THE JURISDICTION OF INTERNATIONAL TRIBUNALS AND AN EVALUATION OF ITS LEGITIMACY

A Focus on ICC and Its Impact on International Law

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1. Introduction

The world community has long been aware of its need for international tribunals to confront crimes against humanity and to save succeeding generations from the scourge of war.\(^1\) On 8 August 1945, the International Military Tribunal was established for the just and prompt trial and punishment of the major war criminals of the European Axis. \(^2\) Subsequently, the International Military Tribunal for the Far East was established On January 19, 1946.\(^3\) These two tribunals are the pioneers for the creation of international tribunals to deal with international crimes\(^4\).

Unfortunately, the scourge of war does not cede after the Nuremberg and Tokyo Trials and it did continue to exist in the world not only on the international level but also on the domestic level. The atrocities in the former Yugoslavia, Sierra Leone, Rwanda and other parts of the world have seen the hard reality relentlessly, after the establishment of International Criminal Tribunal for the former Yugoslavia (ICTY) International Criminal Tribunal for Rwanda (ICTR) Special Court for Sierra Leone, the International Criminal Court (ICC) came with the pace on 1 July 2002.\(^5\) As of December 2010, there are 139 Signatories and 114 Parties to the Rome Statute of the International Criminal Court


\(^2\) Charter of the International Military Tribunal, art.1.

\(^3\) Charter of the International Military Tribunal for the Far East, art.1.

\(^4\) For the seek of arguments in this essay, I do refer to Article 5 of the Rome Statute of the International Criminal Court by using the term “international crimes”, and this shall not extend to “transnational crimes” such as drug trafficking, arms trafficking or money laundering.

\(^5\) The Rome Statute, arts.1, 126.
(hereinafter the Rome Statute), a further 25 countries have signed but not ratified the Rome Statute.  

However, the jurisdiction of the ICC has been controversial, especially the ICC may exercise jurisdiction over nationals of States that are not parties to the Rome Statute without the consent of those States. Largely based on the jurisdiction issue, three of the Security Council Permanent member States, namely the United States, China and Russia did not join the Rome Statute. Ironically, according to the Rome Statute, the jurisdiction can be exercised in a situation which the Security Council refers to the ICC.

This essay aims to re-examine the jurisdiction of the international criminal tribunals with the reference of sophisticated International Court of Justice (ICJ) and the focus of relatively rudimentary ICC. The main structure of this essay is the following: Chapter 2 of this essay defines the key terms which are vital to understand the controversies surrounding the ICC, it starts with the legal definition of the word “jurisdiction” and tries to apply the term in its strictest sense as I move on my arguments towards the final conclusions. Subsequently, I shall define the terms “legality” and “legitimacy” and draw a distinction between them. This is the very foundation for this essay to be done. Chapter 3 deals with specific instances of several criminal tribunals with the reference of the ICJ. The reason for this is that the ICJ, as well as its predecessor PCIJ, has long been standing for its legitimacy, it has developed a relatively sophisticated jurisdiction doctrine which is able to transform political controversies into legal debates. Of course, in the context of the ICTY, ICTR and the Special Court for Sierra Leone, the ICC applies almost the same jurisprudence. But the fundamental differences between ICC and other ad hoc tribunals are the jurisdiction issues. Chapter 4 touches upon the controversies on the jurisdiction of the ICC and explains why it

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7 Rome Statute, art.12(2)(a), (3).

8 Rome Statute, art.13 (b).
is so. Then this leads me immediately jumping out of the ambit of international criminal law, by doing so I shall borrow the jurisprudence from general international law even the domestic constitutional law. Chapter 5 gave a legitimacy test of the ICC jurisdiction and I shall discuss the possible justification of the ICC interference upon non-party States. At the every end, brief conclusions will be drawn based on the aforementioned arguments.
2 Defining the terminologies

2.1 Jurisdiction

2.1.1 What jurisdiction is

Jurisdiction generally describes any authority over a certain area or certain persons. Jurisdiction is not only a matter of domestic law but also an issue of international law. In the realm of public international law, the term jurisdiction has a very close link to the concept of sovereignty. It is in this sense that jurisdiction embodies the principle of sovereignty.9

Article 2(7) of the UN Charter declares that:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter.

Much has been cited from this article to support the principle of non-intervention in international law. For instance, the ICJ in the *Nicaragua case* relied upon this to declare the violation of international law by the United States.10 On the domestic level, the power of the central authorities of a State to exercise public functions over individuals located in a territory is called “jurisdiction” 11 In the context of municipal law, jurisdiction should be distinguished between prescriptive and enforcement dimensions.12

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level, dealing with international criminal law, subject-matter jurisdiction\textsuperscript{13} is frequently referred, such as the ICC has jurisdiction over certain international crimes stated in the Rome Statute Article 5.

Under international law, a state is subject to limitations on\textsuperscript{14}

(a) Jurisdiction to prescribe, i.e., to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court;

(b) Jurisdiction to adjudicate, i.e., to subject persons or things to the process of its courts or administrative tribunals, whether in civil or in criminal proceedings, whether or not the state is a party to the proceedings;

(c) Jurisdiction to enforce, i.e., to induce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other non-judicial action.

International tribunals primarily concern themselves as the judicial bodies to apply international law. And any State in the international communities can not invoke its municipal for the non-performance of its international obligations especially during the judicial processes of international tribunals. The \textit{Nicaragua case} is an extraordinary example for the States in dispute to be bound by the jurisdiction of the ICJ.\textsuperscript{15}

2.1.2 The principles for exercising jurisdictions

However, after defining the legal concept of jurisdiction, it is of the same importance to distinguish the different principles and doctrines to exercise jurisdictions. The Commentary to the Harvard Research Draft Convention on Jurisdiction with Respect to

\textsuperscript{13} Subject-matter jurisdiction is the authority of a court to hear cases of a particular type or cases relating to a specific subject matter.

\textsuperscript{14} Restatement (Third) of Foreign Relations Law, REST 3d FOREL § 401,1987

\textsuperscript{15} \textit{Military and Paramilitary Activities in and against Nicaragua} (Nicaragua v. United States of America), ICJ Reports, 1986, p.429.
Crimes 1935 identified five general principles, namely: (a) the Territorial principle (b) the nationality principle (c) the protective principle (d) the universality principle (e) the passive personality principle. In the context of international criminal law which is primary concern of this essay, I will leave civil jurisdiction aside when taking about those different principles.

(a) The Territorial principle

The territorial basis for the exercise of jurisdiction reflects one aspect of the sovereignty exercisable by a state in its territorial home, and is the indispensable foundation for the application of the series of legal rights that a state possesses. International law has laid very heavy emphasizes on this principle, the most cited reference would probably be the *Lotus case* by the Permanent Court of International Justice (PCIJ) in 1927. The PCIJ stated in the Judgment that

“[...] Now, the first and foremost restriction imposed by international law upon a State is that - failing the existence of a permissive rule to the contrary - it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention”.

It should be noted that, in the *Lotus case*, the PCIJ actually adopted “objective territorial principle”: a State is free to exercise its jurisdiction when a crime has been initiated and completed entirely in its territory, but it may also do so when a crime is initiated in its territory (subjective territorial principle) and when the effects of the crime

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16 Supra note 12, p.126.
18 *The Lotus case, (France v. Turkey)*, PCIJ, Ser. A., No. 10 (1927), para.19
take place in its territory (objective territorial principle)\textsuperscript{19}

However, the judgment in \textit{Lotus case} given by the PCIJ attracted much criticism. Because the court’s opinion seems to be a little bit extreme on the point that “a State is free to act following its free will” It is argued that the \textit{Lotus} principle as regards collisions at sea has been overturned by article 11(1) of the High Seas Convention, 1958, which emphasized that only the flag state or the state of which the alleged offender was a national has jurisdiction over sailors regarding incidents occurring on the high seas\textsuperscript{20}

In the \textit{Anglo-Norwegian Fisheries} case, the ICJ ruled that though delimitation of territorial water is a matter of domestic jurisdiction, but its validity has to depend upon international law.\textsuperscript{21}

\textbf{(b) the nationality principle}

It is taken as granted that a State can exercise jurisdiction over all the nationals who have the nationality of the State. The question of nationality is primarily within the domestic jurisdiction of States. In the \textit{Nationality Decrees in Tunis and Morocco case}, the PCIJ stated that

\begin{quote}
\textquote{[...]} In the present of international law, questions of nationality are, in the opinion of the court, in principle, within the jurisdiction of the State."
\end{quote}

The Hague Convention on the Conflict of Nationality Laws (1930) takes the same view on this.\textsuperscript{22}

However, In \textit{Nottebohm case}, the ICJ has made it clear that when two States have conferred their nationality upon the same individual and this situation is no longer limited

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\textsuperscript{20} Supra note 17, pp.656.

\textsuperscript{21} \textit{The Anglo-Norwegian Fisheries case} (UK v. Norway), ICJ Reports, 1951, p. 116;

\textsuperscript{22} The Hague Convention on the Conflict of Nationality Laws (1930), art.1.
to domestic jurisdiction of one of these States but extends to international field. Furthermore, in the same case, the ICJ stated that nationality is a legal bond having “a genuine connection” with the concerned individuals.

It can be safely indicated from international law that when applying the nationality principle, two factors should be taken into consideration: first, nationality is an issue subject to domestic jurisdiction. Second, there is constraint on the issue of nationality by international law.

(c) the protective principle

This principle provides that states may exercise jurisdiction over aliens who have committed an act abroad which is deemed prejudicial to the security of the particular state concerned. Most nations accept the protective principle. Under international law, the "protective principle" gives a country the jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems.

(d) universality principle

Universal jurisdiction or universality principle is a principle whereby States claim criminal jurisdiction over persons whose alleged crimes were committed outside the boundaries of the prosecuting state, regardless of nationality, country of residence, or any other relation with the prosecuting country. At the present stage of development of international law, this category of crime is generally considered to include piracy, slavery,

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24 Tim Hillier, Supra note 12, p.129; Malcolm N. Shaw, Supra note 17, pp.667.


genocide, crimes against humanity, war crimes, torture, and "perhaps certain acts of terrorism."²⁷ Universal adjudicative jurisdiction depends upon the definitional substance of the crime as prescribed by universal prescriptive jurisdiction, while the legal content of this prescriptive jurisdiction is moored in customary international law.²⁸ It is a long-established custom that piracy is subject to universal jurisdiction. This was crystallized by the UN Convention on the Law of the Sea.²⁹

(e) the passive personality principle

The passive personality principle allows a country to exercise jurisdiction over an act committed by an individual outside of its territory because the victim is one of that country's nationals.³⁰ An example for adopting this principle would be the Cutting case (1886), Cutting was arrested while in Mexico and convicted of the offence (a crime under Mexican law) with Mexico maintaining its right to jurisdiction upon the basis of the passive personality principle.³¹ Another instance for this is the United States v. Yunis case (1991) in which the Chief Judge Mikava supported the passive personality principle.³²

2.2 legitimacy

2.2.1 What legitimacy is

Legitimacy is the foundation of such governmental power as is exercised, both with a consciousness on the government's part that it has a right to govern, and with some

³¹ Supra note 17 , pp.664-665.
recognition by the governed of that right.\textsuperscript{33} Legitimacy drives from the origin of the proper authority. In a democracy, government legitimacy derives from the popular perception that government abides democratic principles in governing, and is legally accountable to its people.\textsuperscript{34} By the same token, the issue of legitimacy did exist in international law. For Rüdiger Wolfrum, the legitimacy of public international law lies in the following:\textsuperscript{35}

For public international law legitimacy rests –at least according to the traditional view-in the consent of the States concerned. According to this view international law is based upon the assumption that States have the ability to negotiate and to adhere to international agreements. By doing so they accept obligation vis-à-vis the other partners to that agreement or vis-à-vis a larger community.

A legitimate international court or tribunal must possess some “quality that leads people (or states) to accept its authority . . . because of a general sense that the authority is justified.”\textsuperscript{36}

2.2.2 Legitimacy and legality

In law, “legitimacy” is distinguished from “legality” (see colour of law), to establish that a government action can be legal whilst not being legitimate, e.g. a police search without proper warrant; conversely, a government action can be legitimate without being legal, e.g. a pre-emptive war, a military junta. An example of such matters arises when legitimate institutions clash in a constitutional crisis.


Legitimacy can reinforce legality, but also it can challenge legality. Ideally, what is legal should be legitimate and what is legitimate should be legal. However the mere prescription ‘should’ suggests that such unity is not always present.\(^\text{37}\)

Legal procedures cannot adequately secure a political system’s legitimacy because a regime of robust legal proceduralism is vulnerable to a perfectly legal means for undermining the very rule of law that proceduralism seeks.\(^\text{38}\)


3 The Jurisdiction of International Tribunals

3.1 The Jurisdiction of ICJ

Before talking about the jurisdiction of the ICJ, two points must be made clear: the one is only States can bring disputes before the court, the other is the disputes must be a “legal” disputes.

According to the Statute of International Court of Justice (ICJ Statute), only States may be parties before the court. This precludes individuals, international organizations and other non-state entities to present cases before the court.

The ICJ Statute requires the court to deal with “legal disputes”. According to Article 36 (2) of the Statute, the legal disputes are:

(a). the interpretation of a treaty;
(b). any question of international law;
(c). the existence of any fact which, if established, would constitute a breach of an international obligation;
(d). the nature or extent of the reparation to be made for the breach of an international obligation.

In the Armed Actions case, the ICJ has to deal with the case in the sense of a dispute capable of being settled by the application of principles and rules of international law.

The jurisdiction of the ICJ can be classified as two categories: Contentious Jurisdiction and Advisory Jurisdiction.

39 ICJ Statute, art. 34(1).
3.1.1 Contentious jurisdiction

In contentious cases, the ICJ can only exercise its jurisdiction by consents, Judge Lauterpacht gave a separate opinion in the *Case Concerning the Application of the Genocide Convention* (1993) and indicated that consent could be given in one of three ways:

(a) under the provisions of a Treaty;

(b) by acceptance of the court’s compulsory jurisdiction under Article 36 (2) of the Statute; or

(c) by acceptance of jurisdiction by the respondent through its conduct following the unilateral initiation of proceedings by the applicant.

Consent by provisions of a treaty, agreement or compromise will typically be the jurisdiction on voluntary basis. This is in accordance with Article 36 (1) of the Statute. A classical example of the compulsory jurisdiction under Article 36 (2) would be the Nicaragua case in which “In order to founded the jurisdiction of the Court the Application relied on declarations made by the Parties accepting the compulsory jurisdiction of the Court under Article 36 of the Statute.”

3.1.2 Advisory Jurisdiction

According to the UN Charter Article 96, the General Assembly or the Security Council or other specialized UN agencies or organs may request the ICJ to give advisory opinions. According to Article 65 (1) of the ICJ Statute, the Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in

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41 *Case Concerning the Application of the Genocide Convention* (1993), Separate Opinion by Judge Lauterpacht.

accordance with the Charter of the United Nations to make such a request. Recent examples are the Kosovo advisory opinion.\textsuperscript{43}

3.2 The Jurisdiction of ICTY

The International Criminal Tribunal for the former Yugoslavia was established by Resolution 827 of the United Nations Security Council on 25 May 1993.\textsuperscript{44} According to paragraph 2 of Security Council Resolution 827,

\begin{quote}
\ldots Decides hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace and to this end to adopt the Statute of the International Tribunal annexed to the above-mentioned report.
\end{quote}

3.2.1 Territorial Jurisdiction of the Court\textsuperscript{45}

The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters.

3.2.2 Temporal Jurisdiction of the Court\textsuperscript{46}

The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.

\textsuperscript{43} Accordanee with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion), ICJ Advisory opinion, 2010.


\textsuperscript{45} Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art.8.

\textsuperscript{46} Ibid.
3.2.3 Subject-mater jurisdiction

(a) The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949.

(b) The International Tribunal shall have the power to prosecute persons violating the laws or customs of war.

(c) The International Tribunal shall have the power to prosecute persons committing genocide.

(d) The International Tribunal shall have the power to prosecute persons responsible for the crimes against humanity.

3.2.4 Personal Jurisdiction

The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

3.3 The Jurisdiction of ICTR

The International Criminal Tribunal for Rwanda (ICTR) was established in November 1994 by the United Nations Security Council Resolution 955. According to paragraph 1 of the Security Council Resolution 955, the sole purpose of the tribunal is prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 and to this end to adopt the Statute of the International Criminal Tribunal for Rwanda annexed hereto.

47 Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art.2, 3, 4, 5.

48 Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art.6.

3.3.1 Territorial jurisdiction\textsuperscript{50}

The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens.

3.3.2 Temporal jurisdiction\textsuperscript{51}

The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994.

3.3.3 Subject-mater jurisdiction\textsuperscript{52}

(a) The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined by the Statute.

(b) The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the crimes against humanity.

(c) The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977.

3.3.4 Personal Jurisdiction\textsuperscript{53}

The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

3.4 Jurisdiction of ICC

The International Criminal Court (ICC), governed by the Rome Statute, is the first

\textsuperscript{50} Statute of the International Tribunal for Rwanda, art. 7.

\textsuperscript{51} Ibid.

\textsuperscript{52} Statute of the International Tribunal for Rwanda, arts.2, 3, 4.

\textsuperscript{53} Statute of the International Tribunal for Rwanda, art.5.
permanent, treaty based, international criminal court established to help end impunity for
the perpetrators of the most serious crimes of concern to the international community.\textsuperscript{54}
Unlike the aforementioned two \textit{ad hoc} tribunals, the ICC is an international independent
organization and it is not a UN organ or UN-created institution.

3.4.1 Territorial Jurisdiction

The territorial jurisdiction of the ICC shall extend to the territory of the State Parties
including their land surface, airspace and territorial waters or other non-parties by special
agreements.\textsuperscript{55}

3.4.2 Subject-mater jurisdiction

The Court has jurisdiction in accordance with this Statute with respect to the crime of
genocide, crime against humanity, war crimes and the crime of aggression.\textsuperscript{56}

3.4.3 Personal Jurisdiction

(a) The ICC has jurisdiction over nationals of the State parties.

(b) The ICC has jurisdiction over nationals of non-parties if the Security Council
refers the situation to ICC.\textsuperscript{57}

(c) The ICC has jurisdiction over nationals of non-parties if they have committed a
crime on the territory of a State party or they accepted the jurisdiction.\textsuperscript{58}

3.4.4 Temporal jurisdiction

(d) The ICC has jurisdiction over nationals of non-parties if the non-parties consent to
do so.\textsuperscript{59}

\textsuperscript{54} http://www.icc-cpi.int/Menus/ICC/About+the+Court/ last visit Dec 2, 2010.
\textsuperscript{55} Rome Statute, art.4(2).
\textsuperscript{56} Rome Statute, art.5.
\textsuperscript{57} Rome Statute, art.13.
\textsuperscript{58} Rome Statute, art.12 (2)(a), (3).
\textsuperscript{59} \textit{Ibid.}
4 The controversies of the jurisdiction of ICC

The ICC now is a reality. However, some countries, including the three Security Council permanent member States (United States, Russia and China) have opposed it, expressing concerns about politically motivated prosecutions, weak procedural safeguards and interference with state sovereignty. The US first signed the Rome Statute but refused to ratify it. Russia signed the ICC Statute on 13 September 2000. However, at the time of writing this note (March 2005), the President has not yet introduced the Statute to the Russian State Duma -- the legislative chamber of the Federal Assembly which passes laws on, among others, ratification of international treaties. China refused to join the Rome Statute based on its strong concern of the sovereignty issues. In this Chapter, I shall elaborate on the reasons why controversies have been repeatedly over the ICC from its very birth till the recent Sudan Darfur situation.

4.1 Sovereignty issues

The sovereignty and equality of States represent the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having a uniform legal personality. The principle of the sovereign equality is the fundamental

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principle in the UN Charter.\textsuperscript{63} This principle has also been upheld in the \textit{Corfu Channel case}\textsuperscript{64} and the \textit{Nicaragua case}\textsuperscript{65}. State sovereignty has many legal dimensions, one of which is that the respect of territorial jurisdiction. Sovereignty contains that no other State can exercise jurisdiction in the States’ territory (the so called \textit{jus excludendi alios}, or the right to exclude others). China’s main concern is that the jurisdiction of the ICC will intrude the legal realm of the sovereignty, thus weakening the legal foundation enshrined by Article 2 (1) of the UN Charter. Especially China’s refusal is primarily based on the non-voluntary and the universal jurisdiction exercised by the ICC. China’s objections are as follows\textsuperscript{66}:

(1) The jurisdiction of the ICC is not based on the principle of voluntary acceptance: the Rome Statute imposes obligations on non-States Parties without their consent, which violates the principle of state sovereignty and the Vienna Convention on the Law of Treaties. Furthermore, the complementary jurisdiction principle gives the ICC the power to judge whether a state is able or willing to conduct proper trials of its own nationals. As a result, the Court becomes a supra-national organ.

(2) War crimes committed in internal armed conflicts fall under the jurisdiction of the ICC. Further, the definition of 'war crimes' goes beyond that accepted under customary international law and Additional Protocol 2 to the Geneva Conventions.

(3) Contrary to the existing norms of customary international law, the definition of 'crimes against humanity' does not require that the state in which they are committed be 'at war'. Furthermore, many actions listed under that heading belong to the area of human

\textsuperscript{63} UN Charter, art.2(1).

\textsuperscript{64} \textit{Corfu Channel case} (Merits) (United Kingdom of Great Britain and Northern Ireland v. Albania), ICJ Reports, 1949, p.35.

\textsuperscript{65} \textit{Military and Paramilitary Activities in and against Nicaragua} (Nicaragua v. United States of America), ICJ Reports, 1986, p.41.

rights law rather than international criminal law; this deviates from the real aim of establishing the ICC.

(4) The proprio motu power of the Prosecutor under Article 15 of the Rome Statute may make it difficult for the ICC to concentrate on dealing with the most serious crimes, and may make the Court open to political influence so that it cannot act in a manner that is independent and fair.

The central concerns for China in this respect is the sovereignty issues, because China may think that the jurisdiction of the ICC may weaken the sovereignty of China.

4.2 Jurisdiction over non-party nationals

As demonstrated in 3.4.3, the ICC can exercise jurisdiction over non-party nationals concerning Article 12 and 13 of the Rome Statute. The most controversial instance is that the ICC has jurisdiction over nationals of non-parties if they have committed a crime on the territory of a State party. Particularly, the US has vigorously objected the possibility that the ICC may assert jurisdiction over its nationals without its consent.67

Unless a nation's extraterritorial law falls within one of five categories--territoriality, nationality, protective principle, passive personality, or universality--it is said, the nation violates international law rules governing “prescriptive jurisdiction.”68

4.3 Universal Jurisdiction doctrine

Universal jurisdiction is the right of a state to "define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern" regardless of whether the prosecuting state can establish a connection with the perpetrator, victim, or location of the offense.69


69 Anne H. Geraghty, Universal Jurisdiction and Drug Trafficking: a Tool for Fighting
Universal jurisdiction gives the nation eager to prosecute a criminal the opportunity to try such a criminal under its own laws. Sometimes this opportunity is so enticing that nations will actually violate international law in order to take advantage of it.\textsuperscript{70}

Nations not parties to agreements providing universal jurisdiction over certain crimes generally cannot exercise universal jurisdiction over such crimes when it is not available as a matter of customary law.\textsuperscript{71}

Although the exercise of universal jurisdiction may in some instances promote international justice and accountability, it may also entail significant costs. By vesting individual nations with worldwide prosecutorial power--including nations that may have a particular axe to grind--the universal jurisdiction concept is subject to potential manipulation and abuse.\textsuperscript{72}

The principle might encourage third states to exercise universal jurisdiction.\textsuperscript{73}

4.4 Relationship with domestic constitutions

The ICC’s jurisdiction, to a certain extent, has have an impact on the domestic constitutions. For example, according to the Russian Constitution the President shall possess immunity\textsuperscript{74}. (I shall talk the immunity issue at a later stage in this paper) But when the president of the Russia committed, let suppose, war crimes in an ICC party State. The possible conflict of the domestic constitution and the ICC jurisdiction will be at the center of the issue.


\textsuperscript{71} \textit{Ibid}. p.24.

\textsuperscript{72} Supra note 68, p.325.


\textsuperscript{74} The Constitution of Russian Federation, art.91.
Let me move to another example. U.S. has been very precautious when it views ICC’s jurisdiction in the context of their constitution.

Table: Comparison of U.S. Constitutional Rights vs. Rome Statute

<table>
<thead>
<tr>
<th>Constitutional Rights</th>
<th>U.S. Constitution</th>
<th>Rome Statute</th>
</tr>
</thead>
<tbody>
<tr>
<td>Presumption of Innocence</td>
<td>Presumption of innocence in favor of the accused. <em>Coffin v. United States</em>, 156 US 432, 453 (1895).</td>
<td>“Everyone shall be presumed to be innocent until proven guilty before the Court...” (Art. 66(1))</td>
</tr>
<tr>
<td>Right to Remain Silent and Privilege Against Self-Incrimination</td>
<td>“No person...shall be compelled in any criminal case to be a witness against himself...” (Amend. V)</td>
<td>“...the accused shall be entitled...not to be compelled to testify ...and to remain silent, without such silence being a consideration in the determination of guilt or innocence....” (Art. 67(1)(g))</td>
</tr>
<tr>
<td>Right to Examine Adverse Witnesses</td>
<td>“In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him....” (Amend. VI)</td>
<td>“...the accused shall be entitled...to examine, or to have examined...the witnesses against him or her...” (Art. 67(1)(e))</td>
</tr>
<tr>
<td>Right to Obtain Witnesses</td>
<td>“In all criminal prosecutions, the accused shall enjoy the right...to have compulsory process for obtaining witnesses in his favor....” (Amend. VI)</td>
<td>“...the accused shall be entitled...to obtain the attendance and examination of witnesses on his or her behalf....” (Art. 67(1)(e))</td>
</tr>
<tr>
<td>Prohibition Against Ex-Post Facto Crimes</td>
<td>“No Bill of Attainder or ex post facto law shall be passed.” (U.S. Const. art. I., § 9, cl. 3)</td>
<td>“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.” (Art. 22(1))</td>
</tr>
<tr>
<td>Prohibition Against Double Jeopardy</td>
<td>“...nor shall a person be subject for the same offence to be twice put in jeopardy of life or limb...” (Amend. V)</td>
<td>“No person who has been tried by another court...tried by the Court with respect to the same conduct....” (Art. 20(3))</td>
</tr>
<tr>
<td>Freedom from Warrantless Arrest and Searches</td>
<td>“[N]o Warrants shall issue, but upon probable cause...” (Amend. IV)</td>
<td>“...the Pre-trial Chamber may...issue...warrants as may be required....” (Art. 57(3)(a)) The Pre-Trail Chamber shall issue a warrant if “it is satisfied that...[t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court and the arrest of the person appears necessary....” (Art. 58)</td>
</tr>
</tbody>
</table>

Prohibition Against Trials in Absentia

The language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial in absentia of a defendant who is not present at the beginning of the trial.


“[O]ne of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial.”

“[T]he accused shall be present during the trial.” (Art. 63)

“[T]he accused shall be present during the trial.” (Art. 63)

“[I]f the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused...[s]uch measures shall be taken only in exceptional circumstances after... (Art. 63(2))

Right to be Present at Trial

Two significant differences exist between trials held in U.S. criminal courts and the ICC. First, the ICC will determine a defendant's guilt or innocence by the Trial Chamber judges whereas U.S. criminal courts employ a jury system to determine a defendant's guilt. Second, a defendant in an ICC prosecution can be found guilty by a majority of the Trial Chamber's judges as opposed to the requirement of unanimity in U.S. criminal cases.

Put policy concern aside, the US thinks that the jurisdiction of the ICC may be inconsistent with their Constitution. It is partly why US has been reluctant to join the Rome Statute.

4.5 Relationship with domestic jurisdiction

Although when dealing with the relationship with the domestic jurisdiction, the ICC relied upon the complementarity principle set out in Article 1 and 17 of the Rome Statute. That relationship is rather difficult. In this section, I will not discuss about the complementarity principle in detail since a lot of literature have been seen. I shall talk about it in a more general way.

It has been argued that the ICC substantive crimes in some regards may fall short of

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and may also exceed customary international law.\textsuperscript{77}

This may have some ramifications for the argument being proposed here in that, in so much as the ICC Statute crimes exceed custom, the encouragement created by the complementarity regime of the Statute to extend local law is not simply an extension of already existing authority under general international law.\textsuperscript{78}

The formal submission of the Prosecutor's application for an arrest warrant against President Al Bashir on 14 July 2009 immediately resulted in an outcry not only from the Government of Sudan, but also of other national governments and regional organizations, with the notable exception of Member States of the European Union.\textsuperscript{79}

It can be inferred on this point that many of the reasons for the reluctance to join the Rome Statute have been the jurisdiction of ICC may be in conflict of their domestic criminal jurisdiction.

4.6 Relationship with the United Nations

The relationship between the ICC and the UN, especially the Security Council is at the very heart of the controversy. The ICC is an independent judicial institution according the Rome Statute. However, it must deal with the relationship with the UN especially under Article 103 of the UN Charter which provides

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

\textsuperscript{77} William A. Schabas, \textit{An introduction to the International Criminal Court}, 2\textsuperscript{nd} Edition. 2004, pp.28, 43, 45.


When the ICC dealing with a situation (this has frequently be the case, i.e. the situation in Darfur) which is essential within the competence of the Security Council, Article 24 of the UN Charter may be a legal barrier for the ICC’s jurisdictional legitimacy. Unlike the ICJ which is the principal judicial organ of the UN, the ICC must give the respect to the UN. In several cases, the ICJ, though its power is conferred by Chapter VI of the UN Charter, has dealt with it with precaution. In Lockerbie case, the ICJ did not deal with the issue of the court’s competence to consider the legality of Security Council Resolutions. The ICJ thus declared that

Whereas the Court, while thus not at this stage called upon to determine definitively the legal effect of Security Council resolution 748 (1992), considers that, whatever the situation previous to the adoption of that resolution, the rights claimed by Libya under the Montreal Convention cannot now be regarded as appropriate for protection by the indication of provisional measures.80

With the reference of the ICJ in the Lockerbie case, it can be safely deduced that the ICC should always exercise a higher degree of precaution to show respect of the UN Security Council.

In this sense, the inclusion of the crime of aggression within the jurisdiction of the ICC is likely to weaken the power of the UN Security Council.

4.7 The issue of immunity

It is a well-established customary international law that head of States and diplomatic agents shall enjoy immunity from the criminal jurisdiction of the receiving State. The fact that 187 State parties to the Vienna Convention on Diplomatic Relations further identifies the customary characteristics of diplomatic immunity. The immunity from jurisdiction of diplomatic agents means that a diplomatic agent shall enjoy immunity from the criminal

jurisdiction of the receiving State.\textsuperscript{81} In the \textit{Arrest Warrant Case}, the ICJ stated that a head of State enjoys in particular “full immunity from criminal jurisdiction and inviolability” which protects him or her “against any act of authority of another State which would hinder him or her in the performance of his or her duties”\textsuperscript{82} Security Council Resolution 1422 (first passed in July 2002 and renewed as Resolution 1487 in June 2003) grants immunity to personnel from ICC non-States Parties involved in United Nations established or authorized missions for a renewable twelve-month period. Security Council Resolution 1497, adopted on 1 August 2003, authorized the critical deployment of a multinational stabilization force in Liberia. However, at the insistence of the United States, the resolution included a paragraph granting “exclusive jurisdiction” to troop contributing states not party to the ICC, effectively opening the door for permanent immunity from the ICC with regard to genocide, war crimes and crimes against humanity.

In practice, the high level officials are always the potential perpetrators of international law. And from a pragmatic point view, only those high level officials can commit the international crimes, such as genocide, war crimes and crimes against humanity.

The ICC jurisdiction over the head of States and diplomatic agents especially in a case when they are non-State parties nationals is most likely to be contradictory to the general international law.

\textsuperscript{81} Vienna Convention on Diplomatic Relations, arts.29, 31.
\textsuperscript{82} \textit{Arrest Warrant Case (Democratic Republic of Congo v. Belgium)}, 2002 ICJ Reports, p.22.
5 Possible justification of the jurisdiction of ICC

Although there are controversies over the jurisdiction, the ICC as the first permanent international criminal court is indeed a big step for international criminal justice. The international community has long aspired to the creation of a permanent international court, and, in the 20th century, it reached consensus on definitions of genocide, crimes against humanity and war crimes. In this Chapter, I shall argue for the justification of the ICC’s jurisdiction on three grounds, first the notion of “universal jurisdiction”, second the *erga omnes* obligation.

5.1 Customary International Law

Unlike the issue of piracy, The ICC does not have universal jurisdiction. For the real “universal jurisdiction” the ICC must be competent to deal with the international crimes regardless of the country of origin. However, at this rudimentary stage, the ICC can not exercise jurisdiction over all territories of the world. The possible justification for this is through the formation of customary international law.

Referring Article 5 of the Rome Statute, the crime of genocide, crime against humanity and war crimes can be considered as violations of international customary law.

Article 38(1)(b) of the Statute of the International Court of Justice accepts “international custom” as a source of law, but only where this custom is (1) “State practice” (2) “opinio juris” War crimes are violation of customary international law. The evidence of general practice can be found when States entered the Hague Conventions of 1899 and 1907, the 1949 Geneva Conventions.

The *opinio juris* can be found in the judgment of the International Military Tribunal for the Trial of German Major War Criminals

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83 http://www.icc-cpi.int/Menus/ICC/About+the+Court/ last visit December, 12, 2010
“From the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity.”

Genocide can also be seen as violation of customary international law. In the *Nicarague case*, bearing UN Charter Article 51 the ICJ stated that customary international law exists alongside treaty law. According to this, the 1948 Genocide Convention is also a codification of customary international law in respect of genocide. Article I of the 1948 Genocide Convention, which has 138 states party, firmly entrenches genocide as a crime under international law. It provides: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

Another example is the customary basis of universal jurisdiction over torture, both in terms of its prescriptive ban on the crime and in terms of its adjudicative scope allowing all states' courts to prosecute the crime, extends beyond those states party to the Torture Convention to contemplate the jurisdiction of all states--making jurisdiction in fact, and in law, "universal."84

5.2 Obligations *erga omnes*

Obligation *erga omnes* is the obligation toward all the international community. The very fundamental philosophy of obligation *erga omnes* is that in the interest of the common humanity, human beings not only have a moral duty but legal obligation to prevent the possible violations of it.

In the *Barcelona Traction case*, the ICJ for the first time clearly stated that

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84 Supra note 28, p.149.
"… an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law . . . others are conferred by international instruments of a universal or quasi-universal character."85

Maurizio Ragazzi summarizes the erga omnes obligation as follows86:

(1) all four examples relate to narrowly defined obligations; (2) all are essentially prohibitions rather than positive obligations; (3) all involve "obligations" in the strict sense of the term, to the exclusion of other fundamental legal conceptions; (4) all concern obligations deriving from rules of general international law belonging to jus cogens and codified by international treaties to which a large number of states have become parties; and (5) all involve obligations instrumental to the main political objectives of the present time, which in turn reflect basic moral values.

85 Barcelona Traction case (Belgium v Spain) (Second Phase), ICJ Reports 1970, p.3.
It can be inferred from the concept of obligation *erga omnes* that the international community has a legal obligation to prevent the crime of genocide, crime against humanity and war crimes. It is precisely on this basis that the ICC can justify its interference over the non-party nationals.
6 Conclusion

Despite three permanent Security Council member States USA China and Russia has not yet joined the Rome Statute, the legitimacy of the ICC’s jurisdiction still stand well.

(a) There is no doubt that the ICC has jurisdiction over nationals of the State parties. This is based on the State consent when the state-parties ratified the Rome Statute

(b) The ICC has jurisdiction over nationals of non-parties if the Security Council refers the situation to ICC, the justification for this is based on the UN Charter which empowers the Security Council to deal with any situations as it deems necessary.

(c) The ICC has jurisdiction over nationals of non-parties if they have committed a crime on the territory of a State party. This is justified based customary international law and the obligation *erga omnes*. On one hand, customary international law prohibits the international crimes contained in Article 5 of the Rome Statute. On the other hand, the international community has the obligation *erga omnes* to prevent those international crimes.
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