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PRECONDITIONS TO THE EXERCISE OF JURISDICTION

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I. General Overview

A. The Issue of the General, not Security Council-triggered, Jurisdiction of the ICC

Article 12—one of the cornerstone provisions of the Statute—regulates a set of fundamental issues: first, the question of how a State would accept the Court's jurisdiction and the meaning of such acceptance with regard to the jurisdiction *ratione materiae* (subject-matter jurisdiction); second, the question of which States must accept the Court's jurisdiction before it could act, thus determining the scope and outreach of the general or 'regular' jurisdiction of the Court (as distinct from the very different Security Council-triggered jurisdiction under Article

13(b));[1] and thirdly, the question of how a non-State Party could accept on an *ad hoc* basis the jurisdiction of the Court and what it would mean in legal terms.

Furthermore, the regulatory content of Article 12 is closely interrelated, in particular, with Article 5 on crimes within the jurisdiction (*ratione materiae*) of the ICC, Article 13 on trigger mechanisms for the exercise of jurisdiction, Article 17 on complementarity, and Article 124 containing a transitional provision.

Given this crucial centrepiece function of Article 12, it is hardly surprising that jurisdiction appears to have been the most important, politically the most difficult and therefore the most controversial question of the negotiations as a whole, in short, the 'question of questions of the entire project'.[2] Therefore it is not surprising either that 'it is on this issue that the differences proved irreconcilable and consensus eventually broke down, leading to a vote at the end of the conference'.[3] Even after the Rome Conference, Article 12 remains one of the most contentious provisions. On the one side, the United States,[4] in particular, continues to argue that Article 12 goes too far and is therefore not acceptable. On the other side, there are many like-minded States who continue to deplore[5] the current Article 12 because it leads in their view to a weak and incomplete jurisdictional system which at the same time lags behind the current state of international law.[6] It is to be hoped that these ongoing differences of opinion will not hinder the ratification process and the effective establishment of the ICC as soon as possible.

B. Conflicting Principles: Universality vs. State Sovereignty

Since their earliest beginnings, the negotiations on the critical issue of the competence and outreach of the future Court were marked by a long-standing conflict between two fundamental principles: universality versus State sovereignty.

In general terms, since the mid-1990s negotiations took place in the universal forum of the United Nations with almost universal participation. As the wisdom of establishing an International Criminal Court was by and large undisputed, there seemed to be a general understanding that the future ICC would have—just like the International Court of Justice—a universal vocation. As the new permanent International Criminal Court would deal with the most serious crimes of

[1] See Ch. 17.2, below.

[2] See S. Williams, 'Article 12', 329, margin No. 1, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999). Williams calls Art. 12 a 'make or break provision'.

[3] See P. Kirsch and J. T. Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process', 93 *AJIL* (1999) at 4.

[4] See D. Scheffer, 'The United States and the International Criminal Court', 93 *AJIL* (1999) 12, at 17–18, 21.

[5] See e.g. K. Kinkel, 'Der Internationale Strafgerichtshof—ein Meilenstein in der Entwicklung des Völkerrechts', *NJW* (1998) 2650, at 2651.

[6] Cf. the criticism by L. Condorelli, 'La Cour pénale internationale: Un pas de géant . . .', 103 *RGDIP* (1999) at 16 *et seq.*

concern to the international community as a whole, this meant, in the view of many, that this specific judicial institution quite logically should and would have some kind of jurisdiction based on universality.

At the same time it was obvious that many States remained concerned about their sovereignty. They therefore took a very cautious and reluctant line in the negotiating process. This is hardly surprising as the project of an ICC as such meant that States would have to accept a certain limitation of one of the most sacred areas of State sovereignty: criminal jurisdiction.[7] It is therefore quite understandable that especially the negotiations on the jurisdictional regime for the future ICC were constantly marked by the conflicting concepts of State sovereignty versus universality. In this particular field the basic positions and attitudes of three more or less well-defined groupings characterized the negotiations.

First, there were States primarily concerned with their sovereignty which, in spite of their declared support for the project, only wanted a symbolic or weak or facultative jurisdictional competence of the future ICC. To this group belonged, for example, India, Mexico, Indonesia, and also Japan. Some of these States—again India and Mexico quite vocal among them—were also sceptical or hostile with regard to potential Security Council control over the Court or with regard to the possibility of the Security Council activating the ICC in situations in which core crimes seemingly were committed.

Second, the permanent members of the Security Council ('P-5'), on the other side, shared the interest of seeing a central role for the Security Council, both in referring matters to the Court or filtering or blocking cases going to the Court. While they thus were primarily interested in the Security Council-based and Security Council-triggered jurisdiction of the future Court, they seemed to have only little or no interest at all in the general jurisdiction of the Court triggered by State complaints or by a prosecutor with the power to initiate proceedings.

Third, among the States belonging to the 'like-minded Group' (hereafter 'LMG'), most members of this group preferred a jurisdictional regime based on some form of universal jurisdiction, meaning that a State Party of the future ICC obtaining custody over a person responsible for core crimes would enable the Court to exercise jurisdiction over that person regardless of his or her nationality or the locus of the crime.[8]

Furthermore, the principled support of the LMG for the creation of an independent and effective ICC meant also, in the view of many, that in order to have a genuine Court, its jurisdictional regime should be based on the principle of

[7] See A. Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', 9 *EJIL* (1998) 2, at 11, 12.

[8] See Ch. 2.3, above.

universal equality before the law. As the ICC project was aiming at an institution ensuring individual criminal responsibility for the most serious international crimes, it was obvious, at least in principle, that international criminal justice to be delivered by the future Court would have to be fair and equal. There should be equal jurisdiction over the most serious crimes of concern for the international community as a whole regardless of the nationality of the perpetrator. Concerned State Parties to the future Statute would have to accept the same rights and obligations, this also with respect to their own criminal jurisdiction and their own nationals. In the same manner, equality before the law would also mean that there would be equal rights and opportunities to address the Court, to make complaints or to initiate criminal proceedings. From this perspective the principled demand for equality and equal treatment of perpetrators and concerned States by the jurisdictional regime of the future ICC meant, in principle, that two risks in particular had to be avoided: first, attempts by States to exclude their nationals from the jurisdiction of the future Court; second, unequal chances for States (e.g. for permanent members of the Security Council on the one side, 'normal' UN members on the other) to bring matters to the Court or to filter or block cases going to the Court.

In general, these were some of the main approaches and issues which marked the negotiating process on jurisdictional issues before and in Rome. Consequently, they may also be borne in mind when evaluating the outcome of the Rome Conference with regard to Article 12 on preconditions for the exercise of jurisdiction.[9]

C. The Quest for Universality—Relevant Aspects of Contemporary Customary International Law

In order to provide a basis for a sober legal assessment, it seems worthwhile to re-examine, again, whether contemporary international law would have permitted the adoption of a jurisdictional regime for Article 12 based on the principle of universal jurisdiction. In essence, this is the customary question whether such a solution would have had a legitimate basis under contemporary international law.

It must be stressed that this issue is clearly distinct from the question whether and to what extent States, when elaborating the Rome Statute, would, *as a matter of legal policy*, move towards the direction of the universality approach and support a jurisdictional regime based on universal jurisdiction. This question is certainly marked by a wide political discretion. It enables States to legitimately pursue a position in keeping with their interests as perceived by them on a national basis. In sum, this type of decision is clearly of a political nature and as such not an issue of international law.

[9] See below, IV.

At the same time, the pertinent question with regard to the Rome Statute is whether current international law would have allowed the future ICC to be given the jurisdictional authority to prosecute the crimes within its jurisdiction *ratione materiae* on the basis of universality. For a long time, it was quite clear that its jurisdiction would cover (only) the most serious crimes of concern to the international community as a whole, namely genocide, crimes against humanity, and war crimes.

The universality approach starts from the assumption that, under current international law, all States may exercise universal jurisdiction over these core crimes. It combines this assumption with the very simple idea that States must be entitled to do collectively what they have the power to do individually. Therefore, States may agree to confer this individual power on a judicial entity they have established and sustain together and which acts on their behalf. Thus, a State which becomes a party to the Statute thereby accepts the jurisdiction with respect to the international core crimes. As a consequence, no particular State—be it a State Party or non-State Party—must give its specific consent to the exercise of this jurisdiction in a given case. This, in essence, is the regime that follows from an approach based on the principle of universal jurisdiction.

It has been argued that the universality approach is not in line with the current status of general international law. Not all the crimes within the Court's jurisdiction are, according to this view, covered by universal jurisdiction so that one has to rely upon the other qualifications for international criminal jurisdiction, in particular territoriality and nationality (hereafter 'customary law argument').

It is submitted that the customary law argument fails the test of close scrutiny.[10] Given the general consensus about the customary nature of universal jurisdiction over genocide[11]—the 'crime of crimes', in the words of the International Criminal Tribunal for Rwanda[12]—it is no longer necessary to say anything in this respect.

The applicability of the principle of universal jurisdiction under customary international law to those war crimes committed in an international armed conflict which are covered by Article 8(2)(a) and (b) (hereafter 'war crimes') cannot

[10] This discussion of the customary law argument draws on H.-P. Kaul and C. Kreß, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises', 2 *YIHL* (1999) 143.

[11] Cf. Art. 6 of the Statute; for a detailed demonstration of the applicability of the principle of universal jurisdiction under customary international law over genocide, see A. Zimmermann, 'The Creation of a Permanent International Criminal Court', 2 *Max Planck Yearbook of International Law* (1998) 206 *et seq.*

[12] Judgment of 4 September 1998 in *Prosecutor v. Kambanda*, ICTR 97-23-S, para. 16.

seriously be questioned either.[13] Concerning the crimes listed in Article 8(2)(a), i.e. the grave breaches of the Geneva Conventions of 12 August 1949, the respective treaty provisions[14]—whose customary character was recently reaffirmed by the International Court of Justice (hereafter 'ICJ') in the *Nuclear Weapons Opinion*[15]—explicitly provide for universal jurisdiction.[16] With respect to the war crimes contained in Article 8(2)(b), the customary validity of the universal jurisdiction principle has recently been shown by Andreas Zimmermann,[17] and it suffices to briefly summarize the points convincingly made by this author: he refers to a long-standing State practice of punishing war crimes regardless of specific points of attachment to the respective *forum* (a practice which in fact pre-dates the Geneva Conventions of 1949 (hereafter 'GC')). This practice, which in itself suffices to establish the customary status of the universality principle, was reaffirmed in the process of elaborating the First Additional Protocol of 1977 to the GC and by the now universal acceptance of some other pertinent international instruments.

The next category which must be carefully examined are war crimes committed in an internal armed conflict, which are listed in Article 8(2)(c) and (e) and which, for the sake of analytical clarity, may also be called *civil* war crimes.[18] It is with respect to this category of crimes alone that the customary applicability of the universal jurisdiction principle was open to argument before the Rome Conference started. On balance, the preferable view of current customary law is to affirm the extension of the universal jurisdiction principle to civil war crimes and to acknowledge a basically coherent jurisdictional regime under customary international law for all core crimes of the Statute. It is true that the Appeals Chamber of the ICTY rejected the extension of the grave breaches regime of the GC to civil war crimes in the *Tadić* Decision.[19] But this statement cannot be so construed as to render this issue moot. First, the majority of the Appeals Chamber recognized a trend under recent customary law to extend the grave breaches regime to civil war crimes, and Judge Abi-Saab in his dissent on this point[20] went so far as to acknowledge such an

[13] Cf. e.g. I. Brownlie, *Principles of Public International Law* (4th edn., 1990) 305. Brownlie states: 'It is now generally accepted that breaches of the laws of war, and especially of the Hague Convention of 1907 and the Geneva Convention of 1949, may be punished by any State which obtains custody of persons suspected of responsibility.'

[14] Art. 49 of the First Geneva Convention, Art. 50 of the Second Geneva Convention, Art. 129 of the Third Geneva Convention, and Art. 146 of the Fourth Geneva Convention.

[15] Cf. esp. para. 79 of the Advisory Opinion of 8 July 1996, 35 *ILM* (1996) 827.

[16] These provisions even enshrine an unqualified duty for States Parties *aut dedere aut judicare*.

[17] *Supra* note 11, at 212.

[18] On this point of terminology, see C. Kreß, 'Der Jugoslawien-Strafgerichtshof im Grenzbereich zwischen internationalem bewaffneten Konflikt und Bürgerkrieg', in H. Fischer and S. R. Lüder (eds.), *Völkerrechtliche Verbrechen vor dem Jugoslawien-Tribunal, nationalen Gerichten und dem Internationalen Gerichtshof* (1999) 36.

[19] ICTY IT-94-1-AR72, 2 October 1995, reprinted in *HRLJ* (1995) 454 *et seq.* (paras. 80 *et seq.*).

[20] Ibid., at 470 (sub IV).

extension by way of subsequent practice to the GC. Secondly and decisively, the customary principle of universal jurisdiction may well govern civil war crimes independently from a grave breaches regime, as is the case with respect to the war crimes in Article 8(2)(b). Starting from this premise, the *Tadić* Decision even lends strong support to an extension of universal jurisdiction to civil war crimes, as it is the key message of this decision that the customary law regarding civil war crimes has undergone a long process of assimilation to that of war crimes.[21] The *Tadić* Decision is not the only piece of practice pointing in this direction. In the *Nicaragua Judgment* (Merits) of 27 June 1986,[22] the ICJ couched the rationale behind common Article 3 of the GC in the terms 'elementary considerations of humanity'. On this basis, one may assume that the ICJ would consider the duties incumbent on individuals under common Article 3 of the GC as possessing a character *erga omnes*. As to the civil war crimes which go beyond the realm of common Article 3 of the GC, States such as Belgium and Switzerland have recently exercised universal jurisdiction without having met with any protest.[23] After the conclusion of the Rome Conference, the Statute itself may be seen as a powerful element of State practice supporting the extension of universal jurisdiction to civil war crimes. Reference can be made to preambular paragraph 6 which recalls 'the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. This phrase may well be seen as an affirmation of the customary application of the universal jurisdiction principle to all international core crimes of the Statute including civil war crimes under Article 8(2)(c) and (e).[24] As a matter of principle, too, the extension of universal jurisdiction to civil war crimes is well justified. One may, of course, argue that the most relevant circumstantial factors of a single civil war crime (place of the crime, nationality of criminal and victim)—unlike the case of a war crime—usually relate only to one jurisdiction, and that a transnational spillover effect is not typical here, as an overall context of massive delinquency is—other than in the cases of genocide and crimes against humanity—no constituent element of the crime in question. But these points do not exhaustively deal with the rationales underlying universal jurisdiction under current international law.[25] One criterion which is usually referred to in order to explain universal jurisdiction is the particularly grave nature

[21] For a detailed analysis of this crucial element of the *Tadić* Decision, see C. Kreß, 'Friedenssicherungs- und Konfliktsvölkerrecht auf der Schwelle zur Postmoderne. Das Urteil des Internationalen Straftribunals für das ehemalige Jugoslawien (Appeals Chamber) im Fall Tadić', *Europäische Grundrechte Zeitschrift* (1996) 645 *et seq.*

[22] ICJ Reports (1986) 114 (para. 218).

[23] For references, see Zimmermann, *supra* note 11, at 213 (n. 163). See, however, the recent case brought before the ICJ by the Congo against Belgium.

[24] See Condorelli, *supra* note 6.

[25] For an interesting analysis of the evolution of the rationales of universal jurisdiction, see K. C. Randall, 'Universal Jurisdiction under International Law', 66 *Texas Law Review* (1985) 800, at 803 *et seq.*

of the crime demanding the solidarity of the international community in its repressive efforts. In this respect the most recent international reactions clearly reveal the fact that civil war crimes may provoke the same kind of international concern as war crimes. Another possible explanation of the universal jurisdiction principle points to what may be called an inherent scepticism in the willingness and/or ability of the State most directly concerned to genuinely prosecute the relevant international core crimes.[26] This explanation, again, appears to apply to civil war crimes as it does to the other international core crimes, as experience tells us that, for a number of reasons, civil war States tend to be reluctant to genuinely prosecute the crimes committed during the conflict.

Given the considerable disparity of the pertinent conventions prior to Rome, the legal situation may be seen as somewhat less straightforward with respect to crimes against humanity[27] than with respect to war crimes. A closer look, though, reveals that the customary principle of universal jurisdiction equally applies to crimes against humanity. This position can be based on State (judicial and legislative) practice, as has recently been shown by Kenneth C. Randall[28] and Andreas Zimmermann.[29] Beyond that, the position is justified as a matter of principle. Together with genocide, crimes against humanity are most directly covered by the ICJ's *dictum* in *Barcelona Traction*[30] on the *erga omnes* character of certain international rules, and the principle of universal jurisdiction must be understood as the legal vehicle by which States, acting on behalf of the international community, can react to any violation of such a rule. Finally, the customary validity of universal jurisdiction over crimes against humanity gains support from the evolving jurisprudence of the ICTY. In its sentencing practice this Tribunal has had the opportunity to directly compare war crimes and crimes against humanity. In its Sentencing Judgment of 14 July 1997 in *Tadić* the Trial Chamber made a statement which is very much in point:

> A prohibited act committed as part of a crime against humanity . . . is, all else being equal, a more serious offence than an ordinary war crime. This follows from the requirement that crimes against humanity be committed on a widespread or systematic scale, the quantity of the crimes having a qualitative impact on the nature of the offence which is seen as a crime against more than just the victims themselves but against humanity as a whole.[31]

[26] For a recent elaboration of this thesis, see R. Merkel, 'Universale Jurisdiktion bei völkerrechtlichen Verbrechen', in K. Lüderssen (ed.), *Aufgeklärte Kriminalpolitik oder Kampf gegen das Böse.* Vol. 3. *Makrodelinquenz* (1998) 261 *et seq.*

[27] Cf. Art. 7 of the Statute.

[28] *Supra* note 25, at 800 *et seq.*

[29] *Supra* note 11, at 211.

[30] ICJ Reports (1970) para. 33. In *Barcelona Traction* the Court only dealt with basic 'rights of the human person' and correspondingly with *erga omnes* obligations of States. The concept of an international core crime implies the idea of 'basic duties of the human person' and correspondingly *erga omnes* obligations of individuals. For a similar view, cf. Randall, *supra* note 25, at 830.

[31] Para. 73 of the judgment.

Taking this into account, it would seem very odd indeed to reject the customary validity of universal jurisdiction over crimes against humanity in the light of the undeniable applicability of the same principle to war crimes.

Against this background, one may certainly conclude that the universal jurisdiction principle is well established under contemporary international law with regard to genocide, crimes against humanity, and war crimes. Consequently, States have a legitimate and acknowledged legal basis to use, if they so wish, the universality approach with regard to these core crimes, either in their national criminal jurisdiction systems or when establishing together a new and complementary international criminal justice system as during the UN negotiations for the ICC.

During the Rome Conference, participating States decided that they would not establish the Court as some 'common organ' of the State Parties as in the case of, for example, the Nuremberg Tribunal.[32] Instead, they chose to create the ICC as a new international organization on which they would confer, through Article 4, international legal personality. Given such a construction, one may ask—and be it only for the sake of analytical clarity—whether such a Court could have been empowered with the same right to exercise universal jurisdiction with regard to the core crimes that States have under contemporary customary international law as demonstrated above.

For a number of rather obvious reasons the answer to this question must be in the affirmative. Even if the ICC has legal personality distinct from its creators its legal powers are derived from State Parties of the Statute. Those State Parties, if they so wish, can confer on the Court they are founding together the authority and rights to exercise jurisdiction they themselves have under international law. This last aspect is the decisive criterion.

As under current international law, all States may exercise universal criminal jurisdiction concerning acts of genocide, crimes against humanity, and war crimes,[33] the Contracting Parties of the Statute can confer through ratification this right on the new institution. Whether they want to achieve this result, is first, a question

[32] See *Trial of the Major War Criminals*, Vol. 22, 41 also reproduced in M. C. Bassiouni, *Crimes against Humanity in International Criminal Law* (1992) 52, in which the Nuremberg Tribunal stated: 'the Allied Powers have done together what any one of them might have done singly'.

[33] A recent and concrete example of the universality approach is UNTAET Regulation No. 2000/15 (6 June 2000). Section 2.1 of this Regulation stipulates that the East Timorese courts created under this regulation by the United Nations Transitory Authority for East Timor may exercise universal jurisdiction with regard to genocide, crimes against humanity, and war crimes the definitions of which are apparently taken from the Rome Statute. If one understands the 'Panels' to be established as courts of the State of East Timor *in statu nascendi*, one has another concrete case of application of the universal jurisdiction principle. If one understands them as UN Courts their jurisdiction must—in the last instance—be derived from the authority of UN Member States to exercise universal jurisdiction with regard to these three core crimes.

within their own free will when elaborating the treaty and then, second, a question of interpretation of this treaty. In general, there is no rule in international law which would prohibit such a transfer of a State's rights to a new entity, under international law, which this State is co-establishing as a Contracting Party and will maintain through its contributions as a State Party. In sum, also under the aspect of a legal personality of the future Court to be established the universality approach can hardly be criticized as being doubtful under international law.

On the level of principles, the universality approach has to be contrasted with various approaches based on the more or less restrictively conceived principle of State sovereignty. Moderate variants of this approach may be called the nationality and/or the territoriality approaches. Hereafter, the jurisdiction of the Court is dependent on the consent of the national State of the suspect and/or the State on whose territory the crime has been committed. A fully-fledged State sovereignty approach goes beyond the criteria of territoriality and nationality in requiring the consent of every State which is in any way directly concerned with or interested in the crime. The additional points of attachment can be the custody of the suspect, the nationality of the victim, or an extradition request.

Again at the level of principles, the question as to whether the consent is expressed by way of ratification (system of automatic jurisdiction) or in a more specific form (system of specific consent) is of secondary importance. It is obvious, though, that the more specific the consent of one (or more) State(s) must be, the greater emphasis is placed on the sovereignty of this (or these) State(s). The alternative between automatic and specific consent-based jurisdiction is thus not only of a technical nature but has substantive consequences.

This introductory overview tries to circumscribe in general terms the wide range of possible solutions for Article 12 on preconditions to the exercise of jurisdiction. The fundamental question which had to be solved by one jurisdictional model or another was whether the general jurisdiction of the Court (i.e. the one not triggered by a Security Council referral under Chapter VII of the Charter) over the crimes referred to in Article 5 would depend merely on ratification or *ad hoc* acceptance of the Statute or whether it would depend on specific consent as a precondition and if so, consent modalities by which State or States for which crimes.

II. *Travaux Préparatoires* with Regard to Article 12

A. Before the Rome Conference

1. The ILC Draft

The starting point for the debate on the jurisdiction of the future Court was the 1994 Draft Statute submitted by the ILC.[34] It provided for a rather restrictive regime which was as complex as differentiated with regard to the various crimes. It also at this time left open the possibility of including beyond the core crimes, certain treaty crimes.

In particular, the following elements of the ILC proposal seem relevant: (1) Article 21(1)(a) provided for inherent jurisdiction (only) in a case of genocide if the complaint was brought by a State Party being also a contracting party to the Genocide Convention.[35] (2) With regard to the other crimes referred to in Article 20, Article 21(1)(b) foresaw that the Court would have jurisdiction where the complaint was brought in accordance with Article 25(2) and furthermore under the condition that the jurisdiction of the Court over the particular crime was accepted under Article 22 both by the custodial State and by the territorial State. (3) Article 22 of the ILC Draft opened up the possibility of various modalities for special declarations by which States would either limit or extend their acceptance of the ICC's jurisdiction specifically for certain or even individual crimes and/or for certain periods of time. This could be qualified as an 'opting-in' regime.

The latter approach was obviously modelled on the submission rules for the International Court of Justice pursuant to Article 36 of the ICJ Statute which give States considerable choice and complete freedom for a selective approach after, and in spite of, having ratified the Statute. The requirement of such a special declaration meant that the future Court would have no inherent jurisdiction but needed explicit State consent for the exercise of jurisdiction. The proposal submitted by the ILC and its various components came under increasing criticism during the deliberations of the *Ad Hoc* Committee and later the Preparatory Committee.[36] The proposed 'opting-in system' in the view of many meant an 'à la carte' jurisdiction, which was hardly acceptable for the core crimes. Furthermore, there was a general assumption that this approach aiming at complete freedom of choice of concerned States would probably have led to an unworkable situation or

[34] Report of the International Law Commission on the Work of its 46th Session, Draft Statute of an International Criminal Court, 2 May–22 July 1994, UN GAOR, 49th Sess., Supp. No. 10, UN Doc. A/49/10 (1994), 29.

[35] UNTS 277, see Art. VI.

[36] See J. Dugard, 'Obstacles in the Way of an International Criminal Court', 56 *Cambridge Law Journal* (1997) at 336, 337; L. Sadat-Wexler, 'First Committee Report on Jurisdiction, Definition of Crimes and Complementarity', 13 *Nouvelles Études pénales* (1997) 163, 173.

even to chaos, with very different declarations of submission depending on whether States chose to be open or restrictive towards the Court. It would therefore foreseeably have led to the Court being completely ineffective.[37]

In its earlier deliberations, the ILC had also considered as an alternative to 'opting-in' an 'opting-out' approach. According to this approach, as reflected in its 1993 ILC Draft,[38] the Court's jurisdiction would have been accepted by all State Parties except for those crimes expressly excluded by individual State Parties not accepting the Court's jurisdiction with respect to those crimes.

Given the nature of the opting-in/opting-out regime as suggested by the ILC it is not surprising that this approach in general appealed more to the sovereignty-oriented and restrictive States. At the Rome Conference this approach was supported in principle by a minority, if a sizeable one of twenty-seven States. However, a closer look reveals that some of them were aiming at such an opting-in/opting-out regime either only for crimes against humanity and war crimes or only for war crimes.

2. The so-called State Consent Regime

This proposal was at the heart of the Draft for a complete Statute submitted by France to the Preparatory Committee in August 1996.[39] It stated that in every individual case, every procedure and regarding every suspect, all the States affected would have to give their explicit consent in order for the Court to be able to proceed (i.e. the territorial State where the crime was committed, the State of the nationality of the victim, the State of the nationality of the suspect and, if applicable, the State applying for extradition as well as the custodial State). This French proposal, which was several times reaffirmed during the Preparatory Committee, would have made the jurisdiction of the Court, even in the case of core crimes, totally dependent on the political discretion of the State Parties and their perceived interests. Highly selective jurisdiction and probably a far-reaching paralysis of the Court would have been inevitable.[40]

In its pure, consistent form, this very sovereignty-oriented and Court-restrictive approach was no longer of any great relevance in Rome.[41] It remained unclear, whether the United States, which expressly reserved its position, would support

[37] See H.-P. Kaul, 'Special Note: The Struggle for the International Criminal Court's Jurisdiction', 6 *European Journal of Crime, Criminal Law and Criminal Justice* (1998) 369–376.

[38] See Report of the International Law Commission on the Work of its Forty-Fifth session, 3 May–23 July, UN GAOR, 48th Sess., Supp. No. 10, UN Doc. A/48/10.

[39] See Art. 34 of the Draft Statute submitted by France, UN Doc. A/AC.249/L.3 (6 August 1996).

[40] See Kaul, *supra* note 37, at 368.

[41] It should be noted, however, that the Draft Statute, mainly because of the insistence of France, still had to include this very Court-restrictive proposal. Cf. UN Doc. A/CONF.183/2/Add. 1, Art. 7, Option 2.

this proposal. However, a particularly critical element of the French proposal remained significant right up to the end: some States opposed to any obligatory jurisdiction, led by the United States, strongly and repeatedly demanded that in the field of the general, not Security Council-triggered jurisdiction pursuant to Article 12, only the consent of the State of the nationality of the suspect should be decisive. In order for jurisdiction to apply, this State would have to be a party to the Statute or have agreed to the proceedings in a particular case.

3. The Principle of Automatic Jurisdiction

The first consolidated text proposal for this basically Court-supportive principle was submitted by Germany back in February 1996.[42] In essence, the proposal took up the ILC suggestion for genocide and generalized it for all the core crimes. Thus, in the Preparatory Committee's compilation of proposals, the German proposal on the question of jurisdiction read as follows: 'A State which becomes a party to the Statute thereby accepts the inherent jurisdiction of the Court with respect to the crimes referred to in the Statute'. At this point nobody could know that the wording later to be agreed in Rome on automatic jurisdiction in Article 12(1) would be, word for word, almost identical.

Support for the 'main building block of automatic jurisdiction'[43] continued to increase during the Preparatory Committee deliberations from 1996 to 1998. In a global démarche with a special position paper in May 1998 the German side again made a strong appeal to all States in favour of automatic jurisdiction. Other States of the LMG which had adopted automatic jurisdiction as one of their 'cornerstone principles'[44] also undertook parallel efforts. Among the LMG it became increasingly clear that the principle of automatic jurisdiction would be a strong candidate for adoption as the basis for the general, not Security Council-triggered, jurisdiction of the Court.

Notwithstanding this basic consensus, however, the question was still open as to which State or States would have to accept the jurisdiction of the Court by becoming a party to the Statute: the State on whose territory the crime had been committed (territorial State), the State in whose custody the suspect was being held (custodial State), the country whose national was the victim of the crime (victim's State) or the country of which a national was a suspect (nationality State), or a combination of these countries, either in a disjunctive or conjunctive list. As this

[42] See UN Doc. A51/22, Supp. No. 22 A, Report of the Preparatory Committee on the Establishment of an International Court, Vol. II (Compilation of Proposals) p. 73, proposal 1 (German proposal).

[43] See the statement of the German delegation made in the Preparatory Committee on 4 August 1997.

[44] See Ch. 2.3, above and *supra* note 11.

question was the subject of various proposals (see below), it had to be solved in Rome.

B. The Options at Rome

1. Introduction

The Draft Statute of the Preparatory Committee as the main basis for negotiations in the Committee of the whole contained most of the relevant options.[45] Others were submitted during the Conference. They reflected a wide spectrum of partly or diametrically opposed options ranging from the proposal on universal jurisdiction by Germany to the most restrictive applications of the State consent principle as outlined above.

Despite intensive efforts by the Chairman and the Conference Bureau to narrow the differences and to foster consensus, the discussions on jurisdiction revealed seemingly unbridgeable differences of views between States primarily concerned with their sovereignty and the expanding group of about fifty to sixty like-minded States. Notwithstanding all the national nuances, the deliberations gradually developed into a stand-off between two competing approaches:

On one side, those delegations primarily concerned with their sovereignty were clearly aiming at a consent-based or facultative regime especially in the field of the general, not Security Council-triggered, jurisdiction. The United States, in particular, took the lead for a general approach whereby the Court should only be able to act when the States concerned allowed it to do so in specific cases and when the state of the nationality of the suspect consented. This was to be achieved through various jurisdictional or other 'safeguards', exempting, if possible, all of the State's own nationals from the Court's jurisdiction. These proposals and efforts seemed to aim at a general jurisdictional regime as weak as possible, thus leaving the future Court *de facto* only as a 'Permanent *ad hoc* Criminal Court' primarily dependent on the Security Council. On the other side, the latter concept was—for different reasons—opposed by some other States with an equally Court-restrictive approach.

On the opposite side, the like-minded States, in contrast, stuck consistently to the objective of an effective workable and independent International Criminal Court. This meant that their efforts had to be directed towards provisions as clear and binding as possible for the general, not Security Council-triggered, jurisdiction of the Court.

[45] UN Doc. A/CONF.183/2/Add.1, Arts. 6, 7, 9, 'further option' for Art. 9, and 'further option for articles 6, 7, 10 and 11'.

Given this critical contest, it became increasingly clear that endeavours for a compromise as well as such a compromise itself—somewhere in the middle, as usual—would be extremely difficult.

2. The United Kingdom Proposal

The first proposal elaborated especially for the forthcoming Diplomatic Conference was a proposal submitted by the United Kingdom.[46] It was a comprehensive proposal, as it covered all the issues of the trigger mechanisms, meaning both the Security Council-triggered jurisdiction as well as the general jurisdiction triggered by State complaints or the Prosecutor. As regards the preconditions for the Court's jurisdiction, the proposal departed from the 'opting-in' regime of the ILC Draft, suggesting that a State would accept the jurisdiction of the Court by the fact of becoming party to the Statute. While the proposal, in further option for Article 7(1), was thus accepting 'automatic jurisdiction' with regard to State Parties, in Article 7(2) the further requirement was that both the custodial State and the state where the crime occurred should have accepted the jurisdiction of the ICC by being State Parties. With regard to non-State Parties, the Court would not be able to exercise its jurisdiction unless both the custodial State and the territorial State had given their consent *ad hoc*.[47]

Critical comments by States, as well by other observers, indicated that many regarded the cumulative consent requirement of both the territorial State and the custodial State as too restrictive.[48] Reacting to these views, the United Kingdom in a statement of 19 June 1998 deleted the custodial State from its draft proposal.

3. The German Proposal

The German Proposal was based on the international law principle of universal jurisdiction. In a discussion paper submitted to the Preparatory Committee, Germany explained its rationale as follows:

> Under current international law, all States may exercise universal criminal jurisdiction concerning acts of genocide, crimes against humanity and war crimes, regardless of the nationality of the offender, the nationality of the victims and the place where the crime was committed. This means that, in a given case of genocide, crime against humanity or war crimes each and every State can exercise its own national criminal jurisdiction, regardless of whether the custodial State, territorial State or any other State has consented to the exercise of such jurisdiction beforehand. This is confirmed by extensive practice. . . . There is no reason why the ICC—established on the basis of a Treaty concluded by the largest possible number of States—should not be in the very same

[46] See UN Doc. A/AC. 249/WG.3/DP.1 (1998).

[47] See E. Wilmshurst, 'Jurisdiction of the Court', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (1999) 127, 132, 133.

[48] See e.g. Lawyer's Committee for Human Rights, 'Exercise of ICC Jurisdiction: The Case for Universal Jurisdiction', 1(8) *ICC Briefing Series* (May 1998).

position to exercise universal jurisdiction for genocide, crimes against humanity and war crimes in the same manner as the Contracting Parties themselves. By ratifying the Statute of the ICC, the State Parties accept in an official and formal manner that the ICC can also exercise criminal jurisdiction with regard to these core crimes.[49]

Thus, the essence of the proposal was that the ICC should have the same jurisdictional authority as Contracting States have under international law and that this authority would be transferred by them, through ratification of the Statute, to the ICC.[50]

It may be noteworthy in this context that the German proposal was in part a reaction to the United Kingdom proposal. The German side had hoped previously that the United Kingdom, then holding Presidency of the European Union, would take the lead with a proposal geared at an effective jurisdictional regime also with regard to the general, not Security Council-triggered, jurisdiction. When these hopes did not materialize, Germany put forward its proposal aimed at applying the principle of universal jurisdiction[51] in order to make the future Court effective and eliminate loopholes. Furthermore the German side wanted to contribute, in accordance with international law, a correct alternative to the various restrictive State consent or opting-in/opting-out approaches which it considered as detrimental to the future Court. Consequently, beyond ratification there should be no further 'preconditions'. This could eventually have obviated the need for Article 12 of the Statute (Art. 7 of the Draft Statute).[52] At the same time, this approach would in no way have affected the strong priority of national criminal justice systems, as stated in Article 17 on complementarity.

The conceptual approach and proposal submitted by Germany attracted strong support from many delegations and from most of the NGOs.[53] At the same time,

[49] See UN Doc. A/AC. 249/1998/DP.2 (23 March 1998).

[50] See the summary of the German proposal and the comments given by Williams, *supra* note 2, margin Nos. 6–7. This contribution also contains a careful and well-documented explanation, with extensive references, of the principle of universal jurisdiction and its origins, going back, *inter alia*, to international piracy on the high seas, the slave trade, and more recently to war crimes, crimes against humanity, and genocide.

[51] See the considerations under I, on relevant aspects of contemporary international law regarding the universal jurisdiction approach.

[52] See the wording of the German proposal in the Draft Statute, *supra* note 42, The 'further option' for Art. 9 read: 'Acceptance of the jurisdiction of the Court:

1. A State which becomes a Party to the Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5, [paras. (a) to (d)].

2. A State that is not a Party to this Statute may, by declaration lodged with the Registrar, accept the obligation to cooperate with the Court with respect to the prosecution of any crime referred to in article 5. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9 of this Statute.'

[53] e.g. International Committee of the Red Cross, International Commission of Jurists, Amnesty International, Human Rights Watch, Lawyers Committee for Human Rights, and the 'NGO coalition for an International Criminal Court'.

however, it became clear that there were considerable reservations and resistance to such an approach. Some States, the United States most prominent and vocal among them, strongly rejected the doctrine of universality and insisted that it should not be given any recognition by the Statute. Apart from political objections, the main counter-arguments were that 'the universality principle was not accepted in the practice of most governments and would—if adopted by this Statute—erode fundamental principles of treaty law'.[54]

It was against this background that the Conference Bureau decided not to include the German proposal in its Discussion Paper of 6 July 1998[55] and thus to eliminate it from the options under consideration. The reason given by the Bureau was that it lacked sufficient support from other delegations to warrant further consideration.[56] In its reaction to the decision of the Bureau, Germany stressed again that the 'approach based on the principle of universal jurisdiction is legally sound and acknowledged in international legal doctrine as well as through extensive State practice.' Germany also predicted that 'probably the participants of this conference including the German side may be criticised very soon by legal writers and law professors from many countries that we did not build the jurisdiction of the ICC on the principle of universal jurisdiction.'[57]

4. The Korean Proposal

Meanwhile the proposal submitted by the Republic of Korea[58] had gained remarkable prominence and even clear majority support.[59] In its proposal Korea argued *inter alia*:

> (1) State consent constituting the basis of the jurisdiction of the Court should not be separated at the two different stages: acceptance and exercise of the Court's jurisdiction. By becoming a party to the Statute, a State is considered as having accepted and agreed to the exercise of the jurisdiction of the Court once and for all . . .
>
> (2) For the sake of jurisdictional nexus, there should be a requirement that one or more of the interested States had given its consent to the exercise of jurisdiction by the Court which, in accordance with (1) above, is replaced with becoming a State Party to the Statute. The interested States should encompass the territorial State, the custodial State, the State of the nationality of the accused, and the State of the nationality of the victim . . .

[54] See Statement by D. Scheffer, Head of the United States Delegation, on the Bureau's Discussion Paper of 9 July 1998.

[55] See UN Doc. A/CONF.183/C.1./L.53.

[56] It is noteworthy that though the German proposal on universal jurisdiction was dropped from the Bureau's discussion paper, no less than 23 States expressed their dismay with regard to its disappearance, see *ICC Monitor* (10 July 1998).

[57] See statement by Kaul, Acting Head of the German Delegation, Rome Conference, 9 July 1998, 1.

[58] See UN Doc. A/CONF. 183/C.1/L.6 (17 June 1998).

[59] According to the *ICC Monitor* (10 July 1998) 1: 79% of the States participating in the debate supported the Korean proposal.

The Korean proposal, in favour of an effective Court, differed significantly from the United Kingdom proposal with its emphasis on the territorial State or from proposals with even more restrictive consent requirements in one decisive point: it permitted jurisdiction if in a given case (only) one or more of the four interested States was a member of the Statute. At the same time the Korean proposal insisted explicitly on a specific jurisdictional nexus recognized by international law. This was the main difference in comparison to the German proposal, while it followed in its theoretical underpinning the universal jurisdiction principle. Many delegations were attracted by this explicit jurisdictional nexus requirement. They found it also more in line with the familiar structure of other proposals discussed. Consequently, the Korean proposal was supported by 79 per cent and 85 per cent of the delegations taking the floor[60] in the orientation debates of 9 July and 14 July 1998, respectively, on the Discussion Paper and first 'Bureau proposal'[61] submitted by the Bureau.

At the same time these debates revealed again the continued opposition of a sizeable group of States insisting on a much more restrictive jurisdictional regime. Nevertheless given the ever-increasing majority support for the Korean proposal, there was a widespread view that it had to be the first choice for settling the critical issue of jurisdiction.

5. The United States Proposal

In the discussions on the general, not Security Council-triggered, jurisdiction of the future Court, the United States had continuously emphasized the consent principle, both with regard to the consent of the territorial State and the State of nationality of the suspect and also both with regard to State Parties and non-State Parties. Special emphasis was given to the consent of the State of nationality which was declared as being indispensable. Thus, the United States proposal submitted on 14 July fully reflected this approach as it demanded both for crimes against humanity and war crimes cumulative acceptance of the jurisdiction of the Court both by the territorial State and the State of nationality of the suspect.[62]

In the previous orientation debate in the Committee of the Whole, the United States expressed support for an 'opting-in' formula for crimes against humanity and war crimes, combined with the further requirement that any jurisdiction should be only possible if the State of nationality was a party to the Statute or had as a non-State Party accepted *ad hoc* the jurisdiction of the Court with respect to the specific crime.

[60] See *ICC Monitor* (10 July 1998) 1 and (15 July 1998) revision 1, 1.
[61] See *supra* note 55 and UN Doc. A/CONF.183/C.1/L.59.
[62] See UN Doc. A/CONF.183/C.1/L.70 (14 July 1998).

As a matter of principle, the United States insisted that the ICC could not have jurisdiction over nationals of non-State Parties as this would be 'a form of extra-territorial jurisdiction which would be quite unorthodox in treaty practice—to apply a treaty regime to a country without its consent'.[63] It was repeatedly affirmed that any possible jurisdiction over nationals of a non-State Party would violate the Vienna Convention on the Law of Treaties, which stipulates in its Article 34 that treaties cannot 'create either obligations or rights for a third State without its consent'.[64] In general, the United States made it clear that it would not accept any regime which would allow criminal proceedings against United States nationals in a Court not accepted by the United States. Furthermore, the United States submitted that, given the worldwide responsibilities of the United States to help maintain international peace and security, United States forces needed protection against politically motivated accusations and frivolous or arbitrary charges or other forms of investigations undertaken without the explicit consent of the United States.

Thus, in order to build into the Statute a strong additional safeguard against such possible prosecution of nationals of non-State Parties by the Court, the United States submitted on 16 July 1998 a further proposal, which would have excluded the jurisdiction over all acts committed 'in the course of official duties and acknowledged by the State as such'.[65] If this type of 'official act' nexus would have been accepted, it would have opened up for all non-State Parties a treaty-based right to foreclose any jurisdiction of the Court for war crimes, regardless of whether they were acting *bona* or *mala fide*.

On the other side, the United States continuously argued for an 'effective Court' through the referral of a situation by the Security Council acting under Chapter VII of the Charter in accordance with Article 13(b) of the Statute, depending, however, on the possible veto of one of the permanent members.

Thus, the overall line taken by the United States, in the view of many, developed into a combination of American insistence on a consent requirement by the State of the nationality of the accused as the indispensable prerequisite for the general jurisdiction of the Court, on the one side, and unequivocal strong support for the Security Council-triggered jurisdiction on the other. This would have left the future Court *de facto* only with a potentially very strong and effective Security Council-triggered jurisdiction, this in sharp contrast to only a facultative or symbolic general jurisdiction 'on paper'. At the same time, it became increasingly clear that such an approach was not acceptable for the great majority of delegations.

[63] See Scheffer, *supra* note 54.
[64] UNTS 331.
[65] See UN Doc. A/CONF.183/C.1/L.90 (16 July 1998).

6. An Informal Package Proposal of the P-5

While the Conference Bureau was intensely pondering how to overcome the existing impasse by a compromise proposal as fair as possible to all, a further informal package proposal emerged. During the final week of the Rome Conference, the delegations of the five permanent members of the Security Council (the United States, Russia, France, the United Kingdom, and China—also known as the P-5) had met intensively to arrive at a 'compromise package' that could be presented to the Conference.[66] Sensing the strong and increasing support for the Korean proposal, the P-5 met to put together a package proposal that was in keeping with their interests. With regard to the general, not Security Council-triggered, jurisdiction the United States, China, and the Russian Federation had previously expressed themselves in favour of a merely optional jurisdiction for crimes against humanity and war crimes. France had supported automatic jurisdiction for genocide and crimes against humanity but had made it clear several times that it could not accept automatic jurisdiction also for war crimes. In addition, the United States had—as outlined above—repeatedly emphasized that in their view the requirement of the acceptance of the State of nationality of the accused was indispensable for the jurisdiction of the Court both with regard to State Parties and non-State Parties.

The P-5 initiative tried to build on previous mediation efforts by Japan, under Ambassador Owada, who had tried to reduce the gap between the LMG and some members of the P-5. His efforts, through a number of meetings and bilateral consultations, had produced a formula to provide for automatic jurisdiction for all core crimes, but envisaging an 'opting-out' regime with respect to crimes against humanity and war crimes for a ten-year, renewable period. This proposal was simply unacceptable to like-minded States, as it would *de facto* have allowed a State to be a member of the Statute 'free of charge', i.e. while indefinitely avoiding most of its obligations.

The informal non-paper put together by the P-5 on the basis of the 'Bureau Proposal' of 10 July 1998[67] reflected these positions. The paper informally presented on 16 July 1998 to the Conference Bureau and a number of other States combined in a predominantly restrictive manner the following elements:[68]

(1) 'opting-out' possibility for war crimes and crimes against humanity for 10 years, including the possibility of extending the period by a simple majority;

[66] See the account given by Scheffer, *supra* note 4, at 19.

[67] See *supra* note 61.

[68] See Kaul, *supra* note 37, with the text of the non-paper put together by the P-5 as annex 1, 374, 375.

(2) non-State Parties should be able to prevent the Court from having jurisdiction by stating that the 'activity alleged to constitute the crime is an act of the State in question and acknowledged by it as such'. This was a version of the proposal which the United States also officially tabled on 16 July 1998;[69]

(3) on the specific issue of preconditions to the exercise of jurisdiction, the United Kingdom proposal was reaffirmed which required the territorial State to be a State Party.

Later during the day, the United Kingdom, seconded by France, introduced a slightly revised version of the above package in an EU coordination meeting, this in an attempt to win as much support from EU States as possible. The main substantive change in this informal paper compared with the previous version was that the opt-out possibility for war crimes and crimes against humanity could no longer be extended by a simple majority but that the opt-out could be 'prolonged by the normal amendment procedures'. While the United Kingdom did not present this paper as a P-5 package or as a proposal of its own, it became clear that both the United Kingdom and France regarded the paper as a basis for compromise.

7. An Informal Counter-Proposal Submitted by Germany

In this situation, Germany, which had followed these developments with growing concern, submitted an informal counter-proposal on the afternoon of 16 July 1998.[70] With regard to the central issue of jurisdiction, it contained the following elements: a more effective jurisdictional regime, by the reintroduction of the Korean proposal for all the core crimes; the opt-out possibility for war crimes continuously supported by France was to be regarded as a 'confidence-building period'. It ought thus to be limited to a single three-year period, without the possibility of extending it, and to be restricted to war crimes (i.e. no possibility for such opting-out with regard to crimes against humanity).

The thrust of the informal counter-proposal submitted by Germany was immediately supported by a majority of EU States and also by other like-minded States. In the view of many, this stabilized and clarified the situation, at least to a certain extent. In the ensuing discussions, both in formal meetings and in the corridors, some trends began to emerge. While many felt that an opting-out regime with respect to crimes against humanity was unacceptable, some delegations expressed a greater readiness to consider seriously the partial overlap of the two informal non-papers, i.e. a possible opt-out for State Parties with respect to war crimes. There was a feeling that an opt-out of some kind on a temporary basis would be

[69] See *supra* note 65.

[70] See Kaul, *supra* note 37, text of the informal German counter-proposal as annex 2, 375, 376.

less damaging to the effectiveness of the Court than an opt-in provision.[71] But that part of the P-5 non-paper which required consent by a State with regard to persons carrying out 'official acts' and would allow, as it were, governments to claim immunity for atrocities carried out on their behalf, met with strong opposition.

8. The Bureau Compromise

At the same time, it became even more obvious that delegations were neither willing nor able to make a last genuine negotiation effort for some kind of a compromise. How would it be possible then to save the Conference from failure? Most delegations seemingly had accepted that there was only one chance left for successful conclusion: if somehow the Conference Bureau would come up with a 'package compromise proposal' as generally acceptable as possible for adoption by the Conference.[72]

In the night from 16 to 17 July 1998, the long awaited final package proposal by the Bureau appeared. With regard to preconditions for the exercise of jurisdiction, it contained the present Article 12 of the Statute. The provision combines the concept of automatic jurisdiction with the concept of additional preconditions for the exercise of jurisdiction by the Court. This means, first, that States accept the jurisdiction of the ICC for the core crimes by becoming State Parties and, second, that the exercise of jurisdiction in a given case is dependent on the condition that either the territorial State or the State of nationality of the accused are among the State Parties.

A limited exception from the rule contained in Article 12 is the Transitional Provision contained in Article 124.[73] The latter article has to be seen as part of the compromise on jurisdiction to gain, in particular, the support of France for the Statute. Article 124 stipulates that States may opt out of the Court's jurisdiction (only) for war crimes for a period of seven years, when the alleged crimes were committed in its territory or by its nationals.

During the course of 17 July 1998, it became clear that this compromise formula was likely to achieve broad and general support. Nevertheless, there was a minority of States clinging to the opt-in approach or the cumulative approach for preconditions or the State consent regime focused on the consent of the nationality of the accused. Prominent among them again was the United States which since the beginning of the Conference had made countless efforts to secure with regard to the general, not Security Council-triggered, jurisdiction of the ICC a restrictive jurisdictional regime in line with its own views. In the final session of the Committee of the Whole, the United States proposed a restrictive amendment

[71] See Wilmshurst, *supra* note 47, 138.
[72] See Ch. 2.3, above.
[73] See A. Zimmermann, 'Article 124', in Triffterer (ed.), *supra* note 2, 1281.

package. This cumulative set of proposals again sought to limit the Court's jurisdiction to those cases where only the State of the accused had accepted the jurisdiction of the Court, either as a State Party or a non-State Party. [74]

The first part of this amendment read:

> 1. With respect to States not party to the Statute, the Court shall have jurisdiction over acts committed in the territory of a State not party, or committed by officials or agents of a State not party in the course of official duties and acknowledged by the State as such, only if the State or States in question have accepted jurisdiction in accordance with this article.
>
> 2. If the acceptance of a State that is not a party to this Statute is required under article 7, that State may, by declaration lodged with the Registrar, consent to the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9 of this Statute.

The second page contained a further variant of a possible protocol for opt-in with regard to crimes against humanity and war crimes, thus taking up again the protocol idea of the informal package proposal put together by the P-5.[75] The amendment was defeated by a no-action motion adopted by a vote of 113 in favour to 17 against, with 25 abstentions.

III. The Content of Article 12 of the Rome Statute

A. Paragraph 1: Jurisdiction over Crimes

Paragraph 1 contains the fundamental rule that States, by becoming parties to the Statute, accept the jurisdiction of the Court with respect to the crimes referred to in Article 5, i.e. the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. With regard to the crime of aggression, however, the acceptance of the Court's jurisdiction by the new State Party can and will have a concrete meaning only when the crime of aggression has been defined and adopted in accordance with Article 5(2).[76] In this connection one must, however, bear in mind that Article 121(5) gives State Parties the choice either to accept or not to accept any amendment to Article 5. This means that a State Party may exclude the jurisdiction of the Court with regard to the crime of aggression even when this crime should have been defined and accepted by seven-eighths of the State Parties as required by Article 121(4).

[74] See UN Doc. A/CONF.183/C.1/L.90 (16 July 1998). It contained a footnote: 'To be read together with A/CONF.183/C.1/ L.70' (14 July 1998).

[75] See *supra*, II.B.6.

[76] See Ch. 11.4, above; A. Zimmermann, 'Article 5', margin Nos. 26–29, in Triffterer (ed.), *supra* note 2.

In general, Article 12 incorporates into the Statute the principle of automatic jurisdiction over all core crimes which was previously contained in option 1 of the Bureau Proposal in Article 7*bis*.[77] This reflects the view of an overwhelming majority of States that the general competence of the Court had to be based on the principle of automatic jurisdiction in order to achieve a, insofar as possible, workable jurisdictional regime for the subject-matter jurisdiction of the Court.

Finally, when discussing Article 12(1), providing for a system of automatic jurisdiction, it should again be noted, however, that the transitional provision of Article 124[78] contains a limited exception with regard to Article 12(1). This is because Article 124 allows States to use a one-time only, time-limited opt-out with respect only to war crimes. Precisely because of these limitations (applicable only for one of the core crimes, opt-out time-limited and not renewable) the regime of automatic jurisdiction as contained in Article 12(1) remains, in principle, unaffected and intact.

B. Paragraph 2: Acceptance by State Parties

As emphasized above, Article 12(2) deals with the general or regular jurisdiction of the Court (as distinct from the one 'triggered' by a Security Council referral under Article 13(b)). In order to determine the scope and outreach of the jurisdiction of the Court, Article 12 combines two basic elements:

First, in cases where, pursuant to Article 13(a) or (c), a situation is referred to the Prosecutor by a State Party,[79] or where the Prosecutor has initiated an investigation *proprio motu*,[80] then State acceptance of the jurisdiction of the Court is required. Second, with regard to the decisive question, which States must have accepted the jurisdiction of the Court, it lays down that State acceptance is necessary from either the territorial State or the State of the nationality of the accused or both.

These, in essence, are the preconditions which must be fulfilled for the Court to be able to exercise jurisdiction. At the same time, this is the compromise proposal which the Bureau came up with in the final phase of the conference in an attempt to strike a balance as fair as possible between the divergent views of significant groups of States. As shown above, there was a clear majority inclined either to universal jurisdiction or a disjunctive list of alternative States exemplified by the Korean proposal.[81] On the other side, there were some States that supported restrictive proposals either on the basis of State Party acceptance by the State of nationality of the accused or on the even more restrictive approaches of a cumula-

[77] See UN Doc. A/CONF.183/C.1/L.59 (10 July 1998).
[78] See Zimmermann, *supra* note 73.
[79] In accordance with Art. 14 of the Statute.
[80] In accordance with Art. 15 of the Statute.
[81] See *supra*, II.B.4.

tive list of States, or equally restrictive jurisdictional approaches as the opt-in or the State consent regime on a case-by-case basis.

It is against the background of this problematic, almost intractable, negotiating situation that one has to evaluate the compromise of the Bureau Proposal. Though one may not be satisfied with the result, one has to acknowledge the dilemma of the Bureau and the related fact that Article 12 was eventually adopted by an overwhelming majority of the Conference.

Thus, it seems understandable that Article 12(2) stipulates the quite conservative jurisdictional precondition that the territorial State or the State of nationality of the accused or both must be State Parties. This is a regression from the universal jurisdiction approach which is generally recognized in customary international law. At the same time, it has long been clear that the principles of territoriality and nationality are internationally undisputed as legitimate bases for criminal jurisdiction.

C. Territorial Jurisdiction

The principle of territorial jurisdiction as enunciated in Article 13(2)(a) is firmly anchored both in international law and in the domestic law of most States. International law recognizes that, as a consequence of State sovereignty, a State possesses jurisdiction over criminal conduct taking place on its territory. States can either exercise this sovereign right themselves or use their sovereign discretion to make dispositions with regard to this right in international agreements. The principle of territorial jurisdiction as the universally undisputed standard rule in international criminal law, thus, is widely reflected in bilateral extradition treaties and multilateral conventions.[82] In the same manner this principle is firmly anchored in the domestic law of most States. Such extensive State practice based on *opinio juris* demonstrates that States ascribe to themselves the right to exercise criminal jurisdiction over crimes committed by an alien on their territory regardless of whether the crime in question is a domestic ordinary crime or a crime under international criminal law. In such a case the territorial state has the authority under international law to initiate criminal proceedings against the alien perpetrator and is not held to somehow have to seek the consent of the State of nationality of the individual in question.

The incorporation of the principle of territorial jurisdiction in Article 12(2) is in full harmony with these generally accepted considerations under international law. Therefore if a core crime is committed by an individual in the territory of a State Party to the Statute, the ICC will have jurisdiction regardless of whether the alleged perpetrator is a national of this territorial State or an alien national of

[82] See the numerous examples and references given by Williams, *supra* note 2, margin Nos. 6, 7, nn. 71–74.

another State Party or of a non-State Party and regardless also of where the alleged offender may be, namely in this territorial state or in the territory or custody of another State, whether State Party or not. If the alleged perpetrator is in the territory or custody of a State other than the territorial State there is, however, a crucial difference: whereas such a State Party is then obliged to cooperate with the ICC,[83] a non-State Party has no obligation whatsoever to cooperate with the Court. Obviously this lack of any obligation to cooperate mirrors again relevant international law and corresponding State practice in the field of international criminal jurisdiction: when a foreigner commits a serious common or international crime in another State, the State of the nationality of the alleged perpetrator normally has no obligations whatsoever to assist the territorial State in the exercise of its territorial jurisdiction, subject only to specific obligations under international law.

Already for this reason, the principle of territorial jurisdiction as laid down in Article 12(2)(a) does not, in contrast to various arguments put forward, in particular, by the United States, render the ICC jurisdiction over non-State Party nationals contrary to international law and in particular to Article 34 of the Vienna Convention on the Law of Treaties. At the same time, the argument that giving the Court jurisdiction over a crime committed in the territory of a State Party by a suspected national of a non-State Party would conflict irreconcilably with the fundamental principle of treaty law that only States that are parties to a treaty are bound by its terms, has been examined intensively and generally been rejected.[84] Furthermore, on the basis of the customary validity of universal jurisdiction over the international core crimes, the treaty law argument is flawed for at least two reasons.[85] First, this argument artificially separates the Statute's jurisdictional regime from relevant customary international law. The treaty law argument erroneously implies that a treaty-based regime of universal jurisdiction for international core crimes creates new rights vis-à-vis third States. In reality, though, such a regime does no more than to set up a new mechanism to (collectively) exer-

[83] C. Kress, 'Art. 86' on the general obligation to cooperate, and C. Kress and K. Prost, 'Art. 89' on the surrender of persons of the Court, in Triffterer (ed.), *supra* note 2, 1051 and 1071, respectively.

[84] For pertinent criticisms of the treaty law argument, see e.g. G. Hafner *et al.*, 'A Response to the American View as presented by Ruth Wedgwood', 10 *EJIL* (1999) at 116 *et seq.*; A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', 10 *EJIL* (1999) at 159 *et seq.*; Williams, *supra* note 2, margin Nos. 10, 15, 18; M. Scharf, 'The ICC's Jurisdiction over the Nationals of Non Party States: A Reply to Ambassador Scheffer', *Law and Contemp. Problems* (2000); R. S. Lee, 'The Rome Conference and its Contributions to International Law', 29, in Lee (ed.), *supra* note 47; L. Arbour and M. Bergsmo, 'Conspicuous Absence of Jurisdictional Overreach', in H. A. M. von Hebel, J. G. Lammers, and J. Schukking (eds.), *Reflections on the International Criminal Court* (1999).

[85] This discussion of the treaty law argument draws on considerations contained in H.P. Kaul and C. Kress, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises', 2 *YIHL* (1999) 143.

cise already existing rights.[86] The second and equally fundamental flaw of the treaty law argument consists of reducing the issue of jurisdiction over international core crimes to a set of bilateral, inter-State legal relationships. It thereby ignores the important, if not central, position of the individual in the realm of international criminal law. According to its very concept, an international core crime implies the violation of an international legal duty of an individual vis-à-vis the international community as such.[87] In short, the Statute deals with the collective reaction of its States Parties to the breach by an individual of its obligation *erga omnes*.[88]

As a matter of principle, the jurisdictional regime of a treaty which sets up an international judicial body to judge international core crimes cannot thus be construed as if it concerned only interstate relationships. On the contrary, the individual criminal must, for the very specific and limited purpose of international criminal law, be seen rather as an independent subject[89] of international law than as an extension of its national or territorial State. Consequently, the jurisdiction of the Court over nationals of non-States Parties to the extent implied in the universality approach should not be seen as imposing an obligation on a non-State Party (or infringing upon a right of such a State), but rather as responding to (existing) obligations of the individual under international law.

Against this background it may, in addition, be appropriate to recall that the principle of territorial jurisdiction is a rule universally accepted under international law. In the same manner, there is no rule of international law prohibiting the territorial State from voluntarily delegating to a new collective judicial mechanism as the ICC its sovereign authority to prosecute perpetrators of the most serious crimes of concern to the international community as a whole.

D. Nationality of the Accused

The principle of jurisdiction on the basis of nationality as enunciated in Article 13(2)(b) is equally firmly anchored in international law as in the domestic law of

[86] This marks an important difference between core crimes of international law and the so-called treaty-based crimes which, for good reasons, have not found their way into the Statute. For a detailed analysis of the treaty law argument in the context of the treaty-based crimes, see Randall, *supra* note 25, 821 *et seq.*

[87] For an extended analysis, see M. C. Bassiouni, 'Réprimer les crimes internationaux: *jus cogens* et *obligatio erga omnes*', in Comité International de la Croix Rouge (ed.), *Répression nationale des violations du droit international humanitaire, Rapport de la réunion d'experts à Genève, 23–25 septembre 1997*, 29; cf. also J.-A. Carrillo-Salcedo, 'La Cour pénale internationale: l'humanité trouve une place dans le droit international', 103 *RGDIP* (1999) 23 *et seq.*

[88] See *supra* note 23.

[89] S. Sur, 'Vers une Cour internationale pénale: la Convention de Rome entre les ONG et le Conseil de sécurité', 103 *RGDIP* (1999) 35, holds that the Statute defines the individual as an object rather than as a subject of law because individuals cannot directly trigger the Court's jurisdiction. This is a matter of perspective. Sur chooses the perspective of procedural law. The qualification as 'independent subject of international law' in the above text refers to the individual's position under substantive international criminal law.

most States. It means that the State of which the alleged perpetrator is a national possesses through such common nationality a legitimate jurisdictional basis recognized under international law to prosecute and punish a perpetrator of serious crimes also when the criminal conduct occurred in another State. As demonstrated by extensive State practice and *opinio juris*, it is an established rule of international customary law that the State of the nationality of the accused can thus exercise extraterritorial jurisdiction at least with regard to the most serious crimes under international criminal law. Also common law States, with their clear preference for the principle of territorial jurisdiction, recognize it with regard to serious international crimes as contained, e.g. in international terrorism conventions, and, in particular, in Articles 6 to 8 of the Rome Statute. Against this background, the incorporation of the nationality basis of jurisdiction in Article 12(2) was and is uncontroversial.

Therefore, if a core crime is committed by a national of a State Party to the Statute, the ICC will have jurisdiction, regardless of whether or not the alleged perpetrator is present or in custody in this State or in another State Party or a non-State Party. But again, only State Parties are then obliged to cooperate with the ICC.[90]

E. Paragraph 3: Acceptance by Non-State Parties

Article 12(3) contains the possibility for a non-State Party, if its acceptance is required under Article 12(2), to declare *ad hoc* its acceptance of the jurisdiction of the Court with respect to the crime in question. Such a State is then obliged to cooperate with the Court in accordance with Part 9 of the Statute. This possible extension of the jurisdiction of the Court is clearly of a facultative nature, as the non-State Party in question retains the sovereign discretion whether to use this possibility or not. In case of a negative decision, the non-State Party is in no way obliged to cooperate. This is a further argument against the mispresentation that the Statute binds non-State Parties.

As the appropriateness of such a provision was for a long time undisputed, even the precise wording of Article 12(3) follows the ILC Draft, the Preparatory Committee's Draft Statute,[91] and the Bureau Discussion Paper and Proposal.[92] Also the first consolidated proposal for the principle of automatic jurisdiction submitted by Germany already in February 1996[93] contained, in its second paragraph on acceptance by non-State Parties, identical wording. The principle of such a provision as Article 12(3) enjoyed broad and long-standing support in the

[90] See *supra* note 83.

[91] See Art. 7(4), Art. 9 option 1, para. 3, option 2, para. 4 and further option para. (2).

[92] See in both documents Art. 7*bis*, UN Doc. A/CONF.183/C.1/L.53 and L.59 (6 and 10 July 1998).

[93] See *supra* note 42.

Preparatory Committee. Most delegations were familiar with its current wording as reiterated many times during the progressive deliberations of the Committee.

These aspects certainly contributed to the fact that it was overlooked even in the Drafting Committee of the Rome Conference and at the time of the adoption of the Statute that the term 'crime in question' was not fully clear. The problem by now is largely known as risk of 'asymmetric liability'.[94] It means that if the term 'crime in question' is understood to mean 'a specific incident' or 'a single crime', a non-State Party can face some kind of 'asymmetric liability'. It may find one or more of its nationals exposed to the Court's jurisdiction following an *ad hoc* consent by, for example, a hostile non-State Party on whose territory the specific incident, is alleged to have taken place. If one chooses such a narrow interpretation in the sense of a 'specific incident', the non-State Party mentioned first might be barred from charging a national or nationals of the territorial non-State Party (possibly the opponent) with the same type of conduct in the same armed conflict. There seems to be, however, some kind of general agreement shared by most participants in the Preparatory Committee's deliberations, and most signatory States, that such an interpretation of the term 'crime in question' was not intended during the negotiations and that it would, potentially, distort the meaning and practical relevance of Article 12(3). It has been argued by many that the term 'crime in question' should therefore be interpreted more in the sense of 'situation in question' (in which one or more of such crimes appears to have been committed). There was broad agreement within the Preparatory Commission that, with regard to this issue, clarification should be provided in the Rules of Procedure and Evidence. On 30 June 2000 the Preparatory Commission, when adopting by consensus the Draft Rules of Procedure and Evidence, adopted as Rule 44 [95] such a clarifying rule as outlined above. Consequently, concerns of some States, regarding this 'risk of asymmetric liability', as voiced in particular by the United States, have thus been effectively laid to rest.

[94] See R. Wedgwood, 'The International Criminal Court: An American View', 10 *EJIL* (1999) 102 *et seq.*; see also R. Wedgwood, 'The United States and the International Criminal Court: Achieving a Wider Consensus through the Ithaca Package', 32 *Cornell International Law Journal* (1999) 535, 541.

[95] See Finalized draft text of the Rules of Procedure and Evidence UN Doc. PCNICC/2000/INF/3/Add. 1 (12 July 2000), which contains the following provision: Rule 44—Declaration provided for in Art. 12(3) I:

'(b) When a State lodges or declares to the Registrar its intent to lodge a declaration with the Registrar pursuant to article 12, para. 3, or when the Registrar acts pursuant to para. (a) above, the Registrar shall inform the State concerned that the declaration under article 12, para. 3, has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation and the provisions of Part 9 of the Statute, and any rules thereunder concerning States Parties, shall apply.'

IV. Assessment and Further Perspectives

In order to evaluate the very difficult compromise of Article 12, it is helpful to analyse it in the context of the overall jurisdictional system of the Statute. It then appears that the Statute contains the almost unrelated side by side co-existence of two different jurisdictional regimes:

1. There is, on one side, the weak general or 'regular' jurisdiction of the Court pursuant to Article 12 which is triggered either by a State complaint or by the Prosecutor.
2. There is, on the other side, the potentially very strong and universal jurisdiction under Article 13(b) triggered by the Security Council.

The general or regular jurisdiction of the Court under Article 12 is weak because only the fulfilment of the quite restrictive preconditions that either the State on whose territory the crime was committed (territorial State) or the State of which the suspect is a national (nationality State) are a party to the Statute will lead to the Court having jurisdiction. Acceptance of the Statute by the custodial State or the State of nationality of the victim do not result in the Court having jurisdiction. Therefore, if there is an internal war—the most common form of conflict today—and neither the territorial State nor the nationality State is a State Party or does not consent *ad hoc* and there is no Security Council referral, perpetrators of core crimes will have nothing to fear from the ICC. This will be so even if they should be in the custody of a State Party or of a State whose nationals (e.g. UN peacekeepers) have been killed by the perpetrator.[96] Moreover, the general jurisdiction under Article 12 is further weakened by numerous procedural hurdles[97] and so-called 'safeguard provisions' such as the one contained in Article 18,[98] applicable only to the jurisdiction triggered by a State complaint or by the Prosecutor.

Compared with the general jurisdiction under Article 12, the Security Council-triggered jurisdiction under Article 13(b) is, in marked contrast, potentially very strong with a universal outreach.[99] The Statute contains the complete jurisdictional regime of a permanent *ad hoc* tribunal which can be activated only by the Security Council, if in particular its permanent members concur or—as a minimum—if no permanent member casts a negative vote. The only requirement is then a referral resolution by the Security Council under Chapter VII of the Charter by which it refers a situation to the ICC Prosecutor. In such a case no

[96] In the case of e.g. war crimes, it is clear that those States may then legitimately exercise national criminal jurisdiction. See *supra*, I.C.

[97] See e.g. F. Hoffmeister and S. Knoke, 'Das Vorermittlungsverfahren vor dem Internationalen Strafgerichtshof—Prüfstein für die Effektivität der neuen Gerichtsbarkeit im Völkerstrafrecht', 59 *Heidelberg Journal of International Law, ZaöRV* (1999) 785.

[98] See Ch. 18.1, below; D. D. Ntanda Nsereko, 'Article 18', in Triffterer (ed.), *supra* note 2, 395.

[99] See Ch. 17.2, below. S. Williams, 'Article 13', in Triffterer (ed.), *supra* note 2, 343.

further conditions apply and no other requirements are necessary. Moreover, this jurisdiction is so strong and effective as this jurisdiction can be activated also against any non-State Party which at the same time will then be under a mandatory obligation to cooperate with the ICC.

While this comparison highlights the differences between the jurisdictional regimes of Article 12 and Article 13(b), the most serious deficit of Article 12 itself is the omission of the custodial State in the list of nations that could provide a jurisdictional link for the ICC. A provision in line with the Korean proposal would have avoided an important loophole. It would have meant in particular that core crimes committed during an internal conflict in a non-State Party could have been prosecuted at least if the suspect had come into the custody of a State Party. In general, the territory of State Parties would have become a risky place for perpetrators of such crimes to be in. Thus, deterrence and prevention emanating from the ICC would have been increased. Furthermore, there can be little doubt that such an inclusion of the custodial State in Article 12 would have been in conformity with current international law. The omission of the custodial State in the disjunctive list of Article 12 has, *inter alia*, the consequence that the future ICC is structurally much weaker than the domestic criminal jurisdiction of any State regarding international core crimes. In practice, the replacement of the Korean proposal by a jurisdictional regime based on the criteria of territoriality and nationality means that the ICC will not be able to exercise its 'regular' jurisdiction over genocide or crimes against humanity committed by a government terrorizing parts of the population of the country in question on 'its' territory unless the State represented by this government has ratified the Statute. This situation marks a painful weakness of the jurisdictional regime of the future ICC and shows to what extent this regime falls short of universality.[100]

Omitting the state of the victim's nationality as provided for in the Korean proposal is another gap. In particular, it would have provided increased protection to the soldiers from State Parties who go on peacekeeping missions in the territory of non-State Parties. The Court would have been able to exercise its jurisdiction over

[100] Cf. the severe criticism by Condorelli, *supra* note 6, at 16 *et seq.*: 'Ce système n'est pas seulement très critiquable et insatisfaisant en soi, vu qu'il n'ouvre même pas la compétence de la Cour au cas que ledit futur Pol Pot (ou Pinochet!) serait capturé à l'étranger, sur le territoire d'un autre Etat partie au Statut ou reconnaissant la compétence de la C.P.I. Il risque aussi, me semble-t-il, d'aboutir à des conséquences singulièrement perverses. En effet, tous les Etats dont les équipes dirigeantes, pour se maintenir au pouvoir, n'excluent pas d'avoir recours aux violations des droits de l'homme et du droit humanitaire contre les oppositions internes, auront doublement intérêt à ne pas devenir parties au Statut: en premier lieu, afin que la Cour ne puisse être saisie contre leurs hauts responsables par un autre Etat ou par le Procureur; en deuxième lieu, pour retarder autant que possible la mise en place de la Cour, c'est-à-dire le moment à partir duquel le Conseil de sécurité disposera effectivement de la possibilité de mettre en branle la procédure de son propre chef.'; Wedgwood, *supra* note 94, concludes at 101: 'Thus, the final text gives undue shelter to the very civil war conflicts that were the moral impetus for the negotiation of a Rome treaty.'

war crimes committed against such peacekeepers even if the territorial State or the State of the perpetrator's nationality had not accepted that jurisdiction.[101]

When assessing Article 12 in its present form, it is an open question whether a compromise package including, in particular, the custodial State in the final Bureau Compromise would not have found the same support by the overwhelming majority of States in Rome. Although opinions on this question may vary and though this question now may seem irrelevant, there are reasonable grounds to assume that had Article 12 been so formulated as to include the custodial State, it would have enjoyed the same overwhelming support (and maybe stronger opposition by a few).

On the other side, in order to understand the extremely difficult situation of the Bureau 'between Scylla and Charybdis',[102] it suffices to recall the very restrictive package proposal put together by the P-5 on 16 July 1998 as described above.[103] The very strong, implicit message of this informal P-5 package was that the Korean proposal was clearly unacceptable to those major powers being permanent members of the Security Council. It must be assumed that this terminated the Korean proposal as a viable option.

As a consequence, the compromise formula for the general jurisdiction of the Court as contained in Article 12 will probably curtail the Court's effectiveness as an independent judicial body for years to come, i.e. until the Statute is ratified by most if not all States. It is widely assumed that many, if not most of the States on whose territory the crimes subject to the Court's jurisdiction are likely to be committed or whose nationals are likely to be responsible for such crimes will not be among early State Parties or accept the Court's jurisdiction *ad hoc*. Initially, and for a certain while, the Court, because of the restrictive preconditions of Article 12, will probably have to rely largely on the Security Council-triggered jurisdiction, pursuant to Article 13(b). Obviously, this latter jurisdiction is in keeping with the general interest and preferences of, in particular, the permanent members of the Security Council.

Against this background it remains astonishing that the United States continues to oppose the weak compromise of Article 12 and has, since the Rome Conference, explored various ways and formulas to alter Article 12 or to make it inapplicable with regard to US nationals.[104]

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[101] See Lawyer's Committee for Human Rights, *The Rome Treaty for an International Criminal Court: A Brief Summary of the Main Issues* (August 1998).

[102] See Ch. 2.3, above.

[103] See *supra*, II.B.6.

[104] Williams, *supra* note 2, margin No. 8, finds it 'ironic to hear the argument that article 12, as it stands, in effect without universal jurisdiction or automatic jurisdiction including the acceptance as a State Party by the custodial State "effectively lets future Saddam Husseins or Pol Pots kill their own people on their territory" from those that promoted in the conference even stricter criteria for preconditions for the exercise of jurisdiction and were adamantly against universal jurisdiction or any variant thereof.'

Finally, it is foreseeable that the lacunae of Article 12 may well be a priority item for the first review conference pursuant to Article 123 which shall consider any amendments to this Statute. The clearer it will then be that the general jurisdiction as provided for by Article 12 is indeed too weak, the greater the chances should be to include, e.g. the custodial State, in a revised Article 12 or to adopt some other form of universal jurisdiction for this universal Court.

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