



2003

## Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts

Kenneth S. Gallant

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [International Law Commons](#), and the [Jurisdiction Commons](#)

---

### Recommended Citation

Kenneth S. Gallant, *Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts*, 48 Vill. L. Rev. 763 (2003).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol48/iss3/2>

This Article is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

## Articles

### JURISDICTION TO ADJUDICATE AND JURISDICTION TO PRESCRIBE IN INTERNATIONAL CRIMINAL COURTS

KENNETH S. GALLANT\*

#### TABLE OF CONTENTS

I. INTRODUCTION .....	764
II. THE IDENTITY OF THE LAWMAKER IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL CRIMINAL COURTS .....	769
A. Piracy: International Crime Without an International Court .....	772
B. The Nuremberg and Tokyo Tribunals: Differing Views of Prescription .....	775
C. The <i>Ad Hoc</i> International Criminal Tribunals and the New Special Court for Sierra Leone .....	782
D. The International Criminal Court (ICC) .....	785
E. The Security Council and the International Crime of “Terrorism” .....	793
III. PERSONAL JURISDICTION IN THE <i>AD HOC</i> TRIBUNALS .....	794
IV. GENERAL STATEMENT AND LIMITS OF JURISDICTION TO ADJUDICATE IN THE ICC STATUTE .....	798
A. Jurisdiction to Adjudicate and Its Limits .....	798
B. Immunities from Jurisdiction—Limited but Not Fully Abolished .....	802
1. Official Immunities Generally Abolished .....	802
2. Rights of Third States to Prevent Transfers .....	803
3. Security Council Deferral of Prosecution .....	807
4. <i>Ne bis in idem</i> .....	807
V. PERSONAL JURISDICTION WHERE A SITUATION IS REFERRED BY A STATE OR AN INVESTIGATION IS INITIATED BY THE PROSECUTOR <i>PROPRIO MOTU</i> .....	809
A. The General Rule .....	809
B. Two Theoretical Problems .....	812

---

\* Professor of Law and Director of Clinical Programs, University of Arkansas at Little Rock William H. Bowen School of Law. The author is a member of the Council of the newly-created International Criminal Bar, which is designed to represent the interests of defense and victims' lawyers in the International Criminal Court, and the interests of their clients. He would like to thank Leila N. Sadat, Roger Clark, Ellen S. Podgor and Mark A. Drumbl for perceptive comments on earlier drafts of this paper.

1. Jurisdiction over the Participant from a Non-Party State Who Acts in a Non-Party State with Effect in a Party State .....	812
2. Retroactively Effective Declarations of Non-Party States Accepting Jurisdiction of the Court and a <i>Nulla Crimen</i> Problem .....	817
VI. JURISDICTION TO ADJUDICATE AND JURISDICTION TO PRESCRIBE IN SITUATIONS REFERRED TO THE COURT BY THE SECURITY COUNCIL, WITH SPECIAL ATTENTION TO SITUATIONS INVOLVING STATES NOT PARTIES TO THE ICC STATUTE .....	820
A. Person (either accused or victim) or Crime Connected to Party State to the ICC Statute .....	821
B. Persons with No Relevant Connection to a Party State to the ICC Statute—Is Jurisdiction Universal After a Security Council Referral? .....	823
1. Theory that Security Council Referral Can Legitimately Create Jurisdiction over an Individual with a Relevant Connection to a United Nations Member State .....	825
2. True Universal Jurisdiction and the Power of the International Community to Legislate for All Individuals and States Including Non-Members of the United Nations and Persistent Objectors to Customary International Law .....	830
3. Universal Personal Jurisdiction, Jurisdiction to Prescribe and the <i>Nulla Crimen</i> Problem .....	838
C. A Challenge to Broad Personal Jurisdiction in Situations Referred by the Security Council—The “Jurisdiction <i>ratione temporis</i> ” Provision .....	840
VII. CONCLUSION .....	841

## I. INTRODUCTION

**D**IRECT jurisdiction over individuals,<sup>1</sup> along with responsibilities to them,<sup>2</sup> will be the outstanding characteristics of the new Interna-

1. See Rome Statute of the International Criminal Court, 53rd Sess., U.N. Doc. A/CONF. 183/9, adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, as corrected by the *proces-verbaux* of 10 Nov. 1998 and 12 July 1999, art. 1 [hereinafter ICC Statute] (discussing jurisdiction over persons); see also *id.* art. 25(1) (explaining that Court’s jurisdiction is limited to natural persons); see also Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT’L L. 901, 902 (2002) (characterizing legislative acts of Security Council as decision that all States shall “take certain actions against financing of terrorist activities, as well as miscellany of other actions designed to prevent any support for terrorists and terrorist activities”).

2. There are at least five types of responsibilities of the ICC to individuals in the ICC Statute, some of which are novel in the system of international law and international organizations. First, the Court is required to protect an expanded set of procedural rights of those being tried. See, e.g., ICC Statute, *supra* note 1, arts.

tional Criminal Court (ICC or Court), as they already are of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR). The ICC will be able to issue warrants for individuals' arrest, obtain their presence at its seat, try them and order them punished.<sup>3</sup> In the standard terminology of international law, the ICC, like the

---

55, 67 (listing rights afforded to persons during investigations including, among other things, right to counsel, right against compelled self-incrimination and right against cruel punishment).

Second, the ICC Statute protects substantive and equal protection rights of accused persons before the Court. *See id.* art. 21(3). Under this provision, the Court must enforce internationally recognized human rights in applying the criminal law. *See id.* The Court is also prohibited from making adverse distinctions among persons on such bases as race, gender, religion, political opinion or national, ethnic or social origin. *See id.*

Third, the protection of the accused is extended to allow monetary remedies against the ICC. In some cases, individuals wrongly imprisoned or convicted may be awarded monetary damages for these wrongs. *See id.* art. 85 (providing that damages are appropriate when conviction has been reversed due to newly discovered evidence).

Fourth, not only the accused, but victims and witnesses are protected in the procedures of the Court as well. *See, e.g., id.* art. 68 (providing specific procedures for victim and witness protection such as limited guarantees of confidentiality). The statute also establishes a separate office, a Victims and Witnesses Unit, to protect their interests. *See id.* art. 43(6) (explaining duties of ICC Registry).

Fifth, the ICC Statute establishes a system of monetary restitution for victims of crimes within the jurisdiction of the Court. *See id.* arts. 75, 79 (extending power to Court to determine scope and extent of damage, loss or injury). Some restitution is provided directly from the assets of convicted persons. *See id.* art. 75 (noting that Court may take account of representations on behalf of convicted person before making order). Other restitution is planned from a Trust Fund. *See id.* art. 79 (stating that Fund shall be established to benefit victims of crimes within jurisdiction of Court); *see, e.g.,* CHRISTOPH J.M. SAFFERLING, *TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE* 330-31 (Oxford Univ. Press 2001) (presenting arguments justifying responsibility of ICC to observe human rights of individuals); *see also* Kenneth S. Gallant, *Individual Human Rights in a New International Organization: The Rome Statute of the International Criminal Court*, in 3 *INTERNATIONAL CRIMINAL LAW (ENFORCEMENT)* 693 (M.C. Bassiouni ed., Transnat'l Publishers 2d ed. 1999) (discussing individual human rights in ICC Statute).

3. *See generally* ICC Statute, *supra* note 1, arts. 5, 6, 7, 10 (discussing investigation and prosecution, describing trials and discussing enforcement); *see also* Shuichi Furuya, *Legal Effect of Rules of the International Criminal Tribunals and Court Upon Individuals: Emerging International Law of Direct Effect*, 47 *NETH. INT'L L. REV.* 111, 120-29 (2000) (discussing different ways international law may create individual duties and ways it is actually accomplished in ICC Statute, and Statutes of International Criminal Tribunal for Former Yugoslavia and International Criminal Tribunal for Rwanda).

The Court will also have limited jurisdiction over States in the course of investigations and prosecutions. States will have international responsibilities under Article 9 of the Statute to cooperate with the Court in the investigation and prosecution of cases or to carry out orders and execute warrants of the Court. In some instances, the Court may be able to operate in the territory of a State without the consent of the State. *See id.* at 122-24. For example, the Pre-Trial Chamber may

“[a]uthorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of the State under Part 9, if, whenever possible having regard to the views of the

current *ad hoc* international criminal tribunals, will have “jurisdiction to adjudicate” allegations of crimes committed by individuals. The ICC and the *ad hoc* tribunals also have legal obligations to ensure that they have personal jurisdiction over those they seek to punish, and that they respect the rights of the accused and the rights of others.<sup>4</sup> In some cases, the ICC Statute supports the obligations of the Court with remedies that are available as a matter of law to individuals.<sup>5</sup>

As a consequence, individuals will have legal personality *vis à vis* this international organization. While this is unusual in the law of international organizations, much of the legal form in which this personality is expressed is not. In particular, many of the notions defining jurisdiction to adjudicate over the person of an accused—personal jurisdiction—in the Statute are familiar to most criminal lawyers in either the civil law or common law systems, and to lawyers who have dealt with transnational or international crime in national courts.

Jurisdiction over persons in international criminal law has recently re-emerged as a vital issue. The International Court of Justice (ICJ) raised the issue in its judgment in the recent *Arrest Warrant* case, and several judges rendered opinions concerning the issue of universal personal jurisdiction for internationally recognized crimes.<sup>6</sup> Both the judgment and the separate opinions considered the special status of international criminal tribunals, though the ICJ did not reach a definitive conclusion on universal jurisdiction in either international or national courts. Moreover, the problem of accused *al Qaeda* and Taliban members raises issues of the criminal jurisdiction of various types of national tribunal. Some commen-

---

State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation [for specified reasons].”

ICC Statute, *supra* note 1, art. 57(3)(d). The author discusses the issue of jurisdiction of the Court over States in Kenneth S. Gallant, *The International Criminal Court in the System of States and International Organizations*, in 2 ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 52 (Flavia Lattanzi & William Schabas eds., il Sirente forthcoming 2003), reprinted in a revised version LEIDEN J. INT’L L. (forthcoming 2003). The Court’s jurisdiction over States does not include the authority to find a State criminally or otherwise liable for international human rights violations. See ICC Statute, *supra* note 1, art. 1.

4. See ICC Statute, *supra* note 1, arts. 19(1), (2)(a) (describing challenges to jurisdiction by accused or person sought to be summoned or arrested); *id.* art. 21(3) (explaining that application of law is pursuant to internationally recognized human rights); *id.* art. 55 (discussing rights of persons during investigation); *id.* art. 57(3)(c) (describing protection and privacy of victims and witnesses); *id.* arts. 66-67 (discussing rights of accused at trial including presumption of innocence); see also Furuya, *supra* note 3, at 144-45 (discussing how international law can directly create rights, as well as responsibilities, for individuals in court).

5. See ICC Statute, *supra* note 1, art. 85 (listing remedies for wrongfully arrested, detained or convicted persons).

6. See generally Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14) [hereinafter Arrest Warrant], available at <http://www.icj-cij.org>.

tators are suggesting an international tribunal as a way to avoid these problems.<sup>7</sup>

These new developments require a reevaluation of jurisdiction to prescribe and jurisdiction to adjudicate, and how they work in the context of international criminal tribunals, especially how they are supposed to work in the newly created ICC. This Article will suggest an evolutionary view that does not discard the traditional views of these jurisdictions.

The identity of the lawmaker in international criminal tribunals is one item that needs further examination. One new commentary begins, "It is the international community of nations that determines which crimes fall within this definition [of international crime] in light of the latest developments in law, morality, and the sense of criminal justice at the relevant time."<sup>8</sup> This Article will examine the extent to which this is true, and the ways in which the international community is a criminal lawmaker. These are more various than normally assumed in traditional doctrines of jurisdiction to prescribe, largely because these traditional doctrines deal with cases in which only States are perceived as having such jurisdiction. This Article will also suggest that the general assumption of universal jurisdiction to adjudicate in the ICC is an overstatement that can be damaging to international human rights discourse and to support for the Court.

This Article is predominantly an analysis of issues of criminal jurisdiction over persons as they are treated in the ICC Statute, as well as in the current *ad hoc* international criminal tribunals. Part II discusses the sources of international criminal tribunals' jurisdiction to prescribe from the end of World War II through the proposal of the ICC Statute. Part III describes the limited jurisdiction to adjudicate over individuals in the ICTY and ICTR. Part IV discusses the ICC Statute's general statement of and limits on jurisdiction to adjudicate over individuals. The subsequent Parts examine personal jurisdiction in the three classes of cases, defined by the manner in which a situation comes before the ICC, as set out in the ICC Statute. Part V addresses two of these, jurisdiction to adjudicate where a situation is referred to the Court by a State or where an investigation is initiated by the prosecutor *proprio motu*. Part VI addresses personal jurisdiction in situations referred to the ICC by the United Nations (U.N.) Security Council. These latter two Parts necessarily address jurisdiction to prescribe criminal law, as well as jurisdiction to adjudicate allegations of crime, because situations covered by the ICC Statute may involve nationals of States not parties to the ICC Statute, that have not accepted the Court's jurisdiction.

---

7. See, e.g., Mark A. Drumbl, *Judging the 11 September Terrorist Attack*, 24 HUM. RTS. Q. 323, 341-51 (2002). Because the jurisdiction of the International Criminal Court is not retroactive, the Court cannot address previous crimes. See ICC Statute, *supra* note 1, art. 11(1) ("The Court has jurisdiction only with respect to crimes committed after the entry into force of this statute.").

8. KRIANGSAK KITTICHAISAREE, *INTERNATIONAL CRIMINAL LAW* 3 (Oxford Univ. Press 2001) (defining international crime).

Some of this discussion involves hypotheticals, which may or may not actually arise under the ICC regime—specifically some crimes named in the ICC Statute are not customary international crimes, and some situations the Court considers may involve persons without relevant jurisdictional connections to any U.N. Member State.<sup>9</sup> These possibilities are worth discussing because they will demonstrate how the ICC Statute both fits into, and seeks to modify, the regime of international law. The issue of non-membership in the U.N. is of theoretical interest. It is also important because genocide and other terrible crimes might follow the breakup of a current State into new States that do not recognize the U.N. Charter, and because, as long as there are any States outside the U.N., an accused might seek refuge there or hide assets there.

This examination will demonstrate that human rights considerations underlie matters as technical as personal jurisdiction in international criminal justice. It will show how human rights law (particularly the rule of *nulla crimen sine lege*) and the law of treaties and international organizations together may provide small but significant limitations on the universality of jurisdiction to adjudicate in the ICC. This law provides analogous limits on the universality of jurisdiction to prescribe in the Security Council acting under its Chapter VII authority to restore and maintain peace and security when it refers situations to the Court. Recognizing and respecting these limitations may well strengthen support for universal (or near universal) jurisdiction in cases not covered by these limitations.<sup>10</sup>

---

9. Non-U.N. Member States include Switzerland, which has signed and is in the process of ratifying the ICC Statute (it has recently held a plebiscite in which the people voted to join the U.N. and may have become a member by the time of publication), and the following States that have not signed: Cook Islands, Niue and the State of Vatican City. The Republic of China (Taiwan) is in an ambiguous position, as both it and the People's Republic of China assert that there is a single State of China, and the People's Republic replaced the Republic in the U.N. The Occupied Territories of Palestine did not at the time of this Article appear to be part of any U.N. Member State. However, the Palestinian Authority has a relationship with the U.N., and Israel, the occupying power in Palestine, is a Member State.

10. *But see* Leila N. Sadat & S.R. Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 397-403 (2000) (summarizing proposed structure of Court). Sadat & Carden's article formed the basis of part of the new book, LEILA N. SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM* (Transnat'l Publishers 2002). Sadat & Carden argue that the U.N. Charter creates a "constitution" for the international community that cannot be ignored by non-Party States and that the ICC Statute "is clearly intended to have the status of custom and even of *jus cogens* obligations." *Id.* at 409-10 n.167 (when referral to court is made by Security Council, ICC Statute may apply to entire world). For further discussion of this matter, see *infra* notes 135-40 and notes 251-54 and accompanying text.

Despite this disagreement, the author has been heavily influenced by this piece, as well as by an earlier article by one of the authors, Leila Sadat [Wexler], *A First Look at the 1998 Rome Statute for a Permanent International Criminal Court: Jurisdiction, Definition of Crimes, Structure and Referrals to the Court*, in 3 *INTERNATIONAL CRIMINAL LAW (ENFORCEMENT)* 655 (M.C. Bassiouni ed., Transnat'l Publishers 2d ed. 1999). Professor Sadat also deserves credit as one of the key members of Professor

Although it necessarily focuses on the new International Criminal Court, this Article addresses limits of jurisdiction to prescribe and adjudicate in international criminal courts more generally. The new Court may not replace all other international criminal tribunals. Certainly it is designed to eliminate the need for new international *ad hoc* tribunals such as those for the Former Yugoslavia and for Rwanda.

Joint international-national tribunals including that recently created for Sierra Leone,<sup>11</sup> are in a different category. Such joint projects have the goal of building judicial capacity in an area affected by widespread violence, as well as bringing to justice those who have committed violations of international humanitarian law. If this type of experiment works, these joint courts may continue to be created. Additionally, the ICC will not have as much jurisdiction as some States would like it to have. Some States from the Caribbean region would have liked the ICC to address international drug trafficking and related money laundering, but the Rome Conference did not include these crimes in the ICC's jurisdiction. It is possible that at some point in the future a regional court will be created to deal with these crimes.

## II. THE IDENTITY OF THE LAWMAKER IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL CRIMINAL COURTS

This Article addresses the issue of jurisdiction over persons to adjudicate claims that they have violated international criminal law, as stated in the ICC Statute and the organic documents of other international criminal tribunals. Almost of necessity this concerns the "legislative" authority by which international criminal law is made—the jurisdiction of some entity to prescribe the law under which those prosecutions are brought. Without a legitimate authority to define international criminal law, or to apply law defined by a legitimate source, the ICC and other international criminal tribunals would have no legitimate authority to adjudicate claims of violations against individuals.

International law traditionally divides the subject of jurisdiction over the person into jurisdiction to prescribe, jurisdiction to adjudicate and jurisdiction to enforce.<sup>12</sup> This Article will address the first two types of jurisdiction.

---

Bassiouni's drafting team in the period leading up to and including the Rome Conference, which finalized the ICC Statute.

11. See Agreement between the U.N. and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, *opened for signature* 16 Jan. 2002; see also Statute of the Special Court for Sierra Leone, 16 Jan. 2002, S.C. Res. 1315, U.N. Doc. S/RES/1315 (2000) [hereinafter Special Court Statute].

12. See generally Sadat & Carden, *supra* note 10, at 406 n.144 (relying on RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401). Sometimes the phrase "legislative jurisdiction" is used instead of "jurisdiction to prescribe." See Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 TEX. L. REV. 785, 786 (1988) (using phrase "legislative jurisdiction" to describe state's authority to make its law applicable to certain areas); see also Michael



Jurisdiction to prescribe is jurisdiction to legislate, or to make rules of law—in the cases discussed here, criminal law—which apply to persons, whether natural or legal. Jurisdiction to adjudicate is jurisdiction to use adjudicatory processes over a person to determine whether that person has committed a crime.<sup>13</sup> The intellectual link between the two aspects of criminal jurisdiction is very close, as shown by this prominent formulation of jurisdiction to adjudicate in national courts: “A state may exercise jurisdiction through its courts to enforce its criminal laws that punish universal crimes and other non-territorial offenses within the state’s jurisdiction to prescribe.”<sup>14</sup> In other words, in national law, jurisdiction to adjudicate allegations of crime follows jurisdiction to prescribe.<sup>15</sup>

This Article will not treat jurisdiction to prescribe and jurisdiction to adjudicate as airtight compartments. They are not. This Article will discuss specific issues that involve both authority to prescribe law for persons and authority to adjudicate allegations of crime against persons. Where both authorities are involved, this Article will use the general term “personal jurisdiction.”

The doctrine of jurisdiction to prescribe in international law has generally applied to the authority of States, rather than international organizations, to make rules of law and apply them to persons who are either not their nationals, or not within their boundaries when they act, or both.<sup>16</sup> The issue is whether a given State has an appropriate connection with an act to apply its definition of crime (whether an ordinary crime or what is

---

Akehurst, *Jurisdiction in International Law*, 46 *Brit. Y.B. Int’l L.* 145, 179 (1972-73) (relying on use of “legislative” rather than “prescriptive”).

13. This power is generally possessed by civil courts, but may also include in some cases institutions such as courts-martial, or national or international military tribunals.

14. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 423 (1987) (discussing national courts’ “Jurisdiction to Adjudicate”). The law concerning jurisdiction to prescribe and to adjudicate in private, non-criminal cases is different, and is the subject of the vast literature of conflict of laws or private international law.

15. See generally Akehurst, *supra* note 12, at 179 (“In criminal law, legislative and judicial jurisdiction are one and the same.”).

16. See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 301 (5th ed. 1998) (providing general definition of jurisdictional competence and collecting sources); MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 322 (3d ed. 1999) (commenting that territorial jurisdiction is most important of principles justifying state’s assertion of jurisdiction); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402-404 (1987) (characterizing jurisdiction to prescribe concerning crimes under international law as State function); Leila Sadat, *Redefining Universal Jurisdiction*, 35 *NEW ENG. L. REV.* 241, 246 n.28 (2001) (describing universal international jurisdiction as alternative to territorial jurisdiction); Sadat & Carden, *supra* note 10, at 406 (“[T]hese three jurisdictional categories classically known to international law have been transformed from norms providing ‘which state can exercise authority over whom, and in what circumstances,’ to norms that establish under what conditions the international community . . . may prescribe international rules of conduct.”) (quoting ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 56 (1994)).

now treated as a crime against international law) to it. The currently dominant classification is as follows: “States exercise jurisdiction in the field of criminal law on five bases: territory, protection, nationality of offender [active personality], nationality of victim [passive personality], and universality.”<sup>17</sup> Not all crimes may be prosecuted on every basis, under either national or international law. For example, so-called protective jurisdiction is generally claimed by States only with regard to crimes, such as counterfeiting their own currency that substantially affect their interests.<sup>18</sup> Universal jurisdiction—jurisdiction over crimes committed anywhere, by anyone and against any victim—may, pursuant to international law, only be exercised with respect to a few crimes at most.<sup>19</sup> Not every State accepts jurisdiction over those crimes on a universal basis.<sup>20</sup>

In the case of ordinary crimes (non-international crimes), a State with jurisdiction to prescribe in fact defines the offense. Even where a crime, such as murder, exists in nearly all legal systems, each jurisdiction may have a different definition, or apply a different set of penalties or allow different defenses.

By contrast, no single State defines international criminal law, and there is no general international legislature. An international criminal tribunal, furthermore, is not a State or an organ of a State. The International Criminal Tribunals for the Former Yugoslavia and for Rwanda are organs of an international organization, the U.N. The ICC and the Special Court for Sierra Leone are each international organizations themselves.

In none of these Courts does the prescriptive function exist wholly within the Court itself. These Courts break from the traditional articulation of the rule that an entity’s (traditionally a State’s) jurisdiction to prescribe is a prerequisite to that entity’s jurisdiction to adjudicate an allegation of crime. This is especially true in the case of the ICC, which is

---

17. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 59 (2001); accord Randall, *supra* note 12, at 787-88 (furthering proposition that state interest unusually occurs in criminal context). See generally RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402, 404 (1987) (discussing territorial aspects of jurisdiction); Akehurst, *supra* note 12, at 156-66 (treating passive personality jurisdiction in discussion of universal jurisdiction); Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 LAW & CONTEMP. PROBS. 13, 47-48 (2001) (treating this formulation as set of rules of international law currently defining when State may exercise jurisdiction over person). One of the bases of extraterritorial jurisdiction, territorial “effects” jurisdiction, is discussed in Part V(B)(1) below. Another basis, “passive personality jurisdiction” is discussed in Part VI(A) below. “Universal jurisdiction” is discussed in Part VI(B)(2) below.

18. See, e.g., Akehurst, *supra* note 12, at 157-59 (discussing scope of protective jurisdiction principle).

19. See *id.* at 160-62; see also Randall, *supra* note 12, at 791-815 (discussing universal jurisdiction applicability to piracy, slave trading, war crimes and crimes against humanity).

20. See, e.g., Akehurst, *supra* note 12, at 164-65 (addressing possible solutions to difference in states’ interpretation of international law).

not an organ of the U.N. The ICC as an international organization does not exercise the entire prescriptive function.<sup>21</sup> The identity of the lawmaker for an international criminal tribunal, and for international criminal law as a whole, is problematic.<sup>22</sup>

The question asked here is this:

Which prescribing authorities can an international criminal court legitimately draw upon to justify its exercise of power over individuals?

We begin with an example of a traditional crime against the “law of nations,” piracy.

#### A. *Piracy: International Crime Without an International Court*

Piracy is the most familiar of the so-called crimes against the law of nations, or international crimes, occurring in the period before World War II. Occasionally other crimes against the law of nations were named including slave trading<sup>23</sup> and crimes against ambassadors.<sup>24</sup> Piracy, however, was viewed as the archetype of them, and the second most prominent, slave trading, was sometimes defined in law as a type of piracy.<sup>25</sup>

In the absence of an international tribunal, an international legislature or international conventional law, the early definition of international crimes necessarily occurred in individual States and their penal systems,<sup>26</sup> and among authors on international law.<sup>27</sup> They frequently

21. See Sadat, *supra* note 16, at 245-46 (noting that ICC Statute is not explicit on prescriptive jurisdiction).

22. Some opponents of international criminal tribunals use this as a justification for their positions. See, e.g., Alfred P. Rubin, *A Critical View of the International Criminal Court*, in 23 FLETCHER FORUM ON WORLD AFFAIRS 139 (1999).

23. See, e.g., Randall, *supra* note 12, at 788 (describing slave trade as prototypical offense that any state can define and punish).

24. See 4 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*70-71 (1772) (noting that rights of ambassadors were established by law of nations). Blackstone also discusses violations of safe conducts and passports in his section on crimes against the law of nations, but he speaks of them as causes for war or for punishment under specific provisions of the laws of England, rather than as individual crimes against the law of nations. See *id.* at 69-70.

25. See, e.g., Piracy Act of May 15, 1820, 3 Stat. 600, 600-01 (1850), discussed and reprinted in ALFRED P. RUBIN, THE LAW OF PIRACY 147-48, 192 n.114, 381-82 (1988) (presenting evidence that definition of piracy was confused, as felonious intent requirement was unclear); see also Randall, *supra* note 12, at 799-800 (citing British treaties defining slave trading as type of piracy).

26. See BARRY HART DUBNER, THE LAW OF INTERNATIONAL SEA PIRACY 40-42 (1980); see also RUBIN, *supra* note 25, at 68 (commenting that England established jurisdiction over pirates' acts by analogizing impact on English ship to impact of physical presence in English county); cf. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987) (positing that jurisdiction to prescribe concerning crimes under international law is State function).

27. See, e.g., United States v. Smith, 18 U.S. 153, 160-80 (1820) (collecting authors who discussed varying definitions of crime of piracy).

conceptualized the ultimate lawmaker, forbidding piracy as the international community. A classic statement of this doctrine occurs in Blackstone, who states that the statutory law of England on piracy “interposes to aid and enforce the law of nations as part of the common law.”<sup>28</sup> It is even clearer in this American judicial statement:

[t]he general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offence against any persons whatsoever, with whom they are in amity, is a conclusive proof that the offence is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment.<sup>29</sup>

In fact, the American legislature had defined piracy by reference to “the law of nations,” rather than by enacting language prohibiting certain conduct. In the quoted case, the United States Supreme Court rejected a challenge that this method of definition was too indefinite to provide fair notice of what was prohibited, even though nations did not have a single definition of piracy adopted as part of their municipal laws.<sup>30</sup>

The international law tradition does contain contradictory statements whether piracy “as an offense against the law of nations” truly means that it is a specific crime against international law, or whether it simply means all nations have jurisdiction to punish pirates under their municipal law.<sup>31</sup>

---

28. BLACKSTONE, *supra* note 24, at \*73 (stating that principle cases involve inflicting adequate punishment for offenses against universal law committed by private individuals). Rubín argues that Blackstone’s “use of the phrase ‘law of nations’ assumed the supremacy of municipal law in particular whatever the basis in policy, reason or historical practice for the identity of prescription applied by the courts of different nations.” RUBÍN, *supra* note 25, at 109 (examining Blackstone’s position on English piracy law). Given the usage of the phrase “law of nations” here, and in another extended quotation Rubín uses, it does not seem correct to say that Blackstone believes there is no international law of piracy other than parallel prescriptions in different national jurisdictions. Compare RUBÍN, *supra* note 25, at 109, with BLACKSTONE, *supra* note 24, at \*67 (proposing definition of “law of nations”).

29. *Smith*, 18 U.S. at 162-63 (accepting Congressional definition of piracy by reference to law of nations).

30. *See id.* at 162 (“We have, therefore, no hesitation in declaring, that piracy, by the law of nations, is robbery upon the sea, and that it is sufficiently and constitutionally defined by the fifth section of the act of 1819.”). For the point that nations did not have a single municipal definition of piracy, see Randall, *supra* note 12, at 795-97.

31. *See, e.g.*, 2 M. CHERIF BASSIOUNI & VED P. NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW (JURISDICTION AND COOPERATION) 32-33 (1973) (discussing offense against law of nations line); DUBNER, *supra* note 26, at 43-44 (defending municipal substance/universal jurisdiction line but also citing conflicting views), relying on Harvard Research in International Law, *Draft Convention on Piracy with Comments*, 26 AM. J. INT’L L. 749, 758 (1932) [hereinafter *Harvard Draft Convention*] (“The proper purpose of a draft convention codifying the international law of piracy . . . [is] to define this extraordinary basis of state jurisdiction over offences committed by foreigners against foreign interests outside the territorial and other ordinary jurisdiction of the prosecuting state.”); see also 1 ROBERT A. FRIEDLANDER,

The jurisdictional view was stated forcefully by a Harvard Study Group in the early 1930s:

International law piracy is only a special ground of state jurisdiction—of jurisdiction in every state. This jurisdiction may or may not be exercised by a certain state. It may be used in part only. How far it is used depends on the municipal law of the state, not on the law of nations.<sup>32</sup>

Even if the international law of piracy is seen as allowing the exercise of criminal jurisdiction, some sense existed in international law of what class of acts made one *hostis humani generis* (an enemy of all humanity),<sup>33</sup> giving rise to universal jurisdiction to punish. Otherwise, the jurisdiction could have expanded without limit, which it did not.<sup>34</sup>

The distinction between piracy being an international crime and being a class of acts over which, under international law, any or all national courts may claim criminal jurisdiction “may not make an important difference.”<sup>35</sup> That is, absent an international criminal tribunal, a State may prosecute a foreign pirate because it believes it is enforcing its own law, made pursuant to international law, or because it believes it is prosecuting

TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL 11-12 (1979) (advocating offense against law nations line); KITICHASAREE, *supra* note 8, at 14-15 (“[P]irates are tried by municipal courts and punishable under municipal law, not international law. International law merely concedes that every State has universal jurisdiction to try and punish pirates when they come within their respective jurisdiction.”); RUBIN, *supra* note 25, at 109 (taking view that piracy is municipal law crime).

32. *Harvard Draft Convention*, *supra* note 31, at 759-60 (discussed extensively in DUBNER, *supra* 26, at 40-44).

33. See 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND \*113 (1629) (originating phrase “an enemy of all humanity”). For further discussion of *hostis humani generis*'s background, see RUBIN, *supra* note 25, at 82-85 (providing historical perspective; Rubin spells first word “*hostes*”).

34. See Randall, *supra* note 12, at 795-97 (noting that State cannot acquire jurisdiction over person when he or she commits acts constituting piracy under domestic but not international law). This conclusion can be seen in Justice Story's opinion in *Smith*, but was disagreed with by Justice Livingston in dissent. See *Smith*, 18 U.S. at 164-83 (Livingston, J., dissenting) (disagreeing with majority's definition of piracy). Rubin also argues that universal jurisdiction over piracy existed only for a limited time, and has been abandoned. *But see* Akehurst, *supra* note 12, at 160 (discussing current applicability of universality principle).

35. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404, Rptrs' note 1 (1987) (“Whether piracy is an international crime, or is rather a matter of international concern as to which international law accepts the jurisdiction of all states, may not make an important difference.”); accord Randall, *supra* note 12, at 788 (providing that universality principle assumes that every state has interest in exercising jurisdiction to combat “egregious offenses” condemned by states). One example of an early author who does not appear to distinguish between these two views is EMER DE Vattel, THE LAW OF NATIONS Bk. I, Ch. XIX, para. 232, p. 108 (Ingraham's edition of Chitty ed. 1852).

a crime pursuant to the law of nations. The difference is conceptualization, but either way a prosecution may proceed in the national court.<sup>36</sup>

This confusion in the tradition has some consequence for modern international criminal law. At the time modern international criminal law began, with the Nuremberg and Tokyo Tribunals, there was no clear, agreed upon conceptualization of the international community as the definer of international criminal law. Yet one could not say that there was no such thing as international crime defined by the law of nations.

#### B. *The Nuremberg and Tokyo Tribunals: Differing Views of Prescription*

The International Military Tribunal at Nuremberg viewed prescriptive authority largely as a national function. In many ways the Nuremberg proceedings were an advance for international criminal justice, especially in the public imagination. Yet from the point of view of lawmaking authority, the Nuremberg Charter<sup>37</sup> and the main Judgment of the International Military Tribunal,<sup>38</sup> as written, are conservative. Where the national model of prescription broke down, the Tribunal struggled, especially, though not only, in its discussion of crimes against humanity. The purpose of this discussion is neither to validate nor to condemn the Tribunal's reasoning, which have both been done extensively before.<sup>39</sup> The purpose is to examine the Tribunal's conceptualization of the prescribing authority for the crimes within its jurisdiction (though some critique will inevitably appear).

The Charter named the crimes within the jurisdiction of the International Military Tribunal (Tribunal).<sup>40</sup> The Tribunal itself stated several times that this document was conclusive as to the existence of the crimes

36. See Randall, *supra* note 12, at 795-97 (noting that States may define "piracy" more broadly than international law, but when it applies broadened part of definition, it must have some basis of jurisdiction to prescribe and adjudicate other than universal jurisdiction); cf. *infra* Part VI(B) (discussing problem of war crimes defined by treaty rather than customary international law).

37. See Charter of the International Military Tribunal [hereinafter Nuremberg Charter], *annexed to* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 279, 284 [hereinafter London Agreement], *reprinted in* 1 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS 8-9 (1947) (outlining process for bringing war criminals to justice).

38. United States et al., v. Göring et al., 1 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS 171 (1947) [hereinafter Nuremberg Judgment] (noting that Tribunal was given power to try and punish those who committed crimes against humanity as defined by Charter).

39. See, e.g., NINA H.B. JØRGENSEN, THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES 28 n.1-2 (2000) (providing criticisms of Nuremberg Trial from English, American and German commentators).

40. See Nuremberg Charter, *supra* note 37, arts. 6, 9, 10 (listing crimes over which Tribunal has jurisdiction as crimes against peace, war crimes and crimes against humanity).

and their applicability to the defendants at Nuremberg.<sup>41</sup> In doing so, it treated the States agreeing to the London Agreement and Nuremberg Charter as the prescribing authority for the Tribunal:

The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world.<sup>42</sup>

The discussion appears to claim that the sovereign right of the victors to legislate—especially by defining crimes but also by creating a Tribunal to try them—would override all claims concerning individual rights of defendants. The Tribunal said that *nulla crimen sine lege* (no act is criminal in the absence of a law against it) “is not a limitation of sovereignty, but is in general a principle of justice”<sup>43</sup> that apparently can be overridden by sovereign will.

Nonetheless, in response to claims that prosecuting the Nuremberg defendants amounted to a violation of the rule *nulla crimen sine lege*, the Tribunal also justified its holdings concerning the definitions of the crimes set out in the Charter by reference to international law. It began by claiming:

The Charter is not an arbitrary exercise of power on the part of the victorious Nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.<sup>44</sup>

Most of the international law that the Tribunal relied upon was treaty law, in which States had exercised their sovereign authority to bind themselves and their citizens. The Tribunal relied several times on multilateral treaties to which Germany was a party and documents relevant to their interpretation for the definitions of crimes, particularly war crimes.<sup>45</sup> Thus, it

---

41. See Nuremberg Judgment, *supra* note 38, at 173-74, 218, 228, 232, 243, 253 (noting that actions of Germany violated laws of war).

42. *Id.* at 218 (noting that law of Charter is decisive and binding upon Tribunal). The Nuremberg Judgment states that any of the parties to the London Agreement could have set up a military tribunal on its own, given its right “to set up special courts to administer law.” *Id.*

43. *Id.* at 219 (noting that in this case it would be unjust if wrongs were allowed to go unpunished).

44. *Id.* at 218.

45. See *id.* at 216-18, 219-23, 238-39, 253 (containing Kellogg-Briand Pact and earlier documents). It is not clear that all the materials used in interpreting the Kellogg-Briand pact would be used under modern practice codified in the Vienna Convention on the Law of Treaties. See Vienna Convention on the Law of Treaties, May 23, 1969, arts. 31-32, 1155 U.N.T.S. 362, 362-63 (entered into force Jan. 27, 1980) [hereinafter VCOLT] (listing acceptable means of interpretation of provisions of international agreements).

relied on States as explicit prescriptive authorities in two ways: through the direct exercise of individual sovereignty (or delegated sovereignty to the Tribunal) as permitted to occupying powers under international law, and as parties to multilateral treaties setting forth law governing them.

In response to an argument that certain provisions of the Hague Convention of 1907<sup>46</sup> were not facially applicable to the Nuremberg defendants because the treaty itself was inapplicable to World War II, the Tribunal stated that these provisions may have been new treaty rules in 1907, “but by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in . . . the Charter.”<sup>47</sup> This is to say that the rules adopted by some States through the treaty making process had later become part of customary international law, regardless of the applicability of the Hague Convention itself. The prescriptive authority here is articulated as “all civilized nations”—in other words, the then-recognized international community.

Similarly, the Tribunal claimed the international community as a source of law, in response to the argument that international law binds only States, not individuals:

[t]he very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law.<sup>48</sup>

This assertion however, was made immediately after the Tribunal relied on the text of its Charter as authority for charging individuals with violations of international law.<sup>49</sup> The Judgment immediately followed with a similar pairing of Charter text and appeal to “the law of all nations” and “international law” as reasons for rejecting the defense of superior orders.<sup>50</sup>

The Nuremberg Judgment does not contain a complete articulation of the Tribunal’s views as to the law making authorities behind international criminal law. In particular, the opinion does not make clear how crimes against humanity were defined, other than by the fiat of the victorious Allies. The statement that the Charter “is the expression of interna-

---

46. See Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, Oct. 19, 1907, arts. 46, 50, 52, 56, 36 Stat. 2277, 2306-09, 2 A.J.I.L. SUPP. 90 (entered into force Jan. 26, 1910).

47. Nuremberg Judgment, *supra* note 38, at 253-54 (discussing Article 6 of Charter pertaining to “War Crimes” and “Crimes Against Humanity”).

48. *Id.* at 223.

49. See *id.* (“Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”).

50. See *id.* at 223-24.



tional law existing at the time of its creation” is not fully justified by the discussion regarding these crimes.<sup>51</sup> The model of pre-World War II creation of crimes by sovereign international acts broke down because there were no treaties defining crimes against humanity, as there were defining violations of the laws of war. That is, the Tribunal found no easy bridge from a treaty (such as the Hague Convention) whose provisions had become recognized by the laws of all civilized countries. Nor did the Tribunal present other evidence of customary international law defining crimes against humanity. In sum, it did not state a source of prescription for crimes against humanity in the community of nations. Nevertheless, the Tribunal was reluctant to appear to rely wholly on the law-making authority of the Occupying Powers as the source of crimes against humanity,<sup>52</sup> leaving the reader somewhat unsatisfied as to the source of lawmaking authority.<sup>53</sup>

---

51. See *id.* at 218 (“The law of the Charter is decisive, and binding upon the Tribunal.”), 254-55 (discussion of crimes against humanity); see also SADAT, *supra* note 10, at 30 n.34 (quoting Theodor Meron, *The Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT’L L. 238, 239 (1996)) (noting that Nuremberg Tribunal “paid little attention to the process or rationale by which various provisions of humanitarian conventions were transformed into customary international law”).

52. The literature discussing the existence of crimes against humanity in international law at the time of World War II or the Nuremberg Tribunal is extensive. See, e.g., TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 294 (1992) (arguing that France did not accept crimes against humanity as independent class of crime).

53. Crimes against humanity by now appear well established as customary international law. See, e.g., Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704 (1993) [hereinafter Secretary General’s Rep.] (discussing how crimes against humanity became customary international law); Prosecutor v. Tadic, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1 (ICTY App. Ch., Oct. 2, 1995), paras. 137-42, available at [www.un.org/icty/tadic/appeal/decision-e/51002.htm](http://www.un.org/icty/tadic/appeal/decision-e/51002.htm) [hereinafter Decision on Appeal on Jurisdiction]; see also KITTICHAISAREE, *supra* note 8, at 88-89 (“Now, it is a settled rule of customary international law that crimes against humanity are international crimes and the perpetrators of these crimes incur individual criminal responsibility.”). But cf. Christian Tomuschat, *International Criminal Prosecution: The Precedent of Nuremberg Confirmed*, 5 CRIM. L.F. 237-42 (1994) (questioning whether all of crimes against humanity listed in ICTY and ICTR Statutes were truly customary); Sadat & Carden, *supra* note 10, at 426-27 (pointing out that before Rome Conference there was no single, accepted definition of crimes against humanity in treaty or customary international law, and showing variety of formulations in Nuremberg Charter, Control Council Law No. 10, IMTFE Charter, ICTY Statute, ICTR Statute, municipal law provisions and International Law Commission versions) (citing STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 45-48 (1997)). Sadat concludes that once the Nuremberg Judgment was entered, it “arguably created the positive law thought lacking prior to its existence.” SADAT, *supra* note 10, at 30.

As to the crime of aggression, the Tribunal purported to find the outlawry of aggressive war in the Kellogg-Briand Pact,<sup>54</sup> read in light of other documents of the interwar period.<sup>55</sup> This may be convincing in terms of the lawfulness of the acts of Germany as a State. The Tribunal's opinion does not, however, refer to a source of the prescription defining the planning and implementation of aggressive war as a crime that can be committed by individuals. As with crimes against humanity, the Tribunal makes no clear statement of the identity of the lawmaker, other than the Allies, yet it appears not to wish to depend solely upon their fiat.

Some prescription is derived from the Nuremberg Charter as implemented by the decision of the International Military Tribunal, rather than directly from the Charter itself. The outlawry of specific organizations was authorized by the Nuremberg Charter, and the Tribunal's Judgment declared the leadership corps of the Nazi party and some other organizations criminal.<sup>56</sup>

Here we have the beginning of a notion that an international body, which has been given appropriate powers by the States that have constituted it, can prescribe for persons, either natural or juridical, that fall within its jurisdiction. The consequence of a finding that the Nazi party was a criminal organization was that members could not deny the illegality of the organization in subsequent cases, even though they had not been party to the case in which the finding was made. That is, the Nuremberg Judgment prescribed that part of the law relating to the legality of organizations under which the subsequent defendants were tried.

There was an important further discussion of prescriptive authority later in the prosecutions of Germans for World War II atrocities, under Control Council Law No. 10, an international military agreement authorizing each of the occupying powers to set up national military tribunals in its own sector of Germany.<sup>57</sup> The United States Military Tribunal (USMT), established under Control Council Law No. 10, repeated the formulations of the International Military Tribunal including the authority of conquering powers to lay down jurisdiction and define crimes for the USMT. The USMT, however, added discussions indicating that it saw crimes against humanity as prohibited by the practice of States and the opinion of states-

---

54. Kellogg-Briand Pact, August 27, 1928, arts. 1 & 2, 46 Stat. 2343, 2345-46, 94 L.N.T.S. 57, 59-63 (entered into force July 24, 1929).

55. See Nuremberg Judgment, *supra* note 38, at 219-24 (noting that previous international history supports Tribunal's position).

56. See Nuremberg Charter, *supra* note 37, arts. 8-9 (stating that individuals only are subject to punishment despite having acted upon orders of appointment or superior, but that tribunal may declare criminal group or organization of which defendant is member); Nuremberg Judgment, *supra* note 38, discussed further in text and *infra* notes 151-52.

57. See Control Council Law No. 10 (20 December 1945), *reprinted in* 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 908 (Leon Friedman ed. 1972) (setting rules for punishment of crimes against humanity and war crimes in occupied territory).

men.<sup>58</sup> German acts charged as crimes against humanity were characterized as “violations . . . of common international law.”<sup>59</sup>

The conceptualization of the prescribing authority for crimes against humanity was more complete in this national tribunal than in the main Nuremberg Judgment. The way in which the international community as a whole is seen as a source of prescriptive authority was more specifically defined, alongside the authority of the States creating the Tribunal and the specific State trying the case.

Politically, the main Nuremberg Judgment was of immeasurable importance to the development of international criminal law and to the view that the international community as a whole can and should take action against those individuals who grossly violate international humanitarian norms. The International Military Tribunal did recognize customary international law as a source of international criminal law applicable to individuals, and, in this sense, the case has not been distorted. However, much of its Judgment continued to rely on the more limited view that the Allied powers, establishing the Tribunal pursuant to the London Agreement, were the real source of its prescriptive authority.

The Nuremberg bases for creation of international criminal law were generally recognized by the International Military Tribunal for the Far East (IMTFE or the Tokyo Tribunal), with some subtle differences tilting in favor of an international prescriptive authority. The IMTFE’s main judgment appears to pull back from the Nuremberg claim that the drafters of its Charter had full sovereign legislative authority in the occupied territory.<sup>60</sup> It rejected that sweeping view through language questioning whether it had ever really been advanced: “In the exercise of their right to create tribunals for such a purpose [(i.e., for the trial and punishment of war criminals)] and in conferring power on such tribunals[,] belligerent powers may act only within the limits of international law.”<sup>61</sup> Thus, the prescriptive authority of the victorious states was seen as limited by the prescriptions against crimes existing in international law.<sup>62</sup>

58. See *United States v. Altstoetter (The Justice Case)*, in 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 954, 963-71 (1946-1953); accord *United States v. Ohlendorf (The Einsatzgruppen Case)*, in 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 411, 453-62 (1946-1953).

59. See *Altstoetter*, in 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, *supra* note 58, at 979.

60. For a further discussion of the Nuremberg claim, see *supra* notes 42-44 and accompanying text.

61. *United States v. Araki (I.M.T. Far East, 1948)*, reprinted in 101 THE TOKYO MAJOR WAR CRIMES TRIAL: THE RECORDS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 48415, 48436 (R. John Pritchard ed. 1998).

62. The editor of THE TOKYO MAJOR WAR CRIMES TRIAL: THE RECORDS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (“IMTFE Proceedings”) suggests that this limitation was motivated by the fact that strictly speaking Japan had not surrendered unconditionally to the Allies, that the Japanese civil authority had not wholly been extinguished by conquest (unlike the Nazi German authority) and

There is one significant difference in the source of prescriptive and adjudicative authority of the Tokyo Tribunal and that of Nuremberg. The Tokyo IMTFE was not created by an explicit international agreement, such as the London Agreement. Instead, it was the creation of the Supreme Allied Commander for the Far East, General Douglas A. MacArthur, through the issuance of a Special Proclamation.<sup>63</sup> The Proclamation was based upon the authority to implement the terms of surrender granted to the Supreme Commander for the Allies in the Instrument of Surrender and in a later agreement among the USSR, the United Kingdom and the United States.<sup>64</sup> The Instrument of Surrender referenced the Potsdam Declaration, which stated, "stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners."<sup>65</sup> In other words, the establishment of the IMTFE was an executive exercise of a power granted in international agreements, including an agreement signed by the defeated power. The London Agreement, with the annexed Nuremberg Charter, was an international agreement about how to handle affairs in a state that had surrendered unconditionally.<sup>66</sup> This difference may explain, in part, the IMTFE's reluctance to claim the use of the sovereign legislative authority of the States that conquered Japan.<sup>67</sup>

The main IMTFE judgment is less expansive on issues of prescriptive authority than it might have been. It expressly disavows a wish to revisit certain issues decided at the main Nuremberg trial. These issues include

---

that the legitimacy of the trial depended upon the "express consent of the Japanese state to submit itself to the jurisdiction of such a court." 101 THE TOKYO MAJOR WAR CRIMES TRIAL: THE RECORDS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST xvii, xxxi (R. John Pritchard ed. 1998) [hereinafter IMTFE PROCEEDINGS] (relying on uncited work of Georg Schwarzenberger, as well as James Crawford, *Prospects for an International Criminal Court*, in 48 CURRENT LEGAL PROBLEMS 303, 306 (M.D.A. Freeman & R. Halson eds. 1995)). The defense's efforts to raise these issues as arguments may have led to this limitation. See *id.* at xxxi-xli n.23.

63. See 104 IMTFE PROCEEDINGS, *supra* note 62, at 16-17 (providing *Special Proclamation by the Supreme Commander for the Allied Powers, Establishment of an International Military Tribunal for the Far East (Jan. 19, 1946)* as "Annex A-4 of the Judgment").

64. See *id.* at 15-17 (reproducing Moscow Conference Agreement as "Annex A-3 of the Judgment" and *Special Proclamation by the Supreme Commander for the Allied Powers, Establishment of an International Military Tribunal for the Far East (Jan. 19, 1946)* as "Annex A-4 of the Judgment").

65. *Id.* at 1, 3, 11, 12 (reproducing Potsdam Declaration of United States, United Kingdom and China (July 26, 1945) as "Appendix A-1 of the Judgment" and Instrument of Surrender (Sept. 2, 1945), which refers to Potsdam Declaration, as "Annex A-2 of the Judgment"); see also Morris, *supra* note 17, at 37-38.

66. See London Agreement, *supra* note 37, at 8, 10; 1 INTERNATIONAL MILITARY TRIBUNAL TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 171, 218 (acknowledging IMT's recognition of this view).

67. For further discussion of the IMTFE's reluctance to claim the use of the sovereign legislative authority of the States that conquered Japan, see *supra* note 62 and accompanying text.

existence of the crime of waging aggressive war (based on the Kellogg-Briand Pact), individual criminal liability in international law, the application of the *nulla crimen* principle to the proceedings and the defense of superior orders.<sup>68</sup> These issues might be expected to raise the problem of lawmaking authority. The extended judgment of the IMTFE is much more narrative than analytical and does not pay the same independent attention to lawmaking authority as does the Nuremberg Judgment.<sup>69</sup>

In terms of lawmaking authority, the IMTFE's judgment appears more internationalist than does the Nuremberg Judgment. It did not have the same effect on political and popular minds as did the Nuremberg Judgment, however.

In the end, the two post-World War II tribunals presented a variety of views concerning the sources of lawmaking authority for international criminal courts. They did not either individually or together, provide a clear, unified theory that future court-builders could easily take over.

### C. *The Ad Hoc International Criminal Tribunals and the New Special Court for Sierra Leone*

The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are subsidiary organs of the U.N. The U.N. also helped create the Special Court for Sierra Leone (Special Court). The U.N. Charter does not explicitly contain general authority to legislate internationally, either for individuals or states. Thus, the source of prescriptive authority in the ICTY, the ICTR and the Special Court is problematic.

When the ICTY was created, the U.N. Secretary General emphasized the importance of international custom to the creation of international criminal law. In his report proposing establishment of the ICTY, the Secretary General suggested that the crimes over which the ICTY have jurisdiction should include only those that were "doubtless [a] part of customary international law."<sup>70</sup> The Secretary General did not ignore

68. See 101 IMTFE PROCEEDINGS, *supra* note 62, at 48, 437-39.

69. By contrast, the five separate IMTFE opinions do pay extended attention to the issues of prescription and prescribing authority. The extent of that attention, however, is more than fairly can be dealt with in this Article. See generally 105 IMTFE PROCEEDINGS, *supra* note 62 (Concurring Opinion of Jaranilla; Dissenting Opinion of Bernard; first portions of dissenting opinion of Pal); see also 109 *id.* (Separate Opinions of Webb, President and of Röling). These opinions present varying ideas that enrich the discussion of issues presented by the main IMTFE Judgment, as well as the Nuremberg Judgment, rather than fully resolving them. See *id.* Unfortunately, due to the difficulty of finding these opinions and, to some extent, their length, they have been even further from the mainstream of political and popular thought about international crime than the main IMTFE Judgment. See RICHARD H. MINEAR, VICTOR'S JUSTICE: THE TOKYO WAR CRIMES TRIAL 32-33 (1971) (discussing troubled history of publication of separate IMTFE opinions, especially dissent of Justice Pal).

70. Secretary General's Report, *supra* note 53, paras. 33-35.

treaty law but defined crimes in his proposed ICTY Statute only with reference to treaties that had become part of international customary law.<sup>71</sup>

There is an important split in the prescriptive authority in the case of the ICTY. The international community as a whole is seen as the definer of customary international crimes, but the U.N. created the organ with jurisdiction to prosecute them. Because of the near-universality of U.N. membership, one can look at the two groups exercising prescriptive jurisdiction as nearly identical. In this case however, the U.N. acts through the Security Council. The Security Council is at once a clearly defined actor (unlike “the international community as a whole”), a principal organ of an international organization and a much smaller group than “the international community.”

This dual prescriptive authority was accepted by the ICTY early on, in *Prosecutor v. Tadic*.<sup>72</sup> *Tadic* accepted the authority of the Security Council to establish the ICTY pursuant to its authority to take actions to restore and to maintain international peace and security.<sup>73</sup> It also accepted the international community as the creator of customary international criminal law applying to individuals such as Mr. Tadic.<sup>74</sup>

By contrast, the Statute of the ICTR is not limited to crimes that are unquestionably customary. It grants the tribunal jurisdiction over treaty-based crimes not included in the ICTY’s crimes termed “doubtless part of customary international law.” Specifically, the ICTR has jurisdiction to prosecute persons responsible for serious violations of Additional Protocol II to the Geneva Conventions of 1949.<sup>75</sup> Rwanda was a party to this treaty before the commission of any of the crimes within the jurisdiction of the Court.<sup>76</sup> Thus, Rwanda served as one of the States acting as lawmaker concerning these crimes.

71. *See id.* paras. 35, 37-46.

72. *See Decision on Appeal on Jurisdiction*, *supra* note 53, paras. 137-42.

73. *See id.* paras. 32-48.

74. *See id.* paras. 96-136.

75. *See Statute of the International Tribunal for Rwanda*, art. 4, adopted by S.C. Res. 955, U.N. SCOR, 49th year, 3453d meeting, at 1, U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute] (incorporating serious violations of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of Non-International Armed Conflicts (Protocol II), which were not among sources of customary international law crimes in Secretary General’s Report recommending creation of ICTY).

76. Thus, Rwanda’s citizens and those acting on its territory could be held to the Protocol’s standards, which include the principle of *nulla crimen sine lege*. *See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, U.N. Doc. A/32/144, art. 6(2)(c) (entered into force Dec. 7, 1978), *reprinted in* 16 I.L.M. 1442 (1977) [hereinafter Protocol No. II]. In *Prosecutor v. Akayesu*, the ICTR relied both on the ratification of Protocol No. II by Rwanda on November 19, 1984 and on a claim that the content of Protocol No. II is now customary international criminal law. *See Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (Sept. 2, 1998), Judgment, para. 617, available at <http://www.ictt.org/>; *see also* JOHN R.W.D. JONES, THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGO-

The theory behind the inclusion of treaty crimes in the ICTR is that, as States, Rwanda and other members of the international community have the authority to define crimes (i.e., to have jurisdiction to prescribe criminal offenses) through the treaty-making process. Where the U.N. may establish an international criminal tribunal pursuant to Chapter VII of the UN Charter,<sup>77</sup> it may endow the tribunal with jurisdiction to adjudicate allegations of commission of treaty-based crimes, where the states in whose territory the crimes may have been committed are parties to the relevant treaties.<sup>78</sup> While states, through the treaty making process, may define international crimes for themselves (presumably as far as provided by the specific jurisdiction), the U.N., an international organization acting pursuant to its Charter, may create an organ with jurisdiction to adjudicate claims of criminal violations of the treaty based rules.<sup>79</sup> In other words, the U.N., through the Security Council, sets out the international crimes over which the ICTR has jurisdiction.

In both the case of the ICTR and the ICTY, the Security Council, as a principal organ of the U.N., claimed the authority to establish an international criminal tribunal as part of its mandate to restore and maintain international peace and security.<sup>80</sup> This included the authority to specify the crimes within the jurisdiction of the tribunal and, at least, to define them within the parameters of possible international crimes under customary international law or, in the case of Rwanda, international treaties to which the relevant State has acceded. Yet, as indicated by the Secretary General's statements and the actual Statutes of the Security Council, the U.N. was reluctant to claim general authority as the voice of the interna-

---

SLAVIA AND RWANDA 496-97 (2d ed. 2000) (discussing U.N. conduct relating to Protocol No. II); Mark A. Drumbl, *Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials*, 29 COLUM. HUMAN RTS. L. REV. 545, 576 n.133 (1998) (noting that Rwanda has ratified Geneva Conventions and additional protocols).

77. See Secretary General's Report, *supra* note 53, paras. 18-30; see also Decision on Appeal on Jurisdiction, *supra* note 53, paras. 28-48.

78. See Decision on Appeal on Jurisdiction, *supra* note 53, paras. 143-44. The decision to allow prosecution of treaty-based crimes in article 4 of the ICTR Statute follows the discussion in the IMTFE Judgment allowing prosecution for "conventional war crimes" in the Tokyo Tribunal. See 101 IMTFE PROCEEDINGS, *supra* note 62, at 48440, 48442-47. While the idea of prosecution for conventional war crimes appears in the Nuremberg Judgment, it is much less important because of the colorable claim of the Nuremberg defendants that the relevant treaties did not apply to the European phase of World War II. Thus, the Nuremberg Judgment argued that the war crimes involved were customary law. See Nuremberg Judgment, *supra* note 38, at 253-54.

79. This is not to deny that the states themselves could have established an international tribunal, which is the theory of the ICC Statute, discussed at length below. See also Agreement between the U.N. and the Government of Sierra Leone, *supra* note 11.

80. See Secretary General's Report, *supra* note 53, paras. 18-30; see also Decision on Appeal on Jurisdiction, *supra* note 53, paras. 28-48.

tional community to create international criminal law. Indeed, no such general power to make international law is stated in the U.N. Charter.

In the case of the *ad hoc* tribunals, the Secretary General and the Security Council appear to have rejected the idea that it “may not make an important difference” whether the Security Council is exercising a power to define crimes or merely a power to create jurisdiction in a tribunal.<sup>81</sup> In order to create a tribunal, the Security Council must properly exercise both powers. Through the Security Council, the U.N. must choose substantive international criminal law from a source with international law legitimacy and must also have authority to create jurisdiction in an *ad hoc* tribunal.

The new joint national/international Special Court continues and expands on the uses of the ICTY and ICTR. As with the two prior tribunals, its creation was authorized by the Security Council.<sup>82</sup> In two ways, however, its jurisdictional basis is different. First, it is an independent international organization created pursuant to an agreement between Sierra Leone and the U.N., not a subsidiary organ of the U.N.<sup>83</sup> This is another indication of the flexibility that the Security Council has to create appropriate devices for restoring and maintaining peace and security. Second, the Statute of the Special Court gives it jurisdiction both over international crimes and over certain crimes under Sierra Leone law.<sup>84</sup> At least where there is consent of the relevant State, an international organization may exercise judicial functions of that State.

The purposes of the Special Court are to bring perpetrators of international crimes to justice, and to help rebuild a fair, independent judicial system in post civil war Sierra Leone. Not only does the Special Court have jurisdiction over national and international crimes, but it is jointly staffed by national and international personnel. It is too early to know whether this experiment will be successful.

#### D. *The International Criminal Court (ICC)*

The Statute of the ICC continues the development of the law of international prescription. The ICC will be an independent international organization in its own right, intended to be permanent. The judicial functioning of the Court is characterized as its primary object, but the ICC also has its Assembly of States Parties, which will enjoy responsibilities such as approval of the Rules of Procedure and Evidence, the Elements of

---

81. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404, Rptrs.’ Note 1 (“Whether piracy is an international crime, or is rather a matter of international concern as to which international law accepts the jurisdiction of all states, may not make an important difference”).

82. See Special Court Statute, *supra* note 11.

83. See Agreement between the U.N. and the Government of Sierra Leone, *supra* note 11.

84. See Special Court Statute, *supra* note 11, art. 7.



Crimes and the budget, and oversight of the Court's operations.<sup>85</sup> Obviously, some of these authorities play a role in prescription. The ICC Statute does disregard the distinctive feature of modern *ad hoc* tribunals: referral of situations to an international tribunal by the U.N. Security Council. This is one of the ways in which the ICC will hear cases.<sup>86</sup>

The ICC Statute provides at least four sources of jurisdiction to prescribe: the international community as a whole, the States adopting the ICC Statute, the U.N. Security Council and the ICC itself.

First, the Statute incorporates customary law or *jus cogens* peremptory norms, in the cases of genocide, many crimes against humanity and war crimes. To this extent, it is following the stated tradition of the earlier tribunals and will enforce the customary criminal law made by the international community as a whole.

Unfortunately, the "international community as a whole" is an amorphous concept.<sup>87</sup> Having no general legislature, it cannot articulate the rules of custom by itself. Thus, it does not state the rules proscribing certain conduct as criminal. These rules are articulated by individual States acting through their politicians, diplomats and jurists, by States acting together in creating treaties, by international organizations, such as the U.N., acting through State representatives, as in a resolution of the General Assembly,<sup>88</sup> or through their own officials,<sup>89</sup> by publicists or by a combination of these actors. The ICC Statute's drafters felt that further

85. See generally David Donat-Cattin, *Decision-Making in the International Criminal Court: Functions of the Assembly of States Parties and Independence of the Court's Judicial Organs* (discussing international organization status of Assembly of States Parties) in 2 LATTANZI & SCHABAS, *supra* note 3; see also Gallant, *supra* note 3 (same). The assembly of States Parties has adopted the Rules of Procedure and Evidence, the Elements of Crimes and the Budget for the first financial period of the Court. See Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3-10 Sept. 2002, Official Records, ICC-ASP/1/3, para. 22, at 5, 10, 108 [hereinafter ICC-ASP/1/3] (Rules of Procedure and Evidence and Elements of Crimes), adopted Sept. 9, 2002; see *id.* para. 19, at 5, 253 (Budget), adopted Sept. 3, 2002.

86. See ICC Statute, *supra* note 1, art. 13. Unlike the *ad hoc* tribunals, a referral to the ICC by the Security Council does not involve the creation of a new court.

87. This is one reason that has been used for rejecting the notion that substantive international criminal law exists. See Alfred P. Rubin, *Actio Popularis, Jus Cogens and Offenses Erga Omnes?*, 35 NEW ENG. L. REV. 265, 267 n.8 (2001). The amorphousness of the community contributes to the possibility that some states will persistently object to formation of some customary norms. For a discussion of the effect of this, see *infra* notes 311-12 and accompanying text.

88. See, e.g., Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95, U.N. GAOR, 1st Sess., U.N. Doc. A/236 (1946) (recognizing establishment of international military tribunals for use in prosecuting war criminals in Europe and Far East).

89. See, e.g., Secretary General's Report, *supra* note 53, paras. 31-49 (stating which rules of international criminal law Secretary General believes have become customary beyond all doubt); see also Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, para. 17, 18, U.N. SCOR, U.N. Doc. S/2000/915 (2000) [hereinafter Sierra Leone Report].

definition of customary crimes would prove necessary and, as discussed below as the fourth source of prescriptive authority, gave the ICC itself a role in defining its substantive criminal law.

Professor Bassiouni, one of the driving forces behind the creation of the ICC, has suggested another way in which the international community as a whole is a prescriptive source for the law of the ICC. He argues that general principles of law recognized in the legal systems of the world contribute to the “general part” of international criminal law (i.e., general principles of criminality and exculpation).<sup>90</sup> “General principles of law derived by the Court from the national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime” are indeed part of the sources of law to which the Court may look in the absence of rules provided in the ICC Statute, other documents of the Court and applicable treaties and principles and rules of international law (presumably meaning international custom).<sup>91</sup> That is, the Court may apply general principles of law in determining cases where other sources of substantive criminal law do not provide an answer. This is particularly clear in the case of defenses to crime.<sup>92</sup> The general principles of law used by the Court may not be inconsistent “with th[e] Statute and with international law and internationally recognized norms and standards.”<sup>93</sup>

The law of the States that might normally exercise jurisdiction in a case is one of the sources used in determining general principles. The law of those States is not, however, given priority over the law of other States in the text of the Statute. One of the reasons to create the ICC was to provide a global voice to enunciate international criminal law. This goal would be undermined if the legal principles applied in different cases varied, depending upon the place of the alleged crime. For example, unlike the ICTY and ICTR Statutes, the ICC Statute does not require the Court to look to the sentencing practices of the States where the crime occurred in determining the sentence for that crime.<sup>94</sup>

---

90. M. Cherif Bassiouni, *The Discipline of ICL [International Criminal Law]* Paper presented to World Conference on International Criminal Law: Quo Vadis, International Institute for Higher Studies in the Criminal Sciences (Nov. 29, 2002). Prof. Bassiouni was Chair of the Drafting Committee at the Rome Conference of Plenipotentiaries that drafted the ICC Statute.

91. See ICC Statute, *supra* note 1, art. 21(1); see also Statute of the International Court of Justice, art. 38, available at <http://www.icj-cij.org> (last visited May 30, 2003) (including general principles of law among sources of law for ICJ).

92. See *id.* art. 31(3) (stating grounds for excluding criminal responsibility may be developed by Court on basis of sources of law listed in art. 21).

93. *Id.* art. 21(1).

94. Compare ICC Statute, *supra* note 1, arts. 76-78, with Statute of the International [Criminal] Tribunal [for the Former Yugoslavia], art. 24, Annex to Secretary-General's Report, art. 4 [hereinafter ICTY Statute] (incorporating serious violations of Protocol No. II, *supra* note 76); see also ICTR Statute, *supra* note 75, art. 23.

The second source of prescriptive authority is the States adopting the ICC Statute, a subset of the entire international community. While the U.N. Security Council accepted the recommendation of the Secretary General to give the ICTY jurisdiction only over those crimes undoubtedly a part of customary international law, the Rome Conference that finalized the ICC Statute had no such constraints.<sup>95</sup> It was a conference of representatives of States that could agree as they wished upon definitions of international crimes.

The ICC Statute was intended by many to mark a progressive evolution of the substantive criminal law, as well as to provide a fair international forum for trying accused international criminals.<sup>96</sup> In fact, a few of the crimes included in the ICC Statute do not appear to be customary crimes. For example, Secretary General of the U.N. Kofi Annan believes that the recruitment or enlistment of child soldiers (those under the age of fifteen) is prohibited by customary international law, but that it may or may not be "customarily recognized as a war crime entailing . . . individual criminal responsibility."<sup>97</sup> Thus, it is not clear whether the ICC Statute's prohibition of conscripting or enlisting children into armed forces is a restatement of customary law or the creation of a new international crime.<sup>98</sup> Similarly, crimes against the environment committed during wartime, prohibited as war crimes by the ICC Statute,<sup>99</sup> may not currently be considered international crimes under customary international law. They are not crimes that have been taken into the domestic law of every state holding membership in the U.N.<sup>100</sup>

Some believe that the ICC Statute goes further than adding a few crimes at the margins of international criminal law. Professor Sadat ar-

95. Formally, the conference was known as "U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court." See Press Release, U.N. Diplomatic Conference to Establish International Criminal Court to Convene in Rome, 15 June - 17 July (June 8, 1998), available at <http://www.un.org/News/Press/docs/1998/19980608.i2867.html>.

96. To this extent, Leila N. Sadat and S.R. Carden's view of the ICC statute is clearly correct. For more information about the perspectives of Leila N. Sadat and S.R. Carden, see *supra* note 10.

97. See Sierra Leone Report, *supra* note 89, para. 17 (stating existence of crime under international law of conscription of children).

98. See *id.* para. 18; see also ICC Statute, *supra* note 1, art. 8(2)(b)(xxvi), (e)(vii).

99. See ICC Statute, *supra* note 1, art. 8(2)(b)(iv).

100. There is little state practice punishing these acts as war crimes under international law. On the other hand, protocol additional to the Geneva Conventions prohibits employment of "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment." See Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 35(3) (entered into force Dec. 7, 1978). Given the variety of definitions of crimes against humanity, one might see in certain cases an argument that an alleged crime against humanity is not a customary international crime. Cf. *supra* note 51 and accompanying text.

gues that “drafting the Statute required clarifying and elucidating the precise content of [offenses] in a way that often moved the ‘law’ of the Statute far beyond existing customary international law understandings.”<sup>101</sup>

The States becoming parties to the ICC Statute appear to be creating treaty-based crimes, as well as explicating in a treaty the boundaries of crimes existing in customary international law. This falls within their prescriptive power, at least regarding the authority to create crimes among themselves.<sup>102</sup>

The States actually ratifying the ICC Statute act as the formal lawmaker. The States attending the Rome Conference, which created the text of the ICC Statute, did not thereby make criminal law for anyone. The Rome Conference, instead, made treaty law relevant to the ICC Statute. For example, it set up the conditions under which states could ratify the Statute (e.g., no reservations are permitted), and set out the conditions under which the Statute would take effect (sixty ratifications needed), by including these matters in the text that the Conference wrote.<sup>103</sup> The Statute is open for ratification or accession by all States, whether or not present at the Rome Conference. Many of those in attendance at the Rome Conference, such as China, India, the United States, Indonesia and Russia (in order of population), have not ratified the Statute, and do not have the rights and obligations of ratifying states.

The ICC Statute, however, envisions an exercise of jurisdiction well beyond the authority of States to arrange matters among themselves including criminal law matters. The ICC Statute is coming into effect with ratification by more than sixty States. These do not include some of the most populous and most powerful nations. By itself, the Statute cannot be said to create new customary international crimes if one is to treat “custom” in the traditional sense of requiring a general consensus or, at least, “general acquiescence.”<sup>104</sup>

The third lawmaker in the scheme of the ICC Statute is the U.N. Security Council. The Statute is intended to create a Court that will have jurisdiction over crimes committed outside the territory of states party to it

101. SADAT, *supra* note 10, at 12.

102. See 101 IMTFE PROCEEDINGS, *supra* note 62, at 48440, 48442-47; see also Randall, *supra* note 12, at 820-21 (explaining that treaty may legitimately grant all states adhering to it jurisdiction to adjudicate allegations of international crime occurring within their borders and discussing multilateral treaties, such as Convention against Torture, in context of right of states, not individuals, to object to exercise of criminal jurisdiction over their nationals).

103. See ICC Statute, *supra* note 1, arts. 120, 125, 126.

104. See Manley O. Hudson (Special Rapporteur), Article 24 of the Statute of the International Law Commission, U.N. Doc. A/CN.4/16, Working Paper, 2 Y.B. INT'L L. COMM. 5 (March 1950). To the extent that Leila N. Sadat and S.R. Carden argue that all the crimes in the ICC statute are intended to be customary, this Article disagrees with them or, at least, argues that, regardless of intention, mere naming of a crime in the ICC statute does not necessarily make it customary. For a further discussion of this issue, see *infra* notes 114-17, 241-43 and accompanying text.

and over nationals of states not party to it, whenever the Security Council refers a situation to the Court. Any situation facing the Court may involve actors who are not nationals of a State that is party to the ICC Statute. The legitimacy of applying crimes defined only by adopting states in situations such as this one is discussed below, because distinctions among varying situations are necessary.<sup>105</sup>

For now, the following suffices: Where a matter has been referred by the Security Council, the ICC may attempt to prosecute treaty-based crimes concerning States not party to the ICC Statute. If the Court does so, it will be accepting the theory that the Security Council, in the exercise of its powers to preserve or restore international peace and security, has jurisdiction to prescribe new criminal law.<sup>106</sup> This is the major issue the Secretary General avoided addressing when recommending the ICTY's creation.<sup>107</sup> Moreover, the referral scheme of the ICC Statute regularizes the exercise of the Security Council's jurisdiction to prescribe that a certain court shall have jurisdiction to adjudicate cases arising from a given situation.

Fourth, as an international organization and a court, the ICC will have a residual jurisdiction to prescribe. This jurisdictional authority does not include the power to define wholly new crimes<sup>108</sup> but does encompass the ability to specify Elements of Crimes and, thus, to define the crimes named in the ICC Statute more clearly. This authority is given to the Assembly of States Parties, a body of State representatives that oversees the Court.<sup>109</sup> The Court itself, as a judicial body, is explicitly given the authority to use its own prior cases to determine the law.<sup>110</sup> Again, this does not

105. For further discussion of jurisdiction where the accused has no relevant connection with a state that is party to the ICC statute, see *infra* notes 262-336 and accompanying text.

106. For a discussion of the role of the Security Council in the possible creation of the international crime of "terrorism," see *supra* Part II(E).

107. See Secretary General's Report, *supra* note 53, para. 34.

108. The States that are party to the ICC Statute will work on defining the crime of aggression, but the court will only have jurisdiction to preside over claims of aggression pursuant to an amendment of the statute. See ICC Statute, *supra* note 1, arts. 5(2), 121, 123.

109. The Preparatory Commission for the International Criminal Court, a temporary U.N. body designated to provide drafts of several important documents needed to implement the Statute, has prepared Draft Elements of Offenses. See *Finalized Draft Text of the Elements of Crimes*, U.N. Doc. PCNICC/2000/INF/3/Add.2 (2000); *Final Act of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Annex I, Res. F, U.N. Doc. A/Conf. 183/10 (1998), available at <http://www.un.org/icc/index.htm> [hereinafter *Final Act, Diplomatic Conference of Plenipotentiaries*]; see DONAT-CATTIN, *supra* note 85 (same); SADAT, *supra* note 10, at 98-103, 293 (same); see also generally Gallant, *supra* note 3 (commenting on role of Assembly of States Parties in structure of ICC). The Elements of Offenses have now been adopted by the Assembly of States Parties. See ICC-ASP/1/3, *supra* note 85, at 5, 108.

110. See ICC Statute, *supra* note 1, art. 21(2). In fact, the ICTY and ICTR are already using precedent in this manner without explicit authorization in their respective statutes. See *Prosecutor v. Aleksovski*, IT-95-14/1-T, Judgment, paras. 107-

create the authority to legislate new crimes but does include the power to clarify the definition of crimes included in the Statute, which ultimately has the effect of prescribing what acts will be adjudicated as falling within or outside the definition of crimes. Thus, both political and judicial authorities in the ICC will participate in the definition of crimes in the Court.

Prescription by an international criminal tribunal, especially the modern *ad hoc* tribunals or the proposed ICC, is somewhat different in international law than prescription by a common law domestic court. Common law courts have some law-making authority within their own systems, but, for international law purposes, this authority is assimilated to other law-making functions of the same sovereign. By contrast, when law is declared by one of the new international criminal tribunals, the judges are acting not as agents of any government but as officers of an international organization.<sup>111</sup> For the most part, their substantive criminal law does not arise out of the acts of the international organization itself but from its founding treaty or from customary international law. However, to the extent that they define crimes, defenses and procedures, and use their own precedents as law, the international organizations will themselves make law.

When either customary international law or general principles of law must be interpreted in order to decide a case, the ICC will be the actor applying them, a fact that is recognized in text of the Statute. The Court's prescriptive role is more active and immediate than that of the international community as a whole, whose actions the Court will be interpreting and the judges deciding cases will be acting for the Court, not on behalf of any State.

The Assembly of States Parties, when it adopts or amends the Elements of Crimes and Rules of Procedure and Evidence, acts somewhat differently from the community of States that adopted the ICC Statute. The Assembly acts as part of an international organization, not as a set of individual, sovereign States. The Elements and Rules may be adopted non-unanimously—by a two-thirds vote.<sup>112</sup>

The conceptualization of jurisdiction to prescribe enunciated here evolves from traditional notions of jurisdiction in international law. It

---

09 (ICTY App. Ch., 24 Mar. 2000); *Kambanda v. Prosecutor*, ICTR 97-23-A, Judgment, paras. 49-95 (ICTR App. Ch., 19 Oct. 2000); Mark A. Drumbl & Kenneth S. Gallant, *Appeals in the Ad Hoc International Criminal Tribunals: Structure, Practice and Recent Cases*, 3 J. APP. PRAC. & PROCESS 589, 632-35 (2001).

111. In the Nuremberg and Tokyo Tribunals, by contrast, the Judges did have status with their own governments.

112. See ICC Statute, *supra* note 1, art. 112(7) (requiring two-thirds majority if consensus cannot be reached). Modification of the Elements and Rules in response to Court decisions may serve as a quasi-legislative check on the lawmaking authority of the Court. This may alleviate some of the concerns expressed in Morris, *supra* note 17, at 32-33, about the difficulty of revising law developed by the Court.

does not abandon core notions that states are primarily responsible for making international criminal law, as other kinds of international law, through the treaty and custom creation processes. Nor does it abandon the notion that there must be some connection between the prescribing authority and those individuals for whom acts are proscribed.<sup>113</sup> It develops the traditional understanding by recognizing that international organizations—specifically, the ICC and the Security Council—have some prescriptive authority.

This theory of prescription is more conservative and evolutionary in international law terms than that proposed by certain other commentators.<sup>114</sup> Some view the ICC Statute as a defining constitutional moment in international law and a key moment in a process by which the identity of the makers of international law is radically changing. They argue that the U.N. Charter creates a “constitution” for the international community, which cannot be ignored by non-Party states. The creation of the ICC is part of the development of the U.N. system, as it has been created through the efforts of U.N. bodies including the Rome Conference,<sup>115</sup> the Preparatory Commission and before them the International Law Commission. Finally, the law of the ICC Statute “is clearly intended to have the status of custom and even of *jus cogens* obligations.”<sup>116</sup>

One advantage of the more conservative view is that it corresponds more closely with the political reality of the new Court. It is difficult to imagine that a constitutional moment in international law has passed without the membership in the ICC of nine of the world’s ten most populous countries (Brazil being the only exception), especially a moment that would drastically change the general lawmaking process for the international community. Customary international law that necessarily concerns all States (as is true of international humanitarian law in general) cannot be created with so many major nations dissenting or, at least, abstaining.

The more conservative view will likely be more acceptable to those political leaders whose support, overt or tacit, is necessary to the success of the ICC and to the project of developing an international criminal law to protect fundamental humanitarian values. Some major states not now party to the ICC Statute and, in particular, China, India, the United States and Russia, frequently rely on a view of international law and politics based on the traditional sovereign equality of states. Unless and until these attitudes change, each country is less likely to cooperate with the project of the Court to the extent that it is seen as a revolutionary re-shaping of the international political and legal order.

---

113. For a further discussion of the ICC’s jurisdiction to adjudicate, see *infra* notes 203-336 and accompanying text.

114. See Sadat, *supra* note 10, at 406-09.

115. For further discussion of the Rome Conference, see *supra* note 90.

116. Sadat, *supra* note 10, at 409-10 n.167. For more information about the intention behind the ICC Statute, see *infra* notes 241-44 and accompanying text.

Moreover, as demonstrated below, almost all of the substantive criminal law results sought by the Court's supporters can be obtained using a more traditional view of the sources of prescriptive authority in the ICC regime. Indeed, this Article questions the fairness of results that fall outside those obtainable under more traditional views.<sup>117</sup> To this extent, additional claims concerning lawmaking authority may prove detrimental to human rights concerns in the administration of criminal justice.

E. *The Security Council and the International Crime of "Terrorism"*

Shortly after the September 11, 2001 attacks on the United States, the U.N. Security Council "decid[ed] that all States shall" criminalize the willful financing of terrorist acts and ensure that terrorist acts are established as serious criminal offenses in their own domestic law, as well as take other specific acts to prevent and suppress terrorist acts and their financing.<sup>118</sup> It also "called upon all States to" become parties to international conventions to prevent terrorism and to fully implement them.<sup>119</sup>

Professor Swart has described this action as the creation of a new international crime of terrorism.<sup>120</sup> He argues that the Security Council made terrorism an international crime akin to slave trading or piracy, because international law requires or allows states to criminalize these acts. He conceptualizes these crimes somewhat differently from those such as genocide and crimes against humanity. Genocide and crimes against humanity are crimes under customary international law itself.<sup>121</sup> Further, he argues there is a difference between terrorism on the one hand and piracy and slavery on the other. Customary international law "obliges or authorizes all states to criminalize [piracy and slavery] in their domestic laws,"<sup>122</sup> but the obligation to make terrorism a crime is derived from an international organization, the U.N., acting through a small subset of its members, the Security Council.<sup>123</sup>

To the extent a new international crime has been created, the Security Council has gone beyond the role that it set for itself in creating the

---

117. For an argument that it is unfair to apply new, non-customary crimes to persons who have no reason to believe the criminal prohibition applies to them, see *infra* Parts V(B) and VI(B).

118. See S.C. Res. 1373, 4385th mtg., U.N. Doc. No. S/RES/1373 (28 September 2001).

119. See *id.*

120. See Bert Swart, International Crimes: Present Situation and Future Development, Paper presented to World Conference on International Criminal Law: Quo Vadis, International Institute for Higher Studies in the Criminal Sciences (November 30, 2002); Szasz, *supra* note 1.

121. See Swart, *supra* note 120, at 1.

122. *Id.*

123. He contrasts this with the European Union, which he characterizes as an international organization, which can require its members to criminalize certain acts, because decisions like this in the E.U. require acquiescence of all members. See *id.*



ICTY and ICTR. In creating those tribunals, it used its Chapter VII authority to restore and maintain international peace and security by giving international courts jurisdiction over crimes that it believed already existed in international customary law or (in the case of the ICTR) in treaty law binding the relevant states.

By contrast, in its action on terrorism, the Security Council used its Chapter VII authority to require States to make certain acts criminal within their domestic law. The Security Council has acted as though it has power to legislate, or at least to require members of the U.N. to legislate, certain criminal laws. It thus burst the bonds it appeared to impose on itself in creating the *ad hoc* tribunals.

This action of the Security Council was not viewed as extremely controversial. Killing of innocent non-combatants, hostage-taking and other acts generally considered terrorist, along with aiding and abetting them with financing, were already criminal in the laws of almost all States. The real question was, and remains, whether these laws, especially the laws against the financing of terrorist acts, can or will be effectively enforced, either within national systems or through international cooperation.<sup>124</sup> Additionally, the Security Council avoided controversy by avoiding to define terrorism.

Because the Security Council did not purport to define terrorism and because the substantive criminal law it requires States to adopt is not new, one may question whether it was truly creating a new international crime in its post-September 11th actions. Yet the Security Council acted as though it does have legislative authority to create criminal law, if the creation of that law would lead to restoration and maintenance of international peace and security.

Whether the Security Council will continue to act in this way, especially by taking on the difficult task of defining crimes not already common to most legal orders, remains to be seen.<sup>125</sup> If it does so successfully, the role of the U.N. as an international organization in the making of international criminal law would undergo a transformation. The obstacles to this general law creation authority—including the less-than-fully-representative nature of the Security Council—remain large.

### III. PERSONAL JURISDICTION IN THE *AD HOC* TRIBUNALS

Until recently, personal jurisdiction, whether to prescribe or to adjudicate, was not an especially troublesome problem for the International Criminal Tribunals for the Former Yugoslavia and for Rwanda. Even now, the problems posed are not as complex as may arise from the ICC Statute.

---

124. Security Council Resolution 1373 recognizes the need for international law enforcement cooperation against terrorism and its financing. For further discussion of the international criminal tribunal's role against terrorism, see *supra* note 7 and accompanying text.

125. See Swart, *supra* note 120, at 2.

This situation occurs largely because of the limited territorial and temporal jurisdiction of the *ad hoc* tribunals and because of the care that was taken in defining the crimes within their subject matter jurisdiction.<sup>126</sup>

The statutes of the tribunals expressly discuss jurisdiction to adjudicate. The tribunals have jurisdiction only over “natural persons,” and not over governmental entities, political parties, corporations or other non-governmental entities.<sup>127</sup>

The ICTY and ICTR statutes also discuss what they call the “[t]erritorial and temporal jurisdiction” of the tribunals.<sup>128</sup> The “territorial” jurisdiction of the ICTY extends “to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters.”<sup>129</sup> The jurisdiction of the ICTR extends to “the territory of Rwanda including its land surface and airspace, as well as to the territory of neighboring States in respect of serious violations of international humanitarian law committed by Rwandan citizens.”<sup>130</sup>

The last portion of the ICTR provision is a limitation on jurisdiction to adjudicate for acts in neighboring states, granting the ICTR jurisdiction only over Rwandan citizens. The remaining portions of both provisions are easily characterized as limiting the subject matter jurisdiction of the tribunals. The provisions as a whole, given how they have been applied in deciding who may be prosecuted, have made issues of personal jurisdiction reasonably straightforward. The prosecution has not pushed cases involving the complicated issues of “effects” jurisdiction, where an accused acts in one place and impacts another locale, which could conceivably arise under the ICC Statute.<sup>131</sup>

Similarly the temporal provisions, combined with a careful definition of crimes, has limited the likelihood of *nulla crimen sine lege* problems arising in these tribunals.<sup>132</sup> In the ICTY, only serious violations of international humanitarian law occurring after 1991 may be prosecuted. In the ICTR, only crimes occurring in 1994 may be prosecuted. As discussed above, crimes in each statute were defined to implement international law applying to the relevant State during the relevant time period.<sup>133</sup> In these

126. For a discussion of the ICC, see *supra* Part II(D) and *infra* Parts IV-VI.

127. See ICTY Statute, *supra* note 94, art. 6; see also ICTR Statute, *supra* note 75, art. 5. In contrast, the Nuremberg Charter allowed organizations to be declared criminal in certain instances. See Nuremberg Charter, *supra* note 37, arts. 9, 10; see also JONES, *supra* note 76, at 121-22, 500.

128. See ICTY Statute, *supra* note 94, art. 8; ICTR Statute, *supra* note 75, art. 7.

129. See ICTY Statute, *supra* note 94, art. 8.

130. *Id.*

131. For a discussion of the theory that crimes having an effect on the territory of a State Party to the ICC Statute may create jurisdiction, see *infra* Part V(B)(1).

132. For possible situations in the ICC, see *infra* Part VI(B)(2).

133. For a discussion of the International Criminal Court, see *supra* Part II(D). There is one possible counterexample in the cases that have been tried. In *Prosecutor v. Furundzija*, the Trial Chamber characterizes “rape” as a crime under

situations, there is no unfairness in submitting persons to the jurisdiction of the *ad hoc* tribunals.

Some matters characterized as issues of personal jurisdiction have arisen from allegedly unfair treatment of the accused. They address jurisdiction to adjudicate where serious procedural irregularities occur.

The recent arrest and problematic transfer of former Yugoslavian president Slobodan Milosevic has spawned an important issue of jurisdiction to adjudicate in the ICTY. The Trial Chamber of the ICTY recently decided this issue, and the trial of President Milosevic is ongoing.<sup>134</sup>

President Milosevic claims that he was transferred to the ICTY in violation of the national law of Yugoslavia, and that this fact vitiates the ICTY's jurisdiction over him. The Trial Chamber rejected this assertion on the ground that Yugoslavia had an international law obligation to surrender him to the tribunal and that national law could not be used to evade that responsibility.<sup>135</sup> Though a proper conclusion, the case raises a troubling spectre of the traditional international law doctrine: the illegality of obtaining the presence of a defendant, even by kidnapping, does not affect the jurisdiction of a court over a person. This concern is further discussed below, under parallel but not identical provisions of the ICC Statute.<sup>136</sup>

Another case presenting issues regarding personal jurisdiction, this time in the ICTR Appeals Chamber, is *Prosecutor v. Barayagwiza*.<sup>137</sup> The

---

international law but states that that law has not defined it. *See* *Prosecutor v. Furundzija*, IT-95-17/1, Judgment (ICTY Trial Ch., 10 Dec. 1998), paras. 174-86 (discussing sources of law to define rape). The Trial Chamber then goes on to define it using general principles of law found in many national law systems. *See id.* This issue does not appear on appeal. *Prosecutor v. Furundzija*, IT-95-17/1, Judgment (ICTY, App. Ch., 21 July 2000). This failure is a bit surprising, given that it would be hard to justify a claim that a crime exists without any definition whatsoever. It would, however, be reasonable to argue that the Trial Chamber's statement that there is no definition of rape in international law is simply a mistake. The Trial Chamber should have recognized that it was actually applying international law when it defined rape using general principles of law, so long as the predicates existed for charging these particular rapes as war crimes. *Cf.* Statute of the International Court of Justice, art. 38(1)(c), June 26, 1945 (providing that "general principles of law accepted by civilized nations" are source of international law); ICC Statute, *supra* note 1, art. 21(1) (general principles of law may be used when other sources listed in ICC Statute fail).

134. *See* *Prosecutor v. Milosevic*, Decision on Preliminary Motions, Case No. IT-02-54 (ICTY Trial Ch., 2001), para. 7.

135. *See id.* para. 47. One difficulty that the ICTY has in this case is that President Milosevic has decided to proceed without counsel, and the tribunal has agreed to allow him to do so. Still, the tribunal has appointed experienced counsel as *amicus curiae* to make appropriate legal arguments. Therefore, it is sometimes necessary when discussing this case to use the passive voice, such as "the claim is," rather than the active voice, "Milosevic claims."

136. For a discussion of the doctrine that the illegality of the person's presence does not affect jurisdiction, see *infra* notes 182-87 and accompanying text.

137. *Barayagwiza v. Prosecutor*, Decision, Case No. ICTR-97-19 (ICTR App. Ch., 3 Nov. 1999), para. 72, available at <http://www.ictr.org/>.

Appeals Chamber initially dismissed the indictment in this case with prejudice after the court held that delays in the prosecution occurring during Mr. Barayagwiza's imprisonment were unfair. The Appeals Chamber, in taking the interlocutory appeal, necessarily decided that the delays impugned the tribunal's jurisdiction over the person.<sup>138</sup>

This discussion was short circuited by the subsequent decision of the Appeals Chamber to revise its judgment and to refuse to dismiss the indictment on the asserted ground that new facts had been discovered that absolved the prosecution of responsibility for much of the delay in bringing the case to trial.<sup>139</sup> This newer decision goes to great lengths not to repudiate what was said concerning the law in the original decision and, instead, justifies its new ruling based on newly presented facts.<sup>140</sup>

Both the *Milosevic* and *Barayagwiza* cases raise the question whether procedural violations, particularly those involving the human rights of an accused, can vitiate an international criminal tribunal's jurisdiction to adjudicate. These cases alone do not provide a full answer. One suggestion follows: A serious violation of the human rights of the accused should be given an appropriate remedy depending upon the violation, regardless of whether the matter is characterized as jurisdictional.<sup>141</sup> Such violations should be characterized as impugning jurisdiction to adjudicate only where the violation concerns how the accused was brought before the Court for adjudication, such as by kidnapping. With this shift, the procedures of international criminal tribunals must be adjusted to include devices to correct ongoing human rights violations, regardless of how they are characterized.

As an example, a case should be dismissed where the violation makes continuing with a fair proceeding in a tribunal impossible, as where a very long delay before trial prevents the accused from presenting substantial evidence. A tribunal should reach this result because of the substantive violation of the rights of the accused, even though the error may not be characterized as jurisdictional.

---

138. See *Barayagwiza v. Prosecutor*, Decision, Case No. ICTR-97-19 (ICTR App. Ch., 3 Nov. 1999), para. 72, available at <http://www.ictr.org/>; International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, Rule 72, U.N. Doc. ITR/3/Rev.10 (2001) (noting that interlocutory appeals are available concerning only jurisdiction or pretrial release).

139. See *Barayagwiza*, Decision of Prosecutor's Request for Review or Reconsideration, Case No. ICTR-97-19-AR72 (ICTR App. Ch., 31 March 2000), available at <http://www.ictr.org>. Many, including some of the Appeals Chamber, saw this as more of a political than a judicial revision necessary to secure the Rwandan government's cooperation with the tribunal.

140. See *id.* paras. 51, 52.

141. Cf. ICC Statute, *supra* note 1, art. 21 (providing that law must be applied in accordance with internationally recognized human rights); see also SAFFERLING, *supra* note 2, at 16-17.

#### IV. GENERAL STATEMENT AND LIMITS OF JURISDICTION TO ADJUDICATE IN THE ICC STATUTE

The provisions of the ICC Statute governing jurisdiction to adjudicate, as well as other jurisdictional issues introduced above, are complex. This Part will consider general issues of jurisdiction to adjudicate and immunities from it. Issues concerning both jurisdiction to adjudicate and to prescribe that are specific to the manner in which the Court receives a case (by referral from a state or *proprio motu* investigation by the Prosecutor on the one hand, and by Security Council referral on the other) are discussed in later Parts of this Article.<sup>142</sup>

##### A. *Jurisdiction to Adjudicate and Its Limits*

The ICC Statute specifically defines the word “jurisdiction” as the authority to make decisions concerning an accused or a suspected person—that is, jurisdiction to adjudicate. First, Part 1, addressing the “Establishment of the Court,” states that the Court “shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute . . . [and] [t]he jurisdiction . . . of the Court shall be governed by the provisions of this Statute.”<sup>143</sup> Later, Part 3, addressing “General Principles of Criminal Law,” delimits the general principle of jurisdiction to adjudicate a bit further, granting “jurisdiction over natural persons pursuant to [the] Statute.”

Additionally, the statute adds: “The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.”<sup>144</sup> This age requirement may be equally well characterized either as a matter of personal jurisdiction (as was in fact done) or as a ground for excluding personal responsibility, generally considered under the rubric of the substantive part of criminal law.<sup>145</sup> One

---

142. See *infra* Parts V (discussing state referral and *proprio motu* investigation) and VI (discussing Security Council referral).

143. ICC Statute, *supra* note 1, art. 1.

144. See *id.* art. 26.

145. See *id.* art. 31. In fact, the Preparatory Committee’s drafts of the ICC Statute considered the issue of juveniles who commit acts within the subject matter jurisdiction of the court under the rubric of personal responsibility rather than personal jurisdiction. See Roger S. Clark & Otto Triffterer, *Article 26, Exclusion of Jurisdiction over Persons under Eighteen*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 493, 494-97 (Otto Triffterer ed. 1999) [hereinafter OBSERVERS’ NOTES]; see also SADAT, *supra* note 10, at 105-06. Professors Clark & Triffterer and Sadat point out that because juvenile crimes are treated as matters of personal jurisdiction rather than criminal responsibility, the statute does not suggest that national courts or other international courts should treat all persons under the age of eighteen as not criminally responsible for international crimes. See Clark & Triffterer, *supra*, at 499; accord SADAT, *supra* note 10, at 105-06 (citing Per Saland, *International Criminal Law Principles*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 189, 201 (Roy S. Lee, ed. 1999)). In fact, the new joint national/international

might also say that only a person over the age of eighteen has the capacity to commit a crime within the subject matter jurisdiction of the Court. The language of jurisdiction to adjudicate is used both in the definition of who may be brought before the Court (i.e., natural persons) and which natural persons are excluded because of age. This demonstrates that the concept of jurisdiction to adjudicate is part of the intellectual framework of the ICC Statute.

The placement of these statements about jurisdiction over natural persons is somewhat unusual. They are located in Part 3 of the Statute (“General Principles of Criminal Law”),<sup>146</sup> rather than in Part 2 (“Jurisdiction, Admissibility and Applicable Law”).<sup>147</sup> Presumably, this choice was made because personal jurisdiction is closely related to issues of personal responsibility, which dominate Part 3.<sup>148</sup>

The Court’s jurisdiction to adjudicate is limited to individuals. It does not extend to governments, political parties, business entities or other associations.<sup>149</sup> The ICC Statute follows the statutes of the *ad hoc* International Criminal Tribunals for the Former Yugoslavia and for Rwanda.<sup>150</sup> All these documents depart from the practice under the Charter of the Nuremberg Tribunal, which allowed organizations to be declared criminal.<sup>151</sup> The theory of the ICC Statute is that it is individuals, not abstract

Special Court for Sierra Leone has been given jurisdiction over juveniles down to age 15. See Special Court Statute, *supra* note 11, art. 7.

146. See ICC Statute, *supra* note 1, arts. 22-33.

147. See *id.*

148. See, e.g., Secretary General’s Report, *supra* note 53, para. 53 (treating principles of individual criminal responsibility as “important element[s] in relation to . . . competence *ratione personae* (personal jurisdiction)”).

149. See ICC Statute, *supra* note 1, art. 25; JØRGENSEN, *supra* note 39, at 72-88 (discussing criminality of corporations and states). Rule of Procedure and Evidence 85 defines victims to include entities other than individuals and states. See Rules of Procedure and Evidence, Rule 85, ICC-ASP/1/3, *supra* note 85, at 52. This is a potentially important development in the international legal personality of non-state entities, which unfortunately cannot be adequately discussed in this Article.

150. See ICTY Statute, *supra* note 94, art. 6; see also ICTR Statute, *supra* note 75, art. 5. The language in the two *ad hoc* statutes is parallel, each stating that the respective tribunal shall “have jurisdiction over natural persons pursuant to the provisions of the present Statute.” See ICTY Statute, *supra* note 94, art. 6; see also ICTR Statute, *supra* note 75, art. 5.

151. See Nuremberg Charter, *supra* note 37, art. 6; see also Nuremberg Judgment, *supra* note 38, at 171. The Nuremberg Charter allowed prosecutions of individuals under article 6, but allowed the court to declare organizations of which those individuals were members criminal organizations. See Nuremberg Charter, *supra* note 37, art. 9. The indictment of the major war criminals asked that certain organizations, both political and governmental, be declared criminal. The Nuremberg Judgment declared some of these organizations to be criminal but recognized the possible problems of overreaching occurring where the organizations themselves were not defendants. See *id.* Likewise, the Nuremberg Judgment also revealed a concern that declaring an organization criminal might have legal effects for currently uncharged and untried members. See *id.*

entities, who commit crimes.<sup>152</sup> Moreover, limiting responsibility to individuals reduces the likelihood of limiting freedom of association or punishing criminally the mere holding or advocacy of political views. Finally, because organizational criminal liability is not well developed in all States, limiting liability to individuals promotes cohesion between the Court and national legal systems and prevents some issues of comparative law from complicating the Court's task.<sup>153</sup>

Failure to include associations, corporations, political parties and governments as entities that can fall within the Court's jurisdiction to adjudicate may seriously reduce the effectiveness of the restitution and restorative justice provisions of the ICC Statute.<sup>154</sup> In modern economies, much of the wealth that may justly be used for purposes of restorative justice is legally held by such entities.<sup>155</sup> The only portion of this wealth under the reach of the ICC Statute is that portion owned by a convicted individual; for example, an individual's personal shares in a corporation. Even wealth that inured to the corporation because of the individual's wrongdoing cannot be seized, so long as it does not belong to the convicted individual. The wealth of juridical persons not "owned" by individuals cannot be subjected to the Court's jurisdiction. In most countries, government agencies, non-governmental organizations and political parties are not seen as subject to ownership by individuals. Despite the crippling limitations imposed on the restitutionary scheme of the Statute, this political choice was made and can be changed only by future amendment to the ICC Statute.

This does not complete the personal jurisdiction analysis, which will vary depending on the source of the referral of the situation to the Court.

152. See Nuremberg Judgment, *supra* note 38. In the new statutes, this reasoning is used as a basis for excluding organizational liability, but the Nuremberg opinion condemned the leadership corps of the National Socialist German Workers Party and other groups as criminal organizations. See *id.*

153. See Kai Ambos, *Article 25, Individual Criminal Responsibility*, in OBSERVERS' NOTES, *supra* note 145, at 475, 478.

154. See ICC Statute, *supra* note 1, arts. 75, 79 (discussing reparations and trust funds as remedies).

155. See Ambos, *supra* note 153, at 477-78 n.9, (citing U.N. Doc. A/CONF.183/C.1/L.3 (1998), art. 23, paras. 5, 6 and providing French delegation's unsuccessful argument in negotiations leading up to ICC Statute's adoption). The current *ad hoc* tribunals for the former Yugoslavia and for Rwanda allow recovery of property wrongfully taken from a victim or its proceeds "even in the hands of third parties not otherwise connected with the crime of which the convicted person has been found guilty." ICTY, *Rules of Procedure and Evidence for the International Criminal Tribunal for the Former Yugoslavia*, Rule 105(B), U.N. Doc. IT/32/REV.24 (2002), available at [http://www.un.org/icty/basic/rpe/IT32\\_rev20con.htm](http://www.un.org/icty/basic/rpe/IT32_rev20con.htm); ICTR, *Rules of Procedure and Evidence*, Rule 105(B), U.N. Doc. ITR/3/Rev.10 (2001); see also Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1321-22 (2000). Neither the ICC Statute nor its draft rules clearly allow for this kind of seizure. Cf. ICC Statute, *supra* note 1; see also *Draft Rules*, *supra* note 149.

While this is discussed more fully below,<sup>156</sup> a few words may be useful here. The Rome Conference made a political decision to include highly technical limitations on the Court's jurisdiction when a situation is referred to the Prosecutor by a State or an investigation is begun by the Prosecutor *proprio motu*. These limitations do not arise in cases where the U.N. Security Council refers a situation to the Prosecutor.<sup>157</sup> The ICC Statute itself governs the Court's jurisdiction over persons.<sup>158</sup> General international law doctrine only assists in interpreting the Statute. Even if universal personal jurisdiction over those accused of heinous customary international crime is or becomes the law in national courts, the ICC Statute controls whether the Court could exercise such jurisdiction.<sup>159</sup>

The political decision to make personal jurisdiction broader in Security Council-referred cases than in cases referred by a party State or investigated by the Prosecutor *proprio motu* is understandable in light of the ICC's status as an international organization. Where the Security Council refers a case to the ICC, the Council can impose a duty to cooperate with the ICC on all U.N. member States.<sup>160</sup> In cases referred by a State Party or a Prosecutor's *proprio motu* investigation, however, the ICC, as an international organization, cannot impose obligations on States that have not consented to the obligations. Normally, an international organization, established by a constitutive treaty, cannot impose obligations on States not party to the treaty or States that have otherwise not consented to be bound. Without a Security Council referral, the Court has no basis for exercising personal jurisdiction over individuals without sufficient connections to a consenting State.

Nothing in the ICC Statute purports to prevent States from exercising universal jurisdiction over those accused of the most serious international crimes, however. Indeed, the Statute expressly limits its development of international law to the issues addressed in the Statute itself.<sup>161</sup>

156. For further discussion of the personal jurisdiction analysis, see *infra* Parts V and VI.

157. Compare ICC Statute, *supra* note 1, arts. 12, 13(a), 13(c) (discussing situations referred by state or investigated *proprio motu*), with *id.* art. 13(b) (examining situations referred by Security Council).

158. See *id.* art. 1.

159. The ICC Statute and the Rules of Procedure and Evidence and Elements of Crimes are the primary sources of law for the court, subject to consistency with internationally recognized human rights. Principles and rules of international law and principles of law derived from national laws are lower in the hierarchy of law to be applied in the court. See *id.* arts. 21(1), (3).

160. See Reparations for Injuries Suffered in the Service of the U.N., Advisory Opinion, 1949 ICJ Rep. 175 (1949). For a further discussion of the U.N. Charter in this context, see *infra* Part VI(B).

161. See ICC Statute, *supra* note 1, art. 10 ("Nothing in this [section on jurisdiction and applicable law] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."). This is not wholly dispositive because the articles referring directly to personal jurisdiction are in other sections of the statute. Nothing in those parts, however, suggests a different effect on international law outside the statute's in-



The ICC Statute also limits jurisdiction by the time of commission of the crime in a way that can be conceptualized as a limit on jurisdiction to adjudicate. “No person shall be criminally responsible under this Statute for conduct prior to [its] entry into force . . . .”<sup>162</sup> This provision was described by one respected commentator as a limit on “jurisdiction *ratione personae*.”<sup>163</sup> Indeed, it states a limitation on jurisdiction in terms of persons and the time of their conduct. However, a similar temporal provision elsewhere in the Statute is described in its heading as “Jurisdiction *ratione temporis*,”<sup>164</sup> thus conceptualizing this matter separately from personal jurisdiction. That provision states that the Court may exercise its jurisdiction only as to “crimes committed after the entry into force” of the Statute; or in the case of a State becoming a party to the Statute after its entry into force, only as to “crimes committed after the entry into force of this Statute for that State, unless the State has made a declaration [accepting its jurisdiction for referrals by a party-State or investigations by the Prosecutor *proprio motu*].”<sup>165</sup> The above mentioned provision may present a problem concerning who the Court may prosecute and punish.<sup>166</sup>

#### B. Immunities from Jurisdiction—Limited but Not Fully Abolished

##### 1. Official Immunities Generally Abolished

One of the most important reasons for bringing the International Criminal Court into existence was to end the “culture of impunity” by which high government officials avoid criminal responsibility for their acts by reason of their positions. Thus, an important part of the statutory scheme is article 27, stating “official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or government official shall in no case exempt a person from criminal responsibility . . . .”<sup>167</sup> To emphasize this point, the Statute restates it in jurisdictional terms: “Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or inter-

---

tent. Cf. *id.* art. 22 (explaining that principle of *nulla crimen* preventing court prosecution for non-statutory international crime does not prejudice characterization of conduct as criminal independently of statute, such as in national courts). The ICC Statute’s preamble also contains a reference that does not exclude the application of universal jurisdiction by States: “[I]t is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.” See *id.* preamble.

162. See *id.* art. 24(1).

163. See Sharon A. Williams, *Article 11, Jurisdiction Ratione Temporis*, in OBSERVERS’ NOTES, *supra* note 145, at 323, 327.

164. See ICC Statute, *supra* note 1, art. 11 (caption).

165. *Id.* art. 11 (referring to art. 12(3)).

166. For further discussion of whom the Court may prosecute and punish, see *infra* Parts V(B)(2) and VI(C).

167. ICC Statute, *supra* note 1, art. 27(1).

national law, shall not bar the Court from exercising its jurisdiction over such a person.”<sup>168</sup>

In contrast, the ICJ recently held that high government officials and diplomats still have immunity under international law from prosecution in the courts of States other than their own, even for crimes against humanity, at least while they are still in office.<sup>169</sup> Thus, the ICJ held that Belgium had to void an arrest warrant obtained against a then-sitting foreign minister of the Democratic Republic of the Congo for crimes against humanity. The opinions of the ICJ judges distinguished between immunity, which attaches to the person, often for a limited time, so that affairs of the State may be conducted without interference, and impunity, which would absolve an official of criminal liability altogether. The ICJ specifically pointed out that the result might be different in the ICC, because of the ICC Statute provisions on immunity.<sup>170</sup>

Despite the apparent wholesale abolition of immunity,<sup>171</sup> the ICC Statute retains three important provisions which will effectively result in temporary or permanent immunity from prosecution for some persons. These are described below.

## 2. *Rights of Third States to Prevent Transfers*

The first immunity exists in the ICC Statute’s provisions concerning how an accused is brought before the Court. A State is not required to violate its obligations to third States in international law in order to hand an accused (or evidence) over to the Court. The Court may not proceed with a request for surrender of an individual which would “require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State” or would “require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of the sending State is required to surrender a person of that State to the Court . . . .”<sup>172</sup> In all cases, the Court can seek a waiver of these immunities from the third (or sending) State, and if it receives the waiver, may proceed with the request to transfer.<sup>173</sup>

There are a few common situations in which this immunity from transfer might arise. These include diplomatic immunity, immunity from re-transfer based on a prior extradition and immunity based in a Status of Forces agreement between the requested State and the State of nationality

---

168. *Id.* art. 27(2).

169. *See* Arrest Warrant, *supra* note 6.

170. *See id.* para. 61.

171. *See* ICC Statute, *supra* note 1, art. 27(2).

172. *See id.* art. 98(1), (2). Article 98 is concerned with protecting the inviolability of diplomatic property as well as persons. This may have consequences for what may be obtained as evidence by the Court or turned over as restitution to victims. *See id.*

173. *See id.*

of the accused.<sup>174</sup> Generally, a State may not arrest and prosecute a diplomat from another State without the sending State's consent; that rule is carried through here. Generally, bilateral extradition treaties require the extradited person to be sent back to the extraditing country when the sentence is complete; the ICC Statute prohibits re-transfer to the Court without the extraditing State's permission by analogy to re-extradition to a third State.<sup>175</sup> A Status of Forces agreement may prohibit a State from sending members of the armed forces of another State to the ICC; these are observed.

This last situation has been particularly controversial, because the United States has sought such agreements with a number of States, and has signed several. The United States would like agreements with European Union member States that would prohibit transfer of any United States citizen to the ICC. The United States has also succeeded in placing protective language requiring the ICC to defer prosecutions of peacekeepers for twelve months (with an intention to renew the deferral) in a Security Council Resolution.<sup>176</sup>

This does not mean that the Court is deprived of jurisdiction in these cases. Under the prevailing conceptualization, immunities do not destroy personal jurisdiction, but merely prevent a court from exercising it.<sup>177</sup>

174. See Kimberley Prost & Angelika Schlunk, *Article 98, Cooperation with Respect to Waiver of Immunity and Consent to Surrender*, in OBSERVERS' NOTES, *supra* note 145, at 1131, 1132-33; see also KITTICHAISAREE, *supra* note 8, at 284; SCHABAS, *supra* note 17, at 64, 92.

175. For a discussion of the differences between transfer to an international court and extradition to another State, see GEERT-JAN ALEXANDER KNOOPS, *SURRENDERING TO INTERNATIONAL CRIMINAL COURTS: CONTEMPORARY PRACTICE AND PROCEDURES*, Ch. 1 (Transnat'l Publishers 2002). See generally Kenneth S. Gallant, *Obtaining the Presence of Defendants in the International Criminal Tribunal for the Former Yugoslavia: Breaking with Extradition*, 5 CRIM. L.F. 557 (1994).

176. According to the Coalition for an International Criminal Court, as of May 21, 2003, 37 nations had signed so-called Article 98 bilateral agreements with the United States including fourteen States Parties to the ICC Statute. See Documents on Impunity Agreements, at <http://www.iccnw.org/otherissuesimpunity-agreem.html> (last visited May 23, 2003) (the current author does not agree with the coalition for the ICC's characterization of these as "impunity" agreements. For further discussion on U.S. negotiations with E.U. members to exclude all U.S. citizens from transfer, see *US Rejects EU Criminal Court Guidelines*, BBC NEWS, available at <http://news.bbc.co.uk/2/hi/europe/2291451.stm> (last visited Oct. 2, 2002). For an argument that these U.S.-requested bilateral agreements go beyond the immunities authorized by ICC Statute Article 98, see Roger S. Clark, *Challenges Confronting the Assembly of States Parties to the International Criminal Court*, Remarks at International Criminal Law Network Conference (The Hague, Dec. 18-20, 2002), at 10-17. For the peacekeeping resolution, see S.C. Res. 1422, U.N. SCOR, 57th Sess., 4572nd mtg., at 1, U.N. Doc. S/RES/1422 (2002) (applying ICC Statute, art. 16). For a critique of the legality of Resolution 1422, see Amnesty International, *International Criminal Court: The unlawful Attempt by the Security Council to give U.S. Citizens Permanent Impunity from International Justice*, AI Index: IOR 40/006/2003 (May 2003).

177. See Arrest Warrant, *supra* note 6, para. 60; cf. ICC Statute, *supra* note 1, art. 27(2).

The ICC may appropriately obtain the presence of the accused in another way, and then it is free to proceed with the prosecution. For example, the State in whose favor immunity exists may waive that immunity.<sup>178</sup> Indeed, if the State in whose favor the immunity exists is a party to the ICC Statute, it probably has an obligation either to waive immunity, or to transfer the person to the Court after repatriation to that State.<sup>179</sup> This is because States parties have a general duty to “cooperate fully with the Court in the investigation and prosecution of crimes within the jurisdiction of the Court.”<sup>180</sup> One might even say that all U.N. Members have a similar obligation of cooperation, in the case of a Security Council referral to the Court, if the Security Council has requested such cooperation.<sup>181</sup> This obligation, however, arises under the U.N. Charter, rather than directly from the ICC Statute, which by itself cannot bind States not party to it.<sup>182</sup> Moreover, where there is no Security Council referral, there is no obligation under the ICC Statute on a non-Party State to surrender or transfer an accused to the ICC.<sup>183</sup>

One difficult issue might arise if there is a surrender of an accused to the Court that is improper under article 98 or appropriate national law. Neither the ICC Statute nor the Rules contemplate this case. In general criminal law, the propriety of the means of acquisition of the presence of an accused is immaterial.<sup>184</sup> Yet this tradition has been so heavily criti-

---

178. See ICC Statute, *supra* note 1, art. 98.

179. See *id.* arts. 86-89, 92(4).

180. See *id.* art. 86. This would not, of course, prevent such a State from claiming the right to investigate and prosecute the alleged crime in its own courts pursuant to the complementarity provisions of the Statute. See *id.* art. 17.

181. Cf. S.C. Res. 827, para. 4, U.N. SCOR, 48th Sess., 3217th mtg., at 1, U.N. Doc. S/Res/827 (1993) (establishing ICTY); S.C. Res. 955 (1994), para. 2, U.N. SCOR, 49th Sess., 3453d mtg., at 1, U.N. Doc. S/Res/955 (1994) (establishing ICTR).

182. Cf. *infra* Part VI(B).

183. See VCOLT, *supra* note 45, art. 34; see also SCHABAS, *supra* note 17, at 92 (suggesting that high officials of States not party to ICC Statute may continue to claim immunity, apparently because article 27 abolishes immunities only for officials of States parties and article 98 allows States to object to transfers in violation of obligations under international law). If Professor Schabas means that non-Party States have no obligation to transfer their own officials to the ICC (at least in the absence of a Security Council requirement), then it is true that this immunity exists. If, however, he means that an official of a non-Party State who has properly come before the Court can make a valid claim of immunity, then Professor Schabas may overstate the case. Immunity from jurisdiction under the law of the official's State is valid in national law, not international law, except to the extent required by Arrest Warrant, *supra* note 6. Thus, article 98 on its face would appear not to apply unless there was an improper transfer of the official to the ICC from the custody of another State, which by hypothesis there has not been. *But cf.* Morris, *supra* note 17, at 44-45 (arguing that non-Party States have interest that are impacted whenever State Party transfers citizen of non-Party State to ICC without consent).

184. See generally *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (holding forcible abduction in foreign country by DEA does not prohibit trial in U.S. criminal courts); *Israel v. Eichmann*, 36 I.L.R. 277 (S.Ct. 1962) (supplying judg-

cized for so many good reasons, such as its apparent countenance of kidnapping, that the new ICC might well wish to reconsider whether it would prosecute a person improperly brought before it.<sup>185</sup>

A similar claim was made by Slobodan Milosevic, as discussed above, in the ICTY.<sup>186</sup> A claim of wrongful transfer like Milosevic's could be stronger in the ICC than in the ICTY. The ICTY has supremacy over national tribunals, and relevant States have an international law obligation to cooperate with it, regardless of internal law.<sup>187</sup> The ICC, by contrast, has a jurisdiction complementary to that of States. The Statute indicates that States should make transfers to the ICC "in accordance with the provisions of this Part [9] and the procedure under their national law . . ."<sup>188</sup> States parties to the ICC Statute will have a treaty law obligation not to use national law to avoid transfer. At least where the Security Council has required Member States of the U.N. to cooperate with the ICC, such states will have a Charter-based obligation not to use national law to avoid transfer.

Yet it is equally true that the Court may not circumvent either its own Statute or appropriate national law procedures in obtaining the presence of an accused.<sup>189</sup> Whether the ICC will take the additional step of allowing improper transfer to vitiate personal jurisdiction—or delay it temporarily until the Court can properly obtain the presence of the accused—remains to be seen.

Whether a transfer of an accused to the ICC might be prevented by immunity could properly come before the International Court of Justice, rather than the ICC. If, for example, a State that was asked to transfer an accused disagreed with another State on whether immunity in favor of the second State exists, that dispute, if not resolved by direct negotiations or

---

ment on kidnapping of Adolf Eichmann from Argentina); *The King v. Walton*, 11 O.L.R. 94 (Can. 1905) (noting that prisoner arrested in United States and taken to Canada without extradition warrant), discussed in CHRISTOPHER PYLE, EXTRADITION, POLITICS AND HUMAN RIGHTS 397 nn.26-27 (Temple Univ. Press 2001); see also KNOOPS, *supra* note 175, at 243-45, 247-49 (describing ICTY's view of "luring" as allowable for exercise of jurisdiction).

185. See, e.g., KNOOPS, *supra* note 175, at 241-43, 249-54 (discussing cases from New Zealand, South Africa, United States, Zimbabwe and ICTY); see also PYLE, *supra* note 184, Chs. 20, 21 & 406-07 n.51 (describing United States' use of abduction and relevant law).

186. For further discussion of *Prosecutor v. Milosevic*, see *supra* notes 134-36 and accompanying text.

187. See ICTY Statute, *supra* note 94, at art. 9; S.C. Res. 827, *supra* note 181, para. 4.

188. ICC Statute, *supra* note 1, art. 89(1). Under article 88 of the ICC Statute, States Parties have the obligation to "ensure there are procedures under their national law" for all required forms of cooperation with the Court, such as transfer. *Id.* art. 88.

189. For further discussion of the requirement that the ICC comply with its own Statute regardless of acts of other organizations, such as the U.N., see generally Gallant, *supra* note 3. The requirement of following national law procedures is derived from article 89(1) of the ICC Statute.

through the good offices of the Assembly of States Parties, may be taken by the disputing States to the International Court of Justice.<sup>190</sup>

These immunities are not intended to produce impunity. However, they may in fact prevent prosecutions in some cases.<sup>191</sup> This is especially likely if the person sought is a national of a non-Party State to the ICC Statute (and which has not submitted to its jurisdiction), in a case that the Security Council has not referred. In such a case, the non-Party State would not have an obligation to surrender the person to the ICC, and the prosecution could be thwarted.

### 3. *Security Council Deferral of Prosecution*

A second, temporary, immunity arises when the Security Council requests the Court to defer an investigation or prosecution for a renewable period of twelve months.<sup>192</sup> This provision was inserted to prevent an investigation or prosecution from interfering with negotiations to end an ongoing or threatened war.<sup>193</sup>

At the request of the United States, the Security Council used the deferral power for the first time for a different purpose: in order to prevent peacekeepers in Bosnia from even possibly falling into the jurisdiction of the ICC. The Security Council also announced its intention to renew the deferral year by year.<sup>194</sup>

### 4. *Ne bis in idem*

The final set of provisions granting immunity is at the heart of the ICC complementarity scheme, and legitimately inures to the benefit of the individual. A case is not admissible before the ICC if it is currently under investigation or prosecution by a State with jurisdiction over it (unless the State is unwilling or genuinely unable to investigate or prosecute); if it has been investigated by a State with jurisdiction, and a decision not to prosecute was made (unless due to unwillingness or genuine inability of the State to prosecute); or the person involved has already been tried (unless

190. See ICC Statute, *supra* note 1, art. 119(2) (setting forth procedure for resolving disputes over interpretation of ICC Statute). Of course, the case must also be within the jurisdiction of the ICJ under its own Statute before the ICJ could take the case. Cf. Arrest Warrant, *supra* note 6 (discussing issue of prosecuting immune person in national court).

191. See Otto Triffterer, *Article 27, Irrelevance of Official Capacity*, in OBSERVERS' NOTES, *supra* note 145, at 501, 514; see also KRISTINA MISKOWIAK, THE INTERNATIONAL CRIMINAL COURT: CONSENT, COMPLEMENTARITY AND COOPERATION 63-64 (2000).

192. See ICC Statute, *supra* note 1, art. 16.

193. See, e.g., Morten Bergsmo & Jelena Pejic, *Article 16, Deferral of Investigation or Prosecution*, in OBSERVERS' NOTES, *supra* note 145, at 373, 378.

194. See S.C. Res. 1422, *supra* note 176; Clark, *supra* note 176, at 8-10 (arguing that this Resolution is invalid under both Chapter VII of U.N. Charter and ICC Statute Article 16); Gallant, *supra* note 3 (revised version forthcoming) (arguing that Resolution 1422 may be unwise, but is valid deferral request).

the trial was conducted for the purpose of shielding the person from criminal liability or was otherwise not independent or impartial).<sup>195</sup> National law immunities based on official position cannot protect a person from prosecution in the ICC if there exists a national unwillingness or inability to prosecute.<sup>196</sup>

The complementarity provisions concerning delay (and ultimate prevention) of ICC investigations and prosecutions represent a tilt back toward national powers from the scheme of the *ad hoc* tribunals. Those tribunals had supremacy over national courts, and could require national courts to defer their proceedings.<sup>197</sup> Because the rule of *ne bis in idem* as stated in the ICTY and ICTR forbids national trial of an accused following a tribunal trial,<sup>198</sup> national courts lose jurisdiction over persons tried in the *ad hoc* tribunals for purposes of the matters tried there.

The provisions of the ICC Statute on which the entity investigates and prosecutes protect the interests of States in their own ability to investigate and prosecute these crimes. However, they also protect the interests of the individual in facing only one full and fair criminal investigation or trial.

Three points need emphasis. First, protection against multiple prosecutions exists in many international human rights documents and the law of many States. However, the ICC Statute's protection is broader than most of those, which generally protect against multiple prosecutions in a particular jurisdiction only, not multiple investigations, or investigations and prosecutions in different jurisdictions.<sup>199</sup> The broadening of immunity from subsequent proceedings is seen as a progressive development in international criminal procedure. Second, these provisions provide protection from prosecution both in the ICC, when there has been a national investigation or prosecution, and in national systems, when there has been an ICC prosecution (though not when there has been an ICC investigation without prosecution).<sup>200</sup> The protection against prosecution in the

195. See ICC Statute, *supra* note 1, arts. 17, 20.

196. Compare *id.* art. 27 (describing abolition of immunities), with *id.* arts. 17, 20 (discussing complementarity and *ne bis in idem*).

197. See ICTY Statute, *supra* note 94, art. 9(2); ICTR Statute, *supra* note 75, art. 8(2).

198. See ICTY Statute, *supra* note 94, art. 10(1) (spelling with hyphens between the words); ICTR Statute, *supra* note 75, art. 9(1) (spelling without hyphens). In article 20 of the ICC Statute, the phrase is *ne bis in idem*. See SAFFERLING, *supra* note 2, at 326-29 (noting that ICTY Statute does not specifically prohibit second proceeding in ICTY itself, but this should be inferred by references to human rights principles).

199. See generally International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 14(7), 993 U.N.T.S. 171 (entered into force Mar. 23, 1976); see also U.S. CONST. amend. V; SAFFERLING, *supra* note 2, at 324.

200. See ICC Statute, *supra* note 1, art. 20. Note that only a trial carried to conviction or acquittal in the ICC grants protection from prosecution in national courts. An investigation not resulting in trial does not result in such protection. See *id.* art. 20(2).

ICC where there has been a national investigation and a decision not to prosecute appears in the article on admissibility of cases in the court,<sup>201</sup> not in the article on *ne bis in idem*. Nonetheless, the provision serves the same human rights interest. Finally, these provisions generally do provide for permanent immunity from further prosecution (except that the protection against ICC investigation and prosecution during a national investigation or prosecution may not be permanent if the national proceeding turns out not to have been genuine).

Those who expect problems of immunity and impunity to disappear as a result of the ICC Statute will probably be disappointed. Rights of third countries to prevent the Court from obtaining the presence of accused persons will probably cause frustration. One can also expect disputes to arise regarding whether a national decision not to prosecute a case following investigation was because of inability or unwillingness to prosecute. The extent to which these problems inhibit the abolition of immunity and impunity in practice remains to be seen.

#### V. PERSONAL JURISDICTION WHERE A SITUATION IS REFERRED BY A STATE OR AN INVESTIGATION IS INITIATED BY THE PROSECUTOR

##### *PROPRIO MOTU*

##### A. *The General Rule*

The ICC Statute contains a specific provision concerning jurisdiction in situations that have been referred to the Court by a State or where an investigation is begun by the Prosecutor *proprio motu* (on his or her own motion). Personal jurisdiction and jurisdiction over states are intertwined in this provision, and require some teasing out. This provision is highly technical, and contains at least one important ambiguity on its face (concerning so-called “effects” jurisdiction). It is far more technical and limiting than the provisions concerning jurisdiction where a case is referred to the Prosecutor by the U.N. Security Council.<sup>202</sup>

In the case of the referral of a situation by a State Party to the Prosecutor, or the case of an investigation initiated by the Prosecutor *proprio motu*,

. . . the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court . . . :

- (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
- (b) The State of which the person accused of the crime is a national.<sup>203</sup>

---

201. *See id.* art. 17(1).

202. *See id.* art. 13(b).

203. *See id.* art. 12(2).



This provision is located in Part 2 (Jurisdiction, Admissibility and Applicable Law) of the Statute and, unlike the age limitation above, is not expressly stated as a matter of personal jurisdiction.

Part 2 of the ICC Statute mediates the discussion of personal jurisdiction by reference to jurisdiction over states rather than individuals. A state that becomes a party to the Statute “accepts the jurisdiction of the Court with respect to the crimes mentioned in article 5.”<sup>204</sup> A non-Party State may “by declaration lodged with the Registrar, accept the exercise of jurisdiction of the Court . . . .”<sup>205</sup> However, Part 2’s avoidance of a term such as “jurisdiction over the person” or “jurisdiction to adjudicate” cannot be used to evade the fact that the Court, an international organization, will have jurisdiction over prescribed classes of persons.

Where a situation has been referred to the Court by a State or by the Prosecutor *proprio motu*, the Court cannot exercise jurisdiction to adjudicate over those individuals not covered in the quoted passage: i.e., nationals of a State that has not accepted the Court’s jurisdiction and who have not committed an allegedly criminal act on the territory of such a State. The Court needs jurisdiction (legitimate authority) over the accused as well as the subject matter of the crime. The statement that in certain cases the Court will “exercise its jurisdiction” only if States bearing certain relationships to the persons suspected have accepted the jurisdiction of the Court<sup>206</sup> is a roundabout way of defining by limitation the persons over which the Court has jurisdiction to adjudicate allegations of crime. Outside of this language, there is nothing in the ICC Statute that defines the persons who may be prosecuted on the basis of referrals by a State or through investigations begun by the Prosecutor *proprio motu*.

There is no claim of universal jurisdiction over the person in these cases. Indeed, there is not even a claim of so-called “passive personality jurisdiction,” jurisdiction where a victim of a crime within the subject matter jurisdiction of the ICC is a national of a State Party.<sup>207</sup>

In a case involving nationals of a State that has accepted jurisdiction of the Court, jurisdiction to adjudicate is clear: the Court has jurisdiction over nationals of these States to adjudicate allegations that they have committed crimes specified in the Statute. In a case where the conduct occurred on the territory of a State that has accepted the Court’s jurisdiction, the notion of personal jurisdiction is only a bit less clear: the Court has jurisdiction over persons who acted in the territory of these States to adjudicate allegations that these acts amounted to crimes specified in the Statute.

---

204. See *id.* art. 12(1).

205. See *id.* art. 12(3); see also *id.* art. 12(2).

206. See *id.* art. 12(2).

207. See KITTICHAISAREE, *supra* note 8, at 327-88 (commenting on ICC Statute, art. 12(2)).

Some have objected to the provision that nationals of a non-Party State to the ICC Statute could be prosecuted under the Statute for crimes committed on the territory of a State Party. For example, an American soldier operating on the territory of a State Party during a U.N. peacekeeping mission could be charged with crimes before the Court, even if the United States is not a party to the ICC Statute. Territorial jurisdiction, however, is one of the most basic concepts of criminal law. International law allows a State, by treaty (in this case, the ICC Statute), to agree that an international tribunal has personal jurisdiction over individuals with whom it might have personal jurisdiction under the territorial principle.<sup>208</sup>

The ICC Statute does, however, provide ways for non-Party States to protect many of their nationals, such as diplomats and soldiers, from the exercise of ICC jurisdiction.<sup>209</sup> These devices including diplomatic immunity, Status of Forces Agreements (SOFAs) and their analogues, are, like territorial jurisdiction itself, deeply embedded in the international law tradition, and the ICC Statute does not purport to do away with them. As mentioned above, the Security Council has already announced an intention to defer prosecution of peacekeepers.<sup>210</sup> Thus, the controversy over this problem, as a legal matter, may be much less than meets the current political eye.

---

208. Cf. Nuremberg Judgment, *supra* note 38 (noting that State may give authority to conduct prosecution to Nuremberg Tribunal); Randall, *supra* note 12, at 820-21 (explaining treaty may legitimately grant all States adhering to it jurisdiction to adjudicate allegations of international crime occurring in any of them). For a subtle argument against Court jurisdiction over nationals of a non-Party State, on the grounds that delegation of jurisdiction by a State Party may impair the interests of the non-Party State, see Morris, *supra* note 17. *Contra* Michael P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS. 67 (2001). Morris's argument is not without force, in that it identifies political reasons a non-Party State may want to object to a State Party's ceding of jurisdiction to an international organization. This does not, however, demonstrate the illegality of the grant. Morris's argument that the delegation to the ICC is illegal because the traditional grounds for jurisdiction do not encompass the grant, overstates matters, because the traditional heads of jurisdiction, at the time they were conceptualized, only purported to address national courts' jurisdiction. See Morris, *supra* note 17, at 47-52. Thus, there is still reason to apply the rule of *SS Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (Ser. A) (Aug. 10, 1927), that a challenge to jurisdiction fails if no ground is shown why jurisdiction is illegal. It is significant that the non-Party State and its national have access to information about the State Party's participation in the ICC, and that the ICC Statute protects the international human rights of those brought before the Court. In sum, those States that believe prosecution of international crime is important may protect their jurisdiction from outside political pressure not to exercise it by giving it to the ICC.

209. See ICC Statute, *supra* note 1, art. 98. For examples of the use of some of these devices, see *supra* note 183 and accompanying text.

210. See S.C. Res. 1422, *supra* note 176.

B. *Two Theoretical Problems*

There will be interpretation and application issues regarding the provision on jurisdiction following referral by a State or initiation of investigation by the Prosecutor. Two of them which have interesting ramifications for general criminal law and for the international legal personality of individuals are addressed here.

1. *Jurisdiction over the Participant from a Non-Party State Who Acts in a Non-Party State with Effect in a State Party*

Based on the text of the ICC Statute, it could be argued either way whether the Court would have jurisdiction to adjudicate over a person who aided, abetted or otherwise assisted<sup>211</sup> persons who acted on the territory of an accepting State, but never himself nor herself acted there. In an era of easy communications and widespread trade in illegal weapons, this situation is likely to occur. For example, an outsider might supply poison gas knowing or intending it be used on civilians in the territory of a State Party.<sup>212</sup> One could also argue either way whether the Court would have jurisdiction to adjudicate over a person acting outside the territory of a State Party firing prohibited weapons, such as that same poison gas, into the territory of a State Party at civilians.

The argument exists in the context of fairly traditional law of personal jurisdiction and of treaty interpretation. It is an argument about the interpretation of a treaty, the ICC Statute, rather than the appropriate limitations of customary or other international law. The case of the *S.S. Lotus*<sup>213</sup> is an example of a national court—in Turkey—having criminal jurisdiction over a person who did not act within the territorial jurisdiction of the court, but whose acts (in that case negligent rather than intentional) had adverse effects on board a Turkish flag ship—the drowning of eight sailors and loss of the ship.<sup>214</sup> This does not establish, however, that the ICC Statute in fact claims this jurisdiction for the Court.

---

211. See ICC Statute, *supra* note 1, art. 25(3)(c).

212. See *id.* art. 25(3) (aiding, abetting, soliciting and other contributions toward crimes within jurisdiction of Court prohibited); see also *id.* art. 8(2)(b)(xviii) (prohibiting use of poisonous gases).

213. See *S.S. Lotus* (Fr. v. Tur.), 1927 P.C.I.J. (Ser. A) 10 (Aug. 1927) (deciding no rule of international law prohibits State from exercising personal jurisdiction over extraterritorial actor whose act had effects on State's territory); see also *Handelswerkerij G.J. Bier v. Mines de Potasse d'Alsace S.A.*, 1976 E.C.R. 1735, 19 C.M.L.R. 284 (1977) (noting civil lawsuit for river pollution may be brought in Netherlands even though pollution occurred upstream in France as result of acts by French corporation). The specific rule of the *Lotus* case concerning jurisdiction over persons involved in shipping accidents was changed by multilateral treaties. See, e.g., U.N. Convention on the Law of the Sea, Dec. 10, 1982, art. 97, 1833 U.N.T.S. 3 (entered into force Mar. 23, 1976); Convention on the High Seas, Apr. 29, 1958, art. 11, 450 U.N.T.S. 82 (entered into force Sept. 30, 1962).

214. *Accord* MALCOLM N. SHAW, INTERNATIONAL LAW 459 (4th ed. 1997) (discussing *Lockerbie* case in which Scotland attempted to and eventually took jurisdiction over two Libyan nationals accused of planting bomb on civilian airliner that

On the one hand, against jurisdiction over our hypothetical chemical arms supplier or user, it could be argued that the ICC Statute contains no clear provision granting territorial “effects” jurisdiction. An international court should not gain jurisdiction over a person acting outside a consenting State without a clear indication, absent from the ICC Statute, of an intent to claim such jurisdiction. The “conduct in question” of the outside arms merchant or user did not occur in the territory of a State accepting jurisdiction, and thus the ICC Statute excludes jurisdiction.<sup>215</sup> The purposes and objects of the Statute include continuing recognition of the concept of State sovereignty insofar as possible, and extension of jurisdiction to acts committed outside the territory of a State Party could be seen as infringing on the sovereignty of a non-Party State.<sup>216</sup>

Arguing in favor of jurisdiction to adjudicate, the conduct that constituted the substantive crime, in this case the use of banned weapons on civilians, occurred on the territory of a State that has accepted jurisdiction of the Court. Moreover, sending weapons into a State that has accepted

---

exploded over Scotland). The site of explosion was the only connection that the defendants or crime had with Scotland. *See id.* A number of examples, both criminal and civil, from both common and civil law countries, of “effects” jurisdiction are collected in JOSEPH MODESTE SWEENEY ET AL., *THE INTERNATIONAL LEGAL SYSTEM* 103-06 (3d ed. 1988). These include:

*France—Beausir* (Ct. of Cassation 1977), *discussed in* 82 *REVUE GÉNÉRAL DE DROIT INT’L PUBLIQUE* 1171 (observing that French court has jurisdiction over Belgian national polluting river water in Belgium because river flowed into France);

*Germany—Cartel Law*, sec. 98(2), *translated and reprinted in* 1 *GUIDE TO RESTRICTIVE BUSINESS PRACTICES, GERMANY* 1.0, 1, 42 (OECD 1964) (applying law to restraints on competition having effect in Germany “even if they result from acts done outside such area”);

*India—Mobarik Ali Ahmed v. Bombay* (S.Ct. 1957), *reprinted in* 24 *I.L.R.* 156 (1961) (discussing how Pakistan national acting from Pakistan was tried for cheating person in India);

*United States—Rivard v. United States*, 375 F.2d 882 (5th Cir.), *cert. denied*, 389 U.S. 884 (1967) (providing that four Canadian nationals acting in Canada and Mexico were extradited to and tried in the United States for conspiracy to smuggle heroin into United States). *See generally* *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990).

Two of the cases cited by SWEENEY ET AL., are not analogous to the problem in the ICC Statute discussed here. These are:

*Kenya—Missisi v. Republic* (High Ct. 1969), *reprinted in* 48 *I.L.R.* 90 (involving person acting in Uganda accused of trying to defraud government of Kenya; not strictly analogous because person was Kenyan national and ICC Statute explicitly provides for jurisdiction over all nationals of States parties, wherever they act, which is principle of so-called “active nationality” jurisdiction);

*United Kingdom—The Queen v. Baxter*, 1 Q.B. 1, 8 (Eng. C.A. 1972) (involving person in Northern Ireland accused of attempting to defraud gamblers in England; not strictly analogous because occurring entirely within United Kingdom of Great Britain and Northern Ireland).

215. *See* ICC Statute, *supra* note 1, art. 12.

216. *See id.* preamble (discussing complementarity of ICC to national jurisdictions).

the Court's jurisdiction is conduct that is not complete until the weapons reach that State. Thus, it is fair to say that our arms merchant comes within the Court's personal jurisdiction by assisting action in such a state. Our arms user has directly caused the prohibited effect in a State Party. It is fair to charge someone for intentionally or knowingly acting in a way that has a prohibited effect on the territory of another State.<sup>217</sup>

The "effects" doctrine is sufficiently well established<sup>218</sup> that, in the case of aiding, abetting, ordering, soliciting, inducing or intentionally contributing to a crime within the subject matter jurisdiction of the Court,<sup>219</sup> the ICC Statute should be read to permit the Court to exercise jurisdiction over persons supporting crime within the territory of an accepting State, even if they are not within such territory when they act.<sup>220</sup> This is an application of the use of the principles and rules of international law and general principles of law existing in national laws as a way to liquidate an ambiguity in the ICC Statute. The use of both these sources is authorized in both the ICC Statute itself and the general law of treaties.<sup>221</sup> The most important purpose of the ICC Statute, the deterrence and punishment of

217. Accord RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 421(2)(j) cmt. b (1987) (explaining that State may exercise jurisdiction to adjudicate over person who has carried on "an activity having a substantial, direct and foreseeable effect within the state, but only in respect of such activity" in outside State; applies in principle to criminal as well as most civil matters). See generally *Simpson v. State*, 17 S.E. 984 (Ga. 1893) (holding that Georgia court may try defendant for firing bullet from South Carolina at person in Georgia). These precedents do not control the hypothesized case because our case requires interpretation of the ICC Statute, not a decision based upon the possible limits of jurisdiction under general international law.

218. See Edwin D. Dickinson et al., *Harvard Research in International Law, Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 487-94 (Supp. 1935); see also Akehurst, *supra* note 12, at 153-55 (criticizing extreme applications of doctrine); Ellen S. Podgor, *Extraterritorial Criminal Jurisdiction: Replacing "Objective Territoriality" with "Defensive Territoriality"*, 28 STUD. L. POL. & SOC'Y 117, 123-25 (2003) (same, especially critical of unconstrained growth of jurisdiction over economic crime).

219. See ICC Statute, *supra* note 1, art. 25(3) (explaining that these are principal means of incurring responsibility for crime other than direct commission). Also included therein is direct and public incitement to genocide, which the author believes is substantively somewhat more problematic than the other means of incurring responsibility for crime, because of the possibility of conflicts with guarantees of free expression in international and national law. See *id.* So long as there are no such conflicts, the jurisdictional arguments concerning direct and public incitement to genocide under article 21(3) of the ICC Statute are the same as for the other means of incurring individual criminal liability. See *id.* art. 21(3).

220. See JANIS, *supra* note 16, at 328 (quoting from RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c)); see also HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 309 (Robert W. Tucker, ed. 2d ed. 1967) (discussing State's ability to punish citizens of another State for crimes committed within its borders); cf. Dickinson et al., *supra* note 218, at 503-06.

221. See ICC Statute, *supra* note 1, art. 21(b) ("principles and rules of international law"); see also *id.* art. 21(c) ("Failing that, general principles of law derived by the Court from national laws of legal systems of the world, including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and

the most serious crimes against the international community, suggests that aiders and abettors of such crimes acting in non-consenting States be held to be within the jurisdiction of the ICC. Additionally, jurisdiction is described in article 13 concerning a “situation”<sup>222</sup> or a “crime,”<sup>223</sup> either of which may include, in ordinary language, acts both within and without the accepting jurisdiction; the Statute does not speak in terms of investigating only specific “acts.” Thus, it is proper to extend personal jurisdiction to all those contributing to the commission of a crime in a State that has accepted the Court’s jurisdiction. Further, the Statute does not distinguish between the person who, for example, directly fires a prohibited weapon at a civilian target, and the person who aids and abets such an attack by sending the weapons into a jurisdiction for use; the sender is justly subject to jurisdiction.

The author finds the arguments in favor of territorial “effects” jurisdiction persuasive, in both the direct action and the aiding and abetting cases. However, limits of this jurisdiction need careful definition. For example, it would be quite reasonable to extend “effects” jurisdiction only to those who knew or intended that their acts would have effect in a State that has accepted the Court’s jurisdiction.

This issue of “effects” jurisdiction will probably not be resolved until raised by a case before the Court or by an amendment to the ICC Statute. There is not a Rule of Procedure and Evidence nor an Element of Crimes covering this issue.<sup>224</sup>

Note that, for academic purposes, one could argue that using the language of personal jurisdiction (or jurisdiction to adjudicate)—as in the paragraphs just above—is unnecessary and potentially misleading in a case where a person is neither a national of a State that has accepted the Court’s jurisdiction, nor has committed an act while physically within the jurisdiction of such a State. That is, the Statute does not set up this issue in explicit terms of personal jurisdiction. One could treat this as an issue of subject matter jurisdiction, and the arguments and results would be the same.

There are, however, some good reasons for treating this as a matter of personal jurisdiction. First, the language of the ICC Statute regarding exercise of jurisdiction speaks of the Court having jurisdiction over “situations” referred to it by a State Party to the Statute.<sup>225</sup> One can imagine the Court having subject matter jurisdiction over a general situation, but not

---

with international law and internationally recognized norms and standards”); *cf.* VCOLT, *supra* note 45, arts. 34, 35, 38.

222. *See* ICC Statute, *supra* note 1, arts. 13(a), 14 (discussing referrals by party State).

223. *See id.* art. 13(c) (detailing investigations initiated by Prosecutor).

224. *See* Rules of Procedure and Evidence, in ICC-ASP/1/3, *supra* note 85; *see also* Elements of Crimes, in ICC-ASP/1/3, *supra* note 85 (lacking definition of elements for S.S. *Lotus*-type situation).

225. *See* ICC Statute, *supra* note 1, arts. 13(a), 14.

over an individual who does not meet certain jurisdictional requirements. Suppose, for example, a State Party refers to the Prosecutor a situation where genocide has been committed in neighboring States pursuant to a common scheme or plan, but only one State has ratified the ICC Statute. Under the Statute, the Court would have jurisdiction over a national of the ratifying State who is accused of committing genocide in either State, or a national of the non-ratifying State who is accused of committing genocide in the ratifying State. There is, however, no jurisdiction to adjudicate over a national of the non-ratifying State accused solely of committing genocide in the non-ratifying State. In this analysis, the concept of personal jurisdiction fits more comfortably than that of subject matter jurisdiction.

Second, there is no more textual support for treating this as subject matter jurisdiction rather than as personal jurisdiction. In the cases of State Party referrals, or Prosecutor-initiated investigations, the Court “may exercise its jurisdiction if [certain] States are Parties to this Statute . . . .”<sup>226</sup> This language does not require the use of one rubric rather than the other.

Additionally, the ICC Statute is properly concerned with the principle of legality of prosecution of individuals. “A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.”<sup>227</sup> As pointed out above, the further provision of the ICC Statute, that “[n]o person shall be criminally responsible under this Statute for conduct prior to [its] entry into force . . . ,”<sup>228</sup> has been described by one respected commentator as a matter of “jurisdiction *ratione personae*.”<sup>229</sup> This focus on the justice of exercising power over an individual also suggests the applicability of the concept of personal jurisdiction in the above situation. That is, the question is whether it is fair for the Court to exercise jurisdiction over a person who is not a national of a State Party and has not committed an act on the territory of a State Party. This is a question traditionally analyzed under the rubric of personal jurisdiction.<sup>230</sup>

Within issues of personal jurisdiction, the question of “effects” jurisdiction is frequently considered by scholars under the rubric of jurisdiction to prescribe—i.e., authority to make applicable rules of law.<sup>231</sup> Most of the cases concerning jurisdiction to prescribe on the basis of effects

226. *Id.* art. 12(2).

227. *Id.* art. 22(1).

228. *Id.* art. 24(1).

229. See Williams, *supra* note 163, at 323, 327 (asserting that Article 11 is linked substantively to Article 24, which deals with jurisdiction *ratione personae*).

230. For further discussion of the referral of a situation by the Security Council under article 13(b) of the ICC Statute, see *infra* Part VI. In such a situation, there may be jurisdiction over persons who are neither citizens of States parties nor acted there, at least where one of the relevant States is a U.N. Member.

231. See, e.g., LOUIS HENKIN ET AL., INTERNATIONAL LAW 1051-55 (West Pub. Co. 3d ed. 1993); SWEENEY ET AL., *supra* note 214, at 90-108. For a further discussion of jurisdiction to prescribe, see *supra* Part II.

within the prescribing jurisdiction involve an adjudicating court making a determination that it is part of an entity (usually a national body) with jurisdiction to prescribe.<sup>232</sup> International law generally permits States to make law concerning activity outside their borders that has direct effects within their borders.<sup>233</sup>

In the case of the ICC, the law being prescribed is, for the most part, customary international criminal law already.<sup>234</sup> The community of States adopting the ICC Statute possesses the jurisdiction to prescribe penal law against these acts through the treaty process.<sup>235</sup> To the extent that the issue arises in the ICC, it will likely be in the context of whether a specific accused can properly be brought before the Court on the basis of acts committed outside the territory of State parties—an issue best characterized as jurisdiction to adjudicate. Given that the arguments do not vary depending on the name given the issue, it may not matter much whether this issue is called a matter of jurisdiction to prescribe or to adjudicate.

## 2. *Retroactively-effective Declarations of Non-Party States Accepting Jurisdiction of the Court and a Nulla Crimen Problem*

The ICC Statute also limits jurisdiction by the time of commission of the crime. One of the provisions concerned with referrals by a State Party or Prosecutor-initiated investigations creates a problem of legality. The Court may exercise its jurisdiction only as to “crimes committed after the entry into force” of the Statute, or in the case of a State becoming a party to the Statute after its entry into force, only as to “crimes committed after the entry into force of this Statute for that State, unless the State has made a declaration [accepting its jurisdiction for referrals by a State Party or investigations by the Prosecutor *proprio motu*].”<sup>236</sup>

This section creates a problem of *nulla crimen sine lege* if a crime under the ICC Statute is not also a crime under customary international law, and the way the Court has jurisdiction over the case and the accused is by a declaration of a non-Party State accepting the jurisdiction of the Court under article 12(3). If the acts were committed before the declaration, then at the time and place of the commission of the conduct in question,

---

232. See, e.g., RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 431 cmt. a (1987) (“[U]nder international law, a state may not exercise authority to enforce law that it had no jurisdiction to prescribe.”). In this context, adjudication is a portion of the enforcement process.

233. For further discussion of extraterritorial jurisdiction, see *supra* notes 203-10 and accompanying text.

234. *But see* SADAT, *supra* note 10, at 12 (arguing that ICC Statute “required clarifying and elucidating the precise content of [international criminal offenses] in a way that often moved the ‘law’ of the Statute far beyond existing customary international law understandings.”).

235. For further discussion of the jurisdiction to prescribe penal law against acts occurring within the State’s border through the treaty process, see *supra* Part II(D).

236. See ICC Statute, *supra* note 1, art. 11 (referring to art. 12(3)).



the accuseds' acts were not criminal, and there is no criminal responsibility. This result is reached by proper application of the *nulla crimen* article, excluding a person's criminal responsibility where "an act is not "at the time it takes place, a crime within the jurisdiction of the Court."<sup>237</sup>

This is not an imaginary problem. As discussed above, it is not self evident that all crimes defined under the ICC Statute are currently customary international crimes—recruitment or enlistment of child soldiers under fifteen years of age, and some environmental crimes—may be counterexamples.<sup>238</sup> This is neither surprising nor a negative reflection on the drafters, many of whom sought a progressive development of international criminal law and procedure.<sup>239</sup>

Although it is not clear how the Court might rule on a claim that a crime, such as enlistment of child soldiers, is not customary, it is clear that it would need to enter into an analysis of the issue. The *nulla crimen* rule is part of the ICC Statute itself, as is an acceptance of international human rights generally.<sup>240</sup> Thus, the Court could not simply rely on the fact that the Statute asserts that this is a customary international crime.<sup>241</sup>

As discussed above, two highly respected commentators argue that the ICC Statute "is clearly intended to have the status of custom and even of *jus cogens* obligations."<sup>242</sup> It is certainly true that many of those in the movement to create an International Criminal Court hope that this will be the effect of the ICC Statute.<sup>243</sup> Jurisdiction to prescribe international criminal law does reside in the international community, and such prescription can include development of *jus cogens* or customary law that would bind all. Additionally, inclusion in the ICC Statute may be used as evidence that any given crime has become customary, in the same way that inclusion of other rules of law in treaties may be used as evidence of custom.<sup>244</sup>

237. See *id.* art 22(1). For further discussion of immunities from jurisdiction, see *infra* Part IV(B).

238. For further discussion of customary international crimes, see *supra* notes 94-99 and accompanying text; see also SADAT, *supra* note 10, at 12.

239. See SADAT, *supra* note 10, at 12-14.

240. See ICC Statute, *supra* note 1, arts. 21(3), 22.

241. See *id.* art. 8(2)(b), (e) (providing statements that recruitment or enlistment of child soldiers is "serious violation[ ] of the laws and customs of [armed conflict, either international or non-international]" for which there is individual criminal liability). By contrast, the Nuremberg Tribunal at least asserted that it was bound by the verbal formulation of crimes contained in its Charter, though it did enter into a *nulla crimen* analysis anyway. See Nuremberg Judgment, *supra* note 38, at 219-23, 238-39, 253.

242. See Sadat & Carden, *supra* note 10, at 409-10 n.167.

243. The author shares this hope but, as discussed below, does not believe this hope is equivalent to the immediate transformation of all crimes listed in the ICC Statute into customary international criminal law.

244. See, e.g., North Sea Continental Shelf Cases (F.R.G. v. Neth.), 1969 I.C.J. 3, 41 (Feb. 20); see also HENKIN, *supra* note 231, at 101-02.

However, the group of States adopting the ICC Statute was about seventy at the time of the creation of the Court, and excluded China, India, the United States, Indonesia and Russia, as well as others among the world's most populous and powerful States. The substantial, but minority, group of State parties to the ICC Statute cannot immediately change customary international criminal law by defining new crimes for all individuals whose States might, at some time in the future, declare acceptance of the Court's jurisdiction.<sup>245</sup>

The *nulla crimen* rule defines a substantive right of individuals under the treaty (i.e., the ICC Statute), as well as under customary international law. If there has not yet been proscription of these new crimes with regard to certain persons with no connection to State parties to the ICC Statute (because the State parties have no jurisdiction to prescribe new crimes for them), there should be no jurisdiction to adjudicate over such individuals, when they are accused of committing acts that constitute the new crimes.<sup>246</sup>

If the relevant State has become a party to the ICC Statute or accepted the jurisdiction of the ICC before the date of the acts alleged to be criminal, there is no *nulla crimen* problem, because the acts are criminal as to the accused individuals when committed.<sup>247</sup> Note, however, that in this case, an apparently procedural statement by a State—that it accepts the

245. See, e.g., VCOLT, *supra* note 45, art. 34.

246. See Madeline H. Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 NEW ENG. L. REV. 337, 347-49 (2001). Professor Morris argues that a treaty (such as the 1970s and 1980s treaties on terrorism) cannot, in and of itself, create universal jurisdiction where none existed before. See *id.* Her claim is that such a treaty would affect the rights of non-Party States in a way not authorized by international law. See *id.* By contrast, the argument here is that universal jurisdiction does not exist where a crime is not recognized at least in customary international law, because such jurisdiction would violate the human rights of the person from a non-treaty state subject to it. But see Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35 NEW ENG. L. REV. 363, 375-76 (2001) (arguing that treaties discussed by Professor Morris concern acts about which "the perpetrator cannot seriously argue" their criminality so that *nulla crimen* principle is inapplicable). Scharf's statement could be interpreted to mean that universal jurisdiction could be invoked where acts are condemned by all states (possibly by analogy to "general principles of law") without an inquiry into whether the act is forbidden by "customary international" law. See *id.* at 379-80 (discussing U.S. claim of universal jurisdiction over two "stateless" vessels in international waters which were transporting marijuana in *United States v. Marino-Garcia*, 679 F.2d 1373 (11th Cir. 1982)). However, it could also be interpreted to mean that the perpetrator cannot seriously argue that the crimes set out in these particular treaties are not forbidden by customary international law. By contrast, the argument of this Article is that there are crimes in the ICC Statute that might not in fact be crimes for all persons in all States. Scharf also denies Professor Morris's view that rights of non-treaty States are invaded by prosecution on the basis of universal jurisdiction, at least for the crimes under the terrorism treaties. See *id.* at 377-78.

247. See *Prosecutor v. Milosevic*, Case No. IT-02-54, (ICTY, Trial Ch., Nov. 8, 2001) (concerning allegations of crimes committed five years after creation of ICTY in Kosovo in 1999).

jurisdiction of the ICC—in fact defines substantive international criminal law for certain persons, its nationals and others within its jurisdiction.

The distinction between a rule created by customary international law and a rule created by treaty law normally does not bear the weight that it is being asked to bear here. Normally, the distinction applies to whether a State that has not adopted a treaty or other international agreement can be held to a rule of law that is set out in the treaty. It can be held to the standard only if the rule is also a rule of customary international law. In that case, it is not the treaty, but the customary law, which binds the State. The weight that this distinction is being asked to bear here is that of determining whether an individual may be prosecuted for a particular crime set out in the ICC Statute. An individual from a State accepting the jurisdiction of the Court who allegedly committed a crime before the State in question accepted the Court's jurisdiction can be prosecuted only if the crime was both customary at the time of its alleged commission, and Statutory—i.e., within the subject matter jurisdiction of the Court.

The alternative to making these judgments is unattractive: it would be to say that the acceptance of jurisdiction of the Court by a non-Party State to the ICC Statute can only apply to crimes committed after acceptance—i.e., prospectively. This essentially would make acceptance of jurisdiction the equivalent of ratification, which it is not. Rather, acceptance allows a State that is unable to prosecute cases of heinous atrocities, or that believes it is in the interest of national reconciliation to remove its own courts from the process of investigation and trial, to give those cases to the ICC, rather than to let them go unpunished.

#### VI. JURISDICTION TO ADJUDICATE AND JURISDICTION TO PRESCRIBE IN SITUATIONS REFERRED TO THE COURT BY THE SECURITY COUNCIL, WITH SPECIAL ATTENTION TO SITUATIONS INVOLVING STATES NOT PARTIES TO THE ICC STATUTE

The ICC Statute is far more ambitious concerning personal jurisdiction in cases that have been referred to the Court by the U.N. Security Council. On its face, the Court's personal jurisdiction extends to all natural persons over the age of eighteen at the time of the commission of a crime.<sup>248</sup> In these situations, there is no language analogous to the article 12 limits regarding who may be brought before the Court.<sup>249</sup> Personal jurisdiction is not limited here by actual ratification or acceptance of the Statute by a State.<sup>250</sup>

This suggests that, for Security Council referrals, the ICC Statute adopts, for an international organization, a theory of universal jurisdiction to adjudicate over persons accused of international crime.<sup>251</sup> As this Part

248. See ICC Statute, *supra* note 1, arts. 25(1), 26.

249. Compare *id.* art. 12, with *id.* art. 13.

250. Cf. *id.* art. 12.

251. See, e.g., Sadat & Carden, *supra* note 10.

will illustrate, whether the Court has jurisdiction over an individual on a theory of universal jurisdiction may depend on the type of crime alleged—whether *jus cogens*, customary or non-customary.

A. *Person (Either Accused or Victim) or Crime Connected to Party State to the ICC Statute*

Where the person or crime involved has some relevant connection to a State Party to the ICC Statute, there is no problem of personal jurisdiction. That State has accepted the jurisdiction of the Court over all crimes within the Court's jurisdiction.<sup>252</sup> Nothing suggests limitation of personal jurisdiction in such a case, whether an accused is a national of the State Party, acted on the territory of the State Party or aided and abetted crimes that were committed in the territory of a State Party.<sup>253</sup> There is no statutory language that arguably prohibits "effects" jurisdiction following a Security Council referral, and international law generally permits the exercise of criminal jurisdiction on this basis.<sup>254</sup>

Where a situation is referred by the Security Council, the Prosecutor may also ask the Court to recognize so-called "passive personality jurisdiction." Under this theory of jurisdiction, a tribunal asserts that the appropriate legislative power (usually the legislative authority of its State) has jurisdiction to prescribe. The tribunal then has jurisdiction to adjudicate a case, because of the nationality of the victim, not the nationality of the perpetrator or the place of the ill effect.<sup>255</sup> Such a situation could arise in the case of an attack on civilian refugees who are nationals of a State Party to the ICC Statute fleeing through international waters, if neither the attackers nor the vessels were connected to a State Party. It could also arise through an attack on a refugee camp where the refugees are from a State Party but the attackers are not.

While this kind of jurisdiction is not utilized by all States in their national courts, and has been heavily criticized, it is sufficiently well accepted that one can say the exercise of such jurisdiction by States is permitted by international law, at least where national security or other special interests in protecting potential victims that are nationals of the State exercising

252. See ICC Statute, *supra* note 1, art. 12(1).

253. The restriction on this type of jurisdiction does not exist in the text concerning Security Council referrals, as it arguably does in the cases of State referrals or investigations initiated by the Prosecutor *proprio motu*. See *supra* Part V(B)(1); cf. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (Ser. A.) No. 10 (1927) (holding that customary international law permitted Turkey to try citizen of France for acts committed on French ship that caused collision with Turkish ship). Compare ICC Statute, *supra* note 1, art. 12, with *id.* art. 13.

254. For further discussion of "effects" jurisdiction, see *supra* Part V(B)(1).

255. The ICC Statute does not authorize passive personality jurisdiction where situations are referred by States parties or investigated by the Prosecutor *proprio motu*. See ICC Statute, *supra* note 1, art. 12; see also KITTICHAISAREE, *supra* note 8, at 327-28 (discussing strengths and shortcomings of ICC). For further discussion, see *supra* note 183 and accompanying text.

jurisdiction are concerned.<sup>256</sup> Recent language from the ICJ indicates that passive personality jurisdiction might be a more solid basis for national criminal jurisdiction than true universal jurisdiction, though the ICJ did not actually decide this issue. President Guillaume, in his separate opinion, stated, "Under the law as classically formulated, a State normally has jurisdiction over an offense committed abroad only if the offender, or at very least the victim, has the nationality of that State or if the crime threatens its internal or external security."<sup>257</sup>

The interests of the international community (as well as the individual interests of any State Party to the ICC Statute) in preventing genocide, war crimes and crimes against humanity are similar special interests, which would justify an international criminal tribunal in accepting passive personality jurisdiction. In the course of an international conflict, nationals of a State that is not a party to the ICC Statute may commit crimes within the subject matter jurisdiction of the Court against nationals of a State Party. If an accused allegedly committed an act against nationals of a State Party on the territory of a non-Party State (as by taking them hostage, or

---

256. See, e.g., CHRISTOPHER BLAKESLEY ET AL., *THE INTERNATIONAL LEGAL SYSTEM* 166 (5th ed. 2001) (citing French Code de Procédure Pénale, art. 689(1)); BROWNIE, *supra* note 16, at 306 (criticizing doctrine and stating that many cases involving it would fall under protective or universal principles of jurisdiction); JANIS, *supra* note 16, at 330 n.337 (citing French Code Civile, art. 14); Kelsen, *supra* note 220, at 309; 3 HERSCH LAUTERPACHT, *INTERNATIONAL LAW, BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT* 235 (E. Lauterpacht ed., 1977) (relying on 1 OPPENHEIM, *INTERNATIONAL LAW* § 147 (6th ed. 1937)); RUBIN, *supra* note 25, at 86-87 nn.63, 67 (indicating early support for doctrine, diminishing by 20th century) (relying on 1 CHARLES MOLLOY, *DE JURE MARITIMO*, ch. IV, para. viii, at 37 (1677)); SHAW, *supra* note 214, at 467-68 (asserting passive personality principle is not strong ground for jurisdiction); see also J.G. STARKE, *AN INTRODUCTION TO INTERNATIONAL LAW* 275 (7th ed. 1972) (referring to statutes in Mexico, Brazil and Italy). RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt g mentions passive personality jurisdiction and some recent United States statutes and cases have appeared to use it as a basis for criminal jurisdiction in terrorism and drug cases. See 18 U.S.C. § 1203 (2002), *applied in* United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991) (allowing U.S. to exercise jurisdiction over foreign national); United States v. Benitez, 741 F.2d 1312 (11th Cir. 1984) (shooting of U.S. drug agents in Colombia); see also 18 U.S.C. § 2332 et seq. (2002), *applied in* United States v. Bin Laden, 92 F. Supp. 2d 189 (S.D.N.Y. 2000) (allowing prosecution of foreign defendant). Traditionally the United States opposed the doctrine. See generally Joshua Robinson, *United States Practice Penalizing International Terrorists Needlessly Undercuts Its Opposition to the Passive Personality Principle*, 16 B. U. INT'L L.J. 487 (1998) (suggesting U.S. Department of Justice institute policy of only prosecuting those cases that have basis for jurisdiction in existing international law to prevent reciprocal exercise of passive personality principle by other nations).

257. See Arrest Warrant, *supra* note 6, paras. 15-17, 41-42; *id.* para. 4 (Separate Opinion of President Guillaume); *id.* paras. 44-47 (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal) (concluding that universal jurisdiction, even *in absentia*, is not prohibited in limited circumstances); *id.* para. 5 (Opinion Individuelle de M. Rezek); *id.* para. 44ff (Dissenting Opinion of Judge Van den Wyngaert) (accepting both passive personality and universal jurisdiction). *But see id.* (Separate Opinion of Judge Koroma) (emphasizing that issue of universal jurisdiction was not decided).

killing them as part of a plan of genocide), passive personality jurisdiction would justify the Court in taking the case.

The language of the ICC Statute concerning Security Council referrals is consistent with the exercise of passive personality jurisdiction. This provision contains no limitations on the jurisdiction of the Court, based on either the place of the crime or the nationality of the offender.<sup>258</sup> Adopting the theory of passive personality jurisdiction would allow the Court in this type of case to avoid the issues of true universal jurisdiction discussed below.<sup>259</sup>

As with “effects” jurisdiction above, passive personality jurisdiction is often considered under the rubric of jurisdiction to prescribe.<sup>260</sup> The argument for considering this as a matter of jurisdiction to adjudicate in the context of an international criminal tribunal is similar to that of “effects” jurisdiction.<sup>261</sup> In the context of international criminal tribunals, this issue has more to do with the propriety of exercising personal jurisdiction over an accused person—jurisdiction to adjudicate—than it does with the prescribing authorities that such a tribunal may legitimately use. Again, however, the characterization as one or the other may not matter too much.

B. *Persons with No Relevant Connection to a State Party to the ICC Statute—  
Is Jurisdiction Universal After a Security Council Referral?*

The Security Council has jurisdiction over disputes that threaten the peace among all U.N. Members. The U.N. Charter also appears to claim authority for the Security Council over disputes that threaten the peace where one or more parties are non-Members.<sup>262</sup> It is possible that the Court will be asked, through a Security Council referral to recognize some

258. See ICC Statute, *supra* note 1, art. 13(b). By contrast, the language concerning non-Security Council referral cases does not permit jurisdiction based solely on the nationality of the victim. See *id.* art. 12(2).

259. One special case is worth mentioning. Switzerland and Nauru were both non-Members of the U.N. when they signed the ICC Statute (though Nauru is now a Member and Switzerland has approved a referendum on becoming a Member). If a State ratifies the ICC Statute but does not become a UN member, there is no problem in international law or justice if the Court exercises jurisdiction over persons connected with them following U.N. Security Council referral of a situation. The States will have accepted the jurisdiction of the Court over all crimes named in the Statute, regardless of the source of the referral of allegations to the Court. The States will have given consent to the legal effect of U.N. Security Council actions. Thus, the case would not fall within the rule that a treaty (i.e., the U.N. Charter) does not apply to a non-Party without its consent. See VCOLT, *supra* note 45, art. 34.

260. For further discussion of jurisdiction to prescribe as a rubric for discussion, see *supra* notes 15, 204-05 and accompanying text.

261. For further discussion of “effects” jurisdiction, see *supra* notes 231-34 and accompanying text.

262. See U.N. CHARTER arts. 24, 32, 50 (referencing to disputes involving non-Members of U.N.); see also *id.* art. 2(6).

form of universal jurisdiction over individuals—that is, jurisdiction without regard to an individual's connection with any State Party to the ICC Statute, any State that has accepted the Court's jurisdiction or, conceivably, any State that is a member of the U.N. Through the same device, the Court may also be asked to recognize and exercise its jurisdiction over States that are not parties to the Statute.<sup>263</sup>

Whether and how the Court can exercise unlimited personal jurisdiction or jurisdiction over all States is an important aspect of the definitions of the international powers and responsibilities—the international legal personality—of the ICC. Universal jurisdiction over individuals suspected or accused in situations referred by the Security Council also affects changing views of international legal personality of individuals. The questions require that the U.N. Charter and the ICC Statute be read together.

Articles 12 and 13 of the ICC Statute assume that the Court has personal jurisdiction over any individuals suspected of crimes within the Court's subject matter jurisdiction where the Security Council refers the situation to the Court. No language elsewhere in the Statute contradicts this reading in specific terms. It is nonetheless problematic in light of some protections of individual human rights in the Statute and international law in general. There is also a section on temporal jurisdiction from which an argument can be constructed that universal jurisdiction is not in fact the rule of the Statute.

One could simply end the matter here by saying that the language of the ICC Statute controls the personal jurisdiction of the Court.<sup>264</sup> Natural persons not having international legal personality in traditional international law cannot object to rules of international law and there is no need to go any further.<sup>265</sup>

Modern notions of legitimacy and changes in the view of the personality of the individual in international law (including changes manifested in the ICC Statute), however, suggest that there should be some further reasoned basis for the exercise of power over an individual by the Court. The legitimacy of imposing the Court's process on an individual becomes an issue, when that person,<sup>266</sup> and his or her international representative

263. For further discussion of how this jurisdiction over States is very limited, see Gallant, *supra* note 3.

264. See VCOLT, *supra* note 45, art. 31 (describing plain meaning rule).

265. Some objections of the Nuremberg defendants seem to have been handled in this way. The International Military Tribunal relied principally on its own Charter as authority rather than investigating the individual defendants' claims. See Nuremberg Judgment, *supra* note 38, at 218. The Tribunal was seen not as an international organization, but as a body that had been set up by a number of States. Each State that was occupying territory in Germany could have done the same individually.

266. In most legal systems, an individual can waive lack of personal jurisdiction as a defense. One can imagine a case where a person would rather be tried by an international tribunal, even if there was a lack of personal jurisdiction, than by a national court with jurisdiction, as in the case of participants in the Rwanda genocide, who are subject to the death penalty only in the national courts. See JONES,

(i.e., his or her State), have not consented to jurisdiction therein. One must rely on the underlying fairness of the constitution of the Court and the substantive and procedural law to be applied by the Court.

1. *Theory that Security Council Referral Can Legitimately Create Jurisdiction over an Individual with a Relevant Connection to a U.N. Member State*

One theory of personal jurisdiction applies to most crimes within the Court's subject matter jurisdiction, at least for nationals of any State that is a U.N. Member, or a person who acted on, or with effect on a U.N. Member State. The Security Council, in the exercise of its enforcement power to maintain or restore international peace and security, has the authority to give an international tribunal jurisdiction over what are already customary international crimes. This tribunal may have personal jurisdiction over any individual with a relationship to a U.N. Member State (e.g., nationality, place of action or effect), without regard to the actual consent of that State to the jurisdiction of the tribunal over that person.<sup>267</sup>

This is essentially the theory behind the creation and operation of the *ad hoc* U.N. Tribunal for the Former Yugoslavia.<sup>268</sup> The creation of the ICTR may have added the element that the Security Council may also declare that an international tribunal has jurisdiction over non-customary treaty-based crimes, where that treaty has been ratified by relevant States.<sup>269</sup> Rwanda voted against the creation of the ICTR, but since then has largely cooperated with the Tribunal, which has exercised jurisdiction over persons arrested both in Rwanda and elsewhere. Additionally, the consent of the various successor States to the Former Yugoslavia has not been seen as necessary to personal jurisdiction over any accused in the ICTY, and many States have cooperated with the ICTY in bringing accused persons to justice. Thus, this theory has support both in State practice and the organizational practice of the U.N.

Jurisdiction to adjudicate created by referral by the Security Council to the ICC, an independent international organization with a treaty relationship with the U.N.,<sup>270</sup> is equally legitimate. Suppose, for example, a situation involving a State that is not party to the ICC Statute (but is a Member of the U.N.), is referred by the Security Council to the Court. A national of the non-Party State is accused of a crime committed wholly on

---

*supra* note 76, at 525 (quoting Statement of Ambassador Bakuamutsa of Rwanda, Debate on Security Council Res. 955, U.N. Doc. S/PV.3453 (8 November 1994)).

267. See Flavia Lattanzi, *The Rome Statute and State Sovereignty: ICC Competence, Jurisdictional Links, Trigger Mechanism*, in LATTANZI & SCHABAS, *supra* note 3, at 51, 60-64.

268. While the Federal Republic of Yugoslavia (Serbia and Montenegro) lost its vote in the General Assembly for some time after the dissolution of the Former Yugoslavia, it never left the U.N., nor ceased to be bound by the U.N. Charter.

269. For further discussion on the inclusion of crimes under Additional Protocol No. II in the ICTR Statute, see *supra* notes 76-79 and accompanying text.

270. See ICC Statute, *supra* note 1, art. 2.



the territory of that State. Despite its legal obligation to cooperate with the Court and to accept its jurisdiction, the non-Party State refuses to do so.<sup>271</sup> If the accused person is found on the territory of a State fulfilling its obligation under the U.N. Charter to cooperate with the Court, that person could be arrested and brought before the Court.<sup>272</sup>

This reading makes sense given the purposes of the ICC Statute<sup>273</sup> and the historical background of prosecutions in international criminal tribunals. One of the main purposes of the ICC Statute at the time of its adoption was to end the need for the creation by the Security Council of a series of *ad hoc* tribunals to deal with situations of genocide, crimes against humanity and war crimes. To achieve this purpose, the Court needs to have personal jurisdiction over the same individuals that the Security Council could give jurisdiction over by creating *ad hoc* tribunals.

This discussion, as that of effects jurisdiction and passive personality jurisdiction, fits comfortably within the rubric of jurisdiction to adjudicate, as well as jurisdiction to prescribe. However, one issue may legitimately concern the authority to prescribe criminal law.

If there are non-customary crimes covered by the ICC Statute, a Security Council referral raises an issue of jurisdiction to prescribe international criminal law. It appears that the ICC Statute contemplates that all crimes defined in the Statute may be prosecuted in situations referred by

271. Any obligation on a non-Party State to the ICC Statute to cooperate with the Court after a Security Council referral must arise from the State's obligation to implement resolutions of the Security Council under Chapters V and VII of the U.N. Charter, and not from the Statute itself. *See generally* Gallant, *supra* note 3; Lattanzi, *supra* note 267; *see also* Sadat & Carden, *supra* note 10, at 404 n.129 (referring to Prosecutor v. Tadic, Case No. IT-94-I-AR72, paras. 34-36 (Appeals Chamber 1995)) (discussing interlocutory appeal on jurisdiction allowing Security Council resolution as basis for jurisdiction of ICTY). For an article expressing some doubts about whether Security Council actions truly bind U.N. Member States to cooperate with the ICC, *see* Pietro Gargiulo, *The Controversial Relationship between the International Criminal Court and the Security Council*, in LATTANZI & SCHABAS, *supra* note 3, at 67, 78-82 n.30-35 (containing citations to collection of many points of view from several languages and legal cultures on this issue). The ICC Statute provides no mechanism for non-Party States to accept the jurisdiction of the Court in cases of referral by the Security Council. *But see* ICC Statute, *supra* note 1, art. 12(3) (describing mechanism for non-Party State to accept jurisdiction in cases of referral by party State or investigation by Prosecutor *proprio motu*). Thus, refusal to cooperate with the Court will be the clearest sign of a non-Party State's refusal to accept the jurisdiction of the Court.

272. This scenario is not far-fetched. Some of the persons wanted by the ICTY were arrested in Germany, a State known to be cooperating with the ICTY, and persons wanted by the ICTR were arrested elsewhere. One can also imagine this occurring where a person wanted for crime is traveling to or through a cooperating State to purchase weapons on the illegal market in order to commit a crime within the subject matter jurisdiction of the ICC.

273. *See* VCOLT, *supra* note 45, art. 31(1) (stating text of treaty is to be interpreted in light of its object and purpose).

the Security Council.<sup>274</sup> If a crime is non-customary, though, this implies an authority in the U.N., acting through the Security Council, and using the device of the Statute of the International Criminal Court,<sup>275</sup> to prescribe international criminal law that did not previously exist for the persons or States involved.

This would be a development of international legislative authority beyond what is normally articulated as acceptable today. If the question were asked generally, "Does the U.N. Security Council have jurisdiction to prescribe general international criminal law by defining crimes that do not exist in customary international law?" most scholars, international lawyers and diplomats would answer, "No." None of the principal organs of the U.N.—the General Assembly, the Security Council and the ICJ—have general legislative competence.

The actual question posed by the referral mechanism is, however, somewhat narrower: "Does the Security Council have jurisdiction to prescribe international criminal law by defining crimes that do not exist in customary international law, if proscription of the non-customary crimes would be a step towards the restoration and maintenance of international peace and security in a specific situation?" There is some ambiguous evidence in current practice, and stronger evidence in theory, that the answer to this question is "Yes."

The Report of the Secretary General which led to the creation of the ICTY stated that the Secretary General took care to include only crimes that are "beyond doubt part of customary [international humanitarian] law" in its sections on substantive criminal law, so that issues concerning treaties that some but not all relevant states adhered to did not arise.<sup>276</sup> Included in the conventional law that had "beyond doubt become part of international customary law"<sup>277</sup> were the Geneva Conventions of 12 August 1949 for the Protection of War Victims.<sup>278</sup> The 1977 Protocols were not, however, mentioned in the Report, or included in the Statute of the ICTY as a source of the definition of crimes. By contrast, when the Security Council created the ICTR a year later, it included as crimes within the jurisdiction of the Tribunal those defined by Additional Protocol II of 1977, as well as the original 1949 Geneva Conventions.<sup>279</sup> This suggests

---

274. See SADAT, *supra* note 10, at 12 (stating that Security Council may apply "to citizens of party and non-Party States alike, the substantive criminal law embedded in the Statute").

275. That is, if there are non-customary crimes in the ICC Statute, the referral by the Security Council is an international legal act, which prescribes criminal law for the situation. The substantive criminal law prescribed is any non-customary crime contained in the text of the ICC Statute.

276. See Secretary General's Report, *supra* note 53, para. 34.

277. *Id.* para. 35.

278. 75 U.N.T.S. 970, 970-973.

279. See ICTR Statute, *supra* note 75, art. 4. Further evidence of a practice of Security Council prescription concerning crimes (i.e., terrorism) is discussed *supra* Part II(E).

that the Security Council believes that it can prescribe international criminal law that may be non-customary, as it has given jurisdiction to the ICTR over crimes that it had not determined in 1993 were without doubt customary.

One must view this evidence with great care, however. Rwanda was, by 1994, a party to Additional Protocol II of 1977. As discussed above, the Security Council may have believed it had the authority to create a Tribunal with jurisdiction over non-customary treaty-based crimes only in States that had adopted the treaty.<sup>280</sup> This limited view would be more consistent with the principle of *nulla crimen* than the general view that the Security Council can create new crimes. Unlike the ICTY, whose statutory jurisdiction has no closing date, the ICTR is limited to trying offenses that happened in 1994, so the creation of new crimes in the ICTR Statute could not have been based on a long-term preventive function.<sup>281</sup>

Theoretical considerations suggest the Security Council does have this jurisdiction to prescribe new crimes where necessary to carry out its mandate. Under Chapter VII of the U.N. Charter, the Security Council may make a determination that proscription of those crimes will lead to the restoration or maintenance of peace and security. In this sense, criminal prescription is like any other device that the Security Council uses. Such a device need not be specifically mentioned in the U.N. Charter to be valid.

Any prosecution of non-customary crimes following a Security Council referral must, however, comply with the *nulla crimen*/non-retroactivity rules of the ICC Statute and customary international law.<sup>282</sup> That is, one could not prosecute non-customary crimes (at least where no applicable treaty or national law<sup>283</sup> provides alternate prescriptive authority), unless those crimes occurred after the time of the referral.

This theory concerning Security Council authority is not the same as true universal jurisdiction. It grants the Court jurisdiction only over those persons who bear some relationship (e.g., nationality of perpetrator or victim, place of action or effect) to a State that has consented to the U.N.

---

280. For further discussion on ratification of Additional Protocol No. II by Rwanda, see *supra* notes 75-76, 94. Persons interested in separation of powers issues will note that when the international community creates a crime, whether by formation of customary international law (or *jus cogens*) or by a treaty regime, obligations are legislated for individuals that do not necessarily go through the constitutionally prescribed legislative process of any given State. This Article will not consider all the implications of this fact, but intellectual honesty requires that it be noted.

281. Compare ICTR Statute, *supra* note 75, art. 1, with ICTY Statute, *supra* note 94, art. 1; see also *supra* notes 134-36 (discussing Prosecutor v. Milosevic).

282. See ICC Statute, *supra* note 1, arts. 21(3), 22. For a discussion of *nulla crimen*/non-retroactivity in the context of Security Council referrals, see *infra* Part VI(B)(3).

283. Cf. Special Court Statute, *supra* note 11 (giving international organization authority to prosecute specific crimes under national law of Sierra Leone).

Charter, including the Security Council's authority. The theory for exercising jurisdiction to adjudicate over an individual in international criminal law remains the relevant connection of that individual with some State. There need not be a claim that the Court can exercise jurisdiction directly over all individuals.

Although the theory discussed here creates criminal jurisdiction over individuals rather than rights for them, this theory would represent consolidation of the international legal personality of individuals, and an extension of the international legal personality of individuals with respect to international organizations. The ICC Statute does provide for the other side of the international legal personality of individuals. They have rights in the Court and against the Court as an international organization. These include both procedural and substantive rights within the Court and, in some cases, monetary remedies against the ICC itself. These apply in all matters before the Court, whether referred by a State, initiated *proprio motu* by the Prosecutor or, indeed, referred by the Security Council.

Professor Sadat argues that non-customary law in the ICC Statute is prescribed by the Rome Conference that wrote the ICC Statute, rather than by the Security Council, when there is a Security Council referral.<sup>284</sup> This is an important development in international law, because the ICC Statute was adopted in a "quasi-legislative" manner—by a non-unanimous vote.<sup>285</sup> Moreover, not all States that might be affected by a Security Council referral were present at the Rome Conference. To the extent that new law exists in the ICC Statute, it can be imposed on States that in no way consented to its creation, on their nationals and on those acting in their territory, by the Security Council.

If the *nulla crimen* analysis suggested here<sup>286</sup> is followed, then the ICC Statute would mean an evolution, but not a revolution, in the way international law is made. The Security Council would be the principal prescribing authority of new criminal law when it makes a referral to the Court. It is the entity determining that defining all the prohibited acts in the ICC Statute as crimes would aid in the restoration or maintenance of international peace and security. However, it would not be defining criminal law retroactively for persons without a relevant connection to a State that has accepted the ICC Statute.

Realistically, however, Sadat is correct that the new law to be applied following Security Council referral would be the international criminal law adopted by the Rome Conference. The Security Council cannot define new crimes and place them within the Court's jurisdiction. The ICC, as an international organization, is bound by its constituent document—the

---

284. See SADAT, *supra* note 10, at 11-14, 16-17.

285. The Law of the Sea Conference provides a precedent for this way of developing law. See *id.* at 13.

286. For further discussion of the *nulla crimen* analysis, see *supra* notes 236-47, 282 and accompanying text; see also *infra* Part VI(B)(3).

ICC Statute—that only grants it jurisdiction over the specific crimes the Statute contains.<sup>287</sup> Definition of crimes by the Rome Conference for application where needed by the Security Council is an evolution in the way international criminal law is made. This is because the Rome Conference acted quasi-legislatively, and without unanimity. But, because the Security Council is accepted as an authority for establishing international criminal jurisdiction, the process of prescription by Council referral is not a major break in the international lawmaking tradition.

In short, the notion of near-universal jurisdiction of the Court following a Security Council referral is consistent with the development of international organization law and international criminal law. The limitations on jurisdiction under this theory are only that the persons charged with crime must have some relevant connection to a U.N. Member State, and the application of law must comply with the principle of *nulla crimen sine lege*—“No person shall be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.”<sup>288</sup>

2. *True Universal Jurisdiction and the Power of the International Community to Legislate for All Individuals and States, Including Non-Members of the U.N. and Persistent Objectors to Customary International Law*

A second basis for supporting jurisdiction over any individual accused of crimes within the subject-matter jurisdiction of the Court is the theory of true universal jurisdiction to adjudicate. Originally, this doctrine held that all States have authority to prosecute those who commit the most heinous international crimes, such as genocide.<sup>289</sup> Nothing in the doctrine of universal jurisdiction prevents its application in international as well as national courts.<sup>290</sup> The ICJ recently indicated that such universal jurisdiction is even more justifiable in the case of international criminal tribunals,

287. See ICC Statute, *supra* note 1, arts. 5-9.

288. *Id.* art. 21(1).

289. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987) (discussing universal jurisdiction to prescribe punishment for “certain offenses recognized by the community of nations as of universal concern”). Israel has tried and either punished (e.g., *Isr. v. Adolf Eichmann*, Crim. App. No. 361/61 (Isr. 1962)) or acquitted on appeal (*Isr. v. Demjanjuk* (Isr. 1993)) persons alleged to be involved in genocide where the crimes took place outside Israeli territory at a time when the State of Israel did not exist. See PYLE, *supra* note 184, at chs. 18, 19. But see Arrest Warrant, *supra* note 6, para. 5 (Separate Opinion of Guillaume, J.) (noting true universal jurisdiction traditionally existed in case of piracy only); J. STARKE, INTRODUCTION TO INTERNATIONAL LAW 234 (10th ed. 1989) (noting only piracy *jure gentium* and war crimes are clear cases in which there is currently true universal jurisdiction). It would seem difficult to state that there is no universal jurisdiction at least in cases of genocide committed by mass murder. For more on the debate on the existence of *jus cogens* crimes, see *infra* note 299 and accompanying text.

290. Cf. Nuremberg Judgment, *supra* note 38, at 218 (noting nations together may create court to try cases they could each try in their own courts).

including the ICC.<sup>291</sup> This is true whether an international court is perceived as receiving its authority by delegation of national judicial power from the States creating it, or by agreement of the international community to create a new judicial power in accordance with international human rights norms. Either way, prohibitions of these most heinous crimes are part of customary international law<sup>292</sup> and should be enforceable either by any State in the international system<sup>293</sup> or by an international judicial authority established by States for the purpose of enforcing them.

If the true universal jurisdiction theory is accepted, the Security Council can, by the referral of a situation to the Court, bring any person, regardless of nationality or place of acting, within the power of the Court. A Security Council referral is required under the Statute before a person alleged to be involved in crimes specified in the Statute can lawfully be hauled into the Court,<sup>294</sup> even though the theory of universal jurisdiction in national courts requires no general analogue to the referral mechanism. This was one of the political compromises necessary to achieve the near-consensus of the Rome Conference on the ICC Statute. Even though the mechanism may not be necessary under a theory of universal jurisdiction, it does provide a reminder that lawful authority over a person must exist before any Court can legitimately act against that person.

The theory of true universal jurisdiction, whether applied in the ICC or in national courts, poses a question of legitimacy in democratic theory.<sup>295</sup> Universal jurisdiction to adjudicate in the Court implies universal jurisdiction to prescribe in some combination of the ICC as an interna-

---

291. See Arrest Warrant, *supra* note 6, paras. 15, 26.

292. The discourse generally speaks of customary international criminal law. However, what is usually not discussed is dissent from customary norms. These customary international crimes may therefore appear to fall under the rubric of *ius cogens*, binding customary law from which there can be no dissent.

293. The State recently associated most closely with the doctrine of universal jurisdiction to adjudicate, Belgium, may be limiting it judicially. An appellate court recently ruled that the Belgian courts can exercise universal jurisdiction over persons accused of customary international crimes committed anywhere in the world, but only if the defendant can be found in the territory of Belgium. If the defendant is not in Belgium, the case is "inadmissible." See *Court: Sharon case inadmissible*, June 26, 2002, available at <http://www.cnn.com/2002/WORLD/europe/06/26/sharon.belgium/index.html> (last visited July 10, 2002). Legislative limitation of universal jurisdiction in Belgium is also occurring. See *Belgium Restricts 'Genocide Law'*, BBC NEWS, Apr. 6, 2003, available at <http://news.bbc.co.uk/2/hi/europe/2921519.stm> (last visited May 23, 2003).

294. Obviously, this does not apply to cases properly referred by a State, or initiated by the Prosecutor *proprio motu*, which have separate grounds for personal jurisdiction, discussed *supra* Part V.

295. True universal jurisdiction, when applied by States, poses similar issues to those discussed in the text, as well as the issue of legitimacy if the State seeking to apply universal jurisdiction is itself undemocratic or its court system biased.

tional organization, the States that have established the Court, the Security Council or the international community as a whole.<sup>296</sup>

Objections to true universal jurisdiction on grounds of legitimacy have at least two bases. First, a crime in the ICC Statute may not be customary, and thus may not bind all persons. Second, the State of which an accused person is a national might be a non-Member of the U.N., or might be a persistent objector to the customary rule of international criminal law that forms the basis for the accusations.<sup>297</sup> In the case of persistent objection, the accused is not part of a body politic that has consented to the substantive rules of law that will apply. In the case of nationals of non-Member States who have no connection with acts in a Member State, the accused is not part of a body politic that has consented, directly or indirectly, to the existence of, or referral of cases to the ICC.

True universal jurisdiction follows naturally from the scheme of the ICC Statute and general international law for any crime that is *jus cogens*, a peremptory international law from which there can be no derogation. The claim that a criminal prohibition is *jus cogens* is a claim that acts that violate it are criminal wherever they occur. If any democratic justification of *jus cogens* criminal jurisdiction is necessary, it is that the international community is sufficiently coherent and democratic and that, as a whole, it can justly formulate and impose a few sufficiently definite rules against exceptionally evil acts that apply to all States and individuals. It does not depend on the existence of the U.N. or membership of any particular State in it.<sup>298</sup>

The international community—or some substantial part of it—can also establish an organization, in this case the ICC, which would justly have power to try such offenses, including jurisdiction to adjudicate over all persons. Trial for such acts by the international community is appropriate, regardless of the place of the crime or the nationality of the accused or the victims, or the national makeup of the international organization that is conducting the trial. Otherwise, the claim that the law involved is peremptory and allows no derogation is undercut, for derogation from the law (impunity) would be allowed for those outside of the U.N. system.

Suppose genocide conducted by the mass murder of a targeted ethnic group occurs in a State that is not a Member of the U.N. or a party to the ICC Statute. The U.N. Security Council refers the situation to the ICC. There is simply no injustice when persons are brought before this Court for allegedly committing crimes that are condemned by the world commu-

---

296. In the case of national tribunals applying universal jurisdiction, the national court must also have jurisdiction to prescribe for all persons by absorbing the rules prescribed by international law into national law.

297. It is assumed in this sentence that the crime charged is customary, but is not *jus cogens*.

298. This is not to deny that the U.N. may have had a part in crystallizing such a rule into *jus cogens*. See *supra* notes 88-89 and accompanying text.

nity as a whole. A penal law that is *jus cogens* gains its legitimacy from this general condemnation.

There are, however, questions about how many crimes fall in the category of *jus cogens*, and a few theoretical questions about whether *jus cogens* exists as a category at all.<sup>299</sup> Those who wrote the ICC Statute included one indication that they believed genocide and crimes against humanity to fall into a category of crimes that are universally condemned so strongly that everyone should be presumed to know that they are unlawful: the Statute states that an order to commit such a crime is “manifestly unlawful.”<sup>300</sup> While the purpose of this provision is to limit a ground for excluding criminal responsibility, the theory behind such a limitation does go to the knowledge that one may be expected to have of the universal condemnation of these acts.

This may prove to be a useful explanation for universal jurisdiction over *jus cogens* crimes. It does not require that one be an advocate of natural law theories of jurisprudence in order to accept *jus cogens*.<sup>301</sup> The possibility of a broad political consensus across States and societies about what is criminally wrong—a positivist conception—is sufficient. This does not of course purport to end the debate over natural and positive law.<sup>302</sup> One can still debate about how one determines what few acts are so evil that we

---

299. See, e.g., VCOLT, *supra* note 45, arts. 53, 64 (assuming existence of peremptory norms from which there can be no derogation), discussed in 2 Y.B. INT’L L. COMM’N 169, 247-49 (1966) (mentioning as possible *jus cogens* principles treaties among States “contemplating or conniving at . . . trade in slaves, piracy or genocide”); Roberto Ago, *The Law of Treaties in Light of the Vienna Convention*, [1971-III] 134 HAGUE RECUEIL 297, 324 n.37, translated in INTERNATIONAL LAW AND WORLD ORDER 143 (Burns Weston et al. eds., 3d ed. 1997) (discussing norms prohibiting genocide, slavery, racial discrimination and protection of rights essential to human person in times of war); see also BROWNLIE, *supra* note 16, at 515 (noting that “least controversial examples . . . are the prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy” (footnotes omitted)); JANIS, *supra* note 16, at 62-64 (viewing “*jus cogens* as a modern form of natural law;” possibility of such law is “hotly controverted by positivists”); OPPENHEIM’S INTERNATIONAL LAW 7-8 (R.Y. Jennings & A. Watts eds., 9th ed. 1992) (containing similar wording to I.L.C. material); IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 222-24 (2d ed. 1984) (arguing that logic and morality suggest prohibition of slave trade and genocide are *jus cogens* norms). For a collection of sources from many languages and legal cultures, both asserting and denying the existence of *jus cogens* norms in international law and concluding that a class of such norms exists, see G.I. TUNKIN, THEORY OF INTERNATIONAL LAW 145-60 (William E. Butler trans., 1974).

300. See ICC Statute, *supra* note 1, art. 33(2). The consequence of such an order being manifestly unlawful is that superior orders and prescription of law can never be raised as grounds for relief from criminal responsibility in the case of these crimes. See *Id.* art. 33(1).

301. Accord JANIS, *supra* note 16, at 62-64.

302. For some of the theoretical debate whether *jus cogens* norms are a species of customary norms or something different, compare BROWNLIE, *supra* note 16, at 515 (describing type of customary law), with JANIS, *supra* note 16, at 62-64 (characterizing *jus cogens* norms as “natural law”).



as a world society find them to be peremptory norms of international law from which there can be no derogation. It would also be possible for a positivist of a realist school to accept that there is actually a consensus among societies on an issue like this; while a positivist who focuses on the formalist need for an identifiable lawmaker to deny that there is in fact a sufficiently coherent international community sensibly to say it has created these norms.<sup>303</sup> The current author accepts the view that a consensus on the content of international law strong enough to constitute *jus cogens* can exist, and at least in the case of genocide by mass killing, does exist.

The true universal jurisdiction argument is tested by the intermediate case of customary international crimes that are not necessarily *jus cogens*. Most of the crimes within the jurisdiction of the Court are, without much question, crimes under customary international law.<sup>304</sup> The crimes within the jurisdiction of the Court are “limited to the most serious crimes of concern to the international community as a whole.”<sup>305</sup> In general, there has not been persistent objection by States to the creation of customary norms forbidding genocide, crimes against humanity and war crimes, and from the Nuremberg Judgment onward, international criminal courts have not devoted substantial portions of their opinions to this issue.<sup>306</sup>

Here, the legitimacy argument may require slightly more than the claim of *jus cogens*. Under traditional views of customary international law, the argument requires that individuals be bound by customary international law that a State to which they have a relevant connection has not

303. See Rubin, *supra* note 87, at 265 (arguing that no consensus exists).

304. See Secretary General’s Report, *supra* note 53, paras. 33-49.

305. See ICC Statute, *supra* note 1, art. 5(1).

306. See Secretary General’s Report, *supra* note 53, para. 35. By contrast, there has been a great deal of controversy over just how far crimes against humanity and war crimes stretch. For example, at the time of the adoption of the ICTY Statute, the 1977 Protocols to the 1949 Geneva Conventions were not listed as among those conventions that have “beyond doubt become part of customary international law.” There is sometimes dispute over whether specific uses of force against civilians occurred during “armed conflict not of an international character” or during “internal disturbances and tensions” not amounting to “armed conflict”—only in the former case does the ICC Statute purport to apply the law of war crimes. See ICC Statute, *supra* note 1, art. 8(2)(d) (using language quoted in defining war crimes). One recent example of a dispute over the applicability of the definition of war crimes is the debate over Russia’s refusal to allow international observation of the situation in Chechniya, which Russia claims is an internal matter. The Government of Israel has also questioned whether the prohibition of torture applies to all applications of force to individuals to obtain information, or only to more serious ones, though the Supreme Court of Israel has ruled against the practice of using “moderate physical pressure” against Palestinian detainees. See *Israel ‘Torture’ Methods Illegal*, BBC News, Sept. 6, 1999, available at [http://news.bbc.co.uk/1/hi/english/world/middle\\_east/newsid\\_4390000/439554.stm](http://news.bbc.co.uk/1/hi/english/world/middle_east/newsid_4390000/439554.stm). The Supreme Court of Israel rejected methods approved in Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service (GSS) Regarding Hostile Terrorist Activity (the “Landau Report”) (1987).

opted out of through persistent objection.<sup>307</sup> Individuals do not yet have a direct voice in the creation of international law, which remains primarily the province of governments, and, increasingly, international organizations. Although civil society (non-governmental organizations) may be taking a greater role (for example in pressuring governments to create the Rome Statute for the ICC) one cannot say that most individuals had a voice in the drafting of that treaty outside of the voice of their government. Even in the current age in which the individual is gaining greater international personality, it is still generally the case that individuals become criminally responsible in international law because they are citizens of a State to which the law applies, or act in or with effect on a State (or its nationals) to which the law applies.

Once it is determined that a type of act constitutes a customary international crime, it is, wherever (outside of a persistent objector) it takes place, "at the time it takes place, a crime within the jurisdiction of the Court"—i.e., within the subject matter jurisdiction of the Court.<sup>308</sup> Exercise of personal jurisdiction over, and punishment of, the perpetrator is fair under principles of international human rights law, which is applicable in the Court as well as to and in the States.<sup>309</sup> As with *jus cogens* there is no need for the perpetrator to have a relevant connection with a U.N. Member State, or a State Party to the ICC Statute.

The fairness of jurisdiction in the ICC is, in this case, no different from the fairness of universal jurisdiction in the court of any State into whose hands the accused might fall.<sup>310</sup> The ICC is bound by international human rights norms,<sup>311</sup> as courts of States should be. It will have judges from many States and different legal systems, and will be less likely to suffer from the biases that might exist in a single State's system. This system is also designed to allow for fair trials even though referrals from the Security Council involve a political process, in the same ways national judiciaries should be designed to conduct fair trials even if political factors influence a decision to investigate a matter.

---

307. See Humphrey Waldock, *General Course on Public International Law*, 106 RECUEIL DES COURS 1, 49 (1962-II) (pointing out that persistent objection must occur during period of formation of customary norm). This assumes that there are no other ways for nations to opt out of customary international criminal law. For example, the argument that newly decolonized States do not take on the entire preexisting apparatus of customary international law as obligatory does not apply here. See *id.* at 49-53. At the very least, the law out of which the decolonized states may opt does not include the criminal law of genocide, crimes against humanity or war crimes. In fact, there does not seem to be much evidence that decolonized States believe they should not be bound by this part of international criminal law.

308. See ICC Statute, *supra* note 1, art. 22.

309. See *id.* art. 21(3).

310. Cf. Nuremberg Judgment, *supra* note 38, at 218 (stating that international tribunal established by States may prosecute international crimes that any State could have prosecuted).

311. See *id.* art. 21(3).

Where there has been persistent objection by a non-Member of the U.N., however, jurisdiction under the ICC Statute may not be quite universal. Under traditional views of customary international law, the citizen of a persistent objector acting with effect only in a persistent objector State against such State's nationals is in a situation similar to that of a person allegedly committing a non-customary crime in a non-Party State to the ICC Statute. There is no evidence that the creation of the U.N. Charter or the ICC Statute has modified or eliminated the persistent objector exception to the universality of customary international law.

An accused ought to be allowed to make a claim that he or she has no relevant connection with any State to which the law applies, and to be released in the rare case that no such connection exists. Such cases would be limited to internal armed conflicts in persistent objector States, or international wars among such States, and to such customary crimes as there has been actual persistent objection from the time of the formation of the custom. Here, the lack of personal jurisdiction follows the lack of jurisdiction in the international community—whether conceived as the Court, the U.N. or both—to prescribe rules of criminal law applicable to individuals in the persistent objector State.

The U.N. Security Council, even when exercising its Chapter VII authority to restore and maintain peace and security, cannot, consistent with contemporary international law and practice, be a general criminal legislative authority for persons connected only with non-Member States. This follows from the traditional view that treaties, including the U.N. Charter, do not bind third States without their consent.<sup>312</sup>

Some scholars are challenging this notion, arguing that the U.N. Charter creates a constitution for the international community that cannot be ignored by non-Member States,<sup>313</sup> or by individuals connected only with such States. "Inasmuch as the activity of individuals can have a bearing on the maintenance of international peace and security, they too can be addressees of Security Council decisions."<sup>314</sup> This suggests that the Security Council can prescribe criminal law (in this case by referral) for individuals with no relevant connection to a U.N. Member State.

It certainly was contemplated that the Security Council would need to take enforcement action against non-Member States, particularly the "enemy states" of World War II.<sup>315</sup> It is also the case that the Charter intends that general principles of peaceful relations among States and sovereign

---

312. See, e.g., VCOLT, *supra* note 45, art. 34.

313. See, e.g., Sadat & Carden, *supra* note 10, at 410 n.167 (relying on Bardo Fassbender, *The U.N. Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529, 574-78 (1998), and recognizing as contrary Herman Mosler, *The International Society as a Legal Community*, 140 RECUEIL DES COURS 1, 205-07 (1974)).

314. Fassbender, *supra* note 313, at 610; see also Sadat & Carden, *supra* note 10, at 410 n.167.

315. See U.N. CHARTER art. 53(2).

equality of States be observed by all States, whether or not U.N. Members.<sup>316</sup> By now, these general principles of peaceful relations and sovereign equality are customary international law.

There is, however, a great distance between that fact and the claim that specific decisions made by the Security Council bind non-Member States, especially when there is no legal requirement that the non-Member State be able to participate in the decision, and the non-Member State cannot vote.<sup>317</sup> The Charter does not even claim that these non-Member States have an obligation to accept and carry out Security Council resolutions; only Member States must do so.<sup>318</sup> That is, there is no basis for claiming the right to require a non-Member State to agree to withdraw its persistent objection to a particular customary crime, or that nationals of such a State may not claim the protection from prosecution afforded by the inapplicability of the rule.

The *Reparations Case*<sup>319</sup> stands only for the proposition that an international organization such as the U.N. can have international legal personality sufficient to allow it to make claims on non-Member States for wrongs done to its officials under international law. It does not purport to assert for the U.N. or any other international organization the authority to prescribe law that non-Members or their nationals (acting wholly within their confines) must follow.

The applicable principle, limiting jurisdiction over the person here is *nulla crimen sine lege*.<sup>320</sup> Where there is no appropriate lawmaking authority, there is no law that the individual is required to obey.

Without Security Council jurisdiction to prescribe a new, non-customary international crime for individuals without a relevant connection to a U.N. Member State, the Council cannot, by referral to the ICC, create jurisdiction to adjudicate claims that an individual has committed such a crime. Where a crime is non-customary, only those within the ambit of the substantive law prescriptive jurisdiction of the Security Council may be prosecuted. The argument against personal jurisdiction here is the same as in the case involving persistent objector States above, only it is stronger, because there is (by hypothesis) no consensus in the international community that the acts involved are criminal.

These limitations on universal jurisdiction should not be a matter of grave concern. The theory of universal criminal jurisdiction depends on the crime being of universal concern among nations. Any such crime would, by definition, have already passed into customary international law. Nor has there been persistent objection to the most important norms of international criminal law, such as the prohibition against genocide by

---

316. *See id.* art. 2.

317. *See id.* art. 32.

318. *See id.* art. 25.

319. 1949 I.C.J. 174.

320. *See* ICC Statute, *supra* note 1, art. 22.

mass murder. These limitations on universal jurisdiction are of important theoretical, and possibly political,<sup>321</sup> concern. They should be recognized. Otherwise the Court's mission of punishing and deterring the worst crimes against humanity and the international community may become entangled in political debate concerning alleged overreaching of authority by an international organization.

### 3. *Universal Personal Jurisdiction, Jurisdiction to Prescribe and the Nulla Crimen/Retroactivity Problem*

Universal personal jurisdiction—that is, universal (or universal within the U.N.) jurisdiction to adjudicate allegations of international crime—requires that there be authority in the international community to define substantive international criminal law for all individuals—that is, the international community has jurisdiction to prescribe for all individuals.<sup>322</sup> Indeed, if either a national tribunal or the ICC claims true universal jurisdiction over individuals,<sup>323</sup> it follows that it is claiming that the substantive crimes it is prosecuting through that jurisdiction are *jus cogens*, international law from which there can be no derogation, or at the very least, that there has been in fact no effective objection by a relevant State to the customary international norm that an individual is accused of violating.

The problem that some crimes (such as enlisting soldiers under fifteen years old or crimes against the environment<sup>324</sup>) defined under the ICC Statute may not currently be customary international crimes, causing a problem of *nulla crimen sine lege*/non-retroactivity for persons without a relevant connection to States party to the ICC Statute at the time of the commission of the alleged crime, raises its head again here.<sup>325</sup> In this case, the referral by the Security Council to the Court, alleging that crimes within the Court's jurisdiction may have been committed, plays the same role in setting up the *nulla crimen* problem as a retroactively effective acceptance of jurisdiction of the ICC by a non-Party State to the ICC Statute

321. Most worrisome is the possibility of the violent breakup of a State into several smaller States that do not accept the U.N. Charter. While all of the new States of the former Yugoslavia acceded to the Charter, the next time a country dissolves into civil war the same might not happen.

322. In the case of national tribunals applying universal jurisdiction, there must also be jurisdiction in the national court to prescribe for all persons by absorbing the rules prescribed by international law into national law, whether by appropriate legislation or (in some common law countries) case decision.

323. If the U.N. and the ICC claim authority to adjudicate cases concerning all individuals with a relevant connection to a U.N. Member, jurisdiction may exist regardless of whether that State has ratified the ICC Statute.

324. See Sierra Leone Report, *supra* note 89, paras. 17-18.

325. For further discussion of problem of *nulla crimen sine lege*/non-retroactivity for persons without a relevant connection to States who are party to the ICC Statute at the time of the commission of the alleged crime, see *supra* Part V(B)(2).

does in the case of a referral by a State, or an investigation by the Prosecutor *proprio motu*.

Although the following discussion is based upon the debatable hypothetical that there are non-customary crimes in the ICC Statute, it is again worth entering into to explicate an important issue concerning any attempt to create a criminal court with worldwide (or nearly world-wide) authority. It is not enough to say, as we all too easily do sometimes, that "war crimes" are prohibited by international law, without looking at the specific crime named to see if it is in fact customary.

If the crime was not defined as customary (or as a crime in the law of a relevant State) at the time of commission of the act, a prosecution for an act committed before the Security Council referral would violate the principles of non-retroactivity and *nulla crimen sine lege* embodied in the ICC Statute, which states, "A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court."<sup>326</sup>

An act that is criminalized only under the ICC Statute (i.e., is not a crime under customary international law) is in general not a crime at the time committed, if committed by a national of a non-Party State outside the territory of any State Party and with no effect in a State Party or on a national of a State Party.<sup>327</sup> This is because, at the time the person commits the conduct, there has not been any law that criminalizes it. Reference to the Court by the Security Council as an enforcement measure under Chapter VII does not change this fact, except for persons who act after the referral. Indeed, as discussed above, the Security Council may not legislate non-customary international crimes, even prospectively, for those with no relevant connection to a U.N. Member State.

For a person with no relevant connection to a State Party to the ICC Statute who acts before a referral, the ICC Statute's principle of "non-retroactivity *ratione personae*" applies: "In the event of a change in the law applicable to a given case prior to a final judgment, the law more favorable to the person being investigated, prosecuted or convicted shall apply."<sup>328</sup> Any attempt to apply a crime defined only by the ICC Statute (and not by applicable custom or relevant national statute) to a person that the crime did not cover when the act was committed would be a change in the law. The law more favorable to the person, making him or her not responsible for the crime, should be applied. Thus, a referral by the Security Council of a situation in which crimes that were not customary had been committed and where the States concerned have not accepted the crimes into

---

326. See ICC Statute, *supra* note 1, art. 22(1).

327. See *id.* The hypotheses in the text sentence are meant to exclude all the traditional bases of criminal jurisdiction other than universal jurisdiction as identified by Harvard Research. See Dickinson et al., *supra* note 218, at 435. Note, however, that this work was done in the context of national criminal jurisdiction before the creation of international criminal courts.

328. ICC Statute, *supra* note 1, art. 24(2).

their law should result, under the ICC Statute, in refusal to bring or confirm charges, or an acquittal for the non-customary crimes, at least if committed before the referral.

The *nulla crimen* and non-retroactivity principles are not specifically stated as matters of personal jurisdiction in the ICC Statute; they are stated as matters of criminal responsibility of the individual.<sup>329</sup> Fairly enforcing these provisions, however, meets the goal of personal jurisdiction requirements: ensuring essential fairness whenever requiring a person to answer an allegation of crime before a court.

This places upon the distinction between customary international crimes and crimes that are merely treaty based a certain burden that the distinction between these two types of law originally bore.<sup>330</sup> It is bound to encourage litigation concerning whether specific war crimes, and perhaps other crimes within the jurisdiction of the Court, existed in customary international law at the time or not. This, however, is an acceptable price to pay for the opportunity to place situations in which atrocities have occurred within or in relation to U.N. Member States within the jurisdiction of the ICC by Security Council referral.

C. *Challenge to Broad Personal Jurisdiction in Situations Referred by the Security Council—The “Jurisdiction *ratione temporis*” Provision*

One could read the “Jurisdiction *ratione temporis*” provision of article 11 to suggest that the Court’s personal jurisdiction is no greater in cases referred by the Security Council than in other cases. Section 2 reads: “If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.” Matters referred by the Security Council are not treated differently by the text of this provision.<sup>331</sup>

Imagine the following situation. A person who is a national of a non-Party State acted solely on the territory of that State and is accused of a crime in the Court following a referral by the Security Council. The State then becomes a party to the ICC Statute. The accused could argue that

---

329. See *id.* arts. 22, 24 (speaking of persons not being “criminally responsible” for acts not criminal when committed). Both articles are contained in the ICC Statute characterized under General Principles of Criminal Law rather than Jurisdiction, Admissibility and Applicable Law. For a discussion of personal jurisdiction provisions appearing in ICC Statute Part 3, see *supra* notes 143-48 and accompanying text.

330. For further discussion of the distinction between customary international crimes and crimes that are merely treaty based, see *supra* Part V(B)(2).

331. By contrast, section 2 of article 12, restricting the Court’s authority to exercise jurisdiction unless certain States have become parties to the Statute or accepted the Court’s authority by declaration, is preceded by a clause limiting its effect to situations referred by a party State or investigated by the Prosecutor *proprio motu*.

the Court has no authority to prosecute and punish him or her because of this provision. Such a person might claim that article 11 indicates an intent not to exercise jurisdiction over a person unless a State with a relevant connection to that person has become a party to the Statute at the time of the alleged crime or has made a declaration of acceptance of jurisdiction. One could even imagine a State becoming a party to the ICC Statute (without making a declaration), in order to immunize its citizens from the jurisdiction of the Court, given a literal reading of this article.

This argument should be rejected. Indeed, it is absurd, given the purposes of the Security Council referral scheme. This provision was not intended to allow States to protect their citizens from the Court's jurisdiction in this manner. Even a literal reading of a treaty should be rejected if it leads to an absurd result.<sup>332</sup>

Instead, this article should be read in the context of all the jurisdiction provisions of the ICC Statute, as well as in light of the Statute's object and purposes.<sup>333</sup> The articles concerning the Court's jurisdiction demonstrate that Security Council referrals were designed to substitute for the creation of *ad hoc* tribunals.<sup>334</sup> The Prosecutor and the Court need to be able to consider allegations that crimes were committed before the referral. The clearly expressed intent of the articles on referrals is to allow the Court to exercise jurisdiction even when relevant States are not parties to the ICC Statute.<sup>335</sup> Article 11 therefore should be read to apply only to situations referred to the Court by a State Party to the ICC Statute or a situation investigated by the Prosecutor *proprio motu*.

## VII. CONCLUSION

Doctrines of jurisdiction to adjudicate and jurisdiction to prescribe in criminal law developed in international law and national legal systems long before the advent of international criminal courts. The existence of these new tribunals means the creation of a new form of jurisdiction over persons: jurisdiction of an international entity that is not a State. From the creation of the ICTY onward, this new entity is the modern international organization.

This development has necessarily brought changes in the way both jurisdiction to prescribe and jurisdiction to adjudicate are handled. One can see in this change evolution of the traditional jurisdictional law, brought about through fairly traditional means of developing interna-

---

332. See VCOLT, *supra* note 45, art. 32(b).

333. See *id.* art. 31. The sentence in the text represents something of a continental approach to the use of the entire text of a treaty and its object and purpose to illuminate the meaning of a specific provision.

334. See ICC Statute, *supra* note 1, arts. 12, 13.

335. For the obligation of U.N. Member States to cooperate with the ICC after a Security Council referral, see *supra* note 271.



tional law. One can also see a continual growth in the concern for individual human rights in the organic law of these new tribunals.

The ICC is now being brought into existence. One can see in its Statute a continuing evolution of jurisdictional doctrine and the way international criminal law is made.

The limits on the personal jurisdiction of the ICC are substantial in the case of referrals made by States that are parties to the ICC Statute, and in the case of situations investigated by the Prosecutor *proprio motu*. In the case of situations referred to the Court by the U.N. Security Council, the limitations on personal jurisdiction are much less, and in fact may be hypothetical.

It is worth setting out these limitations, because some of them go to the principle of *nulla crimen sine lege*—there is no crime in the absence of (applicable) law when and where an act is committed—a fundamental notion of justice, which exists both in the ICC Statute and in customary international law. Admitting these limitations helps harmonize the ICC Statute with the law of international organizations and general international law. These limitations will not, in fact, prevent the prosecution of the most serious crimes within the jurisdiction of the Court.

Observing the limits of jurisdiction both to prescribe and to adjudicate should assist the Court, when it begins operations, in punishing and deterring the most serious international crime without entangling itself in claims that it is overreaching its proper boundaries.

It is also worth setting out these limits because they describe principles of international criminal law that apply to all international criminal tribunals. These principles should be observed when and if other tribunals are created. These may include joint national-international tribunals aimed both at punishing serious violations of international humanitarian law and at building the judiciary of an area that has been wracked by violence. They may also include regional international arrangements to deal with multinational crime including money laundering and drug trafficking.

The ICC Statute may not mark a revolutionary moment in the way international law is made. This should not diminish its usefulness in punishing and ultimately preventing genocide and other horrors. Its non-revolutionary nature may in fact be one of its great strengths.