Kaul, *supra* note 22, at 607-10.

⁵⁸ Rome Statute, *supra* note 1, at art. 12(3); Kaul, *supra* note 22, at 610.

⁵⁹ *See* Giuseppe Palisano, *The ICC and Third States*, in 1 ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 391, 393 (Flavia Lattanzi & William A. Schabas eds., 1999).

⁶⁰ *See* Rep. of the Int'l Law Comm'n, *supra* note 33, at 43 (providing for countries to choose to submit to the Court's jurisdiction for select crimes).

⁶¹ Kaul, *supra* note 22, at 610.

⁶² *See* Rome Statute, *supra* note 1, at art. 12(3).

⁶³ Prosecutor v. Laurent Koudou Gbagbo, Case No. ICC-02/11-01/11, Judgment on the Appeal of Mr. Laurent Koudou Gbagbo Against the Decision of Pre-Trial Chamber I on Jurisdiction and Stay of Proceedings, ¶ 74 (Dec. 12, 2012).

⁶⁴ Carsten Stahn et al., *The International Criminal Court's Ad Hoc Jurisdiction Revisited*, 99 AM. J. INT'L L. 421, 422 (2005).

⁶⁵ *See* Rome Statute, *supra* note 1, at art. 12(3) ("The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9."); *see also id.* at art. 86-102

Referral of a situation by the U.N. Security Council to the Prosecutor is another way for the Court to gain jurisdiction.⁶⁶ This procedure appeared in the ILC draft.⁶⁷ Countries expressed concern for politically-motivated referrals by the Security Council.⁶⁸ The ILC, however, believed such referrals would enable the Security Council to utilize the Court instead of resorting to the creation of *ad hoc* tribunals.⁶⁹ To alleviate concerns over political motivation, the Nordic countries offered a compromise: referrals would focus on specific situations rather than named individuals.⁷⁰ The ILC draft reflected this compromise by allowing for Security Council referral of “matters,” which eventually became “situations” in the final statute.⁷¹ Security Council referral resembles a form of universal jurisdiction because of the wide scope such a referral can take.⁷²

B. *Jurisdictional Challenges at the ICC*

The drafting history of the Rome Statute indicates a deliberate negotiation between the States to achieve agreement on the jurisdiction of the Court.⁷³ This represented a critical step towards protecting people and preventing impunity because State parties submitted to the Court’s jurisdiction upon ratification.⁷⁴ Articles 19 and 82 grant appeals of jurisdiction as of right, reflecting the importance of jurisdiction to the Court.⁷⁵

Article 19(2) specifies the parties capable of appealing the jurisdiction of the Court.⁷⁶ These parties include an accused, a person for whom the

(requiring international cooperation and judicial assistance by State parties, and, per art. 12(3), accepting States).

⁶⁶*Id.* at art. 13(b).

⁶⁷ Int’l L. Comm’n, *Draft Statute of the International Criminal Court with Commentaries*, [1994] 2 Y.B. Int’l L. Comm’n 28, 43.

⁶⁸ *Observations of Governments on the Report of the Working Group on a Draft Statute for an International Criminal Court*, [1994] 2 Y.B. Int’l L. Comm’n 1, U.N. Doc. A/CN.4/458 & Add. 1-8, 45, 83 (expressing concerns of the Hungarian and United States delegations about politically-motivated referrals by the Security Council).

⁶⁹ Int’l L. Comm’n, *supra* note 67, at 44.

⁷⁰ *Observations of Governments on the Report of the Working Group on a Draft Statute for an International Criminal Court*, *supra* note 68, at 63.

⁷¹ See WAR CRIMES RESEARCH OFFICE, THE RELEVANCE OF “A SITUATION” TO THE ADMISSIBILITY AND SELECTION OF CASES BEFORE THE INTERNATIONAL CRIMINAL COURT 12-14 (2009), available at <http://perma.cc/U4XJ-5YHS>.

⁷² Kaul, *supra* note 22, at 612.

⁷³ See *supra* text accompanying notes 27–72; see generally Rep. of the Int’l L. Comm’n, *supra* note 33 (encompassing the entire drafting history of the treaty, including the evolving positions of States in each meeting of the different committees).

⁷⁴ See Rome Statute, *supra* note 1, at art. 12(1).

⁷⁵ See Preparatory Comm. on the Establishment of an Int’l Crim. Ct., Text of the Draft Statute for the International Criminal Court, U.N. Doc. A/AC.249/1998/CRP.14, 3 (Apr. 1, 1998); see also Rome Statute, *supra* note 1, at arts. 19, 82.

⁷⁶ See Rome Statute, *supra* note 1, at art. 19(2).

Court issued a warrant of arrest or summons to appear, a State which is conducting or has completed an investigation or prosecution of the case, and a State from which Article 12 requires acceptance of jurisdiction.⁷⁷ Only parties mentioned in Article 19(2) may challenge jurisdiction.⁷⁸ The Statute limits each party to one jurisdictional challenge.⁷⁹ Challenges brought prior to the confirmation of charges shall be referred to the Pre-Trial Chamber, while challenges brought after confirmation shall be referred to the Trial Chamber.⁸⁰ A challenge by a State whose acceptance of jurisdiction is required, or a State claiming jurisdiction based on a concurrent investigation, suspends the Prosecutor's investigation until the issue is resolved.⁸¹ Decisions can be appealed to the Appeals Chamber under Article 82.⁸²

In the event of State succession, the two potential challengers to jurisdiction presented by Article 19 include an accused before the Tribunal and a State which submitted to the Court's jurisdiction under Article 12(3).⁸³ The most likely challenger will be an accused before the Court, arguing that the Court lacks jurisdiction in the event of State Succession because the new State is not a State party to the Rome Statute.

III. THE INTERNATIONAL LAW OF STATE SUCCESSION

State succession refers to "the replacement of one State by another in the responsibility for the international relations of territory."⁸⁴ Historically, successor States benefited from the "clean slate" principle, which removed treaty obligations to which they did not expressly agree.⁸⁵ This changed in the 1990s with the breakup of the Soviet Union and Yugoslavia.⁸⁶ Approximately twenty-three successor States came into existence at that time, creating an urgent need to determine the international obligations incumbent on these newly-formed sovereigns, especially in the commission

⁷⁷ *See id.*

⁷⁸ *See id.* at art. 19(4).

⁷⁹ *See id.* The Statute indicates that in exceptional circumstances more than one challenge can be undertaken. "Exceptional circumstances" is left undefined. State succession in the course of a trial might rise to the level of an "exceptional circumstance" to allow a second challenge to the Court's jurisdiction.

⁸⁰ *See id.* at art. 19(6).

⁸¹ *See id.* at art. 19(7).

⁸² *See Rome Statute, supra* note 1, at art. 19(6).

⁸³ *See id.* at art. 19(4).

⁸⁴ Vienna Convention on Succession of States in Respect of Treaties, art. 2(1)(b), Aug. 23, 1978, 1946 U.N.T.S. 3 [hereinafter Convention on Succession].

⁸⁵ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 1996 I.C.J. 595, 643 (July 11) [hereinafter Application of the Genocide Convention] (separate opinion of Judge Weeramantry).

⁸⁶ *See Kamminga, supra* note 2, at 469-70.

of international humanitarian and human rights treaties.⁸⁷ This created an abundance of State practice, which provides a starting point to determine the customary international law of State succession applicable to the Rome Statute.

The Rome Statute requires judges interpreting and applying the law to examine the Statute first, and then to applicable treaties and the principles and rules of international law, including the law of armed conflict. When these sources fail to provide the necessary guidance, judges turn to the general principles of law derived from the national laws of the world's legal systems.⁸⁸ The Court can only resort to the principles and rules of international law and the general principles of law when

(i) there is a *lacuna* in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such *lacuna* cannot be filled by the application of the criteria of interpretation provided in articles 31 and 32 of the *Vienna Convention on the Law of the Treaties* and article 21(3) of the Statute.⁸⁹

The Court may also apply principles and rules derived from its previous decisions.⁹⁰ Additionally, the Court's application and interpretation of the law "must be consistent with internationally recognized human rights."⁹¹

A lacuna exists in the written law contained in the Rome Statute; it lacks any specific provision concerning State succession.⁹² The criteria of Articles 31 and 32 of the Vienna Convention on the Law of Treaties fails to fill the vacuum because the Rome Statute relies heavily upon the intuitions of State parties for the Court's functioning.⁹³ This Note assumes the Court's

⁸⁷ *Id.*; see generally *The Breakup of Yugoslavia, 1990-1992*, U.S. DEP'T OF STATE, OFFICE OF THE HISTORIAN, <https://perma.cc/X46W-YPSU> (last modified Oct. 31, 2013) (describing the breakup of the former Yugoslavia); see also Valerie J. Bunce, *The Violent Dissolution of Yugoslavia: A Comparative Perspective*, WILSON CTR. (Oct. 9, 1997), <http://perma.cc/KGX8-EN8C> (offering a comparative explanation for the different outcomes between the violence which erupted in Yugoslavia and the lack of violence in the Soviet Union).

⁸⁸ Rome Statute, *supra* note 1, at art. 21(1).

⁸⁹ Prosecutor v. Omar Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmed Al Bashir, ¶ 44 (Mar. 4, 2009); see also Situation in the Democratic Republic of the Congo, Case No. ICC-01-04-168, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ¶¶ 22-39 (Mar. 4, 2006).

⁹⁰ Rome Statute, *supra* note 1, at art.21(2).

⁹¹ *Id.* at art. 21(3) (including a prohibition against discrimination as the grounds upon which a judgment is to be made).

⁹² See *id.*

⁹³ See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 31 & 32; see also Rome Statute, *supra* note 1 (making no mention of State succession and utilizing State parties' enforcement mechanisms to implement its decisions).

two-prong lacuna test led to employing the customary international law of State succession to human rights and humanitarian treaties to determine whether the Court possesses jurisdiction.

A. *The Formation of Customary International Law*

Customary international law constitutes one of the main sources of international law.⁹⁴ It exists independently, even where identical rules occur in a treaty.⁹⁵ The formulation of customary international law takes a two-element approach.⁹⁶ It develops “from a general and consistent practice of States followed by them out of a sense of legal obligation, or *opinio juris*.”⁹⁷ The *North Sea Continental Shelf* case provides a classic case on the processes of formation and evidence of rules of customary international law.⁹⁸ The ICJ described customary international law as:

State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;— and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.⁹⁹

State practice constitutes the “actual practice” of States.¹⁰⁰ *Opinio juris* is

⁹⁴ Special Rapporteur on the Formation and Evidence of Customary Int'l L., *First Rep. on Formation and Evidence of Customary Int'l L.*, Int'l L. Comm'n, U.N. Doc. A/CN.4/663, ¶ 28 (May 17, 2013) (by Michael Wood) [hereinafter Wood]. The Statute of the International Court of Justice is widely regarded as an authoritative statement on the sources of international law. See generally SHAW, *supra* note 5 (listing customary international law as a source of law to which the ICJ looks in deciding disputes before it); see, e.g., ICJ Statute, *supra* note 7, at art. 38(1) (listing international conventions, customary international law, and general principles as the sources of international law the ICJ shall apply).

⁹⁵ *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 177-78 (Jun. 27) [hereinafter Nicaragua].

⁹⁶ See Wood, *supra* note 94, ¶¶ 50-52 (stating that a two-element approach is generally taken by States in forming customary international law, and listing statements from governments in support of this contention).

⁹⁷ John B. Bellinger, III & William J. Haynes, II, *A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INT'L REV. RED CROSS 443, 444 (2007).

⁹⁸ Wood, *supra* note 94, ¶ 57.

⁹⁹ *North Sea Continental Shelf Cases* (Ger./Den.; Ger./Neth.), 1969 I.C.J. 3, ¶ 74 (Feb. 20) [hereinafter *North Sea Continental Shelf Cases*] (adding that a short passage of time is not a bar on the formation of a new rule of customary international law). The court reaffirmed this standard in *Military and Paramilitary Activities in and Against Nicaragua*, indicating that it “has to direct its attention to the practice and *opinio juris* of States,” as observed in the *North Sea Continental Shelf Cases*. See Nicaragua, *supra* note 95, ¶¶ 183-207.

¹⁰⁰ *Continental Shelf (Tunis./Libyan Arab Jamahiriya)*, 1982 I.C.J. 18, ¶ 43 (Feb. 24).

the “belief that this practice is rendered obligatory . . . [and] States concerned must therefore feel that they are conforming to what amounts to a legal obligation.”¹⁰¹

The “actual practice” of States includes the decisions of tribunals;¹⁰² verbal statements;¹⁰³ legislative acts;¹⁰⁴ and, in certain circumstances, a State’s inaction.¹⁰⁵ The practice must be “in accordance with a constant and uniform usage practiced by the States in question,”¹⁰⁶ but not “in [an] absolutely rigorous conformity” with the supposed rule.¹⁰⁷

The *opinio juris* turns the usage, or practice, into a custom, rendering it part of the rules of international law.¹⁰⁸ The State taking the action “must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”¹⁰⁹ Identifying *opinio juris* in the actions of States presents many challenges because of its subjective qualities.¹¹⁰ At times, the ICJ utilizes U.N. General Assembly resolutions to confirm the existence of *opinio juris*, focusing on the content of the resolution, the circumstances surrounding its adoption,

¹⁰¹ North Sea Continental Self Cases, *supra* note 99, ¶ 77.

¹⁰² See, e.g., Nottebohm Case (2nd Phase) (Liech. v. Guat.), 1955 I.C.J. 4, 22 (Apr. 6) [hereinafter Nottebohm] (referencing the decisions of States’ courts to determine State practice); see also S.S. “Lotus” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, 28-29 (Sept. 7) [hereinafter Lotus] (utilizing the rulings of State courts to determine the State practice element of customary international law).

¹⁰³ See Lotus, *supra* note 102, at 26-30; Nottebohm, *supra* note 102, at 21-23; Nicaragua, *supra* note 95.

¹⁰⁴ Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 58 (Feb. 14) (referencing legislation of States); Nottebohm, *supra* note 102, at 22 (using national legislation in support of its State practice determination).

¹⁰⁵ Lotus, *supra* note 102, at 28 (“[O]nly if such abstention were based on their [the State] being conscious of having a duty to abstain would it be possible to speak of an international custom.”).

¹⁰⁶ Asylum Case (Colom./Peru), 1950 I.C.J. 266, 276 (Nov. 20); see also Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, 131 (Dec. 18) (indicating a lack of consistent practice because some States adhere to the proposed measurements, while others utilize a different formula).

¹⁰⁷ Nicaragua, *supra* note 95, ¶ 186 (“In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.”).

¹⁰⁸ SHAW, *supra* note 5, at 84.

¹⁰⁹ Nicaragua, *supra* note 95, ¶ 207 (quoting North Sea Cases).

¹¹⁰ See SHAW, *supra* note 5, at 87-89 (explaining the conundrum *opinio juris* presents when determining the legality of a principle of international law).

and the attitude of the States concerned.¹¹¹ The ICJ also relies on the work of the International Law Commission and codification of major conventions to determine the *opinio juris* of States.¹¹² The interplay between treaty and customary law is also relevant because of the general recognition that treaties “may be reflective of pre-existing rules of customary international law; generate new rules and serve as evidence of their existence; or, through their negotiation processes, have a crystalizing effect for emerging rules of customary international law.”¹¹³

B. Human Rights and Humanitarian Treaties in State Succession

History contains numerous instances of State succession.¹¹⁴ The Soviet Union, the Former Yugoslavia, and Czechoslovakia represent the most recent and relevant instances of State succession because their actions constituted the actions of “States whose interests are specially affected.”¹¹⁵ Recent judicial decisions shed considerable light on the interpretation of State successions of the late 1990s, providing a subsidiary means to defining the law.¹¹⁶ A number of qualified publicists provide subsidiary means to interpret State succession and the continuity of human rights and humanitarian treaties,¹¹⁷ offering further support for the theory as customary international law.

i. Vienna Convention on Succession of States in Respect of Treaties

In 1978, the United Nations Conference on Succession of States in Respect of Treaties adopted the Vienna Convention on Succession of States

¹¹¹ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 70 (July 8); *see also* Nicaragua, *supra* note 95, at ¶ 188-195 (undertaking the analysis of General Assembly resolutions, and reviewing the attitude of the State parties to the resolutions and the dispute).

¹¹² *See* North Sea Cases, *supra* note 99, at ¶ 36-37 (referencing the 1958 Geneva Continental Shelf Convention); *see also* Case Concerning the Gabcikovo-Nagymaros Project (Hung./Slovk.), 1997 I.C.J. 7, ¶ 53-54 (Sept. 25) (relying upon the International Law Commission’s commentary to determine the requisite *opinio juris*). Relevant resolutions adopted the Security Council may contain rules of customary international law, as well. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 86 (Jul. 9) [hereinafter Construction of a Wall].

¹¹³ Wood, *supra* note 94, at ¶ 34.

¹¹⁴ *See* Detlev F. Vagst, *State Succession: The Codifiers View*, 33 VA. J. INT’L L. 275, 277-80 (1992-93) (listing the different occurrences of state succession throughout the nineteenth and twentieth centuries).

¹¹⁵ *See* North Sea Case, *supra* note 99.

¹¹⁶ *See* ICJ Statute, *supra* note 7.

¹¹⁷ *Id.*

in Respect of Treaties.¹¹⁸ The treaty focuses on successor States and former colonies.¹¹⁹ The State practice during the treaty's drafting concerned colonialism, giving large prominence to the "clean-slate" principle.¹²⁰ Article 34 deals with State succession in the case of separation of parts of a State.¹²¹ It states:

1. When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:
 - (a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed¹²²

The Convention entered into force only in 1996.¹²³ The Convention binds twenty-two States.¹²⁴ The State parties to the Convention represent the newly-formed States following the break-up of the Soviet Union, Yugoslavia, and Czechoslovakia.¹²⁵ Commentators do not consider the Convention to be representative of customary international law.¹²⁶

ii. The Breakup of the Soviet Union, ~~the Former~~ Yugoslavia, and Czechoslovakia

Czechoslovakia

Czechoslovakia joined the European Convention on Human Rights in 1992.¹²⁷ Article 66 of the Convention stipulates that only members of the Council of Europe can be State parties.¹²⁸ Czechoslovakia broke into two

¹¹⁸ Anthony Aust, *Vienna Convention on Succession of States in Respect of Treaties*, U.N. AUDIOVISUAL LIBRARY OF INT'L L. 1 (2009), <http://perma.cc/W4B6-YX9C>.

¹¹⁹ *Id.* at 1-2.

¹²⁰ *Id.*

¹²¹ Convention on Succession, *supra* note 85, at art. 34.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Vienna Convention on Succession of States in Respect of Treaties*, U.N. TREATY COLLECTION, <https://perma.cc/UYK3-6VLX> (last updated Mar. 10, 2014) (listing the State parties to the Convention).

¹²⁵ Aust, *supra* note 118, at 1-2; *see also Vienna Convention on Succession of States in Respect of Treaties*, U.N. TREATY COLLECTION, <https://perma.cc/UYK3-6VLX> (last updated Mar. 10, 2014) (listing the State parties to the Convention).

¹²⁶ Aust, *supra* note 118, at 2.

¹²⁷ Menno T. Kamminga, *Impact on State Succession in Respect of Treaties*, in *THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW* 99, 102 (Menno T. Kamminga & Martin Scheinin eds., 2009).

¹²⁸ *Id.*

independent states: the Czech Republic and the Slovak Republic.¹²⁹ The Council of Europe's Committee of Ministers admitted the Czech Republic and the Slovak Republic, as independent states in 1993.¹³⁰ The Council decided that the two states would be regarded as succeeding to the European Convention on Human Rights retroactively from their date of independence.¹³¹ This action occurred at the behest of the Council of Europe and, most importantly, the Czech Republic and Slovak Republic.¹³² A review of ratification records indicates there is no notification to any depository by either the Czech Republic or the Slovak Republic, indicating that this occurred *ipso jure*, without action on the part of the two successor states.¹³³

The European Court of Human Rights considers admissible individual petitions against the Czech Republic and the Slovak Republic for violations that occurred prior to their formal entry in 1993.¹³⁴ As Kamminga relates, the Court notes in these decisions that "[t]he period to be taken into consideration began on 18 March 1992, when the recognition by the former Czech and Slovak Federal Republic, to which Slovakia [the Czech Republic] is one of the successor states, of the right of individual petition took effect."¹³⁵ Neither Slovakia nor the Czech Republic object to this approach to State succession.¹³⁶

Soviet Union

The Soviet Union dissolved into four categories of States.¹³⁷ The Russian Federation constitutes the first category, a continuing State, as it claims to be the extension of its sovereign predecessor.¹³⁸ The world community generally accepted this fact.¹³⁹ The main reason for this was that the former constituent States of the Soviet Union all agreed to the proposition.¹⁴⁰ The Russian Federation informed the United Nations that it would honor all previous treaty commitments, which included human rights treaties.¹⁴¹

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 102 -03.

¹³² *Id.* at 103.

¹³³ *Id.* Kamminga, *supra* note 127.

¹³⁴ See *Matter v. Slovakia*, App. No. 31534/96, Judgment, (Jul. 5, 1992); *Nemec and Others v. Slovakia*, App. No. 48672/99, Judgment (Nov. 15, 2001).

¹³⁵ Kamminga, *supra* note 127, at 103 (alteration in original).

¹³⁶ *Id.*

¹³⁷ Kamminga, *supra* note 2, at 479.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

Ukraine and Belarus constitute the second category of States.¹⁴² They existed prior to the Soviet Union collapse.¹⁴³ They were also parties to the treaties per the rules of the U.S.S.R. Constitution.¹⁴⁴ The dissolution did not impact their treaty obligations.¹⁴⁵

Estonia, Latvia, and Lithuania comprise the third category of States.¹⁴⁶ They claimed the breakup of the Soviet Union restored the independence they lost with Russian occupation in 1940.¹⁴⁷ They regard themselves not as new states, but as States re-exercising the sovereignty of which they were deprived.¹⁴⁸ They acceded to a number of treaties, including human rights treaties.¹⁴⁹

The fourth and largest category of States includes Azerbaijan, Armenia, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, and Uzbekistan.¹⁵⁰ This category represents the least coherent example regarding treaty succession.¹⁵¹ Kazakhstan, Kyrgyzstan, Tajikistan, and Turkmenistan succeeded to the Geneva Convention and its Protocols.¹⁵² These countries insisted that they acceded to the different human rights treaties.¹⁵³ The Human Rights Committee decided, reluctantly, that a successor state may opt to accede rather than succeed to the Covenant,¹⁵⁴ but for the purposes of the Covenant they are considered having been State parties since independence in 1991.¹⁵⁵ The Committee continues to utilize the language of succession in dealing with this group of countries.¹⁵⁶

The Former Yugoslavia

The breakup of the Former Yugoslavia represented a straightforward exercise in State succession.¹⁵⁷ Bosnia-Herzegovina, Croatia, Macedonia,

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 480.

¹⁵¹ *Id.*

¹⁵² *Id.* at 479.

¹⁵³ *Id.*

¹⁵⁴ Human Rights Committee Annual Report to the U.N. General Assembly, U.N. Doc. A/49/40, ¶ 49 (1994).

¹⁵⁵ Kamminga, *supra* note 127, at 105.

¹⁵⁶ *Id.* (highlighting the committees habit of numbering reports based on years since 1991 and the Committee expressing its appreciation to Kazakhstan for covering the periods from independence to date of accession).

¹⁵⁷ Kamminga, *supra* note 2, at 476.

and Slovenia informed the United Nations that they considered themselves bound by the treaties to which the former Yugoslavia was a party.¹⁵⁸ This was also confirmed with regards to all human rights treaties.¹⁵⁹ Slovenia indicated that victims of human rights violations could seek remedies against Slovenia for actions committed by the former Yugoslavia.¹⁶⁰ Serbia argued that it represented the continuation of the former Yugoslavia and was not required to succeed to any treaties.¹⁶¹ The Arbitration Commission of the Conference for Peace in Yugoslavia, or Badinter Commission, issued an opinion stating that Serbia constituted a new state.¹⁶² The United States held the same position.¹⁶³ The other States of the former Yugoslavia also considered Serbia to be a new State.¹⁶⁴

iii. *Judicial Decisions of the International Court of Justice*

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide

The United Nations requested the International Court of Justice to offer an Advisory Opinion on three specific, interwoven questions concerning reservations to the Genocide Convention.¹⁶⁵ The Court framed the first question in the following terms:

Can the reserving State be regarded as being a party to the [Genocide] Convention while still maintaining its reservations if the reservation is objected to by one of more of the parties to the Convention but not by others?¹⁶⁶

The Court observed that a State cannot be bound to a treaty without its consent and, as a result of this rule of treaty law, no reservation can be effective against a State without its agreement.¹⁶⁷ This concept derives from notion of contract bargaining.¹⁶⁸ The Court concluded the Genocide Convention falls under different principles because the Convention's

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 479.

¹⁶⁴ *Id.* at 477.

¹⁶⁵ See Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 16 (May 28) [hereinafter Genocide Advisory Opinion].

¹⁶⁶ *Id.* at 21.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

intention is to “condemn and punish genocide as a crime under international law involving a denial of the right of existence of entire human groups”¹⁶⁹ In such a convention

the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.¹⁷⁰

The Court concluded that the principles underlying the Convention take on a universal character and bind States without any of the conventional obligations of treaties.¹⁷¹

Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide

On March 20, 1993, Bosnia and Herzegovina instituted proceedings against the Federal Republic of Yugoslavia for alleged violations of the Genocide Convention.¹⁷² Yugoslavia objected to the Court's jurisdiction because the Convention did not bind Bosnia and Herzegovina at the time of its submission to the Court, raising the issue of automatic succession to treaties.¹⁷³ The majority avoided the State succession issue and determined the Court possessed jurisdiction because the United Nations recognized Bosnia and Herzegovina's representative as head of state before international bodies and international agreements.¹⁷⁴ The majority opinion stated in *dicta* that “Bosnia and Herzegovina could become party to the Convention through the mechanism of State succession.”¹⁷⁵ The Court also reaffirmed the special characteristics of the Genocide Convention, and found the rights and obligations enshrined in the Convention to be rights and obligations *erga omnes*.¹⁷⁶

Judge Shahabudden in a separate opinion argued that the object and purpose of the Genocide Convention “required parties to observe it in such

¹⁶⁹ *Id.* at 21-23.

¹⁷⁰ *Id.* at 23.

¹⁷¹ *Id.*

¹⁷² Application of the Genocide Convention, *supra* note 85, at ¶ 1.

¹⁷³ *Id.* at ¶ 16.

¹⁷⁴ *Id.* at ¶ 44.

¹⁷⁵ *Id.* at ¶ 20.

¹⁷⁶ *Id.* at ¶¶ 22, 31.

a way as to avoid the creation of such a break in the protection which it afforded.”¹⁷⁷ The Judge added that the Genocide Convention and human rights treaties are not different because they both concern the rights of human beings.¹⁷⁸

Judge Weeramantry in a separate opinion wrote extensively on the issue of automatic State succession to human rights treaties.¹⁷⁹ The Judge indicated that human rights and humanitarian treaties involve no loss of sovereignty or autonomy of a successor State.¹⁸⁰ Successor States’ continued obligations under human rights and humanitarian treaties placed those States in line with the general principles enshrined in the U.N. Charter.¹⁸¹ Judge Weeramantry added that States do not confer human rights to their people because human rights constitute inalienable rights possessed independently of the State.¹⁸² After reviewing the statements from delegates at the Conference of States in Respect of Treaties and the comments of U.N. human rights bodies, Judge Weeramantry stated:

All of the foregoing reasons combine to create . . . a principle of contemporary international law that there is automatic State succession to so vital a human rights convention Without automatic succession to such a Convention, we would have a situation where the worldwide system of human rights protections continually generates gaps in the most vital part of its framework . . . depending on the break-up of the old political authorities and the emergence of the new. The international legal system cannot condone a principle by which the subjects of these States live in a state of continuing uncertainty regarding the most fundamental of their human rights protections.¹⁸³

iv. *The International Criminal Tribunal for the Former Yugoslavia*

The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia affirmed the continuity of human rights and humanitarian law treaties.¹⁸⁴ Delalic argued that the trial court lacked

¹⁷⁷ *Id.* at 635 (separate opinion of Judge Shahabuddeen).

¹⁷⁸ *Id.* at 637.

¹⁷⁹ *See id.* at 640-655 (separate opinion of Judge Weeramantry).

¹⁸⁰ *Id.* at 645.

¹⁸¹ *Id.*

¹⁸² *Id.* at 647.

¹⁸³ *Id.* at 654-655.

¹⁸⁴ *See* Prosecutor v. Delalic, Case No. IT-96-21-A; In Appeals Chamber, ¶ 111-13, (Feb. 20, 2001).

jurisdiction because Bosnia and Herzegovina did not accede to the Geneva Conventions until December 1992, which followed the events reported in the Indictment; and therefore his acts committed prior to that date cannot be prosecuted under the treaty regime.¹⁸⁵ The Appeals Chamber concluded that because the norms entailed in the Geneva Conventions were customary international law, Bosnia and Herzegovina would have automatically succeeded to them with, or without, a formal notice.¹⁸⁶ The Appeals Chamber stated that in “international law that there is automatic State succession to multilateral humanitarian treaties in the broad sense, *i.e.*, treaties of universal character which express fundamental human rights.”¹⁸⁷

v. *U.N. Human Rights Committee*

The U.N. Human Rights Council (Council) released a General Comment on the legal aspects of the continuation of the International Covenant on Civil and Political Rights (ICCPR) in the event of state succession.¹⁸⁸ The comment considered the fact that the ICCPR does not contain a provision for denunciation, or termination, requiring the Council to consider these treaty functions in the light of applicable rules of customary international law.¹⁸⁹ The Council declared that the ICCPR is not subject to “denunciation or withdrawal unless it is established that the parties intended to admit the possibility of denunciation or withdrawal or a right to do is implied from the nature of the treaty.”¹⁹⁰ The Council determined that the lack of denunciation powers was not an oversight of the drafters because of the deliberate inclusion of Article 41(2) of the ICCPR, which allows a State party to withdraw its acceptance of the competence of the Council to examine communications by filing an appropriate notice.¹⁹¹ The Optional Protocol to the ICCPR—which was negotiated with the ICCPR—contains a denunciation clause, while the International Convention on the Elimination of All Forms of Racial Discrimination—adopted a year prior to the ICCPR—expressly permits denunciation.¹⁹² “It can therefore be concluded that the drafters of the Covenant deliberately intended to exclude the possibility of denunciation.”¹⁹³

The Council also echoed the ICJ’s *Reservations to the Convention on*

¹⁸⁵ *Id.* at ¶ 107.

¹⁸⁶ *Id.* at ¶¶ 111-13.

¹⁸⁷ *Id.* at ¶ 111.

¹⁸⁸ See General Comment No. 26: Continuity of Obligations, U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (Dec. 8, 1997).

¹⁸⁹ *Id.* at ¶ 1.

¹⁹⁰ *Id.* at ¶ 2.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

the Prevention and Punishment of the Crime of Genocide by stating that the ICCP “is not the type of treaty which, by its nature, implies a right of denunciation.”¹⁹⁴ The ICCPR does not possess a temporary character typical of treaties.¹⁹⁵ The rights enshrined in the ICCPR

belong to the people living in the territory of the State party . . . once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant.¹⁹⁶

In a report to the Committee Body on the Succession of States to the ICCPR, the U.N. Secretary General echoed the comments of the General Comment:

[S]uccessor States were automatically bound by obligations under international human rights instruments from the respective date of independent and that observance of the obligations should not depend on a declaration of confirmation made by the Government of the successor State.¹⁹⁷

A clear consensus in support of continuity in State succession emerged from the members of the Committee.¹⁹⁸ The interventions and statements of the members indicate a sense of legal obligation for continuity in the event of State succession.¹⁹⁹

vi. *The European Court of Human Rights*

The European Convention on the Protection of Human Rights and

¹⁹⁴ *Id.* at ¶ 3.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at ¶ 4.

¹⁹⁷ U.N. Secretary-General, *Succession of States in Respect of International Human Rights Treaties*, ¶ 10, U.N. Doc. E/CN.4/1995/80 (Nov. 28, 1995).

¹⁹⁸ FAUSTO POCAR, *Some Remarks on the Continuity of Human Rights and International Humanitarian Law Treaties*, in *THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION* 279, 283 (Enzo Cannizzaro ed., 2011).

¹⁹⁹ *See generally id.* (citing to a number of statements by committee members indicating a legal obligation).

Fundamental Freedoms ensure the human rights of citizens of State parties.²⁰⁰ In 2009, the European Court of Human Rights (ECtHR) considered *Bijelic v. Montenegro*, a case concerning the succession of one of the former states of the Socialist Federal Republic of Yugoslavia.²⁰¹ The applicants lodged complaints against Montenegro on March 24, 2005, and January 31, 2006,²⁰² arguing that Montenegro's failed enforcement of a final decision issued by the Court of First Instance on January 26, 1994, violated the European Convention on Human Rights and Fundamental Freedoms, and that their resulting inability to find adequate housing violated Article 1 of Protocol No. 1.²⁰³ The applicants alleged violations occurred after Serbia and Montenegro joined the European Convention on Human Rights, but before Montenegro became an independent State.²⁰⁴ The ECtHR held Montenegro responsible for the inaction and ordered it to pay restitution to the applicants.²⁰⁵

The case constitutes an important development of the law of State succession with respect to treaties.²⁰⁶ The separation of Montenegro from Serbia forced the ECtHR to consider the issue of state succession with respect to the Convention on Human Rights and Fundamental Freedoms.²⁰⁷ The ECtHR found Montenegro bound by the European Convention on Human Rights retroactively because of the continuing nature of human rights treaties, the implied acceptance of Montenegro, and the fact that the predecessor State acceded to the treaty.²⁰⁸ The willingness of the Court to incorporate an international standard of automatic succession to human rights treaties²⁰⁹ into its decision distinguishes this case from previous ECtHR cases concerning state succession. It is distinguishable because the Court confirmed the automatic *ipso jure* nature of succession to the Convention on the foundation of its status as a human rights treaty and special status under international law.²¹⁰

C. Automatic State Succession to Human Rights Treaties Rises to the

²⁰⁰ European Convention on the Protection of Human Rights and Fundamental Freedoms art. 1, 213 U.N.T.S. 221, E.T.S. 5.

²⁰¹ Craig Baker, *European Court of Human Rights Bijelic v. Montenegro and Serbia (Application NO 19890/05) Judgment of 11 June 2009*, 59 INT'L & COMP. L.Q. 845 (2010).

²⁰² *Id.* at 847.

²⁰³ *Bijelic v. Montenegro and Serbia*, App. No. 19890/05, Eur. Ct. H.R. ¶¶ 1-60 (2009), available at <http://perma.cc/394Q-7QAF>.

²⁰⁴ *Id.* at ¶ 62.

²⁰⁵ *Id.* at ¶ 85.

²⁰⁶ Baker, *supra* note 201, at 851.

²⁰⁷ *Id.*

²⁰⁸ *Bijelic v. Montenegro and Serbia*, *supra* note 203, at ¶ 68.

²⁰⁹ *See id.* at ¶ 58 (quoting directly General Comment No. 26: Continuity of Obligations, U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (Dec. 8, 1997)).

²¹⁰ *See Baker, supra* note 201, at 853-54.

Level of Customary International Law

The actual practice of States and the *opinio juris* for establishing a rule of customary international law that human rights treaties and their obligations continue in the event of State succession exists. The State practice referenced above indicates that the actual practice of States is for continuity of human rights treaties. This State practice satisfies the “actual practice” element of customary international law because it involved the acts of interested States and “occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.”²¹¹ The actions of the Council of Europe and the European Court of Human Rights also provide significant support for the State practice component because they represent a number of third States directly affected by the succession of States, and as implementers and interpreters of the ICCPR and the ECtHR human rights treaty regimes.

The European Court of Human Rights incorporated the U.N. Human Rights Committee’s General Comment, and its continued admission of cases from the period in which the former Czech countries were not State parties, per se, provides considerable support for the State practice element. The succeeding States indicated they considered themselves bound by the treaties due to succession.²¹² This establishes the strongest basis for the *opinio juris* element because it derives from the States involved. The opinions of third States also supports the *opinio juris* element. The perspective from Western countries that the succeeding States were bound by succession adds to the *opinio juris* because these States were peripherally involved because they represented the neighbors of these States, and members of the community of nations concerned with the protection of human rights in the law of nations.

Finally, the actions and comments of judicial bodies provide support for the continuation of human rights treaties in the event of State succession. The *Reservations to the Genocide Convention* adds significant weight to the legal obligation of continuity for human rights treaties. While the majority in the *Application of the Genocide Convention* avoided the direct issue of continuity, the two separate Opinions focused directly on that issue. These two opinions provide weight to the fact that there is a strong sense of legal obligation for the continuity of human rights treaties. These rulings predate the incorporation by the European Court of Human Rights of the General Comment, which illustrates the evolution of international law in this area. The required “actual practice” of states and the *opinio juris* for those actions support the conclusion that a rule of customary international law exists that in the event of State succession human rights

²¹¹ See North Sea Continental Shelf Cases, *supra* note 99.

²¹² See *supra* text accompanying notes 127-64.

treaties continue with the succeeding State.

IV. INTERSECTION OF INTERNATIONAL HUMAN RIGHTS, HUMANITARIAN, AND CRIMINAL LAW

International human rights, humanitarian, and criminal law share a common genesis.²¹³ Broadly, they stand for the protection of the interests of individuals.²¹⁴ A precise definition of human rights treaties beyond this general understanding presents a key challenge: too broad a definition encompasses too many treaties to carve an exception in State succession for human rights treaties.²¹⁵ This section first reviews the origins and legal theories behind human rights, humanitarian, and criminal law. It then dives into the specific characteristics of human rights treaties to offer a template for human rights treaties. It concludes by applying this theory to the Rome Statute to argue that it is a human rights treaty, requiring continuity in State succession.

A. *The Origins of International Human Rights, Humanitarian, and Criminal Law*

The norms behind international human rights, humanitarian, and international criminal law trace their origins to the writings of Sun Tzu, who advocated for the humane treatment of the sick, the wounded, prisoners, and civilians.²¹⁶ These ideas independently developed in other civilizations across the globe, influencing the creation of human rights and humanitarian law.²¹⁷ Humanitarian law was codified into a specific

²¹³ Compare Michelo Hansungule, *The Historical Development of International Human Rights*, in AN INTRODUCTION TO INTERNATIONAL HUMAN RIGHTS LAW 1, 1 (Azizur Rahman Chowdhury & Md. Jahid Hossain Bhuiyan eds., 2010) (stating that international human rights law formed in the aftermath of World War II), with BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 19 (2003) (indicating that international criminal law formed from the Nuremberg Principles after World War II), SCHABAS, *supra* note 12, at (Cambridge Univ. Press 4th ed. 2011) (referencing the use of the “laws of war” to form the basis for Nuremberg Trials).

²¹⁴ Matthew Craven, *Legal Differentiation and the Concept of the Human Rights Treaty in International Law*, 11 EURO. J. INT'L L. 489, 497 (2000).

²¹⁵ See generally *id.* at 497-98 (2000) (explaining the importance to determining a specific subset of international law for international human rights law of the necessity of a narrow view of human rights treaties).

²¹⁶ M. Cherif Bassiouni, *The Discipline of International Criminal Law*, in 1 INTERNATIONAL CRIMINAL LAW 3, 19 (M. Cherif Bassiouni ed., 3rd ed. 2008).

²¹⁷ *Id.* at 20.; See generally M. Cherif Bassiouni, *Introduction to International Humanitarian Law*, in 1 INTERNATIONAL CRIMINAL LAW, *supra* note 216, at 269 (reviewing the detailed historical origins of humanitarian norms).

international norm with the first Geneva Convention.²¹⁸ Human rights law developed into specific norms with the establishment of the Charter of the United Nations.²¹⁹ The two disciplines merged over time from their mutually exclusive application to a complementary regime,²²⁰ valuing the protection of the individual in times of armed conflict.²²¹

The Nuremberg Principles established the core of international criminal law.²²² The principles forged a new relationship between the individual, the State, and the international community.²²³ The central position assumed by the individual in this relationship ushered into the global legal order the expansion of international systems safeguarding human rights and their respective enforcement mechanisms.²²⁴ International criminal law's value-oriented goals include "the prevention and suppression of international criminality, enhancement of accountability and reduction of impunity, and the establishment of international criminal justice."²²⁵ These goals derive from public international law, national criminal law, comparative criminal law, and international human rights law.²²⁶ The system of ICL originates from the functional relationship between the different components of these legal regimes.²²⁷

²¹⁸ Bassiouni, *supra* note 216, at 21; *see also* Robert Kolb, *The Protection of the Individual in Times of War and Peace*, in *THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW* 317, 321-29 (Bardo Fassbender & Anne Peters eds., 2012).

²¹⁹ Kolb, *supra* note 218, at 329-336 (tracing the origins of the norms constituting the principles of human rights law to the advent of the United Nations).

²²⁰ *See* Orna Ben-Naftali, *Introduction: International Humanitarian Law and International Human Rights Law – Pas de Deux*, in *INTERNATIONAL HUMANITARIAN AND INTERNATIONAL HUMAN RIGHTS LAW* 3, 3-4 (Orna Ben-Naftali ed., 2011); *see also* Bassiouni, *Introduction to International Humanitarian Law*, *supra* note, 217, at 290-91; *see e.g.*, Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 183 (Dec. 10, 1998) ("The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law.").

²²¹ *See* Bassiouni, *Introduction to International Humanitarian Law*, *supra* note, 217, at 284.

²²² BROOMHALL, *supra* note, 213, at 19.

²²³ *Id.*

²²⁴ Giuliana Ziccardi Capaldo & Michele Nino, *Globalization of Law Enforcement Mechanisms: Issues of Legality and Legitimacy*, in 2 *INTERNATIONAL CRIMINAL LAW* 47 (M. Cherif Bassiouni ed., 3rd ed. 2008).

²²⁵ Bassiouni, *supra* note 216, at 3.

²²⁶ *Id.*

²²⁷ *Id.*

B. The Rome Statute Possess Characteristics of Human and Humanitarian Rights Treaties

Human rights bodies consider the lack of reciprocity the essential characteristic of human rights treaties.²²⁸ The Inter-American Court of Human Rights expressed this sentiment in the *Effects of Reservations Case*:

[M]odern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for mutual benefit of the contracting State. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.²²⁹

In human rights treaties, it is the rights of individuals that are involved, “not those of other states, and the framework within which they are protected was one of a ‘regime’ or ‘legal order,’ and not simply a relation in the nature of a bilateral agreement.”²³⁰ This reiterates the position taken by the ICJ in the *Genocide Cases*.²³¹ The Rome Statute must involve the protection of the rights of the individual without an element of reciprocity for States parties to be considered a human rights treaty and fall within the doctrine of automatic State succession.

The Preamble of the Rome Statute states that the ICC’s purpose is to prevent impunity and punish those responsible for the grave crimes that threaten peace and the well being of the world.²³² Article 1 reaffirms the purpose of the Court, as stated by the preamble.²³³ The serious crimes over which the Court possess jurisdiction include: genocide, crimes against

²²⁸ Office of the High Commissioner for Human Rights, General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, 52nd Sess., U.N. Doc. CCPR/C/21 Rev.1/Add.6, ¶ 17 (Nov. 4, 1994).

²²⁹ The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75 American Convention on Human Rights), Advisory Opinion OC-2/82, Inter-Am. Ct. H.R. (ser. A) No. 2, ¶ 30 (Sept. 24, 1982).

²³⁰ Craven, *supra* note 214, at 508.

²³¹ See *supra* text accompanying notes 165-83.

²³² Rome Statute, *supra* note 1, pmb1.

²³³ *Id.* at art. 1.

humanity, war crimes, and the crime of aggression.²³⁴ The Rome Statute defines crimes against humanity to include murder, extermination, enslavement, torture, rape and sexual slavery, and persecution.²³⁵ Genocide, war crimes, and crimes against humanity constitute grave breaches of the Geneva Conventions.²³⁶ The ICJ and the Human Rights Committee referred to similar protections in the Genocide Convention and ICCPR to be of a special nature.²³⁷ The Rome Statute follows the path of the Genocide Convention and ICCPR because it protects rights of the individual and international norms of a special character. The Rome Statute enshrines the rights found in the ICCPR into its trial structure.²³⁸ Article 21 requires “[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights.”²³⁹ This article makes the application and interpretation of the law applicable under the Rome Statute subject to international human rights.²⁴⁰ “Human Rights under the Statute; every aspect of [the Statute]. . . . Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights”²⁴¹ The Rome Statute protects the rights of individuals in purpose and in operation, meeting the first aspect of a human rights treaty.

The Rome Statute lacks reciprocity for States parties, meeting the second aspect of a human rights treaty. The Rome Statute requires State parties submit to the jurisdiction of the Court.²⁴² The treaty gives the Court power to declare the investigation and prosecution of an accused before a State’s tribunals ineffective.²⁴³ The Rome Statute also places obligations upon the States parties to prosecute individuals accused of the international crimes listed in the Rome Statute and to assist the Court in enforcement of warrants and sentences.²⁴⁴ These aspects dilute the sovereignty of State parties, which falls outside the normal exchange of rights for mutual benefit. The Rome Statute represents a human rights treaty because it protects individuals and lacks reciprocity of mutual benefit for State parties found in relationships between States. Automatic succession applies to the Rome Statute in the event of State succession because it is a human rights

²³⁴ *Id.* at art. 5.

²³⁵ *Id.* at art. 7.

²³⁶ Yves Sandoz, *Penal Aspects of International Humanitarian Law*, in 1 INTERNATIONAL CRIMINAL LAW, *supra* note 216, at 293, 306.

²³⁷ *See supra* text accompanying notes 165-99.

²³⁸ *See* Rome Statute, *supra* note 1, Part VI (stating the rights of a fair trial and that human rights provisions apply to the rules of evidence).

²³⁹ *Id.* at art. 21(3).

²⁴⁰ Prosecutor v. Laurent Koudou Gbagbo, *supra* note 51, at ¶ 36.

²⁴¹ *Id.* at ¶ 37.

²⁴² Rome Statute, *supra* note 1, at art. 12.

²⁴³ *Id.*

²⁴⁴ *Id.* at arts. 96, 106.

treaty and, as a rule of customary international law, human rights treaties continue in the event of State succession.

V. CONTINUITY OF THE ROME STATUTE IN STATE SUCCESSION DETERS IMPUNITY

A number of the current conflicts could bring the issue of State succession to the Rome Statute before the Court. For example, the Republic of Georgia, which ratified the Rome Statute in 2003,²⁴⁵ faces the issue of State succession in the provinces of Abkhazia and South Ossetia.²⁴⁶ In 2008, an armed conflict erupted in each of those areas, pitting Georgian troops, Russian troops, Abkhazians, and South Ossetians against each other.²⁴⁷ International observers reported a numerous instances of war crimes and crimes against humanity.²⁴⁸ The Office of the Prosecutor of the ICC opened an examination into these alleged crimes shortly after the violence ended.²⁴⁹ The investigation continues with some difficulty due to the succession situation in South Ossetia and Abkhazia.²⁵⁰

Abkhazia and South Ossetia consider themselves to be independent nations.²⁵¹ When Georgia ratified the Rome Statute, Abkhazia and South Ossetia existed as semi-autonomous regions of Georgia but still within its territorial control and government.²⁵² Individuals in those regions who participated in the armed conflict in 2008 and committed war crimes or crimes against humanity face trial before the ICC, if warrants are issued. The Court's jurisdiction would be based on territory and personality because the territory of Georgia includes Abkhazia and South Ossetia. Defense council in such a case would challenge the jurisdiction of the court based on both principles, arguing that Abkhazia and South Ossetia constitute independent successor States. They would argue that the court

²⁴⁵ *Rome Statute*, U.N. TREATY COLLECTION, <https://perma.cc/3P9A-T5JR> (last updated Mar. 13, 2014).

²⁴⁶ See generally JIM NICHOL, CONG. RESEARCH SERV., RL34618, RUSSIA-GEORGIA CONFLICT IN SOUTH OSSETIA: CONTEXT AND IMPLICATIONS FOR U.S. INTERESTS (2008), available at <https://perma.cc/W9RS-224W>.

²⁴⁷ *Id.*

²⁴⁸ See GEORGIAN YOUNG LAWYERS ASSOCIATION ET AL., AUGUST RUINS: REPORT OF THE GEORGIAN NON-GOVERNMENTAL ORGANIZATIONS ON VIOLATION OF FUNDAMENTAL HUMAN RIGHTS & INTERNATIONAL HUMANITARIAN LAW AUGUST WAR 2008, at 39-179 (2009) (listing the individual alleged illegal killings in the armed conflict between Russia-Georgia and the people of South Ossetia).

²⁴⁹ See OFFICE OF THE PROSECUTOR, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2013, at 38-41 (2013), available at <http://perma.cc/R3CJ-NSV4>.

²⁵⁰ *Id.* at 40 (stating the lack of access to the South Ossetia territory).

²⁵¹ Tamas Hoffmann, *The International Legal Aspects of the Georgia-Russia Conflict*, 6 FOREIGN POL'Y REV. 80, 82 (2008).

²⁵² *Rome Statute*, *supra* note 245; see Hoffmann, *supra* note 251 (stating that the current de facto independence of South Ossetia and Abkhazia didn't occur until 2008).

lacks territorial jurisdiction and personal jurisdiction, forcing the Court to determine first whether the Abkhazia and Ossetia were independent States under international law and if it possess jurisdiction.²⁵³

If the Court lacks jurisdiction, then the perpetrators escape with impunity. The Court can base its jurisdiction on either personality or territoriality.²⁵⁴ The use of the territoriality principle could potentially splinter in two ways: the Court invokes territoriality that extends to crimes committed when it had explicit jurisdiction while either territory's status was not in question. The second could be that the Court finds it continues to possess jurisdiction because of the continuity of human rights treaties in the event of State succession. This would follow international law, give credence to the emerging rule of customary international law, fulfill the objective of the Court to protect international human rights, and allow the Court to sidestep the issue of statehood.

A decision by the Court that it continues to possess jurisdiction because of the continuity of human rights treaties could lead the Court to a situation similar to its current predicament regarding Omar Al-Bashir, the President of Sudan, who has an international arrest warrant issued for him by the Court but continues to travel freely about the world.²⁵⁵ Countries ignore the arrest warrant and their duty to cooperate with the Court by allowing Bashir to enter, and leave their territory.²⁵⁶ This questions the legitimacy of the Court because it rejects the Court's international standing for politics. It implies that the Court acts only at the whims of nations rather than to enforce an overarching rule of law or protect human rights.

The Court could decide that the Rome Statute continues in the event of State succession, but indicate that a succeeding State can immediately utilize its withdrawal powers under Article 126.²⁵⁷ This would be legally sound in international law because it relies on the rule of treaty continuation in State succession, fulfills the object and purpose of the Court by prosecuting people for laws of war and crimes against humanity, and maintains legitimacy by duly adhering to the Statute by allowing a succession party to withdraw. The withdrawal by the new State ceases the

²⁵³ See Rome Statute, *supra* note 1, art. 19 (requiring the Court to first satisfy that it possess jurisdiction). The Court undoubtedly wants to avoid questions of statehood due the geopolitical issues involved and the international precedence that it could set. See *e.g.*, Office of the Prosecutor, Situation in Palestine (Apr. 3, 2012), <http://perma.cc/SP23-2228>.

²⁵⁴ See Rome Statute, *supra* note 1, art. 12.

²⁵⁵ See *e.g.*, Prosecutor v. Omar Al Bashir, Case No. ICC-02/05-01/09, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (Dec. 12, 2011) (stating Malawi, a State party to the Rome Statute, failed to meet its international obligations under the Rome Statute to arrest Al Bashir).

²⁵⁶ *Id.* See also Rome Statute, *supra* note 1, art. 87(7).

²⁵⁷ Rome Statute, *supra* note 1, art. 126.

Court's jurisdiction over future crimes, but allows it to continue to try those crimes for which it was seized before withdrawal.²⁵⁸

The Court could also accept a Declaration of Jurisdiction under Article 12(3) from the new State. The Court ruled in the *Prosecutor v. Gbagbo* that such declarations allow the Court to extend the reach of its *ratione temporis* to the entry into force of the treaty in 2002.²⁵⁹ This would allow the Court to address crimes committed during a conflict in the time period between succession and before official recognition of the new State. This would be similar to the European Council's declaration regarding the Czech and Slovak Republics and the jurisdiction of the European Court of Human Rights.²⁶⁰ This means of jurisdiction still requires the new State to consent to the Court's jurisdiction, which potentially hinders the development of the continuity of human rights treaties in State succession.

A less likely and optimal means for the Court to exercise jurisdiction in the event of State succession would be a referral by the U.N. Security Council under Article 13.²⁶¹ The U.N. Security Council referred two situations to the Court: Sudan and Libya.²⁶² This led to a number of issues and continues to be a grey area for the Court as the legal and political issues surrounding referrals are flushed out.²⁶³ A referral confers, in theory, total jurisdiction over a situation to the Court.²⁶⁴ The issue with this is that the referral represents a political compromise amongst the members of the Security Council, especially the permanent members.²⁶⁵ The Court adjudicates within those parameters, which opens the possibility that certain actors and crimes go unpunished. It also questions the legitimacy of the Court as an independent tribunal.

The likelihood of a Security Council referral, especially in the case of the situation in Georgia because of Russia's veto power, is rare. It will be up to the Court to determine its own jurisdiction, or find a judicial compromise, in the event of State succession. A political reality that is in the Court's favor is the fact that new States desperately need recognition

²⁵⁸ *Id.*

²⁵⁹ *Prosecutor v. Laurent Koudou Gbagbo*, *supra* note 51, at ¶ 58.

²⁶⁰ *See supra* text accompanying notes 127-64.

²⁶¹ Rome Statute, *supra* note 1, art. 13(b).

²⁶² *See* S.C. Res. 1970, para. 4, U.N. Doc. S/RES/1970 (Feb. 26, 2011) (referring the situation in Lydia to the ICC); *see also* S.C. Res. 1593, para. 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005) (referring the situation in Darfur to the ICC).

²⁶³ *Supra* note 19. The document contains the positions of the members of the Security Council and the President of the ICC on Security Council referrals. The meeting topic focused solely on Security Council referrals, and the ICC.

²⁶⁴ *Prosecutor v. Laurent Koudou Gbagbo*, *supra* note 5.

²⁶⁵ Referrals require either a unanimous vote without veto by the permanent members, or an abstention by permanent members. Each represents a compromise by the parties involved.

from other States on the international level to solidify their existence.²⁶⁶ Following the example of the former Soviet States and the Former States of Yugoslavia,²⁶⁷ a State could enter a proclamation of succession prior to any ruling to foster support for recognition and legitimacy on the international level. This would be an interesting development because the Court is required to determine its jurisdiction at the outset, *sui generis*. A declaration of succession to the Court during a trial might force the Court to determine whether, or not, the State exists, which would convey a large amount of legitimacy on the State.

A similar situation occurred when Palestine lodged a declaration with the Registrar of the ICC in an attempt to force the Court to review crimes committed by Israelis on Palestinian territory.²⁶⁸ The Prosecutor determined it lacked the power to begin an investigation under Article 12 because Palestine was not a State under the Rome Statute.²⁶⁹ The Prosecutor avoided the issue of statehood by ruling that the power to determine the meaning of “State” within Article 12 rests with the United Nations or the Assembly of State Parties of the Rome Statute.²⁷⁰ The Prosecutor’s determination is distinguishable from the Court’s ruling because the Prosecutor exercised its *proprio motu* powers under Article 15.²⁷¹ The Court’s ruling would be a judicial pronouncement, while the Prosecutor’s determination concerning Palestine resembled an administrative function.

The situation in Georgia warrants close attention because it will be the first test of the Court as a protector of human rights and an independent arbitrator of international law. International tribunals face numerous critics for their rulings and their existence, but they serve a critical role in the international legal order. The ICC represents one of the most advanced and important international criminal courts to date. How it handles the tests it will face as international law and society develop will determine its impact on advancing human rights in the future. State succession to human rights treaties represents one of the many potential challenges. Its roots in customary international law provide the Court the tools to interpret and apply it.

A lacuna exists in the Rome Statute concerning the State succession to the treaty. The State practice and *opinio juris* necessary to establish a rule of State succession for human rights treaties exists. The “actual practice” of the former Soviet States, former Yugoslavia, and the former Czechoslovakia

²⁶⁶ See generally James Crawford, *The Criteria for Statehood in International Law*, 48 BRIT. Y.B. INT’L L. 94 (1977) (explaining the importance that recognition plays in statehood).

²⁶⁷ See *supra* text accompanying notes 127-83.

²⁶⁸ See generally John Quigley, *The Palestinian Declaration to the International Criminal Court: The Statehood Issue*, 35 RUTGERS L. REC. 1 (2009).

²⁶⁹ Office of the Prosecutor, *supra* note 253, at ¶ 5.

²⁷⁰ *Id.*

²⁷¹ See Rome Statute, *supra* note 1, at art. 15.

show that the practice of States whose interests are directly affected veer towards continuity. The *opinio juris* gained from the statements of the States concerned show that there is the required feeling of legal obligation. Customary international law exists to support the Court in continuing to adjudicate over the crimes committed by individuals in events of State succession. State succession presents considerable opportunity for impunity. Perpetrators of heinous crimes cloaked in a new State and immune from the Court's reach weaken the Court and the protection of human rights. International law supports the extension of the ICC's jurisdiction in the event of State succession involving a State party over such perpetrators because the Rome Statute's object and purpose is the protection of human rights.