

JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT: ANALYSIS, LOOPHOLES AND CHALLENGES¹

Abstract

One of the most fundamental questions of law is whether a given court has jurisdiction to preside over a given case. Jurisdiction is a critical legal issue underpinning the prosecution of offenders of international crimes envisaged by the International Criminal Court (ICC). The ICC must establish proper jurisdiction to assert judicial and penal authority over such offenders, especially if they are not citizens of State Parties to the Rome Statute and the crimes they committed were not committed in the territory of a State Party to the Rome Statute. The issue of jurisdiction can act to delimit permissible legal responses by concerned governments or the international community to international crimes. As a result of hard negotiations, it was agreed that the Rome Statute prohibits the criminal responsibility of persons for conduct prior to the statute's entering into force; ICC may exercise jurisdiction when the crime is committed in the territory of the member State to the Rome Statute or when the perpetrator is national of the member State, or when the situation in question is referred to the court by the United Nations Security Council (UNSC) or when a Non-Party State ad hoc accepts the court's jurisdiction. However, this paper argues that the basis of the ICC jurisdiction creates possibilities for perpetrators of core international crimes to go unpunished contrary to the Preamble of the Rome Statute that such crimes must not go unpunished.

Key words: *International Criminal Court, Jurisdiction, International Crimes, State Party and Non-State Party.*

1. Introduction

One intriguing aspect of the Rome Statute which underscores its nature as a constitutive document is that it combines jurisdiction to prescribe, to adjudicate, and enforce all in one instrument. It is perhaps the implementation and implications of the jurisdictional theories of the Statute that are its most revolutionary features. For, through a rather extraordinary process, the jurisdictional categories classically known to international law has been transformed from norms providing "which State can exercise authority over whom, and in what circumstances," to norms that establish under what conditions the international community, or more precisely the State Parties to the Statute, may prescribe international rules of conduct, may adjudicate breaches of those rules, and may enforce those adjudications.

One of the most fundamental questions of law is whether a given court has jurisdiction to preside over a given case. Any court possesses jurisdiction over matters only to the extent granted to it by the Constitution or Legislation upon which it functions. The question of whether a given court has the power to determine a jurisdictional question is itself a jurisdictional question. Such a legal question is referred to as "jurisdiction to determine jurisdiction."

Jurisdiction is the critical legal issue underpinning the prosecution of offenders of international crimes envisaged by the ICC. The ICC must establish proper jurisdiction to assert judicial and penal authority over such offenders, especially if they are not citizens of State Parties to the Rome Statute and the crimes they committed were not committed in the territory of a State Party to the Rome Statute. The issue of jurisdiction can act to delimit permissible legal responses by concerned governments or the international community to international crimes.

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Legally defined, jurisdiction is the power of a court to adjudicate cases and issue orders. Traditionally, an institution may not prosecute a criminal seized beyond its borders unless it has lawful jurisdiction over the committed act. The jurisdiction to prescribe must exist before the jurisdiction to adjudicate and enforce.

The term “jurisdiction” is used in several places in the Rome Statute to identify the scope of the court’s authority. Article 5 is entitled “crimes within the jurisdiction of the court” and provides list of punishable offences. Article 11 indulges the lawyer’s fetish for Latin expressions. It is labelled “jurisdiction *ratione temporis*,” although the plain English “temporal jurisdiction” would have done just as well. Article 12 is entitled “preconditions to the exercise of jurisdiction,” but it actually sets out what are described as “territorial jurisdiction” and personal jurisdiction. Article 19 requires the court to “satisfy itself that it has jurisdiction in any case brought before it.”

As debate unfolded in the *Ad hoc* Committee, in 1995, and later in the Preparatory Committee, there was a trend towards enlarging the scope of the inherent jurisdiction of the court from genocide to crimes against humanity and war crimes. Accompanying this development, and contributing to it, was a tendency to move away from including treaty crimes such as terrorism and drug trafficking in the subject matter jurisdiction of the court. Thus, as the scope of the crimes narrowed to those upon which there was genuine consensus as to their severity and significance, the argument that the court should have automatic jurisdiction over all crimes within its subject matter jurisdiction became more compelling.

As a result of hard negotiations, by virtue of Article 12 of the Rome Statute, it was agreed that the ICC may exercise its jurisdiction when the crime is committed on the territory of the member State to the Rome Statute or when the perpetrator is national of the member State, or when the situation in question is referred to the court by the United Nations Security Council (SC) or when a Non-Party State *ad hoc* accepts the court’s jurisdiction.

Article 12, entitled “Preconditions to the exercise of jurisdiction,” states:

1. A state which becomes a party to this statute thereby accepts the jurisdiction of the court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the court may exercise its jurisdiction if one or more of the following States are parties to this statute or have accepted the jurisdiction of the court in accordance with paragraph 3:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the state of registration of that vessel or aircraft;
 - (b) The state of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a party to this statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the court with request to the crime in question. The accepting state shall cooperate with the court without any delay or exception in accordance with Part 9.

Consequently, there are different forms of jurisdiction under the Rome Statute. Each of them is critically examined in this paper. They are: temporal (*rationes temporis*) jurisdiction, personal (*ratione personae*) jurisdiction, territorial (*ratione loci*) jurisdiction, acceptance of jurisdiction by a non-State Party (*ad hoc* jurisdiction) and subject matter (*ratione materiae*) jurisdiction.

2. Temporal (*Ratione Temporis*) Jurisdiction

Temporal jurisdiction implies the jurisdiction of a State or of a Court of law over a legal action as it may be affected by the effects or passage of time. The right to litigate may be curtailed by the mere passage of time, as in the expiry of times set out in relevant statute of limitations. Thus, temporal jurisdiction refers to the jurisdiction usually of a court of law over a proposed action in relation to the passage of time; either the court has lost temporal jurisdiction because the deadline for litigation of the particular action has expired, or it has temporal jurisdiction because it was launched within the prescribed time limitations.² The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

Article 11 of the Rome Statute spells out the temporal jurisdiction of the ICC. It provides:

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this statute.
2. If a State becomes a party to this statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this statute for that State, unless that State has made a declaration under article 12, paragraph 3.³

The ICC has no jurisdiction retrospectively; it can only prosecute crimes committed on or, after 1 July 2002, the date on which the Statute adopted in Rome on 17 July 1998 entered into force. Retrospective assumption of jurisdiction of crimes listed in Article 5 of the Rome Statute that were criminal under international law but committed prior to that date are ruled out.⁴ Where a State becomes party to the Rome Statute after that date, the court can exercise jurisdiction automatically with respect to crimes committed after the Statute enters into force for that State.⁵

Based on treaty law, as codified in Article 28 of the 1969 Vienna Convention on the Law of Treaties, treaties are not given retroactive application “to any act or fact which took place or any situation which ceased to exist before the entry into force of the treaty with respect to that party” unless a contrary intention is expressed in the treaty or in some other way is established. The Rome Statute seems to repeat the principle of non-retroactivity contained in Article 11 into Article 24 of the Rome Statute⁶ and is substantively linked to Article 22 of the Rome Statute

² Temporal Jurisdiction definition, available at

<http://www.duhaine.org/legaldictionary/T/Temporaljurisdiction.aspx>, Accessed 1 October, 2010.

³Text of the Rome Statute Circulated as document A/CONF.183/9 of 17 July 1998 and corrected by *proces-verbaux* of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force 1 July, 2002, Art. 11.

⁴ Sharon A. Williams, ‘Jurisdiction *ratione temporis*’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article* – (2nd Ed., Germany: Verlag C.H Beck OHG, Wilhelmstrabe, 9, 8080, 2008), 544.

⁵ Omer Y. Elegab, ‘The Darfur Situation and The ICC: An Appraisal’ (2008) Vol. 1, 3 *Journal of Politics and Law*, 47.

⁶ Art. 24(1) States: “No person shall be criminally responsible under this statute for conduct prior to the entry into force of the statute”

dealing with *nullum crimen sine lege* (“no crime without law”).⁷ In fact, the two Articles (11 and 24) of the Rome Statute could easily have been merged at the time of drafting them.⁸ However, Article 24(1) of the Rome Statute only prohibits the criminal responsibility of the person, jurisdiction *ratione personae*, for conduct prior to the statute’s entering into force.⁹

The ICC temporal jurisdiction regime differs from the predecessors as it does not suffer from the above limitations. For instance, the ICTY established in 1993 has temporal jurisdiction over the war crimes and crimes against humanity designed in its Statute committed after 1 January 1991 in the territory of the former Yugoslavia. With this open ended provision, the Prosecutor was able to indict Slobadan Milosevic for alleged crimes against humanity and violation of the laws and customs of war committed in Kosovo between 1 January 1999 and 20 June 1999.¹⁰ In a motion challenging the jurisdiction of the ICTY in *Prosecutor v. Milutinovic, Ojdanic and Scainovic*,¹¹ the Trial Chamber concluded on 6 May 2003 that “the jurisdiction *ratione temporis* of the international tribunal was left open-ended, no doubt because the Security Council foresaw the continuation of conflict.”¹²

The ICTR established in 1994 has jurisdiction over genocide and other serious violations of international humanitarian law committed in Rwanda and in neighbouring States by Rwandan citizens between 1 January and 31 December 1994.¹³ In *Prosecutor v. Ngeze and Nahimana*,¹⁴ on appeal from the Trial Chamber of the ICTR, the Appeals Chamber held that “no one may be indicted for a crime that was not committed between 1 January and 31 December 1994.” Nevertheless, it was noted that even though any accused person could not be held accountable for crimes committed prior to 1994, that reference could be made to such “for historical purposes or as information.”

The ICC Pre - Trial Chamber I addressed the question of the temporal jurisdiction of ICC in respect to the case of *Lubanga*, where it held thus:

Considering that the ‘Statute entered into force for the (Democratic Republic of Congo) on 1 July 2002, in conformity with article 126(1) of the Statute, the (Democratic Republic of Congo) having ratified the Statute on 11 April, 2002,’ the second condition would be met pursuant to article 11 of the statute if the crimes underlying the case against Mr. Thomas Lubanga Dyilo were committed between 1 July 2002 and December 2003. As the case against Mr. Thomas Lubanga Dyilo referred to crimes

⁷ Art. 22(1) States: “A person shall not be criminally responsible under this statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the court.”

⁸ William A. Schabas, *An introduction to the International Criminal Court*, (3rd Edition, Cambridge University Press, New York 2007), 66.

⁹ Sharon A. Williams, *supra*, note 4.

¹⁰ *Prosecutor v. Milosevic*, IT-02-37-PT, “Kosovo” Indictment, 16 Oct., 2001, confirmed 29 Oct. 2001.

¹¹ *Prosecutor v. Milutinovic, Ojdanic and Sainovic*, Case No. IT-99-37-PT, Jurisdiction, Trial Chamber, 6 May 2003.

¹² *Ibid.*

¹³ United Nations Security Council Resolution 955; Sharon A Williams, *supra*, note 4, 540.

¹⁴ *Prosecutor v. Ngeze and Nahimana*, Case Nos. ICTR 96-27-AR72 and ICTR 96-11-AR72, 5 Sept. 2000, p.6. Note that Judge Shahubudden, in a separate opinion also held that the crime of conspiracy presented a special case and that conspiracy entered into prior to 1994 but “remaining to be fulfilled in Rwanda that year ... may also be regarded as having been renewed within that year” in Sharon A. Williams, *ibid.*

committed between July 2002 and December 2003, the Chamber considers that the second condition has been met.¹⁵

Applying this legal narrative to the situation in Darfur, the Security Council Resolution referring the situation to the Prosecutor expressly referred to “the situation in Darfur since 1 July 2002.”¹⁶ Obviously, both the Security Council and the Office of the Prosecutor have acted within the terms of the Rome Statute, as far as events predating its coming into force. While making reference to the 1,732 communications received as of early 2006, the Prosecutor said 5 percent of them concerned events prior to 1 July 2002, and were therefore, outside the temporal jurisdiction of the Court.¹⁷ Explaining why he was declining to proceed with communications concerning international crimes committed in Venezuela, the Prosecutor stated thus:

A considerable number of the allegations referred to incidents that are alleged to have taken place prior to 1 July 2002, in particular in connection with incidents occurring in the context of the short-lived coup in April 2002. These events occurred prior to the temporal jurisdiction of the court and cannot be considered as the basis for any investigation under the statute.¹⁸

The ICC does not have complete jurisdiction over the crimes listed in Article 5 of the Rome Statute after its statute comes into force with respect to States that ratify or accede or otherwise accept to be bound after that date. Its temporal jurisdiction for such a State Party begins after the entry into force for the State.¹⁹ For example, Colombia ratified the Statute in August 2002, several weeks after its entry into force on 1 July 2002. The Statute only entered into force for Columbia on 1 November, 2002, in accordance with Article 126 of the Rome Statute,²⁰ and the court cannot therefore prosecute any cases that are based on the Colombian ratification for the period between 1 July and 1 November 2002. This does not exclude it acting with respect to crimes committed in Colombia during that period, but the court must then establish its jurisdiction on some other basis.²¹ The exception to this is where pursuant to Article 12(3) of the Rome Statute, concerning preconditions to the exercise of jurisdiction by the ICC, that Non Party State has made a declaration, with the Registrar of the Court accepting the jurisdiction of the court with respect to the “crime” in question.²² Such declarations, formulated in accordance with the said article, would appear to be retroactive by their very nature.²³ On 27 February 2004, Uganda made such a statement, which it labeled “Declaration on Temporal Jurisdiction.” Uganda accepted the exercise of the court’s jurisdiction for crimes committed following the

¹⁵ *Prosecutor v. Lubanga* (ICC-01/04-01/06-8, Decision on the Prosecutor’s Application for a Warrant of Arrest, 10 February 2006, para. 26, see also William A. Schabas, *supra*, note 8.

¹⁶ UN Security Council Resolution 1593 (13.03.2005) UN Doc. S/RES/1593.

¹⁷ Update on Communications Received by the Office of the Prosecutor of the ICC, undated (but issued in February 2006), p.2; See also Communication received by the Office of the Prosecutor dated 9 February 2006 (Venezuela), 3 cited in William A. Schabas, *supra*, note 8, 67.

¹⁸ ‘Letter of the Prosecutor dated 9 February 2006’ (Venezuela), 3, cited in *ibid*.

¹⁹ Sharon A. Williams, *supra*, note 3, 544. See also Rome Statute, Art. 11(2).

²⁰ Art. 126 states thus: “(1) This statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. (2) For each State ratifying, accepting, approving or acceding to the statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the statute shall enter into force on the first day of the month after the 60th day following the deposit by such state of its instrument of ratification, acceptance, approval or accession.”

²¹ William A. Schabas, *supra*, note 8, 67.

²² Sharon A. Williams, *supra*, note 4, 544.

²³ William A. Schabas, *supra*, note 8, 67.

entry into force of the Statute on 1 July, 2002.²⁴ The legality of the declaration appears to have been assumed by Pre - Trial Chamber III, which took note of it when it confirmed the arrest warrant against Joseph Kony.²⁵

The aforementioned limitations on the jurisdiction of the ICC is logical, otherwise the court would have been able to dig into events of the distant past. At the same time, one can see the drawback of this argument, namely, the provision of immunity from prosecution for those who committed atrocities prior to the date on which the Rome Statute came into force.²⁶ The ICC's temporal jurisdiction in Article 11(1) of the Rome Statute could, therefore have been broader expressly encompassing the crimes listed in Article 5 of the Rome Statute, as long as they were recognised as crimes under international law at the time of the commission.²⁷ Similarly, in Article 11(2) of the Rome Statute, arguably, the restriction therein is inappropriate because once a State becomes a Party, there is no legal problem in extending back in time the jurisdiction of the ICC where the crimes are universally condemned.²⁸ States that became Parties after the entry into force of the Statute, application could have been made retrospectively. In such circumstances, the ICC could not have been criticized for *ex post facto* criminalization.²⁹ As the Statute now stands, there could be a prosecution for an Article 5 crime, as defined in Articles 6, 7 and 8 of the Rome Statute, that would not violate the Article 22 *nullum crimen sine lege* rule, ("no crime without law") but would still be prevented from coming before the ICC by Article 11 of the Rome Statute.³⁰

The issue of "continuous crimes" remains unresolved by the Rome Statute, for instance, in a case of an "enforced disappearance," which is a crime against humanity punishable under Article 7 of the Rome Statute.³¹ Someone might have disappeared prior to entry into force of the Statute but the crime would continue after entry into force to the extent that the disappearance persisted. It remains undecided and it will be for the ICC to determine how it should be handled.³²

3. Personal (*Ratione Personae*) Jurisdiction

Ratione personae is a Latin term. It is otherwise known as personal jurisdiction. It literally means by reason of his person or by reason of the person concerned. In some international cases, the court's jurisdiction depends upon the fact, whether the defendant is residing within the territory of the court or whether the defendant is a citizen of the State to which the court belongs. In such cases, the jurisdiction of the court is decided by reason of the defendant or *ratione personae*. In international law, *ratione personae* expresses the rule of law that only a State who is a party to the international treaty can take part in the international dispute resolution process.³³ Personal jurisdiction refers to a court's power over a particular defendant.

²⁴ *Ibid.*

²⁵ Situation in Uganda (ICC-02/04-53), Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended, para.32. Situation in Uganda (ICC-02/04-55), Warrant of Arrest for Raska Lukwiya, 8 July 2005, para. 20; Situation in Uganda (ICC-02/04-56), Warrant of Arrest for Okot Odhiambo, 8 July 2005, para. 22; Situation in Uganda (ICC-02/04-57, Warrant of Arrest for Dominic Ongwen, 8 July 2005, para. 20, cited in *ibid.*

²⁶ Y. O. Elagab, *supra*, note 5, 47; See also William A. Schabas, *supra*, note 8, 68.

²⁷ S.A. Williams, *supra*, note 4, 540.

²⁸ *Ibid.*, at 544

²⁹ *Ibid.*, at 540.

³⁰ *Ibid.*

³¹ W.A. Schabas, *supra*, note 8, 70.

³² See generally on the issue of continuous disappearance being unresolved; William A. Schabas, *supra*, note 8, 70-71.

³³ Ratione Personae Law & Legal Definition, available at <http://definitons.uslegal.com/r/ratione-personae/> . Accessed 1 October, 2010.

It implies the ability of a court to hear a case brought against a party stemming from that party's presence, activities or contracts within a specified set of geographical boundaries, usually the borders of a Country, State or Nation.³⁴ If a court does not have personal jurisdiction over a defendant, then the court cannot bind the defendant to an obligation or adjudication.³⁵

The Rome Statute provides for Personal jurisdiction over natural persons only (thereby excluding Organizations or States).³⁶ As a final note on judicial jurisdiction in the ICC, the Statute does not permit trials in *absentia*. Thus, the court must always have the defendant in its custody to obtain personal jurisdiction.³⁷ The ICC exercises jurisdiction over nationals of a State Party who are accused of a crime, in accordance with Article 12 (2) (b) of the Rome Statute, regardless of where the acts are perpetrated. The prosecution of nationals of Non-Party States that accept its jurisdiction on an *ad hoc* basis by virtue of a declaration of the State of nationality can as well be undertaken by the ICC,³⁸ or pursuant to a decision of the Security Council. The Nationality of the offender's basis of the ICC's jurisdiction is the least controversial form of jurisdiction and was the absolute minimum proposed by some States at the Rome Conference.

The present prosecutions at the ICC appear to have been based on territory, rather than the nationality of the accused. In the prosecutions concerning the situations in Uganda, the Democratic Republic of Congo and Sudan (Darfur), there are no allegations that the accused persons are nationals of a State Party. Nor did the Security Council give the court jurisdiction over the acts of Sudanese nationals committed outside Sudan, even where these might be germane to the conflict in Darfur.³⁹ It adopted such an approach when the ICTR was established, authorising the international tribunal to prosecute crimes on Rwandan territory and crimes committed by Rwandan nationals in neighbouring States.⁴⁰

The Prosecutor has examined the possibility of cases based on nationality rather than territory, but has rejected them. In his first report on communications submitted in accordance with Article 15 of the Rome Statute, the Prosecutor noted that there had been several allegations of acts perpetrated by nationals of coalition forces during the invasion of Iraq in 2003.⁴¹ He pursued this in more depth in his second report in February 2006, and especially in the statement concerning Iraq related prosecutions. There he indicated that inquiries had been made concerning nationals of the United Kingdom with respect to acts perpetrated on the territory of Iraq, a Non Party State.⁴²

The Rome Statute provides for an exception to the general principle of jurisdiction over nationals with respect to persons under the age of eighteen at the time of the offence.⁴³ Less

³⁴ Definitions of Personal Jurisdiction, available at en.wikipedia.org/wiki/Personal_Jurisdiction. Accessed 1 October 2010.

³⁵ *Ibid.*

³⁶ Rome Statute, Arts. 1, 25(2).

³⁷ *Ibid.*, Art. 63(1).

³⁸ *Ibid.*, Art. 12(3); Rule of Procedure and Evidence, adopted by the Assembly of States, First Session, New York, 3-10 September 2002, Official Records ICC-ASP/1/3, pp.10-107, Rule 44.

³⁹ S.A. Williams & W.A. Schabas, "Article 12, Preconditions to the Exercise of Jurisdiction", in Otto Tiffterer, *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* – (2nd Ed., Germany: Verlag C.H Beck OHG, Wilhelmstrabe, 9, 8080, 2008), 558; See also William A. Schabas, *supra*, note 8, 71.

⁴⁰ UN Doc S/RES/955 (1994).

⁴¹ *Ibid.*, 'Communications Received by the Office of the Prosecutor of the ICC,' 16 July 2003, 2.

⁴² *Ibid.*, 'Letter of Prosecutor dated 9 February 2006' (Iraq).

⁴³ Rome Statute, Art. 26.

explicit, but certainly just as imperative, is the exclusion of jurisdiction over persons benefiting from forms of immunity.⁴⁴

A crucial test for the ICC will take place over sovereignty. The individual, not the State, will be subject to the jurisdiction. It has been suggested that States may “run the risk of having their nationals sent to be tried by judges possibly from enemy or rogue nations.”⁴⁵ The United States thought it unlikely that any State will cede to the court’s jurisdiction over their citizens, except when it suited their political goals.⁴⁶ Therefore, the ICC would find cooperation only when a State deemed it expedient. Even some who espouse the concept of an ICC, acknowledge the problem that sovereignty presents:

States are understandably jealous of their right to investigate and try international criminals in their own courts. National pride leads States to have faith in the competency and fairness of their domestic judicial systems. They do not want to surrender control over criminal cases to another tribunal. Certainly, with the exception of the core crimes, States are capable of prosecuting the majority of international crimes fairly and effectively, and the Statute [for the International Criminal Court] should encourage national prosecutions when feasible. Moreover, victimized States have incentives to pursue cases that an international tribunals might lack.⁴⁷

Within the context of the ICC jurisdiction *ratione personae*, it should be noted that the Rome Statute may affect criminal procedures in third States. A notable example is double jeopardy in domestic criminal proceedings. Article 20 of the Rome Statute imposes a double jeopardy limitation on national jurisdictions.⁴⁸ As Danilenko observes:

Under Article 20, no person who has been convicted or acquitted by the ICC for the relevant crimes can be tried again before ‘another court’ even if they happen to be crimes under domestic laws. The phrase ‘another court’ includes both international and domestic courts. As a result, subsequent proceedings in domestic courts of State Parties are barred by a final order issued by the ICC. It is not entirely clear whether a domestic trial after a final ICC order by a third State would be consistent with the general principle *non bis in idem*. Many States are bound by this principle as a matter of treaty law ... Although the practice of Human Rights Committee indicates that *non bis in idem* has only

⁴⁴ S. A. Williams & W.A. Schabas, *supra*, note 38; W.A. Schabas, *supra*, note 8, 72-75; See also Rome Statute, Arts. 27 & 98.

⁴⁵ C.L. Blakesley, Obstacles to the Creation of a Permanent War Crimes Tribunal, Fletcher Forum, Summer/Fall, 1999 at 77, 90 cited in Jackson N. Maogoto, The Final Balance Sheet? The International Criminal Court’s Challenges and Concessions to the Westphalian Model, 15 available at <http://lawbepress.com/experss/eps/1402/>. Accessed 1 October, 2010.

⁴⁶ Human Right Watch, available at <http://www.hrw.org/reports98/ICC/Jitbwb-15.htm>, Accessed 5 May 2010; See also J.N. Maogoto, *supra*, note 45.

⁴⁷ Senator Jesse Helms, Commenting on the International Criminal Court during a hearing on the matter in the US Senate. Is a UN International Criminal Court in the US National Interest? Hearing before the Sub. Comm. on Int’l Operations of the Senate Comm. on Foreign Relations; 105th Cong. 1 (1998) 29.

⁴⁸ J.N. Maogoto, *supra*, note 45, 16.

domestic application, a question may be raised as to whether it can now be re-interpreted as having international dimension as well.⁴⁹

The personal jurisdiction of the ICC implies that when the State in question is not a member to the Rome Statute and the crime was committed by its national on its territory there is a possibility that the perpetrator will go unpunished if the situation is not referred to the ICC by the Security Council. This might obviously happen when the perpetrator is not prosecuted by domestic courts of the State in question. It is also easy to assume that when national judiciary, due to some political reasons, is not willing to prosecute the perpetrator (e.g. the crime is committed by high officials or by their order), there is almost no probability that the State in question – a non-member State – will lodge a declaration before the ICC and accept its jurisdiction. A similar anxiety was raised by Williams and Schabas:

It is a serious gap that the acceptance of the Rome Statute by the custodial State does not act as a precondition for the exercise of jurisdiction by the ICC. It is this provision that would have ensured that atrocities will not go unpunished if the territorial state or the State of nationality are not parties or do not consent *ad hoc* and there is no UN SC referral.⁵⁰

The Head of the German diplomatic mission to the Rome Conference, Kaul, had expressed that most of the conflicts which lead to international crimes are of internal war character and in such circumstances, when the custodial State is not a member State and when there is no *ad hoc* consent and no Security Council referral, “perpetrators of core crimes will have nothing to fear from the ICC.”⁵¹ Hence, usually, after such conflicts, one side who won the internal war takes over the State, and crimes such as crimes against humanity, are never prosecuted by the domestic courts as the perpetrators become the officials. Kaul not only notes the possibility that the perpetrators might go unpunished, where neither the State of nationality of the perpetrator, nor the territorial State, where the crime was committed, is Party to the Rome Statute (or has not accepted it *ad hoc*) and no referral by the Security Council, but also criticizes it from a universal equality approach⁵² and has advocated for pure universality principle. He points out that universal jurisdiction for the ICC would have also served these ends:

- (1) It could have avoided attempts by States to exclude their nationals from the court’s jurisdiction.
- (2) It could have avoided unequal opportunities for States to be able to bring cases before the ICC without any blocking or filtering of cases by the Security Council, particularly by Permanent Members.

There may be too many similar scenarios also, for example, genocide is conducted to a minority by the majority ethnic nation in power in a State, and again if the State in question is not

⁴⁹ G.M. Danilenko, ‘The Statute of the International Criminal Court and Third States’ (2000) Vol. 21 *Michigan Journal of International Law*, 445-494 cited in *ibid*.

⁵⁰ S. A. Williams & William A. Schabas, *supra*, note 38, 560.

⁵¹ H. Kaul, “Preconditions to the Exercise of Jurisdiction” in Antonio Cassese, Paula Gaeta, and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol.1, (Oxford: Oxford University Press, 2002), 583.

⁵² *Ibid.*, at 586.

member to the Rome Statute and when there's no Security Council referral, the perpetrators will go unpunished. This leads to say that, in similar cases, the fate of the perpetrator will be decided by the Security Council members, particularly by 5 Permanent Member States. Hence, the position of one of the Permanent Member States will decide whether the perpetrators of core international crimes should go unpunished or not. This is a serious flaw of the Rome Statute that core criminal cases will be decided by a political body, the Security Council.

Bekou and Cryer rightly agreeing with the above expressed anxiety, further the consideration in respect to international peace, as the ICC was not entitled to universal jurisdiction, but first on the territoriality and nationality principles:

As the preamble of the Rome Statute claims, international crimes are said to threaten the peace, security and wellbeing of the world and 'the most serious crimes of concern to the international community as a whole must not go unpunished. Therefore, the refusal of the drafters of the Rome Statute to grant the ICC universal jurisdiction may be criticised not only on the basis that the jurisdictional regime of the Statute means that some offences may go unpunished, but also that the creator of the ICC failed to endow it with the mandate it needs in relation to assisting in the maintenance of international peace and security.⁵³

Similar consideration would be the case of "traveling tyrants," perpetrators⁵⁴ of core international crimes (e.g. ex dictators) would be traveling or moving to non-party States to avoid the jurisdiction of the ICC and might go unpunished due to criminal law provisions of the State or some other "close" relations with the State moved to. Again, it should be noted that these considerations are relevant when there is no Security Council referral.

There are also fair enough criticisms that when there is no basis of jurisdiction for the ICC on territoriality or nationality of the perpetrators of the member State, the Security Council would refer situations in those countries which cannot resist it (obviously this State would not be a permanent member of the Security Council, e.g. neither the ICC, nor the Security Council can do anything to unpunished perpetrators of international crimes in China or Russia since they are not party to the Rome Statute), thus selective enforcement of justice would again be the question.⁵⁵

Some problems may also arise while deciding the nationality of the accused and as the court has jurisdiction when the accused is the national of a member State. It has been claimed that it

⁵³ O. Bekou & R. Cryer, 'The International Criminal Court and Universal Jurisdiction: A Close Encounter?' (2007) Vol. 68, *International & Comparative Law Quarterly*, 56. Even though the authors mention problems with the current Jurisdiction of the ICC, they conclude by stating that "... owing to the difficulties that passing universal jurisdiction, would have created in practice, and the hostility it would probably have caused to the ICC and to Universal Jurisdiction, whether for these reasons or not, the drafters in Rome probably got it right."

⁵⁴ Liela N. Sadat, 'Redefining Universal Jurisdiction' (2001) Vol. 35 *New England Law Review*, 245-256 cited in O. Bekou & R. Cryer, *ibid.*

⁵⁵ D. Johnson, 'Selective Justice for Failed States Only. Do we really need an International Criminal Court?,' available at <http://www.counterpunch.org/johnstone01272007.html>. Accessed 1 October, 2010.

would be difficult to determine the court's jurisdiction where the nationality of the accused is not certain or where the accused has more than one nationality.⁵⁶

4. Territorial (*Ratione Loci*) Jurisdiction

Territorial jurisdiction refers to a court's power over events and persons within the bounds of a particular geographic territory. If a court does not have territorial jurisdiction over the events or persons within, then the court cannot bind the defendant to an obligation or adjudicate any rights therein.⁵⁷ A State has jurisdiction over acts committed within its territory.⁵⁸ This is a basic principle of both domestic and international law.⁵⁹ The "territorial principle" reflects the global community's recognition that without the power to control acts or things located in its territory, a State could not exist.⁶⁰ The Rome Statute embodies the requirement of a territorial nexus. By virtue of Article 12(2)(a) of the Rome Statute, the ICC has jurisdiction over crimes committed on the territory of State Parties, regardless of the nationality of the offender. It also has jurisdiction over crimes committed on the territory of States that accept its jurisdiction on an *ad hoc* basis, in accordance with Article 12(3), as well as where jurisdiction is conferred by the Security Council, pursuant to Article 13(b) but also acting in accordance with Chapter VII of the Charter of the United Nations.⁶¹ The 1948 Genocide Convention provides some precedent for the idea that an international criminal court will have jurisdiction over crimes committed on the territory of a State Party.⁶² Article VI of the Convention envisages just such an eventuality.⁶³

Thus, if a listed crime is committed in State A, a State Party to the ICC Statute by a national of State B, whether or not State B is a State Party, State A will have enabled the ICC to take jurisdiction, whether the alleged offender is present in State A or in another custodial State Party. Some authors⁶⁴ and the United States have argued that the Article 12(2) (a) of the Rome Statute is in violation of Article 34 of the Vienna Convention on the Law of Treaties, 1969 for allowing the ICC to exercise its jurisdiction in certain circumstances within the territory of Non-State Parties. The ICC is not, as has been argued by the United States taking jurisdiction over non-States Parties, in violation of Article 34 of the Vienna Convention.⁶⁵ When an alien commits a crime, whether a domestic common crime or an international crime such as hostage taking, on the territory of another State, a prosecution in the latter State is not dependent on the State of nationality being a party to the pertinent treaty or otherwise consenting.⁶⁶ It is not a case of a non-State Party being bound and the ICC overreaching its jurisdiction, but rather the individual being amenable to the jurisdiction of the ICC where crimes are committed in the territory of a State Party.⁶⁷ There is no rule of international law prohibiting the territorial State

⁵⁶ M. Frulli, 'Jurisdiction Rationae Personae' in Antonio Cassese, Paula Gaeta, and John RWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol.1, (Oxford: Oxford University Press, 2002) 536.

⁵⁷ Territorial Jurisdiction, available at <http://en.wikipedia.org/wiki/TerritorialJurisdiction> Accessed 1 October 2010

⁵⁸ Malcolm N. Shaw, *International Law* 458 (4th ed. 1997) cited in Lance Phillip Timbreza, Captain Bridgeport and the Maze of ICC Jurisdiction, (2007) Vol. 10 *Gonzaga Journal of International Law*, 349.

⁵⁹ *Ibid.*

⁶⁰ Thomas Buergenthal & Sean D. Murphy, Public International Law in a Nutshell, 205 (2002) cited in Lance Phillip Timbreza, *ibid.*

⁶¹ W.A. Schabas, *supra*, note 8, 75.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ Lance Phillip Timbreza, *supra*, note 57; J.N. Maogoto, *supra*, note 45.

⁶⁵ S. A. Williams & W.A. Schabas, *supra*, note 39, 557.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

from voluntarily delegating to the ICC its sovereign ability to prosecute.⁶⁸ Scharf, an international publicist argues that “it is a distortion to say that the Rome Statute purports to impose obligations on Non-Party States.”⁶⁹ The only obligations created by the Rome Statute are extradition, providing of evidence, funding and cooperation; these are only required of the State Parties.⁷⁰ The Rome Statute “simply confirms the recognized principle that individuals are subject to the substantive and procedural criminal laws applicable in the territories to which they travel, including laws arising from treaty obligations.”⁷¹

The territorial jurisdiction includes the land territory of a member State and crimes committed on board vessels or aircraft registered in the State Party.⁷² Logically, it should extend to air space above the State, and to its territorial waters and possibly, its exclusive economic zone.⁷³ Problems are bound to arise while deciding the territory as the court has jurisdiction when the accused has allegedly committed a crime on the territory of a member State. It has been contended that 50% of international boundaries are disputed, particularly when there are conflicts that are ongoing over the territory, the ICC will not be able to determine the territory or boundaries.⁷⁴ These problems would be impossible for the ICC to solve when its decision would lead to determination of an international border or would lead to take side in conflicts over the territory in question. But these problems with territory seem to be a very rare one.

The doctrine of objective territoriality jurisdiction is related to territorial jurisdiction. Under the doctrine of objective territoriality “acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State punishing the cause of the harm as if he had been present at the effect.”⁷⁵ The doctrine may be applied in cases of “aiding, abetting, ordering, soliciting, including, or intentionally contributing to a crime within the subject matter of the court.”⁷⁶ The doctrine may be asserted where an essential element of a crime and its effects have taken place in a territory.⁷⁷ Under the principle, the crime is considered to have been an evil committed against the territory where the effects of the acts resulted.⁷⁸

The Rome Statute does not address the doctrine of objective territoriality directly under Article 12(2)(a). The language of the Rome Statute is consequently limiting. The term “conduct” used in Article 12 (2) (a) is not defined in the Rome Statute.⁷⁹ The strongest argument against the exercise of objective territoriality jurisdiction by the ICC involves an interpretation of conduct requiring the accused to physically carry out conduct on the territory of a State Party.⁸⁰ This

⁶⁸ *Ibid.* The argument that such delegation is either illegal or unprecedented has been put forward since the adoption of the Rome Statute by D. Scheffer, ‘US Policy and the International Criminal Court’ (1999) Vol. 32 *Cornell International Law Journal*, 529.

⁶⁹ Michael P. Scharf, ‘The ICC’s Jurisdiction Over the National of Non – Party States. A Critique of the US Position’ (2001) Vol. 64 *Law & Contemporary Problems*, 67, 98.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² Rome Statute, Art. 12 (2) (a).

⁷³ W.A. Schabas, *supra*, note 8, 76.

⁷⁴ *Ibid.*

⁷⁵ *Strassheim v. Daily*, 221 US. 280, 285 (1911); Indictment, *Prosecutor v. Charles Ghankey Taylor*, Case No SCSL - 2003 - 01 – 1 March 7, 2003 cited in Lance Phillip Timbreza, *supra*, note 57.

⁷⁶ K. S. Gallant, ‘Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts’ (2003) Vol.48 *Villanova Law Review*, 763, 814 in Lance Phillip Timbreza, *supra*, note 57.

⁷⁷ The S.S. Lotus (*France v. Turkey*) 1927. P.C.I.J. (ser. A) No 10; see also *R.v. Nel*, South Africa Sup.Ct .App. Div. 1953, reprinted in *Int’l L. Rep.*, Vol. 20, (1957),192 cited in Lance Phillip Timbreza, *supra*, note 58.

⁷⁸ *Ibid.*

⁷⁹ Lance Phillip Timbreza, *supra*, note 58, 355.

⁸⁰ *Ibid.*

interpretation allows for certain crimes to be beyond the ICC's reach, which is contrary to the purpose of the Rome Statute.⁸¹

The concept of "effects" jurisdiction was the basis for an indictment by the Special Court for Sierra Leone of President Charles Taylor of Liberia.⁸² Taylor was indicted by the Special Court for crimes against humanity.⁸³ The indictment alleged that Charles Taylor is individually criminally responsible for his aid in planning, instigating, and ordering the commission of crimes by Liberian Military groups in Sierra Leone.⁸⁴ President Charles Taylor's action took place in Liberia; however the crimes were carried out in Sierra Leone. The effects of President Taylor's commands were felt in Sierra Leone.⁸⁵ One distinction between the Special Court for Sierra Leone and the ICC is the language in the Statutes. The Statute for the Special Court of Sierra Leone clearly confers objective territorial jurisdiction on the court.⁸⁶ Article 6(1) of the Statute reads: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime ... shall be individually responsible for the crime."⁸⁷ Consequently, on 26 April and 30 May, 2012 respectively, the Trial Chamber rendered its judgement, finding the accused, Charles Ghankay Taylor, guilty of crimes against humanity pursuant to Article 6(1) of the Statute and unanimously sentenced him to a single term of imprisonment of fifty (50) years, commencing from 29 March 2006 during which he was detained in custody pending his trial.⁸⁸ The Statute for the ICTR adopted the same language.⁸⁹

The fact that the drafters of the Rome Statute did not adopt similar language may be telling.⁹⁰ International publicists, such as Kenneth S. Gallant, have adopted the position that the Rome Statute does extend to objective territoriality jurisdiction.⁹¹ This view is consistent with the purpose of the Rome Statute – to see the effective prosecution of certain types of war crimes.⁹² According to Schabas, given the silence of the Statute about the effects jurisdiction, "there are compelling arguments in favour of a strict construction of Article 12 and the exclusion of such a concept".⁹³ However, according to Gallant, "this issue of "effects" jurisdiction will probably not be resolved until raised by a case before the ICC or by an amendment to the ICC Statute."⁹⁴ It is hoped that the issue is raised soonest and resolved before the court.

Nevertheless, a critical look at the current case load at the ICC reveals that no apparent problems concerning territorial jurisdiction have arisen. In approving the arrest warrants for the Five Lord's Resistance Army leaders in Uganda and for Thomas Lubanga in Congo, the Pre-Trial Chamber observed that the crimes were alleged to have been committed on the

⁸¹ Rome Statute, Preamble

⁸² Indictment in the Case of the *Prosecutor v. Charles Taylor* Case No. SCSL – 03 – 01 (Sierra Leone, 4 June 2003).

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ Statute of the Special Court for Sierra Leone, Art. 6 (1).

⁸⁷ *Ibid.*

⁸⁸ *Prosecutor v. Charles Ghankey Taylor*, Case No.: SCSL-03-01-T (Judgement & Sentencing), 26 April 2012 & 30 May 2012. Available at <http://www.scsl.org/LinkClick.aspx?fileticket=U6xCITNg4tY%3d&tabid=107>, Accessed 9 July, 2012.

⁸⁹ Statute of the ICTR, Art. 6(1).

⁹⁰ Lance Phillip Timbreza, *supra*, note 58.

⁹¹ Kenneth S. Gallant, *supra*, note 76, 814.

⁹² Rome Statute, Preamble; Lance Phillip Timbreza, *supra*, note 58.

⁹³ W.A. Schabas, *supra*, note 8, 76.

⁹⁴ K. S. Gallant, *supra*, note 76, 815.

territory of the referring State. Security Council Resolution 1593 declares that the court is to prosecute crimes committed in Darfur.

5. Acceptance of Jurisdiction by A Non – State Party

Apart from the territorial and personal jurisdiction that flows from the ratification of the Rome Statute as it relates to a State Party, Article 12(3) portrays the possibility of a non-Party State accepting the jurisdiction of the ICC on an *ad hoc* basis. By virtue of Article 12(3) of the Rome Statute, such a State must lodge a declaration with the Registrar of the ICC by which it accepts the exercise of jurisdiction by the court “with respect to the crime in question.” Such a State is tagged an “accepting State.”

In general terms, a declaration allows for an extension of the jurisdiction of the ICC and the application of the Statute in circumstances where a non-State Party has a nexus to the alleged crimes(s).⁹⁵ The underlying premise of the declaration is to enable a non-State Party to accept the jurisdiction of the ICC on an *ad hoc* basis, without putting the States under pressure to accede to the Statute itself.⁹⁶ Its applicability is therefore dependent upon the express consent of relevant State, though it should be noted that deference to the sovereignty of non-State Parties can be “bypassed” where the Security Council refers a situation to the Prosecutor under Article 13(b) of the Rome Statute.⁹⁷ The declaration is given in circumstances where the acceptance of this jurisdiction by the accepting State is “required” under Article 12(3) of the Rome Statute. As a consequence, the accepting State has a connection with the crime(s), either as the State on whose territory the crime was (allegedly) committed or as the State of nationality of the person(s) accused of committing the crime.⁹⁸ The accepting State is under an obligation to cooperate with the ICC in accordance with Part 9 of the Rome Statute. However, there does not seem to be any consequence should an accepting State fail to cooperate as required.⁹⁹ In this regard, the accepting State has agreed to take on obligations under the Statute that, as a non-State Party, it would not have. As a result, not only has the accepting State consented to the jurisdiction of the ICC over its nationals or in relation to events on its territory or (both), but it has also accepted the limited jurisdiction of the court over the State itself in relation to the obligation to cooperate.¹⁰⁰ These obligations are not expressed to be subject to any time period and presumably remain binding on the accepting State for as long as the declaration remains in effect.¹⁰¹

⁹⁵ Steven Freeland, ‘How Open Should the Door Be? - Declarations by non-States Parties Under Article 12(3) of the Rome Statute of the International Criminal Court’ (2006) Vol. 75 *Nordic Journal of International Law*, 217 – 218; Carsten Stahn, Mohammed M. El Zeidy and Hector Olasolo, ‘The International Criminal Court’s *Ad hoc* Jurisdiction Revisited’ (2005) Vol. 99 *American Journal of International Law*, 422.

⁹⁶ *Ibid.*

⁹⁷ Art. 13 (b) of the Rome Statute States: “The Court may exercise its Jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of the statute if.: (b) A situation in which one or more of such crimes appears to have been committed is referred to the prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations”; F. Lattanzi, “The Rome Statute and State Sovereignty, ICC Competence, Jurisdictional Links, Trigger Mechanisms”, in F. Lattanzi and W.A Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, Vol. 1, 1999, 11Sirente, Italy, 60 cited in Steven Freeland, *supra*, note 95.

⁹⁸ Rome Statute, Art. 12 (2).

⁹⁹ W.A. Schabas, *supra*, note 8, 75; Sharon A. Williams and William A. Schabas, *supra*, note 39, 958.

¹⁰⁰ R.S Gallant, the “International Criminal Court in the System of States and International Organizations” in F. Lattanzi, and W.A. Schabas (eds), *Essays on the Rome Statute of the International Criminal Court*, Vol. 1, 1999, 11Sirente, Italy, 28 cited in Steven Freeland, *supra*, note 95; David Scheffer, ‘How to Turn the Tide Using the Rome Statutes’s Temporal Jurisdiction’ (2004) Vol. 2 *Journal of International Criminal Justice*, 26.

¹⁰¹ Steven Freeland, *supra*, note 95.

Concerns have been raised over the possible misuse of Article 12(3) of the Rome Statute for political aims and otherwise due to vague expression of “with respect to crimes in question”. According to Schabas:¹⁰²

The text of Article 12(3) is ambiguous in its reference to a declaration by a non-Party State with respect to a ‘crime in question’. Does this refer to one of the crimes listed in Article 5? In other words, are non-party States to make declarations accepting the jurisdiction of the court with respect to one or more of genocides, crimes against humanity and war crimes? Such an interpretation seems consistent with the use of the term ‘crimes’ in paragraph 1 of Article 12. Or is the provision to mean the acceptance of jurisdiction with respect to a specific incident or situation? According to one writer, the understanding of the drafters was that it referred to a situation.¹⁰³ A consequence of this interpretation is to eliminate the perverse situation in which a non-Party State might attempt to make a one sided declaration, aimed at an adversary but at the same time designed to shelter its own behaviour.¹⁰⁴

Carsten Stahn *et.al* stated thus:

A broad construction of Article 12(3) carries some risks. Proceedings before the court may potentially be used as a tool to influence the political landscape and balance of power of a society in transition, or to eliminate political opponents in the context of an ongoing internal armed conflict. Moreover, a declaration under Article 12(3) may present a convenient, easily available option for a government to deal with the prosecution of certain crimes committed on its territory – though without addressing their root causes.¹⁰⁵

They continued by stating further that:

The most controversial aspect of Article 12(3) is the object of the declarations themselves. The wording of the Statute is ambiguous in this regard. Article 12(3) provides that the State may accept the exercise of jurisdiction by the court “with respect to the crime in question.” A literal interpretation of Article 12(3) suggests that third States have some discretion concerning the scope of their declarations. At first glance, it might be argued that Article 12(3) is flexible enough to allow third States to pick and choose the specific criminal acts to be covered by the jurisdiction of the ICC and some commentators have taken this

¹⁰² W.A Schabas, *supra*, note 7, 79; S. A. Williams and W. A. Schabas, *supra*, note 39, 559.

¹⁰³ H. Kaul, *supra*, note 50, 583 – 616. See also M. Cherif Bassiouni, ‘Negotiating the Treaty of Rome in the Establishment of an International Criminal Court’ (1999) Vol. 32 *Cornell International Law Journal*, 443 at 453-4 cited in W.A. Schabas, *supra*, note 8.

¹⁰⁴ William A. Schabas, *op.cit.* at 79; S.A. Williams & W.A. Schabas, *supra*, note 39, 559.

¹⁰⁵ C.S. Mohammed M. El Zeidy and Hector Olasolo, *supra*, note 95, 423.

view. It has been argued, in particular, that Article 12(3) allows a third State “interested in effectively prosecuting a given crime, to accede, in relation to that crime only” and also that the article enables a third State to lodge a declaration “without subjecting its own nationals to the court’s jurisdiction” (the problem of “asymmetric liability”).¹⁰⁶

However, Rule 44 of the Rules of Procedure and Evidence of the ICC improved this controversy in order to prevent abusive and one sided use of Article 12(3). It states:

Declaration provided for in Article 12(3)

1. The Registrar, at the request of the Prosecutor, may inquire of a State that is not a Party to the statute or that has become a party to the statute after its entry into force, on a confidential basis, whether it intends to make the declaration provided for in article 12(3).
2. When a State lodges, or declares to the Registrar its intent to lodge, a declaration with the Registrar pursuant to article 12(3) or when the Registrar acts pursuant to sub-rule 1, the Registrar shall inform the State concerned that the declaration under Article 12(3), has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation and the provisions of Part 9, and any rules thereunder concerning State Parties, shall apply.¹⁰⁷

In an attempt to “fix” what the Americans considered to be the perverse consequences of Article 12(3), they promoted the above provision.¹⁰⁸ They argued that Article 12(3) of the Rome Statute would allow a Saddam Hussein to invoke the jurisdiction of the ICC for crimes committed by the United States in Iraq, and yet prevent it from doing the same with atrocities committed by the regime against the people of the country.¹⁰⁹ The Rule means such a one-sided manipulation of the jurisdiction is impossible. Some supporters of the American position have taken the view that reciprocity flows automatically from the logic of a “sensible reading” of Article 12(3) of the Rome Statute in any event, and that there is no need for a rule to clarify things.¹¹⁰ Others claim that even with Rule 44, the problem persists. According to Goldsmith:

This vague provision does not, as many have stated, guarantee that Article 12(3) parties will consent to jurisdiction for all crimes related to the consent. But even if it did, the Iraqs of the world could consent under Article 12(3) and simply not show

¹⁰⁶ *Ibid.* at 427

¹⁰⁷ Rules of Procedure and Evidence, Rule 44.

¹⁰⁸ D.J. Scheffer, ‘The United States and the International Criminal Court’ (1999) Vol. 93 *American Journal of International Law*, 12 at 18 – 20 cited in William A. Schabas, *op.cit.* at 80; S.A. Williams & W.A. Schabas, *op.cit.* at 559 – 560.

¹⁰⁹ David J. Sheffer, ‘A Negotiator’s Perspective on the International Criminal Court’ (2001) Vol. 167 *Military Law Review*, 1 at 8 cited in W. A. Schabas, *supra*, note 8, 80; S.A. Williams & William A. Schabas, *supra*, note 39, 559 – 560.

¹¹⁰ Ruth Wedgwood, ‘The United States and the International Criminal Court; Achieving a Wider Consensus Through the “Ithaca Package”’, (1999) Vol. 32 *Cornell International Law Journal*, 532 at 541 cited in William A. Schabas, *supra*, note 8, 80; S.A. Williams & William A. Schabas, *supra*, note 39, 560.

up. Rule 44 (2) improves the anomaly of Article 12(3), but does not fix it.¹¹¹

The Rome Statute does not mention how the ICC may deal with declarations that are more specific than required by the Statute and the Rules. It remains to be seen how the ICC would deal with a declaration that is specifically limited to one crime as “the crime in question” (for example, war crimes) in circumstances where the Prosecutor and/or Chamber is of the view that the facts accord more with another crime. It should also be taken into account that the mere acceptance of the court’s jurisdiction on *ad hoc* basis does not automatically trigger the proceedings or investigations. This is not the same as referral of a situation by a member State. Hence, in *ad hoc* jurisdiction, the Prosecutor of the ICC plays an important role and decides whether to commence investigations, or not.¹¹²

As for Uganda, in support of his application for arrest warrants of leaders of the Lord’s Resistance Army, the Prosecutor included a “Declaration on Temporal Jurisdiction”, dated 27 February 2004, whereby the Republic of Uganda accepted the exercise of the court’s jurisdiction for crimes committed following the entry into force of the Statute on 1 July 2002, because Uganda ratified the Rome Statute on 14 June 2002, two months after the entry into force of the Statute itself. Although, no explicit provision allows for a State Party to backdate the effect of its ratification, Article 12(3) of the Rome Statute authorises a non-Party State to accept jurisdiction over specific crimes. Presumably, Article 12(3) is the authority for Uganda’s Declaration of Temporal Jurisdiction.”¹¹³

It is pertinent to note that there are relatively few specific details regarding the declaration mechanism in the various texts under which the ICC operates (ICC Texts) – the Rome Statute, the Rules of Procedure and Evidence of the Court (RPE) and the ICC Regulations.¹¹⁴ Consequently, there is some uncertainty as to the precise procedural route that should be followed when a third State accepts the court’s jurisdiction via the lodging of an Article 12(3) declaration.

6. Subject Matter (*Ratione Materiae*) Jurisdiction

Subject matter is the cause, the object, the thing in dispute.¹¹⁵ Subject matter jurisdiction is the authority of a court to hear cases of a particular type or cases relating to a specific subject matter.¹¹⁶ Within most justice systems, certain courts are delegated certain jobs and are vested with the right only to hear and decide certain disputes and to preside over certain parties. Thus, to hear a case, a court must have subject matter jurisdiction.¹¹⁷ Subject matter jurisdiction must be distinguished from personal jurisdiction which is the power of a court to render a judgment against a particular defendant and territorial jurisdiction, which is the power of the court to

¹¹¹ Jack Goldsmith, ‘The Self – Defeating International Criminal Court’ (2003) Vol.70 *University of Chicago Law Review*, 89, Cited in William A. Schabas, *supra*, note 7, 80; S. A. Williams & W.A. Schabas, *supra*, note 39, 560.

¹¹² Rome Statute, Art. 15.

¹¹³ William A. Schabas, *supra*, note 8, 80 – 81, see also Sharon A. Williams & William A. Schabas, *supra*, note 39, 560.

¹¹⁴ The Judges of the ICC adopted the Regulations of the court (ICC-BD/01-01-04) at their Fifth Plenary Session, 17 – 28 May 2004. The ICC Regulations deal with a range of the court’s activities “necessary for its routine functioning”; Rome Statute, Art. 52(1).

¹¹⁵ Subject Matter Jurisdiction; available at <http://www.lectlaw.com/def2/s188.htm>, Accessed 1 October 2010.

¹¹⁶ Subject Matter Jurisdiction; available at http://en.wikipedia.org/wiki/subject_matter_jurisdiction. , Accessed 1st October 2010. See also what is subject matter jurisdiction: available at http://www.wisegeek.com/what_is_subject_matter_jurisdiction.htm, Accessed 1 October 2010.

¹¹⁷ *Ibid.*

render a judgment concerning events that have occurred within a well-defined territory.¹¹⁸ Unlike personal or territorial jurisdiction, lack of subject matter jurisdiction cannot be waived.¹¹⁹ A judgment from a court that did not have subject matter jurisdiction is forever a nullity.¹²⁰ Subject matter jurisdiction is set by the Constitution and/or Statutes.

The subject matter jurisdiction of the ICC revolves around four categories of international crimes; (1) the crime of genocide (2) crimes against humanity (3) war crimes and (4) the crime of aggression.¹²¹ In both the Preamble to the Rome Statute and Article 5, these are described as “the most serious crimes of concern to the international community as a whole”. Elsewhere, the Rome Statute describes them as “unimaginable atrocities that deeply shock the conscience of humanity,”¹²² “international crimes”¹²³ and “the most serious crimes of international concern.”¹²⁴

The majority of the State Parties at the Rome Conference recognized the general principles of criminal law and the subject matter jurisdiction of the ICC as being grounded in universally accepted and recognized law.¹²⁵ These four crimes are considered part of the ICC’s inherent jurisdiction, because violations breach the safety and peace of the international community. The ICC’s subject matter jurisdiction is derived from customary international law codified in four main treaties: (1) the Genocide Convention, (2) the Geneva Convention of 1949, (3) The Hague Conventions of 1899 and 1907, and (4) The Nuremberg Charter.¹²⁶ The crimes codified in these treaties are identical to the subject matter authorized for the *ad hoc* tribunals.¹²⁷

7. Conclusion

Specifically, in determining whether to institute criminal proceedings before the ICC, a State Party, United Nations Security Council, the Prosecutor and the ICC must ensure that the ICC has jurisdiction to entertain such a situation; whether in form of temporal (*rationes temporis*) jurisdiction, personal (*ratione personae*) jurisdiction, territorial (*ratione loci*) jurisdiction, acceptance of jurisdiction by a non-State Party (*ad hoc* jurisdiction) and subject matter (*ratione materiae*) jurisdiction. Jurisdiction is the critical legal issue underpinning the prosecution of offenders of international crimes envisaged by the ICC. The ICC must establish proper jurisdiction to assert judicial and penal authority over such offenders, especially if they are not citizens of State Parties to the Rome Statute and the crimes they committed were not committed in the territory of a State Party to the Rome Statute. The issue of jurisdiction can act to delimit permissible legal responses by concerned governments or the international community to international crimes.

It is clear that the final terms of the Rome Statute, including some of the more controversial issues covered in Articles 11 & 12 of the Rome Statute, were the product of compromise. It is

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ Rome Statute, Art. 5(1) ;(Art. 6 defines the crime of genocide; Art. 7 defines crimes against humanity; Art. 8 defines war crimes).

¹²² Rome Statute, Art. 1.

¹²³ *Ibid.*

¹²⁴ Rome Statute, Art. 1.

¹²⁵ Gregory P. Noone and Douglas W. Moore, ‘An Introduction to the International Criminal Court’ (1999) Vol. 46 *Naval Law Review*, 112, 113.

¹²⁶ *Ibid.* at 118.

¹²⁷ ICTY Statute, Art.s 2(2), 3, 4(2) and (5); ICTR Statute, Art.s 2(3), 3, and 4.

therefore completely understandable that the terms of the Rome Statute as well as other texts contain ambiguities and give rise to some difficult and unclear questions of interpretation. By virtue of Article 11, Temporal Jurisdiction, the ICC does not have complete jurisdiction over the crimes listed in Article 5 of the Rome Statute after its statute comes into force with respect to States that ratify or accede or otherwise accept to be bound after that date. Its temporal jurisdiction for such a State Party begins after the entry into force for the State.¹²⁸ The ICC's temporal jurisdiction in Article 11(1) & (2) of the Rome Statute should be made broader by amending the Article and expressly encompassing the crimes listed in Article 5 of the Rome Statute as long as they were recognized as crimes under international law at the time of the commission. Similarly, in Article 11(2) of the Rome Statute, arguably, the restriction therein is inappropriate because once a State becomes a Party, there is no legal problem in extending back in time the jurisdiction of the ICC where the crimes are universally condemned for States that become Parties after the entry into force of the Statute, application should be retrospectively. In such circumstances, the ICC would not have been criticized for *ex post facto* criminalization.

Moreover, under Article 12 of the Rome Statute currently in force, there still remains a danger that the perpetrator might go unpunished and application of law on selective basis ("selective justice") is still a relevant concern and there is too much possible political intervention by the Security Council. This paper reveals that the current conditions of the exercise of jurisdiction of the Court is not effective, and when a crime is not committed by a State Party national or on its territory, and when there is no UN Security Council referral and no *ad hoc* acceptance of the Court's jurisdiction, perpetrators might go unpunished. In addition, the Rome Statute enables the Security Council to refer any situation to the ICC no matter the State in question (both State Parties and non-States Parties) to the Rome Statute. Hence, the concern of "selective justice" is still relevant. One would question why the ICC can exercise jurisdiction over any situation and prosecute the alleged criminals when there is a Security Council referral, but cannot do the same on its own without the Security Council referral (approval). Consequently, it is recommended that Article 12 of the Rome Statute be amended to equip the ICC with international jurisdiction to entitle the ICC to exercise jurisdiction over crimes wherever they are committed by anyone and against any national in the world, of course relying on complementarity regime. There would also be no need for a Security Council referral in order to authorize the ICC with jurisdiction when it does not have one, as this will greatly limit political intervention into international criminal justice and increase the deterrent effect of international criminal law.

¹²⁸ Sharon A. Williams, *supra*, note 4, 544. See also Rome Statute, Art. 11(2).