Response: "*Quid*," Not "Quantum": A Comment on "How the International Criminal Court Threatens Treaty Norms"

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I. INTRODUCTION

It is hard not to sympathize with the thrust of Michael A. Newton's impressive article "How the International Criminal Court Threatens Treaty Norms." A friend of the ICC keen to see it thrive, Newton offers some home truths with a view to correcting what he suggests is a damaging tendency towards jurisdictional overreach on the part of the Office of the Prosecutor (OTP) and, through the OTP, the Court. Many readers may find themselves nodding along to the gist of the argument, which puts its finger on something in claiming that the Court is insufficiently sensitive to the finely wrought framework of jurisdictional allocation reflected in the Rome Statute. Sure, one may wonder whether the blame lies solely or even chiefly on the OTP. The *Al Bashir* debacle,[1] for one, is at least as much the fault of the Pre-Trial Chambers and Registrar as of the Prosecutor, although it is true that this tussle involves the Court's competence to proceed with a request for surrender, rather than to entertain proceedings; and when it comes to Newton's examples of the situations in Afghanistan and Palestine, the Prosecutor is yet to proceed beyond preliminary examination. One may equally wish to reflect on some of the article's more detailed reasoning. But there is evident sense in Newton's call for prosecutorial respect for the terms

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1. *See* ROGER O'KEEFE, INTERNATIONAL CRIMINAL LAW 569–73 (2015).

of States Parties' conferral of power on the Court, in particular as it relates to their other treaty arrangements.

Where the reader may differ from the approach taken in the article, even if not necessarily with its practical upshot in specific circumstances, is in its analysis of the jurisdiction conferred by States Parties on the Court in respect of their territory. The maxim *nemo plus iuris transferre potest quam ipse habet* emphasized by Newton cannot be gainsaid. The question, however, is less *quantum iuris*, or how much right a state possesses and passes on, than *quid ius* or *quia iura*, or which right or rights. Jurisdiction is not a solid block of "right." It is a subtle layering of different rights, whose existence, moreover, must be distinguished from their exercise. While a state may undertake by treaty to refrain from exercising one or more of these rights, it still retains them and is competent to confer them in their plenitude on the ICC. True, the state will be obliged to the extent of its other treaty undertaking to refrain from the exercise of these rights through the medium of the Court. But Article 98 of the Rome Statute provides a purpose-built mechanism to prevent the Court from obliging a State Party to act in breach of a treaty undertaking not to exercise one or more of its jurisdictional rights. In short, the Court may not ride roughshod over a variety of other treaty-based jurisdictional arrangements agreed by States Parties. The Court remains competent, however, to entertain proceedings in such cases, whatever this may mean for breach by the state of its other treaties.

II. THE ROME STATUTE'S DELICATE BALANCE

Mike Newton's article performs a considerable service in reminding the reader of some incontrovertible tenets of the law of international organizations (loosely so called in the case of an organ like the ICC) and of the law of treaties. First, the ICC is competent to exercise only that power vested in it by the States Parties to its Statute. In turn, the States Parties are not competent to transfer to the Court a power that they do not possess. *Nemo plus iuris transferre potest quam ipse habet*, as Cicero may or may not have put it. Secondly, a treaty may not lawfully diminish the international legal rights of states not party to it[2]—that is, of what the law of

2. Note that the formulation of the rule *pacta tertiis nec nocent nec prosunt* in Article 34 of the Vienna Convention on the Law of Treaties (VCLT) does not adequately reflect customary international law. It is not simply that a treaty may not create obligations or rights for third states without their consent. It is also the case that a treaty may not impinge upon the legal rights of third states without these states' consent. *See, e.g.*, *Draft Articles on the Law of Treaties with Commentaries*, 1966 Y.B. INT'L L. COMMISSION 187, 226 ¶ 2 ("nor modify in any way their legal rights without

treaties refers to as "third states."[3] States Parties to an agreement that infringes the rights under international law of a third state commit an internationally wrongful act against that state. Thirdly, while specific treaty provisions, the customary international rules of treaty interpretation, and canons of treaty application such as the *lex specialis* and *lex posterior* maxims may go some way to avoiding conflict between a state's multiple treaty obligations, customary international law contains no legal means of deciding which of two unavoidably conflicting treaty obligations is to take priority. A state that becomes party to more than one treaty on the same subject may render itself the servant of two unrelenting masters.

More to the point, Newton is probably right to suggest that the OTP has shown less care than advisable towards the delicate balance struck in the Rome Statute between States Parties' obligations in relation to the ICC and their jurisdictional obligations to third states. The incaution, however, has arguably related more to the Court's competence to proceed with requests for surrender than to its competence to exercise jurisdiction over given persons and to states' customary obligations under the law of jurisdictional immunities than to their jurisdictional arrangements under treaties. But be that as it may. There is, one cannot help feel, a large grain of truth in Newton's argument that the Prosecutor would do well to be more solicitous of the terms of the delegation by States Parties of power on the Court.

III. A STATE'S "JURISDICTION" AND THE DELEGATION OF ITS EXERCISE TO THE COURT

Where one might beg to differ with Newton is in his analysis of the jurisdiction in respect of their territory conferred by States Parties on the Court. There is no doubting the maxim *nemo plus iuris transferre potest quam ipse habet*. The question is how it applies in the present context. In the final analysis, the situation is both more complicated and more straightforward than Newton's reasoning suggests.

The key to understanding here lies in the protean concept of state "jurisdiction." In Newton's article we find repeated reference to the "quantum" of jurisdiction enjoyed by states over their territory and therefore capable of being conferred by them on the Court. But jurisdiction is not a quantity. It is a complex—a complex of rights,

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their consent."); Island of Palmas (Neth./U.S.), 2 R.I.A.A. 829, 842 (1928); ARNOLD (LORD) MCNAIR, THE LAW OF TREATIES 321 (1961).

3. A "third state" is standard terminology in the law of treaties for a state not party to a given treaty. *See* Vienna Convention on the Law of Treaties art. 2(1)(h), 1155 U.N.T.S. 331, 1969, 8 I.L.M. (entered into force Jan. 27, 1980) [hereinafter VCLT] ("'Third State' means a State not a party to the treaty.").

and of rights the existence of which is not to be confused with their exercise. A state's "jurisdiction" in respect of its territory and its conferral of the same on the Court can be accurately analyzed only by appreciating certain crucial distinctions.[4]

It is first necessary to distinguish among the three distinct rights encompassed by the term "jurisdiction," clarity with regard to which is perennially confounded by the fact that each is referred to in its own right as "jurisdiction." These three distinct rights are traditionally labelled jurisdiction to prescribe, jurisdiction to adjudicate and jurisdiction to enforce.[5] Jurisdiction to prescribe refers to a state's right under international law to assert the applicability of its law to given circumstances, whether by means of primary or subordinate legislation, executive decree, or judicial action.[6] In the criminal context, jurisdiction to prescribe can be described simply as a state's right under international law to criminalize given conduct.[7] Jurisdiction to adjudicate refers to a state's right under international law to entertain legal proceedings in respect of given circumstances, which in the criminal context means given conduct.[8] In the criminal context, jurisdiction to prescribe and jurisdiction to adjudicate go hand in hand.[9] Jurisdiction to enforce refers to a state's right under international law to deploy investigative, coercive or custodial powers, whether through police or other executive action or through its courts.[10] The point here is that reference in an international

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4. It is also necessary to appreciate that the international lawfulness of one state's jurisdiction is without prejudice to the international lawfulness of another's. Jurisdiction may be concurrent. In the case of jurisdiction to prescribe and to adjudicate, the fact that another state has the right under customary international law to criminalize and adjudge the conduct, wherever committed, of its nationals and foreign members of its armed forces in no way diminishes the right of the state where the conduct is committed to criminalize and adjudge conduct committed by whomever in its territory. That said, jurisdiction may equally be exclusive. It depends on the terms of any specific agreement or customary international rule in play.

5. *See* O'KEEFE, *supra* note 1, at 4–6.

6. *Id*. at 4.

7. *Id*. at 5.

8. *Id*. at 4.

9. Indeed, separate reference to jurisdiction to adjudicate is generally unnecessary in the criminal context, where the universal practice is that municipal courts will not apply foreign law. In other words, in the criminal-law context, it can be assumed that a municipal court is applying the law of the forum state, and the application of a state's law by its courts is simply the exercise or actualization of prescription, amounting as it does to an assertion that the law in question is applicable to the relevant person. *See id.* at 5. That said, there is no harm in referring to a state's jurisdiction to adjudicate upon criminal matters, and there are instances in which distinguishing between jurisdiction to prescribe and jurisdiction to adjudicate in the criminal context can have explanatory value.

10. *Id*. at 4–5. In the criminal context, jurisdiction to enforce can be described in concrete terms as a state's right under international law to arrest and retain custody over persons and vessels, to have a court sit, to incarcerate persons and confiscate

agreement to a state's "jurisdiction" is not necessarily and not usually to all three distinct rights—or, putting it another way, to all three distinct "jurisdictions"—potentially encompassed by the term. It may be and usually is to only one or two of them.

It is just as necessary, when considering a state's "jurisdiction," to distinguish between the existence of jurisdiction and its exercise. The fact that a given exercise of jurisdiction by a state would be contrary to its international obligations is without prejudice to the internationally lawful possession of the underlying jurisdiction to be exercised. In the case of jurisdiction to adjudicate, a state's treaty undertaking or customary obligation to refrain from prosecuting a given category of persons in no way diminishes its right under customary international law to entertain criminal proceedings in respect of conduct committed in its territory. A state's right under customary international law to entertain criminal proceedings in respect of conduct committed in its territory is without regard to the identity of the author of the conduct, to the nature of the conduct, and so on. It is plenary, and it remains so even where the state undertakes not to exercise it in given circumstances. The present relevance of the distinction between the existence of jurisdiction and its exercise is that reference in an international agreement to "jurisdiction" may be to that jurisdiction's existence or to its exercise.

These two distinctions are critical when considering the legal effect of treaty provisions, such as those found in status of forces agreements (SOFAs) and the like, which provide that given personnel "are subject to the exclusive jurisdiction"[11] of the sending state, as well as of treaty provisions concerning the jurisdictional immunities to be accorded certain categories of persons.

When analyzed closely, in particular in the context of surrounding provisions,[12] what is meant by "jurisdiction" in the

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property, to undertake surveillance, to stop and search, to take physical measures to prevent or repress the commission of a crime, to investigate and to collect evidence, to issue *subpoenae ad testificandum* and *subpoenae duces tecum*, and so on—in short, to exercise any or all of the usual range of police, prosecutorial, judicial, and related executive powers in relation to criminal justice. *See id*. at 5.

11. *See, e.g*., Military Technical Agreement Between International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan Annex A, ¶ 3, Jan. 4, 2002 [hereinafter Military Technical Agreement] (applicable in respect of all ISAF and supporting personnel in Afghanistan).

12. In the case of Annex A, ¶ 3, of the Military Technical Agreement between International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan, crucial context is afforded by the other paragraphs of Section 1 ("Jurisdiction") of Annex A. Paragraph 1 provides that "[t]he provisions of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 concerning experts on mission will apply *mutatis mutandis* to the ISAF and supporting personnel." *Id.* at ¶ 1. In turn, while § 22 of the Convention on Privileges and Immunities indicates that ISAF and supporting personnel are to benefit while in Afghan territory from immunity (in reality, inviolability) from arrest and detention—a point reiterated in Military Technical Agreement, Annex A, ¶ 4—and immunity *ratione materiae* "from legal process of every kind," § 23 of the Convention indicates that these

phrase "subject to the exclusive jurisdiction" is the exercise of jurisdiction to enforce and to adjudicate. In relation to jurisdiction to enforce, such a provision represents, first, an expression by the receiving state of the necessary consent to the otherwise-unlawful deployment in its territory by the sending state of investigative, coercive, and custodial powers over the sending state's personnel and, secondly, an undertaking by the receiving state not to exercise over those personnel its own right under customary international law to deploy such powers in its territory. In relation to jurisdiction to adjudicate, which as a matter of customary international law is concurrent in the criminal context as between the receiving state (in its capacity as the territorial state) and the sending state (in its capacity as the state whose nationals or members of its armed forces the personnel in question are), the relevant provision represents an undertaking by the receiving state not to exercise over the personnel sent its customary right to entertain criminal proceedings in respect of conduct committed in its territory. What such a provision does not represent is the surrender by the receiving state of its very right to entertain criminal proceedings in respect of conduct committed in its territory. The receiving state continues to possess this right, which is without regard to the identity of the author of the conduct, to the nature of the conduct, and so on. The right is plenary and remains so even where the receiving state undertakes not to exercise it in given circumstances.

Similarly, when a treaty provides for "immunity from the criminal jurisdiction of the receiving State"[13] in respect of a given category of persons, it is referring to no more than the exercise by the receiving state of its jurisdiction to adjudicate. Such a provision

immunities may be waived. *Id.* at ¶ 4; Convention on the Privileges and Immunities of the United Nations art. VI, Feb. 13, 1946, 1 U.N.T.S. 15. Were Afghanistan to have surrendered its very rights not only to enforce and to adjudicate but also to prescribe in respect of ISAF and associated personnel, rather than merely to have undertaken not to exercise over such personnel its rights respectively to enforce and to adjudicate, waiver would be of no consequence, since Afghanistan would possess no rights to arrest and detain and to prosecute such personnel or to criminalize their conduct in the first place. The fact that Afghanistan retains under the Military Technical Agreement its right to regulate by its criminal and other law the conduct of ISAF and associated personnel is underlined in Annex A, ¶ 2, which provides that ISAF and supporting personnel "will respect the laws of Afghanistan." Military Technical Agreement, *supra* note 11, at Annex A ¶ 2.

13. *See, e.g.*, Vienna Convention on Diplomatic Relations art. 31(1), Apr. 18, 1961, 500 U.N.T.S. 95. [hereinafter VCDR] (relating to a diplomatic agent accredited to the receiving state). Again, the fact that the immunity can be waived by the sending state, in accordance with article 32, indicates that it constitutes merely a bar to the exercise by the receiving state of its jurisdiction to adjudicate, not to the existence of this jurisdiction, let alone to the existence of its jurisdiction to prescribe. *Id.* art. 32. That the immunity from criminal jurisdiction provided for by, inter alia, the VCDR is merely procedural, not substantive, was emphasized by the International Court of Justice in Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), ICJ Rep 2002, 3, 25, ¶ 60.

represents an undertaking by the receiving state not to exercise any right it may enjoy to entertain criminal proceedings against such a person, a right it does indeed enjoy in respect of conduct committed by that person in its territory. Again, a provision of this sort does not represent the surrender by the receiving state of its very right to entertain criminal proceedings in respect of conduct committed in its territory. Again, the receiving state continues to possess this right, which is unaffected by the identity of the author of the conduct, the nature of the conduct, and so on.

In turn, by way of Article 12(2)(*a*) of the Rome Statute, a receiving State Party to the Statute delegates to the ICC the exercise of its customary right to entertain criminal proceedings in respect of the crimes specified in Article 5 of the Statute when these crimes are committed in its territory. Since its treaty-based acknowledgement of the "exclusive jurisdiction" of the sending state or its according of immunity from its "criminal jurisdiction" in no way diminishes the plenary right it possesses under customary international law to entertain criminal proceedings in respect of crimes under Article 5 of the Statute committed in its territory, a receiving State Party is competent to confer on the Court a plenary "jurisdiction" over such crimes. In short, the scope of the Court's jurisdiction over genocide, crimes against humanity, and war crimes committed in the territory of a State Party is unaffected by the terms of any SOFA or analogous agreement or any treaty provision on jurisdictional immunities by which the State Party may be bound.

But this is not the end of the story.

A State Party's delegation to the ICC of the exercise of what is its plenary right to entertain criminal proceedings in respect of crimes under Article 5 of the Statute committed in its territory nonetheless has implications for any treaty undertaking by it to refrain from entertaining criminal proceedings against a given category of persons.[14] A State Party's surrender for prosecution by the Court of a person whom it has undertaken not to prosecute would constitute a breach by that State Party of its undertaking,[15] since it would amount to the prosecution by that state, via the medium of the Court, of the person.[16]

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14. *A fortiori*, it has implications for any treaty undertaking by the State Party to refrain from exercising custodial powers over the same persons.

15. *A fortiori*, it would constitute a breach of any undertaking by the State Party to refrain from exercising custodial powers over that person.

16. See, to this effect, Prosecutor v. Katanga, ICC-01/04-01/07-1497, Appeals Chamber Judgment on the Appeal of Mr. Germain Katanga Against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ¶ 83 (Sept. 25, 2009), as affirmed in Prosecutor v. Bemba, ICC-01/05-01/08-962, Appeals Chamber Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo Against the Decision of Trial Chamber III of 24 June 2010 Entitled 'Decision on the Admissibility and Abuse of Process Challenges', ¶ 74 (Oct. 19, 2010).

In a partial attempt to obviate such a situation, the drafters of the Rome Statute included in it Article 98(2), which provides:

> The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.[17]

Article 98(2) is designed to bar the Court from obliging a State Party to act in breach of the sort of treaty undertaking to another state[18] not to exercise one or more of its jurisdictional rights typically found in SOFAs and the like, although there is no reason why it cannot cover other agreements falling within the terms of the provision. In addition, Article 98(1) provides:

> The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.[19]

The provision makes no reference to the immunity of heads of state, heads of government, ministers for foreign affairs, or any others who may benefit under customary international law or treaty from immunity *ratione personae*. It is generally accepted, however, that the reference to "diplomatic" immunity is to be interpreted to encompass other comparable immunities recognized by customary international law and applicable treaty.[20] It is also taken as read that

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17. Rome Statute of the International Criminal Court art. 98(2), U.N. Doc. A/CONF.183/9, 2187 U.N.T.S. 90 (July 17, 1998), *entered into force* July 1, 2002, *reprinted in* 37 I.L.M. 999 [hereinafter Rome Statute].

18. Unlike Article 98(1) of the Statute, article 98(2) does not apply only in respect of third states—that is, in the case of Article 98(2), in relation only to international agreements between States Parties and states not parties to the Statute. *Id.* Rather, the Court may not proceed with a request for surrender if this would require a State Party to breach a SOFA or cognate international agreement even with a sending State Party, unless the Court can first obtain the cooperation of the sending State Party for the giving of consent for surrender. That said, it might be expected in practice that the Court would either, first, in the exercise of its powers under article 87(1)(*a*), request the sending State Party to give its consent to surrender, a request binding on that other State Party by virtue of Article 93(1)(l); or, secondly, in accordance with Article 89(1), issue a binding request to the sending state to surrender the individual itself. *Id.* arts. 87, 93, 89.

19. *Id.* art. 98(1).

20. That article 98(1) was textually capable of application to heads of state was not questioned in *Prosecutor v. Omar Al Bashir*, ICC-02/05-01/09, Pre-Trial Chamber Corrigendum to the Decision pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by

the reference to "immunity" encompasses inviolability.[21] In short, it is an overstatement to suggest that the ICC may disregard alternative jurisdictional arrangements agreed on by way of treaty by States Parties to the Rome Statute.

The fact remains, however, that the scope of the Court's jurisdiction to entertain proceedings in respect of the commission on the territory of a State Party of one or more of the crimes under Article 5 of the Rome Statute is not circumscribed by any SOFA or like treaty or any treaty regulating immunity from criminal proceedings to which a State Party may be party. If a person covered by such a treaty is surrendered to the Court by another State Party or a third state for prosecution for a crime committed in the territory of a State Party treaty-bound to refrain from prosecuting that person, the last will stand in breach of its treaty obligation, since it will in effect be prosecuting the person.

IV. CONCLUSION

The question of the ICC's jurisdiction over crimes committed in the territory of a State Party is both more complicated than Newton suggests, insofar as a state's territorial "jurisdiction" is not unitary, and more straightforward, insofar as the lawful scope of the jurisdiction delegated to the Court by way of Article 12(2)(*a*) of the Rome Statute is precisely as the Statute indicates. But insofar as "How the International Criminal Court Threatens Treaty Norms" represents a loyal call for greater concern on the part of the OTP for the fine balance of jurisdictional allocation to which the States Parties to the Statute commit themselves, the article is on the money. Either way, Newton's excellent piece makes an original and bracing contribution to the debate.

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the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (Dec. 13, 2011), in *Prosecutor v. Omar Al Bashir*, ICC-02/05-01/09, Pre-Trial Chamber Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (Dec. 13, 2011), or in any of the many subsequent decisions on point in *Al Bashir*.

21. For the use of the term "immunity" to cover both immunity *stricto sensu* and inviolability, see, e.g., Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), ICJ Rep 2002, 3, 29–31, ¶ ¶ 70, 71 and 75.