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The Limits of Legitimacy:

The Rome Statute's Unlawful Application to Non-State Parties

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TABLE OF CONTENTS

I.	Introduction	64
II.	The Rome Statute's "Universality" Violates the Global Constitution.....	66
A.	The Fundamental Law of the International System	66
B.	Dante's Dream	68
C.	The Imperative Does not Make the Law.....	69
D.	The Rome Statute's "Universality".....	72
III.	No Doctrine of International Law Supports the ICC's Jurisdictional Claims, Absent the Consent of All Affected States.....	75
A.	Universal Jurisdiction	75
B.	Territorial Jurisdiction	79
1.	The Immunities of High-Ranking Officials	80
2.	The Immunity of Military Forces	82
3.	The Rights of States With Respect to Their Citizens Abroad	84
C.	There is Insufficient Valid Precedent to Support the Transfer or Delegation of Territorial Jurisdiction Without a Cession of Territory	85
IV.	A New Form of Jurisdiction?.....	87

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I. INTRODUCTION

By claiming the right to subject the citizens of non-party states to the authority of the International Criminal Court (ICC), the 1998 Rome Statute violates the global constitution.¹ That constitution, which is unwritten but real, contains a number of basic principles around which the international community is organized. The two most fundamental of these principles are that: (1) the ultimate authority over the world's affairs is vested in sovereign and independent nation-states; and (2) each of those states is, at least in law, equal. As a result, rules of international law in general, and the authority of international institutions in particular, cannot be imposed—either by treaty or custom—on states that have not consented to them. Although that consent may be implied in certain instances (as when a new customary rule develops over a long period without dissent), under no circumstance can consent be dispensed with altogether.

That, however, is precisely what the ICC states parties have done in their efforts to incorporate “universality” into the Rome Statute. Under that instrument, the ICC asserts jurisdiction over the nationals, including governmental officials, of non-parties. Such claims are unprecedented and unsupported by any established doctrine of international law. Although ICC proponents have cited the principles of “universal jurisdiction” and “territorial jurisdiction” to justify the court's assertion of authority over non-party nationals, they are mistaken. These doctrines govern when a *state* may criminalize certain misconduct of “universal” concern, and when the jurisdiction of *national* courts can be asserted. Both are limited by other customary rules of international law that were neither recognized nor respected by the Rome Statute. Neither universal nor territorial jurisdiction principles support the creation of an independent, super-national enforcement mechanism.

In this respect, it is important to note that the ICC does not act, or purport to act, as the mere agent of the states parties. It exercises a new, and altogether unknown (at least in modern international law) form of authority that purports to be superior to the individual states who created it—more than the sum of its parts. Under the Rome Statute, the Court can prosecute and punish offenses within its jurisdiction only after it concludes that the relevant national institutions have failed to take action. This determination, however, is left entirely to the Court's discretion, and its power may be exercised without regard to the

1. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF, 183/9 (hereinafter Rome Statute).

requirements of the constitution and laws of any state party. The ICC is not an agent; it is the principal.

There is no support in international law and practice for the creation of such an institution with authority over non-consenting states or their nationals. Previous international courts, such as the International Court of Justice (ICJ), and the United Nation's ad hoc criminal tribunals for the former Yugoslavia and Rwanda, were based on the consent of all of the affected states—whether express or implied.² The Nuremberg and Tokyo tribunals were based upon the rights of the victorious Allies to legislate and act for conquered Germany and Japan. By contrast, the ICC represents an attempt by one collection of states to impose an authority of their own manufacture on the rest—whether the rest like it or not. This is the ICC's universality principle. It is, in fact, a medieval vision of super-national jurisdiction that violates the fundamental tenet of sovereign equality—the very foundation of the international system since the mid-seventeenth century. This article posits that to the extent that the Rome Statute asserts jurisdiction for the ICC over the nationals and officials of non-state parties, it is illegal.³

2. This is also the case with the World Trade Organization's dispute resolution arrangements and the International Tribunal on the Law of the Sea, established under the 1982 UN Convention on the Law of the Sea. The one arguable exception to this rule was the ICTY's exercise of jurisdiction vis-à-vis the Federal Republic of Yugoslavia (Serbia and Montenegro) (FRY), between 1993 and 1995. Although the FRY claimed to be a member of the United Nations, as the automatic successor of the Socialist Federal Republic of Yugoslavia (SFRY), and consequently subject to Security Council action taken under Chapter VII, the UN refused to recognize it as such. However, the UN never suggested that the FRY was ineligible to join, and the legal implications of this unusual standoff defy easy categorization. In any case, the FRY accepted the ICTY's authority as part of the Dayton Accords in 1995, and the court's jurisdiction has clearly been supported by its consent since that time.

3. The United States has consistently objected to this feature of the Rome Statute, viewing it as one of the treaty's most important defects. *See, e.g.*, David J. Scheffer, "The International Criminal Court: The Challenge of Jurisdiction," Address at the Annual Meeting of the American Society of International Law, (Mar. 26, 1999). (At the time this speech was given, David Scheffer was U.S. Ambassador-at-Large for War Crimes Issues and the Clinton administration's point person on the ICC.) In fact, the ICC's claim to jurisdiction over non-parties was one of the primary objections noted by President Clinton in explaining that, even though he had signed the Rome Statute, he would not transmit it to the Senate for advice and consent, and did not recommend that President Bush take this action. *See Statement by the President: Signature of the International Criminal Court Treaty* (Dec. 31, 2000).

II. THE ROME STATUTE'S "UNIVERSALITY" VIOLATES THE GLOBAL CONSTITUTION

A. *The Fundamental Law of the International System*

The first principle of the global constitution is that the international community is composed of independent, sovereign states and, in law, those states are entirely equal.⁴ As the United States Supreme Court noted in an early case: "No principle of general law is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another."⁵ Two generations before, Vattel articulated the same principle as follows:

Since men are naturally equal, and their rights and obligations are the same, as equally proceeding from nature, nations composed of men considered as so many free persons, living together in the state of nature, are naturally equal, and receive from nature the same obligations and rights. Power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is as much a sovereign state as the most powerful kingdom.⁶

The customary law doctrine was codified in Article 2 of the United Nations Charter:

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:

1. The Organization is based on the principle of the sovereign equality of all its Members.

* * *

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United

4. As Emmerich de Vattel wrote in the mid-eighteenth century: "The law of nations is the science of the law subsisting between nations or states, and of the obligations that flow from it." EMMERICH DE VATTTEL, *THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE APPLIED IN THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* 2 (Luke White ed., Dublin 1792).

5. *The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825).

6. VATTTEL, *supra* note 4, at 9.

Nations.⁷

This legal equality of states is a part of what Vattel termed the “necessary” law of nations, a rule inherent in the international system itself. Such fundamentals cannot be abandoned, ignored, or altered by treaty: “[A]ll the treaties and all the customs contrary to what the necessary law of Nations prescribes, or that are such as it forbids, are unlawful.”⁸

Among the principal rules that flow from the doctrine of sovereign equality, two are particularly relevant to the ICC’s universalist pretensions. First, there is no international legislative power through which one or more states may act collectively to impose their will, or institutions, on the others.⁹ Second, the right of states to create multilateral institutions, like the ICC, through the device of a treaty is limited by the contractual nature of treaties, which requires a state’s formal consent before it can be subjected to a treaty’s provisions. As Vattel explained more than two centuries ago: “The several engagements into which nations may enter, produce a new kind of the law of nations called *conventional* or *of treaties*. As it is evident that a treaty binds only the contracting parties; the conventional law of nations, is not an universal, but a particular law.”¹⁰ It follows that a

7. U.N. CHARTER art. 2, para. 184. Significantly, Article 2.6, which provides that “[t]he Organization shall ensure that States which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security,” is not a claim of legal right, but a simple statement of the intent to use power for the common good. For an excellent discussion of this issue see Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 LAW & CONTEMP. PROBS. 13, 53-56 (2001).

8. See VATTEL, *supra* note 4.

9. Only long standing and accepted state practice can create binding customary international law norms. Again, as Vattel explained:

Certain maxims, and customs consecrated by long use, and observed by nations between each other as a kind of law, from the *customary law of nations*, or the *custom of nations*. This law is founded on tacit consent, or if you will, on a tacit convention of the nations that observe it with respect to each other. Whence it appears that it is only binding to those nations that have adopted it, and that it is not universal, any more than *conventional laws*.

* * *

When a custom is generally established, either between all the polite nations in the world, or only between those, of a certain continent, as of Europe, for example; or these who have a more frequent correspondence; if that custom is in its own nature indifferent, and much more if, it be a wise and useful one, it ought to be obligatory to all those nations who are considered as having given their consent to it. And they are bound to observe it with respect to each other, while they have not expressly declared, that they will not adhere to it.

Id. at 11-12.

10. *Id.* at 11. As provided by the Vienna Convention on the Law of Treaties, which on this

super-national legal institution, created by a treaty, cannot be imposed on non-consenting states. Universal authority must be preceded by universal consent.

B. Dante's Dream

Of course, there is little doubt that the current international system, based on the sovereign equality of states, has flaws. As activists never tire of complaining, it permits the continuation of retrograde social systems and governmental practices in much of the world that would be intolerable in the West.¹¹ At the same time, this system, called "Westphalian" after the 1648 Peace of Westphalia, was not arbitrarily adopted or imposed. It was based upon hard-learned lessons in early modern Europe. The "universalism" embraced by so many ICC proponents was once as dangerous to the general peace as fascism and communism later proved to be.

The idea of a super-national, final authority is ancient. It was described, for example, by Dante Alighieri, who longed for a single monarch to act as the ultimate lawgiver and judge of international disputes:

[M]ankind should be ruled by one supreme prince and directed towards peace by a common law issuing from him and applied to those characteristics which are common to all men. This common rule, or law, should be accepted from him by particular princes, in the same way as the practical reason preparing for action accepts its major proposition from the speculative intellect and then derives from it the minor proposition appropriate to the

point, at least, clearly codifies customary international law: "A treaty does not create either obligations or rights for a third State without its consent." Vienna Convention on the Law of Treaties, May 23, 1969, art. 34, U.N. Doc. A/CONF. 39/27 (1969). *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 324(1) (1986). ("An international agreement does not create either obligations or rights for a third state without its consent.") This point has been well made by Professor Madeline Morris: "the ICC Treaty would abrogate the pre-existing rights of non-parties which, in turn, would violate the law of treaties. As the International Law Commission's official Commentaries on the Vienna Convention state, '[i]nternational tribunals have been firm in laying down that in principle treaties, whether bilateral or multilateral, neither impose obligations on States which are not parties *nor modify in any way their legal rights without their consent.*' Morris, *supra* note 7, at 26-27 (quoting *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 (1996)), (Commentary to Draft art. 30, "General Rule Regarding Third States").

11. This attitude is displayed, for instance, in the Human Rights Watch World Report 2000, available at <http://www.hrw.org/wr2k/> (last visited Oct. 8, 2003) ("Sovereignty loomed less large in 1999 as an obstacle to stopping and redressing the crimes against humanity").

particular case, and finally proceeds to action. It is not only possible for one movement to issue from a single source, it is necessary for it to do so in order to eliminate confusion about universal principles.¹²

Dante's dream of a universal prince, who would ensure universal peace, was never realized. It was, however, no coincidence that the Westphalian System was established after the last, and most bloody, effort, by the Habsburg family in the sixteenth and early seventeenth centuries, to make the theory a reality.

The scope and brutality of the ensuing conflicts, including the Eighty Years War between the Dutch Republic and Habsburg Spain, and the Thirty Years War in Germany, were unprecedented, and remained unequalled until the twentieth century. The result was the Peace of Westphalia, which recognized the essential sovereignty of the German states by granting each the right "to make Alliances with Strangers for their Preservation and Safety."¹³ The Westphalian System represented a definitive rejection of universality and was the foundation on which the modern international system was constructed. It created the necessary circumstances for the Enlightenment, and the development of liberal democracy in the eighteenth and nineteenth centuries.

C. *The Imperative Does Not Make the Law*

The fundamentals of the Westphalian System, and in particular the rule that international law cannot be "made" by treaty and then imposed on non-consenting states, have been respected by the community of nations for 350 years. This has been the case even where few doubted the importance, or moral imperative, of proposed international law rules. For example, when Britain determined to abolish the trans-Atlantic slave trade in the early nineteenth century, the government passed a statute, applicable to British subjects, and then sought a series of treaties with each of the maritime powers. Throughout this process, it was fully recognized that the nationals of states that had not entered such a treaty could not be arrested, or otherwise constrained, for engaging in the slave trade. As the High Court of Admiralty judge, Sir William Scott, explained in the *The Louis*:

12. DANTE ALIGHIERI, *MONARCHIA*, bk. I, ¶ 14, reprinted in *FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT* 413, 421 (Oliver O'Donovan & Joan Lockwood O'Donovan eds., 1999).

13. Treaty of Westphalia, 24 Oct. 1648, art. LXV, available at <http://www.yale.edu/lawweb/avalon/westphal.htm> (last modified Oct. 8, 2003).

The great object, therefore, ought to be to obtain the concurrence of other nations, by application, by remonstrance, by example, by every peaceable instrument which men can employ to attract the consent of men. But a nation is not justified in assuming rights that do not belong to her, merely because she means to apply them to a laudable purpose.¹⁴

This view was fully accepted by the United States Supreme Court in *The Antelope*, in which Chief Justice Marshall opined that, as a result of the “perfect equality of nations,”

no [nation] can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. A right, then, which is vested in all by the consent of all, can be divested only by consent; and this trade, in which all have participated, must remain lawful to those who cannot be induced to relinquish it. As no nation can prescribe a rule for others, none can make a law of nations.¹⁵

Ironically, one feature of these treaties, and of a similar proposal by Britain to the United States in 1818, was “mixed courts.” These courts were composed of judges from each of the treaty-parties, although they exercised only a civil jurisdiction over vessels suspected of having engaged in the slave trade. The officers and crew of such ships were subject to criminal prosecution only in the courts of their own countries. Nevertheless, the United States refused to accept such courts, based on the Monroe administration’s conclusion that U.S. participation in such mixed courts would violate the Constitution. These objections were communicated to British Foreign Secretary Castlereagh in a letter from American ambassador Richard Rush:

[T]he powers of government in the United States, whilst they can only be exercised within the grants, are also subject to the restrictions of the federal constitution. By the latter instrument, all judicial power is to be vested in a supreme court, and in such other inferior courts as Congress may, from time to time, ordain and establish. It further provides, that the judges of these courts shall hold their offices during good behaviour, and be removable on impeachment and conviction of crimes and misdemeanors.

14. See Report of the Committee on the Slave Trade, H.R. REP. NO. 59, at 13, 16th Cong. (2d Sess. 1821). In this case, the court ruled that a vessel could not be lawfully condemned because it had been the subject of a stop and search at sea during peace, a right that was neither recognized in customary international law, nor conceded by treaty in this instance.

15. *The Antelope*, 23 U.S. (10 Wheat.) at 122.

There are serious doubts whether, obeying the spirit of these injunctions, the government of the United States would be competent to appear as party to the institution of a court for carrying into execution their penal statutes in places out of their own territory; a court consisting partly of foreign judges, not liable to impeachment under the authority of the United States, and deciding upon their statutes without appeal.¹⁶

However important eliminating “impunity” for violations of international humanitarian law may be,¹⁷ it can hardly be considered more important than the abolition of the slave trade. As Sir William Scott noted, “a nation is not justified in assuming rights that do not belong to her, merely because she means to apply them in a laudable purpose.” Whatever their collective mission, the ICC states parties cannot impose their will on any state that does not consent.

16. Note from Richard Rush to Viscount Castlereagh, 21 Dec. 1818, *reprinted in* Report of the Committee on the Slave Trade, H.R. REP. NO. 59, at 54, 55-56, 16th Cong. (2d Sess. 1821). *See also* Message from President James Monroe to the Senate, 21 May 1824, *reprinted in* Sen. Exec. J., 380, 381-82 (May, 21, 1824) (noting that “mixed courts” had been incorporated in treaties between Britain and Spain, Portugal, and the Netherlands, but that “[t]hey had been resisted by the Executive, on two grounds: one, that the constitution of mixed tribunals was incompatible with [the U.S. C]onstitution; and the other that the concession of the right of search...would be repugnant to the feelings of the nation, and of dangerous tendency”). It was only in 1862, after the Confederacy had abolished the slave trade in its constitution, leaving the Lincoln administration desperate to sway British public opinion in the Union’s favor, that the United States accepted “mixed courts” in the Treaty Between the United States and Great Britain for the Suppression of the Slave Trade, April 7, 1862. Significantly, no case was ever actually adjudicated in these courts, and they amounted to little more than a source of political patronage. They were abolished after seven years, in 1870. *See* Cong. Globe, 40th Cong., 3rd Sess. 818-819 (1869). The constitutionality of this abortive experiment in “international” courts was never adjudicated.

17. In fact, it is far from obvious that ICC “universality” would help to eliminate “impunity,” i.e., violations of international humanitarian law. The existence of the ICTY did not dissuade Yugoslav president Slobodan Milosevic from undertaking a campaign of ethnic violence in Kosovo. Moreover, the history of the last fifty years suggests that the impact of the Nuremberg and Tokyo tribunals was negligible. Only the application of military force has proven effective in this area. Unfortunately, the ICC’s most likely impact will be to make the threshold for military intervention by law-abiding states even higher, further emboldening the rogue states, and making violations of international humanitarian law more, rather than less, likely. This point was, in fact, noted by Ambassador Scheffer, one of the ICC’s most credible and dedicated supporters. In discussing Article 12 of the Rome Statute, Ambassador Scheffer warned that the end result of imposing ICC jurisdiction on non-consenting states “will be to limit severely those lawful, but highly controversial and inherently risky, interventions that the advocates of human rights and world peace so desperately seek from the United States and other military powers. There will be significant new legal and political risks in such interventions.” David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT’L L. 12, 19 (1999), *quoted in* Morris, *supra* note 7, at 53.

D. The Rome Statute's "Universality"

The Rome Statute, of course, does not create the universal monarch Dante promoted. But it does create a modern equivalent—a super-national adjudicative authority, capable of punishing individuals, regardless of their own state's policy, judicial institutions, or fundamental laws, and without its consent. Under Articles 12 and 13 of the Rome Statute, the ICC may exercise its authority in the following cases:

1. Where the U.N. Security Council has referred the matter to the court under its Chapter VII authority;
2. Where the accused is a national of a state party to the Rome Statute; or
3. Where the "conduct in question" took place on the territory of a state party, or on one of its flag vessels or aircraft, regardless of the accused's nationality.¹⁸

Although the first two bases of ICC jurisdiction are grounded in consent, either the consent of a UN member state (implied by its acceptance of the Charter upon admission), to carry out Chapter VII Security Council resolutions, or consent evidenced by ratification of the Rome Statute itself, the third permits the court to exercise its power over the citizens of states that have not consented.

Moreover, these claims of authority do not merely affect the individual citizens of a state; they apply to the state itself, in the form of its civilian and military officials. In this regard, Article 27 of the Rome Statute specifically provides that:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.¹⁹

18. Rome Statute, *supra* note 1, arts. 12(2)(a)-(b), 13(b).

19. *Id.* art. 27.

Government officials act pursuant to the authority, and as the instruments, of their states. Indeed, international law has long recognized that states act only through their duly constituted authorities, and that official acts are attributable to the state, not the individual.²⁰ Therefore, it would be incorrect to assert that the Rome Statute does not burden non-party states because its authority is limited to the prosecution and punishment of individuals. By asserting power over the civilian and military officials of non-party states, the Rome Statute clearly violates the sovereign equality of those countries as guaranteed by international law.

ICC proponents, of course, have argued that the entire community of nations already has accepted the criminal character of the offenses outlined in the Rome Statute, and further defined in the ICC's Elements of Crimes document. However, interpretations of these offenses often differ, even with respect to some of the most commonly accepted violations, such as genocide. The United States, for example, has refused to recognize the infliction of some generalized "mental harm" as genocide, and noted an understanding on this point at the time it ratified the Convention on the Prevention and Punishment of the Crime of Genocide. This understanding made clear that only a "permanent impairment of mental faculties through drugs, torture or similar techniques" would be sufficient,²¹ and the implementing legislation passed by Congress is consistent with this understanding.²²

However, even if it were true that all of the specific, substantive offenses outlined in the Rome Statute had been accepted by all of the non-party states, this would not imply the concomitant acceptance of a super-national enforcement mechanism, such as the ICC. Although all states are bound by international law, that law has traditionally, almost without exception, been enforced by national institutions. The authority

20. As noted in the International Law Commission's Draft Articles on the Origin of State Responsibility: "For the purposes of the present articles, conduct of any State organ having that status under the internal law of that State *shall be considered as an act of the State concerned under international law*, provided that organ was acting in that capacity in the case in question." Draft Articles on the Origin of State Responsibility, art. 5, *reprinted in* IAN BROWNLIE, BASIC DOCUMENTS IN INTERNATIONAL LAW 426-27 (4th ed. 1995) (emphasis added). Although the Draft has not been completed, "[t]he Draft articles constitute evidence of the state of general international law concerning the origin of State responsibility." *Id.* at 426. Although there may, in certain limited circumstances, be individual criminal liability attached to "official acts," the legal authority to prosecute and punish in such cases must be based on an established source of adjudicative jurisdiction. The ICC does not exercise such authority. *See infra* pp. 16-19.

21. *See* United States Reservations and Understandings, *available at* <http://www.unhcr.ch.html/menu3/b/treaty1gen.htm> (last modified Oct. 9, 2001).

22. *See* 18 U.S.C. § 1091 (2003).

to create a super-national institution—especially one capable of prosecuting government officials—cannot be inferred simply from the fact that certain offenses are universally condemned. The fundamental principle of *par in parem non habet jurisdiction*, that “legal persons of equal standing cannot have their disputes settled in the court of one of them,”²³ undercuts the ICC’s claims to jurisdiction over the nationals of non-state parties, since that court’s power is dependent upon the legal authority of the Rome Statute states parties.²⁴

23. Brownlie, *supra* note 20, at 324.

24. Significantly, although the Geneva Conventions of August 12, 1949, the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of Apartheid, suggest the possibility of criminal enforcement in international tribunals, both recognize that this mechanism cannot be imposed on a state without its consent. In this regard, as Professor Morris has noted, the Genocide Convention provides that

[P]ersons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have *jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction*.

Convention on the Prevention and Punishment of the Crime of Genocide, art. VI, Dec. 9, 1948, 78 U.N.T.S. 277 (emphasis added). See Morris, *supra* note 7, at n.114. Moreover, in ratifying the Convention, the United States specifically made clear its understanding that, “with regard to the reference to an international penal tribunal in article VI of the Convention, the United States declares that it reserves the right to effect its participation in any such tribunal only by a treaty entered into specifically for that purpose with the advice and consent of the Senate.” See United States reservations and understandings, *supra* note 21. Similarly, the International Convention on the Suppression and Prevention of the Crime of Apartheid provides that persons accused of apartheid-related offenses may be tried “by an international penal tribunal *having jurisdiction with respect to those State Parties having accepted its jurisdiction*.” International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, art. V, 1015 U.N.T.S. 243 (emphasis added). See Morris, *supra* note 7, at n.114.

With respect to the Geneva Conventions, the text of those treaties clearly contemplates that national courts will be the competent authorities to impose any criminal penalties on individuals. All four agreements require the High Contracting Parties to enact national legislation “to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention,” and

[t]o search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and [to] bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

See Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 49, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 50, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention III Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 129, 6 U.S.T. 3316, 75 U.N.T.S. 135; and Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 146, 6 U.S.T. 3516, 75 U.N.T.S. 287. The text did not rule out the use of international tribunals, according to the ICRC Commentary on the Geneva Conventions, so as not to “exclude handing over the accused to an international criminal court

III. NO DOCTRINE OF INTERNATIONAL LAW SUPPORTS THE ICC'S JURISDICTIONAL CLAIMS, ABSENT THE CONSENT OF ALL AFFECTED STATES

If the ICC's purported authority over non-state party nationals has any basis in law at all, it must be found in the sovereign rights of the states who have ratified the Rome Statute. There is no international law doctrine that would support either the existence or the manufacture of some generalized, inchoate prosecutorial and judicial right in the "international community" at large, separate and apart from that enjoyed by individual states. And, of course, the Rome Statute states parties could not vest in the court authority that they, themselves, do not possess. In this connection, there are two recognized international law doctrines that must be considered: (1) the concept of "universal jurisdiction," which permits all states to criminalize certain conduct deemed of interest to all; and (2) territorial jurisdiction, which permits a state to exercise jurisdiction over individuals who enter its territory. However, neither principle can bear the weight of the ICC's claims.

A. *Universal Jurisdiction*

Although many proponents of a "universal" authority for the ICC raise their standard on the ground of "universal jurisdiction," the Rome Statute itself is more cautious. In no part or particular does it claim "universal jurisdiction" for the Court—and with good reason. That doctrine, as actually supported by international custom and practice, merely permits each sovereign state to criminalize activity that is considered unacceptable by all. Universal jurisdiction has traditionally applied only to piracy and the slave trade (offenses, significantly, involving private actions—rather than state actions, taking place on the high seas—beyond the immediate authority of any one country), and does not address the far more relevant question of which state may prosecute and punish such "universal" offenses in individual cases.²⁵ As

whose competence has been recognized by the Contracting Parties." See, e.g., International Committee of the Red Cross, *Commentary on the Geneva Conventions of 12 August 1949, Geneva Convention III Relative to the Treatment of Prisoners of War* 624 (1960) [hereinafter *ICRC Commentary*]. Thus, even if the Geneva Convention is interpreted to permit criminal trials in an international court, that court can punish violations of the treaties only if the states concerned have given their consent.

25. While pirates have been sometimes supported, and often tolerated by states, as distinct from privateers, they did not act under the authority of any sovereign. Hence, there was no state responsibility implicated by pirate offenses. Significantly, the essentially private character of the conduct involved is also the key characteristic of a new set of "inchoate" universal offenses, described in various multilateral conventions, where states permitted both the right to prescribe

Professor Alfred Rubin has explained, those who assert an existing “universality” for war crimes and similar offenses have mistaken the right to prescribe, or criminalize, an act and the quite separate right to prosecute and try an individual for the offense:

The analogy between war atrocities and “universal offenses” such as “piracy” or the slave trade does not relate to jurisdiction to enforce or to adjudicate, but only to the applicability of national criminal legislation: the reach of so-called “jurisdiction to prescribe.” And, even there, the extension of a national jurisdiction to make criminal the acts of some foreigners outside the territory of the prescribing state has been much exaggerated by scholars unfamiliar with the actual cases and equally unaware of the dismal record of failed attempts to codify the supposed international criminal law relating to “piracy” or the international slave trade.²⁶

Indeed, as Professor Rubin intimates, although there have been numerous claims of universality for offenses within the ICC’s jurisdiction, such as “war crimes,” “crimes against humanity,” and “genocide,” there is little or no actual state practice supporting a universal right to both criminalize and prosecute such offenses—absent some other type of jurisdiction, such as territoriality or nationality.²⁷ The International Military Tribunal (IMT), established by the Allies after World War II, to try and punish the Nazi leadership, certainly does not constitute that practice, although it often is incorrectly cited as such. The IMT did not base its legal authority to try and punish the surviving Nazis on universality, but upon the settled right of a conqueror to

and to punish. These entail “hijacking and other crimes on aircraft, crimes against the safety of maritime navigation, hostage taking, attacks on internationally protected persons and UN personnel, terrorist bombings, and torture [and] each contains provisions permitting a state party to prosecute individuals believed to have committed the enumerated crimes when such individuals are found within its territory.” Morris, *supra* note 7, at 61 (citations omitted).

Moreover, these new universal offenses, to the extent that they are on the verge of becoming a part of customary legal norms, are acquiring this status because of state consent, as expressed by acceptance of the relevant treaties, and a failure to object to specific prosecutions. With regard to the latter point, as argued by Morris, “[t]here have been a number of prosecutions under the terrorism treaties of individuals who were not nationals of state parties to those treaties, and yet there appears to be, thus far, no case in which the defendant’s state of nationality has objected to that exercise of jurisdiction.” *Id.* at 62.

26. Alfred P. Rubin, *Dayton, Bosnia and the Limits of Law*, THE NATIONAL INTEREST, Win. 1996/97, at 45.

27. Even proponents of universalizing such offenses concede this point. See Christopher C. Joyner, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: Arresting Impunity—The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 LAW & CONTEMP. PROBS. 153, 166 (1996).

legislate for the conquered. As the IMT itself explained:

The jurisdiction of the Tribunal is defined in the Agreement and Charter....The law of the Charter is decisive, and binding upon the Tribunal.

*The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world.*²⁸

As a practical matter, the rights of the Allies over Germany and Japan in 1945 were not very different from those of Caesar over Gaul. The sovereignty of both states was at the disposal of the Allies, and it was that sovereignty they exercised in prosecuting and punishing the defeated Axis leaders.²⁹ The states that have chosen not to join the Rome Statute have not been conquered by the ICC states parties, and those states can lay no claim to the prerogatives enjoyed by the victorious belligerents.

Moreover, if there is universal jurisdiction over the offenses included in the ICC's mandate, then there should be a solid body of actual prosecutions, brought by states against the nationals of other states, regardless of where the offense took place, the nationality of the victims, or the official position of the defendant(s). Such cases should be hanging from trees like ripe apples. The orchard, however, is barren. Indeed, the Rome Statute's authors could not even agree on a proper definition of the supposedly "universal" offense of aggression, let alone point to a clear and well-developed body of law permitting the prosecution of each and every one of the offenses they did define.

At most, there are a handful of cases that reference universal jurisdiction principles, such as the Sixth Circuit's decision in *Demjanjuk*

28. *The Nuremberg Trial*, 6 F.R.D. 69, 107 (I.M.T. 1946) (emphasis added). Significantly, as Professor Morris noted, the June 5, 1945, Berlin Declaration specifically proclaimed that the Allies "hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command [of Germany] and any state, municipal, or local government or authority [of Germany]." See Morris, *supra* note 7, at 38.

29. In the case of Germany, the Allies exercised that sovereignty directly. In the case of Japan, they worked through the Japanese government, which had accepted the prosecution of wartime leaders as part of the surrender. See Morris, *supra* note 10, at 37. But see Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS. 68, 103-08 (2001) (arguing that both the Nuremberg and Tokyo tribunals were true "international tribunals" and that their creation and functioning can be used to support the assertion by ICC of jurisdiction over nationals of non-signatory state parties).

v. Petrovsky.³⁰ Such cases are rich in quotations about universality, but did not involve actual prosecutions. In fact, there is only one instance of a criminal prosecution in which a genuinely “universal” jurisdiction was even arguably exercised with respect to offenses within the ICC’s authority: Adolf Eichmann’s trial and execution by the State of Israel.

Beginning as Reinhard Heydrich’s deputy from 1941-45, Eichmann organized and implemented the Nazi Government’s “Final Solution.” He was directly responsible for the murder of millions of Jews, but escaped to South America after the war. In 1960, Israeli agents located Eichmann in Argentina, seized him, and took him back to Israel for trial. Because the State of Israel did not exist at the time Eichmann’s crimes were committed, it generally is assumed that he was prosecuted on a universal jurisdiction theory.

However, even this case involved an ambiguous application of the doctrine. In articulating the legal basis for Eichmann’s prosecution, the Supreme Court of Israel certainly referred to principles of universal jurisdiction.³¹ However, it also specifically found jurisdiction based on the protective and passive personality principles, endorsing the lower court’s view that the “effective link” between the State of Israel and the Jewish people was sufficient to invoke these bases of authority as well.³²

Moreover, the Eichmann case represents a single precedent, arising in the most unusual circumstances, and involving the most horrific atrocities in history. For the ICC’s purposes, there would have to be an established rule of international law permitting every state both to criminalize and punish each of the offenses subject to its jurisdiction, *and to do so over the objections of the targeted state*. Significantly, it is this critical aspect of the equation—an accepted rule requiring states, *undefeated in war*, to accept the exercise of universal jurisdiction over their nationals, including their highest officials, by other states—that is entirely absent. There is simply no actual practice suggesting that any state, other than one defeated in war, believes itself legally bound to accept the paramount authority of another state’s courts, merely because of the “universal” character of the offenses charged.³³

30. 776 F.2d 571 (6th Cir. 1985).

31. Attorney General *v. Eichmann*, 36 I.L.R.277, 298-304 (Isr. Sup. Ct. 1962) [hereinafter *The Eichmann Case*].

32. *Id.* at 304.

33. The case of Augusto Pinochet does not represent such an example. Indeed, in that instance Chile strenuously objected to the treatment of its former president. *See, e.g., Chile’s President to Contest Pinochet Ruling* (Nov. 25, 1998), <http://www.cnn.com/WORLD/americas/9811/25/pinochet.reax.01/>. In Eichmann’s case, the West German government failed to object, and declined to assert jurisdiction—a point noted by the Israeli Supreme Court in its opinion. *See*

In this regard, it is no accident that the only offense clearly subject to universal jurisdiction is piracy, which by definition takes place beyond the territory of any state, and where the individuals involved are not likely to be of much interest to their home countries. Claims to universal jurisdiction by one state against the citizens, and most especially the officials, of another state are rare indeed. Outside of the comical efforts of Belgium to cut a figure on the world stage by asserting the jurisdiction of its courts over foreign leaders, including Israel's Ariel Sharon, and Libya's 1999 "indictment" of U.S. officials for the 1986 air raid on Qaddafi's headquarters (in retaliation for an attack on U.S. military personnel in Berlin), the page is blank.³⁴

There is, of course, a very good reason for this general lack of universal jurisdiction claims. Efforts by one state to exercise judicial power over the nationals (and officials) of another, in circumstances where that state disputes the criminal character of their conduct, can easily lead to conflict—up to and including the use of force.³⁵ In short, claims by any state to exercise broad universal jurisdiction over the nationals of an objecting state remain unsupported in international law and constitute a substantial threat to peace.

B. Territorial Jurisdiction

Thus, if there is a lawful basis upon which the ICC can claim jurisdiction over the nationals of non-party states, it must be found in a delegation of "territorial" jurisdiction from the Rome Statute states parties to the court. Under Article 12 of the Rome Statute, the ICC is granted jurisdiction over offenses taking place within the territory of a state party. However, as in the case of universal jurisdiction, the accepted international law doctrine of territorial jurisdiction is an insufficient buttress for the ICC's claims. That doctrine is limited by a number of exceptions/obligations, in favor of foreign officials and

The Eichmann Case, *supra* note 31, at 302.

34. In fact, litigation and judicial proceedings, with their inherent rigidity, are clumsy tools of statecraft. This, at least in part, explains why even traditional international judicial fora, such as the ICJ, are rarely, if ever, used to resolve the most important issues of international war and peace.

35. Of course, the stage already is set for conflict over the ICC's claims. In response to the Rome Statute's assertions of authority over American nationals, Congress enacted the American Servicemembers Protection Act, which specifically authorizes the President to "to use all means necessary and appropriate to bring about the release of" Americans detained by, or on behalf of, the ICC. See 2002 Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States Act, Pub. L. No. 107-206, § 2008, 116 Stat. 820, 905 (2002).

citizens, which the Rome Statute does not preserve. There is also little support for the proposition that territorial jurisdiction can be delegated without a corresponding transfer of the territory itself.

Territorial jurisdiction is, of course, the most established and strongest species of national jurisdiction, especially national criminal jurisdiction, recognized by international law. As Professor Brownlie explains: "The principle that the courts of the place where the crime is committed may exercise jurisdiction has received universal recognition, and is but a single application of the essential territoriality of sovereignty, the sum of legal competences, which a state has."³⁶

From its inception, the United States has recognized the validity, and power, of territorial jurisdiction. Chief Justice Marshall described the principle as follows:

The jurisdiction of *courts* is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. 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.³⁷

However, as Marshall continued in *The Schooner Exchange*—where the Supreme Court held a French warship, moored in the port of Philadelphia, to be immune from the process of the U.S. courts—the principle of territorial jurisdiction is not unlimited:

[The] perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with reach other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every

36. Brownlie, *supra* note 20, at 300.

37. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) [hereinafter *Schooner Exchange*]. See also *Girard v. Wilson*, 354 U.S. 524, 529 (1957) ("[a] sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction").

nation.³⁸

There are, indeed, a number of exceptions to the territorial-based jurisdiction that the Rome Statute does not adequately recognize or respect.

1. *The Immunities of High-Ranking Officials*

First and foremost, any exercise of territorial jurisdiction is constrained by the immunity, accorded by international law, to high-ranking state officials, especially heads of state and foreign ministers. Although the doctrine of “sovereign immunity” has been significantly complicated—by the development of the modern, bureaucratic state, and the practice of states to become engaged in commercial and other “non-sovereign” activities—since *The Schooner Exchange* was decided,³⁹ immunity remains the general rule, at least with respect to “sovereign” acts (*de jure imperii*):

Under international law, a state or state instrumentality is immune from the jurisdiction of the courts of another state, except with respect to claims arising out of activities of the kind that may be carried on by private persons.⁴⁰

This is especially true with respect to the extension of criminal jurisdiction over foreign officials, particularly high level ones—a point recently, and emphatically, affirmed by the International Court of Justice (ICJ) in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of The Congo v. Belgium)*.⁴¹ That case involved a Belgian court’s effort to prosecute the Congolese foreign minister, Mr. Abdulaye Yerodia Ndombasi, for “international” crimes committed in the Congo. The Congo challenged the international arrest warrant, issued by a Belgian investigating judge, asserting its official’s immunity, as recognized by customary international law and by treaty.⁴²

38. *Schooner Exchange*, *supra* note 37, at 137.

39. As a matter of United States domestic law, the immunities enjoyed by foreign government officials and organizations are now governed by the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (2002).

40. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 10, § 451. This would include all of the offenses set forth in the Rome Statute when undertaken by state officials, high or low, since private individuals have no right to use force in the first instance.

41. 41 I.L.M. 536 (I.C.J. Feb. 14, 2002), available at http://www.icj-cij.org/icjwww/idochat/icobe/icobejudgment/icobe_ijudgment_20020214.pdf.

42. The Congo also argued that the warrant violated its territorial sovereignty, and the sovereign equality of states as guaranteed by the UN Charter. The ICJ, however, decided the case on immunity grounds.

In ruling for the Congo, the ICJ relied upon the customary immunity of high-level state officials. It specifically noted that "in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal."⁴³ It rejected Belgium's argument that, based on the precedents of Nuremberg and the UN ad hoc tribunals, there was an exception to this immunity for "international" crimes, finding these instances to be insufficient evidence of state practice to support a new or modified rule. The ICJ squarely held that national courts do not have the legal right to prosecute, whether for national or international crimes, the high-ranking officials of a foreign state without that state's consent.

At the same time, the right to investigate and prosecute the very highest state officials is a key aspect of the Rome Statute. In this regard, Article 27 specifically provides that "[t]his Statute shall apply equally to all persons without any distinction based on official capacity," and that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."⁴⁴

This is, of course, an extraordinary—indeed revolutionary—claim. In this provision, the Rome Statute purports to sweep aside well-established rules of international law. However, since the individual states who have ratified the Rome Statute do not, themselves, have the right to ignore the immunity of another sovereign's officials, there is simply no *legitimate* source of authority upon which the ICC can base this claim. The mere presence of collective action is certainly insufficient. As defense counsel in the trial of Archbishop Thomas Laud noted in 1640, "he never knew two hundred couple of black rabbits make one black horse."⁴⁵ Only if a state consents, by ratifying the Rome Statute, or accepting the ICC's jurisdiction in a particular case, (or through a Security Council referral) to waive the immunity of its officials, can such individuals be prosecuted.⁴⁶

43. *Congo v. Belgium*, 41 I.L.M. at 549.

44. Rome Statute, *supra* note 1, art. 27.

45. CONRAD RUSSELL, *THE FALL OF THE BRITISH MONARCHIES, 1637-1642* 286 (1991).

46. In this regard, it is significant that the ICJ, in *Congo v. Belgium*, referenced the provisions of article 27 of the Rome Statute in noting that high-level officials could, in certain circumstances, be tried for their official actions. There is no suggestion in the Court's opinion that this elimination of the immunity recognized by international law could be based on anything other than the consent of the states parties. However, it is important to note that the UN ad hoc

2. *The Immunity of Military Forces*

In addition to state officials, international law also recognizes immunity from territorial jurisdiction, at least in certain instances, for military forces. In particular, where the force enters the territory of another sovereign with that sovereign's consent, that permission is deemed to carry immunity from the host's courts—unless other arrangements are specifically agreed. Today, of course, this normally is the case. The rights implied when foreign troops are granted permission to enter the territory of a state are usually governed by specific agreements known as “status of forces agreements” (SOFAs).

By and large, modern SOFAs are less generous than the customary right of “free passage,” which effectively immunized the foreign force from any exercise of jurisdiction by the “receiving” state. However, even today, these agreements reserve to the “sending” state the primary right to prosecute and punish criminal violations such as those established in the Rome Statute. At least, this is the case with the most important such agreement, the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, which governs the status of tens of thousands of American troops stationed in Europe since the end of the World War II.⁴⁷ The Rome Statute itself accepts the reality of these agreements in Article 98, which provides that:

The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.⁴⁸

However, this limitation on the Court's jurisdiction only modifies the obligations of a state party to cooperate. It does not limit the ICC's

tribunals, also mentioned by the ICJ as instances where officials are subject to criminal prosecution, were grounded in the consent, given by each state upon joining the United Nations, to implement Security Council resolutions adopted under Chapter VII of the UN Charter. Similarly, upon joining the ICC regime, states accept the waiver of immunity for their officials.

47. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, art. VII(3)(a)(ii) 4 U.S.T. 1792, 1800, 199 U.N.T.S. 67, 78 (“sending State” is to “have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to...offences arising out of any act or omission done in the performance of official duty”).

48. Rome Statute, *supra* note 1, art. 98(2).

ultimate claims of authority, which could be exercised if the individual in question was seized and surrendered by another party. Since the ICC's lawful authority is necessarily limited to that which could be delegated by the Rome Statute states parties, there simply is no legal basis here for the Court's asserted power. If non-state party forces are stationed on a state party's territory without specific agreement, they are presumed to be immune from its jurisdiction as a matter of customary international law. If their status is governed by a SOFA, the receiving state cannot delegate more authority to the ICC than it has itself reserved. In either instance, the Rome Statute goes too far.

3. *The Rights of States With Respect to Their Citizens Abroad*

Finally, the territorial jurisdiction of all states is limited by certain obligations to foreign citizens, and rights held by foreign states to protect their nationals. Although ordinary citizens traveling in a foreign state are undoubtedly subject to that state's civil and criminal jurisdiction, they nevertheless retain certain rights, recognized by international law. These rights are not well defined, but can be generally stated as the right to be treated "fairly" by the host state. This right takes the form of a right to be treated as a citizen would be in the context of a criminal prosecution. Perhaps more importantly, however, the individual's state of citizenship retains the right to champion its citizen's cause, demanding and ensuring that this fundamental obligation is fulfilled by the prosecuting state.⁴⁹

The Rome Statute, however, neither preserves, nor even recognizes, this right. Although, on its face, the treaty secures the same procedural rights to all individuals, it provides for no mechanism whereby the states parties can carry out their obligations to non-party states, or to each other for that matter, if the ICC's prosecutors and/or judges fail to

49. States retain an interest in the welfare of their citizens, even when in the territory of another state. This principle has been recognized by the U.S. courts. *See* *Harisiades v. Shaughnessy*, 342 U.S. 580, 585 (1951)

(As an alien he retains a claim upon the state of his citizenship to diplomatic intervention on his behalf, a patronage often of considerable value. The state of origin of each of these aliens could presently enter diplomatic remonstrance against these deportations if they were inconsistent with international law, the prevailing custom among nations or their own practices.).

Customary norms of international law aside, most states in today's international system have entered into bilateral and multilateral treaties governing various aspects of the criminal and civil cases involving their citizens. Such treaties set forth a multitude of rights, including, for example, the right of access to consular officials and the opportunity to have one's sentence served in the prisons of one's own state.

provide these rights or act otherwise unjustly.⁵⁰

It could, of course, be argued that the states parties remain obligated by the requirements of international law, and that whatever authority the Rome Statute vests in the ICC, it does not purport to relieve the states parties of these pre-existing obligations. The failure of the states parties to provide a mechanism, whereby their obligations to non-state parties can be discharged, simply puts them in potential violation of their international law obligations—for which they may suffer punitive action by injured non-parties—but this does not affect the ultimate authority of the ICC itself. However, if the ICC's authority over the citizens of non-state parties is, in fact, based upon a delegation of territorial jurisdiction from the states parties, then that delegation must perforce include any pre-existing obligations accepted by the states in the form of treaties, or imposed by customary international law. A principal can vest his agent only with the power he has himself reserved.

C. There is Insufficient Valid Precedent to Support the Transfer or Delegation of Territorial Jurisdiction Without a Cession of Territory

In any case, there is a substantial question whether the ICC states parties would have had the authority, in the first instance, to delegate any form of territorial jurisdiction to the ICC—encumbered or unencumbered by pre-existing obligations. The most important characteristic of territorial jurisdiction is that it belongs to the state in control (either by right or in fact) of the landmass, or appurtenant areas of ocean and airspace, concerned.⁵¹ It is, as Justice Marshall inferred, an essential attribute of sovereignty, and there is no obvious precedent in international law permitting the delegation of this authority without a

50. Although Articles 46 and 47 of the Rome Statute permit the states parties to discipline the prosecutor and judges in certain instances, neither the treaty, nor the Rules of Procedure and Evidence, provide a mechanism by which injustices may be corrected in individual cases.

51. It is possible to make an even broader argument concerning the problems posed by any delegation of jurisdiction. There are five internationally recognized types of jurisdiction: territorial, nationality, protective, passive personality, and universal. Except for universal jurisdiction, which presently provides an uncontested basis only for the piracy and slave trade related prosecutions, all of the other types of jurisdiction reflect two key facets of sovereignty—territory and population. Transferring jurisdiction to another entity, which has neither the territorial nor the demographic connection to the underlying offense, presents numerous problems and ought to be considered only in situations where the national state, which has the right jurisdictional connection to the crime, has suffered a Hobbsean-level breakdown in law and order and cannot function as an organized body politic. This, in fact, was the basis for the invocation by the Security Council of Chapter VII powers, and the creation of the ad hoc tribunals.

corresponding transfer of the territory itself. The precedents that do exist for such delegations are of limited application, and manifestly discredited.

In this regard, perhaps the most extravagant modern example of sovereign power, including judicial power, being exercised by a non-state body, is the British East India Company in the seventeenth, eighteenth, and early nineteenth centuries. However, the Company's general authority in Bengal was based on the theory that its servants, as individuals, were acting as the "deputies of the Moghul Emperor, exercising the privileges and duties of imperial *diwan* on his behalf."⁵² The jurisdiction of the Company's own courts were, in principle, limited to its agents and employees, and then to other British subjects, within the areas it actually controlled.⁵³ Moreover, the exercise of all these powers was an integral part of the "progression into territorial rule."⁵⁴ To find instances of judicial power entirely divorced from responsibility for governance of the territory concerned, it is necessary to turn to the "capitulations" in the Ottoman Empire, and "extra-territorial" jurisdiction exercised by the Western Powers in China and other areas of the Far East.

Beginning with agreements in the eighteenth century, the Ottoman Porte ceded civil and, in certain cases, criminal jurisdiction over foreigners in its territory to relevant diplomatic missions. "Consular courts" were established to try and punish individuals accused of crimes against their fellow citizens, or other foreigners, in Turkish territory. However, these courts did not have jurisdiction when Ottoman subjects were involved, and did not exercise jurisdiction over the nationals of other states.⁵⁵ As explained in a note from Lord Salisbury to Robert Lincoln, U.S. ambassador to Great Britain, outlining Britain's rights:

Her Majesty the Queen (as you are doubtless already aware) possesses extraterritorial jurisdiction over British subjects in the

52. 2 VINCENT T. HARLOW, *THE FOUNDING OF THE SECOND BRITISH EMPIRE 1763-1793: NEW CONTINENTS AND CHANGING VALUES* 86 (1964).

53. *Id.* at 87-92.

54. *Id.* at 85.

55. This was the case unless the individual, or his state of nationality, had consented—tacitly or expressly—by accepting the "protection" of another power. Thus, for example, citizens of Switzerland were under the "protection" of American, French, or German officials in the Ottoman Empire. See 2 JOHN MOORE, *A DIGEST OF INTERNATIONAL LAW* 722 (1906)

([A]s the relations of Switzerland with the Porte were not regulated by the capitulations, and as Switzerland had no representative in the Ottoman Empire, Swiss citizens were at liberty to place themselves under the protection of other powers, and were considered to be subjects to the jurisdiction, both civil and criminal, of the protecting state).

Ottoman dominions.

* * *

I have the honour to inform you that (1) all crimes committed by one British subject against another in the Ottoman dominions, are exclusively justiciable by Her Majesty's consular authorities in these dominions.

(2) All criminal charges brought by a British subject against a Turkish subject, or by a Turkish subject against a British subject in the Ottoman dominions, are justiciable by the Turkish tribunals and according to Turkish law; but the presence of a dragoman from the British consulate is necessary to the validity of such proceedings, and if (at any rate in Constantinople) the dragoman refuses to sign the sentence, it can only be carried into effect after negotiations between the higher authorities of the two countries.

(3) *Criminal charges where foreigners, other than Turkish subjects, are concerned with British subjects are justiciable by the tribunal of the accused's nationality.*⁵⁶

Similarly, in the Far East, China granted extra-territorial jurisdiction to a number of Western powers in a series of treaties, beginning with its 1842 agreement with Great Britain ending with the Opium War. This included both civil and criminal jurisdiction, but was limited—in criminal cases—to authority over a state's own nationals.⁵⁷ Significantly, when actual control over the territory in question passed to another "Christian" power, the extra-territorial authority of the consuls of other such states ended.⁵⁸

These grants of jurisdiction, were, of course, based upon long-discredited, and since-discarded theories of cultural and racial

56. *Id.* at 715-16 (emphasis added). Similar provisions were found in the concessions to the other powers, including the Habsburg Monarchy, Germany, Italy, the Netherlands, and Portugal. *Id.* at 714-21. In 1888, the U.S. Department of State also took the view that consular jurisdiction could not extend to "a criminal complaint against persons not citizens of the United States without the consent of their government." Letter of Acting Secretary of State Rives to Mr. Cardwell, Agent and Consul-general at Cairo, Oct. 13, 1888, *reprinted in* MOORE, *supra* note 55, at 753.

57. *Id.* at 597-99, 600

(The jurisdiction of the ministers and consuls usually is limited to proceedings against persons of their own nationality. In this sense nationality operates as a limitation upon the jurisdiction; and in the same way the nationality of the plaintiff, or even of a witness, may, in certain contingencies, raise an obstacle to the effective exercise of jurisdiction.).

58. *Id.* at 637-40.

superiority that are more properly described as embarrassments, rather than precedents, in international law. Overall, there is simply no valid international precedent or practice to support the delegation or transfer of a "territorial" jurisdiction by one state to another state or institution over the nationals of a third, *absent the third state's consent*.

IV. A NEW FORM OF JURISDICTION?

However, even if territorial jurisdiction could be divorced from territorial sovereignty, and delegated to a non-state such as the ICC, the Rome Statute would not represent such a delegation. The authority that instrument purports to vest in the Court is not merely a species of delegated, or even transferred, territorial jurisdiction. It is an entirely new form of judicial power that claims to be wholly superior to the national authority of the ICC state parties themselves.

Under Article 17 of the Rome Statute, the ICC can proceed with a case only where a state has been "unwilling or unable genuinely to carry out the investigation or prosecution," of the individuals implicated.⁵⁹ This is known as the principle of "complementarity." However, the assessment of whether a state has been "unwilling or unable," is entirely within the discretion of the ICC itself. If it concludes that national proceedings were not "conducted independently or impartially," for instance, the ICC can go forward and its conclusion is not reviewable, either by national institutions, or by the Assembly of States Parties established in the Rome Statute.

Moreover, a "delegation" implies some continuing supervisory role for the delegator. The Rome Statute reverses this relationship, taking the ultimate authority away from the states parties, and vesting it in the ICC. Under the treaty, although the states parties—when acting together in the Assembly of States Parties—can discipline the ICC's prosecutor and judges for acts of personal peculation, they may not interfere with the Court's work. Once the Court has taken up a case, even the withdrawal of the relevant state from the Rome Statute cannot end its authority over the matter, or relieve the state of its obligations to cooperate.⁶⁰ The ICC's power is, in fact, not exercised on behalf of

59. Rome Statute, *supra* note 1, art. 17(1)(a).

60. *Id.* at note 1, art. 127(2)

([A] withdrawing state must still cooperate with the court in investigations and proceedings commenced prior to date when withdrawal becomes effective and withdrawal shall not "prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.).

states parties, or at their direction, but in contravention of the decisions of the relevant national institutions.

However questionable the policy merits of such an arrangement, there is little doubt that, at least as a matter of international law, the states who consent to the ICC's authority, by ratification of the Rome Statute, can be subjugated in this manner. They have, in fact, created a new institution of super-national government, with the ultimate authority, among the Rome Statute states parties, to adjudicate the relevant offenses. However, as explained above, the imposition of such a power on non-consenting states violates the most basic tenets of the global constitution, as they have developed over the past 350 years. A lawful "universality" is, at most, an aspiration for the ICC, rather than an accomplished fact. The only way in which such an aspiration can be realized is through the consent of all affected states to the expansion of the universality principle to encompass both the substantive offenses within the ICC jurisdiction and the right of international tribunals to enforce these norms.

Only the United Nations Security Council is empowered to stay a pending action, for a renewable period of one year. It does not have the authority to alter in any manner a decision of the court once entered.

