THE INTERNATIONAL CRIMINAL COURT AND UNIVERSAL JURISDICTION: A CLOSE ENCOUNTER?

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Abstract The fact that the International Criminal Court has not been granted universal jurisdiction exercisable *proprio motu* has often been criticized on the basis that it will leave some offences beyond its power to prosecute. This article investigates whether the drafters of the Rome Statute were necessarily wrong in deciding not to grant the court such jurisdiction. It concludes that to have given the Court universal jurisdiction would have been lawful under current international law, and would have provided a welcome reaffirmation of the concept. Still, the nature of the cooperation regime and of the Prosecutor's investigatory remit, would mean that such jurisdiction would be difficult, if not impossible, for the Court to use. As the Court has to operate in a world of sovereign States, not all of whom are sympathetic to it, the drafters' choice was a prudent one.

I. INTRODUCTION

The International Criminal Court (ICC) is an organ created to uphold the highest international ideals,[1] but it must live in a basically Vattelian world, alongside politics both supportive and sceptical.[2] The Court was born amidst difficult negotiations,[3] and now must live in the rough-and-tumble world of international relations and diplomacy. It is our purpose in this piece to investigate whether, in one particular way, the drafters of the Rome Statute equipped the ICC well for this task. This is in relation to jurisdiction. There have been a number of criticisms of the ICC on the basis that it was not granted universal jurisdiction, that is, jurisdiction over an international crime notwithstanding any other recognized jurisdictional link to a State party to the Rome Statute than perhaps presence (or custody).[4] It is our purpose in this

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[1] Although Philip Allott might query this, see Philip Allott, *The Health of Nations* (CUP, Cambridge, 2003) 62–9.

[2] See Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (OUP, Oxford, 2003).

[3] See, eg, Phillipe Kirsch and John T Holmes, 'The Rome Conference on an International Criminal Court, The Negotiating Process' (1999) 93 AJIL 2; M Cherif Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court' (1999) 32 Cornell International Law Journal 443.

[4] See nn 14–17, and accompanying text.

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piece to question whether, against the background of the legal and political world in which the ICC has to operate, these critiques are well-founded. On balance, we conclude, that although the critics have a point, it is probably better for the ICC, and for universal jurisdiction, that the Court was not granted such jurisdiction at Rome.

II. THE BACKGROUND

When it was discussed in Rome, the question of jurisdiction was an extremely controversial one.[5] It is the matter upon which the conference broke consensus. The final result, the Rome Statute, which passed by 120 votes to seven against (with 21 abstentions), provides for jurisdiction over war crimes, crimes against humanity and genocide in two primary situations in Article 12.[6] These are, in the language of that article, where:

(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.[7]

Article 13(b) of the Statute also provides for jurisdiction in one case irrespective of whether a territorial or nationality State has ratified the Statute, in '[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.'[8] Therefore, outside of situations referred by the Security Council, the ICC only has jurisdiction over offences committed when a State that has nationality or territorial jurisdiction over the offence is a State party to the Rome Statute.

It need not have been this way. States are entitled to assert universal jurisdiction over international crimes.[9] The ICC operates on the basis of delegated

[5] See, eg, David Scheffer, 'The United States and the International Criminal Court' (1999) 93 AJIL 12.

[6] Art 12(3) also provides for jurisdiction where a State accepts the jurisdiction of the court on an ad hoc basis. It is notable that a State in this situation is obliged to cooperate with the ICC.

[7] See, eg, Sharon A Williams, 'Article 12' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Nomos, Baden-Baden, 1999) 329; Zsuszsanna Deen-Racsmány, 'The Nationality of the Offender and the Jurisdiction of the International Criminal Court' (2001) 95 AJIL 606.

[8] See eg, Sharon A Williams, 'Article 13' in Triffterer, ibid 343.

[9] See, eg, *Prosecutor v Tadić*, Interlocutory Appeal on Jurisdiction, IT-94-1AR72, 2 Oct 1995, para 62. *Prosecutor v Ntuyuhaga*, Decision on the Prosecutor's Motion to Withdraw the Indictment ICTR-96-40-T, 18 Mar 1999; *Prosecutor v Kallon and Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, SCSL-2004-15 AR 72(E) and SCSL-2004-16-AR72(E) 13 Mar 2004, paras 67–71; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume I: Rules* (CUP, Cambridge, 2005) 604; Menno T Kamminga, 'Lessons Learned From the Exercise of Universal Jurisdiction Over Gross Human Rights Abuses' (2001) 23 Human Rights Quarterly 940.

jurisdiction from its State parties.[10] They would, therefore, be entitled to have passed universal jurisdiction to the ICC. Indeed, it is at least arguable that in one instance, they have. This is in relation to Security Council referrals.[11] Since the Security Council has no jurisdiction of its own to pass to the ICC, a strong case can be made that in a situation where the Security Council refers a situation, the ICC is exercising the delegated universal jurisdiction of State parties.[12] We will return to this later.

There were proposals at Rome to give the ICC a more general form of universal jurisdiction.[13] The broadest proposal was introduced at Rome by the German delegation. This would have granted the ICC 'pure' universal jurisdiction, ie jurisdiction over any offence committed anywhere, irrespective of whether the suspect was present in the territory of a State party to the Statute. The US, in particular, was heavily critical of this proposal, and as the negotiations went on, the proposal was dropped.[14] It was largely replaced by a South Korean proposal, which would have given the ICC jurisdiction when any of a number of States were parties to the Statute. These were the States with territorial, nationality or passive personality jurisdiction, or the State with custody of the accused. Broadly speaking, had the South Korean proposal been accepted, this would have reflected a delegation of universal jurisdiction with presence ('conditional universality', as it is sometimes known). However, in spite of considerable support for the proposal, it was not accepted at Rome, and the final compromise became Articles 12 and 13, which were mentioned above.

III. CRITIQUES OF THE OUTCOME

The outcome at Rome has been heavily criticized. Hans-Peter Kaul, for example, refers to the rejection of universal jurisdiction as a 'painful weakness' of the ICC regime.[15] As he says, 'if there is an internal war—the most common form of conflict today—and neither the territorial State nor the nationality State or a State party or does not consent ad hoc and there is no Security

[10] Dapo Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1 Journal of International Criminal Justice 618, 621–34.

[11] Pursuant to its powers under Chapter VII of the UN Charter, and their recognition in Art 13(b) of the Rome Statute.

[12] See, eg, Héctor Olásolo, *The Triggering Procedure of the International Criminal Court* (Martinus Nijhoff, The Hague, 2005) 128–9.

[13] See Elizabeth Wilmshurst, 'Jurisdiction of the Court' in Roy S Lee (ed), *The International Criminal Court*: *Issues, Negotiations, Results* (Kluwer, The Hague, 1999) 127; Hans-Peter Kaul and Claus Kreß, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises' (1999) 2 Yearbook of International Humanitarian Law 143.

[14] ibid 154–5; Wilmshurst, op cit 132–3.

[15] Hans-Peter 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* (OUP, Oxford, 2003) 583, 613.

Council referral, perpetrators of core crimes will have nothing to fear from the ICC'.[16] Similarly, Leila Nadya Sadat writes that owing to the jurisdictional provisions of the Statute, the phenomenon of 'travelling tyrants' is not dealt with, and absent a Security Council referral, 'many of the most egregious cases will not be prosecuted by anyone'.[17]

The critics have a point; there are conflicts which, outside of Security Council action, will remain beyond the reach of the ICC. This is problematic. Like cases ought to be treated alike. As the preamble of the Rome Statute claims, international crimes are said to 'threaten the peace, security and well-being of the world' and 'the most serious crimes of concern to the international community as a whole must not go unpunished'.[18] Therefore, the refusal of the drafters of the Rome Statute to grant the ICC universal jurisdiction may be criticized not only on the basis that the jurisdictional regime of the Statute means that some offences may go unpunished, but also that the creators of the ICC failed to endow it with the mandate it needs in relation to assisting in the maintenance of international peace and security.

Had the ICC been granted universal jurisdiction, it is possible that this would have provided a boost for the ideal of universal justice, with the ICC standing as a beacon in international affairs, embodying the ideals of the drafters without tarnish, rather than seeming to be the product of ugly compromises. If ideas matter in international relations, which they do,[19] it is arguable that even if those ideals were to remain to some extent unfulfilled, it would have been better to have included universal jurisdiction in the ICC, in the hope that it could prove catalytic in bringing those ideals at least closer to reality.

A related point is that granting the ICC universal jurisdiction could have assisted in encouraging prosecutions throughout the world. Perhaps the adoption in the Statute of either the German or the Korean proposal would have meant that all States would prosecute credible allegations of international crimes by their nationals or on their territory. After all, it is clear that, as some expected,[20] the principle of complementarity has encouraged such action on the part of State parties.[21] It might be hoped that, had the ICC been granted universal jurisdiction, it would have externalized this effect far beyond State parties, to provide an incentive for all States to take a more active role in prosecuting offences relating to them domestically.

[16] ibid 612.

[17] Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (Transnational, New York, 2002) 118.

[18] Rome Statute, preambular paras 3 and 9.

[19] See, eg, Alexander Wendt, *Social Theory of International Politics* (CUP, Cambridge, 1999).

[20] Broomhall (n 2) 86–93; David Turns, 'Prosecuting Violations of International Humanitarian Law: The Legal Position in the United Kingdom' (1999) 4 Journal of Armed Conflict Law 1, 3.

[21] In the UK, for example, service members are being prosecuted for their alleged involvement in the killing of the Iraqi hotel receptionist, Baha Musa, see Attorney-General (Lord Goldsmith) *House of Lords Hansard*, 19 July 2005, cols WS80–WS81.

Although we have sympathy for such arguments,[22] there are other aspects of international law and politics relevant to the functioning of the ICC which provide counterpoints to these critiques, and that imply that, whether for the right reason or not, the drafters at Rome were probably right to decline to grant the ICC universal jurisdiction, at the very least for the time being.[23]

IV. MUDDYING THE WATERS

A. Opposition to the Court

To begin to explain why this is the case, it is worth returning to Rome. As mentioned above, the debate over jurisdiction was controversial and engendered some bitterness. The United States, in particular, was hostile to any form of universal jurisdiction being granted to the ICC and promised to actively oppose the Court should it be granted such jurisdiction.[24] As it turned out, the US was not happy with the jurisdictional regime of the ICC anyway, on the basis that it meant that the ICC could exercise jurisdiction over Americans in certain circumstances without its consent.[25] Owing to the ICC operating on the basis of the two uncontroversial jurisdictional principles (nationality and territorial), the US legal case has had to be made by unconvincing appeals to the *pacta tertiis* principle,[26] or more subtly (but still unpersuasively) to arguments related to alleged (but unsubstantiated) prohibitions on States delegating jurisdiction to international organizations and the *Monetary Gold* principle.[27]

Admittedly, since the Bush Government entered office in 2001, US opposition to the ICC has intensified.[28] However, the legal claims are the same. Had the ICC been granted universal jurisdiction, US opposition would have

[22] Admittedly for the last argument, the possibility of this occurring is bound up with the extent that the ICC could be able to effectively exercise jurisdiction over such a person, and, as we will argue, the cooperation regime militates against this.

[23] The advisability or otherwise of including passive personality jurisdiction in the Rome Statute's jurisdictional armoury is beyond the scope of this piece.

[24] See also William A Schabas, *An Introduction to the International Criminal Court* (2nd edn, CUP, Cambridge, 2002) 75.

[25] See, eg, Scheffer (n 5) 17–18.

[26] ibid. Ruth Wedgwood, 'The International Criminal Court: An American View' (1999) 10 European Journal of International Law 93.

[27] See, eg, Madeline Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States' in Dinah Shelton (ed), *International Crimes, Peace and Human Rights: The Role of the International Criminal Court* (Transnational, New York, 2000) 219. For convincing refutation of both arguments see Akande (n 10) 620–40. See also Bartram S Brown, 'US Objections to the Statute of the International Criminal Court: A Brief Response' (1999) 31 New York University Journal of International Law & Politics 855; Monroe Leigh, 'The United States and the Statute of Rome' (2001) 95 AJIL 124.

[28] See, eg, Broomhall (n 2) 178–81. For a taste of the tenor of some of the Bush administration's arguments see John R Bolton, 'The Risks and Weaknesses of the International Criminal Court From an American Perspective' (2000–1) 41 Virginia Journal of International Law 186.

more likely centred on a slightly more vulnerable target, universal jurisdiction. Particularly since 2002, and the *Yerodia* opinion of the ICJ,[29] universal jurisdiction has been placed a little on the back foot.[30] Even critics of the US position in relation to the ICC have expressed their doubts about universal jurisdiction.[31] The point is not that the critics are correct,[32] but that against this background, the useful and important doctrine of universal jurisdiction is beleaguered enough without being further critiqued. A period of retrenchment may be advisable for universal jurisdiction,[33] and that period would be unlikely to be available if those critiques of universal jurisdiction were also apt to be employed as an anti-ICC measure.[34]

At least as importantly, there are a number of other powerful States who, although they share the concern of the US about the possibility of the ICC exercising jurisdiction over them as non-parties, do not have so many troops abroad. Primary in this regard are probably China and India. It seems reasonably clear that Chinese opposition to the ICC would be more vocal, and probably more active, had it felt that its nationals were at risk of prosecution before the ICC.[35] Things being as they are, China seems happy for the US to be at the vanguard of action against the ICC, whilst for the most part itself remaining outside the debate.[36] The same seems true in relation to India, whose views about the ICC are at best ambivalent at present.[37] Were the ICC to assert (universal) jurisdiction without Indian consent, for example over allegations of international crimes in the disputed territory of Kashmir, its position in relation to the ICC would be likely to be far more openly antagonistic.[38] Although Russia's position is

[29] *Case Concerning the Arrest Warrant of 11 April 2001*, ICJ General List 121, 14 Feb 2002.

[30] See, eg, Antonio Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction' (2003) 1 Journal of International Criminal Justice 589, 592–3; Georges Abi-Saab, 'The Proper Role of Universal Jurisdiction' (2003) 1 Journal of International Criminal Justice 596, 601.

[31] George P Fletcher, 'Against Universal Jurisdiction' (2003) 1 Journal of International Criminal Justice 580.

[32] Particularly strong defences of universal jurisdiction are Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 Journal of International Justice 735 and Albin Eser, 'For Universal Jurisdiction: Against Fletcher's Antagonism' (2003–4) 39 Tulsa Law Review 955.

[33] See Naomi Roht-Arriaza, 'Universal Jurisdiction: Steps Forward, Steps Back' (2004) 17 Leiden Journal of International Law 375.

[34] On the interplay between legal argumentation and political antipathy in this area see Diane F Orentlicher, 'Politics by Other Means: The Law of the International Criminal Court' (1999) 32 Cornell International Law Journal 489. For a strong defence of the ICC on jurisdiction see Louise Arbour and Morten Bergsmo, 'Conspicuous Absence of Jurisdictional Overreach' in Herman AM von Hebel, Johan G Lammers, and Jolien Schukking (eds), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (TMC Asser Press, The Hague, 1999) 129.

[35] Lu Jianping and Wang Zhixiang, 'China's Attitude Towards the ICC' (2005) 3 Journal of International Criminal Justice 608, 610–12.

[36] Although China did express its concurrence with US concerns over the ICC during the discussion around the adoption of Security Council Resolution 1593, See UN Doc S/PV.5158, p 5.

[37] See, eg, Usha Ramanathan, 'India and the ICC' (2005) 3 Journal of International Criminal Justice 627.

[38] As much is implied, ibid 631.

perhaps even more ambivalent, were the ICC to have, and assert, non-consensual jurisdiction over the conflict, for example, in Chechnya, Russia would in all likelihood find a perhaps surprising common cause with the US.[39]

Were this to be the case, the ICC would be in a very difficult position, facing the hostility of three permanent members of the ICC and one other populous State. Cooperation, or even cordiality with the UN would be unlikely to have materialized. The Relationship Agreement between the ICC and the UN accepted in late 2004,[40] for example, would have been considerably more difficult to bring into being had a majority of the permanent members of the Security Council been actively opposed to the ICC. The fledgling institution which is the ICC needs all the support it can get, and opposition to it is already notable. To have given the ICC the power to run before it could walk, by granting it universal jurisdiction, could have tilted the balance for and against the ICC unfavourably.

B. Universal jurisdiction, referrals, discretion, and 'situations'

This aside, given the nature of a number of other aspects of the Rome Statute, in practice, had the drafters of the Rome Statute granted the ICC (and thus the Prosecutor) universal jurisdiction, further problems would have arisen. To explain this requires us to look into the trigger mechanisms and powers of the Prosecutor.[41] A decision on whether the Prosecutor ought to investigate is triggered in one of three situations. These are when the Security Council passes a situation to the ICC, where a State party to the Statute refers the situation to the Prosecutor, or, finally, where the Prosecutor decides, *proprio motu*, to initiate an investigation himself, on the basis of information he has received.[42] This last power was extremely controversial, with the United States in particular being strongly opposed to the grant of any such authority to the Prosecutor.[43] If the practice of human rights organizations is any guide, it is unlikely that States would refer the situations in other countries to the ICC.[44] Therefore the most foreseeable position would be that the Prosecutor would receive information from individuals or organizations, rather than referrals from States.

[39] ie if the ICC had universal jurisdiction, without Russia's ratification of the Rome Statute. On the general position see Bakhtiyar Tuzmukhamedov, 'The ICC and Russian Constitutional Problems' (2005) 3 Journal of International Criminal Justice 621.

[40] ICC/ASP/3/Res.1.

[41] The links between Jurisdiction, cooperation and other issues are made very clear in, eg, Kaul and Kreß (n 13); Mahnoush H Arsanjani, 'Reflections on the Jurisdiction and Trigger Mechanism of the International Criminal Court' in von Hebel et al (n 34) 57; Bert Swart and Göran Sluiter, 'The International Criminal Court and International Criminal Cooperation' ibid 92; Arbour and Bergsmo, op cit.

[42] Rome Statute, Art 13, 15. See generally Olásolo (n 12) chs 2–3.

[43] See, eg Bolton (n 28).

[44] The truly surprising phenomenon of self-referrals does not alter this point, although admittedly it does prove that international criminal law has the capacity to outstrip expectations.

The fact that anyone in the world can submit information to the Prosecutor, and ask that he investigate,[45] could have led to considerable problems for the Prosecutor. The first of these might be termed the 'Belgium' problem. Belgium used to have universal jurisdiction legislation without a requirement of presence or any link to Belgium.[46] This led to a plethora of politically sensitive claims being brought to the Belgian courts relating, for example, to Yasser Arafat, Ariel Sharon, and General Tommy Franks, which caused huge consternation internationally. Pressure from the United States, amongst others, caused Belgium to limit its Act, on the basis that it had been 'abused'.[47] It would be very likely that, had the ICC been granted universal jurisdiction, a similar furore would have attended any action by the Prosecutor with respect to those communications. As much is implied not only by the Belgian situation, but also the experience of the ICTY, when the US reacted in an exceptionally hostile fashion to even the suggestion that the Prosecutor might investigate its bombing in relation to Kosovo.[48]

Had the ICC been granted universal jurisdiction, it is not to say that the Prosecutor would have moved to open investigations in all circumstances. When the matter is referred to the Prosecutor, or an investigation is suggested to him by someone sending information to him, the Prosecutor has to decide whether or not to open an investigation into the situation pursuant to Article 53 of the Statute (for references by States or the Security Council) or Rule of Procedure and Evidence 48 (for decisions to proceed under the Prosecutor's *proprio motu* powers). Article 53[49] provides, in relevant part:

In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) the information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
(b) the case is or would be admissible under Article 17; and
(c) taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

[45] Which the vast majority of the 499 communications to the Prosecutor between July 2002 and July 2003 did, see ICC Press Release 16 July 2003, pids.009-2003-EN.

[46] Law of 16 April 1993 Relating to the Repression of Grave Breaches of the Geneva Conventions, as Amended, (1999) International Legal Materials 921, Art 7. For an overview see Damien Vandermeersch 'Prosecuting International Crimes in Belgium' (2005) 3 Journal of International Criminal Justice 400.

[47] See, eg, Steven R Ratner, 'Belgium's War Crimes Statute: A Postmortem' (2003) 97 AJIL 888.

[48] See Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (CUP, Cambridge, 2005) 215–20.

[49] To which Rule 48 also requires the Prosecutor to refer to in making decisions in relation to *proprio motu* decisions.

The two most important of these provisions for our purposes are Articles 53(1)(a) and (c). Had universal jurisdiction been granted to the ICC Article 53(1)(a) would have been considerably curtailed in scope, as the ICC would have had jurisdiction over offences committed anywhere in the world. It must be remembered that the power the Prosecutor has been granted in 53(1)(c) is one of the most controversial that has been passed to him.[50] The concept of prosecutorial discretion of this nature is less usual (or accepted) in many civilian States than in common law jurisdictions. In addition to this, discretion of this nature is particularly controversial where amnesties have been granted in the *locus delicti*. This, alongside the general fear that some States have of prosecutorial discretion of this type, would make deciding whether to initiate an investigation solely on this basis a 'hot' issue. There are strong reasons to think that he would not be quick, or well advised, to do so. After all, the Prosecutor has to justify the expenditure of his resources.[51] As the Annex to the Prosecutor's Policy Paper said:

> In the light of its limited resources, the Office of the Prosecutor is required to set priorities, taking into account all the limits and requirements set out in the Statute, the general policy of the Office and all other relevant circumstances, including the feasibility of conducting an effective investigation in a particular territory.[52]

In situations other than where the nationality or territoriality State is obliged to cooperate (on which, see below) the Prosecutor would have to come to the conclusion that it is worth expending all the resources required to investigate a situation in the somewhat speculative hope that a person responsible will turn up in a State which is subject to an obligation to transfer them to the ICC. It would be difficult to explain to the Assembly of States Parties why resources were being used in this way. It would be even more difficult to ensure that the fledgling international organization that is the ICC would be able to prosper against the opposition of the non-State parties who would doubtless make their antipathy to such a decision known in no uncertain terms if any action was taken, even at the preliminary stage prior to the opening of an investigation. If a State (Belgium) was unable to withstand the international heat, it would be a great deal to ask to expect the ICC to do so. However, to decline to do so, the Prosecutor would have had to rely on the discretion given in Article 53(1)(c). This is probably not the basis upon which the Prosecutor would

[50] See generally John Dugard, 'Possible Conflicts of Jurisdiction With Truth Commissions' in Antonio Cassese, et al (eds) (n 15) 693; Michael P Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court' (1999) 32 Cornell International Law Journal 507; Darryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14 European Journal of International Law 481.

[51] The extraordinary specificity which has characterized the early budgets of the ICC ought to be sufficient to calm the most tremulous critic of the Rome regime of prosecutorial discretion, see, eg, Proposed Programme budget for 206 prepared by the Registrar, ICC-ASP/4/32.

[52] Annex to the 'Paper on Some Policy Issues Before the Office of the Prosecutor: Referrals and Communications' 1.

prefer to be making many of the initial decisions on whether to open investigations.

C. Would custody help?

It might be thought that the South Korean proposal, which, after all, did achieve a considerable degree of support in the Rome negotiations,[53] would have at least mitigated the problems mentioned above. Perhaps it would have. However, even if this were the case (which is by no means clear) adopting the South Korean proposal would not have led to any considerable practical difference, at least in relation to universal jurisdiction. Any mitigation of the problems mentioned above would be offset or outweighed by the problems the ICC would face where the jurisdictional link was a State party with custody over a suspect but such State was neither the territorial nor nationality State.

The particular problem here is linked to the concept of a 'situation', which is the unit of investigation for the Prosecutor. The term 'situation' was not included in the Statute recklessly. There were suggestions in Rome that the terms 'matter' or 'case' ought to be used in relation to trigger mechanisms.[54] 'Situation' was chosen, however, as it tracked most closely the language of Chapter VII of the UN Charter and was considered the broadest term. The reason the wider term was used was a fear that those seeking to trigger the jurisdiction of the ICC could do so in a selective manner, triggering the pre-investigative phase of the Prosecutor's activity (thus any subsequent investigation) over offences committed by one side in a conflict. This concern applies even more so in relation to a possible referral of an individual case. In such a case, a referral would be little short of seeking an act of attainder.

It is notable that since the coming into force of the Statute, both the ICC and the States parties to the Rome Statute have taken steps to attempt to ensure such referrals do not occur. Concerns had been expressed after the Rome Statute was promulgated that, owing to Article 12(3) stating that a non-State party can accept the jurisdiction of the ICC 'with respect to the crime in question', such a State could make a very selective acceptance of the jurisdiction of the Court.[55] To ensure that this did not occur the Rules of Procedure and Evidence provide a 'fix'. Rule 44(2) thus reads:

> When a State lodges, or declares to the Registrar its intent to lodge, a declaration with the Registrar pursuant to article 12, paragraph 3 . . . the Registrar shall inform the State concerned that the declaration under article 12, paragraph 3, has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation . . .

[53] See Kaul and Kreß (n 13) 155.

[54] See, eg, Lionel Yee, 'The International Criminal Court and The Security Council: Articles 13(b) and 16' in Lee (ed) (n 13) 143, 147–8.

[55] See, eg, John T Holmes, 'Jurisdiction and Admissibility' in Roy S Lee (ed), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational, New York, 2001) 321, 326.

The Prosecutor has also made it clear that selective referrals are not acceptable. When Uganda originally referred itself to the ICC under Article 12(1)(a), it attempted to limit the situation referred to crimes committed by the Lord's Resistance Army.[56] The Prosecutor did not accept that he could proceed on that basis, and after discussions, Uganda referred the entire situation in Northern Uganda to ICC. Although so far the only indictments made public in relation to that situation have related to the Lord's Resistance Army, the Prosecutor has made clear that he is also continuing to investigate crimes by others, including Ugandan officials.[57] The only (possible) contrary practice is from the Security Council. When the Council referred the situation in Darfur, Sudan, to the ICC in Resolution 1593, it sought to exclude the ICC's jurisdiction over peacekeepers from non-party States. One reading of the Resolution is that it is an attempt to define the 'situation' as being that in Darfur minus peacekeepers from non-party States.[58] If this is a correct reading of the Resolution (and this is by no means clear) it is inconsistent with the Rome Statute.[59]

The relevance of this to the situation in which the only jurisdictional link the ICC has is custody[60] ought to be clear. In such a state of affairs, a referral to the ICC, or any attempt by the Prosecutor to begin an investigation *proprio motu*, would necessarily involve an investigation into only those people who are in the custody of the third State.[61] This would necessarily be a very small group of people. This would have a fractious relationship with the concept of a 'situation'. It might be countered that the concept of a 'situation' could have been seen differently if this type of jurisdiction had been included in the Statute. Even if this were the case, however, the problem of legitimacy would remain.[62] The vast majority of people responsible for offences in a conflict would not be subject to investigation, even if the motives of the entity triggering the jurisdiction of the ICC were impeccable.[63] The Prosecutor would therefore possibly be placed in the awkward position of appearing to be taking sides in the relevant conflict if he were to initiate investigations.

[56] See, eg, Payam Akhavan, 'The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court' (2005) 99 AJIL 403.

[57] *Situation in Uganda*, Decision to Convene a Status Conference on the Investigation in Uganda in Relation to the Application of Art 53, ICC-02/04-01/05, 2 Dec 2005, para 7.

[58] See Robert Cryer, 'Sudan, Resolution 1593 and International Criminal Justice' (2006) 19 Leiden Journal of International Law 195, 209–10.

[59] ibid 211–13.

[60] ie when, of the territorial, nationality, passive personality or custodial State, only the custodial State has ratified the Rome Statute.

[61] It is true that Art 15 is not limited to 'situations', but it is limited to 'crimes within the jurisdiction of the Court' (Art 15(1)). In this instance, where custody is the only link, all other offenders not in the custody of State parties would not have committed crimes 'subject to the jurisdiction' of the ICC, thus would be beyond the reach of the Prosecutor's powers.

[62] It also shows that were the ICC Statute to be altered to permit such jurisdiction, further changes to the Statute would have to be considered.

[63] In relation to State-based referrals, there are situations in which this could, and would, be challenged.

Supposing this problem could be overcome, it would still be hard for the Prosecutor to justify opening an investigation, which would take resources, into such a small number of people. The political difficulties it would involve are only one of the problems that the Prosecutor would face. The difficulties that would attend investigation in a situation where neither the territoriality nor nationality State is obliged to cooperate would be huge (and are canvassed below).

Equally, by focusing on the person rather than the incident, custody based jurisdiction makes investigation more difficult. Universal jurisdiction prosecutions when undertaken on the basis of presence often also have this problem, so it is not fatal, but it is another difficulty the Prosecutor could do without. It must be remembered in the case of custody-based jurisdiction that should the Prosecutor fail to establish the responsibility of the particular person or people who are in custody[64] then he cannot indict anyone else for that offence, even if he has compelling evidence that they committed the offence, as he has no jurisdiction over them, even for the purpose of investigation. Suffice it to say that against this background the Prosecutor would be risking a great deal were he ever to have sought to assert custody-based jurisdiction if he had the authority to do so. In addition, as the next sections will show, even if he were to do so, the chances of a successful prosecution at the ICC in such a situation would be low.

V. UNIVERSAL JURISDICTION, THE ICC AND THE POSSIBILITY OF A PYRRHIC VICTORY

A. Universal jurisdiction and cooperation

1. The ICC cooperation regime: a consensual one

There is a famous statement made by the ICTY's first president, Antonio Cassese. It is that: 'The ICTY is very much like a giant without arms and legs—it needs artificial limbs to walk and work. And these artificial limbs are state authorities. If the cooperation of states is not forthcoming, they cannot fulfil their functions'.[65] It is so frequently cited that there is a risk of it becoming a cliché. However, it is referred to so often because it is apposite, not only to the ICTY, but also the ICC. The ICC will not be effective unless States circumvent the lack of any real supranational enforcement system by cooperating with the ICC.[66] Practically speaking, investigations would be extremely difficult, and, in essence, no trial can take place at the ICC if States do not provide assistance. No trial can take place without the defendant being surren-

[64] And that is the sole basis of jurisdiction.

[65] Antonio Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 European Journal of International Law 2, 13.

[66] See James Crawford, 'An International Criminal Court?' (1997) 12 Connecticut Journal of International Law 255, 256.

dered by States to the custody of the Court,[67] and no convictions will occur unless States assist it by collecting evidence, serving documents, protecting victims and witnesses and the like. A strong cooperation regime is crucial for the Court's success.

The general obligation to cooperate is found in Article 86 of the Rome Statute.[68] This Article is the first of a total of 17 provisions dealing with cooperation contained in Part 9 of the Statute.[69] The general obligation to cooperate is supplemented by a reminder of this in Articles 89(1) and 93(1), which deal with arrest and surrender and other forms of cooperation respectively.[70] Cooperation in the Statute is State-oriented,[71] which may be explained by the Court's origins in a multilateral treaty, and is characterized by detailed definitions of the relevant obligations, to give clear guidance on what States may and may not do in the course of cooperation with the Court. Still, the exact manner in which cooperation is to be effected between local authorities and the ICC remains somewhat unclear, and subject to a form of margin of appreciation for States to implement their obligations in their domestic legal orders in the manner they deem most appropriate.[72]

Unlike the Tribunals, where the obligation to cooperate is an obligation placed, by the Security Council, on all UN members,[73] the ICC's cooperation regime is limited, and opposable primarily only to State parties to the Statute.[74] There are only two exceptions to this in relation to State cooperation which find their basis in the Rome Statute. The first is by means of a declaration accepting the Court's jurisdiction pursuant to Article 12(3); the second, by virtue of a special agreement to provide assistance to the Court under Article 87(5) of the Statute.[75] In the former situation, when a non-party State accepts the jurisdiction of the Court with regard to a particular crime,[76] it also agrees to cooperate in accordance with Part 9 of the Statute. Any such State

[67] See the Rome Statute, Art 63

[68] Which reads: 'States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.'

[69] This differs from the relevant provision of the ad hoc Tribunals for the former Yugoslavia and Rwanda where Art 29 of the ICTY Statute (Art 28 of the ICTR Statute) is the sole, but all-encompassing provision.

[70] See also Rome Statute, Art 59(1)(7).

[71] Antonio Cassese, *International Criminal Law* (OUP, Oxford, 2003) 358.

[72] See, eg, Kimberly Prost, 'Article 88' in Triffterer (ed) (n 7) 1069.

[73] *Prosecutor v Tihomir Blaškić,* Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 Oct 1997, (IT-95-14-AR108*bis*), para 26 refers to the obligation as being *erga omnes*, but this is not strictly accurate. As was noted in *Prosecutor v Bagosora*, Decision on Defence Motion to Obtain Cooperation From the Vatican Pursuant to Art 28, ITCR-98-41-T, 13 May 2004, para 3, there is no obligation on non-UN Member States to comply.

[74] Arts 34–8 Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331.

[75] Art 87(6) provides for requests for cooperation to International Organisations. The ICC has entered into an agreement on cooperation with the EU, see ICC Press Release ICC-CPI-20060410-132-En 10 Apr 2006.

[76] See also Rule 44E.

would have the same rights and obligations as the rest of the States parties in that respect. In the latter case, provided for in Article 87(5), a State may voluntarily[77] enter into an ad hoc agreement with the Court in order to provide assistance. The State concerned possesses a degree of flexibility to decide the type, field and length of cooperation to be provided to the Court. This might be problematic for the Court, which is bound by its Statute, and thus will not be inclined to go beyond it to accommodate a third party's wishes. As Sluiter rightly observes, the ICC in such a case would face a difficult dilemma. It would either have to refuse assistance by a State or accept the conditions and limitation that State seeks to impose on its help.[78]

A third possibility, not explicitly envisaged in the Statute, would be for the Security Council to require third party cooperation as a Chapter VII measure.[79] In Resolution 1593, which referred the situation of Darfur, Sudan,[80] to the ICC, the Council included an obligation to cooperate in operative paragraph 2. However, the obligation is limited to the 'Government of Sudan and all other parties to the conflict in Darfur'.[81] Although the resolution is explicit that States which are not parties to the Rome Statute are not required to cooperate under the Statute, in this instance, all States are 'urge[d]' to cooperate fully.[82]

As far as the Statute is concerned, State cooperation is entirely consensual. In order to be bound to cooperate a State needs to either have ratified the Statute or, in the case of non-party States, to have explicitly submitted themselves to the Court's regime.[83] The Statute, to secure cooperation of States parties, goes to great lengths to accommodate their concerns. The Statute, for example, provides that cooperation is to be provided pursuant to national law and procedure.[84] It also allows, in certain circumstances, for postponement of cooperation,[85] or even a refusal of a request.[86] One of the most cogent critiques of the regime for cooperation set up by the Rome Statute is that the drafters went too far in bowing to pressure to limit the strength of the obligation to cooperate.[87] Interestingly, Regulation 108 of the Regulations of the

[77] The wording used ('The Court may invite . . .') is indicative of this.

[78] Göran Sluiter, 'The Surrender of War Criminals to the International Criminal Court' (2003) 25 Loyola of Los Angeles International and Comparative Law Review 605, 610.

[79] Although SC referral is provided for in Art 13(b), no mention is made of cooperation in this Article. The only reference to cooperation in cases of referral is Art 87(7) which deals with failure to cooperate following a SC referral.

[80] Sudan has signed, but not ratified the Rome Statute.

[81] Operative para 2.

[82] This resolution also confirms that there is no customary obligation on States to cooperate with the Court; such a suggestion is canvassed, however, in Claus Kreß and Kimberly Prost, 'Article 87' in Triffterer (ed) (n 7) 1055, 1063–4.

[83] Again, absent an obligation imposed on UN members by Security Council Resolution.

[84] Rome Statute, Arts 89(1) and 93(1).

[85] ibid Arts 89(2), 94, and 95.

[86] ibid Arts 93(1)(l), 93(3), 93(4), 90, and 98.

[87] See, eg, Antonio Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 European Journal of International Law 144, 164–7.

Court (which were written by the judges of the ICC) also permit challenges to the legality of cooperation requests made under Article 93, which could cause further delays. Furthermore, there is also (and importantly) the absence of any meaningful enforcement measures against recalcitrant States who, in contumacy of the obligations to cooperate that they have (be they under the Statute or pursuant to a Security Council resolution), still refuse to accede to the ICC's requests for assistance.[88]

There is another quite serious problem, commonly known as the 'complementarity paradox', which has a bearing on cooperation.[89] Complementarity regulates the relationship between the Court and domestic legal orders.[90] The ICC can only be seised of jurisdiction if they prove to be unwilling or unable genuinely to investigate or prosecute.[91] The main provision embodying complementarity is Article 17 of the ICC Statute, which covers issues of admissibility. Article 17 is highly complicated and many of its elements remain far from clear. Still, unwillingness would be shown if a State is trying to shield the accused from criminal responsibility, whereas inability relates more to the unavailability of the judicial system owing to a total or substantial collapse of the State. Of the two, inability will be easier to establish, whereas unwillingness involves an awkward and difficult judgment about the intentions of a corporate entity—a State.

The complementarity paradox is that the very same unwilling and unable fora are required to cooperate with the ICC in order to achieve effective prosecution and trial.[92] It is unrealistic to expect that a State which has proved unwilling[93] will in fact cooperate with an ICC request to collect evidence, to arrest and surrender an accused and generally to cooperate in accordance with the Statute.

The system provided for in the Statute does not seem to acknowledge this discrepancy, let alone address it. Mention is made of this paradox in the Prosecutor's Policy Paper which acknowledges this issue but does not provide a satisfactory answer grounded in the Rome Statute regime. Instead, emphasis is placed on the need for intervention of the international community to assist the Prosecutor in the exercise of his powers.[94]

[88] See, eg, Schabas (n 24) 130.

[89] See Paolo Benvenuti, 'Complementarity of the International Criminal Court to National Jurisdictions' in Flavia Lattanzi and William A Schabas (eds), *Essays on the Rome Statute of the International Criminal Court* (Il Sirente, Ripa Fagano Alto, 1999) 21, p 50.

[90] See 10th Preambular para, Arts 1 and 17 ICC Statute.

[91] Art 17 ICC Statute.

[92] See (n 93).

[93] Which is not the case in relation to at least the DRC self-referral. The DRC has transferred Thomas Lubanga Dyilo to the custody of the ICC, see ICC Press Release ICC-CPI-20060302-125-En, 17 Mar 2006. On some of the reasons for the DRC's self-referral (which are equally applicable to cooperation) see William W Burke-White, 'Complementarity in Practice: The International Criminal Court as Part of a System of Multi-Level global Governance in the Democratic Republic of Congo' (2005) 18 Leiden Journal of International Law 557.

[94] Paper on some policy issues before the Office of the Prosecutor, Sept 2003, available at <http://www.icc-cpi.int/otp/policy.php> 6.

B. Overcoming the cooperation problem

Against this background, there is quite a legitimate fear that States will use the relative weakness of the cooperation regime and its enforcement mechanism to avoid assisting the ICC. One possible solution would to be to look to the possibility of dealing with the State in a disaggregated manner.[95] This would involve, for example, seeing the obstacles to prosecution and cooperation as stemming from different places. For example courts may be willing to prosecute, but the unwillingness may stem from prosecuting authorities, or a particular government department. Also different government departments may have, or perceive themselves as having, different interests. For example, departments of justice, foreign affairs and home affairs may have considerably different views on the advisability of cooperating with the ICC, or prosecuting international crimes at home. The movement of some crimes from military to civilian jurisdiction in, for example, Argentina after the dirty war may provide an example of this.[96] All the ICC would have to do is deal with the most sympathetic entity, or persuade it to put pressure on their fellow departments or agencies. If there is legislation in place requiring cooperation, then, depending on its formulation, interested actors could even attempt to bring judicial reviews of decisions to refuse to cooperate at the domestic level.

However, this rather rosy view depends entirely on the internal organization of the State in question between the executive and the relevant agencies in terms of who will deal with a request by the ICC, and how much freedom in responding to such a request the relevant authority has. The more suspicious a State is of the Court, the more likely it is that tighter controls will be imposed on the relevant agencies in order to ensure that the party line is followed. The Statute itself rather undermines the ability of the ICC to easily refer matters to the part of government that is most likely to help. Article 87(1) of the Rome Statute requires parties to inform the Court of the agency through which all correspondence must occur. A majority of States expressing an opinion have identified their Ministries of Justice for this,[97] although some have designated their Ministries of Foreign Affairs or Public Prosecutor

[95] See, eg, Anne-Marie Slaughter, *A New World Order* (Princeton UP, Princeton, 2004). For cogent critique of aspects of Slaughter's theory see, however José Alvarez, 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory' (2001) 12 European Journal of International Law 183.

[96] On which, see Alejandro M Garro, 'Nine Years of Transition to Democracy in Argentina: Partial Failure or Qualified Success?' (1993–4) 31 Columbia Journal of Transnational Law 1, 12–14.

[97] Declarations pursuant to Art 87(1)(a) of Albania, Argentina, Belgium, Croatia, Cyprus, Finland (although Finland permits other appropriate authorities to be contacted by the Court), Germany, Honduras, Iceland, Liechtenstein, Lithuania, Namibia, Netherlands, Norway, Romania, Sweden, Switzerland, and FYROM (available at <http://untreaty.un.org/ENGLISH/bible/ english-internetbible/partI/chapterXVIII/treaty11.asp>).

as the relevant authority.[98] Whichever ministry or agency has been designated to receive communication (or does so), not only does correspondence have to be through a channel specified by a State,[99] but it has to be confidential as well.[100]

There are perfectly reasonable arguments for keeping at least some requests confidential. For example when there are issues of protection for victims and witnesses, it is both necessary and appropriate to ensure the safety of such witnesses before 'going public'. The ICC Prosecutor has, sensibly, adopted this view. The arrest warrants in relation to the leaders of the Lord's Resistance Army in Northern Uganda were only made public after victim and witness protection programmes were put in place.[101] There is also the problem of the possibility (or even likelihood) of evidence being tampered with when it is known that the Court is seeking it. The experience of the reburials around Srebrenica, to cover up crimes when it was known that investigations were planned,[102] and, on the other side, interference with witnesses to attempt to ensure a conviction by relevant actors (such as that involving Dragan Opacić)[103] show that this can be an extremely difficult balance to achieve.

This would make it difficult for non-State actors (or other governmental agencies) to know where cooperation had been requested but refused. Admittedly, where arrest warrants are made public relating to those known to be in a particular State this is less of a problem,[104] but arrest warrants are not always made public, and, as the Prosecutor has argued in the Lord's Resistance Army case, 'keeping the Warrants under seal is impairing the arrest efforts'.[105]

[98] Declarations of (Ministry of Foreign Affairs) Argentina, Mexico, Peru, and Uruguay, (DRC, Estonia, France (or the Ministry of Justice), Lithuania (or the Ministry of Justice)) (all available ibid). Austria, Brazil, Georgia, Hungary, Latvia, Luxembourg, Malta, Poland, Portugal, Slovakia, Timor-Leste, and the UK have expressed no preference.

[99] Many of whom have identified diplomatic channels as the relevant ones, See, eg, declarations of Andorra, Australia, Belize, Colombia, Egypt, France, Greece, Italy, Mali, Marshall Islands, New Zealand, Panama, Samoa, and Sierra Leone (all available ibid). This method leaves discretion in the ICC who to address correspondence to, and the diplomatic channels who to deliver it to.

[100] Art 87(1)(a) and (3) ICC Statute.

[101] See *Situation in Uganda,* Decision on Prosecutor's Application for Unsealing of the Warrants of Arrest ICC-02/04-01/05, 13 Oct 2005 [hereinafter 'Unsealing Decision'] paras 14, 17, and 20. There are concerns that the level of protection may not prove enough, see *Situation in Uganda*, Decision to Convene a Status Conference Related to Safety and Security in Uganda, ICC-02/04-01/05, 25 Nov 2005.

[102] See *Prosecutor v Krstić,* Judgment, IT-98-33-T, 2 Aug 2001, para 78.

[103] See *Prosecutor v Tadić*, Order for the Prosecution to Investigate the False Testimony of Dragan Opacić IT -94-1, T, 10 Dec 1996.

[104] See Unsealing Decision para 14, which cites the Prosecutor's argument that unsealing the warrants was 'a feasible and powerful means of garnering international attention and support for arrest efforts, thus further ensuring the protection of victims, potential witnesses and their families'.

[105] The arrest warrant for Lubanga Dyilo was only made public after the plane carrying him to the Hague left DRC airspace, see *Prosecutor v Lubanga Dyilo*. Decision to Unseal the Warrant of Arrest Against Mr Thomas Lubanga Dyilo and Related Documents ICC-01/04-01/06-37, 17 Mar 2006.

Whether the State can be disaggregated or not, perhaps the key to obtaining the assistance that will be the Court's lifeline is, in the words of Hans-Peter Kaul, primarily a sense of ownership of the Court:

> In terms of effective judicial cooperation with the ICC, it is up to the ninety-eight states parties themselves to place the working and prosecution activities of 'their' institution on a permanently sound footing, and thus ultimately to secure the Court's prospects of success. The hopes and expectations at the International Criminal Court are that the states parties will support it as responsible joint owners by engaging in unreserved and systematic cooperation in matters of criminal law. Whether they will do so remains, as it were, the question to end all questions.[106]

So, what relevance does this have for the jurisdiction of the Court? It is immensely important. The majority of direct evidence relating to crimes and suspects will most likely be found in their nationality State or in the *locus delicti*. If neither of those States have agreed to cooperate,[107] then the possibility of the ICC obtaining the people and evidence it needs to run a serious trial will be in States which would not be obliged to cooperate. The ICC may attempt to pass on a request to a non-State party that is not obliged to cooperate, but this would only very rarely prove useful in the absence of a designated authority or an obligation to even listen to the ICC's requests. A refusal to cooperate will not be unlawful in domestic law absent some form of domestic implementation legislation, which non-party States are extremely unlikely to have, thus cutting off the possibility of any real domestic law challenge in such a State. Indeed, even for non-State parties willing to cooperate without domestic implementing legislation (or, for monist systems an international obligation that may be applied domestically), any form of cooperation may be difficult to provide within the parameters of domestic law.

Furthermore, it is difficult to see how a non-party would share the sense of ownership vital to the Court, and would assist the ICC even if it nominally had 'universal' jurisdiction. For universal jurisdiction in the ICC to work, cooperation of non-parties to the Court would be indispensable. There is no guarantee (or likelihood) that this would occur.[108] Universal jurisdiction *in absentia* would not have provided the Court with either a suspect or evidence to support a trial. Had the custodial state been accepted in Article 12, perhaps the suspect may have been arrested but evidence, as well as accomplices and compatriot witnesses would be elsewhere, making it difficult for the Court to secure a

[106] Hans-Peter Kaul, 'Construction Site for More Justice: The International Criminal Court After Two Years' (2005) 99 AJIL 370, 383.

[107] Unless the Security Council has required them to do so.

[108] As Lattanzi, criticizing the German proposal observed, 'Dans chaque phase de son activité, la Cour pénale internationale, à l'instar de deux Tribunaux pénaux institués par le Conseil de sécurité, aura besoin de la collaboration des Etats. Elle devra donc agir avec la collaboration au moins de certains des Etats ayant un lien avec le crime et ne pourra pas agir contre leur volonté.' See Flavia Lattanzi, 'Compétence de la Cour Pénale Internationale et Consentement des Etats' (1999) 103 Revue Générale de Droit International Public 425, 433.

conviction. Thus universal jurisdiction, even had it been provided for in the Statute, would probably only remain inchoate.[109]

Even when the Security Council steps in to require cooperation under a Chapter VII Resolution, there is no guarantee that cooperation will be provided. Unless the Security Council is prepared to monitor and sanction non-cooperation,[110] then the problems here may also affect referrals from the Council too. So, to sum up, the complementarity paradox would not have been alleviated by inclusion of universal jurisdiction, conditional or otherwise in Article 12, nor would States which are not parties to the Statute would have had any more incentive to cooperate.

VI. CONCLUSION

There is one final possible counter-argument to our view. That is the possibility which was mooted during and just after the Rome negotiations, that only stable, peaceful, international 'good citizens' would ratify the Statute, whilst States who were subject to allegations of international crimes on their territory or by their nationals would avoid ratifying the Statute, lest they come under the ICC's gaze.[111] Thus, so the argument went, owing to the jurisdictional regime Article 12 creates for the ICC, that institution would probably not have had jurisdiction over any allegations of international crimes, making what Kofi Annan described as 'a gift of hope to future generations'[112] become a white elephant. Neither of these events has come to pass. Not only have States with unhappy recent histories ratified the Statute, but in three cases, also referred themselves to the ICC. In addition, one of the least foreseen partners of the Court, the Security Council, has referred the situation in Darfur to it. As it turns out, even with the jurisdictional principles and trigger mechanisms it has, the ICC has enough work to be getting along with already. By way of comparison, the ICTY and ICTR have both taken well over a decade to scratch the surface of international criminality in one 'situation' each. [113]

So, evaluating the evidence, it would appear that the adoption of universal

[109] See also (n 52).

[110] Its practice in relation to the ICTY does not give great reason for hope. See, eg, Statement by the President of the Security Council, S/PRST/1996/23; and, Statement by the President of the Security Council, S/PRST/1996/34. The closest the SC has come to explicitly requesting compliance Res 1207, 17 Nov 1998, S/RES/1207 (1998). Equally, the Council, in referring the situation in Darfur to the ICC exceeded expectations, so perhaps there is room for (very) cautious) optimism.

[111] The argument is critiqued along the lines that follow, in William A Schabas, 'The International Criminal Court: The Secret of its Success' (2001) 12 Criminal Law Forum 415, 418–19.

[112] Kofi Annan 'Preface', in Lee (n 13) ix, ix.

[113] Indeed, one of the problems the ICC will face is the 'impunity gap' in the situations it deals with, as it cannot prosecute any more than a small sample of offences in any one conflict, and cannot force other States to do so.

jurisdiction by the drafters of the Rome Statute would be unlikely to have helped the Court's ability to mete out global justice in any significant way.

That is not to say there are no arguments in favour of having an ICC with universal jurisdiction. As has been mentioned, inclusion of universal jurisdiction in the Rome Statute would have constituted a rhetorical affirmation of an important jurisdictional principle. It could have prompted more non-party States to consider prosecution of international crimes domestically. There is also an outside possibility that the various happenstances would align such that the ICC could run a successful trial based on universal jurisdiction, as States sometimes do. However, on balance, this is not enough to overcome the significant disadvantages that including universal jurisdiction would engender. Including even an ineffective form of universal jurisdiction would have been apt to increase the opposition to the ICC, and universal jurisdiction, by non-State parties to it. One hundred States parties to the Rome Statute is an impressive rate of uptake, but it is by no means universal. Ironically, had the ICC been granted universal jurisdiction it could be reasonably expected that fewer States would ratify the Statute.[114] With fewer ratifying States, the burden of financing the ICC would have fallen on fewer States, which would probably have led to a smaller budget for the Court, and thus fewer instances in which it could take action.

Article 12 was the result of a considerable, and uncomfortable, compromise in the course of the Rome negotiations. It is not our point to defend the way the negotiations were undertaken, or engage, in the absence of detailed *travaux préparatoires*, in discussions of who said what, and why they said it, at Rome. Our point is a different one. It is 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.

[114] See Schabas (n 118) 417–19. Although the question of passive personality jurisdiction is, strictly, beyond this article's parameters, the temptation to note that granting such jurisdiction might have prompted more ratifications (from States seeking to protect their nationals) is irresistible.