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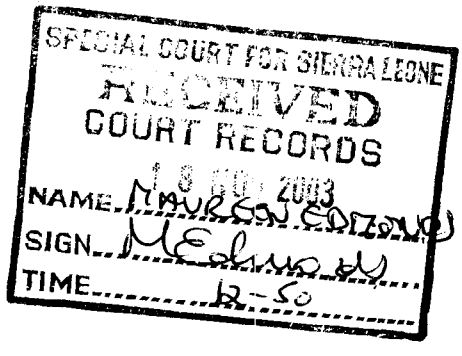

The Law of the Charter

The jurisdiction of the Tribunal is defined in the Agreement and Charter, and the crimes coming within the jurisdiction of the Tribunal, for which there shall be individual responsibility, are set out in Article 6. The law of the Charter is decisive, and binding upon the Tribunal.

The making of the Charter was the exercise of the sovereign 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. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but hi the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.

The Signatory Powers created. this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to. administer law. With regard to the constitution of the Court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law.

The Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime; and it is therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement. But in view of the great importance of the questions of law involved, the Tribunal has heard full argument from the Prosecution and the Defense, and will express its view on the matter.

It was urged on behalf of the defendants that a fundamental principle of all law--international and domestic--is that there can

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(...) are subject to certain limitations. This is particularly true of universal jurisdiction when exercised without territorial links. <=38> n37

Sovereignty does not limit the exercise of criminal jurisdiction to single states; rather, it can be extended to collective state action. This concept was applied in connection with the establishment by the WWII Allies of the IMT <=39> n38 in 1945 and the International Military Tribunal for the Far East sitting at Tokyo <=40> n39 (IMTFE) in 1946. The power that the Allies exercised collectively was based on the power they could have exercised singularly.

The IMT judgment expressly stated this idea:

The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law. <=41> n40

In both the IMT and IMTFE, the states in question exercised their powers to enforce international criminal law on a territorial jurisdictional basis because they exercised de facto sovereign prerogatives over the occupied territories where these tribunals were established. Subsequently, in 1993 and in 1994, the Security Council established, pursuant to its powers under Chapter VII of the United Nations Charter, <=42> n41 the ICTY <=43> n42 and the ICTR, <=44> n43 respectively. In these two

[page 92]

FOOTNOTES:

n37. For example, states with a territorial connection should be accorded priority whenever they seek, in good faith, to prosecute a person accused of the same crime for which another state relying on universality also seeks to prosecute. Where, however, it is found that the state seeking to exercise universal jurisdiction may be the more effective forum, the question should be dealt with as one of conflict of jurisdiction in which the aggregate weighing of factors will determine the most appropriate forum. See *Restatement (Third) of Foreign Relations Law of the United States 403* (1987) [hereinafter Restatement (Third) of Foreign

Relations]. Cf. H.D. Wolswijk, Locus Delicti and Criminal Jurisdiction, 46 Neth. Int'l L. Rev. 361 (1999) (commenting on the interplay between locus delicti and extraterritorial jurisdiction).

n38. IMT Charter, supra note 10.

n39. IMTFE Amended Charter, supra note 10.

n40. IMT Judgment, Sept. 30, 1946, reprinted in 22 Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremburg 411, 444 (1950).

n41. U.N. Charter ch. 7.

n42. ICTY Statute, supra note 10. See M. Cherif Bassiouni & Peter Manikas, The Law of the International Criminal Tribunal for the Former Yugoslavia (1996); Virginia Morris & Michael P. Scharf, An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis (2 vols. 1995).

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ARTICLE: **Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice***

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SUMMARY: ... Universal jurisdiction has become the preferred technique by those seeking to prevent impunity for international crimes. ... Universal jurisdiction is not as well established in conventional and customary international law as its ardent proponents, including major human rights organizations, profess it to be. ... What follows is an assessment of the evolution of universal jurisdiction with respect to jus cogens international crimes based on conventional and customary international law sources. ... Nevertheless, universal jurisdiction to prevent and suppress piracy has been widely recognized in customary international law as the international crime par excellence to which universality applies. ... While customary international law and the writings of scholars recognize slavery and slave-related practices as a jus cogens international crime, the practice of states has not evidenced the fact that universal criminal jurisdiction has been applied to all forms and manifestations of slavery and slave-related practices. ... Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. ... However, it is their cumulative effect which gives weight to the proposition that universal jurisdiction is part of customary international law. ...

TEXT: [*82]

I. Introduction

Universal jurisdiction has become the preferred technique by those seeking to prevent impunity for international crimes. <=2> n1 While there is no doubt that it is a useful and, at times, necessary technique, it also has negative aspects. The exercise of universal jurisdiction is generally reserved for the most serious international crimes, such as war crimes, crimes against humanity, and genocide; however, there may be other international crimes for which an applicable treaty provides for such a jurisdictional basis, as in the case of terrorism. <=3> n2

Unbridled universal jurisdiction can cause disruptions in world order and deprivation of individual human rights when used in a politically motivated manner or for vexatious purposes. <=4> n3 Even with the best of intentions, universal jurisdiction can be used imprudently, creating unnecessary frictions between states, potential abuses of legal processes, and undue harassment of individuals prosecuted or pursued for prosecution under this theory.

Universal jurisdiction must therefore be utilized in a cautious manner that minimizes possible negative consequences, while at the same time enabling it to achieve its useful purposes. It must also be harmonized with other jurisdictional theories. <=5> n4 Furthermore, it should be noted that private international law has not yet developed rules or criteria of sufficient clarity to consider priorities in the exercise of criminal jurisdiction whenever more than one state claims jurisdiction.

[*83] The theories of jurisdiction evidenced in treaties and in the customary practice of states are essentially territorial and based on nationality, whether that of the perpetrator or the victim. Consequently, jurisdictional conflicts between states have been few. Nevertheless, as evidenced by the Lockerbie case, <=6> n5 lack of clarity in treaty obligations concerning the precedence of the duty to prosecute over the duty to extradite leads to tensions between the interested states and a jurisdictional stalemate. In Lockerbie, these problems lasted for almost ten years, until a negotiated solution involving a change of venue was reached. <=7> n6

Universal jurisdiction is not as well established in conventional and customary international law as its ardent proponents, including major human rights organizations, <=8> n7 profess it to be. These organizations have listed countries, which they claim rely on universal jurisdiction; in fact, the legal provisions they cite do not stand for that proposition, or at least not as unequivocally as represented. <=9> n8

Because universal jurisdiction has been infrequently relied upon in national judicial decisions, its relationship with other international legal issues has yet to be clarified. Among them, for example, is the question of whether heads of state and diplomats can invoke immunity as a bar to the exercise of universal jurisdiction. <=10> n9 With respect to certain [*84] international crimes, the substantive defense of immunity has been eliminated since the Nuremberg Charter and the judgments of the International Military Tribunal at Nuremberg (IMT). <=11> n10 Such removal of substantive immunity means that a defendant cannot rely on his or her status as a head of state or diplomat to interpose as a substantive defense resulting in exoneration from criminal responsibility for these crimes. However, so far, there is no treaty or customary law practice that removes the temporal immunity of heads of state or diplomats while they are in office, with the exception of the indictment of Slobodan Milosevic by the ICTY while he was head of state. <=12> n11

For example, Article 27 of the Rome Statute of the International Criminal Court (ICC) <=13> n12 provides:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a [*85] government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person. <=14> n13

Article 7(2) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) states: "The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment." <=15> n14 It was pursuant to this provision that Slobodan Milosevic was indicted by the ICTY while he was head of state of the Federal Republic of Yugoslavia. Article 6(2) of the Statute of the International Criminal Tribunal for Rwanda <=16> n15 (ICTR) utilizes the same language as that contained in Article 7(2) of the ICTY Statute.

The statutes of the ICTY and ICTR, however, do not address the issue of procedural immunity, viz., whether heads of state or diplomats may still benefit from procedural immunity while in office and, for the latter, while

accredited to a host country. Under existing customary international law, heads of state and diplomats can still claim procedural immunity in opposition to the exercise of national criminal jurisdiction. However, if brought to trial, they cannot raise immunity as a substantive defense to the crime charged if it is one of the crimes listed above or if it is a crime for which a treaty specifically disallows such a defense, as is the case with respect to the ICC's Article 27. As to diplomats accredited to a host country, they have the benefit of the Vienna Convention on the Law of Diplomatic Immunity, which provides them with procedural but not substantive immunity. <=17> n16 It is for these reasons that the statutes of the ICTY and ICTR probably do not address these questions.

[*86] Notwithstanding Article 27 of the ICC Statute, Article 98 of the Statute provides for the primacy of other multilateral treaties in assessing immunity:

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

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender. <=18> n17

Presumably, this language applies to Status of Forces Agreements and to diplomats covered by the Vienna Conventions on Diplomatic Relations and Consular Relations. <=19> n18 Thus, pursuant to Article 98, a head of state, diplomat, or other official covered by immunity under a treaty or pursuant to customary international law could still invoke procedural immunity, if applicable.

It is noteworthy that the ICTY did indict Slobodan Milosevic while a head of state in office and sought his extradition, which the Republic of Serbia conceded on June 28, 2001. <=20> n19 Belgium, relying on universal jurisdiction, recently indicted the Democratic Republic of Congo's acting Minister of Foreign Affairs, Mr. Abdoulaye Yerodia Ndombasi for inciting to genocide in the Congo. <=21> n20 Subsequently, the accused [*87] became Minister of Education, but that change of position did not moot the issue, which is why the ICJ is still considering the case. The accused is not a citizen of Belgium, and was indicted while he was in the Congo. Since there were no links to Belgium, this case is to be distinguished from that of four Rwandan defendants charged under the same Belgian law and convicted for crimes committed in Rwanda: they were all domiciled in Belgium and physically present on Belgian territory at the time of their arrest.

In Pinochet I <=22> n21 an Appellate Committee of the House of Lords held by a margin of three to two that former Chilean President Augusto Pinochet was not immune with respect to crimes under international law. <=23> n22 In Pinochet III, <=24> n23 an expanded panel of the House of Lords, in construing the scope of section 134 of the Criminal Justice Act of 1988, ruled that a head of state cannot claim immunity for torture, as it cannot constitute an official act. <=25> n24 The Law Lords, however, held that Senator Pinochet was protected by immunity for the charges of murder and conspiracy to murder. <=26> n25

Universal jurisdiction can be relied upon by a state in its power to prescribe. But when a state relies upon universal jurisdiction for its power to enforce, a state necessarily has to be subject to certain international legal obligations, such as procedural immunity for heads of state and diplomats, and also to be subordinated to the jurisdictional claims of other states seeking to exercise their criminal jurisdiction when such claims are based on weightier interests and are sought to be exercised effectively and in good faith.

Another impediment to the exercise of universal jurisdiction is the application of national statutes of limitations, even though such limitations have been removed with respect to war crimes and crimes against humanity. <=27> n26 Unfortunately, the 1968 U.N. Convention on the [*88] Non-Applicability of Statutes of Limitations to War Crimes and Crimes Against Humanity <=28> n27 has only been ratified by 43 states. The more recent European Convention on Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes (Inter-European) <=29> n28 has just two ratifications. Under the circumstances, it is valid to ask whether the existence of these two conventions (and other manifestations of international opinio

juris) constitutes an expression of customary international law, or whether the limited number of ratifications reveals the insufficiency of national support.

Lastly in this introduction, but foremost in the legal analysis of universal jurisdiction, is its rationale. In the exercise of universal jurisdiction, a state acts on behalf of the international community in a manner equivalent to the Roman concept of actio popularis. <=30> n29 The exercising state acts on behalf of the international community because it has an interest in the preservation of world order as a member of that community. That state may also have its own interest in exercising universal jurisdiction. But if those interests were jurisdictionally based, that state would be exercising its own criminal jurisdiction on the basis of a theory of jurisdiction other than universality, viz., extended territoriality, active personality, passive personality, or protected economic interest.

As an actio popularis, universal jurisdiction may be exercised by a state without any jurisdictional connection or link between the place of commission, the perpetrator's nationality, the victim's nationality, and the enforcing state. The basis is, therefore, exclusively the nature of the crime <=31> n30 and the purpose is exclusively to enhance world order by ensuring accountability for the perpetration of certain crimes. Precisely because a state exercising universal jurisdiction does so on behalf of the [*89] international community, it must place the overall interests of the international community above its own. This article explores the historical evolution of universal jurisdiction, as well as its existence and appreciation in international and national laws. It assesses the status of universal jurisdiction as a recognized international theory and the extent to which it is embodied in national laws and applied in national judicial decisions.

II. Extraterritorial Criminal Jurisdiction and World Order Considerations

The term jurisdiction, whether it applies to civil or criminal matters, includes the powers to prescribe, adjudicate, and enforce. It also includes the means by which the exercise of jurisdiction is obtained over a person. In the post-Westphalian state-centric system of international law predicated on sovereignty, these powers have been reserved to states. <=32> n31 By implication, these powers include an entity exercising some of the attributes of sovereignty. <=33> n32 A sovereign state or a legal entity that has some sovereign attributes can enforce the prescription of another state, or of international law, even though the enforcing power may not have prescribed what it enforces. <=34> n33

[*90] The powers to prescribe, adjudicate, and enforce derive from sovereignty; thus, the exercise of national criminal jurisdiction has historically been linked, if not limited, to the territory of a state and, by extension, to the territory under the dominion and control of a given legal authority exercising de jure or de facto sovereign prerogatives. <=35> n34

Sovereignty and prescriptive jurisdiction are inextricably linked, but adjudicative and enforcement jurisdiction are not necessarily linked to sovereignty. <=36> n35 The reason for that contextual limitation is to avoid jurisdictional conflicts between states, which can threaten the stability of the international legal order. It also provides consistency and predictability in the exercise of the jurisdictional functions of states so as to avoid potential denial of rights and abuse of judicial processes by exposing persons to multiple prosecutions for the same conduct. Linking jurisdiction to territoriality, though allowing it to extend extraterritorially in cases of a valid legal nexus to the enforcing state, is the most effective way to achieve these results. That is why private international law provides some rules for the resolution of jurisdictional conflicts between states. <=37> n36 This is also why exceptions to territoriality [*91] are subject to certain limitations. This is particularly true of universal jurisdiction when exercised without territorial links. <=38> n37

Sovereignty does not limit the exercise of criminal jurisdiction to single states; rather, it can be extended to collective state action. This concept was applied in connection with the establishment by the WWII Allies of the IMT <=39> n38 in 1945 and the International Military Tribunal for the Far East sitting at Tokyo <=40> n39 (IMTFE) in 1946. The power that the Allies exercised collectively was based on the power they could have exercised singularly.

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for it is not to be doubted that any nation has the right thus to set up special courts to administer law. <=41> n40

In both the IMT and IMTFE, the states in question exercised their powers to enforce international criminal law on a territorial jurisdictional basis because they exercised de facto sovereign prerogatives over the occupied territories where these tribunals were established. Subsequently, in 1993 and in 1994, the Security Council established, pursuant to its powers under Chapter VII of the United Nations Charter, <=42> n41 the ICTY <=43> n42 and the ICTR, <=44> n43 respectively. In these two [*92] instances, the Security Council assumed a quasi-sovereign prerogative applicable to a territorial context. <=45> n44 The Council enunciated substantive legal norms, which are extant in international criminal law, and provided for their territorial enforcement through these two ad hoc tribunals. <=46> n45 ']The ICC, however, acts pursuant to a delegation of jurisdictional power granted by the state parties to its establishing treaty, and it is therefore only applicable to state parties. This, however, does not mean that nationals of non-parties cannot be subject to the ICC's jurisdiction if they committed a crime within the ICC's jurisdiction: in the territory of a state party or against citizens of a state party, and are found in the territory of a state party or in the territory of a non-party willing to cede jurisdiction to the ICC.

Until the 1920s the practice of states, both with respect to the power to prescribe and the power to enforce, preserved the connection between state sovereignty in its territorial context and the judicial exercise of national criminal jurisdiction. Judge Altamira, in his dissenting opinion in the Lotus case, stated:

It is certain that amongst the most widely recognized principles of international law are the principles that the jurisdiction of a State is territorial in character and that in respect of its nationals a State has preferential, if not sole jurisdiction... .

... I should have much difficulty in recognizing as well founded an attempt for instance on the part of a court, on the basis of a municipal law, to exercise jurisdiction over a foreigner, who resided on board a vessel flying the flag of his own country and [*93] did not land with the intention of remaining ashore, and that for an alleged offence committed outside the territory of the country which claimed to exercise jurisdiction over him. Such an extension of the exceptions hitherto accepted in respect of the principle of territorial and national jurisdiction appears to me to be altogether unwarranted. <=47> n46

During this time, neither the legislation nor the practice of states, save for few exceptions, included extraterritorial criminal jurisdiction except with respect to the conduct of their citizens under the theory of "active personality." <=48> n47 Under this theory, however, a connection exists between the sovereign power of a state to prescribe conduct and its [*94] nationals to which it is extraterritorially applicable. <=49> n48

Since the 1920s, however, states developed national legislation applicable extraterritorially whenever some territorial link existed between the prescribed conduct and its harmful impact within the territory of the state seeking to exercise its criminal enforcement jurisdiction, or whenever the harmful conduct occurred against their citizens. This was based on the theories of "protected interest," also referred to as the theory of "objective territoriality," <=50> n49 and "passive personality." <=51> n50 After the end of World War II, states expanded their power to proscribe, particularly in economic areas, whenever the extraterritorial conduct had a territorial impact and also as a means of protecting their citizens abroad. These extraterritorial jurisdiction theories reflect a territorial connection or a connection between the proscribing and enforcing powers of a state and its nationals.

The reach of a state may be universal with respect to the extraterritorial jurisdictional theories described above, but in all of them there is a connection or legal nexus between the sovereignty and territoriality of the enforcing state, the nationality of the perpetrator or victim, or the territorial impact of the extraterritorially prescribed conduct. Thus, the universal reach of extraterritorial national jurisdiction does not equate with universal jurisdiction. Nor does the fact that conduct that is universally condemned necessarily imply that universal jurisdiction is applicable to such conduct.

The indiscriminate use of the term "universal" as a spatial and temporal characterization of legal concepts such as jurisdiction, and also in connection with moral concepts and expressions of condemnation caused

terminological confusion evident in the writings of some jurists and in some judicial opinions. <=52> n51 Advocates of international criminal [*95] accountability see universal jurisdiction as the most effective means to accomplish their goal. Frequently, however, they rely on certain judicial opinions and legal writings as support for the proposition that unbridled universal jurisdiction is not a mere desideratum, but established law. The reliance on such sources, however, is often unjustified or stretched too far.[su'51a'] Thus, they cross the line between the lex lata and de lege ferenda. Conversely, major scholarly organizations dedicated to the same goal have preserved this important legal distinction between what is and what ought to be. Among them are the International Association of Penal Law and the International Law Association, which have long expressed the desideratum that states exercise universal jurisdiction over certain international crimes, but without making unfounded claims as to its current existence. <=53> n52 Summarizing this desideratum, the late Professor Donnedieu de Vabres (who was also a judge at the IMT and a founder of the Association Internationale de Droit Penal) aptly stated:

Il est des lors inutile de penetrer le detail des speculations philosophiques par lesquelles on a voulu l'etayer utile-internationalement, universellement utile-et juste, cette competence repond aux desiderata don't s'inspire, pour organiser la repression, la doctrine neo-classique, fondement de presques toutes les legislations positives. <=54> n53

[*96]

III. The Theoretical Foundation of Universal Jurisdiction

The theory of universal jurisdiction <=55> n54 is extraneous to the concept of national sovereignty, which is the historical basis for national criminal jurisdiction. Universal jurisdiction transcends national sovereignty. In addition, the exercise of universal jurisdiction displaces the right of the accused to be tried by the "natural judge," a hallmark of the traditional exercise of territorial jurisdiction. <=56> n55 The rationale behind the exercise of such jurisdiction is: (1) no other state can exercise jurisdiction on the basis of the traditional doctrines; (2) no other state has a direct interest; and (3) there is an interest of the international community to enforce. Thus, states exercise universal jurisdiction not only as national jurisdiction, but also as a surrogate for the international community. In other words, a state exercising universal jurisdiction carries out an actio popularis against persons who are hostis humani generis. <=57> n56

Two positions can be identified as the basis for transcending the concept of sovereignty. The first is the universalist position that stems from an idealistic weltanschauung. This idealistic universalist position recognizes certain core values and the existence of overriding international interests as being commonly shared and accepted by the international community and thus transcending the singularity of [*97] national interests. The second position is a pragmatic policy-oriented one that recognizes that occasionally certain commonly shared interests of the international community require an enforcement mechanism that transcends the interests of the singular sovereignty.

These two positions share common elements, namely: (a) the existence of commonly shared values and/or interests by the international community; (b) the need to expand enforcement mechanisms needed to counter the more serious transgressions of these values/interests; and (c) the assumption that an expanded jurisdictional enforcement network will produce deterrence, prevention, and retribution, and ultimately will enhance world order, justice, and peace outcomes. Under both positions, the result is to give each and all sovereignties, as well as international organs, the power to individually or collectively enforce certain international proscriptions. This theory applies when the proscription originates in international criminal law and not in the national law of a given state. In other words, crimes under exclusive national law cannot give rise to universal jurisdiction.

The universalist and the policy-oriented positions differ as to: (a) the nature and sources of the values/interests that give rise to an international or supranational prescription; (b) what constitutes the international community and its membership; and (c) the nature and extent of the legal rights and obligations incumbent upon states. <=58> n57

The universalist position can be traced to metaphysical and philosophical conceptions arising in different cultures and at different times, but converging in some aspects. For example, in the three monotheistic faiths of Judaism, Christianity, and Islam, full sovereignty rests with the Creator, and transgressions of the Creator's

norms confer the power to enforce by the religious community, irrespective of any limitations in space or time. <=59> n58

[*98] Western jurists and philosophers, as of the fifteenth century, in part based on Christian concepts of natural law, developed an idealist universalist position. But, contrary to the views of some contemporary authors who refer to them, these early jurists and philosophers did not extend their universalist views of certain universal wrongs to universal criminal jurisdiction to be exercised by any and all states. <=60> n59 Cesare Beccaria in his 1764 pamphlet, Dei Delitti e Delle Pene, <=61> n60 expressed an idealist universalist view that there exists a community of nations sharing common values to which all members of the international community are commonly bound to the enforcement of these values, collectively and singularly. But he did not extend it to universal jurisdiction. He expressed his views as follows:

There are also those who think that an act of cruelty committed, for example, at Constantinople may be punished at Paris for this abstracted reason, that he who offends humanity should have enemies in all mankind, and be the object of universal execration, as if judges were to be the knights errant of human nature in general, rather than guardians of particular conventions between men. <=62> n61

Later, Hugo deGroot Grotius, in his two volumes De Jure Belli Ac Pacis, first published in 1625, argued from the same philosophical [*99] premise but relied on a pragmatic policy-oriented approach of pursuing hostis humani generis on the high seas. Grotius' premise was the notion of mare liberum, which was not necessarily a new doctrine, but under which he posited the right of freedom of navigation on the high seas. Because the right of freedom of navigation on the high seas was applicable universally, it followed that an infringement upon that right by pirates would be universally punished. It is that doctrine that became the foundation of the modern theory of universal jurisdiction for certain international crimes.

For the naturalist, a concept of universal wrongs can be identified with reference to natural law, <=63> n62 while for the legal positivist, it cannot. <=64> n63 Thus, the evolution of legal concepts, such as nullum crimen sine lege, nulla poena sine lege, <=65> n64 whose genesis is in the writings of Montesquieu, <=66> n65 but later reflected in the positivism of criminal law of the 1800's European criminal codifications, <=67> n66 flew in the face of the abstract notion of universal wrongs identified by reference to natural law. <=68> n67 These codifications embodied the principles of legality in criminal law and made it difficult for the continued recognition of the universalist position expressed by a few earlier jurists and philosophers.

Many legal scholars since the nineteenth century have advocated the theory of universal jurisdiction without necessarily clarifying the philosophical foundation of that theory or its legal elements. Instead they argue much like the early universalists that certain international crimes imply that all states, irrespective of any existing national [*100] legislation, and even contrary to national legislation, have the power to prosecute, irrespective of any territorial connection to the crime, or any connection to the nationality of the perpetrator or the victim. Perhaps the most articulate expression of the question was made in 1924 by Donnedieu de Vabres, who stated:

Dans sa notion elementaire et son expression absolue, le systeme de la repression universelle, ou de l'universalite du droit de punir est celui qui attribue vocation aux tribunaux repressifs de tous les Etats pour connaitre d'un crime commis par un individu quelconque, en quelque pays que ce soit.

L'Etat qui, se prevalant de cette doctrine, exerce sa competence unverselle, ne revendique nullement un droit de souverainete qui lui serait propre, soit a l'egard de lacte qu'il reprime, soit vis-a-vis de son auteur. Il n'agit pas pour la defense de ses interets. Il intervient, a defaut de tout autre Etat, pour eviter, dans un interet humain, une impunite scandaleuse. Il suit de la que son intervention a un caractere tres subsidiaire. Elle ne se manifeste que si l'Etat qui juge a le delinquant en sa possession.

Tel qu'on vient de le definir, le systeme de l'universalite du droit de punir a sa modeste origine dans un texte du Code de Justinien, C. III, 15, Ubi de criminibus agi oportet, 1, qui, determinant le ressort, en matiere penale, des

gouverneurs de l'Empire, donne a la fois competence au tribunal du lieu de commission du delit, et a celui du lieu d'arrestation du coupable (judex deprehensionis). L'interpretation tendancieuse des glossateurs substitua au judex deprehensionis le judex domicilli.

Neanmoins, il fut admis pendant tout le moyen age, dans la doctrine italienne, et dans le droit qui gouvernait les rapport des villes lombardes, qu'a l'egard de certaines categories de malfaiteurs dangereux - banniti, vagabundi, assassini, - la simple presence, sur le territoire, du criminel impuni, etant une cause de trouble, donnait vocation a la cite pour connaitre de son crime. Au xvi siecle, Doneau retablit la veritable signification du texte fondamental, C. III. 15. 1, favorable au forum deprehensionis. Ayrault ecrit, a la meme epoque: "Il semble que, franchement et volontairement, nous nous rendions sujets aux lois de la patrie dont nous corrompons le repos." Au xvii siecle, [*101] cette idee se fait jour dans les ecrits du Hollandais Paul Vo<um e>t, au xviii siecle, dans ceux de l'Allemand Henricus de Cocceji. Elle penetre jusqu'a notre epoque, ou elle est frequemment reproduite. Il en resulte que la commission de certains crimes, d'une exceptionnelle gravite, est une source de competence universelle.

Il appartint a Grotius qui fut, a l'aube du xvii siecle, le grand vulgarisateur, sinon le fondateur du droit international, d'attacher a la theorie de la competence universelle toute sa valeur philosophique. A l'heure ou les grandes unites politiques, de constitution recente, se dressaient les unes contre les autres, il formula, comme un precurseur, la loi de la solidarite humaine. Il existe, dit-il, une societe universelle des hommes, societas generis humani. Le crime, envisage comme une violation du droit naturel qui la regit, droit non ecrit, mais grave dans la conscience individuelle, est une offense a l'humanite tout entiere. L'obligation de punir qu'il engendre est universelle. Elle se traduit, pour l'Etat dans le pouvoir duquel le criminel est tombe, par l'alternative fameuse d'extrader ou de punir: aut dedere, aut punire. L'influence de Grotius peut s'observer dans la doctrine de ses successeurs hollandais, scandinaves ou allemands. On la rencontre au xviii siecle, et dans la periode revolutionnaire, ou la pure tendance individualiste et humanitaire resiste au socialisme, a l'etatisme issus du Contrat social. On la retrouve, au cours du xix siecle, dans les ecrits de nombreux theoriciens, et dans quelques legislations positives. <=69> n68

This doctrinal view, which is essentially a policy-oriented one despite being grounded in natural law philosophy, has received increasing support among legal scholars in the twentieth century, <=70> n69 but it has not been supported by the practice of states. In fact, there are only a few reported cases known to scholars in which such an unfettered universal jurisdiction doctrine has been applied without the existence of a link to the sovereignty or territoriality of the enforcing state. <=71> n70

[*102] A 1990 Report of the Council of Europe aptly summarizes the contemporary situation of the law and practice of states: <=72> n71

There are considerable differences of opinion among member states concerning the purpose of the principle of universality, according to which criminal jurisdiction is exercised over offences committed abroad, without the requirements underlying the previously mentioned principles of jurisdiction necessarily being present.

Some states are only prepared to apply the principle to certain offences if they are authorised or obliged to do so under international law. Some conventions authorise the assertion of universal jurisdiction, others require such jurisdictional action so as not to leave certain offences unpunished. The majority of states have felt at liberty to introduce the principle in their national legislation without any such authorisation or obligation. Nevertheless, many of the latter group have evidently tried to keep in line with existing international agreements when establishing universal jurisdiction. However, there are also a number of states that have reserved a considerable degree of universal jurisdiction over offences not covered by any agreement. They assume that any conflict of competence with other states, which may arise from their extensive claims, can be avoided in practice by a broad application of the principle of discretionary jurisdiction, or by imposing conditions for prosecution, such as the requirement for authorisation from a central body or for the presence of the suspect. The latter requirement is, for that matter, imposed by all states on the exercise of jurisdiction based on this principle, at least in practice.

Some conventions would seem to permit the assertion of universal jurisdiction in relation to offences covered therein. The Red Cross Conventions of 1949 would be examples, though not [*103] all states party to these conventions have asserted universal jurisdiction under these instruments. The 1961 Single Convention on Narcotic Drugs and the amending Protocol of 1972, and the 1971 Convention of Psychotropic Substances are also examples. Some states have established jurisdiction based on universality in respect of offences covered by these treaties.

Other conventions clearly envisage or require the taking of universal jurisdiction: treaties on counterfeiting, piracy, hijacking and actions endangering the safety of civil aviation afford examples. Virtually all states have established universal jurisdiction over such offences. Comparable conventions envisaging the taking of universal jurisdiction are those relating to the combat against terrorism, the prevention of torture, the protection of diplomatic staff, the physical protection of nuclear material and the taking of hostages.

The maxim aut dedere aut judicare is reflected in an increasing number of conventions, although the way it is translated into national legislation and its effect differ from state to state and even from category to category of offence within a single country.

There is sometimes no clear distinction between the principle of universality and other principles on which extraterritorial jurisdiction is based, such as the "representation" principle or the principle of protection. There are often differences of opinion as to which principle should form the basis of a particular term of extraterritorial jurisdiction. It has also been shown that, under special circumstances, forms of jurisdiction have been established which cannot be classified under any of the traditional principles of jurisdiction described above. These can be found, for example, in military law, in certain emergency laws and in legislation regarding taxes and customs duties.

The difficulty of categorising these different forms of extraterritorial legislative criminal jurisdiction can perhaps be explained by the fact that they do not always have a sound theoretical basis. The committee considered it its task to study the theoretical basis for such jurisdiction and, where possible, to [*104] describe it or develop it further. <=73> n72

Universal jurisdiction has indeed been frequently confused with other theories of extraterritorial criminal jurisdiction. But, as discussed below, with few exceptions, the legislation and practice of states overwhelmingly evidences a connection between the crime and the enforcing state based on the crime's territorial impact or because of the nationality of the perpetrator or the nationality of the victim. As discussed below, explicit or implicit recognition of the theory of universal jurisdiction in conventional international law has been limited to certain international crimes. Nevertheless, the application of universal jurisdiction for certain international crimes does not necessarily mean that it should be devoid of any connection to the enforcing state, or that it has precedence over other theories of jurisdiction. Instead, universal jurisdiction for certain international crimes is a theory of jurisdiction that is predicated on the policy of enhancing international criminal accountability, whereby the enforcing state acts on behalf of the international community in fulfillment of its international obligations, and also in pursuit of its own national interest. But that does not mean that this enforcing exercise supplants the enforcing interests of other states, or for that matter, of international organs like the ICTY, ICTR, and ICC. That is why a balancing test must be applied in the exercise of universal jurisdiction.

Scholars, including this writer, support the proposition that an independent theory of universal jurisdiction exists with respect to jus cogens international crimes. The premises for such a theory are both the historic idealistic universalist position and the pragmatic policy position mentioned above. <=74> n73 In order to support such a theory, however, it is necessary to have an understanding of the historical evolution of that theory and its contemporary content and application. Furthermore, it is indispensable to have guidelines for the

application of this theory in order to avoid jurisdictional conflicts, disruptions of world order, abuse and denial of justice, and to enhance predictability of jurisdictional priorities and consistency in jurisdictional disputes and the outcomes.

[*105]

IV. Universal Jurisdiction in International Criminal Law

The primary sources of substantive international criminal law are conventions and customs that resort to general principles of law and the writings of scholars essentially as a means to interpret conventions and customs. <=75> n74 Conventional international law is the better source of substantive international criminal law insofar as it is more apt to satisfy the principle of legality, nullum crimen sine lege, nulla poena sine lege. <=76> n75 But that does not exclude customary international law or general principles of law as sources of substantive international criminal law, provided they meet the standard of specificity equivalent to that of conventional international law.

The inquiry into universal criminal jurisdiction and its application <=77> n76 must be made by reference to: (1) national legislation to determine whether it exists in most national legal systems representing the families of the world's major criminal justice systems; <=78> n77 and (2) conventional international criminal law to determine the existence of international legal norms that provide for the application of universal jurisdiction by national criminal justice systems and by internationally established adjudicating bodies. <=79> n78

The research of scholars as to national legislation evidences that very few states have provisions allowing their legal systems to exercise universal jurisdiction over anyone who has committed a jus cogens international crime, irrespective of the time and place of the crime's [*106] occurrence, its impact upon the territory of the enforcing state, its commission by one of its nationals, or its commission against one of its nationals. <=80> n79 The judicial practice of states is also limited. To the knowledge of this writer, no state practice presently exists whereby states have resorted to universal jurisdiction without the existence of national legislation, even when international treaties provide for such a jurisdictional basis.

The collective practice of states in establishing international judicial organs since the end of WWI, including five international investigating commissions and four international ad hoc criminal tribunals, evidences that none of them has been based on the theory of universal jurisdiction. <=81> n80 The Statute of the ICC also does not establish universal jurisdiction for "situations" referred to it by states but only a universal scope as to the crimes within the jurisdiction of the Court. <=82> n81 These crimes are: genocide, crimes against humanity, and war crimes, which are jus cogens international crimes. <=83> n82 Since "referrals" <=84> n83 to the ICC are made by a state party, <=85> n84 or by a non-party state, <=86> n85 it is difficult to argue that the ICC's jurisdiction flows from the theory of universal jurisdiction. However, "referrals" by the Security Council for the crimes within the jurisdiction of the Court constitute universal jurisdiction because they can transcend the territoriality of a state party. <=87> n86 Such a provision could be interpreted as allowing the Security Council to refer a "situation" to the ICC, even when it applies to crimes occurring outside the territory of a state party and involving the responsibility of nationals from non-parties.

International criminal law evidences the existence of twenty-seven crime categories. <=88> n87 These twenty-seven categories are evidenced by 276 [*107] conventions concluded between 1815 and 1999. <=89> n88 Some of these conventions include penal provisions that distinguish them from other conventional international law. These international crimes are: aggression, genocide, crimes against humanity, war crimes, crimes against the UN and associated personnel, unlawful possession and/or use of weapons, theft of nuclear materials, mercenarism, apartheid, slavery and slave-related practices, torture, unlawful human experimentation, piracy, aircraft hijacking, unlawful acts against civil maritime navigation, unlawful acts against internationally protected persons, taking of civilian hostages, unlawful use of the mail, nuclear terrorism, financing of international terrorism, unlawful traffic in drugs and dangerous substances, destruction and/or theft of national treasures and cultural heritage, unlawful acts against the environment, international traffic in obscene materials, falsification and counterfeiting of currency, unlawful interference with submarine cables, and bribery of foreign public officials. <=90> n89 Among the penal provisions contained in these conventions there are provisions on criminal jurisdiction, and, of these, only thirty-two conventions contain a reference to a jurisdictional theory <=91> n90 and among them only a few, discussed below, can be construed explicitly or implicitly as reflecting universal jurisdiction. Conversely, ninety-eight provisions reflect the obligation to prosecute and sixty-eight to extradite, evidencing the legislative choice of this enforcement technique over that of conferring universal jurisdiction to any and all states. <=92> n91

Because conventional and customary international criminal law overlap with respect to certain crimes, it is useful to examine whether universal jurisdiction vis-a-vis jus cogens international crimes arises under any of the sources of international criminal law. What follows is an assessment of the evolution of universal jurisdiction with respect to jus cogens international crimes based on conventional and customary international law sources. These jus cogens international crimes are: [*108] piracy, slavery and slave-related practices, war crimes, crimes against humanity, genocide, apartheid, and torture. <=93> n92

It is noteworthy that several international criminal law conventions that apply to crimes that have not risen to jus cogens contain a provision on universal jurisdiction. This evidences the recognition and application given to this theory.

The jus cogens international crimes discussed below in the order of their emergence in international criminal law are: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against humanity; (5) genocide; (6) apartheid; and (7) torture.

A. Piracy

Piracy is deemed the basis of universal criminal jurisdiction for jus cogens international crimes, but that was not always the case. The term piracy has its origins in Greek literature as peiretes and is reported in Homer's Iliad <=94> n93 and The Odyssey, <=95> n94 as well as in Thucydides, History of the Peleponnesian War. <=96> n95 It then appeared in Roman literature, notably in the writings of Cicero, who referred to pirates as pirata and praedones (land-based predators, later referred to as brigands and bandits). <=97> n96 Cicero is also credited with the notion that pirata and praedones are hostis humani generis. <=98> n97 Grotius, relying on Aristotle and Cicero, elaborated on the theory of hostis humani generis and its application in time of war, which was the context in which piracy was viewed at that time. <=99> n98

[*109] The early history of defining piracy was not, however, linked to universal jurisdiction as it was in the nineteenth and twentieth centuries. Professor Alfred Rubin authoritatively documents this history up to contemporary times. <=100> n99 Alberigo Gentili <=101> n100 and Balthasar de Ayala <=102> n101 adopted the universalist view of piracy and its universal punishment by all states because it was dictated by ius gentium. But their application of piracy was essentially in the context of war as the phenomenon was then seen. Grotius, however, whose approach was more pragmatic, saw the problem of dealing with pirates as part of his view of a certain order on the high seas. From a jurisdictional perspective, Grotius, an advocate of freedom on the high seas, mare liberum, posited the principle that ships on the high seas were an extension of the flag state's territoriality. Thus, the flag state could exercise its jurisdiction over non-national ships and persons for acts of piracy. It was not, therefore, an application of universal jurisdiction whereby any and all states could exercise their jurisdiction over any and all pirates. Instead, it could be said that it was the recognition of the universal application of the flag state's jurisdiction in its right to defend against pirates and eventually to pursue them as both a preventive and punitive measure.

The early law of piracy and its jurisdictional applications developed in the national laws and practices of the major sea-faring nations [*110] between the 1600s and 1800s. Though they developed along separate legal concepts and legal techniques, the results were similar. The reason is probably their commonality of interests in securing themselves from the perils of piracy. These developments were based on the recognition of the flag state's power to seize and punish pirates who committed that crime, as it was defined by national law. This was particularly the case with England and in the early years of the United States of America. <=103> n102 As Rubin posits the evolution of the jurisprudence, statutory enactments and the writings of scholars were based on a misunderstanding of the term piracy. <=104> n103 Nevertheless, universal jurisdiction to prevent and suppress piracy has been widely recognized in customary international [*111] law as the international crime par excellence to which universality applies.

Positive international law in the twentieth century has clearly established universal jurisdiction for piracy. <=105> n104 The 1958 Geneva Convention on the Law of the High Seas <=106> n105 includes two provisions on jurisdiction over piracy. Article 18 states:

A ship or aircraft may retain its nationality, although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the state from which such nationality was derived.

Article 19 states:

On the high seas, or in any other place outside the jurisdiction of any state, every state may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the state which carried out the seizure may decide upon the penalties to be imposed and may also determine the action to be taken with regard to the property, subject to the rights of third states acting in good faith.

This Article clearly establishes universal jurisdiction.

Then, in 1982, the Montego Bay Convention on the Law of the Sea <=107> n106 reiterated Article 19 of the 1958 Geneva Convention by incorporating the text verbatim into Article 150:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the person and seize the property on board. The courts of the State which carried out the seizure may decide upon the [*112] penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

Thus, universal jurisdiction for the crime of piracy is firmly established in positive international law.

B. Slavery

Slavery has been associated with piracy since 1815 when the Declaration of the Congress of Vienna equated traffic in slavery to piracy. Since then, there has been a gradual development in the positive international law of slavery and slave-related practices based on the same type of universal condemnation that existed with respect to piracy. Nevertheless, universal condemnation, which is evident in twenty-seven conventions on the subject of slavery and slave-related practices from 1815 to 1982, did not, as discussed below, always produce the resulting universality of jurisdiction. <=108> n107 There are also forty-seven other conventions between 1874 and 1996 relating to slavery, <=109> n108 which, like piracy, is deemed part of jus cogens. <=110> n109

An analysis of the text of these conventions reveals that only a few establish universal jurisdiction or allow a state to exercise it. <=111> n110 [*113] Conventions concerning the suppression of the traffic in women and children and "white slave traffic" <=112> n111 and other slave-related practices do not contain specific provisions on universal jurisdiction, nor does the Forced Labor Convention. <=113> n112

It may be significant that, with respect to traffic in slavery on the high seas, universal jurisdiction is more evident in treaty provisions insofar as that traffic has been equated to piracy. In this situation, universal jurisdiction is necessitated by the medium used by traffickers, namely, the high seas, since it is the most effective way to combat such traffic. However, with respect to sexual exploitation of persons, it seems that the conventions have left it to the states to decide what jurisdictional theories they would rely upon. This may be explained in part by the fact that these practices are conducted by means of transiting through the territory of states and that the ultimate stage of such trafficking is exploitation on the territory of a state. As a result, a state could exercise territorial criminal jurisdiction to combat this international crime without the need for universal jurisdiction. This neutral position on universal jurisdiction is expressed in the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, <=114> n113 which in Article 11 states "nothing in the present Convention shall be interpreted as determining the attitude of a Party towards the general question of the limits of criminal jurisdiction under international law."

Whenever slavery and slave-related practices are committed within the context of an armed conflict, it is subject to international humanitarian law and becomes a war crime. But in such cases, even [*114] though the crime is international and is part of jus cogens, the jurisdictional theory relied upon is usually territoriality. <=115> n114

The provisions contained in all the treaties relevant to slavery and slave-related practices characteristically require the signatory states to take effective measures to prevent and suppress slavery, and also provide specific

obligations as to criminalization and punishment, extradition, and mutual legal assistance. All of these provisions can best be characterized as reflecting the concept of aut dedere aut judicare. This is even true with respect to the more recent treaty provisions that link slavery to piracy. For example, the 1958 Geneva Convention on the Law of the High Seas <=116> n115 provides in Article 13 that:

every state shall adopt effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag, and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall ipso facto be free.

The 1982 Montego Bay Convention on the Law of the Sea adopted an almost identical provision in Article 99. <=117> n116

As in the case of piracy, slavery has all but disappeared in the twentieth century, and that may well have made it possible for states to recognize the application of the theory of universal jurisdiction to what has heretofore been essentially universally condemned. While customary international law and the writings of scholars recognize slavery and slave-related practices as a jus cogens international crime, the practice of states has not evidenced the fact that universal criminal jurisdiction has been applied to all forms and manifestations of slavery and slave-related practices. <=118> n117

[*115] It is also significant that the dramatic increase in the traffic of women and children for sexual exploitation, which has taken place in the last two decades, has only recently been the subject of a specialized convention: the Protocol on International Traffic in Women and Children, which is part of the Convention on Organized Crime of December 2000. <=119> n118 With respect to this category of jus cogens international crimes, it was essentially the writings of scholars that has driven the notion that universal criminal jurisdiction extends to all manifestations of this category of international crimes. <=120> n119

C. War Crimes

Of all international crimes, the war crimes category has the largest number of instruments that include a wide range of prohibitions and regulations. <=121> n120 Many of these instruments specifically embody, codify, or evidence customary international law. The four Geneva Conventions of 1949 <=122> n121 and their two Additional Protocols <=123> n122 are the most [*116] comprehensive codifications of prohibitions and regulations, and their provisions include the most specific and wide-ranging penal norms. <=124> n123 The so-called "Law of Geneva" overlaps with the so-called "Law of the Hague," <=125> n124 much of the latter having been incorporated into the former. The "Law of Geneva" has become part of the customary law of armed conflicts. <=126> n125 The violations of the Geneva Conventions and the so-called "Laws and Customs of War" constitute war crimes and are jus cogens international crimes.

With respect to the four Geneva Conventions of 1949, the "grave breaches" are contained in Articles 50, 51, 130, and 147, respectively. <=127> n126 With respect to Protocol I, "grave breaches" are contained in Article 85. <=128> n127 There are, however, no provisions in these Conventions that specifically refer to universal jurisdiction. One can assume that the penal duty to enforce includes implicitly the right of the State Parties to exercise universal jurisdiction under their national laws. This arises out of the obligation to prevent and repress "grave breaches" and also out of the provisions of Articles 1 and 2, which are common to the four Geneva Conventions, to wit:

Article 1

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

Article 2

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the [*117] state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof. <=129> n128

While no convention dealing with the law of armed conflict contains a specific provision on universal jurisdiction, it is nevertheless valid to assume that the 1949 Geneva Conventions and Protocol I provide a sufficient basis for states to apply universality of jurisdiction to prevent and repress the "grave breaches" of the Conventions. But none of the other conventions dealing with the law of armed conflict contain a provision on universal jurisdiction.

Customary international law as reflected in the practice of states does not, so far, in the judgment of this writer, warrant the conclusion that universal jurisdiction has been applied in national prosecutions. <=130> n129 There are a few cases in the practice of states that are relied upon by some scholars to assert the opposite,[su'129a'] but such cases are so few and far between that it would be incorrect to conclude that they constitute practice. Nevertheless, it can be argued that customary international law can exist irrespective of state practice if there is strong evidence of opinio juris, which is the case with respect to war crimes.

The recognition of universal jurisdiction for war crimes is essentially driven by academics' and experts' writings, which extend the universal reach of war crimes to the universality of jurisdiction over such crimes. The 1949 Geneva Conventions require state parties to "respect and ensure respect," while the "grave breaches" provisions of the [*118] Conventions and Protocol 1 require enforcement. This has been interpreted by some not only as giving parties the right to adopt national legislation without universal jurisdiction, but also as creating an obligation to do so. There is, however, some confusion arising out of collective enforcement mechanisms, such as the IMT, IMTFE, ICTY, and ICTR. The IMT and IMTFE was collective action based on the inherent powers of the involved states as participants in the respective armed conflicts and also on the basis of territoriality. <=131> n130 The ICTY and the ICTR are forms of collective enforcement derived from the power of the Security Council under Chapter VII of the United Nations Charter, but these tribunals' jurisdiction is territorial. In all of these situations, criminal jurisdiction is based on territoriality, and, with respect to the IMT and IMTFE, it could be said to have also relied on "passive personality." As stated above, the ICC does not have universal jurisdiction, though its reach is universal, except insofar as "referrals" from the Security Council to the ICC, which are based on the theory of universality. <=132> n131

Notwithstanding the above, there is nothing in the Law of Armed Conflict that prohibits national criminal jurisdiction from applying the theory of universality with respect to war crimes. It can even be argued that the general obligations to enforce, which include the specific obligations to prevent and repress "grave breaches" of the 1949 Geneva Conventions and Protocol I, allow states to expand their jurisdiction to include the theory of universality.

D. Crimes Against Humanity

Crimes against humanity were first defined in positive international criminal law in Article 6(c) of the Nuremberg Charter as:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious [*119] grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the domestic law of the country where perpetrated. <=133> n132

Similarly, Article 5(c) of the IMTFE Charter <=134> n133 and Article 2(c) of Control Council Law No. 10 <=135> n134 provided for the prosecution of "crimes against humanity." In prosecutions under all three instruments, however, jurisdiction was territorial in nature, though it can also be argued that it extended to "passive personality." Jurisdiction over "crimes against humanity" as provided for in Article 5 of the ICTY, <=136> n135 Article 3 of the ICTR, <=137> n136 and Article 7 of the ICC is likewise territorial except insofar as "referrals" to the ICC by the Security Council, in which case the jurisdiction is universal. <=138> n137

It is also important to note that there is no specialized convention for "crimes against humanity." <=139> n138 As a result, one cannot say that there is conventional law providing for universal jurisdiction for "crimes against humanity." <=140> n139 The writing of scholars essentially drives that proposition. A few States have adopted national legislation allowing domestic prosecution of "crimes against humanity" even when committed outside the State's territory and even when committed by or against non-nationals. But these States have also added some additional jurisdictional links as prerequisites for the exercise of such jurisdiction as discussed below. As a jus cogens international crime, "crimes against humanity" are presumed to carry the obligation to prosecute or extradite, and to allow States to rely on universality for prosecution, punishment, and extradition.

[*120]

E. Genocide

The jus cogens crime of genocide did not exist before the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. <=141> n140 In fact, genocide was assumed to be the successor of "crimes against humanity," but its scope is in effect narrower. Article VI of the Convention states:

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction. <=142> n141

It is clear from the plain meaning and language of this provision that jurisdiction is territorial and that only if an "international penal tribunal" is established and only if state parties to the Genocide Convention are also state-parties to the convention establishing an "international penal tribunal" can the latter court have universal jurisdiction. <=143> n142 However, such universal jurisdiction will be dependent upon the statute of that "international penal tribunal," if or when established.

Since the adoption of the Genocide Convention, two international ad hoc criminal tribunals were established, namely, the ICTY <=144> n143 and the ICTR, <=145> n144 in 1993 and 1994, respectively. In 1998, the Statute for the ICC was opened for signature. <=146> n145 All three statutes contain a provision making genocide a crime within the jurisdiction of the court. But that, in itself, does not give these tribunals universal jurisdiction.

Article IV of the ICTY, <=147> n146 and Article II of the ICTR define genocide in much the same way as Articles II and III of the Genocide Convention. <=148> n147 The jurisdiction of both tribunals is territorial; their [*121] competence extends only to crimes committed within the territory of the former Republic of Yugoslavia and Rwanda, respectively. As for the ICC, Article 6 defines genocide in almost the same terms as Article II of the Genocide Convention. <=149> n148 The jurisdiction of the ICC, as stated above, is essentially territorial as to the parties; though the parties can refer cases to the ICC for crimes that did not occur in their territory and are obligated to surrender persons within their territory, whether nationals or non-nationals. Thus, while the reach of the ICC is universal as to "referral" by State Parties under Article 14 and non-State Parties under Article 12(3), "referrals" by the Security Council have a universal scope and also represent a theory of universal jurisdiction.

Notwithstanding the fact that Article VI of the Genocide Convention hardly justifies the contention that it reflects the theory of the universality of jurisdiction, <=150> n149 commentators argue consistently that customary international law has recognized universality of jurisdiction for genocide even though there is no state practice to support that argument. As Professor Meron states, "It is increasingly recognized by leading commentators that the crime of genocide (despite the absence of a provision on universal jurisdiction in the Genocide Convention) may also be cause for prosecution by any state." <=151> n150

Notwithstanding the absence of support in conventional international law and in the practice of states <=152> n151 for the unqualified assertion that genocide ipso facto allows universal jurisdiction, the ICTY's Appeals Chamber in the Tadic case, in connection with genocide, stated that "universal jurisdiction [is] nowadays acknowledged in the case of [*122] international crimes." <=153> n152 Similarly, the ICTR held in the case of Prosecutor v. Ntuyahaga that universal jurisdiction exists for the crime of genocide. <=154> n153

F. Apartheid

The crime of apartheid did not come into existence until 1973 when the United Nations adopted the Convention on the Suppression and Punishment of the Crime of Apartheid. <=155> n154 The Convention provides in Article IV, in pertinent part, as follows:

The States Parties to the present Convention undertake:

(b) To adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons. <=156> n155

Article V of the Convention states:

Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those State Parties which shall have accepted its jurisdiction. <=157> n156

There is clearly a departure in the text of these two articles from the jurisdictional provision contained in the Genocide Convention, <=158> n157 since Articles IV and V of the Apartheid Convention provide unambiguously [*123] for universal jurisdiction. <=159> n158 However, it seems that after the demise of the apartheid regime in South Africa and the lack of prosecutions for apartheid under this convention by the new regime, that the convention may have fallen into desuetude. For the convention to have any future validity, it should be amended to apply to apartheid-like practices.

G. Torture

Torture was established in conventional international law in 1984 in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. <=160> n159 Article 5 of the Convention provides:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.

[*124]

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law. <=161> n160

The premise of the enforcement scheme in this Convention is the concept aut dedere aut judicare. <=162> n161 Throughout the Convention there are several references to the jurisdiction of the enforcing state, and Article 7.1 of the Convention states:

The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution. <=163> n162

But Article 7.1 is more a reflection of aut dedere aut judicare than it is of universal jurisdiction. <=164> n163 It establishes the duty to extradite, and only in the event that a person is not extradited is a state obligated to prosecute, by implication, in reliance on universal jurisdiction.

In the cause celebre case, In re Pinochet, which reached the House of Lords, there was indeed reference to genocide and other international crimes. In the rehearing there was also a reference to universal jurisdiction as a concomitant to international crimes:

That international law crimes should be tried before international tribunals or in the perpetrator's own state is one thing; that they should be impleaded without regard to a long-established customary international law rule in the Courts of other states is another. It is significant that in respect of serious breaches of "intransgressible principles of international customary law' when tribunals have been set up it is with carefully defined powers and jurisdiction as accorded by the states involved; that the Genocide convention provides only for jurisdiction before an international tribunal of the Courts of the state where the crime is committed, that the Rome Statute of the International Criminal Court lays down jurisdiction for crimes in very specific terms but limits its [*125] jurisdiction to future acts. <=165> n164

Notwithstanding this dicta, the issue was whether the courts of the United Kingdom were competent to decide on the extradition request of Spain for the criminal charge of torture, and whether extradition should be granted in accordance with the treaty obligation of the United Kingdom toward Spain and in accordance with United Kingdom law. The United Kingdom is bound by the United Nations' Torture Convention <=166> n165 and is obligated thereunder to prosecute or extradite. Spain, also a state party to the Convention, sought extradition for torture, relying on its passive personality jurisdiction because its nationals were the victims of the alleged crimes of torture. Thus the Pinochet case, in the opinion of this writer, does not stand for the proposition of universal jurisdiction, nor for that matter is the extradition request from Spain for torture based on universal jurisdiction. The Torture Convention, however, does implicitly allow for universal jurisdiction.

H. Other International Crimes to which Universal Jurisdiction Applies

There are several international crimes that have not yet risen to the level of jus cogens but whose founding instruments explicitly or implicitly provide for universal jurisdiction. The 1963 Hijacking Convention provides in Article III(3): "This Convention does not exclude any criminal jurisdiction exercised in accordance with national law." <=167> n166 It therefore implicitly allows national legislation to provide for universal jurisdiction. Similarly, the 1970 Hague Hijacking Convention states in Article IV(3): "This Convention does not exclude any criminal [*126] jurisdiction exercised in accordance with national law." <=168> n167 Article VII further provides:

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. <=169> n168

The 1971 Montreal Hijacking Convention states in Article V(3): "This Convention does not exclude any criminal jurisdiction exercised in accordance with national law." <=170> n169 In addition, the 1988 Montreal Convention on Hijacking provides in Article III:

In Article 5 of the Convention, the following shall be added as paragraph 2 bis:

"2 bis. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offences mentioned in Article 1, paragraph 1 bis, and in Article 1, paragraph 2, in so far as that paragraph relates to those offences, in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to the State mentioned in paragraph 1(a) of this Article. <=171> n170

All the treaty provisions mentioned above implicitly allow for universal jurisdiction if national legislation provides for it. The following treaty provisions make it more explicit.

The 1988 Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation states in Article 7(4, 5):

4. The rights referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the State in the [*127] territory of which the offender or the alleged offender is present, subject to the proviso that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended.

5. When a State Party, pursuant to this article, has taken a person into custody, it shall immediately notify the States which have established jurisdiction in accordance with article 6, paragraph 1 and, if it considers it advisable, any other interested States, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction. <=172> n171

Article X(1) of this Convention further provides as follows:

1. The State Party in the territory of which the offender or the alleged offender is found shall, in cases to which article 6 applies, if it does not extradite him be obliged, without exception whatsoever and whether or not the

offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State. <=173> n172

The 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf provides in Article III:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when the offence is committed:

(a) against or on board a fixed platform while it is located on the continental shelf of that State; or

(b) by a national of that State.

2. A State Party may also establish its jurisdiction over any such [*128] offence when:

(a) it is committed by a stateless person whose habitual residence is in that State;

(b) during its commission a national of that State is seized, threatened, injured or killed; or

(c) it is committed in an attempt to compel that State to do or abstain from doing any act.

3. Any State Party which has established jurisdiction mentioned in paragraph 2 shall notify the Secretary-General of the International Maritime Organization (hereinafter referred to as "the Secretary-General"). If such State Party subsequently rescinds that jurisdiction, it shall notify the Secretary-General.

4. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States Parties which have established their jurisdiction in accordance with paragraphs 1 and 2 of this article.

5. This Protocol does not exclude any criminal jurisdiction exercised in accordance with national law. <=174> n173

The 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents states in Article III:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set forth in article 2 in the following cases:

(a) when the crime is committed in the territory of that State or on board a ship or aircraft registered in that State;

(b) when the alleged offender is a national of that State;

(c) when the crime is committed against an internationally protected person as defined in article 1 who enjoys his status as such by virtue of functions which he exercises on behalf of that State.

[*129]

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over these crimes in cases where the alleged offender is present in its territory and it does not extradite him pursuant to article 8 to any of the states mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.
<=175> n174

The 1979 Convention Against the Taking of Hostages states in Article V:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over any of the offences set forth in article 1 which are committed:

(a) in its territory or on board a ship or aircraft registered in that State;

(b) by any of its nationals or, if that State considers it appropriate, by those stateless persons who have their habitual residence in its territory;

(c) in order to compel that State to do or abstain from doing any act; or

(d) with respect to a hostage who is a national of that State, if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 1 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law. <=176> n175

The 1994 Convention on the Safety of United Nations and Associated Personnel takes the same jurisdictional approach of the Convention on Internationally Protected Persons. Article X of the United Nations [*130] Personnel Convention states:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in article 9 in the following cases:

(a) When the crime is committed in the territory of that State or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State.

2. A State Party may also establish its jurisdiction over any such crime when it is committed:

(a) By a stateless person whose habitual residence is in that State;

(b) With respect to a national of that State; or

(c) In an attempt to compel that State to do or abstain from doing any act.

3. Any State Party which has established jurisdiction as mentioned in paragraph 2 shall notify the Secretary-General of the United Nations. If such State Party subsequently rescinds that jurisdiction, it shall notify the Secretary-General of the United Nations.

4. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in article 9 in cases where the alleged offender is present in its territory and it does not extradite such person pursuant to article 15 to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2.

5. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law. <=177> n176

The 1961 Single Convention on Narcotic Drugs provides in Article 36(4) that "nothing contained in this article shall affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party." <=178> n177 Article [*131] 22(5) of the 1971 Convention on Psychotropic Substances employs identical language to the 1961 Single Convention. <=179> n178

The 1954 Hague Convention for the Protection of Cultural Property explicitly provides for universality in Article 28: "The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention." <=180> n179 The 1970 UNESCO Cultural Convention states in Article 12: "The States Parties to this Convention shall respect the cultural heritage within the territories for the international relations of which they are responsible and shall take all appropriate measures to prohibit and prevent the illicit import, export and transfer of ownership of cultural property in such territories." <=181> n180

The 1923 Convention on Obscene Materials provides in Article II:

Persons who have committed an offence falling under Article 1 shall be amenable to the Courts of the Contracting Party in whose territories the offence, or any of the constitutive elements of the offence, was committed. They shall also be amenable, when the laws of the country shall permit it, to the Courts of the Contracting Party whose nationals they are, if they are found in its territories, even if the constitutive elements of the offence were committed outside such territories.

Each Contracting Party shall, however, have the right to apply the maxim non bis in idem in accordance with the rules laid down in its legislation. <=182> n181

[*132] The 1929 Convention on the Suppression of Counterfeiting states in Article 17: "The participation of a High Contracting Party in the present Convention shall not be interpreted as affecting that Party's attitude on the general question of criminal jurisdiction as a question of international law." <=183> n182

The 1884 Submarine Cables Convention provides in Articles 1, 8, and 9 as follows:

Article 1

The present Convention shall be applicable, outside of the territorial waters, to all legally established submarine cables landed in the territories, colonies or possessions of one or more of the High Contracting Parties.

Article 8

The court competent to take cognizance of infractions of this Convention shall be those of the country to which the vessel on board of which the infraction has been committed belongs.

It is, moreover, understood that, in cases in which the provision contained in the foregoing paragraph cannot be carried out, the repression of violations of this Convention shall take place, in each of the contracting States, in the case of its subjects or citizens, in accordance with the general rules of penal competence established by the special laws of those States, or by international treaties.

Article 9

Prosecutions on account of the infractions contemplated in articles 2, 5 and 6 of this Convention, shall be instituted by the State or in its name. <=184> n183

Lastly, the Mercenaries Convention states in Article 9(2, 3):

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in articles 2, 3, and 4 of the present Convention in cases where [*133] the alleged offender is present in its territory and it does not extradite him to any of the States mentioned in paragraph 1 of this article.

3. The present Convention does not exclude any criminal jurisdiction exercised in accordance with national law. <=185> n184

The Inter-American Convention on Forced Disappearance of Persons sets forth the doctrine of aut dedere aut judicare in Article 4, while Article 6 provides for qualified universal jurisdiction by implication:

When a State Party does not grant the extradition, the case shall be submitted to its competent authorities as if the offense had been committed within its jurisdiction, for the purposes of investigation and when appropriate, for criminal action, in accordance with its national law. Any decision adopted by these authorities shall be communicated to the state that has requested the extradition. <=186> n185

Article 6.1 of the Draft International Convention on the Protection of All Persons from Forced Disappearance states:

1. Forced disappearance and the other acts referred to in article 2 of this Convention shall be considered as offences in every State Party. Consequently, each State Party shall take the necessary measures to establish jurisdiction in the following instances: (a) When the offence of forced disappearance was committed within any territory under its jurisdiction; (b) When the alleged perpetrator or the other alleged participants in the offence of forced disappearance or the other acts referred to in article 2 of this Convention are in the territory of the State Party, irrespective of the nationality of the alleged perpetrator or the other alleged participants, or of the nationality of the disappeared person, or of the place or territory where the offence took place unless the State extradites them or transfers them to an international criminal tribunal. <=187> n186

[*134] Most of the conventions cited above relate to what is commonly termed "terrorism" and international drug trafficking, which are usually crimes committed by individuals and small groups, and are not usually state-sponsored. Consequently, it is easier for states to recognize and apply the theory of universality and other enforcement modalities to these types of actors, than to do so with respect to those who carry out state policy. This explains why, notwithstanding the extensive harm caused by genocide and crimes against humanity, states have been reluctant to have the same enforcement obligations apply as they have provided, for example, with respect to "terrorism" and international drug trafficking. It is this writer's contention, for obvious self-serving political reasons, that international criminal law conventions whose subjects are those persons engaging in State action or carrying out State policy, contain less effective enforcement mechanisms than other similar international conventions. <=188> n187

I. Contemporary State Practice

Two criteria are necessary to establish customary international law, viz., the existence of a sufficient state practice and opinio juris sive necessitatis. <=189> n188 As stated by the International Court of Justice: "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them." <=190> n189

Sufficient state practice is established when the principle at issue has duration, uniformity, consistency, and generality. <=191> n190 State practice consists of: (1) specific legislation enacting the provisions for universal jurisdiction; (2) legislative enactments that authorize the application of universal jurisdiction; and (3) state judicial practice, whether based on national legislation or international conventions. <=192> n191 In the Military and Paramilitary Activities case, the ICJ noted that:

[*135]

the mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States. Bound as it is by Article 38 of its Statute to apply, inter alia, international custom "as evidence of a general practice accepted as law", the Court may not disregard the essential role played by general practice. Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the opinio juris of States is confirmed by practice. <=193> n192

Opinio juris is the external acceptance by states that a practice is recognized as being obligatory. <=194> n193 To establish opinio juris, states must behave in such a manner that their conduct is "evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis." <=195> n194 The conduct of states, however, need not be "in absolutely rigorous conformity" with the rule:

In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule. <=196> n195

Bearing in mind that there are 189 member states of the United [*136] Nations and 195 countries, it is necessary to assess whether the relatively recent enactments of a few states are sufficient to establish a principle of customary international law of universal jurisdiction over war crimes, crimes against humanity, and genocide, to single out the three crimes within the jurisdiction of the ICTY, ICTR, and ICC, and which all writers supporting universality maintain are the three crimes that call for universal jurisdiction. To this writer, piracy, slavery and slave-related practices, torture and apartheid should also be included in this category. This writer is nevertheless doubtful that the small number of divergent national enactments purporting to apply universal jurisdiction are sufficient to satisfy the elements of consistent state practice necessary to constitute customary international law. <=197> n196

V. Some Misconceptions About National State Law and Practice

A number of states have enacted laws with extraterritorial jurisdictional reach. Most of these laws however extend national legislative reach to situations involving their nationals, or whenever their nationals are the victims of certain crimes. Some extend their extraterritorial reach to crimes committed abroad, but whose impact affects the interests of the enforcing state. Among these national laws are those that provide universal jurisdiction based on national law whenever it is permissible or required by an international treaty. In all of these cases, except in the case of Belgium <=198> n197 and Spain, <=199> n198 which are discussed below, national legislation as applied requires that the accused [*137] be present on the territory of the enforcing state. Scholars however do not give sufficient weight to these distinctions and surmise that the possible application of universal jurisdiction without regard to the need for a nexus to the enforcing state is sufficient to conclude that there is sufficient state practice to warrant the conclusion that universal jurisdiction is part of customary international law. There is no doubt that the existence of such national legislation evidences some recognition of the existence of universal jurisdiction. But whether it is sufficient in and of itself to rise to the level of customary international law is questionable. In addition, there are various national judicial decisions that apply universal jurisdiction or refer to it in dicta. Here again, scholars tend to construe these cases as evidencing the application of universal jurisdiction in national judicial decisions. But, as discussed below, there are only two

cases known to this writer, namely Belgium and Spain, in which universal jurisdiction was applied without any nexus to the enforcing state. Two cases are illustrative of this misconception.

In Attorney General of Israel v. Eichmann, <=200> n199 the Israeli district court referred to universal jurisdiction in dictum, but relied on Israel's national legislation conferring upon its courts jurisdiction over "crimes against the Jewish people," based on a law it passed in 1950 that includes genocide and crimes against humanity whenever committed against the "Jewish people," wherever they may be. <=201> n200 Israel's jurisdictional reach is, under its law, universal, <=202> n201 but it is based on a nationality connection to the victim that places such jurisdictional basis under the "passive personality" theory. Admittedly, that law purports to apply to acts which took place before the establishment of the sovereign state of Israel in 1948, but that does not alter the basis of the theory relied upon. Furthermore, there is no historical legal precedent for such a retroactive application of criminal jurisdiction based on nationality, but that goes to the issue of the law's international validity and the [*138] jurisdictional theory relied upon, rather than its jurisdictional basis. <=203> n202 In its judgment, the district court stated:

All this applies to the crime of genocide (including the "crime against the Jewish people") which, although committed by the killing of individuals, was intended to exterminate the nation as a group ... The State of Israel, the sovereign State of the Jewish people, performs through its legislation the task of carrying into effect the right of the Jewish people to punish the criminals who killed its sons with intent to put an end to the survival of this people. We are convinced that this power conforms to the subsisting principles of nations. <=204> n203

In affirming the district court's judgment, the Supreme Court of Israel, while noting full agreement on the protective principle of jurisdiction, insisted upon the universal jurisdiction argument, as this applied not only to Jews, in whose name Israel claimed to exercise protective jurisdiction, but also to Poles, Slovenes, Czechs, and gypsies. <=205> n204 The Supreme Court further stated, "The State of Israel ... was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant." <=206> n205

In Demjanjuk v. Petrovsky, <=207> n206 the United States Court of Appeals for the Sixth Circuit referred to universal jurisdiction over crimes of genocide and crimes against humanity, but relied on the same Israeli law that was based on the theory of passive personality. The Sixth Circuit noted that

Israel is seeking to enforce its criminal law for the punishment of Nazis and Nazi collaborators for crimes universally recognized and condemned by the community of nations. The fact that Demjanjuk is charged with committing these acts in Poland does [*139] not deprive Israel of authority to bring him to trial. <=208> n207

VI. National State Law and Practice

Several states have enacted national legislation in connection with "grave breaches" of the Geneva Conventions, while others have provided for universal jurisdiction in connection with other international conventions, mostly dealing with genocide and terrorism. Some states have enlarged upon the "grave breaches" of the Geneva Conventions by including other violations of the laws and customs of war. Some states have also provided for universal jurisdiction in the case of crimes against humanity, based on their national legislation. In all of these cases, the application of national legislation has always been with respect to situations in which the accused was in the custody of the enforcing state. Thus, national state law and judicial practice has always required at least the presence of the accused in the territory of the enforcing state or whenever the victim or perpetrator is a national of the enforcing state. A brief discussion of these national laws and judicial opinions follows.

The French Penal Code is an example of national legislation that provides for universal jurisdiction if required by treaty and if domestic implementing legislation is in place, but none has been adopted except for the ICC treaty whose statute, as discussed above, allows for universal jurisdiction when a situation is referred to it by the Security Council. France's Criminal Code defines genocide and crimes against humanity but does not specifically provide for universal jurisdiction, though by implication it is possible for French law to provide for it. <=209> n208 [*140] France's criminal jurisdiction has extraterritorial reach based on territorial impact, national security, protection of currency against counterfeiting, nationality of victim or perpetrator. For "active

personality," the condition of "double criminality" is required. Article 113-8 of the French Penal Code <=210> n209 prohibits the exercise of jurisdiction in cases of prior conviction or acquittal. The public prosecutor acting pursuant to a victim's complaint must commence all criminal actions. <=211> n210 Article 113-11 (1) extends jurisdiction for crimes on board of, or against, aircrafts, whenever the aircraft lands in French territory. Thus, other than the presence of the aircraft in its territory, that jurisdiction is universal. Article 113-12 extends jurisdiction on the high seas without any connection to territory or nationality link or protected interest impact, whenever international conventions and French law provide for it. That too can be viewed as a form of universality of jurisdiction . No specific provision in the jurisdiction article refers to jus cogens international crimes whose definitions are contained in Book II of the Code Penal.

Book II of the Code Penal deals with crimes against persons. It starts with Article 211-1, Du Genocide, and Article 212-1, Des Autres Crimes Contre l'Humanite. These articles define the two crimes respectively, but do not include any reference to jurisdiction. In the Code's structure, jurisdiction is covered in Article 113, as referred to above. But there is no legislative provision that established universal jurisdiction for these crimes. Frederic Desportes and Francis Le Gunehec state:

<sqtl> 194. - Les insuffisances du dispositif legislatif. Les crimes contre l'humanite relevant des regles ordinaires de competence et de procedure. Si, effectivement, le particularisme ne se justifie pas en la matiere, il est possible en revanche de regretter en d'autres domaines quelques insuffisances dans le dispositif [*141] legislatif.

Ainsi, il n'a ete prevu aucune disposition particuliere concernant l'application de la loi francaise et la competence des juridictions francaises pour le jugement des crimes commis a l'etranger. En pareil cas, la repression n'est possible, selon les regles generales, que si les crimes ont ete commis par un francais ou sur la personne d'un francais. Cette limitation s'accorde assez mal avec la nature des crimes contre l'humanite. Il aurait ete convenable et conforme au droit international de conferer en la matiere, comme en bien d'autres, une competence universelle aux juridictions francaises;

On peut se demander toutefois si les dispositions des Conventions de Geneve du 12 ao<cir u>t 1949 ne leur ont pas donne directement une telle competence pour un certain nombre <sqtl> d'actes graves <sqtr>. En effet, ces conventions comportent une disposition ainsi redigee <sqtl> chaque partie contractante aura l'obligation de rechercher les personnes prevenues d'avoir commis, ou d'avoir ordonne de commettre, l'une ou l'autre de ces infractions graves et elle devra les deferer a ses propres tribunaux, quelle que soit leur nationalite. Elle pourra aussi, si elle le prefere (...) les remettre pour jugement a une autre Partie contractante <sqtr>. La chambre d'accusation de Paris, saisie par des ressortissants bosniaques rescapes des camps de detention serbes, n'a pas consacre cette interpretation, estimant que les Conventions de Geneve etaient depourvues d'effet en droit interne et qu'elles ne pouvaient des lors recevoir application en l'absence de texte portant adaptation de la legislation francaise a leurs dispositions (Ch. Acc. Paris, 24nov. 1994, Javar et autres, inedit). Il serait cependant possible, pour retenir la competence des juridicitons francaises, de se fonder sur la Convention contre la torture de New York du 10 decembre 1984, a condition toutefois que l'auteur soit <sqtl> trove en France <sqtr> (et sur l'ensemble, Cl. Lombois, De la competence territoriale, R.S.C., 1995, p. 399) <sqtr>. <=212> n211

Thus, France does not provide for universal jurisdiction for genocide [*142] and crimes against humanity, and that also appears to be the case under French military law for war crimes. <=213> n212

Legislation that provides for universal jurisdiction only if there is a territorial connection can be seen in the domestic enactments of Canada and Germany. Among the number of states that have enacted national legislation of a universal reach, Canada's 1985 law (Can. Criminal Code 7(3.71), <=214> n213 which allows for retrospective jurisdiction over the crimes of genocide, crimes against humanity, and war crimes, provides that, at the time of the crime, the conduct constituted a crime under international law as well as under Canadian law, the defendant was within the territorial jurisdiction of Canada, Canada was at war with the country when the crime occurred, and the crime occurred in the territory of that country or was committed by one of its citizens. All of this points to a territorial or sovereign connection that does not exactly make Canada's jurisdiction truly universal. As the Canadian Supreme Court noted in Regina v. Finta:

Canadian courts have jurisdiction to try individuals living in Canada for crimes which they allegedly committed on foreign soil only when the conditions specified in s. 7(3.71) are satisfied. The most important of those requirements, for the purposes of the present case, is that the alleged crime must constitute a war crime or a crime against humanity. It is thus the nature of the act committed that is of crucial importance in the determination of jurisdiction. Canadian courts may not prosecute an ordinary offence that has occurred in a foreign jurisdiction. The only reason Canadian courts can prosecute individuals such as Imre Finta is because the acts he is alleged to have committed are viewed as being war crimes or crimes against humanity. As Cherif Bassiouni has very properly observed, a war crime or a [*143] crime against humanity is not the same as a domestic offence. <=215> n214

Section 6 of the German Criminal Code has frequently been referred to as providing for universal jurisdiction. <=216> n215 It provides that "German criminal law shall further apply, regardless of the law of the place of their commission, to the following acts committed abroad: (1) genocide ... ." <=217> n216 In 1999, however, the German Federal Supreme Court required a "legitimizing connection" before jurisdiction in Germany would attach. <=218> n217 This connection could take the form of a familial link or former domicile. The German judiciary introduced this requirement based upon concerns that the exercise of such jurisdiction would interfere with the sovereignty of other states.

In addition, Section 6(9) of the German Criminal Code allows for the application of German criminal jurisdiction for acts covered by "an international agreement binding on the Federal Republic of Germany ... if they are committed abroad." <=219> n218

[*144] Italy's criminal code, Article 7, also provides for extraterritorial criminal jurisdiction, but requires a nationality or territorial connection. <=220> n219 Switzerland adopted legislation extending universal jurisdiction over the three crimes of genocide, crimes against humanity, and war crimes. <=221> n220

Switzerland's Code Penal Militaire, enacted by the Federal law of 13 June 1927 and amended up to 29 February 2000, contains a jurisdictional basis for universal jurisdiction in Article 9, which states in paragraph 1: "Le present code est applicable aux infractions commises en Suisse et a celles qui ont ete commises a l'etranger." Chapter 6, Articles 108-109 are also a basis for universal jurisdiction for "infractions commises contre le droit des gens en cas de conflit arme." But more conclusive is Article 6 bis of the Code Penal, which states:

1. Le present code est applicable a quiconque aura commis a l'etranger un crime ou un delit que la Confederation, en vertu d'un traite international, s'est engagee a poursuivere, si l'acte est reprime aussi dans l'Etat ou il a ete commis et si l'auteur se trouve en Suisse et n'est pas extrade a l'etranger. La loi etrangere sera toutefois applicable si ell est plus favorable a l'inculpe.

2. L'auteur ne pourra plus etre puni en Suisse: s'il a ete acquitte [*145] dans l'Etat ou l'acte a ete commis, pour le meme acte par un jugement passe en force; s'il a subi la peine prononcee contre lui a l'etranger, si cette peine lui a ete remise ou si elle est prescrite.

On the basis of that law, Switzerland recently prosecuted and convicted a former Rwandan mayor for war crimes. <=222> n221 A number of states have legislation with extra-territorial reach, including universal jurisdiction. Australia has two statutes; the Geneva Conventions Act (1957), whose 6 and 7 provide for universal jurisdiction for "grave breaches," while the War Crimes Act (1945) (Cth), No. 48, also has universal jurisdiction which resulted in the case of Polyukhovich v. Commonwealth of Australia and Another. <=223> n222

Austria's Penal Code, Article 64, as well as 65.1.2 provides for universal jurisdiction for aut dedere aut judicare. It applied its jurisdiction in the case of a crime committed in the conflict in the former Yugoslavia, where the accused was present in Austria, Republic of Austria v. Cvjetkovic. <=224> n223 Denmark's Penal Code Art. 8(5) is similar to that of Austria's, and has been applied in a similar case, Director of Public Prosecutions v. T. <=225> n224

Belgium <=226> n225 probably has the most far-reaching legislation, which has been described as follows:

Belgium probably provides for the most extensive exercise of universal jurisdiction over human rights crimes of any country. Belgian courts can try cases of war crimes (internal or international), crimes against humanity and genocide committed by non-Belgians outside of Belgium against non-Belgians, without even the presence of the accused in Belgium. As a practical matter, however, courts are not likely to pursue an [*146] investigation unless Belgium has a real connection to the case. <=227> n226

The first application of this new law was in March 2001 in the Court of Assises. The accused were two Benedictine sisters, a former professor at the National University of Rwanda (since then at the Catholic University of Louvain), and a former businessman and Minister (husband of the daughter of the personal doctor of the President Habiarimana). All four have been tried and convicted, but all four were physically present in Belgium at the time they were charged with these crimes.

This was not the case, however, when on April 11, 2000, Belgium issued an international arrest warrant against Mr. Abdoulaye Yerodia Ndombasi, the Democratic Republic of Congo's acting Minister of Foreign Affairs. <=228> n227 The warrant was issued by Mr. Vandermeersch, examining judge at the Brussels Tribunal of first instance, pursuant to Belgium's amended Article 7, and sought his extradition for alleged "grave violations of international humanitarian law." <=229> n228 On October 17, 2000, Congo filed an Application with the ICJ requesting that the Court annul Belgium's arrest warrant. Congo challenged Belgium's assertion of extraterritorial jurisdiction, as well as the propriety of Article 5 of the Belgian law, which negates an official immunity.

On December 8, 2000, the ICJ issued an order denying the Congo's request for provisional measures because, as a result of Mr. Yerodia's reassignment from his former position as Minister of Foreign Affairs, the Congo was unable to demonstrate irreparable injury. <=230> n229 The court, however, unanimously rejected Belgium's request that the case be removed from the docket. <=231> n230 The case before the ICJ raises two related [*147] but separate issues. The first is whether Belgium's universal jurisdiction without any connection to that state is a valid exercise of what may be viewed as a form of extraterritorial jurisdiction. The second is whether the exercise of such universal jurisdiction contravenes the 1969 Vienna Convention on Diplomatic Relations.

With respect to the first issue, this case is, for all practical and legal purposes, a case of first impression as there has never before been a state with such extraterritorial jurisdictional reach. One way of considering this issue is to balance the positive effects of such legislation on the enforcement of international criminal law with respect to jus cogens crimes against the negative effects of potentially disrupting the stability, and predictability of the international legal order and its potential for infringing upon human rights because of the possibilities of politically motivated, vexatious prosecutions, and its potential for multiple prosecutions (in light of the non-applicability of non bis in idem to prosecutors by separate sovereigns).

A solution that would preserve the positive effects and mitigate the negative ones is to recognize a state's right to enact such legislation, but not to recognize a state's power to seek to enforce such legislation beyond that state's territory, unless a nexus can be shown to exist with the enforcing state, such as the physical presence of the accused in that state. The result would be that Belgium's law would be declared not to be in violation of international law, but that its attempt to secure the arrest of the accused outside its territory would be invalid unless it can be shown for enforcement purposes that a nexus to the enforcing state exists.

With respect to the second issue, the 1969 Vienna Convention on Diplomatic Relations is not only binding upon Belgium as a treaty obligation, but is also binding upon it as customary international law insofar as the Convention codifies customary international law, which has not been derogated by any state.

In summary, there is no other country that allows for the exercise of such universal jurisdiction. <=232> n231 There are, however, a number of [*148] contemporary national enactments that provide for expanded extraterritorial criminal jurisdiction with respect to its nationals, or when its nationals have been the subject of criminal violations, or when conduct abroad has had a domestic impact deemed to be criminal.

The sum total of national experience, whether in legislative or judicial practice, does not evidence that the application of universal jurisdiction in state practice has risen to the level of customary international law.

International law sources and national law sources must be assessed to determine whether each category offers sufficient evidence of opinio juris and practice at the international or national levels to justify the assertion that

universal jurisdiction, with or without the existence of a nexus to the enforcing state, is part of customary international law.

As stated above, a number of conventions provide, implicitly or explicitly, for universal jurisdiction with respect to certain international crimes, some of which are deemed part of jus cogens. With respect to the latter category, there exists a legal obligation embodied in the maxim aut dedere aut judicare, to prosecute or extradite, and where appropriate to punish those accused, charged or convicted of jus cogens crimes. This is an inderogable obligation incumbent upon all states as a consequence of the jus cogens character of these crimes. Thus, it is an [*149] obligation erga omnes that is binding even upon states that refuse to recognize such an obligation.

It may appear tautological to add that such an obligation exists because it arises also under customary international law, but it is not because it is customary international law that it is elevated to the level of jus cogens. In addition, "general principles of law" also have also been the basis for the elevation of certain international crimes to the level of jus cogens. Furthermore, the writings of the most distinguished publicists also support the proposition that jus cogens crimes require the application of universal jurisdiction when other means of carrying out the obligations deriving from aut dedere aut judicare have proven ineffective. In fact, it could be argued that the establishment of international investigative and judicial organs since WWII, such as the IMT, IMTFE, ICTY, ICTR and ICC embody the very essence of aut dedere aut judicare with respect to jus cogens crimes. There is no doubt that each one of these sources of international law is by itself insufficient to establish the proposition that universal jurisdiction applies to jus cogens crimes, but it is the cumulative effect of these sources that does. This proposition may run contrary to a purist theory of international law that requires each source of law to rise to a certain level of legal sufficiency in order to achieve the status of binding international law. But if the proposed theory of cumulating sources of international law that have not, each in their own right, achieved the level of legal sufficiency is accepted, then it can be concluded that universal jurisdiction is at the least recognized with respect to jus cogens crimes, if not required.

The other category that needs to be assessed is that of national law including both national legislation and judicial practice. Both of these, however, reveal that only a few states have universal jurisdiction, and only two have universal jurisdiction without any nexus to the enforcing state, and that only four judicial decisions have been rendered that support universal jurisdiction, whether with or without means to the enforcing state. On the other hand, many states have extraterritorial criminal jurisdiction that reaches those who commit international crimes, whether jus cogens or not, and this represents in practice the maxim aut dedere aut judicare. Here, again, the international law purist can challenge this proposition by arguing that the existence of extraterritorial criminal jurisdiction does not necessarily evidence the opinio juris of states in respect of the maxim. The answer to that may be [*150] reminiscent of a sophist's argument, namely: if not that, then what? But a more prosaic argument is: if states extend their national criminal jurisdiction extra-territorially to prosecute more persons charged with international crimes, is that not in itself evidence of their intentions to enforce international criminal law? Granted, most of these national laws are aimed at prosecuting nationals who commit crimes abroad, or non-nationals who commit crimes abroad against the nationals of the state having such legislation, or at nationals and non-nationals who, while abroad, commit acts which have a national impact or effect deemed to be criminal under national legislation. But does that change the impact of that extraterritorial national legislation which also reaches these very same persons when they also commit international crimes?

National legislation and national judicial practice is presently insufficient to establish an international customary practice with respect to universal jurisdiction. But, that limited practice combined with the large number of states that have extraterritorial criminal jurisdiction that also reaches persons accused of international crimes may constitute a sufficient legal basis to conclude that there exists at least a duty to prosecute or extradite, and, where appropriate, to punish persons accused, charged or convicted of international crimes. If that proposition is accepted, then it follows that when available jurisdictional means are ineffective, universal jurisdiction should apply. Once again, this argument may not sit well with the international law purist, but at the risk of raising a sophist's argument: if that is not the case, then what?

I would add that it would be a valid argument to propose that the cumulative weight of international law sources and national legislation and judicial practices can be deemed sufficient to find the existence of universal jurisdiction for jus cogens and even other international crimes.

Lastly, I propose what international law's progressive thinkers would call a policy argument. That argument simply put, is that in the era of globalization, international compensation is necessary to combat crime, whether international crimes or domestic crime, and the only way by which this is achievable is through the obligation to prosecute or extradite and where appropriate to punish persons accused, charged or convicted of a criminal

offense, whether it be international or domestic. To implement such a policy requires the closing of certain jurisdictional gaps consistent with the preservation of the international legal order and respect for and observance of international human rights law. The [*151] closing of such gaps is through universal jurisdiction. Thus, one way of reaching the recognition of universal jurisdiction is through the obligation of aut dedere aut judicare. This does not, however, diminish the recognition of universal jurisdiction as actio populares or on any other legal or policy bases.

VII. Conclusion

The historical evolution of jus cogens international crimes from their recognition as being offensive to certain values to their universal condemnation and finally to their universal proscription developed in different ways. But, the distinctive historical evolution of each of these jus cogens international crimes is no different than that of other international crimes. <=233> n232 The emergence, growth and inclusion in positive international criminal law of international crimes went through different stages and gestational periods. <=234> n233 Piracy, slavery and war crimes have evolved over centuries through declarative prescriptions and later in enforcement proscriptions, <=235> n234 while some crimes like genocide, apartheid, and torture did not. They became international crimes by virtue of their separate embodiment, each in a single convention adopted in 1948, 1973, and 1984 respectively, without prior gestation in other stages of evolution. <=236> n235 Crimes against humanity, however, had a short gestational period between 1919, when the crime was first proposed and almost accepted, and 1945, when it was embodied in positive international criminal law in the Nuremberg Charter. <=237> n236 Since then it has been included in the statutes of the ICTY, ICTR, and ICC, but there is still no specialized convention on that category of crimes as there is with war crimes, genocide, apartheid, and torture. <=238> n237 But the [*152] conventions relative to those crimes do not all have clear provisions, and in some cases, no provisions at all, on universal jurisdiction. It is their status as jus cogens crimes that implies that universal jurisdiction exists.

Universal jurisdiction, as discussed above, resembles a checkerboard. Some conventions recognize it and some national practices of states demonstrate its existence, but it is uneven and inconsistent. Most of all, the practice of states does not evidence its consistent or widespread application.

The confusion about universality is that it has at least five meanings:

(1) universality of condemnation for certain crimes;

(2) universal reach of national jurisdiction, which could be for the international crime for which there is universal condemnation, as well as others;

(3) extraterritorial reach of national jurisdiction (which may also merge with universal reach of national legislation);

(4) universal reach of international adjudicative bodies that may or may not rely on the theory of universal jurisdiction; and

(5) universal jurisdiction of national legal systems without any connection to the enforcing state other than the presence of the accused.

The diverse meanings attributed to universal jurisdiction have probably been among the reasons why confusion has surrounded its legal significance. Similarly, the diverse theories of extra-territorial jurisdiction that were applied by international and national judicial bodies have also contributed to this confusion. But the writings of

scholars added to the confusion when they expressed in lex lata terms what may have been de lege ferenda or only expected desiderata.

What truly advanced the recognition and application of universal jurisdiction has been the acceptance of the maxim aut dedere aut judicare as an international civitas maxima. The duty to prosecute or extradite and, where appropriate, to punish persons accused of or convicted of international crimes, particularly jus cogens crimes [*153] because of their heinous nature and disruptive impact on peace and security, necessarily leads to the recognition of universal jurisdiction as a means of achieving the goals of aut dedere aut judicare.

The writings of scholars have driven the recognition of the theory of universal jurisdiction, particularly for jus cogens international crimes. These writings reflect idealistic universalistic views, as well as pragmatic policy perspectives.

The combination of international and national sources of law has produced a cumulative effect sufficient to warrant the recognition of universal jurisdiction for jus cogens crimes. Universal jurisdiction is the most effective method to deter and prevent international crimes by increasing the likelihood of prosecution and punishment of its perpetrators. This approach to international criminal accountability is also believed to be a factor in reducing impunity for the perpetrators of these crimes. <=239> n238

A dynamic interaction exists between: (1) international and national norms of international criminal law; (2) international and national processes for the enforcement of international criminal law; and (3) state and non-state actors' cooperation in the development of norms and processes and in their implementation. This dynamic interaction is [*154] breaking down traditional compartmentalization between international and national law. <=240> n239 As a result, hybrid norms and processes have developed that include both international and national characteristics and incorporate the combined supportive roles of state and non-state actors in the development of norms and processes, as well as in their implementation. This dialectical relationship, which some call "complementarity," is, however, even more complex. It is an amorphous and changing process that is difficult to define, predict, or assess, other than to recognize that it is both growing and evolving. The fact that it is, in part, the product of contingent circumstantial and occasional factors does not diminish its continued growth.

The policy-based assumptions and goals of universal jurisdiction are that such a jurisdictional mechanism, when relied upon by a large number of states, can prevent, deter, punish, provide accountability, and reduce impunity for some international crimes, and that can enhance the prospects of justice and peace. Irrespective of the checkered nature of the recognition and application of universal jurisdiction in international and national law and practice, the policy arguments advanced in its favor, particularly in light of the historic record of impunity that has benefited so many of the perpetrators of these crimes for so long, support its application. But universal jurisdiction must not be allowed to become a wildfire, uncontrolled in its application and destructive of the international legal processes. <=241> n240 If that were the case, it would produce conflicts of jurisdiction between states that have the potential to threaten world order, subject individuals to abuses of judicial processes, human rights violations, politically motivated harassment, and work denial of justice. In addition, there is the danger that universal jurisdiction may be [*155] perceived as hegemonistic jurisdiction exercised mainly by some Western powers against persons from developing nations.

To avoid these and other negative outcomes, while enhancing the positive outcomes of an orderly and effective application of universal jurisdiction, it is indispensable to arrive at norms regulating the resort by states and international adjudicating bodies to the application of this theory. <=242> n241 At first, guidelines should be developed that in time may garner consensus among scholars and, ultimately, among governments. At that stage, an international convention should be elaborated so that these guidelines can become positive international law.

The history of contemporary international law is replete with examples of scholarly and NGO initiatives that have set in motion a process that ripened into conventional international law. The Princeton Project on Universal Jurisdiction, whose Principles on Universal Jurisdiction are attached, is one of these instances, and hopefully it will result in an international convention on universal jurisdiction for jus cogens and other international crimes that includes jurisdictional priorities, provides rules for resolving conflicts of jurisdiction, and minimizes the exposure of individuals to multiple prosecutions, abuses of process, and denial of justice. <=243> n242

[*156] As the French philosopher Pascal once said, "Every custom has its origin in a single act," and in this case, there is ample evidence of many such acts. However, it is their cumulative effect which gives weight to the proposition that universal jurisdiction is part of customary international law. Nevertheless, the fact that there is a

customary international law recognition of universal jurisdiction does not imply that it can be exercised with respect to all international crimes or that it can be exercised by all states without limitations. The question of to which crimes universal jurisdiction applies is still an unsettled question, though there is more generalized agreement that it includes piracy, slavery and slave-related practices, war crimes, crimes against humanity, genocide, and by convention, torture and some international terrorism crimes. In addition, customary international law has not yet settled the issue of whether there needs to be a nexus to the enforcing state, such as the presence of the accused on its territory. There are also other issues that remain unresolved, such as the temporal immunity of heads of states and diplomats, a number of issues pertaining to the rights of the individual to prevent vexatious and multiple prosecutions, as well as how to ensure due process and fairness in the course of proceedings based on universal jurisdiction. Consequently, it can be said that the recognition of universal jurisdiction in customary international law is in its first stage of evolution, and that it has to be followed by other stages needed to clarify the rights and obligations of states in the exercise of this form of extra-territorial jurisdiction in order to maximize the benefits of universal jurisdiction and eliminate its potential for abuses.

[*157]

VIII. Appendix

The Princeton Principles on Universal Jurisdiction*

The participants in the Princeton Project on Universal Jurisdiction propose the following principles for the purposes of advancing the continued evolution of international law and the application of international law in national legal systems:

Principle 1 * Fundamentals of Universal Jurisdiction

1. For purposes of these principles, universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.

2. Universal jurisdiction may be exercised by a competent and ordinary judicial body of any state in order to try a person duly accused of committing serious crimes under international law as specified in Principle 2(1), provided the person is present before such a judicial body.

3. A state may rely on universal jurisdiction as a basis for seeking the extradition of a person accused or convicted of committing a serious crime under international law as specified in Principle [*158] 2(1), provided that it has established a prima facie case of the person's guilt and that the person sought to be extradited will be tried or the punishment carried out in accordance with international norms and standards on the protection of human rights in the context of criminal proceedings.

4. In exercising universal jurisdiction or in relying upon universal jurisdiction as a basis for seeking extradition, a state and its judicial organs shall observe international due process norms including but not limited to those involving the rights of the accused and victims, the fairness of the proceedings, and the independence and impartiality of the judiciary (hereinafter referred to as "international due process norms").

5. A state shall exercise universal jurisdiction in good faith and in accordance with its rights and obligations under international law.

Principle 2 * Serious Crimes Under International Law

1. For purposes of these principles, serious crimes under international law include: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture.

2. The application of universal jurisdiction to the crimes listed in paragraph 1 is without prejudice to the application of universal jurisdiction to other crimes under international law.

Principle 3 * Reliance on Universal Jurisdiction in the Absence of National Legislation

With respect to serious crimes under international law as specified in Principle 2(1), national judicial organs may rely on universal jurisdiction even if their national legislation does not specifically provide for it.

Principle 4 * Obligation to Support Accountability

1. A state shall comply with all international obligations that are applicable to prosecuting or extraditing persons accused or [*159] convicted of crimes under international law in accordance with a legal process that complies with international due process norms, providing other states investigating or prosecuting such crimes with all available means of administrative and judicial assistance, and undertaking such other necessary and appropriate measures as are consistent with international norms and standards.

2. A state, in the exercise of universal jurisdiction, may, for purposes of prosecution, seek judicial assistance to obtain evidence from another state, provided that the requesting state has a good faith basis and that the evidence sought will be used in accordance with international due process norms.

Principle 5 * Immunities

With respect to serious crimes under international law as specified in Principle 2(1), the official position of any accused person, whether as head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

Principle 6 - Statute of Limitations

Statutes of limitations or other forms of prescription shall not apply to serious crimes under international law as specified in Principle 2(1).

Principle 7 * Amnesties

1. Amnesties are generally inconsistent with the obligation of states to provide accountability for serious crimes under international law as specified in Principle in 2(1).

2. The exercise of universal jurisdiction with respect to serious crimes under international law as specified in Principle 2(1) shall not be precluded by amnesties which are incompatible with the international legal obligations of the granting state.

Principle 8 * Resolution of Competing National Jurisdictions

Where more than one state has or may assert jurisdiction over a [*160] person and where the state that has custody of the person has no basis for jurisdiction other than the principle of universality, that state or its national judicial organs shall, in deciding whether to prosecute or extradite, base their decision on an aggregate balance of the following criteria:

a) multilateral or bilateral treaty obligations;

b) the place of commission of the crime;

c) the nationality connection of the alleged perpetrator to the requesting state;

d) the nationality connection of the victim to the requesting state;

e) any other connection between the requesting state and the alleged perpetrator, the crime, or the victim;

f) the likelihood, good faith, and effectiveness of the prosecution in the requesting state;

g) the fairness and impartiality of the proceedings in the requesting state;

h) convenience to the parties and witnesses, as well as the availability of evidence in the requesting state; and

i) the interests of justice.

Principle 9 * Non Bis In Idem/Double Jeopardy

1. In the exercise of universal jurisdiction, a state or its judicial organs shall ensure that a person who is subject to criminal proceedings shall not be exposed to multiple prosecutions or punishment for the same criminal conduct where the prior criminal proceedings or other accountability proceedings have been conducted in good faith and in accordance with international norms and standards. Sham prosecutions or derisory punishment resulting from a conviction or other accountability proceedings shall not be recognized as falling within the scope of this Principle.

2. A state shall recognize the validity of a proper exercise of universal jurisdiction by another state and shall recognize the final judgment of a competent and ordinary national judicial [*161] body or a competent international judicial body exercising such jurisdiction, in accordance with international due process norms.

3. Any person tried or convicted by a state exercising universal jurisdiction for serious crimes under international law as specified in Principle 2(1) shall have the right and legal standing to raise before any national or international judicial body the claim of non bis in idem in opposition to any further criminal proceedings.

Principle 10 - Grounds for Refusal of Extradition

1. A state or its judicial organs shall refuse to entertain a request for extradition based on universal jurisdiction if the person sought is likely to face a death penalty sentence or to be subjected to torture or any other cruel, degrading, or inhuman punishment or treatment, or if it is likely that the person sought will be subjected to sham proceedings in which international due process norms will be violated and no satisfactory assurances to the contrary are provided.

2. A state which refuses to extradite on the basis of this Principle shall, when permitted by international law, prosecute the individual accused of a serious crime under international law as specified in Principle 2(1) or extradite such person to another state where this can be done without exposing him or her to the risks referred to in paragraph 1.

Principle 11 * Adoption of National Legislation

A state shall, where necessary, enact national legislation to enable the exercise of universal jurisdiction and the enforcement of these Principles.

Principle 12 * Inclusion of Universal Jurisdiction in Future Treaties

In all future treaties, and in protocols to existing treaties, concerned with serious crimes under international law as specified in Principle 2(1), states shall include provisions for universal jurisdiction.

[*162]

Principle 13 * Strengthening Accountability and Universal Jurisdiction

1. National judicial organs shall construe national law in a manner that is consistent with these Principles.

2. Nothing in these principles shall be construed to limit the rights and obligations of a state to prevent or punish, by lawful means recognized under international law, the commission of crimes under international law.

3. These principles shall not be construed as limiting the continued development of universal jurisdiction in international law.

Principle 14 * Settlement of Disputes

1. Consistent with international law and the Charter of the United Nations states should settle their disputes arising out of the exercise of universal jurisdiction by all available means of peaceful settlement of disputes and in particular by submitting the dispute to the International Court of Justice.

2. Pending the determination of the issue in dispute, a state seeking to exercise universal jurisdiction shall not detain the accused person nor seek to have that person detained by another state unless there is a reasonable risk of flight and no other reasonable means can be found to ensure that person's eventual appearance before the national judicial organs of the state seeking to exercise its jurisdiction.

FOOTNOTES:

n1. See generally The Pinochet Precedent: How Victims Can Pursue Human Rights Criminals Abroad, Human Rights Watch Update (Human Rights Watch), Sept. 2000 [hereinafter Human Rights Watch]; Universal Jurisdiction: 14 Principles on the Effective Exercise of Universal Jurisdiction (Amnesty International) [hereinafter Universal Jurisdiction: 14 Principles]; Universal Jurisdiction in Europe: Criminal Prosecutions in Europe Since 1990 for War Crimes, Crimes Against Humanity, Torture and Genocide (Redress), June 1999 [hereinafter Universal Jurisdiction in Europe].

n2. See infra notes 166-187 and accompanying text.

n3. See infra notes 237-239 and accompanying text.

n4. See infra note 238 and accompanying text.

n5. See Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.) (Feb. 27, 1998), at

http://www.icj/cij.org/icjwww/idocket/iluk/ilukjudgment/iluk<uscore>ijudgment& usco re;980227.htm; Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.) (Feb. 27, 1998), *37 I.L.M. 587;* Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), 1992 I.C.J. 3 (Apr. 14); Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114 (Apr. 14).

n6. See Omer Y. Elagab, The Hague as the Seat of the Lockerbie Trial: Some Constraints, *34 Int'l Law 289 (2000);* Michael P. Scharf, Terrorism on Trial: The Lockerbie Criminal Proceedings, *6 ILSA J. Int'l & Comp. L. 355, 356-57 (2000).*

n7. See supra note 1 and infra note 54.

n8. See surveys contained in publications listed supra in note 1. The most recent example of this unfortunate phenomenon is the lengthy Universal Jurisdiction: The Duty of States to Enact and Implement Legislation Sept. 2001. Such efforts, however, only lead to false expectations and disappointment.

n9. For example, there is a misconception that the Pinochet case was predicated upon universal jurisdiction, when, in fact, the decision by the House of Lords was based upon the construction of English law and the Torture Convention, which the United Kingdom had ratified. See infra notes 21-25 and accompanying text.

n10. The IMT at Nuremberg and the International Military Tribunal for the Far East (IMTFE) removed substantive immunity for crimes against peace, war crimes, and crimes against humanity. Charter of the International Military Tribunal, Aug. 8, 1945, art. 7, 59 Stat. 1544, 8 U.N.T.S. 279 [hereinafter IMT Charter]; Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589 at 3, amended Apr. 26, 1946, art. 6., T.I.A.S. No. 1589 at 11 [hereinafter IMTFE Amended Charter].

The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) removed substantive immunity for genocide, crimes against humanity, and war crimes. Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7(2), S.C. Res. 808, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/808 (1993), annexed to Report of the Secretary-General Pursuant to Paragraph 2 of U.N. Security Council Resolution 808 (1993), U.N. Doc. S/2-5704 & Add. 1 (1993) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, art. 6(2), S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].

n11. See infra notes 19-20 and accompanying text.

n12. The Rome Statute of the International Criminal Court removed substantive immunity for genocide, crimes against humanity, war crimes, and, eventually, aggression, when defined and adopted by the assembly of state parties. Rome Statute of the International Criminal Court, Jul. 17, 1998, art. 27, U.N. Doc. A/CONF.183/9 [hereinafter ICC Statute], reprinted in *37 I.L.M. 999 (1998).* It should be noted that Article 27 is in Part III, which has the heading "General Principles of Law;" however, although Part IX contains no reference to immunity, Article 98 seems to allow for immunities. See id. art. 98, reprinted in *37 I.L.M. 999 (1998).* For a discussion of this issue, see infra notes 13-20 and accompanying text.

Thus, one can conclude that substantive immunity has been removed for some crimes and by certain legal instruments. A progressive development position can justifiably be that the removal of such immunity for genocide, crimes against humanity, and war crimes is part of customary international law. Opponents of the progressive view will argue that its removal is connected to certain legal instruments and legal processes that do not reflect the customary practice of states.

n13. Id. art. 27.

n14. ICTY Statute, supra note 10, art. 7(2).

n15. ICTR Statute, supra note 10, art. 6(2).

n16. Apr. 18, 1961, *23 U.S.T. 3227,* 500 U.N.T.S. 95. See also Vienna Convention on Consular Relations, Apr. 24, 1963, *21 U.S.T. 77,* 596 U.N.T.S. 261; see generally Eileen Denza, Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations (2d ed. 1998); Linda S. Frey & Marsha L. Frey, The History of Diplomatic Immunity (1999).

n17. ICC Statute, supra note 12, art. 98.

n18. For an overview of the nature of Status of Forces Agreements, see M.Cherif Bassiouni, Law and Practice of the United States, in 2 International Criminal Law 191, 216-18 (M. Cherif Bassiouni ed., 2d ed. 1999).

n19. See Prosecutor v. Milosevic (Indictment) (24 May 1999), at http://www.un.org/icty/indictment/english/mil-ii990524e.htm. The first trial of a head of state for genocide and crimes against humanity was Prosecutor v. Kambanda, case no. ICTR-97-23-S, September 4, 1998; Prosecutor v. Kambanda, case no. ICTR-97-23-I, October 19, 2000. Jean Kambanda was former Prime Minister of Rwanda, and acting President at the time of the Hutu slaughter of the Tutsis.

n20. See Arrest Warrant of 11 April 2000 (Congo v. Belg.) (Order) (Dec. 8, 2000), at http://www.icj-cij.org/icjwww/idocket/icobe<uscore>iorder<uscore>provisional&us core;measure<uscore>20001208.htm. For a discussion of this case, see infra notes 223-227 and accompanying text.

n21. *R. v. Bow St. Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No. 1), 3 WLR 1456* (H.L.(E.) 1998).

n22. Christine M. Chinkin, United House of Lords: Regina v. Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3), *93 Am. J. Int'l L. 703, 704 (1999).*

n23. *R. v. Bow St. Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3), 2 WLR 827* (H.L.(E.) 1999).

n24. Chinkin, supra note 22, at 708.

n25. Id.

n26. M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law 224-27 (2d ed. 1999) [hereinafter Bassiouni, Crimes Against Humanity].

n27. 26 Nov. 1968, 754 U.N.T.S. 73 [hereinafter U.N. Convention on the Non-Applicability of Statutes of Limitations].

n28. Europ. T.S. No. 82 [hereinafter European Convention on Non-Applicability of Statutory Limitations].

n29. See Marc Henzelin, Le Principe de L'Universalite en Droit Penal International (2000); see also infra note 56 and accompanying text.

n30. This is one of the issues presently pending before the International Court of Justice in the dispute between the Democratic Republic of the Congo and Belgium. See Arrest Warrant of 11 April 2000 (Congo v. Belg.), at 19 (Order) (Dec. 8, 2000), at http://www.icj-cij.org/icjwww/idoc.../icobe<uscore>iorder<uscore>provisio nal<uscore>measure<uscore>20001208.htm. See also supra note 20, and infra notes 223-227 and accompanying text.

n31. The power to enforce is a corollary to the power to prescribe, but the exercise of these two powers are not necessarily co-extensive. Each of these powers can be exercised without the other. In addition, just because a state may prescribe for the possibility of its exercise of universal jurisdiction does not mean that it can exercise its prerogative in all circumstances. See Kenneth C. Randall, Universal Jurisdiction Under International Law, *66 Tex. L. Rev. 785, 786 (1988).*

n32. See Oppenheim's International Law 462-88 (Robert Jennings & Arthur Watts eds., 9th ed. 1992). Entities exercising some of the attributes of state sovereignty include: military forces legitimately occupying foreign territories in accordance with international humanitarian law in their lawful exercise of jurisdictional power over such territories and persons on these territories; state-like entities exercising legitimate attributes over certain territories and its inhabitants which are under their dominion and control; and the United Nations in its exercise of jurisdictional power over certain territories and its inhabitants pursuant to a mandate of the Security Council. See Clive Parry, The Trusteeship Council, in The United Nations: The First Ten Years 47-58 (1957).

n33. International criminal law prescribes certain conduct which states are bound to enforce, particularly those prescriptions arising out of general customary international law of jus cogens. See M. Cherif Bassiouni, The

Sources and Content of International Criminal Law: A Theoretical Framework, in 1 International Criminal Law 3-126 (M. Cherif Bassiouni ed., 2d ed. 1999) [hereinafter Bassiouni, Sources and Content]; M. Cherif Bassiouni, International Crimes: Jus Cogens and Obligatio Ergo Omnes, 59 Law & Contemp. Probs. 4, 63 (1996) [hereinafter Bassiouni, Jus Cogens Crimes].

n34. Territorial jurisdiction is referred to as a principle because of its universal recognition. See S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 25 (Sept. 7), reprinted in 2 Manley O. Hudson, World Court Reports 20 (1935). Other jurisdictional bases are referred to as theories because they are not universally recognized, but their recognition is sufficiently well established to warrant their acknowledgment as constituting part of customary international law. For a discussion of theories of jurisdiction, see Christopher Blakesley, Extraterritorial Jurisdiction, in 2 International Criminal Law 33-105 (M. Cherif Bassiouni ed., 2d ed. 1999); M. Cherif Bassiouni, International Extradition in United States Law and Practice 295-382 (3d ed. 1996) [hereinafter Bassiouni, Extradition].

n35. States can be required to adjudicate or enforce by treaty obligations, or they can delegate their powers to adjudicate or enforce to another state or to an international body. See European Convention on the Transfer of Proceedings in Criminal Matters, May 15, 1972, Europ. T.S. No. 73; Julian Schutte, The European System, in 2 International Criminal Law 643-59 (M. Cherif Bassiouni ed., 2d ed. 1999); Ekkehart M<um u>ller-Rappard & M. Cherif Bassiouni, European Inter-State Co-operation in Criminal Matters (2d ed. 1991); see also ICC Statute, supra note 12, art. 14; M. Cherif Bassiouni, Observations on the Structure of the (Zutphen) Consolidated Text, 13bis Nouvelles Etudes Penales 5, 15 (1998) (discussing the subject of complementarity under the ICC Statute).

n36. Most writers on private international law barely touch on conflicts of criminal laws. The same is true of U.S. writers on conflicts of law. See, e.g., Albert A. Ehrenzweig, A Treatise on the Conflict of Laws (1962); Arthur Taylor von Mehren & Donald Theodore Trautman, The Law of Multistate Problems: Cases and Materials on Conflict of Laws (1965). For conflict of criminal law, see the seminal early work of Henri Donnedieu de Vabres, Les Principles Modernes du Droit Penal International (1928). See also Maurice Travers, Le Droit Penal International (5 vols.1920-1922).

n37. For example, states with a territorial connection should be accorded priority whenever they seek, in good faith, to prosecute a person accused of the same crime for which another state relying on universality also seeks to prosecute. Where, however, it is found that the state seeking to exercise universal jurisdiction may be the more effective forum, the question should be dealt with as one of conflict of jurisdiction in which the aggregate weighing of factors will determine the most appropriate forum. See *Restatement (Third) of Foreign Relations Law of the United States 403* (1987) [hereinafter Restatement (Third) of Foreign Relations]. Cf. H.D. Wolswijk, Locus Delicti and Criminal Jurisdiction, 46 Neth. Int'l L. Rev. 361 (1999) (commenting on the interplay between locus delicti and extraterritorial jurisdiction).

n38. IMT Charter, supra note 10.

n39. IMTFE Amended Charter, supra note 10.

n40. IMT Judgment, Sept. 30, 1946, reprinted in 22 Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremburg 411, 444 (1950).

n41. U.N. Charter ch. 7.

n42. ICTY Statute, supra note 10. See M. Cherif Bassiouni & Peter Manikas, The Law of the International Criminal Tribunal for the Former Yugoslavia (1996); Virginia Morris & Michael P. Scharf, An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis (2 vols. 1995).

n43. ICTR Statute, supra note 10. See Virginia Morris & Michael P. Scharf, The Intenational Criminal Tribunal for Rwanda (2 vols. 1998) (highlighting the significance of the ICTR).

n44. These Security Council decisions are, however, described by United Nations and government legal advisers, as well as by some publicists, as different from the exercise of sovereignty. Since the outcome is the same with respect to the legal aspects of jurisdiction, one cannot help but refer to a non-legal authority, William Shakespeare, who expressed so gracefully a universal popular wisdom: "What's in a name? That which we call a rose by any other word would smell as sweet." William Shakespeare, The Tragedy of Romeo and Juliet, act. 2, sc. 2, ll. 43-44, in The Riverside Shakespeare 1058, 1068 (1974).

n45. The establishment of these two tribunals evidenced a new concept in the exercise of judicial jurisdiction by an organ of the United Nations. See Theodor Meron, War Crimes in Yugoslavia and the Development of International Law, *88 Am. J. Int'l L. 78, 78 (1994).*

n46. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 95-96 (Sept. 7) (Altamira, J., dissenting), reprinted in 2 Manley O. Hudson, World Court Reports 20, 83-84 (1935). Judge Altamira also pointed out:

In regard to criminal law in general, it is easy to observe that in municipal law, with the exception of that of a very small number of States, jurisdiction over foreigners for offences committed abroad has always been very limited: It has either (1) been confined to certain categories of offences; or (2) been limited, when the scope of the exception has been wider, by special conditions under which jurisdiction must be exercised and which very much limit its effects.

Id. at 99, reprinted in 2 Manley O. Hudson, World Court Reports 20, 86 (1935). See Wade Estey, Note, The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption Against Extraterritoriality, *21 Hastings Int'l & Comp. L. Rev. 177 (1997).* For judicial applications of the "passive personality" doctrine, see *United States v. Layton, 509 F. Supp. 212, 215-16* (N.D. Cal.), appeal dismissed, *645 F.2d 681 (9th Cir. 1981); United States v. Benitez, 741 F.2d 1312, 1316 (11th Cir. 1984); United States v. Yunis, 681 F. Supp. 896, 901-03 (D.D.C. 1988);* see also Restatement (Third) of Foreign Relations, supra note 37, 402 cmt. g. Cf. Act for the Prevention and Punishment of the Crime of Hostage-Taking, *18 U.S.C. 1203* (1994 & Supp. IV 1998); Act for the Prosecution of Terrorist Acts Abroad Against United States Nationals, *18 U.S.C. 2331* (1994); *18 U.S.C. 7*(1), 7(8) (1994); *18 U.S.C. 1653* (1994) (delineating limitations on the exercise of criminal jurisdiction by the United States).

n47. This is evidenced in the Harvard Research in International Law: Jurisdiction with Respect to Crime, *29 Am. J. Int'l L. 443 (Supp. 1935).* See also Restatement (Third) Foreign Relations, supra note 37, 402; Donnedieu de Vabres, supra note 36. Under the active personality theory, a state may prosecute a person who committed a crime in another state provided that the crime in question also constitutes a crime in the state of nationality. That

is referred to as "double criminality." See Bassiouni, Extradition, supra note 34, at 346; Blakesley, supra note 34, at 43. In such cases, however, the enforcing state relies on its own law, but that is essentially because of ease and consistency in application. States are not, however, obligated to require "double criminality." National enforcement may require that international legal prescriptions are enacted into national legislation depending on national constitutional requirements and other national laws. This is the case with respect to states that follow the "dualistic" approach to national application of international legal obligations, and also with respect to "monistic" states in connection with non-self-executing treaties.

n48. States, however, rely on extradition as a means of securing in personam jurisdiction in order to subject a national to their enforcing jurisdiction. Bassiouni, Extradition, supra note 34.

n49. Id. at 353; Blakesley, supra note 34, at 50.

n50. Bassiouni, Extradition, supra note 34, at 349; Blakesley, supra note 34, at 54-55. This is based on the notion that states have a right to protect their citizens when a criminal act harms them irrespective of the locus of the criminal conduct's occurrence. But that presupposes that the criminal act is proscribed by the enforcing state or the territorial state. That theory is based on a connection between the enforcing state and the victim of the proscribed conduct.

n51. See, e.g., Attorney Gen. of Israel v. Eichmann, *36 I.L.R. 5, 34* (Jm. D.C., 1961), aff'd, *36 I.L.R. 277 (Isr. S. Ct. 1962)* (confusing universal condemnation with the right to exercise universal jurisdiction). For a discussion of the Eichmann opinions, see infra notes 198-204 and accompanying text.

A recent symposium on universal jurisdiction, held at the New England School of Law, whose proceedings were published in *35 New Eng. L. Rev., 227-470 (2001),* evidence this point, except for the realistic positions of David Scheffer, *id. at 233,* and Alfred Rubin, *id. at 265.* Scheffer in particular says, "I hope to dispel the notion that the mere existence of a crime of universal jurisdiction means that in fact it can be prosecuted universally, in any court, and under any circumstances and in accordance with globally accepted principles of international criminal law. Universal jurisdiction is not a broadly adhered-to standard. Everyone talks about universal jurisdiction, but almost no one practices it. It has mostly been a rhetorical exercise since WWII." *Id. at 233.*

n52. See Resolution of the Third International Congress of Penal Law (Palermo 1933), in 10 Revue Internationale de Droit Penal 144, 157 (1933); International Law Association, Report of the 34th Conference 378, 383-384 (1926); Resolution of the International Congress of Comparative Law (The Hague, 1932); International Conference for the Unification of Criminal Law, Article 7 (Warsaw, 1927). The International Law Association in 2000 issued a report on universal jurisdiction. Princeton University also published a report, The Princeton Principles on Universal Jurisdiction (2001).

n53. Donnedieu de Vabres, supra note 36, at 69. "L'attribtution d'une competence tres subsidiaire au juge du lieu d'arrestation donne satisfaction a un besoin de securite, a un sentiment elementaire de justice." Id. at 445. See also Maurice Travers, 1 Le Droit Penal International 73 (1920); Mercier, Rapport, Annuaire de l'Institut de Droit International 87, 136 (1933).

n54. See Hays Butler, Universal Jurisdiction: A Compilation of Documents (3 vols. 2000); see also, e.g., Jordan J. Paust, M. Cherif Bassiouni & Michael Scharf et al., International Criminal Law: Cases and Materials (2d ed. 2000); Steven Ratner & Jason Abrams, Accountability for Human Rights Atrocities in International Law:

Beyond the Nuremberg Legacy (2001); Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses (Committee on International Human Rights Law and Practice, International Law Association), 2000, at 20-21 [hereinafter Universal Jurisdiction in Respect of Gross Human Rights Offenses] (concluding that states are entitled to exercise universal jurisdiction with respect to genocide, crimes against humanity, war crimes, and torture, but recommending that "gross human rights offenders should be brought to justice in the state in which they committed their offences").

n55. See, e.g., European Convention on Human Rights, Nov. 4, 1950, art. 13, Europ. T.S. No. 5, 213 U.N.T.S. 221; American Convention on Human Rights, Nov. 22, 1969, art. 25, O.A.S.T.S. No. 36; 1144 U.N.T.S. 123.

n56. For a discussion of the circumstances under which a state may proceed actio popularis as a result of a breach of obligatio erga omnes, see Roman Boed, The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations, *33 Cornell Int'l L.J. 297, 299-301 (2000)*. See also Maurizio Ragazzi, The Concept of International Obligations Erga Omnes (1997); Andre de Hoogh, Obligations Erga Omnes and International Crimes (1996); cf. Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5) (defining obligations erga omnes).

n57. These issues are discussed in M. Cherif Bassiouni & Edward M. Wise, Aut Dedere Aut Judicare: The Duty to Prosecute or Extradite in International Law 3-69 (1995). The case for an international civitas maxima supporting the duty to prosecute or extradite is valid; it is doubtful, however, that it includes universal jurisdiction other than a subsidiary jurisdictional basis to enforce the attainment of these goals. In fact, aut dedere aut judicare may well be argued as the substitute for a theory of universal jurisdiction. In this writer's opinion, universal jurisdiction complements aut dedere aut judicare in that whenever a state does not extradite and proceeds to prosecute it may need to rely on universality.

n58. This is why the Ayatollah Khomeni in 1989 issued an edict of death for blasphemy against author Salman Rushdie for his book The Satanic Verses (1988). The majority of the world's states reacted negatively to the extraterritorial reach as did many scholars. See M. Cherif Bassiouni, Religious Discrimination, and Blasphemy, Address Before the 83[su'rd'] Annual Meeting of the American Society of International Law in Proceedings of the Annual Meeting American Society of International Law 432-35 (1989); Hurst Hannum, Religious Discrimination, and Blasphemy, Address Before the 83[su'rd'] Annual Meeting of the American Society of International Law in Proceedings of the American Society of International Law 427-28 (1989); Virginia Leary, Religious Discrimination, and Blasphemy, Address Before the 83[su'rd'] Annual Meeting of the American Society of International Law in Proceedings of the American Society of International Law 428-30 (1989); Ved Nanda, Religious Discrimination, and Blasphemy, Address Before the 83[su'rd'] Annual Meeting of the American Society of International Law in Proceedings of the American Society of International Law 430-31 (1989). This is an example of why universal jurisdiction should be carefully circumscribed. There have nevertheless been many contrary positions expressed by Muslim writers in the West, as well as in the Muslim world, which have taken a position in support of the Ayatollah's fatwa, thus in fact advocating universal jurisdiction.

n59. For a synopsis of the views on this point, including those of Grotius, Heineccius Burlamaqui, Vattel, Rutherforth, Kent, and others, see Henry Wheaton, Elements of International Law 181 (R.H. Dana ed., 8th ed. 1866).

n60. Cesare Beccaria-Bonesana, An Essay on Crimes and Punishment (Academic Reprints ed. 1953) (1819).

n61. Id. at 135; Bassiouni & Wise, supra note 57, at 27.

n62. For different expressions of natural law, see The Natural Law Reader (Brendan F. Brown ed., 1960) (expressing natural law on the basis of Catholicism); Lloyd L. Weinreb, Natural Law and Justice (1987). See also Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 551 (July 8) (Weeramantry, J., dissenting); Saul Mendlovitz & Merav Datan, Judge Weeramantry's Grotian Quest, *7 Transnat'l L. & Contemp. Probs. 401 (1997).*

n63. For these different philosophies of law, see Bassiouni, Crimes Against Humanity, supra note 26, at 89-122.

n64. Id. at 123-67.

n65. 2 Charles de Secondat Montesquieu, De L'Esprit des Lois, Oeuvres Completes (Roger Caillois ed., 1951). The maxim derives from Roman law.

n66. Bassiouni, Crimes Against Humanity, supra note 26, at 123-67. The modern European origin for the "principles of legality" is attributed to Paul Anselm von Feuerbach, who first explicated them in his Lehrbuch des Gemeinen in Deutschland G<um u>ltigen Peinlichen Rechts (1801). See also Giuliano Vassalli, Nullum Crimen Sine Lege, in 5 Novissimo Digesto Italiano: Appendice 292 (1987).

n67. Bassiouni, supra note 26, at 123-67.

n68. Donnedieu de Vabres, supra note 36, at 135-36 (footnotes omitted).

n69. See Butler, supra note 54.

n70. Most of them relating to piracy. See Alfred Rubin, The Law of Piracy (2d ed. 1998). Some cases reported by scholars refer to post-WWII prosecutions, but could not be found by this writer. See William A. Schabas, Genocide in International Law: The Crimes of Crimes 360-68 (2000). For a discussion of contemporary state practice, see infra notes 188-227 and accompanying text.

n71. Extraterritorial Criminal Jurisdiction: Report of the European Committee on Crime Problems, Council of Europe (1990). The report was prepared by the Select Committee of Experts on Extraterritorial Jurisdiction (PC-R-EJ), set on by the European Committee on Crime Problems (CDPC) in 1984.

n72. Id. at 14-16.

n73. See supra note 68 and accompanying text.

n74. Bassiouni, Sources and Content, supra note 33, at 3-126.

n75. See supra notes 64-66 and accompanying text. For a discussion of the process of establishing customary international law, see infra notes 188-194 and accompanying text.

n76. "In its classic statement, however, the universality theory encompasses acts committed beyond any country's territorial jurisdiction, the paradigm offense being piracy on the high seas." Rena Hozore Reiss, The Extradition of John Demjanjuk: War Crimes, Universality Jurisdiction, and the Political Offense Doctrine, *20 Cornell Int'l L.J. 281, 303 (1987)* (citing 1 M. Cherif Bassiouni, International Extradition, United States Law and Practice ch. 6, 6 (1983)). See *id. at 303 n.161* ("The justification for the universality principle lies in the fact that without such jurisdiction, no country could prosecute the offender.").

n77. M. Cherif Bassiouni, General Principles of International Law, *11 Mich. J. Int'l L. 768-818 (1990);* see also Rene David, Les Grands Systemes de Droit Contemporains 22-32 (5th ed. 1973). For a review of national legislation purporting to authorize universal jurisdiction, see Appendix to the present work.

n78. M. Cherif Bassiouni, International Criminal Law Conventions and their Penal Provisions (1997) [hereinafter Bassiouni, ICL Conventions]. For a discussion of contemporary state practice with respect to universal jurisdiction, see infra notes 188-227 and accompanying text.

n79. See supra note 8 and accompanying text.

n80. M. Cherif Bassiouni, From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court, *10 Harv. Hum. Rts. J. 11 (1997).*

n81. See ICC Statute, supra note 12, art. 14; see also M. Cherif Bassiouni, The Statute of the International Criminal Court: A Documentary History (1998).

n82. ICC Statute, supra note 12, arts. 6, 7 and 8.

n83. Id. art. 14.

n84. Id. Germany, New Zealand, and Canada are examples of countries that have recently passed national implementing legislation.

n85. Id. art. 12(3).

n86. Id. art. 14.

n87. See Bassiouni, ICL Conventions, supra note 78. That research refers only to 25 categories since two more were added since 1997.

n88. Id. at 20-21, which refers only to 274 since two new conventions were adopted between 1997 and 1999.

n89. Id.

n90. Id. at 5, 20-21.

n91. Id. at 20-21. While aut dedere aut judicare is advocated as a civitas maxima, it should be noted that the formula is more prevalent in conventions dealing with drugs and terrorism. See Bassiouni, ICC Conventions, supra note 78, at 789-842, 893-1018; Bassiouni & Wise, supra note 57, at 11-19.

n92. Bassiouni, Jus Cogens Crimes, supra note 33.

n93. Homer, The Iliad (A.T. Murray trans., 1971).

n94. Homer, The Odyssey (A.T. Murray trans., 1960).

n95. Thucydides, The Peleponnesian War (C.M. Smith trans., 1969).

n96. Cicero, Contra Verres II (L.H.G. Greenwood trans., 1953). See also Cicero, De Officii (L.H.G. Greenwood trans., 1953); Cicero, De Re Publica (C.W. Keyes trans., 1928).

n97. Coleman Philippson retraces that historical evolution, both as to its substantive meaning and as to exercise of jurisdiction in Greece and Rome. 2 Coleman Philippson, The International Law and Custom of Ancient Greece & Rome (1911).

n98. Hugo Grotius, De Jure Belli ac Pacis (Francis W. Kelsey trans., 1925) (1625). Grotius also relied on the Old and New Testaments and on Aristotle and Cicero for a universal perspective. See Cicero, De Re Publica, supra note 96, at 211 (bk. III, XXII):

True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment.

Id. See also Bassiouni, Crimes Against Humanity, supra note 26, at 108 n.71.

n99. Rubin, supra note 70.

n100. Gentili, De Iure Bellicis Libri Tres (J.C. Rolfe trans., 1933) (1612). See, for example, Gentili's work De Iure Belli (1612), reprinted in Classics of International Law (1933); Grotius, supra note 98. For a brief assessment of these works, see Peter Haggenmacher, Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture, in Hugo Grotius and International Relations ch. 4 (1992) [hereinafter Grotius and International Relations]; G.I.A.D. Draper, Grotius' Place in the Development of Legal Ideas About War, in Grotius and International Relations, supra, ch. 5.

n101. Balthazar Ayala, De Jure et Officiis Bellicis et Disciplina Militari (J.P. Bate trans., 1912) (1581). See Balthazar Ayala, Three Books, on the Law of War, and on the Duties Connected with War, And on Military Discipline 88 (J. P. Bate trans., 1912) (1597).

n102. See Rubin, supra note 70.

n103. Id. at 124. He includes in that category Sir William Blackstone, whose Commentaries on the Laws of England (vol. 4, 1769) influenced American law and jurisprudence. The Constitution in Article 1, Section 8, Clause 10 refers to "Piracies," and the Judicature Act of 24 September 1789, An Act to Establish the Judicial Courts of the United States, ch. 20, 9, 1 Stat. 73, 76-77, gives each of the thirteen original "district courts" exclusive jurisdiction for such crimes. The first time, however, that piracy was deemed a crime of universal jurisdiction arose under Jay's Treaty of 1794, Nov. 19, 1794, art. 21, 8 Stat. 116, *12 Bevans 13, 27.* Joseph Story, however, did not embrace the universalist view of piracy and slavery in his seminal work, Commentaries on the Conflict of Laws (1834); instead, he argued for the same result from a positivistic perspective. Chief Justice John Marshall, also a positivist, recognized the universal reach of United States law whenever the acts of piracy were against a U.S. vessel and U.S. nationals. See *U.S. v. Palmer, 16 U.S. (3 Wheat.) 610 (1818).* In *U.S. v. Klintock, 18 U.S. (5 Wheat.) 144 (1820),* Chief Justice Marshall wrote:

The Court is satisfied, that general piracy, or murder, or robbery, committed in the places described in the eighth section [of the act of 1790], by persons on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatsoever, is within the meaning of this act, and is punishable in the Courts of the United States. Persons of this description are proper objects for the penal code of all nations; and we think that the general words of the Act of Congress applying to all persons whatsoever, though they ought to not be so construed as to extend to persons under the acknowledged authority of a foreign state, ought to be so construed as to comprehend those who acknowledge the authority of no state. Those general terms ought not to be applied to offences committed against the particular sovereignty of a foreign power; but we think they ought to be applied to offences committed against all nations, including the United States, by persons who by common consent are equally amenable to the laws of all nations.

Id. at 152 (emphasis added). The certificate issued by the Supreme Court concludes: "That the act of the 30th of April, 1790, does extend to all persons on board all vessels which throw off their national character by cruising piratically and committing piracy on other vessels." *Id. at 153* (emphasis added).

All other U.S. cases involving piracy had a "contact" with U.S. law, either because the acts of piracy were committed against a U.S. vessel or against U.S. nationals.

n104. This may be due to the fact that piracy has for all practical purposes disappeared as of the nineteenth century, and during the twentieth century there is only one instance that occurred in the Western world. Thus, the international community found it more readily acceptable to recognize universal jurisdiction for piracy. See Thomas Franck, To Define and Punish Piracies; The Lessons of the Santa Maria: A Comment, *36 N.Y.U. L. Rev. 839 (1961).* Conversely, there have been many manifestations of piracy in Southeast Asia. See Gerhard O.W. Muller & Freida Adler, Outlaws of the Ocean (1985).

n105. Apr. 25, 1958, *1 U.S.T. 2312,* 450 U.N.T.S. 82.

n106. United Nations Convention on the Law of the Sea, Oct. 7, 1982, U.N. Doc. A/CONF.62/122.

n107. Bassiouni, ICL Conventions, supra note 78, at 637-734.

n108. Id.

n109. M. Cherif Bassiouni, Enslavement as an International Crime, *23 N.Y.U. J. Int'l L. & Pol. 445 (1991).*

n110. See Treaty for the Suppression of the African Slave Trade, signed at London 20 December 1841, arts. VI, VII, X, and Annex B, pt. 5, 2 Martens Nouveau Recueil (ser. 1) 392. The Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, and Spiritous Liquors (General Act of Brussels), Jul. 2, 1890, 27 Stat. 886, 17 Martens Nouveau Recueil (ser. 2) 345, states in Article V:

The contracting powers pledge themselves, unless this has already been provided for by laws in accordance with the spirit of the present article, to enact or propose to their respective legislative bodies, in the course of one year

at the latest from the date of the signing of the present general act, a law rendering applicable, on the one hand, the provisions of their penal laws concerning grave offenses against the person, to the organizers and abettors of slave-hunting, to those guilty of mutilating male adults and children, and to all persons taking part in the capture of slaves by violence; and, on the other hand, the provisions relating to offenses against individual liberty, to carriers and transporters of, and to dealers in, slaves... .

Guilty persons who may have escaped from the jurisdiction of the authorities of the country where the crimes or offenses have been committed shall be arrested either on communication of the incriminating evidence by the authorities who have ascertained the violation of the law, or on production of any other proof of guilt by the power in whose territory they may have been discovered, and shall be kept, without other formality, at the disposal of the tribunals competent to try them.

Id. art. 5. See Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, opened for signature at Lake Success, New York Mar. 21, 1950, art. 11, 96 U.N.T.S. 271 ("Nothing in the present Convention shall be interpreted as determining the attitude of a Party towards the general question of the limits of criminal jurisdiction under international law.").

n111. International Agreement for the Suppression of the "White Slave Traffic," March 18, 1904, 1 L.N.T.S. 83; International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 98 U.N.T.S. 101; International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, 9 L.N.T.S. 415.

n112. Convention Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55; Convention (No. 105) Concerning the Abolition of Forced Labour, June 25, 1957, 320 U.N.T.S. 291.

n113. Mar. 21, 1950, 96 U.N.T.S. 271.

n114. See discussion of war crimes infra notes 120-131 and accompanying text.

n115. See supra note 105.

n116. See supra note 106.

n117. International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431; Protocol to Amend the Convention for the Suppression of the Traffic in Women and Children, concluded at Geneva Sept. 30, 1921, and the Convention for the Suppression of Traffic in Women of Full Age, concluded at Geneva Oct. 11, 1933, 53 U.N.T.S. 13; Annex to the Protocol to Amend the Convention for the Suppression of the Traffic in Women and Children, concluded at Geneva Sept. 30, 1921, and the Convention for the Suppression of Traffic in Women of Full Age, concluded at Geneva Oct. 11, 1933; International Convention for the Suppression of the Traffic in Women and Children, concluded at Geneva Sept. 30, 1921, amended Nov. 12 1947, 53 U.N.T.S. 39; International Convention for the Suppression of the Traffic in Women of Full Age concluded at Geneva Oct. 11, 1933, Nov. 12, 1947, 53 U.N.T.S. 49; Annex to the Protocol Amending the Agreement for the Suppression of the White Slave Traffic, May 18, 1904, and the International Convention for the Suppression of the White Slave Traffic, May 4, 1910; International Agreement for the Suppression of the

White Slave Traffic, May 18, 1904, amended May 4, 1949, *2 U.S.T. 1997,* 92 U.N.T.S. 19; International Convention for the Suppression of White Slave Traffic, May 4, 1910, amended May 4, 1949, 98 U.N.T.S. 101; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Mar. 21, 1950, 96 U.N.T.S. 271; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institution and Practices Similar to Slavery, Sept. 7, 1956, *18 U.S.T. 3201,* 266 U.N.T.S. 3. See Bassiouni, ICL Conventions, supra note 78.

n118. See Protocol on International Traffic in Women and Children to the Draft United Nations Convention on Organized Crime, U.N. Doc. A/AC.254/4/ Add.3/Rev.6 (2000). That Protocol does not, however, contain a provision on universal jurisdiction.

n119. See supra note 109.

n120. Bassiouni, ICL Conventions, supra note 78, at 285; see also Yoram Dinstein, The Universality Principle and War Crimes, in The Law of Armed Conflict: Into the Next Millennium 17-37 (Michael N. Schmitt & Leslie C. Green eds., 1998); Willard B. Cowles, Universal Jurisdiction over War Crimes, *33 Cal. L. Rev. 177 (1945).*

n121. 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 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *6 U.S.T. 3217,* 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, *6 U.S.T. 3316,* 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; 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 Fourth Geneva Convention].

n122. Protocol I Additional to the Geneva Conventions of Aug. 12, 1949, opened for signature at Berne Dec. 12, 1977, U.N. Doc. A/32/144, Annex I [hereinafter Protocol I]; Protocol II Additional to the Geneva Conventions of Aug. 12, 1949, opened for signature at Berne Dec. 12, 1977, U.N. Doc. A/32/144, Annex II.

n123. Bassiouni, ICL Conventions, supra note 78, at 416-45, 457-94.

n124. Convention with Respect to the Laws and Customs of War on Land, Jul. 29, 1899, 32 Stat. 1803. See M. Cherif Bassiouni, A Manual on International Humanitarian Law and Arms Control Agreements (M. Cherif Bassiouni ed., 2000) [hereinafter Bassiouni, Manual on International Humanitarian Law].

n125. Bassiouni, ICL Conventions, supra note 78, at 286.

n126. First Geneva Convention, supra note 121, art. 50; Second Geneva Convention, supra note 121, art. 51; Third Geneva Convention, supra note 121, art. 130; Fourth Geneva Convention, supra note 121, art. 147.

n127. Protocol I, supra note 122, art. 85; see also Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Yves Sandoz et al. eds., 1987).

n128. See supra note 121 and accompanying text. For particular provisions regarding the enacting of legislation by contracting parties for the repression of grave breaches, see First Geneva Convention, supra note 121, art. 49; Second Geneva Convention, supra note 121, art. 50; Third Geneva Convention, supra note 121, art. 129; Fourth Geneva Convention, supra note 121, art. 146.

n129. For a discussion of contemporary state practice with respect to war crimes, see infra notes 188-227 and accompanying text.

n130. See infra notes 196-97 and accompanying text.

n131. See supra note 86 and accompanying text.

n132. Following World War II, Allied military tribunals referred to the exercise of universality with respect to war crimes and crimes against humanity. See Boed, supra note 56, at 307-08 & n.51 (citing Kenneth Randall, Universal Jurisdiction Under International Law, *66 Tex. L. Rev. 785, 807-10 (1988)).* But these cases were prosecuted pursuant to Control Council Law No. 10 which gave the four major Allies "sovereignty" over their respective zones of occupation. Thus, the tribunals exercised national jurisdiction.

n133. IMT Charter, supra note 10, art. 6(c).

n134. IMTFE Amended Charter, supra note 10, art. 5(c)

n135. Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, Dec. 20, 1945, art. 2(c), reprinted in Benjamin B. Ferencz, An International Criminal Court: A Step Toward World Peace 488 (1980).

n136. ICTY Statute, supra note 10, art. 5.

n137. ICTR Statute, supra note 10, art. 3.

n138. See supra note 86 and accompanying text.

n139. See M. Cherif Bassiouni, "Crimes Against Humanity": The Need for a Specialized Convention, *31 Colum. J. Transnat'l L. 457-94 (1994);* Bassiouni, Crimes Against Humanity, supra note 26.

n140. For a discussion of contemporary state practice with respect to crimes against humanity, see infra notes 188-227 and accompanying text.

n141. Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention] (emphasis added).

n142. Id. art. 6 (emphasis added).

n143. Cf. John F. Murphy, International Crimes, in 2 United Nations Legal Order 993, 1010 (Oscar Schachter & Christopher C. Joyner eds., 1995) ("The Convention does not create a system of universal jurisdiction.").

n144. ICTY Statute, supra note 10.

n145. ICTR Statute, supra note 10.

n146. ICC Statute, supra note 12.

n147. ICTY Statute, supra note 10, art. 4.

n148. ICTR Statute, supra note 10, art. 2.

n149. ICC Statute, supra note 12, art 6.

n150. See Schabas, supra note 70, at 353-78; Matthew Lippman, Genocide, in 1 International Criminal Law 589-613 (M. Cherif Bassiouni ed., 2d ed. 1999).

n151. Theodor Meron, International Criminalization of Internal Atrocities, *89 Am. J. Int'l L. 554, 569 (1995).* But see Christopher C. Joyner, Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability, 59 Law & Contemp. Probs. 153, 159-60 (1996); Jordan J. Paust, Congress and Genocide: They're Not Going to Get Away with It, *11 Mich. J. Int'l L. 90, 91-92 (1989);* Randall, supra note 131, at 837. These and other authors, including this writer, have consistently asserted that universal jurisdiction applies to genocide as a jus cogens international crime. It is because of scholars' influence that the Restatement of the Foreign Relations Law of the United States explains: "Universal jurisdiction to punish genocide is widely

accepted as a principle of customary law." Restatement (Third) of Foreign Relations, supra note 37, 404, reporter's note 1.

n152. For a discussion of contemporary state practice with respect to genocide, see infra notes 188-227 and accompanying text.

n153. Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, par. 62 (Oct. 2, 1995).

n154. Prosecutor v. Ntuyahaga, Case No. ICTR-90-40-T, Decision on the Prosecutor's Motion to Withdraw the Indictment (Mar. 18, 1999).

n155. G.A. Res. 3068 (XXVIII), U.N. GAOR, 28th Sess., Supp. No. 30, at 75, U.N. Doc. A/9030 (1973) [hereinafter Apartheid Convention]. See Roger S. Clark, Apartheid, in 1 International Criminal Law 643-62 (M. Cherif Bassiouni ed., 2d ed. 1999). A draft statute was prepared by this author in 1979.

n156. Apartheid Convention, supra note 154, art. 4.

n157. Id. art. 5.

n158. See supra note 140 and accompanying text.

n159. It should also be noted that 101 states have ratified the Apartheid Convention, which is significantly less than the 185 member states of the United Nations. See Study on Ways and Means of Insuring the Implementation of International Instruments such as the International Convention on the Suppression and Punishment of the Crime of Apartheid, Including the Establishment of the International Jurisdiction Envisaged by the Convention, U.N. Doc. E/CN.4/1426 (1981); M. Cherif Bassiouni & Daniel Derby, Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments, *9 Hofstra L. Rev. 523 (1981).*

n160. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, draft reprinted in *23 I.L.M. 1027 (1985)* [hereinafter Torture Convention]. See Daniel H. Derby, Torture, in 1 International Criminal Law 705-49 (M. Cherif Bassiouni ed., 2d ed. 1999); J. Herman Burgers & Hans Danelius, The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1988).

n161. Torture Convention, supra note 159, art. 5.

n162. See Bassiouni & Wise, supra note 57.

n163. Torture Convention, supra note 159, art. 7.1.

n164. See Rosalyn Higgins, Problems and Process: International Law and How We Use It 64-65 (1994).

n165. R. v. Bow Street Stipendiary Magistrate and others, ex parte *Pinochet Ugarte, [1998] 4 All ER 897, 3 WLR 1456* (H.L.(E.) 1998). See Reed Brody & Michael Ratner, The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain; Human Rights Watch, supra note 1; When Tyrants Tremble: The Pinochet Case (Human Rights Watch). See also The Prosecution of Hissene Habre - An "African Pinochet," in Human Rights Watch, supra note 1, at 11-12. Cf. Human Rights Watch, supra note 1, at 4 (citing the Filartiga case for the proposition that "the torturer has become like the pirate and slave trader before him hostis humanis generis, an enemy of all mankind."). Habre, the former dictator of Chad, was arrested in Senegal, but efforts to bring him to trial on the basis of universality failed, and he was released after a final ruling by the Cour de Cassation of Senegal.

n166. See supra note 159.

n167. Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Hijacking Convention), Sept. 14, 1963, art. 3(3), *20 U.S.T. 2941,* 704 U.N.T.S. 219.

n168. Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Hijacking Convention), Dec. 16, 1970, art. 4(3), *22 U.S.T. 1641,* 860 U.N.T.S. 105.

n169. Id. art. 7.

n170. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Hijacking Convention), Sept. 23, 1971, art. 5(3), *24 U.S.T. 564,* 974 U.N.T.S. 177.

n171. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, adopted by the International Civil Aviation Organization, Feb. 24, 1988, art. 3, *27 I.L.M. 627.*

n172. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, done at Rome 10 March 1988, art. 7(4, 5), *27 I.L.M. 668.*

n173. Id. art. 10(1).

n174. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, art. 3, *27 I.L.M. 685.*

n175. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (New York Convention), opened for signature at New York Dec. 14, 1973, art. 3, *28 U.S.T. 1975,* 1035 U.N.T.S. 167.

n176. International Convention Against the Taking of Hostages, concluded at New York Dec. 17, 1979, art. 5, *18 I.L.M. 1456.*

n177. Convention on the Safety of United Nations and Associated Personnel, opened for signature at New York Dec. 15, 1994, art. 10, U.N. Doc. A/49/742 (1994).

n178. Single Convention on Narcotic Drugs (Single Convention), signed at New York Mar. 30, 1961, art. 36(4), *18 U.S.T. 1407,* referenced in *14 I.L.M. 302.* For an amendment to Article 36, see Article 14 of the Protocol Amending the Single Convention on Narcotics Drugs, 1961, Mar. 25 1972, *26 U.S.T. 1430,* 976 U.N.T.S. 3.

n179. Convention on Psychotropic Substances (Psychotropic Convention), Feb. 21, 1971, art. 22(5), T.I.A.S. No. 9725, 1019 U.N.T.S. 175,. See also id. art. 27 (regarding territorial application).

n180. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, art. 28, 249 U.N.T.S. 240.

n181. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO Cultural Convention), Nov. 14, 1970, art. 12, 823 U.N.T.S. 231.

n182. International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, opened for signature at Geneva 12 September 1923, art. 2, 27 L.N.T.S. 213, 7 Martens Nouveau Recueil (ser. 3) 266. See also International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, Sept. 12, 1923, amended by the Protocol, Nov. 12, 1947, art. 2, 46 U.N.T.S. 169.

n183. International Convention for the Suppression of Counterfeiting Currency, Apr. 20, 1929, art. 17, 112 L.N.T.S. 371.

n184. Convention for the Protection of Submarine Cables, Mar. 14, 1884, arts. 1, 8, 9, 24 Stat. 989, 11 Martens Nouveau Recueil (ser. 2) 281.

n185. International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, adopted at New York Dec. 4, 1989, art. 9(2, 3), *29 I.L.M. 89.*

n186. Inter-American Convention on Forced Disappearance of Persons, adopted at Belem Do Para, Brazil June 9, 1994, art. 6, at http://oas.org/juridico/english/Sigs/a-60.html.

n187. Draft International Convention on the Protection of All Persons from Forced Disappearance, art. 6.1, E/CN.4/Sub.2/1998/19, Annex (Aug. 19, 1998).

n188. See Bassiouni, Sources and Content, supra note 33, at 27-31.

n189. Ian Brownlie, Principles of Public International Law 4-9 (5th ed. 1998); 1 George Schwarzenberger, International Law 41 (3d ed. 1957); 1 L. Oppenheim, International Law: A Treatise 25-27 (8th ed. 1955).

n190. Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 I.C.J. 13, 29-30 (June 3).

n191. David H. Ott, Public International Law in the Modern World 15-16 (1987).

n192. See Brownlie, supra note 188, at 5.

n193. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 97-98 (June 27).

n194. See Ott, supra note 190, at 15.

n195. North Sea Continental Shelf (F.R.G./Den.; F.R.G./Neth.), 1969 I.C.J. 3, 44 (Feb. 20).

n196. Military and Paramilitary Activities, 1986 I.C.J. at 98.

n197. Some states have universal jurisdiction for specific crimes like genocide. Others may have near universal jurisdiction for crimes against humanity and war crimes. Still other states, like Germany, have universal jurisdiction plus a linking connection. No country has universal jurisdiction for all these crimes. It is therefore difficult to say anything more than universal jurisdiction exists sparsely in the practice of states and is prosecuted in only a limited way.

n198. See infra note 221.

n199. Ley Del Poder Judicial, Article 65 (1985), and Ley Organica, Article 23 (1985), which was applied in connection with Spain's extradition request to England for Augusto Pinochet. Naomi Roht-Arriza the Pinochet Precedent and Universal Jurisdiction, *35 New England L. Rev., 311 (2001).* This was also applied in connection with Spain's request to Mexico for the extradition of Ricardo Miguel Cavallo, an Argentine citizen, sought for prosecution in Spain for crimes committed in Argentina during the "dirty war" of the 70's. See Juan E. Mendez and Salvador Tinajero-Esquivel, The Cavalo Case: A New Test for Universal Jurisdiction in Human Rights Brief, Vol. 8, issue 3 (Spring 2001) published by American University, Washington College of Law, p. 8.

n200. *36 I.L.R. 5, 6-57* (Jm. D.C., 1961), aff'd *36 I.L.R. 277 (Isr. S. Ct. 1962).*

n201. See Nazi and Nazi Collaborators (Punishment) Law, 5710-1950, 4 L.S.I. No. 64, at 154. For a discussion of the unique characteristics of this law, see Honigman v. Attorney General, *18 I.L.R. 542, 543 (Isr. S. Ct. 1953).*

n202. Cf. D.W. Bowett, Jurisdiction: Changing Patterns of Authority over Activities and Resources, *1982 Brit. Y.B. Int'l L. 1, 12* (opining that "the exercise of jurisdiction by Israel in the Eichmann case stands out as highly unusual, and probably unfounded").

n203. See Robert K. Woetzel, The Eichmann Case in International Law, in International Criminal Law 354 (Gerhard O.W. Mueller & Edward M. Wise eds., 1965); Telford Taylor, Large Questions in the Eichmann Case, N.Y. Times, Jan. 22, 1961, 6 (Magazine), at 11.

n204. Eichmann, *36 I.L.R. at 57* (para. 38).

n205. Attorney Gen. of Israel v. Eichmann, *36 I.L.R. 277, 304* (para. 12) (Israel S. Ct., 29 May 1962).

n206. Id.

n207. *776 F.2d 571, 582-83 (6th Cir. 1985).*

n208. *Id. at 582.* See Yoram Sheftel, Defending "Ivan the Terrible": The Conspiracy to Convict John Demjanjuk (1996).

n209. Code Penal art. 212-1 (Dalloz ed. 2000). For a discussion of France's three major prosecutions of Barbie, Touvier, and Papon, see Leila Sadat Wexler, The French Experience, in 3 International Criminal Law 273-300

(M. Cherif Bassiouni ed., 2d ed. 1999). See also Brigitte Stern, International Decision, Universal Jurisdiction over Crimes Against Humanity Under French Law, *93 Am. J. Int'l L. 525 (1999);* Leila Sadat Wexler, Prosecutions for Crimes Against Humanity in French Municipal Law: International Implications, in Proceedings of the American Society of International Law 270-76 (1997); Leila Sadat Wexler, Reflections on the Trial of Vichy Collaborator Paul Touvier for Crimes Against Humanity in France, *20 Law & Soc. Inquiry 191 (1995);* Leila Sadat Wexler, The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again, *32 Colum. J. Transnat'l L. 289 (1994).*

The French Cour de Cassation, in a 1998 judgment (Cass. crim., 6 Jan. 1998, Bull. crim., no. 2, Rep pen. Dalloz 2000), considered that universal jurisdiction was applicable in the case of genocide in accordance with Article 689-2 of the French Code of Criminal Procedure. The question was also raised as to whether or not torture should be subject to universal jurisdiction. Commentators also take the position that there would be universal jurisdiction as part of France's obligations to implement Security Council Resolution 827, which established the ICTY, and Resolution 955, which established the ICTR. Based on this reasoning, it could also be assumed that France's implementation of the ICC Statute would justify its exercise of universal jurisdiction.

n210. Yves Mayand, Code Penal; Nouveau code penal, ancien code penal (87th ed. Dalloz 2000).

n211. See Id., Art. 113-8.

n212. Frederic Desportes & Francis Le Gunehec, in Le Nouveau Droit Penal: Droit Penal General (4th ed., 1997).

n213. See, however, Gilbert Azibert, Code de Procedure Penal 2000, at 459 et seq. (12th ed. LITEC 2000), where he comments on extraterritorial jurisdiction, but does not refer to universal jurisdiction. Nevertheless, the Code permits universal jurisdiction if it is included in an international convention that France has ratified, provided that the crime in question is also a crime under French law. This is provided for in Articles *689-2* to *689-7 of the Code* de Procedure Penal. Id., Azibert at 313-14. See also R. Koering-Joulin, "Jurisclasseur de Procedure Penale" fasc. 20, No. 91. See, e.g., Claude Lombois, Le Droit Penal Interna tional (1979); Andre Huet & Renee Koering-Joulin, Le Droit Penal International (1994).

n214. Criminal Code 7(3.71) (Can.).

n215. Regina v. Finta, [1994] 1 S.C.R. 701, 811 (Cory, J.) (first emphasis added) (citation omitted).

n216. Section 6, which is entitled "Acts Abroad Against Internationally Protected Legal Interests," provides as follows:

German criminal law shall further apply, regardless of the law of the place of their commission, to the following acts committed abroad:

genocide (Section 220a); serious criminal offenses involving nuclear energy, explosives and radiation in cases under Sections 307 and 308 subsections (1) to (4), Section 309 subsection (2) and Section 310; assaults against air and sea traffic (Section 316c); trafficking in human beings (Section 180b) and serious trafficking in human beings (Section 181); unauthorized distribution of narcotics; dissemination of pornographic writings in cases under Section 184 subsection (3) and (4); counterfeiting of money and securities (Sections 146, 151 and 152), payment cards and blank Eurochecks (Section 152a subsections (1) to (4)), as well as their preparation (Sections 149, 151, 152 and 152a subsection (5)); subsidy fraud (section 264); acts which, on the basis of an international agreement binding on the Federal Republic of Germany, shall also be prosecuted if they are committed abroad.

6, StGB.

n217. Id. 6 (1).

n218. German Bundesgerichtshof, Urteil vom. 30, Apr. 1999, 3StR 215/98. See Article 211 for genocide and Article 212 for crimes against humanity. France's 1996 criminal code has a similar provision. See also M. Cherif Bassiouni, Crimes Against Humanity, in 1 International Criminal Law 521, 584-86 (M. Cherif Bassiouni ed., 2d ed. 1999).

n219. 6(9), StGB; see also 7, StGB. Section 7, which is entitled "Applicability to Acts Abroad in Other Cases," states:

German criminal law shall apply to acts, which were committed abroad against a German, if the act is punishable at the place of its commission or the place of its commission is subject to no criminal law enforcement.

German criminal law shall apply to other acts, which were committed abroad if the act is punishable at the place of its commission or the place of its commission is subject to no criminal law enforcement and if the perpetrator:

was a German at the time of the act or became one after the act; or

was a foreigner at the time of the act, was found to be in Germany and, although the Extradition Act would permit extradition for such an act, is not extradited, because a request for extradition is not made, is rejected, or the extradition is not practicable.

StGB, 7. On February 12, 2001, the Constitutional Court of Germany affirmed a judgement convicting a Bosnian Serb for Genocide in Bosnia in accordance with 200a StGB, the German Penal Code. See also Article 6-1 of the German criminal code; Hans-Heinrich Jescheck & Thomas Weigend, Lehrbuch des Strafrecht Allegemeines Teil, 170 (5th ed., 1996). As to Spain, see Article 23 of the Spanish criminal code; Rodriguez Devesa and Alfonso Serrano Gomez, Derecho Penal Espanol: Parte General, 226 et. seq. (17th ed. 1994).

n220. See 3 Codice Penale: Annotato con la Giurisprudenza 103-14, arts. 7, 8, 9 (and commentary) (S. Beltrani, F. Caringella & R. Marino eds., Oct. 1996). See also Antonio Pagliaro, Principi de Diritto Penale: Parte Generale, 145-46 (7th ed., 2000); Ferrando Mantovani, Diritto Penale, 951 et. seq. (4th ed. 2001).

n221. See Christian Favre, Marc Pellet & Patrick Stoudmann, Code Penal Annote (1997). Cf. Didier Pfirter, The Position of Switzerland with Respect to the ICC Statute and in Particular the Elements of Crimes, *32 Cornell Int'l L.J. 499 (1999)* (discussing Switzerland's Elements proposal on war crimes).

n222. See Coupable de crimes de guerre et d'assassinat, le maire rwandais est condamne a la perpetuit, Le Temps, May 1, 1999.

n223. [1991] 172 C.L.R. 501 (Austl.).

n224. The 1994 case is discussed in Chandra Lekha Sriram, Contemporary Practice of Universal Jurisdiction: Disjointed and Disparate, Yet Developing, in Princeton Project on Universal Jurisdiction (Princeton Univ., forthcoming 2001).

n225. E. High Ct., 3d Div. Den. 1994. The case, which involved defendant Refic Saric, is discussed in Mary Ellen O'Connell, New International Legal Process, *93 Am. J. Int'l L. 334, 341-42 (1999).*

n226. Act Concerning the Punishment of Serious Violations of International Humanitarian Law 7 (Belgium).

n227. Human Rights Watch, supra note 1, at 8.

n228. Press Release, Congo v. Belgium (Oct. 17, 2000), at http://www.icj-cij.org/icjwww/ipre...ipresscom20002000-32&usco re;COBE<uscore>20001017.htm.

n229. Id.

n230. Arrest Warrant of 11 April 2000 (Congo v. Belg.), at 19 (Order) (Dec. 8, 2000), at http://www.icj-cij.org/icjwww/idoc.../icobe<uscore>iorder<uscore>provisio nal<uscore>measure<uscore>20001208.htm.

Following the Cabinet reshuffle of 20 November 2000, Mr. Yerodia Ndombasi ceased to exercise the functions of Minister of Foreign Affairs and was charged with those of Minister of Education, involving less frequent foreign travel; ... it has accordingly not been established that irreparable prejudice might be caused in the immediate future to the Congo's rights nor that the degree of urgency is such that those rights need to be protected by the indication of provisional measures.

Id.

n231. Id. at 20.

n232. Cf. Human Rights Watch, supra note 1, at 9-10.

Following the genocides in the former Yugoslavia and Rwanda, a number of European countries brought perpetrators to trial on the basis of universal jurisdiction. In Belgium, a Rwandan, Vincent Ntezimana, was arrested and charged with genocide. In Germany, the Bavarian High Court sentenced a Bosnian Serb, Novislav Djajic, to five years imprisonment in 1997 under the Geneva Conventions for aiding and abetting the killing of fourteen Muslim men in Bosnia in 1992. A former leader of a paramilitary Serb group, Nikola Jorgic, was convicted on eleven counts of genocide and thirty counts of murder, and sentenced to life imprisonment by the D<um u>sseldorf High Court. A third case is pending against a Bosnian Serb charged with genocide before the D<um u>sseldorf High Court. In Denmark, Bosnian Muslim Refik Saric is currently serving an eight-year sentence for war crimes, charged under the Geneva Conventions with torturing detainees in a Croat-run prison in Bosnia in 1993. In April 1999, a Swiss military court convicted a Rwandan national of war crimes[,] but held it had no jurisdiction over genocide and crimes against humanity. A Bosnian Serb was indicted but acquitted of war crimes. The Netherlands is prosecuting a Bosnian Serb for war crimes before a military court. France is currently prosecuting a Rwandan priest, Wenceslas Munyeshyaka, for genocide, crimes against humanity, and torture. In addition, in July 1999, French police arrested a Mauritanian colonel, Ely Ould Dah, who was studying at a French military school, on the basis of the U.N. Convention against Torture, when two Mauritanian exiles came forward and identified him as their torturer. Ould Dah, free on bail, slipped out of France in March 2000, however. In February 2000, a Senegalese court indicted the exiled dictator of Chad, Hissene Habre, on torture charges. In 1997, the United Kingdom arrested a Sudanese doctor residing in Scotland for alleged torture in Sudan, but later dropped the charges, apparently for lack of evidence. In August 2000, Mexico arrested Ricardo Miguel Cavallo, a former Argentine military official. Judge Garzon of Spain has filed an extradition request for Cavallo based on the torture and "disappearance" of over 400 people.

Id. See Universal Jurisdiction in Respect of Gross Human Rights Offenses, supra note 1, at 22-29; Universal Jurisdiction in Europe, supra note 1, at 16-47.

n233. See Bassiouni, Sources and Content, supra note 33, at 46-100.

n234. M. Cherif Bassiouni, Enforcing Human Rights Through International Criminal Law and Through an International Criminal Tribunal, in Human Rights: An Agenda for the Next Century 347 (Louis Henkin and Lawrence Hargrove eds., 1994).

n235. The category of war crimes continues to be augmented to reflect different practices and more detailed regulations, slave-related practices have not, as mentioned above. See supra notes 107-131 and accompanying text.

n236. See supra note 33.

n237. For that historical evolution, see Bassiouni, Crimes Against Humanity, supra note 26.

n238. The only logical method of dealing with these problems of uneven development of international criminal law is to codify it, but it regrettably appears that governments do not support this proposition, consequently international criminal law will continue to suffer from a number of legislative and other deficiencies. See, e.g.,

M. Cherif Bassiouni, A Draft International Criminal Code and a Draft Statute for an International Criminal Tribunal (1987).

n239. See Jennifer L. Balint, The Place of Law in Addressing International Regime Conflicts, 59 Law & Contemp. Probs. 103 (1996); M. Cherif Bassiouni, Searching for Peace and Achieving Justice: The Need for Accountability, 59 Law & Contemp. Probs. 9 (1996); Bassiouni, Jus Cogens Crimes, supra note 33; Madeline H. Morris, International Guidelines Against Impunity: Facilitating Accountability, 59 Law & Contemp. Probs. 29 (1996); Douglass Cassel, Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities, 59 Law & Contemp. Probs. 197 (1996); Mark S. Ellis, Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc, 59 Law & Contemp. Probs. 181 (1996); Priscilla B. Hayner, International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal, 59 Law & Contemp. Probs. 173 (1996); Joyner, supra note 150; Neil J. Kritz, Coming to Terms With Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights, 59 Law & Contemp. Probs. 127 (1996); Stephan Landsman, Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions, 59 Law & Contemp. Probs. 81 (1996); W. Michael Reisman, Legal Responses to Genocide and Other Massive Violations of Human Rights, 59 Law & Contemp. Probs. 75 (1996); Naomi Roht-Arriaza, Combating Impunity: Some Thoughts on the Way Forward, 59 Law & Contemp. Probs. 93 (1996); Michael Scharf, The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes, 59 Law & Contemp. Probs. 41 (1996); see also Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference, 17-21 September 1998, in 14 Nouvelles Etudes Penales (Christopher C. Joyner, ed., 1998); Diane F. Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, *100 Yale L. Rev. 2537 (1991).*

n240. See Thomas M. Franck, Legitimacy in the International System, *82 Am. J. Int'l L. 705, 707 (1988).*

The international system of states is fundamentally different from any national community of persons and of corporate entities. It is not helpful to ignore those differences or to cling to the reifying notion that states are "persons" analogous to the citizens of a nation. Some of the differences are of great potential interest. In a nation, Machiavelli noted, "there cannot be good laws where there are not good arms." In the international community, however, there are ample signs that rules unenforced by good arms are yet capable of obligating states and quite often even achieve habitual compliance.

Id. (footnote omitted).

n241. This highlights a significant reason why universal jurisdiction should not be exercised over all international crimes.

n242. The series of Restatements of certain aspects of U.S. law is an interesting model. However, since there is no Restatement on criminal law, the closest analogy is the Restatement (Second) of Conflict of Laws, which, in Section 6, includes a policy-oriented approach to choice-of-law. It states:

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws 6 at 10 (1971). While such a choice-of-law approach can work in a federal system linked by a Constitution that contains a "full-faith and credit" clause, U.S. Const. art. IV, 1, it may not work effectively at the international law level. Consequently, a more hard-fast normative approach may be more appropriate in the international context.

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THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT:

A COMMENTARY

VOLUME I

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PRECONDITIONS TO THE EXERCISE OF JURISDICTION

Hans-Peter Kaul

I. General Overview

A. The Issue of the General, not Security Council-triggered, Jurisdiction of the ICC

Article 12—one of the cornerstone provisions of the Statute—regulates a set of fundamental issues: first, the question of how a State would accept the Court's jurisdiction and the meaning of such acceptance with regard to the jurisdiction *ratione materiae* (subject-matter jurisdiction); second, the question of which States must accept the Court's jurisdiction before it could act, thus determining the scope and outreach of the general or 'regular' jurisdiction of the Court (as distinct from the very different Security Council-triggered jurisdiction under Article

eriously be questioned either.[13] Concerning the crimes listed in Article 8(2)(a), .e. the grave breaches of the Geneva Conventions of 12 August 1949, the respec-ive treaty provisions[14]—whose customary character was recently reaffirmed by he International Court of Justice (hereafter 'ICJ') in the *Nuclear Weapons Opinion*[15]—explicitly provide for universal jurisdiction.[16] With respect to the war rimes contained in Article 8(2)(b), the customary validity of the universal juris-liction principle has recently been shown by Andreas Zimmermann,[17] and it suf-ices to briefly summarize the points convincingly made by this author: he refers o a long-standing State practice of punishing war crimes regardless of specific oints of attachment to the respective *forum* (a practice which in fact pre-dates the Geneva Conventions of 1949 (hereafter 'GC')). This practice, which in itself suf-ices to establish the customary status of the universality principle, was reaffirmed n the process of elaborating the First Additional Protocol of 1977 to the GC and oy the now universal acceptance of some other pertinent international instru-nents.

The next category which must be carefully examined are war crimes committed in n internal armed conflict, which are listed in Article 8(2)(c) and (e) and which, or the sake of analytical clarity, may also be called *civil* war crimes.[18] It is with espect to this category of crimes alone that the customary applicability of the uni-ersal jurisdiction principle was open to argument before the Rome Conference tarted. On balance, the preferable view of current customary law is to affirm the xtension of the universal jurisdiction principle to civil war crimes and to acknow-edge a basically coherent jurisdictional regime under customary international law or all core crimes of the Statute. It is true that the Appeals Chamber of the ICTY ejected the extension of the grave breaches regime of the GC to civil war crimes n the *Tadić* Decision.[19] But this statement cannot be so construed as to render this ssue moot. First, the majority of the Appeals Chamber recognized a trend under ecent customary law to extend the grave breaches regime to civil war crimes, and udge Abi-Saab in his dissent on this point[20] went so far as to acknowledge such an

[13] Cf. e.g. I. Brownlie, *Principles of Public International Law* (4th edn., 1990) 565. Brownlie states: t is now generally accepted that breaches of the laws of war, and especially of the Hague Convention f 1907 and the Geneva Convention of 1949, may be punished by any State which obtains custody of ersons suspected of responsibility.'

[14] Art. 49 of the First Geneva Convention, Art. 50 of the Second Geneva Convention, Art. 129 of he Third Geneva Convention, and Art. 146 of the Fourth Geneva Convention.

[15] Cf. esp. para. 79 of the Advisory Opinion of 8 July 1996, 35 *ILM* (1996) 827.

[16] These provisions even enshrine an unqualified duty for States Parties *aut dedere aut judicare*.

[17] *Supra* note 11, at 212.

[18] On this point of terminology, see C. Kreß, 'Der Jugoslawien-Strafgerichtshof im Grenzbereich wischen internationalem bewaffneten Konflikt und Bürgerkrieg', in H. Fischer and S. R. Lüder eds.), *Völkerrechtliche Verbrechen vor dem Jugoslawien-Tribunal, nationalen Gerichten und dem internationalen Gerichtshof* (1999) 36.

[19] ICTY IT-94-1-AR72, 2 October 1995, reprinted in *HRLJ* (1995) 454 *et seq.* (paras. 80 *et seq.*).

[20] Ibid., at 470 (sub IV).

extension by way of subsequent practice to the GC. Secondly and decisively, the customary principle of universal jurisdiction may well govern civil war crimes independently from a grave breaches regime, as is the case with respect to the war crimes in Article 8(2)(b). Starting from this premise, the *Tadić* Decision even lends strong support to an extension of universal jurisdiction to civil war crimes, as it is the key message of this decision that the customary law regarding civil war crimes has undergone a long process of assimilation to that of war crimes.[21] The *Tadić* Decision is not the only piece of practice pointing in this direction. In the *Nicaragua Judgment* (Merits) of 27 June 1986,[22] the ICJ couched the rationale behind common Article 3 of the GC in the terms 'elementary considerations of humanity'. On this basis, one may assume that the ICJ would consider the duties incumbent on individuals under common Article 3 of the GC as possessing a character *erga omnes*. As to the civil war crimes which go beyond the realm of common Article 3 of the GC, States such as Belgium and Switzerland have recently exercised universal jurisdiction without having met with any protest.[23] After the conclusion of the Rome Conference, the Statute itself may be seen as a powerful element of State practice supporting the extension of universal jurisdiction to civil war crimes. Reference can be made to preambular paragraph 6 which recalls 'the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. This phrase may well be seen as an affirmation of the customary application of the universal jurisdiction principle to all international core crimes of the Statute including civil war crimes under Article 8(2)(c) and (e).[24] As a matter of principle, too, the extension of universal jurisdiction to civil war crimes is well justified. One may, of course, argue that the most relevant circumstantial factors of a single civil war crime (place of the crime, nationality of criminal and victim;) unlike the case of a war crime—usually relate only to one jurisdiction, and that a transnational spillover effect is not typical here, as an overall context of massive delinquency is—other than in the cases of genocide and crimes against humanity—no constituent element of the crime in question. But these points do not exhaustively deal with the rationales underlying universal jurisdiction under current international law.[25] One criterion which is usually referred to in order to explain universal jurisdiction is the particularly grave nature

[21] For a detailed analysis of this crucial element of the *Tadić* Decision, see C. Kreß, 'Friedenssicherungs- und Konfliktsvölkerrecht auf der Schwelle zur Postmoderne. Das Urteil des Internationalen Strafgerichtshofs für das ehemalige Jugoslawien (Appeals Chamber) im Fall Tadić', *Europäische Grundrechte Zeitschrift* (1996) 645 *et seq.*

[22] ICJ Reports (1986) 114 (para. 218).

[23] For references, see Zimmermann, *supra* note 11, at 213 (n. 163). See, however, the recent case brought before the ICJ by the Congo against Belgium.

[24] See Condorelli, *supra* note 6.

[25] For an interesting analysis of the evolution of the rationales of universal jurisdiction, see K. C. Randall, 'Universal Jurisdiction under International Law', 66 *Texas Law Review* (1985) 800, at 803 *et seq.*

niversal equality before the law. As the ICC project was aiming at an institution isuring individual criminal responsibility for the most serious international imes, it was obvious, at least in principle, that international criminal justice to e delivered by the future Court would have to be fair and equal. There should be jual jurisdiction over the most serious crimes of concern for the international ommunity as a whole regardless of the nationality of the perpetrator. Concerned tate Parties to the future Statute would have to accept the same rights and obliga- ons, this also with respect to their own criminal jurisdiction and their own ationals. In the same manner, equality before the law would also mean that there ould be equal rights and opportunities to address the Court, to make complaints r to initiate criminal proceedings. From this perspective the principled demand or equality and equal treatment of perpetrators and concerned States by the juris- ictional regime of the future ICC meant, in principle, that two risks in particu- ar had to be avoided: first, attempts by States to exclude their nationals from the arisdiction of the future Court; second, unequal chances for States (e.g. for per- nanent members of the Security Council on the one side, 'normal' UN members n the other) to bring matters to the Court or to filter or block cases going to the Court.

n general, these were some of the main approaches and issues which marked the egotiating process on jurisdictional issues before and in Rome. Consequently, hey may also be borne in mind when evaluating the outcome of the Rome Conference with regard to Article 12 on preconditions for the exercise of jurisdic- ion.[9]

C. *The Quest for Universality—Relevant Aspects of Contemporary Customary International Law*

n order to provide a basis for a sober legal assessment, it seems worthwhile to e-examine, again, whether contemporary international law would have permit- ed the adoption of a jurisdictional regime for Article 12 based on the principle of niversal jurisdiction. In essence, this is the customary question whether such a olution would have had a legitimate basis under contemporary international law.

It must be stressed that this issue is clearly distinct from the question whether and to what extent States, when elaborating the Rome Statute, would, *as a matter of legal policy*, move towards the direction of the universality approach and support a jurisdictional regime based on universal jurisdiction. This question is certainly marked by a wide political discretion. It enables States to legitimately pursue a position in keeping with their interests as perceived by them on a national basis. In sum, this type of decision is clearly of a political nature and as such not an issue of international law.

[9] See below, IV.

At the same time, the pertinent question with regard to the Rome Statute is whether current international law would have allowed the future ICC to be given the jurisdictional authority to prosecute the crimes within its jurisdiction *ratione materiae* on the basis of universality. For a long time, it was quite clear that its jurisdiction would cover (only) the most serious crimes of concern to the international community as a whole, namely genocide, crimes against humanity, and war crimes.

The universality approach starts from the assumption that, under current international law, all States may exercise universal jurisdiction over these core crimes. It combines this assumption with the very simple idea that States must be entitled to do collectively what they have the power to do individually. Therefore, States may agree to confer this individual power on a judicial entity they have established and sustain together and which acts on their behalf. Thus, a State which becomes a party to the Statute thereby accepts the jurisdiction with respect to the international core crimes. As a consequence, no particular State—be it a State Party or non-State Party—must give its specific consent to the exercise of this jurisdiction in a given case. This, in essence, is the regime that follows from an approach based on the principle of universal jurisdiction.

It has been argued that the universality approach is not in line with the current status of general international law. Not all the crimes within the Court's jurisdiction are, according to this view, covered by universal jurisdiction so that one has to rely upon the other qualifications for international criminal jurisdiction, in particular territoriality and nationality (hereafter 'customary law argument').

It is submitted that the customary law argument fails the test of close scrutiny.[10] Given the general consensus about the customary nature of universal jurisdiction over genocide[11]—the 'crime of crimes', in the words of the International Criminal Tribunal for Rwanda[12]—it is no longer necessary to say anything in this respect.

The applicability of the principle of universal jurisdiction under customary international law to those war crimes committed in an international armed conflict which are covered by Article 8(2)(a) and (b) (hereafter 'war crimes') cannot

[10] This discussion of the customary law argument draws on H.-P. Kaul and C. Kreß, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises', 2 *YIHL* (1999) 143.

[11] Cf. Art. 6 of the Statute; for a detailed demonstration of the applicability of the principle of universal jurisdiction under customary international law over genocide, see A. Zimmermann, 'The Creation of a Permanent International Criminal Court', 2 *Max Planck Yearbook of International Law* (1998) 206 *et seq.*

[12] Judgment of 4 September 1998 in *Prosecutor v. Kambanda*, ICTR 97-23-S, para. 16.

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THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: HIGH CRIMES AND MISCONCEPTIONS: THE ICC AND NON-PARTY STATES

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SUMMARY: ... As we shall see, states are particularly unwilling to enter into broad commitments to adjudicate future disputes, the content and contours of which cannot be foreseen. ... Two plausible theories of ICC jurisdiction as delegated state jurisdiction will be examined here: delegated universal jurisdiction and delegated territorial jurisdiction. ... Certain violations of Protocol I to the Geneva Conventions of 1949, for instance, are not subject to universal jurisdiction under customary law. ... Therefore, we may not simply assume that states' universal jurisdiction may be delegated to an international court as a matter of customary international law. ... Universal jurisdiction arises as a matter of customary international law. ... C. The Lawfulness of Delegated Universal Jurisdiction or Delegated Territorial Jurisdiction as a Legal Innovation ... Considering the process by which the content of a treaty may become part of customary law, the International Court of Justice ("ICJ") in the Continental Shelf case stated that, ... In the absence of customary law recognizing universal jurisdiction over a given crime, each state may acquiesce in or protest against a proposed new subject of universal jurisdiction. ... If that trend continues, then, with sufficient time and state practice, universal jurisdiction over these crimes will pass into customary law. ... Through the catalyst of a treaty proposing a new application of universal jurisdiction, the usual processes of customary law development may be accelerated. ...

TEXT: [*13]

I

Introduction

The Rome Treaty for an International Criminal Court ("ICC") <=2> n1 provides for the establishment of an international court with jurisdiction over genocide, war crimes, and crimes against humanity. <=3> n2 Those crimes often are committed by or with the approval of governments. It is unlikely that a government sponsoring genocide, war crimes, or crimes against humanity would consent to the prosecution of its national for his or her participation. Therein lies the problem with an international criminal court that may exercise jurisdiction only if the defendant's state of nationality consents. The very states that are most likely to be implicated in serious international crimes are the least likely to grant jurisdiction over their nationals to an international court.

The ICC Treaty avoids the dismal prospect of an international criminal court that cannot obtain jurisdiction over international criminals. The treaty provides that the ICC may exercise jurisdiction even over nationals of states that are not parties to the Treaty and have not otherwise consented to the court's jurisdiction. Article 12 provides that, in addition to jurisdiction based on Security Council action under Chapter VII of the United Nations Charter and jurisdiction based on consent by the defendant's state of nationality, the ICC will have jurisdiction to prosecute the national of any state when crimes within the court's subject-matter jurisdiction are committed on the territory of a state that is a party to the treaty or that consents to ICC jurisdiction for that case. That territorial basis would empower the court to exercise jurisdiction even in [*14] cases where the defendant's state of nationality is not a party to the treaty and does not consent to the exercise of jurisdiction. <=4> n3

The United States has objected to the ICC Treaty on the ground that, by purporting to confer upon the court jurisdiction over the nationals of non-consenting non-party states, the treaty would bind non-parties in contravention of the law of treaties. <=5> n4 This objection has given rise to a heated controversy that has focused on the particulars of the international law of treaties and of jurisdiction. On close inspection, however, we can detect a more basic issue struggling to make its way to the surface.

The fundamental issue concerns the nature of the ICC as an international institution. The jurisdictional structure of the ICC is based on a view of the ICC as a criminal court, tout court. In this view, the job of the ICC is to adjudicate the guilt or innocence of individuals accused of recognized international crimes. With this model in mind, it makes sense to give the court meaningful powers of compulsory jurisdiction, lest perpetrators of serious international crimes should escape justice. From this perspective one might reason that, if the court's subject-matter jurisdiction is limited to established international crimes and the process of the court is fair, then no state-whether party or non-party-should have legitimate objections to the court's exercise of jurisdiction over its nationals.

The deficiency of this approach is that it reflects only one of the two types of cases that the ICC will be called upon to decide. In addition to the cases that are concerned solely with individual culpability, there will be ICC cases that focus on the lawfulness of official acts of states. Even while individuals, and not states, will be named in ICC indictments, there will be cases in which those individuals [*15] are indicted for official acts taken pursuant to state policy and under state authority. These official-act cases may well include cases in which an official state act is characterized as criminal by the ICC prosecutor (acting, very possibly, on a referral from an aggrieved state), while the state whose national is being prosecuted maintains that the act was lawful. One can readily imagine ICC cases in which the act forming the basis for the indictment was a military intervention, deployment of a particular weapon, recourse to a certain method of warfare, or other official conduct that the responsible state maintains was lawful. Or the act forming the basis for the indictment might be an alleged official act that the concerned state maintains never occurred. In these sorts of ICC cases, notwithstanding the presence of individual defendants in the dock, the cases will represent bona fide legal disputes between states.

When the ICC is hearing cases in the official-acts category, its function will resemble less that of a municipal criminal court than that of an international court for the adjudication of interstate legal disputes. The shortcomings of the ICC jurisdictional structure and of the arguments that have been advanced in support of that structure stem from the fact that this second aspect of the ICC's character, that of a court for interstate dispute adjudication, is not adequately taken into account.

There is a range of mechanisms for the resolution of interstate disputes. Adjudication is among them, but is not always the approach best suited to a given dispute. Because in many circumstances states see diplomatic, non-adjudicatory dispute resolution as posing fewer risks and offering potentially more constructive resolutions than litigation would, states often are reluctant to submit their disputes to third-party adjudication. As we shall see, states are particularly unwilling to enter into broad commitments to adjudicate future disputes, the content and contours of which cannot be foreseen.

The interest of states in retaining discretion as to their methods of addressing interstate disputes is reflected in the jurisdictional structures of the International Court of Justice ("ICJ") and of specialized international courts of such as the Law of the Sea Tribunal and the World Trade Organization ("WTO") dispute settlement system. The constituting instruments of those international courts reserve to states broad discretion over whether and when those courts will have decisionmaking authority.

The drafters of the ICC Treaty faced the dilemma of needing to fashion a jurisdictional scheme for the ICC that would be sufficiently aggressive to make the court effective in the prosecution of criminals but also sufficiently consensual to make the court a suitable institution for the adjudication of international disputes. A genuine quandary is posed by the need for a jurisdictional structure that will foster the ICC's effectiveness as a criminal court without engendering overreaching by the ICC into areas of interstate dispute settlement in which states have legitimate rights of discretion regarding methods and fora. The following discussion attempts to gain some purchase on the issue of the ICC's jurisdiction [*16] over non-party nationals by considering the court's jurisdictional structure in the light of this dilemma.

This article begins by examining the interests of states with respect to the jurisdiction of international courts and the consequent patterns in the jurisdictional structures of existing international courts. That section will conclude by evaluating the significant differences between the jurisdictional structure of the ICC and that of other international courts in light of the ICC's dual character as the adjudicator of individual culpability and of

interstate legal disputes. Proceeding from that analytic basis, the subsequent sections will examine the strengths and the shortcomings of the theories supporting ICC jurisdiction over non-party nationals. The article will conclude that the ICC's jurisdictional structure and, more specifically, its provision for jurisdiction over non-party nationals, cannot be satisfactorily justified and that this is so, ultimately, because the ICC's role as an adjudicator of interstate disputes is not adequately accounted for in the Court's jurisdictional design.

II

The Jurisdiction to Adjudicate Interstate Disputes

States are notoriously reluctant to submit their disputes to binding third-party adjudication. Despite a dramatic increase in the use of binding third-party adjudication at the international level in recent years, the use of such mechanisms to resolve international disputes remains minimal in comparison with the use of diplomatic means for addressing such disputes. The relative dearth of interstate disputes brought to the ICJ has given rise to extended consideration of why states make such limited use of the ICJ and how greater use might be encouraged. <=6> n5 The fact, quickly noted in discussions of the limited state use of the ICJ, is that states-perhaps more specifically, foreign ministry officials-are reluctant to relinquish control over their disputes to third parties, on either an ad hoc or a compulsory basis. <=7> n6 Such reluctance may be partly explained by states' concerns with a court's procedures or structure. <=8> n7 But even in [*17] the absence of such concerns, there is a more fundamental reluctance to submit to third-party adjudication that rests on the perceived advantages to states in some circumstances of retaining control over the resolution of their disputes. <=9> n8 As Arthur Rovine has put it, "it is one thing to show that resort to the ICJ is preferable to war or armed conflict; it is quite another matter to demonstrate that judicial processes are as valuable as ordinary out-of-court bargaining and discussion." <=10> n9

When a dispute involving allegations of war crimes, genocide, or crimes against humanity involves unsettled law or ambiguous facts, compulsory binding adjudication may not be the most constructive or appropriate method of dispute resolution. While the most flagrant instances of, say, genocide leave no basis for dispute or negotiation, many cases involving allegations of genocide, crimes against humanity, or, especially, war crimes are more complex, factually or legally or both.

Resolving interstate disputes through negotiation and other diplomatic means often is perceived by states as less risky and potentially more constructive than submitting the disputes for third-party adjudication. This is so for a number of reasons. Diplomatic approaches maintain the possibility of leaving the issue in abeyance should matters develop such that non-resolution appears preferable to immediate resolution. <=11> n10 Diplomatic methods are likely to result in less damage to the standing and prestige of the losing state, if there is in fact an identifiable loser. This consideration is heightened in cases where a loss would entail a finding that the losing state had been engaged in wrongdoing. In addition, diplomatically negotiated resolutions do not create legal precedents in the way that reasoned and published legal opinions inevitably do. States may fear the creation of an authoritative (even if not binding) precedent contrary to their interests and, moreover, may object to the prospect of an international court, in effect, legislating international law where the litigated issue concerns an unsettled area of law. <=12> n11 Another influential factor is that, in a dispute between any two states, one party is likely to have a political advantage, a stronger bargaining position, that would be significant in the diplomatic arena but might be of little effect in an adjudicated settlement. <=13> n12 Moreover, diplomacy leaves room for compromise resolutions that adjudication generally does not. <=14> n13 Retaining control over a dispute allows states to respond in a nimble and nuanced way as a controversy and the options for its resolution unfold. All of this states are unwilling to give up wholesale.

[*18] Generally, the more important and sensitive the subject of a dispute is to a state, the less willing the state is to submit the dispute for third-party adjudication. <=15> n14 Equally, the more uncertain the adjudicated outcome of a particular dispute would be, the less willing a state will be to submit to binding third-party adjudication. <=16> n15 By extension, if states frequently are unwilling to submit for adjudication disputes that are important and whose adjudicated outcomes would be uncertain, states also will be unwilling to make broad grants of jurisdiction in advance that could later prove to include important disputes whose adjudicated outcomes would be uncertain. As Professor John Merrills has observed,

Probably the most striking feature of adjudication is that it is dispositive. Because the decisions of courts and tribunals are treated as binding, litigation is a good way of disposing of a troublesome issue when the resolution

of a dispute is considered to be more important than the result. Conversely, when the result is all-important, adjudication is unlikely to be used because it is simply too risky. These attitudes are reinforced by the fact that adjudication is not merely dispositive, but tends to produce a winner-takes-all type of solution. This can obviously render an unfavourable outcome a catastrophe and so encourages states to choose other procedures for disputes which they cannot afford to lose.

Because adjudication is dispositive the attitude of states toward compulsory jurisdiction is conspicuously ambivalent. On the one hand, there is a good deal of support for the principle of the optional clause and similar arrangements [allowing states to consent in advance to the jurisdiction of an international court over future disputes, subject to such reservations as each state may make], since the idea of establishing a binding system to resolve international disputes is an attractive one. On the other hand, as soon as such arrangements are established, states become aware of the risks involved in a commitment to litigate disputes which cannot be foreseen and begin to have second thoughts. The result ... is a reluctance to subscribe to the more general arrangements for compulsory jurisdiction and a preference for agreements concerned either with particular types of cases or individual disputes. <=17> n16

Certainly, states sometimes do choose to submit their disputes for third-party adjudication. But, cognizant of both the advantages and the drawbacks of adjudication, states jealously guard their prerogative to select the circumstances under which they will do so. States' insistence on this prerogative has, in general, been viewed as legitimate (even while many have sought to expand consensual use of the ICJ <=18> n17) and has been reflected in the treaties providing for third-party adjudicatory mechanisms.

All existing international courts have contentious jurisdiction <=19> n18 only over disputes involving states that are parties to treaties providing for their jurisdiction. <=20> n19 Inspection of those treaties reveals that, in general, states have not seen [*19] fit to relinquish discretion over jurisdiction entirely, even by treaty. Rather, the treaties establishing international courts have been designed to afford states parties significant continuing discretion over the powers that the respective courts will have relative to jurisdiction and, relatedly, to remedies. This is true of the ICJ, the Tribunal on the Law of the Sea, and the WTO dispute settlement system, which will serve as three principal examples, as well as of other international courts. <=21> n20

The contentious jurisdiction of the ICJ depends on the consent of the states that are parties to the dispute. <=22> n21 Consent to ICJ jurisdiction may be given in advance either through a compromissory clause in a treaty providing that some or all categories of disputes arising under that treaty will be submitted to the ICJ or through a declaration under the ICJ Statute's "optional clause." <=23> n22 By making [*20] a declaration under the optional clause, a state agrees to accept the ICJ's jurisdiction for some or all categories of future disputes.

A compromissory treaty clause giving jurisdiction to the ICJ tends to be more readily acceptable to states where the clause concerns a narrowly defined subject matter <=24> n23 than where the jurisdiction conferred is more open-ended. <=25> n24 State practice in the use of the optional clause of the ICJ Statute shows similar tendencies for states to be conservative with regard to making grants of jurisdiction in advance. Fewer than a third of the members of the United Nations currently have in force declarations under the optional clause, <=26> n25 and many of those states have made reservations substantially limiting the effect of their declarations. <=27> n26

If consent to ICJ jurisdiction covering a given dispute has not been expressed in advance, the dispute may nevertheless be submitted for ICJ adjudication by special agreement of the parties. <=28> n27 In making such a special agreement, the parties may frame the legal issue in dispute and, to some extent, the basis on which the court should decide the issue. <=29> n28 Even in cases when the ICJ would have jurisdiction on another basis, the parties may choose for the ICJ to adjudicate pursuant to a special agreement. <=30> n29

The jurisdiction of the ICJ, based as it is on a combination of compromissory clauses, optional-clause declarations, and special agreements, is quite thoroughly consent-based. Unsurprisingly, controversies have arisen regarding whether the interests of a non-consenting, third-party state would, in effect, be adjudicated in a case brought by other parties before the court. In the Montary Gold case, four states that wished to submit a dispute for adjudication had all accepted ICJ jurisdiction. The ICJ nevertheless declined to adjudicate the case because Albania, whose property rights were the subject of the dispute, had not [*21] so consented. <=31> n30 The principle of the Monetary Gold decision has subsequently been further clarified. In the Nicaragua case, the ICJ held that the requirement for consent to jurisdiction by each party to the dispute applied only where the

legal interests of the non-consenting state "would not only be affected by a decision, but would form the very subject matter of the decision." <=32> n31

The ICC Treaty's jurisdictional provisions stand in stark contrast to those of the ICJ Statute. In ICC cases in which a state's national is prosecuted for an official act that the state maintains was lawful or that the state maintains did not occur, the lawfulness or the occurrence of that official state act-that is, the question whether the state had a right to take such action or whether it did so-would "form the very subject matter of the dispute." Yet, by the terms of the ICC Treaty, the ICC would exercise jurisdiction in that case with or without the consent of the state whose official acts would form the subject of the adjudication.

Not only the ICJ with its open-ended subject-matter jurisdiction, but also international courts of limited subject-matter jurisdiction have jurisdictional structures reserving significant discretion to states. Two principal examples of such courts are the Tribunal on the Law of the Sea <=33> n32 and the WTO dispute settlement mechanism. <=34> n33

The United Nations Convention on the Law of the Sea ("UNCLOS") provides that, if states are unable to settle their disputes relating to the convention through a prompt "exchange of views," <=35> n34 then the convention's "Compulsory Procedures Entailing Binding Decisions" come into operation. <=36> n35 Those procedures afford states an array of methods of binding dispute resolution from which they may select.

UNCLOS provides that each state party shall make a declaration accepting the jurisdiction of at least one of four enumerated tribunals: the International Tribunal for the Law of the Sea, the ICJ, an arbitral tribunal, and a special arbitral tribunal. If both parties have accepted the same tribunal, then that tribunal [*22] (or another to which both parties agree) will be used. In the absence of such a match, the dispute may be referred to arbitration.

In addition to the considerable flexibility afforded by UNCLOS regarding methods of binding settlement, the convention also exempts from the compulsory settlement system certain subject areas. <=37> n36 Article 297 exempts from compulsory settlement those disputes that relate to enumerated areas involving the sovereign rights of coastal states. <=38> n37 Article 298 permits exemption, at the option of each state party, of disputes relating to sea boundary delimitations and related matters, disputes being addressed by the U.N. Security Council and, most significantly for comparison with the ICC, disputes concerning military activities. <=39> n38 For disputes concerning these specified subject areas, the UNCLOS dispute settlement mechanisms that are otherwise applicable are available, but can be used only with the consent of all parties to the dispute. <=40> n39 The UNCLOS dispute resolution mechanisms thus retain considerable discretion for states regarding the forms of binding third-party settlement that they will accept and, equally significantly, allow states to exempt entirely from compulsory jurisdiction disputes concerning particularly sensitive areas, including military activities.

The dispute settlement system for the World Trade Organization is organized in rather a different way, still reserving to states significant flexibility relating to third-party adjudications, but providing that flexibility more in the remedy provisions than in the jurisdictional structure. The WTO Dispute Settlement Understanding <=41> n40 provides that, when diplomatic means are unavailing in resolving a dispute arising under the covered trade agreements, <=42> n41 the dispute will be settled through the Dispute Settlement Body ("DSB"). In somewhat simplified form, the Dispute Settlement Understanding provides that the DSB will create a panel that will assess the facts and law of the dispute and "make such other findings as will assist the DSB in making the recommendation or in giving the rulings provided for in the covered agreements." <=43> n42 The panel's final report must, within sixty days of its submission, be adopted by the DSB unless either there is a consensus within the DSB not to adopt or a party has given notice of appeal. <=44> n43 Appeals are limited to issues of law. <=45> n44 The appellate report is submitted to the DSB and must be unconditionally accepted by the parties unless the DSB decides by consensus not to adopt the report. <=46> n45

[*23] The WTO dispute settlement system thus provides little flexibility as to procedures and mechanisms. Perhaps as a consequence, substantial discretion is left to states elsewhere in the dispute settlement system. The remedy mechanism introduces considerable flexibility.

The possible remedies for violations of the covered trade agreements are several, ranging from the offending state's promptly bringing its practice into compliance, to that state's indicating that the practice will remain out of compliance "temporarily" (for an unspecified period) and then either paying compensation or doing nothing at all and standing subject to retorsion by the opposing state. <=47> n46 More specifically, when a panel report or, in case of appeal, the Appellate Body report holds that a state's trade measure is inconsistent with a covered

agreement, the report must recommend that the measure be brought into compliance. <=48> n47 Within thirty days of adoption of that report, the state concerned must indicate its intentions relative to implementing that recommendation. <=49> n48 In the event that the compliance recommendation is not implemented within a reasonable period, <=50> n49 the offending state is obliged to negotiate with the complaining state "with a view to developing mutually acceptable compensation." <=51> n50 If no compensation arrangement has been agreed to within a reasonable period, then the complaining state may request the DSB to authorize countermeasures. <=52> n51 More precisely, the complaining state may request that the DSB authorize suspension of the complaining state's concessions or other obligations under the covered agreement in relation to the state in default. <=53> n52 By such a suspension of concessions and obligations, the complaining state is freed to take countermeasures. Should the level of countermeasures permitted be disputed by the offending state, then that level may be set by binding arbitration. <=54> n53

The net result of such a suspension of concessions and obligations is, in a sense, to return the disputing parties to a regime of diplomatic, non-adjudicatory dispute resolution relative to the specific issue in dispute. Certainly, that diplomatic process would proceed very much in the light of the fact that the DSB had identified a violation and had authorized countermeasures. But the dispute would have been returned, in that posture, for diplomatic resolution by the parties. In that way, even while the WTO dispute settlement system provides for compulsory third-party decisionmaking, the remedial mechanism is designed in such a way that, if an offending state chooses neither to bring its practice into compliance nor to pay compensation, it may return the dispute to the realm of diplomatic interstate dispute resolution. Thus, states partially recover in the remedy provisions the discretion regarding methods of [*24] dispute resolution that they give up in the jurisdictional aspects of the WTO dispute settlement system.

We should note also, before leaving our discussion of the WTO dispute settlement system, the national security exception in the WTO system. Article XXI of the General Agreement on Tariffs and Trade, which forms a major part of the substantive law of the WTO, provides that

nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security. <=55> n54

Here we see, once again, that even when states are willing to grant some degree of authority over settlement of interstate disputes to a third-party decisionmaker, military and security-related matters are frequently exempted from that jurisdiction.

In looking at the relevant provisions of the ICJ Statute, UNCLOS, and the WTO's Dispute Settlement Understanding, we have seen that each treaty provides to states considerable discretion over the degree and type of authority that the respective courts will have over interstate disputes. The jurisdictional provisions of the ICC Treaty, by contrast, provide for no such discretion. Rather, the ICC Treaty provides that the ICC may exercise jurisdiction over the national of any state when crimes within the court's subject-matter jurisdiction are alleged to have been committed on the territory of a state that has consented to the court's jurisdiction. <=56> n55

[*25] On the surface, the very easy explanation for this difference in the nature of the ICC's jurisdiction from that of other international courts is that the other courts' purpose is to adjudicate disputes between states while

the ICC's purpose is to adjudicate the criminal liability of individuals. If individuals have committed the crimes of genocide, war crimes, or crimes against humanity, which the community of states has already agreed are serious international crimes, then their prosecution can hardly be likened to a dispute between states. This difference between the missions of the ICC and other international courts might be thought entirely to justify the uniquely non-consensual basis of ICC jurisdiction.

To some extent, this explanation is cogent. For ICC cases concerned strictly with individual culpability, the ICC will have much in common with municipal criminal courts and relatively little in common with the other international courts such as the ICJ. As noted earlier, however, a complexity arises from the fact that, in addition to cases that are purely of the individual-culpability type, the ICC also will hear cases in which official acts-acts that the state in question maintains were lawful or whose very occurrence the state disputes-form the basis for an indictment. <=57> n56 In such cases, the lawfulness of the official acts of states will be adjudicated by the ICC. When the ICC is operating in this capacity, it will have less in common with municipal criminal courts and a great deal in common with other international courts such as the ICJ.

Since cases before the ICC will necessarily involve allegations of genocide, war crimes, or crimes against humanity, <=58> n57 the subject matter of an ICC case of the interstate-dispute type will likely be considered important and sensitive by the involved states. The probable involvement of military activities would tend to heighten the sensitive nature of the cases. And, given the relatively undeveloped state of the law in this field, <=59> n58 the adjudicated outcome of such a dispute is likely to be uncertain. Such disputes, then, are of precisely the sort that states are most reluctant to submit for third-party adjudication. <=60> n59 While the prerogative of states to choose whether to adjudicate such disputes is protected in the ICJ Statute and other international court treaties, that prerogative has been overlooked in the drafting of the ICC Treaty.

This oversight may be attributable in part to the drafters of the ICC Treaty's having viewed the ICC primarily in its capacity as a criminal court determining individual guilt or innocence. Perhaps, in addition, some states wished to use ICC jurisdiction to effectuate a change in interstate power relations by moving an important category of interstate disputes out of the diplomatic realm and [*26] into that of compulsory adjudication. As Arthur Rovine has noted, "weaker states derive an obvious advantage from legal settlement in disputes with more powerful opponents... . Clearly, the strong give up much of their leverage in a contest of legal briefs and argumentation." <=61> n60 Or some participants in the ICC negotiations may have wished to expand the power of international institutions, including courts, without regard to the resultant redistribution of power among particular states.

Whatever the motivating factors were, the failure to protect states' prerogatives regarding jurisdiction over interstate disputes was bound to engender significant resistance to the ICC Treaty, some of which has already been manifested. <=62> n61 In addition to these political consequences, the failure to retain states' discretion regarding jurisdiction over interstate disputes also has legal implications that must be taken into account in any comprehensive analysis of the lawfulness of ICC jurisdiction over non-party nationals.

A number of theories have been advanced in support of the lawfulness of ICC jurisdiction over non-party nationals. While some of these theories have considerable initial appeal, none ultimately provides a satisfactory foundation for the form of jurisdiction claimed for the ICC. The shortcomings of these theories, as we shall see, are largely attributable to the fact that the jurisdictional provisions and the theories offered in their support focus on ICC cases of the individual-culpability type without attending to the legal implications of the fact that the ICC will also adjudicate cases of the interstate-dispute variety.

III

Theories of Delegated Jurisdiction

As reflected in the Vienna Convention on the Law of Treaties, <=63> n62 treaties cannot "create ... obligations" for non-parties. <=64> n63 The United States has claimed that the ICC Treaty, by providing for ICC jurisdiction over non-party nationals, violates this principle of the law of treaties. <=65> n64 The United States may have stated its complaint somewhat too simply. The ICC Treaty does not, per se, impose "obligations" (in the sense of duties or responsibilities) on non-parties by providing for jurisdiction over their nationals. <=66> n65

The legal objection to ICC jurisdiction over non-party nationals is perhaps better articulated as a claim that, by conferring upon the ICC jurisdiction over non-party nationals, the ICC Treaty would abrogate the pre-existing

rights of non-parties which, in turn, would violate the law of treaties. As the International Law Commission's official Commentaries on the Vienna Convention [*27] state, "international tribunals have been firm in laying down that in principle treaties, whether bilateral or multilateral, neither impose obligations on States which are not parties nor modify in any way their legal rights without their consent." <=67> n66 As Judge Huber stated succinctly in the Island of Palmas arbitration, "whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third Powers." <=68> n67 ICC jurisdiction over non-party nationals would appear to be exorbitant jurisdiction under international law, as shall be discussed below. The right of a state to be free from the exercise of exorbitant jurisdiction over its nationals cannot be abrogated by a treaty to which it is not a party.

The legal basis for objection to ICC jurisdiction over non-party nationals turns, then, on the proposition that such jurisdiction would be exorbitant under the international law of jurisdiction. This proposition therefore requires careful scrutiny. The first critical question will be whether the traditional bases for states' jurisdiction provide a legal foundation for ICC jurisdiction over non-party nationals. If, for example, the jurisdiction to be exercised by the ICC were the pre-existing jurisdiction of states parties which they had delegated to the court, then, arguably, the ICC Treaty, far from conferring exorbitant jurisdiction, would be merely an agreement among the states parties regarding the manner in which they would exercise their lawful jurisdiction. Two plausible theories of ICC jurisdiction as delegated state jurisdiction will be examined here: delegated universal jurisdiction and delegated territorial jurisdiction. After concluding that neither of those theories, nor, indeed, any of the traditional bases for states' jurisdiction, provides a legal foundation for ICC jurisdiction over non-party nationals, we will then consider whether such jurisdiction would nevertheless be lawful as a new form of jurisdiction.

A. Delegated Universal Jurisdiction

The ICC Treaty provides that the ICC may exercise jurisdiction over non-party nationals, without consent by the state of nationality or referral by the Security Council, only if the alleged crime was committed on the territory of a state party. Notwithstanding this territoriality requirement, some proponents of the ICC Treaty have contended that ICC jurisdiction over the nationals of non-party states is based, fundamentally, upon the principles of universal jurisdiction pursuant to which the courts of any state may prosecute the nationals of any state for certain serious international crimes. Since any individual state could prosecute perpetrators regardless of their nationality, they reason, a [*28] group of states may create an international court empowered to do the same. Under this theory, each state party, in effect, delegates to the international court its power to exercise universal jurisdiction. Advocates of this view reason that the territoriality requirement simply reflects a choice that the ICC will exercise only part of the full range of jurisdiction that it legally could exercise under the customary law of universal jurisdiction. <=69> n68

For ease of exposition, the theory of ICC jurisdiction over non-party nationals as delegated universal jurisdiction will be considered first, and the theory based on delegated territorial jurisdiction will be considered below.

The theory of delegated universal jurisdiction as a basis for ICC jurisdiction confronts two difficulties. The first is that the theory fails to account for the ICC's jurisdiction over a number of crimes that the Treaty places within the subject-matter jurisdiction of the ICC but which are not subject to universal jurisdiction. Certain violations of Protocol I to the Geneva Conventions of 1949, <=70> n69 for instance, are not subject to universal jurisdiction under customary law. <=71> n70 For example, conscription of child soldiers, prohibited under Protocol I and elsewhere, is placed within the jurisdiction of the court by the terms of the ICC Treaty, <=72> n71 but is not a crime customarily subject to universal jurisdiction. <=73> n72 A delegated universal jurisdiction theory of ICC jurisdiction over non-party nationals thus would not account for jurisdiction over some of the crimes within the jurisdiction of the court under the Treaty.

Perhaps the inclusion of crimes not customarily subject to universal jurisdiction should be viewed as a "proposal", in effect, that customary law henceforth [*29] recognize those crimes as giving rise to universal jurisdiction. <=74> n73 If this proposed extension of universal jurisdiction meets with broad consent, then the law will change accordingly and this particular flaw in a universal-jurisdiction theory of ICC jurisdiction will, in time, be eliminated. Even if all that comes to pass, however, a theory of delegated universal jurisdiction would nevertheless face a much more fundamental obstacle.

The fundamental problem with reliance on universal jurisdiction as a basis for ICC jurisdiction over non-party nationals turns on the question whether universal jurisdiction may be delegated to an international court. The proposition that the universal jurisdiction of states is delegable to an international entity warrants examination.

1. The Significance of Delegation. The delegation of states' universal jurisdiction to an international court would fundamentally alter the consequences of that jurisdiction. The exercise of delegated universal jurisdiction by an international court would have very different implications, involving a different set of state interests, than would the exercise of universal jurisdiction by a state. Because the consequences of universal jurisdiction would be fundamentally transformed by the delegation itself, consent to the universal jurisdiction of states should not be considered equivalent to consent to the delegation of universal jurisdiction to an international court.

Customary international law evolves as a reflection of the consent or acquiescence of states over time. Because consent to universal jurisdiction exercised by states is not equivalent to consent to delegated universal jurisdiction exercised by an international court, the customary law affirming the universal jurisdiction of states cannot be considered equivalent to customary law affirming the delegability of that jurisdiction to an international court.

There are sound reasons for which a state, even while accepting universal jurisdiction, might wish to reject the delegation of such jurisdiction for exercise by an international court. A state might reject compulsory third-party adjudication before the ICC in order to retain the discretion to address interstate-dispute type cases through bilateral relations, even while recognizing the possibility that those bilateral relations might in some cases entail the prosecution of that state's national in another state's courts under universal jurisdiction. The reasons for which states might prefer bilateral relations to third-party adjudication in interstate disputes involving international criminal law are essentially the same as the reasons, discussed earlier, for which states are generally reluctant to submit their interstate disputes to third-party adjudication.

As observed earlier, while the most blatant instances of genocide, war crimes, or crimes against humanity leave nothing to dispute or negotiate, many cases involving allegations of genocide, crimes against humanity, or, especially, war crimes concern issues of unsettled law or ambiguous facts, or both. In such [*30] cases, states may have legitimate reasons for preferring mechanisms other than binding adjudication.

States value the advantages that diplomatic methods of dispute settlement often afford. Particularly where an interstate dispute concerns an area of unsettled law, litigation may entail more risk than states can be expected to accept. If the subject matter is important and the law is unsettled, allowing a third party to, in effect, decide the binding law of the matter is a very perilous course of action. Cases involving highly contested facts also entail obvious risks. States may, therefore, perceive a number of drawbacks associated with compulsory adjudication before the ICC.

First, compromise outcomes of various sorts may be desirable in interstate-dispute type cases, especially in circumstances where the law or the facts are ambiguous. But compromise outcomes are unlikely to emerge from adjudicated rather than negotiated resolutions.

Second, states would have reason to be more concerned about the political impact of adjudications before an international court than before an individual states' courts. An even-remotely successful international court will have significant prestige and authority. The political repercussions of such a court's determining that a state's acts or policies were unlawful would be substantial indeed, and categorically different from the repercussion of the same verdict rendered by a national court. If a guilty verdict were passed by a national court in an official-acts case, the matter would remain a disagreement among equals, one state maintaining that an unlawful act had been committed, the other disputing its occurrence or defending its lawfulness. By contrast, were the ICC to pronounce an official act to constitute a crime, the decision would bear an authoritative weight and resulting political impact of a categorically different nature. The special political impact of ICC decisions will itself create heightened risks for states. It may also create situations in which states will be put to a choice of either revealing sensitive data as defense evidence or withholding that evidence and thereby risking severe political costs in case of a guilty verdict.

A third matter that may be of substantial concern to states is the role of an international criminal court in shaping the law. Because the decisions of an international court will tend to be more authoritative than would those of any individual state's courts, an international court would have the power to create international law in a manner disproportionate to that of any state. This may be more law-making power than some states are comfortable granting to one international institution, especially in sensitive areas involving military activities and international security.

Because the law of genocide, war crimes, and crimes against humanity <=75> n74 is still very much in formation, the issue of law-making power is particularly important in this context. Controversial and politically significant issues remain open, and major new questions continue to emerge. Reflecting the developing [*31] state of the law in this field, the appellate chamber of the International Criminal Tribunals for the former Yugoslavia and Rwanda ("ICTY/R") has on more than one occasion reversed a trial chamber decision on a basic point of law.

Developments in the Tadic case illustrate the point. The "grave breaches" provisions of the Geneva Conventions of 1949 provide for universal jurisdiction over certain crimes when those crimes are committed in international armed conflicts. <=76> n75 Article 2 of the Statute of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") provides that "the international tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts ... ." <=77> n76 The ICTY trial chamber held in Tadic that, when acts defined as grave breaches in the Geneva Conventions are committed against persons or property categorized as protected under the Geneva Conventions, such conduct may be prosecuted before the ICTY regardless of whether the acts were committed in an international armed conflict. According to the trial chamber, Article 2 of the ICTY Statute

has been so drafted as to be self-contained rather than referential, save for the identification of the victims of enumerated acts; that identification and that alone involves going to the Conventions themselves for the definition of "persons or property protected" ... .

The requirement of international conflict does not appear on the face of Article 2... .

There is no ground for treating Article 2 as in effect importing into the Statute the whole of the terms of the Conventions, including the reference in common Article 2 of the Geneva Conventions to international conflicts... . <=78> n77

The ICTY appellate chamber rejected that holding, stating:

With all due respect, the Trial Chamber's reasoning is based on a misconception of the grave breaches provisions and the extent of their incorporation into the Statute of the International Tribunal... . The international armed conflict requirement was a necessary limitation on the grave breaches system in light of the intrusion on state sovereignty that such mandatory universal jurisdiction represents. State parties to the 1949 Geneva conventions did not want to give other states jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts-at least not the mandatory universal jurisdiction involved in the grave breaches system.

[*32] The Trial Chamber has misinterpreted the reference to the Geneva Conventions contained in the sentence of Article 2: "persons or property protected under the provisions of the relevant Geneva Conventions." ... Clearly, these provisions of the Geneva Conventions apply to persons or objects protected only to the extent that they are caught up in an international armed conflict... . <=79> n78

The appellate chamber thus reversed the trial court on a very basic question of international criminal law. The trial chamber was prepared to treat the international-conflict requirement as merely incidental to the Geneva Conventions' definition of grave breaches. The appellate chamber ruled that the trial court's holding misconceived the limited nature of the consent to universal jurisdiction given by the states parties to the Geneva Conventions. Such issues, of great significance going to the very basis of the legitimacy of international criminal law, are only now in the process of being decided, as the Tadic appeal demonstrates.

Appellate reversals of trial chamber decisions on major legal issues such as that in the Tadic case and in other cases before the ICTY/R <=80> n79 indicate that this is an area of law in formation and in which there will be disagreements among experts about the content of the law. It is therefore likely that one state might take a different view of the legality of a particular act or policy than would another state or an international court.

There are, of course, disagreements about the content of the law in domestic settings; and appellate courts reverse trial chambers' decisions in domestic judicial [*33] systems. This is precisely what makes the structure

of the judiciary a crucial feature of states' constitutional designs. What is at issue in the ICC context is whether the judicial structure being proposed-which will then play an inevitably influential role in shaping the law-is acceptable to those who have been asked to join in constituting and accepting the jurisdiction of that judicial power.

The law developed by the ICC will not be susceptible to revision or modification through any legislative process. In municipal justice systems, if the court gets it wrong, the legislature provides a safety valve. There is no such recourse relative to the ICC. <=81> n80 States may have legitimate concerns about the compulsory jurisdiction of such a court; they may not see fit to have an international tribunal in effect legislate international law in areas where the law is relatively undeveloped. States might have sound reasons for preferring to retain more direct control, diffused among many states, over the shaping of international law in this critical field rather than to relegate a substantial proportion of that control to a single international entity.

States are keenly interested that the law in this field should develop in directions that are consistent with their views of international relations, with the extent and nature of their military engagements, as well as with their visions of what would provide the greatest justice and deterrence value. The development of international criminal law, like the development of other areas of international law, is a process of state consent, agreement, and acquiescence. Its development is, in that respect, a series of more or less directly negotiated outcomes in an incremental process. A state might be concerned about granting jurisdiction to an international court that inevitably would have great influence, disproportionate to that of any state, in the formation of that body of law. <=82> n81

In the ways just described, the consequences and implications of ICC jurisdiction are materially different from those of national jurisdiction. These differences are sufficiently significant so that the customary international law of universal jurisdiction should not be quickly presumed to entail the delegability of that jurisdiction from states to an international court. Because different states' interests are affected by the two forms of jurisdiction, consent to or acquiescence in one is not equivalent to consent to or acquiescence in the other.

[*34] The arguments, frequently offered as a response to concerns about ICC jurisdiction, that the ICC would address only very grave crimes, that the ICC prosecutor would be a person of distinction and fine judgment, and that the ICC is not intended to interfere in the affairs of basically law abiding states, do not adequately respond to the fundamental concerns that states may have. Reactions to the NATO intervention in Kosovo illustrate that the arguments offered are beside the point.

Some NATO military actions during the armed conflict in Kosovo were characterized as war crimes by a number of distinguished international lawyers and political actors. <=83> n82 South African Minister of Education (formerly Minister of Water Affairs and Forestry) Kader Asmal stated in July 1999 that NATO's "bombing of water resources in [the Kosovo campaign] is a war crime." <=84> n83 On May 10, 1999, international law professor Ian Brownlie argued on behalf of the Federal Republic of Yugoslavia before the ICJ that the NATO action was in violation of international law for reasons including "the unlawful modalities of the aerial bombardment." <=85> n84 On the same day, lawyers from several countries filed a complaint with the ICTY prosecutor against NATO officials and leaders of NATO member states for alleged war crimes committed in NATO's armed intervention in Yugoslavia. <=86> n85 ICTY prosecutor Louise Arbour subsequently indicated that she would investigate those charges. <=87> n86 All of these statements were made by persons of judgment and distinction. Each was a person who would be a credible candidate for office within the ICC. One need not assume that the ICC would act unreasonably or abusively to envision that any state's action, viewed by that state as lawful, could someday become the subject of an ICC prosecution.

There is an aspect of some of the arguments favoring prosecutions for NATO actions that bears particular notice in this respect. Professor Michael Byers, for example, suggested that, if indeed war crimes had been committed in the NATO action, it would be particularly important to prosecute those crimes in order to demonstrate the evenhandedness of the ICTY. <=88> n87 Such an approach would be consistent with prior ICTY prosecutorial strategy in which, for example, one stated purpose for indictment of a number of Croats at the particular time they were indicted was to dispel Serbian suspicions that the ICTY was [*35] anti-Serb. <=89> n88 If this view regarding the place of "evenhandedness" in international prosecutorial strategy is applied by the ICC, then it could become even more likely that the actions of non-"rogue" states would become the subject of ICC prosecutions.

Thus, even if the ICC will prosecute only grave crimes, will have a distinguished prosecutor with fine judgment, and will not interfere in the affairs of basically law abiding states, this does not mean that the actions

of any given state could never realistically become the subject of ICC prosecutions. Therefore, the question whether ICC jurisdiction is acceptable to a given state must be evaluated on the assumption that ICC jurisdiction may actually be applied.

We have seen that the consequences of universal jurisdiction exercised by a state are significantly different from the consequences of delegated universal jurisdiction exercised by an international court. For that reason, 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. Therefore, we may not simply assume that states' universal jurisdiction may be delegated to an international court as a matter of customary international law. Rather, the question requires analysis.

2. The Content of Custom. As we have seen, there are comprehensible and even good reasons for which a state might object to the delegation of states' universal jurisdiction to the ICC. We turn now to a closer examination of the legal status of such objections.

Universal jurisdiction arises as a matter of customary international law. <=90> n89 If, by custom, universal jurisdiction were delegable to an international court, then states would be obliged to accept such delegation and, by extension, to accept ICC jurisdiction over non-party nationals. If, however, delegation of universal jurisdiction to an international court would constitute an innovation beyond the customary meaning of universal jurisdiction, then the legal status of jurisdiction based on such delegation would remain to be determined. The initial question, then, is whether the customary international law of universal jurisdiction, as it has developed through state practice and opinio juris, entails the possibility of delegation to an international court.

State practice relating to the exercise of criminal jurisdiction by an international court has been limited. The ICTY/R are believed by some to found their jurisdiction on the delegated universal jurisdiction of states. <=91> n90 However, as the [*36] ICTY/R are products of U.N. Security Council action under Chapter VII of the U.N. Charter, <=92> n91 the tribunals' jurisdiction is more properly viewed as arising from the powers of the Security Council to take such steps as are required to restore or maintain international peace and security. In responding to jurisdictional challenges going to the legitimacy of the establishment of the ICTY and ICTR, each tribunal has responded by affirming the power of the Security Council, acting under Chapter VII, to establish a judicial tribunal as an instrument for the maintenance of international peace and security and has cited that Security Council power as forming the jurisdictional foundation of the tribunal. <=93> n92 Neither tribunal has invoked delegated universal jurisdiction or any other form of universal jurisdiction as the basis of its jurisdiction. <=94> n93

[*37] The other international criminal tribunals that some view as precedents for the collective exercise of universal jurisdiction are the International Military Tribunal ("Nuremberg tribunal") and the International Military Tribunal for the Far East ("Tokyo tribunal") established in the aftermath of World War II ("WWII"). <=95> n94 But, in fact, neither the Nuremberg nor the Tokyo tribunal based its competence on the collective exercise of universal jurisdiction. Rather, the Nuremberg and Tokyo tribunals each, in different ways, based their jurisdiction on the consent of the state of nationality of the defendants.

This is not to say that those WWII tribunals were right to have based their jurisdiction on the consent of the defendants' states of nationality. Strong arguments have been made that the claimed jurisdictional basis was flawed by the coerced nature of the consent. <=96> n95 But, even if the jurisdiction of those tribunals were flawed by the coerced nature of the consent, that would mean nothing more than that the jurisdiction was flawed. It would not imply that the tribunals' jurisdiction had rested on some other basis, such as collective exercise of universal jurisdiction.

In the case of the Tokyo tribunal, the Japanese government (which, at least formally, retained sovereign power in Japan after the war) acceded, in the Instrument of Surrender, <=97> n96 to prosecution of Japanese nationals before the International Military Tribunal for the Far East. The Instrument of Surrender states that the Japanese government accepts the provisions set forth in the Potsdam Declaration of July 26, 1945, <=98> n97 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." <=99> n98 The Potsdam Declaration, in turn, provides that "stern justice shall be meted out to all war criminals." <=100> n99 The Potsdam Declaration further states that the terms of the Cairo Declaration shall be carried out. <=101> n100 The Cairo Declaration included the statement that "the ... allies are fighting this war to restrain and punish

the aggression of Japan." <=102> n101 The primacy of the Instrument of Surrender, read together with the two Declarations, in constituting Japan's [*38] consent and, thereby, forming the jurisdictional basis for the Tokyo tribunal, is affirmed both in the Tokyo tribunal's charter and in its judgment. <=103> n102

With regard to the Nuremberg tribunal, the story is more complex. The four Allied states that established the Nuremberg tribunal had taken on supreme authority in Germany. As stated in the Berlin Declaration of June 5, 1945,

the Governments of the United States of America, The Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, 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. <=104> n103

In that position, the Allies exercised judicial and all other powers of sovereignty in Germany. At a minimum, the Allies, acting in their capacity as the effective German sovereign, consented to the prosecution of German nationals at the Nuremberg tribunal. A more robust, and perhaps more accurate, reading would be that the Nuremberg tribunal prosecutions were actually an exercise of national jurisdiction by the effective German sovereign, the Allies. In either case, the effective German sovereign consented to the prosecutions.

One may debate whether the Allies were the German sovereign in 1945 or merely stood in loco sovereigntis. Clearly, the Allies stood in a position essentially different from that of mere occupiers. <=105> n104 There has been no disagreement [*39] as to whether the Allies' position in post-war Germany exceeded the traditional bounds of occupation. Rather, debate focused on whether the Allies were actually the sovereign(s) in post-war Germany or only stood in the place of the sovereign. Fritz Mann took the position that the Allies, while not having assumed territorial sovereignty, nevertheless assumed governmental sovereignty and, thus, occupied the status of the Government of Germany. As he wrote,

from the point of view of international law Germany is a dependent state... . The position of the Allied Governments probably is that they exercise what certain publicists have described as co-imperium. While in the case of a condominium a community of states has sovereignty over a territory belonging to them jointly, a co-imperium exists, if several states jointly exercise jurisdiction or governmental functions and powers in territory belonging to another state... . <=106> n105

Georg Schwarzenberger argued that the Allies were co-sovereigns of Germany and that they conducted the Nuremberg tribunal in that capacity. In his words,

by deballatio, [the Allies] became the joint sovereigns of Germany. Little importance need, therefore, be attached to the circumstance that the joint sovereigns exercised their jurisdiction as the fountain of law and justice in Germany by an international treaty; for this mode of co-ordinating their sovereign wills is not so much determined by the object of their joint deliberations as by the character of the joint sovereigns as four distinct subjects of international law. As the Tribunal stated in its judgment, there would have been little doubt regarding the municipal character of the Tribunal if one state alone had overrun Germany and established such a tribunal, instead of four victorious Powers combining their efforts towards the same end: "The Signatory Power created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any of them might have done singly." [Citing the Nuremberg Judgment, infra note 111.] ... Furthermore, in accordance with Article 29 of the Tribunal's Charter, the right of pardon rests with the Control Council for Germany. In substance, therefore, the Tribunal is a municipal tribunal of extraordinary jurisdiction which the four Contracting Powers share in common. <=107> n106

Hans Kelsen also took the view that the Allies had the right to conduct the Nuremberg tribunal based on their position as German sovereign. As he said,

the criminal prosecution of Germans for illegal acts of their state could have been based on national law, enacted for this purpose by the competent authorities. These authorities were the four occupant powers exercising their joint sovereignty in a condominium over the territory and the population of subjugated Germany through the Control Council as the legitimate successor of the last German Government. <=108> n107

[*40] We may conclude, at a minimum, that the Nuremberg tribunal, having acted with the consent of the Allies, acted with the consent of the effective sovereign of the defendants' state of nationality. It may also be that, beyond merely consenting to the Nuremberg tribunal prosecutions, the Allies actually created the tribunal and conducted those prosecutions in their capacity as effective sovereign. Indeed, this is the view reflected in the Judgment of the Nuremberg tribunal, which states: "The making of the Charter [establishing the Nuremberg tribunal] was the exercise of the sovereign 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." <=109> n108

The jurisdictional basis of the Nuremberg tribunal was not delineated, in the tribunal's charter or judgment, with greater precision. While the language quoted above is strong evidence that the Nuremberg tribunal based its jurisdiction on the consent of the Allies as effective German sovereign, an alternative theory, that the Nuremberg tribunal based its jurisdiction on universal jurisdiction, has attained some currency over the years. The passage from the U.N. Secretary General's 1949 Report on the Nuremberg tribunal, from which this theory may have garnered some of its force, begins by quoting the same sentence from the Nuremberg judgment quoted immediately above. It then goes on to say:

In this statement the Court refers to the particular legal situation arising out of the unconditional surrender of Germany in May 1945, and the declaration issued in Berlin on 5 June 1945, by the four Allied states, signatories of the London Agreement. By this declaration the said countries assumed 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. The Court apparently held that in virtue of these acts the sovereignty of Germany had passed into the hands of the four states 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.

The Court, however, also indicated another basis for its jurisdiction, a basis of more general scope. "The Signatory Powers" [the Tribunal said], "created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law." The statement is far from clear, but, with some hesitation, the following alternative interpretations may be offered. It is possible that the Court meant that the several signatory Powers had jurisdiction over the crimes defined in the Charter because these crimes threatened the security of each of them. The Court may, in other words, have intended to assimilate the said crimes, in regard to jurisdiction, to such offences as the counterfeiting of currency. On the other hand, it is also possible and perhaps more probable, that the Court considered the crimes [*41] under the Charter to be, as international crimes, subject to the jurisdiction of every state. The case of piracy would then be the appropriate parallel. This interpretation seems to be supported by the fact that the Court affirmed that the signatory Powers in creating the Tribunal had made use of a right belonging to any nation. But it must be conceded, at the same time, that the phrase "right thus to set up special courts to administer law" is too vague to admit of definite conclusions. <=110> n109

The Secretary General was right to be wary of drawing, from that passage in the Nuremberg judgment, the conclusion that the Nuremberg tribunal's jurisdiction was based on the protective principle (the reference to counterfeiting) or on the universality principle (the reference to piracy). Rather, the assertion in the Nuremberg Judgment that, in establishing the Nuremberg tribunal, the Allies had "done together what any one of them might have done singly" <=111> n110 is equally applicable to a sovereign-consent theory as to a universal-jurisdiction theory of that tribunal's jurisdiction. Indeed, read together with the passage of the judgment which states that "the making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered," <=112> n111 the meaning seems more consistent with the view that the jurisdiction of the Nuremberg tribunal rested on the effective sovereign powers of the Allies to prosecute or consent to the prosecution of German nationals.

These considerations have not precluded the occasional assertion that the Nuremberg tribunal rested its competence on the collective exercise of universal jurisdiction. For example, the U.N. Commission of Experts on the former Yugoslavia made the claim that,

states may choose to combine their jurisdictions under the universality principle and vest this combined jurisdiction in an international tribunal. The Nuremberg International Military Tribunal may be said to have derived its jurisdiction from such a combination of the national jurisdiction of the states Parties to the London Agreement setting up that Tribunal. <=113> n112

For this assertion, the commission provided no support whatsoever. In light of the evidence that the Nuremberg tribunal rested its jurisdiction on the exercise of effective sovereignty by the Allies or, at a minimum, on the consent of that effective sovereign, quite substantial evidence, which does not appear to exist, would be required to uphold the commission's claim.

The warranted conclusion appears to be that the jurisdictional basis of the Nuremberg and Tokyo tribunals was not the collective exercise of universal jurisdiction but, rather, the consent of the defendants' states of nationality. With regard to Tokyo, this conclusion is uncontroversial. Regarding Nuremberg, what must be said, at a minimum, is that the tribunal rested its jurisdiction [*42] largely on the fact that the Allies as effective sovereign in post-war Germany consented to the trial of German nationals. <=114> n113

Based on the evidence regarding the jurisdictional bases of the Nuremberg and Tokyo tribunals, those tribunals cannot be relied upon as state practice providing precedent for the delegation of universal jurisdiction to an international court. Nor, as discussed above, do the ICTY/R represent such precedents. None of the four international criminal tribunals that have been established to date, then, provides evidence that the customary international law of universal jurisdiction encompasses the option of delegation to an international criminal court. Nor are there alternative sources of law to be relied on to that effect. <=115> n114

[*43] The delegated universal jurisdiction theory of ICC jurisdiction over non-party nationals, in sum, faces a number of difficulties. The delegated universal jurisdiction theory does not account for a number of crimes within the subject-matter jurisdiction of the ICC that are not subject to universal jurisdiction. More importantly, because universal jurisdiction delegated to an international court would have materially different implications for states than would the exercise of universal jurisdiction by individual states, consent to the latter is not equivalent to consent to the former. For that reason, customary development of one should not be presumed to entail customary development of the other.

Rather, the question whether the delegation of universal jurisdiction is lawful requires a distinct analysis. In pursuing that analysis, we have found no precedent in state practice for the delegation of universal jurisdiction to an international court. This absence of precedent precludes the possibility that delegability has been affirmatively entailed within the customary law of universal jurisdiction as it has developed through state practice and opinio juris. It remains to be considered whether delegation of universal jurisdiction to an international court, even if not affirmatively entailed within the customary international law of universal jurisdiction, may nevertheless be lawful. That question will be examined shortly. First, however, we will consider an alternative theory supporting ICC jurisdiction over non-party nationals, based on the delegated territorial jurisdiction of states.

B. Delegated Territorial Jurisdiction

The jurisdictional provisions of the ICC Treaty suggest an alternative to the delegated universal jurisdiction theory of ICC jurisdiction over non-party nationals. This alternative approach would rest on a theory of delegated territorial jurisdiction. The notion here is that, when a non-party national is prosecuted before the ICC for crimes committed on the territory of a state that consents to ICC jurisdiction, the ICC exercises territorial jurisdiction that is delegated to the Court by the territorial state. Under Article 12 of the ICC Treaty, the ICC may exercise jurisdiction if the territorial state is a state party or provides ad hoc consent. If the territorial state, which would ordinarily have jurisdiction, may delegate that territorial jurisdiction to a court outside its own national judicial system, including an international court, then arguably the ICC may legitimately exercise that delegated jurisdiction.

Here, the question arises whether, as a matter of customary international law, territorial jurisdiction may be delegated to an international court without the consent of the defendant's state of nationality. As we shall see, the

consequences of delegated territorial jurisdiction are quite different from those of territorial jurisdiction exercised by the territorial state, particularly for interstate-dispute type cases. As was true in the case of universal jurisdiction, because [*44] the implications of state-exercised jurisdiction and jurisdiction exercised by an international court are not equivalent, states' consent to one is not equivalent to states' consent to the other. We may not simply assume, therefore, that states' territorial jurisdiction may be delegated to an international criminal court as a matter of customary law.

It will be useful to consider first whether a state's territorial jurisdiction may be delegated to another state and then to ask whether it may be delegated to an international court. It appears that a state may, under some circumstances, delegate its territorial jurisdiction over a given case to another state. <=116> n115 Delegated or "vicarious" jurisdiction is unproblematic when the defendant's state of nationality consents. Such vicarious exercise of jurisdiction with consent by the state of nationality occurs, for example, among parties to the European Convention on the Transfer of Proceedings in Criminal Matters. <=117> n116

It is less clear that a state may delegate its territorial jurisdiction to another state in the absence of consent by the defendant's state of nationality. There seems to be no precedent for such exercise of jurisdiction, including under the European Convention on Transfer of Proceedings in Criminal Matters. <=118> n117 The possibility of transfer of jurisdiction where the defendant is a national of a third-party state is not precluded by the terms of that convention, which provide that "for the purposes of applying this Convention, any Contracting state shall have competence to prosecute under its own criminal law any offence to which the law of another Contracting state is applicable." <=119> n118 It appears that in practice, however, there has been no case of a transfer of criminal proceedings under the convention in which the defendant was a national of a non-party to the convention and the state of nationality did not consent to the transfer. <=120> n119 If such a transfer of proceedings were attempted, involving a delegation of territorial jurisdiction without the consent of the defendant's state of nationality, that state of nationality might well protest the prosecution as an invalid exercise of jurisdiction. It would remain to be seen what the result would be of such a challenge. <=121> n120

[*45] If it is dubious that territorial jurisdiction may be delegated from one state to another without consent by the state of nationality, it is even less clear that territorial jurisdiction may be delegated, without that consent, to an international court. There has been no previous instance of delegation of territorial jurisdiction to an international court. Of the four international courts in recent history, the ICTY/R and the Nuremberg and Tokyo tribunals, none has based its jurisdiction on delegated territorial jurisdiction. As discussed earlier, the ICTY/R base their jurisdiction on the Security Council's Chapter VII powers, and the Nuremberg and Tokyo tribunals each founded its jurisdiction on the consent of the state of nationality. <=122> n121 (Indeed, far from basing jurisdiction on delegated territoriality, the Charter of the Nuremberg Tribunal specifically indicated that the Tribunal was to prosecute war criminals "whose offenses have no particular geographical location." <=123> n122)

Beyond the absence of precedent in state practice, there are legally significant reasons that states might object to the delegation of a state's jurisdiction to an international court. These reasons, elaborated earlier in the context of universal jurisdiction, arise from the fact that the consequences for states of the compulsory jurisdiction of an international court are fundamentally different from the consequences of the jurisdiction of national courts. As was discussed at length above, the delegation of a state's jurisdiction to an international court may raise concerns for states regarding the diminished availability of compromise outcomes in interstate disputes, the heightened political impact of verdicts, the role of an international court in shaping the law, and the possible impediments to diplomatic protection of nationals. <=124> n123 Transforming territorial jurisdiction into ICC jurisdiction through delegation would thus produce jurisdictional features entirely distinct from those envisioned in the customary law of territorial jurisdiction. For this reason, coupled with the absence of precedent for the delegation of territorial jurisdiction to an international court, it does not appear that the customary international law of territorial jurisdiction, as that law has evolved through state practice and opinio juris, has entailed the option of the delegation of territorial jurisdiction to an international court.

Not only does the delegation of territorial jurisdiction to an international court lack grounding in customary international law, but the delegation of states' territorial jurisdiction may also be subject to abuse. The primary basis for the unquestioned place of territorial jurisdiction among internationally recognized bases for jurisdiction is the fact that the state where the crime occurred is presumed to have a legitimate interest in seeing that the crime is punished. That crucial linkage between territorial jurisdiction and the legitimate prosecutorial interests of the territorial state would be broken if territorial jurisdiction [*46] were delegated to a state on whose territory the crime did not occur. With that linkage broken, the door may be opened to the exercise of jurisdiction for illegitimate or abusive purposes.

To illustrate the problem, it may be helpful to consider an example involving a state-to-state delegation of jurisdiction. Imagine that France is holding for trial a U. S. national who has committed a crime on French territory. The United States has no basis to object to the exercise by France of its territorial jurisdiction over the U. S. national. Now let us imagine that France proposes to delegate its territorial jurisdiction to Libya and to transfer the defendant to Libya for prosecution. (Just to flesh out the tale, let us say that Libya is holding a French national for trial and is willing to transfer that case to France in exchange for the case of the U.S. national.) The United States would be correct in arguing that Libya does not have territorial (or any other internationally recognized basis for) jurisdiction and that France cannot confer, by delegation or otherwise, territorial jurisdiction upon a state on whose territory the conduct did not occur. While France has a recognized and legitimate interest in the punishment of the crime committed on French territory, Libya lacks that nexus with the crime that forms the basis for territorial jurisdiction. Libya might be motivated to make the jurisdictional trade for reasons that were illegitimate or abusive, for instance, to strengthen its hand in its political dealings with the United States. In any case, the traded jurisdiction would not conform with the principles (in particular, the recognition of the legitimate prosecutorial interests of the territorial state) on which territorial jurisdiction is founded.

The potential for abuse arising from delegation of territorial jurisdiction between individual states presumably is reduced where the jurisdiction is transferred not to an individual state but, rather, to an international court. Where that international court is controlled by a large number of states, the various states parties may provide checks and balances against abuses being perpetrated in the interests of one state or a small group of states. The ICC Treaty provides that the treaty will come into force only when there are a minimum of sixty states parties. Since most of those sixty or more states presumably would be disinclined to permit the Court to be used for the corrupt purposes of one or a few states, corrupt motives would be unlikely to prevail.

Nevertheless, while the potential for abuse may be thus reduced, it is not eliminated. At the beginning of the twenty-first century, the world is not divided into opposing camps, as it was during the decades of the cold war. In the current political context, sixty states would represent an assortment of cross-cutting interests, which would make it difficult for one state or faction to turn the court to the service of its own purposes. But the re-emergence of a bipolar (or even tripolar) world, along any number of foreseeable or unforeseeable fault lines, is not difficult to imagine. In a polarized world, sixty states could represent one faction or at least be amenable to strong influence by one or a few states. In such circumstances, the potential for the abusive delegation of territorial jurisdiction would not be negated by the requirement that the ICC [*47] Treaty have at least sixty states parties to come into force. Rather, in those circumstances, permitting territorial jurisdiction to be treated as a form of negotiable instrument, to be used or conveyed, could have unintended and destructive consequences.

We have seen that there is an absence of precedent in state practice for the delegation of territorial jurisdiction to an international court. We also have seen that such delegation would have implications and consequences that are significantly different from those envisioned in the customary international law of territorial jurisdiction. These factors, in combination, suggest strongly that delegability to an international court is not entailed in the existing customary law of territorial jurisdiction.

C. The Lawfulness of Delegated Universal Jurisdiction or Delegated Territorial Jurisdiction as a Legal Innovation

Even if the option of delegating universal or territorial jurisdiction to an international court is not affirmatively encompassed within the existing customary law of universal or territorial jurisdiction, such a delegation of jurisdiction might nevertheless be lawful. The present section will consider this possibility.

In the Lotus Case, <=125> n124 the Permanent Court of International Justice ("PCIJ") stated in dictum that, where a prosecuting state's jurisdiction is challenged, the burden rests with the challenging state to show what rule of international law the exercise of jurisdiction violates, and does not rest with the prosecuting state to show what principle of international law supports the jurisdiction. If Lotus were to be read in its strongest possible sense, then virtually all innovative bases for jurisdiction, including delegation of states' universal or territorial jurisdiction to the ICC, would be permissible since, being new, there would be, as yet, no rule against them. <=126> n125

But that strong reading of Lotus, even if it were good law when Lotus was decided (which is itself doubtful <=127> n126), is not an accurate description of the law now. <=128> n127 Rather than being strictly based on an open-endedly permissive view that all jurisdiction is lawful unless the challenging state can point to a rule

that it violates, the customary international law of criminal jurisdiction is based on a perceptible, if somewhat ill-defined, set of principles regarding the legitimate prosecutorial interests of states. In most criminal cases, those underlying principles [*48] are not relied upon explicitly, because the customary law of criminal jurisdiction recognizes an identifiable set of valid bases for jurisdiction. When jurisdiction can be justified by reference to one of those recognized bases, as is usually the case, reiteration of the underlying principles concerning the legitimate prosecutorial interests of states is not necessary.

The usual list of internationally recognized bases of jurisdiction includes: territoriality, nationality, protective principle, universality, and passive personality (the last being the least robustly accepted). Some influential authorities maintain that this list is exclusive. <=129> n128 Because the list of recognized bases for jurisdiction is not arbitrary but has developed to reflect an evolving delineation of the legitimate prosecutorial interests of states, it is unlikely that the list is actually closed. Rather, what appears to be true is that jurisdictional bases that are already recognized are uncontroversially acceptable, while the legitimacy of claimed new bases must be determined.

Michael Akehurst has noted that

what is significant is the fact that writers almost always list specific heads of jurisdiction, thereby implying that all other types of jurisdiction are illegal, instead of simply stating the general presumption that all types of jurisdiction are legal and then listing specific heads of jurisdiction which are proved to be illegal. <=130> n129

Akehurst is correct in observing that the practice of enumerating specific heads of jurisdiction that are lawful, rather than listing heads of jurisdiction that are prohibited, is both pervasive and significant. Any number of articles and briefs, after briefly citing Lotus, proceed to devote lengthy arguments to demonstrating that the jurisdiction being argued for fits into one or more of the five recognized bases for jurisdiction. Lotus itself is a specimen of this sort. After articulating the broad "Lotus principle" that "restrictions on the independence of states cannot ... be presumed", <=131> n130 the court then proceeded to base its decision, upholding a challenged exercise of jurisdiction, largely on an argument that the jurisdiction asserted was a form of territorial jurisdiction. The court interpreted territorial jurisdiction to encompass the territorial effects theory-which the court was then at pains to demonstrate had been previously internationally accepted as a valid basis for jurisdiction! <=132> n131

Were the lesson of Lotus very simply that jurisdiction is legitimate unless it violates an identifiable rule, then it would be hard to explain why the Lotus court went to great effort to show that the jurisdiction that it was upholding fell within a previously approved category of jurisdiction. Whatever the Lotus court's dicta, its opinion in toto reflects the subtler reality that determining the [*49] acceptability of a claimed form of jurisdiction requires either the short-cut of demonstrating that the jurisdiction falls within a previously accepted category, or the more complex task of determining whether the form of jurisdiction claimed comports with the underlying principles governing the international law of jurisdiction.

In addition to the writings of courts and commentators, state practice too reflects the fact that there is an identifiable universe of recognized bases for jurisdiction under international law and an identifiable (even if not fully defined) set of principles underlying those bases. When one state challenges another's exercise of jurisdiction, the challenged state routinely responds by reference to one or more of the internationally recognized bases for jurisdiction and, where warranted, to the rationales underlying those bases. <=133> n132 This approach stands to reason. It cannot be that any new basis for jurisdiction, however extravagant or nonsensical, is legitimate simply because it has not been previously claimed and has, therefore, not been previously rejected.

The point here is not to question the very general precept of Lotus that international law leaves to states "a wide measure of discretion which is only limited in certain cases by prohibitive rules." <=134> n133 Rather, the point is that the general precept articulated in Lotus must be read together with the other principles underlying and defining the customary law of jurisdiction. In short, the legitimacy of claimed new forms of jurisdiction must be determined, not assumed. The Lotus case places the burden of proof for this determination on the challenging state, but Lotus does not eliminate the necessity of making the determination of whether a claimed new form of jurisdiction is legitimate.

When a new basis for jurisdiction is claimed or proposed, its validity is evaluated by consideration of its appropriateness, measured in terms of the underlying principles and rationales governing jurisdiction under

customary international law. Typically, this evaluation of appropriateness has meant a form of nexus analysis. The central question has been whether the conduct to be regulated is sufficiently linked to the legitimate interests of the state claiming jurisdiction to warrant recognition of jurisdiction. As Professor Mann puts it, "in essence criminal jurisdiction is determined not by such external, mechanical and inflexible tests as territoriality or nationality, but by the closeness of a state's connection with, or the intimacy and legitimacy of its interests in, the facts in issue." <=135> n134

But this sort of nexus analysis would be inapposite in determining the appropriateness of ICC jurisdiction over non-party nationals. The ICC is not a state and has no "interests" of its own apart from those delegated to it by the states parties to the Treaty. This is where nexus analysis fails us: The legitimacy [*50] of the original jurisdiction (universal or territorial) of those states parties, based on their legitimate state interests, is not questioned here. What is at issue, rather, is the validity of the delegation of that jurisdiction, an issue with respect to which nexus analysis is unhelpful.

In evaluating the appropriateness of the delegation of universal or territorial jurisdiction, it may be useful to begin by articulating the basic principle, perhaps rising to the level of a general principle of law, that legal relations that are based on mutual consent (or acquiescence) may not be altered by one party to the detriment of the other. In treaty law and contract law, this principle is reflected in the axiom "pacta sunt servanda." <=136> n135 In the context of customary international law, the principle prohibiting unilateral alteration of legal relations that are based on consent or acquiescence is reflected in the requirement that customary law develop through pervasive state practice and opinio juris.

Universal and territorial jurisdiction exist within and are defined by customary international law. Customary international law, in turn, comes into being through the consent or acquiescence of states over time. In this way, the definition and parameters of universal and territorial jurisdiction have come into being through the consent and acquiescence of states. The rights and obligations of states relative to universal and territorial jurisdiction thus constitute a set of legal relations based on mutual consent and acquiescence over time.

In the debate about ICC jurisdiction over non-party nationals, there is no controversy about the principle that legal relations based on mutual consent or acquiescence may not unilaterally be materially altered. <=137> n136 Nor is there any controversy over the proposition that the law of universal and territorial jurisdiction is customary law which, in turn, is founded on the consent or acquiescence of states. Rather, the debate concerns whether incorporating the option of delegating universal or territorial jurisdiction to an international court should be considered to constitute a material alteration of the law of universal and territorial jurisdiction.

In addressing this question, we may benefit from an examination of the treatment of an analogous question in another area of law. The law of assignments addresses the question of whether and when the delegation or, more properly, the "assignment" of a right <=138> n137 should be considered a material alteration to a legal relationship. The law of assignments outlines an approach to this question that is suggestive for the present problem regarding the delegation of jurisdiction.

In the assignments context, the question is whether a party holding a contractual right may assign that right to a third party. The basic principle of the [*51] law of assignments, which is pervasively applied in municipal law <=139> n138 and private international law, <=140> n139 is that rights may be assigned only when the assignment does not prejudice the obligor's position. <=141> n140 As described in the Restatement of Contracts 2d, "[a] contractual right may be assigned unless [] the substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor, or materially increase the burden or risk imposed on him ... ." <=142> n141 While assignment is not generally a feature of public international law, <=143> n142 proposals to incorporate the concept of assignment into the law of treaties consistently treat as foundational the principle of non-prejudice to the interests of the obligor. <=144> n143 The non-prejudice rule provides a method for upholding, in cases in which assignment of a right is contemplated, the principle that legal relations that are based on mutual consent or acquiescence may not be materially altered by one party to the detriment of the other.

As was argued earlier, the delegation of states' universal or territorial jurisdiction to an international court would materially increase the risk or burden imposed on a state whose national may be subject to prosecution for an international crime. This increased risk or burden arises, primarily in interstate-dispute type cases, <=145> n144 from the elimination of states' discretion regarding methods of interstate dispute resolution, and from the potential practical, political, and precedential disadvantages that this loss of discretion implies. Applying the non-prejudice principle to the question whether states may delegate (or "assign") jurisdiction to the ICC would

lead to the conclusion that the delegation of jurisdiction from a state to the ICC is not permissible without the consent of what might be called the obligor state (the defendant's state of nationality) because it would materially increase the burden or risk imposed on that state.

The point here is not to suggest that the law of assignments has legal force in the very different field of the customary international law of jurisdiction. The relevance of the law of assignments is that it is a body of law concerned centrally with the question of when the delegation of a right is permissible, and that it offers a cogent framework for approaching that issue. The law of assignments is therefore suggestive of how we might usefully evaluate whether and when the delegation of jurisdiction should be considered permissible. That evaluation indicates that the delegation of states' universal or territorial jurisdiction to the ICC would be impermissible because it would materially alter the legal relationships [*52] constituting the customary law of jurisdiction, and would do so to the detriment of non-party states without their consent.

The previous section of this article concluded that delegability to an international court is not a feature of universal or territorial jurisdiction under existing customary international law. The present section, which has analyzed the appropriateness of delegated universal or territorial jurisdiction as an innovative form of jurisdiction, suggests that delegation of universal or territorial jurisdiction to an international court would not constitute an appropriate innovation. Consequently, it appears that conceptualizing ICC jurisdiction over non-party nationals as the delegated jurisdiction of states does not provide an adequate legal foundation for the jurisdiction claimed. The next and final part of this article will consider whether there may be some other legal foundation for ICC jurisdiction over non-party nationals that does not rest on a theory of delegated jurisdiction.

IV

Jurisdiction Without Delegation

Eliminating the delegated jurisdiction theories, as appears to be warranted, leads us to consider whether there is a legal basis for the ICC Treaty's creating ICC jurisdiction over non-party nationals as a strictly new base of jurisdiction. Such a legal basis might rest upon a theory of global treaties, or a theory of the ICC Treaty as generating new customary law, or on an analogy between the ICC Treaty and the anti-terrorism treaties.

A. Global Treaties

It has been suggested that there exists a genre of treaties that are globally binding because they foster the common interests of humanity. <=146> n145 The ICC Treaty might be thought to fall within that genre. If the ICC Treaty were globally binding, then all states would be bound to accept the treaty's jurisdictional provisions even if those provisions departed from the customary international law of jurisdiction.

A threshold problem with the theory of global treaties is that there will inevitably be disagreement about what in fact will serve the common interests of humanity. An equally formidable problem confronting the theory of global treaties is that, even if that which would serve the common interests of humanity could be dispositively identified, that alone would not bind states who would find unacceptable a particular distribution of the burdens involved in serving those interests. For both of these reasons, the mere invocation of common interests does not resolve the matter.

An effort was made by some states to treat the U.N. Convention on the Law of the Sea as globally binding by virtue of its perceived importance for the [*53] common interests of humanity. <=147> n146 Just as one might expect, notwithstanding declarations by some states that the deep sea-bed mining regime of the Law of the Sea Convention was binding on non parties, non-party states rejected that view and proceeded with legislation and agreements regarding reciprocal recognition of mining sites that were prohibited by the treaty. <=148> n147 The point here is not that states flout treaties. Rather, the point is that invocation of the interests of humanity does not resolve political debate, and it has not proved successful in binding non-parties to treaty obligations.

In the ICC context, the United States has argued, in effect, that humanity is best served by the U.S. remaining free in its peacekeeping and humanitarian activities from such inhibitions as implementation of the current ICC Treaty would pose. <=149> n148 As Ambassador Scheffer has stated,

the illogical consequence imposed by Article 12, particularly for non-parties to the treaty, will be to limit severely those lawful, but highly controversial and inherently risky, interventions that the advocates of human rights and world peace so desperately seek from the United States and other military powers. There will be significant new legal and political risks in such interventions ... . <=150> n149

Proponents of the ICC Treaty take the view that the benefits to humanity offered by implementation of the treaty would outweigh whatever might be lost by way of inhibition of U.S. humanitarian action. Regardless of the merits of that debate, invocation of the interests of humanity clearly does not resolve the issue and only raises again the question of who has the right to decide. Claiming that a particular treaty serves the common interests of humanity does nothing fundamentally to alter the debate.

Before leaving this debate, however, we must examine what some might view as the best example of a treaty entailing global application by virtue of its claim to global benefits. This is the United Nations Charter and, particularly, Article 2 of the charter, which enunciates the charter's fundamental principles. Article 2(6) of the charter states: "The organization shall ensure that states which are not members of the United Nations act in accordance with these principles so far as that may be necessary for the maintenance of international peace and security." Some authorities interpret that article as reflecting that the charter imposes obligations on non-members of the United Nations. <=151> n150 But that view is controversial. <=152> n151 An alternative interpretation is that

Article 2(6) is addressed to the United Nations and its members. While members of the organization may be under a charter obligation to ensure that all states act in accordance [*54] with the Charter, as a treaty provision this rule still remains inter alios acta for the third states which are under no legal duty to comply with it. Indeed, the practice of non-member states shows that they do not consider themselves as legally bound by the Charter of the United Nations. <=153> n152

Certainly, non-members of the United Nations, including Switzerland, take the view that they are not bound by the charter. <=154> n153

Whatever may be the current status of U.N. Charter Article 2(6) with regard to binding third parties, the only relevant issue in drawing an analogy with the current status of the ICC Treaty is the status of third parties relative to the charter at the time of its adoption. Even if we were to assume that customary law has developed in the years since the charter's adoption, such that the principles referred to in Article 2(6) are now binding on non-parties, this would imply nothing for the ICC Treaty except that, in future years, customary law might develop such that aspects of the ICC Treaty would pass into customary law and thereby become binding on non-parties to the Treaty. <=155> n154 What is relevant for present purposes is not whether the U.N. Charter has come to bind non-parties as a matter of subsequent custom but whether it bound non-parties upon its adoption by virtue of its humanitarian aims and global purposes. <=156> n155

The present analysis of whether Article 2(6) was regarded as binding on non-parties at the time of the U.N. Charter's adoption will be limited to analysis of the U.N. Charter as a multilateral treaty. There are those who argue that Article 2(6) has bound non-members since the charter's adoption by virtue of the charter's being a "world constitution" <=157> n156 or other unique instrument. <=158> n157 Whatever the merits of those claims, they are, by their very nature, inapplicable to the ICC Treaty. Viewing the charter as a treaty (and therefore analogous in at least some ways to the ICC Treaty), we must conclude that the charter did not, upon adoption, bind third parties to obligations not previously existing under customary law.

Bentwich and Martin's 1950 Commentary on the Charter of the United Nations states:

The Charter does not purport to impose legal obligations on non-members. It does, however, impose upon the Organization itself an obligation to ensure-by persuasion, if possible, but by the application of force, if necessary-the compliance of non- [*55] members with the Principles of the United Nations. The former will have to obey not as a matter of law, but as the result of the realities of power. <=159> n158

Numerous such commentaries, reflecting the view that the U.N. Charter did not legally bind non-parties, were written in the early years of the United Nations' existence. Those early commentators on the U.N. Charter who viewed the charter as a treaty virtually uniformly took this position. <=160> n159

There is also reflected in the writing of that time, however, an increasing anticipation that the advent of the U.N. system itself and its charter provisions might lead to an erosion in some contexts of the principle that treaties cannot bind third parties. The treatment of this issue in successive editions of the Oppenheim-Lauterpacht treatise on international law is illustrative. Lauterpacht wrote in the seventh edition in 1948 that "non-members are not bound by [Article 2(6)] and they may choose to react accordingly." <=161> n160 By the eighth edition, published in 1955, Lauterpacht wrote,

International Law does not as yet recognize anything in the nature of a legislative process by which rules of law are imposed upon a dissenting minority of states. However, in proportion as international society is transformed into an integrated community, a departure from the accepted principle becomes unavoidable, in particular in the sphere of preservation of international peace and security... . Both the Covenant ... and the Charter ... must therefore be regarded as having set a limit, determined by the general interest of the international community, to the rule that a treaty cannot impose obligations upon states which are not parties to it. <=162> n161

There is a similar progression in the treatment of Article 2(6) in successive editions of Goodrich and Hambro's commentaries on the U.N. Charter. The first edition, published in 1946 states that

the Charter does not of course create any legal obligation for states not Members of the Organization. They are therefore not obligated in a legal sense to act according to the Principles of the Charter for any purpose whatsoever. The Charter system therefore provides for the imposition, by force if necessary, of the prescribed conduct without any legal basis in contractual agreement. <=163> n162

By 1949, Goodrich and Hambro had softened their language, stating, "it is doubtful whether an international instrument can impose legal obligations on states which are not parties to it. The traditional theory, which is not unanimously held [here, the authors cite Kelsen], is that treaties cannot obligate third parties." <=164> n163

[*56] Hans Kelsen has indeed been prominently, but somewhat erroneously, associated with the view that Article 2(6) bound non-members to new obligations from the time of the charter's adoption. He stated in his 1950 book that

non-Member states are obliged by the Charter, just as Members are, to settle their disputes by peaceful means, to refrain in the relation to other States from the threat or use of force, to give the United Nations every assistance in any action it takes in accordance with the Charter, and to refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action. <=165> n164

But Kelsen seems to have meant not that this interpretation of Article 2(6) was law in 1950 but, rather, that such an interpretation of Article 2(6) could or should be law, the final ascertainment of which, however, would have to await the development of custom. As Kelsen wrote, continuing the passage quoted above:

From the point of view of existing international law, the attempt of the Charter to apply to states which are not contracting parties to it must be characterized as revolutionary. Whether it will be considered as a violation of the old, or as the beginning of a new international law, remains to be seen. <=166> n165

Thus, the prevailing view at the time of the U.N. Charter's adoption was that it was not binding on non-parties. There was some thought in the years following its adoption that the emergence of the U.N. system and the very fact of the charter's adoption, including Article 2(6), might effect a movement away from the strict application of the pacta tertiis principle. In retrospect, we may fairly conclude that such an expectation was not fulfilled. Rather, the scope of coverage of Article 2(6) remains somewhat controversial, <=167> n166 and the authorities

that do view the charter provisions as binding on non-parties generally maintain that this is so as a consequence of the development of customary law concerning the charter, not by virtue of an exception to the pacta tertiis principle. <=168> n167 Significantly, the U.N. Charter has not proven to be the herald of a new era of international law featuring global treaties that bind parties and non-parties alike.

The U.N. Charter thus does not provide a precedential foundation for the ICC Treaty's binding non-parties. It would be bootstrapping to suggest that a theory of global treaties can be supported by a reference to the U.N. Charter, which itself was not regarded as "global" when adopted and which, even now, can claim universal applicability, if at all, only by virtue of the usual processes of customary law development.

In the end, the global treaty theory as a basis for ICC jurisdiction over non-parties is untenable not only as a matter of customary law but also as a practical matter. The practical problem is that the theory of global treaties merely reframes the question whether a treaty may bind non-parties as the question [*57] whether a treaty may bind non-parties if it purports to pronounce what is best for humanity-without providing any means for resolving the inevitable disagreements about what is best for humanity and about distributing the burdens of achieving humanitarian goals.

The existence of jus cogens norms and erga omnes obligations does not help to resolve these issues. Jus cogens norms and erga omnes obligations include obligations on states to prevent and perhaps, in some circumstances, to prosecute and punish genocide, war crimes, and crimes against humanity-the crimes that form the subject-matter jurisdiction of the ICC. <=169> n168 But those jus cogens norms and erga omnes obligations do not include a requirement that prevention and punishment occur through the mechanism of an international criminal court. Even while customary jus cogens and erga omnes norms have evolved in certain areas of substantive law, customary law has not developed, as we have seen, to require enforcement of that substantive law through an international court. In fact, as has been discussed, there are reasons for which alternatives to international adjudication may sometimes be preferable in cases that involve interstate legal disputes. Reference to the universally binding nature of the substantive norms of international criminal law cannot be relied on to do double duty to form the basis also for an argument that use of the ICC mechanism is also obligatory or that the ICC Treaty is a global treaty, with jurisdictional obligations binding on all states.

B. The ICC Treaty as Generating Customary Law

Even if a treaty cannot be said to bind non-parties simply by virtue of its claim to serving humanity, there remains the possibility that the content of a treaty may become part of customary law and thereby bind non-parties. Viewing the ICC solely in its posture as an adjudicator of individual culpability, one might conclude that ICC jurisdiction over non-party nationals would constitute only an incremental step in the development of customary law from the existing customary law of universal or territorial jurisdiction. When the ICC's role as an adjudicator of interstate disputes is also taken into account, however, the difference between states' universal or territorial jurisdiction and ICC jurisdiction is revealed to be very significant, as we have seen. When this second aspect of the ICC's character is considered, it becomes clear that establishing customary law supporting ICC jurisdiction over non-party nationals would involve not a minor or an incremental step but a distinct new departure in the law of jurisdiction.

Considering the process by which the content of a treaty may become part of customary law, the International Court of Justice ("ICJ") in the Continental Shelf case stated that,

[*58]

with respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of states whose interests were specially affected... .

Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, state practice, including that of states whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;-and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved. <=170> n169

It would be difficult to argue that the ICC Treaty has generated customary law supporting ICC jurisdiction over non-party nationals. There has been no period of time in which "extensive and virtually uniform" state practice has supported the form of jurisdiction in question. This is true even if we take the adoption of the ICC Treaty by 120 states at the Rome conference as a form of state practice. <=171> n170 Even in a situation in which a treaty faced less opposition than did the ICC Treaty (seven states voted against adoption, twenty-one states abstained), <=172> n171 reliance on adoption of a treaty at a diplomatic conference alone would be a precarious basis for a claim of creation of customary law. In the case of the ICC Treaty, with only twenty-seven states parties and 139 signatories at present, <=173> n172 the ICC Treaty cannot be said to enjoy participation that is "very widespread and representative" much less "virtually uniform." As the ICJ stated in the Continental Shelf case, "the number of ratifications and accessions so far secured is ... hardly sufficient. That non-ratification may sometimes be due to factors other than active disapproval of the convention concerned can hardly constitute a basis on which positive acceptance of its principles can be implied." <=174> n173

Nor does such participation as there is in the ICC Treaty actually include "that of states whose interests are specially affected." The United States, which is disproportionately involved in military activities throughout the world, has vocally rejected aspects of the treaty, most particularly including its jurisdictional provisions.

[*59] Perhaps the most illuminating point regarding whether participation in the ICC Treaty can currently be said to constitute state practice sufficient to have generated customary law is simply that the treaty, by its own terms, requires sixty ratifications or accessions before it can come into force. The treaty's drafters recognized that this was the minimum degree of support that would be required before the ICC could become a credible international court. Because the treaty does not yet have the degree of adherence that the court's supporters recognized was required to make the court a credible international institution, and because the jurisdictional issue was among the most controversial aspects in the treaty negotiations, <=175> n174 it is difficult to see how the treaty can be said already to have sufficient adherence, particularly on the issue of jurisdiction, to constitute the necessary state practice to generate customary law on ICC jurisdiction.

A number of scholars of customary international law have argued that state practice is not a separate element required for the generation of customary law but is relevant only as evidence of opinio juris. <=176> n175 Based on that view, some have argued for the possibility of instant custom. <=177> n176 All, however, ultimately rest their arguments for instant custom on the existence of consensus or virtual consensus regarding the subject at issue-a consensus which is obviously lacking in the case of the ICC Treaty.

Bin Cheng's theory of "instant customary law" begins with the premise that the fundamental substance of customary international law is opinio juris. Practice, he reasons, is not a constitutive element of custom but, rather, provides evidence of the existence and content of the requisite opinio juris. As he puts it,

if States consider themselves bound by a given rule as a rule of international law, it is difficult to see why it should not be treated as such in so far as these states are concerned, especially when the rule does not infringe the right of third states not sharing the same opinio juris... .

From this point of view, there is no reason why an opinio juris communis may not grow up in a very short period of time among all or simply some Members of the United Nations with the result that a new rule of international customary law comes into being among them... .

There is no reason why a new opinio juris may not grow overnight between States so that a new rule of international customary law (or unwritten international law) comes into existence instantly. <=178> n177

In Cheng's theory of "instant custom," then, we find simply the proposition that those who agree to be bound now may be bound now but may not bind others. <=179> n178

[*60] Anthony D'Amato has made a similar point, though he places greater emphasis on the need for consensus if all, rather than only some, states are to be bound:

To the extent that a widely adopted multilateral convention represents the consensus of states on the precepts contained therein those precepts are part of international law by that fact alone. In this sense, multilateral treaties

are and historically have been more important than bilateral ones. But this effect is not due to anything connected with the concept of custom; it involves a separate phenomenon-"consensus"-which deserves separate study as to its nature, identification and provability. <=180> n179

The theory of instant customary law and D'Amato's closely related theory of consensus can be eliminated as plausible bases for ICC jurisdiction over non-party nationals. Those theories rest, as they must, on the observation that if consent is so pervasive as to be consensus then, all agreeing to be bound, all are bound. Such a consensus, or even pervasive acquiescence including specially interested states, is conspicuously absent in the case of the ICC Treaty. The treaty thus cannot currently be said to have created custom, instant or otherwise, with regard to ICC jurisdiction over non-party nationals. <=181> n180

C. The Terrorism Treaties

A number of treaties, primarily concerned with terrorism and concluded in the 1970s and 1980s, <=182> n181 have been understood by some to "create" universal jurisdiction over the crimes that are the subject matter of those treaties. <=183> n182 It has been suggested that the terrorism treaties reflect a power of states to create, by treaty, extraterritorial jurisdiction having no other legal basis, and then to apply that jurisdiction to the nationals of non-party states. If the terrorism treaties can thus create jurisdiction that can be exercised over non-party nationals, the argument proceeds, then the ICC Treaty must be able to do the same. As will be demonstrated in the following pages, the terrorism treaties, if they "create" universal jurisdiction at all, do so by contributing to the development of customary law, not through some exceptional form of fiat by treaty. The terrorism treaties thus cannot be relied upon as precedents validating ICC jurisdiction over non-party nationals.

[*61] Treaties on hijacking <=184> n183 and other crimes on aircraft, <=185> n184 crimes against the safety of maritime navigation, <=186> n185 hostage-taking, <=187> n186 attacks on internationally protected persons <=188> n187 and U.N. personnel, <=189> n188 terrorist bombings, <=190> n189 and torture, <=191> n190 each contains provisions permitting a state party to prosecute individuals believed to have committed the enumerated crimes when such individuals are found within its territory. As no link other than the presence of the suspect is required, jurisdiction would not be based on territoriality, nationality, protective principle, or passive personality but, rather, upon universality of jurisdiction. Because the crimes covered by the treaties in question arguably were not previously recognized as entailing universal jurisdiction, and yet the treaties provide that universal jurisdiction may be exercised over those crimes, the treaties, it is argued, must have created universal jurisdiction over those crimes.

But that conclusion must be incorrect. States are not obliged simply to accept purported new subjects of universal jurisdiction. In the absence of customary law recognizing universal jurisdiction over a given crime, each state may acquiesce in or protest against a proposed new subject of universal jurisdiction. In the event of a protest, the ensuing debate would invoke the usual criteria for determining the legitimacy of a new form of jurisdiction. <=192> n191 Customary law governing the matter would then emerge accordingly. The terrorism treaties that some believe to create universal jurisdiction represent agreements by the states parties not to object when others (or, at least, other states parties) exercise jurisdiction as delineated by the treaties. But the treaties cannot bind non-parties also to accept the treaties' terms.

How, then, are we to understand the import of the treaties that do appear on their face to purport to create universal jurisdiction? Are they simply void, having exceeded the bounds of the customary international law of universal jurisdiction? [*62] Some have taken that view. <=193> n192 An alternative theory, however, would view the treaties as "proposing" the development of customary law.

The terrorism treaties that are cited as creating universal jurisdiction all concern crimes that already were, at the time of the treaties' conclusion, prime candidates for universal jurisdiction. Some of the crimes were already considered by some to entail universal jurisdiction. <=194> n193 And even those that arguably did not yet entail universal jurisdiction shared the principal indicia of crimes over which universal jurisdiction is thought to be suitable. They were crimes of substantial seriousness, of concern to all states, and that are difficult to control without substantial international cooperation. <=195> n194 What the treaties did was, in effect, to propose-to articulate <=196> n195 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) or 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 treaties or prosecutions pursuant thereto). As D'Amato has put it,

the articulation of a rule of international law-whether it be a new rule or a departure from and modification of an existing rule-in advance of or concurrently with a positive act (or omission) of a state gives a state notice that its action or decision will have legal implications. In other words, given such notice, statesmen will be able freely to decide whether or not to pursue various policies, knowing that their acts may create or modify international law. <=197> n196

It appears that, as one might have predicted, the response to the jurisdictional provisions of the terrorism treaties has been acceptance and acquiescence. There have been a number of prosecutions under the terrorism treaties of individuals who were not nationals of states parties to those treaties, and yet there appears to be, thus far, no case in which the defendant's state of nationality has objected to that exercise of jurisdiction.

[*63] In the Yunis case, <=198> n197 for example, the United States prosecuted a Lebanese national under the United States' implementing legislation for the Convention for the Suppression of Unlawful Seizure of Aircraft <=199> n198 and the International Convention Against the Taking of Hostages. <=200> n199 Lebanon was a party to the former but not the latter convention. Nevertheless, Lebanon raised no objection to the prosecution of Yunis for hostage taking.

It is significant to note as well that the United States, in Yunis, did not take the position that the terrorism treaties themselves created universal jurisdiction. Rather the United States in its appellate brief argued that

the universal and passive personality theories of extraterritorial jurisdiction "together provide ample ground [ ] to assert jurisdiction over Yunis", [quoting the trial court's opinion in Yunis].

As that [trial court] decision explains, the universal theory recognizes that certain offenses are so heinous and widely condemned that "any state if it captures the offender may prosecute and punish that person on behalf of the world community regardless of the nationality of the offender or victim or where the crime was committed."

Both the offenses of the aircraft hijacking and hostage taking fall squarely within this principle. Air piracy has been condemned by the 143 nations that are signatories of the Hague Convention, a treaty that, as explained previously, expressly authorizes the prosecution on the basis of the universal principle. Hostage taking has been condemned by the international community in the International Convention Against the Taking of Hostages, which, likewise, recognizes the assertion of extraterritorial jurisdiction under the universal theory. Congress was, therefore, well within its authority to create extraterritorial criminal jursidiction over such universally condemned crimes.

The offense of hostage taking is also cognizable under the "passive personality" theory of jurisdiction which authorizes a state to assert jurisdiction over offenses commited against their citizens abroad. <=201> n200

United States v. Rezaq <=202> n201 is the other case sometimes cited to demonstrate that the United States prosecutes nationals of states not parties to the terrorism treaties under legislation implementing those treaties. But Rezaq, a Palestinian, was not a national of a state whose treaty participation the United States would have recognized or whose diplomatic objection the United States would have recognized even if, contrary to the facts as they actually unfolded, an attempt had been made to lodge a protest against the exercise of jurisdiction over Rezaq. <=203> n202 Because of those features of the Rezaq case, the fact that no state objected [*64] to the prosecution of Rezaq does little to clarify one way or the other the status of the terrorism treaties relative to the customary law of universal jurisdiction.

As of the time of this writing, there have been, to the author's knowledge, no diplomatic protests against the exercise of universal jurisdiction over the crimes that form the subject matter of the terrorism treaties. If that trend continues, then, with sufficient time and state practice, universal jurisdiction over these crimes will pass into customary law.

Through the catalyst of a treaty proposing a new application of universal jurisdiction, the usual processes of customary law development may be accelerated. This occurs not through any deviation from the usual principles governing the development of custom, but simply through an increased rate of occurrence of those actions (acceptance, acquiescence, expressions of opinio juris, and the like) through which customary law develops.

<=204> n203 The treaty 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. Rather, each of the treaties floats a clear proposal for response. If a non-party state were to object to the jurisdiction proposed or to its exercise (as has occurred in the case of the ICC Treaty), the validity of the jurisdiction would have to be evaluated in the usual way. A determination would have to be made as to whether the claimed new basis of [*65] jurisdiction comported with the principles underlying and defining the customary international law of jurisdiction.

The merits of this theory of the terrorism treaties as proposing the development of custom may be clarified by a contrasting example. Imagine that, rather than providing for universal jurisdiction over hijacking, hostage taking, and the like, the treaties had provided for universal jurisdiction over larceny. The larceny treaty or prosecutions brought pursuant thereto presumably would have been objected to promptly by states preferring to retain exclusive jurisdiction over larceny committed on their own territory when that larceny has no special link with other states. It is hard to imagine how the larceny treaty's universal jurisdiction provisions could be defended. Non-party states would readily prevail by showing that there is no support in customary law principles for the claimed jurisdiction and that treaties to which they are not parties cannot "create" otherwise baseless jurisdiction over crimes committed on their territories.

The difference between the hypothetical larceny treaty and the terrorism treaties is that the various forms of terrorism, if and to the extent that they were not already subject to universal jurisdiction at the time of the treaties' promulgation, were likely candidates for universal jurisdiction (meaning that such jurisdiction was likely to be accepted and become customary), while larceny is not. The crimes covered by the terrorism treaties are crimes of concern to all states regardless of where the offense is committed, and are crimes of the sort that would be difficult to control without substantial international cooperation. Ordinary larceny, by contrast, shares neither of those characteristics. For that reason, states would be unlikely to accept the universal jurisdiction proposed in the hypothetical larceny treaty even while states appear, thus far, to be willing to accept the universal jurisdiction proposed in the terrorism treaties.

To the extent that the terrorism treaties are viewed as proposing a new feature of customary law, subject to acceptance or rejection by non-parties, they are a potentially constructive contribution to international legal development. Viewed as an attempt simply to impose otherwise baseless jurisdiction over the nationals of non-party states without those states' consent, the treaties would simply be void.

The terrorism treaties do not represent any exceptional power to create universal jurisdiction by treaty or in any other exceptional way to alter the customary international law of jurisdiction. Rather, the terrorism treaties, properly viewed, are an example of the development of customary international law through the catalyst of treaty making. All that treaties can do, relative to the incorporation of new bases of jurisdiction into the customary law of jurisdiction, is to propose the desired innovation. Where the proposal is widely accepted, the jurisdictional innovation will pass into custom. The terrorism treaties appear to exemplify this process. The hypothetical treaty providing for universal jurisdiction over larceny is an example of a proposal that would be rejected and, consequently, would not generate custom. The ICC Treaty, and in particular its [*66] jurisdictional provisions, can do no more than to propose a jurisdictional innovation to be accepted or rejected by states.

V

Conclusion

The ICC is intended to do an overwhelmingly important job. An international criminal court would, in many instances, be the only meaningful forum in which to pursue justice for crimes of the greatest enormity. The dilemma underlying the debate about ICC jurisdiction over non-party nationals stems primarily from the conflicting needs for the ICC to have sufficient jurisdictional powers to bring to justice perpetrators of genocide, war crimes, and crimes against humanity, and, simultaneously, for states to retain appropriate discretion regarding methods of dispute settlement when the lawfulness of their official acts is in dispute.

Given the terms of the ICC Treaty, the ICC would very likely engage in the compulsory adjudication of interstate disputes through the mechanism of criminal prosecutions, a prospect that many states will, and perhaps should, reject. Fundamental principles of international law reserve to states the right to resolve their disputes by such mechanisms as they find most suitable, limited by such obligations as they have agreed to by treaty or become bound to by custom. The resolution of interstate disputes by the ICC through the mechanism of criminal prosecutions is not a method that non-parties to the ICC Treaty have agreed by treaty to or become bound to by

custom. Thus, the very treaty that would establish a new court to enforce international law may itself breach important international legal principles. Until this basic issue is confronted and satisfactorily resolved, the ICC and, in turn, the critical human interests that the court is intended to serve, will likely suffer from a damaging lack of participation. President Clinton's remarks, in his statement authorizing U.S. signature of the ICC Treaty, are telling in this regard. As he stated:

In signing, however, we are not abandoning our concerns about significant flaws in the treaty. In particular, we are concerned that when the court comes into existence, it will not only exercise authority over personnel of states that have ratified the treaty, but also claim jurisdiction over personnel of states that have not... .

Court jurisdiction over U.S. personnel should come only with U.S. ratification of the treaty. The United States should have the chance to observe and assess the functioning of the Court, over time, before choosing to become subject to its jurisdiction. Given these concerns, I will not, and do not recommend that my successor submit the Treaty to the Senate for advice and consent until our fundamental concerns are satisfied. <=205> n204

FOOTNOTES:

n1. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9 [hereinafter ICC Treaty].

n2. See id. art. 5. While the ICC Treaty also provides for jurisdiction over the crime of aggression, see id. art. 5(1)(d), the treaty further provides that the ICC shall not exercise that part of its subject-matter jurisdiction until such time as the treaty is amended to include provisions defining the crime of aggression and setting out the conditions under which the court will exercise jurisdiction over that crime. See id. art. 5(2).

n3. Note, however, the gap in jurisdiction. If a crime is committed by a non-party national on that non-party's territory, then the ICC may not exercise jurisdiction. So, even if the ICC had existed at the relevant time, it would not, for example, have been able to exercise jurisdiciton over the crimes of Pol Pot in Cambodia or Kambanda in Rwanda if Cambodia or Rwanda, respectively, were non-parties to the ICC Treaty. In this way, the ICC's effectiveness as an enforcement mechanism is significantly limited.

See id. art. 12. Article 13(a) of the treaty articulates a third condition permitting the exercise of ICC jurisdiction. Even in the absence of the nationality or territoriality preconditions articulated in Article 12, the ICC may exercise jurisdiction if the case arises from a situation referred to the ICC prosecutor by the U.N. Security Council acting under Chapter VII of the U.N. Charter. See id. art. 13.

Where the defendant's state of nationality is a party to the ICC Treaty or specially consents to ICC jurisdiction for the case in question, the ICC's jurisdiction is founded on the consent of the state of nationality. Where ICC jurisdiction is based on Security Council action, the jurisdiction also arguably rests on the consent of the state of nationality (assuming that it is a U.N. member state) through its membership in the U.N., which entails consent to cooperate with Security Council actions taken under Chapter VII. See U.N. Charter art. 25. But see Brief for the Appellant, Prosecutor v. Tadic, International Tribunal for the former Yugoslavia, Case No. IT-94-1-AR72 (arguing that the Security Council is inherently incapable of legitimately establishing a judicial organ). The present article will focus not on these consent-based foundations for ICC jurisdiction but, rather, on the territorially based foundation which, by the terms of the treaty, allows the ICC to exercise jurisdiction over nationals of states that have not consented to its jurisdiction.

n4. See David Scheffer, U.S. Ambassador at Large for War Crimes Issues, The International Criminal Court: The Challenge of Jurisdiction, Address at the Annual Meeting of the American Society of International Law (Mar. 26, 1999) (on file with author).

n5. See, e.g., John G. Merrills, International Dispute Settlement 164-66, 285-311 (3d ed. 1998); K. Hubbard, Separation of Powers Within the United Nations: A Revised Role for the International Court of Justice, *38 Stan. L. Rev. 165, 168 (1985);* Arthur Rovine, The National Interest and the World Court, in I The Future of the International Court of Justice (Leo Gross ed., 1976); Gerald Fitzmaurice, Enlargement of the Contentious Jurisdiction of the Court, in II The Future of the International Court of Justice 461-98 (Leo Gross ed., 1976); Judicial Settlement of International Disputes (H. Mosler & R. Bernhardt eds., 1974); L.V. Prott, The Future of the International Court of Justice, 33 Y.B. World Aff. 284 (1979).

n6. See Rovine, supra note 5, at 317; 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).*

n7. See Leo Gross, The International Court of Justice: Consideration of Requirements for Enhancing Its Role in the International Legal Order, in I The Future of the International Court of Justice 22-104 (Leo Gross ed., 1976); Edvard Hambro, Will the Revised Rules of Court Lead to Greater Willingness on the Part of Prospective Clients?, in I The Future of the International Court of Justice 365-76 (Leo Gross ed., 1976); Leo Gross, Review of the Role of the International Court of Justice, *66 Am. J. Int'l L. 479 (1972).*

n8. See Rovine, supra note 5; Fitzmaurice, supra note 5, at 462-73.

n9. Rovine, supra note 5, at 314.

n10. See id. at 317, 319.

n11. 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) ("The prospect that increased activity by the Court will help fill interstices in the international legal fabric or even expand its bounds, is likely to constitute, among diplomats, a negative rather than a positive argument for [enhancing the court's caseload]."); Rovine, supra note 5, at 315-16.

n12. See id. at 319-20.

n13. See Bilder, supra note 6, at 2-4; Falk, supra note 6, at 321-22; Rovine, supra note 5, at 317.

n14. See Falk, supra note 6, at 321; Fitzmaurice, supra note 5, at 488;. Rovine, supra note 5, at 319-20.

n15. See Fitzmaurice, supra note 5, at 473; Szasz, supra note 11, at 511.

n16. Merrills, supra note 5, at 293-94.

n17. See, e.g., sources cited supra note 5.

n18. The contentious jurisdiction of an international court is the court's jurisdiction to decide interstate disputes as distinct from its authority to render advisory opinions or to exercise other, incidental powers.

n19. See United Nations, Handbook on the Peaceful Settlement of Disputes between states 70 (1992) ("Settlement of international disputes by international courts is subject to the recognition by the states concerned of the jurisdiction of the courts over such disputes.").

n20. See generally id.; Merrills, supra note 5 (providing a survey of the jurisdictional and other features of international dispute resolution mechanisms); International Disputes: The Legal Aspects (C.M.H. Waldock ed., 1972) (same).

The European Court of Justice ("ECJ") and the European Court of Human Rights ("ECHR") provide contrasting examples insofar as each has automatic jurisdiction over states parties to the treaties establishing the court. On examination, however, we see that neither of those courts in fact constitutes a counterexample to the proposition that states generally maintain significant continuing discretion over the powers that international courts will have relative to jurisdiction and, relatedly, to remedies.

The ECJ must be distinguished from other international courts because it is the court of the European Communities. The European Communities, even while they are constituted by inter-state organizations, are part of a system of close regional economic integration. We would expect that the degree of authority that member states would be willing to vest in the European Communities' court would be greater than that which states would ordinarily be willing to vest in an international court that was not a constitutive part of an integrated regional economic system.

The ECHR, by contrast, is a creature of the Council of Europe. See Francis Jacobs & Robin White, The European Convention on Human Rights 3-4 (1996). The ECHR has jurisdiction over all matters concerning the interpretation and application of the European Convention on Human Rights, including violations by states parties of that convention and the human rights delineated therein. European Convention on Human Rights arts. 32(1), 33, 34. However, while the jurisdiction of the ECHR is compulsory, the provisions for remedies and for enforcement of ECHR decisions leave those matters to be decided largely through diplomatic and political processes within the Council of Europe. Where the court finds that a state party has committed a violation, its judgment will so indicate and provide the reasons for its finding. It may also award compensation and costs. See Luke Clements et al., European Human Rights: Taking a Case Under the Convention 103 (1999). It will not, however, specify other measures, such as legal or structural reforms, that the offending state party might need to take to remedy the violation (for example, where the violation is ongoing). See id. The convention provides that "the judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution." European Convention on Human Rights art. 46(2). The Committee of Ministers is comprised of the foreign ministers of the member states of the Council of Europe. See Clements et al., supra, at 9-10. That Committee, in some cases, then negotiates with the offending state party concerning what remedial measures will be taken. The convention does not provide for sanctions for failure to implement an ECHR decision. Therefore, the actions that may be taken by the Committee of Ministers in negotiating the remedial measures for an ECHR decision and in ensuring its enforcement are limited to various forms of political pressure. See Jacobs & White, supra, at 398. In sum, the power ceded to the ECHR in the court's jurisdictional structure is somewhat qualified by the remedial and enforcement structures.

n21. See generally Merrills, supra note 5, at 121-45 (on the organization and procedures of the ICJ).

n22. See Statute of the International Court of Justice, June 26, 1945, art. 36(2), 59 Stat. 1055, *3 Bevans 1179* [hereinafter ICJ Statute].

n23. See, e.g., Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes, Apr. 18, 1961, T.I.A.S. 7502, 500 U.N.T.S. 241, attached to the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, T.I.A.S. 7502, 500 U.N.T.S. 95; Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, T.I.A.S. 6820, 596 U.N.T.S. 487, attached to the Vienna Convention on Consular Relations, Apr. 24, 1963, T.I.A.S. 6820, 596 U.N.T.S. 261. The Optional Protocol and Convention of 1961 have 61 and 174 parties respectively. The Optional Protocol and Convention of 1963 have 44 and 153 parties respectively. See Christian L. Wiktor, Multilateral Treaty Calendar 1648-1994, at 726-27 (1998).

n24. See, e.g., American Treaty on Pacific Settlement, Apr. 30, 1948, 30 U.N.T.S. 55 ("Pact of Bogata"); European Convention for the Peaceful Settlement of Disputes, Apr. 29, 1957, 320 U.N.T.S. 243, each of which has 13 states parties, many of whom have attached significant reservations. See Wiktor, supra note 23, at 485, 657.

n25. See Merrills, supra note 5, at 123; see also John Merrills, The Optional Clause Revisited, *64 Brit. Y.B. Int'l L. 197 (1993)* (analyzing states' practice in use of the optional clause).

n26. See id. See generally, Szasz, supra note 11, at 511 (observing that "states are reluctant to submit to international courts, particularly in broad terms and in advance").

n27. See ICJ Statute, supra note 22, art. 36(1); United Nations, supra note 19, at 71-72, and sources cited therein.

n28. See Merrills, supra note 5, at 122-23.

n29. See, e.g., Arbitral Award Made by the King of Spain on Dec. 23, 1906 (Hond. v. Nicar.), 1960 I.C.J. 192 (judgment of Nov. 18) (exercising jurisdiction pursuant to a special agreement notwithstanding that the court also would have had jurisdiction on other bases).

n30. See Monetary Gold Removed from Rome in 1943 (Italy v. Fr., U.K., N. Ir., and U.S.), 1954 I.C.J. 19 (June 15).

n31. Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 431 (Jurisdiction and Admissibility Judgment of Nov. 26); see also Certain Phosphate Lands in Nauru (Nauru v.

Austl.), 1992 I.C.J. 240 (Preliminary Objections and Judgment of June 26) (following same rationale); Concerning East Timor (Port. v. Austl.), 1995 I.C.J. 90 (Judgment of June 30) (same).

n32. United Nations Convention on the Law of the Sea, Dec. 10, 1982, annex VI, Statute for the International Tribunal for the Law of the Sea, *21 I.L.M. 1345.*

n33. Agreement Establishing the World Trade Organization, Apr. 15, 1994, annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, *33 I.L.M. 1226* [hereinafter DSU].

For comprehensive treatments of the mechanisms for settlement of interstate disputes on specified subject areas, see United Nations supra note 19, 135-53; International Disputes: The Legal Aspects, supra note 20, ch. 4.

n34. United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, art. 283, *21 I.L.M. 1261* [hereinafter UNCLOS].

n35. See id. part IV 2. The convention also provides for a specialized Sea-Beds Dispute Chamber with jurisdiction specific to disputes regarding the convention's arrangements regarding the deep sea-bed. See Merrills, supra note 5, at 187-90.

n36. See UNCLOS, supra note 34, arts. 297-98.

n37. See id. art. 297.

n38. See id. art. 298.

n39. See id. art. 299.

n40. See DSU, supra note 33 .

n41. See id. arts. 4-5.

n42. See id. art. 11.

n43. See Merrills, supra note 5, at 205-08.

n44. See DSU, supra note 33, art. 17(6).

n45. See id. art. 17(14).

n46. See id. arts. 19-22.

n47. See id. art. 19(1).

n48. See id. art. 21.

n49. Regarding determination of reasonable time periods, see id.

n50. See id. art. 22(2).

n51. See id. art. 22.

n52. See id.

n53. See id. art. 22(6).

n54. General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XXI, 61 Stat. A3, 55 U.N.T.S. 187.

n55. The ICC Treaty contains "admissibility" provisions that would deprive the ICC of the authority to exercise its jurisdiction under certain circumstances. A case is not admissible before the ICC if

(a) the case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) the case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute.

ICC Treaty, supra note 1, art. 17(a), (b). But those admissibility provisions do not address the fact that the state whose official acts are at issue may view those acts as lawful and, therefore, may see no basis for investigation or prosecution. In addition, the treaty leaves undefined the type and extent of investigation required, the

circumstances in which prosecution is required after investigation, and how much information about the investigation (including potentially sensitive data) may be required to satisfy the Court that the state has met its burden in demonstrating that it is neither unwilling nor unable to handle the matter properly at the national level. Therefore, while the admissibility provisions do ameliorate the problems of ICC jurisdiction, those provisions do not adequately respond to the concerns arising from the ultimate fact that the ICC's jurisdiction does not require that the defendant's state of nationality be a party to the treaty or otherwise consent to ICC jurisdiction.

n56. The two different types of cases that will come before the ICC may not appear as pure types; any given case may have elements of each. For purposes of analysis, however, it will be useful to distinguish between cases of these two distinct characters.

n57. See supra note 2 and accompanying text.

n58. See infra text accompanying notes 74-81.

n59. See supra text accompanying notes 5-17.

n60. Rovine, supra note 5, at 319.

n61. See supra text accompanying notes 4 & 204.

n62. Opened for signature May 23, 1969, arts. 34-38, 1155 U.N.T.S. 331, *8 I.L.M. 679.*

n63. See id. art. 34.

n64. See supra text accompanying note 4.

n65. See Philippe Kirsch, The Rome Conference on the International Criminal Court: A Comment, ASIL Newsletter 1 (Nov./Dec. 1998).

n66. Report of the International Law Commission on the Work of its Eighteenth Session, Draft Articles on the Law of Treaties with Commentaries, II Yearbook of the Int'l L. Comm'n 226 (1966) (Commentary to Draft Art. 30, "General Rule Regarding Third states") (emphasis added); see also Arnold McNair, The Law of Treaties 321 (1961) ("A State which learns that a treaty concluded between two other States has for its object or probable consequence the impairment of its rights, whether enjoyed under customary international law or under a treaty with one of the contracting parties, is entitled at once to lodge a diplomatic protest with those parties and to apply to the International Court of Justice ... for a declaration and ... for interim measures of protection.").

n67. Island of Palmas: 2 U.N.R.I.A.A. 829, 842.

n68. As Professor Scharf puts it,

the drafters did not view the consent of the state of territoriality or nationality as necessary as a matter of international law to confer jurisdiction on the court. Rather, they adopted the consent regime as a limit to the exercise of the court's inherent jurisdiction as a politically expedient concession to the sovereignty of states in order to garner broad support for the statute.

Michael Scharf, The ICC's Jurisdiction Over the Nationals of Non-Party states: A Critique of the U.S. Position, 64 Law & Contemp. Probs. 67, 77 (Winter 2001).

n69. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3.

n70. See Ruth Wedgwood, The International Criminal Court: An American View, 10 Eur. J. Int'l L. 93, 102 (1999).

n71. See ICC Treaty, supra note 1, art. 8(xxvi).

n72. The prohibition on recruitment of children under 15 years of age for service in armed forces, and the obligation to take measures to ensure that such children do not participate in hostilities, appear in the two 1977 Protocols to the Geneva Conventions as well as in the U.N. Convention on the Rights of the Child. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), supra note 69, art. 77(2); Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, art. 4(3)(c) 1125 U.N.T.S. 609; Convention on the Rights of the Child, Nov. 20, 1989, art. 38, *28 I.L.M. 1457*. In none of those treaties is there any suggestion that violations of the child soldier provisions constitute grave breaches or otherwise give rise to universal jurisdiction. Nor is there any other basis for a claim that utilization of child soldiers constitutes an international crime entailing universal jurisdiction. See generally Amnesty International, child Soldiers: One of the Worst Abuses of Child Labor (1999) (reviewing international legal prohibitions on utilization of child soldiers); Ilene Cohn & Guy Goodwin, Child Soldiers: The Role of Children in Armed Conflict 55-72 (1994).

n73. The status of the ICC Treaty as generating customary law will be considered below. See infra Part IVB.

n74. I leave aside the crime of aggression, which is not, for the time being, within the effective jurisdiction of the ICC. See supra note 2.

n75. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, arts. 2, 49, 50, *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 the Armed Forces at Sea, Aug. 12, 1949, arts. 2, 50, 51, *6 U.S.T. 3217* 75 U.N.T.S 85; Geneva Convention III Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 2, 129, 130, 75 U.N.T.S 135; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 2, 146, 147, 75 U.N.T.S 287.

n76. Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, in Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, Annex, art. 2, U.N. Doc. S/25704 (1993).

n77. Prosecutor v. Dusko Tadic, Decision on the Defence Motion on Jurisdiction, Case No. IT-94-1-T, decision of Aug. 10, 1995, PP 49-51.

n78. Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, decision of Oct. 2, 1995, PP 80-83 [hereinafter Tadic Appeal].

n79. Another example of the ICTY/R's addressing major and unsettled legal questions through the process of trial and appeal concerns a defendant's right to counsel. Jean-Paul Akayesu was an indigent defendant indicted for genocide and other crimes before the International Criminal Tribunal for Rwanda ("ICTR"). See Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Trial Chamber decision of Sept. 2, 1998. After dismissing a number of lawyers assigned for his defense, Akayesu decided that he wanted the Canadian lawyer, Jean Philpot, to represent him. Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Appeals Chamber Decision Relating to the Assignment of Counsel, decision of July 27, 1999. At Akayesu's request, Philpot was placed on the list of available counsel that is maintained by the ICTR registrar, see id., but the registrar subsequently refused Akayesu's request to be represented by Philpot. See id. The registrar's refusal was upheld by the ICTR trial chamber on the ground that too great a proportion of the counsel appointed by the ICTR were French or Canadian. See At a Genocide Trial, French is a Handicap, N.Y. Times, Feb. 19, 1999, at A11. That trial chamber decision was reversed on appeal in a very narrow opinion tied closely to the facts of the case:

The practice of the Tribunal has been to provide a list of approved counsel from which an accused may choose... . Mr. Philpot was included in this list by the Registrar upon the insistence of the Appellant that he desired that Mr. Philpot be assigned to him ... . The Registrar thereby gave the Appellant a legitimate expectation that Mr. Philpot would be assigned to represent him before the Tribunal.

Akeyesu Appeals Chamber Decision, supra, at 3.

By basing its holding narrowly on Akayesu's legitimate expectations in the particular circumstances of the case, the appellate chamber chose not to address the broad issues that the case raised regarding the right to defense counsel and, in particular, the proper balancing of the defendant's interest in choice of counsel with the United Nations' interest in geographical representativeness of its personnel. These broader implications of the case were addressed in a number of petitions submitted to the Appellate Chamber. See, e.g., Petition for the Intervention as Amicus Curiae, of the International Criminal Defense Attorneys Association, filed on April 28, 1999. The Akayesu Defense Counsel case thus represents another major question in international criminal law which has come before the ICTY/R, but in this case, the substance of the matter remains to be addressed.

n80. The Assembly of States Parties, by the terms of the ICC Treaty, will provide only a rather minimal form of oversight of the Court's operations. See ICC Treaty, supra note 1, art. 112 (establishing an Assembly of States Parties with oversight functions relative to the ICC).

n81. States may reasonably have significant concerns about ICC jurisdiction not only with regard to official-acts cases but also in relation to cases of the individual-culpability type. In individual-culpability cases, the concerns will relate primarily to diplomatic protection. If a state finds it necessary to provide diplomatic protection to ensure just treatment of a national who is facing prosecution, that state may confront significant disadvantages in interacting with the ICC rather than with another state. In a sense, the need to provide diplomatic protection to ensure just treatment of a national in an individual-culpability case transforms that case, or at least the aspect of it involving the diplomatic-protection issue, into a dispute between the state of the defendant's nationality and the prosecuting authority. Where that dispute is with a state, bilateral diplomatic methods may be employed. Where that authority is an international court, the nature of the dispute resolution process would be entirely different. Indeed, no process for the resolution of such disputes with the ICC has been articulated.

n82. I leave aside here the legality of the NATO military intervention itself because the crime of aggression is not currently within effective ICC jurisdiction as framed by the ICC Treaty. See supra note 2.

n83. Alex Kirby, Kosovo Waterways Bombing a "War Crime" (visited Mar. 22, 2000) <http://news2.thls.bbc.co.uk/hi/english/world/newsid<uscore>394000/394326.stm>.

n84. Ian Brownlie, Co-Agent for the Federal Republic of Yugoslavia, Remarks before the ICJ in the Case Concerning Legality of the Use of Force (May 10, 1999) (on file with author).

n85. See Bruce Zagaris, Complaint Before War Crimes Tribunal Charges NATO Leaders with War Crimes, 15 Int'l L. Enforcement Rep. 249 (1999).

n86. See Burden of Proof (CNN television broadcast, June 1, 1999).

n87. Interview with Michael Byers, The World Tonight (BBC Radio 4 radio broadcast, May 28, 1999).

n88. Conversation of author with Richard Goldstone, then-Prosecutor, ICTY/R, in Brussels, Belgium (July 20, 1996).

n89. Cf. infra Part IVA (regarding the notion of universal jurisdiction created by treaty).

n90. See, e.g., Revised Report of the Working Group on the Draft Statute for an International Criminal Court PP 72-73, U.N Doc. A/CN.4/L.490 and Add.1 (1993); Yoram Dinstein, The Universality Principle and War

Crimes, in The Law of Armed Conflict: into the Next Millenium 17-37 (Michael Schmitt & Leslie Green eds., 1998).

n91. 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).

n92. See Tadic Appeal, supra note 78, at 5-24; Prosecutor v. Joseph Kanyabashi, ICTR, Decision on the Defence Motion on Jurisdiction, Case No. ICTR-96-15-T, June 18, 1997, PP 7-29.

In April 1999, the Federal Republic of Yugoslavia (FRY) brought suit before the ICJ accusing ten NATO countries of violating international obligations to refrain from the use of force against another state. See ICJ, Press Communique 99/39, July 2, 1999 (visited Mar. 22, 2000) <http://www.icj-cij.org>. Several of those NATO respondents, including the United States, challenged the FRY's right to bring suit under the ICJ's optional-clause jurisdiction on the basis that the FRY was not a member of the United Nations. See, e.g., Legality of Use of Force (Yugo. v. Can.), *Request for the Indication of Provisional Measures, 1999 I.C.J. Public Sitting CR99/ 16 P 10* (statement of Philippe Kirsch, Agent of Canada) (visited Mar. 22, 2000), <http://www.icj-cij.org/icj/idocket/iyall/iyall<uscore>iyca<uscore>icr9916 &uscore; 19990510.htlm>. To support the claim that the FRY was not a U.N. member, the respondents made reference to U.N. Security Council Resolution 777 of 1992 and U.N. General Assembly Resolution 47/1 of 1992. See *id. P 11.* The FRY argued, in response, that those resolutions excluded the FRY only from occupying its seat in the General Assembly but not from other participation in the U.N. system. The ICJ declined the FRY's request for provisional measures in the case, but did so on other grounds without addressing the U.N-membership issue. See ICJ, Press Communique, supra.

These circumstances raise the question of what authority the ICTY has in the FRY in light of the fact that the ICTY's jurisdiction and other authority arises from U.N. Security Council action. If the FRY is not a U.N. member (and already was not a member as of 1992 when the two relevant U.N. resolutions were adopted), then, one could argue, the ICTY (which was established in 1993) has no powers in the FRY and no jurisdiction over FRY nationals.

There are a number of appropriate responses to this set of circumstances. First, we must recognize that the status of the FRY relative to the United Nations is not settled. If the FRY's own position on this matter prevails, then the FRY is indeed a U.N. member and, perforce, bound by the Security Council action establishing the ICTY (notwithstanding the FRY's own protests, on other grounds, to ICTY jurisdiction). See Letter from the Charge d'affaires, a.i., of the Permanent Mission of Yugoslavia to the United Nations Addressed to the Secretary General of the United Nations (May 19, 1993) (U.N. Doc. A/48/170-S/25801 (1993)). Given that the FRY's mission to the U.N. has continued to exist and to receive official U.N. communications, that the FRY flag has continued to fly outside U.N. headquarters, and other indicia of U.N. membership, it is not entirely farfetched that the FRY would be found to hold membership.

If on the other hand, the FRY were found to be a non-member of the U.N., then the question whether the U.N. Charter is binding on non-parties would be directly posed. Regarding this debate, see infra text accompanying notes 150-167. If the charter were found to be binding in a robust way on non-parties, then the ICTY would maintain its powers in the FRY. If, however, the charter were found not to be binding on non-members in the relevant respects, then this would have far-reaching and profound consequences, quite possibly among them the loss of the ICTY's powers within the FRY and jurisdiction over FRY nationals.

n93. By contrast, the ICTY has made reference to the principles underlying universal jurisdiction in justifying the primacy of the ICTY over national courts (the concept of primacy is not adopted by the ICC Treaty) and in justifying prosecution of defendants before the international forum rather than before their "natural" (national) fora. See Tadic Appeal, supra note 78, at 32-33 (primacy), 34 ("natural forum"). The ICTY has not, however, stated or in any way implied that universal jurisdiction formed the basis for its jurisdiction.

n94. See, e.g., Christopher Greenwood, The Prosecution of War Crimes in the Former Yugoslavia, *26 Bracton L.J. 13, 16 (1994)* (Nuremberg tribunal).

n95. See, e.g., R. John Pritchard, An Overview of the historical Importance of the Tokyo War Trial 8-10 (1987) [hereinafter Pritchard, An Overview] (regarding Tokyo); cf. Hans Kelsen, The Legal Status of Germany According to the Declaration of Berlin, *39 Am. J. Int'l L. 518, 523 (1945)* (noting that the Allies did not afford German citizens political rights and representation).

n96. Sept. 2, 1945, *3 Bevans 1251.*

n97. *3 Bevans 1204;* see Instrument of Surrender, supra note 96, at 1251.

n98. Instrument of Surrender, supra note 96, at 1252.

n99. Potsdam Declaration, supra note 97, at 1205, P 10.

n100. See id. P 8.

n101. Communique, First Cairo Conference, Dec. 1, 1943, *3 Bevans 858;* see also Pritchard, supra note 95, at 9; R. John Pritchard, The International Military Tribunal for the Far East and Its Contemporary Resonances, *149 Mil. L. Rev. 25, 27-28 (1995)* [hereinafter, Pritchard, The International Tribunal].

n102. See Pritchard, An Overview, supra note 95, at 9 n.16 (citing Proceedings, Vol. 20; Judgment, T.48415-19, and Annex A-1 - A-5); 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."); 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).

n103. Berlin Declaration, June 5, 1945, 60 Stat. 1649, 1650; see also Agreement Between the Governments of the United States of America and the Union of Soviet Socialist Republics and the United Kingdom and the Provisional Government of the French Republic on Certain Additional Requirements to be Imposed on Germany, Sept. 20, 1945, *3 Bevans 1254* (delineating further the powers to be exercised by the Allies including prosecutions for war crimes).

n104. As Fritz Mann reasoned at that time,

to place the City of Koenigsberg and the territories east of the Oder-Neisse line under Soviet and Polish administration respectively far exceed the limits within which a mere belligerent occupant could act, no belligerent occupant could withdraw diplomatic missions or require "German authorities and all persons in Germany" to hand over all gold, silver and platinum, or acquire the right to have placed "at the unrestricted disposal of the Allied Representatives" the entire German shipping and the whole of the German inland transport system. And if one looks at the legislation of the Control Council, one finds Law No. 4 about the reorganisation of the German judicial system ... .

The Allies' failure to exercise the qualified rights of a belligerent occupant seems to be undeniable... . The material question is why the Allies have an internationally recognisable right to behave otherwise than as belligerent occupants... .

Although neither the end of hostilities nor the unconditional surrender nor the disappearance of a central government could, in themselves, have entitled the Allied Governments to adopt an attitude other than that of a belligerent occupant, it is, in the peculiar situation of Germany in 1945, the co-existence of these three facts which provides an internationally recognisable justification for Allied action. The rules relating to belligerent occupation seek to establish a compromise between military necessities and the interests of the inhabitants... . They expect, from both sides, a standard of conduct which becomes impracticable when every single activity of the occupied state expresses a doctrine the eradication of which is the very aim of the war... . No German Government could have been formed to co-operate with a mere belligerent occupant. If the Allies had assumed only the role of belligerent occupants, they and the United Nations in whose interests they act, could not achieve their war aims, which go far beyond military victory; indeed, they would have failed to fulfil their duty and historic mission. It is the unique character of the circumstances which required and sanctioned a unique solution, a new departure.

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

n105. Mann, supra note 104, at 330.

n106. Georg Schwarzenberger, The Problem of an International Criminal Law, 3 Current Legal Probs. 263, 290, 291 (1950); see also Georg Schwarzenberger, The Judgment of Nuremberg, *21 Tul. L. Rev. 329, 334-35 (1947).*

n107. Hans Kelsen, Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?, 1 Int'l L. Q. 153, 167 (1947). Kelsen, however, went on to reason (in a manner of particular interest for our question of ICC jurisdiction over non-party nationals) that if, as he believed was the case, the Allies did not exercise jurisdiction based on their sovereignty in Germany but rather attempted to represent the Nuremberg tribunal as an international tribunal, then its jurisdiction was illegitimate precisely because it lacked the consent of non-parties to the London Agreement, the treaty that formed the basis of the Nuremberg tribunal's jurisdiction. See id. at 168.

n108. Judgment of the International Military Tribunal, Sept. 30, 1946, reprinted in Richard A. Falk et al., Crimes of War 96 (1971).

n109. 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).

n110. 22 Trial of the Major War Criminals Before the International Military Tribunal 461 (S. Paul A. Joosten ed., 1948).

n111. Judgment of the International Military Tribunal, supra note 108, at 96.

n112. Interim Report of the Independent Commission of Experts Established Pursuant to Security Council Resolution 780, 1992, P 73, U.N. Doc. S/25274 (1993).

n113. One certainly may question whether the Allies should have acted in loco sovereigntis in post-war Germany. Concerns could be raised as to whether the Allies were sufficiently interested in the welfare of the German population to act as the German sovereign. In this regard, see Kelsen, supra note 95, at 523 ("the occupant state ... will not confer upon the former citizens of the occupied state political rights with respect to its own legislative or executive organs ... . "). Conducting or consenting to war-crimes prosecutions at the Nuremberg tribunal could be among the points of concern. But the questions of the wisdom and legitimacy of Allied government in post-war Germany need not be resolved in order to acknowledge that precisely such a government did exist. In the position of sovereign or acting sovereign, the Allies fulfilled the role of the government of Germany and, in that capacity, conducted or consented to the prosecution of German nationals by the Nuremberg tribunal.

n114. It has occasionally been suggested that the Genocide Convention or the Apartheid Convention provides support for the collective exercise of universal jurisdiction over non-party nationals. Neither convention, however, provides such support.

The Genocide Convention provides for jurisdiction by the territorial state "or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties as shall have accepted its jurisdiction." Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. VI, 78 U.N.T.S. 277 (emphasis added). It thus does not envision that the court would have jurisdiction with respect to non-contracting parties. The international tribunal provision was included in the Genocide Convention 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. 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)*. The specifics of creation of such a court and its competence were left open by the Convention. This meant that even states parties to the Genocide Convention did not, by becoming parties, grant jurisdiction to or in any other way alter their status or the status of their nationals relative to any international court that might in the future be created. See U.N. GAOR 6th Comm., 3d Sess., 130th mtg. at 684, 676 U.N. Doc. A/C.6/SR 61-140 (1948) (remarks of Mr. Fitzmaurice, U.K.) (stating that the U.K. "could not commit itself to support a court which did not yet exist and the scope of which was not known," and accepting Article VI only on the ground that it "put the court on a hypothetical, facultative basis and did not compel the parties to accept its jurisdiction"); Lawrence J. LeBlanc, The United States and the Genocide Convention 165-67 (1991); Neremiah Robinson, The Genocide Convention: A Commentary 80 (1960); Matthew Lippman, The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later, 15 Ariz. J. Int'l & Comp. L. 415, 461 (1998).

Neither does the Apartheid Convention constitute a precedent for the jurisdiction of an international tribunal over nationals of non-party states. The Apartheid Convention's provisions regarding an international penal tribunal echo those of the Genocide Convention, stating that persons charged with the crime of Apartheid may be tried in the national courts of states parties or "by an international penal tribunal having jurisdiction with respect to those states Parties having accepted its jurisdiction." International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, art. V, 1015 U.N.T.S. 243 (emphasis added). Moreover, even with that safeguard, the jurisdictional provisions of the Apartheid Convention proved extremely controversial and were cited by many states as among their reasons for rejecting the convention. See 27

Yearbook of the U.N. 100 (1973) (remarks of Finland [speaking also on behalf of Denmark, Iceland, Norway, and Sweden], Turkey, United States, Portugal, Spain, United Kingdom, Australia, Costa Rica, Equador, and France).

n115. 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).

n116. See The European Convention on the Transfer of Proceedings in Criminal Matters, Mar. 30, 1978, Europ. T.S. No. 73.

n117. See id.

n118. See id. art. 2(1).

n119. See Communication from M. Cunha, Responsable de l'application des conventions penales du Conseil de l'Europe (conveyed via Marc Henzelin, University of Geneva Faculty of Law) (on file with author).

n120. In 1988, a Select Committee of Experts on Extraterritorial Jurisdiction, convened by the Council of Europe's Committee on Crime Problems, rendered an analysis of the exercise of extraterritorial jurisdiction in Europe including jurisdiction exercised pursuant to the European Convention on Transfer of Proceedings in Criminal Matters. See Council of Europe, Select Committee of Experts on Extraterritorial Jurisdiction, Extraterritorial Criminal Jurisdiction (1990). The Committee did not, in the course of its deliberations or in its published study, examine the question of the applicability of the convention to cases where defendants were non-party nationals. See Telephone Interview with Maurice Harari, Scientific Expert, Council of Europe's Select Committee of Experts on Extraterritorial Jurisdiction, in Geneva, Switz. (May 10, 1999).

n121. See supra text accompanying notes 90-113.

n122. 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.

n123. See supra Part IIIA1.

n124. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9 (Sept. 7).

n125. For an application of this approach to ICC jurisdiction over non-party nationals, see Scharf, supra note 68, at 72-73.

n126. The Lotus decision was controversial. The decision was rendered by an evenly divided court, with the president of the court breaking the tie with a casting vote. At the time of Lotus's publication, the academic literature was replete with vociferous objections to the court's reasoning. See Ian Brownlie, Principles of Public International Law 302 n. 24 (4th ed. 1990) (and sources cited therein); Fritz A. Mann, Studies in International Law 26 n.3 (1973) (and sources cited therein).

n127. See Brownlie, supra note 126, at 302-03; Mann, supra note 126, at 26-27; Prosper Weil, International Law Limitations on State Jurisdiction, in Extraterritorial Application of Laws and Responses Thereto (Cecil Olmstead ed., 1983).

n128. See, e.g., Oscar Schachter, International Law in Theory and Practice 254-55, 257 (1991) ("any one of the [list of five] bases of jurisdiction just mentioned may meet the minimum international law requirements for jurisdiction to prescribe. If none is present, the application of domestic law in the particular case would be "exorbitant' that is, impermissible."); Research in International Law of the Harvard Law School, II Jurisdiction with respect to Crime, Draft convention with Comment, Supplement to *29 Am. J. Int'l L. 435, 445, 446 (1935).*

n129. Michael Akehurst, Jurisdiction in International Law, *46 Brit. Y.B. Int'l L. 145, 167* (1972-73).

n130. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (Ser. A) No. 9, at 18.

n131. See id.

n132. See generally Vaughn Lowe, Extraterritorial Jurisdiction: An Annotated Collection of Legal Materials (1983) (reviewing a multitude of challenges by one state of another's asserted jurisdiction); cf. Attorney General of Israel v. Eichmann , *36 I.L.R. 283-87 (1962)* (citing Lotus to support jurisdiction but then relying extensively on other, positive bases).

n133. See Lotus, 1927 P.C.I.J. at 18.

n134. See Mann, supra note 126, at 80.

n135. Translated as "Agreements (and stipulations) of the parties (to a contract) must be observed." Black's Law Dictionary 998 (5th ed. 1979).

n136. Cf. infra Part IVB (regarding whether the ICC Treaty has already altered customary law).

n137. In the context of the ICC debate, the word "delegation" has been used to refer to the transfer of a right (to prosecute). This language is different from that used in the law of assignments, in which "assignment" would refer to the transfer of a right while "delegation" would refer to transfer of an obligation.

n138. See Mann, supra note 126, at 363.

n139. See, e.g., U.N. Comm'n on Int'l Trade L., Draft Convention on Assignment of Receivables Financing: text with remarks and suggestions, U.N. Doc. A/CN.9/WG.II/WP.104 (July 16, 1999).

n140. See Mann, supra note 126, at 363.

n141. See *Restatement (second) of Contracts 317(2)* (1981).

n142. See Brownlie, supra note 126, at 678.

n143. See, e.g., Christine Chinkin, Third Parties in International Law 58 (1992); Mann, supra note 126, at 363 ("the paramount rule being that [the obligor's] position is not to be prejudiced as a result of the assignment").

n144. There may also be increased burdens and risks in individual-culpability cases if a state wishes to provide diplomatic protection. See supra note 81.

n145. See Gennady M. Danilenko, Law-Making in the International Community 64-68 (1993).

n146. See id. at 66.

n147. See id.

n148. See supra text accompanying note 204.

n149. David J. Scheffer, The United States and the International Criminal Court, *93 Am. J. Int'l L. 12, 19 (1999).*

n150. See, e.g., Brownlie, supra note 126, at 694; Richard Falk, The Status of Law in International Society 185 (1970).

n151. See generally Bruno Simma et al., The Charter of the United Nations: A Commentary 131-39 (1994) (discussing Article 2(6) of the U.N. Charter and the controversy regarding the legal effects of the charter on non-members of the U.N.).

n152. Danilenko, supra note 145, at 60; see also Richard A. Falk, The Authority of the United Nations to Control Non-Members 73-74 (1965). But see Kunz, Revolutionary Creation of Norms of International Law, *41 Am. J. Int'l L. 119,124 (1947)* (taking the view that this analysis evades the core issue of the legal authority of the United Nations to exercise power over non-members); Oppenheim-Lauterpacht, International Law 928 (8th ed. 1955) (same).

n153. See 26 SJIR 84-88 (1970) (official statement of Swiss position); 39 SJIR 264-67 (1983) (same).

n154. As to the question whether customary law developments prompted by the charter itself have given rise to a new customary regime of global treaties, see infra text accompanying notes 169-180.

n155. The prospect of the ICC Treaty passing into customary law will be considered infra Part IVB.

n156. Falk, supra note 152, at 51; see, e.g., Ross, Constitution of the United Nations 32 (1950); Bardo Fassbender, The United Nations Charter as Constitution of the International Community, *36 Colum. J. Transnat'l L. 529 (1998).*

n157. See Falk, supra note 152, at 66-67, 70, 101.

n158. Norman Bentwich & Andrew Martin, A Commentary on the Charter of the United Nations 14 (1950).

n159. See, e.g., id. at 14; Leland M. Goodrich & Edvard I. Hambro, The Charter of the United Nations: Commentary and Documents 108-10 (1st ed. 1946); 1 Guggenheim, Lehrbuch des Volkerrechts 92 (1948); I Oppenheim-Lauterpacht, International Law 928-29 (7th ed. 1948); Kunz, General International Law and the Law of International Organizations, *48 Am. J. Int'l L. 456, 457 (1953);* Kunz, supra note 152, at 119-26; cf. Philip C. Jessup, A Modern Law of Nations 168 (1948).

n160. 1 Oppenheim-Lauterpacht, International Law 652 (8th ed. 1955).

n161. Id.

n162. Leland M. Goodrich & Edvard I. Hambro, The Charter of the United Nations: Commentary and Documents 71 (1st ed. 1946).

n163. Id. at 108-09 (2d ed. 1949).

n164. Hans Kelsen, The Law of the United Nations: A Critical Analysis of its Fundamental Problems 107 (1950).

n165. Id. at 110; see also Verdross, Le Nazioni Unite e i Terzi state, 2 La Comunita Internazionale 455 (1947) (taking a similar view).

n166. See Simma et al., supra note 151, at 131-39.

n167. See id. at 137-38.

n168. See generally Andre de Hoogh, Obligations Erga Omnes and International Crimes (1996) (on development of the erga omnes and jus cogens doctrines as applicable to international crime); cf. Prosper Weil, Towards Relative Normativity in International Law, *77 Am. J. Int'l L. 413 (1983)* (questioning the wisdom of development of the jus cogens and erga omnes doctrines).

n169. North Sea Continental Shelf (Den. v. F.R.G.), 1969 I.C.J. 3, at 42-43 (Feb. 20).

n170. On the debate regarding the treatment of treaty participation as a form of state practice for purposes of customary law development, see Anthony A. D'Amato, The Concept of Custom In International Law 3-4, 89-90, 103-65 (1971); Oscar Schachter, Entangled Treaty and Custom, in International Law at a Time of Perplexity 717, 724-26 (Yoram Dinstein ed., 1989); Arthur Weisburd, Customary International Law: The Problem of Treaties, *21 Vand. J. Transnat'l L. 1 (1988).*

n171. United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Court, Press Release L/ROM/22, July 17, 1998 (visited Mar. 22, 2000) <http://www.un.org/ icc/>.

n172. United Nations, Rome Statute of International Criminal Court: Ratification Status (last modified Dec. 31, 2000) <http://www.un.org/law/icc/statute/status/htm>.

n173. Continental Shelf, 169 I.C.J. at 42.

n174. See Philippe Kirsch & John T. Holmes, The Rome Conference on an International Criminal Court: the Negotiating Process, *93 Am. J. Int'l L. 2, 7-9 (1999).*

n175. See, e.g., Bin Cheng, United Nations Resolutions on Outer Space: "Instant" International Customary Law?, 5 Indian J. of Int'l L. 23 (1965).

n176. See, e.g., id.

n177. Cheng, supra note 175, at 37, 46.

n178. Even this proposition, which seems unexceptionable on its face, may in fact be problematic. By eliminating the requirement of consistent state practice over some period of time before binding customary law is created, Cheng would seem to suggest that states should be irrevocably bound without a period of time in which to observe and consider the incipient rule in practice.

n179. D'Amato, supra note 170, at 165.

n180. Even if the ICC Treaty has not as yet generated customary law supporting ICC jurisdiction over non-party nationals, such custom could conceivably emerge in the future. If and when such a development should take place, the United States presumably would be in a position to claim persistent objector status with regard to ICC jurisdiction over its nationals, having clearly articulated its objections to the purported jurisdiction immediately and consistently from the time it was proposed. For analyses of the preconditions for and consequences of persistent objector status, see Jonathan Charney, Universal International Law, *87 Am. J. Int'l L. 529 (1993);* David Colson, How Persistent Must the Persistent Objector Be?, *61 Wash. L. Rev. 957 (1986).*

n181. See infra notes 183-190 and accompanying text.

n182. See, e.g., Scharf, supra note 68, at 99-100.

n183. See Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, *22 U.S.T. 1641,* 860 U.N.T.S. 105.

n184. See Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, *24 U.S.T. 564,* 974 U.N.T.S. 177; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention of Sept. 23, 1971, Feb. 24, 1988, S. Treaty Doc. No. 100-19.

n185. See Convention and Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, *27 I.L.M. 668.*

n186. See International Convention Against the Taking of Hostages, Dec. 17, 1979, TIAS No. 11,081, 1316 U.N.T.S. 205.

n187. See Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, *28 U.S.T. 1975,* 1035 U.N.T.S. 167.

n188. See Convention on the Safety of United Nations and Associated Personnel, Dec. 15, 1995, U.N. GAOR 49th Sess., Supp. No. 49, Vol. 1, at 299, U.N. Doc. A/49/49 (Jan. 9, 1994), *34 I.L.M. 482 (1995).*

n189. See International Convention for the Suppression of Terrorist Bombings, *37 I.L.M. 249 (1998).*

n190. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, opened for signature Dec. 10, 1984, *23 I.L.M. 1027,* 1465 U.N.T.S. 85. Torture is not a terrorism offense, but the Torture Convention's jurisdictional provisions fit within the mold of the provisions found in the terrorism conventions.

n191. See supra text accompanying notes 124-144.

n192. See, e.g., Jordan Paust, Extradition of the Achille-Lauro Hostage-Takers: Navigating the Hazards, 20 Vanderbilt 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.").

n193. See, e.g., *Restatement (Third) of the Foreign Relations Law of the United States 404* (1987); Kenneth C. Randall, Universal Jurisdiction Under International Law, *66 Tex. L. Rev. 785, 834-38 (1988);*

n194. Michael Akehurst has made a similar observation:

Hijacking is probably not covered by the definition of piracy in international law, but there is doctrinal authority for the view that it is subject to universal jurisdiction nevertheless; Japan in fact claimed universal jurisdiction even before the Hague Convention. Hijacking threatens international communications to the same extent as piracy; it is an attack on international order and injures the international community as a whole, which means that all states have a legitimate interest in repressing it. The policy reasons which justify universal jurisdiction over piracy justify it equally in the case of hijacking.

Akehurst, supra note 129, at 161-62.

n195. On the role of articulation in the development of customary international law, see D'Amato, supra note 170, at 74-87.

n196. Id .at 75.

n197. *United States v. Yunis, 681 F. Supp. 896 (D.D.C. 1988); United States v. Yunis, 924 F. 2d 1086 (D.C. Cir. 1991).*

n198. Supra note 184.

n199. Supra note 186.

n200. *Brief for the United States at 32-34, United States v. Yunis 924 F.2d 1086 (D.C. Cir. 1991)* (No. 89-3208).

n201. *United States v. Rezaq, 899 F. Supp. 697 (D.D.C. 1995); United States v. Rezaq, 134 F. 3d 1121 (D.C. Cir. 1998).*

n202. See Telephone Interview with Scott Glick, prosecuting attorney in United States v. Rezaq, U.S. Department of Justice, Terrorism Division, in Washington, DC, Sept. 15, 1999. A claim, by Rezaq, to Jordanian nationality would not have been helpful to his case. Jordan was a party to the hijacking convention pursuant to which Rezaq was prosecuted. See id.

A similar circumstance arose in the case of Public Prosecutor v. S.H.T., a case prosecuted in the Netherlands pursuant to the Convention for the Suppression of Unlawful Seizure of Aircraft, supra note 183, and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, supra note 184, in which the defendant "had been born in Jerusalem and was a resident of East Jerusalem." Public Prosecutor v. S.H.T., 74 Int'l L. Reports 162, 163 (1987).

n203. This approach to the meaning of the jurisdictional provisions of the terrorism treaties is reflected in Professor Schachter's reasoning. As he has written,

several multinational conventions dealing with crimes of international significance such as hijacking and sabotage of aircraft, hostage-taking, [and] injury to internationally protected persons ... oblige the parties to extradite or alternatively try and punish individuals accused of the crime covered by the convention. A significant feature is that the treaty obligation applies to all offenders apprehended by the state in question, whether the crime was committed in or outside of the state and whether or not it involved injury to nationals. An inference has been drawn from the fact that these conventions have been adopted and ratified by a large number of states that "universal jurisdiction' applies to the crimes in question... . The reasoning here is that if a large number of states have agreed to the obligation to try and punish such offenses, the states must, as a matter of logic, have the right to exercise such jurisdiction under general (i.e., customary) international law. It follows that the right under customary law extends to all states, parties and non-parties... .

To reach the conclusion that customary law allows for universal jurisdiction in regard to the crimes covered by the treaties, one has to rely on three conditions:

1) The adoption of the conventions by overwhelmingly large majorities of states;

2) The implication drawn from these conventions that international law permits states 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 State practice that conforms to the implicit customary law principle stated in (2) above.

Schachter, supra note 170, at 725-26.

n204. Associated Press, Clinton's Words: "The Right Action", N.Y. Times, Jan. 1, 2001, at A6 (reprinting the text of President Clinton's statement authorizing U.S. signature of the ICC Treaty).

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A Response to the American View as Presented by Ruth Wedgwood

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Abstract

In her article in this issue Ruth Wedgwood identifies several features of the Statute of the International Criminal Court that raise American concerns. Although these concerns may have political bearing, the Statute provisions are widely within the scope of existing international law. Explicitly allowing amnesties as a ground for denying surrender of a person to the Court would run counter to the need to avoid impunity for the crimes in question, given their nature, the international concern they merit and their existing legal status. The Statute includes clauses that allow the Court to discontinue prosecution in the general interest of justice. Amnesties may be a relevant factor in such a decision. The Security Council has a significant right to refer cases to the Court, as well as the power to suspend a prosecution. The Statute allows for indefinite renewal of the suspension period. The ICC does not exercise universal jurisdiction. Its jurisdiction is based squarely on traditional modes of jurisdiction exercised by states. There is no principle in international law that prohibits states from conferring their sovereign jurisdiction to an international entity. Problems of pacta tertiis *do not arise, since the Statute does not impose legal obligations on non-state parties. The language in the Statute regarding direct and indirect transfer is a valid interpretation of the Geneva Conventions. Additionally, the Statute must be interpreted according to governing provisions of international law, including the Geneva Conventions themselves. There are several provisions in the Statute which deal with non-compliance with requests of the ICC for cooperation. Further provisions will be elaborated by the Assembly of States Parties.*

When the final plenary meeting of the Rome Conference on the Establishment of an International Criminal Court began, rumours spread that a vote would be requested

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on the text of the Statute which had already been adopted in the Committee of the Whole. Indeed, the United States delegation asked for a non-recorded vote, which resulted in a vote of 120 in favour, seven against (including the United States and Israel) and 21 abstentions. The vote of the United States delegation did not come as a surprise. Until the very last moment, the delegation had attempted to prevent agreement on certain issues which it considered to be major flaws of the Statute, and which it argued would present obstacles for US consent. In her contribution to this debate, Ruth Wedgwood[1] quite correctly elaborates on these issues and the problems they present for the United States. An evaluation of Wedgwood's arguments in order to assess their actual weight would seem to be a worthwhile next step in the debate. In particular, the arguments connected with the omission of amnesties, the role of the Security Council, jurisdiction, transfer of population and enforcement deserve closer scrutiny and will be dealt with in this paper.

1 Amnesties

In the first part of her article, Wedgwood points to the political difficulties that might arise from the exclusion of amnesties as a ground for denying the surrender of a suspect to the ICC. In fact, various discussions were held on the question of amnesties, and arguments both in favour and against their inclusion were put forward. The status of reconciliation commissions and the need to ensure a smooth transition from a criminal to a democratic regime were particularly emphasized. This juxtaposition of the duty to prosecute and to reach a situation of justice and peace[2] is corroborated and confirmed by a letter dated 21 January 1999 from Samdech Hun Sen, Prime Minister of the Royal Government of Cambodia, and an *aide-mémoire* of the same date relating to the development of a formula to bring top Khmer Rouge leaders to trial. This instrument stresses, on the one hand, the importance of punishing people responsible for the crimes, in particular genocide, committed between 1970 and 1998. On the other hand, it underscores the need not to jeopardize the ongoing national reconciliation process since 'national reconciliation and peace are indispensable requirements of the Cambodian nation and people, and the trials of offenders to find justice for Cambodia are the goal and obligation to be fulfilled'. These people 'need both peace and justice'.

This juxtaposition seems to require a solution which balances the duty of prosecution with the fact that peace is not always achievable by such means.

This need to give priority to considerations of peace over those of justice in exceptional circumstances brings us face to face, in the domestic system of some states such as Austria, with the principle of legality. According to this principle, the relevant organs are obliged to take all necessary measures of prosecution, irrespective of the political implications of the situation. But even in those countries which hold to this principle there may exist cases where political considerations could take precedence.

[1] 'The International Criminal Court: An American View', this issue, at 93.

[2] Cf. d'Amato, 'Peace vs. Accountability in Bosnia', 88 *AJIL* (1994) 500.

Political considerations may motivate certain cases of extradition, for instance, according to relevant law (unless there is an international legal obligation).[3]

Existing treaty practice also demonstrates respect for amnesties as a defence against extradition. For example, under the UN Model Treaty on Extradition,[4] a mandatory ground for refusal exists 'if the person whose extradition is requested has, under the law of either Party, become immune from prosecution or punishment for any reason, including lapse of time or amnesty'.[5] Even the most progressive treaty on extradition, that of the European Union of 1996, again contains such an exception.[6] The arguments put forward against this practice and considerations dictated by political necessities included the need to avoid impunity, the existing legal situation of the crimes within the jurisdiction of the ICC, the particular nature of such crimes, and the fact that the Statute itself provides certain escape clauses.

However, impunity has become a major issue of the United Nations,[7] as is revealed by documents such as the Annual Report of the Secretary-General. In his 1998 Report, the Secretary-General stated that the Statute of the ICC aims at putting 'an end to the global culture of impunity — the culture in which it has been easier to bring someone to justice for killing one person than for killing 100,000'.[8] Other instances where measures to combat impunity have been elaborated include the Report of the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions[9] and, within the framework of the protection of human rights, the reports submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities. This Sub-Commission produced a final report on the question of impunity of perpetrators of human rights violations (economic, social and cultural rights),[10] as well as an addition under the heading of 'The administration of justice and the human rights of detainees'[11] which dealt extensively with this problem. The problem of impunity is also commonly included in reports on the progress of conciliation measures in politically unstable areas of the world. Finally, the Statute of the ICC itself commits the ICC to combat impunity, as is expressed in para. 5 of its

[3] The Austrian Act on Extradition and Judicial Assistance in Criminal Matters (Official Journal — BGBl. — No. 529/1979) provides in sect. 34 para. 1 that the Federal Minister of Justice decides on extraditions, also taking into account the interests of the Republic of Austria.

[4] A/RES/45/116 of 14 December 1990.

[5] Article 3(e).

[6] Article 9 (Amnesty) reads: 'Extradition shall not be granted in respect of an offence covered by amnesty in the requested Member State where that State was competent to prosecute the offence under its own criminal law.' It is interesting enough that 'this Article is new in relation to the European Convention on Extradition and the Benelux Treaty but retains the rule already set out in Article 4 of the second additional Protocol to the European Convention. It is in line with Article 62(2) of the Convention on the application of the Schengen Agreement.'

[7] Cf. the international documents on the issue of impunity in: <http://www.derechos.org/nizkor/impu/engl.html>.

[8] UN Doc. A/53/1, Annual Report of the Secretary-General on the Work of the Organization 1998, of 27 August 1998, para. 180.

[9] UN Doc. A/51/457 of 7 October 1996, Annex, paras 118 *et seq.*

[10] UN Doc. E/CN.4/Sub.2/1997/8 of 27 June 1997.

[11] UN Doc. E/CN.4/Sub.2/1997/20/Rev.1 of 2 October 1997.

Preamble.[12] It would therefore have run counter to the basic objectives of the United Nations if respect for amnesties granted by individual states had become an obligation of the ICC.

The existing legal situation relating to crimes within the jurisdiction of the ICC likewise denies the possibility of respect for amnesties, as is documented by an in-depth analysis undertaken by Amnesty International.[13] As far as genocide is concerned, the Convention on the Prevention and Punishment of the Crime of Genocide of 1948[14] unequivocally imposes upon states parties the duty of punishing the crime of genocide.[15] Similarly, the Geneva Conventions do not contain any exception to the duty of punishment for grave breaches of the Conventions; this is imposed on all states parties irrespective of where and by whom such breach was committed.[16] Granting immunity from prosecution and punishment because of an amnesty would therefore run the risk of violating duties under humanitarian law.[17]

Nevertheless, it must also be noted that Article 6(5) of the (Second) Additional Protocol relating to the protection of victims of non-international armed conflicts[18] requests authorities in power 'to endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained'. This provision, however, relates to the particular nature of armed conflicts within a state, as the national criminal law would apply to all such combat activities. It aims to assimilate combatants in such conflicts with those of international conflicts, who are usually not prosecuted for normal combating activities (unless they violate humanitarian law). Hence, the intention of this provision is not to grant immunity from prosecution for breaches of humanitarian law, but only for that which results from activities in normal combat. Roht Arriaza develops this interpretation from the context of this provision;[19] and it is backed up by an authoritative interpretation undertaken by the International Committee of the Red Cross delivered to the ICTY and ICTR in 1995 and 1997.[20] It seems, therefore, rather difficult to use Article 6(5) of the Second Additional Protocol as a vehicle to require ICC respect of amnesties.

As far as crimes against humanity are concerned, once again the legal situation reflected, for instance, in the UN Convention against Torture and Other Cruel,

[12] 'Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes ...'.

[13] Amnesty International, *The International Criminal Court. Making the Right Choices — Part III. Ensuring Effective State Cooperation* (1997), at 47.

[14] 78 UNTS 277.

[15] Article I.

[16] Cf. e.g. Article 49 of the First, Article 50 of the Second, Article 129 of the Third and Article 146 of the Fourth Geneva Convention. See Amnesty International, *supra* note 13, at 48, note 183.

[17] Amnesty International, *supra* note 13, at 49.

[18] 16 *ILM* (1979), at 1391.

[19] Roht-Arriaza, 'Combating Impunity: Some Thoughts on the Way Forward', 59 *Law and Contemporary Problems* (1996), at 87, quoted in Amnesty International, *supra* note 13, at 47, note 176.

[20] Amnesty International, *supra* note 13, at 49, note 186, the letter from the Head of the Legal Division of the ICRC to Douglas Cassel was reproduced in Cassel, 'Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities', 59 *Law and Contemporary Problems* (1996) 212.

Inhuman or Degrading Treatment or Punishment[21] and the general policy expressed in various documents relating to the problems of impunity in the human rights context[22] provide ample proof that respect for amnesties would run counter to established practice.[23]

A further argument can be derived from the legal nature of the crimes within the jurisdiction of the ICC. As has been recognized from the outset, these crimes are considered to be of 'international concern'. The Statute reflects this nature in its Preamble by referring to the 'most serious crimes of concern to the international community as a whole' as well as in Article 1 which limits the jurisdiction of the ICC to 'the most serious crimes of international concern'. According to the rule *ut res magis valeat quam pereat* this particular qualifier of the crimes coming under the jurisdiction of the ICC must be interpreted as having a meaning which produces a particular legal effect. The wording suggests that it is intended to imply that all states have an interest in combating these crimes and that all states' interests and rights are therefore affected. This notion also transpires in the characterization of such criminals as *hostes iuris gentium* and enemies of humankind. In this regard, the duty to exercise jurisdiction over those crimes can be considered an *erga omnes* duty, the violation of which makes all states injured states under the meaning of Article 40 of the International Law Commission's draft articles on State Responsibility. According to this draft provision, injured state means, *inter alia*, 'if the right infringed by the act of a State arises from a multilateral treaty, any other State Party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto'.[24]

This particular structure can also be applied to crimes of such a nature insofar as the ICC could be regarded as protecting the interests of all states parties. Only the ICC itself, and not individual states therefore, will be able to decide on whether certain crimes can be prosecuted. The ICC could be regarded as defending the interests of the community of states parties. Unlike the horizontal relations in extradition and judicial assistance, the relation between the ICC and states parties is a vertical one.

Finally, there is no need for such a clause concerning amnesties, as the Statute itself provides sufficient safeguards against excessive prosecutorial latitude. In this regard, not only does the basic principle of complementarity ensure such restraint, but so too do clauses like Article 53 (Initiation of an investigation). Under this Article, the Prosecutor, in deciding whether to initiate an investigation, shall consider whether, taking into account the gravity of the crime and the interests of the victims, there are nevertheless substantial reasons to believe that an investigation would not serve the interests of justice. Hence, individual interests measured by the gravity of the crime and the interests of victims must be weighed against a more general interest of justice. This juxtaposition of the various interests involved recalls the request by the

[21] A/RES/39/46.

[22] See *supra*, notes 9, 10 and 11.

[23] See Amnesty International, *supra* note 13, at 50.

[24] Article 40, para. 2 lit. f; cf. *Yearbook of the International Law Commission* (1985, II), at 25.

Cambodian authorities, referred to earlier, which calls attention to the need to balance these interests. It can therefore be expected that this balance of interests, which is subject to examination by the Pre-Trial Chamber either at the request of the Security Council, an individual state which referred the matter to the ICC, or by the Prosecutor *proprio motu*,[25] will be used to decide whether the interests in ensuring conciliation and a smooth transition of power by not instituting proceedings will override those of seeking justice without regard to (shortsighted) political necessities. Nevertheless, the interests of the community of states are protected in that decisions to forego prosecution are no longer left to individual states, but rather rest with the ICC as an institution representing common interests.

2 The Role of the Security Council

Ruth Wedgwood finds the role of the Security Council under the Statute to be unnecessarily diminished because of delegations' 'reluctance to permit any significant role for the Security Council'. Under the Statute, the Security Council not only has the right to refer cases to the Court,[26] but also has the power to suspend an investigation or prosecution before the Court.[27] Therefore, the Security Council's role is crucial, even if it does not have full control over case referrals to the Court. Such control would result in the Security Council exercising a *dominating* function rather than merely a *significant* one.

Wedgwood points out that the Council has the ability to suspend the ICC's activity for a period of 12 months with the possibility of one renewal. She argues that this is not sufficient because delicate situations will often continue for many years. However, the language of the Statute provides for the possibility of more than one renewal of the Council's request not to investigate or prosecute. Article 16 specifies that a 'request may be renewed by the Council under the same conditions' without restricting the number of times the Council can make such a renewal request.[28]

Based on her reading of the renewal provision, Wedgwood asserts that the Rome Statute attempts to limit the power of the Security Council in a way that hints of a 'palace revolution' and urges that the Court should not strip the Council of its primary role in peace enforcement and peacekeeping. She argues that the Statute is not the place for Security Council reform and wonders whether the five-week conference rushed to a conclusion that is detrimental to the role of the Security Council. She substantiates her remarks by again referring to the renewal provision and writes, '[t]he Rome [S]tatute attempts to limit the power of the Security Council — forbidding the Council from suspending the investigation of a matter for more than 24 months even in a situation where the Council holds that immediate criminal prosecutions

[25] See Rome Statute of the International Criminal Court, opened for signature 17 July 1998, Article 53(2), UN Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute].

[26] See *ibid*, Article 13(b).

[27] See *ibid*, Article 16.

[28] See *ibid*.

would complicate its efforts for, say, a ceasefire'. As already indicated, however, Article 16 allows for repeated renewal, thus failing to limit the Security Council's powers in the way Wedgwood describes. This compromise was elaborated not only during the five-week Rome Conference, but over the course of six Preparatory Committee sessions extending over three years.

On the issue of the Security Council's right to veto an investigation, the positions of the delegations participating in the negotiations were very diverse.[29] States supported either (1) affirmative action before the court could act;[30] (2) affirmative action to require the Court not to act (Singapore proposal);[31] or (3) no provision at all. With regard to the first option, only Malawi expressly supported the option which prohibits the Court from commencing a prosecution arising from a situation with which the Security Council is dealing, unless the Council otherwise decides.[32] This option would give each permanent member of the Council an effective veto over the Court's investigations. Regarding the second option, 32 states expressed support for such a provision. Of those states, 12 supported the Council's right to renew its veto and four opposed such renewal. For option three, 11 states preferred that the Security Council have no veto power.[33] The United States seemed to support the veto provision, but insisted that the Security Council should not be limited to situations arising under Chapter VII. New Zealand expressed concern at the implied politicization of the Security Council in one of a number of interventions.[34] New Zealand reiterated that the Council has to be open and transparent in its links with the Court. During New Zealand's term as a Council member it had witnessed first-hand how political the Council can be. New Zealand referred to the secret informal consultations where the permanent members of the Security Council have the upper hand in the agenda-setting opposed to the smaller states who rotate every two years.[35] The Czech Republic had already stated in its opening remarks that it could not support the idea that the Security Council should have the power to preclude proceedings before the Court if a situation is being dealt with by the Security Council under Chapter VII. The Czech Republic argued that 'it must be kept in mind that Chapter VII situations are precisely those in which crimes within the Court's jurisdiction are most likely to be committed'.[36] Indonesia reminded the delegates that the Non-Aligned Countries met in Cartagena where they reiterated their declaration on the need to ensure that the

[29] The language of the legislative history is taken from the article Rübesame, 'The Role of the Security Council in the ICC', *N.Y.U.J. Int'l. L. & Pol.* (forthcoming).

[30] See Article 10(7) Option 1, UN Doc. A/CONF.183/2/Add.1 (1998) [hereinafter Draft Statute].

[31] See *ibid.* Article 10(7) Option 2 and Article 10(2) further option.

[32] Information taken from the NGO team reports. Trigger Mechanisms and Admissibility Team, Report 5, (30 June 1998). The publication of the team reports by the NGO Coalition for an International Criminal Court is forthcoming.

[33] Egypt, Iraq, Libya, Nigeria, Oman, Pakistan, Senegal, Sudan, Syria, Tunisia and Venezuela. See *ibid.*

[34] 'New Zealand Protests at Security Council 'Secrecy', On the Record insert in *Terra Viva* (IPS/No Peace Without Justice), 23 June 1998, at 2.

[35] See *ibid.*

[36] Czech Republic, Opening Statement at the Rome Conference for the Establishment of an International Criminal Court (16 June 1998).

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Court should be impartial and independent, especially from political influence of any kind, including that of the United Nations organs, in particular the Security Council, which should not direct or hinder the functioning of the Court nor assume a parallel or superior role to the Court.[37] The Italian Minister for Foreign Affairs called for solutions that balance relations between the Security Council and the Court, ensuring that it can perform its judicial functions in total independence and without hindrance.[38]

The final provisions in the Statute, which relate to the position of the Security Council, in particular Articles 13 and 16, reflect a compromise between the positions discussed above, without, however, restricting the power that this main organ of the United Nations enjoys under the Charter.[39]

3 Jurisdiction

Past attempts to deal with international atrocities have been *ad hoc* in nature. The International Military Tribunals for Nuremberg and the Far East, and the recent International Criminal Tribunals for the Former Yugoslavia and Rwanda have temporal and territorial restrictions on jurisdiction. The ICC will not face these limits. The ICC will be a permanent institution, with automatic jurisdiction over the core crimes of genocide, crimes against humanity, war crimes and aggression (once it is defined).[40] Once a state ratifies the ICC treaty[41] or consents to jurisdiction on an ad hoc basis,[42] it automatically recognizes the Court's jurisdiction over all core crimes committed by its nationals or on its territory.[43]

The principle of complementarity establishes the boundaries of the Court's jurisdiction. Unlike the ad hoc tribunals which take primacy over national courts, the ICC proceeds on the opposite assumption. Complementarity, as established in the Statute's Preamble and in Articles 1 and 17 to 20, assumes that national courts will take jurisdiction.[44] The ICC can only exercise its jurisdiction if states are unable or unwilling to prosecute relevant cases.[45] Complementarity illuminates two of the most salient features of the ICC. First, by creating more effective mechanisms at the international and national levels for prosecuting international crimes, the ICC is

[37] Indonesian Minister for Justice, Mr Muladi, Opening Statement before the Plenipotentiaries Conference of the Establishment of the International Criminal Court (16 June 1998).

[38] Minister of Foreign Affairs of Italy, Mr Dini, Opening Statement before the Plenipotentiaries Conference of the Establishment of the International Criminal Court (17 June 1998).

[39] The question of whether the Security Council could adopt a resolution under Chapter VII of the UN Charter interfering with the activities of the ICC will need to be discussed. In this regard, problems could arise such as how the ICC as a subject of international law separate from that of the State Parties could become bound by such resolutions of the Security Council. This matter could be addressed by the relationship agreement still to be worked out.

[40] See Rome Statute, *supra* note 24, Article 5.

[41] See *ibid*, Article 12(1).

[42] See *ibid*, Article 12(3).

[43] With the exception of an optional seven-year opt-out provision for war crimes: see *ibid*, Article 124.

[44] See *ibid*, Articles 1, 17 to 19.

[45] See *ibid*, Article 17(2) and (3).

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meant to serve as a deterrent — not just a response — to the perpetrators of serious international crimes. Second, the complementarity regime is premised on the belief that national courts should be the first to act. If the ICC does its job, it will never — or at least rarely — need to take jurisdiction over a case.

Despite the safeguards afforded by complementarity, the United States has been critical of the Court's jurisdictional regime. Under certain circumstances, the Rome Statute permits the Court to exercise jurisdiction over the nationals of states which have not consented to the Court's jurisdiction. This may occur if nationals of a non-state party are accused of committing a core crime on the territory of a state which is party to the Statute, or a state that consents to the Court's jurisdiction on an ad hoc basis. Detractors claim that this potential jurisdiction over the nationals of non-state parties is a contravention of international law and threatens the legitimacy of the ICC. They argue that the consent of the state of nationality of the accused is mandatory if an international criminal court is to exercise jurisdiction. Furthermore, they accuse the Court of asserting universal jurisdiction, undermining accepted principles of state sovereignty.

Despite the Court's potential jurisdiction over nationals of non-state parties, it is important to clarify at the outset that it does not wield universal jurisdiction. At the March–April 1998 session of the Preparatory Committee, Germany introduced a proposal that would have granted the Court universal jurisdiction over all core crimes.[46] This would have allowed the Court to prosecute a crime without securing the consent of any state. While many delegations and NGOs at the Rome Conference found this idea attractive, it was quickly conceded that universal jurisdiction would stretch existing interpretations of international law too far and would be politically unacceptable to key states. A number of alternative proposals were put forward which would have required the consent of any one of several states with sufficient jurisdictional ties to the crime. The most popular solution was proposed by the delegation of South Korea.[47] This proposal would have required the consent of any one of the following states: the state of nationality of the accused; the state on whose territory the crime was committed; the state of nationality of the victim; or the state with custody over the accused.

The United States, however, sought to require the consent of the state of nationality of the accused in every circumstance. Although this position found little support among other delegations, the jurisdictional provisions in the final version of the Statute were tailored to accommodate American concerns. Article 12(2) requires the consent of the state of nationality of the accused *or* of the state on whose territory the crime in question was committed.[48] Rather than making jurisdiction exclusively contingent on the consent of the state of nationality (as the American proposal envisioned), this compromise provision recognizes the consent of the territorial state as a sufficient basis for jurisdiction.

[46] See UN Doc. A/AC.249/1998/DP.2.

[47] See Article 8, UN Doc. A/CONF.183/C.1/L.6.

[48] See Rome Statue, *supra* note 25, Article 12(2).

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The jurisdictional regime in the Rome Statute bears no relation to universal jurisdiction (except for cases resulting from situations referred by the Security Council). Rather, Article 12 is rooted in classical bases of jurisdiction that are undisputed in international law. A state may prosecute its own nationals for crimes committed anywhere in the world.[49] Similarly, a state may claim jurisdiction over persons committing crimes on its territory, without regard to the nationality of the person.[50] It is universally recognized that when a state exercises its criminal jurisdiction over persons committing acts on its territory, the state of nationality need not give its consent. Nationality and territoriality are each an independent and sufficient basis for jurisdiction.

By ratifying the ICC treaty, states parties allow the Court to exercise jurisdiction in a given case if they are unable or unwilling to prosecute. The Court may only assert jurisdiction if the traditional bases for the exercise of jurisdiction (nationality or territoriality) apply. It is within the sovereign power of a state to allow an international body to exercise jurisdiction in the same way in which that state may exercise jurisdiction. There is no rule in international law prohibiting a state from conferring its adjudicatory authority on an international court.[51]

Since the Statute's jurisdictional authority derives exclusively from the undisputed jurisdictional authority of the states that are party to the Statute or that have consented to the Court's jurisdiction on an *ad hoc* basis, Article 12 does not raise problems under international law.

Nevertheless, the United States maintains that the Rome Statute violates the principle of *pacta tertiis nec nocent nec prosunt*, by which a treaty may not create obligations (or rights) for a state not party to the treaty without that state's consent. This rule of customary international law is codified in Article 34 of the Vienna Convention on the Law of Treaties (to which the United States is not a party).[52] It is undisputed that the Rome Statute does not create direct legal obligations for non-state parties. However, the ICC treaty may have an effect on the practice of non-state parties. If a national of a non-state party is accused of committing a crime on the territory of a state party, the Court may exercise jurisdiction if it determines that neither state is able or willing to prosecute (nor any other state that has jurisdiction). Since the Court makes such a determination *inter alia* on the basis of the non-state party's attempts (or lack thereof) to prosecute the accused, the non-state party is forced to meet the Statute's threshold for ability and willingness if it wishes to prevent the Court from asserting jurisdiction over its national. Hence, in order for a non-state party to protect its nationals from prosecution by the Court, it must, according to the Statute's complementarity provisions, prosecute its nationals itself.

Although this may appear to be an obligation imposed on non-state parties, which

[49] See P. Malanczuk, *Akehurst's Modern Introduction to International Law* (1997) 111.

[50] See *ibid*, at 110.

[51] The European Court of Human Rights, for instance, derives its exercise of jurisdiction directly from the adjudicatory authority of the states parties to the European Convention on Human Rights.

[52] Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, Article 34, 1155 UNTS, 331 (entered into force 27 January 1980), reprinted in 8 *ILM* (1969) 679.

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would be prohibited under international law by the principle of *pacta tertiis*, it is only a practical consequence of the ICC treaty regime, not a legal one. The non-state party is under no legal obligation to abide by the Statute's provisions on complementarity. It need only alter its practice if it chooses to prevent the Court's assertion of jurisdiction over a national accused of committing a core crime on the territory of a state party. The fact that most states would indeed choose to do this says less about *pacta tertiis* than about political realities.

The complementarity provision of the ICC treaty actually provides a safeguard to non-state parties that is not afforded by domestic judicial systems. Whereas a state on whose territory a crime has been committed may assert jurisdiction regardless of whether the state of nationality is willing and able to prosecute, the Court defers to the state of nationality's jurisdiction if this state genuinely prosecutes the case.[53]

Note that a jurisdictional regime requiring only the consent of the state of nationality of the accused does not solve the supposed *pacta tertiis* problem. Under such a proposal, any other state with jurisdiction over the crime (such as the territorial State) must abide by the Statute's provisions on complementarity in order to prevent the case from being tried by the Court, whether or not that state is party to the Statute. If, for instance, the national of a state party commits a crime on the territory of a non-state party, a jurisdictional provision requiring only the consent of the state of nationality would compel the non-state party on whose territory the crime was committed to demonstrate willingness and ability to prosecute if it wishes to prevent the Court from asserting jurisdiction. The *pacta tertiis* accusations levelled by the United States at the Rome Statute would thus apply equally to a jurisdictional regime requiring only the consent of the state of nationality of the accused.

While the concerns of the United States address the general preconditions to the exercise of the Court's jurisdiction of Article 12(1) and (2), they are particularly acute with regard to the ad hoc consent provision of Article 12(3), the amendment provision of Article 121(5), and the opt-out provision for war crimes of Article 124. Under Article 12(3), a non-state party on whose territory a crime has been committed may consent to the jurisdiction of the Court over nationals of non-state parties accused of committing these crimes. It may do so arguably without subjecting its own nationals to the Court's jurisdiction. This creates an uncomfortable asymmetry. Article 121(5) allows states parties to shield their own nationals from jurisdiction over new crimes added to the Statute under the amendment procedures. Non-state parties may not similarly shield their nationals. Article 124 allows states parties to opt out of jurisdiction over war crimes for the first seven years after the Statute's entry into force. Non-state parties may not similarly opt out. Collectively, these provisions accord more rights to states parties than to non-state parties.

Although this paradoxical arrangement rightly causes political concerns, its legal

[53] As a practical matter, Article 18, Rome Statute, *supra* note 24 allows any state (whether party to the Statute or not) to request a deferral of the Prosecutor's investigation in order for the state to investigate the situation itself. As such, this article provides a mechanism by which non-state parties can postpone the Court's exercise of jurisdiction.

basis is sound. By becoming a party to the treaty, states acquire rights under Articles 121(5) and 124 that they would not have if they remained outside the treaty. This is fully consistent with the Vienna Convention on the Law of Treaties and the customary law it codifies. Furthermore, the conferral of jurisdiction under Article 12(3) poses no more legal problems than the automatic conferral of jurisdiction under Article 12(1).

A further consideration is that the provisions on complementarity require the Court to meet certain thresholds before taking a case. Delegates insisted that the provisions be elaborated as clearly as possible in order to preclude the Court's arbitrary exercise of jurisdiction. Whereas the complementarity provisions specify that the Court will only take jurisdiction in exceptional circumstances, the American argument rests on the assumption that states will readily confer jurisdiction on the Court.

The compromise proposal suggested by one member of the United States delegation, which is mentioned by Wedgwood and which tried to solve the issue of restriction of jurisdiction through the acknowledgement of the acts in question as acts of the state, also raised a large number of problems. An in-depth discussion of these problems was precluded by the late stage of the Conference at which the proposal was introduced.

On the one hand, this concept would have moved the problem from the level of individual responsibility to that of exclusive state responsibility. Thus, this would have involved a total change of the parameters of responsibility, as it cannot be excluded that even different definitions of crimes were to be applied, depending on the kind of responsibility. As long as there is no compulsory jurisdiction relating to states, a state could very easily acknowledge an act as its own without running a great risk of being brought before an international court. The prosecution would then totally depend on the interstate relations existing between the states concerned.

On the other hand, it must not be forgotten that as regards such crimes the states would in any case have the right, if not even the duty,[54] to apply their criminal jurisdiction to the individuals, irrespective of their nationality. Consequently, the only issues where a universal jurisdiction could be doubted are some crimes relating to non-international conflicts and perhaps crimes against humanity. But even there, the threshold for the exercise of jurisdiction by the ICC is so high[55] that for the crimes remaining within the reach of the ICC an optional universal jurisdiction could easily be argued. And the conditions regarding the exercise of jurisdiction sufficiently ensure that there exists a certain link between the crime and the state exercising jurisdiction by surrendering the suspect to the ICC.

It is therefore doubtful whether an interpretative statement reflecting the original proposal would be compatible with Article 120 of the Statute which excludes any reservation. Although this provision does not exclude unilateral declarations, such a declaration would certainly amount to a reservation and would therefore be

[54] The duty to prosecute can be inferred for instance from the Geneva Convention on war crimes.

[55] See, in particular, Article 8(3) for crimes in non-international conflicts and Article 7(2) for the crimes against humanity.

inadmissible.[56] An authoritative interpretation shared by all states parties would, however, be very difficult to achieve, since the first states to ratify the Statute will undoubtedly be those which favour a broad individual responsibility. By contrast, an interpretative declaration does not seem beyond reach, which aims at establishing a symmetric liability as far as Article 12(3) is concerned.

4 Transfer of Population

In its explanation of vote following the adoption of the Rome Statute, the Israeli delegation commented upon the paradoxical situation whereby, despite the bitter history of the Jewish people, this delegation was obliged to cast a negative vote due to the problematic formulation of the war crime of 'transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory'.[57] According to Ruth Wedgwood, this formulation departs from the Geneva Convention and will thus pose an obstacle to the Statute's ratification by both the United States and Israel.

Although the wording actually differs from that of Article 49 of the Fourth Geneva Convention[58] and, consequently, also from that of Article 85(4)(a) of the First Additional Protocol,[59] the addition 'directly or indirectly'[60] is not discarded *prima facie*

[56] Cf. Gerhard Hafner, Article 120, in O. Triffterer, *The Rome Statute, A Commentary Article by Article* (forthcoming).

[57] See Article 8(2)(b)(viii). According to this delegation, this crime was inserted as a means of utilizing and abusing the Statute of the International Criminal Court and the International Criminal Court itself as one more political tool in the Middle East conflict; see: <http://www.un.org/icc/>.

[58] Article 49: 'The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.'

[59] Article 85(4)(a): 'the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention'.

[60] This addition was inserted into the text only at the Rome conference. The Zutphen text (A/AC.249/1998/L.13) still contained various alternatives:

> Option 1
> the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies;
> [*24] Option 2
> the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
> Option 3
> (i) the establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory;
> (ii) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
> Option 4

from a possible interpretation of the former legal instruments.[61] The introductory phrase of Article 8(2)(b) limits the Court's jurisdiction with regard to other serious violations of the laws and customs applicable in international armed conflict to those within the established framework of international law. Hence, a clear limitation to excessive interpretation of this crime is introduced. Furthermore, even the addition to the crime of transfer of population cannot result in this crime being associated with a meaning that goes beyond existing international law for the purpose of defining the jurisdiction of the ICC. It is not yet clear how the elements of crimes will lend a more precise definition to this crime; the proposal presented by the United States in the Preparatory Commission, however, restricted the definition of this crime by adding the conditions that 'the accused intended that such transfer would endanger the separate identity of the local population in such occupied territory' and 'that the transfer worsened the economic situation of the local population and endangered their separate identity'.[62] These conditions would certainly allay fears about an extensive interpretation.

5 Enforcement

In her article, Wedgwood expresses her surprise 'that there was not more discussion at Rome of how the ICC could hope to enforce its orders'. It is true that only limited discussions took place in Rome and that these discussions were mostly concentrated on the role of the Assembly of States Parties in this regard. However, this issue had been dealt with even prior to the Rome Conference, although the relevant discussion to a large extent was lost in the darkness of the undocumented history of the Ad Hoc Committee and the Preparatory Committee.[63] Already in the sessions of these Committees, delegations drew attention to the problem of state responsibility and its relation to individual responsibility. At the Rome Conference itself, proposals were submitted which would have accorded a greater role to the Assembly of States Parties in dealing with the issue of non-compliance with the requests by the ICC. It became

---

No paragraph (f).

The argument of Israel was not directed against the additional element in the formulation, but rather against the inclusion of this crime into the catalogue of war crimes because it was not included amongst the grave breaches of the Fourth Geneva Convention; see: Zimmermann, 'Die Schaffung eines ständigen Internationalen Strafgerichtshofes. Perspektiven und Probleme vor der Staatenkonferenz in Rom', 58 *ZaöRVR* (1998) 68.

[61] Cf. Zimmermann, *supra* note 60, at 68.

[62] UN Doc. PCNICC/1999/DP.4/Add.2, at 11.

[63] In the Preparatory Committee the 'view was expressed that consideration should be given to situations in which a State refused to assist in an investigation in an attempt to shield an individual from criminal responsibility or was unable to provide such assistance owing to the lack of an effective, functioning judicial or legal system. It was suggested that it might be possible to envisage a role for the Security Council in certain situations. It was also suggested that the Statute should envisage a special chamber that would consider refusals or failures to comply with requests for assistance and render appropriate decisions.' Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, (Proceedings of the Preparatory Committee During March–April and August 1996), (GA, 51st Sess., Supp. No. 22, A/51/22, 1996), para. 345.

quite clear from the outset that a primary role for the Security Council, similar to that which it enjoys in relation to the ICTY and ICTR, was beyond reach due to a widespread resistance to confer broader powers on this organ.

As it stands now, the Statute deals with this issue in Article 87(5) with regard to states not party to the Statute that have entered into an ad hoc arrangement or an agreement with the Court, and in Article 87(7) with regard to states parties. Two further provisions may become relevant in this context: Article 112 on the power of the Assembly of States Parties to consider any question relating to non-cooperation and Article 119 dealing with the settlement of disputes between the states parties and the Court. According to these provisions, the first instance to deal with a question of non-cooperation is the Court itself which may make a first finding. After the Court, it is up to the Security Council to tackle this issue in cases referred by it to the Court or the Assembly of States Parties in all other cases. Although certain discussions were held as to the measures that the Assembly should have the power to take in cases of non-cooperation, there was, however, no sufficient time left to ponder this question in more detail; thus, the kind and amount of measures were left open. It will therefore be up to the Assembly to decide on the possible reactions to a case of non-compliance. Thus, neither the scope nor the limits to such measures can be envisioned as yet.

As to the settlement of disputes, two basic considerations prevailed and were reflected in Article 119 accordingly: on the one hand, it was considered necessary to involve the Assembly of States Parties in the dispute settlement and, on the other, it was not considered possible to provide a compulsory jurisdiction of the ICJ.

However, it must also be borne in mind that the question of non-cooperation, if it should amount to a dispute in the sense of Article 119, requires that a legal obligation of cooperation exist. However, Article 87 is not very clear in this regard: Article 86 states the legal obligation of all states parties to 'cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court' but only 'in accordance with the provisions of this Statute'. Article 87 only confirms the authority of the Court to make requests to states parties for cooperation. Although this request could be considered as binding in light of the general obligation of Article 86, Article 93, however, entitles states to invoke existing fundamental legal principles of general application within their national laws as grounds for denial of execution of particular measures of assistance.[64] In such cases, consultations shall take place; if no solution can be achieved, the Court has to make concessions to the national laws

[64] These particular measures of assistance comprise, according to Article 93(1):
(a) The identification and whereabouts of persons or the location of items;
(b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;
(c) The questioning of any person being investigated or prosecuted;
(d) The service of documents, including judicial documents;
(e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;
(f) The temporary transfer of persons as provided in paragraph 7;
(g) The examination of places or sites, including the exhumation and examination of grave sites;
(h) The execution of searches and seizures;
(i) The provision of records and documents, including official records and documents;

insofar as it has to modify the initial request. Hence, it seems that a clear-cut obligation exists only insofar as the non-compliance would amount to preventing the Court from exercising its functions and powers under the Statute.

That this duty of cooperation constitutes the sensitive angle which only makes the Court function is proven by the existing practice with regard to the Ad Hoc Tribunals. In particular, the *Blaskić* case already offered ample opportunity to consider this duty of cooperation, and the ICTY had to recognize that legislative practice of states did not always fully respect the clear wording of Security Council Resolution S/RES/827 (1991).[65] The sometimes vague formulation of the Rome Statute merely reflects the experience gained by these Tribunals.

6 Conclusions

In light of these arguments, the position of the United States, as reflected in Ruth Wedgwood's article, loses its legal support insofar as the Rome Statute only marginally exceeds the limits drawn by existing international law. Although it attempts to exempt the prosecution of such crimes from the exclusive influence of states, it can hardly be construed as establishing a supranational institution which will interfere with core issues of state sovereignty. In this sense it is by no means as powerful as the European Court or the Commission of the European Communities. As far as the ICC does break new ground in international law, whether such a development is the only means for effectively combating such crimes is open to question. Although we might praise the international community for agreeing on such new legal instruments, we should also deplore the fact that such a development is necessary.

(j) The protection of victims and witnesses and the preservation of evidence;

(k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and

(l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

[65] Cf. for instance, Hafner, 'Limits to the Procedural Powers of the International Tribunal for the Former Yugoslavia', in K. Wellens (ed.), *International Law: Theory and Practice* (1998) 651.

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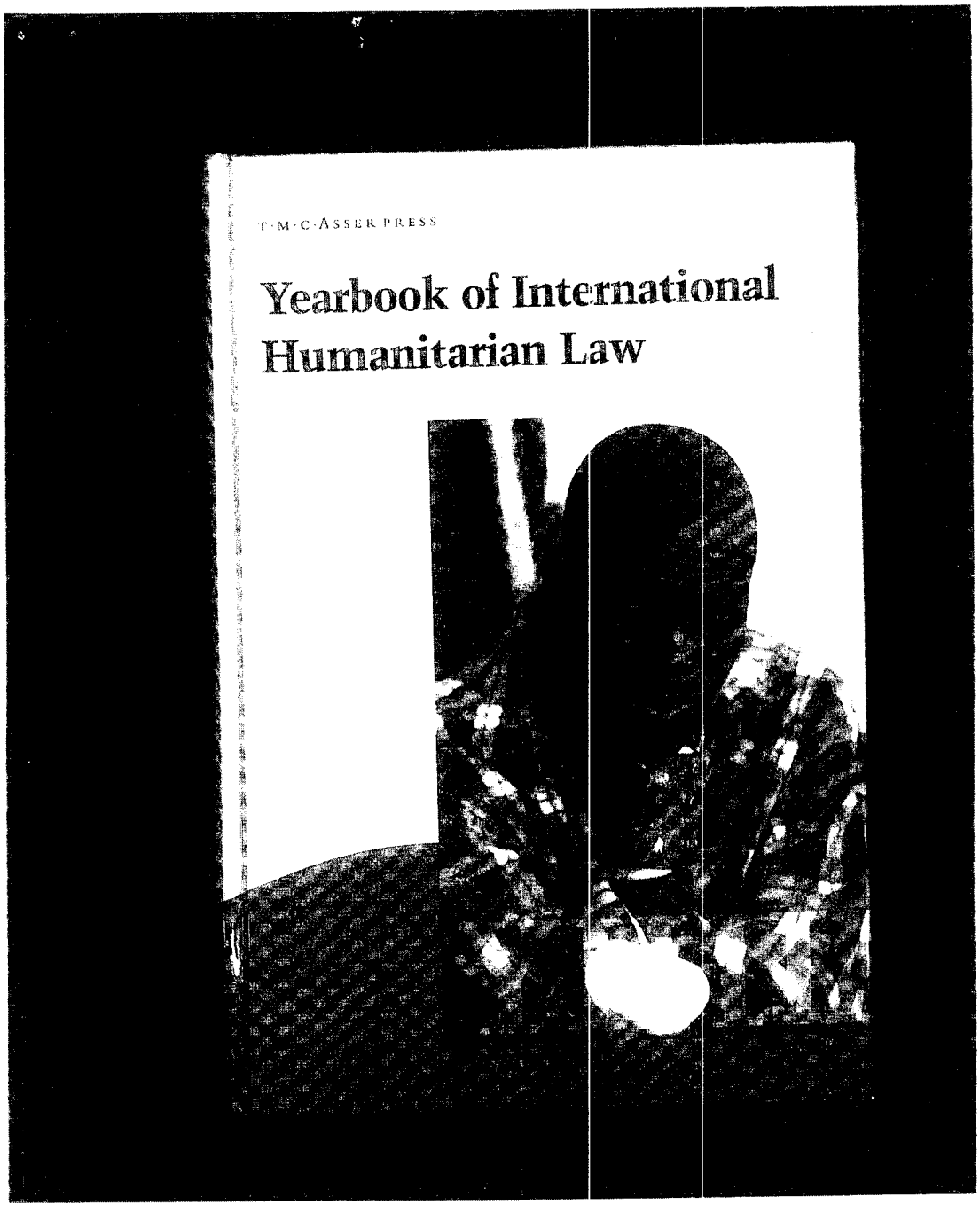
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JURISDICTION AND COOPERATION IN THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: PRINCIPLES AND COMPROMISES[1]

Hans-Peter Kaul[2] and Claus Kreß[3,4]

I. INTRODUCTION

At the Rome Conference on the adoption of the Statute of the International Criminal Court (hereinafter, the Statute and the ICC), the negotiators faced basically three types of problems. First, a considerable number of primarily technical difficulties stemmed from the differences between national systems of criminal law. This type of problem was characteristic for the discussions on general principles of criminal law (Part 3 of the Statute), criminal procedure (Parts 5, 6 and 8) and enforcement (Part 10). Second, a more limited number of disputed questions resulted from deeply-rooted differences in legal culture. This was true for the most important controversies on penalties (Part 7), in particular for the hotly debated death penalty, and for some specific points relating to the general principles of criminal law, in particular, the treatment of voluntary intoxication. Third, delegations were forced to break the impasse with regard to a set of unresolved key issues of a highly political nature. This article deals with two sets of issues belonging to the latter category: jurisdiction and cooperation.

The respective places of jurisdiction and cooperation within the Statute, i.e., Articles 5, 12 and 13 (in Part 2) and Articles 86 to 102 (all of Part 9),[5] tend to conceal the intimate interrelation between them. On a little closer look, though, the links between jurisdiction and cooperation become obvious. Functionally, the implementation of any set of jurisdictional rules defining the Court's sphere of

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4. The views expressed in this article do not necessarily represent those of the German government.

5. In the following text, Articles without further reference are those of the Rome Statute.

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activity depends on a complementary cooperation regime. Systematically, the key elements of the jurisdictional regime constitute starting points in framing the cooperation regime.[6] This is true, firstly, for the limits of the Court's jurisdiction: the choice between a regime of automatic jurisdiction, on the one hand, and a consent or an opt in/opt out system of jurisdiction, on the other hand, has direct repercussions in the area of cooperation.[7] It is important, secondly, for the very basic question of *Kompetenz-Kompetenz*. It is a cornerstone of the ICC's jurisdictional regime that it is up to the Court to rule authoritatively on the issue of jurisdiction. It follows immediately from this that a refusal to cooperate with the Court could not be based on the requested state's assessment that the Court has no jurisdiction in a given case.[8]

Beyond their functional and systematical interplay, jurisdiction and cooperation are also linked at the level of fundamental legal principles. Above all, jurisdiction and cooperation are obviously the decisive factors for the effectiveness of the future Court. Furthermore, they are the most important elements for an overall determination of the legal nature of the Rome treaty. One has to turn to these two areas to answer the question to what extent the Statute possesses an integral character instead of merely comprising a set of purely synallagmatical legal relationships. Similarly, analysis of the two regimes in question offers guidance to what degree the Statute is directly individual-related instead of constituting a purely interstate instrument. In short, in light of the rules on jurisdiction and cooperation, a judgment can safely be made as to what degree the Statute corresponds with one of the most important statements of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in its seminal *Tadić* Decision (Jurisdiction) of 2 October 1995 (*Tadić* Jurisdiction Decision). According to this eloquent statement,[9] in the development of international law: 'a State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach.'[10]

This contribution will first deal with jurisdiction and cooperation in turn (Parts 2 and 3, respectively). In each case, the principles at stake will be discussed briefly.

6. For the need to bear that in mind in interpreting Part 9 of the Statute see C. Kreß, K. Prost, A. Schlunck and P. Wilkitzki, in O. Triffterer, ed., *Commentary on the ICC Statute* (Baden-Baden, Nomos Verlagsgesellschaft 1999) Preliminary Remarks on Part 9, marginal n. 2.

7. To illustrate this point: The option for a ground for refusal to surrender a person to the Court contained in Art. 87(3) option 2(a) of the Draft Statute (UN Doc. A/Conf.183/2/Add. 1, p. 159) was explicable solely on the basis of a jurisdiction regime based on specific state consent. This option for a ground for refusal to surrender remained pending during the Rome conference, with virtually no discussion being devoted to it, until the final decisions on jurisdiction were made.

8. At a late stage of the negotiations of what finally became Art. 89(2) of the Statute, an effort was made by some delegations to introduce the right to a final say of State Parties on the issue of jurisdiction through the back door of cooperation.

9. ICTY Case No. IT-94-1-AR72, 2 October 1995, reprinted in 16 *HRLJ* (1995) p. 458 (para. 97).

10. Cf., the challenging study of Ph. Allott, 'The Concept of International Law', 10 *EJIL* (1999) pp. 31 et seq., concluding with 'The New Paradigm' (p. 50) that shows some ressemblance with the statement of the ICTY.

The analysis then focuses on the course of the negotiations and the elements of the final compromises. On the basis of that, the article proceeds in Part 4 to an appraisal of the negotiations' outcome.

2. JURISDICTION

Looking back to Rome, jurisdiction appears to have been the most important, politically the most difficult and therefore the most contentious question of the negotiations as a whole, in short: the 'question of questions' of the entire project. The United States was not the only one emphasizing 'that the issue of jurisdiction had to be resolved satisfactorily or else the entire treaty and the integrity of the Court would be imperiled'.[11] Given this fact, it is not exceedingly surprising that 'it is on this issue that the differences proved irreconcilable and consensus eventually broke down, leading to a vote at the end of the conference'.[12]

2.1 Principles: universality versus state sovereignty

A state which becomes a Party to the Statute thereby accepts the jurisdiction of the Court with respect to genocide, crimes against humanity and war crimes (hereafter, the international core crimes[13]), and no particular state – be it a State Party or a non-State Party – must give its specific consent to the exercise of this jurisdiction in a given case. This, in essence, is the regime that follows from an approach based on the principle of universal jurisdiction over the international core crimes. The universality approach starts from the assumption that, under current international law, all states may[14] exercise universal jurisdiction over the above-listed core crimes of international law. And it then adds to this assumption the very simple idea that states must be entitled to do collectively what they have the power to do individually. On the level of principles, the universality approach has to be contrasted with various approaches based on a more or less restrictively conceived principle of state sovereignty. Moderate variants of this approach may be called the nationality and/or the territoriality approaches. Hereafter, the jurisdiction of the Court is dependent on the consent of the national state of the suspect and/or the state on whose territory the crime has been committed. A fully fledged state sovereignty approach goes beyond the criteria of territoriality and nationality in requiring the consent of every state which is in any way directly concerned with or interested in the crime (the points of attachment can be the custody of the

11. D. Scheffer, 'The United States and the International Criminal Court', 93 *AJIL* (1999) p. 17.

12. Ph. Kirsch and J.T. Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process', 93 *AJIL* (1999) p. 4.

13. Aggression, being the fourth international core crime, is not dealt with in this article.

14. The universality approach does not entail the wider-reaching assertion that all states have a duty to prosecute international core crimes.

suspect, the nationality of the victim or an extradition request). At the level of principles, the question as to whether the consent is expressed by way of ratification (system of automatic jurisdiction) or in a more specific form (system of [specific] consent) is of secondary importance. It is obvious, though, that the more specific the consent of a (or more) state(s) must be, the more emphasis is placed on the sovereignty of this (these) State(s). The alternative between automatic and (specific) consent-based jurisdiction is thus not only of a technical character but has substantive consequences.

Basically, two legal[15] criticisms have been addressed to the universality approach.[16] First, it is argued that the universality approach is not in line with the current status of general international law. Not all the crimes within the Court's jurisdiction are, according to this view, covered by universal jurisdiction so that one has to rely upon the other qualifications for international criminal jurisdiction, in particular, territoriality and nationality (hereafter, customary law argument). Second, it is held that giving the Court jurisdiction over a crime committed in the territory of a non-State Party or over suspected nationals of a non-State Party conflicts irreconciliably with the fundamental principle of treaty law that only states that are party to a treaty are bound by its terms (hereafter, treaty law argument). It must be stressed that the treaty law argument goes far beyond a mere criticism of the universality approach. Put to its extreme, the treaty law argument is to invalidate any treaty-based system of jurisdiction over international core crimes whose operation is independent of the consent of a non-State Party which, too, has a (non-exclusive) title of international criminal jurisdiction in the given case.[17]

It is submitted that the customary law argument fails the test of close scrutiny. Given the general consensus about the customary nature of universal jurisdiction over genocide[18] – the 'crime of crimes', in the words of the International Criminal Tribunal for Rwanda (ICTR)[19] – it is no longer necessary to say anything in this respect.

The applicability of the principle of universal jurisdiction under customary international law to those war crimes committed in an international armed conflict which are covered by Article 8(2)(a) and (b) (hereafter, war crimes) cannot seriously be questioned either. Concerning the crimes listed in Article 8(2)(a), i.e., the grave breaches of the Geneva Conventions of 12 August 1949, the respective

15. At this point, the article does not aim at an analysis of the political motivations underlying these criticisms.

16. Both points are made by Scheffer, loc. cit. n. 11, at p. 18.

17. For criticisms of the treaty law argument see also G. Hafner, K. Boon, A. Rübesame and J. Huston, 'A Response to the American View as Presented by Ruth Wedgwood', 10 *EJIL* (1999) pp. 116 et seq.; A. Cassese 'The Statute of the International Criminal Court: Some Preliminary Reflections', 10 *EJIL* (1999) pp. 159 et seq.

18. Cf., Art. 6 of the Statute; for a detailed demonstration of the applicability of the principle of universal jurisdiction under customary international law over genocide see A. Zimmermann, 'The Creation of a Permanent International Criminal Court', 2 *MPYIL* (1998) pp. 206 et seq.

19. Judgment of 4 September 1998 in *Prosecutor* v. *Kambanda*, ICTR 97-23-S, para. 16.

treaty provisions[20] – whose customary character was recently reaffirmed by the International Court of Justice (hereafter, ICJ) in the *Nuclear Weapons Opinion*[21] – explicitly provide for universal jurisdiction.[22] With respect to the war crimes contained in Article 8(2)(b), the customary validity of the universal jurisdiction principle has recently been shown by Andreas Zimmermann,[23] and it suffices to briefly summarize the points convincingly made by this author. He refers to a long-standing state practice to punish war crimes regardless of specific points of attachment to the respective *forum* (a practice which, in fact, predates the Geneva Conventions of 1949 (hereafter, GC). This practice, which in itself suffices to establish the customary status of the universality principle, was reaffirmed in the process of elaborating the First Additional Protocol of 1977 to the GC and by the now universal acceptance of some other pertinent international instruments.

Given the considerable disparity of the pertinent conventions prior to Rome, the legal situation may be seen as somewhat less straightforward with respect to crimes against humanity[24] than with respect to war crimes. A closer look, though, reveals that the customary principle of universal jurisdiction equally applies to crimes against humanity. This position can be based on state (judicial and legislative) practice, as has recently been shown by Kenneth C. Randall[25] and Andreas Zimmermann.[26] Beyond that, the position is justified as a matter of principle. Together with genocide, crimes against humanity are most directly covered by the ICJ's *dictum* in *Barcelona Traction*[27] on the *erga omnes* character of certain international rules, and the principle of universal jurisdiction must be understood as the legal vehicle by which states, acting on behalf of the international community, can react to any violation of such a rule. Finally, the customary validity of universal jurisdiction over crimes against humanity gains support from the evolving jurisprudence of the ICTY. In its sentencing practice, this Tribunal has had the opportunity to directly compare war crimes and crimes against humanity. In its Sentencing Judgment of 14 July 1997 in *Prosecutor* v. *Tadić*, the Trial Chamber made a statement which is very much in point:

20. Art. 49 of the First Geneva Convention, Art. 50 of the Second Geneva Convention, Art. 129 of the Third Geneva Convention and Art. 146 of the Fourth Geneva Convention.

21. Cf., esp. para. 79 of the Advisory Opinion of 8 July 1996, 35 *ILM* (1996) p. 827.

22. These provisions even enshrine an unqualified duty for States Parties *aut dedere aut judicare*.

23. Zimmermann, loc. cit. n. 18, at p. 212.

24. Cf., Art. 7 Statute.

25. K.C. Randall, 'Universal Jurisdiction under International Law', 66 *Texas Law Review* (1988) pp. 800 et seq.

26. Zimmermann, loc. cit., n. 18, at p. 211.

27. *ICJ Rep.* (1970) para. 33. In *Barcelona Traction* the Court only dealt with basic 'rights of the human person' and correspondingly with *erga omnes* obligations of states. The concept of a international core crime implies the idea of 'basic duties of the human person' and correspondingly *erga omnes* obligations of individuals. For a similar view cf., Randall, loc. cit. n. 25, at p. 830.

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1814

The Creation of a Permanent International Criminal Court

Andreas Zimmermann[1]

-Articles Note 3!

"Crimes against interna
by abstract entities, an
commit such crimes can
enforced."[2]

-Note 5

Articles Regarding the work of the preparatory committee

I. Introduction

Against the background of this deter
tional Military Tribunal, an attempt
status of the negotiations on the cr
Criminal Court (ICC)[3]. Given the fa

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1 The following remarks by the aut
a member of the German delega
Preparatory Committee on the Establishment of an International Criminal Court, are purely his personal ones and do not reflect the opinion of the German Government.

2 Judgment of the International Military Tribunal of 1 October 1946, Vol. 1, 249.

3 See also the overview by H.-P. Kaul, "Towards a permanent International Criminal Court – Some Observations of a Negotiator", *HRLJ* 18 (1997), 169 et seq. As to the developments up to 1996 see K. Ambos, "Establishing an International Criminal Court", *EJIL* 7 (1996), 519 et seq., as well as H. Roggemann, "Auf dem Weg zum ständigen Internationalen Gerichtshof", *ZRP* 29 (1996), 388 et seq. As to the historical developments, see in particular the overview by M. Cherif Bassiouni, "Establishing an International Criminal Court: Historical Survey", *Mil. L. Rev.* 149/50 (1995), 44 et seq. as well as the overview of relevant literature by

criminal responsibility of a given individual and in particular his
specific intent. Furthermore, if one takes the view that the notio
aggression, as contained in Article 39 of the Charter and the noti
armed attack do not completely overlap, the ICC would have to even
prove on its own whether all elements of an armed attack, not
contained in the notion of aggression, are fulfilled in a given case[
To summarize one might say that the introduction of the cri
aggression into the statute of the ICC brings with it the most
problems both as to its acceptability as well as to its definition. Giv
fact, one might wonder whether it will indeed be possible to bring
a situation in which the crime will be finally contained in the statute
future ICC.

5. Treaty-based Crimes

In the beginning of the project on the creation of a future ICC,
based crimes formed the vocal point of the discussions[131]. Now, ha
this approach finds less and less support among the States particip
the work of the Preparatory Committee. Instead, a large majority o
want to limit the jurisdiction of the ICC to the above mention
crimes of genocide, crimes against humanity, war crimes and eve
the crime of aggression. This is mainly due to the fact that not all
conventions, the violation of which would form the basis for treat
crimes have so far found sufficient worldwide acceptance and thus
be considered as reflecting current customary international law. F

[130] On the other hand one should not overlook the fact that the
Council has even in the case of the invasion of Kuwait not
determination that Iraq had committed an act of aggression. On
hand, the Security Council had on several occasions characteriz
military actions by Israel, Indonesia, and certain acts by Soud
Angola as "*acts of armed aggression*", or "*acts of aggression*" re
For details see J.A. Frowein, "On Article 39", 605 et seq., M
Simma, see note 122.

[131] As to the list of possible treaty-based crimes which were discus
the work of the Preparatory Committee see Doc.A/AC.249/
16–17; see also article 20 lit. (e) of the Draft statute of the ILC
1994, Vol. II, Part 2, 38 as well as the Annex, *ibid.*, 70 et seq. It wa
and Tobago, which in 1989, was asking for the creation of an inte
criminal court to punish the large-scale commission of dr
crimes. For further details see C. Tomuschat, "Sanktionen durch
tionale Strafgerichtshöfe", Verhandlungen des 60. DJT, Vol. II
seq., (57–58).

to include the notion of treaty-based crimes into the jurisdiction
C, it would necessarily follow that only crimes committed on the
of the respective contracting parties of a given convention could
punishable. Furthermore, it would be also necessary that these
states would also be among the contracting parties to the statute
C. Such an approach would then necessarily result in a weakening
except of an inherent and universal jurisdiction of the ICC[132].

Preconditions for the Exercise of Jurisdiction by the ICC

ard to of the question under what conditions the ICC should be
sition to exercise its jurisdiction there are three main models
to each other. The first group of countries, which includes *inter*
many, takes the position that the ICC, once established, should be
exercise *ipso facto* and without any further requirement its juris-
n all of the above-mentioned core crimes, committed worldwide
ardless of whether the State on the territory of which the crime was
ed, the custodial State, the State of the victim of the crime, or the
of origin of the offender or even some of them cumulatively have
d to the exercise of jurisdiction by the court[133]. In contrast thereto
group of States would like to make the exercise of jurisdiction by
dependant on the fact that some or all of the above mentioned
ave either by ratifying the statute[134], or by accepting the jurisdic-
the Court in a manner similar to article 36 of the statute of the
consented to the exercise of jurisdiction by the ICC. Finally, a third
of States, which includes France, would require that with regard to
and every individual investigation, all or some of the States

against this background that Denmark proposed a compromise
ula which suggested including in the statute a review clause accord-
to which, after a given time a review of the crimes to be included in
tatute should take place, for details see article 111, Option 2 of the
Statute.

approach is most clearly contained in the further option to article 9,
1, 33 of the Draft Statute according to which "[a] State that becomes
ty to the Statute thereby accepts the jurisdiction of the Court with
ct to the crimes referred to in article 5 (paragraphs (a) to (d))".

article 9, Option 1, para. 1 of the Draft Statute.

article 9, Option 2, para. 1 of the Draft Statute.