The Rome Statute and Third States: Determining the Validity of the Jurisdiction of the International Criminal Court Over Third-State Nationals

*Ryan D. Mancera**

* '05 J.D., Ateneo de Manila University School of Law (Second Honors); '00 B.S. in Accountancy, De La Salle University (Honorable Mention). The author was part of the Philippine Team that won the 2004 Philip C. Jessup International Law Moot Court Competition for Ateneo de Manila School of Law, besting 529 law schools from 90 different countries. This article is an abridged version of the author's thesis which won the bronze medal for the Best Thesis of Class 2005 at the Ateneo de Manila School of Law.

Cite as 51 ATENEO L.J. 986 (2007).

I. INTRODUCTION

On 20 August 1998, in the aftermath of the terrorist bombings of the United States (U.S.) embassies in Tanzania and Kenya, the U.S. launched an airstrike against the Al Shiffa pharmaceutical plant in Sudan.[1] U.S. officials claimed that the plant was a chemical weapons facility operated by Osama bin Laden, whom they suspected of masterminding the bombings.[2] However, the Al Shiffa plant actually produced legitimate pharmaceutical products, including anti-malaria drugs under a United Nations (U.N.) contract specifically approved by the U.S.,[3] and Osama bin Laden had no connection to the plant.[4]

If the International Criminal Court (I.C.C.) was in existence at the time, the I.C.C. Prosecutor could have conducted an investigation on his own[5] or on referral by a State-Party to the Rome Statute (the Statute).[6] The investigation would have led to the arrest and prosecution of responsible U.S. personnel, even if the U.S. is a non-party to the Statute. As a non-party, the U.S. would not have been bound to provide evidence, surrender accused persons found within its territory, or provide assistance to the

1. *See,* Coordinator for Counterterrorism, U.S. Department of State, Fact Sheet: U.S. Strike on Facilities in Afghanistan and Sudan, United States Information Agency (1998), http://usinfo.state.gov/topical/pol/terror/98082112.htm (last accessed May 10, 2004); Letter Dated Aug. 20, 1998 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/1998/760 (1998), *available at* http://usinfo.state.gov/topical/pol/terror/98082008.htm (last accessed May 10, 2004).
2. *Id.*
3. *See generally,* Michael Barletta, Report: Chemical Weapons in the Sudan, 6 Nonproliferation Rev. 115-37 (1998).
4. *Id.*
5. Rome Statute of the International Criminal Court, art. 15(1), U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute].
6. *Id.* art. 14 (1).

I.C.C.,[7] but under article 12 of the Statute, the refusal of the U.S. to ratify the same would not bar the I.C.C. from issuing an indictment charging American citizens with war crimes or crimes against humanity.[8] This is because the Statute authorizes the exercise of I.C.C. jurisdiction over any national of any State over the latter's objections, provided certain preconditions are met. The possibility of this scenario precisely incited vehement objections from the U.S., and, to this day, constitutes a primary ground for its continuing refusal to sign and ratify the I.C.C. Treaty.[9]

The I.C.C.'s purported jurisdiction over nationals of third States that object to its jurisdiction (third-State nationals)[10] has far-reaching implications, both within public international law and in international politics. A permanent international criminal tribunal that asserts a supranational clout does not sit well with all States. A variety of legally founded or politically motivated reasons cause States to be unwilling to enter into broad adjudicative commitments as to future disputes when the content and contours of such commitments cannot be foreseen.[11]

Although the Statute has 139 signatories and 94 States-Parties,[12] the I.C.C. itself operates through only one prosecutor,[13] one or two deputy prosecutors[14] and eighteen judges.[15] While the Statute may be regarded as

7. *See,* Rome Statute, part 9.

8. Note that under the so-called "effects" doctrine, Sudan's territorial-based jurisdiction would extend to those whose actions in Washington, D.C. had a direct intended effect in the territory of Sudan. *See,* S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser.A) No. 10 (noting that many countries will find jurisdiction for criminal acts done in another State if their effects are felt within its borders).

9. David Scheffer, Hearing Before the Subcomm. on International Operations of the Sen. Comm. on Foreign Relations of the United States Senate, S. Rep. No. 105 724, 105th Cong., 2d Sess. 13 (1998).

10. A State, although not a party to the Rome Statute, may nonetheless give its consent in a particular case. *See,* article 12 (3) of the Rome Statute. For purposes of this paper, the phrase "third State" refers to a State (a) which has not ratified the Rome Statute and (b) which does not consent to its jurisdiction in a given case.

11. Madeline Morris, *The United States and the International Criminal Court: High Crimes and Misconceptions: The I.C.C. and Non-Party States,* 64 LAW & CONTEMP. PROBS. 13 (2001).

12. The Official Web Site of the International Criminal Court, *at* http://www.I.C.C.-cpi.int/statesparties.html (last accessed July 5, 2004).

13. Rome Statute, arts. 15 & 42.

14. *Id.* art. 42 (2).

15. *Id.* art. 36 (1) & 39. The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges.

fair compromise among States with differing interests, the fact is that the Court functions through a handful of individuals whose impartiality may not necessarily be beyond reproach.[16]

While the world may no longer be divided into black and white, the States-Parties to the Statute easily represent counter-balancing interests that prevent States from exploiting the I.C.C., such that the re-emergence of a bipolar world is not difficult to imagine.[17] If this comes to pass, the States-Parties could be amenable to strong influence by one or a few States,[18] yielding to the shifting sands of political expediency to the detriment of third States which, while withholding consent, may still be affected by the Statute.

The I.C.C.'s jurisdictional scope touches upon principles of treaty and customary international law, and State sovereignty, which are basic concepts in public international law. It is not an exaggeration to assert that the Statute is a potent agent for reshaping these areas in public international law. The I.C.C. does not exist in the abstract — it will put real people in real jails.[19] This underscores the need to determine whether I.C.C. jurisdiction is in complete accord with the present state of the law, or in the alternative, an impetus to a very drastic yet valid metamorphosis in public international law, or in the final alternative, a complete and irremediable aberration of international law.

The I.C.C.'s aim of ending the culture of impunity for the perpetrators of the most serious crimes of concern to the international community[20] is not justification for the I.C.C. to cast its jurisdictional shadow over everyone without regard to settled norms of international law. As the international community gives teeth to the ideals of justice in the face of recent human atrocities, the law should not cast aside centuries-worth of hard-won progress. Any shift in legal paradigms should be carefully weighed against the existing legal framework.

This paper ultimately propounds and answers one question: Is it valid under international law for a treaty-based international criminal court to

16. Nonetheless, the Rome Statute attempts to ensure an equitable representation in the I.C.C. judiciary. *See,* Rome Statute, art. 36(8)(a) ("[t]he States-Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for: (i) the representation of the principal legal systems of the world; (ii) equitable geographical representation; and (iii) a fair representation of female and male judges.").

17. Morris, *supra* note 11, at 46.

18. *Id.*

19. Leila Sadat Wexler & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution,* 88 GEO. L.J. 381, 388 (2000).

20. Rome Statute, pmbl. ¶ 4, 5.

exercise jurisdiction over nationals of States which have not ratified the treaty and which object to its jurisdiction?

II. BASIC CONCEPTS OF CRIMINAL JURISDICTION

A proper understanding of the basic principles of criminal jurisdiction should serve as a compass in navigating the turbulent issues on the jurisdictional foundations of the I.C.C., lest the discussion run aground on mistaken conclusions. The term "jurisdiction" refers to the legitimate assertion of authority to affect legal interests.[21] The jurisdiction that states exercise are based on the following principles: (1) the territoriality principle; (2) the nationality principle; (3) the universality principle; (4) the passive personality principle; and (5) the protective principle.[22]

The territoriality principle confers jurisdiction on the courts of the place where the crime, or any of its essential elements, is committed.[23] This principle is an application of the essential territoriality of the sovereignty or the sum of legal competences of a State.[24] Territoriality may be applied in two ways. First, there is the subjective application, which recognizes the jurisdiction of the State where a certain crime is commenced, although the crime is completed or consummated abroad.[25] Second, there is objective territorial application, which recognizes the jurisdiction of the State where any essential constituent element of a crime is consummated, although the crime was commenced abroad.[26] The latter principle is generally accepted and applied.[27] While the territorial character of criminal law is fundamental in all systems of law, all or nearly all these systems extend their jurisdiction to

21. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 301 (1998).

22. *See,* Kenneth C. Randall, *Universal Jurisdiction Under International Law,* 66 Tex. L. Rev. 785-86 (1988). *See generally,* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 300-05 (4d ed. 1990) [hereinafter BROWNLIE, PRINCIPLES]; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987).

23. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402(1), 421 (2) (a)-(c), (h)-(k) (1987); BROWNLIE, PRINCIPLES, *supra* note 22, at 300-03; LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUE 233, 233-36 (1995); Harvard Research in International Law, Jurisdiction with Respect to Crime, Draft Convention with Comment 29 A.J.I.L. Supp. 435, 480-508 (1935) [hereinafter Harvard Research].

24. BROWNLIE, PRINCIPLES, *supra* note 22, at 299.

25. *See,* Harvard Research, *supra* note 23, at 484-87; Public Prosecutor v. D.S., ILR 26, 209 (1958).

26. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 299 (6d ed. 2003) [hereinafter BROWNLIE, PUBLIC INT'L LAW].

27. Lotus Case, 1927 P.C.I.J. 23 (ser. A) No. 10.

offenses committed outside their territory in ways that vary from State to State.[28] The following principles, which constitute the other forms of jurisdictional basis, justify a State's exercise of jurisdiction over extra-territorial acts.

The nationality principle allows a State to exercise jurisdiction over its national who committed a crime outside its territory.[29] Nationality is therefore a mark of allegiance and an aspect of sovereignty,[30] justifying a State's jurisdiction to reach beyond its borders. Jurisdiction based on nationality is not strictly limited to a State's nationals. It may extend to a non-national who takes up residence or has other connections to the prosecuting State as these connections are indicative of allegiance[31] owed by the non-national.[32] Since the territorial and the nationality principles, as well as the incidence of dual nationality create parallel jurisdictions and possible double jeopardy, many States place limitations on the nationality principle[33] and it is often confined to serious offenses.[34] Nationality also provides a necessary criterion in such cases as the commission of criminal acts in locations where the territorial criterion is inappropriate.[35]

While other bases of jurisdiction require links between the prosecuting State and the offense, the nationality of the perpetrator or of the victim, the universality principle provides all States with jurisdiction over a limited category of offenses generally recognized as of universal concern regardless of the absence of any link.[36] This principle is backed by an international public policy which assumes that every State has a sufficient interest in exercising

28. *Id.*

29. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402 (2) & 421 (2) (d)-(f) (1987); BROWNLIE, PRINCIPLES, *supra* note 22, at 303; HENKIN, *supra* note 22, at 236-38; Harvard Research, *supra* note 23, at 519-39.

30. *Lotus Case,* 1927 P.C.I.J. 92 (ser. A) No. 10 (Judge Moore, Sep. Op.); Harvard Research, *supra* note 23, at 519 ff.; *See also,* U.S. v. Baker, ILR 22 (1955), 203; Public Prosecutor v. Gunther B. and Manfred E., ILR 71, 247.

31. *See,* Public Prosecutor v. Drechsler, Ann. Digest, 13 (1946), no. 29.

32. *See,* Ram Narain v. Central Bank of India, ILR 18 (1951), no. 49.

33. Harvard Research, *supra* note 23, at 519 ff.

34. Preuss, 30 *Grot. Soc.* 184-208 (1944). The United Kingdom legislature has conferred jurisdiction over nationals, *inter alia,* in respect of treason, murder, bigamy, and breaches of the Official Secrets Acts, wherever committed.

35. BROWNLIE, PUBLIC INT'L LAW, *supra* note 26, at 302.

36. Randall, *supra* note 22, at 788; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §§ 404, 423 (1987); BROWNLIE, PRINCIPLES, *supra* note 22, at 304-05; HENKIN, *supra* note 31, at 240; Harvard Research, *supra* note 23, at 563-92.

jurisdiction to combat egregious offenses that the community of States universally condemns.[37] Crimes attract universal jurisdiction under customary international law if two criteria are satisfied: [38] *first*, they must be contrary to a peremptory norm of international law so as to infringe a *jus cogens*;[39] and *second*, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order.

The passive personality principle is anchored solely on a State's presumed sovereign right to protect its nationals, such that it allows a State to prosecute and punish aliens for acts which, though committed abroad, are harmful to the nationals of the forum.[40] This is the least justifiable of the various bases of jurisdiction, and certain of its applications fall under the principles of protection and universality.[41] Under the protective principle theory, a State may assume jurisdiction over aliens for acts done abroad which nonetheless affect the security of the State.[42] This concept, while taking in a variety of political offenses, is not necessarily confined to political acts[43] and also covers currency, immigration, and economic offenses.[44]

37. Randall, *supra* note 22, at 787; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. A ("Universal jurisdiction over the specified offenses is a result of universal condemnation of those activities and general interest in cooperating to suppress them ...."); BROWNLIE, PRINCIPLES, *supra* note 22, at 304 ("[T]he repression of some types of crime [is justified] as a matter of international public policy."); MALCOLM N. SHAW, INTERNATIONAL LAW 470 (4d ed. 1997) ("The basis [of the universality principle] is that the crimes involved are regarded as particularly offensive to the international community as a whole.").

38. Pinochet Case, 2 WLR. 825 at 911-12; ILR 119, 135 at 229-30 (1999) (Lord Millet, dissenting).

39. Vienna Convention on the Law of Treaties [VCLT], 1969, art. 53, 1155 U.N.T.S. 331. A peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

40. BROWNLIE, PUBLIC INT'L LAW, *supra* note 26, at 302; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. G (1987); HENKIN, *supra* note 23, at 239-40.

41. BROWNLIE, PUBLIC INT'L LAW, *supra* note 26, at 302.

42. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (3) (1987); BROWNLIE, PRINCIPLES, *supra* note 22, at 304; HENKIN, *supra* note 23, at 238-39; Harvard Research, *supra* note 23, at 543-63.

43. *See,* Nusselein v. Belgian State, ILR 17 (1950), no. 35; Public Prosecutor v. L., ILR 18 (1951), no. 48: Italian South Tyrol Terrorism Case, ILR 71, 242.

44. BROWNLIE, PUBLIC INT'L LAW, *supra* note 26, at 303.

III. THE JURISDICTIONAL UNDERPINNINGS OF THE I.C.C.

The workings of the I.C.C. may be unorthodox and quite confusing. Its allegedly ambitious jurisdictional scope has likewise necessitated various bargain-based devices that exhibit both innovation and restraint. These peculiarities are to blame for the controversy at hand. An overview of how the I.C.C. basically operates as regards its jurisdictional provisions is in order.

The International Criminal Court was established by the Statute of the International Criminal Court on 17 July 1998, when 120 States participating in the "United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court" adopted the Statute. The Statute sets out the Court's jurisdiction, structure and functions and it provides for its entry into force 60 days after 60 States have ratified or acceded to it. The 60th instrument of ratification was deposited with the Secretary-General on 11 April 2002, when 10 countries simultaneously deposited their instruments of ratification. The Statute entered into force on 1 July 2002.

The Statute squarely addresses the question of jurisdiction *ratione temporis*, or jurisdiction in respect of time, and limits the I.C.C.'s temporal jurisdiction to crimes committed after the entry into force of the Statute.[45] The I.C.C.'s *ratione loci*, or geographic jurisdiction, varies depending on the mechanism by which the case comes to the Court. In the event that the Security Council (SC) refers the matter pursuant to its Chapter VII power under the UN Charter,[46] jurisdiction covers the territory of every State in the world, regardless of which State is involved.[47] On the contrary, if the matter is

45. Rome Statute, art. 11 (1)-(2). For States becoming parties after the Statute's entry into force, the Court may exercise jurisdiction only with respect to crimes committed after the entry into force of the Statute with respect to that State, unless the State declares otherwise.

46. Chapter VII of the U.N. Charter is entitled Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression. Under article 39, "[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken to maintain or restore international peace and security."

47. Rome Statute, art. 13 (b). When the Security Council refers the matter, therefore, the question of whether the territorial State or the State of nationality of the offender is a Party to the Statute is not taken into account. Moreover, since the Security Council will refer cases only under its Chapter VII powers, referral to the Court, like the establishment of the two *ad hoc* tribunals, is presumably a measure "not involving the use of force" that the Security Council may adopt to maintain international peace and security. *See,* Prosecutor v. Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), No. IT-94-1-AR72 ¶¶ 34-36 (Oct. 2, 1995) [hereinafter Tadic Appeal].

referred by a State-Party[48] or initiated *motu proprio* by the Prosecutor,[49] the I.C.C.'s jurisdiction extends to the territory of a third State only if that State consents to the jurisdiction of the Court,[50] or either the acts were committed on the territory of the consenting State[51] or the accused is a national of the consenting State.[52] The jurisdiction *ratione personae* of the Statute is limited to those who were at least eighteen years of age at the time of the commission of the offense.[53]

A. Three Jurisdictional Axes of the I.C.C.

Jurisdiction may manifest itself in three forms of authority — prescriptive, adjudicative and enforcement.[54] Intriguingly, the Statute combines these three forms all in one instrument, thereby underscoring its nature as a constitutive document. It is the implementation and implications of the jurisdictional theories of the Statute that are its most revolutionary features. As noted by Professors Sadat[55] and Carden,

> Through a rather extraordinary process, these three jurisdictional categories have been transformed from norms providing which State can exercise authority over whom, and in what circumstances, to norms that establish under what conditions the international community, or more precisely the States-Parties to the Statute, may prescribe international rules of conduct, may adjudicate breaches of those rules, and may enforce those adjudications.[56]

48. *Id.* art. 13 (a).

49. *Id.* art. 13 (c).

50. *Id.* art. 12 (3).

51. *Id.* art. 12 (2) (a).

52. Rome Statute, art. 12 (2) (b). The word "consenting" is used in its general sense because a State may give its consent to the Court's jurisdiction in two ways: by ratifying the Statute, pursuant to article 12 (1), or by consenting to it on an *ad hoc* basis, under article 12 (3).

53. *Id.* art. 26.

54. *See,* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987). Adapting the familiar meaning of these terms to our purposes here, we find that by "jurisdiction to prescribe," we mean the principles permitting the international community to make "its law applicable to the activities, relations, or status of persons, or the interests of persons in things ...." *Id.* § 401 (a). By "jurisdiction to adjudicate," we mean "to subject persons [and in particular criminal defendants] or things to the process of [the I.C.C.]." *Id.* § 401 (b). By "jurisdiction to enforce," we mean "to induce or compel compliance or to punish noncompliance with [the orders and decisions of the I.C.C.]." *Id.* § 401 (c).

55. Professor of Law, Washington University in St. Louis, and Chair of the International Law Association (American Branch) Committee on a Permanent International Criminal Court. Leila Sadat was a delegate to the Rome conference and attended several meetings of the Preparatory Committee on the Establishment of an International Criminal Court in her capacity as Chair of the International Law Association's Committee on a Permanent International Criminal Court.

One of the major historical objections to an international criminal court is the absence of international criminal law with which potential defendants could be charged.[57] The Statute overcomes this by prescribing norms for the international community as a matter of substantive criminal law.[58] Prescriptive jurisdiction was the least controversial of the three jurisdictional axes within the Statute, and this is understandable because the four categories of crimes within the Statute[59] were considered *jus cogens* norms by most writers,[60] even though their precise definition had not yet been completely agreed upon by all States.[61]

Jurisdiction to adjudicate generally follows jurisdiction to prescribe, subject to a rule of reasonableness.[62] This arrangement, as applied in the I.C.C., is subject to two qualifications, namely the State consent regime[63] and the complementarity principle.[64] On one hand, the State consent regime, as discussed earlier, sets in only when the case is referred to the Court by a State-Party, or when the Prosecutor initiates an investigation *motu proprio*.[65] On the other hand, the complementarity principle means that the Court may exercise jurisdiction only if: (1) national jurisdictions are unwilling or unable genuinely to carry out an investigation or prosecution;

56. Sadat & Carden, *supra* note 19, at 406.

57. Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT'L L.J. 665, 717-20 (1996).

58. *See,* Sadat & Carden, *supra* note 19.

59. Rome Statute, art. 5. The crimes within the Court's jurisdiction are genocide, crimes against humanity, war crimes and the crime of aggression.

60. *See,* M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*. 8 TRANSNAT'L L. & CONTEMP. PROBS. 199, 201-02 (1998).

61. Sadat & Carden, *supra* note 19, at 406-7.

62. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987), § 421 (1).

63. Rome Statute, art. 12.

64. *Id* art. 17.

65. *Id.* art. 13 (a) & (c). These provisions, taken in relation to article 12, mean that either the defendant's State of nationality or the territorial State must be a Party to the Statute, and if both are non-parties, either must at least consent to the jurisdiction of the I.C.C.

(2) the crime is of sufficient gravity; and (3) the person has not already been tried for the conduct on which the complaint is based.[66]

In both the State consent and the complementarity regimes, the Statute removes a case from the ambit of the I.C.C., even though as a matter of prescriptive law the I.C.C. Statute would otherwise apply to the conduct in question.[67] This deference to State sovereignty seems derived from the evident unease with the nature of the law being made.[68] Legal theory and political reality conceive of international law-making as predominantly contractual and consensual.[69] Yet, while the Statute takes the form of a treaty or contract between States, its jurisdictional provisions arguably claim the status of custom. This is particularly manifested in cases involving a Security Council referral wherein the Statute's scope is unbounded by geography.[70] Indeed, the Statute textually applies to third-State nationals in certain circumstances, and can be applied by the Security Council to all the human beings of the world.[71]

Enforcement jurisdiction seems to be the weakest application of the three jurisdictional axes of the Statute. Indeed, the I.C.C.'s enforcement jurisdiction is so feeble that it has the potential to completely undermine the efficacy of the Court.[72] For instance, the orders of the I.C.C., such as arrest warrants, judgments, orders to seize assets, or sentences, will need to be enforced. Yet, the I.C.C. has no police force to implement these orders.[73]

66. *Id.* art. 17.

67. Sadat & Carden, *supra* note 19, n166. Thus, if the defendant's conduct is also being regulated (or he or she is being pursued) by a State, the I.C.C. must relinquish jurisdiction over the case if the State so desires. In some instances, this will be true even though it might seem more appropriate for the I.C.C. to pursue the case. Similarly, if the Prosecutor or a State initiates a complaint with the Court, a State consent regime attaches that again may divest the Court of jurisdiction to adjudicate. Finally, although the Statute outlaws genocide and crimes against humanity, a regime transitioning from a genocidal past may decide on amnesty and reconciliation instead of criminal prosecutions. This seems to be permitted by the Statute which is "creatively ambiguous" on this point.
Id.

68. *Id.* at 409.

69. *Id.* at 410.

70. Rome Statute, art. 13.

71. Sadat & Carden, *supra* note 19, at 410.

72. *Id.* at 415.

73. *See,* Sadat & Carden, *supra* note 19, at 415-17 for a more extensive discussion on how the weak enforcement mechanism of the I.C.C. threatens its overall effectiveness.

B. Core Crimes within the Subject-Matter Jurisdiction of the I.C.C.

The jurisdiction of the I.C.C. is limited to the crime of genocide, crimes against humanity, war crimes, and the crime of aggression[74] — all of which the Statute describes as the most serious crimes of concern to the international community as a whole.[75] Agreeing on a definition of the crime of genocide for purposes of the Statute was relatively uncontroversial[76] for it was practically lifted from the Genocide Convention.[77] Defining what constitutes a crime against humanity, however, proved to be one of the most arduous tasks at the Rome Conference because there is no accepted definition at the moment, either as a matter of treaty or customary international law.[78] As regards the definition of war crimes, the Statute is much more detailed than any of the predecessor instruments, with the resultant virtue of making the Statute more complete and the defect of expressly excluding certain very serious threats to international peace and security.[79] It appears that war crimes cannot be committed within the meaning of the Statute unless an armed conflict exists.

C. Article 12 of the Statute

At the heart of the controversy addressed by this paper lies article 12 of the Statute, entitled "Preconditions to the exercise of jurisdiction," which states that:

> 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:

74. Rome Statute, arts. 5 (2), 121, 123. As regards the crime of aggression, article 5 (2) of the Rome Statute provides that "[t]he Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime."

75. Rome Statute, art. 5.

76. Sadat & Carden, *supra* note 19, at 426.

77. Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), 1949, art. 2, 78 U.N.T.S. 277.

78. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 45-48 (1997) *cited in* Sadat & Carden, *supra* note 19, at 427.

79. Sadat & Carden, *supra* note 19, at 434.

(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.

3. If the acceptance of a 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.

As it stands, article 12[80] allows the I.C.C. to exercise jurisdiction over a national of a non-consenting third State when the situation is referred to the I.C.C. Prosecutor by a State-Party, *or* the Prosecutor initiates an investigation *motu proprio*, and, in either case, the territorial State is a Party to the Statute or consents *ad hoc* to the jurisdiction of the Court. These conveniently stacked and clear-cut provisions completely shroud the havoc wreaked at the Rome Conference before article 12 was finally agreed upon. With hopes of attracting the broadest possible support for the Statute, the Conference Bureau presented on the last day of the Rome Conference what

80. Articles 13 of the Rome Statute, which is referred to in article 12, provides:

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State-Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Article 14, in turn, provides:

1. A State-Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

it considered to be the best compromise approach, as ultimately codified in the final text of article 12 of the Statute.[81]

IV. ANALYSIS

A. Does the prosecuting State have the burden of proving the legitimacy of the claimed basis of jurisdiction?

In determining the legality of a claimed basis of jurisdiction, such as that of the I.C.C. over third-State nationals, the *Lotus Case*[82] provides a springboard. Is there a need to determine the legality of a claimed basis of jurisdiction before it can be relied upon, or are all jurisdictional bases presumed legitimate unless it is shown to violate a prohibitive rule of international law?

On its face, the *Lotus Case* leaves States with wide discretion in extending the jurisdiction of their courts to persons, property or acts committed outside their territory. The State exercising jurisdiction, or the prosecuting State, is not obliged to point to some recognized title of jurisdiction under international law in order to justify its exercise of jurisdiction.[83] *Lotus* sets up the first road sign on the path towards determining the validity of the I.C.C.'s jurisdiction over third-State nationals. States are free to collectively establish an international jurisdiction

81. Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT'L L. 2, 10 n.19 (1999). In a last-ditch effort to preserve the prerogatives of the State of nationality of future I.C.C. defendants, the United States proposed an amendment to article 12 that would exempt the nationals of a third State from the I.C.C.'s jurisdiction in cases arising from the official actions of the third State and acknowledged as such by the third State. *See*, U.N. Doc. A/CONF.183/C.1/L.90 (1998). This proposed amendment was soundly defeated on a no-action vote.

Id.

82. Lotus Case, 1927 P.C.I.J. (ser.A) No. 10. The *Lotus Case* concerned a dispute between France and Turkey. A French mail steamer, the Lotus, rammed into a Turkish vessel on the high seas. The Turkish vessel sank, causing the death of eight sailors who were all Turkish nationals. When the Lotus anchored at a Turkish port, Turkish authorities arrested the French officer in charge of the Lotus at the time of the collision. The question arose as to whether Turkey had jurisdiction to try a French sailor for negligence on the high seas. The Permanent Court of International Justice rejected France's argument, ruling that the burden was on France to demonstrate that Turkey's exercise of jurisdiction violated some prohibitive rule of international law.

83. *Id.*

applicable to third-State nationals, and their act is deemed valid unless such arrangement infringes a prohibitive rule of international law.[84]

The *Lotus* principle has been similarly applied by the U.S. when it justified its prosecution of German war criminals after the Second World War. In the *Hadamar Trial*,[85] the U.S. argued that the *Lotus* principle means that jurisdiction, as a question of international law, need be denied only upon a showing that there is a generally accepted rule of international law which prohibits the exercise of such jurisdiction.[86] Fifty years later, the U.S. relied upon the same principle in the *Nuclear Weapons Case*.[87]

The *Lotus* dictum, however, has been widely-criticized[88] and its emphasis on State discretion seems to be contradicted by the views of the I.C.J. in the *Fisheries*[89] and *Nottebohm*[90] cases.[91] Further discrediting *Lotus* is the practice of enumerating specific heads of jurisdiction that are lawful, rather than listing heads of jurisdiction that are prohibited.[92] The criticism of *Lotus* has engendered the view[93] that the usually recognized jurisdictional bases are exclusive and admit of no other. This is untenable. For as long as the prosecutorial interests of States continue to be delineated, the list will continue to evolve, adapting, as it should, to the demands of prosecution

84. Michael P. Scharf, *The United States and the International Criminal Court: The I.C.C.'s Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROB. 67, 73 (2001).

85. 1 Law Reports of Trials of War Criminals 46 (1949). The case involved claims that the defendants and their underlings had executed, by lethal injection, nearly 500 Polish and Russian civilians at a sanatorium in Hadamar, Germany.

86. Charles H. Taylor, Memorandum, Has the Commission Jurisdiction to Hear and Determine the Hadamar Case? U.S. JAGD Document (declassified on June 19, 1979).

87. Written Statement of the Government of the United States of America Before the International Court of Justice, Request by the United Nations General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons 8, June 20, 1995, *cited in* Scharf, *supra* note 84, at 74.

88. *See, e.g.*, LAUTERPACHT, INTERNATIONAL LAW: COLLECTED PAPERS 488-89 (1970). *See,* BROWNLIE, PRINCIPLES, *supra* note 22, at 302 n. 24 (and sources cited therein); FRITZ A. MANN, STUDIES IN INTERNATIONAL LAW 26 (1973) (and sources cited therein).

89. Fisheries Jurisdiction (U.K. v. Ice.), 1973 I.C.J. 3, 180.

90. Nottebohm (Liech. v. Guat.), 1955 I.C.J. 4, 396.

91. BROWNLIE, PUBLIC INT'L LAW, *supra* note 26, at 300.

92. Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145, 167 (1972-1973).

93. *See, e.g.*, OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 254-55, 257 (1991); Akehurst, *id.* at 167.

under the circumstances then prevailing.[94] What appears to be true is that this list consists of jurisdictional bases that are already accepted, while the legitimacy of claimed new bases must be determined.[95]

It is opined that while *Lotus* places upon the challenging State the burden of demonstrating the invalidity of the claimed basis of jurisdiction, it does not in any way dispense with the necessity of determining whether that basis is legitimate.[96] On the contrary, placing the burden on the challenging State necessarily places on the prosecuting State the disputable presumption that its jurisdictional basis is legitimate. If the prosecuting State must still determine the legitimacy of its jurisdiction, the entire act then becomes a charade.

Therefore, when no State challenges the jurisdiction of the prosecuting State, such jurisdiction is presumed legitimate. The need to determine the legitimacy or illegitimacy of a claimed basis of jurisdiction arises only when a State challenges the jurisdiction of another State. The challenging State *must* point to a prohibitive rule of international law with a view to defeating the prosecuting State's claim. If the challenging State identifies a rule which the claimed jurisdictional basis violates, then the claim of the prosecuting State must be rejected. At the same time, the prosecuting State *must* prove the legitimacy of its claimed basis of jurisdiction, in the first instance, by pointing to a recognized title of jurisdiction, such as nationality or territoriality. If the prosecuting State cannot point to an existing title of jurisdiction, which fact alone does not militate against its claim, its jurisdiction may nonetheless be justified by an independent determination of its validity through an examination of the prosecutorial interests of that State.[97]

This arrangement is logical: if the prosecuting State succeeds in proving the legitimacy of its jurisdiction, this simply means that there is no prohibitive rule which it violates. If the challenging State identifies the relevant prohibitive rule, this simply means that the claimed jurisdictional basis is not legitimate.

B. Do prohibitive rules against the I.C.C.'s jurisdiction over third-State nationals exist?

Those who object to the I.C.C.'s jurisdiction over third-State nationals point to two rules which purportedly render such jurisdiction invalid: the rule of non-interference with State sovereignty and the *pacta tertiis* rule. If article 12

94. Scharf, *supra* note 84, at 111.

95. Morris, *supra* note 11, at 48.

96. *Id.*

97. Randall, *supra* note 22, at 785-86.

of the Statute is shown to violate either of these rules, then the I.C.C.'s jurisdiction over third-State nationals must be held invalid.

Sovereignty[98] has long been considered the most fundamental right a nation can possess.[99] Generally, it encompasses two distinct yet interrelated meanings.[100] *First*, sovereignty in its internal, domestic sense provides for a State's power and authority over all persons, things, and territory within its reach.[101] *Second*, sovereignty in an external and international context concerns a State's right and ability to independently manage its own affairs, *including its citizens*, without outside interference or intervention.[102] The objection against article 12 of the Statute is obviously framed within the second context since article 12 affects the citizen of a third State, without the latter's consent, allegedly in violation of the sovereign right of that third State to manage its citizens.[103] The objection, however, does not take into account the contemporary and realistic concept of State sovereignty.

Although sovereignty continues to be a controlling force affecting international relations, the powers, immunities, and privileges it carries have been subject to increased limitations.[104] These limitations often result from the need to balance the recognized rights of sovereign nations against the greater need for international justice.[105] Considering that the crimes within the I.C.C.'s competence are of universal concern, and are subject to the universal jurisdiction of all States,[106] a State not a party to the Statute may

98. *See,* U.N. CHARTER, art. 2, ¶ 1 and ¶ 7.

99. *See,* Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?,* 9 AM. U. J. INT'L L. & POL'Y 1 (1993). Sovereignty is the fundamental concept around which international law presently is organized. *Id.*; Of all the rights that can belong to a nation, sovereignty is doubtless the most precious. EMERICH DE VATTEL, THE LAW OF NATIONS 154 (Joseph Chitty ed., 1883); Sovereignty is the source from which all political powers are derived. *See generally,* 48 C.J.S. International Law §§ 25-29 (1981).

100. *See generally,* Johan D. van der Vyver, *Sovereignty and Human Rights in Constitutional and International Law,* 5 EMORY INT'L L. REV. 321, 419 (1991).

101. *See,* J.E.S. FAWCETT, THE LAW OF NATIONS 39 (1968) (discussing the nature of internal sovereignty).

102. *See also,* van der Vyver, *supra* note 100, at 417-18.

103. *See,* Jelena Pejic, Essay, *The International Criminal Court: Issues of Law and Political Will,* 18 FORDHAM INT'L L.J. 1762, 1763 (1995).

104. *See generally,* Ronald A. Brand, *External Sovereignty and International Law,* 18 FORDHAM INT'L L.J. 1685, 1695 (1995).

105. *See,* Louis Henkin, *Human Rights and State "Sovereignty,"* 25 GA. J. INT'L & COMP. L. 31, 33-35 (1996).

106. *See,* Randall, *supra* note 22, at 834.

not validly claim exclusive jurisdiction over its nationals. Every other State has as much interest as the defendant's State of nationality has in seeing that the perpetrators of such universally condemned crimes are held accountable for the protection of the international community.

A rudimentary concept that every diligent student of public international law knows is the customary[107] principle of *pacta tertiis nec nocent nec prosunt* (*pacta tertiis*).[108] This principle, as embodied in the Vienna Convention on the Law of Treaties (VCLT), provides that a treaty does not create either obligations or rights for a third State without its consent.[109] The present study entails an examination of this principle, especially because it has been argued that by conferring jurisdiction upon the I.C.C. over nationals of third States, the Statute binds the third State in contravention of the *pacta tertiis* principle.[110] *Pacta tertiis*, therefore, may well be the enigmatic "prohibitive rule" contemplated by *Lotus*, and which, in this case, should be used to test the validity of the I.C.C.'s claimed basis of jurisdiction over third-State nationals. However, as will be shown shortly, the *pacta tertiis* argument is an erroneous line of attack against the Court's jurisdiction.[111]

The error is readily gleaned through two levels of discussion: *first*, the I.C.C. adjudicates individual criminal responsibility, not State responsibility; and, *second*, obligations under the Statute are imposed only on States-Parties, and not on third States. Working on the first level of inquiry, what presents

107. Reports of the Commission to the General Assembly, U.N. Doc. A/6309/Rev/1 (1966) reprinted in [1967] 2 Y.B. Int'l Comm'n. at 226, U.N. Doc. A/CM.4/SER/A/1966/Add.1.

108. In the case concerning Certain German Interests in Polish Upper Silesia, the Permanent Court of International Justice stated that "[a] treaty only creates law as between the [S]tates which are parties to it ... ." German Interests in Polish Upper Silesia (Germany v. Polish Republic), 1926 P.C.I.J. (Ser. A) No. 7, at 29 (May 25). *See also,* Aerial Incident of July 27th, 1955 (Isr. v. Bulg., U.S. v Bulg., U.K. v. Bulg.), 1959 I.C.J. 127, 138 (Mar. 17); North Sea Continental Shelf Cases (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 25-27, 41, 46 (Feb. 20); Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554, 577-578 (Dec. 22).

109. VCLT, art. 34.

110. Hearing Before the Subcomm. on International Operations of the Sen. Comm. on Foreign Relations of the United States Senate, July 23, 1998, 105th Cong., 2d Sess., S. Rep. No. 105 724, at 13 (Scheffer, head of the U.S. Delegation in Rome, testified that the I.C.C.'s jurisdiction over third-State nationals violated the law of treaties and constituted, *inter alia,* the most fundament flaw in the Rome Statute that prevented the U.S. from signing the treaty).

111. Sadat & Carden, *supra* note 19, at 407. Sadat and Carden opine, "To the extent [that] the Rome Conference was actually a quasi-legislative process by which the international community legislated by a non-unanimous vote, the political legitimacy of the norms must rest *not on a theory of contract or treaty-making but on some other grounds.*" (emphasis supplied).

itself immediately is the fact that the I.C.C. indeed exercises jurisdiction over persons,[112] as distinguished from the I.C.J. which exercises jurisdiction over States.[113] Clearly, insofar as the I.C.C. exists to adjudicate individual criminal responsibility, a State, whether a Party or not to the Statute, is not affected by the I.C.C.'s exercise of criminal jurisdiction.[114] Even Morris, who is a fervent critic of the I.C.C.'s jurisdiction over third-State nationals, admits that the Statute does not impose obligations on third States, in the sense of duties or responsibilities, by simply providing for jurisdiction over their nationals.[115] The *pacta tertiis* argument nonetheless enters a new dimension and regains momentum when it is contended that while the I.C.C. ostensibly operates solely within the sphere of individual culpability, it likewise functions within a second sphere which involves disputes between States. This second sphere encompasses cases in which official acts, or acts that a State maintains were lawful or never occurred, form the basis for an indictment.[116]

The Statute applies to all persons without any distinction based on official capacity, whether as a head of State or government, as a member of a government or parliament, or as an elected representative or a government official.[117] Even immunities attached to the official capacity of a person, with respect to his or her official acts, do not bar the Court from exercising jurisdiction over such a person.[118] In such cases, the ultimate result would be for the I.C.C. to adjudicate the lawfulness of the official acts of States. The argument proceeds that when the I.C.C. operates within this second sphere, it will have less in common with municipal criminal courts adjudicating individual responsibility, and a great deal in common with other international courts that settle disputes between States, such as the I.C.J.[119] It is precisely within the sphere of inter-State disputes that, it is argued, the

112. Rome Statute, art. 1 ("[The I.C.C.] shall ... have the power to exercise its *jurisdiction over persons* for the most serious crimes of international concern.") (emphasis supplied).

113. I.C.J. Statute, art. 34 (1) ("*Only [S]tates* may be parties in cases before the [I.C.J.],"); art. 35 (1) (The I.C.J. "shall be *open to the [S]tates* parties to the [I.C.J.] Statute.") (emphasis supplied).

114. M. Cherif Bassiouni, *Universal Jurisdiction For International Crimes: Historical Perspectives And Contemporary Practice*, 42 VA. J. INT'L L. 81, 92 (2001) [hereinafter Bassiouni, *Universal Jurisdiction*].

115. *See,* Philippe Kirsch, *The Rome Conference on the International Criminal Court: A Comment*, ASIL NEWSLETTER 1 (1998). Morris, *supra* note 11, at 26.

116. Morris, *supra* note 11, at 25.

117. Rome Statute, art. 27 (1).

118. *Id.* art. 27 (2).

119. Morris, *supra* note 11, at 25.

Statute fails to protect the States' sovereign prerogatives regarding the I.C.C.'s jurisdiction.[120]

Practically speaking, a State's sovereignty interests are ultimately affected indeed in cases where official acts are involved in a controversy adjudicated before the Court. Multilateral treaty arrangements, such as the Statute, often create legal and political realities that could, in one way or another, affect political and legal interests of Third States.[121] However, these are merely residual and indirect effects that constitute an altogether different matter beyond the *pacta tertiis* proscription.[122] In the words of Professor Fitzmaurice, "the effect is simply that the third [S]tate is called upon to take up a certain attitude towards the treaty and its contents and consequences — an attitude of recognition, ... non-interference, tolerance, sufferance, [and] ... respect for valid international acts."[123] The Statute dispenses with the consent of the defendant's State of nationality when the territorial State itself consents to the I.C.C.'s jurisdiction.[124] This scheme acknowledges that while States have a sovereign interest over the adjudication of alleged official acts, sovereignty does not provide exclusive jurisdiction over crimes committed by a State's nationals in a foreign country. The Statute, rather than bind a third State, merely operates upon the consent of the territorial State, with practical, yet still, non-legal consequences on the defendant's non-consenting State of nationality.

The sharp distinction between the State and its nationals, or better yet, between State responsibility and its nationals' individual responsibility, assists tremendously in resolving the issue.[125] Modern international practice accentuates this distinction, as evidenced by the fact that different fora respectively exist for determining individual responsibility and State responsibility. Thus, in the case of the former Yugoslavia, the individual

120. *Id.* at 26. *See,* ARTHUR ROVINE, THE NATIONAL INTEREST AND THE WORLD COURT, in I THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 317, 319 (Leo Gross ed., 1976). *See,* PAUL SZASZ, ENHANCING THE ADVISORY COMPETENCE OF THE WORLD COURT, in II THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 499-549 (Leo Gross ed., 1976). *See,* Richard Bilder, *Some Limitations of Adjudication as an International Dispute Settlement Technique*, 23 VA. J. INT'L L. 1, 2-4 (1982); Richard Falk, *Realistic Horizons for International Adjudication*, 11 VA. J. INT'L L. 315, 321-22 (1971).

121. Gennady M. Danilenko, *The Statute of the International Criminal Court and Third States*, 21 MICH. J. INT'L L. 445, 448 (2000).

122. Scharf, *supra* note 84, at 317, 319.

123. Law of Treaties, U.N. Doc. A/CN.4/130: 5th report by Sir Gerald Fitzmaurice, Special Rapporteur (1960), reprinted in [1961] 2 Y.B. Int'l L. Comm'n. 87, U.N. Doc.A/CN.4/SER.A/1960/Add.1.

124. Rome Statute, art. 12 (2) (a).

125. Scharf, *supra* note 84, at 74-75.

criminal responsibility of its military officers and civilian leaders was adjudicated in the International Criminal Tribunal for the former Yugoslavia, *even if the defendants acted in their official capacity.*[126] On the contrary, the issue on the State responsibility of the Federal Republic of Yugoslavia for genocide was brought separately by Bosnia before the International Court of Justice.[127] In any event, even a finding that an individual is guilty of committing a crime in an official capacity within the context of a State policy implies at most an *obiter dictum*[128] as to State responsibility.[129]

The second level of discussion further sinks the already floundering *pacta tertiis* argument against the Statute. While the Statute imposes obligations on States to cooperate fully with the Court,[130] these obligations are imposed only on States-Parties.[131] Third States are under no obligation whatsoever to comply with requests for cooperation from the I.C.C.,[132] such as a request for the arrest and surrender of suspected persons,[133] facilitating the voluntary appearance of persons as witnesses or experts before the Court,[134] and the execution of searches and seizures,[135] among others.[136] Neither is a third State required to contribute to the Court's funds, as only States-Parties are

126. MICHAEL P. SCHARF, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG 150-55 (1997) (discussing the indictment of and proceedings against Radovan Karadzic and Ratko Mladic) (emphasis supplied).

127. *See,* FRANCIS A. BOYLE, THE BOSNIAN PEOPLE CHARGE GENOCIDE: PROCEEDINGS AT THE INTERNATIONAL COURT OF JUSTICE CONCERNING BOSNIA V. SERBIA ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE 4-80 (1996) (reproducing Bosnia's application before the I.C.J.).

128. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1555 (Philip Babcock Gove ed. 1976). An *obiter dictum* is an incidental and collateral opinion uttered by a judge and therefore not material to his decision or judgment and not binding.

129. Scharf, *supra* note 84, at 75; *See,* Otto Triffterer, *Prosecution of States for Crimes of State,* 67 INT'L. REV. PEN. L. 341, 346 (1996).

130. Rome Statute, part 9 (entitled "International Cooperation and Judicial Assistance").

131. *Id.*, in particular art. 86, which provides that "States-Parties shall, in accordance with the provisions of [the Rome] Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."

132. Rome Statute, art. 87.

133. *Id.* art. 89.

134. *Id.* art. 93 (e).

135. *Id.* art. 93 (h).

136. *Id.* art. 93.

assessed contributions.[137] It is true that the Court is not precluded from making a request for cooperation to a third State. However, in such event, the third State is not obliged to comply unless there is an ad hoc arrangement, an agreement with that third State or any other appropriate basis,[138] clearly indicating that the third State is not bound to comply with the request unless it consents to be bound. The Statute's adherence to *pacta tertiis* is best appreciated by considering the situation where the Court makes a request for cooperation which would require the requested State-Party to violate its international obligations as regards the diplomatic immunity of a person or property of a third State.[139] In such eventuality, the Statute requires the Court to obtain the cooperation of the third State for the waiver of the immunity as a precondition to the requested State-Party's compliance with the request.[140] Clearly, therefore, the Statute restrains itself from prejudicing a third State by going so far as to excuse a State-Party from complying with its request when compliance would ultimately affect a third State.

Viewed from all angles, the inevitable conclusion is that, rather than transgress *pacta tertiis*, the Statute manifests fealty to the principle. Assuming, *for the sake of argument*, that the exercise of jurisdiction over a third-State national amounts to an imposition of obligation on that third State, or binds the latter in any way, will the Statute this time violate *pacta tertiis*? This question is effectively answered in the next section of this paper, which ascertains whether the exercise of jurisdiction by an international tribunal over a third-State national has attained customary status. If it has not, then the Statute violates *pacta tertiis* by imposing obligations on third States through the I.C.C.'s exercise of jurisdiction over their nationals. Contrarily, if the jurisdiction in question is customary, then the Statute remains in harmony with the concept of *pacta tertiis* because in this scenario, *it would be the custom, rather than the Statute, which binds the third State.*[141]

C. *Is the I.C.C.'s jurisdiction over third-State nationals supported by customary international law so as to bind even third States?*

When a basis of jurisdiction is claimed, its validity may be determined in two ways: *first*, by ascertaining whether it falls under any of the previously accepted jurisdictional bases, or, finding that it does not, and *second*, by

137. *Id.* art. 115 (a).

138. Rome Statute, art. 87 (5) (a).

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

140. *Id.*

141. To reiterate, there is no need to prove the customary status of a treaty provision in order to demonstrate its binding effect on States-Parties. The treaty itself binds the parties (emphasis supplied).

considering its appropriateness, measured in terms of the underlying rationales governing jurisdiction under customary international law.

The first method immediately confronts a difficulty. Since the previously accepted bases of jurisdiction are those exercised by States in their individual capacity, and not by an international tribunal, the jurisdiction of the I.C.C. does not fall under any of those previously accepted bases.[142] Consequently, resort must be had to the second means — that of evaluating the appropriateness of the claimed jurisdiction. This evaluation typically consists of a nexus analysis whereby the question boils down to whether the conduct and persons to be regulated are sufficiently linked to the legitimate interests of the prosecuting State so as to warrant recognition of its jurisdiction.[143] However, this second means hits the same wall confronted by the first. Considering again that the I.C.C. is not a State, this typical nexus analysis is inapposite since, being a non-State, the I.C.C. has no interests of its own apart from those delegated to it by the States-Parties to the Statute.[144] To be sure, the legitimacy of the national jurisdiction of the States-Parties cannot be doubted and is not at issue. What is at issue is the validity of the delegation of that jurisdiction to the I.C.C., an issue with respect to which nexus analysis is unhelpful.[145] Thus, the inquiry comes to a *cul-de-sac*, both methods having proven to be of no help. However, the dead-end is more apparent than real. It may be recalled that those two tests resulted from customary international law that gradually evolved as the legitimate prosecutorial interests of States were delineated over time. Extending the rationale underlying those two tests to the quandary at hand, the validity of the I.C.C.'s jurisdiction may therefore be determined by an independent determination of whether or not the delegation of jurisdiction to an international tribunal has achieved customary status, independently of the treaty, so as to bind even third States.

However, the Statute itself, as a treaty, may serve as evidence of generally binding law.[146] As a matter of fact, both international[147] and

142. *See, e.g.*, LOUIS HENKIN ET AL., INTERNATIONAL LAW 821 (2d ed. 1987). International law casebooks invariably treat international jurisdictional rules as rules governing the repartition of competences between States, not those of an international tribunal.

143. *See*, Mann, *supra* note 88, at 80.

144. Morris, *supra* note 11, at 49.

145. *Id.* at 49-50.

146. Report of the International Law Commission to the General Assembly, [1950] 2 Y.B. Int'l L. Comm'n 364, 368, U.N. Doc. A/CN.4/SER.A/1950/Add.1.

147. *See*, Prosecutor v. Furundzija, Case No. IT-95-17/1-T 10, ¶¶ 216, 227, 231 and 244, reprinted in 38 I.L.M. at 360, 363, 364, 366.

domestic[148] tribunals have already started to invoke various provisions of the Statute when ascertaining generally binding international law.

In unraveling the web of arguments surrounding the controversy at hand, a particular contention resonates in support of the I.C.C.'s jurisdiction over third-State nationals. The contention is that States that normally exercise jurisdiction over a crime on the basis of universality or territoriality are deemed to have delegated their jurisdiction to the I.C.C. by virtue of their ratification of the Statute. The thrust of this theory, therefore, is that the I.C.C. merely exercises universal and territorial jurisdiction in the place of the States-Parties, and that such arrangement is in consonance with customary international law, such that the consent of the defendant's State of nationality is not necessary.

The principles of universality and territoriality have customary status. The rights and obligations of States relative to universal and territorial jurisdiction constitute a set of legal relations that may not be unilaterally altered.[149] It remains to be seen if the same customary status has been reached as regards the delegation of universal and territorial jurisdiction to an international tribunal.

The proposition that the I.C.C.'s jurisdiction is based on universality is partly supported by the fact that when the Security Council refers a case to the I.C.C. Prosecutor, the I.C.C. may be asked to pass judgment on the commission of crimes anywhere in the world.[150] The consent of no State is required, even of those third States whose nationals are brought before the Court.[151] So far, this particular arrangement has not been questioned,[152] and is not at issue in this paper. If the Prosecutor or a State refers the case, however, the Statute confers jurisdiction upon the I.C.C. over third-State nationals only if the alleged crime was committed on the territory of a State-Party.[153] The theory, in essence, of those who view the I.C.C. as possessed of delegated universal jurisdiction, is that if any individual State could prosecute perpetrators regardless of their nationality, a group of States may create an international court empowered to do the same.[154] Each State-Party, in effect, delegates to the Court its power to exercise universal jurisdiction.

148. Regina v. Bartle, Ex parte Pinochet, 38 I.L.M. 581 (H.L. 1999).

149. Morris, *supra* note 11, at 50.

150. Rome Statute, art. 13 (b); Bassiouni, *Universal Jurisdiction*, *supra* note 114, at 106; Danilenko, *supra note* 121, at 445.

151. Rome Statute, art. 13 (b).

152. Sadat & Carden, *supra* note 19, at 412.

153. Rome Statute, art. 12 (2) (a).

154. *See generally*, Scharf, *supra* note 84, and Sadat & Carden, *supra* note 19.

D. Are the Statute definitions of the I.C.C.'s core crimes in consonance with customary definitions?

A feasible starting point of inquiry into the customary status of delegating universal jurisdiction is to determine if *all* the Statute crimes are customarily subject to universal jurisdiction. If the Statute covers any crime that is *not* subject to universal jurisdiction, it would be erroneous to assert that the I.C.C. is based on universality for, in this scenario, the I.C.C.'s jurisdiction stretches beyond what crimes individual States may exercise universal jurisdiction over. States cannot delegate what they do not possess. Certainly, it is implausible to delegate to an international court the right to prosecute a mixture of crimes, some of which, in a domestic setting, are subject to universal jurisdiction while others are not, and yet insist that all those crimes, as transported to the I.C.C., are automatically subjected to universality binding upon third States.[155]

The state of the law at present recognizes that genocide,[156] war crimes,[157] crimes against humanity[158] and aggression are all subject to universal jurisdiction exercised by States in their individual capacity.[159] The

155. David Scheffer, International Criminal Court: The Challenge of Jurisdiction, address at the Annual Meeting of the American Society of International Law (Mar. 26, 1999).

156. I.C.J. jurisprudence is particularly explicit in condemning the crime of genocide, as demonstrated by the following decisions: Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23; Case Concerning Barcelona Traction, Light and Power Co. (Belgium v. Spain), 1970 I.C.J. 3, 32; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Yugoslavia), 1993 I.C.J. 325, 440 (separate opinion of J. *ad hoc* Lauterpacht). Finally, several U.S. courts have made pronouncements that the crime of genocide is subject to universal jurisdiction. Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985); Beanal v. Freeport-McMoRan, 969 F. Supp. 362, 371 (E.D. La. 1997).

157. Willard B. Cowles, *Universality of Jurisdiction Over War Crimes*, 33 CAL. L. REV. 177, 194 (1945).

158. *See*, M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 510-27 (1992); 1 OPPENHEIM'S INTERNATIONAL LAW 998 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2537, 2555, 2593-94 & n.91 (1991).

159. G.A. Res. 95, U.N. Doc. A/64/Add.1, at 188 (1946). On Dec. 11, 1946, the U.N. General Assembly unanimously affirmed the "principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal," thereby codifying the *jurisdictional right of all [S]tates* to prosecute the offenses addressed by the Nuremberg Tribunal, namely war crimes, crimes against humanity which covered genocide, and the crime of aggression (emphasis supplied).

reality of the universality principle is inescapable, especially in the aftermath of the Second World War, when several individuals were tried by whatever State in which they were later captured or surrendered, including such far-off countries as Canada[160] and Australia.[161] Moreover, on the basis of universality, Israel tried Adolph Eichmann in 1961[162] and John Demnjanjuk in 1988[163] for crimes committed before Israel even existed as a State. Further, courts of Denmark[164] and Germany have relied on the universality principle in trying Croatian and Bosnian Serb nationals for war crimes and crimes against humanity committed in Bosnia in 1992.[165] Courts in Belgium have cited the universality principle as a basis for issuing arrest warrants against persons involved in the atrocities in Rwanda in 1994.[166]

This survey of international and national jurisprudence leaves no room for doubt that genocide, crimes against humanity, war crimes and aggression are customarily subject to universal jurisdiction. However, it remains to be seen whether these crimes, as previously defined, are identically or similarly defined under the Statute[167] so as to authorize the transportation of their universal character into the context of the I.C.C.'s jurisdiction. The character and definition of the crimes, rather than their nomenclature, are controlling.

Genocide. The Statute definition of genocide presents no controversy for it precisely tracks the definition of genocide under the Genocide Convention,[168] which definition, in turn, has been accepted as customary.[169]

160. *See*, R. v. Imre Finta, 28 C.R. (4th) 265 (S.C.Canada) (1994).

161. *See*, Polyukhovich v. Commonwealth, 172 C.L.R. 501 (Austl.) (1991).

162. Attorney General of Israel v. Eichmann, 36 I.L.R. 277, 299, 304 (Isr. Sup. Ct.) (1962).

163. *See*, Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir.) (1985). The court held that Israel had the right to try Demjanjuk under universal jurisdiction for crimes committed in Poland during 1942 or 1943, prior to the establishment of the Israeli State.

Id. at 582-83.

164. *See*, Mary Ellen O'Connell, *New International Legal Process*, 93 AM. J. INT'L L. 334. 341 (1999).

165. International Law Update 52 (May 1999), *available at* http://www.unikarlsruhe.de/-bgh (last accessed May 10, 2004). *See* Kadic. v. Karadzic, 70 F.3d 232, 240 (2d Cir. 1995).

166. *See*, Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 577 (1995).

167. *See*, Rome Statute, arts. 5, 121, 123. There is no definition yet of the crime of aggression under the Rome Statute.

168. *Compare* Genocide Convention, art. 2, *with* Rome Statute, art. 6.

Crimes Against Humanity. A cursory examination of the Statute definition of crimes against humanity[170] reveals that the Statute textually expands upon the list of offenses enumerated as crimes against humanity in the statutes of the International Criminal Tribunals for the Former Yugoslavia[171] and Rwanda:[172]

1. by adding two new listed offenses - apartheid[173] and enforced disappearance of persons;[174]
2. by expanding the offense of deportation to include forcible transfer of population;[175]
3. by expanding the offense of imprisonment to include other severe deprivation of physical liberty in violation of fundamental rules of international law;[176] and,
4. by expanding the offense of rape to include sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.[177]

Nevertheless, the ostensible overbreadth of the Statute definition does not negate its customary status. *First*, it must be noted that never has a definition in the past attempted to close the list of acts which may be considered as crimes against humanity. *Second*, the corresponding definitions

169. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23 ("The principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.").

170. Rome Statute, art. 7.

171. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, art. 5(i), U.N. Doc. S/25704, Annex (1993) [hereinafter ICTY Statute].

172. Statute of the International Criminal Tribunal of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994, S.C. Res. 955, Annex, U.N. SCOR, 49th Sess., U.N. Doc. S/INF/50 (1996) art. 3 (i) [hereinafter ICTR].

173. Rome Statute, art. 7 (1) (j).

174. *Id.* art. 7 (1) (i).

175. *Id.* art. 7 (1) (d).

176. *Id.* art. 7 (1) (e).

177. *Id.* art. 7 (1) (g).

of crimes against humanity in the Nuremberg Charter[178] and in the statutes of the Yugoslavia[179] and Rwanda tribunals[180] each contain a non-exhaustive list followed by the phrase "and other inhuman acts." The additional offenses in the Statute clearly fall within that category of "other inhuman acts."[181] *Third*, the addition of forcible transfer of population, severe deprivation of physical liberty, and the several sexual offenses in the Statute merely reflects the jurisprudence of the Yugoslavia and Rwanda Tribunals.[182] It is clear, therefore, that the definition of crimes against humanity has continuously evolved[183] and the Statute definition simply encapsulates the concept at its most evolved form.

The Statute's adherence to the customary definition of crimes against humanity is further evidenced by the fact that it does not require any nexus between crimes against humanity and armed conflict, pursuant to the authoritative report on the development of the laws of war at the conclusion of the Nuremberg and Control Council Law No. 10 trials,[184] and the International Criminal Tribunal for the Former Yugoslavia.[185]

178. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and the Charter of the International Military Tribunal annexed thereto, Aug. 8, 1945, art. 6 (c), 82 U.N.T.S. 279.

179. ICTY Statute, art. 5 (i).

180. *Id.* art. 3 (i).

181. *See*, Darryl Robinson, *Defining "Crimes Against Humanity" at the Rome Conference*, 93 AM. J. INT'L L. 43, 55 (1999) (the author was a member of the Canadian delegation to the Rome Diplomatic Conference).

182. *See*, JOHN R.W.D. JONES, THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA 341-55 (1998) (summarizing indictments of those two *ad hoc* tribunals).

183. *See*, MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 52 (1998); The 1969 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 754 U.N.T.S. 73, reprinted in 8 I.L.M. 68 (1969) (Article 1 (b) defines crimes against humanity as including "apartheid."). *See*, Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, U.N. GAOR Supp. (No. 30), at 75, U.N. Doc. A/9030 (1973), reprinted in 13 I.L.M. 50 (1974) (entered into force July 18, 1976).

184. The U.N. War Crimes Commission concluded that international law may now sanction individuals for crimes against humanity committed not only during war but also during peacetime. *See*, History of the United Nations War Crimes Commission and the Development of the Laws of War Compiled by the United Nations War Crimes Commission (1948).

185. Tadic Appeal, *supra* note 47, at ¶ 141 ("Indeed ... customary international law may not require a connection between crimes against humanity and any conflict at all.").

War Crimes. The war crimes enumerated in the Statute[186] are derived from the 1949 Geneva Conventions,[187] the two Additional Protocols of 1977 to the Geneva Conventions,[188] and the Hague Regulations of 1907.[189]

It has been asserted that only grave breaches of the 1949 Geneva Conventions entail individual criminal responsibility and universal jurisdiction under customary international law. The true distinction between grave breaches and non-grave breaches is that there is a universal *obligation* to prosecute those accused of grave breaches and a universal *right* to prosecute those who have committed other violations.[190] Within the context of the Statute, the distinction means that States-Parties, possessed of the *right* to prosecute non-grave breaches, have decided to exercise that right through the International Criminal Court. The Statute definitions of genocide, war crimes, and crimes against humanity manifest adherence to the customary definitions of those crimes.

In addition to confining the I.C.C.'s jurisdiction to core crimes that have been authoritatively recognized as crimes of universal jurisdiction, the drafters stipulated that the I.C.C. is to exercise its jurisdiction only in cases involving the most serious crimes of concern to the international community as a whole.[191] This gravity requirement means that the core crimes will be interpreted narrowly, thereby diffusing any apprehension that the operation of the I.C.C. will arbitrarily expand the concept of universal jurisdiction.

186. Rome Statute, art. 8.

187. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949. 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter 1949 Geneva Conventions].

188. Protocol I Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 (1977), reprinted in 16 I.L.M. 1391 (1977) [hereinafter AP1]; Protocol II Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 (1977), reprinted in 16 I.L.M. 1442 [hereinafter AP2].

189. CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, THE HAGUE CONVENTION AND DECLARATIONS OF 1899 AND 1907 100 (1915).

190. Howard S. Levie, TERRORISM IN WAR: THE LAW OF WAR CRIMES 192-93 (1993) (emphasis supplied).

191. Rome Statute, art. 1.

The conclusion here simply shows that if the States-Parties have indeed delegated their universal jurisdiction to the I.C.C., they have validly done so but *only insofar* as the crimes covered are concerned.

E. Is the customary status of universal jurisdiction exercisable by States indicative of a corresponding customary status of delegating universal jurisdiction to an international tribunal?

The requirement that customary international law should develop through pervasive State practice and *opinio juris*[192] evinces the principle that legal relations based on mutual consent or acquiescence may not be unilaterally altered by one party to the detriment of the other.[193] Within the context of international criminal law, this means that the customary status of certain criminal jurisdictional bases resulted from a process of State consent and acquiescence, or a series of more or less directly negotiated outcomes in an incremental process.[194] The unavoidable conclusion is that the customary status of universal jurisdiction exercised individually by States is not equivalent to an alleged customary status of delegating that jurisdiction to an international court because the States' consent to the former cannot be presumed for the latter.[195] This should be so because the delegation of the universal jurisdiction of States to an international court creates consequences that are very much different from the exercise of universal jurisdiction by a State.[196] There are various reasons why a State, while allowing any State to exercise universal jurisdiction over its nationals, that is, without its consent, may not allow an international tribunal to do so.[197] It is argued that, especially as regards acts alleged to have been committed by the defendant in his official capacity, States may perceive a number of drawbacks associated with compulsory adjudication before an international court.[198]

First,[199] a State desiring to provide diplomatic protection to its national to ensure his or her just treatment may employ bilateral diplomatic methods when its national is brought before another State's national court. On the contrary, such methods have not been articulated within the I.C.C. scheme.

192. MARK VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 3 (1985).

193. Morris, *supra* note 11, at 33.

194. *Id.*

195. *Id.* at 29.

196. *Id.*

197. *Id.*

198. Morris, *supra* note 11, at 30.

199. *Id.* at 33.

Second,[200] States have reason to be more concerned about the impact of adjudications before an international court than before a national court. Arguably, an international tribunal has significant prestige and authority. Its determination, therefore, that a State's acts, as reflected by the defendant's acts, were unlawful would cause political repercussions categorically different from those resulting from the same verdict by a national court. This factor may put States to a choice between revealing sensitive data as defense evidence or withholding that evidence to avoid the political costs of revealing vital State information.

Third,[201] an international court promulgates decisions presumably carrying greater weight than national court decisions. An international forum wields a law-shaping power disproportionate to that of a national forum. States may not be comfortable in granting such power to an international institution, especially in sensitive areas of international law involving genocide, war crimes, and crimes against humanity which are still very much in fruition. Reflecting the incessant legal evolution in these areas of law, the Appellate Chambers of the Yugoslavia and Rwanda Tribunals have, on more than one occasion, reversed a Trial Chamber decision on a basic point of law.[202] This is a valid reason[203] why States might prefer to retain more direct control, diffused among them, over the shaping of international law rather than to consign a substantial proportion of that control to a single international entity.[204]

It is, therefore, undeniable that the consequences and implications of the I.C.C.'s jurisdiction are materially different from those of national jurisdiction. Hence, to reiterate, consent to States' exercise of universal jurisdiction is not equivalent to consent to the delegation of universal jurisdiction to an international court. By extension, customary law supporting the exercise of universal jurisdiction by States is not equivalent to customary law supporting the delegation of States' universal jurisdiction to an international court.[205] Seeing that it is futile to predicate the possible customary status of delegated universal jurisdiction on the *opinio juris* and State practice underlying the customary status of universal jurisdiction exercisable by States, the inquiry should start on a clean slate. The question therefore should be: Do *opinio juris* and State practice of delegating universal jurisdiction to an international tribunal exist? An affirmative answer validates

200. *Id.* at 30.

201. *Id.*

202. Prosecutor v. Dusko Tadic, Decision on the Defence Motion on Jurisdiction, Case No. IT-94-1-T, ¶¶ 49-51 (1995). *See also*, Morris, *supra* note 11, at 30-32.

203. Rome Statute, art. 112.

204. Morris, *supra* note 11, at 32.

205. *Id.* at 34.

the I.C.C.'s jurisdiction over third-State nationals despite objections of such third State. However, before proceeding to examine the relevant State practice and *opinio juris*, it is ideal to discuss first another basis of jurisdiction which States consenting to the I.C.C.'s jurisdiction have allegedly delegated to the I.C.C. — that is, territorial jurisdiction.

The theory of delegated territorial jurisdiction means that when such national is prosecuted before the I.C.C. for crimes committed on the territory of a State that consents to I.C.C. jurisdiction, the I.C.C. validly exercises territorial jurisdiction delegated to it by the territorial State.[206] It is well to note that, in this regard, no one, to be sure, is questioning the right of the territorial State itself to exercise jurisdiction over an individual without the consent of his State of nationality. Indeed, a foreign indictment of a State's nationals for acts committed in that foreign country does not constitute an impermissible intervention in the national State's internal affairs.[207]

As already seen, customary universal jurisdiction exercisable by States is not indicative of an alleged customary principle of delegating universal jurisdiction to an international tribunal. In the same vein, and for the same reasons, the consequences of delegated territorial jurisdiction are different from those of territorial jurisdiction exercised directly by the territorial State.[208] The result, likewise, is that States' consent to the exercise of jurisdiction by the territorial State is not equivalent to States' consent to the exercise of delegated territorial jurisdiction by an international court.[209] Customary territoriality, therefore, cannot be extended to an alleged delegation of territorial jurisdiction to an international court. Thus, the delegation of territoriality should likewise be supported by State practice and *opinio juris*, and its purported customary status should be determined independently. It will be helpful to consider initially whether territorial jurisdiction may, in the first place, be delegated by the territorial State to *another State* without the consent of the defendant's State of nationality. An affirmative result shows that territoriality is, at the very least, delegable and this lends viability to the theory that territorial jurisdiction may be delegated to an international tribunal without the consent of the defendant's State of nationality. A negative finding, however, undermines that theory, for if it cannot be delegated to other States, whose exercise of jurisdiction is

206. Bassiouni, *Universal Jurisdiction*, *supra* note 114, at 92.

207. Scharf, *supra* note 84, at n. 180.

208. Morris, *supra* note 11, at 43.

209. *Id.* at 43-44.

relatively uncontroversial, then with less reason can it be delegated to the I.C.C. whose jurisdiction is highly contentious.[210]

The discussion on this point shall be set within the framework of the European Convention on Transfer of Proceedings in Criminal Matters (European Convention).[211] A close examination of the text[212] of this convention, its legislative history, and the writings of experts on its application reveals that it does in fact permit the transfer of proceedings in the absence of the consent of the State of nationality.[213] The European Convention usually finds application in cases in which an accused offender has fled the territorial State and is present in the requested State, which, pursuant to the authority of the European Convention, is willing to prosecute the offender upon the request of the territorial State.[214]

According to a 1990 study prepared by the Council of Europe's Select Committee of Experts on Extraterritorial Jurisdiction,[215] the European Convention embodies the "representation" principle,[216] which refers to cases in which a State may exercise extraterritorial jurisdiction where it is deemed to be acting for another State which is more directly involved, provided

210. *See,* Ethan A. Nadelman, *The Role of the United States in the International Enforcement of Criminal Law,* 31 HARV. INT'L L.J. 37, 69-70 (1990) (discussing vicarious jurisdiction). To set things in proper perspective, it must be pointed out that there is no controversy in instances when the State of nationality consents to the delegation by the territorial State of its territorial jurisdiction to another State. It is only when the State of nationality objects that questions may arise.

211. *See,* The European Convention on the Transfer of Proceedings in Criminal Matters, Mar. 30, 1978, Europ. T.S. No. 73 [hereinafter European Convention]. *See,* DAVID MCCLEAN, INTERNATIONAL JUDICIAL ASSISTANCE 169-71 (1992).

212. European Convention, art 2(1) provides that "for the purposes of applying this Convention, any Contracting [S]tate shall have competence to prosecute under its own criminal law any offence to which the law of another Contracting [S]tate is applicable."

213. Scharf, *supra* note 84, at 113.

214. *See,* Julian Schutte, The European System, in 2 M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW, PROCEDURAL AND ENFORCEMENT 313, 661 (2d ed. 1999).

215. The committee, which was chaired by Julian Schutte, was composed of experts from 13 member States of the Council of Europe (Austria, Belgium, Denmark, France, Federal Republic of Germany, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Switzerland, and the United Kingdom).

216. Council of Europe, Extraterritorial Criminal Jurisdiction, reprinted in 3 CRIM. L. F. 441, 452 (1992).

certain conditions are met.[217] Instead of requesting the fugitive for trial in the territorial State, the territorial State "deputizes" the custodial State with its authority to prosecute the offender.[218] Moreover, there have been cases in which the transferred person is a national of a third State, whose consent is not requested because it is not relevant under the European Convention.[219] It, therefore, appears legally feasible to transfer territorial jurisdiction to another State, yet the objection to the validity of delegating territorial jurisdiction persists. One reason for the objection is that delegation undermines the features of territoriality which warrant its relatively greater acceptability among the internationally recognized jurisdictional bases.[220] These features include the presumed legitimate interest of the territorial State in seeing that the crime is punished and, secondarily, the convenience of the forum for the availability of witnesses, evidence and the like.[221] This crucial linkage between territorial jurisdiction and the legitimate prosecutorial interests of the territorial State would be broken if territorial jurisdiction were delegated to another State,[222] more so to an international tribunal.

However, this reasoning is too dogmatic for viability. It is certainly erroneous to assert that territorial jurisdiction may not be delegated to another State, or to an international tribunal for that matter, simply because the latter does not possess the relevant evidence. Such assertion, for instance, incidentally and unwittingly thwarts the concept of universal jurisdiction, which requires no link between the prosecuting State and the crime, and which may therefore be exercised by a State which has nothing in its custody except the accused. Moreover, under the legal fiction that a conspiracy takes place wherever a single co-conspirator commits an overt act, courts may

217. *Id.* at 452.

218. *Id.* at 648. Under the European Convention, the requesting State's jurisdiction is transferred to the requested State in that the convention prohibits the requesting State from subsequently prosecuting the suspect for the offense in question.

Id. at 650.

219. According to Professor Andre Klip of the University of Utrecht, who was one of the drafters of the Council of Europe's Explanatory Report on the European Convention, no statistics have been compiled on the number of times the European Convention has been used to transfer a national of a third State, but "such cases [in which the consent of the [S]tates of nationality was not requested or given] are not unheard of." Interview with Andre Klip, Siracusa Sicily, Sep. 15, 1999 *cited in* Scharf, *supra* note 84.

220. Morris, *supra* note 11, at 45-46.

221. *Id.*

222. *Id.*

exercise jurisdiction over co-conspirator acts committed abroad.[223] In this case, most of the witnesses and evidence are located abroad, yet the State which has custody over the accused may exercise jurisdiction.[224] Mere convenience of the forum, therefore, does not warrant the conclusion that territorial jurisdiction may not be delegated.[225] Further, while the other bases of jurisdiction do not have the advantages of territoriality in terms of the location of witnesses and physical evidence, the international community has developed modes of judicial cooperation to hurdle that handicap. Thus, the European countries have adopted the European Convention on Mutual Assistance in Criminal Matters.[226] Similar types of judicial assistance are employed within the I.C.C. scheme.[227]

These observations lead to no other conclusion than that territorial jurisdiction is not so sacrosanct as to be impervious to relinquishment, whether to another State or to an international tribunal.[228] Indeed, the I.C.C.'s exercise of jurisdiction over a third-State national, when conditioned upon the territorial State's consent to the I.C.C.'s jurisdiction,[229] is merely an affirmation of the long recognized principle that individuals are subject to the substantive and procedural criminal laws applicable in the territories to which they travel, including laws arising from treaty obligations.[230] It simply reflects the sovereign right of all States to determine how to exercise their jurisdiction over crimes committed on their own territory.[231]

F. Examining Opinio Juris and State Practice in Support of the Customary International Law of Delegating Jurisdiction to an International Tribunal

223. JORDAN PAUST, ET. AL., INTERNATIONAL CRIMINAL LAW, CASES AND MATERIALS 1270 (1996) (citing cases from the U.S. First, Second, Third, Fifth, and Ninth Circuit Courts of Appeals).

224. Scharf, *supra* note 84, at 111.

225. *Id.*

226. European Convention on Mutual Assistance in Criminal Matters of 1959, Europ. T.S. No. 30 (1959).

227. *See,* Rome Statute, arts. 86-102.

228. M. Cherif Bassiouni & Christopher L. Blakesley, *The Need For An International Criminal Court In The New International World Order*, 25 VAND. J. TRANSNAT'L L. 151, 161 (1992).

229. Rome Statute, art. 12 (2) (a).

230. Kirsch, *supra* note 115.

231. Danilenko, *supra* note 121, at 452.

1. The Nuremberg Tribunal

The Second World War left the international community with the task of seeing that Nazi atrocities must not go unpunished. Thus, the United States, Great Britain, the Soviet Union, and France (the Allied Powers or the Allies) established the International Military Tribunal (Nuremberg Tribunal or the Tribunal)[232] to prosecute and punish major war criminals of European Axis-power through the London Agreement of 8 August 1945.[233]

The Berlin Declaration of 5 June 1945 provided that "the [Allied Powers] hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any State, municipal, or local government or authority."[234] Based on the Allied Powers' assertion, and their acts demonstrating, that they assumed supreme authority with respect to Germany, it is generally believed that the Allied States became the effective German sovereign.[235]

There is no disagreement that the position of the Allied Powers in post-war Germany differed largely from that of mere occupiers[236] and exceeded the traditional bounds of occupation.[237] The Allies actually created the Nuremberg Tribunal, through the making of the Nuremberg Charter, in the exercise of their sovereign legislative power,[238] and they conducted prosecutions in their capacity as the effective sovereign and in the exercise of their national[239] jurisdiction.[240] This is in harmony with the view that the

232. BENJAMIN FERENCZ, AN INTERNATIONAL CRIMINAL COURT 64 (1980).

233. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and the Charter of the International Military Tribunal annexed thereto, Aug. 8, 1945, art. 1, 82 U.N.T.S. 279. *See,* BENJAMIN FERENCZ, *id.* at 74.

234. Berlin Declaration 60 Stat. 1649, 1650 (1945).

235. Morris, *supra* note 11, at 37.

236. Fritz A. Mann, *The Present Legal Status of Germany*, 1 INT'L L. Q. 314, 321-23 (1947).

237. Morris, *supra* note 11, at 39.

238. Judgment of the International Military Tribunal, Sep. 30, 1946, reprinted in RICHARD A. FALK ET AL., CRIMES OF WAR 96, 96 (1971).

239. *National* jurisdiction, which simply means jurisdiction exercised by a State as distinguished from jurisdiction exercised by an international tribunal, should not be confused with jurisdiction based on the *nationality* principle. National jurisdiction may, therefore, refer to the nationality, territoriality, universality, passive personality and protective principles.

240. Judgment of the International Military Tribunal, Sep. 30, 1946, reprinted in RICHARD A. FALK ET AL., CRIMES OF WAR 96 (1971). Relevantly, the Judgment of the Nuremberg Tribunal states: "The making of the Charter [establishing the Nuremberg tribunal] was the exercise of the sovereign

jurisdiction of the Nuremberg tribunal rested on the effective sovereign powers of the Allies to prosecute or consent to the prosecution of German nationals.[241] However, the transfer of sovereignty from the defeated German government to the Allied Powers did not automatically convert the former citizens of Germany into citizens of the Allied Powers.[242] The Allied Powers, even considering the extraordinary circumstances by which they assumed German sovereignty, did not intend to annex Germany.[243] Thus, the jurisdictional basis of the Nuremberg Tribunal was a collective form of universal jurisdiction delegated to the Tribunal by the Allied States.[244]

While the Nuremberg Tribunal itself made relatively few references to universal jurisdiction, the jurisprudence of several of the subsequent war crimes trials based on the Nuremberg Charter and conducted under the international authority of Control Council Law 10 (CCL 10)[245] are more

legislative power by the countries to which the German Reich unconditionally surrendered, and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world."

241. Secretary-General of the United Nations, The Charter and Judgment of the Nuremberg Tribunal: History and Analysis at 80. U.N. Doc. A/CN.4/5, U.N. Sales No. 1949V.7 (1949). The U.N. Secretary-General Report on the Nuremberg Tribunal, issued in 1949, notes the twin facts of Germany's unconditional surrender in May 1945, and of the assumption by the Allied Powers of the "supreme authority with respect to Germany" through the 1945 Berlin declaration. He then concludes, based on these facts, that the Nuremberg Tribunal "apparently held that ... the sovereignty of Germany had passed into the hands of the [Allied Powers] and that these countries thereby were authorized under international law to establish the Tribunal and invest it with the power to try and punish the major German war criminals."

242. Hans Kelsen, *The Legal Status of Germany According to the Declaration of Berlin*, 39 AM. J. INT'L L. 518, 523 (1945). At the risk of sophistry, it may be stressed that an unconsidered insistence on the automatic conversion into the citizenship of the occupying powers would lead to the absurd result that the former Germans became Americans, Frenchmen, Russians and Brits all at the same time.

243. *Id.*

244. *See, e.g.*, Christopher Greenwood, *The Prosecution of War Crimes in the Former Yugoslavia*, 26 BRACTON L.J. 13, 16 (1994).

245. On Dec. 20, 1945, the Allied Control Council of Germany, composed of the Commanders-in-Chief of the occupying forces of each of the Four Powers, issued Control Council Law No. 10, which was intended to "establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal." *See*, Matthew Lippman, *The Other Nuremberg: American Prosecutions of Nazi War Criminals in Occupied Germany*, 3 IND. INT'L & COMP. L. REV. 1, 8 (1992). *See*, CCL 10 and the Rules of Procedure for the CCL 10 proceedings are reproduced in Morris, *supra* note 11, at 494, 497. By its terms, CCL 10 made the London Agreement and Nuremberg Charter an "integral part" of the law,

explicit. The decisions rendered by the CCL 10 Tribunals, which relied on universality, include *In re List*,[246] the 1945 *Hadamar Trial*,[247] the 1946 *Zyklon B Case*,[248] and the 1948 *Einsatzgruppen Case*.[249] These precedents led the

and provided for the creation of tribunals established by the four occupying Powers in their zones of control in Germany to try the remaining German economic, political, military, legal, and medical leaders accused of war crimes and crimes against humanity.

Id. CCL 10, arts. 1 and 3.

246. 11 Trials of War Criminals 757, 1235, 1241-42 (1946-1949) (U.S. Mil. Trib. - Nuremberg 1948). In re List is known as the Hostage Case because civilians were taken hostage and then killed. It involved the prosecution of German officers who had commanded the execution of hundreds of thousands of civilians in Greece, Yugoslavia, and Albania. In describing the basis of its jurisdiction to punish such offenses, the U.S. CCL 10 tribunal in Nuremberg indicated that the defendants had committed "international crimes" that were "universally recognized" under existing customary and treaty law. The tribunal explained that "an international crime is ... an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the [S]tate that would have control over it under ordinary circumstances." The tribunal concluded that a [S]tate that captures the perpetrator of such crimes either may "surrender the alleged criminal to the [S]tate where the offense was committed, or ... retain the alleged criminal for trial under its own legal processes."

Id.

247. 1 Law Reports of Trials of War Criminals 46 (1949) (U.S. Mil. Commission - Wisbaden 1945). In asserting the universality principle as one of its bases of jurisdiction in a case involving allegations that the defendants had executed by lethal injection nearly 500 Polish and Russian civilians at a sanatorium in Hadamar, Germany, the United States Military Commission in the Hadamar Trial case claimed jurisdiction irrespective of the nationalities of the defendants and their victims and "of the place where the offence was committed, particularly where, for some reason, the criminal would otherwise go unpunished." *Id.* at 53. The prosecution had argued that "an offense against the laws of war is a violation of the law of nations and a matter of general interest and concern ... . War crimes are now recognized as of special concern to the United Nations, which states in the real sense represent the civilized world." Trial of Afons Klein, Adolf Wahlmann, Heinrich Ruoff, Karl Willig, Adolf Merkle, Irmgard Huber, and Philipp Blum 9 (The Hadamar Trial) (Earl W. Kintner ed., 1949) (reply by the prosecutor).

248. 1 Law Reports of Trials of War Criminals 93 (1949) (British Mil. Ct. - Hamburg 1946). In a case involving three German industrialists charged with having knowingly supplied poison gas used for the extermination of Allied nations (which did not include British victims), the British military court in Hamburg noted that jurisdictional support derived from the universality principle, under which every state has jurisdiction to punish war criminals. *See, id.* at 103.

United States Court of Appeals for the Sixth Circuit to conclude, in *Demjanjuk v. Petrovsky*, that in view of the jurisprudence of the Nuremberg Tribunal and the Control Council Law 10 (CCL 10) tribunals, "it is generally agreed that the establishment of these [World War II] tribunals and their proceedings were based on universal jurisdiction."[250] On 11 December 1946, the U.N. General Assembly unanimously affirmed the "principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal."[251]

2. The International Military Tribunal for the Far East

However, a conspicuous difference between the Nuremberg and Tokyo Tribunals leads to the irresistible conclusion that the latter cannot be relied upon as a precedent for the alleged delegation of universal and territorial jurisdiction to an international tribunal. Unlike the case of Germany, the Japanese civil power was not extinguished with the end of hostilities, despite Japan's defeat.[252] Thus, Japan, in her sovereign capacity could, as it did, accede in the Instrument of Surrender[253] to the prosecution of Japanese nationals before the Tokyo Tribunal. This is manifested by the fact that the Special Proclamation, which brought the Tokyo Tribunal into existence, claimed that by the Instrument of Surrender "the authority of the Emperor and the Japanese Government to rule the [S]tate of Japan is made subject to

249. United States v. Otto Ohlendorf, reprinted in IV Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 411, 462 (1950). The Einsatzgruppen Case involved the trial before a U.S. Tribunal in Nuremberg of the commanders of killing squads that shadowed the German troops advancing into Poland and Russia. Citing the universality principle as one of the bases for the tribunal's jurisdiction, the tribunal stated:

> They are being tried because they are accused of having offended against society itself, and society, as represented by international law, has summoned them for explanation ... . It is the essence of criminal justice that the offended community inquires into the offense involved ... . There is no authority which denies any belligerent nation jurisdiction over individuals in its actual custody charged with violation of international law. And if a single nation may legally take jurisdiction in such instances, with what more reason may a number of nations agree, in the interest of justice, to try alleged violations of the international code of war?

250. Demjanjak v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985).

251. G.A. Res. 95, U.N. Doc. A/64/Add.1, at 188 (1946).

252. R. JOHN PRITCHARD, THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST AND ITS CONTEMPORARY RESONANCES: A GENERAL PREFACE TO THE COLLECTION, IN THE TOKYO MAJOR WAR CRIMES TRIAL xxxi (J. Pritchard, ed. 1998).

253. Sep. 2, 1945, 3 Bevans 1251.

the Supreme Commander for the Allied Powers."[254] More specifically, the Instrument of Surrender states that the Japanese government accepts the provisions set forth in the Potsdam Declaration of 26 July 1945,[255] and agrees to "take whatever action may be required by the Supreme Commander for the Allied Powers or by any other designated representative of the Allied Powers for the purpose of giving effect to that Declaration."[256] The Potsdam Declaration, in turn, provides that "stern justice shall be meted out to all war criminals,"[257] and that the terms of the Cairo Declaration shall be carried out.[258] The Cairo Declaration, meanwhile, included the statement that "the ... [Allied Powers] are fighting this war to restrain and punish the aggression of Japan."[259] Therefore, in addition to the number and variety of States that took part in the Trial,[260] the legitimacy of the Tokyo Tribunal rested on the primacy of the Instrument of Surrender which, read together with the two Declarations, constitute Japan's express[261] consent to the prosecution of her nationals.[262] That Japan's consent formed the jurisdictional basis for the Tokyo Tribunal is affirmed both in that Tribunal's charter and in its judgment.[263]

3. The Yugoslavia and Rwanda Tribunals

In 1993, the U.N. Security Council established an ad hoc international criminal tribunal with jurisdiction over war crimes, genocide, and crimes against humanity committed in the former Yugoslavia (Yugoslavia Tribunal).[264] On 8 November 1994, the U.N. Security Council set up the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law

254. PRITCHARD, *supra* note 252, at xxxi-ii.

255. 3 Bevans 1204; *See,* Instrument of Surrender, Sep. 2, 1945, 3 Bevans 1251.

256. Instrument of Surrender, 3 Bevans 1251, 1252.

257. Potsdam Declaration of July 26, 1945, 3 Bevans 1204, 1205; Instrument of Surrender, 3 Bevans 1251.

258. Potsdam Declaration of July 26, 1945, 3 Bevans 1204, 1205.

259. Communique, First Cairo Conference, Dec. 1, 1943, 3 Bevans 858; *See also,* Pritchard, *supra* note 252, at 9.

260. PRITCHARD, *supra* note 252, at xxxi.

261. *See,* R. JOHN PRITCHARD, AN OVERVIEW OF THE HISTORICAL IMPORTANCE OF THE TOKYO WAR TRIAL 8-10 (1987).

262. *See also,* In re Yamashita, 327 U.S. 4, 13 (1945) ("Japan, by her acceptance of the Potsdam Declaration and her surrender, has acquiesced in the trials of those guilty of violations of the law of war.").

263. *See,* PRITCHARD, *supra* note 261, at 9.

264. *See,* ICTY Statute.

Committed in the Territory of Rwanda between 1 January 1994 and 31 December 1994 (Rwanda Tribunal).[265]

What sets the Yugoslavia and Rwanda Tribunals apart from all the other international criminal tribunals, including the I.C.C., is the fact that the Yugoslavia and Rwanda Tribunals are products of U.N. Security Council action taken under Chapter VII of the U.N. Charter.[266] This distinction forms the bedrock of the theory that the jurisdiction of the ICTY and ICTR arise from the Security Council's power to take such steps as are required to restore or maintain international peace and security.[267] Indeed, it may be said that the members of the Security Council, by means of a binding S.C. decision, established the ICTY and ICTR not in their capacity as individual States nor on their own behalf, but rather as members of the Security Council acting on behalf of the international community of States.[268] This assertion draws strength from the fact that the S.C. is an organ of the U.N..[269] In other words, the ICTY's or ICTR's power may be ultimately traced to the implied consent of almost all States, owing to the nearly universal membership in the U.N., of which the S.C. is an organ. On the contrary, the I.C.C. is strictly treaty-based such that the signatories to the Statute cannot pretend to be the representative of the entire international community in the same manner as the members of the S.C. ostensibly are.

Secondly, it must be noted that the ICTY has made reference to the principles underlying universality in justifying the primacy of prosecution before the ICTY over prosecution before national courts.[270] This is an express indication that the tribunal's competence springs from universality.

Third, and more importantly, the ICTY has categorically stated that if any State could prosecute a defendant for his alleged war crimes and crimes against humanity under universal jurisdiction, it does not offend State sovereignty that an international tribunal could do so instead.[271] This pronouncement calls into mind the Nuremberg statement that "[t]he

265. S.C. Res. 955, U.N. SCOR, 49th Year, 1994 S.C. Res. & Dec. at 15, U.N. Doc. S/INF/50 (1994).

266. *See,* U.N. S.C. Res. 827, U.N. Doc. S/Res. 827 (1993) and U.N. S.C. Res. 955, U.N. SCOR, 3453d mtg. (1994) (specifying that, in establishing the ICTY and ICTR, respectively, the Security Council was acting under Chapter VII of the U.N. Charter).

267. Morris, *supra* note 11, at 38.

268. *See,* YORAM DINSTEIN, THE UNIVERSALITY PRINCIPLE AND WAR CRIMES, *in* MICHAEL SCHMITT & LESLIE GREEN, THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 17-37 (1998).

269. U.N. CHARTER, art. 7.

270. *See,* Tadic Appeal, *supra* note 47.

271. *See, id.* ¶ 58.

Signatory Powers, [by creating the Nuremberg] Tribunal ... have done together what any one of them might have done singly." Where the Nuremberg chose to be enigmatic in phraseology, the ICTY spells out with clarity by explicitly referring to universality.

Finally, what is most illuminating about the ICTY and the ICTR is the fact that these tribunals were established over the express objections of Yugoslavia[272] and Rwanda,[273] the States of the defendants' nationality. This is undeniable proof that the ICTY and ICTR exercised jurisdiction without the consent and over the objections of the defendant's State of nationality.

G. If there was no pre-existing custom of delegating jurisdiction to an international court, did the ratification of the Statute nonetheless give rise to instant custom to that effect?

At the time of the creation of the I.C.C., there was a pre-existing custom of delegating universal and territorial jurisdiction to an international court.

The *North Sea Continental Shelf Case*[274] is authority for the proposition that the content of a treaty, such as the jurisdictional provisions of the Statute, may become part of customary international law in a short period of time.[275]

This pronouncement imposes three basic conditions[276] that must be met before generalizable provisions[277] of multilateral treaties may give rise to customary international law, to wit: (1) the treaty is accepted by a sufficient number of States;[278] (2) among the parties to the treaty, there are a significant number of those States whose interests are most affected by the treaty; [279] and, (3) the treaty provisions are not subject to reservations by the accepting parties.[280] In this regard, it must be emphasized that the acceptance

272. *See,* Letter Dated 19 May 1993 from the Charge d'affaires, a.i., of the Permanent Mission of Yugoslavia to the United Nations Addressed to the Secretary-General, U.N. Doc. A/48/170-S/25801.

273. *See,* Statement of Rwanda, U.N. SCOR, 49th Sess., 3453 mtg. at 15-16, U.N. Doc. S/PV.3453 (1994).

274. North Sea Continental Shelf (F.R.G. v. Den; F.R.G. v. Neth.), 1969 I.C.J. 3, at 42-43.

275. *Id.* at 41.

276. *Id.*

277. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 12 (5d ed. 1998).

278. North Sea Continental Shelf, 1969 I.C.J. 3, at 43.

279. *Id.*

280. *Id.*

of a treaty may be considered as State practice,[281] and the Statute satisfies all three conditions.

The first requirement is met. The Statute was adopted in its entirety by 120 countries when the Statute was drafted in 1998, which is an overwhelming majority of the 160 participating States.[282] By 1 July 2002, it entered into force upon the ratification by the 60th State.[283] As of June 2004, the Statute has been signed by 139 States and ratified by 94 States.[284] These figures are a reliable gauge[285] in drawing the conclusion that certain rules in the Statute[286] had achieved sufficiently widespread acceptance to become part of customary international law.[287] In fact, customary law has been deduced in the past using a much lower threshold, in particular, on the basis of the practice of *fewer than a dozen States*.[288] It is important to note likewise

281. *See*, Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53, 79-82 (1981).

282. *See*, United Nations, The International Criminal Court, *at* http://www.un.org/News/facts/I.C.C.fact.htm (last accessed June 29, 2004) (indicating that the Statute was approved by an unrecorded vote with 120 States in favor versus seven States in opposition).

283. Rome Statute, art. 126(1) ("This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.").

284. *See*, United Nations, Rome Statute of the International Criminal Court, *at* http:// untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp (last accessed July 15, 2004).

285. 1 PETER H. ROHN, WORLD TREATY INDEX 16 (2d ed. 1984); Corfu Channel Case, (U.K. v. Alb.) 1949 I.C.J. 4; Asylum (Colom. v. Peru) 1950 I.C.J. 266; Rights of U.S. Nationals in Morocco (Fr. v. U.S.A.) 1952 I.C.J. 176; Temple of Preah Vihear (Cambodia v. Thail.) 1962 I.C.J. 6; South West Africa (Eth v. S. Afr; Liber. v. S. Afr) 1966 I.C.J. 6; North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.) 1969 I.C.J. 3.

286. Rome Statute, art. 12.

287. Asylum (Colom. v. Peru) 1950 I.C.J. 266, 277 (Nov. 20); North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.) 1969 I.C.J. 3; STEVEN SCHWEBEL, AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS, CONTEMPORARY VIEWS ON THE SOURCES OF INTERNATIONAL LAW: THE EFFECT OF UN RESOLUTIONS ON EMERGING LEGAL NORMS 301 (1979); C. Wilfred Jenks, *The Conflict of Law-Making Treaties*, 30 BRIT.Y.B. INT'L L. 401 (1953).

288. Paquete Habana, 175 U.S. 677 (1900); S.S. Wimbledon, 1923 P.C.I.J. (ser. A) No. 1; The S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 4, 29 (Sep. 7). The Court cited, as decisive precedents, cases involving only five states: France, Italy, Great Britain, Germany, and Belgium. *See*, 2 HUDSON WORLD COURT REPORTS 43 (1935) for citations to these cases (emphasis supplied).

that the adoption at the Rome Conference by 120 countries was accomplished within a short period of five weeks.[289] This volume of activity occurring within a short period of time indicates a high density State practice that may be more important than the length of time over which the practice occurs in ascertaining the emergence of custom.[290] Incidentally, while it has been alleged that some States-Parties have not complied with the Statute, this does not affect the customary status of its provisions,[291] just as violations of domestic law do not make the same less binding.[292] A contrary rule would doom efforts to construct a world order.[293]

The Statute also meets the second requirement. Without a doubt, the parties to the Statute are all interested in the provisions therein for it may rightfully be presumed that no State is exempted from the international community's duty to prevent and punish perpetrators of the most atrocious crimes. The issue of international crimes is sufficiently broad based so that the absence of a few States should not hinder customary law formation.[294] Moreover, it is not required that all especially interested States should accept the treaty, but only that a sufficient number of them do so.[295] Assuming, therefore, that all 205 States[296] in the world are especially interested in the Statute provisions, the signature of 139 States, or 67.80 percent of all States in the world, is certainly sufficient. The mere fact that only 92 States, representing 44.87 percent of all States in the world, have ratified the Statute, does not detract from this conclusion. The signature of a State, even without

289. The I.C.C., The Making of the Rome Statute 13 (Roy S. Lee ed., 1998).

290. *See, e.g.*, Z. SLOUKA, INTERNATIONAL CUSTOM AND THE CONTINENTAL SHELF 13 (1968).

291. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); *See, e.g.*, D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1126 (1982).

292. Filartiga v. Pena-Irala, 630 F.2d 876, 884 n.15 (2d Cir. 1980); Sohn, *The International Law of Human Rights: A Reply to Recent Criticism*, 9 HOFSTRA L. REV. 347, 350 (1981).

293. *See, Blum & Steinhardt, Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53, 79-82 (1981).

294. Craig L. Carr and Gary L. Scott, *Multilateral Treaties And The Environment: A Case Study In The Formation Of Customary International Law*, 25 DENJILP 71 (1999).

295. *Id.*

296. *See*, World Statistics, *at* http://worldstatistics.internetsurvey.com/pasrtII/countries2004/net. (last accessed July 15, 2004).

subsequent ratification, constitutes an acceptance of the principles contained in the treaty.[297]

Finally, the third requirement is satisfied as the Statute absolutely prohibits reservations to its provisions.[298] Reservations would have frustrated the I.C.C.'s goals by creating a complex web of interactions between States, wherein specific provisions would apply between some States but not between others.[299] This approach is incompatible with the idea that the crimes in the Statute are universally condemned. Prohibiting reservations also suggests that the framers were well aware of the constitutive nature of the Rome Treaty as the fundamental, organic document of an international institution, which establishes permanent organs and provides rules for their operation.[300]

All things considered, any doubt as regards the emergence of custom from the establishment of past tribunals is laid to rest by the widespread ratification of the Statute which, by itself, gave rise to the customary international law of delegating jurisdiction to an international tribunal.

H. The So-Called Terrorism Treaties: Providing a contemporary framework in viewing the Statute's status in international law

While some have taken the view that the terrorism treaties are automatically void for having exceeded the customary bounds of universal jurisdiction,[301] a more reasonable and less rigid theory seems to be in order on this regard. Certainly, the proliferation of terrorism treaties cannot be cavalierly excluded wholesale on the unbending assertion that the crimes covered by those treaties are not, as yet, subject to the customary international law of universal jurisdiction. Accordingly, rather than branding the anti-terrorism treaties as void, they should simply be viewed as proposing, or articulating in a clear form the suggestion, that the crimes become recognized as entailing universal jurisdiction. States were then free to respond to that proposal, by active acceptance — in becoming States-Parties to the treaties, active rejection — by objecting to the treaties or to prosecutions brought pursuant to them, or passive acquiescence — by accepting, or refraining from objecting to, the

297. *Id.*

298. Rome Statute, art. 120.

299. Sadat & Carden, *supra* note 19, at 452.

300. *Id.*

301. *See, e.g.*, Jordan Paust, *Extradition of the Achille-Lauro Hostage-Takers: Navigating the Hazards*, 20 VAND. J. TRANSNAT'L L. 235, 254 (1987) ("universal jurisdiction by treaty under the Hostages Convention ... is highly suspect with regard to defendants who are not nationals of a signatory to the Hostages Convention.").

treaties or prosecutions pursuant thereto.[302] This is basically the lesson learned from the examination of the anti-terrorism treaties.

The lesson benefits the study of the Statute insofar as it answers any lingering assertion that the Statute's jurisdictional provisions are not supported by custom. Thus, *assuming* that the Statute is neither supported by a pre-existing custom, nor has its widespread acceptance generated the relevant customary law, the Statute still cannot be deemed void. Rather, in this scenario, the Statute simply serves as a catalyst proposing a new application of universal jurisdiction, which accelerates the usual processes of customary law development.[303] The Statute itself does not create universal jurisdiction, and it could not do so insofar as that would involve the alteration of customary international law without the necessary processes of State practice and *opinio juris*. So, if a third State were to object to those jurisdictional rules, as what the U.S. has done, the validity of the I.C.C.'s jurisdiction would have to be evaluated in the usual way[304] without rejecting the possibility that the alleged custom could conceivably emerge in the future.[305] In the meantime, the Statute is not void even as regards third States.

I. The I.C.C.'s Jurisdictional Provisions: giving flesh to the customary duty to prosecute or extradite perpetrators of genocide to a competent tribunal

The Genocide Convention[306] bears relevance to the issue insofar as it contemplates an "international penal tribunal" which may prosecute those

302. Morris, *supra* note 11, at 62.

303. *Id.* at 64.

304. *Id.* A determination would have to be made as to whether the claimed new basis of jurisdiction comported with the principles underlying and defining the customary international law of jurisdiction.

305. *Id.* at 62. Professor Schachter, dealing with treaties related to international crimes, lays down three conditions that must be satisfied in order to reach the conclusion that a treaty has generated customary universal jurisdiction over the crimes covered by the treaty:

> 1) The adoption of the conventions by overwhelmingly large majorities of [S]tates;
>
> 2) The implication drawn from these conventions that international law permits [S]tates to exercise jurisdiction on a universal basis in regard to the crimes in question; and,
>
> 3) The widespread ratification of the conventions considered as relevant [S]tate practice that conforms to the implicit customary law principle stated in (2) above.

OSCAR SCHACHTER, TREATY-BASED JURISDICTION 725-26 (1997).

306. As of 1999, the Genocide Convention adopted by the United Nations General Assembly, has been ratified by 127 States.

offending against its provisions.[307] However, the jurisdiction of such international penal tribunal is prominently qualified, at least textually. Thus, the Genocide Convention provides for jurisdiction by "such international penal tribunal as may have jurisdiction *with respect to those Contracting Parties as shall have accepted its jurisdiction.*"[308] Therefore, a plain reading of the text would support the argument that the Genocide Convention does not envision that the tribunal referred to would have jurisdiction with respect to third-State nationals, as what the I.C.C. may do. Rather, the particular provision was included essentially for the purpose of avoiding the necessity of amending the Convention's jurisdictional provisions in the future should an international tribunal with competence over genocide be established.[309] However, the weight of authority is that the cited provision merely establishes the minimum jurisdictional obligation for States in which genocide occurs.[310] Therefore, other States are free under customary international law to expand upon this baseline,[311] and the parties themselves did not intend to abrogate their jurisdictional rights under customary law and instead simply established in article VI a jurisdictional provision that affects the State in which the genocide occurs.[312]

In fact, it has been authoritatively pointed out that since the Genocide Convention expressly contemplates the conferral of jurisdiction on an international criminal court to be created,[313] the Statute can thus be seen as

307. Genocide Convention, art. VI.

308. *Id. See,* Matthew Lippman, *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later,* 8 TEMP. INT'L & COMP. L. J. 1, 61 (1994).

309. *See,* U.N. GAOR 6th Comm., 3d Sess., 97th mtg. at 369, U.N. Doc. A/C.6/SR 61-140 (1948) (Mr. Demesmin, Haiti); U.N. GAOR 6th Comm., 3d Sess., 130th mtg. at 675, U.N. Doc. A/C.6/SR 61-140 (1948) (Mr. DeBeus, Netherlands); U.S. Senate Comm. on Foreign Rel., Report on Int'l Convention on the Prevention and Punishment of Genocide, 28 I.L.M. 754, 765 (1989).

310. *See,* 18 U.S.C. 1091(d) (1994). *See also,* Attorney General of Israel v. Eichmann, 36 I.L.R. 18, 39 (Jerusalem Dist. Ct. 1961), aff'd. 36 I.L.R. 277 (Isr. S. Ct. 1962):

> The reference in article 6 to territorial jurisdiction, apart from the jurisdiction of the non-existent international tribunal, is not exhaustive. Every sovereign State may exercise its existing powers within the limits of customary international law, and accession of a State to the convention does not involve the waiving of powers which are not mentioned in article 6.

311. *Id.*

312. *See,* Randall, *supra* note 22, at 836.

313. Genocide Convention, art. VI.

completing in this respect the scheme for the prevention and punishment of genocide begun in 1948, and at this time when effective measures against those who commit genocide are called for.[314] The I.C.C., therefore, may simply be viewed as one big step towards the fulfillment of the customary[315] duty of all States to prevent and punish genocide[316] through international cooperation.[317] Any attempt on the part of a third State to prevent a State-Party from complying with its obligations under the Statute may amount to violations of a general legal duty of all States to cooperate in the effective prevention and prosecution of genocide.[318] Since it is well-established that genocide threatens the peace, security and well-being of the world, such interference may also amount to violation of U.N. Charter duties to maintain international peace and security and to take effective collective measures for the prevention and removal of threats to the peace.[319]

V. CONCLUSIONS

The object of criticism this time is article 12 of the Statute, which confers jurisdiction upon the I.C.C. over nationals of third States that do not consent to its jurisdiction, although the consent of the territorial State is made a precondition. While 139 signatories to the Statute, 94 of which are already States-Parties, have deemed it appropriate for the I.C.C. to exercise

314. Report of the International Law Commission on the Work of its Forty-Sixth Session, U.N. GAOR, 49th Sess., Supp. No. 10, at 67-68, U.N. Doc. A/49/10 (1994).

315. The Genocide Convention was adopted unanimously and without abstention by the General Assembly on DEC. 9, 1948. *See,* NEHEMIAH ROBINSON, THE GENOCIDE CONVENTION: A COMMENTARY 17 (1960). *See,* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23 ("the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation."); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1996 I.C.J. 595, 616 (July 11) ("the rights and obligations enshrined by the [Genocide] Convention are rights and obligations *erga omnes.*").

316. Genocide Convention, art. I (binds parties to "undertake to prevent and to punish" the crime of genocide); art. IV (declares that any person committing genocide, whether public official or private individual, "shall be punished.").

317. *Id.* Preamble.

318. Danilenko, *supra* note 121, at 452.

319. *Cf.* U.N. CHARTER, art. 1 (stating that one the purposes of the United Nations is "[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace ... .").

this form of jurisdiction, some States insist that this infringes upon the fundamental right of sovereignty of affected third States.

This objection is premised on the mistaken notion that a State has the right to exercise exclusive jurisdiction over its nationals concerning acts committed abroad. Such a notion of absolute State sovereignty is antiquated. It ignores the contemporary shift in the balance between the sovereign rights of individual States and the authority of the international community to ensure that perpetrators of grave crimes are brought to justice. Oppenheim most aptly discarded the notion of absolute sovereignty in the following words: "[T]he very notion of international law as a body of rules of conduct binding upon [S]tates, irrespective of their internal law, implies the idea of their subjection to international law."[320] Therefore, the I.C.C.'s exercise of jurisdiction over third-State nationals, upon the consent of the territorial State, does not infringe upon the third State's sovereignty. The State of nationality has no exclusive right to prosecute its nationals when other bases of jurisdiction exist under international law.

Neither is it reasonable to assail the I.C.C.'s jurisdiction over third-State nationals on the ground of the law of treaties, which proscribes the imposition of treaty obligations on a third State without its consent.[321] *First*, the I.C.C. exercises jurisdiction over individuals and adjudicates individual responsibility, not State responsibility. The exercise of jurisdiction over a State's national is not an imposition of obligations on that State. To hold otherwise is to blur the clear distinction between the national and his or her State of nationality. In any event, if an exercise of jurisdiction over a third State's national produces effects on that State, such as when official acts are involved, these are mere indirect effects that enter the political realm, which is beyond the legal proscription of *pacta tertiis*. These effects, more often than not, merely require the third State to recognize and respect valid international agreements entered into by other States through a treaty in their own sovereign capacity. *Second*, the Statute imposes obligations of cooperation only on States-Parties, or third States which consent to cooperate, but not upon non-consenting third States. Viewed from all angles, therefore, article 12 of the Statute is unassailable on the basis of the law of treaties.

A third State, moreover, is bound to recognize the validity of the I.C.C.'s exercise of jurisdiction over its nationals, without its consent, since this form of jurisdiction simply reflects customary international law. To be sure, article 12 is valid as regards the States-Parties to the Statute, whether or not it reflects customary principles, since article 12 does not violate *jus cogens*

320. 1 OPPENHEIM'S INTERNATIONAL LAW 125 § 37 (Robert Jennings & Arthur Watts eds., 9d ed. 1992).

321. VCLT, art. 34.

norms.[322] The States-Parties are bound to observe it in good faith pursuant to the principle of *pacta sunt servanda*.[323] The ascertainment of the customary status of the I.C.C.'s jurisdiction over third-State nationals, therefore, is necessary only to demonstrate its binding effect upon third States.

Advocates of the validity of the I.C.C.'s jurisdiction over third-State nationals proffer the theory that the States-Parties to the Statute have delegated their universal jurisdiction and territorial jurisdiction to the Court, pursuant to customary international law.

An examination of the relevant *opinio juris* and State practice, consisting mainly of the manner of establishment and the jurisprudence of past international tribunals, reveals that there indeed exists a customary law of delegating universal and territorial jurisdiction to an internationai court. The Nuremberg Tribunal was established without the consent of any State. Coupled with the pronouncements of the Nuremberg Tribunal itself and of the U.N., its jurisdiction was based on universality delegated to it by the Allied Powers, who exercised their jurisdiction together. The jurisdiction is premised on the delegated territorial jurisdiction of the Allies, which, upon establishing the Tribunal, were the *de facto* territorial rulers of Germany. Similarly, the Rwanda and Yugoslavia Tribunals were established and subsequently conducted prosecutions without the consent of the defendants' State of nationality, yet their jurisdiction has never been doubted by the international community.

The customary law of delegating universal jurisdiction to an international tribunal is embodied in the Statute, but only where a case is referred to the I.C.C. Prosecutor by the Security Council, pursuant to the latter's powers under Chapter VII of the U.N. Charter.[324] In this case, the I.C.C. may exercise its jurisdiction over any individual, regardless of whether or not the territorial State, the defendant's State of nationality, or any State at all with links to the crime, is a party to the Statute. This arrangement is more in line with the concept of universal jurisdiction, which may be exercised by any State despite the lack of any connection to the crime.[325] It must be noted, though, that customary international law requires a State to *obtain custody* over a *hostis humanis generis* before it can exercise universal jurisdiction, while the Statute, in the case of an S.C. referral, does not even require the consent of the *custodial State*. In a sense, therefore, the Statute, in this respect, goes a step beyond the concept of customary universal jurisdiction by not even requiring at least the consent of the custodial State. Yet, this arrangement has never been controverted.

322. VCLT, art. 53.

323. VCLT, pmbl. & art. 36.

324. Rome Statute, art. 13 (b).

325 Bassiouni, *Universal Jurisdiction*, *supra* note 114, at 106.

However, the customary law of delegating universal jurisdiction to an international tribunal is not reflected in the Statute when a case is referred by a State-Party to the I.C.C. Prosecutor or investigated *motu proprio* by the latter. In these two instances, the Statute dispenses with the consent of the defendant's State of nationality only when the territorial State consents to the I.C.C.'s jurisdiction. This precondition of the territorial State's consent is contrary to the concept of universal jurisdiction. Despite this territoriality requirement, some scholars still opine that the I.C.C. is possessed of delegated universal jurisdiction. They reason that the territoriality requirement simply reflects a choice that the I.C.C. will exercise only part of the full range of universal jurisdiction that it legally could exercise under the customary law of universal jurisdiction.

If this position seems plausible and enticing at all, it may be due to its ability to reduce the concept of universality to seemingly perceptible, measurable and divisible notions. However, an equally simple, no-nonsense and logical legal stand is that the Statute rejects universality as the basis of its jurisdiction precisely because it requires the consent of the defendant's State of nationality or of the territorial State, as a pre-condition to the exercise of the I.C.C.'s jurisdiction. Indeed, since the concept of universality ignores any traditional link between the State of the forum and the crime, universality is incompatible with those preconditions.

The mere fact that the consent of the territorial State is required thwarts the concept of universality, which requires the consent of no State, except of course that of the custodial State which is to exercise universal jurisdiction. It is true that the consent regime was embedded in the Statute scheme as a politically expedient concession to the sovereignty of States in order to garner broad support for the Statute.[326] Nonetheless, the fact remains that a true universality regime in the Statute would have vested jurisdiction in the I.C.C. without the consent of the territorial State, nor of the defendant's State of nationality. This author does not agree with the proposition that universality underlies article 12 though "layered upon it is a State consent regime,"[327] or any similar proposition that purports to modify, contract, or extend the concept of universality to support the validity of the I.C.C.'s jurisdiction over third-State nationals. The crimes within the I.C.C.'s competence are undoubtedly subject to universal jurisdiction. Certainly, they are universally condemned. However, when article 12 explicitly requires the consent of the territorial State, there is no room to insist that universal jurisdiction still exists within such context. The Statute, therefore, in situations referred by States-Parties or investigated *motu proprio* by the

326 *See,* Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT'L L. 2, 9 (1999); Scharf, *supra* note 84, at 77.

327. Sadat & Carden, *supra* note 19 at 413.

Prosecutor, does not operate on universality. Nonetheless, the determination that there is a customary norm of delegating universal jurisdiction to an international tribunal still helps tremendously in supporting the validity of the I.C.C.'s jurisdictional scope. This goes to show that it is indeed valid for the I.C.C. to dispense with the consent of the defendant's State of nationality. The decision of the Rome Conference delegates to draw a narrower jurisdictional basis in no way abrogates what already exists in customary international law. In other words, since it would have been perfectly valid for the Rome Conference delegates to have required the consent of merely and solely the custodial State, pursuant to a valid delegation of universal jurisdiction, then with more reason should the present, and more conservative, consent regime of the I.C.C. be held valid.

The theory of delegated territorial jurisdiction is less problematic. The I.C.C.'s exercise of jurisdiction, when allowed upon the consent of the territorial State, is in consonance with the customary law of delegating territorial jurisdiction. The territorial State has the discretion to exercise its jurisdiction in the way it deems best, such as through the mechanism of an international court. As Professor Bassiouni puts it, "Sovereignty does not limit the exercise of criminal jurisdiction to single States. [R]ather, it can be extended to collective [S]tate action."[328]

From the foregoing, it is clear that the Statute *per se* does not seek to bind third States, in violation of the principle of *pacta tertiis nec nocent nec prosunt.*[329] Rather, it is the customary international law of delegating territorial jurisdiction, which is merely codified in the Statute, that binds third States and precludes the latter from objecting to the I.C.C.'s exercise of jurisdiction over their nationals.[330]

Considering further the customary status of delegating jurisdiction to an international tribunal, a shift of legal paradigms is necessitated within the framework of the customary duty to prosecute or extradite perpetrators of genocide, war crimes, crimes against humanity and aggression. Also known as *aut dedere aut judicare*, this duty traditionally required a State either to prosecute a criminal before its national court, or to extradite him to another State, the main criterion being that the accused should be prosecuted before a *competent tribunal.* The principle of *aut dedere aut judicare* should be understood to encompass an international court, such as the I.C.C.. In this regard, the I.C.C. may be viewed as merely an extension of a State-Party's national courts, such State having decided to exercise its jurisdiction through the I.C.C.. The States-Parties to the Statute, by delegating their jurisdiction

328. Bassiouni, *Universal Jurisdiction, supra* note 114, at 91.

329. VCLT, art. 34.

330. ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 107 (1971).

to the I.C.C., simply gave flesh to the customary duty to either prosecute an accused within a State's national courts, or to extradite him or her to a competent tribunal. This author submits that the I.C.C. is such a competent tribunal.

Dispensing with the consent of the defendant's State of nationality, at least in certain circumstances, is not an arbitrary arrangement. It serves a real purpose. It bears recalling that the crimes over which the I.C.C. has subject-matter jurisdiction are often committed by or with the approval of States.[331] Moreover, historical experience shows that these States are the least likely to grant jurisdiction over their nationals to an international court.[332] This is the insurmountable problem faced by an international criminal court that may exercise jurisdiction only if the defendant's State of nationality consents. In the I.C.C. scheme, the Statute overcomes this predicament by validly dispensing with the consent of the defendant's State of nationality, at least when the territorial State consents to the jurisdiction of the Court. Article 12 of the Statute, therefore, furthers by great strides the international community's struggle against grave and heinous crimes for the mutual defense and safety of all.

331. *See, e.g.*, Report of the Ad Hoc Committee on Genocide, U.N. ESCOR, 7th Sess., Supp. No. 6 at 12, U.N. Doc. E/794 (1948) ("Those in favour of the principle of universal repression held that genocide would be committed mostly by the State authorities themselves or that these authorities would have aided and abetted the crime. Obviously in this case the national courts of that State would not enforce repression of genocide.").

332. Morris, *supra* note 11, at 13.

Self-Determination as "Defined" Under the United Nations Draft Declaration on the Rights of Indigenous Peoples: Secession or Autonomy?

*A. Edsel C. F. Tupaz**

* L.L.M. cand., Harvard Law School, Class of 2008; J.D., *with honors*, Ateneo de Manila School of Law, Class of 2003; Recipient of the *St. Thomas More Most Distinguished Award* & the Second Honors Medal for Academic Excellence; A.B. Economics-Honors Program, *cum laude*, Class of 1999, Ateneo de Manila University. The author is currently the Chief Speechwriter of Mr. Chief Justice Hilario G. Davide, Jr. (ret.), Philippine Ambassador to the United Nations (2006 – present) and Law Clerk under the Chambers of Senior Associate Justice Ma. Alicia Austria-Martinez, Supreme Court, Republic of the Philippines (2006 – present). Last year, he served as Law Clerk and Principal Speechwriter of Chief Justice Hilario G. Davide, Jr. (2005); Junior Associate, SyCip Salazar Hernandez & Gatmaitan Law Office (2004); and was an Andres G. Gatmaitan Scholar (1999 – 2003). The author is currently teaching *Economics, Agrarian Reform & Taxation* at the Ateneo de Manila University. He taught *Political Philosophy & Philosophy of Law*, also at the Ateneo de Manila (2005). He was a Bar Review Lecturer on *Political Law Review* and *Bar Methods and Techniques* at the University of the East College of Law (2004 – 2005). He co-founded the *Network* of *The Harvard Project for Asian and International Relations* (HPAIR) and has served as keynote and resource speaker in national and international conferences since then. After having been invited by the students at Harvard, he lectured on capital flight in the Financial Volatility Module in the 1999 HPAIR Conference at the Chinese University of Hong Kong, Hong Kong SAR.

The author was Editor (2002 – 2003) and Staff (2001 – 2002) of the *Ateneo Law Journal*. He was Prime Minister (President) of the *St. Thomas More Debate Society* (2002 – 2003). He served as the Moderator of *The Colloquium on Indigenous Peoples*, convened under the auspices of the United Nations Development Programme (UNDP), International Labor Organization-INDISCO (ILO Inter-Regional Program to Support Self-Reliance of Indigenous and Tribal Communities Through Cooperatives and Other Self-Help Organizations), National Commission on Indigenous Peoples, Episcopal Commission on Indigenous Peoples (National Secretariat), Legal Assistance Center for Indigenous Filipinos (PANLIPI), Ateneo Human Rights Center (Katutubo Unit), Ateneo Law Journal, Justitia Hall, 4th Floor, Ateneo Professional Schools, Makati City, Philippines (November 14-15, 2002).

His past works published in the *Journal* include: *Ruiz v. Court of Appeals: A Moral Hazard*, 49 ATENEO L.J. 982 (2004); *A Synthesis of the Colloquium on Indigenous Peoples*, 47 ATENEO L.J. 775 (2002); and *The People Power and the Supreme Court in Estrada v. Arroyo*, 47 ATENEO L.J. 8 (2002).

He wrote THE LAW ON PEOPLE POWER: A JURISTIC THEORY OF SOVEREIGNTY (Manila: Central Lawbook Publishing, 2004) which was extensively