One Step Forward, Two Step Backwards: Addressing Objections to the ICC's Prescriptive and Adjudicative Powers

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"[W]hosoever killeth a human being for other than manslaughter or corruption in the earth, it shall be as if he had killed all mankind, and whosoever saveth the life of one, it shall be as if he had saved the life of all mankind."[1]

"Justice, justice. shall you pursue"[2]

"In the absence of justice, what is sovereignty but organized robbery?"[3]

INTRODUCTION

The evolution of international human rights law, generally, and international criminal law, specifically, has seen the construction of specialized criminal tribunals and courts.[4] The progression from Nuremburg to the International Criminal Court ("ICC") illustrates the development of judicial concepts and tools relating to international criminal law in order to combat transnational crimes and prevent impunity. The construction of specialized domestic and hybrid courts in Sierra Leone,[5] Cambodia,[6] East Timor,[7] Iraq,[8] and Kosovo[9] demonstrate that the notion of "international" criminal courts has pervaded "domestic" boundaries.[10] The universal nature of international crimes is slowly penetrating state borders and raising questions on universal jurisdiction,[11] immunity and amnesty,[12] and humanitarian

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[1] Qu'ran, Al-Ma'ida 5:32.

[2] Deuteronomy 16:20.

[3] St. Augustine, the City of God, bk. IV, ch. 4 (Marcus Dods trans., Hafner Publ'g Co. 1948)

[4] *See generally* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW (2003); BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE (1980); JOHN R.W.D. JONES & STEVEN POWLES, INTERNATIONAL CRIMINAL PRACTICE (2003); LEILA N. SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW (2002); STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY (M. Cherif Bassiouni ed., 1998).

[5] S.C. Res. 1315, P 1, U.N. Doc. S/RES/1315 (Aug. 14, 2000); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, Aug. 10, 2001, *available at* http://www.cambodia.gov.kh/krt/pdfs/KR%20Law%20as%20promulgated%20(Eng%20trans%206%20Sept%202001.pdf (English translation); Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone P 1, U.N.-Sierra Leone, Jan. 16, 2002, http://www.sc-sl.org/scsl-agreement.html.

[6] U.N. Doc. A/53/850-S/1999/231 (Mar. 16, 1999); Steven R. Ratner, *The United Nations Group of Experts for Cambodia*, 93 AM. J. INT'L L. 948, 948-953 (1999); Steven R. Ratner, *The Cambodia Settlement Agreements*, 87 AM. J. INT'L L. 1, 2 (1993).

[7] S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999).

[8] Paul Bremer, III, Administrator, Coalition Provisional Authority, Iraq, Order No. 48, Delegation of Authority Regarding Establishment of an Iraqi Special Tribunal (Dec. 10, 2003), *available at* http://www.iraqcoalition.org/regulations/20031210_CPAORD_48_IST_and_Appendix_A.pdf.

[9] S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999) (establishing the United Nations Interim Administration Mission in Kosovo (UNMIK).

[10] *See generally* Jenia I. Turner, Nationalizing International Criminal Law, 41 STAN. J. INT'L L. 1 (2005); Mark S. Ellis, *The International Criminal Court and Its Implications for Domestic Law and National Capacity Building*, 15 FLA. J. INT'L L. 215, 216 (2002).

[11] *See generally* Roger O'Keefe, *Universal Jurisdiction Clarifying the Basic Concept*, 2 J. INT'L CRIM. JUST. 735 (2005); Rodney Neufeld, *Universal Jurisdiction in Prosecution World Leaders*, 8 Human Rights Tribune/Tribune des droits humains (2001); Naomi Roht-Arriaza, *Universal Jurisdiction: Steps Forward, Steps Back*, 17 LEIDEN J. INT'L L. 373 (2004); Antonio Cassese, *Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction*, 1 Journal of International Criminal Justice 589 (2003); STEPHEN MACEDO, UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW (2004); LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES (2003); Princeton University Program in Law and Public Affairs, The Princeton Principles on Universal Jurisdiction 28 (2001); ALAN BAKER, UNIVERSAL JURISDICTION IN INTERNATIONAL CRIMINAL LAW (2001).

[12] *See generally* CHARLES VILLA-VICENCIO & ERIK DOXTADER, THE PROVOCATIONS OF AMNESTY: MEMORY, JUSTICE, AND IMPUNITY (2003); BEN CHIGARA, AMNESTY IN INTERNATIONAL LAW: THE LEGALITY UNDER INTERNATIONAL LAW OF NATIONAL AMNESTY LAWS (2003); Naomi Roht-Arriaza & Lauren Gibson, *The Developing Jurisprudence on Amnesty*, 20 HUMAN RIGHTS QUARTERLY 843 (1998).

intervention.[13] As international crimes become more pervasive and international interest in preventing impunity becomes more pressing, the legal limits of personal (*ratione personae*) and subject matter (*ratione materiae*) jurisdiction are at the forefront of academic debate.

Following the creation of international criminal tribunals in Rwanda[14] and Yugoslavia,[15] the international community ratified the Rome Statute,[16] verifying the establishment of the ICC and marking a historical step in the development of international criminal law. Since the ICC's creation, scholars have renewed debates on the viability of customary international law,[17] the scope of the "laws of nations,"[18] and the obligations of nation states to prosecute or extradite (*aut dedere, aut judicare*) global criminals while eliminating the problem of impunity.[19] At the focal point of these discussions is the legitimacy of the ICC's power to adjudicate and prescribe punishment for nationals of countries not party to the Rome Statute.[20]

The Rome Statute permits the ICC to exercise subject-matter jurisdiction over individuals who engage in war crimes,[21] genocide,[22] crimes against humanity,[23] and crimes of aggression.[24] However, under Article 13, the ICC may only exercise personal jurisdiction over persons referred by the Security Council under Chapter VII, or over nationals of a state party, or persons whose alleged criminal conduct occurred on the territory of a state party.[25]

The nationality and territoriality requirements place jurisdictional limitation, intended to prevent the ICC from exercising personal jurisdiction without boundaries. As Michael Scharf, professor of international law at Fletcher School of Law and Diplomacy notes:

> "the drafters [of the Rome Statute] 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

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[13] *See generally* J. L. HOLZGREFE & ROBERT O. KEOHANE, HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS (2003); SIMON CHESTERMAN, JUST WAR OR JUST PEACE?: HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW (2001); ANNE ORFORD, READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW (2003).

[14] U.N. S.C. Res. 955, U.N. SCOR, 3453d mtg. (1994) (establishing the International Criminal Tribunal for Rwanda).

[15] U.N. S.C. Res. 827, U.N. Doc. S/Res. 827 (1993) (establishing the International Criminal Tribunal for Former Yugoslavia).

[16] *Rome Statute of the International Criminal Court*, July 1, 2002, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

[17] *See* Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT'L L. 817 (2005); Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 24-25 (1999); *contra* Avi Singh, Note, *Criminal Responsibility for Non-State Civilian Superiors Lacking De Jure Authority: A Comparative Review of the Doctrine of Superior Responsibility and Parallel Doctrines in National Criminal Laws*, 28 HASTINGS INT'L & COMP. L. REV. 267, 276 (2005) (noting "An international treaty, the Rome Statute establishing the International Criminal Court (ICC) is limited in its valuable contribution to customary international law as it is not ratified by, *inter alia*, the United States, China, and India."); Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 LAW & CONTEMP. PROBS. 13, 42 (2001) [hereinafter High Crimes and Misconceptions]; David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 15 (1999) [hereinafter US and the ICC].

[18] Congresses authority to delegate prosecutory power to an international court, including the ICC, falls under Art. I, Sec. 8 of the Constitution, which provides that "The Congress shall have Power To define and punish offenses against the Law of Nations." *See In re Yamashita*, 327 U.S. 1, 7 (1946); Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 1 COLUM J. TRANSNAT'L L. 73, 73 (1995) ("Constitutional objections [to the ICC] are simply poorly reasoned").

[19] *See generally* M. CHERIF BASSIOUNI & EDWARD M. WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW [AUT DEDERE, AUT JUDICARE] (1995).

[20] *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).

[21] Rome Statute, *supra* note 14, at arts. 5(1)(c), 8.

[22] *Id.* at arts. 5(1)(a), 6.

[23] *Id.* at arts. 5(1)(b), 7.

[24] *Id.* at art. 5(1)(d).

[25] *Id.* at art. 13.

inherent jurisdiction as a politically expedient concession to the sovereignty of states in order to garner broad support for the statute.[26]

While the consent regime was intended to provide jurisdictional limitations, it has nonetheless come under substantial scrutiny by non-party states who claim that their nationals can be suspect to the ICC's jurisdiction without their consent.[27] Presumably a non-party national can be subject to the ICC's jurisdiction either by referral from the Security Council, or referral by the state of territoriality. Thus, there is the distinct possibility that the ICC may have prescriptive and adjudicative power over foreign military or civilians operating abroad even if the state of nationality has not consented to the Court's jurisdiction.[28] Beside policy considerations concerning state sovereignty[29] and exposure of military figures to politically motivated prosecutions,[30] the core legal arguments posited by opponents to the ICC is that rights and obligations cannot be created for third states without their consent.[31] This paper will evaluate, dissect, and refute the legal critics leveled against the Rome Statutes powers of adjudication and prescription.

Part I will describe the principle of *pacta tertiis* and its application to treaty-based Courts.[32] The *pacta tertiis* principle has been evoked by non-party States to the Rome Statute in order to prevent the ICC's application of jurisdiction to their nationals.[33] The *pacta tertiis* principle prevents treaties from modifying the legal interests of third parties.[34] However, the principle has changed over time and has given rise to exceptions, including one based on customary international law and *jus cogens* norms.[35]

Part II determines whether the *pacta tertiis* principle is applicable to the Rome Statute.[36] First, there is a presumption under international law that all forms of jurisdiction are valid, unless it violates a norm of customary international law.[37] This paper questions whether states have a legal right to see their nationals free from "exorbitant" jurisdiction.[38] The notion of "exorbitant jurisdiction" is more of a political than legal interest.[39] Moreover, nationality jurisdiction is not exclusive, but concomitant with

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[26] 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 (2001).

[27] Giovanni Conso, *The Basic Reasons for US Hostility to the ICC in Light of the Negotiating History of the Rome Statute*, 3 J. INT'L CRIM. JUST. 314 (2005); David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47, 86 (2002); Hirad Abtahi, *The Islamic Republic of Iran and the ICC*, 3 J. Int'l Crim. Just. 635, 643 (2005); Usha Ramanathan, *India and the ICC*, 3 J. Int'l Crim. Just. 627, 627 (2005); LIN XIN & LIU NANLAI, STUDY ON INTERNATIONAL CRIMINAL LAW 253-54 (1999) (noting that China's refusal to ratify the Rome Statute is partly based on its view that "[t]he jurisdiction of the ICC is not based on the principle of voluntary acceptance").

[28] *See* Scheffer, *US and the ICC*, *supra* note 17, at 18 (listing US concerns that their nationals would potentially be subject to the ICC's jurisdiction when operating in foreign countries who have ratified the Rome Statute.)

[29] *See generally* Michael J. Struett, *The Transformation of State Sovereign Rights and Responsibilities Under the Rome Statute for the International Criminal Court*, 8 CHAP. L. REV. 179 (2005); Lieutenant Colonel Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent With the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20 (2001).

[30] *See* Todd Prichard, *The Rome Statute of the International Criminal Court: Should the United States Sign on the Dotted Line?*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 727, 738-42 (2003); Evo Popoff, *Inconsistency and Impunity in International Human Rights Law: Can the International Criminal Court Solve the Problems Raised by the Rwanda and Augusto Pinochet Cases*, 33 GEO. WASH. INT'L L. REV. 363, 392-93 (2001) (discussing the United States opposition to the ICC on the basis that it would leave soliders to politically motivated prosecutions).

[31] *See* Scheffer, *US and the ICC*, *supra* note 17, at 18; David J. Scheffer, *A Negotiator's Perspective on the International Criminal Court*, 167 MIL. L. REV. 1, 18 (2001).

[32] *See infra*, text accompanying notes 49-76.

[33] *See infra*, text accompanying notes 51-56.

[34] *See infra*, text accompanying notes 49-56.

[35] *See infra*, text accompanying notes 62-76.

[36] *See infra*, text accompanying notes 77-103.

[37] *See infra*, text accompanying notes 77-94.

[38] *See infra*, text accompanying notes 95-103.

[39] *See infra*, text accompanying notes 95-101.

territorial jurisdiction.[40] Thus, the Rome Statute does not modify the legal rights of non-party States *per se*.[41]

Assuming that the Rome Statute does modify such rights, Part III looks at to whether the customary international law exception to the *pacta tertiis* principle is applicable.[42] There are several legal grounds of jurisdiction under international criminal law.[43] Proponents to the Rome Statute argue that universal jurisdiction over international crimes and territorial jurisdiction have reached the status of customary international law.[44] Opponents to the Rome Statute argue that an international court exercises delegated jurisdiction which differs from domestic jurisdiction.[45] In the view of its opponents, delegated jurisdiction requires the consent of the state of nationality even where the domestic state would otherwise be capable of exercising jurisdiction itself.[46] This paper argues that under customary international law, an international court is capable of exercising jurisdiction a state would otherwise be capable of exercising itself.[47] Thus, exercise of jurisdiction by the ICC delegated by states parties is grounded under customary international law even where the state of nationality has not consented.[48]

I. THE PRINCIPLE OF *PACTA TERTIIS*

The Rome Statute is a multi-lateral treaty and is subject to the laws of treaties.[49] As such, the Rome Statute can only be enforced *res inter alios acta*, as between the parties party to the treaty. This can be contrasted with the international tribunals in Rwanda and Yugoslavia, which were created by the Security Council's Chapter VII powers and thus bind all states party to the United Nations Charter.[50] In order to understand the legitimacy of the Rome Statute's legal grounds it is important to conceptualize the importance of non-parties and third parties under treaty law.

Article 34 of the Vienna Convention on the Law of Treaties ("Vienna Convention"), reflecting the customary principle of *pacta tertiis nec nocent nec prosunt*,[51] states, "a treaty does not create either an obligation or rights for a third state without its consent."[52] In other words, "a treaty applies only between the parties to it."[53] The principle of *pacta tertiis* is intended to prevent agreements between states from violating the right of sovereignty and independence of third states.[54] Subsequently, a treaty must leave a non-party unaffected. Corollary to the principle of *pacta tertiis*, a treaty and its interpretations may not

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[40] *See infra*, text accompanying notes 144-147.
[41] *See infra*, text accompanying notes 101-103.
[42] *See infra*, text accompanying notes 104-195.
[43] *See infra*, text accompanying notes 105-111.
[44] *See infra*, text accompanying notes 117-124.
[45] *See infra*, text accompanying notes 112-115.
[46] *See infra*, text accompanying notes 162-195.
[47] *See infra*, text accompanying notes 143-161.
[48] *See infra*, text accompanying notes 160-161.
[49] Rome Statute, *supra* note 14, at preamble.
[50] *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, [hereinafter United Nations Charter] art. 39; *see also infra*, text accompanying notes 164-180 (discussing the different legal implications between the ICTY/R and the ICC as related to the Security Council's ability to confer jurisdiction under Chapter VII.)
[51] *Certain German Interests in Polish Upper Silesia* (Germany v. Pol.), 1926 P.C.I.J. (ser. A) No. 7, at 27-29 (May 25); *Territorial Jurisdiction of the River Oder Commission* (U.K., Czech., Den., Fr., Germany, Swed. v. Pol.), 1929 P.C.I.J. (ser. A) No. 23, at 19-22 (Sept. 10); *Free Zones of Upper Savoy and the District of Gex* (Fr. v. Switz.), 1932 P.C.I.J. (ser. A/B) No. 46, at 141 (June 7); *Aerial Incident of July 27*, 1955 (Isr. v. Bulg.), 1959 I.C.J. 127, 136-42 (May 26); *North Sea Continental Shelf* (F.R.G. v. Den. and F.R.G. v. Neth.) 1969 I.C.J. 3, 26 (Feb. 20) [hereinafter North Sea Continental Shelf].
[52] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S., [hereinafter Vienna Convention] art. 34; *see also* LORD MCNAIR, THE LAW OF TREATIES 309, 310 (1961).
[53] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 598 (6th ed. 2003).
[54] *See* CHRISTINE CHINKIN, THIRD PARTIES IN INTERNATIONAL LAW 26 (1993) ("The *pacta tertiis* rule is founded upon the Roman law analogy to contract and the principles of independence, consensuality, and sovereign equality of States.").

alter the legal rights of non-parties without their consent.[55] Interestingly, the principle of *pacta tertiis* was formulated to prevent the world's great powers from being bound to treaties not formally party to while at the same time binding weaker states through a number of exceptions.[56]

Although, the principle of *pacta tertiis* has reached the status of customary international law,[57] it does not categorically exclude the creation of obligation or altering of third party rights. The *pactaa tertiis* rule is not absolute. While it is true that the *pacta tertiis* requirement reflect the rigidity of demarcations between treaty parties and non-parties, the Vienna Convention was additionally intended to provide needed flexibility in order to bind third States to international norms.[58] The prevailing doctrine of positivism commands respect for sovereignty and fairness between states.[59] However, the Vienna Convention reflects equal concern that violations of customary international law, particularly *jus cogens* offences,[60] do not receive impunity.[61]

The maxim of *pacta tertiis* is modified by article 38 of the Vienna Convention, which does not preclude "a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law."[62] Insomuch that the Vienna Convention intended to modify the *pacta tertiis* rule, it is clear that States are not given full rein to exercise their legal interests in any matter on the basis of sovereignty.[63] Just as the original understanding of *pacta tertiis* arose from notions of independence and sovereign equality, the Vienna Convention sought to limit the absolute role of bi-literalism by reconciling them with overall international interests. As Christine Chinkin notes:

> "the effect of treaties on third parties cannot be determined merely by the formal application of specified rules of treaty law…Instead third party claims must be analysed to determine their factual context, the appropriate policies, and the applicable law."[64]

The Vienna Convention deviated from the original understanding of *pacta tertiis* by incorporating provisions on customary international law and *jus cogens*[65] and by drawing distinctions between non-

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[55] 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"); *Island of Palmas Case* (U.S. v. Neth.), 2 R.I.A.A. 829, 842 (Perm. Ct. Arb. 1928).

[56] *See* CHINKIN, *supra* note 54, at 27; *see infra*, text accompanying notes 62-64 (discussing the "customary law" exception to the *pacta tertiis* principle).

[57] Reports of the Commission to the General Assembly, U.N. Doc. A/6309/Rev/1 (1966); *German Interests in Polish Upper Silesia* (Germany v. Polish Republic), 1926 P.C.I.J. (Ser. A) No. 7, at 29; *Cf. Nationality Decrees Issued in Tunis and Morocco*, 1923 P.C.I.J. (Ser. B), No. 5, at 27-28; *Territorial Jurisdiction of the International Commission of the River Order*, 1929 P.C.I.J. (Ser. A) No. 23, at 19-22; *Free Zones of Upper Savoy and the District of Gex*, 1932 P.C.I.J. (Ser. A/B) No. 46, at 141; *Aerial Incident of July 27th*, 1955 (Isr. v. Bulg., U.S. v Bulg., U.K. v. Bulg.), 1959 I.C.J. 127, 138; *North Sea Continental Shelf*, *supra* note 51, at 25-27, 41, 46; *Frontier Dispute* (Burk. Faso v. Mali), 1986 I.C.J. 554, 577-578; Reports of the Commission to the General Assembly, U.N. Doc. A/6309/Rev/1 (1966)

[58] *See* CHINKIN, *supra* note 54, at 134.

[59] *See generally* Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 VAND. L. REV. 1387, 1389 (1997); Daniel C.K. Chow, *A Pragmatic Model Of Law*, 67 WASH. L. REV. 755 (1992).

[60] It is important to note that not all principles of customary international law need to be *jus cogens* norms; while all *jus cogens* are principles of customary international law. *Jus cogens* norms can be understood as higher levels of custom which are binding on all states, "even those which do not agree with them." *Siderman de Blake v. Argentina*, 965 F.2d 699, 714-15 (9th Cir. 1992); *Doe I v. Unocal Corp.*, 395 F.3d 932, 945 fn. 14 (9th Cir. 2002). In contrast, States that persistently object to customary principles of international law are not bound by them. This exception is inapplicable to *jus cogens* norms.

[61] Whereas traditional notions of "territoriality" guided the "Westphalian" state, broader jurisdictional doctrines became standard in order to incorporate the problems facing courts seeking to exercise jurisdiction over nationals who commit crimes elsewhere. As states interacted with one another, a consensus grew between states that there existed crimes that by their very nature affected the interests of the world (*delicti jus gentium*). *See Nuremburg International Military Tribunal: Judgment and Sentence*, 41 A.J.I.L. 172, 221 (1947) ("individuals have international duties which transcend the national obligations of obedience imposed by the individual State").

[62] *Vienna Convention*, *supra* note 52, at art. 38.

[63] CHINKIN, supra note 54, at 35-39.

[64] *Id*. at 38.

[65] *Vienna Convention*, *supra* note 52, at art. 53 ("A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law."); *Vienna Convention*, *supra* note 52, at art. 64 ("If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.").

parties and third parties. As such, even states that have not ratified a particular treaty are not devoid of obligations. As signatories, States possess the obligation to refrain from any act which would defeat the "object and purpose" of the treaty.[66] In addition, a right or obligation that reaches the level of *jus cogens* creates *erga omnes* obligations that bind all members of the international community.[67]

Customary international law is rooted on the principle that certain rights or obligations are so widely accepted by nation-states, that all states are bound regardless of whether or not they have agreed by formal ratification.[68] Custom is one of the primary sources of international law[69] and binds all states, except those which have "persistently objected" against its affirmation.[70] In order for a right or obligation to rise to the level of custom, they must generally meet two recognized requirements: widespread state practice[71] and *opinio juris*.[72] *Opinio juris* is evidence that states act or refrain from acting in a manner because they believe there is a legal obligation to behave that way.[73]

The signing and ratifying of an international convention or treaty by a multitude of States fulfils the elements of custom.[74] Thus, rules embodied in treaties can alter the rights of non-party states if they reflect customary principles of international law. As the International Law Commission notes in their report to the General Assembly:

> "A principle or rule of customary international law may be embodied in a bipartite or multipartite agreement so as to have, within the stated limits, conventional force for the States parties to the agreement so long as the agreement is in force; yet it would continue to be binding as a principle or rule of customary international law for other States."[75]

The Rome Statute, thus, would have binding effect even on non-state parties if it embodies a rule or principle of customary international law. In general, the Rome Statute as a whole is unlikely, at this time, to embody principles of customary international law.[76] For purposes of this paper, however, it is only important to evaluate whether the Rome Statute's provisions on jurisdiction are reflective of customary principles of international law.

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[66] *Vienna Convention*, *supra* note 52, at art. 18; *See also* BROWNLIE, *supra* note 53, at 603 ("…[S]ignature qualifies the signatory state to proceed to ratification, acceptance, or approval and creates an obligation of good faith to refrain from acts calculated to frustrate the objects of the treaty.").

[67] *See Case Concerning Armed Activities on the Territory of the Congo* (D.R.C. v. Rwanda), 2006 I.C.J. 126 (Feb. 3) at ¶ 60 (*jus cogens* obligations create obligations *erga omnes*.); *Barcelona Traction, Light and Power Co. Ltd.* (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5) at ¶ 42 (holding that obligations *erga omnes* are binding on all States and opposable against any State); *See generally* M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, [*Obligatio Erga Omnes*] 59-AUT LAW & CONTEMP. PROBS. 63 (1996); M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW [INTERNATIONAL CRIMINAL LAW] 698-704 (2003).

[68] There are a number of ICJ cases which have illustrated the binding nature of customary international law: *Armed Activities on the Territory of the Congo* (D.R.C. v. Uganda), 2005 ICJ LEXIS 1, 172-73 (Dec. 19) at ¶ 219; *Military and Paramilitary Activities in and Against Nicaragua* [Nicaragua] (Nicar. v. U.S.), 1986 I.C.J. 14, 97¶ 184 (June 27); *North Sea Continental Shelf*, supra note 51, at ¶ 27.

[69] *See Statute of the International Court of Justice*, 59 Stat. 1031, art. 38(1)(b); BROWNLIE, *supra* note 53, at 4.

[70] *See* BROWNLIE, *supra* note 53, at 10-11 ("Evidence of objection must be clear and there is probably a presumption of acceptance which is to be rebutted. The toleration of the persistent objector is explained by the fact that ultimately custom depends on the consent of states.").

[71] *See generally* THOMAS BUERGENTHAL & HAROLD G. MAIER, PUBLIC INTERNATIONAL LAW IN A NUTSHELL, 22-23 (2nd ed. 1990); Bin Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 INDIAN J. OF INT'L L. 23 (1965).

[72] *See* BUERGENTHAL & MAIER, *supra* note 71, at 5-11; IVAN SHEARER, STARK'S INTERNATIONAL LAW 31-34 (11th ed. 1994); MARK VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 42 ¶ 56 (2d ed. 1997); *Asylum* (Colum. v. Peru), 1949 I.C.J. 267, 276-277 (Dec. 17); *North Sea Continental Shelf*, *supra* note 51, at, 43 ¶ 74; *Nicaragua*, *supra* note 68, at 98 ¶ 186 (June 27); *Doe v. Unocal*, 963 F. Supp. 880, 892 (C.D. Cal. 1997) (*rev'd on other grounds*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000)).

[73] *See* BROWNLIE, *supra* note 53, at 8. To determine whether there is *opinio juris*, Courts look to legislative records, declarations by state representatives, or diplomatic practices as evidence.

[74] *See North Sea Continental Shelf*, *supra* note 51, at 38, 42-44.

[75] Report of the International Law Commission to the General Assembly, [1950] 2 Y.B. INT'L L. COMM'N 364, 368, UN Doc. A/CN.4/SER.A/1950/Add.1.

[76] *See* BASSIOUNI, INTERNATIONAL CRIMINAL LAW, *supra* note 67, at 262.

II. A CONTEXTUAL APPLICATION OF *PACTA TERTIIS*

Opponents to the Rome Statute have four elements to their *pacta* tertiis argument: First, states have a legal interest to see their nationals free from exorbitant jurisdiction. Second, the ICC's jurisdiction is exorbitant when exercised against non-party nationals that have not consented. Third, exercise of this jurisdiction would affect a state's legal interest without its consent and thus violate the *pacta tertiis* principle. Lastly, there is no custom when the Rome Statute does not, *per se*, impose obligations on non-party states by providing rights over their nationals. By analysing each of these arguments, it is clear that the *pacta tertiis* principle does not prohibit the ICC's exercise of jurisdiction against non-party nationals.

A. The presumption of legality under *S.S. Lotus*

There is a fundamental principle of international law that States can exercise any type of jurisdiction as long as they do not violate customary rules of international law. International law does not prohibit the application of a state's prescriptive or adjudicative jurisdiction over non-citizens or acts committed outside of its territory.[77] There is a presumption that all forms of jurisdiction are legitimate so long as they do not violate a prohibitive rule in international law.[78] In one of the most important cases on the international exercise of jurisdiction, the Permanent Court of International Justice held in *S.S. Lotus* that "restrictions upon the independence of states cannot ... be presumed."[79] States have "a wide measure of discretion which is only limited in certain cases by prohibitive rules."[80] As such, every state remains "free to adopt the jurisdictional principles which it regards as best and most suitable."[81] The exercise of criminal jurisdiction over non-citizens does not violate a state's international obligations, such as the duty to respect the sovereignty of other states.[82] Thus, by adopting a *Lotus* inquiry, "the question is not whether international law or precedent exists permitting an ICC with this type of jurisdictional reach…, but rather whether any international legal rule exists that would prohibit it."[83]

Opponents to the ICC reject validity of the *Lotus* doctrine by citing its contentious nature.[84] At the time of its publication, the *Lotus* doctrine divided the Permanent Court of International Justice and led to significant academic opposition.[85] Modern trends similarly dictate against the *Lotus* doctrine. There are clearly rules of permissible criminal jurisdictional conduct. Almost universally, all criminal courts have grounded jurisdiction on the basis of territoriality and nationality.[86] Even the "effects" doctrine, as implicated in *Lotus*, is permissive because it implicates national and territorial concerns.[87] However, the

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[77] *S.S. Lotus Case* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 18 (Sept. 7)[hereinafter S.S. Lotus].

[78] *Id*.

[79] *Id.*

[80] *Id*.

[81] *Id*.

[82] *Id*. at 20; *see also* Winston P. Nagan, *Strengthening Humanitarian Law: Sovereignty, International Criminal Law and the Ad hoc Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT'L L. 127, 137 (1995) ("…under the doctrine of the Lotus decision, the idea that restrictions on the sovereignty of states ought not to be presumed has continuing vitality, especially in the criminal law context.").

[83] Scharf, *supra* note 26, at 73.

[84] *See* Morris, *High Crimes and Misconceptions*, *supra* note 17, at 48; Jon Stephens, Note, *Don't Tread on Me: Absence of Jurisdiction by the International Criminal Court over the U.S. and Other Non-Signatory States*, 52 NAVAL L. REV. 151, 169 (2005).

[85] BROWNLIE, *supra* note 53, at 302 n. 24.

[86] See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§402 (1987) [hereinafter RESTATEMENT THIRD].

[87] In *Lotus*, the PCIJ went so far as to infer the existence of "effects jurisdiction" from general custom on objective territorial jurisdiction. *S.S. Lotus*, *supra* note 77, at 18, 29. *See also* Morris, *High Crimes and Misconceptions*, *supra* note 17, at 48. ("After articulating the broad 'Lotus principle'…the court 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.").

Lotus principle, if read to its logical end, would permit any exercise of jurisdiction absent universal objection. Yet every treaty and law providing for criminal jurisdiction clearly outlines modes of permissible and impermissible jurisdiction.[88] In fact, the "categories" of criminal jurisdiction are very well defined and often considered "exclusive."[89] Even arguments for universal jurisdiction do not presume that it is permissible by virtue of the *Lotus* doctrine. Rather, proponents of universal jurisdiction argue that it is based on the universal nature of *jus cogens* crimes and the international interest in preventing their impunity.[90] Thus, instead of viewing universal jurisdiction presumptively, proponents develop the principle doctrinally.

The rejoinder is that the *Lotus* doctrine is well accepted under international law[91] and has been specifically evoked to justify jurisdiction, including the Nuremburg trials.[92] Even though states have articulated specific jurisdictional limitations, this comports less with a rejection of *Lotus* but more with self-imposed restrictions consistent with domestic concepts of justice and due process.[93] Constraints on international jurisdiction are bargained for and political and in no way reflect exclusive norms of criminal prescription or adjudication. While it is true that authors and scholars list varied forms of "accepted" criminal jurisdiction, such lists are not indicative of exclusivity, but rather are evidence of common and generally accepted jurisdictional modes.

That being said, it is more likely that the *Lotus* principle is inapplicable in this setting. First, the *Lotus* principle has clearly been contested by a large number of States and heavily disputed by publicists. It is unlikely that the principle represents a general principle of international law or reflective of customary international law. Second, the *Lotus* principle was delivered in the context of a state exercising national jurisdiction. International courts are vastly difficult in their roles and abilities and it is questionable as to whether principles relating to national courts apply to international bodies.[94] Lastly, while the *Lotus* principle itself is unclear, the *pacta tertiis* principle is well preserved under customary international law. When the two are at odds, as is the case here, the rule with greater international acceptance and *opinio juris* should prevail.

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[88] Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145, 167 (1972-73). ("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."); Morris, *High Crimes and Misconceptions*, *supra* note 17, at 48.

[89] *See* OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 254-55, 257 (1991).

[90] M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 82 (2001) ("universal jurisdiction has become the preferred technique by those seeking to prevent impunity for international crimes"); Fiona McKay, *U.S. Unilateralism and International Crimes: The International Criminal Court and Terrorism*, 36 CORNELL INT'L L.J. 455, 462 (2004) ("Customary international law also permits states to cooperate in combating impunity for crimes under international law, including exercising criminal jurisdiction."); William W. Burke-White*, A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1, 13-20 ("universal jurisdiction is likely to play a significant role in the future enforcement of international criminal law").

[91] Akehurst, *supra* note 88, at 177 (concluding that customary international law imposes no limits on civil jurisdiction).

[92] As Scharf notes, in at least two instances the United States has evoked the *Lotus* principle to justify criminal prosecutions. Scharf, *supra* note 26, at 20-21. In the *Hadamar* trial, the United States argued that "the principle of the Lotus Case, applied to the case before this Commission, means that the jurisdiction of the Commission, as a question of international law, need be denied only upon a showing that there is a generally accepted rule of international law which would prohibit the exercise of such jurisdiction." Charles H. Taylor, Memorandum, *Has the Commission Jurisdiction to Hear and Determine the Hadamar Case?*, U.S. JAGD Document (declassified on June 19, 1979). Similarly, before the International Court of Justice the United States argued "It is a fundamental principle of international law that restrictions on states cannot be presumed but must be found in conventional law specifically accepted by them or in customary law generally accepted by the community of nations." Written Statement of the Government of the United States of America, Before the International Court of Justice, Request by the United Nations General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, June 20, 1995, at 8.

[93] Justice Scalia has referred to this as "prescriptive comity." *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting) ("The 'comity' they refer to is not the comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere, but rather what might be termed 'prescriptive comity': the respect sovereign nations afford each other by limiting the reach of their laws.").

[94] *See infra*, text accompanying notes 191-192.

B. The political nature of "exorbitant jurisdiction"

Opponents to the ICC's consent regime begin with the contextual argument that no treaty can create third party beneficiary without the consent of ratifying states.[95] They argue that the Rome Statute modifies the legal rights of states without their consent because states have a legal interest and right to see their nationals free from exorbitant jurisdiction.[96] As one author has noted "[e]xorbitant jurisdiction can be defined as those assertions of jurisdiction that are not generally recognized by accepted principles of international law."[97] Whether or not a form of jurisdiction is "exorbitant" is essentially a value judgment made by each individual state. The notion of "exorbitant jurisdiction" is a term of art, not a rule of custom.[98] That is to say, every state has different perceptions of exorbitance.[99] The exercise of jurisdiction is a sovereign act with significant effects on foreign relations and domestic public policy. As the result of different legal values, States naturally have different perceptions of illegality, or exorbitance.[100] Thus, classification of another states exercise of jurisdiction as "exorbitant" cannot be an argument based on custom or principle of international law. Rather it is an argument based purely on domestic public policy. To that extent, a state cannot have an internationally recognized interest in seeing their nationals free from "exorbitant jurisdiction" insofar as it would allow all States of nationality to block any exercise of jurisdiction by territorial States that they disagreed with. As such, there is a difference between "exorbitant jurisdiction" and jurisdiction violating principles of customary international law.

In the realm of private international law, States use the notion of "exorbitant jurisdiction" to prevent enforcement of foreign judgments decided on grounds objectionable to public policy. For example, most countries do not enforce judgments where the United States has exercised general jurisdiction on the basis of systematic and continuous contacts.[101] Similarly, the Brussels Regulation on Jurisdiction stipulates domestic forms of jurisdiction that are not recognized as between state parties to the Convention.[102]

Given its subjectivity, it is hard to see that states have a "legal interest" to see their nationals free from exorbitant jurisdiction. Rather, assertions against exorbitance are more properly classified as political interests that influence international relations. In fact, to avoid having their nationals being

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[95] *See* Morris, *High Crimes and Misconceptions*, *supra* note 17, at 26-27; Scheffer, supra note 17, at 3.

[96] *See Nottebohm* (Second Phase) (Liech.v. Guat.), 1955 I.C.J. 4, 13 (Apr. 6) (holding that "[the] bond of nationality between the State and the individual . . . confers upon the State the right of diplomatic protection."); *see also Barcelona Traction, Light and Power Co. Ltd.* [*Barcelona Traction*] (Second Phase) (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5); *Panevezys-Saldutiskis Railway* (Est. v. Lith.), 1939 P.C.I.J. 1, (ser. A/B), at 357 (Feb. 28); BROWNLIE, *supra* note 53, at 406.

[97] John Fitzpatrick, *The Lugano Convention and Western European Integration: A Comparative Analysis of Jurisdiction and Judgments in Europe and the United States*, 8 CONN. J. INT'L L. 695, 703 n.34 (1993).

[98] Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. LEGAL F. 141, 142.

[99] Kathryn A. Russell, *Exorbitant Jurisdiction and Enforcement of Judgments: The Brussels System as an Impetus for United States Action*, 19 SYRACUSE J. INT'L L. & COM. 57, 58 (1993) ("Exorbitant jurisdiction is jurisdiction validly exercised under the jurisdictional rules of a state that nevertheless appears unreasonable to non-nationals because of the grounds used to justify jurisdiction.").

[100] Jurisdiction itself is defined in personal terms. n the United States, the due process clause which contains perspectives on US morality also limits the permissible limits on jurisdiction. Thus by casting jurisdiction in constitutional terms, exorbitancy is similarly a judgment based exclusively on US perceptions of due process. *See* Lee Scott Taylor, Note, *Registration Statutes, Personal Jurisdiction, and the Problem of Predictability*, 103 COLUM. L. REV. 1163, 1175 (2003).

[101] *See* Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 114-16 (1999); Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121, 133-36 (1992).

[102] Amongst the black listed juridical provisions in the Brussels Regulation are: Article 14 of French Civil Code (*Code civil*): which provides that a French national can sue an alien in the French courts. Similar provisions in Luxemburg (Arts. 14, 15 of *Code civil*) and Belgium (Article 15 of *Code civil/Burgerlijk Wetboek*); Article 4 of Italian Civil Code (Act 218 of 31 May 1995) which had effect of making Italian nationals subject to jurisdiction in Italy regardless of their domicile or the cause of action; Article 23 of the German Code of Civil Procedure (*Zivilprozessordnung*) which permits suit in Germany solely on the basis of presence of defendant's property in the judicial district where suit was brought. In Ireland and UK: jurisdiction on the basis of personal service on the defendant during his temporary presence in the UK is also considered exorbitant. *See also* Russell, *supra* note 99, at 78-80.

caught in the net of another state's "exorbitant" jurisdiction, states often agree to bi-lateral and multi-lateral arrangements.[103] In order words, there seems to be concession that states are relinquishing aspects of their sovereignty by agreeing not to exercise jurisdiction in areas which foreign states consider exorbitant. Thus, arrangements are only enforceable between the state parties. This is equally evident in the European Union where entities and individuals not domiciled in the European Union may be subject to litigation based on heads of jurisdiction recognized as "exorbitant" and "impermissible" against any domiciliary of the European Union.

III. JURISDICTION AND CUSTOMARY INTERNATIONAL LAW

Even assuming that states have a legal interest in seeing their nationals free from exorbitant jurisdiction, there is no rule under international law prohibiting states from exercising "exorbitant" jurisdiction. First, under customary international law all States have the right to exercise jurisdiction over criminal acts committed on their territory and universal jurisdiction over international crimes. Second, exercise of jurisdiction over international crimes does not require the consent of the state of nationality as long as the tenets of due process are recognized. Each of these arguments provides a basis for justifying the ICC's exercise of jurisdiction over non-party nationals when the alleged conduct is on the territory of a state party.

A. Jurisdiction under international criminal law

Assuming, *arguendo*, that the *Lotus* principle does not apply, the question is whether the ICC's exercise of jurisdiction is grounded in customary international law. There are different legal grounds of jurisdiction that have been widely used by states for both purposes of prescriptions and enforcement.[104] Relatively few, however, have reached the status of "custom." In international criminal law, five legal grounds of jurisdiction have been applied by states and are generally accepted: subjective and objective territoriality, active and passive personality, and universality.[105]

Subjective territoriality jurisdiction permits a state to exercise state sovereignty over conduct committed within its territory regardless of the offenders nationality.[106] Objective territoriality jurisdiction, also known as the protective principle or "effects" jurisdiction, allows the state to exercise jurisdiction over conduct abroad that may affect a states territorial interest.[107] Active nationality jurisdiction refers to jurisdiction a states nationals or residents regardless of where the conduct was

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[103] Scharf, *supra* note 26, at 75. ("When the territorial state prosecutes such persons, the state of the nationality of the accused may seek to intercede diplomatically on the basis of comity, but it has no legal right under international law to induce the territorial state to refrain from prosecuting or to impel it to agree to resort to interstate dispute resolution.")

[104] The distinction between these two are generally regarded as prescriptive and enforcement jurisdiction. The latter referring to a states ability to criminalize certain conduct and the former referring to the states enforcement powers. *See* BROWNLIE, *supra* note 53, at 297.

[105] *See generally* Harvard Research in International Law, *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 445 (Supp. 1935) [hereinafter Harvard Research]; RESTATEMENT THIRD, *supra* note 86, §§402-404 (1987); WILLIAM BISHOP, INTERNATIONAL LAW CASES & MATERIALS 531, 551-52 (3d ed. 1971); LOUIS HENKIN, INTERNATIONAL LAW: CASES AND MATERIALS 421 (3d ed. 1993); CASSESE, *supra* note 4, at 277.

[106] *See* Harvard Research, *supra* note 105, at 480; RESTATEMENT THIRD, *supra* note 86, § 403.

[107] *See* Harvard Research, *supra* note 105, at 543; RESTATEMENT THIRD, *supra* note 86, § 402(3); *Board of Trade v. Owens*, 1957 AC 602, 634; *State of Arizona v. Willoughby*, 114 I.L.M. 586 (Arizona). The most common application of this principle is in US anti-trust cases in which US courts have exercised jurisdiction over anti-competitive conduct committed abroad because of the effect on the US economy. *Hartford Fire Insurance v. California*, 509 U.S. 764 (1993) (justifying exercise of jurisdiction over foreign plaintiffs which conspired abroad to affect insurance coverage and rates in the US.); *see also The Wood Pulp Case*, [1988] E.C.R. 5193 (extraterritorial application of EU Competition law over the formation of a cartel outside of the European Union which sought to affect prices within it.); *S.S. Lotus case*, *supra* note 77, at 18 (validating the objective territoriality principal under customary international law); BROWNLIE, *supra* note 53, at 304.

committed,[108] whereas passive nationality jurisdiction over conduct that affects the interests of their nationals.[109] Lastly, a number of states have adopted statutes enabling their courts to exercise jurisdiction over some crimes regardless of nationality or territoriality under the principle of "universality."[110] Universal jurisdiction is legitimized where the nature of the crime creates a legal right, if not obligation, in all states to exercise jurisdiction over the act.[111]

Opponents to the Rome Statute argue that the ICC's jurisdiction does not reflect any of the traditional bases of criminal jurisdiction.[112] That is to say that the ICC does not exercise *actual* territorial or nationality jurisdiction, but rather *delegated* territorial or national jurisdiction.[113] Because the delegation of territorial, nationality, or universal jurisdiction substantially affects its characteristics, delegated jurisdiction does not continue the widespread acceptance that actual jurisdiction has received.[114]

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[108] *See* Harvard Research, *supra* note 105, at 519-23; RESTATEMENT THIRD, *supra* note 86, § 402(2); BROWNLIE, *supra* note 53, at 303. For example, the Protect Act allows US courts to exercise jurisdiction over US residents and citizens for violating provisions on illegal sexual contact with minors abroad. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act, Pub. L. No. 108-21, § 401(b)(1) (2003).

[109] Probably the most famous articulation of the passive personality principle is found in the French Criminal Code. *See* CODE DE PROCEDURE PENALE [C. PR. PEN.] art. 689-1 [Penal Code] (1988) ("Any foreigner who, outside the territory of the Republic, commits a felony, either as perpetrator, or as accomplice, may be prosecuted and tried according to French law, when the victim of this felony is of French nationality.") *translated in* THE FRENCH CODE OF CRIMINAL PROCEDURE (Gerald L. Kock & Richard S. Frase trans., rev. ed.) (1988). Out of all the theories of jurisdiction listed above, the passive personality principle has received the most amount of criticism, particularly since it conflicts with theories of territoriality and active personality which are more vested in notions of state sovereignty. *See* BROWNLIE, *supra* note 53, at 303; Harvard Research, *supra* note 105, at 579; RESTATEMENT THIRD, *supra* note 86, § 402 cmt. g; RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 30(2) (1965).

[110] *See generally Princeton Project on Universal Jurisdiction* (Princeton University Program in Law and Public Affairs, 2001); *see also* Harvard Research, *supra* note 105, at 563; RESTATEMENT THIRD, *supra* note 86, § 404; BROWNLIE, *supra* note 53, at 304. Article 23 of the Spanish 1985 Law on Judicial Power provides that Spanish courts have jurisdiction over crimes committed outside of Spain if they constitute crimes which Spain is obligated to prosecute under custom or international treaties, Sentence of the Constitutional Tribunal of Spain in the Guatemala Genocide Case, Second Chamber of the Constitutional Tribunal, Sep. 26, 2005, *obtainable at http://www.derechos.org/nizkor/guatemala/doc/tcgtm1.html*; Decision of the Audiencia Nacional (Sala de lo penal) of 13 December 2000 (genocide in Guatemala), *available at* http://www.icrc.org/ihl-nat.nsf (last visited Feb. 21, 2006).

Article 6 of the German Penal Code, which provides for universal jurisdiction over genocide, crimes against humanity and war crimes even when the crime has been committed abroad and has no link to Germany, Code of Crimes Against International Law, sec. 153f, *available at* http://www.bmj.bund.de/frames/eng/service/legislation_plans/10000582/index.html (last visited Jan. 27, 2006).

Prior to legislative restrictions imposed by the Belgian legislature in 2003, the Law of 16 June 1993 permitted Belgian courts to have jurisdiction over grave breaches to the 1949 Geneve Conventions no matter where the offences were committed or by whom. *See* Loi relative à la repression des violations graves de droit international humanitaire, Art. 3 §§ A-B (1999), *published in* Moniteur Belge, Mar. 23, 1999. Belgium's new law now requires either the presence of the defendant or that the victim either be Belgian or have resided in Belgium for at least three years when the alleged crimes took place. 5 August 2003 Act on Grave Breaches of International Humanitarian Law, Moniteur Belge, 7 Aug. 2003, pp. 40506 et. seq.

For more cases and discussion on the application of universal jurisdiction *see also* Gabriel Bottini, *Universal Jurisdiction After the Creation of the International Criminal Court*, 36 N.Y.U. J. INT'L L. & POL. 503 (2004); Bartram S. Brown, *The Evolving Concept of Universal Jurisdiction*, 35 NEW ENG. L. REV. 383, 321-92 (2001); Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L. J. 183 (2004); Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988); Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311 (2001).

[111] *See Barcelona Traction, Light and Power Co. Ltd.* (Belg. v. Spain), 1970 I.C.J. 3, 42 (Feb. 5); Sentence of the Constitutional Tribunal of Spain in the Guatemala Genocide Case, Second Chamber of the Constitutional Tribunal, Sep. 26, 2005, *available at* http://www.derechos.org/nizkor/guatemala/doc/tcgtm1.html*; see also* BASSIOUNI & WISE, AUT DEDERE, AUT JUDICARE, *supra* note 19, at 34; Bassiouni, *Obligatio Erga Omnes*, *supra* note 67, at 63; G.C. ROZANKIS, THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES (1976); ANDRE DE HOOGH, OBLIGATION ERA OMNES AND INTERNATIONAL CRIMES (1996).

[112] *See* Morris, *High Crimes and Misconceptions*, *supra* note 17, at 26-27.

[113] *See id.*; Madeline Morris, *Terrorism: The Politics of Prosecution*, 5 CHI. J. INT'L L. 405, 417 (2005); Madeline Morris, *Terrorism and Unilateralism: Criminal Jurisdiction and International Relations*, 36 CORNELL INT'L L.J. 473, 485 (2004) [hereinafter Terrorism and Unilateralism].

[114] David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47, 65-66 (2001-02).

Subsequently, while states do have a right under customary international law to exercise jurisdiction over non-nationals who commit crimes on their territory, delegation of that authority to an international court has not reached the level of customary international law absent the consent of the state of nationality.[115]

Whether or not the Court's exercise of jurisdiction comports with norms of customary international law depends on the theory of jurisdiction underlying the Rome Statute. Subsequently, there are two fundamental questions that need to be addressed on whether the jurisdiction of the ICC is "universal" or consent-based, and alternatively whether either is reflective of customary international law.[116] In other words, there are two independent issues: first, whether universal jurisdiction over non-state actors for the crimes under the ICC's subject matter jurisdiction are reflective of customary international law. Secondly, whether exercise of territorial jurisdiction by the ICC is a delegation of state authority, and if so, whether it is customary.

i. The Rome Statute and the Universality Theory of Jurisdiction

1. The Continuing Importance of Universal Jurisdiction under the Rome Statute

The negotiating history of the Rome Statute indicates that the consent regime was layered upon the ICC jurisdiction, such that without the consent of states under article 12, the court does not have the authority to exercise jurisdiction.[117] The inclusion of article 12 precludes any discussion of universality since the framers clearly did not intend the ICC to be exercising universal jurisdiction.[118] However, a number of proponents to the Rome Statute continue to argue that universal jurisdiction justifies the ICC's exercise of jurisdiction over non-party nationals for a number of reasons.[119] First, the Rome Statute authorizes the ICC to exercise jurisdiction over non-party nationals where the Security Council has referred the matter under its Chapter VII powers.[120] Assumingly, therefore, if there is no territorial or nationality nexus the ICC would inevitably be exercising universal jurisdiction. Yet, even opponents to the Rome Statute do not dispute the validity of the ICC's authority over persons referred to them by the Security Council.

Second, the territoriality and nationality requirements are self-imposed limitations. By its very definition, universal jurisdiction is not limited to states.[121] The very notion of universal jurisdiction

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[115] Morris, *High Crimes and Misconceptions*, *supra* note 17, at 29 ("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.")

[116] Leila N. Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 410 (2000)

[117] *See* Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT'L L. 2, 10 (1999).

[118] A number of scholars have documented that proposals by a small number of states seeking to ground the ICC's jurisdiction on universality were expressly rejected by the majority of states in the preparatory committee. *See* The Jurisdiction of the International Criminal Court: An Informal Discussion Paper Submitted by Germany, U.N. Doc. A/AC. 249/1998/DP. 2 (1998); Christopher K. Hall, *The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 92 A.J.I.L. 124, 131 (1998); Christopher K. Hall, *The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 92 A.J.I.L. 548, 549-50 (1998) (detailing the German proposal during the preparatory committee calling for universal jurisdiction); Jonathan I. Charney, *Progress in International Criminal Law?*, 93 A.J.I.L. 452, 456 (1999); Morris, *Terrorism and Unilateralism*, *supra* note 113, at 481; David J. Scheffer, *The United States and the International Criminal Court*, 93 A.J.I.L. 12, 17-18 (1999).

[119] *See* Scharf, *supra* note 26, at 80; Sadat & Carden, *supra* note 116, at 410-14.

[120] Rome Statute, *supra* note 14, at art. 13(b).

[121] *See* Darryl Robinson, *The Elements of Crimes Against Humanity*, *in* THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 57 (Roy S. Lee ed., 2001) ("Universal jurisdiction, and even international prosecution if necessary, is justified by the scale and gravity of these atrocities and the involvement of a state or organization.")

means that all entities can exercise authority over the alleged conduct and accused as long as it comports with notions of due process. The universality theory is a catchall meant to prevent impunity for a select number of crimes that are *ex jure gentium*. Thus, the territoriality, nationality, and complimentarity requirements are conditions voluntarily imposed by states despite the "full range of jurisdiction available to them under customary international law."[122]

Lastly, some scholars have argued that universal jurisdiction has been delegated to the ICC by individual states.[123] Under customary international law, states can exercise jurisdiction over international crimes that have risen to the level of *jus cogens*. Subsequently, the authority over persons subject to state jurisdiction has been delegated to an international court under the theory of universality. In justifying delegated universal jurisdiction, a number of scholars point to the history of the Nuremburg trial and Tokyo trials.[124] In sum, although the Rome Statute is not grounded on universal jurisdiction, the abovementioned arguments require analysis of the customary status of universal jurisdiction as embodied in the Rome Statute.

2. *The Rome Statute's Embodiment of Customary Principles on Universality*

Following World War II, many scholars argued that the existence of *jus cogens* crimes paved the way for a universal obligation to prosecute, or at least a right to do so.[125] Multi-lateral conventions and treaties were drafted, crystallizing the early framework for universal obligations and duties.[126] Both the Nuremberg and Tokyo trials, as well as the passage of the Geneva Conventions, reflected consensus amongst states that there existed crimes which by their grave nature, inherently carried obligations shared by all states.[127] Moreover, the gradual development of international and hybrid courts as well as the territorial expansion of treaty-body commissions is reflective of the progressive importance of universal promotion of human rights and criminal accountability. Thus, as Professor Bassiouni states, "the growth of international criminal law has expanded the application of the universality theory of jurisdiction."[128]

The idea that universal jurisdiction is granted to crimes of an international character is that "even if it occurred outside its territory, even if it has been perpetrated by a non-national, and even if its nationals have not been harmed by [it]."[129] The character of the crimes under the ICC's subject matter jurisdiction have largely been considered universal and a threat to "international peace and security."[130]

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[122] *See* Scharf, *supra* note 26, at 77 ("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.")

[123] Charney, *supra* note 118, at 456 fn. 29. ("If a state has universal jurisdiction over a suspect, it may choose to prosecute that person in its domestic courts or to delegate that authority to other courts, including the ICC (assuming relevant human rights are protected."); Nicolaos Strapatsas, *Universal Jurisdiction and the International Criminal Court*, 29 MAN. L.J. 1, 7-11 (2002).

[124] *See infra*, text accompanying notes 181-195.

[125] BASSIOUNI, INTERNATIONAL CRIMINAL LAW, *supra* note 67, at 367.

[126] As Edward Wise and Cherif Bassiouni note, the earliest codification of the duty to extradite or prosecute emerged in the International Convention for the Suppression of Counterfeiting Currency, Apr. 20, 1929, 112 L.N.T.S. 371, *see generally* BASSIOUNI & WISE, AUT DEDERE, AUT JUDICARE, *supra* note 19. Between the first and second World Wars two other agreements were additionally drafted, imposing the duty to extradite or prosecute: the Convention for the Suppression of Illicit Traffic in Dangerous Drugs, art. 7, 8, June 26, 1936, 198 L.N.T.S. 299 and the Convention for the Prevention and Punishment of Terrorism, art. 9, 10, 19, Nov. 16, 1937, L.N.O.J. 23 (1938).

[127] *See generally* Bassiouni, *Universal Jurisdiction for International Crimes*, *supra* note 90, at 81.

[128] BASSIOUNI, INTERNATIONAL CRIMINAL LAW, *supra* note 67, at 367. A number of scholars have documented the overwhelming evidence that indicates that the exercise of universal jurisdiction is allowed by customary international law. CASSESE, *supra* note 4, at 293-95; Even critics to the Rome Statute do not dispute the validity of universal jurisdiction to international crimes.

[129] ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT, 57 (1994)

[130] *See* S.C. Res. 955, U.N. SCOR, 49th Cess., at 20, U.N. Doc. S/INF50 (1996); Statement of France, U.N. SCOR, 49th Sess., 3453rd mtg. at 3, U.N. Doc. S/PV 3453 (1994); Statement of the Czech Republic, U.N. SCOR, 49th Sess., 3453rd

However, some scholars have attacked this presumption. Specifically, US Ambassador David Scheffer and Professor of international law, Madeline Morris, have argued that "not all of the crimes within the subject matter jurisdiction of the Court in fact enjoy universal jurisdiction under customary international law" and:

> "…it is implausible for a state party or a consenting non-party state to delegate to a treaty-based international court the right to prosecute a mixture of crimes, some of which in a domestic setting are crimes of universal jurisdiction but other of which, even in a domestic setting, are not crimes of universal jurisdiction."[131]

There is some validity to this argument. The Rome Statute enables the ICC to exercise jurisdiction over war crimes in non-international armed conflicts under Art. 8(2)(c). A number of scholars have largely contested the customary status of universal jurisdiction over war crimes in a non-international armed conflict. In fact, the appellate chamber for the International Criminal Tribunal for Former Yugoslavia ("ICTY") noted in *Prosecutor v. Tadic* that States ratifying the Geneva Convention did not want to extend universal jurisdiction to non-international armed conflicts in order to preserve national sovereignty.[132] Subsequently, the ICC would not have universal jurisdiction over crimes committed in a non-international armed conflict.

However, the Rome Statute is the product of a collaborative effort by states to specifically define custom and is evidence of state practice. In addition, the vast majority of scholars and courts have held that the four crimes under the subject matter jurisdiction of the ICC are *jus cogens* norms, thus satisfying the *opinio juris*.[133] As Dr. Leila Sadat notes, "The Rome Statute embodies prescriptive norms for the international community as a matter of substantive criminal law."[134]

Universal jurisdiction is an extension of the duty to extradite or prosecute.[135] Under contemporary international law, the state of nationality has no right to exercise exclusive jurisdiction over acts committed by its nationals abroad.[136] In accordance with this fundamental principle of international law, a court may exercise jurisdiction against any individual unless it can be shown that this violates a prohibitive rule of international law.[137] The duty to extradite or prosecute set out in the four Geneva Conventions, by virtue of the common article regarding the repression of "grave breaches," is regarded as a customary obligation.[138] As defined in the Conventions "grave breaches" includes serious violations of the laws of war; by which is subsequently considered a violation of the "laws of nations" and *jus*

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mtg. at 6-7, U.N. Doc. S/PV 3453 (1994); Statement of the United Kingdom, U.N. SCOR, 49th Sess., 3453rd mtg. at 6, U.N. Doc. S/PV 3453 (1994); Statement of China, U.N. SCOR, 49th Sess., 3453rd mtg. at 6, U.N. Doc. S/PV 3453 (1994); Statement of Pakistan, U.N. SCOR, 49th Sess., 3453rd mtg. at 10, U.N. Doc. S/PV 3453 (1994); *see also* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 21 (2001).

[131] *Scheffer Address*, *supra* note 20, at 3; Morris, *High Crimes and Misconceptions*, *supra* note 17, at 28

[132] *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, at 80-83.

[133] Scharf, *supra* note 26, at 80; Sadat & Carden, *supra* note 116, at 406-07; Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 555 (1995).

[134] Sadat & Carden, *supra* note 116, at 406; *see also* Johan D. van der Vyver, *Torture as a Crime under International Law*, 67 ALB. L. REV. 427, 437 (2003) (arguing that the :crimes within the jurisdiction of the ICC are crimes under customary international law and subject to universal jurisdiction").

[135] BASSIOUNI & WISE, AUT DEDERE, AUT JUDICARE, *supra* note 19, at 20, 43-44.

[136] Bartram S. Brown, *U.S. Objection to the Statute of the International Criminal Court: A Brief Response*, 31 N.Y.U. J. INT'L L & POL. 855, 871 (1999).

[137] *S.S. Lotus case*, *supra* note 77, at 18; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Rep. 52; *Hadamar Trial*, 1 L. Rep. Of Trials of War Criminals 46 (1949).

[138] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Aug. 12, 1949, 75 U.N.T.S. 31, Art. 49; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, Aug. 12, 1949, 75 U.N.T.S. 85, Art. 50; *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 75 U.N.T.S. 135, Art. 129; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Aug. 12, 1949, 75 U.N.T.S. 287, Art. 146; *Protocol I Additional to the Geneva Conventions of 12 August 1949*, Art. 85; and *Relating to the Protection of Victims and Armed Conflicts*, June 10, 1977, 16 I.LM. 1391 (1977).

cogens.[139] Consequently, a State's refusal to extradite or punish a person accused or convicted of war crimes and "crimes against humanity" is contrary to the United Nations Charter and to generally recognized norms of international law.[140] In such that war crimes are crimes *ex jure gentium,* they are thus triable by the courts of all States.[141] Subsequently, national courts would have the power to exercise jurisdiction over non-state nationals.[142] Under this theory, the ICC's exercise of jurisdiction would be reflective of current customary norms allowing universal jurisdiction for crimes considered a as a threat to mankind.

ii. The Territoriality theory and the Rome Statute

The territorial principle is one of the oldest and well-established theories of jurisdiction in criminal law. As Christopher Blakesley notes, "[c]riminal law may be said to be rooted in the conception of law enforcement as a means of keeping peace within the territory."[143] The notion that states have jurisdiction over all conduct within their territory regardless of the offender's nationality is a direct extension of state sovereignty.[144] As Professor Ian Brownlie notes, "[t]he principal corollaries of the sovereignty and equality of states are: (1) a jurisdiction, prima facie exclusive, over a territory and the permanent population living there; (2) a duty of non-intervention in the area of exclusive jurisdiction of other states."[145] While states may have legal interests regarding their nationals, those interests are not exclusive when the national's conduct is abroad.[146] Those interests, however, may be concurrent with the territorial state.[147]

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[139] Article 147 of the Fourth Geneva Convention; *Tadic*, *supra* note 132, at 96-137, reprinted in 35 I.L.M. 32 (1996); *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995); Restatement (Third) of Foreign Relations Law of the United States § 702 (1986).

[140] *Principles of International Co-operation in the Detention, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, GA Res. 3074 (XXVIII), 28 UN GAOR Supp. (No. 30) at 78, UN Doc. A/9030, Dec. 3, 1973; GA Res. 2840, (XXVI) 26 UN GAOR Supp. (No. 28), at 88, UN Doc A/8429 (1971).

[141] *Judgment 461*, 22 Trial of the Major War Criminals, (1948), *reprinted in* 41 AJIL 172, 216 (1947); The Charter and Judgment of the Nürnberg Tribunal, UN Doc. A/CN.4/5 (1949); *The Hostage Case*, United States v. List et al., 11 CCL Trials (1948) at 1241; *Almelo Trial*, 1 L. Rep. of Trials of War Criminals 35, 42 (1949); *In re Eisentrager*, 14 L. Rep. of Trials of War Criminals 8, 15 (1949); *The Eichmann Case*, Attorney Gen. of Israel v. Eichmann, 36 ILR 18, 39, (Isr. Dist. Ct. – Jerusalem 1961), *aff'd*, 36 ILR 277 (Isr. Sup. Ct. 1962) at 50.

[142] *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570, 974 U.N.T.S. 177, Art. 6; *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents*, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. 8532, art. 3; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dec. 7, 1984, U.N. Doc. A/Res/39/46, art. 5.

[143] Christopher L. Blakesley, *Brief Overview of the Traditional Bases of Jurisdiction over Extraterritorial Crime*, *in* INTERNATIONAL CRIMINAL LAW: PROCEDURAL AND ENFORCEMENT MECHANISMS 33, 43 (M. Cherif Bassiouni ed., 1999).

[144] *See The Schooner Exch. V. McFaddon*, 11 U.S. 116, 136 (1812) ("The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation not imposed by itself…All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself."); *The Antelope*, 23 U.S. 66, 123 (1825); ROGER MERLE & ANDRE VITU, TRAITÉ DE DROIT CRIMINEL 371 (4th ed. 1989) (describing traditional territory principle in civil law countries as "affirm[ing] the territoriality of criminal law (*lex loci delicti*) is to proclaim that penal law applies to all individuals whatever their nationality or that of their victims, who have committed an offence on the territory of the State in which the law is in force…); BROWNLIE, *supra* note 53, at 298.

[145] BROWNLIE, *supra* note 53, at 287.

[146] *See* Bartram S. Brown, *U.S. Objections to the Statute of the International Criminal Court: A Brief Response*, 31 N.Y.U. J. INT'L L. & POL. 855, 870 (1999). As Professor Scharf notes, "When the territorial state prosecutes such persons, the state of the nationality of the accused may seek to intercede diplomatically on the basis of comity, but it has no legal right under international law to induce the territorial state to refrain from prosecuting or to impel it to agree to resort to interstate dispute resolution." Scharf, *supra* note 26, at 75.

[147] The question, therefore, is whether concurrent jurisdiction by non-party states is a legal right modified by the Rome Statute. The principle of complementarity codified in Article 17 makes this issue moot since it preserves concurrent jurisdiction, and gives it deference, to "a State which has jurisdiction over [the conduct or perpetrator], unless the State is unwilling or unable genuinely to carry out the investigation or prosecution." *See* Rome Statute, *supra* note 14, at art. 17; *Case of the Monetary Gold Removed from Rome in 1943* (Italy v. Fr., U.K. & U.S.), 1954 I.C.J. 19, 32 (June 15) [hereinafter Monetary Gold]; *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 18; *Treatment in Hungary of Aircraft and Crew of United States of America* (U.S. v. U.S.S.R

The rejoinder to this argument is that the ICC does not possess "territory" *per se*. Territorial jurisdiction is an extension of a State's territorial sovereignty. Without territorial interests, it is hard to believe that the ICC is exercising *actual* territorial jurisdiction akin to that of national states. Opponents to the Rome Statute argue that the ICC is exercising *delegated* jurisdiction.[148] Proponents of the ICC sidestep this argument. As Professor Bassiouni notes:

> "The ICC is not a substitute for national criminal jurisdiction and does not supplant national criminal justice systems, but rather is 'complementary' to them.[149] The ICC does no more than what each and every state in the international community can do under existing international law. It is an expression of collective action by states parties to a treaty that establish an institution to carry out justice for certain international crimes. The ICC is therefore an extension of national criminal jurisdiction."[150]

However, even Bassiouni's argument falls short. Even if the ICC is not a substitute and is co-terminus with state rights under traditional doctrines of jurisdiction, the exercise of jurisdiction by an international court has long been treated differently than the exercise of jurisdiction by national courts.

The basis of jurisdiction in public international law relies almost strictly on the consent of the adjudicating parties.[151] This requirement drastically distinguishes cases arising in international courts and those in national settings.[152] Even in the context of private disputes by individuals alleging human rights violations against states, regional human rights courts have required consent before possessing jurisdiction over controversies. The International Court of Justice has even inferred that in cases alleging peremptory norms of international law, the jurisdiction of international court adjudicating disputes involving sovereign state interests is still subject to the consent of those states whose interests are impacted.[153] Therefore, there is a strong presumption against the exercise of jurisdiction by international courts absent consent.

However, this argument again, presumes that there is a legal interest owned to states of nationality that is being violated. In the *Case Concerning East Timor*, the ICJ refused to exercise jurisdiction because determining a dispute between Portugal and Australia over the non-self governing territory of East Timor would impact the legal interests of Indonesia, a third party who had not consented to the Court's jurisdiction.[154] Following the departure of Portuguese forces from East Timor, Indonesia unlawfully occupied the area and concluded a treaty with Australia regarding the delimitation of the continental shelf.[155] The Court concluded that Portugal's claim "cannot be assessed without first entering into the question why it is that Indonesia could not lawfully have concluded the 1989 Treaty, while Portugal allegedly could have done so."[156] Similarly, in the *Case of Monetary Gold Removed from Rome*

), 1954 I.C.J. 103 (July 12); *Aerial Incident of March 10th, 1953* (U.S. v. Czech Rep.), 1956 I.C.J. 6 (Mar. 14); *Aerial Incident of 7 October 1952* (U.S. v. USSR), 1956 I.C.J. 9 (Mar. 14). The principle of diplomatic protection confers the right on states to bring claims on behalf of their nationals for alleged breaches of international law. The principle does not grant states exclusive jurisdiction over their nationals. Such principle would be antithetical to international customs relating to criminal jurisdiction and territoriality. While one can argue that states of nationality and territoriality contain concurrent jurisdiction, there is no established hierarchy that would grant states of nationality rights antecedent to territorial states. Even if a hierarchy of jurisdiction existed, it would almost certainly sway in favour of territorial states.

[148] *See supra*, text accompanying notes 112-115.

[149] Rome Statute, *supra* note14, at arts. 1, 17.

[150] BASSIOUNI, INTERNATIONAL CRIMINAL LAW, *supra* note 67, at 500.

[151] *Monetary Gold*, *supra* note 147, at 32; *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 18; *Treatment in Hungary of Aircraft and Crew of United States of America* (U.S. v. U.S.S.R), 1954 I.C.J. 103 (July 12); *Aerial Incident of March 10th, 1953* (U.S. v. Czech Rep.), 1956 I.C.J. 6 (Mar. 14); *Aerial Incident of 7 October 1952* (U.S. v. USSR), 1956 I.C.J. 9 (Mar. 14).

[152] *See infra*, text accompanying notes 191-192.

[153] *See Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)* 1996 ICJ Rep. 52, (holding that the character of State obligation and the gravity of the crime are distinct from questions of jurisdiction.); *Case Concerning East Timor* (Port. v. Austl.), 1995 I.C.J. 90, 120 (June 30), para. 29 [hereinafter East Timor] (stating that "the *erga omnes* character of an obligation and the rule of consent to jurisdiction are two different things").

[154] *East Timor*, *supra* note 153.

[155] *Id.* at 94.

[156] *Id.* at 102.

in 1943, the ICJ held that Albania held title to gold that was in dispute by a number of countries.[157] As such, Albania's "legal interests would ... form the very subject-matter of the decision."[158] The Court declined to exercise jurisdiction because Albania did not consent to its jurisdiction.[159]

States of nationality are not a necessary party to disputes involving the state of territoriality and the accused. The state of territoriality can exercise jurisdiction with or without the consent of the nationality state.[160] More importantly, the state of territoriality has the right to choose which forum to adjudicate the criminal under as long as principles of due process are comported with. The territorial principle is based off the exclusive rights of states to adjudicate disputes within their borders, however they wish, so long as it is consistent with norms of international human rights.[161] Subsequently, if the state of nationality has no right to prevent jurisdiction by the state of territoriality, nor does it have that right when the state of territoriality removes the case to an international court.

B. The status of "consent" based jurisdiction

Opponents to the Rome Statute, however, argue that jurisdiction to the ICC is delegated and not actual.[162] Even if the state of territoriality does not require consent by the state of nationality, the same cannot be said when judicial authority is delegated to an international body. In light of general principles of international law limiting the exercise of exorbitant jurisdiction by international courts, whenever any legal interest by a state is affected the ICC must have that state's consent. The question opponents to the Rome Statute ask is whether each basis of jurisdiction stipulated under Article 13 of the Rome Statute, comports with the consent requirement.[163]

i. Consent-based jurisdiction through the Security Council's Chapter VII powers

Consent-based jurisdiction over non-party nationals can be theoretically conferred by the Security Council under its Chapter VII powers. Article 24 of the UN Charter charges the Security Council with recognizing and responding to threats to international peace and security.[164] As such, the Security Council is the only UN body with legal authority to bind all member states.[165] Pursuant to Article 48 of the UN Charter, all states which have ratified the UN Charter have consented *ipso facto* to any action by the Security Council to "maintain international peace and security" including the establishment of international criminal tribunals.[166] Subsequently, acts taken by the Security Council to create criminal tribunals under Chapter VII confers binding consent by all parties to the UN Charter.[167] Thus, when the Security Council decided to pass a resolution creating the ICTY and ICTR under its Chapter VII powers, it did so with the consent of all nation-states who had ratified the Charter.[168]

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[157] *Monetary Gold*, *supra* note 147, at 32.

[158] *Id.*

[159] *Id.*

[160] *See Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 921 (1984) ("because "the prerogative of a nation to control and regulate activities within its boundaries is an essential definitional element of sovereignty.")

[161] *See Morguard Investments Ltd. v. De Savoye* [1990] 3 S.C.R. 1077 (Can.), at 1095-96 ("The common law regarding the recognition and enforcement of foreign judgments is firmly anchored in the principle of territoriality as interpreted and applied by the English courts in the 19th Century... . This principle reflects the fact, one of the basic tenets of international law, that sovereign states have exclusive jurisdiction in their own territory.");

[162] *See supra*, text accompanying notes 112-115.

[163] Rome Statute, *supra* note 14, at art. 13.

[164] United Nations Charter, *supra* note 50, at art. 24.

[165] *Id.* at art. 25.

[166] *Id.* at art. 48.

[167] *See* Michael A. Tunks, Note, *Diplomats or Defendants? Defining the Future of Head-of-State Immunity*, 52 DUKE L.J. 651 (2002) (arguing that state consent to Security Council enabled the ICTY and ICTR to prosecute head of state without violating the "principle that no head of state may be put on trial without the consent of his home country.")

[168] Morris, *High Crimes and Misconceptions*, *supra* note 17, at 36; U.N. S.C. Res. 827, U.N. Doc. S/Res. 827 (1993); U.N. S.C. Res. 955, U.N. SCOR, 3453d mtg. (1994)

In 1993, the Secretary-General's report setting out the draft Statute of the ICTY, specifically noted that it was an enforcement measure taken by the Security Council under its Chapter VII powers for the "restoration and maintenance of international peace and security in the territory of the former Yugoslavia."[169] Similarly, the ICTR trial chamber noted in *Prosecutor v. Akayesu*, that by acting under Chapter VII in creating the tribunal, the Security Council "charges all States with a duty to cooperate fully with the Tribunal and its organ."[170] As such, the bases of jurisdiction for the two international criminal tribunals were never founded on universal jurisdiction, *per se*, but rather the delegation of national jurisdiction properly evoked through the Security Council's Chapter VII powers.[171] Similarly, the ICC's exercise of jurisdiction under article 13(b), referral by the Security Council, is consistent with general principles of international law.

However, the notion that the ICTY and ICTR function by state consent because they are created by the Security Council's Chapter VII powers is not only contentious, but also disputed by the tribunals themselves. The trial chamber for the ICTY itself distinguishes treaty-based tribunals which are the "consensual act of nations" with Chapter VII resolutions by the Security Council.[172] Treaty-based courts and commissions, as evidenced by the various regional human rights courts and recent national hybrid courts, are created as contracts between nations or as between a nation and international organizations.[173] While the Security Council operates under the express authority of nations under its Chapter VII powers, state parties ratifying the UN Charter have different perceptions as to the scope of the Security Council's powers. Moreover, the veto power allocated to permanent members dramatically changes the political structure of all Security Council resolutions. While States enters into treaties on an equal basis, the Security Council often authorizes resolutions based on political negotiations between permanent members. Thus, the representative limitations in Security Council resolutions deprives them of the consensual effect that treaties possess. While this distinction may not invalidate the two tribunals' jurisdiction, it indicates that the ICTY and ICTR's jurisdiction may not be based on the conferral of national consent but rather on the Security Council's "broad discretion in exercising its authority under Chapter VII."[174] In either case, there is ample state practice and *opinio juris* to support the Security Council's authority to create an international court and confer jurisdiction to it.[175]

The ICC differs from the ICTY and ICTR in a number of important respects. First, the ICC was not a Security Council enforcement measure made under Chapter VII. Rather it is a product of treaty law whose jurisdiction depends on the specific consent of state parties. To that extent, the ICC, as an institution, is formed on the consensual act of parties to the Rome Statute. Second, consistent with the consensual nature of the ICC's jurisdiction, the Court possesses a principle of "complimentarity."[176] The

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[169] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 & Add.l, para. 28 (1993); see also Statute of the International Criminal Tribunal for the Former Yugoslavia, SC Res. 827, annex, pmbl. (May 25, 1993), reprinted in 32 ILM 1203 (1993) (noting that the Statute was passed pursuant to the Security Council's Chapter VII powers); *see also* Kenneth S. Gallant, *Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts*, 48 VILL. L. REV. 763, 784 (2003).

[170] *Prosecutor v. Akayesu*, Judgment, No. ICTR-96-4-T (Sep. 2, 1998) at para. 2

[171] *Id.*

[172] *Prosecutor v. Tadic*, Decision on Jurisdiction, No. IT-94-1 (Aug. 10, 1995) at para. 2, 6-7 (upholding tribunal's jurisdiction on the basis of Security Council's Chapter VII authority to maintain international peace and security).

[173] Aside from the jurisdictional differences between international courts founded on treaties and those created by the Security Council under Chapter VII, there are also practical differences. A treaty-based court does not have primacy over domestic proceedings in third states, whereas a court created under chapter VII is legally binding on all member states.

[174] *Id.* at para. 7; *see also* Statement of the Rapporteur of Committee III/3, Doc. 134, III/3/3, 11 U.N.C.I.O. Docs. 785 (1945) (indicating that the drafters of the UN Charter intended "[w]ide freedom of judgment is left as regards the moment [the Security Council] may choose to intervene and the means to be applied, with sole reserve that it should act 'in accordance with the purposes and principles of the [United Nations]." The lack of direct state consent may also explain why the two international tribunals have faced greater difficulty in securing compliance with arrest warrants and requests for information as compared to treaty committee and courts

[175] *See Prosecutor v. Tadic*, Appeal on Jurisdiction, No. IT-94-1-AR72 (Oct. 2, 1995).

[176] Rome Statute, *supra* note 14, at arts. 1, 17.

ICC may not exercise jurisdiction unless national courts are "unwilling or unable genuinely to carry out the investigation or prosecution."[177] Additionally, the ICC may not require national courts to defer to its competence under any circumstance. The statutes for the ICTR and ICTY, on the other hand, give the Tribunals "primacy over national court"[178] presumably because its powers were conferred to it by the Security Council under Chapter VII.[179] Theoretically, the tribunals may require national courts to confer jurisdiction over any dispute in which the tribunals may have jurisdictional competence over. Even in cases where the ICC is referred cases by the Security Council under Chapter VII; there is no provision that would allow the ICC to exert primacy over national courts. Its provisions on complimentarity would still bind the ICC. Third, the ICC's jurisdictional limitation is not co-terminus to that of the Security Council, even when a case is referred to it under Art. 13(b). On the other hand, the ICTY and ICTR's jurisdiction are limited by the Security Council's jurisdictional limitations. Thus, the Tribunal's jurisdiction cannot exceed that of the Security Council's.[180]

Whether or not referrals to the ICC or the creation of international criminal tribunals, by the Security Council under Chapter VII represents the "consensual act of nations" does not negate the jurisdictional validity of such tribunals or referrals. Regardless of how one perceives the power of the Security Council, there has been widespread acceptance by states inferring that its creation of international tribunals other is permissible under customary international law. Its delegation of authority to an independent international criminal court to adjudicate claim would equally be justified under a moderate perception of the Security Council's broad powers and its legitimacy under principles of international law. Subsequently, the legal basis of the ICC under article 13(b) to adjudicate cases referred to it by the Security Council under its Chapter VII powers seems well grounded, even if not supported under the traditional principle of consent.

ii. Consent-based jurisdiction by delegation of territorial jurisdiction

More contentious then whether the ICC's exercise of jurisdiction through Security Council referral is valid under customary international law is whether the delegation of territorial jurisdiction, as reflected by Article 12(2), is reflective of customary international law. The theory rests on the twin jurisdictional platforms of the ICC, territory and nationality. Because the Rome Statute is ambiguous as to whether it is exercising universal jurisdiction or the delegated jurisdiction of states, and the preparatory documents are silent on the issue, many have argued that the ICC's jurisdiction a reflection of both.[181] Under rules of customary international law, every state clearly has the power to exercise jurisdiction over

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[177] *Id.*

[178] Art. 8(2), Statute of the International Criminal Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994); Art. 9(2), Statute of the International Tribunal, adopted by S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 6, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1203 (1993).

[179] There are some who argue that the ICTY and ICTR primacy over that of national courts is based on the application of "universal jurisdiction" *see Tadic*, at paras. 42 (stating that the crimes in the ICTY statute are "crimes which are universal in nature, well recognized in international law as serious breaches of international humanitarian law, and transcending the interest of any one State.") As Dr. Sadat similarly has noted that the "precedent" established by the two tribunals was extended to the Rome Statute and "permit[s] the international community as a whole, in certain limited circumstances, to supplement, or even displace, ordinary national laws of territorial application with international laws that are universal in their thrust and unbounded in their geographical scope." *See* Sadat & Carden, *supra* note 116, at 407.

[180] *Appeals Chamber, para. 28.* (stating "the Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. . . . Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization"); *See also* Joshua M. Koran, *An Analysis of the Jurisdiction of the International Criminal Tribunal for War Crimes in the Former Yugoslavia*, 5 ILSA J INT'L & COMP. L. 43, 61-63 (1998); as such the operative "life span" of each tribunal is linked "the restoration and maintenance of international peace and security in the territories of former Yugoslavia and Rwanda." In addition, neither the ICTY or the ICTR can theoretically create "new international law."

[181] Morris, *High Crimes and Misconceptions*, *supra* note 17, at 26-27; Scharf, *supra* note 26, at 70.

its nationals or persons who commit acts within its territory.[182] The question is whether a state may delegate that power to an international court, and whether that delegation is equally valid under customary international law. The practice of both the Tokyo and Nuremberg Tribunals sheds light on this analysis.[183]

Opponents argue that the Tokyo and Nuremburg Tribunals are the only international criminal courts that have exercised jurisdiction without Security Council power and thus serve as a basis for determining whether consent of the state of nationality was a requirement for adjudication.[184] Both the Tokyo and Nuremburg Tribunals were established following the Second World War in order to provide legal sanction over the conduct of German and Japanese nationals. However, the tribunals were established by the major wartime powers, mainly the United States, United Kingdom and the Soviet Union. Both the Nuremburg and Tokyo courts recognized that "[i]n the exercise of their right to create tribunals for such a purpose [(i.e., for the trial and punishment of war criminals)] and in conferring power on such tribunals[,] belligerent powers may act only within the limits of international law."[185] Thus, authority of third states to create jurisdiction over non-nationals was limited by principles of international law. As Professor John Pritchard notes:

> "The legitimacy of the Tokyo Trial…depended not only upon the number and variety of states that took part in the Trial but more crucially upon the express consent of the Japanese state to submit itself to the jurisdiction of such a court, relinquishing or at least sharing a degree or two of sovereignty in the process."[186]

While the Japanese government agreed to the prosecution of Japanese nationals before the Tokyo Tribunal in its Instrument of Surrender,[187] the argument is more attenuated with respect to the Nuremberg Court. The German Reich had never consented to the Nuremberg Court's exercise of jurisdiction over German nationals. Only if one agreed that the Allies following Berlin Declaration of June 5, 1945,[188] acted as the German sovereign, as opposed to occupying states, is an argument of consent tenable.[189] Only by accepting this logic can one conclude, as Professor Morris does, "the Nuremberg and Tokyo tribunals each, in different ways, based their jurisdiction on the consent of the state of nationality of the defendants."[190] As such, consent by the state of nationality is an essential requisite to the exercise of jurisdiction by any international court, including the ICC.

Morris also argues that there is a significant difference between the exercise of jurisdiction by states over persons who commit an act within their territories, and the delegation of that jurisdiction to an

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[182] *See supra*, text accompanying notes 143-161.

[183] *The Hostage Case*, *supra* note 141, at 1242

[184] Morris, *High Crimes and Misconceptions*, *supra* note 17, at 42-45; Madeline Morris, *Democracy and Punishment: The Democratic Dilemma of the International Criminal Court*, 5 BUFF. CRIM. L. R. 591, 594 (2002); Bruce Broomhall, *The United States and the International Criminal Court: Towards U.S. Acceptance of the International Criminal Court*, 64 LAW & CONTEMP. PROB. 141, 142 (2001); Thomas M. Franck & Stephen H. Yuhan, *The United States and the International Criminal Court: Unilateralism Rampant*, 35 N.Y.U. J. INT'L L. & POL. 519, 549 (2003); Lee A. Casey & David B. Rivkin, Jr., *The Limits of Legitimacy: The Rome Statute's Unlawful Application to Non-State Parties*, 44 VA. J. INT'L L. 63, 79-81 (2003).

[185] *United States v. Araki* (I.M.T. Far East, 1948), *reprinted in* 101 THE TOKYO MAJOR WAR CRIMES TRIAL: THE RECORDS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 48415, 48436 (R. JOHN PRITCHARD ED. 1998).

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

[187] *See* Sept. 2, 1945, 3 Bevans 1251. The Instrument of Surrender agrees that Japan would accept the provisions in the Potsdam Declaration of July 26, 1945 which in turn enforces the Cairo Declaration that includes the statement that "the ... allies are fighting this war to restrain and punish the aggression of Japan." *See* Communique, First Cairo Conference, Dec. 1, 1943, 3 Bevans 858; *see also* R. John Pritchard, The *International Military Tribunal for the Far East and Its Contemporary Resonances*, 149 MIL. L. REV. 25, 27-28 (1995).

[188] 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).

[189] Morris, *High Crimes and Misconceptions*, *supra* note 17, at 37.

[190] *Id.*

international court because it would disrupt international relations.[191] States allow other states to exercise jurisdiction over their nationals insofar as there is an option for diplomacy, extradition, and negotiation would be open between state actors. The process of negotiations and the tools of international relations are unavailable to a State whose nationals are given to an international court.[192] Therefore, the policy that guided state acceptance of extraterritorial jurisdiction over its nationals is not present where an international court exercises jurisdiction.

However, this is clear jurisprudence that where the state of nationality or the state of territoriality does not exercise jurisdiction over criminals who commit international crimes, that it is the obligation of all nation states to prevent immunity and promote prosecution.[193] This concept is an extension of the Nuremburg principle that "states may do together what any one of them could do separately."[194] Therefore, where one state may exercise jurisdiction over a non-national for crimes committed on their territory, so can states agree to enable an international court to do the same. There is nothing in customary international law that prevents countries or courts from exercising jurisdiction over non-nationals where they have committed crimes on their territory.[195]

CONCLUSION

The principle of *pacta tertiis* should not inhibit an international body from exercising jurisdiction over a criminal legally arrested by a state having proper jurisdiction. If anything, the principle simply prevents the provisions on state obligations under the Rome Statute from having any bearing against non-party states. Thus, for example, the Rome Statute can not create a legal basis requiring cooperation from non-party states, including extradition, mutual legal assistance, transfer of proceedings, etc.[196]

At best, it is unclear as to whether the ICC's exercise of jurisdiction over a non-party national would affect the legal interests of that state. No state has exclusive jurisdiction over the conduct of their nationals committed in other states. While recognizing permissible grounds to prescribe jurisdiction over the conduct of nationals abroad, the United States has never considered such jurisdiction to be exclusive.[197] If anything, states arguably have greater claims to jurisdiction over conduct within their territory, including exercising the discretion to prosecute the offender before an international body.

The ICC was established to prevent impunity by reinvigorating national institutions. It is the culmination of historical lessons that teach against non-cooperation. The Nuremburg and Tokyo tribunals along with the tribunals in Rwanda and Yugoslavia were built for the precise purpose of accounting for crimes which transcend national borders. Objections to the Rome Statute, based on national interests and sovereignty fail in light of the crimes sought to be prevented by an International Criminal Court. Without the safety net provided by international cooperation and prevention of crimes, the world risks facing the dangers it promised "never again" to allow.[198]

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[191] *Id.*at 46.
[192] *Id*.
[193] *See generally* BASSIOUNI & WISE, AUT DEDERE, AUT JUDICARE, *supra* note 19.
[194] International Military Tribunal (Nuremberg), Judgment and Sentences, 41 AM. J. INT'L L. 172, 186 (1947)
[195] *Id*.
[196] *See* Goran Sluiter, *The Surrender of War Criminals to the International Criminal Court*, 25 LOY. L.A. INT'L & COMP. L. REV. 605, 609 (2003).
[197] *See* RESTATEMENT THIRD, *supra* note 86, at § 401(a); Documents of the Fifteenth Session including the Report of the Commission to the General Assembly, [1963] 2 Y.B. INT'L L. COMM'N 162, U.N. Doc. A/CN.4/SER.A/1963/ADD1.
[198] *See Universal Declaration of Human Rights*, G.A. Res. 217(III)A., U.N. Doc. A/810 (1948)